

On the Greatest Property Transfer that Wasn't:
How the National Labor Relations Act Chose Employee Rights
And the Supreme Court Chose Property Rights

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I) INTRODUCTION

There is an old Yiddish joke about a man and his grandson in Belarus who set out by foot from Pinsk to Minsk. They were halfway through their journey, when they come across a field extending as far as the eye could see, with a sign in front that read: “Private Property No Trespassers Allowed.” The boy, worried, looked up at his grandfather and asked how they will get to Minsk since, as the sign expressly forbids it, they cannot cross the field. The grandfather looks at the lad, and tells him that he has read the sign incorrectly. He explains that all texts have implied parts, and that they can only be unlocked by engaging the text in all its parts. The sign, he explains, does not read “Private Property. No Trespassers Allowed.” It actually reads: “Private Property? No. Trespassers Allowed.” With the sign’s encouragement, the old man and lad continued, across the field, towards Minsk.

This canard illustrates how relatively minor assumptions about a text may completely invert its intended meaning. The story makes inherent sense in its context because Hebrew is a language devoid of vowels and certain grammatical symbols, requiring the reader to assume these meaningful markings. Furthermore, there is a long tradition culminating in the Babylonian Talmud that involves students and rabbis engaging in similar grammatical acrobatics with important texts. This story could also make sense in the context of labor relations, because the founding text of that field has continually had background presumptions read into it, often creating something that is the opposite of what the text actually says. This has created an a piece

of legislation that feels weak, timid, ineffectual as applied, belying the strong statutory language and purpose of the original act.

The National Labor Relations Act (NLRA) was passed in 1935 with the dual purposes of promoting industrial peace and pushing back against the Depression by laying the groundwork for a more equitable distribution of wealth.¹ The Act was passed after a great deal of debate and opposition, and was hesitantly signed into law by President Franklin Delano Roosevelt. Though it was a radical statute passed in the course of a host of ambitious New Deal legislation, the NLRA was not well-liked by President Roosevelt, and in many ways it was not really a part of the New Deal.² But, just as with several other foundational statutes passed during the 1930's, the NLRA remains, with a few amendments, the foundation of American labor law.

Unfortunately, the NLRA has never been construed as it was written. The Supreme Court has performed tortured readings of the NLRA in order to make sense of language that seems to be a radical departure from common law property rights and laissez-faire managerial rights. As such, the Act has had a different life than the 74th Congress perhaps intended.

This paper will examine the NLRA and some of the seminal cases that have interpreted it in order to understand the role that property rights—a term and concept that does not appear in the Act but has had an enormous impact on its interpretation and implementation—have in labor relations. This analysis will proceed by first examining the history and passage of the NLRA. Particular attention will be paid to the §2(3) definition of “employee” and how it relates to employees’ §7 rights. Next, the paper will analyze the Supreme Court’s implementation of the Act, and the manner in which it injected property rights into the analysis. This section will focus on the ways that property rights have come to overshadow employee rights. Important to this

¹ James B. Atleson, *Values and Assumptions in American Labor Law* 40 (University of Massachusetts Press 1983).

² *Id.* at 35-43.

analysis will be the need for real balancing of particular interests implicated. After reviewing the ways that the Court has treated organizer access, the Occupation Safety and Health Act will be looked at in order to understand how statutes that have analogous property intrusions have been dealt with. Finally, after disposing of the absolute managerial property rights scheme that the courts have relied upon, this paper will suggest an alternative scheme that is more in line with the original purpose and language of the NLRA. This scheme rejects the Lochner-era common law notions of property that have become judicially embedded into the Act, and instead proposes an approach that does not presume and promote conflict between the employer and the employees. Through a different understanding of property rights in the Labor arena, the ideals of common enterprise, collective bargaining, and industrial peace can be more fully realized in the labor setting.

II. HISTORY AND PURPOSE OF THE NLRA

The National Labor Relations Act has only been amended twice since its passage in 1935—the first time in the 1947 Taft-Hartley Amendments and the second time in the 1959 Landrum-Griffin Act. Since that time, there have been numerous attempts to amend or modify the NLRA in order to better suit the modern workplace, but further changes have been unsuccessful. Largely then, it is the original 75 year old statute that still governs labor-management relations in the workplace. The NLRA is a radical statute that was a product of its time—and perhaps could have only been passed during its time—and to understand it, one must understand the period in which it was passed.³

³ See Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 Minn. L. Rev. 266 (1977-1978).

A. The Pre-history and History of the NLRA

For workers, the Depression of the 1930's simply worsened an already bad situation. Employees in the early part of the century were at the mercy of large employers who were industrializing at a rapid pace. During this time, workers who tried to organize in order to bargain collectively met resistance from both the employers and the government. Employers used mass-firings, "yellow-dog" contracts that conditioned employment on a promise of non-organization, and violence in order to prevent unionization of workers. George W. Norris, the Senator who co-authored the Norris-LaGuardia Act of 1932, has described the "yellow-dog" contracts used in the early part of the century as a form of "semi-servitude."⁴ The employee "practically signed away his liberties. He surrendered his right to ask for increased wages, for better working conditions, or to associate with his fellow workers in giving effectiveness to any attempt to procure changes in these working conditions."⁵ In perhaps one of the greatest instances of legislative irony, employers began using the Sherman Act of 1890 in order to enlist the judiciary in blocking unionization.⁶ Though the Sherman Act was intended to protect the economy from industrial monopolies, the industries successfully argued that labor was a commodity and unions were such monopolies.⁷ Using this argument, employers were able to get federal judges to issue injunctions against strikes and other organizing activities, and were thus able to have the federal government execute and subsidize anti-union enforcement.⁸ The labor injunction was one of the most powerful weapons that employers could use against employees, because with it came the power and imprimatur of the state. When Eugene Debs, founder of the

⁴ George W. Norris, *Fighting Liberal: The Autobiography of George W. Norris* 308 (Macmillan Comp. 1945).

⁵ *Id.* at 309.

⁶ *Loewe v. Lawlor*, 208 U.S. 274, 302 (1908).

⁷ *Id.*

⁸ In order to enforce one such injunction, Federal District Court Judge Walter Gresham rounded up a posse to stop a strike. Walter Nelles, *A Strike and its Legal Consequences- An Examination of the Receivership Precedent For the Labor Injunction*, 40 Yale L.J. 507, 522 (1931).

Industrial Workers of the World (IWW) described the collapse of the famous Pullman Strike of 1894, he said that “the ranks were broken, and the strike was broken up...not by the Army, and not by any other power, but simply and solely by the action of the United States Courts in restraining us from discharging our duties as officers and representatives of the employees.”⁹

Congress reacted to this state of affairs by passing the Clayton Antitrust Act in 1914.¹⁰ Section 6 declared that “the labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor...or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof.”¹¹ Section 20 further states that “no restraining order or injunction shall be granted by any court of the United States...unless necessary to prevent irreparable injury to property.”¹² The founder of the American Federation of Labor (AFL), Samuel Gompers, ecstatically proclaimed that the Clayton Act was the “Magna Carta upon which the working people will rear their structure of industrial freedom.”¹³ Gompers and others saw the Clayton Act as a freeing of the workingman to match his labor against the employer’s capital in bargaining.

The Supreme Court responded to this by saying that the Act’s main effect was to codify the existing common law. President Wilson, who reluctantly signed the Clayton Act on his last day in office, sent the pen that he used to sign the Clayton Act to Samuel Gompers with a note about the Section 20 of the Clayton Act which said labor is not a commodity, but a part of an integral part of an individual’s life: “I am sorry that there were any judges in the United States

⁹ United States Strike Commission, Report on the Chicago Strike of June-July, 1894, 143-44 (1895), quoted in Felix Frankfurter and Nathan Greene, *The Labor Injunction* 17 (The MacMillan Comp. 1930).

¹⁰ 38 Stat. 730 (1914), codified at 15 U.S.C. 12-27, 29 U.S.C. 52-53.

¹¹ *Id.*

¹² *Id.*

¹³ Jeff Vlasek, Note, *Hold Up the Sign and Lie Like a Rug: How Secondary Boycotts Received Another Lease on Life*, 32 J.Corp.L. 179, 181 (2006).

who had to be told that. It is so obvious that it seems to me that that section of the Clayton Act were a return to the primer of human liberty.”¹⁴ The Supreme Court’s response to this *primer on human liberty* was not to admit its mistake in the basics of humanity and proceed as the Act prescribed, nor was it to say that it had read the Sherman Act correctly but now would follow Congress’ new direction laid out in the Clayton Act. Rather, the Supreme Court reacted to §20 of the Clayton Act by reading the phrase “lawfully carrying out the legitimate object” to mean that the Clayton Act simply codified the existing common law standards.¹⁵ So long as the employees were doing what they were legally allowed to do, that is not engaging in certain organized activities, then courts would not issue injunctions.¹⁶ The Supreme Court essentially ignored any change that the Act might have effectuated by simply saying that it “merely puts into statutory form familiar restrictions upon the granting of injunctions already established.”¹⁷ The Court’s posture in this phrase represents the state of labor relations for the next two decades.

Irving Bernstein, one of the preeminent historians of American labor, begins his discussion of the early 1930’s with a curious discussion of Kurt Gödel’s publishing of “Gödel’s Proof” in 1931. This proof collapsed the foundations of western mathematics as it was at least since Descartes. Though Gödel’s Proof ostensibly has little to do with labor, Bernstein begins the story with this proof because at that time “collapse was in the air.”¹⁸ Europe began sliding towards fascism, the American economy continued to suffer following the Great Depression, and the unemployment rate was reaching new heights. Between 1931, when the Depression had already taken a firm hold on the American economy, and 1933 the unemployment rate in

¹⁴ Samuel Gompers, *Seventy Years of Life and Labor* 259 (ed. Philip Taft and John Sessions, E.P. Dutton & Co., 1957).

¹⁵ *Duplex Printing Press Comp. v. Deering*, 254 U.S. 443 (1921).

¹⁶ *Id.*

¹⁷ *Id.* at 470.

¹⁸ Irving Bernstein, *The Lean Years: A History of the American Worker (1920-1933)* 312 (Houghton Mifflin 1960).

America ballooned from 7,971,000 to 15,071,000, representing a full third of wage earners in the country without work.¹⁹ As simple calculations of supply and demand will illustrate, this enormous supply of labor and miniscule demand distorted the entire labor market. Wages dropped precipitously for those who had jobs, and conditions at work deteriorated in part because the individual worker had no room to negotiate for better conditions.²⁰

This climate made ripe the passage of radical employment legislation. Almost 20 years after the failure of the Clayton Act, Congress passed the Norris-Laguardia Act in 1932 in order to finally accomplish what the Clayton Act could not. The Norris-LaGuardia Act was passed at the nadir of commerce clause power by Congress, so rather than mandating certain labor rules, it simply removed the federal government from the equation. The Norris-Laguardia Act made “yellow-dog” contracts, which condition employment upon promise that the employee will not organize, unenforceable in federal courts and removed from the jurisdiction of federal courts the power to issue an injunction in a labor dispute. Essentially, the Act made it official policy that the courts were not to decide on the wisdom of a job action or take sides in a labor dispute.

B. The Core of the NLRA—The §1 Purpose and §7 Rights

A New York Times article from 1934 began: “A rising tide of labor unrest is plainly manifest. Strikes and threats of strikes are increasing in number and magnitude. We are witnessing riots and bloodshed and many fear we may witness more.”²¹ The Norris-Laguardia Act of 1932, coupled with the Democrats sweep into power in 1934, opened up the possibility of the Wagner Act’s passage. Industrial strife had reached a point of crisis that required congressional action. After considerable debate and opposition that lasted more than a year, the

¹⁹ Bernstein, *supra* note 18, at 316-17.

²⁰ Bernstein, *supra* note 18, at 318-323.

²¹ *To Combat the Strike Crisis, Walsh Urges the Wagner Bill—The Massachusetts Senator Says the Measure, While Defining Unfair Practices, Would Leave Employers and Employees Free*, The New York Times, June 03, 1934.

Act passed Congress, and President Roosevelt quietly signed it into law. The Wagner Act, also known as the National Labor Relations Act, broke with the Norris-Laguardia Act in that the government shifted its position of neutrality and openly pinned the blame of industrial strife on the employers.

Section 1 of the NLRA began: “The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest.”²² The Act laid out a group of policies and findings that, according to the 74th Congress, required the Act’s passage. One of the main concerns of the Act was the “inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract and employers.”²³ The Act then listed several findings that it drew from the America’s experience. “Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest...”²⁴ The Wagner Act then declared that it was the government’s policy that workers should bargain collectively.

It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self- organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.²⁵

Many of the same workers who previously feared both the employer and the federal government when they tried to organize, now had assurance that the government supported their cause. It was

²² 29 USC §151.

²³ *Id.*

²⁴ *Id.*

²⁵ 49 Stat. 449. Codified at 29 USC §151.

this declared policy of the U.S. government that allowed union organizers to approach workers and declare, “President Roosevelt wants you to join the union.”²⁶ The employee finally had a federal law that both supported the principles of organizing and provided the means to do so with comprehensive protections under the law.

The central feature of the NLRA was Section 7, which carved out a set of protected employee rights and activities. Section 7 stated “Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.”²⁷ The Act protects employees to recognize their shared fate and shared interest in the enterprise. The focus on “mutual aid and protection” recognizes that it is no longer the employer who will completely dictate the terms of employment. Rather, it is the employees who will deliberate together upon their interests, and then bargain together as a collective for those shared interests. The NLRA had both a simple and grand purpose that is evident from the reports of its drafters. Senator Walsh articulated this interplay between the high and low purposes in the Act in his June 6, 1934 address, which is included in the Congressional record. At one point, Senator Walsh said that the Act’s purpose was to “point out what acts are in conflict with justice, forbid them, and punish those who commit them. This is exactly what the bill pending before Congress, which we are to analyze, proposed to do.”²⁸ In its articulation of employees’ rights, Senator Walsh further compared the importance of the Act, and the foundations that it laid, to the First Amendment.

Why is there need of specifying acts that impair the rights of workers? Are not employers’ and employees’ rights self-evident? But it must be recognized that a

²⁶ Peter E. Millspaugh, *America’s Industrial Relations Experiment: Legal Scholarship Assesses the Wagner Act*, 32 St. Louis U. L.J. 673, 678 n. 25 (1988).

²⁷ 29 USC §157.

²⁸ 78 CONG. REC. 10559 (1934).

declaration or a statute that merely asserts that the press shall be free, that religions shall be free, is not effective unless and until those acts which deny freedom to the press and deny religious freedom are defined, forbidden and punished.²⁹

After analogizing the Act to the First Amendment, and indicating that the Act will serve as a tool to show people what is in conflict with justice, Senator Walsh described the purpose of the Act in much less lofty terms.

The bill indicates the method and manner in which employees may organize, the method and manner of selecting their representatives or spokesmen, and leads them to the office door of their employer with the legal authority to negotiate for their fellow employees. The bill does not go beyond the office door. It leaves the discussion between the employer and the employee, and the agreements which they may or may not make, voluntary and with that sacredness and solemnity to a voluntary agreement with which both parties to an agreement should be enshrouded.³⁰

This seeming tension within the NLRA, between the high and low, is often what confuses the Court. At its core, the NLRA is a simple piece of legislation, not unlike constitutional principles of freedom of association or speech. But it would be a mistake to presume that this simplicity simply left things as they were prior to passage of the Act.

C. The Definition of “Employee”—Its History and Implications

Important to understanding §7 of the NLRA is the definitions section. These definitions are not obvious, and proceed along policy considerations. For instance §2(2) of the Act excludes as “employers” the United States government, state government, the Federal Reserve Bank, any person subject to the Railway Labor Act, or a labor organization.³¹ The definition of “employee” is of great importance in the Act, as only statutory employees receive the Act’s protection. Section 2(3) clearly states, “The term ‘employee’ shall include any employee, and shall not be

²⁹ *Id.*

³⁰ *Id.*

³¹ 29 USC §152(2).

limited to the employees of a particular employer, unless the Act explicitly states otherwise.”³²

This provision was not accidental or an example of poor drafting, but was in fact debated extensively in Congress.³³

The NLRA defined statutory “employees” extremely broadly in order to give greater weight to employee organizational rights over existing employer property rights. Statutory employees are not common sense employees as the term is used in everyday parlance; they are strictly defined according to predetermined bounds. For instance, agricultural laborers are not considered “employees” under the act,³⁴ along with anyone who works for a transportation company,³⁵ or anyone who works for the government.³⁶ It is not that the labor of these workers is worth any less, but rather Congress decided for policy reasons to exclude them from the coverage of the Act. The Supreme Court in turn has had no difficulty in construing the Act to contain these exclusions, and thereby deny statutory protections to individuals who are, in every sense but the statutory, employees.

Similarly, the NLRA also expands the definition of “employees” in certain ways that do not comport with our everyday understanding of employees, but receive coverage and protection for policy reasons. A prime example of such an expansion is that “the term ‘employee’ shall include any employee, and shall not be limited to the employees of a particular employer.”³⁷

Though this definition may not be in line with the common law as it existed prior to passage of the Act—or, for that matter, how it exists now—and it might not comport with our common understanding of “employees,” it is the definition that the 74th Congress settled on. The

³² 29 USC §152(3).

³³ Ellen Dannin, *Not a Limited, Confined, or Private Matter—Who is an ‘Employee’ Under the National Labor Relations Act*, Working Paper p. 8, available electronically at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1115434.

³⁴ 29 USC §152(3).

³⁵ *Id.*

³⁶ 29 USC §152(2).

³⁷ 29 USC §152(3).

definition abandons reference to a particular employer, and instead states that if an individual does not fall under one of the exclusions then one is an employee. In other words, if an employee is a statutory employee for one employer then she is a statutory employee for all employers. The distinction between employees and nonemployees is spelled out in §2(3) of the NLRA, and is explicitly taken out of the hands of individual companies' human resource departments.

It is hard to imagine how Congress could have made this definition more clear than it is in the NLRA. And any arguments about it being inserted accidentally or that Congress intended an alternate reading are countered by the political and legislative history of the Act. "Congress wrestled with the definition for over a year as it sought to ensure that the rights granted in §7 were meaningful, and the result was a definition that is not tied to the employer-employee relationship."³⁸

The hearings and debates on the various provisions of the NLRA lasted from March 1, 1934 until its approval by President Roosevelt on July 5, 1935. During this time, the House of Representatives and the Senate heard testimony from labor and business representatives, revised and reworked drafts of the Act, and considered almost every provision and its implications in detail.³⁹ The definition of "employee" was no exception. In his report to the Senate Committee on Education and Labor, the Chairman of the committee, Senator David Walsh analyzed the Act. In this analysis, he refers to the most important of the definitions as those of "employer" and "employee."⁴⁰ For this reason, the issue of defining an "employee" arose many times over the course of the debates and hearings. An example of the difficulties encountered in trying to

³⁸ Ellen Dannin, *supra* note 33.

³⁹ A rough count indicates that in the course of the 16 months that the bill was being considered by Congress there were no fewer than 9 Senate drafts of the bill, 7 House drafts of the bill, 27 official statements submitted by members of Congress, 2 official statements submitted by President Roosevelt, 3 Senate Reports, 4 House Reports, 248 Senate Hearings, 15 House hearings, 1 Explanatory Statement, 6 House or Senate Resolutions, 3 Senate Debates, 2 House Debates, and 525 Petitions in Support or in Opposition to provisions in the bill. *See* Legislative History of the National Labor Relations Act 1935, Volumes 1-2, (National Labor Relations Board 1949).

⁴⁰ S. REP. NO. 1184 at 3 (1934).

fashion the definition can be seen in the Hearings of the Senate Committee on Education and Labor. At one point a terse exchange was had between the Chairman, Senator Walsh, and Harvey G. Ellard, the representative of the Institute of American Meat Packers where the meaning of “employee” proved quite difficult to communicate.⁴¹ During another hearing by the same Committee, Robert C. Graham, Vice President of the Graham-Paige Motors Corporation and Director of the Automobile Manufacturers Association, raised the issue that the definition of “employee” was broad enough to include employees with no relation to the employer:

We wish to call attention to several specific features of the proposed measure. Take, for example, the definition of the term “employee”, as stated in paragraph (3) of section 2 of the bill. It reads:

The term “employee”***shall not be limited to the employees of a particular employer unless the act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of or in connection with any current labor dispute or because of any unfair labor practice.

⁴¹ Mr. Ellard:...Section 8 of the Bill lists four unfair labor practices. It will be noted that these so-called “unfair labor practices” all relate to acts by the employer. In other words, unfair labor practices can only result from acts of the employer. Unquestionably, employment creates mutual obligations and liabilities, and it seems very strange indeed that only one party of such a relationship can be guilty of an unfair practice arising out of that relationship. Paragraph (9) of section 2 makes a labor dispute include any controversy, regardless of whether the disputant stand in the proximate relationship of employer and employee. Yet this bill provides no restraint upon third parties who disturb the employer and employee relationship, although such third parties have it within their power to create the labor dispute and bring about the very things for which the employer may be condemned under this bill...

[Mr. Ellard goes on to talk of the problems of including workers who have left their positions as “employees”.]

Senator Wagner: There is a very high authority that a striker is still an employee?

Mr. Ellard: Yes, I so understand.

Senator Wagner: I mean legal authority.

Mr. Ellard: That is right, but this goes further and says a person who is away from his employment by reason of any unfair labor practice maintains his status as an employee, and that is the difference I see in this proposition.

In that connection, what is the status of an employee, do you mean an employee for the purpose of this job, or do you mean an employee with all of the implications and responsibilities that go with an employee.

[The exchange continues in this manner for some pages, without resolution.]

National Labor Relations Board: Hearing on S. 1958 Before the S. Committee on Education and Labor, 74th Congress (1935) (statement of Harvey G. Ellard, Representing the Institute of American Meat Packers).

It is an open invitation to employees in plants wholly unrelated to a particular plant where no difficulties exist to stir up trouble in that plant. It encourages agitators everywhere to foment sympathetic strikes.⁴²

In a separate analysis of the Bill, Senator Walsh described some of the reasons for having a broad definition of employees. “Under modern conditions employees at times organize along craft or industrial lines and form labor organizations that extend beyond the limits of a single employer unit.”⁴³ Senator Walsh’s description is of employees having protected rights that are not bound by their employers. The definition of “employee” breaks through the artificial line created by place of employment or employer, and reaches out to include others who have similar interests. Representative William P. Connery, the sponsor of the bill in the House of Representatives, provided a report on the bill to the Committee of the Whole House where he spoke to the breadth and simplicity of the definitions in the bill:

In section 2 are listed various definitions of terms. These definitions are for the most part self-explanatory. The committee wishes to emphasize the need for the recognition as expressed in subsections 3 and 9, that disputes may arise regardless of whether the disputants stand in the proximate relation of employer and employee, and that self-organization of employees may extend beyond a single plant or employer. This is so plain as to require no great elaboration.⁴⁴

On its face, the NLRA seems to give effect to Justice Holmes famous dissent in the case of *Vegeahn v. Guntner*, written almost 40 years prior to the NLRA, that labor must be put in a position of equal bargaining power in the workplace.⁴⁵ The Act clearly identifies worker organizations that could have equal bargaining power, and thereby bargain for collective

⁴² *National Labor Relations Board: Hearing on S. 1958 Before the S. Committee on Education and Labor*, 74th Congress (1935) (statement of Robert C. Graham, Vice President of the Graham-Paige Motors Corporation and Director of the Automobile Manufacturers Association.)

⁴³ S. REP. NO. 573 at 6 (1935).

⁴⁴ H.R. REP. NO. 972 at 8 (1935).

⁴⁵ In his dissent, Justice Holmes declared that “[o]ne of the eternal conflicts out of which life is made up is that between the effort of every man to get the most he can for his services, and that of society, disguised under the name of capital, to get his services for the least possible return. Combination on the one side is patent and powerful. Combination on the other is the necessary and desirable counterpart, if the battle is to be carried on in a fair and equal way.” *Vegeahn v. Guntner*, 44 N.E. 1077, 1081 (Mass, 1897).

agreements, as the solution to deep workplace problems. The Act further identifies the employer as being the wellspring of the problem in the labor market, and carves out a field of protection wherein the employer may not intrude.⁴⁶ Further, the employee is identified not in reference to her particular employer, but in a more functional sense.⁴⁷ If an individual performs work and does not manage people, or perhaps is of the working class subject to several limitations, then that individual is a statutory employee. As such, an employer has the same restrictions in regard to an employee who works at her company as she does to an employee who works for another company, or for a union. These provisions of the Act show that though the Act may have been a product of its time, it was not in continuity with previous employment legislation. It was a paradigm shifting statute.

This understanding of statutory employees is important in understanding the NLRA because it speaks to the broad rights that were afforded to all workers in pursuit of organized activities. These rights were a sharp departure from the preexisting labor conditions, and they speak to a new conception of the worker, her work, and the workplace. Important to this analysis is that employer property rights are not mentioned as a consideration in the NLRA at all. This is especially important considering the fact that prior legislation, such as the Clayton Act—which in part led to the NLRA—explicitly balanced employee rights against employer property rights.⁴⁸

III. THE COURT’S TREATMENT OF THE NLRA

⁴⁶ 29 USC §§157-158.

⁴⁷ 29 USC §152(2).

⁴⁸ 38 Stat. 730, codified at 15 U.S.C. 12-27, 29 U.S.C. 52-53.

The Supreme Court has consistently read the NLRA to include an almost absolute property right by the employer that stands in opposition to the employees' protected rights. In this "balance," property rights invariably prevail, and from them often flow derivative managerial prerogatives and entrepreneurial rights. The rationale that the Court uses to locate and apply these property rights is important in understanding the scope of the NLRA, so several key decisions will be analyzed. These include *Fansteel*, *Republic Aviation*, *Babcock & Wilcox*, and *Lechmere*.

A. *Fansteel* and the Court's Prohibition of the Sit-Down Strike

Two years after the Supreme Court surprised many by upholding a New Deal labor plan after it had struck down so much of Roosevelt's agenda, and holding that the National Labor Relations Act was constitutional in *NLRB v. Jones & Laughlin Steel Corp.*,⁴⁹ the Court took its first major step in limiting the scope of the NLRA. In *NLRB v. Fansteel Metallurgical Corp.*, the Supreme Court held that employees who conducted a sit-down strike in response to numerous employer unfair labor practices, including refusal to recognize and bargain with the employee selected union,⁵⁰ attempts to establish a company union,⁵¹ using "espionage agents" to spy on employees,⁵² and isolating the union leadership,⁵³ were not entitled to reinstatement after a mass-firing.⁵⁴ In *Fansteel*, the National Labor Relations Board (Board) had found the sit-down strike, where property was not damaged, to be a response to the employer's provocations in the form of unfair labor practices proscribed by the NLRA, and prescribed reinstatement as the remedy.⁵⁵ In its holding, the Board did not engage in a form of theoretical balancing where it

⁴⁹ 301 U.S. 1 (1937).

⁵⁰ *Fansteel Metallurgical Corp.*, 5 NLRB 930, 933-34 (1938)

⁵¹ *Id.* at 935.

⁵² *Id.* at 937-38.

⁵³ *Id.* at 936-37.

⁵⁴ 306 U.S. 240 (1939).

⁵⁵ *Fansteel Metallurgical Corp.*, 5 NLRB at 949.

weighed abstract property rights against abstract employee rights. Rather, it balanced the specific rights of the employees not to suffer the unfair labor practices listed above against the employer's specific property damages.⁵⁶ The Supreme Court reversed the Board's holding and looked more to common law property rights than to the NLRA in holding that the employer was warranted in firing the employees for their concerted activities.⁵⁷

The *Fansteel* Court accepted the Board's findings of serious unfair labor practices, but found the employees' resort to "violence against the employer's property" to be unacceptable.⁵⁸ Even though the Board found that most of the property damage was caused by the employer and the police in their use of bombs and tear gas to force the employees to leave the plant,⁵⁹ the Supreme Court was satisfied in finding that the employees' actions in some way led to the property damage. Where the Board viewed the police and employer reaction as a superceding cause that led to the property damage and thereby did not make the employee's liable, the Supreme Court viewed the workers' job action as a superceding cause that freed the employer for liability stemming from its unfair labor practice. The *Fansteel* Court ultimately held that the right to employ or terminate is a basic right of the employer, and it is inconceivable that the NLRA fundamentally changed that feature of the workplace.⁶⁰

The *Fansteel* Court has a difficult time understanding the actual legal changes that the NLRA effectuated. This can be seen in the ways that the Court wrestles with basic concepts of statutory employment and employee protections. The Court begins by employing logic analogous to the *Duplex Printing* Court that held that the Clayton Act simply protected workers

⁵⁶ See *Fansteel Metallurgical Corp.*, 5 NLRB at 933-39.

⁵⁷ *Fansteel*, 306 U.S. at 252-57.

⁵⁸ *Id.* at 255.

⁵⁹ *Fansteel Metallurgical Corp.*, 5 NLRB at 943.

⁶⁰ *Fansteel* 306 U.S. at 254-55.

in acting in ways that were already legal.⁶¹ The *Fansteel* Court falls into this same trap when it states:

It is apparent under that construction of the Act that had there been no strike, and employees had been guilty of unlawful conduct in seizing or committing depredations upon the property of their employer, that conduct would have been good reason for discharge, as discharge on that ground would not be for the purpose of intimidating or coercing employees with respect to their right of self-organization or representation, or because of any lawful union activity, but would rest upon an independent and adequate basis.⁶²

This mode of reasoning is antithetical to the purpose of the Act because it looks first to what the employer would be able to do absent NLRA protections, and holds those rights as unchanged.

This reasoning begins to treat the NLRA as simply another law that protects the pre-existing legal conduct of employees. Indeed, the Court ends this branch of the analysis with a look at the purpose of the NLRA, and what employee conduct is protected by it. The Court concludes by stating “The conduct thus protected is lawful conduct.”⁶³ This statement is only true if it is a tautology. Unfortunately, the Court is saying more than the fact that the NLRA has made previously unlawful conduct lawful, and thereby protected it. It is saying what the *Duplex Printing* Court said decades earlier, that the Act only protects action that was previously legal. From this perspective, the NLRA changed nothing; it merely reiterated that employers may not engage in illegal conduct toward their employees.

The *Fansteel* Court next finds it difficult to understand the difference between an employee in the statutory within the meaning of the statute as opposed to an employee as used in everyday parlance. Though the NLRA defined “employees” in §2(3) to include those “whose work has ceased as a consequence of, or in connection with, any current labor dispute or because

⁶¹ *Duplex Printing Press Comp. v. Deering*, 254 U.S. 443 (1921).

⁶² *Fansteel*, 306 U.S. at 254-55.

⁶³ *Id.* at 255.

of any unfair labor practice,”⁶⁴ the Supreme Court is unable to accept this definition at face value. The Court reasons that since the employees violated the law by seizing the plant, the employer had an independent ground for termination. The Court continues, stating that “[w]e are unable to conclude that Congress intended to compel employers to retain persons in their employ regardless of their unlawful conduct...such legislative intention should be found in some definite and unmistakable expression. We find no such expression in the cited provision [of the NLRA].”⁶⁵

The portion of the definition of “employee” above was included precisely because Congress recognized that employers could easily circumvent the purpose of the NLRA by simply firing employees and thereby stripping them of all protections that come from that status. Therefore, the definition employed by Congress of an employee is one that does not depend on the employer. The Court finds it difficult to understand that a worker may remain a statutory employee and receive all the protections that adhere with that status without remaining in the actual employ of the employer. In other words, an employer retains the right to discharge an employee, but it does not have the right to remove the label and protections of “employee” from him.

Stemming from this misconception, the *Fansteel* Court treats the employee only in terms of her relationship to the employer. Because employees are licensees on the employer’s property and may only act in a way permitted by their license, the Court viewed any job action, where workers worked according to their own terms, a trespass.⁶⁶ Unlike an unfair labor practice by the employer, once the employees committed a trespass everything that flowed from that act was illegal. The Supreme Court did not consider the possibility that the absolute property rights that

⁶⁴ 29 USC §152(3).

⁶⁵ *Fansteel*, 306 U.S. at 255.

⁶⁶ *Id.*

employers may have enjoyed before the passage of the NLRA may have been abridged by the NLRA in order to protect employees and promote industrial peace.

B. Republic Aviation and the Narrow Exception

Where *Fansteel* took a hard line against job actions on employer property, *Republic Aviation* said that an employer may not interfere with an employee's organizing rights unless it showed evidence that special circumstances make necessary such interference "in order to maintain production or discipline."⁶⁷ In *Republic Aviation*, unfair labor practices were alleged where the employer discharged an employee for passing out union application cards in violation of the company's "no solicitation" policy.⁶⁸ The Board held that the "no solicitation" rule violated the NLRA by interfering with the employees' protected organizational rights, and the Supreme Court affirmed.⁶⁹

The Republic Aviation plant was not located in an isolated location or in a place that would make it difficult to access the workers.⁷⁰ The company raised the argument that there was no showing that the location of the plant or its physical characteristics made it difficult for employees to be accessed, and that therefore the Court should rule that no right of access existed.⁷¹ The Supreme Court agreed with the fact that there was no evidence that the plant's location "made solicitation away from company property ineffective to reach prospective union members. [It is not] like a mining or lumber camp where the employees pass their rest as [well] as their work on the employer's premises, so that union organization must proceed upon the

⁶⁷ *Republic Aviation Corp. v. National Labor Relations Board*, 324 U.S. 793, 803-04, note 10 (1945).

⁶⁸ *Id.* at 795.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.* at 798.

employer's premises or be seriously handicapped.”⁷² The Court went on to reject the company's argument that such a handicap must be shown, and said that the right of access, irrespective of the ease of alternatives, is at the heart of the NLRA.⁷³

In a concession to the employer, the Court did affirm the Board's statement that rules prohibiting union solicitation are presumptively unreasonable and discriminatory “in the absence of evidence that special circumstances make the rule necessary in order to maintain production or discipline.”⁷⁴ The *Republic Aviation* Court was not employing the robust §2(3) definition of “employee” in order to allow for union access to employees, but rather the very basic right of employees to hear the union's message. In doing so, the Court discussed mining camps and lumber camps in order to say that it was irrelevant that the company was not similar to one of these work sites that had previously been considered by the Board. In effect, the Court was saying that the burden was on the employer to show that union access created an unreasonable hardship on the running of the company, rather than on the union to show that it had no other means to reach the employees. This balancing of property rights against employee rights proceeds along a fairly discrete path, where specific damages and rights are weighed. The Court looked at the employees' right to hear the union's message for organizing activity against the injury upon the employer by having its rights of exclusive use mildly diminished. Furthermore, it allowed for a narrow exception of allowing infringement of organizing activity when the employer could show that the activity interfered with production or discipline. The *Republic Aviation* Court's words have had a strange life. Later cases have seized upon the rejected arguments and endorsed them, while transforming the exception into the rule.

C. Babcock and the Splintering of Statutory Employees

⁷² *Id.* at 798-99.

⁷³ *Id.*

⁷⁴ *Id.* at 803-04, note 10.

The next major case where the Supreme Court limited employee rights by injecting property rights into the NLRA is *NLRB v. Babcock and Wilcox*.⁷⁵ Though *Fansteel* first used the property rights of employers in a significant way as a foil against employee rights, *Babcock* took the analysis further because it split the statutory definition of “employee” in order to strip the NLRA of one of its significant intended effects. The NLRA protected employees’ organizational rights, and this included the right of access by other employees. The NLRA defined employees extremely broadly by saying that it “shall include any employee, and shall not be limited to the employees of a particular employer.”⁷⁶ Just as the *Fansteel* Court had done, the *Babcock* Court read the definition of the term “employee” to be narrower. By reading it this way the Court implicitly reattaches employee status to employers in a way that Congress took pains to avoid. The Act placed employees on equal terms as the employer by not making employees reliant on employers for their statutory protections. The *Babcock* Court reversed that move.

In *Babcock*, the Supreme Court reversed the Board’s holding that union organizers have the same right of access to employees of an employer as do employees of that employer.⁷⁷ *Babcock* involved several Board decisions involving “nonemployee” access to employees on employer’s property. The Board applied the *LeTourneau* test, developed in the companion case of *Republic Aviation*, which balances the employees’ right to receive union literature—and therefore, the employees’ right of access to other employees on employer property—against the employer’s property rights.⁷⁸ This test is a fact intensive analysis that looks to see how important access to the employer’s property is in order to protect the employees’ §7 rights. Though it adopts background property rights in a way that is not spelled out in the NLRA, it at least reads

⁷⁵ 351 U.S. 105 (1956).

⁷⁶ 29 USC §152(3).

⁷⁷ *NLRB v. Babcock and Wilcox Comp.*, 351 U.S. 105 (1956).

⁷⁸ *Babcock and Wilcox Comp.*, 109 NLRB 485, 493 (1954).

the definition of “employee” as it is spelled out in the statute. The Supreme Court in *Babcock* reversed the Board’s finding of an employer unfair labor practice, and said it was improper to apply the *LeTourneau* test to nonemployees when that test had been developed and used only for employees.⁷⁹ The distinction that the Court makes here is important because under the precedent of *Republic Aviation*, “an employer cannot forbid union solicitation on company property during nonworking time even when there is no showing that solicitation away from the plant would be ineffective.”⁸⁰ Without explaining the nature or source of the distinction, the Court said that it “is one of substance.”⁸¹ The rights that attach to employees do not attach to nonemployees, so once the distinction is made it is determinative of the right of access. But, by making the distinction between employees and nonemployees in a manner that the NLRA explicitly repudiates, the *Babcock* Court expanded the employer’s property rights in a manner that the NLRA sought to abridge. The *Babcock* Court ultimately held that only if the location of employment and living quarters are “beyond the reach of reasonable union efforts to communicate with them,” then the employer must provide the union with access.⁸² *Babcock* took a throwaway line from *Republic Aviation* and turned it into the rule for what it called “nonemployees.”

Babcock created a distinction between employee and nonemployee, and the Board and the courts subsequently applied *Babcock* to mean that unless it is virtually impossible for the union to reach employees, then the employer need not provide access.⁸³ Unless the workplace was a remote mining camp or logging camp, the Board and courts held that employers did not have to provide access to unions. Furthermore the burden was shifted to the union to prove that

⁷⁹ *Babcock and Wilcox*, 351 U.S. at 111.

⁸⁰ *Babcock and Wilcox Comp.*, 109 NLRB at 494.

⁸¹ *Babcock and Wilcox*, 351 U.S. at 113.

⁸² *Id.*

⁸³ See *NLRB v. Lake Superior Lumber Corp.*, 167 F.2d 147 (1948); *Alaska Barite Co.*, 197 NLRB 1023 (1972); *NLRB v. S&H Grossinger’s Inc.*, 372 F.2d 26 (1967).

the employees it was trying to reach were so isolated, and there was no other reasonable means of reaching the employees.⁸⁴ The Supreme Court in a subsequent case interpreting *Babcock* described the burden as “a heavy one” because the union’s act of trying to disseminate literature to employees was “trespassory organizational activity.”⁸⁵ Under the terms of the NLRA, this phrase should have been written as an oxymoron, or a narrow exception at best. The NLRA carved out organizational rights precisely so that “employees” would not be considered trespassers when they were organizing. This narrow reading of union rights is even narrower than it first appears and has often been held almost nonexistent, such as in the case of *NLRB v. Sioux City and New Orleans Barge Lines, Inc.*⁸⁶

In *Sioux City*, the union tried to reach employees who worked aboard a barge. The employees lived aboard the barges and spent between 30-60 consecutive days working. When not working, the employees scattered across 15 states.⁸⁷ The union hired 10 organizers to try to telephone employees, used speedboats to pull alongside the barges and throw literature aboard, and tried to speak with loudspeakers from the speedboats.⁸⁸ Even after these intense efforts, the union was only able to reach 35 out of 118 employees.⁸⁹ The employer refused to allow the union access and the Board found that it was an unfair labor practice. Though it was not literally a mining or logging camp, it appeared to be the functional equivalent because workers lived aboard the barge, and it was severed from normal lines of communication. The 8th Circuit refused to enforce the Board’s order and said that the union did not make a sufficiently “strong showing of its inability to contact the employees,” and that it simply needed to exert “extra

⁸⁴ *Sears, Roebuck and Co. v. San Diego County District Council of Carpenters*, 436 US 180, 205 (1978).

⁸⁵ *Id.*

⁸⁶ 472 F.2d 753 (8th Circ. 1973).

⁸⁷ *Sioux City*, 193 NLRB 382, 383 (1971).

⁸⁸ *Id.* at 384-85.

⁸⁹ *Id.* at 385.

effort.”⁹⁰ The message was clear: union organizers had been wholly cut out of protection under the NLRA.

D. *Lechmere* and the Exception as the Rule

Lechmere took the *Babcock* standard to its extreme and finally stated that it is the employer’s property rights that are of ultimate importance in considering the question of union access to employees.⁹¹ *Lechmere* involved a union that was trying to reach employees of a retail store in a shopping plaza off of a highway. The union organizers had little success in taking advertisements out in the local newspaper, so they resorted to placing handbills on the windshields of cars parked in a lot used mostly by employees.⁹² Managers of the store told the organizers that they could not handbill in the parking lot and that they had to leave the area.⁹³

The Board found that this action constituted an unfair labor practice, the Court of Appeals for the First Circuit enforced the order, and the Supreme Court reversed. Though Justice Thomas wrote the opinion for the Court, and though he often talks in textualist terms, Justice Thomas curiously rejects the plain language of the Act. He states that “[b]y its plain terms, thus, the NLRA confers rights only on *employees*, not on union or their nonemployee organizers.”⁹⁴ But, instead of looking at the text of the NLRA, the Court looks to its own occasional interpretation of the statute in order to find almost no right of access for union organizers. In a strange move for Justice Thomas, he declares that the Court should ignore the text of the relevant statute in construing the statute and look only to precedent.⁹⁵ Justice Thomas quotes Justice

⁹⁰ *Sioux City*, 472 F.2d at 756.

⁹¹ *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992).

⁹² *Id.* at 529-30.

⁹³ *Id.* at 530.

⁹⁴ *Id.* at 532.

⁹⁵ See Scott D. Gerber, *My Rookie Years Are Over: Clarence Thomas After Ten Years*, 10 Am. U.J. Gender Soc. Pol’y & L. 343, 345 (2002) (“Justice Thomas seems even more willing now than he was during his acclimation

Brennan’s majority opinion in *Maislin Industries*, saying “Once we have determined a statute’s clear meaning, we adhere to that determination under the doctrine of *stare decisis*, and we judge an agency’s later interpretation of the statute against our prior determination of the statute’s meaning.”⁹⁶ But the judicial interpretation involved in *Maislin Industries* was of a different variety than in *Lechmere*. *Maislin Industries* was a case involving the interpretation of “reasonable rates” in the Interstate Commerce Act as they relate to secret negotiations.⁹⁷ The interpretation of what constitutes “reasonableness” in a statute is precisely the sort of concept that legislatures often leave to courts and agencies to fill in. This is in contrast to court interpretations of NLRA terms that are clearly defined in the statute by the legislature. A broad application of this doctrine would completely close off the possibility of revisiting a statutory provision that the agency or Court has misinterpreted. Furthermore, the doctrine’s application in *Lechmere* smacks of ideological predisposition towards a certain outcome, because it is not a doctrine that textualist like Justice Thomas would be comfortable with in most arenas.⁹⁸

The *Babcock* Court still talked of balancing the rights of employees with the property rights of employers when it stated “organization rights are granted to workers by the same authority, the National Government, that preserves property rights. Accommodation between the two must be obtained with as little destruction of one as is consistent with the maintenance of the other.”⁹⁹ In contrast to this approach, the *Lechmere* Court tries to avoid even this balance. “It is *only* where such [reasonable] access is infeasible that it becomes necessary and proper to take the

period to say that well-established precedents and/or entire areas of the law should be rethought.”); Cass R. Sunstein, *If People Would be Outraged by Their Rulings, Should Judges Care?* 60 *Stan.L.Rev.* 155, 201 n. 156 (2007) (“Justice Scalia has said that Justice Thomas “doesn’t believe in *stare decisis*, period.... [I]f a constitutional line of authority is wrong, [Thomas] would say ‘Let’s get it right.’ I wouldn’t do that.”).

⁹⁶ *Lechmere*, 502 U.S. at 536-37.

⁹⁷ *Maislin Industries U.S. v. Primary Steel*, 497 U.S. 116, 137 (1990).

⁹⁸ See William Michael Treanor, *Taking Text Too Seriously: Modern Textualism, Original Meaning, and the Case of Amar’s Bill of Rights*, 106 *Mich.L.Rev.* 487, 497 (2007).

⁹⁹ *Babcock and Wilcox*, 351 U.S. at 112.

accommodation inquiry to a second level, balancing the employees' and employers' rights."¹⁰⁰

In short, the Court sees union access to employees on employer property as the exception rather than the rule.

IV. A BALANCING APPROACH TO THE NLRA

If what the Supreme Court does when it considers the legality of organizer access to the workplace can be considered balancing, it is a strange form of balancing that will rarely lead to organizer access. Balancing takes place when “a judicial opinion [] analyzes a constitutional question by identifying interests implicated by the case and reaches a decision or constructs a rule of constitutional law by explicitly or implicitly assigning values to the identified interests.”¹⁰¹ Though balancing is often talked about in terms of constitutional questions, balancing can be used whenever statutes implicate important or fundamental concerns. Constitutional concerns often lead to balancing because they are non-absolutes, thereby requiring the evaluation and weighing of important interests and concerns.¹⁰²

Balancing usually takes one of two forms: categorical (or definitional) and ad hoc.¹⁰³ The Court engages in categorical balancing when it weighs the social and individual interests at a high level of abstraction in order to derive a rule of general applicability.¹⁰⁴ An example of categorical balancing in the area of property rights can be seen in the 1940's case of *Marsh v. Alabama*, where the Supreme Court balanced the property rights of a company town against the

¹⁰⁰ *Lechmere*, 502 U.S. at 538.

¹⁰¹ T. Alexander Aleinkoff, *Constitutional Law in the Age of Balancing*, 96 Yale L.J. 943, 945 (1987).

¹⁰² *Id.* at 995-96.

¹⁰³ *Id.* at 948.

¹⁰⁴ Sheldon H. Nahmod, *Public Employee Speech, Categorical Balancing and §1983: A Critique of Garcetti V. Ceballos*, 42 U. Rich.L.Rev. 561, 569-73 (2008).

freedom of expression of individuals.¹⁰⁵ In *Marsh*, the Court found that the interests of the individuals in distributing literature outweighed the property interests of the company. It said “When we balance the Constitutional rights of owners of property against those of the people to enjoy freedom of press and religion, as we must here, we remain mindful of the fact that the latter occupy a preferred position.”¹⁰⁶ In this statement, the Court was evaluating each party’s interests and rights, and holding that certain ones tip the scale in one direction. The dissenting opinion also used categorical balancing to find that the rights of the company outweighed the individual to express herself. “The rights of the owner, which the Constitution protects as well as the right of free speech, are not outweighed by the interests of the trespasser, even though he trespasses in behalf of religion or free speech.”¹⁰⁷ Categorical balancing does not guarantee a certain outcome, but it at least requires the Court to consider the interests of the parties involved and the individuals at the same level of abstraction. With categorical balancing, the principles are weighed without the discrete facts of any individual cases, and the outcome is a rule that is easily applied to cases that fall under the area it covers. In essence, the Court decides once and for all which interest outweighs the other. In *Marsh*, for instance, the Supreme Court used categorical balancing to make the rule that though there are property rights implicated in company towns, a company may not use those rights to diminish the First Amendment.

The Court performs ad hoc balancing when it looks at the particular facts of the case, weighs the various important factors, and decides on a case-by-case basis what the law requires.¹⁰⁸ In ad hoc balancing, there are no general rules that one can plug in the facts of the case; rather, each case requires a balancing of their relevant factors. Ad hoc balancing allows for

¹⁰⁵ Louis Henkin, *Infallibility Under Law: Constitutional Balancing*, 78 Colum.L.Rev. 1022, 1030-31 (1978).

¹⁰⁶ *Marsh v. State of Alabama*, 326 U.S. 501, 509 (1946).

¹⁰⁷ *Id.*

¹⁰⁸ Aleinkoff, *supra* note 101, at 948.

the individual determinations that categorical balancing does not, but it often leads to more inconsistent results.

If what the Court performs in labor cases can be called balancing, it is closer to categorical balancing than it is to ad hoc balancing. In each of the seminal cases recounted above the Court makes a rule of general applicability that seems to only require the identification of the status of the party. In *Fansteel*, the Court held that employees may not engage in job actions on employer's property. In *Republic Aviation*, the Court held that employers must permit employee access to other employees for purposes of organizing. In *Babcock*, the Court held that union organizers are non-employees. In *Lechmere*, the Court held that organizer access may be proscribed by an employer so long as there is a conceivable alternative form of access. The process that the Court uses in each of these cases is not pure categorical balancing because the Court arrives at the rules not by looking at each party's interests at a high level of abstraction and then weighing them. Employer property rights are looked at abstractly, but employee organizational rights are looked at in specificity. Even where there is no injury to the employer's property, the Court looks at the abstract intrusion upon property, or the infringement upon exclusive use, and balances it against the employees' specific rights to receive the information in question. In such a balance, an employee's right to hear a Teamster organizer's information of pay differentials in a work area parking lot will rarely trump the employer's categorical property rights. It is too easy for the Court to simply say that the message can be received in another place or another manner, without regard to the problems involving knowing the names and contact information of the employees, issues of accessing them in a timely manner that is amenable to a representation election, and the morale problems attached to a union where the organizers seem

to be unable to do something as seemingly minor as reaching employees. The Court then creates rules of general applicability with exceptions so narrow that they are merely nominal.

The Supreme Court should proceed along an ad hoc balancing path when considering employee rights as against employer property rights. The statutory inclusion of a broad category of individuals under the term “employee” does not lend itself to the jurisprudence of labels that the Court has created. The NLRA does not allow for a general rule that deals with individuals who do not work for a particular employer, because under the NLRA they are all “employees” with prescribed protections. Because all “employees” receive a certain level of statutory protections, the Court should look at the facts of individual cases in order to determine what the discrete interests and injuries are in each case. These should be balanced using a set of factors that the Court develops in order to make them commensurate.

V. POSSIBLE BALANCING APPROACHES TO PROPERTY RIGHTS

There are several possible well-developed forms that such balancing could take, including private nuisance, easement, or Average Reciprocity of Advantages. Though a private theory may not work in practice because the issue in employment cases involves physical intrusion of property, private nuisance can serve as an analogy to show the benefits of such balancing in a property context. In addition, the NLRA can be read as producing a limited easement for “employees” for organizing purposes on employer property. This approach differs slightly from the private nuisance approach because rather than balancing the interests of the parties, it provides an allowance within the narrow scope of activities. Similarly, the approach of

the Average Reciprocity of Advantages provides a balancing model that balances property rights against societies interests in its limited infringement.

The property rights that the Supreme Court accords employers seems closest to the property rights that are given to persons in their own home. It is an almost absolute form that holds anyone in defiance of the property owner's wishes to be in violation of trespass. The tort of trespass flows from the property owner's right to exclusive use.¹⁰⁹ Trespass is a strict liability offense that does not require damage to property or a showing of intent or negligence.¹¹⁰ Since the Supreme Court chose to view union organizers' attempts to access employees through the lens of trespassory actions, strict liability attaches and union organizers are left with little defense. The Supreme Court did not have to proceed in this way.

A. The Private Nuisance Analogy

Though there are many reasons why the Court should not have interpreted the NLRA through a property rights perspective, the Court could have done so without choosing the broadest of property rights. Even if it wanted to view the NLRA primarily through the lens of common law property rights, it could have viewed union organizers activity as creating a private nuisance. Labeling union activity as trespass leaves little room for balancing, whereas private nuisance requires a showing that the activity "unreasonably interferes with the plaintiff in the use and enjoyment of the plaintiff's land."¹¹¹ This route would not only require a more equitable balance, but it would also appropriately shift the burden to the employer. This approach is in fact similar to the *Republic Aviation* approach that held that the company may not deny access unless such access unreasonably interferes with the company's production or the maintenance of

¹⁰⁹ Prosser and Keeton on Torts, 5th Edition, §13.

¹¹⁰ *Id.*

¹¹¹ *Id.*

discipline.¹¹² It presumes a legitimate right belonging to the non-property holder, and ultimately requires the property holder to show that her uses are significantly affected by the other's activities. If the Court were to consider the union's access through the lens of a private nuisance then it would have to perform a form of balancing that actually takes into account the use of the land and if the union organizers substantially interfere with that use. If the organizer's activity did not interfere with the employer's use, then the organizer's legitimate right to engage in organizing would trump the employer's right to stop the organizer.

The biggest hurdle to viewing the union's actions as a private nuisance rather than a trespass is that the union is physically invading the employer's property, rather than merely affecting his use in the land.¹¹³ "[T]respass is an invasion in the exclusive possession of his land, while nuisance is an interference with his use and enjoyment of it. The difference is that between walking across his lawn and establishing a bawdy house next door."¹¹⁴ This hurdle is perhaps insurmountable, making private nuisance an unworkable framework for labor-employer relationships. But even if the category does not fit practically, its logic and internal inquiry help illustrate the advantages to a balanced approach that lives beyond the world of trespass.

B. Organizing as a Limited Easement

The Court could have also avoided the difficult task of trying to call a physical invasion a private nuisance if it had read the NLRA as having created an easement, whereby statutory employees may conduct certain limited protected activities. The easement would be limited and would only apply to organizing activities, or in the language of the NLRA, "concerted activities for the purpose of collective bargaining or other mutual aid or protection."¹¹⁵ If, in wishing to

¹¹² *Republic Aviation*, 324 U.S. at 803-04, note 10.

¹¹³ Prosser, *supra* note 109, §87.

¹¹⁴ *Id.*

¹¹⁵ 29 USC §157.

read the NLRA in property terms, the Supreme Court had found such an easement then the union and other “employee” organizers would have a statutory right of limited access, and would only be liable if they went beyond the scope of the easement or unreasonably interfered with the employer’s use of the property. If such an easement were found to have been established by the NLRA, then the Court would not have to balance the employer’s property rights against the employees’ organizational rights and then delve into the inquiry of how trespassing “nonemployees” further those rights. Instead, the Court would begin from the position of saying that both parties have certain property interests, with the employer necessarily having more than the organizers, and ask if the union organizers exceeded the limits of the easement. If they do exceed the limits, then it could be considered a trespass and it would be forbidden. But if the organizers accessed the property in a reasonable manner, in a way that did not interfere with production and focused only on organizational activities, then they would have the rights afforded to any easement holder. Unless the Court were willing to say, contrary to the spirit and text of the NLRA, that an employer has a managerial right to have a non-unionized workforce and that any organization necessarily interferes with the business, then organizing in this framework would be no different than an individual traveling across a right of way to access her property. Through the lens of easement, the employer would have to show more than the mere presence of organizers in order to proscribe their access.

C. The Average Reciprocity of Advantages as a Model Balance

In allowing for a sort of limited easement for the purposes of organizing, or other mechanism that would have allowed for organizer access to employer property, the issue of unconstitutional takings would surely be raised. The claim would likely take the form of arguing that the government through the NLRA has transferred one of the rights in the bundle of property

rights from one group—employers—to another group—employees—for the purported public good. If the statute’s allowance of access were found to be a taking, then just compensation would likely be prohibitively expensive and administratively impossible. The problem of valuing the access for each individual property retrospectively and prospectively would make it impossible for the government to pay every employer in the nation. And since this would likely not fit well into the category of regulatory takings, the *Lucas* approach of compensation would not be followed, where it would only be considered a taking “when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good.”¹¹⁶

The Average Reciprocity of Advantages doctrine, articulated by Justice Holmes more than a decade before the NLRA was passed offers a mechanism to deal with the possible takings problem involved in organizer access. In *Pennsylvania Coal v. Mahon*, the Supreme Court used the doctrine of the “Average Reciprocity of Advantage” to hold that a state statute prohibiting the mining of anthracite coal in a manner that causes subsidence of a surface residence constituted an unlawful taking.¹¹⁷ The Court used the Average Reciprocity of Advantage doctrine in order to distinguish *Pennsylvania Coal* from the previous case of *Plymouth Coal*, where the Court upheld the validity of a statute requiring coal companies to leave pillars of coal in mines.¹¹⁸ The difference, Justice Holmes explained in *Pennsylvania Coal*, is that the statute in *Plymouth Coal* created “a requirement for the safety of employees invited into the mine, and secured an average reciprocity of advantage that has been recognized as a justification of various laws.”¹¹⁹ In *Pennsylvania Coal*, the effect of the statute was to greatly burden the coal company

¹¹⁶ *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019 (1992).

¹¹⁷ *Pennsylvania Coal v. Mahon*, 260 U.S. 393, 415 (1922).

¹¹⁸ *Plymouth Coal Co. v. Commonwealth of Pennsylvania*, 232 US 531 (1914).

¹¹⁹ *Pennsylvania Coal*, 260 U.S. at 415.

(“For practical purposes the right to coal consists in the right to mine it.”¹²⁰), while only benefiting one individual in the rare position of owning only the surface rights. Important also to the analysis is that the state of Pennsylvania recognized a property estate in the subsurface land.¹²¹ Therefore, according to the majority, the statute requires that the coal company lose an entire property estate for the benefit of only one individual, thereby failing the Reciprocity of Advantage test.

In *Keystone Bituminous Coal Association v. DeBenedictis*, the Court uses Justice Holmes’ Reciprocity of Advantage doctrine to find that a similar statute passed was not a taking.¹²² Nearly 65 years later, in *Keystone Bituminous*, the Supreme Court upheld a Pennsylvania statute requiring that 50% of coal to remain unmined beneath structures such as dwellings, public buildings, churches, schools, hospitals, cemeteries, and the like.¹²³ The Court used the Reciprocity of Advantage doctrine in order to find that the statute did not constitute a taking. The test weighs the public benefit in restricting a use of private property against the burdens of the property owner.¹²⁴ If the restriction deals with a public nuisance, as Justice Brandeis argued the coal company’s subsidence mining was in *Pennsylvania Coal*, then the Reciprocity of Advantage test is fairly easy to apply.¹²⁵ Justice Rehnquist’s arguments that the Court should limit the Reciprocity of Advantage doctrine to nuisance, and should be more careful of excepting from the 5th Amendment a regulation based on economic concerns, such as the one in *Keystone Bituminous*, was rejected by the Court.¹²⁶ Similarly, if the regulation actually

¹²⁰ *Id.* at 414 (quoting *Commonwealth v. Clearview Coal Comp.* 256 PA. 328, 331 (Penn. 1917).

¹²¹ *Pennsylvania Coal*, 260 U.S. at 414.

¹²² *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470 (1987).

¹²³ *Id.* at 476-77.

¹²⁴ *Id.* at 491.

¹²⁵ See *Keystone Bituminous Coal*, 480 U.S. at 488, n. 17.

¹²⁶ *Id.* at 513 (Rehnquist Dissenting).

confers a benefit onto the owner of the property, such as protecting its workers or visitors, then the test is fairly easy to apply.¹²⁷

In the labor context, the Reciprocity of Advantage doctrine could be used in order to find that the organizing access allowed by the NLRA is not a taking under the 5th Amendment. The doctrine requires an inquiry into the property interests affected as against the benefits gained by society and the company. The NLRA lays out the problems, and the sources of the problems, that it seeks to remedy in its first section, thereby offering a description of the benefits that Congress intended.¹²⁸ It states that employers have created an imbalanced power structure that has led to industrial strife that ripples through society as a whole.¹²⁹

NLRA section 1 paints two pictures of society and work, employers and employees. It first shows a society being destroyed as a result of a power imbalance in the workplace. It then explores how this unequal power between employers and employees came about. Finally, section 1 sets out its vision for a new society built on a balance of power. This vision is rooted in the workplace, but with effects felt throughout society.¹³⁰

The goals of the NLRA are to create harmony and stability that protects employees, employers, and society. The almost intuitive rationale that unions create higher labor costs, which adversely affect a company's profitability and competitiveness, is more complicated than it first appears. Though it would seem that the lower an employer's labor costs are the more profits it can make, this assumption has historically proven to be false. An early example of this can be found in Henry Ford's assembly lines at the turn of the century. When Ford instituted the assembly line to increase efficiency, his plants suffered from high turnover due to low worker morale and

¹²⁷ *Pennsylvania Coal*, 260 U.S. at 415.

¹²⁸ 29 U.S.C. §151.

¹²⁹ *Id.*

¹³⁰ Ellen Dannin, *Forum: At 70, Should the National Labor Relations Act be Retired? NLRA Values, Labor Values, American Values*, 26 Berkeley J. Emp.&Lab.L. 223, 240 (2005).

alienation from the work-product.¹³¹ In response, Ford doubled the pay for autoworkers to \$5 per day, and his competitors foresaw his ruin. Ford famously commented that “a low wage business is always insecure,” and though his labor costs doubled, his business proved more profitable.¹³²

Beyond the predictions of greater industrial and societal peace from increased organization and collective bargaining, economic research has shown that unionized companies have greater productivity than their non-unionized counterparts.¹³³ Though unionized workers have increased wages and benefits, the companies have decreased turnover, more experienced workers, and better hiring practices.¹³⁴ The gains of a unionized workforce have been quantified across a broad spectrum of industries: the lower turnover rate in unionized manufacturing companies led to a 20% productivity increase;¹³⁵ the decreased need for close supervision of construction employees led to a 10% productivity increase.¹³⁶ In addition, unionized companies have increased employee morale, and have shown to have far more joint employee-management initiatives.¹³⁷ Combined, these factors lead to greater productivity differentials in unionized companies over non-unionized companies in America and around the world.¹³⁸ The stated purpose of the NLRA, mixed with empirical data of the benefits of unionized workforces, show that the side of the equation that looks to the benefits to society and the company are quite high.

Next, it must be asked what property rights are affected by allowing “employee” access for purposes of organizing. Assuming that the access is reasonable and does not allow for

¹³¹ Joseph Z. Fleming, *The “Employee Free Choice Act”: The House of Lords and the House of Labor Have Something in Common: They Both Are Seeking to Avoid Secret Ballot Elections*, SP024 ALI-ABA 519, 550-51 (Dec. 4-6, 2008).

¹³² *Id.*

¹³³ *Id.* at 551.

¹³⁴ Richard B. Freeman and James L. Medoff, *Trade Unions and Productivity: Some New Evidence on an Old Issue*, 473 *Annals Am.Acad.Pol.&Soc.Sci.* 149 (1984).

¹³⁵ *Id.* at 159.

¹³⁶ *Id.* at 160 (1984). *See Also* Dale Belman and Paula B. Voos, *Union Wages and Union Decline: Evidence from the Construction Industry*, 60 *Indus. & Lab.Rel.Rev.* 67 (2006).

¹³⁷ Freeman, *supra* note 134, at 160.

¹³⁸ *See* Zafiris Tzannatos, *Unions and Collective Bargaining: Economic Effects in a Global Environment*, The World Bank (March, 2005).

interference with production or discipline, then the only interest affected is exclusive use. As a property owner, one has the right to exclusive use of the property as against all others. This right is of great importance with regard to one's residence, but it is a myth to hold the right as absolute even in this setting. If one is connected to utilities, then one must allow property access to gas meter readers, water utilities, and phone line operators. The right of exclusive use is even less important in the workplace, because an employer must allow access to safety inspectors, licensing agencies when applicable, and cannot exclude along certain discriminatory lines.¹³⁹ With the right of exclusive use already diminished in the workplace, it should not hold a privileged place in the equation. It is not like the right to mine coal in the *Pennsylvania Coal* case, where there was a separate state created property interest in the coal, and the statute in question was effectively taking the whole interest. In regards to the issue of employee access for organizational purposes, the only right implicated is an already diminished right to exclusive use. The Average Reciprocity of Advantages doctrine would balance these competing interests and would likely result in no taking under the NLRA's right of access to "employees."

VI. OSHA AND THE PERMISSIBLE INTRUSION OF WORKPLACE PROPERTY RIGHTS

Though the Supreme Court has long treated even minimal employee organizational rights on employer property as an unparalleled and inconceivable invasion of private property, there are in fact other statutes that require similar invasions of employer property in order to benefit the public good. The Occupational Safety and Health Act of 1970 (OSHA) is such an example that similarly arises in the labor context. Congress enacted OSHA in order to minimize the "personal injuries and illnesses arising out of work situations [that] impose a substantial burden upon, and

¹³⁹ OSHA, examined below, is an example of this.

are a hindrance to, interstate commerce in terms of lost production, wage loss, medical expenses, and disability compensation payments.”¹⁴⁰ This purpose is quite similar to the explicit problems described in the NLRA. The NLRA stated that the strife caused by lack of collective bargaining had the “intent or the necessary effect of burdening or obstructing commerce...”¹⁴¹ Furthermore, the Act stated that “the inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract and employers...tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners...”¹⁴²

In both statutes, the concerns are internal employment procedures that have wide-reaching effects on society through commerce. Furthermore, both statutes recognize that the employees and employers are engaged in a common enterprise that would be more efficient and mutually beneficial if the parties worked together. In OSHA, the statute states:

the Congress declares it to be its purpose and policy...to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources...by encouraging joint labor-management efforts to reduce injuries and disease arising out of employment.¹⁴³

In the NLRA, the statute states:

It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self- organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.¹⁴⁴

¹⁴⁰ 29 U.S.C. § 651(a).

¹⁴¹ 29 U.S.C. § 151.

¹⁴² *Id.*

¹⁴³ 29 U.S.C. § 651(b)(13).

¹⁴⁴ 29 U.S.C. § 151.

In order to further its stated purposes, OSHA provides for a regime of inspection of workplaces. The statute allows for the Secretary “to enter without delay and at reasonable times any factory, plant, establishment, construction site, or other area, workplace or environment where work is performed by an employee of an employer; and to inspect and investigate...”¹⁴⁵ Though the Supreme Court has held that this provision of OSHA is only valid insofar as there is either consent or a search warrant, the analysis is a 4th Amendment Search analysis and not a 5th Amendment Takings analysis.¹⁴⁶ Furthermore, the Court’s warrant requirement is not as daunting as it may first appear. The Secretary may seek *ex parte* warrants,¹⁴⁷ and these warrants do not require a demonstration of probable cause similar to the criminal setting.¹⁴⁸ The warrants can be issued upon a showing that “reasonable legislative or administrative standards for conducting an...inspection are satisfied with respect to a particular establishment.”¹⁴⁹ This requirement simply requires an OSHA agent to recount to a judge the neutral criteria in place that led to the selection of the targeted employer and the general program that the inspection is intended to further.¹⁵⁰ The warrant requirement protects the property rights of the employers from searches only insofar as they are not being unfairly targeted, but it still allows for fairly wide-reaching on-site inspections.

The significant difference between access to employer property for purposes of inspection under OSHA and for purposes of organizing under the NLRA is the status of the individuals who are seeking access. In the OSHA context it is state actors who are seeking access, whereas under the NLRA it is private individuals who are seeking access. Having

¹⁴⁵ 29 U.S.C. § 657(a).

¹⁴⁶ *Marshall v. Barlow’s Inc.*, 436 U.S. 307 (1978).

¹⁴⁷ *Id.* at 316-20.

¹⁴⁸ *Id.* at 320-21.

¹⁴⁹ *Id.* (quoting *Camara v. Municipal Court*, 387 U.S. 523, 538 (1967)).

¹⁵⁰ Rosemary Harmon, Note, *Defining the Contours of OSHA Inspection Warrants* 48 Brook.L.Rev. 105, 116-17 (1981).

government employees enter the employers' property for purposes of organizing would be antithetical to the entire scheme of the NLRA. The NLRA is premised upon the idea of government neutrality. The Act provides certain ground rules in order to allow employees to organize and bargain collectively if they so desire, but it does not intervene in substantive matters or in promoting union membership. The government only intervenes in order to act as a referee in certification elections and when one side has violated the Act.

The validity of organizer access to employer property should not turn on the fact that the organizers are not government actors. Under both the OSHA and the NLRA statutes, the property rights of employers' are being infringed for the public good. The OSHA infringements have been upheld, with some modification, whereas the broad NLRA infringements have never been seriously considered by the Court. When considering the OSHA access to private property, the Supreme Court balances the employers' private property interests protected by the 4th Amendment against the government's interest stated in the statute. This balance recognizes the importance of access to the property to enforce, monitor, and even educate the employer. The Court recognizes that a strong enforcement of property rights would effectively disable the OSHA.¹⁵¹

In the NLRA setting on the other hand, there is no such balancing of property rights against organizer access. The Supreme Court first ignores the plain language of the definition of employees under Section 2(3) of the NLRA.¹⁵² Then, in addressing the more limited question of whether the right to receive union information is essential to organizing activity, the Court holds that only in extremely exceptional circumstances may a union breach the employer's near absolute property rights. This example is raised in brief to show that there is more at play in

¹⁵¹ *Marshall*, 436 U.S. at 320-21.

¹⁵² 29 USC §152(3).

interpreting employee rights than simply being bound by the employer's property rights. OSHA shows that infringement upon property rights are acceptable for purposes of health and safety of the workplace and society. For unstated reasons, they are unacceptable for purposes of employee workplace rights, benefits, pay, and voice.

VII. POSSIBLE RATIONALES IN INJECTING PROPERTY RIGHTS INTO THE NLRA

The Supreme Court, from *Fansteel*, *Republic Aviation*, and *Babcock* in the first half of the century, to *Lechmere* more recently, has construed the NLRA in a very peculiar way. It has injected a particular understanding of employer property rights, but it has never explained the source of these rights or the rationales in giving them such weight. Property rights have crept into the equation, and it appears that no one objected. Though the Board, and even the Supreme Court, first weighed access to employees in promotion of §7 rights heavily, they always weighed them against an incredibly strong form of background property rights of the employer. Perhaps it seemed so natural that no explanation was ever necessary for the source of these rights, how broad their scope was, or if they were consistent with the NLRA. Therefore, the Supreme Court has never really provided an explanation for what has become an almost absolute federal property right that may in fact be greater than most states' common law property rights.¹⁵³

Therefore it is important to question some of the arguments and rationales that led to this form of property rights in the workplace. Where they advance the NLRA's purpose and goals, there is a

¹⁵³ Cynthia L. Estlund, *Labor, Property, and Sovereignty After Lechmere* 46 Stan.L.Rev. 305, 309 (1994).

strong argument for judicially incorporating them into the Act. But where they are in conflict with the purpose of the Act, and they serve as obstacles to achieving its objectives, it should be examined if the 74th Congress intended to abridge those rights.

The NLRA seems to explicitly exclude employer property rights. Though preceding legislation that greatly influenced the NLRA, such as the Clayton Act, specifically brought property into the equation in protecting workers' rights, the NLRA specifically did not include property language.¹⁵⁴ Section 20 of the Clayton Act states that “no restraining order or injunction shall be granted by any court of the United States...unless necessary to prevent irreparable injury to property.”¹⁵⁵ The Supreme Court has read the silence in the NLRA to mean that Congress intended to adopt the contemporaneous common law property rights into the Act, and the first step in an analysis of the NLRA must first preserve these rights as an undisturbed whole. Justice Reed found property and employee rights as stemming from the same source, and therefore existing on the same plane when he wrote in his majority opinion in *Babcock*, that “organizing rights are granted to workers by the same authority, the National Government, that preserves property rights.”¹⁵⁶ But property rights are not granted by the national government; they are granted by state law. Federal law simply protects private property from being taken without just compensation.¹⁵⁷ And as the Supreme Court held in *Lucas*—decided in the same term as *Lechmere*—a regulation which abridges one of the bundle of property rights that does not “deprive[] land of all economically beneficial use” is not a constitutional takings requiring compensation.¹⁵⁸

¹⁵⁴ 38 Stat. 730, codified at 15 U.S.C. 12-27, 29 U.S.C. 52-53.

¹⁵⁵ *Id.*

¹⁵⁶ *Babcock and Wilcox*, 351 U.S. at 112.

¹⁵⁷ U.S. Const. amend. V.

¹⁵⁸ *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1027 (1992).

Furthermore, as James Atleson points out, the words attached to the rights in the *Babcock* decision are telling:¹⁵⁹ Organization rights are “granted,” while property rights are “preserved.”¹⁶⁰ This language suggests that property rights are almost natural, while employee rights are artificial. This conception of employee and property rights is telling in trying to understand how the Court reaches its result when the two are in conflict. The stated goal is the absolute maintenance of property rights, with the stated assumption that there will be some destruction of employee rights. It is a bizarre reading of the NLRA to conclude that the very document that accorded employees rights stated that those rights should be destroyed if necessary to preserve the purity of property rights. It is also strange that the Court does not hold nationally created employment rights in a privileged position over state created property rights. The Supremacy Clause states that “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof...shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding.”¹⁶¹ Justice Reed’s mistaken analysis in *Babcock* notwithstanding, employee rights and property rights spring from different sources, and each falls on a different position on the hierarchy created by the Supremacy Clause.

VIII) CONCLUSION

The NLRA was passed in a unique time of American history when the political, economic, and social factors combined to create a moment when such a radical statute could be

¹⁵⁹ James B. Atleson, *Values and Assumptions in American Labor Law* 62 (University of Massachusetts Press, 1983).

¹⁶⁰ *Babcock and Wilcox Comp.*, 351 U.S. at 112 (1956).

¹⁶¹ U.S. Const. art. VI, § 2.

passed. Every provision of the NLRA was debated for over a year in the House and Senate, and the bill that passed was intended to bring industrial peace to America. Through an injection of property rights, the Supreme Court has greatly limited the NLRA. Though the Act was intended to change the place of the employee in the workplace, the Supreme Court effectively inserted the Court's own conception of 1920's and 1930's property rights. In an ultimate ironic twist, just as the Sherman Anti-Trust Act was used to enhance employers' managerial powers, the NLRA has become a tool to enhance and expand employer property rights.