COMMENT

Reviewing the Reviews: The Political Implications of Critical Legal Studies

David Michael Friedt†

INTRODUCTION

Two recent book reviews published in this journal have applied the tenets of critical legal studies to recent works on labor relations.1 In issue 10:3, Christopher Tomlins warmly received a new history of American labor, *The Fall of the House of Labor: The Workplace, the State and American Labor Activism 1865-1925*, by David Montgomery.2 Tomlins argued that new histories of working class people that focus on class con-

† B.A., Philosophy, University of California, Berkeley, 1985; J.D., Boalt Hall School of Law, University of California, 1988; Law Clerk, Honorable Gerald W. Heaney, United States Court of Appeals for the Eighth Circuit. I wish to thank Professor Jan Vetter for his patient introduction to legal philosophy, Professor Matthew Finkin for his helpful review of an earlier draft of this Comment, and the editorial staff of the Industrial Relations Law Journal for all their help.

1. Critical legal studies is a loosely bound movement of academics and practitioners who criticize current legal practice and teaching. This Comment focuses on some common claims made by critical scholars. As is the case with most movements, there are important internal divisions. Some critics are interested in reforming the present system. See, e.g., Rabinowitz, *The Radical Tradition in the Law*, in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 310 (D. Kairys ed. 1982). (Hereinafter this book, an early collection of critical essays, is referred to as THE POLITICS OF LAW.) More “radical” critics show an interest in the construction of utopian social alternatives, see infra Part II.C, pp. 546-48, or are interested only in criticism and avoid proposing any alternatives to the present system. See Kelman, Trashing, 36 STAN. L. REV. 293, 298-300 (1984). Generally, critical legal studies advocates claim that criticism by itself will prove valuable by contributing to policy discussions, showing the limits of reform efforts and by providing political education. Id. at 327-29; Dalton, Book Review, 6 HARV. WOMEN'S L.J. 229, 241-42 (1983) (reviewing THE POLITICS OF LAW); Hutchinson & Monahan, Law, Politics, and the Critical Legal Scholars: The Unfolding Drama of American Legal Thought, 36 STAN. L. REV. 199, 227-28 (1984) (“but [w]hile such [criticism] may be indispensable, it can only be preparatory”); Van Doren & Bergin, Critical Legal Studies: A Dialogue, 21 NEW ENG. L. REV. 291, 304 (1985-1986). This Comment does little to illuminate these divisions. For a discussion of different strains in the movement, see Dalton, supra. For a bibliography of critical scholarship, see Kennedy & Klare, A Bibliography of Critical Legal Studies, 94 YALE L.J. 461 (1984). I occasionally use the term “radical” to denote those who either advocate the most foundational changes, or as in Hogler's case, someone who offers the most ideological criticisms of present institutions. Karl Klare for example describes as “radical” his preferred interpretation of the Wagner Act. See infra Part II.B, pp. 512-16.

2. Tomlins, Book Review, "Of the Old Time Entombed": The Resurrection of the American
consciousness when combined with enlightened social criticism could lead to new models of “what the social role of industrial relations properly should be.” 3 In issue 10:1, Raymond Hogler hostilely reviewed a recent analysis of the decline of American unions, The Transformation of American Industrial Relations, by Thomas Kochan, Harry Katz and Robert McKersie (“Authors”). 4 Transformation examined the causes of unions’ decline and recommended statutory remedies. Hogler argued that the book was fatally flawed because the Authors failed to examine the larger social context of labor relations. Hogler criticized the Authors for not responding to critical legal studies’ critique of politics, law and academic research: “[i]t is a body of work which no serious student of industrial relations should ignore.” 5

The Authors should not be faulted for choosing to recommend labor law reform without considering instead whether national political and social relations should be entirely reconstructed. This Comment argues that critical legal studies has not developed a theory of law and society that challenges serious audiences or persuades even sympathetic readers. The social criticism which Tomlins believes will lead to constructive theorizing has instead only lead to shallow utopianism and unconvincing social generalizations. 6

* * * *

Critical legal studies is a movement of academics hostile to American political ideology and Liberal political theory. 7 Political Liberalism

---

3. Id. at 444.
5. Hogler, supra note 4, at 131.
6. See infra text accompanying notes 98-111.
7. At a minimum, “Liberalism” refers to a political theory expressed by limits on government’s powers as a means of preserving individual autonomy. For a more elaborate description, see Tushnet, Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles 96 HARV. L. REV. 781, 783 (1983) (“Liberalism’s psychology posits a world of autonomous individuals, each guided by his or her own idiosyncratic values and goals, none of which can be adjudged more or less legitimate than those held by others.”).

Critics’ characterization of Liberalism has been criticized for being “naive and misleading.” Herzog, As Many as Six Impossible Things Before Breakfast 75 CALIF. L. REV. 609, 611 (1987) (analyzing critics’ version of Liberalism against the aims and desires of original Liberal theorists such as Hobbes, Locke, Smith, Mill, Hume and Montesquieu).

[We] need not read liberal claims as a series of points about the methodology of the social sciences, or the constituent mechanisms of human behavior. . . .

. . . .[L]iberals have insisted on individualism to puncture fantasies about serving the goals of history. They want to make it harder for groups to tell individuals stories about their ultimate or transcendent purposes. . . . In a locution fashionable right now among communitarians, individualism was empowering, not disempowering.
emphasizes individual autonomy and grants equal status to various viewpoints and lifestyles, "pluralism." The rule of law serves the function of protecting the exercise of private rights from interference by other individuals and by government.\textsuperscript{8} Those hostile to Liberalism argue that Liberalism requires judicial decisions that transcend individual preferences in order to preserve pluralism, so fairness can only be guaranteed by decisions, based upon objective criteria.\textsuperscript{9}

Critical legal scholars, "critics," attempt to "deconstruct" Liberalism and jurisprudence using and expanding upon the legal indeterminacy arguments made by legal realists earlier this century.\textsuperscript{10} Critics argue that law is indeterminate because the process of judicial reasoning requires discretionary interpretive choices. Legal rules do not determine results or control judges' choices, and no objective decisional criteria are available within or without legal theory.\textsuperscript{11} Moreover, critics argue, the rhetoric of the Liberal model masks a hierarchical system that benefits some and not others, while obtaining the consent of those whom the system does not benefit.\textsuperscript{12}

Hogler and Tomlins each advocate understanding the current structure of labor relations against the backdrop of this debate. They question whether present institutions can improve the condition of working people. According to Hogler and Tomlins, the problem with current empirical research on labor relations is its tendency to view labor relations in isolation from historical, political, and jurisprudential influences. For example, Hogler stresses the influence of the judicial interpretation of the

\textsuperscript{8} See Hegland, Goodbye to Deconstruction, 58 S. CAL. L. REV. 1203, 1216 (1985); Singer, The Player and the Cards: Nihilism and Legal Theory, 94 YALE L.J. 1, 46 (1984).

\textsuperscript{9} See Singer, supra note 8, at 43. This claim seems to rely on traditional imagery of the judicial role. Cf. Chayes, The Role of the Judge in Public Law Litigation, 89 HARV. L. REV. 1281 (1976) (current litigation challenges the classical view that courts are only to resolve disputes between private parties while legislatures decide issues of public policy). Herzog challenges the view that this is really what Liberalism ever meant.

Demanding the separation of law and politics in this context [Stuart England] meant demanding an end to such abuses of the law [sending jurors who voted against the crown to jail]. It did not mean imagining some bizarre world in which the practice of law would make no political difference. There is then no reason to be scandalized by the "revelation" that judicial decisionmaking is still political. Legal cases do raise political issues. But the political issues are typically remote from the world of daily politics, in ways that make judicial rulings more than declarations of the judges' first-order partisan commitments of "subjective preferences." . . .

It really is true then that judges can rule against their own partisan views or economic interests, and when they do so they are not necessarily mystified, the victims of their own formalist rhetoric. Herzog, supra note 7, at 627.

\textsuperscript{10} See, e.g., Tushnet, supra note 7, at 814-15 (discussing "the openness of precedents").


\textsuperscript{12} See infra text accompanying notes 38-47.
Wagner Act in shaping current labor relations.\textsuperscript{13} He dismisses the Authors' recommendations for legislative action because, he asserts, no matter what Congress does the judiciary will co-opt the legislation by "manipulating and advancing a legal ideology of capitalism."\textsuperscript{14}

Tomlins' review focuses on "labor history's intellectual function."\textsuperscript{15} He accuses traditional historians of portraying the evolution of labor relations as taking a single, necessary path.\textsuperscript{16} Instead, he favors labor historians like Montgomery who attempt to demonstrate that the structure of American labor relations could have developed differently. The discovery of past possibilities, Tomlins hopes, can illuminate present discourse about the future of labor relations.\textsuperscript{17}

This Comment attacks the critics' view of the rule of law and questions the merits of their ideological agenda. Radical critics like Hogler badly overstate their case. They rely on caricatures of political ideology and judicial reasoning. Their excessive focus on legal decisionmaking drains legislative action of meaning. Finally, critics use the twin devices of indeterminacy and ideology to disclaim any progressive potential in present political structures. This Comment challenges these claims using Hogler and, to a lesser extent, Tomlins as examples. The first part of this Comment summarizes the general claims critics make about legal reasoning and social consciousness. Part II locates Hogler's and Tomlins' viewpoints within the critical movement, then contrasts Hogler's claims with the work of other critics. The last three parts review the shape and the implications of some common critical claims, and consider one critic's attempt to construct a social alternative. Given the inadequacies of critics' social and political analysis and the dangerous implications of their own worldview, this Comment concludes that changes in labor relations ought to be effected within present political structures.

\section*{I

THE CRITICAL VIEW OF THE RULE OF LAW}

Critics posit a general picture of how our legal system presents itself. Courts persistently attempt to represent adjudication as impartial and objective. Judges justify decisions in formal written opinions that purport to show why the result is derivable from legal and legislative materi-

\begin{itemize}
\item \textsuperscript{13} Hogler, \textit{supra} note 4, at 132. The National Labor Relations Act ("Wagner Act") is the basis of our collective bargaining structure. It was passed in 1935 and is currently codified as amended at 29 U.S.C. §§ 151-168 (1982).
\item \textsuperscript{14} Hogler, \textit{supra} note 4, at 134.
\item \textsuperscript{15} Tomlins, \textit{supra} note 2, at 428 (emphasis omitted).
\item \textsuperscript{16} \textit{See id.} at 427-30 (arguing that Liberal-pluralist political theory encourages a positivist social science that privileges measurable data about behavior without evaluating "the structures of power and ideology within which that behavior occurs and by which it is inevitably influenced").
\item \textsuperscript{17} \textit{Id.} at 443-44.
\end{itemize}
als, thus minimizing the role of the judge. Judges can rationally resolve disputes using legal rules that sustain a defensible scheme of human association.

A. The Indeterminacy Thesis

Critics assert that legal rules are indeterminate; the results in particular cases are not necessary deductions from legal doctrine. Critics allege that two forms of indeterminacy inhabit legal analysis: (1) more than one rule can apply to each case, "rule indeterminacy," and (2) legal doctrine contains competing principles of social organization which cannot be harmonized, "principle indeterminacy."

Legal realists first identified rule indeterminacy in decisionmaking. They argued that (1) there is usually a cluster of potentially conflicting rules relevant to each case, and (2) judges possess enormous discretion to decide what past precedents mean. As a result, legal decisions cannot be distinguished from the values of the decisionmaker. Critics have adopted the realists' rule indeterminacy arguments.

The influential legal theorist H.L.A. Hart conceded some ground to the realist critique, but attempted to minimize its impact by suggesting that rule indeterminacy was only a problem in a narrow range of cases. He argued that, while some indeterminacy was caused by the inherently

18. Singer, supra note 8, at 21-23.
19. Singer, supra note 8, at 44; Unger, The Critical Legal Studies Movement, 96 Harv. L. Rev. 561, 564-65 (1983); David Trubek argues that the notion of a legal order has four elements: (1) law is doctrine, (2) doctrine can generate necessary answers, (3) doctrine reflects a coherent view of society, and (4) social action reflects legal norms. Using indeterminacy, critics challenge the idea that any legal order exists in any society. Trubek, Where the Action is: Critical Legal Studies and Empiricism, 36 Stan. L. Rev. 575, 577 (1984).
22. Altman, supra note 20, at 208-09; Mensch, The History of Mainstream Legal Thought, in The Politics of Law, supra note 1, at 27.
23. Gordon, supra note 20, at 114-16.
vague and open-ended nature of natural language,25 in practice lawyers and judges could agree in most cases on which rules should be applied. Indeterminacy exists only "at the margin of rules and in the fields left open by precedents."26 Rules can be determined positively, pursuant to agreed upon "rules of recognition," social conventions that determine what rules should be understood as authoritative.27

Critics defend rule indeterminacy against Hart's claims by arguing that the problem is not the ambiguity of language, but that within legal practice conflicting rules may be applicable in a single case so that either party could prevail.28 For example, when the issue is whether a contract should be enforced, well-accepted legal rules can often justify more than one result. The party denying the existence of the contract can invoke a number of doctrines which will vindicate his claim if he can convince the judge that the facts bring his case within one of those doctrines. The party seeking enforcement likewise has legal theories that justify her position. The court must decide which principle best resolves the dispute. The judge will find a review of past applications of the relevant legal rules helpful, if not constraining. Any conclusion about what past cases mean, however, requires subjective interpretation of earlier decisions. Even where there is agreement on how to read earlier cases, the judge might find precedent or dictum sufficient to support either conclusion. The existence of conflicting and justifiable results generated by accepted legal doctrines suggests that rule indeterminacy is caused by more than the vagueness of language.

Critics advance another characterization of indeterminacy, principle indeterminacy, which seeks to explain why these conflicts exist.29 They argue that rules are inherently contradictory because legal materials have absorbed conflicting and irreconcilable principles of ethical and political theory.30 Judges select between rules and results based on their opinion

25. Id. at 125.
26. Id. at 131-32.
27. A constitution which specifies who may make law and according to what procedures is an example of a rule of recognition. Id. at 98.
28. Altman, supra note 20, at 211.
29. Critics also use principle indeterminacy arguments to attack post-realist reconstructions of decisionmaking. See, e.g., Horowitz, Law and Economics: Science or Politics?, 8 HOFSTRA L. REV. 905, 912 (1980) (arguments over distribution have forced law and economics advocates "to come out of the closet and debate ideology with the rest of us"); Kelman, supra note 1, at 294 n.7 (the guidance offered by law and economics is relative to distributional choices); Altman, supra note 20 (critics can use principle indeterminacy arguments to argue that Dworkinian judges will be unable to find the soundest theories necessary for adjudication); Brest; The Misconceived Quest for the Original Understanding, 60 B.U.L. REV. 204, 229 (1980) [hereinafter Brest, Original Understanding]; Brest, The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship, 90 YALE L.J. 1063 (1981) [hereinafter Brest, Constitutional Scholarship].
of which of the visions of society present in legal materials is better.\textsuperscript{31}

For example, critics urge that contract law incorporates the conflict between communitarian and individualistic approaches to social organization,\textsuperscript{32} a contest reproduced throughout the law.\textsuperscript{33} They argue that there is tension between the ideal of two parties asserting their own interests and striking a bargain, and the concern that one party has had trouble doing so effectively. These competing values are characterized as freedom of contract on the one hand, and unconscionability, duress, mistake, mutuality and adequacy of consideration on the other. Tension between the sanctioning of private bargains and equitable considerations is the result of contradictory visions of what type of society we desire. In this contest the legal issue may be whether a particular bargaining situation falls outside of broadly tolerable disparities of information and power between the parties. The political conflict underlying the legal dispute is whether private ordering should be allowed even though individuals are trapped in a hierarchical and unequal society. Critics argue that a judge's decision in a particular case reflects that judge's balancing between autonomy and communitarianism and is not the product of clearly contoured legal doctrines.

According to critics, the problem is that there is no objectified legal method for resolving the conflict between these principles. The contemporary prevalence of balancing tests in the law, which ask judges to consider a number of factors in deciding which principle or policy to validate in a particular case, is a frank admission of both disagreements about rules and judges' power to make value choices between contrary visions of social life.\textsuperscript{34} Legal rules cannot be reconstructed into artificially unified systems that judges can use as decision guides.\textsuperscript{35}

Critics' argue that when reconciliation of competing principles in the law is attempted, present legal discourse does not favor the alternative views of social life preferred by some critics.\textsuperscript{36} If legal discourse does reflect world views that most people in society agree with, however, the critics' burden is to explain why legal discourse is flawed for reflecting widely shared social views. Critics respond by arguing that legal doc-

\textsuperscript{31} See Altman, supra note 20, at 210-11 (arguing that agreement on the outcome can only be explained by shared political values); Unger, supra note 19, at 633-39.

\textsuperscript{32} Unger, supra note 19, at 616-17; see id. at 616-48 (discussion of the operation of contract doctrine considered herein); see also, Gabel & Feinman, Contract Law as Ideology, in THE POLITICS OF LAW, supra note 1, at 172.

\textsuperscript{33} See Dalton, supra note 1, at 234 (discussing Gordon's theories).

\textsuperscript{34} Kairys, Introduction, in THE POLITICS OF LAW, supra note 1, at 2.

\textsuperscript{35} Altman, supra note 20, at 218-19, 221 (arguing that there is no meta-level principle that can resolve conflicts between principles); Dalton, supra note 1, at 235 (arguing the same); Unger, supra note 19, at 571.

\textsuperscript{36} See infra text accompanying notes 38-47.
trine conditions people's thinking and is part of a larger "dominant ideology" that justifies our system even to members of society who are not served by the system.  

B. Legitimation and Social Consciousness

Critics allege that the facade of objectivity in legal reasoning restricts public debate over social policy in several ways: it portrays present hierarchial social relations as the only way a society can be ordered rather than as the product of antecedent choices that could have been made differently; it cloaks private domination and power in the garb of right; it rationalizes inattention to substantive inequalities as an element of neutrality; and finally, it masks the extent of judicial power by displaying what are really value choices as necessary consequences of an algorithmic decision procedure. In short, in our social consciousness legal discourse legitimizes value choices that help some people and not others. People become conditioned by a legal ideology that limits the way they think about social problems.

For example, critics argue that the distinction between what is left to private and public decisionmaking allows concentrated elites to control capital investment without social interference. Employee opposition to management decisions to close production plants or to relocate them to third world countries is stifled by the belief that the decision involves property rights and only management has the relevant property rights. Critics argue that losing one's job in this way is part of the type of social ordering that we accept uncritically. There are other ways to order society but the dominant ideology hides them from our view or makes them appear unattractive.

There are several general and differing versions of this causal claim:


38. Trubek, supra note 19, at 606.

39. Id. at 595.

40. Burns, Race Discrimination, in The Politics of Law, supra note 1, at 93-94; Kennedy, Legal Education as Training for Hierarchy, in The Politics of Law, supra note 1, at 48-49.


42. Hutchinson, supra note 11, at 229; Singer, supra note 8, at 21.

43. Unger, supra note 19, at 593-96.

44. Kairys, supra note 37, at 258.

45. See Hutchinson, supra note 11, at 228-29; Kairys, supra note 37, at 258-60. Rabinowitz, supra note 1, at 315.

46. Kairys argues that as legal doctrine conditions people it breeds a feeling of powerlessness, and apathy results. Kairys, supra note 34, at 3-4. Gordon argues that people internalize this model because they do not want their own rights of ownership jeopardized by changes in property rights. Gordon, supra note 37, at 287.
about the connection between legal doctrine and social control: (1) law is
da means of oppressing people and serves the ruling class, (2) the ruling
class induces consent by spreading belief in universal and utopian norms
which in practice benefit the privileged, (3) the ruling class periodically
sustains the appearance of validity of a universal norm or rule by letting
it serve someone else's interest, thereby offering a false hope of social
progress, (4) elites are themselves taken in by the dominant ideology and
reflexively act upon it, (5) law is the product of class struggle and conces-
sions are the products of bargains, and (6) legal categories affect citizens'
conceptualizations of social problems.47

II

THE CRISIS OF LABOR LAW AND RADICAL ALTERNATIVES

Hogler, Tomlins and the Authors agree that labor law is in a crisis;
union power and workers' standard of living are declining.48 They differ,
however, on whether the problem lies in our political structure.

A. The Reviews

Hogler gives a determinist explanation of American labor relations
and jurisprudence. "[T]he interpretation of legal principles is neither an
objective nor a neutral process but rather is determined by the needs of
the dominant economic interests within our society."49 He rejects the
Authors' thesis that the present range of union bargaining objectives was
in a large part shaped by "business unionists," union leaders who chose
to focus on wages, hours and conditions rather than agitate for manage-
ment power or management participation. Instead, Hogler urges: "An
equally plausible interpretation of American labor law, however, is that
managerial perogatives were not ceded by 'business unionists' but were
consolidated through legal ideology and through agressive tactics of em-
ployer domination in the workplace."50

The foundation of Hogler's criticism is that the Wagner Act was
narrowly interpreted by the Supreme Court and thus stripped of its radic-
ral potential.51 Had the Court given the Wagner Act a reading sympa-
thetic to unionism, Hogler argues, a "broad diffusion of participatory
processes in the workplace accompanied by robust union representation"

47. Gordon, supra note 20, at 93-95.
48. Hogler, supra note 4, at 116; Tomlins, supra note 2, at 444; Kochan, Katz & McKersie,
supra note 4, at 147; cf. T. KOCHAN, H. KATZ & R. McKERSIE, THE TRANSFORMATION OF AMER-
49. Hogler, supra note 4, at 126 (attributing this view to critical legal studies as a whole, and
citing M. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860 (1976)).
50. Id. at 127.
51. Id. (relying on the work of Karl Klare, discussed infra notes 70-98 and accompanying
text).
could have occurred. Instead, the Court narrowly restricted union economic power and thus enhanced bargaining inequality between labor and management. The Supreme Court declined to compensate for bargaining inequality by refusing to inquire into the substantive justice of the collective bargaining agreements that were produced. Moreover, management power went similarly unconstrained; management was allowed to replace striking workers and retained all rights and privileges not addressed in the agreement.

In addition, Hogler argues, the Court's opinions also affected social consciousness by legitimating market inequalities and management prerogatives. The legal system reinforced hierarchy and domination by objectifying contingent and unnecessary choices in social direction.

"[T]he law fulfilled a vital role in sustaining capitalist class interests by enunciating a particular view of the industrial world."

Critics argue that the Court interpreted the Wagner Act consistent with the ideology of "Industrial Pluralism." Tomlins once defined it thus:

Industrial pluralism connotes a systematic approach to labor relations, informed by liberal political and social theory, whose point of departure is the belief that industrial conflict in democratic capitalist societies is best dealt with through routinized procedures of negotiation and compromise leading to agreements formalized in contracts. Its adherents conceive of management and labor as self-governing equals who, through collective bargaining, jointly determine the terms and conditions of sale of labor power; and they see the historic purpose of labor relations law as nothing more than the facilitation of this process.

According to Hogler, the consequences of industrial pluralism are not neutral. The Court ratified bargaining outcomes as voluntary contractual exchanges based upon the incorrect view that labor and management were balanced adversaries. Hogler argues that industrial democracy

52. Id. (arguing that the aim of the Authors' proposals was identical to that of the Wagner Act).
53. Id. at 128-30.
54. Id. at 128 (discussing NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937)).
55. Id. at 128-29.
56. In a larger sense, the importance of labor law history is that 'because it is such a powerfully integrated structure of thought, deeply resonant with other aspects of the hegemonic political culture and closely articulated with important collateral developments in intellectual history (e.g., in political and managerial theory), liberal collective bargaining law is itself a form of political domination.' Id. at 130-31, (quoting, Klare, Labor Law as Ideology: Toward a New Historiography of Collective Bargaining Law, 4 INDUS. REL. L.J. 450, 452 (1981)).
57. Id. at 128.
59. Hogler, supra note 4, at 128. Critics argue that the prevailing ideology views labor and
and worker participation, however, require active legal intervention rather than procedural oversight.\(^6\)

Hogler disputes the effectiveness of the Authors' proposed workplace and legislative reforms aimed at increasing worker participation. Ultimately, he argues, legislative efforts at labor law reform will fail because of judicial hostility.

There has been no failure of statutory design in our industrial relations system; the failure of the law to protect workers' interests lies in its implementation. The "values" of that system are constituted and transmitted by the judiciary, not by the congressional policies of the New Deal. . . .

. . . [The Authors] recommend changes in the law with no awareness of the role of the judicial system in manipulating and advancing a legal ideology of capitalism. The "policy" of labor law has been fashioned primarily by federal courts, and to recommend congressional action alone as a means of altering the attitudes and values of the parties to the collective bargaining process is fatuous.\(^6\)

Hogler urges the development of a class-based view of labor relations that can challenge prevailing business unionism.\(^6\) According to Tomlins, Montgomery's history is the first step in such an effort.

Montgomery attempts to correlate workers' experience with the development of class-consciousness.\(^6\) He concludes that the shared experience of fighting management produced common interests and goals among workers, despite their ethnic and social differences.\(^6\) "In the aftermath of war, working people mobilized their political and economic power behind programs of fundamental social reconstruction—nationalization of the mines and the railroads; the democratization of industry; shop councils; and a labor political party."\(^6\) Due to economic pressures, however, by 1923 the diverse ideological approaches to labor relations within the labor movement had given way to the "hollow triumph" of business unionism.\(^6\)

Tomlins praises Montgomery's revisionist history for rescuing from

---


60. Hogler, supra note 4, at 130 (adopting Stone's view, supra note 58, at 1579-80). Stone, however, argues for greater labor activism in national politics. Stone, supra note 58, at 1580.

61. Hogler, supra note 4, at 132, 134 (emphasis added).

62. Id. at 138-39. The Authors reject a class-based perspective because, they argue, it fails to capture the divisions between workers. Kochan, Katz & McKerzie, supra note 4, at 146.

63. Tomlins, supra note 2, at 426-27.

64. Id. at 426-27, 431-34.

65. Id. at 437.

66. Id. at 438.
obscurity the richness of internal debate over union direction.\footnote{67} He urges the use of this new labor history as an aid to the critical legal studies' project of constructing visions of the future.

Once the positivist vision of history as an exercise in evolutionary functionalism—as a story of how we got from then to now and how all the relevant bits fitted together to produce the particular result which emerged and no other—is abandoned, then analysis of the past will offer an extraordinarily promising arena for experimentation in the construction of visions of the future.\footnote{68} ... [C]ritical thought's agenda is not condemned to be simply an exercise in utopian thought [but] can be pursued empirically.

\section*{B. Disagreement over the Limits of the Present System}

Hogler contends that the judiciary will co-opt legislative labor law reform.\footnote{69} He relies exclusively on Karl Klare's analysis of the Wagner Act to substantiate this claim.\footnote{70} While Klare is critical of the Court's
interpretation, Hogler obscures sharp differences between his position and Klare's. Klare shows far greater appreciation of the limits of the indeterminacy and dominant ideology arguments.\footnote{71}

Klare attempts to reconstruct the worldview of the Court, “the autonomous dimension of legal consciousness,” when the Court interpreted the Wagner Act.\footnote{72} Klare draws upon the political and social context of the time to claim that the Wagner Act had a radical potential.\footnote{73} To demonstrate that the Court could have begun the process of realizing that potential, Klare begins by illustrating the level of indeterminacy specific to the Act.

According to Klare, the Wagner Act contained six potentially conflicting aims: (1) fostering industrial peace, (2) the facilitation of collective bargaining, (3) either the partial or more complete redress of imbalances in bargaining power, (4) the preservation of voluntary choice, (5) increasing consumer purchasing power, and (6) nurturing industrial democracy.\footnote{74} It was up to the Supreme Court to decide how or whether to balance these aims.

As a result, the Wagner Act could have been read to “subject the workplace to a regime of participatory democracy. The Wagner Act’s plain

\[\text{t}\]\text{he indeterminacy of the text and legislative history of the Act [as well as other factors] . . . make it clear that there was no coherent or agreed-upon fund of ideas or principles available as a conclusive guide in interpreting the Act. The statute was a texture of openness and divergency, not a crystallization of consensus or a signpost indicating a solitary direction for future development.}\footnote{75}

saying that future courts will do the same. Hogler’s claim could only be supported if he could already show that the judiciary was biased. Hogler’s argument is circular; he uses Streamway to demonstrate that the judiciary is hostile, and relies on judicial hostility to show why Streamway could be damaging.

\footnote{71. Hogler’s view on the subject of indeterminacy is unclear. Some critics seem to think a nearly infinite number of interpretive possibilities always exist. \textit{See infra} note 130. Klare seems to rely on the existence of multiple rather than infinite possibilities within the loose constraints on the judicial method. \textit{See infra} note 95 and text accompanying note 139. The differences between Hogler and Klare on the source and power of ideology is explored \textit{infra} in the text accompanying notes 86-92. Hogler tends to view consciousness in the strong terms of versions one and two of the causal argument accompanying \textit{supra} note 47. Klare tends toward versions four through six.

\footnote{72. Klare, \textit{supra} note 70, at 268.}

\footnote{73. Klare, \textit{Traditional Labor Law Scholarship and the Crises of Collective Bargaining Law: A Reply to Professor Finkin}, 44 MD. L. REV. 731, 742-43 (1985) [hereinafter Klare, \textit{Reply to Finkin}]. Klare did not base this claim exclusively on readings of the legislative history of the Wagner Act as traditional legal analysis might. He instead argues that the Wagner Act had a radical potential in light of employer fears, worker expectations, and the political and social conditions at that time. \textit{Id.}


\footnote{74. Klare, \textit{supra} note 70, at 281-84.}

\footnote{75. \textit{Id.} at 291.}
language was susceptible to an overtly anticapitalist interpretation.”

Klare reviews early decisions interpreting the Wagner Act. He describes splits on the Court over which policies to prioritize as well as differences between judges on judicial method. He argues that early cases reaffirmed “contractualism.” Rather than providing a basis for worker participation or a forum for review of the substance of the bargains produced, the Court simply treated collective bargaining as a form of voluntary economic exchange. At the same time, the Court curtailed unions’ economic power in the name of preserving industrial peace, thereby damaging union bargaining power and dampening the participatory desires of the rank and file.

Klare attributes the Court’s worldview, in part, to Liberal political theory. He argues that Liberal political theory requires judicial neutrality between private interests. The contractualist analysis of the Court reaffirmed the image of judicial neutrality and Liberal theory, and influenced the consciousness of elites and subsequent judicial decisions in the field. As a result, though many early decisions were received as labor victories, the Supreme Court’s mode of analysis defeated later efforts aimed at greater worker participation in economic decisions. Klare recognizes his inability to demonstrate a direct causal connection between judicial analysis and the attitudes of social actors. He feels nevertheless that the Court’s method of analysis contributed to social consciousness and restrained conceptualization of labor relations.

Hogler relies on Klare’s work to dismiss the Authors’ proposals for statutory reform. Klare, however, explicitly denies that Congress intended a radical interpretation. Furthermore, he does not claim that the Court did anything co-optive. Klare expressly rejects the idea that the Court acted contrary to legislative sentiment. He has continually rejected economic reductionist interpretations that claim the Court is an instrument of economic interests. The Court simply declined to adopt

76. Id. at 285.
77. Id. at 298-308, 325-35.
78. Id. at 293-310.
79. Id. at 308-09 (the Court could have given the National Labor Relations Board the power to review bargaining conduct and the substance of agreements).
80. Id. at 319-21.
81. Id. at 310.
82. Klare, Reply to Finkin, supra note 73, at 751.
83. Klare, supra note 70, at 270.
84. Klare, Reply to Finkin, supra note 73, at 752.
85. Klare, supra note 70, at 268-69.
86. Klare, Reply to Finkin, supra note 73, at 755.
87. Id. at 754; Klare, supra note 70, at 269.
88. Klare, Reply to Finkin, supra note 73, at 755-56; Klare, supra note 70, at 291-93.
89. Klare, supra note 70, at 269: “It is not suggested that the Supreme Court engaged in a plot or conspiracy to defeat or co-opt the labor movement, nor do I think the Court can adequately be
interventionist readings of the Act.90 At best, Klare argues, the Court might have “helped to set in motion processes of change that might well have overflowed the narrower banks contemplated by those who enacted the NLRA”91 by affecting changes in social consciousness.92 Klare accuses the Court of nothing more sinister than leaving further innovation to Congress.

Klare locates the radical potential of the Act in its partial attention to democratic self-government on the job. He clearly states that he is not talking about worker ownership.93 Instead, the radical potential of the Act lay in the humanization of working conditions: speed of the line, discipline and layoffs.94

There are three important differences between Hogler’s and Klare’s approaches. First, Klare’s indeterminacy claims are more modest; he thinks that indeterminacy fluctuates relative to what is being interpreted.95 Second, he rejects economic reductionist explanations for institutional behavior.96 Third, Klare does not claim that the Court co-opts legislative pronouncements, the foundation of Hogler’s argument.97

Klare, however, does not think the present system is capable of remediing fundamental problems in labor relations. The elimination of worker alienation requires “a comprehensive historical metamorphosis of social and political relationships.”98 Hogler and Tomlins might agree. While Hogler disclaims that critical theory advocates revolution, he does so in the context of saying that the actual intent of the Act was suffi-

understood as an instrument of particular economic interests. I emphatically reject any such reductionism or determinism.” He continues in an accompanying footnote: “Indeed, though determinism regrettably remains the popular conception of Marxist method, the most creative work on law within the Marxist tradition begins with the rejection of economic determinism as an explanatory mode.” Id. at 269 n.13.

90. Klare, Reply to Finkin, supra note 73, at 767.

91. Id. at 759.

92. Apparently Klare believes a different mode of labor relations could have been created by changes in consciousness rather than by direct judicial action. See Klare, supra note 70, at 309 n.151.

93. Klare, Reply to Finkin, supra note 73, at 758-59, 818.

94. Id.

95. Klare’s claims about the indeterminacy of the Wagner Act lie at the heart of his exchanges with Finkin. Unfortunately, Klare is not as clear as he could be in presenting a general theory of indeterminacy. He rejects Finkin’s arguments because he says Finkin believes in objective interpretation. Id. at 737. Later he admits that Finkin might be talking about “a range of [correct] solutions,” id. at 782, but still rejects Finkin’s claims because of the existence of conflicting statutory aims and multiple ways to implement them. Id. at 783. “It is little consolation that some outcomes are ‘closer to’ and others ‘more remote from’ core values of the statute or legal order.” Id. at 784.

Nevertheless, there are places in his articles that suggest Klare takes a more favorable view of determinacy when convenient. Finkin points out some in Protest, supra note 73, at 1103-05. See also infra text accompanying notes 139-41.

96. See supra note 89.

97. See supra text accompanying notes 86-92.

98. Klare, supra note 70, at 338 (arguing that we should merge law and ethics in a “quest for justice in each concrete historical setting”).
ciently revolutionary. Hogler's impression of judicial hostility to social reform, his contempt for pluralism, and his economic reductionist account of decisionmaking suggest that he would agree that fundamental changes in economic and political structures are needed in this country. While Tomlins also devotes little attention to proposing transformative alternatives, he adopts the view that "there remains no comfortable, liberal middle way."100

C. Social Alternatives

The critical program can be divided into two parts: (1) "deconstructive" attacks on Liberalism as well as the possibility of objectively justifying social relations; and (2) for some critics, constructive theorizing designed to reconcile the community's needs and individual autonomy in a new social system.101 Deconstruction is an assault on classical Liberal political theory as critics described it. It purports to push the criticisms of legal realists to their natural conclusion.102 Professor Fiss, for one, alleges that deconstruction amounts to sheer nihilism, the absence of grounds for preferring one thing to another.103 If deconstruction is correct, then no critic should be able construct a "better" alternative to present society.

One critic, Professor Singer, defends deconstruction by arguing that the appropriate question is "not how we can be certain we are right, but how should we live?"104 He suggests we give up believing that law and morality have a rational basis. For him, belief is really just a matter of conviction.105 This does not lead to nihilism, according to Singer, it simply requires that the sources of beliefs be identified without being represented as objective or privileged.106 The result is not a moral vacuum, he claims, nor is it moral indifference.107 The result is a freer dialogue where persuasion is directed at public beliefs and where foundational values for arguments must be articulated. The deconstruction of current ideology is presented as a first step toward change. "The lack of a rational foundation does not prevent us from developing commitments, it liberates us to embrace them."108

99. Hogler, supra note 4, at 141.
100. Tomlins, supra note 2, at 38 (adopting an undeveloped statement in Hyman, Collective Bargaining and Industrial Relations: A Review Symposium, 21 INDUS. REL. 101, 103 (1982)).
101. This description follows the one sketched in Van Doren & Bergin, supra note 1, at 292-93.
102. Unger, supra note 19, at 586.
103. Fiss, supra note 19, at 586.
104. Singer, supra note 8, at 60.
105. Id. at 57.
106. Id. at 52.
107. Id. at 52-53.
108. Id. at 9.
Singer's constructive program is ill-defined. He is willing to embrace measures that can end cruelty, alleviate misery, democratize hierarchies and alter those conditions that cause human loneliness. Curiously, he fails to identify the foundation or origin of these goals which he is only now "liberated" to embrace. Others who do try to articulate a positive program generally agree on a communitarian strategy.

The most detailed proposal yet has been offered by Professor Roberto Unger. His communitarian proposals may foreshadow the direction ultimately chosen by those critics who feel that the present system is incapable of meaningful reform. The hidden preconceptions in his proposal illuminate troubling elements of critical legal studies already present in the arguments we have considered.

Unger wants to elaborate present legal doctrine from within by introducing different premises than those chosen by the present system. The two building blocks of his theory are an "ideal" conception of society that guides reform, and a theory of social transformation to achieve the ideal.

Transformation can be accomplished by "enlarged doctrine." Legal doctrine should allow debate over the very premises of how society should be constructed. Present doctrine can be changed by challenging the axioms that underlie the system. The first step must be the creation of an ideal, both because that is what will guide change and because without it, presumably, change would lack normative authority.

Unger generates his proposals by positing a picture of human nature and present society. Individuals possess tremendous creative power but are constrained by social institutions from fully developing their capacities. People are captives of the groups into which they are born; to liberate them, the underlying forms of present social relations must be changed and fixed social roles must be eliminated. Specifically, society

---

109. Id. at 67-70.

110. Tushnet, Perspectives on Critical Legal Studies, 52 GEO. WASH. L. REV. 239, 241 (1984) (arguing that critics' arguments suggest that the alternative should be communitarian); Unger, supra note 19, at 598 (the purpose of his program is to make available new forms of community). Gabel argues for an undefined "decentralized socialism." Gabel, Book Review, 91 HARV. L. REV. 302, 315 (1977).

111. Unger, supra note 19. Kelman questions the necessity for comparing critics' alternatives with the present system as a means for evaluating critical legal studies. Kelman, supra note 1, at 296. He argues through sarcasm, suggesting that the desire to compare systems is tied to the same psychological necessity as the desire to compare fathers.

There is little opportunity to choose blood relations. In contrast, critics claim that we should reexamine profound political choices made in the past. The call for a reexamination of fundamental choices in social direction imparts an acceptability to pursuing information about the options.

112. Unger, supra note 19, at 576-77.

113. Id. at 583-84.

114. Id. at 578.

115. Id. at 579.

116. Id. at 587.
must eliminate divisions and hierarchies. This is the "minimal require-
ment" of a new society, and the ideal guides further detailing of the pro-
posal.\textsuperscript{117} The legal system is to be the transformative instrument that
ends hierarchy.

In Unger's society, every aspect of the social order will be suscepti-
ble to collective conflict and deliberation.\textsuperscript{118} Persons affected by the eco-
nomic decisions of others may use government power to disrupt private
decisionmaking. Unger, however, is fearful of the power of the state. He
recognizes that an important part of the project will be to find a way to
restrain the state while maintaining its transformative power.\textsuperscript{119} To ac-
complish his goals, Unger presents new conceptions of individual rights,
the state, and the market.

Unger suggests four new categories of rights: (1) immunity rights,
which provide absolute protection against the state, (2) destabilization
rights, which permit hierarchies to be attacked, (3) market rights, which
grant access to capital, and (4) solidarity rights, which are entitlements
to communal life and belonging.\textsuperscript{120} Immunity rights would shelter the
individual by securing individual rights and by providing protection from
discrimination. Destabilization rights would disrupt divisions and hier-
archies that manage to endure presently by distancing themselves behind
a veil of privacy. Market rights would replace the present system of pri-

date investment with a rotating public capital fund available to all.\textsuperscript{121}
Lastly, solidarity rights seem to be an attempt to inject a sense of com-

munity belonging and participation into each individual.

Unger hopes that this new system can achieve practical, spiritual,
individual and collective empowerment. Individuals will be able to de-
velop their capacities. Perhaps a system committed to continual self-re-
vision can "liberate societies from their blind lurching between
protracted stagnation and rare and risky revolution."\textsuperscript{122}

Unger's claim that present society offers only a choice between stag-
nation and revolution is generated by unsupported social generalizations.
An analysis of this descriptive fallacy reveals the inconsistencies and dan-
gers of critical legal studies.

\textbf{III}

\textbf{THE RADICAL WORLDVIEW AND SUBJECTIVISM}

Critics view reform of the present system, except where it is an inter-

\textsuperscript{117} Id. at 584, 589, 591-92.
\textsuperscript{118} Id. at 584.
\textsuperscript{119} Id. at 592.
\textsuperscript{120} Id. at 599-600.
\textsuperscript{121} Presumably destabilization and market rights would prevent the situations that cause or
allow plant-closings.
\textsuperscript{122} Unger, \textit{supra} note 19, at 650-51.
mediate step towards the changes they advocate, as hardly worth the effort. Because Liberal theory often disables the state, it prevents progress that requires state intervention. Critics are ultimately cynical about the potential of American society to conform to critics' values.

Critics' claims about what kind of society we should prefer are generated by their "wants and needs" argument. Peoples' "wants" are created by society's dominant ideology, and do not reflect their real needs.

What is missing...[is satisfaction of] the true needs of the human heart as opposed to the distorted needs which have emerged from the operation of a market. The social system...has the attraction of a superficial appeal to values, but it assumes that people's needs are a collection of hypostasized "wants" that can be satisfied through the legal apparatus of a state-regulated market.

Some critics assert that they know what peoples' needs are based on a psychological depiction of modern people. Consider Peter Gabel's version of the psychology argument:

[Americans are a] group of dispersed and isolated persons impotently linked through the cycle of production and consumption that determines their social existence. We find the mechanical functioning that most people call work, the packaged emptiness of fast food, the obsessive manipulation of appliances that occupies the boredom of leisure time, and the sort of "love" that attempts to realize desire through ambivalent dependency and pornographic fantasy.

By definition we can never completely dismiss this claim because it exists at the margin of conceptual possibility, e.g.: "Of course you don't realize how empty and shallow your life is; you're being deceived." Each of us is asked to dismiss our own experiences of social life if they do not agree with these impressions.

The critics' faith in the psychology argument allows them to disregard citizens' self-articulation of wants. Instead, the critics provide a hazy picture of what every citizen needs. This depiction of current alienation serves as the basis for new proposals for social organization designed to cure the perceived problem. Unger must be asking himself what form of social organization best satisfies the human needs
identified.127

Unmodified deconstruction, however, prevents a preference between communities. Critics fail to explain why subjectivity, rather than being a permanent condition of human understanding, is only produced by the Liberal state.128 As a result, Unger's social alternative can never attain an epistemological advantage over Liberalism. If the means-ends rationality Unger relies on to construct and justify his alternative is a permissible form of reasoning, however, then the same form of rationality can be used to critique his system.

Unger's system would permit aggressive interest group assertion with immunity rights, acting as restraints to protect people. Yet there must be some difference between these immunity rights and present civil rights. Perhaps they are similar, but immunity rights are weaker than civil rights in relation to economic decisions so that Unger's society would recognize fewer property rights. It appears that under Unger's system individuals and groups would be given greater power through government to attack the positions occupied by others, so long as those positions under attack are hierarchical or fail some other criteria. Unger still must find a way to balance destabilization rights against immunity rights in order to resolve the tension between community and individual autonomy or explain why no tension will exist. Absent the latter, any resolution of the conflict between destabilization and immunity rights will institute a system masquerading as something principled because there are no objective truths on which to base legislative or adjudicative distributive decisions.

Ironically, it is difficult to imagine dispute resolution in such cases being radically different from Liberalism's adversarial model. Surely there would be deep social dissatisfaction if a tribunal gave no reason for its decision, said all parties who are left-handed lose, or told the parties that the decision was based on who the tribunal liked between the two. The adjudicatory decisions in a new society will likely take some old forms: reference to a social value or to the positive enactment of an authoritative body. Both types of explanation preserve indeterminacy and beg the question of how the power of the tribunal is to be restrained.

The creation of an ideal neither privileges the ideal itself nor rescues its detailed implementation from subjectivity and indeterminacy in deci-

127. See Hutchinson & Monahan, supra note 1, at 234. Hutchinson and Monahan generally reach similar conclusions as this Comment about Unger's proposal, see id. at 231-35, as does Rubin, Book Review, 74 CALIF. L. REV. 233 (1986).

128. Some suggest that we can only know the answer to this by trying an alternative to Liberalism. See Brest, Constitutional Scholarship, supra note 29 at 1109; Klare, supra note 70, at 309 n.151 ("I do not share the premise of liberal political theory that there is an inherent contradiction between community intervention and individual or group self-actualization and freedom."). Unger, however, concedes that the tension between the community and the individual will persist even under his system. See supra note 119 and accompanying text.
sionmaking. Unger is willing to trade what we have and what we know for a system of continual disruption where freedoms are undefined. His reason for change is drawn largely from a psychological theory only briefly developed. He claims that we are creative people bottled up by an impersonal world, who need a more supportive community than the present system provides. Yet he merely asserts that a communitarian political strategy will resolve the alleged problem of alienation. Our society contains many different types of people interacting in infinite ways. Unless this too is only a product of Liberalism, no matter what form of social system we have, some people are going to adjust to their circumstances better than others. Unger offers no demonstration of why his system would create fewer alienated people.

IV
UNDERDETERMINACY, CONSCIOUSNESS AND LEGISLATIVE ACTION

Once the communitarian political agenda lurking in critics’ principle indeterminacy arguments is dismissed, the remaining force of their critique is as an attack on the internal operation of legal reasoning and legislative responsiveness to social need.

Critics sometimes represent their rule indeterminacy arguments as all or nothing: results are necessitated by rules, or there are a nearly infinite number of choices judges can make. “Underdeterminacy” is more accurate, fewer possible results though more than one. Noncritics argue that the common law is a system whose discourse is constrained by professional standards for reasoning which stress coherence and analogy.

Owen Fiss argues that “disciplining rules” and the existence of an “interpretative community” produce constrained interpretation. He describes as objective, interpretations that can be tested against a set of norms that transcend the vantage point of a particular person.

---

129. Unger, supra note 19, at 584-85.
131. Underdeterminacy is a term coined by Larry Solum, supra note 20, at 473.
132. Stick, supra note 130, at 349-50; see id. at 346-47, 359-67. Stick criticizes Singer’s use of Rorty’s philosophy in Singer’s indeterminacy argument (Singer, supra, note 8, at 28-30), arguing that Rorty believed that particular fields could have agreed upon standards of discourse creating objectivity and rationality within that field. Id. at 342; see also Hoy, Interpreting the Law: Hermeneutical and Poststructuralist Perspectives, 58 S. Cal. L. Rev. 135, 144 (1985) (arguing that a choice between conflicting arguments is not arbitrary if there are standards for evaluating the competing arguments).
133. Fiss, supra note 103, at 744-45.
134. Id. Fiss’ argument should be understood as follows. Imagine a spectrum of opinion, with one end as the opinion of a single individual and the other as a God’s-eye objective viewpoint.
latures and the interpretive community of judges produce and authorize a set of norms for evaluating legal interpretation. For example, there are rules for the construction of statutory language. A hierarchical system of courts resolves disputes about these rules and their decisions increasingly constrain discretion.

Fiss' account generates a different picture of legal reasoning than the indeterminacy thesis. A frequent problem for judges is deciding where to look for authority within accepted sources for the purposes of the instant case. For example, in constitutional interpretation, authority might be found in historical intent, past precedent, present social conditions or present values. Critics request a meta-level principle that can resolve these disputes by assigning rules and sources priority. Fiss argues that legal doctrines, however, produced as they are by some consensus among judges and legal professionals, can provide a guiding force without any meta-level organizing principle or the level of determinacy critics desire. The structure of the legal system restrains interpretation. Judges are able to detach their decisionmaking from their personal circumstances. The grounds for an opinion must be persuasive to other judges on the panel before the opinion becomes law. The pressure to persuade other judges enforces moderation. Appellate decisions enforce objectivity by transcending the perspective of a single individual.

Objectification occurs as you move along the spectrum away from the opinion of the single individual and toward the universal view. Though he uses the terms "objective" and "objectivity," Fiss' argument is that for legal reasoning, objectivity is not required; objectification is sufficient.

Fiss' account differs from H.L.A. Hart's in its emphasis. Hart's reaction to indeterminacy focused on the discovery of positive pronouncements from authoritative sources and he believed that agreement as to their contents was seldom a problem except in a few "hard cases." Fiss focuses on how the structure and practice of our legal system fosters agreement. His theory is developed in the course of a debate with Stanley Fish who agrees that interpretation is constrained but attributes constraint to shared understandings developed in professional training. See Fish, Fish v. Fiss, 36 STAN. L. REV. 1325 (1984).


136. Cf. Fiss, supra note 103, at 744-45. For the view that these canons are ineffectual, see Llewellyn, Remarks on the Theory of Appellate Decisions and the Rules or Canons About How Statutes are to be Construed, 3 VAND. L. REV. 395 (1950); MacCallum, Legislative Intent, 75 YALE L.J. 754 (1956).

137. Fiss supra note 135, at 185.

138. Hutchinson, supra note 11, at 212; Singer, supra note 8, at 39, 43; Unger, supra note 19, at 570-71; see also Altman, supra note 20, at 218-19, 221; Dalton, supra note 1, at 235.

139. My own experiences working on an appellate court confirm this account of judicial decisionmaking. Tushnet, however, argues that disciplining rules will not constrain "a reasonably skilled judge." Tushnet, supra note 7, at 819. Tushnet underestimates the need for consensus in decisionmaking and the objectification that results. The substance of his argument is really that judges are not willing to engage in the anti-majoritarian radical social restructuring critics favor. "[J]udges in contemporary America are selected in a way that keeps them from thinking that such arguments [advocating socialism] make sense." Id. at 823.

Brest implies that judges will think alike because they are usually white males, wealthy and members of a ruling elite. Brest, Interpretation and Interest, 34 STAN. L. REV. 765, 771 (1982).
same issue by other tribunals can lead to consensus. Repeated decisions within a particular topic area constrain future interpretation. Klare relies on this very process to explain why it is important to understand legal consciousness. "As this world view matured, it began to set boundaries on the type of questions the Court would ask and the possible scope of results it could reach in the labor field; that is, future decisions were mediated through, and in part determined by, the new legal consciousness."140

Klare seems to adopt underdeterminacy in preference to more radical claims.141 He might agree with Fiss' description of legal reasoning but he would, most likely, press Fiss on how the interpretive direction of a particular issue is initially determined. Klare might grant that over time constraint tightens, but insist on the role of ideology in framing less constrained initial choices. This is a plausible version of the indeterminacy argument. Though judicial latitude may decline in scope over time on previously considered issues, indeterminacy is especially prevalent in important decisions which choose paths for the law. This argument, however, only partially describes how law develops.

A continuing problem with critics' focus on judicial interpretation is their inattention to frequent legislative participation in influencing and redirecting statutory interpretation. For example, in 1976 the Supreme Court decided in General Electric Co. v. Gilbert142 that the exclusion of pregnancy from an employer's disability plan was not gender discrimination within the meaning of Title VII of the Civil Rights Act of 1964. Congress amended Title VII in 1978 to overrule Gilbert.143 In 1984, the Court held in Grove City College v. Bell144 that Title IX of the Education Amendments of 1972 only required certification of nondiscrimination for those departments of an institution which received federal aid and did not require that the entire institution be certified. In 1988, Congress passed the Civil Rights Restoration Act overruling the Court's statutory

There is no evidence that social background is linked to the decisions made by judges once they are appointed. For instance, this generalization would fail to predict the careers of Earl Warren, Harry Blackmun, Sandra Day O'Connor, or for that matter, Thomas Becket. There are at least two works which analyze the backgrounds of federal judges and the appointment process. Brest does not mention either of these sources. See 2 L. BERKSON, S. CARBON, & A. NEFF, FEDERAL JUDICIAL SELECTION DURING THE CARTER ADMINISTRATION (1980); H. CHASE, FEDERAL JUDGES: THE APPOINTING PROCESS (1972) (Eisenhower, Kennedy, and Johnson).

140. Klare, supra note 70, at 292.
141. See supra note 95.
142. 429 U.S. 125 (1976).
interpretation in *Grove City.*

The focus on judicial interpretation is well placed, however, when constitutional issues are raised. The Court is the final authority on the meaning of the constitution. Our constitution places certain actions and aims beyond the power of the majoritarian branches, preserving "certain values transcendent, beyond the reach of temporary political majorities." To link this judicial power to the failure of labor law, critics must demonstrate that meaningful labor law reform would be found unconstitutional.

The Court rarely strikes down economic legislation on constitutional grounds. The "constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of laissez faire." Extreme judicial deference to economic legislation began in 1937 when the Court upheld the constitutionality of the Wagner Act in *NLRB v. Jones & Laughlin Steel Co.* Legislation pursuant to national commerce power will only be questioned if there is no rational basis for believing that the regulated activity affects interstate commerce or the statutory means are unreasonable.

Absent proof of Klare's assertion that the ideology of "contractualism" announced in *Jones & Laughlin* prevented elites from viewing labor relations according to any other paradigm, inattention to congressional control over national policy and its judicial interpretation is inexcusable. Klare's view of indeterminacy and consciousness admits that constraint can be achieved through the use of natural language once initial interpretive choices are made and more decisions are rendered. Legislative acts can be interpretive as well, especially when they are directed at correcting specific judicial decisions.

To agitate convincingly for anti-majoritarian political restructuring, critics must be able to persuade others that the dominant ideology argument and its psychological presupposition are true, as well as convinc-

---


146. "[T]he basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution . . . has . . . been respected by this Court and Country as a permanent and indispensable feature of our constitutional system." Cooper v. Aaron, 358 U.S. 1, 18 (1958).


While courts can give statutes limiting constructions without reaching constitutional issues, Congress has final control over labor law absent constitutional limits on Congress' power to regulate labor relations and production.
ingly support a radical reductionist view of institutional behavior. Otherwise, so long as decisionmakers do not respond only to particular economic interests and citizens are not incapable of speaking for themselves and articulating their own needs, critics should offer competing visions of social life to the public, before courts and to legislatures. Of course such open competition would place an additional demand on critical legal studies. Critics would have to develop attractive social alternatives instead of merely engaging in random trashing.

The reductionist version of the dominant ideology argument cannot explain judicial decisions and legislation that aid relatively powerless groups. Moreover, elites do not use legal discourse to mask controlling public values. Judges engage in a process of justification that mixes appeals to precedent, policy and shared notions of fairness. Critics portray this trend as an acknowledgement of indeterminacy. Perhaps it acknowledges underdeterminacy; but it is also an attempt to ground decisions in justifications that transcend formal language, the language that critics urge masks real decisional criteria.

For example, the decision that women have a right to an abortion in *Roe v. Wade* was justified by including under a broader right of privacy the right of individuals to choose when to begin a family. Singer, however, uses this decision as an example of masking techniques, accusing the majority of misleadingly portraying its reasoning as a deductive exercise in constitutional interpretation. He focuses closely on the text of the opinion and pays no attention to how the decision is understood. Opinions may be written in a formal style, but public perceptions may not be influenced by writing style. What filters through newspaper and television accounts usually is the result and a brief explanation of the Court's reasoning. Many understand that when and whether to have a child is not subject to government control. In public accounts, this right is connected to a larger notion of individual privacy that people can evaluate. Moreover, disagreements over the validity of a decision and the role of the Court are not camouflaged. "[I]t is not plausible that the truth about constitutional adjudication has been successfully hidden in the face of almost two centuries of . . . criticisms levied by dissenting justices, lawyers, politicians, and newspaper editors, as well as scholars."

Critics could continue the attack by arguing that the abortion deci-

---

154. See, e.g., Dallas Morning News, Jan. 23, 1973, at 5A (lead paragraph): "The U.S. Supreme Court struck down Texas abortion laws Monday as an unconstitutional invasion of privacy that interferes with a woman's right to control her body."
sion is a beneficial consequence of the larger notions of privacy and autonomy that still operate to the public's detriment. This attack, however, only reintroduces the danger that critics take civil liberties for granted. What would a communitarian say the likely result of community control of abortions would be? Would they be prohibited? Would they be allowed? Would abortions be required when resources are scarce? Under Unger's system, when there are scarce resources does the decision whether to bear a child implicate an immunity right or a solidarity right? Who will decide which right is implicated? And the most troubling question—will decisionmakers follow the predictive advice of the well-intentioned theorists who advocated communitarianism?

Critics who advocate a positive program must be able to reconcile the tensions between autonomy and community; they have yet to do so. Communitarian advocates admit that there is a risk that individualism may be underemphasized in their alternatives.\textsuperscript{156} Noncritics go further and suggest that intolerance and tyranny may be the result.\textsuperscript{157}

V

PLURALISM AND LIBERALISM

Critical legal studies is a conceptual attack on our political and social system—it goes beyond a description of problems internal to the legal method. Critics argue that objective truth is impossible, and yet some critics claim that there is some method of social organization being denied expression which is knowably better. If critics' premise that all decisionmaking is subjective is correct, however, then a society that emphasizes personal choice is desirable.

Our political system is in part a response to the limits of human insight, our inability to distinguish conclusively between competing visions of the good life. Our system can promote tolerance and we have mechanisms that broker conflict between what deconstruction implies are equally valid viewpoints. We guarantee the freedom to communicate contesting ideas, and we promote tolerance by prohibiting state discrimination and some forms of private discrimination against women, minorities, the handicapped and older Americans.\textsuperscript{158} Pluralism, understood as

\textsuperscript{156} Tushnet, \textit{supra} note 110, at 242.
\textsuperscript{157} See, Rubin, \textit{supra} note 127, at 254-55.
the unconfirmability of ideologies rather than the belief that all social actors have equal power, does not prevent state intervention in order to address substantive inequality. After all, we currently fund, for example, job training, student loans and grants, day care, aid to families with dependent children, Medicare, social security, and aid to the handicapped. As Klare admits, current legal consciousness sends out mixed signals sanctifying both state intervention and the free market.\footnote{Klare, supra note 70, at 334-35.} Dissatisfaction with the pace of progress should reorient struggle to the political process. Katherine Stone writes:

The alternative is to define labor issues as a matter of public concern, and to submit resolution of these issues to the political process. This approach would enable workers to struggle in the arena in which their strength is greatest—the national political arena. At the level of national economic and political institutions, they could utilize their collective strength and define their problems in such a way that genuine solutions would be possible. It is at that level that major decisions about investment policy, both private and public, are made. In the arena of national politics, the numerical strength of the working class and its commonality of interests around those problems would make it a potent force.\footnote{Stone, supra note 58, at 1580.}

Hogler disagrees because he believes that future legislative acts would be co-opted by the judiciary. Legislative efforts to streamline management objections to certification, restore strike power, or to reorient labor law to nonsmokestack industries, however, will likely be deferred to even by conservatives on the Court.

Our Constitution was born from a conception of how people who disagree but who are interdependent can coexist. It encapsulated a particular version of Liberal theory. What critics fail to confront directly is the possibility that society's primary values are not camouflaged. America is instead engaged in an incremental process of exploring and elaborating upon those values. Our Constitution has been changed to embrace more participants and to provide further promises to citizens of fair treatment. These promises are part of the public consciousness, and have generated further reflection on their meaning that has been articulated through legislation as well as through adjudication.

Critics view the institutionalization of the Liberal state in this country as a contingent choice. They are correct in the sense that different premises of social organization are possible. Yet the inescapable implication of critics' inability to articulate for all of us what our needs are, suggests that no political system with different premises suits us as well.