Promises and Challenges of Internal Dispute Resolution

In the Corporate Workplace

by

Lori Charvat

B.A. College of Wooster, 1986
J.D. American University, 1991

A THESIS SUBMITTED IN PARTIAL FULFILMENT OF THE
REQUIREMENTS FOR THE DEGREE OF
MASTER OF LAWS

in

THE FACULTY OF GRADUATE STUDIES

(Faculty of Law)

We accept this thesis as conforming
To the required standard

THE UNIVERSITY OF BRITISH COLUMBIA

April 2002
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Department of Law
The University of British Columbia
Vancouver, Canada

Date April 25, 2002
Abstract

This thesis examines the promises and challenges of internal dispute resolution (IDR) in the corporate workplace of Canada and the United States. The focus of inquiry is twofold: a theoretical and socio-historical study of the corporation followed by a practical analysis of dispute resolution of human or civil rights.

The examination of the role of the corporation begins with a review of the statutory and jurisprudential underpinnings of the "corporate person," which have legitimized the corporation and its powerful place in society. Such power, sanctified by the law, impacts not only society at large but also employees of the corporation. Internalization of legal systems into the corporate workplace has shifted some dispute resolution responsibilities from the public to the private domain, relegating further power to the corporation. This public to private shift has deputized the corporation as an enforcer of its employees' civil rights.

Two predominant theories of the corporation – the Contractarian and Communitarian – provide understanding about power relationships among the corporation and its constituents. U.S. and Canadian courts and legislatures have demonstrated a preference for the Contractarian theory, which holds that the corporation is a nexus of contracts, and that firm managers should prioritize its contract with its shareholders, governing the corporation so as to maximize shareholder wealth. A careful examination of corporate theory and governance illustrates the corporation's conflict of interest in holding shareholder interests primary while resolving employment disputes. The power differential between the corporation, as agents of its shareholder principals,
and employees presents the greatest challenge in equitably resolving employment disputes.

The practical aspects of internal dispute resolution in the corporate workplace focus on the potential benefits and risks to employees. In-house mediation, with certain procedural safeguards, has potential for benefits that outweigh risks to individual employees. Building on principles and structures of formal procedural fairness found in courts of law and administrative tribunals, five essential features can best guarantee fairness in IDR: voluntary participation, retention of employees' right to judicial review, prohibition against reprisal for raising the dispute, use of an external mediator, and oversight of the corporation's IDR program by a neutral, external body.
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Introduction

1. Overview of the Topic

This thesis looks at private justice in the modern Anglo-American corporation. I focus primarily on the social and jurisprudential history of the corporation in the United States, including commentary on the Canadian corporation to a much lesser extent. Specifically, I explore the benefits and risks of mediating employment rights disputes within the private forum of the corporate workplace, where the dispute arises between the employee and the employer firm. As such, I explore the topics of corporate governance, which guides the relationship between the firm and its employees; and alternative dispute resolution (ADR), namely the process of mediation, which provides a process for resolving employment rights disputes. Essentially, my inquiry examines the power relationship between employer and employee and the extent to which private justice can offer a fair process to employees.

The questions that I seek to address here include: To what extent has the law enabled the corporate workplace to develop into the powerful social institution that we know today? How does the law on corporate governance influence or impact local workplace governance and ultimately internal dispute resolution? What checks and balances are necessary to ensure that employees’ human/civil rights are honoured and protected through private, in-house mediation? What would a procedurally fair in-house mediation program look like?

My research includes two primary focal points, the first being the corporation and its workplace, and the second being private dispute processing of employee rights. I
begin my inquiry with a look at the corporation. I explore how law has legitimized the
corporate entity and facilitated its rise to the powerful position it holds in society. That
the corporation has been deemed a “person” entitled to certain constitutional property
rights, serves as an example of law facilitating increased corporate power. Conversely, I
look at how laws, such as anti-trust laws, have at times provided a check to rising
corporate social power. This account of the rise in corporate power is done from an
historical perspective, and is included in Chapter One.

I introduce the corporate governance debate in Chapter One, and continue it in
Chapter Two. The debate around corporate governance provides a contextual point of
departure in considering the relationship between the corporation and its various
constituents in society – both internal and external to the firm. Customers and creditors
are examples of external constituents, while employees exemplify an internal constituent.
This thesis focuses essentially on the relationship between the corporate employer and its
employee constituents. The corporation’s duty to its employees has been heightened in
this age of increased privatization, and now more than ever is worthy of our attention.
Chapter Two focuses on workplace governance, a corollary to corporate governance, and
considers the interplay of governmental, management, and employee powers that regulate
and shape the human relationships and culture within the workplace.

The discussion on workplace governance sheds light on the power dynamics that
come into play in private dispute processing. In essence, Chapter Two seeks to answer
the question: what does corporate power and governance have to do with in-house
dispute resolution? The answer, in brief, is that corporate governance, which is currently
ruled by the primacy of the shareholder theory, inevitably puts employee interests (as
well as other constituents’ interests) below those of shareholders. This poses a threat to employees in getting a fair shake at the dispute resolution table, where the employee is in dispute with the firm, and where the firm’s interest are equivalent to the interests of its shareholders.

Chapter Two additionally examines the institutional checks and balances that manage the employer/employee relationship in the Anglo-American corporation, and offers suggestions to foster greater overall equality in the workplace. The suggestions include expanding the governance debate to be more inclusive of employee interests and their human capital investment in the firm. Moving beyond the notion that the shareholder should be the primary focus of the firm’s efforts offers one way to respond more equitably to employee interests. Additionally, expanding the fiduciary responsibility of corporate officers and directors to include the interests of employee stakeholders, would facilitate greater employee equality in the workplace. Where greater equality for corporate stakeholders is established at the top, and included as part of management’s agenda, then the more equitable workplace follows, and the groundwork is laid for creating a fair dispute resolution system.

Part of the story of power relations within the corporation can be explained by the creation of private legal systems within the workplace. IDR is one kind of private legal system; company policies, which mirror public law regulations, create a system of private “laws”; and private security officers function as in-house law enforcers. This privatization of law is discussed in Chapter Two, and relies heavily on the work of Lauren Edelman.¹ Through empirical studies, Edelman outlines how over the last twenty

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years the workplace has gained increasing power to make laws, resolve disputes and enforce laws privately. The effect of this privatization of legal systems places greater leverage in the hands of the corporate workplace over the lives of its employees. Naturally, this leverage or power in the corporate employer presents challenges of impartiality and neutrality to the IDR process. Chapter Three suggests ways to counter these inherent power and fairness challenges of the private in-house mediation forum.

This research looks at a special kind of ADR – this being internal dispute resolution (IDR) process. Many companies are now offering in-house dispute resolution processes, such as mediation, to their employees who might otherwise take their disputes to court. Parties who elect to address their disputes in-house as opposed to in court still operate within the law’s reach, albeit, one step removed. In-house mediation is a form of private justice as distinguished from the public justice one can pursue in a court of law.

My interest is in the private resolution of disputes arising out of an alleged violation of anti-discrimination rights, with a particular focus on achieving a fair process. Scholars have mixed views on whether mediation benefits employees.\(^2\) I cover this scholarly debate in Chapter Three. Additionally, Chapter Three will looks at measures for ensuring a fair IDR process; and includes a model dispute resolution process.

The use of ADR processes, generally, has become widespread in North America over the last thirty years as viable alternatives to traditional litigation. Legislatures have

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2 Whether we consider the benefit to individual employees or to the class of minority employees is significant here. Employment disputes reflect individual interests in fair and equal treatment as well as public rights – as outlined by public law – to a discrimination-free workplace. At times, individual interests and public rights overlap, such that interests are articulated and actionable under the law. At other times, an individual’s interest may simply be to get an apology. Mediation can offer resolution of rights-based and interest-based disputes. However, mediation cannot offer all things to all people. Ultimately, the “wronged” employee retains the option to decide just how he or she wants to pursue resolution, if at all.
endorsed such alternatives by passing laws specifically aimed at promoting the use of ADR. Given the high costs of litigation coupled with unreasonable delay in processing even a "simple" case, mediation and other forms of ADR make sense. Courts across North America now offer and promote a variety of ADR processes to litigants as auxiliary quasi-judicial forums, including mini-trials, summary jury trials, mediation and arbitration.

In addition to such court-supported or court-annexed ADR programs, a "private" ADR movement has emerged. By "private" I refer to those dispute resolution forums that lie outside the formal legal system that are utilized by communities, churches, schools, between consumers and vendors, and within organizations as a proactive means of addressing disputes (generally) before they get to court. My interest here in this thesis is dispute resolution within organizations, specifically large for-profit corporations. Private justice and formal law are, however, related in that formal laws have a normative effect on private justice. Furthermore, when we address disputes in private that involve legal rights, we almost always "bargain in the shadow of the law." In this way, formal law influences our expectations of fairness in terms of process and outcome, even when outside the courtroom itself.

When an employee's human rights in the workplace have been compromised, that employee can typically seek redress through an administrative tribunal in Canada or federal court in the United States. However, some organizations are now offering their

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3 For example, the U.S. Congress enacted the Civil Justice Reform Act of 1990, which promoted ADR as a viable alternative to speedy justice. 28 U.S.C. 473 (a) (6) (Supp. V 1993).
5 Robert Mnookin and Lewis Kornhauser coined this phrase in recognition of the function that formal law plays in setting the scope and expectations in negotiation and settlement proceedings. Mnookin, R. H. & Kornhauser, L., "Bargaining in the Shadow of the Law: The Case of Divorce" (1979) 88 Yale L.J. 950.
employees the option to an "informal" process to resolve human rights and other types of work related disputes within the organization prior to the formal filing of any complaint. My concern is that employees addressing their human rights claim through an "in-house" mediation program be afforded a fair process – as near to fair that would be found in an administrative tribunal or court. Chapter Three sets out to determine the benchmarks of procedural fairness in formal law. To do so, I will look to the laws and adjudicative structures governing due process in Canada and the United States.

Although Chapters One and Two feature the American corporation as the model workplace employer, Chapter Three includes both American and Canadian laws of due process. In part, I have limited my focus to the American corporation and corporate governance in the United States for the sake of concision. The point in describing the historical rise in corporate social power and outlining the debate of corporate governance was to establish an understanding of the power dynamics between the corporate employer and its employees. Generally speaking, the American corporation offers a more dramatic model workplace employer than the Canadian counterpart. Furthermore, I have chosen to feature the American corporation rather than the Canadian corporation because the debates around corporate governance are made richer in the United States due to the existence of corporate constituency statutes in half of the fifty states. Simply stated, the American corporation provides an archetypical employer – the large bureaucratic firm – to illustrate the challenges of in-house workplace dispute resolution.
II. Terminology

This thesis examines the for-profit corporation in its role as employer and social institution. At times, I refer to the corporation as the firm, which is simply defined as “any business company, whether or not unincorporated.”6 Throughout, I use the firm interchangeably with the corporation. However, more strictly speaking the “firm” often denotes a partnership rather than a corporation, which are two distinct forms. Similarly, I will at times refer to the organization. Although organizations can be structured as for-profits and not-for-profits, or as business, community, or government entities, the organization I have in mind throughout this thesis is the private, for-profit corporation or firm.

Additionally, I often refer to the workplace in this thesis. While the workplace comes in many flavours and forms, the workplace at the center of this research is that housed by the private, for-profit corporation. Furthermore, the workplace in this thesis is of the non-union variety. I have purposefully excluded the unionized workplace from this thesis. To do otherwise would have doubled the breadth and length of this work, as collective bargaining as a process and political vehicle adds several more layers to the employer/employee relationship and the dispute resolution process. Besides, the vast majority of private American workplaces are non-unionized.

I use the term alternative dispute resolution or ADR to refer to the wide array non-adjudicatory dispute resolution processes. These processes, such as mediation and arbitration, are alternatives to the traditional avenues of dispute resolution – litigation or administrative proceedings such as those offered by administrative agencies like the U.S.

6 Webster’s New World Dictionary, 1994, s.v. “firm”.
Equal Employment Opportunity Commission in the United States and the Human Rights Tribunals in Canada. Recently, some people in the legal community have begun to refer to mediation and arbitration as simply dispute resolution, leaving off the alternative qualifier. The rationale behind this severance of alternative signifies that what was once considered alternative has now become more of a mainstream approach.

In fact, official agencies, tribunals and courts have begun to incorporate alternative forms of dispute resolution into their official repertoire of processes. The “multi-door courthouse”\(^7\) that offers traditional trials as well as mediation, arbitration, settlement conferencing, and summary jury trials, among other options has come into vogue over the last 20 years. The multi-door courthouse has developed to such an extent that what is standard and what is alternative has become somewhat blurred. With this phenomenon unfolding, some have suggested the use of “appropriate dispute resolution” to indicate the legal system’s role in offering a variety of processes to meet different kinds of disputes and disputants.\(^8\) Nonetheless, I will use the term ADR (to mean alternative dispute resolution) throughout this thesis because litigation and formal administrative hearings continue to be the standard frame of reference for resolving human rights employment disputes, and as such distinguishing mediation as an alternative still makes practical sense.

Internal dispute resolution or IDR is a sub-category of ADR. IDR refers to the private, in-house dispute resolution processes offered by organizational workplaces to

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\(^7\) Frank Sander of Harvard Law School introduced this vision of such a “multi-door courthouse” in the mid-1970’s. Scholars such as Judith Resnick, supra note 4, have memorialized this image of the multi-door courthouse. See also, T. J. Stipanowich, “The Multi-door Contract and Other Possibilities” (1998) 13 Ohio St. J. on Disp. Resol. 303.

resolve the disputes of their employees. While IDR can be used to resolve disputes among the variety of workplace constituents, I am most interested in the use of IDR to address disputes between the employee and the corporate employer.

III. Theoretical Approach: Law and Society

I have approached this thesis from the theoretical perspective of the Law and Society school. As such, my interest is to unpack the relationship between law and its society. More specifically, I aim to uncover the impact of law on society and two of its institutions – the corporate workplace and the private dispute resolution process. In particular, I look at how the law of corporate governance serves to organize the relationships and power structures of the corporate workplace. With respect to dispute resolution, I look at how public legal institutions have ceded certain powers of dispute resolution to the private workplace and the impact that these ceded powers have had on the employer/employee relationship. Such a law and society analysis inevitably seeks to explain law in the context of a given society or culture. My study here looks primarily at law in Anglo-American society, and its influence on the “private” law of in-house dispute resolution within the Anglo-American corporation. To a limited extent, I look to Canadian law (in addition to American law) for procedural fairness norms that can be used to guide a fair private dispute resolution forum.

9 By Anglo-American, I refer specifically to Canadian and American society. While these two countries have distinct personalities, the similarities are far greater than their dissimilarities, especially when compared to other countries in continental Europe, Latin America or Asia. The similarities between Canadian and American corporate workplaces are likewise numerous enough to examine these two cultures as one. The one exception to this is the fact that unions play a much larger role in the Canadian workplace, especially in British Columbia. However, this thesis looks at the non-union workplace; and thus, this difference remains relatively insignificant.
Law and Society scholarship represents a diverse collection of work. Certainly, the parameters of this school of thought have shifted and expanded since the establishment of the modern Law and Society movement in the mid-1960’s. Thus, it is important to clarify the various nuances of Law and Society scholarship, so as to place my work within this rather broad school of legal thought.

Stephen M. Feldman, in his book entitled *American Legal Thought from Premodernism to Postmodernism*, places Law and Society in the Modernist tradition. Modernists, according to Feldman, can be characterized by their commitment to finding the foundational roots of law. In other words, modernists seek objective explanations or rationales behind the law. Law and Society scholars are, according to Feldman, the Modernist cousins of other legal philosophies such as Positivism, Realism, Relativism, and Critical Legal Studies. For many Law and Society scholars, the

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11 The Positivist school is best defined by the works of John Austin, who penned the “command theory of law” which holds that law is the command of the sovereign (or state) that directs its subjects to behave within a certain course of conduct. Austin rejected the notion that law is rooted in morals. Other Positivists include Oliver Wendell Holmes who sought to locate law’s foundation in human experience. Holmes is attributed with defining the reasonableness standard. See O. W. Holmes, *The Common Law* (Cambridge, Mass.: Belknap Press of Harvard University Press, 1963).

12 Realism attacked the abstract rationalism of Positivism as being too far removed from the real needs of society, and therefore ineffective. Realists also rejected formalism, especially that which was typified by an out-of-touch legislature. Consequently, the Realists favored the just-in-time nature of judge-made law. However, famed American Realist scholars such as Jerome Frank, Felix Cohen and Thurman Arnold joined forces with President Franklin Delano Roosevelt in implementing New Deal legislation. Realism can, thus, also be defined by its commitment to social progress. The work of Karl Llewellyn perhaps best typifies the American Realist school.

13 Relativism contends that the essence or foundation of law is located in democratic and legal processes. Whereas the Realists believed that judicial decision-making represented law’s best manifestation, the Relativist places more faith in the legislature to create good law. Relativists were uncomfortable with the politicization of the Bench and the danger of inconsistent, ends-justifying-the-means decisions. As such, Relativists demanded that judges provide a “reasoned elaboration” of their decisions that were rooted in judicial precedent or legislation. Pluralism, which holds up the democratic process is a sub-set of Relativism. Perhaps the best representative of the American Relativists is Lon Fuller.

14 Critical Legal Studies (CLS) emerged in the late 1960’s as a “radical” offshoot of Law and Society scholarship. “Crits” argue that legal institutions and legal decisions reflect the values and human condition as experienced by society’s dominant classes and groups, and furthermore that these values have been codified as the norms by which all others in society are to be bound and judged. These norms, argue the
empiricism of the social sciences is the avenue by which law’s essence can be located or explained.

Modernists, again according to Feldman, believe that law is instrumental in affecting social progress, and that individuals are indeed capable of harnessing the power in law to exercise control over their social relations. This championing of the individual is important – something that sets the Modernist apart from both the Premodernists, who saw “man” as defined in relation to God and never an autonomous self, and the Postmodernists, who contend that the individual is impotent in effecting change in the chaotic world. Law and Society work seeks to explain the function of law in the context of society, with the more recent scholarship (in particular) placing the individual experience at the forefront of concern.

The earliest Law and Society scholars set out to examine the law through the objective, value-neutral lens of the scientific method. Empiricism reigned king, as the method by which law’s effectiveness or ineffectiveness would be determined. These early Law and Society scholars considered law to be a tool with the power to shape and maintain society. In its simplest form, law was viewed as an instrument, an independent variable, if you will, that could be wielded upon society. Critical Legal Studies scholars argued that this “mainstream” Law and Society work lacked political bite in its steadfast allegiance to empirical objectivity. However, it would be hard to miss out on the reformist flavor of much of Law and Society scholarship. So, while such Law and

Society scholarship may have lacked vehement support of a political agenda, it certainly maintained a "gentle reformist edge"\(^{15}\) with an eye to progressive social ideals.

Austin Sarat, one of the leading Law and Society scholars, provides an insider’s view of Law and Society’s evolution over the last 20 years. Sarat refers to the earlier, "mainstream" Law and Society scholars as “Instrumentalists” and the newer breed (of which he is a member) as “Constitutive”.\(^{16}\) Instrumentalists follow the Parsonian\(^{17}\) tradition of applying the law-as-tool paradigm. Generally speaking, law, for the Instrumentalist is separate from society, and acts upon society in a one-way relationship. In contrast, Constitutive Law and Society scholars hold that law constitutes society and is an integral part of society, rather than being separate from society. Constitutive Law and Society scholars have borrowed the actor-centered approach of Critical Legal Scholars, focusing their work more on individual experiences within the law. Much of the mainstream or Instrumentalist Law and Society work has focused on legal institutions and systems.\(^{18}\) Constitutive scholars like Sarat have turned to conducting research by way of individual narrative. Instrumentalists, by comparison, have traditionally adhered

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\(^{18}\) Such scholarship includes studies like Marc Galanter’s, Why the Haves Come Out Ahead, which looked at the American litigation system and structures which favor those with more means over those with less socio-economic power to fight out their complaints in court. M. Galanter, “Why the ‘Haves’ Come Out Ahead: Speculations on the Limits of Legal Change” (1974) 9 L. & Soc. Rev. 95.
to the rigors of quantitative analysis (as is the case with most social science research) as compared to the more qualitative analysis that is found in narrative-based studies.

In spite of recent criticism of the Instrumentalist\textsuperscript{19} approach as being too apolitical or lacking actionable solutions, I respect the empirical basis of much of the work done in the Instrumentalist school. While I can appreciate the merits of uncovering the law through first-person accounts, such qualitative analysis does not stand up to the demands of empiricism. I am more comfortable relying on the quantitative studies within Law and Society that, like Galanter's\textsuperscript{20} and Edelman's\textsuperscript{21} work, have objectively pointed out the shortcomings of the law.

\textit{IV. Law and Society “Concepts” of Law}

Law and Society scholars take different conceptual approaches to the law, and write about the law with a certain model of the law in mind. Roger Cotterrell, a law and society scholar, suggests that the work within Law and Society can be grouped according to three distinct conceptualizations of the law: law as state law, law as a cultural and social phenomenon, and law as a system of institutions.\textsuperscript{22} The concept of law that drives this thesis is that which considers law as a system of institutions, with the institution of dispute processing on center stage. My concern with law's institutions, however, extends beyond the judiciary and the legislature to examine private bodies or forums that interpret

\textsuperscript{20} Galanter, \textit{supra}, note 18.
\textsuperscript{21} Edelman, \textit{supra}, note 1.
\textsuperscript{22} R. Cotterrell, \textit{The Sociology of Law: An Introduction} (London: Butterworths, 1992) at 38-43. Cottrell also refers to these three categories as “law as coercive order” (state law), “legal pluralism” or in the words of Gurvitch, “layers of law” (law as a cultural and social phenomenon), and “dispute processing” (law as a system of institutions).
and utilize the law, as is the case with mediation and other forms of alternative dispute resolution. *Alternative* dispute resolution represents a relatively new, informal face of the legal institution that (ideally) operates within the formal rules of the law. I am interested in how this informal approach to formal rights works to the benefit or detriment of the workplace. My examination of mediation is largely concerned with issues of procedural justice. However, at times throughout this thesis, I look at the law through other conceptual bases, especially the model that examines law as state law. Chapter One’s treatment of corporate law, for example, looks at the state law of corporations.

**V. Law’s Function in Society**

Staking out one’s *concept* of law provides a framework in which to describe law’s function in society. This harkens back to the distinction between Constitutive and Instrumentalists (also referred to as Functionalists) scholars. For example, those scholars who conceive of law as the law of the state will most likely characterize law as a tool, which is separate from society and acts to shape society. In contrast, those who conceive of the law as a social or cultural phenomenon tend to view law and society as inseparable. I contend that law is essentially a creation of the state, and that the institutions created by law are also creations of the state. However, I view law and society as having a symbiotic relationship with each other. While law is independent and can be separable from society, law’s meaning only makes sense within the context of its host society. Law is essentially a socially constructed vehicle for managing relationships and maintaining order. Said another way, law without society is breathless, meaningless, a collection of mere words. In turn, society requires the order that law offers. Social institutions,
including corporations, courts, and even private forums of justice are creations of the law, some more immediate than others. Granted, law can be both reflective and prescriptive, it is the latter function that interests me most here: law as an independent variable that shapes society, its legal institutions and the workplace.

How then does law act upon the focal points of this thesis – the corporate workplace and private dispute processing? Given the two substantive legal areas in focus here – corporations and dispute processing of employment discrimination complaints – both can be viewed in terms of their prescriptive or normative value. With respect to the workplace, I will discuss how existing corporate law, as architect of the workplace, impacts employees. This discussion will center on the topic of corporate governance, and more specifically workplace governance.

The prevailing American law regarding corporate governance legitimates the corporation’s favour of shareholder interests over all other constituents’ interest in the corporation. This ordering of interests, naturally, has implications for the employee in the corporate workplace, whose interests are subservient to those of the corporate shareholder. Should laws directing corporate governance be amended to affect greater protection for employees’ interests? Can employees achieve greater voice and protection through state corporate constituency statutes? Should employers’ fiduciary responsibility

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23 Corporate governance as a field of study seeks to make sense of the corporation’s accountability to its various constituents. Generally speaking, corporate governance is concerned with managing the competing financial interests of various firm constituents. My intent here is to examine the extent to which the corporation is accountable to its employee constituents, and how this accountability can be juxtaposed against the firm’s accountability to its shareholders. Examining issues of accountability requires more broadly that corporate purpose be defined – be that to maximize shareholder wealth or to contribute to the general welfare of society. Corporate governance is discussed in greater detail in Chapters One and Two.

24 Workplace governance is a variation on the theme of corporate governance. While the corporate governance debate generally centers on the financial interests of the shareholders, workplace governance is more concerned with the human interests of employees, such as the accountability of the firm to uphold workplace rights.
be expanded beyond shareholders’ interests to include employees’ interests? If so, how can these (sometimes) competing interests be balanced? Some will argue that employees’ interests, such as workplace safety and anti-discrimination, are adequately protected by the existing set of laws and regulations. Yet, while these laws and regulations might provide certain protections, they do not provide employees with a voice in the workplace – a voice that could serve as a proactive tool in building or maintaining a more just and equal workplace. Thus, I will address whether the law of corporate governance should be reworked to provide greater recognition of employees’ contribution and stake in the firm.

In looking at the second focal point of this thesis – dispute processing of employment rights – I will discuss how standards of procedural fairness and employment rights impact workplace culture and the employer/employee relationship. Again, I consider law as an independent variable that influences or prescribes social relationships and structures. In the realm of procedural justice (the realm in which ADR/IDR will be addressed here), the law, for example, prescribes the requirements of due process. I will argue that the safeguards of fairness embedded in formal law must, to the extent possible, be employed in private justice forums like mediation in order for procedural fairness to be achieved. Consumers of ADR should only enter into private in-house mediation when procedural fairness can be assured. My model of a fair mediation process is outlined in Chapter Three of this thesis.

The law of employment rights in the United States is perhaps even more palpable in its normative effect on employer/employee relations. When examining the topic of workplace governance, the substance of employment and labour laws play a
complementary role. For example, Title VII, which makes discrimination of certain protected classes\textsuperscript{25} illegal in the workplace, has changed the way people interact at work by bringing the requirement of equality to the foreground. Law, thus functions to create expectations as to equality in the workplace. However, in the interest of economy, I will not address the substance of these employment rights laws. Rather, I will work from the assumption that existing anti-discrimination laws in the United States (and Canada) represent relatively good law, in that they provide important standards for fair treatment of employees.

\textsuperscript{25} Protected classes under Title VII include those who have been discriminated on the basis of race, sex, national origin, and religion.
Chapter One:

The Rise of Social Power in the American Corporate Workplace

I. Introduction to Chapter

Whether we “work to live” or “live to work,” or don’t even work at all, the workplace as a societal institution affects a myriad of American workers, their families, and the general public. Arguably, the American workplace is a more powerful social player than even the government. The workplace, after all, is the vortex of the nation’s economy, which impacts social policy and directs political agendas. The purpose of this chapter is twofold. First, this chapter aims to illustrate the vital role that the workplace plays in today’s American society, generally, and more specifically, the role that the workplace plays in the lives of American workers. Secondly and more importantly, this chapter will explore how the workplace – specifically, the private, for-profit corporation – emerged as the powerful societal force we know. To examine this emergence of power in the corporation, I will trace key areas of corporate law jurisprudence as well as political and historical events that have sought to define the role or purpose of the corporation in American society. This illustration centers on two key themes of the corporation – corporate personhood and corporate governance.
II. The Role of the Workplace in American Society

Work and the workplace play a significant role in the everyday lives of more than 140 million Americans who participate in the U.S. labor force.¹ The American workplace provides its employees with not only wages, but also health insurance subsidies, life insurance, paid vacations, maternity and paternity leaves, and retirement savings plans to name a few. One’s job, then, offers income as well as a broader economic and social safety net.

In addition to these economic offerings of the workplace, one’s job may also provide an individual with personal enrichment. Many of us look to work as a means to self-actualization, where our potential is achieved, and where we feel a sense of accomplishment. Furthermore, the workplace provides a pool of peers that can provide support and camaraderie. Given that working people spend so much time of their waking hours on the job,² it is only natural that friends, and sometimes mates, are often found at work. In essence, the workplace impacts millions of people at the individual level – in terms of income, social security, and personal fulfillment.

Alongside the aforementioned benefits that accrue with work, there are also physical and emotional risks present in the workplace. Even in today’s style of work – that is less physical and increasingly intellectual in nature – approximately 50,000 American workers die each year due to occupational diseases.³ In addition, according to

² According to a U.S. Department of Labor report entitled FutureWork, a typical worker in the U.S. spends more than 1/3 of their weekday waking hours at work. United States, Dept. of Labor, FutureWork at 58, online: United States Department of Labor <http://www.dol.gov/cgi-bin/consoled.pl?media+reports> (date accessed: December 2, 2001)
³ Ibid.
the U.S. Department of Justice, there are 1 million violent assaults occurring on the job every year. In the aftermath of the recent terrorists attacks on the World Trade Center and the Pentagon, the workplace seems even less safe than ever imagined. In addition to physical risks on the job, there are also emotional risks, such as those associated with discrimination. Nearly 80,000 claims of on-the-job discrimination were filed with the U.S. Equal Employment Opportunity Commission in 2000, most of which alleged race (36.2%) or sex (31.5%) discrimination.4

Looking beyond the individual level, the workplace has a symbiotic relationship with the host national economy. These two systems5 are intrinsically entwined, such that changes in one system have direct implications for the other. When the workplace drops in productivity, the general economy is subject to reverberations. Similarly, when the economy takes a downturn, the workplace suffers - unemployment rises and productivity decreases. In the aftermath of the devastating September 11th terrorist attacks on the United States, the American economy and the workplace have together experienced a dramatic decline. Unemployment rates in the United States rose sharply from 4.9% in September 2001 to 5.4% in October 2001, representing a loss of more than 400,000 jobs, the largest number of job cuts in a generation.6 Reports from the U.S. Commerce Department mirrored the bad news about jobless rates with bad news about productivity, saying that American economic output faltered by .4% in the third quarter of 2001,

5 One might argue that the workplace is a subsystem of the national economy.
confirming reports that the economy is entering a recession. What happens in the workplace reflects and impacts the national economy.

Finally, another way that the corporate workplace demonstrates its powerful role in society is through corporate funded political lobbying. The American political system is highly subject to the influence that capital exerts; and the corporation, providing it is profitable, has significant capital to wield. Big Business as a generally wealthy voting bloc has the capability to influence laws and regulations that affect not only the workplace, but also impact state and federal taxes, the environment, and international trade policies. Granted, corporations do not speak in one monolithic voice, and competing lobbying efforts by corporations can cancel each other out. Nonetheless, the corporation owns a voice in national as well as local politics, which, in turn impacts the general population.

The workplace has the capacity to impact – positively and negatively – the lives of millions of Americans. In one sense this can be explained by the simple fact that most people need to work to survive. Unless one is independently wealthy enough to forego employment, work is not an option, but a requirement for most in modern society. The necessity of work, in part, explains why the workplace has come to be the important societal player that it is in our modern capitalist, post-industrial society. To explain how the workplace – in particular, the private, for-profit organization - developed into the

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7 Ibid.
8 I use the term “Big Business” here to refer to the large bloc of influential American corporations, which have earned their influence through financial prowess in the market.
9 In the early years of the United States, the economy was primarily agrarian. In the mid-1800’s, however, a shift occurred, and the economy evolved from its agricultural base to an industrial base. The service industry entered the stage in the early 1900’s, and throughout the century continued to gain ground on manufacturing. Since the 1970’s manufacturing has accounted for 30% of the U.S. gross domestic product – a figure that has been stagnant for the last thirty years. Job growth, according to the U.S. Dept. of Labor exists primarily in the service sector. Hence, I make this reference to the “post-industrial” society. See, FutureWork, supra note 2 at 47.
dynamic force that it is, a review of the legal history of the corporation is in order. As I will illustrate, corporate law has provided a structural framework for regulating social power and organizing relationships among various interests groups, including business, government and employees.

III. The Emergence of the Corporation as a Powerful Social Institution

Today's American corporation has evolved into a powerful social institution, which is manifested most basically in its direct impact on the lives of millions of Americans who show up for work every day. In addition, the corporation influences society at the macro level, weighing in on the national economy, as well as the political, legal and regulatory landscapes. It is the private, for-profit corporation, as distinguished from the public and/or not-for profit corporation, that has risen to such influential stature, primarily because of the leverage that is inherent in large amounts of capital. Thus, my attention here will focus on the private corporation and its component part - the workplace.

How did the private corporation rise to its current prominent stature? Certainly the confluence of science, historical events, economic currents, and political shifts can be examined in answering this question. As equally certain, one can look to developments in the law to determine how the corporation, and by association, the workplace, came to be so powerful a player in our society. By examining the function of law in society generally, one can begin to see the role that law has played in creating the influential corporation.
Below, I explore how law and society have converged in developing the corporation, the powerful host of many American workplaces. To do this, I will begin with commentary on what I see as two of law’s functions in society – to organize relationships and regulate power. The relationships and power dynamics of central concern here are those between the corporate employer and its employees. Specifically, I will look at how laws related to corporate form and governance have affected the employer-employee relationship.

Roger Cotterrell urges that a distinction be made between law’s purpose and law’s function.\(^\text{10}\) The purpose of law is its utility or what law ought to do in and for a given society. Discerning the purpose of law, most often involves an examination of a specific society’s history. One might argue, for example, that the purpose of the U.S. Constitution was to delineate the separation of governmental powers. Similarly, one might argue that the purpose of the Bill of Rights, added as the first eight amendments to the U.S. Constitution, was to provide protection to the individual against a domineering sovereign. A look at early U.S. history, which is marked with acts of defiance against an overbearing King George III, adds credence to this argument on the purpose of the U.S. Constitution. The history of corporate law demonstrates that its purpose has been at times to create mechanisms for capitalization or more broadly speaking, to fortify the United States economy by unleashing corporate profit-making activities.

The function of law, on the other hand, is what law actually does, or the impact that law has in society. At times, law’s purpose is realized and we can then describe the law by its function. A functionalist view of the law then, is one that heavily relies on empiricism and description of the role that law actually plays. Here again, history as a

tool can illustrate the impact that particular laws have had on society. While an understanding of the motivation or the purpose behind corporation law may prove useful contextually, my primary focus here is to describe how the law of corporations has functionally contributed to the rise of the corporation’s social power – a power that affects both the general public and the corporate employee alike. As mentioned, my ultimate concern is the power relationship between the corporate employer and employee. Nonetheless, an understanding of the corporation’s power in society generally provides a useful backdrop to this story.

One of the functions of law in society is to organize relationships among society’s constituents. To the extent that law performs this role in a just way resulting in just outcomes, then social stability is fortified through law. Sociologist Talcott Parsons theorized that law’s function is to provide internal integration to the social system, through organizing and maintaining appropriate relationships among society’s members.¹¹ Law, in Parson’s world, reflects and depends on society’s shared values; integration of society depends on articulating these values.¹² But, whose values get heard and catalogued as the law? Critical legal theorists and others question whether law, as the agent of social integration, can ever be neutral when it has, for the most part, been the creation of the “ruling” class. David Kairys, of the Critical Legal Studies school, contends “law is a major vehicle for the maintenance of existing social and power relations by the consent or acquiescence of the lower and middle classes.”¹³

¹¹ Ibid. at 82.
¹² Parsons defined values as the “conceptions of the desirable society . . . held in common by its members.” Cotterrell, supra note 10 at 83.
I contend that the law offers a valid and capable vehicle for relationship ordering so long as the democratic process in conjunction with the court’s fine-tuning is effective at articulating the public’s shared values. Such a stance, admittedly, relies on significant faith in the existing American system and its laws. This faith, however, is not unshakeable. History provides consolation, demonstrating that social progress occurs in fits and starts. At times the pendulum of justice swings too far from its “optimal” point, but then the pendulum swings again, a few years or decade later, reframing the law again in a more “favourable” light. Creating momentum of the pendulum, however, requires that the democratic process and the courts be open to hearing the voices of outgroups—the economically disadvantaged, racial minorities, gays and lesbians. Otherwise, law will function, as Kairys predicts as a tool of the Haves at the expense of the Have Nots.

Another function of law in society is to regulate power among institutions and constituents, a function that goes hand in hand with relationship ordering. Returning again to the example of the U.S. Constitution, we can see that this Mother of American laws does in fact function to balance the power among the three governmental institutions. The President can check Congress’ maneuvers with a veto, while the Judiciary can narrow or broaden the definition of Congressionally created statutes, and Congress can impeach the President for committing what it determines to be high crimes and misdemeanors. Furthermore, the Constitution serves to regulate the power of the government in relation to individuals. Law enforcement officers are prohibited from

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14 The 2000 U.S. Presidential election certainly shook my faith in the American democratic process and its institutions. In my reading of the U.S. Constitution I failed to find justification for the U.S. Supreme Court’s installation of the American President, which was what effectively occurred in 2000.

15 I use the term “outgroup” here to refer to those who, by virtue of any or several personal characteristics, fall outside the dominant class in American society – which is generally thought of as being white, male, heterosexual, Christian, and economically well-off.
committing "unreasonable" searches and seizures alleged perpetrators of crimes; once charged and convicted, individuals are protected from cruel and unusual punishment.

Just as law serves to regulate power and organize relationships within the general society, so too does law operate to fix roles and mediate the power of the corporation in relation to its various internal and external constituents. Corporate law has served to define and legitimize the corporate entity and its activities. By defining the corporation as a legal "person", the corporate entity has collected certain constitutional rights, which translate into social power. Similarly, the law has attached certain obligations to the corporation, making it accountable under various statutes and common law to employees, shareholders, and the public.\(^{16}\) Outlining rights and obligations is one way in which law regulates power and organizes relationships. Furthermore, state corporate statutes direct the process by which corporations must be chartered, the formalities of public financial reporting, and the stakeholder interests that must be considered in governing the corporation. Corporate law has also created a framework through which the corporate entity can collect and control large amounts of capital in furtherance of its stated business goals. To illustrate how law has legitimized the corporate entity and facilitated its rise in social power, I will concentrate my attention on two significant themes in corporate law: corporate personhood and corporate governance. Building from the premise that law functions to regulate power and organize relationships in society, I will look at ways in which the doctrine of corporate personhood\(^{17}\) has impacted power relations between the

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16 Whereas rights of the corporation have been determined under the U.S. Constitution, "obligations" of the corporation have been outlined under common law torts, securities law, and specific statutes regulating the relationship between employer and employee, e.g., Occupational and Safety Hazard Act (OSHA), Title VII of the Civil Rights Act of 1964, Americans with Disabilities Act (ADA). Obligations under the tort theory of the fiduciary are discussed later in this chapter and again in Chapter Two.

17 Significant court decisions have defined the corporation as a separate legal person, especially when examined within the context of corporate constitutional rights. See, First National Bank v. Bellotti, 435
state and the corporation. Similarly, I will look at how the jurisprudence of corporate governance serves to direct the various relationships the corporation has with its constituent shareholders, employees and the public.

David Sciulli, a contemporary sociology scholar writing on law from a functionalist perspective, has written several works analyzing the power dynamics between the corporation and the state. In his most recent book, *Corporate Power in Civil Society*, Sciulli employs Talcott Parson’s social theory of internal integration to explain how the law, namely the judiciary, has struggled to find a consistent theory of corporate agency and purpose. Sciulli sets out to address two primary questions in *Corporate Power*: “[w]hether and when do corporations either increase or decrease social wealth (what Adam Smith called the wealth of nations)? And, whether and when do corporations broadly support or increasingly enervate and then challenge the basic institutional design of a democratic society?” Given the powerful place that corporations hold in American society, Sciulli concludes that the struggle for consistency in the corporate judiciary, particularly on the issue of corporate governance, has engendered instability in our

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U.S. 765 (1978) [hereinafter Bellotti]. However, the dominant corporate theory holds that the corporation is rather a nexus of contracts, an association of individuals connected by contractual obligations. Thus, a firm definition of the corporate person seems to be somewhat of a moving target. A consistent application of corporate person ideology is in order, however, such that corporation have both rights and obligations as a legal person. The historical account of the evolution of corporate personhood will hopefully put this debate in context.

19 Sciulli includes the debate of corporate personhood within his discussion of agency, and includes the debate of corporate governance within the context of corporate purpose.
21 Sciulli uses the term “corporate judiciary” to refer to courts dealing with a high volume of corporate law cases, namely Delaware.
democratic society. By operating in a world of moving juridical targets, corporations cannot effectively play their balancing role in America’s civil society.\textsuperscript{22}

Sciulli offers a useful historical framework in which to examine the impact of law on corporations and the impact that this relationship has on society. He accomplishes this, in part, by examining the jurisprudential development of corporate personhood and corporate governance.\textsuperscript{23} Sciulli points to three distinct doctrines employed by the corporate judiciary, defining the first two periods as concerned with naming the corporate person – the first period rallying around the \textit{artificial} person theory while the second period is characterized by its support of the \textit{natural} person theory.\textsuperscript{24} Sciulli refers to a third period of corporate law development as one marked by the judiciary’s concern with corporate governance. Using these doctrinal periods as guideposts, I will first discuss the evolution of the corporate person – as a natural and artificial entity. Next, I will discuss the existing debate on corporate governance, a debate that rests on the existential question: what is the purpose of the corporation in society? In examining the competing answers to this question, we have an opportunity to once again examine the potential and actual power of the corporation in society.

\textsuperscript{22} Sciulli labels the corporation an “intermediary association,” a sociological term. The corporation as an intermediary association simultaneously mediates state power in society, and provides a broader avenue for individual loyalties that extend beyond the family or other primary groups. Sciulli, \textit{supra} note 18 at 16.

\textsuperscript{23} This typology is not a centerpiece in Sciulli’s \textit{Corporate Power}. Nonetheless, I found this to be a useful framework to examine the topics of corporate personhood and governance. \textit{Corporate Power} focuses primarily on the modern corporate judiciary’s struggle for consistency on these two topics.

\textsuperscript{24} Also see, M. M. Hager, “Bodies Politic: the Progressive History of Organizational ‘Real Entity’ Theory,” 50 U. Pitt. L. Rev. 575 (1989). Professor Hager (at 579) utilizes similar definitional categories to explain the development of corporate law jurisprudence, which he refers to as the “fiction paradigm,” the “real entity paradigm,” and the “contract association” paradigm.
A. Evolution of the Corporate Person

Personification of the corporation has been an important ideological tool in drawing and enforcing the legal parameters of the corporation. Gregory Mark summarizes the role that personification has played in corporate law theory and practice. According to Mark, this ideology is vital because it (1) implies a single and unitary source of control over the collective property of the corporation’s members, (2) defines, encourages and legitimates the corporation as an autonomous, creative, self-directed economic being, and (3) captures rights, ultimately even constitutional rights, for corporations thereby giving corporate property unprecedented protection from the state.25

Although the utility of the corporate person as a legal ideology is well established, settling on the specifics of its character sketch has not been an easy task for lawmakers. From the inception of the corporation as a legal entity, American courts have struggled to define corporate personhood accurately, and in such a way as to effectively control the corporation’s collective property, legitimize the corporate form, and define corporate rights and obligations. By the early 1800’s the Supreme Court provided a workable paradigm by pronouncing the corporate entity a “person.”26 This paradigm would acquire important qualifiers over the course of the next 200 years, ranging from the artificial27 person to the natural28 person. As the definition of the corporate person evolved, so too did the rights and obligations of the corporation. The comparatively limited constitutional rights of the corporation as artificial person were expanded once

27 Ibid. at 636. Dartmouth v. Woodward declared the corporation an “artificial” person.
the courts deemed the corporation a *natural* person. From the position of a rights-bearing *natural* person, the corporation has acquired considerable social power in relation to the state and the public, a position that has been further fortified by the corporation’s ability to accumulate and manage large amounts of capital wealth. It is this combination of rights and capital that translates into social power for the corporation.

A.1. Evolution of the Corporate Person: The Artificial Entity

David Sciulli labels the first period of corporate jurisprudence as the “artificial entity” era, a long stretch of time spanning from the colonial days of the mid-1700’s to the 1830’s. Because the attitudes of lawmakers regarding the corporation during this period mirrored the attitudes of Thomas Hobbes towards the individual, this time has been referred to as the Hobbesian era of corporate law doctrine.29 In the spirit of Hobbes’ philosophy, the prevailing view of state legislatures and the courts during the mid-1700’s to early 1800’s was that corporate law should manage the state of nature, protecting the corporation (as Hobbes would have law protect the individual) from its self-destructive tendencies, and society as a whole.30 “American state legislatures [of this era],” argues Sciulli, “denied that corporations have inalienable rights, rights independent of the legal duties state legislatures imposed explicitly on them.”31 With this thinking in mind, lawmakers were justified in limiting the freedom of the corporate entity, restricting, for example corporate business to that, and only that, which served a public interest. By declaring corporations *artificial* persons, the courts were spared from granting the wider freedoms of the *natural* person, at least for a while.

29 Sciulli, *supra* note 18 at 27.
The historical roots of the American corporation can be traced to the corporate form established in England. Chartered English corporations like the East India Company and the Hudson Bay Company played a large role in developing and governing the young American colonies. However, the Framers of the United States Constitution rejected the notion of granting the federal Congress rather than the states the authority to grant corporate charters.\textsuperscript{32} Perhaps the Framers chose to exclude the corporation from the Constitution because business issues went beyond the intended scope of the Framers' mandate to "form a more perfect union."\textsuperscript{33} Or, perhaps the Framers determined that endowing the federal legislature with the rather micro-management concern of incorporation was not necessary to regulate commerce in the new nation, since the macro concern of interstate commerce had already been assigned to Congress.\textsuperscript{34} It is equally plausible that the Framers, in the spirit of classical liberal thought, wanted to avoid an alliance of corporate and governmental powers in the interest of protecting individual liberties, including economic liberties.\textsuperscript{35} Thus, from the very beginning of American corporate history, the states rather than the federal government assumed primary responsibility for making and shaping corporate law.\textsuperscript{36} It follows, then, that the sketching of the corporate person emanated from the states' corporate judiciary.

\textsuperscript{33} U.S. Const. Preamble
\textsuperscript{34} U.S. Const. Art. I, Section 8, clause 3 directs Congress to "regulate Commerce with foreign nations, and among the several states, and with the Indian Tribes."
\textsuperscript{35} Adam Smith, in the seminal, \textit{Wealth of Nations}, published in 1776, was highly critical of corporate and government alliance in business, asserting that such consolidated power would interfere with the natural synergy of competition in the market. A. Smith, \textit{An Inquiry Into the Nature and Causes of the Wealth of Nations} (Chicago: University of Chicago Press, 1976).
\textsuperscript{36} The most influential state in the area of corporate law is Delaware, where 40% of the corporations listed on the New York Stock Exchange are incorporated, as well as 60% of the Fortune 500, and 50% of the companies listed in the Dow Jones Industrial Average. Sciulli, at p. 97.
During this Hobbesian era, states took their role as public steward rather seriously. An example of this lies in the process of incorporation. The corporate chartering process required businesses, wanting to incorporate, to apply for and receive a grant to conduct business in the state. States granted such a privilege upon being convinced that the business of the corporation would serve the public interest.\textsuperscript{37} Examples of successfully incorporated business included those contributing to the public infrastructure, such as utilities, railroads and canals. Through this process, the states maintained regulatory oversight of business activities and managed its impact on the community. Creation of the corporate form, then, arose partially in response to the state’s interest in protecting community welfare.\textsuperscript{38} In other words, the corporation existed at the pleasure of state government.

A defining point in corporate law occurred with the 1819 Supreme Court decision in \textit{Dartmouth v. New Hampshire}\textsuperscript{39} – a case that recognized constitutional corporate contract rights, and first offered us the notion of the “corporate person”. In this case, the New Hampshire legislature had passed a law to convert the private Dartmouth College to a public institution. Chief Justice, John Marshall, writing for the U.S. Supreme Court, held that the state legislature had acted in contradiction to the federal constitution, which forbids states from interfering with the obligations of a private contract. Thus, the Supreme Court determined that the New Hampshire legislation that transferred Dartmouth College into public hands interfered with the private contract that chartered the College, and was consequently invalid. Interestingly enough, the private contract at


\textsuperscript{38} Hurst, \textit{supra} note 32 at 17-18.

\textsuperscript{39} \textit{Dartmouth}, \textit{supra} note 26.
the center of this case was the corporate charter establishing the College, and signed by King George III of England and the Trustees of Dartmouth College. The *Dartmouth* case solidified the sanctity of the corporate charter: Even though America’s independence from England rendered the Crown’s rule as invalid, the integrity of the College’s charter, a contract, remained in tact, the contract interest having passed from King George III to the State of New Hampshire.

The Dartmouth case not only established the sanctity of the corporate charter – by affirming corporate rights under the Constitution’s Contracts Clause – it also identified the corporation for the first time as a “person,” albeit a fictitious one. Chief Justice Marshall wrote: “A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence.”\(^{40}\) The characterization of the corporation as an artificial being promised new protections and privileges under the corporate form.\(^ {41}\)

In the years following *Dartmouth*, the corporate form enjoyed increased popularity.\(^ {42}\) In 1800, there were approximately 100 corporations registered in all of the United States. In 1837, Massachusetts alone registered over 70 corporations, a testament to the rapid growth of the corporate form in the mid 1800’s.\(^ {43}\) A major shift in corporate identity had occurred: what was once an entity operating under a grant from the sovereign for public works was now emerging into an entity whose purpose was to further private

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\(^{40}\) *Dartmouth, supra* note 26 at 636.

\(^{41}\) State legislatures resented the *Dartmouth* decision, and a backlash ensued. The states believed that *Dartmouth* hindered their ability to govern the entities they chartered. In response, state legislatures intent on establishing their sovereign position over corporations, enacted new incorporation laws, reserving the power to alter, amend, or repeal corporate charters in the state.

\(^{42}\) Mark, *supra* note 25 at 1442.

enterprise. By the end of the 1800’s, the corporation would be deemed a natural person eligible for certain constitutional protections, a characterization that would further solidify the shift of corporate purpose from public to private. Furthermore, armed with constitutional rights, the corporation became endowed with even greater social leverage.

A.2. Evolution of the Corporate Person: The Natural Entity

Sciulli refers to the second period of corporate jurisprudence as the “natural entity” era, which endured from the 1830’s through the 1920’s. While Hobbesian philosophy informed the previous artificial corporate person era, the philosophy of John Locke played a leading role in furthering the idea of the natural corporate person. John Locke called for a social contract to bind individuals and the state, through which individuals would pledge their loyalty to the state in consideration for the state’s protection of the individual from the forces of nature. Also included in this Lockean deal was a limit on the state’s power in governing the individual. Here again, the analogy can be made between Locke’s individual and the corporate person. Building on the legacy of Dartmouth, courts and legislatures in this era began to concede that corporations, like individuals, were worthy of a more consensual relationship with the state, and further that corporations – as persons – possess certain inalienable rights.

Whereas the state via its grant of a charter legitimized the corporation in the previous era, corporate legitimacy during the natural entity era drew upon the collective will of the corporate members (usually shareholders). The conglomerate natural person,

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44 In comparison to Sciulli, Gregory Mark asserts that the focus on corporate personhood remained central to lawmakers and legal scholars until after WWII. Both Sciulli and Mark agree that once the corporate personhood debate was settled, the scholars and lawmakers turned their attention to organizational and economic theories of the corporation. See, Mark, supra note 25.

45 Sciulli, supra note 18 at 28.
equipped with natural rights, became the prevailing and guiding metaphor of the corporation during this period. By conceptualizing the corporation as a *natural* person, with natural rights, courts justified limiting state legislatures’ regulation of corporate activity. The republican vigilance of Hobbesian political philosophy was thus giving way to a sentiment rooted in popular, group-based democracy.

The emergence of the *natural* person corporation made perfect sense in light of the social, economic and political happenings of the early 1800’s. This was an era of rising individualism, one which resounded the teachings of Locke, a champion of the individual’s inherent and natural rights to “life, liberty, and estate.” This was also a time of spiritual reckoning. In 1825, the United States experienced what is termed the Second Great Awakening, a revival of Protestant Christian ideals. One distinguishing characteristic of the Great Awakening was its rejection of pre-destination in exchange for the belief that individuals are free to choose salvation. This growth of individualism facilitated the corporation’s liberation from the overzealous state control of its affairs.

Another factor contributing to greater liberation of the corporation from state governance was a change in the American economy. During the early part of the 19th century, American society was experiencing a shift from an agrarian based economy to one of a commercial nature. The Industrial Revolution, which surfaced in Europe during the latter half of the 18th century, appeared on the American stage during the first quarter of the 19th century. This industrialization was encouraged in the United States as a result of restrictive trade policies and blockades during the War of 1812, which separated the one-time colonies from trading partners on the European continent. Isolated from its

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suppliers, the American market, thus, had no alternative but to begin producing more
goods at home; industrialization was underway in America.\footnote{S.M. Feldman, American Legal Thought from Premodernism to Postmodernism: An Intellectual Voyage (New York: Oxford University Press, 2000) at 67-68.}

The construction of national railways and waterways\footnote{The Erie Canal was completed in 1825, connecting the Great Lakes to New York City.} facilitated the changing economy by providing faster means of moving products to market. At the same time, the expanding geographical reach of the United States further advanced the need for an expanded transportation system. The Louisiana Purchase in 1803 doubled the United States territory, while the 1847 victory of the United States in the Mexican-American War added the state of Texas to the Union. The growth in U.S. territory demanded an expanded infrastructure, a demand that private industry, namely the corporation, was poised to address. Yet, in order for private capital to participate in the rapidly growing country, the states would have to concede more autonomy to corporations, which they eventually did by the century’s end.

While corporations were perceived on the one hand as a threat to state power, they simultaneously held the promise of economic strength for the state. Aware of the benefits of corporate capital, states began to woo businesses to incorporate within their boundaries - offering tax incentives, real estate deals and mechanisms for consolidating corporate capital.\footnote{A. S. Miller, The Modern Corporate State: Private Governments and the American Constitution (Westport, Connecticut: Greenwood Press, 1976) at 41.} New Jersey, for example, in its efforts to win the business of the railroads, granted in the 1830’s a monopoly to the Camden and Amboy Railroad for the Philadelphia to New York City line, a well-traveled and, hence, profitable route.
Additionally, New Jersey exempted the Camden and Amboy Railroad from paying state taxes as an incentive to incorporation.\textsuperscript{50}

On the political front, the United States was experiencing yet another change. With the presidency of Thomas Jefferson in 1801, a shift in political sentiments had begun, representing a turning away from a paternalistic and centralized federal government to one more state-centered and people-centered.\textsuperscript{51} The election of Andrew Jackson in 1829 solidified this age of individualism and marked a new beginning for the corporation as well. Jackson, a southerner of humble beginnings (in contrast the well-off, well-educated Presidents before him) became a war hero of the War of 1812 and rose through the ranks of state and federal politics. Jackson represented the potential of the common citizen and resounded the virtues of popular democracy touted by the Jeffersonian Republicans. Fading was the Hobbesian notion of a wild state of nature that required government to control and tame self-interested and warring individuals. In its place a Lockean perspective was on the rise, which favoured a more consensual relationship between government and the individual, a sentiment which transferred over to the relationship between state government and the individual corporate person.

The Jacksonian presidency stood for individualism and small government, ideals that informed the “free incorporation” movement of the mid-1800’s. Free incorporation meant that businesses could freely register to do business in the state of their choice. Previously, states granted charters to businesses on a case-by-case basis, and only to those enterprises that, in the opinion of the state, would be beneficial to the state and its

\textsuperscript{50} Prechel, \textit{supra} note 43 at 31.

\textsuperscript{51} Feldman, \textit{supra} note 47 at 68-69. Feldman characterizes the presidencies of Jefferson’s predecessors (George Washington and John Adams) as exhibiting “pre-modern civic republic elitism” in contrast the Jeffersonian Republican presidents (Jefferson, James Madison, and James Monroe), who endorsed a more modern style of governance, one premised on “democratic popular sovereignty.”
constituents. The charter was granted as the result of a contract negotiation, with the benefit to the community serving as consideration in support of the contract.\textsuperscript{52} Thus, corporations were legitimized and empowered to do business only because the state granted them the authority to do so. In this way, the state, as grantor, was in the catbird’s seat of power – watching over the corporation. Free incorporation replaced the case-by-case charter granting process by enacting general incorporation statutes, which set forth general requirements of registering and operating a business within a state.

Free incorporation formalized the states’ relinquishment of its privilege granting power; it also indicated that the corporation was not born of the state but rather was the product of group will. As Gregory Mark points out, “[t]he belief that the privilege of incorporation should have some clear benefit to the larger community gave way to the view that the larger community was served by strengthening the individuals who formed corporations.” Mark goes on to conclude during the Jacksonian era, “[f]ree incorporation . . . suggested that the corporate form was an individual’s natural tool, as useful a device for independence and growth as a farmer’s plow.”\textsuperscript{53} The early 19\textsuperscript{th} century, thus witnessed the simultaneous rise of the natural individual and the corporation – a collective individual, if you will – as a vital source of economic and social vitality. As private capital grew evermore important in the economic development of the country, the states’ role as development trustee diminished.\textsuperscript{54} With the confluence of rising individualism and smaller government as a backdrop, general incorporation

\textsuperscript{52} This contract nature of the corporate charter was outlined in Dartmouth, supra note 26 at 637-38.
\textsuperscript{53} Mark, supra note 25 at 1454.
\textsuperscript{54} This was true except for the case of railroad construction, an area in which states remained active.
statutes provided confirmation of greater corporate autonomy in the face of state regulation.\textsuperscript{55}

The Civil War, which lasted from 1861-1864, wreaked widespread emotional, political and economic havoc on the United States, dampening industrial growth. However, following the Civil War, the reconstruction era witnessed sweeping positive changes to the American topography, particularly on the political and economic fronts. The emotional wounds would take much longer to heal. Progressive new laws led the charge in changing the political and economic landscape in the late 1800's. Most significant of these laws were three amendments to the U.S. Constitution, the first two having direct impact on the nation's commerce. The Thirteenth Amendment, passed by the United States Congress in 1865 abolished slavery.\textsuperscript{56} The abolishment of slavery dramatically altered the once agrarian economic base in the south, and arguably expedited the South's industrialization. Three years later, in 1868, Congress passed the Fourteenth Amendment, which declared, among other things, that no "state shall deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."\textsuperscript{57} As I will illustrate below, this amendment had positive implications for corporations as well as individuals. And finally, the Fifteenth Amendment granted all citizens of the United States, regardless of race, the right to vote.\textsuperscript{58} While this latter Amendment had no immediate affect on

\textsuperscript{56} U.S. Const. Amend. XIII.
\textsuperscript{57} U.S. Const. Amend. XIV.
\textsuperscript{58} U.S. Const. Amend. XV.
commerce or the workplace, it represented a general political shift towards greater social equality.

Amidst this dramatic and changing social terrain, the U.S. Supreme Court handed down a significant ruling in 1886 on the nature of the corporation, and more particularly, the rights to which the corporation was entitled. In a unanimous decision, the high court held in *Santa Clara County v. Southern Pacific Railroad*, that the corporation was indeed a "person," and as such was subject to protections under the U.S. Constitution’s Fourteenth Amendment. The decision demonstrated a shift in jurisprudential thinking about the nature of the corporation. Most significantly, the High Court graduated the artificial corporate person to a natural person. Furthermore, *Santa Clara County* established that the United State Supreme Court, as the ultimate guarantor of constitutional rights, would ensure that corporate rights were not infringed by states overstepping their regulatory reach of its chartered corporations.

Clearly, *Santa Clara County* represented a trend towards greater corporate power. Previously, in 1839, the Supreme Court grappled with issues of corporate characterization and its consequent constitutional protections. The high Court determined in *Bank of Augusta v. Earle*, that the corporation was not a "citizen" within the meaning of the Constitution’s “privileges and immunities” clause, and thus was not afforded the privilege of doing business in a state other than the one in which it was incorporated. *Bank of Augusta*, which reserved state authority to impose limitations on

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59 *Santa Clara County*, *supra* note 28. The Supreme Court reiterated its stance in *Santa Clara County* two years later in *Minneapolis and St. Louis Railroad v. Beckwith*, 129 U.S. 26 (1888).
60 Hurst, *supra* note 32 at 68.
62 The “privileges and immunities” clause, U.S. Const., Art. IV, clause 2.
63 Justice Taney, writing for the Court, held that although corporations were not citizens, as a matter of comity, corporations could presume a privilege to do business in other states, so long as that state did not
foreign corporations (those chartered in other states), was thus regarded as a victory for state regulation over corporate activity. *Santa Clara County*, by contrast, represented an expansion of the corporation’s economic and social power against the states’ economic regulation of corporate activity.

*Santa Clara County* delivered the rights of life, liberty and property to the corporate person.\(^{64}\) Property rights of the corporation were seen as vested in the individual corporate shareholders and manifested in the collective corporate person. The utility of the corporate form in raising and organizing large amounts of finance capital became clearly evident during the transportation boom in the early 1800’s. However, corporations were limited in the amount of capital they could collect, primarily because until the late 1800’s capital could be raised *only* through individual stock sales. Stock ownership by one company of another company was expressly prohibited in the corporate laws of Illinois, Maryland, Massachusetts, New York, and Pennsylvania.\(^{65}\) However, in the 1880’s corporations were allowed to purchase the stock of other companies and the holding company was born.\(^{66}\) New Jersey was the first state to allow corporations to invest and own the stocks of another company, enacting new incorporation laws in 1888, 1889 and 1893.\(^ {67}\) Delaware, not to be outdone by its fellow state, shortly followed suit. This collection of large amounts of capital placed enormous power in the hands of Corporate America.

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\(^{64}\) U.S. Const. Amend. XIV.
\(^{65}\) Prechel, *supra* note 43 at 27.
\(^{67}\) Hurst, *supra* note 32 at 69.
Private capital clearly played a major role in energizing the economy of the late 1800's. Yet, state and federal legislatures maintained caution with the mounting corporate power. Although corporate matters had primarily been addressed at the state level, the concern of nation-wide monopolies and their impact on interstate commerce and competition, caught the attention of the U.S. Congress. With the preservation of healthy competition and fair consumer pricing in mind, Congress created the Interstate Commerce Commission (ICC) in 1887. One of the ICC's main goals was to control the booming railroad industry in its predatory campaign to swallow other businesses.\textsuperscript{68} The ICC, however, proved ineffectual in significantly curbing the efforts of such tycoons as Vanderbilt, Carnegie and J.P. Morgan.

In response to the impotency of the ICC, Congress passed the Sherman Antitrust Act\textsuperscript{69} in 1890 – again to restrict monopolistic efforts of big business and to protect the consumer interests of the public. Furthermore, the Sherman Act bestowed regulatory powers in Congress to oversee interstate commerce. However, the Sherman Act would soon prove to be as ineffective as the ICC at squelching the consolidation of wealth and power through trusts and interstate commerce. The weakness in the Sherman Antitrust Act rested in part in its vagueness, leaving even the term “trust” unclarified. The 1895 Supreme Court decision in United States v. E.C. Knight Co.,\textsuperscript{70} rang the death knell for the

\textsuperscript{68} Miller, supra note 49 at 50.
\textsuperscript{69} Ch. 647, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. Sec. 1 (1997). The Sherman Act made illegal “every contract, combination in the form of trust or otherwise conspiracy in restraint of trade or commerce among the several States, or with foreign nations.”
\textsuperscript{70} United States v. E.C. Knight Co., 156 U.S. 1 (1895). This case held that “manufacturing” was, by definition, different than “commerce”. As such, the Court determined that Congress was prohibited from drawing upon its Commerce Clause Powers and the Sherman Act to restrict monopolies engaged in manufacturing unless such manufacturing rose to the level of interstate commerce. The Court’s intent here was to reserve the right for states to regulate local business activities, such as manufacturing.
Sherman Act as a viable tool against monopolistic trusts. In this case, the High Court held that the reach the meaning of "commerce" under the Sherman Act did not include manufacturing, thus creating a large loophole through which many of the large trusts could slip. Lest there be any doubt regarding the effectiveness of federal antitrust laws, the Supreme Court rendered another damning decision against the Sherman Act in 1911. In Standard Oil Co. v. United States, the high Court held that the Sherman Antitrust law prohibited only "unreasonable" actions that formed a "conspiracy in restraint of trade." The Court thus established the "rule of reason" and placed the judiciary in the position of determining just which contracts, "combinations" or conspiracies were unreasonable. The Sherman Act's broadness proved to be its Achilles heel, and its executioner, the Supreme Court. Later, in 1914 the Clayton Antitrust Act would once again attempt to restrain monopolistic efforts of America's trusts, making minor improvements over the Sherman Antitrust Act.

Characterized as a natural person and armed with constitutional liberty and property rights, the corporation at the close of the 19th century had amassed a significant economic, political and social power base. Liberty rights provided the corporation with

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71 Prechel, supra note 43 at 83.
72 Standard Oil Co. v. United States, 221 U.S. 1, 60 (1911) [hereinafter Standard Oil].
73 Miller, supra note 49 at 66; Standard Oil, ibid. at 58.
74 Ch. 323, 38 Stat. 730 (1914) (codified as amended at 15 U.S.C. Sec. 15 (1997). At the urgings of President Woodrow Wilson, Congress passed the Clayton Antitrust Act, which set up new safeguards to protect competition and interstate commerce. Specifically, the Act prohibited price fixing and set restrictions for executive board memberships of publicly traded companies, disallowing individuals from sitting on the executive boards of competing companies.
75 "liberty" protections under the Fourteenth Amendment were interpreted to include the freedom to contract. See the discussion, infra, on Lochner v. New York. Also see, Miller, supra note 49 at 45 for a general discussion on liberty rights of the corporation. Later, but still in the 19th century, the Supreme Court would expand liberty protections for the corporation to include the rights of free speech, press and petition. See, Chicago, Milwaukee & St. Paul Railway Co. v. Minnesota, 134 U.S. 418 (1890); Bell's Gap Railroad v. Pennsylvania, 134 U.S. 232 (1890); Smyth v. Ames, 169 U.S. 466 (1898).
76 This personalization of property rights was given credence in the Railroad Tax Cases 13 F. 722 (C.C.D. Cal. 1882) at 747. Also see, Prechel, supra note 43 at 63.
protections for expanded commercial activity as well as new protections with respect to free speech and press. Through its exercise of property rights, the corporation began to amass a concentration of wealth, facilitated by the creation of the holding company. 77 Although the states remained wary of corporate wealth and its consequent power, they maintained an interest in the economic benefit that business could bring to the state economy. Given that the United States experienced three major depressions between the years of 1873 and 1897, the need for economic stability was in the forefront of legislators’ minds. 78

While corporations were gaining more and more social power, American workers by contrast were being denied certain power – specifically the power to collectively bargain for their interests. In the early 1800’s courts effectively stopped workers who attempted to organize for better wages by charging them with criminal conspiracy. In 1806, eight shoemakers in Philadelphia were charged and convicted of a “combination and conspiracy to raise their wages.” 79 This decision set off a series of similar cases. During this era, some nineteen jurisdictions followed suit by squelching workers’ efforts with the same criminal conspiracy charges. 80 Finally in 1842, this notion of criminal conspiracy of organizing workers was severely challenged by a Massachusetts court in Commonwealth v. Hunt, 81 which found no criminal element in the workers’ activities.

Although Hunt stopped the momentum of criminal conspiracy charges against workers, the courts failed to provide workers with a consistent body of rights. Not until the

78 Prechel, supra note 43 at 28.
80 Brooks, supra note 79 at 21.
81 45 Mass. (4 Met.) 111 (1842).
National Labor Relations Act in 1934 would workers benefit from the privileges of a national policy towards labour organizing.

The early years of the 20th century were marked by laissez faire commercialism, a trend ignited by the landmark 1905 Supreme Court decision, *Lochner v. New York*.\(^{82}\) In this case, the High Court struck down a New York state law, which restricted the hours bakers could work in a given day, as unconstitutional. The *Lochner* court determined that the New York law violated the 14th Amendment of the U.S. Constitution by infringing on the parties’ freedom to contract. In other words, by invoking the Constitution, the Supreme Court once again checked the power of state government in furtherance of the corporate person’s liberty interests. *Lochner*, thus served to advance corporate power vis-à-vis the state, and at the same time, increased corporate leverage over labor.

The principles of individualism, small government, and the self-regulating market were at the forefront of the *Lochner* court’s decision. Arguably, the majority’s opinion was misguided, failing to consider the impact of such a principled decision on the average worker. While the individual corporate person benefited from the de-regulation decree of *Lochner*, the individual employee was left to fend for him/herself with regards to fair labor standards. Although the case purported to enhance the individual liberties of employees, given the comparatively minimal bargaining power of the employee at this point in time, such espoused goals seem farcical.

Mindful of the average non-unionized worker, Justices Oliver Wendell Holmes and John Marshall Harlan wrote two important dissenting opinions in *Lochner*. Both dissents recognized the risk that the *Lochner* majority decision would impose on the New York bakers and others similarly situated – that is not in a position to bargain for better

\(^{82}\) *Lochner v. New York*, 198 U.S. 45 (1905) [hereinafter *Lochner*].
working conditions. Holmes and Harlan argued that the state’s regulation of hours, which the majority deemed as an infringement of the employers’ and employees’ liberty of contract, were justified in that they furthered the appropriate state interest of promoting a healthy work environment. Holmes outright rejected the constitutionally of the “liberty of contract,” and the laissez faire economic theory behind it. He wrote: “a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of laissez faire.”

Before the arrival of the Roosevelt era in the 1930’s, the *Lochner* court would strike down nearly 200 state regulations and numerous other federal statutes, placing its faith in the regulatory potency of the marketplace rather than the government. The natural corporate person would reap the greatest benefits of *Lochner*’s laissez faire legacy until New Deal legislation in the 1930’s reigned in corporate power once again, by expanding, for example employee rights under the National Labor Relations Act.

In summary, the *natural* entity era of the corporation coincided with the more general political and social movements of the 19th century that focused on individual liberties (such as the right to vote and the right to due process under the laws) and individual property rights. As such, this was a time in which various players of society cautiously monitored concentrated blocs of power that posed a threat to individual rights. As Lockean sentiments solidified, the power of the state was perceived as the greatest threat to individual freedom and popular democracy. Cloaked in its natural entity ideology, the corporation – as a rights bearing individual – was able to benefit from the

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83 *Lochner*, supra note 82 at 75-76.
84 Feldman, supra note 47 at 105, citing research by Karen Orren, published in *Belated Feudalism: Labor, the Law, and Liberal Development in the United States* (1991) at 111-17. Orren concludes that the *Lochner* Court was motivated by its interest in protecting the master/servant relationship embodied in the employment contract.
protections afforded to natural individuals, and ultimately cash in on newfound liberty and property rights. But, as the corporation began to concentrate its own brand of power, it too emerged as a potential threat to the individual and the balance of social power. While the populace maintained its vigil against the power vested in the state, government, as the steward of individual liberties, watched the mounting power in corporations with a wary eye. Even the *Lochner* years during the first quarter of the 20th century, which effectively disempowered labor, were fueled by a purported commitment to the individual – specifically the individual’s freedom to contract. In the end, *Lochner* proved to be the push of the pendulum that necessitated government regulation of corporate power and the re-articulation of employee interests.

Today, American courts continue to affirm that the corporation is a natural person – particularly within the context of the corporate person’s constitutional rights. However, the notion of the corporate person is not fixed within the context of corporate governance, but is instead a concept in flux. Within the corporate governance debate, the corporation is most often viewed not as an entity in and of itself, but rather as a conglomerate of associations. Below, I discuss the corporation within the topic of corporate governance.

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85 See for example, *Bellotti, supra* note 17. Here the court affirmed the corporation’s right to free speech, based on the corporation’s status as a natural person.

86 Margaret Blair offers a persuasive argument for adopting the whole entity corporate person concept into the corporate governance debate – as a way to hold corporations accountable to their obligations to employees and other non-shareholder constituents. M. M. Blair, “Firm-Specific Human Capital and Theories of the Firm” in M. M. Blair and M.J. Roe, eds., *Employees and Corporate Governance* (Washington, D.C: Brookings Institution Press, 1999) 58.
B. The Role of Corporate Governance in Organizing Workplace Relationships

Whereas the evolution of legal doctrine regarding corporate personhood had implications for the regulation of social power (rooted in rights afforded to the corporate person), the legal doctrines regarding corporate governance inform the on-going debate of how to “best” organize social relationships among the corporation’s shareholder, top managers, its employee, the state, and the public. The bulk of David Sciulli’s book, Corporate Power in Civil Society, is dedicated to just this topic of corporate governance, concentrating primarily on the events of the booming years of the 1980’s.\(^87\)

Sciulli characterizes this final and current period of corporate jurisprudence by its focus on corporate governance, and marks the beginning of this doctrinal period with the 1920’s and 1930’s. This is not to suggest that the discussion on corporate personhood simply stopped during the decade between 1920 and 1930, in fact, it may be argued that the characterization of the corporate person was not firmly settled until the 1950’s.\(^88\)

However, the 1930’s (building upon a surge of corporate activity in the 20’s) marked a time when corporate jurisprudential circles energetically turned their attention to the topic of corporate governance. This new interest among corporate scholars rallied around competing and provocative Harvard Law Review articles written by A.A. Berle and E. Merrick Dodd in 1932.\(^89\) In essence, Berle\(^90\) argued that corporate managers duties were

\(^87\) Sciulli’s primary focus is on the corporate judiciary’s role in fine-tuning the parameters of corporate governance, which he couches in terms of corporate purpose. Defining whether corporate purpose is to maximize shareholder wealth or social wealth directs us on questions of corporate governance.

\(^88\) Mark, supra note 25.

\(^89\) A. A. Berle, Jr., “Corporate Powers as Powers in Trust” (1931) 44 Harv. L. Rev. 1049; A. A. Berle, Jr., “For Whom Corporate Managers Are Trustees: A Note” (1932) 45 Harv. L. Rev. 1365; and E. M. Dodd, Jr., “For Whom Are Corporate Managers Trustees,” (1932) 45 Harv. L. Rev. 1145.

\(^90\) Berle’s rationale relied on an assertion that as owners of the corporation, shareholders were entitled to have their interests prevail above other interested parties.
primarily to the shareholder, while Dodd argued for an expansion of corporate managers' duties to include a broader community of stakeholders. This debate has continued; and in the pages that follow, I will illustrate how corporate governance has direct implications for relationship ordering among the corporation’s various constituents. My primary concern here is the influence that corporate governance theory and practice has on the relationship between the corporate employer (as represented by the corporation’s senior management) and its employees.

Political and economic analyst, Kevin Phillips, names three distinct periods in American history when capitalism surged: the first one followed the American Industrial Revolution, and lasted from the 1880’s through 1900; the second period occurred in the Roaring 1920’s; and the third and recent “capitalist heyday” (as Phillips calls them), unfolded during the Reagan years of the 1980’s. I addressed the last decades of the 19th century in the previous discussion of corporate personhood jurisprudence. The 1920’s deserve our attention here – as the context in which this second period of intense capitalism emerged, and the beginning of this era of corporate governance jurisprudence. Following a brief discussion of the political and social developments of the 1920’s, I will jump ahead to discuss key events and trends shaping the corporation and its workplace in the most recent capitalist heyday, the 1980’s.

The 1920’s marked a new phase in society generally and in the life of corporations specifically. Following the socially progressive Democratic presidency of Woodrow Wilson, Republicans Warren G. Harding and his Vice President, “Silent” Cal

91 Dodd called for corporations to be viewed as an “economic institution which has a social service as well as a profit-making function.” Dodd, supra note 89 at 1148.
Coolidge entered the White House in 1921. Whereas Wilson and his “New Freedom” platform called for the break-up of large monopolies, Harding and Coolidge proved to be great friends of Big Business. Through corporate tax breaks and decidedly pro-business policies, Harding and Coolidge would unleash a decade of intense capitalism. Arguably, the surge in capitalist activity during the 1920’s, which enabled large amounts of capital to flow into the inflated stock market, contributed to the market crash of 1929, setting off the Great Depression.93

In addition to these economic events, Congress passed two Constitutional amendments, which altered the social timbre of the day: The 18th Amendment, ratified in 1919, made the “manufacture, sale or transportation of intoxicating liquors” illegal (although the drinking of such liquors was not specifically prohibited).94 The 19th Amendment, passed the following year in 1920, provided women the right to vote.95 The Roaring 20’s demonstrated dichotomous views on individual freedoms: On the one hand, women’s suffrage unleashed a new phase of political liberation. On the other hand, the self-righteous restraints of the 18th Amendment sought to squelch social freedoms, ultimately backfiring, creating a rebellious underground of whiskey runners and speakeasy taverns. Ultimately, the 20’s demonstrated that individualism was alive and well, a demonstration that facilitated the corporate person’s liberation as well.

By the 1920’s the corporation had become a sophisticated machine for not only organizing financial capital, but also for organizing human capital. As corporations grew larger and more complicated to run, the need for professional management surfaced. In 1909, Frederick Winslow Taylor published the Principles of Scientific Management,

93 Admittedly, this is one simplified explanation of what sparked the Great Depression.
94 U.S. Const. Amend. XVIII.
95 U.S. Const. Amend. XIX.
triggering a new trend in organizational management. Taylor promoted the application of science's systematic analysis to business management practices; he emphasized logic, routine, planning, and cost analysis. "Taylorism," as it is called, spawned a division of labor between the physical or technical efforts of line employees and the cognitive efforts of management. As corporations grew larger and more complicated to run, the need for professional management surfaced. Consequently, the number of white collar jobs doubled between 1900 and 1920, while manual service workers increased by a mere factor of 1.5 over the same period.96

Federal legislation during the early Roosevelt years served to curb the power of big business. The National Labor Relations Act (Wagner Act) passed in 1935 and has proved to be a durable piece of legislation, securing new rights for employees to collectively bargain.97 Other New Deal legislation served to dismantle the holding company form through taxing policies. For example, capital transfers between parent and subsidiary companies were now deemed taxable under the new legislation, severely limiting the financial manipulation activities within holding companies. The New Deal succeeded in limiting big business and bolstering its counterbalance – the government. In 1919, 30% of the largest 100 companies in the United States were organized as holding companies. By 1948, after the New Deal legislation and Supreme Court decisions had weighed in, a mere 5 of these large corporate 100 remained a holding company.98

96 Kanter, supra note 77 at 18.
97 The NLRA states "employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." National Labor Relations Act, 29 U.S.C. Sec. 157 (7).
98 Prechel, supra note 43 at 255.
In addition to such legislative moves, FDR made sweeping changes to the social and economic topographies via the federal judiciary. During his eleven-plus years in the White House, FDR appointed seven justices to the Supreme Court. During FDR’s second presidential term, the Supreme Court handed down several important decisions in an attempt to bolster the nation’s general economic welfare. (This was after the Supreme Court struck down eight of FDR’s New Deal programs as unconstitutional; this during his first term in office, between the years of 1935 and 1936.) According to one legal historian, 1937 was a watershed year, and the most important Constitutional year in American history – more important than 1791 when the Bill of Rights was introduced and more important than the years following the Civil War, which introduced the 13th, 14th and 15th Amendments. Arthur S. Miller points to three sets of 1937 Supreme Court decisions addressing 1) the validation of the Wagner Act and Congressional authority to monitor commerce; 2) the upholding of social security legislation; and 3) the approval of state regulations on minimum wage and maximum working hours.

Under FDR, the corporation and its workplace were placed under the stewardship of the federal government, an arrangement that has prevailed into the present time. Thus, the legacy of New Deal regulation continues in the corporate workplace of today: The...
Wagner Act\textsuperscript{104} continues to regulate unionized workplace relations; the Securities and Exchange Commission (SEC)\textsuperscript{105} continue to serve as the watchdog of publicly traded company activities; and the United States Congress continues to set minimum wages and labor standards for the workplace. Writing on the legacy of the New Deal, Michael Parrish refers to this creation of such federal regulatory oversight of the workplace as the “triumph of state capitalism.”\textsuperscript{106} And yet, the corporation of today is different in several ways from the corporation created between the two World Wars.

Just as the Roaring 20’s were ushered in by a pro-business Republican White House, following on the heels of a pro-middle class Democratic president, so too was the decade of the 1980’s. Ronald Reagan defeated Jimmy Carter in 1980, heralding a New Right\textsuperscript{107} agenda. Carter, like his fellow southern Democrat, Woodrow Wilson, championed progressive ideals to better the average American. Carter deregulated the transportation industry to enhance competition and provide better prices for the consumer. And, he convinced Congress to pass the omnibus Superfund legislation to clean up toxic waste in the interest of the public and its environment. Superfund was one of Carter’s rare victories with the usually oppositional legislature of this time. In addition to his challenges with Congress, Carter had to contend with several other economic and political hurdles during his one-term presidency. The oil producing nations formed a price cartel – OPEC – raising the price of oil from $13 to $34 per barrel. This energy

\textsuperscript{104} National Labor Relations Act, supra note 97.
\textsuperscript{107} By “New Right” I refer here to a political orientation that is both socially and fiscally conservative. Socially, the New Right opposes abortion and promotes school prayer. Fiscally, the New Right favors tax policies that promote wealth maintenance and accumulation for the upper classes and business, with the belief that wealth trickles down to benefit lower echelons of society and workers.
crisis in turn sparked high domestic inflation. So it was in the election of 1980, that the “Great Communicator,” Ronald Reagan won the presidential election.

The New Right agenda of the Reagan presidency enabled the capitalist heyday of the 1980’s to unfold. Reaganomics, with its reliance on supply-side strategies, set out to undo the governmental support structure instituted under the New Deal. Reagan’s economic strategy called for the liberation of cash at the top sectors of society – for wealthy individuals and business – with the promise that such a windfall would “trickle down” to benefit other tiers of the society. Specifically, Reaganomics called for tax cuts for corporations and individuals, cuts in government spending on social welfare programs, reduced government support of civil rights programs such as affirmative action, and increased military spending (fueling the military-industrial complex).

Overall, Reagan’s economic plan benefited business. Tax cuts, deregulation and smaller government meant that corporations were placed on a longer leash from government’s watchful eye with more money to spend.

A recent article by Michael Bradley, et al. provides further background on the economic and social impetus behind the corporation that emerged in the heyday 80’s. Bradley names five distinct forces that have transformed the corporation and the workplace over the last 30 or so years: (1) the changing nature of work; (2) the expansion of the capital market; (3) the globalization of product-market competition; (4) the growing variety of organizational forms; and (5) the shifting focus of corporate


109 However, the Tax Reform Act of 1986 closed loopholes that corporations had previously been able to exploit to their advantage, resulting in a corporation taxation net increase of more than $100 billion over five years. See, the “Reaganomics Debate” online: <http://www.youdebate.com/debates/reaganomics.htm> visited on December 3, 2001.

regulation.\textsuperscript{111} All of these factors have acted in concert to change the face of the corporation in the last half of the 20\textsuperscript{th} century. However, in the interest of brevity, I will limit my attention to the above influences that have had the most direct impact on the corporate employer-employee relationship – the altered nature of work, the changing face of organizational structure, and new state and federal regulations of the corporate workplace.

Bradley points to the writings of Peter F. Drucker,\textsuperscript{112} Jeremy Rifkin\textsuperscript{113} and others to describe the evolution of work in the for-profit corporation. According to these organizational scholars, the driving force behind the changing nature of work is technology, manifested in new developments in information, communication, and automation. Work as we now know it began to change when new technologies began to appear after the end of the Second World War.\textsuperscript{114} Bradley illustrates several examples of technology-driven changes in the workplace: Knowledge has replaced land, labor and capital as the primary source of value creation.\textsuperscript{115} Machines that were once used to enhance physical labor are now being replaced by new machines, e.g., the computer, that enhances intellect.\textsuperscript{116} The processes of specialization, standardization, and mechanization, which were so critical to the industrial era, are being replaced by the processes of problem-identification, problem-solving, and strategic-brokering, which are vital to the

\textsuperscript{114} Bradley, \textit{supra} note 111 at 15.
\textsuperscript{115} \textit{Ibid.}
\textsuperscript{116} \textit{Ibid.}
knowledge era. In the earlier industrial era, workers were hired for their physical abilities; today’s workplace, in contrast, seeks out workers for their intellectual capabilities. Finally, today’s workplace, which is more dependent on the human mind than human might, recognizes and awards employees who come equipped with post-secondary education. In essence, the nature of work is changing in such a way that corporations recognize human capital is as important (and sometimes more important, depending on the industry) than physical capital in creating bottom-line value. These changes in the nature of work demand that the organization and incentive of work be adjusted. Bradley suggests that in order to get the most human capital out of the Knowledge Age worker, firms must ensure that its employees’ goals and values are aligned with its own organizational goals and values. Blair, suggests that human capital can best be transformed into value by creating a system of incentives that encourage mutual investment into the organization and fortify relationship among various corporate players.

Just as the nature of work has changed, so too has the organization of work. Technology once again has played a role in this evolution, enabling organizations to transcend the physical boundaries of traditional brick and mortar workplaces. Advanced communications, such as videoconferencing and high-speed internet have made it possible to conduct business across time zones and continents with relative ease. Depending on the kind of work one does, physical presence may no longer be required.

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118 Casey, ibid. at 37.
119 Bradley, supra note 111 at 19-20.
121 Ibid., at 16.
122 Blair, supra note 86 at 80-82.
for one to be “at work.” This virtual or network\textsuperscript{123} organization, as it is variably called, is less dependent on physical boundaries or demarcations. The boundaryless workplace reduces the import of physical markers of the organizational pecking order, such as meeting spaces or office locations. For example, participating in a teleconference meeting is stripped of the usual physical signs of hierarchy such that a meeting in the boss’ corner office (with a view) would otherwise hold. Likewise, cubicle squatters are no longer instantly pegged as the low person on the organizational totem pole. The network or virtual shape of today’s organization fosters a shift in workplace relationships, which encourages less top-down management and more collaboration.\textsuperscript{124} Such changes in organizational form demand that corporate governance be reevaluated.

The third transformational force impacting corporate constituency relationships has been in the form of governmental regulations. Bradley points out some interesting regulatory trends over corporate activity. During FDR’s tenure, federal regulation set its sight on monitoring corporations in the interest of protecting shareholder investments.\textsuperscript{125} The most notable example of this kind of protection is the passage of the Securities and Exchange Act of 1934\textsuperscript{126}, which demanded greater transparency of corporate dealings


\textsuperscript{124} The counter argument to this enhanced collaboration theory is that the new shape of the workplace enables greater disempowerment of workers. Consider how the absence of an office limits workers rights of privacy and enables greater surveillance of worker activities.

\textsuperscript{125} The Sherman and Clayton Acts, which had been instituted in the 1890’s and 1914 respectively, were designed to regulate corporate trusts and ensure fairness in competition, sought to safeguard consumer interests.

and set out requirements of disclosure. Other regulations passed during this time sought to protect banks as a corporate shareholders.\textsuperscript{127}

During the 1960’s and 1970’s, the scope of federal regulation broadened to include various other corporate constituents – employees, consumers and the general public. In its quest regulate the corporation in the interest of employees, Congress passed such laws as Title VII of the Civil Rights Act\textsuperscript{128}, the Age Discrimination in Employment Act\textsuperscript{129}, and the Occupational and Safety Act.\textsuperscript{130} Consumers were likewise in the forefront of Congress’ mind during this era. In 1962, Congress approved the Uniform Commercial Code\textsuperscript{131} for adoption by individual states, which included, among other things, product warranty provisions for consumers. In the 1980’s and ‘90’s state courts followed suit by axing the contributory negligence defense in product liability cases.\textsuperscript{132} In 1968, Congress passed the Truth-in-lending\textsuperscript{133} legislation, which sought to protect consumers from commercial lending companies. And, in 1972, Congress passed the broad ranging Consumer Product Safety Act.\textsuperscript{134} The 1960’s also marked a time when Congress turned its attention to regulating the corporation in the interest of protecting the environment.

\textsuperscript{131} U.C.C. sections 2-312 to 2-318 (1962) (establishing product warranty provisions, that 49 states have subsequently adopted).
Since corporations were the largest producers of toxic waste and pollution, these new regulations re-ordered the relationship between the corporation and the public by bestowing upon the corporation responsibilities for public welfare that heretofore had not been established.

The 1980’s were indeed a time of intense capitalism. This was an era of corporate merger mania and hostile takeovers. Sciulli attributes these intense times to structural changes in U.S. corporations that began in the 1960’s; he points to four specific developments that set the wheels in motion. First, corporations began to merge and acquire other companies as a strategy for growth. These were “friendly takeovers” initiated for purposes of diversifying into new product areas. Moving into new product lines, however, meant that in many instances, the growth exceeded the organizational capabilities of the management team. Second, with the accumulation of new product lines, organizational layers grew taller, eventually separating top managers from line managers and operations. Before World War II, it was the rare company that would have 25 divisions; by 1969, it was not uncommon for a company to have anywhere from 40 to 70 divisions.

The third structural development that fueled the merger mania of the 1980’s was the rising rate of corporate divestitures. Sciulli attributes this increased number of divestitures to a shift in corporate ownership. Whereas corporation during the 1950’s achieved growth by retaining corporate earnings (as opposed to issuing dividends), the corporation of the 1970’s grew by selling more shares of stock to the public. Institutional investors ended up buying the lion’s share of these newly issued shares, tipping the

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135 Sciulli, supra note 18 at 31.
136 Ibid. at 32.
power against individuals and family owners. Individuals owned 84% of all corporate stock in 1965 as compared to a mere 16% that was owned by institutions. By 1990, individuals owned 54% to the institutional investors’ 46%. Institutional owners are less likely to feel personally attached to the shares of a company, when compared to the attachment that an individual may have to stocks that have been, for example, owned by his or her family for generations. With the shift in corporate ownership to more and more detached owners, that corporate divestitures increased in the 1980’s comes as no surprise. Sciulli points to the emergence of a “corporate control market” as the fourth structural change responsible for the intense capitalism of the 1980’s. The “corporate control market” emerged in 1983, creating possibilities to buy and sell entire corporations. What created this new market, in part, was the advent of the junk bond, corporate securities graded as “speculative” or of high credit risk, accompanied by the possibility of higher yields than bonds of higher credit quality. This new market for corporate control facilitated the ease with which hostile takeovers could be conducted.

The face of “state capitalism” has evolved since the reign of FDR, adjusting to new organizational structures, changes in capital markets, and of course innovations engendered by technology. Legislatures and the courts have to varying degrees monitored the impact of the corporation on its constituents. The corporate governance debate considers the role that government should play in corporate decision-making, and the weight that various corporate stakeholders should be afforded in the community of the corporation. Corporate governance is of particular interest here in that it addresses

137 Ibid.
138 Ibid., at 33.
139 Ibid.
140 The term “state capitalism” refers to government investment in social and economic infrastructure in the private and public sector.
how internal relationships of the corporation can and should be ordered. My interest lies in defining corporate governance in such a way as to recognize and value the human capital offered by employees to the corporate enterprise; and to ensure that employees have adequate relative power in their relationship to the corporation and its other constituents.

B.1. The Corporate Governance Debate

The scholarship of corporate governance has primarily addressed the triumvirate relationship among shareholders, corporate senior management, and the board of directors. This scholarship has rested, in great part, on principles of agency law, in which senior management has been deemed agents of shareholders as principals. However, the topic of corporate governance has a wider application to include more than the traditional triumvirate of organizational players. Rather than being limited to the relationship between shareholders and top management, or between shareholders and the board of directors, corporate governance can (and should) extend to address relationships that employees have with corporate managers and boards of directors. By expanding the current boundaries of the prevailing stance on corporate governance, we can facilitate a positive power shift in the employees' relationships within the corporate workplace – a shift that is critical to creating a context where private justice can operate fairly in the corporate workplace. Below I will describe the current competing models of corporate governance, and comment on their limitations and promises.

141 This trend was jump-started by a now-famous article in corporate governance circles by Jensen and Meckling. See, M. C. Jensen and W. H. Meckling, "Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure" (1976) 3 J. Fin. Econ. 305. Jensen and Meckling's article was based on the work of economist Ronald Coase.
Two somewhat distinct branches of scholarship – the “Contractarians” and the “Communitarians” – are waging the current debate on corporate governance. While there is some overlap among scholars, these two camps hold generally different ideas about the essence and purpose of the corporation, as well as the ways in which corporate activities should be regulated. At the risk of being rather categorical in my description of these two schools, I illustrate here (and again in Chapter Two) in perhaps simplified terms, the ideas espoused by the Contractarian and Communitarian models in an attempt to highlight the different approaches offered to corporate purpose and governance.

Contractarians believe that the corporation at its very essence is a nexus of voluntary contractual relationships. In the Contractarian paradigm, the purpose of the (for-profit) corporation is to maximize the wealth of its shareholders; and accordingly, shareholders, above all other constituents of the corporation deserve primary attention. Arising out of the principles of neoclassical economics, Contractarians hold that competition and market forces will provide the necessary and efficient regulations of corporate activity. Placing their faith primarily in the efficiency and self-correcting responsiveness of the market, Contractarians oppose government intervention in the relationships among corporate players and corporate decision-making process.

Communitarians take issue with the Contractarians’ assertion that the nature of the corporation rests on a nexus of contracts. According to the Communitarians'...
paradigm, the corporation is a separate and self-contained entity, a distinct natural person, and not a tangled web of contracts. Communitarians hold that the purpose of the corporation extends beyond maximizing shareholder wealth, that the corporation must be governed in such a way as to consider the interests of other constituents. Communitarians include employees, creditors, customers, suppliers, and the public in their list of corporate constituents. Furthermore, Communitarians believe that considering the interests of the corporation's various stakeholders not only makes good business sense, it is also the socially responsible thing to do. Communitarians hold less faith in the effectiveness of the market to regulate corporate activity than their Contractarian counterparts; they instead recognize the utility of judicial and legislative regulation to counterbalance corporate managerial power in relation to its stakeholders.

The Law and Economics school was the first to promote the nexus of contracts model of corporate governance, touting its market-based efficiency. The takeover mania of the 1980's served to fortify the Contractarian's view of the corporation. Bradley summarizes this perspective: "Takeovers are an external, market-based force; they insure the efficiency of the internal contracts, helping to create an environment to insure the efficiency of the contracting process." Furthermore, "inefficiency in contracting will be penalized by the market, and these penalties provide the impetus for self-correcting behavior. Thus, contractarianism is an internally consistent, self-correcting paradigm for

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146 Early Law and Economics scholars writing in favor of the Contractarian model of corporate governance were inspired by the work of Ronald Coase. See R. Coase, "The Nature of the Firm" (1937) 4 Economica 386.
147 Bradley, supra note 111 at 36, referring to the work of Michael C. Jensen, "Takeovers: Their Causes and Consequences" (1988) J. Econ. Persp. 17 at 21-23.
a corporate economy. Yet, this view of efficient contracting only works under perfect market conditions, which are rarely present.

Communitarians view the corporation as having responsibilities to not only its shareholders, but also to the corporation’s surrounding society. Although the nexus of contracts paradigm, with its focus on shareholder interests, remains the dominant view of corporate governance, considerable scholarship in law, economics, and management studies has been promoting the social benefits of the Communitarian’s model.

Whereas the nexus of contracts paradigm portrays the corporation as a mass of intertwining, contractual obligations, the whole entity paradigm, espoused by some Communitarians relies upon the ideology of the natural person corporation articulated in earlier corporate jurisprudence. The natural person form is concerned about relationship interests within and outside the corporate walls. Supreme Court cases in the 1970’s affirmed the corporation’s separate entity status by furthering its constitutional rights. For example, the High Court awarded 5th Amendment due process rights to the

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148 Ibid.
149 Prof. E. Merrick Dodd’s renowned 1932 article specified that corporations owe a “sense of social responsibility toward employees, consumers, and the general public.” E. M. Dodd, supra note 89 at 1160.
153 See, e.g., Blair, supra note 86. In this article, Margaret Blair challenges Contractarians to revitalize the whole entity view of the corporation, which views the corporation as a separate legal entity, in and of itself, as opposed to a diffused web of contracts. Blair advocates the whole entity view as a means for circumventing the contracting problems inherent in the nexus of contracts paradigm, which relies too heavily upon fiduciary duties in tort as a guard against predatory actions of corporate constituents.
154 See Bradley’s discussion of these developments. Bradley, supra note 111 at 27.

Communitarians, categorically speaking, favour regulatory control of corporate behaviour as a means to managing power differentials inherent among corporate constituents. Contractarians, on the other hand, put their trust in the self-correcting mechanisms of the market, and the balancing effects of social norms\(^ {158}\) as a way to manage power differences within the corporation. Some among the Contractarian school assert that corporate players voluntarily enter into contracts with one another, and that this voluntary participation represents an affirmative choice in participating within the corporation’s life – be that as an employee a customer or a creditor.\(^ {159}\) Yet, voluntariness must be accompanied by relatively equal bargaining power for the contract to be anything but unconscionable. Certainly employees and firm managers (as agents of the employer firm and its shareholders) come to the bargaining table with different amounts of power, and they possess power in different forms. Employers have the power to hire and fire; and they generally have the power to direct how much and by what process work gets done, by setting targets and agendas. Many companies, however, have empowered employees to manage their own work process, by instituting work teams and quality

\(^{155}\) 430 U.S. 564 (1976).


\(^{158}\) A discussion on the effects of social norms in corporate behaviour is discussed later in Chapter Two. The scholarship on social norms has emerged from the Contractarian camp as a way to fill in the explanation gap between “what the market can do” and “what government regulation can do” to maintain good corporate governance. Scholars such as Edward Rock and Michael Wachter proffer that social norms, or “nonlegally enforceable rules and standards (NLERS),” effectively curb bad corporate behaviour and encourage good corporate behaviour, to such an extent that government intervention of corporate governance can be kept to a minimum. E. B. Rock & M. L. Wachter, “Islands of Conscious Power: Law, Norms, and the Self-Governing Corporation” (2001) 149 U. Pa. L. Rev. 1619.

\(^{159}\) See Bradley's explanation of this market reliance, in which he traces this rationale to the work of Adam Smith and Milton Friedman. Bradley, *supra* note 111 at 37-38.
circles. When conflict arises in the workplace, the employer generally holds the upper hand. Reassignment to a less favourable position, promotions denied, or even termination, exemplify the employer's power play options. Employees, on the other hand, can play their power card by filing law suits, taking their story to the media, or leaving for another job, taking their human capital with them. Above all, the corporate employer will almost always have greater leverage because it will possess more financial power – to fight the lawsuit, to wage a rehabilitative media campaign, to recruit a replacement employee. The Communitarian model of corporate governance acknowledges the power differentials inherent in the corporate workplace, and recognizes the limitations of a contractual web to fairly sort out these competing interests. By promoting trust among constituents, Communitarians aim to proactively circumvent power-based conflict. Contractarians, meanwhile, rest their faith in the market and non-legal social norms to address power differential and ensure efficient contract-based relationships among corporate constituents. Furthermore, Contractarians assert that inequalities within corporate relationships should be addressed through legislation such as labour and employment laws or consumer protection laws and not through an adjustment of the corporate governance structure. That corporate managers retain the rights of acting on their own business judgment in governing the workplace is sacred to the Contractarian.

State legislatures have attempted to sort out the corporate governance debate, by enacting so-called *corporate constituency* statutes. More than half of the U.S. states have enacted such statutes that permit or encourage directors to consider the interests of

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160 While most states "permit" or "encourage" directors to consider other constituent interests, Connecticut's statute "requires" directors to factor in non-shareholder interests. See, Conn. Gen. Stat.
non-shareholder corporate constituents, such as employees, suppliers, customers and the community, in the decisions they make on behalf of the corporate entity. The efficacy of corporate constituency statutes to protect non-shareholder interests is debatable. States began to introduce these statutes in the 1980’s as a way of providing directors a tool to fend off hostile takeovers. While some scholars promote the use of corporate constituency statutes to enforce the exercise of management’s fiduciary duties of care towards non-shareholder groups, such as employees, to date, this tactic has not been utilized in the American courts. Several scholars have written on the dangers embedded in corporate constituency statutes, warning that the broadness of the statutes’ language may effectively expand management’s discretion, posing threats to all stakeholders, including shareholders.

The nexus of contracts prevails as the dominant model of corporate governance jurisprudence today, directing management to consider shareholders’ interests before all others. History and tradition provide the rationale as to why the primacy of the shareholder remains the guiding principle in today’s corporate governance debate. Although the earliest American corporations came to life as a result of a special privilege from the state – to conduct business in the interest of public – the modern corporation’s

Section 33-756(d) (1997). For examples of a permissive corporate constituency statute, see Fla. Stat. Ch. 607.0830(3) or N.Y. Bus. Corp. Law 717(b). For an example of an encouraging corporate constituency statutes, see 15 Pa. Cons. Stat. 515(b). Incidentally, Delaware does not have a corporate constituency statute.


163 Corporate constituency statutes have not been invoked by non-shareholders primarily because non-shareholder constituents, like employees, lack standing to bring such actions. See the discussion on the utilization of corporate constituency statutes in the following chapter.

164 See, e.g., Oswald, supra note 161 at 4.
raison d’être was and is to provide a forum in which to collect and organize large amounts of capital. The states grew dependent on such private capital for economic development, a realization that came to light during the transportation boom in the late 1800’s. The capital provider quickly became the focal point of corporate law. From these early years of the modern corporation, laws have concentrated on courting and protecting the capital provider. Passage of the Securities and Exchange Act in the 1930’s reiterated the value law and government has placed on protecting shareholder interests. Thus, the Contractarian view, which centers its attention on protecting the shareholders’ property interests, prevails primarily because of its support in corporate law tradition.

Today’s corporation, however, is so much more than a vehicle for raising and organizing capital. Besides, as previously discussed, “capital” in today’s Knowledge Age is so much more than dollars. Capital aside, because of the corporation’s immense social power, it has a responsibility to factor in the interests of all those in its circle. Certainly, if the corporation is to foster a workplace where employees’ feel that their human capital is valued, then employees interests should be considered alongside those of shareholders. Given the changing nature of work and the breadth of corporate power, the “primacy of the shareholder” is due for reevaluation in the corporate governance debate.

Choosing which side of the corporate governance debate to support depends in part on one’s view of the nature of the firm, its purpose, and its values. Contractarians assert that the firm is essentially an economic nexus of individualized interests, with maximizing wealth as for its owners as its purpose. The Contractarian model promotes the values of competition (may the fittest survive) and liberty. By comparison, the Communitarian’s view the firm as a social, political and economic entity, whose purpose
is to enrich its broadly defined community, shareholders and employees alike. If Communitarians were to create a “Shared Values Statement” surely they would declare justice and cooperation as guiding lights. In comparing these two models of corporate governance, the Communitarian approach distinguishes itself as more conducive to fair internal dispute resolution processes. The Communitarian emphasis on cooperation over competition, and its reliance on trust to manage relationships, potentially neutralizes the relative power differential between employees and managers in dispute. Furthermore, where internal mechanisms may fail to resolve conflicting interests among stakeholders, the Communitarian paradigm may facilitate the expansion of formal fiduciary duties of corporate managers to include employees’ interests. In sum, the communitarian model of corporate governance offers more fertile ground in which private internal dispute processes can grow.

IV. Summary

The law, which has created a corporate form with constitutional rights and the ability to concentrate capital, has fostered a modern corporation that is indeed a very powerful social institution. I have attempted here to explain how corporate social power came to be, resulting from the interplay of law with various social, political and economic forces. Throughout this chapter, I have focused on law’s function in organizing relationships and regulating power between the corporation and its various communities. This chapter has focused primarily on the corporation in relation to its external community, whereas the following chapter will examine more closely the corporation’s relationship with its internal constituents and the power dynamics within these communities.

See, Bradley, supra note 111 at 42-44.
relationships. By looking at the corporation’s power base in society, as I have done in this chapter, we are afforded greater perspective on the more narrow relationship of the corporation to its employees.

In defining the corporate form as a person, the law has crowned the corporation with significant social standing. The corporation has been legitimized as a natural person in the eyes of the law, worthy of certain constitutional rights, including due process, free speech, and the right to own property. Through such property rights, for example, the corporation has come to wield significant economic, and hence social powers on its various constituents.

The scholarship on corporate governance provides an important doctrinal context in which to examine the relationships that the corporation has with its vested internal and external stakeholders. Through this lens of corporate governance, the corporate employer/employee relationship can be examined, and a proposal for fair and effective dispute resolution processes can be suggested. In the following chapter, I will look deeper into the corporate governance debate and further examine the power relationship between the corporate employer and its employees. In the final chapter, I will suggest ways to maximize employees’ opportunities for a fair internal dispute resolution process, given the current state of corporate governance affairs.
Chapter Two:

Workplace Governance – Paradigms of Power and Its
Implications for IDR

I. Introduction to Chapter

In the previous chapter, I discussed how the law – in response to social, political and economic forces – facilitated the corporate entity’s rise in social power. As part of this explanation, I reviewed the evolution of the corporate person from its jurisprudential conception as an artificial entity to its conception as a natural person, with natural rights and responsibilities. Law has not only served to structure the relationships that the corporation has with other, external social institutions and the public, but it has also served to organize the internal workplace relationships of the corporate firm. Corporate governance, as set forth in state corporation laws, agency law, and tort, direct corporations in organizing the relationships among its shareholders, management, and other interested parties, such as employees, creditors and the public. In this chapter, I pick up the topic of corporate governance once again, looking more closely at the particulars of the relationship between the firm and its employees.

Specifically, this chapter focuses on workplace governance, a thematic cousin to corporate governance\(^1\). The concepts of workplace governance and corporate

\(^1\) While the terms corporate governance and workplace governance emphasize different perspectives on governance in the firm, both address relationships and accountability within the firm. Generally, corporate governance has emphasized the triumvirate relationship among shareholders, directors and officers, in contrast to workplace governance that emphasizes the relationships that employees have with other constituents of the firm. Michael Bradley discusses the breadth of the term “corporate governance”, recognizing its extension beyond the mere consideration of relationships among firm shareholders, top
governance provide a framework in which to examine the power relationships among firm constituents. Both workplace governance and corporate governance seek to answer the question: to whom is the firm accountable. In fact, the corporate governance debate, as outlined in the previous chapter, feeds into and informs this discussion of workplace governance. While the topics of workplace and corporate governance are similar, a few distinctions are in order to set the stage for the present discussion. The notion of workplace governance is distinguished from corporate governance by the former’s focal concern with employee interests in relation to the interests of other firm constituents. Whereas the corporate governance debates focuses primarily on shareholders’ financial interests and the relationships that support or compete with meeting these financial interests, workplace governance focuses more on the human interests of working in the firm, particularly as manifested in the experience of employees. A discussion of workplace governance naturally falls to an examination of the paradigm of power between the employee and the firm’s management team, and between employees and the firm itself.²

The purpose of this chapter, thus, is to flush out the power dynamics between employees and management, and between employees and the firm itself – the firm that is a natural and distinct entity. The firm that I have in mind is the large publicly held

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² In the first chapter, much attention was focused on the power relationship between the state and the corporation. Here, I am interested in the power relationship between employees and the corporation.
corporation. By sorting through these power relationships and allegiances among corporate players, we are able to shed light on the possibilities for equitable redress of employment disputes that are handled privately by the firm. In order to make sense of these power relationships, a review of the lay of the workplace land is in order – a review that includes firstly, a theoretical look at the corporate legal form, and secondly, a look at law’s influence on the organizational structure and internal regulation of the corporate workplace. In looking at this first aspect – that of the corporate legal form – I will specifically address what the Contractarian model, with its focus on the shareholder, means for employees. What are the risks to employees under the Contractarian regime and how can those risks be managed? “Corporate law, like most law” writes Eric Orts, “is primarily about the rule-oriented structuring of social power, and it is specifically about the rules that structure the organization of economic power.” Thus, what follows in an examination of organizational power through the prism of corporate law and theory.

After reviewing the impact of the Contractarian corporate model on workplace relationships, I will turn to review how law has shaped the social structure of and relationships within the workplace. This section of the chapter relies heavily on the work of Lauren Edelman, who examines the organizational impact of law’s regulation. Specifically, Edelman’s work looks at the evolution of the firm as private adjudicator and rulemaker, a phenomenon that has placed a great deal of control in the hands of today’s firm over the lives of employees. Given such power dynamics, can the firm provide a

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3 In addition, the workplace that I have in mind is the non-union shop, given that the vast majority of American private sector workplaces are non-union. According to the Report of the Dunlop Commission, the number of employees working in a union environment declined from 37% in 1953 to a mere 12% in 1994. Commission on the Future of Worker-Management Relations, Report and Recommendations, Dec. 1994, Washington, D.C.: U.S. Dept. of Labor.

fair internal dispute resolution processes to address employees' human rights complaints, even where the firm or its management is the alleged wrongdoer? Following the discussions of 1) the Contractarian model's effect on employee standing in the firm, and 2) the effect of the firm's growing private adjudicatory powers, I will discuss what checks and balances might be deployed to counter the inherent power imbalances in the workplace, and foster an environment in which fair internal dispute resolution for employees becomes possible.

II. Lay of the Land:

Accountability and Allegiances in the "Nexus of Contracts" Workplace

What does the Contractarian model, with its requisite allegiance to the shareholder, mean for employees' relative power and opportunity for equitable redress of disputes within the firm?

The corporate governance debate directs much of its attention on defining the purposes and accountability of the firm. As outlined in the previous chapter, the two main themes of corporate law scholarship in this debate are the Contractarians and the Communitarians. The Contractarians, who assert that the corporation is a nexus of contractual relationships, hold that the purpose of the corporation is to maximize the financial interests of the firm's shareholders. Demonstrating their law and economics roots, Contractarians rely on market forces to efficiently guide the many contracts that comprise the corporate nexus. Communitarians assert that the corporation as a distinct
legal entity, and a socially legitimized institution should provide something back to the community, and that part of the firm’s purpose is to enhance the community stakeholders’ various interests.\(^5\) Whereas Contractarians rely on the invisible hand of market competition to distribute wealth, Communitarians call for cooperation and governmental regulation to equitably distribute financial gains among stakeholders.

Both schools of thought have their merits and their disadvantages, which vary depending on whose interests – among firm members – are being considered. The Contractarian model arguably presents more hurdles than advantages to employees in getting their interests heard and met. Yet the Contractarian model prevails in American corporate jurisprudence and consequently, in the structure and function of American corporate society. While the primacy of the shareholder tenet may be due for re-evaluation, the purpose of this paper is not to outline a plan for such a theoretical shift. Rather, this paper takes a practical approach to the current state of corporate theory, accepting the prevailing thinking on corporate purpose and accountability, and suggests ways to work with what we have at hand in managing employee risks.

\(^5\) It is important to emphasize the different images of the corporate firm that the Contractarians and Communitarians hold: Contractarians see the firm as a dispersed, amorphous web of contractual relationships, which connect the various stakeholders together. The Communitarians envision the firm as a separate legal entity, with specific legal rights and obligations. The Contractarian’s model of the “depersonalized” firm is thus not considered directly accountable to the firm’s (non-shareholder) stakeholders since it is a web of contracts rather than personal accountability that connects the firm’s players together. In contrast, the Communitarians envision the firm as having “personal” accountability to its various stakeholders. Current Anglo-American law holds that the corporate form is a distinct and separate entity, a “corporate person.” According to Canadian legislation, “a corporation has the capacity and, subject to this Act, the rights, powers and privileges of a natural person.” \textit{Canada Business Corporations Act}, R.S.C. 1985 c. C-44, s. 15. By comparison, the Delaware Code is silent on the personhood of the corporation. Delaware case law, however, states that the corporation is an artificial entity although not a natural entity. \textit{Guthridge v. Pen-Mod, Inc.}, 239 A.2d 709 (Delaware Sup. Ct., 1967). This notion of the corporation as a “person” poses a challenge to the Contractarian way of thinking. The obvious advantage to the Contractarian’s inanimate firm is that obligations and wrongdoing of the corporation are attached to the corporation’s agents – managers, employees, the Board – while the corporation itself stands protected. Furthermore, how we envision the corporate form directs the flavor and degree of government regulation of the corporation. It is far more justifiable to regulate a corporate person than it is to regulate the contracts that private bodies make with one another. See generally, Bradley, supra note 1 at 37.
A. Contractarian Model’s Espoused Advantages

In spite of the risks that the Contractarian model holds for employees, this model, arguably offers certain advantages for the firm. Before examining the risks more closely, let us first consider some of the potential advantages that Contractarians claim in their model. One such plausible advantage lies in the model’s decision-making efficiency. By concentrating attention on meeting the financial interests of one specific constituent – the shareholder – Contractarians anchor themselves to objective and quantifiable criteria for making decisions on behalf of the firm. This rather single-minded focus of the Contractarians alleviates the cumbersome process of weighing the interests of other firm stakeholders – a task that is expected, in contrast, within the Communitarian model. Certainly, financial interests of shareholders are far more quantifiable than employees’ human interests, such as dignity or respect. Where employees’ financial interests compete with shareholders’ financial interests – here again, the decision-making process is simplified by the Contractarians’ built-in prioritizing. The one caveat to this is that corporate constituency statutes, enacted by more than half of the American states, permit boards to consider the interests of other non-shareholder interests. As discussed previously in Chapter one and later in this Chapter, however, these statutes have done little to shift the shareholders’ priority position in business considerations. Thus, the

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But, see L. D. Solomon, “Humanistic Economics: A New Model for the Corporate Constituency Debate” (1990) 59 U. Cin. L. Rev. 321. Solomon argues that the economic approach fails to provide a neutral goal for decision making. In adopting an economic approach, the decision maker also “adopts its basic assumptions of how humans operate and what role law plays (and should play) in legitimizing structures of power and the distribution of wealth and income.” Solomon at 328.
primacy of the shareholder continues to serve as a guiding principle, making for a comparatively more streamlined and efficient decision-making process.\footnote{See Bradley, \textit{supra} note 1.}

Another espoused benefit of the Contractarian model is that it promises greater transaction and production efficiency. This transactional efficiency goes beyond management decision-making efficiency, directing how the work of the firm gets done. According to Contractarian thinking, the competition of the market drives firm players into efficient contracting. Where inefficiencies in the contractual web arise, the market’s self-correcting mechanisms will kick in to efficiently allocate resources. This allocation takes place at the micro market level – labour, capital and product – as well as in the overall market as a whole. The firm’s internal labour market has the capacity to correct its external capital and product markets. For example, where an inefficient labour contracting situation arises, perhaps manifested in the form of a strike or a labour shortage (due to an inability to attract and retain qualified workers), the product market may suffer in that the firm is unable to deliver goods to market, or deliver goods at an affordable price. The inability to deliver goods to market on time or for good value, consequently affects the capital market, in that investors pull out or new investors shy away from a firm that cannot meet the product market’s demand. Similarly, the external markets impose corrections on the internal labour markets. Where investors fail to provide necessary operating capital, the firm is unable to hire new employees or keep old employees to produce the work of the firm. Some Contractarian scholarship suggests that the market makes for efficient contracting because those involved in the nexus of
contract will naturally act rationally and in their own best interest; and where parties compete against one another, efficiency will result.\(^8\)

Theoretically, market efficiency, which minimizes transaction costs, results in greater market value of the firm as a whole; this in turn leads to greater wealth for members of the firm. But, whose wealth is enhanced? Contractarians make no secret of their goal to maximize shareholder wealth. Such a strategy, however, does not categorically deny other stakeholders from collecting on their claims\(^9\) or investments in the firm. Some theorists\(^10\) assert that wealth in the hands of shareholders, in effect, trickles down to other stakeholders or residual claimants of the firm. The "market value rule" holds that under perfect market conditions, an increase in residual claims held by shareholders in their common stock, in turn enhances the market value of residual claims held by other firm stakeholders, such as employees. Whether other stakeholders can collect on their residual claims is another matter and will be discussed later. Nonetheless, it is conceivable that when a firm succeeds at maximizing wealth for its shareholders, that wealth is reinvested into the firm, and is translated into enhanced employee wealth.

In spite of the potential benefits that the Contractarian model claims to offer, its commitment to the primacy of the shareholder and its staunch reliance on the market, nonetheless poses specific challenges to employees' valuation and ultimately getting their

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\(^8\) Other Contractarian scholarship concentrates on the potency of social norms to manage relationships within the corporation, a topic that is addressed later in this chapter.

\(^9\) Stakeholder claims to corporate value can be either "fixed" or "residual." Professor Janis Sarra offers a clear distinction between the two: "Fixed claims are claims based on statutes or contracts — accounts payable in exchange for supplies, wages owing under employment contracts, interest and repayment charges agreed to in debt instruments. Residual claims arise from expectations, whether implicit or explicit, that the value of dealings with the firm will increase with the firm's increase in value and decrease with the decrease in firm value." J. Sarra, "Corporate Governance Reform: Recognition of Workers' Equitable Investments in the Firm" (1999) 32 Canadian Bus. L. Journal 384 at p. 399.

\(^10\) See Bradley, \textit{supra} note 1 at 38, referring to E. F. Fama and M. H. Miller, \textit{The Theory of Finance}.
interests fairly met in an IDR forum. Take for example, a situation in which an employee brings forth a discrimination complaint to IDR against a supervisor of the firm, who in the eyes of the law is an agent of the firm. If in the process of a private, in-house mediation, the parties determine that in order to resolve the dispute, the firm, on behalf of its agent supervisor, must pay significant damages to the aggrieved employee. A large payout of damages would, in effect, eat into shareholder profits. How then, can the firm’s executive managers – as agents of the shareholders and sponsors of the firm’s IDR address the competing financial interests of the shareholders on one hand and the aggrieved employee on the other? The primacy of the shareholder principle would have the firm’s managers maintain their focus on securing shareholder wealth, while the principles of fairness necessary in an IDR would require the firm to ensure procedural and distributive justice for employees using the program. Such a situation poses a conflict of interest for the Contractarian-conceived firm, where justice is determined to be satisfied by paying a settlement to the injured employee. Potential conflicts of interest in the narrow context of the IDR process, in addition to the more generalized systemic power imbalances fostered by the Contractarian model’s hierarchy poses a challenge to employees in getting their interests heard and met in a private, firm-sponsored IDR forum.

This is not to say, however, that IDR should not be implemented and used. On the contrary, IDR potentially offers significant benefits to the corporate workplace. There are mechanisms – both internal and external to the workplace – that can be invoked to balance the risks to employees seeking redress of their disputes within the American firm. These mechanisms include, among other things, government regulation and workplace

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11 However, as I suggest later in Chapter Three, one of the components of a fair IDR process is that in attempting to solve their disputes privately, employees retain their right to bring their statutory claims to a public court of law should the IDR process fail.
social norms – both of which will be discussed later in this chapter. Additionally, there are certain structural and procedural elements of the IDR forum itself that should be required in order to ensure that employees’ interests are addressed fairly, in spite of whatever hierarchy of interests the corporate paradigm dictates. These hallmarks of a procedurally fair IDR forum will be dealt with at length in Chapter Three.

B. The Contractarian Model’s Inherent Risks to Employee Power

The Contractarian model presents certain risks to employees, specifically challenging their relative power in the firm. *Power*, whether explicit or implicit, overt or covert, plays a role in every relationship. Power is almost always the common denominator in conflict. Thus, defining “power” in workplace relationships and workplace conflict is in order here to lay a conceptual groundwork. Social psychologist Morton Deutsch offers a comprehensive definition of power, which encompasses the relational aspect of power. According to Deutsch, power comes in three forms:

*Environmental power* is the leverage that an individual or a group has to influence their overall environment. This kind of power might be manifested in the Board’s ability to approve of the sell-off of a company division, uprooting a cadre of employees from that division. *Relationship power* is the capacity an individual or group has to favourably influence another person or group. A workteam leader may use her power in this way to encourage other team members to work extra hard in order to meet a project deadline. The third kind of power in Deutsch’s scheme is *personal power* – the ability one has to get what he or she desires.\(^{12}\) Personal power, for example, might be manifested in an

employee’s ability to negotiate a higher salary. My use of the word “power” here encompasses these three flavors of power. Generally speaking, my use of the word “power” means influence or leverage to bring about desired outcomes; and given that my focus here is on employees in relation to their workplace, I am particularly speaking about the group power that employees have to get what they want in the firm.\textsuperscript{13}

Perhaps the greatest risk that the Contractarian model poses for employees is the systemic power imbalance cultivated by the model’s hierarchy of accountability, which places employees’ interests below those of shareholders. Within such a hierarchy, employees’ (environmental and relationship) power in the firm is small, relative to the power that managers wield (to further shareholder interests) in effecting change, or making decisions that impact the workplace. Corporate governance jurisprudence and, to some extent, corporate constituency statutes\textsuperscript{14} dictate that the firm’s managers and directors owe their allegiance, first and foremost, to firm shareholders. As agents and fiduciaries of shareholders, managers and directors are obligated to act in the shareholders’ best interest. Directors, who create firm strategy, and managers, who implement such strategy, work from the premise that the shareholders’ financial interests are supreme; this ultimately impacts the balancing of interests, between shareholder and employees (or between shareholders and other stakeholders as well) in the day-to-day operations of the workplace. Where shareholder interests and employee interests are complementary, such a power issue is moot. However, where employee and shareholder interests collide, employees’ interests will generally not prevail.


\textsuperscript{14} See also, Chapter One text, \textit{infra}, at 66-67, which also discusses corporate constituency statutes.
Moving from theory to actual governance structure, consider the traditional absence of employees from American corporate boards. The Contractarian corporation is premised on hierarchical and closed governance structure, unlike the Communitarian corporation, which is more flat and transparent. Without a seat at the Board, atop the hierarchy, employees are barred from having a voice in firm strategy or operations – decisions that would inevitably affect their environment and daily work life. Large corporations in Germany (which are Communitarian by nature), by contrast, are required to have employee representation on their supervisory boards. German law requires that corporations with more than 500 employees have two boards – one, charged with a supervisory role to direct firm strategy, and a second board that possesses operational responsibilities, managing day-to-day business decisions. Firms with more than 2,000 employees are required by law to staff their supervisory board with 50% employees, while shareholders fill the other 50%.\textsuperscript{15} That employees are not represented on American corporate boards is deliberate: The American corporation, unlike the German corporation, is not conceived as a social entity, but rather as an economic entity. As an economic entity, glued together by a web of contracts, and motivated by market competition, the American firm is not required or expected to fulfill any social contract with its stakeholder members. Rather, the expectation is that the American firm will meet the economic interests of its shareholders. Absent a community consciousness or the notion of a social contract with the public or its employee, American corporations embrace a hierarchical governance structure, in which employees are kept peripheral, and to a great extent - disempowered.

\textsuperscript{15} Bradley, supra note 1 at 52-53.
In addition to the primacy of the shareholder principle in Contractarian theory and the absence of employee representation on corporate boards, there is a third risk to employee power in the workplace: the relative low value placed on labour in the overall corporate market (comprised of labour, product and capital markets). Lacking high value in the labour market means that employees possess relatively weak bargaining power to get what they want in the workplace. Furthermore, if we consider the relative emphasis placed on acquiring and retaining labour in the American corporation as compared with the emphasis placed on capital, it is apparent that labour is not as highly valued as capital in the overall market. Thus, comparing employee and shareholder power, contractual bargaining power of employees vis-à-vis their position in the labour market is far less than the contractual bargaining power of shareholders vis-à-vis the capital market. In the nexus of contracts paradigm, having strong contractual bargaining power means having the leverage to bring about one's desired outcomes.

However, a shift in the way corporations view labour may be under way. This shift is being driven in great part by the changes in how work gets done and which work products are being valued. Specifically, the shift from industrial work to knowledge work means that machines and their operators are valued less than the computer programs and programmers who make the machines tick. Today's work product is not only tangible, physical objects, but is also (and increasingly so) intangible, and

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16 The fact that the primacy of the shareholder has been institutionalized in American and Canadian law demonstrates the comparatively greater value placed on financial capital as compared to human capital. Admittedly, it is difficult to reliably and objectively measure the value of labour or human capital, except as it is reflected through wages and benefits; wages or salary and benefits do not adequately capture the diversity of employees and the unique value of their labour. This is in contrast to financial capital, which is far more quantifiable. Margaret Blair's work discusses the valuation of human capital and financial capital in the corporate environment. See, e.g., M. Blair, Worker Empowerment Through Corporate Law? Ownership and Control: Rethinking Corporate Governance for the Twenty-First Century (Washington, D.C.: The Brookings Institution, 1995).
information-based. Tangible products such as computers and cars and widgets continue to be produced, but alongside of these, computer codes and fiber optic designs are being produced. Where employees were once valued for their physical abilities, today’s employees are valued according to their intellectual skills.\footnote{See, R. B. Reich, The Work of Nations: Preparing Ourselves for 21st Century Capitalism (New York: A.A. Knopf, 1991); and C. Casey, Work, Self and Society (New York: Routledge, 1995).} These are times in which employees’ intellectual capital is increasingly viewed as a valued asset to the employer firm. Such heightened recognition of \textit{human capital}\footnote{Gary Becker, a labour economist, introduced the term “human capital” in his work on the economic incentives for businesses to invest in the training and development of their employees. See, G. Becker, Human Capital: A Theoretical and Empirical Analysis, with Special Reference to Education. (New York: National Bureau of Economic Research, 1964).} holds promise for a shift in the way labour is valued in the market. Where human capital is awarded a higher value, employees stand a better chance for increased power in the workplace.

Human capital is capital that a firm accumulates by investing in the development of its employees’ skills and knowledge to produce work (goods as well as service) on behalf of the firm. Such capital is often considered firm-specific in that the return on skill and knowledge development would be fine-tuned to meet the particular needs of the firm for which the investment was originally made. Yet, certainly, many human skills in today’s information-based market are transferable across firms doing similar work. Lawyers, for example, trained to analyze labour law in one firm, could easily apply this skill in another firm practicing in the area of labour law. We might conclude, then, that less firm-specific training makes for greater transferability of human capital to a competitor firm. However transferable the capital, investment by the firm in its employees poses a certain risk to the firm, in that if and when the specially (or generally) trained employee leaves the firm, that human capital investment leaves as well.
Recognition of human capital enhances employees' leverage in the workplace. Firms that invest in their human capital and value its employees' offerings are more likely to work harder to keep their employees, and consequently afford greater bargaining power to its employees.

The flip side of this human capital scenario is that employees will, likewise, accept certain risks. The risk to employees, however, is that they will not be adequately compensated for their investment of *self* into the work product of the firm. I refer to compensation here to mean salary or wages, as well as any residual claims to which employees may be entitled. Where employees are compensated with up-front bonuses or increased wages for their efforts in learning new skills for the firm, then the risk to employees' wage-based compensation is minimized: Once employees are paid for their efforts, they possess leverage in their ability to walk out the firm's door, depriving the firm from collecting on its human capital investment. Thus, compensating employees up-front is far riskier for the firm than a graduated wage scale that delivers payment on investment at a later point in time. Said another way, where increased wages or salary for employees' investment of self or opportunity cost are delayed for a later point in time – when the firm will likely be able to collect on its human capital investment – then a greater risk for the employee and a reduced risk for the employer firm is presented.

The Contractarian's theory of the firm, with its reliance on the principal-agent paradigm, aligns the firm's interests with those of its shareholders. Shareholders are, thus, a *part of the firm* in a way that no other constituent is. Employees, on the other hand, contract with the firm, but are not part of the firm. This, argues Margaret Blair,

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creates a one-sided playing field in which employees are limited in collecting on their interests, namely their human capital investment in the firm. Blair sees this limitation as stemming from the built-in contracting problems of the Contractarian model of the firm, in which employees possess minimal bargaining power in the nexus of contracts. Blair calls for a shift in corporate theory and/or the expansion of fiduciary duties of managers or directors as possible strategies to head off predatory actions towards employees by shareholders through their agents. Recognizing that a shift in corporate theory or an expansion of fiduciary duties calls for leaps that the law is unlikely to make, Blair points to certain institutional arrangements that may be utilized to protect employees' firm-specific investments. Such institutional arrangements include 1) career paths and seniority rules that delineate channels for advancing in the firm; 2) "hostage" or performance bonds, which are forfeited upon failure to perform or underperformance of a specified task; 3) corporate culture and norms; and 4) enhanced ownership rights and management voice in the firm tied to human capital investment.

I will address these latter two institutional arrangements – norms and employee voice – more fully in the section on workplace governance strategies that follows. But

20 Ibid.
21 Blair, supra note 19 at 75-76. Blair suggests that specified career paths, job ladders, and seniority rules encourage employees to invest themselves in firm-specific capital, and at the same time holds the firm accountable for returning some benefit to employees for their contribution.
22 Ibid. at 76-77. "A 'hostage'" writes Blair, "is something of value that is pledged by one party to a transaction and that will be forfeited to the other party if the first party fails to perform according to the contract. One version of the efficiency wage argument, for example, is based on a hostage argument: that is workers accept wages that are lower than their opportunity cost in the early years of their employment relationship, and this serves as a commitment by the worker to stay with the firm and to be repaid later with wages that are higher." Blair at p. 76. The performance bond works in a similar way. Employees post bond upon joining a firm that is forfeited if the employee leaves the firm or underperforms. The severance package is an example of an employer-funded hostage. Blair concedes, however, that such bonds are effective only when used in conjunction with other institutional arrangements that induce trust and value reputation.
23 Ibid. at 77.
24 Ibid. at 77-80.
first, let us turn to look at the expanded role of the corporate workplace as its own private legal system.

III. Lay of the Land: Evolution of Private Justice in the Workplace

What does the growing rule-making and adjudicatory powers of the firm mean for employees seeking to address their human rights complaints in-house?

Society has entrusted a great deal of power into the hands of the modern corporation – power that is exercised outside the firm as well as within the firm. Chapter One addressed some of the ways in which corporate power is manifested externally to impact national economic and political policy. This Chapter has focused on the corporation’s power exercised internally into the workplace. The Contractarian-styled corporation – with its hierarchical structure, absence of employee board representation, and market reliance that discounts the value of labour – poses one kind of threat to employees’ interests in the workplace. Another threat to employees’ interests result from the on-going trend of privatizing workplace governance.25

Public legal institutions have increasingly delegated rule-making and adjudicatory powers to corporations to privately govern the workplace; this has further enhanced the corporation’s power over the lives of its employees.26 Private governance

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25 By governance, I mean the system of managing organizations (or societies more generally) by making rules, enforcing rules, and adjudicating or settling disputes when the rules get broken.
26 Granted, corporations are not the only ones to have been delegated this authority to make rules and resolve disputes privately. Federal agencies and other types of organizations have likewise been encouraged to create their own compliance strategies and dispute resolution forums. Yet, the large corporation’s conglomerate power, rooted in financial wealth, makes for an entirely different employer-
within the corporation generally falls to corporate managers, who set and enforce rules and policies (that match the requirements of the law), and administer dispute resolution forums when needed. Acting on behalf of their principals—the shareholders—corporate managers are, however, structurally limited in their ability to impartially govern employees in the workplace, most pointedly when the interests of shareholders and employees are at odds. Thus, the allegiance of managers to shareholders means that private governance of the workplace takes place amidst inherent conflict of interests that do not arise when public institutions govern the workplace. Government lawmakers and adjudicators are structurally neutral in a way that internal corporate managers are not.

My primary interest here is the aspect of private governance that takes the form of internal dispute resolution. How can employees be assured of fair IDR given such conflicts of interest among workplace constituents? To put IDR in context, I will explore the general trend of privatization of justice, providing special attention to private dispute resolution.

Corporate power to privately create legal-based rules and adjudicate legal claims has direct implications for the employees of the firm whose lives within the firm are, in great part, directed by such in-house rules and the dispute resolution processes that are available if and when the rules are broken. Lauren Edelman’s work offers a law and society perspective on the privatization of workplace governance.27 I will begin with a

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theoretical account of Edelman's contextual framework of law as a social construct, and then move on to discuss what she calls the "organizational internalization of law."

Law is a social construct, created through dialogue among society’s members and legal institutions; it is, thus, subject to continual reconstruction as society shifts and evolves. For example, laws governing the workplace, such as corporate law, employment law or human rights law, have developed as a result of multi-layered negotiations among workplace constituents - employees, the public, shareholders, and corporate executives - and legal institutions. Social institutions, like the firm, likewise play a role in implementing the law, by creating firm-specific responses to the law that reflect law’s directive. Anti-harassment policies or safety standards in the workplace provide an example of how a firm might respond to the law. Edelman asserts that organizations respond to the law with rational, private solutions that meet the demands of public legal order. These rational responses are supported and justified by "rational myths" or stories that explain such organizational responses to law. Courts, in turn, provide stamps of approval to acceptable organizational responses to the law, legitimizing anti-harassment training or internal dispute resolution programs. Law, then, is created and re-created through this social dialogue.

To illustrate what Edelman calls the "endogeneity" of legal regulation," she examined the development of internal organizational grievance procedures in response to Equal Employment Opportunity (EEO) laws. Edelman works from the premise that legal

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28 Rational myths are widely shared beliefs that have the appearance of being rational, but are not necessarily correct. "Endogeneity", supra note 27 at 410, referring to W. R. Scott, Organizations: Rational, Natural, and Open Systems, 2d ed. (Englewood Cliffs, NJ: Prentice-Hall, 1987).
29 "Endogeneity", supra note 27.
30 "Endogeneity" according to Webster's dictionary means originating internally. Edelman uses the term "endogenous" to describe how the content and meaning of law - designed to regulate the workplace - is articulated or defined within the workplace.
rules, here EEO laws as set forth in the 1964 Civil Rights Act, are not self-enforcing.\textsuperscript{31} Rather, organizations are free to demonstrate compliance in whatever way they see fit, in so far as compliance is actually achieved. According to Edelman “law should be understood more as a rhetorical and symbolic resource than as an articulate mandate.”\textsuperscript{32} I accept Edelman’s premise. The assumption here is that law establishes parameters of acceptable and non-acceptable action, and that organizations adopt compliance schemes to fit within these parameters. In their role as rule-makers, private organizations, thus, play an active part in defining and implementing their own legal regulation. Similarly, when organizations offer private forums for dispute resolution of legal rights, they are in a position to exert certain influences over the dispute resolution process and outcomes.

Edelman’s model of the social construction of workplace law\textsuperscript{33} is premised on the interplay of three groups or institutions that together construct and reconstruct the law. The three components include Professionals (both internal and external to the organization), the Organization itself, and Legal Institutions. The Professionals, comprised primarily of human resource management professionals and lawyers, manage organizations, write about management in the business media, or practice law related to workplace management and compliance. In short, the Professionals that Edelman has in mind are those that promote a particular compliance strategy to meet the demands of the law. Specifically, the compliance strategy at the heart of Edelman’s work as well as this thesis is that of the internal dispute resolution process.

\textsuperscript{32} “Endogeneity”, supra note 27 at 407.
\textsuperscript{33} I use the term workplace law here to include the body of law that affects the workplace. This includes laws framing corporate governance as well as employment law, such as Title VII.
Through their business and personnel literature, Professionals have created rational myths about the efficacy of IDR, thus influencing organizations to adopt IDR and at the same time influencing courts to legitimize the IDR programs created by organizations. Edelman looks specifically at two myths promulgated by Professionals that encourage the organizational adoption and judicial approval of IDR. The first myth asserts that the existence of an IDR program is indicative of the host organization’s commitment to fair treatment of its employees; and that where fair treatment can be had internally, employees will be less inclined to seek redress outside the firm. In other words, IDR offers a way to insulate or buffer the organization from publicly (or externally) imposed legal liability. From the courts’ perspective, the existence of an IDR instills the belief that the organization is committed to fair treatment; courts will, consequently be less inclined to find such a fair-minded organization in violation of human rights laws. That courts view IDR as an adequate substitute trickles down to the ranks of would-be complainants, who then are more inclined to seek redress locally, given the seeming eventuality that courts will require that they first exhaust their quasi-administrative remedies. In sum, this first myth holds that by offering an IDR program, organizations will have fewer complaints waged outside the organization than would otherwise be made in the absence of an IDR program. Incidentally, Edelman’s research found that the first myth was indeed myth – that instituting an IDR did not, in fact, lead to fewer external complaints by employees.34

A second myth proffered by the Professionals is that an internal grievance program offers not only a fair quasi-administrative review process for workplace

34 To determine the “truth” of this myth regarding IDR as insulator, Edelman used survey data from organizations offering IDR. “Endogeneity”, supra note 27 at 419-432.
disputes, but also one that is cost-effective for the organization and the public legal system. From the organizational perspective, maintaining legal review in-house translates into cost savings, given the high cost of the alternatives – be that litigation or hearings before administrative tribunals. When courts buy into the Professionals’ myth that organizations are, indeed, capable of offering fair review of legal rights-based disputes, that also lightens the public docket’s load, they are more likely to refer complainants back to an organization’s internal process. The second myth, in essence, asserts that where a complainant wages an external employment discrimination complaint, the judiciary has increasingly referred complaints back to private IDR that is where the employee has such an option with his or her organization. As for the second myth regarding judicial deferral, Edelman found this myth to be based in truth - that federal courts over time have become more inclined to defer human rights complaints back to IDR.\(^{35}\) The point here is not that these myths are founded or unfounded, but rather to illustrate some background on how the internalization of workplace law and governance has unfolded.

The second component player in the social construction of the privatization of workplace law is the organization itself. Whereas Professionals promote compliance strategies, it is the organization that adopts and implements compliance strategies. As with the Professionals, the organization, likewise, makes use of rational myth to market its adopted compliance strategies internally to its employees and externally to the outside world, namely the judiciary. Over time, organizations, with the assistance of the

\(^{35}\) To determine the “truth” of this myth that where external complaints were filed, courts would often defer review of human rights complaints back to the organization offering IDR, Edelman examined 477 federal cases in which sexual or racial discrimination under Title VII was alleged. “Endogeneity”, supra note 27 at 432-445.
Professionals' literature, have been increasingly successful at convincing the judiciary that their internal grievance procedures offer fair alternatives to public dispute resolution of employment discrimination.\textsuperscript{36}

The third component of Edelman's social construction of law model is legal institutions. Given our focus on the dispute resolution aspect of law, the legal institutions that interest us here are specifically courts and administrative agencies. Legal institutions play the role of legitimizing the compliance schemes that Professionals promote and organization implement. Courts decide whether an organization's compliance scheme is fair or unfair and whether it addresses the spirit of the law. Agencies likewise create guidelines and operate administrative tribunals, which review and approve (or disapprove) of organizational programs and practices. Legal institutions provide a blueprint for what is an acceptable response to law's directives, which organizations then use in adopting their compliance measures.

Corporations as employers have actively participated in constructing workplace law and constructing systems to resolve legal disputes. If we accept the assertion that employment discrimination law is indeed a rhetorical and symbolic resource rather than a mandate,\textsuperscript{37} then corporations do play the role of private lawmaker whenever they create compliance strategies for their workplace. Furthermore, in mimicking public legal systems and processes such as dispute resolution, private organizations like the corporation have emerged as private dispute resolvers of workplace legal rights. Large

\textsuperscript{36} "Endogeneity", supra note 27 at 432-445.
\textsuperscript{37} "Endogeneity", supra note 32 and accompanying text.
corporations as "repeat players" in legal systems are especially well situated to make law and to institutionalize IDR as it relates to employment rights in the workplace.\textsuperscript{38}

These developments of the corporation as private rule-maker and adjudicator are part of a wider trend of the corporation's growing role as private legal entity. Since the mid-1970's large corporations have embarked on a pattern of internalizing certain components of the legal system; rule-making and adjudicating are but two of these.\textsuperscript{39}

However, other areas in which the internalization of law has been manifested inside the corporation include the growing importance of in-house counsel, and the emergence of private, in-house policing. A well-oiled in-house counsel machine enables the corporation to interact more consistently with courts and lawmakers, thus directly conferring the benefits that come with being a repeat player.\textsuperscript{40} Similarly, the growth of "the organization as constable" to monitor security and enforce rules inside the organization provides further evidence that the corporate workplace operates its own legal system. This thesis is concerned with the rule-making and adjudicatory powers of the corporation, but mention all four phenomena for the purpose of providing a context.

The important point to be made here is that the corporate organization has secured important legal powers, which pose direct challenges of equity and fairness within the employer-employee relationship.

\textsuperscript{38} "Repeat players" in the legal system, such as large corporations, have an advantage that "one shotters" do not have. For example, repeat players have amassed institutional knowledge about how to effectively maneuver within the system; they have established relationships with members of legal institutions; and they have reduced transaction costs associated with litigation, due to their economies of scale in litigation proceedings. This notion of repeat players stems from the landmark work of Marc Galanter - a theme which Edelman has adopted in her work on the Internalization of Law in large corporations. See, M. Galanter, "Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change" (1975) 9 Law & Soc. Rev. 95.

\textsuperscript{39} "Organizational Internalization" \textit{supra} note 27 at 943.

\textsuperscript{40} Galanter, \textit{supra} note 38.
Employees seeking redress of their employment based disputes face two structural challenges. First, the primacy of the shareholder principle means that where employees’ interests are at odds with shareholder interests, the firm as de facto adjudicator or dispute resolution forum sponsor cannot assume a neutral position. This hierarchy of interests, in which employee interests are secondary at best, raises questions as to the overall fairness of the dispute resolution process. Second, given that corporations have become self-contained legal entities in their own right, sanctioned by legal institutions, corporations have gained even greater social approval (and power) for settling employment disputes privately. Below, I look at two mechanisms – one legal and one non-legal – to support employees in these structural challenges to fairness. I will first look at the possibilities offered by corporate governance law reform, and then turn to look at the possibilities offered by the informal regulation of social norms.

IV. Managing the Power Differential in the Employer-Employee Relationship

Given the lay of the land, what checks and balances are available to address the power differential between employees and the firm that will likely enhance equity in the workplace such that fair IDR is possible?

Forces stemming from outside and inside the corporation act in concert to govern the workplace, structuring and guiding relationships within the corporate firm. Outside forces include the market and the law. Internal forces might include employee associations or unions, which lobby for employee interests; and private norms, which are
culturally-based standards of behaviour. Other internal factors might include leadership style in the firm, the institutional history of the firm, and management and decision-making structures of the firm, all of which play a role in defining corporate culture. In this section, I will look at the possibilities offered by the outside, public force of the law and the internal force of private social norms to foster an equitable workplace.

A. Balancing Workplace Power Through Corporate Governance Law Reform

Where employees seek redress of employment rights through a firm-sponsored IDR, the primacy of the shareholder principle and emphasis on shareholder wealth maximization41 poses potential conflicts of interest for the firm and its managers. Beyond the question of corporate purpose, the concern here is the degree of accountability that the firm has to its employees. Under current legal theory and jurisprudence related to corporate governance, the firm remains accountable to its employees in only limited ways, if at all.42

Examining the issue of accountability within the context of corporate governance requires some exploration of corporate directors’ fiduciary duties to firm constituents. Fiduciary duties in the corporate governance context arose from the common law concepts of good faith as a way to enforce incomplete contracts between corporate directors and officers on the one hand and shareholders on the other.43 Generally speaking, fiduciary duties require corporate directors to act in good faith with reasonable

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41 Where employees seek monetary compensation from the firm through IDR, shareholders’ wealth is put at risk.
42 However, outside the realm of corporate governance, the corporation as employer is required by specific statutes to ensure, among other things, a safe workplace, fair wages, and a discrimination free environment.
care towards the best interests of the corporation. Courts have held that acting in the "best interests of the corporation" is equivalent to acting in the best interest of the shareholder.

However, legislatures sparked hope for re-drawing the boundaries of "the best interest of the corporation", and thus expanding fiduciary duties, through the introduction of corporate constituency statutes. Recall that these statutes permit corporate directors to use their own discretion in considering other constituents' relative interests in the firm. Although corporate constituency statutes offered hope to some scholars promoting expanded fiduciary duties, these statutes have not delivered such a payoff. Of the few cases that have invoked corporate constituency statutes, none have succeeded in winning benefits for non-shareholder constituents.

Corporate constituency statutes have failed to expand directors' fiduciary duties to include non-shareholder stakeholders and shift the primacy of the shareholder norm for two major reasons. First, corporate constituency statutes fail to give rise to enforceable

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44 The Model Business Corporation Act, which several U.S. states have adopted, defines the duty of care as that which "an ordinary prudent person would reasonably be expected to exercise in a like position and under similar circumstances." Model Business Corp. Act. Sec. 8.30 (1984).
46 See Chapter One, supra note 160 and accompanying text on corporate constituency statutes. Pennsylvania was the first state to enact a corporate constituency statute in 1983. Since that time, more than half of the states have enacted such statutes. Delaware, considered the "showcase" corporate law state, does not have a corporate constituency statute to date.
49 While corporate constituency statutes have not been used to further the interests of employees, the public, or customers of the firm, corporate directors have used constituency statutes as a mechanism to defend themselves against claims of breached fiduciary duty in the context of takeover attempts. Springer, ibid. at 109.
rights on the part of non-shareholder constituents.\textsuperscript{50} Said, another way, these non-shareholder constituents have no standing under corporate constituency statutes. Second, corporate constituency statutes fail to provide an objective standard by which directors can weigh the interests of various constituents in making their business decisions.\textsuperscript{51} In other words, these statutes are too vague to be effective; and courts have been reluctant to fill in the gaps left by this vagueness. Thus, corporate constituency statutes have not provided an adequate mechanism to move the corporate governance stance further along the continuum towards a Communitarian position. The predominant thinking in corporate jurisprudence remains that corporate managers' fiduciary duties to the firm equate to acting with a duty of care and good faith to promote the financial interests of shareholders, and shareholders alone.

The current state of jurisprudence around corporate governance, which holds steadfast to the primacy of the shareholder principle, means that consideration of employees' interests are, for the most part, subject to the good will of the corporate employer. What legal reform might be enacted to secure employees' interests? In spite of the obvious inertia in corporate governance circles, I maintain hope that corporate constituency statutes can one day be invoked for the protection of employees' equitable interests in the workplace. If non-shareholder interests are to be legally articulated, this will likely come as a result of collective action on the part of employee or public interest groups that bring forth test case litigation to challenge current jurisprudence. In essence, the debate on corporate purpose would need to be revisited and amended. When the

\textsuperscript{50} The corporate constituency statutes of Georgia, Nevada, New York and Pennsylvania explicitly prohibit constituents from bringing direct actions against the corporation. As for states where the finding of an enforceable right on behalf of constituents is at the court's discretion, it seems unlikely that courts will find such a direct enforceable right against the corporation or its directors. Springer, supra note 48 at 100.

\textsuperscript{51} Springer, supra. note 48 at 108.
corporation is deemed to have an obligation to the community of which it is a part, then the interests of community members – be they employees within the firm or citizens on the outside of the firm – will naturally have to be considered, and mechanisms for securing these interests will need to be articulated.

While I am hopeful that corporate governance reform can promote greater equity in the workplace, I recognize that such changes will not occur in the near future. However, while such larger, environmental shifts may require our patience, we can proceed on the micro level by creating fair IDR systems locally, workplace by workplace. The following chapter looks at how fairness in local IDR can be achieved through IDR system design.

B. Balancing Workplace Power Through Social Norms

Corporate governance reform offers one way to address the power imbalance between employees and shareholders in the corporate workplace. Granted such legal reform is unlikely to take place in the near future. And yet, the alternative vision of the corporation with a wider constituent focus provides a map, an orientation for future action. Another avenue through which to address workplace governance power is that of social norms – nonlegally enforceable rules and standards ("NLERS")\(^{52}\) that establish parameters and expectations of acceptable behaviour among members of the organization.

Much of the literature on social norms and corporate law has been developed in an attempt to explain the non-legal incentives towards fair play within the Contractarian model of the firm. Devotees of the Contractarian model offer up the promise of social norms as a private alternative to publicly enforced legal regulation of internal corporate relationships. Social norms, it is argued, offers "firm-specific fairness norms . . . to supplement imperfect contracting." Norms motivate members of the firm to uphold their contractual relationships.

With respect to the relationship between the firm and its employees, social norms operate to explain and direct how employees are evaluated, promoted, and fired. Standards of performance and criteria for promotion, then, are examples of social norms. In addition, social norms also dictate protocol for fair treatment. For example, when an employee takes a complaint regarding her supervisor’s bad behaviour (that does not rise to the level of a legal infraction) to the human resource (HR) department, the norm-based expectation is that some constructive change will be initiated by HR, and the problem be addressed. Such protocol may be written in an employee manual or simply handed down as "the way things are done around here". When promotions fail to follow the expected pattern or when an employee is reprimanded for taking her concerns to HR, a sense of unfairness emerges.

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54 Social norms might also instruct employees how they should dress, e.g., women might be expected to wear skirts and nylons, while men are expected to wear ties.
55 In the context of organizational behaviour, social norms are akin to what is referred to as psychological contracts. Behaviour theorists assert that a psychological contract is created between employer and employee, whereby the parties enter into an agreement of mutual obligations and benefits. In essence, the employer promises to provide certain benefits and rewards to its employees in return for the employees’ commitment to hard work and loyalty. Such contracts are generally unwritten rather than memorialized in writing, and are rooted in implicit understanding rather than explicit promises. See, S.L. Robinson and
Norms, like laws, are socially constructed, and like laws are specific to nations, communities and individual organizations. Social norms are informal mechanisms for organizing relationships in society generally or in the corporate workplace. While law provides a public source of rules and enforcement of rules, social norms arise privately and are enforced by members of the community or the workplace. One leading scholar in this area defines social norms as “rules that emanate from social forces, distinguishing them from personal ethics (internalized rules), contracts (rules imposed by a second party controller), rules imposed by organizations, and laws (rules imposed by governments).”

Of the various definitions of social norms offered by scholars, one commonality surfaces – that the concept of social norms is defined in contradistinction to the law. In other words, norms are defined by the fact that they are not of the law.

Norms are not rooted in law; nor does the law enforce community citizens or workplace affiliates to abide by such social norms. Rather, norms are self-enforcing, directing behaviour within the corporation in two ways. First, because norms arise from one’s culture, members of the community internalize the rules and constrain their behaviour in an automatic, reflexive way. Second, non-governmental third parties, such as affiliates within the organization, other organizations, customers, or the public, enforce norms by imposing sanctions for “bad” behaviour or offering benefits for “good”

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behaviour. One of the ways in which individuals or third parties enforce norms is through public shaming or the threat thereof. Some scholars claim that public shaming serves as an alternative to legal reprimand.

However, employees are somewhat limited in the sanctions and benefits available to them to encourage the firm to uphold social norms. The obvious benefit that employees offer the firm is productivity. Yet, good performance is vital to employees’ continued employment and promotion, and is thus just as beneficial to the employee as it is to the firm. In other words, employees have a self-interest in performing well, and will likely offer this benefit to the firm within or outside the context of enforcing social norms. Other benefits that employees offer the firm is good citizenship behaviour. By this, I mean the extra-curricular activities that employees volunteer to do on behalf of the firm. Good citizenship might take the shape of organizing social activities for the firm, or representing the firm as a member of a work-related association.

Employees have two obvious sanctions that they might apply to enforce the firm to abide by social norms of fairness. First, employees may resign from the firm, taking with them their specific human capital. However, the degree to which this is an option depends on the labour market. Where the market is an employees’ market, such that there are ample job opportunities, then resignation is clearly a viable option. If, however, the labour market is down and new job opportunities are limited, the option to resign becomes less attractive for employees. A second sanction available to employees

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58 S. Rousseau, “Canadian Corporate Governance Reform: In Search of a Role for Public Regulation” (Lecture, Global Capital Markets, Merging and Emerging Boards: Current Issues in Corporate Governance, Faculty of Law, University of British Columbia, 8 February 2002) [unpublished].
wanting to enforce social norms is to publicize the firm’s bad behaviour. In other words, employees aiming to enforce norms for equitable treatment in the workplace, might shame the corporate actors by going to the media, filing a case in court (if the action gives rise to standing), or both. However, employees will require a rather large infraction in order to take their complaints public, since only large infractions will capture the ear of the media or the sympathy of the public. Nonetheless, organizations are mindful of the value of good press and the risk of bad press. When corporate actors’ bad behaviours are aired, the corporation stands to lose some or all of its good will or reputation reserves – critical assets of any publicly traded corporation.

In sum, social norms can play a role in workplace governance by providing standards of acceptable behaviour that are enforceable in non-legal ways. Norms do not operate to supplant the predominance of shareholder rights; rather norms assist in balancing out power differentials in internal corporate contracting relationships. While individual employees may have limited enforcement mechanisms available to them, employees as a group can create a powerful lobby to ensure fairness. Unions have demonstrated the strength in collective action. Yet, even in non-union shops, employee associations can amass a collective voice in the workplace to articulate and encourage fairness norms for the employee-employer relationship. Similarly, consumers have a third-party role to play in fostering and maintaining a fair workplace. So long as consumers support or reprimand corporations with their wallets, they can encourage corporations to uphold their implicit contracts with employees, in which one of the terms of the contract is to operate in a spirit of fairness.
Social norms offer a non-legal mechanism for regulating workplace relationships between the firm and its employees. Although employees may have limited power to enforce such norms, they maintain some power to demand that fairness in the workplace be honoured. Similarly, law reform – particularly relating to the expansion of fiduciary duties of corporate directors – offers potential, albeit a remote one, for changing the employee-firm relationship. Both mechanisms require collective action on the part of employees and the public to bring any really change to fruition.

V. Summary

Managing the power dynamics between the corporate employer (as agent of its shareholders) and employees remains critical in creating IDR that is fair in substance and procedure. The dominant corporate theory that insists on allegiance to shareholder interests above all other constituents poses one level of challenges. The emergence of the corporation as full-fledged legal entity that makes and applies the law poses a second level of challenges. Yet, in spite of these challenges, I maintain some optimism that these power-based dynamics can be managed so that IDR can offer a fair alternative to employees seeking private redress of their legal rights. Managing this power differential can be done in a variety of ways. Here, I have outlined two: legal reform of corporate fiduciary duties, and the invocation of private social norms. Both corporate governance reform and social norms operate as broad-brush checks on abuses of power, addressing the macro level of organizational power shaping the employee-employer relationship. While these macro-level power dynamics influence the larger environmental context of IDR, the nuts-and-bolts procedural aspects of IDR deserves our attention as well. The
following chapter examines the procedural safeguards of the IDR process required to achieve fairness. Specifically, I look at disputes arising out of human rights violations in the employment context.
Chapter Three:
Creating a Fair IDR Process

I. Introduction to Chapter

Chapter One examined the large public corporation’s rise in social power. Chapter Two focused on the power relationship among the corporation and its constituents, particularly its employees. First, I explored the corporate employer/employee relationship through the prism of corporate theory, which is oriented around the primacy of the shareholder. Second, I examined the evolution of private justice in the workplace, which in effect has afforded greater power to corporations in relation to its employees. Together, the primacy of the shareholder and the phenomenon of the corporation as emerging quasi-legal institution present certain fairness challenges to employees who seek redress of their human rights employment disputes. While Chapter Two suggested ways that the power differential between the employer firm and employees might be managed from a macro perspective, this Chapter suggests more immediate and local means for promoting a fair IDR process that is procedurally just.¹

¹ I use the terms “fair” and “fairness” to refer to primarily subjective attitudes towards dispute resolution procedures. In other words, what is “fair” or “unfair” is a matter of individual perception — as seen through the eyes of parties to the dispute or outside observers. Since my concern here has been primarily with employees’ welfare, the perceived fairness to which I refer is that from the perspective of employees. However, at times, I interchange the words “fairness” and “justice;” this reflects the interrelatedness of these terms. When procedures and policies are deemed fair, then (actual or perceived) justice is more likely to occur. Similarly, when justice “is done,” then parties are more inclined to expect continued fairness. See, infra note 2 and accompanying text on notions of (procedural) justice. For a comprehensive review of the criteria by which fairness is perceived, see the work of Gerald Leventhal, eg., “What Should Be Done With Equity Theory? New Approaches to the Study of Fairness in Social Relationships” in K. Gergen, M. Greenberg, & R. Willis, eds., Social Exchange: Advances in Theory and Research (New York: Plenum Press, 1980) 27.
Ultimately, my intent here is to outline an IDR system that meets the fairness expectations of employees in the workplace, and that reflects procedural justice.

In addressing employment rights within the context of ADR/IDR, the tension between individual rights and group rights emerge. Employment laws represent publicly articulated and enforceable protections of individuals based on their membership to a particular group. When individuals choose to address their rights-based dispute through IDR, they forego an opportunity to clarify or fortify the group right, to say, a discrimination-free workplace. However, individuals who have standing to pursue this public right may have a personal interest to address that the public forum cannot entertain. For example, parties who experience personality clashes in the workplace that ultimately manifest into rights-based disputes, may have an interest in sorting out the underlying personal differences as well as protecting an employment right. IDR offers such a forum in which personality clashes and rights can both be addressed, whereas a court of law is limited to addressing rights alone. While I believe that group rights need

2 Justice and fairness are intrinsically connected, in that fairness supports and feeds into justice. In other words, where fairness is perceived, justice can follow. My use of the term (procedural) justice here connotes both subjective and objective evaluation. So, while I use “fairness” from a subjective point of view, I consider “justice” to be objectively determinable. John Rawls argues that the principles of justice emerge out of notions of fairness; he wrote, “the principles of justice are agreed to in an initial situation that is fair.” Rawls, infra at 12. This “initial situation” according to Rawls occurs when and where individuals find themselves behind a “veil of ignorance” in which a free and rational person would make choices without knowing the “specific contingencies which put men at odds and tempt them to exploit social and natural circumstances to their own advantage.” J. Rawls, A Theory of Justice (Cambridge, Mass: Belknap Press of Harvard University Press, 1971) at 11. While a more in depth look at Rawls work is beyond the scope of this thesis, the point I wish to make here is that fairness and justice are entwined, that what is deemed “fair” informs what is deemed to be “just.” Also see, J. Thibaut, et al. “Procedural Justice as Fairness” (1974) 26 Stan. L. Rev. 1271.

3 This argument regarding the missed opportunity for precedent is addressed below. The work of Owen Fiss and Richard Delgado speaks to this point.

4 An “interest” is a desire or need that does not necessarily rise to the level of a right. For example, an employee may want recognition for contributions made to a work product, but has no right to such recognition. This interest may however come to light in the context of an annual performance and promotion review, in which the employee was denied promotion. Where the employee is a member of a protected class, this denied promotion, presumably combined with other incidences of “discriminatory” treatment in the workplace may establish a prima facie case to pursue an employment right protection – in addition to the interest for recognition.
public articulation, I also believe that individuals should have choice to address their workplace disputes in the form and manner that is best suited to their particular situation. I endorse IDR because it offers individual employees freedom of choice among other benefits.  

For individual employees who opt to address their rights-based dispute with their employer through a company sponsored IDR, there are certain risks (as well as benefits) involved. These risks stem primarily from the power dynamics between the corporate employer and employee, as discussed in the previous chapters. To borrow from Marc Galanter's paradigm, the employer company might be viewed as the “Haves”, while the employees might be viewed as the “Have Nots”. Galanter’s work demonstrated that the Haves, as “repeat players” in the legal system, come out ahead in court because they are able to manipulate the adjudicatory process to their advantage. The same might be true for parties who take their disputes to IDR as opposed to the public court, since the advantages that the Haves possess in relation to the Have Nots persist in the private workplace just as they do in society at large.

My aim in this chapter is to outline procedural checks that can be instituted in IDR so that manipulation of the process by the “Haves” is kept to a minimum. Specifically, I examine fair process in mediation to address disputes arising in the shadow

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5 Carrie Menkel-Meadow offers a list of ADR’s “best aspects,” which warrant listing here: ADR represents 1) democratic ideals of free choice; 2) a broader range of possible and responsive outcomes; 3) in the case of compromise, a “moral commitment to equality; 4) precision in justice, accommodation, and peaceful coexistence of conflicting needs”; 5) non-legal principles or interests; 6) greater participation, even catharsis than more formal processes; 7) out-of-the-box thinking, unrestricted by win-lose terms; 8) a better exchange of information than the more formal alternative. C. Menkel-Meadow, “Whose Dispute Is It Anyway?: A Philosophical and Democratic Defense of Settlement (In Some Cases)” (1995) 83 Geo. L. J. 2663 [hereinafter “Whose Dispute”] at 2692. I offer a fuller discussion of ADR/IDR’s benefits below.


of statutory-based claims of human rights⁸ in the employment context. My focus here will be the non-union employees’ rights. In particular, I am interested in disputes between the corporate employer and the employee, rather than disputes that arise between co-workers or between employees and customers or clients. I will refrain from an in-depth discussion on the topic of outcomes, limiting my comments on outcomes to the potential benefits of ADR, generally. One of my underlying assumptions is that where procedures are fair, outcomes are likely to be fair; where procedures are unfair, outcomes can never truly be fair.

I have thus far focused on the emergence of the corporation in the United States, using American history, and American corporate law as the framework. This has been deliberate in that the American corporation provides an archetype of the large bureaucratic organization that poses the greatest challenge to employees’ interests. However, my interest in this thesis is to offer a model of IDR that has a wider application – to extend beyond the United States to also include firms in Canada. Thus, in this chapter, I will bring in both Canadian and American employment rights laws and rules of procedure to provide a framework for IDR system design. While the primary focus of this chapter is on procedural fairness, I will touch on the substantive laws that give rise to human rights in the Canadian and American workplace. My purpose in discussing these substantive laws is simply to provide a context for workplace discrimination and not to critique the merit of these human rights. For this chapter I have limited the scope of substantive human rights in employment to two pieces of North American legislation –

⁸ The term “human rights” in Canadian jurisprudential parlance is equivalent to “civil rights” in U.S. jurisprudence.
the Canadian Human Rights Act (CHRA)\textsuperscript{9} and United States’ Title VII of the Civil Rights Act of 1964 (Title VII).

Within an organization, informal dispute resolution may prove an effective means to resolving human rights disputes. IDR is an especially attractive option where the employer and employee intend to maintain an on-going relationship. By avoiding the divisive litigation scenario, working relationships have a better chance of surviving in a non-adversarial forum, such as mediation. Yet, there are some risks and benefits to consider in addressing human rights in the workplace through mediation. In section II of this chapter, I will review what the leading critics and proponents have to say regarding alternatives to traditional dispute resolution in general and mediation, in particular.

Section III of this chapter reviews the formal safeguards for procedural fairness in Canada and the United States, which, in effect, set the standards and expectations of fairness in informal forums. Recall that Edelman’s work relies on the assertion that private workplaces, in their evolving role as private legal systems, must fashion informal processes that mimic the formal laws and processes of the public legal system. Such formal safeguards are rooted in various sources of the law and legal systems, including the Canadian and American Constitutions, human and civil rights statutes, rules of civil procedure, and the judicial structure itself.

In Section IV, I will set out the essential features of a procedurally fair “in-house” mediation forum, based on the benchmarks extracted from Canadian and American formal law. To round out this model of a procedurally fair mediation forum, I will incorporate guidelines and protocols from various organizations, such as the American

\textsuperscript{9}The CHRA is substantially similar to provincial legislation, and thus the conclusions here are generally applicable to provincial statutes as well.
Arbitration Association, Society for Professionals in Dispute Resolution, and the Canadian Human Rights Review Panel.

II. Potential Benefits and Risks in Mediating Employment Discrimination Claims

Before comparing the benefits and risks of mediation, it is important to clarify the terminology used below and to qualify the discussion that follows. I will use the terms alternative dispute resolution, or ADR, to refer to the general category of non-adjudicative, informal processes. (I will continue to refer to the internal dispute resolution processes within organizations as IDR.) By comparison, adjudication and administrative proceedings are "formal" processes. Mediation is but one of the processes that falls under this general heading of ADR, but remains the focus of my discussion. Much of the scholarship in this field is about ADR generally or about "settlement."¹⁰ In writing about mediation specifically, I have drawn upon this body of ADR work, applying those characterizations that accurately describe the mediation process. I have purposely excluded scholarship written specifically about arbitration, as I am of the opinion that arbitration, per se, is nothing more than adjudication in sheep's clothing.

Legal scholars writing on ADR fall into two distinct camps -- those who sing its praises as a more efficient and effective alternative to formal dispute settlement processes, and those who criticize it as potentially harmful to public interests and minority rights. I will first provide an overview of the proponents' scholarship and then turn to the work of the ADR critics.

¹⁰ This focus on "settlement" may be attributed in part to an influential article written by Own Fiss, entitled "Against Settlement" (1984) 93 Yale L. J. 1073, which initiated this scholarly debate about the potential risks and benefits of settlement, or ADR, if you will.
Proponents of ADR hold that informal dispute resolution mechanisms provide for greater efficiency with respect to private and public expenditures of money and time. Savings of time and money go hand in hand, such that reducing the time spent on dispute resolution results in the preservation of money in disputants' pockets as well as states' coffers. Because most ADR mechanisms are less time-consuming, the cost of legal representation is reduced – either because disputants require less time from their legal counsel or because lawyers are not required for the dispute process at all.

Other supporters of ADR hold that informal processes provide greater access to justice when compared to more formal avenues. In effect, the potential savings in time and money make justice more accessible to those who either cannot afford the delays of formal proceedings or the associated expenses of protracted litigation. Additionally, some disputants will feel greater comfort within the comparatively informal context of, say, mediation. For those who would rather ignore discrimination than seek resolution through the comparatively intimidating process of litigation, a kindler, and gentler ADR venue may be the only tolerable access to redress.

Beyond the economic and access arguments, there is yet another perspective which holds that informal dispute resolution offers a more personally satisfying process and more individualized outcome. Unlike the adversarial context of litigation or administrative proceedings (for that matter), mediation is an inherently collaborative

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11 See L. Riskin, "Mediation and Lawyers" (1982) 43 Ohio St. L.J. 29 at 34. But see, Kim Dayton’s article, infra note 14 (which offers empirical evidence that ADR does not necessarily save money).
12 Ibid. But see, H. L. Sarokin “Justice Rushed is Justice Ruined” (1986) 38 Rutgers L. Rev. 431 (asserting that while settlement may save time, it may not fully dissolve the dispute).
13 In 1994, 18 million cases were filed in U.S. courts, costing a total of $300 billion dollars to the parties. In addition, it is estimated that Fortune 500 senior executives spend 20% of their time on activities related to litigation. S. Levine, “The Many Costs of Conflict,” online: Mediation Information Resource Center <http://mediate.com/articles/levine1.cfm> (date accessed: May 15, 2001).
14 See, e.g., “Whose Dispute”, supra note 5.
process, whereby the parties involved are encouraged to jointly problem-solve. While the ideal may not always materialize, the context of cooperation is more likely to be present in mediation than in, say, litigation.\textsuperscript{15} Research suggests that where parties have greater control over process, as they do in mediation, they experience a higher degree of self-esteem and self-confidence.\textsuperscript{16} Furthermore, an informal forum, such as mediation, is not limited to the specific confines of the rules of civil procedure or evidence, thus allowing for greater flexibility in process and arguably in outcome.\textsuperscript{17}

With respect to outcomes, ADR proponents argue that informal alternatives provide disputants with remedies that can more directly address the unique needs of the parties.\textsuperscript{18} Because formal adjudication is naturally concerned with legal rights (some would contend “overly” concerned), personal needs of the parties may go unmet. For example, an aggrieved party may seek resolution in the form of an apology, and yet, the court is not equipped to “order” such a non-legal remedy. However, informal processes like mediation can provide for such an apology. Mediation, thus, may provide “extralegal justice,” which goes beyond what the law alone will provide.\textsuperscript{19} In essence, ADR allows a claimant to assert his or her unique interests, even if these interests are not rooted in a legal right.

\textsuperscript{17} See, C. Menkel-Meadow, “Toward Another View of Legal Negotiating: The Structure of Problem-Solving” (1984) 31 UCLA Law Rev. 754. [hereinafter “Another View”]
\textsuperscript{19} D. Luban, “The Quality of Justice”(1989) 66 Denver Univ. Law Rev. 381. Note that Luban is perhaps more appropriately classified as a “critic” of ADR rather than a proponent.
Carrie Menkel-Meadow has written several scholarly pieces on the potential benefits of ADR. Yet, she recognizes that ADR is not suited for all situations. In drawing the debate away from whether adjudication or settlement is the better process, Menkel-Meadow contends that the focus should rather be on defining the standards by which the chosen process and resulting outcome are to be judged. Above all else, Menkel-Meadow emphasizes that good settlements must be truly consensual. Under such a rubric, mediation that is judicially or statutorily required or in effect coerced - by such circumstances as an inability to wait out the litigation, overbearing lawyers who “push” settlement, or power imbalances that “force” the weaker party to play along - is not “good” mediation. Menkel-Meadow’s concern with the misuse of power in ADR is echoed in the work of those more skeptical of ADR’s value.

ADR critics can be classified in various ways, but for purposes of this paper, I will focus only on those concerned with the “political” implications of informal dispute resolution processes. The “macropolitical” critics, those looking at class or group interests, assert that ADR furthers the rights of society’s “stronger” parties at the expense of society’s “weaker” parties. Richard Abel, a Critical Legal Studies scholar frames his argument around the competing interests of capital and the state (the stronger parties)

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21 See, “Whose Dispute” supra note 5.
22 In addition to critics I feature here, there are others who have concentrated on the economics of ADR, that is whether ADR, in its various forms, is in fact more cost and time efficient. These “empiricist” scholars include Kim Dayton, who conducted a comparative study of U.S. Federal District Courts. The study concluded that districts using ADR were “neither more efficient nor more effective in handling their caseloads or inducing settlement. K. Dayton, “The Myth of Alternative Dispute Resolution in the Federal Courts” (1991) 76 Iowa L. Rev. 889 at 915. Others such as Sanford Weisburst examine the costs arising from judicial review, or “judicial clean-up” of settlements reached with inadequate representation of a party. S. Weisburst, “Judicial Review of Settlements and Consent Decrees: An Economic Analysis” (1999) 28 J. Legal Stud. 55.
23 I am using “political” in the broadest sense here to mean that which relates to power - at the societal or macro level, as well as at the individual or micro level. Note that these categories are not mutually exclusive, but rather intertwined and cross-influential.
against those of the individual (the weaker party). Abel cautions against individual oppression as a by-product of informalism. He contends that formal dispute resolution processes function to guard against state and capital oppression of the individual, whereas informalism effectively “justif[ies] domination, authority, [and] the exercise of control from above.” Further, Abel asserts that the “movement from formalism to informalism reflects and carries forward a shift in power from the less privileged to the more.”

Owen Fiss represents another view on the macropolitical influences of ADR. In his influential article, Against Settlement, Fiss asserts that settlement disallows the court, or the state, if you will, from doing its job. According to Fiss, the courts are in place to “explicate and give force to the values embodied in authoritative texts such as the Constitution and statutes: to interpret those values and to bring reality into accord with them. This duty is not discharged when the parties settle.” Although peace between parties may be achieved through ADR, justice, as a social commodity cannot be.

Furthermore, Fiss claims that proponents of settlement fail to acknowledge the social function of the lawsuit. He holds that “Civil litigation is an institutional arrangement for using state power to bring a recalcitrant reality closer to our chosen ideals.” This attitude reflects faith in the judiciary to be in touch with public values. Fiss refers to the famous U.S. racial desegregation case, Brown v. Board of Education,

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25 “The Role of Informal Justice” ibid. at 257-258
26 Ibid. at 259.
27 Fiss, supra, note 10.
28 Ibid. at 1085.
29 Ibid. at 1089.
as an example of judicial power being "used to eradicate the caste structure." Social values, holds Fiss, cannot be adequately advanced behind closed doors.

Other critics argue that ADR’s focus on individual interests means that collective rights are deflected. By not asserting a legal right in a court of law, such a right is, in effect, depoliticized, and the chance for codifying a group right in precedent is lost. The confidentiality of mediation may also protect the wrongdoer from public scrutiny. In mediation, “[c]onflict becomes private, excluded from public scrutiny and made irrelevant to a public interest or more directly, to a class interest.” Or, as Luban suggests, settlements work in favour of “private peace” and in opposition to “public justice.”

Moving from the macro to the micro perspective, some ADR critics have focused on the individual power dynamics of ADR. They hold that the lack of formal safeguards in ADR leads to unchecked power imbalances, prejudice, and third party bias. Richard Delgado’s work, which centers on the interplay of prejudice and formalism, offers a useful point of departure to weigh formal against informal processes.

Richard Delgado criticizes the informality of ADR as enabling prejudice to operate un-checked in the dispute resolution process. Drawing upon social psychology research, Delgado begins with the assumption that most people possess some amount of

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31 Fiss, supra, note 10 at 1089.
36 Delgado adopts Gordon Allport’s definition of prejudice as "an aversive or hostile attitude toward a person who belongs to a group, simply because he belongs to that group, and is therefore presumed to have the objectionable qualities ascribed to the group." Ibid., at p. 1404, fn 8, quoting G. Allport, The Nature Of Prejudice 7. 25th Anniversary Edition (Reading, Mass.: Addison-Wesley, 1979).
prejudice against those from a different social classes, race, religious or ethnic backgrounds. Social psychology research also demonstrates a human tendency to conform to one’s immediate environment so as to avoid dissonance between internal biases and external ideals of tolerance or acceptance of difference. Delgado, thus, asserts that formal legal systems encourage appropriate behavior, and in capitalizing on this human tendency to conform, suppress prejudice. “Our judicial system...has incorporated societal norms of fairness and even-handedness into institutional expectations....These norms create a ‘public conscience and a standard for expected behavior that check overt signs of prejudice.’” To do away with formalities of traditional adjudication, according to Delgado, is to potentially disadvantage minority disputants who arguably require formal rules and structures in order to achieve fairness of process.

Delgado contends that the informality of ADR increases the risk of unfairness to vulnerable disputants, in other words, those who are outside the dominant group in North American society. He points to specific social psychology research that holds such risk is greatest when parties confront each other directly rather than through an intermediary; when there are few rule to manage conduct; when the forum is sealed in

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37 Delgado’s summary of social psychology research holds that we learn prejudice primarily from our parents, and that such attitudes are stabilized by the time of late adolescence and rarely change thereafter. Delgado, supra note 35 at 1380-1381.
38 Ibid. at 1387-1388, quoting G. Allport, The Nature of Prejudice, supra note 36 at 470.
39 While Delgado’s work focuses on racial minorities, his theory equally applies to other minorities, such as women, gays and lesbians, the poor, the disabled, and non-Christians.
such a way that public values are not guiding principles; and when the dispute involves an issue of a personal or intimate nature. Ultimately, Delgado deduces from the social psychology literature that the chances for prejudice are most likely exacerbated when a disputant of relatively lower status and power faces another person or institution of relatively higher status and power. If Delgado’s concerns are on track, then mediating rights-based employment disputes in an in-house forum, poses substantial risks to the claimant.

Delgado ultimately concludes that minority disputants should only use ADR when the party or parties on the other side of the table are of equal status and power. If a prejudice-free forum is the intent of an organization offering in-house mediation, and assuming that Delgado’s advice is worthy of taking, then such an organization would only offer peer-to-peer mediation; employee to supervisor mediation would, in Delgado’s scheme raise the specter of unfairness. In spite of his clear reservations of informal dispute resolution, Delgado concedes that mediation and other informal forums may offer parties greater flexibility, a speedier resolution, and financial savings. If one “must” resort to an informal process, Delgado suggests that the following elements be required: 1) clearly defined rule that define the scope and parameters of the discussions; 2) open proceedings; 3) a mechanism for higher review; 4) a mutually acceptable professionally

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44 Delgado, supra note 35 at 1402.
trained decision-maker or mediator; 5) and the option to be accompanied by legal counsel.45

Delgado’s work is provocative in that he raises well-founded concerns regarding the potential risks of bias in mediation. These concerns resonate particularly in this thesis since, I, like Delgado am interested in achieving fairness for CHRA and Title VII claimants – the very minority populations that Delgado concludes should not turn to mediation. I concur with Professor Delgado that minority claimants must proceed to the mediation table with caution. However, I assert that an adequate balance can be struck between the risks pointed out by Delgado and the benefits of in-house mediation. My fairness model rests, in part, on certain safeguards found in formal adjudication, which I review below.

III. Procedural Safeguards of Fairness in Formal Adjudication

In order to establish guidelines for procedural fairness in informal dispute resolution forums, I will examine the guidelines for procedural fairness in formal adjudicatory processes. Assuming that formal rules indeed promote fairness (and I believe that they do), then they offer direction in designing fair private mediation programs. However, formal processes differ from informal processes, such as mediation, in fundamental ways that prohibit a “cookie cutter” transfer of rules. For example, formal adjudication is almost always an open forum, whereas mediation is almost always confidential. Thus, we cannot draw exactly upon the rules that require judges to report their decisions and apply this to a closed-door mediation. To do so would be antithetical to one of mediation’s distinguishing characteristics - that it is a confidential proceeding.

45 Ibid. at 1403.
In designing fair informal processes, then, we must look to formal rules and extract the essence of formal fairness, even when we cannot simply transfer rules from forum to forum. Below, I seek to outline the essence of procedural safeguards in formal adjudication as found in the courts and tribunals of Canada and the United States.

Outlining the hallmarks of formal procedural fairness in employment discrimination claims requires an examination of the laws, the institutions and the rules that guarantee procedural fairness in Canada and the U.S. Since the focal point of this chapter is on federal rights, I will limit my review to fairness standards in federal jurisdictions.

A. Fairness Standards in Constitutional and Administrative Law

The Canadian and American constitutions, as the "law of laws" in each respective country, provide the fairness foundation upon which statutes, judicial institutions and rules of procedure reside. The Canadian constitution, namely the Charter of Rights and Freedoms guarantees "everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."46 Similarly, the U.S. Constitution promises due process protections: The 5th Amendment47 protects individuals from federal government abuses, while the 14th Amendment48 guards against abuses of power by state and local governments. Both amendments sanctify the rights of "life, liberty and property", and stipulate that the

46 Canadian Charter of Rights and Freedoms, s. 7, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11. [hereinafter Charter] [Emphasis added]. Note, however, that section 7 protections under the Charter arise when fundamental justice is violated in addition to an infringement of life, liberty or security of the person.
47 U.S. Const. amend. V.
48 U.S. Const. amend. XIV, section 1.
deprivation of such rights by the government must be done so through a *fair and just process.* These concepts of *fundamental justice* and *fair and just process* provide a baseline of fairness in Anglo American jurisprudence.

Fundamental procedural justice in Canadian jurisprudence is based upon the common law concept of “natural justice,” which rests on two pillar rules: 1) *audi alteram partem,* a Latin phrase which translates literally into “near the other side;” and 2) *nemo judex in causa sua debet esse* or “no one ought to be judged in his [sic] own cause.” The first rule mandates that all parties to a dispute must be heard. The second rule bars bias from playing a role in the proceedings. More broadly, natural justice guarantees that parties to a dispute receive adequate notice and a fair hearing. Although the term “natural justice” is not commonly used in U.S. courts, the guarantees of sufficient notice and a fair hearing are robust, the roots of which can be found in amendments to the U.S. Constitution and related judicial opinions.51

The Charter and the U.S. Constitution provide a structure of fairness, mandating *fundamental justice* and *fair and just process,* within which the CHRA and Title VII operate. Fairness of the administrative process, which governs these statutory employment rights, is ensured through judicial review. In comparing the due process guarantees of Title VII vis-à-vis the U.S. Constitution against the due process guarantees

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49 Ibid. [Emphasis added].
50 Amendment IV of the U.S. Constitution guards against unreasonable searches and seizures and mandates notice as to what, specifically, is to be searched. In addition to the due process clause previously mentioned, Amendment V of the U.S. Constitution also guards against self-incrimination, which is akin to the natural justice tenet of *nemo judex in causa sua debet esse.* Amendment VI of the U.S. Constitution provides for a “speedy and public trial by an impartial jury,” the right to notice of the charges presented, and the right of the accused to face witnesses against him or her. Although the 4th, 5th, and 6th Amendments pertain to criminal matters, the essence of due process gleaned from these amendments contribute to the collective understanding and expectations of fairness.
of the CHRA in relation to the Charter, we see, however, quite a different system. These differences can be understood by looking at the comparatively different roles and authority of the Canadian and American administrative bodies responsible for shepherding employment rights complaints and the relationship between these agencies and their respective federal judiciary.

One of the key distinctions between the Canadian Human Rights Commission (CHRC) and the U.S. Equal Employment Opportunity Commission (EEOC) lies in the authority that these agencies hold in overseeing employment rights. The CHRC holds comparatively more enforcement power than its American counterpart. Whereas the CHRC is empowered to dismiss a complaint for lack of merit, and thereby stop the adjudicative process, the EEOC is not authorized to dismiss Title VII complaints.

Employment rights claimants in the U.S. initiate their complaint with the EEOC, which directs the claim through the administrative process. The EEOC investigates the allegations of discrimination, but it does not, however, provide an adjudicatory forum to decide the merits of the case. At best, the EEOC will sue the responding employer on behalf of the charging party (employee). In any event, the EEOC will issue the charging party a Right to Sue Letter upon completion of its review of the case – even if the EEOC determines that it is unlikely that discrimination occurred. As mentioned, the EEOC is not statutorily empowered to dismiss a Title VII claim, a power reserved for the federal judiciary. Having jumped the administrative review hurdles, with a Right to Sue Letter in hand, the U.S. claimant may pursue his or her employment rights in federal court.

Employees in Canada, like those in the United States, begin their human rights claim by filing a complaint with the appropriate federal or provincial human rights claim by filing a complaint with the appropriate federal or provincial human rights

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52 Claimants may also initiate a parallel claim with their state's Fair Employment Practices office.
commission. Generally speaking, human rights commissions across Canada administer complaints of discrimination up to the point of adjudication. The CHRC, for example, may direct an investigation of the complaint filed, arrange for conciliation between the parties, entertain proposed settlement agreements, and put forth a request to the Canadian Human Rights Tribunal to conduct an inquiry. The CHRC can also dismiss a complaint for lack of merit. If, on the other hand, the CHRC finds that discrimination was likely to have occurred, it refers the complaint to the Canadian Human Rights Tribunal (CHRT), which then offers a full hearing on the discrimination charges.

Since adjudication of CHRA rights takes place within the CHRT, and thus outside a constitutionally mandated court (a "section 96 court"), judicial review of constitutionally guaranteed fairness of a CHRC or CHRT proceeding requires a separate and distinct analysis in Canadian jurisprudence. Where a party feels that the CHRC or the CHRT acted in violation of his or her due process rights, the party may appeal to the federal court and request a Section 7 review.

To review the fairness of a Title VII process does not, in contrast, require a separate analysis. This can be explained by the fact that Title VII is enforced by U.S. federal courts rather than through an administrative tribunal. U.S. federal courts, as constitutionally created courts,\textsuperscript{53} are vested with the power to directly enforce the laws of the United States, including those guaranteeing due process. Since formal adjudication of Title VII claims are conducted in the federal courts of the United States, judicial review of inferior courts by superior courts is the mechanism by which procedural fairness is guaranteed. Constitutional due process review is, thus, not required as an additional step

\textsuperscript{53} U.S. Const. art. III states "The judicial power of the United States, shall be vested in one supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish."
in Title VII litigation, but is rather inherent in the law’s design and enforcement through the U.S. federal judicial system. Directly or indirectly, the constitutional guarantees of due process provide an archetype of fundamental justice and fair and just process for resolving employment rights in formal and informal proceedings alike.

B. Structural Safeguards of Fairness

In addition to the Constitutional and administrative guarantees of fair process, the judicial systems in both Canada and the U.S. contain built-in safeguards of fairness. By this, I refer primarily to the mechanisms that insure neutrality of the decision-maker and systemic checks, such as judicial review, which make courts accountable in upholding principles of fairness and justice. In examining these structural safeguards, I will look to the adjudicators of the CHRA and Title VII, the CHRT the U.S. Federal Courts, respectively.

As previously mentioned, CHRA claims are adjudicated in the first instance by the CHRT. The Supreme Court of Canada has confirmed that human rights tribunals hold jurisdiction over complaints arising out of human rights statutes. The Tribunal, as a competent trier of fact and law, is required, as are section 96 courts, to adjudicate complaints in an unbiased fashion. The Canadian Human Rights Act defines competent Tribunal members as those having “experience, expertise, and interest in, and sensitivity

55 Canadian Human Rights Act, R.S.C. 1985, c. H-6, s. 50(2) specifies that the Tribunal has the express authority to determine questions of law.
56 A recent case, Zundel v. Citron (April 13, 1999), Doc. T-1411-98 (Fed. T.D.) held that a Canadian Human Rights Tribunal member, who had previously sat on the Ontario Human Rights Commission (OHRC) at the time when the then Chief Commissioner of the Ontario Human Rights Commission made statements revealing strong actual bias against the complainant, Zundel, raised a reasonable apprehension of bias in the Tribunal member. The Federal court felt that the likelihood of bias was strong enough to remove the former OHRC member from her role in adjudicating Zundel’s case before the Tribunal, even though the incident of actual bias in the OHRC had occurred some ten years prior.
to, human rights." In addition, the CHRA requires that the Chairperson and the Vice-Chairperson to have been members in good standing of the at least one provincial bar for a minimum of ten years; the Act further requires that two additional Tribunal members also possess legal qualifications. This requirement further insures competency and presumably an ethical track record.

U.S. Federal judges preside as the decision-makers in Title VII claims. Laws and judicial codes of conduct require judges to act without bias and prejudice. Theoretically, federal judges are freed from political allegiances and a changing political landscape in that they are appointed rather than elected and enjoy life tenure. In matters where a jury is deciding a case rather than a judge, voir dire enables the parties to select out biased jurors.

Judicial review is an additional structural safeguard for fairness in both Canada and the United States. As previously discussed, the Tribunal's decisions and processes are subject to judicial review by the Canadian Federal Court. In the United States, decisions of the District federal courts are reviewed by the Courts of Appeal, and Courts of Appeal decisions are reviewed by the U.S. Supreme Court. Together, these elements of the formal adjudication system provide potential defenses against bias on the part of the decision-maker as well as provide checks on unfair process in general.

57 Canadian Human Rights Act, R.S.C. 1985, c. H-6, s. 48.1
60 However, one might argue that the judicial branch is indeed political, in spite of the Founding Fathers intention that it be apolitical as a balance against the overtly political Legislative and Executive branch. The Supreme Court of the United States demonstrated its political nature recently when it, in effect, decided the winner in the 2000 U.S. Presidential Election.
61 The Civil Rights Act of 1991 (Pub. L. 102-166) added on the option of a jury trial to some Title VII cases.
C. Rules of Procedure as Sources of Fairness

Rules of procedure provide an additional prospective layer of insurance for a fair process. The Canadian Human Rights Act, however, does not require the Tribunal to conduct its proceedings within prescribed procedural rules. Rather the Act guides the Tribunal to conduct its proceedings “as informally and expeditiously as the requirements of natural justice and the rules of procedure allow.” The Tribunal is, nonetheless, required to conduct an open hearing on the complaint, unless, the judge determines that the public security bears a substantial risk that fairness would be greatly compromised, or there is a “serious possibility that the life, liberty or security of a person will be endangered.” Unlike traditional courts, however, the Tribunal is not bound by strict rules of evidence. Rather, whether evidence is admitted depends on the presiding Tribunal member’s discretion as to what is “credible or trustworthy in the circumstances of the case.” Natural justice requires that those coming before the Tribunal have the right to be heard, to cross-examine witnesses and present evidence.

In the event that a decision of the Tribunal is judicially reviewed by the (Canadian) Federal Court, then the Federal Court Rules, which apply to the Federal Court but not the Tribunal, become applicable. In the federal court forum as in the Tribunal, the rules of natural justice provide the basis for a fair process, guaranteeing the parties an opportunity to present their case and promising a bias-free decision. To facilitate the orderly presentation of each side’s case, the Rules direct the parties to submit concise

63 Canadian Human Rights Act, R.S.C. 1985, c. H-6, s. 48.9(1).
64 Canadian Human Rights Act, R.S.C. 1985, c. H-6, s. 48.3(6) and (7).
65 Canadian Human Rights Act, R.S.C. 1985, c. H-6, s. 48.3(9).
66 Canadian Human Rights Act, R.S.C. 1985, c. H-6, s. 48.3(11).
pleadings of fact and law as well as a concise statement of the order sought. Brevity, theoretically conserves time in litigation, while the pleadings themselves serves as fair notice to the responding party. The Federal Rules further demonstrate an interest in minimizing litigation time, by directing the court to “secure the just, most expeditious and least expensive determination of every proceeding on its merits.” Furthermore, the court can dismiss a proceeding for undue delay on the part of a party to the litigation. Additionally, a signature of a called lawyer must accompany all filings submitted to the federal court. Bound by ethical and professional standards, the signing lawyer is required, as an officer of the court to try cases in good faith, and to proceed in a timely and cost-effective manner. Finally, to safeguard against bias, the Federal Court Act, which accompanies the Rules, directs the court to publicly file their reasons for judgment. By requiring the publication of a judgment’s reasoning, the decision is made available for public scrutiny and appellate review, thus adding additional assurances of fairness.

U.S. Federal Courts operate within the Federal Rules of Civil Procedure. As with their Canadian counterpart, the U.S. Rules require a “just, speedy, and inexpensive determination of every trial.” Also in line with the Canadian rules, the U.S. rules require clear and timely filings of pleadings, motions, and responses, which minimize delay and

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67 Federal Court Rules 1998, r. 70(1). Fair notice is further guaranteed through Rule 174, which directs that “every pleading shall contain a concise statement of material fact on which the party relies.” Rule 181 states that “a pleading shall contain particulars of every allegation contained [therein].”
68 Federal Court Rules 1998, Part I, s. 3.
69 Federal Court Rules 1998, r. 167.
70 Federal Court Act, R.S.C. 1985, c. F-7, s. 48.
71 The Canadian Bar Association’s Code of Ethics, Chapter II stipulates that “[t]he lawyer should serve his [sic] client in a conscientious, diligent and efficient manner and he [sic] should provide a quality of service at least equal to that which lawyers generally would expect of a competent lawyer in a like situation.”
72 Federal Court Act, R.S.C. 1985, c. F-7, s. 51.
provide notice to the parties and to the Court.\textsuperscript{74} American lawyers are similarly required to sign off on all filings submitted to the federal court;\textsuperscript{75} and as with their Canadian counterparts, licensed lawyers in the U.S. are bound by a code of ethics to proceed in good faith.\textsuperscript{76} U.S. federal courts are, like the Canadian federal court, required to report their decisions – again opening up the decision to a fairness review by the public and superior courts.\textsuperscript{77}

Looking back at Delgado’s concerns with fairness, it should come as no surprise that the federal court rules and structure in Canada and the United States, as formal mechanisms, meet his standards. The federal judicial system in both countries provide for 1) clear rules, defining the scope and parameters of the resolution process; 2) open process and publicly reported outcomes; 3) review of the process and decision; 4) professionally trained and appointed decision-makers; and 5) assistance and guidance of legal counsel in the dispute resolution process. However, I posit that Delgado would have concerns regarding fairness with the Canadian Human Rights Tribunal’s comparatively informal dispute resolution process. Delgado would likely point to the Tribunal’s lack of formal procedure and the wide discretion afforded Tribunal members as potential danger spots. I suggest that the Tribunal’s informal process, like that of mediation in general, offers disputants, organizations and society at large potential benefits. While Professor Delgado certainly raises worthy concerns, the risks he sets out can be, to some extent, controlled. Below, I set out what I believe to be the five elements

\textsuperscript{76} Model Rules of Professional Conduct, American Bar Association, 2001. Rule 1.3 directs lawyers to act with diligence on behalf of clients. Rule 3.2 states “a lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.”
of a fair mediation process, a model, if you will, that balances the inherent risks and benefits of an in-house mediation program.

**IV. Features of a Fair “In-House” Mediation Forum**

Safeguards of procedural fairness in formal law provide guidance in establishing procedural fairness in mediation. Yet, we cannot simply copy these formal protections, en masse, and paste them into a forum like mediation without offending some of the foundational elements that make mediation the alternative it is to litigation. (And, I do believe that creating viable and fair litigation alternative is important). For example, one of the proclaimed benefits of mediation that sets it apart from litigation is its efficiency in terms of time, and consequently money, saved. That mediation is a confidential forum contributes to the speed with which disputes can be resolved. Where parties are more focused on open discussions of the interests and rights at stake and less focused on strategizing for points with a judge or a jury, resolutions will likely come earlier and with less strife. I do not include confidentiality as one of the five elements of a fair IDR, because confidentiality is not in and of itself essential to fairness. Yet, confidentiality is an essential and critical feature of the mediation IDR process. The topic of confidentiality deserves special attention here, and I so I have included some comments on this immediately below and added a special note on it at the end of this section.

Mediation is indeed different from formal adjudicatory proceedings. In fact, certain elements of formal fairness, such as the requirement of an open forum, are expressly excluded from the mediation process. I am considering here the feature of
confidentiality, which is a hallmark of mediation. Formal rules mandating an open proceeding are in direct opposition to confidentiality in mediation. And yet, the benefits of free-flowing discussion made possible by confidentiality in mediation arguably mitigate the risks inherent in a closed forum. This is debatable. Where a confidential proceeding puts a disputant at risk, either because confidentiality cannot be assured or because of the sensitive nature of the dispute, then mediation should not be selected as the dispute resolution mechanism. Certainly, mediation, with its confidentiality component, is not appropriate for all disputes.\(^{78}\)

Likewise, the rules of evidence that would bar hearsay from a party’s testimony in court have no place in a mediation process that thrives on unfettered dynamic dialogue. Here again, a risk-benefit analysis is in order. The benefit of not having rules of evidence in mediation means that a wider array of information is available to examine the dispute and to hopefully offer an enhanced perspective on the parties’ positions. The risk of not having rules of evidence is that the information may not be authenticated or validated. However, given that the parties are the decision-makers rather than a judge or jury, then the need to authenticate the evidence loses its importance. Thus, some of the elements—such as confidentiality and rules of evidence—needed to achieve fairness in formal adjudication are not absolutely necessary to achieve fairness in mediation.

Although we cannot directly apply formal rules to such an informal process, we can look behind these formal rules and often assemble parallel mechanism to achieve similar goals. Again, looking to the formal requirement that hearings be open and a decision recorded, we can deduce that a goal behind this rule is to hold the decision

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\(^{78}\) For example, mediation may not be appropriate for disputes involving allegations of sexual harassment. See, J. R. Harkavy, “Privatizing Workplace Justice: The Advent of Mediation in Resolving Sexual Harassment Disputes” (1999) 34 Wake Forest L. Rev. 135.
maker accountable for his or her role in the courtroom. An open forum, in part, guards against bias. Below, I discuss two ways that bias in mediation can be corrected – by retaining the right to pursue one’s claim in a court of law,79 and by creating an external, governmental oversight body of the private organization’s mediation program.

Admittedly, another goal of an open proceeding is to create law in the public space. That mediation does not contribute to the public body of law, according to Professor Fiss, is one of its “flaws.” Mediation cannot be all things to all people and yet it can provide a fair alternative to the courts and tribunals.

The elements of a just mediation program set forth below are in response to some of the ADR critics’ concerns, namely Professor Delgado’s. In addressing these fair process concerns, I have attempted to draw upon the essential lessons of formal procedural safeguards to the extent possible. As just discussed, the fundamental differences between adjudication and mediation limit the degree to which formal safeguards can be incorporated wholly into a mediation program.

The model below is based on several thoughtful protocols, draft legislation, and guidelines from well-respected Canadian and American sources in the field of ADR. Specifically, I have drawn upon the American Arbitration Association’s (AAA) Due Process Protocol for Mediation and Arbitration80; the Society of Professions in Dispute Resolution (SPIDR), Committee on ADR in the Workplace Initiative’s Guidelines for the Design and Integrated Conflict Management Systems Within Organizations,81 the

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79 This is in recognition that mediation does not always work and is not always fair, and that in some circumstances, one must seek justice through formal channels.
Canadian Human Rights Act Review Panel’s report to the Canadian Minister of Justice, entitled *Promoting Equality: A New Vision 2000*; National Conference of Commissioners of Uniform State Laws’ *Draft Uniform Mediation Act*; and the EEOC’s report on *Best Practices Presented by Companies in Alternative Dispute Resolution*. The composite model I set out responds to some of the concerns raised by ADR’s critics, while at the same time reflects the fairness principles embodied in formal adjudication.

### A. Voluntary Participation

One of the hallmarks of mediation is that disputants voluntarily agree to address their dispute in mediation. There are two primary rationales as to why voluntary participation promotes a fair process. Carrie Menkel-Meadow, as discussed above, argues that consensual participation in mediation guards against abuse of power. Consent to mediate — *prior to* mediation — however, does not guard against power leveraging *during* the mediation. The second rationale explaining the relationship between voluntariness and fairness lies in contract doctrine.

Contract law governs private mediation done outside the bounds of the courtroom. As such, the doctrine of unconscionability in contract law requires that parties enter and perform on the contract through informed consent and in absence of duress. Before beginning the mediation process, parties should be invited to initiate the process by reviewing and signing an *agreement to mediate*. In its official policy statements, the

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82 Canadian Human Rights Act Review Panel, Department of Justice. (Ottawa: Canadian Department of Justice, 2000) [hereinafter *Promoting Equality*].

83 *Draft Uniform Mediation Act* (February 2001) (on file with the author).


EEOC has unequivocally stated its opposition to mandatory binding arbitration as a condition of employment.\(^{86}\) Note, however, that the AAA’s Task Force on ADR in Employment was unable to resolve the dilemma over whether mandatory mediation or arbitration was acceptable or not as a condition of initial or continued employment.\(^{87}\)

Much of the debate over voluntary versus mandatory participation revolves around the employees’ participation. However, it should not be assumed that the organization does not have the choice to opt out of mediation that it feels would do the dispute injustice from the organization’s point of view. For example, the organization may, for some reason, feel unnecessarily vulnerable in mediation and prefer the reporting mechanisms of a formal dispute resolution process to protect its interests. The United States Postal Service requires in its mediation program that management, as the organizational representative, agree to mediation and remain in the process at least until the employee has an opportunity to state his or her complaint.\(^{88}\) In other words, the U.S. Postal Service is required to provide the employee with an opportunity to be heard, but is not required to remain in the mediation process if the process breaks down.

Contract law also governs any agreement reached in the process of mediation. Here again, informed consent proves a critical element for an enforceable contract. If the parties reach a settlement through the mediation, the terms of the agreement will be memorialized in a written contract, which is to be enforceable in a court of law. Additionally, contract law governs any confidentiality agreements entered into in the

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\(^{87}\) "AAA Due Process Protocol," *supra* note 80.

mediation. While the rights at the heart of an employment discrimination suit are rooted in statutes, and would be formally enforced by a Tribunal or federal court, these rights as addressed in an informal mediation forum would be enforced through contract law.

In balancing the risks and benefits of voluntary versus required participation in mediation, fairness is better served by making mediation voluntary. To force parties to mediate his or her employment disputes would fly in the face of informed consent under contract law and furthermore offend the spirit of due process, to which every employment rights claimant is entitled.

B. Retention of Statutory Right to Judicial Relief

The second hallmark of a fair mediation process is that parties possessing a statutory claim, who attempt to resolve their dispute through mediation, retain the option to pursue their claim through formal adjudicative procedures. SPIDR’s Guidelines direct that informal mediation “should not preclude access to the public justice system or governmental agencies, except where the disputants knowingly and voluntarily agree otherwise.”\(^89\) By retaining access to formal adjudication, parties who address their employment discrimination dispute through an in-house mediation process, maintain the option of a formal review of their dispute. However, because mediation is conducted confidentially, the actual content of any mediation communications will be, under most circumstances, inadmissible in a court of law. Any formal lawsuit that is subsequently filed regarding an informally mediated dispute will proceed as a de novo trial. Further discussion of the confidentiality issue follows below.

\(^{89}\)“SPIDR Guidelines,” supra note 81 at 25.
The Canadian Human Rights Act Review Panel comments that “[i]t is usually better for both workers and employers if equality issues can be resolved in the workplace, with the Tribunal and the Commission remaining as an alternative if such efforts fail.”

Union employees in Canada may, however, be precluded from bringing a complaint under the CHRA, where the complainant has failed to exhaust “reasonably available” grievance procedures that address discrimination. Under the Canada Labour Code, arbitrators are empowered to interpret the CHRA and apply remedies under the Act to union employees. Non-union employees in Canada, on the other hand, who cannot seek redress through a collective bargaining agreement or other statutory processes directed at a discrimination claim, should still maintain access to the Canadian Human Rights Tribunal where mediation is attempted but fails.

C. Reprisal or Retaliation for Mediation Prohibited

Employees who bring forth a complaint of workplace discrimination to an organization’s mediation forum should be protected from reprisal or retaliation. To not build in such a safeguard would render employees unreasonably vulnerable to termination, demotion or unfavourable reassignments. Furthermore, Title VII specifically stipulates that it is an unlawful employment practice to discriminate against an employee or applicant for employment “because he [sic.] has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under [Title VII].” Canada’s CHRA offers a similar protection to employees. In the spirit of

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90 Promoting Equality, supra note 82 at 27.
91 Canadian Human Rights Act, R.S.C. 1985, c. H-6, s. 41(1).
92 Promoting Equality, supra note 82 Canadian Human Rights Act, R.S.C. 1985, c. H-6, at 85.
these laws, employees who bring their rights-based complaints to an in-house mediation should be afforded the same protection.

D. External, Qualified, Neutral Mediator

A mediator facilitates a negotiation between the disputants and assists them in reaching their own decision. This is in distinct contrast to a judge or arbitrator, who considers the merits of the case and renders a decision for the parties. Because of this comparatively passive role, the mediator cannot inject as much bias into the dispute resolution process as can a formal adjudicator. Nonetheless, the mediator will inevitably possess certain attitudes, beliefs, and personal qualities that can impact the process, even in a subtle way. Bias, actual or perceived, in mediation may show up in the form of one party having more "air time" than the other, or one party experiencing greater rapport with the mediator. Because the perception of fairness (as well as actual fairness) is critical to the mediation process, selecting an in-house mediator that is neutral is essential to the process.  

Below are certain safeguards that an organization can put into place to best insure against bias in the mediator.

First of all, mediators hired for in-house mediation should come from outside the organization. Internal mediators will inevitably bring preconceived notions about management, staff and individuals that have circulated around the organization's halls and water coolers. Internal mediators will naturally feel certain allegiances with departments, work groups, and acquaintances. The greatest risk of bias occurs when a dispute arises between management and staff, and internal mediators are those from the

95 See, Bingham, *supra* note 88.
company’s human resource departments. In this situation, the human resource personnel (as mediator) might experience an obligation to management, who probably directs their department on sensitive employee relation matters, and who often holds the keys to promotions or merit increases. Generally, an internal mediator is more likely to be implicitly swayed by his or her own personal experiences in the organization in such a way that the mediation could be tinted in a splash of bias.

The United States Postal Service has experimented in using both internal and external mediators in its national mediation program to address rights-based employment discrimination complaints. Based on exit surveys of disputants, external mediators were rated by Postal Service employees and management as being significantly fairer than internal mediators. Additionally, participants reported a greater satisfaction with the process generally, in which the mediation was conducted by an external mediator as compared to the mediation conducted by an inside neutral. Now, the U.S. Postal Service only uses external mediators to resolve such employment disputes.

All parties to the dispute should be involved in selecting, and perhaps paying the fee for their mediator. The in-house mediation program administrator, with input from staff and management, would compile a list of qualified mediators to be included on a roster. Qualified mediators would be those possessing a minimum amount of experience and training. In locales where mediators are “certified” by an ADR organization,

96 Bingham, supra note 88.
97 The U.S. Postal Service requires its contract mediators to possess a minimum of 40 hours basic mediation training, plus a 3-day advanced course on transformative mediation (based on the model set forth by Baruch-Bush and Folger, supra note 12), plus at least ten mediations as a lead or co-mediator, and positive evaluations from a qualified source. The EEOC requires its contract mediators to have a minimum of five years of mediation experience, including some specific work as a lead mediator in equal employment related disputes.
certification may be considered as a prerequisite for serving as an in-house mediator.\textsuperscript{98} Qualification and certification of mediators is currently a hotly debated topic, which the confines of this paper prohibit me from entertaining at this point. Nonetheless, organizations would serve their mediation program well to carefully outline requirements for external mediators, with an emphasis on training and experience.\textsuperscript{99} Ideally, disputants would jointly select their mediators from the company’s roster of approved externals. With consideration of time efficiency, having the disputants select their mediator may prove to be administratively challenging. In such a case, the program administrator may appoint a mediator on behalf of the parties, with the parties reserving the right to reject a mediator for potential bias. Mediators on the organization’s roster of neutrals would be required to submit regularly updated disclosure statement of all potential conflicts.

From whom the external mediator is paid poses yet another question for debate. The American Arbitration Association, for example, asserts that “impartiality is best assured by the parties sharing the fees and expenses of the mediator.”\textsuperscript{100} The rationale behind this policy of fee sharing is to eliminate any possibility of favoritism toward the paying party. However, examining whom the parties are is critical in this debate. For example, where the disputants are co-workers of relatively equal financial status or rank, it seems reasonable to require the parties to split the cost of the mediator. Alternatively, in the same situation, it might also be reasonable for the organization to pay the mediator.

\textsuperscript{98} The British Columbia Arbitration & Mediation Institute accredits chartered mediators (C.Med.) who have completed at least 80 hours of mediation theory as well as a minimum of 100 hours of study in dispute resolution generally, plus successfully passed a mediation skills training program, and has conducted at least 10 mediations as a lead mediator or served as the chairperson in at least five fee billed mediations.

\textsuperscript{99} I am not of the opinion that mediators must be lawyers, although to conduct employment discrimination mediation, mediators must have a solid understanding of employment law. I am of the opinion that “good” mediators draw upon multidisciplinary expertise, including law, psychology and organizational behavior.

\textsuperscript{100} "AAA Due Process Protocol," supra note 80 at 4.
on behalf of the disputing co-workers, given that the organization itself is not a party to the dispute. Where the disputants are the employer organization or a manager/supervisor and an employee, then who pays the mediator may again become an issue. Arguably, an external mediator who is paid by an organization may have an implicit bias towards the organization. Even where the parties split the mediator fee, there is a chance that a repeat mediator, who has steady contact with management in an organization, will develop favoritism towards the organization, and arguably to the detriment of individual employees. The truth is: there is no failsafe mechanism against mediator bias. However, so long as the external mediators continued placement on the organization’s mediator roster is not dependent on outcomes of mediation, in other words, the percentage of settlements in favour of management versus those in favour of employees, then this worry is diminished.

E. External Oversight Body

In these times of deregulation, government seems more and more willing to relinquish some of its obligations to the private sector. Deregulation is not necessarily an unwise strategy, especially when greater efficiency can be achieved without compromising the public interest. However, shifting responsibility for employment rights “enforcement” from the public to the private sector, even via informal in-house mediation, should be done carefully and cautiously. In fact, I argue that until private

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101 Note, however, in Canada where the employer is vicariously liable for harassment that occurs in connection to one’s job, the employer will often have an interest in the dispute, even when it is not a direct party to the conflict. See Robichaud v. Canada (Treasury Board), [1987] 2 S.C.R. 84 [hereinafter Robichaud].

102 Private in-house mediation is not an “enforcement” mechanism, per se, but may serve to dissolve rights-based disputes that would otherwise fall upon the government to enforce.
organizations have developed a track record of providing objectively fair mediation processes, a governmental oversight body should oversee or certify private in-house mediation.

The Canadian Human Rights Act Review Panel has developed what it calls the Internal Responsibility Model for internal organizational dispute resolution processes. Recognizing that because an employer has the ultimate control over the workplace environment, the Review Panel asserts that responsibility for workplace equality should follow control. In its recommendations for amending the CHRA, the Review Panel suggests that where organizations have instituted an effective internal responsibility system to resolve disputes arising out CHRA rights, claimants who bring their claim to the Tribunal rather than first attempting resolution through the internal system, may have their complaints dismissed for failing to first pursue other adequate avenues of redress. What is most interesting about this recommendation is that the Review Panel, is, in effect, suggesting a process whereby the Human Rights Commission would certify the adequacy of organizational internal responsibility systems.

I am hesitant about the proposed amendment to the CHRA that would enable the Tribunal to dismiss a complaint because of the availability of a certified in-house dispute resolution option. Such an amendment would subtract the judicial review safeguard set out above. In addition, such an amendment may inhibit access to (public) justice. However, the proposed changes would not require the Tribunal to dismiss a complaint

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103 The Review Panel points to the Canadian high court’s decision in Robichaud v. Canada, supra note 101, which held that employers are strictly liable for workplace sexual harassment. The Court stated: “Indeed, if the [CHRA] is concerned with effects of discrimination rather than its causes (or motivations), it must be admitted that only an employer can remedy undesirable effects; only an employer can provide the most important remedy – a healthy work environment.” Robichaud at 94.
arising from an organization possessing an internal responsibility system, but rather it would simply create the option for the Tribunal to dismiss such a complaint.

F. A Final Note on Confidentiality in Mediation

Confidentiality\textsuperscript{104} is one of the cornerstones of mediation and, at the same time, a feature that inspires concern from ADR critics, such as Fiss and Delgado. Although confidentiality in and of itself may not be classified as a safeguard for a fair process, I cannot set out a model for in-house mediation without including an endorsement of confidentiality as a necessary element. Confidentiality can, nonetheless, enhance rapport among the parties through the spirit of openness that confidentiality breeds. Where constructive rapport is established, the parties are more likely to perceive that the mediation is being conducted fairly.\textsuperscript{105} I concede, though, that a gap can exist between perceived and actual fairness. That being said, let us turn to the critics’ skepticism regarding confidentiality.

Fiss, as discussed earlier in this thesis, concluded that law cannot move to the beat of society’s advancing values within the confines of confidential, off-the-record settlements. Confidential dispute resolution, say the critics, robs the public of common law precedent. Delgado, on the other hand, worries that the closed and confidential forum will serve as a breeding ground for abuse of power by the stronger party over the weaker party. Open proceedings serve to keep bias in check, by allowing in a public conscience for fairness, and creating a record subject to a higher review. Although these

\textsuperscript{104} Confidentiality, to which the parties and mediator consent and agree, creates a privilege upon which the parties and the mediator can rely in subsequent proceedings.

concerns are valid, one cannot remove confidentiality without changing the unique
dynamics of mediation. If a dispute is of significant precedential value or there is a
significant risk of bias or abuse of power, then the disputing parties and the public
interest are perhaps best served by formal adjudication or an informal, but open forum.

The proposed Uniform Mediation Act, a product of the National Commissioners
of Uniform State Laws in the United States, heralds confidentiality as the “primary
focus” of the Act. 106 The drafting commissioners emphasis on confidentiality reflects an
interest in balancing the benefits and risks of confidentiality and creating a standard upon
which disputants can safely rely. The benefit of confidentiality lies in its promotion of
candor on behalf of the parties and mediator in the dispute resolution process. The risks
of confidentiality arise when the privilege of mediation is not honored. Where
confidentiality is not preserved evenly across jurisdictions 107 and venues, parties are
unable to adequately fashion expectations of just how privileged the mediation is. The
risk, then, is revealing something in confidence, that is ultimately not protected
communication. The drafters of the Uniform Act strive to secure confidentiality as a
sanctified privilege in mediation in recognition of the critical role candor plays in
unraveling the intricacies of conflict.

Confidentiality, more than any other element, distinguishes mediation from
formal dispute resolution methods. In contradistinction from formal dispute resolution
processes, parties engaged in confidential mediation are theoretically freed from the

106 Uniform Mediation Act, supra, note 83, prefatory note at 4. Specifically, the proposed Uniform
Mediation Act is concerned with evidentiary privilege.
107 The drafters of the Uniform Mediation Act note that nearly all U.S. states have codified confidentiality
protections in state legislation. However, these statutes – which total approximately 250 – fail to provide
clear guidelines regarding the scope of confidentiality protections and ultimately frustrate the parties’
ability to adjust expectations around privileged communications.
constraints of monitoring their speech for its probative impact, and are rather encouraged to constructively discuss how to best resolve the dispute at hand. Confidentiality only takes on merit where the parties and mediator trust that the mediation communications will, in fact, be privileged from evidence in formal later court proceedings. 108 Diminished, but not completely eradicated, is this threat that what is said can and will be used against you in a court of law. 109 The challenge, then, for the field of mediation, is to more firmly (and uniformly) institutionalize the privileged nature of mediation communication. The Uniform Mediation Act is certainly meeting this challenge head on and providing promise that confidentiality as a privilege will, in due time, be solidified.

V. Summary

The debate regarding fairness in mediating rights-based disputes is alive and well, as it should be. As a consequence of this dialogue between the proponents and critics of ADR mediation as a dispute resolution method is being fine-tuned. I hold that in-house mediation, or IDR, as a developing tool, offers potential benefits to employees, organizations and the public. Clearly, the greatest risks in private mediation are to employees, who are arguably the most vulnerable, especially when the “other” disputant is the employer organization. With this consideration in mind, employees still stand to benefit from mediating rather than litigating their disputes – in terms of time and money savings, relationship preservation, and personal satisfaction. However, such benefits can

108 See, e.g., L. R. Freedman & M. L. Prigoff, “Confidentiality in Mediation: The Need for Protection” (1986) 2 Ohio State J. Dispute Resolution 37. 109 See, e.g. NLRB v. Macaluso, 618 F. 2d 51 (9th Cir. 1980) in which the court balanced the competing public interest in preserving the sanctity of privileged mediation communication against the evidentiary interest in hearing the presiding mediator’s testimony regarding the prior mediation. The court upheld the mediator’s privileged communication.
only be realized in so far as bias is kept in check and power between the parties is balanced as much as possible.

The trend of privatizing employment rights protection is under way, to the point where in-house mediation is being encouraged by proposed and actual legislation in both Canada and the United States. Employees and organizations alike would do well to jointly develop internal dispute resolution systems that reflect the unique culture of the workplace and honor the principles of natural justice and fairness. Cooperation of all stakeholders in the organization is critical in planning and implementing the system, being ever mindful of the need to carefully balance the inherent risks and benefits in mediating rights-based disputes.
Conclusion

This thesis has examined the promises and challenges of private justice in the modern Anglo-American corporation. I have focused primarily on these aspects of IDR from the perspective of employees, and in particular where disputes arise between employee and employer. Disputes always involve issues of power, and thus much of this thesis has focused on the power of the corporation, particularly in relation to its employees.

Chapter One framed the locus of this inquiry, with a survey of the corporation's influential role in today's society – as employer to more than 140 million Americans and 14 million Canadians; and as a dominant force in setting national economic, political, and social agendas. To explain how the corporation rose to its position of social influence, I have offered a broad-brush historical account, focusing on two important legal developments – corporate personhood and corporate governance. The stories of corporate personhood and corporate governance illustrate how the law serves to regulate power and organize relationships among the corporation, society, and the various corporate constituents. I have argued that in granting legal person status to the corporation, the state has afforded the corporate person certain constitutional rights – namely liberty and property rights – which have enabled the corporation to secure its social power base. In addition to its rights-bearing social status, the corporation in its ability to amass and hold large amounts of financial capital has become one of, if not the, most powerful institutions in our society.

Understanding the nature and source of corporate power in society provides a contextual framework for understanding the power dynamics that occur inside the
corporate workplace. In other words, the power that the corporation enjoys in society, generally, is transferable to the relationship that the corporation-as-employer has with its employees; this then affects the power dynamic between employer and employee in the context of IDR. Furthermore, in understanding the social power and legitimacy that corporations possess, we can better understand how it has come to pass that public legal institutions have delegated certain legal powers to the corporation to conduct private versions of lawmaking, dispute resolution and law enforcement.

The story of corporate governance also helps to explain the relationships and power dynamics among the corporation and its internal and external constituents. Yet, while the jurisprudence around corporate personhood has informed the parameters of corporate rights, the corporate governance debate has sought to identify the corporation’s obligations to its various constituents. American courts continue to support the ideology of the corporation as a natural person, and thus continue to protect the corporation’s constitutional rights. However, there seems to be a lack of equilibrium when it comes to matching corporate rights with corporate obligations. The predominant thinking on corporate governance portrays a corporation that is a nexus of contracts rather than a whole entity, or a person. As an amorphous nexus of contracts within the corporate governance debate, obligations of the corporation to its constituents cannot be readily attached – except for the obligation that the corporation has to maximize its shareholders’ financial investment in the firm. So, while the corporation enjoys certain social benefits and power from its articulated rights as a natural person, the prevailing corporate governance jurisprudence permits the corporation ample leverage to define its own obligations to constituents. Although the majority of U.S. states have enacted corporate
constituency statutes that enable corporate directors to consider the interests of non-shareholders, corporate obligations remain comparatively vague. Courts consistently defer to the business judgment of corporate decision-makers (unless the breach of duty of care is particularly egregious) to fulfill its fiduciary obligations in the appropriate order of priorities. Unfortunately for employees’ this business judgment rule does not provide much, if any, insurance that employees’ interests will be afforded adequate protections, in the general sense or in the particular situation of in-house dispute resolution.

Chapter Two further narrowed the examination of power dynamics between the corporate employer and its employees. Here again, the corporate governance debate offered a point of departure. Specifically, I examined the inherent risks to employees seeking redress through IDR under the prevailing Contractarian model of corporate governance. In essence, I argue that so long as corporate purpose is defined as maximizing shareholder wealth, employees’ interests will always be relegated to second tier considerations by firm managers, acting as agents of corporate shareholders. Where employees’ interests compete with those of corporate shareholders – as owners and principals of the corporation – the corporation as sponsor of an IDR faces a challenge of an inherent conflict of interest. This hierarchy of interests within the Contractarian model of governance presents a systemic risk to employee opting to resolve their disputes through IDR. Furthermore, the Contractarians’ reliance on market forces to balance the competing interests of corporate constituents leaves employees in a vulnerable bargaining position – this to the extent that labour is accorded lesser value than capital in the corporation’s internal market.
Although the Contractarian model appears fixed for the foreseeable future, the promise of an alternative corporate governance model bears consideration. I refer here to the Communitarian model, which in contrast to the Contractarian model, emphasizes cooperation rather than (market-based) competition, and considers corporate purpose to be more broadly defined than to maximize the financial interests of the corporation’s equity owners. Communitarians contend that the corporation should be responsible to its host community and its various constituents rather than single-mindedly focusing on shareholder interests. Unlike their Contractarian counterparts, Communitarians favour cooperation over competition and promote trust rather than market forces to manage relationships. While the Communitarian model of corporate governance offers greater promise of equality to internal dispute processes, it seems likely that the Contractarian approach will maintain its stronghold in Anglo-American jurisprudence.\(^\text{110}\)

The Contractarian model of the firm presents one level of challenge to employees seeking fair IDR. Yet, another challenge to employees using IDR is presented by the trend of privatization (or internalization) of legal systems, which empowers the corporate employer to play the role of rule-maker, adjudicator, and law enforcer. As public legal institutions grant greater authority to private organizations to operate quasi-legal systems, corporations are gaining wider leverage over the lives of their employees. This leverage is manifested when employers create employee policies, provide internal security surveillance and enforcement, and play the role of dispute resolver.

Together, the Contractarian model of corporate governance, and the phenomenon of privatized justice, creates systemic power differentials between employee and

\(^{110}\) Although this discussion has been premised on American jurisprudence of corporate governance, Canadian courts have taken a similar position, endorsing the Contractarian model over the Communitarian model.
employer in the workplace – forces which ultimately impact the in-house dispute resolution process. I examined two mechanisms that address this power issue: first, I looked at the possibilities of corporate governance law reform; and second, I explored how informal social norms function to regulate power and relationships within the corporation. As I have said, my intention here is not to promote a specific agenda of corporate governance law reform. Nonetheless, it begs restating that a shift to a Communitarian model of corporate governance would promote greater equality among constituents in the workplace. Such a shift, however, is unlikely to occur any time soon. Short of this theoretical shift, protection for employees’ equitable interest in the firm may be secured through test case litigation that utilizes corporate constituency statutes to command corporate directors to manage business in such a way as to promote or protect employees interests or investments in the firm.

Perhaps a more promising balancer of the power differential between employer and employee in the workplace rests in social norms. Recall that social norms offer non-legal mechanisms for regulating behaviour within the workplace, providing firm-specific parameters of fairness. In contrast to law, which provides a public source of rules and enforcement mechanisms, norms arise from private sources and are enforced by members of the community or the workplace. “Bad” behaviour is sanctioned while “good” behaviour is rewarded. Employees as a group represent a rather powerful lobby to ensure that employers behave fairly in the workplace. Employees wanting to enforce sanctions upon the corporation for bad behaviour, i.e., unfair treatment, have the option of leaving the firm, taking with their human capital investment. Additionally, employees can sanction the corporate employer by taking the infraction public. In contrast,
employees can demonstrate their approval of the corporation’s behaviour by investing their human capital back into the firm and being productive members of the firm. Social norms and corporate governance reform that broadens corporate fiduciary duties offer two avenues for promoting generalized fairness in the workplace.

Turning from this generalized fairness in the workplace to specific requirements of fairness in IDR, Chapter Three enumerated five elements of IDR necessary to promote procedural fairness for employees – voluntary participation, retention of statutory right to judicial relief, prohibition of retaliation for bringing forth a complaint, the use of external neutrals, and the existence of an external oversight body to monitor the IDR program. These elements are drawn in part from formal safeguards of procedural fairness as set out in Canadian and American statutory law, rules of civil procedure and adjudicatory structures. Additionally, in compiling these essential elements, I looked to several protocols for procedural fairness in ADR/IDR as set forth by various dispute resolution experts, such as the American Arbitration Association and the Society of Professionals in Dispute Resolution (SPIDR).

IDR offers both challenges and promises to employee seeking to resolve their human rights complaints privately through a company-sponsored forum. In so far as employees seek redress for private interests as opposed to an articulation of public rights, then IDR promises to deliver quicker justice at lower cost, greater opportunity to preserve relationships among disputants, and a sense of personal empowerment through direct participation in solving one’s own dispute. However, given the inherent power imbalance between employees and their employer, employees using IDR must proceed with some modicum of vigilance to ensure that the process is adequately balanced for
fairness. Not all IDR processes are created equal. However, where inherent power
differentials among disputants are accounted for and procedural fairness elements are in
place, IDR promises to be a viable conflict management tool for today’s corporate
workplace.
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