

# Teaching Labor Law Within a Socioeconomic Framework

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## I. INTRODUCTION

The National Labor Relations Act (NLRA)<sup>1</sup> was enacted to establish a relationship between employers and employees different from that of the common law and different from how most people, even more than sixty years after its enactment, think about employer and employee rights and obligations. It was created to restore equal employer and employee bargaining power in order to promote improved working conditions and create labor and social peace. Every judicial interpretation of the NLRA rebalances power and impels the parties to capitalize on the change or to

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1. 29 U.S.C. §§ 151–69 (2000).

neutralize it. As a result, issues of law, social ordering, economics, and power so naturally infuse labor law that it is nearly impossible to teach the course without addressing their interplay. To study labor law is to rethink what is assumed about a relationship fundamental to social ordering and to the economic prospects of each member of this society. These socioeconomic issues and their enmeshment with law promote transformative legal education.<sup>2</sup>

## II. BACKGROUND ON LABOR LAW

Even before the NLRA, issues of law, power, economics, and social ordering existed within the employment relationship. Put most simply, if employees have enough power to extract more from the employer, the employer has less, and if employees lack bargaining power, the employer has more. More for employees means more money, but also includes more health and safety, equal opportunity, industrial due process and equal protection, democratic engagement, empowerment, and self-actualization.

Using law to promote and protect collective bargaining is intended to restore the equality of bargaining power, which law itself had destroyed. Congress concluded that employers who used corporation and partnership law to become collective had become so powerful that employees could not bargain as equals and were thus denied freedom of association. These harms were not confined to the single workplace; they injured the foundations of society. The NLRA's Policies and Findings stated the following:

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

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

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2. In no other course have I had so many students tell me that the course has changed their lives and the way they see the world. By the same token, questioning imbedded assumptions makes some students uncomfortable. While discomfort can create the opportunity for growth—the core of what we, as teachers, do—the teacher must help students feel included, whatever their views.

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.*<sup>3</sup>

What sort of freedom of association did Congress intend? Rather than opting for individual freedom of choice to associate or not, NLRA freedom of association had the larger meaning of promoting collective organization to make it possible for employees to bargain as equals with the employer, that is, to bargain collectively, to engage in mutual aid and protection, and to have an active part in improving and stabilizing their working conditions. In 1947, Taft-Hartley amended section 7 of the NLRA to add a goal that an employee would also have the right to refrain from concerted activities.<sup>4</sup> As a result, grafted onto the NLRA's basic radical vision of transforming the power relationship of employer and employee is the goal of individual freedom of choice.

This divided purpose has important consequences in the interpretation and application of the law, in the prospects of employees, and in the ability of the NLRA to achieve the goals Congress set for it. Judges with widely divergent philosophies can find support for outcomes at direct odds with one another. As a result, are employee interests protected and promoted only at the level of the individual? What about the employees of a single employer, those employed within an industry, or all members of the working class? Nearly the entire subject of the labor law course is focused on how to help employees achieve a collective form—in order to increase their bargaining power, while not destroying individual rights—and on outlawing certain employer actions, many of which would be legal without the NLRA, that impede gaining that power, while also protecting employer property and managerial rights.

### III. TEACHING LABOR LAW THROUGH A SOCIOECONOMIC LENS

While it is theoretically useful to teach with a socioeconomic perspective, theory is not enough. How is this idea to be transformed into reality? First, a context must be created so the perspective arises naturally and discussion does not feel forced. The way I construct that context is discussed in the next section. Then, in the two sections that

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3. 29 U.S.C. § 151 (emphasis added).

4. *Id.* § 157.

follow, I present how I teach a class with this methodology by discussing my approach to the *Lechmere, Inc. v. NLRB*<sup>5</sup> case.

### A. Creating a Context

The texts we use are not merely compendiums of cases. Rather, they have points of view that set the tone for the class. Any teacher who has had the misfortune of having to teach against the casebook knows just how powerful a hold the text has on the tone of the course.

Most labor law casebooks introduce labor law through a historical section that explores the development of collective action through centuries of repressive judicial decisions, culminating finally in the enactment of the Norris-LaGuardia Act<sup>6</sup> and the NLRA.<sup>7</sup> This traditional framing of labor law is reflected in the choice and presentation of cases. The seminal cases in each area are typically followed by lengthy notes that explain seventy years of ensuing developments. While there is nothing wrong with this approach, I have found that it does not present a congenial context for the perspectives I want to present.

I am currently developing a casebook that takes more of a socioeconomic approach and focuses on the issues labor confronts today. It therefore starts with what is at stake in making the decision to organize a union. The first chapter introduces students to demographic and economic information to help them understand what life is like for the majority of Americans. It examines what it is like to be poor, then examines at-will employment, and finally the impact of union organization.

Later chapters present the law by following a typical course from the unorganized workplace, to organizing a union using currently popular methods such as card check and picketing as well as National Labor Relations Board (NLRB) processes, and finally to bargaining, strikes, and related issues. One advantage of this approach is that students see the course as relevant to their own experiences and to what they see in the news. For example, the second chapter looks at how the NLRA applies to the unorganized workplace. Most students will have had the experience of working in this environment and being told not to discuss their wages or other working conditions with their coworkers. The law becomes personally meaningful to them when they learn from this section that being told not to talk about their working conditions means

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5. 502 U.S. 527 (1992).

6. 29 U.S.C. § 101.

7. See, e.g., ARCHIBALD COX ET AL., LABOR LAW 4-93 (13th ed. 2001); THEODORE J. ST. ANTOINE ET AL., LABOR RELATIONS LAW: CASES AND MATERIALS 1-68 (10th ed. 1999).

they have been victims of a violation of section 8(a)(1).<sup>8</sup>

The casebook uses a high percentage of recent cases. The students like reading these sorts of cases because they make the law seem vibrant and relevant to workers' lives today. The cases are selected to help the students understand the seminal cases and how those cases are now understood and applied. This has meant emphasizing cases with a split of opinion. The notes that follow cases in most labor law casebooks detailing the history of a doctrine since a case was handed down are embodied in the analyses of the majority and dissent. Cases are also chosen to familiarize students with contemporary conditions they are likely to encounter in practice or in the news. For example, in recent years many have advocated avoiding NLRB-conducted representation elections. NLRB elections are conducted by the government, normally at the employer's facility, using a voting booth, secret ballots, and observers. Some argue that NLRB processes are subverted by employers to illegitimately deprive employees of the representation they have chosen.<sup>9</sup> Some have advocated repealing the NLRA because it is outdated and useless.<sup>10</sup>

Instead of petitioning the NLRB to hold a union certification election, they rely on pressuring employers through picketing and community pressure to persuade employers to sign neutrality and card check agreements.<sup>11</sup> An employer who signs a neutrality agreement pledges not to mount an antiunion campaign. An employer who signs a card check agreement binds itself to recognize the union when it has gathered signatures from a majority of employees stating that they want to be represented by the union. The Justice for Janitors campaign has largely relied on these tactics.<sup>12</sup> Most students would have been exposed to their organizing and bargaining strikes in virtually every major city in 2000,

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8. 29 U.S.C. § 158(a)(1).

9. For management and union views, see Eric Heubeck, *New Organizing Methods: Card Check and Neutrality Agreements*, at <http://www.enterstageright.com/archive/articles/1299unorg.htm> (1999); Labor Research Association, *Employer Neutrality and Card-Check Recognition Get Results*, at [http://www.laborresearch.org/page\\_src.php?id=67&src=Employer%20Neutrality](http://www.laborresearch.org/page_src.php?id=67&src=Employer%20Neutrality) (1999).

10. Lane Kirkland, former president of the AFL-CIO, said that unions would be better off with the law of the jungle than with the NLRA. See Harry Bernstein, *Creativity Needed to Stem Unions' Decline*, L.A. TIMES, Sept. 19, 1989, at B1. When Kirkland stated this, an employer representative suggested that, because he felt this way as well, they join together to petition Congress to repeal it. *Id.*

11. See Heubeck, *supra* note 9; Labor Research Association, *supra* note 9.

12. See Service Employees International Union, *Justice for Janitors*, at <http://www.seiu.org/building/janitors/> (last visited Sept. 28, 2003).

and we are due to enter another round of bargaining and, perhaps, strikes as those contracts expire. Success in taking the most powerless workers in the country—unskilled, easily replaceable workers, many of whom are immigrants and even undocumented immigrants, many of whom do not speak English, yet who improved their working conditions through collective action—provides a dramatic contemporary example of what the NLRA was enacted to achieve.<sup>13</sup>

These early classes demonstrate the continuing relevance of labor law, that this is transformative law that has the potential to make a difference in workers' lives and in the lives their children will have as a consequence.

### *B. The Toothpaste Tube Theory of Labor Law*

To teach the course with a focus only on the twists and turns of the black-letter law that has grown up around the NLRA's implementation misses the dynamic of the parties' sensitivity to even subtle changes. I call this the "toothpaste tube" theory of labor law. Employer and employee relations are always under pressure but contained by law. However, when there is a change in pressure, consequences are felt elsewhere, just as a toothpaste tube bulges out in one place when pressure is exerted on another.<sup>14</sup> The toothpaste in this case is power, and NLRB and court decisions have obvious consequences on the balance of power.<sup>15</sup> These changes affect the viability of collective bargaining. Cases commonly refer to the goal of promoting labor peace and freedom of association, yet the NLRB and the courts never say that they have considered whether their decisions affect the NLRA's purpose of promoting collective bargaining.

*Lechmere*<sup>16</sup> is a good example of a case that can be used to explore these dynamics and issues. While labor law professors will be familiar with the facts and issues in the case, other readers may not be. Even

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13. See, e.g., *id.* See generally ORGANIZING IMMIGRANTS: THE CHALLENGE FOR UNIONS IN CONTEMPORARY CALIFORNIA (Ruth Milkman ed., 2000) (discussing several cases in which California immigrant workers organized).

14. The dynamics of these interactions may be a more complex iteration of phenomena associated with recent findings in experimental economics. For an overview of the history of these experiments and their findings, see generally Alvin E. Roth, *Bargaining Experiments*, in THE HANDBOOK OF EXPERIMENTAL ECONOMICS 253 (John H. Kagel & Alvin E. Roth eds., 1995); see also Ernst Fehr & Simon Gächter, *Fairness and Retaliation: The Economics of Reciprocity*, 14 J. ECON. PERSPECTIVES 159, 160 (2000); Elinor Ostrom, *Collective Action and the Evolution of Social Norms*, 14 J. ECON. PERSPECTIVES 137, 139–41 (2000).

15. James Atleson explores this concept in a more rigorous way. See JAMES B. ATLESON, VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW 171–80 (1983); see also James J. Brudney et al., *Judicial Hostility Toward Labor Unions? Applying the Social Background Model to a Celebrated Concern*, 60 OHIO ST. L.J. 1675, 1679 (1999).

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

those familiar with the case may not be fully aware of all that was at stake in the case and, as a result, may not appreciate the opportunities the case creates for teaching using a socioeconomic methods. I will set out those details here and then give examples of how I teach *Lechmere* in the next section.

The issue in *Lechmere* is the access union organizers can have to employees they want to organize. The stakes involve bargaining power, and not only at the targeted employer. When workers at a competitor are not organized, this affects employee union bargaining power at an organized employer. When an industry or an area is completely organized, wages can be taken out of competition so that employers can compete elsewhere, for example, on product or service quality. The NLRA recognizes this when it talks of the need for law to promote the stabilization of competitive wage rates and working conditions within and between industries.

The NLRA provides a number of mechanisms to promote that goal. First, employee section 7 rights, the only rights expressly protected by the NLRA, provide the following:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities . . .<sup>17</sup>

The NLRA protects far more than just the right to organize a union to bargain with one's own employer, for if working conditions within and between industries are to be stabilized, employee rights must extend beyond the four walls of one employer.<sup>18</sup> Therefore, the NLRA gives broad rights for employees, as a class, to make common cause with one

17. 29 U.S.C. § 157 (1994).

18. The NLRB noted the following:

The policy which it expressed in defining "employee" both affirmatively and negatively, as it did in § 2(3), had behind it important practical and judicial experience. . . . It had reference to the controversies engendered by constructions placed upon the Clayton Act and kindred state legislation in relation to the functions of workers' organizations and the desire not to repeat those controversies. The broad definition of "employee," "unless the Act explicitly states otherwise," as well as the definition of "labor dispute" in § 2(9), expressed the conviction of Congress "that disputes may arise regardless of whether the disputants stand in the proximate relation of employer and employee, and that self-organization of employees may extend beyond a single plant or employer."

Briggs Mfg. Co., 75 N.L.R.B. 569, 571 n.3 (1947) (quoting *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 191-92 (1941)) (citations omitted).

another.<sup>19</sup> The breadth of these rights is affirmed in the definition of “employee” in section 2(3): “The term ‘employee’ shall include any employee, and shall not be limited to the employees of a particular employer . . . .”<sup>20</sup> Thus, the NLRA gives employees the right to define their own interests, to define them broadly, and together to advance their collective interests. The purpose of this definition is explained by history: It was enacted so that workers could make common cause in order to achieve industry-wide terms of employment.<sup>21</sup> These rights and protections differ from assumptions about relationships between employers and employees. Despite the centrality of this definition to the enforcement of NLRA rights, the ramifications of this definition have yet to be fully explored. Nor can it be said that courts have generally applied section 7 and section 2(3) as broadly as the language suggests they should be, and this is the case with *Lechmere*.

Lechmere owned and operated a shopping center and a store within that shopping center. The Greater Hartford area Lechmere store was located in a strip mall that surrounded a parking lot on two sides. A publicly owned grassy strip separated the shopping center from a busy highway. The stores in the mall were located essentially on two contiguous sides of a parking lot. The mall uniformly banned solicitors.<sup>22</sup>

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19. See, e.g., *John Hancock Mut. Life Ins. Co. v. NLRB*, 191 F.2d 483, 485 (D.C. Cir. 1951); *H.B. Zachry Co.*, 289 N.L.R.B. 838, 839 (1988); *Paintsville Hosp. Co.*, 278 N.L.R.B. 724, 736 (1986); *Dave Castellino & Sons*, 277 N.L.R.B. 453, 459 (1985); *Lodge 68 of the Int’l Ass’n of Machinists*, 81 N.L.R.B. 1108, 1114 n.5 (1949). *Briggs Manufacturing Co.* explains as follows:

Section 2(3) of the Act provides that the term “employee” “shall include *any* employee” and expressly states that it “shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise.” The Act thus provides for the use of the term “employee” both in the broad generic sense as defined in Section 2(3) of the Act, and also in a more limited sense whenever the Act explicitly so provides. In its generic sense the term is broad enough to include members of the working class generally. In its limited sense the term may include only the employees of a particular employer . . . . This broad definition covers, in addition to employees of a particular employer, also employees of another employer, or former employees of a particular employer, or even applicants for employment. . . . To limit protection against discrimination only to employees of a particular employer, would permit employers to discriminate with impunity against other members of the working class, and would serve as a powerful deterrent against free recourse to Board processes. An employee who had filed charges against his own employer could be blacklisted by other employers and denied employment for filing charges against his former employer. We cannot believe that Congress intended any lesser protection for filing charges under the Act than it did for concerted and union activities.

*Briggs Mfg. Co.*, 75 N.L.R.B. at 570–72 (footnotes omitted).

20. 29 U.S.C. § 152(3).

21. CHARLES O. GREGORY & HAROLD A. KATZ, *LABOR AND THE LAW* 229–30 (3d ed. 1979).

22. According to the Court:

Lechmere had established this policy several years prior to the union’s organizing

Union organizers spent several months trying to organize Lechmere's employees. The union, not the employees, initiated the campaign.<sup>23</sup> It began by placing newspaper ads, and then union organizers began leaving handbills on employee cars parked at the far end of the parking lot. Each time, managers told the organizers they would have to leave and then removed all the handbills. The union organizers then stood on the public grassy strip and tried to pass out literature to employees entering from the busy turnpike. They also picketed there for six months and recorded license numbers. From the license numbers, the organizers got names and addresses of twenty percent of Lechmere's nonsupervisory employees.<sup>24</sup> The organizers then sent out four mailings and made home visits and phone calls. All this effort resulted in one signed card.<sup>25</sup>

The union filed NLRB charges alleging that Lechmere's barring the organizers from placing literature on employee cars or handing out literature in the parking lot violated the NLRA by interfering with, restraining, or coercing employees in the exercise of their section 7 rights. The NLRB and reviewing court of appeals found that Lechmere violated the NLRA. The Supreme Court reversed.<sup>26</sup>

Critical to Justice Thomas's majority opinion was whether the union organizers were employees or not. Or this question should have been critical. The history of the NLRA and the language of section 2(3) suggest that the organizers could be defined as employees engaged in concerted activities for mutual aid or protection with rights protected under the Act. Or the union might be the incarnation of the concerted action of many employees and thus an instrument for effectuating their (and potentially the Lechmere employees') rights to organize to improve

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efforts. The store's official policy statement provided, in relevant part:

"Non-associates [*i.e.*, nonemployees] are prohibited from soliciting and distributing literature at all times anywhere on Company property, including parking lots. Non-associates have no right of access to the non-working areas and only to the public and selling areas of the store in connection with its public use."

On each door to the store Lechmere had posted a 6- by 8-inch sign reading: "TO THE PUBLIC. No Soliciting, Canvassing, Distribution of Literature or Trespassing by Non-Employees in or on Premises." Lechmere consistently enforced this policy inside the store as well as on the parking lot (against, among others, the Salvation Army and the Girl Scouts).

Lechmere, Inc. v. NLRB, 502 U.S. 527, 530 n.1 (1992) (citations omitted).

23. *Id.* at 529–30.

24. *Id.*

25. *Id.* at 530.

26. *Id.* at 527–28.

their working conditions.

The Court, however, never mentioned section 2(3) or, apparently, gave the issue any thought. Rather, it assumed the organizers were not employees, and thus, any rights they might have derived from Lechmere's employees' rights to learn the advantages of self-organization from others. Implicit in this was an assumption that organizers—unions—are outsiders with no interests in common with the Lechmere employees.

However, even the Lechmere employees' rights were seen as highly attenuated. They were characterized as no more than the right to hear the organizers' message. Missing from consideration was why the rights of Lechmere's employees were limited only to hearing a message, whether the organizers had rights beyond merely speaking to the Lechmere employees, and how this affected the goal of promoting collective bargaining. Defining the right as limited to the employees' right to hear confined that right to being but an end in itself rather than as an instrument leading towards taking concerted action for mutual aid and protection, organizing a union, and improving their working conditions. The *Lechmere* dissent argues that the right is actual communication and not mere notice of a campaign;<sup>27</sup> however, is this position closer to the majority's view of employee rights or to the more radical vision of the NLRA's statement of policy in section 1?

In contrast, the Court defined employer property rights broadly. In holding that the employer's property right was always paramount, unless the employees were wholly inaccessible, the Court assumed that Congress intended no changes in employer property rights when it enacted the NLRA. However, it is hard to imagine that the NLRA drafters did not intend some attenuation of those rights because otherwise, the rights they were creating would have little meaning.

The NLRB and court decisions make a useful contrast. The NLRB applied a more sophisticated analysis of employer and employee rights involved in the organizing attempt here and then in its application of a balancing test developed under *Jean Country*.<sup>28</sup>

The content of these rights and how they are balanced is not an abstract exercise. At stake is the possibility that Lechmere's employees might organize a union and have the power to improve their working conditions. Organizer access to the employees has some value to the organizers and potentially to the employees, but that access diminishes the employer's rights, power, and, potentially, finances. If asked to choose where they would set the rights if they were an employer or an employee union, students would see that the employer would want to exclude the

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27. *Id.* at 543 (White, J., dissenting).

28. *Jean Country*, 291 N.L.R.B. 11, 13 (1988).

organizers to the greatest degree possible, and the union organizers would want as much access as possible.

After the *Lechmere* decision excluding the organizers issued, unions reacted by moving to organizing methods employers found far more objectionable than handing out leaflets in a parking lot. They sent in “salts” organizers who applied for jobs with the employer. These salts were fearless organizers. When some employers reacted by firing the salts, they found themselves in violation of the NLRA and sought relief from Congress. Congress held hearings to consider defining salts as nonemployees.<sup>29</sup> The case thus presents a cascade of interesting issues on many levels and an example of the toothpaste tube dynamic.

The Supreme Court’s unanimous decision in *Town & Country Electric*,<sup>30</sup> issued four years later, can be read as a rebuff to many of *Lechmere*’s foundations. The *Lechmere* dissent argued vehemently that the NLRB was entrusted with interpreting the NLRA and courts must defer to the NLRB interpretation as long as it is reasonable, but the *Lechmere* Court inserted itself in setting the balance of rights. In *Town & Country*, in contrast, the unanimous Court made strong statements in support of court deference to the NLRB’s interpretation of who is an employee.<sup>31</sup> It also looked to section 2(3) for the definition of who is an employee and endorsed its expansive interpretation rather than ignoring the statute it was supposed to be interpreting and making up a definition. And it did this in a case where the employer not only had a union organizer on its property; it had the organizer on the payroll.

It is against this background that I teach the case, and it is this background I try to convey to the students as I teach it.

### C. Teaching the Case

The majority states the issue in *Lechmere* as the relationship of employee section 7 rights versus *their* employer’s property rights. *Lechmere* held that union organizers, as nonemployees, have no right to engage in reasonable trespass, and employer property rights are inviolate unless employees are inaccessible.<sup>32</sup> It is possible to probe the Court’s

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29. Fairness for Small Business and Employees Act, S. 2085, 105th Cong. § 101 (1998).

30. NLRB v. Town & Country Elec., Inc., 516 U.S. 85 (1995) (finding salts to be employees).

31. *Id.* at 94.

32. *Lechmere, Inc.*, 502 U.S. at 537–41.

decision on many levels, whether it is doctrinally flawed, how it affects the balance of power, and whether it advances the NLRA's goals.

The entire discussion of employer property rights versus employee section 7 rights is highly abstract and even unsophisticated, but few students are likely to appreciate these qualities of the case on their own. For example, the majority bluntly states that the employer's property right is virtually inviolate.<sup>33</sup> But does this make sense on the facts of the case and in juxtaposition to the employee rights guaranteed by the NLRA? Put another way, if the right to exclude is generally seen as a fundamental aspect of property rights, to what extent and in what ways does the NLRA override it? When there is a clash of employer versus employee rights, must the employer's rights always trump? If so, if employer rights are not diminished to some extent by the NLRA, then what was the point of enacting it?

First, looking at the facts of the case, if Lechmere has the normal right to exclude others from its property, how has it exercised that right? Who has been excluded? Certainly not everyone has been excluded, and actually, very few have been excluded. Otherwise, the store would have been bankrupt long ago. It does not exclude; it invites all the public in, hoping they will become customers, and invites in employees to serve those customers. It probably would evict neither people who come into the store but buy nothing nor people who come in with purposes other than buying, mall walkers who come to exercise, for example. It excludes only solicitors, and this includes the organizers. So, many are called, but few are excluded. Most of the solicitors excluded would be people or groups who would ask potential customers to buy or sign or listen to something, those who would bother the customers and make the shopping experience much less pleasant. But the union organizers were not there to solicit customers. Their target is Lechmere's employees, and they are not there by happenstance or to take advantage of someone else's customers, but rather to exercise—or to help employees exercise—their statutory rights.

These facts necessarily lead to questions of employer versus employee rights that lie at the core of the case. Why are the organizers excluded, beyond the fact that a property owner, with some limitations, has the right to exclude whomever it wants? One possibility is litter, to keep the premises attractive for customers. Excluding solicitors will give shoppers a more pleasant experience. But how often has the employer ejected

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33. Many of my labor law students are aware from their constitutional law classes that the issue of rights of access to malls has had a complicated history.

The dissent points out that the majority is highly selective in its discussion of that history and of precedent concerning access to employees on employer property and that the majority was not bound by any precedent to reach the outcome it did, although the majority speaks as though it had no choice. *Id.* at 541–48 (White, J., dissenting).

customers who litter, and has Lechmere really fought this case to the Supreme Court over litter? Has Lechmere fought this case to vindicate an absolute view of its property rights, or to prevent its employees from organizing unions and gaining the power to demand more?

Given the injury that litter from handbilling might cause, the right to exclude when all the world is invited in seems disproportionate and abstract. Perhaps, then, what the employer really wants is to exclude the organizers in order to control who has access to the employees and whom employees have access to. Can Lechmere have a property interest in its employees—a right to control access to them in order to control their access to exercising their rights? This seems more like the type of injury that an employer might care enough about to fight up to the Supreme Court, that employees might exercise their right to unionize, but no one talks about it. If this is what is at the bottom of the employer right, is this uncomfortably close to Thirteenth Amendment issues of involuntary servitude?

The majority gives employer property rights such power that it ignores the employees' right to self-organization. Students will come into labor law with a grounding in property law, but for most, unions and NLRA rights will be wholly foreign. Questioning whether section 7 protects the rights of nonemployees of the employer—here, the organizers—pushes students to rethink what they believe about the employer-employee relationship. They will accept that section 2(3) plainly defines employee broadly. They will also understand that the definition has historical roots<sup>34</sup> that reflect a judgment that employees can only be effectively protected as a class.<sup>35</sup> Most difficult will be conceptualizing who is an employee whose rights are affected by what happens at Lechmere—for example, unionized employees at competitors' stores who would not want the Lechmere employees to undercut their wages and working conditions, or the union organizers, who are also someone's employees and who here are instruments to vindicate employee rights—and the implications of defining each group as an employee.

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34. The most immediate antecedent is section 13 of the Norris-LaGuardia Act:

The term "labor dispute" includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.

29 U.S.C. § 113(c) (1994).

35. GREGORY & KATZ, *supra* note 21, at 188–99.

At least some students may see that construing employee in the narrow sense is doctrinally problematic and likely to make it more difficult for employees to exercise their rights, including those such as the *Lechmere* employees who are easily defined as employees. Here, the employee rights are core NLRA rights intended to equalize employee-employer power and promote freedom of association and potentially to vindicate rights based in the First and Thirteenth Amendments.<sup>36</sup>

If the employer has the right to exclude the organizers and employees have a right to organize, how can the two be accommodated? *Lechmere* simply concludes that the employer's property right always wins against organizers unless the employees are totally inaccessible—the plant location and employee living quarters place the employees beyond the reach of the union, as when employees live on the employer's property. However, this is the status of so few employees that property rights will always trump these section 7 rights.

The majority makes it clear that employee rights, even those protected by remedial statutes, are so weak as to be nearly nonexistent, and employer rights, even when they are scarcely infringed, are very powerful. The majority cites *Babcock*<sup>37</sup> as mandating the outcome it reaches but also ignores *Babcock* on key points. *Babcock*, for example, stated that the court must accommodate employee section 7 rights with as little destruction of employer rights as possible.<sup>38</sup> It did not say that employer rights had to give way to employee rights only in the most extreme situations. But the *Lechmere* majority gave virtual employer hegemony over access to the employees, a result that arguably ignores or even eviscerates the possibility that the NLRA was enacted to give employees the right to impinge on employer rights to some degree.<sup>39</sup> With *Lechmere* as the law, what employee rights are left?

The NLRB's *Jean Country* test interpreted *Babcock* by accommodating both employer property and employee section 7 rights. It asked (1) to what degree would employee section 7 rights be impaired without access; (2) to what degree would the employer's property right be impaired if access were granted; and (3) to what extent there are reasonably effective alternate means of access. Applying this test lets students revisit and deepen the earlier exploration of the parties' rights.

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36. James Gray Pope, *Labor's Constitution of Freedom*, 106 YALE L.J. 941, 947 (1997); 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, 47–59 (2002).

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

38. *Id.* at 112.

39. It also ignored other key holdings of *Babcock*. For example, *Babcock* says inaccessibility is a reason to permit access, but the majority treats it as the sole reason. See *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 539–41 (1992); *Babcock*, 351 U.S. at 113.

To understand the weight to give employee section 7 rights, we can explore who the targeted audience is and the appropriate manner of asserting the rights. For employer property rights, questions include how the property is being used, what sort of access the public has, what its size is, whether it is open or closed, and what the relationship of the employer to the property is. Finally, reasonably effective access means asking whether neutrals would be enmeshed and determining the safety of alternate sites, the burden or expense entailed in using alternate means of access, and the effectiveness of alternate means. Depending on how you assess the rights, the scale for measuring effectiveness can look at the result of the communication: Are there alternate means that are equally effective in reaching the employees? Can they be assessed by comparing the methods? Are the alternate means not more difficult or expensive? Or, it can ask whether alternate means exist without regard to their effectiveness or cost.

Applying the *Jean Country* test does not mean automatic access for unions or certain union success. Perhaps *Lechmere*'s outcome really has no effect on union organizing. When, as here, the impetus for organizing comes only from outside and the union has no in-plant organizers, the campaign may well be doomed to failure. Even if the union has access to targeted employees at the worksite, would they really feel free to engage in union activities there? Remember that the union organizers actually met with a substantial number of employees at their homes but were still unsuccessful. Would access to the parking lot have made a difference? But perhaps the organizers' exclusion sent such a strong message to the employees about the union's power versus the employer that no amount of home visits could overcome that understanding.

Had the union organizers been given the full status of employees under the NLRA, what would be the content of that right? Would they have had access only to the parking lot, or, as employees, could they have entered into all areas where the *Lechmere* employees worked? If the latter, could they have talked to them and distributed literature to them on the same basis as a *Lechmere* employee? Or is there an appropriate distinction that can be made so that the employees of an employer would have more access rights than would those who are employees in general but not employees of this employer? If union organizers have the section 7 rights of employees, they might fall more under the *Republic Aviation* regime—where the employer has a managerial right to impinge on section 7 rights in order to effectively

manage the workplace, a less powerful right than a property right.<sup>40</sup> Does this provide a rational way of accommodating these conflicting rights? Could the organizers have access rights on par with shoppers? Should the employer's employees have the right to invite others in to protect their rights, for example, Occupational Safety and Health Administration inspectors when employees are exposed to dangerous working conditions?<sup>41</sup> Are there any theories that can be used to support these employee rights?

One way to get at these questions is to consider who owns the job, reasons for those ownership rights, and what those ownership rights mean. Normally, students will automatically say that only the employer owns the job. When pushed, some will suggest that employees should have some ownership rights based on a sweat equity argument, in which the employee's work and commitment to the job generate capital for the employer to invest, distribute as dividends, or use as profits, or even one of adverse possession, based on the employee's longevity and attachment to the job. Some will also argue that society has rights in the job because the community provides important infrastructure, such as transportation, subsidies, policing, support for markets, and law (in particular, corporate law) that subsidizes the employer and even makes it possible for the job to exist and the employer to conduct business.

#### IV. CONCLUSION

A socioeconomic approach pushes students to develop a complex understanding of power relationships, both economic and social, and to see the law's interaction with those power relationships. It asks them to see how different allocations of legal rights have repercussions in terms of employer versus employee union power and thus the roles each can play in increasing their economic clout and power in society. It forces us to examine issues that otherwise are easy, too easy, to capture the reality of the stakes involved. Here, the black-letter law is relatively simple and something the students must know to practice. The holding in relation to labor doctrine is more complex. But the question that matters most is whether and how defining union organizers as employees matters. That is the real issue, the one the parties cared about and the one about which the students can be passionate.

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40. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 797–98 (1945). *Republic Aviation* does not distinguish property and managerial rights. The distinction is a conclusion one arrived at in trying to reconcile outcomes that seem inconsistent. DOUGLAS E. RAY ET AL., *UNDERSTANDING LABOR LAW* § 4.3, at 86–90 (1999).

41. *Cf. Marshall v. Barlow's, Inc.*, 436 U.S. 307, 324 (1978).