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The Value of *Values and Assumptions* to a Practicing Lawyer

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INTRODUCTION

In 1992, Judge Harry T. Edwards of the United States Court of Appeals for the D.C. Circuit published an article entitled *The Growing Disjunction Between Legal Education and the Legal Profession.*[1] The thesis of the article was that "law schools . . . [had] abandoned their proper place, by emphasizing abstract theory at the expense of practical scholarship and pedagogy"; and that, as a result, law school graduates were increasingly ill-equipped to practice law at the highest levels of the profession.[2] Practitioners, moreover, viewed the legal academy as increasingly irrelevant to their work. That article is still generating controversy and rebuttal; it spawned an American Bar Association task force and several symposia and is a topic of law school retreats and semi-empirical investigation today.

Relevant here, in his Article, Judge Edwards delineated his vision of the "practical scholar." This is a scholar who "gives due weight to cases, statutes and other authoritative texts, but also employs theory to criticize doctrine, to resolve problems that doctrine leaves open, and to propose changes in the law or in systems of justice. Ideally, the 'practical scholar' always integrates theory with doctrine."[3] And, to this ideal, he added another—that the practical scholar be a teacher who provides students with "the basic doctrinal skills: the capacity to analyze, interpret and apply cases, statutes, and other legal texts," but also teaches them how "to understand and apply theoretical frameworks and philo-

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1. 91 MICH. L. REV. 34 (1992).

2. *Id.*

3. *Id.* at 35.

sophical concepts so that they will have a capacity to think beyond the mundane" in practicing law.[4] The scholar and teacher Judge Edwards was describing is the author of *Values and Assumptions in American Labor Law*, Professor James Atleson.

I hope that Professor Atleson will not be horrified by this praise of his book's pragmatic value. Of course, *Values and Assumptions* is an important piece of the rich normative scholarship of critical legal studies of labor law, a scholarship that includes Karl Klare's *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*,[5] and Katherine Stone's *The Post-War Paradigm in American Labor Law*.[6] When I read *Values and Assumptions* in manuscript during my first year of law school in 1982, it was in this context. The book's thesis was a revelation, albeit one that fit beautifully into the fabric of a first-year curriculum that included *Death of Contract*[7] and *The Transformation of American Law*.[8] At that time, however, I, like many students and some scholars,[9] viewed *Values and Assumptions* solely as part of the critique of legal doctrine made by outsiders and relevant only to outsiders, defined as those seeking to change the law or expose as pretense the law's claim of principled coherence. In the twenty years that have followed, I have practiced law as a labor lawyer and an appellate generalist, and I have discovered exactly how wrong I was.

In the specifics of its analysis of labor law issues, in its examination of the common law origins of legal rules and doctrine, and in its general methods of case-law examination and critique, *Values and Assumptions* has important lessons for the practitioner. This Essay will provide concrete

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4. *Id.* at 38-39.

5. Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 MINN. L. REV. 265 (1978).

6. Katherine Van Wezel Stone, *The Post-War Paradigm in American Labor Law*, 90 YALE L.J. 1509 (1981).

7. GRANT GILMORE, DEATH OF CONTRACT (1974).

8. MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870-1960 (1992).

9. *See, e.g.*, Matthew W. Firkin, *Reflections on Labor Law Scholarship and Its Discontents: The Reveries of Monsieur Verog*, 46 U. MIAMI L. REV. 1101, 1124 (1992).

and case-specific illustrations of the value of *Value and Assumptions* to the practicing lawyer in each of these respects. These examples, I hope, will illustrate for students the fundamental importance of the book's critical analysis to excellent lawyering on behalf of clients, no matter which position one advocates in a case. I apologize for the personal nature of this exploration; but I can otherwise add little new to the book reviews, praise, and critiques of *Values and Assumptions* already published in law reviews. The extensive commentary on the book and the numerous citations to it since publication are a tribute to its importance. This Essay is, however, simply a constructive thank-you note to James Atleson, Fred Konefsky, John Schlegel, and the other Buffalo Law School professors who offer students the tools to think creatively about legal problems.

I. *VALUES AND ASSUMPTIONS* AND THE PRACTICE OF LAW

A. *The Practice of Labor Law*

After analyzing numerous Supreme Court cases, Professor Atleson concludes that the labor law doctrine announced by these cases cannot be derived from either the text or the history of the National Labor Relations Act (NLRA). One of the central themes of *Values and Assumptions* is that labor law doctrine can be rendered coherent if viewed as the product of a set of underlying but unstated values and assumptions that judges employ in interpreting the NLRA and, indeed, all federal labor legislation.[10] Stating the unstated, Professor Atleson posits: (1) that the judiciary's primary values in announcing labor law include ensuring the continuity of production and management control of the business enterprise, and (2) that judges assume that unless controlled, employees will act irresponsibly and disloyally because they have no interest in the enterprise beyond the specific terms of their employment contracts.[11]

Like any practicing lawyer, a labor lawyer briefing a labor law issue faces certain constraints. If the particular question has actually been decided by the Supreme Court—*i.e.*, can economic strikers be permanently replaced?—the

10. *See, e.g.*, JAMES B. ATLESON, VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW 4-10 (1983).

11. *Id.* at 7-9.

lower courts and the National Labor Relations Board (NLRB) are bound, and there is little one can do (other than argue that the rule does not apply to your facts). But these are not the cases that get litigated, as a general rule. Instead, clients present questions, and lawyers can identify the general rule that governs, but it is unclear how the law applies to that client's facts. Understanding the reality that Professor Atleson lays out in his book substantially assists the labor lawyer confronted with a difficult labor law issue.

To understand why this is true, a practicing lawyer must operate on two assumptions that are generally, but not always, correct—specifically, that the meaning of a statutory text can be determined within some reasonable range of meaning by application of accepted legal interpretive techniques, and that judges can and will both discover and enforce that meaning even if they disagree with the policy choices it represents. I recognize that many disagree with these assumptions, but they have proven accurate often enough in my twenty years of practice that I am dismayed when they fail.

If a practitioner accepts that text and extant case law has meaning that can reasonably be discerned, then the direct exposure of a value or assumption that might pollute or taint the judge's reading of the text or case can prevent the judge from unconsciously enforcing his or her own value and cause that judge to attempt to reach and justify a decision that conforms to aspirational norms of judging in our system. At the very least, it can press a court to address the real basis for its conclusion and to deal with counterarguments directly, better presenting the issue for review. In other instances, exposing the values and assumptions that undergird a legal rule may enhance the argument that the rule applies in a particular case because it produces the outcome that best comports with statutory purposes. In practicing labor law, Professor Atleson's analysis allows a lawyer to understand when unrecognized values and assumptions might torpedo or illuminate an argument, to identify those considerations, and to explain why they should or should not govern.

My examples principally involve the book's treatment of "mandatory subjects of bargaining." The NLRA requires employers and unions to bargain in good faith about "wages,

hours, and other terms and conditions of employment . . . ."[12] The Supreme Court has held that employers and unions are only required to bargain about, and only permitted to engage in economic warfare over, "subjects of mandatory bargaining."[13] Only those subjects that directly affect vital employee interests are mandatory; and certain subjects that directly affect vital employee interests (such as plant closures) are not mandatory if bargaining about those topics would not further the purposes of the NLRA.[14] Employees and employers may bargain about other "permissive" subjects of bargaining, but may not engage in economic warfare over them, even if the employer unilaterally modifies an agreement reached about a permissive subject of bargaining.[15] To skim the surface of Professor Atleson's analysis, the book argues that the Supreme Court's definition of the scope of mandatory bargaining in its cases rests on inchoate notions of "inherent managerial prerogatives," including the necessity of management control for the success and efficiency of the business enterprise and the incompetence and lack of employee interest with respect to management of the enterprise.[16]

I have been outside labor counsel to the Major League Baseball Players Association for many years, and they have asked me at various times whether the following subjects are "mandatory subjects of bargaining": (1) the Major League draft; (2) revenue sharing among the Clubs; (3) the contraction of the Minnesota Twins; (4) the reserve system and salary arbitration; and (5) the amendment of federal law to eliminate the anti-trust exemption for Major League Baseball, etc. In each instance, I returned to the relevant chapter of *Values and Assumptions* for assistance in craft-

12. 29 U.S.C. § 158(a)(5), (d) (2000).

13. *See* NLRB v. Katz, 369 U.S. 736, 737, 743 (1962).

14. *See* First Nat'l Maint. Corp. v. NLRB, 452 U.S. 666, 679 (1981); Allied Chem. & Alkali Workers of Am. Local 1 v. Pittsburgh Plate Glass Co., 404 U.S. 157, 178-80, 188 (1971); Textile Workers Union of Am. v. Darlington Mfg. Co., 380 U.S. 263 (1965); Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203 (1964).

15. *See Pittsburgh Plate Glass*, 404 U.S. at 188. Although no economic warfare is permitted over unilateral changes in permissive subjects of bargaining, the affected employees may sue to enforce any contract rights. *Id.* at 181 n.20.

16. *See* ATLESON, *supra* note 10, at 143-59.

ing arguments that these subjects are mandatory.

The arguments concerning the contraction of the Minnesota Twins are illustrative.[17] The Supreme Court had already decided that plant closures and partial closures are *not* mandatory subjects of bargaining when based on economic decisions, and the Clubs relied on the analogy between closing or partially closing a plant and eliminating a single Club, the Twins. The Clubs stressed that the Court's jurisprudence was focused on giving employers control of decisions that alter the scope and direction of the business enterprise. Clearly, the Association could not conduct the argument purely in terms of the language of the Court's plant-closing decisions. Instead, the Association made two types of legal arguments that sought to shift the focus from management's right to control the enterprise to acknowledged terms and conditions of employment.

First, the Association demonstrated that contraction was not a management decision focused on efficient business operations, but was instead a *collective bargaining strategy*, intended to obtain a labor deal with salary restraints and to force the Association to allow more revenue sharing among Clubs so that small market Clubs could compete. The argument was that because the Clubs made the contraction decision to address labor costs and other labor-related issues, it was a mandatory subject.

Second, the Association pointed out that the Supreme Court had indicated that the analysis of whether certain subjects are mandatory might turn on the unique characteristics and history of an industry. In Major League Baseball, the scope of the bargaining obligation is broader than in traditional sectors of the economy because a wider range of issues directly relate to labor costs. Critically, the Association argued that:

> In this industry, players constitute a major portion of the Clubs' capital, and the Clubs' product is exhibitions among its employees. Players' interests and legitimate labor interests thus overlap with issues of capital and product frequently. That is why the draft, revenue sharing, and product design issues are mandatory subjects in baseball, though the analogous subjects may be permissive in

17. *See* Brief of the Major League Baseball Players Association at 51-71, *In re* Major League Baseball Players Ass'n v. Thirty Major League Clubs, Grievance No. 2001-22 (2002) (Das, Arb.) (on file with arbitrator).

> other industries. . . . [N]egotiation about proposed solutions to payroll disparity, competitive imbalance and revenue sharing issues is the very definition of negotiation in this industry. Contraction is just one more such issue.[18]

In this connection, the Association elaborated that although decisions about product design are not usually mandatory subjects, they are mandatory subjects where, as in baseball, the "employees' performance is the marketed product."[19] Moreover, the Association argued, removing this subject from the bargaining mix would be destructive to the goal of labor peace embodied in the NLRA because it was so intimately related to the fundamental and concededly mandatory issues of salary at the heart of the dispute between these bargaining parties.

Finally, the Association argued that baseball's exemption from the antitrust laws and protection from competition eliminated the justification for giving this employer broad discretion to make business decisions unilaterally. The Association pointed out that the two bases for shielding an employer's capital investment and withdrawal decisions from bargaining are "the rights that attach to owners of private property; and [ ] the efficiency benefits achieved by the market's unfettered determination of where capital should be invested."[20] But, the Union argued, these benefits do not apply to Major League Baseball, which makes its franchise location decisions without competitive constraints. "Accordingly, there can be no substantial claim of economic efficiency in protecting the rights of owners of capital freely to withdraw and invest that capital."[21]

Because this grievance was settled—as you know by the fact that the Twins remain in Minnesota—it is uncertain whether the Arbitrator would have accepted the Association's attempt to demonstrate that contraction is a mandatory subject of bargaining. What is critical for purposes of this paper, however, is the nature of the arguments required to make the attempt. The Association's arguments understand the fundamental concern underlying the Su-

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18. *See id.* at 4-5.

19. *See* Ethan Lock, *The Scope of the Labor Exemption in Professional Sports*, 1989 DUKE L.J. 339, 411.

20. Brief of the Major League Baseball Players Ass'n, *supra* note 17, at 70.

21. *Id.* at 71.

preme Court's plant-closing and mandatory-subject jurisprudence and directly respond to that concern in several ways. First, they seek to distinguish contraction from an economic decision and to tie it to concededly mandatory subjects. Second, they seek to distinguish baseball from other industries in terms that identify the players' interests with capital and show that the Clubs' "retained freedom to manage its affairs unrelated to employment" is correspondingly limited.[22] Finally, they tie the history of bargaining in the industry to the interests that undergird contraction. These arguments acknowledge and attempt to deal directly with the values and assumptions inherent in delineating mandatory subjects of bargaining.

A second example may be found in the Association's arguments that revenue sharing *among the Clubs* is a mandatory subject of bargaining with the Union. The Clubs have argued that this subject is solely a matter of capital movement within the business and within their sole discretion, and therefore that they could unilaterally alter revenue sharing arrangements without bargaining. That argument arose both in connection with contraction and in the protracted, stormy negotiations for the 1997 Basic Agreement. In responding to this argument, the Association has demonstrated both that revenue sharing is intended to and does in fact address salaries and payroll disparity, and that it is inextricably intertwined with bargaining about those plainly mandatory subjects. Specifically, the Association has argued, revenue sharing regulates player salaries by providing low-revenue Clubs with money to use for salaries and by reducing the income of high-revenue Clubs to moderate their salary spending. In addition, the Association contends, high income Clubs set the market price of free agents; when they have more money, the market is generally higher to the benefit of all players; increased revenue sharing drops the market price of all players. Finally, the Association has pointed out the consequences of the absence of competition in the industry—that there are no competition-based benefits to allowing Major League Baseball to make the revenue sharing decision unconstrained.

Like the argument that contraction is a mandatory subject, the Association's arguments on revenue sharing proceed from the premise that the governing jurisprudence is

22. First Nat'l Maint. Corp. v. NLRB, 452 U.S. 666, 677 (1981).

based on a set of values and assumptions that must be addressed and distinguished in order for the client to prevail.

One last example: I was part of the team that represented the Association in its litigation following the 1994 season-ending strike. At the heart of that case, too, was a question of mandatory bargaining—whether Baseball's reserve, free-agency, and salary arbitration systems constituted mandatory subjects of bargaining.

After the 1994 strike ended the 1994 season, the parties continued negotiating through the winter, but spring training approached with no resolution in sight. Although the salary cap and revenue sharing divided the parties, they clearly had not reached an impasse in bargaining. In December 1994 the Clubs nonetheless unilaterally implemented a salary cap and revenue sharing proposal, and we filed an unfair labor practice charge, asserting that the Clubs had unilaterally altered terms and conditions of employment without bargaining to impasse and seeking restoration of the contract terms for off-season free agent negotiations and salary arbitration.

After briefing before the NLRB and meetings suggesting that the Clubs would be found to have unilaterally altered terms and conditions of employment before bargaining to impasse, on February 3, 1995, the Clubs rescinded their unilateral implementation of the cap and revenue sharing proposal. That decision, however, was simply laying the groundwork for the Clubs' move to a different tactic.

On February 6, 1995, the Clubs announced that until a new collective bargaining agreement was ratified, individual Clubs lacked authority to negotiate with individual players because the Player Relations Committee—the Clubs' bargaining representative—was now the exclusive bargaining representative. This eliminated free agency and salary arbitration, and also violated a provision of the collective bargaining agreement known as the anti-collusion clause, which forbid the Clubs to act in concert with each other in negotiating salaries with free agents. There was no dispute that these changes had not previously been the subject of bargaining, let alone any impasse in bargaining; nor was there any dispute that they violated the collective bargaining agreement. Thus, if the reserve system, free agency, salary arbitration, and anti-collusion were mandatory subjects of bargaining, the Clubs had again committed an unfair labor practice.

In hindsight, it appears that the Clubs had decided that they might not be able to persuade the NLRB that their salary cap and revenue sharing proposal was a permissive subject of bargaining or that the parties had been at impasse. As noted, the date for spring training and thus the beginning of the 1995 season was approaching. If the Clubs had committed an unfair labor practice, the Association's strike had become an unfair labor practice strike. In turn, that would mean that as soon as the season commenced the players would start accruing the right to damages in the form of lost compensation if they offered to come back to work under the old contract and the Clubs refused to allow them to do so.

Thus, the Clubs decided to attempt unilateral implementation of a proposal that they believed they could better defend as a permissive subject of bargaining. Specifically, the Clubs argued first "that the right to bid competitively or collectively [for players] must be a permissive topic of bargaining, because if it were a mandatory topic, the Owners would be forced to give up their statutory right to bargain collectively."[23] Second, they argued that the reserve system, free agency, and salary arbitration are permissive subjects because they are a mechanism for determining rights under *future* contracts, not a mechanism for resolving rights under an extant contract.[24]

The district court rejected these arguments, and entered an injunction requiring the Clubs to restore the collective bargaining agreement, to accept the Union's offer to return to work under that agreement, and to return to the bargaining table and negotiate in good faith about mandatory subjects of bargaining. In my view, the Clubs' clever arguments about the importance of *collective* bargaining failed in large part because, as the Association pointed out, they ran afoul of many of the basic values and assumptions embedded in the NLRA. Paramount among these is employees' undoubted interest in their own welfare; arguments often make clear that a particular subject of bargaining is directly connected to economic self-interest, which taps directly into most judges' assumptions about the core purpose of the NLRA.

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23. Silverman v. Major League Baseball Player Relations Comm., Inc., 880 F. Supp. 246, 256 (S.D.N.Y. 1995), *aff'd*, 67 F.3d 1054 (2d Cir. 1995).

24. *See id.* at 258.

Thus, the Association's brief laid out in detail the history of the reserve system, the players' battle for free agency, and the pattern of collective bargaining between the parties—a struggle about the extent of Clubs' reserve rights of property in particular players and the extent and timing of individual players' freedom to change Clubs or increase their salary by appeal to an independent decision-maker (salary arbitration). The briefing sought to demonstrate the deep, central connection between these subjects and salary. In the end, the district judge observed that "the essence of collective bargaining in professional sports is the establishment and maintenance of reserve and free agency systems in which owners agree to bid competitively for some players and collectively for others."[25] She thus held that these systems are mandatory subjects because they determine salary.

Equally significant, the court rejected the Clubs'

> attempt to harken back to the unionizing cry of employees when they banded together to create this nation's labor laws. What the Owners have missed here . . . is that the statutory right to join collective bargaining units belongs to employees, not to employers. *The NLRA gives only employees the section 7 right to bargain collectively through an elected representative.*[26]

In other words, the Clubs' attempt to conjure a notion of collective right and interest out of the NLRA was simply foreign to the court; the Act did not set up a structure for class warfare within industries. As the Union argued and the court summed up, "[t]he Owners' attempt to create reciprocal statutory rights to collective bargaining between Unions and Employer groups is simply a wrong *presumption* from which to start."[27]

On appeal, the Second Circuit was direct about the connection between the reserve system and free agency to salaries. It noted that under the reserve system "the right to a player's services becomes the property of a particular club with limited freedom for the player to seek employment with another club."[28] This "maximiz[es] the transfer of reve-

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25. *Id.* at 256.

26. *Id.*

27. *Id.* at 257 (emphasis added).

28. Silverman v. Major League Baseball Players Relations Comm., Inc., 67

nues from players to clubs . . . ."[29] In contrast, the court noted, free agency would "maximiz[e] the transfer of revenues to players . . . ."[30] Picking up a central Association argument, the court concluded:

> Most importantly, however, both the leagues and the players unions view free agency and reserve issues as questions of *what share of revenues go to the clubs or to the players*. The more restrictive the reserve system is, the greater the clubs' share. The greater the role of free agency, the greater the players' share.
>
> To hold that there is no reasonable cause for the NLRB to conclude that free agency and reserve issues are mandatory subjects of bargaining would be virtually to ignore the history and economic imperatives of collective bargaining in professional sports.[31]

I could provide similar examples as mundane as the rules governing uniform and equipment or as significant as the draft, but the moral of the story is the same in each instance. As Professor Atleson posits and my own experience bears out, the key in any argument seeking to persuade a court that a subject is mandatory is placement of that subject in the court's comfort zone of issues subject to collective bargaining—that is, to persuade the court that your interpretation of the Act is in harmony with the set of values and assumptions that undergird judicial interpretation of the Act since its inception. In doing so, an historic pattern of bargaining about an issue in conjunction with a demonstration of the necessary determinative effect of the subject on salary or working conditions is central. The more attenuated the link, the less likely one is to prevail. This is particularly true when the employer's argument is that the issue implicates managerial control over its property or the workplace itself. Similarly, the key to any argument that a subject is permissive is demonstrating that collective bargaining about that subject will impinge on property interests or managerial prerogatives without sufficient effect on the core topics for bargaining. The most effective labor lawyers address applicable precedent with a direct focus on these underlying values and assumptions as they illuminate the relevant case law and their implications for a particular

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F.3d 1054, 1061 (2d Cir. 1995).

29. *Id.*

30. *Id.*

31. *Id.* (emphasis added).

decision.

Finally, and notably, the direct, unfiltered value of *Values and Assumptions* goes beyond its applicability to NLRA cases to the general area of law (here, labor law, including the Labor Management Reporting and Disclosure Act), and even further (federal laws governing the employment relationship). For example, the question whether an employee is a supervisor or managerial employee and thus not entitled to the protection of the NLRA shows up repeatedly in cases under Title VII, the Age Discrimination in Employment Act, and any number of federal employment discrimination statutes. The insights of *Values and Assumptions* are equally valuable in these latter settings, as is revealed by the Supreme Court's values-based, common law analysis of who is and who is not an employee under Title VII in the recent decision of *Clackemas Gastroenterology Associates v. Wells*.[32]

B. *The General Value of Arguments by Exposure of Assumptions*

As *Values and Assumptions* illustrates, labor law is full of examples of outcomes dictated by assumptions about the prerogatives of management, the status of workers, and the imperatives of the economy. In my experience, there is significant persuasive force in arguments based on the exposure and examination of embedded values and assumptions not only in labor law cases, but also in many other substantive areas of law.

Indian law cases provide a rich set of examples, because judges make significant assumptions about the role of tribes in our federal system. For example, in *United States v. Lara*,[33] the attorneys representing the tribes were fearful that the Supreme Court would assume that tribal courts would discriminate and otherwise be unfair to non-members. The tribal attorneys and other Native American groups formulated an amicus strategy that had as one significant goal the exposing and discrediting of this assumption. Thus, several amicus briefs described tribal justice systems and their fair and protective procedures, and detailed statistics concerning tribal treatment of non-members. The Court ultimately upheld the tribal court's jurisdiction over an Indian

32. *See* 538 U.S. 440 (2003).

33. *See* 541 U.S. 193 (2004).

who was not a tribal member.

A similar concern animated tribal counsel in *Plains Commerce Bank v. Long Family Land & Cattle Co.*[34]—a case involving tribal courts' civil jurisdiction over a Bank's sale of land within a reservation but owned by a non-Indian. Again, the tribes and their amici sought to demonstrate to the Court empirically that tribal courts do not favor Indians in civil cases and that tribal courts have rigorously fair procedures compliant with the federal Constitution. The outcome, however, was different, with the Court holding that tribal courts presumptively lack jurisdiction over non-Indians, even in cases involving land within the boundaries of Indian country.

It is very hard to draw conclusions about the efficacy of exposure of assumptions in Indian law cases. Notably, the question in *Lara* involved tribal jurisdiction over an Indian who was not a tribal member, while *Plains Commerce Bank* involved non-Indians. One might speculate that the burden of demonstrating the absence of discrimination was higher in the latter case than in the former. Directly confronting and disproving assumptions about tribal law and practices, however, appears to be one of the few weapons available to those seeking to preserve what is left of tribal sovereignty by persuading the Court that the tribes have voluntarily bound themselves to provide non-members and non-Indians in Indian country with protections equivalent to those provided by the federal Constitution.

A second example: In *Grutter v. Bollinger* and *Gratz v. Bollinger*, the Supreme Court granted certiorari to address the constitutionality of the race-conscious admissions programs of the University of Michigan's undergraduate college and its law school.[35] The grant suggested to affirmative-action proponents that any race-conscious admission at institutions of higher learning might be deemed unconstitutional. The University and its supporters were concerned that its justification for the race-conscious admission programs—a strong interest in diverse student bodies—would be viewed as pretextual, and that the Court would perceive diversity as nothing more than a code word for racial prefe-

34. *See* 128 S. Ct. 2709, 2714 (2008).

35. Gratz v. Bollinger, 539 U.S. 244 (2003); Grutter v. Bollinger, 539 U.S. 206 (2003).

rence, with no real benefits, instead of a compelling interest sufficient to support race-conscious admission.

An amicus strategy evolved that was designed to demonstrate concretely the compelling nature of higher education's commitment to diversity. We filed on behalf of a group of retired military officers, including Generals Schwarzkopf and Shalikashvili, an amicus brief laying out the race-conscious admissions policies of the four service academies and the ROTC programs at public universities, and the history of violence and racial conflict in the military that had necessitated the growth of the minority officer corps from one percent in the Vietnam era to almost twenty percent today. It was in this historical context that the brief explained why a diverse officer corps was a military necessity. At the same time, many corporations from the Fortune 100 explained why they would be unable to successfully compete in the global economy without a diverse leadership, making an educated, diverse workplace essential to economic security.

In upholding diversity as a compelling basis for some race-conscious admissions policies, the Court expressly relied on these two briefs that had dispelled the notion that diversity was nothing more than a disguise for racial preference:

> These benefits are not theoretical but real, as major American businesses have made clear that the skills needed to today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints. What is more, high-ranking retired officers and civilian leaders of the United States military assert that, "[b]ased on [their] decades of experience," a "highly qualified, racially diverse officer corps . . . is essential to the military's ability to fulfill its principle (sic) mission to provide national security."[36]

The Court went on to quote the brief's description of race-conscious admissions policies at the service academies and in ROTC universities, and to accept the brief's representations that (1) "'the military cannot achieve an officer corps that is *both* highly qualified *and* racially diverse un-

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36. *Grutter*, 539 U.S. at 330-31 (citing Brief for 3M et al. as Amici Curiae Supporting Respondents 5; Brief for General Motors Corp. as Amicus Curiae Supporting Respondents 3-4; Brief for Julius W. Becton, Jr. et al. as Amici Curiae Supporting Respondents 5).

less the service academies and the ROTC use limited race-conscious recruiting and admissions policies,'" and (2) that "[t]o fulfill its mission, the military 'must be selective in admissions for training and education for the officer corps, *and* it must train and educate a highly qualified, racially diverse officer corps in a racially diverse setting.'"[37] Amici's ability to undermine the assumption that diversity is nothing more than a cloak for racial preference by "proving" the compelling national interest in diversity appears to have been critical to the Court majority's willingness to allow race-conscious collegiate and graduate level admissions.

My point is not that the practitioner will prevail if he or she exposes the assumptions that might lead a court to reach a particular result, and then demonstrates that the assumptions are true or false. It is only that thorough advocacy does not stop with statutes and cases, but seeks to address the deepest, most fundamental bases that support and cast doubt on the desired result. There is only one way for a lawyer to persuade a court that holds particular values and assumptions or that consciously or unconsciously believes that the relevant legal principles are based on values and assumptions hostile to the legal rule that lawyer supports. The lawyer must bring those values and assumptions into the sunlight and directly address them and the consequences of the legal rules at stake. And if the court's or the legislature's embedded assumptions support the rule being advocated, the lawyer's briefs and arguments will be more effective if this is pointed out (albeit by tying it to the interpretation of statutes and cases, and *not* by a direct appeal to policy). As Professor Atleson's course and book relentlessly and repeatedly made clear, a good practitioner must habitually consider these questions in preparing legal arguments.

Values and Assumptions is a tool kit of analytical and advocacy-enhancing techniques. It teaches the reader how to dismantle labor law precedent by eviscerating the text of decisions over and over again, and then persuasively locating the underlying values and assumptions. The same exercise can be performed in many other areas of law. And, of course, in describing the tension between the text, limited legislative history and purposes of the NLRA, and the Court's decisions, the book also teaches the reader how to

37. *Id.* at 331 (quoting Brief for Julius W. Becton, Jr. et al., at 27, 29).

argue that the decision-maker's values and assumptions should not dictate the outcome of particular legal disputes. The book implicitly suggests that the lawyer should expressly appeal to institutional values in judicial decision-making, such as fidelity to text, the relevance of legislative history to interpretation of ambiguous text, and the importance of employing accepted tools of judicial decision-making rather than imposing judicial policy preferences. Finally, the book demonstrates the strength of arguments that have on their side the embedded values and assumptions for that particular area of law. Arguments that case law reflects these values and assumptions, and therefore that it is legitimate for judges to interpret and apply the law to further such values and assumptions, can be extremely powerful.

II. *VALUES AND ASSUMPTIONS* AND THE USE OF COMMON LAW RULES AND PRINCIPLES

A second major thesis of *Values and Assumptions* is that decisions interpreting the NLRA can be explained or rationalized when it is understood that judges and other decision-makers (the NLRB) are applying the common law rules governing master-servant relations and property rights in interpreting the statutory text.[38] Examples include *NLRB v. Mackay Radio & Telegraph Co.*,[39] in which the Court permits employers to permanently replace strikers based on the common law view that employers have no obligation to rehire employees who cease work for any reason; *NLRB v. Local 1229, IBEW (Jefferson Standard)*,[40] in which the Court upholds an employer's discharge of employees for disparaging its product, stating "there is no more elemental cause for discharge of an employee than disloyalty to his employer"; and *NLRB v. Babcock & Wilcox Co.*,[41] in which the Court essentially imposed the common law of trespass on union organizers' rights of access to company property. Professor Atleson's thesis is that the NLRA was intended to supersede these common law principles, resulting in significant improvements in employees' rights; but that the Act's

38. *See* ATLESON, *supra* note 10, at 52-53.

39. 304 U.S. 333 (1938).

40. 346 U.S. 464, 472 (1953).

41. 351 U.S. 105 (1956).

goals were thwarted by the unconscious importation of common law precepts.

Before I read *Values and Assumption*, I had not thought generally or specifically about the interaction between common law and statutes. The practicing lawyer can invoke common law rules as backdrop principles in a variety of different settings and in numerous ways. There is virtually no area of law and thus no case in which the lawyer's arguments cannot be improved by considering the common law backdrop of the legal issue presented and the effect of that backdrop on the governing Constitutional or statutory law. My practice group provides the curriculum and instructors for a Supreme Court practicum at Northwestern Law School. In our sessions on research rules and techniques, we teach, in addition to statutory interpretation, legislative history, interpretation of relevant case law, and consideration of the practical and policy consequences of particular legal rules, the necessity of examination of relevant common law principles to assess their impact on the legal issue presented.

First, and most commonly, a lawyer can rely on harmonious common law rules to support his or her interpretation of a statute. This technique is powerful and important in bolstering interpretation of an ambiguous statute. Recently, in *eBay Inc. v. MercExchange*, the Court was required to interpret 35 U.S.C. § 283, which provided that federal district courts "'may' issue [injunctions] 'in accordance with the principles of equity.'"[42] Relying on dicta in several Supreme Court decisions, the Federal Circuit and lower courts had for years interpreted this statute to apply a near-automatic rule that trial judges should permanently enjoin patent infringements once adjudicated. In *eBay*'s petition for certiorari review of that rule, it argued that the text of the statute required courts to use the traditional four-factor common-law test for issuing an injunction. This argument was supported by a detailed exploration of the common law rules for issuance of injunction based on violations of personal property rights. The Patent Act defined patents as personal property, and the common law, commencing with Story's *Commentaries on Equity Jurisprudence*, supported this interpretation of the statute. This authority counterbalanced the lengthy pedigree of the automatic-injunction rule and

42. 547 U.S. 388, 392 (2006) (quoting 35 U.S.C. § 283 (2006)).

the effect of some unhelpful Supreme Court dicta in patent cases. Ultimately, the Court adopted the common law rule as the logical interpretation of the Patent Act, and indeed went so far as to say that the general presumption, when a statute authorizes injunctive relief, should be that the common law rule applies.

Second, there are many instances where a federal statute represents an effort to displace or overrule a prior common law rule. In these instances, it is useful to lay out the common law clearly so that one can demonstrate Congress's intent to reject it, and the necessary conclusion that the court must refuse to apply it. For example, in *United States v. Lara*, discussed above, we argued on behalf of a number of Indian tribes that Congress had enacted a statute specifically to overrule the federal common law rule that tribes lacked jurisdiction to prosecute Indians who were not tribal members for crimes committed in Indian country.[43] The brief contained a lengthy exposition of the road to the common law rule, the disruption resulting from its announcement, and the congressional action to solve the problem. In addition, we described the nature of the common law of tribal sovereignty in Indian country in a variety of analogous settings that the Court had already addressed, and explained why this congressional enactment fit within the scheme for law enforcement on reservations.

Third, common law can be used to flesh out the concrete details of rights and obligations imposed by statutory provisions that lack specific content. We have recently employed this argument on behalf of the Navajo Nation, arguing that when the United States accepted trust obligations with respect to the leasing and exploitation of coal reserves on tribal lands, it incurred an obligation to ensure that the terms of the Tribe's lease with a third party were fair and equitable to the Tribe before approving that lease. This argument was made by providing a detailed exposition of the common law of trusts and the duties it imposes on trustees of natural resources.

In a losing cause, we made a similar argument to the Supreme Court in a case called *Meyer v. Holley*,[44] addressing the question whether a corporate officer of a real estate

43. 541 U.S. 193 (2004).

44. 537 U.S. 280 (2003).

agency, who was also its sole licensed broker and supervisor, was vicariously liable for the discriminatory acts of the agency's individual agents under the Fair Housing Act (FHA). There was nothing in the language, history, or purpose of the FHA about the scope of vicarious liability under the Act. We argued that the FHA, like all other federal civil rights statutes, should be read to incorporate the federal common law of agency which would, in turn, impose vicarious liability upon both entities and individuals. And then we showed that the language ("any person"), history, and purposes of the Act all pointed to vicarious liability for those who supervised agents who discriminated. We directly argued that the imposition of vicarious liability on persons who control or who are in a position to control the action of those who engage in discriminatory housing practices was necessary to fulfill Congress's purposes. Finally, we tried to show that our theory was limited to the facts of the case, and would not make corporate officers and shareholders generally liable for the discriminatory acts of corporate agents, because most officers and shareholders do not control and supervise those agents' work directly.

In the end, the Court held that corporate officers and shareholders are not liable under a theory of vicarious liability. But, the Court adopted the common law test as the relevant interpretive tool for filling out the meaning of the statute. This was a victory for the client in its effort to make other types of vicarious liability arguments under the FHA.

Perhaps more relevant to this audience, in cases involving the scope of a union's duty of fair representation to its members, there have been serious battles over the proper common law analogy to draw. Union lawyers have argued that the decisions of unions are akin to the decisions of legislatures, and should receive the same deference that decisions of legislatures do when making decisions on behalf of constituents. In contrast, individual employees' lawyers have asserted that a union's duties to its members are analogous to the common law duties of a trustee to a beneficiary or a lawyer to a client. In *ALPA v. O'Neill*, the Supreme Court made clear that it was amenable to both of these arguments, depending upon the factual context, although it ultimately arrived at the conclusion that unions should receive substantial deference in most settings.[45] In duty of fair

45. *See* 499 U.S. 65 (1991).

representation cases, these common law analogies are, accordingly, available to the advocate to shape in support of his or her client, whatever side the lawyer supports.

Finally, sobering reminders of the power of common law analogies appear in every Supreme Court term and on every topic, in case any lawyer drifts into complacency. Most recently, we were on the team of lawyers representing Anup Engquist in her attempt to assert that class-of-one equal protection claims are available to state employees who have been singled out for discriminatory discharge without any rational basis.[46] The Supreme Court's jurisprudence established class-of-one claims, holding that a violation of the Equal Protection Clause exists if a single "plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment."[47] Both Oregon and the United States argued that, although the Equal Protection Clause has no exception for employment actions and although the Court's Equal Protection jurisprudence extended to violations of the constitutional rights of state employees, the Court should not allow class-of-one claims by state employees *because doing so would eliminate at-will employment for state employees.* The Court agreed. In other words, a common law doctrine of at-will employment trumped the plain meaning of the Equal Protection Clause as interpreted by the Court in *Olech*. If any law student or practicing lawyer needs evidence of the power of common law assumptions, *Engquist* is the best, recent example I can provide.

CONCLUSION

One last meta-lesson of *Values and Assumptions* lies in its demonstration of the value of analysis that goes beyond the legal issue in a particular case and attempts to make sense of a general area of law. Uniformly, I find that if I speak with an expert in a particular substantive area, be it admiralty, patent law, First Amendment law, or government contracts, there comes a moment when I say that I cannot find a basis for an argument in the statute, regulation, or case law, and the expert tells me that "of course," this proposition is correct, and that it has long been a com-

46. *See* Engquist v. Or. Dep't of Agric., 128 S. Ct. 2146 (2008).

47. Vill. of Willowbrook v. Olech, 528 U.S. 562, 564 (2000) (per curiam).

mon assumption within the practice that the proposition is correct. Professor Atleson notes that "'of course' statements in labor law cases indicate where the corpses are buried."[48] It seems to me that this is true for virtually all areas of law involving substantive expertise. A generalist lawyer is most likely to "screw up" when he or she makes arguments in a specialized area based solely on a reading of sources directly relevant to the legal issue presented without learning where the corpses are buried. Had I fully plumbed the lessons of *Values and Assumptions* more than twenty years ago when I first read it, I would not have had to learn this lesson the hard way.

In sum, in one way or another, and at every level of abstraction, the methods of analysis employed in *Values and Assumptions* have affected and improved virtually every legal analysis that has crossed my desk in the past twenty years. These tools, for better or for worse, may be used by lawyers to support or oppose any value or assumption. Unlike the book, the tools themselves are value-and-assumption free. Use of the forms and methods of analysis in this book allow a practitioner to better understand the legal rules at issue and to bring deeper, more persuasive arguments to bear in persuading judges.

48. ATLESON, *supra* note 10, at 24.