
The Content of Coercion

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This Article is about a new approach to one of the law’s most basic questions: what is coercion? Under its traditional framing, coercion is about transactions. One person makes an offer to another person, who, under the circumstances, has no realistic option but to say “yes.” But that conception has not helped courts articulate a way to test when pressures cross the line from lawful persuasion to illegal compulsion. Without a metric, critics charge that coercion analyses are inevitably normative. This Article challenges that inevitability. Using the workplace as a case study, it argues that it is possible to weigh the impact of speech or conduct on choice, but only if the coercion’s content is clarified so that judges know what they are supposed to be evaluating. Drawing from rapid advances at the intersection of decision-making and emotion science, the Article is the first to describe what it is, exactly, about an external force that might push employees, their superiors, and consumers toward irrational judgments. The new approach unites labor law with emerging law and emotion scholarship, applies across existing doctrine, and, by lending itself to quantifiable assessments, defies normative assumptions to finally standardize the law of coercion at work.

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INTRODUCTION

This Article is about a new approach to understanding one of the law's most basic questions: what is coercion? Most accounts start from the premise that coercion is about transactions. One person makes an offer to another person, who, under the circumstances, has no realistic option but to say "yes."¹ The transactional approach courses through a remarkable cross-section of American law,² and its sheer stability testifies to its theoretical flexibility.³ It has not, however, helped courts advance a "coherent rationale" for measuring when a specific offer constitutes legal coercion and when it amounts to something less.⁴ Critics contend this gap has turned coercion into an "inevitably normative" concept, where detecting its presence has become less about a proposal's impact than "some moral condemnation of the offer itself."⁵

This Article challenges that inevitability. But moving coercion away from a primarily values-based analysis will require a renewed focus on its substance. Weighing an offer's influence requires in the first instance a better idea of what it is, exactly, about an unlawful proposal that pushes someone to do one thing when the rational move would be to do something else. Without that sense, judges simply do not know what they are supposed to be evaluating.⁶

While coercion's content is relevant anywhere the term is at issue, this Article localizes the inquiry to the workplace, where the concept pervades a range of discussions, from forced arbitration, to pressured

¹ For an especially lucid description of this formula, which in a second step often requires that the offeror not "have a right to make" the proposal in the first place, see Benjamin I. Sachs, *Unions, Corporations, and Political Opt-Out Rights After Citizens United*, 112 COLUM. L. REV. 800, 829-33 (2012) [hereinafter *Unions, Corporations, and Political Opt-Out Rights*].

² *Id.* at 832 n.170 (listing examples).

³ Kathleen Sullivan's 1989 article still testifies to the variety of approaches to legal coercion, which broadly involve offers from state and private actors to decision-makers. See Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1428-50 (1989).

⁴ *Id.* at 1428.

⁵ *Id.* at 1446 n.133 (citing commentators in philosophy and law); see also *id.* at 1443 ("[I]n these settings [coercion] is inevitably normative, not merely descriptive, empirical, or psychological. It necessarily embodies a conclusion about the wrongfulness of a proposal, not merely the degree of constraint it imposes on choice.").

⁶ See Sachs, *Unions, Corporations, and Political Opt-Out Rights*, *supra* note 1, at 844 ("To be sure, there is no consistency in the Court's jurisprudence on these questions.").

political contributions, to compelled prescription-filling.⁷ Unions are a particular flashpoint, with mandatory dues and representation fueling repeated allegations of coerced speech at the Supreme Court.⁸

In this Article, the focus is broader and more longstanding: statutory labor law itself, where coercion sits at the center of how the regime as a whole seeks to structure relations between employees, their superiors, and outsiders. All three are routinely bombarded with a diversity of speech that straddles the line between rationalist persuasion the law supports and unfair pressure it limits, and labor law's primary function is to pick a side. Nearly everyone agrees it does not do this well, with the accustomed complaint: it's all just politics.⁹ But if the underlying doctrine has not explained how bad offers operate, or if the law lacks a consistent metric to examine a proposal's psychological fallout, a reliance on norms or a sense of justice is unsurprising. In fact, much of labor law's current approach to coercion, I contend, relies on analytical proxies that point more to things that for historical, policy, or contextual reasons judges don't like than to evidence of genuine choice distortion.

Getting to coercion's content must start with a renewed sense of how people actually make decisions, from all sides: how workers decide to support a union or not; how employers decide to recognize a union or do business with a controversial supplier or not; and how consumers decide to shop at a store under protest or not. It is a propitious moment for a return to these kinds of first principles. Insights from behavioral law and economics, legal neuroscience, and social psychology have cast seemingly decisive doubt on conventional

⁷ See, e.g., Alexander Hertel-Fernandez & Paul Secunda, *Citizens Coerced: A Legislative Fix for Workplace Political Intimidation Post-Citizens United*, 64 UCLA L. REV. DISCOURSE 2, 6 (2016) [hereinafter *Citizens Coerced*] (examining "political coercion in the . . . workplace"); Richard C. Reuben, *Democracy and Dispute Resolution: The Problem of Arbitration*, 67 L. & CONTEMP. PROBS. 279, 308 (2004) (discussing "coerced arbitration" in employment); Lorraine Schmall, *Birth Control As a Labor Law Issue*, 13 DUKE J. GENDER L. & POL'Y 139, 159 (2006) (considering employees "forced to fill birth control prescriptions, notwithstanding . . . religious beliefs").

⁸ See Catherine L. Fisk & Margaux Poueymirou, *Harris v. Quinn and the Contradictions of Compelled Speech*, 48 LOY. L.A. L. REV. 439, 485-86 (2014).

⁹ See James J. Brudney, *Isolated and Politicized: The NLRB's Uncertain Future*, 26 COMP. LAB. L. & POL'Y J. 221, 249-51 (2005) (describing the Board's "politicization" and its impact on precedents); Amy Semet, *Political Decision-Making at the National Labor Relations Board: An Empirical Examination of the Board's Unfair Labor Practice Decisions Through the Clinton and Bush II Years*, 37 BERKELEY J. EMP. & LAB. L. 223, 225-26 (2016) ("The NLRB . . . is often cited as the poster child for partisanship in agency decision-making.").

portraits of cool and detached deciding in everyday life. It is also a restive moment. Just as notions of skewed choice through unconscious bias, intuitions, defaults, and other heuristics go mainstream,¹⁰ another field is pushing to the front of the line.

In just the past dozen years, emotion science has forced an even more basic rethinking of how people make judgments. Research has shown that feelings like sadness, anger, and disgust operate like viewfinders that selectively distort incoming data and bias responses accordingly. Decisions made in the throes of an emotion are not, in other words, “rational” in the traditional sense of pros-versus-cons. While this is a challenge for any area that, like labor law, assumes a rationalist baseline even where passions are in play, the newest research also reveals that the filters and skews are strikingly predictable. And that means that learning about emotions can illuminate coercion’s inner workings in ways not previously possible.

The danger, however, is that the law will not keep up with the advances. That anxiety has been articulated by a range of law and emotions scholars,¹¹ and it has special resonance in work law, where the bedrock cases use analytical avoidance or misdirection to sidestep even seemingly self-evident consequences of facts drenched with emotions. This includes major coercion precedents. The irony, though, is that when it comes to the pressures faced by those forced to make decisions labor law cares about, all the relevant institutions, from business, to labor, to the National Labor Relations Board (“Board”) itself, are nonetheless fixated on one emotion especially: fear. It is everything employers try to generate, everything unions try to transform, and everything the Board tries to identify. What has been missing is a tool to integrate that preoccupation into the law of coercion.

The tool has been found, and my thesis, drawing from still-maturing emotion science insights, is that coercion’s content is fear. Thanks to the emergent research, we now know that fear is extraordinarily well-suited to distort employer, employee, and consumer choice by

¹⁰ See Elizabeth Kolbert, *Why Facts Don’t Change Our Minds*, NEW YORKER, Feb. 27, 2017, at 66 (“As everyone who’s followed the research — or even occasionally picked up a copy of *Psychology Today* — knows, any graduate student with a clipboard can demonstrate that reasonable-seeming people are often totally irrational.”).

¹¹ Kathryn Abrams and Hila Keren have made the strongest case against leaving emotions behind. See Kathryn Abrams & Hila Keren, *Who’s Afraid of Law and the Emotions?*, 94 MINN. L. REV. 1997, 2000 (2010) (responding to “doubts” to “enable broader application of law and emotions analysis to pressing legal problems”); see also Carol Sanger, *The Role and Reality of Emotions in Law*, 8 WM. & MARY J. WOMEN & L. 107, 110-13 (2001) (describing a troubling trend of “misuse of emotions in law”).

modifying rationalist processing. Even a dash of the emotion inflates perceived risks, embeds pessimism, and prompts an uncooperative, defensive outlook. While conceptualizing coercion as an emotion trades a focus on transactions for a focus on interpersonal dynamics, here it is an appropriate switch. That's because work is about interpersonal dynamics. Paychecks, revenue streams, and reputations hang in the balance and relational nuances can tip the scale. A cancelled lunch date, an ominous reference, or even a physical scene can influence immediate and future choices in subtle but meaningful ways. The law's conventional approach of boiling a manager's quip or a union's theatrics down to a take-it-or-leave-it bargain tells very little of that story.

Of course, fear's power to capture decision-making subtleties also makes it a challenging regulatory subject. Judges cannot "measure" fear. They can, however, look at the facts surrounding an encounter and assess the victim's options to cope with the fright. Rounding a corner to find yourself face-to-face with a raucous protest might well be startling, for example. But if you can easily walk right past or entirely avoid it, the feeling is lessened. Those sorts of "exit" options underpin the psychological construct of "control," which is like fear's kryptonite. When things get harrowing, we look for escape hatches, and the more outlets we perceive, the less fear we feel. What makes this regulatory gold is that the types of avoidance opportunities that matter can often be described with specificity and even tested. Control options are, in an evidentiary sense, countable and therefore *measurable*. Conclusions about the coerciveness of an encounter based on principles of exit need not, therefore, be normative.

The Article has four parts. Part I frames the National Labor Relations Act ("NLRA" or "Act") as fundamentally about decision-making and interventions into decision-making. Tradition dictates that valid decisions are "rational" decisions, and Part II serves as an object lesson on the pitfalls of using "coercion" to police rationality absent a sense of what coercion "is" or a metric to weigh the impact of third-party interventions on judgments. Part III starts over, detailing how far decision-making theory has advanced since the law developed its approach to regulating coercion, including the fact that judgments and emotions are inextricably linked. That has long been the Board's intuition, but it's never had the empirical footing to adequately integrate the two. Part IV provides the footing. Present-day developments from emotion science make the case that the content of coerced workplace decision-making is fear, and that fear can be measured across actors and contexts through the concept of control.

The Article concludes by showing how a control-based approach to analyzing coercion can be integrated across existing labor doctrine.

I. LABOR LAW AS DECISION-MAKING AND INTERVENTION IN
DECISION-MAKING

The tale of modern labor law might be thought of as a story about the right to make decisions, with a subplot about the right to intervene in those decisions developed in the second chapter. What today we call the NLRA started out in July 1935 as the Wagner Act, passed for the “high purpose” of a “better relationship between labor and management” through the right to pick a union at work.¹² In a numbers-sense, the system worked — and worked quickly — with labor’s ranks swelling from three to fifteen million in just a decade or so post-passage.¹³ From management’s perspective, the success itself was evidence of a skewed selection system, and after failing to have the law declared unconstitutional,¹⁴ the business community took a different tack by pushing to have the Wagner Act amended. The argument was straightforward: the boss deserves a say in the process.¹⁵ It was also successful. Following a post-World War II strike wave that crippled major segments of the economy and turned public and political opinion, Congress beat back a Presidential veto to pass the employer-friendly Taft-Hartley Act.¹⁶

¹² 79 CONG. REC. 10720 (1935). At the time, relations could not have been much worse, with 1,800 major strikes and over 1.5 million strikers in 1934 alone. See ROBERT H. ZIEGER, *AMERICAN WORKERS, AMERICAN UNIONS, 1920-1985*, at 33-34 (1986) (describing the pre-Wagner era as a time of “lethal bitterness rarely matched in American history”). For a procedural and substantive accounting of the previous regime and its role in the Wagner Act’s development, see Laura J. Cooper, *Letting the Puppets Speak: Employee Voice in the Legislative History of the Wagner Act*, 94 MARQ. L. REV. 837, 838-44 (2011).

¹³ 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, 21 (2012).

¹⁴ See *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 49 (1937).

¹⁵ As written, the Wagner Act encompassed only union rights, and the early-Board required employer neutrality throughout the organizing and representation process. See Alan Story, *Employer Speech, Union Representation Elections, and the First Amendment*, 16 BERKELEY J. EMP. & LAB. L. 356, 366-67 (1995). Suggested changes thus focused on liberalizing employer interventions into what was seen as a “one-sided” statute. See 1 *THE DEVELOPING LABOR LAW* 32 (John E. Higgins, Jr. et al. eds., 6th ed. 2012); see also Story, *supra*, at 378-80 (“[C]ompanies had been complaining since as far back as 1939 that the Board didn’t respect their First Amendment rights.”).

¹⁶ See NELSON LICHTENSTEIN, *STATE OF THE UNION: A CENTURY OF AMERICAN LABOR* 115 (2002); ZIEGER, *supra* note 12, at 108-09.

The immediate result of the legislative whipsaw was to allow employer intervention into employee decision-making.¹⁷ The lasting consequence, however, was a fundamentally hybridized statute that protects the right to freely choose as it also defends the right to freely meddle, setting the stage for a conundrum that has haunted labor law ever since: how much free speech is too much for free choice?¹⁸ The question is a perpetual tension at NLRB, where debates swirl around whether the Act's postwar legislative history forces the agency into a neutral posture that protects management's right to decry collective bargaining as vigorously as it safeguards labor's right to round-up support — or whether it's untouched prewar purpose to “encourage” bargaining triggers a more organizing-sympathetic framework.¹⁹ When scholars brand the Act as a “woeful failure”²⁰ or note that its supporters are “in despair,”²¹ the complaint is sometimes structural and about the law's limited coverage or failure to keep pace with a changing workplace.²² But usually it's about a perceived imbalance between speech and choice that results in lawful interventions that shouldn't be or unlawful interventions with useless remedies.²³ And

¹⁷ Specifically, section 8(c), 61 Stat. 136, 142 (1947), 29 U.S.C. § 158(c) (1947), codified an employer right to persuade during employee organizing.

¹⁸ Catherine L. Fisk & Deborah C. Malamud, *The NLRB in Administrative Law Exile: Problems with its Structure and Function and Suggestions for Reform*, 58 DUKE L.J. 2013, 2033-34 (2009) (describing the National Labor Relations Act as a fusion of two laws passed “under diametrically opposed historical circumstances” and “aimed at correcting diametrically opposed abuses of power”); see also JAMES A. GROSS, *BROKEN PROMISE: THE SUBVERSION OF U.S. LABOR RELATIONS POLICY, 1947-1994*, at 14 (1995) (noting the NLRB's “unique position of choosing between different labor policies” in the same statute).

¹⁹ GROSS, *supra* note 18, at 13-14 (highlighting this “question”); Fisk & Malamud, *supra* note 18, at 2035, 2041-43; see also *Two Current Board Members Describe Differing Approaches to Decisionmaking*, DAILY LAB. REP., May 27, 2004, at A-10.

²⁰ Benjamin I. Sachs, *Employment Law as Labor Law*, 29 CARDOZO L. REV. 2685, 2694 (2008) [hereinafter *Employment Law*].

²¹ Michael H. Gottesman, *In Despair, Starting Over: Imagining a Labor Law for Unorganized Workers*, 69 CHI.-KENT L. REV. 59, 59 (1993).

²² See James J. Brudney, *A Famous Victory: Collective Bargaining Protections and the Statutory Aging Process*, 74 N.C. L. REV. 939, 942 (1996) (calling the Act “largely irrelevant to the contemporary workplace”); Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1530 (2002) (“The core of American labor law has been essentially sealed off . . . from democratic revision and renewal.”); Sachs, *Employment Law*, *supra* note 20, at 2697-700 (describing the Act's many exclusions).

²³ See, e.g., César F. Rosado-Marzán, *Organizing with International Framework Agreements: An Exploratory Study*, 4 UC IRVINE L. REV. 725, 737-38 (2014) (“American labor law is . . . too permissive of employer misconduct and fails to provide adequate means to police the slim protections that it does afford to workers.”); Paul C. Weiler,

when labor repeatedly tries to amend the Act, and business repeatedly tries to stop it, it's primarily because labor dislikes the rules of intervention and business is pretty well fine with them.²⁴

Absent a third statutory overhaul, the philosophical push-pull underlying the lawfulness of choice interference is not going to be settled. But if the analyses were fastened to specific and, especially, measurable standards, perhaps differing takes on legislative history would be beside the point. Taking an initial step down that road requires a basic understanding of both the law's principle decisional pivots and its theory of legitimate decision-making.

A. *Decisional Points in Modern Labor Law*

While the process of establishing a union can vary across campaigns, in nearly every instance workers and employers are confronted with some common choices. For employees, the first decisional point is whether to even get involved. The question is often teed up by a knock on the front door, where a professional union organizer and sometimes a work colleague await with an exercise that is both educational and diagnostic.²⁵ They want to talk about job issues and the budding campaign, but they also want to assess the potential voter's level of sympathy and, if the early returns are positive, ask if she'd like to help out.²⁶ At this stage the campaign is more or less underground, but from informally spreading the word, to going on "house visits" like this one, to joining the "organizing committee" that will set the agenda going forward, there are a number of opportunities to pitch in.²⁷

Early interest or not, the next decision is very concrete: to sign or not to sign. Starting the NLRB's unionization machinery requires that

Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA, 96 HARV. L. REV. 1769, 1787-803 (1983) (describing the Board's traditional remedies and their inadequacies).

²⁴ See Benjamin I. Sachs, *Enabling Employee Choice: A Structural Approach to the Rules of Union Organizing*, 123 HARV. L. REV. 655, 657-58 (2010) [hereinafter *Enabling Employee Choice*] (stating that the "central substantive question raised by [recent legislative] debate . . . is whether it is appropriate for federal law to enable employees and unions to minimize, or avoid entirely, managerial intervention").

²⁵ See *id.* at 664-65.

²⁶ See *id.* "[I]nformal assessments," where organizers "rate workers on union support scales," are a key aspect of these early encounters. Seth Newton Patel, *Have We Built the Committee? Advancing Leadership Development in the U.S. Labor Movement*, 16 WORKINGUSA: J. LAB. & SOC. 113, 116-17 (2013).

²⁷ Patel, *supra* note 26, at 114-15; see also Sachs, *Enabling Employee Choice*, *supra* note 24, at 665.

at least thirty percent of the relevant workforce show “interest” in a secret ballot to elect (or reject) a representative by signing an index card or a petition.²⁸ If the union is successful, the Board notifies the employer, some bureaucracy ensues, and an election date is set.²⁹ The effort is now “public,” and a race to persuade employees to vote for or against collective bargaining — that is to say, to intervene in choice — begins.³⁰

The politicking culminates on election day, as both sides push to get their presumed allies to the polls, which is usually a quiet room somewhere on the job site with a box for paper slips that present workers with their highest-profile decision: “Yes” for representation or “No” for the status quo.³¹ The union needs fifty percent plus one of the ballots cast to win.³² If the math works out, the Board certifies it as the negotiating representative for every employee in the applicable “unit,” and the employer is then obligated to sit down and negotiate. If the union loses, workers cannot vote again for at least a year.³³

The process has innumerable variations, and even if it follows this script, employees face many other decisions across and outside of the timeline. Workers are also consumers and may have to decide whether to honor a boycott or a picket line, for example. One of the most common deviations from the traditional progression brings employer decision-making into view. An employer can short-circuit the formal election step by deciding to immediately “recognize” the union if it has been presented with proof — usually, again, in the form of signatures — that a majority of all employees already want a representative.³⁴ Since collective bargaining is rarely an employer’s

²⁸ See 29 C.F.R. § 101.27(a)(3) (2018).

²⁹ See Sachs, *Enabling Employee Choice*, *supra* note 24, at 665-66. Unless parties are able to stipulate to central aspects of the upcoming election, like the time, place, and eligible voters, the bureaucracy revolves primarily around hearings, which have traditionally been a source of great delay. § 102.62(b); see also Jeffrey M. Hirsch, *NLRB Elections: Ambush or Anticlimax?*, 64 EMORY L.J. 1647, 1652-53 (2015). In 2014, the NLRB reformed its procedures to streamline the process, *id.* at 1649-50, and the current Board has signaled its intention to reverse the changes. See 82 Fed. Reg. 58783-01, 58785 (Dec. 14, 2017) (requesting “information from the public regarding . . . amendments to the Board’s representation case procedures adopted by the Board’s final rule published on December 15, 2014”).

³⁰ Sachs, *Enabling Employee Choice*, *supra* note 24, at 666.

³¹ See NLRB, NLRB CASEHANDLING MANUAL, PART TWO, REPRESENTATION PROCEEDINGS § 11302.2 (2017) (describing “the employer’s premises” as “the best place to hold an election”); *id.* § 11340.4 (describing voting procedures).

³² See *id.* § 11470.

³³ See 29 U.S.C. § 159(c)(3) (2018).

³⁴ Rosado-Marzán, *supra* note 23, at 737-38.

preferred approach to workforce relations, unions often use protest tactics to make this a choice between recognition and continued public shaming instead of recognition or not.³⁵ A popular modification retains the protest but pushes instead for intermediate steps like a commitment to remain neutral in the lead-up to an election or to give organizers more access to the workplace than is otherwise required by law.³⁶

B. Idealizing Decision-Making

These prime decisional points are, on paper, clear enough. A threshold issue for labor law has been to come up with a model of idealized or merely valid decision-making as a baseline to clarify the kinds of facts suggesting that an intervention has forced an unacceptable deviation. The issue is trickier than it might seem. The statute is effectively silent on the matter,³⁷ and the fused legislative histories resolve little about what constitutes an informed — but not unfairly informed — electorate. Thus, whether a human resources director who hears workers discussing unionization and interrupts with her own take enhances or degrades decision-making depends on an organizing versus speech tug-of-war that can be grounded in congressional transcripts but not obviously resolved by them.³⁸

The gap has been partially filled by a consensus that has both surface logic and accords with the bulk of conventional legal thought over the last seventy years:³⁹ a worker's choice to organize a union or vote against one; a consumer's decision to support a boycott; a company's choice to press another company to settle a strike; or really any decision made by anyone having anything to do with a labor law

³⁵ See Roger C. Hartley, *Non-Legislative Law Reform and Pre-Recognition Labor Neutrality Agreements: The Newest Civil Rights Movement*, 22 BERKELEY J. EMP. & LAB. L. 369, 387 (2001).

³⁶ See, e.g., Benjamin I. Sachs, *Despite Preemption: Making Labor Law in Cities and States*, 124 HARV. L. REV. 1153, 1169-70 (2011) [hereinafter *Despite Preemption*].

³⁷ While the Act grants some “special privileges” to representation choices made in secret, through a ballot-box, the Supreme Court has granted equal legitimacy to choices made publicly, in the presence of a co-worker or organizer. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 595-99 (1969).

³⁸ In 2005, a Board majority thought such conduct was “rude, but . . . not unlawful” since the employer's right to intervene — and even interrupt — with anti-union opinions was intended to spark “robust debate.” *Aladdin Gaming, LLC*, 345 N.L.R.B. 585, 586-87 (2005). The dissent said interrupting workers would make them feel surveilled and discourage worker-to-worker discussions. See *id.* at 589 (Liebman, Member, dissenting).

³⁹ Robin West, *Law's Emotions*, 19 RICHMOND J.L. & PUB. INT. 339, 340 (2016).

subject, should be rational.⁴⁰ Early on, influential academics like Derek Bok offered lucid depictions of what, for employees at least, that should mean:

[A] rational decision implies that employees have access to relevant information, that they use this data to determine the possible consequences of selecting or rejecting the union, and that they appraise these possibilities in light of their own values and desires to determine whether a vote for the union promises to promote or impair their interests.⁴¹

And while other scholars continue to grapple with the best representative appointment apparatus, the disagreements are mostly about inputs that arguably taint free choice, not the goal of rationality itself.⁴² At one end are works by Paul Weiler and Craig Becker, who encourage sharp limits on the role of employers in decision-making by shortening the public campaign period or by removing their standing to impact administrative procedures. Both acknowledge there must nevertheless be space for workers to mull employer-generated content before votes are cast — so long as it is not presented in a way that corrupts reasoned judgment.⁴³ At another end are those who push for

⁴⁰ Brishen Rogers has summarized the approach well: “Board members and judges have frequently adopted a particular model of the proper preconditions for autonomous choice: . . . calm, rational, and individualized.” Brishen Rogers, *Passion and Reason in Labor Law*, 47 HARV. C.R.-C.L. L. REV. 313, 321 (2012); see also Sachs, *Enabling Employee Choice*, *supra* note 24, at 686 (“[T]he commitment to employee ‘free’ choice reflects the idea that employees’ choices on the question of unionization should be autonomous.”).

⁴¹ Derek C. Bok, *The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act*, 78 HARV. L. REV. 38, 46 (1964).

⁴² A good example would be Brishen Rogers’ critique of longstanding choice doctrine that nevertheless tries to show how “disruptive action is consistent with, rather than threatening to, worker autonomy.” Rogers, *supra* note 40, at 364. An exception would be Mark Barenberg’s proposal for the converse of the current system, a “default state of unionization” where collective bargaining would serve as the baseline relationship between labor and management. Mark Barenberg, *Democracy and Domination in the Law of Workplace Cooperation: From Bureaucratic to Flexible Production*, 94 COLUM. L. REV. 753, 960 (1994).

⁴³ Weiler’s reform involves an “instant” election that would take place a few days after the showing of interest. Weiler, *supra* note 23, at 1770, 1812. Becker’s suggestion is to eliminate employers’ status as parties to representation cases, barring them from participating in the bureaucratic run-up to the election and shifting control over voting procedures to unions. See Craig Becker, *Democracy in the Workplace: Union Representation Elections and Federal Labor Law*, 77 MINN. L. REV. 495, 585-94 (1993) [hereinafter *Union Representation*]. Both agree there is utility in allowing workers to weigh all sides prior to voting, either as a normative good or as consistent with a

a much freer flow of information, and again, the argument is that rationality demands it.⁴⁴ The proposals range from abolishing most of the law's existing limits on employer persuasion,⁴⁵ to mandating certain data disclosures,⁴⁶ to maximizing the number of days available for campaigning.⁴⁷ Less has been said with respect to choices made by employers and consumers during unionization, but the crux of modern commentary has been criticism of a judicial tendency to declare decisions to observe boycotts or to recognize unions as tainted with unfair influence where facts point just as plausibly to the existence of meaningful deliberation and genuine persuasion.⁴⁸

For its part, the Board too has concluded that good decisions are rational decisions,⁴⁹ but it has done so by reference to two analogies. Its "express paradigm" is for electoral picks to reflect "uninhibited desires" of the sort that would emerge from an "experiment"⁵⁰ in a

"coherent theory" of free choice. Becker, *Union Representation*, *supra*, at 592; see Weiler, *supra* note 23, at 1814-15.

⁴⁴ The case has been made most robustly by Matthew T. Bodie, *Information and the Market for Union Representation*, 94 VA. L. REV. 1, 4-5, 45-47 (2008), who built significantly on Derek Bok's earlier suggestions for a better-informed electorate. See Bok, *supra* note 41, at 50 ("[T]he decision which the employee must make is difficult because it requires a prediction concerning the effects of an institution that is generally quite foreign to his experience."). In the middle are plans for online, phone, and mail balloting, which seek to elicit reasoned preferences by maximizing voting confidentiality while limiting, but not eliminating, employer perspectives. See William B. Gould, *New Labor Law Reform Variations on an Old Theme: Is the Employee Free Choice Act the Answer?*, 70 LA. L. REV. 1, 13-17 (2009); Sachs, *Enabling Employee Choice*, *supra* note 24, at 712-13.

⁴⁵ In an important and controversial early study, Julius G. Getman and others examined over thirty representation elections and arrived at the counterintuitive conclusion that employer influence has relatively little impact on voting preferences. See JULIUS G. GETMAN ET AL., *UNION REPRESENTATION ELECTIONS: LAW AND REALITY* 62-64, 140 (1976). From this perspective, the proper administrative course is thus deregulation combined with a union-side equal time requirement to counterbalance management's control of the work setting. See *id.* at 150-57.

⁴⁶ See Bodie, *supra* note 4444, at 72-73.

⁴⁷ See Joseph P. Mastrosimone, *Limiting Information in the Information Age: The NLRB's Misguided Attempt to Squelch Employer Speech*, 52 WASHBURN L.J. 473, 485, 501 (2013).

⁴⁸ See *infra* notes 138-58 and accompanying text.

⁴⁹ To be specific, the Board has said that "[a]n election can serve its true purpose only if the surrounding conditions enable employees to register a free and untrammelled choice for or against a bargaining representative." *General Shoe Corp.*, 77 N.L.R.B. 124, 126 (1948); see also Bodie, *supra* note 4444, at 4 ("The Board implicitly assumes that the campaign . . . will generate . . . an informed and rational decision.").

⁵⁰ Bodie, *supra* note 4444, at 8, 15. The standard was developed in *General Shoe*

“sterile” lab.⁵¹ Of course, absent extreme and sustained regulation, it is essentially unworkable to apply a “standard of pristine fairness” to a contest over an idea that, at base, implicates power, money, and deeply personal allegiances.⁵² For that reason, the Board and courts frequently lapse into an earlier comparator with a more rough-and-tumble pedigree, the political campaign.⁵³ While the political sphere evokes the lively rhetorical sparring one might expect from a union drive, it also shares very little with the world of white coats and Bunsen burners.⁵⁴ This friction, like the dissonance at the heart of the Act’s purposes, has not been resolved, and the models predictably have “an uneasy coexistence” in case law and in briefs, with practitioners and academics urging the adoption of pro- or anti-interventionist takes based on one analogy or the other.⁵⁵ Craig Becker has played on this reality by labeling the agency’s true conceit “a laboratory for democracy.”⁵⁶

The Board has avoided analogy when it comes to employer and consumer decision-making, but labs and politics have done little to clarify the scope of corrupting influences in the electoral space,⁵⁷ so it is probably not a missed opportunity. Moreover, if there is general agreement that the overall objective is rationality, the Board can turn to the statute for assistance in analyzing the all-important next step, determining when decision-making has become irrational. Here, we get to the question of coercion.

II. CORRUPTED CHOICES: UNDERSTANDING LABOR LAW COERCION

The term “coerce” appears four times in the Act, twice in the context of employee choice,⁵⁸ once in the context of employer and

Corp., 77 N.L.R.B. at 127.

⁵¹ Becker, *Union Representation*, *supra* note 43, at 550.

⁵² *Id.* at 548. It was therefore somewhat strange, then, that in announcing the standard the Board also stated that it would be breached only “in the rare extreme case.” *General Shoe Corp.*, 77 N.L.R.B. at 127.

⁵³ See Bodie, *supra* note 44, at 15-17 (noting that the political analogy reaches back to democratic values that animated the Wagner Act).

⁵⁴ See Becker, *Union Representation*, *supra* note 43, at 550-51.

⁵⁵ Bodie, *supra* note 44, at 25-34; see also Becker, *Union Representation*, *supra* note 43, at 548 (describing the Board as “[v]eering back and forth between metaphors of science and politics”).

⁵⁶ Becker, *Union Representation*, *supra* note 43, at 548.

⁵⁷ See, e.g., *id.* at 552 (“*General Shoe* generated a complex and contradictory body of doctrine.”); Bodie, *supra* note 44, at 17.

⁵⁸ 29 U.S.C. § 158(a)(1), (b)(1) (2018).

consumer choice,⁵⁹ and once outside of the immediate decision-making realm, in reference to the Federal Mediation and Conciliation Service.⁶⁰ Though the existence of coercion as a choice-disruptive phenomenon is central in philosophy and legal theory,⁶¹ applying those insights to “legal doctrine has not succeeded in producing a coherent jurisprudence.”⁶² Given the term’s “ubiquit[y]” this, as Mark Greenberg has argued, poses a “major burden” in most specialties.⁶³

On this account, labor law may be better than most. While lacking a substantive definition of coercion, the NLRA at least lists some generalized bad acts.⁶⁴ But it has not translated to good results. When worker decision-making is at issue, the law tends to be, in dramatic fashion, under-inclusive, deeming interventions consistent with rational judgment when they probably are not. When the analysis involves employer decision-making the law tends to be, even more dramatically, over-inclusive, identifying coercion’s presence and forecasting irrational decision-making on thin facts. Because coercion operates like a legal “light switch”⁶⁵ — if it’s off, decisions are rational, if it’s on, they are not — these are problems of kind, not degree, and the consequences are significant.

Below, I examine these issues, dealing first with the coercion of employees by employers and unions in sections 8(a)(1) and 8(b)(1)(a), and then turning to coercive labor pressure on employers

⁵⁹ § 158(b)(4)(ii).

⁶⁰ § 173(c) (referring to “coercion”).

⁶¹ See Kathleen Kim, *The Coercion of Trafficked Workers*, 96 IOWA L. REV. 409, 425 (2011) (“[T]he concept of coercion has been a source of great concern for political, moral, and legal philosophers.”).

⁶² Oren Bar-Gill & Omri Ben-Shahar, *Credible Coercion*, 83 TEX. L. REV. 717, 779 (2005); see also Sachs, *Unions, Corporations, and Political Opt-Out Rights*, *supra* note 1, at 830 (“[T]he Court has never provided an adequate theory of coercion . . .”); Sullivan, *supra* note 3, at 1428 (“[T]he Court’s . . . rulings display serious inconsistencies in their account of coercion.”). For some classic attempts, see ALAN WERTHEIMER, *COERCION* 5 (1987) (depicting coercion’s function throughout the law); Sullivan, *supra* note 3, at 1489-505 (offering a “systemic account” of coercive, unconstitutional conditions). For more recent attempts, see, e.g., Hiba Hafiz, *Beyond Liberty: Toward a History and Theory of Economic Coercion*, 83 TENN. L. REV. 1071 (2016); Kim, *supra* note 61, at 436-74; Susan S. Kuo & Benjamin Means, *Collective Coercion*, 57 B.C. L. REV. 1599 (2016).

⁶³ Mark Greenberg, *How to Explain Things with Force the Force of Law*, 129 HARV. L. REV. 1932, 1977 (2016) (reviewing Fredrick Schauer, *The Force of Law* (2015)).

⁶⁴ The Act’s sections 8(a) and 8(b) provisions amount to a list of illegal employer and union acts, respectively. See, e.g., § 158(a)(4) (coercing employees for “fil[ing] charges or giv[ing] testimony under this Act”); § 158(b)(2) (coercing employees by “caus[ing] an employer to discriminate against” them).

⁶⁵ Story, *supra* note 15, at 408.

and consumers in section 8(b)(4)(ii). While these areas have been subject to extensive treatment over the years, it has generally involved claims that the law has placed certain types of conduct into the wrong “coercive” or “non-coercive” box. That may often be so, but this part highlights a more basic issue that previous treatments have not examined in detail: the law has never developed a metric to assess the impact of acts that potentially harm rationality.⁶⁶ Given the hybrid nature of the statute, it is no surprise that a weights and measures void in this area results in a body of decisional law that, reflecting the standard complaint, feels “inescapably normative.”⁶⁷ But here my bigger aim is to show that if there is no scale to test the severity of intrusions into free choice, “coercion” — the core theoretical pivot underlying all questions of labor law decision-making — can’t work.

A. *Employee Coercion and the Issue of Ill-Measurement*

The Act deals expressly with the coercion of worker choice in two places. Section 8(a)(1) makes it illegal for an employer “to interfere with, restrain, or coerce employees,” and section 8(b)(1)(A) makes it illegal for a union to “restrain or coerce” workers. Both limit prohibited conduct to things that obstruct the activities listed in section 7, which encompasses all the decisional points discussed, from talking about or campaigning for or against a union, to signing or not signing a card, to even tweeting in support of a better workplace generally.⁶⁸ Though sections 8(a)(1) and 8(b)(1)(A) refer additionally to restraint (and section 8(a)(1) also to interference), “coercion”

⁶⁶ To be clear, Derek Bok and Craig Becker have raised similar concerns with respect to the Board’s treatment of employee choice during the campaign period, which sometimes implicates section 8(a)(1) coercion. *See, e.g.,* Becker, *Union Representation*, *supra* note 43, at 592 (“[T]he ostensible focus of Board campaign law is employee free choice, but the Board lacks a coherent theory for judging the impact of a myriad of campaign tactics.”); Bok, *supra* note 41, at 40-43 (complaining that the Board’s electoral standard “will hardly provide a workable basis for arriving at consistent decisions, for we know so little about the effects of many campaign tactics”); *see also infra* text accompanying note 79 (noting the lower “laboratory conditions” standard at play in electoral contexts). My contention is that far from being limited to that specific context, coercion’s measurement problem extends to all of labor law.

⁶⁷ Sullivan, *supra* note 3, at 1446.

⁶⁸ Section 7 generally protects employee protest or unionization activities that occur “collectively” and “for the purpose of . . . mutual aid or protection.” § 157. It also protects the “right to refrain from any or all of such activities.” *Id.* For an overview of section 7’s breadth, see *Fresh & Easy Neighborhood Mkts.*, 361 N.L.R.B. No. 12, 2014 N.L.R.B. LEXIS 627, at *10-12 (Aug. 11, 2014).

functions as a rhetorical catch-all denoting any degree of unlawful meddling with free choice. In other words, if management delivers an illegal anti-union harangue or illegally spies, or if a union interrogates a worker in some unlawful way, no careful parsing of restraint versus interference versus coercion is necessary.⁶⁹ Usually it's all just called coercive.⁷⁰

And what the Board intends coercion to mean, in broad strokes, is that an employer or union has overcome a worker's free will, such that the choice to do something has been compelled by a power dynamic, not persuasion.⁷¹ This is basically consistent with the sense intended

⁶⁹ See, e.g., *Chamber of Commerce v. Brown*, 554 U.S. 60, 66-67 (2008) (“[N]othing in the NLRA prohibits an employer ‘from expressing its view on labor policies or problems’ unless the employer’s speech ‘in connection with other circumstances amounts to coercion within the meaning of the Act.’” (citing *NLRB v. Virginia Electric & Power Co.*, 314 U.S. 469, 477 (1941))); *NLRB v. Gormac Custom Mfg.*, 190 F.3d 742, 750 (6th Cir. 1999) (describing the inquiry into unlawful union questioning of employee allegiances as whether the conduct “in fact was coercive”); *Aladdin Gaming, LLC*, 345 N.L.R.B. 585, 586 (2005) (stating the “[i]ndicia of coerciveness” at play in the test for unlawful section 8(a)(1) surveillance); *Babcock & Wilcox Co.*, 77 N.L.R.B. 577, 595 (1948) (“If [statements] constitute a violation of the Act, it is because coercion is to be imputed to them”); see also *Bodie*, *supra* note 44, at 8 (summarizing the varieties of illegal election conduct succinctly, as “coercion”). For a new (and contested) possible exception, see *Harborside Healthcare*, 343 N.L.R.B. 906, 916 (2004) (Liebman, Member, dissenting) (criticizing the majority for inserting the term “interfere” into a test that previously referenced only “coercion,” without explaining “what sort of conduct might fall in this category or why it would be objectionable”).

⁷⁰ This practice is consistent with the legislative history, where, as Charles C. Jackson and Jeffrey S. Heller have shown, the three terms were given no “special” meaning, prompted little discussion, and were “treated as well-established legal concepts that had been employed in earlier labor and nonlabor legislation.” Charles C. Jackson & Jeffrey S. Heller, *Promises and Grants of Benefits Under the National Labor Relations Act*, 131 U. PA. L. REV. 1, 37-40 & n.163 (1982). In those contexts, interference, restraint, and coercion all “invariably involved efforts by employers to create a fear of reprisals . . . if employees did not accede to the employer’s wishes.” *Id.* at 39-40. To the extent courts provided specific definitions in non-labor cases, each involved the disruption of employee free will or choice through fear or active and unreasonable pressure. See *id.* at 40 (offering judicial definitions, all implicating corrupted will); see also *id.* at 40 n.163 (“[T]he addition of the term ‘restraint’ was not intended to add anything significant to” interference and coercion.).

⁷¹ In a dated but still famous formulation, the Supreme Court has characterized workplace coercion as persuasion to which “other things are added.” *Thomas v. Collins*, 323 U.S. 516, 537 (1945); see also *Chauffeurs, Local 663 v. NLRB*, 509 F.2d 490, 493 (D.C. Cir. 1974) (stressing the importance, in the context of both sections 8(a)(1) and 8(b)(1)(A), of distinguishing “between employer attempts to persuade workers of the disadvantages of unionization and employer attempts to use their economic power to ‘coerce’ workers into voting against the union”). For scholars, coercion’s meaning is similar, the use of “superior . . . power to compel employees,”

in section 8(a)(1), where legislators wanted coercion to be interpreted literally, not “in an exotic or strained manner,” but in contrast to “influence,” a term that had been included in an older bill and was “bitterly attacked” for its alleged potential to outlaw “peaceful persuasion.”⁷² It also accords with section 8(b)(1)(A), which emerged from a Taft-Hartley floor amendment to mirror section 8(a)(1).⁷³ While a further amendment removed section 8(b)(1)(A)’s “interfere with,” it was for fear that conservative judges would take advantage of the less evocative phrase to “defeat legitimate attempts at labor organization” and eventually target wills convinced, instead of wills contorted.⁷⁴ From there a reciprocal sense of coercion itself generally remained.⁷⁵

Defining coercion in the abstract, however, is not the issue. The trouble arises when the Board tries to identify it in the real world, yet does not have a way to measure it. I survey this reality below, beginning with section 8(a)(1) and then turning to section 8(b)(1)(A).

1. 8(a)(1)

Analyzing coercion under section 8(a)(1) requires the Board to struggle with Taft-Hartley’s gloss in section 8(c) that the “expressing

Jackson & Heller, *supra* note 70, at 40, or “speech that ‘overrides’ the employee’s ‘will,’” Story, *supra* note 15, at 409 (quoting *Tex. & New Orleans R.R. Co. v. Bhd. of Ry. & S.S. Clerks*, 281 U.S. 548, 568 (1930)).

⁷² Jackson & Heller, *supra* note 70, at 40-41, 37-38.

⁷³ See Roger C. Hartley, *Reconceiving the Role of Section 8(B)(1)(A) — 1947-1997: An Essay on Collective Empowerment and the Public Good*, 47 CATH. U. L. REV. 825, 871 (1998). According to the amendment’s sponsor, its purpose was “simply to provide that where unions, in their organizational campaigns, indulge in practices which, if an employer indulged in them, would be unfair labor practices . . . the union also shall be guilty of unfair labor practices.” *Nat’l Mar. Union of Am.*, 78 N.L.R.B. 971, 983 (1948).

⁷⁴ *Nat’l Mar. Union of Am.*, 78 N.L.R.B. at 983 (“The words ‘to interfere with’ were deleted from the amendment . . . [for] fear that these words ‘could easily be construed to mean that any conversation . . . [for] persuasion, any urging on the part of any person, in an effort to persuade another to join a labor organization, would constitute an unfair labor practice.’”); Morris, *supra* note 13, at 25-26; see JAMES B. ATELSON, *VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW* 44 (1983) (noting that union advocates, “relying on past judicial behavior,” long believed that “courts could not be trusted to interpret concepts such as ‘coercion’ if they were applied to the activities of labor organizations”).

⁷⁵ As explained in Part II.A.2, the equivalence was short-lived. See *Randell Warehouse of Arizona, Inc.*, 347 N.L.R.B. 591, 595 (2006) (“[T]he legislative history of the Taft-Hartley Act indicates that Congress intended similar standards to apply to like kinds of employer and union intimidation.”).

of any views, argument, or opinion . . . shall not constitute or be evidence of an unfair labor practice . . . if such expression contains no threat of reprisal or force or promise of benefit.”⁷⁶ Though this new provision was intended to clarify section 8(a)(1) analyses,⁷⁷ whether section 8(c) immunized all employer content that did not contain an explicit threat, or whether facially non-threatening speech could, considering the circumstances, nevertheless coerce, tied courts into knots.⁷⁸

In the short term, the Board dealt with the issue by concluding that by referencing only unfair labor practices, section 8(c) had nothing to say about election proceedings, freeing it to safeguard “laboratory conditions” in voting even if the regulated conduct was not an obvious threat, payoff, or other set of facts that might rise to the level of 8(a)(1) coercion.⁷⁹ The longer term issues were seemingly resolved in 1969’s *Gissel Packing*, when the Supreme Court stated definitively that context matters.⁸⁰ In particular, “economic dependence” matters.⁸¹ Workers cannot be considered objective listeners because they’re bound to “pick up” things “that might be more readily dismissed by” people who are not relying on the speaker for their next house payment.⁸² Nonetheless, section 8(c)’s assurances of free speech

⁷⁶ 29 U.S.C. § 158(c) (2018).

⁷⁷ See *Chamber of Commerce v. Brown*, 554 U.S. 60, 67-68 (2008); ROBERT A. GORMAN & MATTHEW W. FINKIN, *LABOR LAW ANALYSIS AND ADVOCACY* 213-14 (John E. Higgins, Jr. ed., 2012).

⁷⁸ Compare *NLRB v. Sinclair Co.*, 397 F.2d 157, 160 (1st Cir. 1968) (rejecting the argument that because “statements considered separately are lawful . . . the combination of them could not result in illegal conduct” where the “totality of the circumstances” suggested the existence of coercion), with *NLRB v. TRW-Semiconductors, Inc.*, 385 F.2d 753, 759 (9th Cir. 1967) (finding employer statements without literal threats to “fall squarely within the protection of section 8(c), even though they might well produce, in the minds of employees, fears of violence”).

⁷⁹ *Dal-Tex Optical Co.*, 137 N.L.R.B. 1782, 1786-87 (1962); see *General Shoe Corp.*, 77 N.L.R.B. 124, 127 n.10 (1948) (“Congress only applied the new [s]ection 8(c) to unfair labor practice cases. Matters which are not available to prove a violation of law, and therefore impose a penalty . . . may still be pertinent, if extreme enough, in determining whether an election satisfies the Board’s own administrative standards.”). That stated, “[c]onduct violative of [s]ection 8(a)(1) is, a fortiori, conduct which interferes with the exercise of a free and untrammelled choice” under “laboratory conditions,” *Dal-Tex Optical Co.*, 137 N.L.R.B. 1786-87, unless “it is virtually impossible to conclude” the unfair labor practices “could have affected the election results.” *Safeway, Inc.*, 338 N.L.R.B. 525, 527 (2002).

⁸⁰ See *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969).

⁸¹ *Id.*

⁸² *Id.* at 617-18. The same theme is found in the Court’s treatment of section 8(c)’s “promise of benefit” exception five years earlier in *NLRB v. Exchange Parts Co.*, 375

required some safe harbors,⁸³ and the Court found two: opinions about unionism or a specific union were okay, as were gloomy predictions about the impact of collective bargaining — but only if the alleged side-effects were both out of the employer's control and capable of “demonstrabl[e]” proof through “objective fact.”⁸⁴ Suggestions about actions executives “may or may not take . . . solely on [their] own initiative” were just threats.⁸⁵

But as the years have shown, and as the literature stresses, the Board has been unable to translate *Gissel's* guidance into a satisfactory system for probing coercion in the real world.⁸⁶ The most comprehensive critique is Alan Story's, who argues that the Board has come to rely on analytical short-cuts that short-change the decisive impact of work culture on employees' ears. Too often the Board adopts hyper-literal postures or presumes that threats are disinfected by “magic phrases” somewhere in the mix without any basis for concluding that a quip can overcome a broader message of impending doom.⁸⁷ A tale of workers who unionized and promptly “lost . . . their jobs” gets purified into opinion — what “*could* happen,” not “what *would* happen” — by a supervisor's aside that, well, “each set of negotiations is different.”⁸⁸

U.S. 405, 409 n.3 (1964). There, the Court warned that an employer's conferral of benefits in response to incipient unionization disrupts free choice because it underscores workers' implicit reliance on management for their livelihood: “Employees are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged.” *Id.* at 409. So situated, workers are unable to separate gifts and promised gifts from fears that it all goes away if management's preferences are ignored. This, the Court famously declared, is the unlawful “fist inside the velvet glove.” *Id.*

⁸³ See *Linn v. United Plant Guard Workers, Local 114*, 383 U.S. 53, 62 (1966) (“[Section] 8(c) manifests a congressional intent to encourage free debate on issues dividing labor and management.”).

⁸⁴ *Gissel*, 395 U.S. at 618.

⁸⁵ *Id.* at 618-19.

⁸⁶ See, e.g., Kate E. Andrias, *A Robust Public Debate: Realizing Free Speech in the Workplace Representation Elections*, 112 *YALE L.J.* 2415, 2435 (2003) (“Labor scholars have strenuously and extensively critiqued [*Gissel's* conception of] coercion.”); Story, *supra* note 15, at 414 (“NLRB and the judicial decisions reveal a striking reluctance to label a wide range of employer conduct as coercive.”).

⁸⁷ Story, *supra* note 15, at 423-25 (discussing *Mt. Ida Footwear Co.*, 217 N.L.R.B. 1011, 1011-12 (1975), where warning workers that signing cards can be “fatal to a business” was “sanitized” by the addendum “we are here to stay”).

⁸⁸ *Manhattan Crowne Plaza Town Park Hotel Corp.*, 341 N.L.R.B. 619, 619-20 (2004).

a. *The Lack of Metric*

It is easy for advocates to become disillusioned with these and other conclusions, either because they agree with Story's commentary on the Board's methods or because of his larger point that, really, everything's coercive, because employers have all the power, all the time.⁸⁹ But whether the Board could be doing a better job examining words, images, and metaphors in context, or whether the workplace is really just a big coercion box, a deeper doctrinal gap has been lurking for a long time. *Gissel* never provided means for judges to measure the degree to which a speech or a situation endangers a worker's capacity for rational decision-making. There is no way to test, in other words, whether an opinion, promise, prediction, or even threat has genuinely distorted free will. Without that, it is difficult to make a persuasive or stable case that, for example, a worker's choice to kick an organizer off the front stoop following a union-related talking-to from a supervisor the day before was the product of informed logic or unlawful distortion.

Some proof of this lack of metric comes directly from the Board and courts, where outside of the obvious cases everyone seems to agree that determining whether someone has been coerced is pretty much a toss-up.⁹⁰ A leading treatise refers to "the inescapable elasticity of the *Gissel* guidelines" and concludes, "consistency is not attainable."⁹¹ Much of the difficulty can be traced back to the Board's tendency to use a totality of the circumstances approach.⁹² This is consistent with *Gissel's* embrace of context,⁹³ but the results expose the lack of an identifiable barometer for coercion, as the agency is forced to resort to

⁸⁹ See *infra* notes 279–81 and accompanying text.

⁹⁰ See, e.g., *United Food & Commercial Workers Union Local 204 v. NLRB*, 506 F.3d 1078, 1084 (D.C. Cir. 2007) ("[W]e acknowledge that the record could be read differently. . . . Here, the Board determined that threats were neither intended nor understood. Had the Board reached the opposite conclusion, we likely would have deferred to that determination as well."); *Allied/Egry Business Systems Inc.*, 169 N.L.R.B. 514, 514 (1968) ("[I]n all cases such as this one, where one must attempt to fathom the meaning of another's words and assess the impress of such words on employees, reasonable men may differ . . .").

⁹¹ THE DEVELOPING LABOR LAW, *supra* note 15, at 145, 154.

⁹² See GORMAN & FINKIN, *supra* note 77, at 226.

⁹³ See *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969) ("Any assessment of the precise scope of employer expression . . . must be made in the context of its labor relations setting."); *NLRB v. Virginia Elec. & Power Co.*, 314 U.S. 469, 478 (1941) (investigating employer coercion requires accounting for the "totality of the Company's activities," including what "the Company said as well as what it has done").

proxies that point to workplace auras but do not actually drill down on the basic issue of decision-making integrity.

An example is the treatment of employer warnings that a union will bring the company “serious harm” or that the starting point for bargaining will be “from scratch,” meaning state and federal minimums. If it had a set method for measuring coercion, an obvious way the Board might approach these cases would be to apply that standard to the statements in context to judge their effect on rational thought directly. Tellingly, the agency generally does not do that. Instead, it frequently uses unrelated conduct as a surrogate, requiring workers to point to independent unfair labor practices first and then show that this *other* conduct has produced a cloud that colors the actual speech at issue in a “darker hue.”⁹⁴ The First Circuit, for example, has read the agency’s precedent to say that scratch bargaining statements can be coercive only if coupled with an already adjudicated illegality, no matter the context overall.⁹⁵ On one hand, this approach artificially limits coercion to situations where others have been administratively vigilant. But more importantly, it shifts the inquiry away from the core issue of how specific language has constrained workers’ wills and into questions about the length of shadows cast by some other sort of misconduct.⁹⁶

⁹⁴ See *NLRB v. Greensboro Hosiery Mills, Inc.*, 398 F.2d 414, 417 (4th Cir. 1968); see also *Greensboro Hosiery Mills, Inc.*, 162 N.L.R.B. 1275, 1276 (1967) (“We have not ordinarily found such notices to be illegal in and of themselves, for the bare words, in the absence of conduct or other circumstances supplying a particular connotation, can be given a noncoercive and nonthreatening meaning. Even the simultaneous existence of other unfair labor practices may not render the notice coercive, unless these practices tend to impart a coercive overtone to the notice.”).

⁹⁵ See *Shaw’s Supermarkets, Inc. v. NLRB*, 884 F.2d 34, 40-41 (1st Cir. 1989) (extensively canvassing Board precedent on scratch bargaining statements and concluding that “the cases draw a boundary between the lawful and unlawful” based on the presence of other unfair labor practices); see also *Exxon Research & Eng’g Co. v. NLRB*, 89 F.3d 228, 232-33 (1st Cir. 1996) (concluding the same).

⁹⁶ A good example is *NLRB v. Aerovox Corp. of Myrtle Beach, S.C.*, 435 F.2d 1208, 1211 (4th Cir. 1970), where the Fourth Circuit considered whether a “serious harm” statement amounted to a threat” based on the retroactive impact of a coercive letter sent to employees two months later. While it could be argued that the tendencies in this area reflect a stable conclusion that “scratch” and “serious harm” statements generally do not have a coercive impact in isolation, the Board has occasionally found section 8(a)(1) violations based on the intensity of the surrounding atmosphere but without reference to the impact of other ULPs. See, e.g., *Eldorado Tool, Inc.*, 325 N.L.R.B. 222, 222, 235 (1997) (finding the statement, “If the Union gets in, we start from scratch, no benefits, no nothing,” to alone violate section 8(a)(1)); *Somerset Welding & Steel, Inc.*, 314 N.L.R.B. 829, 832 (1994) (stating that “scratch” statements are potentially lawful unless “made in a coercive context”). Overall, considering

Another principle the Board has used as a proxy for coercion is “place.” Coercion is automatic if supervisors visit an employee at home.⁹⁷ At work and during the sensitive election period, the coerciveness of an individualized or small group talk that does not contain an explicit threat has traditionally been mediated by its proximity to the so-called “locus of final authority,” though later cases also consider workers’ sense of familiarity with the locale and the number of others gathered.⁹⁸ Place is still an important proxy if there is no election in sight, but even more atmospheric factors are considered.⁹⁹ While none of these rules offer a direct measure of coercion, the limits of using place as a proxy in the first instance have been almost comically underscored by Craig Becker, who has traced how the authority loci have, over time, inexplicably “wandered throughout the workplace.”¹⁰⁰

But the best proof that the agency can’t measure coercion may be that it continues to green-light management’s most indispensable anti-union tool, the so-called “captive audience” meeting, where workers are required to show up in a room and listen to anti-union speeches.¹⁰¹

coercion in these cases by reference to documented ULPs appears to be most consistent mode of analysis. See GORMAN & FINKIN, *supra* note 77, at 223, 225.

⁹⁷ Martin H. Malin & Henry H. Perritt Jr., *The National Labor Relations Act in Cyberspace: Union Organizing in Electronic Workplaces*, 49 U. KAN. L. REV. 1, 47 (2000) (citing Peoria Plastic Co., 117 N.L.R.B. 545, 547 (1957)).

⁹⁸ See Becker, *Union Representation*, *supra* note 43, at 552-57; see also NVF Co., 210 N.L.R.B. 663, 663-64 (1974) (deeming meetings in the general manager’s office non-coercive because “the employees were familiar with this office” and “not called singly . . . but in groups of five or six”).

⁹⁹ The additional factors include the level of manager speaking, whether that manager has a history of union hostility, whether the employer was seeking information from the employee, and, if so, the “[t]ruthfulness of the reply.” Phillips 66 (Sweeny Refinery), 360 N.L.R.B. 124, 128 (2014); see also Miklin Enters. Inc., 361 N.L.R.B. 283, 283 n.2 (2014) (deeming individualized questioning “noncoercive” because “the conversation took place casually, in an open area, rather than in an office or other locus of authority; and the questioning was rhetorical”); Sunnyland Packing Co., 227 N.L.R.B. 590, 597 (1976) (finding “meetings held with employees in the relatively neutral area adjacent to the cafeteria” to be “basically noncoercive” and not “in violation of section 8(a)(1)”).

¹⁰⁰ Becker, *Union Representation*, *supra* note 43, at 553. Place-familiarity can also trump other facts that would seem to prompt serious distress, like finding yourself alone, face-to-face with the president. See Flex Products, Inc., 280 N.L.R.B. 1117, 1117-18 (1986) (finding individualized anti-union meetings non-coercive because the president “had on previous occasions talked to employees in the plant manager’s office”).

¹⁰¹ See Paul M. Secunda, *The Contemporary “Fist Inside the Velvet Glove”: Employer Captive Audience Meetings Under the NLRA*, 5 FLA. INT’L U. L. REV. 385, 385-86 (2010) [hereinafter *Meetings Under the NLRA*]. An empirical report to the 2000 U.S. Trade

Under a classically transactional approach, this is, quite plainly, “coercion.” The gathering is itself a section 8(c) “threat,” as the explicit or implicit message underlying its convening is “attend . . . or else,” with “else” meaning termination.¹⁰² Though few tactics provoke advocates’ ire like captive assemblies, the Board has not struggled with the contradiction.¹⁰³ This is attributable possibly to inertia or, more likely, ingrained conceptions of worklife, where threats to fire if the uniform looks wrong; or for not coming to an operations meeting; or for not attending an anti-union meeting are all seen as equally valid extensions of “the employee’s common law duty to obey.”¹⁰⁴

While the Board may be starting to probe this equivalence for the first time, the tip-toe itself only highlights the agency’s failure to develop a coercion measuring stick. Specifically, a recent dissent rightly stressed that what separates the disciplinary threat in a captive meeting from every other threat is that it “is directly tied” to NLRA choices: “[T]hey will surely remember not only that the employer

Deficit Commission found that over ninety percent of employers hold captive meetings. Kate Bronfenbrenner, *Uneasy Terrain: The Impact of Capital Mobility on Workers, Wages, and Union Organizing*, CORNELL DIGITAL COMMONS 78 tbl.8 (2000), <http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1002&context=reports>.

¹⁰² See 2 Sisters Food Grp., Inc., 357 N.L.R.B. 1816, 1825, 1828 (2011) (Becker, Member, dissenting) (“An express or implied threat of discipline for not listening to the employer’s speech indisputably adds to the speech the element of coercion . . .”). In fact, anyone can be fired for leaving or asking questions. See F. W. Woolworth Co., 251 N.L.R.B. 1111, 1113 (1980) (asking questions); Litton Sys., Inc., 173 N.L.R.B. 1024, 1030 (1968) (leaving).

¹⁰³ The seminal analysis is from Babcock & Wilcox Co., 77 N.L.R.B. 577, 578 (1948), which contained no substantive analysis at all. From there, “one searches Board precedent in vain for a colorable rationale for the current rule . . .” 2 Sisters Food Grp., 357 N.L.R.B. at 1828 (Becker, Member, dissenting); see also Paul M. Secunda, *The Future of NLRB Doctrine on Captive Audience Speeches*, 87 IND. L.J. 123, 135 (2012) [hereinafter *Captive Audience Speeches*] (“There may not be a good explanation as to why Gissel has not yet been specifically applied to the captive audience setting . . .”).

¹⁰⁴ Story, *supra* note 15, at 421-22. As Becker has noted, “[b]y 1975, even a liberal Board member declared that he had ‘no quarrel with the view that the Act does not preclude’ captive audience meetings. Becker, *Union Representative*, *supra* note 43, at 558-59 (citing J.P. Stevens & Co., 219 N.L.R.B. 850, 854 (1975) (Fanning, Member, concurring in part and dissenting in part)). A number of scholars have discussed why the reticence to re-examine the nature of captives cannot be related to constitutional concerns. See, e.g., Roger C. Hartley, *Freedom Not to Listen: A Constitutional Analysis of Compulsory Indoctrination Through Workplace Captive Audience Meetings*, 31 BERKLEY J. EMP. & LAB. L. 65, 69-70 (2010) (“[T]he First Amendment simply does not protect coercing another into forced ideological listening.”); Secunda, *Meetings Under the NLRA*, *supra* note 101, at 404-07 (describing “a per se ban on employer captive audience meetings” as “entirely supported by . . . U.S. Supreme Court precedent”).

urged them to vote against representation but that the employer threatened them with termination . . . if they refused to listen.”¹⁰⁵ Put otherwise, workers may also recall an employer’s threats to listen to its views on quality control, but a federal statute doesn’t allow them to make up their own minds about that.

This argument, however, needs another step. Pointing out that workers remember the meeting and the threat is one thing, but being able to show the degree to which both inform the decision-making process — and do so in a way that is worse than, say, ordering clean-up in aisle five — would be even more persuasive. Ultimately the dissent can’t do it because the Board hasn’t provided the analytical tool to pull it off.

A consequence of this deficiency is seen in cases like *Frito Lay*, where officials spent an average of thirty to thirty-six hours sitting next to employee-truckers urging them to vote against the union as they went about their delivery routes.¹⁰⁶ The majority characterized the rides as so “relaxed,” “casual,” “amicable,” and “non-threatening” that the tactic was not just non-coercive, but actually consistent with laboratory conditions.¹⁰⁷ The dissent, on the other hand, contended that by playing on the social pressure to talk when an authority figure invades an otherwise private area like a truck’s cab, the rides were perfectly coercive, tailored to “inhibit some drivers from supporting the union and inhibit others from engaging in open union activity that might become a topic for a ride-along conversation.”¹⁰⁸ Which side is right? Without a metric, it’s hard to do much more than argue about it.

2. 8(b)(1)(A)

The NLRB has not figured out a way to weigh the union-initiated “coercion” prohibited by section 8(b)(1)(A) either. The best that can be said is that whatever was originally intended, over time the Board and courts have come to treat the provision less expansively than its employer counterpart.¹⁰⁹ This may be an evolved consequence of

¹⁰⁵ *2 Sisters Food Grp.*, 357 N.L.R.B. at 1825 (Becker, Member, dissenting).

¹⁰⁶ *See Frito Lay, Inc.*, 341 N.L.R.B. 515, 515-16 (2004).

¹⁰⁷ *Id.* at 517.

¹⁰⁸ *Id.* at 518.

¹⁰⁹ *See, e.g.*, Nat’l Labor Relations Bd., FOURTEENTH ANNUAL REPORT OF THE NATIONAL LABOR RELATIONS BOARD FOR THE FISCAL YEAR ENDED JUNE 30, 1949, at 81 (1950), <https://www.nlr.gov/sites/default/files/attachments/basic-page/node-1677/nlr1949.pdf> (“Congress did not intend that section 8(b)(1)(A) be given the broad application accorded section 8(a)(1).”). Moreover, unlike employer violations of section 8(a) — which result in derivative violations of section 8(a)(1) — union violations of section

Congress's decision to retain "interference" as a lower trip-wire in section 8(a)(1).¹¹⁰ Perhaps that has led to a larger universe of activities scooped up by the section as a whole, and because judges tend to brand everything "coercion" the term has developed a certain conceptual capaciousness in the 8(a)(1) context going forward.

But it really reflects power differentials.¹¹¹ The employer signs paychecks and has forty-hours-a-week to order workers around, so managers have serious means and ample ability to artificially bend wills. Unions, on the other hand, are both barred from the job and frequently forced into geographic and temporal gymnastics to even make contact with employees.¹¹² If management wants to get a message out, it calls a staff meeting and everybody has to show up. If a union has an all-points-bulletin, it sends an email and hopes it doesn't end up in the junk folder. Labor just has fewer opportunities and options to pull-off or follow-up on confrontational conduct, and judges notice. Thirteen years after Taft-Hartley, the Supreme Court stated that the Board's power under the section was "limited to authority to proceed against union tactics involving violence, intimidation, and reprisal or threats thereof."¹¹³ And in fact, conventional 8(b)(1)(A) violations¹¹⁴ tend to involve extreme facts — physical assaults, property damage, and threats of both are the norm

8(b) do not automatically implicate section 8(b)(1)(A). See Nat'l Mar. Union of Am., 78 N.L.R.B. 971, 982-85 (1948).

¹¹⁰ Jackson & Heller, *supra* note 70, 7-8.

¹¹¹ See *Louis-Allis Co. v. NLRB*, 463 F.2d 512, 517 (7th Cir. 1972), *petition denied and cross-petition granted* ("The employer occupies a far different position with regard to the coercive impact of its actions upon employees than does a Union."); *Randell Warehouse of Arizona, Inc.*, 347 N.L.R.B. 591, 598 (2006) (Liebman & Walsh, Members, dissenting) ("A union has much less access to employees . . . and its conduct is far less likely to coerce them.").

¹¹² See *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 533 (1992). A 2011 attempt to organize workers in Queens is representative: "On average, a worker's house would be visited around ten times, with some requiring as many as seventeen visits, before the union finally made contact." Benjamin Becker, *Taking Aim at Target: West Indian Immigrant Workers Confront the Difficulties of Big-Box Organizations*, in *NEW LABOR IN NEW YORK: PRECARIOUS WORKERS AND THE FUTURE OF THE LABOR MOVEMENT* 25, 37 (Ruth Milkman & Ed Ott eds., 2014) [hereinafter *Taking Aim*].

¹¹³ *NLRB v. Drivers, Local Union No. 639*, 362 U.S. 274, 290 (1960).

¹¹⁴ I say "conventional" because the provision has almost entirely morphed into a tool for policing the propriety of internal union discipline. Today the "bulk" of section 8(b)(1)(A) cases involve not workers' organizational choices but union member fines and representation issues. *THE DEVELOPING LABOR LAW*, *supra* note 15, at 94-95; *Hartley*, *supra* note 73, at 831-47 (examining this shift and its sharp departure from section 8(b)(1)(A)'s legislative intent).

— and are about nine times less common than section 8(a)(1) misconduct.¹¹⁵

And yet, even this relatively bright line coercion rule has not stopped the Board from reaching, again, for proxy-based tools to support 8(b)(1)(A) allegations. For example, the agency has long accepted the counter-intuitive theory that when unions coerce employers, they legally coerce employees. This almost transitive notion of coercion assumes that because workers associate with both unions and employers, they internalize even second-hand knowledge of union acts against employers “as a reliable warning of what might befall them” just as easily.¹¹⁶ Historically, the doctrine applied only to union coercion of managerial activity that, if engaged in by an employee, would be protected by section 7. The classic example would be crossing a picket line.¹¹⁷ But more recently, the requirement of an “unmistakable nexus” between union misconduct and protected employee activity has vanished.¹¹⁸ That means, in practice, that

¹¹⁵ See, e.g., Int’l Union of Operating Eng’rs, Local Union 450, 267 N.L.R.B. 775, 810 (1983) (violating section 8(b)(1)(A) for a death threat and physical assault); Gen. Teamsters, Local 298, 236 N.L.R.B. 428, 436-37 (1978) (violating section 8(b)(1)(A) for “damaging the automobiles” and “blocking the ingress of employees attempting to enter the plant grounds through [the Union’s] picket line” and “threatening . . . employees and their families with . . . unspecified reprisals” for the same). The rough disparity between employer- and employee-generated complaints is as reported in a Board dissent. See *Randell Warehouse*, 347 N.L.R.B. at 600 (“Between 1994 and 2005, for every complaint that the General Counsel issued against a union, he issued nine against employers. Correspondingly, during the same period, Board decisions involving employers as respondents exceeded decisions involving union respondents by a rate of [nine] to [one].”).

¹¹⁶ Cent. Mass. Joint Bd., Textile Workers Union of Am., 123 N.L.R.B. 590, 609 (1959); see 1199, Nat’l Health & Human Serv. Emps. Union, 339 N.L.R.B. 1059, 1061 (2003) (“Union misconduct [against employers] coerces employees who witness it or learn of it because they may reasonably conclude that if they do not support the union’s goals, like coercion will be inflicted against them.”).

¹¹⁷ As the Board once stated:

The theory is that the violence is calculated to serve as a warning to *nonstriking employees* who observe it or who reasonably may be expected to learn of it, that like violence may be inflicted upon them if they do not support the labor organization in the activity in which it is engaged. In addition violence upon management officials has been held to tend to restrain or coerce *the striking employees* in their right to abandon the strike if they should become of such mind.

District 65, Retail, Wholesale & Dep’t Store Union, 133 N.L.R.B. 1555, 1566 (1961); see also *Union Nacional de Trabajadores*, 219 N.L.R.B. 862, 863 (1975) (applying the theory to a bargaining session).

¹¹⁸ 1199, Nat’l Health & Human Serv. Emps. Union, 339 N.L.R.B. at 1063 (Liebman,

although a “union organizer running half-dressed through . . . corridors chanting childish slogans . . . at managers without any overt motive” undoubtedly upsets the managers, labor law says the upset is a proxy for the feelings of employees who only hear about it later.¹¹⁹ How gossip about a “ludicrous scene” divorced from any trapping of collective activity translates to coerced interests for or against unions is difficult to figure.¹²⁰

B. Employer and Consumer Coercion and the Issue of Ill-Measurement

Labor law also aims for rationality when employers and the broader public make decisions. That goal is similarly policed by anti-coercion provisions, this time in section 8(b)(4). Again, the scheme is hobbled both by a lack of metric for that key term and a reliance on proxies, in this case a historical preoccupation with signs and sticks.

1. 8(b)(4)(ii)(B) and its Picketing Wake

NLRA section 8(b)(4)(ii)(B) makes it illegal “to threaten, coerce, or restrain any person” with “an object” of “forcing or requiring any person . . . to cease doing business with any other person.”¹²¹ The provision grew out of a Taft-Hartley-era attempt to restore common law rules that saw attempts to pressure neutral parties to intervene in labor disputes as flatly illegal.¹²² By the early-1930s federal anti-injunction legislation and softened judicial perspectives had returned

Member, dissenting) (citing Culinary Workers Local 226, 323 N.L.R.B. 148, 159 n.29 (1997)).

¹¹⁹ *Id.* at 1065.

¹²⁰ *Id.* at 1064; *see also id.* at 1063 (Liebman, Member, dissenting) (calling it “dubious . . . that employees would interpret” such activity “as sending *them* any message at all, even indirectly”).

¹²¹ 29 U.S.C. § 158(b)(4)(i)(B) (2018). A violation of section 8(b)(4)(ii) thus requires bad conduct (i.e., coercion or a threat of coercion), plus a bad object (i.e., “conduct undertaken with a design to pressure a neutral party to intercede” with a “more direct target”). *See* Richard A. Bock, *Secondary Boycotts: Understanding NLRB Interpretation of Section 8(B)(4)(B) of the National Labor Relations Act*, 7 U. PA. J. LAB & EMP. L. 905, 931-36 (2005). A sister provision — section 8(b)(4)(i)(B) — operates similarly but with different conduct: inducing or encouraging “any person” to strike. 29 U.S.C. § 158(b)(4)(i). The statute lists “forcing or requiring any person to cease . . . dealing in the products of any other producer” as another possible object in both cases, but because the “cease doing business with” language is broader it is more commonly cited.

¹²² *See* Bock, *supra* note 121, at 912-13; Dan Ganin, Note, *A Mock Funeral for a First Amendment Double Standard: Containing Coercion in Secondary Labor Boycotts*, 92 MINN. L. REV. 1539, 1543-44 (2008).

the tactic to labor's arsenal,¹²³ but in the Wagner Act's post-WWII backlash the notion of embroiling unsuspecting "stranger[s]" in another's fight seemed at least "unfair[]" and at worst too powerful.¹²⁴ Loophole-ridden drafting led to further amendment in 1959 and the current "coercion" language, but by then the legislative concern was not sensible economic play but outright bullying.¹²⁵ In a televised address trumpeting the revision, President Eisenhower called neutral pressure an "oppressive . . . scheme" by "unscrupulous organization officials" against "innocent bystanders" that "America" wants "stopped."¹²⁶ The legislative history is also replete with tales of individual stores confronted with a choice between union recognition or crippling protest.¹²⁷

For reform advocates, both scenarios fell under the "coercion" heading,¹²⁸ and, as with sections 8(a)(1) and 8(b)(1)(A), the alarm related to overpowered wills, from a series of angles.¹²⁹ There was worry that consumers would decide to avoid a neutral business out of

¹²³ Specifically, the 1932 passage of the Norris-LaGuardia Act and the Supreme Court's subsequent decision in *United States v. Hutcheson*, 312 U.S. 219 (1941) exempting labor from anti-trust restrictions gave unions "a relatively unfettered legal right to engage in secondary activities." Bock, *supra* note 121, at 910-12; see also Larry S. Bush, *Customers, Coercion and Congressional Intent: Regulating Secondary Consumer Boycotts Under the National Labor Relations Act*, 86 W. VA. L. REV. 1127, 1130-31 (1984) (describing "judicial climate change" during this period).

¹²⁴ See GORMAN & FINKIN, *supra* note 77, at 382; Kenneth G. Dau-Schmidt & Benjamin C. Ellis, *The Relative Bargaining Power of Employers and Unions in the Global Information Age: A Comparative Analysis of the United States and Japan*, 20 IND. INT'L & COMP. L. REV. 1, 4 (2010); see also 95 CONG. REC. 8709 (1949) ("[T]he secondary boycott ban is merely intended to prevent a union from injuring a third person who is involved in any way in the dispute or strike, and therefore should not suffer economic damage simply because of the action of a labor union." (statement of Sen. Taft)).

¹²⁵ See Bock, *supra* note 121, at 913-15.

¹²⁶ 105 CONG. REC. A8488-89 (1959), reprinted in 2 LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959, at 1842-43 (1960) [hereinafter LEGISLATIVE HISTORY].

¹²⁷ See *NLRB v. Fruit & Vegetable Packers, Local 760*, 377 U.S. 58, 65-68 (1964); *Int'l Hod Carriers Bldg. & Common Laborers Union of Am., Local 840*, 135 N.L.R.B. 1153, 1154-55, 1157 (1962) (describing floor debate that "reveals . . . conflict and compromise" related to so-called "blackmail" recognition pressure).

¹²⁸ LEGISLATIVE HISTORY, *supra* note 126, at 1842 ("Chief among the abuses which Americans need protection are the oppressive practices of coercion . . .").

¹²⁹ See Edgar A. Jones, Jr., *Picketing and Coercion: A Jurisprudence of Epithets*, 39 VA. L. REV. 1023, 1039 (1953) ("[T]here is no debate over the prevailing meaning of 'coercion' . . . the term conveys . . . that there has been some kind of forceful substitution of the coercer's will for that of an unsuccessfully resistant person."); see also *id.* at 1040-51 (drawing distinctions between the observers and the objects of coercive pressure).

intimidation, not persuasion, that the neutral business would repudiate the company at the heart of the dispute for the same reason,¹³⁰ and that lots of businesses would accept representation, and lots of employees would join unions, not after weighing the pluses and minuses, but because it was required to stay operational or employed.¹³¹

In every case the conception of coercion was almost pathologically infused with picketing dread. Owing perhaps to its militaristic, even weaponized linguistic origins or to years of state court depictions of picketers as irrepressibly violent,¹³² federal judges had come to view signs and sticks as a categorically “different . . . mode[] of communication” that “induce[d] action” for reasons having nothing to do with what the placard said.¹³³ For policy-makers, pickets became the “archetypal” form of anti-employer, anti-consumer coercion,¹³⁴ as exemplified by two further clarifications in 1959 that skipped right over the term to get to the same essential point: just don’t picket.¹³⁵

¹³⁰ See *Fruit and Vegetable Packers*, 377 U.S. at 65-68.

¹³¹ Senator McClellan, who headed the hearings into union practices that provided an impetus for the 1959 amendments, described unionization as the cost of continued existence for targeted companies: “[A] labor boss walk[s] into management’s office, slap[s] a contract on the desk and say[s], ‘You sign it and put your men into this union, or else’” LEGISLATIVE HISTORY, *supra* note 126, at 1175; see also *id.* at 1518 (describing a car dealer warned by a union official: “We realize we cannot organize your employees, therefore you will have to organize them for us, or we’ll break you”). In these situations, employees might feel compelled to join the union to keep company running, see Bernard D. Meltzer, *Organizational Picketing and the NLRB: Five on a Seesaw*, 30 U. CHI. L. REV. 78, 80 (1962), but prior to the Taft-Hartley amendments non-members could also be fired under so-called “closed shop” contractual arrangements. Catherine L. Fisk & Erwin Chemerinsky, *Political Speech and Association Rights After Knox v. SEIU, Local 1000*, 98 CORNELL L. REV. 1023, 1031-32 (2013) [hereinafter *Political Speech*].

¹³² See Mark D. Schneider, Note, *Peaceful Labor Picketing and the First Amendment*, 82 COLUM. L. REV. 1469, 1490-91 (1982) (describing this history through case law).

¹³³ *Hughes v. Superior Court of Cal.*, 339 U.S. 460, 464-65 (1950). In this sense 1940’s *Thornhill v. Alabama* 310 U.S. 88, 101-03, 106 (1940), which rejected a state picketing ban on constitutional grounds, stands as a notable — and soon marginalized — exception. See *Int’l Bhd of Teamsters, Local 695 v. Vogt Inc.*, 354 U.S. 284, 291 (1957) (stating that *Thornhill* had been subject to “decisive reconsideration”).

¹³⁴ See Kate L. Rakoczy, Comment, *On Mock Funerals, Banners, and Giant Rat Balloons: Why Current Interpretation of Section 8(B)(4)(II)(B) of the National Labor Relations Act Unconstitutionally Burdens Union Speech*, 56 AM. U. L. REV. 1621, 1629-30 (2007); see also *520 S. Mich. Ave. Assoc., Ltd. v. Unite Here Local 1*, 760 F.3d 708, 720 (7th Cir. 2014) (“[P]icketing . . . of a neutral entity is the paradigmatic case of coercive secondary activity.”).

¹³⁵ A proviso to section 8(b)(4)(ii) allows for “publicity, other than picketing,” to announce to consumers that a neutral employer is distributing goods produced by a

The perceived coercive qualities remain today,¹³⁶ so labor law continues to allow pickets only in limited situations, like against the “primary” target in a labor fight or for a product boycott, but even then with major caveats.¹³⁷

a. *The Lack of Metric*

A primary consequence of the Board’s fixation with picketing is its tendency to short-hand the search for employer and consumer coercion as the search for pickets. That is to say, instead of measuring

business at the center of a dispute. *Fruit & Vegetable Packers*, 377 U.S. at 59 (describing the proviso in detail). Similarly, section 8(b)(7) makes it illegal “to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer” under certain circumstances. 29 U.S.C. § 158(b)(7) (2018). In effect, both provisions could have simply outlawed coercion.

¹³⁶ Justice Stevens’s concurrence in *Safeco*, which stated that labor picketing is a “mixture of conduct of communication” where the “conduct element rather than the particular idea being expressed” predominates, has generally provided the most stable justification. *NLRB v. Retail Store Emps. Union, Local 1001*, 447 U.S. 607, 618-19 (1980); see also *Overstreet v. United Bhd. of Carpenters and Joiners of Am., Local Union No. 1506*, 409 F.3d 1199, 1210 (9th Cir. 2005) (“Justice Stevens’ *Safeco* concurrence . . . provided the rationale . . . that a majority of the Court eventually adopted.”). There are, however, “multiple” other “accounts” that can be cited as Court-approved rationales. Charlotte Garden, *Citizens, United and Citizens United: The Future of Labor Speech Rights?*, 53 WM. & MARY L. REV. 1, 19-20 (2011) (discussing the long history of justifications). Through it all, the underlying idea that picketing “bypasses viewers’ faculties of reason and, thus, in a sense brainwashes,” remains. LAWRENCE H. TRIBE, *CONSTITUTIONAL CHOICES* 200 (1985).

¹³⁷ Section 8(b)(4)(B) exempts “primary picketing.” But section 8(b)(7) then bars primary picketing with a recognitional or organizational “object” if the employer is already unionized, if there has been an election in the past twelve months, or if it continues for over thirty days without a representation petition. See 29 U.S.C. § 158(b)(7)(A)-(C). A section 8(b)(7)(C) proviso, however, allows pickets that tell the public “that the employer does not employ members of, or have a contract with” the union (so long as deliveries continue), *id.* §158(b)(7)(C), and the Board and courts have long agreed that picketing in response to unfair labor practices or to shame a business for not paying an “area standard” wage is not for a recognitional or organization object and can continue for more than thirty days. See, e.g., *Waiters & Bartenders Local 500*, 140 N.L.R.B. 433, 437 (1963) (picketing to protest unfair labor practices); *S.F. Local Joint Exec. Bd. of Culinary Workers v. NLRB*, 501 F.2d 794, 799 (D.C. Cir. 1974) (picketing for area standards); *Houston Bldg. & Constr. Trades Council*, 136 N.L.R.B. 321, 323-24 (1962) (picketing for area standards). Further, pickets that tell consumers to avoid a “struck” product are lawful under *Fruit & Vegetable Packers*, 377 U.S. at 63-69, 71-73, but only if the message does not threaten an entity selling the product with “ruin or substantial loss.” *Retail Store*, 477 U.S. at 623-24. See generally Bock, *supra* note 121, at 918-35 (describing picketing rights and restrictions under section 8(b)(4)); Lee Modjeska, *Recognitional Picketing Under the NLRA*, 35 U. FL. L. REV. 633 (1983) (discussing the impact on picketing imposed by section 8(b)(7)).

the coerciveness of a protest directly, analysis often centers on where conduct falls along a continuum from picketing (coercive), to “the functional equivalent of picketing” (also coercive),¹³⁸ to hand-billing, which the Supreme Court has definitively blessed as “mere persuasion.”¹³⁹ But as was true in the employee context, the proxy approach fails to be a satisfactory test for coercion’s presence or impact.

A major issue is that the definition of “picketing” itself has been amazingly immune to standardization, so it is hard to detect. Patrolling or walking around with a sign has been said to be the “core” element, but the Board has also called standing still at an entrance the “essential feature.”¹⁴⁰ A “physical or, at least, a symbolic confrontation between picketers” and passers-by has also been called “central,”¹⁴¹ but the D.C. Circuit recently said picketing doesn’t even require people, that a sign in a car or a snowbank will do.¹⁴² Things get messier in the context of some modern protest campaigns. There, conduct can extend to capers like following someone around a comics store or a roving Grim Reaper,¹⁴³ forcing judges to label what is essentially guerilla theater as either sort of like picketing or a bit more like flyering.¹⁴⁴ Sometimes the protest is so far removed from either that a credible comparison cannot be made — a few protestors toss garbage bags or many more than a few shop en masse — and coercion

¹³⁸ *Sheet Metal Workers’ Int’l Ass’n, Local 15 v. NLRB*, 491 F.3d 429, 437-38 (D.C. Cir. 2007).

¹³⁹ *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 578, 580 (1988); *see also 520 S. Mich. Ave. Assoc., Ltd.*, 760 F.3d at 720 (“[P]icketing is at one end of a spectrum — the prohibited end — with handbilling on the other, permissible end.”).

¹⁴⁰ *Compare In re United Bhd. of Carpenters and Joiners of Am., Local Union No 1506*, 355 N.L.R.B. 797, 802 (2010) (stating that “patrolling back and forth” is “core” to picketing’s “meaning” and listing cases), *with Serv. Emps. Union, Local 87*, 312 N.L.R.B. 715, 743 (1993) (“[N]either patrolling alone nor patrolling combined with . . . placards are essential elements . . . rather, the ‘important’ or essential feature of picketing is the posting of individuals at entrances . . .”).

¹⁴¹ *United Bhd.*, 355 N.L.R.B. at 802.

¹⁴² *Verizon New England Inc. v. NLRB*, 826 F.3d 480, 488 (D.C. Cir. 2016).

¹⁴³ *See 520 S. Mich. Ave.*, 760 F.3d at 732; *Sheet Metal Workers’*, 491 F.3d at 432-33.

¹⁴⁴ *See, e.g., 520 S. Mich. Ave.*, 760 F.3d at 720 (calling “the central question in this case . . . whether the Union’s conduct . . . is coercive, as in the sense of a . . . picket, or persuasive, as in the case of handbilling” where the “conduct alleged . . . is not satisfactorily described as either”); *Sheet Metal Workers’*, 491 F.3d at 438 (“Having determined the mock funeral lies somewhere between . . . lawful handbilling . . . and unlawful picketing . . . we reach the ultimate question whether the . . . message was coercive . . .”).

then turns on “disruption.”¹⁴⁵ In the end, most section 8(b)(4)(ii)(B) decisions read like analytic free-styling,¹⁴⁶ with the predictable result that judges frequently disagree over identical facts.¹⁴⁷

The bigger tell, however, is the critical fact that a map from picketing-to-handbilling doesn’t lead the way to irrational decision-making. As others have covered, the classic justifications for picketing’s purportedly coercive character range from the anachronistic to the unpersuasive. That modern picketing is not inescapably violent should, at this point, be self-evident.¹⁴⁸ Drained of that subtext, the associated assumption that even non-violent labor picketing is so threatening that some people will reflexively “turn away” is undercut,¹⁴⁹ as it is by the observed reality that people are not

¹⁴⁵ See *United Bhd.*, 355 N.L.R.B. at 805 (stating that “nonpicketing conduct” is “coercive only when” it causes “disruption of the secondary’s operations”); *Serv. Emps. Int’l Union, Local 525*, 329 N.L.R.B. 638, 664-65, 680 (1999) (throwing trash bags); see also *Pye v. Teamsters Local Union No. 122*, 61 F.3d 1013, 1024 (1st Cir. 1995) (discussing “group shopping” as a “new twist” defying “traditional conception[s]” of protest).

¹⁴⁶ As James Gray Pope has emphasized, determining what conduct is “effectively” picketing is an extremely difficult task, because the “concept of effect . . . is infinitely expandable.” See James Gray Pope, *Labor Community Coalitions and Boycotts: The Old Labor Law, the New Unionism, and the Living Constitution*, 69 TEX. L. REV. 889, 939-40 (1991) (listing examples). It is no surprise that student casebooks have a field-day with the exercise. See, e.g., KENNETH G. DAU-SCHMIDT ET AL., *LABOR LAW IN THE CONTEMPORARY WORKPLACE* 832 (2d ed. 2014) (listing activities ranging from singing folksongs to snowmen carrying signs and asking students to “identify what is ‘coercive’ within the meaning of [section] 8(b)(4)”).

¹⁴⁷ Compare *Kentov v. Sheet Metal Workers’ Int’l Ass’n, Local 15*, 418 F.3d 1259, 1265 (11th Cir. 2005) (“We readily conclude . . . the [mock funeral] . . . [was] the functional equivalent of picketing.”), and *Sheet Metal Workers’ Int’l Ass’n, Local 15*, 346 N.L.R.B. 199, 199-200 (2006) (concluding that a mock funeral “constituted picketing”), with *Sheet Metal Workers’*, 491 F.3d at 439 (“[W]e disagree with the Board that the [mock funeral] was ‘picketing.’”).

¹⁴⁸ In other activism contexts, even aggressive pickets that block public access and distress those nearby do not necessarily lead to violence. See, e.g., *Snyder v. Phelps*, 562 U.S. 443, 447-49 (2011) (picketing military funerals); *Madsen v. Women’s Health Ctr. Inc.*, 512 U.S. 753, 757-62 (1994) (picketing abortion clinics). An attempt to uncover recent examples of labor picketing that descended into violence would either come up empty or reveal a genuine outlier. See, e.g., Zolan Kanno-Youngs, *Are You Following Me Now? Striking Verizon Workers Keep Tabs on Their Replacements*, WALL ST. J. (Apr. 22, 2016), <https://www.wsj.com/articles/are-you-following-me-now-striking-verizon-workers-keep-tabs-on-their-replacements-1461336301> (describing sustained and perhaps annoying or even aggressive mobile picketing that nevertheless remained peaceful); see also Pope, *supra* note 146, at 905 n.83 (noting only two instances of publicly-reported “violence in labor-related consumer boycotts between 1980 and 1990”).

¹⁴⁹ See *Bakery & Pastry Drivers & Helpers Local 802 v. Wohl*, 315 U.S. 769, 775

all that intimidated by signs on sticks.¹⁵⁰ And on that point, without some kind of empirical support it is hardly obvious why signs observed from afar are overpowering but in-person interactions with activists whose cause depends upon a “two-stage process” of pausing and reading is purely enlightening.¹⁵¹

A final basis for picketing’s categorization is that it “signal[s]” to union members that blind obedience is required, regardless of the underlying dispute.¹⁵² If there was once merit to this idea it was prior to Taft-Hartley, when getting expelled from the union for defying a picket risked ejection from the job or, even, any unionized job.¹⁵³ But that is old law.¹⁵⁴ Modern “signal” enforcement is limited to social sanctions, viewed by contemporary commentators as “notoriously weak.”¹⁵⁵ But even if not, the prospect of ostracism or hard feelings is precisely the sort of thing someone might deliberate about.¹⁵⁶ Peer

(1942).

¹⁵⁰ Years ago, Theodore St. Antoine made the point that absent facts involving “a frail, elderly person” and “six brawny fellows looking like extras out of *On the Waterfront*,” very little about labor picketing is objectively threatening. See Theodore J. St. Antoine, *Free Speech or Economic Weapon? The Persisting Problem of Picketing*, 16 SUFFOLK U. L. REV. 883, 883 (1982). If the truth were otherwise, we might expect product or even primary picketing to be an over-powering activist tactic. They are not. See, e.g., JAKE ROSENFELD, WHAT UNIONS NO LONGER DO 89-90 (2014) (describing the drastic decline of primary strikes); Pope, *supra* note 146, at 906-08 (“[S]tatistical studies support the view that consumer boycotts rarely . . . can be said to coerce target acquiescence.”). Moreover, as I have detailed elsewhere, the notion that union members have the capacity to exact unique forms of intimidation on the public misapprehends their place in the modern American mindset. See Michael M. Oswald, *Automatic Elections*, 4 UC IRVINE L. REV. 801, 818-23 (2014) (describing the causes and consequences of diminished union consciousness in contemporary times).

¹⁵¹ Pope, *supra* note 146, at 938. Justice Stevens opined that handbills “are so much less effective than labor picketing” because they “depend entirely on the persuasive force of the idea.” *NLRB v. Retail Store Emps. Union, Local 1001*, 447 U.S. 607, 619 (1980). Theodore St. Antoine has wondered in response, “Cannot the handbiller confront the approaching customer with the same pair of beady eyes as the picketer?” Theodore J. St. Antoine, *Labor and Employment Law in Two Transitional Decades*, 42 BRANDEIS L.J. 495, 501 (2004); cf. *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 464, 464 n.23 (1978) (acknowledging “abuses inherent” in “face-to-face selling even of ordinary consumer products” and the associated need for regulation).

¹⁵² See *Retail Store*, 447 U.S. at 619.

¹⁵³ See Fisk & Chemerinsky, *Political Speech*, *supra* note 131, at 1031-32.

¹⁵⁴ *Id.* While unions may still revoke membership for strikebreaking, *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 181-82 (1967), the loss of status is no longer a lawful basis for discharge. See Fisk & Chemerinsky, *Political Speech*, *supra* note 131, at 1032.

¹⁵⁵ Sachs, *Enabling Employee Choice*, *supra* note 24, at 692 n.155.

¹⁵⁶ As Catherine Fisk and Jessica Rutter have suggested, even if signs trigger reflexive loyalty to a cause or reluctance to be condemned by those underneath, the

pressure is also, of course, a defining feature of solidarity.¹⁵⁷ Without it, labor law's premise falls apart.¹⁵⁸ So if today the aggregate responses to picketing cause a business to suffer, it's not because the pickets are too coercive, it's because the pickets are too persuasive.

III. RETHINKING LABOR LAW DECISION-MAKING

To summarize so far: labor law is about decision-making, the Board desires that the choices be made rationally, so, guided by the statute, it restricts interventions that implicate "coercion." The integrity of the doctrinal edifice thus rests on labor law's ability to identify coercion and fix it. As noted, criticism of the agency's take on coercion is not new, but I have tried to redirect concern to the foundational problem: the absence of a workable method to conceptualize and measure it. I suggest that this void affects every angle of analysis, from employees, to employers, to consumers.

The remainder of the Article veers into what is, at least for labor law, uncharted territory. At this point, the literature teems with discussions about what does or does not coerce and sometimes why, but little has been said about what coercion "is," exactly. That is, coercion's

onlooker has still been moved by a message, not robotized. See Catherine Fisk & Jessica Rutter, *Labor Protest Under the New First Amendment*, 36 BERKELEY J. EMP. & LAB. L., 277, 318 ("The power of the message and the social sanctions a community may impose for flouting norms do not make a message less communicative."); see also *In re United Bhd. of Carpenters and Joiners of Am., Local Union No. 1506*, 355 N.L.R.B. 797, 806 (2010) (seeking "to invoke 'convictions or emotions sympathetic to the union activity'" is "persuasion, not coercion").

¹⁵⁷ Strike settings provide the clearest example of the law's respect for this principle. See, e.g., *Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin*, 418 U.S. 264, 283 (1974) ("[F]ederal law gives a union license to use intemperate, abusive, or insulting language without fear of restraint or penalty if it believes such rhetoric to be an effective means to make its point."). Researchers and advocates also underscore peer pressure's centrality to collective action. See, e.g., Daniel G. Gallagher & George Strauss, *Union Membership Attitudes and Participation*, in *THE STATE OF THE UNIONS* 139, 168-69 (George Strauss et al. eds., 1991) (linking mobilization potentials to collective commitments and "peer pressures"); Charley Richardson, *Working Alone: The Erosion of Solidarity in Today's Workplace*, 17 NEW LAB. F. 69, 71 (2008) (describing the importance of "peer pressure" in "creating and enforcing" solidarity "norms through both positive and negative reinforcement").

¹⁵⁸ See, e.g., 29 U.S.C. § 151 (2018) (declaring the "policy of the United States" to encourage "the practice and procedure of collective bargaining" and "self-organization"); *Allis-Chalmers*, 388 U.S. at 181 ("Integral to this federal labor policy has been the power in the chosen union to protect against erosion [of] its status . . ."); *Fresh & Easy Neighborhood Mkt., Inc.*, 361 N.L.R.B. 151, 155 (2014) ("In enacting Section 7, Congress created a framework for employees to 'band together' in solidarity . . .").

substance — how it operates, what it’s made of, how its workings should be conceived — is somewhat of a black box. Judges may know it when they see it, but if pressed might have trouble describing its nuts-and-bolts in isolation. So, in the second half of the Article, I seek to give NLRA coercion content for the first time.

The task begins with acknowledgement that today few decisional specialists would casually accept the law’s baseline that if someone picked “x” instead of “y,” well, that’s just how the math worked out. That would come as no surprise to anyone familiar with recent bestseller lists, where a slew of titles steeped in behavioral economics have shown not simply that people’s choices are not, in the main, rational, but that decision-making is “predictably irrational,” with a variety of heuristics, biases, intuitions, and defaults warping objective processing nearly all the time.¹⁵⁹ That is a conclusion echoed in another expanding field, law and neuroscience, which uses technology to try and locate decision mechanisms in various parts of the brain.¹⁶⁰

Either perspective might be used to deepen the law’s understanding of coercion. So-called “neurolaw’s” whole point, for instance, is that choice distortions can be measured and even seen on a screen.¹⁶¹ My inquiry, however, draws from an area that is related to the other two yet also a traditionally less welcome guest at the law academic party.¹⁶² Over just the last few decades researchers have begun to probe how judgments interact with emotions, and the resulting “law and

¹⁵⁹ See DAN ARIELY, PREDICTABLY IRRATIONAL: THE HIDDEN FORCES THAT SHAPE OUR DECISIONS xviii-xxi, 53, 317-18 (2009); see also DANIEL KAHNEMAN, THINKING, FAST & SLOW 8-15 (2011) (giving common examples of biased decision-making); MICHAEL LEWIS, THE UNDOING PROJECT 18-19 (2017) (tracing the rise of behavioral economics); RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS 3-8 (2008) (discussing how environmental cues or nudges shape behaviors); Paul M. Secunda, *Cultural Cognition at Work*, 38 FLA. STATE U. L. REV. 107, 108-11 (2010) (describing culturally-based biases and implications for labor and employment analysis).

¹⁶⁰ See Abrams & Keren, *supra* note 11, at 2021-27.

¹⁶¹ See *id.* at 2025.

¹⁶² Abrams and Keren call behavioral law and economics, law and neuroscience, and law and emotions “branches of the same tree” that academics have approached with differing levels of acceptance. *Id.* at 1999, 2020. Some even seem to merge the three, putting emotions at the root of behavioral insights. See, e.g., Tamsin Shaw, *Invisible Manipulators of Your Mind*, N.Y. REV. BOOKS (Apr. 20, 2017), <https://www.nybooks.com/articles/2017/04/20/kahneman-tversky-invisible-mind-manipulators/> (“[E]motions powerfully influence our intuitive analysis of probability and risk.”). Abrams and Keren concede this link but emphasize that “behavioral law and economics . . . does not analyze responses that we would describe as emotions, but focuses rather on nonaffective cognitive assumptions that depart from rationality.” Abrams & Keren, *supra* note 11, at 2020.

emotions” scholarship has emerged as perhaps the most direct “collective corrective” to rationalism’s centrality in legal thought and decision-making.¹⁶³ As Kathryn Abrams and Hila Keren have recounted, the path has proceeded in fits and starts, first with grudging acceptance of the initially “radical” claim that, like it or not, emotions already saturate the choices made by judges, academics, and teachers,¹⁶⁴ and later through studies of specific emotions, sparking debate about, for example, the propriety of “disgust” in law.¹⁶⁵

Yet for all its progress, by 2010, law and emotions still struggled to defy perceptions that the field was “more of a novelty than a pragmatic innovation.”¹⁶⁶ Abrams and Keren rose to counter that view, arguing that, far from an “academic pastime,” emotions are a key “instrument” for solving “pressing legal problems.”¹⁶⁷ They urged law and emotion scholars to answer critics by proving the “pragmatic value of law and emotions work” through fresh examinations of doctrinal conundrums and proposals for “specific normative legal solutions” based on research-based, affective principles.¹⁶⁸

Here, I take up Abrams’s and Keren’s challenge. If anything, the case is more compelling today. Writing in the 2015 Annual Review of Psychology, Jennifer Lerner put emotion science at the center of a “veritable revolution” poised to upend much of what is known about decision-making.¹⁶⁹ Reviewing the scholarship — the lion’s share

¹⁶³ West, *supra* note 39, at 340. Abrams and Keren attribute greater “mainstream” acceptance of behavioral and neuroscience law in part to their “conceptual proximity” to rationalist baselines. Abrams & Keren, *supra* note 11, at 2020. For example, even as law and behaviorism “loosens the descriptive assumptions” of rationalism, “it retains the centrality of that frame by cataloguing these forms of behavior as ‘biases’ (or departures from rationality) . . . which reinforces rationality as the *norm*.” *Id.* at 2020; *see also id.* at 2026 (“[T]he more potent association of law and neuroscience with rationalist and objectivist norms accords it higher acceptability among legal scholars.”).

¹⁶⁴ *See id.* at 2003-08 (“These insights produced a modest, yet important, shift . . . [y]et, this change in perception remained, in many ways, shallow Most [academics] remained committed to a core of detached, impersonal [decision-making], though they acknowledged that it could be tinged at times with infusions of affect.”).

¹⁶⁵ *Id.* at 2009 n.47. In this context, Abrams and Keren emphasize the impact of Susan Bandes’ edited work, *THE PASSIONS OF LAW 2* (Susan A. Bandes ed., 1999); *see id.* at 2008-11. For a somewhat updated history from a different vantage, *see* Kathryn Abrams, *Seeking Emotional Ends with Legal Means*, 103 CAL. L. REV. 1657, 1659-65 (2015).

¹⁶⁶ Abrams & Keren, *supra* note 11, at 2013.

¹⁶⁷ *Id.* at 1998, 2000.

¹⁶⁸ *Id.* at 2002.

¹⁶⁹ Jennifer S. Lerner et al., *Emotion and Decision Making*, 66 ANN. REV. PSYCHOL.

published post-2004 — Lerner concluded that “scientists now assume that emotions are, for better or worse, the dominant driver of most meaningful decisions in life.”¹⁷⁰

Thus, in considering coercion’s content, emotion science is a tantalizing resource. It doesn’t have to be revolutionary, however. At its best, a law and emotion perspective can enrich regulatory systems by contextualizing someone’s choice “not simply as a departure from rationality, but as an affirmative mode of apprehension and response” that can eventually be incorporated into even long-entrenched legal assumptions.¹⁷¹ So while the field — and, to be sure, this Article — aims for doctrinal revision, the mechanism is less regime change and more the offering up of a new “rubric, language, or organizing frame” for how the law might come to understand and respond to choice in various workplace settings.¹⁷² Ultimately, that is my goal.

A. Decision-Making and Emotions

For all the recent interest in emotions, scholars have yet to agree on how, exactly, to define them.¹⁷³ A 2010 survey of researchers resulted in thirty-four variations and a seventy-one-word “synthesis” that the

799, 799-800 (2015) (identifying “the potential to create a paradigm shift in decision theories”).

¹⁷⁰ *Id.* at 800-01 (“[Y]early scholarly papers on emotion and decision making doubled from 2004 to 2007 and again from 2007 to 2011, and increased by an order of magnitude as a proportion of all scholarly publications on ‘decision-making’ (already a quickly growing field) from 2001 to 2013.”).

¹⁷¹ Abrams & Keren, *supra* note 11, at 1999-2000 (emphasizing that law and emotions “does not aim simply to correct legal subjects’ [decision-making] in favor of rationality — the primary normative impetus in behavioral law and economics scholarship — but to modify legal doctrine to acknowledge and encompass affective response . . .”).

¹⁷² *Id.* at 2032. Law and public health scholars, for instance, have criticized courts involved in tobacco litigation for their “unwillingness to recognize that an ‘emotional’ graphic warning label could nevertheless be ‘factual.’” Ellen Peters et al., *Emotion in the Law and the Lab: The Case of Graphic Cigarette Warnings*, 2 TOBACCO REG. SCI. 404, 407, 409 (2016).

¹⁷³ E.g., Roddy Cowie et al., *Emotion: Concepts and Definitions*, in EMOTION-ORIENTED SYSTEMS 9, 28 (Paolo Petta et al. eds., 2011) (“[N]obody has yet identified a single, unifying kernel [a]round which all that is known about emotion can be organi[z]ed in a completely coherent, satisfying way.”); Carroll E. Izard, *Emotion Theory and Research: Highlights, Unanswered Questions, and Emerging Issues*, 60 ANN. REV. PSYCHOL. 1, 4 (2009) [hereinafter *Emotion Theory*] (“None of the many efforts to make a widely acceptable definition of emotion has proved successful.”).

author called a “noteworthy and highly pluralistic description” but not, strictly, “a definition.”¹⁷⁴

This gap, though, has proven to be more of an academic point than a road-block, as it has not prevented consensus in many areas relevant to decision-making. For example, there is acceptance that discrete emotions exist, that they have “components and characteristics” that can be examined, and, most importantly, that they affect choice in specific ways.¹⁷⁵ In other words, if researchers have not settled on what an emotion is, they do have a sense of what an emotion *does*.¹⁷⁶

And in general, what emotions do is direct thought and motivate action. On the thought side, once present, an emotion becomes an “implicit perceptual lens” that shapes how one sees the environment.¹⁷⁷ Scientists call this an “appraisal tendency,” because studies show that each emotion has a different prism that guides interpretations of immediate events and the future.¹⁷⁸ So, a crushing

¹⁷⁴ Carroll E. Izard, *The Many Meanings/Aspects of Emotion: Definitions, Functions, Activation, and Regulation*, 2 *EMOTION REV.* 363, 367 (2010) [hereinafter *The Many Meanings*]. While some have even concluded that “emotion concepts cannot be defined at all,” Anna Wierzbicka, *Defining Emotion Concepts*, 16 *COGNITIVE SCI.* 539, 540 (1992), Izard’s work identifies some unifying themes suggesting basic agreement that emotions are biologically-based “response systems” or “feeling state[s]” that “motivate[] and organize[] cognition and action.” Izard, *The Many Meanings*, *supra*, at 367. Definitions also sometimes note that emotions respond to stimuli or “objects, reflecting an underlying appraisal of a particular kind of situation.” Gerald L. Clore & Jeffrey R. Huntsinger, *How Emotions Inform Judgment and Regulate Thought*, 11 *TRENDS COGNITIVE SCI.* 393, 393 (2007).

¹⁷⁵ Izard, *Emotion Theory*, *supra* note 173, at 7; see also Lerner et al., *supra* note 169, at 802-04 (listing themes in current emotion research that “reveal rapid progress in mapping the psychology of emotion and decision making”).

¹⁷⁶ Julie Beck, *Hard Feelings: Science’s Struggle to Define Emotions*, *ATLANTIC* (Feb. 24, 2015), <https://www.theatlantic.com/health/archive/2015/02/hard-feelings-sciences-struggle-to-define-emotions/385711/> (“[S]cientists agree[] more on what emotion *does* than what it is.”).

¹⁷⁷ Lerner et al., *supra* note 169, at 805.

¹⁷⁸ See Paul M. Litvak et al., *Fuel in the Fire: How Anger Impacts Judgment and Decision-Making*, in *INTERNATIONAL HANDBOOK OF ANGER* 287, 289-290 (Michael Potegal et al. eds., 2010). The “[a]ppraisal theory” is now “the dominant approach in emotion research.” Marcel Zeelenberg et al., *On Emotion Specificity in Decision Making: Why Feeling is for Doing*, 3 *JUDGMENT & DECISION MAKING* 18, 20 (2008). See generally Jennifer S. Lerner & Dacher Keltner, *Beyond Valence: Toward a Model of Emotion-Specific Influences on Judgement and Choice*, 14 *COGNITION & EMOTION* 473 (2000) (proposing and justifying the framework). The model suggests that there are multiple dimensions associated with emotion-based appraisal patterns (e.g., high or low assessments of control, responsibility, or pleasantness), Craig A. Smith & Phoebe C. Ellsworth, *Patterns of Cognitive Appraisal in Emotion*, 48 *J. PERSONALITY & SOC. PSYCHOL.* 813, 813 (1985), and each emotion is also thought to be “defined by [the]

World Cup defeat does not just spark a national case of the blues, it correlates with country-specific stock sell-offs.¹⁷⁹ A parking ticket, similarly, leads not only to anger, it drives confidence that an injustice has been committed (no fact-finding needed); assurances about who is responsible (an incompetent street sign-writer); and a steely resolve to fight it on appeal (with pictures).¹⁸⁰ That the meter may have simply run out of time may be hard to spot until the underlying feeling subsides.

Emotions also come with “action tendencies” or “impulses” that push people to react to things with certain patterns of behavior.¹⁸¹ As one scholar puts it, “feeling-is-for-doing.”¹⁸² Some have argued these are “time-tested responses to universal experiences” like a surprise or a loss, and often the associated conduct does seem to flow spontaneously, without much conscious thought.¹⁸³ The classic example is anger, which is associated with snap aggression, including “changes to peripheral physiology that might prepare one to fight, such as increasing blood flow to the hands.”¹⁸⁴ Along the same lines,

central dimensions that characterize its core meaning or theme, for example, anger being defined by a sense of certainty and individual control along with other-responsibility.” Litvak et al., *supra*, at 289.

¹⁷⁹ Vivian Giang, *The Myth of Rational Decision-Making*, FAST COMPANY (July 6, 2015), <http://www.fastcompany.com/3047924/the-future-of-work/the-myth-of-rational-decision-making>.

¹⁸⁰ See Ellen Peters et al., *Affect and Decision Making: A “Hot” Topic*, 19 J. BEHAV. DECISION-MAKING 79, 81 (2006) (“[The] Appraisal-Tendency Framework (ATF) suggests that . . . anger[] is associated with cognitive appraisals (e.g., someone else being responsible for the event causing the emotion, a sense of certainty about what happened, and a sense of ability to control the situation).”); see also Dacher Keltner et al., *Beyond Simple Pessimism: Effects of Sadness and Anger on Social Perception*, 64 J. PERSONALITY & SOC. PSYCHOL. 740, 741, 751 (1993) (noting that anger, associated with a lens of personal control, pushes a sense that individuals bear responsibility for their own plights, while sadness, linked to situational control, spurs people to attribute the same problems impersonally or to outside circumstances).

¹⁸¹ Zeelenberg, *supra* note 178, at 20.

¹⁸² *Id.*

¹⁸³ Lerner, *supra* note 169, at 805, 808; see also Zeelenberg, *supra* note 178, at 20 (“[E]motions are, at least partly, ‘cognitively impenetrable’: One cannot simply choose to have or not have emotions, given certain events or outcomes that are relevant for one’s concerns.”).

¹⁸⁴ Lerner, *supra* note 169, at 808 (stating also that anger is linked to goals of changing the underlying “situation and mov[ing] against another person or obstacle by fighting, harming, or conquering it”); see also Nico H. Frijda et al., *Relations Among Emotion, Appraisal, and Emotional Action Readiness*, 57 J. PERSONALITY & SOC. PSYCHOL. 212, 220 (1989) (finding that “[a]ngry emotions differ from all others . . . [with] antagonistic tendencies such as assault or opposition. . .”).

shame is said to spark “pro-social behavior,” guilt, a “tendency to cooperate.”¹⁸⁵

B. *Emotions, Organizing, and Decisional Indecision at the NLRB*

Together, the appraisal and action tendencies create a reality where emotions “powerfully, predictably, and pervasively influence decision-making.”¹⁸⁶ On the ground, everyone knows this. Unionization is about persuasion from all sides, and persuasion is often about emotion.¹⁸⁷ Gone are the days when a union organizer might rely on promoting the bread-and-butter benefits of a union contract.¹⁸⁸ Modern campaigners rely deeply on “powerful emotional appeals,” calls for justice, and staged public dramas to arouse worker and public sympathy.¹⁸⁹ Employer maneuvers are similarly emotive, with dramatic videos of union-prompted strife, hyper-personalized pleas by upper-management, and cartoon propaganda as standard practice.¹⁹⁰ These are tactics tailored not necessarily to intuitions and biases but explicitly to passions.

¹⁸⁵ Zeelenberg, *supra* note 178, at 23.

¹⁸⁶ Lerner et al., *supra* note 169, at 802.

¹⁸⁷ See, e.g., David DeSteno et al., *Discrete Emotions and Persuasion: The Role of Emotion-Induced Expectancies*, 86 J. PERSONALITY & SOC. PSYCHOL. 43, 43 (2004) (“Appeal to the emotions as sources of leverage in persuasion is a venerable strategy and one that continues to be used by politicians and marketers alike.”).

¹⁸⁸ See Rogers, *supra* note 40, at 348-49. A representative example includes UNITE-HERE’s campaign to organize L.A. Airport-adjacent hotels, which partnered with a Catholic Church to reenact Mary’s and Joseph’s search for lodging with an altered script highlighting hotel workers’ struggles to survive on minimum wage. See Forrest Stuart, *From the Shop to the Streets: Unite Here Organizing in Los Angeles Hotels*, in WORKING FOR JUSTICE: THE L.A. MODEL OF ORGANIZING AND ADVOCACY 191, 197-99 (Ruth Milkman et al. eds., 2010).

¹⁸⁹ Rogers, *supra* note 40, at 318, 354-55.

¹⁹⁰ The films “And Women Must Weep” and “The Springfield Gun,” which depict a child shot by a striker, were repeat players in Board decisions throughout the 1970s and 1980s. See, e.g., McGraw-Edison Co., 216 N.L.R.B. 460, 472-73 (1975). Today employees are just as likely to encounter fictionalized portrayals of suffocating union work rules, like Target’s highly publicized new employee orientation film. See Hamilton Nolan, *Behold, Target’s Brand New Cheesy Anti-Union Video*, GAWKER (Mar. 19, 2014, 1:05 PM), <http://gawker.com/behold-targets-brand-new-cheesy-anti-union-video-1547193676>. CEOs frequently personify the electoral process with statements like, “a vote for the union is a vote against me,” see, e.g., Structural Finishing, Inc., 284 N.L.R.B. 981, 990 (1987); Mechanical Specialties Co., 166 N.L.R.B. 154, 157 (1967); see also Story, *supra* note 15, at 427 (noting the prominence of cartoon propaganda).

The Board is itself cognizant of these realities,¹⁹¹ but the resulting doctrine evinces a sense that the agency is not quite sure how to legally square emotions, reason, and choice. Its instinct is to provide a legal buffer for emotive flare-ups on the job and during protests, but the safe harbors it creates are tainted by blurry tests and labyrinthine factors that imply an underlying ambivalence and assure hedged holdings.¹⁹² In *Peerless Plywood*, the Board apparently intuited that captive audience meetings provoke some sort of emotion inimical to rationality, which it identified as a “mass psychology.”¹⁹³ Yet, in the same breath it fled from this rationale to announce the sole limitation applicable today — a twenty-four-hour pre-balloting bar — on the theory that “the real vice” is “obtain[ing] the last most telling word.”¹⁹⁴ Sixty-some years later, the acknowledged mental element in captive meetings, its impact on choice, and why a thirty-six, forty-eight, or even fifty-six hour cooling-off period would not have been psychically better has never been explained. Likewise, *Gissel*’s axiom, that speech should be analyzed through its impact on economically dependent ears, calls out for consideration of emotional reactions and sensitivities.¹⁹⁵ But, again, the type of reaction judges should look for, or even the clues that might prove speech has touched an economic

¹⁹¹ See *Archer Laundry Co.*, 150 N.L.R.B. 1427, 1433 (1965) (“A union election is often an emotional proceeding. Campaign literature usually appeals to some type of emotion.”).

¹⁹² The Board is clear that “protections of [s]ection 7 would be meaningless were we not to take into account . . . the fact that [workplace] disputes . . . are among the disputes most likely to engender ill feelings and strong responses.” *Hitachi Capital Am. Corp.*, 361 N.L.R.B. 123, 141 (2014). And at times case law reveals special respect for “impulsive behavior,” *Cavalier Division of Seeburg Corp. v. NLRB*, 476 F.2d 868, 879 (D.C. Cir. 1973); “moment[s] of animal exuberance,” *Bettcher Mfg. Corp.*, 76 N.L.R.B. 526, 527 (1948); and “provoked” spontaneity, Susan D. Carle, *Angry Employees: Revisiting Insubordination in Title VII Cases*, 10 HARV. L. & POL’Y REV. 185, 221-22 (2016). The broader view, however, reveals doctrinal inconsistency and judicial and scholarly perplexity. See *Consol. Commc’n Inc. v. NLRB*, 837 F.3d 1, 20-24 (D.C. Cir. 2016) (Millett, J., concurring) (criticizing racial- and gender-based inconsistencies in the Board’s treatment of angry statements on strike-lines); Christine Neylon O’Brien, *I Swear! From Shoptalk to Social Media: The Top Ten National Labor Relations Board Profanity Cases*, 90 ST. JOHN’S L. REV. 53, 105-08 (2016) (detailing the four-factor, totality, and sub-rule analyses applied in cases of sudden workplace outbursts); Michael M. Oswalt, *Improvisational Unionism*, 104 CAL. L. REV. 597, 662 (2016) (describing the Board’s “Frankenstein-esque” test for determining if repeated strikes are sufficiently spontaneous to receive protection).

¹⁹³ *Peerless Plywood Co.*, 107 N.L.R.B. 427, 429 (1953) (describing “an unwholesome and unsettling effect” impacting “sober and thoughtful choice”).

¹⁹⁴ *Id.*

¹⁹⁵ See *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969).

nerve are unknown, so courts typically mouth the rule “in mantra-like fashion” before moving onto the coercion proxies cited in precedent.¹⁹⁶ And in one of the most potentially inflammatory settings — racially-tinged election appeals — the Board concedes that emotions may swirl in reason-corrupting ways but then applies a standard roundly criticized for vagueness, incoherence, and, from civil rights scholars, real world detachment.¹⁹⁷

The Board, to be fair, is trying its best. A reliance on proxies so disparate as to encompass both hand-signs and living rooms has surely made establishing something like a unified theory of coercion difficult. That labor law has proven mostly immune to legislative change makes it unlike other relevant areas, such as human trafficking, where the courts and congress have engaged in a back-and-forth that, while not without fault, has gradually “capture[d] the sociological complexity” of coercion in ways early understandings did not.¹⁹⁸ And since emotion research has matured only in the past decade or so, it is not surprising that long-settled conceptions of decision-making have yet to catch up. But that’s all the more reason for a restart. I take on that task in the final Part.

IV. COERCION AS FEAR AND REGULATION BY CONTROL

The remainder of the Article proceeds in three phases. First, I suggest that there are good reasons to depart from coercion’s conventional theoretical mode and define it instead with an emotion. Second, I argue that emotion should be fear. Third, I propose that labor law regulate — and measure — coercive fear through the psychological construct of “control,” and I detail how the Board could do it.

A. *The Case for an Emotional Model of Coercion*

As noted briefly at the start, coercion’s standard legal construction is transactional. It assumes the existence of an offer (e.g., “if you do that, this will happen”) and asks whether the proposal “alters the recipient’s baseline for choice.”¹⁹⁹ If so, and if it “leaves the recipient in a worse

¹⁹⁶ Story, *supra* note 15, at 430.

¹⁹⁷ Marion Crain, *Whitewashed Labor Law, Skinwalking Unions*, 23 BERKELEY J. EMP. & LAB. L. 211, 233, 241-45 (2002).

¹⁹⁸ Kim, *supra* note 61, at 414.

¹⁹⁹ Kuo & Means, *supra* note 62, at 1606. The classic account at this stage is somewhat narrower and inquires if the recipient “has no reasonable alternative but to” comply with the offer. WERTHEIMER, *supra* note 62, at 172; *see also* Kim, *supra* note 61,

position” than before the offer was made — especially, under a popular conception, if the offeror did not have a legal right to make the proposal — it’s coercive.²⁰⁰ So, the proposition, “your money or your life,” presents two bad options and obviously deteriorates the recipient’s position, but so does, “do what I say, or else,” where “else” is ominous.²⁰¹ Both are coercive. Pitches that seem to provide an opportunity or that do not affect a choice baseline, in contrast, are not.²⁰² For this reason, “walk my dog for \$10” or “feel free to add more salt” are usually non-coercive offers.

Much of labor law’s policing of coercion, even accounting for the Board’s tendency to reach for analytic proxies, fits this mold theoretically.²⁰³ Whether bluntly stated or implied based on place or past illegal conduct, conveying the message, “Vote no or get laid off,” radically shatters an employee’s choice baseline and is considered the archetypal case of section 8(a)(1) coercion.²⁰⁴ The same would be true for “Sign the card or get roughed up” in a section 8(b)(1)(A) context. And section 8(b)(4) similarly presumes that an offer to a neutral like, “Stop doing business with *Big Box Inc.* or we’ll picket,” scrambles deliberative foundations improperly and is coercive because of it. Thus, an emotional conception of coercion may at first seem like a substantial departure. Feelings are more relational than transactional. The background science shows that emotions can be unconscious, incipient, vary in degree, and suddenly arise from a look, a situation, or a setting.²⁰⁵ They cannot, in other words, necessarily be parsed into a back-and-forth.

at 429 (depicting the “no reasonable alternative framework” as an “an unreasonable choice set” where one is required to pick the “the lesser of two evils”).

²⁰⁰ Kuo & Means, *supra* note 62, at 1606; WERTHEIMER, *supra* note 62, at 30.

²⁰¹ Kuo & Means, *supra* note 62, at 1605-06.

²⁰² *See id.* at 1606 (“[W]hether or not the offer is accepted, what is important is that [in a non-coercive setting] the recipient of the offer will be left no worse off than before.”).

²⁰³ A threat, of course, is classic coercion. *Id.* at 1605 (“[T]he issue of coercion turns on the existence of a threat.”).

²⁰⁴ *Caron Int’l Inc.*, 246 N.L.R.B. 1120, 1121 (1979) (“A threat to discharge . . . is ‘coercion of a most serious nature’ . . . [and] ‘one of the most flagrant means . . . to dissuade employees from selecting a bargaining representative.’” (citing *Sol Henkind*, 236 N.L.R.B. 683, 686 (1978); *Gen. Stencils Inc.*, 195 N.L.R.B. 1109, 1109 (1972))).

²⁰⁵ *See* Piotr Winkielman et al., *Affective Influence on Judgments and Decisions: Moving Towards Core Mechanisms*, 11 REV. GEN. PSYCHOL. 179, 187 (2007) (describing how emotion primes that impact behavior are not necessarily “accompanied by conscious changes in mood”); *see also* Jennifer J. Kish-Gephart et al., *Silenced by Fear: The Nature, Sources, and Consequences of Fear at Work*, 29 RES. ORGANIZATIONAL BEHAV. 163, 185 (2009) (describing “humans’ innate tendency to avoid the unpleasant

Of course, *work* is relational. And because it is relational, an emotive model gets at coercive dynamics in ways the existing doctrine — and its offer-recipient infrastructure — never has. *Gissel's* conclusion that even the direst predictions are, if supported objectively, rationality-enhancing is not, on its face, unreasonable. If unionization guarantees bankruptcy, workers — the decision-makers — need to know that. But unions hate the rule not because they want to limit accurate data they dislike, they hate it because the voters in the room have a history with the guy in human resources who made the power-point and trust his “well, it’s out of our control” conclusion not the slightest. The experience is harrowing, not enriching. *Gissel* also grants immunity to “opinions.” Yet, again, if everybody knows the ultracompetitive GM is apoplectic for three days if he loses a round of golf, his anti-union musings will not really feel like musings. Even constitutional scholars have questioned how *Gissel's* proscription of “conscious overstatements” about what a unionized future might look like can be aligned with a transactional model of coercion that, at its core, exempts threats “to do what one has a right to do,” like, in most other contexts, use puffery.²⁰⁶ Perhaps it can’t. It may just be that the Court had the right instinct that, when puffery puts incomes on the line, it is affectively jolting.

It is also the case that labor law is uniquely unsuited to a transactional model of coercion. Unlike, say, contracts,²⁰⁷ NLRA doctrine is saddled with section 8(c)’s muddy speech allowances, inherent power disparities, historical hostilities to signs on sticks, and, especially, the intensely personal sensitivities people attach to their jobs. As a group, these factors skew transactional analyses of suspect conduct in directions that lead to bad or even bizarre results. Thus, section 8(c) means that the boss’s claims that union members are back-stabbing scum, or, “if you strike for more money, I’ll replace you permanently,” are non-coercive in a legal way but, because it’s a mortgage-sustaining job, worsen choice positioning every other way.²⁰⁸ Doctrinal inertia means picketing a neutral is utterly coercive

characteristics of fear . . . that is largely unrecognized by them”); *id.* at 174-77 (noting voice-, facial-, gender-, movement-, and situational-based cues that can trigger fear responses).

²⁰⁶ Sullivan, *supra* note 3, at 1444-45 (citing *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 620 (1969)).

²⁰⁷ See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 177 (AM. LAW. INST. 1981) (“If a party’s manifestation of assent is induced by undue influence by the other party, the contract is voidable by the victim.”).

²⁰⁸ See *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333, 345-46 (1938) (authorizing permanent replacement workers during strikes).

legally but, if millennial shoppers and multi-sub-contracted delivery drivers pay no mind, totally irrelevant to baseline choice in reality.

As Kathleen Kim has observed, coercion's traditional frames work best for "direct and objectively identifiable threats of morally egregious consequences."²⁰⁹ But that's just not how work, generally, works.

B. Coercion as Fear

Of course, if framing coercion as an emotional experience puts factfinders in a better position to detect it, the question becomes: what feeling should they be looking for? The answer is fear, and the reason is one-part experiential, one-part experimental.²¹⁰ For, just as all parties know that emotions impact decision-making, they also know that fear, specifically, is the most corrupting influence. And studies support that instinct.

1. A Three-Party Consensus

A leitmotif runs through coercion jurisprudence, the employer's classic anti-union playbook, and the union's basic organizing blueprint: identifying, provoking, and avoiding fear, respectively. In NLRB decisions, "fear" is effectively a shorthand for "coercion." A coercive speech will often be said to provoke "fears of possible trouble with the" boss, "fears of job loss," or, if the campaign involves undocumented workers, the "most intense fear . . . removal from [your] very home[]." ²¹¹ Similarly, the Board says pickets coerce "employees, customers, or suppliers" by evoking "fear of retaliation if

²⁰⁹ Kim, *supra* note 61, at 468; *see also id.* at 460-61 (describing "blurry line" cases . . . subject to arbitrary assessments by the evaluator" better-suited to a more psychological conception of coercion, which she terms "situational").

²¹⁰ I am not the first to suggest that the essential component of coercion is the emotion fear. Some early human trafficking cases relied on what Kathleen Kim has termed the "'climate of fear' test," which "looked to the totality of the circumstances to determine the level of subjective fear or psychological pressure the victims experienced." *Id.* at 432-34. As Kim notes, the doctrine later evolved in part because of questions surrounding whether courts could fairly and consistently identify claimed fear. *See id.* at 434. Many of the same concerns are applicable to traditional labor law, *see infra* Part IV.B.3, and for that reason I propose that coercion analyses be grounded in the simpler and more measurable concept of control. *See infra* Part IV.C.

²¹¹ *Deep Distributors of Greater NY*, 365 N.L.R.B. 1, 20 (2017). Decisions may even comment on fear's special power of persistence. *See id.* (noting that fear can "remain indelibly etched in the minds of those who would be affected").

the picket is defied.”²¹² Unions, for their part, coerce by scheming “to instill fear of physical harm” in workers on the fence or not with the program.²¹³

For employers, fear is not the byproduct of persuasion, it is the point. That’s not an open secret; it’s just open.²¹⁴ As sociologists Larry

²¹² *In re United Bhd. of Carpenters & Joiners of Am., Local Union No. 1506*, 355 N.L.R.B. 797, 815 (2010) (citing *NLRB v. United Furniture Workers*, 337 F.2d 936, 940 (2d Cir. 1964)).

²¹³ *H. N. Thayer Co.*, 115 N.L.R.B. 1591, 1592 (1956).

²¹⁴ There is the stand-by tactic of firing or laying off a single activist at the first hint of organizing, which generates alarm by blunt force and intimidates whoever is left. See JULIUS GETMAN, *RESTORING THE POWER OF UNIONS: IT TAKES A MOVEMENT* 27 (2010); Larry Cohen & Richard W. Hurd, *Fear, Conflict, and Union Organizing*, in *ORGANIZING TO WIN* 181, 184 (Kate Bronfenbrenner et al. eds., 1998) (calling this practice “standard”). More telling are the subtler gambits tailored to provoke a low grade but just as pervasive sense of foreboding. Organizational change, for example, is scary, and employers do much to make the case that unionism is about welcoming an entirely new order. See GETMAN, *supra*, at 30; see also Tina Kiefer, *Analyzing Emotions for a Better Understanding of Organizational Change: Fear, Joy, and Anger During a Merger*, in *MANAGING EMOTIONS IN THE WORKPLACE* 45, 45-69 (Neal Ashkanasy et al. eds., 2002). Sometimes the case is theoretical and centers on culture. In a typical missive, HarperCollins responded to a drive by explaining that a union would “endanger” the “current feisty, free and open involvement of the entire staff.” Cohen & Hurd, *supra*, at 184-85. Just as often the case is made right before voters’ eyes, with video re-enactments of alleged contract rules that would force workers to ignore customers, unexplained influxes of outside and aggressive supervisors, and the corralling of employees into isolated meeting rooms at strange times. See, e.g., Becker, *Taking Aim*, *supra* note 112, at 25-48, 42-44. These are all power-plays, and the underlying message is futility: even if you win, you lose, because the conflict will be permanent. See Cohen & Hurd, *supra*, at 183-84. And futility, it turns out, translates into fear. See Linda J. Levine & David A. Pizarro, *Emotional Valence, Discrete Emotions, and Memory*, in *MEMORY AND EMOTION* 37, 47 (Bob Utzl et al. eds., 2006) (“Fear is elicited by the perception of a threat of goal failure and motivates thoughts and behaviors directed toward avoiding the threat.”); Winkielman, *supra* note 205, at 182 (citing Rajagopal Raghunathan & Michael Pham, *All Negative Moods Are Not Equal*, 79 *ORG. BEHAV. & HUM. DECISION PROCESSES* 56 (1999)). Finally — and ironically — management’s most fearsome move may be the workaround developed to combat *Gissel’s* rule that predictions need proof: they just keep consequences ambiguous. Telling an assembly, “Who really knows what might happen, but you better think carefully,” is more unsettling than a forecast, because instead of struggling with a specific claim from an openly biased source, it’s shadow-boxing with every imaginable outcome. See GETMAN, *supra*, at 27 (“[M]ost employers ‘imply really bad things are going to happen if the union wins. You know — read between the lines.’”). This accounts for the counter-intuitive finding that the fewer details recalled about a traumatic event the more personal and close in time it feels. See Clore & Huntsinger, *supra* note 175, at 395 (“[R]ecalling more details (ten rather than two) made the [Oklahoma City] bombing seem both more distant in time and less personally important.”); see also Litvak et al., *supra* note 178, at 290 (“[W]hen someone feels uncertain or lacks confidence about the cause of a negative event, she is likely to

Cohen and Richard Hurd have stated succinctly: “[F]ear is at the heart of employers’ union-avoidance strategies.”²¹⁵

This is not lost on the union. When organizers are not rallying workers, they are prepping them to deal explicitly with fear.²¹⁶ The technical term is “inoculation,”²¹⁷ and the idea is to cushion management’s blows by choreographing the punches and demystifying the fighting style. Organizers have seen the playbook, probably know the consultants who wrote it, and, whether the issue is strikes, dues, or lay-offs, have a ready parry.²¹⁸ “They aren’t trying to inform you of anything,” an organizer may say to set an important theme. “They’re just trying to frighten you with everything.”²¹⁹ When it works, the union gets fifty percent plus one of the votes. When it does not, even the most out-front activists will pull back and cite fear as the justification.²²⁰

The use of fear as a paralytic is equally clear in the union’s attempt to transition the setting’s emotional valence from fear to anything else. A United Food and Commercial Workers’ (“UFCW”) organizing manual states that, “When dealing with a strong emotion like fear, we need another emotion just as strong (or stronger) to overcome it.”²²¹

experience fear . . .”). It is the uncertainty, ultimately, that is so chilling.

²¹⁵ Cohen & Hurd, *supra* note 214, at 181; *see also* GETMAN, *supra* note 214, at 31 (“Every employer campaign seeks to exploit employee fears of the consequences of unionization.”); Kimberly Phillips-Fein, *How Employers Broke Unions by Creating a Culture of Fear*, WASH. POST. (Aug. 2, 2016), https://www.washingtonpost.com/news/in-theory/wp/2016/08/02/how-employers-broke-unions-by-creating-a-culture-of-fear/?hpid=hp_no-name_opinion-card-f%3Ahomepage%2Fstory (attributing low union density to employer-created “culture[s] of fear”).

²¹⁶ A United Food and Commercial Workers (“UFCW”) organizing manual says this expressly: “Fear is a challenge that all workers have to overcome to be successful in organizing a union.” UNITED FOOD & COMMERCIAL WORKERS UNION, UFCW STEWARD TRAINING 2, <http://memberpower.ufcw.org/files/2014/05/Steward-Training-Outlines-Organize.pdf> (last visited Sept. 20, 2018).

²¹⁷ Daisy Rooks, *Sticking it Out or Packing it In?: Organizer Retention in the New Labor Movement*, in REBUILDING LABOR 195, 195-224, 278 n.7 (Ruth Milkman & Kim Voss eds., 2004); *see also* Cohen & Hurd, *supra* note 214, at 193.

²¹⁸ *See* GETMAN, *supra* note 214, at 30 (noting that the tactics “are sufficiently standardized that skillful organizers can predict the substance and sequence . . . in advance and rebut management’s claims”).

²¹⁹ *Id.* (“Unions regularly criticize the employer’s campaign, claiming that it was designed to frighten and confuse.”).

²²⁰ *See* Becker, *Taking Aim*, *supra* note 112, at 44 (describing how many of the earliest and most confrontational activists during a campaign at Target soon “shied from . . . public challenges for fear of retribution” after management’s campaign picked up steam).

²²¹ UNITED FOOD & COMMERCIAL WORKERS UNION, *supra* note 216, at 3.

That turns out to be anger, which the UFCW believes “move[s] people to act (not just react) in place of fear.”²²² For this reason, organizing “how-tos” assume a bedrock state of fear and then counsel “getting the person angry” by re-focusing on frustrations, “see[ing] and feel[ing] the injustice[,] and then accessing [one’s] own power to change it.”²²³

Everybody’s right. While fear scholarship is, like emotion science itself, evolving, the conclusions already point in the same direction. Empirically, fear moots rationalist appeals and artificially deforms the choices people make in the very ways the law cares about.

2. Corroded Workplace Choice

A sense of fear’s choice-disrupting processing can be spotted even in its tentative definition, which can be boiled down to “an awareness, based on the raw materials available, that danger is near or possible.”²²⁴ From there, it is no surprise that fear’s principal action tendency is flight.²²⁵ So, if a worker had coffee with an organizer, a

²²² *Id.* Indeed, research shows that where fear enervates, anger, which pivots around a sense of injury, a wrongdoer, and will to fix it, motivates. See Litvak, *supra* note 178, at 290; see also Kish-Gephart et al., *supra* note 205, at 180, 183 (describing anger as a “counter-emotion” that “may provide a counterweight to fear’s inhibitory tendencies”).

²²³ Lisa Fithian, *Getting People Involved*, ORGANIZING FOR POWER, ORGANIZING FOR CHANGE, <http://organizingforpower.org/getting-people-involved/> (last visited Sept. 25, 2018). Empirical work supports links between anger, activism, and support for unionization. See Roger D. Weikle et al., *A Comparative Case Study of Union Organizing Success and Failure*, in ORGANIZING TO WIN, *supra* note 214, at 197, 197-211, 204, 208-09 (“[T]he workers expressed anger in response to experiencing recent decreases in pay or benefits These workers were also ready to take aggressive action after calculating the net benefits of unionization.”).

²²⁴ Fear’s definition, like all emotions, is a scholarly work-in-progress. Joseph LeDoux’s account of struggling to define it is instructive, but he concludes that the given phrasing “ties [everything] together.” Joseph LeDoux, *Coming to Terms with Fear*, 111 PROC. NAT’L ACAD. SCI. 2871, 2876 (2014); see also Joseph LeDoux, *Searching the Brain for the Roots of Fear*, N.Y. TIMES (Jan. 22, 2012), <http://opinionator.blogs.nytimes.com/2012/01/22/anatomy-of-fear/>, (“Scientists generally define fear as a negative emotion state triggered by the presence of a stimulus . . . that has the potential to cause harm.”).

²²⁵ See Lerner, *supra* note 169, at 805 (“[F]ear triggers flight.”); see also NICO H. FRIJDA, *THE EMOTIONS* 72 (1986) (describing fear’s action tendency as the “urge to separate oneself from aversive events”); Robin L. Nabi, *Exploring the Framing Effects of Emotion: Do Discrete Emotions Differentially Influence Information Accessibility, Information Seeking, and Policy Preference?*, 30 COMM. RES. 224, 230 (2003) (describing fear’s “emotional goal” and “action tendenc[y]” as “protection through avoidance”); Gregory Berns, *In Hard Times, Fear Can Impair Decision-Making*, N.Y. TIMES (Dec. 6, 2008), <https://www.nytimes.com/2008/12/07/jobs/07pre.html> (“Fear prompts retreat.”). Of note, “flight can also manifest itself in various other behaviors including

supervisor quips “How was the latte?” and the worker gets scared, the organizer may not get a follow-up and it may have nothing to do with the quality of conversation. Foodies with the hottest reservations in town might get spooked by protestors wrangling on a sidewalk nearby and opt for delivery instead.

But fear has other, less tangible impacts on the choices of interest to labor law that are just as distorting. One of its most heavily researched appraisal tendencies is to make people magnify risk.²²⁶ A widely-cited study conducted days after the 9/11 attacks found that those experiencing fear (as opposed to mostly anger) estimated significantly higher probabilities for an array of potential risks, including those having nothing to do with terrorism, like getting the flu.²²⁷ Fear, in fact, tends to make the future feel generally uncertain and uncontrollable, qualities which further bias preferences toward risk-avoidant choices.²²⁸

Consider the example of a company president thinking about signing an agreement allowing a union to make a pre-approved presentation to employees in a break-room.²²⁹ Red carpet access might legitimize the union or give tacit approval to complaints raised by the campaign, but it might also generate positive media, a less contentious atmosphere, or the possibility of extracting union concessions in response. But add to the recipe a revelation that the union has just tipped a reporter off to an ultra-luxurious corner office remodel that could tarnish the folksy reputation that has built the president's career. To the extent the president fears exposure, it is likely to destabilize the old decisional matrix by inflating the agreement's identified risks, spawning newly perceived risks, and shrinking the probabilities of possible benefits. Ultimately, it is impossible to predict

‘avoidance [or] freezing (‘being paralyzed’) . . . as the situation develops.’ Kish-Gephart et al., *supra* note 205, at 170.

²²⁶ The seminal study is Lerner & Keltner, *supra* note 178, at 473, 485, 487.

²²⁷ See Jennifer S. Lerner et al., *Effects of Fear and Anger on Perceived Risks of Terrorism: A National Field Experiment*, 14 PSYCHOL. SCI. 144, 148-49 (2003).

²²⁸ See Lerner & Keltner, *supra* note 178, at 485; Litvak, *supra* note 178, at 297.

²²⁹ This scenario is not far-fetched. As noted, many modern campaigns operate through ground-rules contractually agreed to by the parties. See Sachs, *Despite Preemption*, *supra* note 36, at 1155. Allowing a union more workplace access than is required by law is a common provision, and some agreements even detail the substance of a union's or employer's communications to employees while on the property. See, e.g., L. M. Sixel, *Hospital Worked with Union as Organizing Effort Unfolded*, HOUS. CHRON. (June 1, 2008, 5:30 AM CDT), <https://www.chron.com/business/article/Hospital-worked-with-union-as-organizing-effort-1604814.php> (providing organizers workplace access and limiting employer messaging to a pre-approved statement).

how the calculus will play out — maybe blaming the renovation on the Board of Directors, getting a jump on press coverage, and then welcoming the organizers will end up feeling like the tamest option. What is for sure is that the fear infusion will fundamentally upend the math relative to the pre-revelation environment.

Risk pessimism could also be implicated for a worker hired to replace strikers startled by a rally near the new job and forced to weigh the risks of forging ahead (confrontation? ostracism?), versus returning to the temp agency (lost paychecks? humiliation?). Here, the fright may also function like a cognitive “highlighter” for other potentially more acute threats.²³⁰ Attention might zero-in, for instance, on things held by strikers that could turn into a flying object, like maybe a water bottle or, more ominously, an egg. Eyewitness testimony scholars refer to this as the “weapon focus,” finding that frightening stimuli — real, described, or pictured — can monopolize mental resources, especially memory, during an event.²³¹ Emotion research has built on this phenomenon to show that the concentration bias also boosts fear’s intensity in ways that double-down on irrationality.²³² An oft-repeated illustration is the strange fact that people will pay more for insurance covering death from the scary but narrow category of “terrorist acts” than for a policy encompassing the much bigger but blander class of “all possible causes.”²³³ Applied to the workplace, the effect means that strike testimonials or photos of abandoned businesses are likely to be processed with such intense scrutiny that trailing disclaimers, hedges, or spreadsheets will be mostly irrelevant — and overall objectivity all but impossible.

Finally, fear stunts the choice most central to the NLRA as a whole: whether to opt-into collective activity in the first place. It prompts an uncooperative, defensive outlook at a time when the cause is trying to assemble motivated and group-minded participants to get off the ground.²³⁴ And it skews perceptions of reality. A fear-induced

²³⁰ Levine & Pizarro, *supra* note 214, at 37-58.

²³¹ *Id.* at 50.

²³² See *id.* at 39, 50 (suggesting that the highlighter effect “increase[s] the salience” of threatening information); see also George Loewenstein & Jennifer S. Lerner, *The Role of Affect in Decision Making*, in HANDBOOK OF AFFECTIVE SCIENCES 563, 619-42 (R. J. Davidson et al. eds., 2002) (stating that “[o]ne’s mental image of a crash landing . . . is likely to be very different from one’s mental image of a safe landing” and noting that “probability weighting depends on the emotional impact of” such distinctions).

²³³ DANIEL GARDNER, *THE SCIENCE OF FEAR* 73 (2008).

²³⁴ See Kish-Gephart et al., *supra* note 205, at 163-67 (highlighting fear’s role in discouraging workers from speaking up at all in work settings); Zeelenberg, *supra* note 178, at 23 (finding that “fear decreased cooperation for” those with “a natural

“mountains out of molehills”²³⁵ effect has been shown literally — where standing on a skateboard at the top of a hill causes gross overestimates of the incline compared to stable ground — and figuratively, where fear reduces optimism and floods consciousness with feelings of vulnerability and paralysis.²³⁶ It would be hard to come up with an outlook less suited to rights-assertion.

3. The Measurement Problem (Redux)

The takeaway from above is that if the workplace coercion project shifts from policing transactions to policing emotions, perspectives from both the field and the lab suggest that the emotion factfinders should be looking for fear. Yet, the prospect of “looking for fear” itself gestures toward a bigger challenge, which goes to coercion’s regulation and, of course, measurement. Because, even if an emotion-based conception of coercion makes analytical sense, and even if the right emotion is fear, if “fear” cannot be measured accurately and consistently, we are back at square one. Coercion’s paradigm might be updated, but its legal application may not be any better.

And, as it turns out, the notion of “measuring” the amount of fear someone feels and then applying that conclusion to a labor law rule is a problem. For example, a lot of speech that is protected under section 8(c) or that the law should obviously allow is frightening. Though it is a fear-inducing thought, an organizer clearly needs to be able to warn a worker that, without a counterweight, management is going to kill the pension plan. There is also the matter of individual differences.²³⁷ Unions like to use massive rat balloons — fangs out, claws out — to publicize strikes or pressure neutral employers.²³⁸ One person might

tendency to act pro-socially”). Here biology seems to play a role: “The most concrete thing that neuroscience tells us is that when the fear system of the brain is active, exploratory activity and risk-taking are turned off.” Berns, *supra* note 225.

²³⁵ Clore & Huntsinger, *supra* note 174, at 395.

²³⁶ See Levine & Pizarro, *supra* note 214, at 48; Litvak et al., *supra* note 178, at 300.

²³⁷ See, e.g., JEFFREY ALAN GRAY, *THE PSYCHOLOGY OF FEAR AND STRESS* 35 (1987) (noting the “common-place observation” that people experience fear differently); PETER N. STEARNS, *AMERICAN FEAR: THE CAUSES AND CONSEQUENCES OF HIGH ANXIETY* 4 (2012) (“Fear . . . is often an individual experience. Individuals also encounter fear differently, depending, of course, on the provocation but also on individual temperament.”).

²³⁸ See Tzvi Mackson-Landsberg, Note, *Is a Giant Inflatable Rat an Unlawful Secondary Picket Under Section 8(b)(4)(ii)(B) of the National Labor Relations Act?*, 28 *CARDOZO L. REV.* 1519, 1524-25 (2006). A Google image search for “Scabby the Rat” provides numerous examples. See Scabby the Rate Images, *GOOGLE IMAGES*, <https://images.google.com/> (enter “Scabby the Rat” into the search query bar) (last

find it scary, another person might find it hilarious, but the hilarity might change if little kids are in-tow. Universal rules about fear's connection to coercion, as even philosophers and the Supreme Court have stated, are hard to come by.²³⁹

There is another hitch. When it comes to work, fear is unavoidable. That is not because employers are intrinsically unkind, unpleasant, or difficult. It's because of their authority. Advocates and some judges have long considered the psychic effects of workplace authority figures,²⁴⁰ but we now can prove that "authority" translates into fear. Recent organizational studies scholarship reveals that in hierarchical settings, status differences are scare triggers.²⁴¹ The effect's origin remain up for debate,²⁴² but one early consensus is that the response is automatic and present even in ostensibly non-threatening circumstances, like asking a question or making a suggestion.²⁴³ As the formative study concluded, "merely occupying the *role* of a dominant group member (boss) — along with the authority cues surrounding the role — is enough to sometimes signal 'threat' and activate a fear-based response."²⁴⁴ Follow-up projects have shown that when asked to explain why a supervisor is intimidating, workers point more often to

viewed Oct. 16, 2018).

²³⁹ See Kim, *supra* note 61, at 433-34 (detailing the Supreme Court's skepticism of early human trafficking cases linking "climate[s] of fear" to psychological coercion absent "objective criteria").

²⁴⁰ See, e.g., *NLRB v. Federbush Co.*, 121 F.2d 954, 957 (2d. Cir. 1941) (Hand, J., dissenting) ("Language may serve to enlighten a hearer, though it also betrays the speaker's feelings and desires; but the light it sheds will be in some degree clouded, if the hearer is in his power. Arguments by an employer directed to his employees have such an ambivalent character; . . . so far as they also disclose his wishes, as they generally do, they have a force independent of persuasion."); Becker, *Union Representation*, *supra* note 43, at 565 ("[T]he central issue that employer workplace campaigning raises is not one of speech or discrimination, but rather one of authority."); James J. Brudney, *Neutrality Agreements and Card Check Recognition: Prospects for Changing Paradigms*, 90 IOWA L. REV. 819, 832 (2004) ("When an employer delivers a series of forceful messages that unionization is looked upon with extreme disfavor, the impact upon employees is likely to reflect their perceptions about the speaker's basic power over their work lives rather than the persuasive content of the words themselves.").

²⁴¹ See generally Kish-Gephart et al., *supra* note 205, at 174 ("[People] will readily experience fear in situations in which hierarchy is salient, as in most work organizations.").

²⁴² The explanations encompass evolutionary (high-status means relational and resource power), learned (bosses always lash out), and socialized (from childhood, culture, or the job itself) factors. See *id.* at 173-79.

²⁴³ See *id.* at 173-75.

²⁴⁴ *Id.* at 174.

the person's "place in the hierarchy" than "specific attributes of or experiences with that boss."²⁴⁵ And while we often think of fear as something naturally time-limited, emotion science confirms that workplace fear can indeed persist and impact decisions over time.²⁴⁶

C. Regulating — and Measuring — Coercion Through Control

The upshot is that while fear may be the best description of coercion, it may not be the best basis for regulating it. But if we start from the premise that hierarchies make varying degrees of workplace fear unavoidable, perhaps labor law should be less concerned with identifying it and more concerned with mitigating it. And if we also accept that when unions interact with others fear is less pervasive but certainly possible, perhaps the law should focus not on mass categories like pickets but the narrow instances where fright is most likely to arise. The fix in both cases is the concept of "control." The best part is, it's measurable.

1. Control as a Fear Antidote

In the literature, control is "the belief that one has a response available that can influence the aversiveness of an event."²⁴⁷ Key terms in that definition are "belief" — because whether someone actually has an effectual response doesn't change control's effects — and "influence," which refers more to the perceived power to lessen an unpleasant impact in the moment than to fundamentally alter an underlying set of facts going forward.²⁴⁸ People appraise the amount of

²⁴⁵ *Id.* Interestingly, the authors note that while "those who work in hierarchies attribute power . . . to a superior's formal position . . . [the] power is likely to be only loosely related to the negative force a superior is actually able (or inclined) to wield." *Id.* A worker's "sensing mechanism," in other words, is "set to detect threat of dominant individuals without concern for accuracy." *Id.* This, in turn, creates a "low threshold for activation." *Id.*

²⁴⁶ This is in large part because, at work, fear's "target or cause" — management — is around all the time. Jean-Francois Coget et al., *Anger and Fear in Decision-making: The Case of Film Directors on Set*, 29 EUR. MGMT. J. 476, 478 (2011); see also Martin P. Paulus & Angela J. Yu, *Emotion and Decision-making: Affect-driven Belief Systems in Anxiety and Depression*, 16 TRENDS COGNITIVE SCI. 476, 477 (2013) (stating that emotions "influence the value and weight computation of available" choices and that "these computations are dynamically adjusted based on the environment").

²⁴⁷ Pamela L. Perrewe & Daniel C. Ganster, *The Impact of Job Demands and Behavioral Control on Experienced Job Stress*, 10 J. ORGANIZATIONAL BEHAV. 213, 215 (1989).

²⁴⁸ See *id.*

control they have over a situation naturally and automatically.²⁴⁹ Scholars have suggested, for instance, that in the presence of authority we make “intuitive” judgments about the things we can probably get away with versus the actions that are likely to lead to rebuke.²⁵⁰

But for labor law purposes, control’s most meaningful quality is that it is a fear antidote. Where a threatening stimulus is even remotely in the air, fear’s intensity is mediated by one’s sense of control over the situation. In short, if perceived control is high, fear will be low; if perceived control is low, fear will be high.²⁵¹ The studies in this area are colorful and telling. A great way to relax dental patients awaiting the drill and other sharp objects? Give them a “stop” button that confers absolute control over the spins, twists, and pokes.²⁵² In experiments the button not only reduces fear before and during procedures, it increases patients’ tolerance for pain — even though most subjects never actually use it.²⁵³ With or without a button, doctors know that a mere warning about impending pain — the old, “you may feel a little discomfort,” trick — imparts a sense of preparatory control that calms.²⁵⁴

Various mechanisms underlying this effect have been developed in the literature, but a theme seems to be that control translates into feelings of self-agency or “-efficacy,” which helps people cope with fears and anxieties by building confidence that they can “minimize maximum danger” through their own actions.²⁵⁵ This coping idea has

²⁴⁹ See Kish-Gephart et al., *supra* note 205, at 169; see also Perrewe & Ganster, *supra* note 247, at 215 (suggesting “there may be an intrinsic need to control the environment”).

²⁵⁰ See RICHARD SENNETT, *AUTHORITY* 19 (1980) (“Of authority it may be said . . . that it is an attempt to interpret the conditions of power, to give the conditions of control and influence a meaning . . .”), *cited in* Kish-Gephart et al., *supra* note 205, at 169.

²⁵¹ See Robin L. Nabi, *Discrete Emotions and Persuasion*, in *THE PERSUASION HANDBOOK* 289, 289-308 (James Price Dillard & Michael Pfau eds., 2002) (“Fear is generally aroused when a situation is perceived as both threatening to one’s psychical or psychological self and out of one’s control . . .”); Kish-Gephart et al., *supra* note 205, at 169 (“[T]he intensity of the fear experience is related to the degree of perceived uncontrollability (i.e., the threat is seen as greater when uncontrollability is higher).”).

²⁵² See ROGER BROWN, *SOCIAL PSYCHOLOGY: THE SECOND EDITION* 645-46 (1986).

²⁵³ See *id.* at 646.

²⁵⁴ See *id.* at 646-48 (“Signals that warn of something unpleasant are intended to provide a kind of control by enabling one to anticipate discomfort and somehow or other get ready for it.”).

²⁵⁵ Here, I am blending Albert Bandura’s pioneering work on control, self-efficacy, and fear, see, e.g., Albert Bandura, *Self-Efficacy Mechanism in Human Agency*, 37 *AM. PSYCHOLOGIST* 122, 136-37 (1982) (“[P]erceived self-efficacy operates as a cognitive

been portrayed powerfully in a series of experiments involving one of the more notoriously control-deficient settings, the nursing home. In the most famous study, residents on two different floors were provided with relatively subtle cues to either enhance or diminish their perceptions of day-to-day control.²⁵⁶ The high control floor, for instance, was told that, “You should be deciding how you want your room to be arranged — whether you want it to be as it is or whether you want the staff to help you rearrange it.”²⁵⁷ The other floor heard: “We want your rooms to be as nice as they can be, and we’ve tried to make them that way for you.”²⁵⁸ Other signals were more direct. Those on the high control floor got to choose whether to see a movie and, if so, when.²⁵⁹ They were also offered a choice of plants and told that it was up to them to take care of it.²⁶⁰ Residents on the other floor were assigned a “movie night” and handed a plant to be watered by staff.²⁶¹

In the words of the eminent social psychologist Roger Brown, the results of the study were “embarrassingly good.”²⁶² Though both floors tested equally at the start, after three weeks it was as if the high control group had been switched with a team of vigorous, sociable, and motivated nursing home all-stars. Relative to the other floor, they spent significantly more time conversing with neighbors, interacting with outside visitors, and talking with staff.²⁶³ To statistically significant degrees they also watched more movies and participated in more activities, including a jelly-bean-guessing contest, by a ten to one margin.²⁶⁴ Amazingly, at the end of the study specialists judged every

mechanism by which controllability reduces fear arousal . . .”), with the “[m]inimax hypothesis,” where control reduces fear because the person “attributes the cause of relief to a stable, internal factor — such as his own response,” as opposed to “some unstable, external factor.” Suzanne M. Miller, *Controllability and Human Stress: Method, Evidence and Theory*, 17 *BEHAV. RES. & THERAPY* 287, 295 (1979). For a fuller accounting of the mechanisms underlying control’s impact on fear, see SHIRLEY FISHER, *STRESS AND STRATEGY* 27-37 (1986) (describing various “control typologies”).

²⁵⁶ See BROWN, *supra* note 252, at 651. For the original study, see generally Ellen J. Langer & Judith Rodin, *The Effects of Choice and Enhanced Personal Responsibility for the Aged: A Field Experiment in an Institutional Setting*, 34 *J. PERSONALITY & SOC. PSYCHOL.* 191 (1976).

²⁵⁷ BROWN, *supra* note 252, at 651. For the full speeches, see Langer & Rodin, *supra* note 256, at 193-94.

²⁵⁸ BROWN, *supra* note 252, at 651.

²⁵⁹ See *id.* at 652.

²⁶⁰ See *id.*

²⁶¹ *Id.*

²⁶² *Id.* at 653.

²⁶³ See *id.*

²⁶⁴ See Langer & Rodin, *supra* note 256, at 196-97.

high control resident but one psychologically “improved,” while the psyches of seventy-one percent of the low control residents had worsened.²⁶⁵ The coping advantage remained during an eighteen-month follow-up, at which point the low control floor reported double the number of deaths.²⁶⁶

Now, employees are not nursing home residents. But control’s emotion buffering qualities have also been found to extend to a variety of workplace-specific frights, anxieties, and stressors.²⁶⁷ Perceived control reduces fears associated with downsizing, lightens the mood in stressful environments, improves productivity, sharpens performance, and ramps up worklife satisfaction overall.²⁶⁸ As one early study summarized, “there is rather compelling evidence that, in general, control is associated with a myriad of positive outcomes.”²⁶⁹ The bottom-line is that where it exists, fear dissipates, and that is true on-the-job and off.

While this is an important insight, how it might translate into a workplace regulatory system is not necessarily obvious. Answering that question starts with one of control’s less academic virtues: people relate to it in ways that are measurable.

2. Toward a Control-Based System of Coercion Regulation

Here’s a thought experiment: think back to a time in your life when you felt fear, but something happened and the feeling lessened. Maybe peers were pressuring you to try a roller-coaster, and then you spotted

²⁶⁵ *Id.*

²⁶⁶ See BROWN, *supra* note 252, at 652-53.

²⁶⁷ See, e.g., Mark E. Johnson et al., *Moderating Effects of Control on the Relationship Between Stress and Change*, 33 ADMIN. & POL’Y MENTAL HEALTH & MENTAL HEALTH SERVS. RES. 499, 499 (2005) (“Several research traditions in organizational psychology are based on the assumption that increased employee work control is associated with better work performance and lower levels of stress.”); E.J. Peacock & P.T.P. Wong, *Anticipatory Stress: The Relation of Locus of Control, Optimism, and Control Appraisals to Coping*, 30 J. RES. PERSONALITY 204, 218 (1996) (“[C]ontrol appraisals emerged as better predictors of coping than optimism and [personality factors implicating control] across all three stressors,” including fears of unemployment.); Perrewe & Ganster, *supra* note 247, at 225 (“[J]obs perceived as containing low levels of personal control lead to psychological anxiety.”).

²⁶⁸ See, e.g., Esther R. Greenglass & Ronald J. Burke, *Hospital Downsizing, Individual Resources, and Occupational Stressors in Nurses*, 13 ANXIETY, STRESS, & COPING 371, 386 (2000) (“Present findings showed that high self-efficacy contributed to lower distress in nurses who were experiencing hospital restructuring.”); Johnson et al., *supra* note 267, at 500 (“[I]ncreased worker perceptions of job control had positive effects on mood, task performance, and task satisfaction.”).

²⁶⁹ Perrewe & Ganster, *supra* note 247, at 215.

the “closed for maintenance” sign. Or you were starting school in a new town, but you learned the smiley neighbor down the street was in your grade and you asked her to sit with you at lunch on the first day. Or you feared giving a speech, but then you started practicing on a sympathetic audience.

In these and many other scenarios, the emotional turning point is related to a changed or emergent sense of control. Life was happening “to us,” and it felt scary. But then something intervened — or you intervened — and it suddenly felt like life was happening “by us.” Things still felt scary, but maybe not as much. While research suggests these sorts of control perceptions can arise internally and relate to personality characteristics,²⁷⁰ they can also be linked to concrete changes in circumstances: the shuttered rollercoaster meant spins on the gentler Tilt-A-Whirl; the lunch invitation avoided an anxious search for a free cafeteria seat; the test run proved it was possible to stand behind a podium without shaking.

That we can point to or even tell stories about these sorts of control-based pivots is, from a regulatory perspective, key. It means that the control analysis is fundamentally external, and that other people, like judges, can sometimes survey the landscape for control too. I use the word “survey” advisedly. Whether it is a supervisor’s speech or a street corner protest, assessing the interior life of the onlookers is not the Board’s strength. But the agency can take a hard look at a setting and literally count the options for coping. How the agency might translate that insight into an administrative procedure, and then incorporate it into eighty-some years of existing precedent, is mapped out below.

a. The Two-Step Procedural Approach

i. Step One: Credible Fear

A fear-based approach to identifying coercion, and a control-based approach to regulating it, would have two procedural steps. First, the General Counsel (“GC”)²⁷¹ would need to establish some factual basis

²⁷⁰ This is known in the literature as “locus of control.” See, e.g., Maureen J. Findley & Harris M. Cooper, *Locus of Control and Academic Achievement: A Literature Review*, 44 J. PERSONALITY & SOC. PSYCHOL. 419, 419 (1983) (“Locus of control refers to a person’s beliefs about control over life events. Some people feel personally responsible for the things that happen to them. . . . Others feel that their outcomes in life are determined by forces beyond their control (e.g. fate, luck, and other people).”).

²⁷¹ The NLRB General Counsel operates independently from the Board’s adjudicatory functions and is responsible for prosecuting unfair labor practices. See

for the Board to conclude that whoever was allegedly coerced credibly feared something relevant to the Act's prohibitions.²⁷² The “relevancy” limitation is important. A consumer might avoid a storefront demonstration for fear of appearing on the evening news, and a checkout clerk might fear co-workers' ire if she skips the organizing meeting, but the NLRA does not regulate exogenous workplace risks, and it protects standard social scorn. Instead, the GC would be looking for the sorts of fears the Board has always policed. In an 8(a)(1) context, that is a credible fear of employer backlash for organizing activities. For section 8(b)(1)(A), that is fear of violence, also in retaliation for section 7-related conduct.²⁷³ In section 8(b)(4) scenarios, that is business disruption or, for those approaching the scene, “confrontation in some form.”²⁷⁴

As discussed previously, while the Board has sometimes opined on the presence or impact of emotions on workplace choices, the moves are tentative and halting. Given that, but especially acknowledging the varieties, vagaries, and individual differences in emotions, as a practical matter this would be a light burden and a light inquiry. But since fear is the very substance of coercion — the engine and the insides of irrational decision-making — establishing its existence is indispensable theoretically.

In the usual course, the showing would be through testimony. At work and in an 8(a)(1) context, this would likely be mechanical, with the investigating Board agent eliciting an affirmation of felt fear and its

generally *The General Counsel*, NAT'L LAB. REL. BOARD, <https://www.nlr.gov/who-we-are/general-counsel> (last visited Sept. 18, 2018).

²⁷² Step One is envisioned as a credibility assessment to ensure that the party subjectively experienced fear. While this raises the possibility of a charge based on fear that is genuinely experienced but unreasonable, or fear that is the consequence of the person's unique sensitivity, it is unlikely such charges would survive the control-based second step, which is objective. The Region would have little incentive to issue a complaint based on unreasonable or highly particularized fears.

²⁷³ As noted, section 8(a)(1) violations require a nexus between employer threats or punishments and union-related activity. *See* 29 U.S.C. § 158(a)(1) (2018). Section 8(b)(1)(A), similarly, is not a “general police power covering all acts of violence by a Union, but rather was intended to bring within its scope only such acts of violence as were directed against the exercise . . . of rights protected by [s]ection 7.” *NLRB v. Furriers Joint Council of New York*, 224 F.3d 78, 80 (2d Cir. 1955) (referencing § 158(b)(1)(A)).

²⁷⁴ Here “confrontation” refers to the Board's most recent picketing formulation, which, considers it a “necessary condition.” *In re United Bhd. of Carpenters & Joiners of Am., Local Union No. 1506*, 355 N.L.R.B. 797, 802, 805-06 (2010) (describing “non-picketing conduct to be coercive only when the conduct . . . could reasonably be expected to directly cause[] disruption . . .”).

connection to employer conduct included in the standard affidavit.²⁷⁵ However, even without a direct statement (one could imagine a subtle threat causing a worker to instead say something like, “It made me nervous,” or “I lost some sleep over it”),²⁷⁶ the agency could round-out the showing with other evidence to meet the low bar. The agency’s expertise, longtime focus on the dynamics of economic dependence, and reference to much of the social, management, and emotion science evidence already discussed would allow it to construct a persuasive case that fear was also present in some degree.²⁷⁷

Testimony would play a more pivotal role in alleged violations of 8(b)(1)(A) and 8(b)(4), primarily to sort non-actionable social fears from credible fears of violence or protest-related confrontations. Someone may legitimately experience fear amid a doorstep conversation with an organizer, but the GC would need to be convinced the fear related to impending physical aggression and not frayed relationships or lonely Saturday nights. Demonstrations, likewise, can certainly be scary or disruptive, but the vibes at most range from prosaic to convivial. People often bring their kids.

Once again, ambiguous or equivocal statements could be supplemented with indirect proof or even social science. In generic solicitation or protest situations particularized evidence would probably be necessary, like an immediate history of local

²⁷⁵ By “mechanical,” I mean that the agent is simply attempting to elicit the surrounding facts plus a reflection on how the worker felt in the moment. It would not require something like the nuanced and multi-faceted analysis of fear “credibility” at issue in initial asylum determinations. See generally Scott Rempell, *Credibility Assessments and the REAL ID Act’s Amendments to Immigration Law*, 44 TEX. INT’L L.J. 185, 190-94 (2008) (describing this process).

²⁷⁶ Perhaps the most obvious example of a ULP where a worker might express an emotion other than fear is the “promise of benefit.” See GORMAN & FINKIN, *supra* note 77, at 238-39. Obviously, a worker promised an unexpected raise or other improved condition might be just as likely to express satisfaction or even delight. Tellingly, in such cases the Board effectively applies a circumstantial analysis that usually detects fear’s presence nevertheless. See *NLRB v. Exchange Parts*, 375 U.S. 405, 409 (1964) (warning of the “danger inherent” in promised benefits in that workers are likely to fear that “future benefits . . . may dry up if [the employer] is not obliged”).

²⁷⁷ Literature on the relationship between authority and endemic fear, examined above, would be particularly relevant, see *supra* notes 240–46, as would work by Peter Cappelli and other industrial relation scholars who have called the prevailing mode of workplace governance the “frightened worker” model. PETER CAPPELLI, *THE NEW DEAL AT WORK* 131 (1999); see also Michael M. Oswald, *The Right to Improvise in Low-Wage Work*, 38 CARDOZO L. REV. 959, 1012-14 (2017) [hereinafter *The Right to Improvise*] (canvassing studies, including ethnographies, depicting fear as a modern management style).

demonstrators getting aggressive or that a worker and an organizer coach rival Little League teams and once nearly came to blows.²⁷⁸

ii. Step Two: Control Options

Ultimately, the low burden's effect will be to funnel most complaints to the much more important, and substantive, second step. Here, the Board's analysis is objective. The second step requires the agency to put itself in the shoes of the allegedly coerced employees, employers, or consumers and ask: *how much control over the situation did they have?* Put another way, what were a reasonable person's options for coping with whatever was causing the fear by avoiding it or even changing it? In most cases, the analysis will lead to something measurable. Control's centrifugal dynamic will allow factfinders to list the ways that a person might reasonably perceive or exert agency in a stated scenario. More control options mean less fear, more rationality, and less coercion. Fewer control options mean more fear, less rationality, and more coercion.

The principle is reflected most clearly during work. Because there is no control. It's an at-will world, so always the possibility of discharge for any reason, even no reason, lurks.²⁷⁹ From there, management can order workers to do pretty much anything it wants,²⁸⁰ authority that never ebbs and always flows.²⁸¹ Most salient, though, is that

²⁷⁸ See Kish-Gephart et al., *supra* note 205, at 171, 176 (describing how “encounter[ing] relevant cues reminiscent” of past threats can trigger fear).

²⁷⁹ See generally Note, *Protecting Employees At Will Against Wrongful Discharge: The Public Policy Exception*, 96 HARV. L. REV. 1931, 1933-37 (1983) (describing the origin and operation of the at-will rule, along with its primary exceptions, which include firings based on race, sex, age, and disability or in retaliation for reporting an employment violation).

²⁸⁰ There are exceptions for things that would violate a clearly-defined public policy, but in practice “the protection it extends to employees is minimal.” *Id.* at 1936-37; see Clark Bros., 70 N.L.R.B. 802, 805 (1946) (discussing employers' plenary “ability to control their actions during working hours”). Amazingly, some of this power extends to off-work activities. See Lewis L. Maltby & Bernard J. Dushman, *Whose Life is It Anyway — Employer Control of Off-Duty Behavior*, 13 ST. LOUIS U. PUB. L. REV. 645, 646 (1994) (discharging employees for “off-duty drinking, motorcycling, cholesterol level, and obesity”).

²⁸¹ See generally ELIZABETH ANDERSON, *PRIVATE GOVERNMENT: HOW EMPLOYERS RULE OUR LIVES AND WHY WE DON'T TALK ABOUT IT* xi (2017) (depicting employers' “arbitrary and unaccountable power over workers” as akin to dictatorship); see also Becker, *Union Representation*, *supra* note 43, at 561 (“The realities of employer authority and employee dependence . . . exist during the entire workday and in every site at the workplace.”). The NLRA provides a slim respite for pro-union solicitations and distributions during break-times, but in many states breaks are not required and,

meaningful control intercessions do not exist. Employees cannot just inject agency onto the scene. They cannot skip the meeting, walk away from the hallway lecture, or avoid the watchful eye. It's like every day is the first day of school, but no matter what you do, the lunch seats are always taken. It is true that if workers understand the law (a big "if"), the NLRA does offer some options for push-back, but the underlying right is tailored more to all-out, condition-specific protests than to fixing how working time — including employer anti-unionism — is structured.²⁸² Similarly, while the possibility of unionizing might supply some sort of vague control perception, the risky, confrontational, drawn-out work of doing it makes any initial, fear-reducing benefits more theoretical than real.²⁸³

For this reason, where the second step prompts detailed analysis it will again usually be in the section 8(b)(1)(A) or 8(b)(4) context. And the relevant facts will be something like the answers to descriptive questions one might pose after learning that a friend just had an unexpected, even hair-raising, encounter: *Were you surrounded? What happened when you turned away? Could you have waited a few minutes? Did you ask them to leave? Were you in danger? Could you have taken the left on Elm Street instead? But, was there still a clear path to walk through? Could you have crossed the street instead?* The goal is to take a snapshot of the allegedly coercive encounter and populate it with as many realistic or reasonable options for coping as possible.

Asking the Board to search for — literally, count — realistic control opportunities leads to a question of line-drawing. How many options should be available before the Board deems a situation non-coercive? I suggest one. That is, a coercive encounter means that the employee,

if they are, workers still do not get them. See *The Right to Improvise*, *supra* note 277, at 1008-112. The real options, particularly for many women and minorities, are acquiesce to day-to-day humiliations or quit. See Catherine L. Fisk, *Humiliation at Work*, 8 WM. & MARY J. WOMEN & L. 73, 84-89 (2001).

²⁸² Creating kinks in management's ability to direct workers this way or that generally requires a flat-out refusal to perform labor, which opens the door to being replaced. See *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333, 345-46 (1938). Actions short of that are likely to be deemed an illegal "refusal . . . to accept the terms of employment set by the employer without engaging in a stoppage . . ." *Elk Lumber Co.*, 91 N.L.R.B. 333, 337 (1950). As the Board pronounced long ago: "We are aware of no law or logic that gives the employee the right to work upon terms prescribed solely by him." *Id.*

²⁸³ See *supra* note 29 and accompanying text. And as David Feller has stated, even where successful, unionization still rests on "an acceptance of the authoritarian nature of the employment relationship." David Feller, *A General Theory of the Collective Bargaining Agreement*, 61 CALIF. L. REV. 663, 737 (1973); see also Story, *supra* note 15, at 413.

employer, or bystander had zero reasonable ways to cope with the situation by avoiding it or actively lessening its impact. Cabining coercion to situations of no control, instead of some other number, is less scientific than an attempt to balance NLRA principles, administrative competency, and the research about how people make decisions. If the Act uses coercion to get at mental states primed for choices that go against true will, and emotion science says that state is fear, there is no clearer case of coercion than a decision made in fear without any perception of control. Once even a single coping option exists — walking around, shutting the door, waiting a minute — fear’s subjective intensity is mitigated, but the degree to which it is mitigated is also instantly up for debate. As discussed, that is not a debate the agency should be having. Fear with no control, instead of fear with a little control, or some control, is the brightest, fairest line.

Arguably this is a rather narrow treatment of coercion, reminiscent perhaps of rational basis review, where a law challenged under equal protection is valid “if any state of facts reasonably may be conceived to justify it.”²⁸⁴ Substituting “facts” with “perceived control” where “it” is putative coercion captures the analogous ease of fulfilling the test. It would not be difficult, for example, to come up with a few coping options for shoppers confronted by the currently legally coercive scene of a few people standing in front of a neutral business with pickets. Yet, in other ways the test expands coercion well past its present parameters. During worktime, where there is no control, every instance of employer anti-unionism is likely to be considered coercive.

Both views are basically correct. In the purest form, the two-step proposal would surely limit 8(b)(4) violations, vastly expand the universe of potential 8(a)(1) misconduct, and probably hold section 8(b)(1)(A) harmless. But “purity” is not a prerequisite for progress. What the literature teaches about fear, control, and how they interact can meaningfully inform how the Board thinks about coercion in the future, even if the suggested two-step test does not become new black letter law. This contingency is most likely to apply at work, in the 8(a)(1) context, where control’s vanishing is so complete that the proposal’s value may come not from its direct application but from how its underlying principles point to some control-based legal reforms. In 8(b)(1)(A) or 8(b)(4) situations, more seamless application of the two-steps may be possible. The Article ends with consideration of these possibilities, plus objections.

²⁸⁴ *McGowan v. Maryland*, 366 U.S. 420, 425-27 (1961).

3. Embedding Control-Based Regulation into Existing Coercion Doctrine

a. 8(a)(1) and the Opt-Out Option

There are many ways the Board could start to incorporate control principles into allegations of section 8(a)(1) coercion. The most straight-forward would be to simply apply the two-step test. There would be no suspense. With fear endogenous and control non-existent, every credible charge, from an out-and-out threat to a note of union disparagement, would come up coercion. Now, although this direct approach is theoretically coherent, it is obviously not going to happen. Even scholars who agree that work is per se coercive²⁸⁵ do not advocate a speech bar, and courts would not allow it anyway.

Nonetheless, it is worth pushing the hypothetical a bit further, because how employers might react in a world where the General Counsel could justify 8(a)(1) complaints with evidence of a control vacuum at work highlights the Board's secondary, more pragmatic,

²⁸⁵ This includes Alan Story and Craig Becker, though both hedge the point somewhat. Story calls for recognition of work's "inherent coerciveness" and states that employees are perpetual "targets of coercion," yet he also notes "some play" in the system for rational choice. Story, *supra* note 15, at 412-14. His solution, though, points to coercion's inevitability: "the judicial and policy-making exercise should be one . . . of line-drawing and choosing which coercion . . . is permissible and which coercion is not." *Id.* at 414. Becker suggests, but does not fully assert, that "all employer speech to employees during working hours, at the workplace, is speech to a captive audience" and thereby coercive. Becker, *Union Representation*, *supra* note 43, at 600; *see also id.* at 561 ("The realities of employer authority and employee dependence . . . exist during the entire work day and in every site at the workplace."). His answer is more "balanced access" to both pro- and anti-union speech. *Id.* at 593. Ironically, the clearest expression of the notion comes from the NLRB itself, which in its inaugural Annual Report labeled employer speech "poison [in] the minds of workers" that, "even when it contains no direct or even indirect threat, is aimed at the worker's fear of loss of his job." 1 NLRB ANN. REP. 73 (1936) <https://www.nlr.gov/sites/default/files/attachments/basic-page/node-1677/nlr1936.pdf>. The agency's fix was management neutrality, something it vigorously pushed through the early 1940s, even in the face of express Supreme Court disapproval in 1941. *Compare* NLRB v. Va. Elec. & Power Co., 314 U.S. 469, 477 (1941) (holding that an employer is "as free now as ever to take any side it may choose"), *with* Am. Tube Bending, 44 N.L.R.B. 121, 129-130 (1942) (reaffirming a commitment to "complete [employer] neutrality with respect to an election"). *See also* GORDON LAFER, NEITHER FREE NOR FAIR, AM. AN AMERICAN RIGHTS AT WORK REPORT 2 (2007), <http://www.jwj.org/wp-content/uploads/2014/04/Neither-Free-Nor-Fair-FINAL.pdf> ("When employers speak out, employees always listen carefully for even the subtlest hints as to what kind of behavior will be rewarded or punished. . . . [S]uch conversations are *inherently* coercive . . ."), <http://www.jwj.org/wp-content/uploads/2014/04/Neither-Free-Nor-Fair-FINAL.pdf>.

path. Take a manager's opinion that "unions are a bad deal for workers," something *Gissel* protects but that without more facts a two-step analysis might well find coercive. The employer could settle the complaint, or it could try to ward it off by pointing to at least one workplace policy that frees listeners to avoid or mitigate the message. That might mean inviting the union in to offer rebuttals on company time or allowing workers equal rights to solicit and distribute pro-union messages during worktime.

The point is not that this scenario is realistic,²⁸⁶ but that instead of newly parsing 8(a)(1) investigations into two steps, the agency could itself scan the workplace for logical places to insert isolated nodes of worker control right now. That is not going to eliminate fear or necessarily limit overall coercion all that much, but it would enhance rationality in certain settings and, more deeply, represent a first attempt at fixing the existing chasm between control on-the-job and off of it.

Where might the agency start? With a simple principle: the chance to say "no." The power to opt-out, to insulate oneself from a situation or conversation at the outset is control's "ground-zero." The right to object to movie nights, plants, and cookie-cutter room arrangements was the psychological elixir in the famous nursing home study. The calming power of saying "yes" — or, "well, on second thought, no thanks" — is why hospitals sometimes let patients administer their own analgesics, with studies showing that a personal bedside button can lead to less anxiety, less pain, and, often, less medication.²⁸⁷

Not only is this insight easy to apply at work, it pervades a reform that many have long pressed: making mandatory anti-union meetings *not* mandatory.²⁸⁸ This is partly because the tactic is so pervasive —

²⁸⁶ That stated, "balanced access" and equity in the solicitation and distribution of pro- and anti-union sentiments are ideas that others have indeed pushed. Becker, *Union Representation*, *supra* note 43, at 593.

²⁸⁷ The vivid control-based rhetoric contained in a patient pamphlet produced by the University of Chicago Hospital System underscores this effect. UNIV. OF CHI. HOSPS., A GUIDE FOR PATIENT-CONTROLLED ANALGESIA http://www.uchospitals.edu/pdf/uch_015755.pdf (last visited Oct. 17, 2018) ("**You** are in control of your own pain relief. . . . Use what you need to achieve a level of comfort, which only you can decide."); see Pamela E. Macintyre, *Safety and Efficacy of Patient-Controlled Analgesia*, 87 BRIT. J. ANAESTHESIA 36, 37-38 (2001) (detailing the effects of perceived pain relief control).

²⁸⁸ See, e.g., Becker, *Union Representation*, *supra* note 43, at 592-93 (advocating the reform as grounds for overturning an election); Matthew W. Finkin, *Captive Audition, Human Dignity, and Federalism: Ruminations on an Oregon Law*, 15 EMP. RTS. & EMP. POL'Y J. 355, 364 (2011) ("Employers do have a federally conferred right to express their views on unionization to their employees; but they have no federal right to

workers contend with around eleven formal gatherings per campaign — but surely also because in a world where coercion is ill-defined, being forced to do something you do not want to do is the cleanest case to make.²⁸⁹

What emotion science adds to the discussion is a way to locate forced listening at the extreme end of the coercion continuum, providing the Board substantive justification to take it on as a worst offender and try to fix it. Most already accept that the meetings are singularly terrifying. Board Members do not use phrases like “extremely devastating” to describe other lawful tactics; scholars marvel at the sheer strangeness of being “forced to sit and listen to opinions” inimical to one’s own; the agency itself once deemed every positive union right “meaningless” without a chance to avoid the gatherings, which among other industrialized nations are legal only in Turkey.²⁹⁰ Here I am providing an empirical basis to confront captive listening’s equally singular decision-making consequences. For if getting pulled from tasks and marched into conference rooms to learn how upset management is about this “union thing” is the essence of on-the-job impotence,²⁹¹ the right to respectfully bow out and keep working provides some concrete control-based armor.

Of course, it’s closer to chainmail than a chest plate. Even implicit awareness that management disapproves of the choice plus the absence of control in every other workday decision is enough to perpetuate fear. There are also some deeper issues, including whether an employer-convened meeting can ever be truly “voluntary.” The people who show up may be doing so only to avoid landing on an

compel attendance.”); Secunda, *Meetings Under the NLRA*, *supra* note 101, at 405-06 (proposing the reform and noting that employees could “voluntarily choose to hear the speech”).

²⁸⁹ Paul Secunda, *Addressing Political Captive Audience Workplace Meetings in the Post-Citizens United Environment*, 120 YALE L.J. FORUM 17, 22 (2010) [hereinafter *Workplace Meetings*] (emphasizing the tactic’s pervasiveness); *see also* 2 Sisters Food Grp., Inc., 357 N.L.R.B. 1816, 1825 (2011) (Becker, Member, dissenting) (“[I]nstructing employees to attend a meeting and informing them it is mandatory . . . threatens . . . discharge. This violates section 8(a)(1).”); Hartley, *supra* note 104, at 74 (“[F]inding that the captive audience tactic violates section 8(a)(1) is elementary . . .”).

²⁹⁰ Clark Bros., 70 N.L.R.B. 802, 805 (1946); David J. Doorey, *The Medium and the “Anti-Union” Message: “Forced Listening” and Captive Audience Meetings in Canadian Labor Law*, 29 COMP. LAB. L.& POL’Y J. 79, 80 (2008) (discussing the “very uniqueness” of the experience); Finkin, *supra* note 288, at 366-67; William B. Gould, *Independent Adjudication, Political Process, and the State of Labor-Management Relations: the Role of the NLRB*, 82 IND. L.J. 461, 484 (2007).

²⁹¹ *See, e.g., Leak Repairs, Inc.*, 241 N.L.R.B. 282, 283, 287-88 (1979).

implicit “Against Us” list, so the amount of perceived control conveyed by a non-attendance “right” could be quite minimal.²⁹² Similarly, forced listening comes in a variety of forms,²⁹³ and the ease of opting-out can vary. Management may call an all-staff meeting for a specific time; a supervisor may spot a small group, walk up, and start talking; or employees may suddenly find themselves in a one-on-one conversation. Though each scenario is equally “captive” in that the employee has no choice but to submit to the message,²⁹⁴ it is one thing for a worker to ignore an emailed, posted, or regularly-scheduled meeting, and quite another to look a superior in the eye and walk away.²⁹⁵

How an opt-out system should maximize perceived control given the slippery nature of “voluntariness” is a hard question without a wholly satisfactory answer. One option would be a rule that employers inform workers that skipping an announced anti-union meeting or exiting an impromptu group or one-on-one conversation where unionization comes up will not lead to retaliation.²⁹⁶ The Board already requires similar assurances in three other situations where employers want to discuss union-related issues with individuals,²⁹⁷ so

²⁹² As the dissent to *Peerless Plywood* stated: “When . . . ‘[f]ield studies indicate how deeprooted is the feeling among workers that their future welfare depends upon ‘not crossing the boss,’ there can be no demonstrable difference in the impact of an employer antiunion speech upon employees made on company time and the same speech made during the lunch hour” *Peerless Plywood*, 107 N.L.R.B. 427, 434 (1953) (Murdock, Member, dissenting).

²⁹³ See Hartley, *supra* note 103, at 94 n.161 (“There always will be employer workplace speech that is on the margins with respect to whether it constitutes a ‘captive audience meeting’ . . .”).

²⁹⁴ The law treats these three scenarios somewhat differently. As “massed assemblies” the first two fall under the *Peerless Plywood* proscription of forced worktime listening 24-hours prior to an election. See *Peerless Plywood*, 107 N.L.R.B. at 429. Because the individualized encounter is not massed it avoids that rule but is instead subject to a multi-factor coercion test. See *Suburban Journals*, 343 N.L.R.B. 157, 163 (2004) (analyzing a “one-on-one meeting” in an elections objections context); see *Rossmore House*, 269 N.L.R.B. 1176, 1178-79 (1984) (using “the totality of the circumstances” to consider the coerciveness of individualized “questioning”).

²⁹⁵ In fact, the Board has at times depicted an inverse relationship between group size and coerciveness, though for a reason — an alleged tendency toward “free and open discussion” in large gatherings — that bears little resemblance to modern captive audience meetings. See *Mead-Atlanta Paper Co.*, 120 N.L.R.B. 832, 834 (1958).

²⁹⁶ Paul Secunda advocates a similar approach in which employers could overcome a presumption of coercion in captive settings by offering a series of disclaimers about the purpose and expectations of the meeting. Secunda, *Captive Audience Speeches*, *supra* note 103, at 128-29, 145.

²⁹⁷ These include: where employers want to ask workers to appear in pre-election

this would create a blanket mandate for any sized group. Assurances, however, enhance control perceptions only to the extent that workers are genuinely “assured.” Whether perfunctory statements from people lacking any incentive to convey a sense of relief actually inspire confidence is, at least, questionable.

The better approach would be to separate the conveyance of the choice to opt-out from direct employer interaction, making it less fraught. Having a list of workers who do not want to hear anti-union speech, for example, would allow management to know not to even ask. From a slip of paper placed in a modified ballot box, to a break-room signature sheet, to a company website, there are several ways a list like that could be generated. The best option would be something created, maintained, and transmitted to employers by the NLRB itself. At any time, employees could use a computer or smartphone to access a standardized “opt-out” form on NLRB.gov, and employers or their representatives would then receive an automated weekly or daily email with an up-to-date batch of names.²⁹⁸ Not only would this approach avoid the specter of employer manipulation of the list, it would deepen perceptual control by supplying an efficient, non-confrontational, and, most crucially, reversible, on/off switch. Workers could opt-out when they want, but they could also opt back in when they want — and change course again after that.²⁹⁹ Control, over the most quintessentially fear-inducing factual setting in the unionization life-cycle, would be theirs.

campaign videos, see *Allegheny Ludlum Co. v. NLRB*, 301 F.3d 167, 173-74 (3d Cir. 2002); where employers want to test a union’s claim of majority support by polling workers, see *Struksnes Constr. Co.*, 165 N.L.R.B. 1062, 1062-63 (1967); and where employers need employee testimony to prepare for an NLRB or court proceeding, see *Johnnie’s Poultry Co.*, 146 N.L.R.B. 770, 774-76 (1964). When employers question workers about union allegiances, providing “assurances” about the non-threatening nature of the inquiry helps disprove coercion but is not necessarily required. See *Stoody Co.*, 320 N.L.R.B. 18, 18-19 (1995).

²⁹⁸ Presumably employers would voluntarily provide an email address for this purpose. If not, the first employee to fill out the form would prompt the appropriate NLRB Regional Office to contact the worker’s employer and request it. *The NLRB Process*, NAT’L LAB. REL. BOARD, <https://www.nlr.gov/resources/nlr-process> (last visited Sept. 20, 2018) (noting that unfair labor practices begin with charges filed at a regional office).

²⁹⁹ Some new employees, for example, might opt-out during their first week of work as a matter of course but later, once organizers arrive on the scene, decide that they are interested in gathering more information from a different source and reverse course. Of course, the effective date of these choices will be mediated by the frequency of the NLRB-transmitted lists.

An opt-out remedy is less extreme than it might seem. As recently as the 1980s, workers had a right to be free from even causal questioning about unions.³⁰⁰ The post-*Citizens United* period has sparked somewhat of a bottom-up renaissance in this line of thought, with a number of states seeking to replicate Oregon’s “Worker Freedom Act,” which lets employees avoid political — but also labor and religious — gatherings at work.³⁰¹ Finally, a main consequence of an opt-out regime could simply be to shift the primary persuasive medium from spoken to written speech. Printed materials have long been an employer favorite, but because letters, flyers, posters, and now email have built-in avoidance mechanisms — namely, the trash can, delete key, or just turning away — written propaganda already squares with the proposed system and might become more attractive.³⁰² In effect, employer persuasion could start to look like lawyer solicitation practices, where face-to-face encounters — “fraught with the possibility of undue influence, intimidation, and over-reaching” — are presumed to impair “reasoned judgment.”³⁰³ For state bar associations, the fix is effectively an opt-in regime, where lawyers reach out with letters, billboards, ads, and emails until someone requests in-person contact. At that point, the “prospective client has exercised a degree of control in the interaction . . . [and] concern about potentially coercive . . . communications in a personal interaction is reduced.”³⁰⁴

³⁰⁰ See *PPG Indus.*, 251 N.L.R.B. 1146, 1147 (1980) (finding “questions concerning employees’ union sympathies . . . to be coercive even in the absence of threats” because it “conveys an employer’s displeasure with employees’ union activity”), *overruled by* *Rossmore House*, 268 N.L.R.B. 1176, 1177 (1984); see also *NVF Co.*, 210 N.L.R.B. 663, 663-64 (1974) (dismissing “doctrine enunciated” in *Peoples Drug Stores*, 119 N.L.R.B. 634 (1957), that “urging” employees “to reject the union is in itself conduct which interferes” with free choice).

³⁰¹ Secunda, *Workplace Meetings*, *supra* note 289, at 17, 23; see also Hertel-Fernandez & Secunda, *Citizens Coerced*, *supra* note 7, at 12-15 (describing similar proposals); Paul M. Secunda, *Toward the Viability of State-Based Legislation to Address Workplace Captive Audience Meetings*, 29 *COMP. LAB. L. & POL’Y J.* 209, 211 (2008) (considering “whether . . . Worker Freedom Act legislation would be preempted by federal labor law”).

³⁰² Per the Department of Labor, over seventy percent of campaigns are “script[ed]” by anti-union consultants with a formula that includes “letters, flyers, leaflets, and emails that the employer distributes to its employees.” 81 *Fed. Reg.* 15924-01, 15926 (2016). *NLRB v. Gissel Packing*, labor law’s seminal speech case, itself involved numerous examples of written propaganda, including letters, pamphlets, and cartoons. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 588-89 (1969).

³⁰³ MODEL RULES OF PROF’L CONDUCT r. 7.3 cmt. 2 (AM. BAR. ASS’N 2013).

³⁰⁴ BOSTON BAR ASS’N ETHICS COMM., *LAWYER REFERRAL SERVICE PROCEDURE 1* (2012), <http://www.bostonbar.org/docs/ethics-opinions/opinion-2012-1.pdf?sfvrsn=4>.

b. 8(b)(1)(A) and 8(b)(4)

Because allegations of union coercion arise in contexts where fear is not necessarily inevitable, and control is sometimes possible, the two-step process applies most readily to sections 8(b)(1)(A) and 8(b)(4).

It would have no impact on prototypical 8(b)(1)(A) situations involving violence or threatened violence.³⁰⁵ Where an organizer assaults a worker or damages employee property,³⁰⁶ fear — apprehending violence — is self-evident, and control — avoiding or minimizing that danger — is already lost. Nothing changes if a punch or smashed taillight is only threatened. The danger of violence remains, and the looming, unpredictable nature of the threatened conduct means the danger cannot be effectively controlled.

The steps have greatest value in closer cases. Take, for example, two instances of union officials heatedly — but not violently — “bump[ing] abdomens” with dissident members during confrontations described in two separate decisions.³⁰⁷ On those facts alone, the fear step would be satisfied. Initiating physical contact easily establishes a credible case that the employee might have feared impending violence that could impact rationality over future union-related decision-making.

The analyses diverge, however, when the issue turns to control and the employees’ options for coping. In one instance an official “spotted” the employee standing in front of the workplace, yelled obscenities and, after walking over, “pushed him with his stomach” and “invited” the worker to punch him in the face.³⁰⁸ Very little about this situation suggests the worker had even one reasonable option to mitigate the fear. The most obvious fix — walking away — was seemingly foreclosed by the official’s interest in a physical altercation right there and then. The goading is strong evidence of that. Absent some other opening for effective relief from the tension, the worker’s realistic

³⁰⁵ See *supra* notes 113–15 and accompanying text.

³⁰⁶ See, e.g., *New Power Wire & Elec. Co. v. NLRB*, 340 F.2d 71, 72 (2d Cir. 1965) (assaulting employees); *Cablevision Sys.*, 312 N.L.R.B. 487, 493 (1993) (damaging an employee’s van).

³⁰⁷ Compare *Teamsters Local No. 115*, 4-CB-9164, 2005 WL 513519 (N.L.R.B. Mar. 1, 2005) (“[The member] testified that, when he had approached the stage area after the adjournment, others gathered around him and [the union official] bumped him with his stomach . . .”), with *Laborers Local 806*, 295 N.L.R.B. 941, 959 (1989) (“[The official] . . . pushed [the employee] with his stomach.”).

³⁰⁸ *Laborers Local 806*, 295 N.L.R.B. at 959.

choices involve fear capitulation, not control, either by fighting or disavowing his dissident status.³⁰⁹ This is coercion.

But what if the same type of hostile bump occurred after the employee “charged the stage” following a union presentation, “uttering a stream of curses” and prompting a bystander to tell him to “watch his mouth because children were present.”³¹⁰ That the employee personally initiated and prolonged the incident is some evidence that he felt himself to be in control of the situation, and hence empowered to end the interaction. The better proof, though, comes from the bystander’s request, which shows others close to the action ascribing the worker with primary agency over the encounter. That is, they believed he had the power to de-escalate the scene and could have even, presumably, left the auditorium. If so, that’s one option for control, and it’s not coercion.

Like all control considerations, each conclusion is factually contingent. A “bump” is not the same as a shove, which is closer to per se coercive violence. In the second decision, the bump is described as a “foreseeable reaction” to the employee’s “charge,” making it seem like a defensive maneuver actually reinforcing a sense of the employee’s dominance over the scene.³¹¹ And everything changes if either bump is paired with a threat. Whatever the surrounding circumstances, control quickly dissipates if the official adds something like, “I’m going to get you later,” suggesting violence is coming — by ambush.³¹²

Ambiguous statements are obviously the toughest calls. Take the real-life example of a section 8(b)(1)(A) complaint against an organizer collecting signatures who told a worker, “we’ll remember the guys who sign the cards [and] we’ll definitely remember the guys who don’t sign.”³¹³ That statement could certainly serve as the foundation for a credible fear of violence, and the trial judge indeed presumed the worker was “frighten[ed] into signing a card.”³¹⁴

The proposal here, however, would force a bit more evidentiary digging, because there are facts that could call that conclusion into doubt. “Remembering” non-signers could easily mean relational

³⁰⁹ As it turned out, the union official “broke it off, saying ‘Ah, get the hell out of here.’” *See id.* at 948.

³¹⁰ *Teamsters Local No. 115*, 4-CB-9164, 2005 WL 513519, at *1.

³¹¹ *Id.*

³¹² As it happened the official called the employee a “no-good Union member,” evincing anger but not an obvious threat of violence. *See id.*

³¹³ *Cablevision Sys.*, 312 N.L.R.B. 487, 489 (1993).

³¹⁴ *Id.* at 492.

isolation, like cold shoulders or dirty looks. Most people would “fear” those things, but those are social consequences of broken solidarity and fallout that labor law permits.³¹⁵ The organizer’s tone or personal relationship with the employee could also impact the evaluation.³¹⁶ Again, the standard is low, but establishing some baseline credibility that the worker feared conduct that section 8(b)(1)(A) guards against — namely, violence — is required.

From there, the control step tries to identify one realistic way for the employee to temper the fear. As noted, generally there is no escaping the cloud of a bona fide threat of violence, but cryptic statements without any retaliatory plan or details provide at least a slim chance of pinpointing some control. In this case, for example, the organizers were a rotating cast of union members from different businesses who were volunteering their “spare time” to collect signatures.³¹⁷ Often interactions with workers occurred in public and seemingly by happenstance, like leaning through a window “at a traffic light.”³¹⁸ Those facts raise at least the potential for an argument that the worker could reasonably avoid the organizer who made the statement — or any of the organizers — going forward. This would especially be true if the facility in question employed thousands in a huge metropolis (here, New York City) or if the worker had asked the organizer to be left alone and the organizer (even begrudgingly or rudely) affirmed the request. Evidence that the campaign rarely attempted to make more than one contact with any single employee would buttress the case. Proof that the campaign also stationed organizers at the employee’s only work entrance would probably destroy it.

The analytical arc is similar in 8(b)(4) situations, but more outcomes will depart from existing law. That’s because the two-step analysis cannot co-exist with a world where secondary picketing or its “functional equivalent” is coercion “per se.”³¹⁹ As is granted in all

³¹⁵ See *supra* notes 157–58 and accompanying text.

³¹⁶ The Board has recognized that tone is important in evaluating statements that could be perceived as threats, see *Manorcare of Kingston PA, LLC.*, 360 N.L.R.B. 719, 719 (2014) (rejecting alleged threats “made in a casual and even light-hearted fashion”). It also accounts for how workers differentially perceive persuasion from co-workers, union staff, and friends. *Phillips 66 (Sweeny Refinery)*, 360 N.L.R.B. 124, 129 (2014) (considering the existence of a “friendly relationship”); *Mastec North America, Inc.*, 356 N.L.R.B. 809, 810 (2011) (“Employees will ordinarily reasonably discount the bravado of co-workers . . .”).

³¹⁷ *Cablevision Sys.*, 312 N.L.R.B. at 488.

³¹⁸ *Id.*

³¹⁹ *Sheet Metal Workers’ Int’l Ass’n, Local 15 v. NLRB*, 491 F.3d 429, 437-38 (D.C. Cir. 2007) (“[U]nlike picketing [other conduct] . . . is ordinarily not coercive and

other substantive areas, picketing is not *necessarily* scary.³²⁰ To the extent the Board can find a bystander or employer who credibly attests to being afraid,³²¹ the fear is not *necessarily* uncontrollable. You might be able to go around it, use a different entrance, walk right through it, or even ask, “So, what’s everyone upset about?” The key inquiry is thus not about “symbolic barrier[s],”³²² but literal barriers: totally blocked entrances; impenetrable streets and sidewalks; or bystanders surrounded in every direction. Activity, in other words, the Board might call “mass picketing,” a term with “no specific or categorical definition” but that generally involves big demonstrations in small places without access, in, out, or around.³²³

The close cases are again the most illuminating. As for the fear step, a much-discussed scenario involved a costumed “Grim Reaper” leading a “prop coffin” around a sidewalk in front of a hospital to publicize malpractice suits impliedly linked to non-union labor.³²⁴ Death is, obviously, a touchy subject around hospitals, and in the abstract it is natural to assume, as the court reviewing the temporary 8(b)(4)(ii)(B) injunction did, that patients, families, and on-lookers were alarmed.³²⁵ But the record shows that should not have been assumed. Besides total disregard, the most common reaction to the Reaper appeared to be people walking “up to . . . inquire about the purpose of the demonstration.”³²⁶ One passer-by commiserated with the union and added a story about her own husband’s shoddy medical treatment, while another complained about the procession to a

therefore does not run afoul of section 8(b)(4)(ii)(B).”); *see also* *Kentov v. Sheet Metal Workers*, 418 F.3d 1259, 1265 (11th Cir. 2005) (collecting cases); *supra* note 136 and accompanying text.

³²⁰ *Sheet Metal Workers*’, 491 F.3d at 436 (picketing any non-labor grievance is “constitutionally protected and cannot be considered coercive”).

³²¹ At least in theory, picketing is synonymous with “confrontation,” which is potentially scary. *In re United Bhd. of Carpenters & Joiners of Am., Local Union No. 1506*, 355 N.L.R.B. 797, 802 (2010).

³²² *See Sheet Metal Workers*’, 491 F.3d at 438.

³²³ *Elec. Workers, UE Local 1150 (Cory Corp.)*, 84 N.L.R.B. 972, 1007 (1948); *see, e.g., Cablevision*, 312 N.L.R.B. at 492 (describing a “large number of demonstrators who converged on a small area”); *Kohler Co.*, 128 N.L.R.B. 1062, 1103 (1960) (“2,500 pickets . . . in front of the . . . plant moved in a double line along the sidewalk across the driveways and plant entrances, in both directions for two city blocks.”).

³²⁴ *Sheet Metal Workers*’, 491 F.3d at 432.

³²⁵ *See Kentov v. Sheet Metal Workers’ Ass’n*, 418 F.3d 1259, 1265 (11th Cir. 2005) (“This activity could reasonably be expected to discourage persons from approaching the hospital . . .”).

³²⁶ *See id.* at 1262.

security guard, but only because he “did not think it was appropriate.”³²⁷ None of this suggests a fear of confrontation.³²⁸

An older decision also involving another unconventional protest can make the same point about the fear inquiry, but from management’s perspective. There, several neutral retailers might reasonably have feared some sort of business disruption after spotting a hoard of union members suddenly walking through the door. In each case, it turned out to be a “group shop-in,” where members swarm check-out aisles with small items paid for in change or large bills.³²⁹ The court, viewing all facts interchangeably, had “little difficulty” labeling the tactic itself “coercion-based.”³³⁰ But, in fact, the credibility of claimed fear could have varied wildly. One protest involved fifty members in a Costco, a massive wholesaler that stocks thousands of items across four football fields of warehouse-space.³³¹ Its check-out process is famous for “lightning speeds.”³³² Other actions involved up to 125 members, local retailers with names like “Kappy’s Liquors,” and included evidence that customers “discouraged by the crush . . . left without transacting any business.”³³³ Kappy’s could probably satisfy step one, Costco maybe not, but each neutral deserved individualized attention.

A good case to consider section 8(b)(4) control principles is *Burns Detective Agency*, where between twenty to seventy union members “marched” with handbills “in an elliptical path immediately in front of the main [and only] entrance” of a trade show that had contracted with unorganized ushers.³³⁴ Though unable to agree on whether the conduct constituted picketing under then-current doctrine, the Board concluded that “establishment of the line of march so close to the arena entrance” made access “more difficult” and therefore was

³²⁷ *Id.*

³²⁸ Other facts, however, do. As the court noted, “a wife of a patient . . . who had died that morning became upset at seeing the demonstration and would not walk out to her car” until it dispersed. *Id.* That testimony would be enough to satisfy step one.

³²⁹ *Pye v. Teamsters*, 61 F.3d 1013, 1016-17 (1st Cir. 1995).

³³⁰ *Id.* at 1024.

³³¹ *Id.* at 1017; Karen Talley, *Costco Targets Mall Space to Expand its Reach*, WALL ST. J. (Aug. 25, 2010, 12:01 AM ET), <https://www.wsj.com/articles/SB10001424052748703447004575449414252053370>.

³³² KLM, *Costco Wholesale: A Warehouse Powerhouse*, HARV. BUS. SCH.: TECH. & OPERATIONS MGMT. (Dec. 6, 2015), <https://rctom.hbs.org/submission/costco-wholesale-a-warehouse-powerhouse/>.

³³³ *Pye*, 61 F.3d at 1017.

³³⁴ *Serv. & Maint. Emps., Local 399 (William J. Burns Detective Agency)*, 136 N.L.R.B. 431, 432 (1962).

“coercive to a very substantial degree.”³³⁵ Absent signs or any request that anyone turn back or avoid the area, the dissent called the scene coercive “only in a sophisticated sense,”³³⁶ gesturing toward what, based on what emotion science tells us about decision-making, is the important point: more difficult or not, everybody still had control over the situation. A whopping 4,000 people — exhibitors, arena officials, concession workers, contractors, and others — walked straight through the ellipse and into the arena during the protest.³³⁷ A “number” of invited customers apparently perceived so many entry options that they “mistook the line of marchers” for a special admissions queue and literally joined the procession.³³⁸

Not only is this enough perceptual and real control to mitigate whatever fear the march initially sparked in on-lookers, consumers, and employees, it raises one of the more obvious control options for employers: waiting it out. A neutral employer might fear activism of any type or size, but if the only real impact is annoyance,³³⁹ doing nothing until people go home can be a genuinely stabilizing choice. This is especially true where all signs point to a short protest. A high-rise management company may get spooked by chanting in the lobby, but if the crowd’s demand is simply to deliver a letter, finding someone acceptable to receive it is real control.³⁴⁰ Activists handing-out flyers to seated diners may also provoke fears of disruption, but if delivered quickly and methodically, the restaurant’s control over the situation may not be much different than dealing with persistent panhandling on an outdoor terrace. In fact, simply asking protestors to leave can, if effective, itself be a powerful form of control. A union official, for example, was conspicuously present during the “shop-ins,” which, following managers’ complaints, lasted about as long as the average errand.³⁴¹

³³⁵ *Id.* at 436-37.

³³⁶ *Id.* at 441.

³³⁷ *Id.* at 432; *cf.* Kohler Co., 128 N.L.R.B. 1062, 1103 (1960) (describing “belly to back’ picketing” where a “double line of pickets would close any space in the line”).

³³⁸ *Serv. & Maint. Emps.*, 136 N.L.R.B. at 437.

³³⁹ See *S. Mich. v. Unite Here*, 939 F. Supp. 2d 863, 877 (N.D. Ill. 2013), *rehearing en banc denied* (“[C]oercion’ has been interpreted as placing the neutral’s business in jeopardy.”).

³⁴⁰ See *S. Mich. Ave. Ass’n v. Unite Here*, 760 F.3d 708, 721 (7th Cir. 2014) (“[T]he Union is permitted some initial entry onto private property so it may convey its views to the decision-makers of a secondary . . .”).

³⁴¹ Two of the shop-ins lasted a total of forty-five minutes, start to finish. *Pye v. Teamsters*, 61 F.3d 1013, 1017 (1st Cir. 1995). The record did not disclose the length of Costco shop-in. *Id.*

D. *Going Forward*

The preceding is only a sketch. The essentially infinite array of employer-employee, union-employee, and protest interactions make accounting for how a fear-based conception of coercion, and a control-based model of regulation, would fully integrate into the law difficult. But emotion science can assist, even if integration is something less than full, because its insights offer real data about the nature of rational choice. So even without rigid imposition of a “two-step process,” if adjudicators start thinking about coercion by zeroing-in on a shopper’s description that “there was no way out,” or worker’s statement like, “I was scared he’d snap if I’d turned away,” progress has been made. An incremental development like that is not unrealistic. As explained, the Board references “fear” all the time in implicit, if not sometimes open, acknowledgement of the emotion’s corrosive impact on choice.³⁴² When 8(b)(4) decisions highlight things like “[n]o traffic was blocked” or “pedestrians were not obstructed or challenged,” the agency is, perhaps without realizing it, already relying on the mental mechanics of control.³⁴³ At base, this Article offers a theoretical and practical road-map to one-day formalize those intuitions.

E. *Objections*

Many objections to the use of fear and control in labor law are possible. A primary one might be that “fear” and “control” are themselves vague constructs, so using them to identify and measure coercion will lead to decisions no less contestable than existing doctrine.

While it is true that fear and control are not exactly quantitative benchmarks, they nevertheless bring clarity to the law of workplace coercion. Initially, and as noted, fear is undeveloped theoretically but still a familiar concept in labor law. That track-record, combined with the Board’s “special function of applying” the law “to the complexities of industrial life”³⁴⁴ suggests that the agency is adequately equipped to

³⁴² *Supra* notes 211–13 and accompanying text.

³⁴³ *Sheet Metal Workers’ Int’l Ass’n, Local 15 v. NLRB*, 491 F.3d 429, 433 (D.C. Cir. 2007).

³⁴⁴ *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 266 (1975); see Michael Z. Green, *The NLRB as an Uberagency for the Evolving Workplace*, 64 *EMORY L.J.* 1621, 1628–29 (2015) (describing the NLRB’s “prominent experts” who are well-suited to decided “challenging workplace questions at the front line”).

consider whether a worker's claim to have, for instance, feared violence as an organizer approached is at least somewhat credible.

But even if not, the actual legal violations hinge on subsequent control assessments, and here two important distinctions with current law emerge. First, control discussions are generally factual and therefore amenable to the type of proof judges are best suited to parse. A question like whether drivers could exercise some modicum of control upon spotting a protest next to a neutral's parking lot would bring photographs, videos, and vehicular berth requirements into play. The GC could ask a witness: "Okay, so you got startled — did anything prevent you from just driving in?" Disagreements may still arise, but the fights would be about traffic flows and second entrances, not picketing essences or normative judgments about protest etiquette. Second, regulating coercion with control swaps the very nature of legal coercion from something airily related to the metaphysics of rationalism to what we now know is how a driver *might actually decide* whether to shop at the store or not: was there a reasonable way to mitigate the fear, or was flight the only option? The ultimate outcome may match the result reached under the Board's current approach, but the justification will finally say something authentic about "coercion."

Procedural concerns may also be raised. Today coercion is presumed in an array of scenarios, while step one requires testimonial evidence of fear and asks the Board to examine its credibility. The suggested approach is cumbersome, burdens the GC with identifying witnesses willing to talk about their feelings, and upends law. Those complications, however, must be weighed against continuing to apply rules that are either assuredly wrong (e.g., picketing is inherently coercive; captive listening is inherently not); possibly wrong (e.g., "facially benign or beneficial" benefit promises are coercive);³⁴⁵ or so obviously correct (e.g., explicit threats and assaults are coercive) that satisfying the first step would not be onerous.

And, importantly, the fear showing puts those and other questionable existing norms to the test in ways that could, over time, reform them. Take *Randell Warehouse*, which considered whether unexplained union photographing of concerted employee activity is

³⁴⁵ Charles C. Jackson's and Jeffrey S. Heller's 1982 article argues that many coercion presumptions "lack empirical support, dispense with the need for litigated proof, and are difficult to defend . . ." Jackson & Heller, *supra* note 70, at 3-4. Their specific proposal takes aim at the "*per se* presumption that even innocuous promises and grants coerce employees . . ." *Id.* at 21, 66-67; see also *id.* at 59-60 & n.245 (describing the Board's "objective standard" approach" to employer threats).

“inherently coercive.”³⁴⁶ Applying the analysis applicable to employer recordings, the majority said absolutely.³⁴⁷ The dissent, after considering power differentials and whether a union’s motive for videotaping employees in public might differ from an employer’s, said only if employees otherwise “have some specific basis for fearing the union.”³⁴⁸ The arguments were spirited, but it was a theoretical debate that didn’t have to be. Everyone would have benefitted from the General Counsel’s attempt to solicit testimony on workers’ fears. A failed search would have undercut the majority’s perception of automatically coerced workers, while testimony like, “they said they’d be watching me,” would have helped the dissent advocate for its narrower rule. No matter what, the Board would have gotten closer to figuring out how coercion works or doesn’t work when unions tape workers.

Other concerns might relate to the proposal’s second-order effects. For example, either because it’s not scary or easily dodged, steps one and two counsel that a standard picket is not coercive. Yet, the statute itself makes no less than twelve direct references to picketing under the precisely opposite assumption.³⁴⁹ This seemingly leads to a friction. However, harmonizing the two positions requires only that the Board redefine picketing to encompass conduct that is both fear-inducing and without escape. As noted, that scenario is already captured by previous NLRB discussions of so-called “mass picketing.”³⁵⁰

Finally, were the Board to acknowledge the absence of control during the workday and, as a result, implement the section 8(a)(1)-related “opt-out” regime recommended in Part IV.C, questions may arise regarding how the employer’s remaining written and voluntary communications should be analyzed. My suggestion would be to take *Gissel’s* emphasis on the coercive power of dependence more literally. Economic dependence is, in effect, a state of diminished life control. So, speech should be viewed with an eye toward the severity of that

³⁴⁶ While *Randell Warehouse* arose in an election objections context, the dissent assumed its holding also applies to section 8(b)(1)(A). See *Randell Warehouse*, 347 N.L.R.B. 591, 602 (2006).

³⁴⁷ *Id.* at 599-600.

³⁴⁸ *Id.* at 601.

³⁴⁹ The references are packed into three provisions: section 8(b)(4)(ii)(B) and its proviso; section 8(b)(7)(C), see *supra* note 137; and section 8(g), which limits picketing at health care facilities.

³⁵⁰ See *Sheet Metal Workers’ Int’l Ass’n, Local 15 v. NLRB*, 491 F.3d 429, 432 (D.C. Cir. 2007).

dependence in each circumstance.³⁵¹ And that should be a highly factual, even individualized analysis focused on how easy it would be for the employee to exit the relationship. That may require the Board to delve into new kinds of investigatory work on the front end, like asking about student debt, needed car or house repairs, or newborns.³⁵² It should certainly involve some analysis of local economic conditions, such as alternative job prospects given the employee's skills, experience, and interests.³⁵³ All of that helps highlight, as *Gissel* counsels, cases of maximum economic dependence, but it also, as emotion science dictates, highlights cases of minimal employee control.

CONCLUSION

Adjudicating coercion does not have to mean making a policy choice; judges just need a good measuring stick. The metric will come with a better sense of how coercion scrambles judgments, and it's increasingly clear that this is related to how people allegedly influenced were feeling at the time. In the workplace, everyone seems to agree that the feeling that matters most is fear. At base, this Article has argued that labor law should take this consensus seriously and

³⁵¹ Cf. *Wisconsin Bearing*, 193 N.L.R.B. 249, 256 (1971) (equating employees' economic sensitivities with the employer's "real control over employment conditions").

³⁵² A helpful model is Kathleen Kim's notion of "situational coercion" in human trafficking. See Kim, *supra* note 61, at 461-74. Kim locates situational coercion within frameworks concerned with "constrained choice sets" but with a greater emphasis on "all the circumstances of the case, including the worker's vulnerabilities and the power inequality between the worker and the employer." *Id.* at 461. She suggests that relevant vulnerabilities "include such things as irregularized immigration status, cultural and linguistic isolation, poverty and impoverished dependent family members, youth, and illiteracy." *Id.*

³⁵³ The best decisions, like *Bancroft Manufacturing*, already do this:

The setting . . . is in point. The employees of this relatively large industrial firm, in a predominantly rural county, would reasonably be expected to be particularly sensitive to any suggestion or hint that the plants might be closed. The Company was providing industrial employment to hundreds of previously untrained farm workers and small-town residents, who would have little opportunity in the county for such employment elsewhere.

See *Bancroft Mfg*, 189 N.L.R.B. 619, 624 (1971). Most decisions do not. See, e.g., *Unifirst Corp.*, 346 N.L.R.B. 591, 598 (2006) (Liebman, Member, dissenting) (criticizing the majority for analysis "inconsistent with the Supreme Court's admonition that we must assess an employer's statements based on how economically-dependent employees will likely understand them").

then distinguish between the myriad of possible fear-based interactions using the more measurable concept of control. In this way, the law can both honor coercion's content and squarely regulate its existence at work for the first time.