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Book Review: Governing the Workplace: The Future of Labor and Employment Law

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BOOK REVIEW

Governing the Workplace: The Future of Labor and Employment Law

Paul C. Weiler*

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Reviewed by Marc Linder**

At the height of the first Reagan administration's antiunion campaign, Paul Weiler published two long and critical articles in the Harvard Law Review,[1] in effect briefing labor's complaints against the biased and dysfunctional structure and operation of the National Labor Relations Act (NLRA). He lent fresh authority to a coalescing sense of discontent with the state of labor-management relations in the United States. Now, some half-dozen years later, with the publication of his first book for a general American audience,[2] Weiler has signaled a partial retreat.

Weiler's ambiguous and ambivalent position is in large part a function of his decision to structure his book as a response to what he views as "the fundamental challenge to . . . labor and employment law" posed by the law and economics movement (vii). This "coherent and powerful" doctrine, Weiler admonishes his allies, "should awaken liberal reformers from a rather dogmatic slumber" (63). Such proponents as Richard Epstein and Richard Posner have inspired Weiler to reconsider the virtues of an unfettered labor market (vii, 63).[3] And although Weiler has by no means

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1. Paul Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization under the NLRA*, 96 Harv. L. Rev. 1769 (1983); Paul Weiler, *Striking a New Balance: Freedom of Contract and the Prospects for Union Representation*, 98 Harv. L. Rev. 351 (1984).

2. Paul C. Weiler, Governing the Workplace: The Future of Labor and Employment Law (1990). All parenthetical page references are to the book under review.

3. In referring to "the comparative advantages of the market" (vii), Weiler misuses a technical economic term: "Comparative advantage" has, from Ricardo to present-day elementary textbooks, been used to justify specialization and exchange between countries (or persons), one of which has an absolute advantage over the other in the production of two commodities (or services), but which is more effi-

awakened as an advocate of laissez-faire in the labor market,[4] he is willing to make concessions. Thus, the claim that "market incentives . . . place significant restraints on management's personnel policies is much more plausible than is commonly conceded by the left-liberal critique of the exercise of corporate power over the worker" (18). But because the impact of economic incentives within the labor market is subject to significant limits, Weiler deems exclusive reliance on it "unwise public policy" (19).

Weiler formulates reform proposals for three principal areas of labor law: first, wrongful dismissal (48-104); second, the NLRA (225-81); and third, a new statutory right guaranteeing "a basic level of internal participation in a specified range of decisions" in all firms (282-98). The first is a moderate suggestion designed to accommodate employers' objections and the efficiencies of "the unregulated labor market," which "[e]ven granted its shortcomings . . . provides a good deal more protection to workers than is popularly supposed" (95). The complex of proposals amending the NLRA, largely distilled from his earlier publications,[5] combines antipaternalistic deregulation of the representation process (113),[6] incisive removal of the encrustations of decades of pro-employer rulings by the Supreme Court[7] and the National Labor Relations Board, and rejection of further-reaching provisions enacted in Canada. The proposed statutory participation, ahistorically modelled on the postwar (West) German works councils, would reinforce the latter's weaknesses in the American context.

Weiler's ambivalent stance on wrongful dismissal legislation largely rests on his view that the burden that litigation imposes on employers is not balanced by benefits that accrue to plaintiff-employees (81-82, 101). Weiler advocates tort litigation without

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cient in one than the other. For a brief critique, see Guy Routh, The Origin of Economic Ideas 118-20 (1977). Weiler pleonastically uses the term repeatedly (e.g., 2, 28) to mean an ordinary advantage, which is inherently comparative.

4. Perhaps the most powerful nineteenth-century condemnation of laissez-faire stemmed from—of all people—Samuel Smiles, who characterized it as " 'Let wretchedness do its work; do not interfere with death.' " H. Scott Gordon, *The Ideology of Laissez-Faire*, in The Classical Economists and Economic Policy 180, 184 (A. Coats ed. 1971).

5. *See supra* note 1.

6. Weiler agrees with Judge Posner and the Reagan-era National Labor Relations Board concerning the need to dismantle regulation of employer speech (274 n.60) and of union access to employees (242-43).

7. Weiler, for example, trenchantly criticizes a unanimous Supreme Court decision that a union may not spend nonmembers' dues on organizing new workers because that activity was insufficiently connected to representing bargaining unit members (277 n.64). Ellis v. Brotherhood of Railway, Airline & Steamship Clerks, Freight Handlers, Express & Station Employees, 466 U.S. 435 (1984).

capped awards for dismissals for bad cause—or at least those causes "that contravene public policy in the stronger sense" (100).

> But if one wants to penetrate more deeply into the employment relationship and establish an employee right to be fired only for good and sufficient reason . . . there are real grounds for concern that enforcing such a right in the courts may do more harm to the employer (and thence to the general economy) than good for its individual beneficiaries (82-83).

Even if the free-marketeer claim is plausible, that employers would not fire employees for no reason because such nonrational behavior would harm the firm (59), employers still (reasonably) object to wrongful dismissal statutes because juries would second-guess their decisions, thus leading to inefficient defensive employer practices (60, 157).[8]

This limited character of Weiler's engagement is most poignantly reflected in the fact that he rejects an at-will regime only to the extent that it defeats the vested rights of long-term employees: "[A]s modern employment has evolved from a casual to a career relationship between worker and firm,[9] the traditional at-will legal concept has become morally untenable" (68).[10] But with regard to the bulk of the work force, who never secure a twenty-year position[11] (and who presumably are largely the lowest paid and unor-

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8. For a strong statement of the position that "[w]hile the promise to terminate employment only for cause includes the right to have the employer's decision reviewed, it does not include the right to be discharged only with the concurrence of the communal judgment of the jury," see Toussaint v. Blue Cross & Blue Shield of Michigan, 292 N.W.2d 880, 896 (Mich. 1980).

9. For evidence that even in the nineteenth century many employees worked for long periods for the same employer, see Susan Carter, *The Changing Importance of Lifetime Jobs, 1892-1978*, 27 Indus. Rel. 287 (1988); Susan Carter and Elizabeth Savoca, *Labor Mobility and Lengthy Jobs in Nineteenth-Century America*, 50 J. Econ. Hist. 1 (1990). The nineteenth-century data, which are very thin—being restricted to one year in one city—, suggest that the share of the oldest cohort of the native-born male labor force that worked twenty years or more for the same employer was somewhat more than half as great as the current level.

10. For an early statement of the life-tenure position, see Frederic Meyers, Ownership of Jobs 6-7, 15 (1964).

11. In 1981, of the race-sex-age cohort with the longest job tenure, white men 55 to 64 years old, 39.9% had been in their " 'present job or business' " at least 20 years. U.S. Bureau of Labor Statistics, Bulletin 2161 Job Tenure and Occupational Change, 1981, at 1 n.1, and at 16 table B-2 (1983). The corresponding length of tenure for women is only half that for men. In 1983, 44.7% of all men aged 55 to 64 had been working 20 years or more continuously with their then employer. Ellen Sehgal, *Occupational Mobility and Job Tenure in 1983*, Monthly Lab. Rev., Oct. 1984, at 18, table 1 at 19. By 1987, this figure had declined to 42.2%, although the corresponding figure for men 65 years and older rose slightly. *See* U.S. Bureau of Labor Statistics, News Release 87-452, table 4 (Oct. 22, 1987). For the purposes of Weiler's discussion, these figures are inflated because they include the self-employed, who have above-average lengths of tenure. Thus in 1987, 18.7% of self-employed males reported having been self-employed continually for 20 years or more, while only 11.5% of wage and salary workers had been working continually for

ganized) (63, 141),[12] Weiler is receptive to Epstein's argument that their best friend is competition among employers for their labor. Weiler therefore appears unconcerned with the effects of labor-market failures on such workers, who do not have the luxury of choices because of oligopsony at their end of the labor market.[13]

Weiler prefers to focus his analysis on an aspect of the uniqueness of the labor market that is precisely the opposite of that facing the most fungible workers[14]—namely, that the employee cannot diversify her risk by working for different employers

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twenty years or more with their current employer. Calculated according to data in U.S. Bureau of Labor Statistics, Job Tenure, at 10, table 3, 12 (1987) (unpublished data made available by BLS).

12. Long-tenure jobs, however, "are not necessarily good jobs in any absolute sense." Robert E. Hall, *The Importance of Lifetime Jobs in the U.S. Economy*, 72 Am. Econ. Rev. 716, 720 (1982). This lack of correlation is suggested by the fact that black men exhibit only a marginally lower length of tenure. *See id.* at 722-23; Bulletin 2161, *supra* note 11, at 16 table B-2. A further indicator of the skewed distribution of tenure is the fact that, in 1987, 16.2% of all male managerial, executive, and professional employees of all ages had worked for the same employer for 20 years or more compared with only 5.6% of male handlers, equipment cleaners, helpers, and laborers, and 6.0% of male service workers. Calculated according to data in Bulletin 2161, *supra* note 11, at 4-5 table 2. For a description, from the 1950s, contrasting the lifetime tenure of executives with the transiency of semi-skilled employees at a large corporation, see Theodore Caplow, The Sociology of Work 87 (1964 [1954]). If, in fact, significant numbers of workers fear losing long-term jobs not because of the loss of seniority-rooted benefits, but for the same reasons that burden all fungible unskilled and low-paid workers, the empirical basis of Weiler's position would be weakened. Whether such a result would bring him closer to Epstein's position is unclear. *See* Robert Hall, *Employment Fluctuations and Wage Rigidity*, 91, 101-02 (Brookings Papers on Economic Activity, No. 1, 1980).

13. *See* Marc Linder, *The Minimum Wage as Industrial Policy: A Forgotten Role*, 16 J. Legis. 151, 165-66 (1990). One hundred fifty years ago, Mill was more attentive to this kind of vulnerability:

> [W]hen the supply of labour so far exceeds the demand that to find employment at all is an uncertainty, and to be offered it on any terms a favour . . . [d]esirable labourers . . . can still exercise a choice. The undesirable must take what they can get. The more revolting the occupation, the more certain it is to receive the minimum of remuneration, because it devolves on the most helpless and degraded, on those who from squalid poverty, or from want of skill and education, are rejected from all other employments.

2 John Stuart Mill, Collected Works: Principles of Political Economy 383 (J. Robson ed. 1965). Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. Chi. L. Rev. 947, 968 (1984), whose reasoning impresses Weiler, offers this undifferentiated picture of choice:

> If coworkers perceive the dismissal as arbitrary, they will take fresh stock of their own prospects, for they can no longer be certain that their faithful performance will ensure their security and advancement. . . . Inferior employers will be at a perpetual competitive disadvantage with enlightened ones and will continue to lose in market share. . . .

14. *See, e.g.*, David M. Beatty, *Labour is Not a Commodity*, in Studies in Contract Law 313 (B. Reiter & J. Swan eds. 1980).

(142).[15] Weiler accepts the plausibility of the market-knows-best claim that employees in the labor market occupy an analogous position to consumers in the sense that the presence of other employers bidding for their services is a more effective source of protection than a union (18, 162-63). But because he emphasizes the golden cage of nonportable seniority-rooted benefits into which the employee becomes locked and which reduce her bargaining power because she fears their loss, Weiler argues, against law-and-economics proponents, that the firm's power over the employee is greater than that over a consumer (21-22, 64-67, 76).[16]

Weiler relates the law-and-economics view that employers need freedom to fire for good reason—"that is, because an employee has not been meeting the minimum standards of performance and behavior required for the productive operation of the enterprise"—if the labor market is to operate efficiently; such discretion has nothing to do with "capitalist domination or management hierarchy"—even worker-owned firms require it (59). Weiler affords some indirect support for this view by expressing concern that productivity and wages would decline if workers spent working time governing their workplace (177-78). Reluctantly, he accepts contract-based private rights of action, provided that judges do not go overboard in transforming expectations of tenure for good behavior into rigid barriers against at-will employment through "a mandatory, nonwaivable, and open-ended requirement of employer good faith in termination actions" (101).[17]

Weiler appears to honor the employer's (or the market's) definition of appropriate on-the-job conduct by workers. He also re-

15. Simon Rottenberg, *Property in Work*, 15 Indus. & Lab. Rel. Rev. 402, 405 (1962), anticipated Richard Epstein by arguing that workers can protect themselves against the obsolescence of their labor as readily as manufacturing firms can hedge against declining product markets by diversifying their skills. For non-long-term employees, perversely, Weiler might well accept the force of such a position. The unreality of the pro-free-labor-market position was underscored at the turn of the century by critics of the judicial and economic view that the hazardousness of various employments was adequately reflected in existing wage rates. *See, e.g.*, E. H. Downey, History of Work Accident Indemnity in Iowa 76-77 (1912).

16. For a more precise statement of the difference in authority between consumer and employment relationships, which does not rely on seniority benefits but which blinks at conceptualizing authority in an employment relationship in the absence of capital, see Oliver Hart and John Moore, *Property Rights and the Nature of the Firm*, 98 J. Pol. Econ. 1119, 1150 & n.29 (1990).

17. Weiler applauds the Montana Wrongful Discharge From Employment Act of 1987 for capping awards and excluding reinstatement in the nonunion firm, but pleads for attorney fees for prevailing plaintiffs (96-97, 85-87). For a devastating attack on the statute for cutting back on already existing common-law remedies, see Meech v. Hillhaven West, Inc., 776 P.2d 488, 507-17 (Mont. 1989) (Sheehy, J., dissenting).

jects, on efficiency grounds, detailed involvement by workers themselves or intervention by the community in the form of judges and juries. It is unclear, consequently, what sort of political-economic democratization Weiler believes his proposal might promote.[18] Weiler's ambivalence regarding wrongful dismissal statutes and litigation may also be a function of his general skepticism about the efficacy of legislative or judicial action that must ultimately be enforced on a day-to-day basis by the affected workers themselves. But whereas other observers of this potentially weak link have focused on the disparity of resources between employers and employees,[19] Weiler emphasizes the disparity among workers (28). Moreover, because the new model of employee involvement and union cooperation that he is propagating presupposes a qualitatively higher level of mutual trust (36)[20] and the sort of local flexibility (69) that will overcome employers' traditional objections to legislative standards (27), Weiler's position implicates a de-emphasis of litigation with its adverse impact on harmonious relations.[21]

That Weiler offers even halfhearted support for wrongful dismissal statutes is ultimately dictated by his view of the unique imperfections of the labor market, which make it very hard for jobshoppers to secure adequate information ex ante concerning the comparative risks of unfair dismissal; in consumer markets, by way of contrast, a small critical mass of comparison shoppers generates satisfactory market controls (74). Yet despite the fact that this defect weighs most heavily on the most vulnerable workers, Weiler would restrict coverage to the "long-service employee" (95), excluding "still mobile employees who invested a relatively short

18. In referring to Robert Dahl as a supporter of worker control, Weiler asserts that "a necessary precondition to such a political position is the evidence and analysis from contemporary labor economics on the nature and significance of the career employment relationship" (174 n.85). Dahl, offering a much broader critique of capitalism as an undemocratic system, does not condition worker control as does Weiler. *See* Robert Dahl, A Preface to Economic Democracy (1985).

19. "Capitalist law cannot break the dependence of rightholders when it is founded on conditions existing outside of the law: the dependence . . . of workers on the market, on their own limited capacities, funds, and mobility, on their employers, and their unions and works-councils." Inga Markovits, *Pursuing One's Rights Under Socialism*, 38 Stan. L. Rev. 689, 757 (1986).

20. Weiler presumes that many workers will prefer independent but not "antagonistic" representation (211).

21. While capitalist law . . . may provide only limited redress for losses, the confrontation and contrariness it reflects may invite people to try to take control of their own lives. But it can come as no surprise that this kind of law, which reaffirms plaintiffs in their confrontation with opponents, is of no use in establishing mutual cooperation and trust.

Markovits, *supra* note 19, at 758.

period of service with their employer" (102).[22]

Weiler reports the market-knows-best argument that a better way of dealing with problems of at-will employment would be implementation of a policy of full employment "that would make it easy for the worker dismissed from one job to find another quickly" (62). But he rejects this notion of job fungibility because "the job rather than the state has become the source of the social safety net on which people must rely when they are not employed" (3). Ironically, then, Weiler resists the very kind of important economic change that would bolster workers' ability to threaten their employers with exit[23] and that would do so in such a way as to reduce disparities among workers. Instead of advocating a European-style social wage, Weiler thus reinforces the "feudal" tendency to bind workers to individual firms.[24] And even when he draws attention to permanent layoffs against which few if any firms can protect their employees financially (70),[25] Weiler fails to appreciate the need for a classwide social wage or solidaristic wage policy so that workers' standards of living would be less dependent on the fortuity of where they happen to work.[26]

Weiler's principal proposals for reconstructing the NLRA fo-

22. In this regard Weiler's proposal is even less generous than the current draft of the Uniform Employment Termination Act § 3(b) (Draft Dec. 31, 1990) (exempting employees with less than one year of employment with the same employer).

23. Because capital benefits crucially from the fact that unemployment increases the penalty associated with being fired, it seems counterintuitive that pro-marketeers would advocate "artificially" full employment. On the functionality of unemployment, see Carl Shapiro and Joseph E. Stiglitz, *Equilibrium Unemployment as a Worker Discipline Device*, 74 Am. Econ. Rev. 433 (1984).

24. *See* Arthur M. Ross, *Do We Have a New Industrial Feudalism?*, 48 Am. Econ. Rev. 903 (1958). Ross expressed concern that reduced mobility might have an adverse impact on the efficiency of the labor market. For another early discussion of the causes and effects of immobilization, see Paul F. Brissenden, *Labor Mobility and Employee Benefits*, 6 Lab. L.J. 762 (1955).

25. Weiler overlooks the irony—or perhaps even the fact—that the "theoretical success" of the " 'new economics of personnel,' " which focuses on such practices as career labor markets, "has come just at the time when the facts themselves are changing rapidly—including mass permanent layoffs "eliminating many previously secure jobs." Sanford Jacoby and Daniel Mitchell, *Sticky Stories: Economic Explanations of Employment and Wage Rigidity*, Am. Econ. Rev., May 1990, at 33, 35.

26. *See, e.g.*, Gösta Rehn, *Swedish Active Labor Market Policy: Retrospect and Prospect*, 24 Indus. Rel. 62 (1985); Andrew Martin, *Trade Unions in Sweden: Strategic Responses to Change and Crisis*, in Peter Gourevitch, Andrew Martin, George Ross, Christopher Allen, Stephen Bornstein, and Andrei Markovits, Unions and Economic Crisis: Britain, West Germany, and Sweden, 189, 205-208, 274 (1984) [hereinafter Unions and Economic Crisis]; David Granick, The European Executive 174-75 (1964[1962]). Even when Weiler tentatively broaches the issue of compulsory severance pay in a footnote, he hedges by conceding that such an obligation might deter employers from hiring workers in the first place (102 n.100). He appears to believe that Congress's failure to enact such a provision is a result of drafting problems (154-55) rather than of opposition by employers.

cus on instant elections and enhancement of workers' ability to strike. The former would effectively exclude employers from participation in election campaigns on the grounds that certification of unions by the National Labor Relations Board confers no authority on them over employers (253-61).[27] Weiler hopes to rectify the "serious imbalance" in the legal treatment of the right to strike by readjusting both employers' judicially created entitlement to replace economic strikers permanently with strikebreakers and statutory restrictions on secondary boycotts (261-73). With regard to each he fashions a moderate compromise.

While presenting an incisive challenge to the so-called *Mackay* doctrine (264-68),[28] Weiler does not advocate "cushion[ing] strikers" against the consequences of an employer's actions to defend itself (264).[29] Because he concedes the employer's right to continue to operate during strikes, he also opposes what he sees as the extremism of a Quebec statute that prohibits even temporary strike replacements (265 n.46, 269). The compromise Weiler devises—which is more cautious than a pending congressional bill[30]—would permit strikers to return to work without consequences within six months after a strike begins even if they dislodge replacements (268-69).[31] His approach to secondary boycotts is similar. After demolishing the traditional arguments for protecting secondary employers (271-72), Weiler again settles for compromise. He therefore calls for an expansion of the *Tree Fruits*

27. In exchange for instant elections, Weiler is willing to permit unilateral employer changes in working conditions without bargaining to impasse (258 n.40).

28. NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333 (1938) (holding it not an unfair labor practice for employer permanently to replace strikers in order to carry on business)(dictum).

29. It is unclear whether Weiler includes unemployment compensation and food stamps among these cushions.

30. H.R. 3936 and S. 2112, 101st Cong., 2d Sess. (1990), would amend the NLRA to make it an unfair labor practice "to offer, or to grant, the status of a permanent replacement employee to an individual for performing bargaining unit work for the employer during a labor dispute." S.55 and H.R. 5, 102d Cong., 1st Sess. (1991), have reoffered this amendment. On the background to this initiative, which was sparked by the strike replacement practices of the International Paper Co., see H.R. 4552 and the *Issue of Strike Replacements: Hearing Before the Subcomm. on Labor-Management Relations of the House Comm. on Education and Labor*, 100th Cong., 2d Sess. (1988); *Preventing Replacement of Economic Strikers: Hearing Before the Subcomm. on Labor of the Sen. Comm. on Labor and Human Resources on S. 2112*, 101st Cong., 2d Sess. (1990); *Legislative Hearing on H.R. 3936: Hearing Before the Subcomm. on Labor-Management Relations of the House Comm. on Education and Labor*, 101st Cong., 2d Sess. (1990). For a critique of the *Mackay* doctrine that takes as its starting point the strike as a functional part of collective bargaining, see Matthew W. Finkin, *Labor Policy and the Enervation of the Economic Strike*, 1990 U. Ill. L. Rev. 547.

31. Weiler also believes that employers should enjoy an effective means of enforcing no-strike clauses (215).

doctrine[32] to permit the striking union to ask secondary employees to refrain from working only on struck products, but rejects "a general sympathy strike against the entire line of business of the secondary firm" (272).

While unwilling to support a new remedy of first contract arbitration where the employer refuses to bargain with a newly certified union, Weiler does propose a private right of action for employees against employers who deny the employees' right to meaningful collective bargaining (249-51). Weiler also opposes interim injunctions for reinstatement of illegally discharged union sympathizers as too controversial and politically untenable (243-47), although he proposes tort damages for thwarting the right to join a union, which he would assimilate to those for wrongful discharge (247-49).

By means of a provocative thought experiment, Weiler underscores the crucial importance of initial presumptions and inertia within the NLRA: Even if, in the "natural" state, employees started out with representation by a union, which they would have to vote out, formally the employees' freedom of choice would not be affected (114-16). Not only does Weiler "not for a moment suggest" implementation of such a reversal "in order to expand the scope of union representation" (116), but also he offers his "pessimistic judgment" that only if the bone of contention is removed—namely, "hierarchical" unions, which are a red flag to "a good many workers" and employers—can workers secure "meaningful involvement and influence" at work (282). Thus despite the fact that he defends the principle established by the Supreme Court that the NLRA does not require employers to agree to any substantive proposal by a union (231 and 231 n.5), Weiler is prepared to move toward substantive state paternalism by taking away the choice regarding representation from employees and employers and conferring instead a guarantee "as a matter of moral right" of "a basic level of internal participation in a specified range of decisions" in all firms (282-83).

That Weiler hits upon the West German works council as his model is hardly surprising in light of the fact that they "[b]y all accounts . . . have played a valuable role in the evolution of West German human resource policy" (284). They fit, moreover, the other ideological needs of trust, flexibility, and decentralized enterprise unionism (36-37) that he emphasizes throughout. Because

32. NLRB v. Fruit and Vegetable Packers, Local 760, 377 U.S. 58 (1964) (approving picketing of retailer designed to encourage consumers to boycott products of primary employer).

labor and capital share a "joint enterprise" constantly at the risk of conflict (4), most employee "concerns" must and should be "solved" within the particular enterprise and industry rather than through broad-ranging statutory programs (161). In his brief account, Weiler neglects the fact that the labor movement in West Germany strenuously opposed the institutionalization of works councils precisely because they represented an effort to conjure up that "fundamental community of interests" (211)[33] propagated by Weiler at the expense of working-class mobilization.[34]

The Employee Participation Committees (EPC) he proposes would have major responsibility for administering safety laws, plant closings, equal employment, and wrongful dismissals, and would receive information and financial support from employers (286-89). Unlike the German works council, however, the EPC would not be entitled to binding arbitration where it did not consent to an employer's action. Weiler rules out this mechanism because an EPC is, after all, designed for employees who do not have and may not want collective bargaining: If workers complain that the EPC would be too weak and timid to impose change on a recalcitrant employer, they can "join a real union" (290). Yet Weiler's argument that unorganized and unrepresented workers cannot enforce statutory protections (159-61) undermines his claim that nonunionized works councils would achieve their aforementioned goals. Thus the circle Weiler hoped to break out of remains intact.

Although Weiler urges reform of certain dysfunctions in the regulation of the operation of the labor market, he reflects the prevailing political and ideological acceptance of the wage-labor or master-servant relationship as such. As intensified international competition becomes paired with a revitalized faith in capitalism as the only plausible social formation under modern economic conditions, the quality of socialization associated with the capital-labor relationship, which prompted vigorous protest in the middle of the nineteenth century, is no longer a subject of discussion.

To work at the bidding and for the profit of another, without

33. On the Nazi roots of the West German labor law doctrine of the plant community, see Marc Linder, The Supreme Labor Court in Nazi Germany: A Jurisprudential Analysis 95-137 (1987).

34. *See, e.g.*, 1 Wolfgang Däubler, Das Arbeitsrecht 184-319 (1976); Horst Thum, Mitbestimmung in der Montanindustrie: Der Mythos vom Sieg der Gewerkschaften (1982); Alfred L. Thimm, The False Promise of Codetermination: The Changing Nature of European Workers' Participation (1980); Andrei Markovits and Christopher Allen, Trade Unions and the Economic Crisis: The West German Case, in Unions and Economic Crisis, *supra* note 26, at 89, 95-98, 162-64; Horst Kern and Michael Schumann, Das Ende der Arbeitsteilung? Rationalisierung in der industriellen Produktion: Bestandsaufnahme, Trendbestimmung 117-36, 218-34 (1984).

> any interest in the work—the price of their labour being adjusted by hostile competition, one side demanding as much and the other paying as little as possible—is not, even when wages are high, a satisfactory state for human beings of educated intelligence, who have ceased to think themselves naturally inferior to those whom they serve.[35]

Despite Weiler's forthright stand in favor of creating real bases of power for employees that will underwrite their enhanced participation in the firm (309), his proposals accommodate the latest stage of Taylorism,[36] inasmuch as they are animated by a renewed "appreciat[ion] that labor is a peculiarly challenging factor of production" (3) and are designed to "enable the firm to tap the insights and ingenuity of the work force in improving the efficiency of its operations and the quality of its product in a fast-changing and highly competitive marketplace" (192). Unionization, according to Weiler, is not suited to new knowledge workers, who need a more cooperative model of direct employee involvement "through structures devised by human resource managers, who realize that this is the best way to maximize the firm's investment in its valuable human capital" (206). Apparently oblivious to the notion that "to think of a man as a 'human resource' is to affront his personality,"[37] Weiler lauds firms such as IBM that have pioneered this form of worker participation: "This unfolding pattern in human resource management is a testimonial to the real benefits that the free market can provide to workers" (31-32). Indeed, Weiler goes so far as to suggest that in such "contemporary collegial approaches to production . . . in which the firm seeks . . . to involve all employees in at least some aspect of management," the "conflict of interest" between labor and capital, which "assumedly" exists in the "traditional hierarchical firm," may have

35. 3 John Stuart Mill, Collected Works: Principles of Political Economy 766 n.c. (J. Robson ed. 1965 [1848]). On why Mill deleted this passage from editions after 1849, see Pedro Schwartz, The New Political Economy of J.S. Mill 293 n.38 (1972). Even such a hardheaded Realpolitiker as Max Weber insisted on the vast cultural consequences of the peculiar capitalist form of industrialization. *See* Max Weber, *Methodologische Einleitung für die Erhebungen des Vereins für Sozialpolitik über Auslese und Anpassung (Berufswahl und Berufsschicksal) der Arbeiterschaft der geschlossenen Industrie*, in Max Weber, Gesammelte Aufsätze zur Soziologie und Sozialpolitik 1, 17-18, 46, 60-61 (2d ed. 1988 [1924]) (first published in 1908).

36. On Taylor's system of "scientific management," see Frederick Taylor, The Principles of Scientific Management (1911); Samuel Haber, Efficiency and Uplift: Scientific Management in the Progressive Era 1890-1920 (1973[1964]).

37. Philip Selznick, Law, Society, and Industrial Justice 96 (1969). William Lazonick, Competitive Advantage on the Shop Floor (1990), parallels Weiler's views from a supra-Marxist position of cooperative value-sharing between labor and capital.

become implausible (217).[38]

In mapping out "Alternative Futures for Worker Participation" (186), Weiler specifies that even an advanced Employee Involvement Plan (EIP) "is really a distinctive style of *managing* the work force. The employer devises procedures for learning from its employees and for motivating them in their jobs for the benefit of both" (211). Driven by his priority to rid firms of "the rigid restraints on the sensible operation of individual enterprises" (309) that have been associated with unions, Weiler strongly urges dismantling § 8(a)(2) of the NLRA because it can be interpreted to include EIPs among the prohibited company unions[39]: "I see no reason why our labor laws should . . . send to nonunion employees the message that they can participate in workplace decision-making only if they opt for unionism as well" (47). Weiler takes this position even though he concedes that EIPs for nonunion employees represent "participation without real power" (33). Indeed, he favors legalizing EIPs in nonunion firms—despite the fact that he acknowledges that they are not fundamentally different from pre-NLRA welfare-capitalist employee representation plans (213)—because workers know a company union when they see one (214).

Of worker control that transcends the limits of the human-assets-management approach, Weiler appears skeptical.[40] To begin with, he states that statutory recognition of workers' right to vote directly on such "key strategic decisions . . . is not a viable possibility in a political economy based on fundamental premises . . . antithetical to the idea of worker control" (173). The possibility of any such democratic transformation, however, is rejected once Weiler

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38. Because Weiler's pragmatism is irreconcilable with existentialist romanticism, he cannot wrap himself in the plasticity that Unger detects in the neo-Taylorist silver lining:

> An American manager in the late twentieth century . . . may think that he can get his workers to produce more willingly and effectively if he opens up opportunities for more independent teamwork in the production process. He may see such experiments as innovations that represent no real threat to the distribution of power and profit. He may also be moved by ideas that underline the horrors of unmediated personal subjection and the lure of pseudointimacy. Once in place, these modest reforms may serve as points of departure for conflicts and inventions that not only unsettle established social arrangements but enable people to imagine untried ways of working and living together. Such discoveries highlight the gap between humanitarian delicacy or bureaucratic impersonality and civic engagement and equality.

Roberto Mangabeira Unger, False Necessity 113-14 (1987).

39. *See, e.g.*, Donna Sockell, *The Legality of Employee-Participation Programs in Unionized Firms*, 37 Indus. & Lab. Rel. Rev. 541, 549 (1984).

40. Weiler gives low priority to employee representation on corporate boards because it would make little difference until an organized employee base exists in the firm (297).

characterizes these "obstacles" as "enduring and neutral values of the American political economy" (228) and "attractive features of the overall legal regime"—namely, respect for free speech and free markets, "deference to managerial judgments about the selection and assignment of personnel and the operations of the firm" (241), and the laws of property, inheritance, and incorporation (263). He worries, moreover, about the conflict between consumers, who prefer lower prices and faster service, and workers, who want a more leisurely pace of work (178). Weiler fails to see that most consumers are also workers and that such tradeoff decisions should be made macrosocietally and not only by plant-egotistical workers (whether they be worker-owners or works councillors) or egotistical consumers. Weiler also overlooks the fact that worker control as an enclave in a capitalist economy is bound to reproduce plant-egotism even though he (misleadingly) analogizes workers' structural dominance to the present "tilt" toward shareholders vis-à-vis a firm's other "constituencies" (180).

Although Weiler cites public opinion poll data showing strong support for unions as institutions of collective defense against exploitation by employers (299-300), he urges packaging his reform proposals as protecting "individual workers" with long-term service (301). Because "more and more firms . . . now feel a strong need for worker autonomy" (46), Weiler envisions an alliance with them and with those whose employees' human capital is more expensive and indispensable to them than the firms' own physical and financial capital (32). Weiler also pitches his political appeal to political leaders, whose support he anticipates as soon as the macroeconomic benefits of labor reform become visible (311).

This class-unconscious public relations approach finds its counterpart on the analytical level, where Weiler fails to operate with a concept of class or class conflict. A faint recognition of class relations can be gleaned in two discussions of authority within the firm, which are curious and mutually contradictory. In the first, Weiler argues that, although employees and shareholders could share the advantages accruing from contractual agreements concerning unfair dismissal, the cost would be borne by managers, who "would lose the felt benefit . . . from wielding unreviewable power over their subordinates" (77). Here Weiler hypostatizes a "phenomenon . . . much more easily explained by certain elementary facts of human psychology" than by any plausible description of rational market behavior (77).[41] Although even economic prin-

41. By the same token, Weiler neglects the fact that certain methods of managerial general deterrence (disciplining some in order to discourage the others) may

cipals have been known to cut off their noses to spite their faces, Weiler appears not to notice that such non-profit-oriented vigilante activity by agents refutes the law-and-economics claim—which he accepts—that the market gives employers the incentive not to abuse their power. Later Weiler reminds himself of and reaffirms this position: "One does not have to assume that the managers' exercise of authority will be ideal in every respect to conclude that it is certainly better than . . . the government. Lodging essentially unilateral control in management is *not* a recipe for exploitation of workers" (162).

Weiler can arrive at this opposite conclusion precisely because of his belief that where senior managers are insulated from shareholders, they can consider claims of other stakeholders, including employees. Indeed, even under the alternative EIP model, management would remain the "monitor and mediator of all the competing constituencies of the firm," with ultimate authority to devise the employment package (192). Weiler himself blinks at his bold transmogrification of management, finally admitting that managers have limited empathy and altruism because in deciding how much of the firm's resources will be expended on the work force, they are subject to "the basic conflict of interest between labor and either consumers or capital," which they mediate but not as neutral arbiters (164). Yet even when he touches on the most profound class antagonisms of material distribution, Weiler remains so tentative that he fails to see that this "war is what labour law is largely about . . . what a good deal of politics is about":[42] "Perhaps, though, there is in fact an inherent conflict of interest between the employees and the other constituencies of the enterprise about precisely where to draw the line between work and leisure, investment and consumption, hierarchy and collegiality" (211).

The question that lurks in the background of Weiler's book—the reason for the decline during the last twenty years of the modicum of political-economic power that the working class had ever been able to mobilize in the United States[43]—remains unresolved.[44] His reform proposals, built on superficial class com-

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only seem to be irrational. *See* Marc Linder, *Employees, Not-So-Independent Contractors, and the Case of Migrant Farmworkers: A Challenge to "Law and Economics" Agency Doctrine*, 15 N.Y.U. Rev. L. & Soc. Change 435, 461-68 (1986-87).

42. Otto Kahn-Freund, Labour and the Law 16 (2d ed. 1977).

43. *See, e.g.*, Kim Moody, An Injury to All: The Decline of American Unionism (1988).

44. Dogmatic Marxist approaches, such as Michael Goldfield, The Decline of Organized Labor in the United States (1987), also fail to advance the debate.

promises, appear unlikely to revivify the workers' movement. Appropriately, then, the fact that such a pragmatic[45] and mainstream[46] observer's criticisms and reform proposals sound radical and are concededly incapable of political adoption[47] is perhaps a more powerful commentary on the current state of capital-labor relations and labor law than the book itself.

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45. "I have always believed that in analyzing policy problems one should be wary of sweeping analytical generalizations, whether they are drawn from economic or philosophical theory" (133). *See also id.* at 227-28.

46. *See* Paul Weiler, *Workers' Compensation and Product Liability: The Interaction of a Tort and a Non-Tort Regime*, 50 Ohio St. L.J. 825 (1989) (author is chief reporter for American Law Institute's Project on Compensation and Liability for Process and Product Liability).

47. For an example of hostility by employers to reform of the NLRA, see Robert Thompson, *An Anti-Worker Labor Bill*, Wall St. J., Aug. 31, 1990, at A10, col. 4. Weiler himself acknowledges that his "somewhat farther-reaching ideas" would be intensely opposed by employers (300) and have no chance of being approved by President Bush or surviving a veto (302). Yet he takes comfort from the contribution that intellectuals made toward enlightening the public regarding tax reform (310). It is unclear whether Weiler has reflected on the potential analogy between the ultimate redistributive effects of tax reform of the 1980s and those of his labor reform proposals.