

## Articles & Essays

### INTRODUCTION: WORKER REPRESENTATION . . . AGAIN!†

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The subject of this Symposium, The Worker Representation and Participation Survey ("WRPS") eventually reported on in *What Workers Want*,<sup>1</sup> was motivated by practical policy concerns. In 1993, the Secretaries of Labor and Commerce in a new Clinton Administration jointly authorized the formation of a Commission on the Future of Worker-Management Relations. Chaired by John T. Dunlop, the former Secretary of Labor under Nixon and Ford and longtime dean of U.S. industrial relations, the formal charge of the Commission was broad. It was asked to make recommendations to the Secretaries on: (1) worthy ways (including "new methods and new institutions") to promote productivity through "labor-management cooperation and employee participation"; (2) changes in labor law to "enhance cooperative behavior, improve productivity, and reduce conflict and delay"; and (3) steps to "increase the extent to which work-place problems are directly resolved by the parties themselves," with the aim of reducing the enforcement burden on courts, agencies, and private litigants.<sup>2</sup>

We thought that this Dunlop Commission—especially with Freeman's subsequent appointment to it (along with other academic friends, business leaders known for good labor relations, two former Secretaries of Labor,

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1. RICHARD B. FREEMAN & JOEL ROGERS, *WHAT WORKERS WANT* (1999).

2. Commission on the Future of Worker-Management Relations, *Fact Finding Report*, May 1994, at xi.

and one former trade union leader, not to mention Dunlop himself)—offered us a unique opportunity to contribute to the national discussion about the future of U.S. industrial relations. Our proposed joint contribution was not another restatement of our own views on the subject, but the WRPS effort to bring the voice of American workers themselves into that discussion.<sup>3</sup> As we said at the time:

Understanding what employees want is vital to fashioning effective labor policies in an era when new technologies and forms of work organization demand change from both workers and managers, and national labor institutions are themselves changing. The characteristics of jobs and the demography of the workforce differ from what they were decades ago when the U.S. established its labor relations system. Private sector unions are in decline. Many firms are experimenting with employee involvement programs. Government regulation of the workplace has dramatically increased without parallel capacities to monitor and enforce the new laws. If these sorts of changes motivate a reconsideration of our national labor policies, they also underscore the need to hear directly from American workers [about] how they think the current system is performing.<sup>4</sup>

In undertaking this effort, we were not entirely naïve. We recognized that business and labor brought very different agendas to the Dunlop Commission, guaranteeing that its discussions would be difficult. Unions wanted the Commission to change labor law to level the playing field between management and labor in union organizing; business wanted it to reduce its regulatory costs and liabilities by promoting enforcement alternatives to courts and agencies, with many firms—particularly in new industries like information technology—regarding any discussion of reforming Depression Era labor laws of utter irrelevance to current needs. At the same time, both business and labor preferred the Commission's deliberations to be "inside the Beltway," where their control was greatest. Neither had much interest in blowing that discussion wide open to the views of American workers, especially as reported by a couple of suspect academics.

Still, we thought, if anyone could get a constructive discussion going between American managers and unions it was John Dunlop, who enjoyed the trust of both principals and a long history of expert labor-management mediation. And Dunlop was all for our effort, sharing our view that any

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3. To be clear here, we speak of what we did jointly. Freeman, of course, participated throughout in Commission deliberations, and pressed his own views. Rogers also testified before the Commission at one point, and served on a team of law professors, convened by Commission counsel Paul Weiler for advice.

4. Freeman & Rogers, *Worker Representation and Participation Survey: First Report of Findings*. December 5, 1994, at 2. (On file with the editors).

intelligent discussion of reform needed better information on what workers themselves wanted out of it. So it seemed to be worth a try.<sup>5</sup>

The eventual recommendations of the Commission were stillborn, a compromise of labor and business interests finally unwelcome by both sides. Those recommendations were stopped dead with the election of the 104th Congress, and its short-lived "Gingrich Revolution." But in retrospect, it seems unlikely they would have gotten far, even under Democratic leadership, had that revolution never occurred. And certainly they did not figure in President Clinton's subsequent "triangulation" reelection efforts, or resurface in his second term.

Now, with a Bush Presidency, it is possible that there will be a renewed push for some version of the TEAM Act that unions so despise and have previously beaten back—a proposal to excise the law's current prohibition of employer-dominated "company unions" without offering real unions anything in return. But it is hard to see how such a one-sided effort would pass this divided Congress, and TEAM was not in any case what the Commission had been recommending. All in all then, it's fair to say that the Commission's deliberations have vanished without a trace.

And what about the voice of the American worker in all of this? It too was barely heard. The Dunlop Commission took on some of the WRPS findings, but muffled them in the wrap of its non-starter compromise, and no major political figure has unwrapped them since. Indeed, the very topic of modernizing our industrial relations system seems to have receded from the scene. Despite some promises to labor by the Democratic nominee, it figured not at all, for example, in the Presidential election just past.

But if the issue of modernizing our industrial relations system is currently out of political fashion, the need is no less pressing than eight years ago. And whether the voice of workers is now listened to or not, it is still out there—and should be listened to if system reform is to be workable and constructive. Thus, we view this Symposium as dealing with a live and important set of issues, if not ones in the current political spotlight. And we appreciate the care with which other Symposium participants have engaged our work.<sup>6</sup>

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5. It may bear renewed emphasis here, contrary to the impression still held by some, that the WRPS was not "conducted under the auspices" of the Commission. Bruce E. Kaufman, *The Employee Participation/Representation Gap: An Assessment and Proposed Solution*, 3 U. PA. J. LAB. & EMP. L. 491, 492 (2001). And although Dunlop and some others on the Commission welcomed the effort, neither did the Commission fund the study or have any powers over its design.

6. We thank the members of this symposium for their thoughtful comments on *What Workers Want*. Special thanks to Professor Summers, from whom over the years we've learned so much and only grown in respect, for initiating the discussion. He belongs to an "old" school of research and writing on labor relations—at once normatively demanding, practically engaged, comparatively informed, and alive to experiment—that sorely needs

Their comments, both critical and complimentary, engage two basic questions about *What Workers Want*. First, the extent to which the book got the story on worker demand for voice and power essentially right. Second, insofar as our findings are correct, what they suggest about what is to be done.

On the first, the representation/participation gap, we believe that we did basically get it right, both in its scale and content. We agree with Matthew Finkin that, “at an irreducible minimum” the book has established “that a great many American employees feel a need for representation vis-à-vis their employers, that their need is not being filled, and that the reason for the gap between demand and supply can be attributed to American management’s unwillingness to relinquish authority or to share power.”<sup>7</sup>

And we disagree with those, here represented best by Professor Kaufman, who think we have exaggerated worker demand for voice, and with it the shortfall between present arrangements and what workers actually desire.<sup>8</sup>

Where our survey replicates, or is replicated by, others—as in the question about willingness to vote “union yes” in NLRB representation elections—there is great consistency between what we and others find. And if anything, public opinion since our survey shows increased support for greater worker voice. For instance, the Peter Hart Research polls conducted for the AFL-CIO over the past several years<sup>9</sup> report a drop in negative attitudes toward unions over the 1993-99 period from 34% to 23% and a corresponding increase in those positive or neutral about unions from 66% to 77%. Most telling, the Hart Research polls find that the share of non-union members who would vote union if given a choice tomorrow has gone up (from 39% to 43%), and that a majority of young workers aged 18-

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renewal.

7. Matthew W. Finkin, *Bridging the Representation Gap*, 3 U. PA. J. LAB. & EMP. L. 391, 392 (2001).

8. Some of Kaufman’s critique is simply mistaken. One of his strongest points for our exaggeration of the representation gap, for example, rests on a simple misreading of Table 3.4, which mapped the degree of satisfaction workers had with their influence against their attitudes toward other aspects of their job. We found that workers reporting high satisfaction with their influence tended to look forward to work more, rate industrial relations there more highly, trust management more, etc. than those less satisfied with their influence. Some eighty-five percent of those very satisfied with their level of say, for example, report usually looking forward to going to work, as contrasted with the fifty-nine percent of those not satisfied with their influence, who wish they did not have to go. Kaufman reads the table in reverse, interpreting us to say that eighty-five percent of those who look forward to going to work, themselves about two-thirds of our respondents, are very satisfied with their influence, and finds this, not surprisingly, a far bigger share than we elsewhere report. *Kaufman, supra* note 5, at 497.

9. These are summarized on the AFL-CIO’s website. Peter D. Hart Research Associates Inc., *Americans’ Attitudes Towards Unions*, AFL-CIO, at [http://www.aflcio.org/labor99/am\\_attitude.htm](http://www.aflcio.org/labor99/am_attitude.htm).

34 have especially positive attitudes and would likely vote pro-union in a hypothetical election.

Nor has the late 1990s economic expansion diminished worker skepticism about management's concern for their interests, negating the need for representation or participation. Replicating the WRPS, a late 2000 *Business Week* poll showed most workers giving business high marks for basic competence, but quite low ones in how they treat their employees. Only 6% of respondents thought business did an "excellent" job in "treating all of their employees well," for example, as against 63% who thought their performance at that was "only fair" or "poor." Comparable figures were reported on management performance in "providing job security for employees"—7% "excellent"; 65% "only fair" or "poor"—even at this time of record low unemployment. And, more generally, the public remains firmly committed to the view that corporate governance and behavior should reflect broader "stakeholder" interests than those of shareholders. Only 4%, for example, agree that profits and shareholder return should be the only goal of business; some 95% thought profits should sometimes be sacrificed for the well-being of employees or their communities.<sup>10</sup> Similarly, recent polls on job satisfaction support the basic story we told. In fact, the latest from the Conference Board, which surveys regularly on the subject, finds employee job satisfaction down substantially from the mid-1990s levels recorded around the time of our survey—among the 45-54 year olds, down 57% to 47% percent over 1995-2000; among 35-44 year olds, down 61% to 51% percent.<sup>11</sup>

All of these results, among others, support the basic contentions of *Work Workers Want* that relate to the magnitude of worker demand for more voice in workplace decision-making.

We are equally untroubled by ambiguities in the respective and overlapping roles of "cooperation," "power," and "voice" in that decision-making. These are noted by virtually all the commentators, and of special concern to Professor Bronfenbrenner in her critical remarks.<sup>12</sup>

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10. *Americans Have a Beef With Big Business*, BUS. WK., Aug. 31, 2000, at [www.businessweek.com/bwdaily/dnflash/aug2000/nf20000831\\_923.htm](http://www.businessweek.com/bwdaily/dnflash/aug2000/nf20000831_923.htm).

11. *Survey Shows Growing Job Malaise Despite Boom Times in U.S. Labor Market*, BNA EMP. POL'Y & L. DAILY, Oct. 17, 2000.

12. See Kate Bronfenbrenner, *What Do Workers Want: Reflections on the Implications of the Freeman and Rogers Study*, 3 U. PA. J. LAB. & EMP. L. 385, 385 (2001). About our pursuit of worker tradeoffs between power and management cooperation, Bronfenbrenner seems particularly upset that we did not ask workers about their feelings toward strong worker organizations enjoying cooperative relations with management, and weak ones suffering management hostility. We did not because we thought the "most preferred" and "least preferred" status of these conditions to be obvious, with further confirmation of that simply a waste of time. The question we wanted to get at was the more difficult tradeoff one, which we also took to be equivalent to a question about whether management attitude, or organizational form, dominated the outcome of worker attitude.

Bronfenbrenner is concerned that we understand worker demand for power, not cooperation. But the fact that even the most ardent union members answered our cooperation questions about the same as the general population gives us confidence that their answers really are a general view, and not an artifact of a misguided question design.<sup>13</sup> Reciprocally, that workers favoring "cooperative" relations in WRPS Wave 1 made clear in Wave 2 that cooperation entails some real effect on management decisions also reassures us. The term "cooperation" has meaning, and it does not denote "lying down." Workers want more power in their relations with management, and they want those relations to be more cooperative. Even recognizing the need—especially given management's dominion—for tradeoffs between these interests, this view is hardly incoherent. Indeed, it is what most people want in one-sided relationships that matter to them.

To be sure, there are things that we would do differently were we to start the WRPS today. Some questions would go, others would be added, and there would be alterations in the wording. But these sorts of changes are themselves clarified by the hindsight of what we have learned from the WRPS—par for the course in any research enterprise—and we doubt that they would alter its basic findings. In the meantime, small disagreements of degree about their scale and content—about whether our estimate of the percentage of workers really wanting "strongly independent" organizations is a bit high, or the percentage really wanting traditional unions a bit low—do not concern us greatly, since the broad brush strokes of this picture are just that. Better than 90% of private sector American workers—well over 100 million adults—have no workplace organization of any kind to talk collectively with employers, and very little protection if they sought one. Almost all say that they want both. The sheer magnitude of that unmet desire is what seems to us most important to keep in view.

Which brings us to the second question—what is to be done? There are many suggestions in the Symposium, and elsewhere, about how we might improve American industrial relations. All operate in some prescriptive policy space whose three dimensions are set by varying normative goals, assessments of what we know or think we know works best to achieve them, and estimates of the likely political support for either. Possible locations within this space are almost limitless in number; in any case, they vastly exceed our capacities for canvass here. We offer, then, just a few points—themselves midway between design desiderative and practical learning—to locate our own thoughts about what is practically desirable. Our affinities with or distance from alternative suggestions should be evident in their statement.

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13. This view was also indirectly confirmed by the like response of public sector workers and Canadian and other foreign workers.

*Free Experiment:* We take the most fundamental failing of present policy on worker representation to be its two-fold denial of voice, and of its appropriate form. *De jure*, our depression era labor laws offer workers and firms a very limited range of choice on worker representation in firm governance—a “0 or 1” choice between nothing and union collective bargaining. *De facto*, they offer even less, since they provide little to no curb to managerial resistance to unions, and resistance is pervasive.<sup>14</sup> Both things need to change. We should secure some hard floor on basic organizing rights, and permit, and indeed actively encourage, diversity in how they are organized. Among those in this symposium, Professor Hunter is at greatest pains to emphasize the importance of recognizing the variety of employment circumstances and attendant employee needs and wants. We share the point, perhaps even its critical application to our own analysis.<sup>15</sup> And while Professor Kaufman is right to bemoan the fact that we lack good data on the costs and benefits of different sorts of worker organization,<sup>16</sup> we think there no practical way to find those out absent some real-world experiment, which only makes it more important that experiment be permitted to begin.

This is not a foreign idea. The heart of our free enterprise system is to allow firms and workers to try (and often fail) different products and modes of production, and our Constitution reserves similar experimental powers to the states. (In this symposium, Professor Finkin offers some useful thoughts on how that might be encouraged in labor relations; these should be extended.<sup>17</sup>) This spirit of trying new things and reinventing old ones should be unleashed on our presently petrified system of labor relations. Let's see what new forms of labor and management organization free citizens can come up with, and let the most effective and generally

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14. Kenneth McLennan finds that management resistance to unions is “simply not credible” as a “major” explanation of their decline. Kenneth McLennan, *Worker Representation and Participation in Business Decisions Through Employee Involvement Programs*, 3 U. PA. J. LAB. & EMP. L. 563, 586 (2001). But given the many studies on this subject, and the sorts of facts reviewed here by Andrew Levin, we frankly find this view itself less than credible. Andrew S. Levin, *What Thirty Million Workers Want-But Can't Have*, 3 U. PA. J. LAB. & EMP. L. 551 (2001). Of course there are many sources of unions' present weakness—technological changes, changes in industrial structure, even wounds long self-inflicted. But growing employer hostility, and the law's lack of worker defense against it, certainly must figure centrally in the explanation of their present circumstance, and even their past difficulty in responding better to broad changes in the economy.

15. Larry W. Hunter, *Considering What Workers Want*, 3 U. PA. J. LAB. & EMP. L. 421 (2001). The growth of “non-standard employment” relations is emphasized as well in the recent MIT project on changing labor market institutions, which finds it probably the single most important challenge facing our current industrial relations system. See generally Paul Osterman et al., *The Task Force on Reconstructing America's Labor Market Institutions* (August 2000) (on file with editors).

16. Kaufman, *supra* note 5.

17. Finkin, *supra* note 7.

satisfying ones win.<sup>18</sup>

*Worker Stakeholders:* Effective twenty-first century U.S. industrial relations require breaking with our nineteenth century rules on corporate governance—which assign workers no real role in determining firm organization and strategy, and generally accord them no residual claim on the firm’s surplus. We quite agree with Jacoby<sup>19</sup> that corporate governance is the “missing link” in most discussions of worker representation, and one that is vital to attend and improve. The growth of employee owned businesses, the extension of stock options and other forms of shared capitalist compensation to workers, and the increased ownership stake of workers through their pension funds all provide a natural material base for such an effort. Their power should be harnessed to devise governance forms more in keeping with our broader goals for worker representation—beginning with more widespread encouragement of employee ownership, greater rights of control for employee owners (including, minimally, more control over the disposition of their present assets), and much better access, for worker-owners, to “inside” firm information.

*Bargaining in the Shadow of the Social Wage:* While there is much that impresses about the potential for decentralized bargaining and consultation—not least its ability to elicit otherwise impacted information for efficiency gains, and to add monitoring and enforcement capacities to public authority in securing workplace standards—it seems far less recommended for such basics as wages and social protections (health insurance, vacation time, family leave, etc.). We favor greater uniformity and higher levels of basic wages and social insurance, which in turn implies a greater governmental role in this area, and breaking with the New Deal system’s institutional orthodoxy on bargaining and organization, viz. that their site and level needed to be the same.

*Productive Solidarity:* While the Dunlop Commission made much of the efficiency and productivity contributions that better worker organization can make, the U.S. does little explicitly to encourage the development or harnessing of that contribution, or to reward it when made. This too should change, beginning with technical and other support to worker organizations that are intent on making such contribution, and their award of greater powers to participate in workforce development, modernization, and other economic development systems. The

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18. Of course, just how they would be judged to “win,” and the mechanisms for sorting “winners” from “losers,” are important continuing issues of debate. We are not unaware of these, but here simply wish to press the importance of opening up that debate and the underlying experimentation with different forms.

19. Sanford M. Jacoby, *Employee Representation and Corporate Governance: A Missing Link*, 3 U. PA. J. LAB. & EMP. L. 449, 450 (2001).



development of this role for worker organizations is one way both to domesticate conflicts with business, and secure their help in stewardship of the economy. Worker groups have, for example, the clearest stake in promoting “high road” economic restructuring in the U.S.—something that many parts of the business community desire, but will not and cannot do on their own. At the same time, worker groups, unions, and other forms of employee groupings are natural providers of a range of services to workers not now enjoying the benefits of organization—legal assistance, advice on career and financial management, access to training services, and the like.

Contrary to some of our critics, then, we do not think that an imported German works councils system or a system that simply lowers the costs of unionization fits the bill for U.S. labor relations in the twenty-first century. What we do think is that a modern labor relations system should give workers greater baseline protections, both procedural and substantive, in dealings with employers, as well as greater property rights in the firm. And we believe that worker organizations, no less than those of business, should be encouraged to take an explicit social role, including new forms of servicing their members, in the stewardship of the economy.

In composite, this seems to us an attractive package, and one resonant with deeply held American values and current economic and social need. It would give American capitalism a more human face, and workers and their organizations greater respect and a more disciplined social role. At the same time, it would almost certainly be good for the productivity of American business, the efficiency of public regulation, and the equity of our distribution of the benefits of social cooperation. Nor need one strain between the lines of *What Workers Want* to see that the effort to strike such a new deal at work would command enormous popular support. The people seem ready for it. It is principally their leaders who lag behind.

As these last comments indicate, what is sad is that U.S. public policy toward labor has been almost impervious to the voice of American workers. They, like others, want freedom and choice at the workplace. But in the dysfunctional and imprisoning ruins of our New Deal industrial relations system, the U.S. offers a more limited institutional menu, and gives management a greater role in choosing among the menu items, than any other society that calls itself democratic. Our labor laws are the least enabling of worker organization, and our political system is the least supportive for individual workers to resolve disputes with their employer, save the few who manage to go to court and sue that employer. Indeed, we now lack even public discussion of how worker interests might be better organized and heard.<sup>20</sup> For the quality of our public life together, it is hard

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20. No other country has gone as long as we without some fundamental reform of its industrial relations system; in most, the discussion of industrial relations trends and what they imply for the state is almost an ongoing topic of political debate.

to imagine anything more important than the rules on the governance of work, and yet in our actual government we hear almost nothing about them. Issues of vastly less importance routinely grab the attention of politicians on both sides of the aisle. Yet even the most thoughtful and constructive suggestions for improving the organization of our working lives, including some represented here, are birthed with the inimitable smell of things already close to death.

We leave it to readers to judge whether *What Workers Want* is what Bruce Kaufman calls “one of the ‘big books’ of modern industrial relations.”<sup>21</sup> In length it certainly is not—only 150 or so pages of text, and even those crowded with lots of tables and figures. But what is big, in our view, are the main findings of the book—that workers have well-formed views of how their workplace operates and how it can be improved; that they can make sensible considered judgments of potential changes in labor laws and institutions;<sup>22</sup> and that they overwhelmingly want something better than what the U.S. currently offers them.

We are confident that, eventually, these views of American workers will be heard. But for them to have political weight they need be listened to, and found agreement with them needs to be voiced by others—elected representatives, groups outside of labor, concerned citizens generally. As a society, we need to recognize that employee freedom at the workplace and a government responsive to its exercise, are not “special interests.” They are the daily guarantees of a democracy. Not listening to what workers want guarantees us less of a democracy than we can have, and that all of us should want.

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21. Kaufman, *supra* note 5, at 491.

22. We think this despite common worker confusion about the protections of current law. See here our discussion in Chapters 6 and 7.