REVIEW ESSAY

Bowling Alone But Working Together

WORKING TOGETHER: HOW WORKPLACE BONDS STRENGTHEN A DIVERSE DEMOCRACY. BY CYNTHIA ESTLUND. NEW YORK: OXFORD UNIVERSITY PRESS, OCTOBER 2003. PP. 240. $35.00.

Reviewed by Joan Flynn†

I have cribbed the title of this review directly from the source.[1] And why not? Cynthia Estlund's *Working Together* is clearly and gracefully written—indeed, to the extent of posing a bit of a challenge to the reviewer in search of a paraphrase. Moreover, Estlund's reference to Harvard sociologist Robert Putnam's *Bowling Alone*[2] is quite telling; Estlund is a

† Professor of Law, Cleveland-Marshall College of Law, Cleveland State University. B.A., Grinnell College, 1982; J.D., New York University, 1987. My thanks to the Cleveland-Marshall Fund for its financial support of this project.

1. *See* CYNTHIA ESTLUND, WORKING TOGETHER: HOW WORKPLACE BONDS STRENGTHEN A DIVERSE DEMOCRACY 5 (2003) [hereinafter WORKING TOGETHER].

2. ROBERT D. PUTNAM, BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY (2000) [hereinafter BOWLING ALONE]; *see also* Robert D. Putnam, *Bowling Alone: America's Declining Social Capital*, 6 J. DEMOCRACY 65 (1995).

Columbia law professor,[3] but her intended audience is plainly not confined to legal academics or to the legal profession at large. Indeed, Estlund describes the impetus for the book as her dissatisfaction with the neglect of the workplace in political and social theory: more specifically, in the literature on public discourse and modern notions of civil society, social capital, and associational life more generally. This ambitious work thus draws on, and extensively critiques, a great deal of social and political theoretical work as well as empirical research on the workplace, and Estlund takes on not only the "cross-over" work of Putnam, but also some of the heavyweights of deliberative democracy theory such as Jürgen Habermas and Robert Post. That being said, there is a great deal here to interest those of a lesser theoretical bent—that is, to readers who are considerably more interested in the concrete role that anti-discrimination law has played and perhaps could play in our society than in whether the workplace falls within or without the hallowed boundaries of "civil society," the subject of Part II of this book.

So what is this book actually about? In the author's words, it is about "the significance of ordinary workplace conversations and interactions—especially among heterogeneous groups of co-workers [fairly read as blacks and whites]—to democratic life."[4] Estlund begins by noting that due to the involuntary nature of workplace associations, the workplace has been ignored or relegated to the margins of most accounts of "civil society"—defined in *Working Together* as "those aspects of social life that are outside of formal structures of governance but that are crucial to the vitality of democratic politics."[5] She then argues (quite persuasively) that the workplace is "the single most important site of both cooperative interaction and sociability among adult citizens outside the family"[6]—especially among black and white adults—and therefore should not be excluded from or marginalized in accounts of what holds our complex, modern democratic society together, but rather should be accorded a central role in those accounts. More specifically, she makes the case that it is the very feature of the workplace that has caused it to be discounted by the deliberative democracy crowd—the involuntariness of workplace associations—that enables it to play such a constructive role in facilitating close and regular interaction between blacks and whites. The anti-discrimination laws, which are the chief (but not the only) cause of the "involuntariness" of workplace interactions, have not only resulted in significant societal benefits, Estlund argues, but could—if such benefits were recognized as a social good in and

3. She is the Isidore and Seville Sulzbacher Professor of Law and Deputy Dean for Research at Columbia.

4. WORKING TOGETHER, *supra* note 1, at vii.

5. *Id.* at 4.

6. *Id.* at 7.

of themselves rather than a mere by-product of the need to protect individual employees from discriminatory employer actions—play an even more effective societal role in the future.

I.
WORKING TOGETHER ACROSS RACIAL LINES

A. Workplace Versus Neighborhood Integration, and the Social Psychology of the Workplace

This complex and intricately argued work is divided into three parts, preceded by an extensive introduction. Part I, "Connectedness and Diversity in the Workplace," focuses on the workplace itself and the nature of workplace interactions. Drawing on social science data, Estlund begins by making two central points. First, working adults report having more meaningful conversations with their co-workers than with anyone else outside their families. Thus, the workplace itself is an important arena of civic and social life. The second goes to the concept of "working together." It is not just the amount and duration of contact among co-workers that tends to promote reciprocal feelings of affection, empathy and loyalty, Estlund emphasizes, but the conditions under which that contact occurs: namely, "under the imperative of getting the work done."[7] This imperative, she asserts, tends to promote "reasonably civil and constructive relationships and some degree of mutual trust, even among co-workers who initially have little mutual affinity and little in common."[8]

In the core of Part I, set forth in Chapter 4, Estlund first analyzes why workplaces are considerably more racially integrated than other settings like schools and neighborhoods, and then discusses the social psychological literature on intergroup relations and its implications for anti-discrimination law and public policy more generally. At the outset, Estlund makes clear that her claim regarding the degree of workplace integration is "a relative one" that "[i]ntegration appears to have proceeded further and more smoothly in the workplace than . . . in neighborhoods and schools."[9] Refreshingly, however, after ticking off various "negatives" such as indications that smaller workplaces often remain highly segregated and that some employers appear to be engaging in their own form of "white flight" by following white workers from central cities to the suburbs, Estlund flatly states that "All the qualifications and caveats, however, should not obscure

7. *Id.* at 24.
8. *Id.* at 25.
9. *Id.* at 60.

the truth . . . that workplaces are comparatively integrated and are becoming more so."[10]

Estlund's analysis of why workplaces are more integrated than neighborhoods and schools is one of the strongest and most interesting sections of her book. She first notes that because the demographics of public schools essentially track housing patterns, the comparison can largely be reduced to workplace integration versus residential integration. As between housing discrimination and employment discrimination, the former, Estlund argues, is infinitely harder to police. While the racial makeup of a particular workforce can be traced to the decisions of a single entity, the employer—and at least with large employers can be powerful evidence of discrimination—the racial makeup of a neighborhood cannot. To the contrary, the composition of a particular neighborhood represents the amalgamation of individual decisions made over many years by multiple actors: buyers, sellers, real estate agents, and developers. Nor is enforcement the sole problem; many of the race-based decisions that contribute to housing segregation, such as decisions by white homeowners to flee neighborhoods that are becoming integrated, to avoid those that are already so, or to pay a "premium" to live in an overwhelmingly white neighborhood, lie beyond the law's reach. Of course, Estlund points out, neither can the law reach decisions by white employees to flee a newly integrated workplace—but "white flight" in the workplace does not appear to be a significant problem.

Estlund's final reflections on the causes of the significantly higher incidence of integration in the workplace than in neighborhoods turn, in contrast, on the likely preferences and desires of black workers and homeowners. Her analysis here is quite interesting. Whereas blacks almost certainly desire integration in the workplace, Estlund argues (for they can hardly afford not to), they have greater ambivalence about living in highly integrated as opposed to predominantly black or even all-black neighborhoods. This ambivalence, she concludes, does not stem solely from the harassment and hostility they may encounter in moving into a predominantly or overwhelmingly white neighborhood; black adults may simply desire to raise their children in a "cultural comfort zone," or may themselves be suffering from "integration fatigue"[11] and desire such a zone for themselves. On the latter point, Estlund quotes a battle-weary female accountant who, like nearly all black professionals, works in a predominantly white institution, regarding her choice to live in an all-black suburb of Atlanta:

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10. *Id.* at 64.

11. The term was coined by Professor John O. Calmore. *See* John O. Calmore, *Race/ism Lost and Found: The Fair Housing Act at Thirty*, 52 U. MIAMI L. REV. 1067, 1071 (1998), *cited in* WORKING TOGETHER, *supra* note 1, at 67.

> So much goes on at the job that we have to endure, the slights and the negative comments and the feelings that we're unwanted. When I have to work around them all day, by the time I come home I don't want to have to deal with white people anymore.[12]

The second major section of Part I, dealing with the social psychology literature bearing on black-white workplace relations and the likely spillover effects thereof, begins with an explication of Gordon Allport's "contact hypothesis," a classic of social psychology.[13] According to Allport, racial and other prejudices flourish in ignorance, but close interracial contact can reduce stereotyping and hostility—*if* the contact is of a type that leads people to do things together. Allport also posited that the effects of such contact are greatly enhanced if "sanctioned by institutional supports."[14] While Allport's *The Nature of Prejudice* dates back to 1958, Estlund's review of the literature convinces her that empirical support for the contact hypothesis has "proven to be quite robust over the years."[15]

As to its implications for the workplace, Estlund first notes that the contact hypothesis requires equal status contact—a requirement that may not be met in a goodly number of workplaces. She determines, however, that despite the racial stratification that pervades some workforces, there is still a substantial amount of interracial peer-to-peer contact in the American workplace as a whole. This cooperative interracial contact, moreover, is not only "sanctioned by," but essentially mandated by management in integrated workplaces; again, the work must get done. Estlund ultimately concludes, then—and this conclusion is central to her overall thesis—that "in the world outside the laboratory, the workplace is virtually unique in its capacity to convene individuals who would not otherwise choose to interact and [to] compel them to cooperate."[16]

The contact hypothesis and its accompanying empirical support represent the bright side of the social psychology of the workplace; on the downside, Estlund recounts, are a number of theories and a body of data pointing toward the intractability of racial bias. First is the social cognition paradigm; the human brain, alas, is hard-wired to simplify things.[17] This may be "efficient," but it predisposes us to stereotype others. Another is

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12. SAM FULWOOD III, WAKING FROM THE DREAM: MY LIFE IN THE BLACK MIDDLE CLASS 204-05 (1996), *quoted in* WORKING TOGETHER, *supra* note 1, at 68.

13. *See* GORDON W. ALLPORT, THE NATURE OF PREJUDICE (2d ed. 1958).

14. *Id.* at 267, *cited in* WORKING TOGETHER, *supra* note 1, at 74.

15. WORKING TOGETHER, *supra* note 1, at 74.

16. *Id.* at 75.

17. *Id.* at 77 (citing Linda H. Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1198 (1995); Katherine Y. Williams & Charles A. O'Reilly III, *Demography and Diversity in Organizations: A Review of 40 Years of Research*, 20 RESEARCH IN ORG. BEHAVIOUR 77, 83-84 (1998)).

the "similarity/attraction" paradigm; people tend to be most attracted to those perceived as similar to themselves, and to feel a greater affinity with members of their own racial or ethnic group than with "outsiders."[18] What makes these tendencies particularly pernicious is their subconscious nature; they are at work when people—such as managers and supervisors—think that they are being fair and unbiased.

Estlund illustrates this perniciousness with a concrete—and highly plausible—scenario: A black employee is denied a promotion on the basis of mediocre performance evaluations that are, in turn, the product of unconscious bias on the part of the evaluating supervisor. If the employee challenges the decision, the "tainted" evaluations themselves are powerful evidence in the employer's defense. Indeed, in the absence of a "smoking gun," an increasingly rare phenomenon in race cases given growing employer sophistication, the employee is almost sure to lose.

Estlund's point here is an excellent one. The "paper trail" problem she refers to, and the courts' general refusal to let employees dogged by such a trail get to a jury, has been evident for some time.[19] This problem, however, has often been conceived of in terms of a consciously biased employer or individual supervisor creating a web of negative paper. Drawing as she does on the insights of social psychological theory and data, Estlund points us to the likelihood of a much broader problem: to the probability that black workers are likely rather often to lose out on job opportunities at the hands of supervisors who think themselves fair and indeed may well be trying hard to be so.

Estlund's subsequent discussion of the literature on "salience" makes clear that the unconscious biases of white managers and supervisors have an even more injurious effect on black workers at the hiring stage. The less particularized information an evaluator has about a person, the more salient are group traits such as race, and the more salient race becomes, the greater the play for unconscious biases to influence perception and judgment. The salience of a group trait such as race—and the operation of stereotypes—is also increased, Estlund recounts, when the group has only token representation in the workforce or other setting in question. Thus, unconscious racial biases are particularly likely to operate at the hiring stage, when employers know relatively little about individual candidates,

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18. *Id.* at 78 (citing Williams & O'Reilly, *supra* note 17, at 85).

19. This problem may be alleviated somewhat by the Supreme Court's June 2003 decision in *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003) (loosening modes of proof in Title VII cases, at least in "mixed motive" cases). *See* Michael J. Zimmer, *The New Discrimination Law:* Price Waterhouse *is Dead, Whither* McDonnell Douglas?, 53 EMORY L. J. 1887 (2004); Jeffrey A. Van Detta, *"Le Roi Est Mort: Vive Le Roi!": An Essay on the Quiet Demise of* McDonnell Douglas *and the Transformation of Every Title VII Case After* Desert Palace, Inc. v. Costa *into a "Mixed-Motives" Case*, 52 DRAKE L. REV. 71 (2003) (both discussing broad implications of *Costa*). A discussion of *Costa*, however, which came down when Professor Estlund's book was on the verge of publication, is far beyond the scope of this review.

and especially against groups who are poorly represented in that workplace to begin with. The literature on intergroup relations, Estlund therefore neatly concludes, "underscores the need for the law to reckon with the persistence of bias, especially unconscious bias, even as conscious attitudes have become much more tolerant and egalitarian."[20]

Estlund's discussion of the social science data does not stop there, however. Estlund is a careful and fair-minded scholar, and she also examines data—more specifically, the literature on organizational diversity and its effect on group performance—that may be thought to undercut or at least weaken her thesis. The literature she describes finds that group diversity enhances performance on the front end by expanding the range of ideas generated and considered before a decision is made, but is more likely than not to impede group functioning at the back end—that is, at the implementation stage.

Estlund finds these results "dispiriting," but concludes that the lesson learned depends on whether one perceives of demographic diversity as a choice or as a fact of organizational life. If it is a choice, she acknowledges, it may not be the obviously profit-maximizing one. If, however, it is a given—as she believes it is, based on the increasing diversity of our society "along with some pressure from the law of employment discrimination"—then the question becomes "whether intergroup relations will be better with more rather than less interpersonal interaction and cooperation across group lines."[21] Citing her earlier discussion of the contact hypothesis and other literature on intergroup prejudice, she argues that the answer here is an emphatic "yes," and that today's employers are thus increasingly motivated—indeed, forced—to find ways of overcoming the friction that accompanies heterogeneity. Taking matters a step further, and circling back to her thesis, "In doing so," Estlund concludes, "they are also doing good work for the society as a whole."[22]

B. Fostering Interracial Bonds, Combating the Tenacity of Racial Bias, and Much More

Part I of *Working Together* is careful, convincing scholarly work. First, Estlund makes a compelling case that the workplace is the sole venue in our society in which significant numbers of black and white adults interact in a sustained and meaningful way, and effectively explains why that is. What is more, she does so very gracefully. For example, after

20. WORKING TOGETHER, *supra* note 1, at 78.

21. *Id.* at 79.

22. *Id.* at 81.

summarizing the generally positive data on the capacity of the workplace to foster interracial bonds, she writes:

> That is not to say that interracial bonds of trust, solidarity and friendship are ubiquitous in the workplace . . . . The evidence confirms a more modest proposition . . . . It can happen, it does happen, and, because of the nature of work and the comparative diversity of workplaces, it happens more in the workplace than anywhere else.[23]

Estlund also makes a strong case that the anti-discrimination laws must factor in both our psychological predisposition toward bias and the tenacity of those biases. Here and elsewhere in Part I, she makes effective use of empirical data, bringing to bear a great deal of literature that is likely unfamiliar to readers lacking significant social science training. Moreover, she does so without overwhelming the reader with detail; she provides an appropriate amount of information about the theories, studies and meta-analyses she describes: no more, no less.

Perhaps surprisingly in view of what I have just said, the primary weakness that I see in the first section of *Working Together* is overinclusiveness; along with the arguments that I have sketched out above, this section includes a significant amount of additional material that seems extraneous to Estlund's overall project. Most conspicuous in this regard is the whole of Chapter 5, which deals not only with sexual harassment as well as sex discrimination more broadly, but also (admittedly relatively briefly) with issues of ethnicity and language, discrimination based on sexual orientation, and even religious discrimination. While there are some pertinent analogies here that might have been usefully folded into Estlund's discussion of race, standing alone this chapter only disrupts the flow of her larger argument. A smaller example is a section on "real stories of integrated workplaces" in Chapter 4. Following on the heels of her closely reasoned analysis of why workplaces are much more racially integrated than schools and neighborhoods, and directly preceding her rigorous discussion of the social science literature on racial bias, these stories come off as precisely what they are—mere anecdote that can only suffer by comparison.

My second criticism of Part I of *Working Together* lies in the sense of repetition that one gets at certain points. In all fairness, this sense is traceable primarily to Estlund's highly comprehensive and detailed introduction,[24] which consumes a full one-tenth of the text. Anyone reading it will learn not only where Estlund intends to go in the body of the book and whether they are interested in accompanying her on the journey, but also a good deal about her thesis and the basis for it. Thus, some of the material in the early chapters comes across as repetitive due to sheer

23. *Id.* at 83.

24. *See id.* at 3-20.

proximity to the introduction. This repetitive sense, however, is bound to be less striking to one reading episodically rather than straight through, and it may be only reviewers who read dense academic books at "one shot." The merits and demerits of a comprehensive introduction, moreover, are doubtless debatable. At the end of the day, then, this is a fairly minor quibble— so let us proceed to Part II.

II.
THE WORKPLACE AND MODERN DEMOCRATIC LIFE

A. The Role of the Workplace in Civil Society

Part II of *Working Together* deals with the importance of the workplace, and of the interracial contact that occurs there, to modern democratic life. Here Estlund situates the workplace in what political theorists call "civil society"—as noted earlier, those aspects of social life that lie outside formal structures of governance but are nonetheless critical to the vitality of a democracy. Most contemporary theorists view the workplace as outside the realm of civil society or would at best relegate it to the margins. In their view, the pervasive regulation of the workplace and the economic coercion and power that permeate it are disqualifying factors; institutions of civil society must be autonomous from the state and egalitarian in nature. Estlund, however, not only challenges the orthodox view but turns it on its head. She agrees that the workplace's susceptibility to government regulation (such as the anti-discrimination laws) and its hierarchical relationships distinguish it from the types of voluntary associations that deliberative democracy theorists place at the center of the overlapping realms of "public discourse" and "civil society:" religious congregations, community groups and voluntary membership organizations. She argues, however, that it is precisely this "coercion" by both government and management that allows the workplace to play a role that voluntary associations cannot: that it is "the law's capacity to compel racial integration, together with the capacity of authorities within the workplace to compel people to get along with each other," that enables the workplace to play a unique and fundamental role in civil society.[25]

That is the big picture. More specifically, the received wisdom that Estlund takes on in Part II of *Working Together* comes primarily from two distinct but related bodies of literature. The first is that on "social capital:" a concept prefigured by Alexis de Tocqueville and rescued from the obscurity of the academic presses by Harvard sociologist Robert Putnam

25. *Id.* at 125.

via his 2000 book *Bowling Alone*.[26] Social capital, as defined by Putnam, refers to "'connections among individuals—social networks and the norms of reciprocity and trustworthiness that arise from them" and that help people to accomplish things together.[27] The concept breaks down into two dimensions: a "soft" dimension (my terminology) consisting of the norms of reciprocity and trust captured by the definition above, and—perhaps less obviously from the definition, a "harder" dimension having to do with the processes of political deliberation. Two kinds of "voluntary associations," according to Putnam, play a crucial role in the formation of social capital: "bonding associations," which "tend to reinforce exclusive identities and homogeneous groups," and "bridging associations," which "encompass people across diverse social cleavages."[28]

As many a New York Times reader will recall—for *Bowling Alone* was definitely something of a social phenomenon—Putnam's book emphasized the benefits to society of "social capital," and lamented what he sees as its dramatic decline in recent decades, as evidenced by Americans joining fewer clubs and organizations and spending less time on informal socializing and political activity. Putnam recognized that the workplace is a natural site for connecting with others, and because of the racial and political diversity often present there, acknowledged that it has been the most successful of our institutions in stimulating the formation of "bridging ties." Nonetheless, because the workplace is suffused with hierarchy and power relationships, Putnam places the ties that develop there, as Estlund recounts, "at the margins of the social capital map."[29]

The second body of literature taken on in Part II of *Working Together* is that on public discourse and deliberative democracy[30] —in particular, the work of Robert Post[31] and Jürgen Habermas.[32] These theorists, whose

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26. *See* BOWLING ALONE, *supra* note 2.

27. *Id.* at 19; *see also* WORKING TOGETHER, *supra* note 1, at 114.

28. WORKING TOGETHER, *supra* note 1, at 107 (citing BOWLING ALONE, *supra* note 2, at 22).

29. WORKING TOGETHER, *supra* note 1, at 6.

30. Deliberative democracy theory has been described as follows:

> At the core . . . is [t]he notion of public deliberation[,] the process in which the members of a political community participate in public discussion and critical examination of collectively binding public policies. The process of deliberation through which these policies are reached is best understood not on the model of political bargaining or contractual market transactions, but as a procedure guided by the commitment to the common good.

JORGE M. VALDEZ, DELIBERATIVE DEMOCRACY, POLITICAL LEGITIMACY, AND SELF-DETERMINATION IN MULTICULTURAL SOCIETIES 31 (2001). For another exploration of the theory, see JOHN S. DRYZEK, DELIBERATIVE DEMOCRACY AND BEYOND: LIBERALS, CRITICS, CONTESTATIONS (2000).

31. Post is the David Boies Professor of Law at Yale Law School. Among his works in the area are *Racist Speech, Democracy, and the First Amendment*, 32 WM. & MARY L. REV. 267 (1991) [hereinafter Post, *Racist Speech*]; and CIVIL SOCIETY AND GOVERNMENT (Robert C. Post & Nancy L. Rosenblum, eds., 2002)

32. Habermas is a philosopher and social theorist. He retired from his position as a chaired professor and Director of the Institute for Social Research at the Johann Wolfgang Goethe University in

emphasis on "public discourse" and political deliberation intertwines in part with Putnam's theories about social capital (that is, with the "harder," political deliberation dimension), are considerably more dismissive than Putnam of the role of the workplace in our society. Like Putnam, they are concerned about the hierarchical nature of the workplace and the economic "coercion" ("You do this because I'm the boss and you need this paycheck") that takes place there. They would take matters a step further, however; in their view, the lack of democracy and unequal relations that characterize the workplace completely disqualify it as a potential site of "public discourse," no matter how much discussion of public affairs may go on there.[33] To deliberative democrats such as Post and Habermas, the workplace is irrevocably tainted because it is a creature of the marketplace; as Estlund explains, they draw a sharp dichotomy between the domain of the market and that of public discourse and civil society.[34]

In her critique of the literature described above, Estlund begins with Putnam, and devotes considerable space to his work. She first commends Putnam for bringing renewed attention to the benefits of social capital to communities and to society as a whole—for recognizing that social capital is a public, not merely a private, good. In this respect, of course, Putnam's work dovetails with Estlund's own thesis: that the social networks, empathy and trust that develop in the situs with which she is concerned—the workplace—should be recognized as a social good, and the "rules of the game" restructured to further foster the development of these "bridging ties" (to use Putnam's term) across racial lines. Where Estlund parts company with Putnam is in his unwillingness to accord more than a marginal role to the workplace as a locus for social capital formation,[35] despite his recognition of its clear superiority to voluntary associations as a site for the development of bridging ties.[36]

Estlund voices her disagreement with Putnam in a measured fashion. At the outset of her analysis, she treats as "serious concern[s]" his view that the hierarchical context in which workplace ties form and the broad power of employers to monitor and even punish communication and association among co-workers greatly reduces the value of workplace ties as a source of social capital.[37] She goes on to argue, however, that hierarchy and

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Frankfurt in 1993, but continues to be an active scholar. His best-known work on deliberative democracy is BETWEEN FACTS AND NORMS (1996).

33. *See* Post, *Racist Speech*, *supra* note 31, at 289; *see also* HABERMAS, BETWEEN FACTS AND NORMS, *supra* note 32, at 366-67 (cited in WORKING TOGETHER, *supra* note 1, at 121, 131-32).

34. *See* WORKING TOGETHER, *supra* note 1, at 121.

35. *See id.* at 6.

36. *See* BOWLING ALONE, *supra* note 2, at 362, 407 (discussed in WORKING TOGETHER, *supra* note 1, at 116).

37. WORKING TOGETHER, *supra* note 1, at 117.

compulsion "do not cut in only one direction" when it comes to social capital formation, because "compulsion and authority and the sheer need to get a job done can and often do help to forge ties and enable cooperation that takes place nowhere else in society."[38] This argument would seem to cut strongly against Putnam's view. Nonetheless, Estlund treads rather carefully, emphasizing that workplace ties essentially complement, but do not replace, the ties that Putnam appears to view as inherently superior: those arising from voluntary associations such as religious congregations, community groups and voluntary membership organizations.[39] Ultimately, however, Estlund makes clear her view that workplace ties, far from being "marginal," easily "make the cut" as a form of social capital:

> Those ties provide a medium for the cultivation of empathy and a sense of belongingness, of "social capital" and . . . norms of cooperation and reciprocity, of . . . communication and compromise, and of conversations that enrich public discourse.[40]

That is, Estlund asserts, they perform both the "soft" and "hard" functions of social capital formation elucidated by Putnam (and discussed at greater length in *Working Together*), and they do so, as she notes, in a relatively diverse environment. Thus, as Estlund would have it: When it comes to social capital formation, "we may be bowling alone, but we are working together."[41]

Estlund's critique of the public discourse literature is tougher and more direct, and proceeds as follows. One of the things that is supposed to take place in civil society, she notes—and largely through voluntary associations—is political deliberation and public discourse. The question thus becomes: Do workplace conversations "count" as "public discourse"? Here Estlund notes that most Americans talk far more at work about social issues and public affairs than they do in the "fabled" (or more likely mythic) public square or at gatherings of whatever voluntary organizations they may take part in. Moreover, conversations among co-workers are much more likely to cross lines of social division than are conversations with non-work friends or with associates from voluntary associations such as church, parent-teacher associations, or professional organizations, all of which are likely to be racially and culturally homogenous. To Estlund, this distinction is critical; "[t]he fact that [workplace dialogue] goes on among comparatively diverse groups of co-workers is of momentous significance to the quality of public discourse."[42]

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38. *Id.*

39. *See generally* Robert D. Putnam, *The Strange Disappearance of Civic America*, 24 AM. PROSPECT 34 (1996).

40. WORKING TOGETHER, *supra* note 1, at 139.

41. *Id.* at 6.

42. *Id.* at 121.

In light of the above, Estlund finds unconvincing the arguments of Post and Habermas that the lack of equality and freedom in the workplace and the power relationships that pervade it necessarily exclude the workplace from the domain of public discourse. In her view, while the ideal conditions for democratic deliberation would certainly include both equality and "freedom from coercion by others and from state-imposed constraints," "[t]he problem is that no social space that actually exists—not the core of public discourse, not the realm of voluntary associations, certainly not the workplace—can meet all of these conditions."[43] Moreover, as indicated above, to Estlund—but not to Post or Habermas or their fellow deliberation theorists—deliberation across racial and cultural lines is of particular significance in our multi-racial, multi-cultural society.

Returning to the notion of "working together," Estlund notes that the workplace is unique in providing a forum for the exchange of ideas among people who are both connected with each other (as co-workers), so that they are likely to listen to one another—but also different from each other, so that they are exposed in these conversations to diverse ideas, opinions, and life experiences. In essence, Estlund views the workplace as complementing—but not replacing—voluntary associations in the realm of public discourse, much as she views it as complementing those associations as a site for the formation of social capital. That she does (unlike Post and Habermas) view the workplace as a site of public discourse, however, is plain: "[Workplace] conversations constitute a layer of public discourse . . . in which ordinary citizens themselves participate in a regular and vital way."[44]

After critiquing the arguments of Putnam and the deliberative democrats and making her affirmative case for recognizing the workplace as an important and distinctive forum for public discourse and social capital formation generally, in the second half of Part II Estlund examines in greater depth the claim that the hierarchical and economically-based power relations that characterize the workplace—i.e., the lack of equality and democracy within—necessarily exclude it from civil society. In the course of this discussion, she also considers another oft-stated ground for barring the workplace from this exalted realm: the pervasive governmental regulation to which it is subject—or stated another way, its lack of autonomy from the state. Here Estlund sets out not only to rebut these arguments but to turn them in her favor; she argues that these features of the workplace not only fall short of rendering it unfit for inclusion in civil society, but are the very features that by all rights entitle the workplace to a central role in that domain.

43. *Id.* at 122-23.

44. *Id.* at 123.

As for hierarchy and economic coercion, Estlund acknowledges that freedom and equality do not reign in the workplace. At the same time, she asserts, the imperative to get the job done—an imperative backed by managerial "coercion"—helps make workplace interactions more constructive and cooperative than they might otherwise be. At the most basic level, moreover, it is the need for a paycheck ("economic coercion," if you will) that gets and keeps people in cooperative relations with others whom they may not otherwise have chosen to associate with: in particular, with people of another race. Thus, Estlund contends, the "economic coercion" present in the workplace actually does much to enable the workplace to play such a constructive integrative function in our society.

As to the pervasive regulation to which the workplace is subject—a potential "barrier" not discussed in connection with Putnam or the deliberative democrats—Estlund first explains why many theorists consider this lack of autonomy from government fatal to any claim for inclusion in civil society; in their view, constituent associations of civil society must serve as a buffer between the individual and the state, and as a potential source of resistance to the state. These "shield" and "sword" functions,[45] Estlund acknowledges, are roles that voluntary associations may be able to play, but that the workplace clearly cannot; this is so because voluntary associations, unlike the workplace, lie beyond the purview of anti-discrimination law (and possibly within the constitution's protection of freedom of association). Armed with this autonomy from the state, Estlund argues, voluntary associations such as private clubs may well be productive of bonding ties. Their freedom from government regulation, however, foists the bridging role—a role that is crucial to our democracy—almost wholly onto institutions like the workplace that are subject to the anti-discrimination mandate. Thus, Estlund asserts, it is precisely the "pervasive regulation" to which the workplace is subject—and more specifically, the "compelled integration" produced by the anti-discrimination laws—that enables it to facilitate cross-racial public discourse and social ties, in Estlund's view important forms of social capital that accord the workplace a central role in civil society. Hence, neither internal democracy nor autonomy from the state, Estlund concludes, are requisite elements of sites of public discourse and institutions of civil society, and our society in fact benefits from the lack thereof in at least one major institution: the workplace.

Estlund closes Part II of *Working Together* with a strong statement of her disagreement with the prevailing view of civil society and its constituent elements, and of her thesis that the workplace, far from lying outside civil society, occupies a central role in that domain:

45. *See id.* at 106.

> [C]ontrary to the thrust of much of the growing literature [on civil society, civil engagement, and associational life], workplace ties do many of the things that civil society is supposed to do. [They] provide a medium for the cultivation of empathy and a sense of belongingness, of "social capital" and . . . norms of cooperation and reciprocity, . . . [and] of conversations that enrich public discourse. The fact that they cultivate all these qualities . . . and feelings in an environment of relative diversity and even compulsory integration makes the workplace a central and uniquely important component of civil society.[46]

B. Coercion as a Force for Good, and the Question of Audience

The strength of this middle section of *Working Together* lies in the intellectual force of Estlund's two central points: (1) that the workplace has been improperly excluded from or marginalized in accounts of civil society; and (2) that it is the very aspects of the workplace that have been viewed as "disqualifying" by others—the economic "coercion" and hierarchy within, and the coercion from without via government regulation such as the anti-discrimination laws—that enable it to play such a crucial role in "civil society." The latter point is particularly compelling and well-argued, and to my knowledge, Estlund's insights regarding the way that the coercion operating in and on the workplace should be read as "cutting" vis-à-vis its eligibility for membership in civil society are wholly original.[47]

Indeed, my main "complaint" about this section is that Estlund appears overly cautious at points—to my mind, a bit too reluctant to declare intellectual victory over her "opponents." In saying this, I should note that the above summary of Part II is just that; in the interests of clarity and brevity, I have omitted certain highly subtle qualifications to and twists and turns in Estlund's arguments that precede the bottom line conclusions set forth at section's end. Of course, Professor Estlund's restraint is in some—perhaps many—ways admirable. It may well be a product of a sense of collegiality and respect for other scholars who are doing serious (if imperfect) work, and there is nothing wrong with such civility. Nonetheless—and this may simply reflect the opinion of one who prefers something of a "take no prisoners" stance where one's "backup" warrants it (as I believe Estlund's does here)—I think her discussion of the workplace's role in democratic life would have been strengthened by a more confrontational, "head-on" approach. The deliberative democrats in particular seem guilty of a "pie in the sky" mode of analysis that is

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46. *Id.* at 138-39.

47. These arguments, as Estlund notes in the book's Preface, were first articulated in her article *Working Together: The Workplace, Civil Society, and the Law*, 89 GEO. L.J. 1 (2000) [hereinafter *The Workplace, Civil Society, and the Law*].

completely divorced from anything resembling the goings-on in the real world. Estlund so indicates in highly subtle terms—but where a stronger statement of "you've missed the boat" would have satisfied more deeply.

A second point I would note regarding Part II of *Working Together* is this. As I have stated, Estlund seems clearly to have bested the "insiders" at their own game here—and thereby to have made a highly significant contribution to the literature on civil society, social capital, and associational life generally. A question that may nag at some readers, however—depending on their background and interests—is: just how significant is it whether the workplace does or does not "count" as a form of social capital, or whether workplace conversations "qualify" as "public discourse"? That is, some outsiders to the literature may wonder how much they should care about the outcome of this inside game—as opposed to Estlund's overall exposition of the unique role that workplace ties play in our society. This is not a criticism of Estlund, but rather an observation or speculation about audience reaction. My own sense is that Estlund's insights into the importance of workplace ties would be considerably more difficult to appreciate were they not placed in the larger theoretical context in which she embeds them; labels and abstract constructs often enable us to recognize that which might otherwise pass us by with little (or less) notice. However, whether this question troubles Estlund's general audience or not will turn on who the audience for *Working Together* turns out to be—a question to which I shall return at the end of this review.

III.
BUILDING A DIVERSE DEMOCRACY THROUGH THE ANTI-DISCRIMINATION LAWS

A. The "Entry/Exit" Stage Problem and a Shift from Motive to Results

In Part III of *Working Together*, Estlund lays out her vision of what the law (and legal actors) could do to make the workplace an even better place for the development of bridging ties across racial lines. As noted earlier, she believes that the workplace is already the most important site in our society for the formation of those ties, but that this has resulted not from a conscious effort to make the anti-discrimination laws serve this end, but rather has developed as a byproduct of their aim of redressing and preventing discrimination. Estlund's overarching point in Part III of *Working Together* is that because the anti-discrimination laws already have a goodly amount of "traction" in the workplace, they could—if actually interpreted and applied with the explicit purpose of promoting integration as well as preventing and redressing discrimination—become an even more powerful tool for building a diverse democracy.

Estlund begins this discussion with a reexamination of the asserted justifications for affirmative action in the workplace. She argues that the conventional justifications—remedying the past effects of discrimination and promoting diversity in the workplace—should be jettisoned in favor of the more forward-looking and pragmatic justification of building a more integrated society. The remedial justification, she notes, increasingly meets with resistance and even hostility on the part of many whites. Indeed, while a recent survey shows strong support among whites for affirmative action in theory—half claim even to support a legal requirement of a certain degree of diversity—the same survey finds whites voicing overwhelming opposition to the proposition that "'because of past discrimination, qualified blacks should get preference over equally qualified whites in the workplace.'"[48] In other words, while half the whites surveyed claimed to support even quotas when dressed up in fancier terms, the vast majority opposed even the weakest form of affirmative action—the use of race as a tiebreaker—when the purpose given was that of remedying past discrimination.

As to the second conventional justification for affirmative action, that centering on diversity, Estlund argues that the integration rationale is superior in at least three respects. First, whereas the diversity justification rests on the purported beneficial effects of exposing all concerned (but perhaps the white majority especially) to differences—in background, experiences, and attitudes—thought to correspond to differences in race or ethnicity, the integration rationale emphasizes the benefits of the interracial connectedness and common ground that can arise in the workplace. Second, the integration argument avoids one of the major drawbacks of the diversity rationale: its rather distasteful and certainly ironic dependence (my terms, not Estlund's) on the use of race as a proxy for certain characteristics or ideas—that is, on just the sort of racial stereotyping that the anti-discrimination laws are aimed, at least in part, at combating. Rather than resting in some sense on such stereotyping, the integration rationale rests on the premise that the intergroup cooperation that takes place in an integrated workplace can help overcome the stereotypes and biases that whites tend to hold about blacks and vice versa. Third and finally, Estlund notes, the integration justification for affirmative action in the workplace is, unlike the diversity rationale for affirmative action, in no way dependent on the notion that a more diverse workforce will enhance the quality of the employer's products or services. This notion of "enhancement," which has played a significant role in constitutional cases

48. WORKING TOGETHER, *supra* note 1, at 147.

arising in the educational setting, most notably *Grutter v. Bollinger*,[49] simply does not translate well to the employment setting, Estlund points out.[50] Indeed, as discussed in Part I of *Working Together*, some studies suggest that diversity in the workforce may, at least in the short term, detract from rather than enhance productivity and the "bottom line." Wrapping up her argument in favor of the integration rationale, Estlund argues that the "societal calculus" is entirely different from the economic one: we live in a diverse society, and must learn to live in it and to govern it together. Whether or not it contributes to an employer's bottom line, she concludes, "working together"—that is, increased cooperative interracial contact in the workplace—contributes to our ability to do so.

Having concluded that the "societal calculus" strongly supports allowing employers to use affirmative action where necessary to achieve a reasonable degree of integration in the workplace, Estlund identifies two potential conflicts thereby created. The first is the legal conflict between Title VII's anti-discrimination mandate and the use of race to allocate a limited number of jobs; the second is the very real potential that such preferential actions may lead to counterproductive and divisive workplace dynamics.

Asserting a reluctance to delve too deeply into the "technical terrain" necessary to a thorough analysis of whether the goal of integration is sufficient to justify race-based preferences, Estlund deals with the legal conflict relatively briefly. First, she cites what she terms the "extensive empirical evidence"[51] that a more than token representation of minorities in a given workplace—that is, the presence of a "critical mass," reduces both conscious and unconscious bias against those groups. Drawing on the work of Michael Yelnosky, she thus argues that affirmative action can be justified "within the four corners of [Title VII]" as a means of preventing racial discrimination.[52] Second, Estlund asserts that we must openly recognize and even embrace "'asymmetry'" in anti-discrimination law—the notion that:

> Employment discrimination *in favor of* racial groups (and women) that were long excluded and segregated and are still disadvantaged in the labor market is fundamentally different, morally and legally, from discrimination

49. 539 U.S. 306 (2003) (upholding University of Michigan Law School's affirmative action program).

50. Professor Estlund discusses this point at greater length in her article *Putting* Grutter *to Work: Diversity, Integration, and Affirmative Action in the Workplace*, 26 BERKELEY J. EMP. & LAB. L. 1 (2005). *See also* Cynthia Estlund, *Taking* Grutter *to Work*, 7 GREEN BAG 2D 215 (2004).

51. WORKING TOGETHER, *supra* note 1, at 149.

52. *Id.* (citing Michael Yelnosky, *The Prevention Justification for Affirmative Action*, 64 OHIO ST. L.J. 1385 (2003)).

against those groups. The former still must be justified, but it sometimes can be; the latter cannot.[53]

In her more extensive discussion of the practical problem posed by affirmative action in the workplace—its potential for fomenting discontent and divisiveness among co-workers—Estlund first notes that this potential is much higher when affirmative action is applied to promotions and discharges, that is, to those already in the employer's workforce, than to hiring. She then uses this point to segue into a discussion of "ordinary" anti-discrimination law (i.e., the law outside the affirmative action context), and how it creates perverse incentives for employers at the hiring versus the discharge stage (the "entry/exit stage" problem), and in a way that serves only to exacerbate interracial tensions.

The original focus of Title VII, Estlund notes, was on hiring discrimination. Nonetheless, by the 1970s (i.e., a decade or so after the Act's passage in 1964), hiring cases were already declining in number, while discharge cases were beginning to skyrocket. Indeed, John Donahue and Peter Siegelman found that as of 1989, an employer who fired an employee falling within a protected class under Title VII was 30 times more likely to face litigation than one who failed to hire a member of a protected class to begin with[54]—even though discrimination is likely most prevalent at the hiring stage, when employers have little particularized information about the applicants, and the salience of group traits like race (and the operation of accompanying biases) are therefore at their highest. Hiring discrimination, while common, is difficult to detect, and difficult for an individual applicant to challenge.

Of course, as Estlund notes, while there is plenty of discriminatory discharge litigation to be had, neither black employees nor members of other protected classes tend to be terribly successful in that litigation, for a number of reasons. First, as employers have become more liability-conscious, they have become much savvier about avoiding race-based remarks and the like; smoking guns, as Estlund noted in Part I, are now a rare bird in race discrimination suits. Second is the paper trail problem also initially discussed in Part I; in order to win a discriminatory discharge suit, a plaintiff must prove bad motive on the part of an employer who created and controls the relevant documents, such as performance evaluations. Although unconscious bias may have been the cause of lower evaluations for black employees in some instances, these evaluations are nonetheless used and treated as strong evidence in the employer's favor in litigation. A final reason for the concomitant high incidence of litigation but low

53. WORKING TOGETHER, *supra* note 1, at 149.

54. *See* John J. Donahue & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983, 1027 (1991), *cited in* WORKING TOGETHER, *supra* note 1, at 150.

plaintiffs' win rate in Title VII discharge cases, Estlund concludes, is the general rule of employment at-will; because simple favoritism, bad management, and "garden-variety unfairness" will not support a cause of action—but race discrimination will—black employees believing themselves to have been fired unfairly have an incentive to look high and low for signs of discrimination and to pour their claims into the only available legal "vessel," Title VII and its state-law counterparts.

All of this brings Estlund to a key point in her argument. Despite the fact that most discriminatory discharge suits fail, she points out, the mere prospect of later litigation acts, in the words of Ian Ayres and Peter Siegelman, as a "tax" on minority hiring.[55] That is, because hiring a minority applicant is much more likely to lead to litigation if that person is ultimately discharged than hiring a white applicant, employers have an economic incentive to discriminate against minorities at the hiring stage, at least at the margins; the prospect of "exit-stage" discrimination litigation operates to reduce opportunities for minorities at the entry stage. Moreover, in a particularly ironic twist, the most discriminatory employers, those who hire very few minorities, are actually "rewarded" for their discrimination by a reduced prospect of subsequent litigation—thus perpetuating minority under-representation in the workplaces most in need of integration.

The "entry/exit stage" problem outlined above is further complicated, Estlund believes (with some empirical backing), by a tendency at large companies at least for employers to tip the scales slightly in favor of minority employees when layoffs and discharges are involved, so as to avoid litigation. As a result, white managers tend to believe that they are actually favoring black employees slightly—by laying off a marginally more-qualified white employee rather than a black employee, for instance, or delaying or even avoiding the discharge of a poor-to-marginally performing black employee—and white workers are likely to share this perception, giving rise to resentment against their black co-workers. Black workers, on the other hand, are likely to perceive themselves as victims of prejudice due to the unconscious biases operating in "lower-level" decisions such as performance evaluations and work assignments, Estlund argues. The end result?: an exacerbation of interracial tension in the workplace.

Estlund suggests two general strategies for simultaneously counteracting or removing the perverse employer incentives and the tendency toward divisiveness created by current law, and making Title VII a more effective guarantor of equal employment opportunity and stimulus

55. *See* Ian Ayres & Peter Siegelman, *The Q-Word as Red Herring: Why Disparate Impact Liability Does Not Induce Hiring Quotas*, 74 TEX. L. REV. 1487, 1488 (1996), *cited in* WORKING TOGETHER, *supra* note 1, at 152.

for workplace integration. The first concerns the content of the law, the second the mode of its enforcement.

As to content, Estlund advocates a shift away from the current focus on motive and in the direction of greater emphasis on results—that is, on bottom-line statistics. The presence of a substantial number of minorities in the workplace, she asserts, both tends to reduce actual discrimination (the "critical mass" as prevention notion discussed above[56]), and to demonstrate the employer's lack of bias. Moreover, she notes, giving employers more credit for hiring minorities in suits challenging discharges as discriminatory would do much to counteract the perverse incentives they currently face at the hiring stage. In addition, given the difficulty of detecting discrimination in hiring cases, Estlund recommends that exemplary (perhaps treble) damages be made available in such cases.

On the enforcement front, Estlund recommends that the EEOC (Equal Employment Opportunity Commission) and its state-law counterparts redirect their efforts from the discharge to the hiring stage. In particular, she would have them devote greater resources to identifying workplaces with "bad numbers" (my term) and investigating the possibility that discrimination is at work there, and to investigating and prosecuting "large-scale" (presumably "pattern or practice") hiring cases more generally.

Finally, Estlund endorses an approach first put forth by Ayres and Siegelman—the implementation of a statutory probation period during which an employee could be fired without any risk of Title VII liability.[57] Many perfectly legitimate discharges, she notes, occur early on, because employers learn much about an employee's performance during the first several months that simply cannot be known ahead of time. A statutory probationary period might well induce employers to take greater risks in hiring minority employees, secure in the knowledge that if the employee "doesn't work out," he or she can be fired without risk of bringing on a Title VII suit as long as action is taken relatively quickly.

The probationary period approach, Estlund points out, effectively reduces the current "tax" on the hiring of minorities by reducing the possibility of "exit stage" discrimination litigation. Viewed slightly differently, it reduces the gap between the expected cost of discharge litigation by minority versus non-minority employees. A more drastic way of reducing this gap, Estlund notes, would be to abandon the rule of at-will employment in favor of some form of just cause protection for all employees. We are virtually the only industrialized nation in the world, she notes, that does not require employers to demonstrate a legitimate reason

56. *See* text accompanying note 52.

57. *See* Ayres & Siegelman, *supra* note 55, at 1520, *cited in* WORKING TOGETHER, *supra* note 1, at 155.

for discharging an employee, and such a requirement would actually provide minority employees with greater protection than Title VII, which requires the employee to prove a bad motive for the discharge. By the same token, she warns, here we must bear in mind the "hydraulics" of the labor market[58]—that is, employers' ability to change their practices in response to legal constraints. If employers reacted to a universal just cause requirement by relying more heavily on "contingent" workers such as "temporary" employees or contract workers, the end result could be less rather than more legal protection for many workers.

B. Estlund's Approach and the Blumrosen Study

The arguments laid out above are packed into a mere dozen pages of *Working Together*—one of the most forceful sections of the book, to my mind. First, Estlund's arguments regarding the superiority of the integration rationale over the more conventional justifications for affirmative action appear dead on. It seems clear that whites (whether rightly or wrongly) simply do not want to hear about the "victimization" of blacks in the workplace anymore, and the "diversity" justification touted so heavily in the educational context, with its strong implicit reliance on racial and ethnic stereotypes, has become, to this ear anyway, rather painful. Moreover, as Estlund points out, the diversity argument simply does not transfer to the workplace context; employers are not educators, and they are legally entitled to be concerned with profit and loss rather than how much their employees are learning from each other's life experiences. She makes a powerful argument, however, that we as a society *are* entitled to be concerned with the non-economic benefits of interracial interaction in the workplace, and to adapt the interpretation of our anti-discrimination laws to reflect that concern.

Estlund's discussion of the "entry/exit" problem and the "tax" imposed on minority hiring by the potential for exit-stage discrimination litigation, moreover, is extremely compelling. It is true that the "tax" idea and the more general notion of a tradeoff between the cost of firing black workers and the likelihood of their hiring were originated by others, such as Siegelman and his collaborators (and, interestingly enough, ultimately trace back to Judge Richard Posner).[59] Estlund lays out the problem, however—and in particular, the perverse incentives it creates—in an inexorably logical fashion.

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58. The "hydraulics" concept is borrowed from the work of Samuel Isaacharoff and Pamela S. Karlan. *See* Samuel Isaacharoff and Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705 (1999), *cited in* WORKING TOGETHER, *supra* note 1, at 167.

59. *See* Ayres & Siegelman, *supra* note 55, at 1526 n.7 (tracing this history); *see also* Richard A. Posner, *The Efficiency and the Efficacy of Title VII*, 136 U. PA. L. REV. 513, 519 (1987).

As to the solutions advanced in Part III, Ayres and Siegelman's "probationary period" proposal is doubtless far too sensible to be enacted—despite the fact that such probationary periods are standard in government employment (as well as many unionized workforces). Estlund's suggestion regarding treble damages is similarly logical but (as she undoubtedly recognizes) similarly unlikely to become law; its premise is too subtle and its targeting too specific for Congress to reopen the Title VII remedial scheme it drastically revised less than fifteen years ago.[60]

What is perhaps Estlund's primary "legal" solution—that of putting more emphasis on results than on motive and giving employers more credit for hiring minorities in discharge cases—is, while highly logical given her exposition of the entry/exit problem and the paper trail and other problems inherent in proving bad motive in discharge cases—very difficult to assess. Given Estlund's asserted reluctance to delve into "technical terrain" that might presumably "lose" her non-legal audience, it is hard to get even the vaguest of handles on what she has in mind here. Even in her endnotes, she states only that "the fact of an integrated workforce should be relevant evidence for the defense of a suit charging exit discrimination."[61] But such evidence has always been considered relevant, although not determinative, in individual disparate treatment cases.[62] Estlund clearly thinks it should be given greater relevance, but the complete lack of detail or even a single concrete example here prevents the reader from forming much of an opinion of her proposal.

As to enforcement of the anti-discrimination laws, Estlund's proposal that the EEOC focus more on "pattern and practice" cases dovetails neatly with the arguments advanced in recent work by Alfred and Ruth Blumrosen of Rutgers University.[63] Using data from the EEOC's own "EEO-1" forms, a breakdown of the workforce by employee race, ethnicity and sex in nine job categories that must be filed by private employers with 100 or more employees as well as certain federal contractors with 50 or more, the Blumrosens concluded that 37% of the employers based in metropolitan areas were discriminating against minorities in at least one category, and 29% against women.[64] They based their conclusions on the "two standard deviations" benchmark generally used in "*Teamsters/Hazelwood*" pattern or

60. *See* Civil Rights Act of 1991, § 102, Pub. L. No. 102-166, 105 Stat. 1071 (1991); 42 U.S.C. § 1981a (as amended 1991) (providing, for the first time, for compensatory and punitive damages under Title VII).

61. WORKING TOGETHER, *supra* note 1, at 212 n.32.

62. *See* Furnco Constr. Co. v. Waters, 438 U.S. 567, 579-80 (1978).

63. *See* ALFRED W. BLUMROSEN & RUTH G. BLUMROSEN, THE REALITY OF INTENTIONAL JOB DISCRIMINATION IN METROPOLITAN AMERICA—1999 (2002), http://www.eeo1.com/1999_NR/1999_nr.htm.

64. *Id.* at Chapter 9, § 1.

practice cases,[65] under which a difference of two standard deviations (which equals a probability of 5% or less that the disparity is a product of chance) or more between the actual number of a protected class in a position and the number one would expect based on the qualified relevant labor market gives rise to a presumption of intentional discrimination. The Blumrosen study caused quite a stir, and the EEOC (which recently approved revisions to the categories used on the form)[66] has refused to grant the researchers access to any further EEO-1 data.[67]

Interestingly, the Blumrosens' proposals regarding EEOC enforcement policy are similar to Estlund's, albeit more specific. They recommend that the EEOC (and the OFCCP, or Office of Federal Contract Compliance Programs) use the very data sitting in their files and carry out statistical comparisons similar to those that they performed to identify workforces where minority representation is far below that in comparable establishments.[68] These establishments, the Blumrosens assert, should first be put on notice of the statistical disparity, thus giving them the opportunity to change their hiring practices to improve the "bottom line," to put forth a nondiscriminatory reason for the disparity, or, if they so choose, to do nothing. Depending on an employer's response, the Blumrosens conclude, the EEOC should then target an appropriate subgroup of these establishments for further investigation and possible litigation.[69]

The EEOC, for its part, claims that it is devoting more resources than in the past to class-type suits, but as of 2004 roughly two-thirds of the suits it filed were on behalf of individual plaintiffs, and the remaining one-third or so were characterized only as "involving multiple aggrieved parties or victims of discriminatory policies,"[70] a rather amorphous category, to say the least. The combination of Estlund's intellectually powerful arguments and the Blumrosens' data surely suggests that a much more dramatic shift in resources is in order.

Returning to my overall assessment of Part III of *Working Together*, two additional criticisms occur. First, Estlund's discussion of the possibility of narrowing the "cost of potential discharge" gap by abandoning the "at-will" doctrine seems less thoroughly thought through

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65. *See* Teamsters v. United States, 431 U.S. 324 (1977); Hazelwood School Dist. v. United States, 433 U.S. 299 (1977). The standard derives from *Casteneda v. Partida*, 430 U.S. 482, 497 n.17 (1977).

66. *See EEOC Gives Final Approval to Revised EEO-1; Changes Set for 2007, Pending Okay by OMB*, Daily Lab. Rep.(BNA) No. 221, at AA-1 (Nov. 17, 2005); *see also* Final Notice of Submission for OMB Review, 70 Fed. Reg. 71294 (Nov. 28, 2005).

67. *See* Alfred W. Blumrosen and Ruth G. Blumrosen, *Intentional Job Discrimination—New Tools for Our Oldest Problem*, 37 U. MICH. J. L. REFORM 681, 698-701 (2004).

68. *Id.* at 698.

69. *Id.*

70. *See New National Call Center, Agency Reorganization Ahead for EEOC in 2005*, Daily Lab. Rep. (BNA) No. 11, at S-27 (Jan. 18, 2005).

than most of her arguments. While the "hydraulics" point she makes is an excellent and sophisticated one, it seems a bit one-sided to note that we stand virtually alone among the industrialized countries in not requiring employers to prove "just cause" without mentioning that we are also the only nation to provide full-blown jury trials in discharge cases[71]—a fact that must surely figure into the feasibility (or details) of adopting such a scheme. Second, as with Part I of *Working Together*, this final section suffers from substantial overinclusiveness. The dozen "power-packed" pages that I described above are followed by twenty more dealing with a polyglot of issues such as sexual harassment law, comparable worth, the restrictions on "employee involvement" programs posed by Section 8(a)(2) of the National Labor Relations Act, and even the possibility of instituting government-backed employee representation in workplaces run by repeat violators of the employment laws. While much of this material is set off in a separate chapter from the material discussed above, it nonetheless appears extraneous to me, and a significant distraction from the overall power of Estlund's thesis. Given Estlund's general highly disciplined and almost relentlessly logical style of presentation, I find myself a bit puzzled by these seeming digressions into largely unrelated territory. They may stem from the difficulties of building a unified book on the foundation of four separate law review articles,[72] or perhaps from the demands of the publisher for a suitably lengthy manuscript; "extraneous" material included, *Working Together* still weighs in at only 181 pages of text. But this may well be a Miesian case in which less would be more.[73]

IV.
CONCLUSION

The comments just above should in no way be construed as an overall "indictment" of *Working Together*. To the contrary, I believe the book deserves to be widely read, and it is unfortunate that (so far as I can tell) Oxford has done very little to market it. *Working Together* has all of the strengths of Cynthia Estlund's overall body of work; it combines a highly imaginative big picture with the back-up and careful consideration of

71. *See* Samuel Estreicher, *Predispute Agreements to Arbitrate Statutory Employment Claims*, 72 N.Y.U. L. REV. 1344, 1357 (1997) (noting that "European countries with wrongful dismissal laws rely on specialized labor tribunals (essentially tripartite arbitration boards)," not jury trials).

72. Those articles are, in addition to *The Workplace, Civil Society, and the Law*, *supra* note 47, *Freedom of Speech in the Workplace and the Problem of Discriminatory Harassment*, 75 TEX. L. REV. 687 (1997); *The Workplace in a Racially Diverse Society: Preliminary Thoughts on the Role of Labor and Employment Law*, 1 U. PA. J. LAB. & EMP. L. 49 (1998); and *The Changing Workplace as a Locus of Integration in a Diverse Society*, 2000 COL. BUS. REV. 331 (2000).

73. Interestingly, van der Rohe apparently borrowed his "less is more" motto from a poem by Robert Browning. *See* AMERICAN HERITAGE DICTIONARY OF AMERICAN QUOTATIONS 48 (1997).

counter-arguments that do not, alas, invariably accompany such creative scholarship. Moreover, the sheer diversity of sources upon which Estlund has drawn—social science data, political theory literature, and the real-world realm of anti-discrimination law—is truly impressive, as is the use she makes of those sources.

Nonetheless, the topic of sources brings me back to the question of "audience" raised earlier in this review. As a professor of employment discrimination law, I found the marriage of social science data from Part I and the more lawyerly discussion of the "entry/exit" problem in Part III immensely helpful in thinking about the state of American discrimination law. At the same time, I must confess, I found myself a bit less interested in Part II's discussion of "social capital" and "deliberative democracy." While fully convinced by Estlund's arguments that the workplace plays a central role in "public discourse" and "civil society," the question of whether this "inside game" was really worth the candle (although ultimately resolved in my mind in Estlund's favor) continued to nag at me as I read.

On the flip side of the coin, when reading the discussion of the "paper trail" and "entry/exit" problems in Parts I and III, I found myself nodding along while reading, completely carried away by the logic of Estlund's arguments. Given the complete absence of any case citations or discussions of doctrine, however—a conscious omission meant to "retain" the non-lawyer reader, I wonder whether one unfamiliar with that doctrine could really understand or appreciate the force of her arguments.

And therein lies the "problem," such as it is, with *Working Together*. In attempting to combine social science research, political theory and the state of anti-discrimination law in one book, Estlund's work may somehow fall between the cracks, perhaps losing the more concrete thinkers in the crowd with a middle section focused on highly theoretical political science literature, while simultaneously losing the more theoretically inclined with a tremendously insightful discussion of anti-discrimination law—albeit one that is likely not readily understood by non-lawyers, or even, I would guess, by lawyers lacking a reasonable grounding in employment law.

That being said, I came away from *Working Together* with a much richer understanding of the central role that the workplace plays in our demographically diverse society (and how that role might be enhanced), as well as some critically valuable insights into the perverse incentives and interracial tensions created or exacerbated by our current anti-discrimination laws, and how they might be redressed if only we gave proper recognition to the value of "working together": that is, to the crucial importance of the interracial interactions that take place every day in the American workplace. *Working Together* is a book of tremendous breadth and ambition, and it is hard to see that as a fault.