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HOW AMERICAN WORKERS LOST THE RIGHT TO STRIKE, AND OTHER TALES

*James Gray Pope**

To paraphrase a veteran labor scholar, if you want to know where the corpses are buried in labor law, look for the “of course” statements in court opinions.¹ By “of course” statements, he meant propositions that are announced as if they were self-evident, requiring no justification. Each year, thousands of law students read such statements in labor law casebooks. And each year, they duly ask themselves — prodded sometimes by the casebook’s notes — how these conclusions could be justified in legal terms. But often there seems to be no answer, and the mystery continues.

This Essay recounts the origins of five such “of course” statements, each of which has had a devastating impact on the American labor movement. The five statements are:

- 1) Of course, workers have no right of self-defense against employers that commit unfair labor practices.²
- 2) Of course, employers enjoy the right to permanently replace economic strikers.³
- 3) Of course, the National Labor Relations Board has no power to deter unfair labor practices.⁴
- 4) Of course, employers may exclude union organizers from their property.⁵
- 5) Of course, employers may close operations out of

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1. JAMES B. ATLESON, VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW 24 (1983).

2. *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240, 257-58 (1939). See discussion *infra* Part I.

3. *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333, 345-46 (1938). See discussion *infra* Part II.

4. *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 235-36 (1938). See discussion *infra* Part III.

5. *NLRB v. Babcock and Wilcox Co.*, 351 U.S. 105, 114 (1956); *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 537 (1992). See discussion *infra* Part IV.

“spite” against workers who choose to unionize.⁶

These statements all share one puzzling feature. In the accepted hierarchy of laws, only the United States Constitution can trump federal statutes.⁷ Yet each of these statements elevates the state common-law rights of employers over the federal statutory rights of workers.⁸ This strange phenomenon gives rise to a hypothesis: If the Constitution is the only source of law with sufficient authority to provide a legal justification for these “of course” statements, then maybe they can be traced to constitutional thinking. To give credit where credit is due, this is not my idea; it builds on an observation by then-Associate Justice William Rehnquist:

From its earliest cases construing the National Labor Relations Act the Court has recognized the weight of an employer’s property rights, rights which are explicitly protected from federal interference by the Fifth Amendment to the Constitution. The Court has not been quick to conclude in a given instance that Congress has authorized the displacement of those rights by the federally created rights of the employees.⁹

In support of this claim, Justice Rehnquist cited *NLRB v. Fansteel Metallurgical Corporation*,¹⁰ the source of our first “of course” statement. But he left the other cases unspecified. The five stories that follow (Parts I-V) confirm the accuracy of the Rehnquist thesis as applied to *Fansteel*, and suggest that — if we include liberty of contract and the Commerce Clause along with property rights — the other four “of course” statements can be explained as rooted in the Constitution as well. In each of the five cases, the Court revived *Lochner*-era doctrines — supposedly defunct since the “switch in time that saved nine” in 1937 — and applied them to cut back on statutory labor rights. Once again, judges have deprived workers of the rights to organize and strike, but this time without the forthright constitutional reasoning of the pre-1937 period.

How did this happen? Why did the Court hide the constitutional ball in “of course” statements? What are the implications for labor law today? Part VI concludes the Essay by addressing those questions.

6. *Textile Workers Union v. Darlington Mfg. Co.*, 380 U.S. 263, 268-70 (1965). See discussion *infra* Part V.

7. See Carlos E. González, *Popular Sovereign Generated Versus Government Institution Generated Constitutional Norms: When Does a Constitutional Amendment Not Amend the Constitution?*, 80 WASH. U. L.Q. 127, 142-48 (2002) (analyzing in depth the operation of trumping norms in cases of legal conflict, including the trumping power of federal statutory law over state common law and of federal constitutional law over federal statutory law).

8. These cases exemplify a general tendency of courts to privilege employer common law rights over worker statutory rights. On this tendency, see ATLESON, *supra* note 1, at 9-10; Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 MINN. L. REV. 265, 293-97 (1978).

9. *Eastex, Inc. v. NLRB*, 437 U.S. 556, 580 (1978) (Rehnquist, J., dissenting).

10. 306 U.S. 240 (1939).

I. HOW AMERICAN WORKERS LOST THE RIGHT OF SELF-DEFENSE

On February 17, 1937, members of the Steel Workers Organizing Committee at the Fansteel Metallurgical Corporation occupied two buildings of the factory and commenced a sit-down strike. That same day, management told the strikers that they were fired.¹¹ After a court enjoined the strikers to cease their occupation, a force of 140 police officers armed with tear gas guns and baseball bats assaulted the plant only to be repulsed by strikers hurling nuts, bolts, and other objects. A second attempt, conducted before dawn with a larger force, succeeded. During both attacks windows were broken and other company property damaged. After their eviction from the plant, a majority of the strikers were convicted of contempt of court and sentenced to fines and substantial jail terms.¹²

The strikers claimed that they had rightfully occupied the factories in self-defense of their right to organize, protected under the recently enacted National Labor Relations Act (NLRA).¹³ Prior to the sit-down, the corporation had committed a variety of unfair labor practices over a period of six months, including planting a spy in the local union, transferring the local's president to an isolated location, establishing a company-dominated union, and announcing that management would never bargain with the union under any circumstances.¹⁴ The workers had filed charges with the National Labor Relations Board (NLRB),¹⁵ but five months had gone by with no action. One union leader recalled: "[T]he members of the lodge felt that . . . we were letting the company push us around, and we were not sticking up for their rights as they considered them under the Wagner labor law. . . . [T]hey demanded we do something."¹⁶ Meanwhile, Fansteel's spy within the union was acting as an *agent provocateur*, urging the workers to go out on a traditional outside strike — thus giving the company an opportunity to break the union by bringing in striker replacements.¹⁷ Caught between the necessity for action and

11. *Fansteel Metallurgical Corp.*, 5 N.L.R.B. 930, 942 (1938), *enforcement denied*, 98 F.2d 375 (7th Cir. 1938), *rev'd in part*, 306 U.S. 240 (1939).

12. *Id.* at 942-43.

13. See James Gray Pope, *Worker Lawmaking, Sit-Down Strikes, and the Shaping of American Industrial Relations, 1935-1958* LAW & HISTORY (forthcoming 2006) (manuscript at 28-35).

14. *Fansteel Metallurgical Corp.*, 306 U.S. at 251-52; *Fansteel Metallurgical Corp.*, 5 N.L.R.B. at 935.

15. Record at 23-24, NLRB v. *Fansteel Metallurgical Corp.*, 306 U.S. 240 (1939) (No. 436) [hereinafter *Fansteel Record*].

16. Henry M. Hart, Jr. & Edward F. Prichard, Jr., *The Fansteel Case: Employee Misconduct and the Remedial Powers of the National Labor Relations Board*, 52 HARV. L. REV. 1275, 1280-81 (1939).

17. *Fansteel Metallurgical Corp.*, 5 N.L.R.B. at 939; *Fansteel Record*, *supra* note 15, at

the perils of a traditional strike, the unionists resorted to the sit-down.

The NLRB bypassed the workers' claim of self-defense by ordering Fansteel to reinstate the strikers as a remedy for the company's pre-strike unfair labor practices.¹⁸ The Supreme Court, on the other hand, squarely confronted the issue of whether the sit-down was protected under the NLRA. In an opinion by Chief Justice Hughes, the Court held that the Board could not reinstate sit-downers even though their strike would not have occurred but for the employer's violations of law. According to the Chief Justice, the strikers lost their status as statutory "employees" when Fansteel discharged them. And since the NLRB was empowered to reinstate only "employees," it could not reinstate the fired strikers.¹⁹ Why was it legal for Fansteel to terminate employees for responding with self-help to its own statutory violations? The opinion made it clear that the employer's common-law property rights were of a different and higher order than the employees' statutory labor rights. While the company's repeated violations of the workers' right to organize did not deprive the company of "its legal rights to the possession and protection of its property," the workers' violation of the employer's property rights put them "outside the protection of the statute."²⁰ At no point in his opinion for the majority did Chief Justice Hughes mention the impact of the employer's unfair labor practices on the workers' statutory rights. In fact, the Court was so little concerned about the corporation's violations that it referred to the sit-down as "an illegal seizure of the buildings in order to prevent their use by the employer in a *lawful* manner."²¹

How did the corporation's common law property rights rise so far above the workers' statutory rights? Constitutional law operated both to pump up the former and to deflate the latter. In *NLRB v. Jones & Laughlin*, the Court had upheld the Board's power to reinstate a worker fired for union activity, but only because the Act allowed the employer to fire a worker for any other reason, and thus did "not

389, 394-95; Hart & Prichard, *supra* note 16, at 1280-81. At the time of the *Fansteel* strike, the Board had already developed the rule that workers who struck in protest of unfair labor practices could not be permanently replaced. *Carlisle Lumber Co.*, 2 N.L.R.B. 248 (1936), *enforced as modified*, 94 F.2d 138 (9th Cir. 1937), *cert. denied*, 304 U.S. 575 (1938); *Jefferey-De Witt Insulator Co.*, 1 N.L.R.B. 618 (1936), *enforced*, 91 F.2d 134 (4th Cir. 1937), *cert. denied*, 302 U.S. 731 (1937). But relying on this rule would do nothing to protect the workers or their union during the period that unfair labor practice charges were pending — a period that, judging from the five-month delay that had already ensued since the union filed its charges, would be a long one.

18. The Board reasoned that reinstatement was necessary to restore the status quo prevailing prior to the employer's violations. *Fansteel Metallurgic Corp.*, 5 N.L.R.B. at 949-50.

19. *Fansteel Metallurgic Corp.*, 306 U.S. at 252-53, 255.

20. *Id.* at 253, 256-57.

21. *Id.* at 256 (emphasis added).

interfere with the normal exercise of the right of the employer to select its employees or to discharge them.”²² In *Fansteel*, Chief Justice Hughes characterized the issue as whether the Act abrogated the employer’s right to fire workers who had illegally seized its property — certainly a “normal” exercise of the right to discharge.²³ “Apart from the question of the constitutional validity of an enactment of that sort,” he wrote, “it is enough to say that such a legislative intention should be found in some definite and unmistakable expression.”²⁴ The Chief Justice did not cite any authority for the existence of a constitutional right to discharge workers, a gap that was filled in *Fansteel*’s brief with citations to the due process clause of the Fifth Amendment and to the *Lochner*-era cases of *Adair v. United States* and *Coppage v. Kansas*.²⁵ Thus, in both *Jones & Laughlin* and *Fansteel*, the Court affirmed that employers continued to enjoy a constitutional right to discharge workers under the due process clause.

While the employer’s right to fire workers rose to the constitutional level, the workers’ statutory right to organize all but disappeared from consideration. This too had its roots in constitutional thinking, here grounded on the Commerce Clause. In *Jones & Laughlin*, the Court had held that a Board order could survive constitutional challenge only if the particular unfair labor practices at issue actually affected interstate commerce and thus fell within Congress’s commerce power.²⁶ NLRB General Counsel Charles Fahy interpreted this to mean that the reach of the Act to a particular enterprise hinged on whether “stoppage of . . . operations by industrial strife” in that enterprise would substantially interrupt or interfere with interstate commerce.²⁷ In its anxiousness to win this point, the Board focused solely on the commerce-protecting purpose of the Act, which tended to cast unions and strikers as dangerous disruptors of commerce. Forgotten were other NLRA policies that might have

22. 301 U.S. 1, 45-46 (1937).

23. *Fansteel Metallurgic Corp.*, 306 U.S. at 252.

24. *Id.* at 255. Justice Stone’s concurrence took a similar approach, observing that if the Act had expressed an intention to bar employers from discharging workers for “unlawful practices,” he “should have thought it of sufficiently dubious constitutionality to require us to construe its language otherwise, if that could reasonably be done . . .” *Id.* at 265 (Stone, J., concurring).

25. Brief for *Fansteel Metallurgical Corp.* at 33, *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240 (1938) (No. 436) (citing *Adair v. United States*, 208 U.S. 161 (1908) (striking down federal statutory prohibition on yellow dog contracts, partly on 5th amendment due process grounds), and *Coppage v. Kansas*, 236 U.S. 1 (1915) (invalidating state statutory prohibition on yellow dog contracts as a violation of the due process clause of the 14th amendment)).

26. *Jones & Laughlin*, 301 U.S. at 30-31 (citing National Labor Relations Act § 10(a), 29 U.S.C. § 160(a) (2000)).

27. See *Consol. Edison Co. v. NLRB*, 83 L. Ed. 126, 132 (1938) (Lawyers’ Edition summary of Fahy’s argument).

offered stronger support for the Board's orders — policies like “restoring equality of bargaining power between employers and employees,” “encouraging the practice and procedure of collective bargaining,” and “protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing.”²⁸

The Court went a step further. Not only did the Justices follow the Board in skipping over these policies and focusing solely on protecting commerce, but they also substituted their own judgment for that of Congress as to *how* commerce would best be protected. Section 1 of the Act declared that it was “the policy of the United States to *eliminate the causes* of certain substantial obstructions to the free flow of commerce . . . by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing. . . .”²⁹ The causes to be eliminated were 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.”³⁰ In this light, it seems clear that — whatever else they were doing — the *Fansteel* strikers were serving the primary purpose of the Act by enforcing its guarantee of the right to organize and thereby helping to “eliminate the causes” of strikes. The NLRB had failed to take action on their unfair labor practice charge, filed five months before the sit-down, and their union was threatened with destruction due to the employer's violations. An outside strike would have exposed the workers to replacement, a danger underscored by the fact that the company's spy in the union was urging that course of action.³¹ Only by sitting down could the workers prevent the employer from reaping the benefits of its violations.

To the Court, however, the need for a prompt remedy did not register in the balance. Chief Justice Hughes declined to consider whether the workers' mode of enforcement was necessary or effective, but considered only whether it was peaceful. Since the sit-down strike involved “force and violence in defiance of the law of the land,” it clearly did not promote industrial peace.³² The procedures of the Act, on the other hand, were “peaceful.” The Court did not pause to consider whether the Board's peaceful processes could, as a practical matter, remedy the employer's destruction of the union's majority support. Thus, the statutory strategy of eliminating the *causes* of

28. National Labor Relations Act § 1, 29 U.S.C. § 151 (2000).

29. *Id.* (emphasis added).

30. *Id.*

31. *Fansteel Metallurgical Corp.*, 5 N.L.R.B. 930, 939 (1938); Hart & Prichard, *supra* note 16, at 1280-81.

32. *NLRB v. Fansteel Metallurgic Corp.*, 306 U.S. 240, 258 (1939).

disruptions to commerce fell out of the equation.³³

The Court's lack of concern for the workers' statutory rights cannot be blamed entirely on Chief Justice Hughes or the *Fansteel* majority. The statute itself reduced the workers' rights to the status of mere means to the end of preventing disruptions to commerce. This was the result of a conscious choice by the bill's creator, Senator Robert Wagner of New York. Labor leaders and others had urged the Senator to ground his bill not on Congress's commerce power but on its human rights powers. To Andrew Furuseth, the labor movement's leading constitutional thinker, the bill exemplified the "Christian principle of evolution from slavery to freedom," which belonged under the Thirteenth Amendment, not the Commerce Clause.³⁴ Philosophically, Senator Wagner took a similar view of his bill. Along with other proponents of the NLRA, he likened the non-union workplace to feudalism and slavery, and he promised that government enforcement of the right to organize would bestow upon workers "emancipation from economic slavery and . . . an opportunity to walk the streets free men in fact as well as in name."³⁵

But Senator Wagner adhered to the commerce power as a constitutional justification, apparently in the belief that it was more acceptable to middle-class reformers and judges.³⁶ As a result, each exercise of the NLRB's authority had to be justified not in terms of labor freedom, but as an effort to prevent disruptions to commerce. During the early, formative period of NLRA jurisprudence, this constitutional requirement shaped the developing interpretation of the statute. Even the Board's own lawyers defended the Act as an exercise of Congress's power to "control" and "punish" strikes under *Lochner*-era precedents.³⁷ In its *Fansteel* opinion, as we have seen, the Board

33. Hart & Prichard, *supra* note 16, at 1321-22.

34. Letter from Andrew Furuseth, President, International Seamen's Union, to Senator Robert F. Wagner (Apr. 16, 1935), in Robert F. Wagner Papers, Labor Series, box 4, folder 39, Georgetown Univ. Special Collections; see also James Gray Pope, *The Thirteenth Amendment Versus the Commerce Clause: Labor and the Shaping of American Constitutional Law, 1921-1957*, 102 COLUM. L. REV. 1, 14, 54-55 (2002) [hereinafter Pope, *Thirteenth Amendment*] (reporting the American Federation of Labor's proposal to ground the bill on the Republican Government Clause of Article IV, and others' advocacy of the Fourteenth Amendment).

35. 79 CONG. REC. 6184 (1935) (address by Senator Wagner), reprinted in 2 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935, at 2284 (1949) [hereinafter LEGISLATIVE HISTORY]; see also *To Create a National Labor Board: Hearings on S. 2926 Before the Comm. on Educ. and Labor*, 73 Cong. 467-68 (1934) (statement of Guy L. Harrington), reprinted in 1 LEGISLATIVE HISTORY, *supra*, at 501-02 (quoting Senator Wagner's insistence that "all [the bill] does is to make the worker a free man"). For other quotations, see Pope, *Thirteenth Amendment*, *supra* note 34, at 47-50.

36. See Pope, *Thirteenth Amendment*, *supra* note 34, at 55-56.

37. See ARGUMENTS IN THE CASES ARISING UNDER THE RAILWAY LABOR ACT AND THE NATIONAL LABOR RELATIONS ACT BEFORE THE SUPREME COURT OF THE UNITED STATES, S. DOC. NO. 75-52, at 124, 171 (1937); Pope, *Thirteenth Amendment*, *supra* note 34,

focused solely on the protection of commerce, failing even to mention the express statutory policies in favor of equal bargaining power, freedom of association, or collective bargaining. In hindsight, it seems inevitable that courts would be tempted to bypass those policies and directly discourage workers from striking, thereby protecting commerce.

Senator Wagner foresaw this possibility and inserted language to prevent it. Section 13 provided that “[n]othing in this Act shall be construed so as to interfere with or impede or diminish in any way the right to strike.”³⁸ The Senator explained that the Act was designed “to reduce the number of strikes by eliminating the main wrongs and injustices that cause strikes.” Accordingly, the “imposition of legal restrictions upon the right to strike, instead of removing these wrongs, would merely deprive the worker of his inalienable right to protest against them.”³⁹

But *Fansteel* demonstrated the inadequacy of section 13 as a control on judges. Chief Justice Hughes easily dismissed the strikers’ section 13 argument on the ground that “the right to strike” encompassed only “the unquestioned right to quit work.”⁴⁰ Senator Wagner’s broader view of section 13 (“I would not buy peace,” he said, “at the price of slavery”⁴¹) dropped out. The Court did not even consider the price of peace in *Fansteel*. And the peace that followed its decision was one of unbridled employer domination. By barring the Board from reinstating the strikers, the Court left *Fansteel* with a workforce composed of striker replacements and workers who had crossed the union’s picket lines. This workforce rejected the Steel Workers Organizing Committee and voted to be represented by an in-house union, which *Fansteel* promptly recognized as the exclusive representative for all its production employees.⁴² This “union” negotiated a grievance procedure culminating in a final decision not by an impartial arbitrator, but by *Fansteel*’s President, R.J. Aitchison. In April of 1939, Aitchison looked back with satisfaction on the course of events. Relations with the employees were “closer than ever before” — so close that not a single grievance had been filed under the new

at 81-82.

38. National Labor Relations Act, ch. 372, § 13, 49 Stat. 449, 457 (1935).

39. *National Labor Relations Act and Proposed Amendments: Hearings Before the S. Comm. on Educ. and Labor*, 76th Cong. 17 (1939) (statement of Senator Robert F. Wagner) (quoted in Leon H. Keyserling, *Why the Wagner Act?*, in *THE WAGNER ACT: AFTER TEN YEARS* 31 (Louis G. Silverberg ed., 1945)).

40. *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240, 256 (1939).

41. 78 CONG. REC. 12044 (1934), reprinted in 1 *LEGISLATIVE HISTORY*, *supra* note 35, at 1241.

42. H. E. Fleming, *In the Wake of a Sit-down Strike*, 46 *CHEMICAL & METALLURGICAL ENGINEERING* 624, 625 (1939).

procedure.⁴³ “You could either be embittered or liberalized by an experience like ours,” he observed. “I think I have been liberalized.”⁴⁴ In what did this liberalization consist? Not in any regret for the company’s unfair labor practices, but in “explaining more to the employees and in giving more attention to employee relations.”⁴⁵

Not only did Aitchison enjoy the new docility of his workforce, but he also received a raft of “fan mail” from other employers congratulating the company on its historic victory.⁴⁶ Just how historic became increasingly apparent over time. The courts and, eventually, the NLRB read *Fansteel* broadly to authorize the discharge of workers for engaging in slow-downs and other partial strike activities.⁴⁷ More recently, the Supreme Court relied on *Fansteel* to support its decision in *Hoffman Plastic Compounds v. NLRB*, denying backpay to undocumented aliens who had been fired for joining a labor union.⁴⁸ In *Hoffman*, as in *Fansteel*, both the workers and the company had violated the law. And as in *Fansteel*, the Court held that the workers’ violations deprived them of their remedy for the employer’s violations. Thus, the workers suffered not only the legal penalties for their lawbreaking — imprisonment and fines in *Fansteel*, deportation in *Hoffman* — but also the disruption of their unions and the loss of jobs and pay. By contrast, the employers in both cases enjoyed the benefits of their lawbreaking, unimpeded by any sanction other than an order to post notices promising to refrain from future violations — notices that might as well have bragged: “Look what we got away with.” *Hoffman* has effectively created “an underclass of low-wage Latino immigrants” whose legal status resembles that of slavery or involuntary servitude in its denial of any effective remedy for violations of worker rights.⁴⁹

43. *Id.* at 627.

44. *Id.*

45. *Id.* at 627.

46. *Id.*

47. Craig Becker, “*Better Than a Strike*”: *Protecting New Forms of Collective Work Stoppages under the National Labor Relations Act*, 61 U. CHI. L. REV. 351, 368-69 nn.77 & 83 (1994).

48. 535 U.S. 137, 142-43 (2002) (citing *Fansteel* as an instance in which awards of reinstatement and backpay were rightly set aside because of serious employee misconduct).

49. Christopher David Ruiz Cameron, *Borderline Decisions: Hoffman Plastic Compounds, the New Bracero Program, and the Supreme Court’s Role in Making Federal Labor Policy*, 51 UCLA L. REV. 1, 4 (2003); Ruben J. Garcia, *Ghost Workers in an Interconnected World: Going Beyond the Dichotomies of Domestic Immigration and Labor Laws*, 36 U. MICH. J L. REFORM 737, 754-55 (2003); Maria L. Ontiveros, *Immigrant Workers’ Rights in a Post-Hoffman World B Organizing around the Thirteenth Amendment* (forthcoming).

II. HOW AMERICAN WORKERS LOST THE RIGHT TO STRIKE

In *NLRB v. Mackay Radio & Telegraph Co.*, the Supreme Court laid down a dictum that has puzzled legal scholars and vexed unions increasingly over the years.⁵⁰ According to this dictum, an employer enjoys the right permanently to replace workers who strike for better wages and conditions. The dictum is puzzling because the strike is one of those “concerted activities” protected under section 7, and employers are prohibited from discharging or otherwise interfering with, restraining, coercing or discriminating against employees for exercising section 7 rights.⁵¹ Yet the *Mackay* Court simply asserted the employer right, offering no explanation why strikers — who are admittedly protected against “discharge” — can nevertheless be replaced permanently at the discretion of the employer.

The employer’s right to hire permanent replacements operates as an unqualified trump over the section 7 right to strike for better conditions and higher wages. The employer need not show any business reason for its exercise (for example, that unless replacements are offered permanent employment the company will be unable to continue operating), and the rule leaves no room for the Board to argue that the impact of permanent replacement on the section 7 right outweighs the employer’s interest.⁵² Theoretically, an employer violates the Act if it replaces strikers for reasons of anti-union animus. But because animus is virtually impossible to prove (unless the employer is clumsy enough to reveal it in public), the law does nothing to prevent an employer from seizing on the strike as an opportunity to replace union with nonunion workers.⁵³ In effect, when workers go out on strike, they give the employer a license to discriminate; the employer need only limit itself to (1) “permanently replacing” union workers as opposed to “discharging” them, and (2) discriminating only between strikebreakers and strikers as opposed to discriminating among loyal strikers (as on the facts of *Mackay*, where the employer targeted active unionists for replacement) or among strikebreakers.

The result is a bizarre reversal of the strike’s traditional function.

50. 304 U.S. 333, 345-46 (1938).

51. National Labor Relations Act § 8(a)(1), (3), 29 U.S.C. § 158(a)(1), (3) (2000); see Eileen Silverstein, *If You Can’t Beat ‘em, Learn to Lose, but Never Join Them*, 30 CONN. L. REV. 1371, 1373 (1998) (“As an exercise in statutory interpretation, even the most conservative students have wondered at a result that honors, on the one hand, the prohibition against discharging employees because they strike, but allows, on the other hand, replacement of strikers and retention of strikebreakers once the dispute has ended.”).

52. See JULIUS G. GETMAN ET AL., *LABOR MANAGEMENT RELATIONS AND THE LAW* 164 (2d ed. 1999); ROBERT A. GORMAN, *BASIC TEXT ON LABOR LAW: UNIONIZATION AND COLLECTIVE BARGAINING* 329 (1976).

53. GETMAN ET AL., *supra* note 52, at 163; George Schatzki, *Some Observations and Suggestions Concerning a Misnomer — “Protected” Concerted Activities*, 47 TEX. L. REV. 378, 383 (1969).

Although the strike is legally protected so that it can provide workers with a source of bargaining power, it now serves as a source of *employer* bargaining power. According to a recent study of collective bargaining negotiations, employers are now more likely to threaten permanent replacement than unions are to threaten a strike.⁵⁴ As Cynthia Estlund recently put it, the *Mackay* dictum has “rendered the strike useless and virtually suicidal for many employees, and has become employers’ Exhibit Number One in union organizing campaigns.”⁵⁵ As employers have turned increasingly to permanent replacements, the incidence of strikes has dropped sharply.⁵⁶ That the labor movement considers the *Mackay* dictum to be a serious problem is evidenced by the fact that in 1996, at a time when the Presidency and both houses of Congress were held by Democrats, the AFL-CIO launched an intense campaign for legislation to overturn it — only to see the bill succumb twice to Senate filibusters.⁵⁷

The *Mackay* Court cited no source and offered no reasoning to support the existence of an employer right permanently to replace strikers.⁵⁸ The statutory language, which makes it an unfair labor practice for the employer to engage in “discrimination” based on union activity or to “coerce” employees in the exercise of their section 7 rights, appears to negate any such right.⁵⁹ An employer that retains nonstriking workers at the end of a strike while denying returning strikers their jobs is certainly discriminating — in the ordinary meaning of the word — based on union activity.⁶⁰ Workers who cross

54. See Joel Cutcher-Gershenfeld, *The Social Contract at the Bargaining Table: Evidence from a National Survey of Labor and Management Negotiators*, in 2 INDUSTRIAL RELATIONS RESEARCH ASSOCIATION SERIES, PROCEEDINGS OF THE 51ST ANNUAL MEETING 214, 216-19 (Paula B. Voos ed., 1999).

55. JULIUS GETMAN, *THE BETRAYAL OF LOCAL 14*, at 224-28 (1998); WILLIAM B. GOULD IV, *AGENDA FOR REFORM* 185-88, 202-03 (1993); PAUL C. WEILER, *GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW* 264-69 (1990); Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1538 (2002) [hereinafter Estlund, *Ossification*] (citing CHARLES B. CRAVER, *CAN UNIONS SURVIVE?* 29, 132-34, 143-46 (1993); Michael H. Gottesman, *Union Summer: A Reawakened Interest in the Law of Labor?*, 1996 SUP. CT. REV. 285, 293-96 (1996); James J. Brudney, *To Strike or Not to Strike*, 1999 WIS. L. REV. 65, 71-72, 80-81 (1999) (book review)).

56. Stephen F. Befort, *Labor and Employment Law at the Millennium: A Historical Review and Critical Assessment*, 43 B.C. L. REV. 351, 440-41 (2002).

57. Estlund, *Ossification*, *supra* note 55, at 1541.

58. *Mackay Radio & Telegraph Co.*, 304 U.S. at 345-46.

59. National Labor Relations Act § 8(a)(1), (3), 29 U.S.C. § 158(a)(1), (3) (2000).

60. See ATLESON, *supra* note 1, at 24-25; GORMAN, *supra* note 52, at 329. Employers sometimes argue that there are no positions for the returning strikers because the replacements are in current possession. However, the strikers were in possession prior to the strike, and section 2(3) of the Act specifies that “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, and who has not obtained any other regular and substantially equivalent employment” remains an “employee.” 29 U.S.C. § 152(3).

picket lines are rewarded with permanent jobs, while workers who exercise their statutory right to strike are punished with the loss of their jobs. And there are few more potent forms of coercion than forcing individual workers to choose between a protected activity and losing their jobs to permanent replacements. Whether the loss of a job comes as a result of a discharge (concededly illegal) or of “permanent replacement,” it certainly constitutes a powerful disincentive to engage in protected activity. Furthermore, at the time of *Mackay*, section 13 of the Act barred courts not only from construing the Act to impose direct legal restraints on the right to strike, but also from reading it to “interfere with or impede or diminish” the right “in any way.”⁶¹

Commentators have tried to fit the *Mackay* dictum into the structure of current law by asserting that it rests on the assumption that employers have a legitimate business need to offer prospective replacements permanent employment in order to operate during strikes.⁶² But the Court never made any such determination, and there is nothing in the opinion to indicate that the Justices were thinking along those lines. If they were, then they were simply wrong on the facts. Employers routinely succeed in obtaining striker replacements without offering permanent employment, and there is no evidence that they need to make such offers.⁶³ Moreover, the *Mackay* dictum would not fit into the structure of current law even if employers could show that they were motivated by a desire to attract replacement workers. Under the current standard, which outlaws employer countermeasures that are “inherently destructive” of section 7 rights even if the employer acted out of legitimate business reasons, the hiring of permanent replacement workers would seem to be inherently destructive just as discharge is inherently destructive.⁶⁴ In short, the *Mackay* dictum cannot be explained or rationalized with reference to the employer’s need to hire striker replacements.

Looking at the paper trail leading up to the dictum, we find that the issue was treated not as a question of the employer’s business necessity, but rather as a matter of constitutional law. As in *Fansteel*, the employer claimed constitutional protection for its freedom to terminate strikers, and argued that termination would promote the statute’s constitutional purpose of preventing disruptions to interstate

61. National Labor Relations Act, § 13, ch. 372, 49 Stat. 449, 453 (1935) (codified as amended at 29 U.S.C. §§ 151-169).

62. See GETMAN ET AL., *supra* note 52, at 164; GORMAN, *supra* note 52, at 329.

63. See Hal Keith Gillespie, *The Mackay Doctrine and the Myth of Business Necessity*, 50 TEX. L. REV. 782, 788-95 (1972); Paul Weiler, *Striking a New Balance: Freedom of Contract and the Prospects for Union Representation*, 98 HARV. L. REV. 351, 391 (1984).

64. NLRB v. Great Dane Trailers, Inc., 388 U.S. 26, 33 (1967); ATLESON, *supra* note 1, at 27-28.

commerce. Mackay Company lawyers contended that a Board order reinstating economic strikers would deprive the employer of its property and liberty guaranteed by the Fifth Amendment. As long as the employer had not provoked the strike by unfair labor practices, its “ordinary right” to select its employees remained “invulnerable.” And, although strikers technically remained employees, they had no current contractual relation with their employer. Thus, concluded Mackay’s lawyers, a Board order reinstating strikers would, in effect, force the employer to enter into a new contract with the strikers — a clear violation of the Fifth Amendment.⁶⁵ In addition, the company’s lawyers argued that strikers *should* be faced with the possibility of losing their jobs permanently, because that threat would discourage them from striking, thus promoting the statutory policy of preventing disruptions to interstate commerce.⁶⁶ The Court of Appeals for the Ninth Circuit twice ruled for the employer, with Judge Curtis Wilbur writing two lead opinions adopting Mackay’s Fifth Amendment theory — one before *Jones & Laughlin* and one afterward, on rehearing.⁶⁷

While Mackay’s lawyers and Judge Wilbur elevated the employer’s rights to the constitutional level, the NLRB subsumed the workers’ rights into the Act’s constitutional purpose of preventing disruptions to interstate commerce. Employer interference with union activity tended to provoke strikes, reasoned the Board, and strikes injured commerce — as illustrated by the Mackay strike itself, which drastically reduced the company’s communications traffic and resulted in considerable loss of business.⁶⁸ This argument fit right in with the constitutional theory embraced by the Supreme Court in *Jones & Laughlin* and its companion cases, but it also portrayed the strikers’ legally protected activity as a kind of economic vandalism. It dovetailed with the employer’s argument that to grant the Board power to reinstate strikers “would thwart rather than accomplish” the Act’s purposes because, “[b]y guaranteeing a striker his job, . . . peaceful negotiation would be discouraged and strikes would be

65. Brief for Respondent at 30, 40-41, *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333 (1938) (No. 37-706) [hereinafter Brief for Respondent *Mackay*].

66. *Id.* at 26.

67. Judge Wilbur’s first opinion construed the statute to grant the power to reinstate economic strikers and then declared it unconstitutional on Fifth Amendment grounds, citing such economic due process cases as *Adair*, *Coppage*, and *Lochner*. *NLRB v. Mackay Radio & Tel. Co.*, 87 F.2d 611, 615-18 (9th Cir. 1937), *rev’d* 304 U.S. 333 (1938), *remanded* to 92 F.2d 761, 764-65 (9th Cir. 1937). The judge’s second opinion applied the clear statement rule to find that the statute — “properly construed in the light of the Constitution” — did not empower the Board to reinstate economic strikers. *NLRB v. Mackay Radio & Tel. Co.*, 92 F.2d 761, 765 (9th Cir. 1937). On both occasions, a second judge concurred on nonconstitutional grounds while a third dissented. *Mackay Radio & Tel. Co.*, 87 F.2d at 631, 632; *Mackay Radio & Tel. Co.*, 92 F.2d at 765.

68. *Mackay Radio & Tel. Co.*, 1 N.L.R.B. 201, 231 (1936), *enforcement denied*, 87 F.2d 611 (9th Cir. 1937), *rev’d* 304 U.S. 333 (1938).

encouraged.”⁶⁹ The Board made no mention of the statutory policies in favor of equal bargaining power or full freedom of association. Nor did it make any mention of section 13, which had been inserted into the Act precisely to ensure that the right to strike would not be suppressed as a means of obtaining industrial peace.⁷⁰

As to the specific issue of permanent replacement, the Board based its original finding of a violation not on the company’s refusal to reinstate economic strikers *per se*, but on its discrimination *among* returning strikers in selecting who would fill the positions that were available at the end of the strike. The opinion explained that the employer had illegally refused to reinstate union officers and activists while, at the same time, reinstating less active strikers. The Board declined to address the broader question of the employer’s right to retain replacement workers in preference to economic strikers because “a decision on the point is not necessary to the final judgment.”⁷¹ But in the Supreme Court, the Board’s General Counsel, Charles Fahy, conceded that an employer could replace strikers and then, at the conclusion of the strike, retain the replacements and refuse to reinstate the would-be returning strikers.⁷²

Scholars have wondered why Fahy made this apparently gratuitous concession. From a constitutional perspective, however, it does not appear gratuitous. Throughout the litigation, Mackay’s lawyers and the Court of Appeals majority had insisted that the Board was seeking a general power to reinstate economic strikers at the end of the strike. In the Court of Appeals’ first decision, Judge Wilbur’s lead opinion went so far as to claim that the Board had relied “solely” on the broad contention that it was unlawful for the employer to refuse to reinstate economic strikers.⁷³ From the Board’s point of view, this was nothing more than an obfuscation; the Board had claimed only the limited power to remedy discrimination among the strikers. But from the point of view of the employer and the Court of Appeals majority, whose approach to the case centered on preserving the employer’s “normal” Fifth Amendment right to select its employees, this was a distinction without a difference. Either way, the employer would be forced to make new contracts with strikers who had — voluntarily and unprovoked by any employer unfair labor practices — terminated their previous contractual relations by going on strike.⁷⁴

69. Brief for Respondent *Mackay*, *supra* note 65, at 27.

70. See *supra* notes 38-41 and accompanying text.

71. *Mackay Radio & Tel. Co.*, 1 N.L.R.B. at 218.

72. Reply Brief for the National Labor Relations Board at 15-17, *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333 (1938) (No. 37-706) [hereinafter *NLRB Reply Brief*].

73. *Mackay Radio & Tel. Co.*, 87 F.2d at 628.

74. See Brief for Respondent *Mackay*, *supra* note 65, at 31-33.

At first, Fahy responded to this problem by trying to clarify the Board's position. In June 1937, he urged his regional lawyers to explain on rehearing that the Board's order hinged not on discrimination against strikers generally, but on discrimination for union membership and leadership among the returning strikers.⁷⁵ At this point, there was no talk of any concession; Fahy continued to follow the Board's original approach of distinguishing — without conceding — the permanent replacement issue. But the Court of Appeals again conflated the issues and accepted Mackay's economic due process argument.⁷⁶ Fahy responded by attempting once more to explain without making any concession, this time in the Board's initial brief to the Supreme Court.⁷⁷ But Mackay's lawyers ignored this explanation and insisted yet again that the Board was claiming a general power to reinstate economic strikers in preference to replacement workers — a power “so obnoxious to the basic principles of our Bill of Rights that it cannot stand.”⁷⁸ It was at this point, in the Board's reply brief, that Fahy made his fateful concession as part of a seven-page discourse explaining, from every possible angle, that the company's argument rested on a “gross misstatement of the Board's position.”⁷⁹

Of course, we can never know for certain the reason for Fahy's decision.⁸⁰ Nevertheless, the available evidence suggests that he was

75. Fahy suggested that “it would be wise to refute the statement in Judge Wilbur's opinion that the Board predicated its conclusion of discrimination ‘upon the inference arising from the refusal of the respondent to reemploy these individuals *solely* from the fact that they were union employees who had been engaged actively in an unsuccessful strike and who desired and were refused reemployment,’” and pointed out the fact that the strikers denied reinstatement “were the most active union officers or strike leaders.” Memorandum from Charles Fahy to A. Norman Somers, NLRB 20th Region, June 4, 1937, NLRB Records (RG 25), Entry 155, Box 860, at 1.

76. NLRB v. Mackay Radio & Tel. Co., 92 F.2d 761, 763-65 (9th Cir. 1937).

77. Brief for the National Labor Relations Board at 35-37, NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333 (1938) (No. 706).

78. Brief for Respondent *Mackay*, *supra* note 65, at 49-50.

79. NLRB Reply Brief, *supra* note 72, at 15-17.

80. Fahy's own explanation does not provide significant evidence for or against the account given here. Fahy tried to persuade the Court that the Board had already decided, prior to the Mackay reply brief, that the employer enjoyed a right to hire permanent replacements. NLRB Reply Brief, *supra* note 72, at 16. In support of this claim, the brief cited three decisions: *Black Diamond S.S. Corp.*, 3 N.L.R.B. 84 (1937), *enforced*, 94 F.2d 875 (2d Cir. 1938), *cert. denied*, 304 U.S. 579 (1938); *Carlisle Lumber Co.*, 2 N.L.R.B. 248 (1936), *enforced as modified*, 94 F.2d 138 (9th Cir. 1937), *cert. denied*, 304 U.S. 575 (1938); and *Jefferey-DeWitt Insulator Co.*, 1 N.L.R.B. 618 (1936), *enforced*, 91 F.2d 134 (4th Cir. 1937), *cert. denied*, 302 U.S. 731 (1937). In each of these cases, the Board reinstated unfair labor practice strikers using language implying that the employer's provocation or prolongation of the strike by unfair labor practices was important to the outcome. See *Black Diamond S.S. Corp.*, 3 N.L.R.B. at 93; *Carlisle Lumber Co.*, 2 N.L.R.B. at 277; *Jefferey-DeWitt Insulator Co.*, 1 N.L.R.B. at 626-27. It does not appear, however, that the issue of the rights of economic strikers was raised in any of these cases. By contrast, the issue was noted, distinguished, and expressly left open in the Board's *Mackay* opinion. 1 N.L.R.B. at 216.

attempting to accomplish by concession what the NLRB lawyers had repeatedly failed to accomplish by explanation — namely, assuaging fears that a holding for the Board in *Mackay* would effectively empower it to compel employers to rehire all economic strikers. This fear had already led to two Court of Appeals decisions applying the Fifth Amendment to negate *any* Board power to reinstate strikers, whether or not there had been discrimination among the strikers. But if the Board could not *convince* skeptics of its narrow intentions, it could *outright negate* any possible fears as to the broad issue by conceding that issue in no uncertain terms. To pay for this negation, the Board would give up only the dubious privilege of trying to defend a general Board power to reinstate strikers against constitutional challenges. Evidence that this would be a difficult task came not only from conservative judicial activists like Judge Wilbur, but also from proponents of deference like Augustus and Learned Hand. Two months before Fahy made his concession, a panel of the Second Circuit Court of Appeals that included both Hands upheld a Board order reinstating *unfair labor practice* strikers against due process attack on grounds that implied economic strikers would not have prevailed. “[N]o more is done,” reasoned the court, “than to maintain the status quo which existed on December 14, 1936, as against unfair labor practices which occurred thereafter.”⁸¹ The panel’s use of this rationale implied that if the strike had not been triggered by the employer’s unfair labor practices, the employer would have continued to enjoy its constitutional right to select its employees. In short, it seems likely that Fahy traded the permanent replacement issue for a favorable holding on the constitutional objection to the reinstatement order in *Mackay*.

At first, the *Mackay* dictum had little impact on the ground. Strikers used mass picket lines to block even temporary replacements. Employers called on police to open the lines, but unions insisted that police action against “peaceful” mass picket lines amounted to partisan intervention in violation of the right to strike. During the great post-war strike wave of 1946 and 1947, the big industrial unions of the CIO called mass demonstrations and mobilized political pressure to keep the police “neutral” in labor disputes. In Rochester, New York; Lancaster, Pennsylvania; Stamford, Connecticut; and Oakland, California, workers staged city-wide general strikes to protest police attacks on mass picket lines.⁸² Most unionized employers soon gave up the idea of trying to operate with replacement workers. While the official law continued to grant employers the right

81. *Black Diamond S.S. Corp.*, 94 F.2d at 879.

82. See GEORGE LIPSITZ, *CLASS AND CULTURE IN COLD WAR AMERICA* 130-42 (1981); ART PREIS, *LABOR’S GIANT STEP: TWENTY YEARS OF THE CIO: 1936-55*, at 267-72, 276-78 (1972).

to operate during strikes, an unofficial norm barred them from doing so. Writing in 1956, Jack Barbash described the "prevailing situation" in the United States: "[T]he employer . . . makes no attempt to operate the plant during the strike and the picket line becomes only the symbolic expression of the strike."⁸³

By the early 1960s, however, a new generation of managers had begun to replace those who had experienced the mass picket lines of the 1940s. Meanwhile, labor leaders had come to rely less on solidarity and strike action than on government processes and employer goodwill. When the new managers challenged the old norm, they were pleasantly surprised to discover that labor's tradition of solidarity had atrophied to the point that many workers were happy to cross picket lines. By the mid-1980s, the *Mackay* rule had become fully effective on the ground, and striking was no longer a viable option for most workers.⁸⁴

III. HOW THE NATIONAL LABOR RELATIONS BOARD LOST ITS TEETH

The Supreme Court has ruled that the NLRB cannot act to deter unfair labor practices, but must limit itself to remedying harms inflicted by parties before the Board.⁸⁵ As a result, employers have little incentive to comply with the law. From a cost-benefit point of view, it is often profitable to fire union advocates. If the employer can avoid even a modest wage increase, the savings are likely to exceed many times over the costs of any back-pay awards that the Board might eventually assess.⁸⁶ It is not surprising, then, that employers fire or otherwise retaliate against one out of every eighteen private-sector workers who support a union organizing campaign.⁸⁷ In the late 1970s, the labor movement and its allies waged a major campaign for legislation to authorize penalties, but the resulting Labor Law Reform

83. JACK BARBASH, *THE PRACTICE OF UNIONISM* 227 (1956); see also LABOR STUDY GROUP, *THE PUBLIC INTEREST IN NATIONAL LABOR POLICY* 88 (1961).

84. See LEON FINK, *IN SEARCH OF THE WORKING CLASS* 161-62 (1994); CHARLES R. PERRY ET AL., *OPERATING DURING STRIKES: COMPANY EXPERIENCE, NLRB POLICIES, AND GOVERNMENTAL REGULATIONS* 39-40 (1982); see also *supra* notes 54-57 and accompanying text.

85. *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 9-10 (1940); GETMAN ET AL., *supra* note 52, at 88-89.

86. See Morris M. Kleiner, *What Will it Take? Establishing the Economic Costs to Management of Noncompliance with the NLRA*, in *RESTORING THE PROMISE OF AMERICAN LABOR LAW* 137, 140-46 (Sheldon Friedman et al. eds., 1994); Paul Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1787-1803 (1983).

87. See Charles J. Morris, *A Tale of Two Statutes: Discrimination for Union Activity Under the NLRA and RLA*, 2 EMPLOYEE RTS. & EMP. POL'Y J. 317, 330 (1998) (study based on NLRB records).

Bill of 1977-1978 fell victim to a Senate filibuster.⁸⁸

The prohibition on Board deterrence has its origins in the Supreme Court's 1938 decision in *Consolidated Edison Co. v. NLRB*.⁸⁹ There, the Court announced that the Board's power to remedy unfair labor practices was "remedial, not punitive" and that it must be exercised as "a means of removing or avoiding the *consequences* of violation" — not as a means of deterring the violations themselves — and even then, only "where those consequences are of a kind to thwart the purposes of the Act."⁹⁰ As in *Mackay*, the Court offered no explanation for its conclusion. Chief Justice Hughes forthrightly depicted it as a matter of opinion:

We think that [the statutory] authority to order affirmative action does not go so far as to confer a punitive jurisdiction enabling the Board to inflict upon the employer any penalty it may choose because he is engaged in unfair labor practices, even though the Board be of the opinion that the policies of the Act might be effectuated by such an order.⁹¹

The Court's prohibition on deterrence finds scant support in the statutory language, which authorizes the Board to order violators "to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this [Act]."⁹² The very breadth of this language poses a problem for interpretation. During the legislative hearings, one witness described it as "the provision that . . . you may require them to do anything else that you want them to do that you think is in accordance with the purpose of the act" and complained that it was "so vague and indefinite that, judging by previous court decisions as to statutes being void for indefiniteness, I am not sure that that section is specific enough."⁹³

Given this indeterminacy, it was inevitable that some combination of Board and court jurisprudence would put limits on the Board's

88. RICHARD B. FREEMAN & JAMES L. MEDOFF, *WHAT DO UNIONS DO?* 202-04 (1984).

89. 305 U.S. 197 (1938). Two subsequent cases are more frequently cited for the proposition, but one of them relies on *Consolidated Edison*, while the other merely applies the principle without stating it or providing any authority or reasoning. *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 197-98 (1941); *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 9-12 (1940).

90. *Consol. Edison*, 305 U.S. at 236 (emphasis added).

91. *Id.* at 235-36.

92. National Labor Relations Act § 10(c), 29 U.S.C. § 160(c) (2000).

93. *Hearings on S. 1958 Before the S. Comm. On Educ. and Labor*, 74th Cong. 448 (1935), reprinted in 2 LEGISLATIVE HISTORY, *supra* note 35, at 1617, 1834 (testimony of Robert T. Caldwell). This was the only on-point remark about the breadth of the Board's remedial powers in the legislative history compiled by the Board, perhaps because the Act's opponents put their main emphasis on attacking the procedure.

discretion; the question was what the limits would be. However, the Court's choice to draw the line so as to prohibit any consideration of deterrence conflicted with the statutory command to order action that would "effectuate the policies of this Act," all of which required the deterrence of unfair labor practices and not merely their remediation. The Act proceeded from the theory that unfair labor practices triggered strikes, and strikes burdened commerce.⁹⁴ Accordingly, section 1 of the Act clearly set forth both *ex ante* deterrent and *ex post* remedial policies, with *ex ante* deterrence coming first:

It is declared hereby 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.⁹⁵

Why, then, did the Court confine the Board to *ex post* remedial objectives only? To answer this question, it will be necessary to consider the factual context of the Court's holding in *Consolidated Edison*. The Board had voided a number of collective bargaining agreements between the Consolidated Edison Company and locals of the International Brotherhood of Electrical Workers (IBEW), an affiliate of the American Federation of Labor.⁹⁶ The agreements had been negotiated in the midst of an organizing effort by the United Electrical Workers (UE), a CIO affiliate with a reputation for militancy.⁹⁷ The Board found that the company had discriminated against the UE and in favor of the IBEW.⁹⁸ According to the Board, the company had discharged six UE activists, had engaged in industrial espionage against the UE, and had provided material assistance to the IBEW, including allowing its representatives to conduct business on company property during working hours. In the

94. See National Labor Relations Act § 1, 29 U.S.C. § 151 ("The denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce . . .").

95. *Id.* (emphasis added).

96. *Consol. Edison Co.*, 305 U.S. at 218. For a more thorough discussion of the factual background of the case plus a revealing analysis of the AFL's position, see CHRISTOPHER L. TOMLINS, *THE STATE AND THE UNIONS: LABOR RELATIONS, LAW, AND THE ORGANIZED LABOR MOVEMENT IN AMERICA, 1880-1960*, at 169-76 (1985).

97. *Consol. Edison Co.*, 305 U.S. at 217-18. On the militancy of the UE, see generally RONALD L. FILIPPELLI & MARK MCCOLLOCH, *COLD WAR IN THE WORKING CLASS: THE RISE AND DECLINE OF THE UNITED ELECTRICAL WORKERS* (1995); RONALD W. SCHATZ, *THE ELECTRICAL WORKERS: A HISTORY OF LABOR AT GENERAL ELECTRIC AND WESTINGHOUSE, 1923-60* (1983).

98. *Consol. Edison Co.*, 4 N.L.R.B. 71, 94-95, 107-08 (1937).

midst of these violations, the company recognized the IBEW locals as the representatives for their members and commenced collective bargaining. Within two months, the company had concluded agreements with the IBEW locals, and those locals — which had enrolled almost no members as of the grant of recognition — had signed up 30,000 of the company's 38,000 employees. The Board found that although the grant of recognition and the collective bargaining agreement purported to cover IBEW members only, the company's policy had been to negotiate with no other union and to extend the collective bargaining agreements to all employees.⁹⁹ Hence, the contracts interfered with the workers' free choice of representatives and had to be dissolved.

The Court disapproved this order for two reasons, both of which flowed from constitutional concerns. First, the order conflicted with the Court's view of how best to fulfill the constitutionally required function of facilitating interstate commerce. As in *Fansteel* and *Mackay*, the Board's decision had stressed this goal to the exclusion of all others. It described in terrifying detail the "disastrous effect" that a strike against such a large provider of electric and gas power would inflict on interstate commerce.¹⁰⁰ The Supreme Court heartily shared this concern, but found the Board's solution perverse. Taking the situation *after* the employer's violations as a given, Chief Justice Hughes argued that because the IBEW contracts prohibited strikes and provided for the arbitration of disputes, they were "highly protective to interstate and foreign commerce." Voiding such contracts, "even pending proceedings to ascertain by an election the wishes of the majority of employees, would remove that salutary protection during the intervening period." Thus, the contracts did not "affect commerce" in a way that would justify their abrogation.¹⁰¹

To the Court, then, the statutory policy in favor of "full freedom of association, self-organization and designation of representatives" was contingent on a case-by-case judicial determination as to whether vindicating those freedoms would facilitate interstate commerce. The employer won in court because its admittedly illegal discrimination was effective on the ground. Once eighty percent of the workers acquiesced in the employer's choice of union, it became highly unlikely that the violations would provoke a strike or otherwise disrupt commerce. Since Consolidated Edison's illegal discrimination had already *worked* to promote the "fundamental" purpose of protecting commerce,¹⁰² it would be silly to insist that peace be

99. *Id.* at 93.

100. *Id.* at 79.

101. *Consol. Edison Co.*, 305 U.S. at 237.

102. *Id.*

achieved — if at all — through the exercise of worker freedom.

Second, the Court was concerned about the Board order's intrusion on the parties' liberty of contract. The IBEW's lawyers had argued that by "absolutely and utterly" destroying "existing contracts of labor organizations of long established standing," the Board had unconstitutionally taken the union's property and impaired the obligation of contracts in violation of the Fifth Amendment.¹⁰³ They further urged the Court to apply a clear statement rule that "[p]ower over and affecting the *life, liberty, property and security of the citizen* may not be taken by inference, but only when the statute under which it is claimed demonstrates a plain intent to grant it."¹⁰⁴ Chief Justice Hughes duly prefaced his analysis of the Board's statutory power to order "affirmative action" by noting that "the Act gives no express authority to the Board to invalidate contracts with independent labor organizations."¹⁰⁵ He then proceeded to hold that the IBEW's members "had the right to choose the Brotherhood as their representative for collective bargaining and to have contracts made as the result of that bargaining" and that the employer's unfair labor practices had not "deprived them of that right."¹⁰⁶ Hughes purported to derive this right from the statute but, as Christopher Tomlins has pointed out, the ruling "was an important affirmation of the supremacy of the common law of contract."¹⁰⁷ To Hughes, the employer's suppression of the UE and support for the IBEW could not justify abrogating the IBEW contracts as long as that union had any members "who joined voluntarily."¹⁰⁸ The contract rights of those members and their union thus trumped the statutory right of the majority of workers to select "representatives of their own choosing."

In dissent, Justice Reed argued that the Board must be empowered to "nullify advantages" that the employer had gained by favoring the IBEW — a purpose that sounded more in deterrence than in remedy.¹⁰⁹ To hold otherwise would be "to withdraw from the Board the specific authority granted by the Act to take affirmative action to protect the workers' right of self-organization." Where the Board had stressed solely the statutory purpose of protecting commerce, Reed tried to build up the purpose of worker freedom. He agreed with Chief Justice Hughes that the "fundamental purpose" of the Act was to

103. Brief for Petitioners International Brotherhood of Electrical Workers et al. at 46-49, *Consol. Edison Co. v. NLRB*, 305 U.S. 197 (1938) (No. 25).

104. *Id.* at 44.

105. *Consol. Edison Co.*, 305 U.S. at 235.

106. *Id.* at 236.

107. TOMLINS, *supra* note 96, at 172 n.78.

108. *Consol. Edison Co.*, 305 U.S. at 238.

109. *Id.* at 245 (Reed, J., joined by Black, J., concurring in part, dissenting in part).

protect commerce, and that this purpose was to be accomplished through collectively bargained contracts. But to Reed, the statute contemplated only contracts that had been negotiated by unions “created through the self-organization of workers, free from interference, restraint or coercion of the employer.” The right of self-organization was “the basic privilege guaranteed by the Act,” and “[f]reedom from employer domination flows from freedom in self-organization.”¹¹⁰

Reed’s treatment of the statutory purposes undoubtedly tracked the intentions of the Act’s framers. They had elevated the commerce-protecting purpose over all others not because they believed it was more important, but because it was the centerpiece of their constitutional strategy.¹¹¹ However, once this purpose was given priority in the statutory text, the Court could scarcely be blamed for taking the framers at their word. Its twofold transgression lay, instead, first in valuing the common law contract rights of the employer and the IBEW over the statutory right of the employees to select their bargaining representative, and second, in substituting its own, *ex post facto* view of how to facilitate commerce in place of the statute’s *ex ante* goal of eliminating the causes of industrial disputes. In the years following *Consolidated Edison*, the Court’s specific holding on the abrogation of contracts has been narrowed,¹¹² but its general prohibition against the deterrence of unfair labor practices lives on.

IV. HOW UNION ORGANIZERS BECAME TRESPASSERS

Under the NLRA, the preferred method for establishing collective bargaining is the union representation election. To most Americans, the word “election” connotes a political contest between two parties of equal legal status. The party currently in office is prohibited from using the power of government against the opposition party. But union representation campaigns are conducted on turf controlled by one of the competing parties, namely the employer. Current law allows employers to use this control to gain advantages unheard of in political elections. The employer may command voters to attend anti-union rallies on pain of discharge. It may require voters to meet one-on-one with their supervisors to hear anti-union messages. And it may adopt and enforce a rule prohibiting everyone but itself from

110. *Id.*

111. See Pope, *Thirteenth Amendment*, *supra* note 34, at 47-50.

112. See *Milk & Ice Cream Drivers & Dairy Employees Local 98 v. McCulloch*, 306 F.2d 763, 765-66 (D.C. Cir. 1962) (enforcing NLRB order abrogating contract between employer and bona fide union, partly on the ground that “[c]ollective bargaining agreements, conducive to industrial peace and stability, are of course encouraged; but the Act contemplates that they shall be between management on the one hand and the freely chosen representative of the employees on the other”).

campaigning during work time.¹¹³ Though daunting, these advantages could be at least partly offset if union organizers could enter the workplace to respond. But except in exceedingly rare circumstances, employers also enjoy the right to exclude organizers from their property.

In *Lechmere, Inc. v. NLRB*, the Supreme Court set forth the rule that section 7 leaves intact the employer's property right to exclude "nonemployee" union organizers from company property "except in the rare case where 'the inaccessibility of employees makes ineffective the reasonable attempts by nonemployees to communicate with them through the usual channels.'"¹¹⁴ The Board is "not permitted" to balance the employees' statutory interest in receiving information against the employer's "right to control the use of his property."¹¹⁵ Instead, the employer's property rights automatically prevail unless "unique obstacles" prevent communication, as in remote logging camps, mining camps, and mountain resort hotels, where the employees both live and work on the employer's premises.¹¹⁶ The employer need not plead any business interest to justify excluding organizers and may, in fact, restrict access for the precise purpose of preventing communication from reaching its employees.¹¹⁷ Because employees typically scatter after work, the *Lechmere* rule poses a serious obstacle to organizing.¹¹⁸ Coupled with the rules permitting

113. See GETMAN ET AL., *supra* note 52, at 51-52; HUMAN RIGHTS WATCH, UNFAIR ADVANTAGE: WORKERS' FREEDOM OF ASSOCIATION IN THE UNITED STATES UNDER INTERNATIONAL HUMAN RIGHTS STANDARDS 19-22 (2000); Craig Becker, *Democracy in the Workplace: Union Representation Elections and Federal Labor Law*, 77 MINN. L. REV. 495, 557-60, 564-65 (1993).

114. 502 U.S. 527, 537 (1992) (quoting *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 113 (1956)) (emphasis added).

115. *Id.* at 537.

116. *Id.* at 539, 541.

117. See Cynthia L. Estlund, *Labor, Property, and Sovereignty After Lechmere*, 46 STAN. L. REV. 305, 325 (1994) [hereinafter Estlund, *Lechmere*].

118. See James J. Brudney, *Reflections on Group Action and the Law of the Workplace*, 74 TEX. L. REV. 1563, 1577-78 (1996) (observing that the "shift to more anonymous suburban residential patterns meant that increasingly dispersed employee populations were less accessible to reasonable efforts at off-site communication," and pointing out that the "usual channels for such communication — mail, telephone, home visits — also were less likely to be effective because of people's fatigued response to the impersonal tactics of the "solicitation industry"). The facts of *Lechmere* illustrate the problem. Despite the union's good fortune in obtaining cooperation from the Connecticut Department of Motor Vehicles in attaching names to employees' license plates, it was able to contact directly only 20 percent of the employees. In the Court's view, the section 7 right of the remaining 80 percent to receive information about self-organization was satisfied as long as union organizers could hold up placards along the public roadway. *Lechmere*, 502 U.S. at 540. The Court has since mitigated the effects of *Lechmere* for some unions by upholding the NLRB's ruling that a paid union organizer who seeks employment at a company in order to organize its employees is a statutory "employee" protected against discrimination in hiring and firing. *NLRB v. Town & Country Elec., Inc.*, 516 U.S. 85, 98 (1995). Departing sharply from its approach in *Lechmere*, the *Town & Country* Court went straight to the statutory definition,

employers to stage captive audience speeches and to campaign on working time while barring workers from doing the same, it puts unions at a gross disadvantage in communicating with voters.

In contrast to *Mackay* and *Consolidated Edison*, the *Lechmere* opinion does cite authority and provide reasoning in support of its rule. At issue was the validity of the Board's standard requiring employers to grant access to union organizers in certain circumstances.¹¹⁹ Under the rule of *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,¹²⁰ the Board's standard was entitled to broad deference unless the Court could find contrary "clear meaning" in the statute.¹²¹ Writing for the Court, Justice Thomas found that "clear meaning" in section 7 of the Act, which guarantees the right of self-organization only to "employees."¹²² He pointed to the "critical distinction between the organizing activities of employees (to whom section 7 guarantees the right of self-organization) and nonemployees (to whom section 7 applies only derivatively)."¹²³ By itself, this left open the question why union organizers, who are "employees" of the union and who are aligned with other employees in collective bargaining, are not "employees" under section 7. The obvious place to look for an answer to this question would be the statutory definition of the term "employee," which is contained in section 2(3) of the Act.

But Justice Thomas chose to conduct his search for the statute's "clear meaning" without so much as a glance at the relevant portion of the statute itself. Why this omission? Section 2(3) states that "[t]he term 'employee' . . . shall not include . . . any individual employed . . . by any . . . person who is not an employer as herein defined."¹²⁴ Justice Thomas could have argued that full-time union organizers are excluded from this definition because they are employed by labor organizations, which are not statutory employers except when they are "acting as" employers.¹²⁵ In the union-organizing setting, the union is

giving its broad language full effect. *Id.* at 89-93. The unanimity of the *Town & Country* opinion suggests that it might have been a "make-up call" for the heavily criticized *Lechmere* decision.

119. The Board's standard was announced in *Jean Country*, 291 N.L.R.B. 11, 16-19 (1988).

120. 467 U.S. 837 (1984).

121. *Lechmere*, 502 U.S. at 536-37.

122. National Labor Relations Act § 7, 29 U.S.C. § 157 (2000); *Lechmere*, 502 U.S. at 537 ("By reversing the Board's interpretation of the statute for failing to distinguish between the organizing activities of employees and nonemployees, we were saying, in *Chevron* terms, that § 7 speaks to the issue of nonemployee access to an employer's property.").

123. *Lechmere*, 502 U.S. at 533.

124. National Labor Relations Act § 2(3), 29 U.S.C. § 152(3) (2002).

125. National Labor Relations Act § 2(2), 29 U.S.C. § 152(2) (2002) ("The term 'employer' . . . shall not include . . . any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.").

certainly not acting as an employer. However, there is legislative history that weakens this argument. Philip Levy, one of the statute's drafters, proposed language specifying that union organizers are statutory "employees," but it was not included "apparently because it was thought not to be necessary."¹²⁶ Why would Levy's language be unnecessary? Perhaps because it was clear to all concerned that the partial exclusion of labor organizations from the definition of "employer" provided no reason at all to hold that union organizers — who are clearly statutory employees in relation to their own employers — should lose that status when performing their function of organizing workers. Labor organizations were partially excluded from the definition of "employer" so that they could not be charged with employer unfair labor practices under then-section 8(3), now section (8)(a)(3). "Otherwise the provisions of the bill which prevent employers from participating in the organizational activities of workers would extend to labor unions as well, and thus would deprive unions of one of their normal functions."¹²⁷ In other words, labor organizations were excluded from the definition of "employer" precisely so that they *could* participate in organizing. In light of this purpose, it would be ironic indeed to seize on the definition of "employer" to *prevent* union organizers from "participating in the organizational activities of workers."

Whatever the reason, Justice Thomas chose to rely not on the statute, but on the Court's pre-*Chevron* decision in *NLRB v. Babcock and Wilcox Co.*¹²⁸ In *Babcock*, the Court had overturned a series of Board orders requiring employers to permit union organizers on their property. The Board had erred, the Court held, by "fail[ing] to make a distinction between rules of law applicable to employees and those applicable to nonemployees."¹²⁹ Unfortunately for Justice Thomas' rationale, however, the terms "nonemployee" and "employee" as used by the *Babcock* Court had nothing whatever to do with the statutory term "employees" contained in section 7, and thus could not meet the *Chevron* requirement of "clear meaning" in the statute.¹³⁰ As of 1956,

126. ARCHIBALD COX ET AL., LABOR LAW: CASES AND MATERIALS 134 (13th ed. 2001) (citing Memorandum from Philip Levy, to Calvert Magruder (Apr. 17, 1935)).

127. S. REP. NO. 74-573, at 6 (1935), *reprinted in* 2 LEGISLATIVE HISTORY, *supra* note 35, at 2300, 2305.

128. 351 U.S. 105 (1956).

129. *Id.* at 113.

130. By relying on a pre-*Chevron* decision, the *Lechmere* court effectively grandfathered in the *Babcock* Court's nondeferential approach. *Cf.* Estlund, *Ossification*, *supra* note 55, at 1598-99 (suggesting "a kind of retroactive application of *Chevron*, through which the Board would be able to revisit old judicial resolutions of textual ambiguities that, in a *Chevron* world, would have been left to the agency," and pointing out that, "under the proposed approach, *Lechmere*, in which the Board had sought to revise that resolution, should have come out differently").

when *Babcock* was decided, the terms “nonemployee” and “employee” had an established usage in cases involving union organizer access to employer property. Courts used the term “nonemployee” in contradistinction not to a statutory “employee” entitled to section 7 rights, but to an employee who was employed by *the particular employer* and therefore rightfully on the property.¹³¹ Not only was this usage developed without any reference to the statutory term “employee,” but it directly conflicted with the statutory definition. “The term ‘employee,’” declares the statute, “shall not be limited to the employees of a particular employer.”¹³² But if the statute did not distinguish between employees and nonemployees of a particular employer, the common law of trespass did. As the Board read *Babcock*, the distinction hinged on the fact “that the nonemployees in *Babcock & Wilcox* sought to trespass on the employer’s property, whereas the employees” did not.¹³³ Accordingly, the Board held that employers enjoyed the property right under *Babcock* to exclude even *their own* off-duty employees — clearly statutory employees entitled to section 7 rights — without pleading any business reason.¹³⁴ In short, *Babcock’s* distinction between nonemployees and employees rested not on the statute but on the common law of trespass, raising once again the question of how state common law rights could trump federal statutory rights.¹³⁵

Unlike the opinions in *Mackay* and *Consolidated Edison*, the *Babcock* opinion addressed this issue directly. “Organization rights are granted to workers, by the same authority, the National Government, that preserves property rights,” declared the Court. “Accommodation between the two must be obtained with as little destruction of one as is consistent with the maintenance of the

131. See, e.g., *NLRB v. Babcock & Wilcox Co.*, 222 F.2d 316, 318 (5th Cir. 1955), *gaff’s* 351 U.S. 105 (1956) (distinguishing “non-employee organizers” from “union organizers who were employees of each company respectively” and contrasting “employee and non-employee union members”).

132. National Labor Relations Act § 2(3), 29 U.S.C. § 152(3) (2000). This language was inserted precisely to counter the persistent tendency of courts to limit the class of workers entitled to rights. See ATLESON, *supra* note 1, at 62; Estlund, *Lechmere*, *supra* note 117, at 329.

133. See, e.g., *Schwab Foods, Inc.*, 284 N.L.R.B. 1055, 1076 (1987) (quoting *Eastex, Inc. v. NLRB*, 437 U.S. 556, 571 (1978)).

134. *GTE Lenkurt, Inc.*, 204 N.L.R.B. 921 (1973). The employer’s right to exclude off-duty employees has since been qualified. See *Tri-County Medical Center, Inc.*, 222 N.L.R.B. 1089, 1089 (1976) (announcing that an employer rule barring off-duty employees is valid “if it (1) limits access solely with respect to the interior of the plant and other working areas; (2) is clearly disseminated to all employees; and (3) applies to off-duty employees seeking access to the plant for any purpose and not just to those employees engaging in union activity”).

135. Despite Justice Thomas’s reference to the term “employees” in section 7, *Lechmere*, like *Babcock & Wilcox* before it, has been read not as incorporating the statutory definition of employee, but the common law distinction between trespassers and invitees. See Estlund, *Lechmere*, *supra* note 117, at 324-25.

other.”¹³⁶ Of course, as any first-year law student can testify, property rights are creatures of state law, not the “National Government.” National involvement in property law can, however, be found in the Fifth and Fourteenth Amendments to the United States Constitution, which prohibit national and state government from depriving a person of property without due process of law or from taking property “without just compensation.”¹³⁷ This was the approach urged by the company’s lawyers,¹³⁸ and it is the only apparent explanation of the *Babcock* Court’s reference to the “National Government,” which, in turn, is the only rationale for the rule of *Lechmere*.

Commenting on *Babcock*, James Atleson remarked that, in light of the opinion’s failure to cite the statutory definition of “employee,” the Supreme Court evidently “feels free to apply common-law property notions without any felt need to respond to either the language of the act or its history.”¹³⁹ That the *Lechmere* Court subsequently managed to find “clear meaning” in the statute sufficient to evade *Chevron* — still without once citing the governing statutory definition — attests to the arrogance of this judicial liberty. Aside from the reference to the national government in *Babcock*, and an occasional explicit invocation of the Constitution by dissenting Justices or lower courts,¹⁴⁰ judges have left the trumping power of property rights unexplained and unexamined.

V. HOW EMPLOYERS WON THE EXCLUSIVE RIGHT TO CLASS SOLIDARITY

Class solidarity has not fared well in American courts. Under the common law, judges held that strikes were lawful only if the strikers were motivated by the prospect of immediate economic gain for themselves; broader or more attenuated motives were condemned as “malicious.”¹⁴¹ When statutes began to displace the common law, courts carried this approach over into their statutory interpretations. Absent a strong showing of immediate worker self-interest, collective action falls outside the NLRA’s protection for concerted activities for

136. *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956).

137. U.S. CONST. amends. V, XIV.

138. Brief for Respondent, at 17, *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956) (No. 250).

139. ATLESON, *supra* note 1, at 62.

140. See *Eastex, Inc. v. NLRB*, 437 U.S. 556, 580 (1978) (Rehnquist, J., with Burger, C.J., dissenting) (quoted *supra*, text accompanying note 9); *NLRB v. Windemuller Electric, Inc.*, 34 F.3d 384, 387 (6th Cir. 1994).

141. See *Plant v. Woods*, 57 N.E. 1011, 1013 (Mass. 1900); TOMLINS, *supra* note 96, at 44. On the use of the term “malice” to describe forbidden objectives, see Oliver Wendell Holmes, Jr., *Privilege, Malice and Intent*, 8 HARV. L. REV. 1, 7-8 (1894).

mutual aid or protection.¹⁴² Moreover, the Supreme Court has construed the Act's secondary boycott ban broadly to include political boycotts on the ground that it is "more rather than less objectionable" for a union to pursue non-traditional objectives instead of higher wages and better working conditions for its own members.¹⁴³

But in *Textile Workers Union v. Darlington Manufacturing Co.*, the Court carved out a limited but increasingly important exception for employer class solidarity.¹⁴⁴ Reversing its usual preference for narrowly self-interested activity, the Court ruled that an employer may close a facility to punish its employees for choosing union representation provided that the employer is *not* motivated by economic self-interest.¹⁴⁵ Management had threatened to close a textile mill that was the economic mainstay of a small southern town if the workers voted to be represented by the Textile Workers Union.¹⁴⁶ Nevertheless, the union won the election by a small margin. Six days later, the company's board of directors voted to close the plant and terminate all 500 employees.¹⁴⁷ Supervisors forthrightly told the workers that the shutdown was because of the union vote, and that the workers would be blacklisted in their search for jobs.¹⁴⁸ Eighty-three percent of the workers then signed a petition renouncing the union, but the top management official declared that "[a]s long as there are seventeen percent of the hard core crowd here, I refuse to run the mill."¹⁴⁹

Section 8(a)(1) of the NLRA makes it an unfair labor practice for an employer to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7." It is difficult to imagine a more dramatic and effective means of coercing employees than to punish them by closing their workplace altogether. The facts of *Darlington* provide a graphic illustration. Within weeks of the closing, a majority of the union voters had renounced their support for the union in a desperate attempt to recover their jobs.¹⁵⁰ The Board found

142. Richard Michael Fischl, *Self, Others, and Section 7: Mutualism and Protected Protest Activities Under the National Labor Relations Act*, 89 COLUM. L. REV. 789, 793-814, 864 (1989); ATLESON, *supra* note 1, at 10.

143. Int'l Longshoremen's Ass'n v. Allied Int'l, Inc., 456 U.S. 212, 225-26 (1982) (quoting the lower court's opinion, Allied Int'l, Inc. v. Int'l Longshoremen's Ass'n, 640 F.2d 1368, 1378 (1st Cir. 1981)); see also Alan Hyde, *Economic Labor Law v. Political Labor Relations: Dilemmas for Liberal Legalism*, 60 TEX. L. REV. 1 (1981) (analyzing and critiquing the distinction between political and economic activity by unions).

144. 380 U.S. 263 (1965).

145. *Id.* at 272.

146. *Id.* at 265.

147. *Darlington Mfg. Co.*, 139 N.L.R.B. 241, 243 (1962).

148. *Id.* at 244 n.10, 279, 281-82.

149. *Id.* at 244.

150. See *supra* note 149 and accompanying text.

unfair labor practices and ordered that the employees be made whole for wages lost from the time of the closing until they found substantially equivalent employment.¹⁵¹

But the Supreme Court announced a new rule that “some employer decisions are so peculiarly matters of management prerogative” they cannot violate section 8(a)(1) no matter how great their impact on section 7 rights, unless they also violate section 8(a)(3), which requires a showing of anti-union discrimination.¹⁵² Furthermore, the Court continued, proof of management’s anti-union hostility — of which there was plenty in *Darlington* — is not enough to establish discrimination. The employer may intentionally destroy the union and punish the workers for exercising their statutory rights unless the Board can prove that these actions were undertaken for the specific purpose of obtaining future economic benefits from the employer’s remaining employees.¹⁵³ Applying these principles, the Court held that a corporation has an “absolute right” to terminate its employees and go out of business altogether regardless of the impact on section 7 rights — there being no remaining employees from whom to obtain future benefits.¹⁵⁴ Further, a corporation may close a part of its business in retaliation for the exercise of section 7 rights unless the NLRB can prove that the closing had the purpose of chilling unionism among the corporation’s remaining employees.¹⁵⁵

Darlington has exerted an increasingly devastating impact on unions as technological advances have smoothed the way for corporations to move their operations.¹⁵⁶ As we have seen, companies are permitted to shut down facilities for retaliatory purposes without any regard for the rights of employees at the closed facilities; the only employees who count are those at the company’s other, still-operating facilities. But if those operating facilities are not in the United States, then their employees are not covered by the Act, and the shutdown could not have been for the purpose of chilling their non-existent section 7 rights. “By focusing on the chilling effect on any remaining domestic employees, instead of on the discrimination practiced against those who lost their jobs,” observes Terry Collingsworth, “the

151. *Id.* at 253-56.

152. *Darlington Mfg. Co.*, 380 U.S. at 269.

153. *Id.* at 270-72.

154. *Id.* at 268.

155. *Id.* at 275. This issue arose because the Board had held that the *Darlington* Company was controlled by a parent company, the Deering Milliken Corporation, and that Deering-Millikin could be held responsible for *Darlington*’s unfair labor practices. *Darlington Mfg. Co.*, 139 N.L.R.B. at 257-58.

156. See Abner J. Mikva, *The Changing Role of the Wagner Act in the American Labor Movement*, 38 STAN. L. REV. 1123, 1129 (1986).

Court . . . has immunized multinational runaways.”¹⁵⁷

The *Darlington* Court’s failure to consider the coercive impact of the closing on the terminated workers and their town has sparked vigorous criticism over the years. Clyde Summers set the tone early on:

The essence of the Court’s logic is that discharge for supporting the union is not itself an unfair labor practice, that it is no wrong as to the ones discharged, and that the law is not concerned with their injury. Discrimination against them is an evil only when it intimidates others; any remedy given them is only to make others feel secure. This is to see in the execution of hostages nothing more than an intimidation of the living; it is to make murder a crime only when the killer’s purpose is to instill fear.¹⁵⁸

Why did the Court turn a blind eye to the terminated workers? As to *Darlington*, the Court asserted that “so far as the Labor Relations Act is concerned, an employer has the absolute right to terminate his entire business for any reason he pleases.”¹⁵⁹ To explain this assertion, the Court contrasted the retaliatory plant closing with the (concededly illegal) retaliatory lockout. An employer might use a lockout to win economic concessions from workers, but:

[A] complete liquidation of a business yields no such future benefit for the employer, if the termination is bona fide. It may be motivated more by spite against the union than by business reasons, but it is not the type of discrimination which is prohibited by the Act. The personal satisfaction that such an employer may derive from standing on his beliefs and the mere possibility that other employers will follow his example are surely too remote to be considered dangers at which the labor statutes were aimed. Although employees may be prohibited from engaging in a strike under certain conditions, no one would consider it a violation of the Act for the same employees to quit their employment *en masse*, even if motivated by a desire to ruin the employer. The very permanence of such action would negate any future economic benefit to the employees. The employer’s right to go out of business is no different.¹⁶⁰

The Court’s attempted analogy between permanent plant closings and employees quitting is simply nonsensical. The reason why no one

157. Terry Collingsworth, *Resurrecting the National Labor Relations Act — Plant Closings and Runaway Shops in a Global Economy*, 14 BERKELEY J. EMP. & LAB. L. 72, 106 (1993).

158. Clyde Summers, *Labor Law in the Supreme Court: 1964 Term*, 75 YALE L.J. 59, 67 (1965); see also ATLESON, *supra* note 1, at 141-42; Julius G. Getman, *Section 8(a)(3) of the NLRA and the Effort to Insulate Free Employee Choice*, 32 U. CHI. L. REV. 735, 754-55 (1965) [hereinafter Getman, *Section 8(a)(3)*]; Robert A. Gorman, *The Negligible Impact of the National Labor Relations Act on Managerial Decisions to Close or Relocate*, 58 TUL. L. REV. 1354, 1359 (1984).

159. *Textile Workers Union v. Darlington Mfg. Co.*, 380 U.S. 263, 268 (1965).

160. *Id.* at 272.

would consider it a violation of the Act for employees to quit for the purpose of ruining an employer is that the Act does not even purport to prohibit *employees* from doing anything; it prohibits *labor organizations or their agents* from restraining or coercing employers in the selection of their representatives for purposes of collective bargaining.¹⁶¹ If a union ordered workers to quit permanently in order to punish an employer for exercising its freedom to select representatives (the appropriate analogy), there is little doubt that the Board and the courts would find an unfair labor practice.

On further examination, the statement only becomes more mysterious. As we have seen, courts have long held that strikes become more — not less — vulnerable to legal suppression when they are motivated by considerations other than economic gain. This principle is grounded on the idea that because a strike involves the deliberate infliction of economic damage, it is justifiable only if the strikers themselves have an observable interest at stake.¹⁶² Yet, under *Darlington*, employers enjoy the privilege of dealing catastrophic economic damage to entire working class communities not only *despite* their lack of any observable economic interest, but *because* they have no such interest and may — in fact — be “motivated . . . by spite against the union.” Thus, *Darlington* stands the old common-law malice test exactly on its head: for employers, malicious motivation can be a ticket to legal immunity.

But in fact, of course, there is much more to retaliatory shutdowns than mere spite or malice. Like sympathy strikes and secondary strikes, they produce valuable benefits — benefits that are reaped not directly by the perpetrator, but by fellow members of the perpetrator’s class. The shutdown operates like a public flogging, intimidating not only the victims themselves, but also every worker who hears of their plight. *Darlington* excludes this effect from consideration unless the employer stands to gain individually from the intimidation of its own remaining employees. Employers that act out of class solidarity, helping to produce a cowed and compliant workforce for their fellow employers, are privileged to commit what would otherwise be statutory violations.

How, then, can *Darlington* be explained? Without specifically mentioning the Constitution, the Court applied the clear statement rule: “A proposition that a single businessman cannot choose to go out of business if he wants to would represent such a startling innovation that it should not be entertained without the clearest manifestation of

161. See National Labor Relations Act § 8(b)(1), 29 U.S.C. § 158(b) (2000) (“It shall be an unfair labor practice for a *labor organization or its agents* — (1) to *restrain or coerce* . . . (B) an employer in the selection of his representatives for the purposes of collective bargaining. . . .” (emphasis added)).

162. See CHARLES O. GREGORY, LABOR AND THE LAW 107-10 (2d rev. ed. 1961).

legislative intent or unequivocal judicial precedent so construing the Labor Relations Act.”¹⁶³ At the equivalent juncture in the opinion below, the Court of Appeals made the constitutional connection explicit. “A statute authorizing an order forcing the continued pursuit of operations in these circumstances,” opined the court, “would be of doubtful validity.”¹⁶⁴

The Supreme Court’s reference to “a single businessman” choosing to go out of business invokes the rights both of property and contract. This problem was mentioned on the floor of Congress, where proponents of the NLRA assured opponents that the bill would not prevent an operator from closing “his” plant.¹⁶⁵ Like our other four “of course” statements, then, *Darlington* can be explained as a belated echo of *Lochner*-era economic due process.

But if the Court was *Lochnerizing*, it was doing an awfully poor job of it. After all, *Darlington* and *Deering-Milliken* were both corporations — not “single” businessmen. Moreover, the Board did not order anyone to remain in business; it required only that the corporations compensate employees who were terminated for retaliatory reasons. The Supreme Court did not comment on this point; it simply assumed that the Board’s ruling was equivalent to the “proposition that a single businessman cannot choose to go out of business if he wants to.” But obviously the government can impose *some* burdens on going out of business, for example taxes on the sale of assets. It is not at all clear why the employer’s liberty interest requires not only that it should be allowed to go out of business for retaliatory reasons, but also that it be freed from any obligation to factor in the cost of compensating terminated employees for the loss of their statutory right to organize.¹⁶⁶

How then, do we make sense of *Darlington*? Is the decision “inherently incredible,”¹⁶⁷ as an exasperated Clyde Summers concluded years ago? Maybe, but there is another possibility. Perhaps we could make some sense of *Darlington* by reading it as a modern

163. *Darlington Mfg. Co.*, 380 U.S. at 270.

164. *Darlington Mfg. Co. v. NLRB*, 325 F.2d 682, 685 (4th Cir. 1963), *vacated by*, 380 U.S. 263 (1965).

165. 79 CONG. REC. 7673, *reprinted in* 2 LEGISLATIVE HISTORY, *supra* note 35, at 2394 (statement of Sen. Walsh) (“[T]here are some fundamental rights an employer has, just as there are rights an employee has. No one can compel an employer to keep his factory open.”); 79 CONG. REC. 9682, *reprinted in* 2 LEGISLATIVE HISTORY, *supra* note 35, at 3110 (statement of Rep. Griswold) (“There is nothing in the bill to keep an operator from closing his plant. There is nothing in the bill that says you shall reach an agreement — nothing of that sort.”).

166. See Getman, *Section 8(a)(3)*, *supra* note 158, at 754 (observing that “the conclusion that an employer should not be forced to stay in business against his will does not require the further conclusion that his conduct in closing down is outside the scope of the Act”).

167. Summers, *supra* note 158, at 67.

constitutional decision. In the constitutional law of the post-New Deal era, as in *Darlington*, non-economic motivation weighs in favor of legal protection. For example, political speech occupies a higher position on the “hierarchy of first amendment values” than commercial speech,¹⁶⁸ and politically-motivated boycotts higher than economically-motivated boycotts.¹⁶⁹ Put this together with the established — albeit bitterly criticized — principle that corporations are entitled to the same degree of constitutional protection as natural persons, and we have a constitutional explanation for *Darlington*’s right of corporations to stand on their beliefs and punish workers for unionizing. On this view, the anomaly in the law lies not in *Darlington* itself, but in the Court’s failure to apply the same rule to unions that refuse to handle goods for solidaristic or political reasons. If non-economic motivation weighs against the suppression of employer conduct, then why should the same motivation make union conduct “more rather than less objectionable” and thus subject to greater restriction?¹⁷⁰

VI. CONCLUSION: THE PERFECT CRIME

This Essay has examined five important labor law doctrines that were originally announced as “of course” propositions. In each case, the proposition in question deployed an employer right grounded in state common law as a trump over a labor right grounded in federal

168. *Carey v. Brown*, 447 U.S. 455, 467 (1980); see, e.g., *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 506-09 (1988) (explaining that a corporation’s efforts to influence a private standard-setting organization were not entitled to full first amendment protection because the company was economically motivated); *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 67 (1983) (holding that pamphlets combining product descriptions with commentary on the desirability of contraceptives in general were commercial speech in part because of the company’s “economic motivation” for selling them).

169. *Compare NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 907-12 (1982) (holding that a “politically motivated” civil rights boycott was protected under the First Amendment), with *Fed. Trade Comm’n v. Superior Court Trial Lawyers Ass’n*, 493 U.S. 411, 427 (1990) (holding that a boycott by court-appointed defense lawyers could be constitutionally prohibited in part because the lawyers’ “immediate objective was to increase the price that they would be paid for their services”).

170. *Int’l Longshoremen’s Ass’n v. Allied Int’l, Inc.*, 456 U.S. 212, 225-26 (1982). For criticism of the Court’s treatment of political and solidaristic labor protest, see ATLESON, *supra* note 1, at 68-74; FISCHL, *supra* note 142, at 865; Julius Getman, *Labor Law and Free Speech: The Curious Policy of Limited Expression*, 43 MD. L. REV. 4, 17-18 (1984); Hyde, *supra* note 143; Thomas C. Kohler, *Setting the Conditions for Self-Rule: Unions, Associations, our First Amendment Discourse and the Problem of DeBartolo*, 1990 WIS. L. REV. 149, 168-70 (1990); Gary Minda, *The Law and Metaphor of Boycott*, 41 BUFF. L. REV. 807, 826-30 (1993); James G. Pope, *The Three-Systems Ladder of First Amendment Values: Two Rungs and a Black Hole*, 11 HASTINGS CONST. L.Q. 189, 189-91, 225-27 (1984); see also Seth Kupferberg, *Political Strikes, Labor Law, and Democratic Rights*, 71 VA. L. REV. 685 (1985) (presenting a carefully crafted effort to rationalize and harmonize the leading cases in a way that would provide a far greater degree of protection for political protest by labor than has been implemented either by courts or the Board).

statutory law — thus reversing the normal hierarchy of laws. And in each case, it turned out that what the Supreme Court treated as a matter “of course,” had been justified by lawyers and lower court judges in constitutional terms. State common law rights of property and contract were elevated above federal statutory rights of self-organization and collective action through *Lochner*-era notions of economic due process and interstate commerce.

This summary leaves us with some important questions. First, if these decisions are best explained in terms of constitutional law, then why didn't the Supreme Court just come out and say so? The answer may be found in the Court's experience with its *Fansteel* opinion, the only one of the five to mention the Constitution directly. Although the opinion as a whole drew mixed reactions, the constitutional language in particular drew harsh criticism. Professor J. Denson Smith charged that *Fansteel* had revived the discredited economic due process decisions of *Coppage v. Kansas* and *Adair v. United States*.¹⁷¹ Once again, he explained, the due process clause had been applied to the employer-employee relationship so as “to protect the general control of the former over the latter,” and this time “even during a period of industrial strife, and notwithstanding that the employer had been guilty of unfair labor practices under the Act.”¹⁷² Others agreed.¹⁷³ On the assumption that *Fansteel* partook of the pre-New Deal mentality, *New York Times* columnist Arthur Krock predicted that the dissenters' position — which was “eloquent of New Deal reasoning” in emphasizing the Board's statutory power to remedy unfair labor practices — would eventually prevail.¹⁷⁴ The reaction to *Fansteel*'s constitutional language signaled that if the Court were to persist in openly resurrecting economic due process in labor law, it would do so at a heavy cost in legitimacy.

So the Justices hid the economic due process in “of course” statements. And, just as importantly, they pushed it away from what were then the central issues and to the margins — out of the political and professional spotlights.¹⁷⁵ Many of the “of course” statements

171. J. Denson Smith, Comment, *From Nose-Thumbing to Sabotage: The Fansteel Sit-Down Decision*, 1 LA. L. REV. 577, 577 (1939).

172. *Id.* at 580.

173. See, e.g., Frank Thomas Miller, Jr., Comment, *Labor Law — Sit-Down Strikes — Reinstatement of Employees Under the Wagner Act*, 17 N.C. L. REV. 438, 439 (1939); Recent Decision, *Labor Law: Power of the National Labor Relations Board to Order Reinstatement of Sit-Down Strikers*, 27 CAL. L. REV. 470, 472-73 (1939).

174. Arthur Krock, *Implications in the dissents of Reed and Black*, N.Y. TIMES, Mar. 1, 1939, at 20.

175. This phenomenon followed the pattern modeled by Jack Balkin as “the crystalline structure of law.” Balkin shows how a dominant principle may triumph over a competing counterprinciple in a central case, yet remain vulnerable to the suppressed counter-principle in more marginal cases. J.M. Balkin, *The Crystalline Structure of Legal Thought*, 39 RUTGERS L. REV. 1 (1986).

were barely noticed at the time. It is only over the past several decades, as their impact has been magnified by social and economic change, that they have emerged as central issues. Taken together, they may account for a substantial proportion of the decline in the American labor movement. The permanent replacement rule of *Mackay*, ignored at the time and rarely utilized until the 1980s, now operates to prevent workers from exercising their right to strike for better conditions.¹⁷⁶ The no-deterrence rule of *Consolidated Edison*, also little noted at the time, now ensures that even when employers are caught red-handed, they stand to gain financially from violating workers' rights.¹⁷⁷ The employer's right to exclude union organizers under *Babcock & Wilcox* and *Lechmere* poses an increasingly formidable barrier to union-worker communication as more and more jobs are located in self-contained facilities like malls, shopping centers, industrial parks and office parks.¹⁷⁸ Finally, the employer's right — announced in *Darlington* — to punish workers for unionizing by closing their place of employment out of "spite," which was considered at the time unlikely to be exercised very often, now causes serious problems due to the increasingly global scope of economic activity.¹⁷⁹

This brings us to the question of legitimacy. Had the Court openly grounded these rulings in the Constitution, it is highly unlikely that they would remain good law today. For half a century, the Court has disavowed economic due process. Despite academic efforts to revive *Lochner*, the decision continues to operate as a negative precedent,

176. Befort, *supra* note 56, at 440-41 (recounting that employers did not begin to make extensive use of the permanent replacement rule until after 1981, when President Ronald Reagan used the tactic to defeat the air traffic controllers' strike). On the recent impact of *Mackay*, see *supra* notes 54-57 and accompanying text. At the time of the decision, unionists and their legal allies focused on the positive aspects of the case, not even bothering to mention the permanent replacement issue. See, e.g., *Supreme Court's O.K. Of NLRB In Mackay Case Blow To Tories*, UNION NEWS SERVICE: COMMITTEE FOR INDUS. ORG., May 20, 1938, at 1.

177. On the impact of the no-deterrence rule today, see *supra* notes 85-88 and accompanying text. Like *Mackay*, *Consolidated Edison* raised a number of issues, and the Board prevailed on all except one. For contemporary reports, see, for example, Ward P. Allen, Recent Decisions, *Labor Law — Power of National Labor Relations Board to Invalidate Contract Between Employer and Bona Fide Union*, 37 MICH. L. REV. 660, 663 (1939), and Recent Cases, *Labor Law — National Labor Relations Act — Abrogation of Contracts Signed During Pendency of NLRB Proceedings*, 52 HARV. L. REV. 695, 695-96 (1939).

178. On the impact of *Babcock & Wilcox* and *Lechmere*, see *supra* note 118 and accompanying text.

179. On the effects of *Darlington* today, see *supra* notes 156-157 and accompanying text. While the *Darlington* decision was heavily criticized at the time, nobody contested the Supreme Court's view that there was nothing more than a "mere possibility" that other employers would follow *Darlington's* lead. *Textile Workers Union v. Darlington Mfg. Co.*, 380 U.S. 263, 272 (1965).

and the charge of *Lochnerizing* rarely fails to elicit strong denials.¹⁸⁰ But by couching its rulings as matters of statutory construction, the Court has entrenched them against change. As Cynthia Estlund recently observed, labor law has ossified. No matter how devoid of statutory reasoning or how destructive of the statute's purposes in light of changed conditions, old Supreme Court constructions of the statute are accorded a kind of super-*stare decisis*.¹⁸¹ Not only are the corpses in labor law buried in "of course" statements, then, but they are buried deeply, beyond the reach of judicial or administrative change. Through misdirection, the Court has pulled off the perfect crime.

180. On the continuing vitality of *Lochner* as a negative precedent, see, for example, *United States v. Lopez*, 514 U.S. 549, 605 (1995) (Thomas, J. concurring) (denying that the majority was reviving *Lochner*), and *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666, 690-691 (1999) (same). On the failure of efforts to rehabilitate *Lochner*, see Gary D. Rowe, *Lochner Revisionism Revisited*, 24 LAW & SOC. INQUIRY 221, 222, 243 (1999).

181. See Estlund, *Ossification*, *supra* note 55, at 1561.