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Labor Law Access Rules and Stare Decisis: Developing a Planned Parenthood-Based Model of Reform

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Labor Law Access Rules and *Stare Decisis*: Developing a *Planned Parenthood*-Based Model of Reform

Rafael Gely*
Leonard Bierman**

This article deals with labor law access rules, particularly the rights of unions to gain access to employers' private property for organizing purposes. Professors Gely and Bierman provide a comprehensive analysis of the access issue and identify two major problems with the manner in which the Supreme Court has approached this area. First, the Supreme Court has dealt piecemeal with the various aspects of this problem without attempting to develop a coherent framework. Second, the Court has been reluctant to analyze the access issue within the context of today's workplace.

Professors Gely and Bierman attribute the Supreme Court's flawed approach to this area to the doctrine of stare decisis. They examine the role of stare decisis in this context and argue that the Supreme Court's own recent decision on stare decisis in the Planned Parenthood case, mandates a need for reform with regard to labor law access rules.

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I. INTRODUCTION

For over five decades the United States Supreme Court, the National Labor Relations Board ("Board"), and most recently Congress, have struggled with the question of what access unions and employees should have to the workplace.¹ While either granting unlimited access to unions and employees or completely closing the workplace to them, would represent simple clear-cut answers, neither provides a satisfactory resolution within the statutory context provided by the National Labor Relations Act (the "Act").² The Act establishes the rights of employees to "form, join, or assist labor organizations, [and] to bargain collectively through representatives of their own choosing."³ This right, as the Court has recognized, must be accompanied by a corresponding right to have the opportunity to receive information about the benefits and costs of collective action.⁴ Thus, the Act's substantive organizational rights are of little import if not accompanied by employee rights to obtain comprehensive information from unions and other employees about unionization.⁵ Conversely, Congress and the judiciary have been very concerned with the encroachments that the Act, in particular its provisions granting organizational rights to employees, makes on the constitutionally protected property rights of employers.⁶ By defini-

1. We will refer to this problem as the "access problem" throughout the Article. The "access issue" has been the focus of an extensive academic literature. See generally JAMES B. ATLESON, VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW 60-62 (1983) (discussing the effects of common law property concepts on unionization activities); THE DEVELOPING LABOR LAW 85-87 (Patrick Hardin et al. eds., 3d ed. 1992) (describing types of employer violations of restrictions on pre-election activities); R. Wayne Estes & Adam M. Porter, Babcock/Lechmere Revisited: *Derivative Nature of Union Organizer Right of Access to Employers' Property Should Impact Judicial Evaluation of Alternatives*, 48 SMU L. REV. 349 (1995); Cynthia L. Estlund, *Labor, Property, and Sovereignty After Lechmere*, 46 STAN. L. REV. 305, 321 n.109 (1994) (discussing the circuit court conflict on the "salting" issue); ROBERT A. GORMAN, BASIC TEXT ON LABOR LAW: UNIONIZATION AND COLLECTIVE BARGAINING 179-94 (1976); Sarah Korn, *Property Rights and Job Security: Workplace Solicitation by Nonemployee Union Organizers*, 94 YALE L.J. 374 (1984); Randall White, *Union Representation Election Reform: Equal Access and the Excelsior Rule*, 67 IND. L.J. 129 (1991) (arguing that giving union *Excelsior* list earlier permits more employee contact).

2. National Labor Relations Act, Pub. L. No. 74-198, 49 Stat. 449 (1935) (current version at 29 U.S.C. §§ 141-87 (1988)).

3. 29 U.S.C. § 157 (1988).

4. "The right of self-organization depends in some measure on the ability of employees to learn the advantages of self-organization from others." NLRB v. Babcock & Wilcox Co., 351 U.S. 105, 113 (1956).

5. See Estlund, *supra* note 1, at 315. See also Larry Cohen, *Overcoming Negativism: The Mission Statement in Union Organizing*, in INDUSTRIAL RELATIONS RESEARCH ASSOCIATION, PROCEEDINGS OF THE FORTY-NINTH ANNUAL MEETING, 72-78 (Paula B. Voos ed., 1997) (suggesting that, in attempting to organize, unions articulate a positive vision for change, instead of merely reacting to problems generated by management).

6. This concern was recognized earlier in the legislative debates over the original NLRA. Senator Wagner, the bill's chief sponsor, noted: "No sensible person would interpret that language [of section 7] to mean that while a factory is at work the workers could suddenly stop their duties to have a mass meeting in the plant on the question of organization." 79 CONG. REC. 7676 (1935). The Court also has

tion, any expansion of the rights of unions and employees to enter the workplace and communicate their message to potential members results in an intrusion on the rights of private employers to have control over their property.⁷

As the result of this difficult clash of policy priorities, the Board and the courts have struggled to develop a coherent policy concerning the “access” question. This article looks at the development of the law in this very contentious area. We argue that while this is certainly a difficult problem, the Court and the Board have made it a much more complex issue than necessary. We argue that there have been two basic flaws in the Court’s treatment of the “access problem.” First, decision-makers have failed to comprehensively deal with the access problem.⁸ Over the years, the courts and the Board have dealt piecemeal with various aspects of this problem without attempting to develop a coherent framework. This disjunction has most recently been illustrated in Court’s decisions dealing with the definition of the term “employee” under the Act.⁹ Second, the Court, and to some extent the Board, has not analyzed the access issue within the context of today’s workplace.¹⁰ The Court has been “stuck” in its understanding of the dynamics of the workplace and of workplace behavior, exhibiting a frame of mind that is more representative of the 1940’s and 50’s than of today’s workplace in its understanding of the dynamics of the workplace and of worker behavior. This article provides a new perspective on the access problem and the Court.

Part II describes and analyzes the development of the law concerning the access problem.¹¹ We examine the historical development of the law concerning employee access, from the initial distinctions of work time/non-work time, and employee/non-employees, to the recent decisions concerning salting. Part III identifies two basic problems in the access problem jurisprudence.¹²

In Part IV, after identifying what we believe is the doctrinal problem in the development of the case law concerning the access problem,¹³ attention

recognized this tension and its importance to the development of labor law. “These cases [*Republic Aviation* and *Le Tourneau*] bring here for review the action of the National Labor Relations Board in working out an adjustment between the undisputed right of self-organization assured to employees under the Wagner Act and the equally undisputed right of employers to maintain discipline in their establishments.” *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 797-98 (1945).

7. See Dianne Avery, *Federal Labor Rights and Access to Private Property: The NLRB and the Right to Exclude*, 11 IND. REL. L.J. 145, 223-27 (1989) (discussing the relationship between section 7 rights and property rights).

8. See *infra* notes 126-32 and accompanying text.

9. See *Town & Country Electric Inc. v. NLRB*, 516 U.S. 85 (1995). See also *infra* notes 92-98 and accompanying text.

10. See *infra* notes 133-45 and accompanying text.

11. See *infra* notes 24-125 and accompanying text.

12. See *infra* notes 126-45 and accompanying text.

13. See *infra* notes 148-56 and accompanying text.

turns to the theoretical issue of explaining why the Board and the Court have applied a flawed approach to the access problem.¹⁴ We argue that the problems in this area of law are rooted in a key component of the judicial process in the United States, i.e., the doctrine of *stare decisis*.¹⁵ We argue that the Board and Court's continued reliance on policy judgments they made decades ago are responsible for the complex state of affairs in this area of law. We turn to behavioral economics and decision making research to help us frame this problem. We find some partial answers in the "escalation of commitment" perspective. In Part V, we comprehensively analyze the access problem within an escalation of commitment framework.¹⁶

In Parts VI and VII we move back from the theoretical discussion to a more doctrinal discussion. Our focus here is to identify possible solutions to the access problem. We find an unlikely ally in our quest: the Supreme Court. In a number of decisions over the last ten years, culminating with the high-profile decision in *Casey v. Planned Parenthood*,¹⁷ the Court has developed an approach to *stare decisis* which maintains the reliance on precedent while at the same time avoiding the decision-making flaws examined by the escalation of commitment research. Using this model, we provide a road map to resolve the access problem.¹⁸ In Part VII we identify the major components of a comprehensive model of reform which combines both the lessons of *Planned Parenthood* on precedent and the lessons of more than sixty years of industrial relations in the United States. Our proposed reform looks at multiple aspects of the access problem. We propose the outlawing of salting in a manner similar to that advanced in a recent congressional proposal.¹⁹ Similarly, we suggest limits on unions visiting employees at their homes, in recognition of the need to protect employees' privacy interests.²⁰ To balance the negative effects that these two proposals are likely to have on the ability of unions to organize new employees, we also propose a number of other reforms. We recommend that Congress reconsider expanding both the rights of unions under the *Excelsior* list doctrine,²¹ as well as the rights currently afforded to off-duty employees regarding organizing activities.²² We also propose overruling the *Lechmere* decision, at least with respect to "quasi-public" employer property such as retail store parking lots.²³ In Part VIII we will summarize our

14. See *infra* notes 157-73 and accompanying text.

15. See *infra* notes 148-56 and accompanying text.

16. See *infra* notes 174-203 and accompanying text.

17. 505 U.S. 833 (1992).

18. See *infra* notes 254-318 and accompanying text.

19. See *infra* notes 254-77 and accompanying text.

20. See *infra* notes 289-96 and accompanying text.

21. See *infra* notes 297-308 and accompanying text.

22. See *infra* notes 309-14 and accompanying text.

23. See discussion *infra* Part VII.D.5.

arguments and conclude. We argue that our proposals for reform provides a vehicle for constructive discussions in this important area.

II.

THE ACCESS PROBLEM

A. "In The Beginning": Republic Aviation, Babcock and NuTone

The rules governing labor organizing at the workplace are fraught with an inherent tension between the rights of employees to "form, join, or assist labor organizations" (under section 7 of the Act) and the rights of employers as property owners and managers. One of the key early cases addressing this conflict is the United States Supreme Court's 1945 decision in *Republic Aviation Corp. v. NLRB*.²⁴ *Republic Aviation* drew a sharp distinction between workplace organizing during work time as opposed to non-work time. The Court found non-solicitation rules to be presumptively valid when applied to work time, while such rules were found to be presumptively invalid when applied to non-work time.²⁵

In *Republic Aviation*, the Court did not distinguish between employee organizers and non-employee organizers. The Board subsequently afforded both groups broad freedom to organize at the workplace during nonworking hours.²⁶ However, eleven years later in *NLRB v. Babcock & Wilcox Co.*,²⁷ the Court sharply reversed the Board differentiating between the workplace organizing rights of employees and non-employee or outside union organizers.²⁸

The Court in *Babcock* held that employers were free to deny access to their property and the workplace to outside, non-employee union organizers so long as "reasonable efforts by the union through other available channels of communication" would enable the union to reach employees with its message.²⁹ The Court in *Babcock* emphasized that a large percentage of the company's employees lived in a nearby small town. As a result those employees were reasonably accessible to the union at their homes and through other means, thus obviating the need for union access to employer property.³⁰

Republic Aviation and *Babcock* mean employers can develop general rules prohibiting on-site solicitation by outside union organizers, and any union solicitation during working time. These decisions do not address,

24. 324 U.S. 793 (1945).

25. See *id.* at 801-05 & nn.8, 10. See also Leonard Bierman, *Toward A New Model For Union Organizing: The Home Visits Doctrine and Beyond*, 27 B.C. L. REV. 1, 3-8 (1985).

26. See Jay Gresham, *Still as Strangers: Nonemployee Union Organizers on Private Commercial Property*, 62 TEX. L. REV. 111, 117 (1983).

27. 351 U.S. 105 (1956).

28. See *id.* at 112-14.

29. *Id.* at 112.

30. See *id.* at 106-07.

however, the question of how these rights might be impacted by an employer's decision to wage a vigorous campaign against a union at the work-site during working time. This question has arisen most frequently in the context of an employer's decision to give a "captive audience" speech—i.e., an anti-union speech given to all gathered employees at the workplace during working time. Various observers have characterized such speeches as perhaps the most potent legal weapon in an employer's anti-union arsenal.³¹

For this and related reasons, the Board has at times in the past found such "captive audience" speeches to violate the Act³² or required employers who choose to make such speeches to give the union the opportunity to come onto company premises to reply.³³ Later Board cases, though, have denied unions any workplace reply to employer speeches of this kind,³⁴ and this latter approach was affirmed by the Court in its 1958 decision in *NLRB v. United Steelworkers (NuTone)*.³⁵ In *NuTone*, the Court held that an employer can lawfully enforce a workplace no-solicitation rule against unions while at the same time "violating" this policy by engaging in anti-union solicitation at times and places prohibited by the rule.³⁶ The Court noted that under the Act, unions have other available avenues of communication, and they are not "entitled to use a medium of communication simply because the employer is using it."³⁷ Significantly, Justice Felix Frankfurter, writing for the Court in *NuTone*, noted that employers were not free to implement rules in this manner where a substantial "imbalance in the opportunities for organizational communication" exists.³⁸

B. The "Home Visits" Doctrine

In the late 1950s, apparently responding to several of the Court's decisions limiting union organizational opportunities, developed its "home visits" doctrine. Under this doctrine, unions would continue to legally visit employees at their homes. Employers are prohibited from engaging in this method of campaigning.

The Board's differentiation between unions and employers in this regard rests on two prongs. First, the Board has found employer campaign

31. See Comment, *Labor Law Reform: The Regulation of Free Speech and Equal Access in NLRB Representation Elections*, 127 U. PA. L. REV. 755, 780 [hereinafter "Penn Comment"] (citing statement by Professor Howard Lesnick); see also Robert Lewis, *The Law and Strategy of Dealing with Union Organizing Campaigns*, 25 LAB. L. J. 42, 46 (1974).

32. See, e.g., *Clark Bros. Co.*, 70 N.L.R.B. 802, 804-05 (1946), *enforced*, 163 F.2d 373 (2d Cir. 1947).

33. See, e.g., *Bonwit Teller, Inc.*, 96 N.L.R.B. 608 (1951).

34. See, e.g., *Livingston Shirt Corp.*, 107 N.L.R.B. 400 (1953).

35. 357 U.S. 357 (1958).

36. *Id.* at 358, 364.

37. *Id.* at 364.

38. *Id.* at 362.

visits to employee homes to be *per se* coercive.³⁹ The Board stated that unions lack the employer's "control over tenure of employment and working conditions" of the kind which imparts the coercive effect to systematic individual interviews.⁴⁰

Second, and far more significantly, the Board has also held that unions should be allowed to visit employee homes while employers are not so permitted in order to offset the lack of union access to employees at the workplace and in other contexts.⁴¹ It is this latter prong concerning the need for union home visits to offset employer organizational advantages which has over time emerged as the major underlying theme of the "home visits" doctrine.⁴²

C. Excelsior/General Electric

The notion of union home visits as an "organizational counterbalance" to employer advantages in reaching employees at the workplace was further solidified by the Board in its famous 1966 holdings in the companion cases of *Excelsior Underwear, Inc.*⁴³ and *General Electric Co.*⁴⁴ In *General Electric*, unions sought greater access to employees at the worksite, particularly the ability to respond directly to employer "captive audience" speeches on company premises during paid time.⁴⁵ In *Excelsior*, refusing unions workplace access, the Board held that unions should be provided with a list of names and addresses for all employees in the given election unit within seven days of a representation election.⁴⁶

The *Excelsior* decision was clearly intended to facilitate the ability of unions to contact employees at home, thereby offsetting employer organizational advantages at the workplace.⁴⁷ Yet the question remains whether the ability to engage in home visits really offsets employer communication advantages at the workplace. In *General Electric*, the Board ruled that broader union organizational access issues should be deferred "until after the effects of *Excelsior* become known."⁴⁸ Yet, it is now over *thirty years* since these cases were decided, and the Board has never squarely reconsidered this issue.

39. See *Peoria Plastic Co.*, 117 N.L.R.B. 545, 547-48 (1957).

40. See *Plant City Welding and Tank Co.*, 119 N.L.R.B. 131, 133-34 (1957).

41. *Id.* at 133.

42. See generally Bierman, *supra* note 25.

43. 156 N.L.R.B. 1236 (1966).

44. 156 N.L.R.B. 1247 (1966).

45. See *id.* at 1250.

46. See *Excelsior*, 156 N.L.R.B. at 1239-40.

47. See *id.* at 1246 n.27.

48. *General Electric*, 156 N.L.R.B. at 1251.

D. Proposed Labor Law Reform Act of 1977-78

Congress did attempt to step into the breach left by the *Excelsior* and *General Electric* cases in the proposed Labor Law Reform Act of 1977-78.⁴⁹ They introduced legislation which contained various proposals designed to broaden union organizational access to employees.⁵⁰ Among these proposals was legislation which would have essentially overturned the Court's decision in *NuTone* and provided outside union organizers with the opportunity to respond at the worksite to all employer workplace anti-union campaigning,⁵¹ as well as language permitting union workplace replies to employer "captive audience" speeches.⁵² In tandem with these legislative proposals calling for increased union access to employees, Republican members of the House of Representatives offered an amendment to overrule the Board's home visits doctrine and allow employers to campaign by visiting employees at their homes.⁵³ Some House Democrats chastised this proposal as the "trick or treat" amendment,⁵⁴ while other members of Congress questioned whether either unions or employers should be permitted to campaign by visiting employees at their homes.⁵⁵ Ultimately, the proposed "home visits" amendment was tabled,⁵⁶ and the legislation died on June 22, 1978 when Senate Democrats failed to break a filibuster by Senate Republicans.⁵⁷

E. Lechmere

While the successful Senate filibuster put a temporary end to the discussion of union access in Congress, the issue surfaced once again before the Court in the 1992 case of *Lechmere, Inc. v. NLRB*.⁵⁸ In *Lechmere*, a union sought to organize employees of a large Connecticut retail store located in a "strip" shopping center surrounded by a parking lot co-owned by the shopping center owner and the store.⁵⁹ When the union's initial efforts to reach employees by way of ads in the local newspaper proved unsuccessful, non-employee union organizers began passing out handbills in the store parking lot.⁶⁰ *Lechmere's* manager and security personnel told the union

49. See H.R. 8410, 95th Cong. (1977), reprinted in Labor Reform Act of 1977: Hearings on H.R. 8410 Before the Subcomm. on Labor- Management Relations of the House Comm. on Education and Labor, 95th Cong. pt. 1, 5-6 (1977); S. 2467 95th Cong. (1978), reprinted in S. REP. NO. 628, 95th Cong., 23, 45-60 (1977); see also Bierman, *supra* note 25 at 20-22.

50. See Bierman, *supra* note 25 at 20-22.

51. See *id.*

52. See *id.*

53. See *id.* at 22-23

54. *Id.*

55. See *id.* at 23.

56. See *id.*

57. See *id.* at 22; see also Penn Comment, *supra* note 31, at 795.

58. 502 U.S. 527 (1992).

59. See *id.* at 529.

60. See *id.*

organizers they were trespassing on private property, relegating them to a grassy strip of public property between the parking lot and an adjoining four lane public highway.⁶¹ From this grassy strip, the union organizers passed out handbills and recorded license plate numbers of cars parked in the employee parking area of the Lechmere parking lot.⁶² The union apparently had a “mole” at the Connecticut Department of Motor Vehicles who gave them the names and addresses of the individuals who owned these cars.⁶³ The union was ultimately able to obtain the valid names and addresses of about twenty percent of the employees it was trying to organize and to send them mailings, call some on the phone, and make a few home visits.⁶⁴

Ultimately, however, these organizing efforts failed and the union filed an unfair labor practice charge with the Board, alleging that Lechmere’s refusal to allow it to organize in its parking lot violated the union’s section 7 rights.⁶⁵ The Board upheld the union’s complaint, applying a “balancing test” which weighed the impairment of section 7 rights against the impairment of employer property rights. The Board found that denying the union access to the parking lot would seriously impair section 7 rights because the union’s alternative organizing methods were “ineffective,” “expensive,” and “unsafe.”⁶⁶ The Board also found that granting such union access did not substantially impair the company’s property rights since the Lechmere parking lot was “essentially open to the public,” and the union’s distribution of leaflets was “unobtrusive.”⁶⁷ On appeal, the U.S. Court of Appeals for the First Circuit upheld the Board’s opinion.⁶⁸

The Court reversed. The opinion represented a very strong reaffirmation of its 1956 holding in *NLRB v. Babcock & Wilcox Co.*,⁶⁹ and *Babcock’s* sharp distinction between the access rights of employees (who have broad access) and non-employee/outside union organizers (who can generally be denied all access to employer property).⁷⁰

Under *Babcock*, non-employee union organizers are denied all access to employer property, except in the case where employees are completely inaccessible through “usual channels.”⁷¹ In *Lechmere*, the Court interpreted this exception to be an extremely narrow one, applying only to the “rare

61. *See id.* at 530.

62. *See id.*

63. *See id.*

64. *See id.*

65. *Lechmere, Inc.*, 295 N.L.R.B. 15, 92 (1989).

66. *Id.* at 93-94.

67. *Id.* at 94.

68. *Lechmere, Inc. v. NLRB*, 914 F. 2d 313 (1st Cir. 1990).

69. 351 U.S. 105 (1956); *see supra* notes 27-30 and accompanying text.

70. *Babcock*, 351 U.S. at 112-14.

71. *Id.* at 112.

case⁷² where employees live at a mining or logging camp or a mountain resort hotel and thus absolutely can not be reached by the union unless union organizers come onto company property.⁷³ In the instant case, although employees lived in a large metropolitan area (greater Hartford, Connecticut), they were not deemed completely “inaccessible.”⁷⁴ Indeed, the Court cited the union’s ultimate success in reaching a substantial percentage of them “via mailings, phone calls and home visits” as well as other methods.⁷⁵ Consequently, *Lechmere* could legally bar the non-employee union organizers from its parking lot and other property.⁷⁶

F. “Salting”

Frustrated by *Lechmere* in attempting to expand their organizing efforts,⁷⁷ unions began looking for solutions. The *Lechmere* decision essentially prevents non-employee union organizers from reaching employees at the workplace. But what if union organizers apply for jobs at and “hire into” targeted workplaces? These union organizers would then be “employees” and, consistent with the Court’s holding in the *Republic Aviation* case, would have broad rights to organize fellow employees at the job site during non-working time.⁷⁸

Salting is among the most controversial current issues in the field of employment law. The United States Chamber of Commerce recently surveyed readers of its national magazine and found that salting was the employment law issue they most wanted Congress to reform.⁷⁹ On March 26, 1998, by a vote of 202 – 200, the United States House of Representatives passed legislation outlawing salting in small businesses.⁸⁰ President Clinton, however, has threatened to veto this legislation.⁸¹ This legislative attention has been sparked, in part, by the Court’s 1995 decision on the topic in *NLRB v. Town & Country Electric, Inc.*⁸² The issue also has begun commanding considerable attention in the scholarly community.⁸³

72. *Lechmere*, 502 U.S. at 537.

73. *See id.* at 539.

74. *Id.* at 539-40.

75. *Id.*

76. *See id.* at 541.

77. *See* G. Pascal Zachary, *Signs of Revival: Some Unions Step Up Organizing Campaigns and Get New Members*, WALL ST. J. Sept. 1, 1995 at A1.

78. *See supra* notes 24-26 and accompanying text.

79. *See Reader’s Views*, NATION’S BUSINESS, Dec. 1996 at 60 (magazine published by U.S. Chamber of Commerce for its members).

80. *See* Jim Abrams, *House Labor Bill Faces Presidential Veto*, THE COMMERCIAL APPEAL, March 27, 1998 at B7.

81. *See id.*; PR Newswire, March 19, 1998, (Clinton address to AFL-CIO executive council in Las Vegas).

82. 516 U.S. 85 (1995).

83. *See, e.g.*, Leonard Bierman & Rafael Gely, *Salting the Contractors’ Labor Force*, 15 J. LAB. RES. 309 (1994); Michael H. Gottesman, *Union Summer: A Reawakened Interest in the Law of Labor?*, 1996 SUP. CT. REV. 285; Susan E. Howe, Comment, *To Be or Not To Be An Employee: That Is the*

As various observers predicted,⁸⁴ *Lechmere* has led to a sharp increase in such union “hiring into” or salting of targeted workplaces.⁸⁵ Employers have responded to this activity either by refusing to hire or by firing individuals to the extent said employers become aware that these individuals are paid union organizers trying to “salt” their workplace and workforce.⁸⁶ The Board, however, has viewed employee organizers, even if they are on a union payroll, as “employees” entitled to the full protection of the Act, including its prohibition of employer discrimination against employees on the basis of “union activity.”⁸⁷ Some federal courts of appeals, though, refused to uphold the Board’s holdings in this regard, instead finding that salter’s divided loyalties left them without protection under the Act.⁸⁸ In 1995, the Court addressed the issue in the case of *NLRB v. Town & Country Electric, Inc.*⁸⁹

G. Union Access and Town & Country

I. Overview

Traditionally, non-employee union organizers have been prohibited from campaigning on employer premises, even when the employers have used their premises to actively campaign against unions. The *Lechmere* decision strongly reaffirms this proposition, extending the ban on union access to “quasi-public” property owned by employers, e.g., retail store parking lots generally open to the public.

To offset these access prohibitions, unions are afforded the opportunity to visit employees at their homes, while such visits by employers are prohibited. The Court has also specifically upheld the right of unions to obtain lists of employee names and addresses once a Board representation election has been scheduled, in order to facilitate union home visits and other

Question of Salting, 3 GEO. MASON INDEPENDENT L. REV. 515 (1995); Philip A. Miscimarra & Andrew W. Altschul, *The Town & Country Case: Legal Issues and Implications*, 18 J. LAB. RES. 73 (1997); Note, *Organizing Worth Its Salt: The Protected Status of Paid Union Organizers*, 108 HARV. L. REV. 1341 (1995).

84. See, e.g., Estlund, *supra* note 1, at 321 n. 109. See also Bierman & Gely, *supra* note 83, at 310.

85. See Gary E. Hess, *Salting: An Industry Perspective*, 18 J. LAB. RES. 47 (1997) (discussing negative effects of salting since the *Town & Country* decision); Michael D. Lucks, *Salting and Other Union Tactics: A Unionist’s Perspective*, 18 J. LAB. RES. 55 (1997), Augustus T. White, *Litigation: Where Has It Been and Where Is It Taking Us?*, 18 J. LAB. RES. 65 (1997); Miscimarra & Altschul, *supra* note 83.

86. See *Hearing on Oversight of the National Labor Relations Board: Hearings Before the Subcommittee on Oversight and Investigations of the House Committee on Economic and Educational Opportunities*, 104th Cong., 1st Sess. at 75-79, 171.

87. See, e.g., *Sunland Construction Co.*, 309 N.L.R.B. 1224 (1993); *Town & Country Elec., Inc.*, 309 N.L.R.B. 1250 (1992).

88. See, e.g., *Town & Country Elec., Inc. v. NLRB*, 34 F. 3d 625 (8th Cir. 1994); *Ultra Systems Western Constructors, Inc. v. NLRB*, 18 F. 3d 251 (4th Cir. 1994).

89. 516 U.S. 85 (1995).

outside-of-work contact with employees.⁹⁰ Finally, unions have started getting around the access bans facing non-employee union organizers by getting union organizers to apply for and obtain jobs at given worksites. By “hiring into” these workplaces, these “salters” then officially become “employees,” and are afforded broad rights to organize fellow employees at the workplace. Salting thus allows union organizers to achieve through the “backdoor” what *Lechmere* prohibits them from obtaining through the “front door.”⁹¹

In its *Town & Country* decision, the Court resolved the conflict between the Board and some of federal appeals courts regarding whether “salters” can be deemed “employees” entitled to the protection of the Act.⁹² The Court agreed with the Board that “salters” are indeed “employees” under the Act.⁹³ The Court noted that the Board’s interpretation of the term “employee” in this regard was consistent with the “broad language” of the statute, and that it generally accords the Board considerable leeway in interpreting the Act.⁹⁴ The Court expressly rejected the notion that “salters” should not be protected under the Act because of potential disloyalty.⁹⁵

The Court’s decision in *Town & Country* is thus a quite narrow one, focusing solely on the definition of “employee” under the Act. The Court cited *Lechmere* only once, simply noting that employers “may as a rule limit the access of nonemployee union organizers to company property.”⁹⁶ The Court submitted that *Lechmere* and *Town & Country* would not conflict if workers took a “Trojan horse”⁹⁷ approach. As an observer put it, the *Town & Country* decision was “somewhat surprising after *Lechmere*.”⁹⁸

2. Employer Privacy and Property Rights

The Court’s decision in *Town & Country* makes sense from the perspective of an overall “balancing” of union/management organizational rights. *Lechmere* severely restricted union organizing rights in considerable measure, relegating unions to making home visits and otherwise contacting employees at their homes.⁹⁹ As examined below,¹⁰⁰ the home visits ap-

90. See *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969).

91. See Letter From Douglas E. Witte, Counsel for Town & Country Electric, Inc. to Leonard Bierman, Professor, Texas A&M University (February 20, 1995) (on file with Texas A&M University).

92. 516 U.S. 85 (1995).

93. *Id.* at 87.

94. *Id.* at 90-91.

95. See *id.* at 95-96.

96. *Id.* at 97.

97. See Judd H. Lees, *Hiring the Trojan Horse: The Union Business Agent as a Protected Applicant*, 42 LAB. L. J. 8, 14 (1991).

98. William R. Corbett, *The “Fall” of Summers, The Rise of “Pretext Plus” and the Escalating Subordination of Federal Employment Discrimination Law to Employment at Will: Lessons from McKennon and Hicks*, 30 GA. L. REV. 305, 319 n.62 (1996).

99. See Leonard Bierman, Reply, *Extending Excelsior*, 69 IND. L. J. 521, 523-25 (1994).

100. See *infra* note 188 and accompanying text.

proach is a difficult one for unions, and may sometimes intrude on employee privacy rights. Indeed, two years after *Lechmere*, in *Department of Defense v. FLRA (DOD)*¹⁰¹ the Court ruled that *federal* employee unions were not entitled to listings of employee addresses on employee privacy grounds. While decided under another statute¹⁰² and *not* applicable to private sector employees,¹⁰³ the decision raises an interesting challenge to the Court's rationale in *Lechmere*. The Court noted, for example, that "many people simply do not want to be disturbed at home by work-related matters" and that it was "reluctant to disparage the privacy of the home which is accorded special consideration" under our laws.¹⁰⁴ If *Lechmere* allowed unions to make home visits, and if, according to *DOD*, unwanted home visits are a bad thing, then salting is one of the remaining alternative ways for unions to organize. The problem with salting is its high cost and limited availability.

Arguably, salting burdens employer privacy and property rights. During the early years of the Act, employers got employees "hired into" positions in unions to collect information as spies or "moles." This was held to be spying and industrial espionage, and outlawed under the Act.¹⁰⁵ While there are clear differences between "industrial espionage" aimed at union prevention and salting aimed at union organization,¹⁰⁶ salting raises some of the same privacy problems. For instance, both industrial spies and salt-

101. 510 U.S. 487 (1994).

102. The case was decided pursuant to the Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135 (1988 ed. and Supp. IV).

103. *DOD*, 510 U.S. at 502-03.

104. *Id.* at 501. Interestingly, Justice Thomas authored both the *Lechmere* and *Department of Defense* opinions. In *DOD*, Justice Thomas appeared to have been substantially impressed by the privacy concerns of the employees ("... it is clear that [the employees] have some nontrivial privacy interest in nondisclosure, and in avoiding the influx of union-related mail, and, perhaps, union-related telephone calls or visits, that would follow disclosure.") *DOD*, 510 U.S. at 501. This concern over employees' privacy rights is curious for at least two reasons. First, Justice Thomas recognized that the Court's decision created a situation under which public sector federal unions were being deprived of information to which their private sector counterparts were presumptively entitled. As Justice Ginsburg observed in her concurring opinion, this result is almost certainly contrary to any reasonable congressional intent. *See id.* at 506 (Ginsburg, J., concurring). Second, while Justice Thomas appeared to have been substantially concerned with the privacy rights of public sector employees in their homes, he evidenced no such concern in *Lechmere* with respect to private employees. In *Lechmere*, Justice Thomas pointed particularly to the ability of unions to reach employees at their homes as an alternative to workplace contact. *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 540 (1992). Thus, the concern that was at least one of the reasons that the dissemination of information was denied to the union in *DOD* was not much of a concern in *Lechmere*.

105. *See Fruehauf Trailer Co. v. United Auto. Workers Fed. Labor Union No. 19375*, 1 N.L.R.B. 68, 73 (1935).

106. For example, one aspect of industrial espionage that was particularly damaging to unions, but that does not appear to have a similar counterpart in the salting situation, is the fact that employers' spies could participate in strategic planning by unions and alert the employer in advance. *See KENNETH GAGALA, UNION ORGANIZING AND STAYING ORGANIZED 27* (1983) (describing the problems industrial espionage creates for unions).

ers are in a position to obtain information which they might not have gained were their real identity known.

Employers and their advocates argue that the burdens of salting are particularly harsh with respect to smaller employers that don't have the financial resources or the large legal and labor relations staffs to effectively formulate policies and otherwise deal with salting.¹⁰⁷ For example, Gaylor Electric Co., a fairly large electrical contractor in Indiana, reportedly budgets \$250,000 a year for legal fees, mainly in opposition to salting decisions by the Board.¹⁰⁸ These charges arise when an employer unlawfully fires, disciplines, or refuses to hire "salters." The company's president, John Gaylor, contends that the company has not been found liable for any unfair labor practices with regard to taking an adverse employment action against salters. He attributes this to the fact that "I can afford \$175,000 in legal fees."¹⁰⁹ Mr. Gaylor also submits that some smaller non-union contractors have been put out of business because they could not afford the legal fees to fight salting.¹¹⁰ Given this opposition, it is not surprising that the Chamber of Commerce wants salting reformed¹¹¹ and supports legislation outlawing this practice which recently passed the House of Representatives.¹¹²

H. *The Newest Wrinkle: "Salting" and Striker Replacements*

The latest chapter in the development of the case law concerning the access problem further illustrates the complexity of this area of the law and the need for a comprehensive approach to its resolution. *Diamond Walnut Growers, Inc. v. NLRB*¹¹³ involved probably the two most contentious issues in labor law over the last two decades: the access problem and striker replacements.

Diamond Walnut arose out of an economic strike at a California walnut packing and processing plant.¹¹⁴ Just about two years after the beginning of the strike, and a few weeks before a representation election to determine if the union would maintain its exclusive representation status,¹¹⁵ the union notified the employer that four economic strikers wished to return to work unconditionally.¹¹⁶ The strikers were reinstated and assigned to seasonal positions, one as a packer, and the others cracking and inspecting

107. For an exhaustive list of eleven preventative steps employees should take in dealing with salting, see Miscimarra & Altschul, *supra* note 83, at 84-87.

108. See Hess, *supra* note 85, at 50-51.

109. *Id.* at 51.

110. See *id.*

111. See *supra* note 79 and accompanying text.

112. See *supra* note 80 and accompanying text.

113. 113 F.3d 1259 (D.C. Cir. 1997) (en banc).

114. See *id.* at 1261.

115. The union had lost an earlier election, but after objections, the Board ordered a rerun election. See *id.*

116. See *id.*

walnuts. Two of the returning strikers had, however, previously held preferable positions. Nevertheless, the employer refused to hire them back to their regular positions, raising concerns about employee safety and possible sabotage.¹¹⁷ During the following weeks, the reinstated strikers campaigned for the union and monitored the activities of the employer, reporting to the union attorney after each shift.¹¹⁸ Following the election, which the union lost, the returning strikers submitted letters of resignation and returned to the picket line. The union then filed a complaint with the Board, arguing that the employer had violated sections 8(a)(3) and 8(a)(1) of the Act by unlawfully discriminating against the returning strikers. The complaint alleged that because of the employees' protected activity, the employer declined to put them in certain available seasonal positions for which they were qualified, and which were preferable to the positions in which they were actually assigned.¹¹⁹

The key issue before the Court of Appeals for the D.C. Circuit was whether the employer had a "legitimate and substantial" business justification for its decision to assign the returning strikers to "non-sensitive" positions.¹²⁰ In its initial disposition of the case, the court examined the reasoning behind the job placement of the returning strikers, noting the two concerns the employer had advanced for its decision. First, the employer had argued that the returning strikers represented a high risk of unrest, due to the fact that earlier in the strike violence had erupted between the strikers and the replacements.¹²¹ Second, the court recognized the employer's fear that returning strikers could engage in sabotage, product tampering, and otherwise disrupt the company's operations.¹²² The court accepted these two concerns, concluding that the employer had established substantial and legitimate business justifications for its "seasonal" placement of the returning strikers.¹²³

In an *en banc* proceeding, however, the full D.C. Circuit recently vacated the three judge panel's initial judgment. The full court considered the case of the two particular strikers involved independently. With respect to one of the returning strikers, the court found that a generalized fear of violence or sabotage fails to constitute a legitimate concern. The court noted that there will be some risk of sabotage or violence anytime a striker returns to work while a strike is ongoing. Citing the Supreme Court's decision in *Town & Country*, the court noted that if an employee in such a situation

117. *See id.* at 1262.

118. *See* Diamond Walnut Growers, Inc. v. NLRB, 80 F. 3d 485, 488 (D.C. Cir. 1996), *vacated and reh'g en banc granted*, 88 F.3d 1064 (D.C. Cir. 1996).

119. 113 F.3d at 1262.

120. *Id.* at 1263.

121. 80 F. 3d 485, 491 (D.C. Cir. 1996), *vacated and reh'g en banc granted*, 88 F.3d 1064 (D.C. Cir. 1996).

122. *See id.*

123. *See id.* at 492.

engaged in sabotage, the employer would likely find out and could then take disciplinary action.¹²⁴

With respect to the other returning striker, the court found that the employer had legitimate business reasons for assigning him to a “non-sensitive” position. The *en banc* court noted that the position that this second employee was seeking was that of quality control assistant. In that position, the court concluded she would have had a special opportunity to commit sabotage with little risk of detention. Because the sabotage could be committed with little risk of discovery, argued the court, the remedies contemplated in *Town & Country* would be inadequate, and thus it was proper for the employer to take preemptive action against this particular employee.¹²⁵

Thus, employers are not able to discriminate against known “salters” absent very strong justifications. Where jobs exist, and organizers might be hired, salting affords unions opportunities for workplace access, even in the context of reinstated economic strikers.

III.

WHAT IS WRONG WITH THE CURRENT APPROACH?

A. Overview

The review of the case law concerning the access issue, and of the various legislative efforts to deal with this issue, illustrates two basic flaws. First, there has been very little effort to provide a framework that comprehensively relates the various aspects of the access problem. Second, the Court has been particularly reluctant to reevaluate its prior decisions in the access area in light of changes in the economic and social aspects of the employment relationship that have taken place over the last forty-plus years. In this section, we first discuss the two basic flaws that we see in the approach the Court has developed to deal with the access problem. We then introduce a theoretical framework to understand and resolve the problems we believe afflict the law concerning workplace access.

B. The Basic Problem

1. Piecemeal Approach

Criticizing the Court for a piecemeal approach to solving the access problem is somewhat unfair, in that the Court, as well as any other adjudicatory body, is constrained by the cases that are brought to its attention.¹²⁶

124. 113 F. 3d 1259, 1266-67 (D.C. Cir. 1997) (*en banc*).

125. *See id.* at 1269.

126. *See generally* DORIS PROVINE, CASE SELECTION IN THE UNITED STATES SUPREME COURT 9-46 (1980); STEPHEN L. WASBY, THE SUPREME COURT IN THE FEDERAL JUDICIAL SYSTEM 163-78 (3d. ed. 1988). *See also* Rafael Gely & Pablo T. Spiller, *A Rational Choice Theory of Supreme Court Statutory Decisions with Applications to the State Farm and Grove City Cases*, 6 J. LAW, ECON. & ORG. 263, 268 (1990) (analyzing the impact of case selection in the ability of the Court to choose policy outcomes).

Both the facts of a case as well as the issues that the parties seek to litigate are to some extent imposed on the Court.¹²⁷ These constraints make it difficult for the Court in every case to make comprehensive policy statements that are both consistent with prior rationales and responsive to the litigants' concerns. Our criticism, however, is of a different kind. Our concern is that the Court and the Board have failed to recognize how the different parts of the puzzle fit together. This failure has been particularly pronounced in more recent decisions, such as those involving the salting issue. As discussed above,¹²⁸ the focus of the Court in its *Town & Country* decision was quite narrow. The Court made only one reference to *Lechmere*, recognizing that a possible inconsistency existed between the two cases.¹²⁹ The Court, however, made no effort to explore an issue that was very ripe for analysis — the role of salting within the access problem debate. Why are unions engaging in what appears to be a fairly expensive organizing strategy?¹³⁰ By allowing salters to enter the workplace, and by protecting those individuals as “employees,”¹³¹ is not the Court undermining the rationale of *Babcock*, and the sharp employee/non-employee organizational distinction? Moreover, Justice Frankfurter's opinion in *NuTone* seemed to mandate Court examination of the overall “balance” of organizational opportunity.¹³²

2. *Failing to Recognize the Changing Context*

A second problem with the current approach to the access problem is a failure to consider the issue in the context of the social and economic forces facing workers *today*.¹³³ An important aspect of the early access cases de-

127. See WASBY, *supra* note 126, at 190-216.

128. See *supra* notes 89-98 and accompanying text.

129. See *NLRB v. Town & Country Elec., Inc.*, 516 U.S. 85, 97 (1995).

130. We refer here to the costs, both direct outlays (e.g., paying the “salter”) and the opportunity costs of salting. see Michael D. Lucas, *Salting and Other Union Tactics: A Unionist's Perspective*, 18 J. LAB. RES. 55 (1997) (describing the development of “salting”).

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

132. See generally *NLRB v. United Steelworkers (NuTone)*, 357 U.S. 357 (1958).

133. Various key changes have been identified in the economics, industrial relations, and sociology literature. Among those changes, the following are particularly relevant to the access problem. First, there has been a growth of single-parent and dual-career families and an increase in labor force participation of mothers of young children. See Eileen Appelbaum & Peter Berg, *Balancing Work and Family: Evidence from Surveys of Manufacturing Workers*, in PROCEEDINGS OF THE FORTY-NINTH ANNUAL MEETING OF THE INDUSTRIAL RELATIONS RESEARCH ASSOCIATION 115, 115 (Paula B. Voos ed., 1997) (analyzing the factors influencing the choice of companies to provide family-friendly policies). For example, between 1982 and 1993, the number of women in the U.S. civilian labor force increased almost twice as fast as that of men. See Robert Drago, et. al., *The Time Crunch and School Teachers*, in PROCEEDINGS OF THE FORTY-NINTH ANNUAL MEETING OF THE INDUSTRIAL RELATIONS RESEARCH ASSOCIATION 123, 123 (Paula B. Voos ed., 1997). Similarly, sixty-seven percent of mother of infants under the age of three were on payrolls in 1991, and dual-earner status is the norm among families with children. See *id* at 124. These changes have been identified as creating a particularly acute pressure on the balancing of family and work responsibilities. See *id* at 125. This suggests that with less time available for family matters, employees are more likely to view the decreasing “family-time” as truly

cided by the Court, particularly *Republic Aviation* and *Babcock*, is the centrality of context in those holdings. In *Babcock*, for example, the Court strongly considered the fact that employees lived in a nearby small town, and were reasonably accessible to the union outside of the workplace.¹³⁴ Similarly, the “home visits” doctrine appears to be based on a model of economic life that suggests that employees live in close proximity to the workplace.¹³⁵ Indeed, such demographic patterns provide a rationale for the “home visits” rule. By granting unions the ability to access the employees at their homes, the Board was in effect balancing out the limiting effects the *Babcock* rule had earlier imposed on unions.¹³⁶ The “home visits” doctrine only makes sense if such demographic patterns are controlling. However, if employees are scattered over a wide geographic area, allowing access to employees’ homes hardly compensates for the denial of access to the workplace. Thus, whether the context has changed has great bearing on access issues.

In *Lechmere*, by contrast, the Court flatly refused to consider the present day context in which the access question arose. The Court’s refusal to consider the changing context in which union organizing takes place today is particularly troublesome given the fact that before *Lechmere* the Board had dealt with the access problem in a manner that showed considerable recognition of these changing contexts.¹³⁷

Two Board cases — *Fairmont Hotel*¹³⁸ and *Jean Country*¹³⁹— illustrate this approach. Devising a balancing test for access questions, the Board in *Fairmont* specifically noted that an analysis of the section 7 rights of employees was more complicated than an analysis of private property rights. Analyzing private property rights requires the Board look at factors such as the use to which the property in question was put, restrictions on public access to the property, and the size and location of the property. On

private. *See id.* Second, there have also been changes in terms of geographical living patterns. With advances in transportation technology and information technology, employees are less likely to be constrained to live close to their places of employment. *See generally* JULIET B. SCHOR, *THE OVERWORKED AMERICAN* 33 (1994).

134. “The plants are close to small well-settled communities where a large percentage of the employees live. The usual methods of imparting information are available Though the quarters of the employees are scattered they are in reasonable reach.” *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 113 (1956).

135. “If, by virtue of the location of the plant and of the facilities and resources available to the union, the opportunities for effectively reaching the employees with a pro-union message, in spite of a no-solicitation rule, are at least as great as the employer’s ability to promote the legally authorized expression of his anti-union views, there is no basis for invalidating these ‘otherwise valid’ rules.” *NLRB v. United Steelworkers of America (NuTone)*, 357 U.S. 357, 364 (1958).

136. *See generally* Bierman, *supra* note 25.

137. *See* Estlund, *supra* note 1, at 318-19. *See also* Rosemary M. Collyer, *Union Access: Developments Since Jean Country*, 6 *LAB. LAW.* 839, 839-43 (1990) (analyzing the case law development before the Court’s *Lechmere* decision).

138. 282 N.L.R.B. 139 (1986).

139. 291 N.L.R.B. 11 (1988), *overruled by* *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992).

the other hand, analysis of section 7 rights requires a more comprehensive analysis. This analysis should include an assessment of the following factors: the nature of the right asserted; the purpose of the exercise of section 7 rights; the situs; the intended audience; the relationship of the situs to the target of the section 7 activity; and the manner in which the section 7 rights were asserted.¹⁴⁰ While the Board in *Fairmont* specifically discarded the consideration of alternative means of communication as part of this initial balancing test, its description of the balancing test clearly indicates a need to look at the context in which the access question is presented.

The Board broadened its consideration of the present-day context of union organizing in *Jean Country*, making it patently clear that the changing context matters. In *Jean Country*, the Board considered whether it was a violation of NLRA section 8(a)(1) for the owner of a shopping mall to deny access to non-employee union organizers who were picketing a non-union clothing store.¹⁴¹ The Board's decision in *Jean Country* emphasized the importance of "balancing" employer property rights and the section 7 rights of unions and individual employees.¹⁴² The Board then expanded on *Fairmont* by specifically including the "availability of reasonable alternative means" factor as part of the initial balancing test.¹⁴³ This requires the Board to look at the demographic and living patterns of the intended audience of a union's message.¹⁴⁴ In fact, following *Jean Country*, and until the Court decision in *Lechmere*, the Board and the various courts of appeals considering the issue engaged in comprehensive assessment of the availability of reasonable means for unions to reach their intended audiences.¹⁴⁵

IV.

WHO OR WHAT IS TO BLAME?

The two flaws in the development of the law concerning the access issue we identified in Part III raise serious concerns about the manner in which courts decide cases.¹⁴⁶ Why did the Court overlook the changing industrial relations environment in which union organizing occurs, rendering its access analysis myopic? Are there any structural or procedural decision-making obstacles that caused these deficiencies? In the next section, we identify what we believe to be the potential cause of these decision-

140. See *Fairmont*, 282 N.L.R.B. at 142.

141. See *Jean Country*, 291 N.L.R.B. at 11.

142. *Id.* at 12-14.

143. See Collyer, *supra* note 137, at 843-44.

144. See *id.*

145. See *Emery Realty Inc. v. NLRB*, 863 F.2d 1259 (1988) (enforcing Board's order requiring owner of building complex to allow nonemployee union representatives to distribute union handbills to hotel employees on owner's property); *Laborers' Local Union No. 204 v. NLRB*, 904 F.2d 715 (1990) (affirming Board's finding that employer had not violated the Act by denying access to nonemployee handbillers engaged in an area standards picketing).

146. See *supra* notes 126-145 and accompanying text.

making problems. We then briefly sketch the parameters of a theoretical framework that we believe is useful in understanding these problems.¹⁴⁷

A. *The Culprit: Stare Decisis and Precedent*

One of the most basic principles of common law legal systems in general and the American judicial system in particular is the notion that courts ordinarily should follow precedent.¹⁴⁸ Under *stare decisis*, courts adhere to precedent in deciding cases.¹⁴⁹ This adherence has been justified on various grounds, ranging from issues of efficiency, limiting judicial power, and resource allocation, to rationales based on equity and basic notions of fairness.¹⁵⁰

Supporters of precedent have argued, for example, that given the limited resources available to the judiciary, and given that to reconsider each case “from scratch” would place undue burdens on these limited resources, the doctrine of *stare decisis* promotes judicial efficiency.¹⁵¹ Others have argued that the use of precedent ensures that similarly-situated litigants will be treated equally over time, and allows individuals to plan their affairs by knowing the future legal consequences of their actions.¹⁵²

Opponents of *stare decisis* have attacked the doctrine on various grounds. Critics of precedent have argued that none of these justifications are compelling enough to justify the adherence to precedent, and that the goals of equity, efficiency, and consistency can be achieved through less draconian principles. Opponents also point out that there are various costs associated with adherence to precedent. These costs include, for example, diminished flexibility and adaptability¹⁵³ as well as inefficient decision-

147. For a detailed treatment of the theoretical framework described below see Rafael Gely, *Of Sinking and Escalating: A (Somewhat) New Look at Stare Decisis*, 60 U. PITT. L. REV. (forthcoming 1999).

148. See Larry Alexander, *Constrained by Precedent*, 63 S. CAL. L. REV. 3 (1989).

149. See Richard J. Pierce, *Reconciling Chevron and Stare Decisis*, 85 GEO. L.J. 2225, 2237 (1997). Professor Schauer describes the use of precedent as follows: “The previous treatment of occurrence X in a manner Y constitutes, solely because of its historical pedigree, a reason for treating X in manner Y if and when X again occurs.” Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 571 (1987).

150. See Earl Maltz, *The Nature of Precedent*, 66 N.C. L. REV. 367, 368-72 (1988).

151. See *id.* Justice Cardozo argued that “the labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case, and one could not lay one’s own course of bricks on the secure foundation of the courses laid by others who had gone before him.” BENJAMIN CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 149 (1925).

152. See Maltz, *supra* note 150, at 368.

153. See *id.*

making.¹⁵⁴ Opponents of *stare decisis* argue that these costs clearly outweigh the alleged social benefits of the doctrine.¹⁵⁵

Arguing the merits of the use of precedent is beyond the scope of this Article. The extent of our argument is that regardless of whether *stare decisis* is or is not a “good” idea, the Court’s reliance on precedent helps us understand the two flaws we identified in Part III concerning the case law development of the access problem (i.e., a piecemeal approach by the Court and the Board, and a failure to recognize the changing context of industrial relations).¹⁵⁶ Before we develop that argument, however, we provide a brief sketch of a theoretical framework that may be applied to understand our argument that reliance on the use of precedent is in part responsible for the current state of the law in this area.

B. Escalation of Commitment

Researchers in the decision-making sciences have for a long time identified a particular flaw in the way individuals make decisions. This “escalation of commitment” problem parallels our argument regarding the use of *stare decisis*. Escalation of commitment refers to the tendency for decision makers to increase their commitment to what objectively appear to be failing courses of action.¹⁵⁷ Escalation situations occur both at the individual as well as at the organizational level. Common examples of escalation situations at the individual level include a decision to wait for a bus for a period of time substantially longer than it would have taken to walk to a destination,¹⁵⁸ and decisions to put additional money into fixing a broken car.¹⁵⁹ At the organizational level, situations involving decisions to open new plants, start new projects, and enter new markets, are all potential examples of the problem of escalation of commitment.¹⁶⁰

What makes these situations fit the escalation of commitment prototype is the inability of individuals to reach a decision under the rational model of decision-making. Under one rational model theory, a decision-

154. “If the best solution to today’s case is identical to the best solution for tomorrow’s different but assimilable facts, then there is no problem. But if what is best for today’s situation might not be best for a different (but likely to be assimilated) situation, then the need to consider the future as well as the present will result in at least some immediately suboptimal decisions.” Schauer, *supra* note 149, at 589.

155. *See id.* at 368-72. *See also* Pierce, *supra* note 149, at 2237-48.

156. *See supra* notes 126-145 and accompanying text.

157. *See* Joel Brockner, *The Escalation of Commitment to a Failing Course of Action: Toward Theoretical Progress*, 17 *ACAD. MGMT. REV.* 39 (1992) (providing a review of the theoretical variations on the escalation of commitment). *See also* JOEL BROCKNER & JEFFREY Z. RUBIN, *ENTRAPMENT IN ESCALATING CONFLICTS: A SOCIAL PSYCHOLOGICAL ANALYSIS* 2-7 (1988) (reviewing escalation of commitment research).

158. *See* Brockner, *supra* note 157.

159. BROCKNER & RUBIN, *supra* note 157, at 1-2.

160. *See id.* at 2-3. *See also* Jerry Ross & Barry M. Staw, *Expo 86: An Escalation Prototype*, 31 *ADMIN. SCI. Q.* 274 (1986) (analyzing the decision-making process by Canadian government authorities with respect to Expo 86 as an escalation of commitment problem).

maker should make decisions based on the comparison of marginal quantities.¹⁶¹ That is, the decision-maker should only consider the *future* costs and benefits of making a given choice.¹⁶² Under this particular rational model, any previous losses or expenses should not be considered, as they do not affect the comparison of marginal quantities.¹⁶³

At the center of the escalation of commitment problem is the presence of *sunk costs*. Sunk costs are to costs that have been incurred and that are beyond recovery at the point in time when the decision is made.¹⁶⁴ That is, sunk costs may be conceptualized as a payment that was made in response to an earlier decision. The payment could have been in the form of money, but also in the form of time or effort.¹⁶⁵ Sunk costs are by definition constant and thus should not enter into decisions whether or not to continue a previously chosen course of action.¹⁶⁶ Once made, sunk costs should not influence subsequent decisions.¹⁶⁷

Sunk costs arise in situations in which over time there are streams of anticipated costs and revenues, that is, in multiple-decision or multiple time-period situations.¹⁶⁸ If the realization of costs and revenues occur at a single decision point, there can be no sunk costs. Multiple time-period decisions have been characterized in the escalation literature as involving four steps. First, decision-makers make initial determinations concerning allocation of resources, with the anticipation of attaining some goal. Second, decision-makers receive some negative feedback, either signaling that they are engaged in a failing venture or that at least they have not yet attained their goals. Third, the decision whether to continue the initial course of action is taken under conditions of uncertainty with respect to whether or not committing more resources would bring about the desired result. Finally, and very importantly, the decision-makers have a choice in deciding whether to continue or withdraw from their initial course of action. In sequential deci-

161. See Carl A. Kogut, *Consumer Search Behavior and Sunk Costs*, 14 J. ECON. BEHAV. & ORG. 381, 382-83 (1990) (describing the rational decision-making process in the context of consumer behavior).

162. See Donald E. Conlon & Howard Garland, *The Role of Project Completion Information in Resource Allocation Decisions*, 36 ACAD. MGMT. J. 402 (1993) (analyzing the various determinants of escalation of commitment situations).

163. See *id.* at 402.

164. See ROBERT H. FRANK, *MICROECONOMICS AND BEHAVIOR* 11-14, 231-32 (1991) (discussing the sunk costs effect as a pitfall to rational decision-making).

165. See Howard Garland & Stephanie Newport, *Effects of Absolute and Relative Sunk Costs on the Decision to Persist with a Course of Action*, 48 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 55 (1991) (showing that relative rather than absolute magnitude sunk costs have a significant impact on subjects' reported likelihood of escalation commitment).

166. See *id.* at 56.

167. See Kogut, *supra* note 161.

168. Gregory B. Northcraft & Gerrit Wolf, *Dollars, Sense, and Sunk Costs: A Life Cycle Model of Resource Allocation Decisions*, 9 ACAD. MGMT. REV. 225, 226 (1984).

sions, individuals often fail to disregard sunk costs, thereby engaging in escalation of commitment.¹⁶⁹

C. Behavioral Manifestations of Escalation of Commitment Situations

The effect of escalation of commitment is the continued adherence to a prior decision on the grounds that changing a previously chosen course of action will result in a loss of prior expenditures. This insistence continues despite the fact that the decision-maker receives feedback indicating that the initial decision resulted in some unanticipated outcome. This decision-making process is typically behaviorally manifested in two ways: failure to account for all available information, and the tendency to decide issues based on partial information. First, individuals engaged in escalation fail to consider all the information available to them when making decisions. In particular, decision-makers tend to ignore information that suggests that the conditions under which the initial decision was made have *changed*. In their analysis of the Long Island, New York Shoreham Nuclear Power Plant, Professors Ross and Staw provide multiple examples of how the executives at the Long Island Lighting Company ignored detailed information regarding new cost projections and projected electric demand needs.¹⁷⁰ This behavior resulted in their involvement in the project way beyond the point when it would have been rational to quit.¹⁷¹

A second behavioral manifestation of escalation of commitment involves the tendency of the decision-maker to compartmentalize particular aspects of a decision, without making an attempt to analyze the "big picture." For example, a major tenet of rational decision-making theory is that wealth is fungible.¹⁷² An implication of the fungibility concept is that what should matter to individuals are changes in total wealth, not changes in a particular "account" of their total wealth portfolio (e.g., housing, food, education accounts). Decision-making researchers have found consistently,

169. See Conlon & Garland, *supra* note 162. To see the relationship between sunk costs and the escalation problem, consider the following often-used thought experiment. Imagine you have just spent \$200 on a pair of dress shoes, finding out shortly after getting home that they are painfully tight. Even after being broken in, the shoes continue to cause major discomfort. Should you continue wearing the shoes, or should you give them away? What would your response be if you had not paid for the shoes, but instead had gotten them as a gift? The choice under the rational response model will be to compare the marginal costs and benefits of continuing wearing the shoes, without any attention being given to the initial expenditure. However, experimental data confirms that individuals are more likely to choose to continue wearing the shoes when they have paid for them, as opposed to situations in which the shoes were a gift. Thus, the escalation problem is closely related to the tendency of individuals to consider sunk costs in choices about future behavior. See FRANK, *supra* note 164, at 231-32.

170. See Jerry Ross & Barry M. Staw, *Organizational Escalation and Exit: Lessons from the Shoreham Nuclear Power Plant*, 36 ACAD. MGMT. J. 701, 709-15 (1993).

171. Shoreham's cost, estimated to be \$75 million when the project was announced in 1966, rose over the next 23 years to a total of over \$5 billion. The project was finally abandoned without ever having begun operations. See *id.* at 701.

172. See FRANK, *supra* note 164, at 227-28.

however, that individuals are likely to make decisions that can only be explained by reference to changes in individual accounts, not in total wealth.¹⁷³ Making decisions based on changes in the “balance” of a particular account is akin to making decisions based on partial aspects of the decision, not on the overall gamut of issues involved in the particular choice.

The two types of behaviors that are observed in individuals that engage in escalation of commitment situations match the two flaws that we have identified as existing in the development of case law on the access problem. The Court’s failure to recognize the changing context surrounding the access issue is a behavior similar to that of participants in decision-making research who consistently ignore information that tends to contradict their prior assumptions. Similarly, the Court’s reluctance to comprehensively deal with the “access” issue parallels the “mental accounts” explanation for escalating-type behavior. The Court appears to be compartmentalizing the “access” issue into various separate and unrelated dimensions, and thus failing to recognize the interrelationships among these various aspects.

V.

ANALYSIS OF THE ACCESS PROBLEM

A. Overview

In this section we look at the access problem as an escalation of commitment problem. Using this structure, we identify the various aspects of the case law dealing with the access problem that we believe fit the escalation of commitment framework.

Our basic argument can be summarized as follows. An analysis of the case law development concerning union and employee access to the workplace reveals an increasing tendency to decide current disputes on the basis of precedent, and an unwillingness to reconsider the totality of arguments advanced on both sides of the dispute. Recent decisions, like *Lechmere*, illustrate the Court’s insistence on applying standards developed over forty ago, and its unwillingness to reevaluate the impact of the changing context upon those standards which currently are being applied. This reluctance, a classic prototype of the escalation commitment problem, is startling given

173. Professors Kahneman and Tversky provide the following experimental demonstration. They tell one group of people to imagine that, having earlier purchased tickets for \$10, they arrive at the theater to discover that they have lost them. Individuals in a second group are told to picture themselves arriving at the theater to buy the tickets just to find out that they have lost \$10 from their wallets. People in both groups are then asked whether they will continue with their plans to attend the performance. Since losing a \$10 ticket has the same effect in terms of total wealth as losing a \$10 bill, the rational model will predict that individuals in both groups should make a similar decision. In repeated trials, however, most people in the lost-ticket group say they would not attend the performance, while an overwhelming majority in the lost-bill group say they would. See Amos Tversky & Daniel Kahneman, *The Framing of Decisions and the Psychology of Choice*, 211 SCIENCE 453, 457 (1981).

the overwhelming amount of negative feedback that has followed the Court's initial decisions in this area of labor law.

B. The Initial Decisions: Republic Aviation and Babcock

The Court's decisions in *Republic Aviation* and *Babcock & Wilcox* can be characterized as the initial decisions concerning the question of union and employee access to the workplace for organizing efforts.¹⁷⁴ A careful reading of these two decisions reveals language and reasoning characteristic of an initial decision under the escalation paradigm.¹⁷⁵ For instance, in both cases, the Court recognizes that the question they resolve is new and requires assessment of a variety of relevant factors.¹⁷⁶ The Court also recognizes the uncertain nature of its task and, accordingly, defines a goal by which to measure the success of task at hand. In *Republic Aviation*, for example, the Court states:

The Wagner Act did not undertake the impossible task of specifying in precise and unmistakable language each incident which would constitute an unfair labor practice Thus a 'rigid scheme of remedies' is avoided and administrative flexibility within appropriate statutory limitations obtained to accomplish the dominant purpose of the legislation. So far as we are here concerned that purpose is the right of employees to organize for mutual aid without employer interference.¹⁷⁷

In *Babcock & Wilcox*, the Court similarly shows concern for defining the appropriate goal of the legislation and the role of the Board and reviewing courts in achieving this goal. In the often-quoted passage, the Court says: "Organization rights are granted to workers by the same authority, the National Government, that preserves property rights. Accommodation between the two must be obtained with as little destruction of one as is consistent with the maintenance of the other."¹⁷⁸

Thus, in *Babcock* and *Republic Aviation*, the Court made clear assessments of the context in which its decisions were being rendered.

C. The Negative Feedback: Increasingly Clumsy Rules and Legislative Efforts

With respect to the access problem, the negative feedback was communicated in two forms. First, the development of the doctrine by the Board and lower courts became increasingly complex, and as recent decisions prove, contradictory. Second, further feedback was received by means of serious legislative attempts to comprehensively amend the Act.

174. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945); *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956).

175. For a discussion of the escalation paradigm, see *supra* notes 157-69 and accompanying text.

176. See *Republic Aviation*, 324 U.S. at 798; *Babcock*, 351 U.S. at 112.

177. *Republic Aviation*, 324 U.S. at 798 (citation omitted).

178. *Babcock*, 351 U.S. at 112.

In the decades following the *Republic Aviation* and *Babcock* decisions, the Board and reviewing courts set in motion the process of implementing the rules and goals identified by the Court in these two seminal decisions. As discussed in Part II, the Board first dealt with the issue of captive audience speeches.¹⁷⁹ Originally, the Board found these speeches to be unlawful. Later, it required that employers who chose to make such speeches give the union an opportunity to reply on the employer's property. A few years later, the Board reversed this policy (that is, no longer required that unions be given a chance to reply), and the Court approved this reversal in its *NuTone* decision.¹⁸⁰ Unlike later decisions in this area, the *NuTone* decision illustrates the Court's willingness to reconsider the principles and goals established in earlier decisions in the context of the ever-changing industrial relations environment. For example, in the majority opinion, Justice Frankfurter refuses to provide a "mechanical answer"¹⁸¹ with respect to the union and employee access problem, and instead issues a reminder of the importance of continuing to reevaluate "the way in which the particular controversy arose."¹⁸²

The regulation of the access problem entered a new dimension a few years later with the Board's development of the "home visits" doctrine and the *Excelsior* lists requirement. The Board devised these two new doctrines in order to compensate for the lack of opportunity of labor organizations to gain access to the workplace. As discussed in Part II, the home visits doctrine allows unions to visit employees in their homes, without a corollary right being afforded to employers.¹⁸³ Under the *Excelsior* list requirement, unions are entitled, within seven days of the Board issuing a representation election order, to obtain from the employer a list of names and addresses for all employees in the given election unit. We have criticized these two doctrines as poor solutions to the access problem. As we discussed in Part III,¹⁸⁴ they are both cumbersome and basically ineffectual in achieving any kind of parity with respect to reaching employees. The home visits doctrine, for instance, may raise issues concerning employees' privacy rights, shifting to some extent to employees the burden of maintaining the *Babcock* case's balancing of labor/management interests. The related *Excelsior* list requirement has been criticized as ineffective, and as coming too late in the election process to be very meaningful.

179. See *supra* notes 32-38 and accompanying text.

180. See *NLRB v. United Steelworkers of America (NuTone)*, 357 U.S. 357 (1958).

181. *Id.* at 364.

182. *Id.* at 362. "For us to lay down such a rule of law would show indifference to the responsibilities imposed by the Act primarily on the Board to appraise carefully the interests of both sides of any labor-management controversy in the diverse circumstances of particular cases and in light of the Board's special understanding of these industrial situations." *Id.* at 362-63.

183. See *supra* notes 39-42 and accompanying text.

184. See *supra* notes 24-125 and accompanying text.

During the period between *Babcock* and *Lechmere*, the Court and the Board received further feedback with respect to the effect that their rulings on the access problem were having when, in the late 1970s, Congress sought to comprehensively amend the Act. In the context of escalation analysis, the congressional efforts in 1977-1978 are significant in that they sent a message to the Court (and the Board) that continued reliance on the rules and goals established in *Republic Aviation* and *Babcock* had become so complex that there was a real need to review the problem anew.¹⁸⁵ The proposed legislation, for example, sought to allow broader access to union organizers, especially when confronted with on-site employer anti-union campaigning. Amendments were also introduced to review the home visits doctrine, by allowing employers to campaign by visiting employees at their homes. While there was, and still is, considerable debate over the soundness of all these measures, the debate that surrounded the congressional effort certainly produced a much needed reassessment of the access problem. Unfortunately, as evidenced by more recent Court decisions, this message did not reach the nation's highest court.

D. *Uncertainty: The Quandary of Property Rights and Organizing Rights*

Substantively, the access problem balances the property rights of employers and the rights of employees to organize and form labor organizations. As discussed in Part II,¹⁸⁶ the Court had set the judicial goal to be that of accommodating the two "with as little destruction of one as is consistent with the maintenance of the other."¹⁸⁷ Almost by definition, this area has inherent uncertainty. Any fine tuning between protecting the private property rights of employers, and the right of employees to organize, will have to be *continuously* evaluated in the context of the particular circumstances, not only of the particular dispute, but also the general state of industrial relations and the social context in which the dispute arises.

The same rationale which in the late 1950s might have justified the Board's finding that union visits to employees' homes were not per se coercive (e.g., small community, minimal privacy invasion)¹⁸⁸ might or might not be present in the late 1990s. Similarly, while in the 1950s it was probably sound to assume that employees lived in fairly close proximity to the workplace, and thus that there were alternative channels for unions to reach employees in the community as well as at their homes, such an assumption might be totally unfounded in the 1990s, in which long commutes are com-

185. Of course, the timing of the legislative push was also affected by political considerations. With both Congress and the White House under the control of Democrats, labor saw this as a unique opportunity for labor law reform. See Penn Comment, *supra* note 31, at 755-97.

186. See *supra* notes 24-125 and accompanying text.

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

188. See Estlund, *supra* note 1, at 331-32.

mon to the American worker's experience. It is this constant change that creates the uncertainty which makes an escalation situation so likely, and which in turn forces the Court to be willing to reassess the rules governing the union and employee access problem.

E. *Real Choice: Lechmere and Town & Country*

1. *Background*

In two recent decisions, *Lechmere* and *Town & Country*, the Court had the opportunity to reevaluate various aspects of the access problem. Unfortunately, it appears that in *Lechmere* the Court disregarded this opportunity, choosing instead to decide the case primarily on the rationale and analysis of a forty-plus year-old case¹⁸⁹ and without any serious attempt to analyze the case with an eye on the future impact of the decision.¹⁹⁰ Similarly, in *Town & Country*, the Court, while willing to consider a broader set of factors in clarifying the meaning of the term "employee" under the Act, did not raise the level of analysis to that necessary to de-escalate the problems created by its prior decisions.

2. *Lechmere*

The *Lechmere* decision relied heavily on the Court's prior 1956 *Babcock & Wilcox* decision. Almost half of the Court's opinion is devoted to a very detailed description of the facts of the *Babcock* decision¹⁹¹ and of the way *Babcock* had been interpreted in subsequent, yet marginally related, Court decisions.¹⁹² After this long recanting of *Babcock*, the Court starts its analysis with the following quote from an earlier decision: "Once we have determined a statute's clear meaning, we adhere to that determination under the doctrine of stare decisis, and we judge an agency's later interpretation of the statute against our prior determination of the statute's meaning."¹⁹³

This quote illustrates the sunk cost character of relying on precedent. The parameters of the Court's analysis entail a retrospective, rather than a prospective, mode of analysis.

The Court then went on to argue that the *Babcock* decision provided the necessary tools for deciding the dispute in *Lechmere*. In particular, the Court noted that under *Babcock*, the only exception to the rule that non-employee organizers do not have any right to enter the workplace is where

189. See *Babcock & Wilcox*, 351 U.S. at 105.

190. As the dissenting opinion of Justice White points out in *Lechmere*, "... the Court's decision fails to recognize that *Babcock* is at odds with the current law of deference to administrative agencies and compounds that error by adopting the substantive approach *Babcock* applied lock, stock, and barrel." *Lechmere v. NLRB*, 502 U.S. 527, 546 (1992).

191. See *id.* at 531-35.

192. See *id.*

193. *Id.* at 536-37 (quoting *Maislin Industries, U.S., Inc. v. Primary Steel Inc.*, 497 U.S. 116, 131 (1990)).

“the location of a plant and the living quarters of the employees place the employees beyond the reach of reasonable union efforts to communicate with them”¹⁹⁴ The Court then cited as classic examples cases where employees will be beyond the reach of reasonable union efforts situations, like logging camps, mining camps, and mountain resorts.¹⁹⁵ Even if the Court was correct in arguing that *Babcock* stands for the proposition that only in those situations will access be permitted, it is difficult to argue that such examples are to a large extent characteristic of the 1990s industrial and social context of the dispute the Court faced in *Lechmere*. The Court appeared to be deciding *Lechmere*, not only bound by the rule and rationale provided in *Babcock*, but also on the basis of a contextual view of industrial relations completely inappropriate given the period in which the case arose. Justice White’s dissenting opinion captures the essence of this argument:

If the Court in *Babcock* indicated that nonemployee access to a logging camp would be required, it did not say that only in such situations could nonemployee access be permitted. Nor did *Babcock* require the Board to ignore the substantial difference between the entirely private parking lot of a secluded manufacturing plant and a shopping center lot which is open to the public without substantial limitation. Nor indeed did *Babcock* indicate that the Board could not consider the fact that employees’ residences are scattered throughout a major metropolitan area; *Babcock* itself relied on the fact that the employees in that case lived in a compact area which made them easily accessible.¹⁹⁶

In *Lechmere* the Court bases its decision on a set of assumptions about industrial relations which is more in tune with the 1950s than with the 1990s.¹⁹⁷ Like decision-makers engaged in escalation situations, the Court fails to consider the nature of the current environment in evaluating whether to follow a previously chosen course of action.

As we discussed earlier,¹⁹⁸ the practical response to *Lechmere* was, or should have been, clear to the Court. With very few options available, unions post-*Lechmere* turned to organizing practices like salting, that are cumbersome and potentially more intrusive of both employer’s business and property rights than union organizers “trespassing” in a shopping mall’s public parking lot.

194. *Babcock & Wilcox*, 351 U.S. at 113.

195. *Lechmere*, 502 U.S. at 539.

196. *Id.* at 543.

197. The *Lechmere* decision has also been explained as the product of Justice Thomas’ view of the primacy of property rights over the statutory rights created under the Act. See generally Leonard Bierman, *Justice Thomas and Lechmere, Inc. v. NLRB: A Reply to Professor Robert A. Gorman*, 10 HOFSTRA LAB. L. J. 299 (1992).

198. See *supra* notes 77-89 and accompanying text.

3. Town & Country

Compared to *Lechmere*, the *Town & Country* decision¹⁹⁹ avoids the escalation commitment decision-making process. Unlike the Court in *Lechmere*, the unanimous *Town & Country* decision shows a willingness to reevaluate the issue at hand, i.e., whether a worker can be a company's "employee" within the terms of the Act if, at the same time, a union pays that worker to help organize the company, without giving undue weight to precedent.²⁰⁰ The Court, for example, focuses on the purposes of the Act, and discusses how a broad definition of the term "employee" appears to be consistent with achieving Congress' intent.²⁰¹ The Court also discusses at length the effects which salters could have on the employer's business operations.²⁰²

Thus, given the above escalation analysis, the Court's decision in *Town & Country* is a vast improvement over the *Lechmere* decision. The decision fell short of serving a model of de-escalation, in that it failed to consider the question of the definition of the term "employee" in the broader context of the law concerning union and employee access to the workplace for organizing purposes. Our concern is that it will likely motivate more unions to engage in behavior like salting, which, as previously noted, is costly and may be ineffective.²⁰³ The access problem requires a *comprehensive* approach one dealing not only with salting, but also with issues such as non-employee access, home visits, *Excelsior* lists, and off-duty employee rights.

VI.

PLANNED PARENTHOOD AND DE-ESCALATING THE "ACCESS" PROBLEM

A. Overview

Our argument up to this point can be summarized as follows. First, we aver that there are some serious doctrinal problems with the legal rules concerning the access problem. In particular, we argue that an analysis of the access problem case law reveals that courts have been unwilling to evaluate the access problem in light of the changing industrial relations environment,²⁰⁴ and that they have failed to deal with the access problem in a

199. *NLRB v. Town & Country Elec.*, 510 U.S. 85 (1995).

200. In fact, unlike in *Lechmere*, there was not much case law, and for that matter, no real precedent on the issue before the Court. This supports our argument that, unhindered by precedent, the Court was able to strike a better balance between the competing interests and make a proper analysis based on a realistic and current view of the situation.

201. *See Town & Country*, 516 U.S. at 90-91.

202. *See id.* at 93-97.

203. *See supra* notes 77-125 and accompanying text.

204. *See supra* notes 126-32 and accompanying text.

comprehensive manner.²⁰⁵ We attribute both of these flaws in part to the doctrine of *stare decisis*.²⁰⁶ Second, we note that these problems are not unique to the judicial decision-making process, but are common to sequential type decision-making.²⁰⁷ Using the escalation of commitment framework, we identify the underlying aspects of the access problem.²⁰⁸

In order to complete our analysis, we now provide a potential solution to the problem we have identified. In this part of the Article, we look, paradoxically, to the Court for guidance. We discuss a model of *stare decisis* which the Court has developed in the last decade. This model, we argue, can be used by the Court to justify abandoning the precedents that have forced it into this “complexity corner.” This contemporary model of *stare decisis* provides support for the argument that the Court should look at the changing industrial relations environment, and that it should attempt to deal comprehensively with the various aspects of the “access” problem. In Part VII we provide the contours of a comprehensive solution to the “access” issue which is consistent with the Court’s guidance on the use of *stare decisis*.²⁰⁹

B. Planned Parenthood and Stare Decisis

Although a unified approach to precedent has been a topic of discussion at the Court for many years,²¹⁰ the last ten years have seen increased interest in such an endeavor.²¹¹ Various Justices have attempted to provide some guidance regarding the proper use of *stare decisis* in the context of statutory, constitutional and common law disputes. Unfortunately, given the “spasmodic way” in which the Court has manipulated *stare decisis*,²¹² it is not clear whether the Court is serious about its new approach. It is not certain whether it will apply this new approach consistently.²¹³ Because the new model of *stare decisis* may provide significant guidance with the “access” issue, it warrants closer examination.

The most extensive discussion of *stare decisis* provided by the Court over the last decade took place in the controversial *Planned Parenthood v.*

205. See *supra* notes 133-45 and accompanying text.

206. See *supra* notes 146-56 and accompanying text.

207. See *supra* notes 157-73 and accompanying text.

208. See *supra* notes 174-202 and accompanying text.

209. See *infra* notes 254-318 and accompanying text.

210. See generally Maltz, *supra* note 150, at 367.

211. See Todd E. Freed, Comment, *Is Stare Decisis the Lighthouse Beacon of Supreme Court Jurisprudence?: A Critical Analysis*, 57 OHIO ST. L.J. 1767 (1996); Amy L. Padden, Note, *Overruling Decisions in the Supreme Court: The Role of a Decision’s Vote, Age, and Subject Matter in the Application of Stare Decisis After Payne v. Tennessee*, 82 GEO. L.J. 1689 (1994).

212. See Freed, *supra* note 211, at 1778.

213. Various commentators have noted how, over time, the doctrine of *stare decisis* has been supported or abandoned as a matter of political expediency. In the 1960s, for example, conservatives facing a liberal Court attacked the inclination of the Court to overrule precedent. By contrast, liberals now facing a conservative Court are quick to criticize it for failing to adhere to precedent. See *id.* at 1779.

Casey decision.²¹⁴ In *Planned Parenthood*, the Court was confronted with the issue of the constitutionality of a Pennsylvania statute imposing a number of restrictions on women seeking abortions.²¹⁵ As evidenced by the opening sentence of Justice O'Connor's opinion,²¹⁶ a major theme of the decision was to resolve the doubt and confusion concerning a woman's constitutional right to terminate her pregnancy, which the Court had recognized some 19 years earlier in *Roe v. Wade*.²¹⁷ The Court clarified its position on *stare decisis* en route to its reaffirmation of the central holding of *Roe v. Wade*.²¹⁸ In *Planned Parenthood*, *stare decisis* served as one of Justice O'Connor's justifications for the Court's upholding of the core of *Roe*. Notably, Justice O'Connor's opinion would provide the basic model of *stare decisis* used by the Rehnquist Court.

The joint opinion began by pointing out that the obligation to follow precedent is not absolute.²¹⁹ The opinion noted the outer limits of the doctrine. On the one hand, efficiency and consistency arguments make precedent indispensable.²²⁰ On the other hand, precedent would seem dispensable when "a prior judicial ruling should come to be seen so clearly as error that its enforcement was for that very reason doomed."²²¹ The opinion went on to describe the four "pragmatic considerations" which courts should use to decide when to overrule or reaffirm a prior case:²²² (1) whether the rule has proven to be intolerable simply in defying practical workability;²²³ (2) whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation;²²⁴ (3) whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine;²²⁵ and (4) whether facts have so changed, or come to

214. 505 U.S. 833 (1992).

215. *See id.* at 844.

216. "Liberty finds no refuge in a jurisprudence of doubt." *Id.*

217. 410 U.S. 113 (1973).

218. *Planned Parenthood*, 505 U.S. at 846. According to Justice O'Connor's decision, the central holding of *Roe v. Wade* was threefold. First, a woman has the right to choose to have an abortion before viability and to obtain it without undue interference from the State. Second, the State has the power to restrict abortions after viability. Finally, the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus. *See id.* *See also* John Wallace, *Stare Decisis and the Rehnquist Court: The Collision of Activism, Passivism, and Politics in Casey*, 42 *BUFF. L. REV.* 187, 209-11 (1994).

219. "The obligation to follow precedent begins with a necessity, and a contrary necessity marks its outer limit." *Planned Parenthood*, 505 U.S. at 854.

220. "With Cardozo, we recognize that no judicial system could do society's work if it eyed each issue afresh in every case that raised it." *Id.* (citation omitted). "Indeed, the very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable." *Id.*

221. *Id.*

222. *Id.* at 854-55.

223. *See id.* at 854.

224. *See id.*

225. *See id.* at 855.

be seen so differently, as to have robbed the old rule of significant application or justification.²²⁶

1. Workability

The first consideration in deciding whether to follow or overrule precedent is whether the rule established in a prior case has proven unworkable. Justice O'Connor's joint opinion appears to define workability in terms of whether the prior rule required courts to undertake tasks outside their realm of competence.²²⁷

The joint opinion also cited approvingly the Court's decisions in *Garcia v. San Antonio Metropolitan Transit Authority*²²⁸ and *Swift & Co. v. Wickham*.²²⁹ *Garcia* and *Swift* define workability not only in terms of judicial competence, but also in terms of the actual effects of the prior ruling. In particular, workability requires an examination of whether the prior ruling has produced inconsistent results in its application,²³⁰ and whether the ruling has produced "mischievous consequences" to litigants and courts alike.²³¹

Finally, workability also has been defined in terms of the relationship between the precedent is construction of a statute and other relevant statutes. In *Patterson v. McLean Credit Union*,²³² for example, the Court noted that a prior ruling would be found to be unworkable to the extent that it "poses a direct obstacle to the realization of important objectives embodied in other laws."²³³

2. Reliance

In deciding whether to adhere to a prior ruling, courts should also consider the cost of repudiating the rule to "those who have relied reasonably on the rule's continued application."²³⁴ This second argument is the basic reliance argument normally advanced as a justification for *stare decisis*.²³⁵

226. *See id.*

227. In finding that *Roe* has not proven unworkable, Justice O'Connor noted that while *Roe* required courts to assess state laws affecting the exercise of the choice to terminate a pregnancy, such determinations were "within judicial competence." *See id.*

228. 469 U.S. 528 (1985).

229. 382 U.S. 111 (1965).

230. In *Garcia*, for example, the Court pointed out that the application of *National League of Cities v. Usery*, 426 U.S. 833 (1976), requiring the Court to decide whether a particular governmental function was integral or traditional and thus immune from particular federal regulation, was inconsistent with the principles of federalism. *See Garcia*, 469 U.S. at 531 (overturning *National League of Cities*).

231. *See Swift & Co. v. Wickham*, 382 U.S. 111, 116 (1965).

232. 491 U.S. 164 (1989).

233. *Id.* at 173.

234. *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 855 (1992).

235. *See Maltz, supra* note 150, at 368 ("In planning their affairs, it is argued, people should be able to predict the legal consequences of their actions. Such predictability can only be obtained if judges can be expected to follow precedent in making their decisions.").

In *Planned Parenthood*, Justice O'Connor provides a useful summary of the relevant considerations in assessing the reliance factor.

The joint opinion starts its discussion of reliance by pointing out that the reliance argument is to a large extent context-specific. Reliance, according to the joint opinion, will weigh more heavily in the commercial context, i.e., in cases involving property and contract rights,²³⁶ where "advance planning of great precision is most obviously a necessity."²³⁷ On the other hand, in other contexts, such as cases involving procedural and evidentiary rules, the reliance argument will be of a lesser significance.²³⁸

The O'Connor opinion goes on to argue that reliance should be broadly defined. Justice O'Connor first conceded that since abortion could be seen as an "unplanned response to the consequence of unplanned activity," a reliance claim appeared to be fairly weak.²³⁹ Justice O'Connor, however, argued that the reliance argument should be defined more broadly to include consideration not only of "specific instances of sexual activity,"²⁴⁰ but also the role that *Roe* has played in other areas. In particular, Justice O'Connor pointed out two key developments. First, for over two decades people had organized intimate relationships and made choices that defined their views of themselves and society in reliance on the availability of abortion.²⁴¹ Second, the decision in *Roe* and the ability that it provided women to control their reproductive lives had impacted substantially the "ability of women to participate equally in the economic and social life of the Nation."²⁴² Both of these factors, concluded Justice O'Connor, should be factored in the reliance argument, since they are evidence of the way individuals have ordered their thinking and living around the rule established by *Roe*.

3. *Intervening Developments in the Law*

The decision whether to adhere to precedent will also be affected by the extent to which related developments in the law have either removed or weakened the conceptual underpinnings from the prior decision.²⁴³ The court should assess whether later developments have rendered the prior decision irreconcilable with competing legal doctrines or policies.²⁴⁴ The focus of the inquiry here is on legal developments related to the precedent case. It is not clear whether "the intervening developments in the law" factor encompasses only the decisional law of the Court, or whether it also

236. See *Payne v. Tennessee*, 501 U.S. 808, 828 (1991).

237. *Planned Parenthood*, 505 U.S. at 856.

238. See *Payne*, 501 U.S. at 828.

239. *Planned Parenthood*, 505 U.S. at 856.

240. *Id.*

241. See *id.*

242. *Id.*

243. See *Patterson v. McLean Credit Union*, 491 U.S. 164, 173 (1989).

244. See *id.*

encompasses decisions by lower courts and or actions by the legislature.²⁴⁵ The Court originally defined intervening developments only in terms of its own decisions.²⁴⁶ However, in its 1995 *Hubbard v. United States* decision,²⁴⁷ a plurality of the Court defined the intervening developments somewhat more broadly, examining its own and lower court decisions as well as actions of Congress.

4. *Changed Facts and Perceptions*

In her joint opinion in *Planned Parenthood*, Justice O'Connor stated that the decision to follow precedent will depend in part on "whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification."²⁴⁸ This fourth factor appears to require the decision-maker to evaluate two different aspects of the initial decision. First, it requires an evaluation of the factual background supporting the prior ruling. Second, it goes further by permitting the decision-maker to evaluate not only factual changes, but also society's perceptions of those changes.

With respect to the first element, consideration of changed facts, the decision-maker is asked to inquire about the factual assumptions underlying the prior ruling and decide whether changes in the landscape of potential relevant facts challenge the central holding of the prior ruling.²⁴⁹ The second element is somewhat different in that it allows the decision-maker to inquire not only about factual changes, but about society's interpretation of those changes. In a case decided just a couple of years before *Planned Parenthood*, the Court, described this element as follows: "[i]t has sometimes been said that a precedent becomes more vulnerable as it becomes outdated and after being 'tested by experience, has been found to be inconsistent with the sense of justice or with the social welfare.'"²⁵⁰

In short, in deciding whether to follow precedent, courts should look at the factual context in which the prior ruling arose, with a view towards evaluating whether the circumstances have so changed, or have come to be seen so differently, as to justify a refusal to follow the prior ruling.

245. *See id.* *See also* Freed, *supra* note 211, at 1782-90.

246. *See, e.g.,* Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477 (1989); Andrews v. Louisville & Nashville R.R., 406 U.S. 320 (1972).

247. 514 U.S. 695 (1995).

248. *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 855 (1992).

249. In *Planned Parenthood*, for example, while admitting that technological changes in maternal and neonatal health care have changed since the *Roe*'s decision, Justice O'Connor concluded that those changes did not affect the central ruling in *Roe*, "that viability marks the earliest point at which the State's interest in fetal life is constitutionally adequate to justify a legislative ban on nontherapeutic abortions." *Id.* at 860.

250. *Patterson v. McLean Credit Union*, 491 U.S. 164, 174 (1989) (citing *Runyon v. McCrary*, 427 U.S. 160, 191 (1976) (quoting B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 150 (1925))).

C. Implications from Planned Parenthood

While *Planned Parenthood* was decided after *Lechmere* and obviously could not have been cited in the Court's opinion, it is somewhat puzzling that there is no mention in *Lechmere* about the Court's new approach to precedent. Although *Planned Parenthood* provides the clearest description of this model, the various components of the model had all been discussed in earlier Court decisions. Yet the Court disregarded its own advice, choosing instead to base its *Lechmere* decision on a rigid adherence to precedent. A persuasive argument can be made that if the Court would have considered *Lechmere* in the context of its new model of *stare decisis*, a very different result could have resulted.

Of the four factors that the *Planned Parenthood* decision proposes should be considered by the Court when deciding whether to follow precedent, three of them support a decision to change the access rules. The workability, intervening developments of the law, and changed facts and perceptions factors are consistent with moving away from *Babcock* and towards a new approach to the access problem.

As argued earlier,²⁵¹ one of the central problems with the law concerning the access problem is the complexity that the initial decisions in *Republic Aviation* and *Babcock* have generated. While implementing *Babcock* is not per se an unworkable task, the Court and the Board quickly recognized that the *Babcock* decision had significant implications in other areas. In order to compensate for the limited access to the workplace created under *Babcock*, the Board devised the home visits and *Excelsior* lists doctrines. As discussed in Part V,²⁵² these doctrines became increasingly unworkable and ever less effective, and have been criticized as poor solutions to the access problem.

The "intervening developments in the law" factor also supports the argument for abandoning the *Babcock* approach. In addition to the case law developed since *Babcock* concerning the home visits doctrine and the *Excelsior* doctrine, two other recent cases illustrate the application of this factor. The Court's "salting" decision in *Town & Country* raises a significant conflict with both *Babcock* and *Lechmere*. One of the underlying principles of both *Babcock* and *Lechmere* is the ability of employers to keep absolute control over their private property. *Town & Country* appears to challenge that premise, at least indirectly, by allowing union organizers to achieve through the back door what *Lechmere* prohibits them from obtaining through the front door. A similar conflict is raised in the *Diamond Walnut* case decided by the D.C. Circuit, which upheld the ability of unions to

251. See *supra* notes 179-85 and accompanying text.

252. See *supra* notes 174-203 and accompanying text.

engage in salting in the context of striker replacements.²⁵³ The Court of Appeals holding not only expands the potential implications of salting, but also raises a potential conflict between the law with respect to striker replacements and the law regarding the access problem.

Under the intervening development factor, the court should assess whether later developments have rendered the prior decision irreconcilable with competing legal doctrines or policies. The focus of the inquiry here is on legal developments related to the precedent case. The recent decisions in *Town & Country* and *Diamond Walnut* arguably are beginning to make patently clear the doctrinal conflicts embedded in the current approach to the access issue.

An argument can also be made that the changed facts and perceptions element requires the decision-maker to inquire about the factual assumptions underlying the prior ruling, and decide whether changes in the landscape of potential relevant facts challenge the central holding of the prior ruling. There can be little doubt that the factual assumptions supporting the *Babcock* approach to the access issue have all but vanished in the workplace context of the 1990s. In particular, a key factual consideration in *Babcock* was the understanding that in only a limited number of cases, e.g., mining and logging camps, were employees inaccessible to the reach of labor organizations. Thus, only in those limited instances would it be proper to require employers to allow union organizers access to the workplace. This understanding was based on the assumption that except in unusual cases, employees were likely to live very close by to the workplace and thus be accessible through other efforts. Indeed, the *Babcock* decision discussed the number of employees in that case living within a walking distance of work. Today's living and work patterns challenge that factual assumption, giving the Court another reason to adopt a new approach to the access problem.

VII.

FOLLOWING THE SUPREME COURT'S LEAD IN *PLANNED PARENTHOOD*

A. *Background*

If our argument so far is correct, and there are good reasons for the Court to change its approach regarding the access problem, the next step in our analysis is to provide a comprehensive model to lead us out of the current situation. In this section we attempt to provide the contours of a new approach to the problem of union and employee access to the property of employers for organizing purposes. We start by evaluating recently in-

253. *Diamond Walnut Growers, Inc. v. NLRB*, 80 F. 3d 485 (D.C. Cir. 1996), *vacated and reh'g en banc granted*, 88 F.3d 1064 (D.C. Cir. 1996).

roduced legislation dealing with the question of salting. Such legislation, while probably a good first step, falls short of providing a comprehensive solution to the access problem. We then identify various other dimensions of the access problem that need to be addressed either legislatively or judicially for a comprehensive solution to occur in this area of the law.

B. Proposed Legislation

Last year, opponents of salting introduced companion bills in the House of Representatives²⁵⁴ and the Senate²⁵⁵ to outlaw the practice. These bills were entitled the "Truth in Employment Act of 1997."²⁵⁶ According to one of their sponsors, Republican Congressman Harris Fawell of Illinois, they were designed to "make it clear that an employer is not required to hire any person who seeks a job in order to promote interests unrelated to those of the employer."²⁵⁷ Congressman Fawell contends that under current laws, employers must choose between "two unpleasant options" — hiring a "salt" who may "disrupt the workplace and file frivolous charges resulting in costly litigation," or denying the "salt" employment and being sued for discrimination under the Act.²⁵⁸ The proposed legislation would permit employers to deny employment or fire salts while purportedly not infringing "on the rights or protections otherwise accorded employees under the NLRA."²⁵⁹

Section 2 of the proposed legislation is based on a number of congressional "findings." First, it begins with the premise that an "atmosphere of trust and civility in labor-management relationships is essential to a productive workplace and a healthy economy."²⁶⁰ The legislation asserts that the "tactic of using professional union organizers and agents to infiltrate a targeted employer's workplace, a practice commonly referred to as salting . . . threatens the balance of rights which is fundamental to our system of collective bargaining."²⁶¹

The legislation insists that salting has "evolved into an aggressive form of harassment not contemplated" when the NLRA was enacted,²⁶² and that "union organizers are seeking employment with nonunion employers not because of a desire to work for such employers" but rather "primarily to organize the employees of such employers or to inflict economic harm."²⁶³

254. H.R. 758, 105th Cong. (1997) [hereinafter "House Bill"].

255. S. 328, 105th Cong. (1997) [hereinafter "Senate Bill"].

256. *See id.*

257. *Press Release, House Comm. on Education and the Workforce: Fawell Introduces the "Truth in Employment Act of 1997"* (visited Nov. 25, 1998) <<http://www.house.gov/eeo/press/salting213.htm>>.

258. *Id.*

259. *Id.*

260. House Bill, *supra* note 254, and Senate Bill, *supra* note 255, at § 2(1).

261. House Bill at § 2(2).

262. *Id.*

263. *Id.* at § 2(3).

Further, the legislation asserts that employers “should have the right to expect job applicants to be primarily interested in utilizing” their skills “to further the goals of the business of the employer.”²⁶⁴ Toward this end it proposes a specific amendment to section 8(a) of the Act.²⁶⁵ Pursuant to this proposed amendment, nothing in section 8(a) of the Act would be “construed as requiring an employer to employ any person who seeks or has sought employment with the employer in furtherance of other employment or agency status.”²⁶⁶

On February 24, 1998, however, H.R. 758, introduced in 1997, was incorporated into a new House Bill, H.R. 3246,²⁶⁷ introduced by Congressman William Goodling and entitled the “Fairness for Small Business and Employers Act of 1998.” This bill added various other pro-small business NLRA reforms to the truth-in-employment language.²⁶⁸ The House Committee on Education and the Workforce’s report on the bill was sent to the full House on March 18, 1998.²⁶⁹ It passed the House on March 26, 1998 by a count of 202 – 200.²⁷⁰ The legislation was then sent to the Senate, as S. 1981,²⁷¹ which updated the Truth in Employment Act with the language of the bill which had been passed by the House in 1998.

The language of H.R. 3246 and S. 1981 is identical to the original Truth in Employment Act bills’ language with one exception. While the original bills amend section 8(a) of the Act²⁷² to state that nothing in section 8(a) shall be construed as requiring an employer to hire a person who seeks employment to further the objectives of another organization, the new bill clarifies this provision. Under the new legislation, the issue is whether the job applicant’s “primary purpose” is one of “furthering another employment or agency status.”²⁷³ The Committee report for H.R. 3246 spells this out further by stating that a job applicant must have “at least a 50 percent motivation to work for the employer.”²⁷⁴ If a job applicant meets this fifty percent test, the new legislation makes clear that such a “bona fide employee applicant” will be entitled to the full protections of the Act.²⁷⁵

264. *Id.* at § 2(4).

265. *Id.* at § 4.

266. *Id.*

267. H.R. 3246, 105th Cong. (1998) [hereinafter “New House Bill”].

268. *Id.* Titles II, III and IV (dealing with small business bargaining units, expeditious handling of unfair labor practice complaints, and attorneys fees awards to small businesses that prevail in litigation against the Board).

269. *See* H.R. REP. NO. 105 – 453 (1998).

270. *See* 144 CONG. REC. H1622 (daily ed. March 26, 1998). *See also supra* note 81.

271. S.1981, 105th Cong. (1998) [hereinafter “New Senate Bill”].

272. 29 U.S.C. § 158(a) (1988).

273. New House Bill, *supra* note 267; New Senate Bill, *supra* note 271, at § 4, line 5 (emphasis added).

274. H.R. REP. NO. 105 – 453, *supra* note 269, text accompanying notes 6-7 (stating the Committee’s view that if at least 50% of a prospective employee’s intent is not to work for the employer, the employer may legally refuse to hire the person).

275. New House Bill *supra* note 267; New Senate Bill, *supra* note 271, at § 4, lines 6-10.

In any event, it is the clear intent of this legislation to congressionally outlaw salting. In doing so, Congress would legislatively overrule the Court's recent decision in *Town & Country*.²⁷⁶ President Clinton has forcefully vowed to veto such legislation should it pass the House and Senate and reach his desk.²⁷⁷

C. *Limitations of the Proposed Legislation*

We agree with legislative pronouncements that salting "threatens the balance of rights which is fundamental to our system of collective bargaining."²⁷⁸ As argued above,²⁷⁹ salting intrudes on the property and privacy rights of employers. Salting arguably represents an incursion on employers' rights to run their businesses. Internal labor market analysis would suggest that salting allows unions to behave "opportunistically" vis-à-vis employers.²⁸⁰ We believe an overturning of *Town & Country* and a direct outlawing of salting would be a positive step by Congress.

The problem, though, is that it represents only a positive *first* step. Outlawing salting without more creates a strong organizational *imbalance* in favor of employers. Pursuant to the proposed legislation and *Lechmere*, union organizers would be completely barred from all employer property including quasi-public employer property such as retail store parking lots. Unions would be relegated to reaching employees outside of the workplace, primarily at their homes.²⁸¹ Such organizing is both extremely difficult for unions to conduct²⁸² and intrusive on workers' non-work lives.²⁸³

Consequently, while the proposed congressional legislation outlawing salting seems correct in that salting "threatens" the proper "balance of rights" in our collective bargaining system,²⁸⁴ it seems *incorrect* in that outlawing salting will "preserve" a proper "balance of rights" among the relevant parties.²⁸⁵ Taken alone, the proposed legislation helps create a further considerable imbalance of organizational rights against unions. The

276. See *supra* notes 92-98 and accompanying text.

277. See *supra* note 81 and accompanying text.

278. House Bill, *supra* note 254; Senate Bill, *supra* note 255, at § 2(2).

279. See *supra* notes 99-112 and accompanying text.

280. The ability of unions and employees to behave opportunistically arises from the internal labor market features of the employment relationships. Employers have invested in employees' training, potentially teaching employees skills somewhat idiosyncratic to the particular employer. In such a context, employees can behave opportunistically in situations in which monitoring of work effort by the employer is less than perfect. See Leonard Bierman & Rafael Gely, *Striker Replacements: A Law, Economics and Negotiations Approach*, 68 S. CAL. L. REV. 363 (1995) (applying internal labor market theory to the striker replacements debate).

281. See *supra* notes 99-112 and accompanying text.

282. Among other things, union organizers operating in this context are frequently viewed as being "unauthoritative." See Mark Barenberg, *Democracy and Domination in the Law of Workplace Cooperation: From Bureaucratic to Flexible Production*, 94 COLUM. L. REV. 753, 934-35 (1994).

283. See *id.*

284. House Bill, *supra* note 254; Senate Bill, *supra* note 255, at § 2(2).

285. Senate Bill, *supra* note 255, at § 3(1).

proposed legislation is only tenable as a first step part of a package of comprehensive labor law reform in this area.

D. A Model for Comprehensive Reform

1. Overview

A comprehensive model for reform must focus on legal rules which are the least intrusive on employer and employee privacy and property rights. Moreover, while the Court has stated that there are no “mechanical answers” in the complex area of union organizational access,²⁸⁶ former Harvard University President Derek Bok correctly points out that the legal rules in this area of employment law have become far too obfuscated and unclear.²⁸⁷ In short, in addition to protecting privacy rights, there is a need for “bright lines” so that parties explicitly know what they can and cannot do. Towards this end, explicitly outlawing salting, along the general lines of the pending congressional legislation,²⁸⁸ would be a positive first step. An explicit outlawing of salting would protect employer privacy and property rights and remove the considerable murkiness created by the Court’s decision in *Town & Country* regarding how employers are to properly deal with this “Trojan horse” union organizing technique.

2. The “Home Visits” Doctrine

Similarly, the reform package should contain language directly overruling the Board’s “home visits” doctrine.²⁸⁹ This doctrine is in many ways anachronistic, harkening back to an era when employees all lived in homes near the workplace, and there was only one wage-earner in the family.²⁹⁰ Today, employees tend to live in widely dispersed areas²⁹¹ and as Professor Marion Crain has noted, female employees juggling employment, housework and child care may have little desire or opportunity to deal with union issues once they get home.²⁹² Moreover, the home visits doctrine represents a strong general invasion of employee rights of privacy, rights the Court recently emphasized in its *DOD* decision.²⁹³

286. *NLRA v. United Steelworkers (NuTone)*, 357 U.S. 357, 364 (1958).

287. See Derek C. Bok, *The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act*, 78 HARV. L. REV. 38, 102-03 (1964).

288. See *supra* notes 254-77 and accompanying text. The 50% or “primary purpose” element of this proposed legislation, though, also seems quite “murky.”

289. See *supra* notes 39-42 and accompanying text.

290. See Michael H. Gottesman & Michael R. Seidl, *A Tale of Two Discourses: William Gould’s Journey from the Academy to the World of Politics*, 47 STAN. L. REV. 749, 778 (1995) (discussing union access rules in the context of these cultural changes).

291. See *Lechmere*, 502 U.S. at 543 (White, J., dissenting).

292. See Marion G. Crain, *Feminizing Unions: Challenging the Gendered Structure of Wage Labor*, 89 MICH. L. REV. 1155, 1217-19 (1991).

293. See *supra* notes 101-104 and accompanying text.

Finally, it seems a bit disingenuous to argue doctrinally that home visits by employers are “coercive” and “harassing” while such visits by union organizers are not. Certainly, a review of some of the recent literature regarding continued organized crime infestation of some unions²⁹⁴ might be somewhat persuasive to the contrary. Moreover, people today are generally wary of opening their doors to *any* strangers.²⁹⁵ In sum, the Board’s home visits doctrine as it currently stands is riddled with problems. Incremental reform of the doctrine proved a significant stumbling block when Congress considered the proposed Labor Law Reform Act in 1977-78.²⁹⁶ A far better approach is the “bright line” repealing of the doctrine and the outlawing of home visits by *both* unions and employers. This approach also significantly bolsters protection of employee privacy rights.

3. *Extending Excelsior*

In the *Excelsior* case, the Board, as noted above,²⁹⁷ held that unions be afforded a list of names and addresses for all employees in a given election unit within seven days of the Board’s ordering of a representation election in that unit. The problem, though, is that the Board will not order such an election until the union has provided the Board with evidence that at least thirty percent of the employees in the given bargaining unit are interested in being represented by a union.²⁹⁸ Moreover, most unions, for strategic purposes, do not seek to schedule such elections until at least *fifty percent* of the employees have expressed interest.²⁹⁹ Thus, unions simply have no rights to employee lists under *Excelsior* during the critical early stage of an organizing campaign when they are trying to garner enough support to actually have an election scheduled. Simply put, the rights afforded unions under *Excelsior* come too late, as many unions never even make it to the point where *Excelsior* rights are triggered.

This dynamic was well illustrated in the *Lechmere* case. In that case a representation election had not yet been scheduled triggering union *Excelsior* rights. Instead, the union was just trying to garner at least a thirty percent showing of interest by unit employees in order to schedule an election. When the employer kicked the union out of the shopping center parking lot, union organizers stood on a public grassy strip near a highway and recorded license plate numbers of cars parked in the employee area of the

294. See, e.g., Clyde W. Summers, *Union Trusteeships and Union Democracy*, 24 U. MICH. J. L. REF. 689 (1991); Randy M. Mastro et al., *Private Plaintiff’s Use of Equitable Remedies Under the RICO Statute: A Means to Reform Corrupted Labor Unions*, 24 U. MICH. J. L. REF. 571 (1991).

295. See generally Estlund, *supra* note 1, at 331-32.

296. See *supra* notes 49-57 and accompanying text.

297. See *supra* notes 43-46 and accompanying text.

298. See 29 C.F.R. § 101.18(a) (1981).

299. See Paul C. Weiler, *Promises to Keep: Securing Workers’ Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1776-77 n.22 (1983).

parking lot.³⁰⁰ Then, the union apparently received the names and addresses of the individuals who owned these cars from a “mole” at the Connecticut Department of Motor Vehicles.³⁰¹

It seems a bit ridiculous to put unions through such “hoops” in order to get employee names and addresses. An offset to the reform package’s removal of union rights to engage in salting or home visits would be the triggering of union *Excelsior* rights at a much earlier stage in the process. One possibility would be to trigger such rights once a union demonstrates a showing of interest from *ten percent* of the bargaining unit’s employees.³⁰²

Extending union *Excelsior* rights would not intrude on employer privacy or property rights, and would represent only a relatively mild incursion on employee privacy rights, since unions would *not* be able to use the name and address lists to make home visits. Unions could, however, use the lists to engage in mailings, place targeted advertising in local media, or perhaps make phone calls to employee homes.³⁰³

Professor Cynthia Estlund³⁰⁴ and others³⁰⁵ have argued, however, that unions need “sustained face-to-face contact with employees” in order to conduct meaningful organizational campaigns, and that union mailings and phone calls are unlikely to be particularly effective.³⁰⁶ While extending union *Excelsior* rights is clearly not a major counterbalance to the removal of union salting and home visits rights, it does seem to represent a worthwhile first step. Although mailings and phone calls may not be the most effective union organizing tools, they are obviously of some use in union organizing campaigns.³⁰⁷ Moreover, unions, as illustrated in the *Lechmere* case, appear to be eager to get employee name and address lists early in organizing campaigns.³⁰⁸

4. *Bolstering Off-Duty Employee Rights*

The Board has vacillated over the years with respect to the organizational rights of off-duty employees. At times, it has likened their status to that of “trespassing” nonemployees,³⁰⁹ although it currently appears to allow union organizational activity by off-duty employees so long as such

300. See *supra* notes 58-71 and accompanying text.

301. *Id.*

302. See Bierman, *supra* note 25, at 29.

303. See *id.* at 28. Telephone calls to employees homes, while intrusive to privacy, do not seem to rise to the same level as home visits and would thus probably be acceptable. See *id.* at 28 n.252.

304. See Estlund, *supra* note 1, at 331.

305. See Gottesman & Seidl, *supra* note 290, at 778.

306. *Id.*

307. See GAGALA, *supra* note 106, at 167-68.

308. The union in *Lechmere* used the names and addresses it obtained from its “mole” at the Motor Vehicles Department to send mailings, make phone calls, and conduct some home visits. *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 530 (1992). Under our proposal, the mailings and phone calls would still be permissible, while the home visits would not.

309. See *GTE Lenkurt, Inc.*, 204 N.L.R.B. 921 (1973).

activity is conducted outside “the interior of the plant and other working areas”³¹⁰ Thus, Professor Robert A. Gorman appears correct in his recent assertion that even after *Lechmere*, off-duty employees have the right to place “a handbill under the windshield wiper of an automobile known to belong to a fellow employee.”³¹¹ Unlike “salters” and other “on-duty” employees, however, off-duty employees are not permitted to engage in union organizing activities *inside* the workplace in non-work areas, such as an employee lounge, or the company cafeteria.

The interior versus exterior off-duty employee workplace “compromise” fashioned by the Board seems like a rather artificial one,³¹² and certainly appears open to question in the context of legislative reform outlawing union salting and home visits. One possible reform might be to bolster off-duty employee organizational rights by according them the same rights as “on-duty” employees. Since these off-duty employees are already admitted onto company property, such a reform would appear to represent little additional incursion on employer privacy and property rights.³¹³ It would also help counter losses in union organizational opportunities due to the outlawing of salting and union home visits.³¹⁴

5. *Overruling Lechmere*

A comprehensive overhaul of the law concerning access will also require a reassessment of the *Babcock* and *Lechmere* decisions. In particular, the factors that led the Court in 1956 to create the non-employee/employee dichotomy for purposes of access clearly have changed in the interim period. To a large extent, that is our criticism of the Court’s decision in *Lechmere*. The Court’s decision is a classic example of the escalation of commitment trap in decision-making, in that it evidences an unwillingness to reevaluate the initial determination in the current context.

In this sense, a legislative reversal of *Lechmere* might be a necessary step in de-escalating the access problem. Such a reversal will imply that non-employee organizers will have *some* form of right to access to the workplace, even if just to quasi-public employer property, such as retail store parking lots. Whether such a reversal is proper requires us to evaluate a number of factors. For example, is the industrial relations context different enough from the time when *Babcock* was decided, as to require us to reassess the nature of the balance struck by the Court in that decision? In

310. *Tri-County Medical Center, Inc.*, 222 N.L.R.B. 1089 (1976).

311. See Robert A. Gorman, *Union Access to Private Property: A Critical Assessment of Lechmere, Inc. v. NLRB*, 9 HOFSTRA LAB. L. J. 1, 21 (1991).

312. See Sarah Korn, *Property Rights and Job Security: Workplace Solicitation by Nonemployee Union Organizers*, 94 YALE L. J. 374, 380 n.40 (1984).

313. See Bierman, *supra* note 25, at 33.

314. It is probably true, however, that such off-duty employees are not as effective at organizing as trained professionals. See Gresham, *supra* note 26, at 153-54. However, they do not pose the “Trojan horse” loyalty problems of “salters.”

answering this question, decision-makers would have to consider factors such as changes in the demographic characteristics of the labor force, changes in the living and commuting patterns of employees, and changes in location of industries. While it is possible to argue, as the Court did in *Babcock*, that in the 1950s only those employees in logging or mining camps were really inaccessible to the union's message, it might very well be that in the late 1990s inaccessibility is defined in terms of other characteristics. Answering these questions is likely to generate some heated debate. Such a debate, however, is what we argue is needed to de-escalate an institutional commitment to a decision that is over forty years old.

6. *Captive Audience Replies: Overturning General Electric or Election Debates?*

Within the context of comprehensive labor reform, it is essential that all aspects of the problem be subject to reassessment. Having proposed abolishing the right of unions to engage in home visits, and having prevented the ability of unions to use "salters," it is important to consider alternatives that offset these losses for unions and that in turn create a better balance in union/management organizational access. Direct union access to employer workplaces, at least for the purpose of participating in some direct election dialogue, will help achieve this balance.³¹⁵

One idea worth exploring in this context "is the possible institution of Board sponsored union/management election debates."³¹⁶ While the general notion of promoting "free debate on issues dividing labor and management"³¹⁷ has of course long been a central one under the Act, this concept has never been operationalized by the actual scheduling of Board sponsored give-and-take election debates.

There are various ways in which the debates could be structured and relatively easily incorporated into the current regulatory framework. For instance, Congress may mandate a set number of such debates to be held on working premises during working time as part of any given representation election campaign. Such debates would replace the right of employers to deliver "captive audience" speeches, as well as the argued-for right of unions to reply to such speeches.³¹⁸ The discourse generated in such debates would better serve to inform and educate the individual employees about the issues involved in the organizing campaign than the combination of an employer captive audience speech and a possible reply by the union.

315. See Martin H. Malin, *Labor Law Reform: Waiting For Congress*, 69 CHI.-KENT L. REV. 277, 279-81 (1994) (discussing the need for changes in the law concerning representation elections under the Act).

316. Bierman, *supra* note 25, at 34.

317. Linn v. United Plant Guard Workers of America, 383 U.S. 53, 62 (1966).

318. See *id.*

7. Summary

We have outlined in this section what we argue is a strategy to change the direction of the law regulating the access of unions and employees to the employer's private property for purposes of organizing. Our contention is that such a strategy requires a comprehensive assessment of the access problem in the context of the industrial relations system of *today*.

VIII.

CONCLUSION

One of the most complex and difficult areas of labor law is the regulation of union and employee access to employer property for purposes of organizing. Starting from the initial "clear-cut" distinctions between working time and non-working time and employees and non-employees, the rules governing the access issue have become increasingly and unduly complicated. In particular, the recent Court decisions in *Lechmere* and *Town & Country* have exacerbated an already difficult situation. We have suggested a theoretical framework which we believe may be helpful in understanding these developments.

We first reviewed the case law regarding the access problem and identified two major problems with the current legal approach to this problem. First, the Court has dealt piecemeal with the various aspects of this problem without attempting to develop a coherent framework. Second, the Court has been reluctant to analyze the access issue within the context of today's workplace. We then argued that these two problems are related to doctrine of *stare decisis*. Relying on theoretical developments in decision-making sciences, we argued that the Court's use of precedent can be understood as an escalation of commitment problem. Having developed this theoretical framework, we proposed a comprehensive set of reforms which include: the outlawing of salting and of union's home visits; the expansion of the *Excelsior* list doctrine, and of the rights of off-duty employees; and the overruling of the *Lechmere* decision. This proposed legislative reform is presented in the context of legislation which was recently enacted by the House of Representatives and is currently before the Senate. We believe that our proposals are comprehensive, and that they address the problems we identified in our review of the case law in this area. We hope these proposals provide the framework for a positive and robust debate.