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Article

Less Is More: A Case for Structural Reform of the National Labor Relations Board

Zev J. Eigen & Sandro Garofalo[†]

INTRODUCTION

The National Labor Relations Act (“NLRA” or “Act”),¹ America’s primary federal labor law, was originally enacted as part of New Deal legislation in 1935, for the purpose of securing workers’ “right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities.”² With the exception of the Health Care Amendments in 1974, only two major amendments have been made to the NLRA since its inception: one in 1947 through the Taft-Hartley Act³ and one in 1959 by way of the Landrum-Griffin

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1. Wagner Act, Pub. L. No. 74-198, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151–169 (2012)).

2. 29 U.S.C. § 157 (2012). This statutory provision, which spells out a set of rights now commonly known as “Section 7” rights, along with Section 8 of the Act, 29 U.S.C. § 158(a), which prohibits unfair labor practices by employers, constitutes the core of the Wagner Act.

3. Labor Management Relations Act, Pub. L. No. 80-101, 61 Stat. 136 (1947) (codified as amended at 29 U.S.C. §§ 141–197). The Taft-Hartley Act was enacted in an attempt to even the playing field between unions and employers at a time when unions had grown strong and widespread criticism had arisen over the NLRA’s seemingly one-sided favoritism of unions in the collective bargaining process. See Charles J. Morris, *How the National Labor Rela-*

Act.⁴ Since 1959, the text of the Act has remained essentially unchanged, except for certain structural changes that apply only to health care institutions.⁵ During the intervening time period, the nature of work, the composition of the American workforce, and the laws and regulations governing employee rights and employer obligations in the workplace have changed markedly.⁶ Commentators have long expressed concern over labor law's failure to adapt to a changing economy and called for re-

tions Act Was Stolen and How It Can Be Recovered: Taft-Hartley Revisionism and the National Labor Relations Board's Appointment Process, 33 BERKELEY J. EMP. & LAB. L. 1, 21–22 (2012). The primary substantive revisions imposed by the Act were regulatory restrictions on union activity. *See id.* at 22–23.

4. Labor-Management Reporting and Disclosure (Landrum-Griffin) Act of 1959, Pub. L. No. 86-257, 73 Stat. 519 (codified as amended in scattered sections of 29 U.S.C.) (adding provisions spelling out the rights of union members and imposing regulations on internal union affairs, and making relatively minor revisions to existing labor-management provisions of the Act).

5. *See* Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1532–33 (2002). Only minor changes have been made to the Act since 1959, including a 1970 revision expanding the Act's coverage to include the U.S. Postal Service, Postal Reorganization Act, Pub. L. No. 91-375, 84 Stat. 719, at 737 (codified as amended at 39 U.S.C. § 1209 (2012)), and a 1974 amendment applicable only to healthcare institutions, Act of July 26, 1974, Pub. L. No. 93-360, 88 Stat. 395, at 395–96 (codified at 29 U.S.C. §§ 152(14), 158(d) (2012)).

6. *See* Estlund, *supra* note 5, at 1535–36 (describing an increasingly diverse workforce, a shift away from the manufacturing industry, technological developments affecting the nature of work, and changes in production methods and organizational structure); *see also* Benjamin I. Sachs, *Labor Law Renewal*, 1 HARV. L. & POL'Y REV. 375, 375 n.4 (2007) (commenting that the NLRA “has proven remarkably inept in responding to changes in the composition of the U.S. labor force, and now entirely excludes from its coverage contingent workers, ‘knowledge’ workers, and undocumented immigrant workers, precisely those segments of the workforce that increasingly define the labor market”). For a discussion of state law developments affecting the rights of individual workers, *see* Katherine Van Wezel Stone, *The Legacy of Industrial Pluralism: The Tension Between Individual Employment Rights and the New Deal Collective Bargaining System*, 59 U. CHI. L. REV. 575, 591–93 (1992). On a national level, the Occupational Safety and Health Act of 1970 (OSHA), 29 U.S.C. §§ 651–678 (2012) (establishing minimum health and safety standards for the workplace), the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1001–1146 (2012) (establishing minimum standards for pension plans in the private sector), the Family and Medical Leave Act (FMLA), 29 U.S.C. § 2617(a)(4) (2012) (requiring employers to offer unpaid leave for certain family and medical reasons), and the Worker Adjustment and Retraining Notification Act of 1988 (WARN), 29 U.S.C. §§ 2101–2109 (2012) (requiring qualifying employers to provide advance notice of plant closings and mass layoffs), have all expanded the basic rights of employees entering into employment contracts. *See* James J. Brudney, *Isolated and Politicized: The NLRB's Uncertain Future*, 26 COMP. LAB. L. & POL'Y J. 221, 228 n.32 (2005).

forms that would allow the NLRA to better meet the needs of individuals, employers, and organized labor.⁷

While several attempts at significant labor law reform have been made, those efforts have so far failed.⁸ Even those attempts at legislative reform that were able to garner majority support in both Houses of Congress were ultimately defeated by well-organized minorities in the Senate.⁹ In 1977, Congress introduced the pro-union Labor Reform Act,¹⁰ which proposed several provisions aimed at deterring employer misconduct and reducing the perceived advantages of employers in union organizing campaigns gained as a result of their superior access to and influence over employees and the workplace.¹¹ The Labor Reform Act passed in the House, only to be defeated following a five-week Republican filibuster in the Senate.¹² During the Clinton Administration, the Cesar Chavez Work-place Fairness Act,¹³ which sought to prohibit employers from firing striking employees, met a similar fate—defeated by an anti-union minority in the Senate.¹⁴ In 1995, the Republican-backed Teamwork for Employees and Management Act (TEAM Act),¹⁵ aimed at amending the NLRA to permit employer-sponsored alterna-

7. See, e.g., WILLIAM B. GOULD IV, *AGENDA FOR REFORM: THE FUTURE OF EMPLOYMENT RELATIONSHIPS AND THE LAW* 9 (1993); Estlund, *supra* note 5; Samuel Estreicher, *Freedom of Contract and Labor Law Reform: Opening Up the Possibilities for Value-Added Unionism*, 71 N.Y.U. L. REV. 827 (1996); Michael H. Gottesman, *In Despair, Starting Over: Imagining a Labor Law for Unorganized Workers*, 69 CHI.-KENT L. REV. 59 (1993); Joel Rogers, *Reforming U.S. Labor Relations*, 69 CHI.-KENT L. REV. 97 (1993); Sachs, *supra* note 6; Paul Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769 (1983).

8. See, e.g., Estlund, *supra* note 5, at 1540 (describing significant failed attempts from the late-1970s and early-1990s).

9. See Brudney, *supra* note 6, at 228–29 (“[E]ach [legislative attempt] garnered majority support from both houses of Congress, but in the end each succumbed to the supermajority requirements of the U.S. Senate.”); Estlund, *supra* note 5, at 1540–41 (summarizing several failed legislative attempts at labor law reform).

10. S. 1883, 95th Cong. (1977). The proposed reforms included a shortened union election period, increased penalties against employers for engaging in anti-union activity barred by the NLRA, and greater access to workplaces for union organizers.

11. See Estlund, *supra* note 5, at 1540.

12. See *id.*

13. H.R. 5, 103d Cong. (1993).

14. See Morris, *supra* note 3, at 13 n.41.

15. S. 295, 104th Cong. (1995).

tives to union representation, was defeated upon Congress's failure to override President Clinton's veto.¹⁶

Most recently, the Obama Administration proposed the Employee Free Choice Act (EFCA),¹⁷ which would have fundamentally changed the process of union recognition. The EFCA would have required employers to recognize a union as the exclusive representative of its employees for collective bargaining purposes if the majority of employees signed "authorization cards" stating that they wished to be represented by the petitioning union.¹⁸ As a matter of practice, this process would all but replace the traditional method by which unions petition the NLRB¹⁹ for the opportunity to hold a secret-ballot election during which both the employer and the union typically have an opportunity to campaign for votes and employees cast ballots for or against union representation.²⁰ Additional provisions of the EFCA would have increased penalties against employers that violated the NLRA²¹ and forced employers and unions to enter into binding arbitration if a collective agreement was not reached within 120 days of union recognition.²² Hopes of EFCA's passing died in 2010—a result of unexpected changes in the party composition of the Senate—before the bill was brought to a formal vote in either House.²³

Past reforms failed for one or both of the following reasons: (1) they were politically motivated, and therefore politically polarizing; or (2) they were outcome-focused, designed either to bolster union membership and power or to minimize it, instead of process- or fairness-oriented. Each of the attempts at legislative reform discussed in the preceding paragraphs illustrates the near-impossibility of enacting labor law reforms that are one-sided and partisan in origin. The highly organized nature

16. See *Clinton Vetoes TEAM Act Despite Pleas from Business for Passage*, DAILY LAB. REP. (BNA) (July. 31, 1996).

17. S. 560, 111th Cong. (2009).

18. *Id.* § 2.

19. The National Labor Relations Board is an independent agency established by the NLRA to interpret and administer the Act. 29 U.S.C. § 153(a) (2012).

20. S. 560 § 2(a).

21. *Id.* § 4(b)(I).

22. *Id.* § 3.

23. See Richard D. Kahlenberg & Moshe Z. Marvitd, "Architects of Democracy": *Labor Organizing as a Civil Right*, 9 STAN. J. C.R. & C.L. 213, 222 (2013) (citing the surprise election of a Republican to replace late Senator Kennedy of Massachusetts as the final blow to hope of passing the EFCA in the Senate).

of both the pro-union and the pro-employer/anti-union political contingents and a political system that permits a small minority to block majority-backed legislation combine to virtually guarantee that politically divisive and results-driven attempts at legislative reform of the NLRA will remain unsuccessful.²⁴ Even if such reform could be pushed through Congress, the result would be a temporary, and possibly Pyrrhic, victory for one side, rather than a lasting solution to more deeply-rooted problems that have contributed to the NLRA's failures. This Article argues that successful reform requires not just revision of substantive provisions of the NLRA, but a rethinking of the process by which the Act is administered.

Proposals for labor law reform have thus far typically rested upon normative assumptions regarding the value of unions in contemporary society. Pro-labor Democratic proposals, operating under the assumption that unionization is good for employees, strive to make it easier for unions to win elections and ultimately increase union membership. Union membership has decreased steadily over the past several decades, from its peak in the 1950s, when about 35% of the workforce was union-represented,²⁵ to 11.3% in 2013.²⁶ Currently only about 6.7% of private-sector employees are represented by unions.²⁷ Pro-union commentators and activists have pointed to this decline as an indication of a failure of the NLRA to serve its original purpose and to meet the evolving needs of the U.S. economy.²⁸ Pro-management, anti-union actors, on the other hand, frequently ground their proposals—which seek to minimize the role of unions and make unionization less attainable—on the assumption that unions have withered because the American economy no longer needs them, essentially positing that unions generate inefficiencies that exacerbate economically unfavorable conditions.²⁹

24. See Estlund, *supra* note 5, at, 1542–44.

25. PAUL OSTERMAN ET AL., *WORKING IN AMERICA: A BLUEPRINT FOR THE NEW LABOR MARKET* 46 (2001).

26. News Release, Bureau of Labor Stats., Union Members—2013 (Jan. 24, 2014), available at <http://www.bls.gov/news.release/pdf/union2.pdf>.

27. *Id.*

28. See Henry H. Drummonds, *Beyond the Employee Free Choice Act: Unleashing the States in Labor-Management Relations Policy*, 19 CORNELL J.L. & PUB. POL'Y 83, 97 (2009).

29. See *id.* It is worth noting another common source explanation of union decline—the growth of laws regulating the workplace based on individual rights, as opposed to collective rights. See Michael Piore & Sean Safford, *Changing Regimes of Workplace Governance, Shifting Axes of Social Mobiliza-*

This Article suggests that labor law reform that focuses on the process by which the NLRA is administered is more politically and practically viable than approaches relying on assumptions about the value of unionization. Rather than using unionization rates or union election win-rates to measure the effectiveness of the NLRA and the fairness of labor law policy, this approach would judge the NLRA's effectiveness by the fairness and stability of labor law decision-making and election processes.³⁰ Broadly, we propose excision of decision-making from NLRB jurisdiction on unfair labor practice charge cases alleging NLRA violations in favor of federal court decision-making. Under this model the Board retains jurisdiction of what it does best: receiving and processing petitions involving questions concerning representation (QCR) and conducting union elections. In the performance of its QCR duties, the Board should be limited by an NLRA amendment to developing and implementing administrative guidance subject to judicial review, not "legislative" (binding) rules subject to the Administrative Procedures Act's notice-and-comment requirements.

The reform proposed in this Article is founded on the belief that current problems with the NLRA are largely a result of the NLRB's approach to deciding unfair labor practice cases. The Board's approach is—some might say "notoriously"—marked by frequent shifts in precedent when the administration changes, combined with a policy of non-acquiescence with federal appellate court rulings until the Supreme Court ultimately decides an issue. In this regard, it is well-established that the NLRA empowers the Board to engage in both notice-and-comment rulemaking and adjudication of individual cases (subject to review by the federal courts of appeal).³¹ However, the Board has historically opted to set policy almost entirely through the latter means, generally refusing to propagate concrete rules guiding the interpretation of the NLRA.³² In the more than seventy-

tion, and the Challenge to Industrial Relations Theory, 45 IND. REL. 299, 320 (2006).

30. For a more in-depth discussion of this process-focused conception of fairness as it relates to union elections, see Zev J. Eigen & David Sherwyn, *A Moral/Contractual Approach to Labor Law Reform*, 63 HASTINGS L.J. 695, 708–13 (2012).

31. See *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 292–95 (1974); *NLRB v. Wyman-Gordan Co.*, 394 U.S. 759, 763–64, 772 (1969).

32. See Brudney, *supra* note 6, at 234. Several possible explanations have been offered for the NLRB's strategy, among them that the rulemaking process is time consuming and burdensome, adjudication allows for more frequent and less administratively burdensome adaptation of rules to new circum-

five years since its inception the Board has successfully engaged in legislative rulemaking on just a few occasions.³³

This approach has led to a number of problems. First, the frequent shift in Board precedent following changes in the administration has left employees, employers, and unions alike uncertain as to their rights and obligations under the NLRA. While caselaw may provide some guidance, adjudicative decisions are fact-specific and thus may not be relied on to the same extent as broad, concrete rules. Second, adjudicative precedent under the NLRA has proven to be anything but stable. The Board has historically, beyond remand in specific cases, defied appellate court decisions in other cases, refusing to defer to judicial precedent when not strictly required to do so.³⁴ Even more problematic is the fact that the NLRB frequently

stance, and adjudication attracts less critical oversight by Congress and the federal courts than formal rulemaking. See Brief for NLRB at 15, *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969) (No. 463), 1969 WL 1202891, at *15 (commenting on the “Board’s judgment that formal rule-making procedures are, as a general matter, too rigid and inflexible for most of the problems with which it is concerned”); Emily Bayer, Comment, *Setting Labor Policy Prospectively: Rulemaking, Adjudicating, and What the NLRB Can Learn from the NMB’s Representation Election Procedure Rule*, 63 ADMIN. L. REV. 853, 859–65 (2011); Brudney, *supra* note 6, at 234–35.

33. In the early 1970s, the Board issued a series of rules clarifying jurisdiction standards for symphony orchestras and private colleges and universities, and declining jurisdiction over the horse racing industry. See 29 C.F.R. §§ 103.1–103.3 (2012). In 1989, the Board promulgated a rule defining bargaining units in health care facilities. Appropriate Bargaining Units in the Health Care Industry, 29 C.F.R. § 103.30. More recently, the Board under the Obama Administration has made two attempts at substantive rulemaking. In 2011, the Board issued a final rule which would require employers subject to the NLRA to post notices of employees’ rights under the Act at the workplace. Notification of Employee Rights Under the National Labor Relations Act, Final Rule, 76 Fed. Reg. 54,006, 54,008 (Aug. 30, 2011) (codified at 29 C.F.R. § 104). The rule’s validity has been challenged in federal courts, leading the NLRB to delay its effective date. See *Employee Rights Notice Posting*, NATIONAL LABOR RELATIONS BOARD, <http://www.nlr.gov/poster> (last visited Apr. 1, 2014). An additional rule, Representation—Case Procedures, 76 Fed. Reg. 80,138 (Dec. 22, 2011) (to be codified at 29 C.F.R. Pts. 101, 102, 103), which shortened the union election period went into effect in April of 2012 but was suspended after being struck down in federal court. See Press Release, NLRB, NLRB Suspends Implementation of Representation Case Amendments Based on Court Ruling (May 15, 2012), available at <http://www.nlr.gov/news-outreach/news-story/nlr-suspends-implementation-representation-case-amendments-based-court>.

34. See Brudney, *supra* note 6, at 237–38; 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).

overrules its own precedent with little explanation other than changes in the composition of the Board.

The NLRB is composed of five members appointed by the president, with the advice and consent of the Senate, for five-year terms.³⁵ The Board operates through regional offices managed by regional directors who receive election petitions, direct and conduct union elections, and investigate and make cause determinations when unfair labor practice charges are filed. In the latter regard, when cause is found a complaint is filed and the Board's Office of the General Counsel prosecutes the complaint before an administrative law judge. Ultimately, an appeal of the Board's decisions on certain representational issues and unfair labor practice charges is available in the federal appellate courts with potential U.S Supreme Court review thereafter through a "petition for review."

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As initially conceived, the Board was to be made up of "strictly nonpartisan" government representatives.³⁹ Democratic Presidents Roosevelt and Truman upheld this commitment to impartiality, generally drawing neutral Board appointees from government and academia; Eisenhower, however, the first Republican to take office since the NLRA was enacted, set a dangerous precedent when he began appointing management-side

35. 29 U.S.C. § 153(a) (2012).

36. *Id.* § 153(b).

37. *Id.* § 153(d).

38. *Id.* § 160(e)-(f).

39. See STAFF OF S. COMM. ON EDUC. & LABOR, 74TH CONG., COMPARISON OF S. 2926 (73D CONG.) AND S. 1958 (74TH CONG.) (Comm. Print 1935), reprinted in 1 LEGIS. HISTORY OF THE NATIONAL LABOR RELATIONS ACT, at 1319, 1320 (1949).

attorneys to the Board.⁴⁰ Subsequent Republican presidents followed Eisenhower's lead by making additional management-side appointments, and Reagan took the approach to a new level by appointing the first decidedly anti-union Board members.⁴¹ Although Democratic Presidents Kennedy, Johnson, and Carter had held to the Democratic tradition of appointing neutral Board members, President Clinton finally reacted to Republicans' pro-management Board-packing strategy by appointing three pro-union attorneys to the Board.⁴² As a result, newly constituted Boards have made a practice of overruling precedent created by past administrations' Boards, with each Board instituting its own set of politically-motivated rules.⁴³ Over-politicization of the Board has also led to an extremely contentious appointment process, and as has been observed, exercise of the 'nuclear' option.

I. THE FLIP-FLOP PROBLEM

Over the years, the Board's practice of flip-flopping its positions on important industrial relations issues with each change in the White House has bred confusion, uncertainty, and operational inefficiencies for employers as they attempt to comply with standards, perhaps better characterized as 'moving targets.' The NLRB's unbridled politicization and frequent policy shifts have eroded employer and union confidence in the Board as a capable and stable agency, as well as lawmakers, the public, academics, and the popular press.⁴⁴ Federal courts, too, have expressed frustration with the Board's constant policy

40. See Joan Flynn, *A Quiet Revolution at the Labor Board: The Transformation of the NLRB, 1935-2000*, 61 OHIO ST. L.J. 1361, 1454-55 (2000) (documenting backgrounds of Board members appointed from 1935 to 1998).

41. See *id.* at 1384-85.

42. See *id.* at 1394-95, 1455. Clinton was also the first Democratic president to appoint management-side lawyers, choosing three to fill the Republican seats on the Board. *Id.* at 1394.

43. See Catherine L. Fisk & Deborah C. Malamud, *The NLRB in Administrative Law Exile: Problems With Its Structure and Function and Suggestions for Reform*, 58 DUKE L.J. 2013, 2020 (2009). See generally Samuel Estreicher, *Policy Oscillation at the Labor Board: A Plea for Rulemaking*, 37 ADMIN. L. REV. 163 (1985).

44. See, e.g., STAFF OF H. COMM. ON OVERSIGHT AND GOV'T REFORM, 112TH CONG., PRESIDENT OBAMA'S PRO-UNION BOARD: THE NLRB'S METAMORPHOSIS FROM INDEPENDENT REGULATOR TO DYSFUNCTIONAL UNION ADVOCATE 4 (2012) (describing "a pattern of behavior at the NLRB that undermines its integrity and creates an impression that the NLRB has morphed into a rogue agency plagued by systemic problems"); Estreicher, *supra* note 43, at 170-71.

oscillation and have accordingly afforded Board decisions limited deference.⁴⁵ In 1983, for example, the Seventh Circuit criticized the Board's "fickleness" in the process of refusing to enforce an order issued by the Board.⁴⁶ During the adjudication process, the Board changed its position three times on the policy governing misrepresentations made during union election campaigns.⁴⁷

Consecutive Boards have battled over the availability of card-check recognition for unions, a practice which allows unions to establish recognition based on a showing of authorization cards signed by employees, in lieu of going through a formal NLRB-supervised election process.⁴⁸ In 2007, for example, the Republican-controlled Board struck down past precedent in order to institute a policy making it easier to decertify unions established by the card-check process than those certified by

45. 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, 418-20 (1995) (noting that federal courts frequently reverse questionable NLRB decisions without remanding them back to the Board for further consideration).

46. *Mosey Mfg. Co. v. NLRB.*, 701 F.2d 610, 612 (7th Cir. 1983).

47. *Id.* Two months before the election in *Mosey*, the Board held in *Shopping Kart Food Market, Inc.*, 228 N.L.R.B. 1311 (1977), that it would no longer try to protect workers from misrepresentations made by either management or unions in election campaigns, as it had done in the fifteen years following *Hollywood Ceramics Co.*, 140 N.L.R.B. 221 (1962). In April 1978 the Board applied to the Seventh Circuit for enforcement of its order against *Mosey*. Shortly before oral argument, the Board decided *General Knit of California, Inc.*, 239 N.L.R.B. 619 (1978), in which it overruled *Shopping Kart* and reinstated *Hollywood Ceramics*, but without saying whether it meant the new rule to apply to pending cases. Although the Board's counsel in *Mosey* urged the Seventh Circuit to apply *Hollywood Ceramics*, the Seventh Circuit remanded the case to the Board and "express[ed] no view on the merits of any objection to the election." *NLRB v. Mosey Mfg. Co.*, 595 F.2d 375, 375, n.2 (7th Cir. 1979). On remand, the administrative law judge found that the union had made a material misrepresentation which in light of a close vote made the election invalid. *Mosey Mfg. Co.*, 234 N.L.R.B. 908 (1979). The Board reversed; it found there had been no misrepresentation and in any event it had not been material. *Mosey Mfg. Co.*, 255 N.L.R.B. 552 (1981). The Board reinstated a bargaining order and again applied to the Seventh Circuit for enforcement. *Id.* After oral argument, but before the Seventh Circuit panel handed down a decision, the Board decided *Midland Nat'l Life Ins. Co.*, 263 N.L.R.B. 127 (1982), which overruled *General Knit* and reinstated *Shopping Kart*.

48. See Fisk & Malamud, *supra* note 43, at 2021. For a general discussion of card-check authorization, see James J. Brudney, *Neutrality Agreements and Card Check Recognition: Prospects for Changing Paradigms*, 90 IOWA L. REV. 819, 824-40 (2005); Benjamin I. Sachs, *Enabling Employee Choice: A Structural Approach to the Rules of Union Organizing*, 123 HARV. L. REV. 655, 668-72 (2010).

NLRB-supervised elections.⁴⁹ Less than five years later, the decision was reversed by the Board under the Obama administration.⁵⁰

NLRA Section 7 protects employees' rights to support or refrain from supporting unions and to engage in protected concerted activity.⁵¹ Protection of "concerted activity" generally extends to communications relating to terms and conditions of employment, arising in connected with activity by two or more employees or in a representative activity.⁵²

The Board's position on which activities and actors should be protected under Section 7 of the NLRA has also vacillated over time. One of the most significant battles has centered around the definition of the word "employee" for the purpose of determining which classes of workers may seek protection under the NLRA. The Board has issued confusing and contradictory decisions, for example, on which kinds of workers might fall into the category of supervisor, temporary employee, or independent contractor, and thus be denied the right to unionize or engage in collective bargaining activity protected by the Act.⁵³

The Board has also flip-flopped in its interpretation of what kinds of activities constitute "other concerted activities for . . . mutual aid or protection" under Section 7 of the Act.⁵⁴ While Republican-controlled Boards have interpreted this protection narrowly, Democratic Boards have applied the protection to a broad range of non-union-related employee activism.⁵⁵ Another particularly egregious example concerns the Board's position on whether Section 7 of the NLRA grants a non-union employee the right to have a co-worker representative present during investigatory issues. The Board answered yes to this question in 1982,⁵⁶ no in 1985,⁵⁷ yes again in 2000,⁵⁸ and no again in 2004.⁵⁹

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

50. Lamons Gasket Co., 357 N.L.R.B. No. 72 (Aug. 26, 2011).

51. 29 U.S.C. § 157 (2012).

52. *Id.*; Compuware Corp. v. NLRB, 134 F.3d 1285 (1998).

53. See Fisk & Malamud, *supra* note 43, at 2027 n.68.

54. 29 U.S.C. § 157.

55. See Fisk & Malamud, *supra* note 43, at 2024.

56. Materials Research Corp., 262 N.L.R.B. 1010, 1010 (1982).

57. Sears, Roebuck, & Co., 274 N.L.R.B. 230, 230 (1985).

58. Epilepsy Found. of Ne. Ohio, 331 N.L.R.B. 676, 678 (2000).

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

In one prominent example, the Board's practice of flip-flopping on an important issue under the Act has spanned half a century. In 1962, the Board concluded in the landmark *Bethlehem Steel Company* decision that employers could lawfully cancel a contractual dues checkoff arrangement when a collective bargaining agreement expires.⁶⁰ This decision was reaffirmed 20 years later in 1982,⁶¹ and again in 2000.⁶² In the latter case, the Board cited numerous decisions relying on *Bethlehem Steel* during the intervening 38 years. The Board again reached the same decision in 2007, relying in that case on the specific language of the agreement at issue.⁶³ However, the Board started to flip in 2010, when it deadlocked on this issue in a 2-2 vote, with one member having been recused from the case.⁶⁴ Then in 2012—exactly 50 years after *Bethlehem Steel*—the Board overruled that decision and held that employers cannot unilaterally cancel dues checkoff upon expiration of a collective bargaining agreement.⁶⁵

The flip-flopping process at the Board frequently involves the agency's most fundamental policy determinations. For example, in the highly controversial *Specialty Healthcare & Rehabilitation Center* decision,⁶⁶ the Board radically changed its historical "community of interest" standard for determining the scope of appropriate bargaining units.

Fundamentally, the NLRA does not require a petitioning union to propose the most appropriate unit for purposes of bargaining. Rather, the Act merely requires a union to petition for "an" appropriate unit.⁶⁷ In determining whether a petitioned-for unit is "an" appropriate unit, the Board developed its community of interest standard, under which, in general, employees in a broad array of job classifications can be deemed appropriate for inclusion in a single unit as long as they share common terms and conditions of employment, such as common supervision

60. *Bethlehem Steel Company*, 136 N.L.R.B. 1500 (1962).

61. *Robbins Door & Sash Co.*, 260 N.L.R.B. 659 (1982).

62. *Hacienda Resort Hotel*, 331 N.L.R.B. 665 (2000).

63. *Hacienda Resort Hotel*, 351 N.L.R.B. 504 (2007).

64. *Hacienda Resort Hotel*, 355 N.L.R.B. 742 (2010).

65. *WKYC-TV, Inc.*, 359 N.L.R.B. No. 30 (2012).

66. *Specialty Healthcare & Rehabilitation Center*, 357 N.L.R.B. No. 83 (2011), *enforced* 727 F.3d 552 (6th Cir. 2013).

67. *Bartlett Collins Co.*, 334 N.L.R.B. 484 (2001).

and management, functional integration, common wages and benefits, and the like.⁶⁸

This standard was clarified in 1980, when the Board explained that its inquiry never addresses, solely and in isolation, the question whether employees have interests in common with each other, and it necessarily involves a further determination whether the interests of the group sought are sufficiently distinct from those of other employees to warrant the establishment of a separate unit.⁶⁹ As recently as 2010, this approach to the community of interest analysis was reaffirmed by the Board.⁷⁰ However, one year later, in *Specialty Healthcare*, the Board rejected this historical approach, while ostensibly *returning* to the community of interest standard. The Board held in that case that if a petitioned-for group shares a community of interest, the burden is on the party who contends that other employees must be included in the unit to show they have an *overwhelming* community of interest with the original group.⁷¹ This flip-flop by the Board is now ushering in an era of “micro-units.” For example, in one recent case, the Board found appropriate a unit limited to the canine technicians and instructors in a guide dog facility, excluding the various employees who provided other services relating to the guide dogs.⁷²

Other examples of radical changes in the law due to shifts in control of the Board have occurred in the health care industry. In 1974, Congress enacted the Health Care Amendments to the Act, extending its coverage to nonprofit health care institutions.⁷³ This was followed by a series of decisions over the next 10 years, in which the Board approved eight bargaining units in acute care hospitals based upon the traditional “community of interest” standard discussed above.⁷⁴ However, in 1984, the Board adopted a “disparity of interest” standard for these institutions, leading to a small number of units.⁷⁵ But five years lat-

68. In some industries the Board has gone so far as to identify “presumptively appropriate unit[s],” such as so-called “wall-to-wall” units in retail stores. *Sav-On Drugs, Inc.*, 138 N.L.R.B. 1032 (1962); *Haag Drug Co., Inc.*, 169 N.L.R.B. 877 (1968).

69. *Newton-Wellesley Hospital*, 250 N.L.R.B. 409 (1980).

70. *Wheeling Island Gaming, Inc.*, 355 N.L.R.B. 637 (2010).

71. 357 N.L.R.B. No. 83, at 1, 11.

72. *Guide Dogs for the Blind, Inc.*, 359 N.L.R.B. No. 151 (2013).

73. 29 U.S.C. §§ 152(14), 158(d), 158(g) (2012).

74. See an explanation in 1 *THE DEVELOPING LABOR LAW 729–35* (John E. Higgins, Jr. ed., 6th ed. 2012) and cases cited therein.

75. *St. Francis Hosp.*, 271 N.L.R.B. 948, 954 (1984). See also 1 *THE DE-*

er, the Board returned to the eight-unit structure for acute care hospitals by adopting a rule in an administrative rulemaking proceeding.⁷⁶

The bargaining unit rule adopted by the Board for acute care hospitals does not apply to non-acute facilities such as nursing homes.⁷⁷ In 1991, the Board decided not to rely on either the “community of interest” standard or the “disparity of interest” standard for these facilities.⁷⁸ The Board stated that it would consider not only community of interest factors but also background information gathered during the acute care rulemaking and prior precedent.⁷⁹ However, the Board reversed course 20 years later, when it overruled the prior precedent for non-acute health care facilities and ostensibly returned to the community of interest standard, albeit a radically different version of that standard.⁸⁰ These “policy” shifts could be readily interpreted as political, based on the composition of the boards in question and the context in which their decisions were rendered.

It is clear that the process of adjudicating claims brought under the NLRA must be depoliticized in order to facilitate fairness and predictability of decision-making. This Article argues that this goal would be best accomplished by eliminating the NLRB’s adjudicative function in unfair labor practice case and amending the NLRA to authorize federal district courts to hear such cases following investigation and conciliation efforts by the Board. Ceding decision-making power to life-appointed Article III judges would greatly de-politicize the process, resulting in more reasoned, consistent, and reliable precedent. It would also eliminate the contentiousness of the Board appointment process and allow the Board to focus on those functions for which it is best suited as a result of its unique agency expertise—administering representation cases, investigating and prosecuting unfair labor practices, and resolving claims that are of questionable merit or otherwise appropriate for early resolution. Increased consistency of decision-making would

VELOPING LABOR LAW 729–35 *supra* note 74, and cases cited therein for further discussion.

76. 29 C.F.R. § 103.30 (2012). The Supreme Court approved the rule in *Am. Hosp. Ass’n v. NLRB*, 499 U.S. 606, 608–09 (1991).

77. 29 C.F.R. § 103.30.

78. *See* Park Manor Care Ctr., Inc., 305 N.L.R.B. 872, 875 (1991).

79. *Id.*

80. Specialty Healthcare & Rehabilitation Ctr., 357 N.L.R.B. No. 83, at 16 (2011).

also be expected to result in less litigation, as the temptation to bring cases in hopes of inciting the latest policy reversal will be lessened. Further, allowing litigants to bring their cases directly to federal district courts will increase expediency of decision-making, which will lead to more effective vindication of Section 7 rights as well as a stronger deterrent to unfair labor practices by both employers and unions.

Part III below will lay out a new plan for labor law reform and address the anticipated effects and potential limitations of the proposal.

II. ELIMINATING THE NLRB AS ADJUDICATOR: A NEW PLAN FOR LABOR LAW REFORM AND ANTICIPATED EFFECTS/LIMITATIONS OF THE PLAN

A. THE PROPOSAL FOR REFORM

The primary change suggested by this proposal is the revision of Section 10 of the Act and related procedural regulations to eliminate the Board's authority to adjudicate unfair labor practice cases and transfer that responsibility to the federal district courts. This approach generally follows the procedural structure of Title VII of the Civil Rights Act, as adapted to the Board's existing organizational structure.

Under the proposal, the Board's regional directors, acting on behalf of the agency's General Counsel, would continue to investigate unfair labor practice charges and determine whether they have merit. If no merit is found, a charge would be dismissed. However, if the regional director finds merit in a charge, an attempt would be made to reach a settlement through conciliation between the respondent (employer or union) and the charging party. If a settlement is not reached, the charging party could file a complaint in an appropriate federal district court based upon the allegations in the charge. In the alternative, the General Counsel, on behalf of the Board, could file such a complaint. A decision of the district court could be appealed by the losing party to the federal courts of appeals.⁸¹ These procedures would follow the same general approach established by Section 706 of Title VII of the Civil Rights Act.⁸²

81. Alternatively, to extinguish forum shopping, one federal appellate court, e.g., the D.C. Circuit, could be designated as the "labor" court of appeals.

82. See 42 U.S.C. § 2000e-5 (2012) (describing the enforcement provisions of the Civil Rights Act).

If a district court finds that a respondent (employer or union) has violated the Act, it could impose the same cease-and-desist and affirmative action remedies under this plan that are now available to the Board under Section 10(c) of the Act.⁸³ Although that section provides for a remedy of reinstatement and back pay, and it also authorizes certain other monetary remedies in appropriate cases, it does not permit compensatory or punitive damages.⁸⁴ Adjustments to add those damages and provisions relating to fee-shifting should be considered to create added incentive for traditional labor lawyers to take charges into federal court.⁸⁵ While the General Counsel presumably would require no such incentives in order to initiate federal court litigation over unfair labor practice allegations deemed meritorious, the ability to recover damages and fees on behalf of the charging party or the government would similarly aid the Board in fulfilling its function of vindicating Section 7 rights. In addition, the proposal does not provide for jury trials or class actions, which are not available under the Act.

As a result of the changes outlined above, regional directors would no longer issue a complaint against a respondent when a determination is made that a charge has merit. Furthermore, administrative law judges would no longer hold hearings on unfair labor practice complaints or issue recommended decisions for review by the Board. The function of administrative law judges would be eliminated.

There would be no change, however, in the Board's responsibility for processing representation cases under Section 8 of the Act. Regional directors, acting on behalf of the Board, would continue to conduct representation hearings; determine the scope of appropriate units; rule on the eligibility of voters; conduct secret ballot elections;⁸⁶ rule on election objections and

83. See Anne Marie Lofaso, *The Persistence of Union Repression in an Era of Recognition*, 62 ME. L. REV. 199, 221-22 (2010) (discussing the Board's authority under 10(c)).

84. See *id.*

85. New remedies could be added to cases involving representational issues that would promote compliance by unions and employers. For example, if an employer violates the Act, the employer would be subject to card checks. And if a union violates the Act, it would be barred from organizing that employer for two years.

86. One paradigm change that would make the proposal more attractive to organized labor is to establish a baseline rule that if a union presents authorization cards signed by a majority of employees it seeks to represent, an employer can demand a secret ballot election in forty-two days, provided the

challenges to voter eligibility; and certify the results of elections. As in the past, the losing party could file a request for review of a regional director's decision with the Board, and the Board would decide whether to reverse or modify the regional director's decision.

In addition, the regional director, on behalf of the Board, would continue to resolve other representation issues that do not involve the election of a representative. For example, the regional director would hear and resolve petitions to clarify a bargaining unit; petitions to amend a certification; and petitions for an election to "deauthorize" a union security provision in a collective bargaining agreement that imposes a requirement of mandatory union membership. And the Board would continue to rule on requests for review of such decisions.

In one change from the past, an employer would no longer be required to commit a "technical" refusal to bargain in order to obtain judicial review of the Board's decision in a representation case. This procedural anomaly would be eliminated by providing a right to appeal such a decision to an appropriate federal court of appeals. The appeal would be expedited so as not to deprive employees of the benefits of collective bargaining if the appeal is denied. The duty to bargain would commence if and when the appellate court dismisses the appeal and orders bargaining. Without this change, under current procedures, the parties are required to go through the motions of a pro forma charge proceeding to find the employer guilty of a "technical" unfair labor practice before appellate review of the decision is permitted—thus burdening the court's docket and causing needless expense for both the employer and the union.⁸⁷ Furthermore, the employer appeals at its peril because the duty to bargain would be retroactive, a result that is contrary to the principle of due process of law.⁸⁸

For example, if a regional director, relying on the *Specialty Healthcare* decision discussed above, approves a micro-unit requested by a petitioning union in a representation case—such as the ladies shoe department in a department store—and the Board certifies the union as bargaining representative following an election in that unit, the employer could file an appeal

employer allows equal workplace access. If an employer refuses to allow union access, elections would then be directed in two weeks.

87. See 29 U.S.C. § 160 (2012) (delineating the procedure for appellate review).

88. See *id.* § 158 (discussing retroactive application of Board decisions).

directly with the circuit court of appeals to challenge the Board's decision. Similarly, if the Board sets aside an employer's victory in a representation election because of a wage increase granted during the pre-election campaign, and the union wins a second election and is certified by the Board, the employer could file an appeal from that decision directly with the court of appeals.

One other procedural change would be required to transfer the adjudication of unfair labor practice charges to the federal district courts. Under current procedure, a party losing a representation election can file both election objections and unfair labor practice charges based upon the same conduct.⁸⁹ The objections and charges are then consolidated for decision by an administrative law judge.⁹⁰ This procedural approach would no longer be workable because the district court, instead of the Board, would rule on unfair labor practice charges, while the Board would rule on election objections. From the standpoint of the representation case, however, this change would have no legal impact because a finding of objectionable conduct affecting the outcome of an election is sufficient to set aside the election and order that a new one be conducted.

In recognition of this procedural overlap, federal judges would stay any action on unfair labor practice allegations in a complaint based on the same conduct as election objections under review by the Board, until the Board finally resolves the matter. At that point, the court would dismiss the allegations unless the interests of justice require continued litigation after the Board's decision. In addition, the court would stay action on such allegations if review of the Board's representation decision has been sought in the court of appeals.

Under current procedure, a union can file "blocking charges" to prevent a representation election from being conducted.⁹¹ This typically occurs in the case of a petition by employees for a decertification election, or an "RM" election petition filed by an employer when a union has sought recognition but declines to file a petition for an election.⁹² Regional directors have wide

89. See 22 FED. PROC., L. ED. § 52:659 (discussing representation proceedings).

90. *Id.*

91. See Sarah Pawlicki, *Levitz Furniture Co.: The End of Celanese and the Good-Faith Doubt Standard for Withdrawing Recognition of Incumbent Unions*, 78 CHI.-KENT L. REV. 381, 382 & n.11 (2003) (discussing blocking charges).

92. *Id.*

discretion in allowing elections to be blocked, and this sometimes results in the delay of an election for months and in some cases for years—especially when the union resorts to the tactic of filing consecutive unmeritorious charges over a long period of time.⁹³ This is contrary to the central policy of the Act, which is to allow employees to freely choose their bargaining representative, or to choose not to be represented at all.

To effectuate this important policy, elections could still be blocked by the incumbent union under the proposal, but for a maximum period of 14 days regardless of the number of charges filed. Of course, if the conduct leading to a charge is also alleged in election objections, and if the regional director concludes that the conduct was objectionable and affected the outcome of the election, a new election could be ordered. The same rules would also apply when a petitioning union files a charge to block an RC election. In either event, whether the charges are filed by an incumbent union or a petitioning union, allegations pending in a lawsuit in federal district court would not block an election. Otherwise, the district court would be drawn into the mechanics of the representation proceeding, which would be unworkable.⁹⁴

Union proponents might argue that this limitation on the blocking charge tactic would result in holding elections without the requisite laboratory conditions. However, this policy must coexist with the equally important policy of allowing employees to vote on whether they want to be represented by the union involved in the election. It is contrary to this policy to allow a union to delay for months, and sometimes years, the election that will provide that opportunity. Furthermore, if the union is

93. A study of cases in 2008 found that the median number of days between the filing of an election petition and the holding of a representation election when blocking charges were filed was 139 days, as compared to 38 days in unblocked cases. See Samuel Estreicher, *Improving the Administration of the National Labor Relations Act Without Statutory Change*, 5 FLA INT'L U. L. REV. 361, 369 (2010). In some cases, the delay resulting from blocking charges is much longer than this median number. For example, the delay was more than three years in *Templeton v. Dixie Color Printing Co.*, 444 F.2d 1064, 1065 (5th Cir. 1971). The delay was more than two years when the appellate court issued its decision in *NLRB v. Anvil Prods., Inc.*, 496 F.2d 94, 95 (5th Cir. 1974). And it was 2.5 years when the decision was issued in *Bishop v. NLRB*, 502 F.2d 1024, 1027 (5th Cir. 1974).

94. Alternatively, certain representation cases involving peripheral issues could be managed in arbitration with expedited timelines, and judicial appeal following thereafter. See *infra*, Part II.B.2.C (discussing “minor” unfair labor practice charges).

unsuccessful in the election, it can be set aside and a new one held if the Board determines that laboratory conditions did not exist.

Certain other functions of the Board would remain unaffected by this proposal. For example, the Board is responsible for resolving jurisdictional disputes by awarding work to one of two competing unions under Section 10(k) of the Act when a charge has been filed under Section 8(b)(4)(D).⁹⁵ In addition, the Board is required to seek injunctive relief under Section 10(l) of the Act when a union is engaging in an unlawful secondary boycott under Section 8(b)(4)(B).⁹⁶ And the Board has the power to seek temporary injunctive relief in federal district court under Section 10(j) of the Act when a complaint has been issued alleging a violation of the Act.⁹⁷ All of these functions would continue as under existing law, with minor conforming amendments to reflect the changes in the adjudication of charges outlined above.

Although the Board has interpreted the Act through adjudication of cases in the past, it would not be able to do so in the future (except for representation cases), because that function would be transferred to the courts as outlined above. Thus, the proposal anticipates that the Board may decide to interpret the law through more frequent rule-making than in the past. However, adopting substantive (legislative) regulations is a very laborious and time-consuming process, and it frequently serves as a lightning rod for challenge in the courts.⁹⁸ As an alternative, the proposal authorizes the Board to issue interpretive guidelines—similar to guidelines issued by the EEOC under Title VII—which do not require notice-and-comment rulemaking. Although such guidelines do not have the force of law, as in the case of substantive regulations adopted through the notice-and-comment process, they are entitled to consideration by the courts in construing a statute.⁹⁹

95. 29 U.S.C. § 160 (2012).

96. *Id.*

97. *Id.*

98. See Scott A. Zebrak, *The Future of NLRB Rulemaking: Analyzing the Mixed Signals Sent by the Implementation of the Health Care Bargaining Unit Rule and by the Proposed Beck Union Dues Regulation*, 8 ADMIN. L.J. AM. U. 125, 128–29 (1994) (discussing the difficulties of rule-making).

99. *AMTRAK v. Morgan*, 536 U.S. 101, 110–11 n.6 (2002) (citing *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 257 (1991)) (EEOC's interpretive guidelines do not receive deference under *Chevron U.S. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984)). Such interpretations are entitled to respect

B. ANTICIPATED EFFECTS OF THE PROPOSAL

It is anticipated that the proposal outlined above will have the following effects, which are expressed as advantages and disadvantages. In addition, the anticipated reactions of labor and management are noted on key points.

1. Advantages

(a) The decision-making process under the Act should be less political than in the past because federal district court judges are likely to be more objective than Board members. The individuals who are appointed to serve on the Board typically have represented either labor or management for many years, and frequently they resume their partisan professional careers upon leaving the Board.¹⁰⁰ Furthermore, this agency has been invested by Congress with wide discretion to make labor policy for the nation, as distinguished from strictly interpreting statutory language and making factual determinations, which allows the latitude to make discretionary decisions reflecting the respective backgrounds of the Board members. Of course, judges also have biases, which typically reflect the political affiliation of the president who appoints them. However, judges are more likely to follow the law than their policy preferences.¹⁰¹ Moreover, district court judges will be required to follow the law as determined by the appellate judges in their respective circuits—unlike the Board, which typically rejects any precedent established by an appellate court with which it disagrees, accepting the court's decision only as “the law of the case.”¹⁰²

(b) The instability in the law resulting from frequent flip-flopping by the Board on key issues under the Act, as described above, should be sharply curtailed if federal judges are the decision-makers on unfair labor practice issues instead of the Board. This would seem to necessarily follow from the proposed change in the existing system, where one agency can, in a sin-

under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944) (citing *Christensen v. Harris County*, 529 U.S. 576, 587 (2000)) (but only to the extent that those interpretations have the power to persuade).

100. See Joan Flynn, “Expertness For What?: The Gould Years at the NLRB and the Irrepressible Myth of the “Independent” Agency, 52 ADMIN. L. REV. 465, 474–77 (2000) (discussing the biases of potential nominees).

101. See, e.g., Erin B. Kaheny, *The Nature of Circuit Court Gatekeeping Decisions*, 44 LAW & SOC'Y REV. 129, 136 (2010) (discussing circuit courts' priority of deference to circuit decisions to maintain uniformity in law rather than expression of policy preferences of circuit court judges).

102. White, *supra* note 34, at 641–42.

gle case, change the law for the entire country simply by achieving a majority of three (or sometimes two) members on the Board. A federal district court judge would not have the same nation-wide jurisdiction, and he or she would be controlled by the precedent in that particular circuit. Under the current system, the Board has no similar requirement to acquiesce in the precedent of a circuit; and in some cases, the Board appears repeatedly before the same circuit in defense of the same position on an issue, knowing that it will lose the case, but nevertheless “respectfully disagreeing” with the court of appeals.

(c) As the Board becomes less politicized, the process of appointing and confirming Board members should also become less political. This would reduce the likelihood that the Board will lose a quorum because of filibusters in the Senate. Twice in recent years the Board has been besieged by challenges to its ability to function as an agency of the federal government. In the first case, *New Process Steel, L.P. v. NLRB*,¹⁰³ the Board had attempted to function with only two members for a period of twenty-seven months because of an inability of the President to make recess appointments due to a filibuster in the Senate. The Supreme Court held that a quorum of at least three members is required by the Act, and it therefore invalidated roughly six hundred decisions issued by the two-member Board.¹⁰⁴ Currently, in *Noel Canning v. Nat'l Labor Relations Bd.*,¹⁰⁵ the Supreme Court is considering whether several recess appointments to the Board were unconstitutional. If so, hundreds of the Board's decisions over recent years will be invalidated.¹⁰⁶

And most recently, on November 21, 2013, the Democratic leadership in the Senate found it necessary to invoke, using a rare parliamentary move, the “nuclear option”—a change in the Senate's filibuster rules—in order to obtain confirmation of a new slate of nominees to the Board.¹⁰⁷ In light of these devel-

103. *New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635, 2639 (2010).

104. *See id.*

105. *Noel Canning v. NLRB*, 705 F.3d 490, 493 (D.C. Cir. 2013), *cert. granted*, 133 S.Ct. 2861 (2013).

106. *See New Process Steel, L.P.*, 130 S. Ct. at 2639.

107. The rules change eliminates the ability of the minority party to hold up nominations for executive branch and judicial (except Supreme Court) appointments, including NLRB member appointments. Now, only a simple majority of fifty-one votes, instead of the sixty vote supermajority requirements that has applied for almost forty years, is needed to approve the appointments. It is debatable whether this legislative “flip flop” will have its intended effect,

opments, it should be obvious that the Board must be depoliticized if it is to continue to function as a vital federal agency.

When the politicization of the Board results in developments like *New Process Steel* and *Noel Canning*, unions and employers must wait for years to learn the ultimate outcome of cases that are critical to their interests—not only the parties to the individual cases but also the larger employer community and organized labor. It is impossible to calculate the inefficiency cost of this legal quagmire, but it clearly is substantial. For example, because of the *Noel Canning* issue, unions and employers do not know whether an employer can lawfully cancel dues check-off upon the expiration of a collective bargaining agreement;¹⁰⁸ whether an employer must turn over confidential witness statements to a union;¹⁰⁹ whether an employer that loses a union election must bargain with the union over layoffs and individual disciplinary actions while negotiating an initial collective bargaining agreement;¹¹⁰ and whether an employer must bargain over the “effects” of implementing a managerial decision that is clearly authorized by the management rights clause of an agreement with the union.¹¹¹

Indeed, this uncertainty extends far beyond the union-management context. For example, numerous class and collective action litigants have been waiting for years to learn whether the Board can prohibit nonunion companies from including a waiver of such actions in a mandatory employment arbitration agreement.¹¹² And companies must wait for years to learn whether the Board can intrude on the nonunion workplace to rewrite confidentiality agreements, nondisparagement policies, and rules requiring employees to be courteous at work;¹¹³ whether an employer can direct employees to hold in confidence an ongoing investigation of misconduct in the work-

as Republicans have already signaled that when the constitution of the Senate changes, appointments will move forward (or not) along party lines.

108. WKYC-TV, Inc., 359 N.L.R.B. No. 30, at 1 (2012).

109. Piedmont Gardens, 359 N.L.R.B. No. 46, at 1 (2012).

110. Alan Ritchey, Inc., 359 N.L.R.B. No. 40, at 1 (2012).

111. Heartland Health Care Ctr.-Plymouth Court, 359 N.L.R.B. No. 155, at 1–2 (2013).

112. D.R. Horton, Inc., 357 N.L.R.B. No. 184, at 1–2 (2012).

113. See, e.g., DirecTV U.S. DirecTV Holdings, LLC, 359 N.L.R.B. No. 54, at 1 (2013); Flex Frac Logistics, LLC, 358 N.L.R.B. No. 127, at 1 (2012); Costco Wholesale Corp., 358 N.L.R.B. No. 106, at 1 (2012).

place;¹¹⁴ and whether employers can fire employees for posting harassing material on social media sites.¹¹⁵

(d) In at least some cases, the decision-making process under the Act might take less time in federal court than in the two-step process at the NLRB, which includes an ALJ proceeding that culminates in a recommended decision, followed by an appeal (known as “exceptions”) filed at the Board by the losing party. Of course, litigation in federal court can also be ponderous and time-consuming, given the opportunity for extensive discovery, complex procedural requirements, and crowded district court dockets. However, some cases languish at the Board for several years before a decision is issued, and this should occur with less frequency, if at all, when the cases are under the control of a federal judge.

(e) Until the Supreme Court resolves an issue under the Act, the Board does not consider itself bound by appellate court rulings, except as the law of the case.¹¹⁶ It appears that the Board might continue to follow this controversial practice of non-acquiescence, even under the structure recommended in the proposal. However, the district courts, which would make the decisions in unfair labor practice cases, would be obligated to follow the law in their respective circuits. This should increase respect for the judiciary and the rule of law. In addition, it would result in a more stable body of case law to serve as precedent to guide employers and unions in the future.

(f) When the Board now seeks temporary injunctive relief in federal district court under Section 10(j) of the Act, the bar for granting such relief is quite low.¹¹⁷ The court can grant any relief that “it deems just and proper.”¹¹⁸ This can place the respondent (employer or union) at an unfair disadvantage in subsequently litigating the same issue before an ALJ and the Board, because the court has already ruled on key issues in deciding whether to grant the request for temporary relief. In effect, the decision is issued and relief granted by the judge on a temporary showing before the case is fully litigated before the ALJ and the Board. Under the proposal, the Section 10(j) proceeding would be consolidated with the litigation in the same

114. Banner Estrella Med. Ctr., 358 N.L.R.B. No. 93, at 2 (2012).

115. Hispanics United of Buffalo, Inc., 359 N.L.R.B. No. 37, at 1–2 (2012).

116. White, *supra* note 34, at 644.

117. See 29 U.S.C. § 160 (2012).

118. *Id.*

court over the allegations in the charge, thus eliminating, to a certain extent, this unfair procedure.

(g) Currently a party that is aggrieved by a final order of the Board in an unfair labor practice case is able to engage in a limited amount of appellate forum-shopping when it seeks review of an NLRB decision on the charges.¹¹⁹ Section 10(f) of the Act provides that the party may obtain a review of such order in any federal court of appeals in the circuit where the unfair labor practice was alleged to have occurred; or where the party resides or transacts business; or in the District of Columbia Circuit.¹²⁰ This option would no longer be available under the proposal because appellate review of unfair labor practice decisions would occur in the circuit in which the district court making the decision is located. Some may consider this change an improvement from a policy standpoint. It would likely be considered a negative change by employers, however, as it would narrow their review options. And unions might also be opposed to it if they are focused on the cases that might arise in which they are the respondent.

(h) Interpreting the law through the adoption of interpretive guidelines by the Board, instead of the case-by-case adjudication of unfair labor practice charges by that agency, could prove to be a more efficient and orderly process, potentially leading to better results from a policy standpoint. However, this would not preclude flip-flopping by the Board to effectuate policy changes in the guidelines when there is a change in control of the Board. In addition, employers would likely view even this informal type of rulemaking as a negative change.¹²¹ Recent experience with the Board's notice-posting rule,¹²² and es-

119. *Id.*

120. *Id.*

121. See *infra* Part II.C (discussing whether the NLRB should be limited to promulgating interpretive and procedural rules and policy statements, as the EEOC is under Title VII).

122. Notification of Employee Rights Under the National Labor Relations Act, Final Rule, 76 Fed. Reg. 54,006, 54,008 (Aug. 30, 2011) (codified at 29 C.F.R. § 104). Soon after the final rule was issued, two district court cases were filed challenging its validity. In *Chamber of Commerce v. NLRB*, 856 F. Supp. 2d 778, 780 (D.S.C. 2012), *aff'd*, 721 F.3d 152 (4th Cir. 2013), a South Carolina district court determined that the Board lacked the authority to promulgate the rule. The Fourth Circuit later affirmed the decision. *Chamber of Commerce v. NLRB*, 721 F.3d 152 (4th Cir. 2013). Soon after, the D.C. circuit enjoined implementation of the rule. *Nat'l Ass'n of Mfrs. v. NLRB*, No. 12-5068, 2012 WL 4328371, at *1 (D.C. Cir. Apr. 17, 2012) (order granting temporary injunction). A subsequent D.C. Circuit ruling vacated the rule for invalid enforcement provisions. *Nat'l Ass'n of Mfrs. v. NLRB*, 717 F.3d 947, 963-64

pecially the so-called, “quickie” election rule¹²³—known by some as the “ambush” election rule—have taught employers that a Board determined to change policy will find a way to do so. Limiting the Board to enforcing the NLRA through interpretative guidance, rather than binding legislative rules, will guard against the unproductive flip-flopping this Article has highlighted as a reason for change.

(i) The proposal would provide an orderly procedure for appealing representation case decisions of the Board to the appellate courts, which would be far more efficient and cost-effective than pro forma litigation over “technical” refusals to bargain. In addition, employers would no longer need to be in the position of intentionally refusing to bargain in order to appeal a decision they believe to be incorrect, nor would they be subject to retroactive penalties for actions taken without bargaining during the period of appellate review. These are compelling arguments from a due process standpoint. Even though the proposal includes an expedited appeal process, unions still may view this procedural modification as a negative, as they are unlikely to welcome the elimination of penalties in a process that will, even if reduced, continue to create delay.

(j) Union reliance on blocking charges should be reduced by the proposal, thus promoting the core policy of the Act that employees should have a free choice in making decisions on questions of union representation. However, unions would likely view this as a negative change because it would deprive them of a tactical weapon in fending off challenges to their representative status.

2. Disadvantages

(a) The litigation of unfair labor practice cases likely would be more expensive in some cases than under the current system for the charging party (usually a union or individual) because of

(D.C. Cir. 2013). As a result of this litigation, the rule has yet to be implemented in any form.

123. Representation—Case Procedures, 76 Fed. Reg. 80,138 (Dec. 22, 2011) (to be codified at 29 C.F.R. pts. 101–02). The rule was ultimately struck down by a D.C. Circuit court for failure to meet quorum requirements in promulgating the rule. *Chamber of Commerce v. NLRB*, 879 F. Supp. 2d 18, 30 (D.D.C. 2012). This led the NLRB to suspend its enforcement. *See* Press Release, NLRB, NLRB Suspends Implementation of Representation Case Amendments Based on Court Ruling (May 15, 2012), available at <http://www.nlr.gov/news-outreach/news-story/nlr-suspends-implementation-representation-case-amendments-based-court>.

a need to retain counsel to file an action in federal court. Currently the General Counsel prosecutes unfair labor practice charges in proceedings before an ALJ and the Board after issuing a complaint.¹²⁴ The charging party can be represented by separate counsel in such proceedings, but this is not necessary.¹²⁵ Under the proposal, the General Counsel could file an action in court, but it would not be required to do so. Thus, in at least some cases, the charging party would need to obtain counsel. Unions are likely to view this as a negative change.

(b) Litigation in court over unfair labor practice allegations would probably be more expensive for both parties than NLRB proceedings, and there could still be considerable delay. Such litigation includes extensive discovery requirements, personal appearances in court by counsel to argue motions, and greater procedural formality than exists under NLRB procedures. Savvy labor lawyers from the ranks of either management or organized labor may be postured, under our model, to “game” court review for extended periods of time. These problems, however, could be mitigated somewhat by special local rules or judge’s standing orders prescribing more streamlined and less burdensome procedures for unfair labor practice cases.

(c) Many unfair labor practice complaints issued under the Act involve matters of relatively minor significance, especially in monetary terms. Parties often litigate before the Board over such nonmonetary issues as posting a notice stating that an employer will avoid allegedly unlawful conduct in the future. At issue can be such questions as the precise wording on the notice, how broadly it must be disseminated, and whether a company executive must read it aloud in a meeting of employees. Given the anticipated costs associated with litigation in the courts, it is likely that at least some cases of this type would not be filed under the proposal if the General Counsel is unwilling or unavailable to file an action in court to enforce the remedy. Unions are likely to view this possibility as a negative change.

(d) The Board’s General Counsel currently attains a high settlement rate in unfair labor practice cases. For example, in the most recent report on this subject, the General Counsel stated that the settlement rate had been 91 percent for meritorious cases during fiscal year 2012.¹²⁶ Given the increased cost

124. See 29 C.F.R. § 101.8, 101.10 (2013).

125. *Id.*

126. See Memorandum from Lafe Solomon, Gen. Counsel, NLRB, to all

of litigation for charging parties, employers might be less inclined to settle some cases, anticipating that an action would not be filed in court.

(e) This proposal already relegates the more technical aspects of NLRA administration to the Board, in recognition of the fact that the Board's administrative law judges, staff attorneys and its General Counsel develop a high level of expertise under the Act, as do the Board members themselves. However, it may still be argued that federal judges would be faced with a steep learning curve under the proposal, and they would seldom acquire the same level of expertise under the Act as personnel at the Board. While this may be offset by other considerations, for example, the federal judiciary being uniquely suited to assume the adjudicative responsibilities outlined in this proposal, to a certain extent it might be considered a negative factor.

(f) The bifurcation of the litigation process in election cases between representation and unfair labor practice issues under the proposal is likely to be a less efficient approach than the current system of consolidating the issues in one case before an ALJ. But there does not appear to be any alternative as it would not be feasible for federal judges to conduct union representation elections, or to make the numerous legal decisions that are currently made by the Board and its regional directors in connection with such elections.

(g) Although the proposal contemplates the adoption of interpretive guidelines like those adopted by the EEOC under Title VII, instead of substantive (legislative) regulations, employers are likely to view this or any other form of increased rulemaking as harmful to their interests. Furthermore, although the proposal contemplates that the guidelines would be entitled to some deference by federal judges but would not be binding, the Board has broad rulemaking authority under the Act, and it could resort instead to the adoption of substantive regulations. This would require a higher degree of deference by the federal courts than is contemplated by the proposal.

(h) The shift in adjudication authority to district courts would also affect the caseloads of those courts, which already have high numbers of matters on their dockets, as well as many vacant positions. While courts might, then, be initially hesitant with this realignment, some of the concerns about backlog

might be ameliorated with, e.g., some form of specialized federal labor law bench comparable to the structure already in place for bankruptcy matters.

C. LIMITING THE NLRB TO PROMULGATING INTERPRETIVE AND PROCEDURAL RULES AND POLICY STATEMENTS, MIRRORING THE EEOC'S ROLE UNDER TITLE VII

To move away from a rulemaking model that replicates binding flip-flopping and politically-based outcomes, we propose Board rule-making authority in the form of administrative guidelines, similar to those adopted by the EEOC, instead of legislative (binding) rules. As with guidance from other administrative agencies, Board guidance would be subject to some deference by the federal courts, given the Board's labor relations subject matter expertise. Ultimately, however, courts would be free to rule outside Board guidelines, applying what over time would become a new (and, we submit, more stable) body of judicial labor law precedent.

1. Rulemaking Under Federal Law Generally.

Federal administrative agency rulemaking can play a significant role within the United States government's establishment of federal law. The basic rulemaking framework for federal agency rulemaking was established under the Administrative Procedure Act of 1946 ("APA" or "Act").¹²⁷ Under the APA, a federal "rule" is, "the whole or part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency."¹²⁸

Implementing rules add no substance to legislative direction that has been fully developed; rules interpreting and clarifying statutory ambiguities, and prescriptive rules (also referred to as "legislative" rules) establish substantive law where

127. See generally 5 U.S.C. §§ 551–559, 701–706, 1305, 3105, 5372, 7521 (2012) (establishing a rule making framework).

128. *Id.* § 551(4); see CORNELIUS M. KERWIN & SCOTT R. FURLONG, RULE-MAKING: HOW GOVERNMENT AGENCIES WRITE LAW AND MAKE POLICY 2–3 (4th ed. 2011) ("[A] rule is the skin of a living policy . . . it hardens an inchoate normative judgment into the frozen form of words . . . Its issuance marks the transformation of policy from the private wish to public expectation . . . [T]he framing of a rule is the climactic act of the policy making process." (quoting U. of Penn. Law School Dean Colin Diver, paraphrasing Oliver Wendell Holmes)).

Congress has provided little detail about how law and policy objectives are achieved.¹²⁹

The APA establishes “formal rulemaking” (seldom used)¹³⁰ processes and “informal rulemaking” processes.¹³¹ Informal rulemaking is commonly characterized as “notice-and-comment” rulemaking and requires each agency to satisfy basic procedural steps: (1) publication of notice of proposed rulemaking; (2) public participation via submission of written comments; and (3) at least 30 days prior to a rule’s effective date, final rule publication supported by a statement of basis and purpose.¹³² No public hearings are required for notice and comment rulemaking.¹³³

Rules regarding agency organization, procedure and practice, agency personnel manuals, interpretive rules, and general policy statements are subject to publication requirements, but are exempt from the other APA requirements.¹³⁴ They are valid upon Federal Register publication.¹³⁵

The outcome of notice and comment rulemaking satisfying all APA requirements is the creation of legislative or substantive rules having “the force or effect of law.”¹³⁶ That is, they are *binding* on the government and private parties until judicially overturned or the agency rescinds them.¹³⁷ In contrast, while courts’ interpretation of federal law generally accords some weight to an agency’s views as expressed in interpretive rules,¹³⁸ interpretive rules, advisory in nature, have no binding

129. KERWIN & FURLONG, *supra* note 128, at 5–6, 22.

130. Formal rulemaking is mandatory when a non-APA statute provides a rule must be “made on the record after opportunity for agency hearing.” 5 U.S.C. § 553(c). Formal rulemaking procedures are rarely used except in certain “rate-making, agriculture marketing order and food additive proceedings.” JEFFREY S. LUBBERS, *A GUIDE TO FEDERAL AGENCY RULEMAKING* 5 (5th ed. 2012).

131. Am. Bar Ass’n, *A Blackletter Statement of Federal Administrative Law*, 54 ADMIN. L. REV. 1, 30–36 (2002).

132. *Id.* (summarizing notice and comment rulemaking).

133. 5 U.S.C. § 553(c) (2012) (providing interested persons an opportunity to participate, but no requirement for an oral hearing).

134. *Id.* § 553(b)(A); see also Claire Tuck, Note, *Policy Formulation at the NLRB: A Viable Alternative to Notice and Comment Rulemaking*, 27 CARDOZO L. REV. 1117, 1146 (2005).

135. 44 U.S.C. § 1507 (2012) (stating that publication in the Federal Register creates a presumption of validity).

136. *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 (1979).

137. ERNEST GELLHORN & RONALD M. LEVIN, *ADMINISTRATIVE LAW AND PROCESS: IN A NUTSHELL* 315–16 (3d ed. 1990).

138. *Id.* at 317.

effect¹³⁹ and are not entitled to deference if inconsistent with statutory intent. In contrast, they may be developed “in any way an agency sees fit.”¹⁴⁰

2. Current NLRB Rules Are Mainly Procedural, Not Substantive

While the Board has rulemaking NLRA authority,¹⁴¹ the Board may exercise its discretion in deciding whether to exercise that authority or to establish national labor policy via adjudication.¹⁴² Nevertheless, NLRB rules found at 29 C.F.R. §§ 101-104¹⁴³ are mainly procedural, not substantive. Part 101 (“Statements of Procedure”) and 102 (“Rules and Regulations”) establish procedures relating to investigation and prosecution of unfair labor practice charges and compliance with NLRB orders as well as the conduct of questions concerning representation, including union elections.¹⁴⁴ Part 103 does contain some limited substantive rules: Subpart A sets forth jurisdictional standards covering colleges and universities, symphony orchestras and the horseracing and dog-racing industries, and Subpart C establishes rules governing appropriate bargaining units in the healthcare industry.¹⁴⁵ Promulgation of the healthcare bargaining unit rules in 1989 was the first and only successful exercise by the NLRB of its rulemaking authority in any material way to establish substantive law.

In contrast, NLRB rulemaking initiatives following promulgation of the healthcare regulations have failed. In 1992, the Board attempted, unsuccessfully, to memorialize via rulemaking the U.S. Supreme Court’s decision in *Communications*

139. *Morton v. Ruiz*, 415 U.S. 199, 236–37 (1974).

140. *KERWIN & FURLONG*, *supra* note 128, at 22–23 (“[I]nterpretive rules may stretch law or rules . . . [but] do not impose new legal obligations . . .” (citing as example Equal Employment Opportunity Commission’s “Uniform Guidelines on Employee Selection”)).

141. *See* 29 U.S.C. § 156 (2012) (stating that the NLRB has authority to “make, amend, and rescind, in the manner prescribed by the [APA], such rules and regulations as may be necessary to carry out” the provisions of the NLRA); *Am. Hosp. Ass’n v. NLRB*, 499 U.S. 606, 609 (1991) (upholding NLRB’s healthcare unit rule); *id.* at 610 (describing how Section 6 of the NLRA is “unquestionably sufficient to authorize the rule at issue in this case”).

142. *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974).

143. Section 104’s effective date has been delayed indefinitely. *See* 29 C.F.R. § 104 (2013).

144. *Id.* §§ 101, 102.

145. *Id.*

*Workers of America v. Beck*¹⁴⁶ establishing unions' obligations to notify members of their financial and membership obligations under labor agreements with union security clauses.¹⁴⁷ Likewise, rulemaking efforts to capture NLRB precedent establishing a presumption in favor of single location units also failed.¹⁴⁸ Both proposed rules crumbled under the weight of strong opposition from interested groups.¹⁴⁹ Unions opposed the higher notice and disclosure requirements imposed by the *Beck* holding and, by putting intense political pressure on the Board, were able to discourage the NLRB from promulgating a final rule.¹⁵⁰ The second rulemaking attempt, which would have classified single locations of multi-location entities as independent bargaining units, was opposed by employers and conservative members of Congress, who believed that the rule would unfairly favor unions by making formation of bargaining units easier.¹⁵¹ Congress successfully killed the proposed rule by attaching a rider to the NLRB budget appropriation bills in 1996, 1997, and 1998 prohibiting the Board from spending any of its budgets on promulgating the rule.¹⁵²

The NLRB's recent attempts at rulemaking on both procedural and substantive issues have also failed primarily because of ongoing challenges relating to Board action without a quorum. On May 14, 2012, so-called "quickie election rules" were struck down by the District Court for the D.C. Circuit because the Board lacked a quorum when it voted to adopt the rule, and the U.S. Court of Appeals for the D.C. Circuit subsequently dismissed the Board's appeal of that decision pursuant to a

146. 487 U.S. 735 (1988).

147. See *Union Dues Regulations*, 57 Fed. Reg. 43,635, 43,637 (1992). The proposed rule was withdrawn four years later in favor of case-by-case adjudication. See *Rules and Procedures for the Implementation of Communications Workers v. Beck*, 487 U.S. 735 (1988); 61 Fed. Reg. 11,167 (Mar. 19, 1996) (codified at 29 C.F.R. pt 102).

148. See *Appropriateness of Requested Single Location Bargaining Units in Representation Cases*, 60 Fed. Reg. 50,146 (Sept. 28, 1995). The proposal was ultimately withdrawn in 1998. See *Rules Regarding Standardized Remedial Provisions in Board Unfair Labor Practice Decisions and the Appropriateness of Single Location Bargaining Units in Representation Cases*, 63 Fed. Reg. 8890, 8891 (Feb. 23, 1998) (codified at 29 C.F.R. pt. 102).

149. See Tuck, *supra* note 134, at 1135–40 (describing political opposition to the NLRB's substantive rulemaking efforts).

150. See *id.* at 1139.

151. See *id.* at 1136.

152. See Flynn, *supra* note 100, at 501–02 n.152.

joint stipulation of the parties.¹⁵³ In February, 2014, the Board republished the election rules, which seems certain to lead to a new round of litigation over the coming years. Additionally, the U.S. Court of Appeals for the D.C. Circuit struck the Board's NLRA employee rights notice rule on May 7, 2013, finding that it violated Sections 8(b) and 8(c) of the Act.¹⁵⁴ The notice rule was later also rejected by the Court of Appeals for the fourth Circuit on lack of quorum and other grounds in *Chamber of Commerce of the United States v. NLRB*. The court stated that “[t]here is no general grant of power to the NLRB outside the roles of addressing [unfair labor practice] charges and conducting representation elections. . . . Indeed, there is no function or responsibility of the Board not predicated upon the filing of an unfair labor practice charge or a representation petition.”¹⁵⁵

Beyond formal rulemaking, every year, the Board's General Counsel issues numerous enforcement guidance memoranda that, while not constituting broad policy guidance, provide notice of the enforcement position the GC will take under the NLRA.¹⁵⁶ Finally, in some areas the NLRB has been prolific in the issuance of procedural interpretive rules and directives and bargaining unit summary guidance.¹⁵⁷

153. *Chamber of Commerce of U.S. v. NLRB*, 879 F. Supp. 2d 18, 28–29 (D.D.C. 2012).

154. *National Ass'n of Mfrs. v. NLRB*, 717 F.3d 947 (D.C. Cir. 2013).

155. *Chamber of Commerce of the United States v. NLRB*, 721 F.3d 152, 154, 160 (4th Cir. 2013). In spite of these losses, on August 30, 2013, the NLRB launched a mobile app for iPhones and Androids providing, “employers, employees and unions with information regarding their rights and obligations under the National Labor Relations Act.” *National Labor Relations Board Launches Mobile App*, NLRB OFF. PUB. AFF. (Aug. 30, 2013), <http://www.nlr.gov/news-outreach/news-story/national-labor-relations-board-launches-mobile-app> (last viewed Apr. 1, 2014).

156. See, e.g., *General Counsel Memos*, NLRB, <http://www.nlr.gov/reports-guidance/general-counsel-memos> (last visited Feb. 6, 2014) (providing links to all general counsel memos).

157. See, e.g., National Labor Relations Board, An Outline of Law and Procedure in Representation Cases (Aug. 2012), available at http://www.nlr.gov/sites/default/files/attachments/basic-page/node-1727/representation_case_outline_of_law_4-16-13.pdf (providing Agency staff and labor-management community with representation case issues); National Labor Relations Board Casehandling Manual, Part One, Unfair Labor Practice Proceedings (Dec. 2011), available at http://www.nlr.gov/sites/default/files/attachments/basic-page/node-1727/Final%20ULP%202013%20_1.pdf (providing procedural and operational guidance for the Agency's Regional Directors and their staffs when making decisions as to unfair labor practice and representation matters under the National Labor Relations Act); National Labor Relations Board Casehandling Manual, Part Three, Compliance Proceedings (Nov. 2013), available at <http://www.nlr.gov/sites/default/files/attachments/basic-page/>

3. Rulemaking Under Title VII.

Congress did not grant authority to the Equal Employment Opportunity Commission (EEOC) when Title VII was enacted to write legislative rules. Under Title VII, the EEOC is only authorized to, “issue, amend, or rescind suitable procedural regulations to carry out” Title VII’s requirements.¹⁵⁸ Thus, the Commission has promulgated “Procedural Regulations” as set out in 29 C.F.R. Part 1601 while, in contrast, its’ remaining Title VII regulations encompass non-binding advisory standards formulated as “Guidelines”¹⁵⁹ that lack the force of law but are entitled to deference.¹⁶⁰

4. Limiting NLRB Rulemaking Authority to Procedural and Non-Binding Interpretive Rules

NLRB adjudicatory rulemaking has been the subject of strong Supreme Court criticism at times.¹⁶¹ The Supreme Court

node-1727/CHMIII-2013.pdf (providing procedural and operational guidance for compliance proceedings); National Labor Relations Board Casehandling Manual, Part Two Representation Proceedings (Aug. 2007), *available at* <http://www.nlr.gov/sites/default/files/attachments/basic-page/node-1727/chm2.pdf> (providing procedural and operational guidance to Agent’s in representation proceedings); National Labor Relations Board Section 10(j) Manual (redacted) (Sept. 2002), *available at* http://www.nlr.gov/sites/default/files/attachments/basic-page/node-1727/redacted_10j_manual_5.0_reduced.pdf (providing procedural and operational guidance for Agent’s for processing Section 10(j) cases); Office of the General Counsel, NLRB, Guide for Hearing Officers in NLRB Representation and Section 10(K) Proceedings (Sept. 2003), *available at* http://www.nlr.gov/sites/default/files/attachments/basic-page/node-1727/hearing_officers_guide.pdf (providing hearing officers with instruction on conducting postelection hearings).

158. 42 U.S.C. § 2000e-12(a) (2012). In contrast, under the Age Discrimination in Employment Act and Americans with Disabilities Act, the Commission has authority to make legislative rules. *See* 29 U.S.C. § 628 (2012) (ADEA) (“[T]he [EEOC] may issue such rules and regulations as it may consider necessary or appropriate . . .”).

159. *See, e.g.*, 29 C.F.R. pt. 1604 (2010) (describing EEOC Guidelines on Discrimination because of Sex); 29 C.F.R. pt. 1605 (2010) (describing EEOC Guidelines on Discrimination because of Religion); 29 C.F.R. pt. 1606 (describing EEOC Guidelines on Discrimination because of National Origin); 29 C.F.R. pt. 1607 (describing EEOC Uniform Guidelines on Employee Selection Procedures).

160. *See* Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 141 n.20 (1976) (*per curiam*), *superseded by statute*, The Pregnancy Discrimination Act of 1978, 92 Stat. 2076, 42 U.S.C. § 2000e(k) (2012), *as recognized in* Shaw v. Delta Airlines, Inc., 463 U.S. 85, 88 (1983).

161. *See e.g.*, Allentown Mack Sales & Serv. Inc. v. NLRB, 522 U.S. 359, 374 (1998) (stating that the NLRB applied a “rule of primary conduct . . . different from the rule . . . formally announced”).

has harshly criticized the NLRB for its adjudication decision-making.¹⁶² Rulemaking is, “a potential remedy for . . . unchecked abusive bureaucratic discretion.”¹⁶³ Rules establish reasonable parameters on the exercise of administrative discretion and create certainty. In order for extant law as it has heaved to and fro over the last few administrations to avoid becoming black letter law, we propose, as under Title VII, that NLRA Section 6 be amended to limit NLRB rulemaking authority to procedural and interpretive rules.¹⁶⁴

Rulemaking—even interpretive rulemaking—creates more certainty for stakeholders. Even with interpretive rulemaking, the agency is less likely to actively reverse prior guidance, because doing so would require it to provide a transparent explanation for its policy shifts in amending a rule if it aims to maintain judicial deference.¹⁶⁵ At the same time the agency can offer valuable policy guidance to parties.

Interpretive rules should be promulgated based on extant NLRB law and continue to be promulgated in that manner. The agency, as subject matter expert on the substantive law, would provide important but not binding guidance for employers, employees, and unions with rules on which they could generally rely (but would not be binding) until judicial review. Presumably the courts would give greater deference to longstanding NLRB precedent, such as rules on solicitation and distribution,¹⁶⁶ but more carefully scrutinize rules that more recently expand existing law, such as the agency’s expansion of solicitation rights to vendor/contractor employees.¹⁶⁷ Preceding NLRB

162. *See id.*

163. KERWIN & FURLONG, *supra* note 128, at 32 (“[O]ur . . . systems are saturated with excessive discretionary power which needs to be confined, structured, checked” (quoting Davis in *Discretionary Power*)).

164. As the Board’s recent experience with its’ employee NLRA rights poster reflects, even if we supported notice and comment rulemaking it would likely practically gridlock the agency. *See* Tuck, *supra* note 134, at 1121 (arguing that “political divisions and intervention from the judiciary and from Congress” make notice and comment rulemaking “not feasible at the NLRB”). “Since the NLRB has rarely used rulemaking for substantive policy issues, parties would likely challenge the legitimacy of any proposed rule.” *Id.* at 1129 (footnotes omitted).

165. *See* John F. Manning, *Nonlegislative Rules*, 72 GEO. WASH. L. REV. 893, 930, 935–36 (2004) (“It is hard to see why an agency would have less of a duty to adhere to—or explain when it wishes to depart from—a policy position announced in a nonlegislative rule.”).

166. *See, e.g.,* Our Way Inc., 268 N.L.R.B. 394, 411 (1983) (establishing time parameters of lawful solicitation and distribution rules).

167. *See, e.g.,* New York New York, LLC, 356 N.L.R.B. No. 119, 9–10 (2011)

decisional law not addressed in newly issued guidance or conflicting with such guidance would be of no force or effect other than as relevant grounds upon which a reviewing court could decide whether the Act has been violated, but that would not rise even to the level of required deference upon review.

Reliance on interpretive rules would avoid judicial interference, as there would be no need to stay a rule that is advisory in nature only.¹⁶⁸ Congressional initiatives to overturn an interpretive rule or policy statement would likely be virtually non-existent in comparison to binding legislative rules. Interpretive rules would also effect savings in areas involving issues that arise over and over and over again, and likely avoid the unnecessary delays the Board is known for, and that are inherent in notice-and-comment rulemaking, as interpretive rules would be valid immediately after Federal Register publication.¹⁶⁹

CONCLUSION

This article challenges a prevailing view that collective representation laws are the Titanic, and that attempts to fix them are rearranging the deck chairs.¹⁷⁰ Prior reform attempts have been unsuccessful because they were motivated either by partisan politics, or were results-oriented, or both. The long list of attempts to fix a broken system should not lead one to conclude that the system is unfixable. Nor should it lead one to conclude that it is not worth it to attempt to amend the glaring problems in this arena. However, it is clear that much work needs to be done. Nothing will be accomplished in a climate presupposing partisan motivation for change. Rather, we believe all stakeholders recognize at some level that the federal labor law enforcement ship is sinking and that it benefits no one to turn that ship into something that benefits one set of polarized interest groups over another. This is unfortunate because it creates an unnecessary barrier to meaningful reform.

(expanding solicitation rights to contractors).

168. Tuck, *supra* note 134, at 1146 (explaining that while non-binding policy statements can be subject to judicial review during an enforcement action, there is generally no pre-enforcement judicial review delaying immediate enforcement).

169. *Id.* at 1132 n.118 (arguing that interpretive rulemaking would avoid “lengthy” notice-and-comment process and expensive litigation).

170. See, e.g., Piore & Safford, *supra* note 29, at 321 (discussing the widespread acceptance that the New Deal system of collective bargaining has collapsed).

While it occurs on a macro level because political interest groups reactively devalue¹⁷¹ any proposal set forth by their opponents, it occurs on a micro level as well, when academics and commentators immediately cast proposals as either “pro-management” or “pro-labor” based on criteria independent of the merits. Dichotomization and reactive devaluation of proposals that do not emanate from a homophilous source reduce the chances of meaningful reform.

Sadly, this problem might be unavoidable. Paradoxically, it could be that the more one tries to present neutral ideas, the more they will be ascribed as non-neutral, and perhaps worse, the more likely they will be coopted by a non-neutral political source and used for non-neutral ends. It may be that no matter how neutral one wants to be, tries to be, or is, that it is unavoidable that non-neutral political leaning motives will be ascribed and coopted in this way. Sarat and Silbey aptly describe the “pull” of neutral well-intentioned policy recommendations for unwanted political ends.¹⁷² They write, “[p]olicy oriented work which intends to be silent about its politics speaks nonetheless.”¹⁷³

The authors’ hope (perhaps too ambitious and optimistic) is to break this vicious cycle of failure of reforms in labor law because of non-neutral ascription or motivation. By adopting a perspective of administrative neutrality and focusing on procedural efficiency, we have attempted to craft a proposal that is genuinely workable as a reform effort. On the net, the hope is to restore credibility to the Board, which it so badly needs, and to harmonize the NLRB’s structural enforcement mechanisms with similarly situated governmental agencies. The net results would benefit management and labor alike. Most importantly, the net results would benefit employees and taxpayers in sig-

171. “Reactive devaluation” is a term used by social psychologists. See Lee Ross & Andrew Ward, *Psychological Barriers to Dispute Resolution*, in 27 MARK ZANNA, *ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY* 270 (vol. 27, 1995). It describes individuals’ deflation of their valuations of offers made by their counterparts in a negotiation, on the spurious assumption that a counterpart’s proposal in her best interest is invariably contra the individual’s best interest. *Id.* There is a substantial body of research on reactive valuation. See *id.* at 255–304; Lee Ross, *Reactive Devaluation in Negotiation and Conflict Resolution*, in *BARRIERS TO CONFLICT RESOLUTION* 26–42 (Kenneth J. Arrow et al. eds., 1995); Lee Ross & Constance Stillinger, *Barriers to Conflict Resolution*, 7 *NEGOTIATION J.* 389–404 (1991).

172. See Austin Sarat & Susan S. Silbey, *The Pull of the Policy Audience*, 10 *LAW & POL’Y* 97, 122–32 (1988).

173. *Id.* at 142.

nificant ways by increasing administrative efficiency, reducing uncertainty in the law, and by augmenting transparency of rule making. Perhaps even if Sarat and Silbey are right about the paradoxical cooptation of this kind of proposal, one way to avoid the serious negative consequences is to focus as we do on structural and procedural reforms that potentially benefit all parties. At least that is our genuine hope.