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HOW STATUTES CREATE RIGHTS: THE CASE OF THE  
NATIONAL LABOR RELATIONS ACT

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INTRODUCTION

The National Labor Relations Act<sup>1</sup> (“NLRA”) has had a rough half-century. After decades of judicial and administrative limitations on the Act’s effectiveness, today, many of labor’s supporters are among the loudest critics of labor’s law.<sup>2</sup> One reason the law has fallen so far short of expectations is the tendency of the National Labor Relations Board (“NLRB”) and the courts to read the NLRA narrowly and allow another legal regime—whether common law or statutory—

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1 Pub. L. No. 74-198, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151–169 (2006)).

2 As early as 1983, unions still counted 20.1% of the workforce as members, compared to 11.3% in 2012. News Release, Bureau of Labor Statistics, Union Members—2012 (Jan. 23, 2013), available at <http://www.bls.gov/news.release/union2.nr0.htm>. It was in these early days that the AFL-CIO President Lane Kirkland suggested that unions would be better off repealing the NLRA and returning to the “law of the jungle.” Cathy Trost & Leonard M. Apcar, *AFL-CIO Chief Calls Labor Laws a ‘Dead Letter,’* WALL ST. J., Aug. 16, 1984, at A8. While labor law scholars have generally not gone that far, many have called for fundamental reforms. See generally JAMES A. GROSS, *BROKEN PROMISE: THE SUBVERSION OF U.S. LABOR RELATIONS POLICY, 1947–1994* (1995); PAUL C. WEILER, *GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW* 241–306 (1990); Robert J. Pleasure & Patricia Greenfield, *Toward Fundamental Change in U.S. Labor Law: A Law Reform Framework in RESTORING THE PROMISE OF AMERICAN LABOR LAW* 125–36 (Sheldon Friedman, et al. eds., 1994); Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1569 (2002) (suggesting labor law reform at state or local levels); Michael H. Gottesman, *In Despair, Starting Over: Imagining a Labor Law for Unorganized Workers*, 69 CHI.-KENT L. REV. 59, 61–62 (1994) (arguing for reform to move away from collective bargaining); Keith N. Hylton, *Law and the Future of Organized Labor in America*, 49 WAYNE L. REV. 685–698–702 (2003) (arguing for labor law reform that aims to slow the decline of unions); Benjamin I. Sachs, *Enabling Employee Choice: A Structural Approach to the Rules of Union Organizing*, 123 HARV. L. REV. 655, 660 (2010) (analyzing default and altering rules to point towards revised labor law).

to settle the case at bar.<sup>3</sup> This tendency has attracted scholarly criticism.<sup>4</sup> Yet, one basic question has gone unasked and unanswered. If courts have simply decided that the NLRA deserves less deference than other statutes with conflicting text or principles, what is wrong with that?

This Article attempts to answer that question.<sup>5</sup> It argues that the NLRA is a “super-statute,” worthy of special deference from the

<sup>3</sup> See, e.g., *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 149–51 (2002) (holding that undocumented workers who have had their NLRA rights violated cannot recover damages because such a result would violate the spirit, if not the text, of the Immigration Reform and Control Act, Pub. L. No. 99-603, 100 Stat. 3359 (1986)). See also *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 538 (1992) (holding that employers’ right to exclude union organizers from their property for any reason trumps union organizers’ right to contact workers); Cynthia L. Estlund, *Labor, Property and Sovereignty After Lechmere*, 46 STAN. L. REV. 305, 308 (1994) (“The [C]ourt allowed this naked property right to trump the substantial statutory interests of organized employees.”). *Brown University* excluded graduate student teachers from the Act’s coverage in part to protect academic freedom, a concern that the Board decided precluded collective bargaining with graduate students. 342 N.L.R.B. 483, 493 (2004); Elizabeth Butler Baum, Casenote, *NLRB Refuses to Harm “Academic Freedom” at Universities by Permitting Graduate Students to Unionize*, 56 MERCER L. REV. 793, 801 (2005).

<sup>4</sup> See, e.g., Denise A. Calderon-Barrera, *Hoffman v. NLRB: Leaving Undocumented Workers Unprotected Under United States Labor Laws?*, 6 HARV. LATINO L. REV. 119 (2003) (arguing that *Hoffman Plastic* undercut the protection available to undocumented workers under U.S. labor laws); Robert I. Correales, *Did Hoffman Plastic Compounds, Inc. Produce Disposable Workers?*, 14 BERKELEY LA RAZA L.J. 103 (2003) (criticizing the NLRB’s decision of granting “employee” status to undocumented workers but denying backpay remedies); Cynthia A. Estlund, *Labor, Property and Sovereignty After Lechmere*, 46 STAN. L. REV. 305 (1994) (arguing that *Lechmere* represents an overbroad conception of the “right to exclude” supported neither by the NLRA nor state property law); Andrew S. Lewinter, *Hoffman Plastic Compounds v. NLRB: An Invitation to Exploit*, 20 GA. ST. U. L. REV. 509 (2003) (arguing that the “Supreme Court’s decision in *Hoffman Plastic* is inconsistent with both labor and immigration policy”); Wilma B. Liebman, *Decline and Disenchantment: Reflections on the Aging of the National Labor Relations Board*, 28 BERKELEY J. EMP. & LAB. L. 569, 582–83 (2007) (criticizing the “dubious policy grounds” of limiting the coverage of the Act); Sarah J. Bannister, Note, *Low Wages, Long Hours, Bad Working Conditions: Science and Engineering Graduate Students Should be Considered Employees Under the National Labor Relations Act*, 74 GEO. WASH. L. REV. 123, 124–25 (2005) (arguing that the “decision to deny graduate students ‘employee’ status under the NLRB is unjustified and irreconcilable” with the reality of graduate work); Ryan Patrick Dunn, Comment, *Get a Real Job! The National Labor Relations Board Decides Graduate Student Workers at Private Universities are Not “Employees” Under the National Labor Relations Act*, 40 NEW ENG. L. REV. 851, 855 (2006) (“[T]he Board’s tradition of interpreting the NLRA exclusively through adjudication . . . reduces the reliability of its decisions.”).

<sup>5</sup> While this Article will argue that the NLRA should receive a purposivist reading, it does not delve into exactly what the purpose of the statute is, particularly as it has been amended by the Taft-Hartley Act of 1947, Pub. L. No. 80-101, 61 Stat. 136. For this reason, this Article essentially ignores Taft-Hartley. While that law is certainly relevant to how the NLRA’s core purpose should be interpreted, it is not clear how or why a limiting amendment to a super-statute necessarily makes the statute less than super. Where the Taft-Hartley Act did not modify the provisions of the NLRA, those provisions should be

courts and vigorous enforcement by the Board. Because it passed after a prolonged period of informed and contentious public deliberation, the NLRA should be treated as more than an everyday public law.

In Part I, I define “super-statutes” and argue that they should be given special deference by the courts. In Part II, I analyze the administrative and political decisions made by key policymakers prior to passage of the NLRA and argue that the Act is a super-statute. Finally, in Part III, I examine the implications of treating the NLRA as a super-statute by discussing a case that would have gone the other way if the Supreme Court had used a super-statute analysis.

### I. WHAT IS A SUPER-STATUTE?

Much of the debate between judicial liberals and judicial conservatives can be summarized as a disagreement about which mechanisms are appropriate for expanding legal rights. Liberals have historically been more comfortable expanding rights by whatever means is available, including, in many cases, by judicial fiat. This has left liberals open to accusations of countermajoritarianism. Whatever the value of civil rights, some have argued, they should not come from unelected judges implementing values not shared by a majority of the American people.<sup>6</sup> Whether or not this criticism is made in good faith, it is made; and even some liberals find it to have merit.<sup>7</sup>

Professors William Eskridge and John Ferejohn have added something important to this ongoing discussion: a theory of progressive constitutionalism that is both democratic and resistant to the ebbs and flows of popular prejudice.<sup>8</sup> They argue that some statutes play a

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given their original intent as part of the purposivist inquiry discussed in Part III. However, a full exploration of the role of later enactments on a super-statute, while a worthwhile inquiry, is beyond the scope of this Article.

6 See, e.g., ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16–23 (1962).

7 See, e.g., CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* 7 (1999). While Sunstein is not opposed to all judicial review, his chosen approach is a jurisprudence in which “judges know that they may be prone to error, and for this reason they are usually cautious about foreclosing outcomes of political processes that do not accord with an ambitious and possibly incorrect understanding of democratic ideals.” *Id.* at 26.

8 Eskridge and Ferejohn’s theory has evolved through a series of articles. See William Eskridge, Jr. & John Ferejohn, *Super-statutes*, 50 *DUKE L.J.* 1215, 1215–16 (2001); William N. Eskridge, Jr., *America’s Statutory “Constitution,”* 41 *U.C. DAVIS L. REV.* 1 (2007). And, most recently, the theory is explained in a book. WILLIAM ESKRIDGE, JR. & JOHN FERREJOHN, *A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION* (2010) [hereinafter *ESKRIDGE & FERREJOHN, REPUBLIC OF STATUTES*].

role analogous to that of constitutional amendments. These “super-statutes” are impervious to changing electoral coalitions; they are protected by the judiciary even beyond the four corners of their text; and they are capable of evolving so that they remain effective as times change. Eskridge and Ferejohn identify a large number of candidates for super-statute status, ranging from Title VII of the Civil Rights Act of 1964 to the 1890 Sherman Antitrust Act.<sup>9</sup>

At first glance, Eskridge and Ferejohn’s theory is both descriptively and normatively compelling. Descriptively, it accounts for American history better than a strictly constitutional view of American rights. Most Americans asked to list the basic guarantees associated with American citizenship would likely mention at least a few rights that can be found only in statutes. The right to be free of racial discrimination in the private workplace is the best example.<sup>10</sup> Eskridge and Ferejohn have captured an important truth about America’s legal history by recognizing that these rights are closer to constitutional principles than to run-of-the-mill public laws.

Perhaps more important, Eskridge and Ferejohn offer a means for expanding rights that is less resistant to change than the constitutional amendment process prescribed by Article V of the U.S. Constitution.<sup>11</sup> And, super-statutes need not share constitutional law’s libertarian bias. They can do more than restrain government; they can impose obligations on government and private actors that may provide more concrete fulfillment to most citizens than the purely negative rights guaranteed by most constitutional amendments.<sup>12</sup>

Eskridge and Ferejohn describe three basic characteristics that define super-statutes. First, super-statutes pass after an unusually intense period of public deliberation.<sup>13</sup> Second, super-statutes require cooperation by several institutions working “together as well as protecting their own authority.”<sup>14</sup> Finally, super-statutes become en-

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<sup>9</sup> See ESKRIDGE & FEREJOHN, *REPUBLIC OF STATUTES*, *supra* note 8, at 26.

<sup>10</sup> See 42 U.S.C. § 2000e-2 (2006).

<sup>11</sup> See ESKRIDGE & FEREJOHN, *REPUBLIC OF STATUTES*, *supra* note 8, at 48–49.

<sup>12</sup> *Id.* at 5, 26, 40–42.

<sup>13</sup> *Id.* at 7, 26; Eskridge & Ferejohn, *Super-statutes*, *supra* note 8, at 1230–31 (finding that super-statutes substantially alter the “then-existing regulatory baselines” with a new principle or policy and often emerge after a “lengthy period of public discussion and official deliberation”).

<sup>14</sup> ESKRIDGE & FEREJOHN, *REPUBLIC OF STATUTES*, *supra* note 8, at 7; *see also* Eskridge & Ferejohn, *Super-statutes*, *supra* note 8, at 1231 (arguing that an “essential feature of the super-statute” is the “feedback loop” among the various branches, including “elaboration [of the super-statute] from administrators and judges, whose work is then subject to meaningful scrutiny and correction by the legislature or even the citizenry”).

trenched over time as courts and other actors treat them with special deference.<sup>15</sup>

This final element of Eskridge and Ferejohn's definition bears discussion. If super-statutes, by definition, become and remain entrenched in American culture over time, then super-statute theory has little prescriptive force. Imagine that judges, as a group, began to limit the Civil Rights Act of 1964 to the narrowest possible reading of its text. A scholar sympathetic to super-statutes might well conclude that those judges had done something wrong; they failed to defer to a super-statute. But the judges would have an easy response: if we do not defer to the Act, then it is not a super-statute.

This Article rejects Eskridge and Ferejohn's definition of super-statutes as only those laws that remain entrenched over time. It therefore cannot rely on standard judicial practice to justify treating super-statutes with special deference. As a matter of empirical fact, courts may often fail to give super-statutes special respect.<sup>16</sup> This premise raises the normative question in its pure form: given that judges may not always treat super-statutes with special respect, can we find normatively compelling reasons why they *should* do so? This Article argues that the answer is yes, and the remainder of this Part is devoted to explaining what those reasons might be.

#### A. *The Democracy Rationale*

This Article's emphasis on super-statutes reflects in part the notion that, in a democracy, laws that more closely reflect the popular will have special legitimacy. Professor Bruce Ackerman has taken this argument one step further. In his *We the People* series,<sup>17</sup> Ackerman distinguishes between two types of lawmaking: higher and lower. When Congress, exercising powers delegated by the people, enacts public laws, it is engaged in lower lawmaking. Higher lawmaking occurs when the people themselves exercise lawmaking authority.<sup>18</sup>

Ackerman points to three "constitutional moments" during which Americans engaged in higher lawmaking: the Founding, Reconstruc-

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15 ESKRIDGE & FEREJOHN, *REPUBLIC OF STATUTES*, *supra* note 8, at 7, 26.

16 The NLRA presents one instance in which, as this Article will argue, courts have failed to provide a super-statute with even average respect.

17 BRUCE ACKERMAN, *WE THE PEOPLE 1: FOUNDATIONS* (1991) [hereinafter ACKERMAN, *FOUNDATIONS*]; BRUCE ACKERMAN, *WE THE PEOPLE 2: TRANSFORMATIONS* (1998) [hereinafter ACKERMAN, *TRANSFORMATIONS*].

18 See ACKERMAN, *FOUNDATIONS*, *supra* note 17, at 3–33.

tion, and the New Deal.<sup>19</sup> In each of these periods, Americans became unusually engaged in the lawmaking process and effected fundamental changes in the country's legal framework. But, none of these periods of higher lawmaking followed the formal rules for amending the Constitution. The Founders rejected the amendment process contained in the Articles of Confederation and invented new rules to meet their needs.<sup>20</sup> The Reconstruction Congress manipulated the requirements for state participation in the ratification of new constitutional amendments.<sup>21</sup> And, the New Deal's changes in constitutional law occurred entirely outside of the Article V process.<sup>22</sup> Yet, each of these eras produced lasting changes in constitutional law that are now almost universally accepted.<sup>23</sup>

Ackerman approves of this unorthodox amendment process. In part, he believes that it reflects a fair reading of the Constitution's prescribed procedure for its own amendment, a proposition his critics find far-fetched.<sup>24</sup> But, Ackerman also justifies his theory on more functionalist grounds. From time to time, Americans find that some part of their system of government requires a general overhaul that they can trust to last beyond the next election cycle. Sometimes, they express this belief through a constitutional amendment; sometimes they do not. The decision about whether to amend the Constitution often has as much to do with political contingency as with principle.<sup>25</sup>

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19 ACKERMAN, FOUNDATIONS, *supra* note 17, at 58. He has subsequently expanded his theory to include other periods of constitutional change, including the civil rights era. See Bruce Ackerman, *The Living Constitution*, 120 HARV. L. REV. 1737, 1742 (2007) ("A second great pathway involves the enactment of landmark statutes that express the new regime's basic principles . . . [such as] the Civil Rights Acts of the 1960s.").

20 ACKERMAN, TRANSFORMATIONS, *supra* note 17, at 34.

21 *Id.* at 99, 101–04, 110–11.

22 *Id.* at 337–342.

23 The change in constitutional interpretation that came with the New Deal is both less likely to be accepted and less likely to be thought of as a change in constitutional law comparable to the change that comes with a constitutional amendment. Ackerman devotes much of WE THE PEOPLE's second volume to explaining why the New Deal should be considered a constitutional moment on par with the Founding and Reconstruction. See *id.* at 255–382. However, one need not accept this claim to accept the considerably less ambitious argument made in this Article.

24 See Michael J. Gerhardt, *Ackermania: The Quest for a Common Law of Higher Lawmaking*, 40 WM. & MARY L. REV. 1731, 1742–46 (1999) (reviewing BRUCE ACKERMAN, WE THE PEOPLE 2: TRANSFORMATIONS (1998)); Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1239–45 (1995) ("Professor Ackerman has failed to exercise such care in constitutional interpretation.").

25 Ackerman argues persuasively that the Reconstruction Congress would likely not have pursued constitutional change had Lincoln lived and been able to appoint a more civil rights-friendly Supreme Court. ACKERMAN, TRANSFORMATIONS, *supra* note 17, at 265,

But, however they express themselves, the people have a right to change their governing institutions when they express a clear desire to do so.

In the constitutional context, Ackerman's thesis is fairly radical and has been widely criticized.<sup>26</sup> But, his basic premise—that some lawmaking is higher than other lawmaking—has both intuitive and theoretical appeal. Ackerman has simply pointed out that not all laws are created equal. America has experienced moments when the people themselves are more actively engaged in the lawmaking process. While it may be difficult to say when exactly the people engage in higher lawmaking, surely courts can distinguish between the Civil Rights Act of 1964—passed after extensive public debate with the whole world watching—and the latest special-interest giveaway drafted by industry lobbyists and rammed through Congress in the dead of night. In a country founded on republican principles, courts should treat the former with more respect than the latter.

### B. *The Epistemic Rationale*

One way to think of super-statutes is as pieces of legislation produced by a process that is closer to direct democracy than the traditional legislative process. Super-statutes are passed when citizens are focused on a particular issue. At these times, lawmakers who want to be reelected are more likely to defer to their constituents on whatever issue has caught the public eye. More so than other laws, super-statutes are therefore the product of the popular will, not the will of government officials.

If we had reason to believe that the popular will is more likely to be correct, this would provide a reason to defer to super-statutes; and, we do. As the Marquis de Condorcet demonstrated in the 1700s, un-

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274–78. By the same token, the New Dealers might have pursued a constitutional amendment, a strategy that was pursued up until the 1937 Switch in Time, had FDR died and his appointments been made by conservative Vice President, John Garner. *Id.* at 271–74.

<sup>26</sup> See Gerhardt, *supra* note 24, at 1735–36, 1767–73 (asserting Ackerman inconsistently follows his methodology); Michael W. McConnell, *The Forgotten Constitutional Moment*, 11 CONST. COMMENT. 115, 117 (1994) (challenging Ackerman's theory of constitutional interpretation because it runs counter to the importance of the text); Tribe, *supra* note 24, at 1240 (“Professor Ackerman has failed to exercise such care in constitutional interpretation.”); see generally Michael J. Klarman, *Constitutional Fact/Constitutional Fiction: A Critique of Bruce Ackerman's Theory of Constitutional Moments*, 44 STAN. L. REV. 759 (1992) (reviewing BRUCE ACKERMAN, *WE THE PEOPLE I: FOUNDATIONS* (1991)) (considering critically Ackerman's thesis); Suzanna Sherry, *The Ghost of Liberalism Past*, 105 HARV. L. REV. 918, 918 (1992) (reviewing BRUCE ACKERMAN, *WE THE PEOPLE* (1991)) (finding that Ackerman's theory is “mired in a fictional past and envisions a utopian future”).

der certain circumstances, larger groups are more likely to find the right answer to tough questions.<sup>27</sup> But Condorcet's "Jury Theorem" only applies in certain circumstances. It provides a compelling reason to defer to legislative enactments, but only when its preconditions are met.<sup>28</sup> Thus, the Jury Theorem provides both a potential justification for the idea of a super-statute and the means for setting some guidelines on what a super-statute is.

### 1. *Condorcet's Requirements*

Condorcet's Jury Theorem is a mathematical proof, not a sociological observation. It shows that when a large number of people provide answers to a common question, even if each answer is only slightly more likely to be right than wrong, the chances that a majority of predictions will be correct approaches 100% as the number of predictions rises.<sup>29</sup> Legal scholars have applied Condorcet's insight to democratic decision-making.<sup>30</sup> If groups make better decisions than even expert individuals, democracy—a mechanism for letting groups make decisions—should be more likely than other systems to get the right answer to tough questions. The conclusion seems to flow naturally from the premise, but the devil is in the details. According to the original Jury Theorem, crowds are wise only when three conditions are met: the question being asked has right and wrong answers; the members of the group answering it are, on average, more likely to be right than to be wrong; and the answers of individual group members are independent of each other.<sup>31</sup>

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<sup>27</sup> See generally Marquis de Condorcet, *Essay on the Application of Mathematics to the Theory of Decision-Making (1785)* in CONDORCET: SELECTED WRITINGS 33–70 (Keith Michael Baker ed., 1976).

<sup>28</sup> *Id.* at 61–63.

<sup>29</sup> *Id.* at 48–49 (“One finds further that if the probable truth of the vote of each voter is greater than 1/2, that is to say if it is more probable than not that he will decide in conformity with the truth, the more the number of voters increases, the greater the probability of the truth of the decision. The limit of this probability will be certainty . . .”).

<sup>30</sup> See, e.g., CASS R. SUNSTEIN, A CONSTITUTION OF MANY MINDS: WHY THE FOUNDING DOCUMENT DOESN'T MEAN WHAT IT MEANT BEFORE 8–10 (2009); ADRIAN VERMEULE, LAW AND THE LIMITS OF REASON 25–33 (2009) (examining Condorcet's Jury Theorem).

<sup>31</sup> Condorcet articulated several other limitations on the Jury Theorem, but they are either not relevant to this discussion or they have been rejected by later scholars. See Bernard Grofman et al., *Thirteen Theorems in Search of the Truth*, 15 THEORY & DECISION 261, 268–269 (1983) (explaining that group members need not be homogenous); Christian List & Robert E. Goodin, *Epistemic Democracy: Generalizing the Condorcet Jury Theorem*, 9 J. POL. PHIL. 277, 284 (2001) (explaining that the Jury Theorem applies even when voters choose from more than two options). For an argument that the Jury Theorem will have limited applicability in real world conditions, see VERMEULE, *supra* note 30.



## 2. *What Is the Question?*

Technically, the Jury Theorem only shows that crowds will be likely to produce right answers to questions of fact for which answers can be correct or incorrect.<sup>32</sup> But, from the perspective of democratic decision-making, it should not matter whether a group is answering a fact question or an opinion question. Imagine the country is asked to vote on whether or not to allow the death penalty. Some voters will interpret this question as one of means-ends rationality and ask which policy will best maximize positive outcomes, like public safety, and minimize negative outcomes, like expense. Others will take a more Kantian approach and simply ask which outcome is consistent with the dictates of justice. Within each group, the Jury Theorem should hold, since each group is answering a question about the fit between an agreed-upon set of values or goals and a particular policy. This is the kind of question susceptible to right answers. As a result, a majority of voters will reliably support the policy most conducive to achieving the majority's goals. If most Americans are utilitarians and abolishing the death penalty maximizes overall utility, a majority will support abolition.<sup>33</sup>

Of course, voters will also be implicitly choosing between two frames for answering the general question: utilitarian and Kantian. This decision may not have a right answer in the traditional sense. But, one could still feel that it is exactly the kind of question that should be committed to democratic majorities. Normative questions that cannot be settled by reasoning from shared values must be settled somehow, and majority rule is at least as appropriate as any other approach.

The Jury Theorem tells us that each group—utilitarian and Kantian—is more likely to find a policy that achieves its ends by submitting the question to democratic decision-making. Democratic principles

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<sup>32</sup> See Condorcet, *supra* note 27, at 38.

<sup>33</sup> For a mathematical proof of this, see Nicholas R. Miller, *Information, Electorates, and Democracy: Some Extensions and Interpretations of the Condorcet Jury Theorem*, in 2 INFORMATION POOLING AND GROUP DECISION MAKING: PROCEEDINGS OF THE SECOND UNIVERSITY OF CALIFORNIA, IRVINE, CONFERENCE ON POLITICAL ECONOMY 177–83 (Bernard Grofman & Guillermo Owen eds., 1986). This result can be expected except where the majority group is not much larger than the minority group and is significantly worse at calculating the best policies for achieving its ends. *Id.* at 178–79. Even in this situation, to the extent that the majority group displays less competence because it cares less about a particular issue, the democratic process might be said to succeed even when it produces an outcome that does not reflect the best means of achieving the majority's goals. *Id.* at 182–83. Seeing no evidence that the NLRA provides an example of this limit on the Jury Theorem's logic, I ignore this limit here.

say that the best way to decide which goals to pursue—when underlying values do not provide an answer—is to submit the question to majority rule.<sup>34</sup> Democracy is thus a dominant strategy even when groups face policy questions that cannot be clearly reduced to questions of fact.<sup>35</sup>

### 3. *Average Likelihood of Being Correct*

For the Jury Theorem to hold true, the average member of a group must do a better job of getting a question right than random chance.<sup>36</sup> This seems like a low bar. Individuals would almost have to consciously avoid the right answer in order to be less accurate than random chance.<sup>37</sup> But, group members might be consistently wrong in two situations: when they are subject to group biases and when they face questions about which they have no information.<sup>38</sup> This suggests the first limitation on the super-statute theory. To the extent that statutes appear to be the product of systematic biases or to cover topics on which individuals have no expertise, they should not be considered super-statutes.

### 4. *Independence of Opinions*

Finally, the Jury Theorem presupposes that voters' preferences are independent. But, it is unclear both what type of independence is necessary and how well the Theorem stands up in situations of less than perfect independence.<sup>39</sup> If the Theorem required that each voter be completely uninfluenced by any other voter, it would have little

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<sup>34</sup> Here, this Article ignores a number of obvious problems with majority rule. They will be discussed below.

<sup>35</sup> Sunstein elides the fact/opinion distinction by pointing out that many questions of morality can be said to have better and worse answers. See Cass R. Sunstein, *Group Judgments: Statistical Means, Deliberation, and Information Markets*, 80 N.Y.U. L. REV. 962, 1044 (2005). Condorcet also believed that moral questions should be seen as having right and wrong answers. Condorcet, *supra* note 27, at 33–34. Whether or not this is true, the Jury Theorem may still apply to questions of policy that combine questions that have right and wrong answers with questions that do not.

<sup>36</sup> Condorcet, *supra* note 27, at 56–57, 60–61. The theorem was initially interpreted as requiring every citizen be more likely than random chance to get the right answer. Modern theorists have made clear that the wisdom of a given crowd depends on its average member. See Grofman et al., *supra* note 31, at 268–69 (emphasizing the importance of juror competence in driving correct verdicts).

<sup>37</sup> *Id.*

<sup>38</sup> See Condorcet, *supra* note 27, at 56–57, 60–61 (listing the required conditions to secure these two essential conditions); Sunstein, *supra* note 35, at 975–76.

<sup>39</sup> See VERMEULE, *supra* note 30, at 30 (finding it unclear “whether, and to what extent, independence is compromised by the common deliberation or discussion”).

to say about contemporary democracy. Few voters are likely to go to the polls without having been swayed by at least one other voter.

Fortunately, a modified version of the Theorem can be justified even if voters do not have completely independent preferences.<sup>40</sup> When opinion leaders are divided on a policy question, large groups will be likely to get the question right, even if many of them blindly follow a given leader on most issues.<sup>41</sup> This is even truer when there are numerous opinion leaders and when leaders do not succeed in swaying their flock to a particular position.<sup>42</sup> Thus, a statute passed during a contentious time, when citizens cannot get a clear signal from a single opinion leader, will be more likely to reflect correct answers to policy questions.

### C. *The Incentives Rationale*

Deference to super-statutes may also facilitate citizen participation and system stability and responsiveness. Citizens decide whether to engage in collective action in part based on whether they think of themselves or their group as politically efficacious.<sup>43</sup> And, citizens are more likely to feel politically efficacious if they have experienced political successes in the past.<sup>44</sup> If citizens mobilize and achieve a legisla-

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<sup>40</sup> See, e.g., Franz Dietrich & Kai Spiekermann, *Epistemic Democracy with Defensible Premises*, 29 *ECON. & PHIL.* 87, 87 (2013) (proving that “large crowds are fallible but better than small groups”).

<sup>41</sup> Robert E. Goodin & Kai Spiekerman, *Courts of Many Minds*, 42 *BRIT. J. POL. SCI.* 555, 570 (2012) (discussing the impact of opinion leaders on group decisions).

<sup>42</sup> *Id.*

<sup>43</sup> In the words of an early and influential statement of this thesis, “the self-confident citizen is likely to be the active citizen.” GABRIEL A. ALMOND & SIDNEY VERBA, *THE CIVIC CULTURE: POLITICAL ATTITUDES AND DEMOCRACY IN FIVE NATIONS* 206 (1989). Almond and Verba’s insight has been confirmed repeatedly. See, e.g., Jeffrey A. Karp & Susan A. Banducci, *Political Efficacy and Participation in Twenty-Seven Democracies: How Electoral Systems Shape Political Behaviour*, 38 *BRIT. J. POL. SCI.* 311, 326–28 (2008) (Eng.) (analyzing the relationship between efficacy and voter participation).

<sup>44</sup> Albert Bandura, a psychologist, has demonstrated that past successes exert a powerful influence on individual and collective self-efficacy, even leading diagnosed phobics to overcome deep-seated fears about particular activities. See Albert Bandura, *Self-Efficacy Mechanism in Human Agency*, 37 *AM. PSYCHOL.* 122, 126, 137 (1982) (“That perceived self-efficacy operates as a cognitive mechanism by which controllability reduces fear arousal.”). Other scholars have taken Bandura’s insights and tested the impact of political successes and failures on feelings of self-efficacy. Douglas Madsen finds that Indians who had successfully petitioned their government for assistance had higher feelings of self-efficacy. Douglas Madsen, *Political Self-Efficacy Tested*, 81 *AM. POL. SCI. REV.* 571, 577 (1987) (“The successful petitioners typically show a sense of self-efficacy that is well above the norm . . .”). Similarly, Christopher J. Anderson and Andrew J. LoTempio find that Americans who vote for losing presidential candidates have less trust in the political system than those who vote for winners. See Christopher J. Anderson & Andrew J. LoTem-

tive outcome only to find their achievement whittled away by the courts, their feeling of collective efficacy will rationally diminish. The impact may be worse than if a mobilized group never succeeded in changing the law.<sup>45</sup> When citizens do not get the votes in Congress to pass their proposals, they may be inclined to try harder next time with more allies and a better legislative strategy. When citizens feel their political achievements have been demolished by politically unaccountable actors, they have no reason to try again in the political realm.<sup>46</sup>

Even those who do not have any special attachment to political mobilization as such can support a model that rewards mobilized citizens by treating their legislative accomplishments as presumptively privileged. Those with the political commitment to mobilize in the first place may be dangerous if their efforts cannot be integrated into the political order.<sup>47</sup> To the extent that they continue to express their political preferences within the system, they are more likely to accept the system as legitimate.<sup>48</sup> Thus, encouraging political action within established lawmaking procedures not only makes the political system more responsive, it makes it more stable.<sup>49</sup>

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pio, *Winning, Losing and Political Trust in America*, 32 BRIT. J. POL. SCI. 335, 341–44 (2002) (Eng.).

<sup>45</sup> Bandura finds that individuals experience a greater decline in feelings of self-efficacy in response to failures when they feel that their failures were not caused by a lack of effort. Bandura, *supra* note 44, at 126. His finding corresponds with common sense. If individuals believe that they can succeed by trying harder, they are less likely to take their failures as a reason to quit.

<sup>46</sup> This may sound like an argument against any kind of judicial review, but it is not. It merely recognizes that judicial review is likely to have a more significant de-mobilizing effect when it acts on legislation that was the product of popular deliberation. Of course, this de-mobilizing impact must still be weighed against other values, like the importance of upholding constitutional principles and protecting minorities.

<sup>47</sup> Evidence from other countries suggests that those with low levels of trust in the government and a general perception that they cannot have an impact on government policy are the most likely to engage in disruptive political activity. See Mitchell A. Seligson, *Trust, Efficacy and Modes of Political Participation: A Study of Costa Rican Peasants*, 10 BRIT. J. POL. SCI. 75, 97–98 (1980) (Eng.) (“Third World peasants with low trust in government are the ones most likely to become involved in mobilized political participation.”).

<sup>48</sup> It is fairly intuitive that those who place more trust in the political system will participate more. Studies also indicate that the act of participation increases trust, producing a virtuous circle from the perspective of both participation and system stability. See Steven E. Finkel, *Reciprocal Effects of Participation and Political Efficacy: A Panel Analysis*, 29 AM. J. POL. SCI. 891, 908–909 (1985); see also Richard Nadeau & André Blais, *Accepting the Election Outcome: The Effect of Participation on Losers’ Consent* 23 BRIT. J. POL. SCI. 553, 560–61 (1993) (Eng.) (showing that opponents of a new political administration are more likely to view the administration as legitimate if they voted in the election that put it in power).

<sup>49</sup> Writing during a time of intense political volatility, Arthur H. Miller documented a widespread feeling of political inefficacy and cynicism and concluded that America faced a se-

*D. A Normatively Defensible Definition of Super-statutes*

With three justifications for treating super-statutes with special deference identified, it is worth revisiting the definition of super-statutes. Eskridge and Ferejohn's definition came mostly from their analysis of the types of laws that courts already pay special respect. Since this Article does not rely on general practice as a reason for deferring to super-statutes, it must identify a set of statutes that fit with the normative justifications discussed above. This dictates a slightly different definition of "super-statute" than the definition offered by Eskridge and Ferejohn and provides a principled means for determining which laws are super-statutes and which are not.

First, super-statutes must have been passed during a period in which citizens had some opportunity to express disapproval of them—and to block them if desired—either before passage or shortly after. In a functioning democracy, citizens can be said to have input on legislation in two ways.<sup>50</sup> They may have the ability to influence their lawmakers by indicating that they will be less likely to support the reelection of any official who supports a given proposal. This mechanism depends on the salience of the statute at issue. To the extent that elected officials believe they could lose votes based on one position on one bill, they will tend to reflect the voters' wishes on that bill, and voters can be said to have effectively participated in the bill's passage or rejection.<sup>51</sup> Voters may also determine whether a bill pass-

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rious risk of politically motivated violence and instability. See Arthur H. Miller, *Political Issues and Trust in Government: 1964–1970*, 68 AM. POL. SCI. REV. 951, 970–72 (1974). More recently, Professors Eskridge and Ferejohn have asserted that "groups told they have no prospect of prevailing in political deliberation become radicalized and may drop out of normal politics" and concluded that "[d]eliberation-ending judicial review is a danger to democracy itself." William N. Eskridge, Jr. & John Ferejohn, *Constitutional Horticulture: Deliberation-Respecting Judicial Review*, 87 TEX. L. REV. 1273, 1285 (2009). Even if political cynicism does not reach the point where it can undermine regime stability, it may nonetheless make effective governance more difficult. Citizens who feel that they have little ability to influence their government are less likely to comply with the law or to engage in allegiant behaviors, such as jury service. See PIPPA NORRIS, *DEMOCRATIC DEFICIT: CRITICAL CITIZENS REVISITED* 226–27 (2011).

<sup>50</sup> The options are borrowed from Warren E. Miller & Donald E. Stokes, *Constituency Influence in Congress*, 57 AM. POL. SCI. REV. 45, 50–51 (1963). The analysis that follows is my own.

<sup>51</sup> The importance of issue salience as a predictor of lawmaker responsiveness to constituent demands was first suggested in a seminal study by Warren E. Miller and Donald E. Stokes in 1963. *Id.* at 51–53. Subsequent studies have provided more direct evidence of the importance of salience. See James H. Kuklinski & Donald J. McCrone, *Policy Salience and the Causal Structure of Representation*, 8 AM. POL. RES. 139, 151–54 (1980) (showing that representatives are more likely to reflect their constituents' preferences in roll call votes when the representatives believe their constituents are focused on the issue in question); Jeffrey

es by electing the representatives who vote directly on the bill. For this mechanism to be relevant, a particular legislative proposal must be salient during an election, such that the election's victors may claim a mandate to pass that proposal.<sup>52</sup>

These criteria for identifying super-statutes are dictated by each of the normative justifications, discussed above, for treating super-statutes with special deference. A statute cannot be said to reflect the will of the people if the people had no way of weighing in on its passage. It is unlikely to take advantage of the people's wisdom if lawmakers had no reason to take the people's input into account. And, treating it with special deference will not encourage political participation if the statute is not the product of public participation in the first place. Thus, the normative arguments in favor of super-statutes apply only if super-statutes are defined to exclude laws that are not the product of public input.

Second, super-statutes must pass during a period when voters would have access to information regarding their substance and likely impact. In part, this requirement simply reflects the fact that if citizens have little information regarding a statute prior to its passage, they will not be able to effectively communicate their position on the proposal to their representatives, and it cannot be said that those representatives reflected the collective wisdom that Condorcet showed to be so powerful.<sup>53</sup> The information requirement also reflects the conditions under which the Jury Theorem would predict that public input will lead to better policy. When more information is available regarding a proposal, the average citizen is more likely to correctly determine the proposal's chances of having a positive impact.<sup>54</sup> However, this requirement should not be overplayed. Provided that citizens have enough information to make their predictions more likely to be correct than predictions made at random, citizen input will tend to produce the right answer to policy questions.<sup>55</sup>

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R. Lax & Justin H. Phillips, *Gay Rights in the States: Public Opinion and Policy Responsiveness*, 103 AM. POL. SCI. REV. 367, 376–80 (2009) (showing increased responsiveness on issues heavily covered in the press).

52 For example, during the 2012 election, President Obama highlighted his intention to raise taxes on high earners, allowing him to claim a mandate after his victory. See Helene Cooper & Jonathan Weisman, *Obama to Insist on Tax Increases for the Wealthy*, N.Y. TIMES, Nov. 10, 2012, at A1.

53 See *supra* Part I.B.3.

54 See Condorcet, *supra* note 27, at 56 (“It is necessary, furthermore, that voters be enlightened . . . .”)

55 See *supra* notes 36–38 and accompanying text.

Third, for the Jury Theorem to apply, a super-statute must emerge from a period when multiple views are expressed, and expressed effectively, regarding the statute's value.<sup>56</sup> The Jury Theorem requires that individual opinions be independent, at least to some extent. This requirement is not met when one opinion leader dominates public opinion or all opinion leaders agree about a particular policy.<sup>57</sup>

## II. THE PASSAGE OF THE NLRA

Part I presented three justifications for treating certain statutes with special deference. Since these justifications only apply to statutes with certain characteristics, they can be used to derive three prerequisites for a statute to be considered a super-statute. First, a super-statute must pass when voters have information regarding the legislation. Second, it must be a high-salience piece of legislation. And third, it must divide opinion leaders such that popular support for the bill cannot be explained simply as citizens being corralled into supporting a decision made by a relative few. This Part will show that the NLRA has these prerequisites.

### A. Information

By the time the NLRA was signed in July of 1935, voters would have had plenty of information on the new law. From the beginning of the 1935 congressional session to when Roosevelt signed the Act on July 5, the *New York Times* discussed the Act in 258 articles.<sup>58</sup> Fifty of those articles appeared on the front page. Other large publications printed between ninety-three and 146 articles, with sixteen to fifty-six appearing on the front page.<sup>59</sup> Press coverage focused on

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<sup>56</sup> See *supra* Part I.B.4.

<sup>57</sup> See *supra* Part I.B.4.

<sup>58</sup> To come up with this number, I searched for all *New York Times* articles containing the word "Wagner" and the word "labor." If the headline did not make it clear that the article discussed the proposed NLRA, I scanned the article. Any article that mentioned the proposal, even if it focused on other subjects, was counted. I excluded articles that merely announced events related to the Act. Wagner also proposed labor reform legislation—identical in most respects to the NLRA—in 1934. In the period between Wagner's first introduction of the bill and the 1934 election, the *New York Times* discussed the proposal in 128 articles, including twenty-four on the front page. To come up with this number, I searched ProQuest for *Times* articles from the beginning of 1934 to November 4, 1934, containing the following terms (each of which the *Times*, at one point, used as the unofficial title of Wagner's bill): "labor disputes bill," "Wagner labor," and "labor board bill."

<sup>59</sup> The *Washington Post* printed 136, with fifty-six on the front page. The *Los Angeles Times* printed ninety-three with sixteen on the front page. And, the *Chicago Daily Tribune* printed 146 with twenty-eight on the front page. I chose these papers because they all had

three elements of the proposed law. First, the law replaced the early New Deal's ad hoc arbitration system with a unified national board for settling most labor disputes. Second, the law established the principle that a majority in a given bargaining unit can elect a representative for the entire unit. And finally, the law banned what Senator Robert Wagner, the legislation's sponsor, called "company-dominated unions."<sup>60</sup> Americans who had been following the evolution of labor law in the early New Deal period would have recognized these provisions as answers to three of the most hotly—and publicly—contested policy questions of the time.

### 1. *Centralized Administration*

When the NLRA was introduced, Americans had seen how a decentralized system for adjudicating labor disputes worked in practice, and they had seen the impact of several attempts to insert greater centralization into the system. The Roosevelt Administration's first attempt to change U.S. labor policy seemed to rely on decentralized enforcement. Section 7(a) of the National Industrial Recovery Act ("NIRA") did not establish a mechanism for enforcing its own labor protections. Its language, similar to language contained in the preamble to the Norris-La Guardia Act, signed into law in 1932,<sup>61</sup> could

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large circulations and represented four different areas of the country. Others have looked to these publications as presenting different political viewpoints today, and they appear to have had different perspectives during the New Deal. See, e.g., Todd A. Collins & Christopher A. Cooper, *Case Salience and Media Coverage of Supreme Court Decisions: Toward a New Measure*, 20 POL. RES. Q. 1 (2011), <http://prq.sagepub.com/content/early/2011/03/07/1065912911398047>. While all four opposed the NLRA, the *New York Times* and the *Washington Post* generally backed Roosevelt and the New Deal. The *Los Angeles Times* and the *Chicago Daily Tribune* did not.

<sup>60</sup> By the term, Wagner meant all unions funded, created, or controlled by employers, including those that allowed substantial amounts of worker participation. See National Labor Relations Act § 8(a)(2) (codified at 29 U.S.C. § 158(2)(5) (2006)). See also *Green Asks Labor to Confer on Drive for Wagner Bill*, N.Y. TIMES, Apr. 22, 1935, at 1; *Here Are Provisions of Wagner-Connery Labor Disputes Bill*, CHI. DAILY TRIB., Jun. 20, 1935, at 8; *President Orders Speed on NRA and Wagner Bills; For Latter 'In Principle'*, N.Y. TIMES, May 25, 1935, at 1. While the law evolved in several respects as it moved through Congress, these provisions remained the core of the proposal. *Wagner Introduces Labor Bill Seeking Company Union Ban*, WASH. POST, Feb. 22, 1935, at 1; *Wagner's Labor Bill Goes Through House*, L.A. TIMES, June 20, 1935, at 1.

<sup>61</sup> Compare National Industrial Recovery Act, ch. 90, § 7(a), 48 Stat. 195 (1933) ("[E]mployees shall have the right to organize and bargain collectively through representatives of their own choosing, and 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; [and] (2) that no employee and no one seeking employment shall be required as a condition of employment to join any company union



be seen as directed at the courts, just as the Norris-LaGuardia Act had been directed at the courts. On the other hand, Section 7(a)'s inclusion in the NIRA suggested that it would be enforced by the National Recovery Administration ("NRA") through the NRA's network of local and industry boards.

President Roosevelt, however, seemed to have other plans. On August 5, 1933, Roosevelt created what would become known as the National Labor Board ("NLB"). In hindsight, the move appears to be a first step toward the creation of a process for labor law adjudication. At the time, however, it was unclear what Roosevelt intended the NLB to do. Roosevelt's statement creating the NLB contained no details regarding its authority, nor was it accompanied by an executive order authorizing the Board.<sup>62</sup>

Even the Board's title—one of the few indicators of its status and mission—was initially unclear. It was originally called the "National Industrial Recovery Adjustment Board,"<sup>63</sup> then the "National Board of Arbitration,"<sup>64</sup> and then the "National Mediation Board."<sup>65</sup> It quickly became the "National Labor Board,"<sup>66</sup> and the name stuck. The shifts in name reflect fluidity in thinking about the new board. A "board of arbitration" would be expected to help parties negotiate settlements. The NLB, on the other hand, could, in theory, do much more. The vagueness of the title—in contrast to the original title's specificity—suggested the possibility of expanding the Board's mission. Nobody knew where this would lead. As one press report put it, "[w]hat final

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or to refrain from joining, organizing, or assisting a labor organization of his own choosing.") with Norris-LaGuardia Act, ch. 90, § 2, 47 Stat. 70 (1932) (codified at 29 U.S.C. § 102 (2006)) ("[I]t is necessary that [the employee] 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.").

<sup>62</sup> See *The President's Statement*, N.Y. TIMES, Aug. 6, 1933, at 1. The Board would not receive official authorization until four months later, after its role as a key player in labor adjudication had already been established. See *Roosevelt Order Backs Labor Board*, N.Y. TIMES, Dec. 20, 1933, at 1.

<sup>63</sup> *Form Industrial Board: NRA Establishes Group to End All Industrial Disputes*, N.Y. TIMES, Aug. 5, 1933, at 2.

<sup>64</sup> *Announcement on Peace Labor Board*, N.Y. TIMES, Aug. 6, 1933, at 2; *Mediation Board Will Cover Nation*, N.Y. TIMES, Aug. 6, 1933, at 3.

<sup>65</sup> *NRA Gives Warning on Racketeering in Recovery Drive*, N.Y. TIMES, Aug. 8, 1933, at 1.

<sup>66</sup> *Federation Held Near for Industry*, N.Y. TIMES, Aug. 7, 1933, at 6.

and permanent form this mediation plan will take is not predicted, and President Roosevelt himself has no set design."<sup>67</sup>

Whatever Roosevelt's intent, the Board quickly began to play a prominent role in resolving labor disputes and developing principles of labor law.<sup>68</sup> Within two weeks of its creation, the NLB had settled a coal strike,<sup>69</sup> a hosiery strike involving 15,000 workers,<sup>70</sup> and two strikes in shirt factories.<sup>71</sup> In the process, it developed a strategy for settling disputes that went beyond facilitating private bargains, to guaranteeing certain labor rights.<sup>72</sup> With the Board continuing to show signs of success,<sup>73</sup> it began to develop a system whereby it would act as something like a supreme court, resolving disputes that could not be resolved by a system of regional labor boards, local NRA boards, or the Labor Department's conciliation service.<sup>74</sup> Finally, after Senator Wagner threatened to resign as NLB chair, the Board secured sole jurisdiction over the nation's labor disputes. It developed a plan to have NLB-supervised regional labor boards, rather than local NRA compliance bodies, serve as first-level adjudicators in all labor disputes.<sup>75</sup> When it took over the responsibilities of New York City's busy labor board on September 29, 1933,<sup>76</sup> the Board appeared to be achieving its goals.<sup>77</sup>

Over the next year and a half, Americans watched the NLB try, with varying degrees of success, to establish itself as the central regulator of American labor relations. In October of 1933, the Weirton Steel Corporation declared that it was not bound by an NLB order to

<sup>67</sup> *Roosevelt Appoints Board of 7 to Decide All Disputes Over Industrial Problems*, N.Y. TIMES, Aug. 6, 1933, at 1.

<sup>68</sup> *Union Labor Wins Victory Under NRA*, N.Y. TIMES, Sept. 13, 1933, at 1.

<sup>69</sup> *Mediators End Coal Walkout; 2 More Tackled*, WASH. POST, Aug. 10, 1933, at 3.

<sup>70</sup> J. Bernard McDonnell, *15,000 End Strike; New Board Scores*, WASH. POST, Aug. 11, 1933, at 1.

<sup>71</sup> *Labor Board Settles Two Shirt Strikes; Collective Bargaining in Pennsylvania*, N.Y. TIMES, Aug. 19, 1933, at 1.

<sup>72</sup> See IRVING BERNSTEIN, *THE NEW DEAL COLLECTIVE BARGAINING POLICY* 59 (1950).

<sup>73</sup> The Board continued to settle and avoid strikes. See *4,000 Garment Workers Return to Jobs Today*, CHI. DAILY TRIB., Sept. 5, 1933 at 7; *Cleveland Car Strike Averted*, WASH. POST, Sept. 11, 1933, at 11; *Film Strike Ended by Labor Board*, N.Y. TIMES, Aug. 24, 1933, at 6; *Labor Board Averts Strike By Air Pilots*, WASH. POST, Sept. 27, 1933, at 5; *Labor Board Settles Strike*, N.Y. TIMES, Sept. 8, 1933, at 6; *Silk Strike Ended by Wagner Board*, N.Y. TIMES, Sept. 15, 1933, at 3. It also began to establish procedures for determining union representation without strikes. See Louis Stark, *NRA Gives Labor Right to Choice*, N.Y. TIMES, Aug. 21, 1933, at 4.

<sup>74</sup> *Labor Board Adopts "Last Resort" Policy*, WASH. POST, Sept. 2, 1933, at 2.

<sup>75</sup> *Labor Board Plans Regional Agencies*, N.Y. TIMES, Sept. 23, 1933, at 7; *Regional Bodies to End Strikes: N.R.A. Agencies Plan of National Labor Board: Johnson Wants End of Wordy Warfare or Resignations*, DAILY BOS. GLOBE, Sept. 23, 1933, at 13.

<sup>76</sup> *See 130 Strikes Ended by NRA in 3 Months*, N.Y. TIMES, Nov. 13, 1933, at 1.

<sup>77</sup> *Wagner to Absorb Whalen NRA Board on Labor Disputes*, N.Y. TIMES, Sept. 29, 1933, at 1.

which it had not consented. The Board fought back in the newspapers and within the Administration, eventually winning Roosevelt's support and, apparently, the power to enforce its will.<sup>78</sup> But, the Weirton fight did not establish a centralized system for adjudicating labor disputes once and for all. In 1935—after replacing the NLB with a tribunal (called the NLRB) which was intended to have more authority<sup>79</sup>—the Roosevelt Administration backed the NRA against the new NLRB in a highly public battle for jurisdiction over a labor dispute in the newspaper industry.<sup>80</sup> As the labor boards' achievements and reversals played out on the front pages of the nation's newspapers, Americans had a chance to develop informed opinions about the desirability of a centralized labor board. By the time Senator Wagner's NLRA proposal came to the public's attention, the public had seen how labor disputes go when a central board can impose a solution and how they go when it cannot.

## 2. Majority Rule

Prior to 1933, unions gained the right to bargain by bringing to bear enough economic power that employers decided bargaining was in their interests. The NIRA set out to make collective bargaining a matter of legal right, not economic force, and this raised key questions. If unions were no longer going to gain the right to speak for workers by coercing employers into sitting down at the bargaining table, somebody would need to decide how unions gained the right to speak and for whom they could speak. Two potential answers to these questions were considered. On the one hand, unions could be seen as speaking for an entire workplace, provided that they had won the support of a majority of that workplace. On the other, unions could be seen as speaking only for their members, with a workplace minority able to make its own bargain with management. Since neither the NIRA nor America's past experience with labor relations dictated an approach to this question, Americans watched as one set of federal officials pursued a policy of majority rule while another did not.

The pre-NLRA NLRB stuck to the principle of majority rule. In the *Denver Tramway* case, decided March 1, 1934, an independent un-

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<sup>78</sup> *Coal Men Defy NRA on Hearing*, N.Y. TIMES, Oct. 13, 1933, at 5.

<sup>79</sup> The National Labor Board became the National Labor Relations Board on June 30, 1934, pursuant to Public Resolution 44 and a Roosevelt executive order. *Text of Order Establishing New Labor Board*, N.Y. TIMES, July 1, 1934, at 20.

<sup>80</sup> *See Roosevelt Curbs NLRB in Code Cases*, N.Y. TIMES, Jan. 23, 1935, at 1.

ion that had won a majority of votes cast in a union election sought the right to represent the entire bargaining unit.<sup>81</sup> The NLB sided with the union. It reaffirmed this approach six months later, when it ruled that the Houde Engineering Company had to grant a closed shop to the United Auto Workers union after it won an NLRB election.<sup>82</sup>

The Roosevelt Administration took a different approach. After issuing an executive order endorsing majority rule,<sup>83</sup> the Administration quickly back-tracked. The day after Executive Order 6580 was issued, Donald Richberg and Hugh Johnson, the Administration's highest-profile labor advisers, declared that the order allowed individuals who had not voted for a union to bargain individually even after a union had won an election.<sup>84</sup> Richberg and Johnson's position got official presidential backing on March 26—less than two months after the introduction of Executive Order 6580—when the President negotiated a truce to avert an auto industry strike. The truce called for a union election in the industry, but without majority rule. Each union participating in the election would be represented proportionally.<sup>85</sup> Employers greeted the President's new policy with jubilation. Labor leaders saw it as a betrayal.<sup>86</sup>

As he made the case for labor law reform, Wagner dramatized the difference between the pluralist approach promoted by the Administration and his goal of majority rule.<sup>87</sup> Americans considering the Wagner Act thus had two clear choices defended by prominent and popular leaders and reflected in concrete policy decisions. They

81 *In re Denver Tramway Corp.*, 1 N.L.B. 64 (1934). It had not, however, won a majority of potential voters. BERNSTEIN, *supra* note 72, at 60; CHARLES J. MORRIS, *THE BLUE EAGLE AT WORK: RECLAIMING DEMOCRATIC RIGHTS IN THE AMERICAN WORKPLACE* 36 (2005).

82 *In re Houde Eng'g Corp.*, 1 N.L.B. 87 (1934); *Majority to Hold Power*, N.Y. TIMES, Sept. 2, 1934, at 1. The *Houde* decision also imposed a duty to bargain in good faith on the employer, another labor law innovation that would be enshrined in the NLRA. See National Labor Relations Act § 8(a)(5) (codified at 29 U.S.C. § 158(a)(5) (2006)).

83 Exec. Order No. 6580 (Feb. 1, 1934), *reprinted in* DECISIONS OF NATIONAL LABOR BOARD I: AUGUST 1933–MARCH 1934 vii (1934).

84 Louis Stark, *NRA Denies Stur at Company Union*, N.Y. TIMES, Feb. 4, 1934, at 25.

85 G. William Domhoff, *THE POWER ELITE AND THE STATE: HOW POLICY IS MADE IN AMERICA* 89 (1990).

86 The President's shift on majority rule may have confused organized labor. The AFL initially backed the President's truce, with AFL President William Green calling it a "great step forward for labor." Louis Stark, *Roosevelt Averts Strike; Auto Workers and Makers Hail Wage Bargaining Plan*, N.Y. TIMES, Mar. 26, 1934, at 1. Just two days later, the *New York Times* announced that the auto truce was seen as a blow to organized labor in general and to the AFL in particular. Louis Stark, *A.F. of L. Setback is Seen in Capital in Auto Agreement*, N.Y. TIMES, Mar. 28, 1934, at 1. It is not clear what caused the shift in coverage.

87 Louis Stark, *Wagner Seeks to Outlaw Company-Promoted Union; Bill for Majority Rule*, N.Y. TIMES, Feb. 15, 1935, at 1.

could choose majority rule as it had been practiced in the *Denver Tramway* and *Houde* decisions, or they could choose the pluralist approach articulated by Johnson and Richberg and reflected in the President's auto settlement.<sup>88</sup> Both approaches had received extensive media attention. And, both Wagner and his opponents made clear that the debate over the NLRA represented a choice between the two.<sup>89</sup>

### 3. *Company Unions*

The NLRA's provision outlawing company unions<sup>90</sup> settled an ongoing debate between three positions. Unions and their backers took the position that company-dominated unions—those that were created and financed by employers—were inherently unrepresentative. These unions distracted employees from real collective empowerment and should be fought.<sup>91</sup>

Roosevelt Administration officials occasionally seemed sympathetic to this view,<sup>92</sup> but the mainstream Administration position was more moderate. According to the Administration, workers could join a

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<sup>88</sup> The Roosevelt Administration's position never created a completely clear contrast with the NLRB approach because the Administration never took a clear position. Even after the auto settlement, the NRA stripped Houde of its Blue Eagle for failing to comply with an NLRB order based on the principle of majority rule. And, even as the NRA backed the NLRB in the *Houde* case, it allowed another company in a similar situation to ignore the majority view among its workers. Both Houde and the press noticed and objected to the inconsistency. Edwin J. Leberherze, Editorial Correspondence, *NRA Rulings Vary Widely in Buffalo*, N.Y. TIMES, Sept. 23, 1934, at E7.

<sup>89</sup> *Harriman Opposes the Wagner Bill*, N.Y. TIMES, Mar. 28, 1935, at 9.

<sup>90</sup> National Labor Relations Act § 8(a)(2) (1935) (codified as amended at 29 U.S.C. § 158(a)(2) (2006)). The debate over "company unions" suffered from inconsistencies in terminology. In the early 1930s, the term "company union" could mean simply a union that was confined to one company and not affiliated with an outside union. Thus, Wagner could say that the NLRA did not ban company unions. See Louis Stark, *Wagner Proposes New Labor Board to Top All Others*, N.Y. TIMES, Feb. 22, 1935, at 1. However, "company union" could also mean a union dominated by a particular employer. Adopting this definition, the press frequently referred to the NLRA as an effort to ban company unions. See, e.g., Louis Stark, *Wagner Seeks to Outlaw Company-Promoted Union; Bill for Majority Rule*, N.Y. TIMES, Feb. 15, 1935, at 1. The confusion allowed officials of all stripes to avoid making clear their position on company-dominated unions.

<sup>91</sup> See *See Holds Threats Bar Labor's Unionizing*, N.Y. TIMES, July 14, 1933, at 11; *Recovery Plan at Stake: Workers Give Notice They Will Battle to Last for Bargaining Right*, N.Y. TIMES, June 25, 1933, at 1 [hereinafter *Recovery Plan at Stake*]; Louis Stark, *Labor Clash Nears on Code Provisions*, N.Y. TIMES, July 18, 1933, at 11. For a discussion of several reasons for opposition to company unions, see Mark Barenberg, *The Political Economy of the Wagner Act: Power, Symbol, and Workplace Cooperation*, 106 HARV. L. REV. 1379, 1442–61 (1993).

<sup>92</sup> See *See Coal Strike Ended on Roosevelt Plea*, N.Y. TIMES, Aug. 9, 1933, at 4; *Recovery Plan at Stake*, *supra* note 91.

company union, an independent union, or no union at all, as long as the decision was not coerced.<sup>93</sup> The NLB reflected this approach. It invalidated employer-controlled company unions that were imposed on workers against their will<sup>94</sup> and declared that employers could not refuse to bargain with an independent union simply by claiming its workers preferred a company union.<sup>95</sup> But, the NLB allowed company unions to compete in free elections.<sup>96</sup>

The final approach came from the courts. The setting was the high-profile case of the Weirton Steel Corporation. Weirton claimed that its employees preferred to be represented by a company union—a claim buttressed by the results of a company-run election—and refused the NLB's demand to run its own election at the company.<sup>97</sup> As Weirton defied the Board, General Hugh Johnson of the NRA declared war on the company, stripping it of its Blue Eagle<sup>98</sup> and referring the case to the Attorney General for prosecution.<sup>99</sup> Labor celebrated as the Administration made clear that companies could not avoid bargaining with an independent union simply by staging an election to be won by an employer-controlled union.

But, the moment was short-lived. Shortly before Congress began to act on the NLRA, the judiciary weighed in on the Weirton case. A federal district court in Delaware ruled that Weirton did not exercise illegal control over a union, even when the company created the union unilaterally and paid its officers and expenses.<sup>100</sup> The court rejected the “old world theory” of an “inevitable and necessary diversity of interest” between employer and employee.<sup>101</sup> As long as companies did not directly coerce employees' choice of representative, the court held, company unions did not violate the NLRA.<sup>102</sup>

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<sup>93</sup> *Auto Code Signed for 35-Hour Week; Ford Waits to Act*, N.Y. TIMES, July 29, 1933, at 1.

<sup>94</sup> BERNSTEIN, *supra* note 72, at 60–61 (citing *In re Nat'l Lock Co.*, 1 N.L.B. 15 (1934), *In re Fed. Knitting Mills*, 1 N.L.B. 69 (1934), and HARRY A. MILLS & ROYAL E. MONTGOMERY, ORGANIZED LABOR 845 (1945)).

<sup>95</sup> See MILLS & MONTGOMERY, *supra* note 94, at 843 n.1 (cataloging several examples of NLB decisions invalidating company unions).

<sup>96</sup> *Id.* at 845–47.

<sup>97</sup> *Coal Men Defy NRA on Hearing*, N.Y. TIMES, Oct. 13, 1933, at 5; *Company Unions Defy Labor Board*, N.Y. TIMES, Dec. 8, 1933, at 36.

<sup>98</sup> The Blue Eagle is the emblem that was granted to companies that cooperated with the NRA. Removal of the Blue Eagle was seen as a government invitation to boycott the targeted business. *Eagle Forfeit Follows Ouster of Union Men*, WASH. POST, Dec. 21, 1933, at 9.

<sup>99</sup> *Labor Heads Call Weir Vote a 'Joke'*, N.Y. TIMES, Dec. 17, 1933, at 3.

<sup>100</sup> *United States v. Weirton Steel Co.*, 10 F. Supp. 55, 61, 84 (D. Del. 1935).

<sup>101</sup> *Id.* at 86.

<sup>102</sup> *Id.* The court's hostility to the government position can be seen by the way it decided the case. After holding against the government on the company union question, it went on

Thus, when voters began to see extensive coverage of the NLRA's provisions banning company unions, they had already seen what an anti-company union policy could look like. They had seen the Administration criticize company unions and go to court to challenge them. And, they had seen the limits of existing law in terms of its ability to stop employers from creating their own unions and imposing them on their workers.<sup>103</sup> Even on this relatively technical point of labor law, Americans had an unusual amount of information available to help shape their opinions.

### B. *Salience*

Americans rarely vote directly on federal policies, but when an issue is particularly salient, the people's representatives generally do a good job of reflecting popular sentiments.<sup>104</sup> No opinion polls exist to directly measure the salience of the NLRA in 1935, but an analysis of newspaper coverage suggests that the Act was extremely salient when it passed.

Todd A. Collins and Christopher A. Cooper have developed a method for evaluating issue salience by examining press coverage after a particular decision is made.<sup>105</sup> They propose analyzing press

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to find the NLRA unconstitutional as applied to Weirton, a manufacturer who engaged in interstate commerce only as a subsidiary of the National Steel Company. *Id.* at 90.

103 It is worth noting that both the administration's criticisms of company unions and the district court's rejection of those criticisms made front page news across the country. See *supra* note 92–93; *Company Union Upheld*, N.Y. TIMES, Feb. 28, 1935, at 1; *Government Loses Test of N.R.A. in Weirton Steel Suit*, L.A. TIMES, Feb. 28, 1935, at 1; *Johnson Warns Weirton Steel May Lose Eagle*, CHI. DAILY TRIB., Dec. 15, 1933, at 1; *New Deal Loses Weirton Steel Injunction Suit*, CHI. DAILY TRIB., Feb. 28, 1935, at 1; *NRA's Section 7-a is Ruled Illegal in Weirton Case*, ATLANTA CONST., Feb. 28, 1935, at 1; *Power is Given to Labor Board*, ATLANTA CONST., Dec. 20, 1933, at 1; *Steel Head Unyielding*, L.A. TIMES, Dec. 15, 1933, at 1.

104 See *supra* note 51.

105 See Todd A. Collins & Christopher A. Cooper, *Case Salience and Media Coverage of Supreme Court Decisions: Toward a New Measure*, 20 POL. RES. Q. 1, 1–12 (2011), available at <http://prq.sagepub.com/content/early/2011/03/07/1065912911398047>. Collins and Cooper updated a measure proposed by Lee Epstein and Jeffrey A. Segal to measure the salience of judicial opinions. See Lee Epstein & Jeffrey A. Segal, *Measuring Issue Salience*, 44 AM. J. POL. SCI. 66, 66–83 (2000). While Epstein and Segal's measure is binary—issues are either salient or not—and focuses on only the front page of only one publication—the *New York Times*—Collins and Cooper have developed a measure that allows for comparisons across issues and takes into consideration coverage in multiple papers. Collins & Cooper, *supra* at 1–3. While the measure was developed to evaluate judicial decisions, it can be used to measure salience in any situation where opinion polling is unavailable or unhelpful. See Epstein & Segal, *supra* at 79–80. There are compelling reasons to think newspaper coverage would correlate with issue salience among the general public. Newspapers interested in keeping customers are likely to disproportionately cover issues in which their readers are interested. And newspaper coverage may in turn increase issue

coverage the day after the decision in four geographically and ideologically diverse newspapers.<sup>106</sup> If a paper covered the decision on the front page, the decision gets two salience points. If the decision was covered elsewhere in the paper, it gets one point. If it was not covered, it gets no points.<sup>107</sup>

The NLRA gets a perfect eight points on the Collins-Cooper scale, as do iconic statutes such as the Voting Rights Act. Even the Social Security Act scores only a seven, as the *Chicago Tribune* chose not to give it front page coverage. Other indicators confirm the Collins-Cooper measure of salience. In the thirty days before it was signed into law, the NLRA was discussed<sup>108</sup> in forty-one front page articles from the four papers considered by Collins and Cooper.<sup>109</sup> The Voting Rights Act appeared in just thirty-six front page articles in the thirty days before it became law.<sup>110</sup> Social Security was mentioned in just thirty-two articles.<sup>111</sup>

### C. *Open Debate*

The final indicator that a bill is a super-statute may also be the least common. Super-statutes' tendency to capture the wisdom of crowds is diminished to the extent that opinion leaders unanimously back a given proposal.<sup>112</sup> Therefore, a true super-statute should emerge from a period in which leaders and interest groups loudly

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salience among those readers. See Spiro Kiouis, *Explicating Media Salience: A Factor Analysis of New York Times Issue Coverage During the 2000 U.S. Presidential Election*, 54 J. OF COMM. 71, 71 (2004) (summarizing the research on "agenda-setting" by the media).

<sup>106</sup> Those papers are the *New York Times*, *Washington Post*, *Los Angeles Times*, and *Chicago Tribune*. See Collins & Cooper, *supra* note 105, at 4. These papers represented a diversity of views during the New Deal. The *Los Angeles Times* was an "Independent Republican" paper in 1935, N. W. AYER & SON'S DIRECTORY OF NEWSPAPERS AND PERIODICALS 87 (1935), as was the *Chicago Tribune*, *id.* at 215. The *New York Times* was "Independent Democratic." *Id.* at 646. The *Washington Post* was simply "Independent." *Id.* at 144.

<sup>107</sup> See Collins & Cooper, *supra* note 105, at 6.

<sup>108</sup> The count of articles that discuss a particular piece of legislation comes from searching for the various titles of the legislation in ProQuest. I count an article as discussing the legislation if it mentions the legislation at least once. I excluded news items that were merely announcing that the legislation would be discussed on the radio or on television.

<sup>109</sup> For the NLRA, I searched for the following key words, all of which capture a title that newspapers used to describe the Act: "wagner labor disputes," "wagner disputes bill," "wagner bill" and "labor," and "wagner-connelly." I spot-checked the results to ensure that they only contain articles which actually discuss the NLRA.

<sup>110</sup> To find articles on the Voting Rights Act, I searched ProQuest for articles containing the term "voting bill," "voting rights bill," "voting rights law," or "voting law."

<sup>111</sup> To find articles on the Social Security Act, I searched ProQuest for any article containing the term "social security."

<sup>112</sup> See *supra* notes 39–42, and accompanying text.



and effectively proclaimed different views on the issue at hand. It is unusual for open debate to prevail when a mobilized populace appears passionate about a given policy proposal. However, the NLRA emerged from a period of open debate.

The main source of criticism of New Deal labor policy was, not surprisingly, the business community. Business groups repeatedly accused the NLB and the NLRB of creating conditions under which American employers could not survive.<sup>113</sup> Some businesses threatened to boycott the NRA code system to send a message to the Administration about its approach to labor law,<sup>114</sup> while others simply refused to comply with NLB orders.<sup>115</sup> One company even shut down its operations—throwing 653 people out of work—to protest an NRA action.<sup>116</sup>

Another prime source of negative information about the NLRA was the country's newspapers. Newspapers almost unanimously editorialized against the proposal.<sup>117</sup> They also provided detailed coverage of opponents' arguments against it. When business leaders argued that the NLRA would stop an otherwise inevitable recovery, they made front page news.<sup>118</sup> When named or unnamed individuals questioned the constitutionality of the proposal, they also received front

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113 *Warns NRA to Stop Raising of Wages: Durable Goods Board Suggests That Specific Needs Precede Price-Fixing Plans*, N.Y. TIMES, Apr. 30, 1934, at 1.

114 Louis Stark, *Dropping of Steel Code to Escape Labor Clause Considered by Industry: Hinges on Board Rulings: Move is Urged to Avoid Unwelcome Collective Bargaining*, N.Y. TIMES, Aug. 18, 1934, at 1.

115 *Houde Firm Is Stripped of Blue Eagle For Its Refusal to Bargain With Union*, N.Y. TIMES, Sept. 15, 1934, at 1. After one particularly controversial NLB ruling, the National Association of Manufacturers advised its members not to comply with NLB decisions. *Employers Defy Bargaining Rule: Manufacturers' Association Advises Members to Ignore Labor Board Decision*, N.Y. TIMES, Sept. 13, 1934, at 1.

116 *Plant Doors Shut by Harriman Mills as Answer to NRA: Johnson Charged with Trying to Wreck Concern by Taking Blue Eagle From It: 653 Employees are Out*, N.Y. TIMES, June 26, 1934, at 1.

117 See BERNSTEIN, *supra* note 72, at 67–68. The newspapers' objection to the proposed law may have had something to do with publishers' conflict with the pre-NLRA NLRB. After the Board accused a San Francisco paper of a discriminatory firing, the publishers rallied behind the paper and convinced the Roosevelt Administration that the Board had no jurisdiction in the case. See *1,200 Newspapers to Decide if Code Has Been Breached: Action Follows Reassertion by Labor Board of Jurisdiction in San Francisco Case*, N.Y. TIMES, Dec. 28, 1934, at 1. The NLRA unambiguously gave the NLRB jurisdiction over the publishers, as Wagner made clear. See Louis Stark, *Wagner Seeks to Outlaw Company-Promoted Union; Bill for Majority Rule*, N.Y. TIMES, Feb. 15, 1935, at 1.

118 *Industry Sees Recovery at Once if Congress Shelves New Laws: Manufacturers Could Spend \$20,000,000,000 in Factory Expansion and Rehabilitation, Giving 4,000,000 Jobs, if New Deal Bills Are Sidetracked, They Say*, N.Y. TIMES, Apr. 29, 1935, at 1; *Steel Men Decry Curbs to Recovery: Grace Says Industry, Ready for Prosperity, Is Held Back by New Deal's Uncertainty*, N.Y. TIMES, May 24, 1935, at 1; *Views of C. of C. on NRA*, N.Y. TIMES, May 3, 1935, at 1.

page coverage.<sup>119</sup> One front page headline informed *New York Times* readers that a prominent business leader would rather be imprisoned than obey labor regulations like those contained in Wagner's proposal.<sup>120</sup> When Wagner's proposal passed the House, the *Chicago Tribune* news coverage summarized it in two sentences: "It would give the American Federation of Labor great power. It has been frequently called unconstitutional."<sup>121</sup>

Of course, the biggest force in early New Deal America was almost certainly the Roosevelt Administration, generally considered an ally of organized labor. But the Roosevelt Administration was never a clear or consistent supporter of the NLRA. President Roosevelt eventually supported the NLRA, but his support was both late and tepid. When Wagner first made a labor reform proposal, in 1934, the Administration declined to publicly support the bill.<sup>122</sup> The White House played no part in drafting Wagner's proposal and took no official position on it. The Secretary of Labor, Frances Perkins, made noncommittal statements, while General Johnson said nothing.<sup>123</sup> Lacking presidential support, Wagner withdrew his proposal in favor of a plan, backed by Roosevelt, which would give the President discretion to create a new labor board without making any changes in labor law.<sup>124</sup>

In 1935, Wagner again proposed systemic reforms, and again, the Administration did not participate in the drafting or take a public position on the proposal's merits. When the White House chose not to endorse the proposal, its silence was heard loud and clear by the media, weakening Wagner.<sup>125</sup> Only Secretary Perkins expressed belat-

119 See, e.g., *Sibley Makes Plea Here: Chamber Head Urges Employers to Guard Hours and Wages*, N.Y. TIMES, May 29, 1935, at 1; *Wagner Bill*, CHI. DAILY TRIB., June 20, 1935, at 1.

120 *'Rather Go to Jail' than Accept Wagner Bill, Says U.S. Steel Executive, Getting Medal*, N.Y. TIMES, May 25, 1935, at 1.

121 *Labor and Old Age Bills Win: Congress Acts as Roosevelt Asks New Taxes; Wants Big Fortunes Split*, CHI. DAILY TRIB., June 20, 1935, at 1.

122 The White House's silence allowed some papers to portray the Wagner Bill as part of the President's agenda, but those close to the legislative process knew better. See Leon H. Keyserling, *The Wagner Act: Its Origin and Current Significance*, 29 GEO. WASH. L. REV. 199, 203.

123 BERNSTEIN, *supra* note 72, at 68.

124 J. Warren Madden, *The Origin and Early History of the National Labor Relations Board*, 29 GEO. WASH. L. REV. 234, 237-38 (1960).

125 Louis Stark, *Grave Labor Issues Facing White House*, N.Y. TIMES, Mar. 3, 1935, at E11 (documenting organized labor's disaffection with the Roosevelt Administration); Louis Stark, *Wagner Seeks to Outlaw Company-Promoted Union: Bill for Majority Rule*, N.Y. TIMES, Feb. 15, 1935, at 1 (noting the lack of administration support for the Wagner Act). It is unclear whether the Administration's public silence indicates ambivalence regarding Wagner's proposal or just political caution. Leon Keyserling—Wagner's chief aide and somebody

ed<sup>126</sup> support for Wagner's effort, and her support was contingent on any permanent NLRB being located within the Labor Department.<sup>127</sup> When Wagner would not concede that point, Perkins promised to scuttle his bill. Most assumed the President was on her side.<sup>128</sup> The President finally endorsed the NLRA on March 24, 1935, after the bill had already been passed overwhelmingly by both houses of Congress.<sup>129</sup>

The passage of the NLRA cannot be explained as the result of powerful opinion leaders dragging their followers toward a foregone conclusion. Americans witnessed a contest between organized labor and organized business, with the latter making strong claims that the NLRA was inconsistent with American values and economic recovery. While many Americans likely made up their minds about the Wagner Act based on interest group influence, the various interest groups competing for support during this time gave Americans a choice of whom to follow, with blind supporters of labor or business likely to cancel each other out.

#### D. Summary

Given the information available to Americans regarding the NLRA, the interest voters took in the matter, and the diverse viewpoints expressed by powerful opinion leaders when the bill was under consideration, the NLRA provides an ideal example of a super-statute entitled to judicial deference. But, what kind of deference? In the

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with an obvious incentive to put his boss and not President Roosevelt at the center of the NLRA victory—has suggested that President Roosevelt invited Senator Wagner to a White House meeting where other senators attempted to convince Wagner to withdraw his proposal. Keyserling, *supra* note 122, at 202–03. Keyserling concludes that the President never fully supported Wagner's plan. *Id.* at 203.

<sup>126</sup> BERNSTEIN, *supra* note 72, at 105; Louis Stark, *Wagner Proposes New Labor Board to Top All Others: Offers His Bill for National Independent Body to Assure Equality Under Sec. 7a*, N.Y. TIMES, Feb. 22, 1935, at 1; see also *Biddle Backs the Bill: Wagner Measure Called Vital to Existence of Labor Board*, N.Y. TIMES, Mar. 8, 1934, at 5; *Elimination of 7A Urged by Biddle: Labor Relations Board Head Tells Senate Committee the Section Is Unenforceable*, N.Y. TIMES, Apr. 12, 1934, at 8.

<sup>127</sup> *Labor Secretary Backs Wagner Bill: But Miss Perkins Opposes Making Board Independent of Her Department*, N.Y. TIMES, Mar. 12, 1935, at 12.

<sup>128</sup> Louis Stark, *Labor's Pet Bills Run Into Trouble: President Refuses to Commit Himself to Guffey Coal Stabilization Measure*, N.Y. TIMES, May 1, 1935, at 22.

<sup>129</sup> NLRB Legislative History, at 3112. Even after the Administration officially endorsed the bill, disagreement within the Administration could be seen. *Both Houses Clear Wagner Labor Bill: Conference Report on 'Must' Measure Is Quickly Adopted and President Will Sign It*, N.Y. TIMES, June 28, 1935, at 6 ("Passage of the bill making the board independent was a disappointment to Secretary Perkins."). For an argument that Roosevelt's support came too late to make a difference, see Keyserling, *supra* note 122, at 203.

next Part, I conclude by applying the super-statute concept to a frequently criticized labor law case and showing how doctrine would look different if courts took super-statutes seriously.

### III. A SUPER-STATUTE IN PRACTICE: REINTERPRETING THE NLRA

Parts I and II argued that the NLRA should be treated as a super-statute. This Part will explain what that would look like in practice by considering a Supreme Court case that would have come out differently if the Court had treated the NLRA as a super-statute. *Lechmere, Inc. v. NLRB*,<sup>130</sup> has been criticized by pro-labor academics, but these critics have not provided an alternative framework for analysis that they would be willing to apply consistently. The theory of super-statutes provides such a framework.

#### A. *The Trouble with Lechmere*

The *Lechmere* case began when union organizers from the United Food and Commercial Workers (“UFCW”) were removed from the parking lot of a retail store owned by Lechmere, Inc., where they had been leaving handbills on the cars of the store’s employees.<sup>131</sup> The union had already reached out to workers through newspaper ads with no success.<sup>132</sup> After they were removed from the parking lot, they tried carrying signs on a narrow strip of grass near the store as a means of informing workers about the ongoing organizing campaign.<sup>133</sup> This too failed.<sup>134</sup>

The UFCW filed a complaint with the NLRB accusing Lechmere of an unfair labor practice. The Board ruled that under the circumstances, Lechmere had a duty to provide the organizers access to company property.<sup>135</sup> The First Circuit agreed,<sup>136</sup> but the Supreme Court reversed. According to the Court, organizers are not protected by the NLRA’s Section 7, which speaks only of “employees.”<sup>137</sup> Section 7 applies to organizers “only derivatively”<sup>138</sup> and must be balanced against employers’ property rights.<sup>139</sup> Thus, the rights of or-

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<sup>130</sup> 502 U.S. 527 (1992).

<sup>131</sup> *Lechmere*, 502 U.S. at 529–30.

<sup>132</sup> *Id.* at 540.

<sup>133</sup> *Id.* at 530.

<sup>134</sup> *Id.*

<sup>135</sup> *Lechmere, Inc.*, 295 N.L.R.B. 92, 92, 97–98 (1989).

<sup>136</sup> *Lechmere, Inc. v. NLRB*, 914 F.2d 313, 324–25 (1st Cir. 1990).

<sup>137</sup> *Lechmere*, 502 U.S. at 531–32.

<sup>138</sup> *Id.* at 533.

<sup>139</sup> *Id.* at 537.

ganizers can be overridden provided employees have some way of learning that an organizing drive is taking place.<sup>140</sup>

*Lechmere* has drawn extensive scholarly criticism.<sup>141</sup> Much of the criticism relates not to the Court's reasoning in *Lechmere* but to its reasoning in a case the *Lechmere* Court relied on: *NLRB v. Babcock & Wilcox Co.*<sup>142</sup> Like *Lechmere*, *Babcock* presented a conflict between property rights and the NLRA. The Court responded by balancing the rights protected by the NLRA against the employer's property rights, with the result that the Court allowed the employer to exclude organizers. A balancing test was necessary, the Court reasoned, because "[o]rganization rights are granted to workers by the same authority, the National Government, that preserves property rights."<sup>143</sup> Of course, as many scholars have pointed out,<sup>144</sup> this is simply untrue. NLRA rights flow from the national government, but property rights are rooted in state common law. When the two conflict, the former should control.

If the *Lechmere* Court had balanced statutory rights granted by the NLRA against common law property rights, it could rightly be criticized for grafting a judicial exception onto Congress's statute. But, it is not clear that this is what the Court did. The Court's reasoning relies less on a decision to balance statutory rights against property rights than on a conclusion that union organizers do not have any statutory rights to begin with. After all, the *Lechmere* Court concluded that organizers are not employees, and only employees have Section 7 rights.<sup>145</sup> If the Court went on to balance organizers' "derivative" rights against employers' property rights, this represents not so much a diminution of statutory rights as a creation of nonstatutory rights, albeit weak ones. In other words, if organizers are not employees within the meaning of the NLRA, the *Lechmere* Court might be criti-

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<sup>140</sup> *Id.* at 539–40.

<sup>141</sup> See, e.g., Ellen Dannin, *NLRA Values, Labor Values, American Values*, 26 BERKELEY J. EMP. & LAB. L. 223, 268 (2005); Cynthia L. Estlund, *supra* note 3, at 305; Moshe Zvi Marvit, *On the Greatest Property Transfer That Wasn't: How the National Labor Relations Act Chose Employee Rights and the Supreme Court Chose Property Rights*, 38 S.U. L. REV. 79, 103 (2010); see also Michael L. Stevens, Comment, *The Conflict Between Union Access and Private Property Rights: Lechmere, Inc. v. NLRB and the Question of Accommodation*, 41 EMORY L.J. 1317, 1337 n.99 (summarizing criticism of *Lechmere* in the press).

<sup>142</sup> 351 U.S. 105 (1956).

<sup>143</sup> *Id.* at 112.

<sup>144</sup> See Cynthia L. Estlund, *supra* note 3, at 311, 334; Jeffrey M. Hirsch, *Taking State Property Rights Out of Federal Labor Law*, 47 B.C. L. REV. 891, 944 (2006); James Gray Pope, *How Americans Lost the Right to Strike, and Other Tales*, 103 MICH. L. REV. 518, 543–44 (2004).

<sup>145</sup> *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 532 (1992).

cized for giving them rights not provided by that statute, but it cannot be criticized for diluting rights that never existed in the first place.

Thus, the question in *Lechmere* is simply whether union organizers are “employees” under the NLRA. The Supreme Court did not do itself any favors when it reasoned through this question. Rather than look to the text of the NLRA, the Court seemed to assume that employees are protected only from interference by their own employer.<sup>146</sup> Thus, *Lechmere* could clearly remove organizers from its property, as these organizers were not employed by *Lechmere*. As scholars have pointed out,<sup>147</sup> this assumption is clearly wrong. The NLRA provides that the term “employee” is not limited to the employees of a particular employer.<sup>148</sup> If Pepsi employees want to engage in collective action, Coke could not interfere any more than Pepsi could.

Some scholars end the analysis here and conclude that the *Lechmere* Court simply misread the NLRA.<sup>149</sup> But, the Act has more to say about the definition of “employee.” Employees must be employed by an employer, and unions, according to the statute, are not employers.<sup>150</sup> While the Court never said as much, its ruling in *Lechmere* could plausibly be read as an interpretation of the language in the NLRA that renders unions non-employers and their employees non-employees.

Professor James Gray Pope has a response to this argument. He looks to the intent of the NLRA and concludes that unions were exempted from the Act’s definition of employer so that they would not be covered by other provisions limiting the ability of employers to participate in workers’ decisions regarding union representation.<sup>151</sup> Since the Act exempted unions from the definition of employer in order to enhance their ability to organize workers, argues Pope, it would be “ironic” to interpret this exemption in such a way as to deny organizers protections needed to reach unorganized workers.<sup>152</sup>

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146 *Id.*

147 Estlund, *supra* note 3, at 326 (“The literal terms of the Act should thus make it unlawful for an employer to interfere with efforts to ‘assist’ a union by employees other than its own, including union organizers.”); Pope, *supra* note 144, at 541–43.

148 National Labor Relations Act § 2(3) (codified at 29 U.S.C. § 152(3) (2006)).

149 Estlund, *supra* note 3, at 326.

150 National Labor Relations Act § 2(2) (codified at 29 U.S.C. § 152(2) (2006)) (“The term ‘employer’ . . . shall not include . . . any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.”).

151 Pope, *supra* note 144, at 542.

152 *Id.*

Professor Cynthia Estlund has another response. According to Estlund, “[t]he economic theory of unionism, which the framers of the 1935 Wagner Act largely adopted, recognizes that the effectiveness of collective bargaining depends on a union’s ability to organize across employer lines.”<sup>153</sup> Union organizing is a collective act between organized workers and those they—through union organizers acting as their agents—seek to organize.<sup>154</sup> Since Section 7 protects collective action, it must protect union organizers—not because organizers enjoy “derivative rights” based on the rights of unorganized workers, but because they are directly protected by the Section 7 rights of the organized workers they represent.<sup>155</sup>

Both Pope and Estlund rely on a particular vision of what the NLRA sought to accomplish. Pope focuses on the intent of Congress in exempting unions from the definition of “employer.” Estlund focuses on the “economic theory of unionism” that motivated the NLRA. But, both arguments work only to the extent that readers or courts are willing to look beyond the text of the Act to the intent of Congress in passing it. Not everybody is willing to make this move.

#### B. Lechmere, *New Textualism*, and Hoffman Plastic

At one point, most courts would have followed Pope and Estlund in consulting indicators of congressional intent other than the statute itself.<sup>156</sup> Today, courts tend to take statutes at face value.<sup>157</sup> In *Lechmere*, this approach would favor the outcome the Court reached. Since union organizers are not clearly covered by the text of the statute, courts would have to look to the statute’s purpose to find organizer protections.

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<sup>153</sup> Estlund, *supra* note 3, at 327.

<sup>154</sup> *Id.*

<sup>155</sup> *Id.* at 326–28.

<sup>156</sup> See *Church of the Holy Trinity v. United States*, 143 U.S. 457, 459 (1892) (“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.”); see also William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 626–27 (1990) (describing the “traditional” approach to statutory interpretation, which uses non-textual sources to ferret out congressional intent).

<sup>157</sup> See Eskridge, *The New Textualism*, *supra* note 156, at 656–66 (documenting the rise of New Textualism in the Supreme Court). The change in approach does not necessarily reflect a change in doctrine. Courts might agree that they will look beyond the text of a statute only when the text is unclear, while disagreeing vehemently about when a statutory text is unclear. In practice, the rise of New Textualism does not foreclose the use of extra-textual sources, but it does limit the circumstances under which these sources will be decisive.

Courts' tendency to focus on the text of statutes reflects the influence of a set of ideas that can be roughly attributed to the New Textualism Movement.<sup>158</sup> New Textualists justify their approach by attacking the idea that laws generally reflect a coherent purpose beyond the provisions contained in their texts. Legislation is almost always the product of compromise.<sup>159</sup> Reformers may have achieved enough power to change the status quo, but they have inevitably compromised with some lawmakers and interest groups who would rather preserve the status quo and others that would prefer different changes. Judges who expand a law to achieve more than the text demands have privileged one side of a negotiation over another, giving an interest group more than it could win at the bargaining table. This, according to the New Textualists, is not the judge's role.<sup>160</sup>

Some scholars go further, arguing that the whole idea of group intent is incoherent. Relying on Public Choice Theory, and particularly the work of Kenneth Arrow,<sup>161</sup> these writers argue that it simply makes no sense to speak of the intent of a group the way we speak of the intent of an individual. Legislation is the contingent product of a particular set of circumstances and procedures. Asking what a group of lawmakers would have thought about an issue it never in fact considered is like asking who would have won a sporting competition, and by how much, without specifying the rules of the game. When courts attribute an unexpressed purpose to a legislative text, they are simply

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<sup>158</sup> See *id.* at 626–27.

<sup>159</sup> This idea has been popularized in large part by scholars in the law-and-economics tradition, who see policymaking as a process of negotiation and compromise between competing interest groups. Just as a contract negotiated between Walmart and General Motors cannot be said to have the general intent of promoting either party's values, a statute negotiated between different interest groups and their congressional champions cannot be said to represent any one party's views of the world. See, e.g., William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875, 894 (1975); Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 227–33 (1986).

<sup>160</sup> *MCI Telecomms. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 231 (1994) (Scalia, J.); *Hrubec v. Nat'l R.R. Passenger Corp.*, 49 F.3d 1269, 1270 (7th Cir. 1995) (Easterbrook, J.) (“[N]o legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute's primary objective must be the law.” (quoting *Rodriguez v. United States*, 480 U.S. 522, 525–26 (1987))); Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 546 (1983) (“[J]udicial pursuit of the ‘values’ or aims of legislation is a sure way of defeating the original legislative plan.”).

<sup>161</sup> See KENNETH J. ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* 204 (2d ed. 1963).



imposing their own values on something that, on its own, has no such thing.<sup>162</sup>

The New Textualist approach reflects the common sense wisdom that if it ain't broke, courts should not fix it. The status quo, whatever its flaws, enjoys a presumption of validity if only because we have learned to live with it.<sup>163</sup> Nobody would want to live in a world where everything is in flux at every moment.<sup>164</sup>

The criticisms of *Lechmere* discussed above could be seen as predicated on the belief that New Textualism is the wrong way to do statutory interpretation. But, I suspect that Pope and Estlund would not always agree with an approach to statutory interpretation that reads statutes expansively to reflect a court's interpretation of statutory purpose. For example, both have expressed their disagreement with the Supreme Court's decision in *Hoffman Plastic Compounds, Inc. v. NLRB*<sup>165</sup> to read the Immigration Reform and Control Act of 1986<sup>166</sup> ("IRCA") as precluding backpay for undocumented workers.<sup>167</sup> Yet, that case is easily defensible if courts can expand statutory texts to reflect a plausible reading of congressional intent. Even Estlund has admitted that Congress was "exquisitely ambiguous"<sup>168</sup> on the question of backpay when it passed the IRCA. It seems likely that many of the members of Congress who supported the IRCA intended to deny undocumented workers any benefit tied in any way to the employment relationship. The Court's error in *Hoffman Plastic* was not that it chose an indefensible interpretation of congressional intent, but that it chose one interpretation and elevated it above the text of the

162 See DANIEL A. FARBER & PHILLIP P. FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* 38–42 (1991); John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 15–16 (2001).

163 See David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. REV. 921, 937 (1992); David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 891–92 (1996); see also Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 264–65 (1986) (arguing that statutes interfere with efficient common law rules).

164 See Strauss, *supra* note 163, at 892 ("[I]t is simply too time consuming and difficult to reexamine everything from the ground up."); Cass Sunstein, *Burkean Minimalism*, 105 MICH. L. REV. 353, 362–86 (2006). While Sunstein does not identify with Burke's support for tradition as such, he agrees with the Burkeans that "[n]o real-world minimalist is likely to want to subject many traditions to critical scrutiny, at least not at the same time." Sunstein, *supra* at 367.

165 535 U.S. 137 (2002).

166 Pub. L. No. 99-603, Title I, § 101(a)(1), 100 Stat. 3359 (1986) (codified at 8 U.S.C. § 1324a).

167 See Cynthia Estlund, *The Supreme Court's Labor and Employment Cases of the 2001–2002 Term*, 18 LAB. LAW. 291, 316–17 (2002); James Gray Pope, *A Free Labor Approach to Human Trafficking*, 158 U. PA. L. REV. 1849, 1868 (2010).

168 Estlund, *supra* note 167, at 315.

Act. While the Court's outcome is no doubt reprehensible to Estlund and Pope (and to me), its approach to interpreting the IRCA is consistent with their approach to interpreting the NLRA.

The theory of super-statutes allows courts to avoid the outcome in *Lechmere* without risking the outcome in *Hoffman Plastic*. It counsels a purposivist approach to statutes like the NLRA and a New Textualist approach to statutes like the IRCA.<sup>169</sup> And, it provides a principled means for determining when to adopt the former approach and when to adopt the latter.

This is because the justifications for New Textualism ring hollow when courts interpret super-statutes. To understand why, it helps to remember that statutes are not black marks on a white background. When courts choose to apply preexisting law—whether derived from the common law or from a statute—they engage in lawmaking every bit as much as when they apply principles derived from statutes. Courts are condemned to choose. The question is whether they will choose the status quo or the statutory change to the status quo.

Under normal circumstances, there are compelling reasons to stick with the status quo. Further, it may be difficult for courts to identify and apply a unifying principle embedded in a statute. When a court interprets a super-statute, however, the status quo has generally been rejected. The kind of popular mobilization that occurs when a super-statute is passed is unlikely when Americans are broadly satisfied with the way things are. Thus, the New Textualist bias in favor of the status quo is inappropriate when courts interpret super-statutes. At the same time, it makes more sense to speak of a collective will in the context of a statute produced after prolonged public discussion of the values and ideas that motivate that enactment. When a policy change follows a period of in-depth public debate, courts should be able to more easily determine a clear motivating principle behind the change.<sup>170</sup>

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<sup>169</sup> I assume here that the IRCA does not qualify as a super-statute.

<sup>170</sup> Even Judge Easterbrook grants that a broad, purposivist interpretation of statutes is appropriate if statutes were generally intended to serve the public interest. Frank H. Easterbrook, *Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4, 15 (1984) ("If statutes generally are designed to overcome 'failures' in markets and to replace the calamities produced by unguided private conduct with the ordered rationality of the public sector, then it makes sense to use the remedial approach to the construction of statutes—or at least most of them."). One way to describe super-statute theory that might be more acceptable to the law-and-economics tradition is as a claim that when the public is closely watching its elected representatives on a particular issue, the various collective action problems that generally prevent public-spirited legislation do not come into play, and lawmakers generally produce legislation in the public interest. In these cases, generous statutory interpretation is warranted.

C. *The Lechmere Problem in Other Cases*

*Lechmere* is not the only precedent that would fall if the NLRA received the treatment it deserves. Professor Ellen Dannin has shown how the remedies available for violations of labor law—one of the most destructive areas of labor law<sup>171</sup>—could be transformed if the courts interpreted the NLRA in light of what she calls “NLRA values.”<sup>172</sup> At the same time, many of those areas of labor law doctrine that protect workers rely on courts treating the NLRA as a super-statute without explicitly justifying the approach. A major part of the basic foundation of labor law was built more on purpose than on text. In *J.I. Case Co. v. NLRB*,<sup>173</sup> one of the first cases to establish the principle that collective bargaining is inconsistent with individual contracts between employers and employees, the Supreme Court began by admitting that the language of the NLRA did not settle the issue.<sup>174</sup> It based its ruling instead on “the practice and philosophy of collective bargaining.”<sup>175</sup> If courts and the Board chose to limit the NLRA to its express terms, even *J.I. Case* would be in danger.

CONCLUSION

The goal of this Article was to show that the NLRA deserves better. Adopting a term made popular by William Eskridge and John Ferejohn, I have argued that the NLRA should be treated as a super-statute. Unlike Eskridge and Ferejohn, however, I derived the justification for treating certain statutes with special deference—and thus the prerequisites for such treatment—from first principles. My goal in Part I was to develop the beginnings of a normative justification for the theory of super-statutes. Applying this framework, Part II makes the case that the NLRA fits a normatively defensible definition of super-statutes. Part III explains why super-statute theory matters. It shows that pro-labor academics tend to interpret the NLRA in light of broad principles that go beyond the Act’s text, while denying similar treatment to other statutes. The super-statute theory provides a justification for this approach and a principled means for determining when to read a statute broadly. It gives judges a framework for giving

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171 See Cynthia L. Estlund, *supra* note 2, at 1537; Paul C. Weiler, *Promises to Keep: Securing Workers’ Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1787–96 (1983).

172 Ellen Dannin, *NLRA Values, Labor Values, American Values*, 26 BERKELEY J. EMP. & LAB. L. 223, 225 (2005).

173 321 U.S. 332 (1944).

174 *Id.* at 336.

175 *Id.* at 338.

the people what they want when they speak with one voice, while avoiding the problems that can come with expansive interpretations of everyday statutes.