Liminal Labor Law

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How do people, organizations, and even movements bounce back from losses and setbacks? For organized labor, the disappointments are routinely legal: an overturned precedent, a loss of coverage, or even the accelerated degradation of the National Labor Relations Act (Act) regime itself. In aggregate, these and other law-based defeats pose a serious, even existential, threat to unions. And yet, the labor movement does not just forge ahead—it renews, shape-shifts, and, in many circles, energizes. This Article suggests that the legal setbacks and the persistence are sometimes connected. Put otherwise, the way labor law is bad is sometimes linked to the movement's resiliency. In making this case, the Article argues that the law's deficiencies frequently force movement actors and institutions to operate within "in-between" spaces: precedential instability means rules often exist between what a current decision says it is and predictions about when a future decision will say it is not; organizing protections can hang in a balance between National Labor Relations Board (NLRB)-created identity poles; and if labor law might range from no rights to great rights, current rights rest, and frequently backslide, between those two extremes. These and other legal in-betweens ultimately corrode collective bargaining and must be fixed. But in the meantime, there is increasing academic, business, and even pop-empirical evidence that in-between or, as described in cultural anthropology, "liminal" states are ripe for creative thought, new relational commitments, and beneficial change. Three recent case studies involving reversed joint-employer precedent, graduate student misclassification, and the Trump NLRB's aggressive attempts to further limit the place of collective bargaining in American life show how these and other liminal effects might be located within the labor movement.

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INTRODUCTION

In March 2020, COVID-19 shut down much of the country, but not all of it. So-called "essential" businesses and services continued to operate, more or less at full speed, though the virus's contagiousness, lethality, and preventive best practices were still very much unknown. So-called "essential" workers—mostly Black, Indigenous, and People of Color (BIPOC), almost entirely low-wage—became real-time, involuntary experimental subjects on all three questions. Increasingly, they also became non-union strikers. A website counted six hundred separate one-day walkouts through June, an astounding number in the context of recent labor history.[1] Amazon, Instacart, Family Dollar, Purdue, FedEx, McDonald's, and other companies large and small faced impromptu pushback from workers whose extraordinary fears of illness and death swamped

1. *How Black & Brown Workers Are Redefining Strikes in the Digital COVID Age*, PAYDAY REP. (May 16, 2022), https://paydayreport.com/how-black-brown-workers-are-redefining-strikes-in-a-digital-covid-age/ [https://perma.cc/J6RY-GPJD].

their ordinary fears of getting fired.[2] Hazard pay, personal protective equipment, and sick leave frequently followed once workers returned.[3]

Anyone lucky enough to work from home was safer, but no one could escape the new intermediate existence between the pre-pandemic life that had ended and a post-pandemic life sure to come—though no one could say when, exactly. From sudden childcare crises to job losses to virtual "schooling" or the generalized depression of isolation, most people and institutions tried to stay optimistic but otherwise were not doing well. Even the immense relief heralded by mass distribution of safe and effective vaccines in early 2021 would, with the shock arrival of the Delta and Omicron variants, be short-lived.[4] Zoom schools, illnesses, and hospitalizations would continue into 2022.[5] As of this writing, mask mandates haven fallen, infections have risen, and conversation has moved from variants to "sub-variants" and even *sub*-sub-variants of the original disease.[6] Conceptually, we remain between the spaces and relationships we left

2. *See* Shirin Ghaffary, *The May Day Strike from Amazon, Instacart, and Target Workers Didn't Stop Business. It Was Still a Success*, VOX (May 1, 2020), https://www.vox.com/recode/2020/5/1/21244151/may-day-strike-amazon-instacart-target-success-turnout-fedex-protest-essential-workers-chris-smalls [https://perma.cc/5QFZ-M78D]; Bridget Read, *Every Food and Delivery Strike Happening Over Coronavirus*, THE CUT (May 27, 2020), https://www.thecut.com/2020/05/whole-foods-amazon-mcdonalds-among-coronavirus-strikes.html [https://perma.cc/PU2E-L69M] (citing May Day strikes at Amazon, Instacart, Whole Foods, Walmart, Target, Trader Joe's, and FedEx).

3. *See* Mike Snider, *Work Strikes at Amazon, Instacart and Whole Foods Show Essential Workers' Safety Concerns*, USA TODAY (Mar. 31, 2020), https://www.usatoday.com/story/money/business/2020/03/30/coronavirus-safety-drives-strikes-amazon-instacart-and-whole-foods/5086135002/ [https://perma.cc/8MKM-KDNR] (describing workers' demands for hazard pay, sick leave, and adequate sanitation equipment); Steven Greenhouse, *Is Your Grocery Delivery Worth a Worker's Life*?, N.Y. TIMES (Mar. 30, 2020) https://www.newyorker.com/news/news-desk/the-pandemic-has-intensified-systemic-economic-racism-against-black-americans [https://perma.cc/6SC4-4Q5R] (explaining that "[a]s often happens when workers finally flex their collective muscles, their actions have gotten results.").

4. *See* Patricia Mezzei, *Omicron Is Just Beginning and Americans Are Already Tired,* N.Y. TIMES (Dec. 22, 2021), https://www.nytimes.com/2021/12/22/us/omicron-virus-worry-dread.html [https://perma.cc/8FB9-9FEU] ("A sense of dread about Omicron's rapid spread—the fastest of any variant yet—has swept through the Northeast and Upper Midwest, which were already swamped with Delta variant cases and hospitalizations. And unease has burgeoned even in states and territories like Florida, Hawaii and Puerto Rico that had moved past a terrible summer of Delta and, until recently, experienced a relative virus lull.").

5. As the calendar turned, the *New York Times* reported "Covid-19 cases spik[ing] unrelentingly," sparking sudden school closures with impacts sure to "radiate through the country, affecting child care, employment and any confidence that the pandemic's viselike grip was loosening." Dana Goldstein, *'It's Chaos' as Schools Confront Omicron*, N.Y. TIMES (Jan. 3, 2022), https://www.nytimes.com/2022/01/03/us/school-reopening-classrooms-omicrom.html [https://perma.cc/9LG2-PHWZ].

6. Isabella Grullón Paz, *A New Subvariant Is Spreading Rapidly in the United States,* N.Y. TIMES (May 4, 2022), https://www.nytimes.com/live/2022/05/04/world/covid-19-mandates-vaccine-cases [https://perma.cc/GQM9-LCAW] ("First came Omicron, then came its highly contagious subvariant, BA.2. That subvariant gave rise to its own subvariants, whose share of new coronavirus cases in the United States is growing.").

behind in 2020 and some future version of daily living that will feel stable and "normal" once again.

It does not, of course, take a pandemic to recognize that much of life can be seen as between two states, phases, or periods in time. A job search may represent a transition between two careers; a birth may be between two styles of living; a coffee break may be between two phases of an afternoon; and an inauguration may represent a point between two philosophies of governance. And so too, this Article contends, the law. Specifically, labor law.

To study the National Labor Relations Act (NLRA or Act) as an academic, to practice it as a lawyer, or to exercise its rights as a worker is to encounter legal in-betweens. For example, much doctrine is subject to shifting majorities on the National Labor Relations Board (NLRB or Board), which interprets the Act. This means many precedents flip from old, to new, to old again. For practitioners, professors, employees, and strategists of all stripes, the "law" often exists somewhere between what a current decision says it is and predictions about when a future decision will say it is not. This can incentivize parties to delay litigation so that they can take advantage of an impending reversal or, more brazenly, to cite rejected precedents they presume won't count as "rejected" much longer.

Similarly, what labor advocates criticize as inadequate organizing and remedial provisions can also be thought of as falling somewhere between a world with no legal protection and one with a satisfactory slate of collective and anti-retaliation statutory shields. If labor law might range from scant rights to great rights, current rights rest somewhere between those two extremes.

By any union or activism-related measure, in-betweenness is not good. Collective bargaining is not furthered by precedents that routinely flip, offer rights between nothing and something, or, as I also identify, resolve coverage questions by balancing workers between identity poles. But perhaps there are second-order effects.

For one, everyday experience suggests that a certain vitality or even creativity can spring from middles and intermediacies. The space, ever so slight, between outstretched fingers in the Sistine Chapel's iconic "Creation of Adam" is, for the faithful, where the magic happens.[7] Or consider the emotions that bubble up just before a long-sought vacation, job offer, or birth. Whole industries rely on commercializing the anticipatory spirit arising between Thanksgiving and Christmas. Those are happy in-betweens, but some of the communication, teaching, and at-home innovations arising out of COVID-19's horrific intercession make the same point.[8]

7. *See Creation of Adam*, MICHELANGELO ("This one detail is the entire reason this painting is famous."), http://www.michelangelo.net/creation-of-adam/ [https://perma.cc/5275-HGHS].

8. Catherine Clifford, *These Are the New Hot Spots of Innovation in the Time of Coronavirus,* CNBC (Apr. 17, 2020) (citing a flurry of new "digital teleworking tools, home-schooling solutions, safe food delivery solutions, therapy and stress coping mechanisms"),

My thesis is that although labor law's in-betweenness reflects a seriously defective regime, the gaps may also contribute to the labor movement's perseverance and adaptability over time.[9] The COVID strikes are a particularly accessible example, but in making the broader case I draw on cultural anthropologist Victor Turner's concept of liminality, which inspired an interdisciplinary wave of thinking about the powers and possibilities of life, as he famously put it, "betwixt and between."[10] Turner used that phrase as a shorthand for spaces that exist between phases, identities, or realities, and over time work on liminality has touched on in-between experiences as disparate as partying at a rave, strolling Disney World's streets, getting hyped at a tailgate, and relaxing during a lunchbreak.[11] It suggests that intermediate states can come with an openness to new options, a downplaying of constraints, and fewer hang-ups about inter- and intra-group differences. Turner used the term "communitas" to summarize these qualities,[12] which bear striking resemblance to idealized notions of solidarity. Just like it, communitas comes with energies that both propel individuals and change groups.

Recently, these and other supposed effects of in-betweenness have started to go mainstream. "Fail forward" consultants help Silicon Valley start-ups recharacterize flops as lucky breaks and firings as resume builders, because the "nowhere between two somewheres," as one author puts it, is the best time for businesses, and businesspeople, to get better.[13] In bestselling books and Netflix specials, pop-empiricists like Brené Brown counsel embracing low points and losses as existential in-betweens rife with opportunities for personal growth and

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https://www.cnbc.com/2020/04/15/hot-spots-of-innovation-as-a-result-of-coronavirus-pandemic.html [https://perma.cc/BY7U-67KA].

9. As Catherine Fisk and Diana Reddy have explored, the "labor movement is a social movement, with a long history of shaping law and being shaped by it in turn." Catherine L. Fisk & Diana S. Reddy, *Protection by Law, Repression by Law: Bringing Labor Back into the Study of Law and Social Movements*, 70 EMORY L.J. 63, 66 (2020). It is my hope that this Article supplies some additional, recent data points on the law's role in this context. That stated, as the authors also noted, labor has traditionally existed at the margins of law and social movement scholarship, *id.*, and incorporating concepts from cultural anthropology, psychology, and organizational studies does not obviously locate the project specifically within that literature. It does, however, share some common ground with conventional studies of how movements become situated within, or transition between, stages. *See, e.g.,* SIDNEY TARROW, DEMOCRACY AND DISORDER 8 (1989) (introducing the concept of "protest cycles" that rise and fall over time); Doug McAdam & William H. Sewell Jr., *It's About Time: Temporality in the Study of Social Movements and Revolutions*, *in* SILENCE AND VOICE IN THE STUDY OF CONTENTIOUS POLITICS 89, 100–125 (Ronald R. Aminzade, Jack A. Goldstone, Doug McAdam, Elizabeth J. Perry, William H. Sewell, Sidney Tarrow & Charles Tilley eds., 2001) (describing "transformative events" and "cultural epochs" as factors that can mark movement transitions). It could therefore provide an additional, interdisciplinary lens to consider movement periods or stages, particularly those attributed to or correlated with changed law or evolving legal frameworks.

10. VICTOR TURNER, DRAMAS, FIELDS, AND METAPHORS 273 (1975).

11. *See infra* notes 272–278.

12. Paul Bohannan & Mark Glazer, *Introduction*: *Victor W. Turner 1920-1983*, *in* HIGH POINTS IN ANTHROPOLOGY SECOND EDITION 501, 502 (Bohannan & Glazer eds., 1988).

13. *See, e.g.*, WILLIAM BRIDGES, TRANSITIONS: MAKING SENSE OF LIFE'S CHANGES 34–35 (2004).

relational power.[14] Her teachings extend to organization design; the National Football League and Pixar have hired her.[15]

While liminal studies already encompass movements, translating its scholarship to the increasingly scattered world of labor advocacy and its union, activist, and allied organization constituent parts is not simple, nor does it lend itself to definitive conclusions. To the extent the Article can be situated within the existing literature on union revitalization, it might be considered more exploratory or descriptive than explanatory.[16] But the explorations and descriptions do reveal trends. I limit my inquiry to events that occurred loosely from 2016 to 2021, in part to make the attempt manageable, but also because the January 2017 change in presidential administrations represented such a stark inflection point for legal rules that had previously been central to campaigns, making it a fertile period for case studies.

Take, for instance, the Article's second case study: university graduate assistants. The NLRB has long analyzed aspiring academics' labor law rights by splitting their identities into two, with student characteristics on one side and employee characteristics on the other. The sides are weighed, and if a majority determines the balance tips toward the student side, protections are extinguished.[17] This leaves those who do much of higher education's teaching, grading, and researching to await their fate in between. It is a decidedly wobbly existence.[18] Most recently, in 2016, assistants won rights and, almost immediately, a rulemaking proposed to tip the scale again and remove them. The see-saw raises questions about workplace stability, reliance interests, and

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14. *See, e.g.*, Reggie Ugwu, *Brené Brown Is Rooting for You, Especially Now,* N.Y. TIMES (Apr. 24, 2020) https://www.nytimes.com/2020/04/24/arts/brene-brown-podcast-virus.html [https://perma.cc/7EWA-2UAM].

15. Maria Aspan, *How This Leadership Researcher Became the Secret Weapon for Oprah, Pixar, IBM, and Melinda Gates*, INC. (Oct. 2018), https://www.inc.com/magazine/201810/maria-aspan/brene-brown-leadership-consultant-research.html [https://perma.cc/9893-8QN7].

16. That is, it seeks to "clarify" the "concept[]" of liminality in law and, using descriptive data, build support for—or even merely identify—a hypothesis that legal in-betweenness impacts the labor movement in particular ways. VALERIE M. SUE & LOIS RITTER, CONDUCTING ONLINE SURVEYS 2 (2012). For important examples of union-related explanatory research, which attempt to "explain why phenomena occur and to predict future occurrences," *id.* at 3, see, e.g., Kim Voss & Rachel Sherman, *Breaking the Iron Law of Oligarchy: Union Revitalization in the American Labor Movement*, 106 AM. J. SOC. 303 (2000) (identifying factors that facilitate changes to established union governance systems); RUTH MILKMAN, L.A. STORY 148 (2006) (identifying "factors underlying the disparate outcomes" in a series of union organizing campaigns); JANE F. MCALEVEY, NO SHORTCUTS: ORGANIZING FOR POWER (2016) (analyzing strategies and structures of successful and unsuccessful campaigns for workplace change).

17. *See* 84 Fed. Reg. No. 184, 29 C.F.R. Part 103, *Jurisdiction–Nonemployee Status of University and College Students Working in Connection With Their Studies* 49695 (Sept. 23, 2019), https://www.govinfo.gov/content/pkg/FR-2019-09-23/pdf/2019-20510.pdf [https://perma.cc/4PWF-UV5W] (discussing NLRB's prior decisions determining whether graduate student assistants were statutorily employees).

18. *See* Univ. of Chicago v. NLRB, 944 F.3d 694, 699 (7th Cir. 2019) ("It is safe to say that over the last several decades, the Board has been consistently inconsistent about whether students employed by their educational institution are 'employees' entitled to collectively bargain . . . .").

perhaps agency procedures, but my interest is how the law's placement of graduate assistants between two identity poles in the first place impacts organizing. Using a Yale University effort as a touchstone, I conclude that the NLRB's fixation with split selves prompts workers to reflect on the genuineness of the categories imposed. The process is relational and, if a conclusion is reached and broadly shared, the result can be unprecedented bargaining persistence.

Liminal spaces are not, though, like magic. Communitas does not just "happen." In confronting an unexpected or unfamiliar between, the natural urge is to fall back on old practices and consoling defaults in a mad rush to the other side. But unlocking liminality's potential takes time and especially openness to new paths. Brené Brown likens the process to having the courage to rewrite the stories that give us comfort during troubling transitions but that, in the end, are mostly make-believe.

Here, the labor movement has proven especially adept. As with the graduate student decision, a rulemaking also attempted to fell a 2015 opinion underpinning unions' ability to bargain with upstream entities controlling webs of weaker contractors. The Obama-era opinion had crystalized a labor priority years—and hundreds of strikes—in the making. The Trump Board's course correction was but one of many that left advocates with doctrinal whiplash and workers with worse rights. Confronted by these unsettling periods of betweenness, the movement paused, reflected, and upended prior approaches, demands, and aspirations. Getting there was not quick, easy, or certain, but the process, I contend, carried badges of communitas.

Ultimately, I suggest that when some of labor law's darkest questions—What difference does doctrine that perpetually flips even make? If organizing rights don't work, what good is the system?—are framed as problems of betweenness, there is hope to be found. I locate it in stories of workers and institutions forced to operate in liminal legal spaces that hobble some goals but inspire others, from new demands, to new campaigns, to a fundamental rethinking of the procedures and purposes of labor law itself.

The Article proceeds as follows. Part I argues that labor law is afflicted by betweenness. I identify three major areas: in-between precedents, in-between identities, and in-between rights. Understanding how betweenness might affect labor movement institutions and actors begins in Part II, which introduces the academic concept of liminality before developing it through an interdisciplinary and, in some ways, colloquial approach.

Part III examines three case studies where betweenness may help inform the movement's post-2017 trajectory. In the first, the NLRB flipped a precedent that had been central to labor's legal and organizing strategies and, instead of moving quickly to something new, the movement took a breath. COVID-19's deadly workplace realities would later disintegrate the usual constraints counseling workers to stay put, and when the newfound militancy was joined by

unprecedented unrest sparked by the murder of George Floyd, unions were ready to let workers and protestors guide an important new course. In the second study, activists' legal identities teetered on a balance of the Board's design before seemingly tipping over to zero out their rights completely. The scale itself may help explain why—rights or not—workers forged ahead anyway. In the last case study, with astounding speed and clarity of purpose, a reshaped NLRB pushed rights that had always provided protections between nothing and something even closer to the "nothing" side—a functional repudiation of the private-sector collective bargaining project itself. An incredible diversity of movement voices responded by gathering, listening, learning, and eventually creating an entirely new approach to not just labor law reform, but democracy. Because liminal experiences lend themselves to storytelling, I have tried to let each example unfold narratively, with an emphasis on first-person accounts.

I.
BETWEEN ALL AND NOTHING: PRECEDENT, IDENTITY, AND RIGHTS IN U.S. LABOR LAW

One of labor law's more enduring narratives traces back to James Atelson's claim that major cases can be understood only through the "values and assumptions" that judges bring to the Act's text.[19] Plain and historically understood meanings of statutory terms like "good faith,"[20] "strike,"[21] or "working conditions"[22] are refracted through common law prisms of class, property, and efficiency before propping up conclusions presented in decisions as obvious from the start. "[G]hosts," he writes, "are buried" between the lines of legal opinions, and the "'of course' rationales" mark the graves.[23]

Atelson's take on decisional law is as close to canon as it gets in labor law scholarship.[24] While initially intended as something of a pedagogical guide to caselaw,[25] his surfacing of zombie norms and conjectures that press against the

19. JAMES B. ATELSON, VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW 2 (1983) ("[M]any judicial and administrative decisions are based upon other, often unarticulated, values and assumptions that are not to be found or inferred from the language of the statute or its legislative history.").

20. *Id.* at 97–101.

21. *Id.* at 19–20.

22. *Id.* at 116.

23. *Id.* at 91.

24. The introduction to a 2008 symposium devoted to Atelson's impact described how "it seemed that no one could ever again write about . . . [the] major cases he analyzed in the book, without acknowledging the significance of his work." Dianne Avery & Alfred S. Konefsky, *James B. Atleson and the World of Labor Law Scholarship*, 57 BUFF. L. REV. 629, 638 (2009).

25. *Id.* at 632. While Atelson's book is often categorized as Critical Legal Studies, he viewed the contribution more narrowly, as "actually a critique of legal writing." *Id.* at 639–49.

words actually passed by Congress[26] deeply influenced practitioners, judges, Board Members, and academics "of all persuasions."[27]

Another way of thinking about Atelson's thesis is that classic cases are afflicted by a kind of in-betweenness. His perspective, in effect, is that holdings are squeezed, with the statute's text and history on one side and free-floating judicial values on the other. In fact, a variety of in-betweens lurk throughout the field, haunting how modern doctrine is understood (between past and future precedents), how workers gain legal status (between agency-imposed identities), and how much protection labor law provides (between no rights and some rights). Below, I offer an account of the law's intermediacies in these three key areas.

A. *In-Between Precedents*

Atelson was writing almost forty years ago, at a time when the Supreme Court had been interpreting the Act regularly for decades and filibuster-felled reform was a relatively new phenomenon.[28] The current Court focuses mostly on the ins and outs of public sector dues-paying[29] as the text yellows under forty more years of stalled amendments. Most of the relevant decisional law is now produced at the agency level, where rules are still in-between, for a different reason. Though the Act is the same as it ever was—specifically, the same as it was in 1947, save for a late-50s touch-up[30]—today's doctrine exists less between words and values than between past and future precedents.

26. Atelson, *supra* note 19, at 10.

27. Avery & Konefsky*, supra* note 24, at 636–38. Beyond articles by U.S. and international labor law experts, the Atelson symposium itself included works by a historian, Joseph A. McCartin, *Unexpected Convergence*, 57 BUFF L. REV. 727 (2009), the NLRB's incoming Chair, Wilma B. Liebman, *Values and Assumptions of the Bush NLRB*, 57 BUFF. L. REV. 643 (2009), a Supreme Court advocate, Virginia A. Seitz, *The Value of Values and Assumptions to a Practicing Lawyer*, 57 BUFF. L. REV. 687 (2009), and a unionist-turned-scholar, Lance Compa, *Still Unjaded: Jim Atelson's 21st Century Turn to International Law*, 57 BUFF. L. REV. 767 (2009).

28. *See infra* Part III.C.

29. *See, e.g.*, Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., 138 S.Ct. 2448, 2468 (2018) (refusing to pay collective bargaining fees is protected by the First Amendment); Friedrichs v. Cal. Teachers Ass'n, 136 S.Ct. 1083 (2016) (per curiam) (affirming mandatory collective bargaining fees by an equally divided Court); Harris v. Quinn, 134 S.Ct. 2618 (2014) (refusing to pay collective bargaining fees in the homecare industry is protected by the First Amendment); Knox v. Serv. Emps. Int'l Union, Loc. 1000, 132 S.Ct. 2277 (2012) (requiring an opt-in regime for certain types of union fees); Davenport v. Wash. Educ. Assoc., 551 U.S. 177 (2007) (upholding a state collective bargaining fee structure). *See also* James J. Brudney, *The Changing Complexion of Workplace Law: Labor and Employment Decisions of the Supreme Court's 1999-2000 Term*, 16 LAB. L. 151, 152–53 (2000) (discussing the Court's shrinking labor docket).

30. The Wagner Act of 1935 established the current framework for collective bargaining rights. Pub. L. No. 74–198, 49 Stat. 449 (1935). The Taft-Hartley Act of 1947 subsequently added significant employer rights and protections. 61 Stat. 140 (1947). In 1959, the Labor-Management Reporting and Disclosure Act addressed union governance procedures and tightened existing rules on secondary labor pressure. Pub. L. No. 86-257, 73 Stat. 519–546 (1959).

What we think of today as the NLRA is really two statutes passed at cross purposes—one pro-union, one pro-business—and mushed together.[31] Whether the amalgam encourages collective bargaining or prioritizes the status quo (and management's right to tout it) can vary based on one textual commitment or the other,[32] but since the White House fills the Board,[33] new Presidents make—and remake—majorities.[34] Policy flips and flops follow.[35] The agency once switched the rule on campaign lies three times—in the same litigation.[36] Describing a worker's right to have a non-union co-worker attend an investigatory interview (yes, 1982; no, 1985; yes, 2000, no, 2004),[37] use the company's email system to advertise a union meeting (no, 2007; yes, 2014; no, 2019),[38] or negotiate alongside permanent staffers as a temp (no 1990; yes, 2000; no, 2004; yes, 2016; not for long, 2021)[39] requires a metaphorical spatula. Whether employers can cancel dues deductions at the end of a bargaining agreement is a live issue after almost sixty years.[40]

31. *See* JAMES A. GROSS, BROKEN PROMISE: THE SUBVERSION OF U.S. LABOR RELATIONS POLICY, 1947–1994 14 (1995) (describing two "different labor policies" combined in the same statute). Many revisions read as if an ornery editor swooped in at the last minute with a red pen. For example, what the initial legislation stated as the "denial by employers of the right of employees to organize," was changed, in a move modern internet trolls might applaud, to the "denial by *some* employers." KENNETH G. DAU-SCHMIDT, MARTIN H. MALIN, ROBERTO L. CORRADA, CHRISTOPHER DAVID RUIZ CAMERON, CATHERINE L. FISK, STATUTORY SUPPLEMENT TO LABOR LAW IN THE CONTEMPORARY WORKPLACE 47 (2019) (emphasis added).

32. For a historical, practical, and statutory overview of the perspectives, see Catherine L. Fisk & Deborah C. Malamud, *The NLRB in Administrative Law Exile*, 58 DUKE L.J. 2013, 2034–37 (2009).

33. 29 U.S.C. § 153(a)–(b) (creating a five-member "Board" appointed by the President and authorized to decide cases with a three-member quorum).

34. For overviews of the Board's nomination process and its increasing politicization, see Amy Semet, *Political Decision-Making at the National Labor Relations Board*, 37 BERKELEY J. EMP. & LAB. L. 223, 228–33 (2016); James J. Brudney, *Isolated and Politicized: The NLRB's Uncertain Future*, 26 COMP. LAB. L. & POL'Y J. 221, 243–52 (2005). Studies have since detected a link between "partisan ideology" and agency decision making. *See, e.g.,* Semet, *supra*, at 226–27; Ronald Turner, *Ideological Voting on the NLRB*, 8 U. PA. J. LAB. & EMP. L. 707, 711 (2006) (concluding that "ideology has been a persistent and, in many instances, a vote-predictive factor when the Board decides certain legal issues.")

35. As far back as 1985, Samuel Estreicher warned that, "Board law is simply in too great a state of flux to justify anyone's reliance on it." *Policy Oscillation at the Labor Board*, 37 ADMIN. L. REV. 163, 173 (1985).

36. Mosey Mfg. Co. v. NLRB, 701 F.2d 610, 611–13 (7th Cir. 1983). The Seventh Circuit "declined enforcement simply out of exasperation." *See* Estreicher, *supra* note 35, at 171.

37. *Compare* Materials Rsch. Corp., 262 N.L.R.B. 1010 (1982) *with* Sears, Roebuck, & Co., 274 N.L.R.B. 239 (1985) *with* Epilepsy Found., 331 N.L.R.B. 676 (2000) *with* IBM Corp., 341 N.L.R.B. 1288 (2004).

38. *Compare* The Register-Guard, 351 N.L.R.B. 1110 (2007) *with* Purple Commc'ns Inc., 361 N.L.R.B. 1050 (2014) *with* Rio All-Suites Hotel & Casino, 368 N.L.R.B. No. 143 (2019).

39. *Compare* Lee Hosp., 300 N.L.R.B. 947 (1990) *with* M.B. Sturgis, 331 N.L.R.B. 1298 (2000) *with* Oakwood Care Ctr., 343 N.L.R.B. 659 (2004) *with* Miller & Anderson, Inc., 364 N.L.R.B. No. 39 (2016) *with* Stericycle, 2019 NLRB LEXIS 588 (Oct. 31, 2019) ("We . . . would be open to reconsidering [Miller & Anderson, Inc., 364 N.L.R.B. No. 39 (2016)] in a future appropriate case.").

40. *Compare* Bethlehem Steel, 136 N.L.R.B. 1500 (1962) (concluding yes) *with* WKYC-TV, Inc., 359 N.L.R.B. 286 (2012) (concluding no) *with* Valley Hosp. Med. Ctr., 368 N.L.R.B. No. 139 (2019) (concluding yes).

The result is that although a decision may technically state a valid rule, litigation delays[41] and the Board's willingness to apply reversed precedent to the parties before it[42] mean that organizing activities, employer responses, and client advice must sometimes incorporate the odds of a reversal in the coming years. A union might counsel activists to communicate with colleagues in a way that threads the needle between current and impending workplace access law, or it may even—as occurred at Boston College—abandon an election victory outright in "anticipat[ion] that a Trump-appointed NLRB might issue a sweeping exemption to religious universities."[43] On the other side, Human Resources may enact one version of a workplace policy but preemptively plan to switch to another if the next election doesn't go its way. A prominent management-side law firm warned at the start of the Obama years that "[i]t is critical that employers consider the effect upcoming changes in NLRB interpretations will have on them today."[44]

Thus, in fraught areas, the "law" exists somewhere between what Westlaw color-codes as good precedent and an administrative law—or political science—judgment about the probability the precedent will soon be reversed. As confidence swells, current rules may, in practice, take on "future" caselaw characteristics. And there is a lot of confidence to go around. The cycles of precedential extinctions and resurrections are now so ingrained that changed

41. *See infra* note 237.

42. The Supreme Court held decades ago that the "Board is not precluded from announcing new principles in an adjudicative proceeding," NLRB v. Bell Aerospace, 416 U.S. 267, 294 (1974), and recent NLRB decisions have fiercely defended the agency's right to do so without public input and without any party having raised the relevant issues on appeal. *See, e.g.*, Boeing Co., 365 N.L.R.B. No. 154, *22–24 (2017) ("[W]e have the authority and the obligation to apply the law as we believe it should be, regardless of whether any party has directly challenged [the precedent], and the test we adopt is one of general application, not limited to the particular [] [facts] at issue in this case."). For a dissenting view, see PCC Structurals, 365 N.L.R.B. No. 160, *14–16 (2017) ("[T]he majority has examined no relevant data, articulated no satisfactory explanation, and established no rational connection between the facts found in this adjudication and the choice to return to the [prior] . . . approach.") (Members Pearce and McFerran, dissenting).

43. Amy Littlefield, *Union-Busting in the Name of God*, NATION (Apr. 13, 2020), https://www.thenation.com/article/society/religious-universities-unions-labor/ [https://perma.cc/A9QS-JRU7]. The move was prescient. *See* Bethany College, 369 N.L.R.B. No. 98 (2020) (reversing Pacific Lutheran Univ., 261 N.L.R.B. 1404 (2014) to decline jurisdiction over faculty at religious institutions).

44. *Implications of NLRB Filled with Obama's Recess-Appointees*, JACKSONLEWIS (Mar. 29, 2010), https://www.jacksonlewis.com/resources-publication/implications-nlrb-filled-obamas-recess-appointees-0 [https://perma.cc/RE7U-3B2U].

majorities prompt impressively accurate endangered decision lists, promoted not just by self-interested trade groups[45] but the Board's own General Counsel.[46]

Recent litigation highlights how some of precedential betweenness's effects play out. When Donald Trump was elected in 2016, companies locked in administrative battles had great incentive to stall not simply for a preferred appellate panel, but for a preferred rule. McDonald's and various franchisees, charged in 2014 with retaliation against lawful strikers, were found by the trial judge to have "purposefully delayed" their direct case in 2017 in hopes of taking advantage of a precedent flip.[47] Their tactics included "unilaterally canceling four hearing days which had been scheduled for six months" and "refusing to present more than one witness each day even though on nine days its sole witness testified for two hours or less."[48] That same year, the University of Chicago tried to stay an election allowed under the then-valid *Columbia University* precedent by arguing that future law *is*, actually, current law: "The . . . Board has a different majority than when *Columbia* was decided, and Chicago submits that it is probable the newly constituted Board will reverse *Columbia*."[49]

There are other consequences. Client advice can be like armchair political punditry, with "for now" a key addendum. The law's status has degraded.[50] Casebooks and treatises can hardly keep up.[51] And, of course, there are calls for

45. In 2017 the Chamber of Commerce produced a white paper it labeled a "roadmap for policy changes" at the Trump Board. U.S. CHAMBER OF COM., RECORD OF THE NLRB IN THE OBAMA ADMINISTRATION: REVERSALS AHEAD? 3 (Mar. 2017), https://www.uschamber.com/sites/default/files/chamber_nlrb_review_-_final_-_march_2017.pdf [https://perma.cc/9PSY-6AVZ]. A 2009 edition did the same for the Obama Board, and in hindsight the Chamber concluded: "We told you so!" *Id.* at 2.

46. Peter B. Robb, *Mandatory Submissions to Advice*, Memorandum GC 18-02 (Dec. 1, 2017) (outlining precedents ripe for "[a]lternative [a]nalysis").

47. McDonald's USA, Case No. 02-CA-093893, Order Denying Motions to Approve Settlement Agreements, 13 (Div. of Judges, July 17, 2018). *See id.* at 12 ("McDonald's and the New York Franchisees refused to stipulate that e-mails they produced pursuant to a subpoena, sent to an address admittedly used by a particular witness, were actually received or seen by that individual.").

48. *Id.* at 13.

49. The University of Chicago, Case No. 13-RC-198325 Motion for a Stay of the Election and All Other Proceedings on the Petition, or in the Alternative, to Impound All Ballots, 2 (Sep. 25, 2017). The Seventh Circuit would later call this line of argument "[p]uzzling[]." Univ. of Chicago v. NLRB, 944 F.3d 694, 701 (7th Cir. 2019).

50. Former NLRB Chair Wilma B. Liebman began a 2007 reflection cataloguing the dark descriptors academics use to summarize the state of the law, which ranged from "moribund" to "largely irrelevant." *Decline and Disenchantment: Reflections on the Aging of the NLRB*, 28 BERKELEY J. EMP. & LAB. L. 569, 570–71 (2007). The NLRB fares particularly poorly in court. James J. Brudney, Chevron *and* Skidmore *in the Workplace: Unhappy Together*, 83 FORDHAM L. REV. 497, 525 (2014) ("Support for NLRB determinations has declined noticeably since *Chevron*, even though the Court remains formally committed to broader deference."). *See also* Michael C. Harper, *Judicial Control of the NLRB's Lawmaking in the Age of* Chevron *and* Brand X, 89 B.U. L. REV. 189, 248 (2009) ("Critics who lament how the Board's policy oscillation has undermined its stature and respect as an expert independent agency.").

51. The field's primary treatise is updated annually through supplements that are sizable enough to be sold as standalone books. *See, e.g.*, BNA, The Developing Labor Law: The Board, the Courts, and the National Labor Relations Act, Preface to the 2020 Update, Bloomberg Law.

reform. Suggestions range from turning decision making over to panels of government "careerists,"[52] perhaps assisted by "lay members" with workplace expertise,[53] to imposing a *stare decisis* presumption,[54] issuing administrative "policy statements,"[55] to letting federal judges decide labor law violations,[56] requiring "new evidence" or at least four votes to reverse course,[57] or embracing rulemaking.[58]

None have really taken hold.[59] Until something does, much of the law will continue to be seen less like a fixed point than the middle flag in a tug of war between former and future Boards, with momentum to either side a de facto gloss on workplace governance. In other situations, a different iteration of legal in-betweenness is more relevant—and much more personal.

B. In-Between Identities

The NLRA applies only to "employees," spelled out with exquisite circularity as "any employee."[60] For the Supreme Court, that puts the focus on the "ordinary dictionary definition" and suggests that Congress wanted "the

52. Joan Flynn, '*Expertness for What?': The Gould Years at the NLRB and the Irrepressible Myth of the 'Independent' Agency*, 52 ADMIN. L. REV. 465, 478–80 (2000) (suggesting that careerists are generally less politically biased and would be more likely to generally "favor[] the status quo").

53. Brudney, *supra* note 34, at 259–60.

54. Keith N. Hylton, *Law and the Future of Organized Labor in America*, 49 WAYNE L. REV. 685, 700 (2003).

55. Claire Tuck, Note, *Policy Formulation at the NLRB: A Viable Alternative to Notice and Comment Rulemaking*, 27 CARDOZO L. REV. 1117, 1148 (2005) ("[I]ssuing prospective policy statements on certain controversial issues . . . would provide affected parties with guidance on how to structure their future conduct . . . lend[ing] more stability and certainty to the" agency's processes).

56. Zev J. Eigen & Sandro Garofalo, *Less is More: A Case for Structural Reform of the NLRB*, 98 MINN. L. REV. 1879, 1989–1900 (2014) (predicting greater stability because a "federal district court judge would not have the same nation-wide jurisdiction, and he or she would be controlled by the precedent in that particular circuit").

57. Samuel Estreicher, '*Depoliticizing' The NLRB: Administrative Steps,* 64 EMORY L.J. 1611, 1616–17 (2015).

58. R. Alexander Acosta, *Rebuilding the Board: An Argument for Structural Change, over Policy Prescriptions, at the NLRB*, 5 FIU L. REV. 347, 359 (2010) ("[R]ulemaking will . . . help stabilize Board law and restore public and judicial confidence in the agency."). *See also* Estreicher, *supra* note 35, at 175–77 (limiting the proposal to policy reversals).

59. The Obama Board exhibited a newfound appetite for rulemaking, with mixed results. *See* Assoc. Builders & Contractors v. NLRB, 826 F.3d 215 (5th Cir. 2016) (upholding a rule amending representation election procedures); Nat'l Ass'n of Mfrs. v. NLRB, 717 F.3d 947, 953, 959 (D.C. Cir. 2013) (rejecting a rule requiring a notice posting of NLRA rights in the workplace). The Trump Board accelerated the trend, *see infra* note 519, though ironically did so partly to reverse the sole rule finalized by the previous administration. *See* Representation—Case Procedures, 84 Fed. Reg. 69524 (Dec. 18, 2019) (reversing much of the Obama Board's rule on representation procedures in a final rule absent notice and comment). The "heavily politicized" environment has led at least one scholar to question whether rulemaking will ultimately lead to "improved certainty and consistency." Charlotte Garden, *Toward Politically Stable NLRB Lawmaking: Rulemaking vs. Adjudication*, 64 EMORY L.J. 1469, 1471–73 (2015).

60. 29 U.S.C. § 152(3). Those in agriculture, "domestic service," supervisors, independent contractors, and some other groups are listed exceptions. *Id.*

conventional master-servant relationship as understood by common-law agency doctrine" to define employment.[61]

This itself presents an intermediacy. As Julia Tomasetti has explained, agency principles put workers at the center of a "tension between employment's class and contractual dimensions," where a right to discuss terms is presumed, yet any and all gaps, questions, and ambiguities are "exclusively and authoritatively interpreted by the employer."[62] Courts eventually translated these and other status-based dynamics into a "plenary property right" for employers,[63] and, as labor law has developed, employees are left with little leeway to gather a group and prepare for negotiations in the first place. Specifically, only a select few are allowed any meaningful time in the building. Union employees are trespassers everywhere and all of the time, including places open to the public;[64] on-site contractors are trespassers the minute they punch out;[65] and even direct hires can solicit assistance only in break rooms[66] or, off-duty, in parking lots.[67]

The property access cases point to a larger issue about identity in labor law. On the clock, as in life, workers wear a lot of hats. They may have another job and need to coordinate schedules. They might be anxious about an upcoming math test or, in the age of pandemic, *teaching* math to their kids, even as they take a customer's order. That dream of submitting a screenplay might, with a few more late nights, actually come true. It would not be exceptional for a waitress to be a grocer, student, teacher, and writer at the same time.

Yet when these sorts of auxiliary identities surface at the NLRB, labor law flails. The tendency is to slice the various aspects of "self" into roles before weighing the non-employee-*ish* parts against any standard employee characteristics that remain.[68] Workers then sit between these newly split identities, with NLRA rights activating only upon a tilt away from whatever has been heaped on the "employee" unbecoming pile.

61. NLRB v. Town & Country Elec., Inc., 516 U.S. 85, 90, 94–95 (1995).

62. Julia Tomassetti, *Who is a Worker? Partisanship, the NLRB, and Social Contract of Employment*, 37 LAW & SOC. INQUIRY 815, 823–24 (2012) (citing ATELSON, *supra* note 19, at 11).

63. *Id.* (citing Christopher Tomlins, *Law and Power in the Employment Relationship*, *in* LABOR LAW IN AMERICA: HISTORICAL AND CRITICAL ESSAYS 74, 83 (Christopher L. Tomlins & Andrew J. King eds., 1992)).

64. Lechmere v. NLRB, 502 U.S. 527, 535 (1992)

65. Bexar Cnty. Performing Arts Ctr. Found., 368 N.L.R.B. No. 46 (Aug. 23, 2019).

66. Republic Aviation Corp. v. NLRB, 324 U.S. 793, 803 n.10 (1945) (stating that restrictions on employee organizing are presumptively invalid as applied to non-work areas during non-work times).

67. Tri-County Med. Ctr., 222 N.L.R.B. 1089 (1976) (stating that off-duty workplace access restrictions are valid only if limited to the company's interiors).

68. Through textual analysis, Julia Tomassetti helps uncover the partisan roots at play in some of the examples discussed below, including how ideology shapes the way "Board members conceive[] of, and construct[], the social content of the employment relationship." Tomassetti, *supra* note 62, at 816.

A model is "salts," or union workers who apply for jobs intending to start or assist with an organizing campaign.[69] Here the dual roles are explicit, and employers allege the organizing identity so infects the applicant persona that the resulting mix is "adverse[] to the company," purging a key feature of common law employment.[70] The Supreme Court has concluded that the roles are relatively contained. Preparing to talk—or actually talking—union with a co-worker does not really impede "wiring sockets or laying cable," and more intensive things like leafletting or home visits are "equivalent to simple moonlighting" with a second job.[71] With the anti-employee side of the ledger empty—"ordinary union organizing activity" is, after all, "specifically protected by the Act"[72]—salts keep their legal status and the right to both natures on the same job.[73]

But the Board later discovered a serious tilt. Frustrated by cases where applicants try to ferret out anti-union discrimination by revealing their organizing roles at the outset,[74] the agency created a third identity tailored to the other edge of the balance: charlatan. In *Toering Electric,* the Board explained that the scale plummets away from the employee side unless the agency's prosecutor (also called the "General Counsel") can prove the salt would have gladly accepted the job (had it, theoretically, been offered).[75] Employers, in turn, are invited to heap "conduct inconsistent with a genuine interest in employment" on the non-employee side of the scale.[76] Given the number of idiosyncratic, context-specific, even quirky reasons one might have for taking or not taking a hypothetical employment opportunity, [77] what the Supreme Court envisioned as the obvious case is now a factual free-for-all, with merely "incomplete" or, in the employer's view, "offensive" applications suggesting the presence of non-employee imposters.[78]

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69. *See* Michael C. Duff, *Union Salts as Administrative Private Attorneys General*, 32 BERKELEY J. EMP. & LAB. L. 1, 2 (2011). The applicant's union affiliation may be "overt" or surreptitious, *id.* at 4–5, and the goals of specific campaigns can vary. *See* Victor J. VanBourg & Ellyn Moscowitz, *Salting the Mines: The Legal and Political Implications of Placing Paid Union Organizers in the Employer's Workplace*, 16 HOFSTRA LAB. & EMP. L.J. 1, 3 (1998) ("[S]alting provides union locals with . . . a way to expose the violations of wage, safety, and anti-discrimination laws that frequently occur on non-union job sites.").

70. NLRB v. Town & Country Elec., Inc., 516 U.S. 85, 93 (1995).

71. *Id.* at 95. The Court even noted that common law principles do not necessarily preclude employee status where workers serve interests of different employers "at the same time." *Id.*

72. *Id.* at 95.

73. *Id.* at 98.

74. Toering Elec. Co., 351 N.L.R.B. 225, 225 (2007) (addressing "such behavior").

75. According to the majority, "one cannot be denied what one does not genuinely seek." *Id.* at 228.

76. *Id.* at 233.

77. *See id.* at 244 (Liebman & Walsh, dissenting) ("The majority's notion that an adjudicator can easily assess whether the applicant would have accepted employment, if offered, is at odds with reality.").

78. The dissent wondered: "Would the phrase 'voluntary union organizer' qualify" as offensive? *Id.* (Liebman & Walsh, dissenting).

Individuals with disabilities can find themselves suspended in the middle of the same sort of scale. If the employer offers too much personal assistance—even if voluntary and only in their off hours[79]—a "rehabilitative" identity emerges to outweigh the "typically industrial" role that characterizes standard employment.[80] From there, doing the same job, for the same pay, during the same hours, under the same supervision, and based on the same standards and discipline as the non-disabled employees beside them[81] is "not really 'working,'" and they are not really "employees."[82] Rooted in such cases[83] is the Board's fear that unionization "is likely to distort the unique relationship between Employer and client and impair the Employer's ability to accomplish its salutary objectives."[84] As Noah Zatz has suggested, the assistance architecture evidently precludes roles for disabled persons as "market-driven economic" agents, though the Board has never explained why or how.[85] Since the question itself arises only once a group has already taken numerous steps—usually at significant personal risk—to win the right to negotiate over company profits, it's a strange conclusion. Others have called it "ludicrous."[86]

Sometimes a satellite identity ascends to weigh against legal status, but the consequences are less than total. A template is the Supreme Court's treatment of immigrants, where questions long surrounded how a person's standing as

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79. *See* Brevard Achievement Ctr., 342 N.L.R.B. 982, 991 (2004).

80. Nominally, the test is based not on identity but on "the nature of the relationship to the employer," *id.* at 984, 988, a multifactor analysis that considers things like the "existence/absence of a job-placement program" and "employer-provided counseling, training, or rehabilitation services." *Id.* at 983–84. But whatever "relationship" emerges cannot be separated from the underlying beliefs about the appropriate workplace roles and capabilities of disabled persons that motivate the need for a "test" in the first place. *Id.* A passage from the dissent in *Brevard* is worth quoting at length:

> The Board's concerns were questionable at the time and, today, they are certainly unnecessarily paternalistic and the product of stereotyped thinking. We should take this opportunity to recognize that disabled workers are capable of evaluating the merits of union representation, and to shed the perception of disabled individuals as being 'different from and inferior to nondisabled people.' Advocacy groups, policymakers, and disabled workers themselves have long fought to dispel this perception, but the majority rejects their appeals.

Id. at 995 (Liebman & Walsh, dissenting).

81. *Id.* at 988, 991.

82. *Id.* at 994 (Liebman & Walsh, dissenting).

83. The doctrine emerged in the context of so-called "sheltered workshops" and initially engaged the "primarily rehabilitative" test only to consider whether the agency should assert jurisdiction over the employer. Justin Sorrell, Note, *Rehabilitative Employees and the NLRA,* 52 WM. & MARY L. REV. 607, 619 (2010). Later and, "without explanation," the Board said the test actually determined whether disabled workers are "employees" at all. *Brevard*, 342 N.L.R.B. at 993 (Liebman & Walsh, dissenting).

84. Goodwill Indus. of S. Cal., 231 N.L.R.B. 536, 537–38 (1977).

85. Noah Zatz, *Working at the Boundaries of Markets*, 61 VAND. L. REV. 857, 901, 913 (2008).

86. William B. Gould, *Independent Adjudication, Political Process, and the State of Labor-Management Relations*, 82 IND. L.J. 461, 471 (2007).

undocumented might weigh against labor law protections.[87] The answer turns out to be just enough to eliminate most of the Board's already limited remedies—reinstatement and backpay—but not enough to excise the Act's architecture completely.[88] So, according to the Court, while working without papers can be analogized to "threatening to kill a supervisor, or stealing" and is apparently worse than perjury, the identity scale still ultimately slides away from such "serious criminal acts,"[89] allowing undocumented employees to do things like vote in elections and be covered by bargaining agreements.[90]

The Board, too, makes identity judgments that lead it to limit rights without nixing employee status completely. Starbucks, Gap, and most other office park workers whose employers lease space enjoy the full slate of NLRA's protections until it's time to go home. Then, the "security" and "safety" of the area supposedly at risk, they become trespassers.[91] The "property owner may have little, if any, idea who the contractor employees are," and freed from formal supervision, the Board casts their "integrity and self-discipline" into doubt.[92] A recent addition is to also assume that the typical employee is some sort of social media maven, deftly gathering coworkers and customers—many strangers, most unknown—to support assorted workplace causes via the internet. Such talents justify removing the right to use work email for off-the-clock organizing because

87. Hoffman Plastic Compounds v. NLRB, 535 U.S. 137, 144–45 (2002). For the Board, the heft fluctuated based on the employer's knowledge of the immigration problem. Hoffman Plastic Compounds, 326 N.L.R.B. 1060, 1062 (1998) (allowing backpay until "the date that [the employer] learned that Castro used fraudulent identification to gain employment").

88. *Hoffman Plastic Compounds*, 535 U.S. at 151 ("[A]llowing the Board to award backpay to [undocumented immigrants] would unduly trench upon explicit statutory prohibitions critical to federal immigration policy"); Sure-Tan v. NLRB, 467 U.S. 883, 903 (1984) (making reinstatement remedies contingent upon "the employees' legal reentry"). *See also Hoffman Plastic Compounds*, 535 U.S. at 144 ("We affirmed the Board's determination [under a previous immigration statute] that the NLRA applied to undocumented workers . . . .").

89. *Hoffman Plastic Compounds*, 535 U.S. at 143, 146. *See also* Agri Processor Co. v. NLRB, 514 F.3d 1, 5–6 (D.C. Cir. 2008) (finding "absolutely no evidence that in passing [immigration statutes] Congress intended to repeal the NLRA to the extent its definition of 'employee' include[d] undocumented" workers).

90. *Hoffman Plastic Compounds*, 535 U.S. at 150, 152 (stating that awarding economic remedies after "criminal" conduct would "condone[] and encourage[] future violations" of immigration law and that the Board's remaining power to require employers to post notices admitting NLRA violations was "sufficient to effectuate national labor policy"). Chief Justice Rehnquist may have thought he had indeed struck some sort of a balance. *See also* Catherine Fisk & Michael Wishnie, *The Story of* Hoffman Plastic Compounds v. NLRB, *in* LABOR LAW STORIES 351, 381 (Fisk et al. eds., 2005) (noting that Justice Rehnquist "did not attempt to reargue that undocumented workers are not statutory 'employees,'" as he had previously dissented). As Catherine Fisk and Michael Wishnie suggested, a true compromise would have "awarded [undocumented employees] less than the traditional make-whole relief of full backpay *and* reinstatement, but more than nothing." *Id.* at 382.

91. Bexar Cnty. Performing Arts Ctr. Found., 368 N.L.R.B. No. 46, *8 (Aug. 23, 2019).

92. *Id.*

"in modern workplaces employees also have access to smartphones, personal email accounts, and social media."[93] Similarly, the Board created an exception to the off-duty trespass rule if contractor employees work "regularly and exclusively" on the property, but it vanishes if landowners prove activists can otherwise "effectively communicate their message" through "Facebook, Twitter, YouTube, blogs, and websites."[94] With 2.6 billion possible "friends" on Facebook alone,[95] the test is tailored not to fail.[96] It is also a comically optimistic take on the union organizing prowess of a worker with a cell phone.[97]

Role balancing can also be prompted by the Act itself. Determining whether workers are statutorily excluded "supervisors" or "independent contractors" requires the NLRB to assess evidence of boss-like powers or control over the job against more standard levels of employee agency. In both cases, the Board has created a weighted balance. The NLRA identifies supervisors through a list of twelve authority types, at least one of which must be exercised in the employer's "interest" and with "independent judgment."[98] The legislative history suggests Congress distinguished "minor supervisors"—think middle management, some of today's most helpless, least happy workers[99]—from those with "genuine prerogatives of management."[100] However, the Board slices supervisory acts so

93. Rio All-Suites Hotel & Casino, 368 N.L.R.B. No. 143, *8–9 (Dec. 16, 2019). Setting aside the opinion's primary arguments about the employer's iron-clad control over its personal property, the majority interpreted two 1940s cases about factories to say that only "*adequate* avenues of communication" are minimally required. *Id.* (emphasis added) (citing Republic Aviation v. NLRB, 324 U.S. 793 (1945) and Le Tourneau Co., 54 N.L.R.B. 1252 (1944)). Since in "the typical workplace . . . oral solicitation and face-to-face literature distribution provide more than" that already, the additional existence of social media made the impact of the right's removal nominal. *Rio All-Suites Hotel,* at *7. As the dissent notes, accepting that conclusion requires heroic assumptions about "typical" socializing at work, as well as the organizational powers of "personal email," Twitter, and Facebook where workers often do not even know the names of many of their co-workers. *Id.* at *23 (McFerran, M., dissenting).

94. *Bexar Cnty.*, 368 N.L.R.B. at *8–9, *11.

95. *Number of Monthly Active Facebook Users Worldwide as of First Quarter 2020*, STATISTA, https://www.statista.com/statistics/264810/number-of-monthly-active-facebook-users-worldwide/ [https://perma.cc/GJ8F-SZNB].

96. As the dissent states, "property owners will virtually always be able to make that nominal showing." *Bexar Cnty.*, 368 N.L.R.B. at *22 (McFerran, M., dissenting). That the test itself is based on an extremely narrow access exception for third-party organizers with no economic relationship to the employer, *id.* at *9 (citing Lechmere v. NLRB, 502 U.S. 527 (1992)); *see id.* at *23 n.62–63 (McFerran, M., dissenting), both supports this conclusion and attests to its inappropriateness for those employed by the owner's own contractor. *See id.* at *23 n.63 (McFerran, M., dissenting).

97. *See id.* at *23 (McFerran, M., dissenting) ("Even with the broadest [online] outreach, bolstered with unlimited resources, attempting to reach the narrow band of the public who patronizes an establishment—a virtually unknowable subset of the population until they set foot in the employer's business—will be impossible.").

98. 29 U.S.C. § 152(11).

99. Jack Zenger & Joseph Folkman, *Why Middle Managers Are So Unhappy*, HARV. BUS. REV. (Nov. 24, 2014), https://hbr.org/2014/11/why-middle-managers-are-so-unhappy [https://perma.cc/2GH6-SGMZ].

100. Oakwood Healthcare Inc., 348 N.L.R.B. 686, 687–88, 698 (2006).

thinly that both types slide away from employee status with equal speed. The supervisory power to "assign . . . other *employees*" or "responsibly to direct them," for example, logically might not strip rights from someone who oversees some tasks, but never people.[101] But the Board says merely giving "ad hoc instruction that the employee perform a discrete task" pushes workers onto the supervisor side.[102] Task assignment and direction must be done "regular[ly] and substantial[ly]," but that is defined, bizarrely, as a mere "10-to-15 percent" of "total work" hours.[103] The result is a "rude shock" for anyone with an assistant or who, 90 percent of the time, *is* the assistant.[104]

Gig workers may increasingly have similar feelings, thanks to a multi-factor independent contractor analysis less thinly sliced than newly loaded with the anti-employee element of "entrepreneurial opportunity."[105] Whether a "super-factor" (the dissent's take) or an overarching "prism" (the majority's descriptor),[106] the addition is indeed an opportunity. But it exists primarily for Silicon Valley entrepreneurs at places like Uber, where workers may have no say over rates of pay, customer acquisition, or routes, but a constant is the chance to make more by working more.[107] For the NLRB, that's enough small business spirit to slide drivers over to the side of owners.[108]

But perhaps the most naked example of Board's drive to balance workers between split identities involves elite college athletes. The legal case that NCAA Division I athletes in moneymaking sports are NLRA "employees" falls somewhere between strong and obvious. The analysis asks whether players perform services for pay under a university's control, and "virtually all labor scholars analyzing the issue" have looked at the nearly six-figure scholarships,

101. That is, the terms suggest that true supervisors have "authority to determine the *basic* terms and conditions of an employee's job, i.e., position, work site, or work hours." *Id.* at 703 (Liebman & Walsh, dissenting). The Supreme Court has suggested as much in dicta. NLRB v. Ky. River Cmty. Care, 532 U.S. 706, 720 (2001).

102. Oakwood Healthcare Inc., 348 N.L.R.B. at 689–90. *See also id.* at 703 (Liebman & Walsh, dissenting) (noting that while the majority disclaims ad hoc task assignment as indicative of supervisory status, "even a single assignment of daily duties" clearly suffices, and it is an explicit indicator under the majority's definition of "responsible direction").

103. *Id.* at 694.

104. *Id.* at 709 (Liebman & Walsh, dissenting).

105. SuperShuttle DFW, Inc., 367 N.L.R.B. No. 75, *11 (2019).

106. *Id.* at *21, *9. The majority states that "entrepreneurial opportunity" is a "principle," not a "factor." *Id.* at *11. The dissent noted that "[p]recisely what this means, even in theory, is not easy to understand." *Id.* at *23 (Liebman &Walsh, MM., 0dissenting).

107. Lawrence Michel & Celine McNicholas, *Report: Uber Drivers Are Not Entrepreneurs*, ECON. POL'Y INST. 5 (Sept. 20, 2019), https://www.epi.org/files/pdf/176202.pdf [https://perma.cc/H53Z-PEM3]. *See also SuperShuttle*, 367 N.L.R.B. at *13 n.29 ("[T]hat SuperShuttle does not limit its hours of service and that the franchisees can drive for SuperShuttle whenever and for as long as they choose . . . maximize[s] their entrepreneurial opportunity.")

108. In mid-2019 the NLRB's Advice Division determined Uber drivers were independent contractors with "significant entrepreneurial opportunity by virtue of their near complete control of their cars and work schedules together with the freedom to choose log-in locations and to work for competitors of Uber." NLRB Advice Memorandum, Uber Technologies, Inc., No. 13-CA-163062 (Apr. 16, 2019), https://src.bna.com/Ibt [https://perma.cc/4YAD-88PX].

seven-figure revenue streams, around-the-clock scheduling and said, at least for football and basketball, absolutely.[109] So did the NLRB's General Counsel[110] and the only Regional Director ever to take evidence on the matter.[111]

The Board, in contrast, is interested in an entirely different question: are players more like students or professional athletes?[112] And yet, the agency has simultaneously declared the identities too difficult to isolate,[113] essentially warehousing the balance by declining jurisdiction.[114] The ironic result is that if there really are two legally-cognizable roles, players aspiring to negotiate with their university between them are instead forced to pick one or the other: "I had a chance to be a pro football player or a doctor," explained Kain Colter, the leader of Northwestern football's stalled drive, but since practice conflicted with premed requirements, "I couldn't do both."[115]

He picked football, and now he organizes unions.[116]

C. In-Between Rights

Finally, beyond the many workplace identities that confer no labor rights,[117] even workers covered by the Act earn protections that are better than nothing, but not by much. These might be thought of as "between" rights in that the law, conceptualized on a continuum, protects at a level somewhere between zero and

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109. Roberto L. Corrada, *College Athletes in Revenue-Generating Sports as Employees: A Look into the Alt-Labor Future*, 95 CHI.-KENT L. REV. 187, 195–98 (2020). For a recent and especially detailed factual account, see César F. Rosado Marzán & Alex Tillett-Saks, *Work, Study, Organize!: Why the Northwestern University Football Players Are Employees Under the NLRA*, 32 HOFSTRA LAB. & EMP. L.J. 301 (2015).

110. Memorandum GC 17-01, General Counsel's Report on the Statutory Rights of University Faculty and Students in the Unfair Labor Context 16 (Jan. 31, 2017) ("[W]e conclude that scholarship football players in Division I FBS private sector colleges and universities are employees under the NLRA.").

111. Northwestern Univ., 2014 NLRB Lexis 221, 13-RC-121359 (Mar. 26, 2014).

112. Northwestern Univ., 362 N.L.R.B. 1350, 1352–53 (2015). Under other precedents, student characteristics weigh against employee status, while various professional athletes have traditionally been covered. *Id.* at 1358–60.

113. In its one opportunity to address the issue, the Board emphasized that "scholarship [football] players do not fit into any analytical framework that the Board has used in cases involving other types of students or athletes." *Id.* at 1352. Having canvassed various analogies on both sides—all apparently inapt—the agency concluded that "nothing in [its] precedent requires us to assert jurisdiction in this case." *Id.* at 1352–53.

114. *Id.* at 1352. As Robert L. Corrada has detailed, the jurisdictional issue should be easily settled by college football's immense commercial impact. *The Northwestern University Football Case: A Dissent*, 11 HARV. J. SPORTS & ENT. L. 15, 29–30 (2020).

115. Joe Nocera & Ben Strauss, *Fate of the Union: How Northwestern Football Union Nearly Came to Be,* SPORTS ILLUSTRATED (Feb. 24, 2016), https://www.si.com/college/2016/02/24/northwestern-union-case-book-indentured [https://perma.cc/Z5K5-ABG6].

116. Dave Zirin (@EdgeofSports), TWITTER (Jan. 22, 2019, 1:36 PM) ("Kain Colter, former quarterback at Northwestern and current organizer with the American Federation of Teachers.") https://soundcloud.com/edgeofsports/talking-ncaa-football-unions-w-kain-colter [https://perma.cc/KCC7-Y7H2].

117. *See supra* note 60.

what advocates might consider minimally adequate. Employees are frequently left, at best, at the threshold of a right's fulfillment. The result is a sprawling landscape of middling rights where an activist might ask, "if my boss does this, am I protected?" and a lawyer might respond not with "no"—or even the classic "it depends"—but with: "sort of."

Three areas are especially relevant: an in-between right to organize, an in-between right to coerce, and an in-between right to a remedy.

1. An In-Between Right to Organize

The NLRA does not just provide for or protect collective bargaining; it "declare[s]" collective bargaining the "policy of the United States" and "encourag[es]" it.[118] Congress actually approved that language twice.[119] And the initial barriers to entry really are pretty low. Under Board regulations, less than a third of the relevant "unit" of workers needs to sign a petition (or notecards) stating an interest in representation.[120] Then, someone has to deliver the results (e-delivery or fax is fine) to one of the NLRB's Regional Offices.[121] Usually a union is involved at this point, but it's not necessary. Indeed, if workers suspect the employer has already responded to the effort in some illegal way—anecdotal descriptions of violations on NLRB.gov helps—anyone, including a stranger, can file the one-page "unfair labor practice" form.[122] Since the General Counsel's office handles the investigation and any eventual litigation—federal court injunctions are possible—there's no need to hire a lawyer.[123] The process

118. 29 U.S.C. § 151.

119. That is, the language remained after the Taft-Hartley amendments of 1947. 61 Stat. 140 (1947).

120. *See* 29 C.F.R. § 101.27(a) (2020) (requiring "at least 30 percent of the employees . . . in the form of cards signed by individual employees"); 29 U.S.C. § 159(b) ("The Board shall decide in each case . . . the unit appropriate for the purposes of collective bargaining . . . ").

121. *The NLRB Process*, NLRB, https://www.nlrb.gov/resources/nlrb-process [https://perma.cc/V87T-UZY4] (allowing filing "by E-Filing, fax, regular mail, or in person").

122. *See* 29 C.F.R. § 102.9 ("Any person may file a charge alleging that any person has engaged in . . . any unfair labor practice"); *Protected Concerted Activity*, NLRB, https://www.nlrb.gov/about-nlrb/rights-we-protect/our-enforcement-activity/protected-concerted-activity [https://perma.cc/Z355-HAA9] (providing a map with thumbnail descriptions of recent employee rights violations around the country).

123. *See* 29 U.S.C. § 153(d) (providing for a prosecutorial arm with "final authority . . . in respect of the investigation of charges . . . "); 29 U.S.C. § 160(j) (allowing the Board "to petition any United States district court . . . for appropriate temporary relief or restraining order").

culminates around a month later in a majority-rules secret-ballot election during the workday.[124] Unions consistently win more elections than they lose.[125]

This summary is, of course, partial to the extreme. The standard account adds the dozens of rules and privileges at play before, during, and after voting that favor employers overtly.[126] But the sanitized version clarifies the in-betweenness. The legal right to unionize clearly exists in the sense that 75,000 non-union workers became union workers through this very process last year.[127] But in winning representation, they actualized what for nearly all other protected workers can only be attempted. The law "encouraging" collective bargaining agreements makes it easy for millions to start, but only thousands can actually get a contract. There is a right to unionize, but almost all workers get stranded between the start and finish lines.

In fact, half-a-loaf protections are actually baked into the Board's own metric for procedural fairness in elections: analogy. Voting is designed to elicit "free and untrammeled choice" and policed by comparison to "a laboratory in which an experiment may be conducted."[128] But since labs aim for sterility and atmospheric stability, and labor struggles self-evidently do not, the Board concedes authentic "laboratory conditions"[129] cannot ever be met. The question, rather, is whether the fit is "nearly ideal as possible."[130]

The law's tendency toward organizing rights that are better than nothing but far from ideal also radiates from various electoral checkpoints that repeatedly tease chances to turn back. Signed cards and petitions are legal contracts and

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124. *See* 29 U.S.C. § 153(b) (allowing regional directors to "take a secret ballot . . . and certify the results" after investigating the petition and providing for hearings). On the ins and outs of timing, see Jeffrey M. Hirsch, *NLRB Elections: Ambush or Anticlimax*, 64 EMORY L.J. 1647, 1652–53 (2015) (citing a 10-year median of 37–39 days). On voting locations, see NLRB, CASE HANDLING MANUAL: REPRESENTATION PROCEEDINGS 11302.2 (2020) (recommending the "employer's premises" as the "best place to hold an election") https://www.nlrb.gov/sites/default/files/attachments/pages/node-174/chm-part-ii-rep2019published-9-17-20.pdf [https://perma.cc/VC42-TX47].

125. *Representation Petitions—RC*, NLRB, https://www.nlrb.gov/reports/nlrb-case-activity-reports/representation-cases/intake/representation-petitions-rc [https://perma.cc/S8LE-RC37] [hereinafter NLRB Representation Petitions].

126. For the classic case, see Paul Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA,* 96 HARV. L. REV. 1770 (1983).

127. Over the last few years, the NLRB conducted between 862 and 1,120 annual elections. *NLRB Representation Petitions*, *supra* note 125. Union win rates in that same time period consistently ranged from 71 to 77 percent. *Id.*

128. General Shoe Corp., 77 N.L.R.B. 124, 126–27 (1948). Enmeshed in this standard is a notion that valid decision making requires a rational sifting through various options. *See, e.g.,* Derek C. Bok, *The Regulation of Campaign Tactics in Representation Elections Under the NLRA*, 78 HARV. L. REV. 38, 46 (1964) (describing the rational ideal in terms of having "access to relevant information" to "determine the possible consequences" of unionization, especially whether "a vote for the union promises to promote or impair [one's] interests"). As has been previously argued, that itself is not fully attainable. Michael M. Oswalt, *The Content of Coercion*, 52 UC DAVIS L. REV.1585, 1588–89 (2019).

129. General Shoe Corp., 77 N.L.R.B. at 127.

130. *Id.*

legal votes for representation,[131] and campaigns rarely present the Region with less than an overwhelming majority.[132] Given that, it is hard to understand the next round of balloting as anything but a formal invitation for second thoughts, just to be sure. A stated goal is to allow management to provide its own perspective in the meantime,[133] but the interim period chiefly allows the employer to generate, if not cold feet, a collective fleeing from the altar.[134] "You can't lose an election that never takes place"[135] is a catchphrase for the bruising "union avoidance" consultancy industry[136] and, indeed, labor's winning percentage in NLRB elections is respectable only if the hundreds of petitions pulled or dismissed before the secret ballot aren't counted in the totals.[137]

But if Board elections are famous for anything, it's for delays that put workers on the precipice of progress and keep them there, stuck in the center of a timeline of unknown duration. The average gap between petition and voting has historically been thirty-eight days.[138] However, that figure relies on the union's instant acceptance of the employer's position on every negotiable aspect of the process.[139] Refusing any term triggers a hearing that has long allowed for

131. *See* Benjamin I. Sachs, *Despite Preemption: Making Labor Law in Cities and States*, 124 HARV. L. REV. 1153, 1169–70 (2011).

132. CHIRAG MEHTA & NIK THEODORE, UNDERMINING THE RIGHT TO ORGANIZE: EMPLOYER BEHAVIOR DURING UNION REPRESENTATION CAMPAIGNS 12 (Dec. 2005) ("In 91 percent of the cases . . . unions filed with at least 50 percent of workers signing cards or a petition in favor of unionization."), https://www.jwj.org/wp-content/uploads/2013/12/UROCUEDcompressedfullreport.pdf [https://perma.cc/C9S5-CCDA].

133. *See, e.g.*, Chamber of Com. of U.S. v. Brown, 554 U.S. 60, 67–68 (2008) (identifying a "policy judgment, which suffuses the NLRA as a whole, as 'favoring uninhibited, robust, wide-open debate in labor disputes'").

134. For comprehensive treatment of this much-discussed issue, see Alan Story, *Employer Speech, Union Representation Elections, and the First Amendment*, 16 BERKELEY J. EMP. & LAB. L. 356 (1995).

135. *NLRA Training & NLRB Elections Results*, BURKE GRP., http://www.theburkegroup.eu.com/nlra.aspx [https://perma.cc/QRS3-S2PS].

136. *See* John Logan, *The Union Avoidance Industry in the United States*, 44 BRIT. J. INDUS. RELS. 651, 651 (2006) (analyzing the development and impact of the "consultants, law firms, industry psychologists and strike management firms" that help employers defeat unionization drives).

137. For example, including petitions that did not culminate in elections drops labor's 2019 win rate from 74.8 to 44 percent. *NLRB Representation Petitions*, *supra* note 125. The pattern is similar up and down the decade. *Id.*

138. Representation—Case Procedures, *supra* note 59; Final Rule, 79 Fed. Reg. 74308, 74317 (Dec. 15, 2014), https://www.govinfo.gov/content/pkg/FR-2014-12-15/pdf/2014-28777.pdf [https://perma.cc/S4VL-CSGV].

139. *See, e.g.*, *id.* at 74318 ("[T]he possibility of using unnecessary litigation . . . sometimes articulated as an express threat . . . detrimentally affect[s] negotiations of pre-election agreements."); JOHN LOGAN, ERIN JOHANSSON & RYAN LAMARE, NEW DATA: NLRB PROCESS FAILS TO ENSURE A FAIR VOTE 2 (2011) ("[T]he mere fact that the NLRB allows parties the *ability* to delay cases for an extended period simply by forcing a hearing skews the process in employers' favor. . . . [I]n order to avoid a hearing and the resulting delay, workers often agree to employers' demands to change the description of the bargaining unit."), http://laborcenter.berkeley.edu/new-data-nlrb-process-fails-to-ensure-a-fair-vote/#endnote5 [https://perma.cc/XJ84-Q3A9].

a virtually infinite array of evidence gathering,[140] appeals to Washington, D.C., and around 160 extra days.[141] The bureaucracy has recently been subject to competing bouts of rulemaking,[142] but under either approach the larger truth remains: NLRB organizing is epic. Collisions between organizing and agency rules have translated into Oscar-winning films,[143] book-length factual-legal summaries,[144] and Human Rights Watch reports.[145] Especially outrageous delaying tactics will sometimes spill into the mainstream, such as a Florida nursing home's multi-year election objection pointing to "lines of pennies, half-empty water cups," and twisted beads as allegedly constituting illegal "voodoo."[146] More often, an employer lodges a legal objection, it takes four years for the Board to reject it as "utterly lacking," workers finally vote two years after that, and hardly anyone hears about it.[147]

It might be countered that an organizing regime that gets workers mostly to the middle of the unionization process—and no further—simply reflects the complex, contingent, and rarely complete nature of persuasion itself. But differently constructed rights would have different middles. There would not be a middle, for example, if collective bargaining were the worksite default, as the

140. For example, in some situations the employer may introduce lengthy testimony while also refusing to state a position on the evidence. *See* Health Acquisition Corp., 332 N.L.R.B. 1308 (2000). *See also* Final Rule, *supra* note 138, at 74318 (noting that under the prevailing rules the "regional director lack[s] discretion to limit the presentation of evidence to that relevant to the existence of a question of representation").

141. A 2011 analysis found:

> "In cases where a pre-election hearing was held, the election occurred an average of 124 days after the petition was filed. Ten percent of elections with a hearing took place more than 193 days after the petition was filed. When an election case involves a decision by the Labor Board, the vote is delayed by an average of 198 days." LOGAN, JOHANNSON & LAMARE, *supra* note 139, at 2.

142. *See* AFL-CIO v. NLRB, 2020 U.S. Dist. LEXIS 99491 (June 7, 2020) (detailing the substance and history of the 2014 and 2019 NLRB election rulemakings).

143. Megan Rosenfeld, *Through the Mill with Crystal Lee and 'Norma Rae,'* WASH. POST (June 11, 1980), https://www.washingtonpost.com/archive/lifestyle/1980/06/11/through-the-mill-with-crystal-lee-and-norma-rae/c0b62170-e8c1-4550-95a5-c7ebe31f7c3c/?request-id=e39da4d9-0251-4fbe-bcd8-21b6a82e16a4&pml=1 [https://perma.cc/P964-GRAC] ("The battle of the union . . . and the company . . . [has] been going on since 1963 . . . and there is no end in sight.").

144. *See, e.g.,* Fieldcrest Cannon, Inc., 318 N.L.R.B. 470 (1995) (totaling 179 Westlaw pages).

145. LANCE COMPA, UNFAIR ADVANTAGE: WORKERS' FREEDOM OF ASSOCIATION IN THE U.S. UNDER INTERNATIONAL HUMAN RIGHTS STANDARDS (2000).

146. *Florida: Voodoo, Votes, and Unions*, N.Y. TIMES, Mar. 26, 2002, at A22. For a description of the campaign, which stretched over a decade and also received coverage in *USA Today*, the *Seattle Times*, and on *NPR*, see MARY BETH MAXWELL & BRUCE NISSEN, SOME OF THEM ARE BRAVE: THE UNFULFILLED PROMISE OF AMERICAN LABOR LAW 11–12 (2003). It was not the first time "voodoo" has been a basis to delay unionization. *See also* King David Ctr., No. 12-RC-7692, 1995 WL 1918041, (Aug. 3, 1995) (describing "threats of voodoo, to coerce employees to vote for" the union).

147. Avant at Wilson, Inc., 348 N.L.R.B. 1056, 1057, 1058 n.4 (2006) (rejecting employer allegations that twenty-two of the twenty-seven voters were supervisors).

unionization right would be fulfilled every time.[148] In a world where individual bargaining required elections, *non*-union status might become the in-between right. Or, employers could be required to negotiate contracts covering only interested employee subsets,[149] satisfying the unionization right fully but on an on-demand basis. The most straightforward alternative would be to maintain the current representation system but make the elections easier to win, transitioning more workers across the unionization threshold gradually and iteratively.[150]

But perhaps the starkest evidence of a resistance force at the heart of the representation right comes from surveys showing that vast swathes of unrepresented workers—probably at least half—*want* to be represented.[151] That the labor movement views these figures not as an opportunity to flood the NLRB with petitions but as an opportunity to innovate outside its walls completes the point. Increasingly, what unions "represent" are policy campaigns for the common good, community partnerships, and inspiration for short protest bursts by everybody else.[152] However, even in these roles they are hobbled by in-between rights to persuade.

148. Mark Barenberg has proposed something like this. *Democracy and Domination in the Law of Workplace Cooperation: From Bureaucracy to Flexible Production*, 94 COLUM. L. REV. 753, 966 (1994).

149. This proposal is commonly stated as minority or "members-only" unionism. Catherine Fisk & Xenia Tashlitsky, *Imagine a World Where Employers Are Required to Bargain with Minority Unions*, 27 A.B.A. J. LAB. & EMP. L. 1, 1–2 (2011).

150. Shortening the election period, for example, might limit the duration of employer pressure applied to employees. Weiler, *supra* note 126, at 1812. Voting by mail, smartphone, or in an off-site electronic kiosk would avoid the current norm of effectively voting in management's campaign headquarters: work. *See generally* Sara Slinn & William A. Herbert, *Some Think of the Future: Internet, Electronic, and Telephonic Labor Representation Elections*, 56 ST. LOUIS U. L.J. 171 (2011) (discussing the background and possible consequences of these methods).

151. The best-known surveys were conducted by Richard Freeman and Joel Rogers in 1999 and again in 2006. RICHARD B. FREEMAN, DO WORKERS STILL WANT UNIONS? MORE THAN EVER 1–2 (Feb. 22, 2007), http://www.sharedprosperity.org/bp182/bp182.pdf [https://perma.cc/FFX2-5D4S]. The more recent report found that slightly more than "one-half the nonunion workforce in the United States desires union representation but does not have it." *Id.* at 2. That number balloons to three-quarters when the option is "independently elected workplace committees that meet and discuss issues with management." *Id. See also* Thomas A. Kochan, *Worker Voice in America: Is There a Gap Between What Workers Expect and What They Experience?*, 72 ILR REV. 3, 19–20 (2019) (finding that the share of workers who would vote for a union if they could jumped from 33 to 48 percent between 1977 and 2017). Currently, support for unions in general has remained high. Jeffrey M. Jones, *As Labor Day Turns 125, Union Approval Near 50-Year High*, GALLUP (Aug. 28, 2019) ("Sixty-four percent of Americans approve of labor unions."), https://news.gallup.com/poll/265916/labor-day-turns-125-union-approval-near-year-high.aspx [https://perma.cc/G7CA-F82X].

152. *See* Kimberly M. Sánchez Ocasio & Leo Gertner, *Fighting for the Common Good: How Low-Wage Workers' Identities Are Shaping Labor Law*, 126 YALE L.J. F. 503, 505–06 (2017) (describing a 'common-good unionism' "that addresses social conditions whether or not they are related to traditional terms and conditions of employment").

2. *An In-Between Right to Coercion*

Economic coercion, and threats of economic coercion, are "part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized."[153] As the eminent Archibald Cox once wrote, the regime envisioned "a brute contest" over workplace goods with only "Lilliputian bonds control[ling] the opposing concentrations of economic power."[154] And if the bonds break, labor gets the strike and management gets the lockout. There is a theoretical symmetry between the two. Each implicates the withholding of employee labor, voluntary or forced,[155] and each is intended to generate "fear" of financial ruin[156] strong enough to press "both sides to compromise at the bargaining table."[157] In a real sense, coercion, funneled through strikes and lockouts, makes the federal collective bargaining project run.[158]

Numbers-wise, it's been a banner decade for both. As unions weakened in the 1970s and 1980s, strikes declined while lockouts rose. Lockouts peaked as a percentage of overall stoppages in the 2010s when employers deemed the post-financial crisis climate "ideal" for shutting workers out.[159] But by then, walkouts of all sorts had caught up, with more workers striking in 2018 than in any other year after 1986.[160]

Yet once again the panoramic view is misleading but clarifying. There surely is a right to strike—over half a million did so in 2019[161]—but the lawful

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153. NLRB v. Ins. Agents Int'l Union, 361 U.S. 477, 489 (1960).

154. Archibald Cox, *The Duty to Bargain in Good Faith,* 71 HARV. L. REV. 1401, 1409 (1958).

155. This obviously depends on the perspective: a strike is a voluntary withholding by employees and a forced withholding for employers. The opposite is true for a lockout.

156. Cox, *supra* note 154, at 1409.

157. Paul Weiler, *Striking a New Balance: Freedom of Contract and the Prospects for Union Representation*, 98 HARV. L. REV. 351, 415 (1984).

158. As Cox put it: "Initially it may be only fear of the economic consequences of disagreement that turns the parties to facts, reason, a sense of responsibility, a responsiveness to government and public opinion, and moral principle; but in time these forces generate their own compulsions, and negotiating a contract approaches the ideal of informed persuasion." Cox, *supra* note 154, at 1409.

159. Steven Greenhouse, *More Lockouts as Companies Battle Unions*, N.Y. TIMES (Jan. 22, 2012), https://www.nytimes.com/2012/01/23/business/lockouts-once-rare-put-workers-on-the-defensive.html [https://perma.cc/Q9NR-WV73]; Katie Johnston, *Lockouts Appear to Be Giving Employers More Clout as Union Strike Fades*, BOS. GLOBE (Aug. 16, 2018), https://www.bostonglobe.com/business/2018/08/16/lockouts-appear-giving-employers-more-clout-union-strikes-fade/ermXcZ8ZXInPZV4iaNQtQL/story.html [https://perma.cc/LC5N-GF9B] (reporting that lockout rates have "been rising steadily through the decades, accounting for 4.1 percent of work stoppages in the 1990s, 5.4 percent from 2000 to 2009, and 7.8 percent since 2010.") .

160. *20 Major Work Stoppages in 2018 Involving 485,000 Workers*, U.S. BUREAU OF LAB. STATS., (Feb. 12, 2019), https://www.bls.gov/opub/ted/2019/20-major-work-stoppages-in-2018-involving-485000-workers.htm [https://perma.cc/ZQ5B-3XLW].

161. According to the Bureau of Labor Statistics, 425,500 struck in 2019, but those numbers only include stoppages involving at least 1,000 workers. *25 Major Work Stoppages in 2019 Involving 425,500 Workers*, U.S. BUREAU OF LAB. STATS., (Feb. 14, 2020), https://www.bls.gov/opub/ted/2020/25-major-work-stoppages-in-2019-involving-425500-workers.htm [https://perma.cc/YUU4-M79V]. Accounting for smaller, often non-union, strikes likely puts the total

path forward is so exceedingly narrow and so delicately marked that for years, commentators declared the right too slight to even count.[162] Recent events have illuminated the proper steps in profound ways, but the unconventional nature of the stoppages has only confirmed the power's partial nature. An in-between right has spawned in-between strikes.

In short, despite the Act's intentions, strikes are not "the ultimate weapon."[163] Decisions from the early years read as if Section 13 came with an anti-magnetic quality that slowly distanced workers from the right to strike, bit by bit. Three years after passage, the right to strike no longer included the chance to freely return to the job.[164] After four years, it required vacating the premises.[165] By the statute's twentieth anniversary, the right no longer applied to protests that involved working more slowly;[166] doing part, but not all, of the job;[167] or striking repeatedly.[168] When the Act turned thirty-five, union workers lost the right to strike during their contract's term.[169] In 2003, the Board determined that strikes must be timed to minimize "foreseeable danger" to the company.[170] In between are dozens of decisions axing the right for workers who had done everything right, except voicing upset properly.[171]

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over half a million. *See, e.g.*, Jasmine Wu, *Amazon Prime Day Strike: Minnesota Workers Are Protesting on Company's Biggest Day*, USA TODAY (July 15, 2019), https://www.usatoday.com/story/money/2019/07/15/amazon-prime-day-strike-2019-workers-minnesota-germany-protest/1737823001/ [https://perma.cc/BY7P-XAR7]; Sam Dean, *Riot Games Workers Walk Out to Protest Forced Arbitration of Sex Discrimination Suits*, L.A. TIMES (May 6, 2019), https://www.latimes.com/business/technology/la-fi-tn-riot-games-walkout-protest-forced-arbitration-20190506-story.html [https://perma.cc/DY6A-QGQP].

162. *See, e.g.,* James Gray Pope, *How American Workers Lost the Right to Strike, and Other Tales*, 103 MICH. L. REV. 518, 528 (2004) ("Although the strike is legally protected . . . it now serves as a source of *employer* bargaining power.").

163. NLRB v. Allis-Chalmers Mfg., 388 U.S. 175, 181 (1967). *See also* Int'l Union, U.A.W. v. Wis. Emp. Rels. Bd. (*Briggs-Stratton*), 336 U.S. 245, 266 (1949) (Douglas, J., dissenting) ("In all of labor's history, no 'concerted activity' has been more conspicuous and important than the strike; and none was thought to be more essential to recognition of the right to collective bargaining.").

164. NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333, 45–46 (1938) ("[The employer] is not bound to discharge those hired to fill the places of strikers, upon the election of the latter to resume their employment, in order to create places for them.").

165. NLRB v. Fansteel Metallurgical Corp., 306 U.S. 240 (1939). *See also* Quietflex Mfg., 344 N.L.R.B. 1055 (2005) (applying ten-factor balancing test to distinguish protected workplace stoppages from unprotected refusals to vacate the employer's property in protest).

166. Elk Lumber Co., 91 N.L.R.B. 333, 336 (1950).

167. Valley City Furniture Co., 110 N.L.R.B. 1589, 1594–95 (1954).

168. *Briggs-Stratton*, 336 U.S. at 264–65.

169. Boys Mkt. Inc. v. Retail Clerks, 398 U.S. 235 (1970)

170. Int'l Protective Servs., 339 N.L.R.B. 701, 702 (2003).

171. Speech that publicly "'disparages' the employer's product," for example, is disloyal and unprotected. *See* Endicott Interconnect Tech., Inc, 345 N.L.R.B. 448, 457 (2005) (citing Sierra Pub'g Co. v. NLRB, 889 F.2d 210, 216 (9th Cir. 1989). Even the use of standard curse words can extinguish rights if customers are present, NLRB v. Starbucks Corp., 679 F.3d 70, 80 (2d Cir. 2012), or if the employer has generally fired employees for intemperate language before. Gen. Motors, 369 N.L.R.B. No. 127, at *2 (2020) (stating the employer's defense to discipline that was linked to protected conduct mixed with intemperate conduct as whether "it would have taken the same action even in the absence of the Section 7 activity").

For many years, rules like these built a sense—backed by data[172]—that the strike right had effectively been zeroed out.[173] Seemingly the last few years have forced a reevaluation.[174] Workers are suddenly striking all the time over an incredible variety of issues. Hachette workers struck against publishing Woody Allen's book,[175] and so did professional softball players after the team's general manager tweeted against Black Lives Matter.[176] Facebook employees refused to work over the handling of President Trump's posts,[177] Philadelphia Inquirer writers struck to protest a "Buildings Matter, Too" headline,[178] and COVID-related stoppages are too numerous to list.[179] Walking out in protest has become an activist calling card, and—suggesting a certain cultural ascendancy—not just at work.[180]

But the "walkout" part itself proves a point. Heading for the exits is only somewhat of a tactic; the alternative is discharge. Returning in a day is not the strategic ideal; it reduces the chance of being replaced, "permanently."[181] A remedial scheme so partial as to almost goad retaliation[182] keeps the relative number of strikers small, allowing machines, tools, and operations to remain

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172. *See* JAKE ROSENFELD, WHAT UNIONS NO LONGER DO 88–90 (2014) ("Despite a labor force that has grown dramatically over the past half century, the number of work stoppages involving a thousand or more workers has plummeted.").

173. *See, e.g.*, Craig Becker, *"Better Than a Strike": Protecting New Forms of Collective Work Stoppages Under the National Labor Relations Act,* 61 U. CHI. L. REV. 351, 371 (1994) (arguing that decisional law has "virtually gutted the right to strike").

174. As Steven Greenhouse wrote in the *American Prospect*: "For years, many labor experts seemed ready to write the obituary of strikes in America . . . But then came 2018 and a startling surge of strikes in both the private and public sectors." Steven Greenhouse, *The Return of the Strike,* AM. PROSPECT (Jan. 3, 2019), https://prospect.org/power/return-strike/ [https://perma.cc/6CL7-WUD4].

175. John Williams, *Hachette Workers Protest Woody Allen Book with a Walkout*, N.Y. TIMES (Mar. 5, 2020), https://www.nytimes.com/2020/03/05/books/1882achette-woody-allen.html [https://perma.cc/QVR5-7XL9].

176. Natalie Weiner, *A Softball Team's Tweet to Trump Leads Players to Quit Mid-Series*, N.Y. TIMES (June 24, 2020), https://www.nytimes.com/2020/06/24/sports/scrap-yard-softball-anthem-tweet.html [https://perma.cc/GXU6-8DXS].

177. Sheera Frenkel, Mike Isaac, Cecilia Kang & Gabriel J.X. Dance, *Facebook Employees Stage Virtual Walkout to Protest Trump Posts,* N.Y. TIMES (June 1, 2020), https://www.nytimes.com/2020/06/01/technology/facebook-employee-protest-trump.html [https://perma.cc/R94M-2BB7].

178. Marc Tracy, *Top Editor of Philadelphia Inquirer Resigns After 'Buildings Matter' Headline*, N.Y. TIMES (June 6, 2020), https://www.nytimes.com/2020/06/06/business/media/editor-philadephia-inquirer-resigns.html [https://perma.cc/53QA-TTGL].

179. *See infra* Part III.A.3.

180. *See, e.g.*, Vivian Yee & Alan Blinder, *National School Walkout: Thousands Protest Against Gun Violence Across the U.S.*, N.Y. TIMES (Mar. 14, 2018), https://www.nytimes.com/2018/03/14/us/school-walkout.html [https://perma.cc/BW2F-JDAB]; Dennis Overbye, *For a Day, Scientists Pause Science to Confront Racism*, N.Y. TIMES (June 10, 2020), https://www.nytimes.com/2020/06/10/science/science-diversity-racism-protests.html [https://perma.cc/4PCD-GZHD] (reporting, among other protests, that scientists would "hold off on reporting any breakthroughs" and ignore email and journal duties to instead "devote the day to a close examination" of racism in science).

181. *See supra* note 164.

182. *See infra* Part I.C.3.

mostly in use. The upshot of small, short, and out-of-sight strikes is public attention and production normalcy, a balance that businesses would likely accept every time. A common executive response to a stoppage, in fact, is simply to deny its existence.[183] At Google, where 20,000 worldwide strikers could not be ignored, the search engine stayed live but then tried to co-opt the protest by officially supporting it.[184] The contemporary strike is courageous, inspiring, and increasingly common. But it is also a judicially prescribed, in-between measure: the right remains, but the coercion is lost.

Coercion is also at issue when workers pressure employers to give into contract demands, recognize their union, or urge the public or outside businesses—usually described as "neutral" or "secondary" employers—to join their cause. The NLRA allows coercion in the first setting,[185] sets a coercion stopwatch in the second,[186] and restricts it everywhere else.[187] The result, by design, is that labor's right to speak is partial and contingent in ways that would be unconstitutional if applied to any other advocate.[188] Civil rights, political, and religious groups get full-tilt coercion, while labor organizations max out somewhere between a low gear and reverse.[189]

Considering the patch-work's practical efforts sharpens the in-between coercion. Unions can, and do, lawfully engage in creative, elaborate, and even

183. Ben Penn, *Fast Food Strikes Erupt in 150 Cities, with Hundreds of Arrests, Organizers Say*, DAILY LAB. REP. (Sept. 4, 2014) [https://perma.cc/Z9VV-YX3Q?type=image] ("As in past actions, a McDonald's statement denied the existence of strikes.").

184. Kate Conger, Daisuke Wakabayashi & Katie Benner, *Google Faces Internal Backlash over Handling of Sexual Assault*, N.Y. TIMES (Oct. 31, 2018), https://www.nytimes.com/2018/10/31/technology/google-sexual-harassment-walkout.html [https://perma.cc/7KB5-363E].

185. Strikes against "primary" employers, and their incidental effects, are protected. 29 U.S.C. § 158 (b)(4)(B) (exempting "primary picketing" from other picketing proscriptions); NLRB v. Int'l Rice Milling, 341 U.S. 665, 670–71 (1951) (picketing employers at the core of a dispute are protected, even if neutral employees subsequently observe the protest line).

186. *See* 29 U.S.C. § 158(b)(7)(C) (prohibiting primary picketing with a recognitional or organizational "object" that lasts for more than 30 days, absent the filing of a representation petition).

187. *See* 29 U.S.C. § 158(b)(4)(A)–(B) (prohibiting picketing, strike inducement, and any other form of coercive pressure against employers and employees neutral to a primary dispute).

188. Cynthia Estlund, *Are Unions a Constitutional Anomaly?*, 114 MICH. L. REV. 169, 202 (2015) ("[U]nions are subject to restrictions on expression that would be unconstitutional if applied to other voluntary associations.").

189. As Catherine Fisk has nicely encapsulated:

> [B]y the late 1960s, symbolic conduct was protected speech if done by civil rights groups, but proscribable conduct if by a labor picket. Harm and inconvenience to third parties caused by picketing were necessary consequences of robust democratic debate over civil rights, but they were grounds for an injunction if the cause was labor. And, most important, some ill-defined government objective was sufficient to prohibit labor protest but insufficient to prohibit civil rights protest.

Catherine Fisk, *Is it Time for a New Free Speech Fight? Thoughts on Whether the First Amendment is Friend or Foe of Labor*, 39 BERKELEY J. EMP. & LAB. L. 253, 265 (2018).

forceful protests.[190] When workers on the Justice for Janitors (JFJ) campaign were not "surg[ing]" into glistening office lobbies "whistling, banging drums and yelling,"[191] they famously followed CEOs to their golf games.[192] But because coercive acts cannot always be identified beforehand, pressing a message aggressively can mean flirting with a booby-trapped category, the margins of which can suddenly expand or contract. Outside of picketing, the prototypical form of coercion,[193] the unlawful boundary is often described as "confrontation," itself a term so ill-defined that the law becomes circular. Courts wonder: is this kind of like picketing?[194] Conclusions are like judicial Rorschach tests, with performance art as the ink blot. Whether "[a] picket is a person"[195] or a thing remains unsettled.[196] Analyzing cases relevant to JFJ, Catherine Fisk and co-authors found deciding factors to include distinctions between "patrolling" (like picketing) versus "parading" (not like picketing), and between not just loud

190. For a roadmap of the legal regulations and analysis at play, see *SEIU, Local 525*, 329 N.L.R.B. 638, 650–651 (1999) (describing how NLRB members can come to differing conclusions regarding the presence or absence of coercion in "unwelcome" and "disruptive" protests, such as following an official home or to the "Racquet Club").

191. Sonia Nazario, *For This Union, It's War*, L.A. TIMES (Aug. 19, 1993), https://www.latimes.com/archives/la-xpm-1993-08-19-mn-25413-story.html [https://perma.cc/96EL-2EG4].

192. ROBERT GOTTLIEB, MARK VALLIANATOS, REGINA M. FREER & PETER DREIER, THE NEXT LOS ANGELES 88 (2005).

193. *See, e.g.,* 520 S. Mich. Ave. Assoc. v. Unite Here Local 1, 760 F.3d 708, 720 (7th Cir. 2014) ("[P]icketing . . . of a neutral entity is the paradigmatic case of coercive secondary activity."). *See also* Babbitt v. United Farm Workers, 442 U.S. 289, 311 n.17 (1979) ("[P]icketing is qualitatively 'different from other modes of communication.'") (quoting *Hughes v. Superior Court*, 70 S.Ct. 718, 721 (1950)); DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Const. Trades Council, 485 U.S. 568, 580 (1988) ("[P]icketing is 'a mixture of conduct and communication' and the conduct element 'often provides the most persuasive deterrent . . . .'") (quoting *NLRB v. Retail Store Emps.,* 447 U.S. 607, 619 (1980) (Stevens, J., concurring)).

194. Specifically, the question is usually posed as whether the protest activities are closer to picketing—which is coercive—or handbilling, which the Supreme Court has said is merely persuasive. *See, e.g.*, *520 S. Mich. Ave.*, 760 F.3d at 720 (calling "the central question in this case . . . whether the Union's conduct . . . is coercive, as in the sense of a . . . picket, or persuasive, as in the case of handbilling," where the "conduct alleged . . . is not satisfactorily described as either"). *See also* United Bd. of Carpenters & Joiners of Am., Loc. Union No. 1506, 355 N.L.R.B. 797, 802 (2010) ("This element of confrontation has long been central to our conception of picketing"); *Chicago Typographical Union No. 16 (Alden Press*), 151 N.L.R.B. 1666, 1669 (1965) ("One of the necessary conditions of 'picketing' is a confrontation in some form . . . .").

195. Sheet Metal Workers' Int'l Ass'n, 346 N.L.R.B. 199, 206 (2006).

196. *Compare* Verizon N.E. v. NLRB, 826 F.3d 480, 488 (D.C. Cir. 2016) ("[P]icketing . . . may . . . extend to the display of [unmonitored] stationary signs—whether in employees' cars, positioned near an entrance to a job site, or even planted in snowbanks.") *with* Verizon New England, Inc. & Int'l Bd. of Elec. Workers, Loc. 2324, 362 N.L.R.B. 222, 225 (2015) ("A necessary element of picketing is personal confrontation.").

noise but "the nature of the noise."[197] Apparently, if the public starts dancing, that's a good sign for protestors.[198]

But even then, a court's favored approach to analyzing activism can introduce surprises. In a well-known example of patrolling with music no one would groove to, a costumed Grim Reaper led coffin-carrying mock mourners "back-and-forth" in front of a hospital to "O Fortuna" and "Siegfried's Funeral March." The D.C. Circuit swerved away from the NLRB's and Eleventh Circuit's canvass of picketing's essences and into abortion clinic precedents to find the scene protected under the First Amendment.[199] This was the right analytical move but, as Charlotte Garden has discussed, also an outlier.[200] When the Trump Board's General Counsel took to calling balloons coercive,[201] the fate of one of the more standard protest tactics seemed to depend on whether other courts were willing to follow the D.C. Circuit's lead.[202] Had they not, whether union favorites like "Scabby the Rat" and "Fat Cat" would ever be seen again was impossible to predict.

And while union violations of the Act's coercion limits lead to severe penalties,[203] the same cannot be said for employer violations of virtually any of the protections provided to labor.

3. *An In-Between Right to Remedies*

Labor law does not lack for remedies. Illegal acts mandate the Board "take such affirmative action . . . as will effectuate the policies of th[e] [Act]."[204] The ambiguity is intentional. "Congress could not catalogue all the devices and

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197. Catherine L. Fisk, Daniel J.B. Mitchell & Christopher L. Erickson, *Union Representation of Immigrant Janitors in Southern California: Economic and Legal Challenges, in* ORGANIZING IMMIGRANTS: THE CHALLENGE FOR UNIONS IN CONTEMPORARY CALIFORNIA 199, 219–21 (Milkman ed., 2000).

198. In a case referenced by Fisk et al., *id.* at 220–21, a protest so loud that it "drowned out" the employer's "own music system" and so large that it blocked sidewalks nevertheless did not coerce, thanks to an audience "appreciative" of "well-known professional musicians and dancers" on a flatbed truck who "provided the gay type of music most popular in the area." Haw. Press Newspapers, Inc., 167 N.L.R.B. 1030, 1032, 1038 (1967).

199. Sheet Metal Workers' Int'l Ass'n v. NLRB, 491 F.3d 429, 438–39 (D.C. Cir. 2007) ("No court has yet determined how the Supreme Court cases dealing with protests at abortion clinics apply to the question whether a particular labor protest is coercive . . . . Here the Union's protest was consistent with the limitations upheld as constitutional—the buffer zones and the ban on confrontational conduct—in [the clinic precedents].").

200. Charlotte Garden, *Avoidance Creep*, 168 PENN. L. REV. 331, 370–71 (2020).

201. *See* Advice Memorandum from Nat'l Lab. Rel. Bd. Off. of the Gen. Couns. NLRB Advice Memorandum, Loc. 134 of Int'l Bd. of Elec. Workers, No. 13-CC-225655 (Dec. 20, 2018) (concluding that use of an inflatable cat was coercive and violated § 8(b)(4)(ii)(B)).

202. Most did. *See, e.g.,* King v. Constr. & Gen. Bldg. Laborers' Loc. 79, Laborers Int'l Union of N. Am., 393 F. Supp. 3d 181, 202 (E.D.N.Y. 2019) ("The notion that a violation of § 8(b)(4)(ii)(B) could be found . . . wherever the target of a protest disagreed with the content of the message (or, indeed, the way it is written) is untenable, and would raise serious constitutional concerns.").

203. *See, e.g.,* Fid. Interior Constr. v. Se. Carpenters Reg'l Council, 675 F.3d 1250 (11th Cir. 2012) (affirming a $1.7 million judgment for secondary picketing).

204. 29 U.S.C. § 160(c).

stratagems for circumventing the policies of the Act[,] [n]or could it define the whole gamut of remedies to effectuate those policies in an infinite variety of specific situations."[205] So it gave the agency "primary responsibility for making remedial decisions" and, on appeal, "greatest deference."[206]

Limits exist. A prime example is that while the Board must remediate, awards cannot be "punitive"—a theoretical distinction that bans penalties deterring future misconduct[207] but otherwise confuses practitioners and judges alike.[208] Nonetheless, fixes abound, from standbys like backpay, reinstatement, and cease-and-desist warnings to assorted interim and "special"[209] variations. All are designed to "restore the wronged to the position [s]he would have occupied" had the employer followed the law.[210] This is the "fundamental element of the Board's remedial approach."[211]

Unfortunately, the law's make-whole principle actually pays out in fractions. The regime routinely offers the vindicated returns between zero and something, and full satisfaction essentially never.[212] Some remedies are inherently partial, a few are largely academic, and others actively sap collective action's potential. The result is a scheme that exists somewhere between total employer impunity and total employee protection.

The partial poster child is backpay. A variety of remedial schemes might approximate wholeness for employees fired for union support. Consequential or liquidated damages might cover the increased cost of interim health insurance. Front pay could assist with a tuition bill. At the very least, backpay would secure

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205. Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 194 (1941).

206. ABF Freight Sys., Inc. v. NLRB, 510 U.S. 317, 324 (1994).

207. Republic Steel Corp. v. NLRB, 311 U.S. 7, 10–12 (1940). *See also* Bell & Howell Co. v. NLRB, 598 F.2d 136, 147 n.36 (D.C. Cir. 1979) (citing *Republic Steel Co. v. NLRB*, 61 S.Ct. 77, 85 (1940) (stating that the Board "may not justify an order solely on the ground that it will deter future violations of the Act")).

208. The Supreme Court, for one, has lamented its own rule: "It is the business of the Board to give coordinated effect to the policies of the Act. We prefer to deal with these realities and to avoid entering into the bog of logomachy . . . by debate about what is 'remedial' and what is 'punitive.'" NLRB v. Seven-Up Bottling Co., 344 U.S. 344, 348 (1953). *See also* Scott R. Haber & Craig B. Klosk, *NLRB Orders Granting Union Access to Company Property*, 68 CORNELL L. REV. 895, 907–09 (1983) (noting how various unconventional remedies are "susceptible to the charge that they are punitive in nature").

209. *See, e.g.,* Fieldcrest Cannon, Inc., 318 N.L.R.B. 470, 473 (1995) (describing "special notice and access remedies").

210. Town & Country Mfg., 136 N.L.R.B. 1022, 1029 (1962).

211. Goya Foods Fla., 356 N.L.R.B. 1461, 1462 (2011). *See also id.* ("The Supreme Court has repeatedly underscored the essential role of make-whole relief in the statutory scheme").

212. *See, e.g.,* LYNN RHINEHART & CELINE MCNICHOLAS, SHORTCHANGED—WEAK ANTI-RETALIATION PROVISIONS IN THE NATIONAL LABOR RELATIONS ACT COST WORKERS BILLIONS 3–4 (Apr. 22, 2021), https://www.epi.org/publication/shortchanged-weak-anti-retaliation-provisions-in-the-national-labor-relations-act-cost-workers-billions/ [https://perma.cc/4QBB-C5F3] ("The cumulative effect of these three shortcomings—no penalties or compensatory damages, no private right of action, and no preliminary reinstatement—is that workers asserting their rights under the NLRA are in a far worse position than workers alleging illegal retaliation for exercising their rights under other labor and employment laws and other whistleblower protection laws.").

whatever would have been earned but for the firing. The Board does none of this. Backpay exists, but the NLRB version is "net," subtracting any wages earned in the interim, including even *un*earned wages arising out of an ill-performed new job search.[213] Where payouts are less than what the employer would have otherwise spent on wages, the remedy actually incentivizes the misconduct.[214]

But at least the Board's backpay powers are regularly used.[215] Other remedies sit idle. Conspicuously, these tend to be the least partial, most whole correctives. In 1969, the Supreme Court confirmed that the proper remedy for an employer's "campaign" of unfair labor practices that cause an election loss or make "the holding of a fair [rerun] election unlikely" is to shut down the mischief by certifying the union and ordering bargaining.[216] The so-called "*Gissel* bargaining order," as it has come to be known, was depicted as somewhat mundane, befitting "less extraordinary cases marked by less pervasive" illegalities where "employee sentiment . . . would, on balance, be better protected by a bargaining order" than something else.[217] The really "outrageous" cases, the Court advised, might require even more liberal use of the orders, including situations where the union could not prove a majority of employees had ever supported it.[218] Neither scenario took. The agency ignored the latter suggestion for over a decade until four circuits asked the Board to take it

213. Fla. Tile Co., 310 N.L.R.B. 609, 609 (1993) ("Facts the employer may attempt to establish [to reduce the "gross" backpay amount] may relate to interim earnings or to a willful loss of interim earnings . . . . A discriminatee that limits his/her work search for personal or no valid reasons that excludes jobs for which the discriminatee is otherwise qualified may create a willful loss of earnings."). As Paul Weiler has argued, it is especially strange to apply a no-fault contract mitigation principle to "a labor statute that bases liability on a showing of subjective unlawful intent." Weiler, *supra* note 126, at 1789 n.70.

214. While the Board has recently added reimbursement of "search-for-work expenses" to backpay calculations, King Soopers, Inc., 364 N.L.R.B. No. 93, *7–11 (2016), it has never been easier for employers to reduce the overall award. *See* Grosvenor Resort, 350 N.L.R.B. 1197, 1199–1200 (2007) (prohibiting backpay from the date of discharge where "a discriminatee fail[s] to commence a [new job] search at some point within" two weeks); St. George Warehouse, 351 N.L.R.B. 961, 961 (2007) (shifting the burden of proving a reasonable search to the General Counsel and discriminatee). Overall, as Human Rights Watch concluded: "Many employers have come to view . . . back pay for workers fired because of union activity as a routine cost of doing business, well worth it to get rid of organizing leaders and derail workers' organizing efforts." *See* Compa, *supra* note 145, at 10.

215. In 2019, the Board recovered around $55 million in backpay. *Monetary Remedies*, NLRB, https://www.nlrb.gov/reports/nlrb-case-activity-reports/unfair-labor-practice-cases/remedies-achieved/monetary-remedies [https://perma.cc/QG74-47RM].

216. NLRB v. Gissel Packing Co., 395 U.S. 575, 610–16 (1969).

217. *Id.* at 614–15. The Court went so far as to say that a bargaining order "should issue" merely where "the possibility of erasing the effects of past practices . . . by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected." *Id.*

218. *Id.* at 613–14. Whether the Court's reference to this scenario qualifies as dicta became a matter of scholarly debate. Terry A. Bethel & Catherine Melfi, *The Failure of* Gissel *Bargaining Orders*, 14 HOFSTRA LAB. L.J. 423, 433 (1997).

seriously.[219] In 1982, the Board finally identified its first outrageous case,[220] but when a split D.C. Circuit refused to enforce the order in 1983,[221] the agency folded and gave up the idea for good.[222] Standard orders, where a union can prove it once had majority support, have since achieved a unicorn-like status.[223]

The Board also has statutory authority to seek interim injunctive relief, often couched as a tool to "preserve" the relevance of its other, much slower remedies.[224] Section "10(j) injunctions" are strong medicine and "highly effective" in combatting serious misconduct, like firings that, left to sit, might "nip [organizing] in the bud" by frightening the others who remain.[225] The legal standard, though, is nothing special, highlighting the tool's crucial misfeature: 10(j) injunctions, like *Gissel* orders, are discretionary.[226] And if bargaining orders are the law's unicorns, 10(j) injunctions are its bears, hibernating through Republican administrations, rousing in Democratic ones. The "almost complete cessation of the practice of seeking injunctions" has been called "one of the most dramatic reversals of policy between the Bush II Board era and the Clinton Board

219. The Third Circuit went furthest, confirming the Board's authority to issue a bargaining order "in the absence of a card majority and election victory" and remanding a case for the agency to consider it. United Dairy Farmers Coop. Ass'n v. NLRB, 633 F.2d 1054, 1069 (3d Cir. 1980). The Tenth, Fifth, and Fourth Circuits had previously raised the possibility but had not ruled on it. Michael Weiner, *Can the NLRB Deter ULPs?*, 52 UCLA L. REV. 1579, 1605 n.176 (2005).

220. Conair Corp., 261 N.L.R.B. 1189 (1982).

221. Conair Corp. v. NLRB, 721 F.2d 1355, 1385 (D.C. Cir. 1983).

222. Gourmet Foods Inc., 270 N.L.R.B. 578, 583 (1984).

223. Between 1979 and 1982, the Board averaged forty-four *Gissel* orders a year, a total researchers described as "minute" relative to its total case intake. Bethel & Melfi, *supra* note 218, at 437. After hovering between single and double digits between 1987 and 1996, Peter Leff, *Failing to Give the Board Its Due: The Lack of Deference Afforded by the Appellate Courts in* Gissel *Bargaining Order Cases*, 18 LAB. LAW. 93, 115 (2002), it dropped to three in 2007. Henry Drummonds, *Beyond the EFCA*, 19 CORNELL J.L. & PUB. POL'Y 83, 99 n.67 (2009). The agency's Performance and Accountability Reports do not currently list annual totals. *See Performance and Accountability*, NLRB, https://www.nlrb.gov/reports/agency-performance-reports/performance-and-accountability [https://perma.cc/P2U8-NN6J]. A charitable view of the decline includes noted hostility to bargaining orders in the courts of appeals, Leff, *supra*, at 111–15, as well as scholarship suggesting that the longer-term impact of *Gissel* orders on organizing and bargaining is dismal. *See* Bethel & Melfi, *supra* note 218, at 437–38, 452 (finding only 29 of 137 *Gissel* orders resulted in a contract and calling the remedy "an abject failure"). A former Chair has argued the "regular refusal to issue *Gissel* bargaining orders" is really a lack of administrative will. Wilma B. Liebman, *Decline and Disenchantment: Reflections on the Aging of the NLRB,* 28 BERKELEY J. EMP. & LAB. L. 569, 579–88 (2007).

224. *See, e.g.*, Ahearn v. Jackson Hosp. Corp., 351 F.3d 226, 239 (6th Cir. 2003) ("[T]he relief to be granted is only that reasonably necessary to preserve the ultimate remedial power of the Board and is not to be a substitute for the exercise of that power."). *See also* Fisk & Malamud, *supra* note 32, at 2028 ("[T]he slowness of the administrative process . . . creates a huge incentive for employers to deliberately violate the statute knowing that they will reap the benefit of illegal conduct for a long time . . . . [S]eek[ing] interim injunctive relief . . . remove[s] the incentive for delay.").

225. NLRB Memorandum GC 10-07, Effective Section 10(j) Remedies, (Sept. 30, 2010).

226. Section 10(j) states that the "Board shall have power . . . to petition any district court of the United States . . . for appropriate temporary relief" and instructs courts to grant the petition "as it deems just and proper." 29 U.S.C. 160(j). Courts differ over the meaning of "just and proper," but even the narrower standard is simply the analysis used for injunctions generally. William K. Briggs, *Deconstructing 'Just and Proper,'* 110 MICH. L. REV. 127, 129–30 (2011).

era."[227] Obama-era injunction authorizations ranged from twenty-eight to fifty-nine.[228] In 2019, the Trump Board approved thirteen.[229]

But the most remarkable aspect of the system is how make-whole relief at times contracts the whole. Instead of expanding or merely refilling the reservoir of union interest, remedies can maintain or even worsen a drought, putting the probability of fulfilling whatever collective goals once existed further out of reach. The prime example is reinstatement. Returning an unlawfully discharged employee can have powerful compensatory effects. The "very presence of the discriminatee at [her] old job," a decision once noted, "reassures others that the law protects their right to engage in union activity and that, if their rights are infringed, the Board is able to come to their aid."[230] And homecomings do seem to spur a collective boost. One study found that when discharged employees returned to work before an election, union win rates increased by 13 percent relative to campaigns without firings at all.[231]

But the opposite appears also to be true. Post-discharge vanishings depress the collective. The same study found that when wrongfully terminated workers were not reinstated before elections, the win rate plunged 19 percent, from 58 percent to 39 percent, well below campaigns absent firings.[232] Similarly, a criticism of *Gissel* bargaining orders is that most of the time, workers still are unable to successfully win a contract, and the union collapses anyway.[233] But when workers are fired and not reinstated, agreements are signed hardly ever.[234]

227. Fisk & Malamud, *supra* note 32, at 2031. *See also* Christopher Ruiz Cameron, Jeffrey S. Brand, Ellen Dannin, Katherine Van Wezel Stone, Jonathan Hiatt & William B. Gould IV, *At Age Seventy, Should the National Labor Relations Act Be Retired: Proceedings of the 2005 Annual Meeting, Association of American Law Schools Section on Labor Relations and Employment Law*, 9 EMP. RTS. & EMP. POL'Y J. 121, 143 (2005) ("Over the past three years this [Bush II] Board has authorized half as many 10(j) injunctions as were authorized in just one year in the 1990s[.]").

228. NLRB, PERFORMANCE AND ACCOUNTABILITY REPORT 48 (2011), https://www.nlrb.gov/sites/default/files/attachments/pages/node-130/nlrb2011par.pdf [https://perma.cc/9G6N-WVFC]; NLRB, PERFORMANCE AND ACCOUNTABILITY REPORT 41 (2010), https://www.nlrb.gov/sites/default/files/attachments/pages/node-130/nlrb2010par.pdf [https://perma.cc/P2U8-NN6J].

229. NLRB, PERFORMANCE AND ACCOUNTABILITY REPORT 74 (2019), https://www.nlrb.gov/sites/default/files/attachments/pages/node-130/nlrb-par-2019-design-508.pdf [https://perma.cc/EM75-47CP].

230. A.P.R.A. Fuel Oil Buyers Grp., Inc., 320 N.L.R.B. 408, 418 (1995) (Browning, M., dissenting in part).

231. Benjamin I. Sachs, *Law, Organizing, and Status Quo Vulnerability,* 96 TEX. L. REV. 351, 371–72 (2017) (citing KATE BRONFENBRENNER, UNEASY TERRAIN: THE IMPACT OF CAPITAL MOBILITY ON WORKERS, WAGES, AND UNION ORGANIZING tbls. 8–9 (2000)).

232. BRONFENBRENNER, *supra* note 231, at tbl. 8.

233. *Supra* note 223.

234. Benjamin W. Wolkinson, Nancy B. Hanslowe & Shlomo Sperka, *The Remedial Efficacy of* Gissel *Bargaining Orders*, 10 INDUS. RELS. L.J. 509, 516 (1989) ("Unions obtained contracts in seven of sixteen cases (44%) where all or some of the discriminatees returned to work, only four of sixteen cases (25%) where all illegally discharged employees rejected employer reinstatement offers.").

And, in fact, most workers offered reinstatement reject it.[235] Most cite fear of continued retaliation—itself suggestive of a less-than-full remedial system—but shocking delays also play a role.[236] In 2019, an appeal-committed employer could prevent a final judgment for over 1,200 days—on average.[237] Even setting aside the necessities of food and housing, the NLRB's backpay mitigation duty also all but ensures the victim has moved to a different job, and maybe a different town.[238]

Finally, tools commonly perceived as weak are better thought of as demoralizing. As Ben Sachs has shown, a remedy best facilitates collective action where it "helps convince workers that management and its preferred system of authority relations is vulnerable."[239] In this context, consider the Board's most universal curative, the posting of notices informing employees of their rights and the employer's renewed commitment to respecting them.[240] There is little evidence that postings—vague, "shrouded in baroque legalese," and sandwiched between bulletin board or in-box clutter—are read and understood, or, if so, believed.[241] "Not once," a union-side attorney has remarked, "has an in-plant activist, discriminatee or other employee commented to me that she felt reassured by a posting notice."[242] So too the solutions for unlawful bargaining or election conduct: more bargaining and more elections,

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235. *Id.* (citing studies). *See also* Brent Garren, *When the Solution is the Problem: NLRB Remedies and Organizing Drives*, LAB. L.J. 76, 79 (2000). Bronfenbrenner found that unlawfully fired workers were reinstated before elections in only 12 percent of campaigns. BRONFENBRENNER, *supra* note 231, at 48–49.

236. Garren, *supra* note 235, at 80 (citing studies finding "fear of company retaliation as the largest reason for not accepting a reinstatement offer" and that of those reinstated, 86.9 percent "left within the first year," with 65.3 percent reporting "unfair company treatment for their reason for leaving").

237. It takes about 150 days for the Board to issue a complaint and have it resolved by an administrative law judge. NLRB, PERFORMANCE AND ACCOUNTABILITY REPORT 56–57 (2019), https://www.nlrb.gov/sites/default/files/attachments/pages/node-130/nlrb-par-2019-design-508.pdf [https://perma.cc/EM75-47CP]. The Board resolves any appeal, on average, in 500 days. *Id* at 56. Because orders are not self-enforcing, a Board decision can be further appealed to the federal courts, which adds, on average, 540 days. *Id* at 57. The Seventh Circuit once called the NLRB the "Rip Van Winkle of administrative agencies." NLRB v. Thill, 980 F.2d 1137, 1142 (7th Cir. 1992).

238. *See* Clyde Summers, *Effective Remedies for Employment Rights: Preliminary Guidelines and Proposals*, 141 U. PA. L. REV. 457, 477–78 (1992) ("93% of those offered reinstatement within two weeks accepted it, but only 5% of those offered reinstatement after six months returned to their old jobs.").

239. Sachs, *supra* note 231, at 354. Sachs draws heavily from political process theory, where the perceived vulnerability of an opponent is central to group mobilization. *Id.* at 357. As he puts it: "If individuals believe that the current regime is invincible, that there is no prospect for change, then they are unlikely to participate in a collective effort to make such change." *Id.* at 358.

240. *See* John W. Teeter, Jr., *Fair Notice: Assuring Victims of Unfair Labor Practices that Their Rights Will Be Respected*, 63 UMKC L. REV. 1, 2–3 (1994) (describing the history of notices as "a common feature of our labor laws").

241. Thomas C. Barnes, Note, *Making the Bird Sing: Remedial Notice Reading Requirements and the Efficacy of NLRB Remedies*, 36 BERKELEY J. EMP. & LAB. L. 351, 358–60 (2015).

242. Garren*, supra* note 235, at 78.

where for decades "more" has equated to diminished probabilities of success.[243] If beliefs about the integrity of management's defenses are linked to workers' views on organizing, these fixes are, at best, unproductive and, at worst, enervating.

II.
LIVING ON THE EDGE

So far, I have argued that in at least three major forms, labor law exists in states of in-between. Many rules exist between past and future precedents. Coverage can depend on where workers teeter between artificially split identities. The Act provides unionization, activism, and remedial rights, but only at a level between nothing and something. None of this is good. But labor law is already heavily criticized,[244] and offering up a fresh critique is not my primary point.

The rest of the Article is focused on downstream consequences—the second-, third-, or even fourth-order effects of legal middles and intermediacies on institutions and actors. Because to exist is to wrestle with phases, approach edges, confront transitions, and deal with flux, and many—from anthropologists to organization theorists, clinicians, and self-help populists—have concluded that midpoints are rife with possibilities, but also ruts. Here, I summarize some of this work, with an eye to my ultimate question: how does legal in-betweenness impact the labor movement?

A. Victor Turner and the Liminal Experience

In-betweenness takes its most obvious academic cues from cultural anthropologist Victor Turner, whose study of preindustrial societies led to an interest in the cultural power of stages.[245] Turner's focus was rituals, chiefly rites of passage where participants transition between social positions, like from being

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243. Section 8(a)(5) imposed a good faith bargaining requirement, but since the Board cannot force agreement and will not impose financial penalties, the remedy for bad faith is simply for employers to try again, this time with good faith. Catherine L. Fisk & Adam R. Pulver, *First Contract Arbitration and the Employee Free Choice Act*, 70 LA. L. REV. 47, 56 (2009). Unsurprisingly, a majority of newly unionized workers are still waiting for a contract after a year. Ross Eisenbrey, Economic Snapshot, *Employers Can Stall First Union Contract for Years*, ECON. POL'Y INST. (May 20, 2009), https://www.epi.org/publication/snapshot_20090520/ [https://perma.cc/XU8M-PRCK]. After three years, a quarter are still waiting. *Id.* Similarly, the standard remedy for election misconduct is another election. *See, e.g.*, Mental Health Ass'n, 356 N.L.R.B. 1220, 1220 (2011). Depending on the misconduct, win rates in the second round range from 0 to 23 percent. Gordon Lafer, NEITHER FREE NOR FAIR: THE SUBVERSION OF DEMOCRACY UNDER NATIONAL LABOR RELATIONS BOARD ELECTIONS 35 n.194, 35–37 (July 2007), https://www.jwj.org/wp-content/uploads/2014/04/Neither-Free-Nor-Fair-FINAL.pdf [https://perma.cc/E9FN-LT54].

244. Withering critiques span the decades. *See, e.g.,* Weiler, *supra* note 126; Michael H. Gottesman, *In Despair, Starting Over: Imagining a Labor Law for Unorganized Workers*, 69 CHI.-KENT L. REV. 59 (1993); Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527 (2002); Kate Andrias, *The New Labor Law*, 126 YALE L.J. 2, 9–10 (2016).

245. Bohannan & Glazer, *supra* note 12, at 501–02.

a child to an adult.[246] He identified a three-part process where individuals or groups first ceremonially "detach[] . . . from either an earlier fixed point in the social structure or from an established set of cultural conditions[.]"[247] Separated from the "familiar[,]" the "routine temporal order," and the ordinary "structures of moral obligations and social ties," participants slip into a "liminal," or in-between, space.[248] In this second stage, they are "'no longer' and simultaneously also 'not yet.'"[249] In Turner's famous formulation, they are "betwixt and between."[250] The "passage" completes in the final phase: the ritual concludes and the "passenger . . . reenters the social structure," sometimes with a new status, sometimes not, but always changed.[251]

The in-between, liminal stage became the most studied and, for Turner, the most resonant.[252] Being separated, even momentarily, from the familiar generates "an instant of pure potentiality."[253] Turner called "the essence of liminality" its "release from normal constraints,"[254] capturing "the mood of maybe, might-be, as-if, hypothesis, fantasy, conjecture, [and] desire."[255] What results is like a conversation between "actuality and possibility" that, as one scholar puts it, "makes available new options for experience and relation that are not possible, or desired, within the constraints of established, conventional order."[256]

The options are meaningful. When individuals "settl[e] back into the social structure" in stage three,[257] the in-between experience survives as bedrock for

246. *See id.*

247. Turner, *supra* note 10, at 232.

248. Guobin Yang, *The Liminal Effects of Social Movements: Red Guards and the Transformation of Identity*, 15 SOCIO. F. 379, 383 (2000). *See also* Turner, *supra* note 10, at 232.

249. Harry Wels, Kees van der Waal, Andrew Spiegel & Frans Kamsteeg, *Victor Turner and Liminality: An Introduction*, 34 ANTHROPOLOGY S. AFR. 1, 1 (2011).

250. *Id.* at 273 ("The intervening liminal phase is thus betwixt and between the categories of ordinary social life.").

251. TURNER, *supra* note 10, at 232. *See also id.* at 259-60 ("After h[er] immersion in the depths of liminality—very frequently symbolized in ritual and myth as a grave that is also a womb—after this profound experience of humiliation and humility . . . [the individual] can surely never again be quite so parochial, so particularistic, in h[er] social loyalties.").

252. Turner actually borrowed the term from French ethnographer Arnold van Gennep, who, in Turner's words, "never followed up the implications of his discovery." Robert Daly, *Liminality and Fiction in Cooper, Hawthorne, Cather, and Fitzgerald,* in VICTOR TURNER AND THE CONSTRUCTION OF CULTURAL CRITICISM: BETWEEN LITERATURE AND ANTHROPOLOGY 70, 71, 168 (Kathleen M. Ashley ed., 1990).

253. VICTOR TURNER, PROCESS, PERFORMANCE AND PILGRIMAGE: A STUDY IN COMPARATIVE SYMBOLOGY 41 (1979).

254. VICTOR TURNER, ON THE EDGE OF THE BUSH: ANTHROPOLOGY AS EXPERIENCE 160 (1985).

255. *Id.* at 295.

256. Sharon Rowe, *Modern Sports: Liminal Ritual or Liminoid Leisure*? in VICTOR TURNER AND CONTEMPORARY CULTURAL PERFORMANCE 127, 129–30 (Graham St. John ed. 2008) [hereinafter CONTEMPORARY CULTURAL PERFORMANCE].

257. Yang, *supra* note 248, at 383.

"self-reflection" and, in time, the collective's "creative self-renewal."[258] In this way, "liminality becomes a kind of dynamic core within which cultures produce, reproduce, and store possibilities of social action and being."[259] Society owes its social and ideological "direction," in other words, to aggregated encounters with betweens.[260]

Turner labeled the engine of betweenness "communitas,"[261] analogizing to the "collective human bond" that undergirds "the ideal notion of 'community.'"[262] Where communitas is sparked, camaraderie is immediate.[263] So too a social leveling. Status, role, sex, age, and other sociocultural differences fall away, replaced with "a flash of mutual understanding on the existential level" and a "'gut' understanding of synchronicity."[264]

Turner was most interested in institutionalized communitas, but friendships with soldiers as a conscientious objector in WWII[265] and structural reversals in classic literature, from Huck and Jim rafting the Mississippi to the Sermon on the Mount,[266] convinced him that communitas was "essentially a human social need" that could be "spontaneous" or "self-generating."[267] Hippies, Franciscan monks, and even Woodstock attendees, for example, could be seen as "voluntary outsiders" and "aspirants to pure communitas."[268] For this reason, it is unsurprising that if liminal studies arose with ritualistic middles, it didn't stay there. Turner himself once annotated "some Haight-Ashbury literature" on rock-

258. Rowe, *supra* note 256, at 129.

259. *Id.* at 130. *See also* Bohannan & Glazer, *supra* note 12, at 502 (defining "social action" as cultural movement "towards the attainment of [the] utopian goal").

260. Bohannan & Glazer, *supra* note 12, at 502-503.

261. To be specific, liminality "develops communitas," *id.* at 502, and "[e]ventually, ideological communitas is assimilated and subsumed by the social structure and broader ideological foundations of the larger society." Paul G. Letkemann, *The Office Workplace: Communitas and Hierarchical Social Structures,* 44 ANTHROPOLOGICA 257, 257–58 (2002).

262. Letkemann, *supra* note 261, at 257. Turner elsewhere suggested that communitas could be "religiously equated with love" or "Edenic" relations. Turner, *supra* note 10, at 266.

263. Graham St. John, *Victor Turner and Contemporary Cultural Performance: An Introduction* in VICTOR TURNER AND CONTEMPORARY CULTURAL PERFORMANCE 1, 7 (Graham St. John ed. 2008).

264. VICTOR TURNER, FROM RITUAL TO THEATRE: THE HUMAN SERIOUSNESS OF PLAY 48 (1982).

265. VICTOR TURNER, REVELATION AND DIVINATION IN NDEMBU RITUAL 21(1975) (calling relationships made as a "noncombatant . . . in a British bomb-disposal unit" the "empirical base of the concept").

266. Edith Turner, *The Literary Roots of Victor Turner's Anthropology*, *in* VICTOR TURNER AND THE CONSTRUCTION OF CULTURAL CRITICISM: BETWEEN LITERATURE AND ANTHROPOLOGY 163, 168 (Kathleen M. Ashley ed., 1990)

267. TURNER, *supra* note 10, at 243–44.

268. *Id.* at 242–45. Turner's writings attest to the expansiveness of liminality and communitas by disclaiming interest in some of its many forms:

> "I am here referring not to such spontaneous behavioral expressions of communitas as the kind of good fellowship one finds in many secular marginal and transitional social situations, such as an English pub, a 'good' party as distinct from a 'stiff' party, the 'eight-seventeen A.M. club' on a suburban commuters' train, a group of passengers at play on an ocean voyage, or, to speak more seriously, at some religious meetings, a 'sit-in,' 'love-in,' [or] 'be-in. . . .'" *Id.* at 242.

and-roll to highlight the genre's in-between qualities,[269] and late in his career tried—some would say struggled—to theoretically account for liminality's tempting application to contemporary, non-obviously ritualistic practices.[270]

The post-Turner wave of academics have had no such problems. If Turner was "not very strict" about liminality's instantiations, modern scholars are downright libertine. In-betweenness has been considered in individual, group, societal, and civilization settings across moments, weeks, months, years, generations, and centuries.[271] It has been used as a lens to interrogate in-between statuses and states like disability,[272] grief,[273] social movements,[274] backpacking adventures,[275] college football tailgates,[276] raves,[277] and Disney World.[278] In these more "everyday" instances, conceptions of communitas's inner workings

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269. *Id.* at 262. An example: "[This shows] [t]hat rock is a vital agent in breaking down absolute and arbitrary distinctions [note: the expression of communitas's power of dissolving structural divisions]." *Id.*

270. As one scholar has noted, Turner initially seemed to "restrict the concept of liminality to . . . tribal contexts, warning against broader application . . . [y]et much of his most creative work involves extending and transforming the concept." Sharon Rowe, *Modern Sports: Liminal Ritual or Liminoid Leisure*, 12 JOURNAL OF RITUAL STUDIES 47, 48 (1998). His attempt to square liminality, traditionally defined, with its "functional equivalents" in other contexts led him to coin the term "liminoid." *Id.* at 49. Liminoid tends to describe transitional or in-between phenomena separate and apart from the "cohesive social tapestry" at play in traditional rituals. *Id.* Liminoid things may be "distinct arts or modes of personal expression, created and chosen by individuals according to taste." *Id.* Unlike religiously or culturally mandated rituals, they are thus "voluntarily chosen" and most easily spotted in leisure activities, like theater, sports, and entertainment. *Id.* at 49. Turner himself was never completely satisfied with the distinction, stating he failed to "make more precise these crude, almost medieval maps I have been unrolling of the obscure liminal and liminoid regions which lie around our comfortable village of the sociologically known, proven, tried, and tested." Turner, *supra* note 253, at 55. Differences between the two are "uncertain[]" or "speculative" at best, and "problematic," St. John, *supra* note 263, at 9, or "unsatisfactory" at worst. MARY JO DEEGAN, AMERICAN RITUAL DRAMAS: SOCIAL RULES AND CULTURAL MEANINGS 10 (1989). For simplicity's sake, I will use "liminality" throughout, and, like many scholars, I am interested less in nomenclature than the "wider social values" and claims at stake in threshold or transitional settings. *See, e.g.,* NICK COULDRY, MEDIA RITUALS: A CRITICAL APPROACH 34 (2003). *See also* Rowe, *supra* note 256, at 129 (arguing "there is no need to distinguish liminal and liminoid").

271. BJØRN THOMASSEN, LIMINALITY AND THE MODERN: LIVING THROUGH THE IN-BETWEEN 89–90 (2014).

272. Jeffrey Willett & Mary Jo Deegan, *Liminality and Disability: Rites of Passage and Community in Hypermodern Society,* 21 DISABILITY STUDS. Q. 137 (2001); Margi Nowak, *Dramas, Fields, and 'Appropriate Education:' The Ritual Process, Contestation, and Communitas for Parents of Special-Needs Children, in* VICTOR TURNER AND CONTEMPORARY CULTURAL PERFORMANCE, *supra* note 263, at 258.

273. Philip Browning Helsel, *Liminality in Death Care: The Grief-Work of Pastors,* 63 J. PASTORAL CARE & COUNSELING 1 (2009).

274. Yang, *supra* note 248, at 384-85.

275. Amie Matthews, *Backpacking as a Contemporary Rite of Passage: Victor Turner and Youth Travel Practices, in* CONTEMPORARY CULTURAL PERFORMANCE, *supra* note 263, at 174, 175.

276. Mary Jo Deegan & Michael Stein, *The Big Red Dream Machine: Nebraska Football, in* MARY JO DEEGAN, AMERICAN RITUAL DRAMAS, *supra* note 270, at 77.

277. Graham St. John, *Trance Tribes and Dance Vibes: Victor Turner and Electronic Dance Music Culture,* IN CONTEMPORARY CULTURAL PERFORMANCE, *supra* note 263, at 149.

278. Alexander Moore, *Walt Disney World: Bounded Ritual Space and the Playful Pilgrimage Center*, 53 ANTHROPOLOGICAL Q. 207, 208 (1980).

are relaxed. The euphoria of a three-and-a-half hour Springsteen show may fill the crowd with an overwhelming "sense of shared experience, belief, and purpose," evoking even a genuine consciousness of "equality," but it's temporary and probably starts to dissipate on the ride home.[279] Sex, race, ability, class, and other structural positionings are not actually erased.[280] The concession helps extend research[281] to settings like a London hair salon, where management's hierarchical authority cannot—even in the "formal" liminal space of the breakroom—be escaped, but casual thresholds like bathrooms, laundry rooms, and doorways nevertheless spark creative banter, relationship building, and other marks of communitas.[282]

Yet the democratization has also led to liminality's most common criticism: if in-betweenness is everywhere, isn't it also nowhere?[283] But the very fact that "liminal" makes appearances in the *New York Times*, *Washington Post*, and SATs suggests the more important point.[284] Something about margins, limbos, transitions, and intermediacies is core to the psychology and development of individuals and, at times, groups. *How*, exactly, is increasingly playing out beyond the academy.

B. Liminality as Opportunity: Personal, Institutional, and Social Progress

Even if Turner's sense of liminality has not quite become the "household" term that it is for cultural anthropologists,[285] observational studies on life and organizational betweenness reveal a conceptual symmetry. In a large interview study, writer Bruce Feiler found that those who've experienced a job loss, divorce, or serious illness tend to describe the fallout in three stages, with the

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279. Letkemann, *supra* note 261, at 258.

280. *Id.*

281. Paul Letkemann and others contended the concept "is better understood as one of many approaches or discourses *about* an experience, rather than constituting an empirical description *of it*." *Id.* at 259. This allows "for the possibility that differentiating social structure can facilitate communitas," as opposed to communitas being, by definition, "antithetical" to the prevailing structure. *Id.* at 267.

282. Harriet Shortt, *Liminality, Space and the Importance of Transitory Dwelling Places at Work*, 68 HUM. RELS. 633, 646–52 (2015). While the staffroom brought forced interactions and, for junior employees, continued work answering phones, a relatively new hire described the laundry room this way: "[W]e fold all the towels in there like we're supposed to and chat whilst we do it and then we basically throw them all on the floor so we can start folding again so we get more time to talk . . . !" *Id.* at 647–49.

283. St. John, *supra* note 263, at 12-13. *See also* Wels et al., *supra* note 249, at 1 ("[Turner's] imprecision in his use of the term is exactly what authors . . . dislike about the concept—because in a sense it is one where 'anything goes.'").

284. Maeve Maddox, "*Liminal" is Not a "Fancy Word*," Daily Writing Tips, https://www.dailywritingtips.com/liminal-is-not-a-fancy-word/ [https://perma.cc/NY2Z-DJ6N].

285. Wels et al., *supra* note 249, at 3.

transformative action in the middle.[286] Soon after the event, nearly eight in ten people report turning to "[r]itualistic gestures" like tattoos, retreats, clutter purges, or skydiving as symbolic announcements that change has taken root.[287] Then comes the "messy middle," where old routines, expectations, traits, or dreams are "shed" or replaced, commonly with creative acts or acts of creation. A parent's death prompts ballet lessons or maybe a writing project. In time, people may report that their identities have changed in some valuable way, as if a threshold has passed.[288]

Of course, in any individual case the progression is unlikely to feel so tidy. Nor, in societies that do not normalize deaths and rebirths for the living, are productive internal changes assured.[289] For those reasons, individuals and organizations increasingly view any betweenness benefits as a choice, as something to be captured.[290] Consultants help "people and organizations to fail intelligently"[291] by capturing the powers and possibilities of being between an ending and a new beginning. In Silicon Valley, today's insolvency can be tomorrow's "calling card," the mere preface to a future success story that, in its middle chapters, gets really inspiring.[292] Amazon, Comcast, and Microsoft now sponsor "FailCon," which celebrates flops.[293]

But if there is a mass market evangel for the personal and institutional powers of the uncertain in-between, it is researcher and author Brené Brown, who has effectively brought liminality to Netflix. Her basic premise—in her streaming special, "The Call to Courage"; podcasts; eponymous movie

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286. BRUCE FEILER, LIFE IS IN THE TRANSITIONS: MASTERING CHANGE AT ANY AGE 147 (2020) ("My names for these three phases are *the long goodbye, the messy middle*, and *the new beginning*."). *See also* Bruce Feiler, *Feeling Stuck? Five Tips for Managing Life Transitions*, N.Y. TIMES (July 16, 2020), https://www.nytimes.com/2020/07/16/well/mind/managing-life-transitions.html [https://perma.cc/K36H-3KPZ] ("For starters, transitions have three phases. I call them 'the long goodbye,' in which you mourn the old you; 'the messy middle,' in which you shed habits and create new ones; and 'the new beginning,' in which you unveil your fresh self.") [hereinafter Feiler, *Feeling Stuck?*].

287. Feiler, *Feeling Stuck?*, *supra* note 286.

288. *Id.*

289. WILLIAM BRIDGES, TRANSITIONS: MAKING SENSE OF LIFE'S CHANGES xiii-xiv (2004).

290. This is commonly depicted as the difference between "change," which is situational, factual, and often linked to external factors, and "transition," which is psychological, internal, and voluntary. WILLIAM BRIDGES, MANAGING TRANSITIONS: MAKING THE MOST OF CHANGE 3–6 (1991) [hereinafter MANAGING TRANSITIONS]. *See also* Feiler, *Feeling Stuck?*, *supra* note 286 ("A lifequake may be voluntary (we leave a bad marriage, start a new enterprise) or involuntary (we get laid off, become ill), but the transition must be voluntary. We must choose to take the steps to go through the process of turning our fear and anxiety into renewal and growth.").

291. Fail Forward, Goodbye Fear of Failure, https://failforward.org [https://perma.cc/NS4C-LDXR].

292. Claire Martin, *Wearing Your Failures on Your Sleeve,* N.Y. TIMES (Nov. 8, 2014), https://www.nytimes.com/2014/11/09/business/wearing-your-failures-on-your-sleeve.html [https://perma.cc/KRG9-R87A].

293. *Id.* The international development community has "Fail Festival," which organizes "crash and burn parties" to "celebrat[e]" collapse as a "mark of leadership, innovation, and risk-taking." Fail Festival, http://failfestival.org [https://perma.cc/S3P7-EGGA].

appearances; books; and one of the most-viewed TED talks of all-time—is that joy, belonging, fulfillment, stability, and love require a headlong plunge into our deepest vulnerabilities.[294] Hence, that need for courage.

For Brown, identifying relevant vulnerabilities is as simple as cataloging the life events we would just as soon forget—that is to say, our most painful in-betweens. [295] Hits to self-worth, from major emotional wounds, like uncovering an affair or going bankrupt, to relatively minor scratches, like tripping on the dancefloor, cast us from calm mental waters to rough psychic seas.[296] Brown has staked her career on unpacking these perilous, but potentially productive, in-between moments. The risk is not drowning. It's grabbing onto the life raft and floating to the other side too quickly. A hard-wired "intolerance for uncertainty" pushes us to come up with an intellectual narrative that makes sense of the situation.[297] And the sooner the better. By clearing up ambiguities, tying off loose ends, and mirroring old insights, a quick accounting can make a humiliating episode start to feel almost logical—like an "aha moment" for hurt.[298]

But Brown cautions that the standard account probably isn't true.[299] Our initial data is limited and lends itself to conspiracies and confabulations that, because they can explain, can also console.[300] Cognitive pain's quick fix is certitude, not accuracy, and while that most accessible story saves us in the moment, it can also turn into a seductive, but misleading, everyday default.[301] The most familiar shore, it turns out, is also the least fulfilling.[302]

So, in the in-between, post-trauma period, Brown preaches an unwinding to discover the deeper—and truer—retelling. Between the hurt (what Brown calls the "Reckoning") and the eventual healing (what Brown calls the "Revolution") is a time to take time (what Brown calls the "Rumble").[303] Specifically, it is a time to "reality-check these narratives."[304] Navigating this intermediate stage takes a certain energy unlocked most consistently by creativity, usually unpolished, visceral, free-associative writing about the event,

294. Reggie Ugwu, *Brené Brown Is Rooting for You, Especially Now,* N.Y. TIMES (Apr. 24, 2020) https://www.nytimes.com/2020/04/24/arts/brene-brown-podcast-virus.html [https://perma.cc/7EWA-2UAM].

295. Brown abbreviates these instances as "facedown on the arena" moments. BRENÉ BROWN, RISING STRONG: HOW THE ABILITY TO RESET TRANSFORMS THE WAY WE LIVE, LOVE, PARENT, AND LEAD xxi (2015).

296. *Id.* at xxi, 46–47.

297. *Id.* at 84.

298. *See id.* at 79.

299. *Id.* at 79–81.

300. *Id.*

301. *Id.* at 84 ("When unconscious storytelling becomes our default, we often keep tripping over the same issue, staying down when we fall . . . we've got the same story on repeat.").

302. *Id.* at 78, 81, 84.

303. *Id.* at 40.

304. *Id.*

which Brown calls creating "your 'shitty first draft.'"[305] Putting feelings you'd be embarrassed to tell anyone but a best friend or a spouse on the page helps cut through and cross-examine default stories. Rage prompted by a supervisor's passive-aggressive email might, after repeated rounds of jots, excavate underlying feelings of inadequacy. "Revolution" comes from being able to eventually identify the passive-aggressiveness as story and the inadequacy as authentic.[306] The payoff of a traversed emotional middle is a more stable and more sustainable "you."

Though Brown is an empiricist, her celebrity—she's "Oprah-endorsed"—could minimize vulnerable betweens, default stories, and the rest as pablum.[307] But IBM, Pixar, the NFL, and major foundations don't think so,[308] and management readings provide parallel insights. Set-backs cast organizations into "the nowhere between two somewheres" or, more formally, the "neutral zone."[309] Ambiguities, doubt, and broken hierarchies frequently follow, but those are qualities to be exploited, not efficiently squared away.[310] They are "entry-points" for new solutions and, once again, the passcode is "creativity."[311] Instead of freewriting, the institutional version might involve switching roles, suspending permission structures, appointing "official critic[s]" of "apparent consensus," or establishing a "transition monitoring team" to gather and report hopes and concerns.[312] Always, the aim is to capture an "unsuspected awareness" of facts[313] that may smooth a "journey from one identity to the other,"[314] like Yamaha's emergence as a digital piano powerhouse when the acoustic market fell through the floor.[315]

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305. *Id.* at 85. She stresses that "it's important that we don't filter the experience, polish our words, or worry about how our story makes us look (which is why writing is often safer than having a conversation)." *Id.* at 88.

306. *Id.* at 42–43.

307. Aspan, *How This Leadership Researcher Became the Secret Weapon*, *supra* note 15.

308. *Id.* Strictly speaking, Brown is, and considers herself, an academic, holding the Huffington Foundation Endowed Chair at the Graduate College of Social Work at the University of Houston, where she also received her PhD. University of Houston, Graduate College of Social Work, Brené Brown, https://uh.edu/socialwork/about/faculty-directory/b-brown/cv_brenebrown3.23.2022.pdf [https://perma.cc/45AQ-BVQS].

309. MANAGING TRANSITIONS, *supra* note 290, at 34–35.

310. *Id.* at 37, 39, 44. "Lacking clear systems and signals, the neutral zone is a chaotic time, but this lack is also the source of its positive aspect." *Id.* at 36. The "danger[]," in effect, is a "premature[]" escape. *Id.* at 6, 36.

311. *Id.* at 44, 43.

312. *Id.* at 42–46.

313. *Id.* at 138.

314. *Id.* at 37.

315. *See* Daniel J. Wakin, *For More Pianos, Last Note Is Thud in the Dump*, N.Y. TIMES (July 29, 2012), https://www.nytimes.com/2012/07/30/arts/music/for-more-pianos-last-note-is-thud-in-the-dump.html [https://perma.cc/A3E9-H82B] ("Piano movers are making regular runs to the dump . . . even burning them for firewood."). *Cf.* Corinna da Fonseca-Wollheim, *Concerts Disappeared. Piano Sales Survived.*, N.Y. TIMES (June 29, 2020), https://www.nytimes.com/2020/06/29/arts/music/piano-sales-coronavirus.html [https://perma.cc/S58B-QV2F] (noting a 60 percent year-over-year uptick in digital sales).

These and other treatments of self and organizational betweenness can slip into modes that make the concept feel individualized, self-help*ish*, or a good fit for the "leadership" shelf in an airport bookstore. Yet those cited above offer much broader social designs. Turner, grounded by the fundamentally social concept of communitas, sets himself the outrageously ambitious task of explicating social structure and its changes. Brown gets clicks as a personal growth guru, but she frames her project as transforming "how we engage with the world," post-tumult, with "tremendous ramifications" for "families, organizations, and communities."[316] Her ideal is rumblings in the wild, with people at school, work, and neighborhood gatherings, recognizing in-between moments and relating "the story I'm making up" before allowing others to help redefine it right then and there.[317] William Bridges, the neutral zone's champion, was writing from a world of accelerating industrial globalization. His aim was new life for shuttered factories and the revival of American communities.[318]

These grander visions highlight liminality's naturally outward orientation, a quality showcased in the three stories of labor movement's approach to legal in-betweens below.

III.
LIMINALITY AND THE MODERN LABOR MOVEMENT

Part I argued that labor law is afflicted by in-betweenness. For unions, employees, and non-employees, the better phrase, accurate in most instances, might be "suffers from" in-betweenness. At the same time, the labor movement has developed an inescapable resiliency. Unions, non-union advocacy groups, academics, and workers-turned-activists are increasingly creative, community-minded, reflective, and aspirational.[319] Labor's character is evolving in ways that can be seen as positive, even if the official membership trajectory may not be.

The next Part suggests that the dots are connected. Labor law thrusts movement actors and institutions into in-between spaces. Lawyers and organizers wrestle with the risks and benefits of dead decisions walking. Workers protest without knowing if their identities are NLRA-acceptable or not.

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316. BROWN, *supra* note 295, at 37, 41. Though heavily enmeshed in the lucrative world of corporate trainings, Brown insisted in a recent *New Yorker* profile that is because "[y]ou cannot change the world if you don't change the way we work." Sarah Larson, *Brené Brown's Empire of Emotion: How a Texan's Stories Teach a Nation to be Vulnerable,* NEW YORKER (Oct. 25, 2021), https://www.newyorker.com/magazine/2021/11/01/brene-browns-empire-of-emotion [https://perma.cc/32GL-E6D9]. She continued: "I'm not going to spend the rest of my life preaching to the converted. I've got a bigger calling than that." *Id.* at 41.

317. BROWN, *supra* note 295, at 90, 266, 255. Brown sets aside time at her own organization for the practice. *Id.* at 90. She gives the example of a staffer who remarked: "I keep asking tough questions . . . and I'm starting to make up that I'm being perceived as not excited or not a team player." *Id.* at 89. Brown reshaped that story by explaining that she "expected a point of view from everyone" and wanted "honesty and tough questions above all else." *Id.*

318. MANAGING TRANSITIONS, *supra* note 290, at 121–23, 40–41.

319. *See infra* notes 526–529.

Unquestioned employees press on with conventional union campaigns, though the law and its remedies are less than what would minimally be required for protection. Social scientists, empiricists, business advocates, and just plain regular people think midpoints, thresholds, and intermediacies are personally and organizationally consequential. Now the goal is to show how the Act's in-betweenness provides a framework for unpacking the labor movement's recent past. While various periods could be considered, the NLRB's shift from Obama- to Trump-appointed majorities marked an especially bold pivot in how labor law is understood and applied, generating fertile ground for doctrinal, identity, and rights-based in-betweenness. Many unions, activists, and academics responded to the changes with strategic, tactical, and relational turns. If transitions really do transform, 2021 was a good time to take stock.

Like any high-level, observed account, my conclusions are tentative, and my analysis relies in part on abstractions and inferences (though this is in keeping with the practical and descriptive approach now taken in liminal studies).[320] My larger aim is to capture, by way of betweenness, the redemptive spirit of a movement that perseveres as the law and its associated bureaucracy remain largely against it.

So, in this final Part, I examine a post-2016 precedent flip, identity tilt, and rights retreat. In the first, unions responded to a change in the scope of joint-employer liability with a strategic pause that, amid upheavals caused by COVID-19 and mass actions against police brutality, created space for new visions of organizing and the movement itself. In the second, reconsideration of graduate assistants' identity led to another round of likely lost rights, but also solidarity and perseverance. In the third, an unprecedented retrenchment in labor law rights preceded a profoundly new, and profoundly inclusive, story of statutory reform.

A. In-Between Precedents: The Law of Joint Employment

Ask a Millennial (or someone from the younger Generation Z) about the labor movement, and "strike" is likely to come up. They, along with anyone following the news, have likely been influenced by the last decade when, after years of repose, walking out in protest reentered popular consciousness. Since 2011, unionized workers have successfully used sometimes weeks-long strikes as a bargaining tactic against major corporations, massive school districts, and, where public sector negotiation is prohibited, entire states.[321] Just as surprising

320. A symposium, for example, recently invited scholars who had not previously considered it "to look afresh at their empirical data and to consider what aspects of the concept of 'liminality' might enable them to highlight and reveal in their data analysis." Wels et al., *supra* note 249, at 2.

321. *See, e.g.*, Noam Scheiber, *Verizon Strike to End as Both Sides Claim Victories on Key Points,* N.Y. TIMES (May 30, 2016), https://www.nytimes.com/2016/05/31/business/verizon-reaches-tentative-deal-with-unions-to-end-strike.html [https://perma.cc/3B27-VF7L] (involving 40,000 strikers over six-and-a-half weeks); Mitch Smith & Monica Davey, *Chicago Teachers' Strike, Longest in Decades, Ends*, N.Y. TIMES (Oct. 31, 2019), https://www.nytimes.com/2019/10/31/us/chicago-cps-

is the list of non-union strikes, too varied to comprehensively list, yet thematically joined by a common duration: one day.[322] The lines blur a bit where represented workers support and assist stoppages by workers without unions. The Teamsters have worked on Uber actions; UFCW, through an affiliate, was involved in Walmart walkouts; and SEIU has long funded the multi-city Fight for $15 (FF15), which strikes for unionization and—with tremendous success—higher wages.[323]

For SEIU, FF15's state and city victories fueled a more profound ambition. As Kate Andrias has detailed, FF15's paper goals soon blossomed into a multi-institution struggle to redesign labor law itself.[324] In Andrias's careful telling, when local walkouts combined with universalized "social" demands and messages, the NLRA's hidebound expectation that negotiations proceed worksite by worksite weakened to reveal the possibilities of a more potent bargaining system happening at sectoral, industrial, or regional levels.[325] The upshot could be higher wage bases or benefits given not because someone had a union, but because someone else's union had raised standards for a whole set of employers, like fast-food restaurants in general.[326]

The key turn in this conceptual evolution occurred in 2015, when the NLRB ruled in *Browning-Ferris* that multiple entities may share bargaining obligations and legal violations over the same employees if they "codetermine . . . essential" employment terms, even indirectly, and even if the power is held in reserve.[327] The decision vindicated FF15's theory of "joint employment," in which "corporate entities with effective power over workers—not only immediate employers—have a responsibility to negotiate."[328] It also set crucial footing for the broader movement goal of stripping legal insulation from high-level (and

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teachers-strike.html [https://perma.cc/J5N6-RLZY] (postponing classes for 300,000 students over eleven days); Dana Goldstein, *Teacher Walkouts: What to Know and What to Expect,* N.Y. TIMES (Apr. 3, 2018), https://www.nytimes.com/2018/04/03/us/teacher-walkouts-strikes.html [https://perma.cc/SJS3-6HXX], (describing strikes and demands for better pay and benefits directed at the West Virginia, Oklahoma, Arizona, and Kentucky legislatures).

322. *See generally* Michael M. Oswalt, *Short Strikes,* 95 CHI.-KENT L. REV. 67 (2020).

323. Steven Greenhouse, *How to Get Low-Wage Workers into the Middle Class*, ATLANTIC (Aug. 19, 2015), https://www.theatlantic.com/business/archive/2015/08/fifteen-dollars-minimum-wage/401540/ [https://perma.cc/3ZJ5-G2ZM] ("Underwritten by the Service Employees International Union, the Fight for 15 has . . . accomplished more than many thought possible just a few years ago."). *See also* Neal Ungerleider, *The Teamsters of the 21st Century: How Uber, Lyft, and Facebook Drivers Are Organizing,* FAST CO. (Oct. 22, 2014), https://www.fastcompany.com/3037371/the-teamsters-of-the-21st-century-how-uber-lyft-and-facebook-drivers-are-organizing [https://perma.cc/T2HT-ZM37] (describing Teamster involvement in strikes by Uber drivers); ADAM REICH & PETER BEARMAN, WORKING FOR RESPECT: COMMUNITY AND CONFLICT AT WALMART 4 (2018) (describing OUR Walmart, which received "staffing support and resources" from UFCW).

324. *See* Andrias, *supra* note 244.

325. *Id.* at 9–10.

326. *Id.* at 53–56 (providing several examples).

327. Browning-Ferris Indus. of Cal. Inc., 362 N.L.R.B. 1599, 1600 (2015). *See also* Andrias, *supra* note 244, at 55–60 (noting the unions, community groups, and non-profits involved in the effort).

328. Andrias*, supra* note 244, at 58.

often national) entities that pass regulatory risks down the weaker (and often local) franchise, staffing, and contracting chain.[329] An on-the-move consolidated complaint alleging 181 unfair labor practices at thirty McDonald's franchises across the country and, as joint employer, the McDonald's Corporation seemed the perfect vehicle to roll the theory out.[330]

In late 2016, the record scratched. Donald Trump's unexpected victory led to brash delaying tactics as McDonald's stalled for its preferred appellate panel.[331] And, indeed, just months after inauguration, *Browning-Ferris*'s minority position became *Hy-Brand Industrial Contractors'* majority position.[332] An ethics scandal sprinkled suspense and derailed the rollback—the Inspector General called a Republican NLRB member's failure to recuse themself from deliberations a "serious and flagrant problem"[333]—but in 2019, the Board's General Counsel fixed the agency's recusal process to let members "insist on participating" no matter what.[334] By early 2020, a joint-employer rulemaking cemented a standard arguably narrower than before the FF15 coalition had ever gotten involved.[335] As for the "largest case ever adjudicated"

329. Andrew Elmore, *Franchise Regulation for the Fissured Economy*, 86 GEO. WASH. L. REV. 907, 911–12 (2018).

330. McDonald's USA, LLC, 363 N.L.R.B. 1362, *7 (2016).

331. Emily Bazelon, *Why Are Workers Struggling? Because Labor Law Is Broken*, N.Y. TIMES MAG. (Feb. 19, 2020), https://www.nytimes.com/interactive/2020/02/19/magazine/labor-law-unions.html [https://perma.cc/3PTK-CBFD].

332. Specifically, *Hy-Brand* rejected *Browning-Ferris*'s treatment of "indirect, and even potential, control to be probative of joint-employer status," returning the standard to cases that had required "direct control over one or more essential terms and conditions of employment" for a secondary entity to also qualify as workers' employer. Hy-Brand Indust. Contractors, Ltd. 365 N.L.R.B. No. 156, *4 (2017). *See also id.* at *1–*2 ("We find that the *Browning-Ferris* standard is a distortion of common law as interpreted by the Board and the courts, it is contrary to the Act, it is ill-advised as a matter of policy, and its application would prevent the Board from discharging one of its primary responsibilities under the Act, which is to foster stability in labor-management relations.").

333. In 2018, the Agency's Inspector General found that a Member of the *Hy-Brand* majority violated Executive Order 13770 (an ethics pledge) because his former law firm represented a party in *Browning-Ferris*. OFFICE OF INSPECTOR GENERAL, MEMORANDUM, NOTIFICATION OF A SERIOUS AND FLAGRANT PROBLEM AND/OR DEFICIENCY IN THE BOARD'S ADMINISTRATION OF ITS DELIBERATIVE PROCESS AND THE NLRA 1 (Feb. 9, 2018), https://www.documentcloud.org/documents/4389557-Emanuel-NLRB-IG-Report.html [https://perma.cc/V86E-6DV5]. Because much of the majority's decision was lifted "verbatim" from the *Browning-Ferris* dissent (including arguments from a brief by the Member's law firm), the IG found it "impossible to separate the two deliberative processes." *Id.* at 3. *See also* Hy-Brand Indus. Contractors, Ltd., 366 N.L.R.B. No. 26 (2018) ("[T]he overruling of the *Browning-Ferris* decision is of no force or effect.").

334. Hassan A. Kanu, *Trump Labor Board Closes Ethics Audit, Revises Conflict Rules,* BLOOMBERG L. (Nov. 19, 2019) https://news.bloomberglaw.com/daily-labor-report/trump-labor-board-closes-ethics-audit-revises-conflicts-rules [https://perma.cc/W2R3-Q7EE].

335. *See* Joint Employer Status Under the NLRA, 85 Fed. Reg. 11,184 (Apr. 27, 2020), to be codified at 29 C.F.R. Part 103. An NLRA press release described the rule as restoring the pre-*Browning-Ferris* standard "but with greater precision, clarity, and detail." NLRB Press Release, *NLRB Issues Joint-Employer Final Rule* (Feb. 25, 2020), https://www.nlrb.gov/news-outreach/news-story/nlrb-issues-joint-employer-final-rule [https://perma.cc/EQY5-VZJT]. That the rule newly required "substantial" direct control instead suggested a heightened standard. *Cf.* Airborne Express, 338 N.L.R.B. 597, 597 n.1

by the NLRB, the McDonald's complaint netted the sum total of $170,000 for twenty employees in a settlement blessed by the Board that had decided *Hy-Brand*, after the trial judge rejected the numbers as totally inadequate.[336] McDonald's Inc.—found to have trained, organized, and directed much of the local response to FF15, including the handling of fired workers—admitted to no violations.[337]

The Board's membership change, and the stinging strategic and tactical defeats that came with it, can be seen as liminal departure points. *Browning-Ferris* and the McDonald's complaint poured the foundation for a new version of law and organizing. The unwelcome demolitions surely created a classic in-between sense of "well, what do we do now?" One answer was that the strike tactic would generally continue—workers at Uber, Wayfair, Buzzfeed, Riot Games, and elsewhere all walked out over various issues in 2019 alone[338]—while the joint-employer legal strategy took a pause.[339] With it came a liminal receptivity and openness to new perspectives that would ultimately elaborate not just joint "employer-*ship*" but labor's identity itself. This story of in-between renewal began to take shape with the terrible events of early 2020.

1. *The Pandemic*

In March 2020, much of the U.S. economy shut down. Fears of overrun hospitals and mass death from a deviously nimble coronavirus prompted state stay-at-home orders, shuttering stores, restaurants, gyms, churches, and salons.[340] Schools went virtual, a fifth of the workforce filed for unemployment,[341] and 7.5 million small businesses risked closing

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(2002) ("The essential element in this analysis is whether a putative joint employer's control . . . is direct and immediate.").

336. McDonald's USA, LLC, Case Nos. 02-CA-093893, et al., Order Denying Motions to Approve Settlement Agreements, 37, 14 (Div. of Judges, July 17, 2018); McDonald's USA, LLC, 368 N.L.R.B. No. 134 (2019) (approving, "contrary to the judge," the settlement agreements).

337. *Id.* at 15, 33–36. *See also id.* at 33 (finding "Division-level Human Resources positions specifically created by McDonald's to focus on responding to the Fight for $15 campaign").

338. Oswalt, *supra* note 322, at 67–69.

339. This is neither to say that Fight for $15 conceded the point, nor was a concession even required. The original McDonald's complaint was based on the then-existing, pre-*Browning-Ferris* standard, and a September 2018 strike over rampant sex harassment notably included a banner flown around Hamburger University, the franchisor's ground zero. Kalena Thomhave, *McDonald's Workers Strike To Demand Response To Sexual Harassment Charges*, AM. PROSPECT (Sept. 20, 2018), https://prospect.org/labor/mcdonald-s-workers-strike-demand-response-sexual-harassment-charges/ [https://perma.cc/9X4V-TMGL]. I only suggest that the Board's sudden doctrinal reversal facilitated a period of strategic reflection.

340. *See generally* Sarah Mervosh, Denise Lu & Vanessa Swales, *See Which States and Cities Have Told Residents to Stay at Home*, N.Y. TIMES (Apr. 20, 2020), https://www.nytimes.com/interactive/2020/us/coronavirus-stay-at-home-order.html [https://perma.cc/62NJ-KQQ2].

341. Anneken Tappe, *1 in 5 American Workers Has Filed for Unemployment Since Mid-March*, CNN (May 7, 2020), https://www.cnn.com/2020/05/07/economy/unemployment-benefits-coronavirus/index.html [https://perma.cc/68G6-H2RT].

permanently.[342] Caught in the middle were workers deemed too "essential" to stay home. Jobs in healthcare, grocery, delivery, warehousing, and transportation all qualified, sending mostly low-paid, poorly insured BIPOC females to the pandemic's front lines.[343] Conscription rarely came with pay or benefit enhancements,[344] so all that changed was the risk.

And the danger to essential workers was great. Over fifty Amazon warehouses incubated active infections by April.[345] More than two thousand chicken workers were positive by May, and at least seventeen of them died in Delaware alone.[346] A Manhattan ER doctor, who was assigned a group of coronavirus patients, found that a fifth worked for delivery apps.[347] Black and Hispanic workers, who made up a disproportionate share of essential jobs, got

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342. Greg Iacurci, *7.5 Million Small Businesses Are at Risk of Closing, Report Finds,* CNBC (Apr. 15, 2020), https://www.cnbc.com/2020/04/14/7point5-million-small-businesses-are-at-risk-of-closing-report-finds.html [https://perma.cc/26C4-BTXJ].

343. Campbell Robertson & Robert Gebeloff, *How Millions of Women Became the Most Essential Workers in America*, N.Y. TIMES (Apr. 18, 2020), https://www.nytimes.com/2020/04/18/us/coronavirus-women-essential-workers.html [https://perma.cc/N97N-GYRP] ("One in three jobs held by women has been designated as essential, [and] . . . [n]onwhite women are more likely to be doing essential jobs than anyone else."). *See also* Ryan Nunn, Jimmy O'Donnel & Jay Shambaugh, *Examining Options to Boost Essential Worker Wages During the Pandemic,* BROOKINGS (June 4, 2020), https://www.brookings.edu/blog/up-front/2020/06/04/examining-options-to-boost-essential-worker-wages-during-the-pandemic/[https://perma.cc/58JK-DDHP] ("Over 4.3 million [essential workers] earn less than $10 an hour and another 23.0 million earn between $10-20 an hour."); Daniel Schneider & Kristen Harknett, *Essential and Vulnerable: Service-Sector Workers and Paid Sick Leave*, SHIFT PROJECT (Apr. 2020), https://shift.hks.harvard.edu/files/2020/04/Essential_and_Vulnerable_Service_Sector_Workers_and_Paid_Sick_Leave.pdf [https://perma.cc/FL7S-JMFF] ("We find that 55% of workers at large service-sector firms have no paid sick leave . . . . [A] third experienced hunger hardship even before the COVID-19 outbreak."); Annie Lowrey, *Don't Blame Econ 101 for the Plight of Essential Workers*, ATLANTIC (May 13, 2020), https://www.theatlantic.com/ideas/archive/2020/05/why-are-americas-most-essential-workers-so-poorly-treated/611575/ [https://perma.cc/YAZ8-XVJL] ("One in seven essential workers lacks health insurance, and one in three lives in a household that makes less than $40,000 a year.").

344. Katie Johnston, *Will Anything Change for the Low-Wage Essential Workers Once Hailed as Heroes?*, BOS. GLOBE (Aug. 3, 2020), https://www.bostonglobe.com/2020/08/03/nation/will-anything-change-low-wage-essential-workers-once-hailed-heroes [https://perma.cc/Y2VC-6EMR] ("Nationwide, only 12 percent of companies have offered hazard pay . . . and many that did have ended it.").

345. Karen Weise & Kate Conger, *Gaps in Amazon's Response as Virus Spreads to More Than 50 Warehouses*, N.Y. TIMES (Apr. 5, 2020), https://www.nytimes.com/2020/04/05/technology/coronavirus-amazon-workers.html [https://perma.cc/LL9W-44UQ].

346. Jane Mayer, *How Trump Is Helping Tycoons Exploit the Pandemic*, NEW YORKER (July 13, 2020), https://www.newyorker.com/magazine/2020/07/20/how-trump-is-helping-tycoons-exploit-the-pandemic [https://perma.cc/7BA8-2MWW].

347. Dhruv Khullar, *The Essential Workers Filling New York's Coronavirus Wards,* NEW YORKER (May 1, 2020), https://www.newyorker.com/science/medical-dispatch/the-essential-workers-filling-new-yorks-coronavirus-wards [https://perma.cc/F4MH-DN5Z] ("It's becoming clear that essential workers experience a disproportionate share of death and disease owing to COVID-19.").

infected at three times the rate of Whites, and died twice as often.[348] "We're not essential," a Black Walmart cashier in South Carolina remarked.[349] "We're sacrificial."[350]

The sentiment had weight. As the virus raged in March, only 7 percent of big service-sector firms required masks, and only 19 percent provided them.[351] Proactive companies often landed on nonsensical policies, like the shipping giant XPO's rule that sick leave had to be paid back[352] or Amazon's offer for paid leave with a positive test, which could take weeks.[353] McDonald's tip—to fashion face shields out of doggie diapers—was simply bizarre.[354] On February 28, a bus driver named Scott Ryan worried on Facebook that he and his colleagues were "high-risk ticking time bombs for being exposed."[355] Less than a month later, COVID killed him.[356]

2. *Liminal Union Visions: A Society Remade*

For unions, an in-betweenness that began with a 2016 political failure that flipped key strategic precedent had been rearticulated as a terrible gulf with survival on one side and death on the other. Thirty of UFCW's grocery-store-heavy membership died between March and April, with another 3,000 falling ill.[357] Seventy-five percent of SEIU's membership continued to work in nursing homes, hospitals, and office buildings[358] amid confusing, often contradictory

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348. Steven Greenhouse, *The Coronavirus Pandemic Has Intensified Systemic Economic Racism Against Black Americans,* NEW YORKER (July 30, 2020), https://www.newyorker.com/news/news-desk/the-pandemic-has-intensified-systemic-economic-racism-against-black-americans [https://perma.cc/5TMA-C29Z].

349. *Id.*

350. *Id.*

351. Emily Stewart, *Essential Workers Still Lack Basic Safety Protections on the Job*, Vox (May 7, 2020), https://www.vox.com/coronavirus-covid19/2020/5/7/21250387/essential-worker-ppe-amazon-walmart-employees-protection-hazard-pay [https://perma.cc/R8RK-BT9C].

352. Rachel Abrams & Jessica Silver-Greenberg, *'Terrified' Package Delivery Employees are Going to Work Sick,* N.Y. TIMES (Mar. 21, 2020), https://www.nytimes.com/2020/03/21/business/coronavirus-ups-fedex-xpo-workers.html?auth=link-dismiss-google1tap [https://perma.cc/8GNJ-CP5N].

353. Weise & Conger, *supra* note 345.

354. Annie Lowrey, *The Workplace Powers That Employees Need*, ATLANTIC (June 24, 2020), https://www.theatlantic.com/ideas/archive/2020/06/workers-need-least-power-protect-themselves/613426/ [https://perma.cc/63GE-QKMD].

355. Greenhouse, *Is Your Grocery Delivery Worth a Worker's Life*?, *supra* note 3.

356. *Id.*

357. Zach Montague, *Coronavirus Cases at D.C. Whole Foods Highlight Risks Facing Grocery Workers*, N.Y. TIMES (Apr. 15, 2020) https://www.nytimes.com/2020/04/15/us/politics/coronavirus-grocery-workers-washington.html [https://perma.cc/G2SA-WATU].

358. David Gelles, *'Working People Want Real Change:' A Union Chief Sounds Off on the Crisis*, N.Y. TIMES (May 22, 2020), https://www.nytimes.com/2020/05/22/business/mary-kay-henry-seiu-corner-office.html [https://perma.cc/GM6B-HAFK].

safety advice, testing voids, and paralyzed regulatory bodies.[359] Asked how she was coping, Mary Kay Henry, the union's President, described "balancing unspeakable grief with outrage."[360]

For these and other labor organizations, job one was getting members and non-members to the pandemic's other side. A new organizing effort called "Protect ALL Workers" sprang up and, in tacit acknowledgment of post-*Browning-Ferris* realities, demanded that contracting and franchising law "be superseded by new corporate commitments to take care of workers who face the most risk of dangerous illness or financial calamity."[361]

But attaching moral responsibilities to various corporate forms "designed to evade" legal obligations was not the only job.[362] For Henry and other leaders, grand in-between uncertainty required a grand reordering. COVID was a system "shock," an economic and racial "reckoning" unmasking "the deepest cracks . . . that we've seen in our lifetimes."[363] And society faced a choice of sutures: "Are we going to return to a status quo that was not good for the overwhelming majority of American families? Or are we going to use this . . . to create the real structural change that we need to rewrite the rules in health care, the environment, immigration and [the economy]?"[364] Strategist Stephen Lerner similarly saw the virus as a "moment[] in history when the world teeters on a razor's edge—where we can plausibly imagine a country and a world remade on

359. *See* David Leonhardt, *The Unique U.S. Failure to Control the Virus,* N.Y. TIMES (Aug. 8, 2020), https://www.nytimes.com/2020/08/06/us/coronavirus-us.html [https://perma.cc/TRF5-MP77]. *See also* Eyal Press, *Trump's Labor Secretary is a Wrecking Ball Aimed at Workers,* NEW YORKER (Oct. 19, 2020), https://www.newyorker.com/magazine/2020/10/26/trumps-labor-secretary-is-a-wrecking-ball-aimed-at-workers [https://perma.cc/S49Y-A3GG] ("Even as millions of workers were risking their health to perform jobs deemed essential, OSHA had done little more than issue a modest list of voluntary safety guidelines.").

360. Gelles, *supra* note 358.

361. Protect ALL Workers, *Workers Across All Industries Call to Protect ALL Workers*, https://protectallworkers.org/national/[https://perma.cc/PR52-ANKQ].

362. *Id.*

363. Gelles, *supra* note 358. The pandemic's revelatory qualities are unmistakable in a series of articles published in the April *American Prospect* symposium, "The Future of Labor in Post-Pandemic America." *See, e.g.,* Stephen Lerner, *What Is Not to Be Done*, AM. PROSPECT (Apr. 29, 2020), https://prospect.org/labor/what-is-not-to-be-done/ [https://perma.cc/35FQ-D99Z] ("The COVID-19 pandemic has exposed the savage inequality, injustice, and failures of our economic and political system."); Steven Greenhouse, *Turning Worker Anger Into Worker Power,* AM. PROSPECT (Apr. 29, 2020), https://prospect.org/labor/turning-worker-anger-into-worker-power/ [https://perma.cc/RU82-LTEP] ("COVID-19 soon trained a spotlight on the many ways [essential workers] were being shafted. The coronavirus crisis made them see many things all too clearly."); Lane Windham, *Labor Will Win by Championing Everyone*, AM. PROSPECT (Apr. 29, 2020), https://prospect.org/labor/labor-will-win-by-championing-everyone/ [https://perma.cc/JF4E-HJ5Y] ("It's in times of great crisis that the world has broken open, and today's pandemic has created just such a moment for American workers.").

364. Gelles, *supra* note 358.

the values of equality, justice, and collective liberation, or one that goes in a very different direction."[365]

This was the language of betweenness—of collective "rumbling," of acceptance of radical uncertainty, of raw assessment of present arrangements, and of top-to-bottom reimagining of the social compact. Long-sought starry-eyed universalisms like single-payer health care, basic income, and community-based child and elder care were now obvious, necessary, turns.[366] If, for Turner, the liminal was an "interlude" that stripped the "familiar," "unhinged" the "normative," and opened a "realm of pure possibility," this seemed to be it.[367]

3. *Liminal Worker Visions: A Workplace Remade*

On the ground, the mostly non-union essential workforce had immediate needs and increasingly walked out to demand them. On March 30, a Monday, Amazon's Staten Island warehouse workers went to lunch and didn't come back, asking and answering their question on their way out: "How many cases we got? Ten!"[368] The plan, according to a leader, was "to cease all operations until the building is closed and sanitized."[369] Thousands of Instacart workers—one report said as many as 150,000[370]—logged off the same day for access to wipes, sanitizer, hazard pay, and sick leave with a doctor's note, not a diagnosis.[371] Tuesday, Whole Foods workers staged a nationwide sickout.[372]

April and May brought some convergences. A survey ending April 6 reported that 92 percent and 46 percent of McDonald's workers had no or "limited" access to masks and gloves, respectively, and that 42 percent were

365. Lerner, *supra* note 363. Journalist Steven Greenhouse also emphasized the period's dual potentials: "One possible scenario might be called the status quo scenario, the other the resurgence scenario." Greenhouse, *Turning Worker Anger*, *supra* note 363.

366. *See* Windham, *supra* note 363 ("The workers' movement can also sketch the blueprints for a new universal social contract" including health care, sick leave, and family care).

367. St. John, *supra* note 263, at 5.

368. Snider, *Work Strikes at Amazon, Instacart and Whole Foods*, *supra* note 3. While the Amazon, Instacart, and Whole Foods walkouts focused the nation's attention, the actions were on the heels of a thirty- to forty-worker strike at a Perdue chicken plant in Georgia the week before, and—owing to public lockdown requirements—a "digital strike" at Family Dollar, Food Lion, and Walmart on March 27, 2020. Read, *supra* note 2.

369. Sara Ashley O'Brien, *Here's Why Amazon and Instacart Workers Are Striking at a Time When You Need Them Most,* CNN (Mar. 30, 2020), https://www.cnn.com/2020/03/30/tech/instacart-amazon-worker-strikes/index.html [https://perma.cc/U5Q2-GDT7].

370. Snider, *supra* note 3.

371. Noam Scheiber & Kate Conger, *Strikes at Instacart and Amazon Over Coronavirus Health Concerns*, N.Y. TIMES (Mar. 30, 2020) https://www.nytimes.com/2020/03/30/business/economy/coronavirus-instacart-amazon.html [https://perma.cc/4SGU-AK2P].

372. *See* Bryce Covert, *The Coronavirus Strike Wave Could Shift Power to Workers—for Good*, NATION (Apr. 16, 2020) https://www.thenation.com/article/economy/coronavirus-workers-strikes-labor/ [https://perma.cc/29BE-U6QD].

prohibited from wearing them anyway.[373] Following walkouts at Memphis, Miami, Orlando, St. Louis, and Raleigh-Durham Golden Arch locations to change that, "hundreds" of workers facing similar plights at eight other major brands like Burger King, Taco Bell, and Subway joined in across fifty California stores on April 8.[374] Two weeks later, and a few days after Amazon's first confirmed COVID death, a map charting infected warehouses was overlaid with fifty locations where three hundred workers collectively called in sick.[375] The first of May lived up to its International Workers' Day tradition when a national coalition of essential workers organized on Zoom and Facebook to strike for safety in heavily publicized marches and car caravans.[376] A website tracking news reports counted over six hundred isolated stoppages during the first three weeks of June.[377]

Actions were over in a day; no businesses shut down; and Instacart claimed a 40 percent increase in shopping the day of[378]—manifestations of post-2012 activism "betwixt and between" a right to debilitate production and a right to something much less. Nevertheless, the strikes remained bold dramatizations of workplace realities impossible to ignore. Public performance, from Broadway to Purim to gospel to sports, was for Turner "the eye by which culture sees itself."[379] With concrete gains like hazard and sick pay at Amazon and Whole Foods, and masks and gloves across poultry plants and fast food,[380] culture seemed to be responding.

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373. SEIU, *McDonald's Worker COVID-19 Survey Data Brief*, (Apr. 8, 2020), https://s3.us-east-1.amazonaws.com/protectallworkers.org-assets/pdfs/mcdonalds-worker-covid-19-survey-data-brief-2020-04-08.pdf [https://perma.cc/4DFM-LTQ5].

374. Lauren Kaori Gurley, *Fast Foods Workers at 50 Restaurants Across California Are Going on Strike*, VICE (Apr. 8, 2020), https://www.vice.com/en/article/7kzyxz/fast-foods-workers-at-30-restaurants-across-california-are-going-on-strike [https://perma.cc/2TN9-AGQP]; Nicole Karlis, *Fear of Inadequate Work Safety Measures Prompts California Fast Food Workers to Strike*, SALON (Apr. 9, 2020), https://www.salon.com/2020/04/09/fear-of-inadequate-work-safety-measures-prompts-california-fast-food-workers-to-strike/ [https://perma.cc/84M4-N9YR].

375. Lauren Kaori Gurley, *Hundreds of Amazon Workers Are Not Going to Work in Nationwide Protest*, VICE (Apr. 20, 2020) https://www.vice.com/en/article/jge77g/hundreds-of-amazon-workers-are-not-going-to-work-in-nationwide-protest [https://perma.cc/M7X7-AC2N]; Erika Hayasaki, *Amazon's Great Labor Awakening*, N.Y. TIMES MAG. (June 15, 2021), https://www.nytimes.com/2021/02/18/magazine/amazon-workers-employees-covid-19.html [https://perma.cc/L22A-LDP6].

376. *See* Ghaffary, *The May Day Strike from Amazon, Instacart, and Target Workers*, *supra* note 2; Read, *supra* note 2 (citing May Day strikes at Amazon, Instacart, Whole Foods, Walmart, Target, Trader Joe's, and FedEx).

377. *COVID-19 Strike Wave Interactive Map*, PAYDAY REPORT, https://paydayreport.com/covid-19-strike-wave-interactive-map/ [https://paydayreport.com/covid-19-strike-wave-interactive-map/].

378. O'Brien, *supra* note 369.

379. St. John, *supra* note 263, at 7.

380. Snider, *supra* note 3; Greenhouse, *Is Your Grocery Delivery Worth a Worker's Life?*, *supra* note 3 ("As often happens when workers finally flex their collective muscles, their actions have gotten results.").

Yet relative to the joint-employer strikes of old, the COVID actions evinced an unmistakable, liminal newness. An article in leftist standard-bearer *The Nation* noted that as the walkout phenomenon rounded into its second decade, "something vital has shifted."[381] Its in-between markings, certainly, had never been clearer. The strikes were social, not just in standard terms of coalitions and outreach, but in widening demands for empathy. Daniel Steinbrook feared for the public after Whole Foods' response to positive cases—a deep clean that night, a staff voicemail in the morning, and shoppers none the wiser—was exposed: "Any transmission within the store will grow exponentially within the community, and it will put people's lives at risk."[382] He walked out for the first time. Vanessa Bain, an Instacart shopper, struck to protect herself and the people accepting her deliveries: we "touch[] every single thing that a customer receives in their order," so "[i]f we get sick, invariably that means they are going to get sick too."[383] General Electric workers demanded that the company stop selling engines and start making ventilators,[384] a startling example of how deeply those without the privilege of workplace social distancing would fight for those advantaged by it.

In demanding protections that would quickly come to be seen, self-evidently, as minimum community standards, activists had in some sense become "moral innovator[s]" of the pandemic, an important marking of communitas.[385] There were others. New, often vanguard solidarities emerged. Instacart's small band of in-store employees had never walked out with the company's army of alleged independent contractors—until now.[386] The action itself was organized virtually by eleven women in six different states, none of whom had ever met.[387] Santa Monica Burger King staff struck when a transgender colleague died days after being forced to work with severe COVID symptoms, which management blamed on hormone treatments.[388] When Amazon fired three warehouse activists, an executive called them "whistle-

381. Covert, *supra* note 372.

382. *Id.*

383. Scheiber & Conger, *supra* note 371.

384. Graig Graziosi, *Coronavirus: GE Workers Walk Off the Job and Demand Company Build Ventilators*, INDEPENDENT (Mar. 31, 2020), https://www.independent.co.uk/news/world/americas/coronavirus-general-electric-workers-ventilators-work-stoppage-labor-massachusetts-a9436881.html [https://perma.cc/MCK7-BDSQ].

385. *See* St. John, *supra* note 263, at 8.

386. Scheiber & Conger, *supra* note 371 ("In the past, only contractors had taken part in similar actions.").

387. Eliza Levinson, *Meet the Gig Workers Collective: 11 Women Who Organize Nationwide Strikes but Have Never Met*, NEXT CITY (May 21, 2020), https://nextcity.org/daily/entry/meet-gig-workers-collective-11-women-organize-nationwide-strikes-never-met [https://perma.cc/UWM5-VL8N].

388. Rebecca Fishbein, *Burger King Staff Strike When Trans Colleague Dies After Being Made to Work with Covid-19*, JEZEBEL (July 12, 2020), https://jezebel.com/burger-king-staff-strike-after-trans-colleague-dies-aft-1844357917 [https://perma.cc/JU3Q-7253].

blowers" and quit in disgust,[389] collapsing the most durable of workplace hierarchies in the process.

Similarly, Turner saw religious pilgrimages and other forms of travelling marches as betweenness "architype[s]" and especially "nourishing environment[s] for creative thought and action."[390] While social distancing norms necessarily altered public presentations, the tradition of protest as motion was retained. In Los Angeles, cars encircled an infected warehouse and grocery store.[391] McDonald's drive-throughs were stuffed with vehicles, and virtual pickets broadcast live feeds of individual strikers from living rooms across the country.[392] These and other actions were creative not just in the sense of COVID-era updating, but in Turner's most capacious sense "of new understandings of self and society."[393] As reporters emphasized repeatedly, the walkouts were products of workers' supercharged perceptions of agency, which developed first as virus-related fears overwhelmed more longstanding fears of retaliation for speaking up.[394] Then self-confidence snowballed.[395] Watching the March protests at Instacart and Whole Foods "definitely was inspiring," said Kris King

389. Mihir Zaveri, *An Amazon Vice President Quit Over Firings of Employees Who Protested*, N.Y. TIMES (May 4, 2020), https://www.nytimes.com/2020/05/04/business/amazon-tim-bray-resigns.html#:~:text=the%20main%20story-,An%20Amazon%20Vice%20President%20Quit%20Over%20Firings%20of%20Employees%20Who,running%20through%20the%20company%20culture.%E2%80%9D [https://perma.cc/KR6B-7J7S].

390. Yang, *supra* note 248, at 384, 392. *See also* Sean Scalmer, *Turner Meets Gandhi: Pilgrimage, Ritual, and the Diffusion of Nonviolent Action,* in CONTEMPORARY CULTURAL PERFORMANCE, *supra* note 263, at 250–251 (applying Turner's pilgrimage analysis to protest marches).

391. Margot Roosevelt, *Coronavirus Energizes the Labor Movement. Can It Last?*, L.A. TIMES (May 1, 2020), https://www.latimes.com/business/story/2020-05-01/coronavirus-labor-unions-mobilize-california [https://perma.cc/36UN-Y8TR].

392. Gurley, *supra* note 374; SEIU, #Walkout Wednesday: Virtual Picket Line, https://www.seiu.org/blog/2020/5/walkout-wednesday-virtual-picket-line [https://perma.cc/LF5F-NXKJ].

393. Yang, *supra* note 248, at 393.

394. Leaders of the Instacart strike said as much: "Many of us are much more fearful for our lives than any retaliation this strike may bring . . . Standing up for ourselves is always a gamble . . . but we're not scared." O'Brien, *supra* note 369. *See also* Josh Eidelson, *When Working Means Deadly Risk, Backlash Brews*, BLOOMBERG BUSINESSWEEK (Apr. 7, 2020), https://www.bloomberg.com/news/articles/2020-04-07/coronavirus-marks-the-best-and-worst-time-for-workers-to-strike [https://perma.cc/PT9F-QCTQ] ("The coronavirus hasn't swept away workers' fears that protesting could get them fired. But for a growing number, it's helped to overcome them."); Greenhouse, *supra* note 348; Alexia Elejalde-Ruiz & Lauren Zumbach, *Workers Now Deemed 'Essential' Want More: How the Coronavirus Crisis Might Bring Permanent Labor Gains on Unionizing, Sick Leave and Other Issues*, CHI. TRIB. (Apr. 13, 2020), https://www.chicagotribune.com/coronavirus/ct-coronavirus-worker-protections-sick-leave-changes-20200410-je7jb4lrqfbovnl3uut4xe5yau-story.html [https://perma.cc/LAB6-KSL3] ("The seriousness of the health risks has spurred some workers to stand up to their employers for the first time . . . .").

395. Sean Scalmer described protest rituals, centrally an "annual march" to the War Office of Aldermaston, as the turning point in the transformation of British Gandhians from timid pacifists to courageous nonviolent direct activists in the 1950s. Scalmer, *supra* note 390, at 249–51. Communitas, in the form of collective confidence and unity, developed from the repetition. *Id.* at 250.

from Trader Joe's. "It made us feel like we could actually have that power to do something like that."[396]

Agency ratcheted up from there, unsettling basic structural assumptions. Essential workers had been called "heroes," indispensable cogs in the nation's—and everybody else's—fate.[397] Around the world, rituals, tributes, and symbols conveyed the public's gratitude.[398] New York City had a nightly balcony clap.[399]

But they weren't paid like heroes, or protected like heroes, and their calls to fix the discrepancy both had broad public support[400] and had been "legitimized" by "other people in authority . . . and prestige,"[401] from politicians[402] to celebrities.[403] That provided a "moral righteousness," leverage,[404] and new perspective, captured powerfully by fired Amazon strike leader Chris Smalls. In the pandemic economy, power flowed up: "[T]o Mr. Bezos, my message is simple. I don't give a damn about your power. You think you're powerful? We're the ones that have the power. Without us working, what are you going to do? You'll have no money. We have the power. We make money for you. Never forget that."[405]

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396. Scheiber & Conger, *supra* note 371.

397. Time Magazine's interactive photo series, "Heroes of the Front Lines," covered the "[s]tories of the courageous workers risking their own lives to save ours." *Heroes of the Front Lines*, TIME, https://time.com/collection/coronavirus-heroes [https://perma.cc/ZF9M-6PZQ].

398. Austin Steele, Sarah Tilotta & Kyle Almond, *Here's How People Are Thanking Health-Care Heroes Around the World,* CNN (Apr. 30, 2020), https://www.cnn.com/2020/04/30/health/gallery/essential-worker-tributes-trnd/index.html [https://perma.cc/W7AJ-NDEC].

399. *Id.* ("Every night at 7 p.m., people in New York City stop whatever it is they are doing and break out into applause, taking to their windows and balconies to thank health-care workers fighting the coronavirus outbreak. Similar tributes have taken place in India, Italy, Spain and many other countries.").

400. *See* Ilya Sheyman & Charlotte Swasey, *Voters Strongly Support the Essential Workers Bill of Rights,* DATA FOR PROGRESS (April 2020), https://www.filesforprogress.org/memos/voters-support-essential-workers-rights.pdf [https://perma.cc/F9DM-ARQT] (finding 75 percent support, 73 percent among Republicans, for strong COVID protections for essential workers).

401. Covert, *supra* note 372.

402. Among many coronavirus employment-related bills, the prominent Essential Workers Bill of Rights provided not just for enhanced pay, leave, health care, and COVID protections, but also childcare, whistleblower, employee classification, and representation election improvements. Sen. Elizabeth Warren, Press Release, Elizabeth Warren and Ro Khanna Unveil Essential Workers Bill of Rights (Apr. 13, 2020), https://www.warren.senate.gov/newsroom/press-releases/elizabeth-warren-and-ro-khanna-unveil-essential-workers-bill-of-rights[https://perma.cc/N8HU-H58U].

403. *See* Adrienne Vogt, *Celebrities Unite to Show Support for Underserved Communities Battling Coronavirus,* CNN (Apr. 19, 2020), https://www.cnn.com/2020/04/18/us/color-of-covid-wrap-cnntv/index.html [https://perma.cc/5DHK-B48U].

404. Covert, *supra* note 372.

405. Chris Smalls, *Dear Jeff Bezos, Instead of Firing Me, Protect Your Workers from Coronavirus,* GUARDIAN (Apr. 2, 2020), https://www.theguardian.com/commentisfree/2020/apr/02/dear-jeff-bezos-amazon-instead-of-firing-me-protect-your-workers-from-coronavirus [https://perma.cc/RQ9D-RKK3]. *See also* Roosevelt, *supra* note 391("These direct actions are inspiring workers to believe they have power.").

4. *"Jointness," Radicalized*

Amid the unrest, institutionalized labor found itself stunned by furloughs, layoffs, mass unemployment, and the virus's incredible health threats.[406] Unionized workers struck twice between April and May, the lowest month-to-month total on record.[407] But behind the scenes, there were signs of alignment. The Teamsters, UFCW, and SEIU all had support roles at Amazon, Instacart, Uber, and across fast-food chains.[408] The Communication Workers and other advocacy groups were busy collecting strikers' names and contact information for follow-up.[409]

On May 25, Minneapolis police killed George Floyd, a forty-six-year-old Black man accused by a convenience store clerk of faking a $20 bill.[410] Bystander videos of officer Derek Chauvin's knee on Floyd's neck for more than eight minutes[411] sparked over two thousand protests—sometimes hundreds in a day—across all fifty states, in cities large and small, towns diverse and mostly White, and even rural counties.[412] Names like Breonna Taylor, Philando Castile, and Tamir Rice, all Black and all previously shot to death by police, filled the air[413] in demonstrations that persisted in the face of militarized police firing tear gas, tasers, and rubber bullets, "often without warning or seemingly unprovoked."[414] The uprisings were racially and ethnically diverse,[415] promptly

406. *See* Robert Combs, *Unions Find New Leverage with Social Justice Protests*, BLOOMBERG (July 24, 2020) https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-unions-find-new-leverage-with-social-justice-protests [https://perma.cc/7BB5-5N6C].

407. *Id.*

408. Roosevelt, *supra* note 391.

409. Greenhouse, *Turning Worker Anger*, *supra* note 363.

410. Evan Hill, Ainara Tiefenthäler, Christiaan Triebert, Drew Jordan, Haley Willis & Robin Stein, *How George Floyd Was Killed in Police Custody*, N.Y. TIMES (May 31, 2020), https://www.nytimes.com/2020/05/31/us/george-floyd-investigation.html [https://perma.cc/5TCB-RFFQ].

411. *Id.*

412. John Eligon, *Black Lives Matter Grows as Movement While Facing New Challenges*, N.Y. TIMES (Sept. 3, 2020), https://www.nytimes.com/2020/08/28/us/black-lives-matter-protest.html [https://perma.cc/FL49-E5FV].

413. *Id. See also* Caitlin O'Kane, *"Say Their Names:" The List of People Injured or Killed in Officer-Involved Incidents Is Still Growing,* CBS NEWS (June 8, 2020), https://www.cbsnews.com/news/say-their-names-list-people-injured-killed-police-officer-involved-incidents/ [https://perma.cc/8N8G-XV5P].

414. Shaila Dewan & Mike Baker, *Facing Protests over Use of Force, Police Respond with More Force,* N.Y. TIMES (May 31, 2020), https://www.nytimes.com/2020/05/31/us/police-tactics-floyd-protests.html [https://perma.cc/NV8L-2KBJ].

415. Dana R. Fisher, *The Diversity of the Recent BLM Protests Is a Good Sign for Racial Equity,* BROOKINGS (July 8, 2020), https://www.brookings.edu/blog/how-we-rise/2020/07/08/the-diversity-of-the-recent-black-lives-matter-protests-is-a-good-sign-for-racial-equity/ [https://perma.cc/FDB7-LPU8] ("[T]hese protests are more diverse than . . . previous moments of protest in the Black Lives Matter movement and the Civil Rights Movement.").

spurring concrete local, state, and national policy changes,[416] and international demonstrations from France to Tunisia to Australia.[417] "Never before in the history of modern polling," the *New York Times* reported, "have Americans expressed such widespread agreement that racial discrimination plays a role in policing, and in society at large."[418]

Organized labor supported the protests,[419] especially in Minneapolis and New York, where unionized bus drivers refused to transport arrestees.[420] For months, a coalition of labor leaders, Black activists, and academics had been meeting to "create an ecosystem and pipeline to develop, nurture, train, and support Black organizers and strategists" for race and economic justice leadership roles.[421] Now, with corporate America rushing to market performative acts of racial solidarity—JP Morgan's CEO actually kneeled, in sneakers, in front of the world's largest bank in homage to blacklisted NFL activist Colin Kaepernick[422]—the intersection was becoming uncommonly clear. "You can't pay people minimum wage for a job, knowing it's not a living wage, knowing

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416. For a list of adopted reforms, including removing police from schools, limiting police budgets, and re-engineering 911 protocols, see *After Weeks of Protest, a Look at Policy Changes in U.S. Policing*, VERA (July 22, 2020), https://www.vera.org/policy-changes-in-us-policing/[https://perma.cc/VV48-6PW3].

417. *Protests Across the Globe After George Floyd's Death,* CNN (June 13, 2020), https://www.cnn.com/2020/06/06/world/gallery/intl-george-floyd-protests/index.html [https://perma.cc/36EF-7N2Z].

418. Giovanni Russonello, *Why Most Americans Support the Protests*, N.Y. TIMES (June 5, 2020), https://www.nytimes.com/2020/06/05/us/politics/polling-george-floyd-protests-racism.html [https://perma.cc/VQT9-YJBL].

419. Like the overall numbers, the Black unionization rate has steadily declined since the 1970s, but, relative to other races, Black workers remain the most likely to be unionized and are heavily overrepresented in the membership. Cherrie Bucknor, *Black Workers, Unions, and Inequality*, CTR. FOR ECON. & POL'Y RSCH. (Aug. 2016), https://cepr.net/images/stories/reports/black-workers-unions-2016-08.pdf?v=2 [https://perma.cc/R8FA-MS3G]. *See also* Kenneth Quinnell, AFL-CIO, Blog, *Working People Respond to the Killing of George Floyd with Nationwide Protests* (June 2, 2020), https://aflcio.org/2020/6/2/working-people-respond-killing-george-floyd-nationwide-protests [https://perma.cc/QE34-UTG5] (collecting statements of AFL-CIO unions offering support for nationwide protests). Labor's major federation also wrestled with calls to remove police unions from its rolls. Ian Kullgren, *AFL-CIO to Keep Ties with Embattled Police Union*, BLOOMBERG L. (June 10, 2020), https://news.bloomberglaw.com/daily-labor-report/afl-cio-votes-to-keep-ties-with-embattled-police-union [https://perma.cc/RG24-BYPF].

420. Lauren Kaori Gurley, *Minneapolis Bus Drivers Refuse to Transport George Floyd Protesters to Jail*, VICE (May 29, 2020), https://www.vice.com/en_us/article/bv8zaw/minneapolis-bus-drivers-refuse-to-transport-george-floyd-protesters-to-jail [https://perma.cc/AH2E-VCBN]; Jason Koebler, *NYC Bus Drivers Union Refuses to Transport Protesters for t0he NYPD,* VICE (May 30, 2020), https://www.vice.com/en_us/article/m7jed3/nyc-bus-drivers-union-refuses-to-transport-protesters-for-the-nypd [https://perma.cc/H78T-G2WA].

421. Marc Bayard, *Black Labor Leaders Are Needed Now More than Ever,* NATION (Sept. 4, 2020), https://www.thenation.com/article/economy/black-labor-movement-strategists/ [https://perma.cc/HF3E-F3D2].

422. Tracy Jan, Jena McGregor, Renae Merle & Nitasha Tiku, *As Big Corporations Say 'Black Lives Matter,' Their Track Records Raise Skepticism*, WASH. POST (June 13, 2020), https://www.washingtonpost.com/business/2020/06/13/after-years-marginalizing-black-employees-customers-corporate-america-says-black-lives-matter/[https://perma.cc/74K8-CAXV].

that [a plurality] of your workforce is [B]lack, and then come out and say, 'Black Lives Matter,'" said Movement for Black Lives leader Richard Wallace.[423] Organized labor, too, was attuned to the hypocrisy. SEIU leadership spoke of companies "quick to claim that 'Black Lives Matter'" yet doing little to protect "the health and economic security of their Black workers."[424]

That economic fairness and racial equality are inextricable was not a new union issue,[425] but recent events seemed to set an order of operations. Turner called the "analysis of culture into factors and their free recombination . . . most characteristic of liminality," and racial justice had begun to be understood as the precondition for justice anywhere.[426] Kyle Bragg, president of the massive janitor and security union, Local 32BJ, told the *Associated Press*: "Until we have racial justice, we cannot have economic, climate or immigrant justice."[427]

Out of this insight emerged a familiar plan for a massive one-day walkout, but with the less familiar aim of "dismantl[ing] racism and white supremacy" as the "necessary first step" to "transform our economy" for workplace, climate, and immigration justice.[428] With the "Strike for Black Lives," sixty groups, from unions to the League of Conservation Voters to the "women-led" human rights initiative CODEPINK, to the Black Male Initiative, called on workers to walkout on July 20.[429]

It was, in a sense, of a piece with pre-Trump "joint employment" aspirations, but with "joint" abstracted to the nth degree. In the modern "fissured" economy, workers' economic destiny was often controlled by dual entities where

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423. Chauncey Alcorn, *Workers Demanding Union Rights Plan to Walk Off the Job in Nationwide Strike for Black Lives*, CNN (July 12, 2020), https://www.cnn.com/2020/07/12/business/strike-for-black-lives-union-wages/index.html [https://perma.cc/FQP5-CZ3E].

424. *Id.*

425. For an insightful summary of this history and its many resulting perspectives, see Charlotte Garden & Nancy Leong, *"So Closely Intertwined:" Labor and Racial Solidarity*, 81 GEO. WASH. L. REV. 1135, 1174–1209 (2013).

426. Turner, *supra* note 10, at 255.

427. Charisse Jones, *'Whatever It Takes': Thousands of Workers Could Join Strike for Black Lives, Walking Off Jobs Monday to Protest Inequality*, USA TODAY (July 20, 2020), https://www.usatoday.com/story/money/2020/07/20/worker-protests-thousands-walk-off-protest-racial-inequality/5470567002/[https://perma.cc/KNV3-CDS6].

428. STRIKE! FOR BLACK LIVES, *We Demand*, https://web.archive.org/web/20201027174245/https://j20strikeforblacklives.org/demands/ [https://perma.cc/DM3E-94K5]. The strike's overarching demand stated: "This is a moment to transform our economy and democracy, but until we dismantle racism and white supremacy, we cannot win economic, climate or immigration justice." *Id.*

429. STRIKE! FOR BLACK LIVES, *About*, https://web.archive.org/web/20200812072517/https://j20strikeforblacklives.org/about/ [https://perma.cc/WQA7-QUBM]. The branding stretched back at least to June 19 or Juneteenth, when BLM "called for general strikes and marches . . . against police brutality and racism" using the same phrase. Matt Keeley, *Protesters Call for a Black Workers' Strike on Juneteenth*, NEWSWEEK (June 13, 2020), https://www.newsweek.com/protesters-call-black-workers-strike-juneteenth-1510728 [https://perma.cc/W8AQ-W3XU].

the law reached only one.[430] Pre-pandemic, and before George Floyd's murder, unions struck against both for a "new labor law" that moved beyond firm-based bargaining. Here, control was redefined by the much broader, and even more insidious, forces of "racism, white supremacy, and economic exploitation wherever it exists, including in our workplaces."[431] The forces again operated jointly, and they again struck against all of it, but the goal was even more profound. Rev. Dr. William Barber II, co-chair of the Poor People's Campaign, described it as "'economic uplift for everybody, poor and low-income Black people, [W]hite people, [B]rown people, [I]ndigenous people, and Asian people."[432] He captured the classically in-between, "subjunctive mood[]"[433] of the new story especially well: "In other words, everybody in, nobody out."[434]

The morning of, workers walked out either for the day or for eight minutes and forty-six seconds—the time an officer knelt on George Floyd's neck.[435] Participants included 1,500 janitors in San Francisco, fast-food cashiers in Los Angeles, and nursing home workers in Detroit, as well as gig, airport, and hospital workers in pockets across the country.[436] Though "Justice for Black communities" remained the prerequisite—specifically, demand "1"—calls for "[e]lected officials and candidates" to "reimagine our economy and democracy" through voter and workplace rights, and for corporations to "dismantle racism, white supremacy, and economic exploitation" through basic steps like childcare support and union recognition, were also included.[437]

Throughout and over the preceding months, commentators' allusions to historical events that altered the substance and goals of the movement, like factory occupations and organizing rights or workplace tragedies and safety

430. Elmore, *supra* note 329, at 909.

431. We Demand, *supra* note 428.

432. Charisse Jones, *A 'Strike for Black Lives' Will Bring Together Workers Calling for End to Systematic Racism*, USA TODAY (July 8, 2020), https://www.usatoday.com/story/money/2020/07/08/workers-go-strike-black-lives-amid-reckoning-racism/5400095002/ [https://perma.cc/D7ZV-YK6T].

433. Victor Turner, *Process, System, and Symbol: A New Anthropological Synthesis*, 106 DAEDALUS 61, 71 (1977).

434. Jones, *A 'Strike for Black Lives' Will Bring Together Workers*, *supra* note 432.

435. Jacob Bogage, *Thousands of U.S. Workers Walk Out in 'Strike for Black Lives,'* WASH. POST (Jul. 20, 2020), https://www.washingtonpost.com/business/2020/07/20/strike-for-black-lives/ [https://perma.cc/E9JD-GN8P].

436. *See* Aaron Morrison, *Workers Protest Racial Inequality on Day of National Strike*, A.P. NEWS (July 20, 2020), https://apnews.com/article/mo-state-wire-new-york-il-state-wire-race-and-ethnicity-virus-outbreak-0fbc6aa5a60520900a434b51bd3c7ef6 [https://perma.cc/467S-Z8GA]; Craig Mauger, *Detroit Nursing Home Employees Walk Out over Pay, Working Conditions*, DETROIT NEWS (July 20, 2020), https://www.detroitnews.com/story/news/local/detroit-city/2020/07/20/detroit-nursing-home-employees-walk-out-over-pay-working-conditions/5471238002/ [https://perma.cc/4QF2-GSJM].

437. We Demand, *supra* note 428.

standards,[438] gestured toward a sense that an identity flashpoint was again at hand. If so, the unfolding spirit could perhaps be summarized as a "civil rights unionism,"[439] where responsibility for racial justice excluded no one, not unions, and least of all, not employers.[440] "Our members have been on a journey . . . to understand why we cannot win economic justice without racial justice,"[441] said Mary Kay Henry. "We have to link these fights in a deeper way than ever before."[442]

It was a nexus that would appear over and again in ensuing months, in many contexts. Fans tuning into the NBA's July 30, 2020, restart in a protective "bubble" saw the fruits of intersectional unionism on courts newly marked with massive "Black Lives Matter" lettering and on uniforms newly inked with phrases like "Say Their Names" and "I Can't Breathe."[443] On August 26, Milwaukee Bucks players refused to tip off after Kenosha police shot Jacob Blake seven times in the back.[444] From the arena, player-leader George Hill called on the state legislature to "address police accountability, brutality, and

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438. *See, e.g.*, Jamelle Bouie, *Another Way the 2020s Might Be Like the 1930s*, N.Y. TIMES (Apr. 28, 2020), https://www.nytimes.com/2020/04/28/opinion/coronavirus-amazon-wildcat-strikes.html [https://perma.cc/R225-V2LB] (analogizing to the 1934 sit-down strikes, "which paved the way for the [NLRA]"); David Unger, *Will COVID-19 Be Our Triangle Fire?*, LABORNOTES (Apr. 3, 2020), https://labornotes.org/2020/04/will-covid-19-be-our-triangle-fire [https://perma.cc/A9QB-JZ5S] (analogizing to the Triangle Shirtwaist Factory fire, which killed 146 and "became a turning point in the history of . . . the U.S. labor movement"). *See also* Covert, *supra* note 372 (quoting a historian's conclusion that a modern "general strike—one that extends across industries and, indeed, possibly engulfs the whole country—'is not inconceivable'").

439. I borrow this term from Robert Rodgers Korstad's history "of a working-class-led, union-based civil rights movement" in North Carolina during the 1940s. *See* ROBERT RODGERS KORSTAD, CIVIL RIGHTS UNIONISM: TOBACCO WORKERS AND THE STRUGGLE FOR DEMOCRACY IN THE MID-TWENTIETH-CENTURY SOUTH 1 (2003).

440. *See also* Donna Murch, *The Amazon Union Drive Showed Us the Future*, GUARDIAN (Apr. 27, 2021), https://www.theguardian.com/commentisfree/2021/apr/27/amazon-union-drive-us-labor-future [https://perma.cc/9NQT-JU6C] (describing a "tide of multiracial labor activism incubated in workplaces during the Covid-19 pandemic" and "a new generation of labor activists [who] see workplace struggle as an essential staging ground for racial and gender justice").

441. Aaron Morrison, *AP Exclusive: 'Strike for Black Lives' to Highlight Racism*, AP (July 8, 2020), https://apnews.com/article/mo-state-wire-wa-state-wire-ct-state-wire-tx-state-wire-virus-outbreak-d33b36c415f5dde25f64e49ccc35ac43 [https://perma.cc/3A3M-JTCZ].

442. *Id.*

443. *See* Ava Wallace, *With the Words on Their Backs, NBA Players Take a Stand*, WASH. POST (July 30, 2020), https://www.washingtonpost.com/sports/2020/07/30/nba-social-justice-jerseys-names-messages/ [https://perma.cc/N8WY-FVGT]; Malika Andrews, *NBA Unveils Black Lives Matter on Orlando Court,* ESPN (July 21, 2020), https://www.espn.com/nba/story/_/id/29510169/nba-unveils-black-lives-matter-orlando-court [https://perma.cc/ND2S-RBVF].

444. *See* Marc Stein, *Led by N.B.A., [Strikes] Disrupt Pro Sports in Wake of Blake Shooting*, N.Y. TIMES (Sept. 4, 2020), https://www.nytimes.com/2020/08/26/sports/basketball/nba-boycott-bucks-magic-blake-shooting.html [https://perma.cc/2P49-L65L] ("Athletes from the N.B.A., W.N.B.A., Major League Baseball and Major League Soccer . . . [struck] games on Wednesday in response to the police shooting of a Black man in Kenosha, Wis.").

criminal justice reform."[445] LeBron James and other National Basketball Players Association stars urged a season-cancelling stoppage before ultimately concluding that integrating racial justice activism into their work would be more meaningful.[446] That November, every NBA facility would become a polling place.[447] And as the 2020 presidential election approached, unions helped organize #MyVoteIsEssential, an essential worker canvass emphasizing issues central to "Black lives," "immigrant families," and "our communities," from climate change to "the protection we need at work."[448] Once in office, President Biden used a video address to direct the nation's attention to a union drive at an Amazon Fulfillment Center in Bessemer, Alabama, where 85 percent of the employees were Black.[449] "Many of the workers that we were meeting with to begin the campaign came to the meetings wearing Black Lives [M]atter t-shirts," said an organizer.[450] "You can't separate that time and condition and that movement from this one."[451]

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445. Rob Mahoney, *The Bucks Stop Play and Demand That the Real Work Begin,* RINGER (Aug. 27, 2020), https://www.theringer.com/nba/2020/8/27/21403744/nba-milwaukee-bucks-strike-jacob-blake [https://perma.cc/S4SY-3YHG].

446. *See* Dave McMenamin, *LeBron James, Chris Paul, Received Advice from Barack Obama During Stalemate,* ESPN (Aug. 28, 2020), https://www.espn.com/nba/story/_/id/29762633/lebron-james-chris-paul-received-advice-barack-obama-stalemate [https://perma.cc/Y4KQ-FWXB] (describing how players including LeBron James and Chris Paul sought advice from former President Obama on how to leverage their platforms for racial justice).

447. *See id.*

448. *See* #MyVoteIsEssential, https://web.archive.org/web/20201101011340/http://www.myvoteisessential.org/. *See also* Adrian Carrasquillo, *Major Essential Worker Rallies to Hit Ten Cities to Get Infrequent Voters of Color to Vote*, NEWSWEEK (Oct. 22, 2020), https://www.newsweek.com/major-essential-worker-rallies-hit-ten-cities-get-infrequent-voters-color-vote-1541461 [https://perma.cc/JX5C-L28P] ("[T]he events across the country . . . included a Todos Con Biden event . . . in partnership with groups on the ground in Florida aimed at Latinos."); @Fightfor15, TWITTER (Oct. 20, 2020, 9:45 PM) ("Our ancestors marched in the street, struck and voted so we would have a better life. We are still fighting for the same things today! I am voting so when we fight we make change so the next generation doesn't have to fight for the same thing.").

449. David Streitfeld, *How Amazon Crushes Unions*, N.Y. TIMES (Mar. 16, 2021) https://www.nytimes.com/2021/03/16/technology/amazon-unions-virginia.html [https://perma.cc/B9B8-DDF7]; Erica Smiley & Erin Johansson, *John Lewis Would March from Selma to Bessemer's Amazon Fulfillment Center*, NEWSWEEK (Mar. 26, 2021), https://www.newsweek.com/john-lewis-would-march-selma-bessemers-amazon-fulfillment-center-opinion-1578738 [https://perma.cc/R5N8-G9B4].

450. Abby Vesoulis, *'We Not Human At All.' Why the Fight to Unionize an Alabama Amazon Warehouse Could Spur a Labor Union Resurgence*, TIME (Mar. 27, 2021), https://time.com/5950288/amazon-union-vote-alabama/ [https://perma.cc/W4D9-F6QR].

451. *Id. See also* Smiley & Johansson, *supra* note 449.

Erica Smiley and Erin Johansson of Jobs with Justice made a similar point, with deeper roots:

> In 1963, John Lewis spoke at the March on Washington for jobs and freedom. We cannot accomplish either if we isolate democracy to just the polling place—we also need to ensure that democracy exists in the workplace, so that Black workers can finally bargain for the protections and benefits they deserve.

Smiley & Johansson, *supra* note 449.

Advocates drew broader historical "parallels between the fight in Bessemer and the fights of the civil rights movement."[452] Racist precincts had poll taxes and intimidation tactics; Amazon had mandatory teachings about the dangers of representation tacked onto picking, packing, and even toilet time—"time taxes," with the intimidation baked in.[453] While poll taxes became illegal, the NLRA continues to welcome company-sponsored union education,[454] and the drive to unionize Amazon workers in Bessemer failed.[455]

Meanwhile, the pandemic raged on, forcing many to reconcile regularized disorder with an end point that, as of this writing, is still unknown. Amid the betweenness, McDonald's worker Adriana Alvarez was asked about the length of an upcoming strike. "As far as I know it's for today," she said. "But if it goes longer, it goes longer."[456] When it comes to labor's approach to the startling, often-grim, always-courageous, and ultimately formative post-2017 period of doctrinal-turned-existential betweenness, a similar ethic seemingly applies: acceptance of uncertainty, and the embrace of possibility. Indeed, soon after the defeat in Bessemer, a tent appeared next to a bus shelter near the JFK8 Amazon warehouse in New York City.[457] Chris Smalls, the fired Bezos letter-writer, sat behind a folding table, organizing another union.[458] On April 1, 2022, he walked out of a vote count at the Brooklyn NLRB, popped a bottle of champagne, and toasted "the first Amazon union in American history."[459]

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452. Smiley & Johansson, *supra* note 449.

453. *Id. See also* Streitfeld, *supra* note 449 ("One place Amazon developed that direct communication was in its warehouse bathrooms under what it calls its 'inSTALLments' program . . . 'Where will your dues go?' Amazon asked in one stall posting . . . . Another proclaimed: 'Unions can't. We can.'").

454. On the nature of captive listening intimidation, see Craig Becker, *Democracy in the Workplace: Union Representation Elections and Federal Labor Law,* 77 MINN. L. REV. 495, 559 (1993) ("Although the Board ratified captive audience speeches on account of the [Act's] free speech proviso, such conduct involves an element of coercion easily distinguishable from expression.").

455. In the weeks that followed, commentators would dissect the loss, assign blame, and suggest next steps. For a summary of the many analyses, see Rich Yeselson, *The Defeat at Amazon and the Union Fights to Come*, JACOBIN (Apr. 12, 2021), https://jacobinmag.com/2021/04/amazon-union-organizing-bessemer-defeat-rwdsu [https://perma.cc/5G25-4CSR].

456. Jones, *supra* note 432.

457. *See* Michael Sainato, *US Workers Continue Unionization Fight—But Will Amazon Prevail?*, GUARDIAN (May 9, 2021), https://www.theguardian.com/us-news/2021/may/09/us-workers-amazon-unions [https://perma.cc/G7B4-TABY].

458. *See id.* Amazon's general counsel told Bezos that Smalls was "not smart or articulate." Julia Carrie Wong, *Amazon Execs Labeled Fired Worker 'Not Smart or Articulate' in Leaked PR Notes*, GUARDIAN (Apr. 2, 2020), https://www.theguardian.com/technology/2020/apr/02/amazon-chris-smalls-smart-articulate-leaked-memo [https://perma.cc/2CLG-KK7B].

459. Karen Weise & Noam Scheiber, *Amazon Workers on Staten Island Vote to Unionize in Landmark Win for Labor*, N.Y. TIMES (Apr. 1, 2022), http://www.nytimes.com/2022/04/01/technology/amazon-union-staten-island.html [https://perma.cc/FJ8T-W7LJ] ("A handful of employees at Amazon's massive warehouse on Staten Island, operating without support from national labor organizations, took on one of the most powerful companies in the world . . . [a]nd, somehow, they won.").

B. In-Between Identity: Graduate Student Workers

In a second case, the Trump era renewed and sharpened a legal in-betweenness that had long existed. While labor organizing among the nation's graduate students is not new, the Board's foregrounding of their liminal identities unleashed new energy, sparked unprecedented unity, and cemented a powerful commitment to clarify their existence as workers, once and for all. Below, a glimpse of this progression is provided through a campaign at Yale University.

American universities run on graduate student labor. Tenured and to-be-tenured faculty make up almost a quarter of the academic workforce, and so do graduate assistants (GAs).[460] Estimates suggest they do well over half the teaching and 90 percent of the grading.[461] Whether their tutelage ends, blends, or coexists with money-making activities that would otherwise be considered a "job" is debatable. What's clear is that graduate work blurs conceptions about who is a student, laborer, trainee, or expert. It is, as one scholar put it, "boundary work."[462]

The NLRA doesn't mention any of these categories, but the Board, as is its practice, is mesmerized by them. Six times since 1972, the agency has divvied up and weighed "made-up"[463] graduate student identities. In three cases and one rulemaking, the scales tipped to the student side, and employee rights were lost.[464] The other two times, the scales tipped to the employee side—once

460. *See* Celine McNicholas, Margaret Poydock & Julia Wolfe, *Graduate Student Workers' Rights to Unionize Are Threatened by Trump Administration Proposal*, ECON. POL'Y INST. (Dec. 19, 2019), https://www.epi.org/publication/graduate-student-workers-rights-to-unionize/ [https://perma.cc/4JHG-66G5].

461. *See* Gordon Lafer, *Graduate Student Unions: Organizing in a Changed Academic Economy*, 21 WORK & DAYS 153, 154 (2003).

462. *See* Ayo Mansaray, *Liminality and In/Exclusion: Exploring the Work of Teaching Assistants*, 14 PEDAGOGY, CULTURE & SOC'Y 171, 171 (2006) (describing "boundary work" as "bridging, mediating, and transgressing many of the hierarchical, symbolic, cultural and pedagogic status boundaries (e.g. teacher-pupil, home-school, etc.) reproduced within schools"). *See also* Tomassetti, *supra* note 62, at 816 ("Their relationships objectively embody the contradictory, partial transformation of nonmarket relationships (between, e.g., a faculty mentor and a graduate student) into labor market relationships (between a university and an RA).").

463. *See* 84 Fed. Reg. No. 184, 29 C.F.R. Part 103, *Jurisdiction–Nonemployee Status of University and College Students Working in Connection with Their Studies* 49695 (Sept. 23, 2019), https://www.govinfo.gov/content/pkg/FR-2019-09-23/pdf/2019-20510.pdf [https://perma.cc/4PWF-UV5W] (proposing that graduate students not be considered "employees" within the meaning of Section 2(3) of the NLRA).

464. In *Adelphi University,* the Board first determined that graduate assistants were "primarily students" and could not be included in a unit with faculty. 195 N.L.R.B. 639, 640 (1972). The conclusion was then extended to bar graduate workers from the Act entirely. *Leland Stanford Junior Univ.*, 214 N.L.R.B. 621, 623 (1974). After a flip, the Board reiterated in *Brown University* that "graduate student assistants . . . are primarily students and have a primarily academic, not economic, relationship with their university." 342 N.L.R.B. 483, 494 (2004). In 2019, the Board attempted to solidify that conclusion in a proposed rule. 84 Fed. Reg. No. 184, 29 C.F.R. Part 103, 49693 ("Under the proposed rule, students who perform services at a private college or university related to their studies will be held to be primarily students with a primarily educational, not economic, relationship with their university, and therefore not

because the work was not "primarily educational,"[465] and once because the purported educational roles were not worth balancing in the first place.[466]

The in-betweenness poses challenges for asserting rights. The very existence of "student" as a non-statutory—and undefined—legal category lets higher education administrators "feign surprise" at the injection of industrial concerns into academic lifestyles.[467] Those inspired by logic, expertise, and empirics in day jobs slip easily into contradictory, even "mystical," arguments about collective bargaining's frightening implications for free thought.[468] If all else fails, they can stall for a Board they like better and pull the contract.[469]

And yet, graduate assistants continue to defy received and data-driven wisdom about the debilitating effects of losing.[470] In 1990, Yale's Graduate Employees and Students Organization (GESO) made a demand for recognition and, in what is likely the "longest-running uninterrupted" union effort in U.S. history, the request gets renewed "multiple times a year."[471] In 2016, the Board credited assistants' history of "fervent[]" organizing "in the absence of access to the Act's representation procedures" as evidence that their so-called student

statutory employees."). For a close and insightful reading of Board analysis in this area, see generally Tomassetti, *supra* note 62.

465. In *New York Univ.*, 332 N.L.R.B. 1205, 1207 (2000), the Board "disagree[d] with the Employer's argument that graduate assistant work is primarily educational" and suggested that "any educational benefit derived" was not necessarily inconsistent with employee status anyway. *See also id.* at 1206 (calling graduate assistants' performance of "services under the control and direction of the Employer," plus "compensat[ion] for those services," the "salient facts").

466. *See* Trs. of Columbia Univ., 364 N.L.R.B. 1081, 1096 (2016) ("We have rejected an inquiry into whether an employment relationship is secondary to or coextensive with an educational relationship.").

467. *See* Alyssa Battistoni, Maggie Doherty, Jeanne-Marie Jackson, Corey Robin & Gabriel Winant, *After Columbia*, N+1 (Aug. 26, 2016), https://nplusonemag.com/online-only/online-only/after-columbia/[https://perma.cc/PL75-XAWF] ("The message they're sending is that change is impossible—that there's no way to make your voice heard.").

468. Mark Oppenheimer, *Graduate Students, the Laborers of Academia*, NEW YORKER (Aug. 31, 2016), https://www.newyorker.com/business/currency/graduate-students-the-laborers-of-academia [https://perma.cc/RXF4-QQCL].

469. *See, e.g.*, Alan Finder, *N.Y.U. Ends Negotiations with Union for Students*, N.Y. TIMES (Aug. 6, 2005), https://www.nytimes.com/2005/08/06/nyregion/nyu-ends-negotiations-with-union-for-students.html [https://perma.cc/B8D3-JA3K] ("The labor relations board, whose composition had changed since 2000, reversed the position it had taken four years earlier. That was when N.Y.U. began to reconsider its relationship with the union.").

470. Unions hardly ever succeed in "rerun" elections ordered in response to employer misconduct. *Supra* note 243. For social movement context and a detailed account of a campaign that defied the odds, see STEVEN HENRY LOPEZ, REORGANIZING THE RUST BELT: AN INSIDE STUDY OF THE AMERICAN LABOR MOVEMENT 51, 63–92 (2004).

471. Battistoni et al., *supra* note 467 ("In this latest cycle, we have demonstrated majority support to Yale multiple times a year.").

identity was overwrought.[472] When GAs don't have rights, campaigns "sprout[] up everywhere you turn."[473] When they do, they win like gangbusters.[474]

GAs' organizing persistence could be explained by the collapsed market for PhDs, plus graduate students' emergence as key—and wildly unpaid—cogs in the increasingly corporatized university environment.[475] And while precarity does not necessarily correlate with activism,[476] betweenness might. Middles and midpoints can be good places for reflection, including whether the borders themselves are authentic.[477] Wanting the world to acknowledge a collective conclusion about inauthenticity can be galvanizing.[478]

In practice, there is much weight on the student side of a budding academic's story. GAs often come to the position with gratitude, the "simple disbelief that I could get paid for thinking and talking and writing about things."[479] Flexibility, university services, and teaching's "psychic rewards" can cloud out low pay and overwork.[480] "[M]any of us . . . [had] ambivalence about considering ourselves 'exploited labor,'"[481] explained one GA. "This is a sweet deal."[482] But "[p]sychic income" doesn't cover rent, and suspicions—grounded

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472. Trs. of Columbia Univ., 364 N.L.R.B. at 1090.

473. Battistoni et al., *supra* note 467.

474. *See* William A. Herbert & Joseph vanderNaald, *A Different Set of Rules? NLRB Proposed Rule Making and Student Worker Unionization Rights*, 11 J. COLLECTIVE BARGAINING ACAD. 1, 11–12 (2020) (listing thirty representation petitions—twenty-six successful—covering twenty-six thousand GAs since winning NLRA rights in late 2016).

475. Scholars aptly refer to the modern university as a "knowledge factory." *See, e.g.*, Christopher Carter, *The Student as Organic Intellectual*, 21 WORK & DAYS 339, 347–48 (2003). On the grim state of graduate student employment prospects and salary levels, see Lafer, *supra* note 461, at 155–56 ("[E]ven if every single assistant professor quit or got promoted, 40% of current graduate students would remain jobless."); Teresa Kroeger, Celine McNicholas, Marni von Wilpert & Julia Wolfe, *The State of Graduate Student Employee Unions*, ECON. POL'Y INST. 4–5 (Jan. 11, 2018), https://files.epi.org/pdf/138028.pdf [https://perma.cc/F3JP-SZD4] (stating that graduate assistants earn, on average, more than $20,000 less per year than even non-tenure track lecturers).

476. While the vulnerability inherent in low-wage, competitive markets would seem to press against acts of resistance, Arne Kalleberg and Steven Vallas noted that the scholarship is mixed: "Research at the micro level tends to report a pattern of resignation or consent, while studies at the macro level unearth more contentious responses to precarization." Arne L. Kalleberg & Steven P. Vallas, *Probing Precarious Work: Theory, Research, and Politics*, 31 RSCH. SOCIO. WORK 1, 19 (2018). *See also* JENNIFER GORDON, SUBURBAN SWEATSHOPS: THE FIGHT FOR IMMIGRANT RIGHTS 113–15 (2005) (describing many emotional, logistical, and psychological barriers).

477. *See* Mihai Coman, *Liminality in Media Studies*, in CONTEMPORARY CULTURAL PERFORMANCE, *supra* note 256, at 95 ("[T]hrough liminality, a society is able to evaluate itself, to reflect upon its structure and the possibilities of changing it."); Turner, *supra* note 433, at 77 ("Ritual is a transformative performance revealing major classifications, categories, and contradictions of cultural processes.").

478. In many ways this point sums up the entirety of Brené Brown's theory of wholeness, healing, and, as she puts it, personal "revolution." Brown, *supra* note 295, at 253–67.

479. *See* Chris Drew, Matt Garrison, Steven Leek, Donna Strickland, Jen Talbot & A. D. Waldron, *Affect, Labor, and the Graduate Teaching Assistant: Can Writing Programs Become "Spaces of Hope"?*, 21 WORK & DAYS 169, 176, 178 (2003).

480. *Id.* at 176–77.

481. *Id.* at 176.

482. *Id.*

in exhaustion—about "something wrong with my working conditions" are sometimes "confirmed" in "witness[ing] the physical, mental and emotional sufferings" of colleagues, officemates, and friends.[483] Recognition that the "program" is "made possible *not* primarily by the management of . . . administrator[s] but by the labor of individual teachers" may dawn on some.[484] A culture of internalization and sometimes gaslighting—tough times presented as the natural order of things—can stunt others.[485] But if the understanding comes, it arrives slowly, unevenly, informally, in "rambling side notes," "tangential conversations,"[486] and, conspicuously, in stages.[487]

The corrected narrative can be propulsive.[488] Some who've made the crossing describe their new surroundings as a "space of hope."[489] To Alyssa

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483. *Id.* at 180–81.

484. *Id.* at 171.

485. GAs "tend to repress negative reactions to their work." *Id.* at 172. Alyssa Battistoni put it especially well:

> For our whole lives we had learned to do school very well; in graduate school we learned to exploit ourselves on weekends and vacations before putting ourselves 'on the market.' Many of us still believed in meritocracy, despite learning every day how it was failing us. The worse the conditions of academic life became, the harder everyone worked, and the harder it became to contest them.

Alyssa Battistoni, *Spadework on Political Organizing*, N+1 (Spring 2019), https://nplusonemag.com/issue-34/politics/spadework/ [https://perma.cc/6F8P-UG9Q]. Graduate school culture itself reinforces the dynamic. *See* Drew et al., *supra* note 479, at 170. In a 2004 attitudinal survey, GAs described "administrators" as a chief organizing roadblock and source of "infantaliz[ation]": "[T]hey . . . refuse to recognize that we are adults with a) adult issues like families and careers and b) extremely solid and heartfelt ideas about teaching and the university." Gerilynn Falasco & William J. Jackson, *The Graduate Assistant Labor Movement, NYU and its Aftermath: A Study of the Attitudes of GAs and RAs at Seven Universities,* 21 HOFSTRA LAB. & EMP. L.J. 753, 791 (2004). *See also* Drew et al., *supra* note 479, at 174–75 (describing "a management imperative" to dismiss GA concerns as run-of-the-mill or unimportant).

486. Drew et al., *supra* note 479, at 184. *See also id.* at 171 ("[T]he road to collective action is not a short one: it isn't, at least in our experience, so simple a task as recognizing the exploitative situation of GTAs and then moving to unionize.").

487. Drew et al.'s retrospective study of "one GTA's refusal to suppress his own overwhelming anger and despair," leading to a graduate department's move toward unionization, proceeded through a series of collective action and consciousness-raising phases over time. *Id.* at 171–72.

488. Mansaray emphasized the "generative process of [liminality]," where the "final condition is not pre-set, but rather is potentially negotiable and contestable." Mansaray, *supra* note 462, at 175. The group studied by Drew et al., for example, came to the understanding that "the possibility of collective action in a form *other* than unionization" could be a form of success. *See* Drew et al., *supra* note 479, at 184.

489. Drew et al., *supra* note 479, at 184. The phrase and its effects resonate with studies of those positioned in the haunting mid-point between past inaction and coming calamity—climate activists—some of whom are described as "brokers of hope," doling the emotion out to others in the movement paralyzed by exhaustion, fear, or overwhelming odds. Jochen Kleres & Åsa Wettergren, *Fear, Hope, Anger, and Guilt in Climate Activism*, 16 SOC. MOVEMENT STUDS. 507, 512–13 (2017). *See also id.* at 513 (couching hope as a solidarity skill can be cultivated in others: "[t]rust in 'one's own' *collective* action seems to be the essence of the hope that activists talk about"); Maria Ojala, *Hope and Climate Change: The Importance of Hope for Environmental Engagement Among Young People*, 18 ENV'T EDUC. RSCH. 625, 625 (2012) (concluding that a "'[c]onstructive' hope had a unique positive influence on pro-environmental behavior").

Battistoni, a political theorist who began organizing at Yale the spring before the 2016 election, it felt like an integration, "finally reconciling parts of myself I'd tried to keep separate."[490] What followed was a drive, in the face of an already crushing workload, not merely for votes, but to catch her colleagues up on the plot twist to their collective identity story.[491] "It was a strange feeling, after a life spent chasing individual achievement, to want something that I could only have if other people wanted it too."[492] The work was exhilarating—"I realized I had never wanted anything so much in my life"—and "wrenching," the "gap between the smallness of everything I could realistically do and the largeness of everything I wanted to happen," immense.[493]

Personal relationships of a sort derived less from mutual affinity than a mutual cause helped her bridge the poles. Battistoni calls this "comrade[ship]," where "the need to work together . . . provides a baseline of commonality that makes it possible to relate across difference and essential to figure out how."[494] The process is "countercultural," with striking resonance to notions of communitas.[495] Race, gender, and class boundaries weaken when conversations "challenge your default expectations of who you can relate to, force you outside of the demographic categories that organize most of your life and the scripts you've learned for interacting with people accordingly."[496] The "sameness" that results, she argues, "is a kind of genuine equality."[497]

With care, these sorts of norm-defying relational parities can stretch both inter- and intra-campus. For example, recognized graduate unions often assist nascent collectives at other campuses with "phone-ins, petitions," and information exchanges, including strategic advice and bargaining templates.[498] Scholars of the graduate assistant movement have described GAs teaching undergraduate activists one day and protesting with them the next.[499] Most tellingly, these sorts of relationships steeled a shrewd and perhaps unprecedented show of national cross-union tactical consensus once President Trump's appointees formally gained NLRB control: GAs organized a mass withdrawal of

490. Battistoni, *supra* note 485.

491. *Id.* ("There was so much I wanted to change, so many people I wanted to move.").

492. *Id.*

493. *Id.*

494. *Id.*

495. *Id.*

496. *Id.*

497. Battistoni likened "organizing conversations" to a "consciousness-raising group" that "locate[s] the fundamental experience of powerlessness lurking beneath the generalized misery." *Id.*

498. *See* Falasco & Jackson, *supra* note 485, at 794–95.

499. Describing the "solidarity between" the undergraduate-driven United Students Against Sweatshops and NYU Graduate Student Organizing Committee, Carter wrote: "It takes but little imagination . . . to picture a GSOC activist as the writing instructor of USAS undergrads." Carter, *supra* note 475, at 348, 356.

representation petitions, preventing the new majority from nixing Obama-era employee rights.[500]

In response, the Trump Board outflanked the adjudicatory process itself by rulemaking.[501] But that route also asked graduate assistants to put an identity on paper and prove it. The illogic of a split-self is now public record, and so is their liminal progress and demand that the journey be recognized in law. A Georgetown philosophy PhD candidate asked how teaching could be training if it disrupts and distracts to the point that many—including the writer—fail to complete their degrees on time.[502] Another noted that the size of an admitted cohort determines whether departments are short or fully staffed.[503] When University of Chicago GAs struck, "both graduate and undergraduate education . . . gr[oun]d to a halt."[504] There are thousands more examples in the archives.[505]

As for Alyssa Battistoni and her colleagues, they won the election. Yale rejected the results, sparking a "quasi-guerrilla" escalation of tactics, including a hunger strike that made national news and that the university largely ignored.[506] By then, Battistoni "had crashed" and made plans to finish her dissertation elsewhere. But she eventually decided to stay, "for the same reason I had done everything else[:] I liked who I was when I put myself out there with other people again and again."[507]

Ultimately, the Board's new majority had provided Yale a literal "Trump" card—a claimed right to refuse to negotiate anything. "[A]dmitting defeat,"

500. *See* Shera S. Avi-Yonah & Molly C. McCafferty, *Grad Student Unions Across U.S. Withdraw Representation Petitions*, HARV. CRIMSON (Feb. 21, 2018), https://www.thecrimson.com/article/2018/2/21/student-unions-withdraw-petitions/ [https://perma.cc/3V25-JDC2. *See also* Michelle Chen, *The Trump's NLRB is Sabotaging Its Own Mission*, NATION (Sept. 7, 2020), https://www.thenation.com/article/politics/trump-nlrb-labor/ [https://perma.cc/K22J-BJB2] ("We pulled our petition to protect the rights of graduate student workers at private universities nationwide.").

501. *See* NLRB, News and Publications, NLRB Proposes Rulemaking Concerning Students (Sep. 20, 2019), https://www.nlrb.gov/news-outreach/news-story/nlrb-proposes-rulemaking-concerning-students [https://perma.cc/45RY-DLXW] (reporting that the Board "seeks public comment on its proposed view that students who perform services - including teaching and/or research - for compensation at a private college or university in connection with their studies are not 'employees' under the NLRA").

502. AFT Academics, Hailey, Georgetown University, https://aftacademics.org/2019/09/28/comment-georgetown/ [https://perma.cc/PW5D-4JLT].

503. AFT Academics, Kaitlyn, Brown University, https://aftacademics.org/comment-brown/ [https://perma.cc/4AG9-A66R].

504. AFT Academics, Ella, University of Chicago, https://aftacademics.org/comment-uchicago/ [https://perma.cc/2FF7-LUPD].

505. *See* Miles Burton, *Over 12,000 Comments Submitted on NLRB Rules as Deadline Looms*, CHI. MAROON (Jan. 15, 2020), https://www.chicagomaroon.com/article/2020/1/15/12000-comments-submitted-nlrb-rule-deadline-looms/ [https://perma.cc/Z4GT-BB8E].

506. Battistoni, *supra* note 485.

507. *Id.*

GESO withdrew its case, and organizing collapsed.[508] Battistoni would later write that "the secret to winning isn't really a secret—you just keep organizing and organizing and organizing so that . . . the question of how to win is just a question of how to keep doing it, after you win and after you lose."[509] If so, graduate assistant organizing—the by-now ritualized struggle between student and worker identities—will not stop, rule or no rule, precedent or no precedent.[510] The Yale campaign, for one, was back by early 2020, leading the charge for healthcare, housing, racial equity, and funding extensions as COVID crises took hold.[511] And, of course, the recognition request was back on the table.[512]

C. In-Between Rights: The Clean Slate Project

Perhaps the clearest testament to liminality's potentially auspicious impact on actors and institutions comes from a recent, and particularly aggressive, degradation of labor law rights. The regime had always offered protections at levels between nothing and something, but a post-2016 retrenchment slid the overall regime closer to the "nothing" side than ever before. For the leaders, workers, academics, and advocates of a reform effort seeded by a program at Harvard University, it prompted the creation of a bold, creative, inclusive—and totally new—story of change: the Clean Slate for Worker Power project.

The in-betweenness afflicting organizing, coercion, and remedial rights has, unsurprisingly, prompted numerous bids for statutory reform. With one exception, the result has been a parade of slow-motion failures, sometimes by veto, usually by filibuster.[513] The most recent attempt in 2009 was also the most

508. *See* Jingyi Cui, *Will Grad Students Ever Get Their Union?*, YALE DAILY NEWS (Feb. 15, 2018), https://yaledailynews.com/blog/2018/02/15/will-grad-students-ever-get-their-union/ [https://perma.cc/9DV4-GU5F]; Battistoni, *supra* note 485 ("Inside the union, things fell apart.").

509. Battistoni, *supra* note 485.

510. And, in fact, months after President Trump's defeat, the NLRB withdrew its proposed graduate assistant rule, preserving—for now—the Board's 2016 precedent permitting unionization. *See* Jurisdiction—Nonemployee Status of University and College Students Working in Connection with Their Studies, 86 Fed. Reg. 14297, 49693 (Mar. 15, 2021).

511. Local 33, *COVID-19 and Yale*, https://local33.org/2020/04/14/covid-19/ [https://perma.cc/9ZNA-3VK6] (Apr. 4, 2020) ("[T]he pandemic has only accelerated the slow-rolling crises of academic work at Yale and elsewhere . . . . In response, we call on Yale to immediately commit to do the following: create universal funding extensions, provide comprehensive access to healthcare, pay a fair share to the city of New Haven, reverse hiring freezes and extend existing teaching contracts, and ensure access to housing for graduate workers.").

512. *Id.* ("We reaffirm that our work makes the university work, and that a contract is essential for protecting graduate workers.").

513. In 1974, the Act was amended to cover nonprofit hospitals. *See* Richard N. Block, *Rethinking the National Labor Relations Act and Zero-Sum Labor Law: An Industrial Relations View*, 18 BERKELEY J. EMP. & LAB. L. 30, 35 n.17 (1997). The next year, President Ford vetoed legislation loosening picketing restrictions at construction sites. *Id.* at 35 n.16. The Labor Law Reform Act, a comprehensive amendment doubling backpay, speeding elections, penalizing bargain failures, and giving unions limited workplace access stalled amid Senate filibustering in 1977. *Id.* at 32, 34–35. Bills

painful, with sixty Democratic votes seemingly lined up for watered-down but still-significant reforms to the Act's organizing and damages provisions.[514] The White House said wait a year, and by then a Massachusetts special election had dropped the number to fifty-nine, which, in Senate-speak, was effectively zero.[515] From there, the legislative stasis that had prevailed for decades returned, more or less solidifying sort-of rights.[516]

The liminal positioning of those rights, though, did eventually shift. Even at an agency as politicized as the NLRB, the Trump Administration's approach to statutory interpretation and enforcement bordered on carnivalesque. "[B]udgetary issues" underpinned staff cuts and plans to eliminate various field offices,[517] even as the agency sat on a multiyear surplus.[518] Board agents were instructed to tell workers supplying even open-and-shut proof of management coercion that the boss would be alerted to their methods and that, if a work rule

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banning permanent replacement workers met similar fates in 1992 and 1994. *Id.* at 34–35. In 1997, President Clinton vetoed legislation allowing bargaining-like non-union "employee participation programs," but organized labor strongly opposed the change. *See* Estlund, *supra* note 244, at 1541.

514. *See* Harold Meyerson, *Under Obama, Labor Should Have Made More Progress*, WASH. POST (Feb. 10, 2010), https://www.washingtonpost.com/wp-dyn/content/article/2010/02/09/AR2010020902465.html [https://perma.cc/GJ3B-KMEF] ("For American labor, year one of Barack Obama's presidency has been close to an unmitigated disaster."). As introduced, the Employee Free Choice Act certified unions based on signatures instead of secret ballots, increased damages, and offered mediation and arbitration for first contracts. *See* Ross Eisenbrey & David Kusnet, Issue Brief #249, THE EMPLOYEE FREE CHOICE ACT: QUESTIONS AND ANSWERS 5 (Jan. 29, 2009), https://files.epi.org/page/-/efcaquestions.pdf [https://perma.cc/RRS2-QXZK]. A compromise version restored the secret ballot but limited the possibility of voting delays. *See* Steven Greenhouse, *Democrats Drop Key Part of Bill to Assist Unions*, N.Y. TIMES (July 16, 2009), https://www.nytimes.com/2009/07/17/business/17union.html [https://perma.cc/4SDY-7XLU].

515. *See* Meyerson, *supra* note 514 ("For the unions, the Senate's inability to pass EFCA is devastating and galling.").

516. This is not to detract from important rights advances made by the NLRB during the Obama administration. For an overview, see Michael Z. Green, *The NLRB as an Überagency for the Evolving Workplace*, 64 EMORY L.J. 1621, 1629–45 (2015).

517. *See* NLRB, News & Publications, Office of Public Affairs, Statement on GAO Report on Recommendations for the NLRB (Mar. 29, 2021), https://www.nlrb.gov/news-outreach/news-story/statement-on-gao-report-on-recommendations-for-the-nlrb#:~:text=The%20report%20further%20finds%20that,in%20the%20agency's%20purchasing%20power [https://perma.cc/EHC5-78AP] ("Since the [Trump] NLRB General Counsel's appointment in November 2017, the decline in staffing in the regions significantly outpaced declines in case intake."); Hassan A. Kanu, *Labor Board Officials Have 'Grave' Concerns About Restructuring*, BLOOMBERG L. (Jan. 25, 2018), https://news.bloomberglaw.com/daily-labor-report/labor-board-officials-have-grave-concerns-about-restructuring [https://perma.cc/6DMB-KZVD].

518. *See* Hassan A. Kanu, *Labor Board Finds Budget Surplus for Second Straight Year*, BLOOMBERG L. (Nov. 1, 2019), https://news.bloomberglaw.com/daily-labor-report/labor-board-finds-budget-surplus-for-second-straight-year [https://perma.cc/77EZ-26QF]. Board officials defended the surplus to the agency's Office of Inspector General investigators, attributing its "primary cause" to "a contracting problem that arose" in 2019. U.S. GOV. ACCOUNTABILITY OFF., NAT'L LAB. RELS. BD., MEANINGFUL PERFORMANCE MEASURES COULD HELP IMPROVE CASE QUALITY, ORGANIZATIONAL EXCELLENCE, AND RESOURCE MANAGEMENT 11 (2021), https://www.gao.gov/assets/gao-21-242.pdf [https://perma.cc/7CV2-VXGF]. A March 2021 GAO report noted that the "OIG disagreed with the agency's conclusion, citing, in part, several inaccurate statements made by NLRB officials." *Id.*

had been violated, they would be fired.[519] Employers were newly invited to sit in on affidavits taken against them.[520] An agency that rarely proposed rules unleashed so many that it hired outside contractors to process comments.[521] Saying "we" in front of a crowd was no longer proof of a collective purpose.[522] A former Chair called the changes "breathtaking" in speed and scope.[523] "[T]hey just kind of snap their fingers and do it."[524]

As in-between rights retreated even closer to the "no rights" side of the continuum, the realities of mass activism doused by legal structures unfit to institutionalize or reliably protect it had, for advocates, never been clearer—or more exasperating.[525] A random sample of U.S. workers would yield fewer union members in 2020 than 1934, before federal organizing rights even existed.[526]

Nor had the line connecting in-between rights and liminality's supposed effects ever seemed like more of a straight shot. In-betweenness, it's been said, can function like a perception cleanser,[527] and the broader movement did seem to be working with new conceptions of the possible. "Pop-up" unions, organized to negotiate a single issue and then dissolve, emerged.[528] Public-sector unions

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519. *See* Office of the General Counsel, Memorandum GC 20-08, at 4 (June 17, 2020), https://www.jacksonlewis.com/sites/default/files/docs/GC20_08ChangesInvestigativePractices.pdf [https://perma.cc/Q2PJ-V96P] (describing how audio recordings provided by employees should be dealt with).

520. *See id.*, at 1–2.

521. *See* Josh Eidelson & Hassan Kanu, *NLRB Shouldn't Have Subcontractors Work on Rule About Subcontractors, Democrats Say*, L.A. TIMES (Mar. 14, 2019), https://www.latimes.com/business/la-fi-nlrb-subcontractors-joint-employer-20190314-story.html [https://perma.cc/677K-8N6H]. *See also* Herbert & vanderNaald, *supra* note 474, at 1–2 (comparing the Board's limited rulemaking history with its new "regulatory agenda to remake precedent through rulemaking on procedural and substantive issues").

522. Alstate Maint. LLC, 367 N.L.R.B. No. 68 at *2, *8 (2019) ("[Activity is not concerted] solely because it is carried out in the presence of other employees . . . and includes the use of the first-person plural pronoun.").

523. Chen, *supra* note 500.

524. *Id. See also* Hassan A. Kanu, *NLRB Rulings Tip Balance Toward Management Coping With Contagion*, BLOOMBERG L. (July 17, 2020), https://news.bloomberglaw.com/daily-labor-report/nlrb-rulings-tip-balance-toward-management-coping-with-contagion [https://perma.cc/E34B-LJQT] (citing a former Republican NLRB General Counsel who "agreed that the board under President Donald Trump has taken a more conservative approach than many preceding boards, including during his tenure under President George H.W. Bush"); *id.* (citing a former Democratic NLRB Chair's conclusion that, "[t]here's 'only one outcome in their decision making—all decisions favor employers, a result inconceivable under a statute designed to protect workers'").

525. *See* Annie Lowry, *The Workplace Powers That Employees Need*, ATLANTIC (June 24, 2020), https://www.theatlantic.com/ideas/archive/2020/06/workers-need-least-power-protect-themselves/613426/ [https://perma.cc/7P43-5C4B] ("[G]iven the shortcomings of American labor law . . . these workers are shouting into a void.").

526. *See* Sharon Block, *Go Big or Go Home*: *The Case for Clean Slate Labor Law Reform*, 41 BERKELEY J. EMP. & LAB. L. 167, 170 (2020).

527. *See* Turner, *supra* note 10, at 256 (describing liminal "expressions" (like Western literature and art) that "stimulate thought and pose problems, [and] cleanse the Doors of Perception[]").

528. *See* EARN, Want to Get Out of Your Non-Compete Agreement?, *FAQ: How Can Forming a Pop-Up Employee Association Help Me Get out of My Non-Compete Agreement?*, https://www.noncompetes.org [https://perma.cc/N7DE-TD9T].

had already been "bargaining for the common good" by bringing community-based needs to the table, but now expiring contracts were being mapped to intensify and coordinate the campaigns and demands nationally, in every sector.[529]

And the intellectual fervor that had fled the movement in the best of times (at least in terms of membership)[530] flooded back, allowing what David Madland has called the "idea environment" to flourish in ways that historically portended cultural and policy change.[531] It was not just that academics and think-tanks had become re-engaged with unions or the labor movement. It was that they had become newly engaged with entirely different regimes, the gap between no rights and adequate rights too vast, the correlated collective power crisis too dire for statutory edgework.[532] "No longer," wrote Sharon Block, Executive Director of Harvard's Labor and Worklife Program, "can I see the procedures for choosing a collective bargaining representative embodied in Section 9 of the Act or the protections for collective action established in Sections 7 and 8 as a viable foundation from which to encourage collective bargaining or protect freedom of association in a meaningful way."[533] It was time to start over.[534]

Others agreed. For nearly two years, Block and Harvard Law Professor Benjamin Sachs organized seventy "advocates, activists, union leaders, labor law professors, economists, sociologists, technologists, futurists, practitioners,

529. *See* Sarah Jaffe, *How Workers Can Win in the Age of COVID-19,* PROGRESSIVE MAG. (Apr. 30, 2020), https://progressive.org/dispatches/how-workers-can-win-jaffe-200430/[https://perma.cc/W7JX-NANU]. *See also* Mapping for the Common Good, https://www.bargainingforthecommongood.org/mapping/ [https://perma.cc/LZ7N-RZQY].

530. As Nelson Lichtenstein has detailed, "as unions reached their twentieth-century apogee" in the 1950s and 1960s, apathy, self-interest, bureaucracy, and corruption caused a "precipitous [reputational] decline." NELSON LICHTENSTEIN, STATE OF THE UNION 141, 155–72 (2013). Organized labor had "become part of the 'establishment,'" *id.* at 142, and effectively "all that 1960s intellectuals believed was wrong with interest groups." Reuel E. Schiller, *From Group Rights to Individual Liberties: Post-War Labor Law, Liberalism, and the Waning of Union Strength*, 20 BERKELEY J. EMP. & LAB. L. 1, 58 (1999).

531. DAVID MADLAND, RE-UNION: HOW BOLD LABOR REFORMS CAN REPAIR, REVITALIZE, AND REUNITE THE UNITED STATES 153 (2021). At the local level, that seemed to already be happening. Madland cited, for example, a Philadelphia law establishing a portable paid leave system for domestic workers—who are excluded from federal labor law—paid for by employers but administered by a workers' association. *Id.* at 156. Washington State has plans for an even more comprehensive regime that would apply to all independent contractors. *Id.*

532. *See, e.g.*, Kate Andrias & Brishen Rogers, *Rebuilding Worker Voice in Today's Economy*, ROOSEVELT INST. 8 (Aug. 2018), https://rooseveltinstitute.org/wp-content/uploads/2020/07/RI-Rebuilding-Worker-Voice-201808.pdf [https://perma.cc/8NEL-UP6Q] (calling on advocates to "think broadly and systematically about fundamental labor law reform" and not "confin[e] discussions to immediately achievable" changes); Charlotte Garden & Moshe Marvit, *COVID-19 Crisis Underscores Need for Stronger Workers' Rights*, CENTURY FOUND. (Apr. 13, 2020), https://tcf.org/content/commentary/covid-19-crisis-underscores-need-stronger-workers-rights/ [https://perma.cc/7NPJ-KYRH] (dismissing "[b]and-aid solutions that respond narrowly" and fail to "rebalance worker power").

533. Block, *supra* note 526, at 169–170.

534. *Id.* at 170 ("[I]t is necessary to think about labor law reform not as amendments to the Act, but as something that has to happen from a statutory clean slate.").

workers, and students from around the world" to brainstorm, and then report, what a "fundamental redesign of labor law" might look like.[535] Eight reform-specific working groups and three equity, domestic, and international advisory groups[536] considered options and avenues, crucially unrestrained by political or other standard reasons why "this" or "that" reform is simply not feasible—an ethic memorialized in the project's name: "Clean Slate for Worker Power."[537]

The sheer diversity of thought and action leaders working together in co-equal groups suggested the conscious construction of the sort of "undifferentiated community"[538] that excels at "the sharing of special knowledge and understanding" across relationships.[539] Tasked with "innovation, boldness, and comity but not consensus,"[540] and true to the cross-cutting networks that participants represented, the Clean Slate community would end up authoring a powerful, and powerfully aspirational, new identity for the nation.

There was already, for example, the "Protecting the Right to Organize Act," a far-reaching NLRA amendment "to redress the inequality of bargaining power between workers and employers" that had recently passed the House.[541] The Clean Slate project, too, aimed at "empowering all workers" through legal reform, but to an even more penetrating dual end: "a truly equitable American democracy and a genuinely equitable American economy."[542] As the final report would explain, "vast disparities of economic power have been translated into equally shocking disparities in political power," where poor and middle-class policy preferences are routinely ignored.[543] While workplace power naturally leans toward democratic voice, concrete changes were needed on both ends.

The project also provided a searching narrative to get there. Policy recommendations typically lend themselves to bullets, lists, and other forms of accountings that can feel clinical. But Clean Slate's version reads almost like a story—each reform a chapter added to expose and start to resolve the misguided,

535. SHARON BLOCK & BENJAMIN SACHS, CLEAN SLATE FOR WORKER POWER: BUILDING A JUST ECONOMY AND DEMOCRACY 1 (2020), https://assets.website-files.com/5ddc262b91f2a95f326520bd/5e28fba29270594b053fe537_CleanSlate_Report_FORWEB.pdf [https://perma.cc/NX4F-M5LF].

536. Clean Slate for Worker Power, Project Structure, HARV. UNIV. https://lwp.law.harvard.edu/clean-slate-project-structure [https://perma.cc/5KMN-8JQ5.

537. Block & Sachs, *supra* note 535.

538. *See* VICTOR TURNER, THE RITUAL PROCESS: STRUCTURE AND ANTI-STRUCTURE 96 (1969).

539. *See* St. John, *supra* note 263, at 7.

540. Block & Sachs, *supra* note 535, at 1.

541. Protecting the Right to Organize Act of 2019, H.R. 2474, 116th Cong. § 3(12) (2019), https://www.govinfo.gov/content/pkg/BILLS-116hr2474ih/pdf/BILLS-116hr2474ih.pdf [https://perma.cc/FG7R-YCQH]. *See also* Eli Rosenberg, *House Passes Bill to Rewrite Labor Laws and Strengthen Unions*, WASH. POST (Feb. 6, 2020), https://www.washingtonpost.com/business/2020/02/06/house-passes-bill-rewrite-labor-laws-strengthen-unions/ [https://perma.cc/QU58-RAER] ("One of the most significant bills to strengthen workers' abilities to organize in the past 80 years passed the House on Thursday.").

542. Block & Sachs, *supra* note 535, at 1.

543. *Id.* at 1, 10.

faulty, or even discriminatory presumptions of an aged narrator. Problems like "explicit racial- and gender-based discrimination baked into" the Act are named,[544] and the actors and institutions responsible, from bigoted lawmakers to chattel slavery, are blamed.[545] From there, fixes are filtered through themes like power and identity, while the impacts are layered within existing structures of wealth, representation, and cultural biases like "deservingness."[546]

So, Clean Slate reform would mean domestic, agricultural, undocumented, incarcerated, and disabled workers win collective rights,[547] but ultimately the scope of those rights will remain defined by "the ways in which intersectionality interacts with . . . policy choices" made beyond labor law.[548] A genuine labor law right to organize, in other words, might not mean much if erratic scheduling and dizzying childcare demands make coffee with a co-worker next to impossible.

First-person voices were also included. Terrance Wise, a second-generation fast-food worker, wrote of losing his home while working two full-time jobs and helping his daughters get ready for school "in our idling purple minivan in sub-zero temperatures."[549] The massive McDonald's Corporation, he argued, could change things but benefits from misguided joint-employer precedent that allows it to "hide[] behind its franchisees and say[] it can't do anything."[550]

Clean Slate's answer to Wise's insight is to create "sectoral bargaining panels," where worker organizations negotiate with employer organizations to set minimum terms applicable to entire industries, no matter the corporate form.[551] This and other ideas are undeniably ambitious, but they need to be. Big gaps—middles wider than in nearly all other industrialized nations[552]—need big fillers. A whittled-out coercion right demands strike and picketing protections "regardless of duration or extent," regardless of focus (primary or neutral employers), and absent fear of permanent replacement or personal bankruptcy.[553] Incursions on the basic right to vote require early, universal precinct balloting,

544. Liz Mineo, *Why U.S. Labor Laws Need To Be Revamped*, HARV. GAZETTE (Jan. 23, 2020), https://news.harvard.edu/gazette/story/2020/01/report-aims-to-reform-american-labor-laws/ [https://perma.cc/9VV3-QKRU].

545. Block & Sachs, *supra* note 535, at 16–17.

546. *Id.* at 18–19.

547. *Id.* at 22–28.

548. *Id.* at 20.

549. *Id.* at 21.

550. *Id.*

551. *Id.* at 37–45.

552. Journalist Steven Greenhouse called this "America's anti-worker exceptionalism." BEATEN DOWN, WORKED UP 8 (2019). *See also* Derek C. Bok, *Reflections on the Distinctive Character of American Labor Laws*, 84 HARV. L. REV. 1394, 1397 (1971) (noting, among numerous other deficiencies, that "[o]nly the United States has persistently excluded millions of workers from the ambit of its basic labor and social legislation").

553. Block & Sachs, *supra* note 535, at 56–63 (proposing, in addition to strike and picketing liberalizations, tax deductible strike fund contributions and unemployment access during labor stoppages).

including weekends and "before and after traditional work hours"; same-day registration; and paid leave for voting and even civic activities "essential to the mechanics of democracy," like campaign or registration assistance.[554]

All of these proposals bridge legal gaps, and all of them help, in a broad sense, to evolve the American identity. The report's conclusion gestures at both. The authors ask: "What would a Clean Slate world look like? Or feel like?"[555] While acknowledging that they "can't know for sure because it hasn't happened yet," Block and Sachs envision workers feeling "safer when they try to organize" and "supported" when they "turn to a coworker or a union for solidarity."[556] They imagine working people with a "louder" democratic voice, "connected to each other in new ways."[557] In asking readers to imagine themselves crossing labor law's liminal gap, if only for a moment, the exercise echoes a point Brené Brown urges anyone in a low moment to consider: "When we own our own stories, we avoid being trapped as characters in stories someone else is telling."[558] It also draws on the hopeful, anticipatory dynamic Victor Turner believed was at play in ritual performance, one that eventually transmits values to the broader culture.[559] As Sharon Block would write: "What it will take to move any labor law reform is a big political moment and a compelling narrative that reform will make meaningful change in people's lives . . . . Without that vision . . . we will never get there and we won't convince anyone—legislators or the public—to come along with us."[560]

CONCLUSION

Liminality ends eventually. It is, by definition, a threshold to something else. The retirement party concludes. Grief evolves. A vaccine emerges. Labor law, too, will transition, though it is unclear how or when. Until then, none of the case studies provide cover for the ultimate reality that labor law betweenness is a net drain on the labor movement in every respect. But unions, workers, academics, non-profits, and other advocates will also—sometimes, not enough times, but sometimes—be energized by it, innovate off of it, and ultimately build support for a new system because of it. And there is at least a little hope in that.

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554. *Id.* at 76–79.
555. *Id.* at 106.
556. *Id.*
557. *Id.* at 107.
558. Brown, *supra* note 295, at xx.
559. *See* Turner, *supra* note 10, at 259 (describing, as an element of communitas, social relations "emptied of their legal-political structural character" in favor of one based in "symbols, ideas, and values").
560. Block, *supra* note 526, at 169. President Biden, at least, now supports sectoral bargaining. Biden-Harris, The Biden Plan for Strengthening Worker Organizing, Collective Bargaining, and Unions, https://joebiden.com/empowerworkers/# [https://perma.cc/F74S-JN5U] (tasking a "cabinet-level working group . . . to further explore the expansion of sectoral bargaining").