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Pedagogy and Critique: *Values and Assumptions* in the Law School Classroom

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An old joke has it that a rabbi, a minister, and a priest were out fishing when the weather took a sudden cooler turn. Without a word, the minister stepped out of the rowboat and walked across the water's surface to retrieve his jacket from shore. A short while later, the rabbi made the same journey, returning to the boat sweater in tow. The priest—experiencing chills from the weather as well as from witnessing his colleagues' seemingly miraculous if not entirely unprecedented feat—offered a silent prayer, stepped gingerly over the gunnel, and sank straight to the bottom of the lake. Whereupon the rabbi turned to the minister and said, “I guess we should have told him where the rocks are.”

Jim Atleson's *Values and Assumptions in American Labor Law*¹—published just over a quarter century ago—set out to tell us where the rocks are in American labor law. Celebrated in a symposium hosted by the Baldy Center and

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

recently published in the *Buffalo Law Review*,² the book was part of a larger “demystification” project—traceable to the legal realists and reinvigorated with a nigh Oedipal vengeance by scholars associated with critical legal studies (“cls”)—the aim of which was to explore what “really” goes on beneath the surface of doctrinal analysis and apology. Prior to cls—back when we were “all realists now”—the usual suspects were “policy” (per the Realist Lite line I heard in my own first-year law classes circa 1975) and the contents of the judge’s breakfast (in the dismissive sound-byte version). But the Reloaded Realism of cls focused instead on ideology as the animating force in law and legality.

Ironically, critical scholars took the pretensions of doctrine far more seriously than had earlier demystification efforts—not for nothing were we called the New Langdells³—carefully exploring all the talk of rules and exceptions, principles and policies, statutory language and structure, legislative history and purposes, etc. for traces of unexamined ideological commitments that might be surfaced in the service of critique. And nowhere was that effort more fruitful than in the law of the workplace, where—Jim’s cls-distancing disclaimers notwithstanding—*Values and Assumptions* took its place alongside the similarly groundbreaking efforts of Karl Klare and Jim’s late, greatly beloved colleague Alan Freeman.⁴

A word or two about the crit-distancing. In the course of his remarks at the close of the live symposium, Jim was emphatic that *Values and Assumptions* was not a “critical legal study.” He struck a similar pose in the book itself, going out of his way to disassociate himself from the claims of his cls-identified contemporaries that the legal doctrine they were busy dismantling served “to make contingent

2. *Symposium on James Atleson’s Values and Assumptions in American Labor Law, A Twenty-Fifth Anniversary Retrospective*, 57 *BUFF. L. REV.* 629 (2009) [hereinafter *Symposium*].

3. See Joan C. Williams, *Critical Legal Studies: The Death of Transcendence and the Rise of the New Langdells*, 62 *N.Y.U. L. REV.* 429 (1987).

4. See Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 *MINN. L. REV.* 1049 (1978); Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 *MINN. L. REV.* 265 (1978).

political and social choices seem inevitable or natural.”⁵ (Been a long time since we’ve heard *that* line.) Yet in the same passage he pled guilty to “demystification”—forthrightly acknowledging that his aim was “to unmask or decode labor law”⁶—and, whatever the author’s intentions, *Values and Assumptions* is a classic of the demystification genre, debunking legalist claims of doctrinal entailment to expose the ways in which judges and other legal decision makers reach contestable results despite their “just doin’ my job, ma’am” professions. Indeed, Jim’s comments at the symposium seemed to suggest that the reason for his dismay at being lumped together with his cls-identified contemporaries was not as much that he disagreed with their work as it was that the lumping offends his visceral contrarian streak, an attribute that for my money makes him more like other prominent first-generation crits rather than less.

But *Values and Assumptions* did differ from contemporaneous critical scholarship in two important respects, and each of those differences may help account for the book’s enthusiastic reception among most labor law scholars, crit-distancing and otherwise. There was first Jim’s decision to put that felicitous appellation—“values and assumptions”—in lights, while relegating talk of “demystification” and “unmasking” to a footnote at the back of the book and avoiding altogether any reference to “deconstruction,” “trashing,” and other scary-sounding lingo of the sort one might have encountered in the *Lizard*, the official *samizdat*-style paper of cls for a brief period in the mid-1980s.⁷ “Values and assumptions” is an expression you can pretty safely take home to Mom, and attributing the disconnect between decidedly anti-labor Supreme Court opinions and the far more pro-labor statute they were purporting to interpret to “values and assumptions” went over far better in polite company than more muscular claims about decision making driven by “ideology” likely would have.

5. ATLESON, *supra* note 1, at 181 n.4; *see also* Dianne Avery & Alfred S. Konefsky, *James B. Atleson and the World of Labor Law Scholarship*, 57 BUFF. L. REV. 629, 639-41 (2009) (oral history quoting Atleson to the same effect).

6. ATLESON, *supra* note 1, at 181 n.4.

7. *See generally* Gary Minda, *Remembering the Eighties: The Lizard Goes to the AALS*, 75 UMKC L. REV. 1161 (2007).

This, I would argue, was more a rhetorical difference than one of substance, for the doctrine-trumping “values and assumptions” Jim famously uncovered—the “rocks” hidden beneath the surface of doctrinal profession—were profoundly ideological: that “the continuity of production must be maintained” (and the statutory right to strike thus narrowly circumscribed); that “employees, unless controlled, will act irresponsibly” (whereas employers could be trusted not to exploit the privileges and loopholes of labor law); that employees—much like the servants of nineteenth-century common law—owed a non-reciprocal duty of “respect and deference” to their masters that “need not be earned but, rather, was implicit in the employment relationship”; that employees were merely guests in the workplace and their statutory rights thus had to “compete with shadowy notions about employer ownership”; and finally that employees could play only a subservient role in workplace governance because a full and genuine partnership would interfere with the “inherent and exclusive managerial rights of employers.”⁸ Referring to these notions as “values and assumptions”—rather than, say, as the Five Pillars of Capitalist Oppression—softened the blow of what was otherwise a deeply convention-challenging account of American labor law.

Jim’s book departed from what was widely assumed to be cls orthodoxy in a second respect (and don’t get me started on the causes and consequences of *this* assumption). Referring to the patterns of thought he exposed and critiqued as “values and assumptions” avoided the suggestion that legal decision making is the product of some sort of ruling class conspiracy, leaving open the kinder and gentler possibility that judges are among the mystified rather than the mystifiers. To be sure, most contemporaneous cls work took as its starting point a critique rather than an embrace of such “vulgar Marxist” notions (in the formulation used by many early crits, doing some distancing of their own) and explored a considerably more complex relationship between ideology and law than what was (and still is) frequently attributed to scholars associated with cls. And in retrospect Jim’s shorthand phrase may have erred in the opposite direction, suggesting as it did a benign dynamic of individual rather than social

8. ATLESON, *supra* note 1, at 7-9.

provenance; who among us, after all, doesn't have values and assumptions? But it was far more difficult for mainstream academics to dismiss an account of judicial decision making based on unexamined "values and assumptions" than it would have been had Jim ascribed the dynamic he so astutely unveiled to one big capitalist plot.

At all events, the principal reason for the book's continuing influence and high iconic status in our field is that its basic point was undeniably *right*. To mention just a few from the long list of labor law decisions scrutinized in *Values and Assumptions*, there's the famous dictum from *Mackay Radio*⁹ (now routinely treated as law) that employers may permanently replace strikers despite a provision in the National Labor Relations Act declaring that "[n]othing in this [Act] shall be construed so as to interfere with or impede or diminish in any way the right to strike[;]"¹⁰ there's the holding in *First National Maintenance*¹¹ that employers may cease operations without consulting the union representing their employees despite a statutory provision requiring collective bargaining over decisions affecting "rates of pay, wages, hours of employment, or other conditions of employment[;]"¹² and there's the holding in *Gateway Coal*¹³ that employers may punish employees who refuse to work for fear of abnormally dangerous conditions unless the refusing employees establish not only their "good faith"¹⁴—as required by the language of the statute—but also the objective accuracy of their assessment under a judicially improvised requirement that the feared conditions "actually obtain."¹⁵

As Jim convincingly demonstrated,¹⁶ decisions like these are far more plausibly attributable to extra-legal commitments—however conscious and whatever we call

9. NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333, 345 (1938).

10. National Labor Relations Act § 13, 29 U.S.C. § 163 (2006).

11. First Nat'l Maint. Corp. v. NLRB, 452 U.S. 666, 674-86 (1981).

12. National Labor Relations Act § 9(a), 29 U.S.C. § 159(a) (2006).

13. Gateway Coal Co. v. United Mine Workers, 414 U.S. 368 (1974).

14. Labor Management Relations Act § 502, 29 U.S.C. § 143 (2006).

15. *Gateway Coal*, 414 U.S. at 386.

16. See ATLESON, *supra* note 1, at 19-34 (discussing *Mackay Radio*), 111-35 (discussing *First National Maintenance*), 97-107 (discussing *Gateway Coal*).

them—than to the supposed entailments of legal reasoning. And as the papers in the published symposium authored by an impressive line-up of contemporary labor scholars and practitioners attest, that core insight continues to guide progressive work in the labor law field to this day.¹⁷

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I want to focus the remainder of my essay on a related but distinct legacy of *Values and Assumptions*—on the role it played in the *teaching* of labor law during the decade or two following its publication. Until I re-read the book in preparation for the live symposium, I had forgotten that it begins with a story about an incident in a labor law class Jim taught early in his career. A puzzled student—reacting to decisions like those recounted a moment ago—asked why courts kept ignoring employee rights that were “clearly and unequivocally set out in the National Labor Relations Act” in favor of limitations that were “neither discussed in the legislative debates and reports nor expressed in the statute.”¹⁸ Jim described the St. Paul moment that the question inspired thus:

I began patiently to answer with the verities I had been taught, that no statute or right is absolute and that all rights had to be balanced against competing interests. I could not continue. Suddenly, the traditional dogma no longer made sense. Removing blinders does not, in itself, create understanding. This book is an attempt to answer the question.¹⁹

In Jim’s characteristically modest account, then, a student is the source of the question that . . . well, killed conventional legal studies, and the initial audience for Jim’s attempt to grapple with it was a law school class.

Jim thus “broke the seal” between frequently dichotomous dimensions of legal academia—teaching and scholarship—and in this he was not alone. My own introduction to first-generation cls work was Duncan Kennedy’s Contracts course in the fall of 1975, and his seminal critical legal study—*Form and Substance in Private*

17. See *Symposium*, *supra* note 2.

18. ATLESON, *supra* note 1, at 1.

19. *Id.*

*Law Adjudication*²⁰—came out the following summer and provided a virtual roadmap of that unforgettable class. Karl Klare was likewise bringing critical scholarship to the classroom and critical pedagogy to his writing—his *Contracts Jurisprudence and the First-Year Casebook*²¹ is a classic of the genre—and his success in doing so was confirmed when the *American Lawyer* (at the time an upstart publication seeking to become the *Rolling Stone* of a profession otherwise extremely short on rock stars and exposés) featured Karl and fellow traveler Roberto Unger among a handful of the most popular and promising young law professors in the U.S.

In retrospect, I think that a crucial link between critical teaching and critical scholarship was the demystification project. Law students—accustomed as they were to Socratic and exam experiences that all too frequently produced the sensation of drowning in the conventional legal materials—were eager to learn “where the rocks are.” And for a complex mix of reasons—to humanize the exercise of professorial power, to avenge the injustices of our own student experiences, and most of all to produce lawyers better equipped to negotiate the terrain of legal analysis and argument—scholars associated with cls were eager to help students find their footing.

In an homage to such efforts by our own teachers, many of us who entered the legal academy in the 1980s focused our early publications on classroom exercises and experiences: Jamie Boyle’s *The Anatomy of a Torts Class*²² and Jenni Jaff’s *Frame-Shifting: An Empowering Methodology for Teaching and Learning Legal Reasoning*²³ come quickly to mind, as does Jeremy Paul’s *A Bedtime Story*, an engaging account of a child’s dispute with his babysitter that has demonstrated to legions of beginning students that they come to law school more familiar than

20. Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976).

21. Karl E. Klare, *Contracts Jurisprudence and the First-Year Casebook*, 54 N.Y.U. L. REV. 876 (1979) (book review).

22. James Boyle, *The Anatomy of a Torts Class*, 34 AM. U. L. REV. 1003 (1985).

23. Jennifer Jaff, *Frame-Shifting: An Empowering Methodology for Teaching and Learning Legal Reasoning*, 36 J. LEGAL EDUC. 249 (1986).

they'd ever imagined with the arguments routinely deployed by American lawyers and judges.²⁴ And my own "fifteen minutes of fame" arrived when a classroom hypothetical— included in an essay about cls and designed to prompt my labor law students to think critically about why it is that profits follow capital rather than labor—was reprinted in the "Week in Review" section of the *New York Times* under the caption "What the Fuss Is About."²⁵

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Values and Assumptions was published in 1983, the year I left practice for teaching. I devoured the book in a single sitting, sorry only that I hadn't read it before I began my half-decade as an appellate lawyer for the National Labor Relations Board—where, like the priest in the rowboat, for want of a map I had plunged into the abyss on more than one occasion. Determined that things would be different for my own students, I assigned the book as required reading for my labor law class that year and for many years after.

Early on, *Values and Assumptions* was a major hit with the student audience. Naturally, it held the most appeal for left-progressives who came to law school with a basic faith in law as an instrument of social justice but didn't much like most of the law they were encountering in their classes. For them, the book's account of benevolent legislative commands repeatedly subverted by unspoken judicial "values and assumptions" rendered the many adverse decisions lawless and illegitimate, producing the exhilarating experience of seeing the emperor without clothes.

The conservatives found themselves exhilarated in a different way: "Of course we should privilege uninterrupted production and employer property rights," they would argue, a little nervous about the methodology (none dared call it judicial activism) but delighted to learn that at least *something* stood between private enterprise and what they

24. Jeremy Paul, *A Bedtime Story*, 74 VA. L. REV. 915 (1988).

25. The hypothetical can be found in Richard Michael Fischl, *Some Realism About Critical Legal Studies*, 41 U. MIAMI L. REV. 505, 527-28 (1987) and the *Times* version at Jennifer A. Kingson, *Harvard Tenure Battle Puts 'Critical Legal Studies' on Trial*, N.Y. TIMES, Aug. 30, 1987, § 4 (Week in Review), at 6.

perceived to be the liberal excesses of the Labor Act and the NLRB.

The political moderates—meaning most of my students—didn't experience the exhilaration but nevertheless came away from the book and our discussions of it sobered by what they processed as the “anti-labor bias” of American courts. Moreover, they were grateful for the powerful tool that the “values and assumptions” analysis gave them for organizing and understanding the voluminous course materials; indeed, before “legal theory” developed a bad name in student circles, this was a view that seemed to be shared by my students of every political stripe.

As the years passed, however, class discussions and exam-grading revealed that my students were increasingly relying on sound-byte versions of the book's rich and nuanced arguments, many of them reading only the introductory chapter (which conveniently listed the previously mentioned Five Pillars) or a student digest of same. The exhilaration that *Values and Assumptions* had at one time generated gave way to increasingly rote and stultified analyses, and at some point in the mid-1990s I stopped assigning the book as required reading.

A number of factors, I think, had led to the diminished efficacy of “values and assumptions” analysis in my classroom. For one thing, I had myself begun to move on to other interests in the labor law field. I found that I greatly enjoyed teaching the intricacies of secondary boycott and recognitional picketing law—topics that Jim's book hadn't covered—and began devoting more class time to those topics each year. Moreover, as a result of my involvement in the 1990s with an international network of progressive labor law scholars and practitioners (Intell), I began to emphasize international and comparative labor issues and also to question the conventional boundaries of the field by exploring immigration, poverty law, and work/family conflict issues that had not previously been on my radar. Likewise, I eagerly reconfigured my course to explore the new organizing strategies developed by the labor movement in the last decade and a half—strategies that rely less on NLRB protection and enforcement and more on collective self-help (thus increasing the importance of the limits on secondary boycotts and recognitional picketing) as well as recourse to areas of work law that lie beyond the reach of the Labor Act (such as employment discrimination law, FLSA, and OSHA). As a result, many of the topics covered

in *Values and Assumptions* loomed less and less large in my labor courses.

A second factor related to a generational shift in the experiences and understandings that my students were bringing to class—a shift revealed to me by an exercise I conduct each year on the first day of class, when I ask each student to write out a brief explanation of the basis for her interest in the course and to state whether she or any member of her family has ever belonged to a labor union. When I started teaching at the University of Miami in 1983, a large majority of my students responded affirmatively to the latter query, many reporting first-hand experiences in a unionized workplace. (That may seem surprising given that Florida is a right-to-work state, but public sector unions were and still are relatively robust there, and for a variety of reasons an influx of police officers and public school teachers were pursuing law degrees at Miami in the early 1980s. During that period there was likewise a substantial cohort of former and soon-to-be former unionized employees of South Florida-based airlines at various stages of bankruptcy). By contrast, in a class I taught in the spring of 2000, not *one* of the students reported either first-hand or familial union experience, reflecting the steep decline in union density that had occurred in Florida and most everywhere else since the early 1980s. As a result, my principal challenge in teaching the labor law course was no longer accounting for the anti-union skew of judicial decision making but was instead helping my students to understand just what a union is and why anyone would want one.

I undertook a variety of strategies to fill that gap, at first assigning books like John Hoerr's account of the long and successful organizing campaign among the support staff at Harvard University²⁶ and Jonathan Rosenblum's account of the ill-fated Arizona copper strike of 1983.²⁷ Those books got some traction with students, but eventually I found far greater success when I started showing classic labor films (such as *Bread & Roses*, *Matewan*, and *Norma Rae*) that bring the experience of organizing to life for a generation

26. JOHN HOERR, *WE CAN'T EAT PRESTIGE: THE WOMEN WHO ORGANIZED HARVARD* (1997).

27. JONATHAN D. ROSENBLUM, *COPPER CRUCIBLE: HOW THE ARIZONA MINERS' STRIKE OF 1983 RECAST LABOR-MANAGEMENT RELATIONS IN AMERICA* (1995).

seemingly more in the thrall of films than of books—or perhaps merely more comfortable with their ability to analyze the former than the latter in the presence of a book-loving law professor. Reference to such films has considerably enriched and enlivened class discussion, and perhaps at some point I'll have the courage and the energy to follow the lead of gifted classroom teachers like Roberto Corrada and Marion Crain and permit my students to unionize and engage in collective bargaining with me over the terms and conditions of the labor law course—an exercise that by all accounts brings the virtues as well as the challenges of collective action and representation home to students in a manner unmatched by even the most compelling film.²⁸

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But perhaps the most important reason that *Values and Assumptions* had lost its “kick” in my classroom was that I was relying too much on the book to get its core message across to my students—and don't doubt for a moment that the message is as important to labor lawyers today as it was in 1983. In recent years, I have thus attempted to provoke my students into experiencing Jim's St. Paul moment on their own and have had considerable success by deploying the following exercise when we study *Lechmere, Inc. v. NLRB*,²⁹ the Supreme Court's 1992 decision permitting an employer to bar union organizers from soliciting support or distributing literature in the employee area of a shopping center parking lot or indeed anywhere else on its property.³⁰

Here, *verbatim*, is the opening sentence of the *Lechmere* opinion:

This case requires us to clarify the relationship between the rights of employees under § 7 of the National Labor Relations Act (NLRA

28. See, e.g., Roberto L. Corrada, *A Simulation of Union Organizing in a Labor Law Class*, 46 J. LEGAL EDUC. 445 (1996).

29. 502 U.S. 527 (1992).

30. For particularly illuminating analyses of the property access issue, see Dianne Avery, *Federal Labor Rights and Access to Private Property: The NLRB and the Right to Exclude*, 11 IND. REL. L.J. 145 (1989); Cynthia L. Estlund, *Labor, Property, and Sovereignty After Lechmere*, 46 STAN. L. REV. 305 (1994).

or Act), 49 Stat. 452, as amended, 29 U.S.C. § 157, and the property rights of their employers.³¹

And here is the question I put to my students when I ask them to read the case in preparation for class: *If you were a legal research and writing instructor at an American law school, and the foregoing line appeared in a student paper, what would you do with your red pen?*

When the next class convenes, I can count on at least one of my more meticulous students to point out that we're missing a legal citation—that the sentence in question introduces two sets of rights, those of employees and those of employers, but that only the former is accompanied by the required reference to authoritative legal materials. I am invariably tempted to follow up that response by asking what employees have to do to secure rights (a) that require no citation and (b) that win the way that employer rights do in *Lechmere*, but time permitting I slow things down and use the response as a springboard to the following discussion.

Let's give the Court a hand and provide the missing citation. What is it? Silence. Is it in the Labor Act? Mass shuffling of pages in the statutory supplement but otherwise continued silence. Does the Court tell us elsewhere in its opinion? More shuffling and more silence as—mirabile dictu—neither source yields an answer.

If no one has figured out the game at this point, I typically pose my next question: *Well, where do property rights usually come from?* I'll sometimes add a "From God?" and then riff a bit on the Baltimore Catechism, but someone will eventually force me back on track and respond that state common law is ordinarily the source of property rights. And that prompts my next question: *If employer property rights come from state common law, what should happen when they conflict with federal statutory rights?* Quite a few students are able to respond to this one by referring to the rock-paper-scissors hierarchy of legal authority: statutes trump common law and federal law trumps state law, so federal statutory rights should handily play scissors to the paper of state common law. *So why, I then ask, did just the opposite happen here?*

31. 502 U.S. at 529.

This frequently leads to a useful digression about whether the rock of the U.S. Constitution might be responsible for breaking the federal statutory scissors in *Lechmere*—i.e., whether a statute interpreted to give union organizers access to the public areas of privately owned shopping centers might constitute a “taking” under the Fifth Amendment—but this line of reasoning doesn’t get us very far, since (a) if the Supreme Court meant to declare a reading of the Labor Act constitutionally infirm it would almost surely have come right out and said so³² and (b) the Court’s decision in *Pruneyard Shopping Center v. Robins*³³—rejecting a “takings” challenge to a California state court decision granting free speech rights to individuals in public areas of shopping centers—pretty strongly suggests that a grant of such access to labor organizers under federal law wouldn’t constitute a “taking” either.

So I continue: *Let’s assume that the Court is right and that, when it comes to union organizing, state common law property rights do trump federal statutory rights. If that’s the case, what result if Lechmere arose in California?* Someone eventually figures out that the employer might have a difficult time, since after *Pruneyard* California employers don’t enjoy a state property law right to bar shopping center access for individuals engaged in expressive activities. *Can this possibly be what Congress intended—that in each case the NLRB is required to examine the particulars of local property law and that employee statutory rights will turn on the results of that inquiry? Is this a plausible reading of the National Labor Relations Act?* I don’t tell them at this point that the NLRB has adopted precisely that interpretation of *Lechmere* and thus looks to state law in order to determine whether the employer in a particular case in fact has a right to limit union access to the property in question³⁴—an approach that makes perfect sense until you think about it for ten seconds. (To be sure, I like the Board’s results, which tend to be far more favorable to organizer access claims than the common law that conservative Supreme Court Justices think they remember from law school. But as a method of interpreting a federal

32. See *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992) (no such luck).

33. 447 U.S. 74 (1980).

34. See, e.g., *Farm Fresh, Inc.*, 332 N.L.R.B. 1424, 1425-26 (2000); *Bristol Farms, Inc.* 311 N.L.R.B. 437, 439 (1993).

statute, this is absurd—although, like most instances of *reductio ad absurdum*, the problem lies in the premise, in this case the Supreme Court's assumption that common law property rights limit employee rights under the Labor Act.)

So isn't this really a question of statutory interpretation? If employer common law property rights are to come into play, isn't it because Congress intended them to trump or limit employee rights under the Labor Act? Is there anything in the statute to support that claim? Murmuring and more shuffling of books and papers. Does the opinion tie this point to legislative history? Ditto.

Until eventually a student ventures: "Well, I think the Court just *assumed* that property rights weren't displaced by the Labor Act." *Bingo, and now we can begin.*