

1986

Proposals to Harmonize Labor Law Jurisprudence and to Reconcile Political Tensions

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Recommended Citation

David L. Gregory, *Proposals to Harmonize Labor Law Jurisprudence and to Reconcile Political Tensions*, 65 Neb. L. Rev. (1986)

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Proposals to Harmonize Labor Law Jurisprudence and to Reconcile Political Tensions

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I. INTRODUCTION

This Article will examine the merits of two major recurrent proposals to reform the National Labor Relations Board's (NLRB or Board's) administration of the National Labor Relations Act (NLRA or Act).¹ Despite the persuasive call by Judge Posner² and Board

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1. 29 U.S.C. §§151-169 (1982).

2. *See, e.g.,* NLRB v. Res-Care, Inc., 705 F.2d 1461, 1466 (7th Cir. 1983) ("[W]hile the Board is entitled to some judicial deference in interpreting its organic statute as

member Dennis³ for Board utilization of rulemaking, this Article concludes that the stabilization achieved by rulemaking could dangerously freeze labor policy. The Board's political viability would be sapped without offsetting advantages. The Board should continue to adjudicate, rather than resort to rulemaking. A federal labor court of appeals is a better alternative to stabilize labor law policy and administration while preserving the Board's necessary political flexibility.

These proposed administrative reforms occur within the larger political context of a besieged Reagan Board that is roundly criticized from many quarters. Several controversial Board decisions within the past two years, reversing many Carter Board precedents, have understandably engendered criticism.⁴ For the past quarter century, the Board has had the unenviable task of effecting coordinated administration of national labor policy in the face of steady judicial erosion of the labor preemption doctrine.⁵ This judicial deterioration of the

well as in finding facts, it would be entitled to even more if it . . . awakened its dormant rulemaking powers . . .").

3. See, e.g., St. Francis Hosp., 271 N.L.R.B. No. 160, 116 L.R.R.M. (BNA) 1465, 1472 (1984), where in a concurring opinion Board Member Dennis stated:

I would have preferred . . . that the Board clearly define a limited number of appropriate health care units, after full consideration of the positions and interests of all elements of the industry, through its rulemaking authority. Such an approach, in my view, would have provided health care labor relations with immediate stability and certainty, and obviated continued litigation before the Board and courts.

See also *NLRB Rulemaking For Health-Care Units*, 119 LAB. REL. REP. 9 (BNA) (May 6, 1985) (Board Member Dennis reiterating her call for NLRB rulemaking in the health care industry).

4. For a compendium of the most controversial Reagan Board decisions in 1982-84, see Raugh, *Reversals By The NLRB: A Union View - Board Reversals Retroactivity and Fairness*, 37 N.Y.U. CONF. ON LABOR §9.01, §9.05, at 9-22 to 24 (1984). See also Estreicher, *Policy Oscillation At The Labor Board: A Plea For Rulemaking*, 37 N.Y.U. CONF. ON LABOR §10.1, at 10-1 n.1 (1984). For a comprehensive analysis of the most important decisions of the Reagan Board in 1984, see Gregory & Mak, *Significant Decisions Of The NLRB, 1984: The Reagan Board's Celebration of the Fiftieth Anniversary of the NLRA*, 18 CONN. L. REV. — (1985).
5. With only a few exceptions since the landmark labor preemption decision of San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959) (holding the NLRB had primary jurisdiction over activity arguably protected or prohibited by sections 7 and 8 of the NLRA), the Supreme Court has held state causes of action not preempted by federal labor law in a wide variety of cases. See *Metropolitan Life Ins. Co. v. Massachusetts*, 105 S. Ct. 2380 (1985) (state minimum health benefit insurance law not preempted by ERISA); *Brown v. Hotel and Restaurant Employees and Bartenders Int'l Union, Local 54*, 104 S. Ct. 3179 (1984) (state law against labor union corruption not preempted by LMRDA); *Bellknap v. Hale*, 103 S. Ct. 3172 (1983) (strike replacements' state law actions for misrepresentation and breach of contract not preempted). Cf. *Allis-Chalmers v. Lueck*, 105 S. Ct. 1904 (1985) (state tort and contract law action by individual against employer preempted by § 301 of LMRA); *Local 926, Int'l Union of Operating Eng'rs v. Jones*, 103 S. Ct. 1453 (1983) (state tort law action by individual against union preempted). For comprehensive analysis of the labor preemption doctrine and the

Board's primary jurisdiction over conduct within the umbrella of the Act, by the ominous trend toward decentralized state court determinations of important labor law issues, has been further exacerbated by the states' rights philosophy of the Reagan administration.⁶ This long-term, broad philosophical assault on the Board is administratively manifested in the chronic understaffing of the Board during the past two years,⁷ and the consequent case backlog,⁸ provoking yet further

pertinent Burger Court decisions, see Gregory, *Toward Remedying The Concomitant Erosion Of The Labor Preemption Doctrine and National Labor Policy*, 27 WM. & MARY L. REV. — (1986). For the representative general position that the Garmon labor preemption rule has been overwhelmed by its many exceptions, see Note, *Preemption in Labor Law Adjudications: A Case Where The Exceptions are Swallowing The Rule*, 24 S.D.L. REV. 466 (1979).

6. For an excellent assessment of the "new" federalism of the Reagan administration, see Note, *Judicial Examination of Deregulation: Exploring The Boundaries Of Executive Discretion*, 59 ST. JOHN'S L. REV. 86 (1984). See also *infra* note 161.
7. Since President Reagan took office in 1981, six members have left the Board (Chair Fanning, and Members Jenkins, Miller, Truesdale, Zimmerman, and Hunter). Reagan-nominated Chair Van de Water could not obtain Senate approval. Only two members successfully appointed by President Reagan since 1981 remain on the Board (Chair Dotson since Mar., 1983, and Member Dennis since May, 1983). The Board had operated with four members since the vacancy caused by the expiration of Howard Jenkins' term had been unfilled since Aug., 1983. The Board was further reduced to only three persons with the expiration of Donald Zimmerman's term in Dec., 1984. With President Reagan's Mar., 1985 nominees, Wilford Johansen and Marshall Babson confirmed by the Senate in May, 1985, the Board was briefly restored to its full five person complement for the first time in two years. *Nomination For Two NLRB Vacancies*, 118 LAB. REL. REP. (BNA) 201 (Mar. 18, 1985). Unfortunately, Member Hunter left the Board with the expiration of his term in Aug., 1985, and did not seek reappointment. *Hunter Departs*, 119 LAB. REL. REP. (BNA) 270 (July 29, 1985). The turnover in Board members and the pronounced gaps in nominating successors have been widely criticized, ranging from Democratic congressional committees to conservative foundations to NLRB Chair Dotson. See HOUSE COMM. ON GOV'T. OPERATIONS, DELAY, SLOWNESS AND DECISIONMAKING AND THE CASE BACKLOG AT THE NATIONAL LABOR RELATIONS BOARD, H.R. REP. NO. 1141, 98th Cong., 2d Sess. (1984) [hereinafter cited as BACKLOG]; STAFF OF HOUSE LABOR-MANAGEMENT RELATIONS SUBCOMM., 98TH CONG., 2D SESS. FAILURE OF THE LABOR LAW — A BETRAYAL OF AMERICAN WORKERS (Comm. Print 1984); Dotson, *Processing Cases At the NLRB*, 35 LAB. L.J. 3, 5 (1984) ("The first and foremost problem has been the turnover of Board Members. . . . Since December 1979, eleven [now thirteen] individuals have served as Board Members."); *Heritage Foundation Report On Labor Policy*, 117 LAB. REL. REP. (BNA) 285, 286 (Dec. 10, 1984) (The conservative Heritage Foundation's 600 page report to the Reagan administration, *MANDATE FOR LEADERSHIP II*, recommended that the President keep the five person Board at full strength.).
8. In Feb., 1984, a record backlog of 1,647 cases awaited decision by the Board. *Criticism of NLRB Politicization, Backlog*, 117 LAB. REL. REP. (BNA) 121, 123-24 (Oct. 15, 1984) [hereinafter cited as *Criticism*]. See also BACKLOG, *supra* note 7, at 4 ("The National Labor Relations Board is in a crisis. Delays in decisionmaking at the Board level and a staggering and debilitating case backlog have resulted in

criticism.⁹

Understood in this broader political context, the Board may be the victim rather than the cause of badly fragmented labor law theory and administration. This Article's renewed proposal for the federal labor court of appeals is certainly not a panacea for this panoply of problems. However, the many advantages of the proposed labor court, and the continued use of Board adjudication, will be steps toward labor policy stabilization and defusion of the political tensions currently afflicting labor law administration.

The NLRB has always been highly politicized. NLRB members are appointed by the President, with the advice and consent of the Senate, for staggered terms. Presidential appointment virtually guarantees that the NLRB will reflect majoritarian politics. NLRB appointees usually implement labor policy consonant with that of the appointing President. Political choices through NLRB decisions have always provoked heated criticism. Throughout the Board's first seventeen years, NLRB members were appointed exclusively by Democrats Roosevelt and Truman. Employers routinely castigated the NLRB from the outset as exclusively pro-labor.¹⁰ Union unfair labor

workers being forced to wait years before cases . . . are decided The case backlog at the Board has risen to a record level. . . .").

The congressional criticism prompted some Board action. In fiscal 1984, the Board issued 1,346 decisions, a 53 percent increase over the 880 decisions issued in fiscal 1983. As of October 1, 1984, there were 1,313 pending cases, a decrease of 334 cases since February 1, 1984, when there was a record backlog of 1,647 cases. *Criticism, supra*, at 123-24. NLRB Chair Dotson said that the Board was making a "concerted effort" to reduce the number of pending cases. 116 LAB. REL. REP. (BNA) 41 (May 21, 1984). From deciding a record 1,185 decisions in 1979, the 602 unfair labor practice (ULP) decisions by the NLRB in 1983 marked a three-year low. In late May, 1984, the Board faced a backlog of 1,459 ULP cases; the normal backlog is 400-500 ULP cases. *Id.* at 41-42. As of July, 1985, there were 1,200 pending cases. N.Y. Times, July 9, 1985, at A14, cols. 2 & 4. See also the related recent statements by Board Chair Dotson on his plans to deal with the NLRB's case backlog. *Case Backlog at Labor Board*, 115 LAB. REL. REP. (BNA) 186 (Mar. 5, 1984) [hereinafter cited as *Case Backlog*]; 115 LAB. REL. REP. (BNA) 163 (Feb. 27, 1984); Irving, *The Crises At The NLRB: A Call For Reordering Priorities*, 7 EMP. REL. L.J. 47 (1981).

9. In addition to the congressional criticism of the NLRB case backlog, see *supra* notes 7 & 8, there has been notorious, highly publicized internal criticism among the Board members. Member Zimmerman was highly critical of the Board's lack of the collegiality throughout 1984, the final year of his term. *Interview With Retiring NLRB Member*, 117 LAB. REL. REP. (BNA) 326 (Dec. 24, 1984). For an overview of the internal controversy at the Board, see Middleton, *NLRB: An Agency In Turmoil*, Nat'l L.J. 1 (July 2, 1984); Wall St. J., June 28, 1984, at 29, col. 3. See also Walther, *Suggestions and Comments on the Future Direction of the NLRB*, 34 LAB. L.J. 215, 228 (1983); *Letter-Writing Contest Over NLRB Case Backlog*, 117 LAB. REL. REP. (BNA) 289 (Dec. 10, 1984); Keller, *Infighting at Labor Board is Reported*, N.Y. Times, July 11, 1984, at A21, col. 4.
10. For a compendium of early references to employer opposition to the Board and to the NLRA at the outset, see Gellhorn & Linfield, *Politics and Labor Relations: A*

practices were not made part of the Act until the 1947 Taft-Hartley amendments, in partial response to incessant employer criticisms. Eisenhower was the first Republican president to appoint NLRB members, and labor was quickly outraged with Eisenhower Board reversals of precedent set by prior Democratic Boards.¹¹ Criticism of the Board has been most pronounced by the party outside the White House. Predictably, employer advocates railed against the Democratic Boards of Kennedy, Johnson, and Carter.¹² In turn, labor criticized the Republi-

Appraisal of Criticisms of NLRB Procedure, 39 COLUM. L. REV. 339 (1939). See also H. MILLIS & E. BROWN, *FROM THE WAGNER ACT TO TAFT HARTLEY* (1950); Booker & Coe, *An Analysis of the Objectivity of the Criticisms of the National Labor Relations Board*, 6 AM. BUS. L.J. 535 (1968); Booker & Coe, *The NLRB and its Critics*, 17 LAB. L.J. 522 (1966) [hereinafter cited as Booker & Coe, *Critics*]; A STUDY OF NATIONAL LABOR POLICY AND LABOR RELATIONS 281-85 (1950).

Perhaps the classic popular article criticising the NLRB as the tool of labor was, and remains, *The G - D - Labor Board*, 18 FORTUNE 52 (Oct. 1938). See also Green, *Labor Board vs. Labor Act*, 19 FORTUNE 97 (Feb. 1939). Significantly, William Green was president of the AFL when he repeatedly castigated the "radical minded if not communistic" Board as favoring industrial unions (CIO) and destroying the AFL craft unions. The AFL and CIO were then openly antagonistic, and were diametrically opposed to their ultimately successful merger.

In 1940, a special committee of the House concluded that some Board members had "radical tendencies" and "pronounced pro-C.I.O. sympathies." HOUSE SPECIAL COMMITTEE TO INVESTIGATE THE NAT'L LAB. REL. BD., FINAL REPORT, NO. 3109, PART I, 76th Cong., 3d Sess. 149 (1940).

For a balanced response to the critics of the NLRB, regardless of political stripe, see Dunau, *The Role of Criticism In The Work of The National Labor Relations Board*, 16 N.Y.U. CONF. ON LABOR 205 (1963). Some studies indicate that general economic conditions, rather than the political philosophy of the Board members, are more determinative of Board decisions. See, e.g., Booker & Trafford, *Environment and NLRB Bias*, 17 LAB. L.J. 202 (1966); Booker & Trafford, *The Predictability of NLRB Decisions*, 16 LAB. L.J. 423 (1965).

11. Briner, *Member Murdock Dissenting*, 7 LAB. L.J. 83 (1956); Cohen, *The NLRB and Its Customers*, 6 LAB. L.J. 109 (1955); Rather, *The Quasi-Judicial NLRB Revisited*, 12 LAB. L.J. 685 (1961); Rather, *Policy-Making by the New "Quasi-Judicial" NLRB*, 23 U. CHI. L. REV. 12 (1955); Rather, *Recent Changes In National Labor Relations Board Policies*, 8 N.Y.U. CONF. ON LABOR 143 (1955); Seligson, *The National Labor Relations Board: A Proposal*, 6 LAB. L. J. 105 (1955). For a more balanced view of the Eisenhower Board, see Note, *The NLRB Under Republican Administration: Recent Trends and Their Political Implications*, 55 COLUM. L. REV. 852 (1955).
12. Browne, *The National Labor Relations Board: Labor Law Rewritten*, 49 A.B.A. J. 64 (1963); Christensen, *The "New" NLRB: An Analysis of Current Policy*, 15 N.Y.U. CONF. ON LABOR 213 (1962); Petro, *Expertise, The NLRB, and The Constitution: Things Abused and Things Forgotten*, 14 WAYNE L. REV. 1126, 1146, 1151 (1968) ("The Board seems to want every employee in the nation to wear a union label . . . President Kennedy had a blatantly pro-union majority within a year or so of his accession."); Phillips, *Resolved: That the NLRB Be Replaced*, 20 LAB. L.J. 631 (1969); Van de Water, *The NLRB . . . New Directions*, 12 STETSON L. REV. 297 (1983); Walther, *supra* note 9, at 215. Cf. Murphy, *The National Labor Relations Board - An Appraisal*, 52 MINN. L. REV. 819, 944 (1968) ("Certainly the Board is not pro-union in any invidious or opprobrious sense . . . [T]he Board

can Boards of Nixon and Ford.¹³ Perhaps never before has organized labor's criticism of the NLRB been so pronounced as it is of the Reagan Board.¹⁴ Past periodic cries for structural, institutional reform of

may fairly be said to be pro-union."'). See also the summary of criticisms in Booker & Coe, *Critics*, *supra* note 10.

13. The Nixon-Ford Board did not significantly raise the ire of labor commentators, especially relative to the controversies that routinely followed changes in Board personnel and policy from other presidential administrations. The Board took a relatively restrained, cautious stance during this period. Miller, *Administrative Decision-Making - Mortal or Immortal?*, 25 HASTINGS L.J. 1131 (1974). See also Beard & Player, *Whither The Nixon Board?*, 7 GA. L. REV. 607 (1973); Isaacson, *The Discernible Trends in the "Miller" Board - Practical Considerations for the Labor Counsel*, 23 LAB. L.J. 531 (1972).
14. AFL-CIO President Lane Kirkland castigated the Reagan Board as "anti-labor ideologues," and as advocates of "the most narrow, retrograde employer interests. . . ." *Criticizing Labor Department*, 115 LAB. REL. REP. (BNA) 195 (Mar. 5, 1984). In addition, the AFL-CIO Executive Council categorized the Reagan Board's policy as one of "malevolence" toward labor. *AFL-CIO Views on NLRB Actions*, 116 LAB. REL. REP. (BNA) 46 (May 21, 1984).

In three days of hearings before the Labor Advisory Committee of the Republican National Committee, several union advocates sharply criticized NLRB decisions and the labor policies of the Reagan administration. Thomas Gleason, president of the Longshoremen's Union, said "the pendulum in Labor Board decisions has swung so rapidly and erratically over the recent past that volumes of Board precedents no longer can be relied upon by unions or employers and their legal counsel." *Criticizing NLRB at Republican Hearings*, 116 LAB. REL. REP. (BNA) 189, 190 (July 9, 1984). See also *Debating Merits of Current NLRB Decisions*, 118 LAB. REL. REP. (BNA) (Apr. 15, 1985) (SMU law professor Charles Morris charged the NLRB with reinterpreting the Act to infringe on specific congressional objectives); *Impact On NLRB of Chairman Dotson*, 117 LAB. REL. REP. (BNA) 164 (Oct. 29, 1984); *Unions' Opposition to St. Francis Decision*, 117 LAB. REL. REP. (BNA) 131 (Oct. 15, 1984); *Challenging Impartiality of NLRB*, 115 LAB. REL. REP. (BNA) 179 (July 2, 1984). See generally Vehar, *Labor Law Reform: Do Labor Organizations Have Equal Access to the System?*, 62 DENVER U. L. REV. 572 (1985).

On related fronts, organized labor has opposed most of the Reagan administration's nominees to the Board. For example, the Teamsters Union led demands on the White House to fire Donald Dotson as Chair of the NLRB. Wall St. J., May 22, 1984, at 1, col. 5. Labor had initially opposed the appointment of Dotson to the Board. Wall St. J., Feb. 2, 1983, at 3, col. 4. Before the Senate's surprising confirmation of Rosemary Collyer as the NLRB General Counsel by voice vote on April 4, 1985, her nomination had been bitterly opposed by organized labor. See *Approval of Collyer as NLRB General Counsel*, 118 LAB. REL. REP. (BNA) 287 (Apr. 15, 1985). See also *ALF-CIO Opposition to Collyer Nomination*, 116 LAB. REL. REP. (BNA) 30 (May 14, 1984) (AFL-CIO President Lane Kirkland said that Collyer had "no visible qualifications in the field of labor law" and that her appointment is another example of the Reagan administration's "contempt for the rights and concerns of working people." Organized labor also took a skeptical preliminary view regarding the Reagan nomination of management attorney Marshall Babson to the NLRB. See *Nominations for Two NLRB Vacancies*, 118 LAB. REL. REP. (BNA) 201 (Mar. 18, 1985).

But the Reagan Board has also been strongly defended. Former NLRB General Counsel William Lubbers, a Democrat appointed by President Carter, cautioned restraint in the vitriolic, partisan criticism of the Reagan Board. While

the Board are resurfacing. Advocacy of rulemaking rather than the Board's historic use of adjudication to formulate or to change policy is particularly resurgent.¹⁵ Radical cries have even been issued for the abolition of the NLRA.¹⁶

labor law reform legislation seems inevitable, mitigating the "flamboyant and extreme" "vehemence, emotion, and rhetoric" of the criticisms would enable a more well-reasoned, constructive evaluation. *Cool Rhetoric; Bitter NLRB Debate*, 115 LAB. REL. REP. (BNA) (Mar. 12, 1984). See also *Debating Merits of Current NLRB Decisions*, 118 LAB. REL. REP. (BNA) 281 (Apr. 15, 1985) (Management A. John Harper, II maintains that the Reagan Board decisions have restored Board credibility in the courts of appeals); *Defense of Board by Chairman Dotson*, 119 LAB. REL. REP. (BNA) 69 (May 27, 1985) (Dotson "laments that some of his critics belong to the 'chicken little school of social analysis' - those who foresee the death of collective bargaining, the collapse of the National Labor Relations Act, and the return 'to the law of the jungle.'"); *Defense of Board Decisions and Nominations*, 118 LAB. REL. REP. (BNA) 266 (Apr. 8, 1985); *Defense of NLRB's Performance*, 116 LAB. REL. REP. (BNA) 103 (June 11, 1984); *Defense of NLRB Rulings*, 116 LAB. REL. REP. (BNA) 3 (May 7, 1984); (NLRB member Dennis, appointed by President Reagan in 1983, characterized significant Reagan Board decisions as a "return to 'normalcy' rather than a curtailment of the rights of unions and individual employees."); *NLRB's Dotson on First Year*, 115 LAB. REL. REP. (BNA) 163 (Feb. 27, 1984) (NLRB Chair Dotson responded to labor criticisms of Reagan Board decisions by asserting that the 1984 case backlog will dissipate with the issuance of several long-awaited, and highly controversial, lead cases by the Board).

See also *Rulemaking as Aid in NLRB Policy Reversals*, 116 LAB. REL. REP. (BNA) 142, 144 (June 25, 1984). Former NLRB General Counsel Peter Nash defended recent controversial decisions of the Reagan Board as self-correcting the badly pro-labor excesses of the Carter Board. Nash stated that "the 'fervor' over the Board's recent policy reversals is the 'result of a larger political agenda' on the part of labor advocates. 'There has not been a substantial reversal of Board doctrine if you read and analyze the decisions.'"

15. See *supra* notes 2 & 3.

16. See REYNOLDS, POWER AND PRIVILEGE (1984); Epstein, *Abolish the Board, Deregulate Unions*, N.Y. Times, July 21, 1985, at F2, col. 3; Epstein, *A Common Law for Labor Relations: A Critique of the New Deal Labor Legislation*, 92 YALE L. J. 1257 (1983) (The NLRA "is in large measure a mistake that, if possible, should be scrapped in favor of the adoption of a sensible common law regime relying heavily upon tort and contract law."); Mikva, *Hard Times for Labor*, 7 INDUS. REL. L.J. 345 (1985); Petro, *On Amending The Taft-Hartley Act*, 4 LAB. L.J. 67, 156 (1953); Petro, *Expertise, The NLRB and The Constitution: Things Abused and Things Forgotten*, 14 WAYNE L. REV. 1126, (1968); Seligson, *The NLRB: A Proposal*, 6 LAB. L.J. 103 (1955) ("[T]he flow of events in the past 20 years has minimized the importance of the Board to the extent that serious consideration should be given to its abolition."); Tost & Apar, *AFL-CIO Chief Calls Labor Laws a "Dead Letter"*, Wall St. J., Aug. 16, 1984, at 8, col. 4 (Lane Kirkland stated labor may be better off if the NLRA were repealed); *Pacific Coast Labor Law Conference*, 119 LAB. REL. REP. (BNA) 47, 48 (May 20, 1985) (James Herman, president of the International Longshoremen's Union, urged unions to avoid resort to the NLRB). See also Vehar, *supra* note 14:

[When asked whether] we ought to return to the law of the jungle, through a repeal of the Act . . . our answer is that we are living under the law of the jungle right now, except that unions are living in a cage and the employers are well armed The time has come for us to

The better course is to stabilize labor law without entirely depoliticizing the positive political responsiveness of the Board. This can be accomplished by refining and implementing several decade-old proposals for the creation of a federal labor court of appeals.

This Article will analyze the most significant proposals for internal and external reforms of the NLRB and of NLRA administration. Initially, it will review current reform proposals for NLRB rulemaking rather than adjudication. Despite its facial appeal, NLRB rulemaking is not generally feasible. Adjudication should continue to be the Board instrument for effecting policy determinations and changes. After reviewing earlier proposals calling for the creation of a labor court, a refined proposal regarding a federal labor court of appeals will be proffered. It is politically capable of implementation and it is more modest in scope than prior reforms.

question whether the National Labor Relations Act . . . has become an albatross on the labor movement.

Id. at 571 n.3 (statements of Robert Pleasure, Associate General Counsel for the Carpenters Union and of Richard Trumka, President of the United Mine Workers, June, 1984, to the House Labor-Management Rel. Subcomm.).

However, there have been forceful responses. *See, e.g.,* Apar, *Kirkland's Call to Void Labor Law Ignites a Growing National Debate*, Wall St. J., Nov. 16, 1984, at 33, col. 3; *Discussion of NLRB Policies at New York Bar Association*, 119 LAB. REL. REP. (BNA) 71 (May 27, 1985) (Samuel Kaynard, regional director of the NLRB in Brooklyn, New York, said the NLRA has worked well for 50 years and "the absence of either the Act or the Board would serve no purpose."); *Pacific Coast Labor Law Conference*, 119 LAB. REL. REP. (BNA) 47 (May 20, 1985) (Arthur Goldberg, general counsel of the Textile Workers Union, said deregulating labor law and repealing the Act is unwarranted, would leave employees and unions unprotected and operating under a regime of employer-imposed rules).

See also Bartosic, *Labor Law Reform - The NLRB and A Labor Court*, 4 GA. L. REV. 647 (1970) (Dean Bartosic called these radical abolitionists "Bourbons . . . who use the Board as a whipping boy when their actual purpose is to attack ruthlessly the institution of collective bargaining."); Getman & Kohler, *The Common Law, Labor Law, and Reality: A Response to Professor Epstein*, 92 YALE L.J. 1415, 1416 (1983) ("Professor Epstein reiterates many of the same propositions, syllogisms, and rationalizations of those who opposed the enactment of the NLRA and the Norris-LaGuardia Act in the first place."); Estreicher, *Workers Still Need Labor Law's Shield*, N.Y. Times, July 21, 1985, at F2, col. 3; Gould, *Mistaken Opposition to the NLRB*, N.Y. Times, June 20, 1985 at A27, col. 2, ("Lane Kirkland, President of the A.F.L.-C.I.O., is toying with a misguided proposal by advocating the repeal of the National Labor Relations Act. . . . Labor is in no position to discard the protections under the Act and to return to bare-fisted scuffles with management. The law, for the most part, has served labor well, and union leadership should work to strengthen it, not abolish it. . . . Repeal of the act on its 50th anniversary would sacrifice the benefits of law without eliminating its burdens."); Irving, *Do We Need A Labor Board?*, 30 LAB. L.J. 387 (1979); Jenkins, *What is the National Labor Relations Board?*, 12 U. FLA. L. REV. 354, 355 (1959) (the NLRB "or a similar institution is absolutely essential to the proper functioning of an industrial democracy."); Rather, *The Quasi-Judicial NLRB Revisited*, *supra* note 11, at 686 ("Under the guise of attacking the Board as one-sided and biased, what they were really attacking was the statutory scheme itself.").

Under this proposal, the NLRB will not be substantively or administratively altered in any significant way. The Board would be stabilized but would not be completely depoliticized. The single federal labor court of appeals, rather than the present twelve circuits, would hear all appeals from NLRB decisions. This will coordinate and centralize NLRA jurisprudence, and end balkanization among the circuits. The federal labor court of appeals would also coordinate NLRB jurisprudence, and would provide the NLRB, labor, and employers with a reasonable and predictable barometer of federal judicial attitudes and prospects of enforcement for NLRB orders. The single labor appellate court would concentrate judicial expertise.

At least initially, the court would focus exclusively on appeals from NLRB decisions. The court's labor expertise would not be diluted by a panoply of other substantive legal subjects on crowded dockets. The case loads of the other circuit courts would be at least marginally reduced. These would be ancillary, but significant, advantages of a single federal labor appellate court. With one federal appellate court hearing all appeals taken from NLRB decisions, the number of labor cases proceeding to the Supreme Court would also be reduced. Conflict among the various circuits regarding NLRB decisions and NLRA law would be eliminated, and with it one of the causes for the granting of certiorari by the Supreme Court. The federal labor court of appeals would effectively become the final court for most significant NLRB labor decisions. Over time, conflicts among different panels of the labor court could be internally resolved.

The first judicial appointments to the new labor court would have to be engineered politically between the opposition party Senate leadership and the appointing President prior to the actual appointments and as the necessary implicit condition to passage of the enabling legislation. The Bankruptcy Amendment and Federal Judgeship Act of 1984 offers a recent schematic for a realistic political compromise for judicial appointments. A delicate political deal must first be arranged to insure appointments of primarily centrist compromise candidates to the labor court. Given the rigid ideological tests applied to judicial candidates by the Reagan Administration, this would be difficult, but not impossible to arrange. The NLRB and evolution of NLRA law could eventually achieve a moderate balance. Board politics would be tempered by the labor court's appellate jurisprudence but, prudently, not eliminated.

While still remaining politically responsive, the NLRB would avoid radical and contradictory fluctuations in its decisions. The coordination and integration effected by a centrist, moderate federal labor court of appeals and a still politically responsive but jurisprudentially stabilized NLRB will significantly strengthen prospects for achieving coherent labor law jurisprudence. The unpalatable alternative is in-

creasing cynicism and disregard for the NLRB and the Act and for meaningful labor law administration, practice, and theory.

II. THE RULEMAKING VS. ADJUDICATION DEBATE: THE MERITS OF CONTINUED NLRB ADJUDICATION AS THE PREFERRED LABOR POLICY INSTRUMENT

Adjudication,¹⁷ rather than rulemaking,¹⁸ has been the Board's most important and virtually exclusive policy and law making instrument.¹⁹ The Administrative Procedure Act (APA)²⁰ provides that an

17. "Adjudication" is defined in the APA as an "agency process for the formulation of an order." 5 U.S.C. § 551(7) (1982). In turn, an "order" is "the whole or part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rulemaking but including licensing." *Id.* at § 551(6). Adjudication by the NLRB takes place in the context of an adversary hearing between immediate parties to an actual case or controversy. There is the standard notice, pleadings and answers to the charges, hearing, briefing, and decision. When Board determines or changes broad policy through adjudication, it transforms the former process, in a convoluted way, into the ultimate functional equivalent of rulemaking. Adjudication can sweep as broadly as rulemaking. Estreicher, *Rulemaking as Aid in NLRB Policy Reversals*, 116 LAB. REL. REP. (BNA) 142, 144 (June 25, 1984) ("Much of what the Board presently does is, functionally, rulemaking in adjudicative clothing."). For an early discussion of the rulemaking and adjudication terminology, see generally Ginnane, "Rule Making", "Adjudication" and Exemptions Under the Administrative Procedure Act, 95 U. PA. L. REV. 621 (1947).

18. The APA defines "rulemaking" in tautological fashion as an "agency process for formulating, amending or repealing a rule." 5 U.S.C. § 551(6) (1982). A "rule" is defined as "the whole or part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy." *Id.* at § 551(4).

The APA provides for two types of rulemaking. Informal rulemaking provides for prior notice and an opportunity for interested persons to submit written positions and data. There need be no opportunity afforded for oral testimony. Formal rulemaking is quite analogous to adjudication, with adversarial hearings. Formal rulemaking is mandated when "rules are required by statute to be made on the record after opportunity for an agency hearing." *Id.* at §§ 553(c), 556-57. See *United States v. Florida E. Coast Ry. Co.*, 410 U.S. 224 (1973); *United States v. Allegheny-Ludlum Steel Corp.*, 406 U.S. 742 (1972). Rulemaking has been described as "the issuance of regulations or the making of determinations which are addressed to indicated but un-named and unspecified persons or situations. . . ." Fuchs, *Procedure in Administrative Rule-Making*, 52 HARV. L. REV. 259, 265 (1938). Administrative agency rulemaking is the equivalent of agency legislation. In *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210, 226 (1908), the Court distinguished adjudication and legislation:

A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. . . . Legislation on the other hand looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power.

19. Note, *Administrative Lawmaking Through Adjudication: The National Labor Relations Board*, 45 MINN. L. REV. 609, 641 (1961).

administrative agency utilize rulemaking and adjudication as its primary instruments.²¹

Traditionally, the NLRB has utilized case adjudication, rather than rulemaking, to make law and policy changes.²² Despite express statutory rulemaking ability conferred upon the Board by the NLRA,²³ the Board has resorted to rulemaking on only a few occasions in its history.²⁴ Nevertheless, critics dissatisfied with the political choices evident through NLRB adjudication have periodically advocated administrative rulemaking as the more reasoned, informed process to formulate and to change NLRB precedent and policy.²⁵ Prestigious

20. 5 U.S.C. §§ 551-76 (1982).

21. The abstract definitions of "rule," "rulemaking," and "adjudication" set forth in the APA are counterproductive to understanding how these agency law and policy making processed actually operate. Bernstein, *The NLRB's Adjudication - Rulemaking Dilemma Under the Administrative Procedure Act*, 79 YALE L.J. 571, 610-20 (1970).

22. Note, *supra* note 19.

23. Section 6 of the NLRA provides that: "The Board shall have authority from time to time to make, amend, and rescind, in the manner prescribed by [the Administrative Procedures Act], such rules and regulations as may be necessary to carry out the provisions of this Act." 29 U.S.C. § 156 (1982).

24. Menard & DiGiovanni, *NLRB Jurisdiction Over Colleges and Universities: A Plea for Rulemaking*, 16 WM. & MARY L. REV. 599, 614 (1975).

25. Berger, *Retroactive Administrative Decisions*, 115 U. PA. L. REV. 371 (1967); Bierman, *Judge Posner and the NLRB: Implications for Labor Law Reform*, 69 MINN. L. REV. 881 (1985); Bernstein, *supra* note 20; Chesrow, *NLRB Policy Making: The Rulemaking - Adjudication Dilemma Revisited in NLRB v. Bell Aerospace Co.*, 29 U. MIAMI L. REV. 559 (1975); Bierman, *Reflections on the Problem of Labor Board Instability*, 62 DENV. U. L. REV. 551 (1985); Estreicher, *supra* note 4, at 10-1; Fuchs, *Agency Developments of Policy Through Rulemaking*, 59 NW. U.L. REV. 781 (1965); Gomberg & Samoff, *Improving Administrative Effectiveness of the NLRB*, 24 LAB. L.J. 201 (1973); Kahn, *The NLRB and Higher Education: The Failure of Policymaking Through Adjudication*, 21 UCLA L. REV. 63 (1973); Katz & Jaffe, *Doff The Black Robes!*, 3 LAB. L.J. 743 (1952); Menard & DiGiovanni, *supra* note 23; Peck, *A Critique of the National Labor Relations Board's Performance in Policy Formulation: Adjudication and Rule-Making*, 117 U. PA. L. REV. 254 (1968) [hereinafter cited as Peck, *A Critique of the NLRB*]; Peck, *The Atrophied Rule-Making Powers of the National Labor Relations Board*, 70 YALE L.J. 729 (1961) [hereinafter cited as Peck, *Atrophied Rule-Making*]; Samoff, *What Lies Ahead for the NLRB?*, 25 LAB. L.J. 408, 414 (1974); Samoff, *Coping with the NLRB's Growing Caseload*, 22 LAB. L.J. 739 (1971); Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 HARV. L. REV. 921 (1965); Silverman, *The Case for the National Labor Relations Board's Use of Rulemaking in Asserting Jurisdiction*, 35 LAB. L.J. 607 (1974); Summers, *Politics, Policymaking and the NLRB*, 6 SYRACUSE L. REV. 93, 105-106 (1954); Note, *Rule-Making and Adjudication in Administrative Policy-Making: NLRB v. Wyman-Gordon Co.*, 11 B.C.L. REV. 64 (1969) [hereinafter cited as Note, *Administrative Policy-Making*]. For articles favoring adjudication, see Note, *supra* note 19, at 656; Note, *NLRB Rulemaking: Policy Reality Versus Procedural Fairness*, 89 YALE L.J. 982 (1980) [hereinafter cited as Note, *NLRB Rulemaking*].

Bar committees,²⁶ scholars,²⁷ congressional panels,²⁸ Board members,²⁹ and unsuccessful labor law reform legislation³⁰ have all periodically supported efforts to persuade the Board to utilize the rulemaking process and to forego Board adjudication.

The contention is that rulemaking insures more careful agency deliberation. There is also opportunity for more informed input into the agency's decision process from a much broader spectrum of potentially affected persons.³¹ In rulemaking, the agency more closely resembles a legislature than a court.

In the typical rulemaking, after notice of proposed rulemaking is published in the Federal Register,³² all interested persons are invited to supply information to the agency.³³ Tentative rules are then formulated and published,³⁴ and the agency invites further comment by interested persons prior to deliberation and promulgation of final, formal rules.³⁵ Absent compelling extenuating circumstances, there is a further thirty day period following publication of the rules in the Fed-

26. In 1958, the American Bar Association Labor Law Section recommended to the NLRB that it bring several important decisional policies within the rulemaking requirements of the Administrative Procedure Act. 1958 ABA COMM. ON NLRB PRACTICE AND PROCEDURE, PROCEEDINGS 116, 121; 42 LAB. REL. REP. (BNA) 482, 513 (1958).

27. See *supra* notes 2 & 25.

28. See *Hearings on Congressional Oversight of Independent Administrative Agencies Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 90th Cong., 2d Sess. 916-918 (1968); BACKLOG, *supra* note 7.

29. See *supra* note 3.

30. The Labor Reform Act of 1977, H.R. 8410, 95th Cong., 1st Sess. (reprinted in 123 CONG. REC. 23,720 (1977)), would have provided for NLRB rulemaking regarding bargaining unit determinations, voter eligibility, and organizer access to employer property. The legislation was passed by the House, but was defeated by Senate filibuster.

31. Menard & DiGiovanni, *supra* note 24, at 616; Peck, *Atrophied Rule-Making*, *supra* note 25, at 757 ("[A]n agency which views as its role the formulation of policy solely upon an *ad hoc* basis may neglect entirely to seek the advice and comments of other interested parties in making a decision of momentous importance . . . the NLRB's rule or policy formulating procedures have suffered from a lack of public participation, the value of which even the Board has recently recognized.").

32. The notice shall include:

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or the substance of the proposed rule or a description of the subjects and issues involved.

5 U.S.C. § 553(b) (1982).

33. *Id.*

34. *Id.* at § 552(b).

35. *Id.* at §§ 552-53. The APA does not require an adversarial hearing, nor is the agency compelled to receive oral testimony in informal rulemaking. As long as the agency affords interested persons an opportunity "to participate in the rule-

eral Register until they become finally effective.³⁶ Failure to comply with these general rulemaking structures of the APA can result in the invalidation of the promulgated rule.³⁷ Proponents of rulemaking consequently maintain that the Board would not be able to make cavalier, precipitous changes in NLRB legal precedent and in policy, as has sometimes occurred in case adjudication.³⁸

Proponents also argue that rulemaking would be a more stable

making through submission of written data, views, or arguments," the APA is satisfied.

36. *Id.* at §553(d).

37. The APA requires the reviewing court to "hold unlawful and set aside agency action, findings, and conclusions [which are] . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.* at §706(2)(A). For discussion of the various positions of the courts, see Peck, *Atrophied Rule-Making*, *supra* note 25, at 754-55.

38. The most recent, aggravated example of repeated reversal of prior case precedent by the Board involves factual misrepresentations during election campaigns. See *Midland Ins. Co.*, 263 N.L.R.B. 127 (1982), *overruling* *General Knit of Cal.*, 239 N.L.R.B. 1311 (1977), *overruling* *Shopping Kart Food Market, Inc.*, 228 N.L.R.B. 1311 (1977), *overruling* *Hollywood Ceramics Company, Inc.*, 140 N.L.R.B. 221 (1962). For representative scholarly commentary on *Midland Insurance*, see Comment, *A Look at the Revolving NLRB Policies Governing Union Representation Election Campaigns*, 19 WAKE FOREST L. REV. 417 (1983). These paroxysms of Board policy reversals were excoriated by Judge Posner of the Seventh Circuit:

[T]he parties [were] unaware of the extent of the Board's fickleness. . . . [T]he Board announced in a footnote that the new rule would apply to all pending cases. . . . [B]y twice during this proceeding changing its mind as to the applicable standard the Board has put Mosey [the employer] through the hoops, subjecting it to protracted legal expense and uncertainty . . . [due to] the Board's inability to decide what standard to use in policing elections — it has changed its collective mind three times in the last five and a half years. . . .

Mosey Mfg. Co. v. NLRB, 701 F.2d 610, 612-13 (7th Cir. 1983). Judge Posner's vitriolic criticism of the Board's repeated reversals of its own precedent highlights perfectly Professor Estreicher's observation that "courts are reluctant to pay little more than lip service to the doctrine of deference to agency policymaking — sustaining the Board only if they agree with the agency's policy judgment, denying enforcement when policy preferences diverge — when the agency appears to take so cavalier a view of its own established rules." Estreicher, *supra* note 17, at 143.

Other recent pointed criticisms of the NLRB by the circuit courts of appeals have occurred in the District of Columbia and in the Third Circuit. In *Yellow Taxi Co. of Minneapolis v. NLRB*, 721 F.2d 366, 383 n.39 (D.C. Cir. 1983), the court criticized the Board's "illogical and cryptic conclusions." The Third Circuit recently stated that "Supreme Court precedent, Board precedent and common sense all militate against the Board's decision . . . which borders on the whimsical." *New Jersey Bell Telephone*, 720 F.2d 789, 792 (3rd Cir. 1983). NLRB Chair Dotson has indicated that the Board may now finally render decisions consonant with the courts of appeals. Where the circuits have "squarely rejected" NLRB decisions, the Board will now conform and back away from its previous "sometimes outright defiance of court decisions, with which they have become impatient. . . . It makes no sense for the NLRB to thumb its nose at the courts." *Case Backlog*, *supra* note 8, at 188. See also Zimmerman & Dunn, *Relations Between*

guide to labor and management.³⁹ Adjudication allegedly has the serious structural weakness of being far more vulnerable to frantic, diametrically opposed, ill-reasoned reversals in policy based on an isolated case, without the benefit of prior consultation with employers and unions.⁴⁰ In a few sentences in a single case,⁴¹ adjudication allows the Board to undo precedent that may have been carefully developed for several years.⁴² Rulemaking usually operates only prospectively, while adjudication can have retroactive effect.⁴³ Retroactive policy changes can burden the parties in the immediate adjudication. They may have relied in good faith upon prior established NLRB law, only to have it reversed unexpectedly.⁴⁴ Adjudication is more likely to prove deleterious to the process-oriented, gradual evolution in the law and in policy that is fostered by more deliberate rulemaking.⁴⁵ Well-

the NLRB and the Courts of Appeals: A Tale of Acrimony and Accommodation, 8 EMP. REL. L.J. 4 (1982).

39. Peck, *Atrophied Rule-Making*, *supra* note 25, at 759 ("Formalized rules, of course, provide more definite guides to conduct."); Peck, *A Critique of the NLRA*, *supra* note 25, at 272. Of course, the purported advantages of the greater stability and certainty of rulemaking "assume[s] that the Board will utilize the rulemaking procedure effectively. If the Board holds a rulemaking hearing, for example, but does not carefully study the views of those who contribute them, the advantage of a variety of viewpoints is nullified." Bernstein, *supra* note 21, at 593.
40. Professor Estreicher has stated that: "[P]ublic participation in Board policy would reduce . . . the 'ivory tower syndrome'. . . . The rulemaking format forces a dialogue between agency and public. . . ." Estreicher, *supra* note 17, at 143. *Cf.* Note, *supra* note 19, at 637 ("Although statements have been made to the effect that administrative agencies are not bound by the principle of stare decisis to the same extent as the courts, an examination of actual practice, especially in the National Labor Relations Board, has revealed a strong tendency to follow prior holdings and such holdings themselves have been phrased so as to command future application.")
41. One commentator has cited an example of the Board effecting "an important change of policy, [regarding § 8b7 picketing] totally irrelevant to the case being decided," via footnote. Peck, *A Critique of the NLRB*, *supra* note 25, at 256.
42. *See supra* note 37. *But see* Note *NLRB Rulemaking*, *supra* note 25, at 995. The Board's ability to change policy in a few sentences in a single case has also been regarded as an advantage: "adjudication permits major policy changes to be made with little or no explanation." *Id.*
43. Peck, *A Critique of the NLRB*, *supra* note 25, at 273, ("One of the most serious adverse effects of using the adjudicatory process for policy formulation is, of course, the retroactive effect upon parties who legitimately relied upon the former rules."); Chesrow, *supra* note 25, at 572. *Cf.* SEC v. *Chenery Corp.*, 332 U.S. 194 (1947). Sometimes the retroactive effect of adjudication is justified, according to the Court in *Chenery*, because "the mischief of producing a result which is contrary to a statutory design or to legal or equitable principles . . . [is] greater than the ill effect of the retroactive application of a new standard." *Id.* at 203.

The Board recently acknowledged the difficulties posed for the parties by the retroactive effect of new rules articulated via NLRB adjudication. *Our Way, Inc.*, 115 L.R.R.M. (BNA) 1009 (1983). *See also supra* note 38.

44. Chesrow, *supra* note 25, at 572. *See also supra* note 38.
45. *See supra* note 38.

reasoned policy is contingent upon prior careful consideration of a wide congeries of variables that usually cannot be fully assessed in the more ad hoc adjudicatory forum. Adjudication may fail to consider the many possible ramifications of initially narrow single interest issues that ultimately transcend the immediate controversy.⁴⁶ Many of these criticisms of adjudication are certainly well founded. However, on balance, even expedited⁴⁷ rulemaking does not offer sufficiently greater advantages to warrant displacement of continued Board adjudication.

A. NLRB Adjudication and the Politics of Labor Law

While rulemaking has certain legitimate administrative advantages, it is premised on theories that do not fully apply in labor law. Rulemaking does not adequately comport with the reality of purposely politicized administrative agencies. This is especially true in the case of the NLRB.⁴⁸ Rulemaking would unwisely depoliticize the NLRB.⁴⁹ The Board would be vitiated rather than stabilized. The Board was consciously designed from its inception as a politically responsive agency.⁵⁰ By providing for Presidential appointment of the five Board members to staggered terms, Congress intended the Board to reflect, at least indirectly, the labor relations philosophy of the ap-

46. K. DAVIS, ADMINISTRATIVE LAW § 6.03, at 142 (1972); Menard & DiGiovanni, *supra* note 24, at 616.

47. Section 6 of the NLRA would require only informal "notice and comment" rulemaking, since it did not mandate "on the record" formal rulemaking. 5 U.S.C. § 553(c) (1982).

48. See, e.g., Peck, *Atrophied Rule-Making*, *supra* note 25:

Very few persons active or interested in the labor area are likely to have been misled by the absence of rules in the Code of Federal Regulations. Complications of substantive law are necessarily so complex that the desire for a simple code intelligible to the untrained layman must be abandoned as unrealistic.

Id. at 760.

49. *Id.* at 760. Note, *NLRB Rulemaking*, *supra* note 25, at 986 "[P]roponents of NLRB rulemaking argue that rulemaking serves as a political check on agency power.").

50. Even some proponents of rulemaking recognize the positive attributes of the inherently political nature of the NLRB. See, e.g., Estreicher, *supra*, note 17:

Congress intended the Board to engage in 'experimental decision making' to fill in the gaps in the statutory scheme when it passed the Act. 'This freedom was thought desirable because the legislators could not agree on important aspects of the scheme . . . and therefore had to delegate a significant policymaking role to the agency' . . . Congress wanted the Board to be able to experiment with its policies, to see how they work in the 'real world', and then refine or abandon the rule in light of actual experience.

Id. at 143.

pointing President.⁵¹ Presidential appointment is the primary instrument for guaranteeing the Board's political responsiveness.⁵² Ultimately, the Board appointees usually continue to reflect the labor law philosophy of the appointing President.⁵³ It has, for example,

51. Section 3(a) of the NLRA, as amended by the Taft-Hartley Act (LMRA) provides:

[T]he Board shall consist of five . . . members, appointed by the President by and with the consent of the Senate . . . for terms of five years each The President shall designate one member to serve as Chairman of the Board. Any member of the Board may be removed by the President, upon notice and hearing, for neglect of duty or malfeasance in office, but for no other cause.

- 29 U.S.C. § 153(a) (1982).

For a particularly cogent synopsis of how and why the NLRB is meant to be responsive to majoritarian political preferences, see Bernstein, *supra* note 21, at 575 n.10:

The unavoidable periodic selection of a President enables new majorities (coalitions of minorities) to obtain political power which carries the authority to make appointments to agencies. These new appointees reflect the most recent political alignment and, by new policy decisions, ameliorate the rigors of existing legislation. Of course, it can be argued that the electorate does not vote on transportation, labor, or dozens of other policies when it chooses a President. But in a general way it does. The interest groups usually know the stakes and support those candidates who are believed well disposed to their interests. The electorate at large knows the general orientation of the major parties and the presidential candidates, probably more clearly in the area of labor relations than in most. Hence, they vote for policy changes, albeit within limits set by existing statutes (which may afford considerable latitude). Thus viewed, the policy shifts of newly-constituted majorities are democratic means of preventing long-dead majorities from ruling from the grave.

To a large extent, all administrative agencies whose members are subject to presidential appointment are politically responsive. W. GELLHORN & C. BYSE, *ADMINISTRATIVE LAW* 128-44 (1974).

One prominent labor lawyer recently highlighted the positive aspects of the NLRB's political flexibility:

[C]omplaint by labor law practitioners about the 'instability' of Board rulings are 'not really justified' because Congress intended [the] NLRB to be a flexible decision maker, most Board policy reversals do not come as a total surprise, and some Board reversals have 'stabilizing consequences' for labor law and labor relations in the long run.

In short, criticizing the Board because it changes its mind is a little like criticizing a zebra for its stripes or a leopard for its spots: the Board is what it is.

Estreicher, *supra* note 17, at 145. Former NLRB Chair Miller stated that "when Congress established the Board in this manner it intended to permit changing administrators to appoint persons more likely to hold social and economic philosophies tending to parallel those of the administration making the appointment." *Defense of NLRB's Performance*, 116 LAB. REL. REP. (BNA) 103, 104 (June 11, 1984). Former NLRB Chair Murphy said the Board is properly part of the political process and reflects presidential philosophy. *Pacific Coast Labor Law Conference* 119 LAB. REL. REP. (BNA) 47 (May 20, 1985).

52. Note, *NRLB Rulemaking*, *supra* note 25, at 998.

53. See *supra* note 51. See also Peck, *A Critique of the NLRB*, *supra* note 24; Note,

been asserted that "[a]s public attitudes toward labor relations change, the NLRB frequently conforms its policies to the new national sentiment."⁵⁴ Board responsiveness to evolving majoritarian politics is a positive attribute. Labor law is not a rigid, timeless absolute. Rather than have Congress continually embroiled in frustrating and probably futile attempts to amend the NLRA, Board flexibility in fluidly developing and changing labor policy is the far more efficacious labor policy desideratum.⁵⁵

At least as much as any other agency, and perhaps more than most, the NLRB is inherently and necessarily political in its administrative lawmaking: "[T]he Board's role has been more than that of an agency merely fleshing out legislative standards; it has served as a means for adapting national labor policy to a continually shifting political climate."⁵⁶ The Board properly is intended to effectuate that function and therefore does much more than merely apply the original congressional intent.⁵⁷ The Board is a derivative policy maker, shepherding the evolution of contemporary labor policy consonant with overarching legislative policy expressed in the Act.⁵⁸ To adapt Marshall's aph-

The NLRB Under Republican Administration: Recent Trends and Their Political Implications, 55 COLUM. L. REV. 852 (1955).

54. Note, *NLRB Rulemaking*, *supra* note 25, at 998. See also Winter, *Judicial Review of Agency Decisions: The Labor Board and the Court*, 1968 SUP. CT. REV. 53, 65 ("The History of the Labor Board amply documents its political responsiveness.").

55. Summers, *supra* note 25, at 100.

56. Summers states that:

This agency reaction to changes in the political climate is not necessarily bad. Ought not government, in the making of policies, reflect majority will? Should not administrative agencies, within the area of discretion granted them, choose the policy which most accurately expresses the desires of the majority? To do so is to make democracy more responsive, an especially significant contribution when government tends to become remote. It is true that our principal instrument for expressing majority will is Congress speaking through legislation. However, there is serious doubt whether Congress is capable of expressing small shifts or gradual changes. Amendments to the National Labor Relations Act make long jumps, tending to go beyond the existing balance point of public opinion. The Board, by bending to the wind can enable the same statutory words to serve a range of shifts, thus avoiding the necessity of frequent changes.

Id.

57. Note, *NLRB Rulemaking: Political Reality Versus Procedural Fairness*, 89 YALE L.J. 982, 988-89 (1980).

58. Bernstein, *supra* note 21, at 574 n.10. ("Policy shifts by new majorities effected by new presidential appointments usually are deplored as unprincipled. I suggest that, within bounds not readily defined, such process of change is not only justifiable but desirable.") Cf. Petro, *supra* note 12, at 1128:

[T]he Board is now and has for many years been substituting its own policies for those declared by Congress in the National Labor Relations Act. . . . Since the Labor Board is an administrative agency, and since the constitution delegates all policy-making, legislative powers to Con-

orism regarding the dynamic Constitution,⁵⁹ it is a "living" NLRA that the Board is expounding. Through its core function, the Board broadly reflects the majoritarian political choices supported by the particular presidential administration. Through relatively short terms contingent on Presidential appointment, Congress intended the NLRB to function not only as a quasi-judicial lawmaker, but also, inevitably and positively, as a political, administrative law maker.

Case adjudication is best suited to enable the Board to implement majoritarian political philosophy more readily in the process of making and changing law and policy: "A national labor policy that responds quickly to political developments reflects the balance of power in the industrial relations system."⁶⁰ Individual cases serve as the vehicles for enunciation of general rules. Proponents of rulemaking contended that it is a more deliberative and thorough process, which serves as a better guide to the parties' conduct than does adjudication. However, if the general rule is riddled with exceptions, it will have no utility.⁶¹ Despite some conceptual clumsiness, adjudication has been firmly established as the Board's functional equivalent of rulemaking.⁶² Initially, this is seemingly convoluted. The Board routinely promulgates general rules in the context of an individual case, a process of ad hoc adjudication.⁶³ The Board thus accomplishes through adjudication what the purists insist be done only through rulemaking: the enunciation of broad principles transcending the problems of the immediate parties. By manipulating the facts of particular cases to enunciate policy changes, the Board, at least theoretically, lessens the likelihood of appellate court involvement in labor policy determinations. In the first instance, labor policy evolution should be shaped by the Board and only then occasionally refined by the courts of appeals to insure general constancy with the legislative intent of the NLRA.⁶⁴

It is important to understand that, "[u]nlike a promulgated rule, which generally represents a firm statement of agency policy that can

gress, a miscarriage of representative government and of the principle of separation of powers has occurred.

59. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). See also O. W. HOLMES, *THE COMMON LAW* 1 (1880):

The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics."

60. Note, *supra* note 25, at 999.

61. Chesrow, *supra* note 19, at 656-57.

62. Summers, *supra* note 25, at 106.

63. Note, *supra* note 19, at 656-57.

64. Note, *NLRB Rulemaking*, *supra* note 25, at 990.

be amended only through new rulemaking proceedings, a rule announced in an adjudicatory proceeding may appear as only a step in the gradual evolution of a general doctrine."⁶⁵ Adjudication enables more flexibility on the part of the Board. If the new policy proves unwise, it can be readily overruled by subsequent adjudication. The lack of flexibility is one of the main reasons why the Board has historically spurned rulemaking, a "cumbersome process of amending substantive rules that necessarily impedes the law's ability to respond quickly and accurately to changing industrial practices."⁶⁶ It is much more difficult to rescind policy established by rulemaking. In the often volatile world of labor relations, steady-state is the rare exception.⁶⁷ Contextual flexibility and responsiveness to political changes are the key ingredients in labor law,⁶⁸ even at the cost of occasional chaos. Adjudication is the better means to safeguard these attributes of Board dynamism.

If labor law and policy are to have relevance, it is imperative that the Board have the necessary institutional dynamism to assess "live" facts in particular controversies and to make the most contextually appropriate decisions.⁶⁹ The NLRB does not set labor policy in a vacuum. Policy evolution is contingent upon the ability to assess continuously changing facts.⁷⁰ Case adjudication, rather than broad

65. *Id.* at 996.

66. *Hearings on Congressional Oversight of Administrative Agencies (National Labor Relations Board) Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 90th Cong., 2d Sess. 1663 (1968).

67. Note, *NLRB Rulemaking*, *supra* note 25, at 988 ("Labor relations is one of the most polarized and controversial subjects of national political debate. It is an area in which labor and management exert tremendous political pressures in support of their interests.") Cf. Samoff, *What Lies Ahead for the NLRB?*, *supra* note 25, at 411 ("We seem to be a steady state, an equilibrium, regarding the law and agency, and I believe this will continue for some time.")

68. One commentator has stated that:

A foundation of the existence of administrative agencies is flexibility through discretion. Sometimes the very justification for creation of an administrative body is that it may exercise discretion in handling individual problems which are difficult to fit within inflexible boundaries laid down by precedents. Any attempt to impose rules of rigid adherence to the notion of stare decisis would strike at the basis of agency existence.

Davis, *The Doctrine of Precedent as Applied to Administrative Decisions*, 59 W. VA. L. REV. 111, 131 (1957). See also Nathanson, *Administrative Discretion in the Interpretation of Statutes*, 3 VAND. L. REV. 470, 490 (1950).

69. William Feldesman, then Solicitor of the Board, stated:

[L]abor relations problems are better handled in an adjudicatory frame of reference . . . there are many good reasons for proceeding via case by case adjudication. Perhaps the best one is the "feel" for a problem, the understanding that comes, when it is dealt with in the ambience of a live dispute between contesting parties in an industrial community. . . .

1969 LAB. REL. Y.B. (BNA) 166, 169.

70. Bernstein, *supra* note 21, at 574-75 ("When the Board does make policy, it should base its decisions on the realities of industrial relations: Indeed, that was the

rulemaking, is more conducive to affording this necessary administrative flexibility. Worship of precedent qua precedent, at the expense of the ability to change policy, would be the most fatal legalism.⁷¹ Thus, the "vice" of the NLRB being more readily able to reverse precedent through adjudication rather than to repeal a regulation via much more cumbersome rulemaking may actually be one of the virtues of adjudication.⁷² Once promulgated, it is much more difficult to rescind a rule than to overrule a prior decision.⁷³ The rule remains in effect until it is formally repealed. Those opposed to repeal can participate in the rulemaking proceeding by which the agency proposes to repeal the prior rule.⁷⁴ While administrative law purists may be disturbed, political realists recognize that law, policy and politics are inextricably interwoven. Professor Jaffe, a preeminent authority on administrative law, put it simply: "policymaking is politics."⁷⁵ The administrative lawmaking process, whether via rulemaking or adjudication, involves agency policymaking.⁷⁶ If adjudication occasionally results in dissatis-

major reason for creating the Board. Only thus can it fashion rules of conduct that promote healthy labor relations and reduce rather than stimulate litigation.").

71. Judge Learned Hand assessed the tendency of mature administrative agencies to become increasingly rigid and calcified and reluctant to change their own precedents:

But I believe that the history of commissions is very largely this: when they start, they are filled with enthusiasts, and they are flexible and adaptive. Like all of us . . . after they have proceeded a while they get their own set of precedents, and precedents save 'the intolerable labor of thought,' and they fall into grooves . . . When they get into grooves, then God save you to get them out of the grooves.

L. HAND, *THE SPIRIT OF LIBERTY* 241-42 (1952). Professor Summers made particularly pointed similar comments regarding the mistaken sentiments of some Board members to eschew political choice in favor of some unreal, abstract, and purely neutral lawmaking:

Just as an agency can be valuable because it may be responsive, it can be dangerous because it is not responsible. Members, once appointed and vested with power may become self-certain in their own judgments as to what is wise policy and become insensitive to majority will. They stand outside the mainstream of political pressures and may fail to sense accurately changes in public opinion. If they make policy case by case they may obscure the developing pattern and thus avoid the crystalizing of opinion. By asserting their independence and denying that they are legislating, they may deflect justified criticism. This irresponsibility need not be intentional, but may be mere misjudgment or failure to understand the place of such an agency within a democratic structure. In any case, there is an ever present threat that irresponsible agencies may impede or frustrate the process of self-government.

Summers, *supra* note 25, at 100-01.

72. Shapiro, *supra* note 25, at 942-47.

73. Peck, *A Critique of the NLRB*, *supra* note 25, at 273.

74. Chesrow, *supra* note 25, at 574.

75. L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 22 (1965).

76. Chesrow, *supra* note 25, at 559 ("Policymaking is a vital function of an administrative agency. In general, administrative law is primarily a process of poli-

ying, seemingly unprincipled reversals in Board precedent, any truly radical aberrations will prove self correcting via the Board's majoritarian political barometer. This is partially complemented by the institution of judicial review.⁷⁷

On balance, therefore, reformers calling for abandonment of adjudication in favor of rulemaking have an unreal, pristine devotion to the abstract theoretical niceties of administrative law. Those who call periodically for Board rulemaking are usually those dismayed with NLRB decisions currently adverse to their own labor law and political preferences. Predictably enough, they see rulemaking as an instrument to dampen the politics of the NLRB. Real world labor relations cannot, however, brook calcification of the Board's effective policymaking instruments. Some critics want to deprive the Board of any meaningful ability to make policy. They see the Board as illegitimately usurping Congress' power to make and to change labor policy. By advocating a static view of rulemaking, they would render the Board unable to change policy.

There is certainly no question that the Board has frequently

cymaking in the administration of legislative authority delegated to the agency in order to enable it to govern a particular sector of society which Congress has recognized as requiring regulation.")

77. See *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951). The Court stated: "The substantiality of evidence must take into account whatever in the record fairly detracts from its weight." *Id.* at 491. This landmark case established that if evidence relied on by the Board is reasonably credible, even in the presence of contrary evidence, the Board decision must be allowed to stand, even if the reviewing court would have reached a different substantive decision on the underlying merits. The court can displace the Board's factual determinations only when they have no reasonable support in the evidence: "This court will intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied." *Id.*

Section 10(e) of the NLRA sets forth the standard to be applied by the courts in judicial appellate review of NLRB decisions:

The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. . . . If the rule is arbitrary, inflexible or impossible of application to all similar situations under the exigencies of changing conditions or peculiar fact situations, there is ever present the check of judicial review, which brings to the administrative decision the perspective that the specialist may lack.

Note, *supra* note 19, at 657. For general discussions of standards and practice of judicial review of administrative agency decisions, see generally Jaffe, *Judicial Review: Question of Law*, 69 HARV. L. REV. 239 (1955) ("[T]he administrative and the judiciary share the role of law pronouncing and law making. They are in partnership. The court may supersede the administrative and itself determine the question of law; it is the senior partner . . ."). See also Rothman, *The National Labor Relations Board and Administrative Law*, 29 GEO. WASH. L. REV. 301, 311-16 (1960). For a compendium of significant cases where the courts have checked the Board's policy-making, see Peck, *A Critique of the NLRB*, *supra* note 25, at 259 n.41.

changed policy, usually reflecting changes in Board appointments by different Presidents.⁷⁸ But depoliticization of the Board would frustrate rather than further congressional intent. Efficiency and political expediency would be unwisely sacrificed for the cumbersome baggage of achieving ultimately illusory consensus through rulemaking. Board resolution of disputes would stultify, and the already serious backlog would quickly result in total administration chaos. Admittedly, rulemaking is not counter-majoritarian. An argument can be made that, by its more deliberate processes, rulemaking is ultimately more democratic and politically responsive to the deeper majoritarian sentiments.⁷⁹

However, rulemaking is much less able to respond to current political choices that must be made by Board members.⁸⁰ Further, rulemaking is also subject to manipulation and influence by special interest groups. By rulemaking, the Board could lose its quasi-judicial lawmaking character, and instead be perverted into an agency issuing advisory opinions. Labor relations law is essentially an adversarial system, demanding resolution of actual controversies, rather than a referee for rulemaking debates and solicitation for comments *ad infinitum* in the Federal Register.

The choice of adjudication over rulemaking is not a radical win-lose proposition. Rulemaking does have many assets; but adjudication has more. There are a number of factors to be evaluated in choosing whether to proceed by adjudication or by rulemaking.⁸¹ Regardless of

78. Peck, *supra* note 25.

79. Note, *NLRB Rulemaking*, *supra* note 25, at 1000. ("Rulemaking is more democratic than adjudication because it requires agencies to issue their rules with greater clarity and specificity, and permits the participation of all interested parties.").

80. Some Board members, including former chair Guy Farmer, disavowed the NLRB role of making majoritarian political choices in their decision-making:

Our job is to administer the law as written and as intended by Congress, and to do this with meticulous impartiality. . . . The only proper function of the Board is to enforce the statutory remedies whenever they are invoked with scrupulous fairness, and let the chips fall where they may. We are not authorized to make labor policy; we enforce a specific statute and that is all.

Farmer, *The NLRB: Its Past, Present, and Future*, 23 TENN. L. REV. 112, 115 (1984)

It is impossible to administer the law with "meticulous impartiality." The consequences of NLRB policy choices will favor either management or labor. Summers, *supra* note 25, at 97 ("The critical issues before the Board represent underlying disputes between unions and management. No matter how the Board decides these issues, it cannot avoid aiding one and hindering the other. Impartiality is impossible.").

81. Professor Peck suggested some of the more important factors in the litany of considerations whether to utilize adjudication or rulemaking in policy determinations:

Among them are the nature of the problem presented, the information available concerning that problem, the practicability of formulating from

whether rulemaking or adjudication is employed, administrative lawmaking by the Board has never been a paragon of jurisprudential clarity.⁸² On balance, however, adjudication is far more consonant with the congressional intent that the Board be flexible and politically responsive. Fortunately, the Supreme Court has repeatedly reaffirmed the ability of the NLRB to continue to utilize adjudication rather than rulemaking. Despite some earlier equivocation,⁸³ the Court has strongly endorsed Board adjudication. Adjudication insures that the Board will remain a politically responsive agency, reflecting majoritarian choices in relatively timely fashion:

The Board could not fulfill its function without the concomitant power to formulate policy. We should not question whether the Board may make law through adjudication, for to establish a tribunal and subsequently wonder whether it may properly develop a body of precedents and rules is to create a paradox.⁸⁴

As the following brief review of the salient Supreme Court decisions will illustrate, the technical debate over the relative merits of rulemaking or adjudication to set law and policy obfuscates the more important, fundamental point. Both adjudication and rulemaking are legitimate aspects of the administrative policy and lawmaking process. Above all else, the NLRB is a policy setter and lawmaker, charged with continuously formulating an evolving labor law consonant with

that information a principle of general applicability, the advantages to the public gained from promulgation of definitive guides, the necessity of speed in the disposition of problems, the desirability of avoiding retroactive changes of law, and the soundness or justice of the policy as developed in one manner or another. Such an exercise of judgment produces no black and white distinctions; it yields instead results which are entitled to respect only as the produce of an informed discretion.

Peck, *supra* note 25, at 755. See also Baker, *Policy by Rule or Ad Hoc Approach - Which Should It Be?*, 22 LAW & CONTEMP. PROBS. 658 (1957); Robinson, *The Making of Administrative Policy: Another Look at Rulemaking and Adjudication and Administrative Procedure Reform*, 118 U. PA. L. REV. 485, 529 (1970).

82. Packard Motor Car Co. v. NLRB, 330 U.S. 485, 492 (1947) ("If we were obligated to depend upon administrative interpretation for light in finding the meaning of the statute, the inconsistency of the Board's decisions would leave us in the dark.").

83. NLRB v. Wyman-Gordon Co., 394 U.S. 759 (1969). For commentary on the case, see Bernstein, *supra* note 20. See also McDonald, *The Wyman-Gordon Case: A Second Look at the NLRB's Excelsior Rule*, 20 LAB. L.J. 599 (1969); Young, *Review of Recent Supreme Court Decisions*, 55 A.B.A. J. 674, 679 (1969); Note, *The Supreme Court, 1968 Term*, 83 HARV. L. REV. 7, 220 (1969); Note, *NLRB V. Wyman-Gordon Co.: Subsequent Retroactive Application of Prospectively Promulgated Decisional Rule Approved by High Court*, 24 SW. L.J. 378 (1970).

In *Wyman*, the Court held that the Board rule, announced in *Excelsior Underwear*, 156 N.L.R.B. 1236 (1966), requiring the employer to furnish the NLRB regional director with a list of employee names and addresses eligible to vote in an ordered representation election, was procedurally inappropriate as a means of establishing a general rule of future applicability.

84. Note, *supra* note 19, at 656.

the broad policy provisions of the NLRA.⁸⁵ Rather than attempt an artificial abstract prioritization of adjudication over rulemaking, it is more important to appreciate that they are positively related in the broader administrative process.⁸⁶ Only when this is fully realized can analysis of the distinctions prove fruitful.⁸⁷ The final pragmatic balance militates strongly in favor of adjudication, which is most consonant with real world labor relations.

Those who argue persuasively for NLRB rulemaking limited to highly specialized areas or used for policy making only place the inquiry on a slippery slope.⁸⁸ To some degree, virtually every labor law decision implicates policy considerations and influences policy evolution. While rulemaking could be productively used in some esoteric areas,⁸⁹ the dangers it would pose for Board flexibility would probably not be worth the risk. Continued Board adjudication, stabilized by the proposed federal labor court of appeals rather than by the speculative virtues of rulemaking, is the better alternative.

B. Pertinent Supreme Court Decisions Regarding NLRB Adjudication

In *NLRB v. Wyman-Gordon Co.*,⁹⁰ the Court criticized sharply the Board's deviance from the rulemaking procedures of the APA. The purpose of the APA is to assure agency fairness and mature consideration in the formulation of general rules. The NLRB could not disregard these APA constraints by purporting to make rules via adjudication.⁹¹ The Court implied that rulemaking rather than adjudication might be required in some future cases.⁹² In *Wyman*, six Jus-

85. Summers states that:

[T]he National Labor Relations Board, like many other administrative agencies, is a lawmaking body. It can and must legislate. It cannot be impartial. Every decision represents a choice as to a rule or policy in an area of conflicting interests and opposing views. Protestations by members of the Board but conceal the true nature of their tasks. The test of the Board is not whether it has legislated or whether it has been impartial, but whether its legislation has been responsible and whether its partiality is that commanded by the statute.

Summers, *supra* note 25, at 107.

86. Peck, *supra* note 25, at 734 ("Though the definitions of the Administrative Procedure Act might suggest otherwise, rule-making and adjudication do not constitute separate, distinct and unblendable aspects of governmental activity; on the contrary, upon occasions they are inseparable and merged aspects of the same problem.").

87. *Id.* at 734-35. For further discussion of the differences between rulemaking and adjudication, see Bernstein, *supra* note 21, at 610-20.

88. See *supra* note 3.

89. *Id.*

90. 394 U.S. 759 (1969).

91. *Id.* at 764.

92. Both the plurality and dissenting opinions in *Wyman* indicated displeasure with Board adjudication rather than rule making:

tices stated that the Board should use rulemaking when promulgating new standards.⁹³ The Board briefly conformed to the judicial signal, and engaged in substantive rulemaking on a few rare occasions in the immediate wake of *Wyman*.⁹⁴ But the Court never followed through with the implications of *Wyman*,⁹⁵ and NLRB general rule promulgation via ad hoc case adjudication soon resumed without interruption.⁹⁶ The cryptic *Wyman* decision was an isolated counter to the Court's other decisions endorsing agency choice of adjudication rather than rulemaking.⁹⁷ The *Wyman* Court did not force the NLRB to choose

The rule-making provisions of . . . [the Administrative Procedure] Act . . . were designed to assure fairness and mature consideration of rules of general application. . . . They may not be avoided by the process of making rules in the course of adjudicatory proceedings. There is no warrant in law for the Board to replace the statutory scheme with a rule-making procedure of its own invention.

Id. (Fortas, J., plurality opinion). Justice Harlan, in turn, stated: "[I]t is precisely in these situations, in which established patterns of conduct are revolutionized, that rule-making procedures perform [their] vital functions. . . ." *Id.* at 781 (Harlan, J., dissenting).

93. *Id.* at 762-66, 775-83. However, the Court failed to indicate how the NLRB is to determine when rulemaking is appropriate: "[B]oth the reasoning and the consequences of *Wyman-Gordon* are as unintelligible as they are unclear. . . . *Wyman-Gordon* poses more questions than it answers." Bernstein, *supra* note 21, at 604.

94. The rules set out at 29 C.F.R. § 103 (1970), marked one rare occasion when the Board utilized rulemaking to assert jurisdiction over private colleges and universities with gross annual revenues of at least one million dollars. Likewise by rulemaking, the Board asserted jurisdiction over symphony orchestras with gross annual revenues of at least one million dollars. *See* 38 Fed. Reg. 6176-77 (1972); 37 Fed. Reg. 16813 (1972). For discussion of the Board's earlier history with a convoluted sort of rulemaking, see Peck, *supra*, note 25. There have been a few other insignificant instances of the Board's use of rulemaking. However, the Board has historically established jurisdictional standards by adjudication rather than by rulemaking. *See* Note, *supra* note 19, at 636 n.149. Despite subsequent identification of several other substantive areas suited for clarification by rulemaking, such as unit determinations and time limitations matters, NLRB rulemaking has been entirely dormant for at least a decade. CHAIRMAN'S TASK FORCE ON THE NLRB FOR 1976 30-32 (1976).

For discussion of the NLRB's last experience with rulemaking over a decade ago, see Silverman, *The Case for the National Labor Relations Board's Use of Rulemaking in Asserting Jurisdiction*, 25 LAB. L.J. 607 (1974).

95. Note, *Administrative Policy Making*, *supra* note 25, at 73. ("The effect of *Wyman-Gordon* is ambiguous because the Court enforced the Board's order against *Wyman-Gordon* while holding that the rule upon which the order was based was invalid.").

96. Board policy determinations via *ad hoc* adjudications had been firmly established in NLRB jurisprudence prior to *Wyman*. *See, e.g.*, *American Potash & Chemical Corp.*, 107 N.R.L.B. 1418 (1954) (Board rule established via adjudication governing craft severance); *Peerless Plywood Co.*, 107 N.L.R.B. 427 (1953) (the Board established the 24 hour captive audience election rule to be applied to all future cases).

97. There are a few pre-*Wyman* cases where the Supreme Court expressed misgivings with the Board's purported promulgation of per se rules through adjudica-

rulemaking over adjudication in any particular situation. It did not interfere with agency discretion. In a much narrower vein, the Court sent a mixed signal that when enunciation of broad policy was appropriate, the NLRB should (but was apparently not mandated to) follow the rulemaking requisites of the APA.⁹⁸ As one commentator has summarized: "As a practical matter *Wyman-Gordon* may mean no more than that the Board can continue to make 'rules' without rulemaking and can compel unwilling parties to comply if it goes through an adjudicatory proceeding."⁹⁹

In the landmark cases of *SEC v. Chenery Corp.*,¹⁰⁰ the Court had earlier held that the Securities and Exchange Commission (SEC) was not bound by prior judicial construction of equitable principles regarding a fiduciary's duty of fair dealing. The SEC was able to apply a standard that it articulated for the first time in the immediate adjudicative proceeding. There was no need for the SEC to have first formulated a prior general rule. The Court deemed that the agency was able

tion. See *Local 357, Int'l. Bd. of Teamsters v. NLRB*, 365 U.S. 667 (1961); *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956). *Morton v. Ruiz*, 415 U.S. 199 (1974), is a post-*Wyman* case that reiterated the Court's preference for rulemaking, and cited *Wyman* for support. In *Morton*, the Court held that the Bureau of Indian Affairs was required to comply with APA rulemaking to establish a general assistance eligibility requirement. However, two months after *Morton*, the Court issued its decision in *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974). In *Bell*, the Court ignored *Morgon* and *Wyman*, and reaffirmed the principles of *SEC v. Chenery Corp.*, 318 U.S. 80 (1943), which endorsed the Board's largely untrammelled discretion to utilize adjudication rather than rulemaking.

98. Justice Harlan would have sent a clearer message. He would not have countenanced confusion of adjudication and rulemaking under the guise of agency discretion: "One cannot always have the best of both worlds. Either the rulemaking provisions are to be enforced or they are not." *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 781 (1969) (Harlan, J., dissenting).

99. Bernstein, *supra* note 20, at 603.

100. 332 U.S. 194 (1947); 318 U.S. 80 (1943). For commentary on these cases, see Forman, *The Role of the Courts in Effecting Administrative Responsibility*, 22 TEMP. L.Q. 300 (1949); Comment, *Ad Hoc Action by Administrative Agencies*, 2 ARK. L. REV. 439 (1948); Comment, *The Promulgation of Standards of Conduct as a Guide to Administrative Determinations - The Chenery Cases*, 28 B.U.L. REV. 216 (1948); Comment, *Administrative Law - Propriety of Order Announcing and Applying New Principle - Scope of Judicial Review of Administrative Order*, 33 IOWA L. REV. 558 (1948); Comment, *Establishment of Employment Relationships by Collective Agreement*, 15 U. CHI. L. REV. 716, 728 (1948); Comment, *Administrative Law: A New Basis for Quasi-Judicial Decisions: Securities & Exchange Commission v. Chenery Corp.*, 1 U. FLA. L. REV. 288 (1948); Note, *SEC v. Chenery Corp.: A Case Study in Administrative Technique*, 62 HARV. L. REV. 478 (1949); Note, *Administrative Law - Ad Hoc Rulemaking - Retroactive Rulemaking*, 8 LA. L. REV. 576 (1948); Note, *Administrative Law - Scope of Judicial Review - Deference to Administrative Choice of Method*, 26 TEX. L. REV. 525 (1948); Note, *Administrative Law - Judicial Deference to Administrative Experience - Evolution of Standards by Ad Hoc Administrative Orders*, 1 VAND. L. REV. 118 (1947); Note, *Permissible Scope of Stockholder Proposals under SEC Proxy Rules*, 57 YALE L.J. 874, 881 (1948).

to derive its own standards based on the agency's special administrative competence.¹⁰¹ Regardless of whether the agency utilized adjudication or rulemaking, it remained essential that the administrative lawmaking be rationally based in order to be upheld upon subsequent judicial review.¹⁰² The Court indicated a general preference for rulemaking, but realized that adjudication was often better suited to dealing with unpredictable exigencies. The Court indicated that the choice of adjudication or rulemaking was left to the administrative agency's informed discretion, depending on the agency's assessment of how it could best fulfill its mandate.¹⁰³ Especially when the agency makes policy, the Court indicated it will defer to the agency.¹⁰⁴ The uniqueness of particular facts especially militate in favor of agency lawmaking adjudication. As the Court summarized in *Chenery*:

[P]roblems may arise in a case which the administrative agency could not reasonably foresee problems which must be solved despite the absence of a relevant general rule. Or the agency may not have had sufficient experience with a particular problem to warrant rigidifying its tentative judgment into a hard and fast rule. Or the problem may be so specialized and varying in nature as to be impossible of capture within the boundaries of a general rule. In those situations, the agency must retain power to deal with the problem on a case-to-case basis if the administrative process is to be effective.¹⁰⁵

These established administrative law principles of judicial deference to the agency decision whether to employ adjudication or rulemaking is especially appropriate in the case of the NLRB. The NLRA is largely a loose statutory amalgam of semantic terms of art.¹⁰⁶ The NLRA is not designed to cover automatically the "infinite

101. SEC v. *Chenery Corp.*, 318 U.S. 80, 92-93 (1943).

102. *Id.* at 94-95.

103. "[A]n administrative agency must be equipped to act either by general rule or by individual order. There is thus a very definite place for the case-by-case evolution of statutory standards. And the choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency." *Id.* at 202-03. See also *NLRB v. Penn Cork & Closures, Inc.*, 376 F.2d 52 (2d Cir. 1967); *NLRB v. A.P.W. Prod. Co.*, 316 F.2d 899, 905 (2d Cir. 1963) ("[W]hether to use one method of lawmaking or the other is a question of judgment, not of power").

104. *NLRB v. Seven-Up Bottling Co.*, 344 U.S. 344, 349 (1953) ("[T]he relation of remedy to policy is peculiarly a matter for administrative competence . . .") (quoting *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941)).

105. SEC v. *Chenery Corp.*, 332 U.S. 194, 202-03 (1947).

106. Several commentators have corroborated the NLRB's unenviable task of wrestling with the often cryptic, Delphic language of the NLRA. See, e.g., Friendly, *The Federal Administrative Agencies: The Need for Better Definition of Standards*, 75 HARV. L. REV. 863, 891 (1962) ("An agency that has done much to translate the general words of its charter into more specific guides for behavior by the regulated and decision by the regulators is the National Labor Relations Board."); Winter, *supra* note 53, at 56-60, 65; Note, *NLRB Rulemaking*, *supra* note 24, at 988 ("The NLRB thus has had to apply statutes with often cryptic and conflicting legislative guidance."). See also Jaffe, Book Review, 76 HARV. L. REV. 858 (1963).

combination of events"¹⁰⁷ in the complex and constantly fluid world of labor relations. Therefore, the NLRB, charged with interpreting and administering the Act, must be vested with the necessary administrative flexibility and discretion to choose the most efficacious mode of administrative lawmaking.¹⁰⁸

On the heels of the equivocal *Wyman* decision, the Second Circuit held that the appellate court had the power to usurp the NLRB's choice of rulemaking or adjudication. Further, the court of appeals could compel the Board to implement the law and policy-making instrument chosen by the court.¹⁰⁹ The appellate court's decision was reversed by the Court in *NLRB v. Bell Aerospace Co.*¹¹⁰ While the Court was split on the substantive labor law aspect of *Bell*,¹¹¹ it rebuffed unanimously the Second Circuit on the germane administrative aspect of the case.¹¹²

The *Bell* Court unequivocally reaffirmed its landmark *Chenery* decision, and 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

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

108. [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 of 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.

Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 194 (1941). See also Rothman, *supra* note 76, at 308-09:

One of the major reasons for the creation of administrative agencies was the inability of conventional legislative and judicial procedures to handle the complexities involved in regulating an industry or a particular type of economic or social activity. The significant thing about the Board's task is that, in some areas, Congress has even left to it the delicate function of making an accommodation between conflicting interests.

109. *Bell Aerospace Co. v. NLRB*, 475 F.2d 485 (2nd Cir. 1973). Although the Second Circuit endorsed NLRB rulemaking rather than adjudication in *Bell*, Judge Friendly had earlier recognized the positive features of NLRB adjudication. H. FRIENDLY, *THE FEDERAL ADMINISTRATIVE AGENCIES: THE NEED FOR BETTER DEFINITION OF STANDARDS* 36-52 (1962).

110. 416 U.S. 267 (1974). For further commentary on the case, see Chesrow, *supra* note 24; Note, *Labor Law*, 24 CATHOLIC U. L. REV. 118 (1974); Note, *Rulemaking or Adjudication in Administrative Policy Formation: Rock versus Hard Place?*, 113 DUQUESNE L. REV. 967 (1975); Note, *The Supreme Court 1973 Term - Labor Law - Exclusion of Managerial Employees from the National Labor Relations Act*, 88 HARV. L. REV. 258 (1974); Note, *Labor Law - Organizational Rights of Managerial Employees*, 53 N.C. L. REV. 809 (1975).

111. By a five to four vote, the Court affirmed the Second Circuit decision on the substantive labor law principle that "managerial" persons, and not merely those involved in labor relations, were excluded from the coverage of the NLRA.

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

Board's discretion."¹¹³ The Court did caution the Board in dictum that adjudication may be inappropriate when its retroactive effect would have significant adverse impact on parties' reliance on past established law.¹¹⁴ As the Court pointed out, "rulemaking would provide the Board with a forum for soliciting the informed views of those affected in industry and labor before embarking on a new course."¹¹⁵ But, after *Bell*, NLRB adjudication under the particular facts would have to constitute a gross abuse of discretion in order to be vitiated by the Court.¹¹⁶ *Bell* marked the last occasion that the Court significantly addressed the Board's preference for adjudication over rulemaking. It is this misunderstood judicial caveat that has again resurfaced to fuel recent, renewed criticisms of NLRB decision-making via adjudication as being inappropriately politicized.

Neither adjudication nor rulemaking has absolute advantages. Administrative flexibility to respond to evolving legal developments is the ultimate benchmark. Not every principle essential to the effective administration of a statute can or should be cast immediately into the mold of a general rule. Some principles must await development, while others must be adjusted to meet particular, unforeseeable situations: "In performing its important functions in these respects, therefore, an administrative agency must be equipped to act either by general rule or by individual order. To insist upon one form of action to the exclusion of the other is to exalt form over necessity."¹¹⁷

The pertinent Supreme Court decisions strike a balance between abstract preference for administrative rulemaking and the necessity of insuring agency flexibility. The balance preponderates in favor of the latter.¹¹⁸ Although the Court has never fully explicated these tensions, the real debate is not merely a choice between the greater administrative flexibility of adjudication and the greater procedural fairness of the rulemaking process. The ultimate choice is between lesser and greater political responsiveness on the part of the NLRB:

[T]o analyze the question of NLRB rulemaking solely in terms of procedural fairness is to disregard the critical issue of the NLRB's relationship to Con-

113. *Id.* at 294.

114. *Id.*

115. *Id.* at 295.

116. Chesrow, *supra* note 24, at 577 ("The Supreme Court's decision [in *Bell*] indicates that it will sanction judicially enforced compulsory rulemaking only when an agency has abused its discretion in proceeding by adjudication.")

117. NLRB v. Bell Aerospace Co., 416 U.S. 267, 293 (1974) (quoting SEC v. Chenery Corp., 332 U.S. 194, 203 (1947)).

118. In answering the Court's last decision on the adjudication and rulemaking controversy regarding NLRB law and policy-making, one commentator concluded: "The Supreme Court placed equal or greater weight on the agency's interest in preserving the flexibility of the administrative process, which includes the power to act quasi-judicially as well as quasi-legislatively in making policy." Chesrow, *supra* note 24, at 576.

gress and the federal judiciary. . . . [F]or Congress to require NLRB rulemaking solely on the basis of procedural considerations would be to use the wrong analytical framework to resolve a far more complex dilemma.¹¹⁹

With the dominance of the *Chenery-Bell* line of cases, the Court has endorsed the agency's greater political dynamism effected via the NLRB's traditional adjudication. The Board's adjudicative, proactive use of evolving political factors, endorsed by the Court, is better suited to development and effectuation of national labor policy than is rulemaking.¹²⁰ The Board must periodically change labor policy. This is an inherent part of the Board's mandate from Congress, given the statutory scheme of the NLRA.¹²¹ To direct the Board to stop making policy would be to "command the impossible."¹²² Indeed, "if the Board members attempted to comply, the almost certain result would be a lower and less satisfactory level of labor law in action."¹²³

Endorsement of Board policy-making is certainly not tantamount to approving sweeping, unprincipled delegation of core congressional responsibilities to an administrative agency.¹²⁴ Rather, it is a realistic appreciation of, at the very least, the necessity of the Board clarifying and elucidating the Delphic semantics of the original statutory language.¹²⁵ The artful language of the statute requires Board interpretation, and the process of interpretation necessarily involves lawmaking by the Board.¹²⁶ As one commentator has remarked: "[T]he Board cannot 'administer the law as written and as intended by Congress.' In many of the most critical areas neither the words nor the intent are clear. The Board must spell out whole bodies of law

119. Note *NLRB Rulemaking*, *supra* note 24, at 1001.

120. *Id.* at 984. In several important labor cases within the first decade of the NLRA, the Court repeatedly referred to the Board's ability to make labor policy. See *NLRB v. Jones & Laughlin Steel Corp.*, 331 U.S. 416, 425 (1947); *NLRB v. E. C. Atkins & Co.*, 331 U.S. 398, 414-15 (1947); *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 803 (1945).

121. Peck, *A Critique of the NLRB*, *supra* note 24, at 257.

122. *Id.* See also Summers, *supra* note 24, at 96:

It is evident that the Board cannot "administer the statute as written and as intended by Congress." The words of the statute and the intent of Congress provide some limitations and guides, but there still remains a substantial area of discretion within which the Board must make choices between competing values and policies. Denying the existence of this power does not avoid its exercise, but only obstructs any useful inquiry into the appropriate standards and procedures for the exercise of that power.

See generally Winter, *supra* note 53.

123. Peck, *A Critique of the NLRB*, *supra* note 24, at 257.

124. For the author's work advocating revitalization of a refined nondelegation doctrines, see Gregory, *The Congressional Response to NLRB v. Bildisco and The Constitutional Subtleties of the Nondelegation Doctrine*, 62 U. DETROIT L. REV. (1985).

125. Peck, *A Critique of the NLRB*, *supra* note 24, at 259.

126. Bernstein, *supra* note 20, at 574.

from meager terms or no terms at all."¹²⁷ Whether it utilizes rulemaking or adjudication, the Board makes policy choices: "The Board, in exercising its functions of interpreting and elaborating the skeletal words of the statute, is compelled to mould and develop a body of law. It cannot act as a mechanical brain, but must choose between competing considerations."¹²⁸

Slavish, myopic devotion to the ultimately illusory and frustrating task of attempting solely to ferret out the intent of Congress from the original language and legislative history of the NLRA evades the purpose of responsible legislative delegation to the administrative agency:

The statutory words alone are all too often inadequate if not misleading guides, for many have a boundless vagueness, others have an irascible ambiguity, and still others are vulnerable to a destructive literalness. Precision is not always gained by searching for the will-o-wisp of congressional intent, for often little light is to be found in the cloudy recesses of the legislative mind. One of the pressing reasons for delegating power to administrative agencies is that legislators do not know or cannot agree on the precise results they seek.¹²⁹

The NLRB's political choices are at the heart of its function as the agency charged with administration of the NLRA, itself an amalgamation of congressional policy preferences. As Professor Summers maintained:

The board, in deciding cases arising under the statute, must exercise the power of choice. The choice is between alternatives which represent not only conflicting interests of the immediate parties but also conflicting views as to labor policy. The new members may make the same choices as the old members, or they may make different choices and order changes, but willy-nilly they must choose. The Board could not, if it would, escape its functions of policy-making.¹³⁰

However, this certainly is not to endorse purely personal preferences. Board members must constantly guard against this danger and make general majoritarian political preferences, consistent with the Act, the basis for NLRB policy.¹³¹ As one observer cautioned:

It is natural and proper that with the change in political climate, there should be changes in the rules and decisions of the Board. However, the Board should keep within the broad limits of the basic statutory purposes, and

127. Summers, *supra* note 24, at 95 (quoting Farmer, *The NLRB: Its Past, Present and Future*, 23 TENN. L. REV. 112, 112 (1954)).

128. *Id.*

129. *Id.* at 101.

130. *Id.* at 98. See also Feldesman, *May The Labor Board Make Policy?*, 52 GEO. L.J. 527, 539 (1964) ("There can be no doubt of the Board's authority to make policy in the exercise of the diverse discretion Congress conferred upon it to carry out its mission to effectuate the purpose of the act.").

131. See, e.g., Summers, *supra* note 24, at 101: "The danger of administrative legislation lies not in the open flaunting of statutory language. It lies rather in the failure to adhere to the underlying purposes of the statute. Through lack of either insight or self-restraint, the members of the agency may unconsciously substitute their personal judgment of values for those premised by the statute."

should neither repudiate the policy choices made by the statute nor defeat its principal objectives.¹³²

The Board's elucidating interpretation of the Act ineluctably implicates policy and politics in the same construct: "Since the NLRB will have to make and reassess policy judgments in the area it regulates, a political coloration will inevitably be cast upon the Board's activities."¹³³ The Board's political responsiveness and flexibility in evolving policy determinations through adjudication operate as federal safety valves on labor law tensions: "A politically responsive NLRB allows national labor policy to be modified without requiring public dissatisfaction to reach the high level necessary for legislative reform."¹³⁴ For all of these reasons, continued NLRB adjudication, rather than rulemaking, must remain the preferred policy and law-making instrument. Centralization of labor law jurisprudence can never be realized by calcification of policy through the cumbersome baggage of rulemaking. Adjudication is the better internal device for labor law coherence. The political tensions that result can be best harmonized by a federal labor court of appeals, rather than by struggling in frustration on the slippery slope of rulemaking.

III. RE-EXAMINING PROPOSALS FOR THE CREATION OF A FEDERAL LABOR COURT OF APPEALS

A. An Overview

The essential problem that afflicted prior proposals for a federal labor court is that they would have accomplished too much, rather than not do enough, to reform labor law administration.¹³⁵ Rather than present another idealistic comprehensive reform plan doomed to

132. *Id.* at 107.

133. Peck, *A Critique of the NLRB*, *supra* note 24, at 259. Cf. Foegen, *What's Right is Right - Labor Board Should Not Be Political*, 13 LAB. L.J. 1060 (1962).

134. Note, *NLRB Rulemaking*, *supra* note 24, at 1000.

135. However, Professor Morris, architect of the most comprehensive reform plans, maintains that other proposals failed because they were not sufficiently holistic:

It is sufficient simply to note a fundamental deficiency common to all of them: each proposal repeats the errors of the blind men describing the elephant and fails to treat the interrelated subjects of labor law as a whole. Many of the proposals would probably provide some limited improvements over the present situation. . . . None would get at the root of the overall problem.

Morris, *The Case For Unitary Enforcement of Federal Labor Law Concerning A Specialized Article III Court and the Reorganization of Existing Agencies*, 26 SW. L.J. 471, 496-97 (1972) [hereinafter cited as Morris, *Unitary Enforcement*]. See also Morris, *The National Labor Relations Board: Its Future*, 26 LAB. L.J. 334 (1975) ("A unitary system of enforcement which would interrelate . . . identify and vitiate the various laws which regulate employee relations, would be the proper course for labor reform generally.") [hereinafter cited as Morris, *The NLRB: Its Future*].

frustration, this Article maintains that "less may be better." The primary benefit of the federal labor court of appeals would be stabilization and centralization of labor law administration, while preserving the political dynamism of the NLRB.

Splits of authority among the various circuit courts of appeals on the same issues will be eliminated. Appeals taken from NLRB decisions will gradually and steadily abate, and NLRA-based case law will achieve equilibrium. Certiorari petitions with the Supreme Court on NLRA matters will be virtually eliminated. All of these positive developments will occur without depriving the NLRB of its necessary political flexibility. Since the NLRB will not be directly altered by this proposal, Board adjudication will continue, and the process of staggered Board appointments by the President with the advice and consent of the Senate will remain intact. The NLRB will continue to be able to reflect political majoritarian labor philosophy in its decision-making.

A quarter century ago, a former chair of the NLRB predicted that some variation of a labor court was inevitable.¹³⁶ During the Nixon administration, a number of proposals were offered. It is certainly time to re-examine the merits of a proposed federal labor court of appeals that is politically capable of implementation. Unlike many prior reforms, this new proposal for a federal labor court of appeals would not supplant the NLRB. It would have no direct bearing on present NLRB adjudicatory practice. The NLRB would sacrifice none of its jurisdiction to this court, nor would any function performed by NLRB personnel, such as the Office of the General Counsel and the Administrative Law Judges, be transferred to this court.

Well aware of the aphorism that "the more things change, the more they stay the same," this Article is certainly not advocating change for change's sake. There is nothing to be gained, and much to be risked, in reform exercises that would only needlessly "churn" the law.

There are several advantages to this present and more modest, but core, proposal for a federal labor court of appeals. Most immediately, the court would partially defuse some of the particularly strident current criticisms of the Board. The Board, while still appropriately politically responsive to popular sentiments, would be more conscious of labor doctrine stabilized by the single appellate court. The Board would more carefully consider possible reversals of its own prior cases. Poorly reasoned NLRB reversals would not be sanctioned by the court. Thus, spasmodic and fitful reversals by the Board of its own

136. See Farmer, *Problems of Organization and Administration of the National Labor Relations Board*, 29 GEO. WASH. L. REV. 353, 356 (1960) ("[T]he ultimate transfer of the Board's judicial functions to a labor court or even to the existing federal district courts may now be reasonably predicted.").

prior decisions would be minimized in frequency and severity. The NLRB could still overrule its own prior decisions, but only after careful thought. More stability would be built into labor law. The law would evolve, rather than mutate. Sheer political expediency by the Board would be effectively checked. While implementation of a federal labor court of appeals poses its own constitutional and political difficulties, they can be effectively met. One federal labor court of appeals reviewing all appeals of NLRB decisions would substantially ease the concerns of critics who see the Board as a legally unaccountable political aberration.

There are considerable advantages to both alleviating current criticisms of Board politics and yet insuring that the Board continues to function without internal structural or jurisdictional changes. The federal labor court of appeals would positively harmonize these tensions. At the expense of sacrificing the dubious advantages of contrasting views of various circuits, labor law appellate expertise would be coordinated in one federal labor court of appeals.¹³⁷ The twelve federal appellate courts have only occasionally manifested NLRA expertise, and then to markedly varying degrees. This historic lack of coordinated labor law sophistication accounts for the frequent conflicts among various circuits on NLRA issues. These conflicts would now be eliminated.

B. The Constitutional Dimension to the Judicial Appointment Process

If carefully structured, implementation of a federal labor court of appeals should not pose any constitutional problems. There are two primary avenues by which the labor court could be constitutionally designed. As federal judges, they would be appointed by the President with the advice and consent of the Senate. If appointed to a term of

137. Bartosic, *supra* note 16, at 668:

A specialized Labor Court would develop into an expert judicial body rendering more enlightened and prompt decisions than courts of appeals. Establishing one appellate forum would also eliminate what many consider to be undignified forum shopping and unseemly races to the courthouse. In addition, it would eliminate conflicting appellate decisions, which create uncertainty and cause delay by requiring Supreme Court resolution.

However, others see any labor court as a wholly utopian demand for homogeneity in a heterogeneous labor and political environment. More broadly, the labor court proposals have been viewed as part of an unrealistic Hamiltonian political agenda to return inordinate power to the federal government. See, e.g., Samoff, *What Lies Ahead for The NLRB?*, *supra* note 24, at 413, 417:

A labor court seems like an ideal solution. It appears so logical and symmetrical. Now we have multiple layers of intermediate bodies before reaching a circuit court. A single labor court would concentrate power in one place. This is just not compatible with the American pattern of separate pathways and tribunals. . . . The American soil is unreceptive to concentrating so much power in one court.

years, the court would constitutionally operate as an Article I court.¹³⁸ If the judges were appointed with life tenure, it would be an Article III court.¹³⁹ Legitimate arguments can be made for either type of court and the contour of the judges' tenure. Doctrinal stability and the prestige consonant with the office of a federal court of appeals judge favors the life tenure of an Article III court. As a former chair of the NLRB summarized, life tenure for the judges of the labor court "would eliminate any temptation for a member to color his decisions in the latter part of a fairly short term of office with an eye to courting reappointment by the administration in power or to future employment by labor or management or by law firms representing one or the other."¹⁴⁰ The countervailing consideration for a term of years is maintenance of doctrinal stability while avoiding the negative of intellectual rigidity on the part of individual judges.¹⁴¹ However, federal courts with judges lacking life tenure are more subject to attack as unconstitutional.¹⁴² One must also not confuse the call for a labor

138. Article I courts are legislative courts, not judicial courts. Article I judges have terms for years, not life tenure. See U.S. CONST. art 1, § 8, cl. 9: "The Congress shall have power . . . to constitute tribunals inferior to the Supreme Court."

139. *Id.* at art. III, § 1, which states in part: "The judicial power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."

140. Miller, *The NLRB - Past, Present and Future*, 43 N.Y.B.J. 86, 90 (1971).

141. Dean Bartosic, a prominent proponent of a federal labor court, opposes life tenure for the judges: "[T]he national labor policy should by an evolutionary process be responsive to political, economic and social changes. Replacing the Board with lifetime judges would minimize change at the risk of stagnation." Bartosic, *supra* note 16, at 660.

142. A term of years for the judges of the federal labor court of appeals would not pose insurmountable constitutional difficulties. Such a problem did occur regarding the bankruptcy courts. In *Northern Pipeline Constr. Co. v. Marathon Pipeline Co.*, 458 U.S. 50 (1982), the Supreme Court held that the 1978 Bankruptcy Code, 11 U.S.C. §§ 101-09 (1978), violated Article III. The Constitution requires the judicial power of the United States to be vested in Article III judges. Bankruptcy courts presumed to exercise federal powers, but did not employ Article III life tenure judges. The Supreme Court summarized:

Art. III bars Congress from establishing legislative courts to exercise jurisdiction over all matters related to those arising under the bankruptcy laws. The establishment of such courts does not fall within any of the historically recognized situations in which the general principle of independent adjudication commanded by Article III does not apply.

Northern Pipeline Constr. Co. v. Marathon Pipeline Co., 458 U.S. 50, 76 (1982). This Supreme Court decision in 1982 sparked a constitutional crisis that threatened to terminate the bankruptcy courts. Resolution was finally effected over two years later, via the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. 98-353, 98 Stat 333 (to be codified at various places in 11 U.S.C. and 28 U.S.C.). For discussion of the constitutional difficulties afflicting the bankruptcy courts, from the Supreme Court decision to beyond the remedial legislation, as seen through the labor prism, see Gregory, *Legal Developments Since NLRB v. Bildisco: Partial Resolution of Problems Regarding Labor Contract Rejection In Bankruptcy*, 62 U. DENVER L. REV. 615 (1985); Gregory, *supra* note 124;

court with an inappropriate analogy to the Article I Tax Court, for example. The Constitution expressly refers to the power of Congress to "lay and collect" taxes. There is, however, no express constitutional reference to labor relations matters, with the exception of the arguable, indirect Article I, section 10 reference to freedom of contract. This is yet another reason militating in favor of an Article III structure for the proposed federal labor court of appeals.

The Supreme Court has consistently indicated a preference for Article III to serve as the constitutional structure for lower federal courts,¹⁴³ and an Article III labor court is a primary component of the reform plans of the principal architect.¹⁴⁴ There is certainly no question that Congress may create courts with limited jurisdiction pursuant to Article III. An Article III federal labor court of appeals would be the better alternative to avoid the constitutional difficulties invited by Article I.

C. Difficulties with an Alternative Non-Appellate Labor Court

Prior reforms have called for a federal labor court that would operate as a trial court,¹⁴⁵ or otherwise transfer present Board functions to

Gregory, *Labor Contract Rejection in Bankruptcy: The Supreme Court's Attack on Labor In NLRB v. Bildisco*, 25 B.C.L. REV. 539 (1984).

143. In *Northern Pipeline Constr. Co. v. Marathan Pipeline Co.*, 458 U.S. 50 (1982), the Court held the bankruptcy courts unconstitutional because they were Article I, dependent legislative courts presuming to exercise Article III powers concerning the bankruptcy laws. See *supra* note 142. See also *Brenner v. Mason*, 383 U.S. 519 (1966) (the Court held that the Court of Customs and Patent Appeals was an Article III court); *Glidden Co. v. Zdanok*, 370 U.S. 530 (1962).

144. Morris, *Procedural Reform in Labor Law — a Preliminary Paper*, 35 J. AIR L. & COMM. 537, 560-62 (1969).

145. This was the essence of the plan advanced by Republican Senator Robert Griffin of Michigan, who was the co-sponsor of the Landrum-Griffin Amendments of 1959, the Labor Management Reporting and Disclosure Act. See S. 103, 91st Cong., 1st Sess. (1969). The Griffin proposal would have seated a 15 judge federal labor court with exclusive jurisdiction over NLRA complaint and representation cases. The judges would serve 20 year terms upon presidential appointment. The administrative law judges would be replaced by ninety commissioners to conduct unfair labor practice hearings. The commissioners would be subject to removal by the labor court. The general counsel of the Board would be replaced by an analogous administrator to prosecute cases. The Federal Rules of Civil Procedure would apply to all proceedings.

Professor Morris also advanced a comprehensive proposal for a specialized federal court with sweeping jurisdiction over the Railway Labor Act (RLA), the NLRA, and 29 U.S.C. §§ 301 to 303 (1982), suits for breaches of labor contract and damages suits for illegal union secondary boycotts. See generally Morris, *supra* note 144; Morris, *Unitary Enforcement*, *supra* note 35, at 504. There are some advantages to a labor court with powers of a federal district court; summary judgments and injunctive relief would expedite the legal process. This would be more

the federal district courts.¹⁴⁶ In addition, allied proposals apart from labor court schemes would modify the internal processes of the Board.¹⁴⁷

If all of the trial functions of the administrative law judges of the NLRB were transferred to the federal district courts, it could send approximately 50,000 additional cases into the federal trial courts each year.¹⁴⁸ Each federal district court judge could see more than ninety additional cases on the docket. While this would not collapse the federal district courts,¹⁴⁹ it would surely constitute a heavy new burden

efficacious than the NLRB's inability to enforce its orders. However, the plan would eventually supplant the NLRB.

For other proposals for a trial-level labor court equivalent to the federal district courts, see Powell & Goerlich, *An Invitation To Improve A Government Service*, 25 AD. L. REV. 49, 56-60 (1973); Schutkin, *One Nation Indivisible - A Plea for a United States Court of Labor Relations*, 20 LAB. L.J. 94 (1969). Seligson, *supra* note 11, at 108, states: "The Board has fulfilled its initial function. Its abolition and replacement by a technically competent bureaucracy of trial examiners to handle day-to-day relations between labor and management might be another aid in the continuing development of better labor-management relations."

146. This was the heart of the proposal by Republican Senator John Tower of Texas. Unfair labor practice jurisdiction would have been transferred from the NLRB to federal district courts. *See, e.g.*, S. 1384, 89th Cong., 1st Sess. (1965); S. 3671, 91st Cong., 2d Sess. (1970). These two bills introduced by Senator Tower were virtually identical. *See also District Court Jurisdiction Over Unfair Labor Practice Cases: Hearings on S. 3671 Before the Subcomm. on Separation of Power of the Senate Comm. on the Judiciary*, 91st Cong., 2d Sess. (1970); Lyne *The National Labor Relations Board And Suggested Alternatives*, 22 LAB. L.J. 408, 418 (1971); Miller, *Administrative Prosecution But Decisions by the Court - A Way Out Of The Procedural Morass of U. S. Labor Law?*, 12 GONZ. L. REV. 19, 28 (1976).

For criticism of earlier proposals to transfer NLRB functions to federal district courts, see Miller, *supra* note 140, at 91.

147. H. R. 7152, 92nd Cong., 1st Sess. (1971). Congressperson Thompson's bill would have retained the NLRB, with certiorari discretion over Administrative Law Judge decisions and self enforcing NLRB orders. Several academic and legislative proposals would repeal the Railway Labor Act and incorporate railroads and airlines under the auspices of the NLRA. *See, e.g.*, S. 560, 92nd Cong., 1st Sess. (1971). This was the legislation proposed by Republican Senators Robert Dole and Robert Griffin.
148. In fiscal year 1984, 43,426 cases were filed, the lowest total since 1974. Of those, 34,855 of the cases were unfair practices, a decrease of 12.9 percent from 1983. *NLRB General Counsel's Summary of Operations For FY 1984*, 118 LAB. REL. REP. (BNA) 121, 122 (Feb. 18, 1985) [hereinafter cited as *Operations For FY 1984*]. In fiscal year 1983, 48,840 cases were filed; 46,665 cases were filed in 1982; and 58,897 were filed in 1981. *NLRB General Counsel's Summary of Operations For Fiscal 1983*, 114 LAB. REL. REP. (BNA) 301, 302 (Dec. 19, 1983) [hereinafter cited as *Operations For Fiscal 1983*].
149. Lyne, *supra* note 146, at 419 (estimating that each federal district judge would hear an additional two or three cases each year). *But cf.* Bartosic, *supra* note 16, at 656 ("Thus, some 30,000 labor cases a year could potentially flood the district courts. The resultant delay would not only dilute the effectiveness of the nation's labor laws but also would tax the country's court system beyond tolerable limits

and cause attendant delay in deciding the non-NLRA federal cases. Of course, the majority of unfair labor practice charges under the Act do not result in issuance of a complaint by the Board. Ultimately, only about 10 percent of the initial charges ever proceed to decision by the NLRB.¹⁵⁰ While each federal judge would therefore see less than ten cases added to the docket, the most negative ramification of transferring Board functions to the federal district courts would be the demolition of an expert bureaucracy with a half century of NLRA expertise, relegating these often complex cases to already beleaguered and often less than labor-expert federal district judges.¹⁵¹ As one commentator has pointed out, "to abolish the Board because of its imperfections would be like abolishing the railroads because they are doing an unsatisfactory job of carrying passengers."¹⁵² Under the present proposal, the Board's functions would not be directly altered. A single labor court of appeals would centralize all appeals from Board decisions, and gradually stabilize labor law jurisprudence under the NLRA.

and produce delay in non-labor cases."'). See also Foeller, *Comments on Recent Proposals for Improving the Administrative Procedures for the NLRB*, 24 LAB. L.J. 81, 87 (1983); Leedom, *Judicializing the Administrative Process: Can Labels Change Facts?*, 3 S.D.L. REV. 1, 3-6 (1958).

150. Lyne, *supra* note 146, at 419. In fiscal year 1983, a record 11,535 settlements were obtained. Only 4,544 complaints were issued from an original intake of 48,740 cases filed. *Operations for Fiscal 1983*, *supra* note 148, at 302-03. In fiscal year 1984, 10,731 settlements occurred, and only 3,610 unfair labor practices complaints were issued from an intake of 34,855 cases. *Operations for FY 1984*, *supra* note 148, at 122.
151. Bartosic, *supra* note 16, at 661 ("[D]istrict court judges now have relatively little contact with Taft-Hartley and are ill-trained to administer it."). But cf. Lyne, *supra* note 146, at 419:

Some commentators argue that only a special court or administrative body with the expertise of the present Board could handle the complications of present day labor law. This argument overlooks the fact that our present federal district courts have successfully managed to acquire the expertise necessary to decide the controversies arising under our complicated law dealing with taxation, patents, anti-trust, utilities, transportation, broadcasting, admiralty, natural resources, etc. For the labor law practitioner to assert that the field of his endeavor stands uniquely alone among federal jurisprudence as the one field too complicated for comprehension by the ordinary federal district judge sounds both pompous and unreal.

Petro, *supra* note 12, at 1127, argues that: "The federal courts . . . lack neither experience nor "knowhow" in labor cases. . . . [O]n the whole the federal judiciary does a first-rate job." See also Getman & Goldberg, *The Myth of Labor Board Expertise*, 39 U. CHI. L. REV. 681 (1972). Cf. Feldesman, *supra* note 130, at 536 ("However strongly one may wish to question the Board's 'expertise,' one cannot deny that it acquires considerable specialized knowledge no one else can obtain because it concentrates exclusively and continuously on the very numerous matters arising under the act.").

152. Wilson, *Labor Law Reform - Needed Now*, 56 A.B.A. J. 248 (1970).

D. The Structure of the Proposed Federal Labor Court of Appeals

The proposed federal labor court of appeals would hear all appeals of the NLRB decisions. The twelve current federal courts of appeals would no longer have jurisdiction over appeals from NLRB decisions.¹⁵³ For reasons of administrative efficiency and economy of resources, the labor court should be based in Washington, D.C. The ultimate size of the court can be determined by the case load. This should not be immediately ascertained, and can best be left for future determination.¹⁵⁴

During recent years, the courts of appeals have been deciding approximately three hundred appeals from NLRB decisions annually.¹⁵⁵ Earlier predictions of near-geometric increases in appeals have fortunately failed to materialize.¹⁵⁶ Therefore, initial appointment of three judges to the proposed labor court of appeals would be adequate. Because NLRA labor law issues would constitute the exclusive business of the court, the case load would be manageable. As the labor appel-

153. Vesting jurisdiction of all appeals from NLRB unfair labor practice decisions in one federal labor court of appeals would require amendment of § 10(f) of the Act, which presently provides:

Any person aggrieved from a final order of the Board granting or denying in whole or in part the relief sought 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

29 U.S.C. § 160(f) (1982).

154. "[A] careful study of the statistics concerning labor cases in the circuit courts of appeal is necessary to determine the size of the court, areas and locations where it should sit, and other such details of its composition and operation." Spann, *Foreward - A Labor Court of Appeals?*, 4 GA. L. REV. 643, 645 (1970).

155. Note, *NLRB Rulemaking*, *supra* note 24, at 990.

156. In 1969, more than 50 percent of all NLRB decisions were taken to the federal courts of appeals. In 1959, the appellate courts heard 83 cases; in 1969 they heard 363 cases on appeal from NLRB decisions. *See Bartosic, supra* note 16, at 654 n.56. In 1978, the courts of appeals heard 333 appeals from NLRB decisions. 1978 NLRB ANN. REP. 43. More recently, 479 NLRB cases were decided by the courts of appeals in 1981, 424 in 1982, 338 in 1983, and 259 in 1984.

In 1984, in addition to fewer appeals being taken, the NLRB had more substantive success before the circuits, winning in whole or in part in 81.1 percent of the cases (81.6 percent in 1983, 79.7 percent in 1982 and 80.2 percent in 1981), and losing entirely only 10.4 percent of the cases, which is the lowest level since 1976 (12.4 percent in 1983, 12.5 percent in 1982, and 13.8 percent in 1981). *Operations for Fy 1984, supra* note 148, at 146.

Of course, one must bear in mind that these statistics can be manipulated. One recent critic, former Board member Peter Walther, appointed by President Ford in 1975 and highly displeased with the "pro-labor" orientation of the NLRB during his Board tenure in the mid to late seventies, forwards substantially different conclusions. Based on his own survey of courts of appeals review of NLRB decisions, Walther maintains the circuits reversed the NLRB in 53 percent of the 1979 cases and in 47 percent of the 1980 cases. Walther, *supra* note 9, at 217.

late court's jurisprudence gradually assumed certain contours, the case load would probably decrease.¹⁵⁷ The NLRB and the private parties would be well aware of the labor court's philosophy, and would be better able to assess the likelihood of success in individual cases. Forum shopping among the circuits would be eliminated. Weak cases thoroughly inconsonant with the jurisprudence of the NLRB and the labor court of appeals would rarely be pursued on appeal to the labor court. As the case load decreased, the initial backlog would also dissipate. This would moot the need for appointment of additional judges. More likely, as the case load decreased and the court's NLRA jurisprudence stabilized, thought could then be realistically given to expanding the court's appellate jurisdiction to non-NLRA labor and employment law cases.

There is a more compelling immediate political reason for not determining the final number of judges from the outset. Implementation of a court permeated with politics would be difficult even under ideal circumstances. One major advantage of the proposed court is precisely to defuse, rather than to exacerbate, the political concerns of the Board's current critics. The Reagan Board is broadly perceived by many as a rigid anti-labor dogmatist. Even a Republican Senate would be hard-pressed to expedite Republican presidential appointment of rigidly ideological judges to the proposed federal labor court of appeals. Critics would see this as the intolerable *coup de grace* for the NLRA and for labor. The organized labor lobby and Democratic senators would be certain to roadblock any scheme to canonize the perceived anti-labor ideology of the Reagan Board in a court of appeals. The proposal for the court would be utterly futile if these legitimate labor concerns could not be effectively addressed. The solution lies in the ability to engineer a political deal prior to, and as an unstated tacitly understood part of, the presidential appointment process. Very recent legislative history has demonstrated the considerable political ability of the organized labor lobby and Democratic representatives to effect compromise with Republican senators regarding the presidential appointment of new judges to a revamped Bankruptcy Court. Rather than provide for appointment of all judges by one President, the appointment process should be spread over more than one term and/or more than one administration.¹⁵⁸

Initially, therefore, there would be prior consultation by the appointing President with leaders of the opposition party. Politically, de

157. Morris, *Unitary Enforcement*, *supra* note 135, at 506 ("It is hoped that in the long run the judicial stature of the United States Labor Court will be deemed so substantial that under the unitary system there would be fewer reversals on appeal than under the present system, so that ultimately the number of appeals would also be reduced.").

158. *Id.* at 500.

facto guarantees would have to be made by the President to key opposition senators. In order to transform this proposed federal labor court of appeals into political reality, the President would have to insure the prior approval of opposition senators to the acceptable prospective nominees to the court. Greater Senate participation in Presidential appointments, via strengthened roles of advice and consent, is fully consonant with the Senate's express constitutional responsibility.¹⁵⁹

For example, if the court were to be implemented initially with three members, one of the initial judges would not be a member of the appointing President's political party. In addition, although not part of the necessary enabling legislation, if the case load eventually warranted additional appointments, the balance could be preserved by providing for no further appointments until the next presidential term. Then, for example, contingent provisions for three additional judges again would insure that at least one of the three judges would not be a member of the then appointing President's political party.

Although this would not fully placate the wary political opposition at the outset, a structured, sequential appointment process would provide for a coordinated and politically balanced initial implementation of the court.¹⁶⁰ Current and perhaps former members of the Board would be removed from consideration. The most fertile ground would be via volunteer transfers from present experienced circuit courts of appeals judges, particularly those with labor law expertise. Federal district judges and NLRB administrative law judges would also supplement the pool of prospective candidates for the initial three appointments. Thus, the pool of qualified candidates would be enriched from the outset via present experienced judicial incumbents, in addition to the other usual sources in the active bar and in legal academia for judicial appointments. Because of the political overlay in the appointment process, special care would have to be taken by the President and the Senate to appoint only the most qualified labor law professionals available from the flexible middle of the political spectrum. Because of both political pragmatics and imperative intellectual integrity, there would be no room for rigid ideologues on the court. Of course, given the Reagan administration's record of appointing doctrinaire political conservatives,¹⁶¹ necessary accommodations may not be readily affected and the proposal could easily be doomed. Without prior political guarantees of balanced, consensus appointments, the legislation for the court would not be enacted. In part, therefore, this

159. Professor Tribe has advocated much closer Senate scrutiny of judicial appointees of the President. See L. TRIBE, *GOD SAVE THIS HONORABLE COURT* (1985).

160. Morris, *supra* note 144, at 564-65.

161. Goldman, *Reorganizing The Judiciary: The First Term Appointments*, 68 JUDICATURE 331 (1985).

proposal is a challenge to the Reagan administration to effect the necessary political compromise in order to make a lasting positive contribution to labor law administration.

If appointment of a second group of three judges would be warranted by the caseload during the next presidential term, the six member court would then normally function in two panels. The three member panels would resolve any divisions by mandatory en banc hearings; discretionary en banc hearings on especially important cases would further insure stable and coordinated development.¹⁶²

Once this federal labor court of appeals reached its full membership of six judges over the course of two presidential terms, thought could then be given to expanding the jurisdiction of the appellate court to other labor law issues.¹⁶³ For example, perhaps all appeals from federal district court decisions concerning the union duty of fair representation could be handled by the court. This is certainly another labor law area where case law continues to proliferate; splits among and even within the circuit courts of appeals abound.¹⁶⁴ But, until the labor court of appeals is at full strength and has demonstrated competence in deciding appeals from NLRB decisions, the NLRA should be the sole initial source of the legal issues to be decided by the court on appeal from NLRB decisions.¹⁶⁵

162. Bartosic, *supra* note 16, at 668; Miller, *supra* note 140, at 91; Spann, *supra* note 154, at 645.

163. See *infra* note 164.

164. For discussion of the variety of DFR law decisions that continue to split the courts of appeals, see Gregory, *A Call For Supreme Court Clarification of the Union Duty of Fair Representation*, 29 ST. LOUIS U.L.J. 45 (1984). Other examples of possible labor and employment matters over which the federal labor court would have future jurisdiction might include, in addition to DFR cases, wage and hour matters under the Fair Labor Standards Act, and employment discrimination cases under 42 U.S.C. §§ 2000(e) to 2000e-17 (1982), Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 1981 (1982), and the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-34 (1982). See Morris, *Unitary Enforcement*, *supra* note 135; Morris, *The NLRB: Its Future*, *supra* note 135; Spann, *supra*, note 154, at 645.

165. This is a point of major variance between the present proposal and the proposal advocated by Dean Bartosic. He would vest §§ 301-03 trial jurisdiction immediately in a trial division of the federal labor court. See Bartosic, *supra* note 16, at 667. This is presuming "too much too soon," and partially compromises the pragmatism of his otherwise fine proposal. He later equivocates on when the court would assume jurisdiction over §§ 301-03 cases. *Id.* at 671. Expanding the labor court's jurisdiction to employment discrimination law, LMRDA matters, and §§ 301-03 suits is a prospect for future assessment. This sweeping labor court jurisdiction, beyond NLRA issues, is also a hallmark of Professor Morris' proposal. See Morris, *supra* note 144, at 563-66. Professor Morris saw this as a means of alleviating the problem of overlapping court and agency jurisdiction over identical labor law matters. *Id.* at 556-60. See also Zimmerman & Dunn, *supra* note 38, at 5 ("The courts of appeals have limited geographic jurisdiction, while the Board holds a nationwide charter. Thus, the Board often refuses to acquiesce when one

E. Advantages of the Proposal

The ultimate advantage from the single federal labor court of appeals would be greater coordination and stability of NLRA legal doctrine,¹⁶⁶ analogous to that effectuated in patent law via the federal court of appeals or in tax law via the Tax Court. There would be no interference with the labor law expertise of the Board. Rather than have various circuits split on NLRA issues, appellate expertise would be concentrated in the one federal appellate labor court, hearing all appeals from NLRB decisions. Since there would no longer be conflicts among the circuits, one cause for labor law cases on the Supreme Court's docket would be eliminated. The circuits would have more time to devote to non-NLRA labor and to non-labor cases. Only labor issues of fundamental importance would need to be resolved by the Supreme Court. As the labor court of appeals' expertise increased, the initial backlog of cases appealed from NLRB decisions would dissipate. Reducing judicial and bureaucratic delays in labor law administration has been a perennial and legitimate concern of all interested parties, and could now be accomplished.¹⁶⁷

The Board would continue to have primary responsibility for decision-making under the NLRA. However, with appellate decisions centered in one federal appellate court, the Board would be forced to

or more of the circuit courts disagrees with its interpretation of the National Labor Relations Act (NLRA).").

166. Lyne, *supra* note 146, at 417. ("[T]he goal of uniformity in labor law is more apt to be obtained by the use of a single appellate tribunal.").

167. Professor Archibald Cox chaired a prominent panel that was most concerned with reducing the inordinate delays that obstructed timely remedies in labor cases. See *Advisory Panel on Labor-Management Relations Law, Report to the Senate Comm. on Labor and Public Welfare, Organization and Procedure of the National Labor Relations Board*, S. Doc. No. 81, 86th Cong., 2d Sess. (1960). See also SUBCOMM. ON NLRB OF THE HOUSE COMM. ON EDUC. AND LABOR, REPORT, 87th Cong. 2d Sess. (1961) ("[T]here is much needless delay in enforcement of the Labor Board orders . . . the losing party 'delays, lingers, and waits' because disobedience of a Labor Board order is not punishable until it is enforced by court action.").

See also *House Committee on Government Operations. Delay, Slowness in Decision-making, and the Case Backlog at the National Labor Relations Board*, H.R. Rep. No. 1141, 98th Cong., 2d Sess. (1984).

The J.P. Stevens Company has had the most notorious history of recalcitrance and obstruction of the NLRB. The uniform contumacy of the company spanned almost 20 years, from the early sixties until widespread settlements in a host of related litigation in the early eighties. The initial point in the J. P. Stevens history is *J.P. Stevens & Co.*, 157 N.L.R.B. 869 (1965), *enforced as modified*, 380 F.2d 292 (2d Cir. 1967), *cert. denied*, 389 U.S. 1005 (1967).

Prominent commentators have focused on the inordinate delays in the remedial process in labor law. Mechanisms to alleviate these delays are usually integral components of any structural reform proposal. See Bok, *The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act*, 78 HARV. L. REV. 38, 60-61 (1964).

consider more carefully the appellate ramifications of any contemplated internal reversals by the Board of its own prior law.¹⁶⁸

Except for those periods when the NLRB has operated with less than the full complement of five members, as has been the situation for most of the past two years,¹⁶⁹ most of the remedial delay has occurred in the courts of appeals and not at the NLRB.¹⁷⁰ This is yet another compelling reason for centralizing all appeals from NLRB decisions in a single federal labor court of appeals, rather than continue the present dispersion among the circuits.

In 1982, Congress implemented the United States Court of Customs and Patent Appeals, an Article III federal court of appeals with exclusive jurisdiction of all patent case appeals from the federal district courts.¹⁷¹ This new federal court of appeals has functioned successfully, and has met with generally favorable scholarly commentary.¹⁷² The proposed federal labor court of appeals is not to be confused with the United States Court of Customs and Patent Appeals, nor is it meant to suggest that each substantive body of law automatically merits its own federal court of appeals. In the present situation, the complexity of NLRA law, the mercurial nature of NLRB, frequent reversals of law and policy, and the dangerous

168. Spann, *supra* note 154, at 645.

169. A 1984 report adopted unanimously by the House Committee on Government Operations says: "[T]he National Labor Relations Board is in a crisis. Delay in decision-making by the Board and a staggering case backlog have forced workers and employers to wait years before cases are decided." *Criticism*, *supra* note 8, at 124.

170. See Bartosic, *supra*, note 16, at 654:

While the increased delay in enforcement proceedings must be viewed in the context of the more than tripled volume of labor cases in the courts, it is readily apparent that the major portion of delay exists at that level. This is especially significant in light of the Board's having reduced by almost one-third the time the median case is before the Board, despite more than a doubling of contested unfair labor practice cases.

171. On Oct. 1, 1982, by the Federal Courts Improvement Act of 1982, 28 U.S.C. § 171 (1982), a thirteenth Court of Appeals was created. It is formally called the United States Court of Appeals for the Federal Circuit. It is an intermediate appellate court of restricted subject matter jurisdiction, formed by merging the Court of Claims and the Court of Customs and Patent Appeals, two Article III courts formerly located in Washington D.C. The new federal court of appeals also has exclusive jurisdiction of appeals from federal district courts of all patent cases. Its jurisdiction is defined in 28 U.S.C. § 1295 (1982).

172. For thorough analysis of the new federal court of appeals and a compendium of prior proposals regarding additional federal courts of appeals, see Adams, *The Court of Appeals for the Federal Circuit: More Than a National Patent Court*, 79 MO. L. REV. 43 (1984).

See also Petrowitz, *Federal Court Reform: The Federal Courts Improvement Act of 1982 - and Beyond*, 32 AM. U.L. REV. 543 (1983); Posner, *Will the Federal Courts of Appeals Survive Until 1984?: An Essay on Delegation and Specialization of the Judicial Function*, 56 S. CAL. L. REV. 761 (1983); Note, *An Appraisal of the Court of Appeals for the Federal Circuit*, 57 S. CAL. L. REV. 301 (1984).

flashpoint political criticisms of Reagan Board ideology form a powerful synergy in favor of the proposed federal labor court of appeals.

IV. CONCLUSION

Many of the articles advocating reforms of the NLRA and the NLRB invited further discussion. This Article is an acceptance of those invitations, and, in turn, constitutes an open invitation for continuing dialogue. Hopefully, this is also a positive refinement of those prior reform plans. The objective is not utopia, but rather a realistic plan that coordinates labor law and its administration in a coherent federal network. The proposed federal labor court of appeals is an integral part of this process. The positive improvements gained via the proposed labor court of appeals would be substantial. Concomitantly, the properly political NLRB will retain necessary flexibility via continued use of adjudication rather than rulemaking.

Maintaining the delicate balance between judicial doctrinal stability without rigidity, and NLRB political responsiveness without irresponsibility, is a difficult but indispensable task.¹⁷³ Labor law is inherently controversial. While present criticism of the Board is particularly heated, it is certainly not unprecedented. The Board and the Act must remain intact and be strengthened rather than repealed. Legitimate criticisms have been made of seemingly unprincipled, cavalier, and precipitous spasms in prior Board precedent. Implementation of the proposed federal labor court of appeals is the best means of responding to those criticisms while preserving the Board and the Act and furthering the coordination of labor law jurisprudence.

173. Maintaining the proper balance between stability and flexibility, while avoiding the respective extremes of calcification and chaos, has always been a major jurisprudential concern. See T. O'HAGAN, *THE END OF LAW?* 4 (1984) ("An advanced legal system is complex and hierarchical. It embodies a system of rules which is both rigid, guaranteeing reliability and predictability, and flexible, allowing for successful application to particular cases and for development according to meta-rules of change."). See also Feldesman, *supra* note 151, at 540-41:

Some flexibility is needed, moreover, to cope with a subject as highly volatile as labor relations. There should be gaps in the statute. By parity or reasoning Board policies ought not become so hardened that they cannot be modified to meet changing conditions. The whole desideratum is the rule of reason and fairness in the light of express legislative policies. Certainty, predictability and even symmetry in filling up the spaces are only some, not all, of its parts.

There is constant movement in the world of industrial reality. Policies which have lost touch with that world can no longer be grounded in reason, or in fairness, and should therefore be abandoned. Neither should those which can be greatly improved remain unaltered. At all times policies should fit the essential facts.