

# IDEOLOGICAL VOTING ON THE NATIONAL LABOR RELATIONS BOARD

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*[National Labor Relations Board Chairman Guy] Farmer acknowledged that the Board was a “political animal” and had been “since its inception.” It was not that someone in the White House would tell a Board how to decide specific cases, Farmer said, but a member appointed to the Board felt pressure to implement the “philosophy that he thought his administration wanted him to project on the Board.”<sup>1</sup>*

*The Board pretends to act like a court solemnly arriving at the correct interpretation of a legislative command, but in fact acts like politicians carrying out their electoral mandate to favor labor or to favor management.<sup>2</sup>*

*There is nothing wrong with the [National Labor Relations] Act. It just needs another President and a different kind of Board.<sup>3</sup>*

## I. INTRODUCTION

The quotations in the epigraph to this Article are representative of the view, held by many, that the National Labor Relations Board (NLRB or

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This Article is dedicated to Professors Clyde W. Summers and William B. Gould IV. Special thanks to my colleague, Darren Bush, for illuminating discussions and his insightful comments.

1. JAMES A. GROSS, *BROKEN PROMISE: THE SUBVERSION OF U.S. LABOR RELATIONS POLICY, 1947–1994*, at 97 (1995) (footnote omitted) (quoting former National Labor Relations Board Chairman Guy Farmer).

2. Charles Fried, *Five to Four: Reflections on the School Voucher Cases*, 116 HARV. L. REV. 163, 179 (2002).

3. Kenneth M. Casebeer, *Holder of the Pen: An Interview with Leon Keyserling on Drafting the Wagner Act*, 42 U. MIAMI L. REV. 285, 347 (1987) (quoting Leon Keyserling).

Board) is, or can be, an administrative agency comprised of partial, if not partisan, members carrying out the mandates, and protecting the interests, of management or organized labor. Commenting on the Board's partiality, Professor Clyde Summers has remarked:

The critical issues before the Board represent underlying disputes between unions and management. No matter how the Board decides these issues, it can not avoid aiding one and hindering the other. Impartiality is impossible. There can be no impartial rules governing the relationship between a tree and the woodsman's ax, even though we let the chips fall where they may.<sup>4</sup>

Another analyst, Professor Joan Flynn, has asked whether "Board members who come from the management or union side [are] more one-sided in their decision-making than their colleagues from government or other 'impartial' backgrounds?"<sup>5</sup> In her view, "there seems little doubt that management and union representatives appointed to the Board are likely to be highly predisposed to the management or union-side point of view."<sup>6</sup> Moreover, Flynn writes, a number of academics in the field of labor law "adhere to a fairly predictable line—more often than not pro-union."<sup>7</sup> And Professor James Gross has argued that "a presidential administration can make or change labor policy without legislative action through appointments to the NLRB,"<sup>8</sup> and that "national labor policy is in a shambles in part because its meaning seems to depend primarily on which political party won the last election."<sup>9</sup> Studies have "found strong evidence that [Board] members were influenced by their own ideological preferences and those of appointing Presidents towards unions and employers (as measured by the political party affiliation of members and Presidents)."<sup>10</sup>

Are these scholars correct that ideology and politics play a role in NLRB decisionmaking? My impressionistic thesis and provisional conclusion—based on service as a labor-management relations examiner

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4. Clyde W. Summers, *Politics, Policy Making, and the NLRB*, 6 SYRACUSE L. REV. 93, 97 (1954).

5. Joan Flynn, *A Quiet Revolution at the Labor Board: The Transformation of the NLRB, 1935–2000*, 61 OHIO ST. L.J. 1361, 1398 (2000).

6. *Id.* at 1403.

7. *Id.*

8. GROSS, *supra* note 1, at 275.

9. *Id.*

10. William N. Cooke et al., *The Determinants of NLRB Decision-Making Revisited*, 48 INDUS. & LAB. REL. REV. 237, 241 (1995); see also William N. Cooke & Frederick H. Gautschi III, *Political Bias in NLRB Unfair Labor Practice Decisions*, 35 INDUS. & LAB. REL. REV. 539, 549 (1982) (arguing that common perceptions of political bias in NLRB decisions are accurate); Charles D. Delorme, Jr. et al., *The Determinants of Voting by the National Labor Relations Board on Unfair Labor Practice Cases: 1955–75*, 37 PUB. CHOICE 207, 217 (1981) (noting "some of the most important political and economic variables that effect the behavior of . . . the NLRB").

with the Board, years of practice as a labor and employment lawyer, and research as an academic lawyer—was that, at least in certain areas of NLRB law and policy, the ideology<sup>11</sup> of a Board member can serve as a predictive indicator of that member's vote.<sup>12</sup> Thus, one could predict, with great confidence, that in some cases members who represented management prior to their appointment to the Board would vote for and in favor of management concerns and interests; likewise, votes for legal rules and policies favoring organized labor could be anticipated and expected from NLRB members with union-side backgrounds.<sup>13</sup>

An opposing view, positing that NLRB decisionmaking is not influenced or affected by politics or member ideology, has its adherents. Current NLRB chair Robert Battista recently remarked, “[i]f you are asking whether the board has gotten a political bias or an ideological bias, I’d say no.”<sup>14</sup> The notion that the NLRB is politicized has also been questioned by Professor Paul Secunda in his recent study of Board decisions “implementing the highly indeterminate inherently-destructive-conduct standard.”<sup>15</sup> Finding “little correlation between the political composition of the Board . . . and the frequency of inherently-destructive-conduct determinations,”<sup>16</sup> Secunda argues that the NLRB’s “institutional collegiality”<sup>17</sup> “helps maintain the impartiality of the Board”<sup>18</sup> and “permits

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11. On the definition of ideology for purposes of this Article, see *infra* notes 23–24 and accompanying text. For an analysis of various definitions and meanings of ideology, see John Gerring, *Ideology: A Definitional Analysis*, 50 POL. RES. Q. 957, 958–59 (1997).

12. For one account of the Board’s ideological divide, written by a former NLRB chair, see WILLIAM B. GOULD IV, LABORED RELATIONS: LAW, POLITICS, AND THE NLRB—A MEMOIR 256, 291–92 (2000).

13. One scholar has concluded that a “change in presidential administration from Republican to Democrat gives rise to a pro-labor shift in NLRB performance, and a change from Democrat to Republican produces a pro-business shift.” Terry M. Moe, *Control and Feedback in Economic Regulation: The Case of the NLRB*, 79 AM. POL. SCI. REV. 1094, 1102 (1985); see also GROSS, *supra* note 1, at 275 (lamenting the instability of the Board as administrations change).

14. Jane M. Von Bergen, *NLRB: Helper or Nemesis?*, Apr. 27, 2005, <http://www.philly.com/mld/philly/business/11500686.htm> (quoting Battista).

15. Paul M. Secunda, *Politics Not as Usual: Inherently Destructive Conduct, Institutional Collegiality, and the National Labor Relations Board*, 32 FLA. ST. U. L. REV. 51, 52–53 (2004). Certain employer conduct violates the National Labor Relations Act (NLRA or Act) when that activity “is so inherently destructive of employee interests that it may be deemed proscribed without need for proof of an underlying improper motive.” *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 33 (1967) (internal quotation marks omitted); see also *NLRB v. Brown*, 380 U.S. 278, 287 (1965) (“[W]hen an employer practice is inherently destructive of employee rights and is not justified by the service of important business ends, no specific evidence of intent to discourage union membership is necessary to establish a violation . . .”).

16. Secunda, *supra* note 15, at 95.

17. *Id.* at 103. Secunda notes that his concept of institutional collegiality is derived from Judge Harry Edwards’ articles discussing collegiality and judicial decisionmaking.

Board members from all ideological perspectives to decide cases solely on their legal merits and with the sole goal of getting the law right.”<sup>19</sup> For Secunda, the “counterintuitive result”<sup>20</sup> of his study provides “reason to believe that if collegiality assists the Board in obtaining a good amount of decisional consistency in this area of labor law, those same collegial impulses should animate Board decisionmaking in other areas as well.”<sup>21</sup> While he is aware of the Board’s “constant policy flip-flops over the years,” Secunda calls for “further empirical studies of other seemingly malleable legal standards,” which may “concretely establish that Board Members and other agency adjudicators are engaging in collegial

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*See id.* at 53 & n.6.

Noting that collegiality does not mean and is not the same as friendship, Judge Edwards refers to “a common interest” judges share “in getting the law right,” with judges “willing to listen, persuade, and be persuaded, all in an atmosphere of civility and respect.” Harry T. Edwards, *The Effects of Collegiality on Judicial Decision Making*, 151 U. PA. L. REV. 1639, 1645 (2003). Edwards also believes “that collegiality plays an important part in *mitigating* the role of partisan politics and personal ideology” as judges “communicate with, listen to, and ultimately influence one another in constructive and law-abiding ways.” *Id.*; *see also* Harry T. Edwards, *Collegiality and Decision Making on the D.C. Circuit*, 84 VA. L. REV. 1335, 1358 (1998) [hereinafter Edwards, *Collegiality and Decision Making*] (discussing the benefits of the collegial deliberative process).

While Judge Edwards’ conception of judicial collegiality and Professor Secunda’s reliance thereon are beyond the scope of this Article, it is worth noting that Edwards has recognized that in a “very hard” category of five to fifteen percent of all cases considered by his court, the United States Court of Appeals for the District of Columbia Circuit, “it is more likely (although not inevitable) that decisionmaking may be influenced by political or ideological considerations.” Harry T. Edwards, *The Judicial Function and the Elusive Goal of Principled Decisionmaking*, 1991 WIS. L. REV. 837, 857 [hereinafter Edwards, *The Judicial Function*]; *see also id.* at 854 (noting that in “very hard” cases with “no discernible ‘right answer[s],’ it may be true that a judge’s views are influenced by his or her political or ideological beliefs”); *cf.* Peter Ingram, *Maintaining the Rule of Law*, 35 PHIL. Q. 359, 376–77 (1985) (“True hard cases . . . are settled in the end according to extra-legal criteria, which in our own day are usually those of politics, morality, or economics.”). Furthermore, and of particular relevance to this Article’s topic, Judge Edwards has noted that “[p]olitical turmoil and revision are nothing new to the NLRB, for the Board historically has responded to, and reflected the philosophies of, the administrations that have appointed its members.” Harry T. Edwards, *Deferral to Arbitration and Waiver of the Duty to Bargain: A Possible Way Out of Everlasting Confusion at the NLRB*, 46 OHIO ST. L.J. 23, 24 (1985); *see also* Epilepsy Found. of Ne. Ohio v. NLRB, 268 F.3d 1095, 1097 (D.C. Cir. 2001) (noting, in Judge Edwards’ opinion for the court, that Board constructions of certain NLRA provisions “invariably fluctuate with the changing compositions of the Board”).

18. Secunda, *supra* note 15, at 103.

19. *Id.* at 105; *see also id.* at 103 (arguing that “the Members of the NLRB are able to separate their political and institutional roles and do what is best for national labor policy”).

20. *Id.* at 53; *see also id.* at 102–03 (arguing that the outcome of the study “is clearly counterintuitive” as the “highly indeterminate nature of the inherently-destructive-conduct standard . . . would appear to permit political bias to infect the decisions made by decisionmakers ensconced in a politically charged agency environment”).

21. *Id.* at 104.

decisionmaking.”<sup>22</sup>

Heeding this call for additional research and inquiry, this Article considers the role that ideology has played in NLRB decisionmaking. The “ideology” discussed herein is not and should not be viewed as a pejorative term or in a negative light. Rather, as used herein ideology—generally “understood as normative commitments of various sorts”<sup>23</sup>—more specifically refers to (1) the political party of the President appointing the Board member, (2) the Board member’s political party affiliation, and (3) the professional background of the member prior to his or her appointment to the NLRB.<sup>24</sup> This Article concludes that the ideology of Board members, so understood, is an important jurisprudential element in a number of areas of NLRB-declared law and policy.<sup>25</sup> Note that I do not claim, and should not be understood as saying, that ideology always has an outcome-influential or outcome-determinative impact in the agency’s work. As “more than ninety percent of the NLRB’s decisions are unanimous,”<sup>26</sup> any such claim would constitute gross overreaching. The only claim made in this Article is that ideology has been a persistent and, in many instances, a vote-predictive factor when the Board decides certain legal issues.

The Article is organized as follows. Part II provides an overview of the National Labor Relations Act (NLRA or Act),<sup>27</sup> the NLRB, and presidential appointments to the agency. Part III, highlighting the Board’s policy oscillations<sup>28</sup> and discussing examples of ideological voting on the NLRB, attempts to qualitatively demonstrate the ways in which Board members have cast ideological votes in divisive cases presenting

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22. *Id.*

23. Cass R. Sunstein et al., *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation*, 90 VA. L. REV. 301, 352 (2004).

24. See *infra* Part III and the Appendix to this Article. In viewing ideology in this way, I am indebted to the excellent work and analysis of Professor Joan Flynn. See generally Flynn, *supra* note 5 (explaining this conception of ideology).

25. As my findings are in accord with my aforementioned impressionistic hypothesis and provisional conclusion, I have kept in mind Judge Harry Edwards’ observation that a “researcher who assumes the existence of ideological bias or strategic behavior may ‘find’ that these exist, while a researcher who considers alternative explanations may find that what exists is rather different.” Edwards, *Collegiality and Decision Making*, *supra* note 17, at 1338. I have tried, to the best of my ability, to avoid this researcher-bias problem.

26. Ross Runkel, *NLRB Reversals During the Bush Administration*, LAWMEMO, Jan. 19, 2006, <http://www.lawmemo.com/articles/nlrbreversals.htm>.

27. 29 U.S.C. §§ 151–169 (2000).

28. See Samuel Estreicher, *Policy Oscillation at the Labor Board: A Plea for Rulemaking*, 37 ADMIN. L. REV. 163, 171 (1985) (discussing “abrupt changes in policy appearing to rework in wholesale major areas of Board law, often undone three or four years later”). For additional commentary on NLRB policy changes, see generally Julius Cohen & Lillian Cohen, *The National Labor Relations Board in Retrospect*, 1 INDUS. & LAB. REL. REV. 648 (1948); Flynn, *supra* note 5; Lee Modjeska, *The Reagan NLRB, Phase I*, 46 OHIO ST. L.J. 95 (1985).

controversial and sharply contested labor law issues.<sup>29</sup> It is in these cases, and not in the well-settled and non-controversial areas of law decided by unanimous Boards, that one can expect that ideological differences will surface and have some degree of adjudicative impact.<sup>30</sup> As discussed in that Part, in “important, complex cases,”<sup>31</sup> Republican administration Boards have ruled in favor of management, and Democratic administration Boards have ruled in favor of unions and employees. Part IV explores certain implications of ideological voting on the NLRB.

## II. THE NLRA AND THE NLRB

In 1935 the United States Congress passed, and President Franklin D. Roosevelt signed into law, the NLRA, “the most dramatic statutory assault on corporate prerogatives in American history.”<sup>32</sup> As amended, this important (and controversial)<sup>33</sup> federal labor law contains a representation

29. Cf. James J. Brudney et al., *Judicial Hostility Toward Labor Unions? Applying the Social Background Model to a Celebrated Concern*, 60 OHIO ST. L.J. 1675, 1679 (1999) (studying judicial behavior and examining “divisive” federal appeals court “cases that present close, controversial issues”).

30. See Sunstein et al., *supra* note 23, at 306, 309 (arguing that it is expected that ideology plays a “large role” in “ideologically contested” areas of law); see also Edwards, *The Judicial Function*, *supra* note 17, at 857 (arguing that decisionmaking in “very hard” cases is influenced by political or ideological considerations).

31. Cooke et al., *supra* note 10, at 254; see also *id.* at 255 (noting that Board member preferences for employers or unions “appear to affect decisions on no more than roughly 20% of [unfair labor practice] complaints decided by the Board”).

32. Mark Barenberg, *The Political Economy of the Wagner Act: Power, Symbol, and Workplace Cooperation*, 106 HARV. L. REV. 1379, 1397 (1993); see also Moe, *supra* note 13, at 1096 (“The NLRB was a quintessential product of the New Deal. It was created by a Democratic president and Congress as an administrative means of stabilizing labor-management relations, and, as such, was part of a much larger attempt to regulate and manage an economy that had gone spiraling out of control.” (footnote omitted)).

33. Reporting on the “bitter struggle over the passage of the . . . Act in 1935,” an article by Julius Cohen and Lillian Cohen noted that “[t]his struggle did not subside when the Board finally won legislative approval; it just took on different form.” Cohen & Cohen, *supra* note 28, at 648.

[I]mmediately after the creation of the Board the same pressures that were vainly exerted to prevent the Board from being conceived persisted to make sure that even if the Board were born, it would be only a “still-life” birth. These pressures took such forms as the report of the National Lawyer’s Committee of the American Liberty League “adjudging” the NLRA unconstitutional, the whipping up of adverse public opinion through a hostile press, the widespread ignoring of the act by many employers, and the [tying] up of the Board by a mass of injunction suits during the first year of its existence.

*Id.* at 648–49. Of course, the argument that the Act was unconstitutional ultimately failed. See *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 49 (1937) (rejecting constitutional challenges to the Act and concluding that “the Act is valid as here applied”); *NLRB v. Fruehauf Trailer Co.*, 301 U.S. 49, 57 (1937) (applying *Jones & Laughlin Steel Corp.*’s

election procedure, in which private-sector workers can vote for or against labor organizations seeking governmental certification as the employees' collective bargaining representative,<sup>34</sup> and prohibits certain employer and union unfair labor practices.<sup>35</sup>

The NLRA created the NLRB and empowered the agency to administer and enforce the Act.<sup>36</sup> Under the statute as enacted in 1935, the Board was comprised of three members appointed to five-year terms by the President with the advice and consent of the United States Senate.<sup>37</sup> In 1947 Congress amended the Act and, among other things, added two additional Board members (with the President designating one member to serve as the chair) and a General Counsel.<sup>38</sup> It has been suggested that this 1947 conversion of the Board "from a multimember board of three . . . into an agency with two separate and generally independent branches—a five-member board and a General Counsel—was achieved by particular men in order to produce particular results."<sup>39</sup> On that view, those favoring the

analysis of the validity of the Act to the case at hand).

34. See 29 U.S.C. § 159(a) (2000) ("Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment . . ."); 29 U.S.C. § 159(c) (providing that NLRB will process election petitions and, where appropriate, will conduct secret ballot elections and certify the results thereof).

35. See 29 U.S.C. § 158(a)–(b) (defining what constitutes unfair labor practices by an employer and a labor organization); see also 29 U.S.C. § 160(c) (authorizing Board to remedy unfair labor practices).

36. See ROBERT A. GORMAN & MATTHEW W. FINKIN, *BASIC TEXT ON LABOR LAW: UNIONIZATION AND COLLECTIVE BARGAINING* § 2.1, at 9 (2d ed. 2004) ("Congress in 1935 created an administrative agency, the National Labor Relations Board, to implement both the unfair labor practice provisions . . . and the representation provisions . . . of the Labor Act.").

37. See FRANK W. McCULLOCH & TIM BORNSTEIN, *THE NATIONAL LABOR RELATIONS BOARD* 23 (1974) ("Congress created a new National Labor Relations Board composed of three members to be appointed by the President and confirmed by the Senate."). Board members can be removed for cause by the President "for neglect of duty or malfeasance in office, but for no other cause." 29 U.S.C. § 153(a).

38. See 29 U.S.C. § 153(a) (addressing the composition of the Board and the appointment and tenure of its members).

39. Seymour Scher, *The Politics of Agency Organization*, 15 W. POL. Q. 328, 328 (1962). Scher argues that the separation of the Board and the General Counsel

was the result of attitudes toward the Board of key senior members of the House and the Republican leadership in the Senate. . . . The dominant view of the Republican-Southern Democratic majority in the House considered separation as a device to dilute the anti-employer bias of the agency and to make the agency under a new act amenable to the continuing influence of the congressional leadership group.

*Id.* at 332.

1947 amendments “objected not so much to the particular allocation of specialized tasks under the over-all control of the three-man Wagner Act Board as, more urgently, to the kinds of decisions that emerged through this structure.”<sup>40</sup> Thus, those “who viewed the Wagner Act as unfair to employers and saw the Board as an agency hopelessly biased in favor of unions and unionization urged some kind of architectural overhaul of the agency along with substantive changes in the law.”<sup>41</sup>

As a matter of custom, and not law, no more than three of the five NLRB members may belong to the President’s political party.<sup>42</sup> Board members, performing a quasi-judicial function, consider and decide cases via a process of case-by-case adjudication.<sup>43</sup> Unlike most agencies, the Board rarely resorts to substantive rulemaking.<sup>44</sup> While the NLRA grants the Board the authority to make rules and regulations,<sup>45</sup> the United States

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40. *Id.* at 329.

41. *Id.*

42. See GOULD, *supra* note 12, at 15 (“Traditionally, the Board consists of three members of the president’s own party and two members of the opposition. In contrast to the situation in other regulatory agencies—most of which are also quasi-judicial—this political allocation is a matter of custom, not of law.”). Thus, like the statutes creating the Occupational Safety and Health Review Commission and the Federal Mine Safety and Health Review Commission, the NLRA does not require political balance on the Board. Marshall J. Breger & Gary J. Edles, *Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 ADMIN. L. REV. 1111, 1139 (2000).

43. See Stephen F. Befort, *Labor and Employment Law at the Millennium: A Historical Review and Critical Assessment*, 43 B.C. L. REV. 351, 359 (2002) (“Independently, the NLRB, as a . . . quasi-judicial body, reviews the unfair labor practice decisions of administrative law judges.”); Mozart G. Ratner, *Policy-Making by the New “Quasi-Judicial” NLRB*, 23 U. CHI. L. REV. 12, 12 (1955) (noting that the Board exercises quasi-judicial functions).

44. See CHARLES J. MORRIS, *THE BLUE EAGLE AT WORK* 183 (2005); James J. Brudney, *Isolated and Politicized: The NLRB’s Uncertain Future*, 26 COMP. LAB. L. & POL’Y J. 221, 234 (2005) (“over its seventy year history the Board has chosen to operate virtually exclusively through adjudication, eschewing its rulemaking authority”); Andrew P. Morriss et al., *Choosing How to Regulate*, 29 HARV. ENVTL. L. REV. 179, 180 (2005) (stating that historically “[w]hile a few agencies, most notably the National Labor Relations Board, operated through case-by-case adjudication rather than rulemaking, this was the exception rather than the norm”); M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383, 1399 (2004) (noting NLRB’s “heavy reliance on adjudication as a way of making policy”); Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1565 (2002) (noting the Board’s “fail[ure] to use its rulemaking powers”); Merton C. Bernstein, *The NLRB’s Adjudication-Rule Making Dilemma Under the Administrative Procedure Act*, 79 YALE L.J. 571, 573–74 (1970) (noting that the Board exercises its adjudicatory authority much more often than its rulemaking authority).

45. See 29 U.S.C. § 156 (2000) (granting the NLRB the power to make, amend and rescind rules and regulations); see also *Am. Hosp. Ass’n v. NLRB*, 499 U.S. 606 (1991) (discussing NLRB’s broad rulemaking powers).

Federal administrative agencies formulate law and policy through rulemaking and adjudication. See 5 U.S.C. § 553 (Administrative Procedure Act (APA) rulemaking provision mandating general notice of proposed rulemaking, comments by interested



Supreme Court has made clear that “the Board is not precluded from announcing new principles in an adjudicative proceeding and . . . the choice between rulemaking and adjudication lies in the first instance within the Board’s discretion.”<sup>46</sup>

As mentioned earlier, Board members are appointed to five-year terms<sup>47</sup> by the President with the advice and consent of the Senate.<sup>48</sup> For

persons, and issuance of a final rule); 5 U.S.C. § 554 (APA provision governing agency adjudication: the agency “in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty”); *see also* Magill, *supra* note 44 (discussing administrative agency choices in performing delegated regulatory task); Jim Rossi, *Redeeming Judicial Review: The Hard Look Doctrine and Federal Regulatory Efforts to Restructure the Electric Utility Industry*, 1994 WIS. L. REV. 763, 769–73 (distinguishing agency rulemaking and adjudication).

46. *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974); *see also* *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 765–66 (1969) (plurality opinion) (stating that adjudicated cases “serve as vehicles for the formulation of agency policies” and “generally provide a guide to action that the agency may be expected to take in future cases”).

47. Professor and former NLRB chair Bill Gould argues that the five-year term plays a political role in the Board’s operations. “As a result, the Board is exposed—not only to the politics governing the initial appointment and confirmation process, which inevitably generate policy discussions—but also to political pressures from Congress and the president each time a member comes up for reappointment.” GOULD, *supra* note 12, at 125. As members “generally choose to stay in Washington” upon the expiration of their terms, “they are almost inevitably affected by the political environment and the necessity to survive in it.” *Id.* at 293. This problem could be avoided, in Gould’s view, by limiting Board members to a nonrenewable seven- or eight-year term. *Id.* at 126.

48. *See supra* notes 37–38 and accompanying text. Given recent developments, it may be more accurate to say that it is not that the President appoints NLRB members with the Senate’s advice and consent, but that the Senate nominates Board members with the President’s concurrence. As Bill Gould reports, in the early 1990s the Bush administration, seeking to accommodate the National Right to Work Committee on the right and Senate Democrats on the left, “put together informal ‘packages’ of nominees.” GOULD, *supra* note 12, at 39. Republicans advised President Clinton that their support for Gould’s 1993 nomination to the Board would be withheld pending the President’s presentation of a “complete package of nominees for the remaining open positions on the Board . . . and consulted with the [Senate Labor and Human Resources] Committee Republicans and the business community regarding those nominees.” *Id.* (quoting Letter from Republican Senator Nancy Kassebaum to President Clinton (Oct. 29, 1993)). This “batching” of NLRB nominees links the appointments of Democratic appointees to Republican appointees, and vice versa, with the package, and not individual nominees, approved by the Senate. *See* Michael Ashley Stein, *Hardball, Politics, and the NLRB*, 22 BERKELEY J. EMP. & LAB. L. 507, 509–10 (2001) (book review) (noting that the Board under Gould was weaker due to this “batching”); *see also* Jonathan P. Hiatt & Craig Becker, *Drift and Division on the Clinton NLRB*, 16 LAB. LAW. 103, 103 (2000) (noting that President Clinton’s appointments to the Board were “the product of negotiation between the Democratic president and the Republican-controlled [S]enate”); John C. Truesdale, *Battling Case Backlogs at the NLRB: The Continuing Problem of Delays in Decision Making and the Clinton Board’s Response*, 16 LAB. LAW. 1, 4 n.12 (2000) (noting the practice of batched appointments and arguing that batching causes extended vacancies on the Board as vacancies remain open until packages are assembled and presented to the Senate for confirmation).

the first eighteen years of the agency's existence, "most Board members were drawn from government or academia—never from industry or labor,"<sup>49</sup> and "the notion of appointing someone from the management or union side to the Labor Board was considered completely verboten; it was generally agreed that such a person could not possibly be fair to both sides, much less be perceived as such."<sup>50</sup> This practice changed in November 1952 with the election of President Dwight D. Eisenhower, the first Republican elected to the presidency since the 1935 enactment of the NLRA.<sup>51</sup> In 1953 Eisenhower appointed management lawyer Guy Farmer to the chairmanship of the Board as well as Albert Beeson, a non-lawyer industrial relations director.<sup>52</sup> Eisenhower's departure from the nomination-of-neutrals norm was not followed by Democratic Presidents John F. Kennedy or Lyndon B. Johnson, as both appointed Board members who were not from union or management backgrounds.<sup>53</sup> Thereafter, in 1970, Republican President Richard M. Nixon nominated management lawyer Edward B. Miller and other management-side members; since that time, "a majority of the Board members appointed have come from management or union-side rather than neutral backgrounds."<sup>54</sup>

### III. IDEOLOGICAL VOTING EXEMPLARS

This Part focuses on thirteen areas of NLRB law and policy in which ideology—the political party of the appointing president, the Board member's political party, and the member's pre-Board professional background—have played an observable and influential role.<sup>55</sup>

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49. Flynn, *supra* note 5, at 1364–65.

50. *Id.* at 1364.

51. See B. Glenn George, *To Bargain or Not to Bargain: A New Chapter in Work Relocation Decisions*, 69 MINN. L. REV. 667, 668 n.14 (1985) ("The election of President Dwight D. Eisenhower in November 1952 resulted in the first Republican administration since the creation of the Board in 1935."). For more on Eisenhower's appointments to the Board, see generally Seymour Scher, *Regulatory Agency Control Through Appointment: The Case of the Eisenhower Administration and the NLRB*, 23 J. POL. 667 (1961).

52. Flynn, *supra* note 5, at 1368–69. Eisenhower also continued to appoint neutrals to the agency. See GROSS, *supra* note 1, at 98, 125, 129, 151–52, 343 n.8 (discussing Eisenhower's appointments).

53. Flynn, *supra* note 5, at 1378.

54. *Id.* at 1365.

55. Facts relative to the ideology (as defined herein) of Board members referenced in this Part are set forth in the Appendix to this Article.

A. *Regulating Election Campaign Misrepresentations*

One of the NLRB's core functions is conducting representation elections. Seeking "to insure that the voters have the opportunity of exercising a reasoned, untrammelled choice for or against labor organizations seeking representation rights,"<sup>56</sup> the Board has declared that it strives "to provide a laboratory in which an experiment may be conducted, under conditions as nearly as ideal as possible, to determine the uninhibited desires of the employees."<sup>57</sup> The Board has emphasized that, when this standard is not met, "the experiment must be conducted over again" and election results must be set aside and a new election held.<sup>58</sup>

The question whether the Board should set aside elections where misrepresentations have been communicated to employees by employers or unions during campaigns has been answered in the affirmative and the negative by different Boards. In its 1962 decision in *Hollywood Ceramics Co.*,<sup>59</sup> the Board—Chairman Frank McCulloch and Members John Fanning and Gerald Brown—ruled that elections "should be set aside only where there has been a misrepresentation or other similar campaign trickery, which involves a substantial departure from the truth, at a time which prevents the other party or parties from making an effective reply," and the misrepresentation "may reasonably be expected to have a significant impact on the election."<sup>60</sup>

*Hollywood Ceramics* was subsequently overruled by the full five-member Board<sup>61</sup> in *Shopping Kart Food Markets, Inc.*<sup>62</sup> Members John Penello and Peter Walther, with the concurrence of Chairman Betty Murphy and over the dissents of Members Fanning and Howard Jenkins, held that the Board would "no longer set elections aside on the basis of misleading campaign statements," and would only intervene where a party to an election proceeding used deceptive practices involving the NLRB or "forged documents which render the voters unable to recognize the propaganda for what it is."<sup>63</sup> In their view, employees are not "naïve and unworldly" individuals, but are instead "mature individuals who are capable of recognizing campaign propaganda for what it is and discounting

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56. Sewell Manufacturing Co., 138 N.L.R.B. 66, 69 (1962).

57. General Shoe Corp., 77 N.L.R.B. 127, 127 (1948).

58. *Id.*

59. 140 N.L.R.B. 221 (1962).

60. *Id.* at 224.

61. Board cases are typically decided by three-member panels. In complex or novel cases "or ones with issues on which certain Board members have no known positions," all five Board members may participate and issue decisions. See EDWARD B. MILLER, AN ADMINISTRATIVE APPRAISAL OF THE NLRB 76-77 (rev. ed. 1980).

62. 228 N.L.R.B. 1311 (1977).

63. *Id.* at 1313.

it.”<sup>64</sup>

*Shopping Kart* lived for only twenty months before it was interred (as we will see, only temporarily) by *General Knit of California, Inc.*<sup>65</sup> Chairman Fanning and Member Jenkins, the *Shopping Kart* dissenters, outvoted Member Penello and resurrected the *Hollywood Ceramics* regime. Fanning and Jenkins stated that they would “adhere strictly” to the *Hollywood Ceramics* standard, would “apply that standard equally to both sides,” and would reduce the likelihood of delays in election certifications and the commencement of collective bargaining by acting “expeditiously on objections involving alleged misrepresentations.”<sup>66</sup>

Subsequently, in 1982, the Board flip-flopped again, holding in *Midland National Insurance Co.*<sup>67</sup> that *Hollywood Ceramics* and *General Knit* were overruled and that the law was being returned to the rule of *Shopping Kart*. Chairman John Van de Water and Members Robert Hunter and Don Zimmerman (with Members Fanning and Jenkins in dissent) acknowledged “that reasonable, informed individuals can differ, and indeed have differed, in their assessment of the effect of misrepresentations on voters and in their views of the Board’s proper role in policing such misrepresentations.”<sup>68</sup> Convinced that *Shopping Kart*’s line between objectionable and unobjectionable campaign speech produced “predictable and speedy”<sup>69</sup> results and reduced the incentive for lengthy litigation, the Board reasoned that employees were mature individuals capable of recognizing and discounting campaign propaganda.<sup>70</sup> In overruling prior case law, the Board relied upon its cumulative experience and noted that the experimental flexibility enjoyed by administrative agencies allows the

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64. *Id.* Members Fanning and Jenkins, dissenting, conceded that in some instances “we have considered employees ‘naïve,’ ‘unworldly,’ and easily swayed by a self-serving campaign.” *Id.* at 1315 (Members Fanning and Jenkins, dissenting in part). Notwithstanding that concession, they adhered to *Hollywood Ceramics* and the “firm belief that employees should be afforded a degree of protection from overzealous campaigners who distort the issues by substantial misstatements of relevant and material facts within the special knowledge of the campaigner, so shortly before the election that there is no effective time for reply.” *Id.* (emphasis omitted).

65. 239 N.L.R.B. 619 (1978).

66. *Id.* at 623. In his dissent Member Penello argued that the *Hollywood Ceramics* standards were “vague and flexible” and delayed the onset of the parties’ collective bargaining. *Id.* at 626 (Member Penello, dissenting). Member and former Chairman Murphy also dissented, arguing that “the Board has neither the qualifications, the practical experience, nor the resources to make valid psychological assessments of the actual effects of a given statement on the behavior of a given set (or group of subsets) of employees.” *Id.* at 635 (Member Murphy, dissenting).

67. 263 N.L.R.B. 127 (1982).

68. *Id.* at 130.

69. *Id.* at 131.

70. *Id.* at 131–32.

Board to change its policy positions.<sup>71</sup> Weighing the benefits of the *Shopping Kart* rule against the possibility that some voters would be misled by campaign misrepresentations, the Board sided with *Shopping Kart* and announced that the agency “will no longer probe into the truth or falsity of the parties’ campaign statements, . . . will not set elections aside on the basis of misleading campaign statements,” and will only set aside an election “where a party has used forged documents which render the voters unable to recognize propaganda for what it is.”<sup>72</sup>

As can be seen, in this area of Board law and policy, changes in presidential administrations and in the composition of the Board corresponded with and can be explained by ideology. *Hollywood Ceramics*, decided by Democratic President John F. Kennedy’s appointees McCulloch and Brown (both Democrats with government service experience) and Eisenhower appointee Fanning (a Democrat with a background in government),<sup>73</sup> regulated certain campaign misrepresentations. *Shopping Kart*’s deregulatory regime was put into place by Republican President Richard M. Nixon’s appointee Penello (a Democrat with government experience) and Republican President Gerald R. Ford’s nominees Walther and Murphy, individuals with management-representation backgrounds; Fanning and Kennedy appointee Jenkins (a Republican with government and academic experience) did not prevail in their efforts to save *Hollywood Ceramics*. *General Knit*’s return to the *Hollywood Ceramics* rule resulted from Fanning’s and Jenkins’ willingness to overrule *Shopping Kart*, a position not taken by Republican appointee Penello. And, from the “if at first you don’t succeed” approach to Board law, in *Midland National*, Van de Water and Hunter, Republicans appointed by Republican President Ronald Reagan, joined with Democratic President James Earl Carter’s nominee Zimmerman (an Independent) in returning the law to *Shopping Kart*, with Fanning and Jenkins finding themselves in the minority yet again. The moves toward and away from regulation of misrepresentations tracked the election returns and the NLRB appointments by Republican and Democratic presidents.

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71. See *id.* at 132.

72. *Id.* at 133. Relegated once again to the role of dissenters, Members Fanning and Jenkins commented on the “seesawing of Board doctrine,” *id.* at 133, and expressed their puzzlement concerning the majority’s distinction between unregulated fraud and regulated forgery. See *id.* at 133–34 (Members Fanning and Jenkins, dissenting). In their view, the *Midland National* Board abandoned employees “to the mercies of unscrupulous campaigners” and the “expert cadre of professional molders who devise campaigns for many of our representation elections.” *Id.* at 134.

73. See Appendix to this Article.

### B. *Dissemination of Plant Closing Threats*

Another important issue relative to employee organizational efforts and employer speech involves the question whether the Board should presume that an employer's unlawful threat to close a facility in the event of unionization is disseminated to employees other than the worker who heard the threat. Recognition of a presumption of dissemination warrants setting aside an employer election victory (i.e., a union loss) if the employer does not rebut the presumption.

Board policy in this area has seesawed along with the occupants of the White House and their Board appointees. In *General Stencils, Inc.*,<sup>74</sup> Members Fanning and Ralph Kennedy (but not Chairman Edward Miller) concluded that a serious threat of plant closure "will, all but inevitably, be discussed among employees. That is a reality of industrial life which the Board has long recognized in situations involving not only threats of closure, but even less serious threats which nevertheless affect every employee in the unit."<sup>75</sup> The Board thus placed the burden on the employer of proving the "unlikely event" that the threat remained isolated.<sup>76</sup> Fourteen years later, however, the Board refused to set aside an employer's election win<sup>77</sup> even though a supervisor told an employee that the plant "will shut down if the Union comes in."<sup>78</sup> Reagan appointees Chairman Donald Dotson and Member Patricia Diaz Dennis, writing in *Kokomo Tube Co.*, saw no evidence that the supervisor's remark, made more than one month before the election, had been disseminated to the seventy or eighty other employees in the election unit.<sup>79</sup>

The first movement in the more recent seesaw occurred in *Springs*

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74. 195 N.L.R.B. 1109 (1972).

75. *Id.* at 1110.

76. *Id.* Chairman Miller argued that his "colleagues, under the guise of an evidentiary presumption, have erected in fact a rule of law that dissemination of every threat will be conclusively presumed." *Id.* at 1114 (Chairman Miller, dissenting). In his view, "it makes no sense whatever to permit the only witness who heard a threat to testify that the threat was made but to remain silent on the question whether he disclosed the threat to any other employee." *Id.* Reasoning that "nondissemination is virtually impossible to prove except by the denial of most or all of the employees in the affected group," Miller refused to place the burden of proof of nondissemination on the employer. *Id.*

77. Thirty-five votes were cast for, and forty votes were cast against, the Union. *Kokomo Tube Co.*, 280 N.L.R.B. 357, 359 n.1 (1986).

78. *Id.* at 358 (quoting supervisor).

79. Member Johansen voted to set aside the election on the basis of the supervisor's remark, as he would "infer dissemination" of the "serious threat, effectively warning that not only [the employee who heard the threat] but all employees would lose their jobs if they voted for the Union." *Id.* at 359 (Member Johansen, dissenting). Further noting that the Union lost the election by just five votes, Johansen refused to view and treat the supervisor's statement as "de minimis." *Id.*

*Industries, Inc.*<sup>80</sup> There, Chairman John Truesdale and Members Sarah Fox and Wilma Liebman overruled *Kokomo Tube* (Member Peter Hurtgen dissented), noting that the “Board’s traditional practice is to presume dissemination of at least the most serious threats, such as threats of plant closure, absent evidence to the contrary.”<sup>81</sup> Addressing a supervisor’s closure threat communicated to three employees, one of whom testified that she told “everybody on break,”<sup>82</sup> the Board concluded that “it is reasonable to presume that this hallmark threat, which would severely and equally affect all employees in the plant, was discussed more widely among employees than just those employees ‘on break.’”<sup>83</sup> In the absence of employer evidence rebutting this presumption, the Board found that the threat was sufficient to affect the election results and set aside the employer’s election win.<sup>84</sup>

In 2004 the seesaw tipped in the other direction. *Crown Bolt, Inc.*<sup>85</sup> overruled *Springs Industries, General Stencils*, “and all other decisions in which the Board has presumed dissemination of plant-closure threats or other kinds of coercive statements, to the extent that those decisions so presume.”<sup>86</sup> Chairman Robert Battista and Members Peter Schaumber and Ronald Meisburg opined that “the *Springs Industries* presumption is contrary to the general rule that the burden of proof should rest on the party who ‘seeks to change the present state of affairs and who therefore naturally should be expected to bear the risk of failure of proof or persuasion.’”<sup>87</sup> Members Liebman and Dennis Walsh dissented, arguing that “historically, the Board has rightly placed on the employer the burden to prove what would be a highly idiosyncratic fact—namely, that contrary to every likelihood, employees did not talk with each other about their employer’s plant-closure threat.”<sup>88</sup> Placing the burden on the union “ignores the reality that employees are often reluctant, even afraid, to testify against their employer, complicating the burden on the objecting

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80. 332 N.L.R.B. 40 (2000).

81. *Id.* at 40.

82. *Id.*

83. *Id.* at 41 (internal quotation marks omitted).

84. Member Hurtgen posited that there should be no presumption that threats of plant closure are disseminated, and he “would decide these cases based on facts, not on legal presumptions” and “would follow the well-established principle that the burden of proof is on the objecting party,” in this case, the Union. *Id.* (Member Hurtgen, dissenting in part).

85. 343 N.L.R.B. No. 86 (Nov. 29, 2004).

86. *Id.*, slip op. at 4.

87. *Id.*, slip op. at 2 (quoting MCCORMICK ON EVIDENCE § 337, at 428 (John William Strong ed., 4th ed. 1992)). These Board members thus agreed with the positions previously taken by Chairman Miller, *see supra* note 76, and Member Hurtgen, *see supra* note 84 and accompanying text.

88. *Crown Bolt*, 343 N.L.R.B. No. 86, slip op. at 6–7 (Members Liebman and Walsh, dissenting in part).

party.”<sup>89</sup>

What role did ideology play in the Board’s journey from *General Stencils* to *Crown Bolt*? In *General Stencils*, Eisenhower appointee Fanning (a Democrat with a government service background) and Nixon appointee Kennedy (a Republican with a government service background) recognized the presumption, and Nixon appointee Miller, a management-side Republican, did not.<sup>90</sup> In *Kokomo Tube*, Reagan appointees Dotson and Dennis, both from the employer representation side of the labor-management divide, did not presume dissemination; that decision was subsequently overruled in *Springs Industries* by Clinton appointees Truesdale (a Democrat with a government service background) and union-side Democrats Fox and Liebman over the dissent of management-side Republican Hurtgen. Bush appointees Battista, Schaumber, and Meisburg, all Republicans with management representation backgrounds, rejected the dissemination presumption doctrine in *Crown Bolt*, with Democrats Liebman and Walsh in dissent. The ideological voting pattern is clear—unlike other Board members, management-side Republican Board members appointed by Republican presidents have not presumed the dissemination of threats.

### C. Supervisory Prounion Activity

When, and under what circumstances, does a company supervisor’s prounion activity constitute objectionable conduct warranting the invalidation of an election?

In its recently issued decision in *Harborside Healthcare, Inc.*<sup>91</sup> the Board—Chairman Battista and Members Schaumber and Meisburg—held that prounion conduct by a supervisor is objectionable when the conduct interferes with employee free choice and materially affects the outcome of an election.<sup>92</sup> In so holding, the Board overruled precedent requiring evidence of an express promise or threat by the prounion supervisor, as the Board had concluded in *Pacific Physicians Services, Inc.*,<sup>93</sup> decided by Members James Stephens, Dennis Devaney, and Charles Cohen; *Sutter Roseville Medical Center*,<sup>94</sup> decided by Chairman William Gould and Members Fox and John Higgins; *Pacific Micronesia Corp.*,<sup>95</sup> decided by Chairman Gould and Members Fox and J. Robert Brame; and *Millsboro*

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89. *Id.*, slip op. at 7.

90. See Appendix to this Article.

91. 343 N.L.R.B. No. 100 (Dec. 8, 2004).

92. *Id.*, slip op. at 1.

93. 313 N.L.R.B. 1176 (1994).

94. 324 N.L.R.B. 218 (1997).

95. 326 N.L.R.B. 458 (1998).



*Nursing & Rehabilitation Center, Inc.*,<sup>96</sup> decided by Members Liebman and Brame over the partial dissent of Member Hurtgen.

Restating the applicable legal standard, the *Harborside* Board set forth a two-prong test<sup>97</sup> to be applied when asking whether laboratory election conditions<sup>98</sup> have been upset by a supervisor's pronoun activity: (1) whether the supervisor's "conduct reasonably tended to coerce or interfere with the employees' exercise of free choice in the election," and (2) "[w]hether the conduct interfered with freedom of choice to the extent that it materially affected the outcome of the election."<sup>99</sup> In addition, the Board held that a supervisor's solicitation of union authorization cards "has an inherent tendency to interfere with the employee's freedom to choose to sign a card or not."<sup>100</sup> This solicitation may now be objectionable even though, under prior Board case law, it was "not objectionable where 'nothing in the words, deeds, or atmosphere of a supervisor's request for authorization cards contains the seeds of potential reprisal, punishment, or intimidation.'"<sup>101</sup>

Dissenting Members Liebman and Walsh argued that, "without the benefit of briefing. . . the majority's new test signals a radical break with the Board's established approach."<sup>102</sup> In their view, the new test shifted the analytical focus from "the possibility of employee coercion: the fear of retaliation or the hope of reward," to the question whether the supervisor's conduct reasonably tended to coerce or interfere with employee free choice.<sup>103</sup> Consequently, supervisory conduct interfering with an election could be found even though the employer communicated its antiunion position to employees "and even where employees cannot reasonably fear retaliation or hope for a reward based on the supervisor's conduct."<sup>104</sup> Furthermore, the dissenters continued, the Board's holding that supervisory solicitation of authorization cards may be objectionable

puts unions in an extraordinarily difficult position. To avoid creating a basis for setting aside an election, unions must now avoid using any person who might later be found to be a statutory

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96. 327 N.L.R.B. 879 (1999).

97. The Board adopted the test articulated by the United States Court of Appeals for the Sixth Circuit in *Harborside Healthcare, Inc. v. NLRB*, 230 F.3d 206, 214 (6th Cir. 2000).

98. See *supra* note 57 and accompanying text.

99. *Harborside Healthcare, Inc.*, 343 N.L.R.B. No. 100, slip op. at 4 (Dec. 8, 2004); see also *id.* (setting forth the factors to be considered in making this determination).

100. *Id.*, slip op. at 6.

101. *Millsboro*, 327 N.L.R.B. at 880 (quoting *NLRB v. San Antonio Portland Cement Co.*, 611 F.2d 1148, 1151 (5th Cir. 1980)).

102. *Harborside*, 343 N.L.R.B. No. 100, slip op. at 10 (Members Liebman and Walsh, dissenting).

103. *Id.* at 12.

104. *Id.*

supervisor to solicit authorization cards. Making such supervisory determinations is, to say the least, difficult even for the Board.<sup>105</sup>

Thus, unions may “err on the side of caution” and exclude solicitors “who might be natural leaders,” or may “guess wrong” and utilize employees who are later found to be supervisors.<sup>106</sup> “Either way, employees who want union representation lose.”<sup>107</sup>

Prior to *Harborside*, Board members of various backgrounds who were appointed by both Republican and Democratic Presidents did not find objectionable the prounion conduct of a supervisor where that conduct did not include explicit threats or promises by the supervisor.<sup>108</sup> On that view, prounion supervisory conduct alone did not constitute objectionable conduct warranting the setting aside of an election. That position has now been rejected by Republican management-side appointees of a Republican President who have also determined that supervisory solicitation of authorization cards inherently interferes with (and therefore increases employers’ opportunities to overturn union wins in) elections. This movement of the law to a more employer-friendly and union-unfriendly rule is an example of the vote-predictive ideology discussed herein.

#### D. *Are Medical Interns and Residents “Employees”?*

Over the years the Board has grappled with the following question: whether NLRA Section 2(3)<sup>109</sup> applies to and provides statutory coverage for persons working as medical interns, residents, and clinical fellows (commonly referred to as house staff).

Answering the foregoing question negatively in *St. Clare’s Hospital & Health Center*,<sup>110</sup> the Board (Members Jenkins, Murphy, Penello, and Walther, with Chairman Fanning dissenting) denied a union motion for reconsideration of its dismissal of a petition for an election in a unit of a hospital’s house staff. “Since the individuals are rendering services which

105. *Id.* at 15; see 29 U.S.C. § 152(11) (2000) (defining the statutory term “supervisor”).

106. *Harborside*, 343 N.L.R.B. No. 100, slip op. at 15 (Members Liebman and Walsh, dissenting).

107. *Id.*

108. See Appendix to this Article.

109. See 29 U.S.C. § 152(3):

The term “employee” shall include any employee . . . but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor . . . .

110. 229 N.L.R.B. 1000 (1977).

are directly related to—and indeed constitute an integral part of—their educational program, they are serving primarily as students and not primarily as employees.”<sup>111</sup> Emphasizing “the discretionary authority left to us by Congress in the 1974 health care amendments,”<sup>112</sup> the Board opined “that when an individual is providing services at the educational institution itself as part and parcel of his or her educational development the individual’s interest in rendering such services is more academic than economic. . . . [W]e do not think that such a relationship should be regulated through collective bargaining.”<sup>113</sup>

Thereafter, in its 1999 ruling in *Boston Medical Center Corp.*,<sup>114</sup> the Board—Chairman Truesdale and Members Fox and Liebman—overruled *St. Clare’s* and other decisions. Turning away from over twenty years of case law, the Board concluded that interns, residents, and fellows fell within section 2(3)’s broad definition of “employee” even though “a purpose of their being at a hospital may also be, in part, educational.”<sup>115</sup> Concluding that the “essential elements” of the house staff’s relationship with the medical center “obviously define an employer-employee relationship,”<sup>116</sup> the Board determined that “nothing in the statute suggests that persons who are students but also employees should be exempted from the coverage and protection of the Act.”<sup>117</sup> Moreover, the Board continued, the house staff were unlike traditional students in that they did not pay tuition or fees, did “not take typical examinations in a classroom setting,” and did not “receive grades as such.”<sup>118</sup> Setting out a number of other considerations supporting its position that the at-issue members of the

111. *Id.* at 1002.

112. *Id.* at 1004.

113. *Id.* at 1003. The Board noted that

by our finding that housestaff are not “employees,” we certainly did not intend to imply that we were thereby renouncing entirely our jurisdiction over such individuals. To the contrary, we have indeed asserted jurisdiction over all classifications at health care institutions . . . but feel that extending bargaining privileges to residents, interns, and fellows would not be in the best interest of national labor policy.

*Id.* (footnote omitted); see also *Cedars-Sinai Med. Ctr.*, 223 N.L.R.B. 251 (1976) (holding that house staff personnel were primarily students and were therefore not section 2(3) employees).

114. 330 N.L.R.B. 152 (1999).

115. *Id.* at 160.

116. *Id.* The Board noted that the house staff worked for the employer, were compensated for their services, received fringe benefits and were eligible for workers’ compensation, and received paid vacations, sick leaves, and parental and bereavement leave as well as dental, life health, and malpractice insurance. *Id.*

117. *Id.*

118. *Id.* at 161.

house staff were statutory employees,<sup>119</sup> the Board declared:

Today, we accord individuals who clearly are employees within the meaning of the Act the rights that are afforded all such employees, and likewise impose the responsibilities commensurate with those rights. We believe that our interpretation of the statute, informed by analysis of the facts here and experience, is a reasonable one that takes into account the entire nature of the house staff-hospital relationship.<sup>120</sup>

The Board members with management backgrounds dissented. Writing that the Board may but is not compelled to treat house staff as employees, Member Hurtgen argued that “the Board makes a policy choice to include or exclude the group at issue.”<sup>121</sup> Seeing no reason to depart from prior case law, he posited that “as a policy matter, the Board should continue to exercise its discretion to exclude” house staff, especially where there were no changed circumstances warranting a “change [in] long-standing precedent.”<sup>122</sup> “I would not alter longstanding and workable precedent simply because of a change in Board membership. In my view, the interests of stability and predictability in the law require that established precedent be reversed only upon a showing of manifest need. There is no such showing here.”<sup>123</sup>

In his separate dissent Member Brame argued that the Board’s overruling of precedent “places in jeopardy the finest system of medical education in the world.”<sup>124</sup> Sharing his understanding of the history and current methodology of medical education in the United States, Brame contended that medical residents are students who work at (and not for) a hospital, provide direct patient care as “an indispensable component of [their] medical education,”<sup>125</sup> and receive stipends, not as compensation for their services but “for the purpose of supporting the individual during a lengthy graduate education program.”<sup>126</sup> Rejecting the majority’s holding and analysis, Brame wrote that granting employee status to house staff was inconsistent with several fundamental policies of the NLRA.<sup>127</sup> Opining

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119. *See id.* at 161–64.

120. *Id.* at 164.

121. *Id.* at 168 (Member Hurtgen, dissenting).

122. *Id.* at 169.

123. *Id.*

124. *Id.* at 170 (Member Brame, dissenting).

125. *Id.* at 176.

126. *Id.* at 177.

127. *See id.* at 178–80. Brame opined that the Congress enacting the NLRA sought to restore the equality of bargaining power between employees and employers and that the Act is based on a fundamental conflict between employers and employees engaged in collective bargaining and anticipates and allows the use of economic weapons by parties to collective negotiations in support of their bargaining positions. *Id.* at 178. The Board’s finding that

that the Board “thus forces medical education into the uncharted waters of organizing campaigns, collective bargaining, and strikes,”<sup>128</sup> Brame predicted: “If the majority is successful in this endeavor, American graduate medical education will be irreparably harmed.”<sup>129</sup>

Which Board members favored employee representational efforts and voted to support the coverage of medical interns and residents under the NLRA, and which members agreed with hospital employers that individuals in medical house staff positions are students with no collective bargaining rights? *Boston Medical Center’s* conclusion that interns, residents, and fellows are statutory employees was announced by three Democratic appointees of a Democratic president, one with prior service in government and two with union-side backgrounds prior to taking their seats on the Board, over the dissent of two management-side Republicans.<sup>130</sup> *Boston Medical Center* overruled Board precedent issued by members appointed by Republican Presidents Nixon and Ford,<sup>131</sup> in *St. Clare’s*, for example, two of those appointees had pre-Board management backgrounds. It is apparent that member votes in these cases are consistent with member ideology.

#### E. *Are Graduate Assistants “Employees”?*

Ideological voting can also be observed in the Board’s responses to the question whether university graduate assistants are employees under and within the meaning of NLRA section 2(3).<sup>132</sup>

In *New York University*,<sup>133</sup> Chairman Truesdale and Members Liebman and Hurtgen held that certain university graduate assistants were statutory employees eligible to vote in a Board-conducted election sought and petitioned for by the United Auto Workers (UAW). The assistants,

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house staff are employees is inconsistent with these policies, Brame argued, as the “primary purpose for which a physician undertakes a residency . . . is to gain certification in a specialty—not the wages, benefits, or working conditions that the residency program affords.” *Id.* Collective bargaining is a “poor fit” in the context of “graduate medical education, which is to a large degree controlled by national accrediting agencies independent of the putative employer.” *Id.* at 179. And “once residents are found to be Section 2(3) employees, they must possess the same statutory rights, including the right to strike, as other health care employees.” *Id.*

128. *Id.* at 182.

129. *Id.*

130. See Appendix to this Article.

131. As noted in the text’s discussion of *St. Clare’s Hospital*, Member Jenkins, a Republican appointed by Democratic President Kennedy, agreed with the view that house staff were not covered by section 2(3). Chairman Fanning, a Democrat appointed by Republican President Eisenhower, dissented in that case.

132. See *supra* note 109 for the text of this section.

133. 332 N.L.R.B. 1205 (2000).

graduate students employed as teachers or researchers, worked under the direction and control of the University's departments and programs, were compensated for their services through the University's payroll system, and spent fifteen percent of their time performing graduate assistant duties. The assistants' "relationship with the Employer is thus indistinguishable from a traditional master-servant relationship," the Board determined, and they "plainly and literally fall within the meaning of 'employee' as defined in Section 2(3)."<sup>134</sup> The assistants were "no less 'employees' than part-time or other employees of limited tenure or status,"<sup>135</sup> and the fact that their work was primarily educational did not mean that they were not employees as the "educational benefits" flowing from such work was not a requirement for a graduate degree in most of the University's departments.<sup>136</sup>

The University made, and the Board rejected, two policy-based arguments. First, the Board was not persuaded by the argument that the at-issue graduate students did not have a traditional economic relationship with the University; in the Board's view, the working conditions of the assistants and the regular faculty did not differ. Second, the Board rejected the assertion that the recognition of bargaining rights for graduate students would infringe upon the University's academic freedom. Noting its three-decades long experience with and assertion of jurisdiction over private colleges and universities,<sup>137</sup> the Board was confident that "the parties can confront any issues of academic freedom as they would any other issue in collective bargaining."<sup>138</sup> Stating that "we cannot say as a matter of law or policy that permitting graduate assistants to be considered employees entitled to the benefits of the Act will result in improper interference with the academic freedom of the institution they serve,"<sup>139</sup> the Board declined to "deprive workers who are compensated by, and under the control of, a statutory employer of their fundamental statutory rights to organize and bargain with their employer, simply because they are also students."<sup>140</sup> Subsequent to the Board's decision, New York University bargained with the Union, thereby becoming the only private university in the United

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134. *Id.* at 1206.

135. *Id.*

136. *Id.* at 1207.

137. *See id.* at 1208 (noting that the Board has asserted jurisdiction over private colleges and universities and has approved bargaining units of faculty members and citing relevant cases).

138. *Id.* (internal quotation marks omitted).

139. *Id.* at 1209.

140. *Id.* Concurring, Member Hurtgen emphasized that "the graduate students involved herein do not perform their services as a necessary and fundamental part of their studies. Thus, I regard the [assistants] as employees who should have the right to bargain collectively." *Id.* (Member Hurtgen, concurring).

States with union-represented graduate students.<sup>141</sup>

*New York University* did not survive a subsequent presidential election and new appointments to the NLRB. In *Brown University*,<sup>142</sup> Chairman Battista and Members Schaumber and Meisburg concluded that the “principal time commitment” of Brown University’s teaching assistants, research assistants, and proctors “is focused on obtaining a degree and, thus, being a student.”<sup>143</sup> The assistants received financial aid and were not paid for their work, the Board noted, and their graduate status and pursuit of a Ph.D. degree were “inextricably linked” and “clearly educational.”<sup>144</sup> Invoking the University’s right to academic freedom (a consideration raised, to no avail, by the University in *New York University*) the Board stated that the “imposition of collective bargaining on the relationship between a university and its graduate student assistants . . . would limit the university’s freedom to determine a wide range of matters” and would “intrude on the core academic freedoms in a manner simply not present in cases involving faculty employees.”<sup>145</sup> Declaring that the Board’s “25-year pre-NYU principle of regarding graduate students as nonemployees was sound and well reasoned,”<sup>146</sup> the Board accordingly overruled *New York University*.

Questioning the majority’s approach to the workplaces of contemporary academies, Members Liebman and Walsh dissented. In their view, the fact that the graduate assistants’ “employment relationship is not the ‘primary’ relationship with their employer” was no reason to exclude the assistants from the Act’s coverage.<sup>147</sup> Moreover, they noted, the assistants worked under the control and direction of the University; performed and were compensated for their services by stipends, health fees, and tuition payments; and received compensation for matters not related to academic achievement, with income taxes withheld and a showing of

141. See Alan Finder, *N.Y.U. Ends Negotiations with Union for Students*, N.Y. TIMES (Aug. 6, 2005), at A13 (describing the University’s claim that union’s grievances endangered its academic rights).

142. 342 N.L.R.B. No. 42 (July 13, 2004).

143. *Id.*, slip op. at 6.

144. *Id.*, slip op. at 7.

145. *Id.*, slip op. at 8 n.26. In the Board’s view, granting collective bargaining rights to graduate assistants would adversely affect the University’s faculty and administration, with “class size, time, length, and location;” assistants’ stipends, hours, and duties; and “decisions over who, what, and where to teach or research” subject to labor negotiations. *Id.*, slip op. at 8.

146. *Id.*, slip op. at 5. The pre-NYU cases cited by the Board included *Adelphi University*, 195 N.L.R.B. 639 (1972); *Leland Stanford*, 214 N.L.R.B. 621 (1974); and *St. Clare’s Hospital*, 229 N.L.R.B. 1000 (1997), overruled by *Boston Medical Center Corp.*, 330 N.L.R.B. 152 (1999).

147. *Brown Univ.*, 342 N.L.R.B. No. 42, slip op. at 14 (Members Liebman and Walsh, dissenting).

eligibility under federal immigration laws required.<sup>148</sup> The Board majority erred, the dissenters argued, “in seeing the academic world as somehow removed from the economic realm that labor law addresses—as if there was no room in the ivory tower for a sweatshop.”<sup>149</sup> Additionally, Liebman and Walsh posited that the recognition of collective bargaining rights for graduate students would not harm academic freedom, as students “presumably will be reluctant to endanger” that freedom in labor negotiations.<sup>150</sup> Thus, they concluded, “collective bargaining and academic freedom are not incompatible; indeed, academic freedom for instructors can be strengthened through collective bargaining.”<sup>151</sup>

Democrats Truesdale (government background) and Liebman (union background) and Republican Hurtgen (management background), all appointed by Democratic President Clinton,<sup>152</sup> voted to grant election voting rights to the at-issue graduate assistants in *New York University*. Graduate students at Brown did not fare as well before Republican President George W. Bush’s Republican and management-background appointees. In sum, union interests and employee representational rights were recognized and furthered in the Board of a Democratic administration. When a Republican president took up residence in the White House and the graduate student issue came back before the Board, the changes in the Board’s composition and the ideologies of the agency’s members were significant as the management view prevailed and *New York University* was overruled. With Brown’s victory, New York University reexamined its bargaining relationship with its graduate students’ union representative and recently notified the UAW that the University will not negotiate a new labor agreement with the Union.<sup>153</sup>

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148. *Id.*, slip op. at 15.

149. *Id.*, slip op. at 13.

150. *Id.*, slip op. at 18.

151. *Id.*

152. See Appendix to this Article.

153. See Finder, *supra* note 141, at A13 (detailing the university’s decision to terminate negotiations with the union due to concern for academic liberties).



## F. *Contingent Employment Arrangements*

The representational rights of contingent workers<sup>154</sup> have been the subject of NLRB examination and reexamination. In its 2000 *M.B. Sturgis, Inc.*<sup>155</sup> decision, a Board comprised of Clinton appointees Chairman Truesdale and Members Fox and Liebman held that a bargaining unit “composed of employees who are jointly employed by a user employer and a supplier employer, and employees who are solely employed by the user employer, is permissible under the statute without the consent of the employers.”<sup>156</sup> Overruling a prior Board decision<sup>157</sup> and rejecting a number of arguments made by Member Brame, the Board concluded that as “all of the employees in the unit are employed, either solely or jointly, by the user employer. . . . a unit of employees performing work for one user employer is an ‘employer unit’ for purposes of Section 9(b)” of the Act.<sup>158</sup>

In November 2004 appointees of President George W. Bush—Chairman Battista and Members Schaumber and Meisburg—overruled *Sturgis*. *H.S. Care L.L.C.*<sup>159</sup> declared that allowing Board elections in combined units of solely and jointly employed workers “contravenes Section 9(b) by requiring different employers to bargain together regarding employees in the same unit. We hold that combined units of solely and jointly employed employees are multiemployer units and are statutorily permissible only with the parties’ consent.”<sup>160</sup> In so holding, the Board was concerned that combined-unit bargaining “hampers the give-and-take process of negotiation between a union and an employer, and places the

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154. Contingent workers “may be temporary and outside or independent contractors, and may be performing functions that were once performed by traditional full-time employees.” Richard C. Reuben, *Democracy and Dispute Resolution: Systems Design and the New Workplace*, 10 HARV. NEGOT. L. REV. 11, 17 n.28 (2005). For discussions of the contingent employment phenomena, see generally KATHERINE V.W. STONE, FROM WIDGETS TO DIGITS: EMPLOYMENT REGULATION FOR THE CHANGING WORKPLACE (2004); CONTINGENT WORK: AMERICAN EMPLOYMENT RELATIONS IN TRANSITION (Kathleen Barker & Kathleen Christensen eds., 1998); Clyde W. Summers, *Contingent Employment in the United States*, 18 COMP. LAB. L.J. 503 (1997).

155. 331 N.L.R.B. 1298 (2000).

156. *Id.* at 1304.

157. See *Lee Hosp.*, 300 N.L.R.B. 947, 948 (1990) (determining that “as a general rule, the Board does not include employees in the same unit if they do not have the same employer, absent employer consent”); see also *Greenhoot, Inc.*, 205 N.L.R.B. 250 (1973) (finding that bargaining units composed of user and supplier employees are multiemployer units and are not appropriate absent consent of both the user and the supplier employers).

158. *Sturgis*, 331 N.L.R.B. at 1305; see 29 U.S.C. § 159(b) (2000) (“The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this [Act], the unit appropriate for the purposes of collective bargaining shall be the employer unit . . .”).

159. 343 N.L.R.B. No. 76 (Nov. 19, 2004).

160. *Id.*, slip op. at 5.

employers in the position of negotiating with one another as well as with the union.”<sup>161</sup> Employees could also be adversely affected, the Board continued, where a union negotiating with different employers “subjects employees to fragmented bargaining and inherently conflicting interests, a result that is inconsistent with the Act’s animating principles.”<sup>162</sup>

The non-management-background members of the Board, Members Liebman and Walsh, dissented. In their view, NLRA section 9(b) permits a bargaining unit of solely and jointly employed workers “and, in fact, is necessary to enable the growing number of employees in alternative work arrangements to benefit from collective bargaining if they so choose.”<sup>163</sup> Viewing the issue from the employees’ perspective, Liebman and Walsh stated, “[s]urely employees who are working side by side, for employers who have voluntarily created that arrangement, should be able to join together in the same bargaining unit, if they choose to.”<sup>164</sup> Opining that employers using contingent workers are motivated by a desire to reduce labor costs and seek to “prevent core and contingent employees alike from organizing and bargaining effectively,”<sup>165</sup> they concluded that “[t]he majority . . . seems to have gone out of its way to make it impossible for joint employees to exercise their Section 7 rights effectively.”<sup>166</sup>

Board members from a management background, rejecting an interpretation of the Act that would allow the NLRB to establish combined employee units without employer consent, emphasized the problems such a unit would create for employers. Members disagreeing with that position (including, from the union side, Fox and Liebman) focused on the collective-bargaining benefits of such bargaining for employees working side by side in the same workplace; for those members, the pertinent and operative consent was that of the employees and not the employers. That these views coincide with the members’ ideologies is an illustration of this Article’s thesis.

### G. Picketing Issues

The legality of union picketing of employer establishments was the issue before the Board in a set of cases decided in 1961 and 1962.

In February 1961 the Board decided *International Hod Carriers*

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161. *Id.*

162. *Id.* For example, the Board stated, where a supplier employer sets the wages of supplied employees, and a user employer sets the wages of its solely employed workers, “the wages of the employees of A/B may be traded away, in bargaining, for the sake of employees of B, or vice versa.” *Id.*

163. *Id.*, slip op. at 8 (Members Liebman and Walsh, dissenting).

164. *Id.*, slip op. at 9.

165. *Id.*, slip op. at 10.

166. *Id.*, slip op. at 12.

(Calumet Contractors).<sup>167</sup> There, the Board—Eisenhower appointees Members Leedom, Rodgers, and Joseph Jenkins<sup>168</sup>—concluded that a union’s picketing of a construction site was done with the intention of inducing and encouraging workers “to refuse to perform employment services for their employers, with an object of forcing or requiring [the employer] to recognize and bargain with [the union] at a time when another labor organization had been certified by the Board as the representative of the employer’s employees.”<sup>169</sup> That conduct violated section 8(b)(4)(C) of the Act,<sup>170</sup> the Board stated, since it was clear that the union’s picketing, done for the purpose of informing the public that the employer was not paying prevailing wages and benefits to its employees, “necessarily had as its ultimate end the substitution of [the picketing union] for the Christian Labor Association, the certified bargaining agent.”<sup>171</sup>

Reconsidering and issuing a new decision in the same case less than eight months later, the Board (Kennedy appointees Chairman McCulloch and Member Brown and Eisenhower appointee and Democrat Member Fanning), held (on the same facts) that the Union’s “admitted objective to require [the employer] to conform standards of employment to those prevailing in the area, is not tantamount to, nor does it have an objective of, recognition or bargaining.”<sup>172</sup> Dissenting Members Rodgers and Leedom adhered to their original February 1961 decision, repeating their view that the union’s picketing “constitute[d] an attempt to obtain conditions and concessions normally resulting from collective bargaining.”<sup>173</sup> While the facts were the same, the outcomes reached by the Eisenhower Board and the Kennedy Board, separated in time by only eight months, were not. The union’s conduct was an unfair labor practice and then it was not. What changed? The Board.

In another picketing case, *Local Joint Executive Board of Hotel & Restaurant Employees (Crown Cafeteria)*,<sup>174</sup> Chairman McCulloch and Members Rodgers and Leedom found that a union’s picket signs asking “members of organized labor and their friends” to refuse to patronize the

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167. 130 N.L.R.B. 78 (1961).

168. See Appendix to this Article.

169. *Calumet Contractors*, 130 N.L.R.B. at 82. The Union’s picketing targeted a construction company and a construction contractor’s association.

170. See 29 U.S.C. § 158(b)(4)(C) (2000) (making it unlawful to force or require employer “to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees”).

171. *Calumet Contractors*, 130 N.L.R.B. at 81–82.

172. *International Hod Carriers (Calumet Contractors)*, 133 N.L.R.B. 512, 512 (1961).

173. *Id.* at 513 (Members Rodgers and Leedom, dissenting).

174. 130 N.L.R.B. 570 (1961).

employer violated Section 8(b)(7) of the Act.<sup>175</sup> Concluding that “apart from the picketing, the Union was in fact demanding present recognition from” the employer,<sup>176</sup> the Board ruled that the picketing did not fall within a proviso of section 8(b)(7)<sup>177</sup> protecting and allowing picketing “tak[ing] the form of truthfully advising the public that the employer is nonunion, or does not have a union contract.”<sup>178</sup> In dissent, Members Fanning and Jenkins argued that the picketing did not violate the statute as alleged, as they were convinced that “recognitional or organizational picketing which truthfully advised the public (including consumers) that the employer did not have a contract with the union” satisfied the proviso to section 8(b)(7) so long as the picketing did not “induce[] a stoppage of deliveries or services.”<sup>179</sup>

The Union filed a motion with the Board seeking reconsideration of the decision, and the Board’s General Counsel filed a motion for “clarification.”<sup>180</sup> In February 1962, one year after the agency had ruled against the Union, Chairman McCulloch and Members Fanning and Brown announced that “[a]fter careful study . . . and in the light of our further reappraisal of the statutory scheme . . . we now conclude that the dissenting opinion [in the 1961 decision] more accurately reflects the congressional intent. Accordingly, we adopt the dissenting opinion in the first decision.”<sup>181</sup> Hence, the very same picketing found illegal in the Board’s 1961 decision was now lawful. Members Rodgers and Leedom, no longer in the majority, were still convinced that the Union had violated the Act. In their view, the Union’s requests for employer recognition constituted independent evidence of a non-informational and therefore unlawful object within the meaning of section 8(b)(7)(C).<sup>182</sup> Like *Calumet Contractors*, the

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175. *Id.* at 571; see 29 U.S.C. § 158(b)(7) (stating that a union not currently certified as employees’ collective bargaining representative commits unfair labor practice when it pickets or threatens to picket an employer “where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative”).

176. *Crown Cafeteria*, 130 N.L.R.B. at 572.

177. See 29 U.S.C. § 158(b)(7)(C) (exempting from picketing prohibition “any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization” so long as the picketing does not “induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services”).

178. *Crown Cafeteria*, 130 N.L.R.B. at 572.

179. *Id.* at 577 (Members Fanning and Jenkins, dissenting).

180. Local Joint Executive Bd. of Hotel and Rest. Employees (*Crown Cafeteria*), 135 N.L.R.B. 1183, 1184 (1962).

181. *Id.*

182. *Id.* at 1188 (Members Rodgers and Leedom, dissenting).

political party of the president appointing members to the Board and the political affiliations and professional backgrounds of the members were relevant and influenced the outcomes.

#### H. *Nonmajority Bargaining Orders*

As mandated by NLRA section 9(a), an employer must bargain collectively with the exclusive bargaining representative “designated or selected” by a majority of employees in an appropriate bargaining unit.<sup>183</sup> The usual (and, from the Board’s perspective, the preferred) route taken by unions seeking exclusive bargaining status is the NLRB-conducted election and certification procedures set forth in section 9(c) of the statute.<sup>184</sup> In certain instances, however, the Board will not hold or will set aside the results of an election where the employer has engaged in serious unfair labor practices. As the Supreme Court made clear in *NLRB v. Gissel Packing Co.*,<sup>185</sup> the Board has the authority to issue bargaining orders where a union has demonstrated the support of a majority of bargaining unit employees and the employer has committed unfair labor practices that “have the tendency to undermine majority strength and impede the election processes.”<sup>186</sup>

The *Gissel* Court noted and left open the question whether bargaining orders can be issued by the Board “without need of inquiry into majority status on the basis of [union authorization] cards or otherwise.”<sup>187</sup> NLRB members have answered that question in the affirmative and in the negative. In *United Dairy Farmers Cooperative Ass’n*,<sup>188</sup> a majority of a three-member panel, Members Murphy and Truesdale, said that the

183. 29 U.S.C. § 159(a) (2000).

184. See 29 U.S.C. § 159(c) (stating the guidelines for the election and certification procedure).

185. 395 U.S. 575 (1969).

186. *Id.* at 614.

187. *Id.* at 613. Support for a union is typically shown by authorization cards signed by workers who express their desire to have the union represent them for purposes of collective bargaining. In *Gissel* the Court quoted the language of one such card:

Desiring to become a member of the above Union of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, I hereby make application for admission to membership. I hereby authorize you, your agents or representatives to act for me as collective bargaining agent on all matters pertaining to rates of pay, hours, or any other conditions of employment.

*Id.* at 583 n.4. Authorization cards can support bargaining orders because “employees should be bound by the clear language of what they sign unless that language is deliberately and clearly canceled by a union adherent with words calculated to direct the signer to disregard and forget the language above his signature.” *Id.* at 606.

188. 242 N.L.R.B. 1026 (1979).

agency's "remedial authority under Section 10(c) of the Act may well encompass the authority to issue a bargaining order in the absence of a prior showing of majority support."<sup>189</sup> Unlike Murphy and Truesdale, who declined to issue such an order in the case before them, Chairman Fanning and Member Jenkins would have issued a nonmajority bargaining order against the employer.<sup>190</sup> Member Penello, accusing his colleagues of "stand[ing] the Act on its head," argued that the Board's remedial power under section 10(c) did not limit the majority rule principle of section 9(a) of the Act.<sup>191</sup> In his view, granting bargaining representative status to a union in the absence of majority support is a decision for "Congress, the body which constructed the Act with the majority rule principle as its foundation."<sup>192</sup>

Considering the same case on remand from the United States Court of Appeals for the Third Circuit,<sup>193</sup> Chairman Fanning and Members Jenkins and Zimmerman held that a bargaining order was warranted.<sup>194</sup> They concluded that, notwithstanding the "risk of imposing a minority union on the employees,"<sup>195</sup> the order was required given the "gravity, extent, timing, and constant repetition"<sup>196</sup> of the employer's violations of the Act and the company's previous misconduct, which was the subject of another NLRB decision.<sup>197</sup>

In 1984 when the Board revisited the nonmajority bargaining order issue in *Gourmet Foods, Inc.*,<sup>198</sup> the law was changed by Chairman Dotson and Members Dennis and Hunter:

Our own review of the statute, its legislative history, Board and court precedent, and legal commentary have convinced us that the majority rule principle is such an integral part of the Act's current substance and procedure that it must be adhered to in fashioning a remedy, even in the most "exceptional" cases. We

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189. *Id.* at 1027.

190. *See id.* at 1032 ("The Board has the authority to issue a nonmajority bargaining order.").

191. *Id.* at 1041 (Member Penello, concurring in part and dissenting in part).

192. *Id.* at 1042.

193. *See United Dairy Farmers Coop. Ass'n v. NLRB*, 633 F.2d 1054, 1056 (3d Cir. 1980) (holding that the Board has the authority to issue nonmajority bargaining orders in certain cases and remanding the case for consideration of whether the facts constituted a level of misconduct justifying the issuance of an order to bargain).

194. *United Dairy Farmers Coop. Ass'n*, 257 N.L.R.B. 772, 775 (1981).

195. *Id.* at 775.

196. *Id.*

197. *See United Dairy Farmers Coop. Ass'n*, 194 N.L.R.B. 1094, 1095-96 (1972) (finding that the United Dairy Farmers Cooperative Association committed an unfair labor practice by retaliating against union activity), *enforced per curiam*, 465 F.2d 1401 (3d Cir. 1972).

198. 270 N.L.R.B. 578 (1984).

view the principle as a direct limitation on the Board's existing statutory remedial authority as well as a policy that would render improper exercise of any remedial authority to grant nonmajority bargaining orders which the Board might possess.<sup>199</sup>

Accordingly, the Board stated that it did "not believe that [it] would ever be justified in granting a nonmajority bargaining order remedy."<sup>200</sup>

Member Zimmerman's lone dissent argued that the Board did have the statutory authority to issue nonmajority bargaining orders because the rights of employees subjected to egregious and flagrant unfair labor practices "cannot be adequately protected if . . . employers are permitted by the Board to engage in unlawful acts that are so coercive as to prevent majority support from ever developing."<sup>201</sup> Seeing nothing in the Act or in the statute's legislative history directing the Board to interpret section 9(a) as a bar to a remedial nonmajority bargaining order, Zimmerman reasoned that such an order "entails only a minimal interim encroachment, if at all, on the majority rule principle. Ultimately, the order is the best available Board remedy to secure uncoerced majority rule."<sup>202</sup>

In the *United Dairy Farmers* litigation, the Board's authority to issue nonmajority bargaining orders protecting unions and employees was recognized by several members of various backgrounds who were appointed by Republican and Democratic presidents.<sup>203</sup> As noted, appointees of Republican President Ronald Reagan (from Republican-management, Republican-government, and Democrat-management backgrounds, respectively) made clear in *Gourmet Foods* that the Board had no such authority. If we can assume that employers would not be in favor of empowering the Board to issue nonmajority bargaining orders (a safe assumption), the Reagan Board's movement away from *United Dairy Farmers* was predictable when viewed through the prism of ideology.

### I. *Work-Relocation Decisions*

Interesting examples of the Board's ideological voting are found in the agency's resolution of litigation involving an employer's decision to relocate work without first notifying or bargaining with its employees' union representative.

Consider *Milwaukee Spring Division of Illinois Coil Spring Co. (Milwaukee Spring I)*.<sup>204</sup> Chairman Van de Water and Members Fanning

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199. *Id.* at 583.

200. *Id.* at 587.

201. *Id.* at 589 (Member Zimmerman, dissenting).

202. *Id.* at 591.

203. See Appendix to this Article.

204. 265 N.L.R.B. 206 (1982).

and Jenkins found that an employer's decision to transfer certain assembly operations from its unionized facility in Milwaukee, Wisconsin, to its nonunion (and lower paying) plant in McHenry, Illinois, constituted a midterm contract modification prohibited by section 8(d)<sup>205</sup> of the Act.<sup>206</sup> The labor agreement between the employer and the Union contained preamble, recognition, and management rights clauses. The Board determined that the preamble and the recognition clause<sup>207</sup> covered the Milwaukee facility and did not apply to the employer's other plants.<sup>208</sup> Also, the management rights clause<sup>209</sup> did not expressly grant the company "the right to move, transfer, or change the location of part of its operations . . . in order to avoid the comparatively higher labor costs imposed" by the labor agreement.<sup>210</sup>

While judicial review of the Board's decision was pending before the United States Court of Appeals for the Seventh Circuit, the Board asked the court to remand the case for further consideration, and the request was granted.<sup>211</sup> Thereafter, in *Milwaukee Spring Division of Illinois Coil Spring Co. (Milwaukee Spring II)*,<sup>212</sup> a differently constituted Board—Chairman Dotson and Members Hunter and Dennis, all appointed by Republican President Reagan<sup>213</sup>—reversed course. Contrary to the position taken in the original decision, the Board reasoned that the employer's movement of work from Wisconsin to Illinois did not modify the employer-union labor agreement since the wages and benefits at the Milwaukee facility were not disturbed.<sup>214</sup> Nor did the relocation modify the contract's recognition clause, the Board concluded, as that clause was not a work preservation clause<sup>215</sup> and did "not state that the functions that the unit performs must

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205. See 29 U.S.C. § 158(d) (2000) (prohibiting midterm contract modifications).

206. *Milwaukee Spring I*, 265 N.L.R.B. at 210 ("Respondent, by deciding without the Union's consent to transfer its assembly operations . . . has unlawfully modified the terms and conditions of [the collective bargaining] agreement . . .").

207. The preamble "specifie[d] that Milwaukee Spring's facility is located at a particular address in Milwaukee," and the recognition clause provided that the employer "recognizes the Union as the bargaining agent of the production and maintenance employees in the company's plant in Milwaukee." *Id.* at 209.

208. *Id.*

209. The Board noted that this clause reserved to the employer "the right to make decisions about the types of products to be manufactured, what equipment will be used, what methods will be used, production schedule—in short, the clause reserves to management the right to decide whether, and how, its products will be manufactured." *Id.* at 210.

210. *Id.*

211. *Milwaukee Spring Div. of Ill. Coil Spring Co. v. NLRB*, 718 F.2d 1102 (7th Cir. 1983) (unpublished table decision).

212. 268 N.L.R.B. 601 (1984).

213. See Appendix to this Article.

214. *Milwaukee Spring II*, 268 N.L.R.B. at 601.

215. See Keith N. Hylton, *A Theory of Minimum Contract Terms, with Implications for*



remain in Milwaukee.”<sup>216</sup> In dissent, Member Zimmerman (an Independent appointed by Democratic President Carter) contended that it was “disingenuous to argue . . . that the [employer’s] relocation decision did not disturb the contractual wages and benefits at the Milwaukee facility. If [the employer] had implemented its decision, there would be no assembly employees at the Milwaukee facility to receive the contractual wages and benefits.”<sup>217</sup>

Another work relocation issue presented the Board with the question whether an employer, not party to a collective bargaining agreement, as the employer was in the *Milwaukee Spring* cases, was required to bargain with its employees’ union over the company’s decision to move certain operations. In the Board’s 1981 ruling in *Otis Elevator Co. (Otis Elevator I)*,<sup>218</sup> Chairman Fanning and Members Jenkins and Zimmerman held that the employer violated section 8(a)(5) of the Act when it did not bargain over its decision to transfer research and development work from Mahwah, New Jersey, to its new facility in East Hartford, Connecticut.<sup>219</sup> The employer’s multimillion dollar capital investment in the new facility “did not signal any change in the direction of [the employer’s] activities or in the character of its enterprise,” and bargaining over the decision “would not have been a significant abridgment of [the employer’s] prerogative to carry on its business activities.”<sup>220</sup>

Three years later, in *Otis Elevator Co. (Otis Elevator II)*,<sup>221</sup> a Board plurality comprised of Reagan appointees, Chairman Dotson and Member Hunter, rejected the 1981 ruling and held that the employer did not violate the Act.<sup>222</sup> Where an employer’s decision “did not turn upon labor costs,” the decision was not subject to mandatory bargaining, they announced, and the employer’s relocation decision “clearly turned upon a fundamental change in the nature and direction of the business, and thus was not amenable to bargaining.”<sup>223</sup> Not joined by Members Dennis<sup>224</sup> and

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*Labor Law*, 74 TEX. L. REV. 1741, 1747 (1996) (noting that a work preservation clause “guarantees some measure of job security to employees”).

216. *Milwaukee Spring II*, 268 N.L.R.B. at 602.

217. *Id.* at 611 (Member Zimmerman, dissenting).

218. 255 N.L.R.B. 235 (1981).

219. *Id.* at 235.

220. *Id.* at 236.

221. 269 N.L.R.B. 891 (1984). The Board successfully petitioned the United States Court of Appeals for the District of Columbia Circuit to remand *Otis Elevator I* to the agency for further consideration in light of the Supreme Court’s decision in *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981).

222. *Otis Elevator II*, 269 N.L.R.B. at 900.

223. *Id.* at 892.

224. Dennis agreed that the employer did not violate the Act but, unlike the plurality, reached that conclusion after applying a two-part test requiring the Board’s General Counsel to prove that “a factor over which the union has control was a significant consideration in

Zimmerman,<sup>225</sup> the *Dotson-Hunter* opinion changed the law governing an employer's obligation to bargain over the decision to relocate bargaining unit work. Thus, after years of litigation, the employer initially failed but ultimately prevailed in the litigation when management-background individuals were appointed to the Board.

The Board's 1984 decision in *Otis Elevator II* was not its final statement on the relocation-bargaining issue. In 1987 the Board held that Dubuque Packing Company had no obligation to bargain with the Union over the company's decision to relocate its hog kill and cut operation from Dubuque, Iowa, to a newly purchased plant in Rochelle, Illinois.<sup>226</sup> A footnote in the five-paragraph opinion issued by Members Marshall Babson and Stephens (Reagan appointees) stated that "under any of the views expressed" in the Board's 1984 *Otis Elevator II* decision,<sup>227</sup> the employer had no obligation to bargain with the Union.<sup>228</sup> When the case was remanded by the United States Court of Appeals for the District of Columbia Circuit,<sup>229</sup> the Board overruled *Otis Elevator II* and adopted a new multi-prong test applicable to decision-bargaining in relocation cases.<sup>230</sup> Reagan appointees, Chairman Stephens and Members Mary Cracraft and Devaney, and George H.W. Bush appointees, Clifford Oviatt and John Raudabaugh, all agreed that the NLRB's General Counsel bore the initial burden of establishing a prima facie case that the employer's decision to relocate bargaining unit work was not accompanied by "a basic change in the nature of the employer's operation."<sup>231</sup> That showing could be rebutted by employer evidence demonstrating that, for various reasons, the employer's unilateral decision did not constitute an unlawful refusal to

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the employer's decision," and "that the benefit for the collective-bargaining process outweighs the burden on the business." *Id.* at 897 (Member Dennis, concurring).

225. Zimmerman argued that bargaining should be mandated when the "employer's decision is related to overall enterprise costs not limited specifically to labor costs," for that approach would recognize the possibility that "union concessions may substantially mitigate the concerns underlying the employer's decision, thereby convincing the employer to rescind its decision." *Id.* at 901 (Member Zimmerman, concurring in part and dissenting in part).

226. *Dubuque Packing Co., Inc.*, 287 N.L.R.B. 499, 543 (1987), *remanded*, UFCW, Local 150-A v. NLRB, 880 F.2d 1422 (D.C. Cir. 1989).

227. *See supra* notes 222-25 and accompanying text.

228. *Dubuque Packing Co.*, 287 N.L.R.B. at 499 n.1.

229. *See* UFCW, Local 150-A v. NLRB, 880 F.2d 1422 (1989). The court opined that the Board's decision was "quite confusing" and asked the agency "to articulate a majority-supported statement of the rule that the Board will be applying now and in the future in determining whether a particular decision is subject to mandatory bargaining or not." *Id.* at 1436-37.

230. *Dubuque Packing Co.*, 303 N.L.R.B. 386 (1991), *enforced*, UFCW, Local 150-A v. NLRB, 1 F.3d 24 (D.C. Cir. 1993).

231. *Dubuque Packing Co.*, 303 N.L.R.B. at 391.

bargain.<sup>232</sup> Applying this new test, the Board concluded that Dubuque Packing had failed to establish that the “Union could not have offered labor cost concessions that could have changed the decision to relocate.”<sup>233</sup> This outcome serves as a reminder that ideology does not ineluctably lead to Board rulings favoring one side; in this case, the employer lost before a Republican Board.

### *J. Board Deferral to Arbitration Awards*

NLRB deferral to arbitration awards resolving unfair labor practice and representation issues is an important federal labor law issue. As noted by Professors Robert Gorman and Matthew Finkin, “the Board has exercised its discretion to ‘defer’ to—more accurately, to show deference to—arbitration awards already rendered when those awards effectively dispose of the unfair labor practice or representation issue.”<sup>234</sup> In the seminal 1955 decision of *Spielberg Manufacturing Co.*,<sup>235</sup> the Board deferred to an arbitration award providing that an employer was not obligated to reinstate four employees who had engaged in misconduct during a strike. While the Board did not decide whether it would have ruled the same way as did the arbitration panel, the agency concluded that deferral was appropriate: “the [arbitration] proceedings appear to have been fair and regular, all parties had agreed to be bound, and the decision of the arbitration panel is not clearly repugnant to the purposes and policies of the Act.”<sup>236</sup> “In these circumstances,” the Board wrote, “we believe that the desirable objective of encouraging the voluntary settlement of labor disputes will best be served by our recognition of the arbitrators’ award.”<sup>237</sup>

The Board’s application of the *Spielberg* deferral standards has not been insulated from ideology. *Electronic Reproduction Service Corp.*<sup>238</sup> held that, absent unusual circumstances, the Board would defer to

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232. The employer can rebut the General Counsel’s prima facie case by demonstrating “that the work performed at the new location varies significantly from the work performed at the former plant,” or “that the work performed at the former plant is to be discontinued entirely and not moved to the new location,” or “that the employer’s decision involves a change in the scope and direction of the enterprise.” *Id.* Alternatively, the employer can defend against a charge of unlawful refusal to engage in decision-bargaining by showing “that [direct or indirect] labor costs . . . were not a factor in the decision or . . . even if labor costs were a factor in the decision, the union could not have offered labor cost concessions that could have changed the employer’s decision to relocate.” *Id.*

233. *Id.* at 396.

234. GORMAN & FINKIN, *supra* note 36, at 1024.

235. 112 N.L.R.B. 1080 (1955).

236. *Id.* at 1082.

237. *Id.* But see *Airco Indus. Gases*, 195 N.L.R.B. 676, 676–77 (1972) (refusing to defer to arbitration award); *Raytheon Co.*, 140 N.L.R.B. 883, 884 (1963) (same).

238. 213 N.L.R.B. 758 (1974).

arbitration awards in discharge and discipline cases even though no evidence bearing on the unfair labor practice issue was presented to and considered by the arbitrator.<sup>239</sup> Chairman Miller and Members Kennedy and Penello, all Nixon appointees, formed the majority; Members Fanning and Jenkins dissented. Thereafter, in *Suburban Motor Freight, Inc.*,<sup>240</sup> the Board (Chairman Fanning and Members Jenkins with the majority-creating vote of Carter appointee Truesdale, with Member Penello dissenting) overruled *Electronic Reproduction* and announced that the Board "will no longer honor the results of an arbitration proceeding under *Spielberg* unless the unfair labor practice issue before the Board was both presented to and considered by the arbitrator."<sup>241</sup> Then in *Professional Porter & Window Cleaning Co.*,<sup>242</sup> Members Fanning, Jenkins, and Zimmerman adhered to *Suburban Motor Freight* and declined to defer to an arbitration award, finding that an employee had been discharged for just cause.<sup>243</sup> In the view of those members, "the arbitrator's gratuitous statement that [the employee] was not discharged for protected activity does not indicate any real consideration of the statutory issue."<sup>244</sup> Chairman Van de Water and Member Hunter (both appointed by President Reagan) issued separate dissents. Hunter proposed that the Board should defer "if (1) the contractual issue is factually parallel to the unfair labor practice issue, and (2) it appears from the record that the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice."<sup>245</sup>

The law changed when a Republican administration came into office. Member Hunter's proposed approach was later adopted by the Board as the governing standard in *Olin Corp.*<sup>246</sup> There, the Reagan Board's Chairman Dotson and Hunter announced:

We would find that an arbitrator has adequately considered the unfair labor practice if (1) the contractual issue is factually parallel to the unfair labor practice issue, and (2) the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice. . . . And, with regard to the inquiry into the "clearly repugnant" standard, we would not require an arbitrator's award to be totally consistent with Board precedent. Unless the award is "palpably wrong," i.e., unless the arbitrator's decision is not susceptible to an interpretation consistent with the

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239. *Id.* at 767.

240. 247 N.L.R.B. 146 (1980).

241. *Id.* at 146-47.

242. 263 N.L.R.B. 136 (1982).

243. *Id.* at 137-38.

244. *Id.* 137.

245. *Id.* at 145 (Member Hunter, dissenting).

246. 268 N.L.R.B. 573 (1984).

Act, we will defer.<sup>247</sup>

K. *Employer Interrogation of Known Union Advocates*

The question of whether, in the absence of threats and intimidation, the Act is violated by employer questioning of employees who are open and known union supporters has been answered both affirmatively and negatively by various Board members. For example, *PPG Industries, Inc.*,<sup>248</sup> decided by Chairman Fanning and Members Jenkins and Truesdale, overruled prior Board decisions<sup>249</sup> and concluded “that inquiries of this nature constitute probing into employees’ union sentiments which, even when addressed to employees who have openly declared their union adherence, reasonably tend to coerce employees in the exercise of their Section 7 rights.”<sup>250</sup> The Board also concluded that the questioning of known employee union supporters “conveys an employer’s displeasure with employees’ union activity and thereby discourages such activity in the future.”<sup>251</sup>

*PPG* was later overruled by *Rossmore House*.<sup>252</sup> Chairman Dotson and Members Hunter and Dennis determined that “*PPG* improperly established a per se rule that completely disregarded the circumstances surrounding an alleged interrogation and ignored the reality of the workplace.”<sup>253</sup> Whether an alleged interrogation violates the Act is to be decided, not pursuant to *PPG*’s per se approach, but by a case-by-case examination and evaluation of all the circumstances.<sup>254</sup> Concluding that the

247. *Id.* at 574 (footnotes omitted). The Board also placed on the party opposing deferral “the burden of affirmatively demonstrating the defects in the arbitral process or award.” *Id.*; see also *id.* at 579 (Member Zimmerman, dissenting in part) (discussing what he viewed as the flaws in the majority’s analysis).

248. 251 N.L.R.B. 1146 (1980). As noted by the Board, the evidence in that case showed that employer foremen questioned employees about their union sympathies and their reasons for supporting the Union. The employees were active and open supporters of the Union and, at the time of the challenged inquiries, were wearing union insignia. *Id.* at 1147.

249. See *Stumpf Motor Company, Inc.*, 208 N.L.R.B. 431, 444 (1974) (finding violation of the Act by employer’s act of “coercively interrogating an employee”); *B. F. Goodrich Footwear Company*, 201 N.L.R.B. 353, 356 (1973) (finding an interrogation “coercive and in violation of Section 8(a)(1) of the act”).

250. *PPG*, 251 N.L.R.B. at 1147.

251. *Id.*

252. 269 N.L.R.B. 1176 (1984). Upon receipt of a mailgram from a Union stating that Warren Harvey and another worker were forming a union organizing committee, the employer’s manager approached Harvey and asked, “Is this true?” Harvey answered yes; the manager said, “Okay, thank you”; Harvey stated, “I am sorry; it is nothing personal”; and the manager responded “Okay” and returned to his office. *Id.* at 1176.

253. *Id.* at 1177.

254. See *id.* The Board noted that it may consider the background, the type of information sought, the questioner’s identity, and “the place and method of interrogation.”

employer's questioning of the employee in the case before it was not coercive, the Board found no violation of the Act.<sup>255</sup> Dissenting from the overruling of *PPG*, Member Zimmerman argued that the Board "ignores the reality that employers sometimes [employ] subtle coercion during an organizing campaign and fails to recognize that even open union adherents may be intimidated by such coercion."<sup>256</sup> Rejecting the view that *PPG* had established a per se rule, Zimmerman opined that *PPG* "simply recognized that just because an employee is an open union adherent does not end the inquiry into the lawfulness of the [employer's] interrogation of him."<sup>257</sup> Further, he saw "no justification for putting an employee in such a defensive position, particularly since these conversations serve no valid employer purpose."<sup>258</sup>

The *PPG* members of the NLRB (two Democrats and a Republican, all coming from a background of government service)<sup>259</sup> prohibited employer questioning of known employee supporters of unions, finding that such interrogations tended to coerce employees as they exercised their organizational rights. *Rossmore House*, decided by management-side Reagan appointees, replaced *PPG*'s bright line rule with a totality-of-circumstances standard, one which did not automatically proscribe employer interrogations. As can be seen, different ideologies of the members participating in the *PPG* and *Rossmore House* decisions yielded different rules of law.

#### L. Weingarten Rights In Nonunion Workplaces

In *NLRB v. J. Weingarten, Inc.*,<sup>260</sup> the Supreme Court, deferring to the NLRB and endorsing the agency's "evolutional approach,"<sup>261</sup> held that an employer's denial of an employee's request for the presence of a union representative during an investigatory interview<sup>262</sup> conducted by an employer violates sections 7 and 8(a)(1) of the Act.<sup>263</sup> The Court noted that the Board's permissible but not required construction of section 7 "reached a fair and reasoned balance upon a question within its special competence"

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*Id.* at 1178 n.20.

255. *Id.* at 1178.

256. *Id.* (Member Zimmerman, dissenting in part).

257. *Id.*

258. *Id.*

259. See Appendix to this Article.

260. 420 U.S. 251 (1975).

261. *Id.* at 265.

262. An investigatory interview is one which the "employee reasonably believes may result in the imposition of discipline." *Id.* at 262.

263. *Id.* at 268; accord *ILGWU v. Quality Mfg. Co.*, 420 U.S. 276 (1975).

and did not “exceed the reach of that section.”<sup>264</sup> *Weingarten* thus definitively answered in the affirmative the question whether employees, upon request, have the right to their union representative in investigatory interviews.<sup>265</sup> Do nonunion employees—workers who are not represented by a labor organization for purposes of collective bargaining—have that same right? Different Boards have given different answers to that question.

*Materials Research Corp.*<sup>266</sup> extended *Weingarten* rights to a nonunion employee whose March 1979 request for a coworker’s assistance at an investigatory interview was denied by the employer.<sup>267</sup> Members Fanning, Jenkins, and Zimmerman, over the dissents of Chairman Van de Water and Member Hunter,<sup>268</sup> held “that the right enunciated in *Weingarten* applies equally to represented and unrepresented employees.”<sup>269</sup> In the majority’s view, this right was derived from section 7’s protection of concerted activity for workers’ mutual aid or protection and was not dependent on a union’s section 9 status as the exclusive bargaining representative of employees.<sup>270</sup> Indeed, the Board said, nonunion workers may have even greater need for the assistance of fellow employees as, unlike their unionized counterparts, unrepresented workers are not subject to or covered

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264. *Weingarten*, 420 U.S. at 267. The Court reasoned that the employee’s request for a union representative “clearly falls within the literal wording of § 7,” *id.* at 260, as the employee seeks the presence of a “knowledgeable union representative,” *id.* at 263, and “aid or protection against a perceived threat to his employment security,” *id.*, and that the presence of the union representative safeguards the interests of the employee and the entire bargaining unit as it allows the Union to “exercis[e] vigilance to make certain that the employer does not initiate or continue a practice of imposing punishment unjustly,” *id.* at 260–61; see also *ILGWU v. NLRB*, 420 U.S. 276, 280–81 (1975) (holding that employee has right to union representative at investigatory interview).

265. The Court made clear that the employee must ask for her union representative and that the employee may relinquish that right and participate in the interview without representation. *Weingarten*, 420 U.S. at 257. In addition, the employer may lawfully decline the employee’s representation request and “is free to carry on his inquiry without interviewing the employee, and thus leave to the employee the choice between having an interview unaccompanied by his representative, or having no interview and forgoing any benefits that might be derived from one.” *Id.* at 258. Additionally, the employer has no legal obligation to bargain with the union representative attending the investigatory interview and “is free to insist that he is only interested, at that time, in hearing the employee’s own account of the matter under investigation.” *Id.* at 260.

266. 262 N.L.R.B. 1010 (1982).

267. *Id.* at 1010–11.

268. See *id.* at 1019 (Chairman Van de Water, concurring and dissenting) (arguing that employees have no right to a interview representative where there is no recognized or certified union representative under section 9); *id.* at 1021 (Member Hunter, concurring and dissenting) (stating that the *Weingarten* right “flows from the status of the union as collective-bargaining representative”).

269. *Id.* at 1016 (majority decision).

270. *Id.* at 1012. On the union’s exclusive representative status under section 9, see *supra* note 183 and accompanying text.

by a labor agreement, and the support of other nonunion workers “may diminish any tendency by an employer to act unjustly or arbitrarily.”<sup>271</sup>

A few years later, in *Sears, Roebuck & Co.*,<sup>272</sup> the Board considered the legality of an employer’s May 1979 refusal to grant a nonunion employee’s *Weingarten* request.<sup>273</sup> Overruling *Materials Research*, Chairman Dotson and Member Dennis issued an opinion stating that employees have no *Weingarten* rights in the absence of a section 9 bargaining representative.<sup>274</sup> *Materials Research* “told employers, in effect, that they have the right to act on an individual basis with respect to an employee’s terms or conditions of employment except for the conduct of an investigatory interview.”<sup>275</sup> Declining to endorse any rule requiring a nonunion employer to deal with employees on a collective as opposed to an individual basis, and tying *Weingarten* rights to section 9, Dotson and Dennis declared that the “[s]ection 7 rights of one group cannot be mechanically transplanted to the other group at the expense of important statutory policies.”<sup>276</sup>

A subsequent Board decision, *E.I. du Pont de Nemours*,<sup>277</sup> reaffirmed the agency’s view that nonunion workers did not have *Weingarten* representational rights. Chairman Stephens and Members Wilford Johansen, Babson, and Cracraft determined that a “fair and reasoned balance” between the interests of labor and management was best assured “by not imposing the constraints on investigatory interviews that recognition of the *Weingarten* right entails.”<sup>278</sup> Conceding that a literal reading of section 7 suggested that nonunion employees did have representational rights, the Board thought it less likely that a nonunion employee would provide the type of helpful assistance at an interview as

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271. *Materials Research*, 262 N.L.R.B. at 1015; see also *E.I. du Pont de Nemours & Co., Inc.*, 262 N.L.R.B. 1040, 1045 (1982) (finding that employer violated Act by denying nonunion employee’s request for coworker’s assistance and by terminating the employee), *enforcement denied*, 707 F.2d 1076 (9th Cir. 1983) (concluding that employee request for coworker did not constitute concerted activity in the absence of evidence of past activity between workers and that there was no indication that other employees would have responded to the interviewee’s request).

272. 274 N.L.R.B. 230 (1985).

273. *Id.* at 254–56 (Taplitz, A.L.J.).

274. Member Hunter concurred, adhering to the views expressed in his *Materials Research* dissent, see *supra* note 268. Hunter did not believe that the Act compelled the finding that nonunion workers have no *Weingarten* rights. In his view, extending such rights to nonunion workers was “a permissible but not a reasonable construction of the Act.” *Sears*, 274 N.L.R.B. at 232 (Member Hunter, concurring).

275. *Id.* at 231.

276. *Id.*

277. 289 N.L.R.B. 627 (1988), *review denied by Slaughter v. NLRB*, 876 F.2d 11 (3d Cir. 1989) (per curiam).

278. *Id.* at 628 (internal quotation marks omitted).



that provided by a union representative, and it further opined that extending *Weingarten* rights to unrepresented workers could actually work to their detriment since employers may legally forego the interview and employees would not be able to challenge disciplinary actions in a subsequent dispute resolution proceeding.<sup>279</sup>

From 1985 to 2000 the Board adhered to the position that nonunion employees did not have *Weingarten* rights. *Epilepsy Foundation of Northeast Ohio*<sup>280</sup> jettisoned the no-rights-rule and resurrected *Materials Research*. Chairman Truesdale and Members Fox and Liebman rejected as speculative the employer's argument that employee witnesses "would not be motivated to act in the interests of their fellow workers, or that employees might lack the abilities to offer constructive assistance to the interviewed employee."<sup>281</sup> They also rejected as speculative the contention that an assertion of *Weingarten* rights in the nonunion setting would disadvantage employees in the event the employer decided to forego the interview.<sup>282</sup> This assertion "assumes the worst in employer motives [and] ignores the fact that employees are not *obligated* to request the presence of a *Weingarten* representative."<sup>283</sup> Finally, the Board determined, contrary to the argument of dissenting Member Hurtgen, that the recognition of nonunion *Weingarten* rights would not place an "unknown trip wire" in front of employers involved in investigations of employee misconduct.<sup>284</sup> The majority could not "understand how an employer's ignorance of employee rights provides a justification for denying those rights to

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279. *See id.* at 630 (arguing that *Weingarten* rights for nonunion employees might induce employers to cancel investigatory interviews and nonunion employers will have no other contractually-bargained opportunity to present their case). Nonunion employees may challenge adverse employment decisions where a company has established an alternative dispute resolution mechanism such as arbitration or mediation. *See IBM Corp.*, 341 N.L.R.B. No. 148, slip op. at 23 (June 9, 2004) (Members Liebman and Walsh, dissenting) ("In nonunion workplaces, employer-imposed alternative dispute resolution (ADR) mechanisms, from grievance procedures to compulsory arbitration, are becoming increasingly common.").

280. 331 N.L.R.B. 676 (2000), *aff'd in part and rev'd in part*, 268 F.3d 1095 (D.C. Cir. 2001).

281. *Id.* at 679.

282. *Id.*

283. *Id.*

284. *Id.*; *see id.* at 684 (Member Hurtgen, dissenting in part) ("[B]y grafting the representational rights of the unionized setting onto the nonunion workplace, employers who are legitimately pursuing investigations of employee conduct will face an unknown trip-wire placed there by the Board."). The Board rejected Hurtgen's argument that nonunion employers "will generally be completely unaware of this right to representation that the Board is imposing on them," an observation accompanied by his statement that the "workplace has become a garden of litigation and the Board is adding another cause of action to flower therein, but hiding in the weeds." *Id.*

employees.”<sup>285</sup>

*Epilepsy Foundation* survived judicial review by the United States Court of Appeals for the District of Columbia Circuit.<sup>286</sup> Writing for the court, Judge Harry Edwards acknowledged that “the Board has changed its position several times in considering whether employees in nonunion workplaces may invoke the *Weingarten* right.”<sup>287</sup> This change of mind was not a forbidden agency action. “It is a fact of life in NLRB lore that certain substantive provisions of the NLRA invariably fluctuate with the changing compositions of the Board.”<sup>288</sup> As “[a]n otherwise reasonable interpretation of [section] 7 is not made legally infirm because the Board gives *renewed*, rather than new, meaning to a disputed statutory provision,”<sup>289</sup> the court did not invalidate the Board’s return to *Materials Research*.<sup>290</sup>

The Board recently changed its institutional mind yet again. In *IBM Corp.*,<sup>291</sup> Chairman Battista and Member Meisburg, with the concurrence of Member Schaumber, announced that “national labor relations policy will be best served by overruling existing precedent and returning to the earlier precedent of *du Pont*, which holds that *Weingarten* rights do not apply in a nonunion setting.”<sup>292</sup> Agreeing with the policy considerations noted in the Board’s prior rulings denying nonunion *Weingarten* rights, Battista and Meisburg introduced new elements into the decisional calculus: the “ever-increasing requirements to conduct workplace investigations, as well as new security concerns raised by incidents of national and workplace violence.”<sup>293</sup> In an age of, and in the wake of, Enron-type corporate scandals,<sup>294</sup> post-9/11 terrorism concerns, and the mandates of antidiscrimination laws, “the policy considerations expressed in *DuPont* have taken on a new vitality.”<sup>295</sup> Battista and Meisburg expressed their concern that the confidentiality of employer investigations could be

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285. *Id.* at 679 (majority decision).

286. *See* *Epilepsy Found. of Ne. Ohio v. NLRB*, 268 F.3d 1095 (D.C. Cir. 2001) (per curiam) (upholding Board’s decision to grant *Weingarten* rights to nonunion employees).

287. *Id.* at 1099.

288. *Id.* at 1097.

289. *Id.*

290. *Id.* The court did reverse the Board’s retroactive application of its return to *Materials Research* because the law at the time of the employer’s denial of the employee’s representation request did not grant such a right and the employer had “acted with no apparent risk in following the law.” *Id.* at 1102.

291. 341 N.L.R.B. No. 148 (June 9, 2004).

292. *Id.*, slip op. at 2.

293. *Id.*, slip op. at 3.

294. *See generally* ENRON: CORPORATE FIASCOS AND THEIR IMPLICATIONS (Nancy B. Rapoport & Bala G. Dharan eds., 2004) (describing and analyzing the causes and consequences of recent large-scale corporate scandals).

295. *IBM Corp.*, 341 N.L.R.B. No. 148, slip op. at 4.

compromised where a nonunion employee “inadvertently ‘let slip’ confidential, sensitive, or embarrassing information” in “casual conversation” with other employees or workplace friends.<sup>296</sup> Thus, “on balance, the right of an employee to a coworker’s presence in the absence of a union is outweighed by an employer’s right to conduct prompt, efficient, thorough, and confidential workplace investigations.”<sup>297</sup>

Ideological voting is on display in the dissenting opinion by Members Liebman and Walsh. “Today,” they wrote, “American workers without unions, the overwhelming majority of employees, are stripped of a right integral to workplace democracy.”<sup>298</sup> Accusing the Board of treating nonunion workers like “second-class citizens of the workplace,”<sup>299</sup> and assuming for the sake of argument that affording *Weingarten* rights to unrepresented employees could make it more difficult for employers to conduct investigations,<sup>300</sup> the dissenters argued that there was no post-*Epilepsy Foundation* evidence that nonunion coworker representation interfered with investigations. Nor were they persuaded by the argument that coworker assistance was not good policy in light of threats of terrorism, workplace violence, and corporate abuses. “[A]llowing workers to represent each other has no conceivable connection with workplace violence and precious little with corporate wrongdoing, which in any case seems concentrated in the executive suite, not the employee cubicle or the factory floor.”<sup>301</sup> By overruling *Epilepsy Foundation* “not because they must, and not because they should, but because they can,” the Board was “taking a step backwards,” Liebman and Walsh contended, and had issued a decision “unlikely to have an enduring place in American labor law.”<sup>302</sup>

The changes in Board law in this area have followed election

296. *Id.*, slip op. at 6.

297. *Id.*, slip op. at 7. Member Schaumber argued in his concurrence that the “better construction [of the NLRA] and the one most consistent with the language and policies of the Act” would hold that the *Weingarten* right is unique to union-represented employees. *Id.*, slip op. at 8 (Member Schaumber, concurring). Where employees are not represented by a union, employers have a common law right to deal with workers on an individual basis, and section 7’s concerted activity requirement “may not be presumed but must be demonstrated.” *Id.*, slip op. at 13. No such demonstration is made, in his view, where an employee requests a coworker’s presence at an investigatory interview, for that request “is neither an interaction among employees nor a conversation between two (or more) employees.” *Id.*, slip op. at 15 (internal quotation marks omitted).

298. *Id.*, slip op. at 18 (Members Liebman and Walsh, dissenting).

299. *Id.*

300. *See id.*, slip op. at 22 (“[W]e will assume that nonunion employees’ right to representation makes it harder, in some measure, for employers to discharge [the] obligation [to investigate].”). This assumption did not lead Liebman and Walsh to the conclusion “that nonunion workers are *never* entitled to a coworker representative in investigatory interviews.” *Id.*

301. *Id.*, slip op. at 18.

302. *Id.*, slip op. at 23.

returns.<sup>303</sup> In *Materials Research*, an employee-protective decision extending *Weingarten* rights to nonunion employees, Reagan appointees Van de Water and Hunter were outvoted by Members Fanning (a Democrat appointed by Eisenhower), Jenkins (a Republican appointed by Kennedy), and Zimmerman (an Independent Carter appointee).<sup>304</sup> Three Reagan appointees—Dotson, Dennis, and Hunter—interred *Materials Research* and (to the delight of management) limited *Weingarten* to unionized workplaces. That limitation, reaffirmed by five Reagan appointees in the 1988 *du Pont* decision, was then rejected by Clinton appointees Truesdale, Fox, and Liebman (the latter two members from union-side backgrounds) in *Epilepsy Foundation*; the only Board member arguing for adherence to precedent in that 2000 decision was Hurtgen, a management-side member also appointed by Clinton. Lest there be any doubt as to the significance of ideology, Bush management-side appointees Battista, Meisburg, and Schaumber flip-flopped back to *du Pont*, with Democrats Liebman and Walsh in the minority. In sum, the question whether a nonunion employee has a right to *Weingarten* representation has been predictably answered affirmatively by Democratic administration Boards and negatively by Republican administration Boards.

#### M. Employer's Claimed Inability to Pay

It is well settled that an employer's assertion that it cannot afford to pay what a union seeks in labor negotiations may trigger a company's obligation to provide the union, upon the union's request, with information substantiating the claim of inability to pay.<sup>305</sup>

Recently, in *American Polystyrene Corp.*,<sup>306</sup> the Board concluded that an employer, who, in response to a union financial proposal said, "No, I can't. I'd go broke," made, but effectively retracted, its inability to pay claim.<sup>307</sup> Chairman Battista and Member Schaumber assumed that the employer made the statement "during the heat of bargaining," but found

303. This calls to mind the statement, "no matter whether th' constitution follows th' flag or not, th' supreme coort [sic] follows th' iliction [sic] returns." FINLEY PETER DUNNE, MR. DOOLEY'S OPINIONS 26 (1901).

304. See Appendix to this Article.

305. See, e.g., *NLRB v. Truitt Mfg Co.*, 351 U.S. 149, 153–54 (1956) (affirming NLRB decision finding that not providing requested financial data to union when claiming inability to pay in contract negotiations was not good faith bargaining under the NLRA); see also *Nielsen Lithographing Co.*, 305 N.L.R.B. 697, 701 (1991) (finding that "an employer's obligation under *Truitt* to provide a union with information" arises "only when the employer has signified that it is at present unable to pay proposed wages and benefits"), review denied by *Graphic Commc'ns Int'l Union, Local 508 v. NLRB*, 977 F.2d 1168 (7th Cir. 1992).

306. 341 N.L.R.B. No. 67 (Mar. 30, 2004).

307. *Id.*, slip op. at 1.

that the employer retracted the claim in a letter delivered to the Union the day after the bargaining session in which the “I’d go broke” statement was made.<sup>308</sup> They concluded that the employer “unequivocally advised the Union that [the company’s] ability to pay for the Union’s bargaining proposals was not in question.”<sup>309</sup> Interestingly, the Board noted that the employer’s denial that the “I’d go broke” statement was ever made had been rejected by the administrative law judge.<sup>310</sup> Battista and Schaumber reasoned that the discredited testimony did not constitute lying under oath, for a “witness can be mistaken or, through faulty recollection, may honestly believe her testimony.”<sup>311</sup>

Member Walsh’s dissent emphasized that the employer’s actions did not constitute a retraction of its stated inability to pay. Disagreeing with the majority, he found it significant that the administrative law judge did not believe the employer’s assertion that the “I’d go broke” statement had never been communicated to the union. “Because the judge discredited [the] denial . . . each of the [employer’s] subsequent alleged retractions began with a falsehood. Clearly, lying is a sign of bad-faith bargaining. An effect of lying is to place in doubt the veracity of any subsequent statements about the subject matter of the lie.”<sup>312</sup> As “there was no reason for the Union to believe anything else [the employer] had to say on the matter,” Walsh concluded that the employer did not unequivocally retract its claim.<sup>313</sup>

*American Polystyrene* is an important example of one way in which ideology operates within a settled rule of law. Both the majority and the dissent agreed on the applicable law but differed as to the application of the operative legal rule to the facts of the case. Bush appointees and Republican management-side Members Battista and Schaumber ruled in the employer’s favor.<sup>314</sup> Member Walsh, a government-service Democrat initially appointed by Clinton and reappointed by Bush, rejected the employer’s defense. While the flip-flops in other areas of labor law discussed in this Part were not repeated, the Board members’ positions were consistent with this Article’s ideological voting hypothesis.

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308. *Id.*, slip op. at 2. The Board had previously ruled that an employer is not required to provide a union with requested financial information where the employer has retracted its “unable to pay” claim. *See, e.g.*, *Central Mgmt. Co.*, 314 N.L.R.B. 763, 769 (1994) (finding that an effective withdrawal of an inability to pay claim ceases the obligation of the employer to provide requested financial information).

309. 341 N.L.R.B. No. 67, slip op. at 2.

310. *Id.*, slip op. at 7 (Parke, A.L.J.).

311. *Id.*, slip op. at 3 (majority decision).

312. *Id.*, slip op. at 4 (Member Walsh, dissenting) (citation omitted).

313. *Id.*

314. *See* Appendix to this Article.

## IV. IMPLICATIONS

More than just an abstract and academic phenomenon, ideological voting by the members of the NLRB affects workers, employers, and unions living under and operating within the regulatory regime of the Act as construed and applied by the Board. The impact of such voting on the agency's constituencies is all the more pronounced when a flip-flopping and seesawing Board changes and departs from precedent as it determines the legality or illegality of the conduct of those subject to its regulation.

What are the implications of the ideological voting discussed in the preceding pages? Should we be concerned that, throughout the agency's history, a number of Board decisions have been decided by votes reflective of and consistent with the ideology of the members participating in those cases? To the extent that "[o]ne of the basic ideas contained in the [Act] is to substitute the rule of law for industrial strife,"<sup>315</sup> the concern that a particular Board decision may reflect and give operative effect to member ideology and is not an impartial application of law to facts is problematic. The "rule of law demands that everyone be subject to the same law"<sup>316</sup> and "that like cases should be treated alike."<sup>317</sup> The phrase "rule of law" is jurisprudential shorthand for, among other things, dispassionate and impartial judging by those entrusted with the task and responsibility of resolving legal disputes. The impartial judge is or should be indifferent to both the identity of the parties before her and to the ultimate outcome of the case. That outcome should be dictated, not by biased or inclinational adjudication, but by reasoned, disinterested, and evenhanded application of the pertinent legal rule. The Board generally "serves the purpose of the rule of law" by the "working out of principles which are generally applied to similar situations," thereby "enabling those governed by the Act to predict, with some degree of close approximation, the course enforcement will take."<sup>318</sup>

It has been urged, however, that decisionmaker impartiality is unachievable. "Pure impartiality is an ideal that can never be completely attained. Judges, after all, are human beings who come to the bench with feelings, knowledge, and beliefs . . . about legal issues they must decide."<sup>319</sup> On that view, the rule of law's "government of laws and not of

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315. William B. Gould IV, *Recognition Laws: The U.S. Experience and Its Relevance to the U.K.*, 20 COMP. LAB. L. & POL'Y J. 11, 13 (1998).

316. H.W. Arthurs, *National Traditions in Labor Law Scholarship: The Canadian Case*, 23 COMP. LAB. L. & POL'Y J. 645, 662 (2002).

317. Ingram, *supra* note 17, at 361.

318. Harvey Pinney, *Administrative Discretion and the NLRB*, 18 SOC. F. 275, 277-78 (1939).

319. Jeffrey M. Shaman, *The Impartial Judge: Detachment or Passion?*, 45 DEPAUL L. REV. 605, 605 (1996).

men<sup>320</sup> ideal gives way to the reality of the partial and interested rule of the decisionmaker. The difference between the rule of law and the rule of men has been described by Peter Ingram:

Simply, there is an opposition between the idea of actions which are an expression of the agent's will and therefore also, too often, an expression of his partiality, irrationality or liability to error, and the idea of actions that, although they are still a person's actions, are guided and even determined by law as a secure system of rules representing abiding general standards and not immediately embodying the particular desires of individuals. Of course, legal rules themselves are by no means permanent; and they are created, changed and abolished by people. They can reflect biases, embody misguided values, and express their intent wrongly or ambiguously; and they are subject to error in interpretation and execution. Nevertheless, as general rules, laws strive to be independent of personal whims.<sup>321</sup>

Ideological voting on the NLRB resulting in different legal rules under Democratic and Republican Boards can give the appearance and create the impression that the members of this quasi-judicial administrative agency sometimes "act[] like politicians carrying out their electoral mandate to favor labor or to favor management."<sup>322</sup> The legislator and politician, unlike the impartial adjudicator, can be as biased and partial as she likes as she pursues and tries to enact into law her policy preferences. Not bound by the conventions of the rule of law, the legislator is legitimately interested in the views and desires of her constituents and, if she agrees with those positions, may attempt to enshrine them in a legislative command. If a Board member acts in this way and favors labor over management or vice versa, the agency's product is not the output of principled adjudication as measured by the rule of law theory discussed above. If this view is correct, the Board may be more properly viewed as a quasi-legislative, and not a quasi-judicial, institution engaged in law-as-ideology adjudication and decisionmaking favoring a member's preferred side of the labor-management divide.

Viewing the Board as a court-like body may unfairly and incorrectly subject the agency to the rule-of-law critique. As noted by one commentator:

[T]he Board—although an adjudicator and in other ways 'judicial'—must, if its existence in its present form is to be justified, have functions not generally attributed to common-law courts. The Board acts collegially—that is, it adjudicates or

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320. Pinney, *supra* note 318, at 275.

321. Ingram, *supra* note 17, at 359 (footnote omitted).

322. Fried, *supra* note 2, at 179.

engages in rule-making by majority vote of a panel or of the entire membership—rather than as adjudicators in the fashion of trial judges.<sup>323</sup>

Moreover, “Board members, unlike federal judges, are not well insulated from the swings of the political process. Since their appointment is for only five years, they seem exceptionally subject to that process and deliberately so.”<sup>324</sup> As a policymaking institution with express rulemaking power,<sup>325</sup> the Board’s “intended functions [are] broader than those generally entrusted to courts, and ones more subject to some form of political control.”<sup>326</sup> Given “the existence of the collegial action requirement, the lack of insulation from political forces, and the presence of rule-making power . . . these functions are in the area of policy-making in a broadly legislative sense.”<sup>327</sup> The policymaking Board

acquire[s] knowledge, not so much as an aid to the fashioning of legal doctrine as a means of determining and evaluating the impact of that doctrine. The Board might be viewed as an agency that can pronounce rules, watch them in operation, and modify or abandon them as their impact is shown to be undesirable. The Board is thus distinguished from a court not only in its superior ability to learn relevant facts, but also in its relative freedom from the doctrine of *stare decisis* and from the need to appear to have found the one correct rule of law every time it adjudicates.<sup>328</sup>

The proposition that the Board enjoys some degree of freedom from the doctrine of *stare decisis* and is not bound by precedent<sup>329</sup> was made and defended in a recent speech by current NLRB Chairman Robert Battista. Pointing to the NLRA’s “broad language,” Battista remarked:

[I]t is not surprising that Board law changes from time to time. The Board’s freedom to act within parameters means that different Boards will act in different ways. Congress envisioned this freedom and basically said: so long as the Board does not stray from fundamental principles and explains itself, it has the

323. Ralph K. Winter, Jr., *Judicial Review of Agency Decisions: The Labor Board and the Court*, 1968 SUP. CT. REV. 53, 54.

324. *Id.*; see also GOULD, *supra* note 12, at 125 (discussing political impact of Board members’ five-year terms).

325. See *supra* note 45 and accompanying text.

326. Winter, *supra* note 323, at 55.

327. *Id.*

328. *Id.* at 63.

329. As Professor Fred Schauer explains, “[t]he previous treatment of occurrence *X* in manner *Y* constitutes, solely because of its historical pedigree, a reason for treating *X* in manner *Y* if and when *X* again occurs.” Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 571 (1987).



power to change.<sup>330</sup>

The chairman opined, further, that the majority of Board members “serv[ing] relatively short and staggered terms” will “reflect, to some degree, the governing philosophy of the appointing President. Purists may gnash their teeth at this, but it was part of the congressional design.”<sup>331</sup> Cautioning that “[t]his is not to say that Congress intended that one party would blindly overrule the precedents of the other party,”<sup>332</sup> Battista emphasized that the Board

is not an Article III court and thus the doctrine of stare decisis does not strictly apply. However, all responsible Members recognize the value of having stability, predictability, and certainty in the law. But, if a Member honestly believes that a prior precedent no longer makes sense, and that a change would be within the fundamental principles [of the Act], he/she can vote to change the law. To be sure, the values of stare decisis counsel against an onslaught of changes. But prudently exercised, change is proper and indeed was envisioned by Congress.<sup>333</sup>

The agency has prudently avoided “radical[ly] swing[ing] to the left or right,” in Battista’s view, and while “[m]ost of the law is well-settled,” “[i]n a few areas, the law has gone though periods of flux, but it has ultimately settled at an accepted point.”<sup>334</sup>

Judicial review of Board decisions is implicated whenever the agency’s willingness to change labor law is the result of and is fueled by member ideology. More than sixty years ago the United States Supreme Court noted that the NLRA “left to the Board the work of applying the Act’s general prohibitory language in the light of the infinite combinations of events which might be charged as violative of its terms.”<sup>335</sup> The Board is empowered to render “decisions based upon evidential facts under the particular statute made by experienced officials with an adequate appreciation of the complexities of the subject which is entrusted to their

330. Robert J. Battista, Chairman, Nat’l Labor Relations Bd., Remarks at the 58th NYU Annual Conference on Labor: The NLRB at 70: Its Past and Its Future 13 (May 20, 2005), available at [http://www.nlr.gov/nlr/press/releases/chairman\\_052005\\_nyu\\_speech.htm](http://www.nlr.gov/nlr/press/releases/chairman_052005_nyu_speech.htm).

331. *Id.* at 14; see also *id.* (“[B]ecause of the limited terms of Members, and the fact that a Board majority will generally reflect the philosophic views of the President, it is not surprising that some Boards will be viewed as leaning liberal and pro-union and other Boards will be viewed as leaning conservative and pro-employer.”).

332. *Id.*

333. *Id.* For a Board member’s account of the ways in which her philosophy and core beliefs were relevant to her decisions, see generally Patricia Diaz Dennis, *A Principled Approach to NLRB Decisionmaking*, 1 LAB. LAW. 483 (1985).

334. Battista, *supra* note 330, at 15.

335. Republic Aviation Corp. v. NLRB, 324 U.S. 793, 798 (1945).

administration.”<sup>336</sup> So long as the agency’s conclusions are supported by substantial evidence on the record as a whole,<sup>337</sup> the Court has made clear that “[i]f the Board adopts a rule that is rational and consistent with the Act, then the rule is entitled to deference from the courts.”<sup>338</sup>

*NLRB v. Town & Country Electric, Inc.*<sup>339</sup> is a helpful example of the degree of judicial deference given to Board rulings. In that case, a unanimous Supreme Court agreed with the Board that a worker can be a company’s “employee” and, at the same time, can be paid by a union for assisting the labor organization in organizing that company’s employees. The Court asked “whether the Board may lawfully interpret” section 2(3) of the Act “to include company workers who are also paid union organizers.”<sup>340</sup> Justice Stephen Breyer, writing for the Court, explained that “[w]e put the question in terms of the Board’s lawful authority because this Court’s decisions recognize that the Board often possesses a degree of legal leeway when it interprets its governing statute, particularly where Congress likely intended an understanding of labor relations to guide the Act’s application.”<sup>341</sup> Noting several arguments and factors favoring the Board’s decision and deferring to the agency’s view,<sup>342</sup> the Court stated: “We hold

336. *Id.* at 800 (citing *NLRB v. Virginia Power Co.*, 314 U.S. 469, 479 (1941); *NLRB v. Hearst Publications*, 322 U.S. 111, 130 (1944)); *see also* *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951) (identifying “the Labor Board as one of those agencies presumably equipped or informed by experience to deal with a specialized field of knowledge, whose findings within that field carry the authority of an expertness which courts do not possess and therefore must respect”).

337. *See* 29 U.S.C. § 160(e) (2000) (“The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive.”); *Universal Camera Corp.* 340 U.S. at 491 (“Whether on the record as a whole there is substantial evidence to support agency findings is a question which Congress has placed in the keeping of the Courts of Appeals. This Court will intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied.”).

338. *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 42 (1987) (citation omitted); *see also* *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 364 (1998) (“Courts must defer to the requirements imposed by the Board if they are rational and consistent with the Act, and if the Board’s explication is not inadequate, irrational or arbitrary.” (internal quotations marks and citations omitted)); *ABF Freight Sys., Inc. v. NLRB*, 510 U.S. 317, 324 (1994) (stating that courts should grant “the greatest deference” to the Board); *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 786 (1990) (noting that the Board has the “primary responsibility for developing and applying national labor policy”).

339. 516 U.S. 85 (1995).

340. *Id.* at 89.

341. *Id.* at 89–90.

342. Rejecting the employer’s argument that the Board’s decision was inconsistent with common-law agency principles, the Court concluded that the Board’s decision was “consistent with the broad language of the Act itself,” *id.* at 90, was “consistent with several of the Act’s purposes” and with the Congressional reports and legislator statements on the floor of the United States House of Representatives, *id.* at 91, was consistent with the

only that the Board's construction of the word 'employee' is lawful; that term does not exclude paid union organizers."<sup>343</sup>

*Town & Country* also cited *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,<sup>344</sup> the Court's important decision setting forth the scope of judicial review of federal administrative agencies' interpretations of law.<sup>345</sup> Recognizing that Congress may expressly or implicitly delegate to agencies the authority to fill gaps in statutory provisions,<sup>346</sup> *Chevron* instructs courts to ask two questions when "review[ing] an agency construction of the statute which it administers."<sup>347</sup> First, the court must ask "whether Congress has directly spoken to the precise question at issue."<sup>348</sup> Where Congressional intent is clear, "the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."<sup>349</sup> Second, and where "the court determines [that] Congress has not directly addressed the precise question at issue," the court must ask "whether the agency's answer is based on a permissible construction of the statute."<sup>350</sup> Thus, a court facing statutory silence or ambiguity may "not simply impose its own construction on the statute"<sup>351</sup> and must defer to permissible agency readings, even when that reading is not "the only one [the agency] permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding."<sup>352</sup>

Given this Article's subject and purpose, another aspect of *Chevron* is

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Court's section 2(3) precedent, and was supported by 29 U.S.C. § 186(c)(1), a provision in the 1947 Labor Management Relations Act prohibiting employer payments to persons employed by unions except where a union employee is also an employee of the employer, *id.* at 92.

343. *Id.* at 98.

344. 467 U.S. 837 (1984).

345. *Chevron* has been cited by the Court in its opinions reviewing NLRB decisions. See, e.g., *NLRB v. Kentucky River Cmty. Care, Inc.*, 532 U.S. 706, 713 (2001); *Holly Farms Corp. v. NLRB*, 517 U.S. 392, 398 (1996); see also *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487 (1951) (holding "that the standard of proof specifically required of the Labor Board . . . is the same as that to be exacted by courts reviewing every administrative action subject to the Administrative Procedure Act").

346. The Court opined that where "Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." *Chevron*, 467 U.S. at 843-44. Where the legislative delegation to the agency is implicit, "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." *Id.* at 844.

347. *Id.* at 842.

348. *Id.*

349. *Id.* at 842-43.

350. *Id.* at 843.

351. *Id.*

352. *Id.* at 843 n.11.

of particular interest and relevance. Comparing the judiciary and administrative agencies, the Court stated:

Judges are not experts in the field, and are not part of either political branch of the Government. Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges' personal policy preferences. In contrast, an agency to which Congress has delegated policy-making responsibilities may, within the limits of that delegation, *properly rely upon the incumbent administration's view of wise policy to inform its judgments. . . .*

When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers of the wisdom of an agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail. In such a case, federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do. The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones: “Our Constitution vests such responsibilities in the political branches.”<sup>353</sup>

*Chevron* thus recognizes that an administrative agency's formulation of law and policy may fluctuate along with and may reflect changes in presidential administrations. It must be acknowledged, however, that this oscillation<sup>354</sup> caused by ideology-based changes in operative legal rules has practical and real-world consequences. Consider, in this regard, the Board's flip-flops in the area of election campaign misrepresentations,<sup>355</sup> a phenomenon cited by the United States Court of Appeals for the Seventh Circuit as an example of the agency's “fickleness”<sup>356</sup> and “indecision.”<sup>357</sup> And recall the Board's changing positions on the legality of employer

353. *Id.* at 865–66 (emphasis added) (quoting *TVA v. Hill*, 437 U.S. 153, 195 (1978)).

354. See generally Estreicher, *supra* note 28 (discussing policy oscillations in the Board's decisions).

355. See *supra* Part III.A.

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

357. *Id.* at 615. In *Mosey*, the employer, arguing that the Union misrepresented a wage increase matter, refused to bargain following the Union's win in an NLRB election proceeding. *Id.* at 612. The court noted the Board's changing views on the regulation of campaign misrepresentations and the fact that the Board's rule of law governing the employer's conduct had changed from *Shopping Kart* to *General Knit* to *Midland National*, see *supra* Part III.A, all within a five-year period as the employer litigated the case before the Board and the court. *Mosey*, 701 F.2d at 612. Judge Posner, writing for the en banc court, stated that in “changing its mind . . . the Board has put [the employer] through the hoops, subjecting it to protracted legal expense and uncertainty.” *Id.* Given “the long delay” in reaching a final disposition of the case “due to the Board's indecision,” the court denied enforcement of the Board's order requiring the employer to bargain with the Union. *Id.* at 615.

denials of a nonunion employee's request for the presence of a coworker during an investigatory interview. In 1980 the Board held that the March 1979 request of an employee was protected activity; in 1984 the Board concluded that an employer had lawfully denied another worker's May 1979 representational request.<sup>358</sup> Thus, the issue of the legality of employer denials of two employees' efforts to procure the assistance of their fellow workers, requests separated in time by two months, was treated and decided differently. Experiencing the same pendulum swing, the Otis Elevator Company was told by the Board in 1981 that its decision to move certain work from New Jersey to Connecticut without bargaining with its workers' union was illegal. After a change in the Board's membership, that exact same conduct by the employer was deemed lawful.<sup>359</sup>

As can be seen, one consequence of the Board's ideological voting is the reality that certain areas of labor law are subject to change based on the outcomes of presidential elections and the resulting appointments of NLRB members. With regard to some (but not all) issues, Republican administration Boards have ruled in favor of business and Democratic administration Boards have ruled in favor of labor.<sup>360</sup> This reality should not be surprising given the "extraordinary vagueness of the NLRA"<sup>361</sup> and the strongly held and disparate views of Board appointees concerning the role and scope of federal intervention in and the regulation of labor-management relations and collective bargaining.

Because, as Chairman Battista noted, Board members may not consider themselves bound by the decisions issued by their predecessors,<sup>362</sup> and given the agency's presumed expertise and the assumption that the Board's competence is superior to that of generalist judges,<sup>363</sup> NLRB flip-flops and seesaws, while problematic, may be unavoidable. When precedent is overruled as the result of ideological voting, those subject to the Board's jurisdiction may question the fairness of the adjudicatory process and result, may experience difficulty in conforming their conduct to unsettled and destabilized legal rules and doctrines, and may find it difficult to view as credible an agency in which ideology and partiality can be demonstrably outcome-influential if not outcome-determinative.<sup>364</sup> Changes in the law attributable solely or primarily to changes in the

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358. See *supra* Part III.K.

359. See *supra* notes 218–25 and accompanying text.

360. See Moe, *supra* note 13, at 1102 ("A change in presidential administration from Republican to Democrat gives rise to a pro-labor shift in NLRB performance . . .").

361. Joan Flynn, *The Costs and Benefits of "Hiding the Ball": NLRB Policymaking and the Failure of Judicial Review*, 75 B.U. L. REV. 387, 393 (1995).

362. See *supra* note 333 and accompanying text.

363. See *supra* note 353 and accompanying text.

364. See Schauer, *supra* note 329, at 595–98, 600–02 (discussing the justifications for and the benefits of adherence to precedent).

ideologies of Board members therefore warrant asking the question whether the changes correspond to the political affiliations of the President and Board members as opposed to “institutional developments or to new insights produced by a maturing expertise.”<sup>365</sup> As noted by one commentator, “[i]f precedent is repeatedly disregarded, one must question whether the result is based more on political/personal viewpoints rather than a measured view of the law.”<sup>366</sup> If ideology is the explanation for the disregard of precedent, the suspicion that bias and partiality are affecting, if not driving, decisional outcomes grows even stronger.

NLRB flip-flops resulting from ideological voting can also have adverse implications with regard to the agency’s presumed expertise and judicial review and evaluation of Board decisions. While administrative law anticipates administration-based policy changes,<sup>367</sup> the vote-predictive Board member ideology observed in the “willingness” of pro-union or pro-employer Boards “to challenge and change well established precedent”<sup>368</sup> raises

the issue of whether the interpretation [of the Act] being given is a reasoned one or whether the Agency is acting in an arbitrary and capricious manner. The mantle of expertise can only be extended so far if there is a constant change in course, and the reputation of the Agency is also diminished.<sup>369</sup>

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365. Bernard D. Meltzer, *Organizational Picketing and the NLRB: Five on a Seesaw*, 30 U. CHI. L. REV. 78, 78 (1962).

366. Andrew M. Kramer, *The Clinton Labor Board: Difficult Times for a Management Representative*, 16 LAB. LAW. 75, 99 (2000).

367. See *supra* notes 353–54 and accompanying text.

368. Kramer, *supra* note 366, at 80.

369. *Id.* at 81. The NLRB’s expertise has been the subject of dispute. Consider one analyst’s view:

The National Labor Relations Board is an especially easy target for skeptics of agency expertise, consistency and neutrality. From its inception, the controversial nature of the NLRB’s business has subjected it to attack, and not without reason. With respect to expertise, it has been observed that courts routinely incant that the board is expert in industrial relations, so that it can evaluate the effects of suspect management actions on workers; yet the board does no empirical work, nor does its staff include experts in social science, industrial relations, or business administration who might ably address such questions.

In a sense, the NLRB myth is functional because it allows the court to narrow its scope of review rather than independently address the complex factual and policy matters about which it knows even less than the board. So, sometimes courts acknowledge doubts about the reality of board expertise but then defer anyway. But the veil of fictional expertise also obscures the continuing costs of possibly unsound decisions. Rigorous judicial scrutiny might prod the agency to develop genuine and useful expertise, if only to resist encroachment.

To the extent that a Board ruling is or appears to be the product of management-inclined members favoring management or union-inclined members favoring unions or employees, the presumption of Board expertise becomes questionable and the deferential judicial review appropriately applied in most cases is not rigorous enough. In that circumstance, reviewing courts should take a hard look at the basis or bases for the agency's ruling, with particular scrutiny of the sufficiency of the record evidence and the decision's legal analysis and reasoning and rationality. A court must ask, skeptically and not deferentially, whether the Board acted within or outside of the limits of Congress's delegation.<sup>370</sup> Hard look review will not necessarily lead to judicial invalidation of or refusal to enforce Board decisions, as courts may still be reluctant to undo or enter into the realm of agency policymaking. But the possibility of such review may serve as a catalyst for the Board to carefully consider the institution's ideological departures from and returns to various rules and policies.

## V. CONCLUSION

This Article has attempted to demonstrate that NLRB members have cast ideological votes in a number of cases addressing and deciding various issues of labor law and policy. Vote-predictive Board member ideology, as defined herein,<sup>371</sup> has had an outcome-influential and outcome-determinative impact in a number of areas of federal labor law, as evidenced by the agency's flip-flops and seesaws and willingness to reject and overrule precedent. Thus, contrary to those who suggest or believe that

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CHRISTOPHER F. EDLEY, JR., *ADMINISTRATIVE LAW: RETHINKING JUDICIAL CONTROL OF BUREAUCRACY* 51–52 (1990) (footnotes omitted); *see also* GOULD, *supra* note 12, at xxi (“Board members and the general counsel tend to be Washington insiders . . . . Practical, or ‘hands on,’ experience with industrial relations or the employment relationship in the field is unusual—as is previously acquired expertise in labor law.”).

370. This point draws on Professor Jim Rossi's discussion of the hard look doctrine and judicial review in the context of regulation in the electric utility industry. *See* Rossi, *supra* note 45. The hard look doctrine “is characterized by the requirement of reasoned analysis, or rationality.” *Id.* at 820. Rossi explains:

The thrust of a requirement of rationality is this: changes in regulatory law are permitted, but only as a product of reasoned analysis brought to bear on accumulated experience; not just the result of transitory political forces or regulatory appointees. To the extent that the hard look doctrine guards against the exercise of such naked preferences in the political process by requiring consideration of all of the relevant reasons . . . it has a legitimacy-enhancing role and is a fully justified use of judicial authority.

*Id.* (footnote omitted).

371. *See supra* notes 23–24 and accompanying text.

the Board acts free from ideological bias,<sup>372</sup> as a descriptive matter ideology has mattered in a number of cases presenting controversial and sharply contested issues of law and policy, cases in which Board majorities have cast votes consistent with and reflecting the differing philosophies of Republican or Democratic administrations and the pre-Board backgrounds of members.<sup>373</sup> When the agency's constructions and applications of the Act fluctuate with presidential elections and resulting changes in the Board's membership,<sup>374</sup> it is understandable that the Board's credibility and impartiality may be questioned, and that some suspect that the Board's actions do not always conform to rule of law precepts. Whether the Board should act in accordance with these principles is an issue warranting further reflection. Considering and answering that question is all the more important given the reality of ideological voting on the NLRB, and the implications and real-world consequences of such voting on those who come to the Board for its quasi-judicial determination that certain conduct does or does not violate the NLRA.

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372. *See supra* notes 14–22 and accompanying text.

373. *See GROSS, supra* note 1, at 97 (“It was not the Board’s place to legislate labor law or to formulate labor policy: that was for Congress and the president.”).

374. *See Epilepsy Found. of Ne. Ohio v. NLRB*, 268 F.3d 1095, 1097 (D.C. Cir. 2001) (“It is a fact of life in NLRB lore that certain substantive provisions of the NLRA invariably fluctuate with the changing compositions of the Board.”).



APPENDIX<sup>375</sup>

Board Member	Appointing President (Party)	Member's Party	Member's Background
Rodgers (1953-63)	Eisenhower (R)	Rep.	Government
Leedom (1955-64)	Eisenhower (R)	Rep.	Government
J. Jenkins (1957-61)	Eisenhower (R)	Dem.	Management
Fanning (1957-82)	Eisenhower (R)	Dem.	Government
McCulloch (1961-70)	Kennedy (D)	Dem.	Government
Brown (1961-71)	Kennedy (D)	Dem.	Government
H. Jenkins (1963-1983)	Kennedy (D)	Rep.	Gov./Academia
Miller (1970-74)	Nixon (R)	Rep.	Management
Kennedy (1970-75)	Nixon (R)	Rep.	Government
Penello (1972-81)	Nixon (R)	Dem.	Government
Murphy (1975-79)	Ford (R)	Rep.	Man./Union
Walther (1975-77)	Ford (R)	Rep.	Management
Truesdale (1977-81, 1994-96, 1998-2001)	Carter (D) Clinton (D)	Dem. Dem.	Government Government
Zimmerman (1980-84)	Carter (D)	Indep.	Government
Hunter (1981-85)	Reagan (R)	Rep.	Government
Van de Water (1981-82)	Reagan (R)	Rep.	Management
Dotson (1983-87)	Reagan (R)	Rep.	Management
Dennis (1983-86)	Reagan (R)	Dem.	Management
Johansen (1985-89)	Reagan (R)	Rep.	Government
Babson (1985-88)	Reagan (R)	Dem.	Management
Stephens (1985-95)	Reagan (R)	Rep.	Government
Cracraft (1986-91)	Reagan (R)	Dem.	Management
Higgins (1988-89, 1996-97)	Reagan (R)/ Clinton (D)	Rep.	Government
Devaney (1988-94)	Reagan (R)	Dem.	Government
Oviatt (1989-93)	Bush (R)	Rep.	Management

375. See GROSS, *supra* note 1, at 23, 92, 245, 247, 249; Flynn, *supra* note 5, at 1405 tbl. 1, 1408 tbl. 2; National Labor Relations Board Members, [www.nlr.gov/nlr/about/structure/fbmembers.asp](http://www.nlr.gov/nlr/about/structure/fbmembers.asp); see also J. Robert Brame Professional Profile, [www.mcguirewoods.com/la wyers/index/J\\_Robert\\_Brame.asp](http://www.mcguirewoods.com/la wyers/index/J_Robert_Brame.asp); Nominations and Appointments, Mar. 11, 1985, [www.reagan.utexas.edu/archives/speeches/1985/31185c.htm](http://www.reagan.utexas.edu/archives/speeches/1985/31185c.htm); Nomination of Clifford R. Oviatt, Jr., To Be a Member of the National Labor Relations Board, July 19, 1989, <http://bushlibrary.tamu.edu/research/papers/1989/89071909.html>; Nomination of John N. Raudabaugh To Be a Member of the National Labor Relations Board, June 20, 1990, <http://bushlibrary.tamu.edu/research/papers/1990/90062006.html>; President Names Three to NLRB, Oct. 28, 1997, <http://www.clintonpresidentialcenter.org/legacy/102897-president-names-three-to-nlr.htm>.

<u>Board Member</u>	<u>Appointing President (Party)</u>	<u>Member's Party</u>	<u>Member's Background</u>
Raudabaugh (1990-93)	Bush (R)	Rep.	Management
Gould (1994-98)	Clinton (D)	Dem.	Academia
Cohen (1994-96)	Clinton (D)	Rep.	Management
Fox (1996-2000)	Clinton (D)	Dem.	Union
Brame (1997-2000)	Clinton (D)	Rep.	Management
Hurtgen (1997-2002)	Clinton (D)	Rep.	Management
Liebman (1997-2002, 2002-)	Clinton (D)	Dem.	Union
Walsh (2000-01, 2002-04)	Bush (R)	Dem.	Union
Battista (2002-)	Clinton (D)	Dem.	Government
Schaumber (2002-)	Bush (R)	Dem.	Government
Meisburg (2004)	Bush (R)	Rep.	Management
	Bush (R)	Rep.	Gov./Man.
	Bush (R)	Rep.	Management