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Labor Law Breaks Free

Reviving State Capacity to Protect Workers Under the NLRA

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About the Roosevelt Institute

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Introduction

"American labor law is fundamentally broken, and nothing less than comprehensive statutory reform can fix it."

For decades, this has been the dominant view among labor law scholars and progressive policymakers. Yet in just a few short years, the current National Labor Relations Board (NLRB or Board) has challenged this notion by significantly reimagining how existing labor law can augment worker power within a modern economy. Many of the Board's recent innovations are now threatened by anti-union corporations and hostile courts (in fact, the very existence of the Board is threatened by hostile courts [Gyauch-Lewis 2024]), and there is still much to be done to make the renewed vision real and lasting. But ongoing contestation should not take away from the significance of what this Board has accomplished—and all that it tells us about how our existing labor law can and should work, when our politics allow it.

Over the past several years, the Board has taken major steps toward reversing what scholars call the "ossification" of labor law. For arguably the first time in decades, the NLRB has lived up to its statutory obligation to craft national labor policy responsive to economic and institutional realities. Importantly, this step did *not* require statutory reform. Rather, what it took was a "deossification" of labor politics. Increased worker mobilization and a resurgence in public support for unions have simultaneously enabled and pushed the Board to do what the agency was always supposed to do—to make our labor law work for workers. As it turns out, the state had much greater capacity to use existing legal authority to protect and support workers—all workers, unionized or not—than it had been using; what was missing was the political will to do so. Will the Board's recent efforts survive? As a legal matter, they should. As a political matter, well, that depends on us.

The Ossification Thesis

In a field-defining article written more than 20 years ago, legal scholar Cynthia Estlund suggested that labor law had played a causal role in American deunionization during the mid–late 20th century (Estlund 2002). Labor law, she argued, had become ossified and was no longer responsive to the conditions and needs of American workers. By "ossification," she meant that the law had become inflexible, hardened into doctrines that no longer served workers' interests and sealed off from democratic reform. The vectors of the law's ossification were many: political gridlock that prevented even the most basic legislative reform; decades of hostile Supreme Court decisions (including *Lechmere, Inc. v. NLRB* and *Hoffman Plastics Compounds v. NLRB*); the Taft-Hartley Act's prohibition on the Board's employment of economists (Hafiz 2018), which inhibited development of pro-worker economic policy; and the National Labor Relations Act's (NLRA) own built-in resistance to innovation, through its broad preemptive reach and

dogged insistence on a particular form of collective worker power—majority bargaining units or bust. As a result of all these constraints, labor law was stuck, frozen in time: perhaps well-enough designed for stable, industrial employment (although many would contest even that), but a fundamental mismatch for the dynamic and flexible information and service economy that has emerged since the 1980s (Estlund 2002).

In the decades since Estlund wrote, the idea that the NLRA—the statutory center of American labor law—is broken and must be fundamentally rewritten has gained almost universal acceptance. It features prominently in almost every scholarly (Andrias 2016) or popular press (Bazelon 2020) article about the problems facing workers and the labor movement, including in my own work (Reddy 2021). As Harvard labor law professor Sharon Block[1] has emphasized, there were more people in unions *before* there was a federal right to unionize than there are today, 90 years after the NLRA became the law of the land (Block 2017). Many scholars, practitioners, and labor leaders have accordingly inferred that the statute itself must be the problem.

The failures scholars have noted with the NLRA are multiple. Across the critiques, there are major themes. Some of the most noted deficiencies in American labor law, whether as written, as construed by courts, or as applied by the Board, include:

- **Unfair and Inefficient Election Process.** Current doctrine permits employers to refuse to voluntarily recognize a union when presented with clear proof that a majority of employees want to unionize, and to instead demand that their workers participate in a formal NLRB election. Employers regularly leverage the additional time afforded by this process to intimidate and discourage workers from unionizing through coercive activities, such as requiring employees to listen to repeated anti-union polemics on the job, and flat-out illegal activities like firing pro-union workers.
- **The NLRB's Limited Remedial Authority.** Unlike most other administrative agencies, the Board lacks the power to impose fines, penalties, or punitive damages on lawbreaking employers; its remedial authority is limited to compensating plaintiffs for immediate losses. As a result, the law can actually incentivize anti-union employers to illegally undermine a union election or drag out first-contract negotiations until workers lose momentum. If an anti-union employer thinks that firing a major union supporter might help defeat a union drive, the lack of potential consequences creates a twisted economic rationale for doing so. Illegal retaliation may help stop unionization in its tracks, and even if it doesn't, there's almost nothing to be lost by trying. The union may never file a charge, or its claim may be too hard to prove. And ultimately, even if an employer is held liable for lawbreaking, the only cost is the same as what compliance would have cost them in the first place.

[1] Block is a Roosevelt Institute board member.

- **Exclusion of Workers Along Racial and Gender Lines.** The NLRA's enactment was a result of political compromise with Southern senators, who in order to preserve the Southern caste system demanded the exclusion of domestic and agricultural workers from the statute's protections. These statutory exclusions, along with court-crafted doctrines that also exclude independent contractors and deny remedies to undocumented workers, continue to disproportionately deny women and people of color the full protection of labor law.
- **Insufficient Options for Collective Power and Insufficient Relevance to Nonunion Workers.** The NLRA is designed to facilitate the formation of exclusive bargaining relationships between a union selected by a majority of employees and their immediate employer. This all-or-nothing approach fails to support minority unions or other nonunion forms of collective worker power that might be a better fit in certain industries or jobs.
- **Ineffective Right to Strike.** The "right" to strike recognized by the NLRA is riddled with confusing limitations that significantly weaken its power as both an economic weapon and a form of political protest. These restrictions include prohibitions on some of the most effective forms of worker protest, including striking indirect employers who exercise market power further along the supply chain. Perhaps most bizarrely, while employers are legally prohibited from firing employees for going on strike to get a better deal, employers remain able to "permanently replace" them, a distinction only a lawyer could dream up.
- **Overbroad Preemption.** The NLRA has been interpreted to have an incredibly broad preemptive reach.[2] Unlike the vast majority of federal employment laws, which set a floor but not a ceiling for state regulation, labor law has been interpreted to prohibit states from legislating to further support worker power, significantly deterring innovation and the expansion of labor protections within our laboratories of democracy.
- **Narrow Focus on Individual Firms and Lack of Sectoral Regulation.** The NLRA imposes bargaining obligations only on individual employers and provides no meaningful mechanism for industry-wide or sectoral bargaining. Unfortunately, focusing on just one employer at a time can create competitive pressure for employers to resist unionization, and it impedes building meaningful union density and power in a fissured economy.

Given these pervasive problems with the statute, all of which fundamentally weaken its ability to encourage collective bargaining—its stated purpose—labor law scholars have invested major efforts in reimagining what a functional labor law regime might look like. Recently, a powerhouse team of scholars, practitioners, organizers, and workers put forth the bold and visionary Clean Slate Plan for Worker Power (Block and Sachs 2020). The report begins with its central premise: "Our laws to empower workers are

[2] See, for example, *San Diego Building Trades Council v. Garmon*; *Machinists v. Wisconsin Employment Relations Commission*.

outdated, failing to keep up with changes in the economy, technology, and employers' tactics to undermine them." Rather than statutory tweaks, then, the report proposes "a new labor law"—one that is "capable of empowering all workers to demand a truly equitable American democracy and a genuinely equitable American economy."

Deossification and the 2021–24 Board[3]

There is little question that the above-listed deficiencies in American labor law are real and profound. Labor law, as it has been applied, mobilized, and imagined for many decades now, *is* a major problem. As a descriptive matter, the ossification thesis is hard to argue with.

As an explanatory matter, however, there is increasing reason to see the story as more complicated than one of unidirectional statutory degeneration. This is because over the past several years, mobilized workers and a proactive NLRB have made *existing* labor law more relevant and workable than it has been in decades. With greater political power—in the form of overwhelming public support for unions and a presidential administration receptive to that sentiment—labor law has become significantly more responsive to the contemporary needs of workers, employers, and the public, *without* legislative action (Blanc 2024).

Examples abound. In its 2023 *Cemex* decision (NLRB 2023a), the Board used its policymaking authority to strategically address the challenge of widespread employer coercion in union elections, notwithstanding its statutorily limited remedial power. Since the 1980s, there has been a marked increase in employer resistance to worker unionization campaigns and in employers' willingness to use flatly illegal tactics to prevent unionization. The narrative has been that, under the NLRA, the Board lacked remedial power to do anything about it—that is, to impose the kind of penalties that would deter illegal employer conduct. But the Board made clear in *Cemex* that if an employer illegally undermines a union's majority—if it refuses to voluntarily recognize a union and then engages in unfair labor practices that destabilize the democratic process—the Board can impose a remedy with teeth. Namely, it can order the employer to recognize and bargain with the union anyway.

Previously, bargaining orders such as this had been treated as an extraordinary remedy, granted only in cases involving pervasive and "outrageous" unfair labor practices, and in which there was no way to rerun an election fairly (for example, if an employer fired multiple union supporters or repeatedly threatened to shut down a facility if workers voted to unionize). As employers collectively upped their resistance, however, the standard for "outrageous" arguably became higher and harder to meet. And when employers engaged in less "outrageous" but still flatly illegal activities (for example,

[3] This section is largely drawn from the author's forthcoming piece in *Labor*, entitled "Relitigating the New Deal: The Ongoing Political Battle over Labor Law's Constitutionality."

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interrogating employees about their support for the union or reducing pro-union workers' hours), they risked only a new election, not a bargaining order. But the *Cemex* decision refuses to grade employers on a curve: If an employer breaks the law even once in the run-up to an election, they risk a bargaining order under this new standard (NLRB General Counsel Abruzzo 2023). Ever since this decision came down, employers' attorneys have been warning their clients: Be more careful (Fink and Mora 2023).

The NLRB under President Joe Biden has also fought to make the NLRA more relevant in *all* workplaces, union and nonunion alike. Jennifer Abruzzo, current general counsel of the NLRB, has emphasized that the NLRA reshapes the default employment contract, limiting the kinds of conditions employers may impose on their employees, whether workers have a union or not. In May 2023, Abruzzo issued a legal memo taking the position that employer-imposed noncompete clauses (which restrict employees' ability to get a new job, by preventing them from working for competitors of their current employer) and non-solicitation clauses (which prevent workers from trying to convince other workers to leave with them) were unlawful. These clauses, she argued, violate labor law's protection for concerted employee activity by unduly restricting worker choice, speech, and mobility—preconditions for effective worker voice and collective power. The NLRB has since initiated multiple cases against employers for forcing these kinds of clauses on their employees. About a year after Abruzzo issued her legal statement, an NLRB administrative law judge found that these clauses do indeed violate the NLRA (Dill, Townsend, and Zagger 2024). Eventually, these cases will make their way to the Board itself, giving it the opportunity to more definitively rule on the question of the harm these clauses pose to NLRA-guaranteed rights.

As a final example, the agency has also employed its underutilized rulemaking power to establish a workable joint-employer standard that addresses the complexity of modern corporate structures, in which employees' working conditions are increasingly shaped by the policies of more than one employer (NLRB 2023b). Under the rule, franchisors, parent companies, and the like would have been required to collectively bargain with workers with regard to any terms and conditions of employment over which they had some control, directly or indirectly, in practice or just on paper—even if those workers were technically employed by a subsidiary, a franchisee, or other entity. Building on principles set forth in case law from the Barack Obama administration's NLRB, this rule was an integral step toward adapting labor law for an economy that has become increasingly fissured over the past several decades. Unfortunately, the rule has been enjoined by a Texas federal court, preventing it from going into effect and rendering its future uncertain (NLRB 2024). Notwithstanding its immediate fate, the rule remains a blueprint for the future, showing that it is possible to make labor law work in an economy characterized by dispersed labor control.

Individually, each of these innovations has the potential to make real working people's lives better, to help workers get the unions they want, to build the power they need, and to enjoy the "full freedom of association and actual liberty of contract" promised by

the statute. Collectively, they do something greater: They begin to meaningfully deossify labor law, to make the statute that we have work the way it was always supposed to.

To be clear, there are *major* challenges ahead. Virtually everything that the Board has accomplished is being challenged in federal court, primarily in the conservative Fifth Circuit Court of Appeals, whose judges hold outsized control over American political economy and labor policy. The Board's constitutionality is under attack. And without greater judicial support or statutory amendment, all the progress made by this Board could be undone by a new Board with different political commitments. Still, the importance of what this Board has done should not be minimized. By showing how simple regulatory changes can make labor law work again, it directs our attention to where the real problem is, where it has always been—in the lack of political will.

Evolving Labor Politics

To 21st-century employers frustrated by the fact that labor law suddenly affects them, it is easy to characterize the Board's recent boldness as an example of administrative agency overreach. Indeed, some conservatives argue that, by crossing the line between law and politics, administrative agencies under Biden brought the recent spate of legal challenges upon themselves (Cassella 2024; Ehrlick 2024).

But this take is ahistorical; it ignores that labor law today is in crisis in part *because* this line was breached decades back. More specifically, it ignores how a vehemently anti-union politics—spearheaded by conservatives but endemic within both parties from the late 1970s through the 2010s—actively prevented the NLRB from doing what Congress created it to do: keep labor law relevant and actually enforceable. Yes, American labor law has never been ideal, and the Taft-Hartley amendments weakened it substantially, but it was once upon a time reasonably workable, until we lost the political will to keep making it so.

Within this longer-term view, the current NLRB's actions are not a deviation from congressional intent; they are a correction, an effort to bring the Board back in line with its purpose. "The responsibility to adapt [the NLRA] to changing patterns of industrial life is entrusted to the Board," the Supreme Court proclaimed in a 1975 decision, emphasizing that this responsibility meant not only that the Board *could* adapt its policies based on real-world economic realities, but that it *should*. "To hold that the Board's earlier decisions froze the development of . . . national labor law would misconceive the nature of administrative decisionmaking," the Court continued (*NLRB v. Weingarten*). The Board is *supposed* to adapt labor policy to major changes in industry—for instance, lower levels of union density, increased employer anti-unionism, new corporate structures, and the like. But for decades, the Board, due to an emaciated labor politics, simply could not.

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All that is to say, "ossification" was no passive process. It was the natural and intended result of the neoliberal revolt against the New Deal. In the late 1940s, conservative backlash was effectuated through statutory amendment. But the neoliberal backlash against unions weakened labor law through economic, political, and cultural muscle instead, by making anti-unionism mainstream and by disempowering the Board from taking appropriate action. In the early 1980s, former AFL-CIO President John Sweeney argued that the growing inefficacy of labor law was a problem of politics, not statutory language. Sweeney insisted that labor law was no longer working because anti-union forces on the ground had already *rewritten it in reality, even if not on paper*. As he put it: "The NLRA has . . . been effectively amended, not by legislative or even judicial edict, but by power politics and management strategies that have destroyed the [equitable] balance of power that had existed between labor and management for nearly fifty years" (Sweeney 1984).

From this perspective, the misalignment between ossified labor law and contemporary political economy was always a symptom of a deeper problem: our ossified labor *politics*. Labor law hit its nadir when anti-unionism, promoted and naturalized by neoliberal economists and politicians, permeated both political parties. By the 1980s, the Republican Party had moved from its toleration of "responsible" unionism to avowed anti-unionism. Meanwhile, the Democratic Party moved from the closest thing the United States ever had to a labor party to an ambivalent and uneasy political ally to labor, accepting of union cash and votes, but noncommittal when it came to labor values and policy. In the late 1970s, with Democratic majorities in the House and Senate, President Jimmy Carter famously refused to support the organized labor–driven Humphrey-Hawkins bill, which would have committed the government to being an employer of last resort for the unemployed (Loomis 2017). In a 1983 *New York Times* op-ed, a Democratic political strategist proclaimed the party's new ethos to the world: "The support of organized labor is no longer a benefit [to us] in politics. The Democratic candidate who recognizes this and acts on it will win" (Stoller 2016). President Bill Clinton pushed through the North American Free Trade Agreement and welfare "reform" over staunch union opposition, and President Obama later sought to do the same with the Trans-Pacific Partnership (Loomis 2017). As former AFL-CIO president Richard Trumka reflected in 2021, Democrats in that era "surrounded themselves with Wall Street people" (Swan 2021) and did not truly fight for organized labor.

Without a political champion and with union density in a free fall, public support for labor unions also plummeted. During the Great Recession—when Republican leaders inaccurately attributed budget shortfalls to public sector unions rather than speculative banks—approval ratings for labor unions dipped to their lowest point in American history (Brenan 2021). While Democrats claimed to remain more supportive of unions than Republicans, that support was often anemic. In 2009, only 39 percent of Democrats believed that unions should have more influence—and this was at the peak

of the new Gilded Age inequality and the nadir of worker protest. Meanwhile, liberal think tanks, endorsing a meritocratic, neoliberal view, insisted that teachers' unions were a cause of inequality rather than a cure for it—their historical commitment to quality jobs and living wages wavering in their certainty that education could cure oligopoly (Moe 2011; Wilson 2013). And at a town hall in 2016, President Obama responded to a union steelworker concerned about job loss with party-line economic and technological determinism, rather than political vision: "Some of those jobs of the past are just not going to come back," he noted. "What magic wand do you have?" (Obama 2016).

In his autobiography, William Gould, former chair of the NLRB under President Clinton and longtime labor law professor at Stanford University, detailed how anti-union politics affected the Board during his tenure, making his job effectively a "mission impossible." He explained how congressional Republicans consistently leveraged their appointment and budgetary powers to prevent the Board from innovating. For instance, when the Board sought to address growing corporate fissuring by making collective bargaining more accessible to temporary workers and independent contractors, congressional Republicans did everything they could to deter them. Republicans emphasized the potential consequences the Board could face if they took action, arguing that it was "particularly troubling" and inappropriate that the NLRB would contemplate making a major change in policy given that it was not at full capacity. But as Gould noted, the Board was not at full capacity *because* of congressional inaction. One of his great regrets, Gould reflected, was that the NLRB ultimately took no action on the temporary worker issue. The Board was too fearful, he said, of facing budgetary retaliation and other consequences—investigatory hearings, burdensome data requests, and more—if they moved forward with making new labor policy.

Gould also emphasized the limited support the Board received from his own party. At some of the most contentious appropriations hearings, he reported, not a single Democrat attended. Democratic Party leaders and even some labor leaders cautioned him to avoid drawing attention to the Board, to avoid using rulemaking or holding oral arguments or speaking publicly about the importance of evolving labor policy. According to Gould, the Board was simply no longer allowed to do what was permissible "by the standards of the NLRB of the 1940s, 1950s, and 1960s" (Gould 2001).

Politics are never static for long, however. And even as political parties continued to play by their neoliberal scripts, by the early 2010s, things were changing from the ground up. The Occupy Wall Street movement propelled economic inequality back into public discourse as a moral issue and a political issue. Popular agitation propelled outsider candidates to prominence on both the right and the left, each preaching a distinct brand of economic populism. And the Donald Trump presidency put in stark relief what the future might look like if the Democratic Party did not recenter real economic inclusion in its platform. Meanwhile, workers and their supporters continued

to fight to reclaim the normative stakes of labor unions—for human dignity, for social citizenship, and for democracy (Reddy 2023).

Today, then, is a new era of union politics. Americans report their highest level of public support for unions in 70 years (Gallup 2024). Liberals, for their part, have reconsidered their adherence to "free market" dogma. Exemplifying this political transformation, Caroline Fredrickson, former American Constitution Society president, penned a powerful mea culpa about the failure of "liberals of [her] generation" to center economic inequality within their political agenda (Fredrickson 2023). And one of the biggest consequences of this great liberal forgetting, she acknowledged, was their failure to prioritize labor policy when considering judicial nominees. In other words, they did not fight for judges that would fight for labor law. "When we pushed the Obama administration on judicial candidates, we focused mostly on demographic diversity, while unsuccessfully pushing for more civil-rights lawyers and public defenders," she admitted. As a result, "when lawyers with backgrounds in antitrust or labor law made it to the bench, they typically came from the corporate-defense side." Her concluding reflection, as the head of one of the most important progressive legal organizations of the period, is striking: "I regret that I mostly ignored where these judges stood on the question of corporate power" (Fredrickson 2023). The current composition of our judiciary and what that means for who will decide the fate of Board innovations is and always has been a *political* problem.

By the outset of the Biden presidency, 90 percent of Democrats said that they approved of labor unions, and 61 percent said they wanted unions to have more influence (Saad 2023). Perhaps more remarkably, many Republicans changed their views on unions too. While the political parties continue to sharply diverge in their absolute level of support for unions, the massive upward shift in support transcends parties. From the Great Recession–era nadir through 2023, support for unions increased by 22, 25, and 21 percentage points for Democrats, Independents, and Republicans respectively (Saad 2023). Whatever its limitations, conservative pro-unionism does exist.

The deossification of labor politics has changed what is possible. At the outset of his presidency, Joe Biden proclaimed that he would be "the most pro-union President leading the most pro-union administration in American history," and he acknowledged the role of popular politics in enabling that stance (Biden 2021). In a speech to union leaders, he declared "one of the reasons I'm able to [be the most pro-union President in history] is that the public is changing, too. You've changed the public; you've educated them a lot" (Biden 2021). In 2023, he became the first and only sitting US president to walk a picket line (Nicholas 2023). And within this new political context, labor law was finally able to start breaking free.

What Comes Next

Over 80 years ago, the Supreme Court recognized that Congress intended the NLRB to have broad authority over labor relations—to translate general statutory principles into workable real-world policies based on current political economic realities. The NLRB, and the courts in appropriately deferential partnership, were supposed to be the NLRA's bulwark against ossification.

Finally, after decades of political gridlock, the current NLRB is once again crafting labor policy to address how lopsided the real-world balance of power between workers and employers became during its quiescence. Over the past 50 years, employer power has grown, largely unchecked: through, for instance, ubiquitous anti-union campaigns, forced noncompetition and nonsolicitation clauses, and the fissuring of employer-employee relationships. That the NLRB is finally adapting labor policy to address these real-world challenges is a desperately needed recalibration.

Much about the future—of labor law, of labor politics, of our country—remains painfully uncertain. Who will be our next president? Will the Fifth Circuit allow any employer that files suit to violate the NLRA with impunity? Will the Supreme Court invent legal principles to declare the Board unconstitutional, destabilizing almost a century of labor relations, and thereby triggering a strike wave that grinds the nation to a halt?

Whatever the vagaries of the political maelstrom, however, the NLRB should continue to walk its current path; it should *continue to do its job*. And doing its job will continue to mean reconsidering existing doctrine to see whether it still makes sense given the state of the world today and applying long-standing doctrine innovatively, addressing old problems as they present themselves in new contexts.

Importantly, legal scholars and policymakers can help here by asking: How many of the current problems with labor law are true statutory or constitutional limitations, and how many are artifacts of decades of ossified labor politics? How many limiting doctrines arose out of vastly different circumstances and merit revisiting? It is certainly true that employers have important First Amendment rights, but does the right to speak truly include the right to force employees to listen? Similarly, permitting employers to permanently replace striking workers may have furthered a healthy balance of power when union density was high and no worker would cross a picket line absent major incentive, but does the same doctrine make sense today, when workers change jobs frequently and the strike rate has dwindled to a fraction of what it used to be? These are meaningful questions of labor law and policy, and the Board has a legal duty to consider them.

None of this is to displace conversations about statutory labor law reform. If and when the opportunity arises, those bills should be ready. But as General Counsel Abruzzo

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recently reminded those waiting on legislation to save workers: “There *is* legislation. It’s called the National Labor Relations Act. It’s in existence right now, and it’s the statute I enforce” (Bloomberg Law 2024). As the song goes, if you can’t be with the statute you love, you gotta love the statute you’re with.

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