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A Famous Victory: Collective Bargaining Protections and the Statutory Aging Process

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A FAMOUS VICTORY: COLLECTIVE BARGAINING PROTECTIONS AND THE STATUTORY AGING PROCESS

JAMES J. BRUDNEY*

When it enacted the National Labor Relations Act in 1935, Congress gave statutory recognition to collectively bargained terms and conditions of employment. In recent decades, the number of cases in which the Supreme Court has interpreted the NLRA has declined, leaving the Act's interpretation and enforcement primarily to the National Labor Relations Board and the federal courts of appeals.

In this Article, Professor Brudney presents the results of his study of 1,224 NLRB adjudications and their fate upon federal court review, from 1986 to 1993. Professor Brudney analyzes the reversal and affirmance data, and identifies areas of general Board-court agreement and disagreement regarding how the Act should be construed. In particular, Professor Brudney identifies a cluster of NLRA issues involving the survival of the collective bargaining relationship, over which the Board and courts markedly split. A closer look at recent cases presenting these issues, Professor Brudney argues, reveals recurrent Board-court tensions over the relative importance of stable collective bargaining relationships versus individual employee free choice.

Professor Brudney contends that by preferring employee free choice to bargaining stability, courts are reflecting the emphasis on individual rights and freedom that pervades contemporary employment law, as well as contemporary law and society in

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general. He further argues that the federal courts' apparent effort to "update" the sixty-year-old Act to conform to the larger legal landscape is misguided and may bring considerable costs.

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INTRODUCTION

"And everybody praised the Duke,
 Who this Great Fight did win."
 "But what good came of it at last?"
 Quoth little Peterkin.
 "Why, that I cannot tell," said he;
 "But 'twas a famous victory."¹

Nearly twenty years ago, Grant Gilmore described American legal culture as passing through statutory middle age.² Citing the New Deal as the major incubation period for federal legislation, Gilmore predicted that "mouldering statutes and elderly agencies" would plague our legal system in years to come.³ Gilmore's concern about the proliferation of aging statutes has been amplified more recently by other legal scholars⁴ and—in pointed terms—by public officials as well.⁵

1. Robert Southey, *The Battle of Blenheim*, in *A TREASURY OF GREAT POEMS* 690 (Louis Untermeyer ed., 1942).

2. GRANT GILMORE, *THE AGES OF AMERICAN LAW* 96 (1977).

3. *Id.* at 91.

4. See, e.g., GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 1-2 (1982) (describing our legal system as "choking on statutes" and advocating that courts be given the authority to limit or retire obsolete statutes); Jack Davies, *A Response to Statutory Obsolescence: The Nonprimacy of Statutes Act*, 4 VT. L. REV. 203, 204-06 (1979) (proposing that legislatures act to withdraw primacy from enactments that are over 20 years old, allowing courts to reform or modify statutes after that point); Donald C. Langevoort, *Statutory Obsolescence and the Judicial Process: The Revisionist Role of the Court in Federal Banking Regulation*, 85 MICH. L. REV. 672, 688-725 (1987) (discussing role of Supreme Court in updating banking laws enacted in 1930s).

5. See, e.g., Pub. L. No. 104-88, 109 Stat. 803 (1996) (abolishing Interstate Commerce Commission, established in 1887); S. 141 and H.R. 500, 104th Cong., 1st Sess. (1995) (proposing to repeal Davis-Bacon Act of 1931); H.R. 246, 104th Cong., 1st Sess. (1995)

The National Labor Relations Act (NLRA or Act)⁶ surely qualifies as one of the aging New Deal-era laws. Enacted sixty years ago to regulate relations between private firms and employees who seek to unionize and bargain collectively, the NLRA has remained essentially unchanged since 1947 in its approach to labor-management relations.⁷ In recent years, with the precipitous decline of private sector unionism,⁸ the Act has been dismissed as largely irrelevant to the contemporary workplace⁹ or even as contributing to the demise of the unions it was initially enacted to protect.¹⁰ There have been

(proposing to repeal Service Contract Act of 1962); H.R. 1756, 104th Cong., 1st Sess. (1995) (proposing to abolish Department of Commerce, established in 1913).

6. Pub. L. No. 74-198, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-169 (1994)). I use "NLRA" to refer to the 1935 statute as amended in 1947, 1959 and at other later dates. The 1935 enactment is referred to as the Wagner Act. The Labor-Management Relations Act of 1947, Pub. L. No. 80-101, 61 Stat. 136 (codified as amended at 29 U.S.C. §§ 141-187 (1994)), is referred to as the LMRA, or Taft-Hartley Amendments. The Labor-Management Reporting and Disclosure Act of 1959, Pub. L. No. 86-257, 73 Stat. 519 (codified as amended in scattered sections of 29 U.S.C.), is referred to as the LMRDA or Landrum-Griffin Amendments.

7. Congress in 1947 significantly modified the original Wagner Act when it enacted the Taft-Hartley Amendments over President Truman's veto. The Landrum-Griffin Amendments of 1959 were aimed principally at regulating the internal affairs of unions. The LMRDA effected only minor adjustments in the statutory scheme that governs conduct of unions and management during the organizing campaign and the bargaining process. See ARCHIBALD COX ET AL., *LABOR LAW CASES AND MATERIALS* 97-98 (11th ed. 1991); ROBERT A. GORMAN, *BASIC TEXT ON LABOR LAW UNIONIZATION AND COLLECTIVE BARGAINING* 5-6 (1976).

8. The proportion of the private nonagricultural workforce represented by unions was as high as 35% in the 1950s, but fell to 20% by 1980 and to 11.2% in 1993. See FACTFINDING REPORT ISSUED BY THE COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS 24 (1994) [hereinafter DUNLOP COMMISSION REPORT]; Samuel Estreicher, *Labor Law Reform in a World of Competitive Product Markets*, 69 CHI.-KENT L. REV. 3, 9-10 & n.23 (1993).

9. See Estreicher, *supra* note 8, at 9-14 (arguing that our decentralized adversarial model of labor relations is incompatible with pressures of modern, globally competitive product markets); Joel Rogers, *Reforming U.S. Labor Relations*, 69 CHI.-KENT L. REV. 97, 97-110 (1993) (arguing that the New Deal system of labor relations cannot survive the elimination of closed national economies and of large, dominant, stable firms); see also DUNLOP COMMISSION REPORT, *supra* note 8, at 10-16, 21-23 (noting dramatic changes in occupational structure of U.S. workforce, including shift to professional and service jobs and to temporary and part-time work); WILLIAM B. GOULD IV, *AGENDA FOR REFORM: THE FUTURE OF EMPLOYMENT RELATIONSHIPS AND THE LAW* 3 (1993) (stating that decline of private sector unions is far more attributable to market factors than to the law itself).

10. See Michael H. Gottesman, *In Despair, Starting Over: Imagining a Labor Law for Unorganized Workers*, 69 CHI.-KENT L. REV. 59, 62-63 (1993) (stating that Act fails to protect employees who seek to unionize against employer reprisal, and fails to protect employees who choose to strike against being permanently replaced); Paul Weiler, *Striking a New Balance: Freedom of Contract and the Prospects for Union Representation*, 98

numerous calls to amend the statute in modest or far-reaching fashion, emanating from legislators and legal academics as well as interested parties.¹¹

Amidst the chorus of criticism, a significant overlooked dimension of the NLRA's current utility or lack thereof involves the interaction between the National Labor Relations Board (NLRB or Board) and the federal appellate courts. The NLRB, charged with implementing statutory protections and prohibitions, acts almost exclusively through adjudication.¹² The courts of appeals are authorized to review, enforce, and set aside the Board's decisions.¹³ This Article begins an empirical and analytical examination of tensions that exist between the NLRB and the appellate courts over the contemporary meaning of the Act.

There is ample reason to focus attention on decisionmaking by the expert agency and the primary reviewing courts as a means to

HARV. L. REV. 351, 358-63 (1984) [hereinafter Weiler, *New Balance*] (criticizing Act's prohibitions and remedies as inadequate to deter employers from unlawfully refusing to bargain in good faith with newly certified unions); Paul Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1776-93 (1983) [hereinafter Weiler, *Promises*] (stating that Act's provisions are inadequate to deter employers from unlawfully discharging union supporters during organizing campaigns); Cathy Trost & Leonard M. Apcar, *AFL-CIO Chief Calls Labor Laws a 'Dead Letter'*, WALL ST. J., Aug. 16, 1984, at 8 (reporting that AFL-CIO President called federal labor laws a "dead letter" and suggested workers may be "better off with the law of the jungle").

11. For recent examples of proposed legislative reform, see, e.g., National Right to Work Act, S. 581 and H.R. 1279, 104th Cong., 1st Sess. (1995) (proposing to modify § 8(a)(3) to bar contracts between unions and management that require union membership as a condition of employment); Teamwork for Employees and Management Act, S. 295 and H.R. 743, 104th Cong., 1st Sess. (1995) (proposing to modify § 8(a)(2) to facilitate employer-initiated collaborative efforts); S. 777, 104th Cong., 1st Sess. (1995) (proposing to provide equal time on the employer's premises for unions to present information to employees during organizing campaigns); S. 778, 104th Cong., 1st Sess. (1995) (proposing to require that Board hold expedited elections in 30 days upon a showing of interest by 60% of employees); Workplace Fairness Act, S. 55 and H.R. 5, 103d Cong., 1st Sess. (1993) (proposing to add new § 8(a)(6) that would ban the permanent replacement of strikers). For reforms proposed by legal academics, see, e.g., Estreicher, *supra* note 8, at 35-46 (proposing modest reforms); Gottesman, *supra* note 10, at 68-96 (proposing extensive reforms). See also Matthew W. Finkin, *The Road Not Taken: Some Thoughts on Nonmajority Employee Representation*, 69 CHI.-KENT L. REV. 195, 199-218 (1993) (proposing "members only" representation as an alternative to exclusive representation based on majority support); Gould, *supra* note 9, at 151-79 (proposing long list of changes).

12. The Board has long had rulemaking authority under the NLRA, see Pub. L. No. 74-198, § 6, 49 Stat. 449, 452 (1935) (codified at 29 U.S.C. § 156 (1994)), but it exercised this authority for the first time only in 1989, *American Hosp. Ass'n v. NLRB*, 499 U.S. 606, 617-20 (1991).

13. Pub. L. No. 74-198, §§ 10(e), (f), 49 Stat. 449, 453 (1935) (codified as amended at 29 U.S.C. §§ 160(e), (f) (1994)).

understanding how the NLRA has evolved or aged over time.¹⁴ Congress has long been unable to muster a working majority to overhaul or even modify the Act's provisions.¹⁵ Legislative gridlock—attributable in large part to the de facto veto power of competing interest groups—is likely to persist for the foreseeable future.¹⁶ The Supreme Court regularly announced groundbreaking interpretations of the NLRA during the initial decades following its enactment and then modification in 1947. Over the past twenty years, however, the Court has become noticeably less active in accepting cases and issuing opinions that construe the NLRA.¹⁷ Accordingly, the Board and the appellate courts have assumed the mantle of interpreting—and perhaps updating—the Act on an interstitial basis. The interplay between these two institutions may well have become the prime source of policymaking in labor-management relations today.

Moreover, rifts identified between the Board and the courts raise important questions concerning the interpretation of aging statutes in general. Given the limited capacity of Congress and the Supreme Court, the burden of interpreting older statutes in light of changed circumstances will tend to rest on agencies and lower courts. The interpretive process in turn will often involve tensions between fidelity

14. The aging of a statute is a complex phenomenon, involving the need to apply original text to new or unforeseen circumstances in light of significant intervening changes in the law or in the society at large. Changes in market factors, technology, and the nature of the workforce certainly help explain the NLRA's perceived inadequacies. My focus, however, is on how the priorities and values embodied in the Act may be regarded differently today than in earlier eras, and differently by the Board than by the appellate courts.

15. Apart from the 1959 Landrum-Griffin Amendments, discussed *supra* note 7, and a 1974 amendment addressing health care institutions, Pub. L. No. 93-360, 88 Stat. 395 (codified at 29 U.S.C. § 158 (1994)), efforts to reform the Act have been notably unsuccessful. The one major pro-union reform effort, launched in 1977, proposed expedited election procedures and stronger remedial provisions. The bill gained House approval but fell short of the 60 votes needed to cut off Senate debate. See H.R. 8410, 95th Cong., 1st Sess. (1977); 123 CONG. REC. 32613 (1977) (bill passes House); 124 CONG. REC. 17749, 18398 (1978) (fifth and sixth cloture votes fail in Senate; bill withdrawn). Other less ambitious pro-union efforts also have stalled in the Senate on cloture votes. See S. 55, 102d Cong., 1st Sess. (1991); 138 CONG. REC. S8237 (1992) (cloture vote fails on bill banning permanent replacement of strikers); 140 CONG. REC. S8844 (1994) (same). Current pro-employer efforts in a Republican-controlled Congress face the similarly daunting task of securing supermajority support.

16. Both organized labor and the business community have had enough supporters in the Senate to prevent enactment. Given the fiercely partisan nature of this issue, legislative reform seems attainable only if one party secures at least 60 seats in the Senate plus the Presidency.

17. See *infra* part I.B.2 for a full discussion.

to original statutory purposes and conformity to contemporary legal norms. An understanding of this process in the labor law area may therefore be instructive with regard to the evolving meaning of other statutes.

My empirical inquiry is directed at disagreements that arose between the Board and the appellate courts during a recent yet extended time period: from late October 1986 to early November 1993. The examination covers 1,224 appellate court cases during this seven-year period that reviewed decisions rendered by the NLRB: each of the 280 cases reversing, remanding, or modifying Board orders; and a random sample of the 944 cases fully enforcing or affirming the Board. The data collected from these cases are classified in terms of general case outcomes and issue-specific outcomes. Analysis of court reversal rates keyed to particular substantive issues as well as general case results offers more refined insights into the complex nature of Board-court tensions.

With respect to general case outcomes, the empirical results suggest that reversal rates¹⁸ turn more on whether the Board has found a statutory violation than on the identity of the culpable party. Once an employer (or union) was charged by the Board's General Counsel with committing an "unfair labor practice"—that is, conduct violative of the NLRA—the courts were significantly less likely to reverse a Board decision that the employer (or union) had committed the unfair labor practice than a Board decision that the employer (or union) was "innocent" of the charged conduct. Further, while Board decisions determining that the union had violated the Act were reversed at a slightly lower rate than Board decisions establishing a violation by the employer, the difference was not statistically significant. The latter finding is surprising in light of the conventional wisdom that appellate courts are result-oriented or hostile to unions. Also surprising—in view of the administrative agency's presumed expertise in remedial matters—is the fact that Board decisions awarding requested relief against a culpable employer were reversed at a significantly higher rate than Board decisions finding statutory liability as charged.

Turning to issue-specific outcomes,¹⁹ Board determinations were

18. The term "reversal rate" refers to the rate at which Board decisions are reversed, remanded, or modified, not simply reversed. "Affirmance rate" (which is 100% minus the reversal rate) refers to the rate at which Board decisions are affirmed or enforced in full.

19. Examples of issues decided by the appellate courts include specific types of violations by an employer under § 8(a) of the NLRA, specific types of union violations

reversed at a significantly high rate on a cluster of issues that involve the survival of a collective bargaining relationship. In my view, this distinctive division between expert agency and intermediate courts stems from the Act's simultaneous commitment to the value of collective action by workers and to the right of those same workers to choose the entity that will represent them. In seeking to reconcile a statutory goal of maintaining—and at times establishing—collective bargaining relationships with a goal of protecting employees' free choice of their bargaining representative, the Board and the courts conspicuously diverged during this seven-year period.

The divergence is manifested with respect to certain discrete yet related issues. At the liability stage, when the Board determines that an employer has violated its duty to bargain by improperly withdrawing recognition from an incumbent union, the courts frequently overturn the Board, invoking the employer's reasonably grounded good faith doubt as to the union's continued majority status. At the remedy stage, when the Board decides that an employer's serious misconduct disrupted an election campaign—making a fair rerun election unlikely—and orders the employer to bargain with the union which lost the election but had previously demonstrated majority support, the courts often reject this relief, concluding that the Board has failed to establish that a free and fair election is impossible. Moreover, when the Board decides that an employer's improper withdrawal of recognition from an incumbent union warrants a bargaining order to restore the status quo ante, courts frequently reject the remedy—even when affirming the violation—insisting on an election or a cease-and-desist order as more appropriate forms of relief.

Each of these issues involves an alleged uncertainty as to the union's continued majority status, and the perceived impact of that uncertainty on the legitimacy of a collective bargaining relationship. Given the strong evidence that appellate courts disagree with the Board's approach, the Article pursues a detailed doctrinal analysis of the cases in which these issues are raised. Review of the relevant Board and court opinions indicates that the high reversal rate is attributable in part to matters of substantive law, such as whether the Board must consider the passage of time and employee turnover before issuing a bargaining order, and in part to matters of factual

under § 8(b), specific remedial issues under § 10(c), and "other" issues such as jurisdiction, procedure, or constitutional questions. See *infra* part II.C for a full description.

record, such as whether the Board has truly considered the totality of circumstances when evaluating an employer's asserted good faith doubt that the union still enjoys majority support. Yet underlying these reversals, whether justified in legal or factual terms, is a persistent conflict in values. The Board gives primary weight to preserving the stability of bargaining relationships, or establishing those relationships, based on earlier evidence of majority employee support. By contrast, the courts tend to worry more about the risk of retaining, or imposing, a representative that current employees may not want.

One way to explain the tension in values is by analyzing the conflicting positions from the vantage point of the statutory aging process. The Board can be seen as emphasizing the primacy of the bargaining relationship based on a sense of fidelity to historical legislative purpose. The appellate courts' pronounced sympathy for protecting current employee choice reflects, by contrast, sensitivity to the re-established paradigm of individual rights, a paradigm that now dominates both the workplace and the larger legal culture. Such judicial sensitivity to current legal values raises serious questions as to whether courts should engage on their own in reshaping a regulatory scheme when Congress has not chosen to do so. Viewing the Board-court conflict in historical and institutional terms offers insights into both the judicial updating process and the risks in having intermediate courts update an aging statute.

Part I provides an overview of the NLRA and its lifespan. It sets forth the Act's original goals—emphasizing the novelty and importance of federal recognition for collective bargaining—and briefly describes the Act's unusual political origins in 1935. Part I also identifies subsequent developments of relevance here, notably Congress's renewed attention in 1947 to preserving individual employee freedom, and the Supreme Court's declining interest in reviewing Board decisions that have interpreted and applied the Act.

Part II describes the methodology used and the results reached in the empirical study. It discusses the general case outcome results and raises a number of questions about those results. Part II also explains how review of issue-specific outcomes helps illuminate the nature and extent of Board-court disagreements. Finally, it identifies the issue cluster involving survival of the collective bargaining relationship that then becomes the basis for further analysis.

Part III presents doctrinal analysis of the cluster of issues involving tensions between bargaining stability and employee free choice. It considers the specific cases in greater detail, and concludes

that the divergence between Board and courts reflects a basic conflict in value preferences over the relative importance attributed to stable collective bargaining relationships.

Part IV considers this tension from the perspective of different institutional approaches to an aging statute. In identifying the divergence between an agency pursuing original purpose and courts reflecting contemporary values, it also points to the risks involved in a dynamic or "updating" approach to statutory interpretation.

I. OVERVIEW OF AN ANOMALOUS STATUTE

A. *The Wagner Act*

A proper appreciation for current tensions between the Board and the appellate courts requires some understanding of the NLRA's historical origins. The Wagner Act represented both a major innovation in federal labor policy and a singular political achievement.

1. A Novel Emphasis on Collective Bargaining

When Congress passed the Wagner Act in 1935, it set forth a national labor policy shaped heavily by the economic exigencies of the times. In the midst of a major depression, the Act announced a policy of "encouraging the practice and procedure of collective bargaining"²⁰ in order to achieve certain overriding legislative goals. Statutory recognition for collective bargaining was meant to address the twin objectives of promoting industrial peace and restoring mass purchasing power, objectives that were linked closely to prevailing ideas about how to achieve national economic recovery.²¹

Faced with industrial unrest on a large if not unprecedented scale, the Wagner Act's chief proponents contended that federal protection for collective bargaining would reduce the costly effects of conflict between management and workers.²² While labor-

20. Pub. L. No. 74-198, § 1, 49 Stat. 449, 449 (1935) (codified at 29 U.S.C. § 151 (1994)).

21. *Id.* (identifying industrial strife and inadequate mass purchasing power as major burdens or obstructions to interstate commerce, burdens the new statute intended to ameliorate); see IRVING BERNSTEIN, *THE NEW DEAL COLLECTIVE BARGAINING POLICY* 90 (1950); Archibald Cox, *Some Aspects of the Labor Management Relations Act 1947*, 61 HARV. L. REV. 1, 2-3 (1947); Leon H. Keyserling, *Why the Wagner Act?*, in *THE WAGNER ACT: AFTER 10 YEARS* 5, 7-18 (Louis G. Silverburg ed., 1945).

22. See S. REP. NO. 573, 74th Cong., 1st Sess. 1-3 (1935), reprinted in 2 NLRB, *LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935*, at 2300, 2300-02 (1985) [hereinafter LEGIS. HIST.]; H.R. REP. NO. 969, 74th Cong., 1st Sess. 6-8 (1935),

management disputes were regarded as inevitable, proponents viewed government facilitation of the collective bargaining process as creating a more nearly equal balance of power that would channel many of these disputes into negotiated solutions.²³

Collective bargaining also was central to the Act's declared effort to address the underconsumption that was exacerbating the business depression. Leading supporters in Congress maintained that increases in mass purchasing power were essential to the short-term revival and long-term health of the economy.²⁴ The growth of collective bargaining would produce substantial economic improvement for workers, which in turn would help the nation to spend its way out of the depression.²⁵

In addition to improving the country's economic future, the enforceable recognition of collective bargaining was justified as promoting basic fairness and as democratizing the workplace.

reprinted in 2 LEGIS. HIST., *supra*, at 2910, 2915-17; 79 CONG. REC. 7573 (1935) (statement of Sen. Wagner), reprinted in 2 LEGIS. HIST., *supra*, at 2321, 2341-42.

23. S. REP. NO. 573, *supra* note 22, at 2, reprinted in 2 LEGIS. HIST., *supra* note 22, at 2301 (stating that "[d]isputes about wages, hours of work, and other working conditions should continue to be resolved by the play of competitive forces," but adding that "[i]t is . . . believed feasible to remove the provocation to a large proportion of the bitterest industrial outbreaks by giving definite legal status to the procedure of collective bargaining and by setting up machinery to facilitate it"); see also 79 CONG. REC. 7573 (1935) (statement of Sen. Wagner), reprinted in 2 LEGIS. HIST., *supra* note 22, at 2341 (advocating pursuit of industrial peace through collective bargaining and rejecting compulsory arbitration approach adopted by some European countries). See generally Kenneth Casebeer, *Holder of the Pen: An Interview with Leon Keyserling on Drafting the Wagner Act*, 42 U. MIAMI L. REV. 285, 286 (1987) (recognizing Act's goal of channeling economic conflict between employers and employees); James B. Zimarowski, *A Primer on Power Balancing Under the National Labor Relations Act*, 23 U. MICH. J.L. REF. 47, 65 (1989) (same).

24. S. REP. NO. 573, *supra* note 22, at 3-4, reprinted in 2 LEGIS. HIST., *supra* note 22, at 2302-03 (encouraging the procedure of collective bargaining as a means that would help "permit the masses of consumers to relieve the market of an ever-increasing flow of goods," and justifying such encouragement as part of a congressional effort "[h]aving in mind both the temporary expediency of priming the pump of business and the permanent objective of crystallizing antidepressive forces for the future"); see 79 CONG. REC. 7567-68 (1935) (statement of Sen. Wagner), reprinted in 2 LEGIS. HIST., *supra* note 22, at 2327-30 (describing Congress's unsuccessful effort under § 7(a) of the National Industrial Recovery Act to raise wages, increase mass purchasing power, and "thus prime the pump of business," and predicting that "[i]f the more recent quickening of business activity is not supported by rises in wages [achievable through the spread of collective bargaining], either we shall have to sustain the market indefinitely by huge and continuous public spending or we shall meet the certainty of another collapse").

25. See Casebeer, *supra* note 23, at 291-92; Keyserling, *supra* note 21, at 8-12; David Plotke, *The Wagner Act, Again: Politics and Labor, 1935-37*, 3 STUD. IN AM. POL. DEV. 105, 125 (1989).

Supporters insisted that protecting employees' freedom to organize and bargain collectively was "a matter of simple justice" needed to offset employers' concentration of economic power.²⁶ Senator Wagner, pointing to recent government-sanctioned increases in industrial combinations, urged that "[i]n order that the strong may not take advantage of the weak, every group must be equally strong."²⁷ Proponents also extolled the virtues of industrial democracy, drawing support from the analogous political right to representation. By providing for workers' voices to be part of industrial decisionmaking, the bill furthered the "inherent" American right of democratic self-government in the workplace,²⁸ and thereby effectively discouraged more extreme challenges to the social order.²⁹

These four major legislative goals—reducing industrial strife, restoring mass purchasing power, promoting a fairer distribution of economic resources, and furthering self-government by employees—did not receive equal billing in the congressional debates leading up to enactment of the NLRA.³⁰ While disputes persist as

26. *Hearings Before the Committee on Education and Labor on S. 1958*, 74th Cong., 1st Sess. 126 [hereinafter *Hearings*] (statement of Lloyd K. Garrison, Dean of The University of Wisconsin Law School and former chair of pre-NLRA National Labor Relations Board), *reprinted in* 1 LEGIS. HIST., *supra* note 22, at 1505-06; *see, e.g., id.* at 101-02 (statement of William Green, President of American Federation of Labor), *reprinted in* 1 LEGIS. HIST., *supra* note 22, at 1477-78; *id.* at 172-73 (statement of H.A. Millis, Chair of Economics Department of The University of Chicago), *reprinted in* 1 LEGIS. HIST., *supra* note 22, at 1552-53.

27. *Hearings*, *supra* note 26, at 34-35, *reprinted in* 1 LEGIS. HIST., *supra* note 22, at 1410-11; *see* BERNSTEIN, *supra* note 21, at 100-01.

28. 79 CONG. REC. 9691 (1935) (statement of Rep. Withrow), *reprinted in* 2 LEGIS. HIST., *supra* note 22, at 3132. *See generally* Craig Becker, *Democracy in the Workplace: Union Representation Elections and Federal Labor Law*, 77 MINN. L. REV. 495, 502-04 (1993) (reviewing historical justifications for Wagner Act that invoked the themes of democracy and self-government).

29. *See, e.g., Hearings*, *supra* note 26, at 125 (statement of Lloyd K. Garrison), *reprinted in* 1 LEGIS. HIST., *supra* note 22, at 1505 (supporting bill "first as a safety measure, because I regard organized labor . . . as our chief bulwark against communism and other revolutionary movements"); *id.* at 179 (statement of H.A. Millis), *reprinted in* 1 LEGIS. HIST., *supra* note 22, at 1559 (expressing belief that protection for labor's right to organize and bargain collectively will reduce friction between classes); Keyserling, *supra* note 23, at 13 (reproducing 1937 speech by Senator Wagner in which he stated that "[t]he denial or observance of this right [to bargain collectively] means the difference between despotism and democracy"). *See generally* BERNSTEIN, *supra* note 21, at 102 (citing testimony from proponents who viewed collective bargaining as an antidote to calls for social rebellion).

30. The Act's economic goals of reducing strife and promoting purchasing power were highlighted in the debates before enactment. Arguments for fairness and democratization also were advanced, but they were not featured as prominently either in the key committee reports or in the floor statements by the bill's manager and recognized leader,

to the priority and weight that should be given to each goal in understanding the Act's meaning,³¹ what is important for present purposes is that all four goals were predicated on the virtues of *collective* action in the workplace. To be sure, achieving the status of

Senator Wagner. S. REP. NO. 73, *supra* note 22, at 1-4, *reprinted in* 2 LEGIS. HIST., *supra* note 22, at 2300-03 (identifying industrial peace, and economic adjustment through enhanced purchasing power, as the bill's general objectives); H.R. REP. NO. 969, *supra* note 22, at 6-8, *reprinted in* 2 LEGIS. HIST., *supra* note 22, at 2915-17 (emphasizing particularly the bill's objective of reducing industrial unrest); 79 CONG. REC. 7565-68, 7573 (1935) (statement of Sen. Wagner), *reprinted in* 2 LEGIS. HIST., *supra* note 22, at 2321-30, 2341-42 (setting forth objectives of restoring mass purchasing power and promoting industrial peace); *see also* Plotke, *supra* note 25, at 125-27 (discussing the four legislative goals and concluding that the fairness and industrial democracy arguments—stressed by labor groups more than by economists or other professionals—"were not well-developed in the pre-passage debates and took shape slowly thereafter").

The prominence of the two economic objectives may reflect strategic judgments, both as to what would persuade congressional colleagues and what would pass constitutional muster when challenged in the Supreme Court. *See, e.g.,* BERNSTEIN, *supra* note 21, at 104-05 (describing Wagner's argument that strikes caused by unfair practices burdened interstate commerce, and that Congress had constitutional authority to regulate or remove such obstructions); Casebeer, *supra* note 23, at 308 (describing constitutional argument in § 1, formulated by Wagner's principal staff aide Leon Keyserling, that denial of right to bargain collectively burdens interstate commerce by adversely affecting performance of economy without regard to existence of strikes or other disruptive practices); Keyserling, *supra* note 21, at 7-12 (describing Senator Wagner's effort to situate NLRA efforts in the mainstream of federal attempts to foster national economic recovery). *See generally* PETER H. IRONS, *THE NEW DEAL LAWYERS* 229-30 (1982) (discussing Keyserling's strategy with respect to Act's possible constitutional infirmity).

31. *Compare, e.g.,* Becker, *supra* note 28, at 502 (characterizing democratization of workplace as "[a]t the forefront of the goals professed by" Wagner Act supporters) with Casebeer, *supra* note 23, at 293-96 (ascribing central importance to Act's goal of increasing purchasing power) and Zimarowski, *supra* note 23, at 65 (stressing Act's "need to redress the pervasive power imbalance between employers and employees, and the need to provide a dispute resolution forum"). *See also* Mark Barenberg, *The Political Economy of the Wagner Act: Power, Symbol, and Workplace Cooperation*, 106 HARV. L. REV. 1379, 1465-89 (1993) (arguing that Senator Wagner intended collective bargaining system to be cooperative rather than adversarial, with goal of enhancing trust and productivity in the marketplace). *See generally* Howell Harris, *The Snares of Liberalism? Politics, Bureaucrats and the Shaping of Federal Labour Relations Policy in the United States, ca. 1915-47*, in *SHOP FLOOR BARGAINING AND THE STATE* 148, 169-70 (Steven Tolliday & Jonathan Zeitlin eds., 1985) (rejecting argument of "revisionist scholars" that Wagner Act was even potentially a radical charter for participatory democracy in industry, and viewing Act instead as embodying more modest collectivist goals); Plotke, *supra* note 25, at 130-38 (rejecting arguments that Wagner Act was an exercise in capitalist autoreform or a project of internally-directed enhancement of state powers, and viewing Act as process of political reform, led by progressive liberals in coalition with labor movement); Theda Skocpol, *Political Response to Capitalist Crisis: Neo-Marxist Theories of the State and the Case of the New Deal*, 10 POL. & SOC'Y 155, 168-69, 182-85 (1981) (rejecting argument of neo-Marxists that Wagner Act was planned and promoted by big business to stabilize and revitalize national economy, and viewing Act instead as extension of state power to manage the economy, achieved over business opposition).

a collectively bargained agreement redounds to the benefit of individual workers, insofar as it offers them greater economic rewards and participatory opportunities. But the Act's emphasis on the *collective* nature of this negotiated status entailed a subordination of traditional individualistic perspectives.

Statutory recognition of collectively bargained terms and conditions of employment meant that individuals gave up their contractual freedom to negotiate their own job conditions.³² The enforceable nature of this recognition meant—again departing from traditional contract law—that employers were compelled to bargain in good faith with this collectively constituted entity.³³ The recognized primacy of collective bargaining also supplanted historical notions that individuals should take moral and legal responsibility for decisionmaking in the economic arena.³⁴

The creation of collectively defined rights and responsibilities for the nation's private workplaces was a novel development in federal labor law, only dimly foreshadowed by earlier federal interventions.³⁵ At the same time, the shift in emphasis toward collective decision-making and collective responsibility was part of a broader change in federal policy that extended to other aspects of the economy as part of the New Deal. The National Industrial Recovery Act (NIRA)³⁶ inaugurated a system of "fair competition" codes, formulated by trade associations and other industry groups to regulate trade practices and certain minimum working standards.³⁷ By suspending the enforce-

32. *J.I. Case Co. v. NLRB*, 321 U.S. 332, 337-39 (1944); see, e.g., S. REP. NO. 573, *supra* note 22, at 13, *reprinted in* 2 LEGIS. HIST., *supra* note 22, at 2313 (noting that "the making of [collective bargaining] agreements is impracticable in the absence of majority rule"); 79 CONG. REC. 7571 (statement of Sen. Wagner), *reprinted in* 2 LEGIS. HIST., *supra* note 22, at 2337 ("Majority rule, with all its imperfections, is the best protection of workers' rights.").

33. 29 U.S.C. § 158(a)(5), 158(d) (1994); see S. REP. NO. 573, *supra* note 22, at 12, *reprinted in* 2 LEGIS. HIST., *supra* note 22, at 2312; Gottesman, *supra* note 10, at 83-84.

34. See BERNSTEIN, *supra* note 21, at ix.

35. See GORMAN, *supra* note 7, at 1-5 (describing Clayton Act of 1914, which created labor antitrust exemption that was then given limited effect by Supreme Court; and Norris-LaGuardia Act of 1932, which stated a public policy in favor of collective bargaining that was "promoted" not by establishing substantive rights but simply by limiting the equity jurisdiction of the federal courts); Harris, *supra* note 31, at 152-61 (describing role of courts in 19th century, sanctioning competitive individualistic relations between employers and employees, and noting limited federal regulatory efforts during World War I and the 1920s).

36. Pub. L. No. 73-67, 48 Stat. 195 (1933). The NIRA was declared unconstitutional in *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529-51 (1935).

37. Pub. L. No. 73-67, §§ 3-4, 48 Stat. 195, 196-98 (1933); see IRONS, *supra* note 30, at 17-23; Ellis W. Hawley, *The New Deal and Business*, in *THE NEW DEAL: THE NATIONAL*

cement of antitrust laws, Congress in the NIRA eschewed traditional notions of competition among individual firms, and instead embraced collective action by businesses to set prices and control production.³⁸

Similarly, the Agricultural Adjustment Acts of 1933 and 1938 (AAA)³⁹ authorized the Secretary of Agriculture to sanction collective action by farmers and agricultural processors in lieu of free market competition among individual producers.⁴⁰ Responding to substantial overproduction of crops, plummeting prices, and a disastrous decline in the purchasing power of American farmers, the AAA allowed farmers to receive a federal subsidy for crops *not* grown, and allowed processors to fix prices through marketing agreements that were exempted from the antitrust laws.⁴¹ This approach paralleled the NLRA and NIRA in enabling and encouraging collective action by particular occupational groups to improve the economic status of their members. The federal government's active promotion of co-determination by various economic subgroups marked a major policy change from the pre-New Deal orientation toward individual self-determination in the economic arena.⁴²

LEVEL 50, 60-61 (John Braeman et al. eds., 1975).

38. Pub. L. No. 73-67, § 5, 48 Stat. 195, 198 (1933); see IRONS, *supra* note 30, at 17-23; Hawley, *supra* note 37, at 60-61. At the insistence of organized labor, the NIRA also required each code of fair competition to include assurances that workers within the industry could organize into unions and bargain collectively. Pub. L. No. 73-67, § 7(a), 48 Stat. 195, 198 (1933). The dismal record of employer compliance under § 7(a) of the NIRA contributed to the origins of the NLRA. See BERNSTEIN, *supra* note 21, at 57-77; IRONS, *supra* note 30, at 203-25.

39. Pub. L. No. 73-10, 48 Stat. 31 (1933); Pub. L. No. 75-430, 52 Stat. 31 (1938) (codified in scattered sections of 7 U.S.C.). The first AAA was declared unconstitutional by the Supreme Court in *United States v. Butler*, 297 U.S. 1, 62-78 (1936). The second AAA was upheld against constitutional challenge in *Wickard v. Filburn*, 317 U.S. 111, 118-33 (1942).

40. See IRONS, *supra* note 30, at 111-35; Richard S. Kirkendall, *The New Deal and Agriculture*, in *THE NEW DEAL: THE NATIONAL LEVEL*, *supra* note 37, at 83, 86-88.

41. Pub. L. No. 73-10, §§ 1 (Declaration of Emergency) and 8, 48 Stat. 31, 31, 34 (1933); Pub. L. No. 75-430, §§ 2, 101-104, 52 Stat. 31, 31-36 (1938); see IRONS, *supra* note 30, at 114-16; Kenneth Finegold, *From Agrarianism to Adjustment: The Political Origins of New Deal Agricultural Policy*, 11 POL. & SOC'Y 1, 2-5 (1982); Kirkendall, *supra* note 40, at 84-88.

42. See Skocpol, *supra* note 31, at 156 (viewing New Deal as transforming federal government "from a mildly interventionist, business-dominated regime into an active 'broker-state' " that incorporated commercial farmers and organized labor into processes of political bargaining at the national level). See generally James Holt, *The New Deal and the American Anti-Statist Tradition*, in *THE NEW DEAL: THE NATIONAL LEVEL*, *supra* note 37, at 27-49 (discussing the shift from pre-New Deal self-determination to a policy of co-determination).

The Wagner Act itself consisted of four basic provisions. Section 7 set forth employee protections in the form of certain rights;⁴³ section 8 prohibited as unfair labor practices specified employer conduct that interfered with or abridged those rights;⁴⁴ section 9 authorized the Board to certify exclusive representatives that had been selected or designated by a majority of employees;⁴⁵ and section 10 regulated the Board's procedure in investigating and adjudicating unfair labor practice cases and included provisions for judicial review of Board decisions by the courts of appeals.⁴⁶ Of particular interest here are section 8(a)(5), requiring the employer to bargain collectively with duly designated employee representatives, and the provisions of section 10, setting forth Board enforcement authority as well as standards for judicial review.

The bill that became the Wagner Act originally identified four employer unfair labor practices but did not prohibit employer refusals to bargain collectively with the employees' designated representative.⁴⁷ Senator Wagner explained the omission by stating that the employees' explicit right to organize and bargain collectively imposed an implicit duty on the employer to bargain with the employees' chosen representative, and that the absence of an explicit unfair labor practice was due simply to "the difficulty of setting forth this matter precisely in statutory language."⁴⁸ Undaunted by the problems

43. Pub. L. No. 74-198, § 7, 49 Stat. 449, 452 (1935) (codified as amended at 29 U.S.C. § 157 (1994)). The three central rights—conferred on employees as a group—were the rights to organize, to bargain collectively, and to engage in concerted self-help activity such as strikes or picketing. *See id.*

44. § 8, 49 Stat. at 452-53 (codified as amended at 29 U.S.C. § 158(a) (1994)). Four of the five employer unfair labor practices included in the Wagner Act remain unaltered to this day; the fifth (now designated as § 8(a)(3)) was amended in minor respects in 1947. With the addition in 1947 of union unfair labor practices, the five employer prohibitions were redesignated as §§ 8(a)(1) to (5).

45. § 9, 49 Stat. at 453 (codified as amended at 29 U.S.C. § 159 (1994)).

46. § 10, 49 Stat. at 453-55 (codified as amended at 29 U.S.C. § 160 (1994)).

47. S. 1958, 74th Cong., 1st Sess. § 8 (1935) *reprinted in* 1 LEGIS. HIST., *supra* note 22, at 1295, 1299-1300. The four unfair labor practices identified are today codified at 29 U.S.C. §§ 158(a)(1) to (4) (1994).

48. *Hearings*, *supra* note 26, at 43 (statement of Sen. Wagner), *reprinted in* 1 LEGIS. HIST., *supra* note 22, at 1419; *Hearings Before the Committee on Labor on H.R. 6288*, 74th Cong., 1st Sess. 16 (1935) [hereinafter *Hearings II*] (statement of Sen. Wagner), *reprinted in* 2 LEGIS. HIST., *supra* note 22, at 2490; *see also* BERNSTEIN, *supra* note 21, at 95 (stating that Wagner and Keyserling had reservations about expressing the employer's duty to bargain in statutory language, and that they "omitted [the duty] in hope that the board would establish the obligation on a common law basis" as previous nonstatutory labor boards had done); Casebeer, *supra* note 23, at 329-30 (stating that Keyserling described the Biddle amendment, adding § 8(5), as a "refinement and specification" of what the

associated with drafting an enforceable duty to bargain,⁴⁹ supporters of the bill pushed for such language to be added. During the hearings, Francis Biddle, chair of the current nonstatutory labor board, proposed to add a fifth employer unfair labor practice as follows: "(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)."⁵⁰ Testimony from Biddle and others who had served on the labor board emphasized the practical necessity of an explicit employer obligation if the new law was to foster genuine efforts by employers to reach an agreement through collective bargaining.⁵¹ The Biddle amendment was adopted by both Senate and House committees and incorporated into the Act;⁵² its language, now in section 8(a)(5), remains unchanged to this day.

Section 10 of the bill that became the Wagner Act called for an independent agency with its own investigation and enforcement

Act's authors meant).

49. Senator Wagner's unsuccessful 1934 bill, *see infra* note 58 and accompanying text, had included a provision making it an unfair labor practice for an employer "[t]o refuse to recognize and/or deal with representatives of his employees, or to fail to exert every reasonable effort to make and maintain agreements with such representatives." S. 2926, 73d Cong., 2d Sess. § 5(2) (1934), *reprinted in* 1 LEGIS. HIST., *supra* note 22, at 1, 3. The last part of this provision, requiring employers to make "every reasonable effort," occasioned disagreement among supporters. *Compare, e.g., Hearings on S. 2926 Before the Committee on Education and Labor*, 73d Cong., 2d Sess. 59 (1934) (statement of Dr. Sumner Slichter, professor of economics at Harvard Business School, objecting to "the notion of merely putting pious wishes into statutes"), *reprinted in* 1 LEGIS. HIST., *supra* note 22, at 89, *with id.* at 117-18 (statement of Dr. Francis J. Haas, member of nonstatutory National Labor Board, urging that language requiring every reasonable effort by employers was "of utmost importance" to assure meaningful negotiations between the parties), *reprinted in* 1 LEGIS. HIST., *supra* note 22, at 147-48.

50. *Hearings*, *supra* note 26, at 79 (testimony of Francis Biddle), *reprinted in* 1 LEGIS. HIST., *supra* note 22, at 1455; *Hearings II*, *supra* note 48, at 176 (testimony of Francis Biddle) (containing slightly modified form of quotation), *reprinted in* 2 LEGIS. HIST., *supra* note 22, at 2650. The nonstatutory labor board had been established pursuant to Executive Order as a means of implementing § 7(a) of the NIRA. *See infra* note 58.

51. *See Hearings*, *supra* note 26, at 79 (testimony of Francis Biddle), *reprinted in* 1 LEGIS. HIST., *supra* note 22, at 1455; *Hearings*, *supra* note 26, at 137 (testimony of Lloyd K. Garrison), *reprinted in* 1 LEGIS. HIST., *supra* note 22, at 1517; *Hearings*, *supra* note 26, at 171 (testimony of Edwin S. Smith), *reprinted in* 1 LEGIS. HIST., *supra* note 22, at 1551.

52. *See* S. REP. NO. 573, *supra* note 22, at 12, *reprinted in* 2 LEGIS. HIST., *supra* note 22, at 2312 (stating that employees' right to bargain collectively "is a mere delusion if it is not accompanied by the correlative duty on the [employer] to recognize [the employees'] representatives . . . and to negotiate with them in a bona fide effort to arrive at a collective bargaining agreement"); 79 CONG. REC. 7565, 7571 (1935) (statement of Sen. Wagner), *reprinted in* 2 LEGIS. HIST., *supra* note 22, at 2335-36 (supporting addition of "the correlative duty of employers to recognize and deal in good faith with" the representatives of their employees).

authority, unencumbered by ties to any other executive branch department.⁵³ Spurred by the failures of weak nonstatutory labor boards under the NIRA, Senator Wagner and his aides used the independently established Federal Trade Commission as their model for the new Board.⁵⁴ The NLRB was granted separate powers of investigation, prosecution, and adjudication, and also the authority to petition courts of appeals for enforcement of its orders.⁵⁵ The Board's findings of fact were entitled to broad deference on appeal,⁵⁶ and the Board's equitable remedial discretion—"to take such affirmative action . . . as will effectuate the policies of this Act"—was broader still.⁵⁷

2. Unusual Political Origins

The Wagner Act may have shared a collectivist purpose with certain other New Deal-era laws, but it was quite distinctive in its political origins. Senator Wagner's initial effort in 1934 to create meaningful statutory protections for collective bargaining was rebuffed by a hostile employer community, uninterested congressional colleagues, and an Administration still enamored of the NIRA's softer approach to industrial self-governance.⁵⁸ Wagner's next effort,

53. S. 1958, 74th Cong., 1st Sess. § 10 (1935), *reprinted in* 1 LEGIS. HIST., *supra* note 22, at 1295, 1301-04. Section 10 was modified only slightly in its legislative path to enactment. *See* S. 1958, as reported, 74th Cong., 1st Sess. § 10 (1935), *reprinted in* 2 LEGIS. HIST., *supra* note 22, at 2285, 2291-95.

54. *See* IRONS, *supra* note 30, at 228; Casebeer, *supra* note 23, at 292.

55. Pub. L. No. 74-198, §§ 10(b), (c), (e), and (f), 49 Stat. 449, 453-55 (1935) (codified as amended at 29 U.S.C. §§ 160(b), (c), (e), and (f) (1994)); *see* BERNSTEIN, *supra* note 21, at 97; IRONS, *supra* note 30, at 228-29.

56. Pub. L. No. 74-198, §§ 10(e) and (f), 49 Stat. at 454-55 (codified as amended at 29 U.S.C. §§ 160(e), (f) (1994)) (specifying that when a Board decision is before a court of appeals, "the findings of the Board as to the facts, if supported by evidence, shall . . . be conclusive").

57. § 10(c), 49 Stat. at 454 (codified as amended at 29 U.S.C. § 160(c) (1994)); *see also* *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941) (majority opinion of Frankfurter, J.) ("Because the relation of remedy to policy is peculiarly a matter for administrative competence, courts must not enter the allowable area of the Board's discretion and must guard against the danger of sliding unconsciously from the narrow confines of law into the more spacious domain of policy.").

58. *See* S. 2926, 73d Cong., 2d Sess. (1934), *reprinted in* 1 LEGIS. HIST., *supra* note 22, at 1-14 (Labor Disputes Act, introduced March 1, 1934). Wagner conceded defeat in June 1934 when his Senate colleagues gutted his bill. *See* 78 CONG. REC. 12016, 12017-18 (1934), *reprinted in* 1 LEGIS. HIST., *supra* note 22, at 1181-84; *see also* BERNSTEIN, *supra* note 21, at 64-75 (discussing ill-fated 1934 Wagner bill); IRONS, *supra* note 30, at 213-14, 226 (same).

Despite language in the 1933 NIRA specifying that the fair competition codes must protect employees' right to organize and bargain collectively, employers' widespread

introduced in February 1935, succeeded through a combination of political events that could hardly have been anticipated. These events included: a stunningly large advantage for Democrats following the 1934 congressional elections;⁵⁹ a series of strikes in 1934 and 1935 that threatened industrial stability yet at the same time strengthened pro-labor forces within the newly emergent Democratic coalition;⁶⁰ the business community's temporarily eclipsed status following its failed strategies for economic recovery and its excessive reliance on the declining Republican party;⁶¹ and Senator Wagner's strength and perseverance in mobilizing a team to draft the bill, devising a strategy to push the measure through extensive hearings and committee consideration, and leading the fight to convert the public, Congress, and the Roosevelt Administration.⁶²

resistance to recognizing unions went virtually unpunished under the nonstatutory labor boards that sought to enforce the NIRA. See IRONS, *supra* note 30, at 203-25 (describing unsuccessful efforts to implement § 7(a) of 1933 Act, first under the National Labor Board established informally by President Roosevelt in August 1933 and augmented by Executive Order in February 1934, and then under the National Labor Relations Board authorized by congressional resolution in June 1934 and implemented by Executive Order in July 1934); Harris, *supra* note 31, at 165-67 (describing the NLB and the first NLRB as largely ineffective due to minimal authority and faltering official support during 1933 and 1934).

59. See BERNSTEIN, *supra* note 21, at 88 (observing that 1934 elections brought lopsided Democratic majorities of 45 in Senate and 219 in House, and that the "election for practical purposes eliminated the right-wing of the Republican Party"); Kenneth Finegold & Theda Skocpol, *State, Party, and Industry: From Business Recovery to the Wagner Act in America's New Deal*, in STATEMAKING AND SOCIAL MOVEMENTS 159, 181 (Charles Bright & Susan Harding eds., 1984) (stating that 1934 elections, on the heels of massive Democratic victory in 1932, resulted in Democrats' gaining nine additional seats in Senate and nine in House, Republican right-wing's being "practically eliminated," and Southerners' role in ruling Democratic coalition being reduced).

60. See Plotke, *supra* note 25, at 116-17 (discussing impact of labor disputes, as simultaneously threatening public order and pressuring Congress to do more than simply allow the disputes to be settled under status quo conditions); see also Harris, *supra* note 31, at 166 (observing that Congress and the administration were sensitive to possibility of national strikes even before the 1934 elections).

61. See Finegold & Skocpol, *supra* note 59, at 181-83 (concluding that failure of NIRA's approach to economic recovery temporarily deprived business community of its traditional "hegemony with respect to definitions of 'what is good for the economy'" and enhanced the credibility of Wagner's arguments that economic recovery required government intervention to achieve higher wages and thereby restore mass purchasing power); Harris, *supra* note 31, at 167 (observing that business community's strategy of all-out opposition was ineffective because it relied on the truncated Republican presence in Congress); Skocpol, *supra* note 31, at 189 (noting that business community's decision to pursue pure opposition strategy after 1934 gave Wagner and liberal allies "more space for legislative maneuver[ing]").

62. See BERNSTEIN, *supra* note 21, at 112-28 (describing Wagner's critical role in developing content and political strategy); Harris, *supra* note 31, at 168 (same); Keyserling, *supra* note 21, at 7-25 (same).

B. *Post-Wagner Act*

In the sixty years since it became law, the Wagner Act has been modified more than once by Congress, and applied by the Supreme Court, the appellate courts, and the NLRB itself. Two aspects of the Wagner Act's "maturation" warrant attention here as lead-ins to the empirical and doctrinal discussion in Parts II and III.

1. The 1947 Amendments

The Taft-Hartley Amendments of 1947 made substantial changes in the Wagner Act's structure and approach. Of interest for present purposes are the addition of an employee's right to refrain from participating in collective activity by fellow workers, and the creation of union unfair labor practices that protect this right to refrain and parallel the employer unfair labor practices created twelve years earlier.⁶³ Congress enacted these changes in response to the widespread perception that unions were abusing their privileged legal status through excessive strikes and disruptive secondary activities.⁶⁴ One effect of the Taft-Hartley Amendments was to alter the Wagner Act's policy of unqualified support for the growth of collective bargaining. The Amendments placed the federal government in a more nearly neutral position by recognizing statutory protections that

Even with all of these factors, enactment was hardly a sure bet at the completion of hearings and committee action in early May of 1935. In addition to virulent business opposition, the press criticized the measure as likely to obstruct economic recovery, to subvert personal liberty and the rights of workers, and to encourage the growth of coercive union bureaucracies. See BERNSTEIN, *supra* note 21, at 109-10, 117; Plotke, *supra* note 25, at 124-25. While the Administration was officially neutral, the Secretary of Labor and her top aides strongly opposed the creation of an independent enforcement agency and also urged that union organizers be subject to the same restraints as management in their contacts with employees. See IRONS, *supra* note 30, at 230; Casebeer, *supra* note 23, at 312. President Roosevelt finally declared his support for the bill following a White House meeting with congressional leaders on May 24. BERNSTEIN, *supra* note 21, at 117-18; IRONS, *supra* note 30, at 231. What ultimately ensured the bill's legislative success, however, was the Supreme Court decision three days later in *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935). The Court's invalidation of the NIRA, *id.* at 541-42, strengthened Administration resolve to support the Wagner Act as an alternate national labor policy. Perhaps more important, the Court's pronouncement led opponents to conclude that a bruising floor fight was unnecessary because the Wagner Act would fail under the same constitutional test. See BERNSTEIN, *supra* note 21, at 120-23; IRONS, *supra* note 30, at 231; Harris, *supra* note 31, at 168.

63. Pub. L. No. 80-101, § 101, 61 Stat. 136, 140-43 (1947) (amending §§ 7 and 8 of Wagner Act; codified as amended at 29 U.S.C. §§ 157, 158(b) (1994)).

64. See COX ET AL., *supra* note 7, at 93-94; THE DEVELOPING LABOR LAW 35-37 (Patrick Hardin et al. eds., 3d ed. 1992).

offset the right to self-organization—notably the employee's freedom of choice *not* to be represented by a union and *not* to be coerced by union agents into support for a union's organizing or self-help efforts.⁶⁵

At the same time, a more neutral approach toward the expansion of union power through organizing and economic self-help did not disturb the Act's basic support for collective bargaining. The amended NLRA retained its commitment to collective action as an essential means to the multiple ends discussed above.⁶⁶ Under section 8(a)(5) the employer's obligation endured to establish and maintain bargaining relationships with the representative designated or selected by its employees. Indeed, the Board's prior decisions holding employers to a standard of good faith in bargaining with those representatives were essentially endorsed by the addition of section 8(d).⁶⁷

65. See Pub. L. No. 80-101, 61 Stat. at 140 (adding §§ 8(b)(1) and (4)); Cox, *supra* note 21, at 24-38, 44; THE DEVELOPING LABOR LAW, *supra* note 64, at 39-41.

66. See 29 U.S.C. § 151 (1994) (as amended) (Taft-Hartley added to the findings and policies of § 1 a justification for curbing union excesses, but left the rest of that section intact); *supra* text accompanying notes 21-32 (discussing Act's four major goals); cf. JAMES B. ATLESON, VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW 47 (1983) (describing Taft-Hartley's effect as "limit[ing] collective activity primarily to the specific relation of employer and certified or legally recognized bargaining agent," while prohibiting or leaving unprotected "[a]ctivities that were based on class or worker solidarity or that existed outside the contractual regime").

67. Section 8(d) defined collective bargaining as "the performance of the mutual obligation . . . to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . . but such obligation does not compel either party to agree to a proposal or require the making of a concession." Pub. L. No. 80-101, § 101, 61 Stat. at 142 (codified as amended at 29 U.S.C. § 158(d) (1994)). The statutory language paralleled the Board's "good faith" approach as approved by the courts of appeals. See, e.g., *Montgomery Ward & Co.*, 37 N.L.R.B. 100, 118-19 (1941), *enforced*, 133 F.2d 676, 684-88 (9th Cir. 1943); *George P. Pilling & Son Co.*, 16 N.L.R.B. 650, 662-63 (1939), *enforced*, 119 F.2d 32, 37 (3d Cir. 1941). The final version of this section rejected in conference the House's effort to prescribe a longer and more objective definition of collective bargaining. See H.R. CONF. REP. NO. 510, 80th Cong., 1st Sess. 8, 34-35 (1947), *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 505, 512, 538-39 [hereinafter LMRA LEGIS. HIST.]; see also 93 CONG. REC. 3694, 3719 (1947) (statement of Rep. Norton, criticizing House definition of collective bargaining as "detailed[,] . . . cumbersome and . . . an empty formula"), *reprinted in* 1 LMRA LEGIS. HIST., *supra*, at 811-12; 93 CONG. REC. 6601 (1947) (statement of Sen. Taft, explaining conferees' adoption of Senate version of § 8(d), and rejection of House definition), *reprinted in* 2 LMRA LEGIS. HIST., *supra*, at 1541. See generally Archibald Cox, *Some Aspects of the Labor Management Relations Act, 1947, Part Two*, 61 HARV. L. REV. 274, 282 (1948) (noting that the language of § 8(d) was a "close paraphrase" of prevailing Board and court law).

The Taft-Hartley Amendments also imposed new limits on the Board's factfinding authority under section 10. The Board was now required to support its unfair labor practice findings based on "the preponderance of the testimony," and its findings were to be reviewed under a "substantial evidence" standard.⁶⁸ These changes reflected congressional intent to broaden the scope of judicial review following perceived Board excesses in the past.⁶⁹ Yet even with these changes, the new standard left the Board with considerable leeway in carrying out its factfinding responsibilities.⁷⁰ Further, the Board's remedial discretion under section 10(c) remained broad, and the Board's already established practice of imposing bargaining orders when necessary to effectuate the policies of the Act was essentially ratified.⁷¹

2. The Supreme Court's Declining Attention to the Act

Throughout its existence, the Board has relied on adjudication rather than rulemaking to interpret and apply the NLRA.⁷² Because contested Board adjudications are without legal effect until enforced by an appellate court, judicial review is critically important to sustaining the Board's decisionmaking judgments. During the first several decades of the NLRA, the Supreme Court played a major role

68. Pub. L. No. 80-101, § 101, 61 Stat. at 147-49 (codified as amended at 29 U.S.C. §§ 160(c), (e), (f) (1994)). Formerly, the Board was authorized to make findings based simply on "all the testimony taken," and the Board's findings were to be deemed conclusive "if supported by evidence" as opposed to "substantial evidence on the record considered as a whole." See Pub. L. No. 74-198, § 10(c), (e), 49 Stat. at 454 (1935).

69. See H.R. CONF. REP. NO. 510, *supra* note 67, at 53-56, *reprinted in* 1 LMRA LEGIS. HIST., *supra* note 67, at 505, 557-60; S. REP. NO. 105, 80th Cong., 1st Sess. 26 (1947), *reprinted in* 1 LMRA LEGIS. HIST., *supra* note 67, at 407, 432; H.R. REP. NO. 245, 80th Cong., 1st Sess. 41-43 (1947), *reprinted in* 1 LMRA LEGIS. HIST., *supra* note 67, at 292, 332-34. See generally Cox, *supra* note 21, at 38-39 (linking criticism of Board orders at that time to broader congressional concern regarding the relationship between courts and administrative agencies).

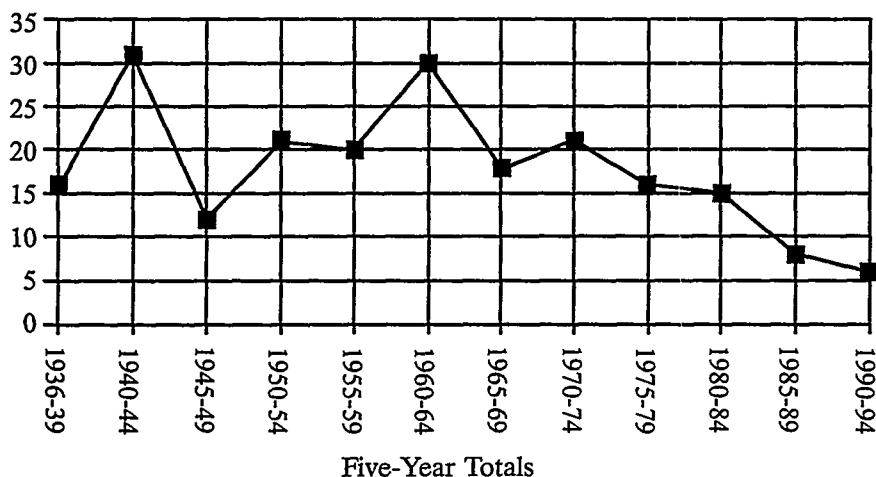
70. See, e.g., S. REP. NO. 105, *supra* note 69, at 26-27, *reprinted in* 1 LMRA LEGIS. HIST., *supra* note 67, at 432-33 (conforming judicial review standard to substantial evidence test used in Administrative Procedure Act); H.R. REP. NO. 245, *supra* note 69, at 40-42, *reprinted in* 1 LMRA LEGIS. HIST., *supra* note 67, at 331-33 (stating that Act continues to "give great effect to findings that rest on th[e] evidence," and that "trials *de novo* in the courts will not be required"); 93 CONG. REC. 3955 (1947) (statement of Sen. Taft, explaining that the substantial evidence test, while increasing the scope of judicial review over Board decisions, still authorizes greater deference to Board factfinding than is authorized when reviewing district court findings), *reprinted in* 2 LMRA LEGIS. HIST., *supra* note 67, at 1014.

71. See *infra* note 187 and accompanying text.

72. See *supra* note 12 and accompanying text.

in this judicial review process. Between 1935 and 1975, the Court issued a stream of decisions reviewing Board adjudications, including major pronouncements as to the scope and meaning of the Act's key provisions. Since the mid-1970s, however, there has been a notable decline in the Court's attention to NLRA cases in which the Board is a party. Full opinions by the Court in cases in which the NLRB is a party have fallen from over forty per decade in the 1940s, 1950s, and 1960s, to just over twenty during the 1980s and only six in the first five years of the 1990s (Chart One).

CHART ONE: NUMBER OF LABOR FULL OPINIONS,
FIVE-YEAR TRENDS



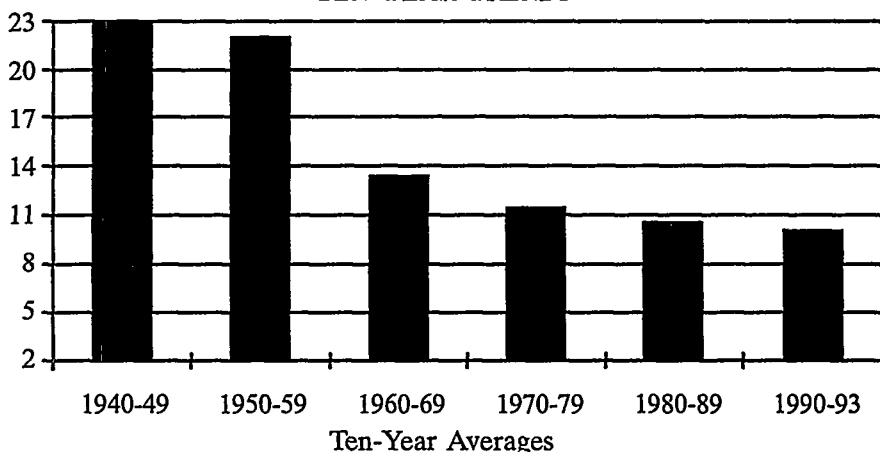
A similar trend is apparent when examining labor full opinions as a percentage of all full opinions issued each Term.⁷³

Another indicator of declining Supreme Court attention is the Court's response to certiorari petitions in which the Board is a party. After granting certiorari in more than twenty percent of all such petitions during the 1940s and 1950s, the Court's "grant rate" has declined steadily since the 1960s, reaching a ten percent level in the

73. After staying at or above three percent for almost the entire period from the late 1930s to the early 1970s, the percentage of full opinions that involved the Board as a party declined below two percent during the 1980s and below one percent during the early 1990s. For data on the basis of which Charts 1 through 3 were created, see LEE EPSTEIN ET AL., *THE SUPREME COURT COMPENDIUM: DATA, DECISIONS, AND DEVELOPMENTS*, Tables 2-5 & 2-6 (1994); Search of Westlaw SCT-OLD database on March 3, 1995 (search was { TI (N.L.R.B. NLRB "National Labor Relations Board") & DA (AFT 8/36 & BEF 1994) }); Search of Westlaw SCT database on March 3, 1995 (same search).

early 1990s (Chart Two).⁷⁴ This lower grant rate may also reflect competing demands placed on the Court's limited capacity to hear cases.

CHART TWO: PERCENTAGE OF LABOR CERTIORARI PETITIONS
IN WHICH CERTIORARI WAS GRANTED,
TEN-YEAR TRENDS



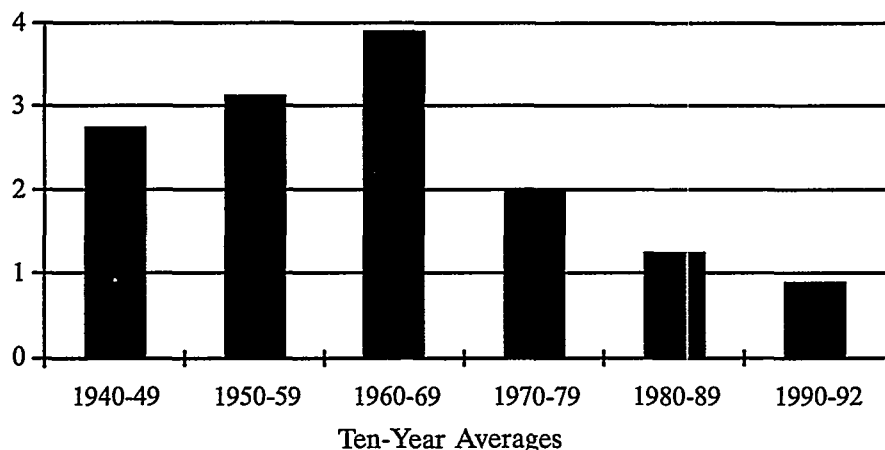
Mirroring, and perhaps contributing to, the Court's reduced interest is the conduct of the parties themselves. Certiorari petitions involving the Board as a party constituted a noticeably larger portion of the Court's certiorari docket during the 1940s, 1950s, and 1960s than they have in recent decades (Chart Three).⁷⁵

74. While Chart 1 refers to the calendar years in which full opinions were issued, Charts 2 and 3 rely on the Supreme Court Terms in which certiorari petitions were processed. Thus, references to "1940-49" in Charts 2 and 3 cover all petitions acted upon between the start of October Term 1940 and the end of October Term 1949, i.e., between October 1940 and June 1950.

The charts depicting Supreme Court labor opinions and certiorari petitions omit a number of cases that were before the Court where the Board was not a party but some provision or dimension of the NLRA was being construed. Such cases include preemption doctrine decisions, cases applying section 301 of the Taft-Hartley Amendments, and cases construing the Landrum-Griffin Amendments of 1959. There is no reason to believe that the addition of these cases would materially alter the larger picture. In any event, they are excluded because they are at best marginally relevant to my focus on tensions between the Board and the appellate courts. Also omitted from the database of Supreme Court labor cases are decisions construing analogous federal labor relations statutes—notably the Railway Labor Act and the Federal Labor Relations Act—that may shed light on the meaning of the NLRA.

75. The reference to "all Paid Certiorari Petitions" in Chart 3 excludes petitions filed in forma pauperis (IFP). While the number of paid petitions per year rose steadily

CHART THREE: LABOR CERTIORARI PETITIONS AS A
PERCENTAGE OF ALL PAID CERTIORARI PETITIONS,
TEN-YEAR TRENDS



One possible explanation for the Supreme Court's diminished labor law appetite is that the menu has become thinner. As union density has sharply declined,⁷⁶ the Board has fewer occasions in which to issue orders, *ergo* fewer Board decisions reach the appellate courts and the Supreme Court simply has less to choose from. There is at best modest empirical support for this explanation. The number of appellate court decisions reviewing Board adjudications has declined, but the decline has occurred only since 1985, which is more than a decade after the Supreme Court's attentiveness to labor cases began to wane.⁷⁷ Moreover, during earlier periods when the volume

between 1940 and 1992 (from 814 to 2441), the number of IFP petitions per year rose explosively over the same time period (from 120 to 4792). See EPSTEIN ET AL., *supra* note 73, at Tables 2-5, 2-6. Inclusion of the IFP petition numbers would not alter the trend presented in Chart 3, but would reduce all columns in a substantial and distortive way.

76. See *supra* note 8 (describing sharp decline in union density between the 1950s and 1993).

77. Between 1965 and 1984, the Supreme Court indicia of labor law interest—number of full labor law opinions and percentage of all labor law certiorari petitions that were granted—declined markedly. See *supra* Charts 1 and 2. During this same 20-year period, the number of labor cases on petitions for review or enforcement that reached the appellate courts notably increased: starting at 1,351 cases from the years 1965-69; to 1,682 from 1970-74; dipping slightly to 1,465 from 1975-79; and then soaring to 1,949 from 1980-84. See 31 NLRB ANN. REP., Table 19 (1966) through 50 NLRB ANN. REP., Table 19 (1985).

of appellate court labor cases fell temporarily, the Supreme Court's interest in these same cases rose dramatically.⁷⁸

A more persuasive explanation for the Court's reduced role has to do with the age of the statute. During the first several decades of NLRA operation, the Supreme Court issued scores of landmark decisions settling within broad outlines the meaning of the Act's major provisions.⁷⁹ After this onslaught of interpretive efforts, many, if not most, of the "hard questions" of statutory interpretation had been initially addressed; subsequent cases often involved refinement or extension of earlier decisions.⁸⁰ At the same time, the Court's attention was drawn to other federal laws—and in particular to newer statutes protecting the rights of employees—that required initial interpretive clarification.⁸¹

78. The Supreme Court issued 30% more full labor law opinions in the 1955-59 period than it had in the 1950-54 period, and these opinions constituted a 10% increase in the percentage of the Court's overall decision docket. See *supra* Chart 1 and note 73. Between these same periods, the appellate courts went from 643 to 428 labor cases, a decline of over 30%. See 15 NLRB ANN. REP. 168 (1950); 16 NLRB ANN. REP. 253 (1951); 17 NLRB ANN. REP. 213 (1952); 18 NLRB ANN. REP., Table 19 (1953) through 24 NLRB ANN. REP., Table 19 (1959).

79. For cases construing § 8(a)(1), see, e.g., *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969); *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956); *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945). For cases construing § 8(a)(3), see, e.g., *Textile Workers Union v. Darlington Mfg. Co.*, 380 U.S. 263 (1965); *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300 (1965); *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333 (1938). For cases construing § 8(a)(5), see, e.g., *NLRB v. Katz*, 369 U.S. 736 (1962); *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342 (1958); *Brooks v. NLRB*, 348 U.S. 96 (1954); *Franks Bros. Co. v. NLRB*, 321 U.S. 702 (1944). For cases construing § 7, see, e.g., *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975); *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270 (1956); *NLRB v. Local 1229, Int'l Bhd. of Elec. Workers*, 346 U.S. 464 (1953). For cases construing § 10(c), see, e.g., *H.K. Porter Co. v. NLRB*, 397 U.S. 99 (1970); *Gissel, supra*; *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941).

80. See, e.g., *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992) (extending *Babcock*, 351 U.S. 105, on meaning of § 8(a)(1)); *Trans World Airlines, Inc. v. Independent Fed'n of Flight Attendants*, 489 U.S. 426 (1989) (applying *Mackay Radio*, 304 U.S. 333, on meaning of § 8(a)(3)); *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27 (1987) (extending *NLRB v. Burns Int'l Sec. Servs., Inc.*, 406 U.S. 272 (1972) on meaning of § 8(a)(5)); see also *First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981) (extending *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 217 (1964) (Stewart, J., concurring) on meaning of § 8(a)(5)). These decisions all had major impact, but they no longer involved issues of first impression.

81. The Supreme Court decided its first case interpreting Title VII of the 1964 Civil Rights Act in 1971. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). The trend for full Court opinions interpreting Title VII since 1970 is as follows: 1970-74, 11 full opinions; 1975-79, 36 full opinions; 1980-84, 32 full opinions; 1985-89, 25 full opinions; 1990-93, 9 full opinions. Search of Westlaw Database (May 8, 1995) (search was { HE (Title VII, 42 USCA 2000e) }). Beginning in the late 1970s, the Supreme Court also has issued a growing volume of full opinions interpreting the Age Discrimination in Employment Act

Whatever the reason or reasons for the Supreme Court's diminished interest in reviewing Board decisions, the Supreme Court has become less of a factor—and the appellate courts have consequently assumed greater importance—in the ongoing dialogue between the agency and the judicial branch. Indeed, given that the Board can enforce its decisions against reluctant employers or unions *only* through the courts of appeals, the Board's track record before the appellate courts becomes even more significant in the absence of regular Supreme Court participation. Accordingly, I now turn to an examination of that record.

II. EMPIRICAL METHOD AND RESULTS

A. *Methodology Used in Compiling and Reviewing Appellate Court Decisions*

1. The Data-Gathering Process

The population under study consists of all appellate court decisions rendered between October 28, 1986 and November 2, 1993 that reviewed adjudications by the NLRB. The seven-year period from late 1986 to late 1993 was selected for several reasons. It was the most recent period of appellate court decisions at the start of the project; it therefore is likely to reflect the nature and extent of any contemporaneous differences in outcome and doctrinal perspective between the Board and the courts. In addition, a period of seven full years insures that the population of decisions under study is not unduly influenced by events or disputes that flamed and fizzled in a particular year. Finally, Presidents Reagan and Bush appointed all Board members who served during this time,⁸² and the conservative

of 1967, the Employee Retirement Income Security Act of 1974, and other recent "workplace" statutes. See, e.g., *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981) (construing ERISA); *Southeastern Community College v. Davis*, 442 U.S. 397 (1979) (construing Rehabilitation Act of 1973); *United Air Lines, Inc. v. McMann*, 434 U.S. 192 (1977) (construing ADEA).

82. With the exception of six earlier Board cases, every Board order reviewed by the appellate courts between late 1986 and late 1993 was issued by the Board between January 1985 and December 1992. The 11 Board members who served during this eight-year period were appointed by Presidents Reagan (nine appointees) and Bush (two appointees and two reappointments). See listing of Board Members at 273 NLRB iii (1984-1985) through 309 N.L.R.B. iii (1992). Of the six earlier Board cases, five were decided in 1984 when all but one of the Board members was a Reagan appointee. The other early case was decided in 1982.

views of those Presidents shaped the appellate bench as well.⁸³ For this reason, partisanship and ideology are less likely to be major factors in accounting for whatever Board-court differences exist.

The 1,224 appellate court cases appeared on monthly lists of closed Board cases; these lists are compiled on a regular basis by the Appellate Division in the office of the General Counsel, and they were furnished to me for research purposes.⁸⁴ The court decisions reviewed Board adjudications addressed to unfair labor practice (ULP) issues. In each instance, the Board had determined (i) the liability of employers or unions under section 8, and/or (ii) the appropriate remedies under section 10 for practices violative of section 8, and/or (iii) procedural or jurisdictional matters related to ULP liability or remedies.

Of the 1,224 appellate court cases, all 280 decisions that reversed, remanded, or modified a Board order ("reversals") were analyzed. Of the 944 appellate court cases that wholly enforced or affirmed a Board order ("affirmances"), I analyzed a stratified random sample of 275 cases.⁸⁵ Most appellate court decisions included opinions

83. At the start of the seven-year period in October 1986, President Reagan had appointed 59 active appellate court judges, and there were 85 active circuit court judges in all appointed by Republican presidents as opposed to 63 appointed by Democratic presidents. Reagan appointees constituted a majority on four circuits—D.C., Second, Sixth, and Seventh—each of which reviewed a high volume of Board decisions. Democratic appointees constituted a majority on only one circuit—the Eleventh—which heard relatively few Board cases. See *Judges of the Federal Courts with Date of Appointment*, 810 F.2d vii, vii-xxviii (1987). By November 1993, Presidents Reagan and Bush had appointed 99 active appellate court judges, more than two-thirds of the total of 146. Reagan and Bush appointees constituted a clear majority in every circuit except the Fourth; even there, Republican appointees—including Nixon and Ford appointees—outnumbered the appointees of Democrats by 9 to 4. See *Judges of the Federal Courts with Date of Appointment*, 9 F.3d vii, vii-xiv. These numbers exclude appointments to the Federal Circuit Court of Appeals, because that circuit's jurisdiction does not extend to appeals from NLRB decisions. See 28 U.S.C. §§ 1292, 1295 (1994).

84. Board personnel were helpful throughout this project. They were thoroughly professional in responding to my requests for information, without attempting to influence my project design or analysis. They, of course, bear no responsibility for my results, and they may well question some of my analysis, but I am deeply grateful for their assistance.

85. The samples were chosen using simple random sampling within each year. Distinctions were drawn on a fiscal year basis of October 1 to September 30. Thus, there were eight separate groups from which samples were randomly chosen; the eighth group included affirmed or enforced cases between October 1 and November 2, 1993. Allocations of the total sample size of 275 to each year were proportional to the number of affirmed/enforced cases in that year. The "stratified" approach to sampling reduced the chance of a disproportionate number of cases being chosen from a narrow time period that does not adequately reflect the entire seven-year context.

Unless otherwise specified, the analysis that follows is based on weighted data. Because the number of affirmances in the population is more than three times the number

explaining the court's result. The vast majority of these were published decisions, all of which were obtained through Lexis or Westlaw searches. Unpublished decisions—including opinions and also summary orders—were secured with the assistance of the General Counsel's office.⁸⁶

A range of data was collected for the 555 analyzed cases.⁸⁷ The factual data compiled from each case included: month and year of court decision; identity of circuit court; and whether the Board result or case outcome being affirmed or reversed had favored union, employees, or employer.⁸⁸ In addition, Board results were further

of reversals, the number of affirmances in the sample were weighted more heavily. Without looking at all the data in a given population, it is impossible to calculate a population's actual mean; rather, one calculates a "best guess" mean from the sample taken. In layperson's terms, a confidence interval is supposed to indicate how far the sample mean may vary from the actual mean, and how likely it is that one has guessed wrong—e.g., a 95% confidence interval signifies a 5% chance that the sample mean is nowhere near the actual mean. Given a sample size of 275, one can estimate proportions between .20 and .50 with a 95% confidence interval of $\pm .05$. Proportions that occur less frequently—e.g., proportions below .10—can be estimated with a 95% confidence interval of $\pm .03$. See generally HUBERT M. BLALOCK, JR., *SOCIAL STATISTICS* 213-18 (revised 2d ed. 1979) (explaining confidence intervals); IVY LEE & MINAKO MAYKOVICH, *STATISTICS: A TOOL FOR UNDERSTANDING SOCIETY* 331-36 (1995) (same).

86. Of the 555 decisions being reviewed, all but a few of the 280 reversals included accompanying opinions. In the very rare instances where the court reversed with no opinion, the Board's subsequent decision disclosed the issue(s) reversed and the reason(s) for reversal. By contrast, over ten percent of the 275 affirmances were summary, i.e., a one-word or one-sentence order, with no published or unpublished explanation. The party that loses before the Board generally does not raise every issue anew on appeal. Although there is no way to be certain—absent a court opinion—as to which issues litigated before the Board were also decided by the appellate court, a reasonable degree of confidence may be attained by reviewing the Board decision and also reviewing the parties' briefs on appeal to see which issues were presented to the court. Accordingly, in order to chart the issues raised on appeal for the 36 summary affirmances, I reviewed the Board decision and the appellate court briefs—the latter are on file at the Board library in Washington, D.C.

87. The data were initially collected from the cases by Shalu Buckley, Jordan Burch, Leo Fuchs, and Thomas Krebs, research assistants and now graduates of The Ohio State University College of Law. For each case, a research assistant prepared a one- to two-page summary and I then reviewed all summaries and accompanying decisions. Occasionally, I corrected ministerial errors, or made changes in issue coding decisions. See *infra* note 89 and accompanying text.

88. Board results were subdivided into three main categories, each of which involves two possible outcomes that may then be affirmed, or reversed, by the appellate courts. For Board results where the employer had been charged with a ULP under § 8(a) or (f), the result was either for union or employees (charging party) or for employer (respondent). For Board results where the union had been charged with a ULP under § 8(b) or (e), the result was either for employer or employees (charging party) or for union (respondent). For Board results where the dispute concerned the nature or scope of the remedy under § 10(c), the result was either for union or employees (broad relief granted) or for employer (relief narrowed or rejected). At times, a Board result covered more than

coded based on the particular statutory issues adjudicated by the Board and litigated on appeal.⁸⁹

2. Limitations of the Data Analysis

Before proceeding to examine the results of this data compilation and analysis, it is worth noting the limitations of such an empirical study. One obvious factor is that the study does not reflect the universe of unfair labor practice charges brought under the NLRA. More than 97% of ULP charges are disposed of before they ever reach the Board—through dismissal or withdrawal at a preliminary stage, informal settlement prior to trial, or formal resolution before

one category: Board decisions often involved both employer liability under § 8(a) and relief against the employer under § 10(c).

Apart from these three basic case outcome groupings, there were cases where the dispute involved discrete issues that affected ULP status but were separately classified, such as procedure, jurisdiction, or constitutional matters. Finally, there were rare cases—30 out of the 1,224 total—where the Board result involved “strange” outcomes: either the union and the employer each prevailed on some issue(s), or the employees prevailed against both the employer and the union. The analysis of outcomes in part II *infra* focuses on the three basic case outcome groupings; together, they encompassed some 94% of the appellate court cases in the population.

89. For instance, if the Board result being reviewed involved a violation of § 8(a)(5), the classification of case outcome was broken down into one or more of six issue codes that recurred with some frequency in appellate court opinions: bad faith bargaining; good faith doubt as to continued majority status; failure to comply with information requests; disagreement as to whether a topic was a mandatory subject of bargaining; unilateral contract modifications; and a general § 8(a)(5) catchall.

The issue codes relevant for present purposes are set forth in detail in part II.C *infra*. Issue code classifications were performed initially by research assistants, based on close readings of appellate court opinions supplemented by review of Board opinions when necessary. I reviewed all issue code entries and suggested revisions on approximately 10-15% of the entries. We met regularly to resolve any differences based on my suggested changes, and also to discuss whether new codes should be added. The final list of issue codes evolved over the first several months of data collection. At the start, we identified issue codes based on traditional types of recurring ULPs, such as §§ 8(a)(1) through (5), and basic categories within each section, such as mixed motive discipline under § 8(a)(3). As other issues appeared with sufficient frequency (six to eight occurrences was a rule of thumb), we added them as separate issue codes; occasionally, we deleted a code that was occurring very rarely. Data collection proceeded first on the 280 reversals and then on the 275 affirmances. Because a number of issue codes were added during data collection on reversals, I rechecked all issue code decisions at the completion of the reversals stage, and made adjustments in an effort to ensure consistency. I also rechecked all issue code decisions on affirmed cases at the completion of that stage, although relatively few adjustments were necessary on the affirmances. Thus, while no coding scheme that relies on analytic judgments can be error-proof, various steps were taken to ensure quality control.

the case is tried or appealed to the Board.⁹⁰ Given that my purpose is to explore the nature and extent of Board-court conflicts over matters of statutory interpretation, the omission of these early resolutions is understandable. Still, it should be recognized that the Act's meaning and effectiveness with respect to pre-Board disposition of ULP charges is simply not addressed.⁹¹

In addition, there are some risks involved when seeking to assign significance to the level of Board-court tensions within a recent, relatively short time frame. The comparative absence of friction on a certain substantive issue often reflects nothing more than judicial deference to the Board's expertise. On occasion, however, such harmony may conceal a history of divergent Board interpretive efforts from an earlier period, efforts that were abandoned only after repeated judicial expressions of skepticism or repudiation.⁹²

90. See William N. Cooke et al., *The Determinants of NLRB Decision-Making Revisited*, 48 INDUS. & LAB. REL. REV. 237, 238-39 (1995) (stating that the Board decided only about 2.5% of all ULP cases closed in fiscal year 1990); 55 NLRB ANN. REP. 157 (1990) [hereinafter 1990 ANN. REP.] (showing that out of more than 32,000 unfair labor practice cases closed in 1990 fiscal year, fewer than 1,100 reached stage of a Board order); 54 NLRB ANN. REP. 211 (1989) [hereinafter 1989 ANN. REP.] (showing numbers for 1989 fiscal year: nearly 30,000 cases closed; fewer than 1,100 reached stage of Board order).

91. Within the universe of judicially litigated cases, the study omits several types of appellate court decisions involving NLRB participation. These decisions include cases reviewing the grant or denial of injunctive relief under § 10(j), cases reviewing Board petitions for an adjudication of civil contempt, and cases involving potential Board liability under the Freedom of Information Act (FOIA) or the Equal Access to Justice Act (EAJA). Although these other cases all featured Board participation before the appellate courts, they did not involve judicial review of Board adjudications on ULP matters. In most instances (FOIA, EAJA, and § 10(j) cases), the decision appealed from was rendered by a district court, and the Board was simply a party on appeal. The contempt cases involved alleged failures to comply with prior court decisions enforcing a Board order. The General Counsel treats these other cases—which are far fewer in number—differently from the Board orders that triggered the 1,224 court decisions under examination here. Appeals from Board adjudications involving alleged ULPs are handled by the Appellate Division of the General Counsel. Appeals involving FOIA, EAJA, § 10(j) or contempt matters are handled by separate branches within the General Counsel operation. See generally 1990 ANN. REP., *supra* note 90, at 16-18, 193-94 (describing disposition of these other non-ULP matters).

92. See, e.g., *Cincinnati Newspaper Guild, Local 9 v. NLRB*, 938 F.2d 284, 288-89 (D.C. Cir. 1991) (affirming Board decision that employer's wage proposal did not constitute bad faith bargaining, and observing that the Board, after numerous reversals, "now seems to have accepted the courts' repeated teaching that an employer's bargaining position is not itself bad faith but only evidence of bad faith, so that a finding of bad faith bargaining must be bolstered by additional evidence"). Only once in the seven-year period was the Board reversed on a bad faith bargaining issue. See *infra* Table Six. Further, in approximately one-half of the cases where the Board was affirmed on this issue, it held in favor of the employer—that frequency of pro-employer judgments was higher than for any other issue under § 8(a). Accordingly, it would seem that Board-court harmony on the

Moreover, while a time frame in which Board and courts are shaped by one political party has the virtue of presenting differences in relatively "pure" institutional terms, the absence of partisanship may result in reversal rates that are artificially low when viewed in the larger context of the Act's history.⁹³

The limitations described above, and others,⁹⁴ counsel in favor of a careful review of study results. Caution, however, need not give way to skepticism. Analysis of case outcomes and issue-specific outcomes can offer real insights into the divergent perspectives of Board and courts and the possible reasons for these differences.

B. *Examining General Case Outcomes*

1. Classifying Based on Board Results

It is useful to think of general case outcomes as involving four distinct options. Assuming the General Counsel has charged the employer (or union) with one or more unfair labor practices, the Board may decide that the employer (or union) is liable or it may find no violation; either result (liability or no-liability) may then be affirmed or reversed by the court of appeals. In practice, Board decisions reviewed by the courts found liability against the charged

bad faith bargaining issue signifies judicial triumph over the Board rather than judicial deference to the agency. Cf. Becker, *supra* note 28, at 534 (describing how sharp decline in litigation over preliminary issues in representation proceedings reveals *not* consensus between employers and unions, but rather unions' decision that they must accept elections on employers' terms as a lesser evil than the massive delay of litigation).

93. Data taken from the Board's Annual Reports indicate that from 1960-92, the percentage of Board orders enforced in full was 66.9%. The rate of success varied widely: it was below 60% in the 1960s, rose to 72% in the early 1970s, declined slightly to 65% in the early 1980s, and was above 75% from 1985-92. The highest success rate was achieved during the period under study here; this also is the period least affected by partisan divisions in terms of presidential appointments to the Board versus the courts. See 25 NLRB ANN. REP., Table 19 (1960) through 57 NLRB ANN. REP., Table 19 (1992).

94. Certain extrinsic factors affect the tensions between Board and courts as well. Such factors include the motivation of the litigants when deciding to appeal or to resist compliance, see *infra* part II.B.2, and also may include the influence of congressional committees in monitoring the Board or delaying confirmation of nominees, the pressure felt by sitting Board members to secure or maintain the approval of Presidents who hold the power of reappointment, and the larger economic environment that may substantially affect the number of charges being filed. See generally Terry M. Moe, *Control and Feedback in Economic Regulation: The Case of the NLRB*, 79 AM. POL. SCI. REV. 1094 (1985) (describing pattern of mutually adaptive adjustment among Board members, their staff, and the constituents that litigate before the agency).

party—employer or union—in nearly ninety-five percent of the cases.⁹⁵ The dramatic Board tilt in favor of liability may be explained as a function of two factors. First, the General Counsel—a public prosecutor—generally litigates only if persuaded that the complaint has merit, and weaker ULP claims therefore tend to fall out prior to Board adjudication. Second, charged parties found liable by the Board often opt for appellate litigation rather than voluntary compliance—for strategic as well as merits-based reasons—whereas cases in which no violation is found will go to court only if the charging party chooses to expend its own resources on appeal.⁹⁶

From a substantive viewpoint, the Board's ULP decisions typically arise in one of three contexts: they may resolve charges against the employer; they may resolve disputes over the scope and content of relief against the charged employer; or they may resolve charges against the union. Over seventy-five percent of the court cases reviewing Board decisions during our seven-year period involved ULP charges against an employer.⁹⁷ By contrast, nearly sixteen percent of the court cases reviewed Board orders resolving remedial disputes against a violating employer, while fewer than nine percent of the court cases involved ULP charges against a union.⁹⁸ This

95. Of 1,027 appellate court cases in which the employer was charged with a ULP or the union was charged with a ULP, the Board found liability in 963, or 93.8%. The liability rate for cases involving employer ULPs was somewhat higher at 94.8%; the rate for cases involving union ULPs was 84.5%. See *infra* Tables One and Two. Court cases in which both employer and union were charged with a ULP were very rare and are not examined in this study. See *supra* note 88.

96. See *infra* text accompanying notes 104-05 (discussing strategic appeals by charged parties); *infra* note 103 (noting agency practice prohibiting General Counsel from appealing cases in which no violation is found). The presence of conservative General Counsels appointed by Presidents Reagan and Bush also may play a role here. It is plausible to suggest that General Counsels operating under a conservative mandate would be less willing to "push the envelope" with novel or ambitious approaches to liability; one result of such caution could be an unusually high success rate for the ULP charges that are fully litigated.

97. Of 1,224 appellate court decisions, 922 reviewed a Board result in which the employer had been charged with a ULP.

98. There were 188 cases reviewing Board decisions that resolved requests for relief against a violating employer; a very small number of court cases involved Board decisions that resolved requests for relief against a violating union. Of the 1,224 court cases, 105 reviewed a Board result in which the union had been charged with a ULP. While the proportions of "employer liability," "remedy against employer," and "union liability" cases add up to approximately 100%, that figure is slightly misleading. Some 6% of the court cases either affirmed or reversed both remedial disputes against an employer and also ULP charges against that employer. See *infra* note 115. Offsetting this "double counting," some 6% of all court cases arose outside the three major categories referred to in text and are therefore omitted from further discussion. Those cases involved disputes that were purely

distribution is not surprising: the Act's primary mission is to regulate and protect employee efforts to organize and engage in collective bargaining, and the vast majority of ULP disputes litigated before the Board can be expected to (and in fact do) allege thwarting of those employee efforts by employers.

Given the range of Board results being reviewed—finding liability or refusing to so find; determining employer liability as distinct from union liability; determining appropriate relief as distinct from any issue of liability—the analysis of appellate court outcomes tracks these different distinctions.⁹⁹

2. Board Result: Liability Versus No Violation

Initially, I consider a distribution of results that is relevant less as a matter of its independent weight than as a predicate to understanding the results that follow. A reviewing court during this period was significantly¹⁰⁰ less likely to reverse, remand, or modify a Board order finding an employer liable than an order determining that no employer ULP had been committed. Similarly, there was a significantly lower likelihood of reversal, remand, or modification for Board orders finding a union liable when compared with orders determining that the union committed no ULP. These results are presented in Table One, addressed to court cases in which an

jurisdictional or procedural, or that involved a strange hybrid outcome, *see supra* note 88, as well as cases involving requests for relief against a violating union.

99. One could analyze the Board's *overall* rate of success before the appellate courts, perhaps comparing it to the overall success rates of other agencies. *See generally* Peter H. Schuck & E. Donald Elliott, *To the Chevron Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984, 1015-22 (discussing various federal agencies' success rates when appearing before reviewing courts). For present purposes, however, a disaggregated approach to agency success rate is more useful in understanding the nature of Board-court tensions.

100. The use of "significant" refers to results that are statistically significant, using the chi-square statistic (Pearson's coefficient). Chi-square enables one to test the "null hypothesis" that two variables are independent of each other, i.e., that the results were obtained by chance rather than by a relationship between the variables. For instance, in Table One the two variables are Board finding (employer liability or no employer liability) and court decision (affirmance or reversal). If the chi-square statistic is significant, this warrants rejecting the null hypothesis and concluding that the variables are related. A result that is significant at the .05 level ($p \leq .05$) means that there is only a 5% chance that a true hypothesis (i.e., no relationship) was rejected. The .05 level of significance is commonly used in the social sciences. *See* BLALOCK, *supra* note 85, at 161; LEE & MAYKOVICH, *supra* note 85, at 281-82; DAVID S. MOORE, *STATISTICS: CONCEPTS AND CONTROVERSIES* 416 (3d ed. 1991). I follow that convention by treating results that are significant at the .05 level as "statistically significant;" *see also infra* note 133 (discussing one-tailed significance tests).

employer ULP was charged, and Table Two, addressed to court cases in which a union ULP was charged.¹⁰¹

TABLE ONE: EMPLOYER ULP CHARGED

	Board Finds ULP	Board Finds No ULP
Affirmed	703	31
Reversed	172	16
% Reversed	19.7	34.0

Chi-square = 5.80; $p < .05$

Unweighted chi-square = 3.18; $p < .10$

TABLE TWO: UNION ULP CHARGED

	Board Finds ULP	Board Finds No ULP
Affirmed	76	10
Reversed	13	6
% Reversed	14.7	37.0

Chi-square = 4.61; $p < .05$

Unweighted chi-square = 2.54; $p = .11$

In my view, the lower reversal rate for Board decisions finding liability is attributable primarily to the motivation of the litigants in deciding to pursue an appeal or await the General Counsel's pursuit

101. The results reported in this Table and others are based on weighted data. Weighting the data was necessary because the proportions of affirmed versus reversed cases in the sample did not match those in the population. Specifically, the sample consists of 275 affirmances and 280 reversals whereas the population consists of 944 affirmances and 280 reversals. The affirmances were weighted more heavily in the analyses, reflecting their occurrence in the population. While this weighting was essential in order to report accurately the reversal and affirmance rates as they appear in the population, making statistical inferences based on weighted data can be problematic. In particular, the value of the chi-square is directly proportional to the number of cases. See BLALOCK, *supra* note 85, at 288; LEE & MAYKOVICH, *supra* note 85, at 382-83. Because of this potential problem, all of the analyses were conducted on both weighted and unweighted data. P-values are reported for both weighted and unweighted data when the chi-square is significant for weighted but not unweighted data.

of enforcement.¹⁰² When the General Counsel loses before the Board, a decision to appeal from the no-liability determination is very likely to reflect a sincerely-held judgment that the Board is wrong on the merits.¹⁰³ The same cannot be said for employers or unions that are deciding whether to appeal from liability determinations. Employers found liable for discriminatory discharges and failures to bargain in good faith may often pursue appeals—or force the Board

102. This difference might also be attributable to the increased presence of internal Board tensions accompanying no-liability determinations subsequently reversed by the courts. Such internal tensions could be manifested in two distinct ways. First, one might anticipate that because no-liability determinations represent the Board's rejection of its own General Counsel's position, dissenting opinions would accompany such rejections more often than in instances where the Board has endorsed the General Counsel's allegations of unlawful conduct. If Board dissents from no-liability decisions are encouraging a "harder look" on appeal, one might further expect that the dissents would appear more often in no-liability decisions subsequently reversed than in decisions subsequently affirmed. Alternatively one might focus on the presence of disagreements between the Board and the administrative law judge (ALJ) who tried the case. Given that the ALJ weighs the evidence and assesses the credibility of the witnesses, perhaps Board decisions to reject the ALJ's recommendation of liability receive less deference or respect from a reviewing court. Disagreements among Board members, or between the Board and an ALJ, could result in higher reversal rates either because litigants and courts respond to the "smell" of conflict, or because the presence of such conflict is a true indicator of "mistaken" legal or factual analysis.

A partial review of Board opinions offers little real support for internal Board disagreements as a substantial explanatory factor. Focusing on Board decisions in which the employer was charged with a ULP, one finds there was far more disagreement accompanying no-liability decisions. Board members dissented from no-liability determinations over five times as often as they dissented from liability determinations. Similarly, ALJ-Board conflict occurred in cases where the Board issued a no-liability decision roughly five times more frequently than in cases where the Board issued a liability decision. Yet this higher level of intra-agency disagreement does not correlate well with subsequent judicial disposition. Board members dissented from five of the sixteen no-liability decisions subsequently reversed (31%) but from seventeen of the thirty-one decisions subsequently affirmed (55%). As for Board-ALJ conflict, it occurs nearly as often in no-liability decisions subsequently affirmed (ten of thirty-one, or 32%) as in no-liability decisions subsequently reversed (six of sixteen, or 37%).

Given the low absolute number of employer no-liability Board decisions included in this study (47 total, as opposed to 875 employer liability decisions), one hesitates to draw too many inferences. Still, the figures on intra-agency disagreements regarding no-liability decisions suggest that some other factor—such as litigant motivation—plays a more central role in accounting for appellate court reversal rates.

103. Pursuant to agency guidelines, the General Counsel may not appeal from an adverse Board determination. See Ida Klaus, *The Taft-Hartley Experiment in Separation of NLRB Functions*, 11 INDUS. & LAB. REL. REV. 371, 381, 389 (1958). A charging party may decide *not* to appeal for strategic reasons unrelated to the substance of the legal issues, such as conserving scarce resources, waiting for a more favorable set of facts, or waiting for a more friendly circuit in which to test the legal issue. The most plausible non-merits strategic factor that would induce a charging party to *pursue* an appeal—forcing the opposition to expend resources on further litigation—does not seem overly persuasive.

to seek enforcement—because they will benefit from the additional months or years of delay prior to final resolution. By extending the litigation process in cases they do not expect to win, employers may effectively chill employee organizing efforts or diminish the prospects for negotiation of first contracts.¹⁰⁴ Unions may well appeal liability determinations or compel Board enforcement petitions for analogous strategic reasons. Time spent prolonging litigation may allow the union to repeat its questionably legal secondary activities or to exert continuing pressure on dissident employees, even when the union does not expect to prevail in court.¹⁰⁵ To the extent that appeals from liability determinations by employers and unions have less to do with the merits of the Board decision than appeals from no-liability determinations, this discrepancy would help account for the high affirmance/low reversal rate where the Board determination is one of liability.

The presence of such strategic motives also is likely to mask the full measure of Board-court disagreements regarding the substantive meaning of the Act. Given that charged parties trigger appellate court involvement in many cases best characterized as meritless, the reversal rates analyzed in the ensuing discussion under-represent—perhaps substantially—the scope of genuine conflict between the Board and the courts of appeals during the seven-year period. Indeed, this development may itself be attributable in part to the statutory aging process. Litigants' evolving familiarity with a

104. See, e.g., Cooke, *supra* note 90, at 241 (reporting on author's earlier study that showed employers benefited from contesting §§ 8(a)(3) and (5) complaints because lengthy litigation reduced likelihood that unions would obtain first contracts); Jeffery A. Smisek, *New Remedies for Discriminatory Discharges of Union Adherents During Organizing Campaigns*, 5 INDUS. REL. L.J. 564, 565-66 (1983); Weiler, *Promises*, *supra* note 10, at 1788-93 (contending that employers benefit from contesting discriminatory discharges of union activists because lengthy litigation diminishes prospects for successful organizing campaign). In addition, delayed resolution of discriminatory discharge cases makes it more likely that discharged employees will have settled into new jobs and will have lost interest in reinstatement.

105. During this seven-year period, two of the most frequent types of union ULPs charged were illegal secondary activity, prohibited under § 8(b)(4), and illegal coercion or restraint of individual employees, prohibited under § 8(b)(1)(A). Illegal secondary activity that occasioned a ULP charge is likely to be halted *pendente lite* through the securing of injunctive relief under § 10(l), but recurring misconduct is not punishable more severely (e.g., by a contempt order) until the court of appeals issues an enforceable order. With respect to illegal coercion or restraint, delays in enforcement may enable the union to maintain pressure against employees who refuse to become members or who resign to cross picket lines during a strike. Still another factor for unions may be constituent politics: unions may decide to appeal from liability determinations to "keep faith" with their members or officers whose offending conduct is at issue.

statute's enforcement scheme may well abet their efforts at circumvention, especially where—as here—Congress has not tightened or even revisited the scheme for a protracted period of time.¹⁰⁶

3. Board Result: Employer Liability Versus Union Liability

When examining appellate court cases reviewing Board ULP decisions, a further inquiry involves differences in reversal rates keyed to whether the Board result favored the union or the employer. Table Three presents appellate court cases reviewing Board liability determinations, which comprise well over ninety percent of all such cases.¹⁰⁷ The courts during this seven-year period reversed Board determinations of employer liability or union liability at a relatively low rate.¹⁰⁸ While reversals did occur with greater frequency when the Board found employers liable, that difference was *not* statistically significant.

TABLE THREE: EMPLOYER AND UNION LIABILITY

	Board Finds Employer ULP	Board Finds Union ULP
Affirmed	703	76
Reversed	172	13
% Reversed	19.7	14.7

Chi-square = 1.30; $p = .25$

The modest difference in reversal rates set forth in Table Three raises questions about the assertion made by some scholars that federal courts are “result-oriented” in favor of employers and against

106. The last observation obviously requires fuller treatment than can be provided in this setting. It is worth pondering, though, whether the NLRA—which was regarded as having a state-of-the-art enforcement approach in 1935—has become inadequate and subject to ready manipulation as resistance to enforcement has grown more sophisticated and judicial dockets have become more crowded. *See, e.g., infra* note 257 (discussing congressional updating of other enforcement schemes and failure to update NLRA).

107. *See supra* note 95 and accompanying text.

108. The annual reversal rates for Board decisions finding liability either against an employer or against a union ranged between 14.5% and 25.6%, with the fiscal year (October 1-September 30) breakdowns as follows: FY 1987, 16.3% (25/153); FY 1988, 17.6% (23/131); FY 1989, 14.5% (22/152); FY 1990, 14.6% (20/137); FY 1991, 25.2% (31/123); FY 1992, 25.6% (30/117); FY 1993-94, 22.2% (34/153).

unions.¹⁰⁹ If employers found liable under section 8(a) are not treated significantly better on appeal than unions found liable under section 8(b), then perhaps political ideology does not figure so prominently in explaining tensions between the Board and appellate courts.

Before deciding, however, that the limited differential identified in Table Three is conclusive, one would have to examine more closely certain other factors. For example, the centrist character of the Board itself during this seven-year period may have produced decisions that in the aggregate were less pathbreaking or controversial, and therefore less susceptible to reversal.¹¹⁰ More generally, insofar as strategic motives play a prominent role in pursuing appeals, employers may well rely on such motives to a greater extent than unions.¹¹¹ If

109. Federal judges traditionally have had far more in common with management than with organized labor, in terms of class background and ideological orientation. Prior to enactment of the NLRA, federal courts were consistently hostile to workers' interests in unionization and collective action. See WILLIAM E. FORBATH, *LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT* 33, 52-53, 151-52, 199-201 (1991). See generally WILLIAM G. ROSS, *A MUTED FURY: POPULISTS, PROGRESSIVES AND LABOR UNIONS CONFRONT THE COURTS, 1890-1937* (1994) (describing unions' persistent criticism of both state and federal courts, and their efforts to restrict the exercises of judicial power). Since 1935, federal courts have often been accused of limiting if not undermining protections accorded under the NLRA for various forms of concerted activity. See, e.g., CHRISTOPHER L. TOMLINS, *THE STATE AND THE UNIONS: LABOR RELATIONS, LAW, AND THE ORGANIZED LABOR MOVEMENT IN AMERICA, 1880-1960*, 239-41 (1985); Michael C. Harper, *The Case for Limiting Judicial Review of Labor Board Certification Decisions*, 55 GEO. WASH. L. REV. 262, 298 n.163 (1987); Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness*, 62 MINN. L. REV. 265, 293-336 (1978).

110. See, e.g., Clifford Oviatt Jr., *The Bush NLRB in Perspective: Does the Playing Field Need Leveling?*, 11 HOFSTRA LAB. L.J. 47, 93 (1993) (former Board member under President Bush summarizing Board's recent decisional record as moderate and middle-of-the-road); AFL-CIO LAWYERS COORDINATING COMMITTEE, *THE LABOR LAW EXCHANGE*, NO. 12: THE STEPHENS BOARD iii (1993) (describing Board decisions from 1986-93 as moderately pro-management and more balanced than the extreme pro-employer Board of the early 1980s).

111. Employers have more to gain in the long-term by pursuing "losing" appeals that will deter organizing campaigns or prevent the negotiation of first contracts. See *supra* note 104 and accompanying text. Union gains from delayed resolution are more finite: e.g., an extra period of secondary activity that ends when appellate court enforcement occurs and the offending union becomes subject to contempt proceedings. Recent statistics from the Board tend to support this hypothesis. During our seven-year period, employers contested adverse ULP determinations in the courts of appeals nearly ten times more often than unions did. See *supra* Table Three (875 employer appeals versus 89 union appeals). Yet the ratio of meritorious ULPs found by the Board against employers as opposed to unions was roughly four to one. See DUNLOP COMMISSION REPORT, *supra* note 8, at 83, 86 (1989 and 1990 Board data indicate approximately 10,000 meritorious 8(a) charges and 2,500 meritorious 8(b) charges per year). Employers' far greater propensity to challenge

employers do litigate strategic appeals more frequently than unions, this would tend to conceal a higher differential in reversal rates based on appellate court resistance to the Board's substantive position.¹¹² Finally, a comparison between general case outcomes that are "pro-union" and outcomes that are "pro-employer" may be incomplete in important respects. Such a comparison fails to consider the nature and merits of the particular issues raised on appeal—including the possibility that reversal rates may vary considerably for certain specific employer liability or union liability issues.¹¹³

4. Board Result: Liability Versus Requested Relief

When one turns to appellate review of Board decisions that resolved remedial disputes against an employer, the results differ markedly from the liability area. These disputes involved Board efforts to seek back pay, reinstatement, a bargaining order, or some other form of relief under section 10(c) against an employer found to have violated section 8.¹¹⁴ A reviewing court during this period was significantly more likely to reverse, remand, or modify a Board order granting the requested relief than a Board order finding liability against an employer. The results are presented in Table Four.¹¹⁵

liability in the courts may be partly attributable to their ability to bear the at times substantial costs of appellate litigation. But employers' willingness to pursue more appeals for strategic reasons is likely to be a significant factor as well.

112. For instance, assuming *arguendo* that one-third of employer appeals are pursued for tactical reasons unrelated to the merits of the case, while only one-sixth of union appeals are strategic in nature, such appeals are almost certain to end in affirmance. If one were able to remove those cases from the mix, the resulting comparison of reversal rates in sincere merits-based appeals would show a greater difference between employer and union.

113. See *infra* part II.C (discussing reversal rates for certain issue-specific Board outcomes with respect to employer liability and also relief against employers).

114. Judicial review of Board efforts to seek relief against a violating union was exceedingly rare; such cases are omitted from study. See *supra* note 98.

115. Table Four includes a lesser number of "employer ULP" cases than appeared in Tables One and Three. There were 77 court cases during this period in which Board determinations that found employer liability and granted relief against the employer either were both reversed (65 cases) or were both affirmed (12 cases). For purposes of comparing reversal rates between the two categories, these overlapping cases were removed. Looking at all 176 court cases in which a Board determination granting relief against an employer was either reversed or affirmed, the reversal rate drops to 31.8%; this is still a very high figure when contrasted with the 19.7% reversal rate for determinations of employer liability.

TABLE FOUR: RELIEF AGAINST EMPLOYERS VERSUS
EMPLOYER LIABILITY

	Board Grants Relief Against Employer	Board Finds Employer ULP
Affirmed	55	638
Reversed	44	160
% Reversed	44.4	20.1

Chi-square= 29.78; $p < .05$

The appellate courts' enthusiasm for reversing Board remedial orders is surprising in light of Supreme Court pronouncements in this area. As a general matter, the Court's leading recent decision gives agencies broad authority to apply ambiguous text—such as the language of section 10(c)¹¹⁶—so long as the agency's approach is “based on a *permissible* construction of the statute.”¹¹⁷ With respect to section 10(c) in particular, the Court has almost invariably found Board applications to be permissible. Indeed, long before *Chevron* set a new general standard of deference to agency interpretations of ambiguous text, the Supreme Court recognized the Board's special expertise in fashioning remedies to effectuate NLRA policies, and deferred on numerous occasions to the Board's exercise of its remedial discretion.¹¹⁸ Yet despite this history, the appellate courts in recent times have been extraordinarily hostile to this very remedial discretion. A particular aspect of the appellate courts' hostility is explored in detail in Part III.

116. Section 10(c) authorizes the Board to order relief against culpable employers as follows: “such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this [Act].” 29 U.S.C. § 160(c) (1994).

117. *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 843 (1984) (emphasis added).

118. See, e.g., *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 610-16 (1969) (bargaining order); *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 215-16 (1964) (order to resume operations); *NLRB v. Seven-Up Bottling Co.*, 344 U.S. 344, 348-52 (1953) (back pay); *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941) (reinstatement). But cf. *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 312-17 (1979) (holding that Board abused its discretion in ordering employer to turn over confidential test data to union). See generally *ABF Freight Sys. Inc. v. NLRB*, 114 S. Ct. 835, 839-40 (1994) (discussing Court's “consistent appraisal of the Board's [broad] remedial authority” going back more than 50 years).

C. Examining Issue-Specific Outcomes

1. Classifying Based on Specific Issues

The above analysis of Board-court tensions keyed to general case outcomes before the Board produced results that are interesting and in some instances surprising. Yet this case outcome analysis fails to take account of important variations among cases. Although most appellate court decisions addressed only one substantive issue, over one-fourth of the reversals involved a reversal of multiple Board issues¹¹⁹ and nearly one-half of the affirmances involved the affirmation of two or more issues.¹²⁰ A case outcome analysis fails to consider the distinction between single-issue and multi-issue cases. Moreover, in more than one-third of the cases classified as reversals, the courts also affirmed the Board's determination on certain issues.¹²¹ Although the case outcomes are classified as reversals because the Board lost on at least one of its determinations, the Board frequently prevailed on many or even most legal claims being litigated before the appellate court. A case outcome analysis does not reflect the presence of these mixed-result cases, much less the distinction between mixed-result outcomes that are mostly reversals and those that are mostly affirmances.

In an effort to capture more accurately the complexities of Board-court tensions during this seven-year period, the study subdivided general case outcomes into issue-specific components. An issue-specific analysis can account for the two important variations just identified: single-issue versus multi-issue cases, and mixed outcomes.¹²² Issue-specific results also facilitate recognition of particular legal claims that are flashpoints or areas of recurrent conflict between the Board and the appellate courts. Such recognition provides a firmer foundation for subsequent doctrinal discussion.

In pursuing issue-specific outcomes, the study focused on two general case categories: Board decisions finding employer liability, and Board decisions granting relief for that employer liability. These

119. Of 280 reversals, 76 reversed the Board on two or more distinct substantive issues.

120. Of 944 affirmances, 480 affirmed the Board on two or more distinct legal issues.

121. Of 280 reversals, 106 cases involved some issues being affirmed, although the case as a whole was reversed, remanded, or modified.

122. There are additional ways of subdividing outcomes that might illuminate variations present among individual cases. See Cooke, *supra* note 90, at 247 (distinguishing between simple and complex cases based on whether more than three Board members participated and whether the case appeared in NLRB annual reports).

are the two largest case categories,¹²³ and they therefore allow the most scope for classification into subgroups of meaningful numerical size. Employer liability and remedies-against-employers also are the two categories that lie at the core of the Board's statutory mission,¹²⁴ making them appropriate subjects for further analysis.

2. Board Result: Bargaining-Related ULP Issues Versus Other ULP Issues

Board decisions finding employer liability are predicated on section 8(a) of the NLRA, which sets forth a range of employer unfair labor practices. Four types of ULP issues recurred with sufficient frequency to be classified as major issue categories: (i) violations of section 8(a)(1), consisting primarily of employer interference—through threats, interrogation, improper benefits, etc.—with employee organizing campaigns and employee efforts to secure a fair representation election; (ii) violations of section 8(a)(3), consisting of various forms of employer discriminatory actions taken against union members or union supporters; (iii) traditional violations of section 8(a)(5), consisting of employer failures to bargain in good faith with a recognized or certified union; and (iv) technical violations of section 8(a)(5), consisting of employer challenges to the Board's certification of the union pursuant to section 9. This last group of challenges, labeled in Table Five as "9" for convenience, could be litigated only when the employer refused to bargain with the duly certified union.¹²⁵ The reversal rates for these four issue categories are set forth in Table Five.¹²⁶

123. See *supra* notes 97-98 and accompanying text.

124. See *supra* text immediately following note 98.

125. Employers often object to a union's certification by the Board, based on a challenge either to the scope of the bargaining unit or to the union's misconduct during the election campaign. Because the Board's certification of election results under § 9(c) is not a final order, an employer typically tests the validity of the certification by refusing to bargain with the certified union, thereby committing a "technical" violation of § 8(a)(5) that is appealable to the courts. These technical § 8(a)(5) violations were separately classified under § 9.

126. The data for "all 8a" issues includes the four major issue categories plus 8a2, 8a4, and 8f, each of which appears in Table Six. When calculating "% Reversed" for a particular issue in Tables Five, Six, and Seven, the denominator equals all occurrences of that particular issue while the numerator equals only those occurrences where the courts reversed the Board on that particular issue.

TABLE FIVE: EMPLOYER LIABILITY; MAJOR ISSUE CATEGORIES

	Affirmed Issue, Affirmed Case	Affirmed Issue, Reversed Case	Reversed Issue, Reversed Case	% Reversed
8a1	305	69	51	12.0
8a3	350	53	57	12.4
8a5	291	48	64	15.9
9	195	10	38	15.6
all 8a	1,156	185	222	14.2

At least two aspects of these results are worth noting. First, the reversal rate for employer liability *issues* is considerably below the 19.7% reversal rate for employer liability *cases*. This lower rate is attributable to the multi-issue and mixed outcome factors discussed above. Because there are many more multi-issue affirmances than multi-issue reversals, and because so many reversed cases also include affirmed issues, an issue-specific analysis yields a higher proportion of affirmances.¹²⁷

Second, the reversal rate for bargaining-related ULP issues—8a5 and 9—is significantly higher than the rate for the two other major employer violations—8a1 and 8a3.¹²⁸ One factor that might contribute to this differential is the relative lack of judicial familiarity with the types of misconduct involved in bargaining-related ULP issues. An unlawful refusal to bargain involves employer conduct directed against the union as an entity. The clash of complex strategies between two collective enterprises—both at and away from the negotiating table—has no obvious parallels in public law outside the NLRA. By contrast, allegations of unlawful threats, interrogations, or discriminatory discharges typically implicate employer

127. Looking at the universe of all cases and all issues, there are 378 reversed issues in the 280 reversed cases, an average of 1.35 reversed issues for each reversed case. By contrast, the 944 affirmed cases contained 1,775 affirmed issues, an average of 1.88 affirmed issues for each affirmed case. Further, 106 of the 280 reversed cases included at least one affirmed issue, and there were 270 affirmed issues in those 106 cases.

128. For comparison of reversal rates of 8a5 and 9 combined (15.8%) versus 8a1 and 8a3 combined (12.2%), chi-square = 4.07, $p < .05$ for weighted data; chi-square = 5.63, $p < .05$ for unweighted data.

actions directed against individual employees. These actions often are comparable to prohibited conduct in other areas of public law,¹²⁹ and courts reasoning by analogy may find it easier to influence or accept the Board's analytic approach.

The disparity regarding bargaining-related ULP issues becomes more dramatic upon further subdivision of the four major issue categories. Table Six presents reversal rates for nineteen distinct ULP issues for which the Board found employer liability with some frequency. These issues include sub-groupings of the four major issue categories, as well as several employer liability issues not captured within those categories.¹³⁰

129. See, e.g., *Price Waterhouse v. Hopkins*, 490 U.S. 228, 248-50 (1989) (addressing mixed motive issues analogous to 8a3); *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 284-87 (1977) (same); 26 AM. JUR. 2d *Elections* §§ 374-85 (1966) (addressing range of political election misconduct analogous to 8a1 that is prohibited by federal or state law, including electioneering, bribery, illegal advertising, and voter intimidation).

130. The ULP issue categories in the left-hand column of Table Six are as follows:

8a1 Misc:	Catchall for 8a1 violations not otherwise identified
8a1B:	Conferring or promising benefits during campaign
8a1I:	Interrogation
8a1S:	Employer solicitation policies
8a1Su:	Surveillance
8a1T:	Threats
8a2:	Domination or interference with labor organization
8a3 Misc:	Catchall for 8a3 violations not otherwise identified
8a3MM:	Mixed motive discrimination against union members or supporters
8a4:	Retaliation for filing charge or testifying under Act
8a5 Misc:	Catchall for 8a5 violations not otherwise identified
8a5BF:	Bad faith bargaining, including surface bargaining
8a5GFD:	Good faith doubt as to continued majority status
8a5I:	Refusal to provide information requested by union
8a5MS:	Refusal to bargain on mandatory subjects
8a5MT:	Unilateral midterm modifications or other unilateral pre-impasse changes
9S:	Technical 8a5 based on challenge to identity or scope of bargaining unit
9U:	Technical 8a5 based on challenge to union's/employees' conduct during campaign
8f:	Pre-hire agreement

For a discussion of the development of these issue codes, see *supra* note 89. Most issues were readily identifiable based on the descriptive and analytic discussion in the appellate court opinions. As a general matter, when the issue was not sufficiently identifiable, it was placed in the "catchall" category—e.g., an 8a5 ULP that did not plainly belong in one of the five more specific subgroups. The 8a3 ULPs other than mixed motive discrimination probably could have been subdivided into several classifications; that adjustment may be made as part of a subsequent study focused on the 8a3 area. The sum

TABLE SIX: EMPLOYER LIABILITY; SPECIFIC ULP ISSUES

ULP Issue	Affirmed Issue, Affirmed Case	Affirmed Issue, Reversed Case	Reversed Issue, Reversed Case	% Reversed
8a1 Misc	62	19	14	14.7
8a1B	23	4	5	15.6
8a1I	79	14	11	10.6
8a1S	10	7	9	34.6
8a1Su	24	3	2	6.9
8a1T	106	22	10	7.2
8a2	3	1	3	42.9
8a3 Misc	165	31	29	12.9
8a3MM	185	22	28	11.9
8a4	7	2	4	30.8
8a5 Misc	151	13	17	9.4
8a5BF	7	7	1	6.7
8a5GFD	34	4	13	25.5
8a5I	37	6	16	27.1
8a5MS	14	4	3	14.3
8a5MT	48	14	14	18.4
9S	120	4	21	14.5
9U	76	6	17	17.2
8f	3	2	5	50.0

of "affirmed issues, affirmed cases" for all 19 issues listed in Table Six differs slightly from the total for all 8a "affirmed issues, affirmed cases" in Table Five because of rounding due to the weighting of cases.

Board decisions ordering relief against employers for their ULP conduct are exercises of the Board's authority under section 10(c) of the NLRA. The court cases studied from our seven-year period reviewed Board remedies of several distinct types: (i) orders focused on back pay awards for employees victimized by employer ULP conduct; (ii) orders requiring the offending employer to bargain with the union; (iii) other orders requiring a range of equitable relief, including reinstatement, continued payments to employee benefit plans, continued operation of certain programs or facilities, and broad cease-and-desist directives. The reversal rates for these three types of relief are presented in Table Seven.

TABLE SEVEN: RELIEF AGAINST EMPLOYER; SPECIFIC ISSUES¹³¹

	Affirmed Issue, Affirmed Case	Affirmed Issue, Reversed Case	Reversed Issue, Reversed Case	% Reversed
10BP	51	11	18	22.5
10BO	24	2	16	38.1
10c Misc	48	17	25	27.8
all 10c	123	30	59	27.8

The issue subgroups identified in Tables Six and Seven disclose considerable variations in the court's reversal rates when compared with the two broad aggregations—"employer liability" and "relief against employer"—to which they belong. Most specific issues reflect reversal rates similar to or below the relevant aggregated rate, but a small number of issues were reversed at rates significantly above the norm. Two of the issues are the focus for the remainder of this Article: (i) employer refusals to bargain based on asserted good faith doubt as to the union's continued majority status; and (ii) the imposition of bargaining orders as a remedy.

131. The remedial issues in the left-hand column are as follows: 10BP—back pay awards against employer; 10BO—bargaining orders; 10c Misc—catchall for 10c relief not otherwise identified.

I chose to concentrate on these two issues for several reasons. First, judicial reversals occurred in high enough volume, and across a large enough number of circuits, to warrant further inquiry regarding the precise nature of Board-court conflicts. In addition, the reversal rate for the two issues was at or near the top of their respective "peer groups" when considering issues that were litigated with some regularity. Finally, the two issues are related in that each directly implicates the core concept of collective bargaining and the extent to which bargaining relations should be protected or limited under the Act.

Appellate courts reversed section 8(a)(5) determinations that were based on the good faith doubt issue at a rate significantly higher than the rate of reversal for virtually all other "employer liability" determinations.¹³² Similarly, the courts reversed Board-imposed bargaining orders at a rate significantly in excess of the reversal rate for all other "relief against employer" determinations.¹³³ The absolute number of reversals for each issue—thirteen and sixteen, respectively—may not seem large. Yet from the Board's perspective, one—or at most two—issue-specific reversals by a circuit court within a relatively short time period may constitute an ominous if not definitive statement of the circuit's position on that issue. The Board may even seek to avoid subsequent enforcement efforts in that circuit, by opting to litigate in another circuit where feasible or by settling the dispute.

A more realistic indicator of the magnitude of Board-court tensions on these two issues may be the number of different circuits in which the Board has been reversed. In that regard, the thirteen

132. For comparison of reversal rates of 8a5GFD versus all other "employer liability" determinations, chi-square = 5.42, $p < .05$ for weighted data; chi-square = 4.49, $p < .05$ for unweighted data. Most other issues for which the reversal rate was significantly above the norm of 14.2 occurred far less frequently, e.g., 8a2 (occurred as appellate court issue 11 times); 8a4 (occurred as issue 13 times); 8f (occurred as issue 10 times). The one statistically significant issue with a comparable frequency rate was 8a5I, also a bargaining-related ULP: chi-square = 8.28, $p < .05$ for weighted data; chi-square = 5.73, $p < .05$ for unweighted data.

133. For comparison of reversal rates of 10BO versus all other "relief against employer" determinations, chi-square = 2.83, $p < .05$ (one-tailed) for weighted data; chi-square = 3.54, $p < .05$ (one-tailed) for unweighted data. I used a one-tailed significance test in this instance because my hypothesis is directional: the question is whether 10BO reversals occur more often than reversals in other "relief against employer" issues. The one-tailed test is appropriate for this type of directional hypothesis. See, e.g., LEE & MAYKOVICH, *supra* note 85, at 285-87; BLALOCK, *supra* note 85, at 163-64. Some of my other hypotheses are also directional and would have supported a one-tailed test, but those results were equally significant using the more conservative two-tailed test.

good faith doubt reversals occurred in ten different circuit courts, while the sixteen bargaining order reversals occurred in six different circuits.¹³⁴ This broad range of appellate court resistance is intriguing when combined with the high reversal rates.¹³⁵ Further, the good faith doubt and bargaining order issues are related in that

134. The Board was reversed on the good faith doubt issue in all circuits except the Third and Eighth. There were three reversals in the D.C. Circuit, two in the Tenth Circuit, and one in all others. The bargaining order reversals were somewhat more concentrated: five reversals in the D.C. Circuit, three each in the Second, Sixth, and Seventh Circuits, and one reversal apiece in the First and Fifth Circuits. Still, the fact that 50% of the circuits reversed, remanded, or modified a Board bargaining order indicates the ample scope of Board-court tension on this issue, especially given that three of the six remaining circuits (Eighth, Tenth, and Eleventh) reviewed no bargaining order issues at all based on the sample of 275 affirmed cases.

135. Variation among circuits may also be a factor worth considering when studying reversal rates. Data compiled on court decisions reviewing Board cases that included "employer liability" determinations or "relief against employer" determinations indicate considerable differences in reversal rates across circuits:

	Employer Liability % Reversed (Total Cases)	Relief Against Employer % Reversed (Total Cases)
1st Circuit	27.9 (14)	100.0 (1)
2d Circuit	10.6 (85)	61.7 (18)
3d Circuit	4.0 (100)	14.9 (20)
4th Circuit	34.6 (58)	22.7 (9)
5th Circuit	34.1 (47)	54.0 (7)
6th Circuit	28.3 (148)	31.2 (45)
7th Circuit	19.9 (116)	59.5 (8)
8th Circuit	27.1 (52)	27.9 (14)
9th Circuit	9.1 (98)	7.7 (26)
10th Circuit	16.3 (37)	100.0 (1)
11th Circuit	8.2 (49)	0.0 (0)
D.C. Circuit	29.3 (72)	34.2 (26)

Among courts of appeals with a higher frequency of reviewing Board decisions finding employers culpable and ordering relief against them, the Third and Ninth Circuits were consistently most supportive of the Board while the D.C. and Sixth Circuits were consistently most hostile to Board determinations. Still, the presence of reversals in so many different circuits on the two identified issues suggests that judicial resistance to the Board's position is widespread and justifies further analysis.

both involve Board efforts to protect or promote bargaining relationships in the face of employer assertions that individual employee choice is being compromised.¹³⁶ Given the steady attrition in the proportion of the private workforce that operates under a collective bargaining agreement, disagreements over whether a collective bargaining relationship should be established or maintained assume special significance. For all of these reasons—the extraordinary reversal rate, the range of circuits resisting Board positions, and the importance of conflict over the survival of bargaining relationships—I now consider the two identified issues in greater detail.

III. DOCTRINE PURSUED: BARGAINING STABILITY AND INDIVIDUAL FREEDOM

In embarking on an examination of the good faith doubt and bargaining order issues, it is important to clarify the limited nature of my objectives. A comprehensive assessment of the law on good faith doubt and bargaining orders is beyond the scope of this Article.¹³⁷ This Part seeks instead to describe the various aspects of disagreement between Board and courts regarding these matters, and then to analyze the disagreement in terms that reconcile the divergent strands. As explained below, the bargaining order conflict identified empirically in Part II is best understood as raising two distinct yet related substantive issues. Accordingly, the discussion that follows is divided into three sections: one on good faith doubt and two on bargaining orders. For each issue, I present a brief historical background, then describe the nature of Board-court tensions during our seven-year period, and conclude by discussing a conflict in underlying values that helps explain the various tensions.

136. See discussion *infra* part III.

137. For further analysis of these issues, see, e.g., Joan Flynn, *A Triple Standard at the NLRB: Employer Challenges to an Incumbent Union*, 1991 WIS. L. REV. 654 (addressing good faith doubt); Terry A. Bethel & Catherine A. Melfi, *Judicial Enforcement of NLRB Bargaining Orders: What Influences the Courts?*, 22 U.C. DAVIS L. REV. 139 (1988) (addressing enforcement of initial recognition bargaining orders); Andrea S. Christensen & Thomas G.S. Christensen, *Gissel Packing and "Good Faith Doubt": The Gestalt of Required Recognition of Unions Under the NLRA*, 37 U. CHI. L. REV. 411 (1970) (addressing bargaining orders to establish initial recognition for union); Norman J. Fry, *The Decontextualization of Labor Relations in Successorship Cases: Williams Enterprises v. NLRB and Sullivan Industries v. NLRB*, 61 GEO. WASH. L. REV. 1616, 1642-48 (1993) (addressing bargaining orders to restore status of incumbent union).

A. Good Faith Doubt

1. Background

A union enjoys a virtually irrebuttable presumption of majority status for a reasonable period after it has won an election and also for the duration of a collective bargaining agreement.¹³⁸ Beyond the protected period established under the Board's certification bar and contract bar doctrines, employees may contest the union's status by petitioning for a decertification election.¹³⁹ The question arises, however, as to what an *employer* may do to challenge an incumbent union's status. When a union that has had bargaining rights in the immediate past is confronted with an employer claim that the union has lost its majority, how should that claim be evaluated?

Under the Board's well-settled approach, an employer may lawfully withdraw recognition from an incumbent union provided that the withdrawal was based on a good faith doubt as to the union's continued majority status, which doubt is supported by sufficient objective considerations.¹⁴⁰ Historically, the Wagner Act did not address either employee decertification petitions or employer-initiated petitions to hold a representation election; absent those statutory options, the Board allowed employer refusals to bargain as a legitimate means of challenging a union's continued majority status.¹⁴¹ The Taft-Hartley Amendments authorized both employer

138. See *NLRB v. Burns Int'l Sec. Servs., Inc.*, 406 U.S. 272, 290 n.12 (1972) (sustaining Board position that irrebuttable presumption also attaches for period of collective bargaining agreement); *Brooks v. NLRB*, 348 U.S. 96, 98-104 (1954) (upholding Board position that union enjoys irrebuttable presumption of majority status for one year after being certified by Board); see also 29 U.S.C. § 159(c)(3) (1994) (barring any election within 12 months of a preceding valid election); *NLRB v. Sierra Dev. Co.*, 604 F.2d 606, 607 (9th Cir. 1979) (comparable presumption of majority status arises for reasonable period of time following employer's voluntary recognition of union). See generally *COX ET AL.*, *supra* note 7, at 273-74 (discussing Board doctrines barring new election for one year following certification of a collective bargaining representative and for up to three years of a collective bargaining agreement's existence).

139. 29 U.S.C. § 159(e)(1) (1994) (requiring Board to order decertification election if petition signed by 30% of bargaining unit members).

140. See *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 778 (1990). An employer also may lawfully withdraw recognition from an incumbent union if it establishes that at the time of its withdrawal the union, in fact, no longer enjoyed majority status. *Id.*; see *COX ET AL.*, *supra* note 7, at 346.

141. See *Huch Leather Co.*, 11 N.L.R.B. 394, 400-01 (1939); *Report of NLRB to Senate Committee on Education and Labor Upon S. 1000, S. 1264, S. 1392, S. 1550, and S. 1580*, 76th Cong., 1st Sess., Part 2, 179 (1939) (stating that employer is not obligated to bargain with union "if the employer, in good faith, is not convinced that a labor organization

election petitions and employee decertification petitions, thereby providing explicit statutory means for testing whether an incumbent union retained majority support.¹⁴² Nonetheless, the Board decided that even after Taft-Hartley, an employer with a good faith doubt as to an incumbent union's majority status could lawfully refuse to bargain once the protected period had expired, and that such good faith doubt could be established without the filing of either an employee decertification petition or an employer petition for an election.¹⁴³ The Board has steadily adhered to this approach as a matter of principle. At the same time, the Board as a matter of practice has tended to require from the employer substantial objective evidence that the union lacks majority support in order to establish a successful good faith doubt defense.¹⁴⁴

2. Recent Differences Between Board and Appellate Courts

During our seven-year period, the appellate courts displayed considerably more sympathy for employer assertions of good faith doubt than did the Board. The extraordinarily high reversal rate with respect to the good faith doubt issue reflected disagreement on a range of distinct legal matters, as well as occasionally divergent approaches to evaluating the factual record.

One legal controversy involved the status of replacement workers hired during a strike called by the union. The Board, after extended vacillation, had concluded that such replacements should *not* be presumed *either* to oppose the union *or* to support the union in the

represents a majority"); see also *Hearings Before the Senate Committee on Labor and Public Welfare on S. 55 and S.J. Res. 22*, 80th Cong., 1st Sess., Part 2, 1917 (1947) (statement of NLRB chair Paul M. Herzog, observing that if employer declines to bargain because of good faith doubt, "[t]he Board will not compel him to do so, unless he is proven wrong in a proceeding under section 8(5) of the [Wagner] Act").

142. Pub. L. No. 80-101, § 9(c), 61 Stat. 136, 144-45 (1947) (codified as amended at 29 U.S.C. §§ 159(c)(1)(B), (e) (1994)).

143. *Celanese Corp.*, 95 N.L.R.B. 664, 672-74 (1951). The Board initially concluded that an employer could not repudiate an existing bargaining relationship based on good faith doubt, because Taft-Hartley had specified the means by which the employer's duty to bargain could be dissolved. *United States Gypsum Co.*, 90 N.L.R.B. 964, 966 (1950). A year later, the Board modified its position in *Celanese*. See generally Flynn, *supra* note 137, at 683-85 (discussing Board's development of the *Celanese* rule).

144. See, e.g., *Wald Transfer & Storage Co.*, 218 N.L.R.B. 592, 592-94 (1975), *enforced mem.*, 535 F.2d 657 (5th Cir. 1976), *cert. denied*, 429 U.S. 1072 (1977); *Bartenders, Hotel, Motel & Restaurant Employers Bargaining Ass'n*, 213 N.L.R.B. 651, 651-54 (1974). See generally Curtin Matheson, 494 U.S. at 788-93 (describing how various forms of conflict between employees and their union are compatible with employees' desire for continued representation by that union).

same ratio as other employees in the bargaining unit.¹⁴⁵ Accordingly, an employer challenging an incumbent union's majority status in connection with a strike had to justify its refusal to bargain by producing objective evidence that striker replacements had repudiated the union in sufficient numbers to establish good faith doubt. Several appellate courts during this period rejected the Board's "no presumption" presumption with respect to striker replacements, and concluded that employers were justified in doubting that the striker replacements supported the union.¹⁴⁶ While the courts in each instance also cited other factors as supporting the employer's withdrawal of recognition, they all relied on the presence of striker replacements as a factor tending to undermine union support. The Supreme Court ended this appellate court trend in 1990, when it sustained the Board's position as a reasonable exercise of its discretion.¹⁴⁷

A second area of legal dispute involved operation of the Board's contract bar doctrine. The Board applied this doctrine expansively, determining that once an employer and a union enter into a valid collective bargaining agreement, the union's majority status may not be challenged for the duration of the contract—up to three

145. See *Buckley Broadcasting Corp.*, 284 N.L.R.B. 1339, 1344-45 (1987), *enforced*, 891 F.2d 230 (9th Cir. 1989), *cert. denied*, 496 U.S. 925 (1990). The Board has a longstanding presumption that new employees hired under non-strike circumstances support the union in the same ratio as the employees they replace. *E.g.*, *National Plastics Prods. Co.*, 78 N.L.R.B. 699, 706 (1948), *enforced*, 175 F.2d 755 (4th Cir. 1949). By contrast, the Board initially presumed that replacements hired during a strike opposed the union, *Stoner Rubber Co.*, 123 N.L.R.B. 1440, 1444 (1959), then reversed itself and presumed that striker replacements—like other new employees—support the union in the same proportion as the employees they replaced, *Cutten Supermarket*, 220 N.L.R.B. 507, 509 (1975), and finally settled on a "no-presumption" presumption in 1987. See *Curtin Matheson*, 494 U.S. at 779-82.

146. See *Johns-Manville Sales Corp. v. NLRB*, 906 F.2d 1428, 1433-34 (10th Cir. 1990), *denying enforcement of* 289 N.L.R.B. 358 (1988); *Bickerstaff Clay Prods. Co. v. NLRB*, 871 F.2d 980, 987-88 (11th Cir. 1989), *denying enforcement of* 286 N.L.R.B. 295 (1987), *cert. denied*, 493 U.S. 924 (1989); *Curtin Matheson Scientific, Inc. v. NLRB*, 859 F.2d 362, 366-67 (5th Cir. 1988), *denying enforcement of* 287 N.L.R.B. 350 (1987), *rev'd*, 494 U.S. 775 (1990).

147. *Curtin Matheson*, 494 U.S. at 788-96. The Court relied on the Board's empirical analysis that even though replacements often do not favor the incumbent union, the circumstances of each strike vary so much that the probability of replacement opposition simply is not strong enough to justify an anti-union presumption. The Court cited in particular: (i) circumstances in which replacements desire union representation despite their willingness to cross the picket line; (ii) circumstances in which the union's weak bargaining position leads it to forsake any demand that replacements be ousted; (iii) circumstances in which the interests of strikers and replacements converge once the strike has ended and job rights have been resolved. See *id.* at 788-93.

years—even if a majority of employees have withdrawn their support.¹⁴⁸ A number of appellate courts, however, were critical of the Board's expansive approach, citing problems they perceived with contract formation or with intervening changes in the bargaining unit. Thus, employer refusals to bargain with an incumbent union were sustained or reinstated where the court determined that the union lost—or might well have lost—majority support between the time the employer offered a contract and the time of union acceptance,¹⁴⁹ or where the court questioned application of the contract bar rule to a workforce that had experienced substantial turnover.¹⁵⁰ Further, in the analogous area of presumed majority status following an employer's voluntary recognition of the union,¹⁵¹ the Board was rebuked for applying the presumption in the face of evidence that the union had misrepresented its majority status prior to obtaining the employer's recognition.¹⁵²

A third area of legal wrangling centered on the employer's use of polling in an effort to show loss of majority support for an incumbent union. During this period, the Board continued its policy of applying the same standard to assess whether an employer may poll its employees that it applies to assess whether an employer may withdraw recognition: Does the employer have sufficient objective

148. See, e.g., *EPE, Inc.*, 284 N.L.R.B. 191, 193, 200 (1987) (rejecting employer's good faith doubt argument despite decertification petition signed by majority of unit employees), *aff'd in relevant part*, 845 F.2d 483, 490 (4th Cir. 1988); *Auciello Iron Works, Inc.*, 303 N.L.R.B. 562, 564-67 (1991) (finding that collective bargaining agreement came into existence, and that employer's admitted withdrawal of recognition the following day—based on doubts that union had had majority support when it accepted offer—was unlawful under contract bar doctrine), *remanded*, 980 F.2d 804, 811-13 (1992).

149. See *Chicago Tribune Co. v. NLRB*, 965 F.2d 244, 249-51 (7th Cir. 1992) (refusing to apply contract bar doctrine where union lost support of its workers prior to accepting contract offer), *denying enforcement of* 303 N.L.R.B. 682 (1991); *Auciello Iron Works, Inc.*, 980 F.2d at 811-13 (remanding for clarification as to whether union lacked majority support at the time it purported to accept the contract).

150. See *El Torito-La Fiesta Restaurants, Inc. v. NLRB*, 852 F.2d 571 (9th Cir. 1988) (unpublished disposition), 1988 WL 72981, at *1 (remanding for clarification as to why contract bars employer challenge to incumbent union's majority status even though only 8 of 180 current employees were working when contract was formed), *denying enforcement of* 284 N.L.R.B. 518 (1987).

151. See *supra* note 138 (citing *NLRB v. Sierra Dev. Co.*, 604 F.2d 606, 607 (9th Cir. 1979)).

152. See *Royal Coach Lines, Inc. v. NLRB*, 838 F.2d 47, 51-54 (2d Cir. 1988) (determining that once employer showed the union misrepresented its majority status in seeking voluntary recognition, burden shifted to General Counsel to show that union had obtained requisite majority support at time it secured recognition; and that General Counsel did not meet his burden), *denying enforcement of* 282 N.L.R.B. 1037 (1987).

considerations on which to base a reasonable good faith doubt as to the union's continued majority status.¹⁵³ The Board defended its use of the same rigorous good faith doubt standard because employer polling and employer withdrawal of recognition share similar purposes—to test whether the union still enjoys majority support, and they carry similar risks—lost recognition for the union and lost representation for the employees.¹⁵⁴ Some appellate courts, however, rejected the Board's approach to polling. They applied a lesser burden for employers seeking to conduct a poll—namely, whether there is substantial, objective evidence of a loss of union support even if that evidence does not itself justify withdrawal of recognition.¹⁵⁵

Still another area of legal controversy during this period concerned the Board's approach to employer assertions of good faith doubt that relied on employee decertification efforts later found to have been tainted by the employer's own misconduct. The Board adopted a stern position towards such employer misconduct, concluding that a decertification election set aside due to the employer's objectionable actions could not be used to support the employer's good faith doubt,¹⁵⁶ and that a successor employer's unlawful refusal to bargain with the incumbent union automatically tainted a subsequent employee petition for decertification so that the petition could not be used to support good faith doubt.¹⁵⁷ One court of appeals, the D.C. Circuit, expressed repeated objections to the Board's approach. The court took the position that employer

153. See *Texas Petrochemicals Corp.*, 296 N.L.R.B. 1057, 1059 (1989), *modified and remanded*, 923 F.2d 398 (5th Cir. 1991).

154. *Id.* at 1060-61.

155. See *Texas Petrochemicals Corp. v. NLRB*, 923 F.2d 398, 402 (5th Cir. 1991) (adopting lesser burden but affirming Board finding that employee poll was improper on separate ground that employer failed to notify union of the poll); *Clesco Mfg. Co. v. NLRB*, 915 F.2d 1570 (6th Cir. 1990) (unpublished disposition), 1990 WL 142349, at *3 (reversing Board's asserted application of the lesser burden to reject an employer poll on grounds that Board lacked substantial evidence to support its findings). Several circuits had rejected the Board's "good faith doubt" approach to polling even before 1986. See *Mingtree Restaurant, Inc. v. NLRB*, 736 F.2d 1295, 1297-99 (9th Cir. 1984); *Thomas Indus., Inc. v. NLRB*, 687 F.2d 863, 868-69 (6th Cir. 1982); *NLRB v. A.W. Thompson, Inc.*, 651 F.2d 1141, 1144-45 (5th Cir. 1981).

156. *St. Agnes Medical Ctr.*, 287 N.L.R.B. 242, 242-43 (1987), *aff'd in part and vacated in part*, 871 F.2d 137 (D.C. Cir. 1989).

157. *Sullivan Indus., Inc.*, 302 N.L.R.B. 144, 149 (1991), *enforcement granted in part and denied in part*, 957 F.2d 890 (D.C. Cir. 1992); see also *Williams Enterprises, Inc.*, 301 N.L.R.B. 167, 174 (1991) (finding that employer's unlawful threats and interrogation tainted subsequent employee petition for decertification).

misconduct preceding employee decertification efforts did not so readily warrant the exclusion of those efforts when assessing the employer's asserted good faith doubt. Rather, the court continued, the Board should examine the totality of circumstances in each case to determine whether the employer's misconduct "significantly contributed to" the employees' subsequent attempt to decertify their union.¹⁵⁸

Apart from their disagreements regarding various discrete legal matters, the Board and the appellate courts diverged on a number of occasions regarding their characterizations of the factual record.¹⁵⁹ When seeking to establish a good faith doubt justification for refusals to bargain with an incumbent union, employers traditionally invoke a wide range of factors as indicative of employee dissatisfaction.¹⁶⁰ Each of these factors may be insufficient standing alone to establish good faith doubt. Both the Board and courts acknowledge, however, their obligation to consider the cumulative effect of all such factors in determining whether the employer's refusal to bargain in a particular instance was justified.¹⁶¹

Despite this professed unity on the need to consider the aggregative impact of all doubt-inducing factors, there is some tension in the application of the "cumulative effect" approach. When the Board rejects an employer's good faith doubt assertion, it at times seems to be considering and dismissing each factor individually rather than evaluating the totality of all factors.¹⁶² The courts of appeals,

158. See *Sullivan Indus. v. NLRB*, 957 F.2d 890, 898 (D.C. Cir. 1992); *Williams Enterprises v. NLRB*, 956 F.2d 1226, 1234-35 (D.C. Cir. 1992); *St. Agnes Medical Ctr. v. NLRB*, 871 F.2d 137, 145-47 (D.C. Cir. 1989).

159. See, e.g., *NLRB v. Oil Capital Elec., Inc.*, 5 F.3d 459, 463-64 (10th Cir. 1993), *denying enforcement of* 308 N.L.R.B. 1149 (1992); *Chesapeake Plywood Inc. v. NLRB*, 917 F.2d 22 (4th Cir. 1990) (unpublished disposition), 1990 WL 162514, at *7-8, *denying in part enforcement of* 294 N.L.R.B. 201 (1989); *Bickerstaff Clay Prods. Co. v. NLRB*, 871 F.2d 980, 992 (11th Cir. 1989), *denying enforcement of* 286 N.L.R.B. 295 (1987), *cert. denied*, 493 U.S. 924 (1989).

160. Such factors may include, for example: less than majority union membership within the bargaining unit; substantial declines in union membership or dues checkoff authorizations; substantial employee turnover; criticism of union expressed in employee-generated letters or employer-conducted polls; personal and specific statements from many unit members that they do not want the union. See *THE DEVELOPING LABOR LAW*, *supra* note 64, at 574-77.

161. See, e.g., *Oil Capital Elec., Inc.*, 5 F.3d at 462-64 (purporting to consider cumulative effect); *U.S. Mosaic Tile Co. v. NLRB*, 935 F.2d 1249, 1258 (11th Cir. 1991) (same); *Transport Serv. Co.*, 302 N.L.R.B. 22, 33 (1991) (same), *enforcement granted in part and denied in part*, 973 F.2d 562 (7th Cir. 1992).

162. See, e.g., *Oil Capital Elec., Inc.*, 308 N.L.R.B. 1149, 1152-53 (1992) (analyzing factors individually and making no reference to their cumulative effect), *enforcement*

by contrast, tend to emphasize that a combination of factors may justify good faith doubt, and they seem more diligent in discussing the cumulative impact of all factors raised. That diligence is evident in cases enforcing the Board's rejection of a good faith doubt defense¹⁶³ as well as cases reversing the Board for ignoring cumulative effect.¹⁶⁴

3. Maintaining Bargaining Stability Versus Crediting Employee Discontent

There were certain recurring differences in emphasis between the Board and courts that seem to characterize their approaches to the good faith doubt issue. The Board worried most about the importance of stable and continuing collective bargaining relationships, and the danger that employers would disrupt or subvert those relationships by invoking the mantra of renewed free choice. Although the priority assigned to maintaining stable bargaining relationships was often implicit in the Board's approach, it occasionally was expressed in ringing terms:

The presumption of continuing majority status essentially serves two important functions of Federal labor policy. First, it promotes continuity in bargaining relationships. . . . The resulting industrial stability remains a primary objective of the Wagner Act, and to an even greater extent, the Taft-Hartley Act. Second, the presumption of continuing majority status protects the express statutory right of employees to designate a collective-bargaining representative of their own choosing, and to prevent an employer from impairing that right without some objective evidence that the representative the employees have designated no longer enjoys majority support. . . . [T]he employer's burden of

denied, 5 F.3d 459 (10th Cir. 1993); *Tile, Terrazzo & Marble Contractors Ass'n*, 287 N.L.R.B. 769, 783-84 (1987) (same), *enforced*, 935 F.2d 1249 (11th Cir. 1991), *cert. denied*, 502 U.S. 1031 (1992); *Bryan Memorial Hosp.*, 279 N.L.R.B. 222, 225 (1986) (same), *enforced*, 814 F.2d 1259 (8th Cir.), *cert. denied*, 484 U.S. 849 (1987); *see also* *ACL Corp.*, 278 N.L.R.B. 474, 480-81 (1986) (considering and rejecting numerous factors individually, making brief conclusory reference to collective consideration).

163. *See, e.g.*, *NLRB v. Laverdiere's Enterprises*, 933 F.2d 1045, 1052-53 (1st Cir. 1991), *enforcing in relevant part* 297 N.L.R.B. 826 (1990); *U.S. Mosaic Tile Inc. v. NLRB*, 935 F.2d 1249, 1258-59 (11th Cir. 1991), *enforcing* 287 N.L.R.B. 769 (1987).

164. *See* *NLRB v. Oil Capital Elec., Inc.*, 5 F.3d 459, 463-64 (10th Cir. 1993) (concluding that Board failed to consider cumulative effect of various good faith doubt factors).

proof [in adducing sufficient evidence to establish good faith doubt] is a heavy one.¹⁶⁵

From the Board's perspective, allowing striker replacements to be presumed opponents of the incumbent union—as opposed to requiring a demonstration of their opposition based on objective evidence—would invite an undermining of the status quo, which is the presence of a bargaining relationship.¹⁶⁶ Further, allowing employers to poll employees already represented by a union without having good faith doubt of the union's majority status "could disrupt collective bargaining and frustrate the policy of the Act favoring stable relations."¹⁶⁷ Similarly, crediting employee concerns that follow a successor employer's unlawful delay in recognizing the incumbent bargaining representative is likely to encourage feelings of employee disaffection toward the union that are "not conducive to industrial peace."¹⁶⁸ In each instance, the Board favored continuity of a bargaining relationship as promoting the fundamental goal of industrial peace, and viewed with suspicion the employer's reliance on "employee rights" to challenge that bargaining relationship.

The courts of appeals had a different angle of vision on the good faith doubt issue. Judicial attention tended to be directed at the importance of preferences being expressed by current employees and the danger that employees would be represented by a union that most of them did not want. Once again, the priority assigned to employee free choice was most often implicit in the courts' analyses. By allowing employer polling based on less substantial evidence of lost union support than would be required for employer withdrawal of recognition, the courts encouraged a nuanced, and sympathetic,

165. *Pennex Aluminum Corp.*, 288 N.L.R.B. 439, 441 (1988) (quoting *Pennco Inc.*, 250 N.L.R.B. 716, 716-17 (1980), *enforced*, 684 F.2d 340 (6th Cir.), *cert. denied*, 459 U.S. 994 (1982)), *enforced*, 869 F.2d 590 (3d Cir. 1989).

166. If striker replacements were presumed to oppose the union, employers who wished to discontinue a bargaining relationship could simply bargain hard to induce a lawful strike and then hire enough permanent replacements to approximate the number of former employees, thereby creating the basis for good faith doubt. A presumption of opposition also would enable employers to reap instant benefits from a petition to decertify the union. See *Buckley Broadcasting Corp.*, 284 N.L.R.B. 1339, 1344 (1987), *enforced*, 891 F.2d 230 (9th Cir. 1989), *cert. denied*, 496 U.S. 925 (1990). For additional reasons to reject the anti-union presumption, see *supra* note 147.

167. *Texas Petrochemicals Corp.*, 296 N.L.R.B. 1057, 1061 (1989).

168. *Sullivan Indus., Inc.*, 302 N.L.R.B. 144, 149 (1991) (quoting *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 40 (1987)), *enforcement granted in part and denied in part*, 957 F.2d 890 (D.C. Cir. 1992).

approach to assessing employee discontent.¹⁶⁹ By insisting that an employer's unfair labor practices must "significantly contribute" to a later decertification effort in order to bar the employer from relying on that effort when it withdraws recognition, the courts accorded preferred status to the expression of employee disaffections.¹⁷⁰ Further, by limiting the scope of the contract bar doctrine where the union's majority support at time of contract formation was subsequently questioned, the courts invited ongoing inquiry into the scope of employees' dissatisfaction with their union.¹⁷¹ The courts' perspective in the latter context was aptly summarized in an opinion by Judge Posner:

As for the Board's rule that a union's unconditional acceptance of an offer for a collective bargaining contract is valid and binds the company unless circumstances have changed since the company's offer was made or renewed, we do not think the rule should apply to a case such as this where between the original offer and its renewal the union lost the support of the workers. *That would give too much weight to the interests of unions and too little to the interests of workers.*¹⁷²

In focusing attention on Board-court disagreements regarding good faith doubt, I do not mean to suggest that the appellate courts have repudiated the importance of preserving collective bargaining stability: an affirmance rate of seventy-five percent on the good faith doubt issue belies any such notion.¹⁷³ Nor should the Board be viewed as elevating bargaining stability to the exclusion of other values under the Act.¹⁷⁴ Indeed, the Board's long-term approach to

169. See *Texas Petrochemicals Corp. v. NLRB*, 923 F.2d 398, 402 (5th Cir. 1991). The court was not unaware of the risk of employer abuse, but concluded that it could minimize that risk by requiring procedural safeguards in polling, and that this minimized risk was outweighed by the risk of a nonmajority union being perpetuated. See *id.*

170. See *Williams Enterprises, Inc. v. NLRB*, 956 F.2d 1226, 1234-36 (D.C. Cir. 1992). As a corollary, the courts accorded diminished status to the employer-related origins of that disaffection, and its effects on industrial stability.

171. *Chicago Tribune Co. v. NLRB*, 965 F.2d 244, 249-50 (7th Cir. 1992), denying enforcement of 303 N.L.R.B. 682, 692 (1991).

172. *Id.* at 250 (emphasis added). By contrast, the Board's reluctance to permit inquiry into the motives of parties accepting a collective bargaining agreement rested in large part on the concern that such inquiry "would create endless possibilities for protracted litigation which would ultimately destroy collective bargaining." *Chicago Tribune Co.*, 303 N.L.R.B. 682, 692 (1991).

173. At the same time, a high proportion of strategic appeals by employers may dilute the significance of this 75% affirmance rate. See *supra* part II.B.2.

174. The Board was criticized by the Supreme Court for *undermining* bargaining stability just before the period being studied here. See *NLRB v. Financial Inst.*

the good faith doubt issue has been recently challenged as inadequate to achieve its own objectives,¹⁷⁵ and the Board may have occasion to rethink its traditional position in the near future.¹⁷⁶

Our present task, however, is to understand why the recent reversal rate for good faith doubt issues is so high when compared with appellate court review of other issues of employer liability for ULP conduct. Significantly, the Board's regular attention to preserving bargaining stability reflects a value that has been repeatedly recognized by the Supreme Court as central to the Act.¹⁷⁷ By favoring such stability, the Board "enable[s] a union to concentrate on obtaining and fairly administering a collective bargaining agreement without worrying that, unless it produces immediate results, it will lose majority support."¹⁷⁸ Moreover, the Board's concern that employer assertions of employee rights could disrupt bargaining stability also echoes strong Supreme Court perceptions. "To allow employers to rely on employees' rights in refusing to bargain with the formally designated union is not conducive to [industrial peace]."¹⁷⁹

The courts of appeals' persistent concern with indicia of majority employee disaffection suggests a reluctance to embrace bargaining stability as a core value.¹⁸⁰ Part IV offers a possible explanation for the appellate courts' lack of zeal regarding the importance of

Employees, Local 1182, 475 U.S. 192, 208-09 (1986) (invalidating Board requirement that non-union employees must be allowed to vote for affiliation before employer may be ordered to bargain with affiliated union, and reasoning that such a requirement undermines stable bargaining relationships by allowing challenges to continued representation on grounds other than a question of representation).

175. See Flynn, *supra* note 137, at 663-99 (arguing that Board should stop applying same good faith doubt standard to evaluate employer polls, employer withdrawals of recognition, and employer petitions for election, and should adopt policy favoring elections and banning or disfavoring polls and withdrawals of recognition).

176. See General Counsel's Position Statement on Reconsideration by the Board at 25-26, *Lee Lumber & Bldg. Material Corp.*, 13-CA-29377 (1995) (urging Board to (i) require that employer's evidence of loss of majority support for incumbent union be tested in secret ballot election before permitting withdrawal of recognition, and (ii) grant employer petitions for such an election if supported by expressed opposition to union from 30% of employees in bargaining unit).

177. See, e.g., *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 794 (1990); *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 38 (1987); *Financial Inst. Employees*, 475 U.S. at 209; *Brooks v. NLRB*, 348 U.S. 96, 100-03 (1954).

178. *Fall River*, 482 U.S. at 38 (citing *Brooks*, 348 U.S. at 100).

179. *Financial Inst. Employees*, 475 U.S. at 209 (citing *Brooks*, 348 U.S. at 103).

180. The Act provides that an employer must not knowingly recognize a minority union, and the Supreme Court has supported that value also. See *ILGWU v. NLRB*, 366 U.S. 731, 739 (1961). But knowing recognition of a minority union is not implicated in these cases, where the issue is simply good faith doubt about continuing majority status. Disputes between rival unions also are not implicated here.

bargaining stability, and their abiding concern with the majority status of the union.

B. Initial Recognition Bargaining Orders

1. Background

Unions seeking to represent an unorganized group of employees traditionally secure recognition through the election and certification procedures set forth at section 9(c) of the Act.¹⁸¹ There are occasions, however, when the employer's ULP conduct has so interfered with or undermined the election process that the employees' rejection of the union in an election is not properly viewed as reproducing employee free choice.¹⁸² The question then arises as to whether the Board may order an employer to recognize and bargain with the union, based on a pre-election authorization card majority,¹⁸³ pursuant to its remedial authority to "take such affirmative action . . . as will effectuate the policies of this Act."¹⁸⁴

The Wagner Act did not limit the designation of collective bargaining representatives to those that had prevailed in an election,¹⁸⁵ and the Board used its remedial powers to order bargaining when the union's card majority had been eroded by subsequent employer ULPs.¹⁸⁶ The Taft-Hartley Amendments left undisturbed

181. See 29 U.S.C. § 159(c) (1994). The Board traditionally has favored the election process as the fairest means of obtaining exclusive representative status. See *Aaron Bros.*, 158 N.L.R.B. 1077, 1078 (1966); *COX ET AL.*, *supra* note 7, at 318.

182. In some instances, the union has not actually lost the election: either no vote occurred because the ULP charges blocked the election, or the vote was inconclusive because challenges to determinative ballots were never resolved in light of the ULPs.

183. The present discussion presupposes that the union has presented persuasive evidence of a card majority. The authority to issue non-majority bargaining orders under the NLRA—an authority suggested but not firmly established by the Supreme Court in the *Gissel* case discussed below—was litigated before the Board and appellate courts prior to 1986, and was not an issue during our seven-year period. See *generally* *Conair Corp. v. NLRB*, 721 F.2d 1355, 1377-84 (D.C. Cir.) (rejecting Board's position that it had authority to issue non-majority bargaining orders), *cert. denied*, 467 U.S. 1241 (1983); *Gourmet Foods, Inc.*, 270 N.L.R.B. 578, 583-87 (1984) (overruling Board's own precedent and agreeing with *Conair* court that Act precludes non-majority bargaining orders).

184. 29 U.S.C. § 160(c) (1994).

185. See Pub. L. No. 74-198, § 9(c), 49 Stat. 449, 453 (1935) (allowing Board to resolve a representation dispute by conducting an investigation, whereupon the Board "may take a secret ballot of employees, or utilize any other suitable method to ascertain [sic] such representatives").

186. See, e.g., *Franks Bros. Co.*, 44 N.L.R.B. 898, 917 (1942), *enforced*, 137 F.2d 989, 994-95 (1st Cir. 1943), *aff'd*, 321 U.S. 702, 704-06 (1944). See *generally* *Christensen & Christensen*, *supra* note 137, at 417-18 (discussing Board's early use of its remedial

the Board's authority to issue bargaining orders against mischievous employers.¹⁸⁷ During the 1950s and 1960s, the Board continued to require such employers to recognize and bargain with unions that had earlier established card majorities, without requiring proof that the union still enjoyed majority support at the time bargaining was directed.¹⁸⁸ Although several appellate courts in the 1960s criticized the Board's exercise of its bargaining order authority,¹⁸⁹ the Supreme Court unanimously upheld the Board's approach in *NLRB v. Gissel Packing Co.*¹⁹⁰

The Court in *Gissel* endorsed the Board's position that "the key to the issuance of a bargaining order is the commission of serious unfair labor practices that interfere with the election processes and

authority, and Supreme Court deference to that authority in *Franks Bros.*). Despite the Act's contemplation of non-electoral means for determining majority employee preference, the Board from an early point relied almost invariably on elections—and not authorization cards—when certifying an exclusive representative under § 9. See Joe Hearin, 66 N.L.R.B. 1276, 1283 & n.11 (1946); Cudahy Packing Co., 13 N.L.R.B. 526, 531-32 (1939). The Board, however, continued to use its § 10 remedial powers to order bargaining in response to employer ULPs, even when no election had taken place. See Lebanon Steel Foundry, 33 N.L.R.B. 233, 256 (1941), *enforced*, 130 F.2d 404, 409 (D.C. Cir.), *cert. denied*, 317 U.S. 659 (1942); P. Lorillard Co., 16 N.L.R.B. 684, 699-700 (1939), *modified*, 117 F.2d 921, 924-26 (6th Cir. 1941), *rev'd*, 314 U.S. 512, 513 (1942).

187. If anything, the legislative history accompanying Taft-Hartley suggests that Congress knowingly reaffirmed the Board's powers in this area. The House-passed Hartley bill would have amended § 8(a)(5) to require that employers recognize certified unions only, i.e., not unions "designated" through a card majority under § 9(a). See H.R. 3020 (as passed by House), 80th Cong., 1st Sess. 21 (1947), *reprinted in* 1 LMRA LEGIS. HIST., *supra* note 67, at 178. The proposed change was not approved by the Senate, and was rejected in Conference. See H.R. 3020 (as passed by Senate), 80 Cong., 1st Sess. 81 (1947), *reprinted in* 1 LMRA LEGIS. HIST., *supra* note 67, at 239; H.R. CONF. REP. No. 510, 80th Cong., 1st Sess. 41 (1947), *reprinted in* 1 LMRA LEGIS. HIST., *supra* note 67, at 545. See generally Howard Lesnick, *Establishment of Bargaining Rights Without an NLRB Election*, 65 MICH. L. REV. 851, 861-62 (1967) (emphasizing importance of the 1947 legislative history).

188. See, e.g., Bryant Chucking Grinder Co., 160 N.L.R.B. 1526, 1530 (1966), *enforced*, 389 F.2d 565, 568 (2d Cir. 1967), *cert. denied*, 392 U.S. 908 (1968); Joy Silk Mills, Inc., 85 N.L.R.B. 1263, 1265 (1949), *modified and enforced*, 185 F.2d 732, 739-45 (D.C. Cir. 1950), *cert. denied*, 341 U.S. 914 (1951). Between 1954 and 1964, the Board adopted the position that if a union with a card majority participated in an election after the employer had denied its request for recognition, the union could not then obtain the ULP remedy of a bargaining order. See Aiello Dairy Farms Co., 110 N.L.R.B. 1365, 1367-68 (1954), *overruled by* Bernell Foam Prods. Co., 146 N.L.R.B. 1277, 1284-86 (1964). During this 10-year period, the volume of Joy Silk bargaining order cases decreased significantly. See THE DEVELOPING LABOR LAW, *supra* note 64, at 527.

189. See, e.g., NLRB v. S.E. Nichols Co., 380 F.2d 438, 442-45 (2d Cir. 1967); NLRB v. S.S. Logan Packing Co., 386 F.2d 562, 564-71 (4th Cir. 1967); Engineers & Fabricators, Inc. v. NLRB, 376 F.2d 482, 487 (5th Cir. 1967).

190. 395 U.S. 575 (1969).

tend to preclude the holding of a fair election.”¹⁹¹ In explicitly rejecting the argument that the bargaining order was a harsh remedy that unduly prejudiced employees’ section 7 rights not to belong to a union, the Court viewed such remedial orders as appropriate to deter an employer’s efforts to “‘profit from [its] own wrongful refusal to bargain’”¹⁹² and also to “effectuat[e] ascertainable employee free choice”¹⁹³ by “re-establish[ing] the conditions as they existed before the employer’s unlawful campaign.”¹⁹⁴ The Court acknowledged that employee choice might be adversely affected by a bargaining order if the union would have lost the election even without the employer’s serious misconduct.¹⁹⁵ But the Court dismissed such an effect as “minimal at best,” because of the employees’ right to decertify the union after a reasonable interval, and the union’s incentive to defeat such a decertification effort by bargaining to satisfy a majority of unit members.¹⁹⁶

The Supreme Court in *Gissel* approved the Board’s authority to issue bargaining orders for two categories of serious employer misconduct. Category one consisted of exceptional cases, marked by “outrageous” and “pervasive” ULPs that make it impossible to conduct a fair and reliable election; category two encompassed “less extraordinary cases marked by *less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election processes.*”¹⁹⁷ In deciding whether ULPs were “outrageous” enough under category one to make a fair election impossible, or whether “less pervasive” category-two ULPs were of sufficient impact to make a fair election improbable, the Supreme Court stated unequivocally that the Board, *not* the appellate courts, should make those determinations “based on its expert estimate as to the effects on the election process of unfair labor practices of varying

191. *Id.* at 594 (stating Board’s current practice).

192. *Id.* at 610 (quoting *Franks Bros. Co. v. NLRB*, 321 U.S. 702, 704 (1944)).

193. *Id.* at 614.

194. *Id.* at 612.

195. *Id.* at 612 n.33.

196. *Id.* at 612 n.33, 613; *see also* *NLRB v. Sehon Stevenson & Co.*, 386 F.2d 551, 557 (4th Cir. 1967) (Sobeloff, J., concurring specially) (observing that “a minority union facing a hostile employer can cause the employees little harm while having strong incentive to do them much good,” and citing *Brooks* and *Franks Bros.* as reflecting the Supreme Court position that “there are other values—such as the need to deter employer unfair practices—in our labor policy which may on occasion override the desideratum of majority representation”).

197. *Gissel*, 395 U.S. at 614 (emphasis added) (discussing categories one and two).

intensity.”¹⁹⁸ The Court then exemplified its deferential approach to agency expertise in this remedial area, by affirming a previously enforced bargaining order in which the Board had given a brief and unelaborated statement as to why the employer’s misconduct made it impossible to conduct a fair election.¹⁹⁹

2. Recent Differences Between Board and Appellate Courts

At the time *Gissel* came down, the decision was viewed as a significant victory for the Board, vindicating its broad remedial authority and limiting the scope of judicial review in this area.²⁰⁰ In the twenty-five years since *Gissel* was decided, however, the Board and appellate courts have clashed repeatedly over the circumstances in which a wrongdoing employer may be required to bargain with a union that has not been previously certified or voluntarily recognized as majority representative.²⁰¹ During our recent seven-year period, the split between Board and courts involved three distinct areas of recurring disagreement.

One major controversy concerned whether the Board should consider changed circumstances in the workplace since the employer committed the violations. The issue is whether a bargaining order that once would have been proper may become inappropriate due to substantial employee turnover, employer restructuring, the replacement of key management wrongdoers, or the simple passage of months (or years) between misconduct and adjudication. The Board has resisted the “changed circumstances” doctrine, maintaining

198. *Id.* at 612 n.32.

199. *See id.* at 615 (affirming First Circuit’s enforcement of bargaining order in which Board made a finding that employer’s threats of reprisal in effect made this a case of “extraordinary” misconduct); *The Sinclair Co.*, 164 N.L.R.B. 261, 265, 269 (1967) (briefly stating Board’s rationale).

200. *See, e.g., The Supreme Court, 1968 Term—Union Authorization Cards and NLRB Orders to Bargain*, 83 HARV. L. REV. 247-52 (1969); Christensen & Christensen, *supra* note 137, at 421-22; Claire Rubin, Case Comment, *Establishing a Labor Representative: Authorization Cards and Employer Free Speech*, 50 B.U. L. REV. 111, 114-16 (1970); *Supreme Court Upholds Unions on Bargaining Without Election*, N.Y. TIMES, June 17, 1969, at 35; *Unions with Employe [sic] Authorization Cards Can Bargain for Workers*, *Top Court Decides*, WALL ST. J., June 17, 1969, at 6.

201. *See, e.g., Bethel & Melfi, supra* note 137, at 142; Benjamin W. Wolkinson et al., *The Remedial Efficacy of Gissel Bargaining Orders*, 10 INDUS. REL. L.J. 509, 517 (1989); Robert G. Pugh, Jr., Note, “*After All, Tomorrow Is Another Day*”: *Should Subsequent Events Affect the Validity of Bargaining Orders?*, 31 STAN. L. REV. 505, 512-20 (1979). As discussed in part III.C *infra*, the disagreement regarding *Gissel* has spilled over into the related area of bargaining order remedies to restore a union that *had* previously been certified or voluntarily recognized.

that any Board consideration of subsequent events as "mitigation" would effectively reward employers for their wrongdoing and also would encourage employers to prolong the litigation process in an effort to avoid their bargaining obligation.²⁰²

Appellate courts in this period regularly rejected the Board's position, insisting upon full and careful consideration of changed circumstances, and explaining that such consideration would best effectuate employee free choice by not "do[ing] violence to majority will at the time the bargaining order issues."²⁰³ In the first few years after *Gissel* was decided, a number of appellate courts had supported the Board's position on changed circumstances, concluding that the need to deter employer misconduct outweighed any risk that a current employee majority might be temporarily disenfranchised.²⁰⁴ By the end of 1993, however, all but one appellate court to consider the subject had concluded that changed circumstances since the employer's violations are necessarily relevant whenever the Board is deciding whether to issue a bargaining order.²⁰⁵

A second area of repeated conflict involved just how detailed the Board's findings must be to support the need for a bargaining order instead of a more traditional remedy. The Board typically offered a

202. See, e.g., *M.P.C. Plating Inc.*, 295 N.L.R.B. 583, 583 (1989), *aff'd in part*, 912 F.2d 883 (6th Cir. 1990); *Camvac Int'l, Inc.*, 288 N.L.R.B. 816, 823 (1988); *Impact Indus., Inc.*, 285 N.L.R.B. 5, 6 (1987), *enforcement denied*, 847 F.2d 379 (7th Cir. 1988). As appellate courts have become hardened in their view that changed circumstances must be evaluated, the Board has adopted a more strategic position, often arguing that even if subsequent events may be relevant in principle, they do not alter the need for a bargaining order in a particular case. See, e.g., *The Salvation Army Williams Memorial Residence*, 293 N.L.R.B. 944, 945-46 (1989), *enforced mem.*, 923 F.2d 846 (2d Cir. 1990).

203. *Camvac Int'l, Inc. v. NLRB*, 877 F.2d 62 (6th Cir. 1989) (unpublished disposition), 1989 WL 65727, at *3 (quoting *NLRB v. Creative Food Design Ltd.*, 852 F.2d 1295, 1302 (D.C. Cir. 1988)); see *Somerset Welding & Steel, Inc. v. NLRB*, 987 F.2d 777, 781 (D.C. Cir. 1993); *Avecor, Inc. v. NLRB*, 931 F.2d 924, 935-36 (D.C. Cir. 1991), *cert. denied*, 502 U.S. 1048 (1992); *M.P.C. Plating, Inc. v. NLRB*, 912 F.2d 883, 888-89 (6th Cir. 1990); *Montgomery Ward & Co. v. NLRB*, 904 F.2d 1156, 1160 (7th Cir. 1990); *Impact Indus., Inc. v. NLRB*, 847 F.2d 379, 383 (7th Cir. 1988).

204. See, e.g., *NLRB v. Kostel Corp.*, 440 F.2d 347, 353 (7th Cir. 1971); *NLRB v. DIT-MCO, Inc.*, 428 F.2d 775, 781 (8th Cir. 1970); *NLRB v. Staub Cleaners, Inc.*, 418 F.2d 1086, 1089-90 (2d Cir. 1969); *NLRB v. L.B. Foster Co.*, 418 F.2d 1, 4-5 (9th Cir. 1969); see also *NLRB v. Schill Steel Prods., Inc.*, 480 F.2d 586, 590 (5th Cir. 1973) (refusing to consider employee turnover in cases of serious and continuing employer misconduct).

205. See *NLRB v. Cell Agric. Mfg. Co.*, 41 F.3d 389, 397-98 (8th Cir. 1994) (citing eight circuits rejecting Board position, and only one circuit, the Ninth, supporting Board); *J.L.M., Inc. v. NLRB*, 31 F.3d 79, 84 (2d Cir. 1994) (citing two more circuits opposed to Board position).

separate summary of the employer ULPs, describing the specific misconduct that was serious enough to have had a lasting coercive impact on the employees, and concluding with a short explanation as to why a bargaining order would protect majority employee sentiments more effectively than traditional remedies such as a cease and desist order or a new election.²⁰⁶ As part of its explanation, the Board recognized that elections are a preferred method of determining employee free choice, but invoked its broad authority to select the most appropriate remedy for employer misconduct, as conferred by the Supreme Court in *Gissel*.²⁰⁷

The appellate courts during this period were hardly deferential toward the Board's "broad" authority to issue a bargaining order. Rather, the courts emphasized that the bargaining order—including specifically the category two bargaining order—was an "extraordinary" and "very harsh" remedy, and that its potential impact on employee free choice meant it should be granted only as a "last resort" in "extreme cases."²⁰⁸ Accordingly, the courts demanded that the Board provide a detailed and reasoned explanation for why more traditional remedies were not available or adequate.²⁰⁹ Applying this standard, the courts often held the Board's findings unacceptable, criticizing its stated refusal to rely on ordinary remedies as lacking in analysis or discussion, conclusory or formulaic, and mechanical.²¹⁰

206. See, e.g., *Somerset Welding & Steel, Inc.*, 304 N.L.R.B. 32, 33-34 (1991); *Avecor, Inc.*, 296 N.L.R.B. 727, 748-50 (1989); *Camvac Int'l, Inc.*, 288 N.L.R.B. 816, 822-23 (1988); *Montgomery Ward & Co.*, 288 N.L.R.B. 126, 129-30 (1988).

207. E.g., *Montgomery Ward*, 288 N.L.R.B. at 129-30 (citing *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 614-15 (1969)); *Camvac Int'l*, 288 N.L.R.B. at 822 (same); *Somerset Welding & Steel*, 304 N.L.R.B. at 33 (same); *Avecor*, 296 N.L.R.B. at 748, 750 (paraphrasing *Gissel*).

208. See *Avecor, Inc. v. NLRB*, 931 F.2d 924, 934 (D.C. Cir. 1991) (describing bargaining order as extraordinary remedy), *cert. denied sub nom. Oil, Chem. & Atomic Workers Int'l Union v. Avecor, Inc.*, 502 U.S. 1048 (1992); *M.P.C. Plating, Inc. v. NLRB*, 912 F.2d 883, 888 (6th Cir. 1990) (limiting bargaining orders to "extreme cases"); *Impact Indus., Inc. v. NLRB*, 847 F.2d 379, 383 (7th Cir. 1988) (stating that bargaining orders may be granted only in instances of "last resort"); *NLRB v. Quality Aluminum Prods., Inc.*, 813 F.2d 795, 797 (6th Cir. 1987) (Krupansky, J., dissenting) (summarizing Sixth Circuit view of bargaining order as "very harsh" remedy).

209. See, e.g., *Somerset Welding & Steel Inc. v. NLRB*, 987 F.2d 777, 779 (D.C. Cir. 1993); *Montgomery Ward & Co. v. NLRB*, 904 F.2d 1156, 1159 (7th Cir. 1990); *Camvac Int'l, Inc. v. NLRB*, 877 F.2d 62 (6th Cir. 1989) (unpublished disposition), 1989 WL 65727, at *3.

210. See *Avecor*, 931 F.2d at 938; *M.P.C. Plating*, 912 F.2d at 889; *Montgomery Ward*, 904 F.2d at 1159; *Camvac Int'l*, 1989 WL at *3.

A final area of disagreement involved the Board's judgment that certain extreme or "hallmark" ULPs were so invasive of employee free choice that they typically were viewed as justifying the imposition of a bargaining order. The Board often cited threats of a plant closure, discharge of visible union supporters, and promises of additional wages as highly coercive "hallmark" violations.²¹¹ The appellate courts did not challenge the Board's hallmark violations approach as openly as they criticized the Board's position on changed circumstances or its failure to provide detailed justifications for disfavoring traditional remedies. Yet the courts during this period did pick away at the Board's hallmark findings, by determining that individual violations were not so egregious in effect, or that the reduced number of violations surviving review might not be cumulatively pervasive, or that the Board had not explained satisfactorily why the particular ULPs had such a severe impact.²¹² On occasion, appellate court judges supported their skepticism about the severity of ULP impact by suggesting that as a general matter, employees reacting to such employer misconduct were "hardier than the Board lets on."²¹³

3. Establishing Bargaining Stability Versus Respecting "Pure" Free Choice

The various disagreements about the propriety of issuing a *Gissel* bargaining order reflect a fundamental difference in emphasis between the Board and the appellate courts. As a remedial device, the bargaining order serves two familiar objectives. It deters future employer misconduct in the organizing and election period, by assuring that the current miscreant employer does not profit from the commission of serious unfair labor practices. It also restores a substantial measure of employee choice, by implementing the most recent untainted expression of majority preference.

In addition to these remedial features, however, the bargaining order from the Board's perspective constitutes "affirmative ac-

211. See, e.g., *Somerset Welding & Steel*, 304 N.L.R.B. at 33; *Avecor*, 296 N.L.R.B. at 749; *M.P.C. Plating, Inc.*, 295 N.L.R.B. 583, 583 (1989); *Montgomery Ward*, 288 N.L.R.B. at 129.

212. See *Somerset Welding*, 987 F.2d at 780-81 (stating that individual violations were less egregious in effect); *Avecor*, 931 F.2d at 935-36 (remanding to determine if surviving ULPs are sufficiently pervasive); *M.P.C. Plating*, 912 F.2d at 889 (stating that more considered explanation needed).

213. *Montgomery Ward*, 904 F.2d at 1163 (Easterbrook, J., concurring).

tion”²¹⁴ to effectuate the Act’s central policy favoring stable bargaining relationships. A bargaining order accords an irrebuttable presumption of majority status so that the union has a chance to perform its collective bargaining role for a reasonable period of time.²¹⁵ This extended protection for the bargaining process distinguishes the bargaining order from other more traditional forms of relief. Unlike an order for a new election, the bargaining order requires that bargaining actually take place, without the delay of another campaign and without the risk that coercive misconduct will not have worn off. Unlike a cease and desist order, the bargaining order enables a union to devote full energy to securing a collective bargaining agreement without the fear of an imminent decertification effort.²¹⁶ In this context, the Board’s steadfast opposition to the changed circumstances doctrine takes on additional meaning. By rejecting or downplaying the relevance of events subsequent to the unfair labor practices, the Board not only resists rewarding employers for their misdeeds but also cultivates conditions conducive to the establishment of ongoing bargaining relationships.

One tradeoff for the extended protection of favorable bargaining conditions is a limitation on current-employee prerogatives. In this regard, the courts and the Board differ in their understanding of what uncoerced or “pure” free choice means and how it is to be effectuated.²¹⁷ From the appellate courts’ perspective, the decertification bar that accompanies a bargaining order is a threat—if not an affront—to pure employee choice. Rather than focusing on the card

214. 29 U.S.C. § 160(c) (1994).

215. See *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 613 (1969). The Board has adopted a case-by-case approach to determining what constitutes a reasonable period of time for bargaining following a *Gissel* order, a settlement agreement, or an employer’s voluntary recognition of the union. The reasonable period may be one year, borrowing from the period of protection accorded under the election bar doctrine. See 29 U.S.C. § 159(e)(2) (1994); *Gissel*, 395 U.S. at 612 n.33. On occasion, the Board has found a reasonable period to be as little as three to four months, based on its determination that the nascent bargaining relationship has been given a fair chance to succeed during that time period. See, e.g., *Tajon, Inc.*, 269 N.L.R.B. 327, 327-28 (1984); *Brennan’s Cadillac, Inc.*, 231 N.L.R.B. 225, 225-27 (1977).

216. Cf. *Brooks v. NLRB*, 348 U.S. 96, 100 (1954) (describing union’s need for “ample time for carrying out its mandate on behalf of its members” following its election victory).

217. Cf. *Conair Corp. v. NLRB*, 721 F.2d 1355, 1394-95 (D.C. Cir. 1983) (Wald, J., dissenting) (describing dilemma of “how the employees, having been subjected to relentless employer pressures not to choose a union, can be best restored to some kind of equilibrium in which they can choose freely for or against the Union,” and supporting Board’s position that “this can happen only if a short-term bargaining order is put into effect”), *cert. denied*, 467 U.S. 1241 (1984).

majority as the best available evidence of employee preference, the courts regard reliance on such a majority as an unfortunate subordination of employees' present desires. Judicial reluctance leads to the characterization of bargaining orders as having the "drastic consequence of forcing union representation on employees."²¹⁸ The fear of this "drastic consequence" has even led courts that were supporting the basic remedy to require that the Board notify all current employees of their right to seek decertification.²¹⁹

Tensions over the value of bargaining orders have affected traditional notions of Board expertise as well. The sometimes abbreviated quality of explanations for the Board's choice of a bargaining order remedy would seem to draw considerable support from Supreme Court pronouncements extolling the expertise of agencies when enforcing statutory text in general, when selecting a suitable remedy under the NLRA, and when determining that a bargaining order is the precise remedy appropriate to the case.²²⁰ Yet the appellate courts, while often professing to respect the Board's expertise, in fact have engaged in exacting review of Board findings and reasoning. Occasionally the courts' skeptical attitude is openly displayed:

We emphasize once again that a bargaining order is not a snake-oil cure for whatever ails the workplace; it is an "extreme remedy" that must be applied with commensurate

218. *Montgomery Ward & Co. v. NLRB*, 904 F.2d 1156, 1159 (7th Cir. 1990) (internal quotation marks omitted). General data on election results suggest that a bargaining order may be viewed as a more "drastic" incursion on employee free choice today than it was in earlier periods. See Peter D. DeChiara, *The Right to Know: An Argument for Informing Employees of Their Rights Under the National Labor Relations Act*, 32 HARV. J. ON LEGIS. 431, 451 (1995) (reporting that union win rate in NLRB elections fell from 75% before 1950 to 60% in 1960s and to less than 50% by 1989). Of course, it remains debatable whether the lower union win rate is attributable in substantial part to the proliferation of serious employer ULPs that chill employee support for the union and make a bargaining order appropriate. See generally Weiler, *Promises*, *supra* note 10, at 1776-1804 (linking decline in union victory rate to growth of employer intimidation tactics).

219. See *NLRB v. Star Color Plate Serv.*, 843 F.2d 1507, 1510 (2d Cir.), *cert. denied*, 488 U.S. 828 (1988); *NLRB v. Synergy Gas Corp.*, 843 F.2d 1510, 1510 (2d Cir. 1988), *cert. denied*, 493 U.S. 846 (1989).

220. See *Chevron U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 843-45 (1984) (giving deference to agencies as interpreters of ambiguous text); *Phelps Dodge v. NLRB*, 313 U.S. 177, 190-96 (1941) (giving deference to Board as interpreter of § 10(c) text); *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 612 n.32 (1969) (giving deference to Board as selector of bargaining order from among panoply of § 10(c) remedies).

care. By requiring specific findings, the courts try to keep the Board from overprescribing.²²¹

Based on such strong language, one might expect that the Board was issuing large numbers of bargaining orders during our period of study. In fact, the number of initial recognition bargaining orders has declined precipitously in the years since *Gissel*. The Board issued over 100 such orders per year in the late 1960s but only 67 per year between 1970 and 1979.²²² While information on developments since 1980 is less complete than for earlier periods, data collected from recent years indicate that the number of *Gissel* bargaining orders continues to fall sharply.²²³

Bargaining orders are hardly a panacea to assure stability or continuity of collective bargaining. Indeed, available evidence

221. *Avecor, Inc. v. NLRB*, 931 F.2d 924, 938-39 (D.C. Cir. 1991) (citation omitted). Once again, I do not mean to suggest that appellate courts were invariably hostile to Board judgments on this issue. Cf. *supra* text accompanying note 173 (recognizing high absolute affirmance rate on good faith doubt issue). There were bargaining order cases in which the courts exhibited genuine deference to the Board's remedial discretion. See *Dlubak Corp. v. NLRB*, No. 93-3018, slip op. at 11 (3d Cir. July 29, 1993), *enforcing* 307 N.L.R.B. 1138 (1992); *NLRB v. International Door Inc.*, 985 F.2d 560 (6th Cir. 1993) (unpublished disposition), 1993 WL 5611, at *1-2, *enforcing* 303 N.L.R.B. 582 (1991); *NLRB v. Salvation Army*, No. 90-4093, slip op. at 2-3 (2d Cir. Dec. 14, 1990), *enforcing* 293 N.L.R.B. 944 (1989). But given the extraordinarily high reversal rate when compared with remedial matters in general, the degree of judicial frustration and anger about Board judgments is surely the appropriate focus of attention.

222. See *Gissel*, 395 U.S. at 596 n.7 (noting that Board issued 117 bargaining orders based on a card majority in 1966 and 157 in 1967); *Wolkinson et al.*, *supra* note 201, at 509 n.2 (noting that average number of *Gissel* bargaining orders issued by NLRB between 1970 and 1979 was 67.5 per year).

223. Because the Board stopped gathering data on *Gissel* bargaining orders after 1980, see *Wolkinson et al.*, *supra* note 201, at 509 n.2, information on post-1980 developments is at best imprecise. My own research into Board decisions from 1985 through 1993 revealed 113 *Gissel* bargaining orders issued by the Board in that nine-year period, an average of fewer than 13 per year. See Search of Westlaw FLB-NLRB database (Aug. 30 and Sept. 20, 1995) (search for decisions containing "GI" and date of 1985 through 1993 found 344 decisions; review of texts yielded 113 in which *Gissel* orders issued). Electronic search results were selectively cross-checked with *Weekly Summary of NLRB Cases*, a document issued by the Board's Division of Information. Review of all weekly summaries for 1988, 1990, and 1991 yielded exactly the same *Gissel* bargaining order decisions produced from the Westlaw search.

It is possible that additional *Gissel* orders were issued by Administrative Law Judges or Regional Offices and never appealed to the full Board, but such instances should be quite rare. Employers who are determined to resist unionization by committing egregious misconduct are unlikely to surrender early in the litigation process, especially given that their success rate when challenging these bargaining orders in the courts is so high. Even assuming *arguendo* that there were as many as 15 bargaining orders per year, that number represents a decline of over 75% since the 1970s. The falloff substantially exceeds the more general decline in election activity during this period. See *infra* note 227.

indicates that *Gissel* orders provide relatively weak protection in securing a long-term bargaining relationship or even in obtaining a first contract.²²⁴ In one respect, that result is not surprising. A remedy that simply requires the parties to sit down and negotiate cannot guarantee that the process will end in a collective bargaining agreement, particularly when one of the parties already has demonstrated hostility to the very presence of the other.²²⁵ Yet the appellate courts' extraordinary reaction to this exercise of Board authority may also have contributed substantially to its lameness as a remedy. The extent to which the courts have effectively encouraged employer resistance to bargaining deserves further attention.²²⁶ It is clear, however, that the courts regard *Gissel* bargaining orders with far less sympathy than the Board, and that the Board's interest in pursuing this remedy has abated steadily since *Gissel* even while the number of serious ULPs committed by employers during election campaigns seems to have risen.²²⁷

224. See Weiler, *Promises*, *supra* note 10, at 1795 n.94 (citing 1982 study as indicating that only 37% of unions operating under *Gissel* order procure a first contract, whereas 63% of unions certified through the election process obtain a first contract; and that unions starting with *Gissel* order have less than 10% chance of securing long-term bargaining relationship with the employer).

225. See also John T. Neighbours & Mark J. Sifferlen, *Bargaining Orders: A Call for Restraint*, 10 LAB. LAW. 301, 314-15 (1994) (relying on earlier empirical studies that questioned whether employer ULPs really deter employee support for union, to suggest that *Gissel's* core assumption—that the union would have won election absent employer ULPs—may be erroneous).

226. There is evidence that the appellate courts have been obstacles to enforcement of *Gissel* bargaining orders since at least the late 1970s. See Bethel & Melfi, *supra* note 137, at 142-54; Pugh, *supra* note 201, at 512-20.

227. One of the "hallmark" ULPs deemed serious enough to justify a bargaining order is the discriminatory discharge of union supporters in violation of § 8(a)(3). See *supra* note 211 and accompanying text. During the first 10 years after the *Gissel* decision, the number of § 8(a)(3) charges doubled (from 9,290 out of 13,601 total § 8(a) charges in 1970 to 18,315 out of 31,281 total charges in 1980) while the number of certification elections—a proxy for union organizing activity—declined by a small amount (7,773 elections in 1970; 7,296 elections in 1980) and the percentage of all ULP charges against employers that were found meritorious by the General Counsel increased slightly (34.2% in 1970; 39.0% in 1980). See Weiler, *Promises*, *supra* note 10, at 1780 (relying on data compiled from NLRB Annual Reports). But cf. Robert J. LaLonde & Bernard D. Meltzer, *Hard Times for Unions: Another Look at the Significance of Employer Illegality*, 58 U. CHI. L. REV. 953 (1991); Paul C. Weiler, *Hard Times for Unions: Challenging Times for Scholars*, 58 U. CHI. L. REV. 1015 (1991) (debating the merits of whether § 8(a)(3) charge data accurately reflect the extent of serious employer misconduct during election campaigns).

Since 1980, the number of § 8(a)(3) charges has declined, as part of a comparable reduction in overall charges against employers that parallels an even larger falloff in union election activity. See 1990 ANN. REP., *supra* note 90, at 6, 137, 168 (3,536 elections; 11,886 § 8(a)(3) charges; 24,075 total § 8(a) charges; 41% of all ULP cases found meritorious);

C. Incumbent Restoration Bargaining Orders

1. Background

The previous section dealt with bargaining orders that follow a union's unsuccessful electoral quest for initial recognition, and rely on the pre-election card majority as the best means of "effectuating ascertainable employee free choice."²²⁸ In a separate and distinct context, the Board has long utilized bargaining orders as a remedy for an employer's unlawful refusal to bargain with a union that—as of the date of the wrongful refusal—already enjoyed the status of exclusive representative under section 9.²²⁹ Typically, the union has been previously designated as majority representative—either through voluntary recognition by the employer or certification by the Board—at the time the employer unlawfully thwarts bargaining.²³⁰ The employer contends that in light of evidence that the union has lost its majority status since the unlawful conduct occurred, an immediate election to test majority status is the appropriate remedy.

The Board's consistent position has been that under these circumstances, an order to bargain for a reasonable period is the traditional affirmative remedy to restore the status quo ante.²³¹ In refusing to consider evidence that the incumbent union no longer enjoys majority support, the Board has relied on two policy justifications. First, the employer's unlawful refusal to bargain, along with "[t]he necessary delays incident to the adjudication of [the] dispute," inevitably have "a deterring effect upon the organizational

1989 ANN. REP., *supra* note 90, at 6, 191, 222 (3,670 elections; 11,567 § 8(a)(3) charges; 22,345 total § 8(a) charges; 37% of all ULP cases found meritorious). The decline in § 8(a)(3) charges is most sensibly attributed to diminished election activity—perhaps combined with diminished union confidence in the Act itself, *see* sources cited *supra* note 10—rather than to increased law-abiding conduct by the employer community. In any event, there were 28% more § 8(a)(3) charges filed in 1990—21 years after *Gissel*—than in the year following the Court's decision, even though the number of certification elections declined by over 50% during that 20-year period.

228. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 614 (1969).

229. *See Inland Steel Co.*, 9 N.L.R.B. 783, 814-16 (1938), *enforcement denied on other grounds*, 109 F.2d 9 (7th Cir. 1940).

230. *See, e.g., P. Lorillard Co.*, 16 N.L.R.B. 684, 699-700 (1939) (ordering employer to bargain with voluntarily recognized union), *modified in relevant part*, 117 F.2d 921, 924-26 (6th Cir. 1941), *summarily rev'd*, 314 U.S. 512, 513 (1942); *Poole Foundry & Mach. Co.*, 95 N.L.R.B. 34, 36 (ordering employer to bargain with Board-certified union), *enforced*, 192 F.2d 740, 742 (4th Cir. 1951), *cert. denied*, 342 U.S. 954 (1952).

231. *See Williams Enterprises*, 312 N.L.R.B. 937, 940 (1993), *on remand from* 956 F.2d 1226 (D.C. Cir. 1992), *aff'd*, 50 F.2d 1280 (4th Cir. 1995).

activity of the union and a discouraging influence upon members already gained which tends to influence them to drop from the ranks.”²³² It is therefore necessary “to restore to the union the bargaining opportunity which it should have had in the absence of unlawful conduct.”²³³ Second, unless the injury to the employees’ collective bargaining rights is remedied by an order to bargain, employers would be encouraged to evade their bargaining obligation, “by profiting from the discouraging effects of [their] already accomplished violation of that very obligation.”²³⁴ The Supreme Court on more than one occasion has approved the Board’s position with respect to status quo ante bargaining orders, invoking both the Board’s broad remedial authority to effectuate the policies of the Act and the Board’s twin justifications set forth above.²³⁵

2. Recent Differences Between Board and Appellate Courts

From the Board’s perspective, the longstanding policy favoring orders to restore preexisting bargaining relationships was in no way affected by the Supreme Court’s *Gissel* decision, which applied to nonincumbent unions seeking initial recognition. In a *Gissel*-type setting, the preferred remedy is a fair election to negate the effects of an unfair election; the bargaining order is the *unusual* remedy invoked when a fair election is impracticable. By contrast, the bargaining order in an incumbent union setting is the *customary* remedy for a wrongful refusal to bargain. In restoring the union to its prior status as the collective bargaining representative, the Board sees “no need for a special showing of *Gissel* factors,” and typically declines to give any specific justification for the order.²³⁶

232. *Inland Steel*, 9 N.L.R.B. at 815.

233. *Williams Enterprises*, 312 N.L.R.B. at 940.

234. *Inland Steel*, 9 N.L.R.B. at 816; see *Williams Enterprises*, 312 N.L.R.B. at 940 (discussing need to prevent wrongdoing employer from “escap[ing] its bargaining obligation as the result of the predictably adverse effects of its unlawful conduct on employee support for the union”).

235. See *Franks Bros. Co. v. NLRB*, 321 U.S. 702, 703-04 (1944) (discussing Board’s policy justifications in detail); *NLRB v. P. Lorillard Co.*, 314 U.S. 512, 513 (1942) (citing Board’s broad remedial authority). See generally *NLRB v. J.H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 265 (1969) (endorsing Board’s remedial authority “to restore, so far as possible, the status quo that would have obtained but for the [employer’s] wrongful act”).

236. See *Williams Enterprises*, 312 N.L.R.B. 937, 941-42 (1993). The *Gissel* factors include explaining (i) how the employer’s ULPs had the tendency to undermine majority strength; (ii) why ordinary remedies, especially a rerun election, would be inadequate to effectuate employee choice; and (iii) what the effect is of changed circumstances on the prospects for a fair election. See *supra* text accompanying notes 191-213.

The appellate courts during our seven-year period were far more willing to treat *Gissel* as directly relevant to the restorative bargaining order and then to apply their rigorous version of *Gissel* to bargaining orders in the incumbency setting. The D.C. Circuit took the lead, rebuking the Board on several occasions for failing to balance competing interests and to explain clearly its reasons for requiring bargaining over an extended period of time.²³⁷ Several other circuits have refused to enforce incumbent-restoration bargaining orders, relying on the analogy to *Gissel* to conclude that an election or a cease and desist order were the only suitable remedies.²³⁸

Status-quo-ante bargaining orders were rejected for a variety of case-specific reasons, including the less than egregious nature of the employer's unlawful conduct;²³⁹ the amount of employee turnover or disaffection expressed since the unlawful conduct;²⁴⁰ the substantial passage of time, especially if inordinate delay was attributable in part to the Board itself;²⁴¹ and the Board's failure to give a reasoned explanation for its action.²⁴² Regardless of the particular circumstances, however, the courts' basic position was that even a restorative bargaining order is an extreme remedy, to be imposed only after a careful assessment of the competing needs to deter employer misconduct and protect employee free choice. The courts' reluctance to enforce the temporary decertification bar that characterizes this form of relief was succinctly summarized by the Fifth Circuit: "We are unable to approve an approach which mechanically places

237. See, e.g., *Sullivan Indus. v. NLRB*, 957 F.2d 890, 903-05 (D.C. Cir. 1992); *Williams Enterprises v. NLRB*, 956 F.2d 1226, 1236-38 (D.C. Cir. 1992); *St. Agnes Medical Ctr. v. NLRB*, 871 F.2d 137, 147-49 (D.C. Cir. 1989). The D.C. Circuit first took the position that a *Gissel*-type analysis applied to incumbent restoration bargaining orders in *People's Gas Sys., Inc. v. NLRB*, 629 F.2d 35, 46 (D.C. Cir. 1980). That court has continued to reject incumbent restoration bargaining orders for failure to adhere to its *Gissel*-type analysis. See *Exxel/Atmos, Inc. v. NLRB*, 28 F.3d 1243, 1247-49 (D.C. Cir. 1994); *Caterair Int'l v. NLRB*, 22 F.3d 1114, 1121-23 (D.C. Cir. 1994).

238. See *NLRB v. Thill Inc.*, 980 F.2d 1137, 1142-43 (7th Cir. 1992) (allowing cease and desist order only); *NLRB v. Laverdiere's Enterprises*, 933 F.2d 1045, 1053-56 (1st Cir. 1991) (remanding for election); *Texas Petrochemicals Corp. v. NLRB*, 923 F.2d 398, 403-06 (5th Cir. 1991) (remanding for election); see also *NLRB v. Koenig Iron Works*, 856 F.2d 1, 4 (2d Cir. 1988) (denying all relief).

239. See, e.g., *Thill, Inc.*, 980 F.2d at 1138-39, 1143; *St. Agnes Medical Ctr.*, 871 F.2d at 148; *Laverdiere's Enterprises*, 933 F.2d at 1054.

240. See, e.g., *Thill Inc.*, 980 F.2d at 1142; *Texas Petrochemicals*, 923 F.2d at 405.

241. See, e.g., *Thill Inc.*, 980 F.2d at 1142; *Laverdiere's Enterprises*, 933 F.2d at 1054-55; *Texas Petrochemicals*, 923 F.2d at 404; *Koenig Iron Works*, 856 F.2d at 3-4.

242. See, e.g., *Sullivan Indus. v. NLRB*, 957 F.2d 890, 904-05 (D.C. Cir. 1992); *Williams Enterprises v. NLRB*, 956 F.2d 1226, 1238 (D.C. Cir. 1992).

deterrence above employee free choice on the scale of values under the Act.”²⁴³

3. Restoring Bargaining Stability Versus Promoting “Pure” Free Choice

The conflict in values between the Board and appellate courts is most striking in the context of restorative bargaining orders. The Board relies heavily on the value of a continuing bargaining relationship, and the vulnerability of an incumbent union and its majority supporters when that relationship is disrupted. After determining that an employer has wrongfully refused to bargain, the Board’s restoration of bargaining for an extended time period—regardless of fluctuations in majority status during that period—is “necessary to give the order to bargain its fullest effect, i.e., to give the parties to the controversy a reasonable time in which to conclude a contract.”²⁴⁴

The parties need a reasonable period of insulation, the Board contends, because even a long history of collective bargaining—frequently present in the cases reviewed here²⁴⁵—can be wiped out when an employer cuts off recognition and the resultant litigation takes time to resolve.²⁴⁶ Employees support unions in order to obtain the benefits of a collective bargaining agreement. If there is no bargaining for years—perforce no possibility of an agreement—a likely result is substantial erosion of respect and support for the union.²⁴⁷ In this respect, an incumbent union re-

243. *Texas Petrochemicals*, 923 F.2d at 406.

244. *Poole Foundry & Mach. Co.*, 95 N.L.R.B. 34, 36 (1951), *enforced*, 192 F.2d 740, 742 (4th Cir.), *cert. denied*, 342 U.S. 954 (1952).

245. *See, e.g., Sullivan Indus.*, 957 F.2d at 892 (collective bargaining relationship for 40 years); *Texas Petrochemicals*, 923 F.2d at 400 (collective bargaining relationship for almost 30 years); *Laverdiere’s Enterprises*, 933 F.2d at 1047 (collective bargaining relationship for 9 years).

246. *See Lancaster Foundry Corp.*, 82 N.L.R.B. 1255, 1256 (1949); *Inland Steel Co.*, 9 N.L.R.B. 783, 815-16 (1938).

247. *See Midway Foodmart, Inc.*, 293 N.L.R.B. 152, 152 n.2 (1989); *Karp Metal Prods. Co.*, 51 N.L.R.B. 621, 624, *enforcement granted in part and denied in part*, 134 F.2d 954 (2d Cir. 1943), *cert. denied*, 322 U.S. 728 (1944). The disruption of a long-term bargaining relationship can be particularly difficult when a successor employer is involved, because the employees need representation as soon as possible to protect their terms and conditions during transition. *See Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 49 (1987). *See generally Fry, supra* note 137, at 1646-47 (stating that employee job security and the establishment of an effective new bargaining relationship by the union are primary concerns in successorship cases). Successor employers were involved in a number of the restorative bargaining order reversals studied here. *See, e.g., Williams Enterprises*,

seated at the negotiating table through a bargaining order following years of litigation is comparable to a union seated at that table following Board certification or voluntary employer recognition.²⁴⁸ The restored union needs a reasonable period in which to reestablish effective communication with its members, reconstitute employee energy and commitment for the bargaining process, and resume efforts to negotiate a contract.

At one level, the Board resists the notion that a restorative bargaining order imposes any limits on employee free choice. Rather, it is the renewed process of collective bargaining that makes free choice possible at all. In light of the subversive effects of the employer's past refusal to bargain, the employees' real desires are purely speculative until the Board's restorative order has been complied with.²⁴⁹

But even if there are limits in terms of postponing the fulfillment of currently expressed employee desires to reject the union, those limits are both temporary and correctable. The Board has steadfastly maintained that the "insulated remedial bargaining period [i]s a reasonable limitation of free choice," and has pointed to decades of Supreme Court statements unequivocally supporting its judgment on this very point.²⁵⁰

For the appellate courts, hostility toward the restorative bargaining order seems almost inevitable when one considers the combined effect of their views that (i) employee discontent with the union, whenever expressed, deserves careful treatment, and (ii) bargaining orders trump employee free choice. The courts focus on the balance between deterring misconduct and protecting employee free choice, while virtually ignoring the statutory interest in continuing prior bargaining relations. There is remarkably little reference in these court opinions to the relevance, much less importance, of bargaining stability. Indeed, the courts' insistence that restorative bargaining orders are analogous to initial recognition bargaining

956 F.2d at 1231-32, *Sullivan Indus.*, 957 F.2d at 894, *Texas Petrochemicals*, 923 F.2d at 400.

248. See *Keller Plastics Eastern Inc.*, 157 N.L.R.B. 583, 586-87 (1966).

249. See *Karp Metal Products*, 51 N.L.R.B. at 627 n.11 (citing *International Ass'n of Machinists v. NLRB*, 311 U.S. 72, 82 (1940)).

250. *Williams Enterprises*, 312 N.L.R.B. 937, 942 (1993) (citing *Franks Bros. Co. v. NLRB*, 321 U.S. 702, 705-06 (1944) and *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 613 (1969)), *enforced*, 50 F.3d 1280 (4th Cir. 1995).

orders discounts the very presence of a preexisting bargaining relationship.²⁵¹

Relying on post-ULP evidence of substantial employee discontent, the courts' primary concern is to vindicate the immediate desires of current employees.²⁵² Bargaining orders are a threat to that concern, precisely because they postpone the expression of employee sentiments. Thus, in the courts' view, enforcement of a restorative bargaining order "without ascertaining the employees' present desires . . . would be tantamount to ignoring their statutory rights,"²⁵³ whereas a Board-certified election "would be most responsive to the wishes of the employees, whose free choice is a primary concern of the NLRB."²⁵⁴

Finally, in emphasizing the promotion of employee free choice in its purely contemporaneous form, the courts have signaled that they have little patience for Board assertions grounded in precedent or history. The appellate courts' insistence that current employees remain free from the extreme restrictions of a decertification bar is a far cry from the Supreme Court's earlier conclusions that a bargaining order is *not* a harsh remedy and does *not* involve any injustice to employees who oppose the union.²⁵⁵ Moreover, the courts' promotion of "pure" free choice in the immediate context deviates from *Gissel's* stated goal of "effectuating ascertainable employee free choice" based on the majority sentiments that prevailed when the

251. See *Sullivan Indus. v. NLRB*, 957 F.2d 890, 904 (D.C. Cir. 1992); *id.* at 909-10 (Silberman, J., dissenting) (criticizing majority for ignoring distinctive aspects of restorative bargaining order).

252. Decertification petitions were often filed in the reversed cases, although there is disagreement about the employer's role in fostering such petitions. Compare *Texas Petrochemicals Corp. v. NLRB*, 923 F.2d 398, 405 (5th Cir. 1991) (describing decertification petition as "unsolicited") and *NLRB v. Laverdiere's Enterprises*, 933 F.2d 1045, 1047 (1st Cir. 1991) (describing employer as playing no role in initiating petition drive) with *Williams Enterprises v. NLRB*, 956 F.2d 1226, 1234 (D.C. Cir. 1992) (recognizing employer ULPs in months before decertification petition, but questioning whether employer misconduct "significantly contribute[d]" to the subsequent loss of majority support) and *Sullivan Indus. v. NLRB*, 957 F.2d 890, 904-05 & n.12 (D.C. Cir. 1992) (requiring Board to explain why employee decertification petition was tainted by employer's unlawful refusal to bargain).

253. *Texas Petrochemicals*, 923 F.2d at 406.

254. *Laverdiere's Enterprises*, 933 F.2d at 1054. Ironically, by ordering an election even in cases where they affirm the employer's unlawful refusal to bargain, the courts in effect have given the employer what it sought in the first place: an immediate chance to rid itself of the union. See *id.*; *Texas Petrochemicals*, 923 F.2d at 404-05.

255. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 612 (1969); *Franks Bros. Co. v. NLRB*, 321 U.S. 702, 705 (1944).

employer's unlawful conduct occurred.²⁵⁶ One court, forsaking the Wagner Act's original commitment to expansive Board authority in determining remedies, has gone so far as to suggest that more searching judicial review is appropriate where Board remedies are at stake, because the Act's remedial structure may reflect "persisting congressional distrust of the Board."²⁵⁷

D. Conflict Recently Magnified

Before proceeding to Part IV, which seeks to explain the various conflicts described in this Part from the standpoint of the NLRA as an aging statute, it is worth considering whether the identified doctrinal tensions are properly viewed as being of recent and distinct vintage. Some of the tensions present during our seven-year period have roots in earlier Board-court differences.²⁵⁸ A reader is entitled to ask whether those earlier disagreements are substantially identical—in quantitative and qualitative terms—to the disagreements that arose between 1986 and 1993. If so, then reasonable explanatory approaches presumably would focus on historically-grounded differences between Board and courts that persist to this day. If not, then it makes more sense to analyze the recent differences as a

256. *Gissel*, 395 U.S. at 614 (emphasis added).

257. *NLRB v. Thill Inc.*, 980 F.2d 1137, 1142 (7th Cir. 1992). Section 10 of the Wagner Act gave the Board substantial new power to issue orders enforceable in the courts of appeals; in crafting that section, the authors consciously departed from the weak enforcement status of labor boards under the NIRA. See *supra* text accompanying notes 53-55. The provision's supporters did not anticipate the delays in obtaining an effective order that have come to characterize Board enforcement in recent decades. Since 1935, Congress has enacted statutes to make orders of many other federal agencies self-enforcing unless a petition for review is filed by an aggrieved party within 30 or 60 days. Enforcement delays attributable to the operation of §§ 10(e) and (f) were not, however, recognized as an issue during congressional debate over the Taft-Hartley and Landrum-Griffin Amendments. See 1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES: RECOMMENDATIONS AND REPORTS Jan. 1968-June 1970, at 239-51 (1971) (summarizing enforcement practices for other federal agencies and describing history and development of Board enforcement powers through Landrum-Griffin Amendments). Congressional gridlock over the NLRA has resulted in no substantial legislative changes since 1959. See *supra* text accompanying note 16. Given that Congress initially acted in a deliberate effort to confer broad enforcement authority on the Board, a failure to update this authority as part of a larger legislative incapacity should hardly be characterized as "persisting congressional distrust of the Board."

258. See, e.g., Julius G. Getman & Stephen B. Goldberg, *The Myth of Labor Board Expertise*, 39 U. CHI. L. REV. 681, 684-85 (1972) (discussing earlier conflicts over Board approach to initial recognition bargaining orders); *supra* note 155 (discussing earlier conflicts over Board approach to employer polling).

function of recently emerging factors, and to talk in terms of the statutory aging process.

This is not an easy question to answer. In part, the question itself suggests a false dichotomy—between total continuity and distinctive discontinuity—with regard to prior periods of a statute's life. From a practical standpoint, the aging process, in statutes as elsewhere, is likely to be a more gradual one. Tensions associated with an aging statute do not simply manifest themselves overnight, although their emergence may accelerate in certain compressed time periods. Moreover, while a longitudinal empirical study might address whether the recent conflicts described here were significant in earlier periods as well, such a study is beyond the scope of this Article.²⁵⁹

Still, there are sound reasons to believe that Board-court conflicts regarding the survival of bargaining relationships increased noticeably in scope and intensity during our seven-year period. With respect to incumbent restoration bargaining orders, appellate court reversals were virtually unknown until the start of the period, but by 1993 five circuits had declined to enforce such orders.²⁶⁰ With respect to initial recognition bargaining orders, Board-court differences over the meaning of *Gissel* first arose in the 1970s, but the differences have deepened and broadened in recent years.²⁶¹ The increased anger expressed by appellate courts is especially remarkable given that the number of *Gissel* bargaining orders issued by the Board has declined sharply during our seven-year period.²⁶² As for the good faith doubt

259. Such a longitudinal study would require considerable investment of resources to identify and analyze appellate court decisions from comparable earlier periods that involved these same bargaining-related issues. Moreover, the task of identifying a "comparable" period of time is not without difficulty. Throughout the 1986-93 period, both the Board and the appellate courts were dominated by Republican appointees. Because partisan shifts in presidential power were a major factor in appointments during earlier decades, partisanship and political ideology may well figure more prominently than divergent institutional perspectives when accounting for Board-court differences during these earlier periods. *See also supra* text accompanying note 92 (identifying problem of determining whether absence of Board-court tension on specific issue at particular point in Act's history is due to judicial deference to Board expertise, or to Board surrender following repeated appellate court attacks).

260. *See supra* notes 237-38 and accompanying text (describing D.C. Circuit's initial foray in 1980, and proliferation of appellate court reversals starting in late 1980s).

261. *See, e.g., supra* notes 204-05 and accompanying text (describing increase in appellate court resistance to Board's position on changed circumstances); *supra* notes 209-10 and accompanying text (describing appellate courts' insistence that Board provide detailed, reasoned explanation for why traditional remedies are unworkable; this factor seems less prominent in the earlier four-year period of 1979-82, *see Bethel & Melfi, supra* note 137, at 142-57).

262. *See supra* note 223.

issue, some strands of Board-court tension existed well before the start of our period while others arose only after 1986.²⁶³ But the Board's tenacity over time and across almost all circuits, in the face of significantly high reversal rates, is itself noteworthy. While the Board's traditional policy of nonacquiescence may have contributed to its persistence,²⁶⁴ the Board's willingness to yield to appellate court pressures on other issues²⁶⁵ suggests that something more is at stake.

In short, the recent extraordinary reversal rates for the cluster of issues examined here cannot be accounted for simply by invoking the past as prologue. Because there are ample grounds for concluding that recent Board-court disagreements in this area constitute a distinctive set of occurrences, a different explanation is warranted.

IV. DIVERGENT APPROACHES TO AN AGING LAW

It should by this point be apparent that the NLRB and the appellate courts have been engaged in a fundamental recurring conflict during the recent seven-year period. The Board's restrictive approach to employer professions of good faith doubt, and its recourse to bargaining orders in other than extreme circumstances,

263. An example of preexisting tension is the Board's "good faith doubt" approach to employer polling, discussed *supra* text accompanying notes 153-55. The Board set forth its position in *Montgomery Ward & Co.*, 210 N.L.R.B. 717, 717 (1974); the appellate courts first rejected it in *NLRB v. A.W. Thompson Inc.*, 651 F.2d 1141, 1144-45 (5th Cir. 1981). See *Flynn*, *supra* note 137, at 667. An example of more recent tension is the controversy over striker replacements, discussed *supra* text accompanying notes 145-47. The Board's conclusion that such replacements should not be presumed either to oppose or support the union was reached only in 1987; appellate court reversals occurred between 1988 and 1990, at which time the Supreme Court upheld the Board's position.

264. The Board has long contended that it is entitled to pursue its understanding of NLRA policy despite conflicting interpretations offered by appellate courts. See *Acme Indus. Police*, 58 N.L.R.B. 1342, 1344-45 (1944). Accordingly, the Board has at times refused to acquiesce in appellate court rulings, even from numerous different circuits, if the Board disagrees with the courts' interpretation of national labor policy and the Supreme Court has not yet addressed the specific policy issue. On many occasions, however, the Board does yield to the prevailing interpretation of the Act offered by the appellate courts. See Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 YALE L.J. 679, 706-07 (1989). See generally Rebecca Hanner White, *Time for a New Approach: Why the Judiciary Should Disregard the "Law of the Circuit" When Confronting Nonacquiescence by the National Labor Relations Board*, 69 N.C. L. REV. 639, 650-71 (1991) (arguing that Board's policy of nonacquiescence is both lawful and proper).

265. See Estreicher & Revesz, *supra* note 264, at 706 (referring generally to frequency of Board acquiescence); *supra* note 92 (discussing Board acquiescence to appellate courts during this period on issue of bad faith bargaining).

reflect a primary attention to the value of stable bargaining relationships. To be sure, employee choice is not ignored as a statutory value. When minimizing *employer* doubts or assertions about majority status, the Board invokes previously expressed majority support as what it considers the best available evidence of genuine employee free choice. At the same time, by establishing a high threshold for evidence of employee opposition to the union that a majority had earlier empowered, and by postponing the employees' opportunity to reject that union for an extended "reasonable" period, the Board also subordinates individual choice, at least temporarily, in order to encourage the success of the collective bargaining enterprise. The Board's pronounced preference for fostering bargaining stability is well-rooted in its own historical practices.²⁶⁶ Further, the Board's position is consistent with the Act's original emphasis on preserving and promoting the collective bargaining process.²⁶⁷

The courts of appeals have adopted a very different attitude toward the two issues described above. In their sympathetic treatment of good faith doubt assertions and their skeptical approach to bargaining orders, the courts have elevated the value of employee free choice, allowing employers to become in effect a primary vehicle for the expression of their employees' discontent. The courts' emphasis on the transcendent importance of free choice has led them to minimize the goal of deterring employer misconduct, and largely to disdain the objective of establishing, maintaining, or restoring bargaining stability. The appellate courts have expressed their strong support for free choice despite various Supreme Court opinions that seem to point in a different direction.²⁶⁸ In doing so, the courts have regularly discredited the Board's expertise and discretion, again defying conventional Supreme Court wisdom in this respect.²⁶⁹

266. See *supra* text accompanying notes 140-44 (describing Board's approach to good faith doubt); text accompanying notes 186-97 (describing Board's historical practice of issuing initial recognition bargaining orders); text accompanying notes 229-35 (describing Board's practice of issuing restorative bargaining orders).

267. See *supra* text accompanying notes 20-34 (describing Act's central policy of encouraging collective bargaining).

268. See *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 38-40, 47-50 (1987); *NLRB v. Financial Inst. Employees, Local 1182*, 475 U.S. 192, 208-09 (1986); *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 610-13 (1969); *Franks Bros. Co. v. NLRB*, 321 U.S. 702, 703-06 (1944), all discussed in part III *supra*.

269. See *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 786-87 (1990); *Chevron U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 843-45 (1984); *Gissel*, 395 U.S. at 612 n.32; *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 190-96 (1941), all discussed in part III *supra*.

Given the extraordinary reach and manifest depth of the conflict over statutory meaning, one is entitled to ask what is *really* going on. I believe that this unusual Board-court tension is appropriately explained by viewing the doctrinal and factual disagreements from the perspective of the NLRA as an aging statute. In this Part, I outline the broad terms for such an explanation.²⁷⁰

It is my contention that the appellate courts are engaged, albeit often subconsciously, in an effort to reshape a now venerable law in light of changing external norms. The notion that courts should be permitted or encouraged to limit and reshape the direction of older laws has been hotly debated among legal academics.²⁷¹ Much less has been written, however, about the practical realities of courts engaged in the "updating" of a particular statute, especially when the administrative agency given primary authority for statutory enforcement does not share the judiciary's renovative aspirations.²⁷² Because the appellate courts' efforts here are opposed by an expert agency that is tending the flame of original legislative purpose, the

270. The persistent conflict between the Board and appellate courts that is set forth in part III could also be characterized in somewhat different terms. Rather than viewing the high reversal rates as reflecting a tension between bargaining stability and pure employee choice, one might recast the disagreement as pitting a Board determined to restore conditions conducive to true free choice following corrosive employer intrusions against courts that view employees as sufficiently mature and robust to make their own choices without the paternalistic protections imposed by the Board. A treatment of this alternative perspective is beyond the scope of this Article. See JULIUS G. GETMAN ET AL., *UNION REPRESENTATION ELECTIONS: LAW AND REALITY*, 139-46 (1976). See generally David L. Shapiro, *Courts, Legislatures and Paternalism*, 74 VA. L. REV. 519, 521 (1988) (arguing that courts should hesitate to act for paternalistic reasons given our basic societal commitment to the value of self-determination). Even under a "paternalism-type" analysis, however, the Board-court conflict may be properly understood as part of the statutory aging process. See *infra* note 303.

271. Compare CALABRESI, *supra* note 4, at 79-119 (contending that courts are the institution best suited to retire or limit obsolete statutes, and that they should be given authority to perform this role) with Archibald Cox, *A Common Law for the Age of Statutes*, 70 CAL. L. REV. 1463, 1467-73 (1982) (book review) (questioning whether courts should be given such authority) and Abner J. Mikva, *The Shifting Sands of Legal Topography*, 96 HARV. L. REV. 534, 540-43 (1982) (book review) (same) and Samuel Estreicher, *Judicial Nullification: Guido Calabresi's Uncommon Common Law for a Statutory Age*, 57 N.Y.U. L. REV. 1126, 1135-46 (1982) (book review) (same). For examples of scholars' divergent perspectives as to the legitimacy and efficacy of judicial updating of older texts, see William N. Eskridge Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479 (1987); Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165 (1993); Martin Redish & Theodore T. Chung, *Democratic Theory and the Legislative Process: Mourning the Death of Originalism in Statutory Interpretation*, 68 TULANE L. REV. 803 (1994).

272. Cf. Langevoort, *supra* note 4, at 718, 732 (describing how judicial updating of New Deal banking laws has relied heavily on deference to agency expertise).

judicial updating gives rise to troubling questions about the interpretation and application of an aging statute.

A. *Alternative Explanations Considered*

Preliminarily, it should be acknowledged that "judicial updating" is not the only possible larger explanation for the persistent conflict under review. One alternative would posit the presence of a general result-oriented jurisprudence, whereby the Board performs its role of historical advocate for, or captive of, pro-union interests, and the courts display their traditional favoritism toward employers and show little sympathy for union efforts to survive or prosper.²⁷³

This account seems flawed in several respects. Although the Board during this period was more moderate and centrist than it had been earlier in the 1980s, it scarcely could be described as a captive of union supporters.²⁷⁴ Moreover, the Republican party's dominance of both Board and appellate court appointments minimized the role of political ideology as a distinguishing factor between the two institutions.²⁷⁵ Most important, the appellate court case outcomes were not systematically result-oriented during this period: the courts did not reverse Board determinations of employer liability significantly more often than Board determinations of union liability.²⁷⁶ To be sure, appellate court action on our identified

273. See generally CALABRESI, *supra* note 4, at 47-48 (contending that agencies become "captives" in the sense that they view compliance with old regulatory positions as equivalent to compliance with the public interest); FORBATH, *supra* note 109, at 37-58, 150-58 (describing federal courts' historical and persistent discomfort over concerted activity by employees); TOMLINS, *supra* note 109, at 239-41 (same); Harper, *supra* note 109, at 298 n.163 (same).

274. See Oviatt, *supra* note 110, at 92-94; AFL-CIO LAWYERS COORDINATING COMMITTEE, *supra* note 110, at 1-29. Notwithstanding the presence of career civil servants as staff attorneys for each Board member, the members themselves—along with their chief counsel, whom they appoint—primarily determine the direction of decisionmaking. During this period, Board members were all appointed by Presidents Reagan or Bush. Six of the 11 Reagan-Bush appointees came directly from private industry or management-side private practice, three had been Republican appointees elsewhere in federal government, and two came from inside the Board. None of the 11 had represented unions in their prior professional careers. The Board chair for virtually the entire period from 1985-92 was James Stephens, former chief labor counsel to conservative Republican Senator Orrin Hatch. See FEDERAL REGULATORY DIRECTORY 362-64 (6th ed. 1990); FEDERAL REGULATORY DIRECTORY 392-94 (5th ed. 1986); FEDERAL REGULATORY DIRECTORY 378-81 (4th ed. 1983).

275. See *supra* notes 82-83 and accompanying text.

276. See *supra* Table Three and accompanying discussion. Although the raw numbers are much smaller, the courts also were not significantly more likely to reverse Board determinations finding unions *not* liable (37% reversed) than Board determinations finding

bargaining-related issues does manifest a pronounced judicial tilt toward employers. But because these judicial decisions are *not* part of a more general pro-employer stance, the extraordinarily high reversal rates for the *specific* issues under review require a more particularized explanation.

Another alternative hypothesis would emphasize the shift in statutory priorities evidenced by changes in the NLRA itself. The Taft-Hartley Amendments codified employees' right to refrain from union-related activity, and made employee freedom of choice a more central statutory value.²⁷⁷ The appellate courts in this period could be viewed as simply according proper respect to that new section 7 right, unlike the Board, which continued to rely on superseded Wagner Act precedents.

Once again, a number of problems arise regarding this hypothesis. As noted earlier, Taft-Hartley's focus was on union misconduct that coerced or interfered with employees' new section 7 choice to refrain.²⁷⁸ The good faith doubt and bargaining order issues involve no such union misconduct. Rather, they presuppose wrongdoing by an *employer* that then asserts employee free choice to shield it from either liability or substantial affirmative relief. In addition, Taft-Hartley's protection of free choice was directed primarily at coercive union expansion through organizing and economic self-help, activities that had been perceived as subject to union abuse.²⁷⁹ The Wagner Act's support for ongoing or incipient collective bargaining relationships, and its protection of bargaining stability against wrongful employer refusals to cooperate, were largely undisturbed by the 1947 Amendments.²⁸⁰ Perhaps the strongest indication that Taft-Hartley effected no major change with respect to the impact of free choice on bargaining stability is the record of subsequent Supreme Court decisions. Over a period of nearly four decades since 1954, the Court in a variety of settings has recognized the importance of establishing and maintaining stable bargaining relationships even at some cost to "pure" employee free choice.²⁸¹

employers not liable (34% reversed). See *supra* Tables One and Two.

277. See *supra* notes 63-65 and accompanying text.

278. See *supra* notes 63-65 and accompanying text.

279. See *supra* notes 63-65 and accompanying text.

280. See *supra* notes 66-67, 187 and accompanying text.

281. See, e.g., *NLRB v. Curtin Matheson Scientific Inc.*, 494 U.S. 775, 794-95 (1990); *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 38-40, 47-50 (1987); *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 610-13 (1969); *Brooks v. NLRB*, 348 U.S. 96, 100-03 (1954).

Neither result-oriented opposition to unions nor insights into the meaning of the Taft-Hartley Amendments can explain adequately the appellate courts' pronounced preference for free choice at the expense of bargaining stability. Instead, I believe it is appropriate to consider the Board-court disagreements from the broader perspective of the tension between dynamic statutory interpretation and originalism, and to portray the courts as in effect recasting the good faith doubt and bargaining order issues in light of background legal and factual changes that have occurred since Taft-Hartley.

B. *Judicial Updating Described*

The idea that courts can and should interpret statutes dynamically to conform them to subsequent legal and factual developments is by now quite familiar.²⁸² In summary form, proponents observe that many statutes enacted decades earlier remain substantially unchanged even though the political, economic, and legal assumptions and conditions that existed at the time of their enactment no longer obtain. As these statutes age, controversies arise that require application of the unchanged text in a social setting altered by new developments in marketplace structure, statutory rights and duties, and constitutional law. Confronted with statutes—or statutory provisions—that (i) do not “fit” with the current legal and factual “landscape,” and (ii) may well not enjoy contemporary majority support, courts engage in innovative forms of statutory construction.

Judicial innovation at times follows the lead of administrative initiatives. For instance, if the regulatory agency primarily responsible for statutory enforcement takes action to readjust original legislative priorities so as to accommodate changes in the nature of the regulated marketplace, courts may then ratify the updating process by deferring to administrative expertise.²⁸³ Agencies, however, may be viewed

282. The account that follows draws on the work of numerous scholars; in its abbreviated form, it does not purport to do justice to the nuances and complexities of dynamic statutory interpretation. Although all scholars cited here advocate some form of dynamic interpretation, they differ as to the precise contours of that approach. See CALABRESI, *supra* note 4; Eskridge, *supra* note 271; William N. Eskridge, Jr. & Philip P. Frickey, *Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26 (1994); Daniel A. Farber, *Statutory Interpretation and Legislative Supremacy*, 78 GEO. L.J. 281 (1989); Langevoort, *supra* note 4; Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405 (1989).

283. See Langevoort, *supra* note 4, at 687-718 (describing how judicial updating of 1933 Glass-Steagall Act to end separation of commercial and investment banking relied heavily on steps taken by Comptroller of Currency and Federal Reserve Board that allowed commercial banks to expand into securities field and allowed securities firms to acquire

as obstacles to the updating of aging statutes. They may become captured by interest groups that oppose changing the original rules. Or they may be overly committed to preserving the status quo that they themselves expended considerable resources to erect. In these circumstances, the judiciary must act on its own if it is to update or limit the meaning of original statutory text. Courts often continue to invoke the rhetoric of fidelity to original legislative intent, which is asserted to be a neutral principle of statutory construction.²⁸⁴ Yet in relying on contemporary legal values, unanticipated social and economic changes, and an overarching "meta-intent" that the law be effective over time, courts may well generate applications of a statute that depart dramatically from what the enacting legislature would have contemplated or intended. When such departures occur late in the statutory life-cycle, long after the enacting congressional majority and its supporters have left the scene, courts are unlikely to be constrained by the risk or threat of legislative override. Indeed, to the extent that dynamic judicial interpretations are consonant with current priorities in the legal culture, they may receive little or no congressional criticism and thereby acquire an aura of legitimacy.

This model of dynamic interpretation to update an aging statute is useful when considering the Board-court conflict under review. The NLRA recognizes both the central value of stable collective bargaining relationships and the importance of the right of free choice, including the right to refrain from union membership or representation. The appellate courts during our period attached considerably less importance to bargaining stability (and relied far more heavily on employee free choice) than would be warranted by reference to original legislative intent, or relatively consistent Board judgments, or even periodic Supreme Court interpretations.

The appellate courts' recalibration of the statutory balance arguably reflects a sensitivity to substantial changes in the legal and socio-economic culture over the past twenty-five or more years. On the one hand, bargaining stability has become less important because it no longer figures as a vital means to achieve the major goals underlying the NLRA. Reducing industrial strife and restoring mass purchasing power are not the critical national concerns that they were during the period of the Great Depression and World War II. The relative prosperity of the 1950s and 1960s helped remove the sense of

control of banks).

284. Courts may also rely on other assertedly neutral principles, such as the plain meaning of the text or the canons of construction.

economic urgency that had initially given rise to a federal policy favoring the practice of collective bargaining.

Promoting a fairer distribution of economic resources remains a prominently stated congressional goal, but the goal is now addressed primarily through federal statutes that focus on minimum entitlements²⁸⁵ or the right to equal treatment in the workplace.²⁸⁶ In enacting a new generation of federal workplace statutes, Congress in the 1960s and early 1970s assuredly did not mean to supplant the role of collective bargaining as a means of redressing economic disparities between workers and management in the private sector. But following the proliferation of these statutes, along with the sharp decline in private sector support for unions since 1970, Congress is now far more receptive to government regulation—and far less willing to rely on private labor-management negotiations—as a mechanism for ordering employment relations and redistributing economic resources.²⁸⁷

Democratic self-government in the workplace, the fourth and final major congressional goal advanced by stable collective bar-

285. See, e.g., Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (1994); Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 801-962 (1988 & Supp. V 1993) (originally enacted as Federal Coal Mine Health and Safety Act of 1969); Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1001-1461 (1994); Employee Polygraph Protection Act of 1988, 29 U.S.C. §§ 2001-2009 (1994); Worker Adjustment and Retraining Notification Act of 1988 (WARN), 29 U.S.C. §§ 2101-2109 (1994); Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2601-2654 (1994).

286. See, e.g., Equal Pay Act of 1963, 29 U.S.C. §§ 201 note, 206(d) (1994); Title VII of 1964 Civil Rights Act, 42 U.S.C. §§ 2000e-17 (1988 & Supp. V 1993); Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. §§ 621-634 (1994); Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (codified as amended in scattered sections of 42 U.S.C.); ADEA Amendments of 1978, Pub. L. No. 95-256, 92 Stat. 189 (codified as amended in scattered sections of 29 U.S.C.); ADEA Amendments of 1986, Pub. L. No. 99-592, 100 Stat. 3342 (codified in scattered sections of 29 U.S.C.); Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213 (Supp. V 1993); Older Workers Benefit Protection Act, Pub. L. No. 101-433, 104 Stat. 978 (1990) (codified as amended in scattered sections of 29 U.S.C.); Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified in scattered sections of 2 U.S.C., 16 U.S.C., 29 U.S.C., and 42 U.S.C.). See generally DUNLOP COMMISSION REPORT, *supra* note 8, at 105-09 (summarizing federal regulatory developments since the 1960s).

287. See PAUL C. WEILER, GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW 22-25 (1990). Whether the expanded federal regulatory presence was in some degree attributable to perceived weaknesses in the union movement, and whether the growing reliance on positive federal law in turn accelerated the decline of collective self-help efforts, are questions worth pondering. See Clyde W. Summers, *Labor Law as the Century Turns: A Changing of the Guard*, 67 NEB. L. REV. 7, 10-14 (1988). Whatever the causal relationships may be, by the late 1980s neither Congress nor the federal courts perceived stable collective bargaining relationships as the primary means to promoting a fairer distribution of economic resources in the workplace.

gaining relationships, has faded as a national priority for reasons perhaps best understood to be part of a larger shift in societal norms. Professor Thomas Kohler has persuasively suggested that the steady decline in union density is related to a larger unraveling of our mediating institutions, including religious congregations, fraternal groups, grassroots political clubs, and even families.²⁸⁸ Without minimizing the importance of workplace-specific factors in accounting for lost union support,²⁸⁹ Kohler asserts that the collapse of communitarian habits of thought has diminished our interest in and capacity for various forms of organizational self-rule at the local level.²⁹⁰ Even if the connection to a withering of civic and religious organizations is associational rather than causal, Kohler and others have accurately observed that the Wagner Act's emphasis on inculcating habits of democratic self-governance seems distinctly less robust in today's social culture.

Just as bargaining stability has faded as a priority in the larger legal and social setting of the workplace, the importance attached to individual employee freedom has risen dramatically in recent decades. Starting in 1963, the federal approach to regulating the workplace has made individual rights and choices preeminent, not subordinate.²⁹¹ During the early decades of NLRA operation, Congress viewed enforceable recognition for collectively bargained terms and conditions of employment as the federal government's primary role in affecting workplace relations.²⁹² In the past thirty years, however,

288. Thomas C. Kohler, *Civic Virtue at Work: Unions as Seedbeds of the Civic Virtues*, 36 B.C. L. REV. 279, 290-95 (1995) [hereinafter Kohler, *Civic Virtue*]; Thomas C. Kohler, *The Overlooked Middle*, 69 CHI.-KENT L. REV. 229, 234-38 (1993) [hereinafter Kohler, *Overlooked Middle*]; see also Robert D. Putnam, *Bowling Alone: America's Declining Social Capital*, 6 J. DEMOCRACY 65, 68-75 (1995) (discussing decline of traditional participatory civic and social organizations in United States). These mediating institutions have traditionally brokered relations between individuals and the larger institutions that dominate public life, i.e., the State and the Market Economy.

289. These factors, well-chronicled by other scholars, include structural changes in the market economy, inadequate provisions of our labor laws, sophisticated employer opposition to unionization, and public perceptions of American unions as tainted by corruption and parochial self-interest. See Kohler, *Civic Virtue*, *supra* note 288, at 289; Kohler, *Overlooked Middle*, *supra* note 288, at 234; *supra* notes 9-10 and sources cited therein.

290. See Kohler, *Civic Virtue*, *supra* note 288, at 292-94; Kohler, *Overlooked Middle*, *supra* note 288, at 235-37.

291. See *supra* notes 285 and 286 (identifying non-exhaustive list of 15 major federal statutes, beginning with Equal Pay Act of 1963, that regulated workplace relations by providing enforceable rights to individual employees).

292. The Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-219 (1994), made a subsidiary contribution by establishing minimum hourly wage and overtime provisions.

support for collective determination of working conditions has become a minor element amidst the rising tide of federal statutes that offer rights and protections to employees on an individual and individually enforceable basis. Federal laws addressing and defining substantive terms or conditions of employment now dominate the legal landscape. Federal courts have developed a perspective and expertise on workplace relations from adjudicating the rights of individual employees under these laws. Moreover, the new federal statutes often relegate unions to the derivative status of facilitating individual employee protections,²⁹³ and occasionally cast them on a par with employers as potential threats to the realization of individual rights.²⁹⁴ Thus, whereas unions under the NLRA-dominated legal regime were leading actors seeking to achieve improved conditions for employees, unions under the individual rights regime are more often bit players or even obstacles to employees' economic amelioration.

Among the most important individual employee rights to receive recognition in recent times has been the right to refrain. In the broader social context, the freedom of choosing not to have one's beliefs shaped or one's conduct limited by membership in a political party, church, fraternal order, or union may be viewed as the "positive" side of the diminished status accorded to those mediating institutions.²⁹⁵ In addition, a major legal development enhancing the

293. *See, e.g.*, 29 U.S.C. §§ 2102, 2104 (1994) (specifying that 60-day notice of plant closing required under WARN Act can go to unions in lieu of employees, although employees are the aggrieved persons under the Act); Occupational Safety and Health Administration Regulations, 29 C.F.R. § 1960.26(b) (1994) (requiring OSHA inspector to consult with union representative during course of inspection, and to confer with that representative at conclusion of inspection regarding apparently unsafe or unhealthful working conditions); 29 C.F.R. § 1960.37(b) (1994) (requiring that employee members of firm-specific occupational safety and health committees be designated by the union); *see also* United Food & Commercial Workers Int'l Union, Local 751 v. Brown Group, Inc., 50 F.3d 1426, 1430-32 (8th Cir.) (holding that unions lack standing to sue for monetary damages under WARN Act), *cert. granted*, 116 S. Ct. 335 (1995).

294. *See, e.g.*, 42 U.S.C. § 2000e-2 (1988) (making unions as well as employers primary objects of liability for race and gender discrimination); 29 U.S.C. § 623 (1994) (same for age discrimination); 42 U.S.C. §§ 12111(2), 12112 (Supp. V 1993) (same for disability discrimination); *see also* Alexander v. Gardner-Denver Co., 415 U.S. 36, 58 n.19 (1974) (holding that employee's rights under Title VII cannot be waived by arbitration of same claim under collective bargaining agreement, and suggesting that union's interest in sacrificing individual claims for good of bargaining unit could threaten integrity of Title VII's separate statutory scheme).

295. *See generally* GEORGE M. MARSDEN, RELIGION AND AMERICAN CULTURE 273-74 (1990) (describing individualistic perspectives on religion and religious institutions); DEAN MCSWEENEY & JOHN ZVESPER, AMERICAN POLITICAL PARTIES 184-89 (1990) (linking growth of individualist attitudes to decline of political party activism and affiliation). *Cf.*

value of individual free choice has been the constitutionalization of the right to refrain. Over the past forty years, the Supreme Court has given broad recognition to a First Amendment protection against government-compelled speech or association.²⁹⁶ The Court has extended to both the union setting and other group contexts an individual's right to refrain from participating in, or being identified with, the speech or conduct of a group to which she is compelled to belong.²⁹⁷ Moreover, by relying explicitly or implicitly on the canon of construing statutes to avoid constitutional problems, the Court has strengthened private employees' rights to refrain from union activities under federal labor law.²⁹⁸ The statutory issue in those cases involved discrimination against employees who objected to certain uses of their union dues or fees.²⁹⁹ It seems a fair inference, however, that appellate courts may now be implying a comparable constitutional urgency for employees' interest in objecting to

Putnam, *supra* note 288, at 70-75 (describing how decline of traditional participatory civic organizations in the United States has been accompanied by growth of mass membership organizations, supported anonymously by writing a check for dues, and how television and the VCR have shifted American leisure pursuits to more individualized activities that involve less social participation).

296. See, e.g., *Keller v. State Bar*, 496 U.S. 1, 9-17 (1990) (upholding attorneys' right to refrain from certain messages promulgated or activities engaged in by state bar); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 232-37 (1977) (upholding employee's right to refrain from participation in certain union activities or messages); *International Ass'n of Machinists v. Street*, 367 U.S. 740, 765-70 (1961) (same); *Wooley v. Maynard*, 430 U.S. 705, 714-17 (1977) (upholding individual's right to refrain from displaying state motto on license plate). But cf. *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 85-88 (1980) (rejecting asserted right of non-association by shopping center owner); *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 792-95 (1978) (rejecting asserted right of non-association by corporate shareholders). The Supreme Court initially articulated a First Amendment right to refrain in *West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 635-42 (1943), which involved a religiously-based refusal to salute the flag; the Court gave the theory more general application in the 1960s and 1970s.

297. See generally Victor Brudney, *Association, Advocacy, and the First Amendment*, 4 WM. & MARY BILL OF RTS. J. 1 (1995) (examining individual's right to refrain from advocacy activities engaged in by large associations); Norman L. Cantor, *Forced Payments to Service Institutions and Constitutional Interests in Ideological Non-Association*, 36 RUTGERS L. REV. 3 (1983) (same); David B. Gaebler, *First Amendment Protection Against Government Compelled Expression and Association*, 23 B.C. L. REV. 995 (1982) (same).

298. See *Street*, 367 U.S. at 749-50 (construing Railway Labor Act to protect individual employees' rights of non-association and thereby avoid First Amendment problems); *Communications Workers v. Beck*, 487 U.S. 735, 745-54 (1988) (construing NLRA to protect individual employees' rights of non-association by relying on *Street* as controlling).

299. See *Beck*, 487 U.S. at 738, 740 (describing issue presented as whether employer collection and union expenditure of agency fees for purposes unrelated to collective bargaining violated § 8(a)(3) of NLRA).

representation by a union that assertedly no longer enjoys majority support.³⁰⁰

One further, related aspect of the importance currently attached to individual freedom is a renewed and even increased faith in liberty of contract as vital to enhancing the welfare of employees.³⁰¹ The NLRA's commitment to collectivizing the employment relationship arose at a time when Congress and the public had lost confidence in the free market's ability to produce a healthy economy.³⁰² That confidence has been largely restored. With the reestablishment of widespread acceptance of, if not support for, private contracting and the efficiency of markets, the appellate courts may well be reflecting a modern sense that collectivization reduces individual freedom and should be required only upon a clear showing of current majority approval.³⁰³

Given the developments in our legal culture that have just been described, one might well wonder why the Supreme Court has not engaged in the same updating approach to bargaining-related issues

300. To be sure, appellate courts also could have practical reasons for their deep distrust of bargaining orders. Union success rates in elections have declined below 50%, see DeChiara, *supra* note 218, at 451, and courts may have come to believe that a short-circuiting of the election process is more threatening to true majority will. Beyond these practical justifications, however, the extent to which employees are now perceived as asserting valid *constitutionally related* objections to certain aspects of forced union association seems likely to enhance the value placed on objections framed as challenges to the very majority-based existence of that forced association.

301. See, e.g., RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 321-30 (4th ed. 1992); Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947, 955-77 (1984). But see WEILER, *supra* note 287, at 72-78 (arguing that labor market includes inherent imperfections that call for government intervention).

302. See Finegold & Skocpol, *supra* note 59, at 183.

303. A very similar type of "judicial updating" hypothesis would apply if one views the instant Board-court conflict as reflecting divergent approaches to paternalism rather than bargaining stability. See discussion *supra* note 270. In briefest terms, the primacy of an individual rights statutory environment, and the reinvigoration of liberty of contract and freedom to refrain, all presuppose an individual employee who is sophisticated and tough enough to make her own choices. See, e.g., *Montgomery Ward & Co. v. NLRB*, 904 F.2d 1156, 1160-63 (7th Cir. 1990) (Easterbrook, J. concurring) (contending that employees are not "wee, tim'rous beasties" readily scared or baffled by employer election misconduct; rather, "as usual, employees are harder than the Board lets on"). By contrast, the Board continues to subscribe to the "ancient" view that individual employees are frequently coerced by employers with vastly superior economic leverage, and that its mission under the Act is to preserve conditions under which concerted activity has a fair chance to succeed. Cf. Weiler, *Promises*, *supra* note 10, at 1816 (contending that while fully informed employee choice is desirable in principle, a shorter election campaign is needed in practice to reduce employers' well-documented penchant for engaging in illegal coercion of their workers).

as have the courts of appeals.³⁰⁴ I believe part of the answer lies in the Supreme Court's diminished attention to the Act: a number of the key Court decisions heralding the value of stable bargaining relationships date from before 1970³⁰⁵ and have not been revisited. The Supreme Court has issued relevant decisions since 1980 as well,³⁰⁶ but on that score the Court's exceptional continuity with earlier periods seems significant. The Supreme Court consists of only nine members, whose service is generally measured in terms of decades rather than years. It is therefore not surprising that more recent Court decisions addressing our bargaining-related issues were written or supported by Justices who came to the Court between 1956 and 1972, a time when collectivization of employment relations was a more vibrant part of the legal culture.³⁰⁷

C. Judicial Updating Questioned

My speculation that appellate courts have been engaging in a form of dynamic statutory interpretation to reshape the Act's meaning with regard to a cluster of bargaining-related issues is just that—speculative. But assuming for the moment that judicial updating is an important element in the interpretive equation, there are troubling aspects to this approach.

The theory that courts should refurbish older statutory provisions deemed anachronistic or obsolete has engendered a fair degree of criticism.³⁰⁸ The first precondition for updating—that a statute no longer conforms to its surrounding legal “landscape”—is problematic in descriptive terms. Statutes often are enacted for the purpose of transforming the surrounding landscape by creating a new structure

304. One might also wonder why the Board itself has not done so; that issue is discussed *infra* note 311 and accompanying text.

305. *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969); *Brooks v. NLRB*, 348 U.S. 96 (1954); *Franks Bros. Co. v. NLRB*, 321 U.S. 702 (1944).

306. *NLRB v. Curtin Matheson Scientific Inc.*, 494 U.S. 775 (1990); *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27 (1987); *NLRB v. Financial Inst. Employees, Local 1182*, 475 U.S. 192 (1986).

307. Justice Brennan (appointed 1956) wrote the unanimous decision in *Financial Institution*, Justice Blackmun (appointed 1970) wrote the 6-3 decision in *Fall River*, and Justice Marshall (appointed 1967) wrote the 5-4 majority opinion in *Curtin Matheson*. Between 1972 and 1990, only four new Justices joined the Court; thus, a majority of the Justices were products of an era in which the NLRA was a central feature of the legal landscape.

308. The criticisms presented here rely on the work of a number of legal scholars, whose insights are not fully reflected in such a summary discussion. See CALABRESI, *supra* note 4; Estreicher, *supra* note 271; Farber, *supra* note 282; Lessig, *supra* note 271; Sunstein, *supra* note 282.

of relationships that significantly alters the preexisting mix of legal rights and duties. Legislatures are in general more competent than courts to address such complex structural matters, and in exercising that competence they frequently challenge or reject prior judicially fashioned solutions. One might doubt whether courts are best suited—or even well-suited—to the task of modifying that legislatively created structure. More fundamentally, if alteration of the judicially created legal landscape in order to effect a different “fit” is precisely what the enacting Congress meant to accomplish, one might well wonder why lack of fit with a new and unforeseen landscape should subject such a structural statute to judicial tampering, which inevitably must be only episodic or piecemeal.

The other precondition invoked to support judicial updating—that a statute does not enjoy the current support of a legislative majority—is suspect in normative terms. Our protracted legislative process features delegation to committees, rules that limit the agenda for floor action, and requirements of bicameralism and presentment. These historical and constitutional constraints were designed to impose a substantial barrier against the enactment of new laws. One corollary is that older laws survive the erosion of political coalitions and popular intensity that initially produced them, unless a new political coalition or popular feeling is strong enough to overcome the forces of legislative inertia. Allowing courts to diminish the meaning of statutory language that has not been repealed, altered or even specifically addressed by subsequent legislative action presents serious problems of legitimacy.

These two challenges to judicial updating bear directly on the appellate courts’ apparent efforts to readjust the statutory balance between free choice and bargaining stability under the NLRA. All statutes depart in some way from prior law, or they would not have been enacted. The NLRA, however, is exceptional in its anomalous character. The Wagner Act was not a narrow measure inserted into an existing body of common law. Nor was it an elaboration of requirements that assumed the continued existence of an underlying legal framework. Rather, it was meant to depart dramatically from existing legal norms by creating a self-contained regulatory structure to govern relations between management and organized labor. Such a regulatory transformation of existing law, effected as a coherent

whole by a legislative majority, is peculiarly ill-suited to selective judicial renovation.³⁰⁹

In this regard, it may be worth distinguishing between judicial updating intended to make a particular statute more effective in its own terms³¹⁰ and judicial updating intended to make federal law as a whole more consistent or harmonious by reducing the scope or diluting the meaning of the particular statute being updated. For the latter form of dynamic interpretation, the argument is made that generalist courts must act precisely because narrowly focused agencies cannot. From the standpoint of both practicality and legitimacy, agency officials charged with enforcing a statute should not be expected to subvert that statute's application, especially if the grounds for impairment are that the statute does not comport with extrinsic developments in the law for which the agency is not responsible.³¹¹

Yet for statutes like the NLRA that impose a self-contained, comprehensive regulatory scheme, the appellate courts' integrationist perspective may bring considerable costs. Judicial efforts to reshape the meaning of particular provisions threaten to distort or disrupt operation of the overall statutory scheme.³¹² In this instance, the Board monitors and supervises a set of complex interrelationships among employer, union and employees. Appellate court updating of

309. See CALABRESI, *supra* note 4, at 134-35 (acknowledging that judicial updating is hardest to justify with respect to a statute that reorganizes a whole area of law); Cox, *supra* note 271, at 1467-68 (arguing that judges may lack the competence and methodological tools to engage in the updating of regulatory or public law).

310. See Eskridge, *supra* note 271, at 1482-96 (discussing Supreme Court's dynamic approach to interpretation of civil rights statutes in *Smith v. Wade*, 461 U.S. 30 (1983) and *United Steelworkers v. Weber*, 443 U.S. 193 (1979)); see also Michael H. Gottesman & Michael R. Seidl, *A Tale of Two Discourses: William Gould's Journey from the Academy to the World of Politics*, 47 STAN. L. REV. 749, 765-66 (1995) (arguing for updated interpretation of NLRA to effectuate its statutory purpose of promoting collective bargaining relationships).

311. See CALABRESI, *supra* note 4, at 49. An agency like the NLRB might become inclined to dilute or subvert the meaning of its enabling statute if the pressures of presidential appointments, along with congressional confirmation and oversight, were combined to push in that direction. See Moe, *supra* note 94, at 1100-02. Between October 1986 and November 1993, however, a Democratic Congress was not predisposed to welcome such a development. More generally, systemic self-limiting interpretations by the NLRB would probably require a sustained period of single-party control over 60 seats in the Senate plus the presidency: these are the very political circumstances needed to allow for legislative reform of the Act. See *supra* note 16.

312. Cf. Peter L. Strauss, *One Hundred Fifty Cases per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093, 1126-29 (1987) (contending that *Chevron* may reflect Supreme Court's effort to enhance enforcement of complex federal statutory schemes by reducing role of lower courts).

the Board's approach has altered the rights and responsibilities of employers, not just unions and employee members of a nascent or mature bargaining unit. Indeed, employers that challenge or dissolve bargaining relationships would appear to benefit from the courts' interpretive changes at least as much as the disaffected employees whose free choice interests they are asserting. Such windfall benefits for employers inevitably alter, in fundamental and unforeseeable ways, the balance of power between management and labor.

A key element in the NLRA's regulatory structure is the value attached to ongoing collective bargaining activity. The promotion and maintenance of stable bargaining relationships was an anomaly on the legal landscape in 1935; the fact that it has become more anomalous sixty years later³¹³ should not be grounds for courts to reshape the direction of the statute. Moreover, Congress in 1935 and 1947 struck a balance between the competing federal policies of free choice and bargaining stability. The Board's stance of subordinating immediate or "pure" free choice in favor of the formation and maintenance of collective bargaining relationships seems a fair reflection of that balance. Insofar as the debate between Board and courts is not over what Congress meant, but rather over the wisdom of adhering to what Congress is known to have meant, that debate should be occurring in Congress, not in the intermediate appellate courts.³¹⁴

Advocates of the judicial updating approach might well point to decades of congressional inattention or ambivalence toward collective bargaining as evidence that courts are justified in reflecting current rather than ancient legislative preferences. Congress, however, has not acted to modify or repeal the commitments made in 1935 and retained in 1947. That the Wagner Act was enacted under unusual political circumstances³¹⁵ does not diminish its applicability over time. Congress's failure to pass significant reform in either direction for nearly fifty years³¹⁶ may not reflect popular satisfaction with the NLRA, but its repeated refusal to approve proposals for change at least signals that there is no consensus to alter the historic scheme.

313. The federal government's promotion of co-determination by occupational subgroups through various New Deal statutes, *see supra* text accompanying notes 36-42, did not become a dominant legal norm.

314. *Cf. NLRB v. K & K Gourmet Meats, Inc.*, 640 F.2d 460, 470-74 (3d Cir. 1981) (Gibbons, J., dissenting) (suggesting that judges on Third Circuit who believe *Gissel* was wrongly decided are engaged in "guerilla warfare" to alter the legislative balance that had been struck in favor of bargaining orders).

315. *See supra* text accompanying notes 58-62.

316. *See supra* text accompanying notes 15-16.

If anything, it can be argued that the Act's strong endorsement for bargaining stability should be assured until comparably unusual political circumstances generate the legislative intensity required to readjust Congress's original priorities.

CONCLUSION

This Article has examined a particular conflict in statutory values at a number of different levels. From a historical standpoint, the establishment and maintenance of stable collective bargaining relationships were deemed enormously important to the achievement of original legislative goals. Upon empirical review, it became apparent that the Board and appellate courts in recent times have disagreed on just how important bargaining stability should continue to be. A doctrinal analysis identified various legal and factual iterations of the disagreement, and concluded that a common theme was the tension between bargaining stability and perceived threats to employee free choice. Finally, this tension was recast in a broader context by suggesting that the courts may have been subordinating original meaning to conform the statute to the current legal landscape.

One element missing from the multiple perspectives offered regarding this congressional enactment is the current voice of Congress. When the legislature does not revisit a regulatory statute like the NLRA for decades, it enables other institutions to become more influential in determining current statutory meaning. When the Supreme Court's interest flags as well, the administrative agency and the appellate courts become the principal arbiters of that meaning. Conventional wisdom is that agency rulemaking and adjudication shape current statutory meaning, and courts are broadly deferential to the expertise and relative political accountability of the federal bureaucracy.³¹⁷ The conflict examined here indicates that on at least some occasions, appellate courts exercise primary interpretive control.

Appellate courts may occupy a favored position as agents of change for older federal laws such as the NLRA. In contrast to Supreme Court decisions, appellate court rulings rarely come to the attention of Congress and are thus unlikely to trigger legislative oversight much less a serious override challenge.³¹⁸ Yet because the

317. See *Chevron U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 843-45 (1984); David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. REV. 921, 954-56 (1992).

318. See James J. Brudney, *Congressional Commentary on Judicial Interpretation of Statutes: Idle Chatter or Telling Response?*, 93 MICH. L. REV. 1, 83-84 (1994) (observing

appellate courts' reviewing relationship with agencies is regular and constant instead of discretionary and episodic, their rulings have a more profound and lasting effect on agency conduct. Moreover, because the Supreme Court need not review appellate court rulings and often does not do so even when a "certworthy" issue arises,³¹⁹ these rulings may well become the final word on statutory meaning.

The conflict presented here illustrates this last point. Congress is unlikely to address the good faith doubt and bargaining order issues in the foreseeable future. It has been unable to legislate on much "hotter" aspects of NLRA interpretation over the past twenty years, and the current stalemate on NLRA reform seems destined to continue. The Board has modified its position on both good faith doubt and *Gissel* bargaining orders in the face of appellate court criticisms; it may be forced to do so on incumbent restoration bargaining orders unless there is a major shift in appellate court position. If the Supreme Court agreed to hear a good faith doubt or bargaining order case, its decision might refocus the substantive debate. But twenty-five years after *Gissel*, there is no indication that the Court is interested in revisiting the tradeoffs between bargaining stability and employee free choice. If appellate courts were in a position to be candid about their willingness to update the NLRA, that too might generate public or political debate. Such candor, however, would invite criticism of unorthodox if not heretical approaches to statutory interpretation, and is hardly to be expected.

One can at least hope for more interest from legal academics. This Article's contention that appellate courts are altering settled meaning in an effort to conform a statute to extrinsic legal events raises practical and normative questions that deserve additional attention. The NLRA is one of many aging statutes being applied in legal and social circumstances unknown to its original authors and proponents. Further examination of the roles played by agencies and

that members of Congress have little familiarity with lower court decisions, because these decisions are far more numerous than Supreme Court decisions and they attract little or no media coverage); Robert A. Katzmann, *Bridging the Statutory Gulf Between Courts and Congress: A Challenge for Positive Political Theory*, 80 GEO. L.J. 653, 662 (1992) (discussing Congress's lack of awareness of lower court decisions).

319. See Thomas E. Baker & Douglas D. McFarland, *The Need for a New National Court*, 100 HARV. L. REV. 1400, 1405-06 (1987) (reporting that Supreme Court denies certiorari in substantial number of intercourt conflicts); cf. Ruth Bader Ginsburg & Peter W. Huber, *The Intercircuit Committee*, 100 HARV. L. REV. 1417, 1419 n.11 (1987) (reviewing various studies that differ as to the extent of unresolved court conflicts over the meaning of federal statutory provisions).

appellate courts may lead to a better understanding as to what has become of other famous victories.