BALANCING IS FOR SUCKERS

Gali Racabi[†]

Balancing workers' statutory rights against employers' interests is the heart of labor law. But balancing—or employers' interests, for that matter—is nowhere to be found in the text of our labor statutes. Yet courts and the National Labor Relations Board routinely grind down workers' rights against this loose legal premise. Balancing is the meta-doctrine that stripped workers of their statutory rights to strike, picket, access information, and act concertedly, among others.

Balancing inherently dilutes statutory rights. Yet it is practiced and preached by employers and unions, Republicans and Democrats, conservatives and liberals. This consensus is devastating. It weakens an already frail agency, channels legal professionals' biases into doctrine, and encourages employers to break workers' concerted activities using the courts' eagerness for balance. Balancing legal rights leads to an imbalanced economy. Continuing to engage in balancing labor law rights with the hope of achieving any other outcomes is, well, for suckers.

There are alternatives to balancing. In other legal contexts, we rarely balance statutory rights with unenumerated interests, even if those are employers' interests. We don't balance workers' rights to a minimum wage or overtime pay with employers' legitimate business interests. We don't balance workers' right to take leave, unemployment insurance eligibility, or workers' compensation either. Here, textualism can serve labor advocates as a doctrinal path of salvaging labor law.

It might be that balancing power, not interests, is labor law's goal. For that purpose, I offer a different read of our labor laws that aims to produce a balanced bargaining power between employers like Tesla, Amazon, Starbucks, or Apple and their workers.

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INTRODUCTION

Labor law is all about finding a balance.[1] But it shouldn't be. Section 7 of the National Labor Relations Act ("NLRA") states

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[1] *See, e.g.*, NLRB v. Truck Drivers Local Union No. 449, 353 U.S. 87, 96 (1957) ("The ultimate problem is the balancing of the conflicting legitimate interests."); NLRB v. Erie Resistor Corp., 373 U.S. 221, 229 (1963) (finding that the Board had correctly performed the "delicate task" of "weighing the interests of employees in concerted activity against the interest of the employer in operating his business in a particular manner and of balancing . . . the intended consequences upon employee rights against the business ends to be served by the employer's

that "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerned activities for the purpose of collective bargaining or other mutual aid or protection."[2]

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conduct"); NLRB v. Great Dane Trailers, Inc., 388 U.S. 26, 33–34 (1967) (describing the Board's "duty to strike the proper balance between . . . asserted business justifications and the invasion of employee rights in light of the Act and its policy"); First Nat'l Maint. Corp. v. NLRB, 452 U.S. 666, 680–81 (1981) (weighing employer's justification for shutting down plant against employees' right to bargain over decisions affecting their employment because "the Act is not intended to serve either party's individual interest, but to foster in a neutral manner a system in which the conflict between these interests may be resolved"); Int'l Bus. Machs. Corp., 265 N.L.R.B. 638, 638 (1982) ("The issue, therefore, is whether the interests of the Respondent's employees . . . outweigh the Respondent's legitimate business interests . . . ."); Stoddard-Quirk Mfg. Co., 138 N.L.R.B. 615, 616 n.2, 617 (1962) (recognizing that resolving the legality of no-solicitation rules involves "striking a proper adjustment between conflicting rights" such that "the abridgement of either right [is] kept to a minimum"); Our Way, Inc., 268 N.L.R.B. 394, 395 (1983) (endorsing Stoddard-Quirk as having "defin[ed] the balance among the rights of employees, employers, and unions with respect to the legal and practical problems presented by solicitation"); Holyoke Water Power Co., 273 N.L.R.B. 1369, 1370 (stating that the right of employees to proper representation by their collective bargaining representative must be balanced against the employer's right to control its property), *enforced*, 778 F.2d 49 (1st Cir. 1985); NLRB v. Cities Serv. Oil Co., 122 F.2d 149, 152 (2d Cir. 1941); NLRB v. Thor Power Tool Co., 351 F.2d 584, 587 (7th Cir. 1965) ("[N]ot every impropriety committed during such [Section 7] activity places the employee beyond the protective shield of the act. The employee's right to engage in concerted activity may permit some leeway for impulsive behavior, which must be balanced against the employer's right to maintain order and respect."); Off. Of Gen. Couns., Nat'l Lab. Rels. Bd., GC 21-04, Mandatory Submissions to Advice 1 (2021) ("[O]ver the past several years, the Board has made numerous adjustments to the law, including a wide array of doctrinal shifts. These shifts include overruling many legal precedents which struck an appropriate balance between the rights of workers and the obligations of unions and employers."); Piper Realty Co., 313 N.L.R.B. 1289, 1290 (1994); Atl. Steel Co., 245 N.L.R.B. 814, 816 (1979); Valley Hosp. Med. Ctr., Inc., 351 N.L.R.B. 1250, 1252–53 (2007) (stating that an employee's Section 7 rights must be balanced against an employer's interest in preventing disparagement of his or her products or services and protecting the reputation of his or her business); MasTec Advanced Techs., 357 N.L.R.B. 103, 107 (2011) (recognizing that an employee's communications with the public may lose the protection of the Act if they are sufficiently disloyal or defamatory); Nat'l Tel. Directory Corp., 319 N.L.R.B. 420, 420–21 (1995) (holding that an employer was not entitled to obtain the names of employees who attended union meetings after balancing competing interests); Stanford Hotel, 344 N.L.R.B. 558, 558 (2005) (citing Aluminum Co. of America, 338 N.L.R.B. 20, 21 (2002)). *See also* Consumers Power Co., 282 N.L.R.B. 130, 132 (1986) (utilizing a balancing test to determine whether employee's egregious behavior removed them from the protection of the act); James B. Zimarowski, *A Primer on Power Balancing Under the National Labor Relations Act*, 23 U. Mich. J.L. Reform 47, 87 (1989).

[2] 29 U.S.C. § 157.

Section 7 appears commanding to a layman. But, the Supreme Court tells us that Section 7 rights are not absolute and that courts and the National Labor Relations Board ("NLRB" or "Board") must balance the "undisputed right of self-organization assured to employees . . . and the equally undisputed right[s] of employers."[3] Balancing is legally mandated and socially necessary, or so the Court tells us, because both parties' rights, employees and employers, are "essential elements in a balanced society."[4]

Where does the Court find this limit on explicit statutory rights? The long answer involves decades of labor law precedents and a labor relations system ingrained with ideals of balance.[5] The short answer is that it is completely made up. Because balancing of Section 7 rights has no redeemable legal basis, and because of the destructive effects balancing had on countless workers' lives and the broader US political economy, balancing must be done away with.

The harms of balancing are incredibly potent now amid an unprecedented labor resurgence.[6] Workers from diverse sectors of the economy—Amazon warehouse workers,[7] Starbucks baristas,[8] New York architects,[9] Tesla assembly workers,[10]

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3 Republic Aviation Corp. v. NLRB, 324 U.S. 793, 797–98 (1945).

4 *See id.* at 798.

5 *See generally* JOHN W. BUDD, LABOR RELATIONS: STRIKING A BALANCE 488 (4th ed. 2021).

6 *See, e.g.*, Alexandra Bruell, *Members of New York Times, NBC News Digital Unions Defy Return-to-Office Plans*, WALL ST. J. (Sept. 12, 2022), https://www.wsj.com/articles/members-of-new-york-times-nbc-news-digital-unions-defy-return-to-office-plans-11663021373 [https://perma.cc/4E62-L5KK].

7 *See* Noam Scheiber & Karen Weise, *Amazon Labor Union, With Renewed Momentum, Faces Next Test*, N.Y. TIMES (Oct. 11, 2022), https://www.nytimes.com/2022/10/11/business/economy/amazon-labor-union.html [https://perma.cc/PR2B-9PAN].

8 *See Starbucks Workers Plan a 3-day Walkout at 100 U.S. Stores in a Unionization Effort*, NPR (Dec. 16, 2022), https://www.npr.org/2022/12/16/1143348405/starbucks-strike-workers-united-walkout [https://perma.cc/K9PH-6ATS].

9 *See* Sarah Holder, *In a First for Architects, a New York City Firm Forms a Union*, BLOOMBERG (Sept. 1, 2022), https://www.bloomberg.com/news/articles/2022-09-01/new-york-city-architecture-firm-forms-union-in-historic-first [https://perma.cc/6HEB-DCYM].

10 *See* Jaclyn Diaz, *Elon Musk Dares United Autoworkers to Try to Unionize Tesla*, NPR (Mar. 3, 2022), https://www.npr.org/2022/03/03/1084366833/elon-musk-dares-united-autoworkers-to-try-to-unionize-tesla [https://perma.cc/6UPZ-5P4M].

Google cafeteria workers,[11] graduate students,[12] and many,[13] many[14] others—are choosing collective representation as their way of workplace bargaining. This upsurge of labor organizing coincides with historic high levels of public support for labor unions,[15] a rising workers' demand for a voice in the workplace,[16] and a growing uneasiness among workers with employer-tilted workplace norms.[17]

But this labor tidal wave is already hitting a land mass: employers' resistance.[18] Decades of research and workers' lived experience demonstrate that labor law facilitated and energized employers' opposition to workers' organizing.[19] Examples are

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11 *See* Gerrit De Vynck & Lauren Kaori Gurley, *4,000 Google Cafeteria Workers Quietly Unionized During the Pandemic*, WASH. POST (Sept. 5, 2022), https://www.washingtonpost.com/technology/2022/09/05/google-union-pandemic/ [https://perma.cc/K3GN-83RZ].

12 *See* Grace Toohey, Summer Lin & Gabriel San Román, *UC Officials Call for Mediator as Strike by 48,000 Academic Workers Causes Systemwide Disruptions*, L.A. TIMES (Nov. 14, 2022), https://www.latimes.com/california/story/2022-11-14/university-of-california-strike-academic-workers-graduate-students [https://perma.cc/LSB9-NPV6].

13 *See* Dan Murphy, *NLRB to Pursue Unlawful Labor Practices Against USC, Pac-12, NCAA*, ESPN (Dec. 15, 2022), https://www.espn.com/college-football/story/_/id/35259868/nlrb-pursue-unlawful-labor-practices-usc-pac-12-ncaa [https://perma.cc/DXT6-C4VH].

14 *See* Josh Eidelson, *Apple Created Pseudo-union to Thwart Labor Efforts, CWA Says (1)*, BLOOMBERG L. (Dec. 16, 2022), https://news.bloomberglaw.com/daily-labor-report/apple-created-pseudo-union-to-defeat-organizers-complaint-says [https://perma.cc/47YF-9WER].

15 *See* Justin McCarthy, *U.S. Approval of Labor Unions at Highest Point Since 1965*, GALLUP (Aug. 30, 2022), https://news.gallup.com/poll/398303/approval-labor-unions-highest-point-1965.aspx [https://perma.cc/F9RV-FA2W].

16 *See* Thomas A. Kochan, Duanyi Yang, William T. Kimball & Erin L. Kelly, *Worker Voice in America: Is There a Gap Between What Workers Expect and What They Experience?*, 72 INDUS. & LAB. RELS. REV. 3, 13 (2019).

17 *See* Jim Harter, *Is Quiet Quitting Real?*, GALLUP (May 17, 2022), https://www.gallup.com/workplace/398306/quiet-quitting-real.aspx [https://perma.cc/9C75-5S4J].

18 *See* Grace Elletson, *Starbucks To Launch New Benefits For Non-union Shops*, LAW360 (Sept. 12, 2022), https://www.law360.com/articles/1529740/starbucks-to-launch-new-benefits-for-non-union-shops [https://perma.cc/MGZ2-J5RB]; Paul Farhi, *Starbucks Will Get Reporters' Messages with Union, Federal Judge Rules*, WASH. POST (Oct. 29, 2022), https://www.washingtonpost.com/media/2022/10/29/starbucks-reporters-union-communications-judge/ [https://perma.cc/ZSL5-VFER]; Shira Li Bartov, *Starbucks to Shut Unionized Store Days Before Christmas: 'Cartoon Villains,'* NEWSWEEK (Nov. 18, 2022), https://www.newsweek.com/starbucks-shut-unionized-store-days-before-christmas-cartoon-villains-1760764 [https://perma.cc/2PPQ-7X3U]; Morris M. Kleiner, *Intensity of Management Resistance: Understanding the Decline of Unionization in the Private Sector*, 22 J. LAB. RSCH. 519, 519 (2001).

19 *See generally* Kate Andrias, *The New Labor Law*, 126 YALE L.J. 2, 17 (2016).

plentiful: U.S. workers effectively lost their right to strike,[20] workers have no effective remedies against retaliation for utilizing their legal rights,[21] and workers face a long and treacherous red-taped road, leading from initial organizing to the signing of a collective bargaining agreement.[22]

Current-day organizing workers rediscover why generations of labor law scholars and union leaders describe the NLRA as a collapsed regime,[23] an ossified law,[24] policy adrift,[25] a tombstone,[26] a failure,[27] a broken promise,[28] and a law surrounded by "cries of woe and despair."[29] To say that the NLRA requires reform is an understatement.[30]

Balancing is the common doctrinal thread among all the legal obstacles workers face when organizing. Balancing is the legal technique with which courts and employers killed the NLRA, one doctrinal balancing act at a time. From day one of the NLRA, worker-hostile courts adhered to employers' pleas and balanced this monumental political victory with unenumerated employers' legal prerogatives.[31] U.S. labor law is

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20 *See generally* James Gray Pope, *How American Workers Lost the Right to Strike, and Other Tales*, 103 MICH. L. REV. 518, 527–34 (2004).

21 *See generally* Benjamin I. Sachs, *Employment Law as Labor Law*, 29 CARDOZO L. REV. 2685, 2694–98 (2008).

22 *See generally* John-Paul Ferguson, *The Eyes of the Needles: A Sequential Model of Union Organizing Drives, 1999-2004*, 62 INDUS. & LAB. RELS. REV. 3, 5 (2008).

23 *See* George Strauss, *Is the New Deal System Collapsing? With What Might It Be Replaced?*, 34 INDUS. RELS.: J. ECON. & SOC'Y 329, 336 (1995).

24 *See* Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1527 (2002).

25 *See* Warren Snead, *The Supreme Court as an Agent of Policy Drift: The Case of the NLRA*, AM. POL. SCI. REV. 1, 3 (2022).

26 *See* Paul C. Weiler, *Milestone or Tombstone: The Wagner Act at Fifty*, 23 HARV. J. ON LEGIS. 1, 2 (1986).

27 *See generally* Richard L. Trumka, *Why Labor Law Had Failed*, 89 W. VA. L. REV. 871, 871 (1987).

28 *See* JAMES A. GROSS, BROKEN PROMISE: THE SUBVERSION OF U.S. LABOR RELATIONS POLICY, 1947-1994 (2010).

29 *See* Charles J Morris, *The NLRB in the Dog House—Can an Old Board Learn New Tricks?*, 24 SAN DIEGO L. REV. 9, 10 (1987).

30 *See generally* William B. Gould IV, *Some Reflections on Fifty Years of the National Labor Relations Act: The Need for Labor Board and Labor Law Reform*, 38 STAN. L. REV. 937 (1986); Dunlop Comm'n on the Future of Worker-Mgmt. Rels., U.S. Dep't of Labor, FINAL REPORT (1994), https://ecommons.cornell.edu/handle/1813/79039 [https://perma.cc/9E4B-9FVK]; CLEAN SLATE FOR WORKER POWER, https://www.cleanslateworkerpower.org/ [https://perma.cc/HY8M-A8TT] (last visited July 10, 2023).

31 Gali Racabi, *Abolish The Employer Prerogative, Unleash Work Law*, 43 BERKELEY J. EMP. & LAB. L. 79, 85–86 (2022).

a textbook example of how political losers in the democratic sphere use courts and legal arguments to snatch away a majority-supported policy win.[32]

Some work-law comparisons might enlighten the absurdity of labor law's special treatment of written rights. Courts do not balance the Fair Labor Standards Act ("FLSA") or equivalent state minimum wage laws with employers' business interests. If an employer has a legitimate business interest not to pay minimum wage, and if there is no statutory exemption they can claim, they still must pay their workers a minimum wage.[33] Alas, a viable business must afford to pay the statutory minimum wage. Courts do not balance workers' statutory rights to overtime pay with employers' common law prerogatives because overtime legislation trumps the common law-originated employer interests. Courts do not balance unemployment insurance payment mandates with employers' state law-based property interests. Again, unemployment insurance laws trump those property interests. Employers also must abide by antidiscrimination laws about race, religion, sex, military service, age, and disability, even when they really, really don't want to.[34]

The comparison between labor law's balancing and the lack thereof in other areas is not to suggest that the enforcement of statutory rights, such as minimum wage, overtime pay, and antidiscrimination statutes, is even close to perfect. Reality is far from it. The comparison also does not suggest that the remedies for violating those laws are leak-proof. Again, nothing can be further from the reality of work-law.[35] But although labor law shares the enforcement and remedies problems of other work-law regimes, in labor law, employers are given one more substantive advantage—a welcomed say on the scope of workers' rights. Balancing invites employers to weigh in.

With balancing, even workers' wins are losses. Take the recent *Tesla* NLRB decision.[36] In *Tesla*, the Democratically

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32 *See generally* Snead, *supra* note 25, at 1; JAMES B. ATLESON, VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW 8 (1983); Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 MINN. L. REV. 265, 267–68 (1977).

33 People v. Uber Techs., Inc., No. CGC-20-584402, 2020 WL 5440308, at *17 (Cal. Super. Ct. Aug. 10, 2020).

34 *See* Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1754 (2020).

35 *See generally* Elizabeth Ford, *Wage Recovery Funds*, 110 CALIF. L. REV. 101, 103–04 (2022).

36 Tesla, Inc., 371 N.L.R.B. No. 131 (2022).

controlled Board decided that wearing union pins and shirts is a protected activity under Section 7 of the NLRA as long as there is no opposing "special circumstances."[37]

In deciding so, the *Tesla* Board flipped a previous Republican-controlled Board precedent—that workers' collective attire choices are governed by their employers, lacking significant other special rationales. In *Tesla*, the Board rejected the employer and dissenting members' argument that this renewed standard nullifies employers' legitimate interest. And it positively asserted that the Board's worker-facing doctrine correctly balances employers' and workers' interests.[38]

But *Tesla*, like most labor law, is structured on conceding the major premise[39] that employers' interests are crucial in deciding the scope of workers' Section 7 rights and—to generalize—that, given the proper context, clear statutory language bows before unenumerated interests. Both the dissent and majority embrace balancing as the crux of labor law. Their disagreement is only about whether the balance should tilt more toward workers or employers.

Nothing in this disagreement can be located in the text of the NLRA. Workers' protection against interference in their concerted activity is right there. Courts can cite it, Board members can argue about its text and what it covers, and scholars can analyze it with a dictionary or an artificial intelligence algorithm. Workers' rights are *there* there. Employers' general business concerns are not, at least not in the text. We cannot find them, we cannot hypothesize about the interpretive significance of their location in the statute's overall structure, and we cannot look them up in the dictionary. Nevertheless, employers' interests still matter insofar that the only question is *how much* they matter.

If employers' general rights are not in the text of the NLRA, where are they? A straight answer is difficult to find. But I suggest (and reject) some possibilities; the first is in the text. Perhaps we can deduce general protection of employers' business interests' rights from the few enumerated rights employers do have in the text or from the few legislative amendments to the NLRA. Another option is external sources: importing the common law of the employer-employee relationship, state property

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37 *See id.* at 1.

38 *See id.* at 18.

39 I owe this mode of thinking about labor law to Professor Michael E. Gold. *See* MICHAEL E. GOLD, A PRIMER ON LEGAL REASONING 67–74 (2018).

common law, or the Constitution. Yet another possible legal source is that employers' interests stem from a purposive reading of the NLRA and what it was meant to accomplish in the US political economy. And yet another is in the structure and function of the NLRB. Finally, I offer the possibility that balancing exists simply as an inevitability.

In depicting the harms of balancing, I offer both big picture and small picture harms. I find two harms of balancing on the micro-scale, i.e., that of the particular case. First, balancing is inherently destructive to workers' rights. Balancing makes workers' claims weaker in the concrete case. It makes organizing or engaging in concerted activities riskier. Second, it introduces an unexplained incoherence into work law legal hierarchy. Balancing is an unexplained deviation from how work law is carried out in many other areas. In addition, it allows judges to inject common law interests and principles into statutory rights.

In terms of big-picture harms, the damage done by balancing is unparalleled to other doctrinal features of labor law. In the effects of law on the broader political economy, I claim that against legal intuitions about constitutional law[40] and against work law instincts, the balancing of rights is expected to exacerbate conflict—not reduce it. Balancing facilitates courts' and agencies' engagement with employers' arguments and encourages attempts to thwart workers' actions; this makes direct coordination between workers and employers more difficult—not easier.[41] Balancing stifles industrial peace and a balanced economy.

Textualism offers a way out of balancing. Recent work law cases, namely *Bostock v. Clayton County*,[42] demonstrated a textualist way out of the balancing trap. In *Bostock*, text triumphs regardless of what advocates claim the implicit purpose or scope of that Act was; it triumphs regardless of possible downstream consequences. In *Bostock*, it did not matter that employers might have legitimate business concerns opposing

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40 *See generally* JAMAL GREENE, HOW RIGHTS WENT WRONG: WHY OUR OBSESSION WITH RIGHTS IS TEARING AMERICA APART (2021); Jamal Greene, *Foreword: Rights as Trumps?*, 132 HARV. L. REV. 28, 34–35 (2018) [hereinafter Greene, *Rights as Trumps?*].

41 *See generally* Jacob S. Hacker, Alexander Hertel-Fernandez, Paul Pierson & Kathleen Thelen, *The American Political Economy: A Framework and Agenda for Research*, *in* THE AMERICAN POLITICAL ECONOMY: POLITICS, MARKETS, AND POWER 2 (Jacob S. Hacket, Alexander Hertel-Fernandez, Paul Pierson & Kathleen Thelen eds., 2021).

42 140 S. Ct. 1731, 1749–50 (2020).

the inclusion of people who are attracted to their own sex or the inclusion of trans people in their workplaces. Employers' interests do not matter, because Title VII does not include any textual indication that it does.

The same approach to the NLRA can carve out decades of misinterpretation. Labor law should be aligned with the rest of the modern Court's jurisprudence in adopting textualism and rejecting the balancing of rights.[43] The simpler the better.

The first alternative to interest-balancing labor law is thus a textualist alternative: *remedy-balancing* labor law. In this alternative, balancing takes place after the recognition of harms—in the fashioning of remedies, not in the substantive recognition of violation of rights. This option is a legally low-hanging alternative to the current model.

A second alternative to interest-balancing labor law is *power-balancing* labor law. To balance the bargaining power of Elon Musk as an employer and Tesla workers, the last thing labor law ought to do is carve exceptions to workers' rights. Suppose we like to engage in labor law as a Madisonian endeavor of creating countervailing powers. In that case, we should strive to carve out Musk's common law legal powers and hold a minimalist, Swiss cheese-like interpretation of his statutory rights as an employer, for example, reading a general workers' prerogative interest and a maximalist read of workers' existing set of rights. The rationale of this offer is that if courts and agencies are already invested in the business of creative construction of doctrines, we might as well creatively construct to promote the statutory goal of encouraging collective bargaining as a means of equalizing bargaining power and encouraging industrial peace, not the other way around.

The Article proceeds as follows. Part I offers *Tesla* and other examples of explicit and implicit balancing of Section 7 rights. Part II offers and rejects some potential legal justifications for balancing. Part III illustrates the small and big picture harms of balancing. Part IV offers alternatives. A short conclusion follows.

I
Labor Law is All About Balancing

Labor is rising. During 2022, union representation petitions and unfair labor practices filed at the NLRB increased

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43 *See generally* Cynthia L. Estlund, *Showdown at Cedar Point: "Sole and Despotic Dominion" Gains Ground*, 2021 Sup. Ct. Rev. 125, 145–46.

substantially from previous years.[44] But while some are optimistic about this resurgence, all are well aware of the exceptionality of the current labor context. U.S. labor unrest is renowned for a hostile reception.[45] Law is a standard weapon in labor disputes, and rationally so.[46] At the core of labor law is balancing.

From its early days to the present ones, from the high waters of union organizing to the depths of contemporary union density figures,[47] labor law always focused on finding the right balance. This Part will provide the substance on this descriptive claim. But first, the statutory language. Section 7 of the NLRA declares that employees "shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representations of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."[48]

Section 8 of the Act follows by declaring that "[i]t shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [Section 7]," and it shall also be an unfair labor practice to "discriminat[e] in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization."[49] Section 10 of the NLRA empowers the Board "to prevent any person from engaging in any unfair labor practice."[50]

Such general language was placed in the law to counter employers' universal and adaptable forms of power. According

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44 *See Correction: First Three Quarters' Union Election Petitions Up 58%, Exceeding All FY21 Petitions Filed*, Off. of Pub. Affs., Nat'l Lab. Rels. Bd. (July 15, 2022), https://www.nlrb.gov/news-outreach/news-story/correction-first-three-quarters-union-election-petitions-up-58-exceeding [https://perma.cc/8FRX-783V].

45 *See, e.g.*, Michael Sainato, *Mass Firings, Wage Cuts and Open Hostility: Workers Are Still Unionizing Despite Obstacles*, Guardian (Sept. 13, 2022), https://www.theguardian.com/us-news/2022/sep/13/unions-starbucks-trader-joes-chipotle-petco [https://perma.cc/5N7U-QXTD].

46 *See, e.g.*, Natalie Noury & Daniel Coates, *Union Workers on strike arrested, pepper sprayed by Pawtucket Police*, ABC6 (Sept. 9, 2022), https://www.abc6.com/union-workers-on-strike-arrested-pepper-sprayed-by-police-in-pawtucket/ [https://perma.cc/BLJ3-WBET].

47 Kanishka Singh, *U.S. Union Membership Rate Falls to All-time Low Despite Organizing Efforts, Data Shows*, Reuters (Jan. 19, 2023), https://www.reuters.com/world/us/us-union-membership-rate-falls-all-time-low-despite-organizing-efforts-data-2023-01-19/ [https://perma.cc/8L46-3ZHY].

48 29 U.S.C. § 157.

49 *Id.* § 158

50 *Id.* § 160.

to Senator Wagner, the drafter of the original language of Section 8(a)(1), its broad phrasing was meant to prevent employers from gaming the law by finding loopholes in supposedly permissible actions they can take to hinder Section 7 rights.[51] This choice of language stemmed from a pragmatic understanding of the immense and flexible "atmospheric" power employers hold and the necessity of using the law to counter that power.[52] In other words, Wagner's idea about how to deal with a flexible form of employers' power was to create a universal layout of legal coverage.

The text of the NLRA does not limit its protections to specific acts, nor are NLRA rights explicitly conditioned in any prerequisite other than the Act's coverage. And for those covered employees and employers, no required ifs or buts exist. The plain text states that it *shall* be an unfair labor practice for an employer to interfere with the right of employees to self-organization, workers *shall* have the right to self-organization, it *shall* be an unfair labor practice for an employer to interfere with Section 7 rights of employees, it *shall* be an unfair labor practice for an employer to interfere with the right of employees to engage in concerted activities, and so on.

Facing this broad language of the Act and political weakness preventing employers from amending the language of Section 7, employers were on the lookout for a legal backdoor.[53] Labor law doctrine was the facilitator of such a backdoor.

The legal method used for circumventing the plain text of the NLRA is balancing. According to the balancing approach, Section 7 rights are not per se rights. They are not guaranteed to covered employees but are instead granted to employees once Court and Board doctrine balance those rights with managerial and propertied interests on a case-by-case analysis and doctrinal construction.

What employers lost on the statutory text front and won in court doctrine is their say about which actions are protected by the NLRA. What workers won on the statutory text and lost in legal doctrine is the universal coverage Wagner drafted. The current state of labor relations affairs in the US demonstrate the astuteness of Wagner's perception—with no universal

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51 *See* Daniel Judt, *The Tragic Pragmatism of the Wagner Act*, 62 AM. J. LEGAL HIST. 1, 12 (2022).

52 *See id.*

53 *See generally* JAMES A. GROSS, RIGHTS, NOT INTERESTS: RESOLVING VALUE CLASHES UNDER THE NATIONAL LABOR RELATIONS ACT 55–60 (2017).

protection against the modular powers of employers, all workers can win is a less-severe loss.

Workers have nothing to gain from balancing. The actualization of rights under the NLRA is always lesser compared with the text because of a felt necessity to offset workers' rights against employers' interests. The cases below provide some examples.

A. A Recent Example: *Tesla*

Consider this recent example of labor law balancing. Are workers protected from employers' discipline for wearing union pins or other union insignia in violation of a facially neutral[54] workplace dress code? In the recent *Tesla* decision, the Board split over the answer to this question.[55]

The Board's Democratic-appointed majority opinion, overruling a previous Republican-appointed Board decision from 2019,[56] decided that to dodge an unfair labor practice, an employer must establish some exceptional circumstances justifying the prohibition of union insignia. Tesla failed to explain what special circumstances might motivate it to prohibit union T-shirts over company-issued Tesla T-shirts. And thus, under the new rule, Tesla was committing unfair labor practices by disciplining workers for wearing union wear.

In the dissent, the Board's two Republican-nominated minority members refused to overturn its 2019 decision and stated that the proper rule is that unless the *workers* demonstrate exceptional circumstances, the neutral dress code is *not* an unfair labor practice, even if the employer uses it to prohibit union insignia.[57] An example of such an exceptional circumstance is that workers may win such a claim if they can demonstrate there are no other viable means of communicating whatever messages they desire to manifest using union wear.

Note the symmetry in the doctrinal outcomes. Both the *Tesla* majority and dissent agree that there are circumstances in which employers may lawfully terminate or discipline workers because they wear union insignia. The disagreement in *Tesla* is on which is the rule and which is the exception.

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54 Neutral in this context indicates that the policy does not explicitly prohibit wearing union wear.

55 Tesla, Inc., 371 N.L.R.B. No. 131, at 8–9 (2022).

56 Wal-Mart Stores Inc., 368 N.L.R.B. No. 146 (2019).

57 *Tesla*, 371 N.L.R.B. at 20–30.

The symmetry indicates that Tesla's majority and dissent are closer in their legal analysis than their cross-takes and opposite outcomes might suggest. Both sides agree that workers' right to wear union insignia is a protected activity under Section 7; both agree that employers have a recognized interest in governing their workplace via the establishment of dress codes and disciplinary procedures; and, importantly, both sides agree that the proper way to manage this conflict is via a balanced doctrinal rule—one that accounts for both workers' Section 7 rights and employers' rights to establish a dress code and to discipline violators. Like many other labor doctrines, the disagreement lies at a final stage: which rule manifests a better balance between the competing interests of employees and employers.

Critical pragmatic differences exist between the two opinions. As in other social contexts, assigning default rules and exceptions matter in work law.[58] For Tesla and its workers, it matters where the balancing chips will fall. But the entire argument rests on a false premise, namely, that a proper labor law doctrine balances Section 7 rights with employers' interests.

In the proceedings leading to the *Tesla* decision, anticipating the reversal of doctrine, the Board invited interested parties to file briefs over the following question: "should [the Board] adopt a new legal standard to apply in cases where an employer's maintenance of a facially-neutral work rule is alleged to violate Section 8(a)(1) of the National Labor Relations Act?"[59] One question the Board asked the parties to address is as follows: "In what respects . . . should the Board modify existing law . . . to better ensure that . . . the Board appropriately balances employees' rights under Section 7 and employers' legitimate business interests?"[60]

This question explicitly states the problem underlying this Article. Balancing employees' rights with employers' legitimate business interests has no statutory anchor. "Legitimate business interests" is not a statutory term, as opposed to "Section 7 rights." Balancing is also not a statutory term. All of those commonsensical outgrowths of labor law doctrine are absent from the text.

Tesla is an excellent example of the logic of balancing because it is so explicit. Balancing is explicit in *Tesla* because

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58 *See* Racabi, *supra* note 31, at 85.

59 Stericyle, Inc. and Teamsters Local 628, 371 N.L.R.B. No. 48, at 1 (2022).

60 *Id.*

both sides keep telling us that balancing is the benchmark for a sound labor law doctrine.[61] Balancing is explicit in *Tesla* because the Board explicitly asked parties to address balancing in their preferred doctrinal outcome. Balancing is also explicit in the brief for employers' representatives' Chamber of Commerce,[62] as it is explicit in the workers-side AFL-CIO's brief on this issue.[63] Balancing is explicit in *Tesla* because of the structure of the legal arguments of both dissent and majority opinions—recognizing the rights of both sides under the NLRA, acknowledging that the NLRB must account for both sets of rights, and realizing that balancing is the way to go about deciding the doctrinal question at hand.

Other cases present balancing implicitly. Not always do the Board and courts balance straightforwardly. However, in *Tesla*, it cannot be stated more clearly: good labor law is predicated on balancing workers' statutory rights versus employers' interests.

It is important to note that the problem with *Tesla* is not with the doctrinal structure of rule and exception. Rule-exception might be an excellent doctrinal structure without cutting into workers' Section 7 rights. Some examples include a rule that dress codes are considered legitimate (the rule) unless they violate Section 7 rights (the exception) or a rule that employers' enforcing uniform dress codes on concerted wear is always violative of Section 7 rights (the rule), unless the employer proves that in this particular fact pattern, it did not interfere with Section 7 rights (the exception). Those immediate, unambiguous rule-exception structures do not cut against the statutory text. These formulations do not balance what is impermissible for the Board and courts to balance. These rule-exception structures enforce the law. Rule-exception structures are not the issue here.

It is also noteworthy that the doctrine in *Tesla* is the *outcome* of balancing interests with rights. Labor law doctrines are the fruits of the poisonous balancing tree. As some *Tesla* amici noted, a balancing test can be both the decision rule for

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61 *Tesla*, 371 N.L.R.B. at 4–5.

62 *See* Brief of Coalition For A Democratic Workplace et al. as Amicus Curiae at 3–4, Tesla, Inc., 370 N.L.R.B. No. 88 (2021), (https://apps.nlrb.gov/link/document.aspx/09031d45833d5bf0 [https://perma.cc/4ZCM-9BSH].

63 *See* Brief of The American Federation of Labor And Congress Of Industrial Organizations As Amicus Curiae at 3, Tesla, Inc., 370 N.L.R.B. No. 88 (2021), https://apps.nlrb.gov/link/document.aspx/09031d45833d4560 [https://perma.cc/U7YR-XNXY].

deciding a doctrinal outcome (for example, a sound labor law doctrine is one that properly balances opposing interests) or the rule itself (for example, the good doctrinal outcome is a balancing test between opposing interests). To illustrate this point, the amici filed in *Tesla* on behalf of the employers'-side HR Policy Group asserted that the correct rule in *Tesla*-like cases is not the "special circumstances" test but instead an open-ended balancing test with multiple possible factors.[64] The HR Policy Group amici would do away with any strict doctrinal confines and, in Section 7 v. Dress Codes conflicts, would ask the Board and courts to balance employers' interests and employees' rights in the specific context at hand.[65] It is hard to argue with the position that the test that best balances the parties' interests is, well, a balancing test.

In contrast to those two issues, the problem at the heart of this Article is the major premise underlying the argument—labor law's decision rule—that a good doctrinal outcome in *Tesla* will balance workers' and employers' interests. The problem with the *Tesla* decision is the problem with its decision rule, with the consensus on balancing and the implicit premise that balancing is a legal and pragmatic necessity in labor law doctrine.[66]

Sticking to the text, employers have no general business interests under the NLRA. Employers have no inherent right to do business if, in doing so, they violate labor law rights. Thus, balancing workers' statutory NLRA rights against the amorphous employers' interests is legally nonsensical. The *Tesla* consensus got one argument right: workers have the statutory right to engage in concerted activities for mutual aid and protection. And it is right that "it shall be an unfair labor practice to violate" a Section 7 right. But no matter how hard or how long one stares at the NLRA, it is impossible to find there a right of employers to force dress codes down the throats of organizing workers, regardless of circumstances. That right isn't there; if it isn't there, it should not be the law.

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64 *See* Motion For Permission To File A Brief As Amicus Curiae and Brief of Amicus Curiae HR Policy Association in Response to Board's Invitation to File at 4–5, Tesla, Inc., 371 N.L.R.B. No. 131 (2022) [hereinafter Amicus Motion], https://apps.nlrb.gov/link/document.aspx/09031d45833d6347 [https://perma.cc/XDF8-GXB6].

65 *See id.* at 8.

66 As there is no one source for balancing, *infra* Part I, there is also no one actor, or one judicial or board composition, that can take the full blame for balancing. The *Tesla* board is not the origin of this doctrine.

Tesla is an easy case. "It shall be" an unfair labor practice to interfere with, restrain, or coerce employees in exercising the rights guaranteed in Section 7. The NLRA covers Tesla workers. Collectively wearing union insignia is a concerted activity protected under Section 7.[67] Thus, it shall be an unfair labor practice to terminate Tesla workers because they wore union insignia. Adding a balancing modifier only muddies the otherwise clear water of the NLRA.[68]

Tesla is an explicit, recent example of a decades-long legal and political error. The legal error is that the Board and courts must balance workers' Section 7 rights. The political mistake is assuming that balancing workers' rights creates some good in the US's political economy.

In the following, I demonstrate how widespread and influential balancing is in labor law. The goal in bringing in more examples is to convince the reader that *Tesla* is an example of a consensus. It is a resounding, entrenched, pervasive, and wholly wrong consensus—a consensus about labor law's decision rule—what makes for a good labor law doctrine? The answer in *Tesla,* as in the examples below, is that the good labor law is a balanced labor law.

B. More Examples of Balancing

Balancing seems inherent in how courts, agencies, lawyers, and scholars think and practice labor law. In some fundamental way, balancing is what labor law is about. This Part highlights some of the more influential explicit and implicit balancing cases. Implicit cases are ones in which employers' interests are identified explicitly, but the method of balancing or the fact of balancing is implicit. The explicit ones are those in which those two stages, or the goal of a balanced outcome, are straightforward.

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67 Such is the consensus in the *Tesla* board. It is possible that textualist interpretations can be utilized to reverse course and carve out currently protected activities. For example, Justice Gorsuch in *Epic Systems* implements a textualist reading of the NLRA to carve out protections for class action waivers and individualized arbitration agreements. *See* Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612 (2018). In doing so, Gorsuch states that the scope of Section 7's general list of activities is limited, overall, to protecting "things employees 'just do' for themselves in the course of exercising their right to free association in the workplace." *Id.* at 1625. Wearing union insignia is likely covered even under this fairly limited standard.

68 *Cf.* Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577, 578 (1988) (noting that straightforward common law rules in property law have been muddied by introducing ambiguity and "equitable second-guessing").

The goal of collecting these examples is to demonstrate the pervasiveness of balancing in the most seminal labor law decisions, in labor law's doctrinal bedrock. The goal is to show that *Tesla*, though supportive of workers' claims and flipping previous Republican-majority Board decisions, is very much in line with the meta-doctrine of our labor law—balancing must be accomplished.

The shape of this meta-doctrine is that though workers enjoy Section 7 rights, employers have an equally valuable right to counter and challenge all Section 7 rights' claims. Thus, actualizing Section 7 rights is always the business of employers and always up for Board and judicial scrutiny. Wherever workers claim they are protected for engaging in concerted activities, there we will find a claim for mirroring and opposing employers' statutory recognized interest. The scope of such employers' interests is at least as broad, at least as vital, and legally valid as Section 7 rights are. To demonstrate this claim, consider some examples.

1. *Explicit Balancing*

On the list of cases in which balancing is a goal or a method for deciding doctrinal outcomes, we can find cases such as *Republic Aviation v. NLRB*, whereby the Supreme Court saw a standoff between workers' Section 7 right to solicit union materials and employers' rights to maintain discipline.[69] In cases of hospitals and health-care facilities, the Board also adds consumers' interests to the mix, finding they weigh against these Section 7 rights.[70] This addition is unique to the labor context; no general and amorphous patient rights are likely to interfere with employers' managerial interests in other cases.

In multiple cases involving striking and concerted activities, the Board has declared that a "legitimate and substantial business justification" might trump Section 7 rights in particular circumstances.[71] In cases of union's demands for information, for example, to investigate and remedy contract violations, the Board must balance the need for information

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69 324 U.S. 793, 797–98 (1945).

70 *See, e.g.*, NLRB v. Baptist Hosp., Inc., 442 U.S. 773, 778 (1979); Beth Israel Hosp. v. NLRB, 437 U.S. 483, 495 (1978); St. John's Hosp. & Sch. of Nursing, Inc., 222 N.L.R.B. No. 182, at 1150 (1976), *enforced in part*, 557 F.2d 1368 (10th Cir. 1977).

71 *See, e.g.*, Sterling Fluid Systems (USA), Inc., 345 N.L.R.B. 371, 375 (2005) (citing Pirelli Cable Corp., 331 N.L.R.B. 1538, 1539 (2000)); *see also* Troy Grove A Div. of Riverstone Grp. Inc., 371 N.L.R.B. No. 138, at 14 (2022).

against the "legitimate and substantial confidentiality interests established by the employer."[72] In *Caesars Entertainment*,[73] the Board balanced employees' NLRA rights and employers' interests to establish that employers may lawfully restrict employees' nonbusiness use of the employers' IT systems, unless the restriction is discriminatory or employees have no other reasonable means of communicating with each other.

2. *Implicit Balancing*

On the list of implicit balancing cases, we can find the 1943 *Peyton Packing Co.*, which created the original distinction between on-the-clock and off-the-clock time concerning the right of employees to solicit union material.[74] The implicit part here is the Court's cryptic assertion underlying the distinction that "working time is for work." It is difficult to discern such a limitation on Section 7 rights from the text. Similarly, the *Mackay Radio* Court found an employer's right to bring permanent replacements for striking workers following an inherent right to keep the business operating.[75] Adding "reasonableness" requirements to workers' concerted activities, again, with no statutory anchoring, is also commonplace.[76]

Workers may also lose the protection of their statutory rights if, while engaging in otherwise protected activities, they are being too rude, too sarcastic, too exuberant,[77] or too vulgar[78] or are operating without the authority of fellow employees.[79] Concerted activity might also lose coverage when it

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72 Penn. Power & Light Co., 301 N.L.R.B. 1104, 1105–06 (1991) (citing Detroit Edison Co. v. NLRB, 440 U.S. 301, 303 (1979)).

73 368 N.L.R.B. No. 143 (2019).

74 49 N.L.R.B. 828, 843 (1943), *enforced*, 142 F.2d 1009 (5th Cir. 1944).

75 *See* 304 U.S. 333, 347–48 (1938).

76 Vemco, Inc. v. NLRB, 79 F.3d 526, 530 (6th Cir. 1996); Quietflex Mfg. Co., 344 N.L.R.B. 1055, 1056 (2005) (determining that twelve-hour stoppages are beyond "reasonable time" by balancing employee's Section 7 rights and employer property rights).

77 *See* U.S. Postal Serv., 360 N.L.R.B. 677, 683 (2014).

78 *See* Carleton Coll. v. NLRB, 230 F.3d 1075, 1081 (8th Cir. 2000) (holding sarcastic and vulgar language not protected); Cellco P'ship, 349 N.L.R.B. 640, 646 (2007) (finding that the employee lost protection because of egregious behavior). "Employees are permitted some leeway for impulsive behavior when engaged in concerted activity, this leeway is balanced against an employer's right to maintain order and respect." *Piper Realty Co.*, 313 N.L.R.B. 1289, 1290 (1994); NLRB v. Pier Sixty, LLC, 855 F.3d 115, 123 (2d Cir. 2017); Inova Health Sys. v. NLRB, 795 F.3d 68, 87 (D.C. Cir. 2015), *enforcing* 360 N.L.R.B. No. 135 (2014); Consumers Power Co., 282 N.L.R.B. 130, 132 (1986).

79 *See* Meyers Indus. Inc., 268 N.L.R.B. 493, 496–97 (1984).

"undermine[s] employer[s'] authority."[80] Nor do workers' statutory rights extend to areas that lie at the "core of entrepreneurial control" or in areas "fundamental to the basic direction of [the] corporate enterprise."[81] Other assertions of unenumerated managerial rights under the NLRA went even further, stating, "[m]anagement must be free from the constraints of the bargaining process to the extent essential for the running of a profitable business" and the employers' "need for unencumbered decisionmaking."[82]

It is important to note that while it is easy to find such a one-sided assertion of employers' rights born out of thin air, all the dissenters usually had to offer is an accusation of a lack of balance. So, the aforementioned *First National Maintenance* majority, which hailed the unencumbered rights of employers, was opposed by its dissent *not* for making employers' rights up but for failing to balance such rights with those of employees properly.[83]

This descriptive fact—labor law and balancing go hand in hand—outlines labor law's doctrinal opinions. The structure of most majority and dissenting opinions is remarkably similar—one calls doctrinal outcome X balanced, and the other states it is not balanced and calls for doctrinal outcome Y. The places change as control over the Board shifts and as the ideological and professional judicial norms adapt, but this structural feature is always there, if not explicitly, implicitly.

It is this descriptive fact I will try to anchor in law and policy arguments. And, after failing to do so, I will offer some alternatives.

II
The Legal Basis of Balancing

Should the NLRB and the courts consider employer interests in determining the scope of Section 7 rights? The major premise for labor law doctrine is that it *must* balance employers' interests and workers' rights.

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80 *See* NLRB v. Starbucks Corp., 679 F.3d 70, 79 (2d Cir. 2012); Felix Indus., Inc. v. NLRB, 251 F.3d 1051, 1055 (D.C. Cir. 2001) (describing case where employee called supervisor "fucking kid" three times); Stanford N.Y., 344 N.L.R.B. 558, 558–59 (2005) (holding this factor favored lost protection when employee called general manager "a fucking son of a bitch").

81 *See* Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203, 223 (1964).

82 First Nat'l Maint. Corp. v. NLRB, 452 U.S. 666, 679 (1981).

83 *See id.* at 689–91.

Analytically, this premise includes two components. First, employers' and workers' interests are recognized under the NLRA; second, those interests are equal in importance, and balancing them is the only viable path to solve labor law doctrinal dilemmas when in conflict. Those components go hand in hand, and one central tension that arises in this section is between the source of the legal rights of employers and the wishy-washy balancing way in which employers' interests are inserted into labor law.

Accordingly, the following Part will (a) outline an attempt to find employers' interests in the text, external sources of the NLRA, and other sources and (b) explain why balancing is mandated and necessary under the NLRA.

As I engage in this legal exercise, two things should be clear: first, because of its consensual nature, balancing is a hidden premise in labor law. Therefore, as other scholars, it is up to me to expose those hidden legal claims and lay them bare.[84] The second related point is that I am ill-positioned to do so as the one attacking the legal validity of these arguments and confident in their social and political harms. I share both of these points in common with other scholars seeking justifications for balancing in labor law.[85]

According to the description in Part I, under the NLRA, employers have a right to maintain certain business practices even while those practices might violate Section 7 rights. This employer's right, or set of rights, can be argued whenever a Section 7 claim is made, and according to Board and court doctrine, what needs to be done with this supposed clash is to balance employers' interests with Section 7 rights.

I will continue using the example of *Tesla* to avoid highbrow theorizing. The asserted legal rights in *Tesla* included: (1) Workers concerted wearing of union insignia was protected activity under Section 7; and (2) Employers have a right to establish policies and prevent workers' from concertedly wearing union insignia.[86] *Tesla* is just one example; many other particular business interests were recognized as valid in consideration of Section 7 rights. Labor law doctrine has developed a contrary general purpose right to balance out Section 7's broad concerted activities protection. Where did this right originate?

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84 *See generally* JAMES B. ATLESON, VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW 87–88 (1983).

85 *See generally* GROSS, *supra* note 53; Cynthia L. Estlund, *Labor, Property, and Sovereignty After* Lechmere, 46 STAN. L. REV. 305, 309–10 (1994).

86 Tesla, Inc., 371 N.L.R.B. No. 131, at 1 (2022).

A. Employers' Interests Are There in the Text

Employees' rights are in the text of the NLRA in multiple places, chief among them in Section 7 of the NLRA. Section 7's broad language guarantees workers the right to engage in various, generally-termed forms of concerted activities.[87] In Section 8, employees are protected from coercion, discrimination, and intervention in their Section 7 rights against unions and employers.[88] Against unions, *employees* enjoy a Section 7 right to refrain from joining all forms of protected concerted activity.[89] It has been long recognized that the NLRA is, thus, focused on *employee* choice.[90] To organize or not to organize, to choose union representation or be free from it, that is the question the NLRA facilitates.

Where can we find employers' rights? The NLRA recognizes the right of "any person" to file charges for unfair labor practices. Employers are persons for that matter.[91] The procedure of administering Board cases is stock-full of procedural rights employers can take advantage of.[92] Employers also can claim that the NLRA does not cover them or their workers[93] or that it would be unwise of the NLRB to assert jurisdiction in a particular case.[94]

On substance, employers have the right to claim that a union committed an unfair labor practice under Section 8(b)'s subsections.[95] For example, Section 8(b)(3) gives employers the right to engage in collective bargaining with a represented union.[96] Section 8(b)(7) gives employers—again, in their capacity as "persons,"—certain rights against unlawful picketing by

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87 *See* 29 U.S.C. § 157.

88 *See id.* § 158(a).

89 *See id.* § 157.

90 *See generally* Benjamin I. Sachs, *Enabling Employee Choice: A Structural Approach to the Rules of Union Organizing*, 123 HARV. L. REV. 655, 656 (2010).

91 "The term 'person' includes one or more individuals, labor organizations, partnerships, associations, corporations, legal representatives . . . ." 29 U.S.C. § 152(1); NAT'L LAB. RELS. BD. DIV. OF JUDGES, BENCH BOOK: AN NLRB TRIAL MANUAL § 3–110 (2022), https://www.nlrb.gov/sites/default/files/attachments/pages/node-174/alj-bench-book-2022.pdf [https://perma.cc/HEP2-69VS].

92 *See generally* NAT'L LAB. RELS. BD. DIV. OF JUDGES, *supra* note 91.

93 *See* OFF. OF GEN. COUNS., NAT'L LAB. RELS. BD., GC 21-08, STATUTORY RIGHTS OF PLAYERS AT ACADEMIC INSTITUTIONS (STUDENT-ATHLETES) UNDER THE NATIONAL LABOR RELATIONS ACT 2 (2021).

94 *See* Trs. of Columbia Univ., 364 N.L.R.B. 1080, 1087–88 (2016).

95 *See* 29 U.S.C. § 158(b).

96 *See id.* § 158(b)(3).

unions. Employers also enjoy Section 8(c) rights against using speech as evidence in unfair labor practices.

The Board interpreted Section 8(c) to signal a broad recognition of employers' free speech rights, which the Board, at times, "balances" against workers' Section 7 rights of being free from coercive threats.[97] But such is a faux balancing, as employees' right to be free from coercion is stated in similar terms as exceptions to Section 8(c) itself, and in such cases, employees never win more rights than what the statute grants them.[98]

Under Sections 8(f) and 8(g), employers in the construction and healthcare industries are awarded certain privileges.[99] Except for those specific sectoral privileges, Section 8 rights do not provide generalized employer rights. Employers do not have an employers' Section 7 equivalent of their own.

Employers' general right to balance Section 7 rights is not found in the text of the NLRA. Nor are there any exemptions from unfair labor practices given a sufficient legitimate business reason. Nor is employers' rights not to be encumbered by Section 7 rights or the lawful activities of unions "to the extent essential for the running of a profitable business."[100] Nor is their right found there to accept Section 7 protected activity only when it is done in a civilized manner or in a manner that does not harm the discipline and hierarchy in the workplace. All of those are specific articulations of a supposed general-purpose interest available to employers under the NLRA to counter Section 7. That right is not in the text of the NLRA or its adjacent legislation.

B. Employers' Interests were Added by the Taft-Hartley Amendments

A common legal trope is that the function and role of the NLRA was transformed in its most significant amendment—the Taft-Hartley Act. So, according to this line of thought, if employers' interests were outside the scope of the law pre-Taft-Hartley, than they must be in the statute post-Taft Hartley.

There are two versions of this argument. The first type would scour the text of the law for pro-management corrections

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97 Intertape Polymer Corp. v. NLRB, 801 F.3d 224, 238 (2015) (stating that where an employer observes union activity in the course of 8(c) conduct, a balance must be struck between Section 8(c) and the employees' Section 7 rights); Cintas Corp. No. 2, 372 N.L.R.B No. 34, at 13 (2022).

98 *See Intertape Polymer Corp.*, 801 F.3d at 238.

99 *See id.* § 158(f), (g).

100 *See* First Nat'l Maint. Corp. v. NLRB, 452 U.S. 666, 678–79 (1981).

and rely on those to assert a general recognition of employers' interests. The other argument relies on identifying a trajectory of Congress weakening union rights under the NLRA. In this argument, employers' general interests are perhaps not in the text itself, but instead they are in the spirit of the amendments. Both arguments are weak.

The textualist argument fails. The law as it stands today, post the Taft-Hartley amendments, contains no employers' general interest provision. It is true that employers gained certain concrete legal tools in the Taft-Hartley amendment like the possibility of unions to commit unfair labor practices, immunity of employers' speech as an unfair labor practice, and more concrete items.[101] But other than those concrete legal levers, no general interest protection was legislated. It is true both in the substantive part of the Taft-Hartley amendments, and also in the addition to the law's preamble—no significant shift or amendment to the original language was included in the statutory language. Nor was Section 7 amended in a way to stand for general employers' interests.

When you ignore the statutory text, you are left with an unbounded judicial intuition about the legislatures' purpose and goals. And the aim of the Taft-Hartley Act was interpreted by both courts and the Board as a permission to weaken unions. Those vibes were amplified by the strong lobbying departments of employers' organizations that reread an extensive and union-weakening premise for all of labor law.[102] But even if Taft-Hartley reflects a congressional intent to weaken unions, it does not follow that, first, the way Congress intended to do it was by strengthening employers' rights, and not employees' right to choose.[103] Second, it does not follow that the way Congress intended to strengthen employers was through the provision of a general and overriding business interest contrary to Section 7. Or, third, that Congress intended to dilute Section 7 rights without amending the relevant propositions in the text itself.

Even if Taft-Hartley was intended to weaken unions and strengthen employers it does not mean that Congress intended that everything goes. Instead, Congress prescribed a particular way in which unions ought to be weakened, and employers

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101 *See* Charles J. Morris, *How The National Labor Relations Act Was Stolen and How it Can Be Recovered: Taft-Hartley Revisionism and the National Labor Relations Board's Appointment Process*, 33 BERKELEY J. EMP. & LAB. L. 1, 30–31 (2012).

102 *See id.* at 21.

103 *See generally* Sachs, *supra* note 90.

be strengthened. Other than those concrete ways, and the examples above present a much broader set of employers' powers and immunities, Taft-Hartley presents no legal basis for the recognition of employers' general interests claims against Section 7 rights, nor mandates any form of unstructured balancing between the two.

C. Employers' Interests are External to the NLRA

If employers' general interests are not in the text of our labor laws, where did they come from? This Part illustrates three possible legal paths external to the NLRA. First is that the employers' general right comes from the common law concepts of employee and employer, which includes certain inherent features of subordination of employees' rights to the employers' interests. The second option stems from state property law. The third is from the Constitution's Takings Clause.

1. *Common Law Subordination and Prerogative*

One of the leading contenders for pinpointing the location of employers' recognized general business interests is in a common law understanding of the relations between employees and employers. According to this possible articulation, when courts and the Board analyze the respective statutory duties and obligations of employers and employees, they must consider some inherent values this legal relationship entails. Namely, the subordination of workers to employers' business interests.

Here employers' general interests stem from how courts have interpreted the powers of employers vis-à-vis their employees for a century now—a relationship wherein the employer holds a general duty of care to its workers and the general right of control over its workplace. Such broad powers of management and control are termed in work law the employer's prerogative.[104]

Under the NLRA, the importation of work-law common law concepts is most explicit in defining employees and employers as covered entities under the Act. Such classification disputes, while also depending on doctrinal shifts, often revolve around issues of control and dependency.[105] As the terms and

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104 *See* Racabi, *supra* note 31, at 82.

105 *See* Gali Racabi, *Despite the Binary: Looking for Power Outside the Employee Status*, 95 TUL. L. REV. 1167, 1171 (2021) [hereinafter Racabi, *Despite the Binary*].

definitions of "employer" and "employee" under the Act are supposedly ill-defined,[106] courts and the Board routinely defer to the common law understandings of employee-employer relationships in their methods of recognizing a covered employee.[107]

So the argument will be that when Section 7 identifies the rights of employees vis-à-vis their employers, it must be interpreted in light of the general common law rights and duties of employees qua employees and the rights and obligations of employers qua common law employers.

Perhaps the issue whereby this theory seems to resonate most are cases in which courts strip workers of their Section 7 rights for undermining employers' authority during otherwise protected concerted activities. The maximal legal argument, when laid bare, is that employees who do not act subordinated are, somehow, not full-fledged employees for the purpose of Section 7.

Subordination as a precondition for inclusion in the NLRA theory contains several flaws. First, coverage is usually considered a status that applies to a particular working relationship, not to specific acts. Tying back the protection for special actions to status without explicitly questioning the position of the worker under the Act is thus poor legal craftsmanship. Second, it is not how courts and the Board treat those kinds of cases.[108] For those issues, the decision is not a matter of personal coverage but of particular insubordinate behavior that goes too far by some implicit matrix. Third, traditionally classification under any work law statute is not a matter of balancing employers' rights versus employees' interests but instead more of a binary.[109]

A more minimal theory about the connection between common law subordination and protection under Section 7 is that protection must be viewed in light of workers' expected common law subordination. This theory is harder to refute, as it is formless. Its mandate and scope are so broad and undecisive that they can take many possible forms. Such usages can be countered by the apparent reliance of courts on common law values, instead of on forms, in interpreting statutory relationships that insert other democratically enacted values, which

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106 "(2) The term 'employer' includes any person acting as an agent of an employer, directly or indirectly . . . . (3) The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise . . . ." 29 U.S.C. § 152.

107 *See* Racabi, *supra* note 105.

108 *But see* NLRB v. E.C. Atkins & Co., 331 U.S. 398, 404 (1947) (tying balancing of bargaining power to the question of status).

109 Racabi, *Despite the Binary*, *supra* note 105, at 1167.

might even flip the common law ordering of values and perceptions of control and subordination.

Tesla, as a case study, fits better with the second, messier explanation. *Tesla* is clearly not a classification case but is instead an explicit attempt to provide for a balance between some benchmark-assumed employers' interests and Section 7 rights. This benchmark-assumed employers' interest might have been derived from implicit common law assumptions about the inherent relationships in all employment relationships.

As mentioned, the messy and convulsant way the court pick and choose which common law values to emphasize makes this argument more chaotic than it might seem. Those categories of employer/employee are not just definitional and used to identify the jurisdiction and scope of the NLRA but also to insert substantive expectations about subordination and control.

2. *State Property Law*

Another possibility for including employers' interests in consideration of Section 7 rights involves employers' state-born property rights. As Cynthia Estlund writes, "[t]he history of labor law has been, in large measure, the history of property rights."[110] According to Estlund's account, that history did not end at the enactment of the NLRA in 1935 but still influence the trajectory of labor law,[111] even though the exact legal path for that influence is not clear.

The legal argument for how state property law is inserted into the NLRA and made into a general counterbalance right to Section 7 rights is as such: state property law provides employers a right to control who enters their property and under what conditions they may remain in it. Therefore, because state property law provides employers with a right to exclude, they may, for example, reject the entrance of union organizers into their property[112] or condition access to abiding by company dress codes and certain disciplinary proceedings.

The balance the Supreme Court placed concerning access rights under the NLRA is that Section 7 rights enter the scene only if property-based exclusion completely bars workers from exercising their Section 7 rights. It is difficult to align such interpretation with the broad language of Section 7 or the overall prohibition on interference in Section 8(a)(1), but nevertheless,

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110 Estlund, *supra* note 85, at 306.

111 *Id.* at 309.

112 Lechmere, Inc. v. NLRB, 502 U.S. 527, 527 (1992).

such is the current balance labor law doctrine identifies. Thus, in *Tesla*-like cases wherein employers have rights to set and enforce a dress code that interferes with Section 7 rights, a *Lechmere*-type analysis would suggest that unless workers do not have an alternative way of actualizing Section 7 rights, they may not violate that dress code. This *Lechmere* balance to *Tesla's* doctrinal questions, without the property-based arguments, was indeed offered by some of the amici.[113]

The best criticisms on this balance of property rights versus Section 7 rights are not my own. Estlund and Hirsch describe in detail how this ideal property right articulated in Section 7 cases is entirely detached from how state property law in fact works.[114] State property law is convalescent and far from unitary on the right of exclusion and the power to license and govern access. Yet somehow such minutia never make it to Section 7 balance analysis.

Another line of criticism focuses on where property rights come from—state law. In other cases of collision between the NLRA and state law, courts use a different kind of analysis—preemption analysis. According to the NLRA's robust preemption doctrine,[115] state law is preempted when it covers an activity "arguably" covered by the NLRA or when Congress meant for such action to be completely unregulated by the state or by the NLRB. There are some exceptions to those two significant doctrinal prongs. For example, the state may regulate issues peripheral to federal labor policy and of vital local concern.[116] Because property rights originate with state law and interfere with activities arguably covered by the NLRA, at a minimum, courts ought to engage preemption doctrinal analysis. But balancing is not currently part of the NLRA's preemption doctrine. We therefore find here a misalignment between the legal origins of the general employers' rights and the balancing method.

Another obstacle to property rights as the source of employers' interests is that employees can lose Section 7 protection outside of the employers' property. And in the process of balancing, the Court comes up with doctrines that ignore the location of the activity and sometimes assign time and manner restrictions to what counts as protected activities—such as the

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113 *See* Amicus Motion, *supra* note 64, at 4.

114 *See* Estlund, *supra* note 24, at 336; *see generally*, Jeffrey M. Hirsch, *Taking State Property Rights Out of Federal Labor Law*, 47 B.C. L. REV. 891, 891 (2006).

115 *See* Estlund, *supra* note 24, at III.A.

116 San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 243–44 (1959).

"work time is for work" modifier to Section 7.[117] Such balanced solutions indicate that property, as a right that is attached to a physical space, is not the only possible source of employers' interests and of such balancing.

The argument that property rights were "abrogated" by the enactment of the NLRA as far as Section 7 rights are concerned is also not original.[118] As it should be. It is a relatively straightforward legal argument. State-based property rights are considered abnegated when discussing other work laws, such as minimum wage, overtime pay, antidiscrimination law, and more. But due to some doctrinal quirk, property rights still prosper under the NLRA. Yet again, the availability of property rights in Section 7 analysis seems to explain only a subset of cases—those that deal with a right to exclude people from the property of the employer. That subsection of cases, while influential and significant, are cabined and much less universal than the prevalence of balancing.

3. *The Constitution*

Another possibility for where employers' general interests came from is the Fifth Amendment of the Constitution. In a recent solo-authored concurring opinion, Justice Kavanaugh retroactively read this theory into the canonical NLRA access cases.[119] An explicit utilization of the protection of property in constitutional theory was used by the Supreme Court in *Cedar Point Nursery v. Hassid*[120] to nullify a California law that allowed union organizers certain access rights into agricultural farms.

The Takings Clause of the Fifth Amendment provides that "nor shall private property be taken for public use, without just compensation."[121] In *Cedar Point*, the Court portrayed union access regulations as per se physical takings of property,[122] and therefore the state was obligated to justly compensate the growers for such takings. Because California did not recognize such union regulations as a Constitutional taking, it also did not compensate the growers in explicit terms. The Court, therefore, ruled that the union access regulations were void.

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117 Republic Aviation Corp. v. NLRB, 324 U.S. 793, 797–98 (1945).

118 Estlund, *supra* note 85, at 310.

119 Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2080–81 (2021).

120 *See id.* at 2071.

121 U.S. CONST. amend. V.

122 *Cedar Point Nursery*, 141 S. Ct. at 2077.

The Court's majority also refused to consider the interactions between its Takings Clause decision and its NLRA jurisprudence, which was not in question in this case.[123] One reason for that is that under the Court's NLRA decisions, the test for determining access rights of union organizers is a balancing test. The Takings doctrine as applied in the court's recent *Cedar Point* case necessitates per se compensation with almost no relevant exceptions.[124]

NLRA access case law also does not explicitly recognize the Fifth Amendment as the source of employers' property rights to object to union organizers' access. For example, in *National Labor Relations Board v. Babcock & Wilcox Co.*, the Court suggested that the source of employers' property claim in NLRA access cases is the "National Government" and does not speak explicitly of the Takings Clause:

> This is not a problem of always open or always closed doors for union organization on company property. Organization rights are granted to workers by the same authority, the National Government, that preserves property rights. Accommodation between the two must be obtained with as little destruction of one as is consistent with the maintenance of the other. The employer may not affirmatively interfere with organization; the union may not always insist that the employer aid organization.[125]

In his concurring opinion in *Cedar Point*, Justice Kavanaugh insists that in *Babcock & Wilcox*, the origin of the employers' property right was the Fifth Amendment.[126] Kavanaugh explains that although the Fifth Amendment was missing from the *Babcock & Wilcox* opinion, it did appear in the employers' briefs.[127] He also strengthens his position by adding three words to the above quotation: "the National Government *via the Constitution* preserves property rights."[128] Kavanaugh also

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123 *Id.* ("The Board contends that [the] approach of balancing property and organizational rights [under the NLRA] should guide our analysis here. But [the NLRA access doctrine] did not involve a takings claim. Whatever specific takings issues may be presented by the highly contingent access right we recognized under the NLRA, California's access regulation effects a *per se* physical taking under our precedents.").

124 Benjamin I. Sachs, *Safety, Health, and Union Access in Cedar Point Nursery*, 2021 SUP. CT. REV. 99, 103–05 (2021) (detailing possible exceptions to Cedar Point).

125 351 U.S. 105, 112 (1956).

126 *Cedar Point Nursery*, 141 S. Ct. at 2080.

127 *Id.*

128 *See id.* (emphasis added) (internal quotations omitted).

disregards *Cedar Point* majority's caution about embracing *Lechmere*-type balancing by choosing to ignore it.

Justice Kavanaugh should be applauded for articulating a theory about where employers' property rights come from in NLRA cases. Still, the problems with the constitutional approach are numerous. First, the approach is not explicit. And while the Court was invited to use the Constitution in *Babcock & Wilcox* by employers, it chose not to do so.[129] Kavanaugh can add words to *Babcock & Wilcox*, but those words weren't there. Not only were the words not there, but also the method of Fifth Amendment takings was not there.[130] This is one source of concern for the *Cedar Point* majority in adopting *Babcock & Wilcox* as a precedent.[131] *Babcock & Wilcox* was not about per se takings of physical property, but rather about balancing employees' Section 7 rights and employers' property rights. Both Section 7 and the employers' property rights are "preserved" by "the National Government."[132] This kind of equivocation of interests is typical of Section 7 balancing doctrine and is atypical of Takings Clause doctrine.

One can adopt a constitutional theory of Section 7 that would justify uplifting NLRA rights to the level of the Fifth Amendment. Some earlier court decisions did so, even if just for rhetorical purposes.[133] Currently, such a reading seems farfetched.

D. Employers' Interests Stem from a Purposive Reading of the NLRA

Under most of the life of the NLRA, the court and the Board assumed its purpose was to facilitate some symmetry between

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129 *See id.*

130 *Cf.* Charlotte Garden, *Avoidance Creep*, 168 U. PA. L. REV. 331, 331, 335–40 (2020) (providing examples where by avoiding constitutional analysis courts create downstream doctrinal "distortions").

131 *See Cedar Point Nursery*, 141 S. Ct. at 2077.

132 *See id.* at 2080.

133 *See* Jefferson Elec. Co. v. NLRB, 102 F.2d 949, 956 (7th Cir. 1939) (quoting N.L.R.B. v. Union Pac. Stages, 99 F.2d 153, 178 (9th Cir. 1938)) (stating that the right of workers to organize was a natural right comparable to free speech rights); Inland Steel Co. v. NLRB, 170 F.2d 247, 258 (7th Cir. 1948) (Major, J., dissenting) ("[T]he right 'to organize for the purpose of securing redress of grievances and to promote agreements with the employers relating to rates of pay and conditions of work' is a constitutional right, and . . . the right of employees to self-organization and to select representatives of their own choosing for collective bargaining or other material protection is fundamental . . . employees have a constitutional right to organize, to select a bargaining agent of their own choosing and, if members of a Union, to elect the officials of such Union.").

workers' and employers' rights. This was the upshot of the law. In declaring the NLRA's constitutional, the Court stated that Section 7 of the NLRA is "a fundamental right"[134] and that "[e]mployees have as clear a right to organize and select their representatives for lawful purposes as the respondent has to organize its business and select its own officers and agents."[135]

If, until the declaration of the NLRA as constitutional, employers had had their freedom of contract and property rights enshrined in the Constitution, now workers had their own constitutionally valid claim for legal rights in the workplace.

According to this understanding of the NLRA, its purpose was the NLRA formation of a balanced *legal rights landscape* between workers and employers. Balance here is not in the sense of "equal" but in the sense of "stable," of mutually contravening rights and interests. That kind of balance was then placed in common sense and expertise-based clamps.

It is of note that the Court often had explicitly removed itself from advocating or regulating for the purpose of equal bargaining power. For example:

> Our decisions hold that Congress meant that [economic weapons], whether of employer or employees, were not to be regulable by States any more than by the NLRB, for neither States nor the Board is 'afforded flexibility in picking and choosing which economic devices of labor and management shall be branded as unlawful.'[136]

But the creation of workers' legal rights in the workplace against the apparent background of employers' rights is right there. And it is the role of the Board and the courts to regulate this right versus interest tension. Thus, for example, the NLRB's role is to strike a balance between competing interests in the national labor policy: "The function of striking that balance to effectuate national labor policy is often a difficult and delicate responsibility, which the Congress committed primarily to the National Labor Relations Board, subject to limited judicial review."[137]

Such balancing of symmetrical rights is clamped within a constraint of taken for granted limitations. Almost from the get-go, the Board and courts drew a parallel between workers'

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134 NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 33 (1937).

135 *Id.*

136 Lodge 76, International Association of Machinists & Aerospace Workers v. Wisconsin Emp. Rels. Comm'n, 427 U.S. 132, 149 (1976).

137 NLRB v. Truck Drivers Local Union No. 449, 353 U.S. 87, 96 (1957).

claims for protection under the NLRA and employers' rights to act against concerted activities of employees. But while the legal source of workers' protection was in the text of the NLRA, the lawful source of the latter was always murky. Labor law's legal technique is one wherein the legal origin of rights does not reflect on their status—at least not for employers' rights.

In *Republic Aviation v. NLRB*, the Supreme Court faced a circuit split regarding the rights of employers to enforce no-solicitation standards against workers' solicitation of union materials.[138] In the decision, the Court stated that "[these cases] bring here for review the action of the National Labor Relations Board in working out an adjustment between the undisputed right of self-organization assured to employees under the Wagner Act and the equally undisputed right of employers to maintain discipline in their establishments."[139]

Despite the seeming imbalance of legal origins, the *Republic Aviation* Court equates workers' and employers' rights as "equally undisputed."[140] And it adds that both rights must bend to mutually accommodate each other. Such mutual accommodation is a social necessity: "[l]ike so many others, these rights are not unlimited in the sense that they can be exercised without regard to any duty which the existence of rights in others may place upon employer or employee. Opportunity to organize and proper discipline are both essential elements in a balanced society."[141]

One more source for employers' rights under the NLRA is common sense. This common sense was used by courts to slide employers' interests into account where a close textualist read would not find them.[142]

Thus, in *Peyton Packing Co., Inc.*,[143] the Board states as obvious that "[t]he Act, of course, does not prevent an employer from making and enforcing reasonable rules covering the conduct of employees on company time. Working time is for work. It is therefore within the province of an employer to promulgate and enforce a rule prohibiting union solicitation during working hours."[144] It is obvious for the Board, for whatever reasons,

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138 Republic Aviation Corp. v. NLRB, 324 U.S. 793, 795 (1945).

139 *Id.* at 797–98.

140 *Id.* at 798.

141 *Id.*

142 *See generally*, Pope, *supra* note 20.

143 Peyton Packing Co., Inc., 49 N.L.R.B. 828 (1943), *enforced*, 142 F.2d 1009 (5th Cir. 1944).

144 *Id.* at 843.

that no citation is needed to assert that "working time is for work" and that while on the clock, workers must abide to a no-solicitation rule—even one that if applied off the clock would violate Section 7.[145]

In other contexts, the Court leans heavily into its notions of what a market economy requires of labor law doctrine. Such is the case regarding the limitation of the scope of mandatory collective bargaining subjects: "Congress may eventually decide to give organized labor . . . a far heavier hand in controlling what until now have been considered the prerogatives of private business management. That path would mark a sharp departure from the traditional principals of a free enterprise economy."[146]

It is perhaps redundant to add that such judicial notions of the substantial legal effects of the "traditional principals of a free enterprise system" have no basis in the text of the NLRA. These principles were made into the law of the land outside the usual course of how the law is made. This is a circumventing route, one that goes only through the Justices' legal training, socialization, and sense of history. It is perhaps also redundant to add that such training, socialization, and sense of history are notoriously anti-worker and is prone to capture by no more sophisticated means than a free weekend at a decent resort.[147]

The purpose theory fails today. We no longer believe that picking and choosing one-liners from legislative history and committee reports can capture the true spirit and purpose Congress installed in a legislative act. We are all textualists now, and "legislative history is not the law."[148] Assumptions about the purpose of a legislation which are not anchored in the statutory text are now considered unstable auspices for a legal argument.

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145 Note that *Peyton Packing*, which is still a good rule, distinguishes the harm to employers' interests not by physical location on the property of the employer; but by being "on the clock." It is not only property interests, in their physical sense, which the board balances against employees' Section 7 rights.

146 *See* Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203, 225–26 (1964).

147 *See* Elliott Ash, Daniel L. Chen & Suresh Naidu, *Ideas Have Consequences: The Impact of Law and Economics on American Justice*, NAT'L BUREAU ECON. RSCH. 1, 7 (2019).

148 *See* Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1631 (2018).

E. Maybe in the Structure and Functions of the NLRB

The history of the Board as an institution is a mediating device between organizing workers and their employers.[149] As mediators, the Board's members had to pursue case resolutions that employers' and employees were willing to abide by voluntarily. In that process, the strict enforcement of statutory language was more often than not a hindrance.[150]

The language of Section 7 rights comes from the National Industrial Recovery Act ("NIRA"):

> Every code of fair competition, agreement, and license approved, prescribed, or issued under this title shall contain the following conditions: (1) That employees shall have the right to organize and bargain collectively through representatives of their own choosing, and shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.[151]

The Board's predecessors, the NLB (1933) and the "old" NLRB (1934), rested on the cooperation of labor and management.[152] Each one's mandate was to create a framework whereby workers enjoyed enough leeway to stop strikes but not so much to alienate employers and stall the national economic recovery.[153] The stingiest of all aspects, which the Board avoided like the plague, is making public declarations as to the meaning of 7(a).[154]

After the formation of local boards, regional managers were instructed to "make settlements even though you are told it violates all the laws of the land, if it meets the dictates of sound judgement and common sense."[155]

To this day, the Board is a remarkably weak agency. Its remedial arsenal for violations is, in comparative terms, minimal. But even in cases of winning a remedy, for ensuring compliance, the Board is almost entirely dependent on voluntary

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149 GROSS, *supra* note 53, at 11–12.

150 *Id.* at 12.

151 National Industrial Recovery Act, Pub. L. No. 73-67, § 7(a), 48 Stat. 195, 1 (1933).

152 GROSS, *supra* note 53, at 11.

153 JAMES A. GROSS, THE MAKING OF THE NATIONAL LABOR RELATIONS BOARD: A STUDY IN ECONOMICS, POLITICS, AND THE LAW 20–23 (1974); GROSS, *supra* note 53, at 12.

154 GROSS, *supra* note 53, at 22.

155 *Id.* at 29.

compliance or court orders to effectuate its remedies. Given such weakness, perhaps it makes sense for a weak remedial structure to be fitted to a weak substantive regime. Or, from a different angle, one may argue that given such a weak corrective regime and reliance on courts and voluntary compliance, perhaps this substantive parity is essential for the Board's legitimacy.

These claims have no basis. Substantive and remedial strength do not always go hand in hand, and Board legitimacy is a known unknown. What is certain is that the Board is no longer structured as a mediation institution. That vision for the Board was rejected in the formation of the "new" NLRB. Indeed, the Board issues doctrinal interpretations for the NLRA, not just for the facilitation of a concrete bargain between employers and employees. Instead, the reality of the Board is one of flip-flopping between administrations on various substantive doctrinal questions.[156] Boards flip flop for all kinds of reasons, but none of those has to do with the accomplishments of concrete deals in the case at hand. Additionally, while no research has been done on this point, it is hard to point to a mechanism that would characterize this kind of doctrinal decision-making as some legitimacy boon.

F. In Any Case, Necessary and Inevitable

As the Court tells us in numerous decisions, balancing workers' statutory rights and employers' common law interests is a social necessity and inevitability. In *Republic Aviation*, the court explicitly calls employers' right to discipline workers and workers' statutory rights to organize "essential elements in a balanced society,"[157] deriving from it the doctrinal conclusion that the two must cohabit labor law doctrine.

Employers "need . . . unencumbered decision-making."[158] Needs, in this case, is the Court's articulation of employers' interests' source and importance.

There are three levels of analysis to the necessity thesis. First is on a dyadic frame—waiving one's claims to absolute rights is a necessity in making good bargains; the second is on a societal level, wherein broad social relations are built on mutual recognition of interests and waivers of absolutes;

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156 *Id.* at 30.

157 Republic Aviation Corp. v. NLRB, 324 U.S. 793, 798 (1945).

158 First Nat'l Maint. Corp. v. NLRB, 452 U.S. 666, 679 (1981).

and a third, a narrower real-politic level, whereby such waivers are necessary because these are enforced by the political community.

The dyadic argument states that mutual waivers of absolute rights are a must to facilitate good bargaining relations, which is the declared goal of the NLRA. This mutuality approach, which at times was declared as formal Board policy,[159] is fine as a bargaining strategy goes. But it is a fallacy of aggregation to deduce from a reasonable bargaining strategy—to the law of the land in labor relations. A good bargaining strategy is not the same as a good labor relations doctrine, which is supposed to accommodate many labor relations bargaining systems.

The second social argument is that in modern society, we must recognize employers' interests for the purpose of labor relations. "[n]o sensible person" so Senator Wagner tells us, "would interpret [Section 7] to mean that while a factory is at work, the workers could suddenly stop their duties to have a mass meeting."[160] Section 7 has an inherent tenability or reasonableness requirement embedded in it.

This argument faces two significant obstacles. The first is that the U.S. is a far, far exception to other Western countries in how far the recognition of employers' interests goes. The sensibility of what is tenable and what is not is so, well, bizarre to comparative-sensitive ears. Wagner's phrase above is unusual even in American terms, where strikes and walkouts happen "while a factory is at work." A right to concerted activities (outside of office hours and space) is quite a significant caveat to Section 7 to be considered inherent in it. Modern societies do just fine without replacing striking workers with permanent replacements as a fundamental labor doctrine. The second obstacle is the textualist argument about the agents we as a society assign to make such decisions for us, namely, legislatures by writing statutes. A willing federal legislature can, and often does, limit workers' rights to act collectively.[161] It is legislatures, not courts, that are assigned to design the social good or balance.

From a real-politic perspective, the Board must adopt this kind of wishy-washy doctrine. The Board is a highly politicized agency and extremely vulnerable to congressional hostility.

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159 Gross, *supra* note 53, at 24.

160 Estlund, *supra* note 85, at 311 n.33.

161 *See* 5 U.S.C. § 7311.

Congressional leverage points are many. Notorious among those is the use of legislative riders on the Board's budget appropriation, which includes substantive decrees about the Board's decisions and rules.[162]

That kind of dependence had led some labor historians to assert that the Board had only two years of enforcing the NLRA to its fullest before its decisions started reflecting a fear about its continued existence.[163] In this perspective, full enforcement of the NLRA is perhaps legally correct but politically shortsighted. Congress still holds significant levers over the operation of the NLRB through budgeting and control over appointments and might respond negatively to full enforcement of Section 7 rights.[164]

Another possible objection to shifting the status quo is that the alternative to balancing workers and employers' rights is the nullification of workers' rights by employers' property rights,[165] being subject to direct cost-benefit analysis,[166] or, ultimately, being run down even further. For example, fighting over balancing indicates that sometimes, when the Board membership aligns, and the Court's spirit is deferential, good pro-worker outcomes can win most of the balancing cases. Your small lot of land, won via this crooked doctrine, can get much smaller. *Tesla* is better for workers than *Lechmere*, which is better than *Cedar Point*. It is not time to provoke the doctrinal gods. Balancing is inevitable—as a descriptive fact, according to this thesis, because core actors are reluctant to shake the semi-floating boat they are on. Perhaps.

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This cloud of possible legal sources for employers' interests hovers over Section 7 like flies; as you raise your hand to swat at one, another lands. Section 7 is immobile, ossified in its concrete words and phrases, in their concrete order, taking pot shots from the Justices' random interpretative cannons. All the while, employers' interests are everywhere and nowhere simultaneously, beyond legal categorization, beyond our dictionaries, beyond limits. Balancing is a rationale that supersedes

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162 GROSS, *supra* note 53, at 77.

163 *Id.* at 22.

164 *See, e.g.*, *id.*

165 Estlund, *supra* note 85, at 310.

166 Zimarowski, *supra* note 1, at 54–55.

our legal structure. Formless, employers' interests were never legally born, so they cannot die.

None of the legal origin stories are sufficient to cover the complete legal grounds for employers' interests in Section 7 cases. The Court itself occasionally recognizes this, for example, by distinguishing between cases that involve employers' "management" interests and cases that involve "property" interests.[167] Legal professional minds are fully capable of creating ad hoc scales and continuums among the various employers' interests that are supposedly at play in balancing Section 7.

The following Part will review some of the harms this legal landscape has caused. The Part following will provide alternative futures in which we disperse the employers' interests cloud over Section 7.

III
The Harms of Balancing

What harms stem from balancing Section 7 rights? The harms associated with balancing tests in legal literature entail increasing legal ambiguity and affording unencumbered discretion to legal professionals. The context of Section 7 is no different in those respects from other legal contexts.

The question of where the balance will be set in a particular doctrinal issue is always at risk of shifting as political tides come and go. No doctrinal area of labor law is secure from a new Board majority placement of a proper balance. The case of *Tesla* is a case in point. No party in the *Tesla* proceedings, including the majority and the dissent, offered any external or objective indication of why their point of balance was correct.[168] The most readily available tool in their legal arsenal was indicating that the other side didn't, in fact, balance at all.[169]

The inherent reliance in rulemaking on legal professionals' understanding of balance adds to the legal ambiguity. Other than the usual democratic-leaning reasons we might dislike legal professionals' discretion on important social issues, in the case of labor law, there is a good reason to suspect such judgment is biased. The tension and discontent between labor and legal professional on the Board and courts has been known for a century. Given this long-term judicial animosity against

167 *See, e.g.*, Hudgens v. NLRB, 424 U.S. 507, 521 n.10 (1976).

168 *See* Tesla, Inc., 371 N.L.R.B. No. 131 (2022).

169 *See id.* at 20.

labor, providing broad discretion in shaping doctrinal outcomes to such professionals is a wrong path of actualizing the law.

Another general issue with ambiguity is that it hinders access to the rights the law provides. In the NLRA context, such access issues pile on other weaknesses of the administrative process to actualize NLRA rights.[170] Such agency weaknesses must be enhanced by the substantive ambiguity balancing provides.

Those general legal issues with balancing add some unique contextual small-picture and big-picture issues to balancing Section 7 rights.

A. Small-Picture Bad

1. *Inherently Destructive to Workers' Rights*

In the most immediate sense, any Section 7 rights balancing is a loss for workers. Workers enjoy no common law protection from their employers for engaging in concerted activities. All workers have in their legal arsenal is the statutory language. Those rights were won after decades of organizing and struggle. Under the balancing model, employers have a common law retort to all of their statutory claims.[171] And while the origins of employers and workers rights differ, their legal treatment and rhetorical importance are surprisingly equivalent.

Furthermore, any balancing courts and agencies do in the US ought to be immediately suspected of bias—bias against workers, against collective rights, and against interruption to employers. In this context, unguarded balancing, of the sort labor law asks both courts and Boards to do, feeds the beast.

We know, from decades of historical research and from other areas of work law, employers' interests are perceived as crucial, necessary, and far more valuable and urgent than workers' rights are. In the common law world, this dichotomy between the types of interest is pertinent. For example, in the context of contractual modifications of employment contracts, it is considered "necessary" by courts to maintain employers'

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170 *See, e.g.*, Anna Stansbury, *Do US Firms Have an Incentive to Comply with the FLSA and the NLRA?* 4 (Peterson Inst. for Int'l Econ., Working Paper No. 21-9, 2021).

171 For example, in a recent case an employer claimed that making employees whole for committing unfair labor practices must be balanced against the administrative complexity such procedure would take from the NLRB. The Board accepted the balancing argument but found it "balanced" against its duty to make employees whole. Again, this sort of balance begs another board to re-balance the doctrinal outcome. Thryv, Inc. 372 N.L.R.B. No. 22, at 18 (2022).

authority to change contractual terms of work: "[e]mployers must have a mechanism which allows them to alter the employee handbook to meet the changing needs of both business and employees."[172] Employers' interests are a "must." Workers' interests are good to have.

In other work law contexts, balancing is not necessarily bad for workers. However, only when balancing happens between a specific statutory right and a general common law interest, like Section 7 rights, is that the case. For example, the common law of work entailed constant balancing of workers' rights, employees' rights, and the public interest. See, for example, a discussion of the application of good faith to employment contracts: "[i]n all employment contracts, whether at will or for a definite term, the employer's interest in running his business as he sees fit must be balanced against the interest of the employee in maintaining his employment, and the public's interest in maintaining a proper balance between the two."[173]

Balancing Section 7 rights is inherently a losing position for workers. It empowers tribunals known for their bias against workers and their claims—both in the context of labor law and other work law statutory contexts. Balancing is an inherent, immediate loss of a legal high ground.

2. *Legally Incoherent*

In other contexts, in law in general and in work law in particular, it is clear that common law rights are subordinated to overriding statutory provisions. For example, the employment law restatement describes in such terms the relations between the common law at will default rule and statutory provisions regulating terminations: "[t]he at-will default rule . . . does not supersede controlling legislation" or other law.[174] In the legal fight between the at will rule, and statutory language, statutes win. Why? Because statutes are legally superior to common law. Common law interests can and do find an entry into statutory cases, but it is done via a legal proxy of some sort—constitutional text for example.

Section 206 of the FLSA (minimum wage) states, "[e]very employer shall pay to each of his employees . . . wages at the

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172 Fleming v. Borden, Inc., 450 S.E. 2d 589, 595 (S.C. 1994).

173 Monge v. Beebe Rubber Co., 316 A. 2d 549, 552 (N.H. 1974).

174 RESTATEMENT OF EMPLOYMENT L. § 2.01(c).

following rates."[175] Any exceptions to that are in the text. Section 207(a)(1) of the FLSA states, "no employer shall employ any of his employees . . . for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed."[176] No balancing is done with overtime pay. Section 102(a)(1) of the Family and Marriage Leave Act ("FMLA") states that "an eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month period for one or more of the following [indicating reasons]."[177] Section 1910.176(b) of the Code of Federal Regulations states that "bags, containers, bundles, etc., stored in tiers shall be stacked, blocked, interlocked and limited in height so that they are stable and secure against sliding or collapse."[178] Again, no balancing is used to enforce that safety standard. If the standard applies to the business, it applies regardless of whether or not the company has a legitimate business interest in stacking items in a nonsecure way.

What the balancing mechanism in labor law does is place a question mark over that hierarchy. It isn't clear why or in what circumstances courts can insert common law interests to balance statutory rights. What distinguishes minimum wage from Section 7? What distinguishes Section 7 from trench height standards OSHA has made?

B. Big-Picture Bad—A Political Economy View

In recent comparative constitutional literature, Jamal Greene offers a possible connection between the robustness of constitutional rights in the US and US political polarization.[179] The suggested mechanism here is that insistence on full-on enforcement of rights creates discord and struggle. Or, on the flipside, treating rights as more malleable and suggestive devices for courts in balancing-like decision-making processes might produce more amicable relations between democratic political interests.

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175 29 U.S.C. § 206.

176 *Id.* § 207(a)(1).

177 *Id.* § 2612(a)(1).

178 Irene Spezzamonte, *2nd Circ. Says Federal Safety Rule Applies to Walmart*, LAW360 (Oct. 4, 2022), http://www.law360.com/articles/1537076/2nd-circ-says-federal-safety-rule-applies-to-walmart [https://perma.cc/2ZXZ-85T4].

179 *See* Greene, *Rights as Trumps?*, supra note 40, at 30.

Although Greene's writing is not meant as a causal mechanism, he clearly identifies a political valence between "rights as trumps" and the current polarized US political climate.[180] And the same kind of argument can be stated against the full enforcement of all rights between contesting parties, including Section 7 rights. The full enforcement of Section 7 rights against employers' interests will tarnish and polarize US labor relations between workers and employers. But the rights-as-trumps argument misses the labor dynamic in multiple ways.

First, we usually think of statutory workplace rights as trumps without regard to political outcomes. Sure, the full enforcement of minimum wage, safety, and health standards, and so on might upset employers and the capital markets underlying their businesses, which can create political discord. But we usually do not attribute significance to such factors in our legal discussions of minimum wages.

Second, the early history of the NLRB is as a mediating institution, one that depends on the consent of both parties to be bound by its decisions.[181] Employers' resistance to the early 1933–34 Boards pushed the legislation to adopt a more formal doctrine-building, adjudicatory function.[182] History suggests that employers' resistance might be a valid social force regardless of the doctrine and structure of the Board.

And third, and relatedly so, political economy literature demonstrates that the issue connecting agency actions and more harmonious labor relations is whether or not employers can achieve their goals without direct coordination.[183] A political system attributed to the high effectiveness of breaking workers' concerted activities is more pronged to strife and less to coordination.[184] Harmony, in those studies, is achieved when employers must engage directly with each other and their workers. Access to the possibility of shutting down workers, not the specific procedure in which courts do that, is the crucial empirical component here. Balancing facilitates courts and agencies' intervention and thus creates long-lasting harm to US labor relations.

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180 *See id.* at 30–38.

181 Gross, *supra* note 53, at 12.

182 *Id.*

183 *See generally* Hacker, Hertel-Fernandez, Pierson & Thelen, *supra* note 41, at 1, 12–13 (emphasizing the role of the fragmentation of US policy making as a source of employers' power).

184 Kathleen Thelen, *Employer Organization and the Law: American Exceptionalism in Comparative Perspective*, 83 Law & Contemp. Prob 23, 29 (2020).

IV
ALTERNATIVES

One alternative to the current state of the law is based on a textualist reading of the NLRA. This option is based on a progressive reading of the NLRA's goals concerning balancing. All the alternatives to the balancing model represent a sharp departure from the current state of labor law doctrine. Still, the textualist proposal aligns labor law doctrine with textualist interpretations of other work law statutes, namely, with *Bostock v. Clayton County* rejection of reliance on legislative history in the interpretation of non-ambiguous statutory language.[185]

Such a close textualist read of the NLRA can be helpful in other areas of labor law. For example, over the years, courts developed an implicit exemption of the NLRA for workers engaged in "developing and enforcing employer policy."[186] The implicit exemption from the coverage of the NLRA had a significant bite on populations equipped with marginal decision-making authorities such as university professors. The insertion of this implicit exemption into the usual readings of who is a covered employee creates another definition of a carved employee—one whose employer is entitled to "undivided loyalty" as that employee's representative.[187]

The substantive debate of whether, for policy reasons, it is wise to add to the already heavy hand of common law employee loyalty an "undivided" modifier is left for another day. The legal reality is that the text of the NLRA makes no such exemption. Nor does the text of the NLRA connect protection from retaliation for forming unions with a duty of loyalty in any way. As it is agreed that under the plain words of the NLRA, policy-executing employees are employees, and as it is clear that no other textual legal hook is available for excluding those employees, it is clear that the NLRA must cover such employees.

This is just an example of one consequence of the far-reaching radical-departure yet common-sense textualist read of the NLRA. Below is the example I consider the most viable alternative to the current state of labor law doctrine.

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185 140 S. Ct. 1731, 1749–50 (2020).

186 NLRB v. Yeshiva Univ., 444 U.S. 672, 682 (1980).

187 *See id.*

A. Remedy-Balancing Labor Law

The first alternative to the current balancing model is shifting balancing to the final stage of legal decision-making—the remedial phase. The upshot of this alternative is explicitly blocking the question of balance from the scope of substantive doctrinal questions—and leaving the balancing of employers' and workers' interests in the remedial phase. Not only is separating the question of harms from the question of remedies common practice in legal adjudication, but also it is a forgotten thread of NLRA law and can easily be read into its doctrines. For example, In *Phelps Dodge Corp. v. NLRB*,[188] the Court said:

> There is an area plainly covered by the language of the Act and an area no less plainly without it. But in the nature of things Congress could not catalogue all the devices and stratagems for circumventing the policies of the Act. Nor could it define the whole gamut of remedies to effectuate these policies in an infinite variety of specific situations. Congress met these difficulties by leaving the adaptation of means to end to the empiric process of administration. The exercise of the process was committed to the Board, subject to limited judicial review. Because the relation of remedy to policy is peculiarly a matter for administrative competence, courts must not enter the allowable area of the Board's discretion and must guard against the danger of sliding unconsciously from the narrow confines of law into the more spacious domain of policy. On the other hand, the power with which Congress invested the Board implies responsibility—the responsibility of exercising its judgment in employing the statutory powers.

Most substantive-balancing cases can be remodeled as remedy-balancing ones. The *Republic Aviation* decision is frequently cited as a call for a balance between workers' and employers' rights. But a more compelling read of *Republic Aviation* is about the Board's balancing of remedies on a case-by-case basis rather than the balancing of rights. Immediately after equating employees' and employers' rights, the Court states that the harm Congress sought to avoid in creating a general right against intervention in concerted activities is a "rigid scheme of remedies."[189] And that rigidity is prevented by the allocation of the adjudicatory function of the NLRA first to a Board with a flexible scheme of remedies. It is unclear from the language what precisely the Court means here. But the

188 313 U.S. 177, 194 (1941).

189 Republic Aviation Corp. v. NLRB, 324 U.S. 793, 798 (1945).

argument's thrust follows the harms—balancing is a cure to remedial rigidness.[190]

What is clear about *Republic Aviation* is that what is under attack there is the Board's legitimacy in processing complaints and issuing decisions.[191] It is not just the substantive allocation of rights and obligations.

In other contexts, remedial balancing is recognized statutorily. Under the FLSA, the Court of Federal Claims has the discretion to award no liquidated damages "if the employer shows . . . that the act or omission giving rise to [the FLSA] action was in good faith" and was based on "reasonable grounds for believing that [the] act was not a violation of the Act."[192]

But such a proposal can also be read as inherent in the Board's administrative and professional capacities and in the Court's equitable role in allocating and designing remedies. Remedy-balancing, not rights-balancing labor law is a ready alternative.

B. Power-Balancing Labor Law

Balancing of bargaining power, not of rights, is a central part of the NLRA's legacy. The bill introducing the NLRB's predecessor, the NLB was slated to "Equalize the Bargaining Power of Employers And Employees,"[193] Commons, one of the ideational founders of the New Deal labor relations model, wrote in 1934 that what he sought was "organized equilibrium of equality."[194] The political model of the NLRA was originally not about one worker one vote but rather about a Madisonian conception of balancing counter powers to private enterprises—industrial democracy in the sense of ambition countering ambition, of an end to tyranny by countervailing power.

This ideal of balancing draws straight from Madison's' Federalist's Papers political insights and throws those into the economic arena. Such that in a 1950 book on the New Deal

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190 *Id.*

191 "The gravamen of the objection of both Republic and Le Tourneau to the Board's orders is that they rest on a policy formulated without due administrative procedure. To be more specific it is that the Board cannot substitute its knowledge of industrial relations for substantive evidence." *Id.*

192 29 U.S.C. § 206.

193 *To Create a National Labor Board: Hearing on S. 2926 Before the S. Comm. on Educ. & Labor*, 73d Cong. (1934).

194 Reuel E Schiller, *From Group Rights to Individual Liberties: Post-War Labor Law, Liberalism, and the Waning of Union Strength*, 20 BERKELEY J. EMP. & LAB. L. 1, 6 (1999).

Collective Bargaining Policy, the author states that it is "politically, economically, and socially desirable for all major interest groups to be organized in approximate equality in order to prevent anyone from gaining dominance."[195] This idea was so powerful that the author considered all the debate about the economic harms of collective bargaining to be "subsidiary to the balance of power concept."[196] The first and foremost goal, the never-reached ideal, is balancing one collective arm of the economy against the other.

Both in the statutory language itself,[197] and in succeeding court decisions,[198] balancing of bargaining power remained a clear purpose of the NLRA.[199]

If there is a rationale for balancing employees and workers, it is power-, not rights-oriented. This notion of balancing the de facto power of unions and employers is long-standing goal and purpose of the NLRA. But balancing rights does not produce balanced power. And power is what ultimately counts. For example, how can the law balance the power of Amazon warehouse workers' union and Amazon? Well, Amazon is the biggest retailer in the world, currently is worth 1.3 trillion dollars, employs about two million people,[200] unilaterally controls the economies of multiple localities, and holds many other localities by its throats. How can the law balance Amazon's power with that of its workers? What kind of balance should labor law be doing to balance the interests of baristas in a Denver Starbucks with a firm controlling 15,444 stores;[201] what kind of balanced labor law can produce equal bargaining power

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195 IRVING BERNSTEIN, THE NEW DEAL COLLECTIVE BARGAINING POLICY x (1950).

196 *Id.* at xi.

197 *See* 29 U.S.C. § 151.

198 *See* American Hospital Association v. NLRB, 499 U.S. 606, 609 (1991); American Comm. Ass'n v. Douds, 339 U.S. 382, 387 (1950); NLRB v. J. Weingerten, Inc., 420 U.S. 251, 261–62 (1975);

199 Kati L. Griffith & Leslie C. Gates, *Worker Centers: Labor Policy as a Carrot, Not a Stick*, 14 HARV. L. & POL'Y REV. 601, 617 (2019).

200 *Amazon's Net Worth 2010-2023*, MACROTRENDS, https://www.macrotrends.net/stocks/charts/AMZN/amazon/net-worth#:~:text=Amazon%20net%20worth%20as%20of%20October%2013%2C%202023%20is%20%241339.14B.&text=Amazon.com%20is%20one%20of,operations%20spreading%20across%20the%20globe [https://perma.cc/5NWN-KE65] (Oct. 23, 2023); Press Release, Amazon, Amazon.com Announces Second Quarter Results (Aug. 3, 2023), https://s2.q4cdn.com/299287126/files/doc_financials/2023/q2/Q2-2023-Amazon-Earnings-Release.pdf [https://perma.cc/5DCZ-VLZZ].

201 *Number of Starbucks Stores in the United States from 2005 to 2022*, by Type, Statista (Oct. 10, 2023), https://www.statista.com/statistics/218360/number-of-starbucks-stores-in-the-us/ [https://perma.cc/XNM2-ZT33].

between Elon Musk and Tesla employees? If that is the balance we seek, and I believe it is, I say, bring it on. The answer is not by compromising the meager legal rights the NLRA provides. Balancing workers' rights with employers' rights does not produce that kind of balance.

One possibility in this space is to enhance the Board's expertise-based analysis to fashion rules and doctrines that would empirically balance workers' and employers' bargaining power. Such a proposal was put forward by Hiba Hafiz.[202] This proposal builds on the (re-)construction of the NLRB as an expertise-based agency, now equipped with the tools to empirically examine and fashion rules suited to the shifting economic structures and conditions. Hafiz's take is a welcome change seeking to create a power-balancing and not right-balancing labor law.

Another possibility is legally oriented. Here, the rule of thumb is that legal rights are stand-ins for power. And if the case is of a power imbalance tilting toward employers, we should tip the legal scale in the other direction. In this view, if we wish to even the power scales, we should pile legal rights on one side and deny from the other or at least cut deeply into the extra-legal privileges of the stronger side.

An example of piling more rights on the workers' side of the aisle is to recognize that Section 7 only provides examples of protected concerted activities and that the rights the NLRA creates are unenumerated.

Or perhaps, similar to the creation of an employers' general right to counter Section 7 right, courts and scholars can develop an employee's general right to object to reasonable business practices, wherever and whenever those exist. Such legal proposal mirrors the general employers' interest claim against any Section 7 right application.

Such pro-worker doctrinal developments can go in smaller steps, mimicking the doctrine and reversing it. For example, assign a limitation of "reasonableness" civility, modicum, and respect for workers' autonomy as a precondition for the legal validity of any legal application of employers' interests. Or, if reformers would go big, suggesting that employees should not be encumbered in the application of their collective rights by employers' business structures and interests. Symmetry can be a beautiful thing.

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202 *See* Hiba Hafiz, *Structural Labor Rights*, 119 MICH. L. REV. 651, 651–52 (2021).

A general workers' prerogative is organizing. The contrary is that employers enjoy only a strict and narrow reading of their statutorily granted rights. We can recognize a procedural default that employers' claims under the NLRA are valid, and that employees' claims are subject to increased scrutiny. The pathways to redistribute rights to rebalance powers are numerous.

Conclusion

Offers to reform the NLRA are legion.[203] Offers to reimagine Section 7 rights are among those suggestions.[204] This Article makes a simpler suggestion—stop balancing Section 7 rights with employers' interests.

The reasons for that are manifold. Textually, employers do not have general rights available to them whenever a Section 7 rights claim is made. Legally, balancing creates an inherently uphill fight between a formless ultra-right with no textual guardrails and an ossified textual right. Realistically, it places judges and other legal professionals as the bearers of balance between workers and their bosses, a dubious value proposition. Politically, it supercharges the NLRB and the court system to repeatedly question workers' rights, which creates an easily accessible venue for employers who wish to legally squash their workers' rights instead of directly negotiating with them. Balancing is legally baseless and politically irredeemable.

Rights-balancing labor law is a doomed project. Balancing is part of labor law's illness, not a path to a cure. Balancing is for suckers.

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203 Clean Slate for Worker Power, *supra* note 30.

204 *See* Staughton Lynd, *Communal Rights*, 62 Tex. L. Rev. 1417, 1417–18 (1984).