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Democracy and Dispute Resolution: Systems Design and the New Workplace

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I. INTRODUCTION

A deep shift appears to be underway in the nature of the non-unionized American workplace, as the rigid hierarchical bureaucracies of our fathers' IBM give way to the more vibrant and egalitarian workplaces of our daughters' dot.com.[1] Going, if not gone in some sectors, are the days when employees spent careers with the same employers, moving up the corporate ladder as seniority and skill permitted, and with long-term employer-employee loyalties lasting throughout the working years and on into retirement.[2] Instead, many observers see the modern workplace as increasingly dynamic and market-driven, with an emphasis on results both for employers and employees, backed by a willingness of both to cut their losses and move on if their interests are not met.[3]

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1. *See, e.g.*, CYNTHIA ESTLUND, WORKING TOGETHER: HOW WORKPLACE BONDS STRENGTHEN A DIVERSE SOCIETY (2003) [hereinafter ESTLUND]; Katherine Van Wezel Stone, *The New Psychological Contract: Implications for the Changing Workplace for Labor and Employment Law*, 48 UCLA L. REV. 519 (2001) [hereinafter Stone, *Psychological Contract*]; PETER CAPPELLI, THE NEW DEAL AT WORK: MANAGING THE MARKET-DRIVEN WORKFORCE (1999); Peter F. Drucker, *The New Society of Organizations*, HARV. BUS. REV., Sept.-Oct. 1992, at 100 [hereinafter Drucker, *The New Society of Organizations*].

2. *See* JOHN H. LANGBEIN & BRUCE A.WOLK, PENSION AND EMPLOYEE BENEFIT LAW 51 (3d ed. 2000); HARRY C. KATZ & OWEN DARBISHIRE, CONVERGING DIVERGENCES: WORLDWIDE CHANGES IN EMPLOYMENT SYSTEMS (2000).

3. *See* Stone, *Psychological Contract*, *supra* note 1, at 471-79. *See generally* CONTINGENT WORK: AMERICAN EMPLOYMENT RELATIONS IN TRANSITION (Kathleen Barker & Kathleen Christensen eds., 1998); ESTLUND, *supra* note 1, at 3-60. For a less sanguine account of the complications that the new workplace has created with respect to wide fluctuations in employee income and the diminished security of workers, *see* Peter G. Gosselin, *If America is Richer, Why Are Its Families So Much Less Secure?*, L.A. Times, Oct. 10, 2004, at 1.

Certainly, individual workplaces and industries vary greatly with respect to such progressiveness.[4] Yet the larger trend seems clear, and the best examples, such as UPS and the SAS Institute,[5] are the subject of frequent discussion and veneration.[6] Responding to this development, Professor Katherine Van Wezel Stone has urged workplace law and dispute resolution scholars to consider the consequences of this change for the meaning, nature, and vindication of workplace rights.[7] In this article, I take up that gauntlet, at least in part, by focusing on some of the implications of this paradigm shift for the design of corporate dispute resolution programs for more progressive "new workplace" companies.

In my view, this shift may be seen as part of a larger democratization of the American workplace that is being fueled by many economic, cultural, and other factors.[8] This seems to be a generally salutary development,[9] and one that should include dispute resolution within its paradigmatic realignment. More specifically, in my view employers should employ dispute resolution mechanisms that

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4. *See, e.g.*, ESTLUND, *supra* note 1, at 56-59 (discussing low-wage workplaces as examples of still-hierarchical and repressive environments, characterized by close supervision, high turnover, minimal training, fixed wages, and tenuous career ladders).

5. *See infra* notes 64-69 and accompanying text.

6. *See* ESTLUND, *supra* note 1, at 51; DON COHEN & LAURENCE PRUSAK, IN GOOD COMPANY: HOW SOCIAL CAPITAL MAKES ORGANIZATIONS WORK 133-35 (2001) [hereinafter COHEN & PRUSAK]; BILL CATLETTE & RICHARD HADDEN, CONTENTED COWS GIVE BETTER MILK 186-87 (1998).

7. Katherine Van Wezel Stone, *Employee Representation in the Boundaryless Workplace,* 77 CHI.-KENT L. REV. 773 (2002); Katherine Van Wezel Stone, *Dispute Resolution in the Boundaryless Workplace*, 16 OHIO ST. J. ON DISP. RESOL. 467, 471-79 (2001). Stone also convened a symposium on the topic. *See* Symposium, *Change at Work: Implications for Labor Law*, 13 CORNELL J.L. & PUB. POL'Y (forthcoming 2005).

8. Others have made this argument as well. *See, e.g.*, ESTLUND, *supra* note 1, at 60-84; Cynthia L. Estlund, *The Workplace in a Racially Diverse Society: Preliminary Thoughts on the Role of Labor and Employment Law*, U. PA. J. LAB. & EMP. L. 49 (1998); Tara J. Radin & Patricia H. Werhane, *The Public / Private Distinction and The Political Status of Employment*," 34 AMERICAN BUS. L.J. 245, 259-60 (1996); CHRISTOPHER MCMAHON, AUTHORITY AND DEMOCRACY: A GENERAL THEORY OF GOVERNMENT AND MANAGEMENT 17-27 (1994).

9. I am not suggesting that corporate America is moving toward the type of corporate democracy seen, for example, in Germany, where workers often participate in the major governance decisions of the corporation through "workers councils." *See* Viet D. Dinh, *Codetermination and Corporate Governance in a Multinational Business Enterprise*, 24 J. CORP. L. 975, 980 (1999). In fact, some commentators suggest Germany may be moving more toward the U.S. Model. *See, e.g.*, Jens C. Dammann, *The Future of Codetermination after Centros: Will German Corporate Law Move Closer to the U.S. Model?*, 8 FORDHAM J. CORP. & FIN. L. 607 (2003). Rather, I am suggesting that on the workplace side, companies are more willing to permit worker teams to make decisions about their tasks, and in general are listening to their employees more than in the past.

foster the fundamental values of democratic governance, as applicable in the new workplace, because those are the values that will ultimately support the structure and values of the new workplace. Conversely, employers should avoid implementing dispute resolution methods in a manner or form that subverts democratic values, because such measures have the capacity to undermine the structure and values of the new workplace.

In this article, I demonstrate how principles of democracy may be applied in the non-union corporate dispute resolution context. My focus is on the workplace rather than on matters of governance, but the democratic character of dispute resolution at the governance level clearly is a matter worth independent consideration.[10] In Part II, I lay a foundation for the analysis by describing the structure and values of the new workplace, by demonstrating how the values that support the new workplace are consistent with democratic values in the traditional governmental context, and by showing how the evolution of the workplace may be seen as a democratization of the workplace. I also argue that it is important to consider dispute resolution as a necessary component of this realignment.[11]

In Part III, I demonstrate how these democratic values can be promoted or frustrated by a dispute resolution systems designer's choice of dispute resolution method or methods in non-union workplaces. After briefly establishing public adjudication as a presumptive baseline for the resolution of formalized workplace disputes, I focus on the democratic character of the two primary methods of Alternative Dispute Resolution, arbitration and mediation. I conclude that arbitration's democratic character is contingent: when it is voluntary and/or non-binding, the availability of arbitration to resolve

10. The research is nascent but promising. *See, e.g.*, Carol B. Swanson, *Corporate Governance: Sliding Seamlessly into the Twenty-First Century*, 21 J. CORP. L. 417, 452 (1996) (calling for use of ADR to resolve corporate governance disputes); Stephen M. Bainbridge, *Why a Board? Group Decisionmaking in Corporate Governance*, 55 VAND. L. REV. 1 (2002) (applying principles of behavioral psychology to the corporate board context); G. Richard Shell, *Arbitration and Corporate Governance*, 67 N.C. L. REV. 517 (1989) (predicting greater use of arbitration to settle shareholder derivative suits); Thomas L. Riesenberg, *Arbitration & Corporate Governance*, 4 INSIGHTS, Aug. 1990, at 2 (criticizing mandatory arbitration of securities disputes); John C. Coffee Jr., *No Exit? Opting Out, The Contractual Theory of the Corporation, and the Special Case of Remedies*, 53 BROOK. L. REV. 919, 921 (1988). Also, in 2004, the American Bar Association Section of Dispute Resolution received a grant from the Sloan Foundation to explore the use of alternative methods of dispute resolution in the settlement of corporate governance disputes.

11. This draws on earlier work on democracy and dispute resolution. *See* Richard C. Reuben, *Democracy and Dispute Resolution: The Problem of Arbitration*, 67 L. & CONT. PROBS. 279 (2004) [hereinafter Reuben, *Democracy*].

workplace disputes enhances corporate democracy, as reflected in the new workplace. However, when arbitration is mandatory and binding, the use of arbitration undermines the new workplace by diminishing the democratic values that structurally support it. As a consensual process, mediation tends to be more democratic than arbitration, but it still must be implemented in a way that assures meaningful party autonomy and self-determination. Failing to implement these dispute resolution methods in a way that enhances the democratic character of the new workplace carries potentially serious costs in that they can erode the human and social capital that lies at the heart of the new workplace, especially trust and organizational citizenship behavior, which in turn can have a negative impact on traditional measures of workplace success, such as diminished performance, retention, and compliance with corporate decisions, rules, and policies.

II. The Transformation of the American Workplace

A. *The Old and New Workplaces*

The bureaucratic paradigm of what can be called the "old workplace" was the predominant model in the United States for much of the twentieth century,[12] and included philosophies that ranged from the "scientific management" of Frederick Winslow Taylor to the "human relations" school of management encouraged by Elton Mayo. Both sought to identify better ways of managing labor during the industrialization of the American economy in the late nineteenth and early twentieth centuries.[13] Taylor's approach was predicated upon close management of employee tasks and schedules, and heralded an era of assembly lines and mass production, workplace compartmentalization, industrial specialization, and autocratic management.[14] On the other hand, Mayo's "human relations" approach was

12. *See* Stone, *Psychological Contract*, *supra* note 1, at 532; Rosabeth Moss Kantor, Men and Women of the Corporation (2d ed. 1993) (describing the bureaucratic model); William H. Whyte Jr., The Organization Man 23-38 (1956).

13. *See* Bruno Ramirez, When Workers Fight: The Politics of Industrial Relations In the Progressive Era, 1898-1916 (1978).

14. Henry Ford's automobile manufacturing company is a common example. *See* Stephen Meyer III, The Five Dollar Day: Labor Management and Social Control in the Ford Motor Company, 1908-1921 37-38 (1981).

to look at environmental and other conditions that would promote greater worker productivity and loyalty.[15]

Both strains and their many variations could be felt within the American workplace, and had the effect of shifting the technical knowledge of production away from the exclusive domain of skilled workers seen in the nineteenth century and relocating it within management.[16] As intended, this development also profoundly changed the axis of power in the employment relationship, shifting it away from labor and toward management.[17]

The result was a workplace generally characterized by fixed, clearly defined jobs, bureaucratic structure, and hierarchical command.[18] For workers, mobility was primarily a function of an internal labor market,[19] with clearly defined promotional opportunities along career ladders established by the employer.[20] Salaries and other benefits in this internal labor market were tied to one's position on the ladder, and employers had a paternalistic role in guiding employees up the ladders they provided. Under this model, employees often stayed with employers for a working lifetime, secured by a psychological contract between management and labor that essentially assured job security in exchange for adequate performance and loyalty.[21] They were trained for specific jobs in the company, and stayed

15. The most famous of Mayo's experiments was the so-called Hawthorne Experiment, in which changes in location and lighting conditions boosted both worker production and morale. For a concise discussion, see LEE ROSS & RICHARD E. NISBETT, THE PERSON AND THE SITUATION: PERSPECTIVES OF SOCIAL PSYCHOLOGY 210-12 (1991).

16. *See* FREDERICK WINSLOW TAYLOR, SHOP MANAGEMENT 98-99 (1911). For a general discussion, see SAMUEL HABER, EFFICIENCY AND UPLIFT: SCIENTIFIC MANAGEMENT IN THE PROGRESSIVE ERA, 1890-1920 (1964).

17. *See* Stone, *Psychological Contract, supra* note 1, at 526-29.

18. *See id.* at 534. Indeed, the rise of unions was an effort to respond to this changed dynamic by empowering workers through collective action.

19. The seminal work on internal labor markets is PETER B. DOERINGER & MICHAEL J. PIORE, INTERNAL LABOR MARKETS AND MANPOWER ANALYSIS (1970); *see also* Stephen F. Befort, *Revisiting the Black Hole of Workplace Regulation: A Historical and Comparative Perspective of Contingent Work*, 24 BERKELEY J. EMP. & LAB. L. 153 (2003); Arnaldo Camuffo, *The Changing Nature of Internal Labor Markets*, 6 J. MGT. & GOV. 281 (2002).

20. *See* ESTLUND, *supra* note 1, at 40-45 (describing bureaucratic workplace structure in both the union and non-union contexts).

21. *See* Stone, *Psychological Contract, supra* note 1, at 537; *see generally* RONALD G. EHRENBERG & ROBERT S. SMITH, MODERN LABOR ECONOMICS: THEORY AND PUBLIC POLICY 170-71 (6th ed. 1997). A "psychological contract" refers to an individual's belief regarding the terms and conditions of a reciprocal exchange agreement between that focal person and another party. A psychological contract emerges when one party believes that a promise of future returns has been made, such as through pay for performance, or a contribution has been given through some form of exchange, and thus some form of future obligation has been created to provide future benefits. *See*

in those positions until they were allowed to climb to the next rung of the corporate ladder.[22]

The new workplace, roughly emergent in the late 1970s and early 1980s, is a product of many different factors, including demographic changes in the workforce, technological changes, corporate globalization, and general societal evolution.[23] Where the old workplace was static, bureaucratic, and hierarchical, the new workplace is much more dynamic along most if not all critical dimensions, especially in more progressive new workplaces. Mobility and flexibility are hallmarks of this new relationship.[24] Job security in the new workplace is a function of employee success, skills, and broader employability, rather than a function of tenure and service to a single company. Employee training and skill development in the new workplace tends not to be firm- or task-specific, but rather tends to be more general so that employees can easily adapt to new and changing environments. Work is also structured less hierarchically, often with work teams empowered with their own leaders, practices, and standards.[25] Pay and benefits, too, are more linked to what the market outside the firm may yield, rather than what may be provided by climbing the corporate ladder.[26]

Another defining structural component of this new workplace is its contingent character, which reflects an important change in the terms of the unwritten expectations, or "psychological contract,"[27] between the old and new workplaces.[28] Recall that the old workplace was characterized by an internal labor market, in which employers

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Denise M. Rousseau, *Psychological and Implied Contracts in Organizations*, 2 EMPL. RESP. & RTS. J. 121, 123 (1989).

22. *See* Stone, *Psychological Contract, supra* note 1, at 535-39.

23. *Id.* at 535-45 (analyzing statistical and other trends).

24. *See* Stone, *Psychological Contract, supra* note 1, at 568-72.

25. In this regard, work teams are a relatively common and popular form of management. *See, e.g.*, THOMAS S. BATEMAN & SCOTT A. SNELL, MANAGEMENT: THE NEW COMPETITIVE LANDSCAPE 424-45 (6th ed. 2004)

26. *See, e.g.*, JILL ANDRESKY FRASER, WHITE-COLLAR SWEATSHOP: THE DETERIORATION OF WORK AND ITS REWARDS IN CORPORATE AMERICA 32, 43 (2001) (examining social Darwinism in the workplace); James A. Gross, *The Common Law Employment Contract and Collective Bargaining: Values and Views of Rights and Justice*, 23 N.Z. J. INDUS. REL. 63, 71 (1998).

27. *See* Rousseau, *supra* note 21, at 124-26.

28. Much has been written about the workplace being contingent in that many workers may be temporary and outside or independent contractors, and may be performing functions that were once performed by traditional full-time employees. *See, e.g.*, Stone, *Psychological Contract, supra* note 1, at 540-49; ESTLUND, *supra* note 1, at 45-46; Gillian Lester, *Careers and Contingency*, 51 STAN. L. REV. 73 (1998); PETER F. DRUCKER, MANAGING IN A TIME OF GREAT CHANGE 66-67 (1995) (describing change in composition of temporary workers).

were the primary gatekeepers of employee career progress, and compensated employee loyalty with job security and retirement benefits.[29] In the new workplace, however, there is no expectation of long-term employment, an issue about which both employers and employees are often quite candid.[30] Employees who are not productive or who are otherwise problematic can expect to be let go.[31] Similarly, employers who fail to provide employees with the income, environment, and other opportunities their employees expect can find it difficult to retain desirable employees.[32] Put another way, unlike the old workplace, the door swings both ways in the new workplace; if the relationship does not work out as hoped, or does not continue to make sense under changing circumstances, both the employee and the employer have options. Employees can be free agents in that they have an exit option in the new workplace that is fundamentally different than they had in the old workplace. Rather than relying on corporate ladders and paternalism, employees in the new workplace in many respects are their own gatekeepers of "boundaryless" careers,[33] able to constantly re-evaluate the employment relationship over time and in light of other options, and to cultivate new skills and capacities to make them more attractive in a dynamic external labor market. This dynamic puts a different onus on companies to provide something in the new workplace other than the mere job security assured by the old workplace: an environment in which employees want to come, stay, and excel.[34] It also puts a burden on employees to perform at higher levels of achievement.[35]

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29. *See* ESTLUND, *supra* note 1, at 40-44.

30. *See, e.g., The Future of Work: Career Evolution*, ECONOMIST, Jan. 29-Feb. 4, 2000, at 89. *See also* DRUCKER, *supra* note 28, at 71; ROSABETH KANTER, ON THE FRONTIERS OF MANAGEMENT 190 (1997); RICHARD SENNETT, THE CORROSION OF CHARACTER 23 (1998).

31. Consider this quote from Jack Welch, former CEO of General Electric Co., in an interview with the Harvard Business Review: "[G]iven today's environment, people's emotional energy must be focused outward on a competitive world, where no business is a safe haven for employment unless it is winning in the marketplace." Noel Tichy & Ram Charan, *Speed, Simplicity, Self-Confidence: An Interview with Jack Welch,* HARV. BUS. REV., Sept.-Oct. 1989, at 112, 120.

32. *See* GREGORY P. SMITH, HERE TODAY, GONE TOMORROW: TRANSFORMING YOUR WORKFORCE FROM HIGH-TURNOVER TO HIGH-RETENTION 12-15 (2001).

33. *See* Stone, *Psychological Contract, supra* note 1, at 553-56; Michael B. Arthur, *The Boundaryless Career: A New Perspective for Organizational Inquiry,* 15 J. ORGANIZATIONAL BEHAV. 295 (1994); Anne S. Miner & David F. Robinson, *Organizational and Population Level Learning as Engines for Career Transitions,* 15 J. ORGANIZATIONAL BEHAV. 345, 347 (1994).

34. *See* SMITH, *supra* note 32, at 12-15 (2001).

35. *See* Stone, *Psychological Contract, supra* note 1, at 479.

In summary, the structure of the new workplace can be said to be one of flexible job descriptions, skills sets, and command structures, a mobile work force, and contingent expectations by both managers and employees.

B. *The Values of the New Workplace*

The primary operating values of the new workplace flow quite logically from the nature of its fundamental structure, and are quite different than those of the old workplace. For the old workplace, workplace values primarily reflected the needs, interests, and concerns of the employer – including maintenance of a stable and productive work force, compliance with company policies and procedures, and loyalty to the company and its goals. To be sure, these values served both employers and employees. Job stability meant job security for workers and a reliable work force for employers, for example. However, the shading of these values tilted in favor of the employers, as the fundamental role of the employee was to serve the larger interests of the company, as defined by the company, and in a manner prescribed by the company.[36]

1. *Employees as Partners, Not Servants*

The new workplace operates from a set of values that differs significantly in at least two important and related respects.[37] First, the new workplace is far more attuned to the interests of the employees. To the extent that the old workplace could be described as a "master-servant" relationship,[38] the new workplace is structured more as a partnership, with employers and employees as mutual stakeholders[39] sharing strengths and capacities for mutual gain. Of course, economic issues are still important, but the new workplace calls for

36. For a classic account, see WILLIAM H. WHITE, JR., THE ORGANIZATION MAN 3-63 (1956).

37. One may reasonably debate whether the values of the new workplace displace or complement the values of the old workplace, in whole or in part. While I appreciate the academic flavor of the debate, I will leave the contention of merits to others so that I can focus on the values themselves.

38. I am speaking at the conceptual level, rather than referring to the doctrine of "master-servant" law. For more on that, see, e.g., MARK A. ROTHSTEIN ET AL., EMPLOYMENT LAW 80-85 (2d ed. 1999).

39. *See, e.g.*, David Wheeler & Maria Sillanpaa, *Including the Stakeholder: The Business Case*, 31 LONG RANGE PLANNING 201 (1998); Rienk Goodijk, *Partnership at the Corporate Level: The Meaning of the Stakeholder Model*, 3 J. CHANGE MGT. 225 (2003). Though the definition of stakeholder does include stockholders, for the purposes of this article we will focus primarily on employees and social influences rather than shareholders when referring to stakeholders.

greater recognition of the needs, interests, and concerns of the employees beyond mere economics.[40] In this regard, some management experts emphasize flexibility in skill cultivation and career mobility, employee participation in management decision-making, and self-regulated economic opportunity, such as bonus and other performance-based incentive systems.[41] Others emphasize recognition of work as a source of dignity and self-actualization, as well as the importance of nurturing trust and communication.[42] But across theories, the equation of new workplace values plainly includes more emphasis on the workers as individuals, recognizing their capacity both to add value to the company when they are satisfied and to go elsewhere should their needs, interests, and concerns be unfulfilled.

2. *The Value of Social Capital to the Company*

A second material respect in which the values of the new workplace differ from the old is the importance of corporate culture and social capital as a resource to be cultivated. It is related to the value that the new workplace places on the worth of the employee, but it is not the same.[43]

The concept of social capital is drawn from the study of democratic governance and civil society, and embraces notions of public trust, social connection, cooperation, reciprocity, and civic virtue.[44] Social capital researchers, led by Harvard political scientist Robert

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40. *See* Orley Robel, *Orchestrated Experimentalism in the Regulation of Work*, 101 MICH. L. REV. 2146, 2146-47 (2003) (reviewing PAUL OSTERMAN ET AL., WORKING IN AMERICA: A BLUEPRINT FOR THE NEW LABOR MARKET (2001)).

41. *See, e.g.*, Michael Beer & Nitin Nohria, *Cracking the Code of Change*, HARV. BUS. REV., May-June 2000, at 133; John P. Kotter & Leonard A. Schlesinger, *Choosing Strategies for Change,* HARV. BUS. REV., Mar.-Apr. 1979, at 106; EDWARD E. LAWLER III, THE ULTIMATE ADVANTAGE: CREATING THE HIGH-INVOLVEMENT ORGANIZATION 43 (1992).

42. Tristin K. Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 HARV. C.R.-C.L. L. REV. 91, 107-8 (2003) [hereinafter Green, *Disparate Treatment Theory*].

43. For a further discussion of this distinction, see *infra* notes 52-63 and accompanying text.

44. *See* ROBERT D. PUTNAM, MAKING DEMOCRACY WORK: CIVIC TRADITIONS IN MODERN ITALY 163-87 (1993) [hereinafter PUTNAM] (describing social capital and its relationship to a democracy's institutional success). In political governance, civil society is generally recognized as the conceptual space between purely governmental and purely private affairs, where much of our collective societal interaction takes place – including churches, schools, places of employment, clubs, and other group affiliations. Peter J. Spiro, *The Citizenship Dilemma*, 51 STAN. L. REV. 597, 625 (1999); *see also* LARRY DIAMOND, DEVELOPING DEMOCRACY: TOWARD CONSOLIDATION 227, 228 (1999); ADAM B. SELIGMAN, THE IDEA OF CIVIL SOCIETY (1992) (discussing the complexity of the term).

Putnam,[45] have come to recognize that this civil society and the social capital it generates, spawned by and supporting the structure of democratic political governance, is just as important to the consolidation of a healthy democracy as properly functioning political institutions.[46]

Putnam's seminal work on the effectiveness of democracy as separately implemented in the autonomous regions of Italy since the 1970s provides a helpful illustration. In brief, Putnam found that democracy in some regions was more effective than others, based on institutional efficiency and responsiveness.[47] The effective democracies were marked by a civil society that broadly encouraged cooperation, reciprocation, and a sense of common good among citizens at all levels of national life, from social to political to economic and beyond.[48] Such cooperation and reciprocation led to an ever-deepening sense of social trust and order, both horizontally among citizenry and vertically between the citizenry and its governmental and national institutions.[49] In contrast, the less effective democracies were marked by civic traditions of distrust, unhealthy competition, and a sense of isolation and detachment between citizens and their governmental institutions.[50] The work of Putnam and other social capital theorists strongly suggests that effective democracy requires more than mere political institutions.[51] It also requires the support of a strong civil society, steeped in public trust of governmental institutions, a sense of social connection and cooperation among citizens and between citizens and their national institutions, as well as a spirit of good will, reciprocity, and civic virtue that reinforces this sense of trust and connection.

Organizational behavior researchers have begun to apply these principles in the organizational context as well,[52] helping to provide

45. *See generally* PUTNAM, *supra* note 44 (comparing effective and ineffective regional democratic governments in Italy since the devolution of most powers to regional governments in 1970).

46. *See infra* notes 48-51 and accompanying text.

47. PUTNAM, *supra* note 44, at 7-9.

48. *Id.* at 165-85.

49. *Id.*

50. *Id.*

51. *See, e.g.*, C. DAVID LISMAN, TOWARD A CIVIL SOCIETY: CIVIC LITERACY AND SERVICE LEARNING (1998) (analyzing the relationship between education, civic virtue, and civil society); MAKING GOOD CITIZENS: EDUCATION AND CIVIL SOCIETY (Diane Ravitch & Joseph P. Viteritti eds., 2001) (same); THE VOLUNTARY CITY: CHOICE, COMMUNITY, AND CIVIL SOCIETY (David Beito et al. eds., 2002) (exploring relationship between civil society and economic health).

52. For a major collection of essays about corporate social capital, see CORPORATE SOCIAL CAPITAL AND LIABILITY (Roger Th.A.J. Leenders & Shaul Gabbay eds., 1999).

new insights on human and social capital assets that were hidden and unappreciated in the old workplace,[53] but which the new workplace recognizes as among its most significant: its people,[54] the culture they create, and how that culture may be cultivated by management.[55]

Social connection, interaction, and reciprocity lies at the heart of workplace social capital[56] and is reflected in trust between and among employees and management, shared workplace values, norms of cooperation and reciprocity, *esprit de corps,* and what some organizational behavior theorists call "organizational citizenship behavior" ("OCB"),[57] the rough equivalent of civic virtue in the political context. OCB generally refers to the willingness of workers to serve the good of the workplace beyond the expectations of formal job roles and systems of reward, such as making an extra effort to come into the office during a snowstorm, being helpful to new employees, or meeting deadlines when circumstances might provide an acceptable excuse.[58]

For early and still influential works, see P. Bourdieu, *The Forms of Capital, in* HANDBOOK OF THEORY AND RESEARCH FOR THE SOCIOLOGY OF EDUCATION 241-58 (J.G. Richardson ed., 1986) and J.S. Coleman, *Social Capital in the Creation of Human Capital,* 94 AM. J. OF SOC. 95 (1988); *see also* GREGORY G. DESS & JOSEPH C. PICKEN, BEYOND PRODUCTIVITY: HOW LEADING COMPANIES ACHIEVE SUPERIOR PERFORMANCE BY LEVERAGING THEIR HUMAN CAPITAL 8-18 (1999).

53. Henry Ford is said to have once lamented "Why is it that when I buy a pair of hands, I always get a human being as well?" *reported in* COHEN & PRUSAK, *supra* note 6, at 6.

54. It is important to distinguish human capital from social capital. Human capital refers to knowledge, skills, and capabilities. Social capital involves the relationships between individuals in a group context, including norms, values, and obligations. *See* Michael A. Hitt & R. Duane Ireland, *The Essence of Strategic Leadership, Managing Human and Social Capital,* 9 J. OF LEADERSHIP & ORGANIZATIONAL STUD. 3, 4-5 (2002).

55. *See, e.g.*, COHEN & PRUSAK *supra* note 6; ESTLUND, *supra* note 1; *id.* Corporate social capital researchers will sometimes distinguish between structural, content, and relational dimensions. *See, e.g.*, J. Nahapiet & S. Ghoshal, *Social Capital, Intellectual Capital, and the Organizational Advantage*, 23 ACAD. OF MGT. REV. 242, 246 (1988). The aspects of corporate social capital I have described here, and am primarily concerned with in this Article, involve relational social capital.

56. COHEN & PRUSAK, *supra* note 6, at 7.

57. *See* DENNIS W. ORGAN, ORGANIZATIONAL CITIZENSHIP BEHAVIOR: THE GOOD SOLDIER SYNDROME 4-5 (1988); *but see* Peter Cappelli & Nikolai Rogovsky, *Employee Involvement and Organizational Citizenship: Implications for Labor Law Reform and "Lean Production",* 51 INDUS. & LAB. REL. REV. 633 (1998) (reporting survey research suggesting lack of a statistically significant total or overall relationship between employment practices and OCB).

58. *See* ORGAN, *supra* note 57, at 9-10; Daniel J. Koys, *The Effects of Employee Satisfaction, Organizational Citizenship Behavior, and Turnover on Organizational Effectiveness: A Unit-Level, Longitudinal Study*, 54 PERSONNEL PSYCHOL. 101, 103-4 (2001).

Workplaces with high OCB may be seen as more desirable, and in many respects may be more effective places of employment than workplaces with low OCB.

While some researchers have identified nearly thirty different forms of OCB,[59] early pioneer Dennis Organ specified five major organizational citizenship behaviors that are now widely recognized: altruism (helping), compliance (with work rules and procedures), courtesy (gestures taken to prevent problems), sportsmanship (willingness to accommodate minor and temporary inconveniences and impositions without protest), and civic virtue (constructive engagement in the civic life of the company).[60] These behaviors have been found to enhance the quality of the workplace, and contribute to job satisfaction, organizational commitment, fairness, trait conscientiousness, and leader support.[61] More particularly, corporate social capital theorists Don Cohen and Laurence Prusak suggest the cultivation of corporate social capital can lead to:

- Better knowledge sharing due to established trust relationships, common frames of reference, and shared goals;
- Lower transaction costs due to a high level of trust and cooperative spirit (both within the organization and between the organization and its customers and partners);
- Lower turnover rates, reducing severance costs and hiring and training expenses, avoiding discontinuities associated with frequent personnel changes, and maintaining valuable organizational knowledge;
- Greater coherence of action due to organizational stability and shared understanding.[62]

Professor Cynthia Estlund further argues that this social capital also provides a basis for loyalty in the new workplace, replacing the old workplace's promise of long-term employment as the glue that keeps the company together. Mere economics, Estlund argues, is not

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59. *See* Philip M. Podsakoff et al., *Organizational Citizenship Behaviors: A Criticial Review of the Theoretical and Empirical Literature and Suggestions for Future Research*, 26 J. OF MGMT. 513, 516 (2000).

60. *See* C. Ann Smith et al., *Organizational Citizenship Behavior: Its Nature and Antecedents*, 68 J. OF APPLIED PSYCHOL. 653, 654-66 (1983); *see generally* ORGAN, *supra* note 57.

61. *See, e.g.*, Jeffrey A. Lepine et al., *The Nature and Dimensionality of Organizational Citizenship Behavior: A Critical Review and Meta-Analysis*, 87 J. OF APPLIED PSYCHOL. 52 (2002) (reporting positive correlation between Organ dimensions and these aspects of the workplace).

62. *See* COHEN & PRUSAK, *supra* note 6, at 10.

enough to "foster either the employee loyalty or the stable and productive relations among co-workers that are necessary for successful competition."[63] Rather, when workers enjoy where they are working, they will be more likely to stay even in the face of potentially greater economic incentives. This is loyalty that is earned, not paid for.

Cohen and Prusak offer SAS Institute, the world's largest privately held software company, as an example.[64] SAS provides data warehouse and decision-support software for a wide range of industries, including seat-and-route data for major airlines, clinical trial data for pharmaceutical companies, and even the Consumer Price Index. Remarkably, SAS's turnover rate is less than 4 percent.[65] Salaries are described as "good but not extravagant," not enough to attract workplace free agents.[66] Rather, loyalty is fostered in other ways. A particularly important vehicle, for example, is the emphasis SAS places on research and development ("R & D"), a shared value among those committed to software. SAS invests around 30 percent of its annual budget into R & D, giving its software engineers the mandate and resources to continually improve their products.[67] SAS also listens to its employees; it estimates that it accepts 85 percent of all employee suggestions for improving software code, which both enhances its products and shows respect for employees.[68] It also shows

63. ESTLUND, *supra* note 1, at 50. This argument is part of a larger argument about the unique capacity of the workplace to strengthen American diversity, particularly racial and gender diversity, by fostering greater understanding, connection, cooperation, and trust.

64. COHEN & PRUSAK, *supra* note 6, at 133-35.

65. In a New York Times Magazine article on loyalty in the virtual age, Stanford University Business Professor Jeffrey Pfeffer was quoted as saying "the company says that people will have three or four careers during their working lives and it hopes all will be at SAS." Adrian Wooldridge, *Come Back, Company Man!*, N.Y. TIMES MAG., Mar. 5, 2000, at 82. Other examples of social capital intensive companies include UPS, the pharmaceutical company Aventis, 3M, Hewlett-Packard, and executive recruiter Russell Reynolds Associates. *See* COHEN & PRUSAK, *supra* note 6, at 4.

66. COHEN & PRUSAK, *supra* note 6, at 134. To be sure, not all new workplaces include the cultivation of social capital as a prominent value. *See, e.g.*, ALAN HYDE, WORKING IN SILICON VALLEY: ECONOMIC AND LEGAL ANALYSIS OF A HIGH-VELOCITY LABOR MARKET 3-23 (2003) (key elements of high-velocity labor market include start-ups, turnover, flexible compensation, outsourcing, and global production networks, often with little or no emphasis on social capital). For a criticism decrying the corrosive effect of a modern capitalism, see RICHARD SENNETT, THE CORROSION OF CHARACTER: THE PERSONAL CONSEQUENCES OF WORK IN THE NEW CAPITALISM 24 (1998) ("corrodes trust, loyalty, and mutual commitment"). For a response, see Sanford M. Jacoby, *Smelting into Air? Downsizing, Job Stability and the Future of Work*, 76 CHI.-KENT L. REV. 1195 (2000) (contending that Sennett overstates the case).

67. COHEN & PRUSAK, *supra* note 6, at 134.

68. *Id.* at 135.

its care for employees in other ways, such as providing generous benefits, including a thirty-five-hour work week, on-site day care, recreational facilities, and a full-indemnity health insurance plan.[69]

C. *The Need to Consider Dispute Resolution as Part of the New Workplace*

Despite the potential for employee enrichment and social capital to energize the new workplace, there will still be conflict. Disputes are an inevitable fact of organizational life. However, they do have the potential to be constructive or destructive depending upon how they are handled.[70] Constructive conflict permits organizations to learn and grow from conflict.[71] Conversely, destructive conflict tears at the fabric of the workplace by fostering dissention, distrust, and unhealthy internal competition.[72] Thus, in the new workplace, effective constructive dispute resolution is a particularly vital consideration for any organization.[73]

Before the rise of the American dispute resolution movement, informal negotiation between workers and managers was the most common form of dispute resolution in the non-union workplace, sometimes followed by litigation if attempts at negotiated settlement failed.[74] However, the workplace has been an important hub of dispute resolution activity, as corporate acceptance of dispute resolution has increased dramatically during the rise of modern ADR.[75] This is

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69. Wooldridge, *supra* note 65, at 82.

70. *See* DEAN G. PRUITT & SUNG HEE KIM, SOCIAL CONFLICT: ESCALATION, STALEMATE, AND SETTLEMENT 9-13 (3d ed. 2004) [hereinafter PRUITT]; *see generally* MORTON DEUTSCH, THE RESOLUTION OF CONFLICT: CONSTRUCTIVE AND DESTRUCTIVE PROCESSES (1973); LEWIS COSER, THE FUNCTIONS OF SOCIAL CONFLICT (1956).

71. *See generally* CHRIS ARGYRIS, ON ORGANIZATIONAL LEARNING (2d ed. 1999); PETER SENGE, THE FIFTH DISCIPLINE: THE ART AND PRACTICE OF LEARNING ORGANIZATIONS (1994).

72. *See* Frances E. Zollers & Elletta Sangrey Callahan, *Workplace Violence and Security: Are There Lessons for Peacemaking?*, 36 VAND. J. TRANSNAT'L L. 449, 479 (2003) (discussing "toxic" workplaces and their capacity to incite violence).

73. *See, e.g.*, CATHY A. COSTANTINO & CHRISTINA SICKLES MERCHANT, DESIGNING CONFLICT MANAGEMENT SYSTEMS: A GUIDE TO CREATING PRODUCTIVE AND HEALTHY ORGANIZATIONS 5-6 (1996); KARL A. SLAIKEU & RALPH H. HASSON, CONTROLLING THE COSTS OF CONFLICT: HOW TO DESIGN A SYSTEM FOR YOUR ORGANIZATION 5-16 (1998).

74. Arbitration has long been a part of collective bargaining agreements. *See* FRANK ELKOURI & EDNA ASPER ELKOURI, HOW ARBITRATION WORKS 3-7 (Alan Miles Rubin gen. ed., 6th ed. 2003).

75. DAVID B. LIPSKY & RONALD L. SEEBER, THE APPROPRIATE RESOLUTION OF CORPORATE DISPUTES – A REPORT ON THE GROWING USE OF ADR BY U.S. CORPORATIONS (1998) (surveying ADR use among 1,000 of largest U.S. corporations) (hereinafter LIPSKY & SEEBER).

particularly true of mediation, and to a lesser extent, arbitration.[76] Moreover, businesses often use "step" or "tiered" approaches that involve several different forms and stages of dispute resolution, often ending in binding arbitration.[77]

The capacity of such mechanisms to control the business costs of conflict is an important factor in employers' embrace of alternative dispute resolution.[78] Other factors include the ability to exert greater control over the process and outcome of dispute resolution and the ability to comply with legal mandates imposed or encouraged by federal and state governments.[79] Of these incentives, cost savings appear to be particularly salient for businesses, and may be achieved in a variety of ways.[80] For example, savings can be achieved through the prevention of unnecessary formalization of disputes,[81] as well as the appropriate early resolution of formalized conflicts, before litigation costs begin to mount.[82] While proponents of corporate dispute resolution rightly tout these benefits,[83] others have been less sanguine, suggesting quite bluntly that business's embrace of ADR

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76. See *id.*

77. *See* e.g., Kathleen M. Scanlon & Harpreet K. Mann, *Inside Guide to Multi-Step Dispute Resolution Clauses,* ADR, 12 Counsel In-Box, Mar. 2003, *cited in* RISKIN ET AL., DISPUTE RESOLUTION AND LAWYERS (3d ed. forthcoming 2005) (chapter 7 manuscript at 85-90, copy on file with author). *See also* DAVID I. LEVINE ET AL., CARVE-OUTS IN WORKERS' COMPENSATION 26-35 (2002).

78. *See generally* SLAIKEU & HASSON, *supra* note 73, at 16-19; LIPSKY & SEEBER, *supra* note 75.

79. *See* LIPSKY & SEEBER, *supra* note 75 (reporting that 81 percent of respondents say mediation provides a more "satisfactory process" than litigation, 67 percent saying it provides more "satisfactory settlements," and 59 percent saying it "preserves good relationships"). It is worth noting approximately 4,000 businesses have signed the CPR Corporate Policy Statement on Alternatives to Litigation (the corporate "Pledge"), under which they commit to explore the use of ADR in disputes with other signers. For specific signatories, see CPR Institute for Dispute Resolution, at http://www.cpradr.org (last visited Feb. 24, 2005).

80. *See* LIPSKY & SEEBER, *supra* note 75, at 5 (reporting that 89 percent of respondents viewed mediation as a cost-saving measure, and 55 percent reporting that cost pressures affected their decision to use ADR).

81. For a study documenting such savings in the context of privatized workers' compensation, see DAVID I. LEVINE ET AL., CARVE-OUTS IN WORKERS' COMPENSATION 119-27 (2002).

82. Brown & Root has estimated its workplace dispute resolution program has saved at least 40 percent of what it would ordinarily spend in legal fees. *See* John W. Zinsser, *Employment Dispute Resolution Systems: Experience Grows but Some Questions Persist,* 12 NEGOT. J. 149 (1996).

83. *See generally* Thomas J. Stipanowich, *Contract and Conflict Management,* 2001 WIS. L. REV. 831 (2001).

relates primarily to its interest in avoiding civil juries and the possibility of hefty punitive damage awards.[84]

Regardless of the motivation, the capacity of dispute resolution to contribute to workplace culture – by managing conflict effectively, by preventing its unnecessary escalation, and by channeling its tensions into a constructive direction as an agent of appropriate change – is a benefit that has been largely overlooked.[85] This capacity is greatest, in my view, when the values of dispute resolution coincide with the larger values of the new workplace itself. In the next part, Part III, I suggest that the values of the new workplace reflect deeply rooted principles of democracy, and in Part IV, I turn to how companies may use this knowledge to design dispute resolution systems that enhance, rather than diminish that democratic character.

III. The New Workplace as an Expansion of Corporate Democracy

The concept of a "corporate democracy" that analogizes corporate and governmental entities is not new.[86] Both corporate and governmental entities are forms of organizational structure in which authority to govern is in part predicated on what is in effect a social (or, in the business context, psychological) contract[87] that includes voter consent as a measure of approval and accountability.[88] The analogy is imperfect, but it is close enough to suggest that the experiences of one domain may provide some helpful insights into the nature, function, and operation of the other. In my view, dispute resolution is one such area in which the sharing of experience is appropriate and instructive.

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84. *See, e.g.*, Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking The Supreme Court's Preference For Binding Arbitration*, 74 Wash. U. L.Q. 637, 683 (1996).

85. *See* Levine et al., *supra* note 81, at 5-6 (observing how most workers' compensation carve-out disputes were settled at early stages of tiered process, thus preventing more formal mediation and arbitration proceedings); D. Leah Meltzer, *The Federal Workplace Ombuds*, 13 Ohio St. J. on Disp. Resol. 549, 596-603 (1998) [hereinafter Meltzer] (discussing benefits of ombuds offices, including identification of needs for systemic changes).

86. *See* Meltzer, *supra* note 85, at 549, 596-603; *see also* Jesse H. Choper et al., Cases and Materials on Corporations 3, 521-30 (4th ed. 1995) [hereinafter Choper et al.].

87. On the corporate side, see Choper et al., *supra* note 86, at 32-34; on the governmental side, see generally Richard Vernon, *Contractarianism*, *in* Political Philosophy: Theories, Thinkers, and Concepts 54-57 (Seymour Martin Lipset ed., 2001).

88. Choper et al., *supra* note 86, at 521. The effectiveness of shareholder approval as a check on corporate action has long been the subject of debate. For a discussion, see Choper et al., *supra* note 86.

A. *Traditional Corporate Democracy*

Traditionally, the notion of corporate democracy has been considered primarily in the context of corporate governance, and one way to think about the workplace transformation from old to new is as an extension of the concept into the workplace, as well as an expansion of its scope.[89]

The underlying theory of corporate democracy in the traditional context of governance is that people are the best judges of their interests,[90] and that increased shareholder participation in the decisions of the corporation will lead to the benefits of accountability in terms of constraining management discretion and curbing abuse; to better, more legitimate corporate decisions and policies; to greater corporate efficiency and effectiveness in achieving corporate goals; and perhaps even to heightened corporate citizenship and social responsibility.[91] Corporate democracy has a certain populist appeal because of its resonance with deeply held American political and cultural values, and is experiencing something of a resurgence as the Enron, WorldCom, and other corporate scandals of the early twenty-first century have given rise to calls for greater corporate accountability and responsibility.[92] In 2003, for example, the U.S. Securities and Exchange Commission ("SEC")[93] unveiled a major corporate democracy initiative, which included proposals to give shareholders greater say in nominating directors' proxy solicitations, corporate control contests, and compliance with disclosure requirements, as well as more

89. *See* EHRENBERG & SMITH, *supra* note 21, at 19, and sources cited therein; William L. Cary, *Federalism and Corporate Law: Reflections Upon Delaware*, 83 YALE L.J. 663 (1974); Sheldon Bernstein & Henry G. Fischer, *The Regulation of the Solicitation of Proxies: Some Reflections on Corporate Democracy*, 7 U. CHI. L. REV. 226 (1940). For an argument that corporate democracy is purely a myth, at least with respect to the inclusion of racial and minority voices, see Thomas W. Joo, *A Trip Through the "Maze of Corporate Democracy": Shareholder Voice and Management Composition*, 77 ST. JOHN'S L. REV. 735 (2003).

90. Olga N. Sirodoeva-Paxson, *Judicial Removal of Directors: Denial of Directors' License to Steal or Shareholders' Freedom to Vote?*, 50 HASTINGS L.J. 97, 110 (1998).

91. *See, e.g.*, John A. Byrne et al., *How to fix corporate governance*, BUS. WK., May 6, 2002, at 68.

92. *See, e.g.*, AMERICAN BAR ASSOCIATION, THE ABA CORPORATE RESPONSIBILITY TASK FORCE FINAL REPORT, Mar. 31, 2003.

93. It is significant to note that this initiative has been promoted by a Republican Party administration, which as a categorical matter is often thought of as more pro-business than the rival Democratic Party.

authority to make general shareholder proposals on matters of corporate governance.[94]

The features of the SEC model are familiar elements of corporate democracy in governance,[95] and roughly parallel the majoritarian conception of democracy in the governmental context. The emphasis is on political rights of voting and participation by shareholders, as well as, to a lesser degree, greater communications among shareholders as fostering democratic interest representation[96] and dialogue.[97] In my view, however, political participation is only one of several values that serve and define democratic governance, regardless of whether that governance is public or private.

B. *Broadening the Frame: The Essential Values of Democracy*

The emphasis on participation values in corporate democracy correlates with the relatively narrow vision that public law has given to democracy in the United States for much of the last century. American constitutional scholarship has defined democracy in largely procedural terms, as a system of governance in which "the majority rules."[98] As a result, the conventional wisdom in law has held that

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94. *See* SEC Press Release, Commission to Review Current Proxy Rules and Regulations to Improve Corporate Democracy (Apr. 14, 2003); Gregory T. Davidson, *Regulation of the Solicitation of Proxies*, 1385 PLI/CORP. 723, 761 (2003). For a discussion of some of the agency's follow-up actions, see R. Daniel Witschey Jr., *The SEC Proposes Proxy Rules: One Would Require a Company to Include Shareholders' Nominees for Director in its Proxy Materials,* NAT'L L.J., Nov. 10, 2003, at 19.

95. James McRitchie, *Universal Elements and Democratic Governance*, Speech Presented to the International Company Secretaries Conference, *available at* http://www.corpgov.net/forums/commentary/universal.html (last visited Feb. 23, 2005).

96. *See, e.g.*, JOHN HART ELY, DEMOCRACY AND DISTRUST 87-88, and 101-04 (1980) (articulating "representation-reinforcing" theory of American democracy). *See* JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT 4-6 (1980) (review appropriate when necessary to vindicate certain individual rights).

97. *See, e.g.*, John Rawls, *The Idea of Public Reason Revisited*, 64 U. CHI. L. REV. 765 (1997) (exploring the notion of "public reason" as a substantive mitigating force in the conflict of doctrines in a pluralistic democracy); Bruce Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013 (1984) (promotion of public dialogue as a substantive value of individual freedom arises from the democratic foundations of the Constitution); Cass Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539 (1988) (outlining the origins and modern applications of the republican belief in deliberative democracy); *see also* MARK TUSHNET, RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW 163 (1988) (arguing that republicanism embraces meaningful citizen dialogue on social and political issues).

98. This focus has been in part a consequence of deep concerns over the so-called "counter-majoritarian difficulty," the possibility of unelected judges negating the will of a majority of elected legislative representatives and, worse yet, imposing their own substantive values on the majority. *See, e.g.*, A. BICKEL, THE LEAST DANGEROUS

democracy should be about process rather than substance, and that the role of the courts is to assure the availability and effectiveness of majoritarian processes.[99]

More recently, however, many legal scholars have been urging a broader definition of democracy, one that recognizes that there are, in addition to the procedural values of democracy, certain substantive values as well.[100] In a recent law review article, I joined these scholars and identified three sets of substantive values that may be used to assess the democratic character of a dispute resolution method, process, or system: political, legal, and social capital values.[101] In brief, the political, or majoritarian, values are participation, accountability, transparency, and rationality. The legal values are equality and due process. The social capital values are public trust, social connection and cooperation, reciprocity, and civic virtue.

Crucially, all of these values are aimed at the more fundamental substantive value of promoting personal autonomy and the capacity for self-actualization.[102] This is a primary lesson[103] from the birth of modern Western democracy in the Age of Enlightenment's repudiation of a divinely ordained socio-political hierarchy,[104] its embrace of

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BRANCH 16, 18 (2d ed. 1986) (judicial review a "deviant institution in the American democracy"). Other disciplines, such as political science, define democracy more broadly, as a system of government with many different component parts. *See, e.g.*, Philippe C. Schmitter & Terry Lynn Karl, *What Democracy Is . . . and Is Not, in* THE GLOBAL RESURGENCE OF DEMOCRACY 47-49 (Larry Diamond & Marc F. Plattner eds., 1993).

99. *See* Reuben, *Democracy, supra* note 11, at 280 n.11.

100. *See, e.g.*, CHRISTOPHER L. EISGRUBER, CONSTITUTIONAL SELF-GOVERNMENT 18-20 (2001) (criticizing failure to distinguish majoritarianism and democracy); CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION 163 (1993) (arguing for greater attention paid to "social outcomes" not based on "existing preferences" derived from voting); Erwin Chemerinsky, *1988 Term: Foreword, The Vanishing Constitution*, 103 HARV. L. REV. 43, 64-72 (1989) (criticizing the Supreme Court for its adherence to a majoritarian paradigm); DANIEL A. FARBER & SUZANNA SHERRY, DESPERATELY SEEKING CERTAINTY: THE MISGUIDED QUEST FOR CONSTITUTIONAL FOUNDATIONS 1-7 (2002) (generally arguing against "grand theories" of constitutional interpretation).

101. See Reuben, *Democracy, supra* note 11, at 287-93. While this tripartite clustering is somewhat arbitrary and contrived, it does help to contextualize and concretize the political elements that are dominant under common majoritarian understandings of democracy.

102. For further discussion, see *id.* at 258-87 and accompanying text.

103. This new understanding touched virtually all aspects of social, economic, and political life – from science, letters, and the arts to religion, philosophy, and political organization. For a general discussion in a classic treatment, see THE AGE OF ENLIGHTENMENT 1-30 (Lester G. Crocker ed., 1969) [hereinafter CROCKER].

104. It should be noted that the roots of Enlightenment-era democracy actually extend back to ancient Greece and Rome. For a discussion, see ROBERT GOLDBERG, *Ancient Theory, in* SEYMOUR MARTIN LIPSET, POLITICAL PHILOSOPHY: THEORIES, THINKERS, AND CONCEPTS 178-88 (2001).

individual worth and self-actualization through reason, education, industry, and opportunity,[105] and its deliberate expression in the grand experiment of American democracy.[106] In the rest of this subsection, I will briefly describe each of these sets of democratic values, as well as their application in the workplace context.

1. *Political Values*

The first, and largest, set of core democratic values may be understood as those primarily intended to foster collective, majoritarian self-governance by enhancing the capacity of individuals to participate in that governance effectively. These include: participation, accountability, transparency, and rationality.

a) *Participation*

The consent of the governed is an essential concept for democracy, and is implemented through the democratic value of participation.[107] This is the root of the traditional majoritarian understanding of democracy. Under this social contract theory, the exercise of coercive government power is seen as legitimate because laws are enacted with the consent of those who will be bound by them. In the workplace context, the notion of "the governed" has been translated to refer to shareholders, and, in my view, may also refer to those who work for the company in the workplace context.[108]

b) *Accountability and Transparency*

In political governance, accountability generally refers to the degree to which government may be held responsible to the citizenry for its policies, words, and actions. A closely related value is transparency, which generally refers to the openness of government decision-making. In the workplace, accountability has a slightly different meaning than that of holding decision-makers accountable. Rather, accountability can be understood as the workplace's responsiveness

105. *See* CROCKER, *supra* note 103, at 3 ("[T]he rejection of Christianity and the substitution of a secular philosophy were at the core of the new outlook.").

106. *See* GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787, 3-10 (1969) (observing that the American revolution was unique among revolutions because "Americans were not an oppressed people; they had no crushing imperial shackles to throw off."); *see also* CROCKER, *supra* note 103, at 3; TUSHNET, *supra* note 97, at 91-118.

107. *See* Vernon, *supra* note 87, at 54-57.

108. *See* Charles B. Craver, *The American Worker: Junior Partner in Success and Senior Partner in Failure*, 37 U.S.F. L. REV. 587 (2003) (describing different models of worker participation in the United States and in other countries).

to effective and ineffective worker performance. To the extent an employee underperforms, principles of accountability in the new workplace would suggest that the employee improve or be terminated; indeed, the failure of management to enforce this principle can have a demoralizing influence on the workplace.[109] To the extent that the employee meets or exceeds performance standards, principles of accountability would suggest appropriate rewards for the employee, which not only benefits the employee, but also provides visible incentives to other employees that are important to the new workplace.

c) *Rationality*

Rationality in the democratic sense refers to the consistency of decisions with law, social norms, or public expectations.[110] In government, rationality acts as a protection against arbitrary and capricious decision-making.[111] In the workplace, rationality may be seen as relating to the sensibility of management and corporate decision and actions in and about the workplace, as well as other corporate goals and objectives. The more sensible such decisions are, the more legitimacy and acceptance they will command.

2. *Legal Values*

The foregoing political values are complemented by at least two values that pertain to the application of substantive rules: equality and due process.[112] Equality, or neutrality[113] speaks to the notion of the same rules being applied in the same manner to all persons who are similarly situated. The principle of equality in a democracy

109. *See, e.g.*, Jill Kickul & Scott W. Lester, *Broken Promises: Equity Sensitivity as a Moderator Between Psychological Contract Breach and Employee Attitudes and Behavior*, 16 J. BUS. & PSYCH. 191, 202-13 (2001) (entitled individuals found to have greater increases in negative affect toward their organization and greater decreases in job satisfaction and organizational citizenship behavior than benevolent individuals following a breach of extrinsic outcomes, such as pay and benefits).

110. *See* Jerry L. Mashaw, *Administrative Due Process: The Quest for a Dignitary Theory*, 61 B. U. L. REV. 885, 901-02 (1981).

111. 5 U.S.C. § 706(2)(A) (2004) (prohibiting arbitrary and capricious actions by federal administrative agencies under the Administrative Procedure Act). *See also* Motor Vehicle Mfrs. Ass'n of the United States v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (requiring a "rational connection between the facts found and the choice made" in order for administrative action to survive arbitrary and capricious review) (quoting Burlington Truck Lines Inc. v. United States, 371 U.S. 156, 168 (1962)).

112. Legal values would also include those human rights values typically embraced by liberal democracy. I emphasize equality and due process because they are most salient to the issues addressed in this paper.

113. *See* CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION 17-39 (1993).

serves as a check on arbitrary and capricious decision-making, which in turn helps to assure the stability of the political, social, and economic orders. Due process is closely aligned with equality in its operation as a constraint upon arbitrary government action, and is essentially the promise of fair treatment at the hands of the government. The path of due process in American public law suggests due process may be understood in at least two dimensions: procedural due process (focusing on the right to notice and a hearing before rights are taken away by the government) and substantive due process (focusing on the substantive fairness of rules).[114] In the business context, due process is particularly significant with respect to the legitimacy of workplace rules,[115] including the promulgation of workplace rules and policies that are seen as substantively fair, applied even evenhandedly, and administered fairly.

3. *Social Capital Values*

The final category of core democratic values relates to social capital, in particular the promotion of civil society.[116] As discussed above,[117] in the corporate context this social capital may manifest itself as the informal culture within the workplace that helps shape attitudes and behavior, including connection, reciprocity, trust, and organizational citizenship behavior.[118] This is the workplace equivalent of civic virtue.[119]

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114. *See* GERALD GUNTHER & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW 415-16 (13th ed. 1997).

115. *See* PUTNAM, *supra* note 44, at 163-87; Tom R. Tyler, *Public Mistrust of the Law: A Political Perspective*, 66 U. CIN. L. REV. 847, 856-58 (1998) [hereinafter Tyler, *Public Mistrust*].

116. *See* PUTNAM, *supra* note 44, at 163-85.

117. *See supra* notes 44-69 and accompanying text.

118. For a good concise discussion of corporate culture and its effects, see John W. Teague, *Does Corporate Culture Justify Defensive Measures to Takeover Attempts?* 42 BAYLOR L. REV. 791, 793-804 (1990). For more general discussion, see T. DEAL & A. KENNEDY, CORPORATE CULTURES: THE RITES AND RITUALS OF CORPORATE LIFE (1982); T. PETERS & R. WATERMAN, JR., IN SEARCH OF EXCELLENCE: LESSONS FROM AMERICA'S BEST-RUN COMPANIES (1982); Edgar Schein, *How Culture Forms, Develops, and Changes*, *in* R. KILMANN ET AL., GAINING CONTROL OF THE CORPORATE CULTURE (1985); Richard Lidstad, *Developing a Corporate Culture for the Maximum Balance Between Utilization of Human Resources and Employee Fulfillment in the United States*, 22 CAN. - U.S. L.J. 157 (1996).

119. *See* Lynn van Dyne et al., *Organizational Citizenship Behavior: Construct Redefinition, Measurement, and Validation*, 37 ACAD. MGT. J. 765, 765-67 (1994) (reconceptualizing organizational citizenship behavior as civic citizenship described in political philosophy).

C. *Closing the Circle: Corporate Democracy in the New Workplace*

The values drawn from the traditional governmental sphere coincide significantly and meaningfully with the values I have already identified as animating the new workplace in the private sphere. The primary emphasis of both is on the individual and the individual's capacity for growth, self-determination, and self-actualization.[120] The aim of that self-actualization in the new workplace may be narrower in that it is directed at professional achievement, job satisfaction, and the sense of personal fulfillment that can flow from these sources.[121] However, it is still clearly a part of the broad sense of autonomy conceived by Hobbes, Locke, Kant, and the other Enlightenment-era political philosophers who were the architects of modern democracy.[122] The autonomy they perceived was, in modern parlance, to "go where you wanna go, do what you wanna do."[123]

Moreover, each of the three supporting categories of values identified in the governmental sphere can also be seen as operative in the new workplace. The most salient of these in both contexts are the political values, especially the value of participation, in part because these political values underscore the significance of personal autonomy and dignity interests that are central to the core of both governmental democracy and the new private workplace. As with public governance, participation also has been the primary context in which democracy has been understood in the organizational context, through such means as the encouragement of employee ownership, employee access to voting rights, "open book" management, greater employee communication, and greater organizational capacity.[124] Unlike in the governmental context, however, participation does not lead to majoritarian rule in the business environment. Rather, participation leads to greater involvement in the shaping of organizational decisions, policies, procedures, etc., and in turn, their greater understanding and acceptance. This phenomenon has been called the "process control" effect[125] or the "voice" effect.[126]

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120. *See* Green, *Disparate Treatment Theory*, *supra* note 42.

121. *See, e.g.*, COHEN & PRUSAK, *supra* note 6.

122. For a general discussion, see CROCKER, *supra* note 103, at 1-30.

123. The Mamas and the Papas, *Go Where You Wanna Go*, *on* IF YOU CAN BELIEVE YOUR EYES AND EARS (MCA 1966).

124. *See* McRitchie, *supra* note 95, at ¶ 32; JOYCE ROTHSCHILD & J. ALLEN WHITT, THE COOPERATIVE WORKPLACE: POTENTIALS AND DILEMMAS OF ORGANIZATIONAL DEMOCRACY AND PARTICIPATION 145-59 (1986) (workers more satisfied in firms that have democratic orientation).

125. John Thibault & Laurens Walker, *A Theory of Procedure*, 66 CAL. L. REV. 541, 546-47 (1978).

As in the governmental context, transparency and rationality are vital political participation values of the new workplace because they foster an environment of openness and constructive communication that both welcomes employee contribution and fosters a more trusting and cooperative workplace relationship between and among employers and employees. Clearly, not all management or institutional decisions can or should be made in the public forum of the workplace; public discussion of personnel, task assignment, and other such issues could be quite counterproductive if made in a public way. (Reasonable minds may, of course, disagree on where the line should appropriately be drawn, but one should be drawn nonetheless.) The organizational behavior literature confirms that the more transparent a workplace makes the reasons behind its policies, major decisions, and goals,[127] and the more those reasons are rational and consistent with the actual and psychological contracts governing the workplace, the more workers will align their behavior with the company's expectations for the present and vision for the future. Similarly, the more the companies are willing to promote open and effective communication of workplace needs, interests, opportunities, and concerns, and the more both employees and employers are willing to be responsive to them, the more the benefits of transparency and rationality may be felt to nurture workplace trust, OCB, and performance.[128] To be sure, responsiveness in this sense does not contemplate agreement. Rather, responsiveness contemplates understanding and somehow acknowledging that understanding,[129]

126. Robert Folger, *Distributive and Procedural Justice: The Combined Improvement of "Voice" and Improvement on Experienced Inequity*, 35 J. PERSONALITY & SOC. PSYCHOL. 108, 115-18 (1977).

127. *See, e.g.*, Nic Beech & Oliver Crane, *High Performance Teams and a Climate of Community*, 5 TEAM PERFORMANCE MGT. 87 (1999) (finding transparency of decision making significant in making transition from normal to high performance teams); Lisa C. Abrams et al., *Nurturing Interpersonal Trust in Knowledge-Sharing Networks,* 17 ACAD. MGT. EXEC. 64 (2003) (finding relationship between transparency in decision making and trust of workers in the knowledge-sharing context); McRitchie, *supra* note 95, at n.9 (citing 1987 General Accounting Office study finding 52 percent higher productivity growth rate by companies with significant employee ownership and participation in decision making).

128. *See* Jacqueline Mayfield & Milton Mayfield, *Leader Communication Strategies: Critical Paths to Improving Employee Commitment*, 20 AM. BUS. REV., June 2002, at 89, 90 ("Communication is a powerful catalyst for establishing and sustaining trust, the emotional state that is shared by highly committed workers and leaders. Leader communication is the bridge that transmits behavioral intent to employees, thus creating the foundation for trust.").

129. Conceptually, this is similar to the notion of empathy. *See* ROBERT H. MNOOKIN ET AL., BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES 46-50 (2000).

engaging rather than ignoring or trivializing difficult issues, and providing a path to real organizational learning.[130]

These autonomy values and political values are balanced by accountability. Democratic participation implies that one will participate responsibly, as this set of values seeks to enable and empower the individual to make choices and take actions based on those choices. The natural consequence of choice, however, is accountability, especially in a social context like the workplace.[131] In the workplace context, this translates into workers receiving the appropriate rewards for jobs well done, as well as appropriate consequences for failing to meet expectations.[132]

In the same way, democracy's legal values of equality and due process, dignitarian in nature, are promoted by formal and informal management policies that treat workers fairly and equally in status and opportunity. Formal workplace prohibitions against discrimination based on race, gender, and national origin are of course a matter of federal and state law.[133] However, many companies go farther than the minimum that law requires – for example, by extending worker benefits to homosexual partners,[134] by doing business with companies that promote values such as environmental protection or international human rights,[135] by creating a culture in which

130. *See supra* note 71.

131. In recognizing the need to temper individual autonomy with social responsibility, Professor Christina Wells has adroitly noted that autonomy "is not about atomistic individuals but about social creatures entitled to respect for their dignity. . . [and] . . . members of society . . . responsible for respecting the dignity of others." Christina E. Wells, *Reinvigorating Autonomy: Freedom and Responsibility in the Supreme Court's First Amendment Jurisprudence*, 32 HARV. C.R.-C.L. L. REV. 159, 161-70 (1997) (drawing on Kantian theory for a social understanding of autonomy that informs free speech theory).

132. *See* Kickul & Lester, *supra* note 110 and accompanying text; Frances A Viggiani, *Democratic Hierarchies in the Workplace: Structural Dilemmas and Organizational Action*, 18 ECON. & INDUST. DEM. 231, 231-60 (1997); Dave Anderson, *Three Keys to Accountability*, 1 SUPERVISION 10, 10-11 (2004).

133. Civil Rights Act of 1964, 42 U.S.C. § 2000e (1964).

134. *See, e.g.*, Robert Ristelheuber, *Domestic Partner Benefits Just Good Business*, 22 ELECTRONIC BUSINESS TODAY, Nov. 1996, at 18 (discussing gay benefits policies as vehicles of employee retention and listing companies that provide such benefits, largely in high-tech industries); Keith H. Hammonds, *Lotus Opens a Door for Gay Partners*, BUS. WEEK, Nov. 4, 1991, at 80 (reporting on gay partners benefits policy of the Lotus Development Corp.).

135. *See, e.g.*, R. Bruce Hutton et al., *Socially Responsible Investing: Growing Industries, New Opportunities,* 37 BUS. & SOC'Y 281 (1998) (describing growth of socially responsible investing industry).

mistakes may be viewed as learning opportunities rather than sanctionable events,[136] by providing for employee "flex time,"[137] and, I would submit, by providing for a variety of means for resolving workplace-related disputes efficiently and effectively.[138] Such actions send a powerful signal to employees, potential employees, and to the outside world about the value that the company places on matters affecting equality, due process, and dignity. Also, such actions contribute mightily to the employee and potential employee perception of the employer's workplace as a desirable place to spend one's time or do business with as a consumer or business partner.[139] Finally, both the public and private social capital research suggests that the fulfillment of democratic political and legal values in the workplace can be expected to help foster a rich, vibrant corporate culture marked by the interrelated values of reciprocity, trust, and OCB. Reciprocity lies at the heart of social capital, which in its essence is a function of human relationships and networks.[140] In his seminal work, sociologist Alvin W. Gouldner theorized that the stability of a social system depends in part on a "norm of reciprocity" among its members that inhibits exploitation and serves to maintain the system.[141] The reciprocity norm also tends to transcend normal egoistic motivation because people generally recognize that reciprocating good deeds

136. *See, e.g.*, Amit Somech & Anat Drach-Zahavy, *Organizational Citizenship Behavior from an Organizational Perspective: The Relationship Between Organizational Learning and Organizational Citizenship Behavior,* 77 J. OCCUPATIONAL & ORG. PSYCH. 281, 290-95 (2004) (finding organizational learning positively correlated to organizational citizenship behaviors that benefit both company and employee as individual).

137. *See, e.g.*, COHEN & PRUSAK, *supra* note 6 (discussing flex time at Hewlett Packard as part of "the HP way").

138. *See* Margaret Shaw, *Designing and Implementing In-House Dispute Resolution Programs*, SD70 ALI-ABA 447 (1999).

139. A. K. Mishra & G. M. Spreitzer, *To Stay or To Go: Voluntary Survivor Turnover Following an Organizational Downsizing,* 23 J. ORG. BEHAV. 707 (2002) (finding trustworthiness of management, distributive justice, procedural justice, and certain dimensions of empowerment facilitate organizational attachment, which in turn facilitates less voluntary turnover in year following corporate downsizing); Thomas R. Mitchell & Thomas W. Lee, *The Unfolding Model of Job Turn-Over and Job Embeddedness: Foundations for a Comprehensive Theory of Attachment*, 23 RESEARCH IN ORG. BEHAV. 198 (2001) (suggesting majority of those who voluntarily leave a company do so because of a great shock that causes employee to rethink relationship with employer).

140. *See* Robert D. Putnam, *Bowling Together*, 14 THE OECD OBSERVER, Mar. 2004, at 14 ("[S]ocial capital refers to social networks and the associated norms of reciprocity.").

141. *See* Alvin W. Gouldner, *The Norm of Reciprocity: A Preliminary Statement,* 25 AM. SOC. REV. 25, 161-178 (1960); Daniel J. Brass et al., *Relationships and Unethical*

increases one's chance of receiving benefits in the future. While individuals may benefit by defecting from the norm, the norm itself tends to inhibit such exploitation.[142]

The reciprocity norm can have a powerful cycling effect. When animated by constructive workplace behaviors, the reciprocity norm can lead to a "virtuous cycle," where total OCB increases as the result of repeated reciprocal helping, courtesy, sportsmanship, civic virtue, and other such behaviors between employees.[143] However, when animated by such destructive workplace behaviors as cynicism, jealousy, and selfishness, the reciprocity norm can lead to a "vicious" cycle in which employees withhold help and other organizational citizenship behaviors from each other because they themselves do not receive help.[144] Worse yet, the result can lead to a reciprocity norm of workplace deviant behavior ("WDB") rather than OCB,[145] where workers engage in behaviors that affirmatively undermine the efforts of co-workers or the larger goals of management.

One area in which this reciprocity norm is particularly important is in organizational trust, an essential value in the new workplace, with respect to both vertical trust among workers, and horizontal trust between workers and management.[146] As noted above, the psychological contract that supports the new workplace is one where the company effectively agrees to provide an environment in which the employee can grow and be successful in ways meaningful to that individual employee, while the employee agrees to make best use of that

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Behavior: A Social Network Perspective, 23 ACAD. OF MGT. REV. 14, 14-31 (1998) [hereinafter Brass et al.].

142. *See* John R. Deckop, Carol C. Cirka, Lynne M. Andersson, *Doing Unto Others: The Reciprocity of Helping Behavior in Organizations,* 47 J. OF BUS. ETHICS 101, 103-05 (citing M. Masuch, *Vicious Cycles in Organizations*, 30 ADMIN. SCI. Q. 14 (1985)); Brass et al., *supra* note 141.

143. For a more detailed discussion, see Deckop et al., *supra* note 142, at 103-05.

144. *Id.* at 107-09. For more on vicious cycles, see Michael Masuch, *Vicious Cycles in Organizations,* 30 ADMIN. SCI. Q. 14 (1985).

145. *See* Deckop et al., *supra* note 142; *see also* Patrick D. Dunlop & Kibeom Lee, *Workplace Deviance, Organizational Citizenship Behavior, and Business Unit Performance: The Bad Apples Do Spoil the Whole Barrel*, 25 J. ORG. BEHAV. 67, 69-70 (2004).

146. *See, e.g.*, Scott W. Lester & Holly H. Brower, *In the Eye of the Beholder: The Relationship Between Subordinates' Felt Trustworthiness and Their Work Attitudes and Behaviors*, 10 J. LEADERSHIP & ORG. STUD. 17, 24-26 (2003) [hereinafter Lester & Brower] (finding positive relationship between felt trustworthiness and performance, organizational citizenship behavior, and job satisfaction); Samuel Aryee et al., *Trust as a Mediator of the Relationship Between Organizational Justice and Work Outcomes: Test of the Social Exchange Model*, 23 J. ORG. BEHAV. 267, 271-82 (2002).

opportunity on behalf of the company.[147] It is essential to the stability of the relationship that each side trust the other to perform according to the general expectations of the psychological contract.[148] A corporate culture imbued with the democratic political, legal, and social capital values that include autonomy, participation, transparency, responsiveness, and equal, fair and respectful treatment promotes this trust,[149] and fosters a sense of social connection between employees as members of a family or team rather than the assembly-line automatons of the old workplace.[150] Accelerated by the interactive reciprocity effect, shared values quickly become group norms that have a powerful compliance effect.[151] As group norms coalesce around substantive democratic values, they act to provide a stable basis upon which the more fluid and conditional new workplace can be erected. In this way, reciprocity and trust come together to foster organizational citizenship behavior.

IV. Arbitration, the New Workplace, and Corporate Democracy

In the preceding parts, I have described the changed nature of the workplace, the fluidity of the structure of the new workplace, and the democratic character of the values that support it. In this Part, I will address the conflict resolution component of the new workplace. This is appropriate because conflict is inevitable, even in the most democratic of workplaces. It is important because conflict can have constructive effects just as it can have destructive effects,[152] and one of the things that will distinguish more desirable workplaces in the modern era is whether those inevitable conflicts are managed effectively and constructively. In workplaces oriented toward democratic

147. *See* Rousseau, *supra* note 21, at 128-29.

148. The failure to meet these expectations is the very definition of breach of trust. *See* Roy J. Lewicki & Barbara Benedict Bunker, *Trust in Relationships: A Model of Development and Decline, in* Conflict, Cooperation, and Justice: Essays Inspired by the Work of Morton Deutsch 133, 165-67 (Barbara Benedict Bunker & Jeffrey Z. Rubin eds., 1995) [hereinafter Lewicki & Bunker].

149. *See* Michael Maccoby, *Creating Quality Cultures in the East and West*, 37 Res. Tech. Mgt., Jan./Feb. 1994, at 57 ("Trust . . . is maintained by open dialogue about expectations in an ever-changing environment. Trust can also be increased by involving employees and their representatives in the strategic planning process, so that they can influence change to take account in their interests.").

150. *See* Estlund, *supra* note 1, at 23-29.

151. *See* Ronald J. Fisher, *Intergroup Conflict, in* The Handbook of Conflict Resolution: Theory and Practice 166, 175 (Morton Deutsch & Peter T. Coleman eds., 2000).

152. Constructive effects of conflict include the fostering of greater understanding, improved social relationships, and social progress. Pruitt, *supra* note 70, at 10-11.

values, constructive conflict resolution will be promoted when the processes of dispute resolution themselves operate in a way that vindicate rather than diminish democratic workplace values – that is, when the processes have a strong democratic character when measured according to the political, legal, and social capital values I have discussed. In this Part IV, I will analyze the democratic character of the primary dispute resolution methods, beginning with public adjudication, before turning to arbitration and then finally to mediation. With respect to arbitration, I will focus on arbitrations conducted under the Federal Arbitration Act ("FAA") because that is the principle legal regime governing non-union employment arbitration in the new workplace. For the sake of organizational clarity, I will first address the political and legal democratic characteristics of arbitration and mediation separately, before consolidating discussion of the autonomy and social capital characteristics.

A. *The Democratic Character of Dispute Resolution*

1. *Public Adjudication*

It is helpful to begin analysis of the democratic character of dispute resolution in the workplace with public adjudication because it is the presumptive method by which formal non-union workplace disputes will be resolved.[153] As I have defined it elsewhere, public adjudication, the right to go to court, is "democracy's endowment for dispute resolution,"[154] the presumptive venue in which formalized workplace disputes will be resolved in the absence of alternative measures. Analysis of the democratic character of dispute resolution in this context therefore also provides an important baseline against which other dispute resolution methods may be assessed.

Not surprisingly, public adjudication exhibits a strong democratic character.[155] Courts promote public participation in the development and administration of the rule of law by allowing parties to bring actions to enforce legal rights, by providing for jury service in

153. By formal disputes, I refer to those disputes that have escalated to the point where there is some kind of formal claiming of rights. Many if not most disputes are resolved by less formal means. For arguments that informal dispute resolution – wholly removed from law – is the primary means by which disputes are actually resolved, see William L. F. Felstiner et al., *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming. . .*, 15 L.& SOC'Y. REV. 631, 633-37 (1981); Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About our Allegedly Contentious and Litigious Society,* 31 UCLA L. REV. 4, 6-11 (1983).

154. *See* Reuben, *Democracy*, *supra* note 11, at 293-95 and accompanying text.

155. For a fuller discussion, see *id.* at 287-93.

certain public adjudications,[156] and by articulating and maintaining societal expectations about the legal consequences of conduct that guides private ordering.[157] Similarly, courts promote equality, due process, and rationality by operating in accordance with specific rules of procedure, evidence, and substantive law that have been enacted pursuant to statutory or administrative prescription, or which have evolved over time at common law.[158] There is also significant accountability and transparency in trial court decision-making through the availability of judicial review of trial level decisions,[159] as well as the public nature of trials and appellate argument.[160] Finally, as instruments of the rule of law, courts help generate a rich reserve of social capital that further reinforces compliance with the rule of law.[161]

2. *The Democratic Character of Arbitration Under the Federal Arbitration Act*

Unlike public adjudication, arbitration is a private, informal adjudicatory process in which the disputing parties authorize a third party to issue a decision in their dispute.[162] This is commonly effected through a contractual arbitration provision that lays out the scope of the arbitrator's authority, the binding character of the decision (or arbitral award), as well as conditions, limits, or obligations on the arbitrator in exercising that authority.[163]

Since the rise of the labor movement in the early twentieth century, arbitration has been a fixture in the unionized workplace.[164] In the 1980s and 1990s, the range of arbitration expanded significantly to cover the non-union employment context, largely under the authority of the Federal Arbitration Act.[165] The FAA was enacted in

156. *See id.* at 288 and sources cited therein.
157. *See id.* at 310 and sources cited therein.
158. *See* Reuben, Democracy, *supra* note 11, at 293-95 and sources cited therein.
159. *See id.*
160. *See id.* at 310-18 and discussion therein.
161. *See id.* at 310-12 and sources cited therein.
162. For an argument that arbitrations conducted under the FAA are public rather than private in nature because of the presence of state action, see Richard C. Reuben, *Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice,* 47 U.C.L.A. L. REV. 949, 989-1017 (2000) [hereinafter Reuben, *Constitutional Gravity*].
163. *See* 1 IAN R. MACNEIL ET AL., FEDERAL ARBITRATION LAW § 1.1.3.2 (Supp. 1999).
164. *See* ELKOURI & ELKOURI, *supra* note 74.
165. *See, e.g.*, Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220 (1987) (compelling arbitration of securities fraud claims under the 1933 Act and RICO); Rodriguez de Quijas v. Shearson/Am. Express, Inc. 490 U.S. 477 (1989) (compelling

1925 primarily to reverse legislatively the historic "ouster doctrine," a centuries-old common law doctrine under which courts refused to enforce agreements to arbitrate.[166] In particular, the Act provides that arbitration agreements will be enforced just like any other agreement, as long as the agreement is enforceable as a matter of contract law.[167] It further permits a court to compel an unwilling party into arbitration if it is satisfied that there is an enforceable agreement to arbitrate,[168] and to stay related legal proceedings.[169]

If the endowment of public adjudication in the United States provides a baseline against which the democratic character of other dispute resolution processes may be measured, arbitration under the FAA tends to fall short of the mark in many important respects. To be sure, arbitration permits party participation, arguably at a higher level than adjudication, considering that the informality of the arbitration process can overcome formal barriers to party participation, such as the prohibitions against hearsay evidence.[170] However, arbitration provides little accountability,[171] as arbitration awards are generally not subject to the substantive review that is available for decisions in public adjudication.[172] Rather, review is limited to

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securities fraud claims under the 1934 Act); Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991) (compelling arbitration of federal age discrimination claim).

166. For a definitive legislative history of the FAA, see IAN R. MACNEIL, AMERICAN ARBITRATION LAW: REFORMATION–NATIONALIZATION–INTERNATIONALIZATION (1992).

167. 9 U.S.C. § 2 (1999); *see also* UNIF. ARBITRATION ACT § 1 (2000); 7 U.L.A. 1 (1997).

168. 9 U.S.C. § 4 (1999).

169. The "court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had." 9 U.S.C. § 3 (1999).

170. There is some constraint on the participation value when contrasted with public adjudication, because arbitration under the FAA does not contemplate a role for public participation, such as through jury service. *See* Edmonson v. Leesville Concrete Co., 500 U.S. 614, 628 (1991). To the contrary, arbitration is private justice. For a book predicated upon the idea that all of alternative dispute resolution is private justice, see KATHERINE V.W. STONE, PRIVATE JUSTICE: THE LAW OF ALTERNATIVE DISPUTE RESOLUTION (2000).

171. For a response to the argument that accountability in arbitration is provided by the private marketplace, see Reuben, *Democracy*, *supra* note 11, at 300-01.

172. While courts have frequently cited their inherent authority to overturn arbitration decisions that are substantively in manifest disregard of the law, it is rare for a court to actually take such a step. For the unusual situation in which a court permitted further proceedings on manifest disregard grounds, see Halligan v. Piper Jaffray, Inc. 148 F.3d 197, 202 (2d Cir. 1997). For a general discussion, see Stephen L. Hayford, *Reining in the "Manifest Disregard" of the Law Standard: The Key to Restoring Order to the Law of Vacatur,* 1998 J. DISP. RESOL. 117 (1998).

misconduct on behalf of the arbitrator[173] or other procedural defects.[174] Similarly, transparency and rationality are not essential values of arbitration. Arbitrators are generally not required to articulate reasons for their decisions in the form of written opinions,[175] effectively precluding substantive judicial review of arbitral awards.[176] Moreover, arbitrators do not have to make their decisions according to rules of law, which can make their awards appear arbitrary or capricious to those unfamiliar with the industry customs or practices upon which a decision may be based.[177]

Because of the enormous decisional discretion vested in arbitrators, arbitration does not, and arguably should not, provide any assurance of equal treatment of similar parties in different cases, at least in the sense of the application of substantive rules. Quite to the contrary, arbitration provides a highly individualized form of justice that is narrowly tailored to the specific circumstances presented to the arbitrator, who makes a decision according to whatever substantive standard he or she determines is appropriate under the circumstances, unless the submission to arbitration specifies otherwise.[178] On the other hand, arbitration does provide for equal treatment in the sense of procedural due process,[179] generally assuring that both parties within the arbitration will be treated equally with respect to

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173. 9 U.S.C. § 10(a) (2002); UNIF. ARBITRATION ACT. § 23(a) (2000).

174. 9 U.S.C. § 11 (2002); UNIF. ARBITRATION ACT § 24 (2000).

175. *See* 3 IAN R. MACNEIL ET AL., FEDERAL ARBITRATION LAW § 37.4.1 (Supp. 1999). For a more detailed analysis, see Richard C. Reuben, *Constitutional Gravity*, *supra* note 162, at 1082-91. The industry is moving toward a user choice model on this issue, however. *Id.* at 1082-85.

176. Such concerns have animated the debate over the depublishing of judicial opinions. *See, e.g.*, Anastasoff v. United States, 223 F.3d 898 (8th Cir. 2000) (Arnold, J.) (discussing Anglo-American history of precedent in finding federal circuit court rule prohibiting use of unpublished opinions unconstitutional under Article III). For a contrary view, though, see Hart v. Massanari, 266 F.3d 1165 (9th Cir. 2001). *See generally* Development and Practice Note, *Anastasoff, Unpublished Opinions, and "No-Citation" Rules*, 3 J.APP. PRAC. & PROCESS 169, 169-70 (2001). For a discussion of similar issues raised by the decertification of judicial opinions, see William Wesley Patton, *Publication, Depublication and Review of State Bar Court Opinions: Bringing the Public into the Process*, 17 WHITTIER L. REV. 409 (1996).

177. *See* Reuben, *Democracy*, *supra* note 11, at 302.

178. Parties, of course, can direct the arbitrator to apply certain standards, and not apply other standards, in their submissions to arbitration.

179. Arbitration submissions routinely include or incorporate by reference specific rules by which the arbitration is to be conducted, such as the Commercial Arbitration Rules of the American Arbitration Association. *See* Commercial Arbitration Rules and Mediation Procedures (including Procedures for Large, Complex Commercial Disputes) (amend. July 1, 2003), *available at* http://www.adr.org/index2.1.jsp?JSPssid=15747&JSPsrc=upload\LIVESITE\Rules_Procedures\National_International\..\..\focusArea\commercial\AAA235current.htm (last visited Feb. 23, 2005).

the presentation of evidence to the arbitrator.[180] While the practices of individual arbitrators in this regard may vary considerably, the market for arbitration cases, and other reputational concerns, tend to constrain abuse of discretion by arbitrators.[181]

3. *The Democratic Character of Mediation*

As a consensual dispute resolution process requiring the consent of the parties before a dispute can be resolved, mediation may generally be seen as an inherently more democratic process than an adjudicatory process like arbitration. However, the enormous variety of styles, practices, and applications of mediation raise uncertainty on several democratic elements – a dynamic that gives rise to some of the most significant, contentious, and largely unresolved policy issues in the field. In my view, democratic theory would suggest that the answers to these fundamental dilemmas may be ascertained by reference to the autonomy value – that is, the capacity for mediation to foster true and meaningful self-determination for the parties in the resolution of their disputes.[182]

The political democratic factors present a particularly mixed bag, in part because of the adaptability of mediation to unique circumstances that makes the process valuable in the first place. While the mediation process generally allows for a high degree of participation

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180. *See, e.g.*, Hooters of Am., Inc. v. Phillips, 173 F.3d 933 (4th Cir. 1999) (rejecting as unconscionable an arbitration provision that limited remedies, depositions, and bound only the employee, among other abuses); Armendariz v. Found. Health Psychcare Servs., Inc., 6 P.3d 669 (Cal. 2000) (arbitration provision requiring only employee to arbitrate, and even then not affording full statutory remedies, was substantively unconscionable); Graham v. Scissor-Tail, Inc., 623 P.2d 165 (Cal. 1981) (music industry arbitration provision requiring nonunion members to arbitrate before union arbitration panel was substantively unconscionable). For a discussion with extensive case citations, see F. PAUL BLAND, JR. ET AL., NATIONAL CONSUMER LAW CENTER, CONSUMER ARBITRATION AGREEMENTS §§ 4.1-4.4 (3d ed. 2003).

181. For more on reputational markets of lawyers in the negotiation context, see Ronald J. Gilson & Robert H. Mnookin, *Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation,* 94 COLUMBIA L. REV. 509, 522-34 (1994) (discussing constraining effect of reputational norms on potential unethical behavior by lawyers).

182. *See infra* notes 208-15 and accompanying text. Self-determination is a core value of the mediation process. *See, e.g.*, MODEL STANDARDS OF CONDUCT FOR MEDIATORS § I (American Bar Association, American Arbitration Association, and the Society of Professionals in Dispute Resolution, 1994) ("Self-determination is the fundamental principle of mediation. It requires that the mediation process rely upon the ability of the parties to reach a voluntary, uncoerced agreement."); MODEL STANDARDS OF PRACTICE FOR FAMILY AND DIVORCE MEDIATION 1A (2001) ("Self-determination is the fundamental principle of family mediation. The mediation process relies upon the ability of participants to make their own voluntary and informed decisions.").

by disputants,[183] the transparency of the process greatly depends upon the particular mediation format that is used. For example, non-caucus models are plainly more transparent to the parties than the arguably more common models in which private caucuses are used, and through which information crucial to settlement is deliberately shielded from one of the parties by the mediator and the other party, absent party consent.[184] Indeed, maintaining the appearance of neutrality while working effectively with private caucus information is a central challenge for practicing mediators who work with the caucus format.[185] Surely this shield of the caucus works both ways in that mediators will typically caucus with both parties. However, one should not confuse even-handedness with transparency. Caucuses shield information, and that is the antithesis of transparency.

Similarly, mediation is not a particularly rational process as compared with our baseline of public adjudication because one of the strengths of the mediation process is the ability of the parties to make decisions about the outcomes of their disputes according to values and standards that are uniquely important to them rather than according to pre-determined legal, workplace, or other standards. As a result, decision making in mediation is more of an idiosyncratic process, rather than one guided by more objective rationality. While this is entirely appropriate, it can raise an enormous practical challenge in assessing the substantive fairness of a mediated settlement agreement, particularly one that falls well short of what the law may provide, but which satisfies other interests of the parties, including just resolving the dispute.[186]

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183. This may be more true for less sophisticated cases, such as routine contract, tort, and landlord-tenant cases, than for more sophisticated cases such as complex commercial matters, antitrust, and bankruptcy matters, in which counsel is likely to represent parties. *See, e.g.*, Jacob Aaron Escher, *ADR Comes to Bankruptcy*, 9 DISP. RESOL. MAG, Summer 2003, at 29; Howard Adler & Richard Chernick, *The Expanding Role of ADR in Antitrust Cases,* 9 DISP. RESOL. MAG., Winter 2003, at 34.

184. For a discussion of the pros and cons of mediation caucuses, see JAMES J. ALFINI ET AL., MEDIATION THEORY AND PRACTICE 131-32 (2001); MEDIATING LEGAL DISPUTES § 3.2, at 68 (Dwight Golann ed., 1996) (describing avoidance of caucuses in family mediation context).

185. This is reflected in the ongoing professional debate over whether mediators have an obligation to assure the fairness of mediated settlement agreements. *Compare, e.g.*, Judith L. Maute, *Public Values and Private Justice: A Case for Mediator Accountability*, 4 GEO. J. LEGAL ETHICS 503 (1991) (arguing in favor of such an obligation) *with* SARAH R. COLE ET AL., MEDIATION: LAW, POLICY, PRACTICE § 2:6-2:7 (2d ed. 2003) (arguing that mediator efforts to assure fairness would risk mediator impartiality).

186. *See, e.g.*, Gary Friedman & Jack Himmelstein, *Deal Killer or Deal Saver? The Consulting Lawyer's Dilemma*, 2 DISP. RESOL. MAG., Winter 1997, at 7.

The mediation process is similarly ambiguous on the final political value, accountability. On the one hand, because mediation parties are not required to settle, they arguably have all the accountability they need.[187] However, this view does not take into account coercive pressures that the mediator can bring to bear on parties in mediation, particularly mediators who use a more directive or cajoling style,[188] as well as other settlement pressures, such as time, resources, and the need for a party to move on. Moreover, this view focuses on particular disputes, and a look at the system as a whole underscores the lack of accountability in mediation. Mediators are not licensed or certified in most states, and so are not accountable to public oversight other than through private actions for malpractice or ethical lapses,[189] and through the reputational market for mediator services.[190] Moreover, unlike most contracts, the results of mediated settlement agreements cannot generally be reviewed for substantive fairness, or even unconscionability.[191] While in most cases there is no need for such review, democracy's concern would be with those cases for which review is appropriate because of undue mediator coercion,

187. For an article generally arguing that disputes are private matters, a view that would support the form of internal accountability I have described, see Carrie Menkel-Meadow, *Whose Dispute Is It Anyway?: A Philosophical and Democratic Defense of Settlement (in Some Cases)*, 83 GEO. L.J. 2663 (1995). *But see* David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619 (1995) (settlement erodes public realm); Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1082-90 (1983) (making the seminal argument).

188. *See, e.g.*, James J. Alfini, *Trashing, Bashing and Hashing It Out: Is This the End of "Good Mediation?,"* 19 FLA. ST. U. L. REV. 47 (1991); Nancy A. Welsh, *Making Deals in Court-Connected Mediation: What's Justice Got to Do with It?* 79 WASH. U. L.Q. 787, 817-26 (2001).

189. Mediators continue to argue for immunity, but the law has been reluctant to oblige. The Uniform Mediation Act, for example, rejected mediator immunity in favor of a mediator liability model of accountability. *See* Memorandum from Richard C. Reuben, Reporter, ABA UMA Drafting Committee, to Friends of the Mediation Law Project, Changes to the June 1999 Draft (Nov. 16, 1999) (copy on file with author) (deletion of immunity). On mediator liability generally, see Michael Moffitt, *Ten Ways to Get Sued: A Guide for Mediators*, 8 HARV. NEGOT. L. REV. 81 (2003).

190. *See supra* note 182 and accompanying text.

191. Courts are generally reluctant to vacate mediated settlement agreements on substantive grounds, such as unconscionability. *See, e.g.*, Zhu v. Countrywide Realty Co., No. 02-3087, 2003 WL 21399026, at *843 (10th Cir. June 18, 2003) (unpublished) (rejecting unconscionability challenge); Vela v. Hope Lumber & Supply Co., 966 P.2d 1196, 1199 (Okla. Ct. App. 1998) (rejecting unconscionability, economic duress, undue influence, and coercion claims for lack of evidence in upholding mediated settlement agreement); *but see* Vitakis-Valchine v. Valchine, 793 So.2d 1094, 1099-1100 (Fla. 4th Dist. Ct. App. 2001) (remanded decision, arguing that mediated settlement agreement can be set aside for mediator misconduct).

party incompetence, or other circumstances suggesting a lack of meaningful autonomy by the disputing parties.

Finally, the mediation process raises similar democratic ambiguity on the legal values of due process and equality. A standard practice of mediators is to work with the parties to establish ground rules for the conduct of the mediation to which both parties agree, and this is strongly democratic in terms of assuring procedural due process.[192] However, both the substantive due process and the equality components of democratic dispute resolution implicate concerns over mediator style in general, and competence to manage power imbalances between the parties in particular. The traditional theoretical divide on mediator style is between facilitative and evaluative mediation,[193] or what Professor Riskin has more recently termed "elicitative" and "directive."[194] In my view, democratic theory holds no preference for one style over the other. Facilitative mediation has great power to enhance party autonomy in the resolution of a dispute, assuming the mediator is skillful in managing power disparities between the parties. If the mediator is not capable of managing a power imbalance effectively, however, the result can be the suppression of the meaningful autonomy of the low-power party, or, worse yet, the direct or indirect coercion of that party's choices.[195] Similarly, in the best of worlds, evaluative mediation can foster meaningful party autonomy by providing a hard-headed third-party assessment of a party's claims; in the worst, it can be just another tool of coercion and suppression, the antithesis of party empowerment. Particularly in more extreme situations, such a dynamic could affect the democratic character of mediation by raising significant issues regarding the substantive fairness of the mediated settlement agreements, as well as the equality of treatment of the low-power party.

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192. *See* ALFINI ET AL., *supra* note 184, at 116-17.

193. *See generally* Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Guide for the Perplexed,* 1 HARV. NEG. L. REV. 7 (1996). It should be noted that Riskin's grid was quadratic, also distinguishing mediation style by reference to the breadth of the definition of the problem to be mediated.

194. Leonard L. Riskin, *Decisionmaking in Mediation: The New Old Grid and the New New Grid System,*79 NOTRE DAME L. REV. 1, 29-34 (2003).

195. Family mediation remains the paradigmatic example. *See, e.g.*, Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L. REV. 1545 (1991); Lisa G. Lerman, *Mediation of Wife Abuse Cases: The Adverse Impact of Informal Dispute Resolution on Women*, 7 HARV. WOMEN'S L.J. 57 (1984).

B. *Autonomy and Implications for Organizational Systems Design*

1. *The Autonomy Value*

As I suggested earlier, the autonomy value has a dominating effect that can help resolve tensions when the other values are burdened or in tension, such as with both arbitration and mediation. Because the autonomy value applies differently in arbitration and mediation, each is discussed separately below.

a) *Arbitration*

The greatest departure from democratic norms under the Federal Arbitration Act, as well as the arbitration process's greatest potential for democratic legitimacy, is in the area of personal autonomy.[196] The issue is complex but fundamental. On the surface, it would seem axiomatic to conclude that voluntary arbitration promotes personal autonomy, while mandatory and binding arbitration frustrates it. A person compelled into arbitration over his or her opposition cannot be said to have chosen to submit to the process.

The problem is more complex, however, because it ultimately requires a policy decision as to the level at which the principle of autonomy is to be applied: at the more general level of the agreement to enter into the transaction, or at the more specific level of the agreement to arbitrate a dispute arising out of that transaction. For example, if an employee takes a job at a company where the terms and conditions of employment, as stated in the employment manual, require workplace disputes to be decided by mandatory and binding arbitration, the employee may be said to have impliedly assented to the arbitration provision by virtue of accepting the job.[197] Although not always expressed as such, this view has some support in the courts. However, for reasons I have detailed elsewhere,[198] I see this result as inappropriate under law because public adjudication rights are an endowment of democracy for dispute resolution, and while they can certainly be waived,[199] the right to make that choice is so fundamental to the legitimacy of the rule of law and democratic governance that it may not be subject to rules of implied waiver.[200] Rather, if it

196. *See* Ackerman, *supra* note 97, at 67-71.

197. *See, e.g.*, Patterson v. Tenet Healthcare, Inc., 113 F.3d 832, 835 (8th Cir. 1997) (enforcing arbitration provision in employment manual).

198. *See* Reuben, *Democracy, supra* note 11, at 293-95.

199. *See* Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 485 (1989) (overruling Wilko v. Swan, 346 U.S. 427 (1953) (right to select judicial forum may not be waived)).

200. *See* Reuben, *Democracy, supra* note 11, at 293-95.

is going to be waived, democratic theory would suggest that waiver must be at least "clear and unmistakable."[201]

It is fair to say that courts generally have not yet reached this result. Rather, the operating assumption of many courts since the early 1990s has been that unilaterally imposed arbitration requirements are permissible,[202] although there is some sign of retrenchment,[203] particularly with respect to judicial concerns about the conscionability of one-sided arbitration agreements.[204] However, the decision rests at a different level in the organizational context. It rests at the level of dispute resolution systems design. Designers have an enormous array of options in structuring dispute resolution systems to fit the unique interests, needs, and concerns of a particular workplace.[205] Crucial choices include not only which type of dispute resolution method should be employed and at which stage of the development of the dispute, but also whether worker participation is to be voluntary or compelled.[206] Democratic theory, as I have described its application in the new workplace context, would expect that this design discretion be exercised in favor of voluntary arbitration processes because it is voluntariness that promotes the autonomy and dignitarian interests in the new workplace, as well as the preservation of meaningful employee choices within the process (such as in the selection of the arbitrator, the time and location of arbitral hearings, and whether the arbitrator should issue a written and reasoned opinion). Indeed voluntariness in some respects defines autonomy when it comes to exercises of decisional discretion. By contrast, a unilaterally imposed dispute resolution process is the antithesis of

201. This language is in quotation marks because it is the language that is currently used by the U.S. Supreme Court to describe the character of this higher standard for waiver, in cases in which that issue is a concern. *See, e.g.*, First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 944-46 (1995); Richard C. Reuben, *First Options, Consent to Arbitration, and the Demise of Separability: Restoring Access to Justice for Contracts with Arbitration Provisions,* 56 SMU L. REV. 819, 857-862 (2003) [hereinafter Reuben, *First Options*] (discussing "clear and unmistakable" standard).

202. The leading case is Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991) (upholding the mandatory arbitration of a claim arising under the Age Discrimination in Employment Act).

203. *See* Reuben, *First Options*, *supra* note 201, at 849-50, 873 (arguing that recent U.S. Supreme Court cases appear to reject implied consent theory in requiring "clear and unmistakable" assent to arbitration, and calling for the court to clarify this tension).

204. *See supra* note 201 and sources cited therein.

205. For a concise review of the literature in the field, see John Lande, *Using Dispute System Design Methods to Promote Good-Faith Participation in Court-Connected Mediation Programs*, 50 UCLA L. REV. 69, 141 n.232 (2002).

206. *See* SARAH R. COLE ET AL., MEDIATION: LAW, POLICY, PRACTICE § 6:4, 6:15-6:20 (2d ed. 2001 & Supp. 2001).

autonomy, at least for the adhered party. There is no room for the individual exercise of decisional discretion; the path of conduct is prescribed.

b) *Mediation*

As the foregoing discussion suggests, the application of autonomy in mediation also can be seen on two levels: entry into the process and party choices about the process within the process. We have already discussed the autonomy implications for party choices with respect to mediation style and competency,[207] but the autonomy implications for entry into the process merit further discussion.

As with arbitration, entry into the mediation process is only problematic from the perspective of democratic theory when it is unilaterally imposed rather than voluntarily selected. However, it is arguably less problematic than arbitration because the process is consensual and the parties in mediation always have the right not to settle. Professor Frank Sander has articulated this view, arguing that parties can be mandated into mediation, but cannot be required to settle.[208] It is upon this principle that many federal and state courts have adopted mandatory mediation programs for some or all civil cases.[209] From the perspective of democratic theory, such an approach, while arguably acceptable, is undesirable in my view.

Much of the discussion around mandatory mediation has taken place in the context of court-related programs rather than corporate programs, and the evidence is mixed. On the one hand, there is considerable empirical evidence that parties like the mediation process once they get into it, achieve similar outcomes to those reached in non-mandatory cases, and tend to be satisfied with the outcomes achieved in the mediations.[210] Moreover, there is some empirical research that suggests that both parties and their lawyers are more likely to use mediation if they have already used the process in the past, and that prior experience with mediation is the best predictor of the likelihood of lawyers choosing or recommending mediation to

207. *See supra* notes 183-85 and accompanying text.

208. *See* Frank E.A. Sander, *The Future of ADR*, 2000 J. DISP. RESOL. 3, 7-8 (2000).

209. *See* KATHRYN VAN WEZEL STONE, PRIVATE JUSTICE: THE LAW OF ALTERNATIVE DISPUTE RESOLUTION 859 (2000) (discussing how "several states, including Texas, Florida, and California, require parties to engage in mandatory mediation before they can obtain a trial in certain types of civil cases").

210. *See generally* Roselle L. Wissler, *The Effects of Mandatory Mediation: Empirical Research on the Experience of Small Claims and Common Pleas Courts*, 33 WILLAMETTE L. REV. 565 (1997).

their clients.[211] To be sure, mandatory mediation in court-related programs has played an important role in the institutionalization of mediation today. On the other hand, there is also considerable anecdotal evidence that mandatory court-related mediation has significant unintended and deleterious consequences.[212] For example, attorneys in mandatory mediation jurisdictions often view it as a procedural formality requiring token compliance that must be taken on the road to trial, inspiring both cynicism and resentment of the process.

This in turn raises the question of the nature of participation in the process – that is, just how cooperative does one have to be in a mandatory mediation, and for how long, in order to comply with a mandatory mediation requirement? Many states have responded to this question by imposing requirements for so-called "good faith" participation in mediation. Such requirements have long been controversial and difficult to implement,[213] and as Professor John Lande has discussed at length, attempts at their enforcement only raise more questions.[214] This dynamic again undermines the legitimacy of mediation as a truly alternative process. Finally, for these and other reasons, there is ample anecdotal evidence that the institutionalization of mandatory mediation in court programs can shift the nature of mediation away from its broader interest-based roots and toward a narrower, more evaluative or directive style of mediation. While such a shift may have the benefit of responsiveness to perceived party needs in some cases, it is a far cry from the effort to establish a truly alternative process that allows parties to use disputes to satisfy deeper interests and needs that gave the mediation movement its force and moral authority.

2. *Implications for Systems Design*

The key implication for dispute resolution systems design is that dispute resolution methods should be integrated into the workplace

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211. *See* Nancy H. Rogers & Craig A. McEwen, *Employing the Law to Increase the Use of Mediation and to Encourage Direct and Early Negotiations*, 13 OHIO ST. J. ON DISP. RESOL. 831, 845 (1998) (citing analysis of Ohio survey, *in* Roselle Wissler, *Ohio Attorneys' Experience with and Views of Alternative Dispute Resolution Procedures* 1 (Mar. 1996) (on file with authors)).

212. For a general discussion of standard criticisms of mandatory mediation, see Wissler, *supra* note 211, at 571-75.

213. For a discussion and review of the voluminous literature on "good faith," see Carol L. Izumi & Homer C. La Rue, *Prohibiting "Good Faith" Reports Under the Uniform Mediation Act: Keeping the Adjudication Camel Out of the Mediation Tent*, 2003 J. DISP. RESOL. 67, 68-80 (2003) and sources cited therein.

214. *See* Lande, *supra* note 205.

in such a way as to assure a high level of meaningful autonomy in the employment of the ADR method. As we saw with arbitration and even mediation, ADR methods generally include at least some anti-democratic elements, but this is where the autonomy value has a dominating effect. Again, it is helpful to consider arbitration and mediation separately.

a) *Arbitration*

The democratic emphasis on voluntariness does not mean that systems designers cannot incorporate arbitration into dispute resolution systems at all – or for that matter, that even mandatory arbitration is prohibited per se. To the contrary, there are a number of ways in which arbitration can be integrated into dispute resolution systems, such that it promotes rather than defeats the goals of workplace democracy. Arbitration, for example, can be structured as a post-dispute option to consider and employ if both parties agree. This of course would be classic voluntary arbitration, and in my view is a highly democratic and normatively desirable way to integrate arbitration into the new workplace. An even stronger variation of this approach would be to make arbitration voluntary and non-binding, meaning that workers are not bound to abide by the results if they are dissatisfied or believe they will be able to achieve a more desirable result in court or through some other process. Under this approach, the arbitrator would essentially provide an advisory opinion or early neutral evaluation (ENE). As the experience with ENE in the Northern District of California has persuasively demonstrated, such feedback to the parties can be enormously helpful in fostering settlement.[215]

However, one can conceive of at least two ways in which an employer's initial preference for arbitration can be structured into a dispute resolution system in a way that is consistent with democratic norms. One way is to make the process mandatory but non-binding, at least for the employee. Under this approach, which preserves worker autonomy and self-determination as well as an employer's initial preference for arbitration, the employee would be required to arbitrate, but, as above, would not be required to accept that decision. Again such a structure would essentially serve as an early neutral

215. *See, e.g.*, Roger M. Deitz, *Early Neutral Evaluation: A Catalyst for the Resolution of Securities Disputes*, 949 PLI/CORP 843, 848-850 (1996); Joshua D. Rosenberg & H. Jay Folberg, *Alternative Dispute Resolution: An Empirical Analysis*, 46 STAN. L. REV. 1487, 1488-91 (1994) (evaluating ENE program in Northern District of California).

evaluation. This is the basis under which arbitration was once integrated into dispute resolution programs in public courts.[216] As Professor Colvin has documented, it has also been used with success in the private corporate context.[217]

A second way to structure an employer's initial preference for arbitration into the design of a dispute resolution system is to make it mandatory only for the employer, and as an "opt-in" for the employee.[218] While some might suggest this provides autonomy only for the workers, such a view overlooks the crucial fact that it is the employers who are designing the system, and therefore their choice to arbitrate disputes arising under it is made when the arbitration component was factored into the overall systems design.[219] In this sense, companies may even wish to consider devising incentives to encourage employees to take this option, such as providing funds for legal or other representation in the arbitration.[220]

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216. *See* DONNA STIENSTRA & ELIZABETH PLAPINGER, ADR AND SETTLEMENT IN THE FEDERAL DISTRICT COURTS 4-5, 29-35 (1996) (describing declining use of arbitration in federal courts). For a general discussion, see Dwight Golann, *Making Alternative Dispute Resolution Mandatory: The Constitutional Issues,* 68 OR. L. REV. 487, 515 (1989) [hereinafter Golann].

217. *See* Alexander J.S. Colvin, *From Supreme Court to Shopfloor: Mandatory Arbitration and the Reconfiguration of Workplace Dispute Resolution*, 14 CORNELL J.L. & PUB. POL'Y (forthcoming 2005) (manuscript at 7-26, on file with author).

218. For a case study of an opt-in program, see Alexander J.S. Colvin, *Adoption and Use of Dispute Resolution Procedures in the Non-Union Workplace*, 13 ADVANCES IN LAB. & INDUS. REL. 71, 82-89 (analyzing TRW's mandatory arbitration program, which is binding only on the employer in order to be consistent with TRW's overall human resource philosophy). Some companies have implemented "opt out" programs, in which disputes are resolved by mandatory and binding arbitration unless the employee opts out of arbitration. While more democratic than traditional mandatory and binding programs, they suffer by the possibility of an employee waiving trial and related rights inadvertently because he or she didn't know about the possibility of opting out in a timely manner. Much would depend upon the notice given to an employee under a particular opt-out program. If it was provided after the dispute, then the waiver would be sufficiently voluntary to satisfy democracy-related concerns. For judicial opinions approving opt-out programs, see see Circuit City v. Ahmed, 283 F.3d 1198, 1199 (9th Cir. 2002) (employee contract included opportunity to opt out of imposed arbitration, which employee failed to exercise); *see also* Circuit City v. Najd, 294 F.3d 1104, 1106 (9th Cir. 2002) (opt-out provision not procedurally unconscionable).

219. Fair concerns could also be raised about the influence of coerciveness on such a choice, particularly if the particular job is in an industry dominated by arbitration, such as the securities industry.

220. *See, e.g.*, John W. Zinsser, *Employment Dispute Resolution Systems: Experience Grows but Some Questions Persist,* 12 NEGOT. J. 149 (1996) (discussing Brown & Root program).

b) *Mediation*

As with arbitration, the key implication for systems design is that mediation programs for the new workplace should be designed in way that maximizes party autonomy along several different dimensions. First, experience with mandatory mediation in the court-related context suggests that mediation should be offered on a voluntary basis in the employment context to support the legitimacy of the process and to reaffirm the principle of autonomy that are so vital to the legitimacy of both the mediation process and to the values of the new workplace. Tiered or multi-step dispute resolution processes that include mediation and other types of processes are common in the business context,[221] and implementing this principle need not impinge upon such programs. Rather, new workplace employers simply need to structure them in a way that is fair and attractive, and provides incentives for employees to take advantage of them.

Similarly, systems designers should factor autonomy into mediation by allowing employees greater participation in the structural choices for the mediation in which they will be participating. An obvious example is in the selection of the mediator. While it is fine to offer employees the option of an in-house mediator, designers should be mindful of the appearance of partiality or bias that such an option may carry (and its potential to diminish the equality and due process democratic values), and offer a list of other mediators that are acceptable to the employer that the employee might also consider. Similarly, employees should be empowered and encouraged to find out about the styles that the mediators use to determine whether, under the circumstances, for example, they would prefer a mediator who is more elicitive or more directive, or a mediator who prefers a caucus or a non-caucus model, or who is particularly skilled at managing power imbalances, disabilities, and other such issues that might be particularly salient for a particular party in a particular dispute.[222] Finally, dispute systems designers should incorporate procedures that empower and encourage the employers and employees to seek counsel to

221. *See, e.g.*, Scanlon & Mann, *supra* note 77; CATHERINE CRONIN-HARRIS, BUILDING ADR INTO THE CORPORATE LAW DEPARTMENT: ADR SYSTEMS DESIGN 720-74 (1997) (describing PECO Energy's four-step dispute resolution clause as a systems design model).

222. The mediation of disability-related workplace disputes is one example in which particularized skills and training may be appropriate for mediators. *See* Judy Cohen, *ADA Guidelines Raise the Ethics Bar*, DISP. RESOL. MAG., Winter 2004, at 3; Peter R. Maida, *Question of Competencies in ADA Mediations*, DISP. RESOL. MAG., Winter 2004, at 9.

review the merits of the mediated settlement agreement, and allow for the time necessary to take that extra step to assure the substantive propriety of the settlement according to the worker's own idiosyncratic preferences. Professor Nancy Welsh has suggested a three-day cooling off period in the court-connected context, and such a cooling off period would also be appropriate in the context of the new workplace, as it would foster both due process and dignitarian interests.[223]

c) *Ombuds*

A third vehicle designers may wish to consider in promoting dispute resolution from a democratic perspective is that of the ombudsman, or, as more recently termed, the ombuds. As a general matter, an ombuds is an official, appointed by a public or private institution, who investigates complaints, facilitates their resolution within that institution, and works for systemic changes to prevent future disputes and other problems. Methods generally include investigating, publicizing, and recommending. While ombuds sometimes mediate and perform other dispute resolution functions as a practical matter, the more classic model is to assist complainants, directing them to other processes that might be appropriate.

The office of the ombuds is of Scandinavian origin and has been around for centuries, classically serving as a buffer between citizens and their government.[224] Over the last quarter of a century, the office has been adapted to other environments, including the corporate context.[225] Because of their structure and purpose, ombuds have a unique capacity to enhance personal autonomy with respect to individual decision making about workplace disputes. Organizationally, ombuds are typically located outside of the management chain of

223. *See* Nancy A. Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?*, 6 HARV. NEGOT. L. REV. 1, 85-91 (2001).

224. *See* Walter Gellhorn, *The Swedish Justitieombudsman*, 75 YALE L.J. 1, 1-2 (1965); *see generally* THE OMBUDSMAN HANDBOOK (Virgil Marti ed., 1994); WALTER GELLHORN, OMBUDSMEN AND OTHERS: CITIZENS' PROTECTORS IN NINE COUNTRIES (1966); WALTER GELLHORN, WHEN AMERICANS COMPLAIN: GOVERNMENTAL GRIEVANCE PROCEDURES (1966).

225. *See* Howard Gadlin, *An Ombudsman Serves as a Buffer Between and Among Individuals and Large Institutions*, 4 DISP. RESOL. MAG., Summer 1998, at 21, 22; *see generally* Mary P. Rowe, *The Corporate Ombudsman: An Overview and Analysis*, 3 NEGOT. J. 127, 127-39 (1987). For descriptions of other forms of ombuds, see American Bar Association, STANDARDS FOR THE ESTABLISHMENT AND OPERATION OF OMBUDS OFFICES 1 (revised Feb. 2004), *available at* http://www.abanet.org/adminlaw/ombuds/ (last visited Feb. 23, 2005) [hereinafter ABA OMBUDS STANDARDS].

command, often reporting directly to the president or chief executive officer of an organization.[226] This independence, and the confidentiality of the office,[227] contribute to the creation of a safe environment in which workers may air their deepest concerns.[228]

An ombuds serves a democracy-enhancing role in dispute resolution in a unique and powerful way: by providing an informal and confidential means of empowering workers by helping them identify their interests and concerns; by choosing dispute resolution alternatives that will best accommodate those interests and concerns; and by providing some informal assistance in facilitating these personal choices. Moreover, to the extent that an individual employee raises issues that the ombuds discerns as problems that are systemic in nature – such as routinized sexual harassment within a particular department or unit – the ombuds has the authority to raise such issues with senior management, regulators, or even the general public in a way that can help alleviate the problem without identifying the worker or workers who raised the issue.[229] In this way, the ombuds not only contributes to personal autonomy with respect to the individual worker involved in a dispute, but also promotes the political values of participation and accountability for the entire organization, as well as the legal values of equality and due process, which in turn can foster such social capital values as social connection, reciprocity, and trust.[230]

3. *The Darker Choice*

All of these are ways of structuring inherently less democratic dispute resolution processes into a dispute resolution program for the new workplace in a way that preserves and promotes the underlying democratic value of autonomy, as well as the other democratic values that go to the heart of the new workplace. By contrast, depriving employees of such choices through a system of institutionalized

226. *See* ABA OMBUDS STANDARDS, *supra* note 225, at A-C.

227. *Id.* at C(3).

228. Indeed, some have suggested that ombuds be used as a means of complying with requirements of the Sarbanes-Oxley Act of 2002 that companies provide a safe vehicle for reporting violations of the Act. *See, e.g.*, Sharan Levine & Paula Aylward, *Integrity Meets Integrity: Using Ombuds to Comply with the Sarbanes-Oxley Act of 2002*, 11 DISP. RESOL. MAG., Winter 2005, at 13.

229. *See* ABA OMBUDS STANDARDS, *supra* note 225, at A(7).

230. For a discussion of social capital, see *supra* notes 44-70 and accompanying text.

mandatory and binding arbitration, or democratically deficient mediation programs can, in my view, be expected to undermine the democratic values and structure of the new workplace. I explore these implications in the next section, drawing especially on the organizational behavior literature for empirical scholarly support.

C. *The Consequences of Undemocratic Dispute Resolution Processes: Eroding Social Capital*

Just as the use of autonomy-enhancing dispute resolution processes can be salutary in reinforcing the values and structure of the new workplace, undemocratic dispute resolution processes can be expected to have just the opposite effect: undermining the OCB and trust that is so important to the social capital of the new workplace, with predictable negative consequences for such traditional organizational measurements as performance, compliance, and retention.

1. *Diminished Social Capital*

a) *Organizational Citizenship Behavior*

As we have seen, organizational citizenship behavior generally refers to the willingness of employees to engage in constructive workplace behaviors that are beyond their formal job descriptions.[231] There are many different motivators of OCB, including procedural justice, participation in decision-making, and high-quality relationships between and among supervisors and co-workers.[232]

Procedural justice, one of the primary determinants of OCB in the workplace,[233] is particularly undermined by mandatory and binding arbitration, but can also be affected by other undemocratic features of a dispute resolution method or system. As a conceptual matter, procedural justice generally refers to worker perceptions of the fairness of workplace procedures on matters such as promotions

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231. *See supra* notes 52-69 and accompanying text.

232. *See, e.g.*, C. Ann Smith et al., *Organizational Citizenship Behavior: Its Nature and Antecedents*, 68 J. OF APPLIED PSYCH. 653, 661 (1983) (job satisfaction as a proxy for positive mood state positively correlated with higher OCB of altruism).

233. *See, e.g.*, Nico W. VanYperen et al., *Towards a Better Understanding of the Link Between Participation in Decision-Making and Organizational Citizenship Behavior: A Multilevel Analysis*, 72 J. OF OCCUPATIONAL & ORG. PSYCH. 377, 377-79 (1999). Other determinants of OCB in the workplace include participation in decision-making, workers' felt sense of trustworthiness by supervisors, high quality relationships between workers and managers, and perceived organizational support. *Id.*

and other rewards, as well as dispute resolution.[234] Perceptions of procedural justice in the workplace have been found to be affected by several process characteristics, such as the neutrality of the decision-maker and decisional process, the degree of trust in the decision-making authority, and respect for status.[235] Significantly, these characteristics are consistent with the characteristic perceptions of procedural fairness in the resolution of conflict,[236] and resonate in the democratic values of participation, transparency, equality, and due process. To the extent that procedural justice expectations are met, they serve to further the virtuous cycle of OCB.[237] However to the extent that these expectations are not met, they have been found to result in lower OCB,[238] and can contribute to vicious cycles of employee behavior.[239] This in turn diminishes an organization's social capital.

As discussed more fully below, reactance theory would suggest that workers may rebel with undesirable behaviors, and indeed, the empirical research supports this view by indicating that workers who believe they have been denied procedural justice may respond by inhibiting their task performance.[240]

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234. Procedural justice should be distinguished from distributive justice, which refers to the perceptions of the fairness of the substantive outcomes of workplace decisional processes. *See* Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 CRIME & JUST. 283, 292 (2003); Ellen S. Cohn et al., *Distributive and Procedural Justice in Seven Nations*, 24 L. & HUM. BEHAV. 553, 553-59 (2000).

235. For a general discussion, see Linda D. Molm et al., *In the Eye of the Beholder: Procedural Justice in Social Exchange*, 68 AM. SOC. REV. 128, 131-32 (2003).

236. *See generally* Welsh, *supra* note 189, at 817-26 (discussing opportunity for voice, perception that views were considered, respectful treatment, impartiality of the decision-maker and decisional process).

237. *See, e.g.*, Bennett J. Tepper & Edward C. Taylor, *Relationships Among Supervisors' and Subordinates' Procedural Justice Perceptions and Organizational Citizenship Behaviors*, 46 ACAD. MGMT. J. 97 (2003) (finding relationship between subordinates' perceptions of procedural justice and willingness to engage in organizational citizenship behavior).

238. *See supra* notes 142-45 and accompanying text. *See also* Bennet J. Tepper, *Health Consequences of Organizational Injustice*, 86 ORG. BEHAV. & HUM. DECISIONAL PROC. 197 (2001) (finding relationship between procedural justice and psychological distress stronger when distributive justice is lower).

239. *See supra* notes 144-45 and accompanying text. For analysis of the vicious cycle of distrust, see Toshio Yamagishi, *Trust as a Form of Social Intelligence*, *in* TRUST IN SOCIETY 121, 124-27 (Karen S. Cook ed., 2001).

240. *See* Rousseau, *supra* note 21, at 128-29; Kickul & Lester, *supra* note 109; William H. Turnley et al., *The Impact of Psychological Contract Fulfillment on the Performance of In-Role and Organizational Citizenship Behaviors*, 29 J. MGMT. 187 (2003) (fulfillment of psychological contract positively correlated with in-role performance and organizational citizenship behavior directed at both company and fellow employees).

b) *Employer-Employee Trust*

Trust theory would also suggest that undemocratic features of a workplace dispute resolution process might erode trust between the employee and the company.[241]

Trust has been studied in a wide array of academic disciplines. It has been often seen as a function of expectations and vulnerability, in particular the expectation that another will behave in a certain way, especially in times of risk, ambiguity, or uncertainty.[242] Compliance with expectations at times of vulnerability generates more trust, while departures or defections from those expectations lead to distrust.[243] Interpersonally and organizationally, positive or constructive consequences generally flow from the achievement of trust. Such consequences include cooperation, reciprocity (and its related cycling benefits), greater efficiency and effectiveness in social relations, as well as a reservoir of good will that is capable of absorbing occasional failed expectations without a total loss of trust.[244] Conversely, negative or destructive consequences flow from the breach of trust and the rise of distrust, such as alienation, attribution error, and self-serving behavior.[245]

In the new workplace, trust is a particularly important part of the psychological contract between the company and the employee[246] and a vital component of a company's social capital.[247] As noted

241. To be clear, I am not discussing the procedural justice question of whether the employee feels the arbitration process itself is fair. That in my view is distinct from the question of the impact of compelled participation on the employee's trust in the employer. A mandatory and binding arbitration system that is by all accounts standard-setting for actual and perceived fairness is still improper and potentially destructive from a democratic theory perspective, where the emphasis is on the person, and less on the process. *See* Menkel-Meadow, *supra* note 187, at 2681-85.

242. *See, e.g.*, Lewicki & Bunker, *supra* note 148, at 135-39; S.D. Boon & J.G. Holmes, *The Dynamics of Interpersonal Trust: Resolving Uncertainty in the Face of Risk, in* COOPERATION AND PROSOCIAL BEHAVIOR 120-211 (R.A. Hinde & J. Groebel eds., 1991); J.B. Rotter, A *New Scale for the Measurement of Interpersonal Trust*, 35 J. OF PERSONALITY 651, 651-55 (1967).

243. Lewicki & Bunker, *supra* note 148, at 161.

244. *See* Douglas Hofstadter, *The Prisoner's Dilemma and Other Tournament Games, in* DOUGLAS R. HOFSTADTER, METAMAGICAL THEMAS: QUESTING FOR THE ESSENCE OF THE MIND (1985) (describing characteristics of "tit for tat" game theory strategy).

245. *See generally* Morton Deutsch, *Cooperation and Competition, in* THE HANDBOOK OF CONFLICT RESOLUTION: THEORY AND PRACTICE 21-41 (Morton Deutsch & Peter T. Coleman eds., 2000); *see also* Yamagishi, *supra* note 239, at 121, 124-27 (analyzing vicious cycle of distrust).

246. *See* Stone, *Psychological Contract*, *supra* note 1, at 552-53.

247. *See* ESTLUND, *supra* note 1, at 25-26.

above, the new workplace carries many expectations, including expectations with respect to the resolution of disputes. Most non-union employees probably expect that workplace disputes can be worked out through simple one-on-one or intermediated negotiations with co-workers, supervisors, or upper management. However, to the extent that this is not possible and the disputes become formalized, employees may reasonably be assumed to expect to have the option of resolving those disputes in a court of law.[248] The "right" to one's "day in court" is a socially learned expectation and a powerful cultural norm in American democracy,[249] and there is little reason to believe that workers generally would not have that expectation with respect to employment disputes. To the contrary, the Civil Rights Act of 1991 expressly grants trial rights for workplace discrimination,[250] as do other statutes.[251] Less democratic processes such as mandatory and binding arbitration not only frustrate this expectation, but do so in a particularly shocking way. For example, a party may not even be aware of a contractual arbitration provision until it is invoked to bar access to the courts.[252]

In breaching this expectation, mandatory and binding arbitration also breaches the psychological contract that the employee will receive procedural justice in the hands of the company. Again, trust theory is illuminative, suggesting that this clash between workplace expectations and reality can be particularly jarring and disruptive. Professor Roy Lewicki suggests that trust may in part be understood to operate at various levels of intensity, roughly ranging from what he calls "calculus-based trust" (based on an arm's length assessment of what a person or entity would do in a situation of ambiguity) to what he calls "identification-based trust" (based on shared values, beliefs, orientations, etc.).[253] While workplace trust can generally be

248. Empirical study of this assumption would be helpful.

249. *See* Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961, 1167 (2001) (citing, *inter alia*, Ronald Dworkin, *Principle, Policy, Procedure*, *in* A MATTER OF PRINCIPLE 72, 73 (1985); Frank I. Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights – Part I*, 1973 DUKE L.J. 1153, 1177 ("however articulated, defended, or accounted for, the sense of legal rights as claims whose realization has intrinsic value can fairly be called rampant in our culture and traditions").

250. 42 U.S.C. § 1981(a) (1991).

251. *See, e.g.*, the Americans with Disabilities Act, 42 U.S.C. §§ 12111-17 (1990) and the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-34 (1967).

252. The Supreme Court has recognized as much. *See* First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 940-41 (1995).

253. *See* Lewicki & Bunker, *supra* note 148, at 144-55.

seen as having a calculative component, there may also be an identification-based component. This is especially true of new workplaces, because of the high premium placed on social connection and the cultivation of social capital.

This social connection is helpful when trust expectations are met – for instance, through dispute resolution policies and procedures that are generally more consistent with autonomy and other democratic values. Meeting expectations reinforces and deepens existing trust, fosters reciprocity, and inspires workplace morale and other OCBs. However, when trust expectations are breached – such as through a dispute resolution method that is inconsistent with democratic new workplace values – existing trust is destroyed and, over time, can be displaced with distrust, alienation, enmity, and cynicism.[254] Moreover, when trust expectations are elevated to the identity level, the consequences of the breach of trust are felt most deeply and may be irreparable.[255]

2. *Predictable Effects*

What might be the effect of the loss of trust and the diminishment of OCB? Reactance theory suggests that employees will respond with workplace deviant behavior rather than just taking the deprivation of dispute resolution rights in stride. Reactance theory generally posits that people will become psychologically aroused when their ability to perform "free behaviors" is threatened or limited. The greater the threat or limitation, the greater the arousal or reaction will be.[256] The reactance arousal phenomenon has been studied in a wide variety of contexts, such as patient non-compliance with medical prescriptions,[257] teen drinking,[258] the ineffectiveness of jury instructions,[259] and heightened sexual attractiveness of persons

254. *See* PRUITT, *supra* note 70; *see also* Lynne M. Andersson & Thomas S. Bateman, *Cynicism in the Workplace: Some Causes and Effects,* 18 J. ORG. BEHAV. 449, 451-54 (1997) (discussing various fairness factors as predictors of cynicism in the workplace).

255. *See* Lewicki & Bunker, *supra* note 148, at 165-67.

256. *See* JACK W. BREHM, A THEORY OF PSYCHOLOGICAL REACTANCE 4 (1966).

257. *See, e.g.*, Jeanne S. Fogarty, *Reactance Theory and Patient Noncompliance,* 45 SOC. SCI. & MED. 1277, 1277-88 (1997).

258. *See, e.g.*, Ruth C. Engs et al., *The Drinking Patterns and Problems of a National Sample of College Students, 1994: Implications for Education,* 41 J. OF ALCOHOL & DRUG ED. 13, 13-33 (1996).

259. *See, e.g.*, Joel D. Lieberman & Jamie Arndt, *Understanding the Limits of Limiting Instructions: Social Psychological Explanations for the Failures of Instructions to Disregard Pretrial Publicity and Other Inadmissible Evidence,* 6 PSYCHOL. PUB. POL'Y. & L. 677, 695-97 (2000).

with whom sexual relationships are not available.[260] While the question begs empirical study, reactance theory suggests that the limitations on the freedom of workers to choose to go to court (or mediation, or some other form of dispute resolution, for that matter) created by unilaterally imposed arbitration requirements may be expected to lead to workplace deviant behaviors that would diminish social capital. The organizational behavior literature strongly suggests that this weakening of social capital can be expected to have deleterious effects on such standard measures of effectiveness as performance, recruitment and retention, and compliance with company policies, decisions, and objectives.

a) *Performance*

Performance may be seen as a function of employee workplace behaviors "that are under the control of the individual [employée] and contribute to the goals of the organization."[261] Organizational behavior researchers have identified three major categories of behaviors as constituting performance: task performance, organizational citizenship behavior, and workplace deviant behaviors.[262] Task performance is what we commonly think of as performance, referring generally to worker output, but both OCB and workplace deviant behaviors also have been found to be important components of performance in the sense of the employee's overall contribution to the company.[263] For example, in a study of three specific OCBs – helping, sportsmanship, and civic virtue – in the performance of small workgroups of paper mill workers, researchers found that both sportsmanship and helping behaviors were positively predictive of task performance, measured in terms of the quantity and quality of paper produced by the groups.[264] A similar study found positive relationships between the organizational citizenship behaviors of sportsmanship and civic virtue in the overall performance of insurance

260. *See* James W. Pennebaker et al., *Don't the Girls Get Prettier At Closing Time: A Country and Western Application to Psychology*, 5 PERSONALITY & SOC. PSYCHOL. BULL. 122, 122-25 (1979).

261. Maria Rotundo & Paul R. Sackett, *The Relative Importance of Task, Citizenship, and Counterproductive Performance to Global Ratings of Job Performance: A Policy-Capturing Approach,* 87 J. OF APPLIED PSYCHOL. 66, 66 (2002).

262. *Id.* at 67-69.

263. *See* Stephan J. Motowidlo & James R. Van Scotter, *Evidence that Task Performance Should Be Distinguished From Contextual Performance,* 79 J. OF APPLIED PSYCHOL. 475, 475-80 (1994).

264. Philip M. Podsakoff et al., *Organizational Citizenship Behavior and the Quantity and Quality of Work Group Performance*, 82 J. OF APPLIED PSYCHOL. 262, 262-70 (1997).

agents.[265] Such studies support the intuitive proposition that there is a positive correlation between trust and OCB, and between OCB and task performance, although they do leave much nuance to be parsed through further empirical research. Measures that enhance workplace trust enhance OCB, and can be expected to have a positive effect on task performance. Similarly, workplace measures that diminish trust, such as a less democratic dispute resolution method or process, can be expected to diminish OCB, and in turn, task performance.[266]

b) *Compliance with Organizational Rules, Policies, and Practices*

Another significant casualty of the diminishment of social capital that can flow from the implementation of a mandatory and binding arbitration or other less democratic processes is the diminishment of compliance with, and promotion of, organizational rules, policies, and practices. This willingness to comply with rules and policies voluntarily is crucial in the workplace environment,[267] in part because of the high transactional and opportunity costs that can be associated with the lack of compliance.[268] Indeed, a central tenet of the new workplace is that people will work hard because they want the company to succeed, not because they are coerced to work.

Reactance theory alone would suggest that the workers who have been stripped of their court rights might tend to be less compliant with company rules, policies, and goals. Indeed, using the example of a secretary who has been told she can't chew gum on the job, Brehm says reactance theory would predict that "[s]he can re-establish her

265. Philip M. Potsakoff & Scott B. MacKenzie, *Organizational Behavior and Sales Unit Effectiveness*, 31 J. OF MARKETING RESEARCH 351, 351-63 (1994). Interestingly, these researchers did not find a correlation between the OCB of helping behaviors and overall performance.

266. *See* Lester & Brower, *supra* note 146.

267. As Tom Tyler writes, "A judge's ruling means little if the parties to the dispute feel they can ignore it. Similarly, passing a law prohibiting some behavior is not useful if it does not affect how often the behavior occurs." TOM R. TYLER, WHY PEOPLE OBEY THE LAW 19 (1990).

268. *See, e.g.*, Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 207-09 (1968) (arguing that a rational actor will only be deterred from committing a profitable wrong if the actor concludes in advance that the expected gain from the wrong is greater than the product of the amount of the potential sanction and the probability that the sanction will be imposed); Keith N. Hylton, *Punitive Damages and the Economic Theory of Penalties*, 87 GEO. L.J. 421, 424-25 (1998) (recognizing same); A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 887-88 (1998).

freedom by engaging in other behaviors of the same class, e.g., sucking on candy or smoking, or better yet, she can engage in what she would assume to be even less acceptable behaviors such as putting on lipstick, combing her hair, or eating candy bars."[269]

Such an understanding would be reinforced by trust theory. As an empirical matter, the relationship between trust and rule-compliance has been studied extensively in the context of citizen compliance with legal rules.[270] A leading researcher, New York University social psychologist Tom R. Tyler, has consistently found that trust in legal institutions far exceeds other factors – including agreement in the substantive correctness of the law – as the primary determinant of the willingness to comply with legal rules.[271] More specifically, Tyler's research suggests people are most willing to comply with the law when it is perceived to be legitimate in the sense that it is perceived to be entitled to, or deserving of, compliance.[272] Tyler has further found that the primary determinants of this sense of legitimacy or entitlement are the procedural fairness of the decision-making process and an underlying trust in the motives of legal authorities.[273] Tyler's research suggests that people begin with a trusting posture, or "illusion of benevolence" toward legal institutions, and then test that trust with each interaction with the institution.[274] Here the research is striking, showing that it is the integrity of the process by which the rule is developed and applied – the processes and behaviors of legal authorities – that determines whether these initially trusting expectations are met or defeated.[275] What is equally striking is that the reference points most salient in making the determination of procedural integrity are the very factors identified in Part III as being

269. *See* BREHM, *supra* note 256, at 11. While Brehm was obviously writing in a different era for the status of women, the example is still helpful.

270. The most significant of this research focused on citizen contact with police and courts as a proxy for what I describe here as the rule of law. *See* Tyler, *Public Mistrust*, *supra* note 115, at 856-58. For a discussion of earlier interdisciplinary research on the relationship between compliance and law, see Jerry N. Clark et al., *Compliance, Obedience, and Revolt in* SAMUEL KRISLOV ET AL., COMPLIANCE AND THE LAW 9 (1972)

271. *See* Tyler, *Public Mistrust, supra* note 115, at 867.

272. Both morality and legitimacy of law strongly outweighed other more instrumental factors affecting compliance, such as the probability of getting caught. *See id.* at 859-60.

273. *Id.* at 866.

274. *See* Tyler, *Public Mistrust*, *supra* note 115, at 868-69.

275. This result is consistent with the wealth of research on procedural justice that has arisen out of the larger dispute resolution movement. For a good overview, see Nancy A. Welsh, *Remembering the Role of Justice in Resolution: Insights from Procedural and Social Justice Theories,* 54 J. LEGAL EDUC. 49 (2004).

central to both democratic legitimacy and the new workplace: whether the authorities (the company, in our context) allow people to influence the outcome (participation), allow people to speak and present evidence (participation), behave neutrally (equality and due process), treat people with dignity and respect (due process), explain judgments (transparency and rationality), and provide desired outcomes (rationality).[276] The consistency of these values across different contexts bears testament to the depth to which they are entrenched in the American psyche.

Again, more empirical research is needed, but the implications for the new workplace seem intuitive enough: the more the workplace operates in a manner that is consistent with our expectations along these dimensions – including with respect to dispute resolution – the more legitimacy the workplace as an institution may be expected to command, the more likely employees will be to comply voluntarily with its rules, policies and goals, and the more OCB will be encouraged. Conversely, the less the workplace acts in accordance with our expectations along these dimensions, the less likely employees will be to comply voluntarily with its commands, thereby reducing the overall effectiveness of the organization.

c) *Recruitment and Retention*

Recruitment and retention are important management functions,[277] and the fluid structure and values of the new workplace raise the stakes for management to "attract people, hold people, and serve and satisfy people."[278] The competition for talent is particularly fierce, as demand is clearly expected to outpace the supply.[279] Where the old workplace relied on salary and tenure to achieve these ends, the contingent nature of the new workplace commands "job satisfaction," "job quality," and "workplace support" – that is, reasons to come to a company, and reasons to stay. Recruiting is a vital component, and more progressive new workplace companies will emphasize

276. *See* Tyler, *Public Mistrust*, *supra* note 115, at 869-73.

277. *See, e.g.*, THOMAS S. BATEMAN & SCOTT A. SNELL, MANAGEMENT: THE NEW COMPETITIVE LANDSCAPE, 298-320 (6th ed. 2004) (focusing on needs and challenges of human resources management).

278. Drucker, *The New Society of Organizations*, *supra* note 1, at 95, 100.

279. For example, in assessing the massive knowledge industry, McKinsey & Company has concluded that "the most important global resource over the next 20 years will be talent: smart, sophisticated business people who are technologically literate, globally astute, and operationally agile." Gregory D. Dess & Jason D. Shaw, *Voluntary Turnover, Social Capital, and Organizational Performance*, 26 ACAD. OF MGMT. REV. 446, 447 (quoting C. Fishman, *The War for Talent*, 16 FAST COMPANY 104, 105 (1998)).

the prospective employee's mindsets, attitudes, general knowledge, experience, and social skills, rather than recruiting on the basis of a precise fit between the skills of the candidate and the tasks to be performed.[280] As one human resources expert puts it, new workplaces will "hire for attitude and train for skill."[281] Such a philosophy recognizes the natural inclination of employees to want to grow professionally through new skills training and opportunities, as well as the need for flexibility that more dynamic working environments require.

Once suitable workers have been recruited, new workplace managers will strive to create an environment in which they are generally satisfied – not only because they will be more productive workers,[282] but because it will make them more likely to stay. Voluntary turnover carries high costs, in terms of departure costs (e.g., administrative processing time, taking of final sick or personal days, etc.), replacement costs (e.g., advertising, interviewing, etc.), training and development, and other costs (e.g., lost opportunities, damaged morale, etc.).[283] By contrast, retention of desirable workers contributes to stability in the workplace, greater human and social capital, and, potentially, higher productivity.[284]

V. CONCLUSION

In a now-classic work on choosing dispute resolution processes, Professors Frank E.A. Sander and Stephen B. Goldberg argued that the "forum [should] fit the fuss."[285] In this article, I have extended this thinking in the design context, suggesting that the forum should also fit the environment. While variants of this principle have already played an important part in the development of public policy

280. *Id.* at 35.

281. *Id.* at 36.

282. The research on the relationship between worker satisfaction and productivity generally does not support this proposition, and is at best mixed. *See* DAVID MACAROV, WORKER PRODUCTIVITY: MYTHS AND REALITY 113-115 (1982). For an attempt to explain the perception that there is a correlation between satisfaction and performance, see Cynthia D. Fisher, *Why Do Lay People Believe that Satisfaction and Performance are Correlated? Possible Sources of a Commonsense Theory*, 24 J. ORG. BEHAV. 753 (2003).

283. SMITH, *supra* note 32, at 21-22.

284. *See id.* at 20-33.

285. Frank E.A. Sander & Stephen Goldberg, *Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure,* 10 NEGOT. J. 49, 50 (1994).

dispute resolution,[286] here I apply it specifically to organizational culture, and argue that environmental fitness should be considered in the workplace context. Dispute resolution systems designers have many choices to make, such as the type or types of dispute resolution methods to offer within those systems, the manner in which participants become involved in those processes, and the method through which those programs are evaluated for success.[287] We should add to these considerations the question of how the dispute resolution system will affect workplace culture, efficiency, and effectiveness. Important consideration should be given to the degree to which organizational goals include cultivating a new workplace, as I have described in this article. If that is a goal, organizational dispute resolution designers should recognize that the characteristics of the new workplace are, at their root, consistent with the fundamental political participation, legal, and social capital values that have been found to determine the quality of democratic governance in the sphere of public governance. This understanding should be used to help cultivate approaches to dispute resolution that are consistent with the democratic character of the new workplace.

Plainly some dispute resolution methods have a stronger inherent democratic character than others. Consensual processes like mediation can be seen as being less problematic from a democratic perspective because they generally involve both the worker and the employer as decision makers. Adjudicatory processes like arbitration differ in that the dispute is resolved not by the parties but by a third party, and thus can raise additional problems from a democratic perspective. Among adjudicatory processes, public adjudication through the traditional process of public trial and appeal has a generally high democratic character, while private adjudication through arbitration has a mixed or contingent democratic character, which depends upon the degree of autonomy the parties have with respect to the process. As a process, private arbitration has a generally lower democratic character because it frustrates rather than fosters such values as accountability, rationality, and equality. However, waiving these values is a plausible choice, sometimes even a wise choice, that participants in a dispute may make in order to gain the process virtues of expertise, informality, speed, and finality that arbitration has

286. *See, e.g.*, LAWRENCE SUSSKIND, THE CONSENSUS BUILDING HANDBOOK (Jennifer Thomas-Larmer et al. eds., 1999); SUSAN CARPENTER & W.J.D. KENNEDY, MANAGING PUBLIC DISPUTES: A PRACTICAL GUIDE FOR PROFESSIONALS IN GOVERNMENT, BUSINESS AND CITIZEN GROUPS (2001).

287. *See* RISKIN ET AL., *supra* note 77, at 1-90.

to offer. Expanding the sphere of dispute resolution options strongly promotes the fundamental principle of autonomy that lies at the heart of corporate democracy in the workplace, just as it does in the governmental context.

The democratization of the new workplace is about its enlightenment, and represents a natural evolution from the earliest thinking about the fitness of democracy as a vehicle for collective self-governance, beginning in the Age of Enlightenment and continuing through the grand experiment of American political democracy. As we have seen since then, democratic principles have great power to support a vibrant society, capable of sustaining both individual and collective maximization. Today's workers, managers, shareholders, and consumers of the new workplace deserve no less.