

The Depth of Liminal Space: Liminal Labor Law

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Date : February 16, 2022

Michael Oswald, *Liminal Labor Law*, 110 **Cal. L. Rev.** ___ (forthcoming, 2022), available at [SSRN](#).

As a labor law scholar of a certain age, it is increasingly rare for me to encounter takes on unions and the National Labor Relations Act (NLRA) that provide a new theoretical framework that generates fresh and important insights. I am happy to say that this article does both. Imaginative in its conception and convincing in its details, *Liminal Labor Law* is a fascinating contribution to the field.

The article applies the social anthropology concept of “liminal” spaces—being “in between”—to labor law, and it does so in multiple ways. While the article describes the “liminal” concept in depth, for purposes here, consider Oswald’s observation that “a certain vitality or even creativity can spring from middles and intermediacies . . . although labor law’s in-betweenness reflects a seriously defective regime, the gaps may also contribute to the labor movement’s perseverance and adaptability over time.” Labor law doctrines, because they so often shift dramatically depending on which political party controls the National Labor Relations Board, are in an “in between” state. Also, certain actors in the labor law world are in such a state, often because of shifting rules. For example, the law alternately describes university graduate assistants as primarily “students,” outside the coverage and concerns of the National Labor Relations Act (NLRA), or, conversely, as sufficiently “employees” to justify NLRA coverage. Most broadly, the COVID-19 pandemic has put the world of employment and worker responses to employment in an “in between state.” While not all attempts to apply theoretical concepts from fields outside law to legal scholarship are successful, this article is. The use of “liminal” theory illuminates both the shifting and often contradictory commands of labor law rules and polices and the practical and creative responses to this by players in the field.

The article provides too many examples of the “liminal” state of labor law and actors subject to it to discuss in detail here. But to pick one, Oswald gets at something I know is much on the minds of both labor law academics and practitioners: frustration with the increasingly wildly-oscillating nature of labor law rules. Oswald tracks the evolution in labor law scholarship, from James Atleson’s insight in his seminal book *Values and Assumptions in American Labor Law* (1983) that Supreme Court interpretations of the NLRA had adopted key, pre-NLRA, “values and assumptions,” to beliefs that labor law had become “ossified” (in part due to the seeming political impossibility of amending the statute). Cynthia Estlund, *The Ossification of American Labor Law*, 102 **Columbia L. Rev.** 1527 (2002). But in the past two decades, the increasingly dramatic shifts in central legal rules, depending on which party controlled the presidency, have taken center stage. While those in the field recognize that this is a highly problematic state of affairs, this article is the first I’ve seen to put a useful theoretical construct around this reality. Even with this example, Oswald finds multiple sub-examples of liminal spaces: he discusses changing doctrines; reconceptualizes the “values and assumptions” model as an expression of a liminal space; and explores the practical effects of constantly-shifting rules on players in the field. The quotes from actual people involved in labor relations remind the reader of what is at stake.

Oswald also provides fascinating discussions of the liminal state of worker identities. Examples include “salts,” undocumented workers, and the often fine line between workers the NLRA covers and workers it excludes (e.g., supervisors, “gig” workers, and certain college athletes). Also, the example of shifting “joint employer” rules fits the “liminal” framing on multiple levels. I wish he had also discussed the arguably incoherent “duty to bargain in good faith” rules in this theoretical context, but the article is chock-full of other great examples.

As befits an article on the potential of “in between spaces,” Oswald’s discussions are impressively nuanced. For example, his description of how workers respond to legal doctrines that make it difficult for unions to win strikes

skillfully avoids the two most common tropes: that this difficulty means labor is doomed unless the rules radically change; or, on the opposite extreme, that workers have found alternatives that are just as effective as traditional strikes. Here again, “liminal space” is a fascinating and useful lens (*e.g.*, Oswald notes how some creative union strategies risk violating secondary activity rules).

Further, this article remains very timely. Oswald correctly describes the “shock” that COVID created, and the reluctance of some workers to return to the status quo. As of this writing, the U.S. is experiencing remarkably high levels of labor shortages and strikes, and more broadly, a sense of “in betweenness” continues to capture the world of work as 2021 nears its end. This is an excellent article; I liked it a lot.

Cite as: Joseph Slater, *The Depth of Liminal Space: Liminal Labor Law*, JOTWELL (February 16, 2022) (reviewing Michael Oswald, *Liminal Labor Law*, 110 **Cal. L. Rev.** __ (forthcoming, 2022), available at SSRN), <https://worklaw.jotwell.com/the-depth-of-liminal-space-liminal-labor-law/>.