

UNIVERSITY OF PITTSBURGH LAW REVIEW ONLINE

Vol. 82 • 2021

ARTICLE

THE BIDEN NLRB AND INDUSTRIAL DEMOCRACY'S REMNANTS

Brandon R. Magner

ISSN 1942-8405 (online) • DOI 10.5195/lawreview.2021.835
<http://lawreview.law.pitt.edu>



This work is licensed under a Creative Commons Attribution-Noncommercial-No Derivative Works 3.0 United States License.



This site is published by the University Library System of the University of Pittsburgh as part of its D-Scribe Digital Publishing Program and is cosponsored by the University of Pittsburgh Press.

ARTICLE

THE BIDEN NLRB AND INDUSTRIAL DEMOCRACY’S REMNANTS

Brandon R. Magner*

INTRODUCTION

Few administrative arenas are more volatile than labor law. With the National Labor Relations Act¹ (“NLRA” or “the Act”) remaining virtually unchanged by Congress since 1959 and the Supreme Court of the United States growing increasingly uninterested in interpreting it,² the role of creating and changing labor policy governing most private-sector workers in America falls almost entirely upon the National Labor Relations Board (“NLRB,” “Labor Board,” or “the Board”). As countless labor law scholars have lamented, this results in a wild oscillation of reversed precedent whenever the White House changes hands between a member of the Democratic or Republican Party. The new appointees to the Labor Board typically make it a priority to overturn as much of the past majority’s decisions as possible, paying special attention to those which recently tilted the doctrinal scales in labor or management’s favor. This can create chaotic results in some areas of the law.³

* J.D. 2018, University of Kentucky College of Law. Member, Indiana Bar.

¹ 29 U.S.C. §§ 151–169 *et seq.* (2018).

² By my count of the United States Reports, the Supreme Court has decided just ten cases on appeal from NLRB decisions since 2000. For context, the Supreme Court decided 15 such cases in the year 1962 alone.

³ For example, the question of whether graduate students are covered as employees under the Act—and thus possess the right to unionize and collectively bargain—has flipped three times since 2000 and is currently slated to change again. *See* Jurisdiction-Nonemployee Status of University and College Students

However, many decisions slip through the cracks. This is especially so for rulings which favor management, as union-sympathetic Labor Boards have essentially been playing a defensive game of whack-a-mole since the passage of the Taft-Hartley Act.⁴ Whether it is because of a lack of time between elections, legislative sabotage by pro-business politicians, or sheer neglect or acquiescence, many of the most onerous decisions issued by Republican-majority Labor Boards have been allowed to calcify over the decades as “settled” law, despite often originating as reversals of long-standing precedent dating back to the earliest days of the NLRA.

President Joseph Biden and his newly inaugurated administration can do something about this. While Biden’s future nominees to the NLRB⁵ should focus on overturning as much of their Trump Board predecessors’ anti-union decisions as possible, they should also examine decisions from the Eisenhower, Nixon, and Reagan Boards which were criticized in their own time for subverting the NLRA’s original intent of establishing industrial democracy in the American workplace.⁶ The fact that these rulings remain on the books today through historical accident or administrative inertia should not alone justify their continuous harmful effects on today’s workers.

Working in Connection With Their Studies, 84 Fed. Reg. 49,691 (Sept. 23, 2019) (to be codified at 29 C.F.R. pt. 103). This rulemaking proposal, if eventually codified, will overturn *Columbia University*, 364 N.L.R.B. No. 90 (2016), the most recent decision to extend Section 7 rights to graduate student assistants.

⁴ Consider that while there have been multiple comprehensive revisions to the NLRA which explicitly curb union power, the Act has comparatively never been amended to expand labor’s rights. See generally Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527 (2002).

⁵ This nomination calculus has been made significantly simpler by the Democratic Party’s recent wins in the Georgia Senate run-off elections. See Danielle Nichole Smith, *Democrats’ Wins in Ga. Bode Well For Biden’s NLRB Agenda*, LAW360 (Jan. 6, 2021), <https://www.law360.com/employment-authority/labor/articles/1342238>.

⁶ These criticisms are chronicled and restated most forcefully in JAMES. A. GROSS, *BROKEN PROMISE: THE SUBVERSION OF U.S. LABOR RELATIONS POLICY, 1947–1994* (1995).

While the Obama Board was far too inactive in reversing older precedent,⁷ its *King Soopers, Inc.* decision⁸ serves as a good example of why this is a project worth pursuing. In that case, the Democratic majority reversed a 74-year-old Labor Board policy dating back to President Dwight Eisenhower's administration⁹ (but even originating in the earliest practices of the Roosevelt Board¹⁰) which, in the context of employees unlawfully discharged for anti-union purposes, denied search-for-work and interim employment expenses that exceeded the discriminatee's interim earnings, creating a loophole in which discriminatees unable to find interim employment were refused any compensation for their search-for-work expenses.¹¹ This sort of administrative archaeology forced President Donald Trump's General Counsel to prioritize it for re-reversal¹² and eventually have to justify why the Obama Board was in error. As of this writing, *King Soopers* remains standing and receives favorable citations.

This Article briefly identifies and discusses several decisions and doctrines from Republican-majority Labor Boards dating from the 1950s through the early 1990s that I believe the forthcoming Biden Board should target for reversal. I have broadly grouped them into three categories: (1) the representational context; (2) traditional unfair labor practice jurisprudence; and (3) the Labor Board's

⁷ A trio of lawyers from the law firm of Littler Mendelson P.C. released a report in 2016 which claimed that the Obama Board overturned 4,559 years of NLRB precedent through adjudicative decisions and the Board's rulemaking functions. MAURICE BASKIN, MICHAEL J. LOTITO & MISSY PARRY, *WAS THE OBAMA NLRB THE MOST PARTISAN BOARD IN HISTORY?* (Dec. 6, 2016), <http://myprivateballot.com/wp-content/uploads/2016/12/CDW-NLRB-Precedents-.pdf>. This calculation is absurd. While it would take many articles to rebut each of these assertions individually, one demonstrative example is the claim that one of the so-called "quickie election" rules allegedly overturned both the classic *Excelsior Underwear* decision and the Supreme Court case which later upheld it. *Excelsior Underwear, Inc.*, 156 N.L.R.B. 1236 (1966); *NLRB. v. Wyman-Gordon Co.*, 394 U.S. 759 (1969). The report thus draws 95 total years of overturned precedent from this event rather than merely 49 from *Excelsior Underwear* alone. BASKIN, *supra*, at 17. Revealingly, roughly 70 percent of the 4,559-year figure is derived from claims made in dissenting opinions. *Id.* at 20–54.

⁸ *King Soopers, Inc.*, 364 N.L.R.B. No. 93 (2016).

⁹ *See West Tex. Utils. Co.*, 109 N.L.R.B. 936, 937 n.3 (1954) (declining to award search-for-work and interim employment expenses that exceeded a discriminatee's earnings).

¹⁰ *See Crossett Lumber Co.*, 8 N.L.R.B. 440, 497–98 (1938) (awarding compensation to discriminatees for search-for-work and interim employment expenses but treating them as an offset to interim earnings, rather than as a separate element of the backpay award).

¹¹ *King Soopers, Inc.*, 364 N.L.R.B. No. 93, slip op. at 3–9 (Aug. 24, 2016).

¹² Memorandum from N.L.R.B. Office of Gen. Counsel to All Regional Directors, Officers-in-Charge, and Resident Officers, Mandatory Submissions to Advice, No. GC 18-02 (Dec. 1, 2017).

remedial and enforcement schema.¹³ All ten reversals, if replaced by interpretations of labor law that often date back to the Roosevelt and Truman administrations, would strengthen the NLRA's core principle of industrial democracy¹⁴ and increase workers' bargaining power with their employers. While these decisions could of course be overturned by future Republican-majority Boards, Democratic appointees must resurrect these dormant issues and put the management-side lobby back on the defensive. Those who wish to weaken workers' collective rights should be the ones playing whack-a-mole.

I. REPRESENTATION CASES

The brunt of modern labor law scholarship has been dedicated to laying bare the ever-increasing difficulty in unionizing private-sector employees.¹⁵ Craig Becker has demonstrated that this phenomenon is aided by the NLRB's reflexive preference for representation elections, which mostly took root after passage of the Taft-Hartley amendments.¹⁶ Some of these obstacles are statutory and would require legislative alteration, but many are the product of adjudicative decisions by Republican-majority Boards.

Take the Labor Board's captive audience doctrine, for example. Captive audience meetings, which allow employers to compel their employees under threat of discharge to attend and listen to anti-union speeches on company time, have long been a thorn in the labor movement's side due to their status as management's most utilized communicative tool in an election campaign.¹⁷ It is no coincidence then that

¹³ Of course, the outcome of most NLRB decisions or doctrines in labor law will influence—either directly or indirectly—the underlying jurisprudence in all three categories. For example, a decision by the Labor Board that works to increase scrutiny of employer conduct in the run-up to an election will clearly involve its representation machinery, unfair labor practice analysis, and the Board's remedial function.

¹⁴ See generally Clyde W. Summers, *Industrial Democracy: America's Unfulfilled Promise*, 28 CLEV. ST. L. REV. 29 (1979); see also Mark Barenberg, *The Political Economy of the Wagner Act: Power, Symbol, and Workplace Cooperation*, 106 HARV. L. REV. 1379, 1422–27 (1993).

¹⁵ The classic article in this field is Paul Weiler, *Promises to Keep: Securing Workers' Right to Self-Organization under the NLRA*, 96 HARV. L. REV. 1769 (1983).

¹⁶ Craig Becker, *Democracy in the Workplace: Union Representation Elections and Federal Labor Law*, 77 MINN. L. REV. 495 (1993). But this lean dates even earlier to the original Wagner-era Board's decision to stop regularly certifying unions without an election. *Id.* at 507–16.

¹⁷ See KATE BRONFENBRENNER, ECON. POLICY INST., NO HOLDS BARRED: THE INTENSIFICATION OF EMPLOYER OPPOSITION TO ORGANIZING, E.P.I. BRIEFING PAPER NO. 235 (2009). Workers are subjected to captive audience meetings in nine out of ten union organizing drives, and drives see an average of ten such meetings. *Id.* at 10.

the doctrine has been targeted for legislative amendment in both of the most recent comprehensive attempts at labor law reform—the filibustered Jimmy Carter-era bill in 1978¹⁸ and the pending Protecting the Right to Organize Act.¹⁹ However, captive audience meetings can effectively be muzzled on a case-by-case basis.

Under the Wagner Act, captive audience meetings were considered unduly coercive and a *per se* unfair labor practice.²⁰ The Truman Board revisited this ruling after the insertion of the employer “free speech” provision as part of the Taft-Hartley amendments²¹ and held that while such meetings were no longer unlawful in and of themselves,²² they would still constitute an unfair labor practice if the employer held a mandatory meeting and did not afford the union an opportunity to respond with equal time on company property.²³ The “equal time” rule lasted for only two years until the new Republican majority of the Eisenhower Board held that employers were entitled to hold captive audience meetings without providing a platform for union organizers to respond.²⁴ This rule persists today.²⁵ The Biden Board should level the playing field and return to the equal time rule constructed by the Truman Board, as urged by 106 labor law professors in a rulemaking petition submitted late in President Barack Obama’s second term.²⁶

¹⁸ Labor Law Reform Act of 1978, H.R. 8410, 95th Cong. § 3 (1978).

¹⁹ Protecting the Right to Organize Act of 2019, H.R. 2474, 116th Cong. § 2(d)(3) (2019).

²⁰ Clark Bros. Co., 70 N.L.R.B. 802 (1946). The Board ruled as such despite the Supreme Court recently holding that employers possessed First Amendment speech rights to resist unionization. *Thomas v. Collins*, 323 U.S. 516, 537 (1945); *see also* *NLRB v. Va. Elec. & Power Co.*, 314 U.S. 469, 477 (1941).

²¹ Labor Management Relations (Taft-Hartley) Act § 8(c), 29 U.S.C. § 158(c) (2018).

²² *Babcock & Wilcox Co.*, 77 N.L.R.B. 577, 578 (1948).

²³ *Bonwit Teller, Inc.*, 96 N.L.R.B. 608, 611–13 (1951).

²⁴ *Livingston Shirt Corp.*, 107 N.L.R.B. 400, 406 (1953).

²⁵ Unions would later lobby the Kennedy Board to return to the “equal time” rule of *Bonwit Teller*, but the Democratic appointees deferred until they could observe the results of their new *Excelsior Underwear* rule, which requires an employer to turn over a list containing the names and addresses of all eligible voters within seven days after an NLRB election has been ordered. *See General Electric Co.*, 156 N.L.R.B. 1247, 1251 (1966); *see also* GROSS, *supra* note 6, at 185. This experiment has woefully failed to serve as a worthy substitute. As any organizer can attest, the union’s right to *possibly* get in contact with potential voters pales in comparison to the employer’s ability to *force* those voters to listen whenever it so desires. *See Becker, supra* note 16, at 565 n.350.

²⁶ Rulemaking Petition, *Proposed Rule to Regulate Captive-Audience Meetings that Provides Grounds For Setting Aside a Section 9 Representation Election and Ordering a New Election*, N.L.R.B. (Jan. 15, 2016). Alternatively, the Biden Board can go further and correct the Truman Board’s original sin of allowing captive audience meetings *at all*. As Paul Secunda has argued, there is ample wiggle room within

Consider also the arena of campaign statements. The NLRB has always taken a relatively hands-off approach to misrepresentations made by competing parties in the election context. As it has stated, “exaggerations, inaccuracies, half-truths, and name calling, though not condoned, will not be grounds for setting aside an election.”²⁷ This is grounded in realistic expectations, for “absolute precision of statement and complete honesty are not always attainable in an election campaign, nor are they expected by employees.”²⁸ The importance lies in what the NLRB does with extreme cases. In 1962, the Kennedy Board first articulated a workable standard against electoral sabotage:

[A]n election should be set aside only where there has been a misrepresentation or other campaign trickery, which involves a substantial departure from the truth, at a time which prevents the other party or parties from making an effective reply, so that the misrepresentation, whether deliberate or not, may reasonably be expected to have a significant impact on the election.²⁹

This standard gave an offending party several potential outs, but it was still too restrictive for Republican Labor Boards. In 1977, a mixture of Nixon and Ford appointees held that the NLRB should get out of the business of regulating election propaganda altogether.³⁰ Arguing that the Kennedy Board’s standard was overly paternalistic, the new majority reasoned that union election rules “must be based on a view of employees as mature individuals who are capable of recognizing campaign propaganda for what it is and discounting it.”³¹ The NLRB would thus only overturn

the legislative history of Taft-Hartley to maintain a full captive audience ban, and such bans should escape First Amendment scrutiny because they regulate employer conduct, not employer speech. Paul M. Secunda, *The Future of NLRB Doctrine on Captive Audience Speeches*, 87 IND. L.J. 123 (2012); see also *2 Sisters Food Group, Inc.*, 357 N.L.R.B. 1816, 1824–28 (2011) (Member Becker, dissenting in part) (arguing that the Board should overturn *Babcock & Wilcox Co.* and hold that captive audience meetings are per se unlawful).

²⁷ *Stimson Lumber Co.*, 224 N.L.R.B. 567, 569 (1976).

²⁸ *Hollywood Ceramics Co.*, 140 N.L.R.B. 221, 223 (1962).

²⁹ *Id.* at 224.

³⁰ *Shopping Kart Food Market, Inc.*, 228 N.L.R.B. 1311 (1977).

³¹ *Id.* at 1313.

election results due to campaign misrepresentations that were made in the form of forgeries.³²

The Carter Board reinstated the Kennedy Board standard a year later,³³ but the Reagan Board subsequently reversed *that* reversal and readopted the deregulatory view.³⁴ It is here where the carousel finally stopped. After years of relentless criticism by academics and practitioners regarding the Labor Board's see-sawing approach, both the Clinton and Obama Boards declined to revive the debate and turned a blind eye to virtually all campaign misrepresentations.

The agency is thus declining to do its job. Under its longstanding "laboratory conditions" doctrine,³⁵ the NLRB is required to "provide a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees."³⁶ This regulation does not infantilize workers; rather, it recognizes that they often do not have the time or energy to parse every lie, trick, fraud, or forgery that comes their way in the course of an election—a disadvantage of which the employer is acutely aware.³⁷

Also ripe for reconsideration is the Labor Board's lax approach to employee interrogations. The NLRB has, since its genesis, barred employers from *coercively* interrogating employees concerning their support for a union. The only thing that has changed has been what level of scrutiny is applied in determining what constitutes a "coercive" interrogation. While the Truman Board initially held all forms of employer questioning regarding an employee's level of union support to be unlawful,

³² *Id.* at 1314. The *Shopping Kart* majority apparently outsourced its entire reasoning to an academic study on union elections, JULIUS GETMAN, STEPHEN B. GOLDBERG & JEANNE BRETT HERMAN, *UNION REPRESENTATION: LAW AND REALITY* (1976). This study was criticized by the dissenting Members, *Shopping Kart*, 228 N.L.R.B. at 1315–17, and both its findings and methodology were quickly challenged by other academics. Thomas J. O'Dowd, Comment, *The Hollywood Ceramics-Shopping Kart Marry-Go-Round: Where Will it Stop*, 20 SANTA CLARA L. REV. 157, 168 n.62 (1980) (gathering sources); see also Weiler, *supra* note 15, at 1781–86.

³³ *General Knit of Cal., Inc.*, 239 N.L.R.B. 619 (1978).

³⁴ *Midland Nat'l Life Ins. Co.*, 263 N.L.R.B. 127 (1982).

³⁵ See *General Shoe Corp.*, 77 N.L.R.B. 124 (1948).

³⁶ *Id.* at 126–27. I have previously written about the laboratory conditions doctrine at some length. Brandon Magner, *Grand Theft Auto: Calibrating Laboratory Conditions to the New Normal in Union Elections*, 5 CONCORDIA L. REV. 99 (2020).

³⁷ Moreover, the law's banning of forgery but acceptance of lies, tricks, and general duplicity makes little practical sense. Written deception can, in many instances, be more quickly verified than a whispering campaign.

reasoning that “employers who engage in this practice are not motivated by idle curiosity, but rather by a desire to rid themselves of union adherents,”³⁸ the Eisenhower Board greatly relaxed this standard by creating a multi-prong test (the so-called *Blue Flash* rule³⁹) that purported to more accurately gauge the context of the questioning.⁴⁰ In one of its few major contributions, the Carter Board briefly reinstated a *per se* unlawfulness standard for interrogations.⁴¹ Notably, this Democratic majority argued that even the questioning of open and known union adherents would likely coerce less solid supporters in the workplace, as any interrogation signals the employer’s clear displeasure with unions and its willingness to personalize the campaign.⁴² But President Ronald Reagan’s appointments quickly steamrolled over this nuance and reinstated the *Blue Flash* rule’s “all the circumstances” analysis.⁴³

This is the state of the law as it stands today. While courts expressed displeasure with the Truman and Carter Boards’ rigid conception of *per se* violations,⁴⁴ the failure of the Clinton and Obama Boards to even strengthen the level of inquiry into employer interrogations represents an unfortunate surrender in this area. The Biden Board should take note of the vast sea of academic research which demonstrates the dictatorial level of control employers wield over their employees⁴⁵ and reverse this outdated aspect of labor law.

Finally, we must examine the Labor Board’s broader tools for preventing employer interference in union organizing. “Card check,” by which a union is certified on the basis of a majority of signed authorization cards instead of through the NLRB’s election process, has long been one of labor’s most desired reforms, and conversely, one of management’s most feared. It was the centerpiece of the failed

³⁸ *Standard-Coosa-Thatcher Co.*, 85 N.L.R.B. 1358, 1362 (1949).

³⁹ *Blue Flash Express, Inc.*, 109 N.L.R.B. 591, 594 (1954).

⁴⁰ *Id.* at 594.

⁴¹ *PPG Indus., Inc.*, 251 N.L.R.B. 1146, 1147 (1980).

⁴² *Id.* at 1147.

⁴³ *Rossmore House, Inc.*, 269 N.L.R.B. 1176, 1177 (1984).

⁴⁴ *See, e.g., Graham Architectural Prods. Corp. v. NLRB*, 697 F.2d 534, 541 (3d Cir. 1983).

⁴⁵ *See generally* ELIZABETH ANDERSON, *PRIVATE GOVERNMENT: HOW EMPLOYERS RULE OUR LIVES (AND WHY WE DON’T TALK ABOUT IT)* (2017).

Employee Free Choice Act⁴⁶ and drew a frenzied response from management lobbies. The reason is that certification on the basis of authorization cards generally prevents companies from deploying the sort of anti-union campaign tactics described above to sap away a union's majority before an election is held.⁴⁷

While card check failed in Congress, the Biden Board can come close to achieving its goals by resuscitating a strand of case law that the NLRB adhered to for 20 years. Under the Truman Board's *Joy Silk* doctrine,⁴⁸ the NLRB would order an employer to recognize and bargain with a union if it represented a majority of workers in an appropriate bargaining unit at the time it requested recognition and the employer denied the request while lacking a good faith doubt as to the union's majority status.⁴⁹ *Joy Silk* made sense with the central tenets of labor law.⁵⁰ The NLRA requires an employer to negotiate in good faith with a union designated by a majority of employees to serve as their bargaining representative.⁵¹ It naturally followed that when an employer was presented with signed authorization cards from a majority of its employees and did not have a reason to doubt the legitimacy of this majority support, the employer was unlawfully refusing to bargain.⁵²

Despite *Joy Silk*'s acceptance in every circuit court which reviewed it,⁵³ management representatives regularly attacked the doctrine on several grounds: it placed the burden of proof on employers; it required the NLRB to subjectively interpret the employer's intent based upon a few words of dialogue (or sometimes none at all); and it allowed unions to obtain a bargaining order despite the supposedly

⁴⁶ H.R. 1409, 111th Cong. (2009).

⁴⁷ Gordon Lafer, *What's More Democratic than a Secret Ballot? The Case for Majority Sign-Up*, 11 WORKINGUSA 71, 74–82 (2008).

⁴⁸ See *Joy Silk Mills, Inc.*, 85 N.L.R.B. 1263 (1949).

⁴⁹ *Id.* at 1264.

⁵⁰ Brian J. Petruska, *Adding Joy Silk to Labor's Reform Agenda*, 57 SANTA CLARA L. REV. 97, 133–43 (2017).

⁵¹ National Labor Relations Act 29 U.S.C. § 158(a)(5) (2018).

⁵² If good reason existed to doubt the union's claims, then the employer could insist that the union establish its majority through a representation election. *Joy Silk Mills, Inc.*, 85 N.L.R.B. at 1264. But even if the employer provided valid grounds for doubting the union's majority status, the NLRB would use the employer's independent unfair labor practices to find a lack of good faith where "if its insistence on such an election is motivated, not by any bona fide doubt as to the union's majority, but rather by a rejection of the collective bargaining principle or by a desire to gain time within which to undermine the union." *Id.*

⁵³ Petruska, *supra* note 50, at 137 n.152 (gathering cases).

inherent unreliability of authorization cards.⁵⁴ Of course, little effort was made to explain why a signature solicited by a union organizer was an obvious product of coercion, but an election held following an employer's months-long blitzkrieg against the union equaled a true barometer of freedom of choice.⁵⁵ The "good faith doubt" analysis of *Joy Silk* was eventually abandoned for a more lenient approach which only sanctioned bargaining orders in the face of "outrageous" and "pervasive" unfair labor practices.⁵⁶ The Nixon Board further clarified that not only did employers *not* have to bargain with a union when presented signed cards from a majority of the proposed bargaining unit, employers did not even have to ask the NLRB for an election;⁵⁷ this too fell on the union to initiate. To this day, unions are forced to endure the negative onslaught of the election process except in the most extreme of circumstances.⁵⁸

As Brian Petruska has convincingly demonstrated, the Board's abandonment of *Joy Silk* opened the door for widespread employer interference in representation elections.⁵⁹ Management has increasingly probed the outer boundaries of its free speech rights and found that the most common scenario in the post-*Joy Silk* world—an edict by the NLRB to rerun a tainted election—is well worth the opportunity to

⁵⁴ For a contemporaneous criticism from a leading management lawyer, see Bertrand P. Pogrebin, *NLRB Bargaining Orders Since Gissel: Wandering from a Landmark*, 46 ST. JOHN'S L. REV. 193, 193–98 (1971).

⁵⁵ Lafer, *supra* note 47, at 80–81. The historical record also reveals that the anti-*Joy Silk* movement received considerable help from liberal law professors, who perhaps shortsightedly lent legitimacy to the claims that the NLRB's practices were onerous and conclusory. See, e.g., Howard Lesnick, *Establishment of Bargaining Rights Without an NLRB Election*, 65 MICH. L. REV. 851, 856–63 (1967).

⁵⁶ *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 578 (1969). The story of how *Joy Silk* was abandoned by the NLRB is rather extraordinary, involving what can only be described as grossly unethical conduct by a career agency attorney in oral argument before the Supreme Court. Petruska, *supra* note 50, at 108–10 (summarizing Laura J. Cooper & Dennis R. Nolan, *The Story of NLRB v. Gissel Packing: The Practical Limits of Paternalism*, in *LABOR LAW STORIES* 219–22 (Catherine Fisk & Laura J. Cooper eds., 2005)).

⁵⁷ *Linden Lumber Div., Summer & Co.*, 190 N.L.R.B. 718, 720–21 (1971).

⁵⁸ I have discussed the stark differences between *Joy Silk* and *Gissel* bargaining orders as they relate to modern-day application in case law. Brandon Magner, *Why Labor Law Needs "Joy Silk" Bargaining Orders*, *LABOR LAW LITE* (Nov. 29, 2020), <https://brandonmagner.substack.com/p/why-labor-law-needs-joy-silk-bargaining>.

⁵⁹ Petruska, *supra* note 50, at 111–33.

stall an organizing drive to death.⁶⁰ The Biden Board should return to a prouder time in its election jurisprudence and strive to put the “order” back in bargaining orders.⁶¹

II. UNFAIR LABOR PRACTICE CASES

As in the representation context, the NLRB’s ability to effectively prosecute and prevent unfair labor practices by employers has been whittled down to a nub. Conversely, Republican-majority Boards have expanded the level of scrutiny that should be applied to unions under Section 8(b)(1)(A)⁶² of the NLRA. Neither of these phenomena are justified by the Act’s legislative history or its statutory text, but both projects have seen relatively little pushback from Democratic Boards.

For example, consider the case of two employees with identical safety concerns. One works in a union shop; the other is non-union. The union worker files a grievance under her collective bargaining agreement; the non-union worker files a claim with her state’s department of labor. At this point, the union worker’s employer may not lawfully discharge the worker for her decision to file, but the non-union worker may be lawfully discharged for hers. This is only so because of a cramped reading of the law by the Reagan Board,⁶³ which overturned an older decision that extended legal protections to individual employees who asserted rights created for all employees by workplace-related statutes.⁶⁴ Section 7 of the NLRA protects employees’ right to engage in “concerted activities for the purpose of collective bargaining or other mutual aid or protection.”⁶⁵ In *Meyers*, Republican appointees interpreted this language to mean that a lone act by a single worker—such as the

⁶⁰ See, e.g., *Sysco Grand Rapids, LLC*, 367 N.L.R.B. No. 111, slip op. at 23–47 (Apr. 4, 2019) (Member McFerran, concurring in part and dissenting in part); see also Magner, *supra* note 58.

⁶¹ Interestingly, the forward-thinking “Clean Slate” project out of Harvard Law School’s Labor and Worklife Program appears to call for the return of *Joy Silk* without explicitly stating so. SHARON BLOCK & BENJAMIN SACHS, CLEAN SLATE FOR WORKER POWER: BUILDING A JUST ECONOMY AND DEMOCRACY 52 (2020) (“Where the employer’s illegal actions interfere with workers’ ability to freely choose to be represented by an exclusive bargaining agent, the NLRB should require the employer to bargain with that worker organization as the workers’ exclusive agent An employer would have standing to challenge the validity of cards or petitions in an NLRB proceeding but must have a good-faith basis for any such challenge, which ordinarily would be limited to an allegation of forgery.”).

⁶² Labor Management Relations (Taft-Hartley) Act 29 U.S.C. § 158(b)(1)(A) (2018).

⁶³ *Meyers Indus., Inc. (Meyers II)*, 281 N.L.R.B. 882 (1986).

⁶⁴ *Alleluia Cushion Co.*, 221 N.L.R.B. 999, 1001 (1975).

⁶⁵ National Labor Relations Act 29 U.S.C. § 157 (2018).

filing of a wage or safety claim with a state agency—could not properly be construed as a “concerted” effort.⁶⁶

One of the many problems with *Meyers* is that there is a Supreme Court opinion which expressly rejects this logic with regards to individual grievances under collective bargaining agreements.⁶⁷ The Reagan Board unconvincingly distinguished contractual rights from statutory rights by arguing that the former only exist because of the previous exertion of Section 7 (i.e., negotiating a labor agreement), while the latter is the product of legislative drafting, which is too remotely related to the activities of employees in the workplace.⁶⁸ But one federal circuit court rightfully skewered this cabined logic:

Statutory rights form the fabric upon which employees weave the pattern of their collective-bargaining agreement. . . . A labor-management agreement is not written on a tabula rasa; rather, it is created against the background of a panoply of statutory employment rights. Employees, conscious of the milieu in which they decide to organize and bargain, rely on the availability of the enacted rights they already possess.⁶⁹

The NLRA should not be read to exclude workers that invoke their rights in pursuit of better working conditions. Instead of imposing a standard which requires coworkers to explicitly signal their support of a worker’s complaint, it should be presumed that *all* employees care about something as universal as workplace safety. To hold otherwise creates a gulf between the Section 7 rights of union and non-union workers despite that provision being written to empower the unorganized masses.⁷⁰

⁶⁶ *Meyers II*, 281 N.L.R.B. at 887.

⁶⁷ *NLRB v. City Disposal Sys., Inc.*, 465 U.S. 822, 830–31 (1984).

⁶⁸ *Meyers II*, 281 N.L.R.B. at 887–88.

⁶⁹ *Ewing v. NLRB*, 861 F.2d 353, 360 (2d Cir. 1988).

⁷⁰ In a divergence from the other cases highlighted in this Article, former General Counsel Fred Feinstein litigated to overturn *Meyers* during the Clinton years. *See Pikes Peak Pain Program*, 326 N.L.R.B. 136, 136 (1998). Inexplicably, neither of the two Democratic Board Members with union-side backgrounds agreed to reverse *Meyers*, leaving Chairman William Gould to pen a dumbfounded dissent in solo. *Id.* at 152. “The acceptance or rejection of precedent on the theory of concerted activity indicates, perhaps more clearly than in any other area of the statute we administer, where a Board member stands on such critical matters as statutory construction and the scope of the Board’s role in administering the Act,” Gould would forcefully remind his colleagues. *Id.* (Chairman Gould, dissenting). Biden’s appointees should take note.

Compare the Reagan Board's narrow reading of this portion of the statute with the expansive one afforded to union coercion. In the emotionally charged setting of picket lines, the NLRB had for decades refused to regulate the often-heated words exchanged between striking workers and their replacements. The Labor Board acknowledged that because strikes produce strong emotion, strikers are not expected to observe "the rules of the parlor," and some "exuberance" is to be expected (and tolerated) during a strike.⁷¹ Under this rule, verbal threats unaccompanied by any physical action or gestures were not considered serious strike misconduct.⁷² And if unfair labor practice-striking workers were discharged for potentially serious strike-related misconduct, the agency would balance the severity of the employer's unfair labor practices that provoked the strike against the gravity of the striker's misconduct.⁷³ In many circumstances, the NLRB would find the employer the guiltier party and order reinstatement of the striker.⁷⁴

Not content with this level of adjudicative nuance, the Reagan Board abandoned it altogether and replaced it with a per se rule against verbal threats of any kind.⁷⁵ Actions which "may reasonably tend to coerce or intimidate employees" would lose a striker the protection of the NLRA and leave them open to discipline or even discharge.⁷⁶ In *Clear Pine Mouldings*, Reagan's appointees elucidated an extremely neutered version of industrial relations which defanged labor in the exercise of its greatest weapon: "As we view the statute, the only activity the statute privileges in this context, other than peaceful patrolling, is the nonthreatening expression of opinion, verbally or through signs and pamphleteering[.]"⁷⁷

Although later decisions have attempted to soften the Reagan Board's ruling, *Clear Pine Mouldings* remains on the books today as a lodestar for striker misconduct analysis. Indeed, this case was recently cited by the Trump Board as inspiration for further crackdowns on "abusive" employee speech towards

⁷¹ *Coronet Casuals, Inc.*, 207 N.L.R.B. 304, 305 (1973).

⁷² *Id.*

⁷³ *NLRB v. Thayer*, 213 F.2d 748, 755 (1st Cir. 1954); see *Blades Mfg. Corp.*, 144 N.L.R.B. 561, 567 (1963).

⁷⁴ See, e.g., *Blades Mfg. Corp.*, 144 N.L.R.B. at 567.

⁷⁵ *Clear Pine Mouldings, Inc.*, 268 N.L.R.B. 1044, 1046 (1984).

⁷⁶ *NLRB v. W.C. McQuaide, Inc.*, 552 F.2d 519, 528 (3d Cir. 1977).

⁷⁷ *Clear Pine Mouldings, Inc.*, 268 N.L.R.B. at 1047.

management.⁷⁸ The Biden Board must uproot this unjustified intrusion into workplace conduct, which as one legal commentator once noted, amounts to a “pious pronouncement that employees must deport themselves as ladies and gentlemen or risk the loss of the job that created the emotion in the first place.”⁷⁹

Employer weapons have also been allowed to proliferate unabated. For the first several decades of the NLRB’s existence, the agency prohibited employer lockouts except in “defensive” situations, i.e. in response to slowdowns, industrial sabotage, credible or imminent strike threats, or strikes designed to “whipsaw” all members of a multi-employer bargaining unit by targeting its weakest members with economic pressure.⁸⁰ The ban on “offensive” lockouts came to an end in 1965 with the *American Ship Building* case, where the Supreme Court held that employers may lock out their employees solely as a means of imposing economic pressure on unions at the bargaining table.⁸¹ However, the Court expressly left open the matter of whether employers could hire temporary replacements for employees that were laid off as the result of an offensive lockout.⁸²

This question fell to the NLRB’s policy making discretion, and the Kennedy Board answered it in the negative.⁸³ While these initial decisions hinged on the argument that employers could not justify such aggressive posturing on legitimate business reasons alone, the reviewing courts urged the agency to go even farther and hold that employers could never employ temporary replacements because this was

⁷⁸ General Motors LLC, 369 N.L.R.B. No. 127, slip op. at 10 (July 21, 2020).

⁷⁹ Terry A. Bethel, *Recent Decisions of the NLRB—The Reagan Influence*, 60 IND. L.J. 227, 283 (1985). The Reagan Board did not bother to explain why it was tightening the screws on statements made by strikers at the same time it had moved to deregulate misrepresentations made during the course of organizing drives. *See supra* notes 28–38. But apparently spontaneous threats from one’s coworkers on the picket line are, in defiance of all basic power dynamics, more coercive than the meticulous and systematic threats from one’s provider of wages and employment.

⁸⁰ *See Int’l Shoe Co.*, 93 N.L.R.B. 907, 909 (1951) (intermittent strikes); *Quaker State Oil Ref Corp.*, 121 N.L.R.B. 334, 337 (1958) (credible strike threats); *Buffalo Linen Supply Co.*, 109 N.L.R.B. 447, 455 (1954) (whipsaw strikes); *Betts Cadillac Olds, Inc.*, 96 N.L.R.B. 268, 293 (1951) (imminent strike threats); *Int’l Shoe Co.*, 93 N.L.R.B. 907, 909 (1951) (intermittent strikes); *Link-Belt Co.*, 26 N.L.R.B. 227, 264–65 (1940) (sit-down strikes).

⁸¹ *Am. Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 308, 318 (1965).

⁸² *Id.* at 308 n.8.

⁸³ *Inland Trucking Co.*, 179 N.L.R.B. 350, 350, 359–60 (1969). The Kennedy and Johnson Boards can be treated synonymously because President Lyndon B. Johnson re-nominated all of Kennedy’s Labor Board appointees. GROSS, *supra* note 6, at 194–95.

“inherently destructive” of the locked-out employees’ Section 7 rights to collectively bargain.⁸⁴ The Kennedy Board never got the chance to implement this request before President Richard Nixon’s appointees walked back this case law into a sea of uncertainty.⁸⁵ It was eventually resolved by the Reagan Board’s incredible proclamation that an employer’s use of temporary replacements was reasonably adapted to achieving legitimate employer interests and had “only a comparatively slight adverse effect on protected employee rights.”⁸⁶

In other words, the NLRB treats a bazooka like a squirt gun. Even a cursory understanding of modern labor relations reveals that the offensive lockout, when deployed tactically by a cunning employer, essentially vitiates the right to strike.⁸⁷ It inherently discriminates against employees that exercise their lawful right to collectively bargain by denying them work and offering it to non-union workers.⁸⁸ Whereas the union’s members are immediately forced to live off a fraction of their previous earnings while out of work, most employers will happily sacrifice a temporary dip in quality or output so long as production continues to at least some degree. It is thus hardly surprising that the use of offensive lockouts has skyrocketed in recent decades as a share of total work stoppages.⁸⁹

The current landscape is a policy choice. Although the NLRB was denied in its attempt to eradicate this economic weapon altogether,⁹⁰ the Supreme Court gave the

⁸⁴ *Inland Trucking Co. v. NLRB*, 440 F.2d 562, 565 (7th Cir. 1971).

⁸⁵ See, e.g., *Ottawa Silica Co.*, 197 N.L.R.B. 449, 450–51 (1972) (holding that absent proof of an antiunion motive an employer does not violate Sections 8(a)(1) or (3) by locking out employees and temporarily replacing them).

⁸⁶ *Harter Equip., Inc.*, 280 N.L.R.B. 597, 600 (1986).

⁸⁷ While American labor law is ostensibly rooted in the understanding that employers and their employees possess inherently unequal levels of bargaining power, National Labor Relations Act 29 U.S.C. § 151 (2018), NLRB case law is nonetheless riddled with false equivalences which ignore this guidepost. Perhaps most insidious among them is the legal fiction that the lockout is equivalent to the strike, despite the former’s absence from the NLRA’s original text and the latter’s explicit statutory protection. National Labor Relations Act 29 U.S.C. § 163 (2018).

⁸⁸ *Ottawa Silica Co.*, 197 N.L.R.B. 449, 453–54 (1972) (Members Fanning & Jenkins, concurring in part and dissenting in part).

⁸⁹ Moshe Marvit, *Is It Time for the Courts to End Labor Lockouts?*, CENTURY FOUNDATION (June 30, 2016), <https://tcf.org/content/report/time-courts-end-labor-lockouts/> (“Work stoppages in America have reached historically low levels, and although unions rarely resort to strikes, employers have not similarly abandoned the lockout.”).

⁹⁰ *Am. Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 318 (1965) (denying enforcement of *Am. Ship Bldg. Co.*, 142 N.L.R.B. 1362 (1963)).

agency free reign to shape the ultimate effectiveness of these lockouts. Republican-majority Boards have endeavored to make them as devastatingly potent as possible in the hands of employers and have seen little to no resistance from the Clinton and Obama Boards despite their continuing proliferation. The Biden Board should recognize that the use of temporary replacements in opportunistically-timed lockouts is inherently destructive of employees' Section 7 rights and render their usage an automatic unfair labor practice.⁹¹

But the Labor Board's rightward shift in bargaining jurisprudence may be most drastic of all. It may be hard to believe now, but the NLRB once essentially banned management rights clauses⁹² and instructed employers to bargain over most capital allocation decisions—i.e., managerial determinations to close, relocate, reassign, or subcontract bargaining-unit work.⁹³ The Supreme Court has rebuffed the NLRB in many of these efforts⁹⁴ and cordoned off most capital allocation decisions from bargaining due to their supposedly inherent nature at the “core of entrepreneurial control.”⁹⁵

This is an area of labor law begging for legislative reform,⁹⁶ but NLRB members attentive to these issues can still do quite a bit of good through the agency's

⁹¹ The Biden Board should further consider overruling the *Darling & Co.* decision, which holds that an employer need not have bargained to impasse before deploying an offensive lockout. *Darling & Co.*, 171 N.L.R.B. 801, 802–03 (1968).

⁹² *Am. Nat'l Ins. Co.*, 89 N.L.R.B. 185, 187 (1950).

⁹³ See *Schnell Tool & Die Corp.*, 162 N.L.R.B. 1313, 1316 (1967) (leasing of operations); *Ozark Trailers, Inc.*, 161 N.L.R.B. 561, 565 (1966) (partial termination of operations); *Standard Handkerchief Co.*, 151 N.L.R.B. 15, 18 (1965) (relocations and consolidation); *Star Baby Co.*, 140 N.L.R.B. 678, 681 (1963) (complete termination of operations); *Adams Dairy, Inc.*, 137 N.L.R.B. 815, 816 (1962) (use of independent contractors); *Renton News Record, Inc.*, 136 N.L.R.B. 1294, 1296 (1962) (automation of operations); *Fibreboard Paper Prods. Corp.*, 138 N.L.R.B. 550, 554 (1962) (subcontracting); *Town & Country Mfg. Co.*, 136 N.L.R.B. 1022, 1027 (1962) (subcontracting).

⁹⁴ See *First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. 666, 687 (1981) (partial closings); *Textile Workers Union v. Darlington Mfg. Co.*, 380 U.S. 263, 276 (1965) (plant closings); *NLRB v. Am. Nat'l Ins. Co.*, 343 U.S. 395, 410 (1952) (management rights clauses).

⁹⁵ *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 223 (1964) (Stewart, J., concurring). For a discussion of how Justice Potter Stewart's narrow concurrence in *Fibreboard* was elevated by Republican-majority Boards above the majority opinion to essentially become controlling law, see GROSS, *supra* note 6, at 225–27, 259–62.

⁹⁶ While the House-passed version of the Protecting the Right to Organize Act would overturn many Supreme Court opinions in the realm of labor law, the Act does not attempt to alter the current landscape of mandatory versus non-mandatory subjects of bargaining.

adjudicative function. For example, the Carter Board held that mid-contract decisions to transfer bargaining-unit work from a union shop to a non-union plant constituted an unlawful refusal to bargain.⁹⁷ President Jimmy Carter's appointees reasoned that the transfer was an obvious ruse to avoid the collective bargaining agreement's wage provisions, and noted that the contract did not contain any explicit language permitting the employer to transfer the work.⁹⁸ On remand of that decision a few years later, the Reagan Board flipped this logic on its head: because the contract did not contain any language which did *not* permit the employer to transfer work, it was therefore an inherent management right which did not require bargaining.⁹⁹ The Reagan appointees feebly argued that the wage provisions of the contract could not be violated because there were no bargaining-unit employees left for it to cover, and it was not the NLRB's responsibility to "create an implied work-preservation clause in every American labor agreement based on wage and benefits or recognition provisions."¹⁰⁰ One of the Carter holdovers pointed out in an indignant dissent that the majority's decision permitted the employer to accomplish indirectly (by transferring the bargaining-unit work to an open shop) what it could not have done directly (unilaterally reducing the wages of the unionized employees).¹⁰¹

Despite this clear evisceration of union bargaining rights and its broader meaning as to the employer's duty to bargain, neither the Clinton nor Obama Boards attempted to reinstate the Carter Board's interpretation.¹⁰² Instead, Democratic appointees have seemed content to let Republicans steer the ship. In the celebrated *Dubuque Packing* case,¹⁰³ the H.W. Bush Board softened the Reagan Board's stance

⁹⁷ Milwaukee Spring Div. of Ill. Coil Spring Co. (Milwaukee Spring I), 265 N.L.R.B. 206, 210 (1982).

⁹⁸ *Id.* at 209–10.

⁹⁹ Milwaukee Spring Div. of Ill. Coil Spring Co. (Milwaukee Spring II), 268 N.L.R.B. 601, 604 (1984).

¹⁰⁰ *Id.* at 602.

¹⁰¹ *Id.* at 610–11 (Member Zimmerman, dissenting).

¹⁰² Confusingly, the Reagan Board premised its decision in *Milwaukee Spring II* partly on the policy argument that "realistic and meaningful" bargaining would be encouraged where labor-cost motivations could justify a mid-contract relocation of work. *Id.* at 605. But as the dissent pointed out, employers are already incentivized to be truthful about their economic circumstances when seeking concessions from unions. *Id.* at 612 (Member Zimmerman, dissenting). All the majority did was ease employers' ability to avoid their bargained-for contractual obligations.

¹⁰³ *Dubuque Packing Co.* (*Dubuque Packing II*), 303 N.L.R.B. 386 (1991). The first decision in this matter had involved three different analyses regarding the work relocation issue and generated a scathing remand from the reviewing court. *Dubuque Packing Co.* (*Dubuque Packing I*), 287 N.L.R.B. 499 (1987), *remanded sub nom.* *UFCW Local 150-A v. NLRB*, 880 F.2d 1422, 1435–38 (D.C. Cir. 1989). This original case had merely attempted to navigate the disparate holdings of the Reagan Board's equally

on work relocation by enunciating a serpentine standard that defined what and would not be lawful:

Initially, the burden is on the General Counsel to establish that the employer's decision involved a relocation of unit work unaccompanied by a basic change in the nature of the employer's operation. If the General Counsel successfully carries his burden in this regard, he will have established prima facie that the employer's relocation decision is a mandatory subject of bargaining. At this juncture, the employer may produce evidence rebutting the prima facie case by establishing that the work performed at the new location varies significantly from the work performed at the former plant, establishing that the work performed at the former plant is to be discontinued entirely and not moved to the new location, or establishing that the employer's decision involves a change in the scope and direction of the enterprise. Alternatively, the employer may proffer a defense to show by a preponderance of the evidence: (1) that labor costs (direct and/or indirect) were not a factor in the decision or (2) that even if labor costs were a factor in the decision, the union could not have offered labor cost concessions that could have changed the employer's decision to relocate.¹⁰⁴

A normal person will read this byzantine passage and leave befuddled. An experienced management lawyer will read it and realize that it supplies no less than six automatic outs from bargaining, and their client need only satisfy one of them. Nonetheless, this formula was soon praised in the leading treatise of labor law for "reducing uncertainty about the burdens of proof" and bringing "a measure of order to a body of law that is destined to remain unruly."¹⁰⁵

As with the *Meyers* case, the lone enthusiast among Democratic Board members for reversing these decisions was Chairman Gould. In a 1997 concurrence, Gould wrote that the NLRB should jettison *Dubuque Packing* and simply require bargaining over work relocation in all situations "where the reasons underlying the relocation of unit work are amenable to bargaining and not solely to those decisions

controversial foray into this issue. *Otis Elevator Co. (Otis Elevator II)*, 269 N.L.R.B. 891 (1984). Like *Milwaukee Spring*, the *Otis Elevator* case had been motioned for remand by the Reagan Board to reverse the Carter Board's previous holding endorsing a broader duty to bargain. *Otis Elevator Co. (Otis Elevator I)*, 255 N.L.R.B. 235 (1981); GROSS, *supra* note 6, at 260–61.

¹⁰⁴ *Dubuque Packing II*, 303 N.L.R.B. at 391.

¹⁰⁵ THE DEVELOPING LABOR LAW: THE BOARD, THE COURTS, AND THE NATIONAL LABOR RELATIONS ACT 1170 (Patrick Hardin & John Higgins, Jr. eds., 4th ed. 2001). Certainty, of course, rarely favors the party pushing for the more expansive reading of the law.

which implicate labor costs.”¹⁰⁶ This approach is far more faithful to the foundation of the NLRA, which states in its opening preamble that it was enacted to encourage the practice and procedure of collective bargaining.¹⁰⁷ And if the duty to bargain is to mean anything, it must allow workers to have a say in whether their jobs *will even continue to exist*.

III. REMEDIES AND ENFORCEMENT

As with its representation and unfair labor practice doctrines, the Labor Board’s lacking remedial offerings have long been skewed. The armada of such scholarship is too vast to cite, but it is telling that both the Labor Law Reform Act and the Protecting the Right to Organize Act—spanning over forty years between their introduction as legislation—devote the lion’s share of their provisions to beefing up the NLRB’s remedies for employer violations. But Democratic-majority Boards are not cooking with a bare cupboard.

There is perhaps no more flagrant violation of the NLRA than an employer’s refusal to bargain with a duly certified union. The wanton firing of individual union supporters, while unlawful, can at least be viewed as a preemptive strike against a nascent threat; the refusal-to-bargain case is the industrial equivalent of plugging one’s ears and stomping of feet. It is unfortunate that this temper tantrum is so often rewarded. Refusals to bargain allow the employer one last bite at the apple and initiate numerous institutional delays through the NLRB’s unfair labor practice proceedings,¹⁰⁸ working to discourage employees’ enthusiasm for the union and their belief that collective action can produce material gains. Little surprise, then, that more than a third of unions which have won an NLRB election are unable to secure a first collective bargaining agreement within two years of certification.¹⁰⁹

The NLRB has a statutory mandate “to take such affirmative action . . . as will effectuate the policies” of the NLRA.¹¹⁰ This means the agency must calibrate its remedies to both cure the ills of individual cases and deter widespread wrongdoing. In 1967, the Kennedy Board appeared ready to fashion a remedy which would

¹⁰⁶ Q-1 Motor Express, Inc., 323 N.L.R.B. 767, 770 (1998) (Chairman Gould, concurring).

¹⁰⁷ National Labor Relations Act 29 U.S.C. § 151 (2018).

¹⁰⁸ The process is summarized neatly in Becker, *supra* note 16, at 522 n.119. These purposeful Section 8(a)(5) violations have long been termed “technical” refusals-to-bargain in labor law parlance. See Theodore J. St. Antoine, *A Touchstone for Labor Board Remedies*, 14 WAYNE L. REV. 1039, 1042 (1968).

¹⁰⁹ BRONFENBRENNER, *supra* note 17, at 22.

¹¹⁰ National Labor Relations Act 29 U.S.C. § 160(c) (2018).

require an employer to reimburse its employees for the loss of wages and fringe benefits that they would have obtained through collective bargaining if the employer had not unlawfully refused to bargain in good faith. The experimental case, *Ex-Cell-O Corp.*, touched off a firestorm of academic debate and political lobbying as labor and management prepared for a world in which companies could not simply flout bargaining obligations at will.¹¹¹

But in an excruciating instance of administrative delay, the Democratic majority was not able to draft its decision before Richard Nixon won the presidency in 1968.¹¹² The moderates on the panel thereafter shelved the case until the new president got to weigh in on the controversy with appointments of his own.¹¹³ Finally in 1970, the Nixon Board handed down its ruling in *Ex-Cell-O*: a sheepish capitulation that argued the agency was without power to order compensatory (“make-whole”) relief in refusal-to-bargain cases, even in the face of an employer’s frivolous appeals.¹¹⁴ The majority reasoned that such relief amounted to compelling contractual agreement in contravention of the NLRA’s statutory “laissez faire” approach to bargaining; that the relief was too speculative; and that it would constitute an illegal punitive penalty.¹¹⁵

In an unusual reversal of roles, the reviewing District of Columbia Circuit took a more expansive view of the NLRB’s powers and urged it to rethink its concession.¹¹⁶ First, the court argued, compensatory relief would not force contract terms on an employer; it and the union were free to bargain above or below the hypothetical wage and benefit amounts the Labor Board would order as

¹¹¹ See Stephen I. Schlossberg & John Silard, *The Need for a Compensatory Remedy in Refusal-to-Bargain Cases*, 14 WAYNE L. REV. 1059 (1968); Kenneth C. McGuiness, *Is the Award of Damages for Refusal to Bargain Consistent With National Labor Policy?*, 14 WAYNE L. REV. 1086 (1968). Schlossberg and Silard were prominent union attorneys that litigated numerous high-profile labor cases together in the 1960s and 70s for the United Auto Workers, while McGuiness was a pioneering management attorney who regularly lobbied for restrictive readings of the NLRA on behalf of the pro-employer Labor Policy Association. They respectively represented the union and employer in the *Ex-Cell-O* case. GROSS, *supra* note 6, at 187.

¹¹² GROSS, *supra* note 6, at 224–25.

¹¹³ *Id.* at 225.

¹¹⁴ *Ex-Cell-O Corp.*, 185 N.L.R.B. 107, 108 (1970).

¹¹⁵ *Id.* at 108–11.

¹¹⁶ *UAW v. NLRB*, 449 F.2d 1046, 1050–51 (D.C. Cir.) (1971). The D.C. Circuit’s argument was predicated on the recently issued opinion in *Int’l Union of Elec. Workers v. NLRB*, in which it considered the same make-whole relief matter on appeal. 426 F.2d 1243 (D.C. Cir.) (1970).

remuneration.¹¹⁷ Second, the mere fact that the relief would require speculation by the Labor Board did not invalidate the approach, as speculative relief was a hallmark of much of American damages law.¹¹⁸ And third, while the Supreme Court had prevented the NLRB from ordering punitive damages,¹¹⁹ the relief in question was strictly compensatory rather than penal.¹²⁰ Employers would otherwise receive a windfall from their intransigence.¹²¹

The Nixon Board refused the D.C. Circuit's proposition and maintained in subsequent cases that the NLRB should not order make-whole relief in refusal-to-bargain cases.¹²² According to the majority, the mere fact that damages would largely be speculative—how could NLRB attorneys determine what a new union would have earned in wage and benefit increases if bargaining had taken place?—meant that they should refuse to contemplate this sort of remedy altogether. But this belies a simple lack of motivation to redress employer abuses of the agency's procedures. As contemporary commentators mentioned, the Bureau of Labor Statistics has tracked industrial economic data for decades.¹²³ Expert civil servants could very feasibly base their calculations off these indices just as the National War Labor Board did in making its wage adjustments during World War II.¹²⁴ The Biden Board should thus finish what the Kennedy Board started and adopt the make-whole relief contemplated in *Ex-Cell-O*. Complaints that the relief is an “extraordinary” remedy would accordingly fall on deaf ears.¹²⁵

¹¹⁷ *Int'l Union of Elec. Workers*, 426 F.2d at 1252.

¹¹⁸ *Id.* at 1252.

¹¹⁹ *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 235–36 (1938).

¹²⁰ *Int'l Union of Elec. Workers*, 426 F.2d at 1253 n.14.

¹²¹ *Id.* at 1249 (“[A] prospective-only doctrine means that an employer reaps from his violation of the law an avoidance of bargaining which he considers an economic benefit. Effective redress for a statutory wrong should both compensate the party wronged and withhold from the wrongdoer the ‘fruits of its violation.’”) (citation omitted).

¹²² *See, e.g.*, *J.P. Stevens & Co.*, 205 N.L.R.B. 1032, 1032–33 (1973).

¹²³ *See, e.g.*, *St. Antoine*, *supra* note 108, at 1046 (“[I]t should be fairly easy for a union to demonstrate, on the basis of Bureau of Labor Statistics figures, what were the average annual or quarterly gains in wages and fringe benefits in first-contract and subsequent negotiations across the country, or in particular industries, or in particular localities.”).

¹²⁴ *See generally* Harold A. Seering, Address, *Wage Stabilization*, 19 WASH. L. REV. & ST. B.J. 98 (1944).

¹²⁵ *Ex-Cell-O* arguably represents the moderate position, as employees can never be fully compensated for an employer's obstinance in negotiating a contract. How does one quantify the sense of security, dignity, and other intangible benefits bestowed upon the workforce by a collective bargaining agreement?

Consider finally how the Labor Board approaches arbitration. Many actions by an employer may generate potential claims for a union under both the NLRA and its collective bargaining agreement. The most prominent examples are when the discipline or discharge of an employee may violate both the anti-union discrimination clause of the NLRA and the labor agreement's "just cause" provision, and when a unilateral change in working conditions could violate both the NLRA's duty to bargain and an express provision of the labor agreement prohibiting such changes. Despite this framework appearing to give unions (and individual employees) multiple avenues of recourse, the NLRB will reflexively defer or even relinquish its jurisdiction to the grievance-arbitration machinery of a labor agreement. The Labor Board will defer to an arbitration award which presented potential unfair labor practice claims except under the most extreme circumstances (*Spielberg* deferral);¹²⁶ it will defer to private arbitration when a grievance has already been initiated under that system (*Dubo* deferral);¹²⁷ and it will even defer taking action on meritorious unfair labor practice charges when the facts giving rise to those charges may hypothetically be remedied through the parties' system of private arbitration through a yet-to-be-filed grievance (*Collyer* deferral).¹²⁸

In effect, the public agency charged with preventing violations of federal labor law will subcontract a major portion of its statutory responsibility to a private system of conflict resolution with no comparable expertise in prosecuting those infractions.¹²⁹ As you may have guessed by now, the NLRB did not always follow this path. The Roosevelt and Truman Boards refused to recognize arbitration awards in general and independently examined the charged conduct for potential violations of the NLRA.¹³⁰ They also held the agency open as a genuine option—rather than the secondary option—of resolution, finding that failure to utilize an available grievance procedure was not a bar to the processing of an unfair labor practice

Industrial democracy cannot be boiled down to a number. See Alan E. Kraus, Comment, *Labor Law—J.P. Stevens: Searching for a Remedy To Fit the Wrong*, 55 N.C. L. REV. 696, 703–04 n.51 (1977).

¹²⁶ *Spielberg Mfg. Co.*, 112 N.L.R.B. 1080, 1082 (1955).

¹²⁷ *Dubo Mfg. Corp.*, 142 N.L.R.B. 431, 432–33 (1963).

¹²⁸ *Collyer Insulated Wire Co.*, 192 N.L.R.B. 837, 842 (1971).

¹²⁹ *National Radio Co.*, 198 N.L.R.B. 527, 533 (1972) (Members Fanning & Jenkins, dissenting) (arguing that applying *Collyer* deferral to a Section 8(a)(3) discrimination charge is tantamount to "subcontracting to a private tribunal of the determination of rights conferred and guaranteed solely by the statute" and that "[s]uch action mocks the statute and the reason for this Board's existence").

¹³⁰ See, e.g., *Rieke Metal Prods. Corp.*, 40 N.L.R.B. 867, 874 (1942).

charge.¹³¹ The deferral policies only later crystallized under the Eisenhower, Nixon, and Reagan Boards.¹³²

The single attempt to modify these standards in the last 40 years came in 2014 when the Obama Board narrowed the *Spielberg* standard for deferring to an arbitration award.¹³³ That decision has since been reversed by the Trump Board,¹³⁴ but no actions have been taken to challenge the far more nefarious *Collyer* standard, which definitively subordinates the NLRB's procedures to the private arbitral system.¹³⁵ The Biden Board should decline to follow this path and reclaim the agency's status as the principal authority in remedying unfair labor practices by rejecting deferral policies altogether.

Admittedly, this final recommendation would likely be the most difficult to implement. Labor lawyers have practiced under the dominant religion of labor arbitration for over half-a-century, and the Republican supermajority on the Supreme Court appears content to let the Federal Arbitration Act swallow all of contract law whole.¹³⁶ But the underlying assumptions of the NLRB's deferral policies no longer apply. *Collyer* deferral in specific arose at a time when NLRB filings were exploding in number, leading to long delays in the handling of unfair labor practice charges, many of which could have been processed under the charging party's contractual grievance system.¹³⁷ The NLRB's caseload has since greatly diminished in volume. Moreover, the leading luminaries in labor relations sincerely believed that arbitration would culminate into a sort of all-encompassing industrial jurisprudence for a widely

¹³¹ See, e.g., *Merrimack Mfg. Co.*, 31 N.L.R.B. 900, 901 (1941).

¹³² The exception is the largely uncontroversial *Dubo* standard, which was initiated by the Kennedy Board.

¹³³ *Babcock & Wilcox Constr. Co., Inc.*, 361 N.L.R.B. 1127, 1131 (2014).

¹³⁴ *United Parcel Serv., Inc.*, 369 N.L.R.B. 1, 1 (2019).

¹³⁵ President Barack Obama's Acting General Counsel issued a memorandum to field staff in January 2012 which eliminated automatic deferral to arbitration of Section 8(a)(1) and (3) cases unless the arbitration would be completed within one year. Memorandum from N.L.R.B. Office of Gen. Counsel to All Regional Directors, Officers-in-charge, and Resident Officers, Guideline Memorandum Concerning *Collyer* Deferral Where Grievance-Resolution Process is Subject to Serious Delay, No. G.C. 12-01 (Jan. 20, 2012). But no attacks were made on *Collyer* before the Board itself.

¹³⁶ See *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612, 1619 (2018) (holding that class-action waivers in mandatory arbitration agreements are enforceable under the FAA despite the NLRA's explicit protections for "other concerted activities" in Section 7).

¹³⁷ See Bernard Samoff, *The Case of the Burgeoning Load of the NLRB*, 22 LAB. LJ. 611 (1971); see also Note, *Some Post-Deferral Considerations Prompted by the NLRB's New Collyer Doctrine*, 13 WM. & MARY L. REV. 824, 829 (1972).

unionized American workforce; unions would be accepted as a fact of life and their complaints would be efficiently communicated and resolved through ever-evolving collective bargaining agreements.¹³⁸ The outcome of that prediction need hardly be explored.

Democratic appointees should naturally be skeptical of *any* Labor Board policy that deregulates the agency's enforcement mechanisms and places it in the hands of private actors. The Supreme Court has made clear in the past that the NLRB is not merely the runty little brother of labor arbitration which must leave the room whenever ordered.¹³⁹ The NLRB should strive to become a trusted enforcer of the legal rights it was created to protect.

CONCLUSION

These proposals are not meant to suggest that Republican-majority Boards possess a monopoly on making bad law. For example, the worst aspects of the *Mackay Radio* case¹⁴⁰—which grants employers the right to hire permanent replacements during “economic” strikes—were greatly exacerbated by *Hot Shoppes, Inc.*,¹⁴¹ a Kennedy Board decision.¹⁴² Indeed, the Labor Board's volumes are replete with cases issued by appointees from both political parties that flagrantly contradict the NLRA's central purpose of promoting industrial democracy through collective bargaining.

However, the Democrats are ascendant and their opportunities are abundant. This Article merely attempts to argue that if the party places emphasis on reversing

¹³⁸ See generally Katherine Van Wezel Stone, *The Post-War Paradigm in American Labor Law*, 90 YALE L.J. 1509 (1981).

¹³⁹ See *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 438 (1967) (holding that the NLRB has jurisdiction over refusal-to-furnish-information cases); *NLRB v. C & C Plywood Corp.*, 385 U.S. 421, 427–28 (1967) (holding that the NLRB has authority to interpret provisions of collective bargaining agreements to determine whether parties have waived statutory rights); *Carey v. Westinghouse Elec. Corp.*, 375 U.S. 261, 272 (1964) (holding that the NLRB's authority in concurrent jurisdiction cases takes precedence over that of the arbiter).

¹⁴⁰ *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333, 345 (1938).

¹⁴¹ 146 NLRB 802, 805 (1964).

¹⁴² Mark Kaltenbach, *All Mackay Says: Why the National Labor Relations Board should replace its hard-to-justify interpretation of the “Mackay Rule”* (Unpublished Article Draft) (https://www.onlabor.org/wp-content/uploads/2016/09/kaltenbach_all-mackay-says_final.pdf).

many of the Trump Board's actions for their restrictive readings of the Act,¹⁴³ then it should also prioritize the reversal of many other such decisions from past Republican-majority Boards that have had a more durable impact on federal labor law. Partisanship should at least be wielded efficiently.

Moreover, it should go without saying that the NLRB's case-by-case adjudicative function is no substitution for genuine labor law reform by way of Congress. Any change recommended in this Article can simply be reversed by the next Republican presidential administration that wins office. But to just assume an administrative back-and-forth is, in my view, to admit defeat and excuse neglect. Few would have predicted that conservatives would control the White House in 20 of the next 24 years following Richard Nixon's win in 1968, and labor law was dramatically changed for the worse at a critical moment of mass deindustrialization.¹⁴⁴

While we cannot recover this lost time, we can assure that the next decade is not beholden to yesterday's mistakes. Labor law can be as malleable as any other legal enclave. Its skeletal frame is mostly stuck in place, but the muscle and tissue within it can be grown and flexed. Biden's NLRB appointees will have good reason

¹⁴³ This seems highly likely based upon the attention given to the Trump Board by pro-union organizations. See Celine McNicholas, Margaret Poydock & Lynn Rhinehart, *Unprecedented: The Trump NLRB's attack on workers' rights*, E.P.I. REPORT 1 (Oct. 16, 2019) (cataloging and criticizing the Trump Board's decisions and rulemaking from 2017–19). Management lawyers have already begun the process of warning employers as to which Trump Board decisions may be overturned under Biden's administration. See, e.g., Daniel Dorson & Matthew A. Fontana, *Potential Changes to Labor Policy Under a Biden Administration*, FAEGRE DRINKER BIDDLE & REATH LLP (Nov. 10, 2020), <https://www.faegredrinker.com/en/insights/publications/2020/11/potential-changes-to-labor-policy-under-a-biden-administration>.

¹⁴⁴ Professor James Gross makes this point emphatically:

With the exception of Jimmy Carter's one term in 1977–81, Republican administrations controlled appointments to the NLRB for more than twenty years after the [Kennedy] Board. During that time these Republican-appointed Boards, especially the Dotson Board, elevated management's authority to manage above employers' statutory obligation to bargain. During the Reagan presidency in particular, the Dotson Board seriously diminished the statutory obligation to bargain, once considered central to the act, by excluding management decisions considered too important to an employer's business to be negotiated with a union. Many of these decisions have a direct and significant impact on jobs. . . . Pursuit of that policy was particularly devastating to union organization and collective bargaining because it came at a time when the nation's major industries were in economic trouble and organized labor was already in a marked decline.

GROSS, *supra* note 6, at 275.

to address its open wounds from the Trump Board, but I hope this Article has demonstrated that the agency's older scars still need healing.