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## What *Brady v. N.F.L.* Teaches About the Devolution of Labor Law

Michael C. Duff\*

### I. INTRODUCTION

It is tempting to write exclusively in narrow technical terms about some of the very interesting (to a lawyer or a law professor), but arcane,<sup>1</sup> labor law issues at play in the United States Court of Appeals for the Eighth Circuit’s 2011 decision in *Brady v. National Football League*,<sup>2</sup> which prevented the players from obtaining labor injunctions against the league.<sup>3</sup> While this essay will, indeed, discuss my technical views on the labor law issues at play in *Brady*—especially respecting the appropriate application of the Norris-LaGuardia Act of 1932 (“NLGA”) to pro football labor disputes—I do not want that discussion to obscure what I *really* think about the case. In short, I think that sports labor cases—especially NFL cases—frequently showcase the weakness of the National Labor Relations Act (“NLRA”) by perversely reducing it to an offensive tool in service of *employer* interests. Such reduction is starkly at odds with the intent of the original, worker-centered architects of the NLRA<sup>4</sup> and arguably even at odds with later centrist (by today’s standards) NLRA reformers, who purported to move labor law to a

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<sup>1</sup>It is tempting for me to engage in such technical exposition because the dissent in *Brady v. NFL (Brady II)*, in an earlier interlocutory phase of the proceedings, a decision on a motion for stay pending appeal, cited one of my articles in support of its position on what turned out to be the key issue in the case, whether the Norris-LaGuardia Act applied. 640 F.3d 785, 797 (8th Cir. 2011) (Bye, J., dissenting) (citing Michael C. Duff, *Labor Injunctions in Bankruptcy: The Norris-LaGuardia Firewall*, 2009 MICH. ST. L. REV. 669, 678 n.39 (2009)). The dissent did not seem initially to realize that, in fact, my article in some ways better supported the majority’s ultimate decision, for the article underscored the Congress of 1932’s intent that judges be kept out of labor disputes at all costs. Because that was the practical outcome of *Brady II*, I might have concurred in the result had I been involved in judging it. But I very strenuously disagree with how the majority arrived at its decision, and that is the main point of this essay. In a later phase of the subject litigation, *Brady III*, my article not unexpectedly disappeared from the dissent’s quiver. *Brady v. NFL (Brady III)*, 644 F.3d 661 (8th Cir. 2011).

<sup>2</sup>644 F.3d 661 (8th Cir. 2011).

<sup>3</sup>*Id.*

<sup>4</sup>KENNETH G. DAU-SCHMIDT, ET AL., *LABOR LAW IN THE CONTEMPORARY WORKPLACE* 49–54 (2009).

position of societal neutrality respecting labor disputes by amending the NLRA through enactment of the Taft Hartley Act.<sup>5</sup> In fact, this is not as much an essay “about” *Brady* as it is an extended discussion about many things that have gone wrong with labor law as *exemplified* by cases like *Brady*.

Bigger than the question of whether antitrust law may properly be invoked in some phase of a sports labor dispute is the question of *why* unionized football players wanted to invoke antitrust law to further their aims instead of the benefits and clout imagined to be afforded by labor law.<sup>6</sup> The twists and turns of *Brady* are strange enough for legal academics and specialists to follow. But the arcane spectacle presented by *Brady* and cases like it is virtually impenetrable to the general public if reports by sports broadcasters and the reactions of my students and layperson acquaintances are any indication. For many people, labor disputes in professional sports represent a major exposure—perhaps their only exposure—to labor law concepts. If those observers equate labor law, and especially the NLRA, to the legal shenanigans that go on in cases like *Brady*, I fail to see how they can come away with any positive regard for the statute that Professor Ellen Dannin has called “the workers’ law.”<sup>7</sup> It is a very bad introduction to labor law on a very big stage.

Consider the general oddness that in *Brady* the Eighth Circuit essentially refused to allow unionized football players, members of the NFL Players’ Association (“the union”), to *de-*

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<sup>5</sup>There would have been no opportunity at that historical juncture to argue that labor law should openly serve employer interests; neutrality was all that could be explicitly argued for. *Id.* at 67 (pointing out that the underlying purpose of the Taft-Hartley Act was to “curb the growing economic and political power of organized labor”).

<sup>6</sup>Here my focus departs from the perspective reflected in Professor LeRoy’s excellent recent article on the *Brady* case. *See generally* Michael H. LeRoy, *Federal Jurisdiction in Sports Labor Disputes*, 2012 UTAH L. REV. 815 (2012) (focusing empirically on the frequency with which courts allow antitrust cases to proceed in the course of labor disputes, finding that district courts are most likely to do so, and arguing that they should not). I am more interested in the motivation behind the resort to antitrust law.

<sup>7</sup>ELLEN DANNIN, *TAKING BACK THE WORKERS’ LAW: HOW TO FIGHT THE ASSAULT ON LABOR RIGHTS* (2006).

unionize.<sup>8</sup> The players’ rationale for de-unionizing was grounded in tactical considerations—frankly, in a sham.<sup>9</sup> By “refusing” to allow de-unionization, I do not mean that the court denied the player-employees’ basic statutory right not to join a union.<sup>10</sup> Nor do I mean that the court directly interfered with the sham, though I think it should have. I mean, in essence, that the court applied the NLGA to the underlying “labor” dispute.<sup>11</sup> By applying the NLGA to the case, the

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<sup>8</sup>In this the court was supporting the NFL’s consistent position that labor law must be applied to these underlying disputes. In a prior related dispute, the NFL purportedly *required* players to *reunionize* following tactical deunionization as a condition of out of court settlement. *See Brady v. NFL (Brady I)*, 779 F. Supp. 2d 992, 1002 (D. Minn. 2011), *vacated*, 644 F.3d 661.

<sup>9</sup>This is how the NFL characterized the disaffiliation, and I have no reason to disagree, though with not quite the same level of moral opprobrium. The players had the legitimate objective of trying to improve their “terms and conditions” of employment. The NFL filed a “bad faith bargaining” charge in connection with the sham, under Section 8(b)(3) of the National Labor Relations Act (“NLRA”). As I will argue, the NFL may have been better served by filing an election petition. The NFL’s invocation of the National Labor Relations Board’s (“NLRB”) election process might have presented the District Court with a more difficult primary jurisdiction problem than the one it encountered. It is generally true, as the District Court noted, that under primary jurisdiction doctrine a court may decide, and not refer, an ancillary administrative law issue not requiring the involved agency’s expertise. *Brady I*, 779 F. Supp. 2d at 1006–07. But it is also true, as the court also noted, that Congress may specify that certain adjudication is within the exclusive statutory jurisdiction of an agency. *Id.* at 1007 (citing RICHARD J. PIERCE JR., ADMINISTRATIVE LAW TREATISE § 14.2, at 1185 (5th ed. 2010)). Assuming, for the sake of argument only, that a bad faith bargaining allegation does *not* lie within the *exclusive* competence of the NLRB, a “question concerning representation” in an appropriate bargaining unit *certainly* does. *Am. Fed’n of Labor v. NLRB*, 308 U.S. 401, 409 (1940) (emphasizing that the legislative history of the NLRA makes clear that Congress did not intend for representation proceedings to be subject to judicial review). Hence, the NFL might have filed a petition for election in the bargaining unit—initiating a representation proceeding—on the theory that it had a good faith doubt of the union’s continuing status as majority bargaining representative. *See generally Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359 (1998). The NLRB would then be under a different kind of pressure to resolve the issue expeditiously, and the district court would not be required as a threshold matter either to ignore or to assess the bona fides of the apparent sham. As I will argue, I think ignoring the sham is untenable in these kinds of cases.

<sup>10</sup>Labor-Management Relations Act, 29 U.S.C. § 157 (2006).

<sup>11</sup>The Norris-LaGuardia Act prevents courts from issuing labor injunctions to suspend peaceful labor activity occurring during labor disputes. There are two discrete NLGA issues under consideration in the football labor dispute cases. The first issue is whether the NLGA is properly applied to prevent player-employees from obtaining any kind of injunction, including an antitrust related injunction, against NFL employers in the course of a labor dispute. The Brady majority said yes. I disagree, for reasons I will discuss more fully later in the essay. The second NLGA issue is whether a “labor dispute” actually exists after players have disaffiliated from their union. There is no question that the statutory definition of labor dispute is extremely expansive. First,

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). Then, assuming that the facts of a controversy escaped the breadth of this provision, the Act also applies when a case *grows out of* a labor dispute:

No court of the United States, as defined in this chapter, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a

players' disaffiliation from the union was thwarted, and they were in effect pulled back into the labor law regime under protest. Thus, some of the difficult issues that I will discuss in this essay were never reached in the Eighth Circuit's opinion in *Brady*, though they were reached in the district court's decision below.<sup>12</sup> The puzzling sequence of events hardly seems like it could be related to coherent labor law. Perhaps specialists can work through such puzzles, but the "game" makes no sense to anyone else.

It bears repeating that at the heart of the players' strategy was a sham; they did not *really* want to de-unionize.<sup>13</sup> Everyone knew that.<sup>14</sup> They wanted to apply economic pressure on the

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labor dispute, except in a strict conformity with the provisions of this chapter; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this chapter.

29 U.S.C. § 101. A case is said to "grow out of" a labor dispute when it:

involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein; or who are employees of the same employer; or who are members of the same or an affiliated organization of employers or employees; whether such dispute is

- (1) between one or more employers or associations of employers and one or more employees or associations of employees;
- (2) between one or more employers or associations of employers and one or more employers or associations of employers; or
- (3) between one or more employees or associations of employees and one or more employees or associations of employees; or when the case involves any conflicting or competing interests in a "labor dispute" (as defined in this section) of "persons participating or interested" therein (as defined in this section).

29 U.S.C. § 113(a).

<sup>12</sup>See generally *Brady I*, 779 F. Supp. 2d 992.

<sup>13</sup>In the 1993 settlement agreement between the parties, the NFL promised not to pursue the sham disaffiliation allegation thereafter. I assume for purposes of this discussion that the promise would not affect the NLRB's ability to assess the bona fides of the disaffiliation. See generally *Indep. Stave Co.*, 287 N.L.R.B. 740 (1987). Furthermore, if a court concluded that the question of whether the players' disaffiliation was a sham is "primarily representational," it is likely that the NLRB could retain jurisdiction of a "sham case," even if the union first brought a breach of contract action on the issue. *DiPonio Construction Co. v. Int'l Union of Bricklayers & Allied Craftworkers, Local 9*, 687 F.3d 744, 748 (6th Cir. 2012).

<sup>14</sup>Precisely the same tactic had been carried out in the litigation leading to the settlement agreement, pursuant to which the NFL had in fact been operating since 1993 and leading up to the *Brady* events. *Brady I*, 779 F. Supp. 2d at 1002 (citing *White v. NFL*, 822 F. Supp. 1389 (D. Minn. 1993)). The union purportedly disbanded after the players disaffiliated. The newly disaffiliated players filed antitrust suits. Virtually the moment that the court in *White* certified a class for damages and injunctive relief, the union and the NFL entered into the settlement agreement. *Id.* Under the terms of the agreement, the NFL demanded that the players promptly re-certify the union. *Id.* Can anyone doubt that the disaffiliation/re-affiliation machinations had more to do with avoidance of the antitrust laws than with collective bargaining?

League for the purpose of achieving a desirable collective bargaining agreement.<sup>15</sup> I fully understand that the motivation behind the sham had everything to do with the general inability of workers to apply economic pressure in labor disputes because of the utter weakness of American labor law.<sup>16</sup> I think the court probably understood this too, but I do not read in the opinion an explicit acknowledgment of this subtext of futility.<sup>17</sup> Essential labor law weakness is what is driving contemporary sports labor dispute cases. This weakness now routinely forces traditionally-unionized players in various sports to look for tactical legal solutions to bargaining impasses that originate outside of the labor law regime, including solutions premised on a refined kind of disaffiliation lie.<sup>18</sup> Thus, a labor law regime that has been ineffectual for “ordinary” working people since at least the 1970s has now also become ineffectual for professional

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<sup>15</sup>The pressure first arises because in a given case, antitrust law subjects violators to treble damages, though how that calculation would be made in the context of a group boycott violations is an extremely complex question. See Patrick L. Anderson, Theodore R. Bolema, & Ilhan K. Geckil, *Damages in Antitrust Cases*, (Anderson Econ. Grp., LLC, Working Paper No. 2007-2, 2007), available at <http://www.andersoneconomicgroup.com/Portals/0/upload/Doc2066.pdf> (last visited Apr. 14, 2013) (explaining difficulties and competing economic theories at play when calculating damages after antitrust violations have been established). More importantly, a court decision that established that personnel practices violate antitrust law could have far reaching consequences. Such a challenge represents a kind of “nuclear” option because it calls into question the entire collective bargaining regime. Cf. *Am. Needle, Inc. v. NFL*, 130 S. Ct. 2201, 2216 (2010) (holding that licensing activities for individual teams’ intellectual property, conducted through a corporation separate from the teams and with its own management, constituted concerted action that was not categorically beyond the coverage of Section 1 of the Sherman Act, which made illegal a contract, combination, or conspiracy in restraint of trade.). The upshot of *American Needle, Inc. v. NFL* is that the NFL’s licensing activities were thrown open to court scrutiny.

<sup>16</sup>It is also true of course that the career of a professional football player is on average so brief that protracted collective bargaining is especially damaging to players’ prospects. A single lost year may have an incredibly adverse impact on the career of a journeyman player. Ethan Lock, *The Scope of the Labor Exemption in Professional Sports*, 1989 DUKE L.J. 339, 403 (1989). In this context, bargaining for a new collective agreement may assume enhanced levels of intensity and prompt resort to any and every tactic to get on to the field under anything even approaching acceptable working conditions and compensation.

<sup>17</sup>There is simply a general recitation of the fact of disaffiliation in the United States Court of Appeals for the Eighth Circuit’s opinion. *Brady III*, 644 F.3d 661, 667 (8th Cir. 2011). The District Court also seems to mention the event offhandedly. *Brady I*, 779 F. Supp. 2d at 1003.

<sup>18</sup>Some commentators at times have stated that the players sought to formally decertify the union. See Allison Stoddart, *A Stronger Defensive Line: Extending NFL Owners’ Antitrust Immunity Through the Norris-LaGuardia Act in Brady v. NFL*, 53 B.C. L. REV. E-SUPPLEMENT 123, 127 (2012). But as I will argue, “decertification,” an NLRB process, differs from the type of deregulated “disaffiliation” that transpired in *Brady* and which looks especially suspicious to an outside observer.

athletes.<sup>19</sup>

I cannot agree, however, that the way out of the morass is unabashed engagement with dissembling,<sup>20</sup> especially when such a misrepresentation is made for all to see on one of the most visible of labor law stages. Never is there more interest in labor law among my students than when a labor dispute is brewing in football. The dissembling may provide an expedient “solution” to a present controversy between the parties, but it looks dishonest, and it does nothing to highlight actual issues in a way that is elucidating to the broader society or that assists in developing labor policy.<sup>21</sup> I think resorting to such an ephemeral solution discredits the entire labor relations regime. As I will flesh out in the next section, the district court in *Brady* should have insisted that the question of whether players *truly* wanted to disaffiliate from the union be sorted out administratively as a threshold matter by referring the case to the National Labor Relations Board under a primary jurisdiction theory<sup>22</sup> to determine whether there was actually a

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<sup>19</sup>This is why I cannot agree with scholars who chide federal judges for not unflinchingly applying labor law in antitrust/labor hybrid cases. *See generally, e.g.,* LeRoy, *supra* note 6. In addition to various doctrinal difficulties embedded in the interplay of the two regimes is the elephant-in-the-room reality that players will almost certainly lose in the labor law paradigm. *See* Lock, *supra* note 16, at 355–59 (describing in compelling terms why the players’ bargaining power is perennially weak and the owners’ strong).

<sup>20</sup>Perhaps it was a “solemn public lie.” *See* Frederick Bernays Wiener, *Another “Solemn Public Lie,”* 27 U. RICH. L. REV. 497, 497–98 (1993) (explaining Roger Williams’s use of the phrase and exploring such lies in entertaining contexts).

<sup>21</sup>This is often the case when public law controversies are treated as if they were private disputes. For a discussion in the administrative law context, see William Funk, *When Smoke Gets in Your Eyes: Regulatory Negotiation and the Public Interest—EPA’s Woodstove Standards*, 18 ENVTL. L. 55, 94 (1987).

<sup>22</sup>For refined theoretical support, see Louis L. Jaffe, *Primary Jurisdiction*, 77 HARV. L. REV. 1037, 1050–52 (1964) (arguing that primary jurisdiction is applicable to a greater degree in spheres where concurrent jurisdiction has not been explicitly conferred to both the agency and the court and also noting, in particular, the NLRB’s exclusive role in representation proceedings). More to the point, under the Eighth Circuit’s own precedent, there is a strong presumption that representational matters having no clear connection with Section 301 breach of contract actions fall under the NLRB’s primary jurisdiction. *Local Union No. 204, I.B.E.W. v. Iowa Electric Light & Power Co.*, 668 F.2d 413, 417–19 (8th Cir. 1982). The difficulty in *Brady* is that the employer filed an unfair labor practice charge when it might have filed a representation petition on the theory that it had a good faith reasonable uncertainty as to whether the union enjoyed majority support. In an unfair labor practice case (involving an alleged violation of law), there was more latitude for the district court to take the position that abeyance under a primary jurisdiction theory was unwarranted.

“question concerning representation.”<sup>23</sup> It is worth noting that when courts have previously discussed the possibility of the nonstatutory labor exemption ceasing to apply upon player “deunionization,” they did so in terms of *decertification*, not of some lesser, unregulated version of disaffiliation.<sup>24</sup> If this is an unconscious imprecision, it is nevertheless a telling one. In the end, of course, the disaffiliation tactic could not succeed unless significant numbers of players felt strongly enough about whatever underlying dispute was at stake to walk away from their sport to pursue antitrust litigation for the many years it would take to complete.<sup>25</sup> Much of what is happening in these cases, therefore, is symbolic. The merits of the antitrust litigation are not at issue. The question is how close the players can come *procedurally* to being able to argue the merits of the antitrust case. The closer they can get to being able to argue the merits of such a case, the better for them the ensuing collective bargaining agreement is likely to be. The larger question I pose in this essay is how any of this can be good for labor law writ large or for the ordinary workers typically covered by it.

Overall, it is a strange spectacle to see pro football owners howling for the *application* of

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<sup>23</sup>The NLRB has on one occasion taken the position in intra-agency administrative deliberations that no question concerning representation arose in a connection with a “disaffiliation” during an NFL labor dispute. See Memorandum from Gen. Counsel to Reg’l Dir., Region 6 (June 26, 1991) (regarding Pittsburgh Steelers, Inc., No. 6-CA-23143), *available at* 1991 WL 144468. In coming to this conclusion, agency officials opined that “[i]n order for a union’s disclaimer in representing a particular unit to be valid, it must be unequivocal, made in good faith, and unaccompanied by inconsistent conduct.” *Id.* at \*2 n.8. The factual contexts of the cases the NLRB cited in support of the proposition were wildly dissimilar from the posture of the NFL cases. In the typical cases raising the issue, a union has clearly lost the support of employees and simply walks away *or* there is some inter-union intrigue in which an incumbent union suspiciously disclaims interest just as an apparent rival union is filing a petition to represent the incumbent’s employees. But even assuming for the sake of argument that the doctrine relied upon by the Board officials in *Pittsburgh Steelers* were applicable, the conduct of the officials’ hasty analysis was inadequate, for they decided in a conclusory fashion that “there has been no conduct by the NFLPA which is inconsistent with its disclaimer.” *Id.* Thus, the officials continued, a question concerning representation was not presented. *Id.* What, pray tell, happened to the good faith prong of the analysis? How long would it have taken, in a reasonably vigorous examination of players under oath during an administrative proceeding, to ferret out that players fully expected to continue being represented by the NFLPA when the labor dispute had concluded? Furthermore, despite the union’s effort to demonstrate that it was *really, really* disclaiming representative status, would not questions during a hearing explore the ease of the union in *un*-disclaiming?

<sup>24</sup>*Brown v. Pro Football, Inc.*, 518 U.S. 231, 250 (1996) (citing with apparent approval, *Brown v. Pro Football, Inc.*, 50 F.3d 1041, 1057 (D.C. Cir. 1995)); *Powell v. NFL*, 930 F.2d 1293, 1306 (8th Cir. 1989) (Heaney, J., dissenting).

<sup>25</sup>See Michael McCann, *Legal Lessons from NBA/NFL Lockouts*, <http://www.sloansportsconference.com/?p=5244> (March 3, 2013).



labor law to disputes with players. Once one understands the essential emptiness of labor law in the absence of the ability of worker/players to engage in strikes combined with the employer/owners' nearly unlimited "right" to impose player lockouts, however, the picture clarifies considerably. The owners rationally argue for application of a toothless law they need not fear. There is nevertheless a *special* kind of oddness and repugnance to the court's invoking the NLGA to protect employer interests, and I turn now to explore that issue.

I will next discuss additional background helpful to understanding the *Brady* controversy. Thereafter, I will discuss the historical background of the NLGA and show why the Eighth Circuit's reading of it was simply wrong. I will then move on to a discussion of why I view *Brady* to be a provocative case that is both harmful to labor law and a textbook example of its "devolution." That discussion will be followed by reflection on other infamous examples of courts not getting labor law "right"—of losing track of its "statutory music"—and of the role that those examples have played in the general loss of labor law credibility. After reflecting upon those examples, I will reconnect the discussion to the *Brady* case itself and conclude the essay with a consideration of labor law's future.

## II. SOME BACKGROUND AND THE *BRADY* COURT'S TREATMENT OF THE NORRIS-LAGUARDIA ACT

The *Brady* dispute was grounded in a disagreement between the NFL and its players over distribution of new sources of revenue.<sup>26</sup> The nature or origin of the revenue is not especially important to this discussion: it was "new" and there was a strong difference of opinion over how

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<sup>26</sup>*NFL Locks Out Players, Who File Suit*, ESPN.COM, <http://sports.espn.go.com/nfl/news/story?id=6205936> (last visited Apr. 14, 2013) (stating that "[u]nable to decide how to divvy up \$9 billion a year, NFL owners and players put the country's most popular sport in limbo by breaking off labor negotiations hours before the collective bargaining agreement expired").

it should be divided.<sup>27</sup> Upon reaching impasse over the division, the players claimed that they wanted to abandon union representation, for “it would not be in their interest to remain unionized, because the existence of the union would ‘allow the NFL to impose anticompetitive restrictions with impunity[.]’ ”<sup>28</sup> The NFL then locked the players out.<sup>29</sup> The players probably understood that the NFL could press its lockout to the point where the entire 2011–12 NFL season might be cancelled. A sharp offensive battle over union disaffiliation might have seemed preferable to a drawn-out lockout in which the union was exclusively on the defensive. In any case, it became common knowledge that the purpose of the disaffiliation was to allow individual players to sue the NFL as individual plaintiffs in antitrust actions.<sup>30</sup> The players could probably not credibly threaten such actions if they remained unionized because the NFL was protected from antitrust liability by the nonstatutory labor exemption. There was suggestion under the case

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<sup>27</sup>The story was perhaps a bit more complicated than was generally reported at the time. True, there was dispute over the division of nine billion dollars of revenue. But there was also a more hard-nosed, labor-related dispute. The NFL had previously agreed with the players that it would *maximize* television revenues, which would in turn provide the players with a bigger piece of the pie, which they would receive after apportionment with the league. When television interests became skittish about the possibility of a labor dispute in connection with the expiring labor agreement, the NFL agreed to take *less* revenue from the networks if such a dispute were to materialize. The players argued that this violated their “maximization agreement” with the NFL. See LeRoy, *supra* note 6, at 841.

<sup>28</sup>*Brady II*, 640 F.3d 785, 788 (8th Cir. 2011). This was not a new argument. The players raised it successfully in *McNeil v. NFL*, 764 F. Supp. 1351, 1354 (1991). [We were unable to verify this source. The document in the sourcebook does not match.] (I’ve confirmed the cite but added a pincite. Could you re-check? If we are still miscommunicating maybe we could have a brief phone conversation or email communication) The district court in *McNeil* allowed the case to proceed to trial on the underlying antitrust merits, agreeing that union disaffiliation ended the NFL’s immunity to antitrust liability under labor law. A jury ultimately awarded the eight players who were plaintiffs in the case a combined total of \$543,000, though four of the players were awarded no damages. *McNeil v. NFL*, 1992 WL 315292, at \*1 (D. Minn. 1992). Obviously, the enormous implications of the principle that might have been established by the award dwarfed the relatively low amount of damages in the single case. Not surprisingly, the matter settled along with a second case, *Jackson v. NFL*, 802 F. Supp. 226 (D. Minn. 1992), that was also then on the verge of going to trial. The ensuing “Stipulation and Settlement Agreement” in 1993 temporarily resolved several outstanding issues and effectively governed NFL labor relations right up to the onset of the Brady controversy. *Brady I*, 779 F. Supp. 2d 992, 1002 (D. Minn. 2011), *vacated*, 644 F.3d 661 (8th Cir. 2011).

<sup>29</sup>“A lockout occurs when an employer lays off or ‘locks out’ its unionized employees during a labor dispute to bring economic pressure in support of the employer’s bargaining position.” *Brady I*, 779 F. Supp. 2d at 1003.

<sup>30</sup>This has become the new normal in sports labor disputes. The maneuver has also been employed or contemplated in professional hockey and basketball. See George Richards, *NHL Players’ Association Expected to Approve Decertification*, MIAMI HERALD, (Dec. 21, 2012), available at <http://www.miamiherald.com/2012/12/21/3151305/nhl-players-association-expected.html>; Howard Beck, *N.B.A. Season in Peril as Players Reject Offer and Disband Union*, N.Y. TIMES, Nov. 14, 2011, at A1.

law that if players disaffiliated, the exemption would cease to apply.<sup>31</sup> If the antitrust actions survived summary judgment—which depended on the district court’s acceptance of the disaffiliation argument—it was at least conceivable that injunctions could be obtained that would effectively end the league’s lockout.<sup>32</sup> The clearest route to that outcome would be if the lockout itself could be persuasively categorized as a commercial “group boycott,” potentially unlawful under antitrust law.<sup>33</sup> The district court below accepted that the nonstatutory labor exemption expired as a matter of law with the players’ disaffiliation and issued injunctions against the employer to suspend the NFL’s lockout on an antitrust theory.<sup>34</sup> Thus, antitrust law was utilized as a novel “weapon” to leverage the union’s position in labor negotiations.<sup>35</sup>

When this mess reached the Eighth Circuit, the court preliminarily held that the players could not obtain an injunction because a labor dispute—or a controversy arising from a labor dispute—was underway.<sup>36</sup> The court found that the existence of the labor dispute triggered

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<sup>31</sup>The possibility of this maneuver was hinted at as early as 1989 in *Powell v. NFL*, 930 F.2d 1293, 1305 (8th Cir. 1989) (Heaney, J., dissenting) (stating that “[t]he practical effect of the majority’s opinion, however, is . . . the labor exemption will continue until the bargaining relationship is terminated either by a NLRB decertification proceeding or by abandonment of bargaining rights by the union”).

<sup>32</sup>Employer lockouts are lawful, within certain boundaries, under present labor law. To be lawful, the purpose of the lockout must be to pressure the union into accepting an employer’s bargaining position and not to destroy the union. See discussion *infra* notes 33–35. However, the lockout was lawful only if it was ultimately determined that antitrust law did not apply. If antitrust law did apply, the lockout might be characterized as an unlawful group boycott under the Sherman Antitrust Act. *Brady I*, 779 F. Supp. 2d at 998.

<sup>33</sup>See L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST 229–32 (1977) (explaining the concept of a group boycott and observing that it is sometimes described as a “concerted refusal to deal”).

<sup>34</sup>29 U.S.C. § 104 states that “[n]o court of the United States shall have jurisdiction to issue any . . . temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute . . . from doing, whether singly or in concert,” any of several acts. Under 29 U.S.C. § 104(a), one of the acts is “refusing . . . to remain in any relation of employment.” The NFL’s argument for applying the NLGA was that a lockout was a refusal “to remain in a relation of employment,” and that the court accordingly was without jurisdiction to issue the “antitrust” injunctions. *Brady I*, 779 F. Supp. 2d at 1022. The district court concluded in essence that the antitrust case did not involve or grow out of a labor dispute. *Brady I*, 779 F. Supp. 2d at 1026–1032. [We need a citation in order to verify these statements.]

<sup>35</sup>“Economic weapon” is a labor law term of art utilized routinely to describe a union or employer’s resort to a strike or lockout, respectively, to leverage a bargaining position. Use of such weapons for such purposes is considered a lawful, even normal, feature of American labor law. I am noting here what every reasonably sophisticated actor knew—that the union was attempting to utilize antitrust law as an economic weapon.

<sup>36</sup>*Brady II*, 640 F.3d 785, 791–92 (8th Cir. 2011) (determining that, given the timing of the surrounding facts, the case *arose* from a labor dispute even assuming, for the sake of argument, the labor dispute had ceased to exist because of the player’s union disaffiliation).

application of the NLGA. Ultimately, the court never reached the non-statutory labor exemption,<sup>37</sup> which provides generally that conduct potentially attackable as anticompetitive under antitrust law might nevertheless be shielded from antitrust liability through the preemptive operation of labor law to protect “the collective bargaining process.”<sup>38</sup>

Courts had previously struggled with the question of when the nonstatutory labor exemption to the antitrust laws ended. The developing doctrine has held that the exemption continues to apply even after the expiration of a collective bargaining agreement, and, apparently, for the duration a bargaining deadlock.<sup>39</sup> But the Eighth and D.C. Circuit Courts of Appeal had suggested in opinions preceding *Brady* that the exemption might not apply in the absence of a bargaining relationship.<sup>40</sup> The *Brady* court may have been poised to apply the exemption despite the expiration of the governing collective bargaining agreement, even in the context of the players’ disaffiliation.<sup>41</sup> In this posture, however, the court would have been hard pressed to explain how the exemption could possibly be furthering “the collective bargaining process.” The players had noisily rejected the collective bargaining process as the best vehicle for achieving their aims.<sup>42</sup> One would have been left, therefore, with the continuing paradox of labor law being rejected by employees, yet insisted upon by employers for the transparent purpose of protecting their exemption from antitrust liability under circumstances seeming to bear very little relationship to anything that could be recognized as the “collective bargaining

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<sup>37</sup>See *Brown v. Pro Football, Inc.*, 518 U.S. 231, 235–36 (1996) (acknowledging and reaffirming the exemption in the professional football context).

<sup>38</sup>Technically, the theory is that federal labor policy “preempts” antitrust policy. Gary R. Roberts, *Reconciling Federal Labor and Antitrust Policy: The Special Case of Sports Leagues Labor Market Restraints*, 75 GEO. L.J. 19, 58 (1986) (indicating that “[t]he nonstatutory exemption results from the preemption of antitrust policy by the 1935 National Labor Relations Act (NLRA)”).

<sup>39</sup>*Brown v. Pro Football, Inc.*, 50 F.3d 1041, 1057 (D.C. Cir. 1995), *aff’d*, 518 U.S. 231 (1996).

<sup>40</sup>*Id.*; *Powell v. NFL*, 888 F.2d 559, 568 n.12 (8th Cir. 1989).

<sup>41</sup>Thus overturning the opinion of the district court below to the contrary in *Brady I*.

<sup>42</sup>*Brady I*, 779 F. Supp. 2d 992, 1003 (D. Minn. 2011). [We could not find a relevant slip opinion, but we think we found support in the case.]

process.”<sup>43</sup> None of these conceptual rivulets seem remotely consistent with my understanding of labor law or of its deep underlying purposes.

Despite this cacophony, I could have lived with *Brady* (and its ilk) as reaffirming an expanding policy of protecting a “collective bargaining process” for transparently employer-friendly reasons in the narrow confines of sports labor relations. But I cannot accept as legitimate the circuit court’s ultimate ground of decision: that the NLGA may be invoked to shield employers from employee injunctions during a labor dispute (if that is what this was).<sup>44</sup> That holding is far from narrow. Furthermore, I cannot ignore certain other aspects of the case, as did the district court below. The NFL and the players took positions premised on fictions: the NFL taking shelter under a labor law that can no longer credibly pretend that employers—especially those as powerful as the NFL—require protection from the ravages of “industrial strife;” the players taking shelter in a dubious union disaffiliation.<sup>45</sup>

I will next discuss why the court’s NLGA holding is plainly ahistorical. Then, I will broaden the discussion to consider more generally courts’ troubling disregard for labor law context in a variety of labor law cases decided in recent years. This kind of doctrinal analysis has been undertaken previously, but I approach the discussion somewhat differently as a former labor lawyer and union organizer who “felt” the vitiation of the law that questionable court decisions represented and experienced their impact on “the street.” I will then explain why I think *Brady* represents continued vitiation of the law and indeed crosses a kind of threshold into the realm of the “devolution” of labor law.

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<sup>43</sup>Judy Batista, *In Labor Clash, N.F.L.’s Union Calls Old Play*, N.Y. TIMES, Mar. 1, 2011, at A1 (stating that “[w]hen management says you must have a union even if you don’t want one, that tells you the world has turned upside down,” said one veteran of sports labor negotiations who spoke on the condition of anonymity because he was not authorized to speak publicly”).

<sup>44</sup>The NLGA issue had not been reached squarely in the earlier sports labor controversies. Often, the underlying cases settled before it could be addressed.

<sup>45</sup>To be clear, the circuit court declined to reach the disaffiliation, resting its opinion on NLGA grounds. *Brady III*, 644 F.3d 661, 682 (8th Cir. 2011).

### III. THE NORRIS-LAGUARDIA ACT IN HISTORICAL CONTEXT

Having sketched an introductory context for *Brady*, I now proceed to discuss the history surrounding the enactment of the NLGA to set the stage for discussing broader points about labor law. Congress passed the NLGA in 1932 with one overriding objective: to divest federal courts of injunctive authority in peaceful labor disputes. Federal courts had been suppressing peaceful labor activity by granting injunctions to employers.<sup>46</sup> Throughout the late 19th century, and extending into the first two decades of the 20th century, employers had been using (ironically enough) antitrust cases brought under the Sherman Antitrust Act of 1890 as vehicles for obtaining *de facto* federal court jurisdiction over labor disputes. Once achieving any kind of federal subject matter jurisdiction, these employers easily obtained injunctions that suppressed peaceful labor activity, activity the common law had been routinely finding legitimate as a form of worker self-defense by the early-20th century.<sup>47</sup> Indeed, the overwhelming sense of the 75th Congress was that such injunctions were almost *reflexively* granted, and that the injunctions had everything to do with the judiciary's personal, class-based hostility toward labor unions.<sup>48</sup> Congress had first attempted to curtail these antitrust injunctive abuses through passage of the Clayton Act in 1914.<sup>49</sup> But, when the Supreme Court interpreted the language of that Act in a manner continuing to afford the judiciary a great deal of discretion in determining when labor conduct was "legitimate," Congress was provoked to further action by enacting the emphatic

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<sup>46</sup>FELIX FRANKFURTER & NATHAN GREENE, THE LABOR INJUNCTION 201 (1930).

<sup>47</sup>The outline of the self-defense doctrine began to emerge as early as 1842. *See generally* Commonwealth v. Hunt, 45 Mass. (4 Met.) 111 (1842).

<sup>48</sup>*See* Duff, *supra* note 1, at 677–81.

<sup>49</sup>Section Six of the Clayton Act states:

The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.

15 U.S.C. § 17 (2006).

NLGA.<sup>50</sup>

The panel majority in *Brady* asserted that the 75th Congress would have been “even handed” (if the question had been put to it) and agreed that the NLGA should protect *employers* from federal court injunctions during labor disputes, just as it always has been assumed to do for unions and employees.<sup>51</sup> The proposition simply does not square with history. The 75th Congress could not have imagined a need to protect employers—in any respect, including protection from labor injunctions during labor disputes—from the weak unions in existence in 1932. Unions did not yet enjoy sufficient density in the private sector to carry out work stoppages of the scale justifying federal court intervention.<sup>52</sup> With the exception of railway unions recognized under the Railway Labor Act of 1926, unions were without *any* of the protections of positive federal labor law.<sup>53</sup> While minor judicial tinkering with the NLGA is not

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<sup>50</sup>*Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 474 (1921) (holding secondary boycott not a legitimate object of a labor organization, thereby removing such conduct from the protective anti-injunction sweep of the Clayton Act).

<sup>51</sup>*Brady III*, 644 F.3d 661, 677–78 (8th 2011).

The evenhanded introductory clause of § 4 still forbids a court to enjoin “*any* person or persons” in a labor dispute from “refusing ... to remain in any relation of employment.” That the terms of § 4(a) afford employers less protection against injunctions than they afford employees (who were, after all, the target of the controversial injunctions that prompted the NLGA) does not mean that Congress gave employers no protection at all.

*Id.* Thus in 1937, the Court, close in time to the enactment of NLGA, was aware of the union-protective essence of NLGA:

The evident purpose of [Section 9 of the NLGA], as its history and context show, was not to preclude mandatory injunctions, but to forbid blanket injunctions against labor unions, which are usually prohibitory in form, and to confine the injunction to the particular acts complained of and found by the court.

*Virginian Ry. v. Sys. Fed’n No. 40*, 300 U.S. 515, 563 (1937). By 2011, the Eighth Circuit had apparently lost the core of this teaching.

<sup>52</sup>Richard B. Freeman, *Spurts in Union Growth: Defining Moments and Social Processes*, in *THE DEFINING MOMENT: THE GREAT DEPRESSION AND THE AMERICAN ECONOMY IN THE TWENTIETH CENTURY* 265, (Michael D. Bordo, et al., eds. 1998) available at <http://www.nber.org/chapters/c6896>. Union density was in significant decline from 1921 to 1934, eroding from 17.4% in 1921 to 11.5% in 1934. *Id.* at 268, Table 8.1. While 11.5% exceeds today’s private sector union density of under 7%, it must be borne in mind that overall density in 1932 did not include public sector unionization, which in 2011 accounted for approximately 37% of that year’s overall U.S. union density of 11.8%. See Press Release, Bureau of Labor Statistics U.S. Dep’t of Labor, Union Members Summary (Jan. 27, 2012) available at <http://www.bls.gov/news.release/union2.nr0.htm>. (archived pdf: [http://www.bls.gov/news.release/archives/union2\\_01272012.pdf](http://www.bls.gov/news.release/archives/union2_01272012.pdf))

<sup>53</sup>The Railway Labor Act (“RLA”) granted unions in the railroad industry the right to exist. See 45 U.S.C. § 151 (2006). Most of the RLA architecture, however, concerned itself with mandated arbitration of contractual disputes

now new,<sup>54</sup> I do not concede that the Congress of 1932 would have been supportive of even that minor tinkering.<sup>55</sup> The 75th Congress did not as a body “like” judges and meant to keep them out of labor disputes at all costs, which is why the *judgment* of the *Brady* court was at least arguably in accord with the zeitgeist of 1932.<sup>56</sup> But it is wrong to claim that Congress would therefore have intended for the NLGA to protect *employers* from employee or union labor injunctions; that is, injunctions issued against employers involved in a labor dispute. From the perspective of Congress, judges and employer interests were so closely allied that protection could hardly have been thought necessary.<sup>57</sup> It is also worth noting that unions would have had far less opportunity to invoke federal jurisdiction than was the case for employers.<sup>58</sup> Employers had backed into the federal injunction business by bootstrapping injunctive proceedings on to

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in which collective bargaining agreements were already in existence. *See id.* § 157. The RLA’s limited jurisdiction and strongly contractual character distinguishes it from later labor statutes of broad general applicability.

<sup>54</sup>The exceptions to the anti-injunction rule that the law has recognized since 1932 were ostensibly created to facilitate the collective bargaining process. *Avco Corp. v. Aero Lodge No. 735, Int’l Ass’n of Machinists & Aerospace Workers*, 390 U.S. 557, 560 (1968) (holding that federal courts may compel by injunction parties’ continuing compliance with a collective bargaining agreement during a Section 301 breach of contract court action); *Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235, 254–55 (1970) (holding that federal courts may enjoin a strike when a collective bargaining agreement contains a no-strike provision coupled with the “strike dispute’s” coverage by an arbitration provision).

<sup>55</sup>I take the side of purposivists in seeking “to derive a constructive rather than subjective legislative purpose by asking how a *reasonable person* familiar with the operative text, the background rules of interpretation, and the full context of the legislation would have resolved the interpretive problem at hand.” John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 90–91 (2006).

<sup>56</sup>At the end of the day the court refused to issue an injunction in a labor dispute, an outcome which I believe can be argued to have some “cash value” — to borrow William James’s term, *see* GEORGE COTKIN, WILLIAM JAMES, PUBLIC PHILOSOPHER 3 (University of Illinois Press 1994) — or to be a bottom line desideratum. The question, however, is whether it is sensible to contend that the 75th Congress would have entertained such an argument in 1932. I think not.

<sup>57</sup>75 CONG. REC. 4938 (daily ed. Feb. 29, 1932) (statement of Mr. Norris). Mr. Norris stated,

We ought to hesitate before we take away from these suffering companies the blessed right to have an injunction issued by a Federal judge, holding office for life, who, perhaps, forsooth, has obtained his job upon the recommendation of the very men and the very corporations who are asking the injunctions at his hands.

*Id.*

<sup>58</sup>*See, e.g.,* *Tilbury v. Ore. Stevedoring Co.*, 8 F.2d 898 (D. Ore. 1925), *aff’d*, 7 F.2d 1 (9th Cir. 1925), summarized in Edwin E. Witte, *Labor’s Resort to Injunctions*, 39 YALE L.J. 374 app. at 385 (1930)

In this case, an injunction and damages were sought by members of the longshoremen’s unions of Portland, Ore., to break up the “hiring hall” system of hiring longshoremen, which was claimed to be a method of blacklisting union members. The injunction was denied on the ground that no interference with foreign or interstate commerce was established and that therefore the federal courts did not have jurisdiction



antitrust cases.<sup>59</sup> Unions had no jurisdictional analogue. There were very few contemporary reported cases of unions even *seeking* injunctions in the federal courts, let alone being granted them.<sup>60</sup>

#### IV. WHY *BRADY* IS “PROVOCATIVE”

*Brady* implicitly continues the notion that application of the nonstatutory labor exemption is necessary to protect the “collective bargaining process.”<sup>61</sup> As Justice Breyer once put it, “the implicit exemption recognizes that, to give effect to federal labor laws and policies and to allow meaningful collective bargaining to take place, some restraints on competition imposed through the bargaining process must be shielded from antitrust sanctions.”<sup>62</sup> One wonders whether a weak union being consistently locked out by a strong, recalcitrant employer promptly upon reaching bargaining impasse represents “meaningful collective bargaining.” It seems to me that reflexive lockouts represent the death or “collapse” of collective bargaining. The problem appears to be that, when there is a whole lot of anticompetitive activity afoot and precious little

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<sup>59</sup>I speak here of the “routine” injunction as ancillary to the Sherman Antitrust Act. It seems clear that the origin of the federal labor injunction was as a device to quell the widespread insurrection of workers employed by railroads in federal receivership during the disturbances of 1877. Walter Nelles, *A Strike and its Legal Consequences—An Examination of the Receivership Precedent for the Labor Injunction*, 40 YALE L.J. 507, 533 (1931).

<sup>60</sup>In 1930, Edwin Witte was able to identify only seventy-three injunctions that had been sought by unions in the preceding quarter-century. Witte, *supra* note 58, at 380–387. Witte’s list shows only a single instance of a union’s successfully obtaining an injunction in federal court, in *Brotherhood of Railway & Steamship Clerks v. Texas & N.O.R. Co.*, 24 F.2d 426 (S.D. Tex. 1928) *aff’d sub nom Texas & N.O.R. Co. v. Brotherhood of Ry. & S.S. Clerks*, 281 U.S. 548 (1930). But that case was an outright challenge by an employer-railroad to the newly enacted Railway Labor Act. *See generally id.* It was not an example of federal court equitable involvement in an isolated labor dispute but the courts’ vindication of the clearest legislative policy. Although Witte acknowledged the list’s incompleteness, the general paucity of reported cases provides a clear impression that the Congress of 1932 would not likely have had in mind the need to protect employers from courts.

<sup>61</sup>Judge Bye, in dissent, pushed back against this potentially fantastic narrative by emphasizing prior Supreme Court dictum that

“an agreement among employers could be sufficiently distant in time and in circumstances from the collective-bargaining process that a rule permitting antitrust intervention would not significantly interfere with that process. As one example of such a sufficiently distant event, the Court cited a ‘collapse of the collective-bargaining relationship, as evidenced by decertification of the union.’ ”

*Brady II*, 640 F.3d 785, 789 (8th Cir. 2011) (citing *Brown v. Pro Football* 518 U.S. 231, 250 (1996)). The point is not simply that decertification of the union represents such a collapse but that various other examples might exist.

<sup>62</sup>*Brown*, 518 U.S. at 237.

collective bargaining, an all-or-nothing approach to the exemption is misguided.<sup>63</sup>

Also, *Brady* merely glosses the problem of the players' union disaffiliation. I contend that the bona fides of the disaffiliation must be probed *somewhere* for rule of law reasons.<sup>64</sup> I think that Judge Heaney's dissent in *Powell v. National Football League* appropriately took on the question of the potential for addressing various labor-antitrust issues in the context of the NLRB's decertification procedures.<sup>65</sup> He concluded, however, that no one would file such a petition.<sup>66</sup> The League would not do so, he contended, because of the potential for increased antitrust scrutiny.<sup>67</sup> The union, he argued, would also not file such a petition because "the price will be the loss of collective bargaining rights."<sup>68</sup> But Judge Heaney's discussion did not occur in the context of a disaffiliation meant to end the nonstatutory labor exemption. I would argue first that the League *might* have an incentive to file a representation petition because it would thereby gain entrance into the debate about whether workers *should* disaffiliate.<sup>69</sup> Although it

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<sup>63</sup>Ethan Lock, *Powell v. National Football League: The Eighth Circuit Sacks The National Football League Players Association*, 67 DENV. U. L. REV. 135, 153 (1990) (arguing that "[e]xpiration of the labor exemption does not mean that management's restrictions on free agency necessarily have to violate federal antitrust law [because] [t]he Sherman Act condemns only unreasonable restraints of trade."). Subjecting practices, originally products of a collective bargaining relationship, to increased scrutiny when bargaining breaks down would only invalidate unreasonably anticompetitive practices.

<sup>64</sup>See Charles Gardner Geyh, *Can the Rule of Law Survive Judicial Politics?*, 97 CORNELL L. REV. 191, 236–37 (2011) ("If the legal establishment persists in its one-dimensional defense of an independent judiciary that proceeds from a premise the public increasingly regards as counterfactual, it is only a matter of time before the public and its elected representatives reassess the value of an independent judiciary."). How can the general public continue to tolerate the facially counterfactual threshold notion in these cases that the players wish to abandon the union without *some* factual exploration?

<sup>65</sup>*Powell v. Nat'l Football League*, 930 F.2d 1293, 1306 (8th Cir. 1989) (Heaney, J., dissenting).

<sup>66</sup>*Id.* Technically, the League could not file a decertification petition; I assume the Judge meant that the League could file an RM petition.

<sup>67</sup>*Id.*

<sup>68</sup>*Id.*

<sup>69</sup>An employer's vehicle for initiating representation procedures culminating in an NLRB election is known as an "RM" petition. Furthermore, the NLRB prefers that questions pertaining to whether employees continue to want to be represented by an incumbent union be resolved in an NLRB supervised, secret ballot election. *Levitz Furniture Co. of the Pac., Inc.*, 333 N.L.R.B. 717, 727 (2001). In order to support the filing of such a petition an employer need only establish that it has a "good-faith uncertainty" of employees' continued support of an incumbent union. *Id.* It seems impossible to argue that a purported disaffiliation of the union by employees would not create such an uncertainty. Although the NLRB has on one occasion concluded that no question concerning representation exists in the case of a player-disaffiliation, to come to such a conclusion without conducting a hearing is indefensible. See *supra* note 23, at 4, and accompanying text. This argument, however, is vulnerable to the extent that antitrust

would be a very odd kind of representation campaign to see the employer arguing for unionization,<sup>70</sup> it is not impossible to imagine because the NFL has previously insisted on player re-certification with the union as a condition precedent for settling prior antitrust litigation and agreeing to a new collective bargaining agreement.<sup>71</sup> Moreover, the union and players might (and should) opt to file a decertification petition so as to lift any cloud respecting the authenticity of broad support for de-unionization.<sup>72</sup> The NLRB should also favor a representation proceeding to ensure employee free choice leading up to convoluted antitrust proceedings. It is hard for me to accept that the interests of a superstar quarterback would *necessarily* be in alignment with that of a third-year journeyman offensive lineman. Maybe they are, but as a former NLRB agent, I would want to make sure of it.<sup>73</sup> I find it disquieting to see the overly broad application of the nonstatutory labor exemption, and I desire to see all players canvassed officially by the NLRB regarding their desire to leave their union, but these issues do not provoke me. Ultimately, I consider *Brady* provocative because the case is symbolic of the federal judiciary's broader unmooring from labor law through its reading of the NLGA.

The NLGA is not just any statute. It represents the historical beginnings of a truly federal labor law and policy. Its premise was simple: the legislative branch would no longer permit federal judges to interfere with the peaceful labor activity of workers, whether or not those typically upper-class judges happened to view the activity as legitimate. My blue collar roots

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litigation takes too long to be pursued. If antitrust litigation could never succeed because players would not wait for final judgments, the NFL may have an incentive *not* to expedite the proceedings. Perhaps this is why it has declined to continue filing RM petitions. If that is the case then its subsequent complaints about sham disaffiliations are not especially compelling in an equitable sense.

<sup>70</sup>Under § 8(c) of the NLRA the NFL would have broad latitude to state its position on unionization during an election campaign occasioned by the filing of a decertification or RM petition. It is hard to escape the conclusion that it could offer virtually any opinion that did not contain a threat of force or reprisal or a promise of benefit.

<sup>71</sup>*Brady I*, 779 F. Supp. 2d at 1002.

<sup>72</sup>This is no doubt why the NBA players' union's first instinct in the 2011 labor dispute was to file a decertification petition with the NLRB. See Howard Beck, *N.B.A. Season in Peril as Players Reject Offer*, N.Y. TIMES, Nov. 14, 2011, [http://www.nytimes.com/2011/11/15/sports/basketball/players-reject-nbas-offer-and-begin-to-disband-union.html?pagewanted=all&\\_r=1&](http://www.nytimes.com/2011/11/15/sports/basketball/players-reject-nbas-offer-and-begin-to-disband-union.html?pagewanted=all&_r=1&).

<sup>73</sup>I served as an NLRB field attorney from 1997 to 2006.

simply bristle at the breach of the NLGA—a document I consider as foundational for the American labor constitution establishing the *legal* legitimacy of the labor movement. Any formal breach of the statute—as perhaps the greatest and most quintessential of the labor statutes—is for me a harbinger of a serious global challenge to that constitution.<sup>74</sup> I therefore view superficial treatment of the statute as intensely provocative and pernicious. As I have explained in the preceding section, the overwhelming evidence in the legislative record is that Congress had absolutely no intention of protecting *employers* from labor injunctions. In a 1962 Railway Labor Act case, *Baltimore & Ohio*, the Seventh Circuit set out what I think to be the only reasonable treatment of the question of whether the NLGA prohibits issuance of federal injunctions against employers during labor disputes.<sup>75</sup> The court first noted that the Act’s prefatory policy language strongly reflected that the NLGA was enacted exclusively with an intention to protect the rights of workers.<sup>76</sup> The court went on to say,

While the Carriers earnestly argue that it is apparent from the legislative history

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<sup>74</sup>Even commentators disagreeing with the establishment of this “constitution” recognize the NLGA and the Wagner Act as its “two main pillars.” See Charles W. Baird, *American Union Law: Sources of Conflict*, 11 JOURNAL OF LABOR RESEARCH 269 (1990) (essentially arguing for the elimination of all New Deal labor law).

<sup>75</sup>*Bhd. of Locomotive Eng’rs v. Baltimore & Ohio R.R. Co.*, 310 F.2d 513 (7th Cir. 1962).

<sup>76</sup>*Id.* at 517. The court set out the relevant text of the statute and emphasized portions of it the court deemed significant:

“[T]he interpretation of this chapter and in determining the jurisdiction and authority of the courts of the United States, as such jurisdiction and authority are defined and limited in this chapter, the public policy of the United States is declared as follows:

“Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, *the individual unorganized worker is commonly helpless* to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, *it is necessary that he have full freedom of association*, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that *he shall be free from the interference, restraint, or coercion of employers of labor*, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; *therefore, the following definitions of and limitations upon the jurisdiction and authority of the courts of the United States are enacted.*”

*Id.* (emphasis in original).

and the terms of the Act that Congress sought to achieve the purposes of the Act by limiting the participation of federal courts in labor disputes, regardless of whether the conduct complained of was that of employers or employees, our study of that history and the language of the Act above set forth convinces us that the purpose of Congress in this respect was to protect only employees and unions. We find nothing in the statement of policy to indicate any intention to deny jurisdiction to issue injunctions against employers. Two isolated exceptions to this overall purpose appear in the Act and serve to emphasize that they are exceptional provisions. Thus in § 3(a) (b) (§ 103(a) and (b)), there are provisions declaring unenforceable any agreement not to join, as well as any agreement to withdraw from, a labor organization or an *employer* organization. In the other instance, in § 4(b) (§ 104(b)), it is declared that no United States court should have jurisdiction to issue an injunction against any person becoming a member of a labor organization or an *employer* association.

The enactment of the Act was, of course, the responsibility of Congress, and not that of this court. That Congress may have been intent upon shielding organizations of employees from injunctions rather than employers was and is a matter within its province. The same can be said of the exemption of labor organizations from the sanctions of antitrust laws. Those are matters over which the courts have no control, in the absence of a constitutional attack.

The language used clearly negatives any intention to recognize any general reciprocity of rights of capital and labor. Essentially the Act is frankly a charter of the rights of labor against capital.<sup>77</sup>

I agree, and I think the matter is free from doubt. How, therefore, could the court possibly read the statute in the manner it did?<sup>78</sup> My first, unfiltered attempt at answering that question was emotional and concededly non-rational. When I was a young blue-collar worker

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<sup>77</sup>*Id.* at 517–518.

<sup>78</sup>In reaching the decision, the *Brady* plurality cited two district court cases: one, *Plumbers & Steamfitters Local 598 v. Morris*, 511 F.Supp. 1298 (E.D. Wash.1981), was not appealed, and another, *Clune v. Publishers Ass’n of N.Y.C.*, 214 F.Supp. 520(S.D.N.Y.), *aff’d*, 314 F.2d 343(2d Cir. 1963) that was upheld by the Second Circuit without analysis. Additionally, the *Brady* court cited an unreported *per curiam* Seventh Circuit decision, which held, without analysis, that the employer in that case was entitled to relief from an injunction issued in a labor dispute. *Chi. Midtown Milk Distribs., Inc. v. Dean Foods Co.*, 1970 WL 2761, slip op. at 1 (7th Cir. July 9, 1970). In other words, the Eight Circuit could find no persuasive circuit court authority in support of its position that NLGA anti-injunctive protections —on the books since 1932— applied to employers. On the other side of the ledger were two circuit court opinions analyzing in detail the legislative history of the statute and concluding that the history established that the “cease to remain in employment relation” language, upon which the NFL relied to support its protection under the NLGA, pertained to the right of *workers* to quit and not be subject to federal injunction to return to work. *Local 2750, Lumber & Sawmill Workers Union v. Cole*, 663 F.2d 983, 986 n.5 (9th Cir. 1981) (quoting S.Rep. No. 63-698, at 51 (1914)); *see also de Arroyo v. Sindicato de Trabajadores Packinghouse, AFL-CIO*, 425 F.2d 281, 291–92 (1st Cir. 1970). The court underplays these opinions, for they fairly obviously stand for the proposition that § 4(a) of the NLGA does not apply to employers *at all*. *Local 2750*, 663 F.2d at 986; *de Arroyo*, 425 F.2d at 290–291.

without an undergraduate degree and with only the scantest exposure to law, I attempted with limited success to read labor-related judicial opinions. Those opinions evoked emotional responses in me. “My” side seemed always to lose. I found many such opinions unsupportable, morally bankrupt, and intellectually dishonest. I could not yet articulate “legal” reasons for finding them dishonest. But I instinctively blamed “the judges” for decisions I found discordant with my class-based sense of what labor law *ought* to be. My unrefined line of thinking was similar to (but decidedly less elegant than) that expressed in George Schatzki’s short, powerful essay arguing that judges simply do not *like* labor unions.<sup>79</sup> I *still* agree with my understanding of Schatzki’s view. Judges cannot respect the collective ethic that is at the heart of unions and of unionism. It is simply too foreign to their highly individualistic experiences and values. Without sympathetic instincts, I had thought, judges will unavoidably and presumptively misunderstand unions and reflexively misapply labor law. This was how I first “felt” about *Brady*.

As my thinking has become more informed by knowledge of labor law and history, it has developed in ways I did not exactly expect. The “fault” I had attributed almost exclusively to the judiciary—my perception of its *deliberate* flouting of labor law, the first reaction that I had in connection with *Brady*—I now see as the possibly inevitable by-product of dysfunctional

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<sup>79</sup>George Schatzki, *It's Simple: Judges Don't Like Labor Unions*, 30 CONN. L. REV. 1365, 1366 (1998). Professor Schatzski stated:

Probably, no judge has integrated into his or her psychology a commitment to communitarianism, although some may have adopted it as a theoretical construct. By their nature, judges, in general, and Supreme Court Justices, in particular, are elitists, individualists, overachievers, meritocrats, and fierce competitors; by their legal training and experience, judges have ingrained into them the value of individual rights. It follows that the philosophy (if not always the practices) of the labor movement is anathema to judges. The labor movement believes in primary concern for the group (even at the expense of individuals), leveling, reward according either to one's existence or to one's needs (and certainly not to one's merits), anti-elitism, less work and more play, and no competition between employees. In certain ways, the labor movement celebrates the average, the typical, the mediocre in and among us. It is no wonder that judges, of all people, are put off by the philosophy of the labor movement.

*Id.*

legislative ossification and, importantly, of labor union malaise.<sup>80</sup> The central legal justification of labor law, after all, was instrumental: it was thought a necessary mechanism to maintain “industrial peace.”<sup>81</sup> The statute itself recites that Congress was concerned with remedying industrial strife.<sup>82</sup> There was reason to believe that industrial strife—especially as manifested by strikes, lockouts, and the turbulent after effects of this conduct—would be a perennial feature of the American economy.<sup>83</sup> I understand that other normative justifications were at play during the period of the NLRA’s enactment. Some of these were ultimately nonstatutory, but implicit from the contemporaneous deliberations, such as an encouragement of industrial democracy.<sup>84</sup> Some made their way explicitly into the statutory formulation, like increasing the purchasing power of otherwise individual, powerless workers.<sup>85</sup> But let us not delude ourselves. The overriding normative justification ensuring the NLRA’s passage and the courts’ enforcement of it was industrial peace.<sup>86</sup> Even when the NLRA was amended in 1947, the wave of strikes in 1946 had underscored the continued relevance of industrial peace policies in the United States, and there was, accordingly, little serious thought that compulsory labor relations writ large might somehow be jettisoned.<sup>87</sup>

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<sup>80</sup>See generally Cynthia Estlund, *The Ossification of American Labor Law*, 102 COLUMB. L. REV. 1527 (2002).

<sup>81</sup>Labor Management Relations Act, 29 U.S.C. § 151 (2006); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 42 (1937).

<sup>82</sup>29 U.S.C. § 151.

<sup>83</sup>See e.g., *Vegeahn v. Guntner*, 167 Mass. 92, 108–09 (1896) (Holmes, J., dissenting) (arguing that conflict between employers and employees is “eternal”).

<sup>84</sup>See William E. Forbath, *Caste, Class, and Equal Citizenship*, 98 MICH. L. REV. 1, 61–63 (1999).

<sup>85</sup>29 U.S.C. § 151. But even where inequality of bargaining power is specifically referenced, it is added that such inequality “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.” *Id.* The commercial justification of the statute and its promise to “safeguard[] commerce from injury, impairment, or interruption, and promote[] the flow of commerce” remain paramount. *Id.*

<sup>86</sup>Cynthia Estlund, “*It Takes a Movement*” – *But What Does It Take To Mobilize the Workers (In the U.S. and China)?*, 16 EMP. RTS. & EMP. POL’Y J. 507, 517 (2011) (“But there is no denying that a central purpose of the Wagner Act, and one that the Supreme Court elevated above all others in upholding its constitutionality, was the promotion of labor peace.”).

<sup>87</sup>MELVYN DUBOFSKY & FOSTER RHEA DULLES, *LABOR IN AMERICA: A HISTORY* 333–334 (7<sup>th</sup> ed. 2004)

Today, work stoppages in the U.S. are rarely found.<sup>88</sup> Thus, why *should* judges take labor law seriously, if the underlying rationale for it is industrial peace, especially in contexts in which it is doctrinally unclear how, or whether, labor law applies?<sup>89</sup> One can imagine a contemporary judge with the following thought: assuming labor law was first conceived as a bulwark between aggressive labor and capital antagonists thought to be in perpetual conflict, why is that body of law needed now, given the apparent evaporation (or extirpation) of the conflict?<sup>90</sup> It was once feared that the fight between these allegedly intractable foes, whatever the equities involved, would spill out into the streets and paralyze interstate commerce. That seemed a problem worth addressing.<sup>91</sup> Now, we are beginning to openly confront questions that may not have been explicitly considered in the 1930s. For example, are there equities concerning employee rights justifying a policy extending beyond industrial peace in the service of interstate commerce? At this moment in history the justification that collective worker rights are necessary to prevent widespread industrial strife simply rings hollow.<sup>92</sup>

As unions have lost their willingness and ability to strike and much of their overall vigor,<sup>93</sup> it has become much harder for judges to rationalize the broad intrusion of labor policy

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<sup>88</sup>In 2010, for example, there were 11 major strikes and lockouts involving 1,000 or more workers, the second lowest annual total since the major work stoppages series began in 1947. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, MAJOR WORK STOPPAGES IN 2012 (Feb. 8, 2013), *available at* <http://www.bls.gov/news.release/wkstp.nr0.htm>.

<sup>89</sup>Or am I becoming too easy on judges with the passage of time and my own advancing age? Ekow Yankah has argued that legal institutional hypocrisy occurs “when the legal system in one way or another misleads citizens about the ways in which laws serve its own espoused values.” Ekow N. Yankah, *Legal Hypocrisy* 21 (forthcoming), *available at* <https://www.law.upenn.edu/live/files/330-yankahlegalthypocrisypdf>. If he is right, one could argue that passively permitting misconceptions to continue—such as the myth of a viable labor law—may not be so innocent.

<sup>90</sup>As Professor Estlund has framed the issue, given all the quiet, perhaps labor law has “succeeded.” *See* Estlund, *supra* note 86, at 517.

<sup>91</sup>*See* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

<sup>92</sup>This I think is the thrust of the scholarship that has been exploring an alternative labor policy based on the 13th Amendment. Professor James Pope has been especially prolific in this area. *See, e.g.,* James Gray Pope, *What's Different About the Thirteenth Amendment, and Why Does It Matter?*, 71 MD. L. REV. 189 (2011); *see also* Maria L. Ontiveros, *Immigrant Workers' Rights in a Post-Hoffman World: Organizing Around the Thirteenth Amendment*, 18 GEO. IMMIGR. L.J. 651 (2004).

<sup>93</sup>This is obviously a very long story. *See* James Gray Pope, *How American Workers Lost the Right to Strike and Other Tales*, 103 MICH. L. REV. 518 (2004). As Pope and others have shown, the judicial role in the process of



on “structural” grounds under various preemption, deference, and primary jurisdiction doctrines<sup>94</sup> into facially unrelated policy areas.<sup>95</sup> To be sure, judges continue to follow longstanding, and more or less uncontested, labor law.<sup>96</sup> For instance, with only a few problematic exceptions,<sup>97</sup> it is doctrinally as unlawful to fire a worker now for supporting or trying to organize a union as it was in 1935; this is the most straightforward of the labor law violations.<sup>98</sup> It is hard to argue that judges have not followed labor law in these kinds of cases, assuming the NLRB can establish “substantial” evidence of an anti-union motive.<sup>99</sup> In “open texture” or “structural” contexts,<sup>100</sup> however, unions and workers have been losing badly.<sup>101</sup>

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rights erosion is undeniable and I am therefore not trying to deny it. But I am not as much interested here in the judicial incursions themselves as I am in the workers’ muted responses to the evisceration and the resulting impact on the public perception of labor law. In most places, after all, labor movements have begun as outlaw organizations. The very existence of something called “labor law” reflects societal accommodation, albeit in grudging terms, of a force that *demand*ed recognition. I am focusing on the seeming absence of continuing demands.

<sup>94</sup>*Garmon* and *Machinists’* preemption are good examples of these doctrines, and I will discuss *Garmon* later in this essay. Those cases speak to jurisdictional allocations. In a world without much industrial strife it is a lot easier for courts to tinker with the doctrines. Additionally, notions of court deference to administrative agency actions as reflected most clearly in the 1984 *Chevron* case, were influenced doctrinally by early labor cases involving the appropriate deference of courts to decisions of the NLRB. *NLRB v. Hearst Publ’ns*, 322 U.S. 111, 131 (1944) (“But where the question is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially, the reviewing court’s function is limited.”). In the absence of industrial strife, courts simply do not experience the same kind of pressure to defer to the NLRB.

<sup>95</sup>See *Pichler v. UNITE*, 542 F.3d 380, 383–84 (2008) (finding that the union violated the Drivers’ Privacy Protection Act of 1994 when it collected license plate numbers for the purpose of identifying bargaining unit members to whom to direct its message); see also *infra* text accompanying note 170. Because unions have been almost absolutely excluded from employers’ property in recent years, it has been increasingly difficult for employees even to hear unions’ messages. See generally *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992); see also *infra* note 118 and accompanying text.

<sup>96</sup>The authority of the NLRB to reinstate with backpay employees discharged for the purpose of discouraging union membership has been settled since 1938. *NLRB v. MacKay Radio*, 304 U.S. 333, 348 (1938).

<sup>97</sup>See *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 151–52 (2002) (finding undocumented workers ineligible for back pay because such awards would conflict with the IRCA).

<sup>98</sup>See James G. O’Hara & Daniel H. Pollitt, *Section 8(a)(3) of the Labor Act: Problems and Legislative Proposals*, 14 WAYNE L. REV. 1104, 1105–06 (1968) (describing unlawful discharges as the most essential labor law violation because of its “malicious” character).

<sup>99</sup>*Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477–78 (1951).

<sup>100</sup>By “open texture” contexts I mean primarily circumstances in which the NLRA or, in the case of *Brady*, the NLGA, conflict with other statutory regimes such as the antitrust regime. Statutes are unclear and workers lose in statutory interpretation ignoring or minimizing labor policies. By “structural” contexts I mean in particular situations in which the NLRB should arguably have jurisdiction over some aspect of a labor dispute but is not given it.

<sup>101</sup>Among the best works describing the steady systemic erosion are Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 MINN. L. REV. 265 (1978); James Gray

Judicial disregard for labor law in open texture predominated in *Brady* to the point where courts have now regressed to calling into question the NLGA, the foundation of American labor law. This is incoherent devolution, not merely open-texture erosion; and the sports-labor context has consistently exhibited a peculiar pattern of labor law incoherence and exerted devolutionary pressures on labor policy.<sup>102</sup> Before discussing *Brady* further, I want to provide broader examples of the judicial disregard of labor law outside of the sports context. As I have mentioned, these examples have been discussed at length in the scholarly literature. I seize upon them now because of the impact I observed them having in “the real world.” They are related in my mind to the *Brady* phenomenon because they were viewed by laypersons as unnaturally technical and substantially incredible. I view the cases as part of a slippery slope of labor law disregard culminating in the devolution that is *Brady*.

## V. “KEYS” OF DISREGARD OF STATUTORY “MUSIC”

In 1947, Jerome Frank explored an interesting analogy between musical and statutory interpretation.<sup>103</sup> There was always more going on in labor law than was immediately revealed by the text of the statute—a kind of music or inner coherence.<sup>104</sup> As Professor Atleson has shown, there were many instances during labor law’s evolution, from its inception really, in which common law notions of property and management rights reemerged periodically to defeat statutory rights; wherever possible judges read common law “management rights” into the

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Pope, *How American Workers Lost the Right to Strike, and Other Tales*, 103 MICH. L. REV. 518 (2004); JAMES B. ATLESON, *VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW* (University of Massachusetts Press 1983).

<sup>102</sup>C. Peter Goplerud III, *Collective Bargaining in the National Football League: A Historical and Comparative Analysis*, 4 JEFFREY S. MOORAD SPORTS L.J. 1, 3 (1997), available at <http://digitalcommons.law.villanova.edu/mslj/vol4/iss1/2> (explaining the “uniqueness” of applying labor law to the professional sports and especially football).

<sup>103</sup>Jerome Frank, *Words and Music: Some Remarks on Statutory Interpretation*, 47 COLUM. L. REV. 1259 (1947).

<sup>104</sup>For those readers not drawn to the musical analogy I would point out that the inner essence of a statute has also been thought of as its “spirit”: “It is a ‘familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit nor within the intention of its makers.’ ” *Nat’l Woodwork Mfrs. Ass’n v. NLRB*, 386 U.S. 612, 619 (1967) (citing *Holy Trinity Church v. United States*, 143 U.S. 457, 459 (1892)).

NLRA.<sup>105</sup> Despite this dissipation, for a long period of time one could continue to hear the statutory music within doubtful interpretations of the NLRA rendered by federal courts and often by the NLRB itself. One could say with more or less a straight face during the “mature” period of labor law that any tearing of the statutory fabric was leading to some greater statutory purpose; the rending was on some level an unfolding of the inner statutory logic advancing to meet novel contemporaneous challenges.<sup>106</sup> One could even argue that such doubtful interpretation was necessary to advance the deep policy of the law.

The wise composer expects the performer to read his score “with an insight which transcends” its “literal meaning.” He does not deplore the performer’s creative activity, does not denounce it as “caprice” or “subjective tricks.” . . . Sometimes a literal interpretation of a piece of legislation is indubitably correct. Often, however, so to construe a statute will yield a grotesque caricature of the legislature’s purpose.<sup>107</sup>

Looking at the situation in hindsight, one might now be justified in seeing such textual departures as a conscious but non-malicious disregard of the statute—as a form of incremental soft sabotage meant to diminish, but not to extinguish, the potential for real working class power embedded within the statute. The soft sabotage might be analogized to a broader anti-democratic spirit manifested by judges during the 20th century. As Jerome Frank explained, “When, not so long ago, some judges were anti-democratic, they often obstructed the democratic will voiced by the legislature. This they sometimes did by obstinately construing a statute narrowly, without real regard to its intention.”<sup>108</sup> However, the incrementally congealed judicial departures from the NLRA—the narrow constructions of the type Judge Frank was describing—eventually

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<sup>105</sup>JAMES B. ATLESON, *VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW* 32–34 (University of Massachusetts Press, 1983).

<sup>106</sup>See Katherine Van Wezel Stone, *The Post-War Paradigm in American Labor Law*, 90 *YALE L.J.* 1509, 1517 (1981) (arguing that this enthusiastic “industrial pluralist” viewpoint represented a halfway measure because it delegated the crucial aspects of collective bargaining to a private forum.)

<sup>107</sup>Frank, *supra* note 103, at 1262.

<sup>108</sup>*Id.*

became widely understood if not accepted.<sup>109</sup> Whether the deviations were “minor key” frolics or “major key” detours, one could still make out the musical theme in the whole while the composer remained discernible.

For decades, interpretations of labor law resulted in a fine work of doctrinal *local coherence*—a concert overture—if not always in a product reflecting *correspondence* of rules to the reality of labor management relations and conflict.<sup>110</sup> One could read many cases over the last half-century that did not seem quite right, but which connected to each other neatly. The unifying themes of the cases created music of *managed* chaos, a chaos accepted because of the presumed existence and permanence of labor–management conflict and the corresponding need for negotiation writ large. Perpetual conflict suggested the need for at least some level of cooperation. There was no question of anyone *winning* the struggle.<sup>111</sup> To allow the battle to be fought without restraint was considered society’s loss, culminating in grievous injury to industry and commerce.<sup>112</sup> Over time, the courts began to forget the sound and coherence of the music in

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<sup>109</sup>See ROSCOE POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 37 (1922) (describing a life cycle of legal systems consisting of periods of “creation” followed by logical reconciliation of details).

<sup>110</sup>On coherence theory generally see Ken Kress, *Why No Judge Should be a Dworkinian Coherentist*, 77 TEX. L. REV. 1375, 1380 (1999). Kress wrote:

The coherence theory of truth may be crudely characterized as the view that a proposition is true if and only if it fits with other believed propositions. This theory sharply contrasts with the thin correspondence theory of truth, which holds that a proposition is true if and only if it corresponds to the facts. The thick or traditional correspondence theory adds to this a metaphysical thesis about facts: facts are external to us, and independent of our beliefs about them (unless the proposition itself is about our beliefs). Correspondence theories of truth evoke the image of true propositions mirroring reality.

*Id.* On “local” coherence—the view that rules need only cohere within discrete domains of law—see Barbara B. Levenbook, *The Role of Coherence in Legal Justification*, 3 LAW & PHIL. 355, 367-374 (1984).

<sup>111</sup>*Vegeahn v. Guntner*, 167 Mass. 92, 108 (1896) (Holmes, J. dissenting):

One of the eternal conflicts out of which life is made up is that between the effort of every man to get the most he can for his services, and that of society, disguised under the name of capital, to get his services for the least possible return. Combination on the one side is patent and powerful. Combination on the other is the necessary and desirable counterpart, if the battle is to be carried on in a fair and equal way.

*Id.*

<sup>112</sup>*NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 42 (1937):

minor and major ways, yielding to the reality that the deregulatory experience playing out was not quite corresponding to the received tale. When the statute *was* disregarded, the promised horrors failed to materialize. Unions were more or less quiet. Workers were more or less quiet.<sup>113</sup> History seemed to move on without significant economic dislocation.<sup>114</sup>

I now briefly discuss a few specific examples of creeping judicial incoherence and the loss of the musical theme. Significantly, the reaction to the “creep” by unions and workers was at best muted, a reality that judges who were already unconvinced by the statute’s industrial strife policy have noticed, even if unconsciously. Minor ways of disregarding labor law statutory music are heard most discordantly by everyday practitioners working in the field, but often not by laypersons, or even by legally trained non-specialists. When courts interpret the NLRA in silly, unnatural ways, they communicate to “repeat players” that the statute is not taken seriously. Those repeat players are then quite likely to pass on the ethos to laypersons, even if they do not mean to do so. I know I did as an NLRB agent. In these circumstances courts damage the statutory regime slowly and incrementally rather than traumatically and immediately. After recounting some of these minor instances of field incoherence, I will move on to a major one, and then reconnect the discussion to *Brady*.

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Experience has abundantly demonstrated that the recognition of the right of employees to self-organization and to have representatives of their own choosing for the purpose of collective bargaining is often an essential condition of industrial peace. Refusal to confer and negotiate has been one of the most prolific causes of strife. This is such an outstanding fact in the history of labor disturbances that it is a proper subject of judicial notice and requires no citation of instances.

*Id.*

<sup>113</sup>See Estlund, *supra* note 86, at 517–518.

<sup>114</sup>Compare this state of affairs to the one leading up to enactment of the NLRA:

Recurrency of strikes affected our whole industrial economy. During the period from 1901 to 1905, approximately 14,000 strikes occurred, in a large proportion of which “the major issue was the right to organize for collective bargaining or for union recognition, as it is technically known.” Another wave of strikes occurred in the war and post-war period from 1916 through 1922, and again in the period immediately preceding the passage of the Act from 1932 to 1935. These strikes had an immediate and devastating impact on the nation's whole economy which affected entire industries. Most of our states and, almost every type of industry was affected.

Earle K. Shawe, *The Role of the Wagner Act in Preventing Industrial Strife*, 32 VA. L. REV. 95, 98 (1945)

### ***A. Minor Key I: Inconsistent Deference to the NLRB***

In theory, courts are required to defer to the NLRA’s permissible constructions of ambiguous statutory provisions within the purview of the agency’s statutory mandate.<sup>115</sup> No one would now argue that *Chevron* deference—named after the case that most famously announced that courts should not second-guess agencies’ interpretations of vague statutes within the agencies’ jurisdiction—is as simple as it once seemed.<sup>116</sup> In certain instances it is hard to argue that the Supreme Court has even attempted to apply *Chevron*, or any other authentic deference canon<sup>117</sup> to the decisions of the NLRB. This non-deference has been particularly noticeable to labor relations specialists through the courts’ unpersuasive second guessing of the NLRB’s attempts to unravel convoluted employee and supervisory definitions under the NLRA.

#### **1. Who is an employee?**

In *Lechmere v. NLRB*,<sup>118</sup> the Supreme Court held that “non-employee” union organizers were barred from an employer’s property in nearly absolute terms. The general rule had been laid down, but arguably qualified, in the 1950s-era *Babcock and Wilcox* case.<sup>119</sup> Following that decision, the NLRB continued to administratively balance employer property rights with the right of nonemployee union organizers to access employer property as reflected in cases like *Jean Country*,<sup>120</sup> and eventually the Court took notice. For all practical purposes, it closed the

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<sup>115</sup>*Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984). The Court has putatively afforded “some” kind of “modern” administrative law deference to the NLRB since the late 1970s. *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 500 (1978).

<sup>116</sup>STEPHEN BREYER, MAKING DEMOCRACY WORK, 117–20 (2010); William N. Eskridge & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083, 1090 (2008) (stating “[i]ndeed, from the time it was handed down until the end of the 2005 term, *Chevron* was applied in only 8.3% of Supreme Court cases evaluating agency statutory interpretations . . . [D]uring this time frame, the Court employed a *continuum of deference regimes*.”).

<sup>117</sup>See Eskridge, *supra* note 116.

<sup>118</sup>502 U.S. 527 (1992).

<sup>119</sup>351 U.S. 105 (1956) (allowing a balancing test in limited instances that might still grant access to nonemployee union organizers).

<sup>120</sup>291 N.L.R.B. 11, 14 (1988).

door to union access of employer property entirely in *Lechmere*.

*Lechmere* had a profound impact on day-to-day union organizing. As a practical matter, it had long been recognized that a union's only real access to employees was face-to-face in the workplace.<sup>121</sup> By cutting off such direct access, the Supreme Court in nearly absolute terms denied unions the use of their primary organizational tactic: interacting with employees at work.<sup>122</sup> The end of this kind of union-employee contact would severely circumscribe organizing. Every practitioner of labor relations of every stripe knew it.<sup>123</sup> I spoke and dealt with union organizers, for example, who were acutely aware not only of the decision but of its symbolic power. What was more, the position of the NLRB—the agency with alleged labor relations expertise—that such drastic banishment of union organizers would diminish employee rights was rejected almost out of hand. Union organizers and labor attorneys confided in me their surprise at the curt dismissiveness with which the *Lechmere* court assessed the NLRB's position in the case. There was obvious symbolic power in such a summary rebuff.

*Chevron* loomed large in the *Lechmere* opinion by virtue of the dismissive treatment visited on the NLRB by the Court.<sup>124</sup> As the dissent argued, the question of access to employees by “third party” unions under the NLRA is not addressed in the statute, and access issues therefore necessarily present ambiguities.<sup>125</sup> The *Babcock and Wilcox* case had been decided

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Accordingly, in all access cases our essential concern will be the degree of impairment of the Section 7 right if access should be denied, as it balances against the degree of impairment of the private property right if access should be granted. We view the consideration of the availability of reasonably effective alternative means as especially significant in this balancing process.

*Id.*

<sup>121</sup>See Alan L. Zmija, *Union Organizing after Lechmere, Inc. v. NLRB—A Time to Reexamine the Rule of Babcock & Wilcox*, 12 HOFSTRA LAB. L. J. 65, 113–16 (1994).

<sup>122</sup>See *id.*

<sup>123</sup>See R. Wayne Estes & Adam M. Porter, *Babcock/Lechmere Revisited: Derivative Nature of Union Organizers' Right of Access to Employers' Property Should Impact Judicial Evaluation of Alternatives*, 48 SMU L. REV. 349, 371 (1995).

<sup>124</sup>*Chevron* is cited almost in passing, curiously buried at the end of a string citation of cases. *Lechmere v. NLRB*, 502 U.S. 527, 536 (1992).

<sup>125</sup>*Id.* at 545–46 (White, J., dissenting).

prior to *Chevron*. The NLRB's interpretation of the NLRA as permitting union access to employees in non-working areas of an employer's property accordingly seemed permissible under deference principles, especially under the kind of cautious balancing scheme the agency had been utilizing.<sup>126</sup> As a practical matter, the NLRB sometimes permitted organizational activity in locations of a facility formally owned or leased by employers, but not part of working areas, and otherwise frequented by the public without challenge or the need to obtain advance permission.<sup>127</sup>

The most jarring aspect of *Lechmere* for many labor relations specialists was the failure of the Court to acknowledge that "non-employee" union organizers might arguably be considered statutory employees presumptively afforded access to an employer's facility to engage in protected labor activity.<sup>128</sup> The NLRA does not limit employee status to employees of any particular employer, and there is no legitimate conceptual reason why union agents employed by the union would not fit into the statutory definition.<sup>129</sup> Non-exclusion of union agents from the statutory definition of the NLRA makes sense. Under section 2(9) of the NLRA, the term "labor dispute" is defined to include "any controversy concerning terms, tenure or

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<sup>126</sup>Robert A. Gorman, *Union Access to Private Property: A Critical Assessment of Lechmere, Inc. v. NLRB*, 9 HOFSTRA LAB. L.J. 1, 15 (1992) (stating that "[f]or the *Lechmere* Court to assert, however, that the language of Section 7, by according rights only to 'employees,' satisfies the *Chevron* requirement – that Congress directly address the precise question at issue – is little short of mind-boggling").

<sup>127</sup>See Cynthia L. Estlund, *Labor, Property, and Sovereignty After Lechmere*, 46 STAN. L. REV. 305, 316–17; see also *Hudgens v. NLRB*, 424 U.S. 507, 509 (1976); *Ralph's Grocery v. U.F.C.W. Local 8*, No. S185544, slip op. (Cal. Sup. Ct. Dec. 27, 2012).

<sup>128</sup>See Estlund, *supra* note 127, at 323–25; Gorman, *supra* note 126, at 11.

<sup>129</sup>Section 2(3) of the NLRA states:

The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless [the Act] explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

29 U.S.C. § 152(3) (2006) (internal citations omitted).



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 the disputants stand in the proximate relation of employer and employee.”<sup>130</sup> The definition mirrors statutory language in the NLGA and is transparently directed at the tendency of the judiciary to see all labor activity undertaken by employees not proximately employed by an employer as illegitimate.<sup>131</sup> Solidarity is trouble. Through application of “absolute” state property rights, the Court needlessly constitutionalized union access. Moreover, and more importantly for my present purposes, the Court sent an unmistakable message to those involved in organized labor relations of its hostility and of its intention to continue to interpret the NLRA in the narrowest possible fashion. Nonemployee union organizers were necessarily “strangers” to the workplace, and employers need take no notice of them unless employees managed to designate a union to represent them under the difficult new regime.<sup>132</sup>

More cramped interpretations resulting in statutory employee exclusions from the NLRA exist; I will discuss one of them momentarily. In my labor law practice experience, however, the professional union organizer exclusion was most notable. The determination had a palpable and immediate impact on traditional union organizing. Still, I do not characterize court-authorized banishment of nonemployee union organizers from employers’ property as more than minor

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<sup>130</sup>29 U.S.C. § 152(9).

<sup>131</sup>*See e.g.* Duplex Printing Press Co. v. Deering, 254 U.S. 443, 471-474 (1921). [We could not find the ATL material in this source for a pincite.]

<sup>132</sup>Here I must add as a matter of doctrine that technically non-employee organizers would not be banished if an employer did not have the right under state property law to exclude trespassers; or if a union had “no reasonable alternatives” to accessing an employer’s property to communicate its message. In my nine years as an NLRB field/investigating attorney, I was never involved in an “access” case (assuming the employer had the right to exclude trespassers) in which a union was found *not* to have such reasonable alternatives. Where a union has such alternatives, an employer may summon the police to exclude the non-employee. *See* Jeffrey Hirsch, *Taking State Property Rights out of Federal Labor Law*, 47 B.C. L. REV. 891, 906 (2006) (stating that “[i]n those circumstances, virtually any attempt by the employer to remove the organizers will be lawful, as long as reasonable alternatives to reach employees exist and the employer does not discriminatorily enforce its no-solicitation policy”).

disregard of the NLRA statutory music; the judgment was a plausible, if doubtful, accommodation of federal-state “access” tensions that have existed for decades.<sup>133</sup> It is possible to conceive of *Lechmere* as one end point of a continuum of constantly and necessarily shifting conceptions of property. Ultimately, the decision may have as much to do with generally cramped conceptions of property as with anti-union animus.<sup>134</sup> At bottom, the disingenuous interpretation of the employee definition was not an open assault on the “core legitimacy” of union organizing or collective bargaining but rather a narrowing of the field of conflict prompted by judicial hostility. In the subsequent unorthodox salting campaigns, which developed in reaction to *Lechmere*<sup>135</sup> and its rule of restricted access for unions,<sup>136</sup> the courts substantially upheld the protected status of “salts.” This outcome seems unlikely if the intent of the courts at the time had been to baldly prevent all union contact with employees, a development that would have represented a “major key” departure from the statute.

## **2. Who is a Supervisor (and therefore not an Employee)? The Case of Nurses**

The courts have continually second guessed and refused to defer to the NLRB on the question of whether workers, especially nurses, are supervisors within the meaning of the NLRA. The question is important because supervisors have almost no rights under the NLRA and can play no part in encouraging unionization of health care facilities. Deference is admittedly an imprecise enterprise, and courts may occasionally, or even more than occasionally, disturb

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<sup>133</sup>*Id.* at 898–905 (describing the courts’ “decades long” struggle to accommodate state law property rights with federal law labor organizing rights).

<sup>134</sup>*See generally* Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 NW. U. L. REV. 1283 (1996) (analyzing the common law right to exclude from private property in various non-labor related business contexts and demonstrating a variety of puzzling inconsistencies).

<sup>135</sup>Salts are professional union organizers who apply for and sometimes obtain—often surreptitiously—employment with a non-union employer for, among other reasons, the purpose of persuading the employer’s employees to unionize. *See* NLRB v. Town & Country Elecs., Inc., 516 U.S. 85, 98 (1995) (holding that a worker may be a company’s employee, within the meaning of the NLRA, even if, at the same time, a union pays that worker to help the union organize the company).

<sup>136</sup>Estlund, *supra* note 127, at 321 n.109.

agency interpretive decisions.<sup>137</sup> However, the Supreme Court in two instances in a mere seven-year period disturbed highly fact-sensitive NLRB decisions on supervisory status under the NLRA.<sup>138</sup> This failure to defer to the NLRB is noteworthy given the infamously muddled statutory definition of “supervisor.”<sup>139</sup> If ever a court were to defer to an agency, one would think it would do so in connection with cases interpreting such a definition.<sup>140</sup> A nurse who is a supervisor is not an employee within the meaning of the NLRA.<sup>141</sup> Each decision to classify a nursing job as supervisory has the effect of deregulating the workplace with respect to nurses falling within the classification.<sup>142</sup> While decisions overturning NLRB findings of supervisory status have always seemed to represent a broader, calculated, deregulatory agenda, in no area has this agenda been as strong as in the health care industry.<sup>143</sup> Frankly speaking, as an administrative law professor, I think the Court’s decisions reviewing NLRB factual assessments of the supervisory authority of nurses defy principles of “substantial evidence”<sup>144</sup> applicable

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<sup>137</sup>See generally Eskridge & Baer, *supra* note 116.

<sup>138</sup>NLRB v. Ky. River Cmty. Care, Inc., 532 U.S. 706, 721 (2001) (overruling the NLRB’s interpretation of the statutory term “independent judgment,” one of the factors in determining an employee’s supervisory status); NLRB v. Health Care & Ret. Corp. of Am., 511 U.S. 571, 584 (1994) (overturning the NLRB’s interpretation of supervisory authority exercised “in interest of employer”).

<sup>139</sup>Section 2(11) of the NLRA states:

The term “supervisor” means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

29 U.S.C. § 152(11) (2006).

<sup>140</sup>*Health Care & Ret. Corp. of Am.*, 511 U.S. at 579 (stating that “phrases [used by Congress] such as ‘independent judgment’ and ‘responsibly to direct’ are ambiguous”).

<sup>141</sup>*Id.* at 598 (Ginsburg, J., dissenting) (stating that “[t]he Court’s opinion has implications far beyond the nurses involved in this case. If any person who may use independent judgment to assign tasks to others or direct their work is a supervisor, then few professionals employed by organizations subject to the Act will receive its protections”).

<sup>142</sup>*Id.*

<sup>143</sup>See Jennifer Myers, *Are Nurses Supervisors: A Critical Look at the Circuit Split After NLRB v. Hilliard Development Corporation*, 3 U.P.A. J. LAB. & EMP. L. 671 (2001) (discussing intensifying circuit court splits and refusals to defer to the expertise of the NLRB on the question of nurse supervisory status).

<sup>144</sup>In *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951), the Supreme Court explained that “substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Id.* at 477 (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

generally to administrative adjudications.<sup>145</sup> The decisions taken together represent theoretical embarrassment for administrative law and practical confusion for the NLRB and for the repeat players appearing before the agency. I focus on the area of supervisory findings because it was so striking to me in practice that individuals found to be supervisors were not “truly supervisory,” and that everybody involved in day-to-day labor relations matters knew it.<sup>146</sup> Thus, I am not as interested in doctrinal parsing as I am in the pervasive sense among workers and labor lawyers that the courts have completely lost the thread of workplace reality.

Charge nurses, for example, “are nurses who have some oversight responsibilities in addition to performing patient care.”<sup>147</sup> The basic problem has been that such nurses historically possessed the scantest “supervisory” duties, especially in nursing homes or in the case of “Licensed Practical Nurses” (“LPN”).<sup>148</sup> I personally took affidavits from nurse-witnesses in several health care supervisor issue cases and developed a clear impression of their perceptions of the cases. In short, they told me that “charge” nurses were often “in charge” because no one else wanted to be in charge, or because some nurses simply knew more about nursing than others. In many workplaces, charge-nurse duties were rotated, so that a relatively large percentage of nurses in a facility had at one time or another been “in charge.” If a charge nurse

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Accordingly, it “must do more than create a suspicion of the existence of the fact to be established . . . it must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury.”

*Id.* (quoting *NLRB v. Columbian Enameling & Stamping Co.*, 306 U.S. 292, 300 (1939)).

<sup>145</sup>In the D.C. Circuit, for example, agency decisions premised on substantial evidence grounds are upheld on average at a rate of about seventy-one percent. David Zaring, *Reasonable Agencies*, 96 VA. L. REV. 135, 178 (2010).

<sup>146</sup>“The definition of ‘supervisor’ was intended to apply only to those employees with ‘genuine management prerogatives’ so that those employees excluded from the Act’s coverage would be ‘truly supervisory.’” *Ky. River*, 532 U.S. at 727 n.8 (Stevens, J., concurring in part and dissenting in part). I think that much of the *Kentucky River* opinion is “a *tour de force* supported by little more than *ipse dixit*, [as] the Court conclude[d] that *no* deference [was] due the Board’s evaluation.” *Id.*

<sup>147</sup>Amy Albro, “*Rubbing Salt in the Wound*”: *As Nurses Battle with a Nationwide Staffing Shortage, an NLRB Decision Threatens to Limit the Ability of Nurses to Unionize*, 3 NW. J.L. & SOC. POL’Y 103, 115 (2008).

<sup>148</sup>Jonathan Edward Motley, *Grandmothers and Teamsters: How the NLRB’s New Approach to the Supervisory Status of Charge Nurses Ignores the Reality of the Nursing Home*, 73 IND. L.J. 711, 717 (1998).

is a supervisor, a facility could end up with a large number of supervisors.<sup>149</sup>

Findings of nurse supervisory status hamper union organizing efforts in at least two ways. First, supervisors are by definition not “employees” under the NLRA, so a potential bargaining unit is stripped of eligible members. Second, it is not permissible for supervisors to become involved in organizing activity on behalf of unions.<sup>150</sup> If it is found that they *have* become involved in such activity, any election in which a union has prevailed might be set aside and rerun.<sup>151</sup> Because a union cannot know in advance if putative supervisors will ultimately be found by the NLRB or the courts to be supervisors, it conducts at its peril an organizing campaign in which there are disputed supervisory classifications.<sup>152</sup> The resulting chilling impact on organizing activity is entirely foreseeable and tactically intended.

When courts refused to defer to the NLRB on nurse supervisory determinations, practitioners understood immediately that mere *assertions* of supervisory status—that is, employer assertions that apparent employees are supervisors—could paralyze NLRB proceedings. I was at the NLRB when some of the supervisory cases were being decided and witnessed some of the chaos first-hand. Pre-election hearings assessing the status of purported supervisors were among the most tedious I had the occasion to preside over. It was widely perceived, for example, that changed definitions and agency delay carried the potential for

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<sup>149</sup>Memorandum from NLRB Gen. Counsel to Reg'l Dirs. (Oct. 31, 2003) (on file with author).

Evidence of supervisor-to-employee “ratios” is most useful if it goes beyond sheer numbers and includes the workplace context. A seemingly disproportionate ratio may be reasonably explained in a high-risk industry, where employers may conclude that closer supervision is necessary, but considerably less plausible in cases in which the work is highly routine.

*Id.*

<sup>150</sup>*Harborside Healthcare, Inc.*, 343 N.L.R.B. 906, 909 (2004).

<sup>151</sup>*See id.*

<sup>152</sup>*But see Veritas Health Servs., Inc. v. NLRB*, 671 F.3d 1267, 1273 (D.C. Cir. 2012) (upholding the NLRB’s determination that an election was not voided because of pro-union conduct of putative charge nurse supervisors).

reversing increased union density in the nursing profession, intensifying hearings on the issue.<sup>153</sup> The impetus for the chaos was the courts' *de facto* insistence on ignoring administrative law deference canons.<sup>154</sup>

Nevertheless, I regard all of this confusion as only *minor key* disregard of statutory music because the statutory definition of “supervisor” was already explicitly muddled in a way that invited judicial mischief. The courts' narrowing impulses are in significant measure a function of the statute itself. The development would probably not have been possible if there were a clearer statutory definition of “employee,” despite the impression among many health care workers that a health care employer could simply hand a nurse a clipboard one night a month and convert him to a “supervisor,” when everyone knew he was not. From the perspective of nurses sympathetic to unions, the game may feel rigged. But the supervisory definition is the responsibility of the divided Congresses of 1935 and 1947 and their failure to provide clarity. The courts did not break the definition; it was already broken by the manifest legislative gridlock of the era.

### ***B. Minor Key II: Preemption and Implied Repeal***

Also evincing judicial disregard for labor law “statutory music” has been, speaking broadly, the tendency of courts to allow narrower policies embedded in sundry federal laws to “trump” the much broader policies of federal labor law. The evil in the process is that in the eyes of the broader society, NLRA policy is denigrated. The NLRA can be seen “competing” with statutory regimes of much more recent vintage and of far more limited impact and “losing” in the

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<sup>153</sup>See Albro, *supra* note 147, at 112 (stating that “[o]ver the past decade, union participation has steadily hovered just below twenty percent of the nursing population, but with the number of nurses in the workforce increasing overall, the number of union represented nurses is also climbing”).

<sup>154</sup>The ship seemed for a fleeting moment to have begun to right itself. *Compare* Frenchtown Acquisition Co. v. NLRB, 683 F.3d 298, 316 (6th Cir. 2012) (upholding an NLRB determination that charge nurses were not supervisors within the meaning of the NLRA), *with* Lakeland Health Care Assocs. v. NLRB, 696 F.3d 1332, 1349–50 (11th Cir. 2012) (declining to uphold an NLRB determination on similar issues).

competition. The development has been effectuated in part through the thrusting aside of *Garmon* preemption<sup>155</sup> principles in favor of what is a dramatic over-reading of “the independent federal remedy” exception, as articulated in cases like the Supreme Court’s opinion in *Connell Construction*.<sup>156</sup> “As a general rule,” the *Garmon* case establishes that “federal courts do *not* have jurisdiction over activity which ‘is arguably subject to § 7 or § 8 of the [NLRA],’ and [in such cases] they ‘must defer to the exclusive competence of the National Labor Relations Board.’ ”<sup>157</sup> The purpose of the rule is to discourage development of inconsistent labor policy arising from a welter of tribunals.<sup>158</sup> *Garmon* itself did not concern a clash between federal policies but involved a conflict between *state* and federal policies. But *Garmon*’s primary jurisdiction language was sweeping and seems generally applicable to federal courts entertaining suits in which there is conflict between *federal* statutory policies and the NLRA. As I will discuss momentarily, this matter has not been resolved. *Garmon* broadly instructed that, where conduct was *arguably* protected or prohibited by the NLRA, the NLRB, and not the states, should serve as the forum for disputes arising out of the conduct:

When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by § 7 of the National Labor Relations Act, or constitute an unfair labor practice under § 8, due regard for the federal enactment requires that state jurisdiction must yield. To leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law.<sup>159</sup>

This begs the question of *when* conduct is arguably protected or prohibited by the NLRA. As to that question, *Garmon* held that the determination was for the NLRB to make.

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<sup>155</sup>San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959).

<sup>156</sup>Connell Constr. Co. v. Plumbers & Steamfitters Local Union No. 100, 421 U.S. 616, 626 (1975).

<sup>157</sup>Kaiser Steel Corp. v. Mullins, 455 U.S. 72, 83 (1982) (quoting *Garmon*, 359 U.S. at 245).

<sup>158</sup>Garner v. Teamsters Local Union No. 776, 346 U.S. 485, 490 (1953) (stating that “Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules and to avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies”).

<sup>159</sup>359 U.S. at 244.

At times it has not been clear whether the particular activity regulated by the States was governed by § 7 or § 8 [of the NLRA] or was, perhaps, outside both these sections. But courts are not primary tribunals to adjudicate such issues. It is essential to the administration of the Act that these determinations be left in the first instance to the National Labor Relations Board. What is outside the scope of this Court's authority cannot remain within a State's power and state jurisdiction too must yield to the exclusive primary competence of the Board.<sup>160</sup>

Under cases following *Connell Construction*, however, a competing principle<sup>161</sup> applicable to conflicts between federal statutes has arisen that: “federal courts may decide labor law questions that emerge as collateral issues in suits brought under independent federal remedies.”<sup>162</sup> It is far from clear, however, when a labor law question is a “collateral issue” in a suit brought under an “independent federal remedy.” More precisely, it is not clear what the *Connell* court meant by the term “collateral” issue. Taken in its broadest sense, “collateral” might mean simply an *accompanying* issue. That is, *any* time cases are brought under non-NLRA federal statutes possessing non-NLRA remedies, federal courts—rather than the NLRB—may take or retain jurisdiction of the cases, presumably even if conduct implicating sections 7 or 8 of the NLRA predominates. If that is all collateral means, then the rule of *Garmon* will necessarily be defeated. The only reason underlying conduct is ever arguably protected or prohibited by sections 7 or 8 of the NLRA is that it emerges in the context of some other law that *might* also apply. The independent remedy rule seems to stand *Garmon* on its head by establishing a *per se* rule working in the opposite direction: if other federal statutes arguably apply to cases also involving labor issues, federal courts have virtually unfettered license to assume or retain jurisdiction and decide those issues. The *Garmon* presumption, however, was that courts would be far less likely to produce uniform labor policy than the NLRB.

I suppose that makes sense if one assumes, as many do, that the *Garmon* Court was *only*

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<sup>160</sup>*Id.* at 244–45.

<sup>161</sup>Assuming one accepts that *Garmon* could in theory apply to a conflicts analysis as between two federal policies.

<sup>162</sup>42 U.S. 616, 626 (1975).



addressing conflicts between state and federal law. That is a difficult notion to accept because the Court specifically referenced federal courts, and not just state courts, deferring to the exclusive competence of the NLRB.<sup>163</sup> In *Vaca v. Sipes*,<sup>164</sup> for example, Justice White, while acknowledging that Congress had carved out various exceptions to strict application of the *Garmon* primary jurisdiction rule in both federal and state court contexts, presumed that the rule applied to federal courts, that it continued to be vital, and that exceptions to the rule must take into account “the effect upon the administration of national labor policies of concurrent judicial and administrative remedies.”<sup>165</sup> Similarly, in *Communication Workers of America v. Beck*,<sup>166</sup> Justice Brennan cited *Garmon* reflexively in considering whether a claim that a union had violated its federal common law “duty of fair representation” was required to be heard preliminarily by the NLRB. He appeared to assume without analysis that the NLRB would have exclusive jurisdiction of the claim in the absence of a qualifying independent federal remedy.<sup>167</sup> At a minimum, *Garmon*, *Vaca*, and *Beck* stand for the proposition that the *Garmon* rule is presumptively applicable to federal courts. In deciding whether the *Garmon* presumption is rebutted by the independent federal remedy rule, it appears that courts must consider labor policy explicitly and balance it with facially conflicting federal statutes when deciding cases under those statutes. Of course, courts would have had no reason to develop an independent federal remedy exception in the first place if no good argument existed that *Garmon* did not apply to federal courts and to conflicts between the NLRA and other federal statutes.

Assessing the independent federal remedy exception on its own terms produces instant difficulty once the term “collateral” is subjected to adequate scrutiny. Black’s Law Dictionary,

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<sup>163</sup>*Garmon*, 359 U.S. at 245.

<sup>164</sup>386 U.S. 171 (1967).

<sup>165</sup>*Id.* at 180.

<sup>166</sup>487 U.S. 735 (1988).

<sup>167</sup>*Id.* at 742–43.

for example, defines “collateral” as: “Supplementary; accompanying, but secondary and subordinate to[; e.g.,]whether the accident victim was wearing a seat belt is a collateral issue.”<sup>168</sup> If the independent federal remedy exception to *Garmon* was interpreted according to this definition of “collateral,” courts would be limited to deciding labor issues that were “secondary” or “subordinate” to a given case. The purpose of such a rule might be to prevent avoidance of NLRB jurisdiction and forum shopping through artful pleading, a possibility hinted at by Justice Brennan in *Beck*.<sup>169</sup> Presumably, courts would defer cases in which labor issues were not merely secondary or subordinate to the case to the NLRB for resolution.

A superlative example of how failure to apply careful preemption analysis to cases containing obvious labor issues can produce suspect results is the Third Circuit’s decision in *Pichler v. UNITE*.<sup>170</sup> In *Pichler*, eight employees of Cintas Corporation, and five of their relatives, alleged that the Union of Needletrades, Industrial & Textile Employees AFL–CIO (“UNITE”) recorded license plate numbers from vehicles parked outside of Cintas’s Allentown, Pennsylvania facility while engaging in a protected union organizing drive of Cintas employees during the winters of 2003 and 2004. The plaintiffs alleged that the union used the license plate numbers to retrieve the addresses of the vehicles’ owners from Pennsylvania motor vehicle records and then contacted the owners at their homes to try to persuade them to join the union. The plaintiffs alleged that the conduct violated the Drivers’ Protection Privacy Act (“DPPA”), a statute meant to stem the increase in opponents of abortion rights using public driving license databases to track down and harass abortion providers and patients.

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<sup>168</sup>BLACK’S LAW DICTIONARY 257 (9th ed. 2009).

<sup>169</sup>487 U.S. at 743 (observing that plaintiffs could not circumvent NLRB jurisdiction simply by casting an NLRB statutory claim in terms of a different policy).

<sup>170</sup>542 F.3d 380 (3d Cir. 2008).

License number collection has been thought of as garden-variety labor activity.<sup>171</sup> It became more important after the U.S. Supreme Court barred nonemployee union organizers from employers' property in the *Lechmere* case.<sup>172</sup> License number collection was explicitly mentioned by the Court in *Lechmere* as one of the methods the union in that case had utilized to gain access to employees. The Court was satisfied that the union in *Lechmere* had reasonable access to employees in part because of its ability to collect license plate information, notwithstanding the barring of nonemployee union organizers.

The *Pichler* court not only failed to balance what appeared to be competing federal policies, it explicitly refused to accord NLRA policy any weight at all. In this regard, the court failed to devote any discussion to the NLRB's historical treatment of the organizing conduct that the court acknowledged was at issue.<sup>173</sup> If one did not know better, one might assume that no "legitimate" countervailing labor law considerations existed.<sup>174</sup> The court never cited to *Garmon* and never made reference to the independent federal remedy exception.<sup>175</sup> As the dissent

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<sup>171</sup>The collection of license plate information has been described by the NLRB as a "usual channel" by which union organizers have attempted to communicate with employees. *See* Tech. Servs. Solutions, 324 N.L.R.B. 298, 303–04 (1997) (Chairman Gould, concurring) (including license number collection and distribution of handbills as accepted organizing activities in the "typical work situation"); Falk Corp., 192 N.L.R.B. 716, 720 (1971) (criticizing a union for *not* attempting to gather license plate information).

<sup>172</sup>*See supra* text accompanying note 118.

<sup>173</sup>Indeed, the court underscored the organizational nature of the conduct in dismissing the union's argument that it was engaged in the license plate and information activity in anticipation of litigation, an explicit exception to application of the Driver's Protection Privacy Act ("DPPA").

<sup>174</sup>As the dissenting judge in *Pichler* noted, the legislative history of the DPPA discloses that the motivation for the enactment of the act centered on two infamous events:

A television actress in California who had an unlisted home number and address "was shot to death by an obsessed fan who obtained her name and address through the DMV." In Tempe, Arizona, "a woman was murdered by a man who had obtained her home address from that State's DMV." The Senate debate focused on the need to protect the privacy of persons from stalkers and potential criminals. At that time, personal information was easily available from 34 states' DMVs.

542 F.3d at 400 (Sloviter, J., dissenting) (citations omitted).

<sup>175</sup>*See generally Pichler*, 542 F.3d 380 (failing to discuss *Garmon*). The district court below briefly discussed *Garmon* in connection with the union's preliminary motion to dismiss. 339 F. Supp. 2d. 665, 668–69 (E.D. Pa. 2004). The court curtly held that *Garmon*'s primary jurisdiction doctrine applied solely to conflicts between state and federal jurisdiction. *Id.* at 669. As I have already argued, I think this is incorrect. *See* discussion *supra* notes 163–169 and accompanying text; *see also* Tamburello v. Comm-Tract Corp., 67 F.3d 973, 976 n.2 (stating that "[a]lthough the *Garmon* doctrine, which is rooted in the Supremacy Clause of the United States Constitution . . . ,

observed:

[I]t is important to note that there is nothing illegal about efforts to organize a union. It is one of the activities protected by our labor laws. There is no indication that the need to obtain names and addresses of employees for the purpose of unionization was ever brought to Congress' attention when it drafted the DPPA.<sup>176</sup>

In light of the *Pichler* court's failure to even consider balancing statutory policies, one is driven to the realization that the court may have concluded, *sub silentio*, that the DPPA had implicitly repealed sections of the NLRA affording protection to activities arguably protected or prohibited by the DPPA.<sup>177</sup> To be sure, courts sometimes find under an implied repeal theory that specific provisions of later statutes must prevail over general provisions of earlier statutes. On the other hand, as the Third Circuit itself has recognized, courts should, in the absence of clear congressional intent to the contrary, make every attempt to reconcile competing federal statutory policies.<sup>178</sup> As the Supreme Court stated decades ago,

[t]he cardinal rule is that repeals by implication are not favored. Where there are two acts upon the same subject, effect should be given to both if possible. There are two well-settled categories of repeals by implication: (1) Where provisions in the two acts are in irreconcilable conflict, the later act to the extent of the conflict constitutes an implied repeal of the earlier one; and (2) if the later act covers the whole subject of the earlier one and is clearly intended as a substitute, it will operate similarly as a repeal of the earlier act. But, in either case, the intention of the legislature to repeal must be clear and manifest; otherwise, at least as a general thing, the later act is to be construed as a continuation of, and not a substitute for, the first act and will continue to speak, so far as the two acts are the same, from the time of the first enactment.<sup>179</sup>

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was originally concerned only with federal supremacy over conflicting *state* laws, it has been extended to cover the relationship between the NLRA and other federal statutes"). Some courts have agreed with the district court's position, but that appears to be a minority approach. *Teamsters Local 372 v. Detroit Newspapers*, 956 F. Supp. 753, 759 n.2 (E.D. Mich. 1997).

<sup>176</sup>*Pichler*, 542 F.3d at 402 (internal citations omitted).

<sup>177</sup>For a persuasive argument that the courts have been non-traditionally expanding "the range of circumstances in which courts may partially repeal statutory enactments" see Jesse W. Markham, Jr., *The Supreme Court's New Implied Repeal Doctrine: Expanding Judicial Power to Rewrite Legislation Under the Ballooning Conception of "Plain Repugnancy,"* 45 GONZ. L. REV. 437, 438 (2010).

<sup>178</sup>*Remington Rand Corp. v. Gen. Servs. Admin., Office of Fed. Supply & Servs.*, 836 F.2d 825, 826 (3d Cir. 1988) (citing *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1018 (1984)).

<sup>179</sup>*Posadas v. Nat'l City Bank of N.Y.*, 296 U.S. 497, 503 (1936).

Only the first category could apply under the *Pichler* facts. The Third Circuit might have attempted to show that the NLRA and the DPPA were in irreconcilable conflict on the question of driver license plate information collection. It might also have attempted to show that Congress had a clear and manifest intention to repeal the portion of the NLRA authorizing union organizers to collect driver information. It did neither. It made *no* attempt to reconcile DPPA and NLRA policies. Moreover, the court below admitted that it could discover *no* congressional intent with respect to the interplay between the NLRA and the DPPA.<sup>180</sup> It merely argued that because union organizational activity was not explicitly exempted from the general prohibition on collecting driver information under the DPPA, the union activity was flatly prohibited, just like any other activity not arguably protected by a federal statute.<sup>181</sup> The point of *Garmon*, however, is effectively to provide the NLRB a role in developing federal labor policy precisely because courts are often unwilling or unable to do so. *Pichler* demonstrates the wisdom of the rule—without it NLRA reconciliation would probably never occur.

While I have been focusing on *Pichler*, a particular federal appellate court case, Professor Cameron has made similar points quite effectively in the course of critiquing the Supreme Court's infamous opinion in *Hoffman Plastic Compounds, Inc. v. NLRB*.<sup>182</sup> According to Professor Cameron,

[e]xcept for some narrow but significant changes made in 1984, Congress has enacted no substantive reforms of federal labor policy since 1959. But the Supreme Court has. Seizing on purported conflicts between the NLRA and other federal legislation, the Court periodically has taken advantage of this repose to “enact” its own substantive policy choices. In selected cases, the Court has set up

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<sup>180</sup>*Pichler*, 339 F. Supp. 2d at 669.

<sup>181</sup>*Pichler*, 542 F.3d at 396.

<sup>182</sup>535 U.S. 137 (2002). The opinion held that an unauthorized worker discharged for anti-union reasons was not entitled to backpay because such an award would be in conflict with immigration policy despite clear legislative history that Congress in enacting the Immigration Reform and Control Act had no intention of disturbing NLRA remedies.

an apparent conflict between the NLRA and some other federal legislative scheme, then resolved that conflict by effectively abrogating federal labor policy in favor of federal “other” policy. Typically, the majority dresses its rationale in the clothing of true congressional intent, and dismisses as the ravings of an incompetent bureaucracy any views to the contrary expressed by the National Labor Relations Board.<sup>183</sup>

Professor Cameron points to *Connell Construction* as one example of this abrogation,<sup>184</sup> and, as should be clear at this juncture, I agree. Despite *Pichler* not relying on, or even citing, *Connell Construction*, the spirit of *Connell* is manifest. The independent federal remedy exception to *Garmon* creates a slippery slope. Once it is vaguely permissible for labor cases to escape the labor paradigm, anomalies like *Pichler* are sure to follow.<sup>185</sup>

I raise the statutory conflict issue, and focus on *Pichler* in particular, because of the impact such cases can have on the general public and in the world of practice. I cannot explain *Pichler* in a doctrinally credible manner to supporters of the labor movement. How can a drivers’ privacy statute, not aimed at labor organizing and of very recent vintage, be applied to stifle the longstanding statutory right of employees to engage in accepted labor organizing activities like collecting drivers’ license information? It was obvious that the purpose of the activity was to contact employees to solicit them for union membership and support. I am also unable to teach law students about cases like *Pichler* without transmitting to them the reality of a legal hierarchy in which labor law is simply unimportant. I nevertheless conclude that these developments, while important, are properly assigned to the minor disregard category. While incrementally devolutionary, the erosion occasioned by assigning the NLRA a status of relative unimportance in instances of statutory conflict does not rise to the level of major key like the *Brady* case does.

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<sup>183</sup>Christopher David Ruiz Cameron, *Borderline Decisions: Hoffman Plastics Compounds, the New Bracero Program, and the Supreme Court’s Role in Making Federal Labor Policy*, 51 UCLA L. Rev. 1, 6 (2003).

<sup>184</sup>*Id.* at 9.

<sup>185</sup>*See id.* at 6.

### ***C. Significance of Minor Key Disregard***

I chose the foregoing examples of minor key disregard of labor law because, although they are not necessarily “inherently destructive” of the music of labor law, they operate day-to-day as pernicious depleting agents of labor rights and work over time as *de facto* deregulation. They discredit and devalue labor law in the eyes of practitioners and the general public alike. But their assault has been incremental. It is only over the long haul that they have contributed to the hollowing out of labor law. I discuss minor key disregard to distinguish it from cases like *Brady*, which arose in the context of major key disregard of statutory music: the labor lockout, or more specifically the practically unfettered use of the lockout tactic, which has become a standard operating procedure of employers as we proceed into the twenty-first century.

### ***D. Major Key: Lockouts***

Most of the major key departures from labor law have been so well canvassed that I do not feel it would be useful to discuss them here.<sup>186</sup> But there is one major key departure that I want to discuss, both because it is featured in *Brady* and in many other sports labor dispute cases, and because it has exerted such a recent powerful impact on both the practice and the perception of labor law. The increasing frequency of employer lockouts has become so noticeable to the public that it was the subject of a recent article in the New York Times.<sup>187</sup> As Professor Chaison noted in the article: “Lockouts were once so rare they were almost unheard of. Now, not only are employers increasingly on the offensive and trying to call the shots in bargaining, but they’re backing that up with action — in the form of lockouts.”<sup>188</sup> Steven Greenhouse, the article’s author, contended,

[t]he number of strikes has declined to just one-sixth the annual level of two

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<sup>186</sup>See generally Pope, *supra* note 93; Estlund, *supra* note 80.

<sup>187</sup>Steven Greenhouse, *More Lockouts as Companies Battle Unions*, N.Y. TIMES, Jan. 22, 2012, at A1.

<sup>188</sup>*Id.*

decades ago. That is largely because labor unions' ranks have declined and because many workers worry that if they strike they will lose pay and might also lose their jobs to permanent replacement workers.

Lockouts, on the other hand, have grown to represent a record percentage of the nation's work stoppages, according to Bloomberg BNA, a Bloomberg subsidiary that provides information to lawyers and labor relations experts. Last year, at least 17 employers imposed lockouts, telling their workers not to show up until they were willing to accept management's contract offer.<sup>189</sup>

Is the law of lockouts as presently understood consistent with the NLRA? To assess the question a review of some basic labor law principles is in order.

It is generally lawful for employees, through their unions or otherwise, to strike.<sup>190</sup> It is lawful for employers to permanently replace striking employees.<sup>191</sup> In discussing these strike and replacement principles with law students and laypersons, I have found there is a basic acceptance of the symmetry of the right to strike and the corresponding right of management to replace strikers, though it has always been contestable that employers should be at liberty to *permanently* replace striking workers.<sup>192</sup> The subject of the lockout is not as well understood and, once understood, not as generally accepted on a conceptual level. In the early days of the development of the law relating to lockouts, it was generally accepted that lawful lockouts must be defensive: employers could defensively lock out employees if there was a risk that a union

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<sup>189</sup>*Id.*

<sup>190</sup>The right to strike is explicitly protected by Sections 7 and 13 of the NLRA. 29 U.S.C. § 157 (2006).

<sup>191</sup>*NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333, 343 (1938). Employees who strike for economic reasons, for example in order to secure a pay raise or an improvement in benefits, may be permanently replaced. Permanent replacement means that a striking employee is entitled to return to work only upon the departure of the worker who replaced the employee. Employees who strike because of the employer's commission of an unfair labor practice—a violation of Section 8 of the NLRA—are entitled to reinstatement to their jobs at the end of the strike, even if a replacement must be discharged to make room for the unfair labor practice striker. *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 379 n.5 (1967).

<sup>192</sup>*See, e.g.,* Stephen A. Yokich, *The Striker Replacement Doctrine as Seen by a Union Attorney*, LERA PERSPECTIVES ON WORK (Fall 2006), available at <http://www.lera.uiuc.edu/Pubs/Perspectives/onlinecompanion/Fall06-Yokich.htm> (last visited Apr. 18, 2013).



might strike when the employer was especially vulnerable.<sup>193</sup> While even this rule was never free from theoretical challenge, it seemed defensible as part of the statutory symmetry of labor law.<sup>194</sup> If workers could strike in a way that could seriously and possibly permanently harm an employer's business, employers could lock them out.<sup>195</sup> There was arguable symmetry provided that all the employer was attempting to do was protect its business from the abnormally-injurious fallout of a well-timed strike. Of course, it was also observed that employers already had a counterbalance to the strike in the hiring of permanent replacements.

Then came the dawning of the legality of the "offensive" lockout. In *American Ship Building Co. v. NLRB*,<sup>196</sup> the employer locked out its unionized employees before they had the opportunity to strike during the cold winter months when the Great Lakes were unnavigable and the company therefore experienced the height of its dry dock business.<sup>197</sup> Previously, the employer had bargained with various unions who had strategically struck during the busy season, and the employer was determined not to let it happen again.<sup>198</sup> The NLRB found a violation of the NLRA.<sup>199</sup> It articulated its then-existing doctrine that lockouts were permissible only when a strike was imminent and even then only in certain situations: "in order to protect the property of customers, or to prevent waste or spoilage of perishable inventories, or where the public safety and welfare are in danger."<sup>200</sup> The Supreme Court squarely rejected the NLRB's view that the employer carried out the lockout merely "to resist the demands made of it in the negotiations and

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<sup>193</sup>See Robert F. Koretz, *Legality of the Lockout*, 4 SYRACUSE L. REV. 251, 267 (1953); see also *NLRB v. Truck Drivers Local Union No. 449 (Buffalo Linen)*, 353 U.S. 87, 97 (1957) (holding lockout lawful in context of whipsaw strike).

<sup>194</sup>William Feldesman & Robert F. Koretz, *Lockouts*, 46 B.U. L. REV. 329, 329-30 (1966).

<sup>195</sup>See Dell Bush Johannesen, *Lockouts: Past, Present, and Future*, 1964 DUKE L.J. 257, 260 (1964).

<sup>196</sup>380 U.S. 300 (1965).

<sup>197</sup>*Id.* at 302.

<sup>198</sup>*Id.*

<sup>199</sup>*Am. Ship Bldg. Co.*, 142 N.L.R.B. 1362, 1364-65 (1963).

<sup>200</sup>*Id.* at 1364.

to secure modification of these demands.”<sup>201</sup> The Court famously found “nothing in the [NLRA] which would imply that the right to strike ‘carries with it’ the right exclusively to determine the timing and duration of all work stoppages.”<sup>202</sup> Thus, it has come to be understood that *American Shipbuilding* “has obliterated, as a matter of law, the line previously drawn by the Board between offensive and defensive lockouts.”<sup>203</sup>

A couple of additional rules regarding lockouts are necessary to make some obvious points about the perception of lockouts to all but the most esoteric of observers. First, lockouts that are made purely in support of bargaining positions without even a hint of the business exigency found in *American Shipbuilding* are perfectly lawful.<sup>204</sup> Second, bargaining lockouts—that is, those that make no claim to being defensive—can be lawfully executed by an employer even if the parties have not reached a bargaining impasse.<sup>205</sup> Finally, employers may lawfully obtain the services of temporary replacements during a lockout, though they may not permanently replace locked out workers.<sup>206</sup> However, the employer’s motive for locking out workers may not lawfully be “anti-union.” That is, the employer may not take the action for an anti-union motive or for the purpose of interfering with employee rights to be represented by a union.<sup>207</sup>

From the perspective of economically vulnerable workers, this set of rules is perilous. All is well and good, of course, if a union and an employer agree to a collective bargaining contract. But suppose they cannot agree and reach a bargaining impasse, a point at which good-faith negotiations have exhausted the prospects of concluding an agreement. After bargaining to

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<sup>201</sup> *Am. Ship Bldg. Co. v. NLRB*, 380 U.S. at 309.

<sup>202</sup> *Id.* at 310.

<sup>203</sup> *Evening News Ass’n*, 166 N.L.R.B. 219, 221 (1967).

<sup>204</sup> *Boehringer Ingelheim Vetmedica, Inc.*, 350 N.L.R.B. 678, 679 (2007).

<sup>205</sup> *Aldan Leeds, Inc.*, 357 N.L.R.B. No. 20, slip op. at 16 (2011) (citing *Darling & Co.*, 171 N.L.R.B. 801, 802–03 (1968)).

<sup>206</sup> *Harter Equip., Inc.*, 280 N.L.R.B. 597, 597 (1986).

<sup>207</sup> *Id.*

an impasse, an employer does not violate the Act by making unilateral changes that are “reasonably comprehended” within its pre-impasse proposals.<sup>208</sup> In other words, the employer may as a practical matter unilaterally implement the terms over which the parties have deadlocked in bargaining.<sup>209</sup> Suppose the union does not like unilateral implementation. It may lawfully call a strike of employees, and the employer may lawfully permanently replace the striking employees. In theory, the employees can wait out the strike. In practice, they cannot.<sup>210</sup> Therefore, the union decides not to strike. The employer can nevertheless lock out employees in the event that the union declines to accept its proposals, even if the parties have not reached an impasse over the disputed issues. Is not the message to the union, “agree with us, and fast, or the employees you represent will find themselves promptly out of work?” As the *coup de grace*, the employer may “temporarily” replace striking workers during the lockout, though the temporary nature of replacement is misleading as it is permissible for the duration of the lockout.<sup>211</sup>

Many casual observers of sports labor disputes assume that work stoppages—for example, the recently resolved 2012–2013 NHL labor dispute—are brought about by player strikes. But as should now be clear, it is very dangerous for any union to engage in a strike. It is true that replacing striking workers is more difficult when they perform jobs requiring more than ordinary skill. Replacing a striking grocery clerk would normally be easier than replacing a striking aircraft mechanic. This principle might cause one to assume that professional athletes are not replaceable. But experience shows that this is not the case. In fact, the NFL won a

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<sup>208</sup>Taft Broadcasting Co., 163 N.L.R.B. 475, 478 (1967), *aff’d sub nom.* Am. Fed’n of Television & Radio Artists v. NLRB, 395 F.2d 622 (D.C. Cir. 1968).

<sup>209</sup>For a compelling argument that this nearly automatic allowance itself departs from what was permitted under earlier labor law, see generally Ellen J. Dannin, *Collective Bargaining, Impasse and Implementation of Final Offers: Have We Created a Right Unaccompanied by Fulfillment*, 19 U. TOL. L. REV. 41 (1987).

<sup>210</sup>See generally JULIUS G. GETMAN, *THE BETRAYAL OF LOCAL 14: PAPERWORKERS, POLITICS, AND PERMANENT REPLACEMENTS* (1999) (chronicling the bitter and ultimately unsuccessful attempts of paperworkers in Jay, Maine to sustain a strike after being permanently replaced and the toll the dispute took on the entire community).

<sup>211</sup>See NLRB v. Brown, 380 U.S. 278, 284 (1965); Int’l Bhd. of Boilermakers Local 88 v. NLRB, 858 F.2d 756, 766 (1988).

resounding victory during the 1987 strike season as fans came out to watch—in this writer’s opinion—simply awful football.<sup>212</sup> That loss for the players demonstrated what others in the labor movement had long since learned: strikes only work when the labor movement is able to persuade a much broader community of the inherent justice of its underlying cause.<sup>213</sup> This is the essential theory of the union “corporate campaign.” To be blunt, it is simply difficult to gain support from the general public for athletes widely perceived to be “already wealthy.”<sup>214</sup>

Giving the employer the right to both replace and lock out workers creates a devastating arsenal of weapons at the employer’s disposal; for if a union is too weak to strike, it is probably also too weak to sustain a lockout. The interesting question is why it took employers so long to uncover the inner logic of *American Shipbuilding*. I am aware that many judges and policymakers view this state of affairs as perfectly acceptable and even logical. I happen to strongly disagree, but that is not really the question. Is it really possible to imagine that the architects of the National Labor Relations Act had any such system in mind? The right to strike means the right to strike. Expansion of the lockout obviously vitiates it. After all of the *Sturm und Drang* associated with employee designation of a union, we have arrived at a moment of realpolitik in which employees have rights until they disagree with their employers over terms and conditions of employment, at which point they have *nothing*. I suppose that is one way to achieve industrial peace, at least in the short term.

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<sup>212</sup>See Lock, *supra* note 16, at 404.

In 1987, many fans attended the replacement games and, when the walkout ended, fans seemed to forget the strike ever took place. Few employers in other industries could respond to a work stoppage by hiring inferior employees and producing an inferior product without the fear of losing market share and employees to a competitor. Few other employers or multi-employer bargaining units enjoy the type of monopoly and monopsony power enjoyed by the NFL owners. Not surprisingly, few unions face the same disadvantages at the bargaining table as the NFLPA.

*Id.*

<sup>213</sup>*Id.*

<sup>214</sup>*Id.* at 403–04.

## VI. BACK TO BRADY

I return now to *Brady*, a case that seems the archetype of devolution. The NFL possessed lockout power and exercised it. The players tactically resigned from the union in a manner that I think strayed far from the original music of the NLRA,<sup>215</sup> but under this law one can wonder what they were supposed to do. The district court played fast and loose with the players' sham disaffiliation and did not *seriously* consider the possibility of deferring to the NLRB's primary jurisdiction on the question.<sup>216</sup> The NLGA was torn to tatters. While purporting not to address the question of when the nonstatutory labor exemption expires,<sup>217</sup> by applying the NLGA to the players' antitrust injunctions, the court strongly implied that it *never* will. If a labor dispute or its logical outgrowth continues to exist within the meaning of the NLGA after union disaffiliation, or, I imagine, after union decertification (the courts have not bothered to distinguish the processes), when would there *not* be *some* outgrowth of a dispute that *might* be resolved through the collective bargaining process? The expandable kernel of *Brady*, therefore, is that the players are bound in perpetuity to a "collective bargaining process" that perhaps once was but is no longer. It is a trap: "you can check out any time you want, but you can never leave."<sup>218</sup> What was once the workers' law has been subverted to serve interests far removed from workers. The outcome in *Brady* had nothing to do with a "collective bargaining process." As Ethan Lock has said so well,

[t]he purpose of the NLRA, however, will not be realized where the agreement reached is based not on consent, but on a significant mismatch in relative

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<sup>215</sup>It is true that the Supreme Court has opined that it is not for the NLRB to assess the legitimacy of economic weapons employed by the parties to a labor dispute. But where the weapon chosen represents a kind of abuse of process, it seems much harder to ignore its use.

<sup>216</sup>I understand that cases cannot magically make their way from a court to an agency, *Local Union No. 189, Amalgamated Meat Cutters v. Jewell Tea Co.*, 381 U.S. 676, 687–88 (1965), and the NFL—whatever its reasons—did not pursue the issue by filing an RM petition. Perhaps the court could have appointed a magistrate to consider the question in the absence of an NLRB vehicle to address it.

<sup>217</sup>*Brady III*, 644 F.3d 661, 682 (8th Cir. 2011).

<sup>218</sup>EAGLES, *Hotel California, on HOTEL CALIFORNIA* (Asylum 1976).

bargaining positions. The requirement of good faith, arm's-length negotiations suggests that the union must be strong enough to extract some concessions from management. At some point the parties' relative bargaining positions are so unequal that the agreement is not the product of arm's-length negotiations. In those cases such an agreement clearly fails to properly accommodate competing antitrust and labor policies.<sup>219</sup>

Unions cannot win under the present state of the law. If you cannot win with Tom Brady at the helm, when *can* you win?

## VII. THE FUTURE LIES AHEAD<sup>220</sup>—FROM BRADY TO THE WILD BLUE YONDER

At present, *Brady* is the biggest case in which the court chose to simply ignore the history of the NLGA. If the other major and minor instances of disregard of labor law that I have discussed are devolutionary and represent “a sleep and a forgetting,”<sup>221</sup> *Brady* represents the utterly forgotten fountainhead of labor law and announces that “devolving” has concluded and “devolution” has arrived. When a student asks me what is “going on” in an NFL labor case like *Brady*, I immediately provide the student with my office hours and an invitation to visit me later, as it is unlikely that I will be able to communicate even the vague outline of the issues I have discussed in this essay in a short, impromptu meeting. I submit that such operational complexity is both unhealthy to society at large and dispiriting for the broader labor relations community. But the complexity of the case is merely emblematic of deeper labor policy instability.

I was pleased to see that a former Chair of the NLRB, Peter C. Schaumber, would be delivering the keynote address at the symposium of which this essay forms a part. It is always a good opportunity for students, practitioners, and academics to gain the perspective of those who have functioned in government positions relevant to a specific practice area. But when the

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<sup>219</sup>Lock, *supra* note 16, at 397–98.

<sup>220</sup>I have borrowed this delicious tautology from Mort Sahl's classic 1959 comedic album. MORT SAHL, *THE FUTURE LIES AHEAD* (Verve Records 1959).

<sup>221</sup>William Wordsworth, *Ode; Intimations of Immortality from Recollections of Early Childhood*, in *THE OXFORD BOOK OF ENGLISH VERSE: 1250-1900* (Sir Arthur Thomas Quiller-Couch ed., 1919), available at <http://www.bartleby.com/101/536.html>.

former functionary proposes that the very governmental unit of which he had been a part be eliminated, as Mr. Schaumber did, one realizes the exceptionally unstable nature of the times. Mr. Schaumber's proposal, as I remember hearing it at the symposium, was that the powers of the NLRB should be transferred to the federal judiciary because the present incarnation of the NLRB has been acting lawlessly by "unilaterally" altering interpretations of the NLRA without adequate legal justification, especially in comparison with prior iterations of the NLRB.

It is very hard for me, as an administrative and labor law professor, to take such an objection too seriously. As my students complain, the study of the labor law of the last fifty years is in essence a study of the NLRB's shifting positions on various classic issues and the courts' reactions to those shifts.<sup>222</sup> On the broader merits, however, Mr. Schaumber and I may have some points of agreement. A deep irony is instantly presented, however, in any proposal suggesting that labor law be turned over in total to the federal courts. Such a proposal ignores the class dimensions of the origins of modern labor law. As I have indicated, labor law was essentially born through a statute, the NLGA, which was profoundly hostile to the federal judiciary. To return labor disputes to the same judiciary is completely inimical to twentieth century ideas of labor relations.

In partial defense of Mr. Schaumber, however, I think that his proposal has the virtue of trying to break what is an obvious impasse in federal labor relations law. I share his view that the present state of affairs is unacceptable, but my reasons are vastly different from his. Nevertheless, I am not hostile to rethinking the policy foundations of labor law with scholars and commentators I suspect (or am certain) do not share my worldview, which is decidedly "pro-worker." At the heart of the labor policy problem, as I have already contended, is the absence of

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<sup>222</sup>Many former students of labor law, for example, may recall being exposed to the NLRB's violently shifting positions on the regulation of misrepresentations during representation election campaigns. It was a subject of which my labor law professor, alas, was extremely fond.

the kind of industrial strife originally contemplated by the design of federal labor law. Reliance on the “bargaining power” rationale of the NLRA, an explicit statutory policy justification of the Act,<sup>223</sup> depends on acceptance of contested Keynesian economic principles.<sup>224</sup> Furthermore, the bargaining power rationale is inextricably linked to industrial strife. The theory is that denial by employers of employees’ right to organize and refusal by employers to accept collective bargaining burdens commerce by, among other things, “causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.”<sup>225</sup> Thus, the policy justification of conferring bargaining power on employees is to prevent strikes and industrial unrest that may in turn decrease wages and purchasing power, which ultimately may disrupt the market for goods in interstate commerce. But, again, if there is no industrial unrest in the first place, the entire loop is called into question.

One answer to this problem is that the lull in industrial strife is only temporary. This response is in accord with Holmes’s view that labor-management conflict is “eternal.”<sup>226</sup> The possibility cannot be dismissed but implicitly assumes that “industrial peace” is both cyclical and fundamentally economic. However, there is good reason to believe that such peace is

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<sup>223</sup>The relevant section of the NLRA states:

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.

29 U.S.C. § 151 (2006) (emphasis supplied).

<sup>224</sup>*See id.* For evidence that Keynesian economic principles remain contested, see generally BURTON W. FOLSOM, JR., *NEW DEAL OR RAW DEAL?: HOW FDR’S ECONOMIC LEGACY HAS DAMAGED AMERICA* (2008).

<sup>225</sup>The relevant section of the NLRA states:

The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by . . . causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

29 U.S.C. § 151 & 151(d).

<sup>226</sup>*See* *Vegeahn v. Guntner*, 167 Mass. 92, 108 (1896) (Holmes, J., dissenting).



psychological and attitudinal.<sup>227</sup> In the meantime, we are faced with the kind of devolution that cases like *Brady* reflect. Can we continue to sustain flagging confidence in the rule of law indefinitely?<sup>228</sup> It seems unlikely. It simply will not do to merely await industrial strife, even if we believe on some level that it must be coming.

As Professor Joseph Singer has argued, lawyers in recent years tended to eschew normative arguments in favor of utilitarian, social welfare arguments that appear—at least on the surface—more manageable because expressed in terms of quantifiable cost-benefit analyses.<sup>229</sup> I think some of this dynamic was evident at the time of the enactment of the NLRA, but not simply because the statute’s lawyer-drafters were uncomfortable with expressing labor rights in moral terms. Ultimately, the NLRA had to be justifiable on constitutional grounds, and the protection of interstate commerce—as well as the cost-benefit analysis implied in such protection—suited that purpose. I accept that decision, as I must, though I can imagine purely normative reasons for preventing the formation of what Jeff Faux presently terms “the Servant Economy.”<sup>230</sup> Yet it seems incontestable to me that we are now in a different historical place. The question is, what is labor law *for* now? I am persuaded by Professor Singer that lawyers and law makers can and should play a larger role in posing and attempting to answer such questions.<sup>231</sup>

Professor Harry Arthurs has shown that there are various approaches offering answers to

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<sup>227</sup>Herbert R. Northrup & Harvey A. Young, *The Causes of Industrial Peace Revisited*, 22 INDUS. & LAB. REL. REV. 31 (1968) (reviewing case studies of companies involved in peaceful labor relations with unions and finding that positive outcomes were usually correlated with psychological and not economic factors).

<sup>228</sup>At this very symposium, both former NLRB Chairman Schaumber and former NLRB member John Raudabaugh contended that certain NLRB current practices failed to comport with the rule of law. I am not as interested in whether the claim is true as I am in the phenomenological reality that significant sectors of the legal community and the general public believe it to be true.

<sup>229</sup>Joseph William Singer, *Normative Methods for Lawyers*, 56 UCLA L. REV. 899, 927 (2009).

<sup>230</sup>*See generally* JEFF FAUX, *THE SERVANT ECONOMY: WHERE AMERICA’S ELITE IS SENDING THE MIDDLE CLASS* (2012).

<sup>231</sup>Singer, *supra* note 229, at 928–29.

the question of the purpose of labor law.<sup>232</sup> Labor law might be embedded in a regime of “fundamental and universal human rights”;<sup>233</sup> it might “empower workers by facilitating their accumulation of human capital and the realization of their human capacities”;<sup>234</sup> it might “remain unchanged: to enable workers to mobilize to seek justice in the workplace and the [labor] market.”<sup>235</sup> In thinking about big changes to labor law, however, one immediately faces the American reality of legislative gridlock that is likely to continue for the foreseeable future. The challenge is how to reimagine labor law along lines that could conceivably be accepted by the present intractable societal antagonists of “liberal” and “conservative.” Some “liberal” scholars have essentially argued that the original labor law must be retaken, whether through legislative changes or judicial reinterpretation.<sup>236</sup> But in the absence of an extreme shock to the established political landscape, that is simply not going to happen. It is just as unlikely, however, that “conservative” forces will be able muster enough strength to eliminate the weakened and distorted labor law on the books. It seems to me there are two *cooperative* choices remaining. One could soldier on with the status quo and witness the ongoing and potentially escalating contortion of the law represented by cases like *Brady*. Or one could break the present impasse by abandoning the federal project altogether, an option that might be agreeable to liberals and conservatives alike. Even organized labor might sign on. Former AFL-CIO president Lane Kirkland once famously said, in a late 1980s interview with the New York Times, “[a]s between present law and no law, I’d prefer no law.”<sup>237</sup> I might add that at this point in history, as between law that is a game—winnable only by elites, without policy foundation, and premised on obvious

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<sup>232</sup>Harry Arthurs, *Labour Law After Labour* 14–15 (Osgoode Hall Law Sch. Comp. Res. in L. & Pol. Econ., Research Paper No. 15, 2011), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1791868](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1791868).

<sup>233</sup>*Id.* at 23.

<sup>234</sup>*Id.* at 24.

<sup>235</sup>*Id.* at 27.

<sup>236</sup>*See, e.g.*, DANNIN, *supra* note 7.

<sup>237</sup>Martin Tolchin, *A.F.L.-C.I.O. Chief Laments State of Labor Laws*, N.Y. TIMES (August 30, 1989), available at <http://www.nytimes.com/1989/08/30/us/afl-cio-chief-laments-state-of-labor-laws.html> (last visited Apr. 18, 2013).

fictions—and no federal labor law at all, I would prefer no federal labor law at all.

One thing is clear, however. Labor law of whatever kind has never been a substitute for a vibrant labor movement. Law follows the *Zeitgeist* of working people; it does not lead, though it may make things easier by smoothing the way. One way or the other, through action or inaction, workers will have significant input respecting their own fate. As we witness the devolution of labor law that *Brady* so ably embodies, I am reminded of Professor Alan Hyde's theory that, "[l]abor law in contemporary advanced economies . . . is frequently, perhaps typically, a vehicle for concessions to disruptive worker movements by threatened elites."<sup>238</sup> A corollary of that proposition is that where there is no disruption, there are no concessions. *Brady* takes us one step further; where there are no concessions for a significantly long period of time, the law forgets the music of the compromise and devolution is the result.

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<sup>238</sup>Alan Hyde, *A Theory of Labor Legislation*, 38 BUFF. L. REV. 383, 431 (1990).