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Regoverning the Workplace: From Self-Regulation to Co-Regulation. By Cynthia Estlund.

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Cynthia Estlund.

evidence that minimum wage increases reduce poverty and then effectively demonstrate why this is the case. Using difference-in-difference methods, they show that movements onto the poverty rolls by the families of workers whose employment is negatively affected by minimum wage increases more than offsets the movement out of poverty by the families of workers whose wage earnings are positively affected by an increase in the minimum wage. Neumark and Wascher then provide evidence that the Earned Income Tax Credit (EITC) is a far more efficient policy mechanism for reducing poverty among working Americans. Unlike the minimum wage, which raises the wages of all affected workers, including the majority who are second or third earners in non-poor families, the EITC only subsidizes the wages of low-income families and does so via the tax system, hence avoiding the negative employment effects of minimum wage increases.

Like Card and Krueger, Neumark and Wascher are outstanding empirical economists who have made substantive additions to the minimum wage literature and have now produced a book that is decidedly greater than the sum of their research in this literature. It is an appropriate companion piece to *Myth and Measurement*. Additionally, for those who are interested in the history of economic thought, it is a continuation of a fundamental economic dispute going back to the first modern policy evaluations of minimum wage legislation published in the *American Economic Review* in 1946 by Stigler and Richard A. Lester. Stigler, basing his argument on marginalist theory (Hickian-derived demand for labor equations) and weak empirical evidence, asserted that further increases in the federal minimum wage would increase the wages of some low-skilled workers at the cost of other low-skilled workers' employment. In its place, he recommended the implementation of a negative income tax to reduce poverty. Lester was much more skeptical of the value of marginalist theory in explaining real-world economic events. He demonstrated his point using equally weak empirical evidence from a case study of the employment effects of federal minimum-wage increases on cotton plantation workers in the South which, he argued, led to an increase in their wages with no effect on their employment.

Over the next fifty years, the economics profession increasingly sided with Stigler on the value of marginalist economic theory in predicting the unintended consequences of government intervention into markets in general and for minimum-wage legislation in particular. Card and Krueger, who dedicated their iconoclastic book to their Princeton University colleague Richard Lester, not coincidentally chose the topic of minimum-wage legislation as their vehicle for demonstrating their innovative empirical methods. In doing so, they forced the economics profession not only to reevaluate conventional wisdom on the consequences of minimum wage increases, but also, more generally, to reevaluate the way that we come to our empirically based judgments on the behavioral and distributional consequences of public policies.

In *Minimum Wages*, Neumark and Wascher provide a definitive review of the empirical evidence on the

behavioral and distributional consequences of minimum wage legislation since the publication of *Myth and Measurement*, much of it using these same methods. Even though it is distressing that potential readers will be able to guess the answers that Neumark and Wascher provide to the two questions posed by Stigler, it is not the authors' personal answers that matter but the empirical evidence on which they rest.

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Labor and Employment Law

Regoverning the Workplace: From Self-Regulation to Co-Regulation. By Cynthia Estlund. New Haven, CT: Yale University Press, 2010. 320 pp. ISBN 978-0-3001-2450-7. \$50 (cloth).

Cynthia Estlund may be best known to labor and employment law academics and practitioners as the scholar who most completely and aptly described the current crisis in American labor law in *The Ossification of American Labor Law* (*Columbia Law Review*, 2002). In that piece, she described vividly, starkly, and I believe accurately, the anachronistic nature of the National Labor Relations Act (NLRA) (see 29 U.S.C. §§ 151–169), due to the political stalemate that has left the law basically unchanged in its current form for more than fifty years (since the passage of the Taft-Hartley Amendments in 1947), despite the fact that the labor, capital, and products markets have changed dramatically.

It is therefore not surprising, with the lack of any labor law reform in the ensuing period, that Estlund begins her new book, *Regoverning the Workplace* (RTW), with a description of the continuing inadequacies of American labor and employment law to protect the interests and rights of the average worker. Not only is traditional labor failing workers in providing adequate voice in the workplace through union representation, but also its *de facto* replacement, employment law, is a multi-headed hydra made up of a confusing array of minimum labor standards and workplace rights. Additionally, private litigation in the area has been substantially diminished by a U.S. Supreme Court seemingly set on an anti-litigation agenda in the civil rights context.

What is at first surprising, and then more expected upon further reflection, is Estlund's embrace of "regulated self-regulation" in the workplace, or "co-regulation." This New Governance theory has been extolled before by other labor and employment law scholars, most notably by Orly Lobel in the Occupational Safety and Health Act (OSHA) context. New Governance theory, according to Estlund, has "two interlocking themes: the idea of 'decentering the state' and elevating the regulatory role of other nongovernmental actors, including regulated entities themselves; and the idea of 'reflexivity' in law—of replacing direct regulatory commands with efforts to shape self-regulation

and self-governance within organization” (p. 136).

In *Regoverning the Workplace*, Estlund fashions a distinctly proceduralist spin on New Governance theory. By proceduralist, I mean an approach that emphasizes the existence of procedural devices to mitigate employer unfairness in the workplace. Specifically, Estlund argues for “co-regulation,” a system of workplace governance by which corporate self-governance is tempered through use of two procedural mechanisms: (1) inside employee representation and (2) independent outside monitors. This system also seeks to “condition legal benefits of self-regulation on the existence of genuine employee representation” (p. 149). So through a combination of internal employee committees, “truly” independent outside monitors, and a reward-and-punishment system calibrated to the bona fides of the corporate compliance system (i.e., a system of responsive regulation), Estlund hopes to foster employer-employee collaborations and bring a substantial employee voice into the workplace. For support of her vision, she invokes the global anti-sweat shop movement, corporate codes of conduct, regulation of smaller employers by larger companies in supply-chain scenarios, work center campaigns, and outside monitoring as part of agency legal actions, all to illustrate situations in which groups have successfully pressured employers to self-regulate in a way that met or exceeded legal workplace norms.

Estlund’s instincts on workplace governance in this book resonate with a similar proceduralist model she adopted in arguing for a due process approach to public employees’ free speech rights. In “Harmonizing Work and Citizenship: A Due Process Solution to a First Amendment Problem” (*Supreme Court Review*, 2005, 2006), Estlund argued, “the employee who claims that she was fired for speaking on matters of public concern in the course of doing her job should have the right to a fair hearing—though not necessarily a federal lawsuit—on whether that speech was in fact the basis for her discharge and whether the discharge was nonetheless justified” (p. 117). The idea is that public employees, who have recently lost much substantive free speech protection, would regain some rights by requiring employers to hold a due process hearing. My reluctance to adopt the proceduralist approach in that context is based on the same skepticism I have in this context: a fear that employers would merely go through the motions and engage in cosmetic compliance.

History has shown repeatedly that limitless employer power, constrained only by market forces and reputational costs, leads to the worst forms of employer opportunistic behaviors and employee abuses. To her credit, Estlund acknowledges as much in numerous places throughout her book, including recognizing the limits on the use of legal incentives in the employment discrimination context. She therefore seeks to apply institutional checks against disingenuous attempts at corporate compliance by employers, asserting that “it is possible to create and recognize a system of well regulated self-regulation—one with built-in safeguards against bad faith and cosmetic compliance” (p. 211). Further, she maintains that some employee representation in the workplace is better than none (what with the

low union density rate in the private sector). For my part, I am not so sure, and I am certainly not ready to throw in the towel quite yet.

I remain unconvinced that employees can participate meaningfully in self-regulation through some form of non-union collective representation. The power dynamic between employer and employee in the workplace is suffused with the employer’s control over the employee’s job. In 1969, for example, in *NLRB v. Gissel Packing Co.*, the U.S. Supreme Court recognized “the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear” (see 395 U.S. 575—Supreme Court (1969)). It is because of the fear that an employer will attempt to dominate an inside employee organization that such company unions are still rightfully prohibited (NLRA, 29 U.S.C. § 158(a)(2)).

Indeed, what makes Estlund’s co-regulation model potentially dangerous is that the employer will be seen as engaging in sanctioned “regulated self-regulation,” though the employer might be really exercising the power of the “fist inside the velvet glove,” since “[e]mployees are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged” (*NLRB v. Exchange Parts*, 375 U.S. 405, 409 (1964)). So, I agree with Estlund that there can be “no self-regulation without workplace representation,” but unlike Estlund, I believe that workplace representation must be through a truly independent union or else co-regulation will inexorably morph into employee co-optation.

I am also concerned about Estlund’s idea of independent, outside monitors. Consider a union organizer attempting to organize a group of workers in a virulently anti-union environment (many U.S. workplaces these days). How is an outside organization, whether a union, non-profit, or work center, supposed to protect the interests of the worker on a daily basis when its own access to the company is significantly limited and workers, without real representation, will fear reprisal and economic ruin if they should ask for outside assistance? The lesson of private litigation in the whistleblowing context teaches of the futility of relying upon First Amendment or statutory rights to hold employers accountable for such misconduct. NYU Law Professor Samuel Estreicher has also shown that reputational costs alone do not work well to constrain employer opportunistic behavior.

Even in these days of limited union density in the private sector, independent unions still remain the best and only effective counterweight against absolute employer domination of the workplace. They alone provide what Estlund describes in *Regoverning the Workplace* as “an effective, independent, collective voice . . . to empower” employees (p. 162). To hope that employers will see the business, legal, or moral case for co-regulation, and voluntarily reform their sharp practices toward employees, is to believe that employers will act ahistorically.

Despite my concerns about her proposed co-regulatory system, Estlund should be congratulated for writing an important, thought-provoking book that makes many contributions to the goal of workplace fairness. I would urge Estlund to continue to push for some of the other reforms she trumpets in the book, including (1) continuing to agitate for labor law reform to make union organizing and collective bargaining easier and remedies more effective; (2) moving to expand the definition of "employer" in other employment statutes to the broader definition contained in the Fair Labor Standards Act to provide for more joint-employer liability in supply-chain situations; and (3) pushing for increased shareholder activism on behalf of labor interests. Through such gradual efforts, the hope is that employees will be able to govern the workplace meaningfully in a partnership with their employers.

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Human Resources, Management, and Personnel

Pension Policy: The Search For Better Solutions.
By John A. Turner. Kalamazoo, MI: W.E.
Upjohn Institute for Employment, 2010. 239
pp. ISBN 978-0-88099-355-5, \$40 (cloth).

In *Pension Policy: The Search For Better Solutions*, John A. Turner provides a useful discussion of some of the most important issues confronting the continued development of employer pensions in the United States. The book centers on nine major issues that are outlined in brief in the opening chapter and then examined in more detail in the subsequent chapters. Though the focus of the book is pension policy in the United States, Turner uses his extensive knowledge of international developments to provide some guidance on policies that American employers, workers, and regulators might consider.

Since the 1980s, only about half of the U.S. labor force has been afforded pension coverage. Turner explores policies that might increase the incidence of pension coverage. One central question he addresses is whether employers should be required to offer their employees the opportunity to participate in a pension plan, a discussion to which Turner devotes Chapters 2 and 3. Specifically, in Chapter 2, Turner provides a brief overview of the methods adopted by other countries to require employers to offer retirement plans. In Chapter 3, he focuses on developments in the United States that could increase the proportion of firms that offer a retirement plan and the percentage of workers in firms with plans that actually enroll in the pension plan. Workers' decisions to participate, given that a plan is offered, have become a more important component of pension coverage due to the shift to defined-contribution plans, which require worker actions. Turner notes the important role of information and

defaults in the pension coverage.

Pension coverage depends on employer and employee preferences. The characteristics of defined-benefit and defined-contribution plans imply different risks to agents in the labor market and affect worker behavior in different ways. In Chapter 4, Turner examines how pension plans alter retirement choices and turnover. The lack of portability is one of the most important disadvantages of traditional, defined-benefit plans. Turner explains in the following chapter that in many countries, employers are encouraged to offer retirement plans through tax policy. In general, tax policy tends to treat pension contributions or returns to pension investments more favorably than current income. Thus, contributions to an employer pension plan can be a more efficient method of saving. Once again, Turner illustrates that preferential treatment of employer pensions is a common practice in many countries.

A major difference in defined-benefit and defined-contribution plans is who bears the investment risk. Devoting Chapter 6 to this issue, Turner describes a series of financial risks associated with both types of plans and considers methods of addressing or modifying some of the risks inherent in deferred compensation. The distinction between defined-benefit and defined-contribution plans can be bridged somewhat through the use of hybrid plans, which typically share some of the characteristics of each. In Chapter 7 Turner describes the basic characteristics of these alternative plans.

In his analysis on funding issues (in Chapter 8), Turner considers who bears the incidence of pension contributions and asks if it matters whether the employer contributes directly to the plan or employees contribute through payroll deductions. As with many other analysts, he tends to underplay the investment risk that workers bear in defined-benefit plans, including employer bankruptcy, plant closing, and plan terminations. A relatively new concern of economists is the role of financial literacy and defaults in promoting retirement saving in pension plans in which workers must make important choices. The author spends more time on the defaults and places too little emphasis on what people know and how education might enhance retirement planning.

Turner devotes Chapter 9 to a variety of issues concerning the actual receipt of benefits, from pension plans to what he calls "lost pensions." How can workers who change jobs find their pensions from earlier jobs? He considers the policies of other countries that assist employees in finding these pension benefits, earned earlier in their careers. Turner is concerned about the decline in annuitization of pension assets. This trend is based on two factors: first, the shift from defined-benefit plans, which by law must offer a life annuity, to defined-contribution plans that provide the benefit in a lump sum; and second, the increasing tendency of defined-benefit plans to offer lump-sum options. He suggests several methods of increasing the proportion of retirees that would annuitize their retirement benefits. In the final chapter, Turner presents his ideas for achieving better solutions for American pensions.