The Gradual Effects of Statutory Interpretation: The Supreme Court and Policy Drift

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Scholars of American politics have recently expanded upon understandings of “policy drift”: the process through which a policy’s operation changes due to formal stagnation in the face of a dynamic environment. Existing research highlights how a veto riddled legislative process and other systemic features may facilitate this process. However, relatively little attention has been paid to how specific political actors and institutions may facilitate policy drift in the United States. In this paper, I outline mechanisms through which the Supreme Court may act as an agent of policy drift and use the case of labor law to illustrate these mechanisms in practice. When interpreting federal statutes, the Court may facilitate policy drift by shifting the burden of positive action away from initial policy “losers” and towards the original policy “winners”, thereby putting the onus on policy winners to formally update policies in light of changing conditions. Furthermore, the Court may act as a veto point when innovative actors attempt to apply statutes to changing environments. In addressing the right to strike, federal preemption, and the autonomy of the NLRB, the Court has facilitated drift by interpreting the National Labor Relations Act in a way that shifted the burden of positive action towards labor and their allies, and precluded attempts by sub-federal actors and the NLRB from applying labor law to address socioeconomic change. Placing the Court in a framework of policy drift can help explain why certain policy domains have undergone drift and illuminate subtle effects of judicial decisions.

1. Introduction

*“The Court’s opinion is like a pirate ship. It sails under a textualist flag, but what it actually represents is a theory of statutory interpretation that Justice Scalia excoriated—the theory that Courts should “update” old statutes…”*

*-*Justice Samuel Alito, *dissenting* in *Bostock v. Clayton County* 590 U.S \_\_\_ (2020)

“*Title VII of the Civil Rights Act of 1964, now more than half a century old, invites an interpretation that will update it to the present, a present that differs markedly from the era in which the Act was enacted”*

-Judge Richard Posner, *concurring* in *Hively v. Ivy Tech Community College* 853 F.3d 339 (7th Cir. 2017)

In the above excerpts, two notable jurists address Title VII of the Civil Rights Act of 1964, and if that provision protects gay and transgender individuals from workplace discrimination based on their sexual orientation and gender identity. The jurists approach the question, and statutory interpretation more broadly, with vastly different assumptions. Justice Alito’s dissent is illustrative of a textualist interpretation which claims that statutes must be interpreted based on their meaning at the time of original enactment.[[1]](#footnote-1) In contrast, Judge Posner believes statutes should be interpreted in keeping with changing circumstances, even if those realities were potentially unforeseen by the enacting legislature. While these debates are ultimately of a *jurisprudential* nature, they allude to important realities of American politics and policymaking.

The contrasting visions over the meaning of Title VII points to the prerogative of the judiciary to “say what the law is” and by extension, the judiciary’s position to shape policy development after laws are enacted by Congress.[[2]](#footnote-2) The importance of the Court’s decisionmaking is magnified when other political institutions face internal gridlock, within a branch of government, and/or external gridlock, when coordinate branches of government are unable to reach consensus. Regardless of *how* the Court interprets a statutory provision, it will affect public policy, and create subsequent ripples across the political landscape.

In what follows, I use the case of federal labor law to show that the Supreme Court is a powerful agent of “policy drift” and that the Court’s power to shape downstream policy developments remains largely overlooked. Separation of powers studies recognize the Court’s policymaking role but fail to incorporate the gradual effects of judicial decisionmaking, such as drift. Policy drift refers to the changing operation of a public policy due to a lack of formal updating in the face of a changing external environment.[[3]](#footnote-3) Through drift, policies change in the face of formal stasis*.* A classic example of policy drift is the minimum wage. Although the federal minimum has yet to change from the $7.25 rate set in 2007, the minimum wage in 2021 functions differently than it did in 2007. As inflation rises, the wage provides less purchasing power to minimum wage workers today than it did in 2007.

I contend that Supreme Court statutory decisions may facilitate policy drift through two mechanisms: 1) by vetoing attempts of bureaucrats, state actors, or other agents seeking to update a policy[[4]](#footnote-4) and 2) changing the political dynamics surrounding a policy by shifting the burden of positive action from the original losers (opponents of a policy) towards the original winners (the enacting coalition and/or their allies). By vetoing attempts to update or adapt existing policies, the Court facilitates the continuation of the policy status quo despite surrounding external changes. In addition, when the Court interprets a statute in a manner that contradicts the interest of the original policy winners, it provides policy opponents with the luxury of playing defense in subsequent rounds of policymaking. If the Court rules in the favor of a law’s opponents, they can leverage Congressional veto points and force policy proponents to forge a legislative supermajority to update the policy in the face of changing conditions. In this sense, the immediate political effects of a statutory ruling affect the downstream development of that policy. By politically advantaging the law’s opponents, the Court may facilitate the legislative stagnation surrounding a given policy area. In the appendix, figures A1 and A2 use the cases of *NRLB v. Mackay Radio* 304 U.S 333 (1938)and *Epic Systems v. Lewis Corp* 584 U.S \_\_\_ (2018)to visually illustrate these processes.

Of course, a necessary condition for the Court to facilitate drift is that Congress does not update public policy in light of changing conditions and that the Court’s decisions are not “overridden”.[[5]](#footnote-5) Public law scholars, including William Eskridge, have shown that Congress has been willing and able to respond to judicial interpretations of statues in multiple important instances.[[6]](#footnote-6) In recent years, however, the frequency of Congressional responses to statutory decisions has declined.[[7]](#footnote-7) Furthermore, even in the scope of Eskridge’s study there remain notable examples of legislative majorities failing to respond to the Court’s ruling due to the numerous veto points in the U.S federal system. Judicial interpretations of the NLRA and subsequent federal labor laws---the Taft-Hartley and Landrum-Griffin Acts, have largely remained untouched by Congress across both the twentieth and twenty-first centuries.

In the next section, I provide a brief overview of the National Labor Relations Act, New Deal politics, and two post-war labor laws: The Taft-Hartley and Landrum-Griffin Acts. I then use three areas of labor law: strike replacements, federal preemption, and NLRB autonomy to illustrate how the Supreme Court may facilitate policy drift. Before concluding, I address other explanations of the Court’s actions towards labor law and how incorporating the concept of drift adds to existing understandings. Finally, I provide a recap of the paper and key takeaways in a brief conclusion.

1. Federal Labor Law

Labor policy in the United States is primarily governed through the 1935 National Labor Relations Act (“Wagner Act” or “NLRA”). Since its initial passage during the “Second New Deal”,[[8]](#footnote-8) the Wagner Act has undergone two legislative revisions: The Taft-Hartley Act (1947) and The Landrum-Griffin Act (1959). Taft-Hartley, among other things, provided employees with the right to refrain from certain union activities, allowed states to enact “right to work” laws,[[9]](#footnote-9) and constrained union activity by outlawing “closed shop” agreements[[10]](#footnote-10) and “secondary boycotts”.[[11]](#footnote-11) Twelve years later, the Landrum-Griffin Act targeted corruption among labor unions and gave authority to state labor boards and courts to addresses certain cases where the NLRB explicitly declined jurisdiction, outlawed “hot cargo” agreements,[[12]](#footnote-12) and tightened union reporting requirements.[[13]](#footnote-13)

Despite these revisions, key tenets of the Wagner Act remained in-tact. The formal §7 provisions ensuring the right of workers to join unions, bargain collectively, and undertake “concerted activities” to advance their general welfare remained untouched. Furthermore, it remained illegal for employers to interfere with the exercise of §7 rights and to discriminate against employees based on union status as prescribed by §8 of the act. Although the formal language of the NLRA has remained unchanged since 1959, two key metrics concerning labor relations have undergone drastic change: private sector union membership has plummeted, and the use of strikes has fallen. These metrics changing in the face of formal legislative stasis provides evidence that federal labor law has undergone drift.[[14]](#footnote-14)

Since the enactment of the NLRA and subsequent boon to workers, the status of labor has precipitously declined in the latter part of the twentieth century and the decline has continued into the 2000s. Following the passage of the Wagner Act, unionization exploded in the United States as raw membership went from 3,753,300 to 6,555,550 unionized workers by 1939 and then up to 12,562,100 by 1945.[[15]](#footnote-15) Even after Taft-Hartley, which constrained union authority, the United States saw an all-time high unionization rates of about 1/3rd of the working population.[[16]](#footnote-16) After hovering around 1/3rd until about 1959, unionization rates began a steady decline among non-agricultural American workers.[[17]](#footnote-17) By 1983, the unionization rate had dropped from about 1/3rd of the population to 1/5th of American workers, according to the Bureau of Labor Statistics.[[18]](#footnote-18) By 2018 the rate fell to approximately 1/10th of workers.[[19]](#footnote-19)

In addition, the rate of work stoppages (strikes) in the United States has decreased.[[20]](#footnote-20) Given that the NLRA was in part enacted to ensure “industrial peace”, the declining rate of work stoppages may be initially viewed as a sign of labor law functioning as it was intended. However, as outlined below, the sharp rise of economic inequality and decline of unionization indicate that the decline in strikes may be due to an alternative explanation. As elaborated upon further in the next section, a decline in strikes is better explained by the gradual inability of the NLRA, in conjunction with external trends, to protect the status of striking workers and the growing incentives of employers to respond to strikes with forceful measures such as closing plants or hiring replacement workers. Rising economic inequality serves as additional evidence that the relative bargaining power between labor and business has shifted within the system established by the NLRA (and even Taft-Hartley and Landrum-Griffin) and that the decline in strikes is not due to equal relations between business and labor. Across various measures, economic inequality has widened in recent decades. Beginning in 1980, the richest 1% of Americans went from accumulating approximately 10% of the national income per year (including capital gains) to over 23% of the national income per year in 2007.[[21]](#footnote-21) According to Pew Research, from 1970-2018, the middle income range of households have gone from earning 62% of America’s income per year to just 43%.[[22]](#footnote-22) And as of 2020, the richest 0.1% of Americans have the same amount of wealth as the bottom 90%.[[23]](#footnote-23) In order for an achievement of “industrial peace” to explain falling strike rates and unionization one would assume that the relative status of workers would be converging, not diverging, with those at the top of the economic ladder.

Despite the collapse of unionization in the United States and erosion of strikes as a labor tactic, Congress has yet to address the growing disparity between the bargaining power of business and labor. The changing outputs of federal labor law paired with legislative stagnation in federal labor policy since 1959 has led several scholars to classify labor law as an example of policy drift. [[24]](#footnote-24) While the Taft-Hartley and Landrum-Griffin Acts created some meaningful changes in the law, these amendments moved the law in a conservative direction and provided no recourse to alleviate the trends that became especially pronounced in the late 1970s and early 1980s. It is not that these trends have gone unnoticed. Rather, the case of labor law appears to be one where policy drift is intentional- it has been maintained by Congressional Republicans and conservative Democrats who leverage key veto points to prevent updating to labor law as seen during deliberation over the 1978 Labor Law Reform Bill and the plethora of failed bills proposed from 1991-1993 to protect striking workers and balance the playing field between labor and their employers.[[25]](#footnote-25) Although the concept of “drift” insinuates passivity, it is important to remember that political players exercise agency in leveraging veto points, maintaining oppositional cohesion, and keeping legislative updating off the agenda. Paying close attention to the actors and institutions involved in policy drift will reveal the machinations of political players who use obstruction to distort the operation of important policies.

The policy arrangements outlined by the Wagner, Taft-Hartley, and Landrum-Griffin Acts are sprawling and complex. I will therefore focus on three specific areas of labor law and demonstrate how the Court’s adjudication of these questions helped facilitate labor law’s drift: the right to strike, federal preemption, and the autonomy of the National Labor Relations Board (NLRB). Table 1 outlines the three areas of labor law I will cover in subsequent sections, pertinent cases, and brief summaries of each relevant decision.

Table 1: Important Cases Related to NLRA and Policy Drift

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| --- | --- | --- |
| **Policy Area** | **Supreme Court Decision (Year Decided)** | **Notable Case Impact(s)** |
| Replacement Workers | *NLRB v. Mackay Radio* (1938) | The Court, in dicta, reasoned that employers may hire permanent replacements for striking workers. |
| Replacement Workers | *Trans World Airlines v. Flight Attendants* (1989) | The Court once again affirmed the *Mackay* dicta as law and expanded upon the scope of the *Mackay* decision by ruling that the NLRA did not require firms to layoff more junior employees to make way for more senior, striking workers. |
| Federal Preemption | *San Diego Building Trades Union v. Garmon* (1959) | The Court ruled that labor practices that are expressly protected or prohibited by federal labor statures cannot be addressed by subnational policies. |
| Federal Preemption | *International Association of Machinists v. Wisconsin Employment Commission* (1976) | The Court ruled that labor practices unaddressed by federal labor law are intended to be left to “market forces” (unregulated by governing institutions). |
| Federal Preemption | *Chamber of Commerce v. Brown* (2008) | A conservative majority ruled that a California statute was preempted by federal labor law, indicating the emerging Conservative affection for federal preemption. |
| Constraining the NLRB | *NLRB v. Consolidated Edison* (1938) | The Court, in dicta, proclaimed the NLRB’s power to be “remedial”, not “punitive”. |
| Constraining the NLRB | *Republic Steel v. NLRB* (1940) | The Court directly addressed the scope of NLRB authority and affirmed the *Consolidated Edison* dicta- the Board’s authority is only “remedial”, thus curtailing the power of the NLRB to deter labor violations. |
| Constraining the NLRB | *NLRB v. Yeshiva University* (1980) | The Court reversed an NLRB ruling that authorized the unionization of collegiate faculty. The Court reasoned that faculty performed “managerial” functions and are therefore excluded from unionization. |
| Constraining the NLRB | *Hoffman Plastic Compounds v. NLRB* (2002) | The Court reversed the NLRB in awarding back pay to undocumented workers who had suffered an unfair labor practice. |
| Constraining the NLRB | *Epic Systems v. Lewis* (2018)[[26]](#footnote-26) | The Court ruled that class-action lawsuits were not a protected activity under section 7 of the NLRA on the grounds that this style of litigation would not have been considered by the drafters of the NLRA. |

The goal of subsequent sections is not to provide a comprehensive account of all Supreme Court rulings towards federal labor law, nor is it to explain each piece of the causal puzzle as to why labor law has gradually lost its luster in the United States. Rather, in the next sections I use historical examples to demonstrate how the Supreme Court has facilitated the process of drift by disadvantaging labor’s allies in the political arena and blocking attempts at policy innovation by subnational and bureaucratic policymakers. Because a lack of significant policy updating is a necessary condition for the presence of drift, before delving into each “case within a case” (policy area within labor law) I will explain why Taft-Hartley (1947) and Landrum-Griffin (1959) do not rebut my claim that labor law is an example of policy drift and that the Court had a role in facilitating its drift.

**Right to Strike:[[27]](#footnote-27)** In addressing the Supreme Court’s role in the rights of striking employees, I will examine two cases: *NLRB v. Mackay Radio & Telegraph Co.* 304 U.S 333 (1938) and *TWA v. Flight Attendants* 489 U.S. 426(1989)[[28]](#footnote-28).

In the universe of cases related to striker replacements, *Mackay Radio* and *TWA Airlines* are most relevant in examining how the Court facilitates policy drift. In addition to affirming the conservative interpretation of the NLRA as it pertains to striker replacements, neither case was overturned or directly affected in any other way by Taft-Hartley and Landrum-Griffin. *Mackay Radio* was decided before the passage of Taft-Hartley and Landrum-Griffin and therefore interprets only the National Labor Relations Act. Furthermore, a Congressional majority sought to overturn *Mackay Radio* in the early 1990s, long after the passage of Taft-Hartley and Landrum-Griffin, indicating that these amendments did not address the policy changes brought on by *Mackay* and its progeny. *TWA v. Flight Attendants* was decided years after both Taft-Hartley and Landrum-Griffin and was also addressed in deliberations over labor law reform in the 1990s.

**Federal Preemption[[29]](#footnote-29):** The preemption cases cited in the analysis below are *San Diego Building Trades Council v. Garmon* (1959)*, International Association of Machinists v. Wisconsin Employment Commission* (1976)*,* and *Chamber of Commerce v. Brown* (2008). While Landrum-Griffin (1959) was passed shortly after the *Garmon* decision was handed down, it did not reverse the Court’s ruling. The other pertinent cases, *Machinists v. Wisconsin Employment* and *Chamber of Commerce v. Brown* came well after Congressional action in Taft-Hartley and Landrum-Griffin. While Taft-Hartley and Landrum-Griffin delegated authority to state-level decisionmakers, neither law was interpreted as ensuring state authority to make labor policy that deviates from federal statutes, nor did either law preclude the Court from affirming federal authority in the three aforementioned decisions.

**NLRB Autonomy:** The Supreme Court has curtailed the autonomy of the NLRB in two ways. First, they have broadly limited the scope of NLRB authority by confining their actions to those of a “remedial”, rather than a “punitive” nature. And second, the Court has vetoed attempts by the NLRB to apply the NLRA in novel ways. The former set of cases, *Consolidated Edison v. NLRB* (1938)and *Republic Steel Corp v. NLRB* (1940), were handed down before Taft-Hartley and Landrum-Griffin. Furthermore, Congress attempted to enshrine “punitive” authority in the NLRB during the late 1970s, indicating that not only did Taft-Hartley and Landrum-Griffin not address these cases, but that the cases were perceived as shaping the operation of labor law decades after these amendments were passed. The second set of cases (*Yeshiva University v. NLRB* (1980); *Hoffman Plastic Compounds, Inc v. NLRB* (2002)*; Epic Systems v. Lewis* (2018)) were all handed down after the midcentury amendments and address the original scope of the NLRA.

In the next sections I will address in detail the three domains of cases outlined above (the right to strike, federal preemption, and NLRB autonomy) and describe how these decisions facilitated the gradual policy drift we have seen in regard to labor law in recent decades.

1. The Right to Strike[[30]](#footnote-30)

Beginning in the late 19th century and exacerbated by highly publicized incidents such as the Pullman Strike (1894) and the Ludlow Massacre (1914),[[31]](#footnote-31) labor strikes became an increasingly salient part of the American economic landscape and a pressing political dilemma. The extent to which labor should receive legal protection to engage in strikes was debated in Congress in the 1930 amidst the Great Depression. Ultimately, the right to strike was outlined in the 1935 National Labor Relations Act in §13 which reads, in part, “Nothing in this act [subchapter], except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike or to affect the limitations of qualifications of that right”[[32]](#footnote-32) and §7, which provides a broader grant of power to labor, by ensuring the right to “engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection”.[[33]](#footnote-33) Shortly after the implementation of the NLRA, the Supreme Court was presented with cases addressing the specific meaning of these provisions and the extent to whether these rights would be treated as meaningless guarantees, absolute rights, or somewhere in between.

3.1 Mackay Radio and Strike Replacements

On May 16th, 1938, the United States Supreme Court handed down its decision in *NLRB v. Mackay Radio* & *Telegraph Co.* In *Mackay Radio*, the Court addressed the NLRB’s mandate that the Mackay Radio company must “cease and desist from discharging or threatening to discharge any of its employees because of their membership in the union or on account of union activities”. Additionally, the NLRB ordered the Mackay Radio company to reinstate the five men it had not rehired following the conclusion of the strike.[[34]](#footnote-34) Writing for a 7-0 majority, Justice Owen Roberts addressed a number of points in the Court decision. First, Justice Roberts asserted that the striking workers were striking in relation to an ongoing labor dispute, and even though there was not an explicit “unfair labor practice” committed by Mackay Radio, the strike falls under the purview of the NRLA. Second, the Court reasoned that striking workers remain “employees” under the definition of the NLRA. Third, the Court affirmed the jurisdiction, procedures, and authority of the NLRB to address the dispute and upheld the NLRB findings that there were instances of Mackay Radio discriminating against union members over the course of the labor dispute.

However, the Roberts opinion also contained important dicta that read “Nor was it an unfair labor practice to replace the striking employees with others in an effort to carry on the business. Although §13 of the act provides “[n]othing in this Act shall be construed as so as to interfere with or impede or diminish in any way the right to strike,” it does not follow than an employer, guilty of no act denounced by the statute, has lost the right to protect and continue his business by supplying places left vacant by strikers”.[[35]](#footnote-35) This portion of the opinion limited the right to strike guaranteed in the NLRA by protecting the rights of employers to carry on their business through the replacement of striking workers. In practice, this provided a compelling deterrence against strikes should businesses choose to replace striking workers with new hires.

Despite the dicta regarding strike replacements, the Court’s unanimous decision was widely viewed as a win for labor and the NLRB. *The New York Times* highlighted the Court’s validation of NLRB procedures when the Court determined that the agency had not denied Mackay Radio a full and fair hearing.[[36]](#footnote-36) Similarly, a *Milwaukee Journal* article summarized the decision as supporting the NLRB and that the Court’s interpretation allowed striking workers to remain “employees” under the Wagner Act.[[37]](#footnote-37)

On the same day, just down the road from the Court, Senator Robert Wagner (D-NY), architect of the NLRA, took to the Senate floor to cheer the *Mackay* decision as yet another win for the NLRB. Wagner, remarking on *Mackay Radio,* noted“This marks the eleventh straight victory for the Labor Board in the Supreme Court, and the seventh in which the Court reversed a circuit court of appeals decision averse to the Board. The Board’s orders have now been upheld in 33 out of 39 cases reviewed by the Courts”.[[38]](#footnote-38) Senator Thomas (D-UT) joined Senator Wagner in praising the decision and its legitimating function upon the procedures used by the Labor Board.[[39]](#footnote-39) Outside of Senators Thomas and Wagner, the *Mackay* decision received little immediate attention in Congress.

As of now (January 2021), the *Mackay Radio* decision remains unchanged. The Court has not reversed its interpretation of the NLRA in relation to replacement workers, nor has Congress passed legislation to address the Court’s decision. Nevertheless, the use of replacement workers has evolved since 1938 and the perceptions of relevant actors towards the *Mackay* decision has gradually shifted as changes in the economic landscape incentivized the use of replacements.

The National Labor Relations Act was passed in Congress by New Deal Democrats backed by the AFL and more militant labor organizations including the CIO. More conservative elements of the Democratic Party in Congress were brought on board following the exclusion of household and agricultural workers form from the bill’s protection, which alleviated their fears of Black workers gaining new workplace protections.[[40]](#footnote-40) Opposition to the bill came from Congressional conservatives and assorted business organizations such as the National Association of Manufacturers, who quickly weaponized skepticism of federal power to turn Southern Democrats against federal labor law after its initial passage.[[41]](#footnote-41) Even the AFL joined the opposition after a string of favorable rulings towards the CIO at their expense, creating a significant fracture among American labor. Congressional conservatives, business interests, and moderate elements of the labor movement turned towards formally updating federal labor law by 1937 but faced an almost insurmountable Democratic majority and veto-riddled political landscape.[[42]](#footnote-42)

In relation to the hiring of replacement workers, however, the Supreme Court’s *Mackay* decision shifted the burden of positive action from conservatives towards labor and their Congressional allies despite the lack of legislative updating. In doing so, economic conservatives in Congress have been able to leverage veto points to ensure the Court’s interpretation in *Mackay* remained the policy status quo. The potential for *Mackay* to destabilize employer-employee relations became evident in the 1970s as global trends in technology and trade increasingly put labor in a precarious position in the public eye and at the negotiating table.[[43]](#footnote-43) Although the highly salient dismissal of air traffic control workers by President Reagan, in 1981, is often cited as a seminal event in the use of replacement workers, this practice became increasingly frequent years before.[[44]](#footnote-44)

Between the *Mackay* ruling in 1938 and attempts to reverse the decision in the early 1990s, the Court affirmed the legitimacy of the *Mackay* doctrine and clarified the applicability of the decision to new sets of facts. Despite limiting the applicability of *Mackay* by prohibiting the awarding of “super-seniority” to workers who cross the picket line[[45]](#footnote-45) and precluding employers from refusing to re-hire workers for reasons that do not meet the threshold of a “legitimate and substantial business justification[[46]](#footnote-46), the Court continued to affirm the *Mackay* doctrine as a guiding legal principle. In 1989, the Supreme Court *expanded* the applicability of *Mackay* in *Trans World Airlines v. Flight Attendants* by upholding an appellate court ruling that Trans World Airlines was not required under the Railway Labor Act (RLA) or NLRA to layoff more junior employees to make way for more senior, striking workers following a labor stoppage. The flight attendants union argued that *Mackay Radio* is inapplicable because the current case addressed the status of junior employees as replacements rather than outside workers, and cited the *Erie Resistor* decision that ruled it unfair for employers to award crossover workers 20 years extra seniority.[[47]](#footnote-47) Justice O’Connor’s majority opinion rebuked the application of *Erie Resistor* to this set of facts and noted that under *Mackay*, that assurances of employers towards workers who accepted employment during a strike that “their places may might be permanent was not an unfair labor practice, nor was it such to reinstate only so many of the strikers as there were places to be filled” *Trans World Airlines v. Flight Attendants* 489 U.S. 426 (1989). Given the recency of the case in relation to attempts to reverse *Mackay,* and its affirmation of the decision, it is unsurprising that *Trans World Airlines* came under the purview of reform efforts in the early 1990s.

As striking workers became replaced with more frequency, the urgency felt by unions and many Democrats to update federal labor law only grew. After the inauguration of Bill Clinton in 1993, following twelve years of Republican presidencies, legislative reform finally appeared possible. Attempts had been made in 1991 and 1992 but faced tremendous odds given the vocal opposition to the bill by the Bush White House. Legislation passed the House during the Bush presidency but failed to garner enough votes to override a potential veto and in the Senate the bill received only 57 cloture votes.[[48]](#footnote-48) By 1993, it appeared possible that labor allies in Congress might overturn both *Mackay* and *Trans World Airlines*. However, once again, labor allies in Congress would fail to clear the bar for cloture in the Senate leading to the death of the legislation. In the Senate, the 1993 version of reform (S.55) was voted on and failed to pass cloture by a vote of 53-46 on July 13, 1994. Like its predecessors during the Bush presidency, the bill would have prohibited the hiring of replacement workers. Among Democrats, fifty-two of fifty-seven Senators voted for cloture while just one of forty-three Republicans (Arlen Specter (R-PA)) voted in favor of ending debate on the bill.[[49]](#footnote-49) Not only did Democrats in Congress seek to amend labor law to even the playing field of labor relations, but they also attributed the need for legislative updating in part to the *Mackay* decision.

The awareness among labor allies that *Mackay Radio,* and strike replacements more generally,had taken on increased significance throughout the twentieth century manifested both in Congress and among organized interests. The *Trans World Airlines* decision was also viewed as significant and a target of reversal. The 1993 attempt to update labor law largely centered around S. 55 which, according to the Senate Committee on Labor and Human Resources, sought to amend the National Labor Relations Act to “prevent discrimination based on participation in labor disputes”.[[50]](#footnote-50) In the fifty one page committee report on the bill, a search for “Mackay Radio” returns 63 hits, demonstrating the salience of the case in Congressional deliberations. Committee members in favor of passage found that initially *Mackay* had minimal impact in bargaining relations, but that “In the last decade however, employers have significantly increased their use or threatened use of permanent replacements”,[[51]](#footnote-51) a right enshrined by *Mackay Radio* that “undermines the collective bargaining process as a whole”.[[52]](#footnote-52) The report went on to cite an abundance of research showing that the use, or threatened use, of permanent replacements had drastically grown in the 1980s.[[53]](#footnote-53) Even the Republican dissenters on the Senate Committee on Labor and Human Resources did not dispute the centrality of *Mackay Radio* to the contemporary labor landscape. Opponents of S.55 argued that *Mackay Radio* was a necessary lynchpin in the domain of labor relations that “serves as an important market check on opportunistically high demands of unions”.[[54]](#footnote-54) The attribution of *Mackay* to such a check is striking when placed alongside the news coverage in 1938 which largely missed the potential for the decision to become a tool of business. Such a gradual transformation demonstrates how judicial interpretations of laws, and legal arrangements more broadly, may take on new meanings as external environments undergo changes.

Of course, the committee report on S.55 is not the only authoritative source on whether *Mackay Radio* shaped labor relations in meaningful ways. Additional evidence can be found among influential interest groups and whether they perceived *Mackay Radio* doctrine to be responsible for a reduction in strikes and the gradual shift of power away from unions and towards business. Secretary-Treasurer of the AFL-CIO Thomas Donahue testified before Congress in 1991 that the *Mackay* decision “threatens the very vitals of free and productive collective bargaining” and pointed to the increase of replacement workers at major firms such as International Paper, Eastern Airlines, Greyhound, and the New York Daily News.[[55]](#footnote-55)

In addition, the earlier 1991 effort to overturn was described as the number one priority of unions outside of healthcare reform as AFL-CIO President called the labor legislation a “burning issue”.[[56]](#footnote-56) On the other side, the United States Chamber of Commerce and National Association of Manufacturers opposed the reversal of *Mackay* for reasons echoed by Congressional conservatives- specifically that legislation barring the hiring of replacement workers would “disarm” management in labor relations.[[57]](#footnote-57)

*Trans World Airlines* alsoremained salient throughout Congressional hearings in both 1991 and 1993. In 1991, a House hearing over H.R.5, Vicki Frankovich, President of the International Association of Flight Attendants voiced support for the bill and detailed their experience during the strike against Trans World Airlines in the mid-1980s. Ms. Frankovich testified that usually the hardships end when a strike concludes, but that due to the use of strike replacements, “In our situation, the agonies lasted more than 3 years with people on the street. During the course of our 3 years out of work, single mothers with children were forced to sell their homes and move back with parents; some lost their homes to foreclosure. In other instances, both husband and wife were flight attendants, so both incomes were lost”[[58]](#footnote-58)

In the same hearings, David Westfall, a Harvard Law Professor, testified against H.R.5, arguing that the bill would effectively “supercede” *Trans World Airlines* by amending both the RLA and NLRA.[[59]](#footnote-59) The *Trans World* decision remained pertinent two years later, in 1993, when Congress once again visited the question of replacement workers. In the House, William Jolley, legal representative for the International Association of Flight Attendants (respondents in the *Trans World Airlines* case), testified in favor of H.R.5, decried strike replacements, and detailed the injuries incurred by his clients as a result of the Trans World Airlines replacement practice in the 1980s.[[60]](#footnote-60) Representatives of Midwest Motor Inc, decried the bill in the same hearing and bemoaned that the bill would overturn *Mackay* and *Trans World.[[61]](#footnote-61)* A month earlier, in the U.S Senate, John Irving (previous counsel to the NLRB (1975-79) and the Chamber of Commerce) argued that labor has misread legislative history, citing the Court’s affirmation of *Mackay* (including *TWA*) as evidence that striker replacements were not precluded by the NLRA.[[62]](#footnote-62)

The development of strike replacements under the NLRA illustrates the expected contours of policy drift and illustrates how the Court facilitated the process. First, legislative winners (congressional liberals and labor unions) enact a policy (in this case the NLRA) which is not successfully repealed by the law’s opponents (congressional conservatives and businesses). However, the law’s opponents have enough legislative influence to prevent policy updating of the given statue. Given the gap between the *Mackay Radio* decision in 1938 and attempts to respond to the decision in Congress in the 1990s, it is evident that striker replacements were not perceived as a problem, fitting Kingdon’s expectations that for an item to get on the agenda it must be perceived as a priority among legislators. Once it was on the agenda in the 1990s, Republicans in Congress leveraged key veto pivot points to prevent policy updating despite a changed labor environment, matching Krehbiel’s model that stresses how a legislative majority is often insufficient for successful lawmaking. The Court facilitated this process by putting the onus on labor allies to reverse a 1938 Court decision at a time when pro-business forces were ascendent in American politics.[[63]](#footnote-63) By interpreting the law to allow permanent replacements the Supreme Court not only moved the law in a more conservative direction but also fashioned a policy arrangement that was suitable to coalitions large enough to leverage the Senate filibuster. The Supreme Court has also facilitated the policy drift of labor law by shutting off alternative venues for potential policy innovation and by constraining the autonomy of NLRB officials.

1. Federal Preemption

Questions of federalism have remained salient from the founding through the twenty first century across vitally important policy domains including immigration,[[64]](#footnote-64) environmental policy,[[65]](#footnote-65) and perhaps most notably, the status of Black Americans in the polity as defined by issues such as slavery and civil rights which has always included discourse on “states’ rights”. Labor policy in the United States has proved no different as questions of state and federal authority remain contested and unsettled. However, unlike explicitly racial issues such as segregation and voting rights, where conservatives typically seek greater local authority, in labor law, attitudes towards preemption have been more dynamic. While conservatives sought greater local control for much of the twentieth century, a gradual shift emerged as liberals slowly became more amenable to state and local innovation and conservatives warmed to federal preemption.

The extent to which the NLRA and its subsequent amendments would preempt state and local action was largely adjudicated in federal courts. In this section, I will focus on three rulings and how these rulings prevented local labor law innovation and by extension facilitated the process of drift as alternate policy venues were shut off from reformers who failed to overcome Congressional gridlock. The Court’s decisions in *San Diego Building Trades Council v. Garmon* and *International Association of Machinists v. Wisconsin Employment* created an arrangement where the NLRA broadly preempted large swaths of potential action at the state and local levels. Years later, the Court’s decision in *Chamber of Commerce v. Brown* illustrates how the legal dynamics surrounding preemption gradually shifted from the *Garmon* case in 1959 to 2008.

Questions of federalism and preemption are important in understanding the political dynamics of policy drift. When there is stagnation in the legislature (in this case the U.S Congress), political actors will seek new venues through which they can update targeted policies. The Court’s jurisprudence and political dynamics surrounding labor law have created a legal arrangement in which this recourse is largely sealed off from labor and their allies.[[66]](#footnote-66)

4.1 *Garmon* and *Machinists* Preemption: Precluding Subnational Policymaking

The Court’s enunciation of federal preemption of labor law was largely shaped by *San Diego Building Trades Council v. Garmon* (1959). In *Garmon,* a five member majority agreed that the NLRA preempted any subnational policymaking that attempts to regulate any activity expressly prohibited (i.e discriminating on employees based on union status) or protected (i.e forming and joining unions, bargaining collectively, going on strike) by federal labor law. Justice Frankfurter’s opinion declared “When it is clear….that that activities which a state purports to regulate are protected by §7 of the National Labor Relations Act, or constitute an unfair labor practice under §8, due regard for the federal enactment requires that state jurisdiction must yield”.[[67]](#footnote-67) The dissenting bloc of Justices Clark, Harlan, Whittaker, and Stewart, agreed that the NLRA should preempt local laws but found the extent of jurisdiction outlined by Justice Frankfurter to be too broad.

Contemporaneous political events and specific reactions to the *Garmon* decision illustrate how in 1959 labor law preemption was viewed as a liberal project. As Congress addressed labor law in the late 1950s and eventually produced the Landrum-Griffin Act, a handful of failed proposals were advanced that would alter the balance between state and federal authority. For example, Representative Howard Smith (D-VA), notorious Southern Democrat and segregationist, was one of a handful of legislators to introduce legislation in 1957 that would empower states in the field of labor relations.[[68]](#footnote-68) Mr. Smith’s bill, backed by the Chamber of Commerce, would instruct the judiciary not to assume that federal legislation superseded state laws unless such an intent was explicitly stated. Others proposed bills would have amended the Taft-Hartley Act to allow states to hear disputes when the NLRB declined to exercise jurisdiction,[[69]](#footnote-69) allow the NLRB to decline jurisdiction and thus grant jurisdiction to states,[[70]](#footnote-70) and finally, a bill proposed by Senator Watkins would amend the Administrative Procedures Act to give states jurisdiction when *any* federal agency did not act.

During debate over Howard Smith’s legislation, Representative Holland (D-PA) attacked the bill. “H.R.3 was born in the states which have refused to recognize the worker on any higher plane than they did the slave. H.R.3 received its greatest support from right-to-work states who were crying “crocodile tears” for individual members of the union, while at the same time they will use this bill to destroy by State legislation the advances labor made over the years”.[[71]](#footnote-71) Following the remarks of Representative Holland, Representative Powell (D-NY) went on to cite the precarity of the status of black workers should H.R 3 gain passage[[72]](#footnote-72), a point that alludes to the numerous set of issues mixed up in Smith’s proposal with civil rights, civil liberties, and labor being especially salient. Representative Celler (D-NY) also joined in providing robust opposition to the bill, citing his own concerns over the potential harm to workers and the vehement opposition from the NAACP who feared it would facilitate even greater discrimination across the South.[[73]](#footnote-73) The bill was favorably reported out of the House Judiciary Committee in 1958, passed the House 241-155 but then died in the Senate Judiciary Committee after referral. The next year, H.R.3 was once again favorably reported on by the House Judiciary Committee on June 2nd 1959.[[74]](#footnote-74) The minority views contained in the report bemoaned the potential of the bill to upset labor relations and cited instances in which the Court upheld state authority to address labor relations in some less sweeping cases.[[75]](#footnote-75)

In addition to position taking on the aforementioned bills to transfer authority to state and local decisionmakers, conservative players also responded directly to the *Garmon* decision. A Chamber of Commerce representative spoke against the *Garmon* decision when testifying before the House Joint Subcommittee on Education and Labor as the committee deliberated labor reform in 1959.[[76]](#footnote-76) The Chamber’s strong advocacy in favor of subnational control over labor questions becomes especially interesting when compared with their 2007 advocacy for preemption in *Chamber of Commerce v. Brown* (2008)*.* Even the arrangement of judicial voting betrays an ideological nature of the preemption question in the late 1950s as the *Garmon* minority consisted of the four most conservative justices on the Court[[77]](#footnote-77).

The broad reach of the National Labor Relations Act outlined in *Garmon* was furthered in the 1976 decision *International Machinists v. Wisconsin Employment Commission.* In *Machinists,* a 6-3 Court overturned a decision by the Wisconsin Employment Commission that unions refusing to work overtime during a labor dispute constituted an unfair labor practice. Justice Brennan, writing for the Court, reasoned that although overtime refusal is not explicitly mentioned in the NLRA, states are preempted from addressing this tactic as “Congress intended that the conduct involved be unregulated because it was left “to be controlled by the free play of economic forces”.[[78]](#footnote-78) In other words, Congress intended those actions not expressly permitted nor expressly prohibited to be available for employers and employees to use in the course of labor relations only to be constrained by market forces.

The *Garmon* and *Machinist* decisions, taken together, created a blanket of preemption that stifled innovation at the state and local levels. As Congress remained gridlocked on the issue of labor law, states took notable attempts to address the declining status of labor but were subsequently rebuked by courts and administrative agencies based on the precedents described above. For instance, in the 1980s, Wisconsin sought to bar firms with a history of labor violations from state procurement for a period of five years but was rebuffed by a 9-0 Supreme Court.[[79]](#footnote-79) In Illinois, a 2003 effort to strengthen the protection of labor was prohibited based on preemption grounds.[[80]](#footnote-80) The 7th Circuit Court of Appeals ruled that the Illinois 2003 legislation was “so starkly incompatible” with federal labor law that the court was baffled at how any responsible legislator or governor could approve it.[[81]](#footnote-81) And as described below, California’s Assembly Bill 1889 was also nullified by the Supreme Court in *Chamber of Commerce v. Brown* (2008).

The preemption doctrine outlined by the Court enshrined the need for labor allies to forge Congressional supermajorities (veto override and filibuster-proof majorities) to update labor policy. By precluding state and local action, the Supreme Court confined the playing field of labor law to Congress which became increasingly gridlocked throughout the twentieth century and less amenable to policy change. Since proponents of reform are limited in their ability to seek alternate venues of policymaking they must create congressional supermajorities to affect change through the legislative process or gain enough sympathy in the Senate and Presidency to appoint labor-friendly justices willing to relax or reverse important precedents. In Congress, the rightward drift of the Republican Party and increasing parity in Congressional elections has only exacerbated the challenge facing the allies of labor in updating federal policy. In addition to obstacles presented by the Republican Party, strains of economic conservatism remained prevalent among sectors of the Democratic party in the modern era.[[82]](#footnote-82) Outside Congress, recent Republican dominance of the judiciary it appears unlikely that a jurisprudential revolution would overturn or loosen the preemption doctrine in a way that is amenable to labor.[[83]](#footnote-83) In this environment, Congressional conservatives and the Chamber of Commerce gradually became staunch defenders of the preemption doctrine as seen in *Chamber of Commerce v. Brown* (2008).

4.2 The Chamber of Commerce and The Growing Conservative Embrace of Preemption

In 2000, the state of California prohibited certain employers receiving state funds from using said funds “to assist, promote, or deter union organizing” when they passed Assembly Bill 1889.[[84]](#footnote-84) In a sharp reversal from their robust support for Howard Smith’s H.R.3, which had embraced state authority, the Chamber of Commerce led the charge against Assembly Bill 1889 in the early 2000s. While conservatives were wary of federal preemption during the midcentury, by the *Brown* case, many conservative groups voiced their support for preemption through the filing of amicus briefs including the Cato Institute, the Right to Work Legal Defense Fund, The National Federation of Independent Businesses, and the George W. Bush Justice Department.[[85]](#footnote-85) On the other side, Amicus briefs were filed by the AARP and assorted states that had either passed laws of a similar nature or were considering such policies.[[86]](#footnote-86) The AFL-CIO served as a respondent alongside the state of California.

The Court, in a 7-2 decision, struck the relevant provisions of Assembly Bill 1889 on the grounds that, as in *Machinists,* “they [provisions of AB 1889] regulate “within a zone protected and reserved for market freedom.””.[[87]](#footnote-87) The *Brown* decision not only served as a veto point against California’s policy mandating union neutrality from employers receiving state funds, but also nullified a handful of similar statutes across the United States.[[88]](#footnote-88) In addition, the Court’s decision ensured that labor reformers had to take the initiative to update policy while business and their legislative allies could play defense, leverage key veto points, and stifle legislative innovation. This constellation of legal decisions blocking local action in labor relations began to draw the attention of liberals in Congress. For example, Representative John Conyers Jr (D-MI) introduced a bill on November 18, 2010 that would have explicitly reversed the Court’s decision in *Chamber of Commerce v. Brown.* The bill, entitled “The State Public Funds Protection Act” was then cosponsored by Bob Filner (D-CA).[[89]](#footnote-89) The bill was referred to the House Committee on Education and Labor the same day as its introduction where it failed to advance further in the legislative process.[[90]](#footnote-90) Although Congress has yet to expand the purview of states and localities to make labor policy under the NLRA, the NLRB remains a source of policy innovation and institution capable of protecting American workers.

1. NLRB Autonomy

Following continued constraints on subnational actors and increasing gridlock at the Congressional level, prospects for innovation in labor policy appear confined to federal agencies, specifically, the National Labor Relations Board. A number of historical case studies demonstrate the innovative potential in federal bureaucrats to foster policy innovation and leadership.[[91]](#footnote-91) Indeed, the NLRB was initially charged with enforcing the Wagner Act as labor allies remained suspicious of federal courts based on their frequent issuance of injunctions to end strikes and other economic disruptions in the late 1800s and early 1900s.[[92]](#footnote-92) Despite Congressional intentions to legitimate the autonomy of the NLRB, the Supreme Court confined the NLRB to a narrow sphere of action shortly after the passage of the NLRA and in later years vetoed attempts by the NLRB to extend protections of the NLRA to new groups and novel labor tactics. The curtailment of NLRB discretion came in two early cases: *Consolidated Edison v. NLRB* in which the opinion dicta said the power of the NLRB was “remedial” and not “punitive”[[93]](#footnote-93), and *Republic Steel v. NLRB* which explicitly addressed the scope of NLRB authority and affirmed the dicta first articulated in *Consolidated Edison.* In addition to confining the NLRB’s scope of action, the Supreme Court has rejected Board attempts to award back pay to undocumented immigrants,[[94]](#footnote-94) extend unionization rights to college faculty,[[95]](#footnote-95) and include class-action lawsuits as a §7 “concerted activity” protected by federal law.[[96]](#footnote-96)

5.1 *Consolidated Edison* & *Republic Steel*: The Constraints of “Remedial” Authority

In the early years of the NLRA, the authority of the NLRB was curbed by the Supreme Court in *Consolidated Edison v. NLRB* (1938) and *Republic Steel Corp v. NLRB* (1940). In both cases, the Court delineated the bounds of NLRB discretion by ruling that the NLRB may take only remedial, as opposed to punitive, action. The initial significance of these rulings was largely missed by contemporary observers. Following *Consolidated Edison,* representatives from the AFL were “joyful” following the decision as the Court reversed the NLRB’s nullification of Consolidated Edison’s contract with the union, while the CIO “belittled” the decision.[[97]](#footnote-97) The contemporaneous news coverage of *Consolidated Edison* underscored the continued rivalry between AFL and CIO unions and missed the potential downstream effects in Justice Hughes’ opinion that confined the NLRB to remedial action. The dicta from the *Consolidated Edison* majority was applied directly to the dispute in *Republic Steel.* Inthat case, a 6-2 majority ruled that the NLRB lacked the authority to mandate the Republic Steel Corporation reimburse work relief agencies for wages paid to striking workers.[[98]](#footnote-98) Interpreting the Wagner Act to preclude punitive actions from the NLRB weakened incentives for corporations to comply with federal law compared to the counterfactual in which the NLRB could punish violators.[[99]](#footnote-99) By interpreting the NLRB as lacking punitive power, the Court reduced incentives for business to adhere to prohibitions against unfair labor practices. Politically, this interpretation flipped the burden of positive action towards labor allies in Congress who were left to reverse the Court’s decision via future Court rulings or Congressional legislation. Given the prevalence of veto points in Congress and the ability of conservatives to maintain a filibuster-proof majority in the Senate, labor allies have remained unable to strengthen the NLRB’s punitive power.

Congress attempted to address the limited authority of the NLRB in the 1977 Labor Law Reform Act by enshrining, via legislation, the NLRB’s authority to deter labor violations including the power to mandate double back play to employees and the authority to bar employers from federal contracts for a period of three years if found guilty of a labor violation.[[100]](#footnote-100) The bill included other provisions, including the expedition of union votes, which did not pertain to the authority of the NLRB to punish and deter labor violations.[[101]](#footnote-101) The bill was supported by labor, including the AFL-CIO but received robust opposition from the Chamber of Commerce and Business Roundtable. After sailing through the House, Senators Richard Lugar (R-IN) and Orrin Hatch (R-UT) led opposition to the bill and leveraged the filibuster pivot to avoid passage of labor reform. The final cloture bill failed 58-41 and took on a sectional flair as Senators from “right to work” states (mostly south and west) rallied against the bill. There was some cross-party collaboration as 14 Republicans voted for cloture and 15 Democrats voted against.[[102]](#footnote-102) Thus, as the Supreme Court curtailed the NLRB’s authority in the late 1930s and early 1940s, they laid the groundwork for downstream political struggles. Not only did these rulings provide immediate incentives to businesses to push the boundaries of labor practices, but also shifted the political landscape in favor of the opponents of the NLRA. Thus, in the 1970s, as the labor relations landscape had noticeably tilted towards business, supporters of the NLRA faced the need to re-assemble a pro-labor supermajority despite their legislative success in 1935. Despite a large majority of support in the House, Presidential backing, and a Senate majority in favor of reform, a business-friendly minority in the Senate successfully leveraged the filibuster to kill prospects of reform. The 1970s political dynamics mirror those of the 1990s, and the political dynamics of policy drift more broadly. In both instances, the coalition aligned with earlier legislative “winners” faced the burden of positive action and were unable to overcome veto points despite holding Congressional majorities. Thus, even without passing major revisions to the NLRA, based on jurisprudence and external changes, the initial “losers” in labor law continue to be advantaged at both the economic and political levels.

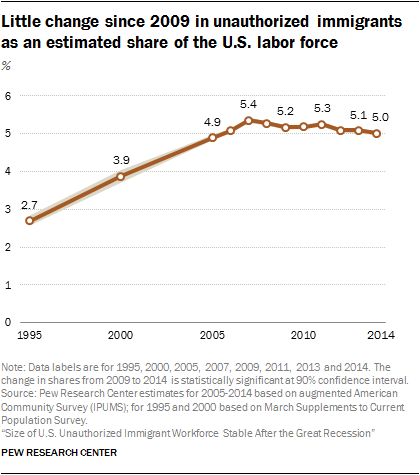
In addition to early rulings that bounded the NLRB’s discretion, the Court has also served as a veto point against NLRB efforts to apply the NLRA to a broader scope of workers and activities. The Court has limited the applicability of the NLRA to college faculty and undocumented workers, and excluded class-action lawsuits from §7 protection as a “concerted activity” undertaken by labor to protect their interests.

5.2 *Yeshiva, Hoffman Plastics,* and *Epic Systems*: Stifled Innovation

*NLRB v. Yeshiva University* (1980) provides a clear example of the Court acting as a veto point through statutory interpretation and hindering the adaptation of the Wagner Act to new contexts. At issue in the case was whether full professors are included under the NLRA’s definition of “employee”. Justice Powell, writing for the 5-member majority, agreed with Yeshiva University’s claim that professors have a role in University decisionmaking and are therefore “managerial” in nature, thus excluding professors from the purview of the NLRA’s protections afforded *employees.* The ruling affirmed the appellate Court’s decision not to enforce the NLRB’s order for Yeshiva University to bargain with their professors. The immediate consequences of the *Yeshiva* case quickly became clear. Within two years of the decision, approximately 40 private colleges and universities sought legal action to end ongoing collective bargaining with their faculty based on the *Yeshiva* ruling.[[103]](#footnote-103) Politically, the ruling appeared to cut across the conservative coalition as some influential Republicans, including Labor Secretary William Brock, opposed the decision citing that cooperation within the workplace was beneficial for America’s competitive standing on the global, economic market. Speaking for more conservative elements in the GOP, Senator Orrin Hatch took issue with Brock’s sentiment that the unionization of college faculty was desirable.[[104]](#footnote-104) The Court’s decision continued the trends towards labor law’s inefficacy and sealed off the possible expansion of unionization across the U.S. Despite some apparent sympathy among the GOP in the 1980s for collegiate faculty to unionize, there do not appear to have been meaningful Congressional attempts to update labor law to include extend to full professors. Shortly after *NLRB v. Yeshiva* (1980), the Court was faced with questions over the extent to which undocumented workers were entitled to NLRA coverage.

Since 1995, the proportion of undocumented labor in the U.S workforce has increased from 2.7% to a high of 5.4% in 2007, according to Pew Research.[[105]](#footnote-105) The steady increase of undocumented workers in the labor market prompted no legislative updating, in liberal or conservative directions, to the NLRA. This legislative stasis means ambiguities remain regarding the relationship to the Wagner Act and roughly 5% of the American workforce; and to the extent that these ambiguities have been clarified they have largely been specified by the NLRB and federal courts.

[Figure 1: Undocumented Labor as Share of the American Workforce, 1995-2014]



Beginning in the 1970s, the NLRB sought to apply the NLRA to undocumented workers. In July 1976, the Chicago-based Surak Leather Company invited INS agents to check the immigration status of company workers after the employees had voted to unionize.[[106]](#footnote-106) The NLRB found that Surak had violated Section 8 (a)(3) of the NLRA which forbids discrimination against employees based on union membership. As part of their broader determination, the Board ruled that undocumented workers did indeed fall under the law’s purview of “employees”. The Supreme *Court* affirmed the NLRB’s decision in *Sure-Tan Inc v. NLRB* (1984), thus nudging the operation of the NLRA’s towards more expansive coverage of laborers in the United States.

In 2002, however, the Court disrupted the NLRA’s protection of undocumented workers by ruling that the NRLB could not award undocumented workers back pay. In *Hoffman Plastics v. NLRB* (2002), a five-member majority found that the NLRB was not authorized under Section 10 (c) of the NLRA to award backpay to an undocumented laborer whose employer had been found to violate his labor rights. Despite the Bush White House filing an amicus brief on behalf of the NLRB, the Court reasoned that the Immigration Control and Reform Act (ICRA)[[107]](#footnote-107) (1986) precluded the awarding of backpay as a remedy to labor violations pertaining to undocumented workers.[[108]](#footnote-108) The decision undermined the tools available to the NLRB to address labor violations against undocumented workers by vetoing the extension of existing remedies towards a specific class of labor.

In addition to curbing *who* is protected by the NLRA, the Court has also recently limited *how* workers may advance their interests in labor relations. A 5-4 majority decided in *Epic Systems v. Lewis* (2018)that class-action lawsuits were not a protected activity under the NLRA’s “concerted activities” clause.[[109]](#footnote-109) Epic Systems corporation had an arbitration agreement in place with employees that requires workers to resolve any labor dispute through individual arbitration rather than class-action lawsuits. When challenged in District Court by Jacob Lewis in 2015, the arbitration agreement was ruled to be a violation of Section VII of the NLRA which protects “concerted activities” to ensure the mutual aid or protection of workers.[[110]](#footnote-110)The Seventh Circuit of Appeals affirmed the District Court’s decision, adding that the arbitration agreement also violated the Federal Arbitration Act (1925), which states that agreements are to be enforced unless there are legal or equitable grounds that would render the contract unenforceable.[[111]](#footnote-111) The Supreme Court reversed, finding that neither the FAA nor NLRA preclude the arbitration agreement provided by Epic Systems.[[112]](#footnote-112)

Justice Gorsuch, writing for the majority, reasoned that “It is unlikely that Congress wished to confer a right to class or collective litigation in §7, since those procedures were hardly known when the NLRA was adopted in 1935”.[[113]](#footnote-113) Following the undermining of strike protections in *Mackay* as well as the general erosion of employee strength following Taft-Hartley, the NLRA’s operation had already moved away from the vision of those who saw the law’s original purpose as ensuring “equality” in bargaining between employees and employers (evidenced by falling union rates, wage stagnation, and rising economic inequality).[[114]](#footnote-114) The legal entrepreneurship of Jacob Lewis, his attorneys, and subsequent endorsement by the lower courts provided an opportunity for labor to fortify its position under Section VII of the NLRA. The Supreme Court’s reversal of the Seventh Circuit and the originalist logic behind Justice Gorsuch’s majority opinion prohibited the use of novel tactics to fortify the position of labor in relation to business.

The Court’s decision in *Epic Systems v. Lewis* (2018) altered both the resources and incentives afforded employers and employees. Employees have been denied rights to bring class-action lawsuits against alleged labor malpractice such as wage theft or workplace discrimination. In contrast, forced arbitration clauses have been enshrined as a resource for business to use to limit employee recourse in when labor rights are violated.[[115]](#footnote-115) Furthermore, *Epic Systems* incentivizes corporations to commit labor malpractice as the costs of doing so are reduced as the risks of individual arbitration are far lower than collective litigation. The appeal of arbitration to employers is evident given the sharp rise of such agreements in the twenty-first century.[[116]](#footnote-116)

Once again, The Supreme Court’s operation as a veto point requires that labor allies in Congress forge supermajorities in Congress for the NLRA to adapt to the current environment. Labor allies such as the Economic Policy Institute have called for the passage of the “Restoring Justice for Workers Act”[[117]](#footnote-117) and the “Forced Arbitration Injustice Act” (FAIR),[[118]](#footnote-118) which would overturn the Court’s decision in *Epic Systems.*[[119]](#footnote-119)The “Restoring Justice for Workers Act contained a number of provisions which sought to enhance the power of labor in relation to business and included a specific provision that would overturn *Epic Systems.[[120]](#footnote-120)* The bill failed to get out of the House judiciary committee.[[121]](#footnote-121) However, the FAIR Act was reported favorably upon by the Judiciary Committee and then passed the Democratic-controlled House 225-186 (Roll call No. 540) in 2019. Upon arrival in the Republican-led Senate, the bill has since stalled after being referred to the Judiciary Committee.[[122]](#footnote-122) The act received support from the AFL-CIO and NAACP while the Chamber of Commerce opposed the bill.[[123]](#footnote-123) In the House Judiciary Committee Report on H.R. 1423: “Forced Arbitration Injustice Repeal Act” (FAIR) the Republican minority argued the bill would restrict contractual rights and push disputants towards more costly legal proceedings.[[124]](#footnote-124) The issue of mandatory arbitration appears to divide neatly along party lines. On the House floor, only 2 of 185 Republicans voted for the bill while only 2 of 225 Democrats voted against the bill.[[125]](#footnote-125) Additionally, the 2020 Democratic Party Platform includes a call for the end to mandatory arbitration- specifically, “That is why Democrats will ensure labor protections…and will block anti-worker provisions including forced arbitration”.[[126]](#footnote-126)

1. Alternate Explanations & Conclusion

The relationship between the United States Supreme Court and federal labor law has been the subject of previous scholarship that has advanced understandings of both the judiciary and the development of labor policy in the United States. Several law review articles have provided comprehensive analysis into jurisprudential developments over time and include descriptions of large number of cases.[[127]](#footnote-127) In political science, there has been notable research into the Court’s adjudication of the NLRA that have explained why the act has failed to live up to the hopes of labor’s most ardent supporters[[128]](#footnote-128) and how Congress left important questions regarding the specifics of labor policy to the courts.[[129]](#footnote-129)

In some ways, this work builds on the insights of Stuart Chinn (2014) who articulates a compelling narrative of the Supreme Court’s adjudication of labor law and its role in fashioning a system of “industrial pluralism”. Chinn contends that by squaring the liberal commitments of the NLRA with preexisting institutional authorities and rights, the Supreme Court “delimited” the bounds of reform and then “recalibrated” the NLRA into the modern system of “industrial pluralism”.[[130]](#footnote-130) This account rightly describes the importance of the judiciary in the development of labor law and the downstream consequences of judicial rulings. However, while Chinn’s account does acknowledge the legislative stasis in labor law, his account centers on the *jurisprudential¸* rather than the *political* dynamics of the Court’s decisions. For explanations of the jurisprudential logics employed by the justices and how these logics remained pertinent over time, Chinn’s account is extremely valuable. A lens focusing upon jurisprudence leads Chinn to highlight the stability in legal logics which obscures the extent to which federal labor law has become increasingly unable to address modern economic realities-a trend that does not fit the “stability” found in jurisprudence. To understand the broader politics of labor law and the disposition of pertinent actors towards the NLRA, placing the Court’s decisions within the scope of policy drift is fruitful. The use of policy drift mandates a close attention to coalition developments, political strategies and incentives, and how the Court not only addresses policy questions but also influences the politics surrounding a given issue. Not only does the Court operate within a political system of gridlock, judicial decisions can facilitate gridlock by moving policy in a way that has meaningful policy effects but fails to garner sufficient backlash that a veto-proof coalition takes shape.

George Lovell’s (2003) *Legislative Deferrals* highlights the ambiguity of important legislative provisions across different labor statutes- the Erdman Act, the Clayton Act, the Norris-LaGuardia Act, and the NLRA. Lovell argues that Congress, in important instances, intentionally leaves policy details to the courts when they are either unwilling or unable to write precise statutes themselves. Taking a largely normative perspective, Lovell critiques this practice and what it means for democratic accountability and the interbranch dynamics found in the U.S political system. In regard to the NLRA, Lovell argues that the judiciary was *invited* into the field of labor law based on §10(e)-(h) of the Wagner Act which assigns oversight functions to specific courts.[[131]](#footnote-131) Furthermore, Lovell’s research demonstrates that Congress *intentionally* left unaddressed key questions that were relevant in *Mackay Radio­*, including, whether the use of replacement workers by employers was an acceptable labor practice.[[132]](#footnote-132) Lovell’s account of the Court’s decisionmaking in *Mackay Radio,* and its broader implications, are not in contrast with the Court acting as an agent of drift. In fact, the purposeful cession of authority from Congress to the Court in interpreting the specifics of public policy only magnifies the importance of the judiciary in making public policy. The claim that the Court can facilitate drift is undermined in cases where the Court is merely implementing widely held, uncontroversial applications of a law that are shared across the legislature and administrative agencies; or when the Court addresses an area of law whose functions remain stable over time. In Lovell’s account of *Mackay*, the Court may not be explicitly contradicting Congressional majorities, but are they also not rubber stamping a pre-ordained outcome.

Centering the role of the Supreme Court in a framework of policy drift makes several contributions. First, bringing the Court in helps illuminate a possible explanation as to why labor law underwent policy drift when other federal policies have not. Second, this account provides some specificity of how different institutions and political actors may facilitate or alleviate policy drift in a way that moves us beyond “systemic” explanations that rely heavily on the presence of “veto points”. While veto points are vitally important in understanding drift—and play a key role in the above account—the presence of veto points alone is an insufficient explanation for policy drift. Third, merging theories of policy change with judicial politics provides a more holistic understanding of the role of the Court in public policy. Accounts of the judiciary often focus on the input side of decisions: judicial ideology, legal doctrines, and systemic pressures; or seek to explain one specific policy domain in tremendous detail. Using policy drift to understand judicial decisionmaking provides a conceptual framework that can travel across policy domains and invites cross-subfield collaboration and engagement with scholars in fields such as public policy, sociology, and American political development. Finally, positioning the Court as an agent of drift brings light to new modes of judicial power. Rather than nullify legislation, much of the Court’s work involves subtly tweaking or elaborating upon existing policies in a way that may not be evident when the decision is handed down. Taking a more longitudinal view of policy development can illustrate how previously overlooked decisions may gain increased importance when viewed in the relation to policy drift and other modes of gradual change.

In closing, it is important to reiterate both the goals and the limits of this paper. This paper sought to theorize how the Supreme Court may facilitate policy drift through shifting the burden of positive action from policy losers to policy winners and by vetoing attempts to update policies. In addition, I used some notable examples in the field of labor law to show how the Court has contributed to the NLRA undergoing policy drift. This paper did not seek to explain the entirety of labor law’s development, nor did I assert that the Court is always an agent of policy drift. Relatedly, I did not attempt to explain, in generalizable ways, when the court acts as an agent of policy drift and when it acts to alleviate drift. These are questions for future research.

Appendix

Figure A1: *NLRB v. Mackay Radio* (1938) and Shifting the Burden of Positive Action

1993-Present

1991-1993

1937

1938

Court Reviews the NLRA and status of striking workers.

Federal labor law remains unamended by Congress since 1959.

Labor allies go on the offensive to reverse the *Mackay* decision, are unable to create a coalition large enough to overcome legislative veto points.

Favors business conservatives by allowing for the hiring of replacement workers.

External Trends

* Changing External Environment: the use of strike replacements become increasingly common (1970s-1990), unionization rates decline
* Congressional Gridlock Increases: Congressional polarization increases; Congress responds less frequently to judicial decisions, policies go without maintenance

Figure A2: *Epic Systems v. Lewis* (2018) as Facilitating Drift[[133]](#footnote-133)

2018

SCOTUS (5-4) reverses NLRB, ruling that §7 does not protect class-action lawsuits.

1935-2011

1935-2011

2012

1935

Court nurtures and shapes this status quo.

The NLRA is enforced by the NLRB, with judicial oversight, and fashions specific rules and procedures that do not include the explicit protection of class-action lawsuits under §7

NLRA Passed by Congress, including §7 that protects “concerted activities” taken on behalf of labor.

The NLRB interprets §7 to protect class-action lawsuits.

External Trends

* Changing External Environment: unionization rates decline; the strike loses its potency.
* Congressional gridlock increases: Congressional polarization increases; Congress responds less frequently to judicial decisions, policies go without maintenance.

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1. For a deep dive into textualism as a school of interpretation see Scalia, Antonin and Gardner, Brian A. 2012. *Reading Law: The Interpretation of Legal Texts.* St. Paul, MN: Thomson/West. [↑](#footnote-ref-1)
2. In *Marbury v. Madison* 5 U.S 137 (1803), Chief Justice John Marshall famously wrote, “It is emphatically the duty of the Judicial Department to say what the law is.” [↑](#footnote-ref-2)
3. Hacker, Jacob. 2004. “Privatizing Risk without Privatizing the Welfare State: The Hidden Politics of Social Policy Retrenchment in the United States” *American Political Science Review*. Vol 92 (2): 243-260. [↑](#footnote-ref-3)
4. Galvin and Hacker (2020) find that coalitions opposing policy drift will seek action in political venues where their opponents will struggle to block policy updating. Galvin, Daniel J. and Hacker, Jacob. 2020. “The Political Effects of Policy Drift” *Studies in American Political Development.* Vol 34 (2): 216-238. [↑](#footnote-ref-4)
5. While scholars of judicial politics and public law often use the term “override” to refer to legislative responses to judicial decisions, I will often use the term “legislative response” or “response” in its place. Oftentimes, the Court invites judicial updating in their opinion making the use of “override” inappropriate as it alerts the reader to a confrontation between the branches which in some instances does not exist. [↑](#footnote-ref-5)
6. Eskridge, William. 1991. “Overriding Supreme Court Statutory Interpretation Decisions” *The Yale Law Journal.* Vol 101 (2): 331-455. [↑](#footnote-ref-6)
7. Hasen, Richard. 2013. “End of the Dialogue: Political Polarization, the Supreme Court, and Congress” *Southern California Law Review.* Vol 86: 205-262. [↑](#footnote-ref-7)
8. Some historians divide New Deal legislation into a “first” and “second” wave. The second wave (1935-36) is conserved to be more liberal and transformative than the first wave (1933-34). The first wave consisted of work projects such as the Civilian Conservation Corps and the Tennessee Valley Authority and short-term fixes such as the Emergency Banking Act. The second New Deal consisted of legislation such as the National Labor Relations Act, Social Security Act, and the Banking Act of 1935 that sought to permanently transform the socio-economic landscape. See Rauch, Basil. 1944. *The History of the New Deal, 1933-1938.* New York, NY: Creative Age Press. [↑](#footnote-ref-8)
9. The National Right to Work Foundation describes “right to work laws” as laws “guaranteeing that no person can be compelled as a condition of employment, to join or not join, nor to pay dues to a labor union” as outlined by Section 14(b) of Taft-Hartley [https://www.nrtw.org/right-to-work-frequently-asked-questions/]. The AFL-CIO bemoan “right to work” laws as making it “harder for working people to form unions and collectively bargain for better wages…” [https://aflcio.org/issues/right-work] [↑](#footnote-ref-9)
10. “Closed shop” agreements are those in which employers and unions agree to only hire employees from a specific union and that continued employment is contingent upon ongoing membership in that union. [↑](#footnote-ref-10)
11. Secondary boycotts are when a company is boycotted for doing business with another company. This draws a “neutral” party into the labor dispute who is not the direct subject of employee displeasure. [↑](#footnote-ref-11)
12. “Hot cargo” agreements are those in which a union and employer agree that union members will not handle materials coming from an entity with which the union has a dispute. [↑](#footnote-ref-12)
13. This is not an exhaustive list of all policies affected by Landrum-Griffin but highlights some of the most salient portions of the legislation and provides an overview of the different areas of labor policy addressed. [↑](#footnote-ref-13)
14. Rocco, Philip and Thurston, Chloe. 2014. “From Metaphors to Measures: Observable Indicators of Gradual Institutional Change” *Journal of Public Policy*. Vol 34 (1): 35-62. [↑](#footnote-ref-14)
15. Tomlins, Christopher. 1985. *The State and The Unions: Labor Relations, Law, and the Organized Labor Movement in America, 1880-1960.* New York, NY: Cambridge University Press. (p.148). ; Tomlins, Christopher. 1979. “AFL Unions in the 1930s: Their Performance in Historical Perspective”. *The Journal of American History.* Vol 65 (4): 1021-1042. [↑](#footnote-ref-15)
16. Galvin, Daniel J. 2019. “From Labor Law to Employment Law: The Changing Politics of Workers’ Rights” *Studies in American Political Development* Vol 33(1): 50-86; Weiler, Paul. 1983. “Promises to Keep: Securing Workers’ Rights to Self-Organization Under the NLRA. *Harvard Law Review* Vol 96 (8): 1769-1827. (p.1772) [↑](#footnote-ref-16)
17. Weiler, Paul. 1983. “Promises to Keep: Securing Workers’ Rights to Self-Organization Under the NLRA. *Harvard Law Review* Vol 96 (8): 1769-1827. (p.1772) [↑](#footnote-ref-17)
18. See “Union membership rate 10.5 percent in 2018, down from 20.1 percent in 1983” *Bureau of Labor Statistics.* (Jan 25, 2019) <https://www.bls.gov/opub/ted/2019/union-membership-rate-10-point-5-percent-in-2018-down-from-20-point-1-percent-in-1983.htm?view_full#:~:text=In%201983%2C%20the%20first%20year,were%2017.7%20million%20union%20workers.&text=In%202018%2C%20the%20union%20membership,for%20women%20(9.9%20percent)>. [↑](#footnote-ref-18)
19. Ibid [↑](#footnote-ref-19)
20. According to the Bureau of Labor Standards, there were at least 145 work stoppages with over 1,000 participants each year from 1947-1981, with a high of 470 in 1952. From 1982- 2019, the number of such work stoppages never exceeded 96. <https://www.bls.gov/web/wkstp/annual-listing.htm> [↑](#footnote-ref-20)
21. Piketty, Thomas and Saez, Emmanuel. 2003. “Income Inequality in the United States, 1913-1998” *Quarterly Journal of Economics.* Vol 118 (1): 1-39. The data has since been updated through 2007 and is presented up to that time in Hacker and Pierson’s (2010) *Winner Take All Politics: How Washington Made the Rich Richer- and Turned its Back on the Middle Class.* New York, NY: Simon & Schuster. [↑](#footnote-ref-21)
22. “Trends in Income and Wealth Inequality” *Pew Research Center* (January 9, 2020) https://www.pewsocialtrends.org/2020/01/09/trends-in-income-and-wealth-inequality/ [↑](#footnote-ref-22)
23. Pierson, Paul and Hacker, Jacob. *Let them Eat Tweets: How the Right Rules In An Age of Extreme Inequality.* New York, NY: Liveright Publishing Co. [↑](#footnote-ref-23)
24. Galvin (2019, 50); Labor scholar Cynthia Estlund (2002) has described labor law as “ossified”, which while distinct from drift, alludes to labor law’s “longstanding insulation from democratic renewal and local innovation” (p.1527). See Suzanne Mettler (2016) on how Congress has neglected policy updating on economic matters, including labor relations. Mettler, Suzanne. 2016. “The Policyscape and the Challenges of Contemporary Politics to Policy Maintenance” *Perspectives on Politics.* Vol 14 (2): 369- 390. [↑](#footnote-ref-24)
25. Hacker, Jacob. 2004. “Privatizating Risk without Privitizing the Welfare State: The Hidden Politics of Social Policy Retrenchment in the United States” *American Political Science Review.* Vol 98(2): 243-260. [↑](#footnote-ref-25)
26. *Epic Systems v. Lewis* (2018) addressed binding arbitration under both the NLRA and FAA (Federal Arbitration Act). The use of arbitration has become favored by businesses who increasingly place binding arbitration clauses in employment contracts (Staszak 2020). For a thorough explanation of arbitration’s role in the development of labor law see Staszak, Sarah. 2020. “Privatizing Employment Law: The Expansion of Mandatory Arbitration in the Workplace” *Studies in American Political Development*. ; Stone, Katherine Van Wetzel. 1981. “The Post-War Paradigm in American Labor Law” *Yale Law Journal.* Vol 90 (7): 1510-1580; and Stone, Katherine Van Watzel. 2005. “The *Steelworkers Trilogy*: The Evolution of Labor Arbitration” in *Labor Law Stories* ed. Cooper, Laura and Fisk, Catherine. St. Paul, MN: Foundation Press. [↑](#footnote-ref-26)
27. There is a long line of cases where the Supreme Court addressed pertinent areas that affect the right to strike. For the purposes of this paper, I seek to merely illustrate examples of the theory outlined above. My exclusion of other relevant cases is not a concession that these cases did not facilitate policy drift, but rather that tradeoffs had to be made to accommodate scope constraints. Most notably absent is perhaps the Court’s decision in *NLRB v. Fansteel Metallurgical Corp* (1939). In *Fansteel,* the Court adjudicated between the property rights of employers and the rights of employees to engage in sit down strikes. The Court ruled that sit down strikes constituted an “illegal seizure” and was not protected by §7 of the NLRA that protected the right to bargain collectively and undertake other “concerted activities”, nor was it deemed to be protected by §13 which guaranteed the right to strike. The jurisprudential logic and significance of the *Fansteel* decision is covered in great detail by scholars such as James Gray Pope (2004) in “How American Workers Lost the Right to Strike, and Other Tales” *Michigan Law Review* Vol 103 (3): 518-553. Karl Klare (1978) describes in “Judicial Deradicalization of the Wagner Act” how *Fansteel* contributed to curbing the radical potential of the act and Stuart Chinn (2014) similarly contends that *Fansteel* helped “delimit” the bounds of labor law’s liberal potential in *Recalibrating Reform.* Despite *Fansteel*’s clear importance, it fits less well as an example of policy drift. Historical accounts such as Dubofsky’s (1994) *The State and Labor in Modern America* show that very few political leaders advocated for sit-down strikes at the time of the Court’s decision. President Roosevelt, Senator Wagner, the AFL, and even most CIO leaders had condemned sit down strikes indicating that *Fansteel,* while important, seemed to push the NLRA down its current path rather than seriously rework operation of the act (Dubofsky 1994, 164). In light of this, *Mackay Radio* appears to be a better exemplar of the Court facilitating drift than their actions in *Fansteel.*  [↑](#footnote-ref-27)
28. The *Mackay Radio* case has progeny beyond *TWA v. Flight Attendants* 489 U.S. 426 (1989). According to Nexus Uni (formerly Nexis Lexis) there are 575 cases that have cited the Supreme Court’s *Mackay Radio* decision. While I will of course not explore each of these 575 in this paper, I will briefly touch a few important cases here that did not warrant full inclusion in the “right to strike” section of this paper. While the striker replacement language in *Mackay Radio* was merely dicta when handed down, the *Mackay* radio logic was applied to other cases by the Supreme Court. In *NLRB v. Rockaway News Supply* 345 U.S. 71, a 6-3 majority ruled that it was not an unfair labor practice for an employer to discharge and employee who refused to cross a picket line during a strike conducted by a union to which the employee did not belong. Writing for the Court, Justice Jackson rebuffed the NLRB, writing “The distinction between discharge and replacement in this context seems to us as unrealistic and unfounded in law as the Court of Appeals found it. This application of the distinction is not sanctioned by *Labor Board v. Mackay Radio & Telegraph Co.* 304 U.S 333.” Furthermore, the Court affirmed the *Mackay* replacement doctrine in 1963, despite upholding an NLRB ruling that it was an unfair labor practice to confer “super seniority” upon those crossing picket lines. In the majority opinion, Justice White wrote, “We have no intention of questioning the continued vitality of the *Mackay* rule, but we are not prepared to extend it to the situation we have here.” (*NLRB v. Erie Resistor Corp* 373 U.S 331 (1963)). In a similar manner, the Court in *NLRB v. Fleetwood Trailer* 389 U.S. 375 (1967) affirmed the right of employers to refuse the hiring of striking workers when “jobs claimed by the strikers are occupied by workers hired as permanent replacements during the strike in order to continue operations”, even though the Court ruled against the employer in this particular case (*NRLB v. Fleetwood Trailer* 389 U.S. 375 (1967)). [↑](#footnote-ref-28)
29. In contrast to the trends towards federal supremacy outlined here, exceptions for state authority were carved out regarding tort claims at the state level. In *United Construction Workers v. Laburnum Construction* 347 U.S. 656 (1954) the Court upheld the authority of state courts to hear tort claims as the NLRA does not provide a federal substitute for this type of dispute. Four years later in *International Association of Machinists v. Gonzales* the Court upheld a California court awarding $9, 300 to a former union member alleging he had been expelled from the Machinists and blocked from future employment. A 6-2 majority found that this dispute was of a “contractual” nature that had long been addressed by California state law. While these cases carved out enclaves of authority for state actors to exercise implementation discretion, neither case authorized subnational actors to amend or supplement the fundamental commitments of federal labor law such as the right to unionize, bargain collectively, or partake in “concerted activities”. [↑](#footnote-ref-29)
30. For a comprehensive overview of judicial decisions and the right to strike under the NLRA see James Gray Pope’s (2004) “How American Workers Lost the Right to Strike, and Other Tales” *Michigan Law Review.* Vol 103 (3): 518-553. [↑](#footnote-ref-30)
31. On the Ludlow Massacre see, Andrews, Thomas. 2008. *Killing for Coal: America’s Deadliest Labor War.* Cambridge, MA: Harvard University Press. For the salience of the Pullman Strike and its significance in the development of the labor movement and labor law see Forbath, William. 1991. *Law and the Shaping of the American Labor Movement*. Cambridge, MA: Harvard University Press; Dubofsky, Melvyn. 1994. *The State and Labor in Modern America.* Chapel Hill, NC: University of North Carolina Press. [↑](#footnote-ref-31)
32. National Labor Relations Act §13, 29. U.S.C §163 [↑](#footnote-ref-32)
33. National Labor Relations Act §7, 29. U.S.C §157 [↑](#footnote-ref-33)
34. *NLRB v. Mackay Radio & Telegraph* 304 U.S 333 (1938) [↑](#footnote-ref-34)
35. *NLRB v. Mackay Radio & Telegraph* 304 U.S 333 (1938) [↑](#footnote-ref-35)
36. “Board Wins Mackay Case” *The New York Times* (May 17, 1938) [↑](#footnote-ref-36)
37. Dinwoodey, Dean. “Labor Board May Be Unpopular, But Has Supreme Court Support” *The Milwaukee Journal* (May 29, 1938). [↑](#footnote-ref-37)
38. Wagner Jr, Robert F. (NY) *Congressional Record* (1938) p.6906 [↑](#footnote-ref-38)
39. Thomas, Elbert D. (UT) *Congressional Record* (1938) p.6905 [↑](#footnote-ref-39)
40. Dubofsky, Melvyn. 1994. *The State and Labor in Modern America*. Chapel Hill, NC: University of North Carolina Press. (p.126); Katznelson, Ira. 2013. *Fear Itself: The New Deal and the Origins of Our Time.* New York, NY: Liveright Publishing. [↑](#footnote-ref-40)
41. See Kim Philips-Fein (2010) *Invisible Hands: The Businessman’s Crusade Against the New Deal.* New York, NY: W.W Norton. See Dubofsky (1994) and Katznelson (2013) on the backlash against the NLRA found among Southern Democrats. [↑](#footnote-ref-41)
42. Dubofsky, Melvyn. 1994. *The State and Labor in Modern America*. Chapel Hill, NC: University of North Carolina Press. (p.146) [↑](#footnote-ref-42)
43. Logan, John. 2008. “Permanent Replacements and the End of Labor’s Only “True Weapon”” *International Labor and Working-Class History.* Vol 74 (1): 171-192. [↑](#footnote-ref-43)
44. John Logan has uncovered early instances of replacement workers being used in the South well before the trend towards widespread usage began in the 1970s. (Logan 2008, 174-175). See LeRoy (1993) as an example of scholarship that traces the use of strike replacements to President Reagan. In addition, LeRoy (1995) examines NLRB decisions from 1935-1991 and finds that strike replacements were used continuously throughout the 20th century but that 1975, not 1980, marked the initial spike in the modern era (LeRoy 1995, 208). [↑](#footnote-ref-44)
45. *NLRB v. Erie Resistor Corp* 373 U.S 221 [↑](#footnote-ref-45)
46. *NLRB v. Fleetwood Trailer* 389 U.S 375 [↑](#footnote-ref-46)
47. *Labor Board v. Erie Resistor Corp* 373 U.S. 221 (1963) [↑](#footnote-ref-47)
48. “A bill to amend the National Labor Relations Act and the Railway Labor Act to prevent discrimination based on participation in labor disputes.” (S.55): Roll Call vote No. 120 and No. 121 *United States Senate* (1992) <https://www.congress.gov/bill/102nd-congress/senate-bill/55> [↑](#footnote-ref-48)
49. “A bill to amend the National Labor Relations Act and the Railway Labor Act to prevent discrimination based on participation in labor disputes.” (S.55): Roll Call vote No. 189 *United States Senate* (1994) <https://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=103&session=2&vote=00189> [↑](#footnote-ref-49)
50. U.S Senate. Committee on Labor and Human Resources. “Workplace Fairness Act: Report together with Minority Views [to accompany S.55]” (S.Rpt. 110). p. 1 [↑](#footnote-ref-50)
51. U.S Senate. Committee on Labor and Human Resources. “Workplace Fairness Act: Report together with Minority Views [to accompany S.55]” (S.Rpt. 110). p. 2 [↑](#footnote-ref-51)
52. U.S Senate. Committee on Labor and Human Resources. “Workplace Fairness Act: Report together with Minority Views [to accompany S.55]” (S.Rpt. 110). p. 20. [↑](#footnote-ref-52)
53. U.S Senate. Committee on Labor and Human Resources. “Workplace Fairness Act: Report together with Minority Views [to accompany S.55]” (S.Rpt. 110). p. 10-13. This includes studies by the GAO, AFL-CIO, An Associate Professor at Alabama-Huntsville, the UAW, and the USW. (ibid, p. 10-13). These reports were correct in showing that worker replacements grew in the 1980s but fell into the common refrain that President Reagan’s dismissal of air traffic controllers served as some sort of “critical junction” in the matter. [↑](#footnote-ref-53)
54. U.S Senate. Committee on Labor and Human Resources. “Workplace Fairness Act: Report together with Minority Views [to accompany S.55]” (S.Rpt. 110). p. 37 [↑](#footnote-ref-54)
55. Condo, Adam. 1991. “Unions Challenge 38’ Ruling” *Cincinnati Post* (March 29, 1991) [↑](#footnote-ref-55)
56. Eskey, Kenneth. 1991. “Unions will battle scabs” *Marietta Journal* (January 77th, 1991); U.S Senate. Committee on Labor and Human Resources. “Prohibiting Discrimination Against Economic Strikers: On S. 55”. (S.Hrg. 80). p.94. [↑](#footnote-ref-56)
57. Roels, Ronald E. and Mendels, Pamela. 1990. “More Employers Replacing Strikers…” *The Huntsville Times* (December 26, 1990). [↑](#footnote-ref-57)
58. U.S. House of Representatives. Committee on Public Works and Aviation. “Prohibiting Permanent Replacement of Striking Workers: On H.R 5” (H.Hrg.6). p.44-48. [↑](#footnote-ref-58)
59. U.S. House of Representatives. Committee on Public Works and Aviation. “Prohibiting Permanent Replacement of Striking Workers: On H.R 5” (H.Hrg.6). p. 189. [↑](#footnote-ref-59)
60. U.S House of Representatives. Committee on Public Works and Transportation. “To Amend the National Labor Relations Act and Railway Labor Act to Prevent Discrimination Based on Participation in Labor Disputes: on H.R.5” (H.Hrg.13). p.94 [↑](#footnote-ref-60)
61. U.S House of Representatives. Committee on Public Works and Transportation. “To Amend the National Labor Relations Act and Railway Labor Act to Prevent Discrimination Based on Participation in Labor Disputes: on H.R.5” (H.Hrg.13). p.196 [↑](#footnote-ref-61)
62. U.S Senate. Committee on Labor and Human Resources. “Prohibiting Discrimination Against Economic Strikers: On S. 55”. (S.Hrg. 80). p.94 [↑](#footnote-ref-62)
63. On the role of presidential leadership in facilitating pro-business ideologies see Skowronek, Stephen. 1993. *The Politics Presidents Make.* Cambridge, MA: Harvard University Press. On the rise of business as a political force see Philips-Fein, Kim. 2010. *Invisible Hands: The Businessmen’s Crusade Against the New Deal.* New York, NY: Norton Publishing. [↑](#footnote-ref-63)
64. Gulasekaram, Pratheepan and Ramakrishnan, Karthick. 2015. *The New Immigration Federalism*. New York, NY: Cambridge University Press. [↑](#footnote-ref-64)
65. Notably, the Court has addressed whether Congress could regulate state level waste management in *New York v. United States* 505 U.S 144 (1992). For more recent developments, see Konisky, David M. and Woods, Neal D. 2018. “Environmental Federalism and the Trump Presidency: A Preliminary Asssessment” *Publius: The Journal of Federalism* Vol 48 (3): 345-371. [↑](#footnote-ref-65)
66. It is important to note however, that this preemption reaches only to questions of labor law (i.e collective bargaining, striking workers, union elections, etc), but not employment law (i.e minimum wage, fair workweek laws, paid leave, etc). Indeed, Galvin (2019) and Galvin and Hacker (2020) have demonstrated that workers and their allies have advanced their interests through subnational employment laws in lieu of updating labor policies. Katherine V.W. Stone (1992) also addresses the rise of state and local employment law but finds that it is an inadequate substitute for the protections provided by a more robust collective bargaining regime with higher unionization rates. [↑](#footnote-ref-66)
67. *San Diego Building Trades Council v. Garmon* 359 U.S 236 (1959) [↑](#footnote-ref-67)
68. Ellis, Fred W. 1957 “The Edge of No Man’s Land-A Definition of the Boundaries of State-Federal Jurisdiction Over Labor Relations” *Louisiana Law Review.* Vol 18 (1): 148-161 [↑](#footnote-ref-68)
69. Bill proposed by Congressman Ayres of Ohio (see Ellis 1957, p. 160) [↑](#footnote-ref-69)
70. Bill proposed by Senator Ives of New York (see Ellis, 1957, p.160) [↑](#footnote-ref-70)
71. Holland, Elmer. (PA) *Congressional Record* (1958) p.14142 [↑](#footnote-ref-71)
72. Powell Jr., Adam (NY) *Congressional Record* (1958) p.14143 [↑](#footnote-ref-72)
73. Cellar, Emmanuel (NY) *Congressional Record* (1958) p. 14144 [↑](#footnote-ref-73)
74. U.S. House of Representatives. Committee on the Judiciary. “Establishing Rules of Interpretation for Federal Courts Involving the Doctrine of Federal Preemption: to accompany H.R.3” (H.Rpt.422) [↑](#footnote-ref-74)
75. The minority cited *United Construction Workers v. Laburnum Construction Corp.* 347 U.S 656 (1954)and *International Association of Machinists v. Gonzales* 356 U.S 617 (1958) among others, to demonstrate that the NLRA had not completely removed subnational authority in labor matters. U.S. House of Representatives. Committee on the Judiciary. “Establishing Rules of Interpretation for Federal Courts Involving the Doctrine of Federal Preemption: to accompany H.R.3” (H.Rpt.422) p.15 [↑](#footnote-ref-75)
76. U.S. House of Representatives. Committee on Education and Labor. “Labor Management Reform Legislation: on H.R 3540, H.R. 3302, H.R 4473, and H.R. 4474” (H.Hrg.1739). p.1317 [↑](#footnote-ref-76)
77. Based on an averaging of the Martin-Quinn scores for each justice that included the 1958 term and those before it the ideology of the justices are arranged as follows (the larger the number the more conservative the Justice)- MAJORITY: Black (-2.28); Frankfurter (0.339); Douglas (-2.756); Warren (-1.022); Brennan (-0.78); MINORITY: Clark- (0.6606); Harlan (1.1938); Whittaker (1.090); Stewart (0.836). No Justice in the minority is more liberal than any justice in the majority according to this metric. [↑](#footnote-ref-77)
78. *International Association of Machinists v. Wisconsin Employment Rel Comm’n* 427 U.S 132 (1976) [↑](#footnote-ref-78)
79. Wisconsin Dept of Industry v. Gould (1986). The 9-0 ruling also shows how past precedents can remain so binding on future action, even liberal justices did not permit Wisconsin’s efforts. [↑](#footnote-ref-79)
80. Freeman, Richard B. 2006. “Will Labor Fare Better Under State Labor Relations Law?” *LERA Symposium* (p. 13). [↑](#footnote-ref-80)
81. Higgins, Michael. “State’s strikebreaker law called “incompatible” *The Chicago Tribune.*  [↑](#footnote-ref-81)
82. For how Democrats were constrained by GOP commitments economic conservatism see Skowronek, Stephen. 1993. *The Politics Presidents Make: Leadership from John Adams to Bill Clinton.* Cambridge, MA: Harvard University Press. see Hacker and Pierson’s *Winner Take All Politics: How Washington Made the Rich Richer* (2010) on how a pro-business disposition was increasingly found among both parties beginning in the 1970s. Kim Philips-Fein documents the gradual accumulation of power by business interests in the GOP in her [↑](#footnote-ref-82)
83. Between the inauguration of President Richard Nixon and October 1, 2020, Republican presidents have appointed 14 of the last 18 Supreme Court Justices (not counting the elevation of Justice Rehnquist to Chief as another appointment). This could rise to 15 of the last 19 if the Senate confirms Judge Amy Coney Barrett to the Court this fall/winter. The aggressive appointment strategy of President Trump towards lower, federal courts is also well documented. [↑](#footnote-ref-83)
84. Assembly Bill 1889 CA (2000) [↑](#footnote-ref-84)
85. The amicus briefs for *Chamber of Commerce v. Brown* can be found at Scotus Blog (<https://www.scotusblog.com/case-files/cases/chamber-of-commerce-v-brown/>) [↑](#footnote-ref-85)
86. The states that filed a joint brief were New York, Connecticut, Florida, Illinois, Iowa, Kentucky, Maine, Massachusetts, Minnesota, Missouri, Montana, Nevada, New Mexico, Ohio, Oregon, Rhode Island, West Virginia, and Wyoming. Certainly, the diversity of states in this coalition indicates that support for California indicates that the issue does not cut perfectly along a single issue dimension or is an issue where each side maintains complete ideological homogeneity. Given the differences across these states it is possible that such a statute would advance the relative strength of unions in some environments and the power of employers in others. Furthermore, states may have filed a brief to advance their own interest in legislating rather than to preserve this specific statute. [↑](#footnote-ref-86)
87. *Chamber of Commerce v. Brown* 556 U.S 60 (2008) [↑](#footnote-ref-87)
88. “Court to Hear Challenge…” *Los Angeles Times* (Nov 20, 2007) [↑](#footnote-ref-88)
89. “Conyers Introduces….” *Government Press Releases* (Nov 23, 2010). [↑](#footnote-ref-89)
90. There is a striking lack of attention paid to this bill in the news media. Despite Democratic majorities in both Chambers, it appears to have gone largely unaddressed in Congress as well. At the time, Democrats controlled the House Committee on Education and Labor by a margin of 30 seats to 19 Republican Seats. Nevertheless, there is no indication that this bill gained any serious traction in the committee. [↑](#footnote-ref-90)
91. For a theoretical basis and in-depth case studies showing the conditions under which bureaucrats may operate as policy innovators see Carpenter, Daniel. 2001. *The Forging of Bureaucratic Autonomy: Reputations, Networks, and Policy Innovation in Executive Agencies, 1862- 1928.* Princeton, NJ: Princeton University Press; and Moore, Colin. 2017. *American Imperialism and the State, 1893-1921.* New York, NY: Cambridge University Press. From a separation of powers (SOP) perspective, Potter 2017) finds that although federal bureaucrats are sensitive to their surrounding political context, they exercise policymaking autonomy by “slow-rolling” or “fast-tracking” the rulemaking process to avoid Congressional interference. Terry Moe (1985; 1987) has also contributed to our understandings of bureaucratic autonomy by rebutting theories of “congressional control” by demonstrating ways in which federal agencies are influenced by processes and goals endogenous to their own institution and by forces outside of Congress. For instance, Moe (1987) shows how an organized interest, Nader’s consumer movement, led to the FTC shifting its priorities (Moe 1987, 495). Looking specifically at the NLRB, Moe (1985) uses large-N analysis of Section 8 decisions to demonstrate how the NLRB, while sensitive to external political considerations also responds to socioeconomic shifts (as measured through unemployment and inflation), indicating that the NLRB has the autonomy to shift its operations in light of changing conditions. [↑](#footnote-ref-91)
92. Indeed, in addition to labor allies, the Supreme Court was viewed skeptically by progressive thinkers for much of the latter 19th and early 20th century (Klare 1978). According to Tomlins (1979, 133-34) to further insulate itself from judicial interference, the NLRB employed highly professional and legalistic procedures in order to meet the standards of the federal judiciary. [↑](#footnote-ref-92)
93. Remedial action refers to the authority of the NLRB to rectify the specific wrong caused by an unfair labor practice. This might include awarding back pay to a worker or ordering the reinstatement of a terminated employee. Punitive action, in contrast, not only remedies the specific wrong, but also adds additional penalty for the party violating law. Punitive action has the potential to deter future violations as the cost of violating labor law would grow compared to solely remedial action. [↑](#footnote-ref-93)
94. *Hoffman Plastics Compounds, Inc. v. NLRB* 535 U.S. 137 (2002) [↑](#footnote-ref-94)
95. *NLRB v. Yeshiva University* 444 U.S. 672 (1980) [↑](#footnote-ref-95)
96. *Epic Systems v. Lewis 584* U.S \_\_\_ (2018) [↑](#footnote-ref-96)
97. “High Court Ruling Subject of Dispute” *Daily Telegram* (Dec 6, 1938) [↑](#footnote-ref-97)
98. “NLRB Ruling Upset by Supreme Court as Punitive Edict” *New York Times* (Nov 13 1940). [↑](#footnote-ref-98)
99. While difficult to get inside the minds of employers Weiler (1983) shows that from 1950 to 1980, the accusations of unfair labor practices against businesses skyrocketed going from 4472 in 1950 to 7723 in 1960 to 13,601 in 1970 and then up to 31,281 in 1980, indicating a lack of effective deterrence against labor violations. Additionally, Shelton (2017; 380) notes that businesses increasingly fired workers who attempted to unionize as the only punishment for doing so was hiring the same works and awarding pay which they would have owed should the workers had remained employed. [↑](#footnote-ref-99)
100. “Labor Law Reform Hearing: Statement of the American Bankers Association” (Sept 16, 1977) (p.820); Shelton (2017; 380). [↑](#footnote-ref-100)
101. Shelton, John. 2017. “”Compulsory Unionism” and its Critics: The National Right to Work Committee, Teacher Unions, and the Defeat of Labor Law Reform in 1978”. *Journal of Policy History* Vol 29 (3): 378-402 (p.380) [↑](#footnote-ref-101)
102. Shelton (2017, 380). The fourth, and final cloture motion failed 53-45 on June 22nd, 1978. <https://www.congress.gov/bill/95th-congress/house-bill/8410/all-actions> [↑](#footnote-ref-102)
103. Gray, John A. 1982. “Managerial Employees and the Industry Analogy: NRLB v. Yeshiva University” *Labor Law Journal.* 390-408. [↑](#footnote-ref-103)
104. In 1986, William Brock’s labor department filed a report to explore the furtherance of Secretary Brock’s goal to “increase the ability of Americans to compete successfully in domestic and world markets through labor-management cooperation.” While Senator Hatch shared this goal, he disagreed with the report’s conclusion that the *Yeshiva* decision “jeopardizes the desired method of operation in an ideal cooperation plan.” *Congressional Record*-*Senate* October 8, 1986 (p. 29543 – 29545) [↑](#footnote-ref-104)
105. Passel, Jeffrey S. and Cohn, D’Vera. 2016. “Size of U.S. Unauthorized Immigrant Workforce Stable After the Great Recession” *Pew Research.* <https://www.pewresearch.org/hispanic/2016/11/03/size-of-u-s-unauthorized-immigrant-workforce-stable-after-the-great-recession/> [↑](#footnote-ref-105)
106. The events described took place at Surak Leather company even though the case is referred to as “*Sure-Tan”*. The case at the appellate stage was formally titled *NLRB v. Sure-Tan Inc, and Surak Leather Company.*  [↑](#footnote-ref-106)
107. Since Congress passed the Immigration Control and Reform Act (ICRA) in 1986, the Court’s decision that the NLRB may not award back pay to undocumented workers may reflect this policy updating, therefore challenging my assertion that the *Hoffman Plastics* decision facilitated policy drift. To ensure that this was not the case, I checked the Congressional record to determine whether Congress, in updating immigration policy, also sought to revise the disposition of existing labor laws towards undocumented workers. The congressional record does not indicate a clear intent, by Congress, to adjust the existing status quo of labor law. The ICRA is explicitly meant to target employers who hire illegally hire undocumented workers. The House Judiciary Committee’s report on the bill stated “It is not the intention of the Committee that the employer sanctions provisions of the be used to undermine or diminish in any way labor protections of existing law, or to limit the powers of federal or state labor relations boards, labor standards agencies, or labor arbitrators, to remedy unfair labor practices committed against undocumented employees for exercising their rights before such agencies or for engaging in activities protected by existing law.”(p.58). This is certainly not to say that the decision in *Hoffman* plastics was clearly incorrect, or clearly correct. The Congressional record, does however, provide rationale for the Court to rule in favor of the undocumented workers. A conclusion further supported by the narrow 5-4 decision and Amicus position of the George W. Bush Department of Justice. Thus, what can be asserted is that the facts and doctrines presented before the Court in *Hoffman Plastics* created an opportunity for judicial discretion to rule in either direction. The Court was provided with ample reason to rule in either direction in the case, thus making the Court’s decision pivotal in the development of labor law in relation to undocumented workers. [↑](#footnote-ref-107)
108. *Hoffman Plastics Compound Inc v. NLRB* 535 U.S 137 (2002) [↑](#footnote-ref-108)
109. Under President Obama, the Solicitor General filed a brief on behalf of the defendant, the Office of the Solicitor General flipped their position following inauguration of President Trump in January 2017 before oral argument took place; see: <https://www.scotusblog.com/2017/06/murphy-oils-law-solicitor-generals-office-reverses-course-arbitration-cases-supports-employers/>; ; The aforementioned “concerted activities” clause is found in Section VII of the NLRA which states “employees shall have the right to self-organization….and other concerted activities for the purpose of collective bargaining or other mutual aid or protection…” [↑](#footnote-ref-109)
110. *Lewis v. Epic Systems Corp* United States District Court for the Western District of Wisconsin [↑](#footnote-ref-110)
111. *Lewis v. Epic Systems Corp* No 15-2997 (7th Cir. May 26, 2016) [↑](#footnote-ref-111)
112. The *Epic Systems* decision was a combination of three cases, in two of the cases the Appellate Court determined that the arbitration agreements were in violation of Section 7 of the NLRA. [↑](#footnote-ref-112)
113. *Epic Systems Corporation v. Lewis* 584 U.S (2018) [↑](#footnote-ref-113)
114. Hacker, Jacob and Pierson, Paul. 2011. *Winner-Take-All Politics: How Washington Made the Rich Richer—and Turned its Back on the Middle Class.* New York, NY: Simon & Schuster Publishing [↑](#footnote-ref-114)
115. See Staszak, Sarah. 2020. “Privitizing Employment Law: The Expansion of Mandatory Arbitration in the Workplace” *Studies in American Political Development.* Vol 34 (2): 239-268; and Stone, Katherine W.V. 2005. “The Steelworkers Trilogy: The Evolution of Labor Arbitration” in *Labor Law Stories* ed Laura Cooper and Catherine Fisk. New York, NY: Foundation Press. [↑](#footnote-ref-115)
116. Staszak, Sarah. 2020. “Privitizing Employment Law: The Expansion of Mandatory Arbitration in the Workplace” *Studies in American Political Development.* Vol 34 (2): 239-268 [↑](#footnote-ref-116)
117. “Restoring Justice for Workers Act” S. 1491., 116th Congress. (2019) (Introduced by Patty Murray (D-WA)). [↑](#footnote-ref-117)
118. “Forced Arbitration Injustice Repeal Act” H.R. 1423., 116th Congress (2019) (Introduced by Henry “Hank” Johnson (D-GA)). [↑](#footnote-ref-118)
119. Targeted News Service. 2019. “Economic Policy Institute- One Year Since Epic Systems…” [PDF on file] [↑](#footnote-ref-119)
120. “Restoring Justice for Workers Act” S. 1491., 116th Congress. (2019) [↑](#footnote-ref-120)
121. “Restoring Justice for Workers Act” H.R 2749, 116th Congress (2019) (House version introduced by Jerrold “Jerry” Nadler (D-NY)). <https://www.congress.gov/bill/116th-congress/house-bill/2749/all-actions> [↑](#footnote-ref-121)
122. “Forced Arbitration Injustice Repeal Act” H.R. 1423., 116th Congress (2019) (Introduced by Henry “Hank” Johnson (D-GA)). <https://www.congress.gov/bill/116th-congress/house-bill/1423?q=%7B%22search%22%3A%5B%22Forced+Arbitration+Injustice+Act%22%5D%7D&s=4&r=1> [↑](#footnote-ref-122)
123. Interest group positions were found using 2019 legislative scorecards for the groups mentioned. The Club for Growth, ADA, and ACU did not score the bill. [↑](#footnote-ref-123)
124. United States House of Representatives. Committee on the Judiciary. “Report on Forced Arbitration Injustice Repeal Act” (H.Rpt. 116-204) [↑](#footnote-ref-124)
125. “Forced Arbitration Injustice Repeal Act” H.R. 1423. 116th Congress (2019). Roll Call 540. <https://clerk.house.gov/Votes/2019540> [↑](#footnote-ref-125)
126. “2020 Democratic Party Platform” *The American Presidency Project* at U.C Santa Barbara. <https://www.presidency.ucsb.edu/documents/2020-democratic-party-platform> [↑](#footnote-ref-126)
127. For example, see James Gray Pope (2004) in “How American Workers Lost the Right to Strike, and Other Tales” *Michigan Law Review* Vol 103 (3): 518-553; and Estlund, Cynthia. 2002. “The Ossification of American Labor Law” *Columbia Law Review.* Vol 102 (6): 1527-1612. [↑](#footnote-ref-127)
128. Chinn, Stuart. 2014. *Recalibrating Reform: The Limits of Political Change.* New York, NY: Cambridge University Press. [↑](#footnote-ref-128)
129. Lovell, George I. 2003. *Legislative Deferrals: Statutory Ambiguity, Judicial Power, and American Democracy.* New York, NY: Cambridge University Press. [↑](#footnote-ref-129)
130. Chinn, Stuart. 2014. *Recalibrating Reform: The Limits of Political Change.* New York, NY: Cambridge University Press. [↑](#footnote-ref-130)
131. Lovell, George I. 2003. *Legislative Deferrals: Statutory Ambiguity, Judicial Power, and American Democracy.* New York, NY: Cambridge University Press (p.222) [↑](#footnote-ref-131)
132. Lovell, George I. 2003. *Legislative Deferrals: Statutory Ambiguity, Judicial Power, and American Democracy.* New York, NY: Cambridge University Press. (p.234) [↑](#footnote-ref-132)
133. In the “External Trends” block, see McCarty, Nolan (2016) on rising polarization levels see Hasen, Richard (2013) on the declining response rate to Supreme Court decisions; Mettler, Suzanne (2016) on the lack of policy maintenance at the federal level. [↑](#footnote-ref-133)