

Book Review

Abortion, Absolutism, and Compromise

Abortion: The Clash of Absolutes. By Laurence H. Tribe.* *New York & London: W.W. Norton & Co., 1990. Pp. xvi, 270. \$19.95*

Stephen L. Carter†

I

Back around the turn of the century, the head of the United States Patent Office suggested that the time might have come to close his bureau down. His reason was simple: there would be no more useful patents, because all the inventions had been made.

The literature on abortion is like that too: one longs for something new, an idea that will shake things up, but as each new article or book comes out, one is left with the dreadful and yet unavoidable sense that everything has been said. Not only that, but most of it was said ten years ago. Whatever arguments for free choice Justice Blackmun might have omitted in his comprehensive but unsatisfying majority opinion in *Roe v. Wade*¹ have long since been filled in, and the basic pro-life argument, that the fetus should be protected for its real or potential personhood, is restated in lots of clever ways but is still only restated. As eyes glaze over, it often has seemed during the past two decades that only the names of the authors who offer the arguments have changed.

* Tyler Professor of Constitutional Law, Harvard Law School

† William Nelson Cromwell Professor of Law, Yale University.

1. 410 U.S. 113 (1973).

If the scholarship on abortion has changed little, the politics of abortion have changed much. As a constitutional precedent, *Roe* stands out as a political failure. This judgment has nothing to do with the constitutional argumentation that undergirds the decision, still less to do with the correct answer to the moral question that abortion starkly poses; rather, it reflects the simple and remarkable reality that as *Roe* approaches the end of its second decade as law of the land, there are tens of millions of Americans who are quite unembarrassed about disagreeing quite openly with the decision, and it is still possible (and, for some politicians, even sensible) to run against it. Take a watershed decision with which *Roe* is often compared: *Brown v. Board of Education*.² As controversial as *Brown* was in its time, within a good deal less than twenty years it was no longer politically respectable to run a campaign that argued explicitly that the decision should be overturned. One might resort to all sorts of code words, of course, and one might counsel the most outrageous forms of legal circumvention, but two decades after *Brown* one could not build a political career on the proposition that racial integration was wrong, and, certainly, no President could have been elected on a platform expressly calling for its reversal. But today, 18 years after *Roe*, there are districts in nearly every state where an *explicit* anti-abortion platform is not only useful, but actually required, and, for presidential candidates, running and winning on anti-abortion platforms has recently been the rule, not the exception.³

But that is only one part of the political reality, the part that marks the Supreme Court's *decision* in *Roe* as a failure. There is another reality that marks the *idea* underlying *Roe*, the vision of reproduction as personal choice, as a clear, if still fragile, political success. After running comfortably and risklessly against *Roe* for years, hundreds or perhaps thousands of pro-life politicians—mostly, but not exclusively, drawn from the ranks of conservative Republicans—suddenly find themselves in the unexpected and, as it turns out, often unwanted position of being able to do something about it. This is because the Supreme Court, in *Webster v. Reproductive Health Services*,⁴ dumped much of the abortion question back where the pro-life movement had always said that it should be: in the laps of the states. The immediate result was that pro-choice forces discovered that their fears and rhetoric were equally unfounded: most Americans didn't want their governments to exercise the restrictive authority against which pro-choice forces had always warned. As for the pro-life forces,

2. 347 U.S. 483 (1954).

3. Nothing in this argument turns on whether voters are deeply influenced by the candidate's stance on abortion; for example, many pro-choice voters no doubt supported Presidents Reagan and Bush, both of whom ran pro-life campaigns. The point, rather, is simply that it is politically respectable to run a campaign that calls for the reversal of *Roe*.

4. 109 S. Ct. 3040 (1989).

they found that the public that voted for them was less ready than they supposed to turn political slogans into political action.⁵

Less ready is not the same as unready, however, and many states (Louisiana recently to the fore) have seen movements to place very restrictive abortion laws on the books. As with any other practice that the state is allowed to regulate, the content of the "right" to decide whether to end a pregnancy now varies from one state to the next. Pro-choice forces point to this as a problem, but at least it accords with the old argument that federalism allows the states to serve as laboratories in which social policies can be tested on a small scale before being adopted in the large. Whatever one's view of *Roe*, however, the result that a pregnant woman might face markedly different laws in different states is plainly offensive to the idea that the right to decide whether to end a pregnancy is a right of *constitutional* dimension.

Still, by returning many aspects of abortion regulation to the legislatures, *Webster* might be envisioned as a vehicle for enhancing the possibility that new laws might move through deadlocked legislatures. But as every student of legislative process knows, the heavier burden is on those wishing to change the status quo, not those wishing to preserve it; concomitantly, it is naive to suggest that a refusal to enact a new statute or change an old one represents the will of the people. Quite apart from any question of the distribution and intensity of preferences, it is the pro-life forces, seeking to change the law, who face the more difficult legislative task, because the pro-choice forces, except in those states where there are serious legislative threats to gains in reproductive freedom, have little incentive to compromise.⁶

Besides, many of the battle-lines may have hardened rather than softened in the wake of *Webster*, because now that so much of the fight is in the state legislatures, the angry, polemical street demonstrations on both sides of the issue make a good deal more sense than they did when the matter was entirely before the courts: political pressure is what legislators are supposed to notice. And although pro-life forces prevail in some states, pro-choice forces in others, there is no sense in which one can say that the two sides are holding a dialogue. Because they can see no common ground, then, there is a political void to match the void in scholarship.

Laurence Tribe seeks to fill both voids with *Abortion: The Clash of Absolutes*,⁷ an ambitious but ultimately unsatisfying effort to explain (and justify)

5. In this review, I use the words "pro-choice" and "pro-life" because these are the names that the movements have in recent years most frequently applied to themselves. I recognize that the pro-life movement says that the pro-choice movement should be labeled "pro-abortion" or even "pro-death," and that the pro-choice movement says that the pro-life movement should be labeled "anti-abortion" or even "anti-woman," but absent the risk of a total collapse of the language, I am willing to let movements choose their own labels.

6. For an argument that pro-choice forces *shouldn't* compromise, see Dellinger, *Should We Compromise on Abortion?*, THE AMERICAN PROSPECT, Summer 1990.

7. L. TRIBE, *ABORTION: THE CLASH OF ABSOLUTES* (1990) [hereinafter cited by page number only].

the constitutional theory of reproductive freedom. The book, plainly written with a lay audience in mind, is a readable and provocative treatment of the problem, as one has come to expect from the prolific Tribe. I think that anyone seriously interested in the subject of abortion will benefit from reading this book, but I fear that the reader (especially the reader whose predispositions are pro-life rather than pro-choice) will likely come away frustrated, convinced (as Tribe's title suggests) that there is no room for compromise.

Still, Tribe tries to find one; indeed, the book is motivated by the idea that there is a set of shared interests between the competing forces. According to Tribe, "[o]ur national institutions are braced for a seemingly endless clash of absolutes."⁸ Tribe tells us, however, that his goal is to build a bridge between the pro-life and pro-choice forces, to supply the common ground that is now missing. Few issues are as morally searing as abortion, so teasing out compromise is an important and laudable goal; the only difficulty with the way Tribe does it is, as I shall show, that in seeking to construct his bridge, he gradually allows the pro-choice arguments to dominate his narrative, so that by the end of the book, when the rhetoric becomes almost ringingly pro-choice, the adamantly pro-life readers to whom he is so plainly reaching out will surely wonder why anyone would imagine that the bridge is worth crossing. So even if Tribe is right that there are absolutes clashing here, he is wrong to suppose that he has found a way of softening their conflict.

II

Tribe promises as early as the first chapter to "challenge[] the inevitability of permanent conflict" and "lay the groundwork for moving on."⁹ But before he can get to his proposed solutions to this seemingly intractable disagreement, there is, he explains, a bit of underbrush to be cleared away. So he spends a chapter explaining the Supreme Court's abortion jurisprudence,¹⁰ another on the history of abortion in America,¹¹ and a third on, as he puts it, "Locating Abortion on the World Map."¹² (This comparative chapter is one of the most useful in the book, a neat counterpoint to the easy assumption of many Americans that both the problems that we face and the solutions that we propose are somehow *sui generis*.) These background chapters are intended to provide a context for the rest of the book and also, particularly the chapter on the Supreme Court, to guide lay readers who might be unfamiliar with the relevant legal terrain, and each is a very interesting catalogue in its own right.

8. P. 6.

9. P. 7.

10. Pp. 10-26. Much of the chapter is devoted to a discussion of Court personnel and their stances on the abortion issue, but the book was published before Justice Brennan retired and was replaced by Justice Souter.

11. Pp. 27-51.

12. Pp. 52-76.

Even in these early background chapters, however, one sees evidence of the phenomenon that I suggested before, the tendency of the pro-choice perspective to dominate a book that strives to be even-handed. A single striking example will suffice to make the point. In rejecting Mary Ann Glendon's argument that the United States should follow the example of European countries and use the teaching authority of law to celebrate life by urging women not to have abortions (for instance through mandatory counseling) but nevertheless allowing them the ultimate choice,¹³ Tribe tells us that these laws would not work in American society because they provide only unenforceable norms of behavior rather than enforceable rules:

Law, of course, can be as important for the message it sends as for the rules it promulgates. Society may benefit from the incorporation in its laws of normative statements of principle. Yet the codification of a truly empty promise, one whose vision is belied by the people's day-to-day experience, one that is utterly at variance with the substance of the law in which it is contained, can take an unacceptably high toll on confidence in the rule of law and in the integrity of the legal system as a whole. The French solution, within an Anglo-American legal system that has long insisted that law be composed of *enforceable* norms, seems to teach mostly hypocrisy.¹⁴

As far as it goes, the argument is certainly true: it is possible to design legislative schemes that change nothing but appear to change much. But this cannot be a serious objection to requiring counseling and other means of persuasion. Surely Tribe does not mean to suggest that when pro-life forces argue that the state should discourage abortions, they are asking the impossible, and they must therefore be prevented from succeeding *for their own sake*, lest they lose respect for law. The stronger argument, one assumes, is that government persuasion should be prohibited because it intimidates pregnant women and interferes with their choice, not because it doesn't work!¹⁵

Still, it must be said that the argument against importing the various European experiments is only a very small point and not one of Tribe's principal themes. In these introductory chapters, his only aim is to establish a series of starting points: abortion is largely back with the legislatures, the problem has been around for centuries, and it is a problem everywhere in the world. This is the ideal time, he seems to think, to search for a resolution that rests on the

13. M. GLENDON, *ABORTION AND DIVORCE IN WESTERN LAW* (1987).

14. Pp. 73-74.

15. The Supreme Court has rejected some efforts at requiring counseling. See *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983). As a constitutional matter, however, the claim that the state cannot seek to influence the choice of the pregnant woman is much weakened by the abortion funding cases, *Maher v. Roe*, 432 U.S. 464 (1977), and *Harris v. McRae*, 448 U.S. 297 (1980), and, more recently, by *Rust v. Sullivan*, 111 S. Ct. 1759 (1991). For a forceful statement of the argument that the funding decisions are flatly inconsistent with *Roe*, see Perry, *Why the Supreme Court Was Plainly Wrong in the Hyde Amendment Case: A Brief Comment on Harris v. McRae*, 32 *STAN. L. REV.* 1113, 1126 (1980).

commonalities between the two sides rather than their differences. I can scarcely fault Tribe for arguing that the time to act, if there is action to be taken, is now. I am confident, however, that despite the fierceness of our moral battle, future generations, whatever their judgment on the right answer, will shake their heads disdainfully when they reflect on our struggle over the abortion question. They will laugh not because they will not believe in grappling seriously with difficult dilemmas, but because the time will come when a consensus exists that is far stronger than the weak and shifting survey results that one sees today.

III

Today's debate over abortion, like so many arguments over what might seem facially to be moral questions, is governed by an imposed consensus: the right to choose whether to end a pregnancy is fundamental because the Supreme Court has said it is, and, one supposes, it will cease to be fundamental *in the constitutional sense* if a future Supreme Court changes its mind. This, I think, is what was really at stake in the battle over Robert Bork's nomination to the Supreme Court (a battle that Tribe, unlike some other opponents, fought with considerable integrity, and continues to fight in this book).¹⁶ The Block Bork Coalition, to be sure, comprised an impressive range of civil rights and civil liberties organizations, but Justices whose views the groups opposed were confirmed in the past, even though some of them might have harbored constitutional visions equally objectionable to the Coalition. Most of the gains that the Coalition described as threatened were not, because no other Justice shared the views of, say, the public accommodations section of the Civil Rights Act of 1964 that Bork was said to hold. The only significant issue on which it could be argued in a serious way that a Justice Bork would probably "tip the balance" was abortion, for Bork would be joining a Court on which it was widely suspected that there were already four votes to overturn *Roe*.

Tribe, very much recognizing that *Roe* even now hangs in the balance, therefore sets about shoring up its constitutional foundations. The immediate difficulty that he faces is that the opponents of abortion have successfully reduced their legal position to what is almost an applause line: the right to end a pregnancy is not mentioned in the Constitution; it is a right invented by the courts.

This particular argument against *Roe* is simplistic in its misunderstanding not of constitutional theory but of judicial process, and few sophisticated

16. For Tribe's continuing effort to justify the result in the Bork brouhaha, see pp. 18-19. For my commentary on instances in which Bork's other opponents went a bit overboard, see Carter, *Bork Redux, or How the Tempting of America Led the People to Rise and Battle for Justice*, 69 TEX. L. REV. 759 (1991). For a general statement of Tribe's strong view (one that I dispute) that the Senate has the right and even the duty to consider the judicial philosophy of nominees to the Supreme Court, see L. TRIBE, *GOD SAVE THIS HONORABLE COURT* (1985). I reject this position in Carter, *The Confirmation Mess*, 101 HARV. L. REV. 1185 (1988).

constitutional scholars take it seriously as it stands. Because he is writing for a lay audience, however, Tribe, who is a very sophisticated scholar, does take the time to treat it seriously, although it must be said that he has little trouble in refuting it. Still, the argument that he presents in response lacks a crucial step. Tribe first explains how it is that the courts use the due process clause to protect some rights that do not appear in the Constitution in so many words.¹⁷ He runs into difficulty, however, when he seeks to link the result in *Roe* to the Court's established jurisprudence on the right of privacy—the same difficulty, to be sure, that confronted Justice Blackmun in the majority opinion in *Roe*.

John Hart Ely, mere months after *Roe* was decided, was out with a rather fierce article contending that the trouble with the decision was not that it was bad constitutional law, but that it was not constitutional law and gave “almost no sense of an obligation to try to be.”¹⁸ Although he does not cite the Ely essay itself, Tribe chooses this as the essential form of argument that he must refute; *Roe*, he wants to show, not only *is* constitutional law but is *good* constitutional law. But it is here that Tribe, like so many pro-choice scholars who choose to defend *Roe* as it stands rather than on some other ground, begins to run into more serious difficulty. Perhaps the transformation of privacy in the way that the Court has traditionally meant it to privacy in the sense that is needed to encompass the decision whether to end a pregnancy is not as easy as it might appear.

Roe v. Wade, Tribe insists, is the logical outgrowth of the Court's privacy decisions. In order to make this work, however, he must first put the right spin on the privacy jurisprudence. Thus, for example, *Griswold v. Connecticut*,¹⁹ in which the Court for the first time restricted the authority of the state to prohibit contraceptive use (at least by married couples) becomes a case about protection of “the right to engage in sexual intercourse without having a child.”²⁰ Tribe does not quote *Griswold* itself for this proposition, nor could he, since no such notion is discussed in the case. One may make what one likes of the majority opinion in *Griswold*, but what concerned the Court was the fact that the law could be enforced only by sexual legitimacy police invading “the sacred precincts of marital bedrooms.”²¹ *Griswold* was a case about privacy in the strictest sense: when one is on one's own and away from public scrutiny, the government mustn't snoop, least of all when one is engaged in sex. *Griswold* is about the sexual act, not about the result of that act, and certainly not about medical procedures, a realm in which the state had not theretofore been thought forbidden to regulate. The logical corollary of *Griswold* is not

17. Pp. 77-92.

18. Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 947 (1973).

19. 381 U.S. 479 (1965).

20. P. 94.

21. 381 U.S. at 485.

reproductive freedom of choice for pregnant women, but complete sexual freedom of choice for consenting adults; which is another way of saying that as long as *Griswold* is the law of the land, it is difficult to defend the result in *Bowers v. Hardwick*.²²

Perhaps *Roe* can be modeled in this traditional sense of privacy, too, as long as one does not find that the interjection of a physician (which states may constitutionally require) makes things different. But this has never been the strongest principle available to justify the result. Surely the pro-choice advocate can better defend *Roe* on the model of equality, writing privacy out of the case altogether and challenging abortion restrictions as sex discrimination.²³ (Tribe acknowledges this possibility and seems to find it compelling, but he spends only a page on it,²⁴ which is quite a sensible choice, given his principal mission of exegesis rather than invention of new arguments.) One can go further and argue, again in equality terms, that reproductive freedom is required to avoid the subordination of women. My point here is not to determine whether these arguments are convincing or not, but simply to propose that they are more compelling than the privacy rationale on which *Roe* currently rests. The one thing that cannot be done is to argue that *Roe* follows from *Griswold* in some *a fortiori* sense.

It is possible, however, to work matters the other way around, to reinvent abortion as being about sex rather than reinventing the privacy cases as being about reproduction. In fact, by thinking of the abortion debate as an argument about sex, Catharine MacKinnon has developed an intriguing explanation for polling data suggesting that men often are more supportive than women of broad abortion rights.²⁵ MacKinnon, who readily admits that for many well-meaning people, men and women alike, abortion poses a difficult dilemma, focuses on the other side of the matter: not why some surveys show fewer women than men supporting broad abortion rights, but why the surveys show more men than women supporting them, a subtle and important inversion. MacKinnon wants to know why, in a world characterized by patriarchy, so many men would be in favor of something that seems to provide women with additional freedom. The reason, MacKinnon suggests, is that when men dominate, abortion is not a freedom. Men, she says, support reproductive "freedom" for their own benefit: the widespread availability of abortion, she argues,

22. 478 U.S. 186 (1986). For a somewhat longer version of my argument that *Griswold* entails freedom to choose one's sexual partner far more directly than it entails freedom to choose whether to end a pregnancy, see Carter, *The Inaugural Development Fund Lectures: Scientific Liberalism, Scientific Law*, 69 OR. L. REV. 471, 483-84 (1990).

23. For provocative efforts to defend abortion on equality and other grounds apart from privacy, see, for example, C. MACKINNON, *Privacy v. Equality: Beyond Roe v. Wade*, in FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 93 (1987); Regan, *Rewriting Roe v. Wade*, 77 MICH. L. REV. 1569 (1979); Thomson, *A Defense of Abortion*, 1 PHIL. & PUB. AFFAIRS 47 (1971).

24. P. 105.

25. See MacKinnon, *The Male Ideology of Privacy: A Feminist Perspective on the Right to Abortion*, RADICAL AMERICA July-Aug. 1983, at 23.

translates into a widespread heterosexual availability of women. If an unexpected pregnancy can be ended in an instant, there is still less reason (there was never much, she seems to say) for men to be responsible, or even kind, in their selection of sexual partners.

I think that MacKinnon, too, might be oversimplifying a complex psychology, but her view has a certain appeal. She articulates what is often unspoken in the abortion debate. We may frame the debate as being about privacy, or about control of one's reproductive processes, or about equality, or about much else besides; but for MacKinnon, the argument is really about sex. The smaller the number of legal roadblocks to abortion, the fewer the practical barriers to heterosexual intercourse.

When one moves MacKinnon's analysis onto the constitutional plane, however, one has to wonder which way it cuts. After all, if the widespread availability of abortion makes it harder rather than easier for women to withstand the predatory conduct of men, then *Roe* is about sexual privacy only in a special sense: it is about the privacy of men who are being oppressive rather than the privacy of women who are being oppressed. This is, it seems, another of those intriguing areas (the prohibition of exploitative pornography is another) in which the feminist left meets the traditionalist right, for many women in the pro-life movement have very strong views about the proper conditions for sex, and when they counsel women to avoid sex outside of marriage, they are expressing well-known concerns that men who have no fears about fatherhood will "take advantage" of women whom they no longer have any reason to respect. This language is all very old-fashioned and it harks back to a world that was more oppressive of women than this one, but there is still an intriguing point, one that dovetails with MacKinnon's analysis: a principal consequence of abortion rights is that they make sex harder for women to avoid, which in a patriarchal society potentially degrades women by increasing the likelihood of sexual exploitation. One may accept this argument or reject it; my reason for mentioning it is simply to suggest that the coin of privacy has more than one side.

IV

There is a second and more troubling difficulty with Tribe's constitutional discussion, one with eerie but clear echoes of the battle to keep Robert Bork off the Supreme Court. I suppose one might refer to it as the Myth of the Disinterested Expert, and Tribe exemplifies it in this startling passage:

What may surprise some, given the certitude with which Judge Bork and a number of others pronounce that *Roe v. Wade* was constitutionally illegitimate, is how many lawyers and law professors throughout the country believe the Supreme Court's decision in that case was entirely correct as a legal matter. For example, a friend of the court brief was

filed in the *Webster* case “on behalf of 885 American law professors . . . who believe that the right of a woman to choose whether or not to bear a child, as delineated . . . in *Roe v. Wade*, is an essential component of constitutional liberty and privacy commanding reaffirmation by [the Supreme] Court.” Similarly, the American Bar Association in February 1990 approved a resolution expressing the ABA’s recognition that “the fundamental rights of privacy and equality guaranteed by the United States Constitution” encompass “the decision to terminate [a] pregnancy.”

Now, of course, nearly a thousand law professors and the nation’s leading organization of lawyers could certainly be wrong on a matter of law. But how plausible is it that all of them would fail to recognize as blatant a legal blunder as some say the Court made in *Roe*?²⁶

What is one to make of this? Does Tribe seriously suggest that the nation’s law professors are so apolitical that they would prefer identifying a “blatant . . . legal blunder” to making a political point? Maybe he is right, and I would like to think so, but there has been nothing in recent history, or past history either, to suggest that he is; law professors have to work as hard as anybody else to separate their personal moral convictions from their conclusions on what the Constitution requires or permits or forbids, and nowadays this separation is thought by many to be impossible or wrong. As to the ABA, it has recently repealed the controversial 1990 resolution of which Tribe makes so much. Maybe “the nation’s leading organization of lawyers” has changed its mind about the law: does this imply that the rest of us should too? One might respond, of course, that only politics led to the repealer, and one would undoubtedly be right; but if the ABA is so susceptible to political pressure to find other than the “correct” legal answer, then why assume that the initial pro-choice resolution amounts to anything other than politics? In fact, why give special weight to the organization’s views at all?

My point is not that Tribe is wrong or that these groups are. My point, rather, is that in a book written for the lay public, it is important not to make too much of the positions taken by professional organizations. In particular, it is potentially misleading to suggest that their members are making disinterested, dispassionate judgments about law. Besides, even if they are as distant and objective as Tribe implies, the majority sentiment among “experts” is surely irrelevant. In determining constitutional meaning or learning whether a constitutional mistake has been made, the last thing that it seems sensible to do is count heads, even if they are the heads of smart law professors and smart lawyers. If that is the ideal guide to whether the courts have made a mistake or not, then there is scarcely any need for judges.

26. Pp. 82-83 (ellipsis and brackets in original) (footnotes omitted).

V

A principal weapon in the pro-life arsenal is exactly what the movement's name implies: the argument that the fetus is a person. This argument has important political consequences, because in a world in which much regulation of abortion has been returned to the legislatures, it will obviously be easier for pro-life forces to enact abortion restrictions if they can convince legislators (and the public) of the personhood of the fetus. The question that Tribe poses, however, is whether fetal personhood possesses any *legal* significance.²⁷

The first point that should be made is that there is a broad consensus among legal scholars, whether pro-life or pro-choice, that the state lacks the power to define personhood when its definition would interfere with the exercise of the constitutional right to terminate a pregnancy.²⁸ I am not sure that the matter is quite as clear as this consensus might imply,²⁹ but the argument is certainly a plausible and straightforward one: if the state cannot prohibit abortion, then it cannot use a subterfuge to reach the same goal.

Still, this proposition has the practical effect of putting the entire abortion debate off limits; as is so common in American political dialogue, it allows one side to say to the other that there is no need for *moral* debate because the rights that are at stake are of *constitutional* dimension. But there is no reason that

27. Tribe's discussion of the problem of personhood is refreshingly free of any suggestion that the religious motivation of many pro-life advocates rules their positions out of bounds, either as a matter of constitutional law or as a matter of secular liberal dialogue: "[A] question such as this, having an irreducibly moral dimension, cannot properly be kept out of the political realm merely because many religions and organized religious groups inevitably take strong positions on it." P. 116.

This is a point worth stressing. Many in the pro-choice movement have evidenced an unfortunate tendency to denigrate religious motivation, as though the fact that the moral positions of many in the pro-life movement are fired by spiritual commitment is itself an index of illegitimacy. Political rhetoric, letters to the editor, even law review articles by scholars who should know better, have all advocated what amounts to a ban on participation in these debates by people whose morality is shaped by religious conviction. Tribe quite poignantly admits that this was once his own view. P. 252 n.3. Even one Justice of the Supreme Court has suggested that the definition of personhood is inherently religious and therefore not the state's business. See *Webster v. Reproductive Health Services*, 492 U.S. 490, 571 (1989) (Stevens, J., concurring in part and dissenting in part).

There is much tragedy in this tendency. The American political tradition is full of religious activism, much of it in the service of expressly liberal ends. There was no demand for the separation of church and state during the civil rights movement, which was sparked by open and explicit calls upon religious belief, and it is an ahistorical fantasy to imagine that the religious aspect was mere window dressing. Moreover, no one seems to consider the problem irreducibly religious when the state defines personhood for other purposes, such as inheritance, murder, or the abolition of slavery.

28. See, e.g., Cox, *Congress v. The Supreme Court*, 33 MERCER L. REV. 707, 711 (1982); Emerson, *The Power of Congress to Change Constitutional Decisions of the Supreme Court: The Human Life Bill*, 77 NW. U. L. REV. 129 (1982); Estreicher, *Congressional Power and Constitutional Rights: Reflections on Proposed "Human Life" Legislation*, 68 VA. L. REV. 333 (1982). All of these articles were written in response to the movement to enact a "Human Life Bill" as an effort to reverse or at least undermine *Roe v. Wade*, an effort that was sparked by Stephen Galebach. See Galebach, *A Human Life Statute*, 7 HUMAN LIFE REV. 3 (1981).

29. See Carter, *The Morgan "Power" and the Forced Reconsideration of Constitutional Decisions*, 53 U. CHI. L. REV. 819 (1986).

elevating a moral claim to constitutional status should put an end to public moral conversation.

The task of defining personhood is necessarily of vital importance to the liberal state, for, under liberalism, rights attach to sovereign individuals. Not all persons are treated the same, of course—17-year-olds cannot vote, 18-year-olds can—but distinctions among persons are no longer supposed to be signs of their differing worth. The state determines when a being is a person for the purposes of murder, inheritance, taxes, tort, and much more (including the prohibition on slavery). In fact, the state can scarcely regulate without some understanding, whether explicit or not, of what constitutes a “person.”

The state’s power to define personhood is denied only when one has an *ex ante* preference that a particular thing be defined as something other than a person. Thus, the reason that the state is prohibited from defining the fetus as a person is that allowing the state to do so is seen as complicating the case for making abortion widely available. One cannot find another sensible reason. It cannot be, as Justice Blackmun’s majority opinion in *Roe* suggests, that the reason the state cannot define the fetus as a person is that there has never been societal consensus on its personhood,³⁰ for there is no principle of law forbidding difficult legislative choices in the absence of consensus; if there were, federally mandated affirmative action, to take only one of many sensitive subjects, would not exist. Nor can the reason be, as some theorists have suggested, that science itself is unable to supply the answer, for were legislation forbidden in the absence of scientific consensus, it would be constitutionally impermissible to fund the Strategic Defense Initiative.

Consequently, the only “reason” that the state is not allowed to define the fetus as a juridical person is that the right to abortion exists. This might seem like a case of the tail wagging the dog, but it reflects a legitimate fear that the case for killing a person is weaker than the case for allowing a woman to choose freely whether to bear a fetus that might become one. For all the argument over personhood, however, it is not clear that it possesses either the political or the constitutional significance that is claimed for it.

Opinion surveys consistently show a majority of Americans (actually, a majority of white Americans) opposed to overturning *Roe v. Wade*, but some surveys also show a necessarily overlapping majority believing that the termination of a pregnancy is the equivalent of killing a child.³¹ Plainly, this is one area in which a survey is just words: the group that is in both majorities is unlikely truly to believe that ending a pregnancy is like killing a child or it

30. 410 U.S. at 156-57.

31. The figures on overlapping majorities are drawn from a 1986 CBS News/New York Times poll. N.Y. Times, Feb. 23, 1986, at 22E. For recent evidence of general public support for *Roe*, see G. GALLUP, THE GALLUP POLL: PUBLIC OPINION 1989, at 20-22, 160-64 (1990). For evidence of the discrepancy between white and black Americans on the issue of abortion, see, for example, NATIONAL RESEARCH COUNCIL, A COMMON DESTINY: BLACKS AND AMERICAN SOCIETY 215 (1989).

would likely oppose *Roe*. What the survey is really detecting, one supposes, is a majority sense that the fetus represents a form of life the destruction of which makes many people uncomfortable. But many of those who are uncomfortable are not so uncomfortable that they want to turn their discomfort into positive law. According to the surveys, they still believe that abortion is sometimes the best way out of a difficult situation and that the choice should be left to the pregnant woman; most Americans, although they might be willing to limit the *grounds* on which an abortion might be sought, are unwilling to take the ultimate decision out of the private sphere. Although the results of surveys on this issue are volatile and widely regarded as suspect, it is at least possible that a politician could survive—cf. Mario Cuomo—while holding simultaneously the views that a fetus is a person and that abortion should remain an unfettered personal choice. So the absolute political significance of personhood may be small.

Nor is it at all clear that fetal personhood possesses the constitutional significance ordinarily claimed for it; indeed, the success of the pro-life movement in holding that personhood is an important constitutional question, while perhaps invited by the structure of the majority opinion in *Roe*,³² has always been something of a puzzle. Even Tribe seems to be taken in by the peculiar pro-life canard holding that were the fetus deemed a juridical person within the meaning of the Fourteenth Amendment, a state law *permitting* abortions would violate the Constitution. Says Tribe:

Notice that this is not really an argument in support of a state's power to go either way on the subject of abortion. For under this argument for fetal rights, if a state legislature *permits* abortion, it is licensing others to deprive the fetus of life without due process of law and is denying to the fetus the equal protection of the state's murder laws, in a blatant violation of the Constitution's ban on all such denials.³³

In this, Tribe is simply echoing the majority opinion in *Roe v. Wade*, wherein Justice Blackmun wrote: "If this suggestion of personhood is established, the appellant's case, of course, collapses, for the fetus' right to life would then be guaranteed specifically by the [Fourteenth] Amendment."³⁴ This notion that the equal protection clause or the due process clause by their own force would prohibit the state from allowing the killing of persons within its jurisdiction forms the basis for the so-called Human Life Bill that was once a central part of the anti-*Roe* strategy; but as a legal principle, it is just as wrong as it can be.

32. See Carter, *supra* note 29, at 837-40.

33. P. 115 (emphasis in original).

34. 410 U.S. at 156-57.

Piling irony upon irony, it is Robert Bork, who has heaped such vehement contempt upon *Roe v. Wade*, who pointed out the error in the course of his testimony against the Human Life Bill. (In the frequently ugly campaign to defeat Bork's nomination to the Supreme Court, some over-eager researcher informed the opponents that Bork had testified in favor of the bill—an error that, like so many other misstatements in our one-liner political world, was accepted and reported without a shred of evidence.)³⁵ In his testimony, Bork pointed out that the Supreme Court indulges in balancing tests all the time, and that once a right of privacy is accepted, there is nothing on the face of the Fourteenth Amendment to indicate why that right must always be trumped by the rights of the fetal person. On the contrary, said Bork, a court could perfectly well accept the fetus as a juridical person and yet deny that the Constitution itself requires the pregnant woman to carry it to term; indeed, he said, we could end up with a “common law of abortion” that would look very much like what the Justices announced in *Roe*.³⁶

There is another reason, too, that the status of the fetus as juridical person would not by its own force end the constitutional argument over abortion. The fact that you the reader and I the writer are juridical persons does not lead to any conclusions whatsoever about the constitutional status of the state's criminal law of murder. The fact that we are persons does not mean that some optimal murder statute is constitutionally required, and the degrees of protection (if one considers both degree of punishment and likelihood of its imposition) vary widely from state to state. Nor does the equal protection clause require that all murders be treated the same. Many states punish the killing of peace officers in performance of their duties more severely than other killings; I see nothing in our constitutional doctrine as it now stands to prevent the state from punishing more or less severely the killing of a reader or a writer, for neither involves a suspect classification. So unless one is prepared to make a case for the suspectness of classifications turning on whether the “person” has yet been born, a court might well sustain the state's decision to punish less severely (or not at all) the killing of a fetus—particularly, as Bork pointed out, when there are competing interests at stake.

VI

There is a further pro-choice argument for the irrelevance of fetal personhood. Even if the fetus is a human person in every relevant respect, conscripting women to carry fetuses of which they would rather be free is said to be a form of slavery. That is not a bad argument, especially when paired

35. On the false report that Bork supported the Human Life Bill, see R. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 289-90 (1990).

36. See *The Human Life Bill: Hearings on S. 158 Before the Subcommittee on Separation of Powers of the Senate Judiciary Committee*, 97th Cong., 1st Sess. 308-16 (1982) (statement of Robert Bork).

with the equality concern that, whether the possibility of pregnancy is a biological accident or not, the state makes no similar effort to conscript men to support living things that they would rather not (although males who were Vietnam-era military draftees might have disputed this point). Whether one finally finds that argument persuasive or not, however, I am interested in turning it on its head and pursuing the moderately less familiar but still common pro-life argument that the dehumanizing of the fetus is like the dehumanizing of the slave. Tribe uses a form of this analogy to reject the claim that the value of fetal life is only what people in power make it: "The same thing once was said of slaves," says Tribe. "[T]he value of black Americans was less than the value of white Americans in the view of people with power."³⁷

True, but too soft. In the view of many people with power, the slaves were a sub-species, not fully human, which justified their masters in holding them in thrall and making all decisions for them. Self-described pro-life feminists (some say this is an oxymoron, but that is a semantical quibble that I would rather not pursue) argue that the situation of the fetus in society is much like the situation of women historically: without power or choice, totally subject to the whim of the owner.³⁸ The further, and perhaps stronger, analogy to slavery is obvious.

So is the refutation, one might suppose. Whatever our views about the fetus, we *know* that the woman, and the slave, are fully human. The reason we know is that, for the sake of our argument, we have defined things that way. After all, the slaveholder might say that he should be free to decide whether his slave, his property, is human, for the due process clause guarantees property in terms just as strong as those protecting liberty. Indeed, if not for the trifling matter of the Thirteenth Amendment, the slaveholder might say that if *Roe v. Wade* is correct, then *ipso facto* his rights must be protected too.

As a moral matter, one might draw a distinction between the woman making a choice about something intrinsic to her body and the slaveholder making a choice about something extrinsic to his body. The slaveholder might respond that control of the slave is every bit as vital to his well-being as control of her body is to the woman. The easy rejoinder is that the slaveholder's control is over another human being, but that simply returns the argument to its beginning: we have not yet explained *why* the state should be able to override the slaveholder's claim that what he is enslaving is not human.

A better candidate for distinguishing the cases would note the difference in what the two protesters, the slaveholder and the pregnant woman, are trying to accomplish. Here the conscription argument for reproductive freedom might be brought into play. The slaveholder wants to control what the state seeks to liberate, whereas the woman seeks to rid herself of what the state seeks to force

37. P. 119.

38. See Callahan, *The Impact of Religious Beliefs on Attitudes Toward Abortion*, in *DEFINING HUMAN LIFE* 279 (M. Shaw & A. Doudera, eds. 1983).

her to keep; without regard to the humanity of the object, then, one seeks control of what the state wishes to make free, while the other seeks freedom from that which the state wishes to make her control. The distinction, then, turns not at all on the question of who has the right to determine personhood, and much more on the liberal bias toward freedom rather than control; so that even if the fetus and the slave are both human, the result that slavery is prohibited and abortion is allowed is both coherent and consistent.

VII

But that does not make it right. Pro-life forces are not interested in clever scholarly arguments; they are interested in saving the lives of what they insist are human beings. The true climax of Tribe's book arrives in his effort to solve the problem posed by his title, by "explor[ing] the grounds for a political compromise *other* than the one reached in *Roe* itself."³⁹ He first runs through a series of what he calls "cruel" compromises: imposing consent requirements, mandating notification (for example, of parents in the case of a minor), dictating waiting periods, allowing abortions only for specified reasons, limiting the use of public funds for abortions, restricting the activities of clinics, and altering *Roe*'s cut-off dates.

Tribe has two principal objections to these "compromises." The first is that they don't work; that is, according to Tribe, "they don't even serve the purpose of decreasing the number of abortions."⁴⁰ I am not sure that his statistics are convincing, but let us assume that he is right. What is more intriguing is his second, more central objection: the various "compromises," he says, are "cruel"—cruel, he means, to the pregnant women whose privacy rights are implicated:

The overarching problem with all these purported compromises is that they are not compromises at all. Many of the laws put forward to stake out what is supposedly a middle ground in the abortion debate, rather than meaningfully protecting either life or choice, randomly frustrate both and do not move us closer to a society of caring, responsible people.

In the case of any given woman, these laws will either act as an absolute obstacle to abortion or will not stand in the way. . . . [I]t seems obvious that most of these solutions are unsatisfactory in that they promise abortion rights in principle but deny them in practice to those who are least able to bear the burden of motherhood—particularly the young, the uneducated, the rural, and the nonwhite.⁴¹

39. P. 197 (emphasis in original).

40. P. 209.

41. Pp. 208-09. For a similar analysis of abortion "compromises," see Dellinger, *supra* note 6.

But that line of argument, while perhaps sensible as a matter of constitutional theory, is unlikely to appeal to one whose starting premise is not the need to safeguard reproductive autonomy or individual privacy, but the desire to protect fetal life. To the pro-life advocate, the compromises would seem equally cruel, but for a different reason: the cruelty would be to the fetuses, the real or potential humans, whose lives the compromises would snuff out. For just as the pro-choice advocate would note that the compromises still interfere with privacy or autonomy, the pro-life advocate would note that they still allow the destruction of some fetuses.

Unless one begins with a bias, either pro-choice or pro-life, one cannot say which cruelty is the greater. Tribe's examples really serve as evidence that compromise in the sense of agreement might be impossible; indeed, Tribe's own pro-choice biases are surely at work in his ultimate decision to reject cruelty to women in favor of cruelty to fetuses. The choice that he makes is moral and principled and might even be the one that most people in our society would prefer, at least as a matter of law (although this is not as clear as one might think); but there is no particular reason that others, whose moral starting points are very different from Tribe's, should find his argument persuasive.

And that, perhaps, is the difficulty. Tribe's title tells the story of his book, and of this critique: much of the debate over abortion does represent a clash of absolutes, and not only are they absolutes—they are axioms. Putting to one side the millions of Americans whose views are reflected in opinion surveys, most of whom clearly find this issue a tough one, there are at the core of both the pro-choice and pro-life movements people sufficiently sure of their starting points that conversation with others whose axioms differ is virtually impossible. To speak of dialogue is to talk past both groups. The argument, finally, is about power. The only issue is who wins.

VIII

Still, Tribe has answers, and some of them are quite sensible. He suggests, for example, that cheap and reliable neonatal care and better and more widespread contraceptive technologies would go a long way toward reducing reliance on abortion as a means of dealing with unwanted pregnancies. Abortion is not something that any woman embraces cheerfully; as Adrienne Rich has written, "No free woman, with 100 percent effective, nonharmful birth control readily available, would 'choose' abortion."⁴²

But birth control is not all of it. Surely the lodestar of a real solution to the abortion dilemma should be the proposition that a world in which few women desire abortions is better than one in which some women desire them but are unable to attain them. Thus if the pro-life movement wants to reduce the

42. A. RICH, *OF WOMAN BORN: MOTHERHOOD AS EXPERIENCE AND INSTITUTION* 268-69 (1976).

number of abortions but is unable to enact legislation that will do very much to accomplish this goal, it must offer other incentives for women who choose to carry their pregnancies to term, finding ways to convince others to value life as much as the movement does. One must deal, after all, with the *roots* of the problem, and abortion is more a symptom than a problem; when women seek abortions, there are *reasons* that they do. We live in a world where child care is often shoddy or expensive, where jobs are not put on hold for women (or for men) who take time off to care for their children, where the very act of devoting one's life and skills to one's children continues to be viewed with suspicion.⁴³ Absent a considerable network of legal guarantees—that one's job will be waiting, that child care will not bust one's budget, and so on—it will continue to be very difficult for many women who might prefer to make another choice to carry their pregnancies to term.⁴⁴

And of course, there will always be women whose pregnancies will be "unwanted" for reasons that the government is powerless to alter: rape, incest, accidents, family situations, illnesses, birth defects, and so on. These abortion decisions cannot be reached by a strategy designed to remove the obstacles to childbearing, for these women are not so much facing obstacles as they are choosing for themselves which future life's vision they most desire. This is, perhaps, the essence of a private choice,⁴⁵ for no one can select a life's vision for someone else. Whether this is a private choice with which the government must interfere in order to protect life is a different matter, and it is one that Tribe, in the last part of his book, seeks to elide by means of a thought experiment involving an artificial womb.⁴⁶ Tribe suggests that if we had a safe and reliable means for removing the fetus from the pregnant woman and installing it in an artificial womb where it could be carried to term, the woman would suddenly be situated similarly to the man involved in bringing about the pregnancy: neither would have the fetus within the body.

The troubles with this proposal, even as a thought experiment, are two. First, the pro-choice advocate might object that it is only the woman, not the

43. See E. Aird, *Militant Mothering* (work-in-progress on file with author).

44. There is an additional, more controversial strategy. If one truly cares about incentives and cannot find negative ones, then one must generate positive ones instead. So it may be that what the pro-life movement should ultimately demand from the government is not prohibition but money, with which women will be paid for carrying pregnancies to term; for one incentive that has always worked is to offer people a reward for the behavior that one prefers. This is in two different senses a regressive solution—surely the women more likely to be attracted by a cash payment for carrying pregnancies to term rather than ending them will be mostly poor and disproportionately women of color, and it raises the specter not of conscription but of an all-volunteer army of human incubators—but the same might be said, albeit indirectly, of proposals, for example, to improve neonatal care and child care. Those are both services that women with sufficient resources can purchase in the market, so when the government provides them or subsidizes them, it is doing indirectly what direct payments do directly.

45. See A. ALLEN, *UNEASY ACCESS: PRIVACY FOR WOMEN IN A FREE SOCIETY* (1988). See also Rubinfeld, *The Right of Privacy*, 102 HARV. L. REV. 737 (1989).

46. Pp. 220-25. A few years back, I offered a similar idea. See Carter, *Roe vs. Wade Left Both Sides Open to Science*, WALL ST. J., Aug. 21, 1985, at 24, col. 4.

man, who is forced to undergo this invasive surgical procedure. The state might deem the procedure safe, and so it might be, but the woman's sovereignty over her own body is still put in question as long as this is the *only* procedure that she is permitted to choose. Second, as Tribe himself acknowledges, this form of compromise might be said to "violate a woman's rights to offer her equality only by rendering her womanhood inconsequential and marginalizing her distinctiveness as a woman"—an objection that would also hold, one supposes, were technology developed to allow impregnation of men—and, further, it "would vindicate a woman's right to be free of the burden of pregnancy but *not* her right to control the use of her genetic material in the creation of a child."⁴⁷

And Tribe's other "humane compromises"—for example, approval of the so-called abortion pill, RU-486—are unlikely to make the pro-life side happy. It is true, as Tribe argues, that were abortion a matter of taking the proper medication rather than undergoing a surgical procedure, the privacy defense that is under so much fire would be more plausible.⁴⁸ But the pro-life advocate would see this technological advance less as a compromise than as a surrender: the cheaper and easier the technology of abortion, the pro-life argument necessarily runs, the greater the devaluing of the human life that the fetus represents.

IX

The short of the matter is that, although one side obviously must prevail, compromise seems unlikely. What, then, are we to do? Tribe offers this guide to a solution: "In the end, the answer to both sides is the same: *In a democracy, voting and persuasion are all we have.*"⁴⁹ The implication is that the two sides in this battle should be talking *to* each other rather than *at* or *past* each other, a lovely vision of the role of public moral dialogue in the liberal state.

The trouble is that Tribe has just devoted most of his book to showing us all of the many forces that make conversation difficult or impossible, and even when he has suggested common ground, I have tried to show why it is rarely ground that the pro-life side is likely to find attractive; and the one time that it might be—in his discussion and apparent advocacy of a technology that would allow the pregnant woman to end the pregnancy but not kill the fetus—he might run into trouble from the pro-choice side. I fear that his title got the matter right and the book, for all of its value, has not really resolved it. The clash is still one of absolutes, and there is no particular reason to think that dialogue will resolve it in the near term.

That does not mean that no resolution is possible, however, for in the American constitutional democracy, voting and persuasion are *not* all we have.

47. Pp. 224-25 (emphasis in original).

48. P. 216.

49. P. 240 (emphasis in original).

We also have the Constitution. Although Tribe is at pains to point out that the Constitution can be amended,⁵⁰ amendment has lately proved almost impossible, even for the broadly popular amendment to guarantee equality for women. When a moral battle seems politically intractable, the parties cease to battle each other and fight for control of the legal apparatus instead, arguing before the courts the merits of their moral positions (in legal guise), or, better still, choosing judges on the basis of predictions about the way that they will vote. The reason, I suspect, that *Webster* came as such a stunning setback to both sides is that neither was well-prepared to cope with a world in which the political institutions would actually have to resolve a moral dilemma instead of letting the Supreme Court do it and taking potshots at the results.

Robert Goldwin, in a little essay on the search for morality in the Constitution, has complained that moral absolutism tends to distort constitutional law.⁵¹ This, of course, is true. But in a world in which moral absolutists, many in number, are not content with the results of political process, there are few alternatives to litigation or civil war. We tried civil war once already, and if hundreds of thousands died, at least the viciously repressive system of chattel slavery was eradicated. In the abortion debate, the most firmly committed activists on both sides seem to think that every bit as much is at stake now as was then, which suggests that until there is some sign of political consensus, it may turn out that in *this* democracy, litigation and protest are all we have.

50. P. 240.

51. ROBERT GOLDWIN, *Of Men and Angels: A Search for Morality in the Constitution*, in WHY BLACKS, WOMEN, AND JEWS ARE NOT MENTIONED IN THE CONSTITUTION, AND OTHER UNORTHODOX VIEWS 21 (1990).

Wither Goest Labor Law: Law and Economics in the Workplace*

Governing the Workplace: The Future of Labor and Employment Law. By Paul C. Weiler.** Cambridge: Harvard University Press, 1990.

Michael H. Gottesman†

INTRODUCTION

The long and steady decline in the percentage of private-sector employees represented by unions—a decline now in its fourth decade¹—preoccupies all thinking about American labor law today. One would not have learned of this decline from the writings of scholars and courts during the 1960's and 1970's; indeed, these sources espoused little but unadulterated enthusiasm for the institution of collective bargaining.²

An entire generation of labor law academics focused their scholarship upon perfecting the system of collective bargaining created by the Wagner Act³ for

* In the interest of upholding *The Yale Law Journal's* reputation for editorial reliability, I wish to be clear that the spelling of "wither" is mine, retained after an editor's query, and that it is intended as a double pun. The existing scheme for regulating the workplace—that established by the National Labor Relations Act—is withering away, as reflected by the precipitous decline in the percentage of private-sector employees who are union represented. See *infra* notes 1 and 2 and accompanying text. And some scholars advocate that the future course be reliance on an unregulated market, a total withering away of the law as an instrument of regulation. See *infra* notes 23-30 and accompanying text.

** Professor of Law, Harvard Law School.

† Professor of Law, Georgetown University Law Center. I wish to thank Alan Axelrod, Stanley Besen, Gary Peller, Warren Schwartz, Mark Tushnet, and participants in a Georgetown Faculty Research Workshop for enormously helpful reactions to an earlier draft of this review, and Patricia Steele for invaluable research assistance. The views expressed in this review undoubtedly are informed by—and readers may wonder whether they are skewed by—my long service in the firm of Bredhoff & Kaiser representing labor unions.

1. The percentage of private-sector employees represented by unions peaked in 1954 (at 38%) and then began a decline that, by 1990, found less than 14% union represented. Gottesman, *Rethinking Labor Law Preemption: State Laws Facilitating Unionization*, 7 YALE J. ON REG. 355, 362 (1990).

2. See, e.g., *infra* notes 3, 5-8.

3. National Labor Relations Act of 1935, Pub. L. No. 74-198, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §151-168 (1973 & Supp. 1990)) [hereinafter Wagner Act or NLRA]. The literature on the NLRA is vast and rich. The following books and articles are some among the many that are important in the field: J. ATLESON, *VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW* (1983); J. GETMAN, S. GOLDBERG & J. HERMAN, *UNION REPRESENTATION ELECTIONS: LAW AND REALITY* (1976); Bok, *The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act*, 78 HARV. L. REV. 38 (1964); Cox, *The Duty To Bargain in Good Faith*, 71 HARV. L. REV. 1401 (1958); Cox, *Federalism in the Law of Labor Relations*, 67 HARV. L. REV. 1297 (1954); Feller, *A General Theory of*

ordering the legal relations between employers and employees.⁴ The courts were no less rhapsodic; the Supreme Court, for example, repeatedly declared that collective bargaining is "our national labor policy,"⁵ and its decisions gave collective bargaining the fullest possible sway. So powerful was the Court's commitment that it went to great lengths to prevent interference by federal courts and state governments with the parties' bargaining freedom⁶ and even subordinated the values of other federal statutes, such as Title VII of the Civil Rights Act of 1964,⁷ to the primacy of collective bargaining.⁸

the Collective Bargaining Agreement, 61 CALIF. L. REV. 663 (1973); Gorman & Finkin, *The Individual and the Requirement of "Concert" Under the National Labor Relations Act*, 130 U. PA. L. REV. 286 (1981); Gould, *The Question of Union Activity on Company Property*, 18 VAND. L. REV. 73 (1964); Hyde, *Economic Labor Law v. Political Labor Relations: Dilemmas for Liberal Legalism*, 60 TEX. L. REV. 1 (1981); Lesnick, *The Gravamen of the Secondary Boycott*, 62 COLUM. L. REV. 1363 (1962); Summers, *Collective Agreements and the Law of Contracts*, 78 YALE L.J. 525 (1969); Wellington, *Union Democracy and Fair Representation: Federal Responsibility in a Federal System*, 67 YALE L.J. 1327 (1958). To these should be added, for reasons that will be apparent later, the prior articles of Paul Weiler diagnosing the defects in the NLRA. See *infra* note 143.

4. Under the NLRA, employees have the right to select by majority vote an exclusive bargaining representative, the employer is obliged to bargain with that representative in a good faith attempt to arrive at a mutually acceptable collective bargaining agreement, and employees enjoy a protected right to use various forms of economic pressure (strikes, picketing, consumer boycotts, etc.) to induce the employer to accept their representative's bargaining proposals. Under this scheme, government facilitates the creation and functioning of the bargaining process, but the determination of substantive employment terms is left entirely to the parties.

5. See, e.g., *Trans World Airlines v. Hardison*, 432 U.S. 63, 79 (1977); *Lodge 76, Int'l Ass'n of Machinists v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132, 136 (1976); *Teamsters Union v. Morton*, 377 U.S. 252, 260 (1964); *infra* notes 6, 8.

6. For restraints on federal courts, see, e.g., *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29 (1987) (except in the most extreme circumstances, courts cannot set aside arbitration awards implementing collective bargaining agreements on ground that they offend public policy); *Jacksonville Bulk Terminals, Inc. v. Int'l Longshoremen's Ass'n*, 457 U.S. 702 (1982) (courts ordinarily may not enjoin strikes even if they think them in breach of collective bargaining agreement); *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960) (courts may not refuse to enforce arbitration awards because they think arbitrators' decisions are wrong on merits; parties chose arbitrators, not courts, to decide merits, and arbitrators are better qualified to do so); *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960) (courts may not refuse to order arbitration of grievances alleging breach of collective bargaining agreement because they think them frivolous; parties have selected arbitrators, not courts, to construe their agreement, and arbitrators are better qualified to do so).

For restraints on state governments, see, e.g., *Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608 (1986) (NLRA preempts city's right to deny taxi franchise to company for failing to reach agreement with union on terms of new collective bargaining agreement); *Lodge 76, Int'l Ass'n of Machinists*, 427 U.S. 132 (NLRA preempts states' rights to regulate concerted slowdowns on the job); *Amalgamated Ass'n of Street Employees v. Lockridge*, 403 U.S. 274 (1971) (NLRA preempts states' right to regulate union activity causing employer to discharge nonmember); *San Diego Building Trade Council v. Garmon*, 359 U.S. 236 (1959) (NLRA preempts states' rights to regulate picketing).

7. Civil Rights Act of 1964, Title VII, Pub. L. No. 88-352, 78 Stat. 253 (1964).

8. See, e.g., *Int'l Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977) (disparate impact doctrine of Title VII inapplicable to seniority systems, absent discriminatory intent); *California Brewers Ass'n v. Bryant*, 444 U.S. 598, 608 (1980) (rejecting effort to limit *Teamsters* to certain types of seniority systems: "Congress passed the Civil Rights Act of 1964 against the backdrop of this Nation's longstanding labor policy of leaving to the chosen representatives of employers and employees the freedom through collective bargaining to establish conditions of employment applicable to a particular business or industrial environment. . . . It does not behoove a court to second-guess either that process or its products."); *United Steelworkers v. Weber*, 443 U.S. 193 (1979) (racial quota for admission to training programs, negotiated between private employer and union, does not constitute race discrimination under Title VII); *Trans World Airlines v. Hardison*, 432 U.S. at 79 (obligation to provide reasonable accommodation to religious objectors

The only discordant note in this affection for collective bargaining has been sounded by those for whom the institution was designed—the employees—who appear no longer to share the enthusiasm of the academic and judicial onlookers.⁹ At the peak of the Wagner Act's success, nearly 40% of private-sector employees in America were represented by unions.¹⁰ That volume constituted a critical mass, large enough to put pressure on nonunion employers to match collectively bargained terms in order to prevent unionization and/or compete in the marketplace for employees. Collective bargaining set the national standards that other employers were obliged to follow.

Today, however, the percentage of private-sector workers represented by unions is less than 14%, below the level that existed in 1935 before passage of the Wagner Act.¹¹ Where collective bargaining once set the standards for other employers, unionized employers now are under pressure to *escape* collectively bargained terms as they face competition from foreign and non-union firms enjoying much lower labor costs. "Our national labor policy" is withering away.

A. *Ordering the Workplace: Competing Theories*

The plunge in unionism makes this a critical moment in labor law scholarship. There is no longer a consensus regarding the core out of which the whole of the labor law must be elaborated, namely, the central principle for ordering the relationship between employer and employee. It is easy enough to identify the logical contenders: an unregulated marketplace, in which the law treats employer-employee negotiations no differently from the employer's negotiations with suppliers of raw materials; a marketplace overlaid with government conferral of substantive protections upon employees; and some form of collective dealing by employees with their employers (collective bargaining being the most familiar but not the only paradigm of this last approach).¹² What is only

does not require departure from collectively bargained seniority system: "[c]ollective bargaining . . . lies at the core of our national labor policy, and . . . [w]ithout a clear and express indication from Congress, we cannot agree . . . that an agreed-upon seniority system must give way when necessary to accommodate religious observances"); *Emporium Capwell Co. v. Western Addition Community Org.*, 420 U.S. 50, 69 (1975) (minority employees may not engage in concerted activity to alter employer's racial policies in derogation of union's role as exclusive bargaining representative; substantive right conferred by Title VII to be free of racial discrimination "cannot be pursued at the expense of the orderly collective-bargaining process contemplated by the NLRA").

9. Of course, most employers were never fans of the NLRA, but their disapproval has not been perceived as an indication that the law has failed in its essential purpose. It is quite another thing when workers abandon the Act.

10. Gottesman, *supra* note 1.

11. *Id.*

12. Sunstein, *Rights, Minimal Terms and Solidarity: A Comment*, 51 U. CHI. L. REV. 1041, 1059 (1984). Forms of collective dealing other than traditional collective bargaining are discussed *infra* notes 170-03 and accompanying text. There are two other ways in which employees can interact with the governance of their employer, but neither offers a generally useful solution for ordering the workplace. One is voting employee representation on the employer's Board of Directors. The desirability of such representation is

just beginning is a serious debate and dialogue among contemporary labor law scholars about the relative merits of these options.¹³

B. *"Governing the Workplace": Paul Weiler's Evaluation of the Competing Theories for Ordering the Workplace*

This context of uncertainty and controversy makes especially timely Paul Weiler's new book, *Governing the Workplace*.¹⁴ Weiler is one of the most widely respected contemporary scholars in American labor law.¹⁵ His contribution is especially provocative because it constitutes a systematic effort to demonstrate that collective bargaining, despite its recent setbacks, truly is the most effective ordering principle for the workplace, and with proper adjustments in the legal mechanisms that regulate it and self-restructuring by the labor movement its centrality might be reestablished.

Weiler develops his thesis out of three broad explorations.¹⁶ First, he asks, why not allow the "market" to regulate the workplace by treating the sale of labor in the same manner as the sale of raw materials?¹⁷ Here, Weiler engages in a debate with Richard Epstein, an ardent champion of the market approach.

hotly debated. *See, e.g.*, Stone, *Labor and the Corporate Structure: Changing Conceptions and Emerging Possibilities*, 55 U. CHI. L. REV. 73, 157-58 (1988) (workers have greater entitlement than shareholders to voting Board membership); Williamson, *Corporate Governance*, 93 YALE L.J. 1197, 1206-07 (1984) (at most, unions should have nonvoting members for purposes of obtaining information). But even were voting representation provided, it could not suffice to protect employee interests unless employees controlled the Board. Absent such control, the shareholder majority inevitably would opt for solutions that optimized the interests of the employer vis-à-vis the employees. The second alternative is employee control of the governance of the corporation, most likely achieved through employee stock ownership plans. It would be sufficient to point out that employee control is so unlikely to become the predominant mode of corporate governance that it cannot be looked to as our national solution. But Weiler explores the pros and cons of employee control, emerging uncertain whether, were it politically viable, it would offer a meaningful alternative to the approaches described above in text. *See* P. WEILER, *GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW* (1990) [hereinafter cited by page number only].

13. Of course, issues of this sort have been generally debated at least since Adam Smith and Karl Marx. And debates continued in disciplines outside the law schools during the post-World War II period. *See, e.g.*, M. FRIEDMAN & R. FRIEDMAN, *FREE TO CHOOSE: A PERSONAL STATEMENT* 228-47 (1979); O. WILLIAMSON, *MARKETS AND HIERARCHIES: ANALYSIS AND ANTITRUST IMPLICATIONS* 57-82 (1975); Alchian & Demsetz, *Production, Information Costs, and Economic Organization*, 62 AM. ECON. REV. 777 (1972). But the 1980's saw the first signs of interest among contemporary legal scholars.

14. *See* P. WEILER, *supra* note 12.

15. Weiler is Canadian, but has been a member of the Harvard Law School faculty for many years and has written extensively about American labor law. His contributions have been especially enriched, as has this book, by his knowledge and experience respecting Canadian labor law—under which unions have fared much better than in the United States. *See infra* note 142. Weiler was Chair of the British Columbia Labor Relations Board from 1974 to 1978, has served on the United Auto Workers' Public Review Board since 1980, and has been an Impartial Umpire to the AFL-CIO since 1987. AALS, *DIRECTORY OF LAW TEACHERS* 880-81 (1990).

16. The tripartite structure ascribed to the book in this review is my effort to organize its contents. The book wanders back and forth among its various theses without a roadmap. For example, the case against reliance on the marketplace is scattered in three separate chapters, pp. 56-78, 118-33, 134-52. This lack of cohesion is, I suspect, a bigger problem for reviewers than readers. Weiler's writing style, here as always, is fluid, and his discussion is interesting throughout.

17. Pp. 56-78, 134-52.

Epstein contends that the employment relationship is a supply contract like any other and should be treated as such by the law.¹⁸ Weiler, it eventuates, is not content to trust the market. Second, Weiler asks, why not protect employees through direct government regulation, rather than leaving them to struggle to obtain the protections for themselves? He carefully assesses the merits and demerits of government regulation of employment terms and concludes that the weaknesses are substantial enough to warrant a search for alternative solutions.¹⁹ Dissatisfaction with the market and with government regulation leads Weiler to the final stage, where he tackles a trio of interrelated questions: Is collective bargaining superior to these other forms of regulating the workplace?²⁰ If so, why haven't employees embraced it in larger numbers?²¹ How (and in what forms) can it be resuscitated?²² It is from these inquiries that Weiler's program for reinstating collective bargaining as the ordering principle for the American workplace emerges.

There is much that is insightful in this book, and some that is, in my view, ill-founded. I shall try to convey both qualities in the discussion that follows.

I. WEILER VS. THE MARKET

A. *Neoclassical Economics: The Case for Leaving the Labor Market Unregulated*

Weiler's analysis of labor markets responds to a thesis propounded in the past decade by Richard Epstein and other adherents of neoclassical economics who contend that there is no reason for the law to treat the sale of labor differently from the sale of products.²³ In their view treating the employer-employee relationship as a typical supply contract respects the autonomy of both parties and yields outcomes that are efficient. The frequently voiced charge that workers suffer an "inequality of bargaining power"²⁴ in dealing with their em-

18. Epstein, *A Common Law for Labor Relations: A Critique of the West New Deal Labor Legislation*, 92 YALE L.J. 1357 (1983) [hereinafter Epstein, *Common Law*]; Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947 (1984) [hereinafter Epstein, *Contract at Will*]; Epstein, *Agency Costs, Employment Contracts and Labor Unions*, in PRINCIPALS AND AGENTS: THE STRUCTURE OF BUSINESS 127 (J.W. Pratt & J.R.J. Zeckhauser eds. 1985). The most extensive elaboration of Epstein's market thesis will appear in Epstein's forthcoming book, tentatively titled, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS chs. 2-5 (forthcoming from Harvard University Press 1991).

19. Pp. 78-87, 152-61.

20. Pp. 87-94, 181-85.

21. Pp. 105-18, 186-93.

22. Pp. 193-311.

23. See Harrison, *The "New" Terminable-at-Will Employment Contract: An Interest and Cost Incidence Analysis*, 69 IOWA L. REV. 327 (1984); Power, *A Defense of the Employment at Will Rule*, 27 ST. LOUIS U. L.J. 881 (1983); *supra* note 18. Richard Posner has literally cast his vote in favor of this thesis. *Jordan v. Duff & Phelps, Inc.*, 815 F.2d 429, 447-50 (7th Cir. 1987) (Posner, J., dissenting), *cert. denied*, 485 U.S. 91 (1988).

24. See, e.g., the NLR's statement of purpose, 29 U.S.C. §151 (1988) (there is "inequality of bargaining power" between employees and corporate employers; a purpose of NLRA is "restoring equality

ployers is exaggerated, if not entirely wrong, for employers must compete against each other to attract workers and thus no employer can succeed unless it matches the competitive wage.²⁵ Any intervention that increases the cost of labor above that which would be freely negotiated is suboptimal.²⁶ (The thesis assumes that redistribution of wealth is not a goal we seek to achieve through our choice of legal regime; Epstein asserts that if we *are* interested in redistributing wealth, we can do so more efficiently through the tax and welfare laws than through the labor laws.)²⁷

B. *Neoclassical Economics Applied: Should Discharges Be Regulated?*

Epstein puts these arguments to work examining the workplace issue that has most intrigued academics and courts in the past decade: what legal constraints, if any, should be placed upon the employer's ability to discharge its employees. Epstein notes that at common law the relationship between employer and employee was deemed to be completely contractual, with both sides presumed to have reserved the right to end the relationship "at will" unless the contract expressly provided otherwise.²⁸ He recognizes that discharges that violate public policy—i.e., that offend the interests of strangers to the employment contract in a way that the law regards as intolerable—are a proper subject

of bargaining power between employers and employees").

25. Epstein, *Contract at Will*, *supra* note 18, at 974.

26. *Id.* at 976. Samuel Issacharoff has succinctly captured the neoclassical view of suboptimality (with which he disagrees):

[U]nions . . . distort both the allocative and distributive functions of an otherwise efficient market. Unions artificially inflate wages for a privileged sector of the economy at the expense of consumer welfare (including that of the nonunion workforce). By constraining the free functioning of the employment market, unions also deflect the operation of individual employees' preeminent protection from oppressive and unjust work conditions: the ability to quit and seek employment with a rival employer.

Issacharoff, *Reconstructing Employment* (Book Review), 104 HARV. L. REV. 607, 619 (1990) (reviewing P. WEILER, *supra* note 12).

27. Epstein, *Contract at Will*, *supra* note 18, at 977. Market advocates are divided on the question whether workers should be allowed to combine to attempt to enhance their market position vis-à-vis the employer. On the one hand, many libertarians believe that workers should be free to do so, but that the employer should have no obligation to deal with the combiners and should be free to deal instead with others who offer to work for less (indeed, free to secure "yellow dog" contracts in which employees bind themselves not to join a union.) Epstein, *Common Law*, *supra* note 18, at 1369, 1381-85. Utilitarians, on the other hand, would object that unions represent cartels attempting to fix the price (through control of the supply) of the commodity they are selling, and that this is just as injurious to society when done with respect to labor as with respect to other resources upon which the employer must rely. *See id.* at 1379-81. Richard Posner argues that unions function as traditional cartels. Posner, *Some Economics of Labor Law*, 51 U. CHI. L. REV. 988 (1984). Posner professes not to take a stand on whether that is a good or bad thing: "I take no position on whether it is socially preferable for the price of labor to be determined on a competitive or on a cartelized basis." *Id.* at 990.

Weiler's book analyzes the cartel issue at length, concluding that a union cannot function as an effective cartel except where the employer's product market is itself already cartelized and in that setting the union's cartelization is benign as it merely enables the workers to capture some of the rents generated by the existing employer cartel. Pp. 118-33.

28. Epstein, *Contract at Will*, *supra* note 18, at 947-48.

of legal regulation.²⁹ For example, an employer may not have committed itself contractually to abstain from firing employees who refuse to violate the law, but society has an interest in preventing such discharges. However, when a discharge threatens no interests except those of the discharged employee and its only supposed vice is that it is somehow unfair to that employee, it is not, in the absence of a contractual undertaking to refrain from such discharges, a proper subject for legal intervention.

Epstein assures us that the market will deter most frivolous discharges. While employers need to be able to rid themselves of bad employees, there are built-in costs to discharging employees and these will act as natural restraints upon frivolous discharges: the employer will lose its training investment in the employee, incur the costs of recruiting and training a replacement, jeopardize the morale (hence productivity) of the remaining employees, and suffer a reputational loss that will disadvantage it in competing with other employers to attract and retain employees.³⁰ We can expect, therefore, that the instances of frivolous discharge will be relatively infrequent, because they are economically unsound.

Still, Epstein concedes, there may be some frivolous discharges. But society would suffer unacceptable costs were we to attempt to prevent or remedy these through legal intervention. Allowing employees to litigate whether their discharges lack good cause would subject *all* decisions (not just those that are in fact frivolous) to second guessing by juries, who may be biased and in any event may err. Consequently, employers would engage in defensive employment practices, expending resources to document employee shortcomings in anticipation of having to defend future discharges or, worse still, retaining unsatisfactory employees out of fear that justified discharges would be overturned by juries.³¹ There would be a dead-weight loss in the efficiency of the enterprise which would harm society however the loss were distributed.³²

Of course, if an employee really *wants* this protection against frivolous discharge, she is free to bargain for it, presumably trading other components of her wage package for this protection. But, Epstein posits, the almost universal absence of such contractual protection in the nonunion sector demonstrates that employees generally do not want this protection, or at least are not willing to pay for it. He sees this as confirmation of the inadvisability of governmental interference in the workings of a free market.³³ He suggests that, on balance,

29. *Id.* at 952.

30. *Id.* at 966-76.

31. *Id.* at 970-73.

32. If the cost were reflected in the price of the employer's product, the loss would be suffered by consumers. If absorbed as lower profits, it would be suffered by shareholders. If recaptured out of the package of benefits extended generally to employees, the effect of legal protection would not be a net gain for workers, but rather a redistribution in which the better employees subsidized those at the margin who are the likely targets of an employer's discharge.

33. *Id.* at 948, 955.

employees have preferred ex ante to spare employers the cost of this legal restraint and to share in the surplus thus generated.³⁴

C. *The Liberal Response to the Neoclassical Economists: Ignore or Engage?*

When Epstein first unveiled (or, more accurately, reintroduced the legal fraternity to³⁵) the market thesis for regulating the workplace, Professors Julius Getman and Thomas Kohler responded:

[P]rofessor Epstein's work does not contribute in any way to our existing store of knowledge about labor law. It sheds no light on the reality of labor relations, nor does it contribute anything to our understanding of the impact of labor law on society Professor Epstein's Article is representative of a growing but lamentable tendency in the legal literature to comment critically on areas in which the author has no expertise, using as a measure axioms formulated *in vacuo* and without regard to observed actualities.³⁶

If the liberals' only concern were to ward off the prospect that society might use Epstein's thesis to define the agenda for shaping the labor laws, this peremptory dismissal likely would suffice. Nothing in contemporary political experience suggests that the public views the sale of labor as indistinguishable from the the sale of fish.³⁷ Quite the contrary, the decline in unionization has been accompanied by an explosion, coming from three directions at once, of legal rules compelling employers to confer protections and benefits upon employees: federal legislation, state legislation, and expansion of common law doctrines by state courts.³⁸

Still, it is important that liberals articulate systematically the deficiencies they believe inhere in the neoclassical model. For a conviction that workers cannot be abandoned to an unregulated market is but the start of the venture; it remains to be determined just what regulation is in order. And prescribing the right remedy requires accurate diagnosis of the disease. To that end, it is important to take up the challenge issued by Epstein, in his rejoinder to Getman and Kohler:

34. *See id.* at 956-57.

35. *See supra* note 13.

36. Getman & Kohler, *The Common Law, Labor Law, and Reality: A Response to Professor Epstein*, 92 YALE L.J. 1415, 1416 (1983).

37. "The labor market might just be different in important ways from the market for fish." R. SOLOW, *THE LABOR MARKET AS A SOCIAL INSTITUTION* 30 (1990), *quoted in* Finkin, *Weiler, Governing the Workplace* (Book Review), 32 WM. & MARY L. REV. 1005 (1991) (reviewing P. WEILER, *supra* note 12).

38. Gottesman, *supra* note 1, at 361-74; Summers, *Labor Law as the Century Turns: A Changing of the Guard*, 67 NEB. L. REV. 7, 11-14 (1988). *See generally* H. SPECTER & M. FINKIN, 2 INDIVIDUAL EMPLOYMENT LAW AND LITIGATION 134, 288-90 (1989).

Reexamination of first principles is always hard, and often unpleasant, especially if it entails a change in orientation or commitment

Yet a closer look at Getman and Kohler's own work should be sufficient to dissipate any complacent support for the status quo. It should be apparent that Getman and Kohler present no hint of any theory, normative or positive, relevant to labor relations, or indeed to any other legal area. Nonetheless *it takes a theory to beat a theory*, so it is wholly insufficient for them to belittle the use of common law [market] arguments without some explanation as to why these arguments are wrong or why they should be replaced.³⁹

This is the point at which Paul Weiler enters the debate. Like Getman and Kohler, he is a true believer in collective bargaining. But he does not follow the denunciatory course of his predecessors-in-arms. In Weiler's view, Epstein's argument for leaving the labor market unregulated is a "coherent and powerful thesis" that should "awaken liberal reformers from a rather dogmatic slumber."⁴⁰ But respect does not connote acceptance. Weiler takes up Epstein's challenge and attempts to present theories that will beat Epstein's theory.

D. *Weiler's Response: Yuppie Justice as the Refutation of the Neoclassical Economists' Case*

Weiler conceptualizes the challenge he is undertaking with this hypothetical: In some instances, robots have replaced workers in our society. We would not think to develop a legal regime that intervened to influence the terms that the robot-seller extracts from the employer or the manner in which the two negotiate over those terms. Why, in the case of work to be done by humans, should we have a different and more aggressive legal regime for regulating either the terms upon which such labor will be furnished or the process by which the parties arrive at those terms?⁴¹ This is, undoubtedly, the right question, effectively asked, for it forces us to seek out and examine the differences between contracts for goods and contracts for labor.

Weiler does battle with Epstein over this question largely on Epstein's turf. At no point does Weiler rest his case on a desire to redistribute wealth from capitalists to workers; indeed, Weiler apparently believes that such a redistribution cannot be accomplished through the labor laws except perhaps in cartelized industries.⁴² Rather, Weiler's arsenal contains two theories, one "moral" and one "economic," each asserted to be a sufficient refutation of the propriety of relying on the market to order labor terms.

39. Epstein, *Common Law, Labor Law, and Reality: A Rejoinder to Professors Getman and Kohler*, 92 YALE L.J. 1435 (1983) (emphasis added).

40. P. 63.

41. Pp. 135-36.

42. Pp. 131-33. I discuss the redistribution issue *infra* notes 96-103 and accompanying text.

Weiler's theories are quite unlike traditional liberal justifications for government intervention in that they protect only relatively well-off employees, more precisely the ones Weiler terms "career employees"—those whose talents the employer will want to retain throughout their careers.⁴³ Indeed, as we shall see, Weiler would leave less favored employees defenseless under the law.⁴⁴ His book, then, is the ultimate brief for yuppie justice—a legal regime that protects only skilled, well-educated employees.⁴⁵

Weiler's first theory declares that many employees have been induced to stay with their employer through the latter's adoption of employment terms that create an expectation of career employment, and it is not "moral" to permit the employer to frustrate that expectation without good justification.⁴⁶ The second theory asserts that these career employees have become so dependent upon the employer—whose largesse would not be replicated were these employees to seek other jobs available in the market—that they lack the modicum of bargaining leverage necessary to produce an economically efficient agreement.⁴⁷ I shall describe Weiler's vision of the career employee, which is common to both theories, and then examine the theories themselves.

1. *The Emergence of the Career Employee*

Weiler begins by cataloguing characteristics that distinguish the relationship of a long-term employee with her employer from that of the raw materials supplier (the robot-seller in Weiler's conceptual hypothetical). First, the employee will spend her work-life under the employer's supervision and control; the robot-seller will not. This means that the employee must subjugate her autonomy to the dominion of another. It also means that the workplace will represent the environment in which she spends a substantial part of her life and in which she will develop friendships and a way of life that will be important to her. Thus, the rules and practices of that workplace—including the ability to remain there—will be of paramount concern to the employee, but not, presumably, to the robot, and surely not to the robot-seller. Second, the robot-seller can diversify his risk, selling robots to many customers at once; the employee, however, cannot be two places at once and thus inevitably makes a greater commitment to the enterprise. Third, once the robot has been sold, the robot-seller is indifferent to its treatment by the employer; if the employer breaks it, that is a problem for the employer alone. But when an employer "breaks" an

43. See *infra* notes 49-56 and accompanying text for a description of Weiler's career employee.

44. See *infra* notes 53, 89-91, 122 and accompanying text.

45. The book is criticized severely on this point by Matthew Finkin who, like me, believes the law's primary responsibility is protection of those with the *least* leverage in the workplace. See Finkin, *supra* note 37. For my view, see *infra* notes 96-103 and accompanying text.

46. See *infra* notes 49-67 and accompanying text.

47. See *infra* notes 68-88 and accompanying text.

employee, e.g., through unsafe or unhealthy conditions in the workplace, that is very much the employee's concern.⁴⁸

Weiler's catalogue seems accurate, and it suggests that the employee will have a stake in securing protections that are far more complicated than those covered in a typical material supply contract. However, it is not self-evident that, standing alone, this difference renders the market an inappropriate forum for reaching agreement about those interests. In the commercial world, the market facilitates complicated as well as simple agreements.

But now comes the point that for Weiler is decisive: the emergence of the career employee. Weiler claims that a "fundamental transformation" in the nature of the workplace has occurred over the past quarter century⁴⁹—a change that post-dates not only the development of the at-will doctrine but even the enactment of the NLRA. Whereas employment historically tended to be short-term and the duty expected of employees was simple obedience, in recent years employers increasingly have encouraged long-term career relationships and employee participation in shaping both the terms of employment and the manner in which the work gets done. Employers have opted to retain current employees even when stronger or cheaper candidates are available in the market, to promote from within, and to back-load the package of compensation and benefits so that employees are induced to stay with the employer throughout their careers.⁵⁰

Weiler explains that these career-inducing practices were developed first at unionized firms and reflected the desires of employees, not employers. They were adopted at the insistence of the more senior employees, who exercised particular influence over the shaping of the unions' agendas. Moreover, the initial adoption of similar practices by nonunion firms was a defensive reaction prompted by the need to compete for workers and/or to avoid unionization, again not a reflection that employers preferred this regime.⁵¹

But Weiler insists that many nonunion employers (such as IBM), who have no need to behave defensively, now embrace the career relationship and find that it is in the *firm's* interest to foster such relationships. The advent of the global economy and the corporate takeover have increased the pressure to maximize return on capital and made it imperative that businesses react quickly to competitive challenges, and this makes it attractive for employers to have continuity: employees (unlike robots) can leave, and when they do the employer is saddled with substantial recruiting and training costs. In addition, employees, unlike robots, can be moody; their productivity will vary depending upon their morale and sense of commitment to the firm. Finally, as American firms learn from their foreign competitors the benefits of employee participation in deci-

48. Pp. 135-36, 142-44.

49. P. 307.

50. Pp. 63-66, 136-52.

51. Pp. 32, 141, 151.

sionmaking, they want employees to work together as a team and to utilize their firm-specific knowledge to make valuable innovative suggestions.⁵²

In Weiler's view, the key to the refutation of Epstein's approach lies in recognizing the emergence of this career relationship. Weiler agrees with Epstein that the at-will doctrine was appropriate when employment relationships tended to be short-term and there was no substantial employee investment that would be snuffed out by the employer retaining the same right as the employee to terminate the relationship at any time.⁵³ But now, with employers paying long-service employees extra compensation and benefits in order to induce them to stay, those employees have attained stature in their present jobs that cannot be replicated anywhere else. Much of what the employer is paying for is job-specific or at least employer-specific know-how that would not be of value to other employers—what economists call “firm-specific human capital.”⁵⁴ Moreover, even if the capital is in theory transportable to other employers, the fact that so many employers now promote from within (“internal labor markets”) means that the career employee, in order to work elsewhere, would have to start at the bottom of the seniority ladder and wait years to achieve anything approximating her current status.⁵⁵

Weiler asserts that a majority of jobs in America are now of this career type.⁵⁶ The plight of the career employee as just described—induced to remain until effectively locked-in—is the predicate of both Weiler's theories for refuting Epstein's market thesis.

2. Weiler's "Moral" Thesis

The traditional at-will legal concept is “morally untenable” in the case of career employees, Weiler contends, for one reason: such employees “can rightfully assume that they have some entitlement to retain their position as long as they are performing their jobs reasonably well.”⁵⁷ Why that assumption is “rightful” is, of course, the crux of the matter, and Weiler is not altogether convincing on this point. The employee's assumption surely would be rightful if the employer had promised that in return for long service the employ-

52. Pp. 31-32, 64, 144-52.

53. “From a socioeconomic perspective, the employment relationship (particularly in manual work, which comprised the majority of jobs at the time) was truly casual and episodic; thus the law's adoption of a strong presumption of an at-will contract was very much in accordance with workplace life.” P. 145 (footnote omitted); *see also* p. 101; *infra* notes 89-91, 122 and accompanying text (those employees who knowingly accept at-will contracts should be held to them).

54. The landmark work on this phenomenon is O. WILLIAMSON, *supra* note 13. For particularly pertinent analysis, *see id.* at 57-81, 129-30.

55. Pp. 65-66, 139-40.

56. P. 141. This claim is at best arguable in light of recent statistics. *See* Linder, *Governing the Workplace* (Book Review), 9 LAW & INEQUALITY ____ (1991) (reviewing P. WEILER, *supra* note 12 (citing statistics showing, inter alia, that only a small percentage of American workers remain with a single employer for 20 years or more)).

57. P. 68.

ee would be protected—even Epstein would enforce contractual promises—but Weiler’s view is that most nonunion career employees do *not* receive such promises.⁵⁸ Instead, Weiler weaves a sort of promissory-estoppel-without-a-promise theory.

Weiler interprets empirical investigations as showing that career employees are underpaid during the early portion of their careers relative to their marginal product, and overpaid during the latter part of their careers:⁵⁹

New employees come to work under a regime in which they initially earn less in pay and benefits than they produce. . . . This system has been designed by the firm to induce workers to remain in its employ, because the employees realize that eventually they will reap the benefits of the system when they have put in sufficient time under it.⁶⁰

My difficulty with this account is two-fold: it defies economic theory and it defies common sense. To begin with the latter, why, absent a promise of future benefit, would employees accept employment at less than they could earn elsewhere? Weiler’s answer—that they know the employer’s treatment of long-service employees and assume they will be allowed to reach that status—is inconsistent with his assertions elsewhere that most employees at time of hire are ignorant of the employer’s employment practices.⁶¹ Moreover, Weiler’s candidates for career employment are sophisticated folks; why would they assume that longevity is assured when the employer conspicuously has withheld any such assurance?

Even less plausible is Weiler’s account of the employer’s motivation. It is not hard to see why employers would underpay new hires if they could get away with it. But why would employers pay senior employees more than they are worth? Weiler’s answer, in effect, is that employers value career employees so highly they will overpay them to retain them. That answer is its own refutation.

These common sense doubts about Weiler’s “moral” thesis are corroborated by economic theory. It may be true that employees at the time of hire accept

58. Pp. 77-78. Matthew Finkin vigorously disputes Weiler’s assumption that there is no contractual promise in the case of most career employees. Finkin, *supra* note 37. In Finkin’s view, employers regularly make such promises, but in a fashion that, while persuasive to employees, is not enforced by the courts. He cites, as examples, oral promises that some courts hold violative of the statute of frauds and/or too “indefinite” to be enforceable, and written representations in handbooks that courts ignore because of disclaimer clauses that employees do not read or understand. *Id.* Weiler’s description of the career relationship provides powerful empirical support for reforming these legal doctrines, as Finkin urges, to uphold such representations on estoppel if not on contractual grounds. This is not, however, Weiler’s thesis. As Finkin notes, Weiler never mentions the oral promise and expressly endorses the rulings exonerating employers who make disclaimers. *Id.* (citing pp. 54-55, 101).

59. Pp. 64-67.

60. P. 67.

61. See *infra* notes 69-70 and accompanying text.

less in *wages and benefits* from some employers than they could earn elsewhere, but Weiler is mistaken in thinking that this means they are being “underpaid” and are counting on being “overpaid” later in their careers. What Weiler is overlooking is that the IBM-type employers he is discussing impart substantial training to new employees, some of which is general (i.e., not firm-specific) and thus is transportable. It is standard economic doctrine that, while employees will not accept lower wages to receive firm-specific training, they often will make short-term wage sacrifices to secure training that is transportable; thus in the usual scenario some wage sacrifice for general training is predictable.⁶² This does not mean they are being “underpaid,” but rather that a portion of their compensation is in the form of training.

Conversely, once the employee has received training from the employer, the employer is likely to pay a wage premium, both to reduce the chances that the employee will exit with the general training and to reflect the increased value of the employee to the employer.⁶³ Nothing in this scenario supports Weiler’s vision that employees knowingly accept substandard compensation in their early years with a firm in reliance upon a unilateral assumption that they will be overpaid decades later. Career employees are paid more later because they are worth more to the employer *then*, not as delayed compensation for earlier contributions.⁶⁴

Weiler’s attempt to refute Epstein’s thesis with a “moral” claim on behalf of career employees thus rests entirely on a factual assumption that is incor-

62. F. MACHLUP, *THE ECONOMICS OF INFORMATION AND HUMAN CAPITAL* 434-35 (1984):

General training is an investment in the worker’s capacity to perform and earn not just in his present employment but in many other jobs too: if he is free to quit and collect higher wages working for another employer, the firm that provides free training may lose money. Hence, even if firms “finance” general training of their employees, they can rationally afford to do so only if the cost of the training is shifted to the trainee. This shifting takes place through lower wages being paid to workers receiving these valuable learning experiences.

Matters are different in the case of specific training, an investment in the workers’ capacity to perform in the job for which they are trained, in the firm that provides the training but not elsewhere. In this case, although the firm would lose if the trained employee were to quit, the worker too would lose, since what he has learned cannot improve his performance elsewhere. Thus, the risk of trained workers leaving their jobs is small and firms can afford to bear the cost of specific training.

In actual fact, most kinds of training are partly general, partly specific; it is most likely, therefore, that the cost of in-service training is shared between worker and employer, not in any explicit way, but in the implied form of the trainees’ wages being somewhat lower [during the training period] than the wages of unskilled workers in the same locality and same occupation; the trainees’ wages are likely to increase with work experience.

63. *Id.* at 435 (“In order to reduce the risk of losing the investment in its workers, a firm would offer ‘higher wages after training than could be received elsewhere. In effect, it would offer employees some of the return from training.’”) (quoting G. BECKER, *HUMAN CAPITAL* 22 (1964)).

64. Weiler reads too much into the empirical studies showing that wages increase faster than productivity. Of necessity, such studies can measure only tangible evidence of productivity. But the firm-specific human capital that firms value in career employees yields benefits to the firm—such as suggested innovations and training of junior employees—that are not measurable by investigators but are fully understood by employers.

rect.⁶⁵ If there *is* a unique moral claim to be advanced for career employees,⁶⁶ it would have to be rooted in *promises* of continued employment communicated to such employees. But as noted earlier, Weiler, unlike other observers, believes that career employees generally do not receive such promises.⁶⁷

3. Weiler's "Economic" Thesis

a. *The Lock-in of the Career Employee*

Weiler's second assault upon Epstein's market thesis is grounded in economic considerations. Epstein's thesis assumes the existence of a "spot market"—a daily auction in which employers bid against each other for the services of prospective employees—to which the employee may always repair if dissatisfied with the current employer's terms. But, Weiler insists, the career employee, possessed of firm-specific capital that is valuable only to the current employer and general training that is transportable only in theory (because other employers' internal labor markets prevent lateral entry), is effectively locked in. Because the market approach depends upon competition, and because nobody will compete with the incumbent employer for the career employee's full range of talents, Weiler concludes that the market will not work. This lock-in effect upon career employees "inhibits the play of market forces that function most effectively in settings where there is flexibility and mobility in the competition for services."⁶⁸ In effect, the employer has become a monopsonist, the only bidder for the employee's full range of talents.

According to Weiler, *new* employees enjoy a competitive market, and in theory could negotiate for job protection, but probably won't. He reasons that employees when first hired often suffer from an information gap, in that they (unlike the employer) do not know the employer's practices and thus do not realize the need for protection.⁶⁹ Moreover, when first hired they lack the

65. My view on this point is not shared by Samuel Issacharoff, who finds Weiler's demonstration wholly persuasive. Issacharoff, *supra* note 26, at 621-23.

66. I shall later discuss a moral claim (redistribution of wealth) that would be applicable to *all* employees. See *infra* notes 96-103 and accompanying text.

67. See *supra* note 58 and accompanying text.

68. P. 141; see also p. 76.

69. Pp. 74-75. The information gap is the only significant market imperfection that Weiler identifies as applicable to new hires. That gap can be a significant imperfection with respect to a subject like safety and health, where the imbalance of knowledge at the time of hire is likely to be enormous. But in the case of discharge, I wonder whether it is really substantial at all. My doubt is premised upon an empirical question as to which neither Weiler nor I has data: What is the state of mind of the typical job applicant? If most job applicants assume that there is a risk of discharge, but also assume that it happens infrequently, and if that is in fact the case, the lack of hard information does not impair their negotiating position.

Weiler also suggests that workers, even those possessed of information, tend to discount irrationally the risks of adverse consequences in the workplace. Pp. 74-75. That may be true, and there is surely a school that advocates legal intervention on the paternalistic premise that the government must save some parties from their own foolishness in the marketplace, but Weiler does not develop a theory as to why that should

investment of time in the employer that would make protection against job loss a high priority. Only after they have been there awhile do they acquire both the information needed to bargain intelligently over job-loss protection and the incentive to do so; but by then, per Weiler's thesis, they have been locked in and lack the leverage to get it. (As only new employees are comparison shoppers, they alone will have the capacity for choice that provides the competitive leverage necessary to make a traditional market work.)⁷⁰

The career relationship, Weiler contends, justifies the law's intervention to prevent wrongful discharges, despite the costs that Epstein shows (and Weiler concedes⁷¹) will result from such regulation. The employer has "locked in" its senior employees: they do not have the benefit of a competitive market in dealing with their current employer, and so they have no leverage to negotiate for protections against job loss.⁷²

b. *Bilateral Monopoly: The Lock-in Works Both Ways*

Weiler is wholly persuasive in showing that Epstein's "spot-market" competitive model is inapplicable to these career employees. But the simple monopoly model also does not apply, for in the career relationship story Weiler tells, the lock-in phenomenon is a two-way street. While it is true that the senior employee is locked in, so is the employer: the employer cannot afford to lose this employee without suffering an enormous productivity, recruiting, and training cost. There will not be replacements who have the employer-specific knowledge possessed by this employee.

Thus, there is a bilateral monopoly: the employer cannot find another supplier of labor who offers the job-specific bundle of talents that the incumbent employee possesses, and the employee cannot find another employer who wants that bundle of talents. Oliver Williamson has described nicely the transition from competition to bilateral monopoly that characterizes this type of relationship:

There is no longer parity with rivals, however, once the initial supplier undertakes substantial investments in durable transaction-specific assets. In such cases, both buyers and suppliers have a strong interest in preserving the continuity of the exchange, since economic values would be sacrificed if the ongoing supply relation were to be terminated. . . . Accordingly, what was a competitive market with a large number of bidders at the outset is effectively transformed into one of bilateral monopoly thereafter.⁷³

apply to wrongful discharge (or, for that matter, to the employment relationship generally) more readily than to other important transactions that people negotiate in the marketplace.

70. P. 76.

71. Pp. 79-80, 154-59.

72. Pp. 76, 141.

73. Williamson, *supra* note 12, at 1202-03.

Intuitively, employees seem to enjoy greater protection in this bilateral monopoly than Weiler's analysis suggests. For example, if we ask how likely it is that an employer would discharge a senior employee who possesses firm-specific human capital, we should expect that this would occur only when the grounds for doing so were so strong that they would have survived a contractual or legal constraint against frivolous discharge had one been applicable. In essence, the employer's interest in not losing its investment in the career employee serves the same purpose as would a contractual or legal bar.

Of course, it is possible to imagine individual instances in which managers would subordinate their firm's interest to the satisfaction of some personal vendetta against a career employee. But the employer who has invested heavily in human capital will have an enormous incentive to create internal constraints against managerial behavior so inconsistent with the interests of the enterprise. Not surprisingly, many of these employers have created internal grievance procedures by which employees may challenge a discharge to higher levels of management. Those procedures may be seen as a benefit conferred upon employees, but their likely motivation is a desire to protect the employer's investment in those employees.

c. *Dividing the Surplus Created by the Bilateral Monopoly: Should We Care?*

Let us now examine more rigorously whether, as a general proposition, this intuition that the employee is protected in the bilateral monopoly relationship holds true—true enough to satisfy us that the law need not intervene. This relationship has generated a surplus: the added value to the employer of retaining the employee with the firm-specific human capital as compared to hiring a replacement lacking that capital.⁷⁴ The proper question, if we are to assess

74. Epstein assumes that the bilateral monopoly exists only with respect to that surplus, for he presumes that the employee has access to other jobs in the competitive market for the skills she possesses apart from that capital and that the employer can find other employees in the competitive market who possess all but the firm-specific skills. Epstein, *Contract at Will*, *supra* note 18, at 975. In practice, this assumption may not prove true. If most employers adhere to internal labor markets (i.e., promote from within), a skilled employee cannot transfer directly from a high-level job with one employer to the same job at another, but instead must start at an entry-level job with a new employer and with a beginner's seniority. See *supra* text accompanying note 55. The employer's control then will extend beyond the surplus.

Moreover, whatever protections career employees enjoy against frivolous discharge, they are not absolute. The career employees will have a legitimate concern that there may come a time when the mutuality of the parties' interdependence will no longer serve as a safeguard against discharge. The employer's technology or product line may change, and the employee's specialized skills may then be of less value to the employer; or, as the employee grows older, the employer may be animated by a desire to find "new blood" or to avoid continued pension accrual by an employee close to retirement age. In circumstances like these, the intuition that the bilateral monopoly will protect the employee falls away. It is thus not surprising that the law has seen fit to protect employees against age discrimination and discrimination to prevent pension accrual. See Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 (1982); ERISA, 29 U.S.C. § 1140 (1982).

Conversely, if the employer has provided extensive training that is *not* firm specific, the employee may enjoy substantial leverage because that training *can* be transported and the law will not allow the employer

Weiler's "economic" case against the market, is whether there is justification, on efficiency grounds, for legal intervention into the process by which employers and employees in a bilateral monopoly will divide the surplus it produces.

(i) *Neoclassical Economics: We Shouldn't Care How the Surplus Is Divided*

Neoclassical economists appear not to care how the surplus winds up being distributed between the two parties. Thus Epstein, who recognizes that jobs creating firm-specific human capital fit the bilateral monopoly model rather than the spot market model,⁷⁵ insists that so long as the wage remains above the competitive wage available to the employee in the market (i.e., the wage she could receive for her talents minus the firm-specific human capital), both parties will have incentive to reach agreement, and society's only interest—that that human capital be utilized so that social wealth is maximized—will be satisfied.⁷⁶

Epstein hypothesizes that if the parties have roughly equal bargaining power, they will choose to divide the surplus equally.⁷⁷ And he assumes, based on a superficial weighing of several factors, that on average such an equal distribution in fact occurs in the workplace.⁷⁸ That however is not Epstein's main point. Rather, he insists, there is no reason for the law to interfere no matter *how* the surplus is divided:

The whole question of inequality of bargaining power arises in the bounded context of how much of a *supra*competitive wage the worker will obtain. At the very worst, the worker will get the amount that is offered in some alternate employment where he has built up no specific capital. To try to formulate and administer a set of legal rules that will allow some trier of fact to measure the size of the surplus embedded in the ongoing transaction, and to allocate half (or more) of it to the worker, cannot be done at any social cost that is less than the expected size of the surplus itself, if it can be done at all. The entire exercise is fraught with the possibility of real error, as real resources would have

to protect itself indefinitely through covenants not to compete. See H. SPECTER & M. FINKIN, 1 *INDIVIDUAL EMPLOYMENT LAW AND LITIGATION* 459-64 (1989).

75. Epstein, *Contract at Will*, *supra* note 18, at 973-77.

76. *Id.* at 973-75.

77. *Id.* at 974-75. This hardly seems self-evident. If, for example, the employer has had to invest enormous resources to train an employee of merely average capacities, it might be that the employer is entitled to more, while if the employer's training investment has been small and the surplus generated largely because of the employee's unique talents the reverse would apply.

78. *Id.* at 975-76. The factors Epstein considers that favor the employer are greater resources and more experience in negotiations. Favoring the employee are the employer's need to rely upon agents to negotiate, the employee's lower opportunity cost for the time spent negotiating, and the employee's knowledge of the employer's reservation price (revealed in negotiations with other employees). The employer's greater wealth would enable it to hold out longer, but by the same token its resolve may be weaker because what it would gain by holding out is of less importance to it. *Id.*

to be expended solely to make transfer payments that in no way enhance productive efforts.⁷⁹

(ii) *Weiler: We Should Care How the Surplus Is Divided*

Weiler recognizes that the relationship between employer and career employee is a bilateral monopoly, because the employer is locked in as well as the employee. But his analysis begins and ends with the observation that despite its bilateral character the employee will be the loser:

[W]hile it is true, as a market proponent would point out, that the employer also suffers some tangible loss when an employee leaves . . . the senior employee loses the only job she has, while the firm loses only one of what may be a workforce composed of thousands of such employees.⁸⁰

Thus, Weiler concludes, the employee will blink first, and there is an “imbalance of power” that enables the employer to dictate terms. Ironically, Weiler cites as corroboration a phenomenon that Epstein relies upon for the opposite thesis: the virtual absence of contractual protection against job loss in nonunion workplaces. Weiler posits that senior employees could not possibly *want* this vulnerability and notes that similarly situated employees upon unionizing immediately bargain for and obtain such protection. He rejects the possibility that this reflects self-selection, those wanting such protection opting for unionism to get it. Rather, he believes, this reflects the reality that locked-in employees lack the leverage to secure even the most basic protections.⁸¹

I have no doubt that Weiler, by virtue of his real-world experience,⁸² is better positioned than Epstein to evaluate the relative bargaining powers of employers and employees, and my own experience representing nonunion career employees leads me to believe that Weiler’s assessment in this instance is correct. Still this responds only to Epstein’s minor theme, a veritable throwaway in Epstein’s analysis. Epstein’s main point is that we should not care whether an imbalance of bargaining power produces a one-sided distribution of the surplus, so long as the distribution leaves the employee with more than is available elsewhere and thus does not lead to society’s loss of the firm-specific human capital. To this, Weiler proffers no response at all.

79. *Id.* at 976.

80. P. 22. The same point is made, in different words, at P. 50.

81. Pp. 77-78, 183-84.

82. *See supra* note 15.

(iii) *Can the Case for Caring How the Surplus Is Divided Be Strengthened?*

Weiler cannot declare victory at beating Epstein's theory with an alternative efficiency-based theory until he refutes this point. There are, arguably, two ways in which bilateral monopolies can be inefficient, even if outcomes merely divide the surplus: transaction costs and suboptimal outcomes (from society's standpoint) attributable to absence of countervailing power.

[a] *Transaction Costs*

The existence of a surplus and no competitive market to determine how it should be distributed creates what Oliver Williamson terms "a serious dilemma in contracting."⁸³ The upshot may be opportunistic haggling which at a minimum is costly and at the extreme might lead to a breakdown in the relationship with consequent loss to society of the surplus.⁸⁴

This concern, whatever its force in other contexts, seems unimportant in the employment setting. Those who are familiar with nonunion employment will know that such negotiations rarely are complex and almost never break down entirely.⁸⁵ Epstein speculates that the reasons parties to the employment relationship reach agreement so easily are their familiarity with one another's preferences and the existence of benchmarks from the outcomes of negotiations with other employees.⁸⁶ It might as easily be suggested that, as Weiler's analysis indicates, the bargaining power is so lopsided that the employee will take whatever crumbs of the surplus the employer offers. Whatever the reason, there is no theory on the table that explains why legal intervention is needed in the nonunion employment context to avoid transaction costs.

[b] *Bilateralism Without Countervailing Power*

The other basis for positing the inefficiency of the bilateral monopoly is that society should not be indifferent as to how the surplus is divided.⁸⁷ The argument proceeds in essence as follows. Each monopoly, standing alone, has the potential to produce inefficient outcomes. The assumption that their concurrence avoids those inefficient outcomes will be correct only if the two monopolies are of roughly equal strength; that is, if each furnishes its possessor sufficient bargaining power to resist the other's potential for monopolistic exploi-

83. Williamson, *supra* note 12, at 1203.

84. *Id.*

85. There have been rare instances in which professional athletes have sat out a season rather than accept the employer's best offer, but few employees can afford that strategy.

86. Epstein, *Contract at Will*, *supra* note 18, at 975.

87. A recent articulation of this theory appears in Cirace, *A Synthesis of Law and Economics*, 44 SW. L.J. 1139, 1175-76 (1990).

tation. It is not inevitable that countervailing monopolies will have this property. Thus, if one party is better able to exploit its monopoly position than the other, the inefficient outcomes we would fear from a unilateral monopoly may still result.

For example, let us assume, with Weiler, that the employer can stand the loss of the employee better than the latter the loss of her job, and thus that the employee will yield virtually all of the surplus to the employer. Epstein dismisses this as of no consequence, declaring that the parties are merely jousting over a “supracompetitive” wage.⁸⁸ But the employee in question has capacities not shared by those in the competitive market; the issue is the compensation to be paid for these greater capacities. If the employee receives too small a return for these enhanced capacities, there may be a decline in the employee’s productivity and an attendant loss to society caused by a reduction in the firm’s optimal productivity. Yet this strategy may be optimal from the firm’s standpoint, for the monopoly rents extracted from the employee may, despite the lesser production, exceed in value the additional profits that could be garnered from increased production discounted by the higher compensation that would have to be paid to the employee to secure that increased production. In short, if bargaining power is sufficiently disparate, bilateral monopolies in the workplace have potential to produce the same injuries to society as simple monopolies, and there is the same justification for legal intervention. Laws that “equalize” bargaining power, as the NLRA undertakes to do, would (if they worked) remove the venom that is potential in workplace bilateral monopolies, for with such equalization the neutralizing potential of the offsetting monopolies would be realized.

Let us take stock. Weiler has set out to refute the market advocates’ claim that labor markets are efficient and that there is no need for legal intervention. Weiler has successfully shown (if we buy his account of the career relationship in today’s employment setting) that the market advocates’ spot-market “competition-between-employers” model is inapposite to most jobs in the current workplace. But he has not fully answered Epstein’s contention that the resultant bilateral monopoly likewise does not justify legal intervention. I have suggested some possible rejoinders to Epstein, but I would not be so bold as to pronounce victory upon the issue.

E. *Alternative Approaches to Refuting the Market Thesis: Justice for Unskilled Workers as Well as Yuppies*

However, no matter how this debate proceeds, I am disquieted by the thought that the future course of American labor law might turn on its resolution. Weiler’s ultimate conclusion is that we need the law’s intervention to help

88. See passage quoted *supra* text accompanying note 79.

only the relatively affluent workers who possess special talents, not the low-paid unskilled and semi-skilled workers who have been the prime concern of labor laws until now. His scheme would leave the latter without legal protection.⁸⁹ If *all* modern relationships were of the new type Weiler describes, this dichotomy would be of no concern. But the reality is that today, as yesterday, the least advantaged workers in America do *not* have career relationships; those who clean office buildings at night, scrub dishes in restaurants, drive trucks, or serve customers in fast-food restaurants—and these are among the fastest growing jobs in America⁹⁰—do not, by and large, advance up career ladders of the sort Weiler describes. Weiler's thesis would lead to the creation of a two-tiered scheme in which the affluent would enjoy legal protection while those at the bottom would be relegated to the market.⁹¹ My intuition—I suspect shared by many people—is that this is not the direction in which the law should be going.

I see two possible justifications, not explored by Weiler, for legal intervention on behalf of *all* employees—whether that intervention takes the form of direct statutory conferral of benefits or strengthening of the right to collective bargaining. One, which is consistent with Epstein's assumption that inefficiency is the sole justification for intervention in the market, asserts that individual employees want, but cannot negotiate efficiently for, employment benefits that possess the characteristic of a "public good," i.e., benefits that cannot be furnished to one employee without simultaneously being provided to all.⁹² The other approach is operative if society determines *not* to accept efficiency as the sole justification for legal intervention and instead elects to intervene for the purpose of redistributing wealth.

Crucial to both is a recognition that employees seek to satisfy many interests through their jobs beyond merely bringing home a paycheck. Workers spend a good deal of their lives in the workplace, developing friends, habits, and interests; it is important to them that the work environment be pleasurable and that it not be taken from them by unwarranted discharge. Employees hope to secure intellectual satisfaction and psychological self-esteem from their work; it is important that they not be deprived of deserved promotions and that their interests in participating in the creative life of the workplace be vindicated. Moreover, employees have a vital stake in the health and integrity of their bodies; it is important that the workplace provide occupational safety and health.

89. Pp. 144-45, 48.

90. P. 108 n.7.

91. Indeed, as we shall see shortly, *infra* notes 122-24 and accompanying text, Weiler does wind up proposing legal rules that favor only career employees.

92. The leading work on public goods is M. OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* (1965).

1. Solving the "Public Goods" Problem

The neoclassical economic approach would posit that an employee desirous of vindicating these interests need only purchase them from the employer, i.e., accept a lower salary in exchange for the employer's providing the desired benefits. For example, the employee who wants protection against discharge without just cause might "pay" the employer, through a lower salary, for the employer's cost of providing that protection. That approach might actually work for protection against discharge, which an employer could provide to some employees without necessarily providing it to others,⁹³ but many of the other nonmonetary interests employees will wish to pursue are not of that character.

Consider, for example, an employee's desire that the employer reduce the level of toxic emissions in the factory. The employer could not deliver that benefit to one employee without simultaneously delivering it to all others. And the cost of reducing toxic emissions would likely exceed the total salary of the one employee, so that the employee could not possibly afford it and in any event would not deem the cost worth bearing. Plainly, this is a benefit that can be purchased, if at all, only by the collective contribution of many employees, who must agree that the *pro rata* cost of a collective purchase is worth bearing and who are able to get together to discover their mutual interest and to bargain with the employer for its realization. Indeed, there would seem to be two ingredients essential to negotiating for the benefit: (1) the employees (or at least a large number of them) must get together and agree that they all wish to spend an agreed-upon sum to purchase this benefit; and (2) there must be some means to impose the fair share of the costs of the benefit upon those employees who would *not* be willing to spend the necessary sum (or who would attempt to "free ride") but who would inevitably enjoy the benefit were it purchased. There are only two ways that these conditions for an efficient exchange can be met, and both require rejecting the traditional market approach: through governmental imposition of the benefit (as by the Occupational Safety and Health Act)⁹⁴ or through creation of a system of collective employee bargaining in which the collective decision can be imposed upon nonconsenting employees by requiring them to contribute their *pro rata* share of the purchase price (as by unionization under the NLRA.)⁹⁵

93. Ironically, Weiler invokes the "public goods" problem as a market imperfection only in his discussion of protection against discharge where it is least persuasive and where in consequence he is obliged to acknowledge that it has relatively little weight, p. 75. An employer could, after all, maintain the records necessary to justify its discharge actions only for employees who have been provided such promises, while proceeding differently (and without additional expense) as to those who have not.

94. 29 U.S.C. § 651 et seq. (1982). Note that OSHA does not necessarily increase the employer's overall labor costs, as the employer might reduce wages to recapture the increased cost of occupational safety and health. Thus, it is possible to envision OSHA as a nondistributional means of facilitating purchases of health and safety.

95. Section 9(a) of the NLRA, 29 U.S.C. § 159(a) (1988), provides that a union selected by a majority of the employees in a bargaining unit becomes the exclusive bargaining representative of *all* employees in

What is true of safety and health is true of a great number of interests that employees may wish to advance through negotiations with their employer. Group insurance is cheaper than individual insurance, and many employees thus are likely to want to purchase the provision of such coverage from their employer; but it is necessary to agree what kinds and amounts of insurance the employer will provide to the group, and to secure collective employee payment. Many opportunities in the workplace are scarce and must be distributed to employees in some fashion; many employees may have an interest in securing an equitable mechanism (such as seniority) for allocating opportunities for promotions, order of layoffs, priority for securing desired overtime, priority for escaping undesired overtime, etc. Many employees would like the employer to shut down for two weeks during the summer so that all can vacation at the optimal time; failing that, there will be need to determine who has priority in choosing vacation dates. Many employees would like a grievance-arbitration system, but it is expensive and can be purchased only by group effort. The list could be expanded to include virtually all subjects contained in the typical collective bargaining agreement, once we get past wage rates and discharge-protection.

Ironically, it is the focus on wages and discharges in Epstein's analysis, which Weiler tracks, that has drawn the combatants' attention away from the "public goods" issue that attends virtually every other aspect of the employment relationship. Once we shift our attention to these other aspects, the case for governmental intervention into the workplace can be made on neoclassical efficiency grounds. That intervention might take the form of government-dictated terms applicable to all workplaces (the group decision having been made nationally in support of the legislation) or sanctioning of a collective bargaining representative that can facilitate group decisionmaking and bind potential free riders (enabling separate group decisionmaking at each workplace). And the case for intervention in either form is just as strong for the low-paid worker as for the career employee.

2. *Redistributing Wealth*

The second justification for rejecting Epstein's market thesis will be applicable *if* a societal determination is made to use the law to redistribute wealth from capitalists to workers. The case for redistributing wealth from shareholders to workers can be made on two levels. First, even if such redistribution does not maximize overall social wealth, a majority in society controlling its legislative agenda is entitled to determine that the greater marginal utility of money to the less privileged justifies more equitable allocation of resources even if the loss

the unit, with the power to bind those who did not choose it and who do not agree with the choices it makes. See, e.g., *Emporium Capwell Co. v. Western Addition Community Org.*, 420 U.S. 50 (1975); *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953); *J.I. Case Co. v. NLRB*, 321 U.S. 332 (1944).

to total societal wealth exceeds in absolute dollars the gain to the poor.⁹⁶ Second, wholly apart from considerations of marginal utility, perceptions of historical injustice may persuade some that redistribution from capital to labor is warranted. In that view, the *present* distribution of wealth is not pre-ordained “right” but merely represents the consequence of the rather arbitrary decision made in the nineteenth century to treat suppliers of capital but not suppliers of labor as “owners” of the enterprise. That legal ordering was not inevitable; it was merely conventional. Employees can reasonably argue that they make the greater contribution to the enterprise, committing not only their labor but the bulk of their waking lives, and indeed their bodies as well. Society might choose not to accept the disparities visited by the law of the past and commit present bargaining to a market in which each side must deal from the historically determined status quo.⁹⁷

To argue that a desire for redistribution of wealth justifies intervention into the labor market requires taking on Epstein’s assertion that wealth redistribution can be accomplished more efficiently through tax and welfare laws than through labor laws.⁹⁸ There are two rejoinders to Epstein. First, as David Strauss

96. See Hovenkamp, *Legislation, Well-Being, and Public Choice*, 57 U. CHI. L. REV. 63, 70-71, 74 (1990) (discussing marginal utility of money and ability of policy makers to choose to maximize well-being instead of wealth).

97. See Kronman, *Wealth Maximization as a Normative Principle*, 9 J. LEGAL STUD. 227, 240 (1980). As Charles Fried has pointed out (responding to Epstein’s claim that the NLRA’s quite modest expropriation of employer property is unwarranted), arguments such as these “cut[] beneath the level at which [Epstein’s] analysis begins.” Fried explains:

Epstein’s analysis is vulnerable at its central premise: the definition of the property rights involved. Only by assuming that the preexisting common law system of property rights had some natural, pre-conventional status can the expropriatory thrust of the Wagner Act (to the extent that there is one) be criticized. If, however, property rights are—as thinkers from Kant to Nozick have held—essentially conventional, then Epstein runs up against the problem of showing why the Wagner Act system does not represent simply a redefinition by society of what have always been central conventions in any event.

Fried, *Individual and Collective Rights in Work Relations: Reflections on the Current State of Labor Law and Its Prospects*, 51 U. CHI. L. REV. 1012, 1022, 1016 (1984) (footnotes omitted).

98. It requires, as well, answering those who claim that wealth redistribution ultimately *cannot* be effected through the labor laws—a claim that surfaces whenever increases in the minimum wage are proposed. For me, it is sufficient that tax laws can be used to generate revenues that will then be spent (redistributed) according to choices reflected in the labor laws. I develop this point *infra* notes 102-03 and accompanying text, and more fully in Gottesman, *Twelve Topics To Consider Before Opting for Racial Quotas*, 79 GEO. L.J. 1737 (1991). Accordingly, I do not dwell on the issue whether such redistribution can be accomplished through labor laws *alone*. The competing arguments on this latter point are reviewed in F. MACHLUP, *supra* note 62, at 96-99.

It is clear that unionization historically produced a 10-15% wage premium. P. 13 n.6; Stewart, *Union Wage Differentials, Product Market Influences and the Division of Rents*, 100 ECON. J. 1122 (Dec. 1990). But unionization occurred principally in cartelized industries, and the premium represented a capture of part of the rents already being obtained by the employers by reason of their cartel. P. 132-33; Stewart, *supra*, at 1122-23. Where this occurred, there may have been a true redistribution of wealth, for income was transferred from shareholders to workers. However, if an industry was sufficiently cartelized, the shareholders may have been able to recapture from consumers through higher prices what was lost, in which event the redistribution was from consumers (themselves largely workers) to workers, an event with far less redistributive consequences.

There is a serious debate among economists whether wealth can be redistributed at all from shareholders to workers in noncartelized industries. Those who claim not argue that shareholders will leave the market

recently observed in a somewhat analogous context, there is a great difference in the culture of our society between a recipient of a transfer payment and one who has earned a benefit through working.⁹⁹ The latter is perceived as an achiever, the former a failure. This difference is important to the psychological well-being of the recipient, but even more critically it is likely to affect whether society chooses to bestow the benefit at all. There may be little societal impetus to make increased transfer payments to the poor, yet much greater disposition to provide increased rewards for work.¹⁰⁰ This may be especially true if, as I next discuss, the question is whether to provide employees nonmonetary protections in circumstances that command great public sympathy, as in the case of occupational safety and health.

Second, and more fundamentally, many of the benefits society might wish for moral or aesthetic reasons to assure that employees enjoy (e.g., self-esteem, intellectual satisfaction, bodily integrity) are not monetary in nature and thus not easily deliverable through transfer payments. Providing such opportunities is costly and may reduce the employer's profits; the employer will not be disposed to provide them to those lacking the power to extract them in bargaining. These are goals that many employees cannot secure for themselves in the market.

There is a school of economics that treats all interests as commodifiable; that school would point out that there is some price at which a worker would forego each of the interests I have described.¹⁰¹ Nonetheless, there are several reasons why society might choose to disregard the equation. From an aesthetic standpoint, it might prefer that employees retain their limbs rather than sell them for a price they found acceptable. Society might also be concerned that there will be costs that others, not the employee, must bear because of his handicap. Finally, employees would put widely varying price tags on these interests, as they are highly subjective; it would thus be difficult and expensive

in search of a higher return on their capital if the law reduces the return available from corporate investment. Stewart, *supra*, at 1122. Opponents argue that there are quasi-rents that can be captured, i.e., that there is some margin of reduced profit that shareholders will accept without withdrawing their capital. F. MACHLUP, *supra* note 62, at 97-99.

Apart from shareholders, the likeliest bearers of increased employment costs are consumers (assuming that all competitors in the market are subject to the same increased costs and thus can increase their prices to reflect them). But even if increased employment costs *can* be passed on to consumers, there is, as already noted, a question of how meaningful a redistribution of wealth will result, given that most consumers are themselves workers. It is this consideration that prompts Weiler to despair at making wealth redistribution a goal of the employment laws. P. 123.

99. Strauss, *The Law and Economics of Racial Discrimination in Employment*, 79 GEO. L.J. 1619, 1631 (1991). Strauss argues that racial quotas in employment are justified to help overcome the disadvantage blacks have suffered from historic discrimination visited outside the workplace as well as within. In the passage discussed in text Strauss is responding to the argument that transfer payments are a better vehicle than employment quotas for overcoming that disadvantage.

100. *Id.* at 1630-31.

101. For example, this notion is implicit in Richard Posner's belief that the goal of judicial decision-making is wealth maximization. For a discussion of Posner's tendency to treat all interests as commodifiable, see Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1857 n.38 (1987).

for the law to redistribute the “wealth” associated with these interests through monetary transfer payments.

This recitation suggests two ways in which the nonmonetary character of benefits points to intervention through the labor law. First, it is likelier that there will be a societal consensus to tackle a particular workplace problem such as safety and health than a consensus to redistribute wealth in the abstract. Second, it is more efficient to decide just once what should be spent to reduce workplace accidents than to arrive on a case-by-case basis at a “price” to pay to each employee losing a limb in lieu of avoiding those accidents. In the real world, the nonmonetary interests we have been discussing likely will be protected through the labor laws or not at all.

But, it may be argued, what I have said to this point does not refute Epstein’s assertion that if we wish to redistribute wealth we can do it through transfer payments; if we provide monetary transfers through the tax system, employees *could* afford to sacrifice wages to purchase these nonmonetary benefits (the transferred money would replace the wages sacrificed). Indeed, the argument might go, that is the preferable approach, for it allows each employee to decide whether the benefit is worth the purchase price, rather than having the government make a paternalistic decision that binds all.¹⁰² Ultimately, the response to this argument is the same as that presented earlier within the efficiency model: the “public goods” character of most of the interests in question precludes their purchase by individual employees. Thus, a model that would redistribute wealth, just as a model that would accept the present allocation of wealth, points ultimately to either collective bargaining or government dictation as the means for ordering “public goods” in the workplace. Tax laws might generate the revenues, but we need labor laws to achieve their optimal distribution.¹⁰³

102. I am indebted to my colleague Warren Schwartz for pointing out the need for me to address this issue.

103. That collective bargaining can be a vehicle for distributing revenues generated by tax laws will be evident from the discussions *supra* notes 93-95, 98 and accompanying text and *infra* notes 192-93 and accompanying text. For example, government could allocate tax-generated revenues in specified amounts for improving each employer’s workplace health and safety leaving the choice as to how best to utilize the revenues for that purpose to collective decisionmaking.

II. WEILER ON GOVERNMENT REGULATION

Whether or not Weiler is ultimately convincing in his effort to refute the neoclassical economists' case for trusting the market—indeed, even if such refutation were impossible at an academic level—there seems little doubt that legal intervention in labor markets will continue to be the accepted norm in our society. From a practical standpoint, the real debate is whether intervention should be direct (government dictation of employment terms) or indirect (strengthening collective bargaining). It is to this debate that Weiler makes his strongest contribution.

A. *The Problems with Government Regulation of Employment Terms*

The predominant view among scholars today is that, with the decline of unionism, government regulation will become the predominant monitor of the employer-employee relationship. That prospect is greeted with enthusiasm by some¹⁰⁴ and accepted with disappointment by others who believe, with Weiler, that collective bargaining is the preferable approach.¹⁰⁵ Whatever the desirability of government regulation of employers on behalf of employees, the experience of the past decade surely suggests that it is a growing enterprise.¹⁰⁶

Weiler is a sharp critic of the drift toward acceptance of increased government regulation as a substitute for collective bargaining. He acknowledges the surface appeal of government regulation. It proffers "a somewhat neutral and detached" legislature or court to determine what rights are appropriate and purports to extend them to all employees, not merely those who take the initiative and have the leverage needed to win them in collective bargaining.¹⁰⁷ And, perhaps most important, it is a form of protection that all employees can help obtain. If reaching the employer at the bargaining table has failed for most Americans, there is an alternative route by which the employer can be reached. Employees constitute a majority of the voting populace. Employee *voting* power can be the antidote for insufficient *bargaining* power. Simply stated, employees can win from the legislature what they could not get at the bargaining table.¹⁰⁸

But offsetting these benefits are disadvantages that Weiler sees as decisive. Most issues in the workplace are too complex and too varied to be dealt with by government. For example, the government could not possibly determine the appropriate wage for each job of each employer; indeed, government has a hard enough time simply determining what the minimum wage should be and has

104. See, e.g., Fried, *supra* note 97.

105. See, e.g., Summers, *supra* note 38.

106. See *supra* note 38 and accompanying text.

107. Pp. 153-54.

108. *Id.*

proven utterly incapable of correcting the pay disparities between men and women in jobs of arguably comparable worth.¹⁰⁹

Where the government *does* undertake regulation, as in the occupational safety and health area, the rules necessarily must be stated generally in order to encompass the wide variety of workplaces that will be covered. The consequence is uncertainty as to the law's meaning when applied to the particulars of each workplace, with inevitable delay and transaction costs. Attempts to avoid this result through insistence upon compliance with rigid, specific commands imposes inefficiencies of a different kind. Workplaces vary enormously, and different approaches are likely to be optimal at different workplaces. A rigid command applicable to all preempts the opportunity for flexibility of application.¹¹⁰

Of greatest importance, whatever its success in other settings, government regulation breaks down in the workplace for want of adequate enforcement. Weiler points to OSHA as an example. The government does not have sufficient resources to inspect—let alone to crack down on violations in—the enormous number of workplaces in America.

As a result, enforcement depends upon the employees, who must bring the violations to the government's attention. But in practice, Weiler reports, this works only where the employees are unionized. Nonunion employees lack both the information necessary to evaluate the potential dangers of their workplace and the resources to hire the experts who could tell them what they need to know. Nonunion employees are also unlikely to know what constitutes a violation of OSHA or how to seek its correction. Moreover, most of these employees would be unwilling to invoke the law even if they knew how, out of fear of employer retaliation (a fear that is warranted in the nonunion workplace because, as we shall see, reinstatement has proved an inadequate remedy in the absence of a union in the workplace).¹¹¹

Finally, Weiler like many others¹¹² believes that "voice" is an important interest of employees, i.e., that employees want to participate in shaping the rules that govern their working environment. Government regulation takes control of the workplace away from both employer and employees, imposing rigid terms that may not correspond to either's desires.¹¹³

For Weiler, collective bargaining is superior to government regulation in all the respects just discussed. Employees participate with employers in shaping rules that are tailored to their workplace and that reflect the interests of both.

109. P. 154.

110. Pp. 155-56.

111. Pp. 157-59. Weiler cites, as another example of a statute that has failed for want of adequate enforcement, the NLRA itself. Violations are rampant, challenges thereto inexorably slow to be resolved, and remedies wholly inadequate. Pp. 40-41, 233-73.

112. *See, e.g.*, Gottesman, *supra* note 1, at 367; Summers, *supra* note 38, at 26-27; Sunstein, *supra* note 12, at 1059.

113. Pp. 159-61, 175, 181-83.

Those rules are enforceable through informal mechanisms established in their agreements that are cheaper, quicker, and more informed than those available under public statutes.¹¹⁴

B. *The Problems with Government Regulation, Applied to the Wrongful Discharge Issue*

Weiler underscores this contrast between government regulation and collective bargaining in his discussion of the discharge issue. Court litigation—the mechanism by which government currently monitors wrongful discharge, e.g., discharges violative of public policy—has all the defects that Epstein ascribes to it: high transaction costs, risk of error, and consequent defensive decision-making by employers.¹¹⁵ In addition, it is accessible only to the highest paid employees, for only they have potential damage awards large enough to make the cost of litigation a sensible investment.¹¹⁶ A less formal mechanism, such as an administrative or arbitral process that might result in orders of reinstatement, won't work because empirical evidence shows that reinstatement is not a viable remedy in the absence of a union: the reinstated employee is not welcomed by the employer and will be hounded out in the absence of an in-plant organization to guard against employer abuse.¹¹⁷

Weiler's analysis of the shortcomings of government regulation is compelling.¹¹⁸ It leads to his embrace of collective bargaining as the preferred method of workplace governance.¹¹⁹ However, it is worth taking note of Weiler's search for the "second best" solution to the discharge problem, i.e., the role the law should play in the absence of a union. Government regulation is better than the market, he says.¹²⁰ But what type of government regulation? That, Weiler suggests, depends on the nature of the challenge to the discharge.¹²¹

114. Pp. 181-85.

115. Pp. 80-81, 156-57.

116. Pp. 81-82.

117. Pp. 85-87. *Accord* Getman, *Labor Arbitration and Dispute Resolution*, 88 YALE L.J. 916, 934-38 (1979); Hyde, *Endangered Species* (Book Review) 91 COLUM. L. REV. 456, 461 n.16 (1991) (reviewing P. WEILER, *supra* note 12).

118. I should not overstate Weiler's disapproval of government regulation, *see, e.g.*, p. 159, nor my own. Even in unionized settings, government regulation plays an important role where there is potential for division among employees that may disable some unions from battling vigorously for an end that society values, such as the elimination of employer discrimination that Congress sought to achieve in Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e. There are also issues that are so complex that unions cannot be expected invariably to be able to afford the level of expertise necessary to hold their own with employers as, for example, in the cases of OSHA and ERISA, 29 U.S.C. §§ 1001-1461.

Finally, in nonunion settings, government regulation is often a better second-best solution than reliance on the market place. Unless we are prepared to say that those who reject unionism forfeit the public's interest in protecting, e.g., their right to receive a minimum wage, we must be prepared to build a safety net for the nonunion employee. P. 159.

119. Pp. 181-85.

120. P. 95.

121. Pp. 99-100.

Weiler approves of court litigation in the same categories of cases as does Epstein: public policy tort claims and breach of contract claims. With respect to the former, Weiler contends that it is appropriate to lower the boom on employers who offend public policy, and the prospect of punitive damages will make these cases viable; and Weiler would permit court litigation of breach of contract claims because it is appropriate that the parties' expectations from agreements be fulfilled.

However, in the absence of public policy torts or contracted-for protection against job loss, Weiler would not afford employees access to court but instead would provide them minimal protection delivered through informal administrative proceedings. Legal protection would be extended only to senior employees, reflecting Weiler's view that only the career relationship justifies legal intervention. Claims would be processed through a very informal process, perhaps as an additional item to be resolved in unemployment compensation proceedings. And a finding of discharge without cause would merely entitle the employee to an award of severance pay predicated on length of service.¹²²

Weiler settles for severance pay delivered administratively because he thinks the costs to employers of defending suits in court are disproportionate to the benefits employees are likely to achieve; it would be unacceptable to generate large damage awards through a process as informal as the one he proposes; and reinstatement is not a meaningful remedy for nonunion employees.¹²³

This seems a disappointing denouement to Weiler's saga of the career employee. We have been led up the mountain by an impassioned demonstration that the modern employee is locked into a relationship vital to her existence which cannot be replicated elsewhere, and that this circumstance cries out for legal protection. But we are then told that in the absence of contractual protection the employee should receive a small amount of severance pay as the sole compensation for the unjustified elimination of her lifetime investment in the employer.¹²⁴ One can hear Richard Epstein chuckling in the wings that Weiler has *professed* not to buy the at-will doctrine, indeed to find it "morally untenable,"¹²⁵ yet ultimately proposes as a substitute a system which differs from at-will employment only in the rather trivial respect that it would afford wrongfully terminated employees a few weeks' severance pay.

122. Pp. 100-02. Weiler suggests as an alternative a system of "no-fault severance pay" that would be available to all long-service employees without the requirement of a finding that good cause was lacking. P. 102 n.100.

123. See *supra* note 117 and accompanying text.

124. This disappointment would be substantially mollified, of course, if courts invariably found that employees positioned as career employees have implied-in-fact contracts, but if that happened the result would be the same as creating a *general* just cause protection enforceable in court, the very notion that Weiler thinks objectionable. P. 101.

125. P. 68.

To be sure, Weiler can envision a world with stronger remedies. His reluctance to champion one flows from his assumption that reinstatement is an unrealistic remedy for nonunion employees. But as I will describe in the next section, Weiler makes a proposal later in the book that would bridge this gap: mandating in-house worker committees in every workplace to monitor the employer's compliance with the applicable employment laws (including compliance with contracts).¹²⁶ This step would provide the monitoring presence that today is found only where a union is present. If a monitoring presence existed, and employees therefore *could* be reinstated with meaningful protection against employer harassment, there would be no reason to sell short Weiler's vaunted career employee with nothing but severance pay.¹²⁷ But that is a form of collective employee dealing, and does not rebut Weiler's demonstration of the inadequacy of government regulation *absent* a regime of collective dealing.

We must recall, though, that we are discussing Weiler's *second*-best solution. His first is collective bargaining, pursuant to which a discharged employee would have prompt access to an arbitral reinstatement remedy (which would be meaningful because it would be policed by a union) and full backpay.¹²⁸ Weiler's difficulty in finding a second-best solution is perhaps implicit support for his first. The very difficulty in fashioning a satisfactory means for governmental deliverance of protection against wrongful discharge is proof of the superiority of collective bargaining as the mechanism for governing the workplace.

III. WEILER ON COLLECTIVE BARGAINING

Having stated the case for collective bargaining by indirection—i.e., having located the deficiencies in the market and in government regulation—Weiler turns to his positive task: stating the case for collective bargaining directly. He begins, as he must, by addressing the hypothesis that the decline in the incidence of collective bargaining shows that it is not a desirable means for ordering the private workplace. It is Weiler's thesis that the decline is attributable to defects that are not inherent in collective bargaining and that are correctible. He then prescribes the means for correction. Finally, because collective bargaining will never become universal, he proffers an alternative model of collective dealing that he would make mandatory in all workplaces, unionized or not: work councils modeled after those mandated by German law.

126. Pp. 286-87. See *infra* notes 185-93 and accompanying text. This is but a small part of a more ambitious agenda Weiler proposes for such committees. As I explain later, *infra* notes 177-93 and accompanying text, I support the use of such committees for the law-enforcement function, but doubt their efficacy for the other tasks Weiler would assign them.

127. Weiler makes this very point in chapter 6, where he advocates in-house worker committees. Pp. 286-87.

128. Weiler would modify existing law in one respect, allowing a discharged employee to take her own case to arbitration if the union declined. Pp. 90-93.

A. *Where Have All the Members Gone?*

Weiler does not doubt that collective bargaining is the best mechanism for regulating the workplace, but he must confront and explain the steady decline of its hold on the American workforce. Weiler posits two possible explanations for the decline: a drop in the *demand* for unions (worker lack of interest) or a drop in the *supply* of unions (employer conduct rendering unions inaccessible to employees).¹²⁹

Weiler notes three possible causes of a drop in demand and, while acknowledging that each has probably played some role, suggests that all, collectively, cannot account for the major part of the decline. First, the American workplace has changed demographically, from manufacturing to service, blue-collar to white-collar, rust belt to sun belt.¹³⁰ But, Weiler notes, many of the emerging occupations are unskilled or semi-skilled and resemble those where unions traditionally flourished: the five fastest growing occupations in America today, in terms of numbers of employees, are cashier, registered nurse, janitor, truck driver, and waiter/waitress.¹³¹ Of these, only nurses typify the changed demography, yet ironically that is the one group among the five that is currently unionizing to a substantial degree.¹³²

Second, unions were slow to react to the changing economic climate of the past several decades, and polls showed that they were dropping in popularity among American workers.¹³³ But unions have made some adjustments, and since 1981 there has been a dramatic turnabout in public perceptions of unions; polls now consistently show that a substantial majority of the American public believes that unions are the best instrument for protecting employee interests in the workplace.¹³⁴ Yet the decline in union representation has continued unabated, suggesting that something else besides disapproval of unions as institutions is at work.¹³⁵

A third possible cause for a drop in the demand for unions is that many employers have switched to furnishing career relationships to employees, thus diminishing employee dissatisfaction with their terms and conditions of employment.¹³⁶ But this cannot account for the decline in unionism in industries

129. P. 106.

130. Pp. 106-07.

131. P. 108 n.7.

132. Pp. 107-08, 108 n.7. Indeed, accelerated organization among nurses can be anticipated in light of the Supreme Court's recent upholding of the Board's rule that nurses in acute care hospitals constitute an appropriate bargaining unit unto themselves. *American Hosp. Ass'n v. NLRB*, __ U.S. __ 111 S. Ct. 1539 (1991).

133. P. 298 n.88.

134. Pp. 299-300; *see also* pp. 298 n.88, 108-09 n.8. At the same time, the polls reflect a public perception that unions have become too weak (in large part due to employer intimidation of employees) to protect those interests adequately. Pp. 299-300 n.90.

135. Pp. 106-07 n.3.

136. *See supra* notes 49-52 and accompanying text.

where policies remain unchanged and where the conditions resemble those that traditionally led to unionization.

In light of the analytic weaknesses of all three of these explanations, Weiler concludes that a major part of the story lies on the supply side. He suggests that employers are systematically denying their employees the opportunity to unionize by committing flagrant violations of the NLRA that destroy at the outset any impetus for unionization.¹³⁷ The extent of this phenomenon is not measurable simply in the number of violations committed or elections lost, for these are but the tip of the iceberg. Employees know that to convert their workplace from the conventional status of nonunion into a unionized workplace they must run a gauntlet that has little chance of succeeding (only one-fifth of the employees who vote in NLRB elections following organizing drives ultimately become covered by collective bargaining agreements)¹³⁸ and carries high risks of job loss (one in every ten workers who supports a union is fired for her efforts).¹³⁹ Weiler posits that employees are not willing to gamble their jobs on such odds.¹⁴⁰

Weiler notes that while not every employer will be disposed to violate the law, good employers get the benefit of the fear that is instilled by the bad: the percentage of employees who believe their employer would punish union supporters far exceeds the percentage of employers who do.¹⁴¹ Thus, Weiler concludes that terror, not lack of interest, accounts for much of the unwillingness of American workers today to opt for unionism.¹⁴²

137. Pp. 111-18.

138. See p. 240. Roughly 40% of the employees whose workplaces are the subject of an NLRB election wind up with a union certified as bargaining representative, but unions obtain collective bargaining agreements following certification in only half the cases. *Id.* It bears emphasizing that the workplaces where NLRB elections are conducted are those chosen by the union for organizing, and in which at least 30% of the employees signed union authorization cards (the minimum showing of interest necessary to secure an NLRB election).

139. P. 112.

140. Pp. 114-15.

141. Pp. 113-14. Weiler reports that in a 1984 Lou Harris Poll of nonunion employees "43 percent believed that their own employer would fire, demote or take other retaliatory measures against employees who visibly supported the union." P. 117 n.25.

142. Pp. 113-14, 240-41. Weiler finds corroboration for this diagnosis in the contrast between the degrees of unionism in Canada and the United States. The demographics of the two countries are similar, as are the basic structures of their labor laws, but the rate of unionization in Canada is much higher than in the United States. Pp. 254-55, 280. A principal factor that distinguishes the rate of unionization in the two countries, Weiler suggests, is that the Canadian laws are more effectively enforced and employers do not violate them. Without the terror, workers have opted for unionism at much higher rates. *Id.*

The explanation for the difference in rates of unionization in Canada and the U.S. has been the subject of innumerable studies, and Weiler's analysis represents the consensus view: although many factors influence the difference in unionization rates between the U.S. and Canada, the primary reason is the difference in labor laws. See, e.g., Chaison & Rose, *New Directions and Divergent Paths: The North American Labor Movements in Troubled Times*, Aug. 1990 LAB. L.J. 591, 591; Bruce, *Political Parties and Labor Legislation in Canada and the U.S.*, 28 INDUS. REL. 115 (Spring 1989); Freeman, *The Changing Status of Unionism Around the World*, in ORGANIZED LABOR AT THE CROSSROADS 111 (W. Huang ed. 1989).

However, a dissenting view has been put forward recently by Leo Troy. See Troy, *Is the U.S. Unique in the Decline of Private Sector Unionism?*, 11 J. LAB. RES. 111 (1990) [hereinafter Troy, *Is the U.S. Unique*]; Troy, *Will a More Interventionist NLRA Revive Organized Labor?*, 13 HARV. J.L. & PUB. POL'Y

B. *What Will Reverse the Decline in Collective Bargaining?*

Weiler discusses three strategies which, used in combination, he believes might restore collective bargaining to its preeminent role in American labor law: amending the NLRA to remove inhibitions to unionization; self-restructuring by the labor movement to afford greater autonomy to the employees themselves in shaping and negotiating their workplace agendas; and creating a second tier of collective employee participation in the workplace modeled after the German works councils.

1. *Amending the NLRA*

By far the most important and analytically persuasive of Weiler's proposals are those for amending the NLRA. This is not new ground; Weiler authored two articles in the early 1980's that constitute the definitive critique of the NLRA,¹⁴³ and this part of the book represents a condensation (and slight updating) of the views contained in those articles.

Weiler posits three central weaknesses of the NLRA: it fails in its stated purpose to protect employees against employer retaliation for attempting to unionize;¹⁴⁴ it fails in its stated purpose to induce employers to negotiate in good faith to reach agreement;¹⁴⁵ and it fails in its stated purpose to arm employees with economic weapons that will equalize the parties' respective bargaining powers.¹⁴⁶ Employers beat the system by bullying employees out of unionization, by cold-shouldering those who are brave enough to vote for a union nonetheless, and by hiring permanent replacements for those suicidal enough to attempt to inflict bargaining pressure through a strike.¹⁴⁷ Weiler's proposed amendments attempt to correct these three weaknesses.

583 (1990). Troy contends that the rate of unionization in the private sector in Canada is in the beginning stages of decline. He posits that Canada lagged behind the U.S. in the shift from manufacturing to service and in structural changes within manufacturing and private services, so that the trend that hit the U.S. earlier is only now occurring in Canada. He also asserts that the decline in private sector unionism has been masked by Canada's lead over the U.S. in the growth of public services and an accompanying meteoric rise in public sector unionism. He posits further that with the new trade agreement between the two countries, Canada will be under increased competitive pressures which will accelerate the decline of private sector unionism. See Troy, *Is the U.S. Unique*, *supra*, at 113. Weiler implicitly recognizes these concerns in his observation that "while the present situation of Canadian unions is far better than that of their U.S. counterparts, the prospects for collective bargaining in the Canadian private sector are not particularly rosy, despite the more favorable legal framework." P. 280 n.72 (citing an analysis of Canadian trends by N.M. Meltz, *Unionism in the Private Service Sector: A Canada-U.S. Comparison* (University of Toronto, 1989) (unpublished manuscript)).

143. Weiler, *Promises To Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769 (1983); Weiler, *Striking a New Balance: Freedom of Contract and the Prospects for Union Representation*, 98 HARV. L. REV. 351 (1984).

144. Pp. 233-40.

145. Pp. 249-50.

146. Pp. 261-73.

147. See *supra* notes 137-42, *infra* notes 148-55, and accompanying text.

First, Weiler proposes amendments that would impose meaningful constraints on employers' firing or otherwise punishing workers who attempt to unionize. The NLRA's existing remedies are too trivial to deter violations and come too late to salvage the unionization effort once the employer's misconduct has squelched it: discharged employees, if ultimately found to have been discharged for union activity—and this finding will not come until months or years after the organizing drive is over—will be awarded nothing more than reinstatement and lost earnings (discounted by earnings that were or could have been received in substitute employment).¹⁴⁸ Weiler's proposals provide both speed (injunctive relief reinstating the employee prior to the election) and remedial teeth.¹⁴⁹ As to the latter, Weiler would amend the NLRA to remove the Act's preemptive effect so that state courts could entertain claims of anti-union discharge as public policy torts and award tort remedies, including compensatory and punitive damages.¹⁵⁰ I have recently published an article suggesting that an amendment is not necessary to achieve this—the Supreme Court could decree it under the existing statute.¹⁵¹ As that article indicates, I share Weiler's view that tort sanctions for antiunion discharges would be a significant deterrent.¹⁵²

With respect to the other weaknesses Weiler identifies in the existing NLRA scheme—the employer's ability to avoid agreement through bad faith negotiating and superior bargaining power—Weiler proposes a package of interrelated amendments: stiffer penalties for employers who negotiate in bad faith to avoid reaching a first agreement with a newly certified union;¹⁵³ a ban on permanent replacement of strikers for the first six months of a strike;¹⁵⁴ and an exception from the secondary boycott laws to enable unions to request that employees of other employers not handle goods of the struck employer.¹⁵⁵

148. Pp. 233-40.

149. Pp. 243-49.

150. P. 249.

151. Gottesman, *supra* note 1, at 394-410.

152. *Id.* at 369-72. Weiler also proposes that the United States adopt the Canadian system of "instant elections," whereby an election is held within a few days of a union's petition. Weiler suggests that the long election campaign in the U.S. provides the employer the opportunity to wreak terror. Pp. 253-61.

153. Weiler explains that in Canada when an employer negotiates in bad faith over an initial contract the remedy is compulsory arbitration over the terms of that contract. Weiler suggests that this remedy will likely be too strong for American tastes, given the national preoccupation with the principle of freedom of contract and the administrative burdens that would attend any effort to impose contracts through arbitration. Weiler suggests, however, that compensatory remedies for refusals to bargain would be a second-best solution. Pp. 249-51; *cf.* *Ex-Cell-O Corp.*, 185 N.L.R.B. 107 (1970).

154. Pp. 264-69. Weiler is in this respect quite restrained. Bills are now pending in Congress that would forbid hiring of permanent replacements at any time. S. 55, 102d Cong., 1st Sess. (1991); H.R. 5, 102d Cong., 1st Sess. (1991).

155. Pp. 269-73. Weiler considers and rejects yet another NLRA reform that has considerable support: providing unions equal access to the employer's premises during organizing drives. *See, e.g.*, Gottesman, *supra* note 1, at 411-18, sources cited at 414 n.220 therein; *see also* Block, *Redressing the Imbalance in the Law of Union Representation Elections: The Principle of Workplace Neutrality*, Proceedings of the Forty-Third Annual Meeting of the Industrial Relations Research Association (Dec. 28-30, 1990). Weiler does not dispute the justice of the reform, but believes that it would be of limited utility and is not worth the investment in political capital necessary to obtain it. Pp. 242-43. I agree with Weiler that from a practical

Weiler's package of NLRA amendments is a wish list that far exceeds what anyone thinks legislatively attainable at present, given the potential for filibuster in the Senate and presidential veto. But it is doubtful that anything short of what he proposes could overcome the obstacles to collective bargaining that exist in the present NLRA minefield.

2. Restructuring Labor Unions

Weiler contends that large, industrial unions (at least as they have functioned traditionally) are ill-suited to organizing the new breed of workers in our changing workplaces. These unions, which developed after passage of the Wagner Act and organized the large manufacturing industries such as auto and steel, negotiate industry-wide or company-wide agreements of great length and specificity to govern large numbers of workplaces.¹⁵⁶ In Weiler's view, these institutional structures are not well-suited to the new work environment, in which employers need greater flexibility in their operations to respond to changes in competitive markets and career employees desire a greater voice in setting their own workplace agendas than is possible when negotiating is done nationwide.¹⁵⁷

Weiler declares that we are entering an era in which the institutional form preferred by employees will be "enterprise unionism,"¹⁵⁸ i.e., union structures that enable the agenda to be shaped at the workplace level by those immediately affected and employment agreements that leave room for flexibility in responding to unforeseen circumstances.¹⁵⁹ Weiler argues that it is possible for industrial unions to delegate the autonomy necessary to achieve this, and cites as proof the General Motors-United Auto Workers Saturn Plant agreement: that agreement is not only plant-specific but also is just a fraction of the size of traditional auto agreements and remits most questions to *ad hoc* resolution at the plant level, as they arise, by the parties directly affected.¹⁶⁰

While employee voice and employer flexibility are the considerations that prompt Weiler to champion enterprise unionism, he has not overlooked that in-

standpoint this is a less important injustice than others he proposes to correct. Gottesman, *A Union Lawyer's Reaction to Proposals for a "New Path" for Employee Representation Rights*, Proceedings of the Forty-Third Annual Meeting of the Industrial Relations Research Association (Dec. 28-30, 1990). But I wonder whether, in a context in which there was receptivity to the other proposals Weiler is making, this would be so hard to tag on.

156. Pp. 187-88.

157. Pp. 186-201.

158. P. 218.

159. Pp. 218-24.

160. Pp. 203-04. The Saturn Plant agreement is an exemplar of "relational contracts"—those that remit resolution of future contingencies to later decisionmaking by the parties instead of trying to dictate a solution at the time of initial contracting. See Goetz & Scott, *Principles of Relational Contracts*, 67 VA. L. REV. 1089 (1981); MacNeil, *Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neoclassical, and Relational Contract Law*, 72 NW. U. L. REV. 854, 870-73 (1978); Williamson, *supra* note 13, at 67-70.

house employee negotiators will need resources that only a national organization can provide. Here is where he sees a meaningful role for the industrial unions. Because these unions are so large, they are able to aggregate large sums of money to finance the acquisition of experts to deal with complex workplace issues such as safety and health, fringe benefits, etc. He sees these unions becoming service providers, furnishing expert assistance to in-house negotiators on matters requiring specialization.¹⁶¹

Weiler's advice to the labor movement is that it had better restructure itself to accommodate these changing tastes, or else it will hold no appeal to the modern worker. My own view is that, while Weiler undoubtedly has a point, he generalizes an insight that has limited application.

Certainly there are employees in many occupations and with many employers whose willingness to unionize will depend upon the employees' ability to retain autonomy at the local level. But I doubt that that will be universally true. For example, I doubt that the reluctance of cashiers, janitors, truck drivers, and waiters/waitresses to unionize—and these, recall, are four of the five fastest growing occupations¹⁶²—can be attributed to a desire for greater voice in shaping their workplace agendas.¹⁶³ For these categories, as Weiler's own analysis of the causes of union decline confirms, the defects in the NLRA are the real obstacle to unionization.¹⁶⁴ I predict that if we implemented Weiler's NLRA reforms, vast numbers of employees in these occupations would join existing union structures overnight.

There is, in short, a need for many different union structures to accommodate many different workplace settings in our changing economy. As Weiler reports, the labor movement has been studying this very point,¹⁶⁵ and traditional economists will assure us that, if there is indeed a market for a particular kind of unionism, then providers will emerge who are ready to meet those needs.

However, I am not as confident as Weiler that the needs of the new breed of technical and professional employees will be met through transformation of existing unions. It seems far likelier that new institutions will evolve that are suited to the special interests of these employees. One need only observe the history of what is currently America's largest labor organization to see how this might occur.¹⁶⁶ The National Education Association (NEA) began as an organization that concentrated on issues relating to the quality of education. Over

161. Pp. 208, 309.

162. See *supra* note 90 and accompanying text.

163. Matthew Finkin, *supra* note 37, agrees that "[b]lue collar workers especially do not appear to be deeply interested in participating directly in managerial decisions other than those they perceive as having an immediate impact upon themselves."

164. See *supra* notes 137-42 and accompanying text.

165. Pp. 219, 292.

166. The National Education Association became the nation's largest labor organization in the late 1980's, as its membership approached two million. 25 Gov't Empl. Rel. Rep. (BNA) 964 (July 13, 1987).

the past two decades, however, its leaders and members have transformed it into an aggressive labor organization.¹⁶⁷ In most respects, the NEA fulfills Weiler's image of a decentralized institution where local voice is paramount in determining workplace governance rules and the national organization provides services that support local bargaining units.¹⁶⁸ We should expect that an evolution of this type—transformation of a professional standards organization into a labor organization—will be the means by which many professionals and technicians will find their way to collective bargaining. Weiler's vision of organization from without by existing unions thus will not be the whole story.¹⁶⁹

3. *Mandating Works Councils*

Weiler acknowledges that revitalization of collective bargaining cannot possibly produce total unionization in America, and he proffers a proposal that would bring some measure of collective participation to all workers. He would make *mandatory* the creation of Employee Participation Committees (EPC's) in all workplaces.¹⁷⁰

These Committees, which would be financed primarily by compulsory employer contributions,¹⁷¹ would perform some (not all) of the functions of works councils in Germany. They would be indigenous to the individual workplace, would be staffed by representatives chosen by the employees, and would consult with management about a wide range of issues—wider than the list of mandatory bargaining subjects under the NLRA.¹⁷² Employers would be required to inform the EPCs not only of all policies relating to wages, hours, and terms and conditions of employment—the subjects on which employers are bound to negotiate under the NLRA¹⁷³—but also of entrepreneurial decisions that would affect the employees' work-lives but that the employer has no

167. A. WEST, *THE NATIONAL EDUCATION ASSOCIATION: THE POWER BASE FOR EDUCATION* 21-27, 39-87 (1980).

168. P. 222 n.50.

169. On one related point I agree with Weiler completely. He notes that the NLRA impedes the development of new forms of unionism through its ban on "company unions" and the exclusion from the Act's protections of those who are allotted any participation in making managerial decisions. Pp. 211-18. (The exclusion of managerial employees from the Act's coverage does not appear on the face of the Act, but was inferred by the Board and has been upheld repeatedly by the Supreme Court. *See* NLRB v. *Yeshiva Univ.*, 444 U.S. 672 (1980); *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974)). In workplaces where employees are invited to participate in managerial decisions, the price of acceptance should not be forfeiture of the right to unionize. And where employers are prepared to finance employee organizations to function in such a participatory environment, we should welcome these initial steps down a road that may lead to in the employees opting for a stronger version of collective action. Thus, as Weiler proposes, the ban on company unions in § 8(a)(2) of the NLRA, 29 U.S.C. § 158(a)(2), should be abolished and the Act's protections should be extended, at least to those whose managerial roles are limited in scope. Pp. 217-18.

170. Pp. 284-95.

171. Weiler would require the employees to pay some amount to finance the Committees, and the employer to pay a multiple of each employee's contribution. P. 289.

172. Pp. 285-87.

173. §§ 8(a)(5)-8(d) NLRA, 29 U.S.C. §§ 158(a)(5), 158(d).

obligation under the NLRA to discuss with employees.¹⁷⁴ The EPC, like the shareholders and the Board of Directors, would be entitled to information respecting the "broader financial, investment, and profit situation of the firm."¹⁷⁵ The employer would be obliged to meet periodically and consult with the employee representatives of the EPC.¹⁷⁶

Weiler is not alone in proposing that the information and consultation features of the German works council law be carried over to the American workplace; this recommendation has become quite the vogue.¹⁷⁷ For the life of me, I do not understand why. Granted, labor relations go swimmingly in Germany as compared to the United States. But the features that these scholars seek to transplant are but a small part of a much larger mosaic that regulates German labor law, and it is that larger mosaic that explains the success of the works councils.

To begin with, although only 40% of the German workforce belongs to unions, 90% of German workers are covered by collective bargaining agreements which the unions hammer out on a national, industrywide, or areawide basis.¹⁷⁸ The agreements set basic terms and conditions for all workplaces in the industry.¹⁷⁹ The works councils function alongside that basic structure. They perform the role that might be played by a local union in a large American industrial union, working out terms that are specific to the particular location. They differ, however, in that they are not a part of the union, but a distinct workplace-specific institution enjoying autonomous control of the local issues that are within their jurisdiction. That local agenda is ambitious indeed, including both overseeing compliance with the law and the collective agreements and formulating the rules that will govern such matters as scheduling vacations, establishing plant rules and discipline, setting job and piece rates, restructuring and designing jobs, and instituting safety measures. As to all these

174. P. 288; *cf.* *First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981).

175. P. 288.

176. P. 285.

177. Clyde Summers has compared the German system with that of the U.S. and, while arguing that German works councils cannot be transplanted into the U.S., has attempted to construct a codetermination model for the U.S., incorporating the information and consultation elements of the concept as a starting point for discussion. Summers, *Codetermination in the United States: A Projection of Problems and Potentials*, 4 J. COMP. CORP. L. & SOC. REG. 155 (1982); *see also* Summers, *An American Perspective of the German Model of Worker Participation*, 8 COMP. LAB. L.J. 333 (1987) [hereinafter Summers, *An American Perspective*]. A more direct case for adoption of the information and consultation elements in the U.S. has recently been proposed by Janice Bellace. J. Bellace, *Mandating Employee Consultation and Information Rights*, Proceedings of the Forty-Third Annual Meeting of the Industrial Relations Research Association (Dec. 28-30, 1990).

The works council idea has also been widely advocated in Canada. *See* Adams, *Should Works Councils Be Used as Industrial Relations Policy?*, MONTHLY LAB. REV. July 25, 1985; Adams & Rummell, *Workers' Participation in Management in West Germany: Impact on the Worker, the Enterprise, and Trade Union*, 8 INDUS. REL. J. 4 (1977); Beatty, *Constitutionalizing a Labour Code: Creative Uses of Comparative Law*, 8 COMP. LAB. L.J. 211 (1987).

178. Summers, *The Usefulness of Unions in a Major Industrial Society—A Comparative Sketch*, 58 TUL. L. REV. 1409, 1412 (1984).

179. *Id.*

matters, the council has not merely the right to receive information and consult (the powers that Weiler and others would transport to the U.S.) *but the power to secure a binding resolution from a neutral decisionmaker if the parties do not agree* (i.e., “codetermination”¹⁸⁰).

Weiler and his colleagues all agree that this last aspect—interest arbitration in the American terminology—stands no chance of gaining political acceptance in America. Employers would resist mightily any legislative proposal to divest them of control over their operations, would protest the transfer of decision-making to neutrals who could not possibly possess the knowledge and expertise enjoyed by management, and would find political paydirt in the deep-seated American commitment to freedom of contract.¹⁸¹ Weiler and his colleagues would, accordingly, borrow the information and consultation steps of the German system without the decisionmaking step.

To advocate the enactment of such an information and consultation scheme seems to me a prodigious waste of scarce political resources. Without a terminal point, these consultations would be meaningless exercises. Weiler points out that if employees become frustrated by their inability to secure resolution of the issues discussed in these committees, they can always form a union to acquire leverage.¹⁸² Indeed, one suspects that Weiler’s real hope is that these EPC’s would give the workers a whiff of collective participation that would prod them into unionizing, I fear, however, that they would create the opposite impression: that collectivization produces mere frustration.

Moreover, I doubt that an effort to impose even these loose tea-parties on American employers through legal compulsion would be successful. In Germany, the employers are already dealing with unions and are merely distributing the locus of bargaining between two different sites, some national and some local. However, in America, many employers are dedicated to achieving a union-free environment. If employers bargain in bad faith with impunity under the NLRA,¹⁸³ why should we assume that they would be any more forthcoming under an EPC law? How will we compel them to share with these commit-

180. *Id.* at 1416; Waschke, *Workers’ Participation in Management in the Nine European Community Countries*, 7 COMP. LAB. L.J. 83, 86-88 (1977). Codetermination is not applicable to certain entrepreneurial decisions such as the decision to relocate. There, the Works Council Act provides only for informing and consulting—the same process that would be applicable here under the Weiler proposal. Summers, *An American Perspective*, *supra* note 177, at 347-48. But that unionized employers in Germany governed by this network of laws engage meaningfully in such discussions (if they do) is no predictor of how America’s nonunion employers would behave. It is one thing to expect employers to deal seriously with an entity that has leverage in other aspects of the relationship, and quite another to expect employers to deal seriously with an entity that has no leverage anywhere. See *infra* notes 183-84 and accompanying text.

181. Pp. 289-90.

182. P. 290. Under Weiler’s proposal, every workplace, including those that are unionized, would have a statutory committee. The unionized employees could, if they choose, select their union to perform the committee functions, but need not. If the union were selected, the nonbargaining unit employees in the workplace would be entitled to choose their own representatives. Pp. 293-95. The potential existence of dual representatives for unionized employees contains the seeds for much mischief.

183. See *supra* text accompanying notes 145-47, 153-55.

tees their secret financial information and plans? Earlier Weiler made a telling demonstration of the weaknesses of government regulation,¹⁸⁴ yet he would attempt to impose a continuing obligation on employers that would be unwelcome and notoriously difficult to enforce.

All this is not to say that there is not a germ of an idea lurking within the EPC suggestion. While I think it meaningless to mandate superficial consultations, in-house committees *to monitor the employer's compliance with legal and contractual dictates*—one among the many functions Weiler would assign to such committees¹⁸⁵—seems an exceedingly good idea.¹⁸⁶

Recall that earlier Weiler has shown that reinstatement of wrongfully discharged employees is unsuccessful in nonunion workplaces because there is no union to monitor the employer's postreinstatement treatment of the employees.¹⁸⁷ Recall further that he has shown that OSHA is not enforced in nonunion workplaces because there is no union to provide the expertise necessary to identify and follow through in eliminating violations.¹⁸⁸ These are but instances of a more general proposition: that enforcement of any legal norm in the workplace, whether regulatory or contractual, depends on an employee in-house presence that can serve both an informational function and as protector against employer retaliation. Herein lies the kernel of a restricted form of mandated committee—a law-enforcement committee that could police employer compliance with the law and employee contracts, negotiate for resolution of alleged violations, and prosecute allegations that are not resolved informally.

Federal law could require the formation of such a committee at every workplace, with representatives elected by the employees. Because the committee would be performing a law-enforcement function, it would be appropriate that the committee's activities be financed with government revenues.¹⁸⁹ If the committee is to function effectively, the amount of the government subsidy would have to be sufficient to enable the committee to afford to contract for the expert services needed to enforce the more complex laws such as OSHA

184. See *supra* Part II.

185. Pp. 286-87.

186. Moreover, I would suggest that union representatives, where they exist, automatically serve as the committee representatives, at least on behalf of their bargaining unit members, to avoid the mischief of dual representation. See *supra* note 182.

187. See *supra* text accompanying notes 117, 123.

188. See *supra* text accompanying notes 110-11.

189. Weiler proposes that the committee he champions, which would have many functions in addition to law enforcement, be financed principally by the employer with a small contribution by the employees. See *supra* note 171 and accompanying text. I doubt that the benefits we would derive from those broader functions would justify the crippling competitive burdens the compelled contributions would place on American employers operating in global markets. I discuss a similar point in Gottesman, *Twelve Topics To Consider Before Opting for Racial Quotas*, *supra* note 98. Limiting the committee's function to law enforcement justifies placing the cost on the government instead, thus spreading the cost to all taxpayers. Note that this is *not* the same as Epstein's assertion that redistribution should be the role of tax laws alone, for my approach requires labor laws as well to determine *how* the revenues are to be distributed.

and ERISA. Unions could offer those expert services, as Weiler's proposal contemplates,¹⁹⁰ but others could provide them as well.

Because resort to the law is a meaningful terminal point to any problem not resolved locally, and one that employers would in most instances find unpleasant, there is reason to think that consultations would be productive under such a regime. This strategy would address many of the weaknesses Weiler identifies in government regulation today, by providing employees access to the information and technical expertise necessary for effective invocation of the law, and by enforcing their legal rights to be free of retaliation when they do invoke the law.

I have had some personal experience with enforcement committees such as these, established pursuant to consent decrees under Title VII of the Civil Rights Act of 1964.¹⁹¹ There can be little doubt that these committees "work," in that they ferret out arguable violations and elicit diligent efforts to resolve them. Employers take such committees seriously because problems not resolved at home will find their way into less hospitable judicial forums.

The existence of such committees at all workplaces would create broadened options for the shape of government regulation. I have described Weiler's account of the demerits of generic procrustean safety and health regulation that is not tailored to the specifics of each workplace.¹⁹² An alternative strategy for government regulation, sometimes styled "reconstitutive law,"¹⁹³ might have government prescribe only broad objectives and delegate the selection of the most cost-effective means to achieve those objectives to each employer and its workplace committee.

Workplace law-enforcement committees, while having a natural appeal to those who favor collective workplace decisionmaking, should also appeal to those who favor government regulation. Weiler is most persuasive when he argues that the absence of information, technical expertise, and insulation from retaliation inhibits employees' invocation of their rights under public law. Thus, this strategy could be pursued independent of efforts to overhaul the NLRA to facilitate more traditional union organization, indeed even by those who do not favor NLRA overhaul.

IV. CONCLUSION

Governing the Workplace is of immense value to those interested in the future of American labor law. It is a kaleidoscopic journey, ranging from

190. P. 293.

191. For example, the Steel Industry Consent Decree, entered into in 1974, established committees at virtually all steel plants in the United States to enforce the terms of the Decree as well as Title VII's commands generally. *United States v. Allegheny-Ludlum Indus., Inc.*, 517 F.2d 826, 835 (5th Cir. 1975), *cert. denied sub nom. Harris v. Allegheny-Ludlum Indus., Inc.*, 425 U.S. 944 (1976).

192. See *supra* note 110 and accompanying text.

193. See Stewart, *Reconstitutive Law*, 46 MD. L. REV. 86, 108-09 (1986).

voluminous empirical data about the operation of the modern workplace to scholarly analyses drawing on law, economics, industrial relations, and critical theory. It contains an education about work, the law, and the intersection of the two.

While Weiler has a decided point of view on all the issues he discusses, he is scrupulously fair in laying out the competing views and acknowledging the strengths of those positions. As a result, his book provides the reader with a fair canvass of the range of scholarly and political debate about the workplace today.

As I have described in this review, I agree with many of Weiler's contributions and find them effectively presented. His critique of the efficacy of government regulation in the absence of a union is state of the art. The part of his discussion of mandatory workplace committees in which he highlights their potential for facilitating law enforcement provides the nucleus for a whole new strategy for regulating the workplace. His pathology of the NLRA and diagnoses for its resuscitation likewise are the best available. And his description of the evolution of industrial relations—from casual employment to employer preference for career relationships—provides empirical data necessary to evaluating our choice of legal strategies for governing the workplace.

I have identified three major areas where I believe his analysis falls short. He accepts Epstein's challenge to show that government intervention in the market is justified on efficiency grounds, but declares victory without waiting for the final inning: while he chases Epstein out of the spot market, he does not deliver a decisive blow on the bilateral monopoly issue that is then encountered. Moreover, Weiler's analysis abandons the neediest non-career employees, although both efficiency and wealth distribution arguments exist for legal protection of such employees.¹⁹⁴ Finally, his advocacy of mandatory works councils for inform-and-consult functions seems ill-advised because such committees are unlikely to succeed and securing them through legislation would waste precious political capital.

These disagreements, however, do not shake my assessment of the overall importance of this book. If one wishes to turn to a single book to gain an understanding of the workplace today and of the themes of academic debate about how the workplace should be governed, this book unquestionably is my first choice.

194. My critique of Weiler on these points is not shared by Samuel Issacharoff, who finds Weiler's "response to the neoclassical revival . . . perhaps the strongest individual section of *Governing the Workplace*." Issacharoff, *supra* note 26, at 619. In Issacharoff's view, the "shakiest" part of Weiler's analysis is the part I find most persuasive—Weiler's preference for collective bargaining over government regulation. *Id.* at 627; *see also id.* at 627-33.

and ERISA. Unions could offer those expert services, as Weiler's proposal contemplates,¹⁹⁰ but others could provide them as well.

Because resort to the law is a meaningful terminal point to any problem not resolved locally, and one that employers would in most instances find unpleasant, there is reason to think that consultations would be productive under such a regime. This strategy would address many of the weaknesses Weiler identifies in government regulation today, by providing employees access to the information and technical expertise necessary for effective invocation of the law, and by enforcing their legal rights to be free of retaliation when they do invoke the law.

I have had some personal experience with enforcement committees such as these, established pursuant to consent decrees under Title VII of the Civil Rights Act of 1964.¹⁹¹ There can be little doubt that these committees "work," in that they ferret out arguable violations and elicit diligent efforts to resolve them. Employers take such committees seriously because problems not resolved at home will find their way into less hospitable judicial forums.

The existence of such committees at all workplaces would create broadened options for the shape of government regulation. I have described Weiler's account of the demerits of generic procrustean safety and health regulation that is not tailored to the specifics of each workplace.¹⁹² An alternative strategy for government regulation, sometimes styled "reconstitutive law,"¹⁹³ might have government prescribe only broad objectives and delegate the selection of the most cost-effective means to achieve those objectives to each employer and its workplace committee.

Workplace law-enforcement committees, while having a natural appeal to those who favor collective workplace decisionmaking, should also appeal to those who favor government regulation. Weiler is most persuasive when he argues that the absence of information, technical expertise, and insulation from retaliation inhibits employees' invocation of their rights under public law. Thus, this strategy could be pursued independent of efforts to overhaul the NLRA to facilitate more traditional union organization, indeed even by those who do not favor NLRA overhaul.

190. P. 293.

191. For example, the Steel Industry Consent Decree, entered into in 1974, established committees at virtually all steel plants in the United States to enforce the terms of the Decree as well as Title VII's commands generally. *United States v. Allegheny-Ludlum Indus., Inc.*, 517 F.2d 826, 835 (5th Cir. 1975), *cert. denied sub nom. Harris v. Allegheny-Ludlum Indus., Inc.*, 425 U.S. 944 (1976).

192. See *supra* note 110 and accompanying text.

193. See Stewart, *Reconstitutive Law*, 46 MD. L. REV. 86, 108-09 (1986).

IV. CONCLUSION

Governing the Workplace is of immense value to those interested in the future of American labor law. It is a kaleidoscopic journey, ranging from voluminous empirical data about the operation of the modern workplace to scholarly analyses drawing on law, economics, industrial relations, and critical theory. It contains an education about work, the law, and the intersection of the two.

While Weiler has a decided point of view on all the issues he discusses, he is scrupulously fair in laying out the competing views and acknowledging the strengths of those positions. As a result, his book provides the reader with a fair canvass of the range of scholarly and political debate about the workplace today.

As I have described in this review, I agree with many of Weiler's contributions and find them effectively presented. His critique of the efficacy of government regulation in the absence of a union is state of the art. The part of his discussion of mandatory workplace committees in which he highlights their potential for facilitating law enforcement provides the nucleus for a whole new strategy for regulating the workplace. His pathology of the NLRA and diagnoses for its resuscitation likewise are the best available. And his description of the evolution of industrial relations—from casual employment to employer preference for career relationships—provides empirical data necessary to evaluating our choice of legal strategies for governing the workplace.

I have identified three major areas where I believe his analysis falls short. He accepts Epstein's challenge to show that government intervention in the market is justified on efficiency grounds, but declares victory without waiting for the final inning: while he chases Epstein out of the spot market, he does not deliver a decisive blow on the bilateral monopoly issue that is then encountered. Moreover, Weiler's analysis abandons the neediest non-career employees, although both efficiency and wealth distribution arguments exist for legal protection of such employees.¹⁹⁴ Finally, his advocacy of mandatory works councils for inform-and-consult functions seems ill-advised because such committees are unlikely to succeed and securing them through legislation would waste precious political capital.

These disagreements, however, do not shake my assessment of the overall importance of this book. If one wishes to turn to a single book to gain an understanding of the workplace today and of the themes of academic debate about how the workplace should be governed, this book unquestionably is my first choice.

194. My critique of Weiler on these points is not shared by Samuel Issacharoff, who finds Weiler's "response to the neoclassical revival . . . perhaps the strongest individual section of *Governing the Workplace*." Issacharoff, *supra* note 26, at 619. In Issacharoff's view, the "shakiest" part of Weiler's analysis is the part I find most persuasive—Weiler's preference for collective bargaining over government regulation. *Id.* at 627; *see also id.* at 627-33.