THE EMPLOYEE PARTICIPATION/ REPRESENTATION GAP: AN ASSESSMENT AND PROPOSED SOLUTION

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Richard Freeman and Joel Rogers ("F&R") have produced one of the "big books" in modern industrial relations.1 Sure to be discussed and debated for many years, What Workers Want examines the system of workplace governance in American firms. In particular, it examines the form and extent of employee influence and voice through alternative mechanisms of participation and representation. F&R use data collected from focus group meetings and telephone surveys with several thousand employees and managers to paint a detailed picture of not only "what is" in terms of the prevailing pattern of worker participation and representation, but also "what would be" if employees were free to choose their desired form of workplace governance.

As I read their book, four main conclusions stand out. Briefly, they are:

1. A large "participation/representation" ("P/R") gap exists in the American workplace in that workers' desire for voice and influence is much greater than the amount currently available. F&R describe the situation thus: "given a choice, workers want 'more'—more say in the workplace decisions that affect their lives, more employee involvement at their firms, more legal protection at the workplace, and more union representation."²

2. Although workers express a desire for more of all forms of P/R, the two most preferred are: (1) an independent union and (2) some type of non-union plant-level (or company-level) joint worker-management committee similar in broad outline to a European-type works council. More legal protection at the workplace, while also valued, is not the preferred approach of the great majority of workers. Thus, F&R conclude that "almost half

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1. RICHARD FREEMAN & JOEL ROGERS, WHAT WORKERS WANT (1999).
2. Id. at 154.
of American workers want an organization that has considerable independence at the workplace . . . .”

3. The main cause of the P/R gap is “management resistance.” F&R state that “the chief reason that workers have less influence at their workplaces than they want is that management is unwilling to cede power or authority to them.”

4. The P/R gap is a serious social problem that national labor law should be reformed to reduce. The gap reduces the quality of working life for employees, conflicts with the fundamental American belief in democracy and self-determination, and leads to behaviors that impose economic costs on employers and the nation, such as higher employee turnover and stunted work motivation. Thus, F&R conclude: “the right choice for private action and public policy would be to help workers gain the voice and representation in workplace decisions that they so clearly want.” Although they do not spell it out in What Workers Want, the clear inference is that F&R favor changes in labor law that promote a substantially higher level of unionization and widespread establishment of some form of quasi-independent works, council-type employee organization.

In this article, I critically evaluate each of these four conclusions. My judgment, in a nutshell, is that the first conclusion (the existence of a P/R gap) is true, but F&R most likely overstate its size and seriousness; the second conclusion (the desire by a majority of workers for a relatively strong form of representation at the workplace) is also overstated and gives undue emphasis to stronger, more centralized forms of P/R; the third conclusion (the central role of management resistance) is only partially true and ignores other barriers created by government and supported by unions; and the fourth conclusion (the need for policy reform) is true, but in several important respects, should take a different direction than what F&R seem to advocate. Each of these points is elaborated below.

I. CONTEXT

Some background information helps in assessing the findings and conclusions contained in F&R’s book. What Workers Want grew out of a two-wave survey, called the Worker Representation and Participation Survey (“WRPS”), conducted under the auspices of the Clinton-appointed Commission on the Future of Worker-Management Relations

3. Id. at 152.
4. Id. at 63.
5. Id. at 155.
("Commission") (also known as the Dunlop Commission in honor of its chair, John Dunlop). The charge of the Commission was to determine how, if at all, American labor law should be changed to foster enhanced workplace productivity through expanded labor-management cooperation and employee participation. Richard Freeman was one of the Commission’s ten members.

In my view, What Workers Want is a solid, highly informative piece of research that explores a number of important, but neglected subjects. Its authors are also among the most capable and respected in the industrial relations profession. The reader leaves the book feeling impressed with the breadth and depth of information presented, and the care and detail with which the WRPS was put together. F&R are correct, I think, in their claim that the WRPS provides the most extensive, well-designed analysis of worker attitudes toward workplace relations conducted in this country for at least two decades.

At the same time, the WRPS and What Workers Want inevitably reflect the biases and commitments of the authors. It is fair to say that F&R are broadly sympathetic to the aims and purposes of trade unionism and collective bargaining. Certainly, both have long advocated the economic and public welfare benefits of unions, deplored the long-term decline in union density in this country, and recommended public policy measures to reverse this trend. Much the same can be said about nearly all the other academic members of the Dunlop Commission. Indeed, F&R in an earlier study made the case that the nation suffers from a serious

6. Id. at 3-4.
8. FREEMAN & ROGERS, supra note 1, at 2.
9. Id. at 3.
"representation gap" and proposed legal remedies that would foster both greater unionization and European-style works councils. Neither author can be called "pro-management," and Freeman, in particular, has singled out "management resistance" as a crucial and largely undesirable factor behind the long-term decline in union density. Therefore, in evaluating What Workers Want, these philosophical and policy perspectives must be kept in mind, as they inevitably influence both the questions asked and the conclusions reached.

II. IS THERE A PARTICIPATION/REPRESENTATION GAP?

F&R conclude that employees want considerably more P/R in the workplace than what employers currently provide. F&R say, for example, "[t]he WRPS shows as conclusively as any survey can that the vast majority of employees want more involvement and greater say in company decisions affecting their workplace." Since the existence of a large P/R gap is the central fact that drives the rest of the book, a careful evaluation of What Workers Want must begin here.

On both practical and theoretical grounds, I believe the existence of a P/R gap is plausible and to be expected. However, in my view, F&R overstate the size and seriousness of this gap. Here, briefly, are four reasons why.

The first reason the reported P/R gaps in What Workers Want are overstated is due to poor question design in the WRPS. F&R calculate the P/R gap by taking the difference between two numbers obtained from the WRPS; the first number is the "percentage of workers for whom it is very important to have a lot of influence" (as determined from the self-reports of the persons interviewed); the second is the "percentage of workers who said they had a lot of direct influence and involvement." The average value for the first number ("wanting influence") is fifty-five percent, and the average for the second ("having influence") is twenty-eight percent, yielding a P/R gap of twenty-seven percentage points. Based on this number, F&R conclude that workers want twice the amount of influence they currently have. An alternative measure yields an even larger measured P/R gap of fifty-three percentage points (calculated as the

12. Freeman & Rogers, supra note 10, at 66.
14. FREEMAN & ROGERS, supra note 1, at 40.
15. Id. at 48-49, exhibit 3.5.
16. Id.
17. Id.
"percentage of workers with less involvement than they want").

Close inspection of the survey questions reveals several serious problems, however. For example, in questioning workers about how much influence they actually have, F&R asked "how much direct influence and involvement" they had. But "direct" influence, as commonly understood by both lay people and academic experts, implies some form of personal participation of a "face-to-face" or "hands-on" nature, thus excluding by definition all forms of "indirect" or "representational" participation (e.g., a plant council or union). Some respondents may also have participated in what is conventionally defined as a direct form of P/R, such as a town hall-type meeting in which all employees are present, but may nonetheless not consider it to be "direct influence and involvement" if all they did was sit and listen to company executives. Thus, it is not surprising that only six percent of workers said they had "a lot of direct influence and involvement" in pay-raise decisions, since few companies can provide an opportunity for individual workers to personally get involved in the wage setting process. Nonetheless, many of these workers may indeed have effective influence on salary and other workplace issues through indirect means, such as representation by union leaders in collective bargaining in an organized firm or, in a nonunion firm, by fellow workers who serve as representatives on a gain sharing committee or safety committee. If F&R had framed this question in the WRPS more broadly, to capture all forms of direct and indirect employee voice and influence, the measured P/R gap they report would no doubt be smaller.

A second example will further illustrate the pitfalls here. At various points in the book, F&R equate the P/R gap with lack of worker "voice" and "say in the workplace." However, in actually calculating the P/R gap they use a more restrictive criterion, one that rests on "influence and involvement." But "voice" and "influence" are two very different things: a voice involves expressing or communicating a thought or desire; influence is the exercise of power ("muscle") to change or affect a person or outcome. Undoubtedly, many more workers have an opportunity to voice opinions and desires to management than have the power to influence decisions. Thus, using voice as the criterion would certainly have led to a smaller measured P/R gap.

F&R marshal other evidence besides the data in exhibit 3.5 to support

18. Id.
19. Id. (emphasis added).
21. FREEMAN & ROGERS, supra note 1, at 48, exhibit 3.5. For example, even in universities where faculty governance is the norm, few professors can say that they have "a lot of direct influence and involvement" in determining their pay raise.
22. Id. at 154-55.
23. Id. at 49, exhibit 3.5.
their contention that the American workplace suffers from a large P/R gap. Consideration of this data points out a second reason why their reported findings are overstated. That is, at various places in What Workers Want, data is interpreted in ways that have the effect of accentuating or highlighting the alleged gap in participation and representation. For example, exhibit 3.1 shows the responses to two questions. One question is: “Overall, how satisfied are you with the influence you have in company decisions that affect your job or work life?” The second question is: “If it were your decision alone, and everyone went along with it, would you generally like to have more influence in these areas [(various workplace issues)], less influence, or would you want to keep things the ways they are now?” Persons looking for an optimistic interpretation of the data would gravitate toward the first question, as roughly three out of four workers stated that they were “very satisfied” or “somewhat satisfied” and only about one out of four workers stated that they were either “not at all satisfied” or “not too satisfied” with their amount of influence in the workplace. Persons seeking to emphasize the negative, however, would gravitate toward the second question, since it shows that nearly two out of three workers reported that they “want more influence.” Revealingly, F&R show (using pie charts), but do not discuss, the results of the first question (except as they bear on a measurement issue), while they discuss at some length the negative conclusions from the second question and cite these results as evidence in support of a sizable P/R gap.

Also, consider the following example: although F&R acknowledge that the P/R gap “varies among groups and across workplaces,” they nevertheless go on to describe it as “ubiquitous.” In a short section in Chapter Three, however, we learn that much of the dissatisfaction with workplace influence and involvement is concentrated among what F&R call “the discontented third.” They state in this regard, “[w]e found that, on average, two-thirds of workers were reasonably satisfied with their work lives, but that the other one-third were dissatisfied, and their dissatisfaction was closely linked to their lack of influence on the job.” F&R go on to say that the “discontented third” is comprised predominantly of workers from the lower end of the labor market, such as the less educated, minorities, and blue-collar workers. This admission would seem to call

24. Id. at 41, exhibit 3.1.
25. Id.
26. Id.
27. Id.
28. Id. 40-41, 42.
29. Id. at 4.
30. Id. at 43-45.
31. Id. at 43.
32. Id.
into question the "ubiquity" of the P/R gap and, instead, suggest that a perceived or real lack of influence is a problem primarily affecting only certain workforce groups. Reinforcing the conclusion, F&R report that sixty-six percent of workers "usually look forward to going to work" and, among these workers, eighty-five percent are "very satisfied" with their influence in workplace decisions.

There is yet a third reason why the size of the P/R gap measured by F&R is overstated. The questions asked by F&R seek to determine the strength and direction of workers' desire for influence. But desire by itself is not an accurate gauge of effective demand. A well-specified demand function has to include not only preferences, but also price.

From an individual worker's point of view, "influence" in workplace decisions is a "good" since it is likely to permit him or her to achieve a higher level of personal utility (from higher pay, better benefits, etc.). Not unexpectedly, when workers are asked if they would like to have more influence at work the large majority responded with a strong "Yes!" But the same would be true if they were asked about their desire for any other workplace "good," such as more safety or training (or consumer items, such as vacations in Paris or new cars). Since all such goods are costly for firms to provide, it should not be surprising to learn that the amount of goods workers express a desire for is less than the amount firms supply. One could take the amount of the good desired, subtract from it the amount supplied, and call the difference a safety or training (or vacationing in Paris) "gap," but the evident question is what does this "gap" really measure? It measures only that people do not have as much of something as they want. However, this is endemic to life (i.e., is "ubiquitous") and although regrettable, does not, by itself, demonstrate either a failure in the economic system or a social problem that needs correction.

A more accurate measure of a P/R gap must take into account not only workers' desire for influence, but also the price they must pay to get it. As elaborated below, more P/R does not, generally, come free. It has to be produced with capital, labor, and other real resources. Hence, workers, firms, and society at large must balance the benefits of extra P/R against the costs. Workers may respond that they desire more P/R, possibly in the form of union representation; but if asked if they are willing to pay thirty dollars a month for union dues to obtain it, many may say "no." Likewise, workers at a non-union company may say they want substantially more P/R. However, if presented with the corresponding cost of a company-wide system of works councils, they might change their minds. For

33. Id. at 44, exhibit 3.2.
34. Id. at 47, exhibit 3.4.
35. See Miltiades Chacholides, Microeconomics 13 (1986).
36. Freeman & Rogers, supra note 1, at 41, exhibit 3.1.
example, if substantially more P/R raises business costs more than productivity, the firm becomes less competitive and may lower wages or reduce long-term employment. However, F&R largely bypass these considerations of cost. The one exception is that they ask respondents if they would be willing to volunteer two to three hours per month to participate in a workplace committee. Even at this very modest price, only one-third of employees replied they would be willing to do so. Thus, not only do F&R’s reported P/R gaps overstate workers’ effective demand by omitting price, this last result provides a hint that workers demands may be “soft,” or not very intense.

I now come to the fourth and last reason why F&R’s reported P/R gap is likely overstated. It further supports the conjecture just broached—that the actual worker demand for more P/R may be modest in size and “soft” in intensity. If there is indeed a large and widespread divergence between the amount of workplace influence and what employees want versus what they have, one would expect to observe various behavioral consequences or “signals.” In the labor market, for example, the employee turnover rate should be positively correlated with the level of P/R in firms (ceteris paribus), while wage/benefit levels should be negatively correlated. Likewise, in the political arena one would expect dissatisfied worker/voters to exert pressure on elected officials to pass new laws that increase the supply of P/R in the workplace. Finally, another behavioral sign should be a negative correlation between union organizing activity and the level of P/R in non-union firms.

Do we see these signals from frustrated demand? Only in one area do F&R present evidence in support of this thesis. As they note, non-union firms that have extensive employee involvement/participation programs have a much lower probability of union activity. In the other two areas they present no evidence. Analysis of labor market data, particularly regarding turnover rates, might well yield results consistent with their hypothesis, making it unfortunate that they did not further pursue this angle. Activity in the political arena, on the other hand, seems to point in the opposite direction. In the conclusion to their study, F&R state, “[t]he basic message to decision-makers in business, labor, and government is clear: A huge opportunity exists for America to increase the representation and participation of workers at their jobs.... Political leaders will find

37. FREEMAN & ROGERS, supra note 1, at 55.
38. Workers with more say and influence would be less likely to quit the firm due to dissatisfaction with wages and other labor conditions, thus causing the extent of P/R and the employee turnover rate to be negatively correlated. In a competitive labor market, firms offering more P/R would be more attractive to prospective employees, would have a larger queue of applicants, and, other things being equal, could offer a lower wage.
39. FREEMAN & ROGERS, supra note 1, at 114.
potential votes for such reforms... However, if the unsatisfied demand for P/R is huge, one is left to wonder why the political and business leaders have not yet responded. One possibility, presumably favored by F&R but not spelled out by them, is that both the business and political market places have significant imperfections that prevent or impede the ability of competition and the prospect of personal gain to close the P/R gap. A second possibility is that the P/R gap is in fact much smaller and softer than F&R maintain and, hence, politicians and business leaders have little incentive to make P/R reform a top priority item. No one can say a priori which situation is closer to the truth, but certainly, the fact that workplace reform was not a central topic of debate and discussion in the Presidential campaign of 2000 is consistent with the view that F&R have overstated the size and seriousness of the P/R gap.

III. THE OPTIMAL AMOUNT OF EMPLOYEE PARTICIPATION AND REPRESENTATION

The considerations just discussed call into question the validity of F&R's fundamental proposition—the existence of a significant, widespread employee P/R gap in the American labor market. Given the limitations and constraints of the WRPS, it is unlikely that any amount of reexamination and reinterpretation of the data will provide definitive, empirical evidence to resolve this issue.

An alternative approach is to examine what theory indicates the existence and size of a P/R gap. Although F&R's decision to largely eschew issues of theory in What Workers Want is understandable given time and space constraints, making such an examination would not only strengthen the end product, but would have enabled them to present a more compelling argument in support of their main thesis. To illustrate the potentiality, in this section I use basic economic concepts to consider the following question: what is the optimal amount of employee P/R in the workplace? Consistent with F&R's claim, the answer that emerges

40. Id. at 155.
41. An earlier work by Freeman does examine these theoretical issues, but the findings are not incorporated into the body of What Workers Want. See Richard B. Freeman & Edward P. Lazear, An Economic Analysis of Works Councils, in WORKS COUNCILS: CONSULTATION, REPRESENTATION, AND COOPERATION IN INDUSTRIAL RELATIONS 27 (Joel Rogers & Wolfgang Streeck eds., 1995). See also John T. Addison et al., Worker Participation and Firm Performance: Evidence from Germany and Britain, 38 BRIT. J. INDUS. REL. 7 (2000) (examining and extending the F&R works council and employee involvement model); David I. Levine & Laura D'Andrea Tyson, Participation, Productivity, and the Firm's Environment, in PAYING FOR PRODUCTIVITY 183 (Alan S. Blinder ed., 1990) (discussing the effects of participation on productivity).
42. The model developed here, as well as much of the discussion throughout the remainder of this section, is based on Bruce E. Kaufman & David I. Levine, An Economic
suggests that a P/R gap will indeed exist at many firms, although the size and seriousness of the gap is likely to vary considerably across worksites, and may well be smaller in the aggregate than F&R claim.

The optimal amount of P/R can be evaluated with respect to two criteria. The first criterion is economic efficiency. The second criterion is ethical and moral beliefs about non-economic goals, such as industrial democracy and social justice. Both types of outcomes, economic and non-economic, are regarded by most societies as desirable.

The goal of economic efficiency is to use society's scarce factor inputs of capital, labor, and natural resources to produce the maximum amount of goods and services given the state of technology and the structure of relative prices. Microeconomic theory shows that economic efficiency is promoted when firms use additional units of factor inputs, as long as the marginal social benefit from the resulting production is greater than the marginal social cost of the input. When the two become equal, economic efficiency is maximized and usage of the factor input is optimal. In this schema, employee participation and representation can be considered as another factor input that firms use to produce output. The optimal amount of P/R can then be determined using the marginal decision rule just elaborated.

The optimal amount of P/R can also be determined using ethical and moral criteria, such as industrial democracy and social justice. The concept of industrial democracy has been defined in a number of different ways over the years, ranging from profit sharing to management of industry by labor. However, the general sense of the term that most people have in mind is broadly analogous to "political democracy"—a system of workforce governance of "law instead of men," in which employees have well-defined rights protected by due process methods of conflict resolution and a voice in the determination of the terms and conditions of employment and in the administration of workplace rules. Employee participation and representation are core elements of industrial democracy, for only through these mechanisms do employees gain an explicit voice in workplace

43. See CHACHOLIADES, supra note 35, at 481-501.
44. See id.
governance and the opportunity to influence management decision-making. The optimal amount of P/R, in turn, rests on individually held ethical beliefs about the degree to which the workplace should be structured and run in accordance with democratic principles. Some people, for example, will favor a minimal level of industrial democracy, where workers have only basic, guaranteed, legal rights and an open-door opportunity for voice. Others will favor extensive industrial democracy in which workers have numerous protected rights and strong independent forms of P/R. Given that industrial democracy rests on individual ethical beliefs, the optimal level cannot be determined using principles of economic analysis, but instead, must be found through a political process of majority voting by citizens of the nation state.

A parallel argument can be made about other widely held ethical and moral beliefs such as social justice. Social justice, like industrial democracy, is hard to specify in concrete detail. In the eyes of most though, social justice means that all groups and people in society receive fair treatment with respect to both the process by which economic rewards are distributed and the share of the outcomes they receive. Social justice does not mean all economic outcomes should be decided by voting or that everyone’s income should be equal, but it does imply that limits are placed on the unilateral exercise of authority and the degree of inequality in income and other economic rewards. Similar to the extent of industrial democracy, individual citizen-workers will differ on their preferred level of social justice; the socially optimal amount can only be determined through some collective choice mechanism.

Because the industrial democracy and social justice arguments are non-economic in nature, I set them aside for the moment and concentrate on the economic efficiency rationale. Although the prediction from economic theory is not iron-clad, the weight of the argument suggests that firms will, on net, adopt a socially sub-optimal amount of employee participation and representation.

Forms of employee P/R may either be voluntarily adopted by business firms or mandated by law. From the perspective of a firm’s management, employee P/R is one of a variety of possible human resource practices it might adopt. The decision to do so, and the breadth and depth of the P/R program, turns on the impact on firm profits. Similar to capital and labor services, employee P/R and other human resource practices can be treated as another factor input into production. The goal of management is to maximize profits; hence, additional units of a factor input should be

48. See Kaufman & Levine, supra note 42, at 164.
employed as long as they add more to revenue than to cost. From a firm's perspective, the optimal level of P/R is therefore determined by adding additional units, however measured, until the marginal revenue product of P/R equals the marginal factor cost.\textsuperscript{49} Importantly, the relevant benefits and costs that influence the decision-making of the individual firm are private in nature, meaning they include only those benefits and costs that actually impact the profit of the firm in question.

The benefits of P/R to a firm come from the additional productivity it fosters. At least three sources are identifiable. The first is improved organizational coordination. The job of management is to determine what products are produced, how they are produced, and who will perform the individual tasks. In a world of perfect information and unlimited human cognitive ability (in other words, the textbook model of microeconomic theory), managers are able to make these decisions without error or cost. However, in the presence of bounded rationality, imperfect information, and systemic uncertainty, the job of coordinating production in a large firm with complex technology is formidable.\textsuperscript{50} In such an environment, employee P/R can increase productivity in several ways: it can shorten the steps in the firm's vertical chain of command, thus improving the quality and/or timeliness of information reaching top management from the shopfloor level; ensure that employee perspectives are factored into information sets and decisions, thus overcoming asymmetrical "framing" effects; and it can help achieve a more decentralized coordination of interdependent production tasks by allowing employees to make decisions that would otherwise be passed up the chain of command to supervisors or middle management.

A second source of productivity gain from employee P/R comes from enhanced employee motivation and morale. The productivity of a unit of labor, like the work hour, is variable since it depends on the willingness and desire of the employee to exert mental and physical effort to the act of production. Employee P/R can increase the morale and motivation of workers, and hence productivity, in several ways. For example, employee P/R can strengthen trust and confidence by improving the quantity and quality of communication between management and the workforce. Workers would make more of an effort or maintain higher morale since they would better understand the reasons and rationales for management decisions. Similarly, employee P/R can also contribute to a greater sense

\textsuperscript{49} Id. at 150; see also Walther Müller-Jentsch, Germany: From Collective Voice to Co-management, in WORKS COUNCILS 53, 61 (Joel Rogers & Wolfgang Streeck eds., 1995) (reporting that the advice given to German employers by a management research institute is "to consider the works council as a ‘factor of production’").

that workplace decisions are fair and equitable, since employees are given an opportunity to influence decisions rather than have them handed down as a fait accompli. Employee P/R can also help both sides take a more long-term view of the employment relationship, thus promoting productive investments and commitments in training and capital equipment by fostering an expectation that conflicts and adverse "shocks" to the firm will be handled through consultation and joint problem-solving, rather than unilateral cost-cutting and employee layoffs.\textsuperscript{51}

Thirdly, employee participation and representation can also promote better firm performance by reducing principal-agent problems and opportunism by supervisors and lower-level management. Supervisors and foremen should implement firm employment policy and deal with production workers in a way that serves the interests of the organization and its owners. Due to imperfect information, however, supervisors and foremen gain discretion to manage the people below them in ways that either promote their self interest (e.g., engaging in sexual harassment or demanding an excessive pace of work in order to meet a production schedule), or work against the interests of the organization (e.g., insensitive handling of employees, which leads to higher turnover and reduced morale).\textsuperscript{52} Employee P/R helps solve these types of principle-agent problems by giving management better information about the behavior of supervisors and foremen, hence reducing productivity-sapping acts of opportunism and insensitivity.

For the aforementioned reasons, employee P/R can be a productive human resource management practice for firms. Therefore, it is possible to speak of firms as having a "demand" for employee P/R. The level of demand for P/R is influenced, in turn, by two distinct sets of factors. The first are variables that determine the relative productivity of P/R to the firm.

Some firms will have a small or nonexistent demand for employee P/R because they gain little or no additional productivity from it. Others will reap a large productivity gain and will have a large demand. Without going into detail, some of the most important variables that increase the productivity of P/R include: a large scale of production; production processes characterized by greater technological complexity or knowledge intensity; interdependent forms of production; workplace conditions that have a significant "public good" quality; imperfect competition in product markets; a high level of company-specific training or other such factors which create a long-term employment relationship and/or makes labor a strategic asset; an extensive internal labor market; high-performance human resource management practices; full employment in the

\textsuperscript{51} See id. at 182-98.
\textsuperscript{52} See id. at 120-37.
macroeconomy; and stable levels of economic growth.\textsuperscript{53}

In effect, all of these factors shift the P/R demand curve left or right for individual firms, creating a large demand for P/R on the part of some and a small demand on the part of others. For any one firm, however, the P/R demand curve is downward sloping, reflecting the law of diminishing returns. That is, holding constant other factors of production, additional units of P/R at some point lead to increasingly smaller increments in production and, eventually, to a decrease in production. Formation of a joint safety council, or a plant-level works council, may at first contribute to increased efficiency, but one can well imagine that the gain to productivity will quickly diminish as more time and resources are invested in these forms of P/R. In effect, a firm’s management has to calculate whether, for example, thousands of hours of management and employee time devoted to works council operations over the course of a year could be more effectively used in other ways, such as working at assigned job tasks. In some firms, the management may conclude that anything beyond a minimal investment in P/R quickly exhausts the resulting productivity gains.

The optimal amount of P/R for a firm is determined not only by the benefit gained in terms of increased productivity, but also by the cost or "price" the firm has to pay for each extra unit of P/R. The price of employee P/R is influenced by both direct and indirect forms of cost.\textsuperscript{54} The former payments include compensation of employee representatives for time not worked and payment for staff and administrative expense associated with P/R programs.\textsuperscript{55} The latter include a possible increase in decision-making time, reduced organizational flexibility, higher wage and/or benefit costs (in order to promote trust and cooperation), and an increase in the bargaining power of employees (also leading to higher wages and benefits).\textsuperscript{56} The sum of direct and indirect costs yields a per unit price which allows the firm to determine its optimal level of P/R from the demand curve.

Individual firms will compare the private marginal benefit and cost of additional "units" of employee P/R and select the level or form that maximizes profit. As indicated, some firms will choose none, others will choose a modest amount, and still others will demand an extensive amount of P/R. Given this fact, the next issue is whether the amount or form of P/R voluntarily chosen by firms will also be: (a) socially optimal in terms of economic efficiency, and (b) optimal in terms of employee preferences. I will briefly consider each question.

\textsuperscript{53} Kaufman & Levine, \textit{supra} note 42, at 159-62.
\textsuperscript{54} \textit{Id.} at 158.
\textsuperscript{55} \textit{Id.}
\textsuperscript{56} \textit{Id.}
Economic theory shows that the price system in a perfectly competitive market economy will allocate resources in a manner that maximizes efficiency.\textsuperscript{57} "Maximum efficiency" implies that no other allocation of resources can lead to an increase in the production of one commodity without a decrease in another. A corollary of this proposition is that firms will use the optimal amounts of all of the factors of production, including various human resource management practices such as employee participation and representation. If there is to be a non-optimal use of employee P/R, evaluated from an efficiency standard, it must arise from the presence of what economists call "market imperfections."\textsuperscript{58} Imperfections include factors such as limited information, public goods, externalities, a few number of buyers and/or sellers, and coordination failures.\textsuperscript{59} In general, it can be shown that these imperfections will lead firms to adopt a smaller amount of employee participation and representation than is socially optimal because they may cause a divergence between the social benefits and costs of P/R and the private benefits and costs that accrue to firms. Stated another way, market imperfections, coupled with the divergence in social and private benefits and costs, lead to a gap in P/R. The following provides a non-exhaustive list of specific illustrations.

\textbf{A. The Prisoner-Dilemma Problem}

As described above, employee P/R can increase firm productivity and profits by increasing employee morale and motivation. Typically, however, the "price" that employees expect for their greater productivity is a share of the increased profits. These profits may come either directly, through some kind of gainsharing program, or indirectly, through higher wages and benefits, or increased job security. Although the potential of a win-win outcome for the employer and employees exists, the two sides may nonetheless be at odds due to what economists call a "prisoner's dilemma" problem.\textsuperscript{60} The prisoner's dilemma arises from imperfect information and a lack of credible commitments. Successful operation of a P/R program requires that both the employer and the employees trust each other to share the long-term gains and avoid an opportunistic "welshing on the deal" that works to the short-term gain of one side at the expense of the other. For example, workers may fear that once they share their ideas for improved plant operations, or begin to work more diligently, the management will renege on its promises and layoff redundant employees or fail to increase wages in line with profits. Conversely, management may

\textsuperscript{57} See Chacholiades, supra note 35, at 435-54.
\textsuperscript{58} See id. at 496-500.
\textsuperscript{59} See id.
\textsuperscript{60} Miller, supra note 50, at 21.
fear that once it empowers workers through a P/R program, employees will use their influence to promote their own self-interests (e.g., engaging in longer rest pauses or a slower pace of work). Alternatively, management may fear that workers will come to regard the higher wages or improved working conditions as an entitlement, and the program will lose its motivational force. Because of such fears and uncertainties, the firm and/or employees may decide not to implement the P/R program, even though doing so would lead to an increase in productivity for the firm and economic efficiency for society. Stated another way, the marginal benefit to society is greater than the marginal private benefit to the parties, creating a gap in social welfare.

B. Bargaining Opportunism

A related problem arises when management fears that even though employee P/R may increase productivity and profit, it will also increase the influence and bargaining power of workers who may use it opportunistically to capture most of the additional surplus. In effect, from a management perspective, the increase in the size of the surplus created by P/R is more than outweighed by the larger share of the pie going to labor. In this case, profit maximizing management will rationally forego employee P/R because, from a private perspective, the higher wages are costs that outweigh the productivity benefit. However, from a social point of view, the higher wages are an income transfer, not a cost of real resources; hence, the decision of the company to forego P/R results in a loss of extra output and a loss of economic efficiency.

C. Adverse Selection

Firms that adopt employee P/R typically modify or attenuate the traditional “hire and fire” employment-at-will policies seen at other, more traditional, firms. Because of the promise of fair dealing and increased job security, these firms will attract numerous job applicants. The problem for a P/R firm is that a disproportionate share of job applicants will be “lemon” employees who have a higher risk of being dismissed for low performance—a process known as “adverse selection.” Unless governmental legislation, or some other device, mandates similar policies at all other firms, the P/R firm will end up with a more problem-prone, low performing workforce, thus reducing its incentive to adopt P/R in the first place.

61. See Addison et al., supra note 41; Freeman & Lazea, supra note 41.
62. MILLER, supra note 50, at 95.
D. Positive Externalities

Microeconomic theory shows that any good that generates positive externalities (benefits that third parties have not paid for) will be under-produced in a free market system.\textsuperscript{63} Employee participation and representation may be one such good. One form of P/R, for example, is a joint safety committee. To the extent that these committees improve safety, but the benefits (e.g., reduced health care cost) do not accrue to the firm but to third parties (e.g., families of workers, community hospitals, and taxpayers), employers will under-invest in P/R relative to this social optima.

E. Unemployment and Macroeconomic Instability

Conditions of involuntary unemployment and cyclical instability in the macroeconomic environment can also reduce incentives for firms to adopt P/R. The presence of involuntary unemployment, for example, provides firms with an alternative, often cheaper method to motivate employees—the fear of dismissal.\textsuperscript{64} Likewise, extensive layoffs that go with frequent and/or deep recessions reduce the incentive of the firm to invest in costly employee training, and inevitably corrode the spirit of cooperation that P/R systems are meant to promote.

F. Principal-Agent Problem

A final example stems from the principal-agent problem.\textsuperscript{65} The "principal" of the firm is the owner or stockholders, and the agent is the management that is hired to run the firm in the principal's best interest. The owners' goal is to maximize profit, but due to imperfect information and costs of policing, the managers gain discretion to run the firm in ways that promote their interests over those of the principal.\textsuperscript{66} P/R may increase profit, but managers may, nonetheless, choose not to implement it because it detracts from a "good" that increases their utility. Two such goods are power and control. To the extent that managers have discretion, they may derive satisfaction from exercising power and control over employees. P/R reduces these goods so managers may choose to under-invest in employee participation and representation to maintain them.

In summary, economic theory predicts that in a perfectly competitive market system, firms should produce the socially optimal amount of

\textsuperscript{63} CHACHOLIADES, supra note 35, at 499.
\textsuperscript{64} JOHN COMMONS, INDUSTRIAL GOVERNMENT 269 (1921).
\textsuperscript{65} MILLER, supra note 50, at 120.
\textsuperscript{66} Id. at 121.
employee participation and representation. Judged from the yardstick of economic efficiency, no P/R gap will exist. (Note however, employees may still state that they have less P/R than desired.) Yet, to the extent labor markets contain imperfections, these imperfections will lead to the deleterious consequences described above and a shortage of employee participation and representation relative to the social optimum. Abstracting from the industrial democracy and social justice rationales, F&R’s claim that a P/R gap not only exists, but is ubiquitous, is, if judged from the perspective of society, tantamount to a claim that the imperfections and market failures described above are likewise serious and ubiquitous.

On one hand, I believe that the case F&R make for the existence of a P/R gap would have been stronger had they included a “theory” chapter which could have built on insights such as those described above. Theory suggests that a P/R gap will exist in all but a “perfect” market, and it does not take much argumentation to convince people that perfect markets exist only in textbooks. On the other hand, playing the “theory card” would also lead to potentially troublesome questions about the (alleged) large size and seriousness of the P/R gap. It is one thing to say that markets are less than perfect, and thus a gap in P/R is likely to exist. It is quite another, and more difficult, thing to say that these imperfections are sufficiently widespread and serious enough to cause the large and ubiquitous P/R gaps that F&R claim to find.

Market imperfections may indeed be widespread and serious, but F&R do not present concrete evidence to support this position. In Chapter One of their book they discuss, in a cursory fashion, why labor markets are not “spot” markets as assumed in simple economic models. They also note that imperfect information and mobility costs make the “exit” option for employees—quitting one job for another—a less than perfect solution to workplace problems from either the individual or social point of view. F&R do not go beyond these points in the remainder of the book. Without knowing more about the size and seriousness of market imperfections and coordination failures, it is impossible to judge to what extent F&R’s reported P/R gaps do indeed reflect a basic malfunctioning of labor markets.

I believe it is fair to say that nearly all economists would agree with F&R’s basic thesis that most labor markets do not operate completely like the spot markets depicted in textbooks. In contrast, I think it is fair to say that many economists—I conjecture a majority—nonetheless continue to believe that most labor markets are reasonably competitive. In these cases, market imperfections are clearly present but are typically of small or

68. FREEMAN & ROGERS, supra note 1, at 8-14.
modest seriousness, and the trend is toward greater competitive conditions in labor markets, not less. The majority view may be wrong, but absent any showing to the contrary, many readers will conclude that their reported P/R gaps may not be the serious social problem that F&R allege. While they report that over three-quarters of workers thought greater P/R would strengthen the competitive position of their companies and improve product quality (a position supported by a majority of managers), this type of evidence is at best suggestive in determining the efficiency case for greater P/R.

Maximizing economic efficiency is obviously not the only criterion for judging the optimal amount of employee participation and representation. As I already noted, other rationales of a moral and ethical nature, such as industrial democracy and social justice, can also be made to justify greater P/R in the workplace. In my view, however, the burden of proof falls on F&R to demonstrate that, in practice, the gap between the supply of, and demand for, P/R is large and pervasive for these non-economic reasons. They must also provide some explanation for the nature of the imperfections in the political marketplace that prevent society from getting closer to the optimal level. By not meeting this burden, they leave their empirical results largely devoid of a well-articulated theoretical or ethical underpinning.

In sum, F&R document, with data from the WRPS, that workers want more P/R than most firms provide, albeit subject to the measurement and interpretation problems noted in the previous section. They do not adequately explain, however, why competitive forces in the economic and political marketplaces do not narrow this gap and, correlative to, why this gap is a significant social problem. It is not surprising, after all, that many employees want more voice and influence in the workplace. Having more of these qualities would lead to more of the “goods” that increase a worker’s well being, such as higher wages, shorter hours, more generous benefits, increased job security, and more respect and dignity from supervisors. But all economic agents have an unsatisfied demand for “more,” given the unlimited nature of human wants and the scarcity of real resources. The case F&R have to build is that workers’ demand for more P/R has compelling social merit either on economic efficiency or


70. FREEMAN & ROGERS, supra note 1, at 42-43.
ethic/moral grounds. In my opinion, the brief discussion they give to this subject in Chapter One does not go nearly far enough in this direction.

IV. IMPLICATIONS FOR POLICY

F&R state that the central finding of their study is: "given a choice, workers want 'more'—more say in the workplace decisions that affect their lives, more employee involvement at their firms, more legal protection at the workplace, and more union representation." The implication for practice and policy is equally clear-cut. In their words:

The basic message to decision-makers in business, labor, and government is clear: A huge opportunity exists for America to increase the representation and participation of workers at their jobs and thereby to improve the quality of working life.... The right choice for private action and public policy would be to help workers gain the voice and representation in workplace decisions that they so clearly want.

In marked contrast to the vanilla language, and the "on the one hand this and on the other hand that" style of most academic treatises, F&R clearly and unequivocally tell the reader what they think is the "bottom line" conclusion of their study. This is to be applauded. But what about the substance of their recommendations and the methods by which these recommendations are to be accomplished? Here, greater caution is required.

One can debate, for reasons previously cited, the size and seriousness of the employee P/R gap. But let us accept, as an operating assumption, that some gap does indeed exist. The interesting issue is determining the best way to close this gap.

Surprisingly, F&R remain largely silent on this subject. They state that the nation's current system of workplace governance is "outmoded" and that their goal in writing the book is to "spur, and guide, a serious effort at reforming our national labor policy and developing the labor institutions and policies that fit modern workers and firms." Given this objective, the reader would expect that F&R would weigh and shift the evidence from the WRPS and present a set of implications and/or recommendations with respect to reform of national labor policy at the end of the book. However, in What Workers Want, no such set of implications or recommendations are provided beyond the general call for "more." Apparently, F&R chose to let the facts speak for themselves, allowing

71. Id. at 154.
72. Id. at 155.
73. Id. at 2.
readers to form their own impressions. This *modus operandi* has its merits, but also makes my job as reviewer more difficult since I have to construct, possibly erroneously, what I perceive to be the policy implications from the book. Since F&R state that influencing policy remains their goal,\(^{74}\) it is necessary to explore this subject, with the caveat that this discussion is speculative at times.

I think it is fair to say that in the eyes of F&R, not all forms of employee P/R are equally desirable or effective. In particular, they tend to favor systems of indirect representation over direct participation, and independent union forms of representation over non-union representation. This preference is apparent in both the way the WRPS was designed and in F&R's interpretation of the findings.

With respect to the former, F&R acknowledge that they originally designed the WRPS to cover only systems of workplace representation, such as works councils and unions;\(^{75}\) but later, at the urging of management advisors, they broadened the survey to include methods of direct participation, like quality circles and self-managed teams.\(^{76}\) The final product, however, still gives most attention to unions and other larger-scale forms of representation, and does little to explore the extent and performance of smaller-scale, management-created systems of direct participation. F&R give only slightly more attention to small-scale, decentralized, management-created representational committees, such as gain sharing committees and peer review panels.

In Wave One of the WRPS, for example, the only question asked about forms of direct participation was: "Some companies are organizing workplace decision-making in new ways to get employees more involved—using things like self-directed work teams, total quality management, quality circles, or other employee-involvement programs. Is anything like this now being done in your (company/organization)?"\(^{77}\) Note that forms of direct participation are lumped together with indirect forms of representation (i.e., "other forms of employee involvement," which could be any kind of joint worker-management committee), making it impossible to say anything definitive about the extent of the former. The low priority F&R give to these forms of P/R is further revealed by the fact that no follow-up question exists to learn more about particular types of direct participation, such as work teams or small-scale representational committees. The near complete neglect of work teams is particularly surprising given the fact that such bodies are widely portrayed in the management and legal literature as the principal forms through which

\(^{74}\) *Id.* at 16.
\(^{75}\) *Id.* at 27.
\(^{76}\) *Id.*
\(^{77}\) *Id.* at 167.
employee involvement is achieved at modern-day "high performance" workplaces. 78

Other examples can be cited. Many companies believe, for instance, that efficiency and workplace relations are promoted by dealing with employees on an individual basis. However, F&R presumably believe that employees, if given a chance, would uniformly reject this approach in favor of some "collective" method. 79 Indicative of this expectation, in constructing the question that asked employees to describe their preferred type of workplace P/R organization, F&R did not include "no organization desired" as a response option. To their surprise, a number of workers volunteered that they were opposed to a workplace organization of any kind. 80

Similarly, many companies prefer to offer employees an opportunity for voice and influence through a set of small-scale, relatively narrowly-focused forms of P/R, such as a joint safety committee, dispute resolution panel, and gain-sharing committee, rather than one plant or company-wide "union-like" body. 81 Their rationale is that this type of decentralized system is more flexible, cost effective, and better targets specific areas of employee concern. 82 To critics, however, this system is preferred by management for less admirable reasons—it fragments workers, thus inhibiting the development of a collective identity and exercise of bargaining power. 83

One can infer that F&R lean more toward the latter group, given the nature of the question they pose to workers about their preferred type of P/R organization. That is, workers are asked to choose amongst three options: more laws, joint employee and management committees that discuss problems, and joint committees that negotiate or bargain. 84 Although the exact nature of the "joint committee" F&R have in mind is intentionally left unstated, they clearly envision it to be a plant or company-wide body, as is clear from their description of it in the singular as "a potentially new institution—an employee-management committee. 85

79. Freeman & Rogers, supra note 1, at 6-7.
80. Id. at 143.
82. Id.
84. Freeman & Rogers, supra note 1, at 150.
85. Id. at 140.
Other questions in the WRPS about workplace committees also described them in the singular (i.e., as "an organization").86 A single plant- or company-wide body, as already noted, is not what many companies desire, nor even what a number of workers want.

The essential point I am making is that the nature of the questions asked in the WRPS influenced the nature of the conclusions derived from it. When these questions are examined closely, there seems to be a perceptible "tilt" that steers responses toward a position that seemingly favors more formal, large-scale employee organizations. Had F&R approached the design of the WRPS from a more "management-oriented" position, I conjecture that different questions would have been asked and different conclusions reached. How different that conclusion would be is an interesting question, but one which at this point is unknowable.

It is also instructive to examine the implications derived by F&R concerning the optimal forms of employee P/R organizations based on the questions asked in the WRPS. As previously noted, they do not explicitly state a conclusion on this matter, but rather present the evidence, draw inferences, and let the readers make up their own minds. The following will re-trace the findings and inferences F&R make and develop conclusions from them:

**Finding 1.** A large, widespread P/R gap exists in American industry.87

**Finding 2.** Employees want more say with management through two mechanisms: individual, one-on-one dialogue with managers and various kinds of collectively organized groups and organizations.88 By a ratio of three to one, American employees express a desire for some kind of representational organization at work.89

**Finding 3.** The large majority of employees want a workplace P/R organization that has several features: joint involvement of management and workers, cooperative relations with management, and some measure of independent authority.90

**Finding 4.** Aspects of independent authority that workers want in an employee organization include: either workers or management are able to raise problems and issues, decisions are jointly determined by workers and managers, conflicts are resolved by an outside arbitrator or other neutral third party, and employee representatives are elected by workers.91

**Finding 5.** Approximately one-third of American workers state that

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86. *Id.* at 175.
87. *Id.* at 4.
88. *Id.* at 4-5.
89. *Id.* at 144.
90. *Id.* at 142-43.
91. *Id.* at 146.
they currently would like a union form of employee representation.\textsuperscript{92} If management is not opposed to unionization, the proportion choosing union representation rises to forty-four percent.\textsuperscript{93} Only fourteen percent are currently represented by unions,\textsuperscript{94} implying that the demand for a strong and independent form of P/R exceeds the supply by an order of three to one.

\textit{Finding 6.} The large majority of union members are relatively satisfied with union representation, and less than one out of ten would vote to decertify the union. These results suggest, according to F&R, that to most union members, "to know unions is... to love them."\textsuperscript{95} Union workplaces, F&R conclude, do a better job satisfying worker desires for P/R than do non-union workplaces.\textsuperscript{96}

\textit{Finding 7.} The most important reason why the workers who want unions do not have them is management opposition.\textsuperscript{97} Workers are deterred from seeking union representation because they want to maintain cooperative relations with management and, furthermore, fear possible negative repercussions if they seek to organize. If management adopted a neutral or supportive attitude toward unions, the number of union victories in representation elections would increase substantially.\textsuperscript{98}

\textit{Finding 8.} American firms are very heterogeneous with respect to their breadth and depth of "advanced" human resource management ("HRM") practices, such as employee involvement ("EI") programs, a grievance procedure, and so on. The distribution of firms plots a relatively normal, or "bell-shaped," curve with a minority of firms at the tails and the large majority somewhere in the middle.\textsuperscript{99}

\textit{Finding 9.} Employees who work at firms with more advanced HRM practices express a higher level of satisfaction with work and report that worker-management relations are generally good to excellent.\textsuperscript{100}

\textit{Finding 10.} Sixty percent of workers reported that their company had some kind of EI program.\textsuperscript{101} Workers approve of EI programs, believe that they benefit both employees and companies, and think that they promote improved workplace relations.\textsuperscript{102}

\textit{Finding 11.} While EI programs help close the P/R gap, they do not

\textsuperscript{92} \textit{Id.} at 68.
\textsuperscript{93} \textit{Id.} at 69, 87.
\textsuperscript{94} \textit{Id.} at 81.
\textsuperscript{95} \textit{Id.} at 68.
\textsuperscript{96} \textit{Id.} at 68-69, 77.
\textsuperscript{97} \textit{Id.} at 5.
\textsuperscript{98} \textit{Id.} at 58, 87.
\textsuperscript{99} \textit{Id.} at 96, exhibit 5.2.
\textsuperscript{100} \textit{Id.} at 99.
\textsuperscript{101} \textit{Id.} at 6.
\textsuperscript{102} \textit{Id.} at 101, 108.
eliminate it. 103 This is particularly true among non-union firms, since they offer less EI than organized firms and give workers less opportunity for the exercise of voice and influence. 104 F&R conclude that EI is, on net, more effective in unionized firms and that non-union firms are unlikely to voluntarily provide as much breadth and depth of EI as workers want. 105 Paradoxically, although unionism seems to make EI work better, the spread of EI may actually undercut the amount of unionism in the economy since non-union workers who participate in EI programs express much less desire for union representation. 106

Finding 12. Employees express a desire for greater legal protections in the workplace, particularly in areas such as firing without cause and layoffs. 107 Employees also express ambivalence and concern about greater government involvement in the workplace, worrying that legal procedures and regulations, such as new laws and going to court, are burdensome, time consuming, expensive, and often ineffective. 108

Finding 13. Given a choice, the majority of employees favor a more workplace-centered method to gain more say and protection. 109 For example, they favor methods of alternative dispute resolution, such as binding arbitration of disputes, and use of workplace committees to monitor and enforce regulatory standards and employment laws. 110

Finding 14. The largest single group of workers (forty-four percent) want a workplace organization that has a strong degree of independence from management, while nearly as large of a proportion (forty-three percent) want an organization that is somewhat independent. 111 Only a small fraction desire either no organization or one that depends entirely on management. 112

Finding 15. Asked to choose their preferred means of gaining more say and influence in the workplace, only about one in seven workers prefer "more laws." 113 Almost half of workers report that they want an organization that has considerable independence at the workplace (a union or strongly independent joint committee), while less than one-third of workers want a "somewhat independent" organization, and less than one in

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103. Id. at 110.
104. Id. at 115.
105. Id.
106. Id. at 106, 110, 113.
107. Id. at 7.
108. Id. at 126-28.
109. Id. at 7.
110. Id. at 132-38.
111. Id. at 147, exhibit 7.2.
112. Id.
113. Id. at 151, exhibit 7.4.
ten want no organization at all.\textsuperscript{114}

Finding 16. Roughly fifty-eight percent of workers prefer some kind of joint labor-management committee that is supported by the employer, discusses a wide range of workplace issues, and has some independence and power (e.g., arbitration of disputes and election of representatives).\textsuperscript{115} As F&R note, American labor law largely prevents employers from operating this type of P/R system because it would run afoul of the "company union" prohibition contained in sections 158(a)(2) and 152(5) of the National Labor Relations Act ("NLRA").\textsuperscript{116}

After digesting these sixteen findings, what would the average person be led to conclude about the optimal "solution" to the P/R gap? I think a reasonable estimate is the following four recommendations:

Recommendation 1. The nation needs a substantially higher level of unionization. Labor law, principally the NLRA, but also other legislation such as the Railway Labor Act, should be amended in ways that make it significantly easier and less costly for workers to obtain union

\textsuperscript{114} Id.

\textsuperscript{115} Id. at 152.

\textsuperscript{116} 29 U.S.C. §§ 152(5), 158(a)(2) (1996). Section 158(a)(2) states that it is an unfair labor practice for an employer "to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it." 29 U.S.C. § 158(a)(2) (1996). Section 152(5), in turn, defines a "labor organization" quite broadly. A labor organization is "any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work." 29 U.S.C. § 152(5) (1996). The effect of these two restrictions is that any employer-created or supported employee representational committee that has bilateral dealings with workers over any aspect of the terms and conditions of employment is illegal. As Kaufman explains, these provisions were included in the NLRA in order to ban what are now commonly referred to as "company unions." See Kaufman, supra note 81. Company unions, also, and less pejoratively, called employee representation plans, first appeared in the late 1910s and spread among progressive-liberal non-union employers in the 1920s as a method of joint-dealing with employees. See id. Many additional employers hastily established employee representation plans in 1933-34 as a way to comply with the labor provisions of the National Industrial Recovery Act, or to avoid the wave of union organizing that the Act unleashed. National Industrial Recovery Act, ch. 90, 48 Stat. 195 (1933). These new employee representation plans were widely viewed as anti-social union avoidance devices and threats to the New Deal economic recovery program. Therefore, language effectively prohibiting them was inserted into the NLRA. Similar restrictions were also included in the Railway Labor Act at approximately the same time. Railway Labor Act, ch. 347, 44 Stat. 577 (1926). A thorough overview of this subject is provided in Bruce E. Kaufman, Accomplishments and Shortcomings of Nonunion Employee Representation in the Pre-Wagner Act Years: A Reassessment, in NONUNION EMPLOYEE REPRESENTATION: HISTORY, CONTEMPORARY PRACTICE, AND POLICY 21 (Bruce E. Kaufman & Daphne Gottlieb Taras eds., 2000) [hereinafter Kaufman, Accomplishments and Shortcomings of Nonunion Employee Representation]; see also Bruce E. Kaufman, The Case for the Company Union, 41 LAB. HIST. 321 (2000) [hereinafter Kaufman, The Case for the Company Union].
representation. Possible methods include expedited representation elections, card check certification, greater financial and criminal penalties on employers for acts of anti-union discrimination, stronger and speedier enforcement powers for the National Labor Relations Board ("NLRB"), and amending the exclusive representation provision to enable minority unionism and plural unionism in a bargaining unit.

Recommendation 2. Firms should be required or highly encouraged to form some type of enterprise-level joint worker-management committee. This committee should be modeled after a European-type works council or, alternatively, a more independent, legally secure version of a 1920's style American employee representation plan. These committees would provide for independent election of worker representatives, require discussion and joint decision-making on a wide range of workplace and employment issues, and mandate some form of third-party resolution of disputes, such as binding arbitration. They could not be disbanded or substantially altered by employers, unless approved by workers.

Recommendation 3. Non-union employers should be encouraged to expand both the breadth and depth of EI programs. However, in order for workers to be able to use these forums to exert influence over employment issues, the prohibition of company unions contained in the NLRA must be significantly relaxed. On the other hand, it is important that public policy not thereby permit the re-emergence of the classic "dominated" or "sham" company union. These types of organizations fail to satisfy the workers' desires for at least a semi-independent form of P/R and, further, may be used by employers as a union/works council avoidance device. Hence, a significant relaxation of sections 8(a)(2) and 2(5) of the NLRA is conditioned on labor law reform that guarantees to workers low-cost, easily obtainable access to representation by unions and/or works councils.\footnote{National Labor Relations Act §§ 8(a), 2(5), 29 U.S.C. §§ 152, 158 (1996). Section 8(2) makes it an unfair labor practice for an employer to financially or other support a labor organization. Section 2(5) defines a labor organization for the purposes of the NLRA.}

Recommendation 4. The monitoring and enforcement of employment and labor laws, and the resolution of disputes, should be shifted to the workplace as much as possible. In particular, the employees in most medium to large size firms would be represented either by a union or a works council-type organization. These organizations would take on increased responsibility for overseeing and administering employment and labor laws relating to matters such as safety and health, anti-discrimination and equal opportunity, and wage and hour restrictions. They would also provide a quasi-legal forum for dispute resolution, thereby greatly reducing the number of suits and complaints filed with courts and regulatory agencies.

Although F&R do not at any point list Recommendations One through
Four in *What Workers Want*, I have some confidence that these recommendations are indeed close to what they would counsel. One reason is that it appears to me nearly impossible to read Findings One through Sixteen above and come to any other conclusion. A second reason is that F&R have advanced a similar set of recommendations in other articles and books.¹¹⁸ Third, these recommendations are similar to those proposed by several other members of the Dunlop Commission.¹¹⁹ Finally, other reviewers of the results of the WRPS have reached the same conclusions concerning the implicit policy recommendations.¹²⁰

V. ASSESSMENT AND ALTERNATIVE RECOMMENDATIONS

As I have already indicated, I believe a prima facie case exists for the proposition that a free market system will lead to an undersupply of employee participation and representation relative to the social optimum. This is true even if judged only by the criterion of economic efficiency, but becomes even more certain if non-economic goals such as industrial democracy and social justice are included. I have also suggested reasons why I think F&R most likely overstate the size and seriousness of the P/R gap. I now wish to critically examine their proposed solution to the P/R gap, as it was outlined above. Similar to other parts of their study, the policy reforms implicitly suggested by F&R have merit but are also unduly "collectivist" and tilted in favor of labor’s interests versus those of management and society in general.

Sketched below is my critique of F&R’s policy position, followed by an alternative policy reform proposal that I think helps close the P/R gap in a way that better serves the interests of all parties to the employment relationship. Before proceeding further, note that my critique of F&R’s position rests on what I infer their position to be, which may or may not be correct. If the latter is true, the discussion that follows is still useful because many others who read *What Workers Want* may come to the same conclusions that I attribute to F&R. To organize the discussion, I separately consider union and non-union forms of P/R.


¹¹⁹ See Thomas A. Kochan & Paul Osterman, *The Mutual Gains Enterprise: Forging a Winning Partnership Among Labor, Management, and Government* (1994); Kochan, *supra* note 11; Voos, *Employee Involvement*, *supra* note 11; Voos, *Labor Law Reform*, *supra* note 11. In addition to these recommendations, Kochan and Osterman also advocate other complementary policies, such as expanded training programs.

A. Union P/R

The first prong of the F&R policy reform proposal, as I have interpreted it, is to encourage a substantially higher level of unionization in the economy through changes in labor law. F&R advocate this outcome on the following grounds: (a) assuming no management opposition, forty-four percent of the employees say they want union representation, but currently only fourteen percent have it; (b) the large majority of workers who have union representation want to keep it, suggesting a relatively high degree of member satisfaction; (c) employee involvement programs and works council-type employee committees function more effectively in unionized firms and in a heavily unionized economy; and (d) unionization on net promotes, or at least does not harm, economic efficiency. They identify "management opposition" as the key reason why many workers are unable to obtain union representation. Hence, labor law should be changed in ways, as outlined above, that make union joining considerably easier.

Each of these positions is open to question. For example, one can persuasively argue that F&R overstate employee demand for unionization. The forty-four percent figure is based on two assumptions: (1) that all workers who expressed a desire for a union in the telephone interview actually would vote this way in an actual NLRB election, and (2) that the absence of management opposition would swing many "no union" votes to the "yes union" side. However, this does not necessarily have to be the case. Certainly the evidence from NLRB representation elections suggests that a much larger number of workers initially expresses a desire for union representation than actually vote in favor of it, as indicated by the substantially greater number of authorization cards signed requesting an election relative to the number of "yes" votes cast in the election. This attrition may reflect the corrosive effect of management opposition. However, it may also indicate second thoughts on the part of many workers.

121. Freeman has elsewhere stated that he views the optimal level of unionization in the United States as somewhere between twenty-five percent (the level existing in the middle to late 1970s) and roughly seventy to eighty percent (the level in Scandinavia). Richard Freeman, Is Declining Unionization of the U.S. Good, Bad, or Irrelevant?, in UNIONS & ECONOMIC COMPETITIVENESS 143, 166-67 (Lawrence Mishel & Paula B. Voos eds., 1992). The mid-point on this range would be close to the forty-four percent of American workers that F&R conclude desire union representation. This figure is also quite close to the level of union density in the public sector, which Freeman cites as an example of what union density might be in the private sector were it not for employer opposition. FREEMAN & MEDOFF, supra note 10, at 243.

122. FREEMAN & ROGERS, supra note 1, 150-55.
123. Id. at 86-89.
124. See JOHN J. LAWLER, UNIONIZATION AND DEUNIONIZATION: STRATEGY, TACTICS, AND OUTCOMES 210 (1990); see also Kate Bronfenbrenner, The Role of Union Strategies in NLRB Certification Elections, 50 INDUS. & LAB. REL. REV. 195 (1997).
as to the underlying benefits and costs of representation or, alternatively, that employees were never serious about unionization, but decided to "play the union card" as a way to exert additional pressure on the company for improved wages or benefits.

F&R also seem to paint an overly sanguine picture of the degree to which unions satisfy worker aspirations for voice and influence in the workplace relative to non-union, employer-created EI programs. Their conclusion that "to know unions is to love them" is based, in part, on the fact that nine out of ten union members report they would vote in a new election to keep the union. But, as F&R note, this predilection may reflect not satisfaction with the "voice" or "industrial democracy" function of unions, but rather the desire to keep the above-market wages, benefits, and job security that goes along with being a union member (the "golden handcuff" effect). They dismiss this argument on the grounds that unions are democratic organizations and dissatisfied members can change the union policies to more closely resemble their preferences; but this argument is overly facile. Other studies reveal that a number of unions at both the local and national level have substantial elements of non-democratic practice, and some are highly corrupt and/or authoritarian. Further, F&R's survey results show that only one-third of union members are "very satisfied" with their influence in choosing local union leaders, and only one-fifth express that same sentiment regarding choice of national union leaders.

F&R also asked workers to list the most important services that unions provide to members. Union members were four times as likely to say "better pay/working conditions" than "more say in workplace issues," again suggesting that members believe that unions mainly exercise "muscle" to win economic gains rather than express "voice" to management, although the two are not entirely separate. Finally, although F&R do not point it out, the WRPS reveals that union members report just as large a P/R gap, if not larger, with respect to influencing most aspects of union policy as they do with regard to company policy.

125. FREEMAN & ROGERS, supra note 1, at 70.
126. Id. at 73.
127. Id. at 74.
129. FREEMAN & ROGERS, supra note 1, at 78, exhibit 4.5.
130. Id. at 79-80.
131. Id. at 79, exhibit 4.6.
132. Id. at 41, exhibit 3.1.
Exhibit 3.1 shows that between seventy-four and eighty-one percent of workers are “very satisfied” or “somewhat satisfied” with their influence on company workplace policy, while Exhibit 4.5 shows that the percentage of union members that are “very satisfied” or “somewhat satisfied” with their influence over five dimensions of union policy is lower in all but one area: seventy-nine percent (choosing local leaders), seventy-two percent (bargaining wages/benefits), sixty-nine percent (choosing national leaders), sixty-eight percent (union national political issues position), and sixty-three percent (union endorsement of political candidates).

F&R are also overly optimistic about the positive relationship between unions and the adoption and performance of EI programs. Certainly, good reasons exist for a positive relationship. Unions, for example, can pressure reluctant management to institute or strengthen an EI program, while individual non-union workers typically lack such power. In addition, unions help balance the power relationship between management and workers—a factor that promotes more stability and permanence in EI programs, and gives workers greater confidence that they can speak out and not suffer retribution from management. However, unions also work against successful EI programs in ways that F&R do not acknowledge. A number of unions have been very skeptical about EI programs, participate in them reluctantly, and in some cases refuse to participate altogether. Others agree to participate, but only in return for other benefits, such as a no-layoff pledge or profit-sharing. These demands, however, reduce the prospective return to an EI program and may cause management to forego the investment. Finally, the large element of adversarialism inherent in periodic contract negotiations makes intra-contract cooperation more difficult.

133. Id.
134. Id. at 78.
136. See COTTON, supra note 20, at 53; see also GUILLERMO J. GRENIER, INHUMAN RELATIONS: QUALITY CIRCLES AND ANTI-UNIONISM IN AMERICAN INDUSTRY (1988).
138. See id. Addison critically reviews the econometric evidence that the payoff to EI programs is larger in unionized firms and he concludes that the proposition is “unsubstantiated.” John T. Addison, The Dunlop Report: European Links and Other Odd Connections, 17 J. LAB. RES. 77, 81 (1996). A more recent study of EI programs in Britain found that the payoff to EI is larger in non-union firms. Addison et al., supra note 41, at 28.
Also implicit in the F&R policy recommendations is the idea that the works council-type employee committees they endorse will perform better if complemented by a union. But the evidence in support of this proposition comes largely from Europe, where unions specialize in setting wages and labor standards over broad areas (industries and geographic regions) while works councils handle plant-level employment issues. This system is impractical in the United States because collective bargaining is highly decentralized and unions have a strong presence at the plant level, implying that unions and works council-type committees would be plagued with an overlap of functions and organizational rivalry. The likely outcome, particularly if union organizing is made much easier, is that many of the employee committees in non-union firms would eventually turn into independent unions—shifting the locus of activity from "voice" to "bargaining"—while in organized firms they would be absorbed into the union local.

139. Germany is the exemplar. Based on a review of European countries, Rogers observes, for example, that "the continental European systems in which councils appear most effective have a developed ‘first channel’ of worker representation and labor-management dealings, centered on regional or national wage-setting practices and political bargaining over the social wage and labor market policy, external to the firm." Joel Rogers, United States: Lessons from Abroad and Home, in Works Councils: Consultation, Representation, and Cooperation in Industrial Relations 375, 394 (Joel Rogers & Wolfgang Streeck eds., 1995). He goes on to say that "[w]hile the United States seems unlikely ever to contemplate true peak bargaining between unified union federations and a unified business community,. . . . more modest efforts to facilitate wage generalization on a regional or sectoral basis might be considered. The law on multiemployer bargaining might be amended . . . ." Id. at 404.

140. Rogers & Streeck, supra note 118, at 100 (noting that where collective bargaining is less developed and more decentralized, as in Italy, Spain, and Greece, “council powers more closely resemble those of a local union”). Clyde Summers states that, regarding the coexistence of a works council and labor union in the same plant, “[t]he first reaction (and for many the last) is that it would be like trying to keep two bulls in the same pasture.” Clyde W. Summers, Works Councils in the American System, Industrial Relations Research Association Series: Proceedings of the Forty-Ninth Annual Meeting, 106, 110 (1997). He concludes that these fears are overstated, saying that, "I see no reason why the coexistence of a works council and a union in the same plant would cause more difficulties than the coexistence of two competing unions.” Id. But multi-unionism gives rise to numerous inefficiencies, rivalries, and conflicts, and most certainly would be strenuously opposed by most employers.

141. Summers, supra note 140, at 130. Freeman alludes to this eventuality, stating that:

[M]ost important, UK adherence to the Social Charter [of the European Union] will bring mandated works councils which will offer a new field of influence for unions. Union movements can function effectively with much lower density in a world of elected works councils than in a world of voluntary recognition: a largely non-union work-force may elect union activists to represent it on councils.

However, if unions contribute to improved productivity and economic efficiency, as per point (d) above, would not greater unionization nonetheless be a boon? Once again F&R are most likely overstating the case. The standard economic critique of unions is that they act much like a monopolist in the labor market; that is, they use their market power to raise wages and benefits above the competitive level, leading to higher production costs and product prices, less output and employment, and a reduction in economic efficiency. In contrast, Freeman has argued elsewhere that the voice function of unions leads to lower employee turnover, higher firm productivity, and other forms of cost saving which, in the aggregate, outweigh, or at least offset, the "monopoly" costs. I think it is fair to say, however, that the majority of economists are skeptical of this argument. They grant that unions in some firms and industries have positive efficiency effects, but that the overall union effect is negative, especially in the long run, when allowance is made for reduced capital investment and slower productivity growth.

In sum, the gist of my argument is that F&R overstate both the American workers' desire for union representation and the positive outcomes that would flow from greater unionization in the economy. Attempting to close the P/R gap through a substantial increase in union density would, therefore, be a mistake. However, some more modest encouragement to union organization may, nonetheless, have considerable social merit.

I do not accept that simply because one-third of workers state that they

(1995); see also Edmund Heery, Learning from Each Other: A European Perspective on American Labor, 22 J. LAB. RES. (forthcoming 2001) (stating that works councils would facilitate "union access to non-union firms"); Sanford M. Jacoby, Reflections on Labor Law Reform and the Crisis of American Labor, 69 CHI.-KENT L. REV. 219, 226 ("[A] works council... transforms an inchoate mass of employees into an organized group ripe for picking by union organizers. The hassle of being hit with repeated organizing drives is one reason why employers gave up on independent unions in the 1950s... ").


143. FREEMAN & MEDOFF, supra note 10.

144. For example, John Addison and Barry Hirsch review the empirical literature on the economic impact of unions and conclude that "[w]hile empirical evidence is mixed, the contention that unions, on average, significantly raise productivity cannot be sustained." John Addison & Barry Hirsch, Union Effects on Productivity, Profits, and Growth: Has the Long Run Arrived? 7 J. LAB. ECON. 72, 100 (1989). They go on to say that "[s]uch evidence as we have been able to uncover does not encourage an optimistic view of unionism's longer-term consequences." Id.; see also BARRY T. HIRSCH, LABOR UNIONS AND THE ECONOMIC PERFORMANCE OF FIRMS (1991). Other studies show that unionism leads to a two to four percent decline in employment per annum on average. See generally Bruce E. Kaufman, Models of Union Wage Determination: What Have We Learned Since Dunlop and Ross?, INDUS. REL. (forthcoming); Jonathan Leonard, Unions and Employment Growth, 31 INDUS. REL. 80, 91 (1992).
want a union, public policy should seek to accommodate this desire. Such a position ignores, as I have already explained, the economic and social costs of greater unionization. So, can a more cogent case be made for stronger laws that better protect and promote union organization? The answer is "yes" if the additional encouragement to unions is kept within modest bounds and effective constraints are in place to check monopolistic union "rent seeking" behavior.¹⁴⁵

The guiding principle in labor law reform that should be followed is to identify the ways increased unionism can promote greater economic efficiency, because this goal clearly benefits society at large and will likely gain widespread political support.¹⁴⁶ Then, the non-economic rationales for greater unionism (e.g., industrial democracy and social justice) should be introduced, again with an eye to spotting the situations where greater unionism will most clearly advance the social interest.

Efficiency arguments for unionism can be made at both the microeconomic and macroeconomic level.¹⁴⁷ With regard to the former,

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¹⁴⁵. Rent seeking is defined as the expenditure of resources to increase one party's share of the economic pie, rather than to grow the size of the pie. Unions rent seek when they use strikes and other forms of economic or political pressure to redistribute income from company revenues to labor compensation. See Michael L. Wachter, Labor Law Reform: One Step Forward and Two Steps Back, 34 INDUS. REL. 382, 386 (1995).

¹⁴⁶. See id. at 396 (arguing that "the relevant economic question is whether extending [collective] bargaining to such topics [(issues traditionally determined unilaterally by management)] increases the joint surplus.")

¹⁴⁷. The principle economic justification, as stated in the preamble of the NLRA, for protecting and encouraging trade unionism is that "[the inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions . . . ."] 29 U.S.C. § 151 (1996). The "inequality of bargaining power" argument is almost never cited by contemporary economists (including Freeman) as a justification for unions. As I have interpreted the term elsewhere an equality of bargaining power occurs in a market situation of perfect competition because neither employer nor worker can influence the wage. See Bruce E. Kaufman, Labor's Inequality of Bargaining Power: Changes Over Time and Implications for Public Policy, 10 J. LAB. RES. 285 (1989). Labor suffers from an inequality of power when market imperfections and macroeconomic coordination failures give employers the ability to lower wages and conditions below the competitive, full employment level. The efficiency case for unions then rests, in part, on the proposition that labor continues to suffer from some degree of inequality in bargaining power and a union countervailing power is needed to restore competitive, full employment labor standards. I argue that labor's inequality of bargaining power has diminished substantially but still exists among certain workgroups due to various immobilities, information constraints, lack of effective competition among employers, and excess supplies of labor. Freeman, on the other hand, appears to assume that there is a "level playing field" in labor markets per his unqualified assumption that union wage gains are "above competitive levels" and that the "monopoly face" of unions should be weakened. Thus, the source of efficiency gain from unions rests on the use of "voice" internal to the firm as opposed to the exercise of bargaining power to affect wages and labor standards vis a vis
unionism can contribute to increased economic efficiency in several ways. For example, it can offset employer monopsony power and exploitation of labor, caused either by a small number of competing employers in a local labor market or a constraint on labor mobility, that give individual employers some degree of market power over "inframarginal" employees in their workforce.\textsuperscript{148} A second possibility is that unions overcome public goods and externality problems in the workplace, contributing to a more efficient and competitive supply of working conditions for employees, and forcing firms to internalize costs they would otherwise shift to society.\textsuperscript{149} A third is that unions prevent injury or wastage to the firm's and the nation's human resources by placing a floor under labor standards (e.g., maximum work pace and overtime hours), thus preventing "destructive competition" in periods of involuntary unemployment or excess capacity.\textsuperscript{150}

On the macroeconomic side, a principal argument advanced to justify passing the NLRA was that unionism promotes a more stable, full employment economy by taking wages out of competition, thus preventing destabilizing wage deflation and boosting household purchasing power and consumption expenditure by redistributing income from capital to labor and

external markets. See Freeman & Medoff, supra note 10, at 248-49. I note that this position leaves his justification for unions seriously at odds with the purpose of the NLRA. It truncates the potential sources of efficiency gain from unionism, immediately cedes to critics of unions the claim that higher union wages are "monopolistic," and appears to conflict with his desire that unions be promoted in order to reduce the inequality of income, which depends on their ability to raise wages. The fact that the economic justification for unionism contained in the NLRA is so at odds with that advanced by Freeman and many other contemporary academic supporters of unions may well provide insight on why national labor policy "no longer works to the good of the American economy." See Rogers, supra note 139, at 375.


149. Freeman & Medoff, supra note 10, at 8; Hirsh & Addison, supra note 142, at 189; Donald R. Stabile, Activist Unionism: The Institutional Economics of Solomon Barkin (1993); Robert E. Lucore, The Fictitious Commodity: A Union View of Labor's Antitrust Exemptions, 21 J. Lab. Res. 563 (2000). Lucore states, for example, that "unions seek to . . . remove wages, benefits, and working conditions from competition . . . . [I]f firms compete on the basis of low labor costs, workers will deteriorate or the community at large will pay the social costs." Lucore, supra, at 567.

A second macroeconomic argument is that unions promote productivity growth by encouraging firms to adopt more efficient HR management practices, spend more funds on capital investment, and reorganize the workplace to squeeze out costs. Finally, unions can have positive effects at both the microeconomic and macroeconomic levels by stimulating managers to seek out improved methods of production and employment practice in order to hold the line on cost.

The macroeconomic aggregate demand and supply rationales for increased unionism are weak. Unionism may, on net, promote stronger, more stable aggregate demand, but the links are tenuous. Other policy instruments, such as monetary policy, are available and more effective. In addition, the costs to the supply side of the economy from greater unionism (e.g., restrictive works rules, strikes, and slower decision making) most likely outweigh any benefits on the demand side. Certainly, if most American citizens were asked to name policy reforms that would spur growth and competitiveness, few would say "increased unionization."


153. HIRSCH & ADDISON, supra note 142, at 208.


155. It is somewhat anomalous in this regard that the major rationale advanced by the Dunlop Commission for promoting unions is that they promote more effective labor-management participation and, hence, productivity and competitiveness, a conclusion partly foreordained by the nature of the commission's charter. The father of American industrial relations, John Commons, states that the purpose of unions is "wealth redistribution" and "protection and mutual aggrandizement" and that their social efficacy should be judged on this basis. JOHN R. COMMONS, LABOR AND ADMINISTRATION 121 (Sentry Press 1964) (1913). Although this perspective accords with the underlying purpose of the NLRA and the tenor of my remarks here, it is not the rationale focused upon by F&R and other academics on the Dunlop Commission. Rather, they focus on "high performance" workplaces, such as Saturn and NUMMI, and endeavor to show that unions make these "high involvement" organizations perform better. See KOCHAN & OSTERMANN, supra note 119; Saul Rubinstein et al., The Saturn Partnership: Co-Management and the Reinvention of the Local Union, in EMPLOYEE REPRESENTATION: ALTERNATIVES AND FUTURE DIRECTIONS 339 (Bruce E. Kaufman & Morris M. Kleiner eds., 1993). This type of "supply side" rationale for unions was also advanced in the 1920s, unsuccessfully, principally in the context of the labor-management cooperation experiment at the B&O Railroad. See IRVING BERNSTEIN, THE LEAN YEARS 98-101 (1960). But, as Commons points out, workers do not join unions to help make firms more competitive, they do so to restrict the employer in various ways and gain higher wages and more secure employment. If unions promote
Furthermore, the economy has been more stable and able to operate closer to full employment in recent decades, thus reducing the merits of the destructive competition rationale. These same macroeconomic forces of full employment and stable growth have also helped improve the economic position and leverage of many workers in the "disenchanted third" of the workforce, at least relative to what would exist in less prosperous economic times, such as the Great Depression, when the NLRA was enacted.

In addition, the degree of employer power over terms and conditions of employment has, on net, significantly diminished in recent decades. But some arguments for the efficiency effect of unions retain validity. Although one-company towns are now largely a thing of the past, some employers nonetheless continue to have a net power advantage over workers that is exercised to the latter's disadvantage in the form of excessively long hours, low wages, or intense pace of work. Likewise, evidence points to the conclusion that market imperfections lead to some degree of social under-investment in employment conditions and labor standards in a number of non-union workplaces, such as employee safety.
and health, pension protection, and time off for pregnant women.¹⁶⁰ Large-scale immigration into the United States, the adverse impact technological change has on unskilled workers, and the continuing effects of discrimination also continue to put pressure on labor standards at the bottom of the labor market.¹⁶¹ Finally, the union "threat effect" continues to promote economic efficiency by inducing non-union firms to vigilantly provide competitive employment conditions.¹⁶²

These considerations lead me to believe that a reasonable case can be made on economic efficiency grounds that a modest expansion in the size of U.S. union density would be in the social interest, particularly in the private sector where the current density rate is slightly less than ten percent. I stress the word "modest" because the efficiency gains of increased unionism are likely to be quickly exhausted. This reflects both the decline in the importance of market imperfections and involuntary unemployment in labor markets, and the propensity of unions to target organizing and bargaining power—not the disadvantaged groups that need countervailing power the most, but on work situations where there are rents to exploit. F&R take a more optimistic view of this matter, but I side with the opinion of other economists that the evidence they adduce overstates unionism's net contribution to improved economic performance.¹⁶³

Of course, economic efficiency is not the only criterion on which public policy is based; hence non-economic considerations must also be considered. Here, too, a case can be built that society would benefit from a modest expansion in union density. Many employees in the "disenchanted third," and to a lesser degree in the middle and upper parts of the job market, have limited opportunities for voice in their places of employment and little-to-no protection from unilateral management decisions.¹⁶⁴ On the grounds of basic human rights and commonly held moral and ethical principles, a reasonable case can be made that additional unionization


¹⁶³. See Addison & Hirsch, supra note 69, at 162 ("Overall, then, the evidence indicates that union effects are real and distortionary. Whatever the positive benefits of collective voice on firm performance, these seem to have been overshadowed by rent-seeking behavior as reflected in reduced profitability and lower investment.").

would promote the social goal that all employees enjoy a minimal level of "industrial democracy." Likewise, a reasonable argument can be made that the rising degree of economic inequality recently witnessed in the United States harms social cohesiveness and norms of fairness. Additional unionism would provide a social benefit to the extent it would raise wages and other economic rewards among the bottom tier of the workforce.

Finally, unions generate a positive externality for society to the extent that they balance the power and influence of business interests in the political process and promote the cause of disadvantaged social groups.

Countervailing arguments also exist. A number of unions, for example, have significant internal elements of non-democratic practice, such as discrimination against minorities and women, are controlled or heavily influenced by organized crime and, on occasion, are more autocratic than the firms they seek to organize. Research suggests that the decline of union density is only one of many factors contributing to greater income inequality, and encouragement of greater unionism might be relatively impotent to reverse this trend, given underlying demographic shifts and ongoing global economic integration. Finally, more powerful unions mean more strenuous lobbying and political campaigning for various legislative and regulatory measures, such as restrictive trade policies and burdensome regulatory practices. This promotes the narrow interests of union members at the expense of the broader interests of society. Therefore, industrial democracy and social justice influences provide an additional argument for a modest expansion of unionism, but the case for going further is not compelling.

For the reasons cited above, I am led to conclude that some reform of the nation's labor law is required in order to provide additional protection and encouragement of the right to organize. The positive case for labor law reform is further buttressed by the evidence that a minority of employers exploit the weak penalties and administrative delays built into the current

166. Voos, Labor Law Reform, supra note 11.
168. See sources cited supra note 128.
law to illegitimately thwart employees desire for union representation.\textsuperscript{171} Thus, I favor some, but not all, of the legislative changes to the NLRA that were recommended by the Dunlop Commission. My proposed changes to the NLRA include speedier representation elections from a mean of six or seven weeks to four, heftier penalties against employer acts of anti-union discrimination, mediation and arbitration of unresolved first contract disputes, greater union access to the workplace, and greater ability for the NLRB to provide injunctive relief to employees harmed by anti-union acts of employers.\textsuperscript{172}

It is my judgment that these legislative reforms would result in only a modest increase in union density. I conjecture that F&R believe that these reforms would have a larger impact, based on the assumption that the frustrated demand for unions is relatively strong and widespread. I also opine that they would favor stronger incentives for the right to organize than that which either the Dunlop Commission felt was politically practical or that which I feel is justifiable on the grounds of social benefit and cost. Examples of measures that F&R have advocated in other places include card check certification, one week “quickie” representation elections as used in several Canadian provinces, relaxation of the exclusive representation requirement in order to facilitate minority and plural unionism, and banning of striker replacements.\textsuperscript{173} These options err, however, in tilting the playing field too far toward labor and harming economic efficiency and reasoned, un-coerced choice in workplace representation.\textsuperscript{174}

\textsuperscript{171} Richard Hurd & Joseph Uehlein, Patterned Responses to Organizing: Case Studies of the Union-Busting Convention, in RESTORING THE PROMISE OF AMERICAN LABOR LAW 61 (Sheldon Friedman et al. eds., 1994); LAWLER, supra note 124.

\textsuperscript{172} Commission on the Future of Worker-Management Relations, Report and Recommendations, Dec. 1994, at 18-24. The Commission recommended that representation elections be held within two weeks, but in my view this unduly compromises the time needed for management to make its case and for workers to reach a deliberative, reasoned decision. Too long a campaign allows employers to unduly introduce fear and intimidation, but too short a campaign allows unions to unduly make false claims and whip-up unrealistic expectations. Although mandatory arbitration of first contract disputes contains perverse incentives (i.e., an exaggeration of demands), some such procedure is necessary to effectuate the employees' desire for collective bargaining, particularly when striker replacement undercuts the exercise of direct economic power. An increase in financial penalties on employers for acts of anti-union discrimination seems quite meritorious, given that race and gender discrimination may result in the assessment of treble damages and multi-million dollar jury awards, while anti-union discrimination typically requires only payment of back wages.

\textsuperscript{173} See, e.g., Freeman & Rogers, supra note 10, at 64-65; Joel Rogers, Reforming U.S. Labor Relations, 69 CHI.-KENT L. REV. 97, 113 (1993).

\textsuperscript{174} Not only do card certification and “quickie” elections inhibit reasoned choice, the former is non-democratic since it compromises the secrecy of the choice and provides the union with the opportunity to unduly exert pressure and practice discrimination on workers
B. Non-union P/R

Next, consider the implications of *What Workers Want* for public policy reform regarding the level and form of employee participation and representation in the non-union sector of the economy. As outlined above, F&R favor policy reforms that mandate or strongly encourage widespread adoption by non-union firms of some American versions of a European-style works council. F&R also favor legislation that relaxes the "company union" prohibition in the NLRA so that non-union companies can discuss terms and conditions of employment with employee representational committees and councils. However, they favor this legislation only on the condition that workers have a much more liberalized right to organize, and that a semi-independent works-council-type organization be readily available to workers.

These proposals, like dealing with increased union representation, have considerable merit but also err on the side of unduly promoting a centralized and independent form of P/R, favoring the interests of labor over management, and sacrificing the goal of economic efficiency. As I have already pointed out, the questions included in the WRPS were not entirely neutral with regard to discovering workers' preferences for various types and forms of P/R. In particular, the decentralized, less formal method of P/R practiced by many employers was given short shrift and respondents were asked to speculate about the characteristics and features of some hypothetical plant or enterprise-level employee organization. But given these caveats, it is nonetheless noteworthy, perhaps the most noteworthy finding reported in the entire book, that the most preferred organizational vehicle for P/R on the part of a majority of American workers is a hybrid for which no real world counterpart in the United States currently exists. That is, what the single largest group of workers want, in the context of the WRPS, is some form of organization that is at least partially financed and operated by companies, takes an integrative, cooperative approach to the solution of workplace problems, and discusses a full range of workplace issues, including company sales and financial performance, day-to-day production and operations, and terms and conditions of employment. Workers want an organization that gives employees a modicum of independence and influence vis-a-vis management, such as by election of

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175. Freeman & Rogers, *supra* note 10, at 63 ("Should such councils be mandated? A good case can be made that they should, as in Western Europe. But a case can also be made on efficiency grounds for national encouragement of their voluntary formation.").
176. *Id.* at 64-65.
177. FREEMAN & ROGERS, *supra* note 1, at 152.
representatives and third party resolution of disputes.\textsuperscript{178} But such an employee organization is clearly illegal under the provisions of sections 8(a)(2) and 2(5) of the NLRA, and efforts of American employers to establish and operate such committees have been struck down by the NLRB and the courts numerous times.\textsuperscript{179}

Although F&R recognize this conundrum, they oppose allowing employers freedom to re-establish “dominated” employee committees.\textsuperscript{180} Their solution is to use government legislation to mandate or strongly encourage some form of plant or company-wide works council or “Employee Participation Committee.”\textsuperscript{181} Their approach suffers from significant conceptual and practical shortcomings. From my perspective, the central conclusion that comes out of \textit{What Workers Want}, is that the best approach toward a solution of the P/R gap is not more government regulation or mandates on non-union employers to promote councils, but \textit{less}. In particular, the single most effective reform government could make to foster greater P/R in the ninety percent of the private sector workforce that does not have union representation is to repeal the NLRA’s and Railway Labor Act’s prohibition on company unions.

The guiding principle for policy reform should be exactly parallel to that enunciated above for unions. First, determine the forms of P/R that most clearly and efficaciously improve economic efficiency; second, consider the non-economic case for and against various forms of non-union P/R. If this perspective is adopted, two major anomalies become apparent in the policy recommendations that flow from \textit{What Workers Want}.

The first pertains to the role of management resistance. The economic theory presented in Section Three of this article implies that companies should welcome, not resist, additional employee P/R as long as it promotes improved profitability. Indeed, in a perfectly competitive economy, firms opt for the socially efficient level of P/R and resistance to further P/R is to

\textsuperscript{178} \textit{Id.}


\textsuperscript{180} \textit{See} Freeman & Rogers, \textit{supra} note 10, at 64-65 (describing the company union bar as “the core and legitimate purpose of which is to prohibit management from choosing those workers who will represent others”). The Dunlop Commission in its final report also recommended that the company union bar in the NLRA be retained. \textit{See supra} note 172, at 8.

\textsuperscript{181} Freeman & Rogers, \textit{supra} note 10, at 63 (“[W]ould it be feasible and desirable to graft council-type institutions onto our present labor relations scheme? Yes, we think it would.”). F&R go on to state that government encouragement of such councils “should be vigorous . . . . Through such actions, government would send employers the message that it favors independent forms of worker voice and will smooth employer adoption of them.” \textit{Id.}
be applauded, not condemned, since management is wisely proportioning scarce resources. But I also pointed out that market imperfections may well lead companies to under-invest in employee P/R relative to the social optimum. Hence, management will rationally resist additional P/R even when the social benefits outweigh the costs. Since markets are not perfect and imperfections of various sorts are widespread, a prima facie case exists that management resistance does indeed keep the nation from reaching the socially optimal amount of P/R. And, equally true, management resistance is particularly strong and vigorously exercised when the type of P/R employees want takes the form of independent unionism.

Can we conclude then, as F&R do, that management resistance is the major contributor to the employee P/R gap and that public policy should seek to neutralize or override this opposition through legislation encouraging or mandating new forms of P/R? The answer, on two counts, is “not necessarily.”

The first reason is that it is not evident that management resistance is in fact the most important obstacle to increased P/R in American workplaces. Perhaps the most interesting new finding to emerge from What Workers Want is that the type of employee organization the majority of workers say they want is prohibited by American labor law because it takes the form of a “company union,” that is, a management-financed, jointly-operated representation committee or council that discusses terms and conditions of employment. Given this, F&R appear to make a leap in logic when they attribute the shortfall of P/R to employer resistance, since it was not employers in the 1930s who lobbied for the NLRA’s section 8(a)(2) ban of employee representation plans, and it is not employers today who adamantly resist any relaxation of this ban.

Seen in this light, one could make the argument that it is union resistance that most contributes to the P/R gap. The reason is because organized labor has adamantly opposed any modification of sections 8(a)(2) and 2(5)—modifications that would open the door to more P/R for the ninety percent of private sector workers who are in non-union firms. Of course, if

182. Kaufman & Levine, supra note 42.
183. FREEMAN & ROGERS, supra note 1, at 152.
185. Jonathan P. Hiatt & Laurence E. Gold, Employer-Employee Committees: A Union Perspective, in NONUNION EMPLOYEE REPRESENTATION: HISTORY, CONTEMPORARY PRACTICE, AND POLICY 498 (Bruce E. Kaufman & Daphne Gottlieb Taras eds., 2000). Gold and Hiatt, speaking for themselves and not in an official capacity for the AFL-CIO, do concede that liberalization of section 8(a)(2), if complemented by Canadian-style regulations on organizing and elections, “might make an acceptable legal regime;” nonetheless, they conclude that the main effect of liberalization would be to give employers another union deterrence weapon without any appreciable increase in genuine worker
sections 8(a)(2) and 2(5) were modified so that non-union employers are free to choose their desired level of P/R, it is likely, for reasons previously described, that these firms will resist adopting the full breadth and depth of employee P/R. However, before concluding that employers are the principal problem and coercive legislative mandates are the answer, the nation would be well advised to first give employers the chance to voluntarily augment the amount of P/R in the economy by eliminating the company union restrictions in the NLRA. This initial step-up in the level of P/R is the lowest-cost, most voluntary source of additional P/R available.

But, examining this issue further, is it not true that management resistance is responsible for the stunted supply of one form of P/R, independent trade unionism, and that the reason the NLRA bans “company unions” is precisely because employers use them to thwart outside organization? Both parts of this question must also be considered.

F&R again overstate the case when they claim that management resistance is key to understanding the low and declining level of union density in this country. Most observers agree that employers are more resistant to union organization and practice union avoidance more openly and with greater vigor than in earlier decades. In some cases, they defeat unions by methods that are unjust or illegal, due to administrative delays, weak penalties in the law, and endless litigation. It is for these reasons, in addition to the efficiency arguments advanced earlier, that I favor reforms to the NLRA that strengthen the protections of the right to organize are the better option. Recognizing these facts, however, does not allow one to conclude that management resistance is the major culprit behind the low organizing success of unions.

Considerable academic research suggests that the demand for unionization has declined for a host of other reasons unrelated to management resistance: structural shifts in the economy away from traditional union strongholds (such as goods-producing industries, blue-collar occupations, and male workers); the substitution of government protection for union protection; the growing competitiveness of markets (making it more difficult for unions to take labor cost out of competition and capture rents); improved HR management practices in American companies; higher reported levels of job satisfaction among non-union employees; and various perceived shortcomings of unions and collective

empowerment. Id. at 509; see also Herrnstadt, supra note 83.

186. Freeman & Rogers, supra note 1, at 60-63.


188. See sources cited supra note 171.
Further, it must be realized that not all forms of management resistance are anti-social, such as the improved human resource practices and higher wages and benefits that non-union firms put in place to remain union-free. Indeed, as Freeman has described in other research, an important cause of greater management resistance is the secular rise in the union/non-union differential in labor costs (wages and benefits)—a trend that, in conjunction with greater competition in product and financial markets, has forced companies to take a harder position vis-a-vis unions and collective bargaining. While in earlier decades the union wage premium could be rationalized as a non-distortionary income transfer of monopoly rents from capital to labor, in today’s more competitive economy the union tax on capital is less easily absorbed by companies and, therefore, engenders greater business resistance. Although unfortunate from the perspective of unions and their members, this increased opposition may nonetheless be in the social interest, to the extent that it promotes a more economical use of the nation’s resources. Increased management opposition, and a decline in organizing success may also be a signal to organized labor that its basic mission and strategy are increasingly misaligned with the economic and social environment.

189. See the symposium of articles on this subject in the Spring and Summer 2001 issues of the Journal of Labor Research (vol. 22). The fact that workers at many firms do not want unions because they are relatively satisfied with employment conditions is suggested in the following remark by Freeman: “[T]he employees at Texas Instruments, Motorola and their peer firms are not hungering for unions [in part due to the presence of EI programs].” Freeman, supra note 141, at 528.

190. FREEMAN & MEDOFF, supra note 10, at 239. An illustrative case study is the southern paper industry. See Bruce E. Kaufman, The Emergence and Growth of a Non-union Sector in the Southern Paper Industry, in SOUTHERN LABOR IN TRANSITION, 1945-1975 295 (Robert H. Zierger ed., 1997). Prior to the mid-1970s, nearly every major paper mill in the south was unionized, and companies did not actively resist organization of new mills. But union labor costs began to increase rapidly in the 1970s and product and financial markets became less accommodative, forcing the companies to take a harder line. Starting in 1975, the paper companies also began designing new mills to incorporate socio-technical, “high performance” principles of work organization and human resource management practice (such as teams, EI programs, and gain sharing) that reportedly led to much higher employee job satisfaction. The outcome of greater management resistance and new methods of work organization was that none of the seventeen new paper mills opened after 1977 were organized by unions.


192. The possibility of such a misalignment is strongly suggested in this observation by Freeman: “The AFL-CIO response to the problems of American unionism has been, at best, too little, too late, and, at worst, utter miscalculation and blunder.” Freeman, supra note 141, at 530. Also suggestive is the proposal advanced by Rogers for a far-reaching, fundamental reorientation of organized labor’s strategy and structure. Rogers, supra note 10.
this matter a different way, one might ask: What would the economic impact be if management resistance went to zero, and workers had all the voice and influence they reported wanting in the WRPS? The repercussions for long-term competitiveness, living standards, and employment, I conjecture, would not be positive.

Lastly, recent empirical evidence appears to contradict the F&R conclusion about the central and debilitating role played by management opposition. Using the WRPS data set and multiple regression analysis, Fiorito finds that stronger management opposition is actually positively related to workers' probability of voting for union representation, in direct opposition to F&R's claim.¹⁹³ Moreover, using data from a large survey of American and Canadian workers, Lipset and Katchanosvki find that "a random sample of U.S. managers express more union friendly attitudes than Canadian," and "more Canadian than American private sector employees in non-union workplaces predict employers will oppose organization harshly," again undercutting the F&R argument that low American union density is due to a more hostile management.¹⁹⁴ What is responsible for America's low and declining rate of union density? Lipset and Katchanovski state, "traditional American values that are more libertarian and individualist, i.e., much less social-democratic, than in Europe and Canada, have weakened organized labor.... [E]conomic improvements in successive periods have refurbished the classic American libertarian and market-oriented values, thereby also weakening potential union sentiment."¹⁹⁵

There is also the fear that removing the company union prohibition in the NLRA will serve mainly to give employers one more potent tool to thwart outside unionization. From the perspective of F&R, the consequence of such a legislative change would be to reduce the supply of the relatively independent, strong form of P/R that the majority of workers say they want, (i.e., labor unions) and replace it with a weak, management-dominated form that cannot adequately serve workers' interests. From the perspective of organized labor, the ability of employers to freely operate and structure non-union forms of P/R creates the fear that worker demand for unions would precipitously decline. F&R provide evidence of this fact in What Workers Want, arguing that relatively few employees in firms with well-run EI programs say they would vote for union representation.¹⁹⁶ But these positions are problematic on a variety of counts.

¹⁹⁵. Id. The other major contributing factor they cite is structural change.
¹⁹⁶. Freeman & Rogers, supra note 1, at 113.
A false presumption exists among F&R and other critics that employer-created representation plans are ethically illegitimate, most often toothless "shams," and are principally used for purposes of union avoidance. The Dunlop Commission, for example, touted the virtues of company-sponsored EI programs but nonetheless argued that "dominated" representational committees and councils (in other words, those created, operated, and/or supported by management) should continue to be banned where the subjects of discussion involve substantive aspects of terms and conditions of employment. However, this rule is illogical and, paradoxically, violates the principle of free choice it intends to protect. It is equally true that all other aspects of a nonunion company's human resource policy are similarly "dominated"—such as its compensation policy, training programs, and staffing decisions—but no one seriously argues that these policies should therefore be decided by majority vote of the employees or declared illegal because they conflict with basic democratic beliefs and institutions. Why then, should employee involvement committees and councils be held to a different standard? In

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197. Rogers, supra note 139, at 392 ("In many cases, company unions were the shams they have come to be widely viewed as."); id. at 390 ("[M]ost of these plans gave workers no real power in decision making."). F&R state that they favor the company union ban because they support its "core and legitimate purpose of which is to prohibit management from choosing those workers who will represent others." Freeman & Rogers, supra note 10, at 65; see also Kochan, supra note 11, at 353; Voos, Employee Involvement, supra note 11; Voos, Labor Law Reform, supra note 11, at 129.


199. The illogic of this position is evident in this statement made by Senator Wagner explaining the purpose of the NLRA: "Whatever the men want to do... within a plant, that is all right, only if it is the free choice of the men. Of course, we are all for that. That is all I am seeking to do, to make the worker a free man to make his choice... ." Amendment of National Recovery Act—National Labor Board: Hearing on S. 2926 Before the Comm. on Education and Labor, 73rd Cong. 440 (1934) (statement of Senator Wagner), reprinted in 1 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935, at 440 (1985). But, if free choice is the operative principle, then why should the employees not be allowed to choose a nonunion form of representation? One possible answer is that conditions cannot be created within the plant for free choice. However, this premise is undercut by the NLRA's system of secret ballot election and protections against employer coercion. These protections may need to be strengthened, but surely, at some level, free choice can be insured. Another possibility is that workers do not desire company-created plans, but this was disproved in the 1930s by the large number of workers who voted for a company union in secret ballot representation elections supervised by Wagner in 1933-34 under the labor boards created by President Roosevelt to mediate disputes arising from the National Industrial Recovery Act. See generally LEO WOLMAN, THE EBB AND FLOW OF TRADE UNIONISM 77-79 (1936). The conclusion I come to is that the principle of free choice was sacrificed in the NLRA in order to explicitly promote trade unionism for economic and ideological reasons. See Kaufman, supra note 81, at 790-92. Present day opponents of relaxing the company union ban are caught in the same contradiction.

200. See Kaufman, supra note 81, at 784.
addition, the historical record does not support the claim of critics, such as F&R, that argue that company-created councils and committees are typically powerless or ineffective in serving workers’ interests.  

For example, William Leiserson, arguably the most knowledgeable and objective judge of the merits and shortcomings of the 1920s-era “company unions,” concluded that, “if you take it as a whole, the unskilled and semi-skilled working people of this country, in the last six years, have obtained more of the things trade unions want out of employee representation plans [(company unions)] than they have out of the organized labor movement.”  

Echoing the findings of the WRPS, Leiserson goes on to say that “[t]here is even evidence that these workers sometimes deliberately prefer company unions to the regular trade unions.”

The appropriate test for judging the social efficacy of company HR practices is not to see that they follow pro forma democratic practices, but rather to assure they serve the social interest in promoting economic efficiency, generate mutual gains for all parties to the employment relationship, and respect basic human rights. How can labor policy ensure this result? The answer, I believe, is to deregulate the market place for nonunion employee P/R, ensure that adequate constraints and safeguards are in place so that competition is effective and fair, and then let employees exercise free choice. As I have argued elsewhere, one important safeguard is full employment so that workers dissatisfied with a company-created EI plan can easily quit and seek work elsewhere. A second important safeguard is reasonably low cost, unobstructed access to independent union representation in cases where the “exit” option is costly or obstructed.

When employees have these two “escape routes,” companies may “dominate” the operation of representation councils and committees, just as they do the compensation, training, and staffing functions, but the competition in the labor market and marketplace for alternative forms of P/R will nonetheless constrain them to operate EI programs in an above-board, mutual gain manner.


203. Id.

204. Kaufman, supra note 81.

205. Conditions of full employment cannot always be counted on and, indeed, the experience of the Great Depression illustrates that recessions and depressions are the factors that most disrupt and degrade “high performance” HR strategies, and company-created EI programs in particular. Id. On the one hand, the fact that the economy does not always operate at full employment provides a rationale for stronger legal protection of the right to
Yet, won’t companies still use these employer-created plans to thwart outside union organization of their workers? The answer is “yes” and “no.” Progressive, “high performance” employers use EI programs and other HR practices to gain competitive advantages by fostering cooperation and a unity of interest in the workplace. One result is relatively high employee job satisfaction and a lack of interest in a labor union. However, in the eyes of most people, this type of “union avoidance” is not only benign, but also in the social interest. It arises from “win-win” employment practices that increase not only economic efficiency, but also employees’ quality of work life.\textsuperscript{206} Other more overt and anti-social forms of union avoidance are precluded, however, by the provisions advocated above that in various ways strengthen the protections of the right to organize in the NLRA.\textsuperscript{207}

organize, both to offset the consequent weakness of the “exit” escape route and to give workers countervailing economic power to maintain competitive labor conditions. On the other hand, the protection of the right to organize and the encouragement given to union power that are currently provided for in the NLRA were crafted in a historical period when the economy experienced serious instability and unemployment. This suggests that these provisions are already strong enough (or are too strong) with respect to giving workers adequate protection and countervailing power in the contemporary era of sustained growth and full employment. My proposal to further strengthen the NLRA is, in this light, “liberal,” and motivated by the desire to fully safeguard worker interests given the uncertainty of continued prosperity and the evidence that a viable union threat effect is a significant contributor to successful performance of company-created representation plans.

\textsuperscript{206} Of twenty non-union companies selected in the early 1930s as exemplars of positive employer-employee relations, fourteen had an employee representation plan. CANBY C. BALDERSTON, EXECUTIVE GUIDANCE OF INDUSTRIAL RELATIONS 9-220 (1935) (describing individual companies and their human resource practices). Two companies, Polaroid and The Donnelly Corporation, were recently ordered by the NLRB to disband “dominated” labor organizations. Both were selected as among “the best 100 companies to work for” in 1984. ROBERT LEVERING ET AL., THE 100 BEST COMPANIES TO WORK FOR IN AMERICA 272, 282 (1984). It is not obvious to most people, I conjecture, how the disestablishment of these committees serves the social interest, or the interests of workers. Writing in the late 1920’s, Leiserson suggests what I think is the appropriate position:

The weakening of trade unionism that has resulted [from employers’ use of progressive personnel practices] is an undesirable consequence, but who will say then that we should go back to the days when management neglected its social responsibilities toward its employees .... The labor movement ... [i]f it is weakened by the activities of personnel management ... needs to look to its larger program.


\textsuperscript{207} I favor an additional legal safeguard that creates a new “unfair labor practice” provision in the NLRA that would enjoin a nonunion company from creating or modifying a representational committee upon petition by a labor organization for recognition. This bar
Although the net effect of these provisions may be a drop in union density, evidence from Canada, where labor law permits not only "company unions," but also contains stronger protection of the right to organize, suggests that the actual effect is neutral, or even positive.\(^\text{208}\)

For the reasons just outlined, I believe F&R substantially overstate the extent to which management resistance is the prime culprit behind the undersupply of employee P/R. This conclusion leads to the second major anomaly in their policy recommendations regarding ways of augmenting the supply of P/R in the nonunion section.

Rather than use a deregulation strategy to increase the supply of nonunion employee P/R, F&R seek to accomplish this end from the opposite direction—by imposing new regulation upon nonunion employers.\(^\text{209}\) They suggest legislative reform that either strongly encourages or mandates adoption of an Americanized version of the European-style works council. The final report of the Dunlop Commission does not advocate such a policy shift (reportedly because it was deemed politically unrealistic),\(^\text{210}\) but in other publications F&R have staked out this position.\(^\text{211}\)

Would works councils be an effective method to solve the employee P/R gap in this country? From F&R's point of view, they are close to the ideal, particularly evaluated against other nonunion options. F&R find a number of problems arising from leaving P/R plans solely to employer discretion: too few employers implement them; those that do implement them deliberately structure them to minimize employee influence; often the employer plans give workers no say over strategic business issues or basic


\(^{209}\) Rogers, supra note 139, at 402 ("It is striking, and instructive, that all functioning council systems involve some degree of state mandate . . .").

\(^{210}\) Kochan, supra note 11, at 355.

\(^{211}\) FREEMAN & ROGERS, supra note 1, at 63.
terms and conditions of employment; and the employer-created plans tend
to have a short half-life, since management can let them atrophy or die as it
pleases.\textsuperscript{212} European-type works councils correct all of these inadequacies:
companies are required to establish a works council if workers so petition;
one in place, the works council can not be unilaterally disbanded by
management; management is required by law to consult with the works
council over a wide range of business issues and to seek approval of the
council on issues directly related to enterprise-related employment
conditions; and the council representatives are elected by co-workers.\textsuperscript{213}
The works council, in their eyes, fits as closely as possible the "ideal" type
of P/R organization that the largest majority of workers surveyed in the
WRPS report they want. An added benefit, as F&R see it, is that the works
council can also serve as a locus for internal dispute resolution in the firm
and plant-level administration of employment law (e.g., equal opportunity),
thus providing a more decentralized, cost effective, and expeditious
alternative to litigation in the courts and appeal to government regulatory
agencies.

All of these arguments have merit, and the last is particularly
intriguing given the huge and rapidly rising costs and caseloads associated
with employment-related law suits and charges.\textsuperscript{214} But there are also
negative features that have to be considered. The first is the balance
between benefit and cost. On the benefit side, mixed econometric evidence
exists that works councils in Germany promote productivity. Some studies
find a positive effect, while other evidence points to a negative or neutral
effect.\textsuperscript{215} Small firms, however, clearly appear to suffer. Case study
evidence also suggests a range of experiences, albeit of relatively small
magnitude in either direction.\textsuperscript{216} More intangibly, works councils also
appear to promote consensus, information exchange, adaptation to change,
and a common organizational culture.\textsuperscript{217} On the cost side, econometric
studies find that wages are higher and profits are lower in firms with works
councils. Also on the cost side, individual works councils entail a
substantial administrative cost, tend to slow decision-making, make

\begin{itemize}
\item \textsuperscript{212} Freeman & Rogers, \textit{supra} note 10, at 27, 35-36.
\item \textsuperscript{213} Rogers, \textit{supra} note 139; Freeman & Rogers, \textit{supra} note 10.
\item \textsuperscript{214} Commission on the Future of Worker-Management Relations, \textit{supra} note 7, at 105.
\item \textsuperscript{215} See John Addison et al., \textit{Nonunion Representation in Germany, in NONUNION
EMPLOYEE REPRESENTATION: HISTORY, CONTEMPORARY PRACTICE, AND POLICY 365} (Bruce
E. Kaufman & Daphne Taras eds., 2000); Addison et al., \textit{supra} note 41; \textit{see also} Addison,
\textit{supra} note 138, at 81 ("It is immediately apparent that there is no consistent evidence of the
assumed beneficial effect of works councils on any outcome measure . . . . Some of the
evidence actually points to markedly unfavorable effects of works councils.").
\item \textsuperscript{216} Kirsten Wever, \textit{Learning from Works Councils: Five Unspectacular Cases from
Germany, 33 INDUS. REL. 467} (1994).
\item \textsuperscript{217} \textit{Id.; see also} Müller-Jentsch, \textit{supra} note 49, at 53.
\end{itemize}
workplace operations less flexible, and introduce a political element into running the business.\textsuperscript{218}

Other considerations also counsel caution in moving ahead with works councils. As already mentioned, for example, transplanting works councils from Europe to North America may be difficult given the markedly different institutional and social environments.\textsuperscript{219} Part of the allure of works councils in Europe is that they are largely “voice” institutions, given that the “muscle” function is performed by unions and employer associations at the industry and regional level. But since union density is much smaller in this country and bargaining more decentralized, works councils would inevitably take on both a “voice” and a “muscle” role at many firms. This combination risks losing some of the positive efficiency effects from voice due to the adversarialism and information-distortion that is inevitably engendered in a distributive bargaining game.

This consideration leads to the next major caveat about works councils in the United States. As they engage in implicit bargaining with management, workers will often be led to desire more leverage than a works council provides, given that most are enjoined from explicit collective bargaining and traditional pressure tactics such as striking.\textsuperscript{220} More likely than not, many works councils would eventually evolve into labor unions, just as has happened in years past with many employee professional associations.\textsuperscript{221} Although F&R may well view this outcome as desirable, I doubt that large-scale unionization of the labor market “

\begin{itemize}
  \item \textsuperscript{218} Müller-Jentsch, \textit{supra} note 49, at 53.
  \item \textsuperscript{219} Addison et al., \textit{supra} note 215, at 382. F&R are cognizant of the transplant difficulties, but nonetheless believe that “it would be feasible and desirable to graft council-type institutions onto our present labor relations scheme.” Freeman & Rogers, \textit{supra} note 10, at 61, 63. They state they favor mandatory health and safety committees and “strong encouragement” of other, more broadly structured council-like organizations. \textit{Id.} at 63.
  \item \textsuperscript{220} The evidence suggests that employer-created plans are able to maintain a cooperative, win-win relationship with workers as long as the economic environment and firm’s financial performance are supportive. KOCHAN & OSTERMAN, \textit{supra} note 119, at 14; Kaufman, \textit{Accomplishments and Shortcomings of Nonunion Employee Representation, supra} note 116; Kaufman, \textit{The Case for the Company Union, supra} note 116; Taras & Copping, \textit{supra} note 208. Yet, when adversity hits and costs must be reduced, an adversarial, win-lose element quickly emerges. It is in this situation that workers often become disillusioned or dissatisfied with employer plans and start to consider outside unionization. Business cycles and other adverse economic shocks not only reduce the benefits from nonunion \textit{EI}, as discussed earlier in the text, but also make them more susceptible to unionization, further reducing employer demand. One implication, ignored by the Dunlop Commission and most proponents of labor law reform, is that policy initiatives aimed at maintaining a stable, full employment economy may well do more to promote employee \textit{PR} (and at considerably less social cost) than similar initiatives aimed at promoting more independent systems of workplace governance. Indeed, I think this is one of the central lessons of the Wagner Act experience. Kaufman, \textit{supra} note 151.
  \item \textsuperscript{221} FREEMAN & MEDOFF, \textit{supra} note 10, at 244.
\end{itemize}
the back door" is what the majority of Americans favor. Certainly, I doubt it can be justified on economic grounds of improved efficiency and competitiveness.

Rather than works councils, I believe the better approach—at least as a first step—is to allow employers greater freedom to establish and operate company-created P/R plans by eliminating the company union prohibition in the NLRA, in conjunction with the steps previously proposed to strengthen the protections of the right to organize.\textsuperscript{222} This method leads to a win-win outcome since employers are unlikely to adopt such plans unless they promote efficiency, and at the same time, these plans provide workers with more voice and influence. For reasons previously elaborated, it is likely that the new "equilibrium" level of P/R will still fall short of the socially optimal amount. But rather than adopt a costly and bureaucratic system of works councils, two other more efficacious solutions are available. The first, as already proposed, is to modestly strengthen the NLRA so workers can more easily gain union representation. Not only does this target employers with the most egregious P/R gaps, but through the union "threat" effect it motivates all remaining non-union companies to pay more attention to employee relations and worker influence. The second solution is to identify specific workplace issues or problem areas where greater employee influence would clearly yield a net social gain and legislatively mandate, or highly encourage, some targeted, decentralized form of joint worker-management P/R. The area that has received the most attention to date is workplace safety and health. Another area where current performance appears sub-optimal is in workplace dispute resolution.\textsuperscript{223} Such a targeted approach is sure to be more "efficiency-friendly" than a broad-brush works council strategy, and would, at the same time, provide workers with more voice and influence than they currently possess.

\textsuperscript{222} See Estreicher, supra note 187.

\textsuperscript{223} See David Lewin, \textit{Theoretical and Empirical Research on the Grievance Procedure and Arbitration: A Critical Review}, in \textit{EMPLOYMENT DISPUTE RESOLUTION AND WORKER RIGHTS} 137 (Adrienne E. Eaton & Jeffrey M. Keefe eds., 1999). As I have argued elsewhere, a principal reason employer-created P/R forms under-perform is that employees fear reprisal and retribution for speaking-out. See Kaufman, \textit{supra} note 81, at 808. Hence, I believe a good argument can be made that whenever an employer-created committee deals with employment disputes, the procedures must conform to minimal standards of due process, as outlined by the Dunlop Commission or the National Academy of Arbitrators in \textit{ARBITRATION 1995: NEW CHALLENGES AND EXPANDING RESPONSIBILITIES, PROCEEDINGS OF THE 48TH ANNUAL MEETING} 298, app. B (Joyce Najita ed., 1996). Obviously, a broader mandate (e.g., that all non-union workplaces have a formal dispute resolution system that meets minimal due process standards) would be even more effective in encouraging employee voice, but the costs also loom larger. Unfortunately, Lewin notes that employees who grieve tend to suffer more adverse consequences than those who do not, even in relatively strong, procedurally fair systems. Lewin, \textit{supra}, at 158-66.
However, F&R will most likely believe that this approach to augmenting the supply of P/R does not go far enough, particularly in terms of providing workers with power and influence over wages and other market-determined conditions of employment. Among the numerous labor market problems they see, two loom large. One is the rising economic inequality in this country, marked by steadily rising real wages for upper income groups and stagnating real wages for lower income groups. The second is the “downward escalator” in the labor market, on which many workers in the middle and lower parts of the labor market appear to be traveling. This is exemplified by the eroding wages and job prospects of the less educated and unskilled, and the growth of contingent work that provides few benefits and little job security. F&R’s strategy for correcting these problems borrows significant elements from European systems and, in particular, “social democratic” and “corporatist” approaches to political economy. That is, they seek to achieve a more equal distribution of income and to put a floor under labor standards by promoting unionization, as unions tend to level income both inside and across firms, as well as regularize and stabilize employment conditions. However, to achieve this “leveling” and “stabilizing” function, unions need to establish broad market reach in order to effectively take wages out of competition, as well as bargaining power to win higher labor compensation (defined broadly to include things such as improved job security and health insurance). Since the U.S. economy is highly diverse and decentralized, and union density is quite low, the current system effectively precludes unions from accomplishing the wage equalization and stabilization function. Hence, in the F&R reform program a need exists for new labor law and institutions at the local, regional, and national level that either directly encourage widespread unionization or transmit union standards to non-union firms and workers. In the words of Rogers, “[t]he broad goal is to bring the totality of the regional labor market under common wage and benefit norms, while establishing at least minimal union presence in all key firms.”

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224. See, e.g., Rogers, supra note 173, at 100 (stating that the negative outcomes of the present “New Deal” labor relations system include, “lost productivity growth, rising inequality, a failure to block the ‘low road’ response to rising international competition, ineffective enforcement of labor standards, and, less tangible but no less real, the erosion of democratic norms”); see also KOCIAN &osterman, supra note 119, at 19; Freeman, supra note 141, at 533; Voos, Employee Involvement, supra note 11; Voos, Labor Law Reform, supra note 11.

225. See generally Addison, supra note 138 (describing “social democratic” and “corporatist” approaches).

226. FREEMAN &MEDOFF, supra note 10, at 78.

227. Rogers, supra note 10, at 380; see also Jacoby, supra note 141, at 224 (suggesting one way the Rogers’ idea could be implemented is through an expanded version of the Davis-Bacon prevailing wage law in the construction industry). Freeman has expressed a
Economists are divided about the extent and seriousness of these trends, but I think it is accurate to state that a large majority of them agree that a discernible increase in income inequality and some deterioration in the economic position of certain workforce groups has occurred. Without debating this issue further, and accepting that these developments are indeed a social problem, the issue becomes whether and to what degree the unionization and works council strategy promoted by F&R, and supported by the other academic members of the Dunlop Commission, is a desirable approach. I have grave doubts.

I believe that using some combination of unions and works councils to take labor standards out of competition, or to somehow achieve regional, industrial, and national coordination, is a near-impossible task in a country as diverse as the United States, especially in an age of global integration. Going down this road would impose substantial new costs on firms and the economy, yield meager-to-modest results, and bring forth calls for even more extensive and radical labor law reform. Further, using unions and works councils to improve the economic position of the working poor, contingent workers, and other disadvantaged groups in the “disenchanted third” is a relatively blunt instrument, especially given the inherent difficulty unions have organizing these groups and exerting effective economic pressure on their behalf. Finally, the unions and works council strategy does not address the fundamental cause of growing inequality and downward pressure on labor standards at the low end of the labor market. More effective policies, likely to yield a far higher social rate of return, would be immigration reform, investment in improved education and training, and expanded work and family programs. To reiterate, I support a modest expansion of unionism in order to extend the protection of independent labor organization to those workers who are most exposed

less expansive and visionary role for the labor movement than articulated by Rogers, but nonetheless views it, in conjunction with the works council system, as accomplishing greater wage standardization, integration and coordination of employment practices and policies. Freeman, supra note 141. As noted by Addison, the “corporatist” inclinations of F&R and the other members of the Dunlop Commission are revealed in a seldom-discussed end-section of the Final Report that proposes creation of a “National Forum” comprised of representatives of labor, business, and government that are to periodically meet, propose legislation, and promote social dialogue. Addison, supra note 138, at 91. He observes that this type of tripartite body could be used as an instrument for spreading unionism and works councils, as has occurred in Europe through directives issued by the pan-national European Commission created under the Treaty of Rome. Id.; see also Jeffrey Rothstein, The European Works Councils Directive: A First Step or the Final Word?, in PROCEEDINGS OF THE FORTY-NINTH ANNUAL MEETING 368 (Indus. Rel. Res. Ass’n, 1997).


229. See, e.g., Mitchell & Zaidi, supra note 154, at 109-113 (reaching a similar conclusion).
VI. CONCLUSION

Richard Freeman and Joel Rogers deserve hearty praise for successfully undertaking the Worker Participation and Representation Survey and presenting the results in such an engaging, thoughtful book. What Workers Want includes important research, presents a wealth of new and insightful information, and provides much food for thought for all persons interested in national labor policy and workplace employment practices.

Since What Workers Want is sure to be an influential and well-known study, it deserves critical reading and evaluation. It is in this spirit that I reviewed the book. The fact that this article criticizes and questions its findings largely reflects the nature of the assignment. Hopefully, this review succeeds at joining criticism with fairness and balance.

What Workers Want finds that a large and ubiquitous employee P/R gap exists in the United States. The amount of P/R supplied by firms is much less than what workers actually want. The gap exists mainly because employers resist sharing power and control with workers. The central conclusion is that labor law should be reformed to encourage two alternative, but complementary P/R organizations—-independent labor unions and an Americanized version of a European-style works council or, equivalently, a more independent and powerful version of the 1920's U.S. "company union." Modest additional legal protection, and encouragement of decentralized, small-scale employee involvement programs by employers, rounds-out the solution.

I believe that F&R significantly overstate the size and seriousness of the gap in employee voice and influence in the workplace. A gap exists, but it is smaller, "softer," and more concentrated in certain subgroups of the workforce than they lead the reader to believe. Part of the reason the gap is overstated lies with the design of the WRPS; another part lies with the way F&R interpret and present the data. More fundamentally, F&R misidentify the measurement of the gap because they make employees' demand for P/R a function of only preference ("tastes") and omit nearly all consideration of cost ("price").

Despite these problems, a cogent case can be made on theoretical grounds that a competitive market system will under-produce the socially optimal amount of employee P/R. I demonstrate this point using elementary economic theory, showing that the size of the P/R gap depends on the extent of various market imperfections, as well as ethical and moral beliefs about the importance of non-economic goals, such as "industrial
democracy" and "social justice." While this analysis supports the claim by F&R that a P/R gap is likely to exist in the U.S. labor market, it also shows that providing the full amount of P/R desired by workers is not likely to be a socially desirable outcome because of the harm done to economic efficiency. I further conclude that the optimal amount of power and independence given an employee organization depends, in part, on the severity of the imperfections and coordination failures in the market economy; the more severe they are, the more likely labor outcomes will fall below the competitive level and the more workers should have countervailing power. Although empirical evidence is mixed, I conclude that the majority of economists believe that product and labor markets are reasonably competitive and are becoming more so, thus suggesting a two-prong P/R strategy. One prong is to encourage powerful P/R organization (in the form of trade unions, for example) where market imperfections and coordination failures are substantial. A second prong is to make widely available and selectively encourage a mix of less powerful and independent P/R organizations in the broader range of market situations where reasonably competitive conditions prevail.

Using this conceptual framework, I next examine the policy implications that flow from the empirical results reported in *What Workers Want.* F&R do not explicitly state policy recommendations in the book, but I derive them from the survey results, their previous writings, and the final report of the Dunlop Commission. Broadly stated, the major policy implication of *What Workers Want* is that labor law should be reformed to encourage all forms of employee voice, but that special emphasis should be given to achieving: (1) a significantly higher level of union density and (2) widespread, if not mandatory, adoption of some type of joint labor-management P/R committee at the plant and/or company level that pursues a largely cooperative approach to addressing workplace issues, yet provides employees with a fair amount of independence and influence. Probably the best contemporary example of such a committee is a European-type works council.

My evaluation of these policy recommendations and their implications, is that they too, are overstated and unbalanced with respect to the socially optimal amount of employee P/R. Careful analysis of the WRPS reveals that questions are constructed in a way that most likely overstate workers' demand for both independent unions and works council-type organizations. I further conclude that enactment of the F&R policy regime would entail a serious loss in economic efficiency and could only be justified to the extent that society highly values achievement of non-economic goals of industrial democracy and social justice, and believes that collectivist forms of worker organization are effective instruments in attaining these goals.
I support an alternative strategy for solving the employee P/R gap that is both consistent with the empirical findings reported in What Workers Want, but also less collectivist and costly in terms of economic efficiency. My strategy also has two prongs: (1) selective strengthening of the protections of the right to organize contained in the NLRA (and related legislation), with the goal of achieving a modest increase in union density, and (2) elimination of the “company union” prohibition in the NLRA (and related legislation) so that non-union companies are free to expand the supply of employee P/R.

The rationale behind the first part of the strategy is that certain subgroups of the workforce desire and need the protection of an independent labor union, and that current labor law inadequately protects their rights to obtain such protection. In addition, a modestly more potent union “threat” effect is beneficial to efficiency and human values because it motivates the large mass of non-union employers to practice better employee relations and run their non-union P/R plans in a mutual gain, win-win manner. On the other hand, I also believe that a substantial liberalization of labor law and an increase in union density is neither desirable on economic grounds nor what the majority of American workers want.

The rationale behind the second part of the strategy is that a policy of deregulation will most effectively spur the supply of employee P/R in the non-union sector of the economy. Although F&R claim that employer resistance is the major constraint obstructing an increase in the supply of P/R in the private sector workforce, an equally important factor is fear by non-union companies that they will be charged under the NLRA with running an illegal, “dominated,” “company union”-like P/R committee. Removing this constraint would automatically increase the amount of P/R in non-union firms toward the economically efficient level, since the quest for profit would lead some firms to expand their P/R plans in terms of both breadth and depth, beyond the level now allowed by law. Evidence from Canada, where company unions are legal, suggests that some companies will indeed initiate formal joint worker-management committees similar to the type many workers in the WRPS say they want, while many others will utilize a plethora of smaller-scale, more narrowly targeted and informal P/R teams, councils, and committees (many of which are also illegal under present U.S. law). Thus, rather than mandate works councils (the regulation strategy), the more cost effective, easy-to-implement strategy is to deregulate the marketplace for alternative forms of employee P/R and let

In addition, the expanded protections of the right to organize advocated above ensure that employers cannot use these committees as anti-social "shams" or overt devices for union busting, as workers with relative ease can opt for the union alternative. Given the evidence—illustrated in What Workers Want—that successful EI programs substantially reduce workers' desire for union representation, the only possible loser is organized labor. However, evidence from Canada suggests that even this fear is overdrawn.

In sum, What Workers Want makes a great contribution to modern industrial relations scholarship and policy. For the first time in several decades, the WRPS allows us to hear from a broad cross-section of the American workforce—what they like, what they do not like, and what they would like to see done differently. Workers are important stakeholders in the economic system and their voices should not only be heard, but also counted. But, What Workers Want also has major shortcomings and leaves important questions unanswered.

With respect to shortcomings, F&R too hastily and uncritically advance the notion that what workers want in workforce governance also serves the social interests and even the long-run interests of workers themselves. Realistically, if the nation implemented the workforce governance system suggested by the findings of the WRPS, the American economy would most likely be less competitive, have a lower standard of living, and fewer jobs available. Thus, it is highly problematic that the gains from increased employee voice would outweigh these costs. Secondly, the book fails to provide an explicit set of policy recommendations that flow from the findings of the WRPS, and those that the book implicitly promotes are too costly, "collectivist," and anti-employer to solve the employee P/R gap. The single most important finding from the WRPS is that a significant majority of American workers prefer a form of joint worker-management P/R committee that is currently illegal under American law. However, neither F&R nor the Dunlop Commission advocate the most obvious and low-cost solution to this problem—namely, the elimination of the company union prohibition in the NLRA.

Moreover, F&R never discuss what is surely the greatest paradox underlying their study. Despite the fact that only fifteen percent of workers surveyed favor "greater laws" as their preferred method for dealing with workplace problems, the United States has pursued this exact approach for the last four decades. This cleavage represents either a huge disparity between the preferences of the working population and policy makers, or stark evidence that F&R's findings are badly biased because they largely omit consideration of benefit and cost at both the individual and social level vis-a-vis alternative systems of workplace governance. My
impression is that the nation gave unions and collective bargaining a thirty year trial-run (between 1935 and 1965) as the principal instrument for solving workplace problems, and for a variety of reasons, concluded the result was increasingly falling short.\textsuperscript{231}

Commencing with the Civil Rights Act of 1964, America has instead turned to legislation and the courts as the principal instrument to advance the economic and social interests of workers. This strategy has many shortcomings and is escalating in cost, but I see few signs that the nation is actively considering switching back to collective bargaining in place of legal enactment, despite the many attractive features of a more decentralized, enterprise-based system of workplace regulation.\textsuperscript{232} Seen in this light, I conclude that the findings and implicit recommendations in \textit{What Workers Want} provide an insightful but ultimately skewed picture of majority demand for workforce governance and the relative benefits and costs of labor unions. For this reason, the book is unlikely to impact public policy in the direction that F&R and their Dunlop Commission colleagues favor. Paradoxically, however, it may prove influential in making the case for legal reform of a nature they never intended to promote—legalization of employer-created, non-union employee representation committees, including "company union" plans similar to those popular in the 1920s, but banned by the NLRA in 1935.

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