THE NLRB IN ADMINISTRATIVE LAW EXILE: PROBLEMS WITH ITS STRUCTURE AND FUNCTION AND SUGGESTIONS FOR REFORM

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INTRODUCTION

The great hope of administrative law in the New Deal was that expertise and professionalism, balanced by political accountability and careful institutional design, would yield the best possible governance in a decidedly imperfect world. Administrative agencies were to step in where both the judiciary and the legislature had failed, avoiding the dangers of government by plutocracy and government by patronage.[1] Agencies would discharge government's "responsibility not merely to maintain ethical levels in the economic relations of the members of society, but to provide for the efficient functioning of the economic processes of the state."[2] To do so, they would study social and economic problems thoroughly and regulate wisely relying on scientific or empirical information that courts and legislatures did not consider.[3] Moreover, they would provide a forum

1. *See* JAMES M. LANDIS, THE ADMINISTRATIVE PROCESS 15–16 (1938).
2. *Id.* at 16.
3. *See id.* at 37–39.

in which the stakeholders in a regulated industry could participate in resolving disputes.[4] Sensible policy would emerge through careful and inclusive procedure, reliance on experts and empirical evidence, and political accountability for value choices.[5] Agencies would be responsive to changing circumstances and innovate when necessary, but they would do so with a healthy respect for the rule of law and the value of process.[6]

One can find in the early discussion of administrative law particularly high hopes for the National Labor Relations Board (NLRB). James Landis, in his classic 1938 lectures on the administrative state, said the NLRB had as its "jurisdiction the general problem of unfair practices" regarding labor and had as its responsibility the "policing of industry as a whole," not merely, as in the case of other agencies, the "supervision over the welfare of a definable line of business."[7]

Unfortunately, the NLRB is not well suited to the regulatory task of bringing public-minded rationality to the processes of labor organizing and collective bargaining. From the agency's beginning, the Supreme Court has sharply limited the Board's range of policy discretion in the name of judicial supremacy in the interpretation of statutes.[8] Within its range of discretionary policymaking, the Board has oscillated between extremes with every change of controlling political party, bringing its legitimacy as expert policymaker sharply into question.[9] Part of the reason for the essentially political nature of Board decisionmaking is that the agency lacks the kind of non-legal expertise that the administrative state was supposed to bring to the table.[10] Although the Board has disappointed people across the

4. *See id.* at 38–40.

5. *See id.* at 40–46.

6. *See id.* at 150–55.

7. *Id.* at 16–17.

8. For important early examples, see JAMES B. ATLESON, VALUES AND ASSUMPTIONS IN LABOR LAW (1983).

9. One particularly egregious example was Board policy on the regulation of misrepresentations made during election campaigns. For a discussion, see, for example, Samuel Estreicher, *Policy Oscillation at the Labor Board: A Plea for Rulemaking*, 37 ADMIN. L. REV. 163, 163–75 (1985).

10. *See* National Labor Relations Act, 29 U.S.C. § 154(b) (2006) (added by the Taft-Hartley Act, Pub. L. No. 80-101, 61 Stat. 136 (1947) (codified at 29 U.S.C. §§ 141–87 (2006)) ("Nothing in this Act shall be construed to authorize the Board to appoint individuals for the purpose of conciliation or mediation, or for economic analysis.")). For the disputes leading up to this provision, see JAMES GROSS, THE REMAKING OF THE NATIONAL LABOR RELATIONS BOARD: NATIONAL LABOR POLICY IN TRANSITION 1937–1947, at 5–225 (1981).

political spectrum who believed in the promise of the administrative state, the failures of the NLRB have been a particularly bitter disappointment to those on the left because they had the highest hopes for administrative regulation.[11]

For decades, academic and judicial critics of the Board have urged it to embrace rulemaking, especially for cases in which it contemplates overruling precedent.[12] The courts lack power to force rulemaking on the NLRB,[13] but their impatience with the Board manifests itself in many other ways—and does so often.[14]

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11. For two excellent and broad-ranging recent critiques, see James J. Brudney, *Isolated and Politicized: The NLRB's Uncertain Future*, 26 COMP. LAB. L. & POL'Y J. 221, 241–52 (2005); Cynthia Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1535–44 (2002).

12. *See, e.g.*, Merton C. Bernstein, *The NLRB's Adjudication-Rule Making Dilemma Under the Administrative Procedure Act*, 79 YALE L.J. 571, 610–22 (1970); Brudney, *supra* note 11, at 234–37; Estreicher, *supra* note 9, at 175–77; Cornelius J. Peck, *The Atrophied Rule-Making Powers of the National Labor Relations Board*, 70 YALE L.J. 729, 752–62 (1960); Cornelius J. Peck, *A Critique of the National Labor Relations Board's Performance in Policy Formulation: Adjudication and Rule-Making*, 117 U. PA. L. REV. 254, 260–75 (1968); Clyde W. Summers, *Politics, Policy Making, and the NLRB*, 6 SYRACUSE L. REV. 93, 105–07 (1954); Ronald Turner, *Ideological Voting on the National Labor Relations Board*, 8 U PA. J. LAB. & EMP. L. 707, 752–61 (2006); George W. Chesrow, Comment, *NLRB Policymaking: The Rulemaking-Adjudication Dilemma Revisited in* NLRB v. Bell Aerospace Co., 29 U. MIAMI L. REV. 559, 570–82 (1975). A classic discussion of the advantages and disadvantages of rulemaking and adjudication as policymaking vehicles, including but not limited to discussion of the NLRB, is David L. Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 HARV. L. REV. 921 *passim* (1965). Indeed, The President's Committee on Administrative Management recommended to President Roosevelt and Congress in 1937—just two years after the passage of the Wagner Act—that in general

> Congress should consider whether it is not desirable for the rule-making power further to penetrate into those areas of policy determination now preempted by commissions that develop such policies as a mere byproduct of administrative adjudication. . . . It is one thing to allow sufficient discretion in individual cases to make possible the adaptation of general rules to the peculiar facts of each case. It is quite another to have no general rules, other than empty statutory formulas, to guide particular adjudications.

THE PRESIDENT'S COMM. ON ADMIN. MGMT., REPORT OF THE COMMITTEE WITH STUDIES OF ADMINISTRATIVE MANAGEMENT IN THE FEDERAL GOVERNMENT 316, 332 (1937).

13. *See* NLRB v. Bell Aerospace Co., 416 U.S. 267, 294–95 (1974); NLRB v. Wyman-Gordon Co., 394 U.S. 759, 765–66 (1969); *see also* United States v. Mead Corp., 533 U.S. 218, 229–31 (2001) (including both notice-and-comment rulemaking and formal adjudication as "relatively formal administrative procedure[s] tending to foster the fairness and deliberation that should underlie a pronouncement" with force of law); *cf.* SEC v. Chenery, 318 U.S. 80, 94–95 (1943) (suggesting that the courts' review of administrative decisions is limited to whether "the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained").

14. One example of the longstanding judicial frustration may be found in the many decisions rejecting the Board's interpretation of section 2(11), which excludes supervisors from the definition of employees entitled to the protection of the NLRA. The history of the

The fact that the NLRB eschews notice-and-comment rulemaking makes it immune to the frequent post–Administrative Procedure Act waves of regulatory reform that have focused on the rationalization and coordination of informal rulemaking.[15] The NLRB has the power to engage in rulemaking, and has even done so (exactly once)[16] with considerable success, if success can be measured by the Supreme Court's satisfaction with the process.[17] But the agency immediately returned to its old ways: it occasionally proposes rulemaking but withdraws its proposals without explanation (and seemingly without regret).[18] Thus, the debate (made especially important by the appointment of Professor Cass Sunstein to head the Office of Information and Regulatory Affairs (OIRA)) over whether

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supervisory exclusion, with particular focus on the ongoing controversy about which health care employees are supervisors, is covered in Marley S. Weiss, *Kentucky River at the Intersection of Professional and Supervisory Status: Fertile Delta or Bermuda Triangle?*, *in* LABOR LAW STORIES 353–98 (Laura J. Cooper & Catherine L. Fisk eds., 2005).

15. *See, e.g.*, Regulatory Flexibility Act of 1980, 5 U.S.C. §§ 601–12 (2006); Administrative Review Act, 5 U.S.C. §§ 801–08 (2006). This is not to say that Congress and the Executive could not come up with regulatory reform strategies for agency adjudication, but they have not done so.

16. Appropriate Bargaining Units in the Health Care Industry, 54 Fed. Reg. 16,347 (Apr. 21, 1989) (codified at 29 C.F.R. § 103.30 (2008)).

17. Am. Hosp. Ass'n v. NLRB, 499 U.S. 606, 613–20 (1991); Mark H. Grunewald, *The NLRB's First Rulemaking: An Exercise in Pragmatism*, 41 DUKE L.J. 274 *passim* (1991) (describing the NLRB's rulemaking process and subsequent litigation regarding the rule). *See generally* WILLIAM B. GOULD IV, LABORED RELATIONS: LAW, POLITICS, AND THE NLRB—A MEMOIR 69–74 (2000) ("The Board's rule making, which was approved by the Supreme Court in *American Hospital Association v. NLRB*, had substantially diminished litigation in this industry."). The Administrative Conference of the United States issued recommendations regarding, *inter alia*, "Facilitating the Use of Rulemaking by the National Labor Relations Board" in the aftermath of that rulemaking. 56 Fed. Reg. 33,841, 33,851–52 (July 24, 1991) (codified at 1 C.F.R. § 305.91-5 (2006) ("This recommendation, while recognizing that the Board will justifiably continue to make policy through adjudication, suggests steps to facilitate further rulemaking by the Board . . . .").

18. *See, e.g.*, Unified Agenda, National Labor Relations Board, 63 Fed. Reg. 23,036, 23,036 (Apr. 27, 1998) (withdrawing notice of proposed rulemaking on some questions of remedies "frequently appearing in Board decisions"); Unified Agenda, National Labor Relations Board, 61 Fed. Reg. 24,045, 24,045 (May 13, 1996) (withdrawing notice of proposed rulemaking on the duties of labor organizations under *Beck*, choosing instead "to address the issues raised following the *Beck* decision on a case-by-case basis through its adjudicatory procedures"). To be fair, on some occasions Congress blocks the NLRB from pursuing rulemaking. *See, e.g.*, Unified Agenda, National Labor Relations Board, 61 Fed. Reg. 63,528, 63,528–29 (Nov. 29, 1996) (explaining a lack of action in a notice of proposed rulemaking regarding the appropriateness of requested single-location bargaining units in representation cases because "a rider attached to the 1996 and 1997 appropriations bills prohibits the Agency from expending any funds to promulgate a final rule"). After a 1998 rider to the same effect, the Board indefinitely withdrew the notice of proposed rulemaking over the dissent of Chairman Gould. Unified Agenda, National Labor Relations Board, 63 Fed. Reg. 23,036, 23,036–37 (Apr. 27, 1998).

independent agencies are subject to executive branch coordination and oversight will have little impact on the NLRB because the agency relies only on adjudication.[19]

Much of what the Board does by adjudication amounts to policymaking. In this Article we evaluate NLRB policymaking by adjudication on its own terms, and in the process bring the NLRB into the general conversation about developments in administrative law.

From the standpoint of labor law specialists, a shift in perspective from substantive labor law to administrative law might prove helpful. As is well known and much lamented in the labor law field, the last round of congressional labor law reform took place in the late 1950s,[20] and, at least given presidential priorities in the current economic crisis, the chances for passage of the pending Employee Free Choice Act[21] are uncertain despite Democratic Party control of Congress and the White House. Solutions to the NLRB's problems are less likely to come from labor law reform in Congress than from closer attention to the demands of administrative law by all charged with review and oversight of the Board, and by the Board itself.

The Bush II Board[22] made a number of significant and controversial policy changes, both in substantive law and in its enforcement process, and the issue we seek to address in this Article is how to evaluate those changes as a matter of administrative law (as opposed to as a matter of labor policy preference). Even within the limits of adjudication, there are ways that the NLRB—with the urging of the courts of appeal—can increase the coherence and legitimacy (legal and political) of its policymaking.

In Part I, we provide an overview of the decisions of the Bush II Board that have provoked the greatest controversy, both within and outside the Board.

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19. For the proposal, see Robert W. Hahn & Cass R. Sunstein, *A New Executive Order for Improving Federal Regulation? Deeper and Wider Cost-Benefit Analysis*, 150 U. PA. L. REV. 1489, 1494–97 (2002). For early proposals on the exercise of executive control over rulemaking (but not adjudication) by independent agencies, see THE PRESIDENT'S COMM. ON ADMIN. MGMT., *supra* note 12, at 333.

20. *See* Brudney, *supra* note 11, at 228; Estlund, *supra* note 11, at 1530.

21. Employee Free Choice Act of 2009, H.R. 1409, 111th Cong. (2009); Employee Free Choice Act of 2009, S. 560, 111th Cong. (2009).

22. We use Bush II Board to refer to the Board during the eight-year administration of President George W. Bush. Bush I Board refers to the Board during the administration of President George H.W. Bush.

In Part II, we demonstrate that the unresolved tensions between two major components of the National Labor Relations Act (NLRA)—the 1935 Wagner Act and the 1947 Taft-Hartley Act—are centrally implicated in the Bush II Board controversies. These are, we argue, the kinds of conundrums that cannot be resolved without recourse to precisely the administrative law tools the agency lacks. In the course of so doing, we raise the question of where the line should be drawn between Board findings of law and Board discretionary policymaking, a distinction with great significance to the relationship between the Board and the courts.

In Part III, we look to the historical antecedents of NLRB policymaking by adjudication. We also describe some of the structural obstacles the NLRB faces in attempting to make coherent policy. These include the exclusion of social scientists from its policymaking staff and social science–based reasoning from its decisions, its isolation from labor policymaking activities and data analysis at the Department of Labor, and 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.

In Part IV, using examples from the Bush II and Clinton Boards, we show that the result has been a formalistic style of adjudicatory reasoning that packages questions of policy as questions of law, and, in so doing, deems social science data and analysis (what might be characterized as "legislative facts") irrelevant to Board policymaking.

We end, in Part V, with some modest recommendations for how the executive, Congress (through the oversight and appropriations processes), the Obama Board (with Bush II Board dissenter Wilma Liebman as its designated chair), process-oriented courts of appeals, and the Supreme Court might improve the quality of Board decisionmaking—rather than just putting their mark on its political leanings. In particular, we suggest: (1) that the NLRB should be encouraged to take a more holistic regulatory approach to problem solving, including by increasing its reliance on social science expertise and Department of Labor data in both adjudication and rulemaking; (2) that the executive consider across-the-board reform of independent agencies and those agencies that rely primarily on adjudication; (3) that Congress consider enhancing its own policy analysis in the labor field; and (4) that both courts of appeals and the Supreme Court assimilate review of NLRB action into the way they

review the action of all federal agencies to be more coherent and consistent in how they draw the line between law, fact, and policy and the extent to which they will defer to agency adjudicatory decisions.

I. AN OVERVIEW OF THE BUSH II BOARD

Those familiar with the Board know that it changes the rules depending on which party occupies the White House. Eight years allows a Board to remake the law fairly significantly, as the Board issues hundreds of decisions each year. The changes from one administration to another were less sweeping during the first four decades of the Board's existence because there was some consensus that Board appointments should be relatively middle-of-the-road.[23] As Professor Joan Flynn has shown, Republicans first broke with that tradition during the Eisenhower administration and many years later—in the Clinton administration—Democrats did too.[24] The Bush II Board's swing to the right was not a difference in kind as compared to the twelve years of Reagan-Bush Boards, but its effects were magnified by significant changes in the economy that raised the question of whether the NLRA has a meaningful future in regulating the American workforce. Doctrinally, some of the changes simply overruled decisions from the Clinton Board which themselves had overruled decisions from the Reagan or Bush I Boards. Some of the decisions addressed issues that are new because of the changing economy. Some overturned longstanding precedent. And some did not appear to overturn precedent but simply limited prior contrary decisions to their facts.

Across a range of doctrinal arenas, it is apparent that Bush II labor policy made a decisive shift in favor of protecting managerial prerogative and augmenting the ability of employers and employees to oppose unionization. We discuss several of the most significant Bush II Board policy changes, including those limiting the availability of voluntary recognition of unions, those relating to the scope of the section 7 protections for concerted activity for mutual aid and protection, and the use of interim injunctions against ongoing unfair labor practices under section 10(j).

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23. Joan Flynn, *A Quiet Revolution at the Labor Board: The Transformation of the NLRB*, 61 OHIO ST. L.J. 1361, 1367–68 (2000).

24. *Id.* at 1369, 1392.

A. Constraining the Availability of Voluntary Recognition

One of the most controversial decisions of the Bush II Board was *Dana Corporation*,[25] which addressed the availability of card check as a vehicle for union recognition.[26] This figures to be a huge issue going forward, as unions have increasingly begun seeking recognition based on a showing of signed union authorization cards combined with economic and political pressure rather than an election supervised by the NLRB.[27] Indeed, labor's top legislative priority is the Employee Free Choice Act, which would require employers to recognize a union based on a showing of union authorization cards signed by employees rather than based on a ballot election conducted after the customary anti-union campaign.[28] In the *Dana* case, the Bush II Board limited the effectiveness of the card-check recognition strategy by making bargaining relationships formed through card-check recognition more easily eliminated than a bargaining relationship formed through an NLRB-supervised election.[29] In *Dana*, a majority of the Board overturned the old rule, which treated challenges to unions that were voluntarily recognized in the same manner as challenges to unions selected through NLRB-sponsored elections.[30] *Dana* adopted a new rule allowing a decertification petition at any time after voluntary recognition, including after an employer and union had signed a collective bargaining agreement, unless the employer or union followed newly imposed procedural requirements after voluntary recognition.[31]

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25. Dana Corp., 351 N.L.R.B. 434 (2007).

26. *Id.* at 434–35.

27. *See generally* James J. Brudney, *Neutrality Agreements and Card Check Recognition: Prospects for Changing Paradigms*, 90 IOWA L. REV. 819, 824–40 (2005) (detailing the proliferation of card-check agreements beginning in the 1970s and accelerating in the 1990s); Benjamin Sachs, *Card Check and Employee Choice: A New Altering Rule for Labor Law's Asymmetric Default*, 123 HARV. L. REV. (forthcoming Jan. 2010) (manuscript at 13–21, on file with the *Duke Law Journal*) (analyzing contemporary use of authorization cards and proposing reforms to maximize employee free choice and informed decisionmaking and to minimize potential for union or employer coercion during the union organizing process).

28. Employee Free Choice Act of 2009, H.R. 1409, 111th Cong. § 2 (2009); Employee Free Choice Act of 2009, S. 560, 111th Cong. § 2 (2009).

29. *Dana*, 351 N.L.R.B. at 441–44.

30. *Id.*

31. *Id.*

B. Narrowing the Scope of Concerted Activity for Mutual Aid and Protection

Section 7 of the NLRA protects the right to "form, join, or assist" a labor organization, the right to "engage in other concerted activities for mutual aid and protection," and the right to refrain from doing so.[32] In a number of areas, the Bush II Board limited the scope of the section 7 protections. Several of the most noteworthy cases are discussed here.

1. *Section 7 Protection for Union Activity*. First, in a series of decisions arising out of union organizing efforts, the Board limited section 7 protection for assisting labor organizations. Some of the decisions pared back standard protections. For example, in *Aladdin Gaming*,[33] a divided Board held that supervisors monitoring employee break-room conversations about union organizing was not unlawful surveillance.[34] The majority characterized the supervisor's conduct of hovering around and interjecting in employee conversations as a combination of normal social interaction and exercise of the employer's free speech rights.[35] The dissent perceived the conduct to be coercive surveillance designed to deter employees from engaging in section 7 conduct and would have found it illegal under longstanding Board precedent banning surveillance.[36]

Second, the Board began to expand the category of activity that is unprotected by the NLRA on the grounds that it is disloyal or harmful to the employer. In *International Protective Services, Inc.*,[37] the Board held that a strike by building security guards was unprotected because it occurred during the months of March and April, which were the months during which attacks on other federal buildings had occurred (the only attack specified was on the Oklahoma City federal building).[38] Although the majority justified the strike prohibition on national security grounds, critics of the decision disputed the need for the rule and worried about its scope: would employees of government contractors be prohibited from striking

32. National Labor Relations Act § 7, 29 U.S.C. § 157 (2006).
33. Aladdin Gaming, L.L.C., 345 N.L.R.B. 585 (2005).
34. *Id.* at 587–88.
35. *Id.*
36. *Id.* at 589–90 (Liebman, Member, dissenting in part).
37. Int'l Protective Servs., Inc., 339 N.L.R.B. 701 (2003).
38. *Id.* at 702–03.

during any month in which a terrorist attack occurred? Under what other circumstances might section 7 rights be subordinate to national security concerns? In *Endicott Interconnect Technologies, Inc.*,[39] employees complained on a blog about mass layoffs.[40] In a newspaper article in which a company manager defended the layoff by saying that he had a "fiduciary responsibility to make this business profitable," an employee was quoted as saying he thought the layoff was not in the best interest of the company because people with important knowledge were let go "leaving voids in the critical knowledge base," and that a union might "help to stop the job losses, and root for the workers of the community."[41] The employee was fired for his statements.[42] Although two members of the Board found the comments to be protected by section 7, Chairman Battista would have found that the comments were unprotected because the employee had not been laid off, his comments did not specifically refer to a labor dispute, and the comments disparaged the company and its management.[43]

Third, in the *Register-Guard*[44] decision discussed extensively below, the Board also limited section 7 protections both in the union and nonunion workplace by deciding that the NLRA does not protect the right of employees to use company email servers to engage in section 7 activity.[45] The impact of the *Register-Guard* decision is substantial in and of itself, as email has increasingly replaced face-to-face or telephone communication in many workplaces. But it is even more significant when considered alongside *Aladdin Gaming*, which enhanced an employer's power to have supervisors monitor employee lunchtime or break time conversations and to join the conversation to argue against unionization.[46] *Aladdin Gaming* and *Register-Guard* together enable a determined employer to prevent employees from having private communications about unionization during nonworking time; any communication about unions without supervisory monitoring and intervention would have to occur away from work on private phones or email accounts.

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39. Endicott Interconnect Techs., Inc., 345 N.L.R.B. 448 (2005).
40. *Id.* at 448–49.
41. *Id.*
42. *Id.* at 449.
43. *Id.* at 452–53 (Battista, Chairman, dissenting).
44. Guard Publ'g Co., 351 N.L.R.B. 1110 (2007).
45. *Id.* at 1114–16.
46. *See* Aladdin Gaming, L.L.C., 345 N.L.R.B. 585, 587–88 (2005).

2. *Section 7 Protection for Concerted Activity Unrelated to Unions*. A second significant retreat of the Bush Board was its withdrawal of section 7 protection for conduct that has nothing to do with forming a union. Section 7 broadly protects not only the right to join or assist unions, but also the right "to engage in other concerted activities for mutual aid or protection."[47] Section 7 could be read as providing general antiretaliation protection for all forms of worker activism, so long as the activism is "concerted" and for "mutual aid or protection." As union density has declined, the applicability of section 7 outside the union context has gained in importance. The Board, with the support of the Supreme Court, has at various points affirmed that section 7 applies broadly.[48] The Board's willingness to extend the protections of the statute beyond activities related to unionization has ebbed and flowed over time, with Republican Boards taking a narrow view of the scope of section 7 and Democratic Boards finding it to have broader applicability in nonunion workplaces.

Continuing the pattern of oscillation, the Clinton Board held that section 7 protected a variety of instances of conduct unrelated to union organizing, such as an employee's use of email to complain about a proposed change in vacation days[49] or a trio of employees who together filed unemployment compensation claims during a summer layoff.[50] In contrast, the Bush II Board held that section 7 does not protect the effort of an employee to persuade a coworker to testify at an administrative hearing on allegations of sexual harassment[51] and does not protect nurses who called a state department of health hotline to complain about excessive heat in the nursing home where they worked.[52] Whereas in the sexual harassment case, the Board reasoned that the worker activism was unprotected because it was solely about her own working conditions,[53] in the

47. 29 U.S.C. § 157 (2006).

48. *See, e.g.*, Eastex, Inc. v. NLRB, 437 U.S. 556, 570–76 (1978) (concluding that section 7 protects distribution of leaflets urging support for an increase in the minimum wage, urging opposition to the enactment of a state right to work law, and generally urging workers to support politicians who were friends of labor, even though none of the political activity mentioned in the leaflet would directly affect the employees' working conditions).

49. Timekeeping Sys., 323 N.L.R.B. 244, 245–47 (1997).

50. Tri-Country Transp., Inc., 331 N.L.R.B. 1153, 1154 (2000).

51. Holling Press, Inc., 343 N.L.R.B. 301, 301 (2004).

52. Orchard Park Health Care Ctr., Inc., 341 N.L.R.B. 642, 642 (2004).

53. *Holling Press*, 343 N.L.R.B. at 309.

nursing home case the Board found the hotline call unprotected because it was not about their own conditions (in the Board's view, the call was motivated by concern about patients, not about workers).[54]

The Bush II Board also rejected Clinton Board precedent on the question whether section 7 protects the right of a nonunion employee to have a coworker present during a disciplinary interview. The Bush II Board held that section 7 offers that protection only to union employees.[55] On this issue, the Bush II Board overturned a Clinton Board decision, which had held that asking for a coworker to be present during a disciplinary interview is "concerted activity" and that it is for "mutual aid or protection."[56] This is an issue on which the Board has flipped with almost every change in the party occupying the White House: the Clinton Board's broad reading of section 7 had overturned a Reagan Board decision,[57] which itself had overturned a decision from the end of the Carter Board era.[58]

The Board also narrowed prior precedent which had held that employer rules that broadly prohibit "abusive" or "profane" language or verbal harassment were invalid if they were likely to have a chilling effect on section 7 activity. In *Martin Luther Memorial Home*,[59] a split Board held that such rules are valid on their face but can be challenged if in specific instances they prohibit section 7 speech (such as the right to call a strikebreaker a "scab").[60] Three years later, in *Albertson's, Inc.*,[61] a majority of a divided Board further limited the scope of section 7 by upholding a rule prohibiting off-the-job conduct that "has a negative effect on the [c]ompany's reputation or operation or employee morale or productivity."[62] In so ruling, the Board distinguished prior Board precedent which had held that overbroad

54. *Orchard Park Health Care*, 341 N.L.R.B. at 643.

55. IBM Corp., 341 N.L.R.B. 1288, 1288 (2004).

56. Epilepsy Found., 331 N.L.R.B. 676, 680 (2000).

57. *See* Sears, Roebuck & Co., 274 N.L.R.B. 230, 232 (1985) (reversing Materials Research Corp., 262 N.L.R.B. 1010 (1982), which held that a right to union representation at a disciplinary interview extended to nonunionized employees).

58. *See Materials Research Corp.*, 262 N.L.R.B. at 1016.

59. Martin Luther Mem'l Home, Inc., 343 N.L.R.B. 646 (2004).

60. *Id.* at 647.

61. Albertson's, Inc., 351 N.L.R.B. 254 (2007).

62. *Id.* at 375.

workplace rules regulating the tone or content of speech might chill section 7 speech.[63]

3. *The Overlap Between Political and Labor Activism.* The Bush II Board's General Counsel also contributed to this narrowing of section 7 rights. The largest exercises of concerted worker activism since 2000 have been the massive "Day Without an Immigrant" rallies held in major cities across the United States every May 1.[64] Tens of thousands of immigrants and supporters of immigrants' rights marched to highlight exploitation of immigrant labor, to protest harsh restrictions on immigration, and to celebrate the value of immigrants and immigrant labor for American culture and the economy. These were about as close to a general strike as the American economy has seen in generations. Not surprisingly, several unfair labor practice charges were filed after each year's rallies when workers were fired for participating in them. The Bush II Board rejected statutory protection for these workers.[65]

4. *Exclusion of Workers from Statutory Protection through a Narrow Definition of "Employee".* The labor critique of the Bush II Board is not merely that it shifted the law too far in favor of

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63. *See* Adtranz ABB Daimler-Benz Transp., N.A., Inc., 331 N.L.R.B. 291, 293 (2000), *enforcement denied in part*, 253 F.3d 19 (D.C. Cir. 2001); Flamingo Hilton-Laughlin, 330 N.L.R.B. 287, 287–88 (1999); Lafayette Park Hotel, 326 N.L.R.B. 824, 833 (1998). The *Adtranz* and *Lafayette* cases are discussed in William R. Corbett, *The Narrowing of the National Labor Relations Act: Maintaining Workplace Decorum and Avoiding Liability*, 27 BERKELEY J. EMP. & LAB. L. 23, 41–44 (2006).

64. *See, e.g.*, Randal C. Archibold, *Immigrants Take to U.S. Streets in Show of Strength*, N.Y. TIMES, May 2, 2006, at A1; Jenalia Moreno, Cynthia Leonor Garza & Eyder Peralta, *Fears Didn't Deter Protests: Thousands of Migrants Join In Despite Worries of Losing Jobs, Rumors of Raids*, HOUSTON CHRON., May 3, 2006, at B1.

65. *See generally* Am. Cable Co., N.L.R.B. Gen. Couns. Advice Memorandum 4-CA-34669 (Feb. 21, 2007), *available at* http://www.nlrb.gov/shared_files/Advice%20Memos/2007/4-CA-34669.pdf (concluding that even if participation in the "Day Without Immigrants" rallies is protected under section 7, the employer was nevertheless justified in discharging employees because of the harm work stoppages cause to business); Fire Fab., Inc., N.L.R.B Gen. Couns. Advice Memorandum 32-CA-22668 (Dec. 4, 2006), *available at* http://www.nlrb.gov/shared_files/Advice%20Memos/2006/32-CA-22668.pdf; CALMEX, Inc., N.L.R.B Gen. Couns. Advice Memorandum 32-CA-22651 (Nov. 30, 2006), *available at* http://www.nlrb.gov/shared_files/Advice%20Memos/2006/32-CA-22651.pdf (concluding the same); Reliable Maint., N.L.R.B Gen. Couns. Advice Memorandum 18-CA-18119 (Oct. 31, 2006), *available at* http://www.nlrb.gov/shared_files/Advice%20Memos/2006/18-CA-18119.pdf (concluding the same). For a general discussion of whether section 7 protects worker participation in such rallies, see Michael C. Duff, *Days Without Immigrants: Analysis and Implications of the Treatment of Immigration Rallies Under the National Labor Relations Act*, 85 DENV. U. L. REV. 93 (2007).

management (labor has probably made that critique about every Republican-dominated Board for years). The new critique is that the Board made labor law protections unattainable for the nontraditional workers who are most likely to seek collective bargaining rights.[66] First, as noted, the Bush II Board resisted efforts to apply the protections of the NLRA to nonunion workers other than in the context of union organizing. Given the small fraction of the workforce that is unionized, the Board is irrelevant to the vast majority of workers.[67] Second, in defining the workers protected by the full panoply of statutory protections to exclude many of those engaged in union organizing, including those on the border of supervisory positions, those on the border of being independent contractors, and immigrants not authorized to work, the Board—sometimes on its own and sometimes at the direction of the Supreme Court—renders itself less significant to the modern workforce than it might be.[68]

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66. Some of the critiques—many of which are partisan—include William B. Gould IV, *Independent Adjudication, Political Process, and the State of Labor-Management Relations: The Role of the National Labor Relations Board*, 82 IND. L.J. 461 (2007) (Gould, a Stanford law professor, was Chair of the NLRB during the Clinton administration); Jonathan P. Hiatt & Craig Becker, Response, *At Age 70 Should the Wagner Act Be Retired? A Response to Professor Dannin*, 26 BERKELEY J. EMP. & LAB. L. 293 (2005) (Hiatt and Becker are prominent union-side lawyers and Becker was formerly a law professor at UCLA); Wilma Liebman, Essay, *Decline and Disenchantment: Reflections on the Aging of the National Labor Relations Board*, 28 BERKELEY J. EMP. & LAB. L. 569 (2007) (Liebman, who was appointed Chair of the NLRB by President Obama, was originally appointed to the Board by President Clinton and was a union-side lawyer before entering government service).

67. *See supra* text accompanying notes 55–56; *see also* Charles I. Cohen, *Neutrality Agreements: Will the NLRB Sanction Its Own Obsolescence?*, 16 LAB. LAW. 201, 201 (2000) (discussing neutrality agreements, which allow for unionization outside of the NLRB regulation and recognition process); Duff, *supra* note 65, at 150 (arguing that the NLRB should extend protection to unauthorized workers when appropriate); David Rosenfeld, *Worker Centers: Emerging Labor Organizations—Until They Confront the National Labor Relations Act*, 27 BERKELEY J. EMP. & LAB. L. 469, 512–13 (2006) (describing work centers as an alternative to unions for low-wage workers).

68. On the expanding exclusion of supervisors, see *NLRB v. Kentucky River Community Care*, 532 U.S. 706 (2001), which held that, in some cases, nurses may qualify as supervisors under the National Labor Relations Act, *id.* at 712–13, 717, and *Oakwood Healthcare, Inc.*, 348 N.L.R.B. 686 (2006), which excluded "rotating charge nurses" as statutory supervisors, *id.* at 694. In *Croft Metals, Inc.*, 348 N.L.R.B. 717 (2006), however, the Board found that the lead persons at a factory did not have supervisory authority because they did not exercise independent judgment in directing their crew members. *Id.* at 722. Similarly, in *Beverly Enterprises-Minnesota. Inc.*, 348 N.L.R.B. 727 (2006), the Board held that the employer's charge nurses were employees rather than supervisors. *Id.* at 732. On leased employees, see *Oakwood Care Center*, 343 N.L.R.B. 659, 663 (2004). On independent contractors, see *Roadway Package System, Inc.*, 326 N.L.R.B. 842 (1998), which held that delivery truck drivers are employees, *id.*

C. Enforcement and Remedies

1. *Section 10(j).* Another major policy change on which the Clinton Board and the Bush II Board differed significantly is illustrated in the frequency with which the Board sought injunctions from the federal district courts against ongoing unfair labor practices. One criticism frequently leveled at the NLRA is that the relative mildness of the remedies (reinstatement plus back pay) and the slowness of the administrative process (it can take years from the filing of a complaint by an aggrieved employee to the issuance of an enforceable order) creates a huge incentive for employers to deliberately violate the statute knowing that they will reap the benefit of illegal conduct for a long time, if not permanently in the case of a successful defeat of an organizing campaign.[69] Efforts to amend the statute to stiffen the penalties have been filibustered or vetoed. One thing the Board can do is to seek interim injunctive relief to remove the incentive for delay.

Under section 10(j) of the NLRA, in any case in which a Regional Office has issued a complaint charging an unfair labor practice, the Board is empowered to petition a federal district court for a preliminary injunction against an ongoing unfair labor practice.[70] The Board has developed an elaborate internal process for handling 10(j) cases, which requires the regional office to seek authorization from the Board's General Counsel in Washington, D.C.[71] The General Counsel, in turn, must obtain authorization from the Board before filing a petition in a district court.[72]

The General Counsel of the Clinton Board, and the Board itself, made a major priority of seeking 10(j) injunctions,[73] and the number

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at 854, and *Dial-A-Mattress Operating Corp.*, 326 N.L.R.B. 884 (1998), which held that delivery truck drivers are independent contractors, *id.* at 894. For a discussion of the obstacles that temporary workers face in their attempts to unionize, see generally Bita Rahebi, Comment, *Rethinking the National Labor Relations Board's Treatment of Temporary Workers: Granting Greater Access to Unionization*, 47 UCLA L. REV. 1105 (2000).

69. *See, e.g.*, Paul Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769 (1983).

70. 29 U.S.C. § 160(j) (2006).

71. *See* NAT'L LABOR RELATIONS BD., CASEHANDLING MANUAL § 10200 (2008), *available at* http://www.nlrb.gov/nlrb/legal/manuals/CHM1/CHM1.pdf.

72. *See id.*

73. The memoir of Professor William B. Gould IV, the chair of the Clinton Board, explains the significance of the Board's section 10(j) initiative. *See* GOULD, *supra* note 17, at 65–67, 178–82, 300–02. Professor Gould's earlier book, WILLIAM B. GOULD IV, AGENDA FOR REFORM:

of authorizations grew, as the data in Table 1 reveal, from 26 in 1992 (the last year of the Bush I Board) to 104 in 1995. During the Clinton Administration, the lowest number of 10(j) authorizations was 43. During the Bush II Administration, the *highest* number of 10(j) authorizations was 28, and the lowest, reached in 2005, was 15.

THE FUTURE OF EMPLOYMENT RELATIONSHIP AND THE LAW (1993), made the case for various procedural reforms to increase incentives for compliance with labor law.

Table 1. Injunctions against Ongoing Unfair Labor Practices under Section 10(j)[74]

FY	Total 10(j) Requests Received	GC 10(j) Requests to Board	Authorizations	Board Denials	10(j) Petitions	Success Rate
2008	86	—	28	—	18	84%
2007	68	39	25	3	21	86%
2006	69	30	25	0	22	94%
2005	61	22	15	3	11	93%
2004	70	22	14	4	10	100%
2003	90	24	17	3	14	100%
2002	87	26	16	0	15	73%
2001	99	43	43	0	29	88%
2000	154	73	68	4	45	86%
1999	115	58	45	1	27	85%
1998	104	53	45	4	32	95%
1997	124	62	53	6	36	87%
1996	131	59	53	4	39	91%
1995	259	109	104	6	78	91%
1994	207	85	83	0	62	82%
1993	137	42	42	1	34	FY 1989–1993 91%
1992	116	27	26	0	24	
1991	142	36	38	1	32	
1990	157	41	39	0	31	
1989	163	62	62	1	48	
1988	166	44	43	0	33	FY 1985–1988 89%
1987	155	37	37	1	29	
1986	163	45	43	0	41	
1985	168	42	38	3	24	
1984	195	40	30	15	26	
1983	309	71	51	18	34	1/1/80–12/31/83 87%
1982	255	58	53	5	44	
1981	301	71	71	0	54	
1980	272	82	81	1	57	
1979	262	80	80	0	N.A.	7/1/78–6/30/79 81%
1978	260	53	51	2	46	
1977	219	62	62	0	55	
1976	160	27	26	1		

74. The data in Table 1 were provided to the authors by the NLRB Division of Information. The data for FY 2008 are drawn from Memorandum from Ronald Meisburg, Gen. Counsel, Office of the U.S. Gen. Counsel, to All Employees of the Office of the U.S. Gen. Counsel, Summary of Operations (Fiscal Year 2008), at 9–10 (Oct. 29, 2008), *available at* http://www.nlrb.gov/shared_files/GC%20Memo/2009/GC%2009-03%20Summary%20of%20Operations%20FY%2008.pdf. Data are not reported for FY 2008 for GC 10(j) requests to the Board and Board denials because the NLRB delegated 10(j) authority to the General Counsel during FY 2008 at the time when the Board's membership fell to two. For a discussion of the significance of the change in Board policy on section 10(j), see William B. Gould IV, *The NLRB at 70: Some Reflections on the Clinton Board and the Bush II Aftermath*, 26 BERKELEY J. EMP. & LAB. L. 309, 316 (2005).

The almost complete cessation of the practice of seeking injunctions against ongoing unfair labor practices under section 10(j) is one of the most dramatic reversals of policy between the Bush II Board era and the Clinton Board era. It is not one that was accomplished through adjudication—unlike the policies we discuss elsewhere in this Article—but instead through discretionary enforcement practice that is entirely beyond the reach of judicial review and largely beyond the view of public or congressional oversight. Indeed, the 2002 General Counsel memorandum articulating the new enforcement philosophy of the Bush II Board regarding section 10(j) gave no indication that a dramatic change was intended or should occur.[75]

2. *Adjudication Policies and Remedies in Duty to Bargain Cases*. Criticism has also been leveled at the administrative procedures the Bush II Board adopted for handling other aspects of its caseload. Some of the changes are highly technical and not readily apparent, such as heightened pleading and proof requirements.[76] But they will

75. Utilization of section 10(j) Proceedings, N.L.R.B. Gen. Couns. Memorandum 02-07 (Aug. 9, 2002), *available at* http://www.nlrb.gov/shared_files/GC%20Memo/2002/gc02-07.html ("[T]he Section 10(j) program is, and must continue to be, an important tool in administering the Act.").

76. In *Raley's Supermarkets & Drug Centers*, 349 N.L.R.B. 26 (2007), the Board both reduced the employer's duty to disclose information to the union necessary to process grievances and effectively imposed a heightened pleading requirement on the General Counsel to prove that the employer failed to provide the union with the information necessary to represent an employee in a grievance. *Id.* at 28. In that case, the union twice requested information that the employer had assembled regarding alleged incidents of harassment and retaliatory transfer. *Id.* at 26. The employer simply informed the union that the employees whom it interviewed had not complained of disrespectful treatment and "we believe the situation has been addressed and the matter closed." *Id.* Only during the hearing on the unfair labor practice charge did the employer reveal that it had decided that the grievances lacked merit, it had not prepared a report of its investigation, and it had taken no remedial actions in response to the allegations. *Id.* at 27. The Board held that the employer had no duty to provide witness statements or to inform the union that it had taken no action on the incidents and had prepared no report of its investigation. The Board also held that the employer's failure to inform the union that it had no report was not an unfair labor practice because the General Counsel had alleged only that the employer failed to provide the report and had not specifically alleged that the employer failed to inform the union of the nonexistence of the report. *Id.* at 28. Although the Board purported to make no new law, the dissent pointed out that cases from the Clinton Board had found the employer to have a duty to provide investigation reports and files, and that it suffices for the General Counsel to allege that the employer failed to provide information rather than having to allege that the employer failed to state that the requested information did not exist. *See id.* at 28–30 (Liebman, Member, dissenting) (citing Postal Serv., 332 N.L.R.B. 635 (2000)); Care Manor of Farmington, Inc., 318 N.L.R.B. 330 (1995); Gloversville Embossing Corp., 314 N.L.R.B. 1258 (1994)).

cumulatively have the effect of making it much harder to prove a case and, therefore, make it more difficult for the regional attorneys, who are the enforcement arm of the Board, to bring cases.

Another area of acute regulatory failure (at least from the standpoint of labor) is the failure of the Board and the courts to develop remedies for bad faith bargaining. During the last decade, nearly half of all newly certified unions failed to reach a collective bargaining agreement, up from one-third of new unions that failed to secure a first contract in the early 1990s.[77] Scholars, Board members, and judges have complained for years that an employer determined to thwart unionization can bargain endlessly without ever reaching agreement unless the union has sufficient political or labor market power to force an employer to come to terms.[78] Although section 8(a)(5) of the NLRA imposes a duty to bargain in good faith, the Supreme Court long ago decided that the Board lacks the authority to force a recalcitrant (or even an illegally recalcitrant) party to reach agreement.[79] It will simply order the party who bargained in bad faith

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In *St. George Warehouse*, 351 N.L.R.B. 961 (2007), the Board majority switched the burden of proof from the employer to the General Counsel to show mitigation of damages in the case of illegal discharge. *Id.* at 961. In other cases, the Board changed rules in ways that make it more difficult to prove or to recover remedies in cases involving unfair labor practices against "salt," union members who apply for jobs for purposes of organizing a workplace. *See* Toering Elec. Co., 351 N.L.R.B. 225, 234 (2007); Oil Capitol Sheet Metal, Inc., 349 N.L.R.B. 1348, 1353 (2007).

77. John-Paul Ferguson, *The Eyes of the Needles: A Sequential Model of Union Organizing Drives, 1999–2004*, 62 INDUS. & LAB. REL. REV. 3, 16 (2008); *see also* DUNLOP COMM'N, THE DUNLOP COMMISSION REPORT ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS: FINAL REPORT 39 (2004) (observing that "[r]oughly a third of workplaces that vote to be represented by a union do not obtain a collective bargaining contract").

78. *See, e.g.*, DUNLOP COMM'N, *supra* note 77, at 45 (describing proposals that would mandate arbitration in cases of bad faith bargaining, and concluding that it is difficult to distinguish between bad faith bargaining and "permissible hard bargaining"); Charles J. Morris, *The Role of the NLRB and the Courts in the Collective Bargaining Process: A Fresh Look at the Conventional Wisdom and Unconventional Remedies*, 30 VAND. L. REV. 661, 668 (1977) (observing that the duty to bargain does not fully capture the "grey area" touching upon "entrepreneurial decision-making" when there is little expectation of reaching an agreement); Theodore St. Antoine, *A Touchstone for Labor Board Remedies*, 14 WAYNE L. REV. 1039, 1046 (1968) (arguing that "the fact that a contract might not have emerged from bargaining does not necessarily preclude" compensation under the NLRA).

79. H.K. Porter Co. v. NLRB, 397 U.S. 99, 102 (1970); *see also* NLRB v. Am. Nat'l Ins. Co., 343 U.S. 395, 404 (1952) ("[T]he Board may not, either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements.").

to bargain more.[80] Here, as elsewhere, the problem is not solely of the Board's own making, for the Supreme Court early adopted a view of the Board's regulatory authority that was arguably narrower than the statutory language compelled.[81] One provision of the Employee Free Choice Act would rectify the problem by providing for interest arbitration in the case of a failure to bargain to a first contract.[82] Here, the Board, informed by social science data about the reasons for the failure of newly certified unions to obtain first collective bargaining agreements, might be able to take a creative approach to the remedial powers it has, because its own refusal to issue make-whole or other remedies in such cases has been controversial ever since a narrowly divided Board declined to assert such power in 1970.[83]

II. THE BUSH II BOARD AND THE HYBRID NLRA

The Bush II Board's philosophy is a manifestation of one of two polar conceptions of the NLRA, and it is a position that must be taken seriously. The interpretation and implementation of the NLRA straddles a major fault line. The NLRA is an amalgam of two statutes, the Wagner Act (1935) and the Taft-Hartley Act (1947).[84] They arose

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80. *See, e.g.*, J. FREEDLEY HUNSICKER, JR., JONATHAN KANE & PETER D. WALTHER, JR., NLRB REMEDIES FOR UNFAIR LABOR PRACTICES (2d ed. 1986).

81. Section 8(d) of the NLRA, added as part of the Taft-Hartley Act, defines the duty to bargain in general terms with the proviso that "such obligation does not compel either party to agree to a proposal or require the making of a concession." 29 U.S.C. § 158(d) (2006). Scholars, courts, and Board members have debated for decades whether this language compels the conclusion that no remedy can be imposed that would have the effect of preventing a strong employer from, as one scholar put it, "talk[ing] a union to death." *See, e.g.*, Archibald Cox, *The Duty to Bargain in Good Faith*, 71 HARV. L. REV. 1401, 1412–13 (1958) ("As long as there are unions weak enough to be talked to death, there will be employers who are tempted to engage in the forms of collective bargaining without the substance. The concept of 'good faith' was brought into the law of collective bargaining as a solution to this problem.").

82. Employee Free Choice Act of 2009, H.R. 1409, 110 Cong. § 3 (2009).

83. In *Ex-Cell-O Corp.*, 185 N.L.R.B. 107 (1970), the Board split 3 to 2 on the question whether the Board could issue compensatory remedies for failures to bargain in good faith. *Id.* at 114. As scholars have pointed out, ample data based on the employer's contracts at other unionized plants enabled relatively precise calculation of the economic harms caused to employees by the employer's illegal conduct, and state labor boards do issue compensatory remedies in failure-to-bargain cases. *See* George Arakelian Farms, Inc. v. ALRB, 783 P.2d 749, 758 (Cal. 1989) (observing that when the employer's "election challenges are merely a stalling tactic designed to thwart union organization," makeshift compensation by the Board "compensate[s] the employees for the actual loss of the opportunity to negotiate an agreement").

84. *See generally* CHRISTOPHER L. TOMLINS, THE STATE AND THE UNIONS: LABOR RELATIONS, LAW, AND THE ORGANIZED LABOR MOVEMENT IN AMERICA, 1880–1960 (1985)

under diametrically opposed historical circumstances, and were aimed at correcting diametrically opposed abuses of power. One could encapsulate much labor law practice and scholarship as answers to the question, "How radically pro-union was the Wagner Act, and how radically anti-union was Taft-Hartley?" When left labor scholars (particularly those speaking with the hope of shoring up labor law against further erosion) talk to outsiders, they portray the Wagner Act as a transformative, pro-union, pro-collective bargaining "super-statute"[85] and Taft-Hartley as an amendment that whittled away at the margins of union and NLRB abuses of power but did nothing to change the pro-union, pro-bargaining thrust of the statute.[86] But there are, in fact, genuine debates among legal historians and other labor scholars on both of these questions. Some agree that the Wagner Act was transformational but view Taft-Hartley as a catastrophic reshaping of the field.[87] Others are sharp critics of the view of the Wagner Act as radical, and see Taft-Hartley as merely an adjustment in what was already a compromised statute.[88] Even among those who see the Wagner Act as radical at its origins, many believe that the Supreme Court clipped its wings almost immediately because the

(tracing the historical development of the National Labor Relations Act, including the Wagner and Taft-Hartley Amendments).

85. *See* William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1227 (2001) (developing the concept of super-statutes and using the NLRA as an example).

86. *See* Nelson Lichtenstein, *Politicized Unions and the New Deal Model: Labor, Business and Taft-Hartley*, *in* THE NEW DEAL AND THE TRIUMPH OF LIBERALISM 135, 138 (Sidney M. Milkis & Jerome M. Mileur eds., 2002) (discussing the work of George Lipsitz and David Plotke); *see also* Estlund, *supra* note 11, at 1533–35 ("The Taft-Hartley Act . . . represented a major setback for the labor movement. . . . But the 1947 amendments worked largely by addition, not subtraction; they left the core provisions of the original New Deal text—and in particular the existing employer unfair labor practices—essentially intact."); *cf.* Archibald Cox, *Some Aspects of the Labor Management Relations Act, 1947*, 61 HARV. L. REV. 274, 274 (1961) (arguing that Taft-Hartley "appears to reject the policy of encouraging the spread of collective bargaining, [and] accepts the institution where it already exists").

87. *See, e.g.*, Nelson Lichtenstein, *Taft-Hartley: A Slave-Labor Law?*, 47 CATH. U. L. REV. 763, 765 (1998); *see also* Katherine Van Wetzel Stone, *The Postwar Paradigm in American Labor Law*, 90 YALE L.J. 1509, 1518–65 (1981) (discussing industrial pluralism and its negative impact on labor unions).

88. *See, e.g.*, Lichtenstein, *supra* note 86, at 138–41 (describing the work of scholars, like Christopher Tomlins, who critique the Wagner Act as statist and therefore do not see Taft-Hartley as a deradicalization of the Wagner Act, and then arguing that this position is inconsistent with the historical evidence of the urgency with which labor's supporters opposed Taft-Hartley); *cf.* TOMLINS, *supra* note 84, at 280 (contrasting the rhetoric of labor's supporters regarding Taft-Hartley's alleged radicalization with the law's modest substantive changes).

Court was unprepared to conclude that Congress meant to undercut core managerial prerogatives as the cost of labor peace.[89]

The conservative wing of the Bush II Board took the position that, after Taft-Hartley, the NLRB is supposed to be neutral toward collective bargaining and especially protective of the right of employees to resist unionization and the right of employers to speak their minds during union election campaigns—rights placed in the statute by Taft-Hartley in response to perceived NLRB pro-union bias. The liberal wing of the Board took the position that the NLRA should encourage collective bargaining and protect pro-union employees from employer abuses of power.[90] Put differently, the conservatives think it is their highest mission to avoid false positives (that is, collectivization of employees who do not genuinely want to unionize), and the liberals, false negatives (that is, exclusion of employees who genuinely want unions from the benefits of collectivization).

Both the Wagner Act and the Taft-Hartley Act used federal labor regulation to prevent bargaining disputes between employees and firms from mushrooming into industrial unrest and, in the case of the Wagner Act, to achieve a modicum of wealth redistribution by enhancing the power of employees to negotiate collectively. The Wagner Act declared employers' militant refusal to recognize unions as the major cause of industrial unrest, and the abuse of employer

89. *See* ATLESON, *supra* note 8, at 19–34; Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937–1941*, 62 MINN. L. REV. 265, 292–93 (1978); Katherine Van Wetzel Stone, *The Future of Collective Bargaining: A Review Essay*, 58 U. CIN. L. REV. 477, 484–85 (1989) (book review) ("Both Professor Karl Klare and I have argued that the Wagner Act grew out of a widespread perception that there was a public interest and a public stake in the fairness of the terms of the wage bargain. Accordingly, the Act brought labor issues into the public arena and made it a legitimate role of government to intervene to equalize the bargaining power of labor and management. We both claim that despite this mission, the Wagner Act has been interpreted so as to relegate labor issues back to the private realm."); *cf.* Julius G. Getman and Thomas Kohler, *The Story of* NLRB v. Mackay Radio & Telegraph Co.*: The High Cost of Solidarity*, *in* LABOR LAW STORIES, *supra* note 14, at 13, 44–46 (arguing that the Wagner Act provided merely a "framework for private ordering, but not the substance of that order").

90. The liberal-conservative split was on display during December 13, 2007, joint hearings before the House Subcommittee on Health, Employment, Labor and Pensions, Committee on Education and Labor and the Subcommittee on Employment and Workplace Safety, Committee on Health, Employment, Labor and Pensions. *See The National Labor Relations Board: Recent Decisions and Their Impact on Workers' Rights: Joint Hearing Before the H. Subcomm. on Health, Employment, Labor and Pens. of the H. Comm. on Education & Labor, & the S. Subcomm. on Employment & Workplace Safety of the S. Comm. on Health, Educ., Labor & Pens.*, 110th Cong. 1–124 (2007).

economic power as the major obstacle to improved labor standards.[91] Taft-Hartley saw union militancy as the cause of industrial unrest, and union coercive tactics as socially damaging rent seeking that distorted the labor market and threatened capitalist economic growth.[92] The NLRA, the odd marriage between the two, left it to the NLRB to enforce these inconsistent mandates. The fact of the matter is that the NLRB's post-Taft-Hartley mandate is messy, and that makes it very difficult to find a vantage point for evaluation.

A. Statutory Interpretation of the Hybrid NLRA: Bounded Purpose

The NLRB's conflicted mandate makes it difficult to determine whether the agency's approach to its enabling statute shows fidelity to statutory purpose. Simplistic purposive statutory interpretation is not much help in hybridized statutes like the NLRA. In statutes like the hybrid NLRA, to borrow Hart & Sachs legal process terms, one must recognize that "[p]urposes . . . may exist in hierarchies or constellations. E.g. (to give a very simple illustration), to do *this* only so far as possible without doing *that*." [93] In such situations, the legislative mandate is "do *X* (status quo–altering purpose) only insofar as *Y*," when *Y*—the limits placed on how far Congress is

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91. The legislative findings in section 1 of the Wagner Act said "[t]he denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest," which impairs commerce or "cause[es] [substantial] diminution of employment and wages," and that the

> inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry.

National Labor Relations Act, Pub. L. No. 74-198, § 1, 49 Stat. 449, 449 (1935) (codified as amended at 29 U.S.C. § 151 (2006)).

92. The legislative findings in section 1 of the Taft-Hartley Act said "Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce . . . through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public . . . ." Labor Management Relations (Taft Hartley) Act, 1947, Pub. L. No. 80-101, § 1, 137, 61 Stat. 136 (1947) (codified at 29 U.S.C. §§ 151–66).

93. HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1377 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994); *see also* Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59, 63 (1988) ("To use an algebraic metaphor, law is like a vector. It has length as well as direction. We must find both, or we know nothing of value. To find length we must take account of objectives, of means chosen, and of stopping places identified. All are important.").

willing to take *X* or what methods Congress is prepared to use to achieve *X*—are as much a part of the statutory scheme as is the statute's affirmative purpose. For example, the winning argument in *United Steelworkers of America v. Weber*[94] asserted that Title VII aimed to end discrimination against minorities but only insofar as doing so did not interfere with management discretion to discriminate in their favor.[95] For lack of a better label in the statutory interpretation literature for this approach, we shall call it bounded purpose.[96]

In the analysis of bounded purpose, much turns on the relative weights accorded to *X* and *Y*. In some cases, *Y* is an outer limit on *X*, but in cases of uncertainty, it is preferable to have too much *X* than too little. In these cases, *Y* is but a marginal correction to *X*; we work harder to avoid false negatives than false positives. But when *Y* is weighed equal to or more heavily than *X*, bounded purpose is binding indeed. Burdens of persuasion can be strong evidence of the relative weight of *X* and *Y*. As elaborated in *Weber*'s successor case in the Supreme Court, for example, voluntary affirmative action plans are presumed not to count as discriminatory unless proven invalid[97]—making it clear that *Y* is being weighted more heavily than *X*—despite the fact that *X* (antidiscrimination) is present in the text of the statute and *Y* is not. Viewing the hybrid NLRA through the lens of bounded purpose, the question is whether the affirmative commitments of Taft-Hartley (*Y*) merely limit the affirmative commitments of the Wagner Act (*X*) at the margins; whether they are

94. United Steelworkers of Am. v. Weber, 443 U.S. 193 (1979). In this case, the Supreme Court upheld voluntary affirmative action under Title VII of the Civil Rights Act of 1964. *Id.* at 197.

95. *See* Deborah C. Malamud, *The Story of* United Steelworkers of America v. Weber, *in* EMPLOYMENT DISCRIMINATION STORIES 173, 212–13, 218–19 (Joel Wm. Friedman ed., 2006).

96. The specific Hart & Sacks language quoted in text is not included in the legislation casebook coauthored by the editors of the Hart & Sacks legal process materials. WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 697 (3d ed. 2001) (substituting a paraphrase). The concept we call bounded purpose may fall within the casebook editors' concept of imaginative reconstruction, which they draw in part from the work of Judge Richard Posner. *See id.* at 684–85, 685 n.n. (citing RICHARD A. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 286–93 (1985)). Judge Posner suggests that Hart and Sacks are "reluctan[t] to recognize that statutes often are the product of compromise between opposing groups and that a compromise is unlikely to embody a single consistent purpose." POSNER, *supra*, at 289. Bounded purpose is a way of expressing the purposeful—as opposed to the purely strategic—nature of at least some legislative compromises.

97. Johnson v. Transp. Agency, 480 U.S. 616, 626–27 (1987).

coequal in importance; or whether Taft-Hartley's commitments trump the original Wagner Act when the two come info conflict.[98]

In our view, bounded purpose is the right approach to the NLRA. Pursuant to that approach, we believe that although Taft-Hartley does not trump the Wagner Act, it does more than tinker at its margins. Certainly Taft-Hartley manifests a strong congressional judgment that collective bargaining is not unassailably good, and that problems with collective bargaining as it actually exists on the ground are of central concern to the formation of federal labor policy. When combined with the management-protective limitations so early imposed by the Supreme Court on the Wagner Act itself, the Taft-Hartley Act makes it impossible to view the combined NLRA as an unabashedly pro-collective bargaining charter.[99] That, we think, is as far as generalities about the relationship between the two statutes can take us. Beyond that, the field is faced with the extremely difficult task of forging a contemporary labor policy from old and conflicting statutory enactments. Given the death of the nondelegation doctrine, one must work on the assumption that the impossibility of the task does not make it go away.

B. Law versus Policy under the NLRA

There are, to be sure, plenty of routine cases on the Board's docket that do not implicate the fault line we have described. Indeed, at the end of the Bush II Administration, a two-member, two-party Board continued to work through a substantial portion of the Board's docket, in part by agreeing to apply Board precedent and to seek compromise on fact-finding when the "facts of the case can

98. This vocabulary is both less absolutist and far more useful than is, for example, reliance on the formalistic "canon against implied repeals." For a critique of the canon, see Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 812–13 (1983). The canon would seem particularly inapt when the later statute is explicitly formulated as an amendment to the earlier statute.

99. *Cf.* Estlund, *supra* note 11, at 1528 ("As for collective bargaining, it is hard to be against the idea of fostering negotiations between the managers of an enterprise and the workers, speaking through their chosen representatives, over wages and working conditions. *Putting aside the particular choices that labor and management have made (some of which now appear rigid and inefficient), and some of the particular embellishments added by the labor laws*, collective bargaining in its essence responds to current demands for flexible accommodation to the market, to local conditions, and to change. It is at least potentially decentralized, tailored to local circumstances, flexible, and democratic." (emphasis added) (footnotes omitted)).

reasonably be interpreted in more than one way."[100] But when it comes to legally significant cases, the underlying debate is generally unavoidable.

The NLRB's task is especially open-ended because so few of the major cases coming before the Board are statutory interpretation cases as that category is commonly understood: that is, as questions of law to be answered by analyzing text and legislative history.[101] A surprisingly large proportion of legally significant Board cases do not rest on any specific statutory language at all.[102] In others, the statutory language is either open-ended or circular.[103] Often there is no helpful

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100. *Schaumber, Liebman Discuss Dynamics of Two-Member Board*, DAILY LABOR REP., Sep. 18, 2008, at 2. The legality of a two-member Board deciding cases was recently upheld by the First Circuit, and remains under challenge elsewhere. Ne. Land Servs. Ltd. v. NLRB, No. 08-1878, 2009 WL 638248, at *5 (1st Cir. Mar. 13, 2009) (upholding the legality of a two-member board); Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB, Nos. 08-1162 & 08-1214 (D.C. Cir. oral arguments held Dec. 4, 2008); DAILY LABOR REP., *supra* (noting other possible challenges). Members Schaumber and Liebman have, however, continued a general Board practice of indicating in opinions that one or the other would prefer to reexamine precedent but decline to do so "for institutional reasons." *See, e.g.*, Lorge School & Linda Cooperman, 352 N.L.R.B. 119, 119 & n.5 (2008) (Schaumber); Resistflame Acquisition Co., 353 N.L.R.B. 1, 2–3 & n.3 (2009) (Liebman).

101. *See, e.g.*, Charles H. Koch, FCC v. WNCN Listeners Guild*: An Old-Fashioned Remedy for What Ails Current Judicial Review Law*, 58 ADMIN. L. REV. 981, 987–88 (2006) ("In policymaking, agencies are not to parse language, delve into legislative history, or engage in the other interpretive strategies. Rather, they are to make permissible, but not mandated, judgments based on legislative facts developed for that purpose. Courts may not ignore Congress and take over this function by converting into interpretation. . . . [especially when] the policy expressed in the statute is inchoate, incomplete, or insufficiently specific and the agency must actually make policy, not just find it in the statutory language."); *see also* Ronald M. Levin, *The Anatomy of* Chevron*: Step Two Reconsidered*, 72 CHI.-KENT L. REV. 1253, 1289 (1997) (citing Nat'l Ass'n of Regulatory Util. Comm'rs v. Interstate Commerce Comm'n, 41 F.3d 721, 727 (D.C. Cir. 1994)) ("When Congress' instructions are conveyed at a high level of generality, an agency is not likely to consider its action as 'interpretation' of the authorizing statute, nor is that action likely to be challenged as 'misinterpretation.' (Yet even then, the agency would be expected to assert that a particular decision was shaped by the general policy concerns that animated the legislation.)"); Edward L. Rubin, *Discretion and Its Discontents*, 72 CHI.-KENT L. REV. 1299, 1318 (1997) (stressing the "instrumental character" of agency policymaking in the face of unclear congressional commands).

102. This is in part an artifact of the lack of legislative activity in the field. *See* Estlund, *supra* note 11, at 1530–44.

103. For example, the NLRA defines "employee" entirely circularly as follows: "The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer . . . ." 29 U.S.C. § 152(3) (2006). Similarly, the NLRA protects, but does not define, "the right to strike." *Id.* § 163. The NLRA prohibits secondary boycotts (although it does not use that term) in terms so broad that, read literally, would prohibit primary strikes and picketing that are clearly protected by the NLRA, and it prohibits certain uses of picketing without defining what constitutes picketing. *See generally* JULIUS G. GETMAN, BERTRAND B. POGREBIN & DAVID L. GREGORY, LABOR MANAGEMENT RELATIONS AND THE LAW 267, 277 (2d ed.

legislative history. The Supreme Court's statutory interpretation in NLRA cases often turns on nothing more than statements about the underlying purposes of the statute, and shows the same incapacity the Board manifests when it comes to how to prioritize Wagner Act versus Taft-Hartley formulations of those purposes.[104] The Court often purports to be so sure of the right answer that, either explicitly or in retrospect, it deems its decision to have been made at *Chevron* Step One.[105] But, in many cases, the issue is more accurately described as a question of policy rather than as a question of law, and the arbitrary-and-capricious standard for discretionary policymaking is the standard the Court *should* be applying.[106] The line between

1999) ("The Act does not define picketing . . . . The Board, however, has interpreted 'picketing' liberally, focusing on some type of union activity near the entrances to the employer's business and the results of such activity.").

104. Examples of this approach to statutory purpose abound in the area of the duty to bargain in good faith, and the views of the statutory purpose are often thought to reflect a tension between two divergent purposes. In one view, a more interventionist view, the purpose of labor law is to facilitate a rational bargaining process that will produce agreement, and the Board and the courts are empowered to find particular bargaining tactics illegal based on the harm they cause to the process. *See, e.g.*, NLRB v. Katz, 369 U.S. 736, 738–39 (1962) (holding that a unilateral change in terms before bargaining to impasse violates the duty to bargain); NLRB v. Truitt Mfg. Co., 351 U.S. 149, 153–54 (1956) (holding that the employer must provide information to the union to support its claim that the company could not afford a particular contract term). In another, more laissez-faire view, the purpose of labor law is only to provide the outer boundaries of economic struggle, and the Board lacks the power to regulate the fairness or rationality of the process. *See, e.g.*, NLRB v. Ins. Agents' Int'l Union, 361 U.S. 477, 484 (1960) (holding that parties may use economic power away from the bargaining table to secure a more favorable agreement, and saying that "the most basic purpose" of the duty to bargain is to force the employer and union to negotiate but "what happens behind [the] doors [of the negotiating room] is not inquired into, and the bill does not seek to inquire into it").

105. For example, in *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992), the Court refused to defer to the Board's interpretation of the statutory term "employee" as including people employed by unions or by other employers who were attempting to organize employees at a worksite at which they did not work. *Id.* at 540–41. The Court, disregarding the statutory definition of "employee" as including "any employee, and shall not be limited to the employees of a particular employer," insisted that the organizers in question were not employees and therefore that neither they, nor the people who worked on the property, had rights to have them distribute literature in a shopping mall parking lot. *Id.* The Court said, "in *Chevron* terms . . . section 7 speaks to the issue of nonemployee access to an employer's property." *Id.* at 537. For the significance of the distinction between *Chevron* Steps One and Two, see *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967, 982–83 (2005).

106. For example, when Justice White raised the question, in *Lechmere*, whether the old statutory interpretation precedent being used in that case would be understood as a *Chevron* Step One or a *Chevron* Step Two decision, *Lechmere*, 502 U.S. at 545–47 (White, J., dissenting), he was asking the wrong question. The better question would be whether that precedent concerned law or policy. More attention has been paid by the Court to the line between board fact-finding and policymaking, *see* Allentown Mack Sales & Serv., Inc. v. NLRB, 522 U.S. 359, 366–80 (1997), than to the line between law and policy under the NLRA.

Chevron Step Two and the arbitrary-and-capricious standard as applied to discretionary policy is by no means clear.[107] Both ask courts to defer to reasonable agency decisions. The line between *Chevron* Step One and the arbitrary-and-capricious standard, however, is clear. The arbitrary-and-capricious standard gives the Board great discretion to make and change policy; *Chevron* Step One gives the agency no discretion to interpret statutory language that the courts find to be unambiguous.[108]

C. The Bush II Board's Fundamental Policy Conflict

A succinct illustration of the internal policy rift in the Bush II Board concerns the *Dana* case and the issue of voluntary recognition via card check. The following debate during a December 2007 congressional oversight hearing not long after the *Dana* decision highlights the political controversy over the activities of the Bush II Board.[109]

Both the Republican and the Democratic members of the Board used the hearing to articulate their views on card-check recognition and the balance between the right of employers to persuade their employees to exercise their rights to refuse to join unions and the rights of employees to join unions without intimidation by their employers. Yet neither side addressed the nature of the Board's decisionmaking process as being an issue. Inasmuch as several of the witnesses were Board members, it is not surprising that they did not fault themselves for failing to rely on empirical data. They focused their criticism of the *Dana* case on whose approach was truer to the real meaning of the NLRA. Republican Board Chair Battista testified:

> [O]ur critics lose sight of the fact that the statute was amended in 1947 by the Taft-Hartley Act to protect employees from not only employer interference, but also union misconduct and to give employees the equal right to refrain from union activities and representation. . . .

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107. *See, e.g.*, Michael Herz, *The Rehnquist Court and Administrative Law*, 99 NW. U. L. REV. 297, 314–18 (2004) (discussing the uncertain relationship between *State Farm* hard look review and *Chevron* Step Two).

108. *Brand X*, 545 U.S. at 982–83.

109. *The National Labor Relations Board: Recent Decisions and Their Impact on Workers' Rights*, *supra* note 90 *passim*.

> The statute was not intended to benefit unions or employers. Rather, the rights granted by the statute belong only to employees whether unionized or not. Once again, the fundamental principle of the act is to provide for employee free choice, allowing employees to decide for themselves whether they wish to be represented by a union or to otherwise act concertedly in dealing with their employer. *The law is neutral, and so is this agency*.[110]

Member Liebman, in contrast, disputed the characterization that the Board is "neutral" and indifferent as to whether employees unionize or not. She said:

> [T]he board has pretty expressly stated for the first time in the board's history that freedom of choice—and in this case, that would be the freedom to reject union representation—has paramount value in this statute over the goal of promoting collective bargaining. That is the first time that the NLRB has ever stated that ranking of statutory policies in that way.[111]

Chairman Battista insisted in his testimony that, whatever policy the Wagner Act had articulated, the Taft-Hartley amendments eliminated favoring the right to engage in collective bargaining, or promoting collective bargaining as a favored form of labor relations: "The fact of the matter is that I think that the Taft-Hartley Act did work changes and did result in a more neutral stance by the Board."[112] Member Liebman disagreed:

> I guess you could call me a strict constructionist or maybe even an originalist about this law. I believe that the majority's apparent conviction that Taft-Hartley somehow diminished the primacy of collective bargaining as a national policy goal is just wrong. I would call it revisionist history.
>
> . . . The law's overriding aim was and still is to make it possible for workers to freely choose collective representation and to promote collective bargaining. . . . [E]mployees are free under this statute to choose freely to decline unionization . . . . They have that

110. *Id.* at 18 (statement of Hon. Robert Battista, Chairman, NLRB) (emphasis added). For further elaboration of Liebman's position, see Wilma B. Liebman, *Labor Law Inside Out*, 11 WORKINGUSA 9, 16–18 (2008), *available at* http://ssrn.com/abstract=1134899.

111. *The National Labor Relations Board: Recent Decisions and Their Impact on Workers' Rights*, *supra* note 90, at 61 (statement of Wilma B. Liebman, Member, NLRB).

112. *Id.* at 78 (statement of Hon. Robert Battista, Chairman, NLRB).

> right. But the fact remains that the primary goal of this statute is to promote collective bargaining.[113]

Frequently during her testimony, as here, Member Liebman identified the core policy of the Act as the encouragement of "collective bargaining freely chosen."[114] That very formulation straddles the Taft-Hartley/Wagner Act fault line—because it begs the question of what "freely chosen" really means.

D. Ideology and Policy Change under the NLRA

An important part of the rhetoric of Member Liebman's testimony is that Board reversals of precedent can be justified by changes in conditions on the ground or by the discovery of errors in the reasoning of a prior Board, but not by changes in ideology.

> When changes in the economy or the workplace show that an old legal rule is outdate [*sic*] or where experience shows that an old rule is unworkable, where there are conflicts within the case law that need to be resolved, or when more careful examination shows that a prior board's reasoning was flawed. In all those kinds of situations, overruling precedent is acceptable and even justified. This is an administrative agency, not a court.
>
> In my view, when the Clinton board reversed precedent, it did so for these kinds of reasons that I've just outlined . . . . In my view, the Bush board has done the opposite with respect to overruling precedent.[115]

The problem with this claim is that one determines the *meaning* of changes on the ground only by reference to ideology. "Present conditions" are not merely a matter of raw facts—like, for example, the steady and sharpening decline in private-sector union density since its high point in the 1950s. The evaluation of present conditions also requires an understanding of what is causing the decline, and of whether the decline is a good, bad, or neutral phenomenon from the standpoint of the agency's statutory mandate.[116] For the conservatives, unionization has become much more the exception than the rule and

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113. *Id.* at 64 (statement of Wilma B. Liebman, Member, NLRB).

114. *Id. at* 64, 77, 78.

115. *Id.* at 76–77.

116. *Cf.* Brudney, *supra* note 11, at 253 (arguing that the weakening of the labor movement for reasons external to the NLRB "has surely helped to marginalize the status of the agency").

there is no reason to think of unionization and collective bargaining as the default "best practice" in industry. Furthermore, conservatives (ironically echoing the left critics of state-dependent unions) see success in collective bargaining as dependent upon unions' actual economic strength, which is in turn dependent upon solidarity rather than upon law.[117] For the liberals, collective bargaining is taken without question to be the best practice, both in "fact" and in federal labor policy,[118] so that declining union density means that it is in the public interest to give unions more power to organize. That is a pretty fundamental difference in how the raw facts on the ground are interpreted.

The Wagner Act and Taft-Hartley were both passed in periods of mass union militancy. In the former case, the union cause was seen as consistent with the public interest; in the latter case, it was seen as antithetical to the public interest. Applying the combined NLRA to a period in which economic conditions are hard and mass militancy is rare makes for difficult policy judgments.[119] Whatever the answers to these questions, they are not to be found in the language of the statute, nor are they likely to emerge from the adjudicated factual record presented in individual cases. They are to be found in the necessarily ideologically informed interpretation of changed circumstances.

III. THE BUILT-IN LIMITS OF THE NLRB AS A POLICYMAKING AGENCY

Unfortunately, the Board is not exactly well constituted to make defensible policy determinations for reasons that have been endemic to the Board from its very beginnings. It is to that problem we turn next. In this Part of the Article, we explore four significant features of the design of the NLRB that have created challenges for NLRB policymaking: the statutory ban on the Board hiring economists, the isolation of the Board from other labor policymaking governmental bodies, the dominance of lawyers on the Board, and the quasi-judicial

117. THOMAS GEOGHEGAN, WHICH SIDE ARE YOU ON? TRYING TO BE FOR LABOR WHEN IT'S FLAT ON ITS BACK 3–8 (1991).

118. *See, e.g.*, Estlund, *supra* note 11, at 1528 ("As for collective bargaining, it is hard to be against the idea of fostering negotiations between managers of an enterprise and the workers, speaking through their chosen representatives, over wages and working conditions.").

119. On the history of the NLRA and the divergent policy goals of the Wagner Act and the Taft-Hartley Act, see generally TOMLINS, *supra* note 84, and sources cited *supra* note 86.

and highly doctrinal style of reasoning the Board generally uses in its decisions.

A. The Early War against Board Policymaking and Social-Scientific Expertise

Landis's hopes for administrative law in the area of labor relations were doomed to be disappointed from the start. President Roosevelt was not initially prepared to make the Wagner Act a high priority; he needed to be persuaded to support it, and gave the statute his "tepid public blessing" only once it was certain to pass.[120] Frances Perkins, the influential Secretary of Labor during the Roosevelt administration, thought it would be a big mistake to create the NLRB as an independent agency outside the Labor Department, but she lost that battle in the Senate and, eventually, in the statute as enacted.[121] Almost everyone expected the Wagner Act to be held unconstitutional, an expectation that became a near certainty when the Supreme Court struck down the National Industrial Recovery Act in the *Schechter Poultry* case.[122] The NLRA was under consideration in Congress when the case came down, and opposition dried up as certainty rose that the statute would be held unconstitutional and was therefore not worth fighting.[123] Employer noncompliance hamstrung the NLRB and rendered it powerless until the Supreme Court decided in 1937 to uphold the constitutionality of the NLRA in

120. JAMES A. GROSS, THE MAKING OF THE NATIONAL LABOR RELATIONS BOARD: A STUDY IN ECONOMICS, POLITICS, AND THE LAW VOLUME I (1933–1937), at 147 (1974) [hereinafter GROSS, MAKING] (quoting Leon H. Keyserling, *The Wagner Act: Its Origin and Current Significance*, 29 GEO. WASH. L. REV. 199, 203 (1960)). For general discussion of the statute's passage, see GROSS, MAKING, *supra*, at 142–47. For other sources on the history of the National Labor Relations Board, see generally IRVING BERNSTEIN, TURBULENT YEARS: A HISTORY OF THE AMERICAN WORKER 1933–1941 (1970); JAMES A. GROSS, THE RESHAPING OF THE NATIONAL LABOR RELATIONS BOARD: NATIONAL LABOR POLICY IN TRANSITION 1937–1947 (1981) [hereinafter GROSS, RESHAPING]. One of the authors has done archival work on the Board during this period, in the National Archives Record Groups 25 (National Labor Relations Board) and 174 (Department of Labor), and at the Wisconsin Historical Archives in the papers of David Saposs, the Board's first and only Head of the Department of Economic Research. Those materials will be cited as "RG25", "RG174", and "Saposs", respectively.

121. John L. Lewis of the American Federation of Labor supported Perkins's position because labor already felt comfortable with Perkins and with its level of influence in her Department of Labor. RG25, Former Chairmen, Box 1, 1935 Biddle, unmarked folder (Substance of John L. Lewis's Remarks 1 (Mar. 19, 1935)).

122. A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 542 (1935).

123. GROSS, MAKING, *supra* note 120, at 142–45.

NLRB v. Jones & Laughlin Steel Corp.[124] and its companion cases.[125] During this period of uncertainty, Secretary Perkins found it difficult to recruit people whom she most wanted to accept positions at the Board,[126] and the agency's powerlessness diminished its support from its erstwhile allies.[127]

During its period of political impotence the agency had to deal with the unanticipated conflict between the Congress of Industrial Organizations (CIO) and the American Federation of Labor (AFL). The response of the Board and its most earnest supporters was, in essence, to beg both the unions and the regional staffs not to bring any cases that required the Board to choose between AFL and CIO unions.[128] (A most colorful internal comment from a member of the Board's regional staff was that when the issue arises "about the only thing that you can do . . . is to, when you see them both coming, turn around and run till you hit a stone wall, and then turn around and

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

125. NLRB v. Fruehauf Trailer Co., 301 U.S. 49, 57 (1937); NLRB v. Friedman-Harry Marks Clothing Co., 301 U.S. 58, 75 (1937); Associated Press v. NLRB, 301 U.S. 103, 133 (1937); Wash., Va. & Md. Coach Co. v. NLRB, 301 U.S. 142, 146–47 (1937).

126. Perkins, who was working with her Solicitor of Labor Charles Wyzanski on appointments, had asked Thurman Arnold, William O. Douglas, George Stocking, Charles Clark, and several others before settling on the candidates eventually appointed to the Board. RG174, Perkins, NLRB, boxes 84–85 (Letter from Charles E. Clark to Frances Perkins (Aug. 6, 1935); Letter from Thurman Arnold to Frances Perkins (Aug. 13, 1935); Memorandum to the President (Aug. 14, 1935); Telegram from Frances Perkins to Joseph Chamberlain). Clark, dean of Yale University School of Law, turned her down in part because "work under the act cannot be very interesting and effective until its validity has been sustained in part at least." RG174, Perkins, NLRB, Box 84 (Letter from Charles E. Clark to Frances Perkins (Aug. 9, 1935)).

127. For example, in a remarkable memorandum from Board attorney Benedict Wolf to the Board, reviewing the agency's first year, Wolf remarks that:

> The Board has lost some prestige, both with the public, and with the major figures of the Administration. It has no real power with the Congress or the President. I believe this result was inevitable, for the Board has functioned for a year without real power, without public support (except from labor, which hoped to gain by its actions, and which has inevitably disappointed, with a resultant loss of prestige even here), and without support from the leaders of the Administration.

RG25, NLRB, Group 1, Former Chairmen's Files, Program Correspondence Files, Box 2, unmarked folder (Memorandum from Benedict Wolf, Board Attorney, to the Board (Apr. 1936)).

128. *See, e.g.*, RG25, Former Chairmen, Box 1 Unmarked Files (Letter from Lloyd Garrison to Joseph Warren Madden, Chairman, NLRB (Jan. 18, 1936)) (advice from Lloyd Garrison); RG174, Perkins, NLRB Box 85 (Memorandum from J.R. Steelman to the Secretary, Craft-Industrial union case before NLRB (Feb. 28, 1936)) (discussion within Perkins's office that the Board had been advised that getting involved in AFL vs. CIO cases "would mean axiomatic suicide for the Board").

giggle."[129]) Largely spurred by the dissatisfied AFL, strongly anti-NLRB congressional hearings (with strong anticommunism fueling the flame) started to take shape in mid-1937,[130] tying the Board's hands (and retaliating against it for liberal decisions like upholding sit-down strikes) and effectively stripping it of its one source of labor-economics expertise—expertise that, quite frankly, the Board saw no use for given its quasi-judicial and anti-policymaking vision of its mission.[131]

From the very beginning, the NLRB understood that to be quasi-judicial meant to be purely reactive, and therefore to be apologetic about any accusation of having adopted "ruling[s] or regulation[s] implementing the statute in a substantive way."[132] As of mid-1940, the

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129. RG25, NLRB, Former Chairmen's Files, Program Correspondence, Box 1: Madden 1937, Regional Conference (Wednesday Morning Session (Oct. 27, 1937)).

130. For the hearings and their impact, see generally GROSS, RESHAPING, *supra* note 120, at 85–108.

131. From the very beginnings of the "first" National Labor Relations Board, the Department of Labor warned the NLRB against any policymaking outside the context of adjudicated cases. When Edwin Smith, later a member of the first post–Wagner Act Board, excitedly wrote Perkins suggesting that "it would be desirable for the Board to start its work with some sort of statement of principles. . . . to let the public know at the start certain predispositions which the Board has," his idea was struck down by the Department of Labor with the message "it would be bad policy for the Board to say what it is going to do in advance." RG174, Frances Perkins, NLRB, Chron boxes 84–85 (Letter from Edwin S. Smith to Frances Perkins (July 3, 1934)). Perkins's highest compliment to NLRB Chairman Madden was that he had such a "judicially-minded tribunal." RG25, Former Chairmen, 1935, Biddle, Box 1 (Letter from Frances Perkins to Joseph Warren Madden (Nov. 8, 1935)). Her office's memorandum for the President's use in his first conversation with new members of the Board put forward that "[t]he work of the Board will be to decide specific cases and to refrain from research work," and that it "should discourage theoretical discussions." RG174, Frances Perkins, NLRB, Box 84 (Memorandum for the President's use in conversation with new members of the National Labor Relations Board (Aug. 1, 1935)). This position echoed think tank advice from the Twentieth Century Fund's Special Committee on the Government and Labor, which called for a "quasi-judicial" labor tribunal that "should not be a policy making body but should confine itself to administering policy as defined in the laws." Saposs, 8–14, 1935 (Findings and Recommendations of the Special Committee of the Government and Labor of the Twentieth Century Fund, Inc. 4 (Mar. 4, 1935)). The irony here is that David Saposs worked on that Committee, and the quasi-judicial approach empowered the lawyers against the economists at the Board in ways that diminished his influence once he was appointed the Board's chief economist. Saposs reported that NLRB Chairman Madden hired him but had no idea of what his role would be, and that the lawyers on the Board had no respect for his office or the value of economic training, especially when it came to studies aimed at guiding the Board in its formulation of policy (as opposed to the development of a factual record on the impact of particular businesses on interstate commerce). GROSS, MAKING, *supra* note 120, at 173–76.

132. RG25, NLRB, Group 1, Former Chairmen's Files, Program Correspondence Files, Box 2 unmarked folder (Conference Memorandum, H.A.M. and Mr. Knapp on Chairman's

agency would admit to only one such instance: its decision that employer refusal to sign a written agreement at the close of successful collective bargaining was an unfair labor practice, which was said to "occup[y] almost a unique position."[133] The Board also concluded that it would be inappropriate to share economic and historical analyses produced by the Board's Division of Economic Research with its adjudicative staff, viewing that information as "one sided," "biased," and likely to impair fact-finder objectivity.[134] The NLRB was never involved in looking into conditions in industries that unions were not trying to organize; there was no systematic policy at all about the white-collar workforce, for example, despite chief NLRB economist David Saposs's expertise in the white-collar middle classes.[135] The NLRB was, of course, very concerned about company unions as a matter of policy, but was not involved in challenging them unless "real" unions came along trying to organize companies with company unions. The principle of exclusive representation was also absolutely central as a matter of policy—NLRB insiders saw exclusive representation as a major difference between the NLRA and the National Industrial Recovery Act. Yet as Charles Morris has explained, it was the unions themselves rather than the Board that turned member-only recognition into full scale exclusivity, and the unions did so without recourse to NLRB appropriate bargaining unit determinations and Board elections.[136] The Board left important industries (including much of retail) to state regulation for fear of asserting defensible but controversial claims of power under the Commerce Clause.

Once World War II started, the War Labor Board became far more influential in establishing forward-looking collective bargaining

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Statement on S. 675, S. 674, S. 918, at Page 3, 8th line (Apr. 20, 1941) (transcript of conversations between Chairman Millis and his advisors in advance of congressional testimony).

133. *Id.*

134. National Archives, Smith Committee Files, General Counsel Files, Box 2, Blankenhorn (Memoranda of the Board from S.M. Wasserstrom to John Fahy, General Counsel 6 (Nov. 18, 1939)) (reviewing propriety of practices previously identified as potentially problematic for Smith Committee oversight).

135. For discussion of the NLRB's early attitudes toward white-collar unionization, see generally Deborah C. Malamud, Letting in the Company: The National Labor Relations Board and the White-Collar Worker in the New Deal (Nov. 2008) (unpublished manuscript, on file with the *Duke Law Journal*).

136. CHARLES J. MORRIS, THE BLUE EAGLE AT WORK: RECLAIMING DEMOCRATIC RIGHTS IN THE AMERICAN WORKPLACE 81–88 (2005).

policy than the NLRB had ever been.[137] By the time the NLRB emerged from wartime and started to respond to the massive labor unrest caused by the lifting of wartime no-strike pledges, Congress had already begun the rampage against labor unions that resulted in the Taft-Hartley Act. As Professor James Brudney has argued, it was not until the 1960s that the Board briefly found its policymaking voice and used it persuasively in Supreme Court review.[138]

B. Independence as Isolation

Other limitations on the Board's policymaking are its lack of complete jurisdiction over labor relations and its lack of access to the labor policymaking resources of the Department of Labor. Because of the fragmented nature of the many state and federal laws governing work, no single agency is able to regulate the totality of working conditions. The NLRB is unable to coordinate its decisionmaking with the data-gathering, policy analysis, and regulatory initiatives undertaken by the Department of Labor, the Equal Employment Opportunity Commission, or the many state agencies that regulate the workplace.

When Congress decided in Taft-Hartley to make collective bargaining agreements enforceable in federal courts, rather than committing their enforcement and interpretation to the NLRB, it decided that the NLRB was precisely the wrong venue to decide the fate of ongoing collective bargaining agreements. The law of collective bargaining itself was made as much by the courts in cases arising under section 301 (which provides jurisdiction to federal courts to enforce collective bargaining agreements)[139] as by the Board in cases under section 8(a)(5) (which imposes a duty to bargain).[140] Moreover, because arbitration is at the core of the process of defining the nature and scope of the collective bargaining relationship, and the Board adheres to a policy of deferring to arbitration when the same conduct possibly constitutes an unfair labor practice and a violation of a collective bargaining agreement, the Board has voluntarily ceded its

137. JAMES B. ATLESON, LABOR AND THE WARTIME STATE: LABOR RELATIONS AND LAW DURING WORLD WAR II 59 (1998). This was the case especially when it came to key organized war industries.

138. Brudney, *supra* note 11, at 241.

139. 29 U.S.C. § 185 (2006).

140. *Id.* § 158(a)(5).

power to regulate ongoing bargaining relationships.[141] In addition, when the Supreme Court decided that the power of federal courts to enforce collective bargaining agreements included the power to enjoin strikes in violation of collective bargaining agreements,[142] and when Congress created a private right of action with tort damages for violation of the secondary boycott provisions of Taft-Hartley,[143] federal courts became deeply involved in the regulation of labor management relations without preliminary involvement of the NLRB at many phases of the relationship. Secondary boycott suits occur at the organizing stage, whereas suits seeking damages or an injunction against violation of a no-strike clause occur once a bargaining relationship has been established. Moreover, district courts also adjudicate duty of fair representation cases without NLRB involvement.[144] To a significant extent, then, the Board stands at a distance from the everyday world of established bargaining relationships.

Although Frances Perkins failed to place the NLRB within the Department of Labor, she was heavily involved in monitoring (and often meddling in) NLRB affairs, and it was her intention that the Department of Labor provide economic and other social science data to the NLRB.[145] But in practice, the status of the NLRB as an

141. *See, e.g.*, Olin Corp., 268 N.R.L.B. 573, 573–74 (1984) (deferring to arbitration even when the arbitration only considered a parallel contract issue); United Techs. Corp., 268 N.L.R.B. 557, 560–61 (1984) (refusing to entertain an unfair labor practice charge alleging discrimination against section 7 activity unless and until the union takes the complaint through the grievance process); Collyer Insulated Wire, 192 N.L.R.B. 837, 839, 843 (1971) (dismissing an unfair labor practice charge alleging a breach of duty to bargain when the same conduct could be arbitrated, but retaining jurisdiction to hear future motions based on the outcome of the grievance process); Spielberg Mfg. Co., 112 N.L.R.B. 1080, 1082 (1955) (dismissing an unfair labor practice charge when it covered the same facts as a previous arbitration). The extent to which the NLRB will defer to the grievance process was an issue on which the Board changed rules with changes of the party holding the majority of the seats on the Board. *See* Gen. Am. Transp. Corp., 228 N.L.R.B. 808, 808 (1977) (undermining *Collyer*, and itself later undermined by *United Technologies*). Republican Boards dismissed unfair labor practice charges in more cases than Democratic Boards did. As shown by the two 1984 decisions cited above, the rules have remained relatively constant since the Reagan Board.

142. Boys Markets, Inc. v. Retail Clerks Union, Local 770, 398 U.S. 235, 237–38 (1970) (holding that a district court can enjoin a strike in violation of a no-strike clause in a collective bargaining agreement with a mandatory arbitration clause).

143. 29 U.S.C. § 187 (2006).

144. Vaca v. Sipes, 386 U.S. 171, 188 (1967); Steele v. Louisville & Nashville R.R. Co., 323 U.S. 192, 207 (1944).

145. Perkins's stated reason for wanting to keep the NLRB out of the business of research was that she did not want it duplicating or interfering with the Department of Labor's already-

independent agency outside the Department of Labor has meant that the two administrative bodies have little to do with each other. The Department of Labor has the expertise and facilities to produce high-quality empirical analyses of the myriad questions that arise in NLRB cases, but it lacks the jurisdiction to intervene (formally or informally) in NLRB debates. The NLRB has the jurisdiction, but, as already noted, Congress denied it the authority and the resources to engage in independent empirical analyses (as a result of which the Board lacks the internal expertise to evaluate empirical analyses offered by interested parties).

The Board's limited jurisdiction is often problematic in labor issues involving immigrant workers. Some of the most dynamic union organizing occurs among workforces with a significant percentage of immigrant workers, and some of those workers are undocumented.[146] Although the law has been settled for some time that undocumented workers are statutory employees covered by the NLRA,[147] in the nitty-gritty of NLRB enforcement, there remains considerable controversy about whether the immigration status of workers can be brought up in the enforcement proceedings and about remedies for undocumented workers who have been proven to be victims of unfair labor practices. When the issue reached the Supreme Court in *Hoffman Plastic Compounds, Inc. v. NLRB*[148] in 2002 and the NLRB took the position (both in its own ruling[149] and its briefing on appeal[150]) that effective enforcement of labor policy required that undocumented workers receive the same statutory protections and the same remedies as all other workers, the Supreme Court refused to

existing research apparatus. She opposed NLRB mediation and conciliation for the same reason. Indeed, Congress made clear that the NLRB could not engage in mediation and conciliation in the same amendment that closed down the Board's economic research division.

146. For an extensive discussion of a labor campaign involving immigrants, see generally Christopher L. Erickson et al., *Justice for Janitors in Los Angeles and Beyond: A New Form of Unionism in the Twenty-First Century?*, *in* THE CHANGING ROLE OF UNIONS: NEW FORMS OF REPRESENTATION 22 (Phanindra V. Wunnava ed., 2004); Christopher L. Erickson et al., *Justice for Janitors in Los Angeles: Lessons from Three Rounds of Negotiations*, 40 BRIT. J. INDUS. REL. 543 (2002); Catherine L. Fisk et al., *Union Representation of Immigrant Janitors in Southern California: Economic and Legal Challenges*, *in* ORGANIZING IMMIGRANTS: THE CHALLENGE FOR UNIONS IN CONTEMPORARY CALIFORNIA 199 (Ruth Milkman ed., 2000).

147. Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 891 (1984).

148. Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137 (2002).

149. Hoffman Plastic Compounds, Inc., 326 N.L.R.B. 1060, 1060 (1998).

150. Brief for the National Labor Relations Board at 14–15, *Hoffman Plastic Compounds, Inc.*, 535 U.S. 137 (2002) (No. 00-1595).

give deference to the agency.[151] The lawyer for the Solicitor General's office who argued the case was unable to even complete the traditional opening "May it please the Court," before Justice Scalia interrupted him to question whether the Immigration and Naturalization Service (as the agency within the Justice Department responsible for immigration enforcement was then known) had approved the government's position in the case.[152] The majority opinion explicitly held that the NLRB's interpretation of the remedial structure of the NLRA was entitled to no deference because it rested on a statute outside the NLRB's authority and competence to administer.[153] This example may be atypical, but it illustrates the potential difficulty the Board faces in formulating labor policy in the complex patchwork of other federal statutes that it does not administer. Although a Justice Department lawyer (not, as is usually the case, a lawyer from the appellate staff of the NLRB) tried to persuade the Supreme Court to accept the Board's interpretation of the intersection of labor and immigration statutory policy as one that the Justice Department had approved, the isolation of the NLRB from the rest of the federal labor and immigration framework provided a reason for the Court to accord no deference to the government's interpretation of the statute.

Only part of the Board's isolation is a problem of its own making.[154] The decline in the Board's influence is partly attributable to the decline in union density brought about by deindustrialization. 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. As the labor force has changed due to a massive influx of immigrants from Latin America and around the world, industries that were once heavily unionized suffered huge losses in union density as employers throughout the unionized regions of the northeast and Midwest

151. *Hoffman Plastic Compounds*, 535 U.S. at 151–52.

152. Catherine L. Fisk & Michael J. Wishnie, *The Story of* Hoffman Plastic Compounds, Inc. v. NLRB*: Labor Rights Without Remedies for Undocumented Immigrants*, *in* LABOR LAW STORIES, *supra* note 14, at 399, 426.

153. *Hoffman Plastic Compounds*, 535 U.S. at 149.

154. Admittedly, we have not exhausted all of the problems of the Board's making that increase its isolation. For discussion of the Board's nonacquiescence to circuit courts, see Brudney, *supra* note 11, at 237–40.

closed plants and moved operations to new facilities staffed with nonunion labor. This has been exacerbated by the woeful failure of unions to make any effort to organize huge sectors of the economy for decades and to respond proactively to globalization in manufacturing and basic industry. Unions delayed too long in finding strategies to overcome racial division (indeed, many promoted racial division), which made unions all but irrelevant to labor conditions in the South. Unions failed to prioritize organizing over the administration of existing collective bargaining relationships.

As a result of all this, the NLRB is independent, but it also is ill-informed and without influence in the shaping of national labor policy. This is a real shame. The NLRB's independence and lack of empirical data collection and analysis have contributed to the widespread sense that the Board has failed to adapt labor law to the changing economy. The qualities that make the NLRB seem most like a specialized labor court and least like a modern administrative agency—its reactiveness, its lack of reliance on data, and its practice of deciding all issues based on adjudication of individual cases—have contributed toward its seeming inability to be proactive in responding to massive changes in the economy and labor relations over the course of seventy-five years. Whatever mix of legal rules and economic and social changes that made collective bargaining a more peripheral aspect of the labor market than it was in the 1930s, the result is that the Board has never shaken off the shackles of its earliest years: it remains reactive rather than proactive in dealing with social and economic change.

C. Choice of Appointees as a Limit on the Board's Scope of Experience

Drawing from data compiled by Professor Joan Flynn, it is clear that Board appointees now come from established management and labor legal practice. On both sides of the aisle, mainstream labor practice is tilted toward the management of ongoing collective bargaining relations.[155] This portion of the labor bar has far less

155. *See* Brudney, *supra* note 11, at 246; Flynn, *supra* note 23, at 1365. This characterization includes both lawyers in private practice and labor arbitrators/mediators (the background of both of the Members on the two-member Board—which is perhaps a reason that they are succeeding in getting so much done). For the backgrounds of Peter C. Schaumber and Wilma B. Liebman, see National Labor Relations Board, http://www.nlrb.gov/about_us/overview/board/ (last visited Apr. 1, 2009). The exception is appointments drawn from the portion of the

experience with the currently unorganized sectors of the economy, the kinds of workers found in them—in particular, immigrants—and the kind of organizing drives most successful in reaching them. This means a significant lack of expertise exists in precisely the areas most likely to be at the cutting edge of Board practice. That expertise is most likely to be found among federal and state labor officials with responsibility for issues facing unorganized low-wage workers: wage and hour and wage-payment violations, health and safety violations, and so forth. Candidates with this kind of expertise rarely appear on NLRB nominating "wish lists."[156] Indeed, the question of how to organize previously excluded groups of workers is one of the issues that caused the exceedingly counterproductive split between the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) and Change to Win (which is itself splintering as we write).[157]

Another way appointments to the Board limit the Board's expertise is that, unlike previously, Board appointees are uniformly lawyers. Other sources of labor relations expertise, and other sources of questions and insights that could be brought to Board adjudication, are needlessly locked out of the Board's decisionmaking process.[158]

D. Rights-Balancing versus Regulation

In keeping with the Clayton Act's key declaration that "labor is not a commodity,"[159] federal labor law has taken the form of a rights regime. This way of thinking has great appeal if the goal is legitimizing protection for labor. Analogizing labor rights to fundamental civil rights like freedom of speech or freedom from racial discrimination is a useful rhetorical and organizing strategy in the face of the familiar charges that labor unions are communistic,

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management-side bar that specializes in short-term client relationships and union-avoidance techniques. Brudney, *supra* note 11, at 248.

156. *See* Flynn, *supra* note 23, at 1419–38 (describing the nominations to the NLRB).

157. For a basic summary of the relationship between the two federations, see *After Bitter Split, Unions Try to Heal Deep Wounds*, ABC NEWS, Feb. 28, 2009, http://i.abcnews.com/Business/Economy/wireStory?id=6979425.

158. As Professor Joan Flynn rightly points out, labor law expertise does little good—at least when it comes to appointing a Board chairman—if it is not joined with a modicum of political judgment. *See* Joan Flynn, *"Expertness for What?": The Gould Years at the NLRB and the Irrepressible Myth of the "Independent" Agency*, 52 ADMIN. L. REV. 465, 470 (2000).

159. Section 6 of the Clayton Act, once described by a labor leader as labor's Magna Carta, says that "the labor of a human being is not a commodity or article of commerce." Clayton Act, ch. 323, § 6, 38 Stat. 730, 731 (1914) (current version at 15 U.S.C. § 17 (2006)).

corrupt, or undemocratic. But the tendency of lawyers to think of the protection of labor rights in this way has had the consequence of making some of the agenda of modern regulatory policy irrelevant to Board deliberations.

In particular, unlike in the areas of environmental protection, product safety, or even workplace safety, where there is explicit discussion of what level of protection is technically feasible and at what cost, there has not been either a legislative or agency effort to quantify the effects of labor law on the constituencies of labor policy (or indeed to identify those constituencies). In any other regulatory area, one would be likely to see agency-generated (or OIRA-demanded) studies of this nature. Such studies need not be limited to hard numbers and economic concepts; they could include survey-based or ethnographic efforts to document the dignitary value of union membership to the majority of union members who do not hold leadership positions. Regulatory policy has a vocabulary (if a contentious one) for comparing incommensurables. Indeed, any other regulatory area is likely to have something resembling a definition of agency success. What would that be in labor law? Is it the prevention of strikes? No. The right to strike against unfair labor practices is fundamental (if massively underprotected), and economic strikes are an ordinary part of the bargaining process. Is it to generate the optimal number of strikes? No, because the agency has no way to make such judgments. Is it the job of the NLRB to diminish labor unrest? Does it matter if the Board does so by refusing protection to protesting workers or by granting them protection? Without a benchmark (other than speed of case processing), how does one know how the NLRB is doing?

The conceptualization of labor protection as a rights regime more than a regulatory problem has had other consequences as well. The Board's and reviewing courts' practice of speaking about "rights" under the NLRA applies not only to workers' rights to join or refrain from joining unions and concerted activity, it also—particularly recently—has become a common way of referring to how the statute protects employers. Thus, in *Register-Guard*, the Board reasoned that an employer's property right in an email system entitles it to prohibit use of email for union-related communication.[160] In *Lechmere*, the Supreme Court reasoned that the property rights of the owner of a

160. Guard Publ'g Co., 351 N.L.R.B. 1110, 1110 (2007).

shopping mall entitled it to allow access to the public generally but to prohibit access to those seeking to form a union.[161] More recently in *Chamber of Commerce v. Brown*,[162] the Supreme Court characterized section 8(c) of the NLRA as granting a right to supplement "the First Amendment right of employers to engage in noncoercive speech about unionization"[163] and held that this right preempts state laws that would restrict the use of state funds to support or defeat union organizing drives. A more regulatory approach to envisioning employer participation in election campaigns would be amenable to reshaping by data. For example, in a regulatory regime, it would matter if evidence showed that employer participation—even when it falls short of coerciveness and therefore of illegality under current standards—does more harm than good in fostering rational and informed decisionmaking by members of the bargaining unit. In a rights regime, that question is irrelevant.[164]

Another example of a regulatory approach the Board could take concerns the possibility of coercion stemming from both authorization card campaigns and employer election campaigns. The Board's approach to issues is atomistic instead of holistic—it underutilizes the potential for creating synergies between discrete areas of doctrine. For example, in *Dana*, the Board could have combined its forty-five-day waiting period after voluntary recognition with a policy of seeking immediate injunctive relief for any employer unfair labor practice committed during that period and a renewed commitment to prohibiting misleading or coercive statements during the organizing process. Such a policy might have presented a workable compromise. A holistic approach to doctrine and remedies would have allowed the majority to implement a policy favoring NLRB-conducted elections without completely ignoring the evidence

161. Lechmere, Inc. v. NLRB, 502 U.S. 527, 530 (1992).

162. Chamber of Commerce v. Brown, 128 S. Ct. 2408 (2008).

163. *Id.* at 2413.

164. Professor Brudney suggests that the lack of a regulatory framework for the NLRB stems from the fact that the agency does not see itself as having a mandate to protect "the public interest," but instead "the NLRB's role appears more akin to that of a traffic cop, monitoring interactions between two identified constituencies." Brudney, *supra* note 11, at 257. At the very least, the Board has three constituencies: unions, management, and employees, some of whom wish to be organized and others of whom do not. One might also argue that the Board is accountable to the "public interest" more generally: to the interest of the public in labor peace, in the steady flow of goods, in being able to obtain goods produced under publicly acceptable labor standards, in supporting labor standards above the minimum wage, etc. Nothing the Board does or says suggests that it views the public interest as a proper object of concern in this sense.

and argument presented by unions and labor scholars showing that employer misconduct causes too much of the negative effect of employer involvement (coercion) and too little of the positive effect (better information). The Board could have diminished coercion by using section 10(j) injunctions. At the same time, the Board could have abandoned the controversial rule adopted by the Reagan Board, which removed the Board from involvement in policing misleading statements during election campaigns. (The Reagan Board rule ended a period in which Democratic- and Republican-dominated Boards had frequently changed the rule as to whether the Board would set aside a representation election on the grounds that the employer or the union had made misrepresentations during the campaign.[165]) In the context of voluntary recognitions under *Dana*, the NLRB could require unions and employers to disclose certain kinds of objective information to the members of the proposed bargaining unit. In other words, the agency could both adopt a policy in favor of secret ballot elections and do something to counteract their potential for coercion. This would be preferable to just flip-flopping from one administration to the next.

There is nothing in the Board's structure or processes to prevent it from pursuing such a holistic approach to doctrines and remedies that are presently entirely discrete. Despite these opportunities, the Board continues to operate like a court, limiting itself to the specific issues brought to it by the General Counsel, failing to bring multiple areas of Board doctrine together to enrich its understanding and amplify its remedial capacities, and, most of all, using rights rhetoric as a way to mask what would otherwise be its obligation to seek out (let alone generate) empirical assessments of the effects of its policies.

IV. CASE STUDIES OF THE QUALITY OF THE BOARD'S REASONING

The structural and habitual problems with NLRB policymaking described above have manifested themselves particularly acutely since 2001. Given the very broad range of policies that may be said to be within range of the Board's mandate because of the conflicting goals of the Wagner Act and Taft-Hartley Act, an uncontroversial measure of the Bush II Board's policymaking is not easy to define. It is not our purpose here to demonstrate that the Bush II Board's

165. *See* Midland Nat'l Life Ins. Co., 263 N.L.R.B. 127, 130 (1982) (explaining the historical changes to the rule).

changes in the law were more radical or less faithful to the statute than Clinton Board changes were or Bush I Board changes before that. Our point is that argument along those lines will necessarily turn on the values of the person doing the analysis. What we can do, and what we try to do here, is to illuminate the style of reasoning that the Bush II and Clinton Boards used to change policy. One measure of the Board's success as policymaker is whether its methods and choices are perceived as legitimate by all of the major stakeholders within its jurisdiction. By this measure, the Bush II Board did not succeed. Nor, for that matter, did the Clinton Board succeed in many areas.[166]

In this section, we closely examine the reasoning of several decisions making a few significant policy changes. Some of the decisions are from the Bush II Board and some are from the Clinton Board. We compare the style of reasoning of the two Boards with respect to two types of decisions. In the first comparison, we look at how the Board, under two different majorities, analyzed the role of the Board's election processes and voluntary decisions about recognition or withdrawal of recognition of unions. In the second comparison, we look at some examples of how the Board explains a decision to adapt old rules to new or changed circumstances. We chose the issue of voluntary recognition because of its overwhelming importance in modern organizing and its great political salience in light of the debate over the Employee Free Choice Act. We chose cases involving significant changes of policy in order to see how the two Boards dealt with controversial policy change.[167]

We examined the Board's decisions in the terms in which lawyers and judges often evaluate the persuasiveness and legitimacy of their own work: do the opinions candidly acknowledge the difficulty of difficult issues? Do they address the countervailing arguments? When making factual assertions or assumptions, do the opinions consider whether they have a basis in fact? Does the reasoning attempt to persuade a skeptic, or is a new rule announced as *ipse dixit*? In the

166. *See* Flynn, *supra* note 158, at 502–03 (explaining the NLRB meddling in "appropriations tug-of-war" as an example).

167. For a general effort to operationalize the administrative law goals of consistency and rationality, see, for example, Colin S. Diver, *Policymaking Paradigms in Administrative Law*, 95 HARV. L. REV. 393, 396 (1981); Yoav Dotan, *Making Consistency Consistent*, 57 ADMIN. L. REV. 995, 997 (2005). We realize that we are only scratching the surface of the subtlety with which these issues have been addressed in scholarship that is more general and theoretical than our own.

context of either a policy adopted to deal with a new circumstance or a policy change in an existing area, a persuasive decision is one that is tied closely to uncontroverted facts and that is premised on logical reasoning from clearly articulated values that would garner respect or consensus—values that were clearly in the statute or that would be shared by the relevant community. As we will explain, part of the challenge confronting the Board is that the relevant facts are often hotly contested and it is difficult to find a set of values that enjoy unqualified statutory support. But even given these limitations, the Board's reasoning during the Bush II Administration has left much to be desired.[168]

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168. We chose this qualitative method of analysis of a sample of cases in part because large-scale quantitative or qualitative analyses of the success or impact of the Board during 2001–2008 are not feasible. There are too many decisions to conduct a systematic qualitative analysis of the fate of the Bush II Board decisions on judicial review. A quantitative analysis cannot rely on the Board's own Annual Report data on its success rate in the courts of appeals because the NLRB defines "win" as including a win in whole or in part. A partial win could involve a judicial decision finding the Board to have erred on a significant issue. The NLRB Annual Reports indicate that the win rate did not change in any perceptible pattern between 2002 (which, given the time it takes to dispose of a case on appeal, would encompass mainly, if not entirely, Clinton Board decisions) and 2006 (which would encompass mainly Bush II Board decisions).

We analyzed a subset of fifty significant decisions from the Bush II Board period (2001 to 2007) that overruled precedent. Of those, only eleven had subsequent appellate history. The following synopses show no clear trend in the decisions:

Three decisions upheld the Board's rule entirely. Five Star Transp. Inc. v. NLRB, 522 F.3d 46, 53 (1st Cir. 2008), *aff'g* Five Star Transp. Inc., 349 N.R.L.B. 42 (2007) (deferring to the Board's application of its rule); Local Joint Exec. Bd. v. NLRB, 515 F.3d 942, 947 (9th Cir. 2008), *aff'g sub nom.* Aladdin Gaming, 345 N.L.R.B. 585 (2005) (upholding the Board's new test for determining when supervisor interjections into employee conversations are coercive and the Board's application of the test to facts); Minn. Licensed Practical Nurses Ass'n v. NLRB, 406 F.3d 1020, 1024–27 (8th Cir. 2005), *aff'g sub nom.* Alexandria Clinic, 339 N.L.R.B. 1262 (2003) (upholding the Board's new rule requiring advance notice if a strike will commence later than the time originally specified, as well as advance notice if a strike will commence earlier and also the Board's decision to apply the new notice rule retroactively to a pending case).

Two cases were remanded for the Board to explain and justify its new rule. In one case, the Board found that the employer unlawfully installed surveillance cameras but denied reinstatement and backpay to employees because the cameras revealed that they had engaged in conduct justifying their discharge. Anheuser-Busch, Inc., 342 N.L.R.B. 560, 561 (2004). The court remanded to the Board to distinguish prior Board precedent which had held that, when an employer would not have discovered the employee's behavior without its own illegal conduct, the Board would order reinstatement. Brewers & Maltsters Local 6 v. NLRB, 414 F.3d 36, 48 (D.C. Cir. 2005), *rev'g and remanding sub nom.* Anheuser-Busch, Inc., 342 N.L.R.B. 560 (2004). Upon remand, the Board overruled the prior precedent. Anheuser-Busch, Inc., 351 N.L.R.B. 644, 650 (2007). In the other case, the court upheld enforcement of the Board's order on the basis of substantial evidence for its factual findings, but remanded the case because the Board's order was overbroad. NLRB v. Curwood Inc., 397 F.3d 548, 558 (7th Cir. 2005), *enf'g in part, vacating in part* Curwood Inc., 339 NLRB 1137 (2003). The court made clear that, on remand, the Board could still find that the challenged employer speech was unlawful. *Id.*

A. Weighing Elections and Voluntary Recognition: Dana Corporation *and* Levitz

One of the most significant features of contemporary union organizing is the preference many unions exhibit for organizing based on shows of support occurring outside the NLRB's election process. This process is known colloquially as card-check recognition or voluntary recognition. The basic idea is that the union gathers employee signatures on cards authorizing the union to represent the employees for purposes of collective bargaining and then uses whatever market or political leverage the union can muster to induce an employer to recognize the union and to commence bargaining. Under these circumstances, bargaining commences without an NLRB election and certification of the union as the bargaining representative.[169] The significance of card-check recognition is huge, to both unions and employers. A number of studies have shown, using various methods of data gathering and analysis, that the majority of employers exercise the right currently protected under the NLRA to conduct extensive campaigns to persuade their employees to oppose the union.[170] Many unlawfully fire union supporters.[171] Many exercise the rights granted by the statute to bar union organizers from the employer's premises and to make it as difficult as possible for the

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Two cases rejected the Board's application of its rule because it was not supported by substantial evidence and because it was a misapplication of the Board's precedent or an improper interpretation of the statute. UAW v. NLRB, 520 F.3d 192, 197 (2d Cir. 2008), *rev'g and remanding sub nom.* Stanadyne Auto. Corp., 345 N.R.L.B. 85 (2005) (upholding the Board's application of the rules regulating employer speech on two issues but reversing on a third issue); Jochims v. NLRB, 480 F.3d 1161, 1174 (D.C. Cir. 2007), *rev'g sub nom.* Wilshire at Lakewood, 345 N.L.R.B. 1050 (2005) (holding that the Board's decision to treat an employee as a supervisor was not based on substantial evidence, but rather on a misapplication of Board precedent).

Some cases apparently settled while the appeal was pending or have not been decided.

169. For a brief but insightful summary of the card-check process, see JULIUS G. GETMAN ET AL., UNION REPRESENTATION ELECTIONS: LAW AND REALITY 131 (1976).

170. A recent empirical study that also contains a literature review of past studies is Adrienne E. Eaton & Jill Kriesky, *NLRB Elections vs. Card Check Campaigns: Results of a Worker Survey*, 62 INDUS. & LAB. REL. REV. 157, 159–61 (2009).

171. GETMAN ET AL., supra note 169, at 14; Kate Bronfenbrenner & Tom Juravuich, *It Takes More Than House Calls: Organizing to Win with a Comprehensive Union-Building Strategy*, *in* ORGANIZING TO WIN: NEW RESEARCH ON UNION STRATEGIES 19, 28 (Kate Bronfenbrenner et al. eds., 1998); Morris M. Kleiner, *Intensity of Management Resistance: Understanding the Decline of Unionization in the Private Sector*, 22 J. LAB. RES. 519, 527 (2001); *cf.* John J. Lawler & Robin West, *The Impact of Union-Avoidance Strategy in Representation Elections*, 24 INDUS. REL. 406, 409 (1985) (discussing, amidst other employer resistance efforts, the notion of "discrimination against union supporters").

union to communicate with employees about the benefits of unionization.[172] The union argument is, therefore, that card-check recognition avoids some of the deleterious consequences of the NLRB election process. Going forward, unions argue that the Employee Free Choice Act, which would amend the NLRA to facilitate recognition based on a showing of authorization cards[173] is necessary to counteract the one-sided nature of the two-month-long campaigns running up to NLRB-supervised elections.[174] The employer argument is that cards do not accurately reflect employee preferences regarding unionization and that only the NLRB-supervised secret ballot election, preceded by a campaign in which the employer has the ability to state its case against unionization, accurately measures employee support for unions.[175] In this highly salient and contested field, the Bush II Board's decisions on the circumstances when an employer may withdraw recognition of a union that became the bargaining representative through card check as opposed to formal NLRB certification reflect important policy changes.

Since at least 1966, the Board had adhered to a policy known as the recognition bar.[176] Under that rule, when an employer recognizes a union based on a showing of authorization cards signed by a majority of employees, the Board will decline to entertain a petition to decertify the union until a reasonable time has elapsed.[177] The purpose of the recognition bar doctrine is to protect a newly formed bargaining relationship from challenge for enough time to enable a union and an employer to negotiate a collective bargaining agreement. After a reasonable time, if the union fails to negotiate a contract, the Board will entertain a decertification petition signed by a minimum of 30 percent of the employees in the bargaining unit. The Board will then conduct an election to determine whether a majority of the employees prefer a union. If the parties enter into a collective

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172. *See* Weiler, *supra* note 69, at 1781 (estimating the odds that a union supporter will be fired for exercising section 7 rights at 1 in 20).

173. H.R. 800, 110th Cong. (2008).

174. *See, e.g.*, American Rights at Work Resource Library, http://www.americanrightsatwork.org/employee-free-choice-act/resource-library/ (last visited Apr. 7, 2009) (providing fact sheets and other resources regarding the Employee Free Choice Act).

175. *See, e.g.*, Thomas J. Donohue, President & CEO, U.S. Chamber of Commerce, Employee Free Choice Act Crushes Workers' Right to Cast Secret Votes (Aug. 31, 2008), http://www.uschamber.com/press/opeds/080831_cardcheck.htm.

176. Keller Plastics E., Inc., 157 N.L.R.B. 583, 586 (1966).

177. *Id.*

bargaining agreement, then, under the contract bar doctrine, no decertification or rival union petition can be filed for the term of the contract, not to exceed three years.[178]

In *Dana*, a majority of the Board overturned the old rule and held that the employer or employees may file a decertification petition at any time after voluntary recognition, including after the employer and union sign a collective bargaining agreement, unless the employer or union follow newly imposed procedural requirements after voluntary recognition.[179] The requirements are that (1) the Regional Office must be notified after voluntary recognition, (2) the Regional Office must send a notice to the employer for posting that advises employees that the employer had voluntarily recognized the union, and (3) the employer must post the notice for a period of forty-five days. If no decertification petition is filed within the forty-five days after the posting of the notice, then the recognition bar or the contract bar doctrine apply.[180]

The *Dana* rule rests on a number of factual and policy premises, none of which are clearly stated or actually defended in the opinion. It rests on the view that bargaining relationships formed on the basis of cards should be less insulated from challenges than those formed on the basis of an election. This in turn rests on a preference for allowing challenges to the validity of union recognition as opposed to protecting a nascent union. It also reflects a view that the election campaign following the filing of the decertification petition is good because it will enable the employer to make its case against unionization. The factual premises underlying the majority opinion are that cards are a less reliable indicator of employee preference than an election, and that the signatures on a representation petition do not suffer from the same risk of unreliability as cards do. Both factual assumptions turn on a further factual premise that coercion may occur in the context of signing cards that does not occur during the period running up to an election. And then there is a mixed factual and policy judgment: that is, that the benefits of an election outweigh the risks that an employer will decline to cooperate in bargaining during the forty-five-plus day window and that there will

178. *See generally* ROBERT A. GORMAN & MATTHEW W. FINKIN, BASIC TEXT ON LABOR LAW: UNIONIZATION AND COLLECTIVE BARGAINING 53–83 (2d ed. West 2004) (explaining the procedures for representation cases).

179. Dana Corp., 351 N.L.R.B. 434, 434–35 (2007).

180. *Id.* at 443.

therefore be no agreement or that an agreement will be invalidated for failure to comply with the procedural requirements.

Not surprisingly, the dissenting opinion rests on diametrically opposed policy preferences and factual premises.[181] The policy preferences and factual premises are more explicitly stated in the dissent than in the majority opinion. However, it too suffers from a lack of unchallenged empirical support for its positions. The dissent would have adopted a policy of protecting new bargaining relationships and found that decertification election campaigns pose unacceptable risks of undermining bargaining and of employer coercion in the decertification election campaign. Moreover, some readers might find in the dissent an unstated factual premise that an employer that signs a neutrality and card-check agreement will be able to effectively break its promise of neutrality by stalling at the bargaining table while inducing disgruntled employees to file a decertification petition; such a strategy would allow the employer to run the anti-union campaign during the decertification election that it promised not to run during the card-gathering process. The degree to which these scenarios are real threats is, as with the majority opinion, an empirical question that would benefit from study.

The two opinions in *Dana* use the fact that unions with strong card majorities still lose elections to draw different conclusions. For the conservatives, election results show that cards are coerced or based on ignorance, and are not as reliable as votes in NLRB-administered elections. For the liberals, it is just as clear that the cards represent true preferences and the election results show the adverse reaction of employees to coercive employer campaigns and actions. Union advocates have long pointed to polling data on untapped demand for unionization to support their view that it is employer coercion rather than peer pressure that explains the difference between cards and election results,[182] but that argument has not persuaded Boards dominated by Republican appointees. Is the proper response of a reviewing court, in a hard look review, to determine the factual correctness of one inference or the other?

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181. *Id.* at 444 (Liebman & Walsh, Members, dissenting) (citing stable bargaining relationships and employee free choice as the most important interests).

182. *See, e.g.*, RICHARD B. FREEMAN & JOEL ROGERS, WHAT WORKERS WANT 69, 83, 97 (1999) (graphing surveys of employee attitudes about work and finding that 63 percent of workers wanted more influence than they had at work, 56 percent would prefer to raise problems through an association rather than alone, and 32 percent of unrepresented workers and 90 percent of union members would vote for union representation if given the chance).

Probably not—a court would likely say that the agency needs to give reasons why it chooses one over another and respond to arguments on both sides. So the test of the validity of the *Dana* decision, given the absence of evidence before the Board on whether cards or election results are more reliable, is simply whether its reasoning takes the arguments seriously and tries to persuade skeptics.

Imagine a skeptical third party trying to decide between the majority's and the dissent's positions. That person may want to know how often it is that employees are pressured to sign or not sign an authorization card or a petition to conduct a decertification election, and whether that kind of pressure is greater or less than the pressure that an employee experiences in the run-up to an election. There may be a factual answer to where the greatest risk of coercion lies, but neither the majority nor the dissent offers the data. Another way of thinking about it is this: if corrupt unions use card check and employ intimidation to get cards, even a dedicated supporter of unions might worry about card check. The supporter might worry even more if the facts show that the alternative, a secret ballot election, involves no risk of employer coercion to induce employees to vote against the union. On the other hand, if the union using card check is not corrupt and does not intimidate employees to sign cards, and the employer in question would intimidate employees to sign a decertification election petition or would run an extended anti-union campaign, including firing union supporters, lecturing employees about the harms of unionization, denying access to employees to talk to the union about the benefits of unionization, and suggesting that it will eliminate jobs if the union wins the election, then a neutral third party may be persuaded that the Board's policy preference does not strike the right balance in favor of employee freedom of choice.

A skeptical third party may also want to know whether the recognition bar insulates ineffective unions from accountability (as conservatives believe) or protects freely chosen unions from employers' bad faith refusals to bargain intended to undermine support for the union (as union supporters believe). Empirical data would be illuminating. What accounts for the failure of nearly half of newly certified unions to achieve a first contract?[183] Is it union

183. In 1994, the influential Dunlop Commission (the Commission on the Future of Worker-Management Relations) found that the failure of a newly certified union to secure a first contract was a serious problem when approximately one-third of new unions failed to secure a contract within two years of bargaining. In the 2000–2004 period, 44 percent of new unions

ineptitude and overreaching? Or is it employer anti-union animus and intransigence?

That neither the majority nor the dissent relied on factual evidence to support their conclusions is not surprising. Lacking any social science experts within the agency staff and having no capacity to conduct studies of actual labor conditions, the Board does not have access to social science data or other factual research in deciding cases except as the parties choose to provide it in their briefs.[184] In the *Dana* case, none of the parties or the many amici cited data in the briefs, at least in the sample of briefs that the NLRB posted on its website.[185] Both the majority and dissenting opinions cited a law review article that surveyed some of the social science data,[186] but that is no substitute for rigorous analysis of data.

During the Clinton era, the Board also overturned precedent on the subject of the balance between elections and voluntary recognition. In *Levitz Furniture Co.*,[187] the Board held that an employer may withdraw recognition from a union without an election only if the union has actually lost the support of the majority of the bargaining unit employees. It also overruled a 1951 Board decision allowing withdrawal of recognition on the basis of good-faith doubt about the union's majority status.[188] At the same time, the Board lowered the threshold for an employer to file a decertification petition to enable the employer to file upon a showing of "good-faith reasonable uncertainty" as to the union's majority status, rather than having to show "disbelief" about the union's majority status.[189]

The style of reasoning in *Levitz* differs somewhat from the reasoning in *Dana*. In particular, there was a slightly greater effort in

failed to secure a first contract. ARCHIBALD COX ET AL., LABOR LAW: CASES AND MATERIALS 529 (14th ed. 2006); *see* John-Paul Ferguson, *The Eyes of the Needles: A Sequential Model of Union Organizing Drives, 1999–2004*, 62 INDUS. & LAB. REL. REV. 3, 16 (2008).

184. One empirical study of the extent of employer, union, and coworker pressure in elections and in card-check campaigns asserts that there is a "gaping hole" in the empirical literature attempting to compare the degree of pressure in the two organizing scenarios. *See* Eaton & Kriesky, *supra* note 170, at 160.

185. *See* National Labor Relations Board Frequently Requested Documents, http://www.nlrb.gov/research/frequently_requested_documents.aspx (last visited Apr. 7, 2009) (providing seven briefs of the parties and ten amicus briefs).

186. *Dana*, 351 N.L.R.B. at 442 n.34 (majority opinion) (citing Brudney, *supra* note 27); *id.* at 445 & n.4 (Liebman & Walsh, Members, dissenting) (citing Brudney, *supra* note 27).

187. Levitz Furniture Co., 333 N.L.R.B. 717 (2001).

188. *Id.* at 717 (overruling Celanese Corp., 95 N.L.R.B. 664 (1951)).

189. *Id.* at 727.

Levitz to justify the new rule through an appeal to the Board's expertise as opposed to through the superiority of the new rule as a matter of policy. The type of expertise that the Board offered, however, is quite different from what generally counts as administrative agency expertise. Through an extended discussion of the development and operation of the rules, a discussion based on the Board's experience as practicing lawyers rather than social science data, the *Levitz* Board attempted to situate its policymaking in the context of the only kind of expertise it possesses—the logical coherence of doctrine and an intuitive sense about whether particular rules generate productive or unproductive litigation.[190]

Both *Dana* and *Levitz* overturned longstanding Board precedent. Because the quality of Board reasoning in overturning precedent matters in how it is perceived as an administrative agency, it is useful to compare how the two opinions handled the task. The *Dana* opinion did not attempt to justify the departure from precedent apart from the previous portions of the opinion that justified the rule as policy. All it said about precedent was: "Even in the context of administrative law, the principle of stare decisis is entitled to considerable weight. 'The rules governing representation elections are not, however, fixed and immutable. They have been changed and refined, generally in the direction of higher standards.'"[191] In *Levitz*, the majority offered a more extensive explanation of why stare decisis should give way: the old rule failed to serve statutory policy and the Supreme Court's decision in *Allentown Mack* pointed out the confusion of the existing law and added to it by changing part of the rule.[192] Several more pages of discussion addressed objections from the concurring Board member to the new rule and discussed the new lower standards for employer-initiated (RM) petitions that would allow an employer to test a union's majority support more easily to counteract the possible adverse effects of the new rule making it harder for the employer to withdraw recognition without an election.[193] But fundamentally, both *Dana* and *Levitz* justified the new rule on the ground that it was superior as a matter of logic and policy, and not really on the ground that circumstances had changed.

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190. *Id.* at 720–23.

191. *Dana*, 351 N.L.R.B. at 441 (quoting Excelsior Underwear, Inc., 156 N.L.R.B. 1236, 1240 (1966)).

192. *Levitz Furniture*, 333 N.L.R.B. at 726.

193. *Id.* at 726–28.

Both *Dana* and *Levitz* acknowledge the significance of the rule change by making the new rules apply only prospectively. The Board customarily applies a new rule to all cases pending at its adoption, so the decision to make the rule only apply prospectively signals the importance of the policy change. Prior Supreme Court case law, including a short statement in *Allentown Mack*, makes clear that the Board is free to decide whether to proceed by rulemaking or adjudication, assuming those affected by the change receive fair notice of it, and that giving a decision reached through adjudication prospective-only application does not render it procedurally inappropriate.[194] *Dana* reached the decision after giving broad notice of the issue it was considering and soliciting amicus briefs from the labor community in response.[195] Adjudication is most like notice-and-comment rulemaking when it takes this form. In *Levitz*, the Board explained prospective application was desirable to avoid back-pay liability for employers who had relied on the fifty-year-old *Celanese* rule in withdrawing recognition and unilaterally lowering wages.[196]

In both *Dana* and *Levitz*, the Board's principal claim to deference for its policy changes was the strength of its policy and practical arguments about the desirable balance between the value of promoting bargaining relationships and the value of having a union only so long as a majority of employees want it. Just as there was no data in *Dana* to support the Board's decision to lower the bar for withdrawal of recognition to minimize the risk of coercion of employees who oppose the union, there was no data in *Levitz* to support the decision to increase the bar for withdrawal of recognition to minimize the risk of coercion of employees who support the union. The unsupported factual premises play a slightly larger role in *Dana* than they do in *Levitz*, for the heart of the *Dana* reasoning is that card-check recognition involves a risk of coercion that the election machinery does not,[197] whereas the heart of the reasoning in *Levitz* was an asserted need to simplify and reconcile legal standards in the wake of a significant change imposed by the Supreme Court.[198] But both decisions would have been significantly more persuasive if they had included empirical data about the comparative advantages of the

194. *See* Allentown Mack Sales and Serv., Inc. v. NLRB, 522 U.S. 359, 376–77 (1998).

195. *Dana*, 351 N.L.R.B. at 434 n.2.

196. *Levitz Furniture*, 333 N.L.R.B. at 729.

197. *Dana*, 351 N.L.R.B. at 438.

198. *Levitz Furniture*, 333 N.L.R.B. at 723.

various devices for recognition and withdrawal of recognition of a union, the costs and benefits of stability of bargaining relationships, and the degree of manipulation and abuse of legal standards that occur when employers or unions try to prevent a change in unionization status against the preferences of the majority of employees (whatever those preferences may be).

When the Board is balancing statutory goals, it is really engaged in policymaking rather than in statutory interpretation. There is often no specific statutory language at issue at all. The majority in *Dana* stated in a footnote that "the Board's irrebuttable presumption of a union's continuing majority status following recognition is based on policy considerations, not on factual probability. Consequently, our modification of the recognition bar stems from our reassessment of those policy considerations."[199] Outside the NLRB context, there is no question that policy judgments are supposed to turn on factual analysis. Note too that the line between the two does not have to be as clear because both policymaking and fact-finding via notice-and-comment rulemaking are subject to arbitrary-and-capricious review. But there is a significant difference between policymaking in a case like *Dana* and engaging in rulemaking. The policy would be subject to judicial review if it were made through rulemaking, but not if it were made through adjudication. Employees and unions cannot seek review of NLRB representation case decisions.[200]

B. Adapting Old Rules to New Circumstances—Register-Guard *and the Student-Employee Cases*

In this section, we consider how both the Bush II Board and the Clinton Board used changed circumstances to justify the creation of a new rule. The first example concerns the Board's controversial and much-anticipated decision on whether employees have the right to use workplace email servers to communicate about section 7 activities, including union organizing. The second example is the series of cases in which the Board decided whether graduate student teaching assistants and medical residents and interns are employees entitled to bargain.

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199. *Dana*, 351 N.L.R.B. at 438 n.17.

200. *See* Leedom v. Kyne, 358 U.S. 184, 188 (1958) (explaining that such decisions are not for "review," but rather to "strike down an order . . . made in excess of [the Board's] delegated powers").

1. *Email and Section 7 Activity*. One of the most significant examples of the Board's effort to apply old rules to a new circumstance is its decision in *Register-Guard*, which held that employers can prohibit employees from using a company email server to communicate about union matters even though they allow employees to use the system to communicate about other nonwork matters.[201] The Board had held earlier that the statute allows employees to communicate via email about section 7 activity unless the employer flatly prohibits all personal use of email.[202] In *Register-Guard*, the Board held that employers can prohibit employees from using email for solicitations for unions even if they allow the employees to use email to solicit support for charitable organizations, for personal correspondence, for invitations to social events, and to buy and sell things and services like sports tickets and pet sitting.[203] In other words, employers can discriminate against all section 7 related communication, so long as it does not discriminate in favor or against unions.[204] In response to the argument that email had replaced the face-to-face communication or distribution of leaflets that the Board had long found section 7 to protect, the Board said that the "use of e-mail has not changed the pattern of industrial life at the Respondent's facility to the extent that the forms of workplace communication sanctioned in [past cases] have been rendered useless and that

201. Guard Publ'g Co., 351 N.L.R.B. 1110, 1110 (2007).

202. Media Gen. Operations, Inc., 346 N.L.R.B. 74, 76 (2005); E.I. du Pont de Nemours & Co., 311 N.L.R.B. 893, 919 (1993).

203. *Guard*, 351 N.L.R.B. at 1116.

204. The Board reasoned as follows: (1) The employer has a property right in its email system which allows it to regulate employee use of the system. (2) Prior cases have held that the employer can restrict employees from nonbusiness use of equipment such as telephones, bulletin boards, or public announcement systems without running afoul of section 8(a)(1), which prohibits enforcement even of neutral rules that interfere with the exercise of section 7 rights absent sufficient business justification. (3) Prior cases have held that the employer cannot prevent employees from communicating with each other in the workplace about union-related matters, though the employer may prohibit nonwork-related communications during working time and may prohibit the distribution of literature at any time in working areas because of the need to control litter. (4) Email is more akin to a telephone, a bulletin board, or a public announcement system than it is to oral solicitation or distribution of literature. (5) The cases having to do with section 7 protections for oral solicitation or literature distribution, which require a balancing between the employees' section 7 rights to communicate and the employer's rights to control the workplace, are inapposite because email communication is not like oral communication, and the section 7 right to communicate "does not require the most convenient or most effective means of conducting those communications, nor does it hold that employees have a statutory right to use an employer's equipment or devices for Section 7 communications." *Id.* at 1115.

employee use of the Respondent's email system for section 7 purposes must therefore be mandated."[205] It offered no reasoning for this conclusion.

The philosophical position reflected in the case was a significant departure from past practice. For many decades, the NLRB and the courts read section 7 of the NLRA to give employees rights to communicate about unions at work, both orally and in writing, so long as they did so during nonworking time. In past cases, the Board and the Supreme Court rejected the contention that employers' ownership of the factory, office, or other work space, or their contractual right to control employees' behavior at work, gave them the right to control what employees said about unions while on the premises except as necessary to maintain production during working time and to avoid litter of working areas caused by distribution of literature during nonwork time.[206] But in *Register-Guard*, the Board read the employer's property rights in the email server to trump the employees' section 7 rights to communicate.[207]

Register-Guard also overturned established Board policy with respect to whether an employer that allows some forms of nonwork-related communication can prohibit union-related communication. The law has long been settled that an employer may not discriminate against section 7 activity (whether it was pro- or anti-union) in the enforcement even of legitimate rules, such as those regarding telephones or the distribution of literature.[208] The Board embraced a new theory for what violates section 8(a)(1): absent evidence that the employer discriminates among types of section 7 activity, the employer need not show any legitimate purpose for its rule. The law had previously been settled that section 8(a)(1) did not require proof of discrimination; rather, that the employer allowed some forms of

205. *Id.* at 1116.

206. Republic Aviation Corp. v. NLRB, 324 U.S. 793, 797, 803 n.10 (1945).

207. The employee at issue in *Register-Guard* had not used the employer's computer to send certain emails; she had done so from a computer off of the premises. *Guard*, 351 N.L.R.B. at 1112. Nevertheless, the Board found that the employer's ownership of the email server trumped the employees' rights to communicate, even though the Board conceded that it was unlikely that union messages caused any measurable burden on the server or otherwise harmed the employer's property interest in its server in any way. *Id.* at 1116 n.11.

208. *See, e.g.*, GORMAN & FINKIN, *supra* note 178, at 151 (stating that 8(a)(1) prohibits an employer from taking "action which, regardless of the absence of antiunion bias, tends to interfere with, restrain, or coerce a reasonable employee in the exercise of the rights guaranteed in section 7, provided the action lacks a legitimate and substantial justification such as plant safety, efficiency or discipline").

nonwork communications was evidence that the employer had no legitimate business purpose for its restriction on communication and, therefore, section 7 rights should trump the employer's rights to control its workplace or communications devices.[209] The Board rejected this balancing of interests approach in favor of a theory requiring discrimination to prove a violation of section 8(a)(1).[210]

The opinion discussed no data to address the question whether there was any legitimate employer need to restrict employee use of email systems. If one does not accept the majority's assertion that the employer's mere ownership of the email server answers the question whether section 7 protects the rights of employees to use the server to communicate about unions or other concerted activities for mutual aid and protection, there is little else in the opinion that would help one decide whether section 7 protects the right to communicate via the employer's email server. Section 7, like most other labor and employment statutes, interferes to some degree with what occurs on the employer's property. So a skeptic might want some factual basis

209. For example, in *Republic Aviation*, the Supreme Court held unlawful a company rule which forbade solicitation of any kind on company property and rejected the defense that the no-solicitation rule had been adopted before the advent of the union, was not motivated by antiunion bias, and had been applied nondiscriminatorily against all forms of in-plant solicitation. 324 U.S. at 805; *see also* GORMAN & FINKIN, *supra* note 178, at 151–53 (describing NLRB and Supreme Court decisions establishing that proof of discriminatory motive is generally not required in section 8(a)(1) cases).

210. The Board adopted a view articulated by the Seventh Circuit in a couple of cases declining enforcement of Board orders that only rules treating section 7 conduct differently from all other similar conduct violate section 8(a)(1). *Guard*, 324 U.S. at 1117–18. The two Seventh Circuit decisions were ones that the Board previously had refused to acquiesce in. Guardian Indus., Corp., 49 F.3d 317 (7th Cir. 1995), *denying enforcement*, 313 N.L.R.B. 1275 (1994); Fleming Co. v. NLRB, 349 F.3d 968 (7th Cir. 2003), *denying enforcement*, 336 N.L.R.B. 192 (2001). The other authority the Board cited for this proposition, aside from two decisions from the Bush II Board, neither of which was on point, was a 1958 Supreme Court decision, NLRB v. Steelworkers (*Nutone & Avondale*), 357 U.S. 357 (1958), which allowed an employer that prohibits solicitation during working time to violate its own no-solicitation policies by using work time to give anti-union speeches to employees. In *Enloe Med. Ctr.*, 348 N.L.R.B. 991 (2006) and *Salmon Run Shopping Center*, 348 N.L.R.B. 658 (2006), the Board held that discriminatory enforcement of a no-solicitation rule violated section 8(a)(1). *Enloe Med. Ctr.*, 348 N.L.R.B. at 991; *Salmon Run*, 348 N.L.R.B. at 658 . Neither held that discrimination was *necessary* to prove the section 8(a)(1) violation, only that enforcement of a facially valid rule in a discriminatory manner violates section 8(a)(1). *Enloe*, 348 N.L.R.B. at 991; *Salmon Run*, 348 N.L.R.B. at 659–60. The Board in *Salmon Run* recognized that discrimination in the enforcement of a facially valid rule is an exception to the general mode of analysis, which is the *Republic Aviation* rule that compares the burdens on the employer's operations against the benefits of section 7 activity and does not turn on proof of discrimination. *Salmon Run*, 348 N.L.R.B. at 658.

for deciding how to balance the employees' labor rights against the employer's property rights.

The absence of evidence about the necessity for or impact of the rule was not, in this case, the result of a lack of evidence presented to the agency. The parties had adduced evidence about the costs to firms of allowing employee use of email for nonwork communication, but the Board dismissed it as irrelevant. "Testimony in the record that sending or receiving a simple 'text' e-mail does not impose any additional monetary cost on the Respondent is of no consequence to our inquiry here. The Respondent's property rights do not depend on monetary cost."[211] There was also summary information presented in at least one amicus brief about the aggregate costs firms spend to maintain email systems and summaries of some survey data on the average amount of time employees spend per day or week on email, on nonwork-related email, and on the number of employers that monitor employee computer use through keystroke records and lists of websites visited.[212] The opinion cited none of this data, and the Board's reasoning made the justifications for the employer's policy irrelevant: "An employer has a basic property right to regulate and restrict employee use of company property. The Respondent's communications system, including its email system, is the Respondent's property and was purchased by the Respondent for use in operating its business."[213]

2. *Graduate Students, Residents, and Interns*. One of the controversial issues at the Board during the Clinton and Bush II Administrations was whether medical residents and interns (house staff) and graduate student teaching assistants were eligible for protection under the NLRA in their efforts to unionize and bargain collectively. In some cases decided in the early- and mid-1970s—shortly after hospitals became subject to NLRB authority by 1974 statutory amendments, and the Board first asserted jurisdiction over private, nonprofit universities in 1971—the Board held that house staff and teaching assistants were not eligible for statutory protection

211. *Guard*, 351 N.L.R.B. at 1116 n.11.

212. Brief for the United States Chamber of Commerce as Amicus Curiae Supporting Respondent at 3, Guard Publ'g Co. v. Eugene Newspaper Guild, 351 N.L.R.B. 1110 (2007), *available at* http://www.nlrb.gov/nlrb/shared_files/Briefs/Chamber%20of%20Commerce.pdf.

213. *Guard,* 351 N.L.R.B. at 1114 (citation and internal quotation marks omitted).

for collective bargaining.[214] As organizing continued among other job categories in the health care industry, residents and interns continued attempts to organize, and in 1999, a case came before the Board that presented the issue anew. In *Boston Medical Center Corporation*,[215] the Board overturned its rulings from the 1970s and extended bargaining rights to them.[216] Graduate student teaching assistants, among whom organizing had spread rapidly in the 1990s, seized upon the *Boston Medical Center* decision and, in *New York University*,[217] the Board held that they too were eligible for statutory protection for collective bargaining.[218] Four years later, in *Brown University*,[219] the Board overturned *New York University* and held that graduate student teaching assistants are not entitled to statutory protection for collective bargaining.[220] This trio of decisions offers an example of the ways in which the Board goes about its policymaking function.

Boston Medical Center is the longest of the opinions, made the greatest effort to provide a factual basis for its policy judgments, and placed the least emphasis on reasoning based on precedent. The opinion asserted the Board's policymaking authority through a detailed description of the job functions of medical residents and interns and their role in a major teaching hospital.[221] It also made functional arguments based on the experience of the labor market: the opinion began by pointing out that, until the merger of two hospitals, the house staff at the hospital had been covered by the Massachusetts public sector labor law and had been unionized and bargained collectively since 1969, and then analyzed in detail how the house staff function in the hospital.[222] Toward the end of the opinion, the Board placed great emphasis on evidence from actual practice in

214. St. Clare's Hosp. & Health Ctr., 229 N.L.R.B. 1000, 1003–04 (1977) (holding that house staff are employees but are not eligible to bargain); Cedar's Sinai Med. Ctr., 223 N.L.R.B. 251, 251 (1976) (holding that house staff are not employees under the NLRA); Leland Stanford Junior Univ., 214 N.L.R.B. 621, 621 (1974) (holding that graduate student teaching assistants are not employees); Cornell Univ., 183 N.L.R.B. 329, 331 (1971) (asserting jurisdiction over private, nonprofit universities).

215. Boston Med. Ctr. Corp., 330 N.L.R.B. 152 (1999).

216. *Id.* at 152.

217. N.Y. Univ., 332 N.L.R.B. 1205 (2000).

218. *Id.* at 1205.

219. Brown Univ., 342 N.L.R.B. 483 (2004).

220. *Id.* at 483.

221. *Boston Med. Ctr.*, 330 N.L.R.B. at 153–56.

222. *Id.* at 156.

hospitals.[223] The Board discussed a variety of state public sector labor laws allowing residents and interns of public hospitals to bargain, and continued:

> It is plain that collective bargaining by public sector house staff has been permitted and widely practiced. No party or amicus in the instant proceeding has pointed to any difficulty arising from this bargaining. Indeed, the American Medical Association, although opposed to granting house staff the right to strike under the Act, urges that house staff be accorded bargaining rights.[224]

In some sections, the Board emphasized its role as interpreter of the statutory language.[225] Early in the opinion, the Board discussed the language of the NLRA, emphasizing the breadth of the statutory definition of an employee ("The term 'employee' shall include any employee"[226]), and discussed their job functions in light of the dictionary definition of employee.[227] The opinion also examined other statutory language, including section 2(12)(b), which includes "any employee who (i) has completed the course of specialized intellectual instruction and study . . . and (ii) is performing related work under the supervision of a professional person to qualify himself to become a professional employee . . . ."[228]

In several sections, the Board turned away from either statutory language or evidence from actual practice to focus on judicial reasoning. The opinion examined the legislative history of the healthcare amendments to the NLRA.[229] It pointed out that the *Cedars-Sinai* decision, which held house staff not be employees, had drawn a sharp dissent.[230] The sharp dissent within the Board is the only place to find a careful review of the majority's decision because, under *Leedom v. Kyne*,[231] unions have no effective way to gain judicial

223. *Id.* at 163.

224. *Id.*

225. *Id.* at 159.

226. *Id.*

227. *Id.* at 159–61.

228. Labor Management Relations Act, ch. 120, § 2, 61 Stat. 136, 139 (1947) (current version at 29 U.S.C. § 152(12) (2006)).

229. *Boston Med. Ctr.*, 330 N.L.R.B. at 163.

230. *Id*.

231. Leedom v. Kyne, 358 U.S. 184 (1958).

review of unfavorable representation decisions that do not violate express statutory commands—and most do not.[232]

In one short section, the Board presented the argument that precedent should be overruled on account of changed circumstances, emphasizing "our experience and understanding of developments in labor relations in the intervening years since the Board rendered [the] decisions [in *Cedars-Sinai* and *St. Clare's Hospital*]."[233] But then the opinion moved on without study of the developments in labor relations. Instead, the opinion turned to judicial interpretation: "Almost without exception, every other court, agency, and legal analyst to have grappled with this issue has concluded that interns, residents, and fellows are, in large measure, employees."[234] The only discussion of labor relations in that section was the assertion that the "overriding purpose of the 1974 Healthcare Amendments was the elimination of recognition strikes and picketing," a purpose that would be served by covering house staff by the Act so that their recognitional efforts would be subject to regulation.[235] Finally, the Board addressed the arguments that bargaining by house staff would infringe upon the academic freedom of medical schools.[236]

The Board's decision in *New York University* extending bargaining rights to graduate student teaching assistants was much shorter, and relied largely on the reasoning of *Boston Medical Center*.[237] It too recited the broad statutory definition of employee, and briefly pointed out that "graduate assistants perform services under the control and direction of the Employer, and they are compensated for these services by the Employer."[238] The opinion then concentrated on responding to the university's argument about the differences between graduate student teaching assistants and house staff with regard to the amount of time they spend working each day, the fact that graduate students receive a degree whereas house staff only receive certification necessary to obtain a full license, and whether graduate students' economic relationship with their

232. *See id.* at 188 ("This suit is not one to 'review' in the sense of that term as used in the Act, a decision of the Board made within its jurisdiction.").

233. *Boston Med. Ctr.*, 330 N.L.R.B. at 163.

234. *Id*.

235. *Id*.

236. *Id*. at 164–65.

237. N.Y. Univ., 332 N.L.R.B. 1205, 1206–09 (2000).

238. *Id*. at 1206.

employer is significantly different from house staffs' relationship with a hospital.[239] Finally, the opinion dismissed the employer's arguments about academic freedom.[240]

In overturning the *New York University* decision, the Bush II Board in *Brown University* placed principal emphasis on *New York University* having overturned precedent.[241] It described *Leland Stanford Junior University*[242] as old or "longstanding" precedent over a dozen times.[243] After describing the job functions of graduate student teaching assistants and the financial support the university provided to them, the bulk of the Board's opinion focused on Board cases and on statutory language and purpose.[244] The heart of the Board's reasoning is its assertion that "the underlying fundamental premise of the Act," is that it is "designed to cover economic relationships"[245] and that the relationship between graduate student teaching assistants and universities is not economic.[246] The reasoning depends largely on arguments from definition: student-university relations are educational not economic; bargaining rights regulate an adversarial process and the student-university relationship is not adversarial.

The majority rejected the dissent's contention that "the changing financial and corporate structure of universities" justified graduate student unions, as the Clinton Board had held.[247] But to do so it offered no empirical support, and instead simply reiterated its arguments from definition (for example, the individuals seeking bargaining rights "are *students*," the money the universities pay and the work the students perform depend on their "being a *student*").[248] Finally, as to the evidence that graduate students at many state

239. *Id*. at 1206–07.

240. *Id.* at 1208.

241. Brown Univ., 342 N.L.R.B. 483, 483 (2004).

242. Leland Stanford Junior Univ., 214 N.L.R.B. 621 (1974).

243. *See, e.g.*, *Brown*, 342 N.L.R.B. at 483 ("This longstanding approach towards graduate student assistants changed abruptly with *NYU*."); *id*. at 491 ("Our colleagues' assertions, therefore, turn a blind eye to the Board's longstanding policy.").

244. *See id.* at 488–500.

245. *Id*. at 488.

246. The Board reasoned that the relationship between graduate students and a university "is primarily educational," that teaching and research experience "is integral to the education of the graduate student," and that the compensation paid for the work "is the financial support provided to graduate student assistants because they are students." *Id.* at 488–89.

247. *Id*. at 492.

248. *Id*.

universities had unionized and bargained without apparent consequence for education or academic freedom, the majority stated: "inasmuch as graduate student assistants are not statutory employees that is the end of the inquiry."[249] Similarly, responding to the dissent's argument that the new rule was unsupported by "empirical evidence" and was "policymaking reserved to Congress," the majority said "[o]nce again, inasmuch as graduate student assistants are not statutory employees, that is the end of our inquiry."[250]

Regardless of one's views on the outcomes, there is much to regret in the reasoning of the Board's decisions in these hotly contested areas. Arguments from definition rarely persuade skeptics, especially when the relevant statutory language is as vague and circular as the statement that an "employee" is defined as "employee." Moreover, to the extent that the *New York University* decision is based on the assertion that collective bargaining would interfere with graduate education and with academic freedom,[251] those assertions are empirically testable. The Clinton Board decisions extending bargaining rights had at least a rhetorical advantage in being able to point to the record of (apparently) successful bargaining at public universities and at public sector hospitals to support their argument. But a skeptic would want better data: what is the effect of bargaining at hospitals and universities that allow it, and how does that experience compare to hospitals and universities that do not?

V. WHAT IS TO BE DONE?

As much as Democrats wish it were otherwise, sooner or later the Republican party will win back the White House and will have the chance to appoint its own NLRB majority. If past experience is any guide, that Board will be fully able to sweep away precedents from the Obama Board, just as the Bush II Board swept away the policies of the Clinton Board. Is there anything that an Obama Board can or should do to anticipate yet another swing of the pendulum? In the nearer term, when the Obama Board goes about reversing the Bush II Board decisions, are there ways that the Board could make its decisions more likely to survive appellate review in federal courts dominated by Bush II judges? If the Obama Board simply says, as

249. *Id*.

250. *Id.* at 493.

251. *See* discussion *supra* notes 245–50 and accompanying text.

Member Liebman put it in her congressional oversight hearing testimony in 2007, that the Bush II Board has overvalued individual anti-union employee freedom at the expense of encouraging collective bargaining,[252] there is no reason to believe that story line will appeal to the current majority of the federal appellate bench.

Our aim here is not merely to evaluate the Bush II Board's work, but also to explore the challenges facing the agency going forward: are there ways to improve labor law as a field by working from the perspective of administrative law, rather than the seemingly impossible quest for an overhaul of the NLRA?

Perhaps.

A. For the Board

(1) Take a more holistic regulatory approach to problem-solving, using a wider range of synergies between doctrinal and remedial approaches. This suggestion is directed both to the members of the Board and to the Board's General Counsel, whose job it is to screen cases for litigation and initiate substantive and remedial strategies in Board litigation.

(2) More clearly identify Board decisions as involving policymaking—not only as opposed to fact-finding, but as opposed to law-finding. Impose an internal hard look doctrine when evaluating the Board's reasoning, especially in cases inconsistent with previous precedent or purporting to rest on economic changes. When policy judgments are ideological, identify and defend them as such.

(3) Work with the Department of Labor to generate data relevant to the major policy issues facing the Board. When proceeding by adjudication, expressly solicit amicus briefs from the relevant social science communities. Examples might include the question of whether cards are more or less reliable than elections; the economic effects of treating categories of workers as employees (such as graduate students and house staff) based on studies on collective bargaining by those workers under public-sector state labor law.

(4) Develop internal social science expertise notwithstanding the ban on hiring persons for economic analysis. Be prepared to defend in courts (should someone successfully assert standing), or (more likely)

252. *The National Labor Relations Board: Recent Decisions and Their Impact on Workers' Rights*, *supra* note 90, at 26 (statement of Wilma B. Liebman, Member, NLRB) ("Virtually every recent policy choice by the board impedes collective bargaining, creates obstacles to union representation, or favors employer interests.").

in congressional oversight hearings, the position that the Board no longer construes the ban as broadly barring the internal development and evaluation of social science evidence.

(5) Take advantage of the Federal Advisory Committee Act[253] to develop a consultative relationship with an interdisciplinary group of labor scholars, experts in the interpretation of empirical research, widely respected former governmental officials (including retired appellate court judges), and experts in fields outside NLRB jurisdiction but with implications for NLRB policy (for example, immigration). Use the Advisory Committee as a forum for exchange on matters of policy that are within the power of the NLRB to address, as opposed to using it for purposes of generating legislative proposals unlikely to get off the ground.

(6) Consider alternatives to both rulemaking and adjudication in the formulation of policy (e.g., nonbinding policy guidance documents), at least at the early stages of policy development.[254]

(7) Consider using rulemaking rather than adjudication in recurring circumstances in which adjudicatory decisions would be insulated from judicial review (for example, representation case decisions that would be unreviewable by unions), or in circumstances in which the Board has already been harshly criticized by the courts of appeals for multiple changes in position.

B. For the Executive

(1) Appoint some Board members from unconventional backgrounds. The early membership of the Board included social scientists—the members need not all be lawyers. Among lawyer

253. 5 U.S.C. app. §§ 1–15 (2006). A new advisory committee can be established by an agency head if it is "determined as a matter of formal record, by the head of the agency involved after consultation with the Director [of the Office of Management and Budget], with timely notice published in the Federal Register, to be in the public interest in connection with the performance of duties imposed on that agency by law." *Id*. § 9(2). Advisory committees can also be "specifically authorized by statute or by the President." *Id*. § 9(1). The FACA applies to an "agency" within the meaning of the Administrative Procedure Act section 551(1), which includes independent agencies. *Id*. § 3(3).

254. *See, e.g.*, Claire Tuck, *Policy Formulation at the NLRB: A Viable Alternative to Notice and Comment Rulemaking*, 27 CARDOZO L. REV. 1117, 1120–21 (2005) ("[T]he Board should provide some guidance to parties beyond individual adjudications by issuing nonbinding statements of policy."); M. Elizabeth Magill, *Agency Choice of Policymaking Form*, ADMIN. & REG. L. NEWS, Fall 2004, at 15, 32 ("Some agencies rely heavily on adjudication, others on legislative rules, and others on a rich mix of tools. These varying practices invite questions about how agencies choose among their available options.").

appointees, choose some lawyers with Department of Labor experience or experience in employment sectors that are the object of nontraditional organizing drives.

(2) For purposes of Executive administrative law reform, develop a definition of "agency rule" or "agency regulation," that includes some or all agency adjudicative orders, and develop regulatory reform tools that would apply to them.

(3) Consider an across-the-board approach to regulatory reform of independent agencies. At the very least, use (and publicize) prompt letters and other existing regulatory reform tools currently deemed appropriate to independent agencies, to move them toward a coherent regulatory approach.

(4) Review the work of other adjudicative agencies to look for models that would improve the NLRB.

(5) Take advantage of the Solicitor General's involvement in NLRB Supreme Court litigation to influence the clarity of the agency's decisionmaking.[255]

C. For Congress

(1) Congressional supporters of collective bargaining should realize that there is a downside to effectively cutting the Board's membership to two members. The result will be a significant backlog of the Board's most important, policy-determining decisions, which will then be reviewed by courts of appeals impatient with delayed and hastily reasoned Board opinions.

(2) Use oversight hearings and appropriations pressures as an occasion to request data from the U.S. Government Accountability Office (GAO, previously known as the General Accounting Office)[256]

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255. On the thorny question of the relationship between the Solicitor General and independent agencies, see generally Neal Devins, *Unitariness and Independence: Solicitor General Control over Independent Agency Litigation*, 82 CAL. L. REV. 255 (1994).

256. A review of the GAO's website showed very few congressional requests for information relevant to substantive NLRA issues. The GAO did provide a study of the NLRB's July 8, 1997, Draft Strategic Plan, submitted by the Board pursuant to the Government Performance Results Act of 1993 (The Results Act). U.S. GEN. ACCOUNTING OFFICE, NAT'L LABOR RELATIONS BD., OBSERVATIONS ON THE NLRB'S JULY 8, 1997, DRAFT STRATEGIC PLAN (1997), *available at* http://www.gao.gov/archive/1997/he97183t.pdf. The study was presented to the House of Representatives on July 24, 1997. *Oversight of National Labor Relations Board: Hearing Before the H. Subcomm. on Human Resources of the H. Comm. on Government Reform and Oversight*, 105th Cong. 148–59 (1997) (statement of Carlotta C. Joyner, Director, Education and Employment Issues, U.S. General Accounting Office). By its terms, the section of The Results Act requiring agencies to formulate strategic plans applies

and other reliable sources (for example, the Congressional Research Service)[257] to study questions over which there are significant policy disputes. Such data could, for example, quantify the costs both of the Board's administrative practices (for example, the dollar cost to the agency of its intracircuit nonacquiescence policy or societal costs of administrative delay) and the costs and benefits of its substantive policies.

(3) Consider prioritizing labor law reform legislation (although, for reasons already described, this call has fallen on deaf ears for decades).

D. For the Courts of Appeals

(1) Be clearer on the line between law and policy, not just the line between fact and policy.

(2) When applying administrative law to Board decisions, cite and use the same modern Supreme Court precedents that are routinely used in other regulatory fields. Reviewing courts tend to cite only other NLRB cases, many of them predating important developments in the contemporary law of judicial review.[258] The effect is for the Board to be isolated from those developments in administrative law that apply to agency adjudications.

(3) Articulate a version of the arbitrary-and-capricious or hard look standard for agency policymaking (and the harder look standard for agency changes in policy) that is well adapted to agency policymaking-by-adjudication. Some courts of appeals treat *State Farm* as a deferential standard,[259] whereas others—especially the D.C.

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only to executive agencies as defined in 5 U.S.C. § 105. *See* 5 U.S.C. § 306(f) (2006). Independent agencies like the NLRB are not executive agencies under this definition, but the NLRB has participated in the process nonetheless. For further discussion, see The Results Act section of the GAO website. U.S. GAO, Results-Oriented Decision Making, http://www.gao.gov/transition_2009/challenges/results_decision_making/home_results_decision_making.php (last visited Apr. 10, 2009).

257. According to the Congressional Research Service website, the Service "provides, exclusively to the United States Congress, objective, nonpartisan assessments of legislative options for addressing the public policy problems facing the nation," and has a large, multidisciplinary staff with subject matter expertise on a wide range of policy fields, including labor. About the Congressional Research Service, http://www.loc.gov/crsinfo/aboutcrs.html (last visited Mar. 30, 2009).

258. *See, e.g.*, NLRB v. Beverly Enters.-Mass., Inc., 174 F.3d 13, 21–36 (1st Cir. 1999) (going through a full recitation of standards of review for law, fact, and policy, and then proceeding not to use any of them).

259. *See, e.g.*, Recon Refractory & Constr. Inc. v. NLRB, 424 F.3d 980, 987–88 (9th Cir. 2005).

Circuit—give it more of a hard look standard inflection.[260] The latter seems more appropriate in the case of policy changes, given the Board's ailing reputation.

(4) Use hard look review under the arbitrary-and-capricious standard (as the doctrine was used in *Overton Park*) to condition approval of NLRB policymaking on the development of the kind of record it would possess if it were engaged in rulemaking.[261] In other words, demand that the Board secure, through party briefs or independent research, the kinds of economic and other social science analyses that would better inform its policymaking.

(5) With regard to arbitrary-and-capricious or hard look review, accept the following caveat: be modest about one's own understanding of American workers and their varied workplaces, and also about one's knowledge of labor law as a field. The decline in union density has meant a decline in the number of NLRB cases reaching the courts of appeals, and most NLRB cases skip the district courts entirely. This means that newly appointed federal appellate judges are likely to take a very long time to internalize the values (conflicting though they may be) underlying the NLRA. Judges would do well to recognize the difference between poorly reasoned opinions and opinions that draw upon assumptions and understandings widely shared by those with background in the field.[262]

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260. *See, e.g.*, Pearson Educ., Inc. v. NLRB, 373 F.3d 127, 131 (D.C. Cir. 2004); Nathan Katz Realty, LLC v. NLRB, 251 F.3d 981, 994 (D.C. Cir. 2001); *see also* Long Island Head Start Child Dev. Serv. v. NLRB, 460 F.3d 254, 257–58 (2d Cir. 2006) ("Our 'hard look' will also examine whether an agency decision accurately reflects its own caselaw . . . . [U]nder *State Farm,* an agency explanation will not be afforded deference unless the agency has considered all relevant issues and factors."); *cf.* Local 814, Int'l Bhd. of Teamsters v. NLRB, 512 F.2d 564, 572 (D.C. Cir. 1975) (Bazelon, J., dissenting) (objecting to a "remand for supplementation" and calling for reversal and remand "for a thorough reconsideration of the doctrinal quicksand in this area" in question).

261. In *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971), a case involving "informal adjudication," the Court, dissatisfied with the state of the record underlying an "informal adjudication," effectively required the agency to produce a formal record or make officials available for live testimony—all the while acknowledging that the APA does not require formal findings in such a case. *Id.* at 419–20.

262. *See* Brudney, *supra* note 11, at 247 (referring to data showing that judges with labor experience, even management experience, uphold the Board more often than others do).

E. For the Supreme Court

(1) Follow suggestions one, two, and three for the courts of appeals in Part V.D.[263]

(2) Do a more serious job of applying arbitrary-and-capricious review to NLRB policymaking. Take *Allentown Mack* as a case in point.[264]

The NLRB is much maligned for hiding the ball: for hiding its policymaking in adjudicatory fact-finding.[265] *Allentown Mack* is the leading Supreme Court case addressing this problem, and it has put the Board on notice that this practice is no longer acceptable. But at the same time, *Allentown Mack* hardly serves as an example of rigor when it comes to judicial review of Board policymaking as such.

The case involved the Board's unitary standard for three mechanisms through which an employer wishes to test the continuing majority support for an incumbent union: polling, Board decertification elections, and withdrawals of recognition. This is all the Court had to say about it:

> While the Board's adoption of a unitary standard . . . is in some respects a puzzling policy, we do not find it so irrational as to be "arbitrary [or] capricious" within the meaning of the Administrative Procedure Act. The Board believes that employer polling is potentially "disruptive" to established bargaining relationships and "unsettling" to employees, and so has chosen to limit severely the circumstances under which it may be conducted. The unitary standard reflects the Board's apparent conclusion that polling should be tolerated only when the employer might otherwise simply withdraw recognition and refuse to bargain.
>
> It is true enough that this makes polling useless as a means of insulating a contemplated withdrawal of recognition against an unfair-labor-practice charge—but there is more to life (and even to business) than escaping unfair-labor-practice findings. An employer

263. With respect to (2), see, for example, *NLRB v. Health Care & Retirement Corp. of America*, 511 U.S. 571 (1994), reversing the Board on an important question of statutory interpretation, the scope of the term "supervisor," without citing *Chevron*. *Id.* at 576–84. The Supreme Court often cites a pre-*Chevron* case, *Fall River Dying & Finishing Corp. v. NLRB*, 482 U.S. 27 (1987), rather than contemporary sources on the appropriate scope of review of NLRB decisions. *E.g.*, *Health Care*, 511 U.S. at 576.

264. Allentown Mack Sales & Serv., Inc. v. NLRB, 522 U.S. 359, 366–67 (1998).

265. *See, e.g.*, Joan Flynn, *The Costs and Benefits of "Hiding the Ball": NLRB Policymaking and the Failure of Judicial Review*, 75 B.U. L. REV. 387 (1995); Michael J. Hayes, *After "Hiding the Ball" is Over: How the NLRB Must Change its Approach to Decision-Making*, 33 RUTGERS L.J. 523 (2002).

> concerned with good employee relations might recognize that abrupt withdrawal of recognition—even from a union that no longer has majority support—will certainly antagonize union supporters, and perhaps even alienate employees who are on the fence. Preceding that action with a careful, unbiased poll can prevent these consequences. The "polls are useless" argument falsely assumes, moreover, that every employer will *want* to withdraw recognition as soon as he has enough evidence of lack of union support to defend against an unfair-labor-practice charge. It seems to us that an employer whose evidence met the "good-faith reasonable doubt" standard might nonetheless want to withdraw recognition only if he had conclusive evidence that the union *in fact* lacked majority support, lest he go through the time and expense of an (ultimately victorious) unfair-labor-practice suit for a benefit that will only last until the next election. And finally, it is probably the case that, though the standard for conviction of an unfair labor practice with regard to polling is identical to the standard with regard to withdrawal of recognition, the chance that a charge will be filed is significantly less with regard to the polling, particularly if the union wins.
>
> It must be acknowledged that the Board's avowed preference for . . . elections over polls fits uncomfortably with its unitary standard; as the Court of Appeals pointed out, that preference should logically produce a more rigorous standard for polling. But there are other reasons why the standard for polling ought to be *less* rigorous than the standard for Board elections. For one thing, the consequences of an election are more severe: If the union loses an employer poll it can still request a Board election, but if the union loses a formal election it is barred from seeking another for a year. If it would be rational for the Board to set the polling standard either higher or lower than the threshold for an . . . election, then surely it is not irrational for the Board to split the difference.[266]

Splitting the difference, without the presentation by the Board of any internal logic beyond indecision and "apparent" compromise, hardly stands up to arbitrary-and-capricious review in its hard look aspect. The Board should not be led to believe that all it needs to do is identify its action as "policymaking" in order to be left alone by reviewing courts.

(3) Be willing to reconsider old precedents that, in effect, decided policy issues as if they were questions of law decided at

266. *Allentown Mack*, 522 U.S. at 364–66 (citations omitted).

Chevron Step One. Allow the Board to revisit those questions, subject to hard look review. Make it clear to the Board that this reconsideration process is dependent on the quality of the Board's reasoning.[267]

(4) For those precedents and new issues that are appropriately viewed as law rather than policy, use the fuzziness of *Mead* to carve out a category of adjudications that will not be entitled to *Chevron* deference. (*Mead* made clear that "express congressional authorizations to engage in the process of rulemaking or adjudication" are a "very good indicator of delegation meriting *Chevron* treatment," but stopped short of saying that *all* agency adjudications *must* receive full *Chevron* deference.)[268] Make it clear to the Board, for example, that poorly reasoned decisions that exhibit no meaningful expertise will be taken to be quick-and-dirty resolutions of individual cases that lack the seriousness indicative of the intent to make law.

(5) If these efforts prove unavailing, revise *Mead* to treat the use of adjudication by an agency that also has the power to engage in rulemaking as a negative factor in determining whether the agency's decision is entitled to full *Chevron* deference. Such a reworking of *Mead* would no more require rulemaking than did *Overton Park*. It would merely factor in to the NLRB's calculus of the relative advantages of rulemaking and adjudication as methods of "finding law."

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267. We are aware that it is not only in the case of the NLRB that reviewing courts are unclear about the level of deference they are actually applying (notwithstanding the terminology they use and the precedents they cite). *See* Matthew C. Stephenson, *Mixed Signals: Reconsidering the Political Economy of Judicial Deference to Administrative Agencies*, 56 ADMIN. L. REV. 657, 709 (2004) ("The Supreme Court's deference doctrine may instead be determined by other factors, it may reflect normative or doctrinal commitments independent of short-term policy results, or it may be as confused and inconsistent as some observers have charged."). But the age of so many significant NLRB precedents compounds the problem in the labor law setting. *See* Estlund, *supra* note 11, at 1527 ("[T]he National Labor Relations Board . . . is increasingly hemmed in by the age of the text and the cumulative impact of stare decisis.").

268. *See* United States v. Mead Corp., 533 U.S. 218, 229 (2001).