AN ASSUMED TRADITION: HOW THE 3-2 BALANCE OF THE NLRB IS MORE THAN THE SUM OF ITS APPOINTMENTS AND AN ARGUMENT FOR ITS CONTINUATION

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The National Labor Relations Board stands at the center of the conflict between private-sector unions and employers. Appointments to the Board are essential to the contentious conflict it adjudicates, yet the Board has upheld a tradition of 3-2 balance between members of the president's party and the opposition for decades. Scholars have opined that the Board's appointment history is primarily driven by the political branches and their partisan influences, first by the president and currently by the Senate. This Note argues that there is more at play. The Board is unique among federal agencies in having such a bipartisan structure without statutory requirement. This is because of the Board's internal design as a quasi-judicial agency and its position within the American labor-management ecosystem. The counteracting needs of practicing impartiality in adjudication and responding to the public interest on the labor issue results in the 3-2 split. It has been surprisingly stable in the past and will likely continue to be in the future since it benefits both sides of the labor constituency. Institutional actors within the NLRB ecosystem can rely on the Board's relative consistency on most issues due to the constraints of repeat Board interaction while also using their moments in power to push for change on fundamental policies. Meanwhile, those not in power can push for their goals knowing that their time in power will happen in the future. This design pushes the Board towards the center and creates a culture of stability that both pro-labor and pro-management interest groups prefer more than an unbalanced Board.

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Introduction

The National Labor Relations Board (NLRB) is the independent agency regulating labor relations in the United States. Since its formation in 1935, it has overseen union elections, adjudicated labor disputes, and formulated general labor policy. Its structure consists of five Board members[1] with five-year terms who issue opinions on cases brought by the General Counsel ("GC"), who has a four-year term. All of these individuals are appointed by the President with the advice and consent of the Senate.[2]

1. It originally had three. Wagner Act, ch. 372, § 3, 49 Stat. 449, 451 (1935).
2. 29 U.S.C. §§ 153(a), (d).

Policy regarding labor relations is one of the most contentious issues in American politics and has been such since the inception and development of unions.[3] Its connection to the economy and employment makes it central to the platforms of presidential candidates, as voters' individual viewpoints on economic outcomes often decide the outcomes of presidential elections.[4] Congress also views labor policy as vitally important, yet the strongly-held but divergent beliefs of congresspeople on the proper capacity of unions and scope of labor rights has made modern labor law reform impossible.[5] Given its political centrality, it would be logical to assume that a president would push for as many Board members from their party as possible in order to ensure the development of their most preferred labor policy.

Surprisingly, however, this is not the historical tradition of the Board. Despite these political forces and the changes in majority power over time, the NLRB has consistently held a 3-2 breakdown in membership: three Board members from the president's party and two Board members from the opposing party. No president has successfully received Senate confirmation for a Board with more than three members of their party since 1956.[6] Presidents even nominate individuals that

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3. *See, e.g.*, M. Stephen Weatherford, *The Eisenhower Transition: Labor Policy in the New Political Economy*, 28 STUD. AM. POL. DEV. 201, 203 (2014). The author notes that this general controversy, and the NLRB's role leading it, has reached a critical point as three corporations have alleged that the agency is unconstitutional. *See generally* Haleluya Hadero, *Amazon Argues that National Labor Board is Unconstitutional, Joining SpaceX and Trader Joe's*, ASSOCIATED PRESS (Feb. 16, 2024, 5:31 PM), https://apnews.com/article/amazon-nlrb-unconstitutional-union-labor-459331e9b77f5be0e5202c147654993e [https://perma.cc/S2DZ-DNUK]. Without knowing the result of these cases, this Note will assume that the courts will uphold the agency as constitutional.

4. *See* Frank Newport, *Economic Perceptions and the Election*, GALLUP (Sept. 18, 2020), https://news.gallup.com/opinion/polling-matters/320372/economic-perceptions-election.aspx [https://perma.cc/6FPS-FUV6] ("The economy has been a major factor in determining the outcome of presidential elections throughout U.S. history."); Foreign Press Ctrs., *U.S. 2022 Midterm Elections: Role of the Economy in Elections*, YOUTUBE (July 15, 2022), https://youtu.be/KgPRPfmtPhw [https://perma.cc/3TVP-G4QT] (stating, in the description, that "economic sentiment plays a pivotal role in how Americans make their electoral choices").

5. *See, e.g.*, JAMES A. GROSS, BROKEN PROMISE: THE SUBVERSION OF U.S. LABOR RELATIONS POLICY, 1947-1994, at 275–76 (1995) [hereinafter GROSS, BROKEN PROMISE] ("Since 1947 Congress has defaulted on its responsibility to make and change labor policy. Lawmakers have not been able to get past short-term maneuverings for political advantage, political horse-trading, ideologically inspired emotion, unfounded and unsubstantiated beliefs about unions and labor relations, and the cavalier manipulation of labor policy to achieve other political objectives.").

6. *Members of the NLRB Since 1935*, NAT'L LAB. RELS. BD.: ABOUT NLRB, https://www.nlrb.gov/about-nlrb/who-we-are/the-board/members-of-the-nlrb-since-1935 [https://perma.cc/NUX7-4ST6]. A table of the appointments, as relevant for this Note, is available in the appendix. *See infra* Table 1.

are antithetical to their administration's goals,[7] despite no legislative or administrative requirement to do so.[8]

The 3-2 design of the NLRB developed after the Taft-Hartley amendments to the National Labor Relations Act (NLRA), and it has endured through different political environments. The original Wagner Act defined the Board as a "strictly nonpartisan body" constituted of "impartial government members."[9] When the Board expanded under Truman, it originally was a 3-2 Democratic majority split.[10] The Truman and following Eisenhower administrations did have 4-1 majorities for the Democrats and Republicans, respectively.[11] However, after 1956, the 3-2 split was a consistent pattern for the Board.

This bipartisan tradition, though, has two distinct phases. The first, from Eisenhower's second term to Carter, theoretically upheld the goal of impartiality.[12] Both sides of the political spectrum on the Board were relatively unbiased, frequently voting with their opposition on cases involving fundamental policy.[13] In the second phase, beginning with the Reagan administration and continuing to the present, the Board has fallen into polarization. The Republican-appointed members, often from the management bar, have been staunch defenders of business and the management side; the Democrat-appointed pro-union or union members have similarly closely adhered to the pro-labor side of cases brought to the Board.[14] Professor Joan Flynn argues that the change in

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7. Joan Flynn, *A Quiet Revolution at the Labor Board: The Transformation of the NLRB, 1935-2000*, 61 Ohio State L.J. 1361, 1412 (2000) [hereinafter Flynn, *A Quiet Revolution*].

8. It is important to note that Board members are specifically appointed to a named seat, which has a statutorily designed expiration date. *See Members of the NLRB Since 1935*, *supra* note 6. Even so, a one-term president could theoretically still appoint four Board members, which could result in a stronger majority than 3-2. *See also* William Gould, *Politics and the Effect on the NLRB Adjudicative and Rulemaking Processes*, 64 Emory L.J. 1501, 1507 (2015) [hereinafter Gould, *Politics*]. There is no NLRB rule which requires such a breakdown, and it is not included in the NLRA. *See* James A. Gross, The Making of the National Labor Relations Board: A Study in Economics, Politics, and the Law, 1933-1937, at 132 (1974) (stating that "there was no provision for partisan membership" in the Wagner Act) [hereinafter Gross, The Making].

9. Flynn, *A Quiet Revolution*, *supra* note 7, at 1363–64 (referencing Staff of Senate Comm. on Educ. & Lab., 74th Cong., Comparison of S. 2926 (73rd Congress) and S. 1958 (74th Congress) § 3 (Comm. Print 1935), *reprinted in* 1 NLRB, Legislative History of the National Labor Relations Act of 1935, at 1319, 1320 (commemorative reprint 1985)).

10. *Members of the NLRB Since 1935*, *supra* note 6.

11. *Id.*

12. Flynn, *A Quiet Revolution*, *supra* note 7, at 1365.

13. *Id.* at 1404–07.

14. *Id.* at 1384–97, 1411 (noting that their voting is one-sided and has gotten more one-sided over time); *see infra* notes 100 (Obama), 102 (Trump), 105 (Biden).

polarization is due to the evolution of the administrative appointment process generally, which allowed for greater Senate control over the selection of nominees and their packaging of opposing viewpoints in the confirmation process.[15]

Analysis of the appointees to the NLRB ends with Flynn's work in 2000. This Note extends the historical narrative through the Biden administration, demonstrating the continued practice of polarized appointments. The question left open by Flynn's article, Professor James Gross's plethora of books on the NLRB, and other scholars is the following—why does the 3-2 NLRB partisan balance stick?

Flynn argues that the trends in NLRB appointments fit into a larger trend of administrative agency appointments;[16] however, a theory of the appointment process generally does not adequately explain why the NLRB has a structure unique to the federal government. This Note will show that the NLRB stands alone among independent federal agencies because of its internal quasi-judicial structure and external influence. First, a comparison to other agencies shows that the NLRB is the only one which holds a balanced structure despite the lack of a legislative mandate requiring such a design and the polarized viewpoints on its jurisdiction. One reason for this uniqueness is that the Board operates like a court. The Board uses almost exclusively adjudication to promulgate its regulations, is reliant on lower ALJ decisions, is separate from the General Counsel which prosecutes cases, can only react to the choices of aggrieved parties and the GC, and is unable to use economic research in its decisions. The Board is thus a quasi-judicial agency; in order for it to respond to the party in power while simultaneously maintaining a sense of impartiality, the 3-2 balance is upheld. Beyond the Board itself, the other reason the NLRB differs from other agencies is due to the American labor relations ecosystem. The inability to pass federal labor law reform, stemming from the two fundamentally opposed views on the goals of the NLRA and the general decline in unionization, leaves the NLRB stuck in the partisan balance.

Given the uniqueness of the NLRB's structure and the broad forces which uphold it, it is important to address the future stability and value of its bipartisan framework. Flynn, Gross, and other scholars have mostly analyzed the NLRB at times when unionization rates were lower and public support for unions was weaker.[17] However, with the American labor movement experiencing newfound fervor, should

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15. Flynn, *A Quiet Revolution*, *supra* note 7, at 1366–67.
16. *Id.*
17. *Infra* notes 236–44.

unions and management-side groups push like-minded presidents to make appointments that would form a 4-1 or 5-0 Board?

This Note argues that the bipartisan structure should and likely will be upheld because it benefits both sides to have a culture of institutional stability. The consistency of Board decisions on most decisions in labor law is directly tied to the tradition of the 3-2 balance; the members in the majority pull themselves towards the center more than they would under a more unbalanced Board due to the foresight that they will not be in the majority forever. And, for the issues which experience consistent policy oscillation, the 3-2 balance allows interest groups to meet their policy goals when they have the public support behind them. A less-balanced Board would likely produce more policy oscillation on the generally agreed upon majority of labor issues than the current structure, creating instability in an already volatile body of rules. Thus, the 3-2 structure has more benefits than costs for all interest groups.

This Note will proceed in three parts. The Note will first review the history of the Board and its appointees. The second part of the Note analyzes the driving forces behind the stability of the 3-2 structure, starting with Flynn's proposal but arguing that more is involved—namely, the Board's internal structure and the general labor-management ecosystem. The closing Part discusses the value of the NLRB's 3-2 breakdown and whether it should be upheld in the future.

I. The History of the Board and Its Appointments

In the face of employer mistreatment and increasing labor violence in the early 20th century, the need for a federal law that generally defined the parameters of union and management relations became apparent. In response, Senator Robert Wagner led the drafting of what was to become the Wagner Act, passed in 1935.[18] This bill created "an impartial board of three members as an independent agency . . . empowered to enforce rights rather than mediate disputes"—this is the NLRB.[19] Unlike previous government bodies that regulated labor relations, the NLRB was designed to be a legalistic, judicial body made up of neutrals deciding cases,[20] and relied on the assumption that it would be staffed by nonpartisans. As Professor Gross put it:

> there was no provision for partisan membership 'since it ha[d] generally come to be recognized that such membership impair[ed]

18. Gross, The Making, *supra* note 8, at 131.
19. *Id.* at 132.
20. *Id.* at 231–32.

> the impartial action of the Board as a quasi-judicial body and [would] lead[] to compromise and adaptation on the questions of law.'[21]

Conservatives did not approve of what they perceived to be the Board's pro-union foundations and eventually passed the Taft-Hartley amendments to the NLRA in 1947. Although the amendments made major changes to the Board's jurisdiction, its procedure when considering a case, and its relationship with the General Counsel and the regional offices, the only change to the Board's composition was to expand to five members. The amendments did not alter the assumed neutrality of the Board.[22]

Despite the assumption, the appointees to the Board have never been neutral in practice: "[t]he NLRB, although technically an independent administrative agency, is in many ways . . . a creature of Congress and the executive."[23] Discussion of this phenomenon will proceed in three sections. The first covers the Board under the Roosevelt administration through Eisenhower's first term, paying key attention to the Taft-Hartley Act expanding the Board to five members and instances in which the Board had more than three members of the president's party. The second section discusses Eisenhower's second term through the Carter administration. This section emphasizes the development of the 3-2 tradition in a non-polarized political climate, notable appointments, as well as the beginnings of polarization under Nixon. Finally, Part I closes with an analysis of the Board in a polarized political climate from Reagan to today. After paying particular attention to the changes under Reagan, it then focuses on the Clinton administration and lastly discusses the three most recent presidents.

A. The Early Board: Roosevelt through Eisenhower's First Term

1. Roosevelt's Boards, The Truman Administration, and Taft-Hartley

When Roosevelt built the first Board, all of the confirmed members were either from government or academia.[24] This is unsurprising—the labor and employment lawyer bar which now feeds the NLRB did not exist in such an organized fashion at the beginning of American

21. *Id.* at 132.
22. James A. Gross, The Reshaping of the National Labor Relations Board: National Labor Policy in Transition, 1937-1947, at 253–59 (1981) [hereinafter Gross, The Reshaping].
23. *Id.* at 261.
24. Flynn, *A Quiet Revolution*, *supra* note 7, at 1367–68.

labor law.[25] Under the Wagner Act, the Board had three members, and originally all three members were Democrats.[26] In 1941, Roosevelt nominated Gerard D. Reilly, the first Republican, to the Board; in addition to replacing a solid liberal vote, he later assisted in drafting the Taft-Hartley Act.[27] These Boards and their development of the law were perceived as exceedingly pro-labor, with decisions that drastically expanded labor power as union membership soared.[28] Roosevelt seemed to oppose the Board's exercise of such independence and picked more conservative individuals in his later appointments.[29]

The pro-labor decisions of the Board also inspired the congressional Republicans to draft a more conservative vision of American labor law. After a massive wave of strikes leaned public opinion against union power, Congress passed the Taft-Hartley Act, more formally known as the Labor Management Relations Act of 1947, over Truman's veto.[30] Most significantly, the Act added union activities to the list of potential unfair labor practices that could be adjudicated and gave employees the right to refrain from union activity.[31] Although Congress considered mandating the partisan affiliation of Board members, the final law had no such provision and only expanded the membership to five people.[32] Other relevant changes to the Board include the separation of the General Counsel from the rest of the Board and the complete deletion of

25. GROSS, THE MAKING, *supra* note 8, at 169; Flynn, *A Quiet Revolution*, *supra* note 7, at 1368.

26. *See infra* Table 1.

27. GROSS, THE RESHAPING, *supra* note 22, at 241–42; FRANK W. MCCULLOCH & TIM BORNSTEIN, THE NATIONAL LABOR RELATIONS BOARD 30 (1974).

28. *See* GROSS, THE RESHAPING, *supra* note 22, at 24–39 (detailing the strong decisions of the first Board and the power of unions at the time); MCCULLOCH & BORNSTEIN, *supra* note 27, at 57 (stating that the Board's work was perceived as pro-labor regardless of what it actually accomplished).

29. GROSS, THE RESHAPING, *supra* note 22, at 226–28 (describing the choice of Harry A. Millis, a "less partisan appointee," for Chairman as a clear reflection of the Roosevelt administration's "displeasure with the Board's exercise of its independence" causing "fundamental changes" to the NLRB's later opinions and operations).

30. *Id.* at 251–52; *see also* Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1534 (2002).

31. *1947 Taft-Hartley Substantive Provisions*, NAT'L LAB. RELS. BD.: ABOUT NLRB, https://www.nlrb.gov/about-nlrb/who-we-are/our-history/1947-taft-hartley-substantive-provisions [https://perma.cc/GYU3-J53N].

32. GROSS, THE RESHAPING, *supra* note 22, at 196, 225 (stating that the Smith amendment to the Wagner Act, which was used to model the later Taft-Hartley bill, included a provision that "no more than two [appointees to a three-person board] would be members of the same political party"); *see also* MCCULLOCH & BORNSTEIN, *supra* note 27, at 42.

the economics division, both of which left the Board as a predominantly judicial body.[33]

Truman followed Roosevelt's example by continuing the 2-1 spread before Taft-Hartley, and was the first to establish the bipartisan 3-2 tradition after the expansion.[34] Although Roosevelt's later changes to the Board's personnel had already turned it in a more conservative direction,[35] Truman continued that trajectory with his appointment of Paul M. Herzog as chair of the Board.[36] Given the immense political pressure to make the NLRA less pro-labor, which culminated in the Taft-Hartley Act, any presidential appointment by Truman would inevitably be criticized as politically motivated, either by responding to Congress's conservative pull or pushing against it with liberal appointees.[37] Professor Gross summed up the effects of this period in the ominous closing to his second book:

> The tragedy of the first twelve years of the NLRB's history is not only that the NLRB never achieved a proper balance between judicial independence and executive and legislative dependence, but that the experiences of those years made it almost unlikely that a proper balance could be attained in the future.[38]

2. *Eisenhower and the First Republican Administration*

With the election of President Eisenhower in 1952, conservative management interests saw an opportunity to have their agenda realized at the federal level. While some powerful bodies like the Chamber of Commerce wanted to disband the NLRB and place its jurisdiction back in the federal courts, others standing with the National Association of Manufacturers (NAM) wanted to move away from the prior history of

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33. 29 U.S.C. § 153; McCulloch & Bornstein, *supra* note 27, at 42; *see also* Gross, The Reshaping, *supra* note 22, at 264–65 (describing the changes as well as their effect on the NLRB); Gross, Broken Promise, *supra* note 5, at 18–19 (describing the creation of the independent General Counsel as "one of the most radical changes"); Harriet F. Berger, *Appointment and Confirmation to the National Labor Relations Board: Democratic Constraints on Presidential Power?*, 8 Presidential Stud. Q. 403, 406 (1978) (describing the independent General Counsel change).

34. *Infra* Table 1.

35. Gross, The Reshaping, *supra* note 22, at 232, 237, 239.

36. *Id.* at 246–48 (stating that Herzog pulled the Board further right toward an equalization between employers and unions).

37. *Id.* at 247–51 (describing Truman's reasoning for appointing Herzog as slowing down the potential pro-labor future of the Board and his beliefs about the political motivation of Board decisions); *see also* Gross, Broken Promise, *supra* note 5, at 24 ("Truman was accused of using a clever court-packing device to thwart the congressional majorities that passed Taft-Hartley.").

38. Gross, The Reshaping, *supra* note 22, at 267.

appointments to place expressly management-friendly appointments on the Board.[39] Eisenhower took a more moderate position and initially sought to pass a minor amendment to federal labor law.[40] His reform would have made the Board explicitly bipartisan.[41] The media painted the proposal as promoting unions, which pushed business leaders and conservatives to end their support of the measure.[42]

Eisenhower then turned to the Board, deciding that the NAM position was less wrought with conflict and more readily achievable.[43] Due to the timing of Board member resignations and the cyclical nature of term expirations, Eisenhower was able to quickly nominate several new members.[44] His first divisive nominee was management attorney Guy Farmer for Chairman; however, this nomination did not upset the balance of the Board, which was still majority Democrats, and thus, it received little attention from the Senate.[45] After Philip Ray Rodgers, a Republican government official, also easily received confirmation, Eisenhower decided to nominate Albert Beeson to the Board.

Beeson's nomination was contested for a number of reasons.[46] First of all, Beeson's appointment would decisively tip the scales in favor of management with a 4-1 Republican Board.[47] Second, Beeson was a polarizing figure in labor relations—he was well known for his pride in fighting union organizing efforts.[48] This created a third issue: because tenure at the Board is only five years if the individual does not

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39. Seymour Scher, *Regulatory Agency Control Through Appointment: The Case of the Eisenhower Administration and the NLRB*, 23 J. POL. 667, 669–70 (1961).

40. Weatherford, *supra* note 3, at 201, 203.

41. Scher, *supra* note 39, at 673. The reform the Eisenhower administration had in mind would have also completely separated the Board and the General Counsel and expanded the Board to a larger seven-member agency. *Id.*

42. Weatherford, *supra* note 3, at 210; *see also* GROSS, BROKEN PROMISE, *supra* note 5, at 90 (arguing that the Eisenhower administration failed to amend the labor laws because "the White House demonstrated no sophisticated understanding that the labor policy problem ran as deep as the fundamental determination of whether the federal government should encourage and protect workers' right to organize or should act only as a neutral guarantor of the right to worker to choose to join or refrain from joining a labor organization").

43. Weatherford, *supra* note 3, at 203; MCCULLOCH & BORNSTEIN, *supra* note 27, at 62 ("[Eisenhower's] ultimate decision was to do nothing about the Board except to make appointments satisfactory to management.").

44. Scher, *supra* note 39, at 675–76; GROSS, BROKEN PROMISE, *supra* note 5, at 94–95.

45. Flynn, *A Quiet Revolution*, *supra* note 7, at 1369; Weatherford, *supra* note 3, at 216.

46. GROSS, BROKEN PROMISE, *supra* note 5, at 99–101.

47. Scher, *supra* note 39, at 683; Weatherford, *supra* note 3, at 217; GROSS, BROKEN PROMISE, *supra* note 5, at 99–100.

48. Flynn, *A Quiet Revolution*, *supra* note 7, at 1369; Scher, *supra* note 39, at 683; Weatherford, *supra* note 3, at 217; GROSS, BROKEN PROMISE, *supra* note 5, at 100–01.

seek renomination, Beeson could very easily return to a management position after his service at the NLRB, which could inform his decision-making as a Board member.[49] Despite a contentious nomination process, the narrow Republican majority Senate confirmed his nomination in a party-line vote.[50]

This experience represents an initial change in the conception of the NLRB from the original definition of the agency in the Wagner Act.[51] The Eisenhower administration had placed an ideologue on the Board, breaking away from the precedent set by Roosevelt and Truman of appointing government officials and academics.[52] Beeson's confirmation also gave Republicans a 4-1 majority on the Board, which moved Board policy considerably towards favoring management.[53] Scholars view this episode as the beginning of the movement of partisan appointments, which fully came to fruition with Reagan.[54] Yet, even with these strong conservative appointments, Eisenhower still put John Fanning, a Democrat, on the Board because he wanted to ensure that it was bipartisan.[55]

B. 3-2 without Polarization: Eisenhower's Second Term through Carter

Beeson's nomination represented the conservative high water mark in Eisenhower's NLRB nominations; in Eisenhower's second term, increased Senate scrutiny of presidential appointments led to more moderate nominees.[56] The President nominated Boyd Leedom as Chairperson because he was a "noncontroversial figure" to both sides.[57]

49. Flynn, *A Quiet Revolution*, *supra* note 7, at 1371.

50. *Id.* at 1372–75; Scher, *supra* note 39, at 683–84; Weatherford, *supra* note 3, at 217.

51. Flynn, *A Quiet Revolution*, *supra* note 7, at 1374.

52. Eisenhower also nominated and confirmed a partisan for General Counsel. Flynn, *A Quiet Revolution*, *supra* note 7, at 1376–77.

53. Gould, *Politics*, *supra* note 8, at 1508–09 (describing how the Eisenhower board changed multiple doctrinal holdings, including the rules for captive audience meetings, union right of reply, coercion during a union election campaign, and what constitutes legal secondary activity); *see also* Scher, *supra* note 39, at 686; Weatherford, *supra* note 3, at 217–20; McCulloch & Bornstein, *supra* note 27, at 61.

54. Flynn, *A Quiet Revolution*, *supra* note 7, at 1365; *see also* Gross, Broken Promise, *supra* note 5, at 101 (stating that the NLRB appointments under Eisenhower "led to the public perception that the NLRB would decide cases according to the philosophy or labor policy of whatever administration was in power").

55. Gross, Broken Promise, *supra* note 5, at 151–52.

56. Scher, *supra* note 39, at 685; McCulloch & Bornstein, *supra* note 27, at 62 ("After the Beeson confirmation struggle, the White House was far more circumspect about its appointments.").

57. Gross, Broken Promise, *supra* note 5, at 124–29.

Following Eisenhower, the Kennedy and Johnson administrations followed the tradition of Roosevelt and Truman by only appointing government officials or academics—rather than ideological individuals like union lawyers—to the Board.[58] During this time, the NLRB was a strong supporter of employee rights and brought about liberal innovation to Board policy.[59] Yet Kennedy and Johnson still nominated Republicans to the Board to maintain the partisan balance.[60] Though the labor movement urged Johnson to end the 3-2 balance, he chose not to, firmly establishing the tradition.[61]

The Nixon administration continued to respect the 3-2 tradition; although Nixon would have preferred more conservative Board members, his administration knew that the Democratic Senate would not confirm far-right candidates.[62] For his first appointment, Nixon nominated Edward Miller, a career management lawyer,[63] for Board chair.[64] Advancing similar concerns to those raised against the Beeson nomination, the AFL-CIO and pro-labor Democrats believed Miller would fail to be impartial because of his likely return to legal practice after his service to the Board.[65] Miller's supporters argued that his experience as a management lawyer gave him practical experience that government officials and academics would never have, so his decisions would better fit the needs of labor-management relations.[66] Despite the union opposition, Chairman Miller was confirmed by a Democratic-majority

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58. Flynn, *A Quiet Revolution*, *supra* note 7, at 1378; McCulloch & Bornstein, *supra* note 27, at 71.

59. Berger, *supra* note 33, at 409 (citing McCulloch & Bornstein, *supra* note 27, at 71) (stating that the Kennedy/Johnson Board was "considered generally liberal, innovative, and . . . strongly supportive of employee rights and the philosophy of free collective bargaining"); Gross, Broken Promise, *supra* note 5, at 147 ("What Kennedy did do for organized labor, however, was to appoint a new chairman and member to the NLRB, who along with an Eisenhower-appointed carryover member brought about widespread reversals of Eisenhower Board doctrine and interpreted Taft-Hartley in ways that encouraged unionization and collective bargaining . . . .").

60. Gross, Broken Promise, *supra* note 5, at 195 ("Although there was no statutory requirement that a bipartisan balance be maintained on the Board, a practice of giving both political parties representation was emerging. Since an Eisenhower appointee [Rodgers] was being replaced, even some Democratic senators considered the vacancy a Republican seat on the Board."); *see also* McCulloch & Bornstein, *supra* note 27, at 70 (discussing Howard Jenkins).

61. Gross, Broken Promise, *supra* note 5, at 195.

62. *Id.* at 219 (stating that the Nixon administration could not threaten the "broad political cooperation it needed to achieve its domestic and foreign programs").

63. Christopher Lydon, *Business Lawyer Named to NLRB*, N.Y. Times, Feb. 19, 1970, at 1, 18; Gross, Broken Promise, *supra* note 5, at 220.

64. Gross, Broken Promise, *supra* note 5, at 220; Flynn, *A Quiet Revolution*, *supra* note 7, at 1378–79.

65. Flynn, *A Quiet Revolution*, *supra* note 7, at 1379–80.

66. *Id.* at 1381–82; Gross, Broken Promise, *supra* note 5, at 220.

Senate; among many reasons, this was likely because he was replacing a fellow Republican and thus did not upset the partisan balance of the Board.[67] Nixon then appointed two career NLRB officials, including one Democrat; he also reappointed Fanning, a Democrat, in the hopes of gaining some union support in the upcoming election.[68]

In the wake of Watergate, the Ford administration also had to compromise, but still put in place some conservative management attorneys.[69] Ford, like presidents before him, maintained the 3-2 balance but ensured that the Board moved in a more conservative direction without reversing many major precedents.[70] Carter's appointments had a "short-lived effect on the national labor policy" in a liberal direction before the long run of Reagan-Bush conservatism.[71] Carter also nominated a conservative Independent, Zimmerman, who was confirmed to the Board.[72]

C. 3-2 with Polarization: Reagan through Today

1. Reagan and the Birth of Polarized Appointments

During the Carter administration, the polarization of the political process in Congress—now considered normal—came to the surface; this process "inevitably affected labor-management relations" and started impacting the Board under Reagan.[73] Reagan nominated multiple management lawyers with storied anti-labor careers to the Board.[74] His first choice for NLRB chair, management lawyer and anti-union consultant John Van de Water,[75] was blocked by the Senate after

67. McCulloch & Bornstein, *supra* note 27, at 74; Flynn, *A Quiet Revolution*, *supra* note 7, at 1382.

68. *See* Gross, Broken Promise, *supra* note 5, at 217; McCulloch & Bornstein, *supra* note 27, at 75.

69. Gross, Broken Promise, *supra* note 5, at 231–32.

70. Berger, *supra* note 33, at 410 (citing McCulloch & Bornstein, *supra* note 27, at 76); *see also* Gross, Broken Promise, *supra* note 5, at 232 (describing Ford's goal of a "three-to-two votes for management" his later concern about the presidential election leading to the renomination of a Democrat).

71. Gross, Broken Promise, *supra* note 5, at 242.

72. *Id.* at 245.

73. Gould, *Politics*, *supra* note 8, at 1512–13.

74. *See* Vanessa Waldref, *Reagan's National Labor Relations Board: An Incomplete Revolution*, 15 Geo. J. on Poverty L. & Pol'y 285, 288 (2008).

75. Warren Brown, *Reagan Nominees Lean Toward Management*, Wash. Post (Sept. 7, 1981, 8:00 pm), https://www.washingtonpost.com/archive/politics/1981/09/07/reagan-nominees-lean-toward-management/948cf5c4-c17b-4df8-bfdc-d3b2e2ffda63/ [https://perma.cc/NS8M-HCLR]; *see also* Flynn, *A Quiet Revolution*, *supra* note 7, at 1386 (detailing how Van de Water had defeated 125 of 130 union campaigns he had fought in his career); Gross, Broken Promise, *supra* note 5, at 249 (same).

a massive union opposition campaign against him.[76] The second choice for chair, Donald Dotson, was confirmed by the Senate, although he was still a former corporate labor counsel known for his anti-union past.[77] Robert Hunter, put up for nomination with Van de Water, was a well-known Republican staffer in the Senate who had formerly worked at a conservative think tank and advocated for a full restructuring of the NLRB.[78] Even Reagan's Democratic nominees who received confirmation, Patricia Dennis, Marshall Babson, and Mary Cracraft, were all management lawyers.[79]

The appointment of these ideological Board members moved Board policy in a significantly conservative direction.[80] The trend of conservative, management-friendly appointees continued under George H. W. Bush (Bush I).[81] However, Bush I was the first to nominate a Board member with a significant amount of union-side experience, although the nominee was not confirmed due to his involvement in potentially corrupt activities as a White House staffer.[82] Because the Bush Board "avoided the highly controversial doctrinal changes" pursued under Reagan, it was seen as "middle of the road" despite its clear conservative viewpoint.[83] This era of the Board made it clear that the national labor policy "seems to depend primarily on which political party won the last election."[84]

76. Flynn, *A Quiet Revolution*, *supra* note 7, at 1384–87; GROSS, BROKEN PROMISE, *supra* note 5, at 249–50.

77. Flynn, *A Quiet Revolution*, *supra* note 7, at 1384–85; GROSS, BROKEN PROMISE, *supra* note 5, at 250–51 (noting that Dotson was also an undesirable candidate for the pro-labor side, but the AFL had used too much capital to block Van de Water's nomination and could not fight against Dotson).

78. Brown, *supra* note 75; Flynn, *A Quiet Revolution*, *supra* note 7, at 1385; Waldref, *supra* note 74, at 292; GROSS, BROKEN PROMISE, *supra* note 5, at 247–48.

79. Flynn, *A Quiet Revolution*, *supra* note 7, at 1387–90; *see also* GROSS, BROKEN PROMISE, *supra* note 5, at 250 (describing Dennis as a management lawyer).

80. Gould, *Politics*, *supra* note 8, at 1514 (describing how the NLRB changed positions in a number of areas, including recognition of authorization cards, the extent of the right to refrain, and what constitutes a mandatory subject of bargaining); GROSS, BROKEN PROMISE, *supra* note 5, at 269 (describing the Reagan Board as overturning many Carter Board decisions but also reversing "many major policy decisions covering at least two decades of NLRB history"); *see also* Waldref, *supra* note 74, at 291–92, 294.

81. Flynn, *A Quiet Revolution*, *supra* note 7, at 1392.

82. *Id.* at 1393–94.

83. GROSS, BROKEN PROMISE, *supra* note 5, at 271.

84. *Id.* at 275.

2. *Clinton Brings Partisanship to Full Fruition*

The Reagan and Bush I administrations made it obvious that management lawyers were a new norm for the NLRB; in response, the AFL-CIO decided it would end its self-imposed policy of restraint and propose explicitly union-side officials and attorneys for Board positions.[85] However, their goal required a friendly administration; William Clinton's election presented the right opportunity.[86] Clinton nominated the first union lawyer, Margaret Browning, to the Board, who received an easy confirmation with a Democratic Senate.[87] During his administration, Clinton nominated three union-side lawyers and three management-side lawyers.[88]

Clinton's embrace of nominees with pro-union experience put him at odds with the Senate. Clinton's later appointments experienced a 9-month delay in consideration by the Senate Republicans.[89] This included his new Chairman nominee, William Gould, who had strong credentials as an impartial attorney due to his experiences advocating for both unions and management and his tenure in government and academia.[90] Senate Republicans tore apart Gould's publication *Agenda for Reform* as "extremist" and believed Gould had an overt agenda for labor policy.[91] He was eventually confirmed with the "second narrowest margin in the sixty-year history of the Labor Board."[92] The Senate did not stop there, though: the Board received increased scrutiny from the Republicans due to the swing back in Board policy towards a pro-union side.[93]

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85. Flynn, *A Quiet Revolution*, *supra* note 7, at 1388–89.

86. *Id.* at 1388–89, 1394–95 (describing the AFL-CIO's choice to switch to advancing union-side lawyers, and the first confirmation of a labor-side lawyer by President Clinton).

87. *Id.* at 1394; *infra* Table 1.

88. Flynn, *A Quiet Revolution*, *supra* note 7, at 1394–97; Wilma B. Liebman & Peter J. Hurtgen, *The Clinton Board(s) – A Partial Look from Within*, 16 LAB. L.J. 43, 44 (2000).

89. Joan A. Flynn, *"Expertness for What?": The Gould Years at the NLRB and the Irrepressible Myth of the "Independent" Agency*, 52 ADMIN L. REV. 465, 491 (2000) [hereinafter Flynn, *"Expertness for What?"*]; William B. Gould IV, *The National Labor Relations Board in the Twenty-First Century*, *in* THE CAMBRIDGE HANDBOOK OF U.S. LABOR LAW FOR THE TWENTY-FIRST CENTURY 34, 39 (Richard Bales & Charlotte Garden eds., 2019) (describing a Senate delay in consideration for NLRB appointees) [hereinafter Gould, *Twenty-First Century*].

90. Flynn, *"Expertness for What?"*, *supra* note 89, at 466–67, 481–83.

91. *Id.* at 493.

92. *Id.* at 494 (internal citations omitted).

93. *See* Gould, *Politics*, *supra* note 8, at 1516–18 (describing how Congress brought scrutiny to the Board's actions through oversight committees and appropriations based on decisions); Liebman & Hurtgen, *supra* note 88, at 47–48 (same).

George W. Bush (Bush II) continued the practice of his Republican predecessors of nominating management attorneys to the Board,[94] but still nominated Democrats to uphold the partisan balance.[95] Once the NLRB had a Republican majority, it proceeded to overrule multiple seminal Clinton Board decisions.[96] The flip-flop in Board policy pushed the Democratic Senate of his last two years in office to refuse to confirm any NLRB appointees, forcing a reliance on recess appointments.[97]

3. The Current Board

As of the Obama administration, it has become established that Board appointees now predominately come from the established labor-management bar.[98] Under a Democratic Congress, Obama experienced no interference with his nominees to the Board; he had to make a few appointments due to Bush II's refusal to nominate Board members at the end of his term in the face of the Senate's refusal to confirm.[99] The Republican takeover of the House of Representatives in the 2010 midterm elections created tension, though again mostly over the Board's decisions, not the President's nominees.[100] Obama did attempt to make wide use of the recess appointment process to fill the NLRB, though this practice faced a legal challenge that made its way to the Supreme Court. While the Court upheld the general practice of recess appointments, the majority struck down President Obama's specific use of the recess appointment in 2012 for NLRB nominees Sharon Block,

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94. *See, e.g.*, Press Release, The White House, President Bush Signs Recess Appointment of Michael Bartlett (Jan. 22, 2002), https://georgewbush-whitehouse.archives.gov/news/releases/2002/01/20020123-6.html [https://perma.cc/Y8DR-Y9UF].

95. *See* Holly Foster, *Dennis Walsh '76 Nominated for NLRB by Bush*, HAMILTON: NEWS (Nov. 7, 2001), https://www.hamilton.edu/news/story/dennis-walsh-76-nominated-for-nlrb-by-bush [https://perma.cc/3Z5G-N233].

96. David P. Twomey, *Policymaking Under the Bush II National Labor Relations Board: Where Do We Go From Here?*, 59 LAB. L.J. 141, 143, 149 (2008); Gould, *Twenty-First Century*, *supra* note 89, at 41 (internal citations omitted).

97. Gould, *Politics*, *supra* note 8, at 1519; Gould, *Twenty-First Century*, *supra* note 89, at 41 (internal citations omitted).

98. 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, 2053 (2009).

99. Gould, *Politics*, *supra* note 8, at 1519–20.

100. *Id.* at 1520–21 (describing how Congress invalidated a rule promulgated by the NLRB under the Congressional Review Act, a rarely imposed statute). *But see Obama Appointment to Labor Board Sparks Opposition*, CNN (Mar. 27, 2010, 11:13 PM), http://www.cnn.com/2010/POLITICS/03/27/obama.appointment.controversy/index.html [https://perma.cc/B3XK-GUC9] (describing partisan fights over NLRB appointments during the Obama Presidency).

Richard Griffin, and Terence Flynn.[101] Despite this setback, the Obama NLRB predictably moved in a pro-labor direction.[102]

Finally, in the past two administrations, Trump and Biden have continued the identified trends. The Trump administration followed suit by appointing ideological lawyers to the Board[103] and pushing NLRB policy in a pro-management direction by overturning many Obama-era decisions.[104] Facing a majority Republican Senate for his whole term, he did not run into many issues with his nominations once they were considered by the Senate.[105] Biden, taking office in 2021, had a split Senate which made the need for balancing appointments to all agencies crucial.[106] The Board has recently started to issue decisions that lean pro-labor.[107] Similarly, there has been some pushback from Republican

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101. N.L.R.B. v. Noel Canning, 573 U.S. 513, 518–20 (2014).

102. *See* Mark Landler & Steven Greenhouse, *Vacancies and Partisan Fighting Put Labor Relations Agency in Legal Limbo*, N.Y. TIMES (July 15, 2013), https://www.nytimes.com/2013/07/16/us/politics/vacancies-and-partisan-fighting-put-labor-relations-agency-in-legal-limbo.html [https://perma.cc/VN3S-ZC2L] ("In addition to the Boeing case, Republicans complain that the board has ordered businesses to post notices informing employees of their right to unionize, and has issued new rules to streamline and speed up unionization elections — making it easier, in theory, for workers to organize.").

103. Lydia Wheeler, *Senate Confirms Second Trump Nominee to Labor Board*, THE HILL (Sept. 25, 2017, 6:38 PM), https://thehill.com/regulation/administration/352345-senate-confirms-second-trump-nominee-to-labor-board/ [https://perma.cc/66QG-YXCV].

104. Gould, *Twenty-First Century*, *supra* note 89, at 42; Mark Joseph Stern, *Donald Trump, Union Buster*, SLATE (Dec. 19, 2017, 1:35 PM), https://slate.com/news-and-politics/2017/12/donald-trumps-union-busting-appointees-just-incinerated-obamas-labor-legacy.html [https://perma.cc/EH65-KM27].

105. Democratic Senators under Trump took actions to prevent recess appointments by scheduling meetings to meet the constraints in *Noel Canning*, *supra* note 101. Jordain Carney, *Senate Blocks Trump from Making Recess Appointments over Break*, THE HILL (Aug. 3, 2017, 7:40 PM), https://thehill.com/homenews/senate/345261-senate-blocks-trump-from-making-recess-appointments-over-break/ [https://perma.cc/F95P-Y99U]; *see also infra* Table 1.

106. Ian Kullgren & Robert Iafolla, *NLRB's Vacant GOP Seat Likely to Remain Empty Until Summer*, BLOOMBERG L. (Dec. 19, 2022, 5:05 AM), https://news.bloomberglaw.com/daily-labor-report/nlrbs-vacant-gop-seat-likely-to-remain-empty-until-summer [https://perma.cc/23ML-WNP8]; *see infra* Table 1.

107. *See, e.g.*, Alina Selyukh, *Amazon Warehouse Workers Get to Re-do Their Union Vote in Alabama*, NPR (Nov. 29, 2021, 4:37 PM), https://www.npr.org/2021/11/29/1022384731/amazon-warehouse-workers-get-to-re-do-their-union-vote-in-alabama [https://perma.cc/E7KU-5TAY] (describing the Board's decision to allow for a new election due to extensive coercive practices from Amazon); Daniel Wiessner, *U.S. Labor Board Rejects Starbucks' Call to Revisit Union Election Test*, REUTERS (Sept. 29, 2022, 6:43 PM), https://www.reuters.com/legal/legalindustry/us-labor-board-rejects-starbucks-call-revisit-union-election-test-2022-09-29/ [https://perma.cc/WDA2-UCSV] (describing the Board's decision to still allow for mail-in ballot elections at the discretion of the relevant Regional Director).

Senators; this includes the introduction of the NLRB Reform Act, which would expand the Board to six members evenly split across Democrats and Republicans and would require a four-person majority for any ruling, ensuring bipartisan decision.[108]

II. Why Does the 3-2 Tradition Stick?

As shown in Part I, the National Labor Relations Board has operated with three members of one party and two of another for the vast majority of its existence. Presidents have gone as far as to nominate individuals with goals diametrically opposed to their administration to uphold the structure. Yet, the structure is not required by law.

Why has this structural tradition been upheld? Professor Flynn identifies the appointment process as the main motivating force. This process has changed over time—before the polarization of America's two-party system, the appointment process was mostly controlled by the President and operated as expected under an assumed repeat game of party politics.[109] Since polarization, the Senate exerts more influence over the choice of nominees, leading to the batching of nominees together and the delays in appointments if the Senate is dissatisfied with the NLRB's recent decisions.[110] Flynn's article places the NLRB squarely within the constellation of administrative agencies, arguing that the changes in its appointments are one example of a more general change in American governmental relations.[111] Her argument is outlined in the first section of Part II.

However, there is more to the phenomenon of NLRB partisan balance than the relationship between the President and the Senate when making appointments. This section begins with a comparison of the NLRB to other agencies to show that it is unique among its counterparts in holding such a 3-2 balance despite no such requirement

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108. Press Release, Senator Tim Scott, Scott, Blackburn, Cassidy, Braun Introduce Bill to Stop Political Weaponization of National Labor Relations Board (Mar. 29, 2023), https://www.scott.senate.gov/media-center/press-releases/scott-blackburn-cassidy-braun-introduce-bill-to-stop-political-weaponization-of-national-labor-relations-board [https://perma.cc/432D-GBBP].

109. *See infra* notes 113–23 and accompanying text. The repeat game is the power shifts between Democrats and Republicans holding the presidency and the majority of the Senate that congressmembers and the President operate under. The party in power is aware that its control will not last forever; in order to make sure that it is not absolutely undercut by its opposition once it is out of power, the party in power makes concessions to its opposition. Simultaneously, the party out of power knows that it will be in power at some point in the future, so it can use threats of repercussions in the future to pull the party in power to recognize and realize some of its preferred policies.

110. *See infra* notes 124–45.

111. Flynn, *A Quiet Revolution*, *supra* note 7, at 1420.

in the NLRA. This difference is attributed to two things—the Board's internal structure and the external American labor relations ecosystem. The Board is an adjudicative body: it relies on the decisions of ALJs, has a separate prosecutorial function vested in the General Counsel, reacts to the decisions of those two offices without control over their initial choices, and operates without the support of empirical research. The existence of a majority allows the Board to be responsive to the popularly-elected majority, while the slimness of the majority allows the Board to maintain the type of impartiality expected of a court-like body. After discussing the internal structure in detail, Part II ends by looking more generally at the labor-management relations landscape. The basic inability of Congress to amend the organic statute of the NLRB since 1947[112]—stemming from the two opposing goals of American labor law and the steep decline in unionization since the passage of Taft-Hartley—have made the NLRB less relevant in recent times to the interest groups it directly regulates and to the general American political psyche. Therefore, there is no powerful enough reason to consider changing the 3-2 balance.

A. Appointment Procedure

As defined in the NLRA, the members of the Board are "appointed by the President . . . with the advice and consent of the Senate."[113] In the early years of the NLRB, the process closely replicated those words. Depending on the partisan leaning of the President, labor or management leaders would generate a list of possible nominees.[114] The opposing group could exercise a "limited veto power" over candidates which it viewed as particularly egregious due to the repeat game of nominations—labor and management leaders knew they would later lose power, so they rarely named heavily controversial candidates.[115]

Only after this external interest group compilation and debate was the shortlist presented to the President to choose a nominee.[116] Once the candidate was brought to the Senate for confirmation, the Senate

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112. McCulloch & Bornstein, *supra* note 27, at 67 (describing that the only amendment in the Landrum-Griffin Act, 29 U.S.C. §§ 401–531, which affected the Board "authorized [it] to delegate most of its power to define bargaining units and to direct elections to its regional directors, subject to a discretionary review before the whole Board").

113. 29 U.S.C. § 153(a).

114. Flynn, *A Quiet Revolution*, *supra* note 7, at 1417.

115. *Id.*

116. *Id.* at 1418 (describing how presidents could choose a candidate for reasons like engaging a key Congressmember's support or increasing diversity in the federal government).

in this period chose to exercise deference to the President. The only time the Senate, usually organized by the opposing party's leadership, would fight a nominee was if there was a serious, nonpolitical reason to oppose the nominee or if a nomination would upset the partisan balance of the Board.[117] Thus, interest groups suggested relatively middle-ground individuals, presidents selected candidates which met the political constraints they faced, and Senators approved candidates deferentially unless there was a flagrant ethical issue with the candidate. The strategically restrained exercise of political power by all relevant actors thus upheld the Board's partisan balance in the absence of any rule mandating it.

The trend changed after the rise of party polarization and the election of Reagan. Not only were interest groups suggesting and presidents nominating more partisan candidates, but the Senate was also more active in vigorously reviewing all candidates, extreme or moderate.[118] Regardless of the ideological views of a nominee, they received more intense Senate scrutiny compared to the previous era of appointments due to the influence of heavy interest group lobbying.[119] Eventually, under Clinton, the Senate began presenting its *own* list of nominees to the President rather than the reverse.[120]

Another routine established under the Clinton administration was the packaging of Board nominees; this involved nominating usually equal numbers of labor-leaning and management-leaning individuals to the Board simultaneously.[121] Senate leaders could also condition the approval of Board nominees on the President agreeing to submit the next nominee.[122] The influence of Senate control has become even more prominent in more recent administrations. On some occasions, the

117. *Id.*; *see, e.g.*, *supra* notes 46–50 and accompanying text (describing the Beeson nomination).

118. Flynn, *A Quiet Revolution*, *supra* note 7, at 1419–20.

119. *Id.* at 1424–25 (Reagan), 1426 (Bush I).

120. *Id.* at 1428–32.

121. *Id.* at 1429–32. It is important to note that nominees usually undergo their confirmation process at separate times. The partisan leaders of the Senate Health, Education, Labor, and Pensions Committee and the Senate are generally aware of the later nominees due to the "package" consideration of them together before beginning the formal confirmation process.

122. *Id.* at 1445 ("the President has receded into the background, and a 'you pick two, we pick two' mentality has taken over, instead of all concerned agreeing upon—or at a minimum acquiescing in—the appointment of a particular individual, the rival camps have simply divided up the pie between them: the President and/or key Senate Democrats pick one or more nominees, and key Senate Republicans pick one or more others.").

Senate, when controlled by the opposition, delayed or outright refused to confirm any nominees for political reasons.[123]

Flynn argues that more congressional control over nominations leads to more extremely ideological nominees.[124] Presidents are incentivized to be politically moderate in their nominations because they aim to bring about a much wider policy agenda; Senators, with smaller constituencies, have a narrower policy agenda to achieve.[125] This is compounded by the committee system, as Senators seek assignment to committees they want; the committee's monopoly jurisdiction then leads to heavy lobbying of the Senators by the interest groups relevant to the committee.[126] This collection of influences makes the Senate Health, Education, Labor, and Pensions Committee the main body pushing extreme nominees to the NLRB.[127] And, when confirmed, these extreme nominees have more one-sided voting records than their earlier counterparts—a trend that has generally increased over time.[128]

B. More than External Procedure: The Uniqueness of the NLRB

However, the process described above occurs across agencies: partisan appointees, packaged nominations, and heightened Senate involvement have become the norm.[129] Despite the changes in appointments, the NLRB has held its 3-2 structure until today. This makes it unique among federal agencies: the NLRB is the only independent agency that does not have a mandated partisan structure yet has maintained one. First, this section will compare the Board to other federal agencies to show why it is unique among its counterparts. Why is it unique? The first reason is the internal Board's structure as a quasi-judicial body. The second is the broader American labor relations ecosystem and its influence on the Board. This section will discuss both in turn.

1. Comparison to Other Agencies

The NLRB stands alone among independent federal agencies as one that has no mandated partisan balance requirement yet continues to have one despite the intensely partisan beliefs involved. Many

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123. *See* Gould, *Politics*, *supra* note 8, at 1519 (Bush II); *Obama Appointment to Labor Board Sparks Opposition*, *supra* note 100 (Obama).
124. Flynn, *A Quiet Revolution*, *supra* note 7, at 1437.
125. *Id.* at 1437–38.
126. *Id.* at 1438–40.
127. *Id.* at 1443.
128. *Id.* at 1408, 1411–12 (internal citations omitted).
129. *Id.* at 1435–37.

agencies are subject to strict partisan balance under the two-party system; for example, the Federal Election Commission ("FEC") and the International Trade Commission ("ITC") cannot have more than three of the six commissioners which lead them from the same political party.[130] Other agencies, like the Federal Trade Commission ("FTC") and the Securities Exchange Commission ("SEC") can only have a bare majority from the same political party which, like the NLRB, is a 3-2 split.[131] Even the National Mediation Board ("NMB"), which operates like the NLRB for the rail and air industries, and the Federal Labor Relations Authority ("FLRA"), a similar agency but for federal government employees and employers, have statutorily mandated partisan balances of 2-1.[132] Congress declined to mandate a partisan balance in the Wagner Act, the Taft-Hartley Act, and the Landrum-Griffin Act. Indeed, such a formal partisan balance was considered during Taft-Hartley and made it into the House's approved bill but was removed from the final law for unknown reasons.[133]

The NLRB is not the only "exception[.]"[134] The Occupational Safety and Health Review Commission ("OSHRC"),[135] the Federal Mine Safety and Health Review Commission,[136] the Chemical Safety and Hazard Investigation Board,[137] and the Federal Reserve Board[138] are other independent agencies with no partisan requirements. Unlike the NLRB, though, they all do not have a strong unwritten tradition of partisan balance. The OSHRC, Federal Mine Safety and Health Review Commission, and Chemical Safety and Hazard Investigation Board are all agencies that have leadership chosen among the group of people

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130. Joshua Kershner, *Political Party Restrictions and the Appointments Clause: The Federal Election Commission's Appointments Process Is Constitutional*, 32 CARDOZO L. REV. 615, 616 (2010) (citing 2 U.S.C. § 437c(a)(1)) (FEC); Daniel J. Lass, *Loss of Independence? The Future of the International Trade Commission, Partisan Balance, and Their Relationship with the President*, 14 AM. U. INTELL. PROP. BRIEF 21, 23 (2022) (citing 19 U.S.C. § 1330(a)) (ITC).

131. Ronald J. Krotoszynski Jr. et al., *Partisan Balance Requirements in the Age of New Formalism*, 90 NOTRE DAME L. REV. 941, 972, 1011 (2015) (citing 15 U.S.C. § 41 for the FTC and 15 U.S.C. § 78d(a) for the SEC).

132. *Id.* at 1011, 1014.

133. Brian D. Feinstein & Daniel J. Hemel, *Partisan Balance with Bite*, 118 COLUM. L. REV. 9, 54 (2018); *see also* GROSS, THE RESHAPING, *supra* note 22, at 196 (describing how a partisan balance requirement was considered under the Smith Amendment, which was later used as a template for the House's Taft-Hartley bill).

134. Feinstein & Hemel, *supra* note 133, at 32.

135. Marshall J. Berger & Gary J. Edles, *Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 ADMIN. L. REV. 1111, 1139 (2000).

136. *Id.*

137. Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 CORNELL L. REV. 769, 797 (2013).

138. *Id.*

"who are qualified by reason of training, education, or experience to carry on the functions" of the agency—the required technical expertise for the nominees minimizes the importance of partisan affiliation.[139] The Federal Reserve Board, leading the regional Federal Reserve Banks and general U.S. monetary policy, is also distinguishable from other independent agencies due to its operation as the national bank, extensive congressional oversight, and absence of funding from Congress.[140]

Thus, the NLRB stands alone even among federal independent agencies; despite the absence of a statutory mandate, the Board maintains a partisan balance. The Board essentially operates as an agency that has such a statutory requirement.[141] As the next subparts will discuss, the Board's internal structure and the labor-management ecosystem explains this surprising phenomenon.

2. *Internal Board Structure*

The NLRB, despite being an agency with both rulemaking and adjudicative powers, almost exclusively[142] relies on adjudication to

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139. Berger & Edles, *supra* note 135, app. at 1281 (discussing OSHRC). Given the similarities in operation and responsibility between the three agencies, though, such a characterization is extendable to the other two. *See id.* at 1241 (Chemical Safety), 1264 (Mine Safety), 1281 (OSHRC) (showing the similarity in their missions as agencies).

140. Datla & Revesz, *supra* note 137, at 797 (identifying the Federal Reserve Board as an independent agency). The Federal Reserve operates like a bank, which means its funding does not come from Congress. In addition, it is under extensive congressional oversight not seen in other federal agencies. For more information, see *What Does It Mean that the Federal Reserve Is "Independent Within the Government"?*, BD. GOVERNORS FED. RSRV. SYS.: FAQs (Mar. 1, 2017), https://www.federalreserve.gov/faqs/about_12799.htm [https://perma.cc/LC3H-JZY5].

141. Feinstein & Hemel, *supra* note 133, at 55 ("In short, we find little to suggest that the difference between the NLRB's partisan balance convention and the statutory [partisan balance requirement]s applicable to other agencies has any effect on ideological composition—the NLRB looks much like the statutory PBR agencies in terms of the ideological preferences of appointees."); *see also* Neal Devins & David E. Lewis, *The Independent Agency Myth*, 108 CORNELL L. REV. 1305, 1354–55 (2023) (stating that the NLRB, like agencies with party balance requirements, has fallen into the pattern of batching in the federal agency nomination process).

142. *See* Charlotte Garden, *Toward Politically Stable NLRB Lawmaking: Rulemaking vs. Adjudication*, 64 EMORY L.J. 1469, 1471 (2015) (stating that the Board has only used notice-and-comment rulemaking to successfully pass a rule twice in its history prior to 2015—for a rule regarding bargaining units in health care and one to streamline elections). Since 2015, the Board has only promulgated four rules: one setting the standard for joint employer status and three which flip-flop on union election rules between presidential administrations. *See National Labor Relations Board Rulemaking*, NAT'L LAB. RELS. BD.: ABOUT NLRB, https://www.nlrb.gov/about-nlrb/what-we-do/national-labor-relations-board-rulemaking [https://perma.cc/QH9T-HK9L]; *National Labor Relations Board Rulemaking Archive*, NAT'L LAB. RELS. BD.: ABOUT NLRB, https://www.nlrb.gov/about-nlrb/what-we-do/national-labor-relations-board-rulemaking-archive [https://perma.cc/3Q7V-Q3Y2].

promulgate policy.[143] As then-Senator John F. Kennedy stated when discussing appointments to the Eisenhower Board:

> The Board (which is not a policy-making branch of the administration) is a quasi-judicial agency, whose primary function is to interpret and apply the basic labor relations law of the land . . . . Board members are, in effect, judges; and their decisions are of tremendous importance in the determination of the legal rights of labor and management.[144]

Other basic features of the Board's internal procedure demonstrate its similarity to a court. It is empowered to issue subpoenas for witnesses and evidence[145] and must follow evidentiary rules.[146] Most importantly, four structural features of the Board illustrate its quasi-judicial status: the Board's reliance on ALJ decisions, its separation from the NLRB General Counsel, its reactionary posture vis-à-vis the GC and the strategic pursuit of cases, and the prohibition on considering empirical and economic research in decisions. Each is considered in turn; it is their combined effect which upholds the 3-2 balance.

a. ALJ Decision Reliance

There are many administrative agencies that rely on ALJ decisionmaking to make longstanding policy; the NLRB is one of the few that resolves disputes between two separate regulated interests rather than a dispute between the agency and a party.[147] NLRB ALJs make decisions only in unfair labor practice cases, which can be filed by a worker, union, or employer.[148] Reliance on ALJ decisionmaking is expected for a few reasons. First, agency appointees who are more political in nature often rely heavily upon the expertise of the

143. James J. Brudney, *Isolated and Politicized: The NLRB's Uncertain Future*, 26 Comp. Lab. L. & Pol'y J. 221, 234 (2005).

144. Berger, *supra* note 33, at 412 (quoting Scher, *supra* note 39, at 685).

145. Gross, The Making, *supra* note 8, at 136.

146. Gross, The Reshaping, *supra* note 22, at 253–54.

147. *See* Harold J. Krent, *Limits on the Unitary Executive: The Special Case of the Adjudicative Function*, 46 Vt. L. Rev. 86, 86 n.1 (2021) (stating that the NLRB, FLRA, and the Merit Systems Protection Board (MSPB) are different than other administrative adjudicatory bodies because they resolve disputes between two, non-governmental parties).

148. *See Decide Cases*, Nat'l Lab. Rels. Bd.: About NLRB, https://www.nlrb.gov/about-nlrb/what-we-do/decide-cases [https://perma.cc/9ZWG-3PWL]; *Unfair Labor Practice Charges Filed Each Year*, Nat'l Lab. Rels. Bd., https://www.nlrb.gov/reports/nlrb-case-activity-reports/unfair-labor-practice-cases/intake/unfair-labor-practice-charges [https://perma.cc/WQ92-AC6A].

specialized experts who have been with the agency for longer tenures.[149] Second, it is NLRB policy that, as an appellate body, it is not allowed to overrule the ALJ's conclusion unless a clear preponderance of all relevant evidence points in the opposing direction (akin to the "clear error" standard of review for factual findings of federal district courts by federal appellate courts).[150] Third, drawing on the relationship between trial and appellate federal courts, ALJ decisions, which often feature heavy reliance on specific facts, could compel the Board to uphold these decisions based on a totality of the circumstances approach or as a narrow factually-based rule.[151] Fourth, the Board is required to conduct a "whole record review" of an ALJ decision appealed to it and, if in disagreement, it must provide a written legal justification for its reasoning.[152] Given the large caseload faced by the NLRB and the backlog of cases, the ALJ decision can serve as a cue that shortens the review of the record and allows the Board to focus on non-routine cases.[153]

The combination of these expectations creates a strong assumption that the Board will rely on ALJ decisions. Professor Cole Taratoot demonstrated this empirically.[154] According to his study of the Board from 1991 to 2006,[155] "the decision of the ALJ is the most important determining factor of the Board outcomes during this period[,]" with political ideology of the Board's majority playing a more moderate role than assumed in previous scholarship.[156] In the fifteen years analyzed, 89.4% of appealed and non-appealed case decisions match the outcome of the ALJ's decision.[157] Whether the case result was pro-management, pro-labor, or split, the ALJ decision was the strongest

149. Cole D. Taratoot, *Review of Administrative Law Judge Decisions by the Political Appointees of the NLRB, 1991-2006*, 23 J. PUB. ADMIN. RSCH. & THEORY 551, 555 (2013).

150. *Id.* at 555–56 (citing Standard Dry Wall Products, 91 NLRB 544 (1950)).

151. *Id.* at 556. *See also* Brudney, *supra* note 143, at 235 (stating that this is a common approach from the Board).

152. Taratoot, *supra* note 149, at 556.

153. *Id.* at 556–57; *see also* Gould, *Politics*, *supra* note 8, at 1514 (noting the beginning of the backlog in cases is attributed to the Reagan administration); Taratoot, *supra* note 149, at 573 ("As agency caseloads increase, and Board members look for shortcuts to more efficient decision making, the cue of the ALJ's decision becomes one of increasing importance.").

154. Taratoot, *supra* note 149, at 553, 565–66.

155. Given arguments made throughout this Note about the relative stability of the Board in terms of its partisan appointments, it is likely that ALJ decisions have a similar effect on opinions issued by today's Board opinions.

156. Taratoot, *supra* note 149, at 553, 566.

157. *Id.* at 559.

determining factor.[158] Economic influences, political forces such as the President or Congress, and case characteristics such as whether a party filed exceptions did not play a significant role.[159] The result was unaffected by whether the case was routine or influential.[160] Professor Taratoot also found that ALJs on unfair labor practices cases were not preconditioning their decisions to "satisfy the Board." Not only was this effect not observed in the analysis, Professor Taratoot also notes that ALJs have ample legal protections to minimize this pressure, such as separate compensation plans, different promotion and demotion schedules, and unique firing procedures in comparison to the Board.[161]

b. Board and GC Separation

Another key feature of the Board is its separation from the General Counsel, which solidifies its existence as a quasi-judicial agency. The Taft-Hartley amendments aimed to "[s]eparate the judicial and prosecutory functions of the NLRB through the creation of a separate administrator empowered to prosecute complaints and to seek enforcement of Board orders in the courts"[162] under the theory that "the Board should function like a court and be totally divorced from the prosecutory function."[163]

The Taft-Hartley amendments codified a practice the agency had voluntarily followed and had been mandated by the Administrative Procedure Act ("APA") prior to Taft-Hartley.[164] Before Taft-Hartley,

158. *Id.* at 559 n.8, 565–66.

159. *Id.* at 560–64, 567–68. *But see id.* at 567–68 (noting that the only case characteristic which did play a role was the number of cases which a party had in front of the Board; a higher caseload brought by a union resulted in more split decisions).

160. *See id.* at 568–70 (discussing how routine cases are most of the case work of the NLRB, but the result still holds generally in important cases, although the influence of partisan identity of the majority is higher in important cases). *See generally* 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 (2016) (upholding Taratoot's conclusion through her own research, which takes into account the panels which heard the cases). In Semet's words, "Time and time again, the most important predictors of how the NLRB will rule is the panel type and ALJ decision." *Id.* at 284.

161. Taratoot, *supra* note 149, at 571–72 (referencing Cole D. Taratoot & Robert M. Howard, *The Labor of Judging: Examining Administrative Law Judge Decisions*, 39 AM. POL. RSCH. 832 (2011)).

162. GROSS, THE RESHAPING, *supra* note 22, at 253.

163. MCCULLOCH & BORNSTEIN, *supra* note 27, at 45.

164. Administrative Procedure Act, 5 U.S.C. §§ 500–96; *see also* Ida Klaus, *The Taft–Hartley Experiment in Separation of NLRB Functions*, 11 INDUS. & LAB. REL. REV. 371, 374 (1958) (stating that the APA "put into effect a uniform system of fair and orderly standards of procedure and internal organization to govern the operations of all administrative agencies").

the Board had already set up an internally separated structure in which staff who supported prosecutorial tasks and those who assisted in the adjudicative process were isolated from each other.[165] Congress later established, with the APA, a provision requiring separation of prosecution and adjudication within every administrative agency, including the NLRB.[166] The internal regulations of the NLRB "accorded in all substantial respects with the requirements of the [APA]."[167] Yet, Congress still chose to separate the functions in the NLRB's organic statute, rendering the NLRB the sole exception to the APA rules in this respect.[168] Senator Taft consistently stated that the definition in the Taft-Hartley amendments would make no real difference from the requirements of the APA, but never explained why this regulation was necessary.[169]

The general terms of the requirements under Taft-Hartley forced the real responsibility for separating powers onto the Board and the General Counsel. The Truman appointees thus had to delineate these responsibilities, which caused massive internal conflict and public controversy.[170] Ultimately, the GC was given significant powers previously held by the Board. This included more control over the Regional Offices and their handling of representation petitions[171] and the responsibility to pursue enforcement and offer defense of Board orders in federal court if necessary for a case, among others.[172] Former Chairman Gould described this design as "a kind of two-headed monster, which can lead to intra-agency divisiveness."[173] Since the Truman Board, however, there has been minimal conflict between the two offices.[174] The separation of the Board from the General Counsel, combined with the reliance on the lower decisions of the ALJs, fashions the Board as a quasi-judicial agency.

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165. Klaus, *supra* note 164, at 373.
166. *Id.* at 374; *see also* 5 U.S.C. § 554 (d).
167. Klaus, *supra* note 164, at 374.
168. Gross, The Reshaping, *supra* note 22, at 264.
169. Klaus, *supra* note 164, at 377–78.
170. McCulloch & Bornstein, *supra* note 27, at 58–59.
171. The two major categories of cases which are under the Board's jurisdiction are representation cases and unfair labor practice cases. These may overlap: a representation election could involve unfair labor practices. The handling of petitions for representation and unfair labor practices have different procedural tracks within the agency.
172. Klaus, *supra* note 164, at 379.
173. Gould, *Twenty-First Century*, *supra* note 89, at 37.
174. McCulloch & Bornstein, *supra* note 27, at 60; *see also* Gross, Broken Promise, *supra* note 5, at 58 ("The enforcement of policy as well as the making of policy was seriously impeded by Taft-Hartley's separation of powers [during the Truman administration] . . . .").

c. Reactionary Posture of the Board

The NLRB—like a court—does not exert control over either the regulated entities filing cases or the General Counsel, and must instead react to those parties' actions. Given the assumed political stance under an elected president, putative complainants will strategically bring cases to improve the law in their favor.[175] A Democratic administration carries with it more case activity from unions, and a Republican president means more activism from employers; political scientist Terry Moe refers to this activity as "mutually adaptive adjustment[.]"[176] Such activity is not just motivated by the unions and employers themselves: the General Counsel[177] and the Board[178] inspire the strategic action.

Cases brought by regulated parties are then further subject to the choices and discretion of the General Counsel—decisions the Board cannot direct. In addition to motivating parties to bring cases, the General Counsel also has the "full and unreviewable authority" to choose not to pursue a filed unfair labor practice case.[179] Neither the

175. *See* Twomey, *supra* note 96, at 149 ("[W]ith a change in administration and the usual 'packages' of partisan appointments with the party in power maintaining the majority position, the majority then waits for, indeed hunts for, a case containing the policy issue it would like to change.").

176. Terry M. Moe, *Control and Feedback in Economic Regulation: The Case of the NLRB*, 79 AM. POL. SCI. REV. 1094, 1095 (1985).

177. The General Counsel often publishes memoranda which state policy goals for their term. This signals constituent parties to bring cases that conform to these policy objectives if they arise. *See, e.g.*, Memorandum GC 23-08 from Jennifer A. Abruzzo, Gen. Couns., Nat. Lab. Rels. Bd., to All Reg'l Dirs., Officers-in-Charge, and Resident Officers, Non-Compete Agreements that Violate the National Labor Relations Act (May 30, 2023), https://apps.nlrb.gov/link/document.aspx/09031d4583a87168 [https://perma.cc/6DT8-NW7G]; Memorandum GC 23-02 from Jennifer A. Abruzzo, Gen. Couns., Nat. Lab. Rels. Bd., to All Reg'l Dirs., Officers-in-Charge, and Resident Officers, Electronic Monitoring and Algorithmic Management of Employees Interfering with the Exercise of Section 7 Rights (Oct. 31, 2022), https://apps.nlrb.gov/link/document.aspx/09031d45838de7e0 [https://perma.cc/C63D-REBG]; Memorandum GC 22-04 from Jennifer A. Abruzzo, Gen. Couns., Nat. Lab. Rels. Bd., to All Reg'l Dirs., Officers-in-Charge, and Resident Officers, The Right to Refrain from Captive Audience and other Mandatory Meetings (Apr. 7, 2022), https://apps.nlrb.gov/link/document.aspx/09031d458372316b [https://perma.cc/32XU-S9F5]. These memoranda are addressed to the NLRB Regional Offices and their staff and are publicly posted for access by constituents as well. They also extensively discuss the types of evidence and arguments needed to achieve the policy change, which, although meant to give direction to NLRB investigators, can be relied on by the later filing party.

178. Twomey, *supra* note 96, at 149 ("[T]he majority then waits for, indeed hunts for, a case containing the policy issue it would like to change. It then squeezes its policy change into the decision often without a compelling policy reason but because it can.").

179. Klaus, *supra* note 164, at 378.

Board[180] nor the filing party[181] can truly fight the General Counsel's choice on this matter. So, an unfair labor practice case comes before the Board only after the independent decisions of multiple actors: the aggrieved party must decide to bring the case, the General Counsel must choose to pursue the case, the ALJ must make a ruling, and a party (either the GC or the opposing party) must decide to appeal the decision from the ALJ for it to finally reach the Board.[182] Cases involving issues with a representation petition or election also have several procedural requirements, including a stop with a Regional Director under the direction of the GC, before they reach the Board.[183]

This leaves the NLRB in a reactionary position to the choices of others, making it "act solely in a quasi-judicial capacity[.]"[184] Unlike the more routine cases which demonstrate heightened deference to the ALJs, on the crucial and polarizing issues the Board members will react to the case and write opinions that match their predisposed preferences towards unions or employers as former members of the management or labor bar.[185] Because it does not rely on rulemaking,[186] the ultimate policy choices of a Board are instigated by constituents and the General Counsel and make the Board "seem most like a specialized labor court and least like a modern administrative agency[.]"[187]

d. Ban on Economic Research

Another court-like quality of the Board is its "lack of reliance" on economic data.[188] Under the Wagner Act, the Board internally created a

180. *Id.* (stating that the Board can only decide the cases which are brought to it by the GC).

181. Brudney, *supra* note 143, at 231 (citing N.L.R.B. v. United Food & Commercial Workers Union, Local 23, 484 U.S. 112, 122–23 (1987)).

182. On appeal, a panel of three Board members often decides cases. If the appealed case involves a novel issue or could potentially change precedent, the full Board will consider it. *Decide Cases*, *supra* note 148.

183. Instead of going to an ALJ, representation issues are first decided by a Regional Director. Given the separation of powers with the GC, the Regional Director sits under the GC. Either the union or the employer can ask the Board to review the Regional Director's decisions. *The Main Steps in the Representation Case Process Under the Proposed Amendments*, *supra* note 163.

184. Klaus, *supra* note 164, at 378.

185. *See* Flynn, *"Expertness for What?"*, *supra* note 89, at 477 ("As a realistic matter, Board members who have come from the management or union side and are doubtlessly headed right back there at the end of their term are almost certain to be locked into the 'management' or 'union' view of important policy issues from the outset.").

186. *See supra* note 143 (discussing the infrequency of Board rulemaking).

187. Fisk & Malamud, *supra* note 98, at 2053.

188. *Id.*

Division of Economic Research that gathered economic data to be used as evidence for specific Board cases and to inform the Board in general policy formulation.[189] The data collected and summarized by the Division played a key role in the Supreme Court upholding the agency as a whole in *NLRB v. Jones & Laughlin Steel Corp*.[190] Beyond internal struggles over the importance and use of the economic research,[191] the Division came under intense scrutiny during the House of Representatives Smith Committee investigation into Communism at the Board.[192] A result of the investigation was the complete cut of appropriations for the salaries of those working in the Division of Economic Research.[193] Thus, when the Board was banned from conducting "economic analysis" in the Taft-Hartley amendments,[194] not much changed at the agency; it had already ended the use of economic research.[195]

Deeming labor economics data and analysis "irrelevant"[196] to Board policymaking has drastic effects. Primarily, it solidifies the Board's posture as a court-like agency. The loss of economic data goes further, though, by leaving the agency to make adjudicative decisions based on "intuition" and "true meaning" rather than based on empirical evidence about labor-management relations, economic theories about the labor market, or evidence regarding the actual impact of past Board rules.[197] Although Taft-Hartley prevents the Board from conducting its *own* economic research, the NLRB has also failed to utilize resources from other agencies, like the Department of Labor, to incorporate some economic policy in its decisions.[198] This combination of choices inhibits the Board's ability to

189. James A. Gross, *Economics, Politics, and the Law: The NLRB's Division of Economic Research, 1935-1940*, 55 CORNELL L. REV. 321, 323–25 (1970) [hereinafter Gross, *Division of Economic Research*].

190. *See id.* at 327–33 (internal citations omitted).

191. *See id.* at 333–39 (internal citations omitted); *see also* GROSS, THE RESHAPING, *supra* note 22, at 218 (describing that the antagonism between the economists and lawyers at the Board derived from the basic issue—"whether Congress intended the NLRB to be a judicial agency or an industrial relations agency.").

192. *See generally* GROSS, THE RESHAPING, *supra* note 22, at 85–108; Gross, *Division of Economic Research*, *supra* note 189, at 340–44 (describing the Smith Committee and its investigation).

193. Act of Oct. 9, 1940, ch. 780, 54 Stat. 1037.

194. 29 U.S.C. § 154 (a).

195. Gross, *Division of Economic Research*, *supra* note 189, at 321.

196. Fisk & Malamud, *supra* note 98, at 2019.

197. Samuel Estreicher, *Policy Oscillation at the Labor Board: A Plea for Rulemaking*, 37 ADMIN. L. REV. 163, 172 (1985) (internal quotations omitted); *see also* Fisk & Malamud, *supra* note 98, at 2019 (discussing "the tendency of Board members, who recently have been drawn almost entirely from the ranks of labor and management attorneys to reason like lawyers balancing rights rather than policy analysts studying social and economic regulatory problems" as an obstacle to coherence of Board policy).

198. Fisk & Malamud, *supra* note 98, at 2019, 2049.

achieve the intent of Congress which was to "be able to experiment with its policies, to see how they work in the real world, and then refine or abandon the rule in the light of actual experience."[199] Scholars have thus criticized the Board for being unable to update labor law to meet the demands of the changing American and global economy.[200]

e. Coda – Why the Quasi-Judicial Structure Leads to a 3-2 Partisan Split

This section outlined four forces at play within the NLRB: the reliance of the Board on prior ALJ decisions, the separation of the Board from the General Counsel, the positioning of the Board as a reactionary to its constituents and the GC, and the inability of the Board to use internal economic research. They all combine to render the NLRB a quasi-judicial agency; the Board's court-like nature upholds the tradition of the 3-2 partisan balance.

The Board was originally intended to be "impartial"[201]—as a quasi-judicial body, an element of balance between sides is necessary to ensure a semblance of impartiality. But, Congress specifically took this issue out of the courts.[202] So, the NLRB should *not* function like an actual court and practice *stare decisis*; rather, it should change its position as the party holding the Presidency changes because that is what Congress intended.[203] The NLRB furthers that goal by its common invocation of a totality of the circumstances approach with strong ties to factual circumstances of individual cases, which prevent Congress or the courts from attempting to overhaul its efforts.[204] Thus, Boards under Republican presidents can consider the facts to rule in ways that match a conservative ideology, while Boards under Democratic presidents can do just the same to reach a liberal goal. Such a partisan design has actually come to be accepted by political theorists—not only was the

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199. Estreicher, *supra* note 197, at 167 (internal quotations omitted); *see also* Brudney, *supra* note 143, at 224 (noting that agencies should adhere to the original purposes of their organic statute as well as sensitive to changed circumstances in the world).

200. Fisk & Malamud, *supra* note 98, at 2053; *see also* Gross, The Reshaping, *supra* note 22, at 264–65 (stating that the removal of the Division was irresponsible because it introduces doubt as to the administrative expertise of the Board).

201. Gross, The Making, *supra* note 8, at 132.

202. *See* Estreicher, *supra* note 197, at 166. *See generally* James W. Wimberly Jr., *The Labor Injunction – Past, Present, and Future*, 22 S.C. L. Rev. 689, 689–94 (1970) (describing the history of the use of labor injunctions by courts to stifle the labor movement, culminating in congressional action which banned their use).

203. *See* Estreicher, *supra* note 197, at 166 (citing Ralph Winter, *Judicial Review of Agency Decisions: The Labor Board and The Court*, 1968 Sup. Ct. Rev. 53).

204. Brudney, *supra* note 143, at 235.

idea of complete impartiality in an administrative agency "unrealistic[,]" but it also would prevent them from best serving the public interest by "respond[ing] to changes in national political sentiment reflected in Presidential elections."[205] The balance between practicing impartiality in adjudication and responding to the public interest requires a partisan balance in Board membership. The 3-2 Board split is the result of the counteracting forces.

3. The Labor-Management Relations Ecosystem

Outside of the internal infrastructure or the partisan appointment process to the Board, the American labor relations ecosystem upholds the 3-2 partisan balance. The first force influencing the Board is the inability to pass American labor law reform. There have been many attempts at reform since the passage of Taft-Hartley, but all have failed to come to fruition.[206] While agencies like the SEC and the Federal Communications Commission ("FCC") have received updates to their organic statute from Congress and additional congressional direction on how to tackle new technology and responsibilities, the NLRB has received little substantive direction.[207] As Professor Brudney describes the issue, the Board thus "relies on an aging regulatory structure to monitor and respond to labor relations realities that could scarcely have been anticipated sixty or seventy years earlier."[208] This inaction signals congressional acquiescence to the Board's structure—including the 3-2 balance—outdated as it might be. The absence of political will to change the established tradition of appointments signals to the Board and to other interest groups Congress's tacit approval of the 3-2 structure.

The inability to amend and update the NLRA also leaves the Board to contend with the two contradictory fundamental goals of the statute. The policy goal of the NLRA is to "encourag[e] the practice and procedure of collective bargaining and . . . [protect the] full freedom of association[.]"[209] The right given to employees is "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively. . . and to engage in other concerted activities[,]"

205. McCulloch & Bornstein, *supra* note 27, at 176.

206. *See supra* notes 39–42 (describing the failure to amend the Wagner Act under the Eisenhower administration); Estlund, *supra* note 30, at 1540–41 (discussing failed reform efforts in 1977-78, 1992, and 1994). The trend continues in the most recent Congressional sessions, which have ultimately failed to pass the Protecting the Right to Organize Act (PRO Act); *see* H.R. 2474, 116th Cong. (2019); H.R. 842, 117th Cong. (2021); H.R. 20, 118th Cong. (2023).

207. Brudney, *supra* note 143, at 227–28.

208. *Id.* at 228.

209. 29 U.S.C. § 151.

but the law also explicitly grants "the right to refrain from any or all of such activities" as amended by Taft-Hartley.[210] Congress passed this amendment because the original Wagner Act only regulated management activity; by adding unfair labor practices that labor organizations could commit and the right to refrain, the amendment's drafters aimed to make the law more equitable between labor and management.[211]

The purposes behind the Wagner Act and the Taft-Hartley Act thus reflect two conflicting goals of American labor policy enshrined in the NLRA.[212] The management/conservative interpretation is that the Taft-Hartley amendments, in response to "perceived NLRB pro-union bias[,]" ultimately made the agency "neutral toward collective bargaining" with extra concern for protecting the ability for employees to "resist unionization" and employers to "speak their minds during union election campaigns[.]"[213] The union/liberal interpretation is that the NLRA "encourage[s] collective bargaining and protect[s] pro-union employees from employer abuses of power."[214] The statute thus reflects "the odd marriage between the two" and leaves "it to the NLRB to enforce these inconsistent mandates."[215] The conflicting goals exacerbate the already deep division of interests between unions and employers and the policy flip-flopping at the Board.[216] The 3-2 balance prevents either side of the divide from dominating labor policy. By having both viewpoints represented, Board opinions are pulled towards the center and do not reach their fullest potential at either end of the spectrum only to switch back with a new administration.[217] This is analogous to the repeat game idea describing the Senate-President relations in appointments[218]: controlling Board members know that they will be in the minority in the future, so they pull their decisions towards the center in the hope that their counterparts will do the same once they are in power. Thus, Board's opinions reflect a more stable,

210. *Id.* § 157.

211. GROSS, BROKEN PROMISE, *supra* note 5, at 39 ("In reality, its more significant purpose was to curb the growing economic and political power of organized labor.").

212. Fisk & Malamud, *supra* note 98, at 2033–34.

213. *Id.* at 2035.

214. *Id.*

215. *Id.* at 2036; *see also* GROSS, BROKEN PROMISE, *supra* note 5, at 14 ("Because there were potentially conflicting statutory purposes in the Taft-Hartley act, the new five member NLRB was in the unique position of choosing between different labor policies and, over time and political administrations, of swinging labor policy from one purpose to its direct opposite."); *id.* at 120 ("The Board must always make choices between competing values and policies.").

216. Estreicher, *supra* note 197, at 168–69.

217. *See* Gould, *Twenty-First Century*, *supra* note 89, at 42 (describing the political split as "unavoidable [but] promot[ing] balance and stability").

218. *See supra* note 109.

more central position than the ones that a 5-0 Board might espouse; the more partisan opinions of such a Board would experience dramatic reversal upon changes in administration, creating more instability than is currently witnessed in this field of law.

The inability to pass labor law reform, as well as the 3-2 Board split, may also be caused by the steady decline in unionization in the United States since the Taft-Hartley amendments. This is a global phenomenon in the industrialized world due to "offshoring, contracting out, automation, [and] globalization[.]"[219] While some scholars argue that the law caused the decline as well, others argue that the law "accelerated this change" caused by external forces.[220] Professors Catherine Fisk and Deborah Malamud describe the phenomenon of union decline as follows:

> Very few industries that were not unionized before the Taft-Hartley Act have since become unionized. And the industries that were heavily unionized before Taft-Hartley - mining; metal production; heavy manufacturing including automobile production; and meat slaughtering and processing - are almost all in decline.[221]

The interpretation of these external events, and how the Board should respond to them, also falls along the two different viewpoints about the fundamental policy behind the NLRA. Without the ability to conduct empirical research of events or to incorporate others' research into its opinions, the Board must base its interpretations on the "true meaning" of the statute.[222] For conservatives, the decline supports the idea that unionization and collective bargaining are not automatically the best practices in industrial relations.[223] Since they believe union strength should be dependent solely upon their economic and reputational strength rather than having the support of a legal framework, their success must rely solely on their own building of solidarity. Therefore, the decline in unions must be a result of their failure to inspire workers.[224] Liberals view the change differently. Because collective bargaining under the NLRA policy is the assumed best practice, unions must be given *more* power

219. *Id.* at 34.
220. *Compare id.* ("the labor movement in the United States . . . is in retreat due to . . . the law"), *with* GROSS, BROKEN PROMISE, *supra* note 5, at 254–55 (describing how the Dotson Board under Reagan accelerated the massive decline in union membership due to hostility, high unemployment, and foreign competition).
221. Fisk & Malamud, *supra* note 98, at 2052.
222. *See* the discussion *supra* in Part II under "Ban on Economic Research."
223. Fisk & Malamud, *supra* note 98, at 2043–44.
224. *Id.* at 2044.

to organize workers to counteract the declining union membership.[225] These differing interpretations warrant the persistence of the 3-2 split by ensuring that Board opinions consider both interpretations.

The decrease in union membership, specifically in the private sector,[226] has led to a decline in the NLRB's influence.[227] Fewer workers operating with union representation or pursuing such representation means there are fewer instances in which the Board is acting to promulgate policy. The long period of Republican control of the Presidency (Reagan and Bush I) also was the beginning of organized labor's disillusionment of the Board. Unions and their members no longer viewed the Board as "a possible source for protecting or vindicating statutory rights," and they tried their best to organize workforces and draft contracts "avoiding NLRB jurisdiction as much as possible."[228] This led to increased use of card check agreements and voluntary recognition rather than pursuing a Board election.[229] The trend also upheld the 3-2 balance: if there is no political capital to be gained from changing the structure of the Board because the Board is no longer influential, there is no reason for the President or Congress pursue reform through nominations or statute.

Thus, the external factors from the labor management ecosystem—the inability to pass labor law reform, the opposing views on the fundamental policy behind the NLRA, and the decline in unionization and thus Board influence—additionally uphold the 3-2 partisan split in Board membership.

III. Looking Towards the Future of the Agency

The Note has discussed why the party balance, with three members of the president's party and two of the opposing party, has persisted over the course of the NLRB's history. In that analysis, it has described the Board as having explicitly partisan members despite the

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225. *Id.*

226. The NLRB is the agency tasked with labor relations in the private sector. Public sector employees have other bodies which they act through; it is important to note, though, the non-binding influence the NLRB holds on public sector unions and employers.

227. Fisk & Malamud, *supra* note 98, at 2052 ("The decline in the Board's influence is partly attributable to the decline in union density brought about by deindustrialization."); Brudney, *supra* note 143, at 253 ("The substantive reality of a weaker labor movement has surely helped to marginalize the status of the agency charged with protecting collective bargaining relationships.").

228. Brudney, *supra* note 143, at 251.

229. *See* Adrienne E. Eaton & Jill Kriesky, *Union Organizing Under Neutrality and Card Check Agreements*, 55 Indus. & Lab. Rels. Rev. 42, 42 (2001) ("Collectively bargained language to address the process of organizing new workers is increasing in frequency and importance.").

legislatively-mandated impartiality; serving as a reactionary body to the efforts of the agency's ALJs, General Counsel, and constituent groups; relying on legalistic fortune-telling instead of economic empirical data for its opinions; flip-flopping on its views of the fundamental American labor policy; and ultimately existing as an uninfluential body in the face of decreasing unionization. This characterization leaves little hope for the future of the agency and inspires questions about whether this is the best way to promulgate evidence-based labor policy.

Yet, after the COVID-19 pandemic, there has been an upswing in both union activity and support for the labor movement. Seventy-one percent of Americans approve of labor unions and sixty-eight percent of current union members find their membership to be somewhat or extremely important.[230] Requests for union elections increased by over fifty percent in the first eight months of 2022.[231] Workers have sparked movements to unionize at American household name companies like Starbucks,[232] Amazon,[233] and Trader Joe's.[234] While the Writers Guild of America (WGA) and the later Screen Actors Guild and American

230. Justin McCarthy, *U.S. Approval of Labor Unions at Highest Point Since 1965*, Gallup (Aug. 30, 2022), https://news.gallup.com/poll/398303/approval-labor-unions-highest-point-1965.aspx [https://perma.cc/K3SU-7HNP].

231. Thomas Kochan & Wilma Liebman, *America's Seeing a Historic Surge in Worker Organizing. Here's How to Sustain It*, Commentary, WBUR (Sept. 5, 2022), https://www.wbur.org/cognoscenti/2022/09/05/worker-organizing-labor-day-thomas-kochan-wilma-liebman [https://perma.cc/EW4K-MEVE] (citing Press Release, Nat'l Lab. Rels. Bd., Union Election Petitions Increase 57% in First Half of Fiscal Year 2022 (April 6, 2022), https://www.nlrb.gov/news-outreach/news-story/union-election-petitions-increase-57-in-first-half-of-fiscal-year-2022 [https://perma.cc/3VJC-YX4G]).

232. *See, e.g.*, *Current Starbucks Statistics*, Union Election Data, https://unionelections.org/data/starbucks/ [https://perma.cc/JJ4L-X9D8] (showing that Starbucks Workers United, an SEIU affiliate, has successfully unionized 403 stores nationwide as of April 2024); Megan K. Stack, Opinion*, Inside Starbucks' Dirty War Against Organized Labor*, N.Y. Times (July 21, 2023), https://www.nytimes.com/2023/07/21/opinion/starbucks-union-strikes-labor-movement.html [https://perma.cc/YP2Q-U5L2] (discussing the anti-union campaign waged against Starbucks organizing).

233. *See, e.g.*, Charlotte Alter, *He Came Out of Nowhere and Humbled Amazon. Is Chris Smalls the Future of Labor?*, Time (Apr. 25, 2022, 7:00 AM), https://time.com/6169185/chris-smalls-amazon-labor-union/ [https://perma.cc/58GC-A75G] (discussing the rise of the union movement at Amazon's JFK8 warehouse independent of the backing of a big-name union); Noam Scheiber & Karen Weise, *Amazon Labor Union, With Renewed Momentum, Faces Next Test*, N.Y. Times (Oct. 11, 2022), https://www.nytimes.com/2022/10/11/business/economy/amazon-labor-union.html [https://perma.cc/KB8S-GQKH] (discussing the Amazon Labor Union's (ALU) new test—continuing the momentum—despite the losses at two other warehouses).

234. Noam Scheiber, *Trader Joe's Workers Vote to Unionize at a Second Store*, N.Y. Times (Aug. 12, 2022), https://www.nytimes.com/2022/08/12/business/economy/union-vote-trader-joes.html [https://perma.cc/BB5Z-QHAC] (discussing the successful unionization elections at two Trader Joe's locations).

Federation of Television and Radio Artists (SAG-AFTRA) strikes were trending national news with visible consequences for consumers,[235] workers even in less visible workforces have also taken action that have garnered online support through social media.[236] Such action can grow into other industries, inspiring others to unionize.[237]

These movements face challenges. First, it is "too early to tell" if the surge will continue "if the economy weakens or employer resistance continues[.]"[238] Additionally, a successful organizing drive and election is only the first step—the newly unionized workforce and its employer must actually negotiate and reach an agreement in order for employees to actually feel the benefits of the union.[239] This faces a disappointing reality:

> Unions that use the NLRB election process as the means for organizing are successful in achieving a collective bargaining agreement in less than 10% of cases where the employer resists the organizing effort to the point that an unfair labor practice charge is filed.[240]

Unions have such a low success rate because of, among other issues, employers' ability to delay bargaining with legal appeals and fighting over minute details and the lack of resources at the NLRB, which cause delays in hearing cases.[241]

The agency, though, can be a helpful resource for these worker movements if used correctly. The Biden NLRB has worked to improve a union's ability to run elections, fight unfair labor practices, and collectively bargain with employers. Such changes include the GC's promise to increase the use of 10(j) injunctions to enjoin an unfair labor

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235. Lauren Zornosa, *Why Actors Are Going on Strike*, TIME (July 13, 2023 5:46 PM), https://time.com/6294212/sag-aftra-actors-strike/ [https://perma.cc/A2ZY-9JKE].

236. Ian Kullgren et al., *U.S. Labor Unions Are Having a Moment*, TIME (Oct. 17, 2021, 11:55 AM), https://time.com/6107676/labor-unions/ [https://perma.cc/F2QE-RLZZ]; *see also* THOMAS A. KOCHAN ET AL., U.S. WORKERS' ORGANIZING EFFORTS AND COLLECTIVE ACTIONS: A REVIEW OF THE CURRENT LANDSCAPE 5 (2022) (arguing that strikes now have more of a "public face" than in the past).

237. Kochan & Liebman, *supra* note 231; KOCHAN ET AL. *supra* note 236, at 5.

238. Kochan & Liebman, *supra* note 231; *see also* McCarthy, *supra* note 230 ("The low unemployment rate that developed during the pandemic altered the balance of power between employers and employees, creating an environment fostering union membership that has resulted in the formation of unions at several high-profile companies.").

239. Kochan & Liebman, *supra* note 231 (stating that the successes in organizing must translate into negotiations and agreements with companies).

240. KOCHAN ET AL. *supra* note 236, at 23.

241. *See* Stack, *supra* note 232.

practice as the charge itself is litigated at the NLRB;[242] the Board's overruling of the *Linden Lumber* standard to put in place a faster way for unions with majority support to get to an election or a bargaining order;[243] and the Board's new rule which speeds up the resolution of representation cases before the NLRB.[244] Counting out the agency, especially for independent unions like the Amazon Labor Union (ALU) which are "the new face, the new-school style of 21st century organizing,"[245] would prove to be a detriment to their future success.[246]

The changes taken on by the Biden administration's Board to the benefit of unions raises the question of whether the labor movement should push for a 4-1 or 5-0 Board. While that may seem appealing in the short run, such advocacy could prove to be damaging to those interest groups in the long run. The foresight that the Board members in power will lose their position in the future pushes the individuals currently in the majority towards the center. Many of the conflicts in which the Board gets involved are routine and "do not implicate the fault line" of the two fundamentally opposite visions of labor law.[247] Pushing a Board further from the 3-2 balance could create *more* oscillation by expanding it to policies that previously had no conflict, thus creating a more unstable ecosystem for the relevant interest groups.

The oscillation which already occurs on the big questions of labor law is also not detrimental to the goals of unions or employers. As Professor Estreicher argues:

> Precisely because this agency can change its mind, . . . opponents of today's Board can rest assured that today's gems in the NLRB Reports are not frozen for all time, and change need not await a hazardous attempt to open up the basic statutory charter to the amendment process.[248]

242. Memorandum GC 21-05 from Jennifer A. Abruzzo, Gen. Couns., Nat. Lab. Rels. Bd., to All Reg'l Dirs., Officers-in-Charge, and Resident Officers, Utilization of Section 10(j) Proceedings (Aug. 19, 2021), https://apps.nlrb.gov/link/document.aspx/09031d458351637c [https://perma.cc/E6TS-BXKZ].

243. Cemex Construction Materials Pacific, LLC, 372 N.L.R.B. No. 130 (2023).

244. 29 C.F.R. § 102 (2023).

245. Alter, *supra* note 233 (quoting Chris Smalls, President of ALU).

246. Chandni Shah, *Amazon Gets Labor Board Complaint of Failure to Bargain with New York Union*, REUTERS (July 13, 2023, 11:19 AM), https://www.reuters.com/business/retail-consumer/amazon-faces-labor-complaint-over-failure-bargain-with-union-2023-07-13/ [https://perma.cc/W4BG-Z3HU].

247. Fisk & Malamud, *supra* note 98, at 2038.

248. Estreicher, *supra* note 197, at 167.

The changes in non-routine policy enacted by a Board under a new president can also be more in tune with the political sentiment of the public.[249] Thus, the Board should not be criticized for failing to be exactly like a court—its political responsiveness is beneficial as a body that can either advance the law in a constituent's favored direction or whose decisions can motivate political change in the future.[250]

Lastly, the 3-2 structure of the NLRB has been institutionalized and has created a culture of stability within the labor relations ecosystem.[251] That is, the politicization of the appointments and the partisan split on the Board have become entrenched into the constituents', government's, and public's vision such that it is self-perpetuating.[252] Why should unions or employers fight the structure, creating more upheaval and uncertainty in an already uncertain area of policy? Instead, each side should use the existing structure to their benefit. When their preferred party holds the majority, they should advocate for their desired policy changes while also remaining aware of the Board majority's need to hold the center due to their future status as the minority. Scholars advocate for the need for unions and employers to work together[253]—the Board's structure has the capability to and does promote collegiality among unions and employers due to the repetitive fights and interactions that play out in front of the agency. The 3-2 balance should continue to be upheld.

Conclusion

Scholars refer to the partisan balance on the National Labor Relations Board as a "tradition" and do not further explore its existence.[254] Yet, the 3-2 structure is central to the agency's design and output. The NLRB is unique among other federal independent agencies as a body with a persistent partisan balance despite the absence of statutory requirement. This Note argues that the Board's partisan balance is not just the result of the relation of the President and the Senate in appointments. Its existence owes itself to the Board's internal structure and the relationship between parties that interact with the Board. The balance should remain undisturbed to promote stability and allow for policy changes which favor unions and employers over time.

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249. McCulloch & Bornstein, *supra* note 27, at 176.
250. Ronald Turner, *Ideological Voting on the National Labor Relations Board*, 8 U. Pa. J. Lab. & Emp. L. 707, 753–54 (2006) (internal citations omitted).
251. Terry M. Moe, *Interests, Institutions, and Positive Theory: The Politics of the NLRB*, 2 Stud. Am. Pol. Dev. 236, 255 (1987).
252. *Id.*
253. Kochan & Liebman, *supra* note 231.
254. *See, e.g.*, Gould, *Politics*, *supra* note 8, at 1507; Gross, Broken Promise, *supra* note 5, at 195; Flynn, *A Quiet Revolution*, *supra* note 7, at 1365.

Given this phenomenon as well as the recent rise in union fervor, there is a new opportunity for pro-labor groups to challenge the "assumed tradition." This Note argues that the 3-2 balance is beneficial to both sides and thus should not be challenged in reform efforts. Parties should rely on the Board as a partisan-leaning, court-like agency and bring cases at times when it would be most beneficial to them. So, instead of upending the agency to put in place a stronger liberal majority of four or five seats, unions and workers should use the current administration to promulgate their reform efforts, recognizing that this current iteration of the Board will issue labor-friendly opinions with a careful eye towards their inevitable future position in the minority. Such restraint and balance limits future turbulence in labor law and ultimately inspires confidence and reliance[255] in the National Labor Relations Board and its future.

255. The Note assumes that the design is constitutional, as it has been held to be such for almost one hundred years, despite the arguments to the contrary of Starbucks, Trader Joe's, and SpaceX. *See* Hadero, *supra* note 3.

Appendix

Table 1 – Table of the Board and its Political Restraints

Years (Term)	President(s)	Senate Majority Party[256]	Breakdown in Board[257]
1935-1937	FDR (D)	74 - D - 69/96	3-0 D 2-0 D 3-0 D
1937-1939	FDR (D)	75 - D - 76/96	[no change]
1939-1941	FDR (D)	76 - D - 69/96	3-0 D 2-0 D 3-0 D
1941-1943	FDR (D)	77 - D - 66/96	2-0 D 2-1 D
1943-1945	FDR (D)	78 - D - 57/96	1-1 2-1 D
1945-1947	FDR (D) / Truman (D)	79 - D - 57/96	2-1 D 2-0 D 2-1 D
1947-1949	Truman (D)	80 - R - 51/96	3-2 D [increase to 5] 3-1 D
1949-1951	Truman (D)	81 - D - 54/96	4-1 D
1951-1953	Truman (D)	82 – D - 49/96	4-0 D 4-1 D
1953-1955	Eisenhower (R)	83 - R - 48/96	3-1 D 3-2 D 3-2 R 3-1 R 4-1 R 3-1 R
1955-1957	Eisenhower (R)	84 - D - 48/96	4-1 R 3-1 R 4-1 R 3-1 R
1957-1959	Eisenhower (R)	85 – D - 49/96	3-2 R 3-1 R 3-2 R

256. *Party Division*, U.S. S., https://www.senate.gov/history/partydiv.htm [https://perma.cc/V4V7-UWWE].
257. *Members of the NLRB since 1935, supra* note 6.

1959-1961	Eisenhower (R)	86 - D - 65/100	2-2 3-2 R
1961-1963	JFK (D)	87 - D - 64/100	3-2 D 2-2 3-2 D
1963-1965	JFK/LBJ (D)	88 - D - 66/100	3-2 D 3-1 D
1965-1967	LBJ (D)	89 - D - 68/100	3-2 D
1967-1969	LBJ (D)	90 - D - 64/100	[no change]
1969-1971	Nixon (R)	91 - D - 57/100	3-1 D 3-2 D 2-2 3-2 R
1971-1973	Nixon (R)	92 - D - 54/100	3-1 R 3-2 R
1973-1975	Nixon/Ford (R)	93 - D - 56/100	2-2 3-2 R 2-2
1975-1977	Ford (R)	94 - D - 61/100	3-2 R
1977-1979	Carter (D)	95 - D - 61/100	3-2 R 2-2 3-2 D
1979-1981	Carter (D)	96 - D - 58/100	3-1 D 2-1 D 2-1-1 3-1-1 D 2-1-1
1981-1983	Reagan (R)	97 - R - 53/100	1-1-1 2-1-1 3-1-1 R 2-1 R 3-1 R
1983-1985	Reagan (R)	98 - R - 55/100	3-1 R 3-1-1 R 2-1-1 2-1 R
1985-1987	Reagan (R)	99 - R - 53/100	3-1 R 3-2 R 2-2 3-2 R 3-1 R 3-2 R 2-2

1987-1989	Reagan (R)	100 - D - 55/100	2-1 R 3-1 R 3-2 R
1989-1993	Bush I (R)	101 - D - 55/100	2-2 2-1 D 2-2 3-2 R
1991-1993	Bush I (R)	102 - D - 56/100	3-1 R 2-1 R 3-1 R
1993-1995	Clinton (D)	103 - D - 56(7)/100	2-1 R 1-1 2-1 D 1-1 2-1 D 3-1 D 3-2 D 2-2 3-2 D
1995-1997	Clinton (D)	104 - R - 52(3)/100	3-1 D 2-1 D 3-1 D 3-0 D 3-1 D
1997-1999	Clinton (D)	105 - R - 55/100	2-1 D 3-1 D 3-2 D 2-2 3-2 D
1999-2001	Clinton (D)	106 - R - 55/100	3-1 D 2-1 D 3-1 D
2001-2003	Bush II (R)	107 - 50/100 (R with Cheney, then became 51/100 with 1 independent)	3-1 D 3-0 D 3-1 D 2-1 D 1-1 3-1 R 2-1 R 3-2 R
2003-2005	Bush II (R)	108 - R - 51/100	2-2 3-2 R 2-2 2-1 R

2005-2007	Bush II (R)	109 - R - 55/100	1-1 2-1 R 3-1 R 3-2 R
2007-2009	Bush II (R)	110 - D - 49/100 (D plus 2 independents)	2-2 1-1
2009-2011	Obama (D)	111 - D - 57/100 (D plus 2 independents)	1-1 3-1 D 3-2 D 3-1 D
2011-2013	Obama (D)	112 - D - 51/100 (D plus 2 independents)	2-1 D 1-1 3-2 D 3-1 D 3-0 D
2013-2015	Obama (D)	113 - D - 53/100 (D plus 2 independents)	2-0 D 3-0 D 3-1 D 3-2 D
2015-2017	Obama (D)	114 - R - 54/100 (D plus 2 independents)	3-1 D 2-1 D
2017-2019	Trump (R)	115 - R - 51/100 (D plus 2 independents)	2-1 D 2-2 3-2 R 2-2 3-2 R 3-1 R
2019-2021	Trump (R)	116 - R - 53/100 (D plus 2 independents)	3-0 R 3-1 R
2021-2023	Biden (D)	117 - D - 48/100 (D plus 2 independents and Harris)	3-1 R 3-2 R 2-2 3-2 D 3-1 D
2023-Current	Biden (D)	118 - D - 48/100 (D plus 3 independents)	[no change]