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The Continuity of Collective Action
and the Isolation of Collective
Bargaining: Enforcing Federal Labor
Law in the Obama Administration

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Thank you to the Berkeley Journal of Employment and Labor Law for hosting the annual David Feller Labor Law Lecture and for extending to me the honor of being this year's speaker. I would also like to thank David Rosenfeld not only for serving as the point of contact between the Journal and me but also for his relentless creativity and boundless energy which resulted in several of the most interesting and important cases to come before the Board during my service as a Member.

During the 21 months that I served on the Board from April 2010 to January 2012, I was invited to give many speeches and I found it to be one of the easiest but most frustrating aspects of the job because as a Member of the Board you cannot actually talk about anything your audience wants to hear about. But once one develops a standard speech artfully saying nothing, it is not onerous. Now that I am a former Member, the task is potentially more satisfying but also more difficult. What do I make of my

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brief experience administering federal labor law? In *Fibreboard Paper Products Corp. v. NLRB*,¹ one of many landmark labor cases argued by David Feller, the Supreme Court explained that the deep deference it accorded the Board in fashioning remedies was based on the “enlightenment” the Board has “gained from experience.” I am not entirely sure that I gained any such enlightenment during my short tenure on the Board, but let me nevertheless offer a few reflections.

After one of those speeches in which I artfully said nothing, I was asked whether it was the intention of the Obama Board² to simply swing the pendulum back to where it had been before the Bush Board. I answered that that was certainly not my conception of the Board’s role and that I hoped we could change the metaphor slightly so that rather than the pendulum swinging back and forth as the composition of the Board changed, we would be seen as swinging the pendulum forward into the second decade of 21st century. But moving labor law forward through the NLRB is a challenging task for a number of reasons I would like to outline today

Let me begin at the end. In December of last year the Board issued 70 decisions in contested cases. In the first three days of January up to noon on January 3 when the 1st session of the 112th Congress ended by operation of law and with it my service on the Board, we issued another 10 decisions. During that same time period, the Board also adopted a final rule revising its representation case procedures.³ Now I know there are a few of you out there whose cases did not get decided and for that I am sorry, but that is 80 decisions in 34 calendar days during a period when there were only three Board Members and we did not know from day to day if or when the two houses of Congress would reach agreement to end the session and thus my service, thereby depriving the Board of a quorum.⁴

Among the decisions issued on January 3, the last day of my service, was that in a case called *D.R. Horton, Inc.*⁵ The question in *D.R. Horton* was whether an employer can require individual employees, as a condition of employment, to agree to arbitrate all disputes arising out of their

1. 379 U.S. 203, 216 (1964) (citing *NLRB v. Seven-Up Bottling Co.*, 344 U.S. 344, 346 (1953)).

2. Shortly after he took office, President Obama elevated one of the two sitting Board Members, Wilma Liebman, to the Chairmanship on January 20, 2009, and thus I date the advent of the Obama Board to my swearing in as a Member on April 5, 2010, followed by that of my fellow Obama appointee, Mark Gaston Pearce, on April 7, 2010. See National Labor Relations Board, Board Members Since 1935, <http://www.nlr.gov/who-we-are/board/board-members-1935> (last visited Oct. 30, 2012).

3. See NLRB Representation Case Procedures, 76 Fed. Reg. 80138-01 (Dec. 22, 2011) (to be codified at 29 C.F.R. pts. 101-02).

4. At the end of my service, the Board was reduced to two members and, only a few months after my service on the Board began, the Supreme Court held in *New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635 (2010), that two members do not constitute a quorum of the Board.

5. 357 N.L.R.B. No. 184 (Jan. 3, 2012).

employment and to do solely on an individual basis, thereby waiving their right to pursue collective action both in court and before an arbitrator.

It is particularly appropriate to explore *D.R. Horton* in the David Feller Labor Law Lecture because among Professor Feller's many lasting legal legacies are the three Supreme Court decisions that have become known as the *Steelworkers Trilogy*.⁶ On April 27 and 28, 1960, Professor Feller argued all three cases before the Court. While I have not been able to research the question exhaustively, I suggest with some confidence that Professor Feller's arguing three cases before the high court over two days is an achievement unmatched in the modern era until the current Solicitor General, Donald Verrilli, argued on three consecutive days in late March 2012 concerning the challenges to the Patient Protection and Affordable Care Act.⁷ And it is certainly an achievement unmatched by any labor lawyer.

The result of Professor Feller's prevailing in all three *Steelworkers* cases, as the Board pointed out in *D.R. Horton*, is that "arbitration has become a central pillar of Federal labor relations policy."⁸ That pillar stands on a foundation of consent by both employees' union representative and their employer to resolve disputes arising out of a negotiated collective bargaining agreement through arbitration.⁹ But as the Honorable Marsha Berzon, who studied labor law under Professor Feller, has pointed out, his achievement in the *Trilogy* had "unintended consequences."¹⁰ Professor Michael Gottesman, who began his distinguished career as a labor lawyer as David's associate, has explained that the *Steelworkers Trilogy* served as a pivot, turning the Supreme Court to a policy favoring arbitration which it then extended far outside the context of collectively bargained agreements to arbitrate. "Ironically, Dave's success in moving the Court to receptivity for labor arbitration had a powerful reverberating impact on commercial arbitration. . . . Although there was no intervening change in the Federal Arbitration Act [FAA] — the federal statute that regulates commercial

6. See *United Steelworkers v. Am. Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Enter. Wheel & Car Corp.*, 363 U.S. 593 (1960); *United Steelworkers v. Am. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960).

7. The argument was on March 26, 27, and 28, 2011. See *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 130 S. Ct. 2566 (2012).

8. 357 N.L.R.B. No. 184, slip op. at 17.

9. The Board considers this consent an essential foundation of arbitration. See *Hilton-Davis Chem. Co.*, 185 N.L.R.B. 241, 242 (1970) (holding that absent express consent to resolve disputes via arbitration post-expiration of a contract, parties can unilaterally refuse to arbitrate even though the substantive provisions of the contract, as well as the grievance procedure up to the point of arbitration, cannot be unilaterally altered post-expiration); *Ind. & Mich. Elec. Co.*, 284 N.L.R.B. 53, 54 (1987) ("[A]rbitration . . . is characterized by the parties' consensual surrender to an entity with the authority to issue a final and binding decision.").

10. Marsha Berzon, *David Feller—A Remembrance*, 24 BERKELEY J. EMP. & LAB. L. 227, 227, 231 (2003).

arbitration—the Court, citing its labor precedents, abandoned its prior hostility to arbitration and erected similar pro-arbitration presumptions under the FAA, citing the Steelworkers Trilogy.”¹¹ These presumptions have been extended even to contracts of adhesion between large sellers of goods and services, such as AT & T, and individual consumers.¹² And, despite the fact that it arose out of a voluntary agreement between represented employees and their employer to arbitrate disputes arising under a collectively bargained contract, the Court has extended the policy in favor of arbitration to individual employees’ “agreement” to arbitrate statutory claims against their employer “accepted” as a condition of employment.¹³

It is that chain of judicial logic that led many employers, such as D.R. Horton, to argue that the FAA privileges their demand that employees waive their right to take collective legal action as a condition of employment so long as the waiver is encased in an agreement to arbitrate. Professor Feller would no doubt have been distressed by this drift of the doctrine he helped to create, but heartened by the fact that the Board could cite the *Trilogy* as the foundation for its statement, “Nor does our holding [that the required waiver was an unfair labor practice] rest on any form of hostility or suspicion of arbitration. . . . Rather, our holding rests not on any conflict between an agreement to arbitrate and the NLRA, but rather solely on the conflict between the compelled waiver of the right to act collectively in any forum, judicial or arbitral, in an effort to vindicate workplace rights and the NLRA.”¹⁴

The logic of the Board’s holding in *D.R. Horton* is simple. First, filing or participating in a class or collective action (in court or before an arbitrator) is unquestionable “concerted activit[y] for the purpose of . . . mutual aid or protection.”¹⁵ After all, the Supreme Court made clear in its 1978 *Eastex* decision that the Act “protects employees from retaliation by their employer when they seek to improve their working conditions through resort to administrative and judicial forums.”¹⁶ And there is an unbroken line of precedent dating back to the first decade after the NLRA’s passage holding that “concerted legal action addressing wages, hours or working conditions is protected.”¹⁷ Given that a strike to secure higher wages is

11. Michael Gottesman, *David Feller, Senior Partner*, 24 BERKELEY J. EMP. & LAB. L. 265, 270 (2003).

12. See *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740, 1747 (2011).

13. See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 35 (1991) (enforcing such an “agreement” to arbitrate claims under the Age Discrimination in Employment Act).

14. 357 N.L.R.B. No. 184, slip op. at 17.

15. 29 U.S.C.A. § 157 (West 2012).

16. *Eastex, Inc. v. NLRB*, 437 U.S. 556, 566 (1978).

17. *D.R. Horton*, 357 N.L.R.B. No. 184, slip op. at 2 & n.4 (collecting cases).

protected, collective legal action with the same objective (for example, under the Fair Labor Standard Act) surely is as well under a statute, the NLRA, designed to preserve industrial peace.

Second, employers commit an unfair labor practice when they prohibit employees from engaging in protected activity, even if they do so by requiring employees to “agree” to forgo such activity as a condition of employment. Indeed, federal labor law was expressly intended to outlaw the “yellow dog contract,” which forced employees to do exactly that in relation to union membership.¹⁸ And “[t]he law has long been clear that all variations of the venerable ‘yellow dog contract’ are invalid.”¹⁹

Third, a holding that the *D.R. Horton* agreement violates the NLRA is not inconsistent with the FAA because it does not preclude an agreement to arbitrate, even if it is a condition of employment, so long as the arbitration agreement does not also require the waiver of the right to take collective action in court *and* in arbitration. Moreover, the FAA expressly provides that an arbitration agreement may be invalidated “upon such grounds as exist at law or in equity for the revocation of any contract”²⁰ and the Board would invalidate any contract between an employer and employees requiring the waiver of protected rights as a condition of employment. Finally, even if a policy in favor of “streamlined proceedings” is read into the FAA, as the Supreme Court arguably did in its decision *AT&T Mobility v. Concepcion*,²¹ involving consumer fraud claims, and class arbitration is considered inconsistent with that policy (despite the fact that Rule 23 embodies the obvious observation that sometimes class actions are “superior . . . for . . . efficiently adjudicating the controversy”²²), the limited infringement on what is, at most, a peripheral policy implicit in the Arbitration Act in order to prevent violation of the right to engage in concerted activity, which is central to the NLRA, through a form of yellow dog contract, long held to be anathema to federal labor policy, surely represents an appropriate accommodation of the two laws by the Board.²³

I have outlined the Board’s decision in *D.R. Horton* at some length because it is particularly illustrative of five important elements of the NLRA and its administration. First, the decision demonstrates that the employee rights guaranteed by the NLRA exist in all workplaces, not only in those where there is an ongoing organizing drive ongoing or an existing

18. See *id.* at 7-8 (discussing the origins of this prohibition in the Norris-LaGuardia Act of 1932 and its continuation under the NLRA).

19. *Barrow Utils. & Elec.*, 308 N.L.R.B. 4, 11 n.5 (1992).

20. 9 U.S.C.A. § 2 (West 2012).

21. 131 S. Ct. 1740, 1748 (2011).

22. FED. R. CIV. P. 23(b)(3).

23. See *Southern Steamship Co. v. NLRB*, 316 U.S. 31, 47 (1942) (articulating Board’s duty when NLRA conflicts with another federal statute).

representative. Moreover, those rights are not simply lying dormant, permitting employees freely to make a choice concerning union representation that most will never be presented with.²⁴ Rather, the Act is actively protecting employees as they engage in a spontaneous set of collective actions from comparing wage rates to protesting a change in the dress code.²⁵ Employees routinely exercise their rights under the NLRA although they are often not fully aware of it until they experience retaliation. In other words, the activity protected under the Act is not only forming a union and engaging in collective bargaining, but a much wider spectrum of collective action. In 1984, in *NLRB v. City Disposal Systems, Inc.*,²⁶ the Supreme Court explained, “in enacting § 7 of the NLRA, Congress sought generally to equalize the bargaining power of the employee with that of his employer by allowing employees to band together in confronting an employer regarding the terms and conditions of their employment. There is no indication that Congress intended to limit this protection to situations in which an employee’s activity and that of his fellow employees combine with one another in any particular way.”

The forms of “concerted activity for mutual aid and protection” protected under the Act range from informal and spontaneous protest to the highly choreographed and court-supervised process of pursuing a class-action. Paradoxically, however, we may be more cognizant of the protection of informal, spontaneous forms of concerted activity. Most labor law case books contain the Supreme Court’s 1962 decision in *NLRB v. Washington Aluminum Co.*,²⁷ upholding the Board’s conclusion that a spontaneous walkout by unorganized employees to protest bitter cold temperatures in a machine shop, but few if any point out the protected status of more deliberate forms of collective action other than joining a union and engaging in collective bargaining, such as pursuit of a class action suit²⁸ – at least prior to the decision in *D.R. Horton*.

24. In fiscal year 2009, the Board conducted 1,619 representation elections in which 96,030 employees were eligible to vote while there were approximately six million employers in the U.S. See Seventy Fourth Annual Report of the National Labor Relations Board for the Fiscal Year Ended, Sep. 30, 2009 11 (2009); 75 Fed. Reg. 80,410, 80,415 (Dec. 22, 2010) (citing Small Business Administration which in turn cites Census Bureau data from 2007).

25. See *Parexel International, LLC*, 356 NLRB No. 82 (2011) (termination of employee to prevent discussion of wages and possible discrimination unlawful); *Wyndam Resort Development Corp.*, 356 NLRB No. 104 (2011) (discipline of employee for seeking to provoke collective protest of change in dress code unlawful).

26. 465 U.S. 822, 835 (1984).

27. 370 U.S. 9 (1962).

28. See, e.g., ARCHIBALD COX ET AL., *LABOR LAW* 460-62 (15th ed. 2011) (citing *Washington Aluminum* but not explaining that protected concerted activity can encompass litigation).

Second, class and collective actions²⁹ in court parallel collective bargaining in important respects. Rule 23 of the Federal Rules of Civil Procedure permits one or more employees (or other parties) to sue as “representative parties”³⁰ just as Section 9 of the NLRA creates a mechanism through which employees may designate “representatives” for purposes of collective bargaining.³¹ Rule 23 requires that the court “define the class”³² just as Section 9 requires that the Board decide “in each case . . . the unit appropriate for the purposes of collective bargaining.”³³ And the federal courts and NLRB are empowered to place the government’s imprimatur on both forms of collective action, in each case using the same term of approval—“certify.”³⁴ In both instances, certification vests in the representative a right to represent the group but also creates a corresponding legal duty to do so fairly.³⁵ And both forms of collective action bear the marks of the same political history. Just as the rules of collective bargaining established in 1935 were significantly revised in the 1947 Taft-Hartley Act, concerted legal action to enforce the 1938 Fair Labor Standards Act was set on a path that diverged from collective enforcement of all other legal rights by the 1947 Portal-to-Portal Act.³⁶

These parallels, cast in relief by the Board’s decision in *D.R. Horton*, suggest the key point: in various way we have sought to use law to facilitate, and, indeed, institutionalize, collective action. In its 1989 decision in *Hoffmann-La Roche v. Sperling*,³⁷ the Supreme Court explained that in Section 16(b) of the FLSA “Congress has stated its policy that . . .

29. I use the term “collective action” to refer to an action brought under section 16(b) of the Fair Labor Standards Act which permits employees to bring action on behalf of themselves and “other employees similarly situated.” 29 U.S.C. § 216(b) (2006). Collective actions may also be brought under the Equal Pay Act (which is part of the FLSA) and the Age Discrimination in Employment Act (which incorporates section 16(b)). See 29 U.S.C. §§ 206(d), 626(b) (2006).

30. FED. R. CIV. P. 23(a).

31. 29 U.S.C. § 159(a) (2006).

32. FED. R. CIV. P. 23(c)(1).

33. 29 U.S.C. § 159(b) (2006).

34. FED. R. CIV. P. 23(c)(1)(A) (“certify the action as a class action”); 29 U.S.C. § 159(c)(1)(B) (2006) (“certify the results” of an election).

35. See *Miranda Fuel Co., Inc.*, 140 NLRB 181, 184 (1962), *rev’d* 326 F.2d 172 (2d Cir. 1963) (under the NLRA a duty of fair representation is implicit in authority to serve as exclusive representation of all employees in appropriate unit); FED. R. CIV. P. 23(a)(4) (“the representative parties will fairly and adequately protect the interests of the class”).

36. Craig Becker & Paul Strauss, *Representing Low-Wage Workers in the Absence of a Class: The Peculiar Case of Section 16 of the Fair Labor Standards Act and the Underenforcement of Minimum Labor Standards*, 92 MINN. L. REV. 1317, 1319-22 (2008) (describing changes wrought by Portal-to-Portal Act); Marc Linder, *Class Struggle at the Door: The Origins of the Portal-to-Portal Act of 1947*, 39 BUFF. L. REV. 53 (1991) (describing changes wrought by Portal-to-Portal Act).

37. 493 U.S. 165, 170 (1989).

[employee-]plaintiffs should have the opportunity to proceed collectively.” That same opportunity is guaranteed by Rule 23 and the NLRA.³⁸

Third, the opportunity to proceed collectively is peculiarly central to enforcement of workplace rights. Employment is not single transaction, like purchasing a phone, but an ongoing relationship, one that, importantly, may continue beyond a violation of rights and, at least employees hope, beyond any resulting enforcement action. There is thus a real danger that the employer’s ongoing authority over employees will chill any individual employee from seeking legal remedies. The Supreme Court has recognized that “it needs no argument to show that fear of economic retaliation might often operate to induce aggrieved employees quietly to accept substandard conditions.”³⁹ This reality has been recognized by the lower federal courts under Rule 23 both in considering whether joinder of individual claims is “impracticable” and whether a class action is “superior to other available methods for fairly and efficiently adjudicating the controversy.”⁴⁰ For example, the Fifth Circuit concluded that one district court “reasonably presumed that those potential class members still employed by [the employer-defendant] might be unwilling to sue individually or join a suit for fear of retaliation at their jobs.”⁴¹ The Tenth Circuit agreed, “employees “are frequently unwilling to pioneer an undertaking of this kind since they are unsure as to whether the court will support them. Even if they do prevail, they are apprehensive about offending the employer as a result of taking a stand. These are all factors that enter into the impracticability issue.”⁴² “Absent class treatment,” one District Court concluded, “each employee would have to . . . undertake the personal risk of litigating directly against his or her current or former employer. Many employees would likely be unable to bear such . . . risks.”⁴³ Thus, as the Board observed in *D.R. Horton*, “in a quite literal sense, named-employee-plaintiffs protect the unnamed class members” and thus their action are for “mutual aid or protection” within the meaning of section 7 of the NLRA.⁴⁴

Fourth, for these reasons, the NLRA should not be thought of as the old, collective regime now largely replaced by a new sets of individual

38. The Third Circuit drew this parallel just seven years after adoption of the FLSA, observing that it was “very likely” that what “Congress had in mind” when adopting the FLSA’s §16(b) was “that employees, if they wish, can join in their litigation so that no one of them need stand alone in doing something likely to incur the displeasure of an employer. It brings something of the strength of collective bargaining to a collective lawsuit.” *Pentland v. Dravo Corp.*, 152 F.2d 851, 853 (3d Cir. 1945).

39. *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 292 (1960).

40. FED. R. CIV. P. 23(a)(1); FED. R. CIV. P. (b)(3).

41. *Mullen v. Treasure Chest Casino, LLC*, 186 F.3d 620, 625 (5th Cir. 1999).

42. *Horn v. Assoc. Wholesale Grocers, Inc.*, 555 F.2d 270, 275 (10th Cir. 1977).

43. *Ingram v. Coca-Cola Co.*, 200 F.R.D. 685, 701 (N.D. Ga. 2001).

44. 357 N.L.R.B. No. 184, slip op. at 3 & n.5 (Jan. 3, 2012) (quoting 29 U.S.C. § 151 (2006)).

employment rights. Collective action was central to the creation and remains central to the enforcement of individual employment rights. Professor Jim Brudney, who did not study under Professor Feller, but did begin his labor law career at the descendent of the firm Professor Feller founded, Goldberg, Feller and Bredhoff,⁴⁵ has argued “that changes in federal workplace law over the past thirty years have undermined the concept of group action – in particular collective bargaining – as a preferred means of regulating the employment relationship.”⁴⁶ He concludes, “The commitment to group action under the NLRA was diluted not only because collective bargaining was losing market share but also because emphasis on such a commitment no longer fit comfortably within our broader legal culture.”⁴⁷ But surely changes in workplace law in the past half-century cannot be separated from the revision of Rule 23 in 1966 as one of the central achievements of federal employment law since the passage of the Civil Rights Act of 1964 is the breakdown of race and sex segregation and discrimination in the workplace and collective action in the form of class actions was central to that development.⁴⁸ Collective action thus produced, reshaped and extended the new laws vesting individual rights in employees and gave them reality in the workplace.

Finally, in the adjudication of *D.R. Horton*, the various parts of the executive branch of the federal government with responsibility over employment policy spoke to one another about a common problem of workplace regulation, even if they did so through the narrow mechanism of an amicus brief. In *Horton*, the Department of Labor and the Equal Employment Opportunity Commission filed a joint brief arguing that waivers of collective and class action in mandatory arbitration agreements interfere with employees’ ability to vindicate their rights under the statutes administered by the amici, the Fair Labor Standards Act, the Equal Pay Act, Title VII of the 1964 Civil Rights Act, the Age Discrimination in Employment Act, and the Americans with Disabilities Act. What is notable about that brief, however, is its exceptional nature. That brief is the only official communication concerning federal labor policy I had with any of the Board’s sister labor and employment agencies during my 21 months on the Board.

45. The firm is now named Bredhoff and Kaiser.

46. James J. Brudney, *Reflections on Group Action and the Law of the Workplace*, 74 TEX. L. REV. 1563, 1563 (1996).

47. *Id.* at 1595.

48. *See, e.g., Int’l Union v. Johnson Controls, Inc.*, 499 U.S. 187 (1991) (class action successfully challenged exclusion of women from specified classifications); *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975) (class action successfully sought backpay for discriminatory application of seniority system); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (class action successfully challenged educational prerequisites for job that had a disparate impact but were not job related).

That last point is central to the second part of what I would like to explore today. As I hope I have now suggested, there is continuity among the forms of collective action, yet collective bargaining is increasingly isolated in our society and legal system. Let me illustrate this point with four observations. First, and most obviously, as the number of employees represented by unions declines, the system of collective bargaining becomes increasingly foreign to most employees' experience. When over one-third of workplaces were organized in the mid-1950s,⁴⁹ many employees came to work having experienced collective bargaining on a previous job and many others had a family member, neighbor or coworker who was or had been represented by a union. As the Supreme Court recognized in its 1956 decision in *NLRB v. Babcock & Wilcox*, "The right of self-organization depends in some measure on the ability of employees to learn the advantages of self-organization from others."⁵⁰ While the Court was addressing the ability of union organizers to enter the workplace to talk to employees, routine casual contact with union members is probably even more important but is far less common today than when *Babcock* was decided because today less than seven percent of private sector employees are members of unions.⁵¹

In order to address employees' lack of knowledge of their rights, due, in part, to this growing isolation of collective bargaining, on August 30, 2011, the Obama Board published a final rule requiring all employers covered by the Act to post a balanced notice of employee rights under the Act.⁵² The Board's authority to require notice posting was challenged in actions filed in federal district courts in the District of Columbia and South Carolina by plaintiffs including the U.S. Chamber of Commerce, National Association of Manufacturers, and National Right to Work Legal Defense and Education Foundation. The District Courts split on the question of whether the Board had statutory authority to require notice posting, but the judge in the District of Columbia, who sustained the Board's action, at the same time undermined the effectiveness of the Board's action by holding that the Board could not, at least as a categorical matter, classify a failure to post as an unfair labor practice or grounds for tolling the statute of

49. See GERALD MAYER, CONG. RESEARCH SERV., RL32553, UNION MEMBERSHIP TRENDS IN THE UNITED STATES, app. at 22-23 tbl. A1 (2004), available at http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1176&context=key_workplace (showing that between 1950 and 1960, over thirty percent of wage and salary workers were union members).

50. 351 U.S. 105, 113 (1956).

51. U.S. Dep't of Labor, Bureau of Labor Statistics, *Economic News Release, Table 3: Union Affiliation of Employed Wage and Salary Workers by Occupation and Industry*, available at <http://www.bls.gov/news.release/union2.t03.htm>.

52. 76 Fed. Reg. 54006 (Aug. 30, 2011).

limitations.⁵³ The cases are now on appeal in the District of Columbia and Fourth Circuit Courts of Appeal and, based on the contending decisions in the lower courts, the D.C. Circuit stayed the operation of the rule pending its decision.⁵⁴ Thus, as of now, on workplace bulletin boards nationwide are postings informing employees about their right to equal employment opportunity, a safe workplace, family and medical leave, pay at the minimum wage, and freedom from polygraph testing.⁵⁵ But the isolation of the rights guaranteed by the NLRA continues.

Second, paralleling the declining number of employees engaged in collective bargaining is a declining case load at the Board which, in turn, will necessarily distance the law of collective bargaining from the reality of the workplace. Because the Board has traditionally and almost exclusively operated through adjudication,⁵⁶ a declining case load threatens the Board's ability to keep the Act aligned with changing employment relations. The Supreme Court made clear in its 1975 *Weingarten* decision that "The responsibility to adapt the Act to changing patterns of industrial life is entrusted to the Board."⁵⁷ Yet since 1975, the number of cases decided by the Board has declined steadily, dropping by over 50% between 2000 and 2010 alone, making administrative adaptation via adjudication increasingly difficult and unsystematic. A vicious cycle is in operation as the Act is increasingly mismatched with the economy and workforce but, partly as a result of that very mismatch, the Board has fewer and fewer opportunities to do anything about it.

Although, I take some pride in noting that in both 2010 and 2011 the number of decision increased from a historic low in 2009 (in fact, doubling

53. *Nat'l Ass'n of Mfrs. v. NLRB*, 846 F. Supp. 2d 24, 38 (D.D.C. 2012) ("the Board did not exceed its statutory authority in promulgating Subpart A of the challenged rule"); *Chamber of Commerce of the U.S. v. NLRB*, 856 F. Supp. 2d 778, 780 (D.S.C. 2012) (granting summary judgment for plaintiffs because the Board "exceeded its authority in violation of the Administrative Procedure Act").

54. *Nat'l Ass'n of Mfrs. v. NLRB*, No. 12-5068, 2012 WL 4328371, at *1 (D.C. Cir. Apr. 17, 2012).

55. Nine federal laws require such workplace posting. *See, e.g.*, 45 U.S.C. § 152 Eighth (2006) (Railway Labor Act); 42 U.S.C. § 2000e-10 (2006) (Title VII of the Civil Rights Act of 1964); 29 U.S.C. § 1821(b) (2006) (Migrant and Seasonal Agricultural Workers Protection Act); 29 U.S.C. § 2003 (2006) (Employee Polygraph Protection Act); 42 U.S.C. § 12115 (2006) (Americans with Disabilities Act); 29 U.S.C. 2619(a) (2006) (Family and Medical Leave Act); 38 U.S.C. § 4334(a) (2006) (Uniformed Service Employment and Reemployment Rights Act). Additionally, the Department of Labor has required the same under the FLSA via rulemaking without specific statutory authority. *See* 29 C.F.R. § 516.4 (2012). In addition, numerous state laws and administrative agencies require similar notice of employees' rights. *See, e.g.*, S.C. CODE ANN. § 41-1-10 (Supp. 2011) ("Every employer shall keep posted in a conspicuous place a printed notice stating the provisions of the law relative to the employment of adult persons and children and the regulation of hours and working conditions.").

56. *See* 76 Fed. Reg. 36812 n.1 (June 22, 2011) (citing law review articles criticizing the Board's practice).

57. *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 266 (1975).

between 2009 and 2011), this is not a problem that can be addressed by greater diligence on the part of individual Board Members or their staffs. But it can be addressed through resort to other tools of administration such as rule-making. That is precisely why Congress vested the Board with broad authority to “from time to time to make, amend, and rescind . . . such rules and regulations as may be necessary to carry out the provisions of this Act.”⁵⁸ After allowing this administrative tool to lie dormant for almost all of its 77 years of operation, with the exception of the 1989 promulgation of a rule defining appropriate units in acute care hospitals,⁵⁹ in its first 21 months of operation under President Obama, the Board completed two rule-making proceedings, adopting the notice posting requirement I mentioned earlier and reforming its representation case procedures, i.e., the administrative proceedings that precede and follow Board-supervised elections.⁶⁰ Yet, for different reasons, the implementation of both rules has been enjoined by federal district courts and, as a consequence, although appeals are pending, the Board’s efforts to narrow the distance between the law of collective bargaining and the realities of the contemporary workplace through rulemaking has been, at least temporarily, frustrated.

Third, in some instances, the Board’s own processes have been used to isolate collective bargaining from concerted activity. This has occurred when the Board has permitted parties’ strategic behavior to transform statutory procedures from mechanism to facilitate self-organization and institutionalize it in collective bargaining, when employees so desire, into barriers to achieving employer recognition of a duly designated employee representative.

Consider how the Board has carried out its duty to define appropriate units. Employees naturally organize with others with whom they share a community of interest. Such organization is ordinarily along lines drawn by the employer, for example, lines defining job classifications or departments or work locations. Nevertheless, when the employees file a petition for an election in such units, employers opposed to employee representation often argue that the smallest appropriate unit includes additional employees in order to dilute what they assume is support for the union in the petitioned-for unit. Twenty years ago, Judge Easterbrook of the Seventh Circuit described the Board’s resolution of such conflicts as follows: “Chaos there may be, but that is nothing new. Unit-determinations

58. 29 U.S.C. § 156 (2006).

59. 29 C.F.R. § 103.30 (2012).

60. See NLRB Representation Case Procedures, 76 Fed. Reg. 80138-0180,138 (Dec. 22, 2011) (to be codified at 29 C.F.R. pts. 101-02). This rule, like the notice-posting rule, was enjoined by a federal district court, although on different grounds – that a quorum of the Board did not participate in its adoption. See *Chamber of Commerce of the U.S. v. NLRB*, 856 F. Supp. 2d 778 (D.D.C. 2012), *appeal docketed*, No. 12-5250 (D.C. Cir. Aug. 13, 2012).

have been ad hoc since 1935.”⁶¹ While that may be a slight exaggeration of the state of Board law in this area, the Board’s failure to articulate a standard in some cases of this type and use of slightly varying verbal formulations in others left employees and employers unable to predict with certainty what the Board would consider an appropriate unit and created fertile ground for litigation concerning the appropriate scope of the unit which can significantly delay the conduct of an election.

The Board addressed this recurring problem in a case called *Specialty Healthcare Center of Mobile*.⁶² The Act provides that the Board shall decide “in each case . . . whether the unit appropriate for the purpose of collective bargaining shall be the employer unit, craft unit, plant unit or subdivision thereof.”⁶³ Yet, as the Supreme Court has recognized, Section 9, “read in light of the policy of the Act, implies that the initiative in selecting an appropriate unit resides with the employees.”⁶⁴ In fact, the Act expressly provides that the Board should make that unit determination “in order to assure to employees the fullest freedom in exercising the rights guaranteed by” the Act.⁶⁵ Central among those rights is the right to “self-organization,” which entails a right to draw the boundaries of that organization. While the Act also provides that “the extent to which the employees have organized shall not be controlling,”⁶⁶ the Supreme Court has made clear that it may be considered a relevant factor among others.⁶⁷ Add to this statutory mix, the fact that the Act only requires that the Board determine if a proposed unit is an appropriate unit “not necessarily the single most appropriate unit.”⁶⁸ Considering all of these principles together, the Board held in *Specialty Healthcare* “that when employees or a labor organization petition for an election in a unit of employees who are readily identifiable as a group (based on job classifications, departments, functions, work locations, skills, or similar factors), and the Board finds that the employees in the group share a community of interest after considering the traditional criteria, the Board will find the petitioned-for unit to be an appropriate unit, despite a contention that employees in the unit could be placed in a larger unit which would also be appropriate or even more appropriate, unless the party so contending demonstrates that employees in

61. *Laidlaw Waste Systems, Inc. v. NLRB*, 934 F.2d 898, 900 (7th Cir. 1991).

62. 357 N.L.R.B. No. 83, Case No. 15-RC-8773 (Aug. 26, 2011).

63. 29 U.S.C. § 159(b) (2006).

64. *Am. Hosp. Ass’n v. NLRB*, 499 U.S. 606, 610 (1991).

65. 29 U.S.C. § 159(b) (2006).

66. 29 U.S.C. § 159(c)(5) (2006).

67. *NLRB v. Metro. Life Ins. Co.*, 380 U.S. 438, 442 (1965).

68. *Am. Hosp. Ass’n*, 499 U.S. at 610.

the larger unit share an overwhelming community of interest with those in the petitioned-for unit.”⁶⁹

Critics have attacked the *Specialty Healthcare* decision as permitting formation of “micro-units.”⁷⁰ But there is nothing in *Specialty Healthcare*’s restatement of the standard that favors smaller units. A “unit of employees who are readily identifiable as a group (based on job classifications, departments, functions, work locations, skills, or similar factors)” may be large or small. In fact, the unit of all Certified Nursing Assistants in a nursing home at issue in *Specialty Healthcare* was twice the median size of units found appropriate by the Board in the last decade.⁷¹ Moreover, as the Board explained in *Specialty Healthcare*, a unit is not inappropriate “simply because it is small.”⁷² It is wholly consistent with the policies of the Act to permit collective bargaining to be introduced into a workplace in a small unit, so long as it is appropriate, and thereafter allow the parties to expand the unit either via an election or voluntary recognition if, and *only if*, a majority of the other employees view representation as beneficial after seeing it in operation. Such an approach narrows the distance between concerted activity and collective bargaining. Yet employers continue to vigorously contest the *Specialty Healthcare* framework in the courts of appeals.⁷³

Fourth, as my allusion to the uniqueness of the Labor Department’s and EEOC’s brief in *D.R. Horton* suggested, the NLRB itself is isolated from other parts of the executive branch concerned about employment and the workplace. Professors Catherine Fisk and Deborah Malamud (only one of whom passed through Professor Feller’s firm) wrote an article three years ago entitled, “The NLRB in Administrative Law Exile.”⁷⁴ But I would suggest the Board is not so much in “administrative law exile” as in administrative exile. This isolation is both from the President and from sister departments and agencies. In its 1984 *Chevron* decision, the Supreme Court articulated a theory of judicial deference to administrative agencies grounded on agencies’ carrying out the will of the elected President: “[A]n agency to which Congress has delegated policy-making responsibilities may, within the limits of that delegation, properly rely upon the incumbent

69. 357 N.L.R.B. No. 83, Case No. 15-RC-8773, slip op. at 17 (Aug. 26, 2011).

70. See, e.g., Kevin Bogardus, Business Groups Ask Senators to Overturn NLRB’s ‘Micro-Union’ Decision, THE HILL (June 13, 2012), <http://thehill.com/blogs/on-the-money/1007-other/232273-business-groups-ask-senators-to-overturn-nlrbs-micro-union-decision>.

71. 357 N.L.R.B. No. 83 slip op. at 15 n.23.

72. 356 N.L.R.B. No. 56 slip op. at 10.

73. See, e.g., *Kindred Nursing Centers East, LLC v. NLRB*, Nos. 12-1027, 1174 (6th Cir.) (on petition for review from *Specialty Healthcare*); *Nestle Dreyer’s Ice Cream Co. v. NLRB*, Nos. 12-1684, 1783 (4th Cir.) (on petition for review of Board decision following *Specialty Healthcare*).

74. 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 (2009).

administration's views of wise policy to inform its judgments."⁷⁵ But presently, at least at the Board, those views are expressed solely through the appointments process. After that there is silence. That is not a dynamic form of interaction and perhaps not the soundest method of formulating wise labor policy.

The Board is similarly isolated from its sister agencies. It notifies the Federal Mediation and Conciliation Service (FMSC) and the Labor Department's Office of Labor-Management Standards when a new representative is certified. It refers disputes to the National Mediation Board (NMB) when there is an argument that they arise under the Railway Labor Act (RLA) rather than the NLRA. At times, it has entered into memoranda of understanding with other agencies, such as the Equal Employment Opportunity Commission, concerning which agency will proceed first when there is overlapping jurisdiction. But there is no ongoing forum in which a common federal labor and employment policy is discussed. The Board does not talk to the FMCS about the impact of its bargaining jurisprudence on the resolution of disputes. It does not talk to the NMB about conducting election even though the NMB conducts representation elections under the RLA just as the NLRB does under the NLRA. It does not talk to the Labor Department's Wage and Hour Division, the Occupational Safety and Health Administration, or the EEOC about workplace enforcement practices.

The Board is, of course, an independent agency, as are most adjudicatory agencies. Its Members do not serve at the pleasure of the President.⁷⁶ But independence does not require isolation. There is an ongoing debate about the "unitary executive" and the authority of the President to direct actions assigned by statute to subordinate executive branch officials and even strong proponents of a unitary executive concede that the President cannot direct the actions of an independent agency such as the Board and certainly cannot enforce such directions by removal.⁷⁷ But while independence, indeed even a degree of isolation, is critical to adjudication, independence does not preclude communication, cooperation and even coordination concerning the formulation of policy outside the context or a particular case. In a 1981 decision rejecting a challenge to Environmental Protection Agency action based on intra-executive branch, *ex parte* contacts, the United States Court of Appeals for the D.C. Circuit

75. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984).

76. *See* 29 U.S.C. § 153(a) (2006).

77. *See generally* STEPHEN G. CALABRESI & CHRISTOPHER S. YOO, *THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH* 3-29 (2008). Justice Kagan, when she was a law professor, articulated a theory of a unitary executive that did not encompass the power to direct independent agencies. *See* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2251 (2001).

explained, “Our form of government simply could not function effectively or rationally if key executive policymakers were isolated from each other and from the Chief Executive. Single mission agencies do not always have the answers to complex regulatory problems. An . . . administrator . . . needs to know the arguments and ideas of policymakers in other agencies as well as in the White House.”⁷⁸ Since the Reagan Administration, Presidents, through the Office of Management and Budget and its Office of Information and Regulatory Affairs (OIRA), have engaged in considerable, centralized oversight of rule-making by non-independent executive branch agencies and department, focused on insuring that the benefits of regulations exceed their costs.⁷⁹ As recently as March 20, the Administrator of OIRA issued a Memorandum for the Heads of Executive Departments and Agencies concerning the “Cumulative Effects of Regulations.”⁸⁰ The Memo called for “coordination” and “regulatory harmonization.”⁸¹ But in the absence of structures of communication among sister agencies and with the White House, such coordination will remain fragmentary.⁸²

Of course, I recognize that statutes are the product of particular historical circumstances, compromise, and personalities. This might be a different lecture had President Franklin Roosevelt’s Secretary of Labor Francis Perkins prevailed in her effort to locate the NLRB within the Department of Labor.⁸³ Federal labor and employment laws have different objectives, enforcement schemes, and patterns of administration. But any sound federal labor and employment policy must consider the whole. The right to engage in collective bargaining has to be drawn into the center and considered alongside workplace safety, minimum wages, equal opportunity, full employment, and other federal workplace policies.

Collective bargaining, like a class action, is a legal mechanism designed to facilitate and institutionalize concerted activity in order to

78. *Sierra Club v. Costle*, 657 F.2d 298, 406 (D.C. Cir. 1981).

79. See E.O. 12291 (Feb. 17, 1981); E.O. 12866 (Sept. 30, 1993); E.O. 13563 (Jan. 18, 2011). See Exec. Order No. 12,291, 46 Fed. Reg. 13, 193 (Feb. 17, 1981); Exec. Order No. 12,866, 58 Fed. Reg. 51735 (Sept. 30, 1993); Exec. Order No. 13,563, 76 Fed. Reg. 3821 (Jan. 18, 2011).

80. See OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, MEMORANDUM FOR THE HEADS OF EXECUTIVE (Mar. 20, 2012), available at <http://www.whitehouse.gov/sites/default/files/omb/assets/inforeg/cumulative-effects-guidance.pdf>.

81. *Id.* at 1.

82. I do not mean to endorse recent proposals to expand OIRA’s oversight of independent agency rule-making. See, e.g., Independent Agency Regulatory Analysis Act of 2012, S. 2468, 112th Cong. (2012). Rather, I am proposing expanded communication and coordination in the formulation of labor policy – with the Domestic Policy Council, the Council of Economic Advisers, the Department of Labor, and other agencies administering federal labor and employment laws – not expanded, centralized review of the results of a continued, balkanized policy-making process.

83. See JAMES A. GROSS, *THE MAKING OF THE NATIONAL LABOR RELATIONS BOARD: A STUDY IN ECONOMICS, POLITICS AND THE LAW, 1933-1937* 104-05 (1974).

redress “inequality.”⁸⁴ Among the Board’s central duties is to insure that that mechanism remains available to employees who wish to utilize it. During my tenure, the Obama Board took several modest steps to insure the continued accessibility of collective bargaining to employees in today’s workplace. But the accomplishment of that task requires initiating a wider discussion that reveals the continuity of collective action and its centrality both within the structure of the NLRA and more widely in insuring a just workplace. I hope my remarks today have contributed to some small degree to that discussion.

84. 29 U.S.C. § 151 (2006).

