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Journal
Labor Studies in Working-Class History of the Americas, 22(1)

ISSN
1547-6715

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Publication Date
2025-03-01

DOI
10.1215/15476715-11521422

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Every April the staff of the National Labor Relations Board (NLRB; the board) gathers to celebrate what they call "Constitutionality Day." Here they mark the anniversary of the US Supreme Court's April 1937 decision in *NLRB v. Jones & Laughlin Steel Corp*, upholding—against all odds—the constitutionality of the National Labor Relations Act (NLRA).[1] Whether due to President Franklin Delano Roosevelt's bluster or the righteous intransigence of almost two million striking workers, the court did the unexpected in *Jones & Laughlin*:[2] It walked away from its *Lochner*-era deference to capital and toward a new constitutional paradigm, one that treated economic regulation and an administrative apparatus capable of its enforcement as consistent with both the Constitution and the public interest.

Last year, however, the NLRB's Constitutionality Day celebration was a more tempered one. That is because, in 2024, labor law's long-settled constitutionality became suddenly unsettled. Faced with escalating labor unrest, early twenty-first-century titans of industry began reviving the lost constitutional claims of their early twentieth-century counterparts. Within the first few months of 2024, SpaceX, Amazon, Starbucks, and Trader Joe's all began arguing that the NLRB was unconstitutional. The bravado of these attacks has unnerved many of labor's supporters, who know all too well that the NLRA barely scraped by the first time.

This short essay gives legal and political context to these constitutional challenges. To some extent, these attacks are a consequence of labor's recent successes. Sharp increases in new employee organizing, coupled with the board's assertiveness

1. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937). According to James Gross's classic history of the NLRB, the court's decision was wildly celebrated by board staff when it was issued, and annual celebrations followed for some period thereafter. Gross, *Making of the NLRB*. The current practice of annual celebration began again in 2004, according to current board staff. This essay was written in the summer of 2024 and does not cover developments after that time.

2. Bureau of Labor Statistics, *Analysis of Strikes in 1937*.

Labor: Studies in Working-Class History Volume 22 • Issue 1
DOI 10.1215/15476715-11521422

under President Joe Biden, put employers on the defensive. As a result, they have hired elite corporate defense law firms to do what elite corporate defense law firms do: engage in scorched-earth litigation tactics.

But these attacks are also enabled by a much longer-term conservative campaign against administrative agencies writ large. Aggrieved employers accordingly can draw from a treasure trove of long-percolating conservative legal arguments, crafted to upend the New Deal constitutional paradigm shift and end “the administrative state” as we have known it. And they invoke these arguments at a moment when the most conservative Supreme Court since the New Deal appears ready and willing to adopt them.[3]

Exactly how worried should labor’s supporters be about these challenges? As I discuss below, there is no easy answer to this question. On the one hand, this is not *Jones & Laughlin*. *Jones & Laughlin* was existential, about whether Congress *could* give workers collective rights at all. By contrast, the current suits challenge just the administrative specifics, questioning *how* the board goes about enforcing those rights. For the moment, the *can* and the *how* seem synonymous. The NLRA is the statute that we have; it was passed at a politically extraordinary moment, perhaps the only moment in American history when it could have been passed. If the Supreme Court were to enjoin the board from operating until Congress “fixed” any constitutional deficiencies, there is a strong possibility that nothing would make it back. Still, it is important to keep in mind that the two key elements of the New Deal, economic regulation in the public interest and the administrative state as we know it, are linked as much by historical conjuncture as by logical necessity. Other *hows* remain possible.[4]

On the other hand, this is a pivotal time in labor politics, a rare, unsettled moment when profound change seems possible. And these lawsuits are perfectly timed to arrest labor’s momentum, in part by undermining the accomplishments of the most audaciously effective NLRB in recent memory. It is already working. In July 2024, a Texas federal court ruled that the board must stop prosecuting SpaceX, notwithstanding the company’s seemingly flagrant violations of federal law. In that court’s view, it was inequitable to subject SpaceX to an administrative proceeding likely to be unconstitutional.[5] For now, employers who sue the NLRB within the Fifth Circuit Court of Appeals can violate the NLRA with impunity.

Whatever the ultimate outcome of these challenges, it is important for labor’s supporters to remain clear-eyed about how we got here. The labor movement has long had a negativity bias when it comes to law. It would be easy to let this moment become a one-track tale of repression by law. But this is *not* only a tale of losses. Over

3. Totenberg, “Supreme Court Is the Most Conservative.”

4. Scholars of administrative law and political economy have argued that in contemplating the future of the administrative state, it is imperative that we “not settle for simply restoring the status quo ante.” Rahman, “After Chevron.” Moreover, it is worth considering whether shuffling off questions of worker freedom, economic oppression, and industrial democracy to expert-driven administrative agencies is itself a component of “the law of apolitical economy.” Reddy, “After the Law of Apolitical Economy.”

5. Wiessner, “SpaceX Wins.”

the past decade, workers have reclaimed significant political power, and this has made labor law more functional than it has been in decades. In response, conservatives are now marshaling their political power, their frustrating efficacy in placing like-minded people in judgeships, in order to put labor law back in its place. However, the current pushback is not the end of labor's legal story; it is just another chapter.

De-Ossifying Labor Law and Politics

I start this essay, then, not with the constitutional challenges but with their prequel.[6] Over the past several years, workers, their supporters, and the Biden NLRB were able to breathe new life into labor law—in vision and in doctrine, albeit not always in successful real-world application.

For decades, the dominant story among labor law scholars, practitioners, and even union members has been that American labor law is fundamentally broken. To some, it was always broken; the American legal system could never and would never empower the working class.[7] To others, labor law had ossified.[8] Because of its isolation from democratic renewal, labor law had failed to keep up with massive changes in the economy and labor relations during the late twentieth century. Comprehensive statutory reform was needed to fix it, but such reform was a political impossibility. The NLRB was of little help. As two legal scholars lamented in 2009, the board was "ill-informed and without influence." The agency, they said, was notable for its "seeming inability to be proactive" in making labor law relevant in a postindustrial economy.[9]

This story is not wrong. But as the past several years have shown, it was incomplete. As it turned out, with greater political power—overwhelming public support for unions and a presidential administration responsive to that sentiment—labor law got better.[10] Led by General Counsel Jennifer Abruzzo, the Biden NLRB made labor law significantly more responsive to the contemporary needs of workers, employers, and the public, *without* legislative action. These legal innovations were built on the work of previous administrations, yet the Biden board, enabled by the moment and enabling the moment in return, consistently went bigger and bolder.

There are numerous examples. In 2023, the agency employed its underutilized rulemaking power to establish a workable joint employer standard, an integral step toward adapting labor law for the fissured economy (though, consistent with the theme of this essay, that rule has since been vacated by a Texas federal court).[11] But under the rule as envisioned, franchisors, parent companies, and more would have

6. Portions of this section were included in the author's brief for the Roosevelt Institute, "Labor Law Breaks Free: Reviving State Capacity to Protect Workers Under the NLRA," available here: https://rooseveltinstitute.org/publications/labor-law-breaks/.

7. Tomlins, *State and the Unions*.

8. Estlund, "Ossification of American Labor Law."

9. Fisk and Malamud, "NLRB in Administrative Law Exile."

10. Gallup, "Labor Unions."

11. National Labor Relations Board, "The Standard for Determining Joint Employer Status"; National Labor Relations Board, "NLRB's Joint-Employer Rule Vacated."

been required to collectively bargain with workers *formally employed by their business partners*, as to any terms and conditions of employment over which they had some control, directly or indirectly, in practice or in reserve. Notwithstanding the rule's immediate fate, it remains a blueprint for the future, showing that it is possible to make labor law work in an economy characterized by dispersed labor control.

In its 2023 *Cemex* decision, the board used its policymaking authority to address the massive ongoing challenge of employer coercion in union elections, consistent with the NLRA's inherent remedial limitations.[12] Since the 1980s, employers have increasingly opposed worker unionization campaigns, often through flatly illegal tactics. Again, the narrative has been that the board lacked the remedial power to meaningfully influence employer behavior. But under the *Cemex* doctrine, 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. It can order the employer to recognize and bargain with the union anyway. Previously, bargaining orders were treated as an extraordinary remedy, available only for the most egregious unfair labor practices. As a result, employers had won effective immunity for their garden-variety violations of law. But *Cemex* refuses to let the fact that employers regularly violate the law set the legal standard. As Seth Harris and I recently argued, unlawful employer resistance may have become "ordinary," in that it is common, but it remains extraordinarily destructive to the purposes of labor law and *Cemex* finally treats it as such.[13]

The Biden NLRB also championed the principle that the NLRA matters in *all* workplaces, union and nonunion. According to Abruzzo, the NLRA reshapes the default employment contract, limiting the kinds of conditions employers may impose on any workers. In May 2023, Abruzzo issued a legal memo indicating the Board's intention to take on employer-imposed noncompetition and nonsolicitation clauses. These, she argued, violate labor law's protection for concerted employee activity by unduly restricting worker choice, speech, and mobility.[14] In so doing, she radically expanded the potential relevance of labor law to the conditions faced by working people today.

And all along the way, the NLRB steadfastly enforced the law. Notwithstanding budget limitations and a staff much too small for even its pre-surge caseload, the board supported burgeoning worker demand for industrial democracy. With ten weeks left in fiscal year 2024, the NLRB had already received over 2,600 union election petitions—more than the 2,594 petitions received in *all* of 2023.[15] Moreover, it doggedly prosecuted unfair labor practices against the biggest and most powerful employers of the twenty-first century: According to one report, in the past few years,

12. Cemex Construction Materials Pacific, LLC, 372 NLRB No. 130 (August 25, 2023).

13. Harris and Reddy, "Tragedy to Triumph at Mercedes?"

14. General Counsel of the National Labor Relations Board, Memorandum GC 23-08, May 30, 2023.

15. Wiessner, "US Union Organizing."

the board filed over 125 complaints against Starbucks alone, alleging more than 1,000 instances of illegal behavior.[16]

With this kind of success, pushback was inevitable.

The Unconstitutionality Bandwagon

The current spate of constitutional attacks against the NLRB began in earnest early in 2024—when, in the course of defending the rights of SpaceX employees, the board took on Elon Musk. In 2022, a group of SpaceX employees circulated a letter calling out the "culture of sexism, harassment and discrimination" which they believed "pervade[d] . . . the [SpaceX] workplace."[17] This culture, they insisted, began at the top, aided and abetted by Elon Musk and his incessant tweets. SpaceX fired these letter writers for insubordination. The workers then filed a charge with the board alleging retaliation for protected activity. On January 3, 2024, the board issued a complaint against SpaceX, finding reasonable cause to believe that the company had engaged in unlawful retaliation.[18]

The very next day, SpaceX sued the NLRB in federal district court in Texas.[19] SpaceX demanded that the court step in and legally prohibit the NLRB from fulfilling its statutory obligations. According to its complaint, SpaceX sought court relief from "an unlawful attempt by the [NLRB] to subject SpaceX to an administrative proceeding whose structure violates Article II, the Fifth Amendment, and the Seventh Amendment of the Constitution of the United States."[20] The board's structure, the complaint alluded, represented "the very definition of tyranny."[21]

Within a month, other employers joined the unconstitutionality bandwagon. None of them initially went as far as SpaceX—they did not directly sue the agency—but they defended themselves in ongoing enforcement proceedings with claims about the unconstitutionality of the board's structure. In an NLRB hearing in early 2024, for instance, a lawyer for Trader Joe's proclaimed a new affirmative defense: that "the structure and organization of [the agency] . . . is unconstitutional."[22] Amazon and Starbucks quickly raised similar defenses.[23] More recently, other affirmative lawsuits have been filed against the board. In April, SpaceX filed its *second* lawsuit against the NLRB, this time challenging the board's attempt to restrict its use of noncompete

16. Greenhouse, "Major US Corporations Threaten."

17. Maidenberg, "Eight Fired SpaceX Employees Allege Company Violated Labor Law."

18. Scheiber, "SpaceX Illegally Fired Workers."

19. Grush and Eidelson, "SpaceX Sues U.S. Labor Board over Fired Employees Case."

20. Space Exploration Techs. Corp. v. NLRB ("SpaceX"), S.D. Tex., No. 1:24-cv-00001, filed January 4, 2024 (hereafter cited as SpaceX Complaint).

21. Mueller, "Musk's SpaceX Seeks to Blow Up NLRB."

22. Jamieson, "Trader Joe's Attorney Argues NLRB Is 'Unconstitutional.'" In response to the attorney, the NLRB ALJ noted he would not be ruling on his own constitutionality; constitutional claims would need to be resolved in court. The attorney clarified that Trader Joe's sought only to preserve the issues for appeal and did not expect the ALJ to rule on them.

23. Giorno and Shapero, "Corporate Giants Aim to Hobble."

clauses.[24] In June, two energy companies (also facing board prosecution for alleged unfair labor practices) followed SpaceX's lead. They, too, sued the NLRB in Texas federal court.[25]

Across the lawsuits, there are three primary constitutional claims currently being raised. It is worth discussing each to emphasize what is, and what is not, at stake.

The first claim concerns whether the president has sufficient control over NLRB judges. Here, SpaceX and other employers argue that both NLRB members and its administrative law judges (ALJs) have *too much* judicial independence.[26] Rooted in a legal doctrine called the "unitary executive theory," their argument is that because Article II of the US Constitution vests "all executive power" in the president, the president must be able to exercise full and complete authority over the entire executive branch.[27] According to conservatives, this must include the power to terminate lesser executive officials, including ALJs, at will. But because, historically, administrative law has been shaped by a competing concern—that the judicial functions of agencies operate independently of their prosecutorial functions—the NLRA and the Administrative Procedures Act protect NLRB members and ALJs from arbitrary removal without cause.[28] This layer of judicial independence, according to the plaintiffs, improperly insulates the agency from the "constitutionally required degree of electoral accountability."[29]

A second claim concerns the scope of the Seventh Amendment's right to trial by jury and whether it should limit the board's authority to hear claims and provide remedies. According to SpaceX and others, the Biden NLRB's decision in *Thryv, Inc.*—a ruling that permits plaintiffs to recover for "direct or foreseeable" pecuniary harms, in addition to the traditional remedies of reinstatement and back pay—runs afoul of the Seventh Amendment.[30] According to these employers, monetary dam-

24. Over vigorous objection from the company, SpaceX's first suit was transferred from Texas to California, where most of the underlying events occurred. By filing a second suit, SpaceX created another opportunity to have its claims decided by the notoriously anti-agency Fifth Circuit. The Fifth Circuit includes the federal courts of Texas, Louisiana, and Mississippi. Fry, "Tracking Attacks on the NLRB: SpaceX Tries Its Luck Again"; Space Exploration Techs. Corp. v. NLRB ("SpaceX II"), W.D. Tex., No. 6:24-cv-00203, filed April 19, 2024.

25. Thompson, "In Lawsuit, Oil and Gas Companies." Other pending federal court cases that involve claims about the board's unconstitutionality include Kerwin v. Trinity Health Grand Haven Hospital, case number 1:24-cv-00445, filed in a Michigan federal court (within the Sixth Circuit Court of Appeals), in which the defendant hospital is disputing the board's constitutionality in response to a board petition for a Section 10(j) injunction; and Cortes v. National Labor Relations Board, case number 1:23-cv-02954, filed in 2023 in a federal court in DC (within the District of Columbia Circuit Court of Appeals). Cortes is a Starbucks barista who had unsuccessfully sought to decertify her store's new union. She is represented by the National Right to Work Legal Defense Foundation.

26. SpaceX Complaint.

27. Sunstein and Vermeule, "Unitary Executive."

28. 5 U.S.C. §§ 1202(d), 7521(a); 29 U.S.C. § 153(a).

29. SpaceX Complaint.

30. Thryv, Inc., 372 NLRB No. 22 (December 13, 2022); National Labor Relations Board, "Board Rules Remedies Must Compensate."

ages require a trial before a jury. Careful readers of labor law history may note that this was one of the claims raised and summarily rejected by the Supreme Court in *Jones & Laughlin*. As the court ruled in 1937, the Seventh Amendment applies only to suits at common law; it has never been interpreted to apply to administrative enforcement of statutory causes of action.[31] However, there has been a concerted conservative attempt in recent years to limit agency power by expanding the reach of the Seventh Amendment. SpaceX and others argue that evolving constitutional standards and the board's broader interpretation of its make-whole powers mean that *Jones & Laughlin* no longer controls.

A third claim concerns separation of powers. Employers assert that the NLRB improperly mixes its legislative, executive, and judicial functions.[32] While there are broader (and more worrisome) versions of this argument, SpaceX's initial complaint specifically focuses on the board's procedures for seeking Section 10(j) injunctions. Section 10(j) of the NLRA authorizes the general counsel to seek injunctions in federal court to stop unfair labor practices when stakes are particularly high. Agency rules require that the general counsel obtain approval from the board before doing so.[33] The reason for this procedure, ironically, is to protect defendants like SpaceX from the risk of overzealous prosecution by requiring quasi-judicial approval prior to going to court. But SpaceX contends that this procedure compromises the independence of the board's judicial role. Since the board is the ultimate adjudicator of unfair labor practices, SpaceX argues that it violates core separation of powers principles to allow them this one-sided sneak peek at claims that they may later consider as a neutral adjudicator.[34]

There are various other arguments percolating out there as well. The American Civil Liberties Union briefly argued that President Biden unconstitutionally terminated General Counsel Abruzzo's predecessor before appointing her. If a court were ever to adopt this argument, it could call into question all that has been accomplished on Abruzzo's watch.[35] Meanwhile, Amazon has attempted to revive the nondelegation doctrine—which the Supreme Court has not used to curtail agency power since 1935—to argue that the NLRB is unconstitutional because its broad discretion amounts to legislative power.[36]

A War on the Administrative State

While the lawsuits against the NLRB are largely opportunistic, the specific claims being wielded by employers are not. Rather, these arguments have been decades in development, part of a comprehensive campaign by conservatives against what they

31. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

32. SpaceX Complaint.

33. 29 U.S.C. § 160(j).

34. SpaceX Complaint.

35. American Civil Liberties Union, Case Nos. 05-CA-300367, 05-CA-302762.

36. Fry, "Tracking Attacks on the NLRB: Amazon Invokes the Major Questions Doctrine."

see as the outsized role of administrative agencies in modern governance. As such, for those wondering how courts might just *now* be discovering the constitutional infirmities of a ninety-year-old agency, that is not what is happening. These arguments are newly viable. Just five to ten years ago, before President Donald Trump's judicial appointees shifted the political leanings of the federal judiciary, these claims would likely have been deemed frivolous. This is because they seek to upend long-settled questions of law, from as far back as *Jones & Laughlin* itself. Make no mistake: They are trying to relitigate the New Deal.

And if their last term is any indication, this Supreme Court has few qualms about flipping over the whole table. In June of 2024, the court issued two major decisions, each scrapping settled administrative law principles, and each with important implications for the future of the NLRB and the viability of the constitutional claims against it.

In *SEC v. Jarkesy*, the court considered a case against the Securities and Exchange Commission (SEC). Here the plaintiffs raised two of the arguments currently pending against the NLRB—that the SEC's ALJs were not sufficiently accountable to the executive branch and that the Seventh Amendment prohibited the SEC from adjudicating certain claims that required a trial by jury (they also raised a third claim about the nondelegation doctrine).[37] While the Fifth Circuit Court of Appeals ruled against the SEC on all claims, the Supreme Court focused only on the Seventh Amendment issue. It held that the SEC acted unconstitutionally when it imposed civil penalties on a defendant for securities fraud. According to the court, administrative agencies could not award monetary damages intended to deter or punish without a jury trial.

Thanks to the remedial inadequacies of the NLRA, the court's holding in *Jarkesy* may be of limited relevance to the NLRB. The board lacks the power to punish, and its new monetary remedies remain compensatory, intended to reimburse a plaintiff for actual losses. Moreover, the court's avoidance in *Jarkesy* of whether the Constitution can tolerate "good cause" protection for administrative law judges may signal that it is *not* willing to adopt a legal theory that would thrust many administrative agencies into turmoil. Or perhaps the court is just biding its time. While it bides its time, though, the Fifth Circuit's decision ruling against the SEC on the ALJ issue remains good law in that circuit, incentivizing employers to keep filing suit there.

Second, in *Loper Bright Enterprises v. Raimondo*, the court overruled the longstanding administrative law principle known as *Chevron* deference, which held that courts should defer to reasonable agency interpretations of the law when the statute at issue is ambiguous or silent.[38] Interpreting the law, the court held, is a job for Article III courts and not administrative agencies. Given the centrality of *Chevron* deference

37. SEC v. Jarkesy, 603 U.S. __ (2024).

38. The principle was named after the 1984 Supreme Court decision Chevron USA Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984), officially adopting it. Loper Bright Enterprises v. Raimondo, 603 U.S. __ (2024).

to modern agency practice, *Loper Bright* will mean a major change in how administrative agencies operate. It will likely also mean a major power shift from agencies to the federal courts.

Again, what this decision will mean for the NLRB is unclear. *Chevron* has never been as foundational for the board as it has been for other agencies. In part this is because the court adopted NLRB-specific deference principles long before *Chevron*, grounded in Congress's clear delegation of policymaking authority to the board at the time of enactment.[39] Yet the court's conservative members have separately indicated a reluctance to continue traditional forms of deference to the board.[40] Whatever the standard applied, though, there seems little question that courts have been given the green light to more readily substitute their judgment for that of the NLRB.

How Worried Should We Be?

What is likely to come of all these attacks? Given the complex and contingent relationship between law, politics, and social change, there is no clear answer.

The pessimistic view is that one way or another, the board will be incapacitated. It may have already lost its ability to deploy its expertise in labor relations independent of aggressive judicial scrutiny; it could now be embroiled in legal battles for years to come. Then, when it loses some or all of the pending claims, it will have to radically restructure its operations. Union lawyers are fast at work coming up with potential solutions: at-will judges, administrative juries, abandoning new remedies, abandoning rulemaking. This work will consume the board, diverting its attention from the working people who are currently clawing tooth and nail to organize workplaces previously seen as unorganizable.

There is also the worst-case scenario alluded to earlier. Although the pending challenges focus on relatively discrete board attributes and the NLRA is clear about the severability of its provisions, it is always possible that the court would refuse to separate the putatively unconstitutional elements of the NLRB's structure from the constitutional.[41] The court might accordingly enjoin the board from operating, until and unless Congress fixes the statute. Given the state of American politics today, it is unclear if Congress would do so. At that point, we return to the law of the jungle, the streets, or the states.[42]

39. 29 U.S.C. § 160(e), (f); NLRB v. Hearst Publications, 322 U.S. 111, 130 (1944). In a decision by the DC Circuit shortly after *Loper Bright* was decided, that court continued to afford the board "a very high degree of deference." Kullgren and Iafolla, "D.C. Circuit Signals Labor Board Shielded."

40. Starbucks Corporation v. McKinney, 602 U.S. __ (2024); Glacier Northwest, Inc. v. International Brotherhood of Teamsters Local 174, 598 U.S. ____ (2023). Ironically, some conservatives have argued that the NLRB is unconstitutional precisely because Congress made it clear that the agency should be afforded deference in its legal and factual decisions. Giving the board that kind of deference, the argument goes, means an unconstitutional delegation of Article III power.

41. U.S.C. §166.

42. From the view of labor voluntarists, of course, this is not necessarily a bad thing. A return to unregulated industrial unrest may be dangerous for American labor unions, but it is not without risk for American employers either.

The more legally optimistic view is that these challenges do not approximate the magnitude of what was at stake in *Jones & Laughlin*. These challenges, even if successful, should mean procedural tweaks. And the NLRB is great at tweaks. Perhaps more than any other agency, the NLRB is used to being flexible, to making things work under less than ideal circumstances. The NLRB made things work when the NLRA was first enacted, and employers were so sure it would be found unconstitutional that they completely ignored the law, along with the board's entreaties to comply with it.[43] The NLRB made things work when it was permanently barred from engaging in expert economic analysis, even as expert economic analysis became the raison d'être of the modern administrative agency.[44] Fifteen years ago, the NLRB made things work when a Republican Congress refused to confirm a third member to the board, forcing it to operate for twenty-six months with only two members; it continued making it work when the Supreme Court went on to invalidate all five-hundred-plus decisions made by those two members, for lack of a quorum.[45] In the current war on administrative agencies, the NLRB is arguably at an advantage. It is used to the fight.

Law and the Reshaping of the American Labor Movement

Right now, things look bleak. But they looked bleak in the run-up to *Jones & Laughlin* too. One great lesson of labor history is that law has never been a self-contained system. This is *not* to say that we should expect a miraculous change of heart at the Supreme Court anytime soon, at least not without a drastic increase in strikes. It is to suggest caution, though, in how we make sense of this moment. As legal historian William Forbath tells it, the American labor movement was indelibly marked by its early legal battles; the young movement's experience of "government by injunction" was a trauma that it never fully recovered from.[46] Even though labor unions have experienced many legal victories since then, the movement remains characterized by a deep-seated, essentializing mistrust of law as an institution.

How should working people and their supporters think about the promises and perils of law, in light of all the Biden NLRB accomplished *and* all the pushback that has resulted? The legal struggle is intertwined with the political struggle, and the struggle continues. ■

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43. Gross, *Making of the NLRB*.
44. Hafiz, "Economic Analysis in Labor Regulation."
45. New Process Steel, L.P. v. NLRB, 560 U.S. 674 (2010).
46. Forbath, *Law and the Shaping of the American Labor Movement*.

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References

Bureau of Labor Statistics. *Analysis of Strikes in 1937*. Accessed August 1, 2024. https://www.bls.gov/wsp/publications/annual-summaries/pdf/analysis-of-strikes-in-1937.pdf.

Estlund, Cynthia L. "The Ossification of American Labor Law." *Columbia Law Review* 102, no. 6 (2002): 1527–1612. https://doi.org/10.2307/1123792.

Fisk, Catherine, and Deborah Malamud. "The NLRB in Administrative Law Exile: Problems with Its Structure and Function and Suggestions for Reform." *Duke Law Journal* 58, no. 8 (2009): 2013–85. https://scholarship.law.duke.edu/dlj/vol58/iss8/3.

Forbath, William E. *Law and the Shaping of the American Labor Movement*. Cambridge, MA: Harvard University Press, 1991.

Fry, John. "Tracking Attacks on the NLRB: Amazon Invokes the Major Questions Doctrine." *OnLabor*, accessed July 14, 2024. https://onlabor.org/tracking-attacks-on-the-nlrb-amazon-invokes-the-major-questions-doctrine.

Fry, John. "Tracking Attacks on the NLRB: SpaceX Tries Its Luck Again." *OnLabor*, accessed July 13, 2024. https://onlabor.org/tracking-attacks-on-the-nlrb-spacex-tries-its-luck-again.

Gallup Inc. "Labor Unions." *Gallup.com*, August 31, 2007. https://news.gallup.com/poll/12751/Labor-Unions.aspx.

Giorno, Taylor, and Julia Shapero. "Corporate Giants Aim to Hobble National Labor Relations Board." *The Hill* (blog), February 28, 2024. https://thehill.com/business/4491063-corporate-giants-aim-to-hobble-national-labor-relations-board/.

Greenhouse, Steven. "Major US Corporations Threaten to Return Labor to 'Law of the Jungle.'" *The Guardian*, March 10, 2024. https://www.theguardian.com/us-news/2024/mar/10/starbucks-trader-joes-spacex-challenge-labor-board.

Gross, James A. *The Making of the NLRB: A Study in Economics, Politics, and the Law*. Albany: State University of New York Press, 1974.

Grush, Loren, and Josh Eidelson. "SpaceX Sues US Labor Board over Fired Employees Case (3)." *Bloomberg Law*, January 4, 2024. https://news.bloomberglaw.com/daily-labor-report/spacex-sues-us-labor-board-over-fired-employees-case.

Hafiz, Hiba. "Economic Analysis in Labor Regulation." *Wisconsin Law Review* 2017, no. 6 (2018): 1116–88. https://wlr.law.wisc.edu/wpcontent/uploads/sites/1263/2018/01/Hafiz-Final.pdf.

Harris, Seth, and Diana Reddy. "Tragedy to Triumph at Mercedes? How the NLRB and the Biden Administration Might Still Make Things Right for Workers." *Power at Work*, June 16, 2024. https://poweratwork.us/tragedy-to-triumph-mercedes.

Jamieson, Dave. "Trader Joe's Attorney Argues National Labor Relations Board Is 'Unconstitutional.'" *HuffPost*, January 26, 2024. https://www.huffpost.com/entry/trader-joes-attorney-nlrb-unconstitutional_n_65b41e7ae4b014b873b11cc2.

Kullgren, Ian, and Robert Iafolla. "D.C. Circuit Signals Labor Board Shielded from Chevron's Shift." *Bloomberg Law*, July 5, 2024. https://news.bloomberglaw.com/daily-labor-report/dc-circuit-signals-labor-board-shielded-from-chevrons-shift.

Maidenberg, Micah. "Eight Fired SpaceX Employees Allege Company Violated Labor Law." *Wall Street Journal*, November 17, 2022. https://www.wsj.com/articles/eight-fired-spacex-employees-allege-company-violated-labor-law-11668716597.

Mueller, Eleanor. "Musk's SpaceX Seeks to Blow Up NLRB." *Politico*, January 4, 2024. https://www.politico.com/news/2024/01/04/musks-spacex-seeks-to-blow-up-nlrb-00133919.

National Labor Relations Board. "Board Rules Remedies Must Compensate Employees for All Direct or Foreseeable Financial Harms." Accessed July 13, 2024. https://www.nlrb.gov/news-outreach/news-story/board-rules-remedies-must-compensate-employees-for-all-direct-or.

National Labor Relations Board. "NLRB's Joint-Employer Rule Vacated by U.S. District Judge." https://www.nlrb.gov/news-outreach/news-story/nlrbs-joint-employer-rule-vacated-by-us-district-judge (accessed August 1, 2024).

National Labor Relations Board. "The Standard for Determining Joint-Employer Status." https://www.nlrb.gov/about-nlrb/what-we-do/the-standard-for-determining-joint-employer-status-final-rule (accessed August 1, 2024).

Rahman, K. Sabeel. "After Chevron: Political Economy and the Future of the Administrative State." LPE Project, July 24, 2023. https://lpeproject.org/blog/after-chevron-political-economy-and-the-future-of-the-administrative-state/.

Reddy, Diana. "After the Law of Apolitical Economy: Reclaiming the Normative Stakes of Labor Unions." *Yale Law Journal* 132, no. 5 (2023): 1213–1599. https://www.yalelawjournal.org/feature/after-the-law-of-apolitical-economy.

Scheiber, Noam. "SpaceX Illegally Fired Workers Critical of Musk, Federal Agency Says." *New York Times*, January 3, 2024, Business sec. https://www.nytimes.com/2024/01/03/business/spacex-elon-musk-nlrb-workers.html.

Sunstein, Cass R., and Adrian Vermeule. "The Unitary Executive: Past, Present, Future." *Supreme Court Review* 2020, no. 1 (2021): 83–117. https://doi.org/10.1086/714860.

Thompson, Cameron. "In Lawsuit, Oil and Gas Companies Challenge Constitutionality of NLRB Hearing." *Courthouse News Service*, June 27, 2024. https://www.courthousenews.com/in-lawsuit-oil-and-gas-companies-challenge-constitutionality-of-nlrb-hearings/.

Tomlins, Christopher. *The State and the Unions: Labor Relations, Law, and the Organized Labor Movement in America, 1880–1960*. Cambridge: Cambridge University Press, 1985.

Totenberg, Nina. "The Supreme Court Is the Most Conservative in 90 Years." NPR, July 5, 2022. https://www.npr.org/2022/07/05/1109444617/the-supreme-court-conservative.

Wiessner, Daniel. "SpaceX Wins Block on US Labor Board Case over Severance Agreements." Reuters, July 10, 2024. https://www.reuters.com/legal/spacex-wins-block-us-labor-board-case-over-severance-agreements-2024-07-10/.

Wiessner, Daniel. "US Union Organizing, and Unions' Election Win Rate, Is Surging, NLRB Says." Reuters, July 17, 2024. https://www.reuters.com/legal/litigation/us-union-organizing-unions-election-win-rate-is-surging-nlrb-says-2024-07-17/.