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After "Hiding the Ball" Is Over: How the NLRB Must Change Its Approach to Decision-Making

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I. INTRODUCTION

Is the National Labor Relations Board (the NLRB or the Board), the agency that oversees federal labor law, still relevant? When this question is considered, as it frequently is by scholars, lawyers and officials of the NLRB itself, the focus typically is on whether changes in the workplace, the economy and society are diminishing the relevance of the Board.[1] But there is a new and more immediate threat

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1. For examples of consideration of this questions by scholars, see, for example, WILLIAM B. GOULD IV, AGENDA FOR REFORM (1994); PAUL C. WEILER, GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW (1990); Kenneth G. Dau-Schmidt, *Employment in the New Age of Trade and Technology: Implications for Labor and Employment Law*, 76 IND. L.J. 1 (2001); William B. Gould IV, *The Third Way: Labor Policy Beyond the New Deal*, 48 KAN. L. REV. 751 (2000); Michael C. Harper, *The Continuing Relevance of Section 8(a)(2) to the Contemporary Workplace*, 96 MICH. L. REV. 2322, 2326 (1998); William C. Green, *Negotiating the Future: The NLRA Paradigm and the Prospects for Labor Law Reform*, 21 OHIO N.U. L. REV. 417 (1994); *Symposium on Labor Law Reform*, 69 CHI.-KENT. L. REV. 3-290 (1993); Michael Bologna, "NLRA Relevant in Modern Workplace, Speakers Tell Industrial Relations Meeting," 1998 Daily Lab. Report (BNA) 07 (January 12, 1998).

For examples of discussions of this issue by labor lawyers, see, for example, Susan J. McGolrick, *NLRB: Board Members, Labor Attorneys Discuss Current State, Future of NLRB at Symposium*, 87 Daily Lab. Rep. (BNA) B-1 (May 4, 2001); Michael Bologna, *NLRB Still Has Not Addressed New Cyberspace-Based Workplace*, 53 Daily Lab. Rep. (BNA) C-1 (March 19, 2001); Terry Carter, "A Labor of Law," 86 A.B.A.J. 54 (April 2000); Susan J. McGolrick, *Electronic Communication Raises Issues Over Rights of Workers, Unions, Employers*, 27 Daily Lab. Rep. (BNA) B-1 (February 9, 2000); *Competition Propelling New Order in Workplace, Conference Speakers Say*, 1995 Daily Lab. Rep. (BNA) 97 (May 19, 1995).

For examples of discussions of the issue by NLRB officials, see, for example, Susan J. McGolrick, *NLRB: Four Current Members Discuss Their Views on Major Rulings, Criticism,*

to the relevance of the Board that so far has been mostly ignored—that the Board is in danger of being rendered a superfluous legal institution in the scheme of American administrative law. In 1998, the U.S. Supreme Court's decision in *Allentown Mack Sales and Service, Inc. v. NLRB*[2] created an opening for appellate courts to completely disregard the Board's rulings in labor law cases and decide these cases as they wish. And a number of appellate courts have already plunged through that opening to regularly decide labor law cases, and labor law issues, without any regard for the Board's views on them.

The threat to the Board has come through courts' questioning of the Board's approach to fact-finding. In *Allentown Mack*, the Supreme Court declared that "[the Board] should not be able to impede judicial review, and indeed political oversight, by disguising its policymaking as fact-finding."[3] The Board technique of "disguising" policymaking as fact-finding had been identified by many scholars, most notably Professor Joan Flynn, who showed that the Board commonly engaged in the practice of making policy determinations in the guise of (ostensibly policy-neutral) fact-finding,[4] a practice that Professor Flynn and others dubbed "hiding the ball."[5] These scholars argued that the Board hides the ball in order to make its policy

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Future Issues, 154 Daily Lab. Rep. (BNA) C-1 (Aug. 10, 2001); Drew Douglas, *Liebman Says Reducing Delays, Maintaining Workplace Relevance are NLRB's Challenges*, 58 Daily Lab. Rep. (BNA) B-1 (March 24, 2000); Susan J. McGolrick, *NLRB: Fox, Hurtgen Discuss Board Turnover, Backlog, Changes in Modern Workplace*, 100 Daily Lab. Rep. (BNA) C-1 (May 25, 1999).

2. 522 U.S. 359 (1998).

3. *Id.* at 376.

4. Joan Flynn, *The Costs and Benefits of "Hiding the Ball": NLRB Policymaking and the Failure of Judicial Review*, 75 B.U. L. REV. 387 (1995); *see also* Colin S. Diver, *Policymaking Paradigms in Administrative Law*, 95 HARV. L. REV. 393, 402 (1981) (contending that "[t]he 'stairstep' judicial scrutiny announced in cases like *NLRB v. Hearst*—in which questions of 'fact' and 'mixed law and fact' were reviewed leniently, while questions of 'law' were far more searchingly examined—also encouraged agencies to take a narrow focus"); Samuel Estreicher, *Policy Oscillation at the Labor Board: A Plea for Rulemaking*, 37 ADMIN L. REV. 163 , 174 (1985) (referring to "fact-specific, subterranean policymaking" by Board).

5. *See* Flynn, *supra* note 4. Professor Flynn credits Harvard Law School Professor David L. Shapiro as the first to use the term "hiding the ball" to refer to modes of agency decision-making. *See id.* at 390 (citing David L. Shapiro, *The Choice of Rulemaking and Adjudication in the Development of Administrative Policy*, 78 HARV. L. REV. 921, 940 (1965)).

determinations less visible and therefore less likely to be reversed by the federal courts of appeals or attacked by members of Congress.[6]

Attacks from Congress are far less frequent than reversals by court of appeals: Congressional amendment of the National Labor Relations Act has occurred only a handful of times since its original enactment, with the latest revision occurring more than 20 years ago.[7] By contrast, appellate courts reverse dozens of Board decisions every year.[8] Consequently, the more salient reason for the Board's hiding the ball is to avoid reversal by courts of appeals, and so the relationship between the Board and those courts will be the focus of this article.

The Supreme Court's ruling in *Allentown Mack* now makes it impossible for the Board to protect its policy judgments through hiding the ball. That alone requires a significant adjustment in Board decision-making, because as Professor Flynn has shown, the Board commonly disguises policymaking as fact-finding in its rulings on a variety of important issues.[9] *Allentown Mack*'s potential impact on the Board, however, extends far beyond the eradication of Board ball hiding. In *Allentown Mack*, the Supreme Court held that "[w]hen the Board purports to be engaged in simple fact-finding . . . [it] must draw all the inferences the evidence fairly demands."[10] As Part II explains fully, this holding enables a court to overrule any Board "inference" on the ground that the court believes it is not the one "demanded" by the evidence. Thus, courts can overturn any Board "inferences" with which they disagree.

This is a major threat to the Board because it rarely explicates whether its rulings are inferences based on fact, or legal judgments based on policy considerations. Indeed, in a great majority of its decisions, the Board fails to mention policy at all. Without any clear declaration from the Board that its

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6. *See* Flynn *supra* note 4; *see also* Christopher Berzins, *Policy Development By Labour Relations Boards in Canada: Is There a Case for Rulemaking*?, 25 QUEENS L.J. 479, 489 & n.36 (2000); Lars Noah, *Administrative Arm-Twisting in the Shadow of Congressional Delegations of Authority*, 1997 WIS. L. REV. 873, 935 & n.230.

7. *See* PATRICK HARDIN, THE DEVELOPING LABOR LAW 35-86 (1992) (discussing the four times Congress has amended the Act).

8. *See* 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, 1694-95 (1999) (discussing appellate courts' reversal of 280 Board decisions in a seven-year period).

9. *See infra* Part II.C. (discussing Professor Joan Flynn's documentation of issues where the Board commonly hides the ball in its decisions).

10. Allentown Mack Sales & Serv., Inc. v. NLRB, 522 U.S. 359, 378 (1998) More specifically, according to the Court, the Board's inferences must be supported by "substnatial evidence." *See id.* at 361, 366-377.

decision is a policy judgment, reviewing courts are free to regard Board rulings as inferences, which under the *Allentown Mack* standard must be supported by "substantial evidence." When the Board's inferences are based on unstated policy considerations, which is often the case, then almost by definition they are not based on the factual evidence, and so are readily subject to reversal under the *Allentown Mack* standard. The appellate courts have in fact already demonstrated a tendency to treat Board rulings as inferences, and to reverse them under the rationale of *Allentown Mack.* [11] With the bulk of its decisions being open to practically unrestricted review by the courts, the Board faces the prospect of having no meaningful role in American labor law.

The key for the Board to preserve its relevance is for it to reclaim a very important role indeed: that of the primary policymaker in labor relations. As discussed in Part III, that is the role that Congress intended for the Board when it enacted the National Labor Relations Act. In particular, Congress deliberately chose the Board to predominate over the courts in making labor policy. Part III also explains that judicial deference to the Board is required by current standards of administrative law, and supported by practical advantages the Board possesses over the courts in making labor policy.

Part IV addresses another emerging threat to the Board, a theory that courts are not required to defer even to Board policymaking. After Part IV establishes that the Board is indeed entitled to deference when it makes policy, Part V urges the Board to reassert consistently and openly that it is making labor policy through its rulings. Part V makes specific recommendations on how the Board should go about doing this, discussing typical approaches the Board now uses in making its decisions and explaining how to reform those approaches to emphasize the Board's policymaking role. As Part V describes, the Board can combine the reassertion of its policymaking role with its ongoing project of considering how labor law should respond to societal changes. In this way, the Board would not only remain relevant, but would take the leading role in shaping labor law for the 21st century.

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11. *See infra* Part II.D. (discussing circuit court decisions relying on *Allentown Mack* to reverse Board decisions).

II. THE SUPREME COURT INVALIDATES HIDING THE BALL

A. *Curtin Matheson*

The groundwork for the majority opinion in *Allentown Mack* was laid by the author of that opinion, Justice Scalia, in his dissent eight years earlier in *NLRB v. Curtin Matheson.*[12] The views on NLRB decision-making that Justice Scalia unsuccessfully promoted in *Curtin Matheson* were adopted by a majority of the Court in *Allentown Mack.* Some of the strictures that Justice Scalia imposed on the NLRB in *Allentown Mack* were more fully explained in his dissent in *Curtin Matheson.* Consequently, in order to fully understand the limits and requirements the Supreme Court has now placed on NLRB decision-making, it is important to analyze *Curtin Matheson* as well as *Allentown Mack.*

The issue in *Curtin Matheson,* as in *Allentown Mack,* was whether the employer had been legally justified in withdrawing recognition from a union, based on alleged "good faith reasonable doubt" that the union was supported by a majority of employees.[13] Curtin Matheson contended that the fact that it had hired permanent replacements, and that those replacements outnumbered the strikers at the time of withdrawal of recognition, was a legally sufficient ground for doubting the union's majority status and withdrawing recognition.[14]

Justice Scalia asserted that the question presented in the case was whether the Board's "factual finding" that Curtin Matheson lacked reasonable doubt of the union's majority status was supported by "substantial evidence."[15] The Court majority rejected that definition of the question presented, saying that it "misconstrue[d] the issue."[16] The Court majority pointed out that in the petition for certiorari the question presented had been phrased as "whether, in assessing the reasonableness of an employer's asserted doubt that an incumbent union enjoys continued majority support, the Board may refuse to apply any presumption regarding the extent of union support among replacements for striking employees."[17] The Court then explained that the question whether to apply this

12. NLRB v. Curtin Matheson Scientific, Inc., 494 U.S. 775 (1990).

13. *Id.* at 777-78.

14. *Id.*

15. *Id.* at 801 (Scalia, J. dissenting).

16. *Id.* at 778 n.2.

17. *Id.* (quoting Nat'l Labor Relations Board's Petition for Certiorari at I, NLRB v. Curtin Matheson Scientific Inc., 494 U.S. 775 (1990) (No. 88-1685)).

presumption arose in "all cases of this type," and was not an "evidentiary question" limited to "the facts of this particular case." Therefore, the Court held, the "substantial evidence standard" for reviewing Board fact-finding was "inapplicable to the issue before us."[18] Having defined the issue in terms of whether the Board should adopt a general presumption, the Court majority devoted the rest of its decision to discussing whether the Board's refusal to adopt the presumption was rational and legally permissible, which the Court found it was.[19]

Justice Scalia's dissent, in which Justices O'Connor and Kennedy joined, began by stating, "The Court makes heavy weather out of what is, under well-established principles of administrative law, a straightforward case."[20] As noted earlier, Justice Scalia regarded the case as involving a "straightforward" matter of fact-finding. Justice Scalia declared that the issue whether the employer had a reasonable doubt of the union's majority status was a "central factual determination," and that, therefore, the question before the Court was whether the Board's factual determination in this case was supported by "substantial evidence."[21]

After summarizing the facts and procedural background of the case in Part I of his dissent, Justice Scalia began Part II by explaining the bases for applying the "substantial evidence" standard to the Board's decision. Justice Scalia asserted that application of the "substantial evidence" standard was required both by § 10(f) of the National Labor Relations Act and by provisions of the Administrative Procedure Act (APA). Section 10(f) of the NLRA is the provision governing judicial review of Board decisions, and it directs courts to apply the "substantial evidence" standard to Board *findings of fact*.[22] With regard to the APA, Justice Scalia stated that an NLRB unfair labor practice case is a "formal adjudication" as defined in § 554 of the APA.[23] Justice Scalia then explained that for formal adjudications, the APA requires that "the agency opinion must contain 'findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record'"[24] and that a court reviewing an agency

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18. *Id.* at 778 n.2.

19. *See id.* at 778 n.2, 787-796.

20. *Id.* at 801 (Scalia, J., dissenting).

21. *Id.*

22. *See* 29 U.S.C. § 160(f) (1994) ("[T]he findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.").

23. 494 U.S. at 803 (Scalia, J., dissenting) (citing 5 U.S.C. § 554(a) (1994)).

24. *Id.* at 804 (Scalia, J., dissenting) (quoting 5 U.S.C. § 557(c) (1994)).

adjudication "must 'hold unlawful and set aside agency action, findings, and conclusions found to be . . . unsupported by substantial evidence.'"[25]

As these quotations demonstrate, § 10(f) of the NLRA expressly applies only to Board findings of fact, and § 706 of the APA also seems to be more pertinent to factual findings than legal conclusions, as it refers to "findings and conclusions . . . unsupported by evidence" rather than conclusions unsupported by reasoning or precedent. Consequently, Justice Scalia's conclusion that the "substantial evidence" standard applied to the Board's decision was based largely on his premise that the decision was a finding of fact.

As noted above, the Court majority disagreed with this premise and with the appropriateness of the substantial evidence standard. Justice Scalia challenged the majority's holding that the question presented was whether the Board must adopt a "general presumption" that striker replacements oppose the union.[26] Justice Scalia argued that the majority's approach amounted to "characterizing factual probabilities as presumptions."[27] Justice Scalia illustrated this assertion by describing a hypothetical appeal of a criminal conviction, in which the basis for the appeal was the defendant's assertion that the record showed that he was not at the scene of the crime. Justice Scalia argued that the majority's characterization of the issue in *Curtin Matheson* as the validity of a presumption was "the equivalent of characterizing the [hypothetical] appeal . . . as involving, not the adequacy of the evidence, but rather the question whether the jury was required to adopt the general presumption that a person cannot be in two places at the same time."[28]

Justice Scalia then contended that it was "misleading" to label as a "presumption" the fact that striker replacements likely oppose the union, because that fact should instead have been treated as probative evidence.[29] According to Justice Scalia, the Board's "refusal" to take that evidence into account "den[ied] evidence its inherently probative effect" and thus "produce[d] a decision that is not supported by substantial evidence."[30] Justice Scalia charged that the Board, in framing both the question presented to the Court and the central issue in its own decision as the validity of

25. *Id.* (Scalia, J., dissenting) (quoting 5 U.S.C. § 706(2)(E) (1994)).

26. *See id.* at 778 n.2 (majority's definition of question presented); *id.* at 812 (Justice Scalia's reference to this definition).

27. *Id.* at 812 (Scalia, J., dissenting).

28. *Id.*

29. *Id.* at 813.

30. *Id.*

rejecting a presumption, was "invit[ing] us to confuse fact-finding with policymaking."[31] And Justice Scalia chastised the Court majority for "accept[ing] the invitation."[32]

The Court majority did in fact adopt the Board's position that policy considerations, particularly promotion of bargaining stability, also supported the Board's refusal to "presume" that striker replacements oppose the union.[33] Indeed, the majority criticized Justice Scalia for "entirely ignor[ing] the Board's policy considerations, apparently on the rationale that policy is an illegitimate factor in the Board's decision."[34] The Court majority noted, quite correctly, that Justice Scalia's treatment of policy issues was "founded on the premise that the issue before us is the factual question whether substantial evidence supports the Board's finding that respondent lacked a good-faith doubt."[35]

Justice Scalia's response to the charge he had "ignored" policy was, in essence, that the Board claimed to be engaging in fact-finding, and that it was inappropriate for the Board to promote policymaking through fact-finding. Justice Scalia devoted much of his dissent to drawing a firm distinction between fact-finding and law- or policymaking. This distinction that Justice Scalia advocated in *Curtin Matheson* was later adopted by a Court majority in *Allentown Mack*, so this portion of Scalia's *Curtin Matheson* dissent is crucial in understanding how *Allentown Mack* affects Board decision-making.

Justice Scalia explained that the use of the single term "presumption" obscured the point that there were distinct "presumptions of law" and "presumptions of fact," with the latter also known as "inferences."[36] As an example of the former, a presumption "applied 'as a matter of law,'" Scalia gave the Board's holding in *Pennco*,[37] in which the Board said it would presume that striker replacements *supported* the union.[38] Justice Scalia maintained that this sort of legal or policy judgment was distinct from a factual presumption or inference, "which is '[a] process of reasoning by which a fact or proposition sought to be established is deduced as a logical

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31. *Id.*
32. *Id.*
33. *Id.* at 794-95.
34. *Id.* at 795 n.13.
35. *Id.*
36. *Id.* at 814 (Scalia, J., dissenting).
37. Pennco, Inc., 250 N.L.R.B. 716 (1980), *enforced*, 684 F.2d 340 (6th Cir. 1982), *cert. denied*, 459 U.S. 994 (1982).
38. 494 U.S. at 814 (Scalia, J., dissenting).

consequence from other facts, or a state of facts, already proved or admitted.'"[39]

Justice Scalia acknowledged that the Board has discretion in employing presumptions of law, that it could "create and apply" them "as means of implementing authorized law or policy in the course of adjudication."[40] Justice Scalia even granted that the Board could adopt legal presumptions that were contrary to factual reality ("in the teeth of the facts," as he put it), giving as an example the Board's policy of almost invariably presuming majority support for a union during the first year following its certification.[41] But Justice Scalia contended that the Board did *not* have discretion over inferences or presumptions of fact. Justice Scalia declared that inferences "are not creatures of the Board but its masters, representing the dictates of reason and logic that must be applied in making adjudicatory factual determinations."[42]

Justice Scalia then applied this distinction between presumptions of law and presumptions of fact to the Board's decision in *Curtin Matheson*. Justice Scalia stated that the Board "perhaps . . . could lawfully have reached the outcome it did here" through a presumption of law—specifically, by "forbidding" on policy grounds the "rational inference" that "an employer has good-faith doubt of majority status when more than half the bargaining unit are strike replacements."[43] But, Justice Scalia found, the Board did not employ a presumption of law in its decision. Instead, the Board purported to engage in basic fact-finding and to find "as a matter of logic and reasoning, 'the hiring of permanent replacements who cross a picket line, in itself, does not support an *inference* that the replacements repudiate the union as collective-bargaining representative.'"[44] Justice Scalia declared that this factual finding was "simply false."[45] According to Justice Scalia, the Board, in failing to draw the inferences that were dictated by "reason and logic,"[46] was guilty of "bad fact-finding, and must be reversed under the 'substantial evidence' test."[47]

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39. *Id.*
40. *Id.* at 815 (Scalia, J., dissenting).
41. *Id.*
42. *Id.*
43. *Id.* at 816 (Scalia, J., dissenting).
44. *Id.* at 816 (quoting Station KKHI, 284 N.L.R.B. 1339, 1344 (1987)).
45. *Id.*
46. *Id.* at 815.
47. *Id.* at 816 (Scalia, J., dissenting).

Justice Scalia explained that for the Board "to support its decision properly on policy grounds" the Board should have stated its conclusion in terms of a "counterfactual presumption" of law, i.e., "[e]ven though the facts require conclusion X, we reject it for policy reasons."[48] Instead, the Board had claimed to find that the facts (that a majority of employees were striker replacements) did not support the conclusion that the employer had a reasonable doubt of the union's majority status. Near the conclusion of his dissent, Justice Scalia asserted that when the Board professes to be doing fact-finding, then the only pertinent question is whether the evidence supports the Board's findings.[49] In other words, the Board cannot rely on legal or policy considerations to support its findings of fact.

Thus, in *Curtin Matheson*, Justice Scalia announced his position that fact-finding was distinct from policymaking, and that the Board could not use the former to carry out the latter. Foreshadowing the holding in *Allentown Mack*, Justice Scalia declared that the Board "is not entitled to disguise policymaking as fact-finding, and thereby to escape the legal and political limitations to which policymaking is subject."[50]

B. Allentown Mack

In 1998, eight years after *Curtin Matheson*, Justice Scalia revisited the issue of Board decision-making in *Allentown Mack Sales & Service, Inc. v. NLRB*.[51] Although the Court split three ways in *Allentown Mack*, four Justices (Chief Justice Rehnquist and Justices O'Connor, Kennedy and Thomas) joined Parts III and IV of Justice Scalia's opinion, in which he set forth his holdings on Board fact-finding and decision-making. Thus, Justice Scalia spoke for a majority of the Court on these issues, and his opinion in *Allentown Mack* establishes the current governing law on Board decision-making.

Like *Curtin Matheson*, *Allentown Mack* involved an employer that had withdrawn recognition from an incumbent union. The Board had decided

48. *Id.* at 817.

49. *Id.* at 819 (Scalia, J., dissenting) ("Thus, when the Board purports to find no good-faith doubt because the facts do not establish it, the question for review is whether there is substantial evidence to support that determination."). With regard to this dissent "foreshadowing" the Supreme Court's decision in *Allentown Mack*, see Joan Flynn, Allentown Mack: *A Happy Exemplar of the Law of Unintended Consequences*?, 49 LAB. L. J. 983, 990 (1998) ("[T]o read Scalia's *Curtin Matheson* dissent is to see the foundation for *Allentown Mack* being laid.").

50. *Id.* (Scalia, J., dissenting).

51. 522 U.S. 359 (1998).

that the company had committed unfair labor practices when it conducted a poll of its employees to determine their level of support for the incumbent union and also when it withdrew recognition of that union when the poll revealed that less than a majority of employees supported the union.[52] In finding these violations, the Board applied its rule that withdrawal of recognition from an incumbent union, or even employer polling to assess employee support for such a union, are permissible only when the employer has a "good faith reasonable doubt," based on "objective considerations," that the union is supported by a majority of employees. The Board found that Allentown Mack failed to show that it had such objective reasonable doubt at the time of its polling, and therefore its polling and its consequent withdrawal of recognition were unlawful.[53] The Board's decision was upheld by the United States Court of Appeals for the District of Columbia Circuit.[54]

In Allentown Mack's appeal to the Supreme Court, it challenged the Board's decision on essentially three grounds. The first ground was that it was irrational for the Board to require that an employer already have an "objective reasonable doubt" of a union's majority status before the employer can poll its employees to determine their support for the union.[55] The Court rejected that argument, finding that the Board's standard was "puzzling,"[56] but not irrational.[57] Allentown Mack's second and third grounds, which the Court called "conceptually intertwined,"[58] were that the Board erred in its factual finding that Allentown Mack had lacked a reasonable doubt of the union's majority status, and that in reaching this finding the Board followed a pattern of cases in which the agency professed to apply the "reasonable doubt" standard but actually required the employer to show that the union had definitely lost majority support.[59] Justice Scalia and a majority of the Court ultimately agreed with both these arguments.

In Part III of the Court's majority opinion, Justice Scalia defined the question presented as whether the Board had erred in finding the employer had "no reasonable doubt" of the union's majority status. Justice Scalia then

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52. *See* Allentown Mack, 316 N.L.R.B. 1199 (1995); *see also* Allentown Mack Sales & Serv., Inc. v. NLRB, 522 U.S. 359, 362-63 (1998) (summarizing the Board's ruling).

53. *Allentown Mack*, 522 U.S. at 362-63.

54. Allentown Mack Sales & Serv., Inc. v. NLRB, 83 F.3d 1483 (D.C. Cir. 1996).

55. *Allentown Mack*, 522 U.S. at 363.

56. *Id.* at 364.

57. *Id.* at 364-66.

58. *Id.* at 364.

59. *Id.*

turned to defining what "reasonable doubt" meant. Justice Scalia focused on the meaning of the word "doubt." The Board argued that it regarded the word "doubt" as meaning "disbelief," but Justice Scalia rejected this definition as "linguistic revisionism."[60] Justice Scalia held that "doubt" meant "uncertainty," and that therefore the issue before the Court was whether a fact-finder could reasonably decide, based on the record, that Allentown Mack lacked reasonable uncertainty about whether the union was supported by a majority of employees.[61] Justice Scalia then reviewed the evidence and found that the Board had rejected much evidence that showed that Allentown Mack had reasons for being "uncertain" of the union's support, because the Board incorrectly demanded that evidence be firm proof that the union had actually lost support.[62] Taking into account the evidence rejected by the Board, Justice Scalia concluded at the end of Part III of his opinion that it was "quite impossible for a rational fact-finder to avoid the conclusion that Allentown had reasonable, good-faith grounds to doubt—to be *uncertain about*—the union's retention of majority support."[63]

That conclusion could have been a sufficient basis for overturning the Board's decision—indeed, Justice Scalia noted "[t]hat conclusion would make this a fairly straightforward administrative-law case."[64] But Justice Scalia and the majority did not stop there. Instead, Justice Scalia, now with the support of four of his colleagues, returned to the criticisms of Board decision-making that he had begun in his *Curtin Matheson* dissent.

Justice Scalia raised these issues at the beginning of Part IV of his opinion by noting that the employer argued in its brief that although "the Board continues to cite the words of the good faith doubt branch of its withdrawal of recognition standard . . . it has in practice eliminated the good faith doubt branch in favor of a strict head count."[65] Justice Scalia then observed that though the Board "not too persuasively" denied that it required an actual head count, the Board did "defend its fact-finding in this case by saying that it has regularly rejected similarly persuasive demonstrations of reasonable good-faith doubt in prior decisions."[66] Justice Scalia also pointed out that the D.C. Circuit had "accepted this defense," as the court relied on "earlier, similar decisions to conclude that the Board's findings were

60. *Id.* at 367.
61. *Id.*
62. *Id.* at 368-71.
63. *Id.* at 371.
64. *Id.* at 372.
65. *Id.* (quoting Petitioner's Brief at 10, *Allentown Mack*, 522 U.S. 359 (1998)).
66. *Id.*

supported by substantial evidence here."[67] Justice Scalia closed the first paragraph of Part IV by relying on Professor Flynn's article on Board ball hiding, describing her article as "academic commentary" that suggested that the Board's ruling in *Allentown Mack* "conform[ed] to a long pattern,"[68] and quoting the article at length for the proposition that the Board's actual standard deviated from its stated one.[69]

Justice Scalia found that the Board's defense of consistency with prior decisions, and the D.C. Circuit's acceptance of that defense, placed before the Supreme Court the question whether it was permissible for the Board to employ in a case a standard as "consistently applied" rather than the standard "[as] recited."[70] Justice Scalia acknowledged that the Board "could certainly have . . . impos[ed] a more stringent requirement than the reasonable-doubt test, or . . . adopt[ed] a formal requirement that employers establish their reasonable doubt by more than a preponderance of the evidence."[71] But the Board did not choose that approach. The Board's approach, in Justice Scalia's characterization, was "formally leaving in place the reasonable-doubt and preponderance standards, but consistently applying them as though they meant something other than what they say."[72] Justice Scalia devoted the remainder of his opinion to explaining why the Board's approach was legally impermissible.

As in his *Curtin Matheson* dissent, Justice Scalia relied on the Administrative Procedure Act (APA) as a basis for invalidating the Board's decision-making approach. Justice Scalia explained that the APA "establishes a scheme of 'reasoned decision-making,'"[73] which means that "[n]ot only must an agency's decreed result be within the scope of its lawful authority, but the process by which it reaches that result must be logical and rational."[74] Justice Scalia pointed out that NLRB adjudication is governed by the APA's requirement of reasoned decision-making. And Justice Scalia reasoned that the requirement of reasoned decision-making dictated that the standard announced must be the same as the standard actually applied:

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67. *Id.* at 372 (citing Allentown Mack Sales & Serv., Inc. v. NLRB, 83 F.3d 1483, 1488 (D.C. Cir. 1996)).

68. *Id.* at 372.

69. *See id.* at 372-73 (quoting Flynn, *supra* note 4, at 394-95).

70. *Id.* at 373.

71. *Id.* at 373-74.

72. *Id.* at 374.

73. *Id.* at 374 (quoting Motor Vehicle Mfrs. Ass'n, Inc. v. State Farm Mut. Automobile Ins. Co., 463 U.S. 29, 52 (1983)).

74. *Id.* at 374.

> It is hard to imagine a more violent breach of that requirement [of reasoned decision-making] than applying a rule of primary conduct or a standard of proof which is in fact different from the rule or standard formally announced. And the consistent repetition of that breach can hardly mend it.[75]

After holding that the Board's practice of departing from announced standards violated the APA, Justice Scalia also condemned the practice for causing major practical problems. Justice Scalia found that the Board's practice would prevent "consistent application of the law by subordinate personnel (notably administrative law judges)"[76] because such personnel would be unable to determine which standard to follow.[77] Justice Scalia then raised what seemed to him an even greater concern—that the Board's conduct "prevented" and "frustrated" effective judicial review.[78]

Justice Scalia not only expressed concern that the Board's departure from announced standards would impair judicial review, he strongly implied that such impairment was the *intentional goal* of the Board in deciding cases in this manner. Justice Scalia referred to the Board's practice of "divorcing . . . the rule announced from the rule applied" as a "revision of the Board's standard of proof" that was "achieved . . . subtly and obliquely . . ."[79] Justice Scalia explained that the Board's "revising standards" in this way would make it difficult for appellate courts and even the Supreme Court to review Board decisions.[80] Justice Scalia then tied this particular practice to the larger concerns about Board fact-finding that he had expressed in *Curtin Matheson.* Justice Scalia repeated his admonition from *Curtin Matheson* that the Board should not be allowed to "disguis[e] its policymaking as fact-finding," but this time charged that the Board used that mode of decision-making to "impede judicial review, and indeed even political oversight."[81]

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75. *Id.*

76. *Id.* at 375.

77. *See id.* at 375-76 (using Laidlaw Waste Systems, Inc., 307 N.L.R.B. 1211 (1992), as an example of the Board sending unclear and confusing directions to administrative law judges ("ALJs")).

78. *Id.* at 375-76.

79. *Id.* at 376.

80. *Id.*

81. *Id.* at 376. In Professor Flynn's article, she also concluded that the Board's reason for disguising policymaking as fact-finding was to protect its policies from judicial review. *See* Flynn, *supra* note 4, at 421-45. Although Justice Scalia reached the same conclusion in Part IV of his opinion, and Justice Scalia extensively quoted Professor Flynn's article in the same Part, Justice Scalia did not explicitly rely on Professor Flynn's article to support his

In *Curtin Matheson*, Justice Scalia had contended that it was improper for the Board to conduct policymaking through fact-finding. In *Allentown Mack*, speaking for the majority, Justice Scalia imposed this as a limitation on Board decision-making. And this time, he asserted that the limitation was necessary to enable meaningful judicial review. Justice Scalia declared that the Supreme Court and lower appellate courts "do not, moreover (we could not possibly), search to find revisions of the agency's rules—revisions of the requisite fact that the adjudication is supposed to determine—hidden in the agency's factual findings."[82] Rather than have courts search for the policies the Board "hid" amongst its findings of fact, Justice Scalia decreed that the Board could not engage in policymaking in the course of fact-finding.

Justice Scalia held that this limit on Board decision-making was required by the substantial evidence standard of review. Again repeating a position he had staked out in his *Curtin Matheson* dissent, Justice Scalia held that because the Board purported to be engaging in "[o]n-the-record agency fact-finding" its decision was subject to the "substantial evidence" standard, both under § 10(e) of the NLRA and § 706(2)(E) of the APA.[83] Justice Scalia stressed that this was "an objective test," in which the court determined whether there was sufficient evidence for a "reasonable fact-finder" to reach the conclusion in question.[84] Justice Scalia then reasoned that it would be practically impossible for courts to apply the substantial evidence test if the Board made policy through fact-finding, because whenever a court suggested that a Board factual finding was erroneous, the Board could claim that the finding was correctly based on a revised legal standard. As Justice Scalia put it, allowing the Board to make policy through fact-finding would result in "a regime in which inadequate factual findings become simply a revision of the standard that the Board's (adjudicatorily adopted) rules set forth, thereby converting those findings into rule-interpretations to which judges must defer."[85] Justice Scalia concluded that in such a regime, "the 'substantial evidence' factual review provision of the APA becomes a

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view that the Board was concealing policymaking to impede judicial review. Instead, as noted elsewhere, Justice Scalia expressly referred to Professor Flynn's article as showing that the Board had a "long pattern" of actually departing from the stated "good faith doubt" standard when deciding withdrawal of recognition cases. *See supra* notes 68-69 and accompanying text; *infra* notes 100-07 and accompanying text (describing Justice Scalia's discussion of Professor Flynn's article).

82. *Allentown Mack*, 522 U.S. at 377.

83. *Id.* at 377 (citing 29 U.S.C. § 160(e) (2002) and 5 U.S.C. § 706(2)(E) (2002)).

84. *Id.*

85. *Id.* at 377-78.

nullity."[86] Therefore, to preserve the substantial evidence standard, the Board must be forbidden from engaging in policymaking through fact-finding.

Justice Scalia next revisited the distinction between fact-finding and policymaking that he had described in detail in *Curtin Matheson.* As in that case, Justice Scalia acknowledged that the Board had considerable discretion in making policy: "The Board can, of course, forthrightly and explicitly adopt counterfactual evidentiary presumptions (which are in effect substantive rules of law) as a way of furthering legal or policy goals—for example, the Board's irrebuttable presumption of majority support for the union during the year following certification."[87] Similarly, Justice Scalia also granted that "[t]he Board might also be justified in forthrightly and explicitly adopting a rule of evidence that categorically excludes certain testimony on policy grounds, without reference to its inherent probative value."[88] Justice Scalia indicated that the only limits on the Board's authority to make policy decisions were that such decisions were "subject to judicial review for their reasonableness and their compatibility with the Act."[89]

By contrast, Justice Scalia and the majority held that the Board had little or no discretion when conducting fact-finding. Justice Scalia held, "[w]hen the Board purports to be engaged in simple fact-finding, unconstrained by substantive presumptions or evidentiary rules of exclusion, it is not free to prescribe what inferences from the evidence it will accept and reject, but *must* draw all inferences that the evidence fairly demands."[90] Justice Scalia left no doubt that the Board was mandated to draw all inferences suggested by the facts—not only did he state that the Board "must" do so, but he also stated that drawing such inferences was the Board's "obligation."[91]

Justice Scalia further declared that this "obligation" to draw the inferences "demanded" by the facts was "the foundation of all honest and legitimate adjudication."[92] This echoed Justice Scalia's proclamation in *Curtin Matheson* that factual inferences were "masters" of the Board and represented "the dictates of reason and logic that *must* be applied in making

86. *Id.* at 378.
87. *Id.*
88. *Id.*
89. *Id.*
90. *Id.* (emphasis added).
91. *Id.*
92. *Id.* at 379.

adjudicatory factual determinations."[93] Thus, Justice Scalia and the majority made clear that the Board had to follow a straight and narrow path in drawing inferences from the facts, without taking into account policy or any other considerations. In *Curtin Matheson*, Justice Scalia had asserted that the Board could not "disguise policymaking as fact-finding."[94] In *Allentown Mack*, Justice Scalia and the majority held that the Board was forbidden to inject policy considerations into fact-finding at all.

C. Allentown Mack's Challenge to the Board

Allentown Mack's rule that the Board must conduct its fact-finding without being influenced by policy considerations presents a major threat to well-established practices of the Board in adjudication. As noted in the Introduction, Professor Joan Flynn has thoroughly documented that the Board frequently implements its policy judgments *through* fact-finding, that in fact the Board often disguises its policymaking as fact-finding.[95] When deciding *Allentown Mack*, the Supreme Court was almost certainly aware of how commonly the Board engaged in this practice. Indeed, as will be discussed shortly, the Court majority was specifically aware of Professor Flynn's article on the subject, and relied on it in defining the kind of Board fact-finding that was invalid.

In her article, Professor Flynn explained that the most common method through which the Board concealed its policymaking within its fact-finding is something she named the "*de jure/de facto* gap."[96] When the Board uses the de jure/de facto gap, there is a "significant disparity between the Board's articulated adjudicative standard and its application of that standard."[97] Professor Flynn explained that the Board typically employs this method through a legal standard that "sounds flexible" on its face, "but that the Board applies in a rigid, near-absolute fashion."[98]

Professor Flynn then discussed a number of situations in which the Board consistently purported to apply a flexible, multi-factor standard (such as the "totality of circumstances" test) while actually applying a per se rule

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93. NLRB v. Curtin Matheson Scientific, Inc., 494 U.S. 775, 815 (1990) (Scalia, J., dissenting).

94. *Id.* at 819 (Scalia, J., dissenting).

95. Flynn, *supra* note 4.

96. *See id.* at 393-94 (explaining the de jure/de facto gap).

97. *Id.* at 393.

98. *Id.* at 394.

or limiting its focus to only one or two factors.[99] The first situation discussed by Professor Flynn was the one later at issue in *Allentown Mack*: the Board's standard for employer withdrawals of recognition. As noted above, the Supreme Court majority relied extensively on this portion of Professor Flynn's article. The Court referred to the article as "academic commentary" that showed that the Board had a "long pattern" of engaging in fact-finding that was at odds with the stated legal standard.[100] The Supreme Court then quoted Professor Flynn at length to describe the Board's fact-finding method. The Court stated that "[o]ne scholar, after conducting "[a] thorough review of the withdrawal of recognition case law," concluded:

> "[C]ircumstantial evidence, no matter how abundant, is rarely, if ever, enough to satisfy the good-faith doubt test. In practice, the Board deems the test satisfied only if the employer has proven that a majority of the bargaining unit has expressly repudiated the union. Such direct evidence, however, is nearly impossible to gather lawfully. Thus, the Board's good-faith doubt standard, although ostensibly a highly fact-dependent totality-of-the-circumstances test, approaches a *per se* rule in application . . . ."[101]

In her article, Professor Flynn concluded that the Board varied its fact-finding from its announced standard in order to further policy objectives. Professor Flynn stated that "the Board's ultra-stringent application of the good-faith doubt test is plainly meant to further the increasingly elevated statutory goal of stability in bargaining relationships."[102] Professor Flynn observed that "the Board could pursue this goal more directly by simply banning withdrawals of recognition,"[103] but quickly added that the Board's "apparent reluctance to take such a direct route is readily explained; withdrawals have been permitted throughout the Act's entire 60-year history, and an outright ban on them would certainly draw close judicial scrutiny."[104] The *Allentown Mack* Court did not explicitly cite this part of Professor Flynn's article. But as discussed in the previous section, the Court majority, either in implicit reliance on Professor Flynn or on its own, discussed the same motives for the Board's approach—making policy and

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99. *Id.* at 394-99.

100. Allentown Mack Sales & Serv., Inc. v. NLRB, 522 U.S. 359, 372 (1998).

101. *Id.* at 372-73 (quoting Flynn, *supra* note 4, at 394-95) (citations in Flynn article omitted).

102. Flynn, *supra* note 4, at 399.

103. *Id.*

104. *Id.* at 399-400.

evading judicial scrutiny of that policy.[105] The Court addressed both rationales, holding that the Board could not make policy through fact-finding,[106] and could not "impede judicial review . . . by disguising its policymaking as fact-finding."[107]

Withdrawal of recognition is not the only situation in which the Board applies a de jure/de facto gap, and Professor Flynn discussed two other examples in her article. The first was the Board's application of the now-defunct *Jean Country*[108] standard, which was used to determine whether union organizers had a right of access to an employer's property. The *Jean Country* standard was a multi-factor balancing test that on its face seemed fact-specific.[109] But the Board, when applying the *Jean Country* test, almost invariably held that organizers had to be granted access to the employer's property.[110] The second example discussed by Professor Flynn was the very important issue of bargaining unit determinations,[111] which the Board must make in hundreds of representation cases every year. The Board applies the vague "community of interest" standard to this issue and claims that the unit determination must be made on a case-by-case basis that takes into account a "long list of factors."[112] In actuality, however, "the flexibility of the Board's approach is illusory,"[113] and the Board typically applies fixed presumptions and per se rules to define units.[114]

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105. *See supra* notes 77-80 and accompanying text.

106. *See supra* notes 82-94 and accompanying text (discussing this aspect of *Allentown Mack*).

107. Allentown Mack Sales & Serv., Inc. v. NLRB, 522 U.S. 359, 376 (1998); *see also supra* notes 77-80 and accompanying text (discussing this portion of *Allentown Mack*).

108. 291 N.L.R.B. 11 (1988). The Supreme Court struck down the *Jean Country* test in 1992 in *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992).

109. As Professor Flynn put it, the *Jean Country* standard "appeared to involve an extremely open-ended inquiry, the outcome of which would be difficult to predict in any given case." Flynn, *supra* note 4, at 396.

110. *Id.* at 397 & nn. 42-43 (citing, inter alia, Peter J. Ford, *The NLRB,* Jean Country, *and Access to Private Property: A Reasonable Alternative Means of Communication under* Fairmont Hotel, 13 Geo. Mas. U.L. Rev. 683, 700 (1991); Robert A. Gorman, *Union Access to Private Property: A Critical Assessment of Lechmere, Inc. v. NLRB*, 9 HOFSTRA LAB. L.J. 1, 7 (1991)).

111. *See id.* at 397-99 (discussing Board's approach to bargaining unit determinations).

112. *Id.* at 397.

113. *Id.* at 398.

114. *Id.* (citing Berton B. Subrin, *Conserving Energy at the Labor Board: The Case for Making Rules on Collective Bargaining Units*, 32 LAB. L.J. 105, 110 (1981)).

Professor Flynn explained that as was the case with withdrawal of recognition, the Board's de jure/de facto gaps in its treatment of the issues of access to property and bargaining units resulted from the Board's desire to further policy goals in a surreptitious manner.[115] Professor Flynn reasoned that the Board favored granting organizers access to property because the Board attached greater importance to the NLRA-guaranteed rights of employees to communicate about unionization than to the state-law property rights of employers.[116] But according to Professor Flynn, the Board did not announce this pro-access policy openly because the Board suspected, with good reason, that appellate judges would elevate property rights over NLRA rights.[117] Similarly, the Board's presumptions and de facto rules on bargaining units all tend to make units easier to organize, but open "pro-organizing" policies have faced hostility from Congress[118] and probably would from appellate judges as well.[119]

Although the de jure/de facto gap is the primary means through which the Board hides its policymaking within fact-finding, Professor Flynn found that the Board sometimes used another method, which she called "manipulation of legislative fact-finding."[120] Professor Flynn explained that "legislative facts" are "facts or assumptions about the way the regulated parties behave in the real world" that often serve as the factual premise for decision-making.[121] Professor Flynn determined that the Board sometimes "manipulates its findings regarding industrial reality in order to mask an out-and-out policy judgment as the mere product of impartial legislative fact-finding."[122] In these instances, the Board, rather than admitting it is making a policy judgment, "will instead assert that the policy necessarily follows

115. *See id.* at 400-04 (discussing the motivations underlying the Board's approach to the access to property and bargaining unit issues).

116. *Id.* at 400.

117. *Id.* at 400-02.

118. *See* Susan J. McGolrick, *Over Chairman's Dissent, Board Withdraws Proposed Rule on Single Location Bargaining*, 1998 Daily Lab. Rep. (BNA) 35 (February 23, 1998) (explaining that Board withdrew proposed rule because of strong opposition by employers and Republican members of Congress); Michelle Amber, *NLRB Seeks Relief from Congressional Rider Banning Funds for Single Location Unit Rule*, 1997 Daily Lab. Rep. (BNA) 26 (Feb. 7, 1997) (discussing Congressional measure blocking Board from issuing a rule on single location bargaining units).

119. *See* Flynn, *supra* note 4, at 397-98 (discussing why judges would resist bargaining unit policies that facilitate union organizing).

120. *See id.* at 405 (explaining manipulation of legislative fact-finding).

121. *Id.* Professor Flynn noted that legislative facts in labor law are typically referred to as "industrial reality."

122. *Id.*

from its findings of fact—findings that have been carefully shaped to support the desired end."[123]

As a prime example of the Board's use of legislative fact-finding to disguise policymaking, Professor Flynn discussed the Board doctrine upheld by the Supreme Court in *Curtin Matheson*:[124] that the Board would not apply any presumption as to whether striker replacements supported or opposed the union.[125] Professor Flynn pointed out that in the *Station KKHI*[126] decision, where the Board first adopted this rule, the Board had "characterized its position as a product of careful legislative fact-finding, emphasizing that its members had 'carefully . . . assessed [their] experience' before concluding that generalizations about replacements' union sentiments were simply not possible."[127] Professor Flynn explained that the Board's conclusion was unsupportable as a matter of legislative fact-finding, and that the Board's ruling was almost certainly grounded in policy considerations that the Board chose not to reveal.[128]

Professor Flynn showed that there were strong reasons why "[p]ermanent [striker] replacements almost surely oppose the union."[129] Replacements usually encounter verbal abuse (and sometimes even physical abuse) from union members, and more importantly, unions almost always seek to oust replacements from their jobs to make room for returning strikers.[130] Professor Flynn explained that though the facts did not support the Board "no presumption" rule, policy considerations did. If the Board adopted the factually accurate presumption that replacements oppose the union, there would be negative policy consequences. Employers would have a major incentive to provoke strikes because employers would be entitled to withdraw recognition from a union simply by hiring a sufficient number of replacements.[131] Moreover, without the union's presence, strikers would

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123. *Id.*

124. NLRB v. Curtin Matheson Scientific, Inc., 494 U.S. 775 (1990); *see* discussion *supra* Part II.A.

125. *See* Flynn, *supra* note 4, at 405-06 (discussing the Board's adoption of the "no presumption" position).

126. 284 N.L.R.B. 1339 (1987), *enforced*, 891 F.2d 230 (9th Cir. 1989).

127. Flynn, *supra* note 4, at 406 (quoting *Station KKHI*, 284 N.L.R.B. at 1344).

128. *Id.* at 406-11. Professor Flynn noted that the Board briefly "acknowledged that policy considerations contributed" to its decision, but she explained that the Board referred to these policy factors only as a "make-weight" and the Board devoted most of its discussion to legislative fact-finding. *See id.* at 406 n.83.

129. *Id.* at 406-07.

130. *Id.* at 407-08.

131. *Id.* at 408.

lose almost any prospect of reclaiming their jobs, which would substantially undermine the statutorily protected right to strike.[132] Professor Flynn concluded that "[t]he Board's refusal to acknowledge replacements' true union sentiments is plainly intended to forestall the untoward results described above."[133] Nonetheless, the Board did not openly admit to these policy bases for its ruling, but instead asserted it was based on (very questionable) legislative fact-finding. Professor Flynn reasoned that in establishing the "no presumption" rule, the Board disguised its policymaking as legislative fact-finding because of fears that an explicit policy judgment would be more vulnerable to attack by the federal circuit courts and by Congress.[134]

Professor Flynn described a number of issues regarding which the Board consistently disguises its policymaking as fact-finding, and all these issues are very significant in labor relations. The "community interest" standard for defining bargaining units is applied to nearly every union representation election.[135] The standard for withdrawal of recognition plays a decisive role whenever an employer decides to question whether it must continue to accept a union as its employees' representative. And though cases involving permanent replacement of strikers are less common than representation elections or withdrawal of recognition, few issues are more central to the NLRA's balance of employer and employee interests than the viability of employees' right to strike. The Board's decisions on these vitally important issues are now all subject to reversal by the appellate courts on the ground that the approach the Board uses to decide them violates *Allentown Mack*'s stricture against disguising policymaking as fact-finding.[136]

In addition, based on *Allentown Mack,* appellate courts could rewrite, and repeal, many other doctrines of labor law by relying on empirical studies that are critical of the Board. For example, a famous study by Professors Getman, Goldberg and Herman found that empirical data did not support the factual assumptions that underlay many of the Board's legal rules.[137] The

132. *Id.* at 409.

133. *Id.*

134. *Id.* at 411-12.

135. *See* Hardin, *supra* note 7, at 448-52 (discussing community of interest standard).

136. *See* Allentown Mack Sales & Serv., Inc. v. NLRB, 522 U.S. 359, 376 (1998); *see also supra* Part II.B.(discussing *Allentown Mack*'s holding).

137. JULIUS G. GETMAN, ET AL., UNION REPRESENTATION ELECTIONS: LAW AND REALITY 140-50 (1976) (summarizing findings on validity of Board assumptions). This study was not only famous, but also controversial: Several scholars wrote articles criticizing the study's methodology, while Professors Getman, Goldberg and others responded with articles defending the study. *See* Cox, Bok, Gorman & Finkin, LABOR LAW 186-91 (13th ed. 2001);

researchers found, for example, that employer promises or grants of benefits during union organizing campaigns, which the Board has long proscribed as illegally "interfering" with employees' right to support a union, actually have little or no impact on employees' support of unions.[138] The researchers similarly found that employer questioning of employees about their views on unions, which the Board regards as coercive and illegal "interrogation," did not intimidate or even bother most employees.[139] In another empirical study, Professor Laura Cooper found that various forms of employer conduct that the Board has declared to constitute illegal "interference" with employees' union support did not in fact reduce employee support of unionization.[140]

Allentown Mack thus puts into question many significant and well-established Board doctrines. As important as that is, the challenge that *Allentown Mack* poses to the Board is broader and more fundamental than that, for it allows a federal court of appeals to reverse any Board decision with which it disagrees, for whatever reason. It does so by mandating that fact-finding by the Board and its ALJs be nothing more than a straightforward process of looking at all the evidence in the record and drawing logical inferences from that evidence. Even more importantly, *Allentown Mack* specifically requires the Board to draw *all* inferences that the evidence demands.[141] Now, whenever a circuit court disagrees with the Board's resolution of any issue, the court can find that the Board violated *Allentown Mack*'s rule that the Board draw the inferences "demanded" by the evidence. The circuit court can find that the Board failed to draw the "correct" inference, with "correct" meaning the result the circuit court believes should have been reached. In other words, the *Allentown Mack*

Michael C. Harper & Samuel Estreicher, LABOR LAW 355-58 (4th ed. 1996) (summarizing the articles discussing Getman, Goldberg and Herman's methodology). Notwithstanding the controversy, several circuit court decisions have favorably cited the Getman, Goldberg, & Herman study, suggesting that circuit courts would probably have little hesitation in relying on its empirical findings. *See, e.g., Skyline Distribs. v. NLRB*, 99 F.3d 403, 409 (D.C. Cir. 1996); *NLRB v. Precise Castings, Inc.*, 915 F.2d 1160, 1161 (7th Cir. 1990); *NLRB v. Best Prods. Co.*, 765 F.2d 903, 912 (9th Cir. 1985); *NLRB v. Village IX*, 723 F.2d 1360, 1368 (7th Cir. 1983); *Certainteed Corp. v. NLRB*, 714 F.2d 1042, 1054 (11th Cir. 1983).

138. *Id.* at 118-19.

139. *Id.* at 149.

140. *See* Laura Cooper, *Authorization Cards and Union Representation Election Outcome: An Empirical Assessment of the Assumption Underlying the Supreme Court's* Gissel *Decision*, 79 N.W. U. L. REV. 87 (1984).

141. *See supra* notes 87-91 and accompanying text for a discussion *Allentown Mack*'s rulings on Board decision-making.

decision serves as a convenient basis for circuit courts to engage in what is, essentially, unfettered review of Board decisions.

In Professor Flynn's article on the Board's "hiding the ball," she explains, and ultimately endorses, the Board's main reason for disguising its policymaking as fact-finding: to protect its policies from reversal by a federal judiciary that is for the most part opposed to the policies and goals of the National Labor Relations Act.[142] If that was the objective of the Board's ball-hiding strategy, the federal judiciary has now trumped it. *Allentown Mack* gives federal appellate judges the means to reverse Board fact-finding whenever they so desire. After *Allentown Mack*, Board fact-finding is more vulnerable to judicial reversal than Board policymaking.

D. Allentown Mack *in the Circuit Courts*

Many federal appellate courts are already relying on *Allentown Mack* to overturn Board decisions. The most significant example is the United States Court of Appeals for the District of Columbia Circuit, whose rulings are especially important to the Board because the Act provides that a party appealing a Board decision always has the option of bringing the appeal to the D.C. Circuit, which makes the D.C. Circuit the only court with potential jurisdiction over *all* the Board's decisions.[143] The first D.C. Circuit decision in which the court relied on *Allentown Mack* to overturn a Board decision was *Matthews Readymix, Inc. v. NLRB*,[144] in which the court ruled that the Board had erred in holding that the employer violated § 8(a)(5) when it withdrew recognition from the Teamsters union. The Teamsters union had gone on strike against Matthews Readymix, and within nine days the company had hired permanent replacements to supplant all the strikers. Within the next two weeks, nearly all the replacement employees signed petitions stating they did not want to be represented by the Teamsters, and

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142. *See* Flynn, *supra* note 4, at 421-45 (section on "The Costs and Benefits of 'Hiding the Ball'"); *id.* at 445-46 (summarizing Professor Flynn's conclusion that "the Board's roundabout ways result in a greater effectuation of the Act's purposes than would be achieved were the Board to abandon its present methods and open the door to closer judicial supervision").

143. *See* National Labor Relations Act, 29 U.S.C. § 160(f) ("Any person aggrieved by a final order of the Board . . . may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, *or in the United States Court of Appeals for the District of Columbia*, by filing in such a court a written petition praying that the order of the Board be modified or set aside.") (emphasis added).

144. 165 F.3d 74 (D.C. Cir. 1999).

based on those decertification petitions the employer withdraw recognition of the Teamsters.[145] The Board found that it was illegal for the employer to rely on the employee petitions as a basis for withdrawing recognition because those petitions were "tainted" by application forms (completed by about two-thirds of the replacement employees) that illegally asked whether the applicant was a member of a union.[146]

The D.C. Circuit began its analysis by explaining that in reviewing the Board's decision the court would be "mindful" of the Supreme Court's holding in *Allentown Mack* "that when 'the Board purports to be engaging in simple fact-finding . . . it is not free to prescribe what inferences from the evidence it will accept and reject, but must draw all those inferences that the evidence fairly demands.'"[147] The court found that the Board failed to fulfill this obligation with respect to the fact that the replacement employees who did *not* see the illegal application form also signed decertification petitions; the court held that in light of this fact "[t]he only fair and sensible inference is that there was no causal connection between the application form and the petitions."[148] The D.C. Circuit also noted that there was testimony at the unfair labor practice hearing that some replacement workers had expressed fear that they would lose their jobs once the union ended the strike, and the court held that "[t]he only reasonable inference" that could be drawn given this evidence was that "their [the replacement employees'] expressed fear of being discharged because they were replacements, not the unmentioned but lingering effect of a question on the application for employment they had filled out, motivated them to sign the petitions."[149]

A few months after issuing *Matthews Readymix*, the D.C. Circuit again relied on *Allentown Mack* to overrule a Board decision in *Warshawsky & Co. v. NLRB*.[150] The D.C. Circuit reversed the Board's finding that when a union distributed a handbill protesting the wages and benefits paid by a subcontractor, the union did not have the illegal intent of encouraging employees of the general contractor and other "neutral" employers to stop performing work. On review, the D.C. Circuit declared that, given the parties

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145. *Id.* at 75-76.

146. *Id.* at 75-77. The Board found, and the employer did not contest, that the question about union membership on the application form constituted illegally interrogation of applicants under Section 8(a)(1).

147. *Id.* at 77 (quoting Allentown Mack Sales & Serv., Inc. v. NLRB, 522 U.S. 359 (1998)).

148. *Id.* at 79.

149. *Id.*

150. 182 F.3d 948 (D.C. Cir. 1999).

had stipulated to the facts, "[t]he case turns only on the reasonableness of the inferences the Board did, and did not draw, from the raw stipulated facts."[151] The court next stressed that *Allentown Mack* commanded that the Board "must draw all those inferences that the evidence fairly demands."[152] The D.C. Circuit then asserted, "We think that the evidence does 'fairly demand' the inference that the union sought to induce the neutral employees to walk off the job site."[153]

The D.C. Circuit's 2001 decision in *Alldata Corp. v. NLRB*[154] demonstrates how an appellate court can use *Allentown Mack* as a vehicle to substitute its view of the facts for that of the Board. In *Alldata*, the employer asserted that it discharged a salesperson for "failure to maintain sales volume,"[155] while the Board inferred that the employer's motive for the discharge was the unlawful one of retaliating against the employee for representing co-workers in complaining about working conditions.[156] The Board drew its inference of unlawful motive from such circumstances as "the timing of the discharge in that it occurred shortly after Abbadessa's voicing of employee complaints . . . the disparity in [the employer's] treatment of Abbadessa and other underperforming sales people; and the inconsistency between commending and rewarding Abbadessa for his sales performance and then shortly thereafter firing him for alleged poor performance."[157] The D.C. Circuit rejected the Board's finding of motive, but the court also did not endorse the employer's stated motive of firing the employee for poor sales. Instead, the D.C. Circuit found another motive on its own—that Alldata had fired the employee for his "extraordinary" act of proposing a new agreement with one of Alldata's contractors, and even asserting that this was the "obvious" motive for the discharge.[158] The D.C. Circuit then justified the substitution of its inference for that of the Board by declaring that "[the Board's] inference drawn from the circumstances is unreasonable" and cited *Allentown Mack* for support.[159]

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151. *Id.* at 953.

152. *Id.* (quoting *Allentown Mack*, 522 U.S. at 378).

153. *Id.* The evidence that compelled that inference, according to the court, was "[t]he handbills themselves, the time, place, and manner of their distribution, the simultaneous conversations between the union agents and the neutral employees, and the subsequent response of those employees." *Id.* at 953-54.

154. 245 F.3d 803 (D.C. Cir. 2001).

155. *Id.* at 806.

156. *Id.* at 807-08.

157. *Id.* at 808 (quoting Alldata Corp., 327 N.L.R.B. 127, 127 n.2 (1998)).

158. *Id.*

159. *Id.* at 809.

The D.C. Circuit is not alone in using *Allentown Mack* to overturn Board decisions. The United States Court of Appeals for the Fourth Circuit has at least twice relied on *Allentown Mack* to justify reversing the Board. In *Sam's Club v. NLRB*,[160] the Fourth Circuit held that the Board erred in finding that the employer unfairly (and unlawfully) disciplined union activist Lawrence Perez twice for the same infraction. The Fourth Circuit decided that the Board should have accepted the employer's assertion that the two forms of discipline had been for two separate infractions. Invoking *Allentown Mack's* rule that the Board "'must draw all those inferences that the evidence fairly demands,'"[161] the Fourth Circuit found that the Board "disregarded" what the court called a "compelling inference" that the employer's assertion was true, based on evidence that the employer had previously corrected "double discipline" for another union activist.[162]

In *Pirelli Cable Corp. v. NLRB*,[163] the Fourth Circuit relied on *Allentown Mack* to overturn the Board's finding that a strike had been caused by unlawful threats that an employer made in a letter to all employees. In discussing the standard of review, the Fourth Circuit quoted *Allentown Mack*'s language on inferences, and then declared, "[c]ourts performing substantial evidence review, therefore, must examine whether the Board considered all of the reasonable inferences compelled by the evidence in reaching its decision."[164] Based on its own review of the hearing testimony on the employees' motivations for striking, the Fourth Circuit inferred that the motivation for the employees' strike was "their refusal to accept their employer's demand for economic concessions,"[165] and the court faulted the Board for failing to "acknowledge this obvious and reasonable inference."[166] The Fourth Circuit found that this failure violated the rule of *Allentown Mack* because "[t]he Board did not examine all of the reasonable inferences that should be drawn from the evidence,"[167] and therefore the Board's decision was invalid.

The U.S. Court of Appeals for the Eighth Circuit has also raised *Allentown Mack* as the basis for overturning a Board ruling. The Eighth Circuit held in *NLRB v. MDI Commercial Services* that the Board erred in

160. 173 F.3d 233 (4th Cir. 1999).
161. *Id.* at 244 (quoting *Allentown Mack*, 522 U.S. 359, 378 (1998)).
162. *Id.*
163. 141 F.3d 503 (4th Cir. 1998).
164. *Id.* at 514.
165. *Id.* at 519.
166. *Id.*
167. *Id.* (citing *Allentown Mack*, 522 U.S. at 368-70.)

ignoring an employee's failure to testify in a case alleging he was unlawfully discharged.[168] The court referred to the common law maxim that an adverse inference should be drawn when a party fails to testify,[169] but the court considerably strengthened the force of that principle by holding that the Board's failure to make such an adverse inference violated *Allentown Mack*'s requirement that the Board "'must draw all inferences that the evidence fairly demands.'"[170]

Judge Lay dissented from the court's holding, stressing that "the fundamental flaw in the majority's reasoning that the adverse inference rule should be applied is that it overlooks the fact that the inference is solely within the Board's power, as the fact-finder, to draw."[171] Judge Lay further contended that "there is no basis for this court to rely upon such an inference in reviewing the administrative record" and that "[i]n making such an inference, the majority wrongfully usurps the role of the trier of fact."[172] Judge Lay overlooked that the majority did have a basis for drawing an inference that the Board failed to draw—*Allentown Mack* invites appellate courts to do just that. And *Allentown Mack* will continue to enable appellate courts to substitute their judgments for those of the Board anytime they wish. The only way the Board can avoid consistent displacement of its judgment by appellate courts is to reform its approach to decision-making.

III. THE BOARD'S POLICYMAKING ROLE: KEY TO PRESERVING RELEVANCE

To avoid being pushed into irrelevance by *Allentown Mack*, the Board must change its approach to decision-making. Most obviously, the Board must revise its approach to the issues where Professor Flynn has documented that the Board has consistently "hidden the ball."[173] Unfortunately for the Board, the threat *Allentown Mack* poses to its rulings extends far beyond the issues identified by Professor Flynn. That is clearly demonstrated by the

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168. 175 F.3d 621, 628 (8th Cir. 1999).

169. *Id.* at 628 (citing Rockingham Machine-Lunex Co. v. NLRB, 665 F.2d 303, 304-05 (8th Cir. 1981)); Int'l Union, UAW v. NLRB, 459 F.2d 1329, 1335-40 (D.C. Cir. 1972); Meier v. Comm'r, 199 F.2d 392, 396 (8th Cir. 1952)). In dissent, Judge Lay observed that this maxim was known as "the absent witness rule" and that it "finds its origins in the common law." *Id.* at 632 (Lay, J., concurring and dissenting).

170. *Id.* at 628 (quoting *Allentown Mack*, 522 U.S. at 378).

171. *Id.* at 633 (citing NLRB v. Link-Belt Co., 311 U.S. 584, 597 (1941); NLRB v. Falk Corp., 308 U.S. 453, 461 (1940)).

172. *Id.* at 633.

173. *See supra* Part II.C. (summarizing Professor Flynn's discussion of cases in which the Board disguises policymaking as fact-finding).

court of appeals decisions that have already relied on *Allentown Mack* to reverse the Board: those decisions reversed the Board on a variety of issues, and none of those issues was one discussed by Professor Flynn.[174] In all those decisions, the courts showed a marked tendency to assume that Board conclusions were merely "inferences" based on facts, which permitted the courts to use *Allentown Mack* to declare erroneous any inferences with which the courts disagreed. Thus, any Board ruling that an appellate court can characterize as an "inference" will be reviewed under the *Allentown Mack* standard and will therefore be readily reversible.

This means that for the Board to obtain more deferential review, the Board must make clear that the ruling is not just an inference. In *Allentown Mack*, while the Supreme Court was making it easier for courts to reverse the Board's inferences, the Court also reaffirmed that Board rulings made to "further[] legal or policy goals" were entitled to deference from the courts as long as they were reasonable and consistent with the statute.[175] Accordingly, the clearest way for the Board to obtain deferential review of a ruling is to make clear that the ruling is a *policy* determination and not just an inference. In other words, far from "hiding" the policy ball, the Board should openly highlight the policy bases of its rulings.

That would be a major change in the Board's decision-making approach. In the overwhelming majority of its decisions, the Board does not refer to policy bases for its rulings, or make any reference to policy at all. For the most part, the Board reserves discussion of policy considerations for cases in which it makes a major policy change.[176] In all other cases, the Board leaves unstated that its rulings are based on prior policy determinations.

The Board cannot assume that appeals courts will recognize the implicit policy nature of Board rulings and, hence, defer to them. When a Board decision makes no reference to policy judgments or policy considerations, the reviewing court has no reason to take the time and effort to try to discern policy grounds for the Board's ruling, and nothing to discourage it from taking the tempting course of making the ruling the court prefers. For the

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174. *See supra* Part II.D. (discussing court decisions reversing Board rulings on the basis of *Allentown Mack*).

175. *See Allentown Mack*, 522 U.S. at 378.

176. *See, e.g.*, Kolkka Tables and Finnish-American Saunas, 335 N.L.R.B. No. 69, 2001 WL 1044723 (2001); Levitz Furniture Co., 333 N.L.R.B. No. 105, 2001 WL 314139 (2001); Epilepsy Found. of N.E. Ohio, 331 N.L.R.B. No. 92, 2000 WL 967066 (2000), *enforced in relevant part*, 268 F.3d 1095 (D.C. Cir. 2001); Boston Med. Ctr. Corp., 330 N.L.R.B. 152 (1999) (examples of recent Board decisions in which the Board discussed policy considerations as a basis for overturning precedent).

Board to avoid "*Allentown Mack*" review of its rulings, and the judicial displacement of its judgment that so often results from such review, it will be up to the Board to assert explicitly that its rulings are policy determinations.

When the Board openly makes or reaffirms policy, it has compelling grounds for demanding judicial deference to its policy decisions. As this Part will explain, the National Labor Relations Act, the prevailing administrative law standards for judicial review of agency decisions, and important practical considerations all require judicial deference to Board policymaking.

A. The NLRA Establishes the Board as the Favored Policymaker

It is of course the United States Congress that has the primary and paramount authority to make labor relations policy.[177] In enacting the National Labor Relations Act ("the Act"), Congress chose to delegate much of this authority to the National Labor Relations Board.[178] In § 10 of the Act, the Board was "empowered . . . to prevent any person from engaging in any unfair labor practice (listed in section 158 of this title) . . . ."[179] In § 9, Congress gave the Board exclusive authority over issues concerning how employees select their bargaining representatives.[180] And in § 6, Congress expressly gave the Board authority "to make, amend, and rescind . . . such rules and regulations as may be necessary to carry out the provisions of this [statute]."[181]

Given the nature of the Act, the authority Congress gave the Board was necessarily *policymaking* authority. If the Act had defined employee rights, unfair labor practices, and representational principles in a detailed and precise manner, then the Board's role would be limited to carrying out policies already specifically defined by Congress. Instead, the language of the Act is broad and ambiguous, and leaves many policy questions

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177. *See* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) (upholding the constitutional authority of Congress to make labor relations policy).

178. *See generally* 1 JAMES A. GROSS, THE MAKING OF THE NATIONAL LABOR RELATIONS BOARD 130-148 (1974) (discussing the legislative history of the National Labor Relations Act and Congress's decision to give labor policymaking authority to the Board).

179. 29 U.S.C. § 160(a) (2002).

180. *See* 29 U.S.C. § 159; *see also* HARDIN, *supra* note 7, at 28 ("Section 9 . . . gave the NLRB exclusive jurisdiction over questions of employee representation.").

181. 29 U.S.C. § 156 (2002).

unresolved.[182] As then-Professor, now Second Circuit Judge Ralph K. Winter explained, "Much of the need for a specialized agency to administer the National Labor Relations Act might be attributed to the ambiguity of many of the provisions of that statute."[183] As examples, Winter discussed some of the key provisions of the Act: § 8(a)(1), which makes it an unfair labor practice for employers to "interfere with, restrain or coerce employees" in exercising their rights under the Act; § 8(b)(1)(A) which forbids unions "to restrain or coerce employees in the exercise" of such rights; and §§ 8(a)(5) and 8(d), which together make it illegal for employers to refuse to "bargain . . . in good faith with respect to wages, hours, and other terms and conditions of employment."[184]

The broad and vague language of the Act makes it necessary for the Board to resolve specific policy issues. The fact that the statute's generality forces the Board to act as a policymaker was promptly recognized by the U.S. Supreme Court in two decisions issued within ten years of the Act's passage. In *Phelps Dodge Corp. v. NLRB*,[185] the Court held:

> A statute expressive of such large public policy as that on which the National Labor Relations Board is based must be broadly phrased and necessarily carries with it the task of administrative application. . . . [I]n the nature of things Congress could not catalogue all the devices and stratagems for circumventing the policies of the Act. Nor could it define the whole gamut of remedies to effectuate these policies in an infinite variety of specific situations. Congress met these difficulties by leaving the adaptation of means to end to the empiric process of administration. The exercise of the process was committed to the Board, subject to limited judicial review.[186]

Similarly, in *Republic Aviation Corp. v. NLRB*,[187] the Court concluded,

> The Wagner Act did not undertake the impossible task of specifying in precise and unmistakable language each incident which would constitute an unfair labor practice. On the contrary, that Act left to the Board the work of

182. *See* JULIUS G. GETMAN & BERTRAND B. POGREBIN, LABOR RELATIONS: THE BASIC PROCESSES, LAW AND PRACTICE 4 (1988) ("The language of the Act . . . is overly general, often confusing and contradictory.").

183. Ralph K. Winter, *Judicial Review of Agency Decisions: The Labor Board and the Court*, 1968 SUP. CT. REV. 53, 56.

184. *Id.* at 56-57.

185. 313 U.S. 177 (1941).

186. *Id.* at 194.

187. 324 U.S. 793 (1945).

> 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.[188]

Congress not only intended the Board to make labor policy, but more importantly for the issue of judicial review, Congress deliberately chose to have the Board predominate over the courts in making such policy. There is some evidence of this in specific documents of legislative history. For example, the Act's sponsor, Senator Wagner, stated during the debates over the statute, "For years lawyers and economists have pleaded for a dignified administrative tribunal . . . entitled to deal quasi-judicially with issues with which the courts have neither the time nor the special facilities to cope."[189]

Even stronger proof that Congress favored the Board over the courts in making labor policy comes from the structure of the Act and the historical context in which the statute was enacted. Only three years before passage of the National Labor Relations Act, Congress had passed the Norris-LaGuardia Act of 1932,[190] which stripped federal courts of their jurisdiction over enforcement of "yellow dog contracts" (contracts in which employees agreed not to affiliate with unions) and (more importantly) over granting injunctions in any case involving a labor dispute.[191] As scholars have observed, the Norris-LaGuardia Act "was an eloquent legislative indictment of judicial treatment of union activity"[192] resulting from the federal courts' "long and sorry history of dealing with labor problems."[193] Three years after Norris-LaGuardia, in passing the National Labor Relations Act, Congress continued the process of diminishing the role of courts in the labor area by creating an *alternative* to the courts, the National Labor Relations Board, and giving it primary and sometimes even exclusive authority over labor law

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188. *Id.* at 798.

189. 1 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT of 1935, at 1428 (1985).

190. Norris-LaGuardia Act of 1932, 47 Stat. 70 (1932) (codified as amended at 29 U.S.C. §§ 101-115).

191. 29 U.S.C. §§ 101, 103 (2002). The provision on yellow dog contracts first "declared [such contracts] to be contrary to the public policy of the United States" and then stated that they "shall not be enforceable" in federal court. *See* 29 U.S.C. §103.

192. B. MELTZER & S. HENDERSON, LABOR LAW CASES, MATERIALS AND PROBLEMS 28 (3d ed. 1985).

193. Lee Modjeska, *The NLRB Litigational Processes: A Reply to Chairman Dotson*, 23 WAKE FOREST L. REV. 399, 403 (1988). Professor Modjeska documented this "long and sorry history" by describing the courts' use of antitrust law, conspiracy doctrine and injunctions to undermine labor activity. *Id.* at 401-03.

issues.[194] As Professor Winter has noted, in the Act, Congress "established broad lines of labor policy, the further elaboration of which was left to the Labor Board rather than the courts."[195] Moreover, the Act placed limits on the ability of courts to review Board decisions by omitting any means of direct appeal of Board decisions on representational matters[196] and providing that in reviews of Board decisions in unfair labor practice cases, "the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive."[197] This context and structure of the Act leads to the conclusion that, as Professor Winter put it, "The creation of the Board . . . may fairly be viewed as the result of congressional dissatisfaction with judicial lawmaking in the area of labor law."[198]

Soon after the Act's passage, the Supreme Court acknowledged and endorsed the Board's primacy over the appellate courts in making labor policy. In its 1941 decision in *Phelps Dodge*, the Supreme Court actually admonished the appellate courts to leave policymaking to the Board: "Because the relation of remedy to policy is peculiarly a matter for administrative competence, courts must not enter the allowable area of the Board's discretion and must guard against the danger of sliding unconsciously from the narrow confines of law into the more spacious domain of policy."[199] Later in the decision, the Court reemphasized that the role of the courts was limited in relation to the Board's broad policymaking authority, stating "[w]e believe that the procedure we have indicated will likewise effectuate the policies of the Act by making workable the system of restricted judicial review in relation to the wide discretionary authority which Congress has given the Board."[200]

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194. As noted above, the statute gives the Board the authority to initially determine whether unfair labor practices have been committed, and gives the Board exclusive authority over representational issues. *See supra* notes 179-181 and accompanying text for a discussion of Sections 10 and 9 of the Act); *see also* GETMAN & POGREBIN, *supra* note 182, at 1 ("The role of the courts, already limited by the Norris-LaGuardia Anti-Injunction Act, was to be further reduced by giving the Board exclusive jurisdiction over labor law questions, subject to limited judicial review.").

195. Winter, *supra* note 183, at 59 n.5.

196. *See* 29 U.S.C. §§ 159, 160 (1994).

197. 29 U.S.C. § 160(f).

198. Winter, *supra* note 183, at 59 n.5.

199. Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 194 (1941).

200. *Id.* at 196. These statements in *Phelps Dodge* were not dicta because the Court did in fact defer to the Board's judgment on several issues in the case. It should be noted, however, that on one issue the Court did not entirely defer to the Board. The Board had

The Supreme Court has repeatedly reaffirmed that the Board has the primary authority to make policy regarding the Act, and that courts should generally avoid interfering with the Board's policymaking. In the decade after *Phelps Dodge*, the Supreme Court held, in a declaration it has reasserted many times since, that "[t]he function of striking [a] balance to effectuate national labor policy is often a difficult and delicate responsibility, which the Congress committed *primarily* to the National Labor Relations Board, subject to *limited* judicial review."[201]

The Supreme Court most clearly explicated the relationship between the Board and the courts in two decisions in the late 1970s. In *Ford Motor Co. (Chicago Stamping Plant) v. NLRB*,[202] the Court reconfirmed that Congress had granted the Board predominant authority to make labor policy:

> It is thus evident that Congress made a conscious decision to continue its delegation to the Board of the primary responsibility of marking out the scope of the statutory language and of the statutory duty to bargain. This case, therefore, is one of those situations in which we should 'recognize without hesitation the primary function and responsibility of the Board'

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decided that it would not reduce back pay by amounts that discharged workers failed to earn, on the ground that calculating these amounts would be too administratively burdensome. The Court rejected this rationale, stating that the Board "overestimates administrative difficulties and underestimates its administrative resourcefulness," and finding that the administrative burden was outweighed by the "fairness" of mitigating damages. *See id.* at 197-98. Even on this issue, though, the Court stressed the primacy of the Board's policymaking power: the Supreme Court reversed the portion of the Second Circuit's decision that directly modified the Board's order, declaring that "the Board's order should not have been modified by the court below. The matter should have been left to the Board for determination . . . ." Moreover, on the mitigation issue, the Court also emphasized that Congress had granted the Board great discretion in making labor policy. The Court explained, "The remedy of back pay, it must be remembered, is entrusted to the Board's discretion. . . . And in applying its authority over back pay orders, the Board has not used stereotyped formulas but has availed itself of the freedom given it by Congress to attain just results in diverse, complicated situations. . . . The Board has a wide discretion to keep the present matter within reasonable bounds through flexible procedural devices." *Id.* at 197-98 (citations omitted).

201. NLRB v. Truck Drivers Local Union No. 449, 353 U.S. 87, 96 (1957) (emphasis added) *quoted in* NLRB v. Ky. River Cmty. Care, Inc., 121 S. Ct. 1861, 1873 n.5 (2001) (Stevens, J., concurring in part and dissenting in part) (emphasis added); Charles D. Bonanno Linen Serv., Inc. v. NLRB, 454 U.S. 404, 409 (1982); American Broadcasting Co. v. Writers Guild, Inc., 437 U.S. 411, 431 (1978); NLRB v. Erie Resistor Corp., 373 U.S. 221, 236 (1963).

202. 441 U.S. 488 (1979).

> which is that 'of applying the general provisions of the Act to the complexities of industrial life . . . .'[203]

The Court noted that appellate courts would review the Board's decisions, but stressed that they should not substitute their policy judgments for those of the Board: "Of course, the judgment of the Board is subject to judicial review; but if its construction of the statute is reasonably defensible, it should not be rejected merely because the courts might prefer another view of the statute."[204] In *Beth Israel Hospital v. NLRB*,[205] the Supreme Court also acknowledged, "[i]t is the Board on which Congress conferred the authority to develop and apply fundamental national labor policy,"[206] and the Court sharply contrasted the limited role of the appellate courts: "The judicial role is narrow: The rule which the Board adopts is judicially reviewable for consistency with the Act, and for rationality, but if it satisfies those criteria, the Board's application of the rule, if supported by substantial evidence on the record as a whole, must be enforced."[207]

In sum, the National Labor Relations Act establishes the Board as the chief policymaker in federal labor law. Through the statute, Congress deliberately chose to limit the role of the appellate courts in reviewing Board policymaking. The Supreme Court has recognized and supported the Board's dominance in policymaking, and has exhorted appellate courts to respect and defer to the Board's policymaking authority.

B. Judicial Review of Administrative Agency Decisions: The Chevron *Standard*

Judicial deference to Board policymaking is also prescribed by leading principles of administrative law. As a federal administrative agency, the Board is bound by federal administrative law in general, and in particular by the Supreme Court's decisions on judicial review of administrative agency actions. Since 1984, the dominant administrative law precedent on judicial review of decisions by administrative agencies has been the Supreme Court's ruling in *Chevron U.S.A., Inc. v. Natural Resources Defense Council*.[208] As one treatise writer recently put it, "The world of judicial review of agency

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203. *Id.* at 496 (citations omitted).
204. *Id.* at 497.
205. 437 U.S. 483 (1978).
206. *Id.* at 500.
207. *Id.* at 501 (citations omitted).
208. 467 U.S. 837 (1984).

legal conclusions is now clearly the world of *Chevron*."[209] Under a proper application of the *Chevron* standard, the Board's policymaking authority should remain largely free from interference by the federal appellate courts. In *Chevron*, the Supreme Court established a two-part standard that courts were to apply whenever they reviewed an agency's interpretation of a statute the agency was responsible for administering:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.[210]

Applying this standard to Board decisions, the first question an appellate court must address is whether Congress "unambiguously expressed intent" regarding "the precise question at issue." In the case of the Board, the answer to this question will almost always be no, there is no clear congressional intent. As discussed above, the NLRA is mostly written in broad and ambiguous language.[211] More particularly, the provisions that the Board is most often involved in applying are all phrased in vague and general terms. More than 50% of all unfair labor practice charges considered by the Board claim violations of § 8(a)(3), which prohibits "discrimination" by employers without ever defining that term or explaining what constitutes discriminatory conduct.[212] The provision that is next most commonly invoked is § 8(a)(5),[213] which makes it illegal for employers to "refuse to bargain collectively" or to fail to bargain "in good faith,"[214] while leaving it

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209. GARY LAWSON, FEDERAL ADMINISTRATIVE LAW 588 (1998).

210. *Chevron*, 467 U.S. at 842-43.

211. *See supra* notes 182-88 and accompanying text.

212. 29 U.S.C. § 158(a)(3) (2002). The only issue that § 8(a)(3) discusses in greater detail is when payment of union dues can be made a condition of employment. *See id.*

213. 29 U.S.C. § 158(a)(5) (2002).

214. *See* 29 U.S.C. § 158(d) (2002) (defining "bargain collectively" as meaning to "confer in good faith").

for the Board to determine the meaning of the vague phrase "in good faith." Meanwhile, in the thousands of representation cases the Board administers every year, the statute gives the Board such vague directives as asking it to decide if there is a "question of representation," to define "appropriate" units for union elections, and to determine which employees are "eligible" to vote in a union election.[215] Thus, far more often than not, the Board will be applying and construing provisions where there is no clear Congressional intent.

Accordingly, if courts were to fairly and reasonably apply the *Chevron* standard to Board decisions, they almost always would proceed to the second stage. At that stage, courts must accept the Board's decision as long as it is a "permissible" interpretation of the statute. So as long as the Board stays within the broad outlines of the Act, courts must defer to its policymaking decisions.

In 2001, in *United States v. Mead Corp.*,[216] the Supreme Court issued a major ruling regarding the application of the *Chevron* standard of judicial review. Although it is too soon to say whether the world of judicial review is now "the world of *Mead*," Justice Scalia did assert in his dissent in the case that "the *Mead* doctrine . . . has today replaced the *Chevron* doctrine . . . ."[217] Certainly *Mead* is a significant decision that now must be considered in assessing judicial review of Board policymaking.

In *Mead*, the Supreme Court found that the level of deference courts owed to an agency's decision depended on the degree to which Congress had delegated authority to that agency. The Court observed that when Congress explicitly delegates authority to an agency to define a specific statutory provision, the agency's interpretation must be reviewed under a highly deferential standard. The agency's decision is upheld "unless procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute."[218] The Court then explained that the *Chevron* standard was created to apply to situations where Congress's delegation of authority was implicit:

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215. *See* 29 U.S.C. § 159 (2002). Although courts cannot hear direct appeals of the Board's decisions in representation cases, courts can and do review Board representation rulings in Section 8(a)(5) cases where employers accused of "refusal to bargain" defend by claiming that the union's selection as a representative is invalid. *See* COX, ET AL., LABOR LAW 113-14 (13th ed. 2001).

216. 533 U.S. 218 (2001).

217. *Id.* at 239 (Scalia, J., dissenting).

218. *Id.* at 227 (citing *Chevron*, 467 U.S. at 844 and United States v. Morton, 467 U.S. 822 (1984)).

> Congress, that is, may not have expressly delegated authority or responsibility to implement a particular provision. . . . Yet it can still be apparent from the agency's generally conferred authority and other statutory circumstances that Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute or fills a space in the enacted law . . . .[219]

In these situations of implicit delegation, the Court reaffirmed, the *Chevron* standard should apply because "a reviewing court has no business rejecting an agency's exercise of its generally conferred authority to resolve a particular statutory ambiguity simply because the agency's chosen resolution seems unwise."[220]

Under this reasoning, the key to deciding whether the *Chevron* standard should be applied in reviewing an agency's application of a statute is whether Congress implicitly delegated authority to the agency to make that application. The Supreme Court in *Mead* found that a "very good indicator" that Congress had made an implicit delegation was a statutory grant of authority to an agency "to engage in the process of rulemaking or adjudication."[221] The Court reasoned that when Congress "provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of [law]," then it is fair to conclude that Congress intended the agency to make binding law.[222] The Court also held that authority to make rules or adjudications was not necessarily required,[223] as Congress's implicit delegation of authority to make law could be shown "by some other indication of a comparable congressional intent."[224]

Applying the new *Mead* standard to the Board, there is conclusive evidence that Congress implicitly delegated authority to the Board to make decisions having the force of law. The Board does have the "very good indicator" of delegated authority that the Court identified in *Mead*, because Congress did give the Board authority to adjudicate cases under the Act: § 10 sets out the adjudicative procedures the Board is to use to decide if an

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219. *Id.* at 229.

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.* at 231 ("[T]he want of [formal] procedure here does not decide the case, for we have sometimes found reasons for *Chevron* deference even when no such administrative formality was required and none was afforded.").

224. *Id.* at 227.

employer or union is guilty of an unfair labor practice,[225] and § 9 authorizes the Board to conduct hearings in representation cases.[226] Indeed, in *Mead* itself, the Supreme Court listed two NLRB cases as examples of "adjudication cases" where *Chevron* deference was deemed appropriate.[227] Further evidence that Congress granted the Board implicit lawmaking authority is found in § 6, where Congress gave the Board authority to engage in rulemaking,[228] though the Board has only once in its history issued a substantive rule.[229]

In sum, current federal administrative law, as embodied in *Chevron* and *Mead*, requires courts to afford considerable deference to the Board's interpretations and application of the Act. This body of law would provide further protection to the Board if it openly engaged in the policymaking role that Congress intended for it.

C. The Board's Practical Advantages Over Courts as a Policymaker

The primacy of the Board over the courts in labor policymaking is dictated not only by congressional intent, but also by the fact that, as a practical matter, the Board remains better suited than courts to make labor relations policy. The National Labor Relations Board is a specialized agency that is focused exclusively on the National Labor Relations Act. Every day, day after day, the five members of the Board, their staff lawyers, and the administrative law judges and regional directors whose decisions the Board reviews, devote their time and attention entirely to the National Labor Relations Act. These Board decisionmakers review thousands of cases each year, they rule on the same relatively narrow band of issues again and again, and, consequently, they become thoroughly familiar with these issues and all their ramifications. By contrast, for federal appellate judges, labor law is but one small part of an entire body of federal law (and even state law, in diversity cases) that they must administer.[230] Empirical studies of federal

225. *See* 29 U.S.C. § 160(b) and (c).

226. *See* 29 U.S.C. § 159(c).

227. *Mead*, 533 U.S. at 230 n.12 (listing Holly Farms Corp. v. NLRB, 517 U.S. 392 (1996) and ABF Freight Sys., Inc. v. NLRB, 510 U.S. 317 (1994)).

228. *See* 29 U.S.C. § 156 (2002) (authorizing Board "to make, amend, and rescind . . . such rules and regulations as may be necessary to carry out the provisions of this [statute]").

229. Hardin, *supra* note 7, at 738 (Supp. 1999).

230. Winter, *supra* note 183, at 60 (making the point that "one who adjudicates nothing but cases under the National Labor Relations Act will know more about the unique characteristics of collective bargaining and the impact of the statute in that context than one who is concerned with the entire body of law").

circuit courts' workloads have found that NLRB appeals constitute only about 1% of the courts' dockets.[231] And of this relatively small pool of cases, a substantial number are settled, so that an even lower percentage of labor cases are actually decided by appellate judges.[232] Professor Daniel Meador has contended that when an appellate court does not decide a "critical mass" of cases in a subject area, the court will perform inadequately in ruling on such cases,[233] and he cited NLRB cases as one type in which courts were likely to be deficient.[234]

Even if one does not accept Professor Meador's "critical mass" theory, the fact remains that the odds are against an appellate judge's being able to build up an expertise in labor law and policy. Indeed, some appellate judges have admitted their lack of labor law expertise. Several years ago, the late circuit judge Robert Vance said, "In view of the limited volume of labor cases, it is unrealistic to expect a particular expertise in labor law from the members of the court."[235] Judge Vance's observation has become even more true in recent years, according to a 2002 speech by First Circuit judge Sandra Lynch, who told a group of labor lawyers that because the number of NLRB decisions in the circuit courts has declined dramatically in recent decades, appellate judges have less expertise in the labor area.[236]

Admittedly, some commentators have questioned whether the Board truly possesses expertise, or utilizes what expertise it does possess.[237] These critics typically note that the Board rarely refers to empirical studies or

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231. *See* Flynn, *supra* note 4, at 426 & n.165 (citing Peter H. Schuck & E. Donald Elliott, *To the* Chevron *Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984, 998, 1015; Daniel J. Meador, *A Challenge to Judicial Architecture: Modifying the Regional Design of the U.S. Courts of Appeals*, 56 U. CHI. L. REV. 603, 604, 624 (1989) (finding that in 1987, only 561 of the 37,000 appeals filed in the federal circuits involved the NLRB)). *See also* Susan J. McGolrick, *Labor Law: Appellate Judges Have Less Expertise in Labor Law as Cases Decline, Lynch Says*, 38 Daily Lab. Rep. (BNA) C-1 (Feb. 26, 2002) (discussing speech in which First Circuit judge Sandra Lynch observed that less than 0.5 percent of the circuit's docket involves the NLRB).

232. *See* Robert S. Vance, *A View from the Circuit: A Federal Circuit Judge Views the NLRA Appellate Scene*, 1 LAB. LAW. 39, 39 (1985).

233. Meador, *supra* note 231, at 619.

234. *Id.* at 623.

235. Vance, *supra* note 232, at 39. Judge Vance added that appellate judges were also unlikely to bring that experience with them to the bench, stating, "It is a fact of life that lawyers with prior labor experience rarely receive appointments to circuit courts of appeals." *Id.*

236. *See* McGolrick, *supra* note 231.

237. *See* Flynn *supra* note 4, at 428-29 nn.174-78 (summarizing books and articles questioning Board expertise).

practical knowledge of labor relations or industrial practices.[238] To some extent, such critics misapprehend the nature of the expertise that the Board does bring to bear in its decisions. The Board's expertise is not in empirical labor relations studies, but in the labor policy embodied in the National Labor Relations Act. As Professor Lee Modjeska (a former Assistant General Counsel of the Board) has put it, "[t]he specialized competence of the Board relates to the law of the land, not the law of the shop."[239]

More importantly for purposes of this article, critics of Board expertise pay no attention to the question of *relative* expertise, the Board compared to the courts. As Professor Winter correctly observed, "The relevant comparison is not between Board members and experts in industrial relations, but between specialists and generalists."[240] As "specialists" in labor law and policy, the Board's members have a clear advantage over "generalist" appellate judges. The degree of the Board's advantage is greatly strengthened when one takes into account, as most critics of Board expertise do not, that the Board has a permanent career service staff composed of lawyers, administrative judges and others with many years of labor law experience and professional service to the Board.[241] When one also takes into account that much of the appellate courts' work on labor appeals will be performed by judicial clerks just out of law school, who almost all have virtually no experience with or knowledge of labor law, the Board's expertise advantage comes close to being overwhelming.

For all the reasons discussed in this Part, the Board would be on firm ground to assert openly its primacy over courts in the making of national labor policy. The Board should boldly exercise its policymaking prerogative. In decision after decision, it should announce that its ruling is based on policy considerations and its responsibility to "fill gaps" in the National Labor Relations Act. But before discussing how the Board should do that, this Article must address a looming challenge that some appellate courts are presenting to the Board's policymaking role.

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238. *Id.*

239. Lee Modjeska, *In Defense of the NLRB*, 33 MERCER L. REV. 851, 855 (1982).

240. Winter, *supra* note 183, at 60.

241. *See* Lee Modjeska, *The NLRB Litigational Processes: A Response to Chairman Dotson*, 23 WAKE FOREST L. REV. 399, 472 (1988) ("It does not detract from a long line of distinguished Board members to note the obvious extent to which the very efficacy of the administrative process depends upon the quality and continuity of the career service. . . . That 'cumulative experience' which in the [Supreme] Court's view comprises much of the Board's 'specialized knowledge' necessarily resides in substantial part with the career staff.").

IV. A NEW CHALLENGE TO BOARD POLICYMAKING: THE THEORY THAT *CHEVRON* DEFERENCE IS INAPPLICABLE TO THE BOARD

A. Courts and Commentators Establish the Theory

As discussed in the preceding Part, the Supreme Court's *Chevron* standard decrees that when an appellate court is reviewing an administrative agency's resolution of an issue, and the statute is silent or ambiguous regarding that issue, the court must defer to the agency's determination as long as it is "based on a permissible construction of the statute."[242] But two circuits, the Seventh and Fourth, have held that this *Chevron* standard does not apply to decisions by the Board, and that appellate courts should apply a much less deferential standard of review to Board decisions. The Seventh Circuit decision adopting this view was *Bob Evans Farms, Inc. v. NLRB*,[243] in an opinion written by Judge Cudahy and joined by Judges Coffey and Kanne. The three-judge panel in *Bob Evans* reviewed, and ultimately overruled, a Board decision holding that a walkout of restaurant employees was concerted activity protected by the Act and that it was therefore illegal for the employer to fire employees for the walkout.

After summarizing the facts of the case in Part I of its decision, the court devoted all of Part II (five pages) to determining the appropriate standard of judicial review of the Board's decision.[244] The court began by noting that there was a dispute between the parties as to whether the court should apply the *Chevron* standard of review: the Board asserted that the court must apply the *Chevron* standard,[245] while the employer and the *amicus curiae* Labor Policy Association (LPA) contended that application of the *Chevron* standard would be "misplaced" because "*Chevron* applies only in the context of agency rulemaking as opposed to agency adjudication."[246]

The Seventh Circuit immediately accepted a central premise of the employer/LPA position, that *Chevron* applied only to rulemaking or "rulemaking-like" agency decisions.[247] The court found that *Chevron*

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242. Chevron U.S.A., Inc. v. Nat. Res. Def. Council, 467 U.S. 837, 843 (1984).

243. 163 F.3d 1012 (7th Cir. 1998).

244. *See id.* at 1016-20.

245. *Id.* at 1016.

246. *Id.* at 1017.

247. Brief of Amicus Curiae Labor Policy Association at 16-30, Efco Corp. v. NLRB, 2000 U.S. App. LEXIS 10909 (4th Cir. May 17, 2000) (No. 99-1147) available at http://www.lpa.org//papublic/policy/amicus/briefs/EFCO_brief.pdf; Brief of Amicus Curiae Labor Policy Association at 3-13, Bob Evans Farms, Inc. v. NLRB, 163 F.3d 1012 (7th Cir.

involved a "rulemaking or quasi-legislative function imbued with policymaking responsibilities delegated by Congress."[248] But the Seventh Circuit also recognized that many adjudications could be "rulemaking-like": "the functions of rulemaking and adjudication are not mutually exclusive; frequently adjudication is the vehicle for a statutory interpretation that is functionally equivalent to a rule."[249] The court noted that this was especially true in the case of the Board because the Board "'has chosen to promulgate virtually all of the legal rules in its field through adjudication rather than rulemaking.'"[250] The Seventh Circuit explained, "[s]ince the Board develops general rules in the course of adjudication, there will invariably be occasions when a special degree of deference [*Chevron* deference] is appropriate."[251] This meant, of course, that the converse was also true: that except for these "occasions," it was *not* appropriate to apply the *Chevron* standard to Board adjudications.

The Seventh Circuit next discussed how to determine when the *Chevron* standard should, and should not, be applied to a Board decision. The court identified "the prominence or obscurity of a legislative purpose or of policymaking itself" as the key factor to consider in that determination.[252] The Seventh Circuit also made clear that it believed that the "obscure" far outnumbered the "prominent," as the court declared that "[w]hile the Board can, and occasionally does, make rules in the course of adjudication, the bulk of its orders have only a slight legislative dimension."[253] The Seventh Circuit additionally identified as a "significant" factor "the extent to which the subject matter invokes the special expertise of the Board," and stated that such cases "warranted" *Chevron* deference.[254]

1998) (Nos. 97-4096, 98-1119) available at http://www.lpa.org/papublic/policy/amicus/briefs/Bob_Evans_brief.pdf.

248. *Bob Evans*, 163 F.3d at 1018.

249. *Id.* (citation omitted).

250. *Id.* (quoting Allentown Mack Sales & Service, Inc. v. NLRB, 522 U.S. 359 (1998)).

251. *Id.* By "special degree of deference," the court clearly meant *Chevron* deference. As authority, the court cited *Holly Farms Corp. v. NLRB*, 517 U.S. 392, 397-99 (1996), and added the parenthetical "(applying *Chevron* to Board adjudication)." And as additional authority, the Seventh Circuit cited two other decisions in which courts applied the *Chevron* standard in reviewing Board decisions, *Mid-America Care Foundation v. NLRB*, 148 F.3d 638 (6th Cir. 1998), and *NLRB v. Webcor Packaging, Inc.*, 118 F.3d 1115, 1119 (6th Cir. 1997).

252. *Bob Evans*, 163 F.3d at 1019.

253. *Id.*

254. *Id.* at 1019 (citing Ferriso v. NLRB, 125 F.3d 865, 869 (D.C. Cir. 1997) and NLRB v. Americare-New Lexington Health Care Center, 124 F.3d 753, 756 (6th Cir. 1997)).

In applying these factors to the case at issue, the Seventh Circuit further explicated its views on when Board decisions were entitled to *Chevron* deference. The court asserted that the central question in the case, whether certain employee conduct was protected concerted activity, "cannot be said to involve policy choices or rulemaking in the legislative sense."[255] Instead, the court found, in deciding whether employee conduct was protected by statute, "the Board was engaged in the classic *judicial* exercise of resolving competing claims under the statute."[256] In this way, the Seventh Circuit, which had earlier acknowledged the traditional distinction between findings of fact and conclusions of law,[257] further subdivided conclusions of law into "legislative" determinations and "judicial" determinations. And the Seventh Circuit declared that making judicial determinations was "a function which does not implicate the Supreme Court's central concerns in *Chevron*."[258] Therefore, the Seventh Circuit rejected the Board's argument that the court should apply the *Chevron* standard in reviewing the Board's decision, and the court instead applied what it called a "traditional deference" standard, under which it reversed the Board's decision.[259]

The United States Court of Appeals for the Fourth Circuit found the *Chevron* standard inapplicable to a Board adjudication in its unpublished decision in *Efco Corp. v. NLRB*.[260] In a per curium opinion by a three-judge panel,[261] the Fourth Circuit considered what standard of review to apply to a Board decision that held that the employer violated § 8(a)(2) of the Act by establishing and exerting control over three employee committees that the Board found to be "labor organizations" under § 2(5) of the Act.

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255. *Bob Evans*, 163 F.3d at 1019. As this article will discuss below, the determination of what kinds of employee conduct are, and are not, covered by the Act in fact involves very significant policy judgments. *See infra* notes 333-348 and accompanying text.

256. *Id.* at 1020 (emphasis added).

257. *Id.* at 1017.

258. *Id.* at 1020. There is no support in *Chevron* for this artificial distinction between "legislative" and "judicial" determinations by an agency. *See infra* notes 314-16 and accompanying text.

259. *Id.* The Seventh Circuit did note that even under the *Chevron* standard, it likely would have reversed the Board's decision, because "*Chevron* deference is also premised on the reasonableness of the agency construction." The court stated that "[w]hichever the preferred standard—traditional deference or *Chevron* . . . the Board's decision does not survive." *Id.*

260. 2000 U.S. App. LEXIS 10909, at *12 (4th Cir. May 17, 2000).

261. The panel was composed of circuit judges Luttig and Traxler and federal district court judge G. Ross Anderson sitting by designation.

The Board contended in *Efco*, as it had in *Bob Evans Farms*, that the court should apply the *Chevron* standard in reviewing its decision.[262] The Fourth Circuit responded by quoting *Bob Evans Farms* in declaring that "the applicability of *Chevron* in this context is by no means clear."[263] Similar to the Seventh Circuit in *Bob Evans Farms*, the Fourth Circuit construed *Chevron* as meaning that courts should defer to an administrative agency when it "acts within [its] *rulemaking or policy-formation* discretion,"[264] and held that whether to apply the *Chevron* standard depended on "whether or not the Board adopted what amounts to a 'rule' in its decision."[265]

The Fourth Circuit then adopted the same approach the Seventh Circuit had used in *Bob Evans Farms*, by ascertaining the extent of "legislating" or policymaking that was involved in the Board's decision. The Fourth Circuit found that the Board's "determination" in the case "that the committees were labor organizations and the employer interfered with them cannot be said to involve policy choices or rulemaking in the legislative sense."[266] Quoting *Bob Evans Farms*, the Fourth Circuit found that in making its decision, "'the Board was engaged in the classic judicial exercise of resolving competing claims under the statute, a function which does not implicate the Supreme Court's central concerns in *Chevron*.'"[267] Therefore, the Fourth Circuit concluded that *Chevron* deference was inappropriate and instead applied "traditional deference standards in reviewing the Board's decision."[268]

The theory that most Board decisions are not entitled to *Chevron* deference, which the Seventh Circuit and Fourth Circuit have adopted, appears to have originated with the Labor Policy Association, an employer advocacy group that represents more than 250 private sector employers on labor relations issues.[269] The Labor Policy Association filed *amicus* briefs in both *Bob Evans Farms* and *Efco*.[270] Both briefs were authored by The

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262. *Efco*, 2000 U.S. App. LEXIS 10909, at *9-10.

263. *Id.* at *10 (quoting *Bob Evans Farms*, 163 F.3d at 1016).

264. *Id.* at *10-11 (emphasis added).

265. *Id.* at *11.

266. *Id.* at *12.

267. *Id.* (quoting *Bob Evans Farms*, 163 F.3d at 1020).

268. *Id.* The Fourth Circuit ultimately upheld the Board's decision under that standard. *See id.* at *13-19.

269. Susan J. McGolrick, *Management Group Seeks NAFTA Review of U.S. Actions on Employee Participation*, 71 Daily Lab. Rep. (BNA) A-11 (April 14, 1999) (describing the Labor Policy Association).

270. *See Bob Evans*, 163 F.3d at 1013; *Efco*, 2000 U.S. App. LEXIS 10909, at *1 (identifying Labor Policy Association as the only *amicus* to file a brief).

Labor Policy Association's vice president and general counsel Daniel V. Yager.[271] In both briefs, Mr. Yager asserted that Board decisions did not warrant *Chevron* deference,[272] a position he explained in greater detail in a 1998 law journal article that he co-authored (with then-law clerk Joseph J. LoBue), *Is the* Chevron *Standard Too High-Octane for the NLRB?*.[273] The Yager and LoBue article asserted that the Supreme Court had not "authoritatively" resolved whether the *Chevron* doctrine applied to adjudications,[274] and that it was therefore an open question whether Board decisions were entitled to *Chevron* deference. The article contended that this question should be answered in the negative, for a number of reasons.

The article's main argument was that the *Chevron* standard, particularly the deferential "second prong" of that standard, applied only to agency decisions that "create new law" (e.g., rulemaking) and "not those that interpret existing law" (e.g., adjudication).[275] This argument was based largely on the language of *Chevron*. The article noted that the Supreme Court defined the first stage of the *Chevron* standard as determining whether congressional intent was clear from the language of the statute, and that [i]f it was "that is the end of the matter."[276] The article emphasized that in discussing this first stage, in footnote 9 of its decision, the Supreme Court stated that "[if] a court, employing traditional tools of statutory construction, ascertains that Congress *had an intention* on the precise question at issue, *that intention is the law* and must be given effect."[277] Based on this language, the article asserted that "the question of *Chevron* deference turns not on congressional intent—as that phrase is commonly used—but rather on whether Congress *had* an intention."[278] Echoing the language of footnote 9 of *Chevron* (though rephrasing it somewhat), the article declared that "[i]f

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271. *Feinstein Continues as General Counsel as Clinton Makes Recess Appointment*, 205 Daily Lab. Rep. (BNA) AA-1 (October 23, 1998) (identifying Mr. Yager's titles near the time of the submission of his *amicus* brief in *Bob Evans Farms*); *Justices Considering Five Employment Cases, But No Labor Cases Yet This Term*, 06 Daily Lab. Rep. (BNA) S-21 (January 10, 2000) (identifying Mr. Yager's titles near the time of the submission of his *amicus* brief in *Efco*).

272. *See supra* note 247.

273. Daniel V. Yager & Joseph J. LoBue, *Is the* Chevron *Standard Too High-Octane for the NLRB?*, 23 EMPLOYEE REL. L.J. 67 (1998).

274. *Id.* at 76-80. The article's assertion was in fact erroneous, as the Supreme Court has clearly decided that the *Chevron* standard does apply to Board decisions.

275. *Id.* at 72.

276. *Id.* at 70 (quoting *Chevron*, 467 U.S. at 843).

277. *Id.* at 71 (quoting *Chevron*, 467 U.S. at 843 n.9).

278. *Id.* (emphasis added).

Congress had an intention, that intention is the law and it is the duty of the judiciary to find and apply the law."[279] Thus, when Congress had an intention, review of an agency decision should be resolved at the first stage of the *Chevron* analysis.

According to the article, courts would proceed to the second stage only when "Congress had *no intention*."[280] The article characterized these cases where Congress "had no intention" as ones where "there exists *no law* to find and apply."[281] The article explained that in these circumstances where there is no congressional intention and therefore "no law" an agency "with rulemaking power can create law."[282] The article contended that the second stage of *Chevron* is designed for these "creations" of law, to determine whether they are "'permissible' (that is, not arbitrary, capricious, or contrary to the statute.)"[283] But, the article reiterated, when law is not being created, but already exists, then the second stage of the *Chevron* standard does not apply: "[*Chevron*] deference is appropriate only with respect to the creation of new law, not the application of existing law."[284]

The article contended that its "proposition that *Chevron* applies to agency decisions that create new law, not those that interpret existing law" was also supported by the *Chevron* decision's "lengthy discussion about the accountability of the political branches of government."[285] The article contended that deferring to the executive branch on accountability grounds was appropriate "only if the policy choices at issue involve the creation of new law, a task which the federal system has always entrusted to the politically accountable branches of government."[286] By contrast, the article claimed, "the application of existing law" was "purposefully remove[d] from the reach of the political branches" by "the constitutional scheme" and was placed "in the hands of an *independent* judicial branch."[287] Thus, the article reasoned, it would be inappropriate for the "independent" courts to defer to executive agencies in cases involving application of existing law.[288]

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279. *Id.*
280. *Id.*
281. *Id.*
282. *Id.*
283. *Id.*
284. *Id.* at 72.
285. *Id.*
286. *Id.*
287. *Id.* at 72-73.
288. Indeed, the article asserted that it would be wrong for agencies *or* courts to take account of "political" or "policy" considerations in adjudications. *See* Yager, *supra* note 273, at 82 ("[T]he political influences found to be appropriate in *Chevron* can mean only that

In addition to contending that the second stage of *Chevron* applied only when agencies "created" (rather than interpreted or applied) law, the article also asserted that such law "creation" could occur only through rulemaking. The article argued that the second stage of *Chevron* applied only in instances where "Congress intentionally or inadvertently does not create law in a particular area."[289] The article declared that "[i]n *some* of those instances, Congress has authorized executive agencies to create law—that is, by granting the agency rulemaking power."[290] The article stressed that this rulemaking process was distinguishable from "the process of determining what *existing law* means."[291] Relying on a paragraph in *Chevron* that referred to "express delegation of authority to the agency to elucidate . . . the statute by regulation" and to "legislative delegation,"[292] the article argued that "[i]t is the rulemaking power that brings *Chevron* deference."[293]

The article drew a hard line between rulemaking and adjudication. The article maintained that "[u]nlike the prospective legislative rulemaking at issue in *Chevron*, however, agency adjudications involve the wholly different process of applying existing law."[294] The article quoted a 1947 *Manual of the U.S. Attorney General* that stated that "[r]ule making is agency action which regulates future conduct" while "[c]onversely, *adjudication is concerned with the determination of past and present rights and liabilities*."[295] The article also noted that in *NLRB v. Wyman-Gordon Co.*[296] several Supreme Court Justices had found that "a rule of law announced in an adjudication could not be applied only prospectively."[297] The article said this was true "because such rules are statements of what existing law is, not what future law will be."[298] The article asserted that agency adjudications, by their very nature, involved application of existing law: "agency adjudications . . . are necessarily founded on the proposition

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Chevron does not apply to agency adjudications."); *id.* at 96 ("[A]djudication is not the context in which political policy goals should be advanced.").

289. *Id.* at 70.

290. *Id.*

291. *Id.* at 71.

292. *Id.* at 72 (quoting *Chevron*, 467 U.S. at 843-44).

293. *Id.* (citations omitted).

294. *Id.* at 81.

295. *Id.* (emphasis in original) (quoting ATTORNEY GENERAL OF THE UNITED STATES, MANUAL ON THE ADMINISTRATIVE PROCEDURES ACT 13-14 (1947)).

296. 394 U.S. 759 (1969).

297. Yager, *supra* note 273, at 81.

298. *Id.*

that there is existing law to apply."[299] Thus, the article propounded, adjudications (such as Board decisions) were a kind of agency decision-making that was wholly distinct from rulemaking and policymaking, and the second prong of *Chevron* applied only to the rulemaking/policymaking decisions.

As discussed above, this distinction between rulemaking and adjudication was largely adopted by the Seventh Circuit in *Bob Evans Farms* and the Fourth Circuit in *Efco*.[300] The courts departed somewhat from the article in finding that the line between rulemaking and adjudication was blurred in some cases, where the Board promulgated its policies through an adjudicative decision. But the courts held that such cases were rare, and that most Board decision were on the "adjudicative" side of the rulemaking/adjudication line. And the courts agreed with the article that for decisions on the adjudicative side of the line, courts did not have to apply the deferential "second prong" of the *Chevron* standard.

B. Why the "Lesser Deference" Theory Is Invalid

The Supreme Court has rejected the idea that, for purposes of judicial review, there is a meaningful distinction between adjudication and rulemaking. In decisions issued within the past few years the Supreme Court has resolved that the *Chevron* standard does apply to agency adjudications. In its 2000 decision in *Christensen v. Harris County*,[301] the Supreme Court found that adjudications were entitled to *Chevron* deference. The petitioners in that case argued that the Court should defer to a United States Department of Labor opinion letter, but the Court held that such letters were not entitled to *Chevron* deference.[302] In so holding, the Court expressly distinguished opinion letters from adjudications, saying "[h]ere, however, we confront an interpretation contained in an opinion letter, not one arrived at after, for example, a formal adjudication or notice-and-comment rulemaking."[303] The majority then explained that the basis for the distinction between rulemaking and formal adjudication on the one hand, and on the other "[i]nterpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals and enforcement guidelines" was that the latter

299. *Id.*
300. *See supra* notes 243-68 and accompanying text.
301. 529 U.S. 576 (2000).
302. *Id.* at 586-88.
303. *Id.* at 587.

"all . . . lack the force of law."[304] The majority then held that these agency determinations that lack the force of law "do not warrant *Chevron*-style deference."[305] Thus, the *Christensen* majority strongly indicated that for purposes of *Chevron* deference, formal adjudications and notice-and-comment rulemaking were equivalent, and were both entitled to *Chevron* deference because they had "the force of law."

In 2001, in *United States v. Mead Corp.*,[306] previously discussed in Part III,[307] the Supreme Court even more explicitly held that adjudications, like rules, were entitled to *Chevron* deference. As discussed in Part III, in *Mead Corp.* the Supreme Court announced a new test for determining which types of agency actions were covered by *Chevron*, a test that turned on whether Congress had implicitly delegated lawmaking authority to the agency.[308] The Court strongly endorsed authority to adjudicate as a factor favoring Chevron deference, stating that "[d]elegation of such authority may be shown in a variety of ways, *as by an agency's power to engage in adjudication or notice-and-comment rulemaking*,"[309] and "[w]e have recognized a very good indicator of delegation meriting *Chevron* treatment in express congressional authorizations to engage in the process of rulemaking or adjudication that produces regulations or rulings for which deference is claimed."[310] Thus, even more definitely than in its *Christensen* decision, the Supreme Court equated adjudication and notice-and-comment rulemaking for purposes of entitlement to *Chevron* deference.

In *Mead Corp.*, the Supreme Court expressly recognized that Board adjudications were among those that were qualified for *Chevron* deference. The Court listed the prior decisions in which it had "appl[ied] *Chevron* deference" to adjudications, and two of the eight decisions on that list were

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304. *Id.*

305. *Id.* Interestingly, the majority held that "interpretations contained in formats such as opinion letters" should be reviewed under the *Skidmore* standard, *see* Christensen, 529 U.S. at 587 (citing *Skidmore v. Swift & Co.*, 323 U.S. 133, 140 (1944)), which was the standard that Yager & LoBue argued should be applied to NLRB adjudications. *See* Yager and LoBue, *supra* note 273, at 95-96. Under the *Skidmore* standard, agency determinations are not entitled to any deference "by reason of their authority," but courts can refer to them for "guidance" and can follow them if they have "power to persuade." *See Skidmore*, 323 U.S. at 140.

306. 533 U.S. 218 (2001).

307. *See supra* Part III.

308. *See supra* notes 218-24 and accompanying text.

309. *Mead Corp.*, 533 U.S. at 227 (emphasis added).

310. *Id.* at 229.

Supreme Court reviews of Board adjudications.[311] Meanwhile, in another 2001 decision, *NLRB v. Kentucky River Community Care, Inc.*,[312] the Supreme Court again applied the *Chevron* standard to an NLRB adjudicative decision. In Part II of *Kentucky River*, which was unanimous,[313] the Court held, "[t]wo aspects of the Board's interpretation are reasonable, *and hence controlling on this Court*," and cited *Chevron* as support.[314] Thus, in citing to the pages of *Chevron* that set forth the two-pronged standard, and in holding that a court must defer to the Board's "reasonable" interpretation of a statute, an unanimous Supreme Court clearly applied the second prong of the *Chevron* standard to adjudicative decisions by the Board and its Regional Director.

These rulings by the Supreme Court illustrate that Yager and LoBue's assertion that the second prong of Chevron does not apply to adjudications is based on a misreading of the *Chevron* decision. Yager and LoBue explicitly base their conclusion on two underlying premises: that there is a hard distinction between "making law" and "applying law," and that administrative agencies "make law" only through rulemaking. Both premises are wrong.

With regard to the first premise, the *Chevron* decision makes no reference to a making law/applying law distinction, and does not even refer to an agency performing the task of "making" a law or "applying" a law. Instead, *Chevron* is wholly concerned with, and refers repeatedly to, the agency task of "interpreting" or "construing" a statute.[315] Agency

311. *Id.* at 230 & n.12 (citing Holly Farms Corp. v. NLRB, 517 U.S. 392 (1996) and ABF Freight Sys., Inc. v. NLRB, 510 U.S. 317, 324-25 (1994)).

312. 532 U.S. 706 (2001).

313. *Id.* at 722, 730.

314. *Id.* at 713 (emphasis added) (citing *Chevron*, 467 U.S. at 842-44). For this proposition, the Supreme Court also cited its prior decision in *NLRB v. Town & Country Electric, Inc.*, 516 U.S. 85 (1995). In *Town & Country*, the Supreme Court had stated, in explaining its reasoning for upholding a Board decision, that "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" and the Court supported this reasoning with a "*see also*" cite to *Chevron*. *Town & Country*, 516 U.S. at 89-90. Even before *Kentucky River* and *Mead Corp.*, Professor Dan Kahan cited *Town & Country*'s reference to *Chevron* as proof that the Supreme Court applied the *Chevron* standard to Board adjudications and to adjudications in general. Dan M. Kahan, *Is* Chevron *Relevant to Federal Criminal Law?*, 110 HARV. L. REV. 469, 502 & n.169 (1996).

315. *See, e.g.*, *Chevron*, 467 U.S. at 842 ("When a court reviews an agency's *construction* of a statute . . . the question for the court is whether the agency's answer is based on a permissible *construction* of the statute."); *id.* at 844 ("[A] court may not substitute its

interpretation of a statute often unites the "making law" and "applying law" functions that Yager and LoBue posit are separate. An agency can, within the same regulation or adjudicative decision, "make" law by developing a new specific legal rule to effectuate the purposes of the statute and "apply" law by utilizing an already existing specific legal rule that is clearly contained in the statute. *Chevron* makes no distinction between different *kinds* of statutory interpretation by agencies—whenever an agency interprets a statute, *Chevron* applies.

Every Board decision is an exercise in statutory interpretation because in every decision the Board is, at bottom, interpreting the National Labor Relations Act. For example, in the *Bob Evans* case in which the Seventh Circuit refused to grant *Chevron* deference to the Board's decision, the Board had interpreted the meaning of the phrase "other concerted activities for the purpose of . . . mutual aid or protection" in Section 7 of the Act.[316] And in *Efco*, the case in which the Fourth Circuit determined that the *Chevron* standard should not be applied to the Board's decision, the Board had interpreted two statutory provision, § 8(a)(2)'s prohibition on employer domination of labor organizations and § 2(5)'s definition of the term "labor organization."[317]

Yager and LoBue's second key premise, that agencies make new law only through rulemaking and not adjudication, is also erroneous. The Supreme Court established, in its 1947 decision in *SEC v. Chenery Corp.*,[318] that an administrative agency can promulgate a new standard through an adjudicative proceeding rather than through a rulemaking. The Supreme Court applied that rule to the National Labor Relations Board in 1974 in *NLRB v. Bell Aerospace Co.*[319] In *Bell Aerospace*, the Supreme Court held that "the Board is not precluded from announcing new principles in an adjudicative proceeding and that the choice between rulemaking and adjudication lies in the first instance within the Board's discretion."[320]

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own construction of a statutory provision for a reasonable *interpretation* made by the administrator of an agency.").

316. *See* Bob Evans Farms, Inc. v. NLRB, 163 F.3d 1012, 1019, 1020-21 (7th Cir. 1998) (explaining Board's ruling was based on its construction of Section 7 of the Act).

317. *See Efco*, 2000 U.S. App. LEXIS 10909, at *2 (4th Cir. May 17, 2000).

318. 332 U.S. 194 (1947).

319. 416 U.S. 267 (1974).

320. *Id.* at 294. In their article, Yager and LoBue at one point acknowledge that agencies have the "power" to make policy through adjudication, Yager & LoBue, *supra* note 273, at 86 & n.38 (citing *Bell Aerospace*, 416 U.S. 267 (1974)), but in the very next paragraph they in effect withdraw that acknowledgment by declaring that "the type of policy

Since *Bell Aerospace*, the Supreme Court has never questioned that the Board can make new law through its adjudicative decisions.[321] In fact, in its 1991 decision in *Martin, Secretary of Labor v. Occupational Safety and Health Review Commission*,[322] the Supreme Court reaffirmed the Board's authority to make policy through its adjudications. In *Martin*, the Supreme Court distinguished between agencies that possessed only "nonpolicymaking adjudicatory powers," like the OSHRC and agencies that were authorized to make policy through adjudication, with the National Labor Relations Board given as an example.[323]

The Supreme Court declared that for some agencies, "adjudication operates as an appropriate mechanism not only for fact-finding, but also for the exercise of delegated lawmaking powers, including lawmaking by interpretation," and the Court immediately cited *Bell Aerospace* as the leading example of policymaking adjudication.[324] The Court explained that in *Bell Aerospace*, "we concluded that agency adjudication is a generally permissible mode of lawmaking and policymaking only because the unitary agenc[y] in question [the Board] also had been delegated the power to make law and policy through rulemaking."[325] In *Martin*, the Supreme Court reiterated that Congress delegated to the Board the authority to make policy, and that the Board was free to engage in policymaking through adjudication. Thus, Yager and LoBue's assertion that Board adjudications cannot involve policymaking flies in the face of Supreme Court precedent and congressional intent.

In *Bob Evans* and *Efco*, the Seventh Circuit and Fourth Circuit actually acknowledged that the Board could make policy in its adjudications, and that *Chevron* deference would be appropriate in such cases.[326] However, these

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decisions made in an adjudication" cannot involve the making of new policy, but must be limited to determining already existing law. *Id.* at 86.

321. *See* 1 KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 6.8, at 272-73 (1994) ("The Court has not even suggested that a court can constrain an agency's choice between rulemaking and adjudication in any opinion since *Bell Aerospace*.").

322. 499 U.S. 144 (1991).

323. *Id.* at 154.

324. *Id.* (citing NLRB v. Bell Aerospace Co., 416 U.S. 267, 292-94 (1974) and SEC v. Chenery Corp., 332 U.S. 194, 201-203 (1947)).

325. *Id.* (citing *Bell Aerospace*, 416 U.S. at 292-294; *Chenery Corp.*, 332 U.S. 194, 202-203 (1947); David L. Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 HARV. L. REV. 921 (1965)).

326. *See* Bob Evans Farms, Inc. v. NLRB, 163 F.3d 1012, 1018 (7th Cir. 1998); Efco Corp. v. NLRB, 2000 U.S. App. LEXIS 10909, at *10-*11 (4th Cir. May 17, 2000).

courts asserted that the Board only "occasionally" made policy in its adjudications, and that most Board decisions do not involve policymaking.[327] In *Bob Evans* and *Efco*, the courts found that the Board decisions they were reviewing were the typical ones in which there was little or no policymaking dimension, and therefore the *Chevron* standard was inapplicable.[328]

The Seventh and Fourth Circuits are far from the mark in asserting that only "occasionally" does the Board make policy in its decisions. On the contrary, the Board engages in policymaking in nearly all its decisions. As noted earlier, in virtually all its decisions (and specifically in those that were reviewed by the Seventh and Fourth Circuits), the Board interprets one or more provisions of the National Labor Relations Act.[329] As discussed previously, most of the provisions of that Act are phrased in general and ambiguous terms,[330] and so in most cases the Board is called upon to decide, Congress has not spoken clearly and directly to the issue at hand.[331]

In almost every case that comes before the Board, the Board must decide, with the barest guidance from statutory language, whether the statute grants employees or a union or an employer the "right" to do something, whether the statute bars an employer or union from doing something or requires an employer or union to do something, or whether when and under what conditions a representation election should be held. The Seventh Circuit in *Bob Evans* referred to such determinations as "resolving competing claims under the statute," and called this a "classic judicial exercise."[332] The Supreme Court has more accurately recognized, and repeatedly asserted, that resolving competing views of the statute is a *policymaking* exercise, which Congress delegated to the Board: "The function of striking [a] balance to effectuate national labor policy is often a difficult and delicate responsibility, which the Congress committed primarily to the National Labor Relations Board, subject to limited judicial

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327. *See Bob Evans*, 163 F.3d at 1019 ("While the Board can, and occasionally does, make rules in the course of adjudication, the bulk of its orders have only a slight legislative dimension."); *Efco*, 2000 U.S. App. LEXIS 10909, at *11 ("Since the Board develops general rules in the course of adjudication, there will invariably be *occasions* when a *special* degree of deference is appropriate") (emphasis added)).

328. *See Bob Evans*, 163 F.3d at 1019-20; *Efco*, 2000 U.S. App. LEXIS 10909, at *11-*12.

329. *See supra* notes 177-84 and accompanying text.

330. *See supra* notes 182-88, 211-15 and accompanying text.

331. *See supra* notes 211-15 and accompanying text.

332. *Bob Evans*, 163 F.3d at 1020.

review."[333] As the Supreme Court has long recognized, when the Board decides how to apply the general language of the statute to specific situations, the Board is performing its congressionally delegated role of developing labor policy.[334]

The *Bob Evans* and *Efco* cases actually exemplify the policy nature of Board decision-making. In each case, after the Seventh Circuit and Fourth Circuit declared there was no policy dimension to the Board's decision, the court went ahead and made a ruling that could only be characterized as a policy judgment. In *Bob Evans*, the Seventh Circuit stated that "[t]he Act is silent as to permissible forms of concerted activity,"[335] thus acknowledging that Congress had made no explicit decision as to what limits should be placed on means of protest. The Seventh Circuit then imposed the limit that the means of protest must be proportional to the grievance being protested.[336] The court did not base this new limit on statutory language or legislative history. Indeed, the court explicitly discounted statutory language that contradicted its new rule. When the Board invoked § 13 of the Act, which states that "[n]othing in this subchapter, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike,"[337] the Seventh Circuit declared, "this provision *notwithstanding*, the right to engage in concerted strike activity pursuant to Section 7 is not unlimited."[338]

The Seventh Circuit did not, and probably could not, justify its proportionality rule based on statutory language. The court's addition of this new limit was a policy choice, and the court expressly based it on policy considerations. The court found that requiring proportionality was consistent

333. NLRB v. Truck Drivers Local Union No. 449, Int'l Bd. of Teamsters, 353 U.S. 87, 96 (1957), *quoted in*, NLRB v. Kentucky River Cmty. Care, Inc., 121 S. Ct. 1861, 1873 n.5 (2001) (Stevens, J., concurring in part and dissenting in part); Charles D. Bonanno Linen Serv., Inc. v. NLRB, 454 U.S. 404, 409 (1982); American Broad. Co. v. Writers Guild of Am., W., 437 U.S. 411, 431 (1978); NLRB v. Erie Resistor Corp., 373 U.S. 221, 236 (1963).

334. *See supra* notes 199-207 and accompanying text (discussing Supreme Court decisions affirming that the Board makes labor policy through its decisions). At one point in *Bob Evans*, the Seventh Circuit appears to suggest that a Board decision is not a policymaking decision unless the Board creates a "new rule." *Bob Evans*, 163 F.3d at 1019. But it is absurd to hold that a rule is a "policy" and entitled to deference the first time it is announced, but is never again entitled to deference when it is subsequently applied. Under that logic, even an administrative regulation would receive *Chevron* deference only when it was first promulgated, but not when it is subsequently enforced.

335. *Id.*

336. *Id.* at 1023-24.

337. 29 U.S.C. § 163 (1994).

338. *Bob Evans*, 163 F.3d at 1019 n.2 (emphasis added).

with "the objectives of industrial harmony on which the National Labor Relations Act rests."[339] The court observed its rule was supported by "the conventional wisdom that preserves strike activity as a measure of last resort,"[340] thus elevating that "conventional wisdom" over the specific statutory mandate in Section 13 that strikes should not be "impeded." Thus, in *Bob Evans*, the Seventh Circuit created a new rule based on policy justifications, an action that certainly must be called policymaking.

In *Efco*, the Fourth Circuit ruled on what in recent years has been one of the most controversial policy issues in labor law: what kinds of employee committees and other employee participation programs does § 8(a)(2) of the Act prohibit. Only four years before *Efco*, Congress passed, and President Clinton vetoed, a law to amend § 8(a)(2) in a way to lessen greatly the Act's restriction on employers' ability to create or maintain employee participation organizations.[341] Section 8(a)(2) forbids employers from dominating any "labor organization,"[342] and the Act defines "labor organization" in typically general and ambiguous terms.[343] Over the years, the Board has had to fill in the meaning of the vague language defining labor organization, particularly the key phrase "dealing with."[344]

In *Efco*, the Fourth Circuit upheld the Board's ruling that Efco's Employee Safety Committee, Employee Benefit Committee and Employee Policy Review Committee met the Act's definition of "labor organizations" and that Efco violated Section 8(a)(5) by creating and otherwise dominating them.[345] In its short discussion in *Efco* of its reasons for finding the committees to be labor organizations, the Fourth Circuit reaffirmed its agreement with the Board's position that "dealing with" meant a "'bilateral mechanism involving proposals from the employee committee . . . coupled

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339. *Id.* at 1022.

340. *Id.*

341. *See* H.R. 743 104th Cong. (1995); 1995 S. 295 104th Cong. (1995); *see also* President Clinton's Veto Message, *in* Weekly Compilation of Presidential Documents.

342. 29 U.S.C. § 158(a)(2) (2002).

343. Section 2(5) of the Act provides, "The term 'labor organization' means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work." 29 U.S.C. §152(5) (2002).

344. *See, e.g.*, Cabot Carbon Co., 117 N.L.R.B. 1633 (1957), *enforcement denied*, 256 F.2d 281 (5th Cir. 1958), *rev'd and Board decision enforced*, 360 U.S. 203 (1959) (leading case on meaning of "dealing with").

345. Efco Corp. v. NLRB, 2000 U.S. App. LEXIS 10909, at *4-*9 (4th Cir. May 17, 2000).

with real or apparent consideration of those proposals by management.'"[346] The court in *Efco* thus reaffirmed a rule that was grounded largely in policy assessments. In *Electromation*, in the footnote cited in *Efco*, the Board had justified this conception of dealing with as consistent with "the abuses Congress meant to proscribe in enacting the Wagner Act."[347] In *Peninsula*, the case in which the Fourth Circuit first adopted the Board's definition of "dealing with," the court explained it did so because

> [w]e believe that, when properly applied, it recognizes an important point concerning §§ 2(5) and 8(a)(2): "logic and experience under the Act . . . dictate that not all management efforts to communicate with employees concerning company personnel policy are forbidden on pain of violating the Act. An overly broad construction of the statute would be as destructive of the objects [of] the Act as ignoring the provision entirely."[348]

In *Efco*, the Fourth Circuit decided a sensitive and controversial policy issue by reaffirming its adoption of a Board standard that the Board had devised based on policy factors and that the Fourth Circuit had originally adopted for policy reasons. Hence, contrary to the court's assertion in *Efco* that the Board's decision "cannot be said to involve policy choices,"[349] policy judgments were actually at the heart of the Board's ruling.

In sum, the Seventh Circuit and Fourth Circuit are simply wrong in asserting that most Board decisions are not entitled to *Chevron* deference. These courts greatly underestimated the policymaking role that the Board plays in its adjudicative decisions (while Yager and LoBue disregarded the Board's role altogether). In fact, there is a significant policy aspect to nearly every legal conclusion made by the Board in one of its adjudications, and consequently virtually every Board decision is entitled to *Chevron* deference.

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346. *Id.* at *15-*16 (quoting NLRB v. Peninsula Gen. Hosp. Med. Ctr., 36 F.3d 1262, 1271 (4th Cir. 1994) and Electromation, 309 N.L.R.B. 990, 995 n.21 (1992)).

347. *Electromation*, 309 N.L.R.B. at 995 n.21, *quoted in Efco*, 2000 U.S. App. LEXIS 10909, at *15-*16 (4th Cir. May 17, 2000)).

348. *Peninsula*, 36 F.3d at 1272 (quoting NLRB v. Streamway Div. of Scott & Fetzer, 691 F.2d 288, 292 (6th Cir. 1982)).

349. *Efco*, 2000 U.S. App. LEXIS 10909, at *12.

V. THE NEW APPROACH NEEDED FROM THE BOARD: CONSTANT EXPRESSION OF ITS POLICYMAKING ROLE

For many years, the Board has downplayed its role as a labor policymaker. As Professor Joan Flynn has documented, the Board has often concealed policy determinations by making them in the form of fact-finding.[350] When the Board is not hiding its policymaking role, it is usually ignoring it: in most of its decisions, the Board makes no reference to the fact that it is making or reaffirming labor policy.

As Professor Flynn has suggested, the Board may have concealed or soft-pedaled its policymaking in order to avoid judicial interference with its policies.[351] The Board's approach may have helped it elude overt judicial reversal of its policies, but it opened the way for courts to disregard the Board's policy judgments in favor of their own. When the Board engages in fact-finding, or makes any conclusion that a court can label as fact-finding, *Allentown Mack* allows courts to overturn the Board's ruling on the ground that the Board failed to draw the correct inferences.[352] Even when the Board makes rulings that are unmistakably legal in nature, the Board's failure to refer to them as policy determinations has enabled courts to declare that most Board decisions do not involve policymaking and instead are "a classic judicial exercise" that courts can perform as well as the Board.[353]

The Board has, in effect, ceded to the appellate courts the primary role in making labor relations policy, a position that Congress intended the Board to fill.[354] Indeed, the Board will have no lawmaking role at all if appellate courts continue to disregard Board legal rulings and make the rulings they prefer. In practical terms, the Board's review of a case would become a meaningless intermediate step between the building of a record at an unfair labor practice or representation hearing and the actual making of a decision in the case, which would now be performed entirely by an appellate court.

For the Board to reverse this slide into irrelevance, the Board must reclaim its preeminent policymaking authority by reasserting it. It is not sufficient that the Board discuss its policymaking functions, as it now does,

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350. *See supra* notes 95-136 and accompanying text.

351. *See* Flynn, *supra* note 4, at 413-18, 442-46.

352. *See supra* notes 141-70 and accompanying text (discussing effect of Allentown Mack Sales & Serv., Inc. v. NLRB, 522 U.S. 359 (1998).

353. *See Efco*, 2000 U.S. App. LEXIS 10909, at *12; Bob Evans Farms, Inc. v. NLRB, 163 F.3d 1012, 1020 (7th Cir. 1998).

354. *See supra* Part III.A.

only in cases where the Board is making a major change in a legal rule.[355] Instead, even in decisions where the Board is just reaffirming prior precedent, even in what the Board may regard as "routine" cases, the Board should invoke its policymaking function. In decision after decision, the Board should announce that its ruling is based on policy considerations and its responsibility to "fill gaps" in the National Labor Relations Act.

From time to time since the 1960s, scholars have recommended that the Board more openly and fully articulate the policy reasons for its decisions.[356] For Professors Estreicher and Winter, the objective of their recommendation was to improve the quality of Board decision-making, not to preserve the Board's policymaking role vis-a-vis the courts. Indeed, both Professor Estreicher and Professor Winter envisioned the appellate courts as enhancing the Board's policymaking function by compelling the Board, through remands and other devices, to explain the policy rationales for its decisions.[357] In her 1995 article, Professor Flynn called this the "articulation requirement" and described it as "the Board clearly articulat[ing] both what its policy is and why that policy is an appropriate one in light of the underlying purposes of the Act and the Board's understanding of the practicalities of the situation."[358] But Professor Flynn ultimately rejected adoption of the articulation requirement; while she expressed belief it would be appropriate in an "ideal-world scenario,"[359] she concluded that in the real

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355. *See supra* note 176 (identifying recent decisions in which the Board relied on policy considerations to overrule precedent). One of these decisions actually illustrates the advantages to the Board of explicitly relying on policy considerations: The Board's policy change in Epilepsy Foundation of N.E. Ohio, 331 N.L.R.B. No. 92, 2000 WL 967066 (2000) was upheld in *Epilepsy Found. of N.E. Ohio v. NLRB*, 268 F.3d 1095 (D.C. Cir. 2001). The D.C. Circuit, in affirming the Board's policy ruling, specifically relied on Chevron deference in holding that it could not reverse a Board policy judgment as long as it was rational. The court explained: "[T]he rationale underlying the decision in this case is both clear and reasonable. That is all that is necessary to garner deference from the court. 'When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail.' The [employer's] challenge here is merely an attack on the wisdom of the agency's policy, and, therefore, the challenge must fail." *Id.* at 1102 (quoting Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837, 866 (1984)).

356. *See, e.g.*, Samuel Estreicher, *The Second Circuit and the NLRB 1980-81: A Case Study in Judicial Review of Agency Action*, 48 BROOK. L. REV. 1063, 1065 (1982); Winter, *supra* note 183, at 69.

357. *See id.*

358. Flynn, *supra* note 4, at 430.

359. *Id.* at 430-32.

world "ball hiding" was a rational means for the Board to protect its policymaking from appellate courts that likely were hostile to the premises of the National Labor Relations Act.[360]

After *Allentown Mack*, hiding the ball is no longer available as a means for the Board to protect its policies from judicial reversal. Whenever the Board presents itself as engaging only in fact-finding, appellate courts can, and do, overturn any Board finding with which they disagree.[361] In this new context, the Board's open assertion and explanation of its policymaking no longer increases the Board's exposure to judicial interference because the Board is completely exposed anyway.

Admittedly, open policymaking by the Board would not insulate it from judicial reversal. As a practical matter, given the nature of the appellate process, appellate courts always have the potential of overriding the Board's legal positions and imposing their own. The best the Board can do is to reduce the likelihood that appellate courts will overturn its decisions. The way the Board has done that in the past is by "hiding" its policy decisions so that courts would tend to overlook them as candidates for reversal. Now, after *Allentown Mack*, courts are as likely to scrutinize and reverse an ostensibly "nonpolicymaking" decision as an overtly policymaking one. Given the Board is now left without means to reduce the likelihood of judicial scrutiny, the Board's best option is to reduce the likelihood that courts will decide to *reverse* the decisions they do scrutinize. And that means Board decisions should be made in a way that maximizes the difficulty to appellate courts of reversing them.

The best way for the Board to do that is to emphasize its policymaking authority in its decisions. When the Board makes a policy decision, an appellate court faces significant legal hurdles in reversing it. The court must overcome the fact that it was the intent of Congress, repeatedly reaffirmed by the Supreme Court, that the Board predominate over courts in fashioning labor policy.[362] When the Board is making a policy based on an ambiguous provision of the Act, as it usually would be,[363] the reviewing court also is constrained by the *Chevron* standard to defer to the Board's decision as long as it is based on a permissible construction of the statute. For these reasons,

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360. *See id.* at 441-46.

361. *See supra* Parts II.C. and II.D. (explaining how *Allentown Mack* enables courts to reverse any Board finding with which they disagree and discussing examples of court decisions that have relied on *Allentown Mack* to do so).

362. *See supra* notes 189-207 and accompanying text.

363. *See supra* notes 182-88, 211-15 and accompanying text (explaining that the Act is mostly written in vague and general language).

the Board is in its strongest position relative to the appellate courts when it makes a policy determination; under *Allentown Mack*, the Board's relative position is greatly weakened if the reviewing court can characterize the Board's ruling as fact-finding. For the Board, the choice could not be more clear: whenever possible, it should strengthen its hand by asserting that it is rendering a policy decision.

How should the Board go about asserting its policymaking authority in its decisions? The specific means used will, of course, vary from issue to issue. But there are some general approaches that probably would be useful. On some issues, there are implicit policy considerations that lay just below the surface of the Board's decision, and the Board would simply have to state those considerations explicitly. For example, as discussed in Part II, Professor Flynn identified several policy considerations that probably motivated the Board to adopt the position that it will not presume whether striker replacements support a union. The next time the Board has occasion to apply that rule, the Board should openly identify those policies as the bases for it.

On many issues, it is very common for the Board to do nothing more in explaining a ruling than to assert it (often saying it is "well-established" or "well-settled") and then cite one or two cases as precedent for it.[364] In such cases, the Board should add discussions of policy rationales for its rulings. In many of these cases, the Board offers little support for its decision even though it is making rulings that are particularly vulnerable to judicial overruling. For example, in *Supervalu, Inc.*,[365] the Board declared, based on citation to two precedents, that it was "well-established" that employees on sick or disability leave are presumed eligible to vote in a representation election. In *Hoffman Plastic Compounds, Inc.*,[366] the Board asserted, again

364. For examples just from the year 2001, see Local 282, Int'l Bhd. of Teamsters, 335 N.L.R.B. No. 98, 2001 WL 1149039 (2001) (ruling that union has a right to seek uniformity in wages in an industry); New Mexico Symphony Orchestra, 335 N.L.R.B. No. 72, 2001 WL 1022054 (2001) (ruling that employer's failure to make contractually required benefit contributions is an illegal unilateral modification of an agreement); Dobbs Int'l Servs., 335 N.L.R.B. No. 78, 2001 WL 1110342 (2001) (rulings on imputing knowledge and actions of supervisors to employer); Robert Orr-Sysco Food Servs., 334 N.L.R.B. No. 122, 2001 WL 910764 (2001) (ruling that photographing or videotaping employees engaged in union activity violates Section 8(a)(1)).

365. 328 N.L.R.B. 52 (1999) (citing Red Arrow Freight Lines, 278 N.L.R.B. 965 (1986); Pepsi-Cola Co., 315 N.L.R.B. 1322 (1995)).

366. 326 N.L.R.B. 1060, 1061 n.3 (1998) (citing Hoffman Plastic Compounds, 314 N.L.R.B. 683, 683 (1994); Holo-Krome Co., 302 N.L.R.B. 452, 454 (1991)), *enforced*, 237 F.3d 639 (D.C. Cir. 2001), *reversed on other grounds*, 122 Sup. Ct. 1275 (2002).

based only on a citation to two cases, that an employer's offer of reinstatement will toll the accrual of back pay only when the offer is "specific, unequivocal and unconditional." As findings of fact, both these rulings are questionable because the issues (whether an employee on leave is likely to return to work, whether an employee should have recognized an employer's statement as an offer of reinstatement) actually depend on the circumstances of each individual employee. Especially after *Allentown Mack*, a court could reject the application of the general rule to a case because it draws the "wrong inference" given the facts of that particular case. If the Board made clear these rules were policy judgments, however, based on policy considerations (e.g., that employees on leave should not be rendered ineligible because leave is subject to manipulation by an employer, that employers should be encouraged to make firm and unconditional offers of reinstatement to avoid disputes and employee misunderstandings), then courts would have to defer to the rules as long as they were rational.

The Board also fails to offer fuller justification for its rulings even when faced with opposition by one of its own Members, or by courts. For example, in *National Steel Corp.*,[367] Member Hurtgen contended in his dissent that the employer's confidentiality concerns justified its failure to provide the union with information about its hidden surveillance cameras.[368] The majority's only response was that it would "adhere to precedent" that the burden is on the employer to "seek an accommodation" between its confidentiality concerns and the interest of the union.[369]

Even when appellate courts have expressed disapproval of a Board position, the Board often reasserts it with no more justification than citation to a couple of Board precedents. For example, even though several appellate courts have held that § 8(c) of the Act prevents the Board from relying on lawful anti-union speech as evidence of animus in a § 8(a)(3) discrimination case,[370] the Board in *Sunrise Health Care Corp.*[371] simply restated that protected employer speech could be used "as background evidence of antiunion animus" and offered no justification for that position other than citation to a couple of precedents.[372] Similarly, even after a circuit split

367. 335 N.L.R.B. No. 60, 2001 WL 1033825 (2001).

368. *Id.* at *4.

369. *Id.* at *3.

370. *See* Rebecca Hanner White, *The Statutory and Constitutional Limits of Using Protected Speech as Evidence of Unlawful Motive Under the National Labor Relations Act.*, 53 OHIO ST. L.J. 1 (1992).

371. 334 N.L.R.B. No. 111, 2001 WL 888293 (2001).

372. *Id.* at *2.

developed over which side bore the burden of proof regarding whether an employee was or was not a supervisor,[373] the Board in numerous cases simply asserted its position that the burden rested on the party who claimed an employee was a supervisor, without offering any explanation or support other than (occasionally) citation to one or two Board precedents.[374] It fell to the Supreme Court to articulate rationales for the Board's position when the Court upheld it in *NLRB v. Kentucky River Community Care, Inc.*[375]

In all these cases where the Board relies only on citations to its own precedents to support its legal rulings, the Board could readily supplement those citations with policy rationales. For guidance on how to do that, the Board could look to the too-rare decisions where the Board does explain the policy reasons for its legal doctrines. For example, in *Detroit Newspapers*,[376] the Board majority, apparently goaded by a dissent by Member Liebman, offered policy justifications for adhering to its position that employers can unilaterally change the employment terms of striker replacements. The Board's *Keystone Shipping Co.*[377] decision illustrates

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373. *Compare* NLRB v. Health Care & Ret. Corp. of Am., 987 F.2d 1256 (6th Cir. 1991) (holding that in unfair labor practice cases, the General Counsel has the burden of *disproving* supervisory status), *with* NLRB v. Bakers of Paris, Inc., 929 F.2d 1427, 1445 (9th Cir. 1991) (holding that "burden of proving supervisory status rests upon the party asserting it").

374. *See, e.g.*, Coventry Health Center, 332 N.L.R.B. No. 13, 2000 WL 1369711 (2000); Carlisle Engineered Products, Inc., 330 N.L.R.B. 1359 (2000); Elmhurst Extended Care Facilities, Inc., 329 N.L.R.B. 535 (1999); Benchmark Mechanical Contractors, 327 N.L.R.B. 829 (1999).

375. 121 S. Ct. 1861 (2001). The Supreme Court stated:

> The Board's rule is supported by "the general rule of statutory construction that the burden of proving justification or exemption under a special exception to the prohibitions of a statute generally rests on one who claims its benefits." The Act's definition of "employee," § 2(3), 29 U.S.C. § 152(3), "reiterate[s] the breadth of the ordinary dictionary definition" of that term, so that it includes "any 'person who works for another in return for financial or other compensation.'" Supervisors would fall within the class of employees, were they not expressly excepted from it. The burden of proving the applicability of the supervisory exception . . . should thus fall on the party asserting it. In addition, it is easier to prove an employee's authority to exercise 1 of the 12 listed supervisory functions than to disprove an employee's authority to exercise any of those functions, and practicality therefore favors placing the burden on the party asserting supervisory status. We find that the Board's rule for allocating the burden of proof is reasonable and consistent with the Act, and we therefore defer to it.

121 S. Ct. at 1866 (citations omitted).

376. 327 N.L.R.B. 871, 871-72 (1999).

377. 327 N.L.R.B. 892, 895 (1999).

that the Board's explanations need not be lengthy or complicated: in that case, the Board briefly rehearsed the reasons behind its presumption that bargaining units of seagoing personnel are fleet-wide in scope.

For some of the Board's longest-standing legal doctrines, particularly regarding what types of employer conduct constitute illegal "interference" under § 8(a)(1), the Board simply finds a violation without citing any precedent at all.[378] As discussed in Part II, empirical studies have questioned whether well-established § 8(a)(1) violations like interrogation or surveillance actually "interfere" with employee union activities or attitudes.[379] Particularly in light of these studies, it would be easy for appellate courts to overrule regularly Board findings of such violations by treating them as "erroneous factual inferences" under *Allentown Mack*,[380] or non-policymaking legal conclusions under *Bob Evans Farms* or *Efco*.[381] To preserve its rules that employer actions like interrogation, surveillance, solicitation of employee grievances, and so on are § 8(a)(1) violations, the Board could expressly invoke the policy considerations that led the Board to declare such conduct illegal in the first place. With regard to surveillance, for example, the Board could rely on its very first published decision, *Pennsylvania Greyhound Lines*,[382] in which the Board found that

> [t]he maintenance of open surveillance of the union meeting of employees is a vicious form of restraint and coercion, especially when coupled as here with threats of discharge, for it has the obvious intent and effect of placing the employees in fear of their jobs because of their activity in connection with the union.[383]

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378. To review examples from just a single N.L.R.B. volume, *see, e.g.*, Wal-Mart Stores, Inc., 335 N.L.R.B. No. 103, 2001 WL 1149041 (2001) (interrogation); Villa Maria Nursing & Rehab. Center, 335 N.L.R.B. No. 99, 2001 WL 1158837 (2001) (surveillance); Sodexho Mariott Servs., Inc., 335 NLRB No. 43, 2001 WL 1022052 (2001) (interrogation and creating impression of surveillance); Chariot Marine Fabricators & Indus. Corp., 335 N.L.R.B. No. 30, 2001 WL 1006054 (2001) (surveillance and creating impression of surveillance); Yuker Constr. Co., 335 N.L.R.B. No. 28, 2001 WL 1011925 (2001) (interrogation and creating impression of surveillance); L.W.D., Inc., 335 N.L.R.B. No. 24, 2001 WL 1006053 (2001) (interrogation).

379. *See supra* notes 137-40 and accompanying text.

380. *See supra* text accompanying notes 90-93 and 141-70.

381. *See supra* Part IV. A.

382. 1 N.L.R.B. 1 (1935).

383. *Id.* at 22.

Taking interrogation as an example, the Board could invoke the reasons it discussed in its 1949 decision in *Standard-Coosa-Thatcher Co.*,[384] where the Board justified its proscription of interrogation with detailed reasons.[385]

The Board is by no means limited to relying on its past policy justifications to support its legal rulings. Indeed, the imperative that the Board assert the policy bases for it decisions fits well with the objective expressed by Board members, referred to in the introduction, of ensuring that the Board adapt to keep pace with changes in the American economy, workplace, workforce and employer-employee relations.[386] As various

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384. 85 N.L.R.B. 1358 (1949).

385. The Board stated:

> Interrogation by an employer not only invades the employee's privacy and thus constitutes interference with his enjoyment of the rights guaranteed to him by the Act. Its effect on the questioned employee, like that of open surveillance of union activity, is to "restrain" or to "coerce" the employee in the exercise of those rights. The employee who is interrogated concerning matters which are his sole concern is reasonably led to believe that his employer not only wants information on the nature and extent of his union interests and activities but also contemplates some form of reprisal once the information is obtained. The finger which espionage might merely direct to him is actually pointed at him by the inquiry from his employer. He fears that a refusal to answer or a truthful answer may cost him his job. He is also in effect warned that any contemplated union activity must be abandoned, or he will risk loss of his job. Weighing these "subtle imponderables," the Board early characterized direct interrogation as "a particularly flagrant form of intimidation of individual employees." The Board assumed the violation "obvious." Many courts did likewise . . . Our experience demonstrates that the fear of subsequent discrimination which interrogation instills in the minds of employees is reasonable and well-founded. The cases in which interrogated employees have been discharged or otherwise discriminated against on the basis of information obtained through interrogation are numerous. These cases demonstrate conclusively that, by and large, employers who engage in this practice are not motivated by idle curiosity, but rather by a desire to rid themselves of union adherents. In prohibiting interrogation, therefore, we are not only preserving the employees' right to privacy in their union affairs; we are not only removing a subtle but effective psychological restraint on employees' concerted activities; but we are also seeking to prevent the commission of the further unfair labor practice of discrimination by condemning one of the first steps leading to such discrimination.

Id. at 1360-62.

386. *See* Susan J. McGolrick, *NLRB: Four Current Members Discuss Their Views on Major Rulings, Criticism, Future Issues*, 154 Daily Lab. Rep. (BNA) C-1 (Aug. 10, 2001); Susan J. McGolrick, *NLRB: Board Members, Labor Attorneys Discuss Current State, Future of NLRB at Symposium*, 87 Daily Lab. Rep. (BNA) B-1 (May 4, 2001); Drew Douglas, *Liebman Says Reducing Delays, Maintaining Workplace Relevance are NLRB's Challenges*, 58 Daily Lab. Rep. (BNA) B-1 (March 24, 2000); Susan J. McGolrick, *NLRB: Fox, Hurtgen*

issues present themselves in cases before the Board, the Board can and should evaluate whether it still makes policy sense to apply established rules to resolve those issues. In evaluating a legal rule, the Board must determine whether, in light of current economic and workplace circumstances, that rule furthers the policies of the Act. Where the Board decides it does, the Board should clearly and fully explain why. And when the Board decides that changed circumstances have rendered a rule ineffective in promoting the Act's policies, then the Board should fashion a new rule that will serve those policies.

The project outlined for the Board, of explicating policy grounds for all its rulings, is unquestionably an ambitious and demanding one. By expending the time and effort to explicitly make and explain policy in all or most of its decisions, the Board can reclaim its function as the leading policymaker in labor relations. Then, the Board would again fulfill the role that Congress intended it to play.

Discuss Board Turnover, Backlog, Changes in Modern Workplace, 100 Daily Lab. Rep. (BNA) C-1 (May 25, 1999).