

GEORGE MASON UNIVERSITY SCHOOL OF LAW

**WHAT WORKERS WANT OR WHAT LABOR
EXPERTS WANT THEM TO WANT?
A REVIEW ESSAY OF *WHAT WORKERS WANT* BY
RICHARD B. FREEMAN & JOEL ROGERS,
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What Workers Want or What Labor Experts Want Them to Want?
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Introduction

Labor has been classified as the activity which corresponds to the biological process of the human body and is bound to vital necessities.¹ Hannah Arendt saw the household economy as the ideal embodiment of the life of labor.² She “insists that freedom, even life itself, has no meaning apart from the necessity associated with labor.”³ Necessity repeatedly signifies that workers cannot do what they want nor have the kind of influence in the workplace they prefer. Social science critic, Christopher Shannon maintains this striking conception of labor as necessity is about as palatable to the modern world as submission to God.⁴ He also insists that an effort to extract meaning from work premised on the enterprise of social science is inherently self-defeating because it problematizes human life⁵ while concurrently breathing life into the iatrogenic probability—a disease caused by the modern process of incessant diagnosis and treatment.⁶ Modern efforts to eliminate necessity from human life and substitute various conceptions of freedom have paradoxically led to bureaucratic managerialism. Bureaucratic managerialism issues forth as a scientific process in which the terms of employment as well as the conditions under which labor unions materialize are regulated by a hierarchy that is justified by the contention that government possesses resources that rank and file citizens and workers lack.⁷

Despite an explosion of government intervention during the period commencing during President Hoover’s administration⁸ and continuing throughout the current age, workers must tackle post-Enlightenment gloom which appears to be entrenched in the present

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¹ CHRISTOPHER SHANNON, CONSPICUOUS CRITICISM: TRADITION, THE INDIVIDUAL, AND CULTURE IN MODERN AMERICAN SOCIAL THOUGHT 200 (2006).

² SHANNON, *supra* note ___ at 200.

³ SHANNON, *supra* note ___ at 200.

⁴ SHANNON, *supra* note ___ at 200.

⁵ Wilfred M. McClay, *Foreword*, in CHRISTOPHER SHANNON, CONSPICUOUS CRITICISM: TRADITION, THE INDIVIDUAL, AND CULTURE IN MODERN AMERICAN SOCIAL THOUGHT xi (2006).

⁶ SHANNON, *supra* note ___ at 199-201.

⁷ ALASDAIR MACINTYRE, AFTER VIRTUE 85 (1984) (Suggesting that as the government becomes more scientific and accepts that it can manipulate human action, “[g]overnment itself becomes a hierarchy of bureaucratic managers, and the major justification advanced for the intervention of government in society is the contention that government has resources of competence which most citizens do not possess”).

⁸ GEORGE C. LEEF, FREE CHOICE FOR WORKERS: A HISTORY OF THE RIGHT TO WORK MOVEMENT, 7-12 (2006) (Hoover was an interventionist who set the stage for even greater government involvement and control during the Roosevelt administration).

epoch.⁹ Workers' angst is elevated by allegations of falling¹⁰ or stagnant wages,¹¹ increasing employment uncertainty and increasing disparities in non-white versus white unemployment.¹² Many of these developments can be linked to bureaucratic regulation and control¹³ that have become part of a legal edifice of stunning complexity.¹⁴

Whatever its source, America's gloom appears to reflect the postmodern conclusion that our world has fallen apart and that we live at the end of the neoclassical age.¹⁵ In the aftermath of confusion and helplessness, society struggles with the possibility that the real world,¹⁶ including the world of politics, markets and labor lacks reality. Postmodernism like modernism offers few solutions. "For most of the modern era, morality has been invoked as an alternative to nihilism. In our present postmodern moment, morality has revealed itself to be nihilism."¹⁷ While postmodern individuals and groups can assume an endless variety of identities consistent with expanding conceptions of human autonomy, they find it difficult to reach agreement regarding notions of justice, the character of inequality as well as the attributes and the possibility of progress. In such a world wherein individuals and groups are searching endlessly for something,¹⁸ the nature of work and labor union membership raise unavoidable questions. Questions include the differences between the individual goods that workers seek as opposed to the collective goods mandated by labor hierarchs, the absence of certainty about the goals that unions ought to pursue as well the strength and the sources of opposition to such goals.¹⁹

This process leads to doubts concerning the nature of, and the necessity of unions "in a society that is waiting, but does not know what it is waiting for. The feeling of being locked in implies the dream of liberation and implies, too, the suspicion of something hidden beyond the confines of daily life, however adequate daily life is claimed to be."²⁰ In such a society, workers are increasingly enticed by expressive individualism, which concentrates on

⁹ Fredrick Mark Gedicks, *Spirituality, Fundamentalism, Liberty: Religion at the End of Modernity*, 54 DEPAUL L. REV. 1197, 1197-1198 (2006).

¹⁰ John A. Tatom, *Is Inequality Growing as American Workers Fall Behind?* Networks Financial Institute at Indiana State University, Working paper available at <http://ssrn.com/abstract=985669> (examining and refuting this claim).

¹¹ Seth D. Harris, *Don't Mourn—Reorganize! An Introduction to the Next Wave Organizing Symposium Issue*, 50 NEW YORK LAW SCH. L. REV., 303, 304 (2006) (asserting that real wages have fallen for those with a high-school diploma or less)..

¹² RICHARD K. VEDDER & LOWELL E. GALLAWAY, *OUT OF WORK: UNEMPLOYMENT AND GOVERNMENT IN TWENTIETH-CENTURY AMERICA* 278-79 (1993)

¹³ VEDDER & GALLAWAY, *supra* note ___ at 278-79 (showing the federal government led initiatives in the legislative and regulatory environment that while aimed at raising the wages for workers, produced a regulatory milieu that has been effective in the widening of nonwhite-white unemployment differentials which contribute to widening income disparity among workers).

¹⁴ *United Food & Commercial Workers Union, Local 1036 v. NLRB*, 307 F. 3d 760, 763 (9th Cir. 2002) (en banc) (The NLRA "establishes an elaborate and complicated structure that governs labor relations in almost all of the industries within the nation's private sector.").

¹⁵ Gedicks, *supra* note _____ at 1197.

¹⁶ Gedicks, *supra* note _____ at 1197-98.

¹⁷ SHANNON, *supra* note ___ at 198.

¹⁸ Harry G. Hutchison, *A Clearing in the Forest: Infusing the Labor Union Dues Dispute with First Amendment Values*, 14 WILLIAM & MARY, BILL OF RIGHTS J. 1309, 1311 (2006)[hereinafter, Hutchison, *A Clearing in the Forest*].

¹⁹ Hutchison, *A Clearing in the Forest*, *supra* note _____ at 1311.

²⁰ CHANTAL DELSOL, *ICARUS FALLEN: THE SEARCH FOR MEANING IN AN UNCERTAIN WORLD*, xxvii (2003).

subjective self-realization, and they are less likely to find attractive any collective action that requires individual interest to yield to group interest and solidarity.²¹ Workers may embrace Isaiah Berlin's claim that "the capacity for choice and for a self-chosen form of life . . . [is] itself constitutive of human beings."²² Workers may be gripped by the opportunity "to invent for [themselves] through the exercise of the powers of choice a diversity of natures, embodied in irreducibly distinct forms of life containing goods (and evils) that are sometimes incommensurable and . . . rationally incomparable."²³ Alternatively, workers might be captivated by a nonvoluntary characteristic such as ethnicity, race or gender which leads them to a morally laudable interest in the lives of members of their own ethnic or gender subgroup."²⁴ This process reinforces uncertainty about the appeal of unions in the present age. Doubts are realized in the shape of an ongoing decline in union density coupled with fear that human progress ostensibly embedded in the union movement²⁵ will not be realized. Simultaneously, the fall in union density contributes to the urgent pursuit of alternatives to traditional unions.

On one account, labor unions ought to be conceived of as a robust engine of collective insurgency against globalization, hierarchy, unwarranted management power, class-based injustice, and putative disparities in income.²⁶ Coherent with this perspective labor organizations can be seen as part of the philosophic vanguard of an inevitable, historically driven movement catalyzed by hierarchs that produces human progress in the form of egalitarianism and solidarity.²⁷ Workers by contrast, can be seen as a *tabula rasa*, which due to poorly developed workplace intuition requires direction by members of the hierarchy. Unions on this account bring protections for workers and an organized collective voice to the workplace.²⁸ This bureaucratic approach appears to foster "the instrumentalization of every aspect of life in the service of 'society'"²⁹ and thus moves the country toward transformation.³⁰ A competing view maintains that unions are private organizations that have received an unconstitutionally coercive grant of power in the form of the right to exclusive representation of workers through majority-rule democracy.³¹ This quintessentially

²¹ See e.g., Sharon Rabin Margalioth, *The Significance of Worker Attitudes: Individualism as a Cause for Labor's Decline*, in *Employee representation in THE EMERGING WORKPLACE: ALTERNATIVES/SUPPLEMENTS TO COLLECTIVE BARGAINING* 41-49 (1998, ed. Samuel Estreicher).

²² JOHN GRAY, ISIAH BERLIN 14 (1996).

²³ GRAY, *supra* note ___ at 15.

²⁴ Hutchison, *A Clearing in the Forest*, *supra* note ___ at 1335.

²⁵ See e.g., George Feldman, *Unions, Solidarity and Class: The Limits of Liberal Labor Law*, 15 BERKELEY J. EMP. & LAB. L. 187, 199-202 (1994).

²⁶ Harry G. Hutchison, *Reclaiming the Labor Movement Through Union Dues? A Postmodern Perspective in the Mirror of Public Choice Theory*, 33 UNIV. OF MICH. J. OF L. REFORM 447, 448-49 (2000) [hereinafter, Hutchison, *Reclaiming the Labor Movement Through Union Dues*] (considering this viewpoint).

²⁷ Harry G. Hutchison, *Toward a Robust Conception of "Independent Judgment": Back to the Future?* 36 UNIV. OF SAN FRANCISCO L. REV. 341, 368-69 (2002) [hereinafter, Hutchison, *Toward a Robust Conception of "Independent Judgment"*] (critiquing this view).

²⁸ Adrienne E. Eaton & Paula B. Voss, *Unions and Contemporary Innovation in Work Organization, Compensation, and Employee Participation in UNIONS AND ECONOMIC COMPETITIVENESS* 173, 174 (Lawrence Mishel & Paula B. Voos eds., 1992).

²⁹ SHANNON, *supra* note ___ at 202.

³⁰ See SHANNON, *supra* note ___ at 190 (discussing how modern social science persistently attempts to transform culture and society through individual participation).

³¹ Charles W. Baird, *Policy Analysis: The Permissible Use of Forced Union Dues: From Hanson to Beck*, 4 (July 24, 1992) available at www.cato.org/pubs/pas/pa-174. See also, *Steele v. Louisville & Nashville R.*

natural rights perspective signifies that workers are self-owned people and that as individuals the costs and benefits of personal conduct can be fully internalized. Labor unions, under this classically liberal view, can only be legitimized when they act as purely voluntary associations that require consent before the obligations of membership must be shouldered by workers.³² The clash between competing perspectives on labor unions will not be settled here. It is doubtful that such disputes attached as they are to alternative and incommensurable conceptions of justice, can be settled short of authoritarianism no matter how frequently society resorts to the language of pluralism, democracy and equality. Such language serves to mask the depth and extent of the country's disagreement and confirms Karl Marx's observation that "conflict and not consensus is at the heart of modern social structure."³³

Against this backdrop, nearly all commentators agree that private sector unionization has experienced significant decline. America's overall union density rate (percentage of workers in unions) has fallen from 13.3 percent in 2002.³⁴ to 12.0 percent in 2006.³⁵ This trend is driven largely by a decline in private sector union density rates. Private sector density has fallen from around 35-to-36 percent in the early 1950s to about 7.4 percent in 2006.³⁶ Public sector density rates have remained essentially stable, falling to around 36.2 percent in 2006.³⁷ down from a peak of 38.7 percent in 1994.³⁸ but rising from 25.4 percent in 1976.³⁹ America's leading labor law and economics expert maintains that "the central and

R. Co, 323 U.S. 192, 208 (1944) (Murphy, J. concurring) ("The constitutional problem inherent in [exclusive representation] is clear. Congress . . . has conferred upon the union selected by a majority . . . the power to represent [all members of a bargaining unit] in all collective bargaining matters. While such a union is essentially a private organization, its power to represent members of [a bargaining unit] is derived solely from Congress). Apparently in "the same case the Court noted that, as an exclusive bargaining agent, a union 'is clothed with power not unlike that of a legislature which is subject to constitutional limitations on its power . . .'" Baird *supra* note ___ at 4 (citing *Steele v. Louisville & Nashville R.R. Co* 323 U.S. at 198). Baird states that it is doubtful that the United States Constitution granted Congress that power in the formation and execution of private, voluntary exchange contracts. Instead Congress has usurped that power, with the consent of the Supreme Court primarily on the basis of an illegitimate reading of the commerce clause of the U.S. Constitution. Baird, *supra* note ___ at 4-5. This analysis is consistent with a Lochnerian understanding of substantive due process wherein the freedom to contract is seen as a liberty interest, which further implies that government legislation must bear some reasonable relation to a legitimate in order within stand constitutional muster. For a discussion of these issues, see JOHN D. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* 442-55 (7th ed. 2004).

³² See e.g., CHANDRAN KUKATHAS, *THE FRATERNAL CONCEIT: INDIVIDUALIST VERSUS COLLECTIVIST IDEAS OF COMMUNITY 2* (1991).

³³ See e.g., MACINTYRE, *supra* note ___ at 253.

³⁴ Terry Thomason & John F. Burton, *Unionization Trends and Labor-Management Cooperation in the Public Sector*, in *GOING PUBLIC: THE ROLE OF LABOR-MANAGEMENT RELATIONS IN DELIVERING QUALITY GOVERNMENT SERVICES* 69, 72 (edited by Jonathan Brock and David B. Lipsky, 2002).

³⁵ Bureau of Labor Statistics, United States Department of Labor, New Release, USDL 07-0113, available at <http://www.bls.gov/news.release/union2.nr0.htm> (accessed June 2, 2007).

³⁶ Bureau of Labor Statistics, United States Department of Labor, New Release, USDL 07-0113, available at <http://www.bls.gov/news.release/union2.nr0.htm> (accessed June 2, 2007).

³⁷ Bureau of Labor Statistics, United States Department of Labor, New Release, USDL 07-0113, available at <http://www.bls.gov/news.release/union2.nr0.htm> (accessed June 2, 2007).

³⁸ Thomason & Burton, *supra* note ___ at 72.

³⁹ Barry T. Hirsch and David A. Macpherson, *Union Membership, Coverage, Density and Employment Among Public Sector Workers 1973-2006* (2007), available at www.trinity.edu/bhirsch/unionstats/contends.htm.

inescapable fact of American unionism in our time is decline.”⁴⁰ There is little reason to doubt this deduction. Declining labor union strength leads to the claim that “private sector labor law . . . has shrunk in its reach and its significance and is clearly ailing,”⁴¹ thus impairing “workers’ efforts to advance their own shared interests through self-organization and collective protest, pressure, negotiation, and agreement with employers.”⁴² This contention, if verified, implies that there is a “gap” between the desire for and the supply of collective representation in workplace governance⁴³ – suggesting that this socially beneficial and market-correcting outcome is underproduced.⁴⁴ Because postmodernism, public choice theory and a reasonable understanding of human autonomy, coupled with the difficulties of translating individual preferences into collective preference, reduce the likelihood that labor unions can reasonably represent the actual human diversity within the United States, it is doubtful that the claimed representation gap exists.⁴⁵ Accordingly, private sector decline appears both foreseeable and irreversible despite the persistent claim that a representation gap exists.⁴⁶

Labor union decline has been the subject of several explanations. Explanations range from structural to demographic changes – including increasing global competition.⁴⁷ Some observers imply that union decline represents the failure of the National Labor Relations Act (“NLRA”) of 1935⁴⁸ to sustain union gains including the “sharp rise in private sector unionism in the United States during the early and mid-twentieth century.”⁴⁹ Closely connected to this claim is the employer hostility hypothesis, wherein management precludes workers from exercising their free choice.⁵⁰ This contention, if sustainable, offers a promising avenue for reversing or stabilizing the fall in private sector membership, which could then be accomplished by reducing or eliminating management hostility (if it exists) via statutory amendments, administrative interpretations, implementing union actions that

⁴⁰ Keith H. Hylton, *Law and the Future of Organized Labor in America*, 49 WAYNE L. REV. 685, 686 (2003).

⁴¹ Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1527 (2002).

⁴² Estlund, *supra* note ___ at 1527.

⁴³ Estlund, *supra* note ___ at 1527.

⁴⁴ Hutchison, *A Clearing in the Forest*, *supra* note ___ at 1345 (contesting this claim).

⁴⁵ Hutchison, *A Clearing in the Forest*, *supra* note ___ at 1345-46.

⁴⁶ Hylton, *supra* note ___ at 686.

⁴⁷ See e.g., WILLIAM B. GOULD IV, LABORED RELATIONS: LAW, POLITICS AND THE NLRB, 7-8 (2001) (stressing the following reasons for the decline of unions: the global economy induced employers to relocate factories to countries where labor was less expensive, and either fewer workers or temporary workers were substituted for the existing cohort of permanent workers, the increase in the number of foreign-born workers in the United States, the expansion of the service sector and the development of new information technologies).

⁴⁸ The National Labor Relations Act, 29 U.S.C. 158 (1935) (amended 1947) (2000).

⁴⁹ Jeffrey M. Hirsh and Barry T. Hirsch, *The Rise and Fall of Private Sector Unionism: What Next for the NLRA?* 1 (2007) available at SSRN: <http://ssrn.com/abstract=933493>.

⁵⁰ See e.g., James J. Brudney, *Neutrality Agreements and Card Check Recognition: Prospects for Changing Paradigms*, 90 Iowa L. Rev. 819, 820 (2005) (abstract) [hereinafter, Brudney, *Neutrality Agreements*] (asserting that the NLRB election process is no longer normatively justified because this paradigm regularly tolerates, encourages and effectively promotes coercive conditions that preclude the attainment of employee choice.). See also, RICHARD B. FREEMAN WHAT DO UNIONS DO? THE 2004 EDITION, 34 (2004) (offering employer hostility as a highly influential explanation for union decline and maintaining that management hostility constitutes the leading cause—from 25-50 percent—of union decline).

embarrass employers or utilizing some other strategy.⁵¹ On the other hand, it is possible that the leading cause of private sector union deterioration is a lack of workers' interest in labor organizations.⁵² According to a recent Zogby poll, only 16 percent of non-unionized workers would definitely vote for a union.⁵³ If this poll accurately reflects attitudes it is possible that the drive for autonomy and the absence of solidarity, which are connected to an increasingly educated and postmodern workforce, may offer a superior explanation for union decline.

Against this background, Richard B. Freeman & Joel Rodgers, offer an important addition to the industrial relations literature. This work is grounded in survey methodology. The authors' original thesis, premised on the Worker Representation and Participation Study (WRPS) which Freeman & Rogers designed more than ten years ago, concludes that there is "a large gap between the kind and extent of representation and participation workers had and what they desired."⁵⁴ The updated edition of their book, *What Workers Want*, does not present new or innovative polling or original empirical research directed by the authors. Instead, much of the new data cited comes from several polls "that come closest in spirit to the WRPS focus on particular aspects of the workplace and compensation package as opposed to job satisfaction broadly defined."⁵⁵ In particular, the authors made heavy use of a set of surveys conducted by Stony Brook University in New York.⁵⁶ The authors also referred to the Christian Science Monitor's 2002 poll regarding loyalty and attitudes toward management as well as a similar survey commissioned by Randstad North America.⁵⁷ On several issues, the authors relied on surveys taken by Peter D. Hart Research Associates.⁵⁸ Other polls that Freeman & Rogers used to support their arguments included the California Workforce Survey conducted by the University of California at Berkeley between 2001 and 2002.⁵⁹ Many of the polls appear to confirm the authors' original thesis. On the other hand, Freeman & Rogers tended to find surveys conducted by the Gallup organization and the General Social Survey (GSS) less helpful. On the whole, Freeman & Rogers justify their reliance on post-WRPS survey with this statement:

⁵¹ There may be reason to doubt such claims. See e.g., Hutchison, *A Clearing in the Forest*, *supra* note ___ at 1377-1394.

⁵² See e.g., Margalioth, *supra* note ___ at 42 (arguing that shifts in general social attitudes respecting individualism have altered the predisposition of workers to consider collective solutions to workplace problems). Evidently, Americans "perceive unions to be overly involved in politics (70 percent), more intent on fighting change than in helping to bring it about (65 percent), and stifling of individual initiative (59 percent)." Seymour Martin Lipset & Marcela Ridlen Ray, *Technology, Work and Social Change*, 27 J. OF LABOR RESEARCH 613, 617 (1996).

⁵³ Tim Kane, *The AFL-CIO's Disintegration and its Possible Implications*, Web Memo, Heritage Foundation, available at <http://www.heritage.org/Research/Labor/wm808.cfm?renderorprint=1> (accessed on August 6, 2005).

⁵⁴ RICHARD B. FREEMAN & JOEL ROGERS, *WHAT WORKERS WANT* 1 (2006). The final WRPS design consisted of a four-part study with each part designed either to add additional knowledge or to test the reliability of the other parts plus three additional surveys that probed the universality of the results. See FREEMAN & ROGERS, *supra* note ___ at 64-65.

⁵⁵ FREEMAN & ROGERS, *supra* note ___ at 6.

⁵⁶ FREEMAN & ROGERS, *supra* note ___ at 6.

⁵⁷ FREEMAN & ROGERS, *supra* note ___ at 6-7.

⁵⁸ FREEMAN & ROGERS, *supra* note ___ at 8.

⁵⁹ FREEMAN & ROGERS, *supra* note ___ at 13.

Of course, if worker attitudes had changed [over the past ten years] or if the country had reformed the labor relations system, we would have redone the survey, producing WRPS II. But our review of surveys conducted by groups and public opinion polling organization in this Introduction shows that . . . the main findings of the first edition still stand. Much has changed in the economy and politics, but the disconnect between what workers want in the form of influence at their workplaces and what they have remains sizable.⁶⁰

This review essay examines Freeman and Rogers's conclusions and their latest recommendations and proposals. Torn between optimism and despair, *What Workers Want? (Updated edition)* endeavors to offer a balanced approach to labor relations in America. From a positive perspective, their approach puts forward an alternative to another round of endless proposals and counter-proposals for reforming the National Labor Relations Act.⁶¹ However, closer scrutiny uncovers grave problems in their analysis and proposals for reform. In Part I, this review critically summarizes Freeman & Rogers's findings and conclusions including an examination of the WRPS as well as post-WRPS polling data. Although the authors tend to discount competing polls on grounds of reliability, their results and the post-WRPS data on which they rely, appear to suffer from reliability and credibility disparities as well. Part II considers Freeman & Rogers's important proposals which are aimed at creating a new labor relations system that revives collective labor organizations in some form. Specifically, the authors allege that the American labor system is plagued by flaws that prevent it from adequately dealing with the labor problems of the twenty-first century.⁶² "The result is an ossified system limited to a shrinking union core, out of step with current economic practice while becoming increasingly irrelevant to the bulk of workers and employers."⁶³ Because factual and analytical gaps exist in their analysis and because actual data appears to be available which undermines their conclusions and recommendation, this essay finds that Freeman & Rogers's book less than fully persuasive.

Part I: Freeman & Rogers's Findings and Conclusions

Freeman and Rogers book is predicated on results taken from both the WRPS and new post-WRPS survey research, which investigated how "American workers felt about their influence on decisions at the workplace and about possible ways to improve *their* role in workplace governance."⁶⁴ Depending on how such surveys are constructed, they run the risk of finding evidence that supports a pre-existing conclusion or alternatively evidence that simply illustrates a centuries-old conflict between workers and management.⁶⁵

⁶⁰ FREEMAN & ROGERS, *supra* note ___ at 3.

⁶¹ The most notable recent proposal is the *Employee Free Choice Act*, which is currently circulating in congress. This proposal would guarantee that a union that sought to represent a group of worker would be certified by the NLRB in the absence of an election if the Board finds that a majority of employees in a unit appropriate for bargaining has signed valid authorization cards. *See e.g.*, Employee Free choice Act of 2007, H.R. 800, Section 2 (a) (6). There is some controversy over whether this act actually affords employees with a free choice or simply provides unions with an easier road to representation.

⁶² FREEMAN & ROGERS, *supra* note ___ at 185.

⁶³ FREEMAN & ROGERS, *supra* note ___ at 185.

⁶⁴ FREEMAN & ROGERS, *supra* note ___ at 1 (emphasis added).

⁶⁵ Molly S. McUsic & Michael Selmi, *Postmodern Unions: Identity Politics in the Workplace*, 82 IOWA L. REV. 1339, 1339 (1997) ("The workplace has always been a place conflict although historically that conflict has centered around the struggle for power between owners and workers.").

A. Gaps between the Extent of Representation and Participation.

Freeman and Rogers's found a "gap between the kind and extent of representation and participation workers had and what they desired."⁶⁶ Although a small percentage of workers—10-15 percent—did not want collective voice at the workplace,⁶⁷ the authors found that a representation/participation gap exists across diverse groups of workers (men and women, different races, skilled and unskilled, etc.) and across many issues (compensation, supervision, training, availability of information on firm plans, use of new technology, etc.).⁶⁸ The authors emphasize this claim by focusing on specific issues relating to the state of labor-management relations and workers' desire to influence decisions in particular areas such as provision of benefits, use of new machinery, training and the like.⁶⁹ The authors did not appear to be interested in all workers' views on an equal basis. The authors concluded that workers who were satisfied with their jobs but who also *wanted* a greater influence on their employment conditions were more interesting and important research subjects than individuals who were dissatisfied but had no ideas about changing the workplace.⁷⁰ This focus on uncovering individuals who were interested in changing the workplace indicates a predisposition, which their survey results and the post-WRPS survey results they find credible, sustain. The authors claim that the avoidance of largely generic job satisfaction questions in their WRPS represents a superior approach to post-WRPS questions, which relied on such generic questions.⁷¹ It is not necessarily obvious that their approach is superior when two major competing surveys show high and virtually constant levels of job satisfaction. For example, the Gallup Poll results show that 86 percent workers reported moderate to high levels of job satisfaction.⁷² Similarly from 1972 to the present, the General Social Survey (GSS) showed consistently high levels of job satisfaction.⁷³ Largely congruent with these competing studies, the original WRPS study showed that respondents by a margin of 66 percent to 25% preferred going to work as opposed to staying away from work.⁷⁴ In 2005, the Harris polling firm found that 59% of workers were satisfied with their jobs while 41% were not.⁷⁵ None these surveys substantiate the claim that workers as whole are dissatisfied.⁷⁶ Missing from the survey results reported in the *Introduction* to the updated edition is unencumbered (endogenous) data showing workers' opportunity costs, as distinct from exogenous evidence confirming or disconfirming how marital happiness or various other outside factors affect job satisfaction. In essence, what is missing from Freeman & Rodgers analysis is clear data on worker satisfaction concerning the things that management controls. Nevertheless, Freeman & Rogers argue that the variance generated by comparing the Gallup Poll and GSS results regarding job satisfaction to their own WRPS results imply

⁶⁶ FREEMAN & ROGERS, *supra* note ___ at 1.

⁶⁷ FREEMAN & ROGERS, *supra* note ___ at 1.

⁶⁸ FREEMAN & ROGERS, *supra* note ___ at 1.

⁶⁹ FREEMAN & ROGERS, *supra* note ___ at 4.

⁷⁰ FREEMAN & ROGERS, *supra* note ___ at 4.

⁷¹ FREEMAN & ROGERS, *supra* note ___ at 4.

⁷² FREEMAN & ROGERS, *supra* note ___ at 5.

⁷³ FREEMAN & ROGERS, *supra* note ___ at 5.

⁷⁴ FREEMAN & ROGERS, *supra* note ___ at 4.

⁷⁵ FREEMAN & ROGERS, *supra* note ___ at 5.

⁷⁶ FREEMAN & ROGERS, *supra* note ___ at 5 (The 1995 Conference Board survey found that about 60 percent of workers were broadly satisfied with their jobs, and a 2004 Conference Board survey reported that 50 percent of workers were satisfied while neither the General Survey nor Gallup showed any downward trend in satisfaction).

that these competing surveys are “less reliable”⁷⁷ than the results they prefer. Given the missing data, and their avoidance of dealing seriously with competing poll information, their reported results should also be called into question.

Persuasiveness shrinks even more when *loyalty* is considered. The authors contend that *discontent* with labor-management relations shows up in how workers seek trust and loyalty at the workplace.⁷⁸ The authors report that “56 percent of workers reported that they felt a lot of ‘loyalty’ to their employer but only 38 percent trusted management,”⁷⁹ which gives rise to a so-called loyalty gap of 18 percent between workers’ sense of loyalty and their trust of management.⁸⁰ Freeman & Rogers also refer to a number of subsequent polls including the Randstad North America survey and the Harris poll that found similar levels of “worker distrust.”⁸¹ This gives rise to a question of whether management “trusts” workers or whether the poll results produce much of value for policymakers who desire to improve the workplace. Although cause and effect are difficult to determine, it is possible that reported worker distrust is less important than overall satisfaction with work-place labor-relations. Equally possible, worker distrust of management may simply be an embedded factor affecting work-place labor-relations results and overall job satisfaction numbers. If true, this tends to diminish the significance of the authors’ worker distrust observations.

First, consider the contrast between Freeman & Rogers’s loyalty/worker distrust claims and their WRPS results showing workers’ satisfaction with work-place *labor-relations*.⁸² The WRPS survey showed that more than 95 percent of workers stated that they viewed labor-relations relations as excellent to fair with only seven percent viewing such relations as poor (the numbers fail to add to 100).⁸³ Second, compare labor-relations satisfaction with overall job satisfaction. Although the authors state that the surveys that come closest in spirit to the WRPS do not focus on job satisfaction broadly defined,⁸⁴ and while the authors therefore discount overall job satisfaction surveys and results, it appears that their own WRPS labor-relations results mirror the job satisfaction results derived from competing (GSS and Gallup) surveys they criticize. Given such results, the persuasiveness and clarity of the high job satisfaction numbers reported by the GSS and the Gallup poll appear to improve and Freeman & Rogers’s loyalty claims appear to wane. These results reporting high levels of labor-relation and overall job satisfaction should create uncertainty about the significance and meaning of the discontent they partially attribute to the loyalty numbers they emphasize. Since the authors contend that workers’ discontent with their jobs and the state of labor-management relations correlate with workers’ dissatisfaction with their ability to influence workplace decisions,⁸⁵ this uncertainty envelops and calls into question the authors’ claims about the necessity of increased worker influence on workplace decisions as well.

Freeman & Rogers bolster their assertion that workers are trapped in a participation/representation gap by revealing a sizeable divergence between workers’ desire for *influence* on decisions and their actual influence on several important features of the

⁷⁷ FREEMAN & ROGERS, *supra* note ____ at 6.

⁷⁸ FREEMAN & ROGERS, *supra* note ____ at 73.

⁷⁹ FREEMAN & ROGERS, *supra* note ____ at 6.

⁸⁰ FREEMAN & ROGERS, *supra* note ____ at 6.

⁸¹ FREEMAN & ROGERS, *supra* note ____ at 11 (citing Peter D. Hart Research).

⁸² FREEMAN & ROGERS, *supra* note ____ at 8.

⁸³ FREEMAN & ROGERS, *supra* note ____ at 8.

⁸⁴ FREEMAN & ROGERS, *supra* note ____ at 6.

⁸⁵ FREEMAN & ROGERS, *supra* note ____ at 73.

workplace.⁸⁶ While the authors' original study attempted to assess whether the desire for workplace influence varies among workers with different demographic or economic characteristics,⁸⁷ nowhere is evidence (new or old) adduced that workers have adequate access to information on what constitutes "adequate" employee participation or adequate information to exercise decision making power. Equally important, the authors fail to supply evidence that workers are inclined to leave jobs which provide few opportunities to participate in favor of employers who provide such opportunities. The largest reported participation/representation gap was associated with 'bread and butter' issues concerning pay and benefits, followed by training issues, while the smallest gap concerned decisions on how to organize their work.⁸⁸ A number of subsequent surveys cited in the book confirm these particular results including a rise in the percentage of workers who felt that management had not sufficiently shared profits with them.⁸⁹ Concerning the issue of salary, a number of other facts need to be taken in consideration before the results become significant: (A) the fact that workers are not asked or required to forego anything in order to demand a greater share of the profits; (B) the absence of causal evidence showing that the purported gap was caused by the unwillingness of managers to share profits as opposed the workers unconstrained desire for higher wages and (C) as more fully developed below, the veracity of Kenneth Arrow's observation about the necessity of authority to chart the course of any viable organization, particularly when participants have unequal access to information coupled the absence of survey evidence demonstrating that workers possessed firm-specific knowledge equal to that of their management. Taken together, the WRPS survey and post-WRPS results fail to convincingly confirm the gravity of the representation/participation gap.

As a general matter, doubts about the WRPS survey and post-WRPS results can be further elevated because survey response results depend heavily on how survey questions are phrased. To their credit, Freeman & Rogers concede this point. For instance, they show that when Peter D. Hart Research Associates asked workers about the relationship between management and workers, substituting the word "corporation" for "management" significantly lowered favorable survey responses by workers to employers and firms.⁹⁰ Unmistakably, these kinds of results imply more information about the biases embedded in the questions as opposed to representing meaningful information about what workers want.

B. Employees prefer Cooperative Relations with Management

Evidently, workers preferred cooperative relations with management to adversarial ones where cooperative meant mutual respect and some power sharing.⁹¹ Workers were open to various paths to increasing their representation and participation within the workplace.⁹² Such results impel Freeman and Rogers to insist that "the U.S. system of workplace governance had failed the country."⁹³ This conclusion is far from sustainable unless one accepts the postmodern cultural imperative that, as Americans, we are entitled to whatever we want, however scarce resources become, and no matter what is happening to the country and the world around us. Employee participation may be plausible as part of an effort to

⁸⁶ FREEMAN & ROGERS, *supra* note ___ at 9.

⁸⁷ FREEMAN & ROGERS, *supra* note ___ at 79.

⁸⁸ FREEMAN & ROGERS, *supra* note ___ at 9.

⁸⁹ FREEMAN & ROGERS, *supra* note ___ at 9-10.

⁹⁰ FREEMAN & ROGERS, *supra* note ___ at 8.

⁹¹ FREEMAN & ROGERS, *supra* note ___ at 1-2.

⁹² FREEMAN & ROGERS, *supra* note ___ at 2.

⁹³ FREEMAN & ROGERS, *supra* note ___ at 2.

solve problems that are connected to information asymmetries wherein employees have access to information that might improve the efficiency of the organization in a firm characterized by a layered bureaucracy.⁹⁴ On the other hand, Freeman & Rogers do not provide information that the workers surveyed in either the WRPS or subsequent post-WRPS surveys used to bolster their primary conclusions actually have an informational advantage over management. Kenneth Arrow demonstrates⁹⁵ collaborative approaches that entail consensus governance are attractive when all members of the organization have identical interests and information that result in preferences that are easily aggregated, permitting relatively easy collective decisionmaking.⁹⁶ “In contrast, authority-based decisionmaking structures arise where group members have different interests and amounts of information.”⁹⁷ Doubtlessly, the latter conclusion applies to many, if not most, employers suggesting the implausibility of converting workers’ survey results into actual management practice no matter how attractive such results may be. Lastly, of course, worker responses favoring cooperative relationships with management, if accurate, constitute additional evidence that unions are continuing to lose support from workers. Such a trend is consistent with the long-term decline in private sector unionization in the United States.

C. Workers want Union and Nonunion Forms of Representation.

Freeman and Rogers note that the U.S. labor system effectively offers only one form of collective voice to workers: trade unions that win secret ballot elections.⁹⁸ Economists have long believed that the main objective of labor unions is to limit the supply of labor so that employer cannot use competition among workers to control the price of labor.⁹⁹ Even though Richard Posner’s classical economic perspective does not support the suppression of labor unions as unlawful combinations in restraint of trade, he argues that we should be suspicious of labor unions under certain conditions.¹⁰⁰ In an era characterized by a mobile workforce, an absence of evidence of employer conspiracies designed to depress wages, the presence of employees’ knowledge about the labor market, and the implausibility of labor monopsony, Posner argues that the country should be wary of labor unions for a number of reasons.¹⁰¹ The economic effect of unionization is to reduce the supply of labor in the unionized sector, and the higher wages obtained by a union tend to induce employers to substitute capital for labor and also to substitute cheaper for costlier labor.¹⁰² Losers in this process are workers who are terminated because of a reduction in demand caused by union wage scales.¹⁰³ These workers become part of the nonunionized sector where an increasing supply of workers causes wages to fall.¹⁰⁴ Consumers also lose out because labor inputs are being used less efficiently throughout the economy, which drives up the prices of goods.¹⁰⁵

⁹⁴ Stephen Bainbridge, *Participatory Management within the Theory of the Firm*, 21 IOWA J. OF CORP. LAW 657, 687 (1996) [hereinafter, Bainbridge, *Participatory Management*].

⁹⁵ KENNETH J. ARROW, *THE LIMITS OF ORGANIZATION* 78 (1974) (just like we cannot increase director accountability to shareholders, courts and regulatory bodies without undermining their discretionary authority, we cannot increase managers accountability to employees without compromising their authority).

⁹⁶ Bainbridge, *Participatory Management*, *supra* note ___ at 665 (citing Arrow).

⁹⁷ Bainbridge, *Participatory Management*, *supra* note ___ at 665.

⁹⁸ FREEMAN & ROGERS, *supra* note ___ at 17.

⁹⁹ RICHARD A. POSNER, *THE ECONOMIC ANALYSIS OF LAW*, 341 (2007).

¹⁰⁰ POSNER, *supra* note ___ at 341-342.

¹⁰¹ POSNER, *supra* note ___ at 342.

¹⁰² POSNER, *supra* note ___ at 342-43.

¹⁰³ POSNER, *supra* note ___ at 343.

¹⁰⁴ POSNER, *supra* note ___ at 343.

¹⁰⁵ POSNER, *supra* note ___ at 343.

On Posner's account, the "National Labor Relations Act is a kind of reverse Sherman Act, designed to encourage cartelization of labor markets."¹⁰⁶ The effectiveness of this cartel is now in doubt despite the existence of selective incentives¹⁰⁷ in the form of statutory rules providing for representation elections, the principle of exclusive representation, and the presence of union shops.¹⁰⁸

In *What Workers Want*, the representation gap is highlighted by indications that 32 percent of nonunion/nonmanagerial workers said they would vote for a union and 90 percent of union workers said they would vote to keep the union.¹⁰⁹ The authors' interpretation of this information implies a desired rate of private sector unionization of 44 percent, which was about four times the actual rate of unionization in 1995.¹¹⁰ This claim is contestable for three reasons. First, accepting the veracity of the WRPS survey, only 10.3% of private sector workers were union members and 11.3 % of workers were represented by unions in 1995.¹¹¹ If ninety percent of union members would vote to keep the union that yields roughly nine percentage points plus the 32 percent of nonunion workers who said that they would vote for unions. This leads to a desired rate of private sector unionization of only 41 percent, not the 44 percent, Freeman & Rogers report. Second, the WRPS study on which they rely appears to be misleading because the unionization rate for workers included in the survey is 16 percentage points—roughly 6 points or 60 percent—higher than the actual private sector rate.¹¹² This implies that both the survey and Freeman & Rogers's explication of the evidence overstates union support. Equally probable, some of the post-WRPS studies—taken by Peter D. Hart Associates, a well-known Democratic Party consultant¹¹³—may reflect similar bias. Third, the survey results likely fail to reflect the true preferences of workers since nonunion workers in particular have been presented with a hypothetical rather than an actual choice. Taken together Freeman & Rogers's survey results seem questionable from a descriptive and policy making perspective.

The authors avoid exploring fully a decisive factor in the decline of labor--- a change in the social attitudes of the American workforce.¹¹⁴ "The traditional trade union does not appeal to the American worker. Americans are not attracted to unionization because they are increasingly inhospitable to collective action."¹¹⁵ This prospect shrinks the probability that traditional labor unions will reclaim their former ascendancy but does not bar workers from becoming open to new or different types of representation. Perceptively, Freeman & Rogers insist that workers have become attracted to nonunion channels of collective voice including "workplace committees that could meet with management to discuss problems without the collective bargaining powers that belong uniquely to unions."¹¹⁶ Given a choice among several vehicles (unions, legal enactments, and workplace committees) to increase employees'

¹⁰⁶ Posner, *supra* note ___ at 344.

¹⁰⁷ See e.g., DENNIS MUELLER, PUBLIC CHOICE II 308 (1989).

¹⁰⁸ POSNER, *supra* note ___ at 343.

¹⁰⁹ FREEMAN & ROGERS, *supra* note ___ at 17.

¹¹⁰ FREEMAN & ROGERS, *supra* note ___ at 17.

¹¹¹ Barry T. Hirsch and David A. Macpherson, *Union Membership, Coverage, Density and Employment Among Private Sector Workers, 1973-2006*, available at <http://www.unionstats.com>.

¹¹² FREEMAN & ROGERS, *supra* note ___ at 213 n. 7.

¹¹³ Hart & Associates, Staff Bios, Peter D. Hart, available at <http://www.hartresearch.com/about/bios/> (accessed June 6, 2007).

¹¹⁴ Margaliath, *supra* note ___ at 43.

¹¹⁵ Margaliath, *supra* note ___ at 43.

¹¹⁶ FREEMAN & ROGERS, *supra* note ___ at 24-5.

say in workplace matters and to ensure workers are treated fairly, 52 percent of employees chose workplace committees.¹¹⁷ Since WRPS and post-WRPS survey questions give workers this choice, workers' responses appear to have an advantage over other survey results that are based on questions which simply asked whether workers would definitely or probably vote to form a union.¹¹⁸ Several post-WRPS survey results confirm that workers appear to want some form of representation, either as an alternative to or in addition to a union.¹¹⁹ This leads to the following conclusion: The "institution that appeals to most workers, whether they want a union or not, is an independent workplace committee to represent them in workplace decisions."¹²⁰

Freeman & Rogers, present data that indicates that unionized workers (at least in the abstract) tend to rate unions highly but "were critical of the union movement broadly and of their own union's ability to improve their working lives."¹²¹ The general public tends to be highly skeptical of the ability of unions to deliver the goods for their members. Workers "were least satisfied with union involvement in political activity."¹²² In light of the sizeable percentage of union dues devoted to political as opposed to collective-bargaining activities, this conclusion is predictable.¹²³ Since unions spend a disproportionate amount of union dues on political and other non-representational activities, such evidence makes it possible to understand more fully the contemporary decline in private sector unionization.

The next section examines Freeman & Rogers's contribution to the formation of a new labor relations system based on their most recent discussions of, and recommendations for viable labor organization strategies. The authors focus on employee voice, union organization efforts, and open-source unionism.

Part II. Toward a New Labor Relations System?

One of the advantages of *What Workers Want* is the authors' genuine attempt to deal with perceived worker discontent. That said, Freeman & Rodgers ask readers to accept that the major findings of their book are valid.¹²⁴ Since it is doubtful that survey results persistently provide a clear and verifiable picture of the real world, and since the authors' interpretation of the data is also at issue, this plea should be treated with a high degree of skepticism.

A. Voice

While the collective voice thesis appears to bring a new and important emphasis to the labor-management table, an accurate interpretation of statutory law shows that the NLRA, at its inception, held that "collective bargaining would serve the social purpose of enriching democracy by giving workers a voice in decisions of industry affecting their working

¹¹⁷ FREEMAN & ROGERS, *supra* note ____ at 25.

¹¹⁸ FREEMAN & ROGERS, *supra* note ____ at 18-19.

¹¹⁹ FREEMAN & ROGERS, *supra* note ____ at 25.

¹²⁰ FREEMAN & ROGERS, *supra* note ____ at 27.

¹²¹ FREEMAN & ROGERS, *supra* note ____ at 20-21.

¹²² FREEMAN & ROGERS, *supra* note ____ at 21.

¹²³ See e.g., Joe Knollenberg, *The Changing of the Guard: Republicans Take on Labor and the Use of Mandatory Dues or Fees for Political Purposes*, 35 HARV. J. ON LEGIS. 347, 350 (1998) (Union expenditures for political and related purposes continue to rise on a per member basis while membership declines.) See also, LINDA CHAVEZ & DANIEL GRAY, BETRAYAL: HOW UNION BOSSES SHAKE DOWN THEIR MEMBERS AND CORRUPT AMERICAN POLITICS, 12 (2004) (Unions spend only a fraction—perhaps less than 20 percent—of their dues revenues on collective bargaining and related activities.).

¹²⁴ FREEMAN & ROGERS, *supra* note ____ at 184.

lives.”¹²⁵ Despite the statutory language, the precise scope, attributes, and extent of workers’ voice remains in dispute. Given this dispute, it is not surprising that some labor experts turn to collective voice as a vehicle to reclaim the labor movement. It is possible to argue that collective-voice provides an alternative to employee exit. Instead of quitting the firm, workers (via union or other representation) engage in collective voice discussions with their employer about unsatisfactory employment conditions before quitting their job outright.¹²⁶ On the other hand, there is an absence of conclusive data that supports this initiative¹²⁷ as well as the presence of data showing that many workers prefer a voice approach without its collective/union component.¹²⁸

Previously, Freeman & Rogers’s argued that “voice” is far more informative than exit because it permits the exploration of problems.¹²⁹ Today, the authors venture the following position: “[t]here is a major gap in America between what workers want by way of democratic say at their workplace and what they have.”¹³⁰ If this contention were accurate, then this gap would lead to a demand by workers for some version of voice at the workplace. Although “[i]t would be a mistake to view the collective voice model as a single unified approach,”¹³¹ skepticism multiplies because survey results fail to specify what workers might be willing or required to forego in the form of wages and benefits, job security or unemployment risks in order to establish a more collaborative and democratic workplace. Given this lacuna, it is difficult to judge the intensity of workers putative desire to consult with management regularly about workplace issues or to insist on some organization short of collective bargaining that provides “fair adjudication of disputes.”¹³²

In particular, uncertainty arises regarding union-led collective voice because labor unions are collective organizations led by hierarchs whose interest may differ from the interest of rank and file members.¹³³ In the past the workplace was always seen as place of “conflict centered around the struggle for power between owners and workers. In that struggle, workers were generally seen to be bound together by common interests . . . Today, the focus of struggle has shifted; increasingly the focal point of conflict is not between workers and owners, but among the diverse interest of workers . . .”¹³⁴ It is likely that traditional labor organizations will discover it difficult to fully respect the diversity in individual variations in tastes and demands that are contained within the membership.¹³⁵ At the same time, a significant *number* of workers have expressed an interest in *participating in joint employee-*

¹²⁵ Clyde W. Summers, *Taft-Hartley Symposium: The First Fifty Years: Questioning the Unquestioned in Collective Labor Law*, 47 CATH. U. L. REV. 792 (1998).

¹²⁶ Addison & Belfield, *supra* note ___ at 3.

¹²⁷ See e.g., Addison & Belfield, *supra* note ___ at 19-25 (surveying the literature concerning the contribution of unions, employee involvement programs and other workplace practices and suggesting that the research is in its infancy and to date provides mixed results).

¹²⁸ Addison & Belfield, *supra* note ___ at 17.

¹²⁹ FREEMAN & ROGERS, *supra* note ___ at 92 (citing an earlier version of their book).

¹³⁰ FREEMAN & ROGERS, *supra* note ___ at 184.

¹³¹ John T. Addison & Clive R. Belfield, *Union Voice*, Discussion Paper no. 862, Institute for the Study of Labor, (IZA) 2 (2003) available at <http://www.ssrn.com/abstract=446243>.

¹³² FREEMAN & ROGERS, *supra* note ___ at 184.

¹³³ See generally, Hutchison, *A Clearing in the Forest*, *supra* note ___ at 1331-48 (discussing union solidarity claims in the absence of preference convergence between union members and hierarchs).

¹³⁴ McUsic & Selmi, *supra* note ___ at 1339.

¹³⁵ See McUsic & Selmi, *supra* note ___ at 1348 (the perception of union subordination has been enhanced by understanding that unions have often furthered the interest of their traditional constituents at the expense of women and minorities).

management run organizations as opposed to independent labor organization such as unions.¹³⁶ This development reflects legal scholar Stewart Schwab's intuition that the law has failed "to require, let alone enforce, democratic collective bargaining [and] has left union members subject to manipulation of union leaders and negotiators with interest sharply different from theirs."¹³⁷ Even if union leaders are concerned about the interests of union members, representative participation "can be frustrated by isolation of the representatives from their constituents. As a result employee representatives have difficulty gathering accurate information about worker preferences and coherently aggregating those preferences."¹³⁸

Nonetheless, Freeman and Rogers stress: "That so many workers do not have the voice at the workplace that they want bespeaks a remarkable institutional failure in the country's labor laws and labor relations system."¹³⁹ Contrary to Professor Schwab's informed concentration on union shortcomings as a source of workers' demand for alternative workplace organizations, the authors gaze pensively at evidence provided by other countries in an attempt to point the way forward. This focus is grounded in a presupposition that appears to favor "voice." Consider Freeman & Rogers's assertions that: (A) no other advanced market democracy has anything like America's unfulfilled demand for workplace representation and participation; (B) the proportion of workers in the U.S. who cannot obtain the "voice" they want is higher than in other major English-speaking countries; (C) this proportion is also higher than other countries in the European Union and (D) the unstated but implied assumption that increased workplace voice is achievable without employers or workers incurring any additional costs.

Several things are missing in their analysis. Notably absent is a discussion of the distinct possibility that other countries have engaged in a race to the bottom—at least in terms of unemployment rates. European workers, have greater participation rights as well as higher unemployment rates,¹⁴⁰ which provokes this question: which Americans ought to be laid off to establish a European-style workplace? Indeed, recent scholarship confirms that "works councils" and other European styled initiatives designed to give workers a greater voice are not free of adverse costs and that such initiatives may correlate with greater unemployment.¹⁴¹ Furthermore, Freeman & Rogers overlook recent evidence suggesting that European unions as well as employee voice initiatives are facing an ongoing period of

¹³⁶ Samuel Estreicher, *The Dunlop Report and the Future of Labor Law Reform*, 12 LAB. LAW 117, 118 n.2 (1996) (citing PRINCETON SURVEY RESEARCH ASSOCIATES WORKER REPRESENTATION AND PARTICIPATION SURVEY: REPORT ON THE FINDINGS 49 (1994) ("By an overwhelming 86% to 9% margin, workers want an organization run jointly by employers and management, rather than an independent employee-run organization. By a smaller, but still sizable margin of 52% to 34%, workers want an organization to be staffed and funded by the company, rather than independently through employee contributions.").

¹³⁷ Stewart J. Schwab, *Union Raids, Union Democracy and the Market for Union Control*, 1992 U. ILL. L. REV. 367, 371 (1992).

¹³⁸ Bainbridge, *Participatory Management*, *supra* note ____ at 667.

¹³⁹ FREEMAN & ROGERS, *supra* note ____ at 184.

¹⁴⁰ See e.g., U.S. Department of Labor, Bureau of Statistics, Foreign Labor Statistics, Table 2. *Civilian Labor Force, Employment and Unemployment Approximating U.S. Concepts*, available at [ftp://ftp.bls.gov/pub/special.requests/ForeignLabor/lfcompensium02.txt](http://ftp.bls.gov/pub/special.requests/ForeignLabor/lfcompensium02.txt) (showing that in 2006, France's unemployment rate was 9.2 percent, Germany's unemployment rate was 10.3 percent and Italy's unemployment rate was 6.8 percent while the unemployment rate in the United States was 4.6 percent).

¹⁴¹ See e.g., John T. Addison, Claus Schnabel, Joachim Wagner, *The (Parlous) State of German Unions*, Discussion Paper No. 2000, Institute For the Study of Labor (IZA) (Bonn) (provisional paper) available at <http://ssrn.com/abstract=890275>, 5 (2006) (implying that the institution of work councils in Germany, for example, was grounded in the notion that cost are secondary to democracy at the workplace).

decline. For example, the literature shows that over the course of the last three decades, German unionism has declined sharply and “[t]oday just one in five workers is a union member.”¹⁴² Works council coverage, while remaining substantial, has also declined sharply, while unemployment rates remain robust.¹⁴³ Taken together, it is far from clear that the evidence sustains the viability of Freeman & Rogers’s recommendations and the usefulness of their survey results.

Nonetheless, discerning readers should scrutinize meticulously Freeman & Rogers’s explanation for the lack of voice in the U.S. workplace. The absence of voice is attributed to the hypothesis that the NLRA has outlived its usefulness.¹⁴⁴ Specifically, four flaws are identified that preclude U.S. labor law from satisfactorily solving the labor problems of the twenty-first century. According to the authors, these flaws conduce to an ossified system limited to a shrinking union core, which is out of step with current economic practice while becoming increasingly irrelevant to the bulk of workers and employers.¹⁴⁵ Labor law’s four flaws include: (1) it privileges collective bargaining by exclusive union representation as the basis of employee representation and precludes other forms; (2) it gives management near-veto power over whether workers can achieve union representation via NLRB supervised elections; (3) it forbids management from offering alternative institutions of representation for workers; (4) finally, through the preemption doctrine, it gives the federal government the near exclusive right to regulate and enforce private sector labor law and therefore precludes states or localities from experimenting with alternative labor codes.¹⁴⁶ While I briefly examine the latter two flaws in Part II C and D, I will only consider the first two flaws in this subsection.

Consider their initial claim. It is true that the NLRA privileges collective bargaining. Labor unions operate as exclusive representatives of workers complete with compulsory membership rules enforceable through selective economic incentives requiring workers to join or maintain their membership by paying dues. These rules are complemented by unions’ statutory right to procure the termination of workers who fail to comply with such rules.¹⁴⁷ This approach prompts Charles Baird, an astute opponent of compulsory bargaining, to characterize private sector unionism as a forced bargaining regime that can never be justified.¹⁴⁸ In a poignant surrender to paradox, Freeman & Rogers, two long-time defenders of compulsory bargaining regimes, effectively reach the same conclusion—the NLRA is flawed—because the statute has failed to ensure labor union ascendancy. It is doubtful that the NLRA could ever be plausibly interpreted to require representation of all workers by labor unions. While the law privileges labor unions, it cannot guarantee worker support. Indeed the 1948 amendments to the NLRA were aimed at rebalancing the scales in favor of worker choice including the choice to refrain from joining a union.¹⁴⁹

¹⁴² Addison, Schnabel & Wagner, *supra* note ___ at page 1 (abstract).

¹⁴³ Addison, Schnabel & Wagner, *supra* note ___ at page 1 (abstract).

¹⁴⁴ FREEMAN & ROGERS, *supra* note ___ at 185.

¹⁴⁵ FREEMAN & ROGERS, *supra* note ___ at 185.

¹⁴⁶ FREEMAN & ROGERS, *supra* note ___ at 185.

¹⁴⁷ ROBERT GORMAN and MATTHEW W. FINKIN, LABOR LAW UNIONIZATION AND COLLECTIVE BARGAINING 907 (2nd ed., 2004) (an employee’s job under a union shop provision can be terminated for failure to satisfy his or her “financial core” obligations).

¹⁴⁸ Charles W. Baird, *Henry Hazlitt on Unions, Freeman: Ideas on Liberty*, 47, 47(Nov. 2004).

¹⁴⁹ Thomas C. Kohler, *Setting the Conditions for Self-Rule: Unions, Associations, Our First Amendment Discourse and the Problem of Debarolo*, 1990 WIS. L. REV. 149, 149-152 (1990) (The Wagner Act portion

Second, consider Freeman & Rogers's contention that management has been given near-veto power over workers' ability to achieve union representation. The authors are not alone in constructing such claims. Labor scholar, James Brudney asserts that the NLRB election process is no longer normatively justified because the election paradigm regularly tolerates, encourages and promotes coercive conditions that preclude the attainment of employee choice.¹⁵⁰ Likewise, Richard B. Freeman in the 2004 edition of his book, *What Unions Do?*, dismisses scholarly criticism of his employer hostility thesis stating that "it is incomprehensible that firms, seeking to preserve profits against union wage and benefit increases, would spend large sums of money and management time to defeat unions in NLRB representation election if this was not effective."¹⁵¹ On the other hand are a number of scholars that offer contrasting explanations that refute the employer hostility thesis.¹⁵²

Consider Professor Hylton's repudiation of Freeman & Rogers's hypothesis. Professor Hylton states that if one assumes that employers are rational, they will oppose unions as long as having one puts an employer at a serious competitive disadvantage relative to a non-union competitor.¹⁵³ The rational employer will make an effort to determine the cost of the 'competition tax' imposed by the union and will invest in an anti-union campaign until the marginal dollar spent on the campaign just equals the expected competition tax avoided.¹⁵⁴ Thus, as the economy becomes more competitive, rational employers should be expected to invest more resources in blocking unionization.¹⁵⁵ However employer hostility is not cost-free because carried to excess this approach may alienate a number of the firm's most productive employees.¹⁵⁶ Hence, as the market becomes more competitive, the cost connected to employer hostility should increase, just as the competitive tax associated with becoming unionized rises. In essence, the costs connected with management hostility and unionism (the competitive tax) exert opposing pressures on employers.¹⁵⁷ Given the range of potential employer responses to union organization, the rational employer would avoid the cost tied to employer hostility and at the *same* time minimize the risk of a union forming by ascertaining employee preferences and trying to "meet them—and these investments in meeting employee preferences should be made well before a union organization drive begins on a work site. Once a union organization drive begins, a policy of aggressive hostility,

of the NLRA is framed in terms that emphasize association and self-government whereas the Taft-Hartley Act portion is framed in highly individualistic language).

¹⁵⁰ James J. Brudney, *Neutrality Agreement and Card Check Recognition: Prospects for Changing Paradigms*, 90 IOWA L. REV. 819, 820 (2005) (abstract).

¹⁵¹ RICHARD B. FREEMAN, *WHAT UNIONS DO? THE 2004 EDITION*, 32 (2004) (criticizing Flanagan, McLennan and Lewin who argue that a loss of worker interests in organizing is the prime factor contributing to the decline of private sector unions).

¹⁵² See e.g., Hylton, *supra* note ____ at 695-697 (showing that rational employers only invest in anti-union activities as long as having one puts them at a competitive advantage with nonunion employers and also showing that union win-rates in the private sector have remained consistent at the 50% level for a number of decades); Kenneth McLennan, *A Management Perspective on What do Unions Do?* in *WHAT DO UNIONS DO? THE EVIDENCE TWENTY YEAR LATER* (2005) (rejecting the claim that anti-union activities directed by highly-paid consultants hired by employers are the primary explanation for the decline in unionism) quoted in FREEMAN *supra* note ____ at 34.

¹⁵³ Hylton, *supra* note ____ at 695.

¹⁵⁴ Hylton, *supra* note ____ at 695.

¹⁵⁵ Hylton, *supra* note ____ at 695.

¹⁵⁶ Hylton, *supra* note ____ at 695.

¹⁵⁷ Hylton, *supra* note ____ at 695.

divorced from any effort to inform employees about the competitive effects of unionization, would appear to be foolish for many employers.”¹⁵⁸

Professor Hylton sustains his evisceration of the employer hostility thesis by inspecting union win-rates. Since the mid-1970s union win-rates as measured by NLRB certification elections have remained consistent at the 50 percent level.¹⁵⁹ Before then, the union win-rate exceeded 50 percent, with a level close to 80 percent in 1940, demonstrating a steady decline until the mid-1970s and has remained at 50 percent until the present.¹⁶⁰ If “employer hostility motivated by competitive pressure were the reason for the pre-1975 downward trend in the union win-rate, one would expect the win-rate to continue declining after 1975,” but that is not the case.¹⁶¹ There is clear evidence that domestic firms experienced accelerating competitive pressure after the mid-1970s. One measure of competitiveness shows that the share of imported goods in the U.S. economy continued to rise after 1975.¹⁶² At the same time, the number of NLRB certification elections (elections initiated by unions) declined sharply, which reflects employer efforts to make unionization unnecessary by meeting employee preferences as opposed to insisting on resistance in the form of employer hostility.¹⁶³ This data constitutes evidence that union organizers often recognize that the expected gains from unionization are not worth the costs. Moreover, the evidence verifies that in cases today where employees clearly prefer the union, employers generally cave and voluntarily recognize the union and forego an election.¹⁶⁴ On the other hand, the high win-rate during the 1940s actually reflected employer hostility as a high percentage of employers forced unions to prove their support in a certification election.¹⁶⁵ The current win-rate (50 percent) shows the opposite is true—after a union files a petition, employers today examine the costs and benefits of fighting the union—because the current win-rate is more consistent with a *decline* in employer hostility during the contemporary era in comparison with earlier period of U.S labor history.¹⁶⁶ “[U]nion election petitions are filed when the expected payoff, which is the probability of a union victory, multiplied by the expected gain exceeds the cost of union organization and maintenance.”¹⁶⁷ Since the costs of union organizing have fallen for a variety of reasons,¹⁶⁸ the decline in election filings must be due to a decline in unions’ expected payoff from unionization.

Professor Hylton’s investigation places Freeman & Rogers’s employer hostility thesis at risk. This seems particularly the case since workers’ failure to organize can be tied the workers lack of interest in joining labor organizations.¹⁶⁹ Consistent with this probability, McUsic and Selmi confirm that postmodernism and identity politics have affected workers willingness to subordinate their own individual and subgroup interest to the demands of large collective organization.¹⁷⁰ This probability also gives rise to the viability of postmodern

¹⁵⁸ Hylton, *supra* note ___ at 695.

¹⁵⁹ Hylton, *supra* note ___ at 696.

¹⁶⁰ Hylton, *supra* note ___ at 696.

¹⁶¹ Hylton, *supra* note ___ at 696.

¹⁶² Hylton, *supra* note ___ at 696.

¹⁶³ Hylton, *supra* note ___ at 696.

¹⁶⁴ Hylton, *supra* note ___ at 696.

¹⁶⁵ Hylton, *supra* note ___ at 696.

¹⁶⁶ Hylton, *supra* note ___ at 697.

¹⁶⁷ Hylton, *supra* note ___ at 697.

¹⁶⁸ Hylton, *supra* note ___ at 697.

¹⁶⁹ *See supra*, Introduction.

¹⁷⁰ McUsic & Selmi, *supra* note ___ at 1339. (“Today the focus of struggle has shifted; increasingly the focal point of conflict is not between the workers and owners, but among the diverse interests of workers—

labor organizations.¹⁷¹ Unions and alternative labor/workplace organizations require solidarity. Solidarity denotes the ability of people to cooperate in the absence of legal sanctions.¹⁷² Since workers live in a cultural milieu wherein Americans see themselves as highly autonomous and mobile, the consequent loss of labor solidarity plays a role in the ongoing decline in union density as well as a “loss of legitimacy for unions as the enablers of group action.”¹⁷³ It is likely that many forms of collective voice fail to meet the requirements of, and remain contrary to the interest of, contemporary workers.

Though labor scholars John Addison and Clive Belfield maintain that it is too early to conclude that union voice is dead,¹⁷⁴ the union voice model remains seriously deficient in under-emphasizing the bargaining problem, in over-emphasizing worker dissatisfaction, in neglecting individual voice, and in uncritically equating collective voice with autonomous unionism.¹⁷⁵ Although much scholarship implies that neither unionism nor alternative workplace organizations are no longer the all-inclusive solution to worker dissatisfaction, the literature is consistent with the probability that individualism plays a much larger role in explaining the lack of workplace representation than Freeman & Rogers concede. Equally possible the efforts of other scholars may lend support to those parts of Freeman and Rogers’s thesis that imply that the decline in unionization may substantially but not solely reflect workers’ distaste for current representation options. It is possible, therefore, that workers may be open to alternative workplace options including some form of participatory management/employee-voice which might enable bureaucratized firms to deal with the problem of “of persistent information asymmetries.”¹⁷⁶

B. Other Possibilities for Reviving Unionism & Collective Representation.

Freeman & Rogers commence their discussion of the likely contours of a new labor relations system by dismissing both pro-union and pro-business attempts to amend the Labor Management Relations Act.¹⁷⁷ They also ponder union attempts to move beyond despair by concentrating on organizing.¹⁷⁸ Despite difficulties, this venture may have promise—particularly for labor unions which have persistently devoted a substantial percentage of their resources to political and other non-representational activities.¹⁷⁹ and are

a diversity that many believe had previously been ignored or suppressed in order to achieve unity in the name of the working class.”). *See also*, Margalioth, *supra* note ___ at 41-49 (suggesting that workers are increasingly enticed by expressive individualism, which concentrates on subjective self-realization and are less likely to find attractive any collective action that requires individual interest to yield to group interest and solidarity); Hutchison, *A Clearing in the Forest*, *supra* note ___ at 1331-1339 (discussing the likely disappearance of solidarity in the mirror of postmodernism).

¹⁷¹ *See generally*, McUsic & Selmi, *supra* note ___ at 1365-73 (discussing the possibility of postmodern/cosmopolitan unions as alternatives to traditional ones).

¹⁷² Eric A. Posner, *The Regulation of Groups: The Influence of Legal and Nonlegal Sanctions on Collective Action*, 63 U. CHICAGO L. REV. 133, 135 (1996).

¹⁷³ James J. Brudney, *Reflections on Group Action and the Law of the Workplace*, 74 TEX. L. REV. 1563, 1564 (1996).

¹⁷⁴ Addison & Belfield, *supra* note ___ at 1.

¹⁷⁵ Addison & Belfield, *supra* note ___ at 1.

¹⁷⁶ *See e.g.*, Bainbridge, *Participatory Management*, *supra* note ___ at 682 (discussing the possible effectiveness of participatory management programs as a corrective for overly bureaucratized organizations).

¹⁷⁷ FREEMAN & ROGERS, *supra* note ___ at 186-187.

¹⁷⁸ FREEMAN & ROGERS, *supra* note ___ at 187-191.

¹⁷⁹ *See e.g.*, ROBERT P. HUNTER, PAUL S. KERSEY & SHAWN P. MILLER, MACKINAC CTR. FOR PUB. POLICY, THE MICHIGAN UNION ACCOUNTABILITY ACT: A STEP TOWARD ACCOUNTABILITY AND DEMOCRACY IN LABOR ORGANIZATIONS 4-15 (2001), available at <http://www.mackinac.org/archives/2001s2001-02.pdf>

now prepared to reverse direction and spend those funds on organizing efforts. Equally likely, organizing within the traditional union framework is unlikely to substantially increase workers' voice because majority-based collective bargaining will neither satisfy workers' desire for increased workplace power nor raise union density enough to once again make labor unions a major force in the labor market.¹⁸⁰

The authors offer union supporters optimism in the shape of another labor movement renaissance triggered by an unforeseeable spurt in labor membership.¹⁸¹ While they fail to persuasively explain this possibility, the authors aver that union growth in the form of sudden sharp spurts is directly related to the probability of another social crisis.¹⁸² This move can be perceived by examining the rise in union density in nearly all advanced countries during World War I when governments needed unions' assistance to prosecute the war.¹⁸³ Additionally, the authors contend, unions grew a great deal during the Great Depression because workers lost faith in business leadership and the market system.¹⁸⁴

This claim bears analysis because it disregards a great deal of evidence illustrating that both unemployment and income inequality were *advanced* by pro-union government policies contrary to the authors' implication that government policy advanced the interest of workers and reduced income disparity. Reflective commentators such as Vedder & Gallaway verify the Hoover and Roosevelt administrations' role in enacting laws that created labor cartels that expanded the scope of the depression.¹⁸⁵ The federal government wrongly attributed increasing unemployment levels to the premise that wages and prices that were too low.¹⁸⁶ Predictably, government efforts to raise wages and prices were a disaster.¹⁸⁷ Roosevelt's insistence on raising the price of labor, not only increased unemployment and human suffering, it widened the unemployment gap between blacks and whites.¹⁸⁸ Ineluctably, these

(concluding the U. S. Supreme Court approved a detailed examination of union financial records that found: (1) in *Communications Workers of America v. Beck*, 487 U.S. 735 (1988), 79 percent of union dues were not chargeable to collective bargaining and related activities; and (2) in *Lehnert v. Ferris Faculty Association*, 500 U.S. 507 (1991), the union spent 90 percent of its dues revenue on non-representational activities).

¹⁸⁰ FREEMAN & ROGERS, *supra* note ___ at 188.

¹⁸¹ FREEMAN & ROGERS, *supra* note ___ at 191-193.

¹⁸² FREEMAN & ROGERS, *supra* note ___ at 192.

¹⁸³ FREEMAN & ROGERS, *supra* note ___ at 192.

¹⁸⁴ FREEMAN & ROGERS, *supra* note ___ at 192.

¹⁸⁵ *See e.g.*, VEDDER & GALLAWAY, *supra* note ___ at 130-143.

¹⁸⁶ *See e.g.*, VEDDER & GALLAWAY, *supra* note ___ at 112-113 & 130-143 (rapidly rising money wages tied to banking policies and New Deal wage-raising legislation including the Wagner Act can be viewed as a continuation of the underconsumptionist, high-wage policy initiated by Hoover and further developed by Roosevelt).

¹⁸⁷ VEDDER & GALLAWAY, *supra* note ___ at 141 & 142-146 (1993) (The data show that government sponsored unionization was the more important cause of prolonged high unemployment during the period immediately following the passage of the National Industrial Recovery Act and the NLRA which includes the downturn in 1937-1938.).

¹⁸⁸ VEDDER & GALLAWAY, *supra* note ___ at 272-279 (showing that racial differences in terms of unemployment rates were essentially nonexistent between 1890-1930 but during the 1930's the federal government's initiatives in the legislative and regulatory environment that were aimed at raising the wages for workers, actually widened the unemployment gap between black and white workers and contributed to increased income inequality).

largely prounion policies confirm the omnipresence of government failure,¹⁸⁹ the probability of majoritarian pathologies,¹⁹⁰ and government's role in increasing income inequality.¹⁹¹

In terms of the current labor market, Freeman & Rogers poignantly deplore income inequality while simultaneously arguing that wages have failed to keep up with the cost of living.¹⁹² Properly understood, any effort by Freeman & Rogers to lament the ongoing decline in union density or promote labor union growth spurs disregards considerable evidence showing that as the government invades the marketplace through bureaucratic regulation and cartelization favoring the growth of labor organizations that unions tend to thrive.¹⁹³ However, to “the extent that unions are successful, they redistribute income toward their members who are predominantly white male, and well paid at the expense of consumers as a whole, taxpayers, nonunion workers, the poor, and the unemployed.”¹⁹⁴ Labor unions, properly understood, far from freeing all workers, have the capacity (at least in some cases) to advance human subordination through bureaucratic managerialism. Even Professor Freeman acknowledges that “unions raise wages in ways that misallocate labor and reduce social output.”¹⁹⁵ Further, extensive international evidence indicates that unions tend to lower productivity¹⁹⁶ and demonstrates a strong negative association between unionism and investment in physical and innovation capital.¹⁹⁷ Taken together, this investigation substantiates a paradox: the mourned decline in private sector union density rates may deliver higher wages, and benefits and lower unemployment levels for rank and file workers.¹⁹⁸ Freeman & Rogers fail to grasp this possibility.

C. Open Source Unionism As a Solution to Workplace Angst?

Notwithstanding American workers' reluctance to subordinate their self-interest to the mandates of solidarity, Freeman & Rogers remain confident that this disinclination can be reversed. They endorse an innovative and broadly conceived initiative: Open-source

¹⁸⁹ See e.g., James D. Gwartney & Richard E. Wagner, *Public Choice and the Conduct of Representative Government*, in *Public Choice and Constitutional Economics* 3, 6 (James D. Gwartney & Richard E. Wagner eds, 1988) (“The actual conduct of government may deviate, perhaps sharply, from that characterized by conceptual models . . . For various reason government may lack the competence required to fulfill its . . . functions.”).

¹⁹⁰ Gwartney & Wagner, *supra* note ___ (“government behavior that oppresses some for the benefit of others is pathological”).

¹⁹¹ Harry Hutchison, *Toward a Critical Race Reformist Conception of Minimum Wage Regimes: Exploding the Power of Myth, Fantasy, and Hierarchy*, 34 HARV. J. ON LEGIS. 93, 93-134 (1997) (describing the adverse of effects of minimum wage regimes on blacks and linking America efforts to champion minimum wage regimes to pre-Mandela, apartheid-style labor laws in South Africa) [hereinafter, Hutchison, *Toward a Critical Race Reformist Conception of Minimum Wage Regimes*].

¹⁹² See Freeman & Rogers, *supra* note ___ at 12 (citing a 2005 Hart survey showing that 23 percent of workers suggested that the biggest problem that workers face are wages that fail to keep up with the cost of living).

¹⁹³ See generally, VEDDER & GALLAWAY, *supra* note ___ at 130-146.

¹⁹⁴ MORGAN O. REYNOLDS, MAKING AMERICA POORER: THE COST OF LABOR LAW 29 (1987).

¹⁹⁵ Richard Freeman, *Is Declining Unionization of the U.S. Good, Bad, or Irrelevant?*, IN UNIONS AND ECONOMIC COMPETITIVENESS 143, 144 (Lawrence Mishel & Paula B. Voos eds., 1992).

¹⁹⁶ Addison & Belfield, *supra* note ___ at 11 (British evidence tends to show lower productivity in unionized plants in the 1980s and more recent evidence collected after Prime Minister Thatcher's reforms weakened the bargaining power of unions, indicates unions have less of a negative impact on productivity).

¹⁹⁷ Addison & Belfield, *supra* note ___ at 12.

¹⁹⁸ See e.g., Tatom, *supra* note ___ at 4-5 (showing that real compensation per hour of workers has been growing very rapidly in this decade and this growth includes manufacturing wages).

unionism.¹⁹⁹ This term, borrowed from the world of software development, “refers to software created and improved by a diverse community of programmers working with a source code available to all rather than a single vendor or proprietary code.”²⁰⁰ Freeman and Rogers state that this new organizational form would function as follows: “Open-source unions would be open to any employee who wanted to join with others in improving work conditions . . . [and] would operate through networks of members rather than traditional union bureaucracies.”²⁰¹ This move has the dual advantage of not limiting unionization to those workers who could attain majority status as required by the NLRA²⁰² and in being less dependent on union bureaucracies. Instead of seeking majority status, open-source unions would welcome all workers who wanted to become members including workers who saw little chance of achieving majority status under the current LMRA system.²⁰³ Unions might encourage this approach by allowing open-source members to pay lower dues than members covered by collective bargaining, but otherwise they would be normal union members.²⁰⁴

Uncertainty surfaces regarding how open-source unions would support members who are not covered by collective bargaining agreements. Consistent with the notion that the world is plagued by information asymmetries, open-source unions could support members by providing information about their workplace as compared with others, supplying information about the legal rights of workers, and advising members about their own careers.²⁰⁵ Freeman & Rogers state that these information services could be provided at low cost over the Internet.²⁰⁶ Relying on the Internet to lower the transaction costs is attractive, at least in theory. Nevertheless, if such information is as valuable as Freeman & Rogers believe, and if the information can be provided as cheaply as they contend, the relevant questions become (1) why such information has not already been made available, (2) why don’t unions who are interested in attracting new members provide this service to everyone, particularly, if the information is non-rivalrous in consumption,²⁰⁷ and (3) if information costs about the firm, occupations, wage and employment developments have now been lowered by the Internet, why don’t unions lower union dues for their regular members.²⁰⁸

Perhaps anticipating this criticism, Freeman & Rogers argue that the provision of cyber-information would be supplemented by “in-person support for the resolution of workplace problems.”²⁰⁹ In-person support consists of bringing together members in a local

¹⁹⁹ FREEMAN & ROGERS, *supra* note ____ at 193-205.

²⁰⁰ FREEMAN & ROGERS, *supra* note ____ at 193.

²⁰¹ FREEMAN & ROGERS, *supra* note ____ at 193.

²⁰² FREEMAN & ROGERS, *supra* note ____ at 193.

²⁰³ FREEMAN & ROGERS, *supra* note ____ at 193-92.

²⁰⁴ FREEMAN & ROGERS, *supra* note ____ at 194.

²⁰⁵ FREEMAN & ROGERS, *supra* note ____ at 194.

²⁰⁶ FREEMAN & ROGERS, *supra* note ____ at 194.

²⁰⁷ For a discussion of non-rivalrous goods *see e.g.* P. A. MCNUTT, THE ECONOMICS OF PUBLIC CHOICE 178-179 (1996). There are two salient properties pertaining to the provision of collective goods, namely, non-excludability in supply and nonrivalry in consumption. The latter implies that the consumption by one citizen of the collective good will not affect the consumption level of any other citizen. Radio broadcasts, clean air or defense spring to mind as examples of a non-rivalrous collective good.

²⁰⁸ *See, e.g.*, KENNETH R. WEINSTEIN & THOMAS M. WIELGUS, HERITAGE FOUNDATION, HOW UNIONS DENY WORKERS’ RIGHTS (1996), *available at* <http://www.heritage.org/Research/GovernmentReform/bg1087.cfm> (stating that from the period from 1991 through 1995, total receipts by several of the major international unions that make up the AFL-CIO actually rose while membership fell).

²⁰⁹ FREEMAN & ROGERS, *supra* note ____ at 194.

community to talk about common problems, to discuss ways of enhancing one's career and to unite workers in diverse ways beyond collective bargaining,²¹⁰ Finding commonality among diverse groups of workers who possess their own conception of self-interest and autonomy and who are employed at diverse workplaces raises, once again, the necessity but also the improbability of finding long-lasting solidarity. Since solidarity is required for the long-term viability of unions, open-source unionism must face a number of challenges. For example, although connecting with strangers over the Internet or even through in-person support groups may prove desirable for some workers, the salient but unanswered question concerns the intensity of interest of members whose main connection is through the Internet or via community meetings where members fail to share a common workplace, a common economic destiny, and similar workplace issues. If that is the case, solidarity remains unlikely.

Open-source unionism provides promise—particularly for highly educated workers. Consider Freeman & Rogers's leading example: "In 1998, a group of young law firm associates wanted to pressure law firms to increase their pay. They set up the web site www.greedyassociates.com, which provided detailed information to potential recruits about salaries and working conditions at firms."²¹¹ Fearful that this site would result in complaints that would adversely affect recruitment, law firms quickly improved conditions, raising pay massively in some cities to remedy pay differentials which previously existed.²¹² Freeman & Rogers assert that this example involving professional workers with substantial alternative job prospects and concurrent mobility is instructive for lower skilled workers without similar job options. Perhaps inadvertently, the authors imply that increasing the income for young middle-to-upper-middle-class lawyers is a serious problem implicating America's workplace governance system's failure to serve the country.²¹³ Correspondingly, the book expresses concern for inequity,²¹⁴ including the assertion that full-time workers near the bottom of the American wage structure are in a particularly bad economic state compared with their peers in the European Union.²¹⁵ Stating that "American poverty rates are the highest in the developed world," the book devotes much ink to rising income disparity and rising poverty rates and increasing yacht ownership rates.²¹⁶ In a stunning capitulation to irony, Freeman & Rogers appear to offer open-source unionism as a solution to the salary struggles of lawyers—a group that appears to enjoy low poverty rates, above-average income and above-average mobility.

Even so, Freeman & Rogers insist that open-source unionism would operate differently from majority-status collective bargaining.²¹⁷ They provide negligible evidence that such hopes can be realized. It is possible that unions that are willing to accept postmodern individualism as its membership norm might gain traction with workers who today appear uninterested in unionization. Still, open-source labor organizations wherein the unit lacks majority support at the workplace present risk to firms and unions. Robert Gorman and Matthew Finkin explain: A "labor organization may be recognized as a bargaining representative for all employees only when it has been, in the terms of section 9(a) of the

²¹⁰ FREEMAN & ROGERS, *supra* note _____ at 194.

²¹¹ FREEMAN & ROGERS, *supra* note _____ at 196.

²¹² FREEMAN & ROGERS, *supra* note _____ at 195.

²¹³ FREEMAN & ROGERS, *supra* note _____ at 2.

²¹⁴ FREEMAN & ROGERS, *supra* note _____ at 41.

²¹⁵ FREEMAN & ROGERS, *supra* note _____ at 41.

²¹⁶ FREEMAN & ROGERS, *supra* note _____ at 41.

²¹⁷ FREEMAN & ROGERS, *supra* note _____ at 193-194.

labor Act, ‘designated or selected for the purposes of collective bargaining by the majority of employees in a unit appropriate for such purposes.’”²¹⁸ Gorman and Finkin concede that the LMRA “interposes no bar to a contract between employer and minority union when the union acts as spokesman not for all employees in the unit but only for those employees who are members of that union or otherwise authorize it to bargain on their behalf.”²¹⁹ While “members-only” agreements do not violate the LMRA, “their legality becomes questionable when the employer either denies comparable ‘members-only’ bargaining to another organization or extends to one union in a ‘members-only’ contract such favorable terms that it appears to be affording that union a position of privilege within the plant and an improper inducement for other employees to join.”²²⁰ Although open-source unions may strengthen commentator Kye Pawlenko’s proposal to resurrect rival unionism by making competition more likely,²²¹ minority unions of the open-source variety pose risks for both employers and unions under prevailing interpretations of the LMRA. An employer that expresses its preference for a minority open-source union by engaging in discriminatory action against another labor organization or via some other form of favoritism violates section 8(a) (1) and (2) of the LMRA.²²² Admitting these perils, Freeman & Rogers take shelter in this claim: “The issue has been neglected so long that clarification of the NLRB’s position is needed.”²²³ Even though clarification may be desirable, it is doubtful that it will be forthcoming in the near future.

D. Examining Freeman & Rogers’s Reform Position

In addition to open-source unionism, Freeman & Rogers question legal rules that preclude workplace committees,²²⁴ and propose vitiating the legal force of the Supreme Court’s decision in *San Diego Building Trades v. Garmon*,²²⁵ which held that states cannot regulate activity which the LMRA protects as part of a strategy aimed at devolving labor law to the states.²²⁶ Although legislation allowing workplace committees may be a helpful innovation, it is doubtful that it will dramatically change the life of workers. As we have seen, recent evidence confirms the contemporary demise of similar labor vehicles in Europe. Moreover, the devolution which Freeman & Rogers pursue appears dubious given the strength of the Supreme Court’s commitment to the doctrine of preemption.²²⁷ Ultimately, however, the book returns to a consistent refrain: The U.S. labor relations system is broken

²¹⁸ GORMAN and FINKIN, *supra* note ___ at 270. *See also*, Charles J. Morris, *Minority Union Collective Bargaining: A Commentary on John True’s Review Essay on the Blue Eagle at Work and a Reply to Skeptics Regarding Members-Only Bargaining Under the NLRA*, 27 BERKELEY J. EMP. & LAB. L. 179, 180-207 (2006) (reaffirming the thesis that minority-union bargaining is defensible within the meaning of the National Labor Relations Act).

²¹⁹ GORMAN AND FINKIN, *supra* note ___ at 273.

²²⁰ GORMAN AND FINKIN, *supra* note ___ at 273.

²²¹ *See generally* Kye D. Pawlenko, *Reevaluating Inter-Union Competition: A Proposal to Resurrect Rival Unionism*, 8 U. PA. J. LAB. & EMP. L. 651-706.

²²² GORMAN AND FINKIN, *supra* note ___ at 273.

²²³ FREEMAN & ROGERS, *supra* note ___ at 231 n.22.

²²⁴ FREEMAN & ROGERS, *supra* note ___ at 205-208.

²²⁵ 359 U.S. 236 (1959).

²²⁶ FREEMAN & ROGERS, *supra* note ___ at 208-209. *See also*, GORMAN and FINKIN, *supra* note ___ at 1081 (Stating that *Garmon* stands for the proposition that a state cannot prohibit conduct that the federal law protects).

²²⁷ *See supra* Part II A.

because it does not give workers what they want.²²⁸ This contention deserves a book-length reply. Here, however, I will simply point to a few inconvenient facts.

Freeman & Rogers's basic allegation that the labor system is fractured reflects the fear that unions have become irrelevant despite extensive counterfactual evidence substantiating persistent growth in union political influence and economic wealth.²²⁹ It is possible that labor's current difficulties correspond with despair regarding the progressive agenda as the economic and political conditions that have enabled the NLRA/LMRA to succeed in the past have come to an end.²³⁰ Persistent decline in union density rates is consistent with Richard Epstein's forecast that private sector unions will continue to lose ground because they no longer provide their membership with benefits that outweigh their costs.²³¹ Indeed, current union density fails to differ greatly from union penetration rates prior to the passage of the NLRA.²³² Thus, the return to the *status quo ante* fails to constitute a principled ground for alarm unless one retains a predisposition to favor collective solutions.²³³ Although Freeman & Rogers's foundational claim (a broken labor relations system) constructively gives space for individual disinterest in collective labor organizations, this claim seems inescapably tied to some conception of collectivization. One labor commentator advances this position directly:

The war is between those who support collective values and well-being for all and those who support unbridled individualism; between those who value workplace and social democracy and those who promote workplace and governmental totalitarianism.²³⁴

First, Professor Dannin's contention dangerously misplaces "Madison's conception of human freedom and liberty grounded in consensual exchange."²³⁵ Second, her commentary misplaces governmental totalitarianism by situating it inaccurately on the side of the individual as opposed to the collective interest.²³⁶ Like many labor union advocates, Professor Dannin subordinates workers' freedom, liberty and autonomy to majoritarian interest and collective conceptions of the good.²³⁷ Freeman & Rogers's approach appears both sympathetic to Professor Dannin's position yet superior to it because it concedes the possibility that the workers' interest can and will diverge from the interests of labor unions.

Nevertheless, Freeman & Rogers appear to retain an uncritical yearning for collective labor organizations that rose out of the passage of the labor laws of the 1930s. Such laws

²²⁸ FREEMAN & ROGERS, *supra* note _____ at 209-210.

²²⁹ Harry G. Hutchison, *Compulsory Unionism as a Fraternal Conceit? Free Choice for workers: A History of the Right to Work Movement*, by George C. Leef, 125, 126-127 U. C. DAVIS BUS. L. J. (2006) (citing evidence of the continued growth in total receipts by several major unions, which make up the AFL-CIO while membership levels declined) [hereinafter, Hutchison, *Compulsory Unionism as a Fraternal Conceit?*].

²³⁰ Hutchison, *Compulsory Unionism as a Fraternal Conceit?*, *supra* note ____ at 127.

²³¹ Richard A. Epstein, *A Common Law for Labor Relations: a Critique of the New Deal Labor Legislation* 92 YALE L. J. 1357 (1983).

²³² Hutchison, *A Clearing in the Forest*, *supra* note ____ at 134 n. 216.

²³³ Hutchison, *A Clearing in the Forest*, *supra* note ____ at 134 n. 216.

²³⁴ Ellen Dannin, *At 70, Should the National Labor Relations Act Be Retired?; NLRA Values, Labor Values, American Values*, 26 BERKELEY J. EMPL. & LAB. L. 223, 274 (2005).

²³⁵ Hutchison, *Compulsory Unionism as a Fraternal Conceit?*, *supra* note ____ at 158.

²³⁶ Hutchison, *Compulsory Unionism as a Fraternal Conceit?*, *supra* note ____ at 158.

²³⁷ Hutchison, *Compulsory Unionism as a Fraternal Conceit?*, *supra* note ____ at 158.

were justified, at least in part, in order to ensure industrial peace.²³⁸ In reality, industrial peace declined after passage of the 1930s labor legislation which deflates this rationale for compulsory unionism.²³⁹ Coherent with the industrial peace rationale that led to the passage of the NLRA, Freeman & Rogers maintain, despite rapid economic growth, low unemployment and productivity increases over the past decade, that a labor relations system that does not deliver voice to workers is a calamity.²⁴⁰ This essentially unreflective claim concentrates on the allegation that American workers truly want voice and the speculative contention that the existing labor system has failed to deliver adequate income distribution, adequate real earnings growth and defensible health benefit levels.²⁴¹ A more balanced approach would enhance the persuasiveness of their claims.

Consider income equality for example. Freeman & Rogers's discussion of income inequality, neglects a key factor—the aging of the population.²⁴² There are two basic sources of income: wage income and income from capital, and the distribution of income depends upon the distribution of ownership of labor and capital.²⁴³ Professor Tatom shows that income variation should be expected to, and does, rise when older, less equal groups come to dominate the population.²⁴⁴ In addition, increasing amounts of Americans' income is not reported for tax reasons and escalating amounts of income “are now being realized through payments for fringe benefits, especially health care insurance, employer contributions for retirement income, vacations, sick leave and other benefits.”²⁴⁵ Evidently, such benefits are more equally distributed across actual income levels. Thus the rise in benefits gives the *appearance* that wages and salaries, excluding benefits, are rising much more slowly among lower wage workers and that higher income workers have disproportionately higher reported income for tax purposes.²⁴⁶ Real compensation per hour has been growing very rapidly this decade contrary to popular opinion.²⁴⁷

[Moreover,] analysts who think that workers are falling behind focus on manufacturing wages where globalization might have taken its biggest toll on less well-educated and less competitive workers. This conception of developments in manufacturing could not be further from the truth. Manufacturing real wages have risen at a 3 percent annual rate since mid-1997, somewhat faster than in the overall business sector where real wages rose at a rapid 2.7 percent.²⁴⁸

Thus, one explanation for the decline in unionization can be found in the fact that private sector workers are doing better than prevailing expert opinion admits; hence, there is little

²³⁸ See e.g., Edwin Viera, Jr. *Poltrons on the Bench: The Fraud of the “Labor-Peace” Argument for Compulsory Public-Sector Collective Bargaining*, 18 GOV'T UNION REV. 1, 2 (1998) (discussing the 1930s labor legislation).

²³⁹ See e.g., Charles W. Baird, *Toward Voluntary Unionism*, published in the JOURNAL OF PRIVATE ENTERPRISE, VOLUME XVII, No. 1 (Fall 2001), available at <http://www.cbe.csueastbay.edu/~sbesc/volunion.html> (last visited May 2, 2006) (“The incidence of strikes and strike violence escalated dramatically after 1935”).

²⁴⁰ FREEMAN & ROGERS, *supra* note ___ at 209-210.

²⁴¹ FREEMAN & ROGERS, *supra* note ___ at 210.

²⁴² Tatom, *supra* note ___ at 2.

²⁴³ Tatom, *supra* note ___ at 2.

²⁴⁴ Tatom, *supra* note ___ at 2.

²⁴⁵ Tatom, *supra* note ___ at 3.

²⁴⁶ Tatom, *supra* note ___ at 3.

²⁴⁷ Tatom, *supra* note ___ at 4.

²⁴⁸ Tatom, *supra* note ___ at 4.

economic urgency propelling unionization today. Tatom's results provide a startling contrast with the picture painted by Freeman & Rogers's reliance on survey data. Although feelings may matter, the authors' acceptance of survey results suggesting that workers *feel* that they are underpaid appears to be less reliable given the accessibility of actual data connected to an aging populace and income distribution. The failure to examine actual data may fatally undermine Freeman and Rogers's results and correlative claims and proposals.

This is not the only example of the price paid for uncritical acceptance of survey results. Other costs can be found in the authors' credulous embrace of European works councils, their embrace of post-WRPS survey results suggesting that workers are dissatisfied with employers' failure to pay a "fair share" of health care costs.²⁴⁹ and survey results favoring more legal protection for workers.²⁵⁰ Consider legal protection for workers. If one contemplates reality as opposed to survey results, it is possible to make the case that the expansion of legal protection to workers in the workplace has displaced labor unions and contributed to the decline in unionization in America.²⁵¹ Although cause and effect may be difficult to discern, Professor Stephen Bainbridge demonstrates that in many cases public law enactments have displaced the need to unionize.²⁵² The actual enactment of legal protections which Freeman & Rogers appear to champion may undermine the very representation by labor organizations they cherish.

Finally, dispassionate analysts should consider the methodological basis of Freeman & Rogers's conclusions with a healthy degree of skepticism. The authors' reliance on survey research breathes life into Harvey Mansfield's admonition, which he applies to political science's attempt to arrive at universal propositions.²⁵³ It applies with equal force to Freeman & Rogers's attempt to universalize labor analysis. Mansfield shows that political science, because it concentrates on the study of politics, ought to be sensitive to the importance of information and data.²⁵⁴ Nonetheless, political science, like other abortive social sciences aims to *abstract* from individual data names and positions in order to arrive at universal propositions.²⁵⁵ Survey research is a quintessential example of this move. "Yet human beings and their associations always have names; this is how they maintain their individuality. Names mark off the differences between individuals and societies or other groups, and they do so because the differences are important to us."²⁵⁶ Therefore no matter

²⁴⁹ See e.g., FREEMAN & ROGERS, *supra* note ____ at 11.

²⁵⁰ FREEMAN & ROGERS, *supra* note ____ at 155-160 (since the authors were apparently disappointed with survey results generated by the Employment Policy Foundation, a business-supported group, Freeman and Rogers designed a slip-question survey which suggested that in many areas, workers felt that there were too few legal protection for workers).

²⁵¹ Stephen M. Bainbridge, *Employee Involvement in Workplace Governance: Post-Collective Bargaining: A Retrospective on Selznick's Law, Society, and Industrial Justice*, at 14 (working paper, available at <http://www.ssrn.com>)[hereinafter, Bainbridge, *Employee Involvement*].

²⁵² Bainbridge, *Employee Involvement*, *supra* note ____ at 14 ("The Family & Medical Leave Act grants unpaid leave for medical and other family problems. OSHA mandates safe working conditions. Plant closing laws require notice of layoffs. Similarly, many of the protections once provided by grievance arbitration are now provided by adjudication. Judicial erosion of the employment at will doctrine has taken the place of the just cause provision implied into collective bargaining agreements by many arbitrators. Protection against discriminatory firing, once the subject of grievance arbitration, is now mainly a matter for civil rights litigation.").

²⁵³ Harvey Mansfield, *How to Understand Politics*, FIRST THINGS, 41 (August/September 2007).

²⁵⁴ Mansfield, *supra* note __ at 41.

²⁵⁵ Mansfield, *supra* note __ at 41.

²⁵⁶ Mansfield, *supra* note __ at 41.

how much anonymous survey data is accumulated, it is crucial to note that although “[y]ou can think your way to an abstract individual or society without a name, you cannot be one or live in one.”²⁵⁷ The American workplace is comprised of individuals and not universal propositions. Taken together then, while *What Workers Want? Updated 2006 Edition* is a welcome addition to the literature, the methodology on which the authors rely coupled with flaws in their overall approach imply that the book suffers from credibility issues that undermine its usefulness.

Conclusion

Like social scientist Robert Lynd who sought to engage the people directly in order to provide a guide for progressive social change,²⁵⁸ Freeman & Rogers attempt to engage workers directly in bid to provide progressive workplace changes that workers want. John Dewey and his acolytes²⁵⁹ promoted personal participation in society as an idealized vehicle to transform human life and create a new shared culture.²⁶⁰ Similarly, the authors of *What Workers Want*, having ostensibly discovered that workers want to influence, direct and transform the workplace, now offer “voice” as a new workplace ideal. On the surface, Freeman & Rogers’s reliance on results derived from workers’ responses appears to neglect the possibility that workers must depend on expert opinion or alternatively that workers are transformed by submitting to the recommendations of their betters.²⁶¹ Obtaining information about workers’ workplace preferences through WRPS and confirmatory post-WRPS surveys appears to have the advantage of providing more accurate information about the preferences of workers than observations premised on the superiority of experts.²⁶²

However, whatever advantages the authors’ approach may possess are minimized because the book declines to explain the survey results by appealing to incentives.²⁶³ Consideration of incentives and their probable effect on workers’ responses generates uncertainty about the value of the surveys the book endorses. The authors’ less than skeptical interpretation of survey results implies that workers are dissatisfied and discontented with labor-relations at the workplace. Freeman & Rogers overlook competing survey results as well as their own results which indicate workers are not only satisfied with labor-relations, they are satisfied with their jobs. Moreover, the authors ignore the possibility that dissatisfied workers (particularly in a vibrant economy) have the option of exiting their current firm and seeking work elsewhere.

Equally apparent, the authors fall short of appreciating that the attractiveness of collective groups (labor unions or otherwise) varies inversely with the legal protections already available to employees in the workplace and disregard persuasive evidence that

²⁵⁷ Mansfield, *supra* note ___ at 41.

²⁵⁸ SHANNON, *supra* note ___ at 113.

²⁵⁹ SHANNON, *supra* note ___ at 67 (John Dewey offers a partly scientific but largely unsuccessful effort to apply evolutionary biology to human life wherein participation as a form of communication replaces contract as the nexus of scientific rather than economic exchange.).

²⁶⁰ SHANNON, *supra* note ___ at 190 (discussing Richard Rorty, John Dewey’s disciple, who advocates a social vision comprised of maximum material prosperity combined with a constantly transforming culture composed of participatory, self-creating individuals).

²⁶¹ See e.g., Sandra J. Peart & David M. Levy, *Attitudes Towards Race, Hierarchy and Transformation in the 19th Century*, 47 THE HISTORY OF ECONOMIC THOUGHT 15, 22-24 (2005) (describing this viewpoint).

²⁶² Peart & Levy, *supra* note ___ at 11.

²⁶³ For a discussion of this issue, see Peart & Levy, *supra* note ___ at 25 (classical economists often appeal to incentives to explain outcomes and differences between people and different responses by people in arguing that people should retain the opportunity to make choices for themselves).

signifies collective voice offers fewer solutions than they imply.²⁶⁴ The book declines to balance survey results with verifiable data illustrating that real income for American workers is rising, European “employee voice” initiatives are weakening, and European unemployment rates remain robust. Although Freeman & Rogers’s approach valorizes a regnant social scientific and regulatory view requiring human life to be studied—perhaps endlessly,²⁶⁵ the authors’ diagnosis and prescription are fractured by analytical gaps (such as their employer hostility thesis) that threaten their hopeful recommendations for changing America’s workplace. These fissures expose a conflict that is distinct from the perpetual clash between workers and employers—an ossifying contradiction between what workers actually want and what labor experts want them to want. Freeman & Rogers’s social science breathes life into the iatrogenic prospect. Workers, therefore, should be wary of their prescriptions for reform.

²⁶⁴ See e.g., Addison & Belfield, *supra* note ____ at 1-30 (suggesting that union voice in particular manages to summon only a modicum of empirical support but remains in urgent need of restatement); Addison, Schnabel, and Wagner, *supra* note ____ 1-28 (despite Works Councils and co-determination, union density is declining sharply in Germany); Bainbridge, *Participatory Management*, *supra* note ____ at 661-665 (citing some of the problems associated with increased worker participation).

²⁶⁵ See McClay, *supra* note ____ at vii-xii (discussing Christopher Shannon’s book).