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James J. Brudney

Fordham University School of Law, jbrudney@law.fordham.edu

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ISOLATED AND POLITICIZED: THE NLRB'S UNCERTAIN FUTURE

James J. Brudney†

INTRODUCTION

For an agency that presides over a dwindling domain, the National Labor Relations Board (“NLRB” or “Board”) has generated a fair amount of heat in recent times.¹ Since the start of 2004, the Board has issued a remarkable series of decisions weakening the rights of workers to engage in organizing and collective bargaining under the National Labor Relations Act (“NLRA” or “Act”).² These decisions invariably have been authored by appointees of President Bush and typically have been accompanied by an angry or despairing dissent. In the aggregate, they have limited the Act’s coverage over numerous distinct groups of employees,³ restricted the basic right of

† Newton D. Baker-Baker & Hostetler Chair in Law, The Ohio State University Moritz College of Law. I presented an earlier version of this article at the annual meeting of the International Association of the Editors of the Journals of Labor Law, and I am grateful to participants for their insights. Philip Bryden, Victor Brudney, Cindy Estlund, Fred Feinstein, Peter Shane, and Steven Willborn provided valuable comments and suggestions. Katie Downing, Rebecca Fitzthum, and Sara Sampson furnished excellent research assistance. Amy Beaudreault ably prepared the manuscript. The Ohio State University Moritz College of Law and its Center for Interdisciplinary Law and Policy Studies each contributed generous financial support.

1. See, e.g., Steven Greenhouse, *Labor Board’s Critics See a Bias Against Workers*, N.Y. TIMES, Jan. 2, 2005, at A-20; Editorial, *Labor Pains*, NEW REPUBLIC, Jan. 17, 2005, at 7; John Herzfeld, *AFL-CIO Counsel, Management Attorney Both Fault New Directions of Labor Board*, Daily Lab. Rep. (BNA) at A-7 (Jan. 29, 2005); Kenneth R. Dolin, *Estreicher Urges Reforms to Address NLRB “Policy Oscillation,”* ABA Labor and Employment Law 2 (Spring 2005).

2. 29 U.S.C. §§ 151–169 (2000). I use the term “NLRA” to refer to the original 1935 statute as amended at various later dates. I also refer to the 1935 enactment as the Wagner Act, and the 1947 amendments as the Taft-Hartley Act.

3. See, e.g., *Brown University*, 342 N.L.R.B. No. 42 (2004) (holding that graduate assistants are not “employees” because their relationship to their employer is primarily educational); *Brevard Achievement Center*, 342 N.L.R.B. No. 101 (2004) (holding that disabled workers employed as janitors are not “employees” because their relationship to their employer is primarily rehabilitative); *Oakwood Care Center*, 343 N.L.R.B. No. 76 (2004) (holding that “leased” employees (employed by user employer and supplier employer) and “regular” employees (employed solely by user employer) may not be included in same unit for purposes of collective bargaining if user employer objects, even when the two groups of employees share a community of interest).

workers to engage in “concerted activities for the purpose of . . . mutual aid or protection,”⁴ and substantially augmented the ability of employers to interfere with or intimidate employees who seek to organize⁵ or to bargain collectively.⁶ Many of the Board’s decisions have overruled or disregarded prior precedent.⁷ The Board also has invited review in two additional cases that suggest it may be prepared to abandon its decades-old commitment to principles of voluntary recognition.⁸

4. 29 U.S.C. § 157 (2000). *See, e.g.*, *Waters of Orchard Park*, 341 N.L.R.B. No. 93 (2004) (holding that nursing home employees fired for calling state patient care hotline to report excessive heat were engaged in activity that was “concerted” but not “protected” because intended to protect patients rather than workers); *Holling Press, Inc.*, 343 N.L.R.B. No. 45 (2004) (holding that employee who solicited coworker to testify before state agency in support of her sexual harassment complaint was engaged in activity that was “concerted” but not “protected” because intended to advance her own case and not the position of others with similar problems); *IBM Corp.*, 341 N.L.R.B. No. 148 (2004) (holding that non-union employees have no right to be accompanied by a fellow employee when required to meet with employer in setting that may result in discipline or discharge).

5. *See, e.g.*, *Crown Bolt, Inc.*, 343 N.L.R.B. No. 86 (2004) (holding that employer’s threats to close its facility in the event employees vote for union representation are not presumed to be disseminated throughout the bargaining unit); *Washington Fruit & Produce Co.*, 343 N.L.R.B. No. 125 at 8 (2004) (holding that employer’s ‘Excelsior’ list of employee names and addresses that gave incorrect addresses for 87 employees did not warrant setting aside election results in which union lost by 40 votes and union never was able to locate correct addresses for 28 of the 87 erroneous addresses distributed by employer); *Delta Brands, Inc.*, 344 N.L.R.B. No. 10 (2005) (holding that employer’s maintenance of a plainly unlawful no-solicitation policy in an employee handbook is not itself sufficient grounds to set aside an election); *Aladdin Gaming, LLC*, 345 N.L.R.B. No. 41 (2005) (holding that managers who closely observed conversations among off-duty employees about union authorization cards, and then interrupted to offer employer’s position against union, were not engaged in coercive conduct or unlawful surveillance).

6. *See, e.g.*, *AMF Trucking & Warehouse, Inc.*, 342 N.L.R.B. No. 116 (2004) (holding that employer’s asserted refusal to agree to wage increases because firm was “weaker than it was in previous years” and “fighting to keep the business alive” does not constitute a claim of inability to pay and therefore does not trigger obligation to furnish financial information to union as part of good faith bargaining); *Essex Valley Visiting Nurses Assn.*, 343 N.L.R.B. No. 92 (2004) (holding that while employer’s unilateral transfer of nurses from administrative to field positions was unlawful bad faith bargaining, employer’s subsequent firing of the transferred nurses on the grounds that they were unqualified for their new positions was lawful); *Lutheran Heritage Village-Livonia*, 343 N.L.R.B. No. 75 (2004) (holding that employer’s “facially neutral” work rules prohibiting use of “abusive and profane language,” “harassment of other employees . . . in any way” and “verbally, mentally, or physically abusing” a fellow employee or supervisor were not unlawful).

7. *See, e.g.*, *Brown University and Oakwood Care Center*, *supra* note 3; *IBM Corp.*, *supra* note 4; *Crown Bolt and Delta Brands*, *supra* note 5; *Lutheran Heritage*, *supra* note 6.

8. *See* NLRB Order Granting Review in *Dana Corp and Metaldyne Corp.*, *Daily Lab Rep.* (BNA) at E-1 (June 9, 2004) (questioning the presumptive validity of employer decision to recognize union through card check rather than Board-supervised election); *Shaw’s Supermarket*, 343 N.L.R.B. No. 105 (2004) (questioning the continuing validity and application of accretion doctrine set forth in *Kroger Co.*, 219 N.L.R.B. 388 (1975)).

This is hardly the first time that the Board has drawn sharp criticism for being perceived as tilting too far toward management or union interests. Attacks on Board objectivity were made as early as 1939⁹ and have continued periodically for more than half a century.¹⁰ Still, the most recent pattern of pro-management decisions is sufficiently striking to warrant further exploration of the Board's role in implementing and developing labor relations policy.

This Article examines how the NLRB has managed to remain unusually detached or isolated in its decision-making even as it has come to operate in an openly partisan manner. There is a certain paradoxical quality to the coexistence of these two descriptors for Board conduct: isolation in agency performance suggests a neutral separation from the political process whereas politicization implies a close connection to the elected branches. The explanation for this odd pairing involves a number of factors, both institutional and political, some of which have been initiated by the Board while others are beyond its control. The bottom line is an agency strangely removed from national conversations about the future of employer-employee relations.

The Board's isolation and politicization have left it in an unfortunate position. As the agency principally charged with overseeing the development and retention of collective bargaining relationships, it seems incapable of halting or even responding to the movement away from such relationships. The dramatically reduced role played by unions and collective bargaining in the U.S. private economy is hardly attributable solely or even primarily to the workings of the legal regime. At the same time, the Board in its

9. See, e.g., *Proposed Amendments to the National Labor Relations Act: Hearings Before the House Committee on Labor*, 76th Cong., 47-55 (1939) (statement of Rep. Anderson); *id.* at 105-13 (statement of Rep. Ford). See generally *Verbatim Record of the Proceedings of the House Committee Investigating the Labor Board and Wagner Act* (2 vols., Dec. 11, 1939 to Feb. 6 1940) (BNA 1940).

10. See, e.g., *Administration of the Labor-Management Relations Act by the NLRB: Hearings Before the Subcommittee on National Labor Relations Board of the House Committee on Education and Labor* 87th Cong., 516-17 (1961) (statement of Elliot Bredhoff, General Counsel, United Steel Workers of America); *id.* at 149-57 (statement of William Pollock, General President, Textile Workers Union of America); AFL-CIO Lawyers Coordinating Committee, *The Labor Law Exchange: The Dotson Board's Decisions, 1983-85* (1985) [hereinafter *Report on Dotson Board*]; *The National Labor Relations Board: Recent Trends and Their Implications: Hearing before the Subcommittee on Employer-Employee Relations of the House Committee on Education and the Workforce*, 106th Cong. 11-15 (2000) [hereinafter *2000 House Hearing*] (statement of Roger King, member, Society for Human Resource Management); Kirk Victor, *Management Lashes Out at NLRB*, 27 NAT'L J. 2163 (Sept. 2, 1995); Michael D. Goldhaber, *Is the NLRB in a Pro-Labor Mood?*, NAT'L L. J., Oct. 9, 2000 at B-1.

isolated and politicized status has failed to contribute to—and may well have inhibited—a constructive response to these developments.

Part I considers the factors behind the NLRB's isolation and related lack of accountability. Part II describes the increased politicization of Board membership and its special impact in a period of Republican ascendancy. Part III discusses how these two features (isolation and politicization), in concert with the depleted state of the union movement, have contributed to the agency's current troubled status and its seemingly bleak prospects.

I. THE ISOLATING AUTONOMY OF BOARD DECISIONMAKING

A. *Two Sides of Autonomy*

Autonomous tendencies in regulatory decision-making need not be a source of concern. Administrative agencies typically are charged with implementation and enforcement of complex statutory schemes initially formulated years or decades earlier. In exercising such authority, they seek to be both faithful to the regulatory policies enacted by prior Congresses and responsive to the legal, economic, and political changes that have altered the nature of their regulated marketplace.

When accommodating these two roles—fidelity to original purposes and sensitivity to changed circumstances—agencies may well engage in a process of updating statutory meaning as part of their policymaking role.¹¹ Scholars have recognized that federal agencies may construe statutory text “dynamically” when acting as adjudicators, rulemakers, or advocates in the federal courts.¹² The aspiration underlying an agency's dynamic interpretive approach is to make the regulatory scheme as faithful to legislative policy as possible over time and in light of unforeseeable events.¹³

With respect to the Board, however, agency autonomy has lately been associated not with making the NLRA effective or adaptable to changed circumstances but rather with the Act's diminished relevance or applicability to the modern American workplace. A recent

11. See Donald C. Langevoort, *Statutory Obsolescence and the Judicial Process: The Revisionist Role of the Court in Federal Banking Regulation*, 85 MICH. L. REV. 672, 678–718 (1987) (discussing role of Comptroller of Currency and Federal Reserve Board in updating banking laws enacted in 1930s); Jerry Mashaw, *Agency Statutory Interpretation*, <http://www.bepress.com/ils/iss3/art9>, at 14–15, 23 (describing agencies as prudently synthesizing the past and the present).

12. See Edward L. Rubin, *Dynamic Statutory Interpretation in the Administrative State*, <http://www.bepress.com/ils/iss3/art2> at 2, 10; Mashaw, *supra* note 11, at 15.

13. See Mashaw, *supra* note 11, at 21.

national study of worker attitudes estimated that over half of all private sector employees would opt for union representation if given a genuinely free chance to do so.¹⁴ Yet, as new groups of workers in the post-industrial economy have attempted to organize, the Board has found ways to exclude them from protective coverage. Decisions since 2004 have concluded that graduate teaching assistants, disabled workers employed as janitors, and artists' models are not "employees" entitled to the Act's protections,¹⁵ and that temporary workers and regular employees performing side by side may be prohibited from forming a union together.¹⁶

There is powerful evidence that the American workplace today features widespread employer practices of lawful and unlawful resistance to unionization,¹⁷ practices that understandably have led employees to fear mistreatment or termination if they try to organize a union.¹⁸ Yet, the Board in a series of rulings has sharply diminished employees' rights in the pre-election setting, by allowing employers greater leeway when they unlawfully threaten employees,¹⁹ improperly restrict employees' ability to solicit union support,²⁰ and

14. See Andy Levin, *57 Million U.S. Workers Would Form a Union Tomorrow*, Voice@Work Network (March 30, 2005), http://www.unionvoice.org/aflcio_voiceatwork/notice-description.tcl?newsletter_id=1419159 (reporting on recent national poll indicating 53% of nonunion workers want to form unions). See also RICHARD B. FREEMAN & JOEL ROGERS, *WHAT WORKERS WANT* 89 (1999) (reporting that 44% of private sector employees want to be represented by a union).

15. See *Brown University*, 342 N.L.R.B. No. 42 (2004), *Brevard Achievement Center*, 342 N.L.R.B. No. 101 (2004), *Penn. Acad. of the Fine Arts*, 343 N.L.R.B. No. 93 (2004).

16. See *Oakwood Care Center*, 343 N.L.R.B. No. 76 (2004).

17. See, e.g., International Confederation of Free Trade Unions (ICFTU), *International Labor Standards in the United States: Report for the General Council Review of Trade Policies of the United States 3* (2004) [hereinafter *ICFTU Report for WTO*] (reporting that 92% of employers in contested campaigns force employees to attend closed-door meetings and 78% subject employees to one-on-one meetings with supervisors). UNFAIR ADVANTAGE: WORKERS' FREEDOM OF ASSOCIATION IN THE UNITED STATES UNDER INTERNATIONAL HUMAN RIGHTS STANDARDS 71-74 (2000) (reporting that employers threaten to close workplace in 50% of U.S. organizing campaigns); COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS, FINAL REPORT 70 (1994) [hereinafter *DUNLOP COMMISSION REPORT*] (reporting that by 1990, one of fifty union supporters in an election campaign could expect to be victim of unlawful termination). Charles Morris, *A Tale of Two Statutes: Discrimination for Union Activity Under the NLRA and RLA*, 2 EMP. RTS. & EMP. POL'Y J. 327, 330 (1998) (estimating that by the late 1990s, one of every eighteen workers who participated in a union organizing campaign was the object of unlawful discrimination).

18. See *DUNLOP COMMISSION REPORT*, *supra* at 17 (reporting that as of 1991, 41% of all non-union non-managerial employees believe their own employer would fire or otherwise mistreat them if they campaigned for a union).

19. See *Crown Bolt, Inc.*, 343 N.L.R.B. No. 86 (2004).

20. See *Delta Brands Inc.*, 344 N.L.R.B. No. 10 (2004). *But cf.* *Harborside Healthcare Inc.*, 343 N.L.R.B. No. 100 (2004) (allowing little leeway when employer supervisors attempt to solicit employees to support union).

mislead union organizers through dissemination of incorrect employee home addresses.²¹

Employers' intense resistance to efforts at unionization also gives special meaning to the interpretation of what qualifies as concerted activity "for mutual aid or protection" under section 7 of the Act. Yet, the Board seems determined to impose a shriveled understanding of when employees are engaged in "protected activity" under this core provision. In a spate of recent decisions, the Board has held that nurses who adhere to state health department requirements that they report serious risks to patient safety are unprotected,²² as is an employee who solicits a coworker to testify in support of her sexual harassment claim against her employer,²³ or an employee who requests assistance from a coworker in an employer disciplinary proceeding that may result in his termination.²⁴

The Board's recent performance has elicited sharp disapproval from legal academics as well as unions.²⁵ Far from rendering the Act as effective as possible in modern circumstances "by encouraging the practice and procedure of collective bargaining and . . . protecting . . . workers' . . . full freedom of association,"²⁶ the Board has undermined a range of employee protections including some that seemed well-established under prior decisions. On a broader scale, the labor movement in the past decade has criticized the Board and its accompanying legal regime as obstacles to fulfilling the purposes of the Act.²⁷ Many unions have adopted a contractually based approach to organizing: by negotiating directly with employers for neutrality agreements and voluntary card check recognition, labor organizations are increasingly abandoning the Board-supervised representation elections process.²⁸ The current Board seems prepared to restrict this

21. See *Washington Fruit & Produce Co.*, 343 N.L.R.B. No. 125 (2004).

22. See *Waters of Orchard Park*, 341 N.L.R.B. No. 93 (2004).

23. See *Holling Press, Inc.*, 343 N.L.R.B. No. 45 (2004).

24. See *IBM Corp.*, 343 N.L.R.B. No. 148 (2004).

25. See *Greenhouse*, *supra* note 1 (reporting disapproval from several leading labor law scholars as well as AFL-CIO general counsel); Herzfeld, *supra* note 1 (reporting concerns expressed by prominent labor law scholar who also represents management interests in private practice).

26. 29 U.S.C. § 151 (2004) (quoting congressionally formulated "policy of the United States" under Wagner Act and Taft-Hartley Act).

27. See, e.g., *Remarks by AFL-CIO President John J. Sweeney to ABA Labor and Employment Law Section*, Daily Lab. Rep. (BNA), at E-44 (July 12, 2000); Eric Lekus, *Card Check, Neutrality Accords, Best Way for Unions to Organize, UNITE's Raynor Says*, Daily Lab. Rep. (BNA), at C-1 (June 4, 2004).

28. See Lekus, *supra* note 27; James J. Brudney, *Neutrality Agreements and Card Check Recognition: Prospects for Changing Paradigms*, 90 IOWA L. REV. 819, 824-31 (2005).

approach as well, having signaled its willingness to reconsider established precedent supportive of voluntary recognition.²⁹

The scope and magnitude of the Board's rulings raise the question of how the agency can operate in such an apparently unaccountable fashion. On one level, the Board could be viewed as "behaving accountably" in that this barrage of decisions arguably mirrors the intensely anti-union philosophy of a Republican White House and a combatively conservative Congress. At a deeper level, however, the Board's ability and willingness to depart so readily from its own past precedent and the evident purpose of Congresses that enacted and amended the NLRA have been enhanced by its unusually isolated status—a status the agency has in part been assigned and in part helped to construct. This isolation has developed over decades, influenced by several distinct institutional factors.

B. Factors Isolating the NLRB from Other Actors

1. Congressional Inaction

One important way in which agencies renew their vitality and contribute to the development of national policy is by being forced to respond to directives from Congress. The nature of the securities markets has changed dramatically since the 1930s, and Congress repeatedly has asked the Securities and Exchange Commission (SEC) to take on new responsibilities or relinquish old ones.³⁰ Similarly, Congress has frequently requested that the Federal Communications Commission (FCC) address new issues as they have arisen in a dynamically shifting communications industry.³¹

Like its sister New Deal era agencies, the NLRB's domain—the labor-management relations arena—has experienced transformative shifts and upheavals. There have been substantial changes *inter alia* in

29. See *supra* note 8 (describing NLRB orders in *Dana*, *Metaldyne*, and *Shaw's Supermarket*); *NLRB General Counsel Rosenfeld's Report on Unfair Labor Practice Allegations Involving Neutrality Agreements*, Daily Lab. Rep. (BNA), at E-1 (Nov. 18, 2004).

30. See, e.g., Williams Act of 1968, Pub. L. No. 90-439, 82 Stat. 459 (1968) (regulating stock tender offers); Securities Act Amendments of 1975, 15 U.S.C. §§ 78a to 80b-17; Insider Trading and Securities Fraud Enforcement Act of 1988, 15 U.S.C. §§ 78t-1, 78u-1, and 80b-4a; Private Securities Litigation Reform Act of 1995, 15 U.S.C. § 78a; Securities Litigation Uniform Standards Act of 1998, 15 U.S.C. § 78a; Sarbanes-Oxley Act of 2002, 15 U.S.C. §§ 7201 et. seq.

31. See, e.g., Communications Satellite Act of 1962, codified at scattered sections of 47 U.S.C.; Communications Act Amendment of 1978, 47 U.S.C. §§ 390 et. seq.; Children's Television Act of 1990, 47 U.S.C. § 609; Public Telecommunications Act of 1992, 47 U.S.C. § 609; Cable Television Consumer Protection and Competition Act of 1992, codified at scattered sections of 47 U.S.C.; Telecommunications Act of 1996, 47 U.S.C. §§ 609-610.

how terms and conditions of employment are defined and structured,³² in the nature of competition within product markets and the service sector,³³ and in the perceived roles that labor-management cooperation can play in this radically altered workplace.³⁴ Congress, however, has made no comprehensive changes in the NLRA since 1959.³⁵ As a result of this legislative inaction, the Board enjoys neither a renewed mandate nor additional powers and responsibilities. Instead, it relies on an aging regulatory structure to monitor and respond to labor relations realities that could scarcely have been anticipated sixty or seventy years earlier.

What accounts for this extended period of statutory silence? For a start, it reflects the inability to enact majority-supported reforms when a determined and well-organized minority uses congressional procedures to create impasse. As Professor Cynthia Estlund has observed, there have been a number of occasions since the mid 1970s when Congress tried to amend the Act, in an effort to reduce the considerable advantages employers enjoy during union campaigns, to deter rising employer misconduct, and to prohibit certain "lawful" employer activity that seriously chills organizing and collective bargaining efforts.³⁶ Each of these legislative proposals would have augmented and energized Board authority. Each also garnered

32. For instance, safer workplaces, pensions, and family leave have become relatively standard terms of employment that employees want provided or protected. Congress since 1970 has enacted a series of minimum standards statutes (Occupational Safety and Health Act; Employee Retirement Income Security Act; Family and Medical Leave Act) in response to these evolving employee interests.

33. See, e.g., THOMAS I. PALLEY, *PLENTY OF NOTHING: THE DOWNSIZING OF THE AMERICAN DREAM AND THE CASE FOR STRUCTURAL KEYNESIANISM* 29-30, 156-75 (1998) (discussing effects of globalization, deregulation, and free trade policies); DUNLOP COMMISSION REPORT, *supra* note 17, at 1-14 (discussing *inter alia* increased globalization of economic life, impact of technology and deregulation, and links between immigration and terms of employment).

34. See DUNLOP COMMISSION REPORT, *supra* note 17 at 29-42 (discussing new range of employer-sponsored employee participation plans or committees); Brudney, *supra* note 28, at 832-40 (discussing labor and management interest in neutrality agreements and card check recognition).

35. Congress did add amendments in 1974 targeted to the healthcare industry. See Pub. L. No. 93-360, 88 Stat. 395 (1974). There has been considerable organizing and collective bargaining activity in the healthcare sector since the mid 1970s, and these new developments are closely linked to the congressional changes as construed and implemented through Board action. See generally Stephani M. Hildebrandt, Note, *Physicians, Nurses, & Housestaff: The Continuing Struggle for Collective Bargaining Rights*, 33 SUFFOLK U. L. REV. 107 (1999); Rhonda Ferrero-Patten, Comment, *Collective Bargaining Units in the Health Care Industry: The NLRB and Rulemaking*, 12 N. ILL. U. L. REV. 133 (1991).

36. See Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1540-41 (2002) (summarizing failed efforts at labor law reform in 1977-78, 1992, and 1994).

majority support from both houses of Congress, but in the end each succumbed to the supermajority requirements of the U.S. Senate.³⁷

There is, however, more to the story than the business community's ability to marshal a determined legislative minority that can block labor law reform. Congress has remained concerned to promote a fairer distribution of economic resources through workplace regulation—a concern that had helped animate the NLRA. After 1960, though, Congress has addressed this concern through a barrage of new regulatory enactments that offer rights and protections to employees on an individual and individually enforceable basis.

Federal statutes assuring employees equal or nondiscriminatory treatment have established rights for a range of workplace minorities defined by their status as such.³⁸ Federal laws setting minimum standards for specific terms and conditions of employment have effectively preempted firm-based negotiations between management and labor to determine basic levels of protection.³⁹ To be sure, these legislative forays are not incompatible with congressional support for collective bargaining between private entities. Over several decades, however, they have become more than just interstitial efforts to supplement a legal order based on respect for such collective bargaining.⁴⁰ In that regard, the failure to update the NLRA in a comprehensive fashion for nearly fifty years contrasts sharply with Congress's repeated willingness to modify these major individual rights statutes.⁴¹

37. See *id.* (discussing filibusters that blocked three major legislative efforts); James J. Brudney, *To Strike or Not to Strike*, 1999 WIS. L. REV. 67, 81–82 (1999) (summarizing unsuccessful reform efforts in 1992 and 1994). Professor Estlund notes that organized labor also has made use of supermajority requirements to thwart legislative reform. See *id.* at 1542 (discussing 1995 Teamwork for Employees and Managers Act (TEAM Act) and Republican Congress's failure to override veto by President Clinton). But as she points out, while unions need to change the status quo in order to make labor law effective, the business community is content to block all change and allow unions to wither, largely unprotectible under an outmoded regulatory regime. *Id.* at 1543–44.

38. See Title VII of the 1964 Civil Rights Act, 42 U.S.C. §§ 2000e to e-17 (2004); Equal Pay Act of 1963, 29 U.S.C. § 206(d) (2004); 1967 Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621–634 (2004); 1990 Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101–12213 (2004).

39. See, e.g., Occupational Safety and Health Act of 1970 (OSHA), 29 U.S.C. §§ 651–678 (2004); Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1001–1461 (2004); Worker Adjustment and Retraining Notification Act of 1988 (WARN), 29 U.S.C. §§ 2101–2109 (2004).

40. See James J. Brudney, *Reflections on Group Action and the Law of the Workplace*, 74 TEX. L. REV. 1563, 1569–71 (1996) (discussing how individual rights-based legal regime supplanted collective bargaining as primary federal mechanism for ordering employment relations and redistributing economic resources).

41. With respect to Title VII, see Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (codified in scattered sections of 42 U.S.C.); Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076 (codified at 42 U.S.C. § 2000 e(k)); Civil Rights

As a regulatory scheme becomes further removed from its origins, periodic expressions of congressional commitment can be very important in guiding the quality and direction of agency conduct. Conversely, extended congressional silence can send a distinctly cautionary signal. In this instance, decades of Congress's "conscious inaction"—failure to legislate in the face of widely perceived problems with the NLRA—seems to have left the Board with a sense that it should simply persevere on its own to the extent practicable. That sense presumably has been reinforced by Congress's at best episodic interest in conducting formal oversight of Board activities.⁴²

The Board has not been an entirely passive observer in this scenario. As the agency charged with implementing and enforcing legislative protections for the collective bargaining enterprise, it might have been expected to advert to—if not advocate for—issues in need of legislative attention. It has not done so. Instead, as identified in subsequent discussion in this Part, the Board has tended to maintain a low profile, exercising a subdued form of autonomy rather than promoting substantively or recognizing procedurally any continuing need for new policy directives. This unwillingness by an expert agency to address the shortcomings of the status quo probably reinforces Congress's tendency to inertia regarding the existing statutory scheme.

Ultimately, however, the Board is not responsible for what it is unable to control. Major legislative programs such as the NLRA cannot indefinitely sustain high levels of public interest and political attentiveness. Over a period of time, organized supporters shift their attention to other public issues, regulated entities use superior resources to help soften public attitudes, and continuing regulatory

Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (1988) (codified in scattered sections of 20, 29, and 42 U.S.C.); Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified in scattered sections of 42 U.S.C.). With respect to the ADEA, *see* ADEA Amendments of 1978, Pub. L. No. 95-256, 92 Stat. 189 (codified in scattered sections of 29 U.S.C.); ADEA Amendments of 1986, Pub. L. No. 99-592, 100 Stat. 3342 (codified in scattered sections of 29 U.S.C.); Older Workers Benefit Protection Act of 1990, Pub. L. No. 101-433, 104 Stat. 978 (codified as amended in scattered sections of 29 U.S.C.).

42. *See* Brudney, *supra* note 40, at 1593–94 (contrasting meager NLRB oversight in 1980s with stronger oversight of MSHA, OSHA, and EEOC). Since 1995, there have been more oversight hearings, especially in the House, but after 2000 a primary focus of House hearings has been for the Republican majority to criticize union organizing campaigns premised on neutrality and card check, issues that the Board had done little to address directly. *See generally* *Compulsory Union Dues and Corporate Campaigns: Hearings on H.R. 4636 Before the Subcomm. on Workforce Prots. of the House Comm. on Educ. & the Workforce*, 107th Cong. (2002); *Labor Organizing Campaigns: Hearings Before the Subcomm. on Employer-Employee Relations of the House Comm. on Educ. & the Workforce*, 108th Cong. (2004).

presence itself serves to placate public concern.⁴³ When new generations of legislators are unwilling or unable to update the statutory approach, thereby effectively signaling a lack of urgency, the agency is unlikely to take a leading role.

2. The Act's Restrictive Right of Access to Federal Courts

A second element contributing to the Board's autonomy and isolation stems from the absence of a private right of action under the NLRA. Virtually every major employee rights statute enacted by Congress accords workers a right of access to federal court on their own behalf. Employees generally are given the right to sue without serious restriction,⁴⁴ although in some instances this right may be eclipsed when the agency brings an appropriate action in court.⁴⁵ By contrast, the NLRA places enforcement authority entirely in the hands of the Board: adjudication is administrative rather than judicial, and the aggrieved party has very little ability to alter or contest the General Counsel's prosecutorial discretion.⁴⁶

This administrative scheme for enforcing statutory rights reflects the general orientation of New Deal regulatory policy.⁴⁷ It also comports with the historical perception of federal judges as systematically hostile to workers' interests in unionization and collective action.⁴⁸ When Congress did amend the NLRA in 1947 to increase access to federal courts, the impetus came from the business

43. See generally MARVER H. BERNSTEIN, *REGULATING BUSINESS BY INDEPENDENT COMMISSION 74-95* (1955) (discussing parallel aging processes within government agencies).

44. See, e.g., 42 U.S.C. § 2000e-5(f)(1) (Title VII); 29 U.S.C. § 626(c) (ADEA); 29 U.S.C. § 1132(a) (ERISA).

45. See, e.g., 29 U.S.C. § 216(b) (Fair Labor Standards Act); 29 U.S.C. § 2617(a)(4) (Family and Medical Leave Act). One other workplace statute that vests enforcement authority exclusively in the agency is OSHA, see 29 U.S.C. § 659. Coincidentally or not, the agency's performance under OSHA also has been heavily criticized and there too the statute has proven virtually impossible to amend.

46. See *NLRB v. United Food and Commercial Workers Union, Local 23*, 484 U.S. 112, 122-23 (1987) (observing that General Counsel's decision not to issue unfair labor practice complaint is not subject to judicial review); *THE DEVELOPING LABOR LAW 2599-2608* (Patrick Hardin & John Higgins Jr. eds., 4th ed. 2001) (discussing general rule that lower federal courts lack jurisdiction to consider suits seeking to vacate or mandate Board action in connection with representation or unfair labor practice cases).

47. See, e.g., 15 U.S.C. § 78u (describing SEC investigative and enforcement powers); 47 U.S.C. §§ 203-05, 207-08, 312, 401-07 (describing FCC administrative and enforcement powers). See generally PETER H. IRONS, *THE NEW DEAL LAWYERS 3-6, 10-14* (1982).

48. FELIX FRANKFURTER & NATHAN GREENE, *THE LABOR INJUNCTION 200-05* (1930); see IRONS, *supra* note 47, at 13. See also Matthew C. Stephenson, *Legislative Allocation of Delegated Power: Uncertainty, Risk, and the Choice Between Agencies and Courts* (May 20, 2005, unpublished draft on file with author) (discussing why legislators prefer delegation to agencies rather than courts when ideological distance between Congress and agency is perceived as smaller than between Congress and courts).

community, which wanted to assure that unions, as unincorporated associations, could be held accountable for their contractual agreements and also for their participation in illegal secondary picketing.⁴⁹ That creation of private rights of action did not, however, alter the administrative scheme for enforcing employees' rights to organize or engage in collective bargaining free from employer misconduct under section 8(a) of the Act.

In more recent decades, of course, private litigation under other federal workplace laws has expanded the universe of participants contributing to the reform and updating of employee rights and employer responsibilities. As illustrated by Title VII of the 1964 Civil Rights Act, private actions that allow for attorneys' fees bring additional institutional players into the larger dialogue about race and sex discrimination in the workplace.⁵⁰ Litigation, often initiated as part of a national strategy by the plaintiffs' civil rights bar, has on various occasions pushed the envelope of federal antidiscrimination policy.⁵¹ These lawsuits, and the reactions of the sophisticated groups that support or oppose them, also have helped fuel Congress's continued interest in revisiting and revising the basic regulatory scheme. Major changes in Title VII have been due at least in part to the civil rights community's pressure to override certain restrictive Supreme Court decisions, and the business community's concern to temper the potential excesses of trial courts and juries when awarding damages to plaintiffs.⁵²

Even without granting explicit access to federal court for workers, the NLR's open-textured statements addressed to employee rights and employer prohibitions⁵³ can be viewed as

49. See Brudney *supra* note 28, at 847 (discussing § 301); Estlund, *supra* note 36, at 1553 n.110 (discussing § 303).

50. See, e.g., *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (class action by African American employees establishes disparate impact right of action); *Franks v. Bowman Transp. Co. Inc.*, 424 U.S. 747 (1976) (private class action establishes access to retroactive seniority for victims of unlawful discrimination); *City of Los Angeles, Dept. of Water & Power v. Manhart*, 435 U.S. 702 (1978) (private class action establishes that gender-based differential in pension fund contributions is unlawful sex discrimination).

51. To take one example, a series of Supreme Court cases has established the existence and contours of a right of action for hostile environment sexual harassment. See *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986); *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998). See generally Estlund, *supra* note 36, at 1556.

52. The 1991 Civil Rights Act (Pub. L. No. 102-166) included provisions overriding numerous Supreme Court decisions, as well as provisions responsive to employer concerns about excessive litigation. Interest groups from the civil rights and business communities played pivotal roles in the lobbying and negotiation processes accompanying enactment. See generally Adam Clymer, *Senate Approves Civil Rights Bill 95-5*, N.Y. TIMES, Oct. 31, 1991, at A20.

53. See 29 U.S.C. §§ 7, 8(a)(1), 8(a)(3); Estlund *supra* note 36, at 1552.

allowing for such a proactive role, by in effect inviting agency arguments that would favor an implied private right of action. Significantly, the SEC from an early point chose to advocate for such implied rights of action on behalf of investors under the federal securities laws.⁵⁴ The Commission's theory—regularly advanced in amicus briefs as well as party submissions—was that the persons Congress intended to protect under the Act should be able to sue when their protections were abridged through a breach of the statute.⁵⁵ Following the SEC's success in the lower courts over several decades and ultimately in the Supreme Court in 1964,⁵⁶ there has been far more private litigation under the federal securities laws than litigation initiated by the SEC.⁵⁷ That altered balance, reflecting in part the limited resources allocated to the SEC for judicial enforcement, has contributed substantially to the development of new policy in the securities law arena.

The Board, however, has never chosen to press for private rights of action.⁵⁸ In this regard, Professor Estlund has conducted an intriguing thought experiment, borrowing from the Title VII jurisprudence of disparate impact claims and hostile environment discriminatory harassment litigation to imagine private lawsuits that allege disparate impact liability or "hostile anti-union environment" harassment based on the broad antidiscrimination language of section 8(a)(3).⁵⁹ Such private litigation efforts could have led to a more open and elaborate debate as to what constitutes anti-union conduct. This

54. See *Geismar v. Bond & Goodwin Inc.*, 40 F. Supp. 876, 878 (S.D.N.Y. 1941) (implying action for damages under § 29(b) of 1934 Act); *Baird v. Franklin* 141 F.2d 238, 239, 242 (2d Cir. 1941) (recognizing implied damages action against stock exchange for failure to enforce Commission rules authorized under § 6 of 1934 Act); *Kardon v. Nat'l Gypsum*, 69 F. Supp. 512, 513-15 (E.D. Pa. 1946) (implying private right of action by defrauded investors under Rule 10b-5). See generally David S. Ruder, *The Development of Legal Doctrine Through Amicus Participation: The SEC Experience*, 1989 WIS. L. REV. 1167, 1172-74 (1989).

55. See *Kardon*, 69 F. Supp. at 513-14, Ruder, *supra* note 54, at 1173.

56. See *J.I. Case Co. v. Borak*, 377 U.S. 426, 433-35 (1964) (recognizing implied right of action to enforce SEC proxy rules promulgated under § 14 of 1934 Act). For thoughtful discussion of the SEC's role during this extended period, see Ruder, *supra* note 54, at 1174 nn.30-31.

57. See Ruder, *supra* note 54, at 1174-75 (reporting that from 1961 to 1988, number of federal court cases filed by SEC rose from roughly 100 to roughly 200 annually, while number of private lawsuits rose from about 170 to 2,400). Ruder attributes some of the substantial increase in private litigation to the liberalization of class action procedures under Fed. R. Civ. P. 23, see *id.* at 1175. It seems likely that readier access to class actions could also have benefited workers seeking remedies under the NLRA.

58. To be sure, had the Board supported an implied right of action on behalf of the Act's principal beneficiaries, it would have had to address whether employees or unions should be primary initiators, as well as the prospect that employers might pursue comparable rights of action under § 8(b) of the Act.

59. See Estlund *supra* note 36, at 1556-57.

debate in turn would presumably generate more congressional interest in adapting the Act to embrace or reject judicial interpretations inspired by private lawsuits. No such events have occurred, however, because private rights of action under the NLRA simply do not exist.

Apart from private litigation, the NLRA language—including its authorization to pursue remedies—is expansive enough to be viewed as conferring broad policymaking powers on the Board itself.⁶⁰ As discussed below, the Board has for the most part elected not to pursue those powers. Given that unions and employees lack the independent ability to initiate law reform efforts through the courts, the Board's decision to forego a dynamic or high profile enforcement role further contributes to the agency's isolation.

3. Board Reliance on Adjudication, not Rulemaking

Agencies administering federally enacted regulatory schemes are expected to perform two basic functions: promulgating norms or standards of general applicability and resolving specific controversies that arise under the law. Each function enables an agency to develop, implement, and enforce policies that are consistent with and promote the regulatory arrangement established by statute. Congress typically confers on an agency both rulemaking and adjudicatory authority, and the NLRB possesses both sets of powers.⁶¹ However, over its seventy year history the Board has chosen to operate virtually exclusively through adjudication, eschewing its rulemaking authority.⁶²

The Board's decision to rely on case-by-case adjudication as its means of developing policy presumably reflects a series of strategic judgments regarding how best to promote the agency's mission. The traditional notice-and-comment rulemaking process⁶³ is often time-consuming and cumbersome, and thus can interfere with the Board's ability to respond in a prompt and adequate fashion to rapidly changing industrial practices. In addition, the binding and uniform

60. See § 10(c) (authorizing Board to exercise broad remedial powers, including "such affirmative action as will effectuate the purposes of the Act"); *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 500-01 (1978); *Phelps-Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941).

61. See *NLRB v. Bell Aerospace Co.* 416 U.S. 267, 292-95 (1974) (recognizing that Board has both powers); *NLRB v. Wyman-Gordan Co.*, 394 U.S. 759, 763-64, 772 (1969) (same).

62. See *American Hosp. Assn v. NLRB*, 499 U.S. 606, 614 (1991) (upholding Board's one and only completed rulemaking endeavor). This rulemaking was initiated pursuant to the 1974 health care amendments discussed *supra* at note 35.

63. See 5 U.S.C. § 553 (2004). See generally *Motor Vehicle Mfrs. Assn. v. State Farm Mutual Ins. Co.*, 463 U.S. 29 (1983); *United States v. Nova Scotia Food Prod. Corp.*, 568 F.2d 240 (2d Cir. 1977).

effect of formally promulgated rules makes agency adjustment and adaptation more difficult. The Board may well have perceived that rulemaking's monolithic approach would leave little room for geographically inspired variations in judicial response. Such variations are likely if not inevitable given the distinct regional differences that exist regarding public attitudes toward collective bargaining. Relatedly, there is far more at stake when a rule is rejected by a federal court than when an adjudicated decision is reversed. The Board may prefer the incremental adjudication-based approach to policymaking because it minimizes the risks associated with judicial review.

As it strives for political respect and legitimacy in the divisive setting of labor-management relations, the Board may also have chosen adjudication for more narrowly self-protective reasons. An adjudicatory approach tends to promote autonomy by shielding agency policy preferences from the systematic oversight of Congress or federal courts. Rather than establishing clear standards of conduct based on articulated reasons that may be challenged by the two other branches of government, the Board on a range of sensitive topics has developed some version of a totality-of-the-circumstances approach.⁶⁴ Thoughtful Board insiders have noted that the agency's multi-factor approaches often yield fairly consistent rule-like outcomes, but do so through low key fact-based adjudication that attracts less attention from congressional committees or federal judges.⁶⁵

Notwithstanding the advantages associated with adjudication, the Board's strategy has imposed certain costs. Rulemaking allows for advance planning, enabling an agency to develop a coherent agenda regarding which problems to address instead of acting exclusively in response to particular controversies as they arise. Rulemaking also encourages the collection and analysis of information at a more complete and sophisticated level. Agencies that exercise

64. See, e.g., Jean Country, 291 N.L.R.B. 11 (1988) (setting forth multi-factor test to balance employer property rights against union organizers' access rights); Sofco, Inc., 268 N.L.R.B. 159 (1983) (setting forth totality of circumstances approach to assess employer's claim of good faith doubt as to whether a previously certified union has lost its majority support); Avecor, Inc. 296 N.L.R.B. 727, 748-50 (1989) and Camvac Int'l Inc., 288 N.L.R.B. 816, 822-23 (1988) (adopting totality of circumstances approach to whether employer ULPs are serious enough to warrant bargaining order); NLRB v. Purnell's Pride, Inc., 609 F.2d 1153 (5th Cir. 1980) (identifying eleven factors on which Board relies when deciding if there is appropriate "community of interest" to approve a requested election unit).

65. See Joan Flynn, *The Costs and Benefits of "Hiding the Ball": NLRB Policymaking and the Failure of Judicial Review*, 75 B.U.L. REV. 387, 393-97 (1995) (discussing Board's application of Jean Country test and good faith doubt approach); Berton B. Subrin, *Conserving Energy at the Labor Board: The Case for Making Rules on Collective Bargaining Units*, 32 LAB. L.J. 105, 110 (1981) (discussing Board's use of community of interest approach).

policymaking responsibilities outside the confines of individual disputes are more likely to initiate or request empirical studies, and to gather and integrate qualitative materials on their own. By declining to make use of its rulemaking powers, the Board has missed opportunities to recognize and respond when studies indicated that its laboratory conditions doctrine results in an uneven playing field,⁶⁶ or that its remedial approach does little to deter employer misconduct.⁶⁷

Administrative law scholars have identified the general challenge of retaining agency vitality “when the evil which gives rise to a [regulatory] reform has been partially alleviated.”⁶⁸ The Board’s overly judicialized approach tends to increase that challenge. A focus on ad hoc decision-making makes it harder for Board members to engage in long-range planning or to contemplate a more public dialogue in response to significant changes in the nature of the workplace.⁶⁹

Over the past half-century, unions and management have had to confront numerous problems in a post-industrial setting that were not addressed or in some instances even foreseen by the Congresses that enacted the NLRA. The impact of publicly accessible workplaces on an employer’s common law right to exclude union organizers from its premises, the dramatic growth of professional and service work, the proliferation of temporary and part-time employment, and the mobility of capital as it affects the transfer and consolidation of jobs: these are among the issues that might have benefited from more systematic, deliberative, and transparent agency consideration. There is the chance, of course, that higher agency visibility would bring more opposition, and that Congress or the courts might not accept the

66. See, e.g., RICHARD B. FREEMAN & JAMES L. MEDOFF, *WHAT DO UNIONS DO?* 234–36 (1984) (summarizing results from multiple studies that show substantial adverse impact on employee free choice from lawful employer speech and conduct); Kate L. Bronfenbrenner, *Employer Behavior in Certification Elections and First Contract Campaigns: Implications for Labor Law Reform*, in *RESTORING THE PROMISE OF AMERICAN LABOR LAW* 75, 80–82 (Sheldon Friedman et. al. eds., 1994) (reporting adverse impact from captive audience meetings); Richard B. Freeman & Morris M. Kleiner, *Employer Behavior in the Face of Union Organizing Drives*, 43 *INDUS. & LAB. REL. REV.* 351, 361, 364 (1990) (reporting adverse impact of supervisors’ speaking out against union).

67. See, e.g., Paul Weiler, *Promises to Keep: Securing Workers’ Rights to Self-Organization Under the NLRA*, 96 *HARV. L. REV.* 1769, 1787–93 (1983) (discussing inadequacies of Board’s back pay and reinstatement remedies); Terri A. Bethel & Catherine A. Melfi, *Judicial Enforcement of NLRB Bargaining Orders: What Influences the Courts?*, 22 *U.C. DAVIS L. REV.* 139, 173–75 (1988) (discussing inadequacies of Board’s bargaining order remedy).

68. LOUIS L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 12 (abridged student edition 1965).

69. See JAFFE, *supra* note 68; WILLIAM L. CARY, *POLITICS AND THE REGULATORY AGENCIES* 66 (1967). See generally Estlund, *supra* note 36, at 1535–36 (summarizing changes in the economy, the organization of work, and the composition of the workforce).

Board's rule-based outcomes or might undermine Board efforts at consistency by imposing partial invalidations.⁷⁰ In avoiding these risks, however, the Board has also compromised its ability to contribute to national policy on labor-management relations or even to think in such terms. This posture has frustrated both Congress and the courts, replacing the possibility of constructive engagement with the reality of subtle but persistent disdain for an agency that rarely steps up to the plate.⁷¹

4. Board Non-Acquiescence

Administrative agencies may at times refuse to conform their internal policies and practices to seemingly applicable appellate court precedent. This practice, known as non-acquiescence, derives from agencies' perception that Congress and the President have by statute authorized them to perform as the primary interpreters and enforcers of the relevant national policy. As was true regarding its preference for adjudication, the NLRB is not alone among federal agencies when it engages in such non-acquiescence.⁷²

The Board, though, has been unusually determined and aggressive in pursuing this practice for more than sixty years.⁷³ While recognizing that an appellate court's judgment must be treated as controlling in the decision actually announced by that court, the Board frequently accords such decisions no more deference than is due to the law of the case.⁷⁴ Thus, the Board believes it may disregard not only the precedent of a geographically distinct circuit court—intercircuit non-acquiescence—but also the precedent of the very

70. *But cf.* *American Hosp. Assn. v. NLRB* 499 U.S. 606 (1991) (sustaining unanimously the Board's one and only exercise of its rulemaking authority despite strenuous opposition from the acute health care industry).

71. *See, e.g., Lechmere Inc. v. NLRB*, 502 U.S. 527 (1992) (rejecting Board's multi-factor test for determining union organizers' access rights); *Lee Lumber & Bldg. Material Corp. v. NLRB*, 117 F.3d 1454, 1461–62 (D.C. Cir. 1997) (criticizing Board's consistent refusal to set forth reasons or standards justifying its imposition of bargaining orders). *See also* Joyce Cutler, *Gould Criticizes Congress, Budget Cuts in Last Public Speech as Board Chairman*, Daily Lab. Rep. (BNA) at D-19 (July 23, 1998) (reporting that outgoing Board Chairman expressed dismay over pressure from individual Republican senators and House members regarding pending adjudications and proposed budget cuts).

72. *See generally* Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 YALE L.J. 679 (1989) (discussing Internal Revenue Service and Social Security Administration as prominent practitioners).

73. *See* *Acme Indus. Police*, 58 N.L.R.B. 1342 (1944).

74. *See* Rebecca Hanner White, *Time for a New Approach: Why the Judiciary Should Disregard the "Law of the Circuit" When Confronting Nonacquiescence by the National Labor Relations Board*, 69 N.C.L. REV. 639, 642 (1991).

circuit that will review the agency's decision—intracircuit non-acquiescence.⁷⁵

The Board over the years has set forth several reasons for refusing to acquiesce in appellate court decisions. One is that it is charged with “[the] uniform and orderly administration of a national act” and it can best fulfill this congressionally delegated responsibility by adhering to its own conception of national labor policy, subject only to Supreme Court decisions that set forth conflicting national rules or standards.⁷⁶ In addition, the Board points to its special expertise in the complex field of industrial relations, and the Supreme Court at times has recognized that expertise in deferring to Board interpretations rather than those of the intermediate courts, even when the Board has been less than consistent in its approach.⁷⁷ Finally, the NLRA's generous venue provisions mean that review of Board orders is available in many different circuits, and the Board cannot readily anticipate which circuit court's “law” would be applicable to an agency decision.⁷⁸

The NLRB's practice of non-acquiescence affects the agency's conduct internally as well as in its relations with the circuit courts. This internal non-acquiescence is especially important given that some 97% of Board actions are disposed of at the agency level.⁷⁹ The Board has made clear that a trial examiner's duty is to decide cases based on the precedent of the Board rather than the courts of appeal.⁸⁰ Even more important, the General Counsel typically does not consider appellate court precedent when exercising his very broad discretion as to whether to initiate an unfair labor practice action.⁸¹

75. See White, *supra* note 74, at 642–43; Ross E. Davies, *Remedial Nonacquiescence*, 89 IOWA L. REV. 65, 100 (2003).

76. Ins. Agents Int'l Union, 119 N.L.R.B. 768, 773 (1957). *enf. denied* 260 F.2d 736 (D.C. Circuit 1958), *aff'd* 361 U.S., 477 (1960). See Estreicher & Revesz, *supra* note 72, at 708.

77. See, e.g., NLRB v. Curtin Matheson Scientific, Inc., 494 U.S. 775, 786–96 (1990) (crediting Board's latest position regarding presumption of union support among permanent replacements); NLRB v. Trans. Mgmt. Corp., 462 U.S. 393, 398–404 (1983) (deferring to Board's new approach to mixed motive discrimination). See generally Estreicher & Revesz, *supra* note 72, at 708 n.154.

78. See 29 U.S.C. § 160(e), (f) (providing that an aggrieved party may appeal from, and the Board may seek enforcement of, an NLRB order in the circuit where the unfair labor practice arose, or in which the aggrieved party resides or transacts business); White, *supra* note 74, at 648–49 (observing that for employers or unions that transact business nationwide, all circuits are available).

79. See 68 N.L.R.B. Ann. Rep. tbl. 8 (2003); 69 N.L.R.B. Ann. Rep. tbl. 8 (2004).

80. See Flynn, *supra* note 65, at 420 and sources cited therein.

81. See *id.* The Board's reluctance to invoke appellate court precedent has not deterred the employer community from doing so. It is not unusual for employers to cite circuit court cases in their post-hearing briefs to trial examiners. Such citations could reflect ignorance of Board practices, but more likely signal to Board attorneys an intent to pursue reversal of any violations found by the NLRB.

The Board's non-acquiescence doctrine stems in part from the historical circumstances at the time the agency was created. Congress enacted the NLRA in 1935, during an extended period in which federal courts were deeply unsympathetic to labor unions.⁸² Although the NLRA and the Norris-La Guardia Act⁸³ placed important limits on the power of federal courts, the Board's insistence on its role as primary articulator of labor relations policy continues to resonate. Appellate judges in recent decades have been perceived as having little knowledge about the real world of industrial affairs⁸⁴ and a declining appreciation for the collective rights principles underlying the NLRA.⁸⁵ A more persuasive justification for Board non-acquiescence today may be judicial lack of familiarity with labor-management relations rather than the judicial hostility toward unions that helped inspire the Act.

Once again, however, a collateral attribute of Board non-acquiescence has been the agency's failure to initiate or contribute to dialogue among policymakers. The Board's insistence on the correctness of its position often does not include any effort to confront or recognize its fundamental policy differences with the appellate courts.⁸⁶ To some extent, the omission may be linked to certain dubious aspects of Board expertise. As adjudicators, Board members are invariably trained attorneys but they often lack substantial experience in the labor relations world.⁸⁷ Although the General Counsel's staff in the regions and the administrative law judges who try cases may have greater exposure to the realities of organizing and collective bargaining, Board members who must remain administratively neutral have little or no contact with those professionals.⁸⁸ For these among other reasons, the Board tends not to elaborate on its legal conclusions by reference to what accounts for

82. See, e.g., FRANKFURTER & GREENE *supra* note 48, at 200-05, Bernard D. Meltzer, *The Brandeis-Gompers Debates on "Incorporation" of Labor Unions*, 1 THE GREEN BAG 299, 313-15 (2d. ser. 1998). See generally WILLIAM G. ROSS, *A MUTED FURY: POPULISTS, PROGRESSIVES, AND LABOR UNIONS CONFRONT THE COURTS, 1890-1937* (1994).

83. Pub. L. No. 72-65, 47 Stat. 70 (1932).

84. See generally Flynn, *supra* note 65, at 426 n.164 and sources cited therein.

85. See James J. Brudney, *A Famous Victory: Collective Bargaining Protections and the Statutory Aging Process*, 74 N.C. L. REV. 939, 988-1020 (1994) (documenting appellate courts' insensitivity to bargaining-related protections in 1980s and 1990s).

86. See Davies, *supra* note 75, at 100 n.149 (citing decisions that reflect persistent but unexplained non-acquiescence). See also Brudney, *supra* note 85, at 969 n.92 (citing decisions that reflect Board's capitulation on non-acquiescence, but without explanation).

87. See JULIUS G. GETMAN ET. AL., *LABOR-MANAGEMENT RELATIONS AND THE LAW* 9 (2d ed. 1999) (discussing how neutral labor relations experts are rarely asked to serve, and even more rarely do so).

88. See *id.*

newly emerging employee attitudes or the changing nature of labor-management practices.⁸⁹

Moreover, as an adjudicatory body, the Board must contend with the potentially supervening role of appellate courts that review agency findings of fact and conclusions as to statutory meaning. In seeking to avoid or minimize judicial rejection of its positions, the Board apparently believes it presents less of a target by simply asserting its expertise and consequent entitlement to deference, rather than by explaining and justifying how it applies that expertise with reference to the circumstances of each case. Some observers have concluded that the agency's silence as to the reasons for non-acquiescence reflects primarily an interest in maximizing its success rate on appeal, as opposed to using its expertise to educate circuit courts or to signal the Supreme Court about a major policy disagreement.⁹⁰

Over the years, the NLRB's elliptical or unexplained approach to asserting its primacy has yielded mixed results. The Supreme Court has rejected the Board's "expert" positions in several key policy areas,⁹¹ and appellate courts have eviscerated the agency's stance on other important matters.⁹² The extent to which Board use of non-acquiescence has enhanced agency success in adjudicative terms remains open to debate.⁹³ What is more certain is that non-acquiescence as practiced by the Board has further encouraged the agency's isolation from other branches of government.

89. See *id.* at 10 (noting that apart from its own spotty knowledge about labor relations reality, Board studiously ignores research on this subject by others). Merton C. Bernstein, *The NLRB's Adjudication—Rule Making Dilemma Under the Administrative Procedure Act*, 79 YALE L.J. 571, 578 (1970) (discussing Board's lack of information regarding real world of labor-management relations, and inability to monitor the impact of Board doctrines on industrial practices).

90. See Flynn, *supra* note 65, at 425–29; Davies, *supra* note 75, at 100–01.

91. See, e.g., *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992) (restricting union organizers' access to employer premises); *NLRB v. Yeshiva Univ.*, 444 U.S. 672 (1980) (excluding university faculty from NLRA coverage as managers); *NLRB v. Health Care and Ret. Corp.*, 511 U.S. 271 (1994) (excluding licensed practical nurses from NLRA coverage as supervisors).

92. See Brudney, *supra* note 85, at 969 n.92 (describing appellate courts' rejection of Board approach to substantive bad faith bargaining); *id.* at 988–1018 (describing appellate courts' rejection of Board approach on good faith doubt, initial recognition bargaining orders, and incumbent restoration bargaining orders).

93. See, e.g., Peter H. Schuck & E. Donald Elliott, *To the Chevron Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984, 1020–22 (1990) (reporting that NLRB decisions reviewed by courts of appeal in 1984–85 were affirmed *in toto* at a lower rate (75%) than decisions of other agencies that operated wholly through adjudication, such as Merit Systems Protection Board (90%), Immigration and Naturalization Service (83%), and Patent and Trademark Office (81%)).

C. *The Evolving Consequences of a Stand-Alone Posture*

I have tried to demonstrate how various factors—reflecting the extrinsic realities of politics, the structure of the Act, and internal agency choices—have contributed to the Board's unusual remoteness from Congress and the courts, and its consequent minimal role in the ongoing national dialogue about workplace law and policy. I do not mean to imply that a minimal role means no role at all: the Board has not simply abjured interest in the policymaking arena. Indeed, the agency's preference for adjudication and its penchant for non-acquiescence may be understood in part as an effort to focus on the Supreme Court as a discussant addressing how best to update the Act.

From this perspective, the Board experienced some triumphs, perhaps most notably in the 1960s. During that ten year period, the Court acceded to the Board's positions by conferring protection against diverse employer efforts to chill group action,⁹⁴ by requiring unionized employers to comply with certain collective bargaining norms,⁹⁵ and by authorizing the Board to order bargaining when extreme employer misconduct undermined a representation election.⁹⁶

Since 1970, however, Board efforts in the Supreme Court to vindicate employees' support for organizing and collective bargaining have been less successful. In aggregate terms, Board findings of employer liability under section 8(a) were sustained at a far greater rate in Court cases decided before 1970 than they have been in subsequent Court decisions.⁹⁷ Moreover, on a number of high profile occasions, the Court has rebuffed Board attempts to maintain or

94. See *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 587–89, 616–20 (1969) (protecting against employer threats during campaign); *NLRB v. Exch. Parts Co.*, 375 U.S. 405 (1964) (protecting against employer conferral of economic benefits during campaign); *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26 (1967) (protecting against employer discriminatory self-help strategies).

95. See, e.g., *NLRB v. Katz*, 369 U.S. 736 (1962) (prohibiting employers from unilaterally altering working conditions without bargaining); *Fibreboard Paper Prod. Corp. v. NLRB*, 379 U.S. 203 (1964) (requiring employer to bargain with union over decision to subcontract portion of the work). See also *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956) (earlier decision requiring employer to produce information as part of bargaining process).

96. See *Gissel*, 395 U.S. at 595–616.

97. See Brudney, *supra* note 40, at 1573–74 (reporting that Court sustained Board's § 8(a) findings in fifty of sixty cases (83%) before 1970, but in only twenty-one of thirty-six cases (58%) from 1970 to 1994). Since 1995, Board determinations of employer liability under § 8(a) have been supported by the Court in three decisions and rejected by the Court in three others. Compare *NLRB v. Town & Country Elec., Inc.*, 516 U.S. 85 (1995) (supporting Board determination), *Holly Farms Corp. v. NLRB*, 517 U.S. 392 (1996) (same), and *Auciello Iron Works v. NLRB*, 517 U.S. 781 (1996) (same) with *Allentown Mack Sales and Service, Inc. v. NLRB*, 522 U.S. 359 (1998) (rejecting Board determination), *NLRB v. Kentucky River Cmty. Care, Inc.*, 532 U.S. 706 (2001) (same), and *B.E. & K. Const. Co. v. NLRB*, 536 U.S. 516 (2002) (same).

renew the Act's vigor in the contemporary workplace. The agency's position has been rejected when it sought to make job security a mandatory subject of bargaining;⁹⁸ to provide non-employee union organizers with access to employer premises in the service sector;⁹⁹ and to emphasize the Act's applicability to professional employees who exercise independent authority in their jobs.¹⁰⁰ In several of these decisions, the Board's isolated status and less than transparent decision-making approach appear to have contributed to its lack of success.¹⁰¹

The Board, of course, has no influence over the composition of the Supreme Court. The Court's growing distaste for agency efforts to protect collective bargaining in a post-industrial economy coincided with the arrival of a new generation of Justices whose backgrounds and experiences may well have left them less sympathetic than their predecessors were to the virtues of unions and the collective bargaining process.¹⁰² In addition, product and labor markets have increasingly been shaped by factors beyond the Board's ability to control, such as deregulation, foreign competition, and the impact of technology.

These external changes in values and policy priorities likely deserve more weight than Board internal processes when accounting for the agency's indifferent track record since 1970. Still, it is worth

98. See *First Nat'l Maint. Corp. v. NLRB*, 452 U.S. 666 (1981).

99. See *Lechmere Inc. v. NLRB*, 502 U.S. 527 (1992).

100. See *NLRB v. Yeshiva Univ.*, 444 U.S. 672 (1980), *NLRB v. Health Care and Ret. Corp.*, 511 U.S. 576 (1994), *NLRB v. Kentucky River Cmty. Care*, 532 U.S. 706 (2001).

101. See, e.g., *First National Maintenance*, 452 U.S. at 673, 680-86 (criticizing Board's adjudicatory inconsistency and developing a general rule to preclude mandatory bargaining over partial closing decisions); *Lechmere*, 502 U.S. at 535-38 (noting lack of predictability in Board's multi-factor balancing test governing access for non-employee organizers, and holding that Board misapprehended earlier Supreme Court decision when developing the test); *Yeshiva*, 444 U.S. at 678, 691 (refusing to defer to Board's approval of unit of all full-time faculty members, in part because of agency's conclusory rationales and absence of factual analysis). See also *Allentown Mack*, 522 U.S. at 372-76 (criticizing Board's repeatedly unreasonable application of its stated "good faith doubt" test, adding that "an agency should not be able to impede judicial review, and indeed political oversight, by disguising its policymaking as factfinding").

102. Justice Powell, who joined the Court in 1971, is the most prominent example of this new ideological perspective. See, e.g., *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974); *NLRB v. Yeshiva Univ.*, 444 U.S. 672 (1980); *Bowen v. U.S. Postal Serv.*, 459 U.S. 212 (1983); *Patternmakers' League of North America, AFL-CIO v. NLRB*, 473 U.S. 95 (1985); *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 54-63 (1987) (dissenting opinion). Justice O'Connor, appointed in 1981, also evidenced relatively little sympathy for workers and unions engaged in concerted activity. See, e.g., *NLRB v. City Disposal Sys., Inc.*, 465 U.S. 822, 841-47 (1984) (dissenting opinion); *TransWorld Airlines Inc. v. Indep. Fed'n of Flight Attendants*, 489 U.S. 426 (1989); *Holly Farms Corp. v. NLRB*, 517 U.S. 392, 409-15 (1996) (dissenting opinion). The same can be said for Justice Scalia, appointed in 1986. See, e.g., *Allentown Mack Sales and Service, Inc. v. NLRB*, 522 U.S. 359 (1998); *NLRB v. Kentucky River Cmty. Care*, 532 U.S. 706 (2001); *NLRB v. Curtin-Matheson Scientific, Inc.* 494 U.S. 775, 801-19 (1990) (dissenting opinion).

pondering whether the Board's lack of transparency, perhaps useful when Justices and executive branch leadership were largely supportive of the Act, has become a genuine burden as certain judicial and political centers of gravity have shifted. One might, for instance, wonder if a less isolated Board would have utilized its expertise and experience to develop a dialogue involving concerned labor and business interests, or to engage a Democratically-controlled Congress as the Court became gradually less receptive to agency interpretations of congressionally enacted labor policy.

Apart from the impact of external events, the agency's participation as an institutional actor in national policy conversations also has been seriously compromised by the increased politicization of Board membership. As with the Board's unusual isolation, this politicizing effect has emerged over time; its cumulative impact deserves attention.

II. THE POLITICIZATION OF BOARD MEMBERSHIP

The NLRB was established with the understanding that its members would be nonpartisan and neutral. The Congress that created the three-member Board in 1935, and the Congress that expanded it to five members while modifying its structure in 1947, each had in mind an adjudicative body of nonaligned individuals. Starting in the 1950s, and accelerating since 1980, Board membership has come to reflect something quite different—a body composed principally of experienced management attorneys and lately union attorneys as well. The result has been an increasingly polarized Board, which in turn has eroded the agency's role as a neutral and principled adjudicator.

Professor Joan Flynn has thoughtfully described much of the transformation in Board membership in a recent law review article;¹⁰³ I rely extensively on her research and analysis in the summary discussion that follows.

A. *Original Intent—Complete Nonalignment*

When Congress established the NLRB in 1935, it considered a tripartite structure consisting of representatives from industry, labor, and government, but chose instead a “strictly nonpartisan” Board

103. Joan Flynn, *A Quiet Revolution at the Labor Board: The Transformation of the NLRB, 1935-2000*, 61 OHIO ST. L.J. 1361 (2000).

composed of "three impartial government members."¹⁰⁴ Given that the Wagner Act created unfair labor practices only on the part of employers, it is perhaps not surprising that the business community and its supporters in Congress came to perceive the Board as heavy handed if not biased during its first decade.¹⁰⁵

Nonetheless, when Congress in 1947 enlarged the NLRB to five members and separated more formally its adjudicative and prosecutorial functions,¹⁰⁶ there was no suggestion that the expanded Board should be anything other than nonpartisan and impartial. Indeed, the House version of the LMRA would have made the Board overtly bipartisan by limiting the number of members who could belong to one political party,¹⁰⁷ but the Senate did not go that route¹⁰⁸ and the final version makes no reference to members' party backgrounds.¹⁰⁹ The floor debate on the LMRA also makes clear that both supporters and opponents expected the Board to be composed of truly neutral adjudicators.¹¹⁰

104. SEN. COMM. PRINT, COMPARISON OF S.2926 (73D CONG.) and S. 1958 (74TH CONG.) § 3 (1935), *reprinted in* 1 LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT [hereinafter NLRA LEG. HIST.] 1319, 1320. *See* Flynn, *supra* note 103, at 1363–64 (discussing revisions that departed from tripartite structure used by National Labor Board under the National Industrial Recovery Act).

105. *See, e.g.*, Noel Sargent, *Can Justice Be Partial?*, in THE NATIONAL LABOR RELATIONS ACT: SHOULD IT BE AMENDED 89–90 (Julia Johnson ed., 1940); Malcolm Ross, "The G— D— Labor Board", in THE WAGNER ACT: AFTER TEN YEARS 63, 68 (Louis G. Silverburg ed., 1945). *See generally* 93 CONG. REC. 3953 (1947) (statement of Sen. Taft) *reprinted in* 2 LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT [hereinafter LMRA LEG. HIST.] 1011.

106. Pub. L. No. 80-101, § 101, 61 Stat. 136, 139 (increasing Board membership to five persons); *id.* at § 101, 61 Stat. 136, 139–40 (formally separating adjudicative and prosecuting functions).

107. *See* H.R. 320 as reported, § 3(a) (1947), H.R. 320 as passed House, § 3(a) (1947), *reprinted in*, 1 LMRA LEG. HIST. at 44, 171 (Board to be composed of three members, not more than two from the same political party).

108. *See* S. 1126 as reported, § 3(a) (1947), H.R. 320 as passed by Senate, § 3(a) (1947), *reprinted in* 1 LMRA LEG. HIST. at 106, 233–34.

109. *See* H.R. REP. 80-510, at 36–37 (1947), *reprinted in* 1 LRMA LEG. HIST. at 540–41 (announcing five-member board as compromise in Conference Report between House version (three members) and Senate version (seven members), with no language about political party background of members). Notwithstanding this silence, a tradition has developed of appointing both Democrats and Republicans to the Board, with the President's party holding a three-to-two majority of the seats and also the chair. *See* Matthew M. Bodah, *Congress and the National Labor Relations Board: A Review of the Recent Past*, 22 J. LAB. RES. 699, 700 (2001).

110. *See* 93 CONG. REC. 4559 (1947) (exchange between Sen. Ball and Sen. Ives), *id.* at 4561 (statement of Sen. Smith), *reprinted in* 2 LMRA LEG. HIST. 1201, 1203. The floor debate with respect to the agency's expanded composition and new structure focused heavily on whether the Board's backlog was best solved by increased funding or expanded numbers; there was no mention of Board membership being anything besides neutral. *See, e.g.*, 93 CONG. REC. 3953 (1947) (statement of Sen. Taft), *id.* at 4158, 6660–61 (statements of Sen. Murray) *reprinted in* 2 LMRA LEG. HIST. at 1001, 1052, 1576.

B. Initial Inroads—Moderate Management Orientation

As Professor Flynn points out, Presidents Roosevelt and Truman acted consistently with Congress's intent, drawing their Board appointees primarily from government service and secondarily from academia.¹¹¹ Of the fourteen individuals who joined the Board between 1935 and 1952, only one came from either the labor or management sectors.¹¹²

President Eisenhower initiated the movement away from a Board composed exclusively of neutrals. Eisenhower was the first Republican to occupy the White House since the Wagner Act established the NLRB, and two of his early Board appointees had strong roots in the management sector.¹¹³ During the nearly three decades from 1953 to 1980, roughly one-half the Board members appointed by Republican Presidents came from the management sector.¹¹⁴ By contrast, Democratic Presidents Kennedy, Johnson, and Carter continued to draw all their Board appointments from government service or academia.¹¹⁵

This decision on the part of Republican Presidents—that individuals with extensive management backgrounds should serve on the Board—generated intermittent expressions of concern. With respect to a controversial management-side nominee in the 1950s, opponents insisted that favoring appointees from the management sector conflicted with Congress's vision of the Board as a quasi-judicial agency composed entirely of impartial members.¹¹⁶ At a subsequent nominee's hearing, opponents emphasized the damage of a "revolving door" syndrome in which appointees from management-side law firms would return to that practice after a period of Board

111. See Flynn, *supra* note 103, at 1367–68, 1454 (discussing early Board members and their backgrounds).

112. The exception was Copeland Gray, a 1947 Truman nominee who had been the industrial relations director of an engineering company but who in fact had virtually no knowledge of the Act. See *id.* at 1367 n.26.

113. See *id.* at 1369 (noting that Guy Farmer (served 1953–55) had spent the eight years before his nomination at Steptoe & Johnson, where he represented management, and Albert Beeson (served 1954) was a non-lawyer who directed industrial relations for two different companies before being nominated).

114. See *id.* at 1454–55 (noting that three of eight Eisenhower appointees had spent most of their recent working lives representing management, as had three of five Nixon/Ford appointees).

115. See *id.* at 1455 (noting that five of the six Board members appointed by Kennedy, Johnson, or Carter had government service as their primary occupation while the sixth came from academia).

116. See *id.* at 1374–75 & nn.50–53 (discussing Senate opposition's views on Albert Beeson, expressed in committee report and also in floor statements by various senators).

service, thereby exacerbating the appearance if not the reality of bias.¹¹⁷

The prediction that appointees selected from the management bar would effectively use service on the Board to enhance their partisan status in subsequent career moves has turned out to be disturbingly accurate. Nearly four-fifths of the Board appointees who came directly from management positions returned straight to management representation upon leaving the Board.¹¹⁸ As Professor Flynn observes, "for the vast majority of management lawyers appointed. . . , service on the Board has been but a brief hiatus in a decades-long career on the management side."¹¹⁹

Supporters of these initial management-side nominees defended the practice on grounds of both virtue and necessity. They touted the nominees' expertise in labor law and their familiarity with industrial relations processes and customs as genuine assets that would enhance their performance as Board members.¹²⁰ They also observed that because such expertise and familiarity were typically acquired in service to either labor or management interests, it would be almost impossible to find suitably qualified Board members who did not have at least some allegedly prejudicial exposures.¹²¹

For the initial series of management-side appointees, the "expertise and familiarity" argument has some intuitive appeal. Professor Flynn points out that the management lawyers named by Presidents Eisenhower, Nixon, and Ford tended to come from established law firms, having represented unionized clients involved in mature bargaining relationships.¹²² Years of familiarity with the specialized nature of Board policies and practices may generate a more neutral respect for the Act's doctrinal scope, at least when that familiarity is acquired in the context of applying or enforcing collective bargaining-related norms.

117. See *id.* at 1379–80 & nn.68–79 (discussing testimony of AFL-CIO president opposing nomination of Edward Miller in 1970).

118. See *id.* at 1399 n.165 (noting that as of September 2000, eleven of fourteen Board members who had come from the management side had returned to the management side upon leaving the Board). Patterns of post-Board employment for union-side appointees are still quite preliminary. Of three union-side attorneys appointed by President Clinton in the 1990s, one returned to the union side, one remains on the Board, and the third died while still in office. See *id.* at 1401 n.166. It seems likely that the post-Board career moves of union-side appointees will not differ substantially from their management-side counterparts.

119. *Id.* at 1401.

120. See *id.* at 1372 & n.43 (recounting arguments made by Albert Beeson and his Senate supporters).

121. See *id.* at 1373–74 (discussing argument made by Senate supporter).

122. See *id.* at 1384 & nn.98–100.

My own prior work offers possible support for this theory. In a coauthored comprehensive study of appellate court cases reviewing Board decisions between 1986 and 1993, Sara Schiavoni, Deborah Merritt, and I found that judges with prior experience as management-side attorneys were actually more likely to *support* union legal positions in the courts of appeals than were their counterparts.¹²³ We suggested that such voting behavior might be due to the “familiarity breeds respect” theory, especially given that the NLRA’s collectivist focus and its anticompetitive policy goals had by the 1980s become increasingly anomalous in our individual rights-based legal culture.¹²⁴ Alternatively, we observed that judges with prior management-side experience might be “captured” by the Act because the success of their own practice representing unionized clients “depended to some extent on how energetically the Act was enforced,” encouraging these attorneys to develop “a more expansive attitude toward the Act’s protections [that] they then carried forward as judges.”¹²⁵

Still, even if former management lawyers with lifetime Article III appointments may be more respectful of NLRA rules and priorities when removed from a client-based mindset, it does not follow that they would apply their knowledge and experience in a comparably independent fashion during a brief stint at the NLRB. Attorneys who represent employers are more apt to relinquish their background partiality when career change is permanent than when they can rationally anticipate resuming their management-side careers in a few years’ time.¹²⁶ Moreover, a key aspect of the “familiarity breeds respect” argument is that such familiarity is acquired within a mainstream labor relations community that recognizes and respects the advantages associated with collective bargaining. After 1980, Republican appointments to the Board began to be drawn from a very different segment of the management bar.

123. See James J. Brudney, Sara Schiavoni & Deborah J. Merritt, *Judicial Hostility Toward Labor Unions? Applying the Social Background Model to a Celebrated Concern*, 60 OHIO ST. L.J. 1675, 1715, 1722, 1725, 1741 (1999).

124. See *id.* at 1742–48.

125. *Id.* at 1745 n.211.

126. See Flynn, *supra* note 103, at 1382 n.91, 1398–1401 (arguing that partisan ties will trump expertise in the short-term Board appointments setting, so that the public fails to reap the benefit of members’ experience as labor or management-side lawyers).

C. Full Flowering—An Embrace of Union Avoidance

President Reagan in his Board appointments during the early 1980s departed dramatically from the approach taken by his Republican predecessors. Reagan's initial nominees were not establishment-type management representatives with a basic commitment to the NLRA's purposes and processes. Rather, they were apostles for union avoidance, with professional backgrounds and philosophies that questioned or challenged the agency's traditional approach to applying the Act.¹²⁷

The record of this Reagan Board reflected the sea change in its composition. During the two year period from 1983–85, when the new set of appointees formed a majority, the Board's pattern of decisions changed remarkably from that of its recent predecessors. In the area of unfair labor practice adjudication, the Nixon-Ford Board of 1975–76 and the Carter Board of 1979–80 each had upheld complaints filed against employers about 84% of the time.¹²⁸ By contrast, the Reagan Board upheld only 52% of the nearly 800 unfair labor practice complaints brought against employers—a decline of roughly two-fifths in the General Counsel's success rate.¹²⁹ The results were similarly telling with respect to representation cases. The proportion of representation decisions that supported the employer's position was 35% under the Nixon-Ford Board and 46% under the Carter Board, but it soared to 69% in the 1983–85 period.¹³⁰ The Reagan Board's anti-union predisposition was manifested in a substantial number of high-profile decisions, often overruling earlier Board doctrines,¹³¹ and

127. See *id.* at 1384–85 (describing strong anti-union backgrounds of nominees Van De Water, Dotson, and Hunter). See also Diane E. Schmidt, *The Presidential Appointment Process, Task Environment Pressures, and Regional Office Case Processing*, 48 POL. RES. Q. 381, 384–85 (1995) (discussing President Reagan's radical departure from presidential tradition of appointing and reappointing Democrats and Republicans acceptable to both labor and business interests, and effects of this radical change on Board's decision-making routines).

128. See *Report on Dotson Board*, *supra* note 10, at 7–8.

129. See *id.*

130. See *id.*

131. See, e.g., *Meyers Industries*, 268 N.L.R.B. 493 (1984) (overruling *Alleluia Cushion Co.*, 221 N.L.R.B. 999 (1975) by adopting a restrictive approach to when individual employee conduct is “concerted”); *Sears, Roebuck & Co.*, 274 N.L.R.B. 230 (1985) (overruling *Materials Research Corp.*, 262 N.L.R.B. 1010 (1982) by limiting *Weingarten* rights for non-union employees); *Gourmet Foods*, 270 N.L.R.B. 578 (1984) (overruling *Conair Corp.*, 261 N.L.R.B. 1189 (1982) by holding that Board lacked authority to issue a non-majority bargaining order); *Milwaukee Spring Division, Illinois Coil Spring Co.*, 268 N.L.R.B. 601 (1984) (overruling *Milwaukee Spring Division, Illinois Coal Spring Co.*, 265 N.L.R.B. 206 (1982) by allowing employers to relocate during term of collective bargaining agreement without violating § 8(a)(5)).

in the many routine cases in which the Board overlooked employer misconduct and frustrated the rights of employees.¹³²

Organized labor quickly perceived that the new breed of Reagan appointees had elevated management perspectives to a different level. The AFL-CIO announced publicly that it would cease adhering to its traditional pursuit of nominees whose background did not identify them as partisans of either camp.¹³³ Observing that “[f]or the first time, appointments to the NLRB have been of a character that represents the perversion of that board into an instrument of anti-union employers,” AFL-CIO President Lane Kirkland made clear that labor would henceforth seek the appointment of partisans committed to the union cause.¹³⁴

Although this decision to adopt an avowedly partisan approach to Board membership may have stemmed from an understandable sense of outrage, its implementation has further contributed to the politicized atmosphere surrounding the Board. When President Clinton was elected after twelve years of Republican control, his Board appointments over eight years included three experienced union-side attorneys.¹³⁵ Clinton’s appointments also featured three experienced management attorneys—indeed he was the first Democratic President ever to appoint a management lawyer to the NLRB.¹³⁶ The Clinton Board’s early performance drew mixed reactions from veteran Board watchers in the management bar.¹³⁷ The business community directed some of its harshest criticism at the Board’s academic chair rather than his union-side colleagues,¹³⁸ but

132. See James Coppess & Sarah Fox, *Decisions by the Dotson Board in Nonprecedent-setting Cases: The Psychopathology of Everyday Life*, in *Report on Dotson Board*, *supra* note 10, at 27–36.

133. See Flynn, *supra* note 103, at 1388–89 (discussing statements by AFL-CIO President Lane Kirkland).

134. *Id.* (quoting from Kirkland press conference statement in June 1983).

135. See *id.* at 1394–95 (discussing appointments of Margaret Browning, Sarah Fox, and Wilma Liebman).

136. See *id.* at 1394.

137. Compare Edward B. Miller, *What Has the Gould Board Been Doing?*, 47 LAB. L.J. 75 (1996) (observing that Board in first year had not swung as far to left as business community might have expected) with *Review of the National Labor Relations Board: Hearing Before the Subcomm. on Employer-Employee Relations of the House Comm. on Educ. & the Workforce*, 105h Cong. 61-99 (1997) (statement of G. Roger King, member, Society for Human Resource Management (critical of Board’s overreaching and pro-union bent)). As an aside, King’s statement apparently misunderstands an article I authored (see note 85 *supra*) that had critically analyzed appellate court reversals of Board efforts to fulfill the Act’s purpose; King refers to the article as a discussion of the Board’s “erroneous and unlawful conduct.” *Id.* at 65.

138. See, e.g., Tony Mauro, *The Case of the Missing NLRB*, LEGAL TIMES, Apr. 8, 1996, at 8 (reporting on rift between Chairman Gould and Justice Department over major antitrust/labor case argued before Supreme Court); Arleen Goodman, *The NLRB’s Secret War on Small Business*, WALL ST. J., Mar. 19, 1997, at A18 (attacking Gould’s plan for “single site rule” that

the Clinton Board ultimately was vilified by Republicans in Congress as well as by anti-union segments of the employer community.¹³⁹ There is some evidence that voting by both union-side and management-side Board members became more uniform and predictable in the Clinton Board when compared to Board members' voting patterns in earlier periods, although the evidence is drawn from a relatively small number of split decisions (i.e., with at least one dissenter) that may not represent the Board's overall voting patterns.¹⁴⁰

D. Politicization in a Republican Era

The politicization of membership has taken a toll on the agency's reputation as an adjudicative body. Board precedent has never been as presumptively sacrosanct as judicial determinations, but rule of law values obviously matter. The Board's overtly partisan composition has invited both labor and management litigants to show less respect for its prior decisions.¹⁴¹ In this regard, the current Bush Board has been roundly criticized from within its own ranks for refusing to examine the practical consequences of Clinton-era decisions before overturning them, for failing to engage the arguments advanced in dissenting opinions, and for overruling precedent without first seeking input from the interested communities through amicus briefs.¹⁴²

The politicized nature of appointments also has undermined confidence in the Board's ability to fulfill its mission. Both political

would allow union organizing on a site by site basis); Karen Alexander, *Gould's Exit Produces Rancor, Decisions*, LEGAL TIMES, Sept. 28, 1998, at 18 (reporting on criticisms of Gould's tenure by management-side observers and others).

139. See, e.g., 2000 House Hearing, *supra* note 10, at 2-3 (statement of Subcommittee Chair Rep. John Boehner); *Oversight of the National Labor Relations Board: Hearing Before the Senate Comm. on Labor and Human Resources*, 104th Cong. 62-72 (1996) (statement of Daniel V. Yager on behalf of Labor Policy Association).

140. See Flynn, *supra* note 103, at 1405-12 (discussing two studies—one of Board member votes in split decisions from 1985 to 2000 and the other of Board member votes from 1955 to 1979 involving cases that raise novel questions or create important precedents). As Professor Flynn recognized, these two studies relied on quite different criteria for compiling datasets; see *id.* at 1413-14. Moreover, a focus on split decisions, which comprise a small fraction of the total number of cases decided each year, may produce results that differ from outcomes for the dataset of all decisions. See Brudney, Schiavoni, & Merritt, *supra* note 123, at 1711-12, 1729-31, 1737-38 (explaining how the types of substantive issues addressed in split decisions may contribute importantly to voting patterns that are more—or less—partisan than patterns for the universe of all decisions).

141. See Dolin, *supra* note 1 (discussing Professor Samuel Estreicher's concern that seemingly partisan reversals of precedent undermine respect for Board).

142. See Susan J. McGolrick, *Members Schaumber, Liebman Discuss Differing Views on Recent Board Decisions*, Daily Lab. Rep. (BNA) at C-2 (March 3, 2005) (remarks of member Liebman). See also Herzfeld, *supra* note 1 (reporting remarks of Professor Estreicher, critical of Board's failure to explain or justify its recent departures from precedent).

parties have contributed to an overtly partisan appointments process, but the transformation has occurred during a period of Republican ascendancy in national politics.¹⁴³ In this setting, new voices have emerged as dominant within the business community regarding the desired composition and direction of the Board. As Professor Flynn documents, it is the National Right to Work Committee more than the Business Roundtable that now calls the shots on which nominations succeed and sometimes which ones are made.¹⁴⁴ Thus, although politicization is a long-simmering development at the Board, its convergence with the domination of an increasingly conservative Republican party has accelerated the changes occurring in national labor policy as well as in the agency's reputation.

The trend toward polarization since 1980 has not been uniform.¹⁴⁵ Nonetheless, the Board's image has been shaped by its intense periods of partisanship rather than the intervening moments of relative calm. And the results of the Board's partisan decision-making have very often undermined the rights and protections sought by those invoking the Board's jurisdiction in the first place. An important consequence has been organized labor's widespread disillusionment with the Board as a possible source for protecting or vindicating statutory rights. Many leading unions are now convinced that their best chances to organize and bargain contracts lie in avoiding NLRB jurisdiction as much as possible.¹⁴⁶ This set of union responses further contributes to the perception of the Board as a tangential actor in the future of workplace law and policy.

143. Since 1980, Republicans have controlled the Presidency more than two-thirds of the time and the Senate more than three-fifths; Democrats have had control of both institutions in only two of the past twenty-five years.

144. See Flynn, *supra* note 103, at 1423–26. Professor Flynn suggests that the role of interest groups in a more polarized Board appointments process is part of a larger trend in which individual Senators, typically aligned with interest groups, have exercised far greater sway over the traditional presumption in favor of the President's executive branch nominees. See *id.* at 1432–52. Although the Senate's committee structure and dispersed power centers may well be easier for interest groups to manipulate if not control, Republican presidential administrations since 1980 have been committed to union avoidance in a way that their predecessors from Eisenhower to Nixon never were. That executive branch commitment helps account for the politicized NLRB appointments process at least as much as the increasing role played by individual Senators with less than deferential views.

145. From 1985 to 1992, the Reagan-Bush Board was chaired by a more moderate Republican with a government background, James Stephens, and former government attorneys constituted a majority for much of that seven year period. See Flynn, *supra* note 103, at 1424 & nn.240–41 (discussing appointments of Johansen, Higgins, and Devaney, while suggesting that these "status-quo-type individuals" retained most of the Dotson Board's decisions).

146. See, e.g., *supra* note 27 and accompanying text; Michelle Amber, *Special Report: SEIU Sees Record Growth: 64,000 New Members Organized in 1998*, Lab. Rel. Week. (BNA) at 1419–21 (Dec. 23, 1999) (reporting that of 64,000 workers in newly SEIU-organized bargaining units, less than 15,000 came through Board elections).

One final byproduct of the politicized appointments process is Congress's abandonment of any collective attention to Board membership. Hearings on Board nominees were the norm from the 1950s through the mid 1980s, but such hearings have virtually disappeared since 1985.¹⁴⁷ Recess appointments were non-existent from 1953 to the late 1970s, but have become almost standard in the past twenty years.¹⁴⁸ In addition, Board appointments now tend to come in the form of packaged deals: the White House, interested groups, and a small number of Senators on each side agree on a group of union-side and management-side individuals who can then be recess-appointed without objection or confirmed without senatorial notice.¹⁴⁹ It may be that Congress's extended failure to revisit the Act's substance eventually led to a corresponding lack of interest in the individuals designated to administer or enforce that substance. Alternatively, perhaps the preemptive influence exerted by a handful of individual Senators is part of a more general phenomenon involving decentralized control over executive branch nominations.¹⁵⁰ Whatever the explanation, the Senate's collective indifference to who serves on the NLRB is one more illustration of the Board's isolated status.

147. Sara Sampson, research librarian at The Ohio State University Moritz College of Law, searched the CIS index of congressional hearings using "National Labor Relations Board" and "nomination" as subject descriptors and key words. The search results indicate that the Senate held confirmation hearings for 27 of 38 Board appointments from 1953 to 1985, and that 6 of the 11 appointments without hearings were multi-term members who had at least one hearing. By contrast, of 29 appointments since 1985, only 1 (Chairman William Gould in 1994) had a hearing.

148. No Board member was recess appointed between 1953 and 1977—all eighteen appointments were formally nominated and confirmed by floor vote. Since 1977, Presidents Carter, Reagan, and Bush each made two recess appointments, President Clinton made seven, and the current President Bush has made four so far. See *National Labor Relations Board Members*, <http://www.nlr.gov/nlr/about/structure/fbmembers.asp>; Digest of other White House Announcements, 18 WEEKLY COMP. PRES. DOC. 1662 (Dec. 23, 1982); Digest of Other White House Announcements, 17 WEEKLY COMP. PRES. DOC. 883 (Aug. 17, 1981). These figures include recess appointees who were later confirmed; multiple recess appointments of the same individual are counted separately.

149. See *Meisburg's Recess Appointment Ends, While Walsh's Term Set to Expire Soon*, Daily Lab. Rep. (BNA) at A-1 (Dec. 13, 2004) (discussing standard practice of packaging appointments in past two decades). See, e.g., Flynn, *supra* note 103, at 1429-30 (discussing initial packaging of Board members Johansen and Babson in 1985, and members Devaney, Oviatt, and Rogers in 1989); *id.* at 1430-32 (describing Clinton's package deal appointments in 1993-94 and 1997).

150. See generally *id.* at 1432-52 and sources cited therein.

III. SOME BROADER PERSPECTIVES

A. *The Extraordinary Decline of Union Strength in the United States*

The previous discussion has accounted for the NLRB's diminished status as primarily a function of developments within government. By focusing on the agency's waning interactions with and support from Congress and the federal courts, and on the President's and Senate's newer approach to member qualifications, I have downplayed events occurring outside the three branches. This explanation is, of course, incomplete in important respects. The NLRB's status has been gradually transformed as its historical constituencies—unions and employees seeking to unionize—have precipitously declined in strength. The substantive reality of a weaker labor movement has surely helped to marginalize the status of the agency charged with protecting collective bargaining relationships.

From a comparative law standpoint, the decline of American unions helps account for both the cause and effects of congressional inaction over such a prolonged period. Organized labor has lost strength and influence in most advanced industrial economies during the past several decades. These losses, however, have been less dramatic in Canada and Britain than in the United States.¹⁵¹ Union density in Canada and Britain is not what it was in 1970, especially in the private sector.¹⁵² Still, organized labor's greater residual strength in those countries, combined with its ties to the political party system,¹⁵³ have helped keep labor-management relations on the legislative agenda even as that topic has faded from view in Congress.

Further, the efficiencies of parliamentary government, as well as enhanced prospects for legislative innovation at the provincial level in

151. See Lyle Scruggs & Peter Lange, *Where Have All the Members Gone? Globalization, Institutions, and Union Density*, 64 J. POL. 126, 134 (2002) (reporting declines in union density from 1974 to 1994 in United Kingdom (50.4% to 33.8%), Canada (31.3% to 30.8%) and United States (24.2% to 13.9%); also Australia (47.5% to 35.0%)). Only in the United States did decline approach 50%, and U.S. density by 1994 was between one-half and one-third that of the other three countries.

152. See *id.* See also SEYMOUR MARTIN LIPSET & NOAH M. MELTZ, *THE PARADOX OF AMERICAN UNIONISM* 52 (2004) (reporting private sector union density in United States fell from 29.1% in 1970 to 9.0% in 2001, while decline in Canada during same period was from 29.3% to 18.3%); *Labour Market Trends* (July 2002) p. 345 (U.K. private sector union density at 24% in 1993 and 19% in 2001).

153. See BOB HEPPLE & SANDRA FREDMAN, *LABOUR LAW AND INDUSTRIAL RELATIONS IN GREAT BRITAIN* 24 (2d. ed. 1992) (discussing close historical relationship between Labour Party and affiliated trade unions); LIPSET & MELTZ, *supra* note 152, at 18 (discussing influence of New Democratic Party (NDP) in 1990s in Ontario, British Columbia, and Saskatchewan). See generally PAUL DAVIES & MARK FREDLAND, *LABOUR LEGISLATION AND PUBLIC POLICY* 238–525 (1993).

Canada,¹⁵⁴ have resulted in periodic policy changes being accomplished in the legislative arena in both Britain and Canada.¹⁵⁵ Unions have prevailed in some parliamentary contests and been defeated in many others, but the definitive nature of these engagements reflects that labor relations policy has developed primarily through legislatures rather than agencies and courts.¹⁵⁶

Congress's inability or unwillingness to act since 1959 has left the NLRB as the default channel for those seeking to affect labor relations policy. Notwithstanding the procedural obstacles that characterize our system of divided government, one can readily imagine that a stronger labor movement might have overcome supermajority roadblocks to produce substantial legislative reform on at least one or two occasions over nearly fifty years. Alternatively, a more robust union presence could at least have negotiated compromise packages of legislative adjustments with the business community.

The effort to influence labor relations policy through the Board appointments process has produced certain paradoxical effects. Board membership has become increasingly politicized as both sides strive for an edge in the de facto policymaking arena. The more sharply partisan nature of Board reasoning has, in turn, led to cycles of greater polarization in Board decisional outcomes, cycles that have undermined the putative neutrality of the agency.

The Board as an institution—including the General Counsel's office as well as career legal staff—has not been insensitive to these developments. Recognizing that the appointments process is increasingly targeted from both sides by well-organized private interests and partisan individual Senators, Board chairmen have at times tried to make the agency less visible by navigating below the

154. See LIPSET & MELTZ, *supra* note 152, at 49 (noting that in Canada, only 10% of employees are covered by federal legislation while 90% are covered by provincial laws; ratios in United States are almost exactly the opposite—roughly 90% of employees covered by federal legislation).

155. See, e.g., DAVIES & FREEDLAND, *supra* note 153, at 366–76 (discussing Trade Union and Labour Relations Act 1974); *id.* at 443–67 (discussing Employment Act 1980); *id.* at 483–89 (discussing Trade Union Act 1984); DOUGLAS G. GILBERT ET. AL. CANADIAN LABOUR AND EMPLOYMENT LAW FOR THE U.S. PRACTITIONER, 399–411 (2000) (describing range of collective bargaining statutes in Canada's eleven provinces, enacted during 1970s, 1980s, and 1990s).

156. See Kevin M. Burkett, *The Politicization of the Ontario Labour Relations Framework in the 1990s*, 6 CAN. LAB. & EMP. L. J. 161, 165–74 (1998) (discussing numerous legislative changes in Ontario labor relations laws over several decades, and contrasting these developments with legislative paralysis in United States); DAVIES & FREEDLAND, *supra* note 153, at 1–5 (discussing explosive rate of legislative change in British labor relations law from early 1960s to 1990s).

radar of politically conscious inter-branch discourse.¹⁵⁷ One can thus view the Board's reluctance to interact with the courts or Congress on an express policymaking level—through formal rulemaking or candidly explained non-acquiescence—as in part derived from a sense that being isolated and marginal furthers agency self-preservation in an adjudicatory capacity. And yet the Board's decisions become less valued—because less neutral and also less predictable over the long-term—as Board members reflect more directly the policy-related ambitions of those who control or influence their appointments.

A labor movement with greater clout would make periodic recourse to Congress a more feasible policymaking option. Such recourse might have dampened the tendency to view NLRB adjudication as something other than a presumptively neutral effort to interpret and enforce statutory meaning. A realistic prospect of legislative change might also have led to the Board being better prepared to develop policy interstitially through rulemaking, and to engage the appellate courts more openly when pursuing its path of non-acquiescence.

B. The NLRB and other New Deal Agencies

The deterioration of a once-powerful labor movement does not, however, fully account for the NLRB's present condition. Many of the key choices made by the agency occurred in the early decades of its existence, when it commanded greater attention and respect from the courts as well as from a less polarized Congress. As discussed in Part I, the Board never pursued a litigation strategy favoring the implication of private rights of action. Unlike its youthful counterpart, the SEC, the NLRB during the 1940s and 1950s chose not to invite the law's primary beneficiaries to join in shaping the future direction of its regulatory regime. By declining to push for judicial access rights on behalf of unions and employees, the Board apparently viewed the status quo of exclusive control over adjudication as preferable to the possibility that shared power might yield richer or more dynamic policymaking options.

The Board's preference for adjudication over rulemaking and its penchant for non-acquiescence also originated well before 1970, again

157. See, e.g., Kirk Victor, *National Relations Board*, 27 THE NAT'L J. 1589 (June 19, 1993) (discussing Chairman Stephens' role in lowering the intensity of attacks on the agency after the Dotson era); Cindy Skrzycki, *For NLRB, an Improvement in Its Own Relations*, WASH. POST, Dec. 25, 1998, at B-9 (discussing less combative tone associated with Chairman Truesdale following the Gould era).

during an era when the agency operated against a backdrop of congressional attentiveness to and activism on labor-management relations. Even after Congress shifted its focus to individual rights approaches, the Board was in a position to launch serious efforts at updating the applicability of its authorizing statute. The expansive language of the NLRA has remained in place, establishing open-ended rights to engage in collective action and to secure comprehensive relief for employer interference with those rights.¹⁵⁸ Recent Supreme Court jurisprudence celebrating deference to agency judgments in general has enhanced the potential for agencies to undertake policymaking initiatives.¹⁵⁹ Although the Board thus retains considerable discretion to operate in a post-industrial era, it has tended to rely on its internally driven practices for self-protection, not to participate in a policy dialogue. To be sure, the Board over time may justifiably have come to fear the wrath of a Congress and judiciary less amenable to union influence. Nonetheless, the agency's insular approach has ended up making it increasingly irrelevant in efforts to maintain or renew commitments to collective action in the workplace setting.

The NLRB's current marginal position differs sharply from the more vibrant and relevant role played in recent decades by other New Deal era agencies such as the SEC and the FCC. There are many complex reasons for the divergence, and a full discussion is beyond the scope of this article. One important factor, discussed earlier, is that Congress has regularly revisited the jurisdiction of the SEC and FCC, revising and expanding agency powers and responsibilities.¹⁶⁰ Two additional factors, set forth briefly here, may also help explain why these agencies have retained greater authority and stature than the Board.

First, the SEC and FCC each view it as their basic mission to protect a dispersed and unorganized public—the interest of investors who depend on accurate information and the integrity of the securities markets,¹⁶¹ and the interest of consumers who require efficient, cost-effective, and nondiscriminatory access to televisions, telephones, and

158. See 29 U.S.C. §§ 157, 160(c); Estlund, *supra* note 36, at 1608–10.

159. See generally *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

160. See *supra* notes 30–31 and accompanying text.

161. See, e.g., 15 U.S.C. § 78b (describing necessity for federal regulation to protect public interest under 1934 Securities Exchange Act); see generally *The Investor's Advocate: How the SEC Protects Investors and Maintains Market Integrity*, <http://www.sec.gov/about/whatwedo.shtml>.

other communication services.¹⁶² Because there exists a broad-based understanding that both agencies do operate to serve the public interest, a rough consensus has developed on the need for an evolving regulatory presence. This consensus is apt to be felt most strongly during periodic crises that affect public confidence in the operation of the securities markets or of basic communication services.¹⁶³

By contrast, the NLRB's role appears more akin to that of a traffic cop, monitoring interactions between two identified constituencies. In overseeing relations between unions and management in the private sector, the Board is charged with protecting employee free choice and encouraging collective bargaining in order to further the larger goal of securing and maintaining industrial peace.¹⁶⁴ But that connection to the interest of the public generally seems somewhat attenuated, and it has become even more so as destabilizing conflicts between labor and management are no longer familiar features of our national economic landscape.¹⁶⁵

Second, and relatedly, the SEC and FCC seek to promote the interest of their respective consuming publics while overseeing multiple disparate constituencies within the business community. Apart from auditing and regulating the disclosure practices of publicly traded companies, the SEC monitors the activities of other key

162. See, e.g., 47 U.S.C. § 303 (authorizing FCC to exercise broad powers and duties "as public convenience, interest, or necessity requires") See generally *The FCC History Project*, <http://www.fcc.gov/omd/history>. See also *NBC v. United States*, 319 U.S. 190, 215–216 (1943) (describing Act as making FCC more than simply a traffic supervisor; it also has "the burden of determining the composition of that traffic"). Whether the FCC has effectively fulfilled this mission is open to question in a number of areas, perhaps most notably television broadcasting and—until recent decades—telephone regulation as well. See generally STANLEY M. BESEN ET. AL., *MISREGULATING TELEVISION* 1–2, 4–19 (1984); STUART MINOR BENJAMIN ET. AL., *TELECOMMUNICATIONS LAW AND POLICY* 605–823 (2001).

163. One recent example involves the SEC's aggressive regulatory approach from 2003–05 under Bush-appointed Chairman William Donaldson in the wake of the Enron scandal and enactment of the Sarbanes-Oxley Act. See, e.g., John Cranford, *Lightning Rod on Wall Street*, *CQ WKLY.* 1430–38 (May 30, 2005); Deborah Solomon, *Tough Tack of SEC Chief Could Relent*, *WALL ST. J.*, Jan. 12, 2005, at C1, C5. Another illustration is the FCC's response to public dissatisfaction with violence on television, by imposing a ratings system compatible with the congressionally mandated V-chip and by requiring child-friendly programming. See generally Edmund L. Andrews, *Communications Bill Signed, And the Battles Begin Anew*, *N.Y. TIMES*, Feb. 9, 1996, at A1; *Commercial TV Gets Passing Grade in New Annenberg Study*, *COMM. DAILY*, June 29, 1999, at 4; Alan Breznick, *Kids' TV Issues Dominate D.C. Landscape*, *CABLE WORLD*, July 5, 1999, at 40.

164. See 29 U.S.C. § 151 (setting forth national labor relations policy). See generally About the NLRB, <http://www.nlr.gov/nlr/about/default.asp>. It is noteworthy that the NLRB in its Web site overview description never refers to the public interest.

165. See, e.g., Fehmida Sleemi, *1997 Work Stoppages*, *COMPENSATION AND WORKING CONDITIONS* 50 (Summer 1998) (reporting annual major work stoppage data, indicating that strikes involving 1000 workers or more declined from 289 per year during 1970s to 114 per year in 1980–84, 52 per year in 1985–89, and 37 per year in 1990–97).

players in the securities world, such as investment advisors, accountants, broker-dealers, mutual funds, and stock exchanges.¹⁶⁶ Similarly, the FCC regulates participation in communications markets by firms or sectors with divergent if not conflicting interests. These entities include radio broadcasting licensees, television and cable television operators, satellite communication companies, the producers of long-distance, local, and cellular telephone services, and firms providing Internet access; there is also the recurring importance of overseeing interconnection and cost-sharing among all these service providers.¹⁶⁷ Given the presence of such distinct and at times competing business perspectives, policy debates about the importance of agency regulations or enforcement tend to be less polarized and starkly partisan than is the case with respect to debates about the need to protect employees or unions from overreaching by management.

To take just one example, the SEC's recent regulatory and enforcement initiatives have separately targeted *inter alia* mutual funds, securities markets, corporate management, accountants, and in-house lawyers as part of the agency's campaign to rebuild public confidence in the integrity of the securities markets.¹⁶⁸ The agency has undertaken these initiatives based in part on new congressional directives and increased federal funds for regulation and enforcement.¹⁶⁹ To be sure, the SEC's reputation is not without controversy; in recent decades it has been criticized both for tilting too far toward hyperactivity and for sinking into lethargy in its regulatory approach.¹⁷⁰ Still, the agency remains a serious player in articulating and defending the interest of the investing public, as part of an ongoing policy debate that includes businesses with distinct

166. See, e.g., Cranford, *supra* note 163; Harvey L. Pitt, Regulation of the Accounting Profession (Jan. 17, 2002), <http://www.sec.gov/news/speech/spch535.htm>. See generally *The Investor's Advocate*, *supra* note 161.

167. See generally BENJAMIN ET. AL., *supra* note 162, at 35–54, 380–91, 541–44, 623–42, 825–26 (2001); *FCC History Project*, *supra* note 162; Nicholas Economides, *Telecommunications Regulation: An Introduction* 4–12 (AEI-Brookings Joint Center for Regulatory Studies, Nov. 2003).

168. See John Gibeaut, *Back in Business*, A.B.A. J. 41 (May 2005); Cranford, *supra* note 163; Solomon, *supra* note 163; Tamara Loomis, *SEC Gores GC in Sarbanes-Oxley Dust-Up*, LEGAL TIMES, Jan. 24, 2005, at 18.

169. See Solomon, *supra* note 163, at C1 (discussing impact of Sarbanes-Oxley law on SEC activities); Gibeaut, *supra* note 168, at 43 (describing impact of substantially increased SEC budget on agency staffing and enforcement).

170. See, e.g., Jonathan R. Macey, *Administrative Agency Obsolescence and Interest Group Formation: A Case Study of the SEC at Sixty*, 15 CARDOZO L. REV. 909, 937–49 (1994) (criticizing agency as hyperactive during period of Republican presidential control in early 1990s); JOEL SELIGMAN, *THE TRANSFORMATION OF WALL STREET: A HISTORY OF THE SECURITIES AND EXCHANGE COMMISSION AND MODERN CORPORATE FINANCE* 349–556, 569–77 (revised ed. 1995) (analyzing agency performance as at times overly cautious and passive under Republican and Democratic administrations).

perspectives on how their regulated markets should be structured. That role contrasts notably with an NLRB that has generally adopted a low-profile approach, eschewing assertions about the public interest in the face of an increasingly polarized interest group disagreement as to the value of unions and collective bargaining in the labor market.

CONCLUSION

In the end, the diminished status of unions is linked to important factors besides the inadequacies of the legal regime: globalization of product and labor markets, insufficient energy or imagination within the labor movement, and the unusually fierce opposition of the U.S. business community all have played prominent roles. Indeed, as union strength has ebbed, management interests have become even more militant in their hostility to the existence of the collectively bargained arrangements the statute is meant to foster. Perhaps not surprisingly, the Supreme Court as well as lower courts have responded more supportively to management's perspective.¹⁷¹

Those sympathetic to the Act and its purposes seem largely resigned to the persistence of Board stagnation. They maintain in effect that given its long tradition of ad hoc decision-making, the Board is a permanent victim of how history has developed. Before legislative gridlock and member politicization really set in, the agency might have used its more respected position (and Congress's then less polarized status), to invite and even initiate discussion as to how the Act could best be updated amidst changing economic circumstances. But that window of opportunity has long since closed. Now the most the Board can do is engage in de facto interstitial policymaking through adjudication. Anything bolder would be deeply wounding if not suicidal.

Part of me accepts that somber conclusion. But another part of me wonders about the inevitability of the downward spin into irrelevancy that now grips the agency. At a minimum, it may be worth exploring whether the NLRB's adjudicatory function can be made less partisan. In Britain, administrative tribunals that adjudicate a wide range of statutory disputes concerning individual employees—including charges of discrimination or unfair dismissal for participating in trade union activities—are typically comprised of a presiding judge plus two lay members who serve part-time and are

171. See *supra* notes 91, 92, 97–100 and sources cited therein. See generally Brudney, *supra* note 40, at 1572–88.

appointed from qualified lists submitted by employer and employee organizations.¹⁷² Similarly, the agency charged with adjudicating trade union applications for statutory recognition, and with resolving disputes about information disclosure during the collective bargaining process, operates through three-person panels consisting of a government chair plus two lay members appointed from lists of individuals experienced as representatives of employers or workers.¹⁷³ These tribunals have not been above criticism,¹⁷⁴ but in their appointment, training, and retention of lay members, they have managed to avoid the extreme partisanship and politicization that have afflicted the NLRB.¹⁷⁵

Beyond this prospect, one need not throw caution to the wind to conclude that the Board should confront the importance of making internal reforms. These may well include trying for more rulemaking, inviting academics and others to submit studies of where the Act succeeds or fails (or acknowledging that such studies already exist and referring to them), and seeking to generate solutions that make the Act more relevant to post-industrial workplaces, especially the challenges borne by workers who want to organize and engage in collective bargaining. Such efforts may well trigger some political recriminations, at least in the short term. But those responses seem preferable to watching this once-respected and still-talented group of agency professionals continue to have their status battered while clinging to the status quo.

172. See JEREMY MCMULLEN ET. AL., *EMPLOYMENT TRIBUNAL PROCEDURE* 3–11 (2002) (describing Employment Tribunals and Employment Appeal Tribunal); JOHN BOWERS ET. AL., *EMPLOYMENT TRIBUNAL PRACTICE AND PROCEDURE* 6–7, 12–13 (2002) (same); UK: *Thematic Feature—Individual Labour/Employment Disputes and the Courts*, at <http://www.eurofound.eu.int/2004/03/tfeature/uk0403101t.html> (same).

173. See *What is the Central Arbitration Committee?* and *Central Arbitration Committee Annual Report 2004-2005* at 6–7, found on CAC Web site, <http://www.cac.gov.uk> (describing composition of Central Arbitration Committee).

174. See, e.g., *Scanfuture UK Ltd. v. Secretary of State for Trade and Industry*, [2004] IRLR 416 (EAT 2001) (reviewing and rejecting challenge to EAT impartiality and independence when Secretary of State for Trade and Industry is a party to the proceedings).

175. See generally John K. MacMillan, *Employment Tribunals: Philosophies and Practicalities*, 28 *INDUS. L. J.* 33, 37–43 (1999); Sir John Wood, *The Employment Appeal Tribunal as it Enters the 1990s*, 19 *INDUS. L.J.* 133, 140–41 (1990); Hon. Mr. Justice Browne-Wilkinson, *The Role of the Employment Appeal Tribunal in the 1980s*, 11 *INDUS. L.J.* 69, 70 (1982); R.W. Rideout, *What Shall We Do with the CAC?*, 31 *INDUS. L.J.* 1, 12–32 (2002).