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# YES, LABOR MARKETS ARE FLAWED— BUT SO IS THE ECONOMIC CASE FOR MANDATING EMPLOYEE VOICE IN CORPORATE GOVERNANCE

SCOTT A. MOSS\*

## I. INTRODUCTION

As a leading labor economist, Kenneth Dau-Schmidt is well-positioned to—and does—offer a persuasive, withering critique of the state of American labor markets.<sup>1</sup> Dau-Schmidt documents the economy's troubling mix of (a) wage decline for blue-collar workers at the same time as (b) substantially increased CEO compensation that, being dependent on short-term stock values, encouraged the excessive risk-taking that collapsed financial markets in 2008.<sup>2</sup> He also effectively notes key labor market flaws, such as information asymmetries, employee vulnerability to opportunistic terminations, other bargaining power disparities, and under-provision of public goods in the workplace.<sup>3</sup> These market flaws support Dau-Schmidt's view, which I share, that various current labor market outcomes disadvantaging workers are not just unfortunate consequences of hard-hearted, yet efficient, corporate decisions.<sup>4</sup> These outcomes also result from market flaws, and they justify a robust scheme of statutory and other rights for workers—union rights, compensation rights (wage as well as pension protections), and rights against employment actions that are discriminatory, retaliatory, or otherwise opportunistic.

Yet, I find myself unpersuaded by much of Dau-Schmidt's economic

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\* Associate Professor, University of Colorado Law School. The author thanks the following: Paul Secunda, for conceiving and organizing this symposium; Kenneth Dau-Schmidt, whose gracious feedback on my presentation and prior draft was helpful and deeply appreciated; fellow symposium participants Joseph Slater, Ann Hodges, Aditi Bagchi, Laura Cooper, and Michael Fischl; and Andrew Schwartz for his feedback on a prior draft.

1. Kenneth G. Dau-Schmidt, *Promoting Employee Voice in the American Economy: A Call for Comprehensive Reform*, 94 MARQ. L. REV. 765 (2011).

2. *Id.* at 793–94.

3. *Id.* at 781–82.

4. *Id.* at 780–81.

case for mandating increased union voice in corporate governance.<sup>5</sup> This Essay focuses on the reasons for that skepticism. I believe unions redress workplace power imbalances as well as a wide range of workplace violations and inequities, so I agree with union voice in *labor relations* because unions properly speak, negotiate, and advocate for their workers. But Dau-Schmidt argues for “promot[ing] employee voice in *both* corporate governance *and* labor relations,”<sup>6</sup> and it is on the former—requiring union voice in corporate governance—that I find the economic argument wanting for several reasons.

- Most of the labor market flaws Dau-Schmidt notes, such as employers’ incentives to make opportunistic terminations,<sup>7</sup> are not flaws that union voice in corporate governance would fix.
- Dau-Schmidt says financial market failures support union voice in corporate governance,<sup>8</sup> but the labor market lacks analogues to the main financial market flaws including speculative bubbles; debt, fraudulently or shortsightedly issued; and hedging and shorting by the same folks who sold the assets while betting they would fail.
- Employee voice in corporate governance, as a prescription, over-targets and mis-targets its disease. It goes beyond the market flaws it targets, yet it would not redress key flaws like short-term corporate thinking and the manufacturing decline underlying wage decline.

I come to these views despite sharing Dau-Schmidt’s perspective that economic analysis supports labor market interventions to protect workers.<sup>9</sup> I have argued that market forces do not stop discrimination due to cognitive biases,<sup>10</sup> information costs,<sup>11</sup> and cost externalization.<sup>12</sup> I have also argued that even if bias disappears, free markets are too path-dependent to eliminate disparities;<sup>13</sup> that ‘labor markets pervasively

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5. *See id.* at 820–31.

6. *Id.* at 800 (emphases added).

7. *Id.* at 781.

8. *Id.* at 820–31.

9. *Id.* at 821

10. Scott A. Moss & Daniel A. Malin, *Public Funding for Disability Accommodations: A Rational Solution to Rational Discrimination and the Disabilities of the ADA*, 33 HARV. C.R.-C.L. L. REV. 197, 207–08 (1998).

11. *Id.* at 201–03.

12. *Id.* at 203–06.

13. *See* Scott A. Moss, *Women Choosing Diverse Workplaces: A Rational Preference with Disturbing Implications for Both Occupational Segregation and Economic Analysis of*

deviate from the rational actor models that underlie skepticism (and narrow construction) of workplace laws;<sup>14</sup> and that courts hostile to litigation restrict employee lawsuits with inconsistent rulings<sup>15</sup> and procedural barriers.<sup>16</sup> Thus, I am not Dau-Schmidt's most hostile audience, yet I am still not persuaded by the economic case for mandating employee voice in corporate governance.

This Essay focuses on my points of skepticism, but that skepticism is limited to *economic* arguments for mandating employee voice in *corporate governance*, rather than just in labor matters. These are both important caveats. I agree wholeheartedly with employee voice through unions in labor matters, and I see important non-economic arguments for employee voice in corporate governance, even though the pure economic arguments are underwhelming. I also do not fault Dau-Schmidt just because his prescription is no cure-all for the downsides of a manufacturing and unionization decline that has vexed workers, policy-makers, and academics for decades. Dau-Schmidt's piece is a real contribution to the literature on the state of American labor markets and the appeal of employee voice. This Essay is a modest note of skepticism about the limited force of certain economic arguments supporting only the corporate governance portion of his case.

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Law, 27 HARV. WOMEN'S L.J. 1, 82, 84 (2004).

14. See Scott A. Moss & Peter H. Huang, *How the New Economics Can Improve Employment Discrimination Law, and How Economics Can Survive the Demise of the "Rational Actor,"* 51 WM. & MARY L. REV. 183, 189–90 (2009).

15. See Scott A. Moss, *Fighting Discrimination While Fighting Litigation: A Tale of Two Supreme Courts*, 76 FORDHAM L. REV. 981, 981, 987–95, 1004 (2007) [hereinafter Moss, *Discrimination*] (arguing that courts unduly restrict employee rights lawsuits by an inconsistent mix of narrowly construing statutes and conjuring up judicially created defenses); Scott A. Moss, *Where There's At-Will, There Are Many Ways: Redressing the Increasing Incoherence of Employment at Will*, 67 U. PITT. L. REV. 295, 298 (2005) [hereinafter Moss, *At-Will*].<sup>1</sup>

16. See Scott A. Moss, *Reluctant Judicial Factfinding: When Minimalism and Judicial Modesty Go Too Far*, 32 SEATTLE U. L. REV. 549, 552–54 (2009); see also Moss, *Discrimination*, *supra* note 15, at 1004.

## II. THE UNFORTUNATE STATE OF THE BLUE COLLAR LABOR MARKET—AND THE LIMITED PROMISE OF UNIONIZATION AS REDRESS

### *A. The Decline of Blue-Collar Labor Due to Intertwined Increases in Communications Technology, Production Technology, and Globalization*

A key premise of Dau-Schmidt's call for increased worker voice is that, despite recent decades of mostly solid national economic growth, "workers' wages and benefits have been stagnant—or even declining—for decades, increasing income inequality . . . as risks of job loss, medical expenses and training obsolescence have devolved from employers to employees."<sup>17</sup> He notes that the major cause is likely "the rise of global production using the new information technology," which increased employer ability to coordinate the production of their suppliers and contractors worldwide. With increased ease of foreign production of goods, "Americans compete with workers in developing countries across the globe [and] cheap labor . . . put[ting] tremendous downward pressure on wages and benefits on workers in developed countries."<sup>18</sup>

Wage stagnation is a complex phenomenon with causes other than globalization, but other key causes are technological as well. Even aside from globalization, "improvements in technology," Dau-Schmidt notes, "have improved capital's productivity . . . increasing capital's share" at labor's expense.<sup>19</sup>

Because of these changes, primarily driven by technological innovations, real wages in America have stagnated, especially in manufacturing. Over the span of a decade, from 2001 to 2010, the annual consumer price index (CPI) increase was 2.1% (23.5% over 10 years),<sup>20</sup> and average wages rose by barely more, just 2.8% (32.0% over 10 years).<sup>21</sup> But in manufacturing, real wages actually declined, with the

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17. Dau-Schmidt, *supra* note 1, at 767.

18. *Id.* at 775 & n.42; see also Jeffrey M. Hirsch, *Making Globalism Work for Employees*, 54 ST. LOUIS U. L.J. 427, 427–37 (2010) (noting effects of globalization on American workers).

19. Dau-Schmidt, *supra* note 1, at 795.

20. See BUREAU OF LABOR STATISTICS, CONSUMER PRICE INDEX, CPI DETAILED REPORT DATA FOR SEPTEMBER 2010, at 68 tbl.24 (2010), <http://www.bls.gov/cpi/cpid1009.pdf> [hereinafter BUREAU OF LABOR STATISTICS, CPI].

21. BUREAU OF LABOR STATISTICS, EMPLOYMENT COST INDEX: HISTORICAL LISTING, CURRENT-DOLLAR, MARCH 2001 – SEPTEMBER 2010, at 3 tbl.1 (2011), <http://www.bls.gov/web/eci/echistrynaics.pdf>.

annual increase of only 1.8% (19.6% over 10 years) lagging the CPI.<sup>22</sup>

*B. Manufacturing Decline Is the Primary Cause of  
Unionization Decline—So Unionization Is Dubious  
Redress for Manufacturing Decline*

Dau-Schmidt is correct that wages have declined “not only in manufacturing, but in any service in which work can be digitalized and sent . . . elsewhere in the world.”<sup>23</sup> Foreign call centers are the most famous and prevalent example of non-manufacturing jobs being shipped abroad, and higher-wage service work has gone overseas as well.<sup>24</sup> Medical services like radiology may be performed remotely, and media reports document examples of “medical tourism”—Americans going abroad for cheap surgeries, from face lifts to cardiac surgery.<sup>25</sup>

But call centers and medical tourism are just a few high-profile service sector examples; it is manufacturing that has borne the brunt of globalization-induced and technologically driven wage and job losses in America.<sup>26</sup> Over roughly three decades preceding the 2008 recession (1979–2007), the service sector grew while the goods-producing sector shrank.<sup>27</sup> Breaking down goods-producing jobs into subcategories illustrates that manufacturing is where the losses occurred: among the three goods-producing job categories, construction and mining were stable while manufacturing declined by over half, from 21.6% of jobs to only 10.1%, shedding over 5.5 million jobs.<sup>28</sup> No other category lost *one-*

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22. *Id.*

23. Dau-Schmidt, *supra* note 1, at 775, n.42.

24. Tom Kiskan, *Hospitals are Outsourcing Radiology Work*, VENTURA COUNTY STAR (Camarillo), Oct. 17, 2008. According to the article, NightHawk, a company based in Idaho that serves approximately 1,500 hospitals nationwide, sends scanned radiology images to 120 board-certified radiologists located in the United States as well as Australia and Switzerland. *See id.*

25. *Website Helps You Mix Medical Treatment, Travel*, FORT WORTH STAR-TELEGRAM, May 23, 2010, at E. Several countries, such as Mexico, Costa Rica, India, Thailand, and Korea, are becoming more attractive for Americans seeking less expensive medical treatments while also offering vacation opportunities. *See id.* For instance, the typical angioplasty treatment can cost \$57,000 in the United States, but will only cost \$14,000 in Costa Rica. *See id.* Similarly, a face lift will only cost approximately \$1,000 in India or Thailand, compared to \$15,000 in the United States. *See id.*

26. *See* LAWRENCE MISHLE ET AL., ECONOMIC POLICY INSTITUTE, THE STATE OF WORKING AMERICA 2008/2009 183–85 (2009).

27. *See id.* at 184 tbl. 3.25

28. *Id.*

*tenth* as many jobs as manufacturing.<sup>29</sup> These job losses accompany the wage losses detailed above—the decade of real manufacturing wages lagging the CPI by 0.3% even as wages overall beat the CPI by 0.7%.<sup>30</sup> Thus, technology-induced wage and job losses are overwhelmingly a manufacturing-centered phenomenon.

The manufacturing locus of wage and job loss explains much of the contemporaneous decline in unionization. Manufacturing was where unionization and productivity both spiked in the postwar era, when the United States faced a lack of competition while Europe and much of East Asia recovered from years of war. The recent unionization decline has been far greater in blue-collar jobs (down 55% from 1978 to 2005) than white-collar jobs (down 27% during the same period),<sup>31</sup> leading to several union-sympathetic economists' conclusion that it is "especially in the manufacturing sector [that] unions have weakened."<sup>32</sup>

With the most unionized part of the private sector, manufacturing, having shrunk by over half, it is unsurprising that unionization has declined by over half in blue-collar jobs.<sup>33</sup> Certainly, union-sympathetic laws could stem the tide, while union-hostile laws could accelerate the decline—and the National Labor Relations Board (NLRB), during its control by Republican appointees for the majority of recent decades, has issued rulings narrowing union rights and powers.<sup>34</sup> But with most of

29. *See id.*

30. *See* BUREAU OF LABOR STATISTICS, CPI, *supra* note 20, at 68 tbl.24.

31. *See* MISHEL ET AL., *supra* note 26, at tbl.3.35.

32. *See id.* at 206.

33. Hirsch, *supra* note 18, at 430 ("[T]he increased challenges for formal unions in the global economy [are] reflected by the worldwide decline in union membership. And although not the sole factor, globalism has been a significant contributor to this trend.")

34. As one frequently cited article about the NLRB notes:

[Since] 2004, the Board has issued a remarkable series of decisions weakening the rights of workers to engage in organizing and collective bargaining . . . authored by appointees of President [George W.] Bush. . . . This is hardly the first time that the Board has drawn sharp criticism for being perceived as tilting too far toward management . . . .  
 . . . [President Ronald] Reagan's initial nominees were not establishment-type management representatives with a basic commitment to the NLRA[.]. . . [T]hey were apostles for union avoidance . . . .  
 . . . [F]rom 1983–85, when the new set of appointees formed a majority, the Board's pattern of decisions changed remarkably[,] . . . [having] upheld only 52% of . . . unfair labor practice complaints brought against employers—a decline of roughly two-fifths . . . . The results were similarly telling . . . [in] representation cases.



the unionized sector collapsing, unionization was bound to decline too, even if union-empowering legal developments—NLRB rulings, National Labor Relations Act (NLRA) amendments, etc.—could decelerate the collapse somewhat. Jeffrey Hirsch notes that, due to globalization:

Many [American] workers . . . have seen their compensation and work conditions deteriorate or have simply lost their jobs. . . . [W]orkers' ability to fight these changes and pressure employers for better conditions has been undermined by the same global competition that has led employers to cut labor costs. Demands for better wages . . . are often ineffective, as employers know that they can eventually move their production elsewhere.<sup>35</sup>

More generally, where unions achieve gains for workers, it typically is not by helping to save jobs in dying industries. Rather, unions disproportionately achieve gains in thriving industries or with individual employers holding monopoly power. Dau-Schmidt notes as much: “[I]t seems much more plausible that unions could organize employers who enjoy product market power rents, Ricardian rents or quasi-rents . . . . [T]he best available evidence suggests that union wage increases come largely at the expense of employers and are strongly associated with the [firm’s] market power.”<sup>36</sup> This is a good defense against the argument that unions’ gains damage productivity or kill jobs: unions win gains mainly where there is plenty of wealth to spread around. But “globalism has reduced the quantity of such rents and the magnitude of rents that do exist,” which “limits employees’ ability to capture employer rents.”<sup>37</sup> If unions achieve gains mainly in thriving sectors, that calls into doubt how effective unions can be as a bulwark against the manufacturing decline that is diminishing unions and decreasing union-provided employee voice.

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James J. Brudney, *Isolated and Politicized: The NLRB's Uncertain Future*, 26 COMP. LAB. L. & POL'Y J. 221, 221, 223, 248 (2005).

35. Hirsch, *supra* note 18, at 427.

36. Dau-Schmidt, *supra* note 1, at 806–07.

37. Hirsch, *supra* note 18, at 437.

### III. LABOR MARKET FLAWS: REAL, BUT NOT NECESSARILY LENDING SUPPORT TO MANDATING MORE EMPLOYEE VOICE IN CORPORATE GOVERNANCE

Dau-Schmidt correctly catalogues several ways labor markets are flawed.<sup>38</sup> These flaws each support the case for varied reforms, but few support the particular reform of mandating more employee voice in corporate governance.

One labor market flaw Dau-Schmidt mentions is that there are “significant transaction costs . . . in long complex relationships such as the employment relationship where it is too costly to completely and expressly specify all terms of the relationship so that some remain implicit giving rise to incentives for opportunism” by employers, such as “incentive to renege on their implicit promise not to discharge employees before their thirty year pension vested.”<sup>39</sup> It is not clear how employee voice redresses strong employer incentives to renege on express and implied deals to pay deferred compensation—pensions, scheduled commission and bonus payouts, and late-career raises. What this opportunism risk supports is (a) protection of mandatory long-term compensation duties for employers, such as guarantees of pension solvency (e.g., the Pension Benefit Guaranty Corporation) and (b) an array of legal doctrines against terminations preventing imminent vesting of either a pension (e.g., the ERISA bar on taking employment actions to interfere with pensions<sup>40</sup>) or other deferred compensation (e.g., the implied covenant of good faith and fair dealing<sup>41</sup>).<sup>42</sup> Opportunism risk plausibly could support replacing employment at will with a rule requiring just cause for termination, if opportunism risk is high enough to outweigh the cost of decreasing employers’ personnel flexibility. A discussion of such a change is beyond the scope of this Essay; it suffices here to note that none of the relevant redresses for opportunism, whether narrow protections like ERISA rights or broad

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38. See Dau-Schmidt, *supra* note 1, at 781–82.

39. *Id.* at 781.

40. Employee Retirement Income Security Act (ERISA) of 1974 § 510, 29 U.S.C. § 1140 (2006).

41. See *Wakefield v. N. Telecom, Inc.*, 769 F.2d 109, 112 (2d Cir. 1985) (applying the implied covenant of good faith and fair dealing under New York law); see also *Fortune v. Nat'l Cash Register Co.*, 364 N.E.2d 1251, 1255–57 (Mass. 1977) (applying the implied covenant of good faith and fair dealing under Massachusetts law).

42. See generally Moss, *At-Will*, *supra* note 14, at 303–04, 342–62 (discussing economic and social norm theories supporting a broad array of such protections under state common law).

protections like for-cause rights, are really about employee voice.

The second labor market flaw Dau-Schmidt notes is “‘information asymmetry’ . . . [f]or example, if employees do not understand that the chemicals they work with will cause cancer in twenty years.”<sup>43</sup> But if employees do not know these flaws, it is not clear how more employee voice would help. This flaw supports aggressive regulation of risks employees cannot anticipate well—workplace toxins, pension fund bankruptcy, etc. While this flaw also does not support employee voice, it does support mandatory employer disclosure of known risks (akin to consumer warnings), mandatory workplace postings on worker rights, etc.<sup>44</sup>

A third labor market flaw Dau-Schmidt notes is, at least in certain industries, that “employers generally have [much] more bargaining power because they have more choice of employees than the employees have choice of jobs, and large employers are usually not significantly inconvenienced by the loss of an employee, while an employee loses his or her livelihood with the loss of a job.”<sup>45</sup> This flaw supports unionization to beef-up worker bargaining power, but the benefit of the union here is its raw power in labor negotiations, not its voice.

Fourth, and less typically noted, is Dau-Schmidt’s creative point that “many terms of employment are ‘public goods’” because they are “non-rivalrous, in that many people can enjoy the same good, and non-excludable,” in that the producer of the public good “cannot exclude others from also enjoying” it:<sup>46</sup>

[E]xamples in the workplace include the speed of the assembly line, the cleanliness of workplace air, the level of noise in the plant, and even the type of health insurance the employer provides. . . . [E]ach employee has incentive to hold back and ‘free-ride’ on the efforts of others to gain the public good, with the result that too

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43. Dau-Schmidt, *supra* note 1, at 781.

44. ROBERT S. PINDYCK & DANIEL L. RUBINFELD, MICROECONOMICS 294 (5th ed. 2001). “Market failure can also occur when consumers lack information about the quality or nature of a product and so cannot make utility-maximizing purchasing decisions.” *Id.* Because consumers may lack this information, government intervention may be necessary to avoid this failure in the market. “Truth in labeling” is one example of government intervention aimed at ensuring consumers have adequate information to make utility-maximizing decisions about the products they purchase.

45. Dau-Schmidt, *supra* note 1, at 782–83.

46. *Id.* at 781–82.

little of the good is negotiated.<sup>47</sup>

Theoretically, a lack of workplace public goods supports Dau-Schmidt's prescription of union voice. At least for public goods benefitting employees (e.g., air quality—but not assembly line speed, which benefits the employer more), a union includes all benefitting from the good, so unions have more incentive than any one worker to pursue a good and explain its need. But there is not clearly a deficit of workplace public goods, in the sense of things one or few employees control or know, yet from which many would benefit. Certainly many workplaces' air quality, insurance, etc., is subpar—but how much of the cause is the “public good” problem that only a small number of employees know of the problem or have incentive to fix it? Many employers offer subpar air, insurance, etc., just to save money—not because employees fail to know or explain the problem enough. Ultimately, Dau-Schmidt's public goods suggestion is intriguing, but brief and largely theoretical. This argument could be a topic for future work, but for now it is just a theoretical possibility.

In sum, most of the labor market flaws Dau-Schmidt notes (opportunism, information asymmetry, and bargaining power) do not support mandating more employee voice in corporate governance; others, including the under-provision of public goods, are insufficiently shown to exist. More generally, Dau-Schmidt's Article seems to mismatch problems (various labor and financial market flaws) with solutions (mandating more employee voice). As Josh Wright has argued, “it is incredibly common practice . . . to jump from the identification of a behavioral or cognitive bias . . . to accepting that some regulation must be appropriate.”<sup>48</sup> All markets are imperfect; just noting a flaw or bias and then “argu[ing] that the bias undercuts” all market outcomes provides insufficient basis for any particular reform.<sup>49</sup> The relevant questions are which particular flaws exist, in which market, and which particular regulations might redress these flaws. As discussed in the next section, Dau-Schmidt is even more adventurous in claiming support for his proposed labor market reform based on the failures of financial markets, which trace substantially to flaws entirely absent from

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47. *Id.* at 782; see generally PINDYCK & RUBINFELD, *supra* note 44, at 644–49.

48. Posting of Josh Wright to Truth on the Market, <http://truthonthemarket.com/2009/08/21/jones-v-harris-and-some-ramblings-on-burdens-of-proof-empirical-evidence-and-behavioral-law-and-economics/> (Aug. 21, 2009, 11:19 EST).

49. *Id.*

labor markets.

#### IV. FINANCIAL MARKET FLAWS: SUBSTANTIAL, BUT LARGELY IRRELEVANT TO LABOR MARKETS

The 2008 financial crisis and ensuing recession showed financial markets to be deeply flawed, and Dau-Schmidt sees these market flaws as a sufficient indictment of corporate decision-making to justify mandating more employee voice as a way to inject new blood into a failed corporate decision-making structure. He notes that “the near collapse of our financial system” has made “particularly acute” the problem of “subordination of workers’ interests in . . . corporate governance and labor relations.”<sup>50</sup> Employee voice thus could improve corporate decision-making and thereby improve employee welfare, he argues.

Financial market flaws do support regulation of (a) financial markets and (b) executive compensation—and employee voice could help as to the latter. But the key financial market flaws are absent from labor markets, and thus have no relevance to labor markets, other than as to executive compensation.<sup>51</sup> And there is reason to doubt that employee voice would have prevented the short-term profit-seeking mentality underlying the financial crisis. So it is hard to see how financial markets’ failure supports Dau-Schmidt’s proposed reform.

##### A. *Financial Market Flaws Irrelevant to Labor Markets: Bubbles, Securitization, and Hedging and Other Bets on Failure*

While views vary on the causes of the financial crisis, “bubbles” in financial and real estate values were a key market failure,<sup>52</sup> though other information-related flaws also underlie those bubbles.<sup>53</sup> First, major

50. Dau-Schmidt, *supra* note 1, at 784.

51. See RONALD G. EHRENBERG & ROBERT S. SMITH, *MODERN LABOR ECONOMICS* 301 (8th ed. 2003); see also Richard A. Posner, *Are American CEOs Overpaid, and, If So, What If Anything Should Be Done About It?*, 58 *DUKE L.J.* 1013, 1040–41 (2009).

52. Posner, *supra* note 51, at 1040–41.

53. Erik F. Gerding, *Laws Against Bubbles: An Experimental-Asset-Market Approach to Analyzing Financial Regulation*, 2007 *WIS. L. REV.* 977, 1032 (“[M]any of the same phenomena that may contribute to the rise of asset-price bubbles — for example, behavioral biases and feedback loops — reverse dramatically and destructively during a bubble’s collapse.”); Nadelle Grossman, *Turning a Short-Term Fling Into a Long-Term Commitment: Board Duties in a New Era*, 43 *U. MICH. J.L. REFORM* 905, 936 (2010).

[I]nformation biases . . . make investors more short-termist than they

financial institutions on which the entire system depended (AIG, Lehman Brothers, etc.) were worth so much less than everyone thought that they could not survive, and millions of homeowners, once rates rose or once they lost their jobs, held mortgages they could not afford or that came to be worth more than their properties.<sup>54</sup> It is hard to see much analogy to labor markets, where bubbles do not exist. Labor may be overvalued, but when attorneys are overpaid, layoffs, pay cuts, and cheaper billing correct excess more easily than pricey thirty-year mortgages can be corrected. At worst, some labor markets are slow to adjust to changed demand for a slow-to-develop skill, and “the failure of [labor] supply to adjust immediately to changed market conditions can cause boom-and-bust cycles.”<sup>55</sup> If demand for a new skill increases rapidly (e.g., computer programmers in the 1990s), wages may spike until the years it takes for more workers to develop the skill;<sup>56</sup> if demand for the skill later decreases, wages will sharply decline because of the glut of workers who developed that skill.<sup>57</sup> But wages rising and falling sharply to reflect skill scarcity or surplus accurately is not a bubble akin to the inaccurately inflated, then collapsing, values that financial markets see.

Second, securitization and derivatives of overvalued assets, like real estate, made the financial bubble much more widely spread in the economy.<sup>58</sup> Seemingly safe mutual funds and retirement investments came to include risky real estate debt packaged into “investment-grade mortgage-backed securities” that eventually proved “far riskier than

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might otherwise be. Investor short-termism also emerges from investors’ irrational behavior, exemplified by the current financial crisis in which investors got caught up in the housing bubble and herded to the same financial securities despite the long-term risks of those investments.

Grossman, *supra*, at 936.

54. Gregory Scott Crespi, *The Trillion Dollar Problem of Underwater Homeowners: Avoiding a New Surge of Foreclosures by Encouraging Principal-Reducing Loan Modifications*, 51 SANTA CLARA L. REV. 153, 153–54 (2011) (“[T]here are at least 11.3 million U.S. homeowners, and probably as many as 15.2 million or more, who are ‘underwater’ in that the outstanding balances on their mortgages exceed the market value of their homes . . . . These two estimates constitute 23% and 32.2%, respectively, of all mortgaged residential properties.”).

55. EHRENBERG & SMITH, *supra* note 51, at 301.

56. *See id.* at 301–02.

57. *See id.*

58. *See generally* Timothy M. Sullivan, *Federal Preemption and the Rating Agencies: Eliminating State Law Liability to Promote Quality Ratings*, 94 MINN. L. REV. 2136 (2010).

previously thought.”<sup>59</sup> Labor markets have no real analogue to securities and derivatives, so the failure of certain workplaces or job types does not broadly infect the entire economy, such as by destroying a pension fund unrelated to the collapsing workplace or job category.

Third, real estate markets feature another flaw labor markets lack: players betting on, or indifferent to, failure. Sketchy mortgage peddlers (brokers and banks alike) had incentive to expand their customer base by offering mortgages to those previously, and accurately, deemed bad mortgage risks.<sup>60</sup> Such mortgages unsustainably depended on a mix of initially low, but rising, adjustable rates<sup>61</sup> and income-reporting fraud.<sup>62</sup> Such ill-fated overselling has no labor market analogue. The closest might be headhunters and placement agencies—but those entities play a limited role in labor markets and cannot drive excessive hiring or wages to the extent financial markets saw with mortgages. Worse, “hedging” and “shorting” deeply wounded financial markets: major financial players drew profit from the failure of even investments and assets they

59. *Id.* at 2145–46.

Large scale investors ... [including] pension funds invested heavily in mortgage-backed securities. ... [that,] especially those rated investment grade, were insulated from loss by overcollateralization of the investment pool and subordination of riskier tranches. ...

... [But] [a]s defaults and foreclosures mounted, mortgage-backed securities became distressed. ...

... [and] investment-grade mortgage-backed securities looked far riskier than previously thought. All three of the major rating agencies quickly lowered their ratings for large swaths of mortgage-backed securities.

*Id.*

60. Claire A. Hill, *Who Were the Villains in the Subprime Crisis, and Why It Matters*, 4 ENTREPRENEURIAL BUS. L.J. 323, 323–33 (2010).

61. Kyle Cutts, Comment, *City on the Brink: The City of Cleveland Sues Wall Street for Public Nuisance*, 58 CASE W. RES. L. REV. 1399, 1408 (2008) (noting “estimates that 2.5 million adjustable-rate mortgages will adjust to higher rates . . . , threatening households already struggling to pay the lower rates. Often, this leads to default”).

62. Hill, *supra* note 60, at 335.

A mortgage originator making a loan that would very quickly adjust to require a payment the originator basically knew the borrower could not afford might not have been lying . . . . But the strategy behind such loans would seem to have been to make many of them, quickly realize large amounts of fee income, and be nowhere around when the defaults began

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*Id.*

had marketed or touted themselves.<sup>63</sup> There is no analogue to hedging or shorting in labor markets, nothing encourages excess hiring by allowing a firm to profit from worker failure.

In sum, financial markets feature numerous flaws that labor markets do not. Much of the financial crisis, therefore, is not very relevant to labor markets. I agree that labor market regulation conceivably could draw support from two particular financial market flaws detailed below: excessive executive compensation and unduly short-term decision-making. But as discussed below, the executive compensation problem supports only limited reform, and unduly short-term decision-making is a problem unions are unlikely to redress.

*B. Executive Compensation Encouraging Short-Term Thinking and Bad Risk: A Real Inefficiency, but One Supporting Only Limited Reform*

While America has seen declines in real wages for blue-collar and manufacturing workers, “American corporations have bestowed on senior executives enormous compensation packages that seem increasingly divorced from . . . rationality.”<sup>64</sup> Executive compensation has notoriously sharp ups and downs, unlike slowly rising hourly wages, but, overall, the average annual rise has been substantial.<sup>65</sup> After stagnating in the early 1990s, Chief Executive Officer (CEO) compensation more than doubled in a decade, rising 240% from 1995 to 2005.<sup>66</sup>

Skyrocketing executive compensation is a problem of both fairness and morality, but it also is a problem of inefficiency, in two ways. First, executive compensation exceeds efficient levels due to several market

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63. *Id.* at 332–33.

The clearest examples of villains in the subprime crisis engaged in behavior that was clearly illegal[, such as] . . . [a] mortgage broker who lied about the borrower’s income when selling the loan to a third party. . . .

[T]he behavior of Ameriquest, a subprime mortgage loan originator[,] . . . included deceiving borrowers about the terms of their loans, forging documents, falsifying appraisals and fabricating borrowers’ income to qualify them for loans they couldn’t afford (internal quotations and citations omitted).

*Id.*

64. Dau-Schmidt, *supra* note 1, at 766.

65. Posner, *supra* note 51, at 1021–22.

66. *See id.*



flaws, mainly principal-agent problems of CEOs being hard to police when they pursue their own interests.<sup>67</sup> Corporate boards of directors, which typically include CEOs and similar magnates, are too disengaged and easily captured by a CEO community self-interested in supporting deference to CEOs and high CEO pay.<sup>68</sup> Second, recent forms of executive compensation have incentivized excessive corporate risk-taking and short-term thinking, a phenomenon also driven by investors with short-term horizons.<sup>69</sup> To redress their difficulty policing CEOs, corporations typically align their incentives with compensation packages heavy in stock and options—which increases CEO stake in the company, but also encourages short-term thinking and risk-taking.<sup>70</sup> CEOs may take risks with negative expected value because they draw a fully proportional share of the benefit of gains (stock appreciation) but a less than proportional share of the cost, limited to the value of the lost equity (i.e., lost value of underwater options or lost value of stock upon company bankruptcy).<sup>71</sup> Similarly, CEOs have incentive to take risks that pay off short-term but are disastrous long-term (riding bubbles, taking on debt, etc.), as long as they plan to retire, or otherwise move on, in a few years.<sup>72</sup> These incentives increase risk-taking by executives who are already likely to be risky, because the typical corporate culture rewards and promotes those prone to optimism and risk-taking.<sup>73</sup> This CEO risk-taking incentive was one cause of the disastrously risky lending, and leveraging of corporate assets to take on high-yield

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67. *See id.* at 1023–24.

68. *See id.*; D.A. Jeremy Telman, *The Business Judgment Rule, Disclosure, and Executive Compensation*, 81 TUL. L. REV. 829, 871 (2007) (highlighting the problematic “dynamic whereby corporate executives sit on corporate boards and pay their peers salaries in line with what they in turn would want to be paid”).

69. Grossman, *supra* note 53, at 905–06.

There is significant pressure . . . , both from executives as well as from investors, to . . . produc[e] profits over a short period of time, . . . without regard to the ill effects of those decisions on the longer-term health of the business. This tendency to manage for the short-term, or “short-termism,” in large part explains the near collapse of institutions like AIG and Merrill Lynch that seemed almost impregnable not long ago.

*Id.*

70. *See* Posner, *supra* note 51, at 1026–30.

71. *Id.* at 1026–27.

72. *Id.* at 1041.

73. Donald C. Langevoort, *Organized Illusions: A Behavioral Theory of Why Corporations Mislead Stock Market Investors (and Cause Other Social Harms)*, 146 U. PA. L. REV. 101, 153–55 (1997).

investments, underlying the 2008 financial crisis.<sup>74</sup>

Complaints about excessive pay and irresponsible corporate decision-making used to draw stern rebuke from free-market economists, but the 2008 financial crisis has led to some newfound support for regulating corporate pay and lending. “The problem of executive compensation is not only real,” Judge Richard Posner wrote in 2009, “it is more serious than I believed it to be.”<sup>75</sup> Alan Greenspan went further, opining: “It may be necessary to temporarily nationalize some banks in order to facilitate a swift and orderly restructuring.”<sup>76</sup>

Union voice in corporate governance conceivably could redress excessive executive pay; the union could object to pay packages that seem excessive in size or, more importantly, excessively composed of equity. At the least, unions could hardly do worse than corporate boards, which have been quite weak policers of executive pay.<sup>77</sup> But there are reasons to question the compensation-policing voice that unions would provide. Unions seem likely to focus on limiting the size, rather than the equity-based composition, of executive pay. But it is the equity, not the size, that is the problem, and capping compensation amounts risks diminishing the available talent pool. Even if unions did focus on equity compensation rather than just on compensation amounts, equity compensation is not unequivocally bad. By design, it increases the CEO’s stake in the company and discourages complacency; it just comes with the tradeoff of encouraging more risk. So a policy against equity compensation, or in favor of lower compensation generally, would not necessarily be a net positive. In sum, union voice might help redress excessively short-term corporate thinking by limiting the excessive equity compensation that promotes

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74. Posner, *supra* note 51, at 1041.

75. *Id.* at 1014.

76. Krishna Guha & Edward Luce, *Greenspan Backs State Control for Banks*, FINANCIAL TIMES (LONDON), Feb. 18, 2009, § 1, at 1. To be sure, others stood by their lifelong fealty to the free market: “It’s bad,” Larry Ribstein wrote of capping CEO compensation even at only those firms receiving federal bailout funds; under simple labor supply-and-demand logic, “executive talent and banking business ultimately will go to [other] firms” lacking such restrictions. Posting of Larry Ribstein to Ideoblog, <http://busmovie.typepad.com/ideoblog/2009/10/perspectives-on-feinberg-pay.html> (Oct. 22, 2009, 07:43 EST).

77. Telman, *supra* note 68, at 859. Telman quoted older commentary on executive compensation problems inferring that past commentary is still applicable to current executive compensation issues. See *id.* “[C]orporate boards’ one significant remaining responsibility is the selection and monitoring of the corporation’s CEO. However, passivity characterizes the board’s typical role in that process as well.” *Id.* (citing MELVIN A. EISENBERG, THE STRUCTURE OF THE CORPORATION: A LEGAL ANALYSIS 162, 164 (1976)).

short-term thinking—but union voice might limit compensation too greatly, yielding countervailing problems. And beyond the specific role of policing executive compensation, union voice is an unlikely way to promote long-term thinking, as detailed below.

*C. Unions Are Not Generally More Long-Term in Focus than Corporations, So More Union Voice Is Unlikely to Increase Innovation*

I take an overall positive view of unions, and I agree that more union voice conceivably could help prevent the forms of executive compensation that encourage short-term thinking; however, I disagree as to another way Dau-Schmidt suggests unions could promote long-term corporate welfare. Dau-Schmidt expresses optimism that unions could help corporations as “an important long-term ally in considering the merit of long-term strategies and investments” because their “investments in firm-specific human capital and pensions” give them an “interest in the long run operation of the firm.”<sup>78</sup>

Dau-Schmidt thus sees unions as forces for innovation that, had there been more voice in corporate governance in recent decades, might have persuaded American automakers not to lag in alternative energy.<sup>79</sup> Yet it is too easy to pick on American automakers for allowing Toyota to take the lead with the wildly successful Prius, for example. Dau-Schmidt says the high oil prices generated by the 1970s OPEC embargo “should have removed all doubt” that “fuel economy would eventually become of crucial importance.”<sup>80</sup> I am dubious: with gas prices low for over two decades before 2005, the viability of high-cost research into high-priced hybrids was far from certain. Failing to develop an “American Prius” seems a huge blunder only in retrospect: for every “hybrid cars are the future,” plenty supposed “waves of the future” flop—day trading, mortgage securitization, and various internet startups, to name just a few.<sup>81</sup> And which waves of the future will fail is as hard to predict as which will succeed. Leading voices in corporate law called for the acceleration of trends that proved to be as bad as mortgage-backed securities.<sup>82</sup> Even where an innovation like

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78. Dau-Schmidt, *supra* note 1, at 767.

79. *Id.* at 819.

80. *Id.* at 789.

81. See STARTUP.COM (Artisan Entertainment 2001). *Startup.com* is a documentary film that chronicles the start-up phenomenon and failure of the website govWorks.com.

82. Larry E. Ribstein, *Ethical Rules, Agency Costs, and Law Firm Structure*, 84 VA. L. REV. 1707, 1707–08 (1998). Ribstein advocates for revision of legal ethical rules to allow non-

alternative-energy cars succeeds, it is hard to tell success from failure *ex ante*. Hybrids succeeded while hydrogen-powered car subsidies seem a waste and Google succeeded while AOL stalled only after markets believed the inflated valuation that let AOL buy TimeWarner.<sup>83</sup> Perhaps the American failure to develop hybrid cars was a foreseeably bad decision, as opposed to only a retrospectively bad one, but I am not so sure.

But I am skeptical of Dau-Schmidt's point in a broader way: I do not see how workers have more interest in long-term corporate well-being than managers or stockholders. Even far-sighted workers' interests in their employers' long-term well-being has declined due to trends Dau-Schmidt notes, such as decreased job security, tenure length, and pensions,<sup>84</sup> and the decline of the old life-cycle labor model under which firms invested in training on the now-quaint assumption that workers will spend their careers in one place.<sup>85</sup> With companies offering workers fewer future prospects, workers have less reason to care deeply about the company's future. So while workers may have the most to lose when their employers fail, I disagree with Dau-Schmidt's premises that "the workers [are] the party with the true long-term investment in the enterprise"<sup>86</sup> and that "labor is emerging as the stakeholder with the greatest personal interest in the [firm's] long-run operation."<sup>87</sup>

Even if workers remained focused on their employers' long-term interests, unions are unlikely to do so, because union management faces its own agency problems. Union leaders have incentive to focus on the present and upcoming collective bargaining agreement, which determines their success, failure, and re-election—a time horizon of only several years. Union negotiations for benefits can make employers act in even more short-sighted ways, such as agreeing to large future pensions the employer fails to fund contemporaneously—essentially putting

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competition agreements among law firms, in part to "protect law firms' property rights in expertise on, and forms for, transactions such as . . . mortgage-backed securities." *See id.* at 1737.

83. Tim Arango, *In Retrospect: How It Went So Wrong*, N.Y. TIMES, January 11, 2010, at B1 (explaining the downfall of the AOL/TimeWarner merger).

84. Dau-Schmidt, *supra* note 1, at 798 ("The security of employer-provided employee benefit plans has . . . declined in the last three decades.").

85. *See generally* Stewart J. Schwab, *Life-Cycle Justice: Accommodating Just Cause and Employment at Will*, 92 MICH. L. REV. 8 (1993) (noting decline of career-wage model).

86. Dau-Schmidt, *supra* note 1, at 790.

87. *Id.* at 801 (so asserting as to BP).

compensation of current workers off-budget into the future.<sup>88</sup>

So despite their other merits, unions are unlikely forces for innovation—and at times they can even be quite anti-innovation. Are unions really more interested than management in sacrificing present revenue by spending on research and development whose fruits are uncertain? Evidencing the contrary, a major national union recently declared war on clean energy subsidies, arguing that such subsidies harm the status quo. In September 2010, a charge filed “by the 850,000-member United Steelworkers union[] accuse[d] China of violating the World Trade Organization’s free-trade rules by subsidizing exports of clean energy equipment like solar panels and wind turbines.”<sup>89</sup> Perhaps this charge has merit, but it might illustrate how unions can be an unlikely source of support for investments in environmental or other innovations that would divert present funds into pursuits that, at best, pay off much later. This is no indictment of unions in particular; unions simply are no better than any other entity or group at foreseeing the future or at sacrificing current money for potential future gain.

A full discussion of redressing short-term corporate thinking is beyond the scope of this essay, but shareholder information seems key to any solution. With informed shareholders, corporations could not think unduly short-term; without informed shareholders, corporations seem likely to get away with short-term thinking. There is room for disagreement as to how to serve the need for better shareholder information. On one side would be advocacy for information-forcing

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88. Based on pension promises made for prior generations of workers, but inadequately funded since, state and local “[p]ublic pensions . . . are underfunded by more than \$1 trillion; in many cities, pension obligations will soon consume a quarter or more of the annual budget.” Richard Riordan & Alexander Rubalcava, Op-Ed., *How Pensions Can Get out of the Red*, N.Y. TIMES, Sept. 15, 2010, at A33. This phenomenon should not be overstated for two reasons, however. First, unusually generous pensions aside, there often are reasons for public employee pensions to be larger than their private counterparts, from the lower salaries of public employees to the unavailability of social security benefits for almost a third of state and local employees. THOMAS MARGENAU, INTERNATIONAL FOUNDATION OF EMPLOYEE BENEFIT PLANS, SOCIAL SECURITY OFFSETS: POLICIES PUBLIC EMPLOYEES LOVE TO HATE AND DON’T UNDERSTAND 3 (2007) (noting, as an example, that California and Texas teachers do not receive social security). Second, major public employee pensions have been getting less generous; for example, in 2010, Illinois raised retirement ages, limited pension increases, capped benefits, and ended pensions for retirees working another public job. Ben Smith & Maggie Haberman, *Pols Turn on Labor Unions*, POLITICO.COM, June 6, 2010, <http://www.politico.com/news/stories/0610/38183.html>. I thank Joseph Slater for calling my attention to the Margenau and Smith and Haberman pieces.

89. Keith Bradsher, *U.S. Steelworkers See Illegal Subsidies in Clean Energy Industry*, N.Y. TIMES, Sept. 9, 2010, at B1, B7.

regulations,<sup>90</sup> or even banning risky practices about which information cannot reasonably be spread. On the other side would be the libertarian view that useful information will find its way into shareholders' hands, or at least that those who decline to become informed are making a choice that, for example, their modest 401K holdings do not justify investing in more information.<sup>91</sup> Whether provided by regulation or by free markets, information for shareholders seems a better solution to short-term thinking than mandating an additional voice by employees unlikely to focus on the corporate long term.

#### V. THE UNPERSUASIVENESS OF COMPARATIVE EXAMPLES: JAPAN AND GERMANY AS DUBIOUS ROLE MODELS

Finally, Dau-Schmidt cites Japan and Germany as exemplars, citing approvingly to work “distinguish[ing] between ‘liberal market’ economies, . . . [such as] the United States and Great Britain, and ‘coordinated market’ economies, for example Germany and Japan, . . . [which] undertake alliances that involve labor to conduct corporate governance.”<sup>92</sup>

But Japan and Germany are hardly economic role models; they have not looked like the wave of the future since the 1980s. Japan has had stagnant growth for two decades. Since 1991, it has not had a single year of Gross Domestic Product (GDP) growth above 3.3%, and for a *majority* of years it has had growth rates under 1% or negative.<sup>93</sup>

90. Of course, forcing more disclosure of information about investments is an old goal of securities law. See *SEC v. Ralston Purina Co.*, 346 U.S. 119, 124 (1953) (“The design of the statute is to protect investors by promoting full disclosure of information thought necessary to informed investment decisions.”). This could make information-forcing regulations seem a solid, mainstream prescription. On the other hand, if decades of information-focused regulation has fallen short, that failure might call into question whether more information really is a useful prescription. Ultimately, though, the question of what further regulations of financial markets are warranted, if any, is well beyond the scope of this paper.

91. This is the concept of “rational ignorance[:] . . . situations in which people may rationally prefer not to know their own preferences—not to read forms, seek advice, or perform research—because the costs of doing so are too high.” Adam S. Zimmerman, *Funding Irrationality*, 59 DUKE L.J. 1105, 1121–22 (2010) (describing rational ignorance in the context of individuals deciding whether to submit claims for their share of class action litigation proceeds).

92. Dau-Schmidt, *supra* note 1, at 809–10.

93. Takatoshi Ito & Frederic S. Mishkin, *Two Decades of Japanese Monetary Policy and the Deflation Problem 2* (Nat’l Bureau of Econ. Research, Working Paper No. 10878, 2004), available at [http://unpan1.un.org/intradoc/groups/public/documents/apcity/unpan\\_023671.pdf](http://unpan1.un.org/intradoc/groups/public/documents/apcity/unpan_023671.pdf).

The average growth rate from 1993 to 2003 is just above [one] percent.

Germany has fared little better, with its stagnation taking the form of high unemployment instead of stagnant growth.<sup>94</sup> “Since 1992, Germany’s GDP growth has been mediocre, falling behind many European countries, particularly those in Eastern Europe.”<sup>95</sup> In the past fifteen years, Germany has had only two years of 3% growth or better, and its unemployment rate has been no lower than 7.4%, usually hovering around 9%.<sup>96</sup> Much of its difficulty traces to the unification of West Germany with the far less prosperous East Germany—but Germany’s unemployment problem is not solely an Eastern problem. From the early 1990s until recently, West Germany’s unemployment rate typically has ranged from 8-10%,<sup>97</sup> only in 2009 dropping to 7.0%.<sup>98</sup>

Dau-Schmidt acknowledges these facts, conceding that compared to Japan, “the United States seems to enjoy advantages in market flexibility, job creation and innovation,” but he argues that Japan’s system helps it “provid[e] high wages and low unemployment.”<sup>99</sup> Yet high wages cannot long remain a feature of an economy that, like Japan, suffers decades of low or negative economic growth. When per capita GDP is stagnant for decades, average wages cannot keep rising. I do not mean to overstate the point, but just to note that even if what Dau-Schmidt suggests is good policy, its adoption in once-promising yet long-stagnant economies like Japan and Germany is a damning, not supporting, fact.

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Since 1998, the inflation rate, either measured by GDP deflator or CPI, has been negative. The deflation has brought the CPI price level by the end of 2003 to 3% below the 1997 level. . . . Due to virtually zero growth and deflation, the Japanese nominal GDP has shrunk by 4% from 1997 to 2002. . . .

*Id.*

94. Polya Lesova, *The Wall’s Fall Proved a Boom for German Equities*, MARKETWATCH.COM, Nov. 9, 2009, <http://www.marketwatch.com/story/the-walls-fall-proved-a-boom-for-german-equities-2009-11-09>.

95. *Id.*

96. Index Mundi, [http://www.indexmundi.com/germany/unemployment\\_rate.html](http://www.indexmundi.com/germany/unemployment_rate.html) (last visited May 13, 2011) (illustrating historical data on Germany’s unemployment rate).

97. Helmut Seitz, Presentation at the Conference on German Unification at University of Haifa 15 (Jan. 21–22, 2009), available at [http://www.tu-dresden.de/wwwlemp/publikation/Praesentation\\_on\\_the\\_economic\\_and\\_fiscal\\_consequences\\_%20of\\_German\\_Unification.pdf](http://www.tu-dresden.de/wwwlemp/publikation/Praesentation_on_the_economic_and_fiscal_consequences_%20of_German_Unification.pdf).

98. Lesova, *supra* note 103.

99. Dau-Schmidt, *supra* note 1, at 819.

## VI. CONCLUSION: A LIMITED SKEPTICISM

This essay offers a limited skepticism of the economic case for mandating union voice in corporate governance. Union voice certainly has a core role as to *labor relations*. It communicates worker wage and benefit priorities, e.g., what mix of wages, health benefits, and retirement benefits are preferable; it provides a safer and surer mechanism than individual worker complaints for reporting workplace problems; and it complements other forms of social voice for workers, such as litigation and lobbying. My skepticism is limited to the economic case for mandating union voice in non-labor corporate governance matters.

Perhaps most importantly, there are broader, non-economic arguments for increased union voice, such as the dignitary value of the right to be heard, long acknowledged in the context of litigation and alternative dispute resolution,<sup>100</sup> and the value of feeling a stake in one's job.<sup>101</sup> Dau-Schmidt notes this point: "Promoting employee voice . . . treats workers more as humans than a commodity, giving them a larger say in the rules that organize our society."<sup>102</sup> And I fully agree with Dau-Schmidt's broader sentiment that "it is imperative that we take account of values other than efficiency in the regulation of the labor market," values that tend to be "lost in the simple neoclassical economic model."<sup>103</sup>

Thus, this Essay's skepticism of Dau-Schmidt's economic case is not opposition to proposals for "a significant and meaningful voice for American workers on the corporate Board of Directors," such as Dau-Schmidt's suggestion of modest union representation on the corporate boards of sufficiently large corporations.<sup>104</sup> That is, more union voice in corporate governance may be a good idea, but the case must be made on the non-economic grounds that Dau-Schmidt cites but gives less "air

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100. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 666 (2d ed. 1988) ("[T]here is *intrinsic* value in the due process right to be heard, since it grants to the individuals or groups against whom government decisions operate the chance to participate in the process by which those decisions are made, an opportunity that expresses their dignity as persons.").

101. Moss & Huang, *supra* note 14, at 234 (noting that many people "draw from their job [a] sense of self-worth . . ." and source of identity (citing Samuel Issacharoff, *Contracting for Employment: The Limited Return of the Common Law*, 74 TEX. L. REV. 1783, 1803 (1996))).

102. Dau-Schmidt, *supra* note 1, at 807.

103. *Id.* at 784.

104. *Id.* at 824.



time” than his economic-based arguments. This need to prioritize non-economic arguments recalls Richard Posner’s caveat on the limited power of economic logic to explain all law: “So law and economics are not perfectly congruent after all. But you knew that.”<sup>105</sup>

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105. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 716 (6th ed. 2003).

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