6-1-1999

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Judicial Review Gone Awry: The Supreme Court Rewrites the NLRB's Unitary Standard in Allentown Mack Sales & Service, Inc. v. NLRB

The rise of the administrative state has produced considerable tension between the federal judiciary, whose duty it is to interpret the law, and the administrative agencies charged with interpreting and applying the various statutes under which they operate. Much of this tension results from the ability of agencies to perform both quasi-legislative and quasi-judicial functions. Agencies can pass regulations with the binding force of statutes, and they can adjudicate disputes arising under statutes and their rules. Over the past several decades, the U.S. Supreme Court has enunciated several principles establishing a policy of judicial deference toward agency actions taken pursuant to statutory mandate.

1. Many commentators have viewed administrative agencies as a threat to separation of powers. See, e.g., Cynthia R. Farina, Statutory Interpretation and the Balance of Power in the Administrative State, 89 Colum. L. Rev. 514-16, 525-26 (1989) (arguing that judicial deference to administrative agencies undermines the separation of powers in favor of the executive branch); Abner S. Greene, Checks and Balances in an Era of Presidential Lawmaking, 61 U. Chi. L. Rev. 182-84 (1994) (same). For a contrary view, see Kenneth Culp Davis & Richard J. Pierce, Jr., Administrative Law Treatise § 2.1, at 107-08 (1994) (arguing that many of those who criticize the constitutionality of administrative agencies on separation of powers grounds misinterpret the Constitution to forbid the reallocation or blending of powers between or among branches of government).

2. See generally 1 Davis & Pierce, supra note 1, §§ 7-8, at 287-401 (describing the legislative and adjudicatory functions conducted by administrative agencies).

3. The Court announced its most famous example of this deference in Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). Prior to Chevron, the judiciary lacked any consistent theoretical approach to the review of agency actions. See Mark Seidenfeld, A Syncopated Chevron: Emphasizing Reasoned Decisionmaking in Reviewing Agency Interpretations of Statutes, 73 Tex. L. Rev. 87-94 (1994). Indeed, the Supreme Court paid great deference to agency actions in some cases while substituting its own judgment for agency decisions in others. See 1 Davis & Pierce, supra note 1, § 3.1, at 107-09.

Chevron filled this vacuum with a two-step test for courts to apply to the interpretations that agencies give to the statutes they administer. See Chevron, 467 U.S. at 842-43. The first step is a “plain meaning” test: A court reviewing an agency's interpretation must ask whether the statute directly and unambiguously addresses the precise question at issue. See id. If the answer is yes, then no deference should be given to the agency's interpretation, since both the court and the agency must give effect to “the unambiguously expressed intent of Congress.” Id. The second step, which is reached only if “the statute is silent or ambiguous with respect to the specific issue,” requires a court to
dictates that federal courts give "substantial deference" to an administrative agency's interpretation of a rule promulgated pursuant to statute. At odds with this principle is the lower courts' willingness to review and overturn agency actions they deem inconsistent with an agency's preexisting rules. Furthermore, the Supreme Court has asked whether an agency's statutory interpretation "is based on a permissible construction of the statute." Id. at 843. If the agency's interpretation is a permissible construction of the statute, Chevron dictates that a court defer to it. See id. A construction is permissible if it is "reasonable." Id. at 845.

The lower courts have observed the deference mandated by Chevron with "unusual consistency." Seidenfeld, supra, at 94. The Supreme Court, on the other hand, has slowly decreased the amount of Chevron deference that it affords agency interpretations of statutes, invalidating a growing number of agency interpretations by finding them at variance with the "plain meaning" of statutes. See Thomas W. Merrill, Textualism and the Future of the Chevron Doctrine, 72 WASH. U. L.Q. 351, 351-54 (1994); Richard J. Pierce, Jr., The Supreme Court's New Hypertextualism: An Invitation to Cacophony and Incoherence in the Administrative State, 95 COLUM. L. REV. 749, 750 (1995).


4. See Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 413-14 (1945). The Seminole Rock principle is similar to Chevron. Whereas Chevron mandates that courts in most cases defer to an agency's interpretation of a statute it administers, Seminole Rock requires courts to defer in most cases to an agency's interpretation of a rule it promulgates pursuant to statute:

Since this involves an interpretation of an administrative regulation a court must necessarily look to the administrative construction of the regulation if the meaning of the words used is in doubt. The intention of Congress or the principles of the Constitution ... may be relevant in the first instance in choosing between various constructions. But the ultimate criterion is the administrative interpretation, which becomes controlling weight unless it is plainly erroneous or inconsistent with the regulation.

Id. Courts have applied this principle in numerous cases to uphold agencies' interpretations of their own rules and regulations. See, e.g., Shalala v. Guernsey Mem'l Hosp., 514 U.S. 87, 101-02 (1995) (upholding the refusal of the Department of Health and Human Services ("HHS") to reimburse a hospital for costs it calculated by generally accepted accounting principles ("GAAP"), even though HHS had previously issued rules arguably requiring hospitals to follow GAAP); Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 515 (1994) (upholding HHS's refusal to reimburse a hospital for certain educational costs based on the agency's interpretation of the relevant regulation).

Unlike Chevron's two-step test, the legitimacy of the Seminole Rock principle has rarely been called into question by either the courts or academia. See 1 DAVIS & PIERCE, supra note 1, § 6.10, at 281-82 (noting that courts continue to espouse the Seminole Rock principle); John F. Manning, Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules, 96 COLUM. L. REV. 612, 614 (1996) (stating that the Seminole Rock principle "has long been one of the least worried-about principles of administrative law"). Manning, however, is the exception, arguing that the Court "should replace Seminole Rock with a standard that imposes an independent judicial check on the agency's determination of regulatory meaning." Manning, supra, at 617.

5. See generally Harold J. Krent, Reviewing Agency Action for Inconsistency with
itself at times seemingly departed from the deference it espouses. This discrepancy between principle and practice was evident recently in *Allentown Mack Sales & Service, Inc. v. NLRB*, a case in which the Supreme Court and the National Labor Relations Board (“NLRB” or “Board”) clashed over the Board’s interpretation of its standard for employer polling of union support. The Board currently permits an employer to poll its employees to determine the existing level of union support only if the employer has an “objective reasonable doubt” about the union’s majority status. The Board applies this standard, also called the good faith reasonable doubt standard or the unitary standard, to Representation Management (“RM”) elections and employer withdrawals of union recognition.

Prior Rules and Regulations, 72 CHI.-KENT L. REV. 1187 (1997) (demonstrating the courts’ willingness to upset agency actions where those actions deviate from preexisting agency policies). Krent notes that the courts are typically reluctant to second-guess administrative decisions when “judicially administrable standards” are lacking. *Id.* at 1187. This reluctance is evidenced by several doctrines governing judicial review of administrative actions. *See id.* at 1187-88. For example, the Supreme Court has held that an agency’s nonenforcement is presumptively unreviewable because nonenforcement “often involves a complicated balancing of . . . factors which are peculiarly within [the agency’s] expertise.” *Id.* (quoting Heckler v. Chaney, 470 U.S. 821, 831 (1985)). Although reluctant to intervene when judicially administrable standards are difficult to find, courts frequently reassert their authority to monitor agency actions where such standards can be divined. *See id.* at 1188. Thus, courts do not hesitate to review an agency’s nonenforcement where a challenger asserts that the nonenforcement is inconsistent with an agency rule. *See id.*


9. The Board first applied the objective reasonable doubt test to polling in *Montgomery Ward & Co.*, 210 N.L.R.B. 717, 717 (1974). *See infra* notes 181-86 and accompanying text (discussing *Montgomery Ward & Co.*). “Majority status” does not necessarily mean that a union must be supported by a majority of all an employer’s employees. Rather, a union has majority status if it is supported by a majority of employees in the appropriate bargaining unit. *See 29 U.S.C. § 159(a) (1994).* The National Labor Relations Act (“NLRA” or “the Act”) invests the Board with the power to decide whether a bargaining unit in a particular case is appropriate. *See id.* § 159(b); Merrifield et al., *supra* note 8, at 241. Over the years, the Board has formulated certain criteria for determining the appropriateness of a bargaining unit. *See Merrifield et al., supra* note 8, at 241. The most important criterion is mutuality of interest, which requires that “employees with similar interests shall be placed in the same bargaining unit.” *Id.* (quoting *In re Chrysler Corp.*, 76 N.L.R.B. 55, 58-59 (1948)).


11. *See id.* at 364.

12. Representation Management (“RM”) elections are provided for in 29 U.S.C.
An employer that does any of these actions without an objective reasonable doubt as to the union's majority status commits an unfair labor practice. Despite the risk of an unfair labor practices charge, an employer that believes it can satisfy the objective reasonable doubt standard has a legal incentive to do at least one of these actions because bargaining with a union that lacks majority support is itself an unfair labor practice. Although the Board's standard resembles the jury trial reasonable doubt standard, the Board has historically interpreted its standard to be more demanding than the latter standard. In Allentown Mack, the Court rejected the Board's more rigorous interpretation of objective reasonable doubt and substituted a simple jury standard in its place.

This Note first examines the facts of Allentown Mack and the Supreme Court's disposition of the case. After reviewing the relationship between the Board and the Court, the Note outlines the

§ 159(c)(1). Under this provision, an employer with a good faith reasonable doubt about the level of union support can file a petition for a Board-supervised election. See Maria Fabre Manuel, Comment, Abolishing the Withdrawal of Recognition Doctrine: Serious Doubts About the Good Faith Doubt Test, 55 La. L. Rev. 913, 916-17 (1995). A union that loses an RM election faces loss of recognition as the representative of the employer's employees. See id.

13. Unlike RM elections, an employer's right to withdraw recognition of a union, once it has a good faith reasonable doubt about the level of support for the union, is not a right conferred on it by the Act; the Board created the right to withdraw in Celanese Corp. of America, 95 N.L.R.B. 664 (1951): "[T]he employer can, without violating the Act, refuse to bargain with a union on the ground that it doubts the union's majority, provided that the doubt is in good faith." Id. at 672.

14. An employer commits an unfair labor practice within the meaning of the NLRA whenever it interferes with, restrains, or coerces employees in any way in connection with their right to engage in concerted activities, protect working conditions, and join labor organizations for the purpose of collective bargaining. See 29 U.S.C. § 158(a) (1994); WILLIAM B. GOULD IV, A PRIMER ON AMERICAN LABOR LAW 45 (3d ed. 1993).

15. See NLRB v. West Sand & Gravel Co., 612 F.2d 1326, 1328 (1st Cir. 1979).

16. See Joan Flynn, The Costs and Benefits of "Hiding the Ball": NLRB Policymaking and the Failure of Judicial Review, 75 B.U. L. Rev. 387, 394 (1995). The Board applies a totality of the circumstances test to determine whether its objective reasonable doubt standard has been met, but the case law reveals that circumstantial evidence is rarely enough to satisfy the objective reasonable doubt test. See id. at 394 n.33 (citing Walkill Valley Gen. Hosp., 288 N.L.R.B. 103, 107-09 (1998) (holding that high employee turnover, decreasing union membership, and filing of a decertification petition signed by fewer than half the employees did not satisfy the objective reasonable doubt standard and justify the employer's unilateral withdrawal of recognition); Century Papers, Inc., 284 N.L.R.B. 103, 107-109 (1998) (holding that mere employee criticism of the union does not give rise to a good faith reasonable doubt as to the union's majority status); Petroseky Geriatric Village, Inc., 295 N.L.R.B. 800, 804 (1989) (stating that union inactivity is not enough to constitute an objective reasonable doubt about union support)).

17. See Allentown Mack, 522 U.S. at 366-71; infra notes 61-68 and accompanying text.

18. See infra notes 26-102 and accompanying text.

19. See infra notes 103-80 and accompanying text.
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Board's adoption and application of the polling standard.20 The Note then reviews the history of the polling standard controversy in the courts of appeals.21 A discussion of Allentown Mack's significance in light of the Board's historic relationship with the Court and the specific facts of the polling standard controversy follows.22 The Note asserts that the Court usurped the Board's role when it rewrote the polling standard23 and considers allegations that the Board regularly disguises policymaking as factfinding.24 Finally, the Note contends that judicial review of the sort practiced by the Court in Allentown Mack may prove more costly than beneficial.25

On December 20, 1990, Mack Trucks, Inc. sold its Allentown, Pennsylvania factory branch to managers of the factory.26 The managers formed Allentown Mack Sales, Inc. and hired thirty-two of the factory's forty-five former employees.27 Prior to the sale of the factory, Local Lodge 724 of the International Association of Machinists and Aerospace Workers, AFL-CIO, represented the employees.28 Both before and after the sale, at least eleven Mack employees made statements indicating that the union had lost support among the workers.29 Of those employees, eight made statements during job interviews suggesting that they no longer supported the union.30 Three employees made comments essential to the Court's resolution of the case: (1) Ron Mohr, a union official, informed one of the managers that if a vote were taken, the union would lose;31 (2) Kermit Bloch told a manager that he was certain the entire night shift did not support the union;32 and (3) Dennis Marsh said to a manager that the union did not adequately represent his interests for the amount of dues he paid.33

On January 2, 1991, the incumbent union, pursuant to beginning negotiations for a new contract, requested that Allentown Mack

20. See infra notes 181-90 and accompanying text.
21. See infra notes 191-235 and accompanying text.
22. See infra notes 236-69 and accompanying text.
23. See infra notes 236-58 and accompanying text.
24. See infra notes 259-64 and accompanying text.
25. See infra notes 268-69 and accompanying text.
27. See id.
28. See id. at 361-62.
29. See id. at 362, 369.
30. See id. at 362.
31. See id.
32. See id. The entire night shift consisted of five or six employees. See id.
33. See id. at 369.
recognize it as the employees' collective bargaining representative. Allentown Mack declined to extend recognition, citing a "'good faith doubt'" as to the union's majority status. After informing the union that it intended to poll employees to determine the level of support for the union, the corporation conducted the poll on February 8, 1991. The union lost by a vote of nineteen to thirteen and subsequently filed an unfair labor practices charge with the NLRB.

An administrative law judge ("ALJ") found that Allentown Mack was a successor employer to Mack and was therefore obligated to bargain with the union. Allentown Mack's successor status also entitled the union to a rebuttable presumption of continuing support. Nevertheless, the ALJ excluded the testimony of Ron Mohr, Kermit Bloch, and Dennis Marsh because of its questionable reliability. Based on the remaining evidence, the ALJ ruled that the corporation violated the National Labor Relations Act ("NLRA" or "Act") when it conducted its poll because it did not have an objective reasonable doubt about the union's majority status. The NLRB adopted the ALJ's findings and ordered Allentown Mack to recognize the union.

34. See id. at 362.
36. See id.
37. See id. at 362-63.
38. A "successor employer" is one who has purchased or assumed a business and has become liable for the labor obligations of its predecessor. See B. Glenn George, Successorship and the Duty to Bargain, 63 NOTRE DAME L. REV. 277, 277 (1988). Determining whether an employer is a successor employer can be difficult given "the almost unlimited variations of business transfers in which the issue can arise." Id. When a change in ownership is effectuated by a simple stock purchase "without an intervening break or change in operations," a new employer's liability for its predecessor's labor obligations is easiest to establish. Id. When, however, merger or acquisition of a company's assets results in significant changes in "the size, scope or direction of the enterprise," a new employer's liability is more difficult to establish. Id. at 278.
40. See id.
41. See id. at 1207-08. The evidentiary presumptions and factual circumstances that led the ALJ to exclude this testimony are detailed infra notes 99-102 and accompanying text.
43. See Allentown Mack, 316 N.L.R.B. at 1208. The ALJ held that Allentown Mack violated 29 U.S.C. § 158(a)(1) & (5). See Allentown Mack, 316 N.L.R.B. at 1208. Subsection (a)(1) forbids any attempt by employers "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed" them by the Act. 29 U.S.C. § 158(a)(1). Subsection (a)(5) imposes a duty on an employer to "bargain collectively with the representatives of his employees." Id. § 158(a)(5).
44. See Allentown Mack, 316 N.L.R.B. at 1199-1201.
On appeal, the D.C. Circuit enforced the Board's order.\textsuperscript{45} Allentown Mack had urged the court to hold that the Board’s polling standard was too strict and that under the appropriate lesser standard Allentown Mack’s poll was legal.\textsuperscript{46} Although admitting that it was not satisfied with the unitary standard, the court declined to replace the NLRB’s polling standard with a lower “judicially-created” standard.\textsuperscript{47} Turning to the evidence, the court held that Allentown Mack failed to satisfy the existing polling standard\textsuperscript{48} and agreed with the Board that the ALJ’s exclusion of Dennis Marsh’s testimony was consistent with NLRB precedent holding that anti-union sentiments expressed during job interviews are unreliable.\textsuperscript{49} The court also found that the exclusion of statements made by Kermit Bloch and Ron Mohr was consistent with the Board’s historic reluctance to give credence to unverified individual employee reports of “the antipathy of other employees toward their union.”\textsuperscript{50}

The Supreme Court granted Allentown Mack’s request for certiorari and, in an opinion authored by Justice Scalia and joined by a shifting majority of Justices, reversed the D.C. Circuit.\textsuperscript{51} The Court held that the Board’s polling standard was rational,\textsuperscript{52} that the Board had incorrectly interpreted its own standard,\textsuperscript{53} and that the Board’s determination that Allentown Mack lacked an objective reasonable doubt about the union’s majority status was not supported by substantial evidence.\textsuperscript{54} The Court proceeded to condemn the Board’s alleged practice of subtly altering its rules through adjudication rather


\textsuperscript{46} See id. at 1485. Three other circuits had held previously that the Board’s polling standard was too high and had substituted in its place a “substantial, objective evidence” test. Mingtree Restaurant, Inc. v. NLRB, 736 F.2d 1295, 1299 (9th Cir. 1984); Thomas Indus., Inc. v. NLRB, 687 F.2d 863, 867 (6th Cir. 1982); NLRB v. A.W. Thompson, Inc. 651 F.2d 1141, 1145 (5th Cir. Unit A Sept. 1981). For a discussion of these decisions and the substantial, objective evidence test, see infra notes 191-226 and accompanying text.

\textsuperscript{47} See Allentown Mack, 83 F.3d at 1487.

\textsuperscript{48} See id. at 1487-88.

\textsuperscript{49} See id. at 1488 (citing Middleboro Fire Apparatus, Inc., 234 N.L.R.B. 888, 894, enforced, 590 F.2d 4, 9 (5th Cir. 1978)). The court also noted that Board precedent does not allow an employee's expressions of mere dissatisfaction with the quality of union representation to be treated as opposition to the union. See id. (citing Destileria Serralles, Inc., 289 N.L.R.B. 51, 52 (1988), enforced, 882 F.2d 19 (1st Cir. 1989)).

\textsuperscript{50} Id. (citing Westbrook Bowl, 293 N.L.R.B. 1000, 1001 n.11 (1989); Louisiana-Pacific Corp., 283 N.L.R.B. 1079, 1080 n.6 (1987); Sofco, Inc., 268 N.L.R.B. 159, 160 n.10 (1989)).

\textsuperscript{51} See Allentown Mack, 522 U.S. at 360, 380.

\textsuperscript{52} See id. at 363-66; infra notes 56-60 and accompanying text.

\textsuperscript{53} See Allentown Mack, 522 U.S. at 366-67; infra notes 61-64 and accompanying text.

\textsuperscript{54} See Allentown Mack, 522 U.S. at 367-71; infra notes 65-68 and accompanying text.
than by promulgating policy changes through rulemaking.\textsuperscript{55}

The Court rejected Allentown Mack's argument that the NLRB's unitary standard was irrational.\textsuperscript{56} The corporation had argued that the NLRB's standard failed to provide employers with any legal incentive to poll because the same reasonable doubt standard applied to polling, Board-supervised RM elections, and unilateral withdrawals of recognition by employers.\textsuperscript{57} While admitting that the NLRB's unitary standard for polling, elections, and withdrawals was "in some respects a puzzling policy," the Court nevertheless concluded that the standard was neither irrational nor capricious within the meaning of the Administrative Procedure Act ("APA").\textsuperscript{58} The Court offered two reasons why an employer might want to poll employees even when it has the good faith doubt required for withdrawal of recognition. First, an abrupt withdrawal of recognition could antagonize employees.\textsuperscript{59} Second, the likelihood of being charged with an unfair labor practice is significantly lower for polling than for withdrawal.\textsuperscript{60}

Despite holding that the unitary standard is not irrational, the Court took issue with the NLRB's definition and application of the reasonable doubt standard in the instant case.\textsuperscript{61} At oral argument, the NLRB had asserted that "doubt" means either "uncertainty" or "disbelief" and that it is the latter definition that the Board applies to its reasonable doubt polling standard.\textsuperscript{62} After consulting several dictionaries, the Court concluded that uncertainty, not disbelief, is the proper definition of doubt.\textsuperscript{63} As reformulated by the Court, the correct standard in polling cases is whether a reasonable jury could find that an employer had a reasonable uncertainty about the union's majority status when the employer polled its employees.\textsuperscript{64}
The Court then reviewed the evidence presented using this standard and concluded that the Board's findings were not supported by substantial evidence. It noted that the NLRB itself had found that statements by seven of thirty-two employees (or roughly twenty percent of Allentown Mack's workforce) supported a good faith reasonable doubt as to the union's majority status. The Court also criticized the ALJ and the NLRB for discounting the statements of Kermit Bloch, Dennis Marsh, and Ron Mohr, describing the comments of all three men as probative. The Court held that the statements of the seven employees, taken together with those made by Bloch, Marsh, and Mohr, compelled a finding that Allentown Mack had a reasonable good faith doubt about the union's majority status.

In the final portion of its opinion, the Court considered Allentown Mack's assertion that the NLRB has in practice, though not in principle, forsaken the good faith doubt test in favor of a strict head count test. Without reaching a definitive conclusion on the validity of this assertion, the Court undertook to determine whether the NLRB has the authority to apply consistently a different standard from the one it has previously announced it would apply.

The Court began its analysis with the premise that the APA establishes a system of "reasoned decisionmaking" to govern an administrative agency's promulgation of rules and adjudication of cases arising under those rules. This system dictates that the process through which agencies such as the NLRB reach their results be "logical and rational." Applying a different standard than the one announced impedes not only consistent application of the law by subordinate agency actors but also effective judicial review of agency decisions. From these premises, the Court deduced that an agency's

65. See id. at 367-71.
66. See id. at 368. The Court, however, declined to hold that "20% first-hand-confirmed-opposition ... [to the union] ... is alone enough to require a conclusion of reasonable doubt." Id. at 369.
67. See id. at 369-70.
68. See id. at 371.
69. See id. at 372-80. Chief Justice Rehnquist and Justices O'Connor, Kennedy, and Thomas joined this portion of the majority opinion. See id. at 360.
70. The head count test requires an employer to prove that a majority of the employee bargaining unit has actually repudiated the union. See id. at 373.
71. See id. at 373-74.
73. Id.
74. See id. at 375.
application of a different standard than the one it articulates amounts to "unreasoned decisionmaking" in violation of the APA.\textsuperscript{75} The NLRB does not, the Court noted, promulgate its rules through the rulemaking process employed by every other administrative agency but rather develops them in the course of adjudicating individual cases.\textsuperscript{76} The Court determined that the APA's reasoned decisionmaking requirement applies to policymaking by adjudication\textsuperscript{77} and refused to allow the NLRB to modify "subtly and obliquely" its policies by consistently applying different standards than those it purports to apply.\textsuperscript{78} To hold otherwise, said the Court, would be to allow the NLRB to impede judicial review and political oversight by disguising policymaking as factfinding.\textsuperscript{79}

The Court pointed out that the NLRB is free to adopt a more rigorous standard for polling than the reasonable doubt standard if it does so "forthrightly and explicitly."\textsuperscript{80} Similarly, the Board can adopt counterfactual evidentiary presumptions that would be subject to judicial review for their reasonableness.\textsuperscript{81} Absent such forthright and explicit presumptions, however, the NLRB "must draw all the inferences that the evidence fairly demands."\textsuperscript{82}

Chief Justice Rehnquist dissented from the majority's view that the Board's unitary standard is rational.\textsuperscript{83} He began by examining the text of the NLRA in search of support for the Board's position and concluded the NLRA does not address polling.\textsuperscript{84} Because the Act is silent on polling, the Chief Justice located any authority that the Board might have to regulate polling in the NLRA's general provision prohibiting employer practices that "'interfere with, restrain, or coerce employees in the exercise' of their right to bargain collectively."\textsuperscript{85} In his estimation, the Board had failed to demonstrate how polling done in accordance with procedural safeguards, and

\textsuperscript{75} Id.
\textsuperscript{76} See id. at 374; infra notes 123-27 and accompanying text.
\textsuperscript{77} See Allentown Mack, 522 U.S. at 374.
\textsuperscript{78} Id. at 376.
\textsuperscript{79} See id.
\textsuperscript{80} Id. at 378.
\textsuperscript{81} See id.
\textsuperscript{82} Id.
\textsuperscript{83} See id. 380 (Rehnquist, C.J., concurring in part and dissenting in part).
\textsuperscript{84} See id. at 382 (Rehnquist, C.J., concurring in part and dissenting in part).
\textsuperscript{85} Id. (Rehnquist, C.J., concurring in part and dissenting in part) (quoting 29 U.S.C. § 158(a)(1) (1994)). The NLRB had argued that the statutory basis for its authority to regulate polling is found in 29 U.S.C. § 158(a)(5), which makes it an unfair labor practice for an employer to refuse to bargain collectively with its employees' representatives. See Allentown Mack, 522 U.S. at 382 n.1.
without overt coercion, violated the NLRA.86

The Chief Justice further noted that the disparate effects which polling, RM elections, and unilateral withdrawals of recognition have on the workplace make the application of a unitary standard to all three practices irrational.87 The Board's rationale for the unitary standard is that it promotes the NLRA's goal of peaceful relations between employers and employees.88 Polling and withdrawal, however, have "dramatically different effects" on the workplace.89 A unilateral withdrawal of recognition creates a significantly greater disturbance in the workplace than polling does.90 Consequently, the Chief Justice maintained, the standard for assessing the propriety of withdrawals should be higher.91

Dissenting in part, Justice Breyer agreed with Justice Scalia that the NLRB's unitary standard is not irrational, yet disagreed with the majority's holding that the agency's findings were not supported by substantial evidence.92 He criticized the majority for ignoring evidentiary presumptions that the Board has developed to guide ALJs in their application of the good faith doubt standard.93 He also cited precedent to bolster his argument that the Court may upset a Board action only if the Board "'misapprehended or grossly

86. See Allentown Mack, 522 U.S. at 383 (Rehnquist, C.J., concurring in part and dissenting in part).
87. See id. at 384-85 (Rehnquist, C.J., concurring in part and dissenting in part).
88. See id. at 381 (Rehnquist, C.J., concurring in part and dissenting in part).
89. Id. at 385 (Rehnquist, C.J., concurring in part and dissenting in part).
90. See id. (Rehnquist, C.J., concurring in part and dissenting in part).
91. See id. (Rehnquist, C.J., concurring in part and dissenting in part); see also Allentown Mack Sales & Serv., Inc. v. NLRB, 83 F.3d 1483, 1486 (D.C. Cir. 1996) (stating that the standard for withdrawing union recognition should be higher than that for polling), rev'd, 522 U.S. 359 (1998). The Chief Justice also suggested that the NLRB's polling standard might violate an employer's First Amendment right to solicit employee views. See Allentown Mack, 522 U.S. at 386-88 (Rehnquist, C.J., concurring in part and dissenting in part). Citing a number of cases in support of this view, he concluded that "the Board must allow polling where it does not tend to coerce or restrain employees." Id. at 388 (Rehnquist, C.J., concurring in part and dissenting in part) (citing NLRB v. Gissel Packing Co., 395 U.S. 575, 616-19 (1969); Thomas v. Collins, 323 U.S. 516, 537 (1945); NLRB v. Virginia Elec. & Power Co., 314 U.S. 469, 477 (1941)). This argument is potentially significant because, to the extent that polling cases involve freedoms protected by the First Amendment, the judiciary may not be obliged to defer to the Board's findings of fact. See Note, Deference to Legislative Fact Determinations in First Amendment Cases After Turner Broadcasting, 111 HARV. L. REV. 2312, 2314 (1998) (remarking that existing precedent gives the courts authority to review independently facts giving rise to agency adjudications when First Amendment rights are at stake).
92. See Allentown Mack, 522 U.S. at 388 (Breyer, J., concurring in part and dissenting in part).
93. See id. at 388-89 (Breyer, J., concurring in part and dissenting in part).
Justice Breyer objected to the majority's treatment of the Board's unitary standard in part because it omitted the phrase "objective considerations" from its analysis of the NLRB's reasonable doubt polling standard. This phrase is important because it denotes, inter alia, rules of evidence that the Board applies to cases involving employer polling, RM elections, and withdrawals of recognition. According to Justice Breyer, the Court, rather than defer to the Board's "specialized knowledge of the workplace," chose to ignore these "[k]ey words of a technical sort" in its interpretation of the Board's unitary standard, substituting instead its "common understanding of human psychology" for the NLRB's expertise. Justice Breyer described the Court's refusal to view the evidence in accordance with the NLRB's interpretation of its own rule as a departure from "settled principles permitting agencies broad leeway to interpret their own rules."

After expressing his disagreement with the majority's treatment of the unitary standard, Justice Breyer reviewed the evidence in light of the Board's relevant rules of evidence to determine what evidence qualified as "objective considerations." Rather than surreptitiously plotting to make policy under the guise of factfinding, the Board, Justice Breyer concluded, merely followed its rules of evidence in resolving the issues of the case—rules that the Court ignored in its evaluation of the evidence. Echoing the D.C. Circuit's reasoning, Justice Breyer argued that the exclusion of Dennis Marsh's statement was rooted in the NLRB's rule that employee statements made during job interviews with employers interested in a nonunionized workforce reveal nothing about the employees' real attitudes regarding the unions. Likewise, the exclusion of Kermit Bloch's statement was supported by the NLRB's rule that a statement made by one employee purporting to portray the views of other employees is not "'objective' within the meaning of the 'objective reasonable doubt' standard."

Justice Breyer contended that, regardless of

94. Id. at 389 (Breyer, J., concurring in part and dissenting in part) (quoting Universal Camera Corp. v. NLRB, 340 U.S. 474, 491 (1951)).
95. See id. (Breyer, J., concurring in part and dissenting in part).
96. Id. (Breyer, J., concurring in part and dissenting in part).
97. Id. (Breyer, J., concurring in part and dissenting in part).
98. See id. at 390-97 (Breyer, J., concurring in part and dissenting in part).
99. See id. at 392 (Breyer, J., concurring in part and dissenting in part) (citing Middleboro Fire Apparatus, Inc., 234 N.L.R.B. 888, 894, enforced, 590 F.2d 4 (5th Cir. 1978)).
100. Id. at 393-94 (Breyer, J., concurring in part and dissenting in part) (quoting
whether Ron Mohr's statement should have been admitted, the ALJ was well within his authority when he found that Allentown Mack did not meet the NLRB's objective reasonable doubt standard, even in light of other evidence.  

A proper understanding of the issues involved in *Allentown Mack* requires an examination of the scope of the NLRB's authority under the NLRA and the posture the Court has traditionally adopted vis-à-vis that authority. Congress passed the NLRA in 1935 in part as an attempt to end "the disruption of industry by labor-management disputes." Although Congress has twice amended it substantially, the Act continues to protect the rights of employees to join labor organizations and bargain collectively through their chosen representatives. The NLRA also established the NLRB, investing the Board with certain powers, including the powers to remedy unfair labor practices and to make, amend, and rescind any rules.

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101. Allentown Mack argued to the D.C. Circuit that Mohr's statements were admissible because Mohr was a union official and the Board has held that an employer may rely in certain circumstances on a union official's admission that a union lacks majority support. See Allentown Mack Sales & Serv., Inc. v. NLRB, 83 F.3d 1483, 1488 (D.C. Cir. 1996) (citing Universal Life Ins., 169 N.L.R.B. 1118, 1119 (1968)), rev'd, 522 U.S. 359 (1998). The D.C. Circuit held, however, that the ALJ had adduced facts that deprived Mohr's statements of "sufficient indicia of reliability" and had therefore properly excluded it. *Id.* The ALJ excluded Mohr's statement for several reasons. Mohr made the statement prior to the sale of the factory. See Allentown Mack Sales & Serv., Inc. 316 N.L.R.B. 1199, 1207 (1995), *enforced*, 83 F.3d 1483 (1996), *rev'd*, 522 U.S. 359 (1998). When he made it, he was referring to a Mack bargaining unit of 32 employees, only 23 of whom were hired by Allentown Mack (that is, his statement did not purport to convey the views of all Mack employees, and not all of those employees whose views he did purport to represent were subsequently hired by Allentown Mack). See *id.* at 1208. Moreover, Mohr himself did not oppose the Union. See *id.*

102. See *Allentown Mack*, 522 U.S. at 397 (Breyer, J., concurring in part and dissenting in part).


104. Congress passed the Taft-Hartley amendments in 1947 in an effort to mitigate labor's perceived excesses under the original Act. See *1 HARDIN, supra* note 103, at 35, 39. Among other things, Taft-Hartley split the prosecutorial and adjudicatory functions of the NLRB. See *GOULD, supra* note 14, at 30. The General Counsel heads the prosecutorial side, while a five-member board hears and decides cases. See *id.* The Landrum-Griffin amendments, passed in 1959, attempted to reduce union corruption. See *id.* at 52.


106. See *id.* § 153.

107. See *id.* § 160(a). The language of this section is somewhat misleading. The NLRB can "order" an employer or labor organization to cease an unfair labor practice, but the only way the NLRB can compel a recalcitrant party to obey the order is to seek
enforcement of the order in a court of appeals. See id. § 160(e).

108. See id. § 156.

109. See id. § 160(f). Section 160(f) provides:
Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice ... was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia.

Id.

110. See infra notes 111-22 and accompanying text.


112. For an explanation of the Seminole Rock principle, see supra note 4 and accompanying text.

113. 512 U.S. 504 (1994). Justice Kennedy authored the majority opinion. See id. at 505.

114. See infra notes 115-22 and accompanying text.

115. The Social Security Act authorizes the Secretary of Health and Human Services to issue regulations that define reimbursable costs. See 42 U.S.C. § 1395x(v)(1)(A) (1994). Acting pursuant to this authority, the Secretary has declared that hospitals may be reimbursed for the costs of "approved educational activities." 42 C.F.R. § 413.85(a)(1) (1998).

116. The regulation at issue was 42 C.F.R. § 413.85(c). This regulation recognizes that "[m]any [health care] providers engage in educational activities including training programs for nurses, medical students, interns and residents," all of which "contribute to the quality of patient care ... and are necessary to meet the community's needs." 42 C.F.R. § 413.85(c) (1998). Because these programs are so important, the regulation provides that Medicare "will participate ... in the support of these activities." Id.

This reimbursement policy is limited by the regulation's community support principle and anti-distribution clause. See id. The community support principle derives from the regulation's statement that "the costs of such educational activities should be borne by the community." Id. Medicare will reimburse providers for educational activities of the kind listed above only "until communities undertake to bear these costs." Id. The regulation's anti-distribution clause prohibits providers from being reimbursed for "increased costs resulting from redistribution of costs from educational institutions or units to patient care institutions or units." Id.

and regulations necessary to carry out the NLRA's provisions. The NLRA affords parties who lose a case before the Board a statutory right to appeal the decision to the federal courts of appeals. This appeal of right raises the question of what deference, if any, the courts owe to the Board's decisions.

The answer lies in the APA. It authorizes courts to overturn an administrative agency's action only if the action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Consistent with this policy of judicial deference, the Seminole Rock principle, as expressed in Thomas Jefferson University v. Shalala, requires federal courts to defer substantially to an agency's interpretation of the rules it promulgates pursuant to the NLRA. At issue in Thomas Jefferson was whether the Secretary of Health and Human Services correctly interpreted a challenged regulation.
to mean that the petitioner was not entitled to reimbursement for certain costs incurred by the petitioner’s graduate medical education programs.\textsuperscript{117} The Court cited the APA and prior decisions as authority for the proposition that the courts must give “substantial deference” to an agency’s interpretation of its own regulations.\textsuperscript{118} Under the “substantial deference” standard of review, a court may not substitute its own interpretation of an agency’s regulation for that of the agency merely because the court’s interpretation better serves the “regulatory purpose.”\textsuperscript{119} Indeed, as explained by the Court, “substantial deference” dictates that an agency’s interpretation of its own regulations be given “‘controlling weight unless it is plainly erroneous or inconsistent with the regulation.’”\textsuperscript{120} Turning to the facts of the case, the Court upheld the Secretary’s denial of petitioner’s claim, holding that the Secretary’s actions were predicated on an interpretation of the regulation’s anti-redistribution clause that was neither erroneous nor inconsistent with the regulation’s language.\textsuperscript{121} \textit{Thomas Jefferson}, then, limits courts’ power to invalidate an agency’s interpretation of its own regulation when the interpretation is neither “‘plainly erroneous [n]or inconsistent with the regulation.’”\textsuperscript{122}

Regarding the NLRB, the deference question has been complicated by the Board’s unique approach to rulemaking. Most

\begin{itemize}
\item \textsuperscript{117} See \textit{Thomas Jefferson}, 512 U.S. at 512-13. Between 1974 and 1983, Thomas Jefferson University Hospital had sought and received reimbursement from Medicare for salary-related graduate medical education (“GME”) costs. See id. at 509. Subsequently, however, the hospital sought reimbursement for nonsalary-related GME costs that it had previously borne without seeking reimbursement from Medicare. See id. at 510. The Secretary denied reimbursement after finding that to reimburse the hospital for nonsalary-related GME costs would violate § 413.85(c)’s anti-distribution clause and community support principle because these principles prohibited reimbursement for costs previously and historically borne by the hospital. See id. at 511.

\item \textsuperscript{118} See id. at 512 (citing Martin v. Occupational Safety and Health Review Comm’n, 499 U.S. 144, 150-51 (1991); Lyng v. Payne, 476 U.S. 926, 939 (1986); Udall v. Tallman, 380 U.S. 1, 16 (1965)).

\item \textsuperscript{119} See id.

\item \textsuperscript{120} Id. (quoting Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945)); see also Tallman, 380 U.S. at 16-17 (1965) (quoting the same language from \textit{Seminole Rock}). Such deference is especially warranted, said the Court, where, as here, the regulation at issue is part of a highly complex regulatory scheme “in which the identification and classification of relevant ‘criteria necessarily require significant expertise and entail the exercise of judgment grounded in policy concerns.’” \textit{Thomas Jefferson}, 512 U.S. at 512 (quoting Pauley v. BethEnergy Mines, Inc., 501 U.S. 680, 697 (1991)).

\item \textsuperscript{121} See \textit{Thomas Jefferson}, 512 U.S. at 513. Because the Court upheld the Secretary’s interpretation of the anti-redistribution clause, it did not rule on the Secretary’s interpretation of the regulation’s community support principle. See id.

\item \textsuperscript{122} Id. (quoting Tallman, 380 U.S. at 17 (quoting \textit{Seminole Rock}, 325 U.S. at 414)).
\end{itemize}
administrative agencies separate their rulemaking and adjudicatory functions. One branch of the agency typically formulates rules in accordance with the procedures outlined in the APA, while the other branch hears and decides cases that arise under those rules. Rather than employ the rulemaking procedures detailed in the APA, the Board almost always formulates its policies through its adjudicatory function. In other words, it announces policy in the course of deciding individual cases. Criticized repeatedly for allowing its adjudicatory function to swallow its rulemaking function, the NLRB announces rules in cases to be applied prospectively without giving all of those potentially affected an opportunity to offer their input. This refusal to engage in rulemaking has often irritated the courts.

The Supreme Court first dealt squarely with the Board's predilection for rulemaking through adjudication in NLRB v. Wyman-Gordon Co. In Wyman-Gordon, the NLRB had ordered an employer to furnish the union with a list of employees prior to a certification election, deriving its power from its own precedent. The Court granted certiorari to decide whether the Board may

123. See generally 1 DAVIS & PIERCE, supra note 1, §§ 7.1-7.14, 8.1-8.6, at 287-401 (describing the legislative and adjudicatory functions of administrative agencies).

124. The APA prescribes several procedures that agencies must observe when exercising their rulemaking powers designed to provide notice and a chance for input to interested parties. See 5 U.S.C. § 553 (1994).

125. See Allentown Mack, 522 U.S. at 374; Flynn, supra note 16, at 391.

126. See, e.g., Flynn, supra note 16, at 392 (noting that commentators have "been almost universally critical of" the Board's refusal to engage in rulemaking); Cornelius J. Peck, A Critique of the National Labor Relations Board's Performance in Policy Formulation: Adjudication and Rule-Making, 117 U. PA. L. REV. 254, 260-63 (1968) (criticizing the Board's "persistent refusal to utilize its rule-making powers despite the urging of practitioners, academicians, and judges that it do so").

127. See Flynn, supra note 16, at 418-19. The Board's relations with the lower federal courts have been further complicated by the Board's persistent refusal to acquiesce to contrary circuit law. See, e.g., id. at 389 n.12; infra notes 214-26 and accompanying text (describing the Board's refusal to abandon the objective reasonable doubt test despite criticism from some courts of appeals).


129. See id. at 761-62 (plurality opinion). The rule relied upon by the Board in Wyman-Gordon was enunciated in Excelsior Underwear Inc., 156 N.L.R.B. 123, 1239-40 (1966). See Wyman-Gordon, 394 U.S. at 762. In Excelsior, the Board concluded that "basic fairness" requires employers to provide lists to unions with the names and addresses of employees eligible to vote in union elections. See Excelsior, 156 N.L.R.B. at 1239-40. Since Excelsior Underwear had no prior notice of the newly-created obligation to provide lists, the nascent rule was not applied to the company. Instead, the Board announced that the rule would be binding in future cases. See Excelsior, 156 N.L.R.B. at 1240 n.5, 1246; see also 1 DAVIS & PIERCE, supra note 1, § 6.8, at 269-72 (discussing Excelsior).
announce by adjudication rules that are to be applied prospectively.\textsuperscript{130} The Court upheld the Board's order, though no single rationale for the decision commanded a majority of Justices.\textsuperscript{131}

The plurality rejected the idea that the NLRB can formulate general policies through adjudication.\textsuperscript{132} The APA's rulemaking provisions were enacted "to assure fairness and mature consideration of rules of general application."\textsuperscript{133} According to the plurality, these provisions may not be circumvented by promulgating rules during adjudicatory proceedings.\textsuperscript{134} Nevertheless, the plurality upheld the Board's order on the grounds that the Board had the authority to subpoena an employee list under § 11(1) of the NLRA.\textsuperscript{135}

Concurring in the result, Justice Black disagreed with the plurality's assertion that the Board may make rules only by following the APA's rulemaking procedures.\textsuperscript{136} Administrative agencies, Justice Black remarked, must frequently formulate new rules to settle controversies to which no antecedent rule applies.\textsuperscript{137} Rules made in the course of adjudication guide future agency action much like rules

\footnotesize{\textsuperscript{130} See Wyman-Gordon, 394 U.S. at 764 (plurality opinion).}
\footnotesize{\textsuperscript{131} Justice Fortas wrote for the plurality and was joined by Chief Justice Warren and Justices Stewart and White. See id. at 761 (plurality opinion). Justice Black, joined by Justices Brennan and Marshall, concurred in the result. See id. at 769 (Black, J., concurring in the result). Justice Douglas dissented, see id. at 775 (Douglas, J., dissenting), as did Justice Harlan, see id. at 780 (Harlan, J., dissenting).}
\footnotesize{\textsuperscript{132} See id. at 764 (plurality opinion).}
\footnotesize{\textsuperscript{133} Id. (plurality opinion).}
\footnotesize{\textsuperscript{134} See id. (plurality opinion).}
\footnotesize{\textsuperscript{135} See id. at 768-69 (plurality opinion). Section 11(1) of the NLRB permits the Board to access "any evidence ... that relates to any matter under investigation or in question." 29 U.S.C. § 161(1) (1994). Professors Davis and Pierce criticize the plurality opinion in Wyman-Gordon as difficult to interpret because the conclusion that the order was valid seems to render meaningless all of the prior reasoning about the necessity for rulemaking. If an agency can use a "rule" announced in an adjudication as the sole basis for valid orders directing all others to engage in conduct that conforms to the "rule," such a "rule" would seem to have the same effect as an APA rule issued through notice and comment procedures.}
\footnotesize{\textsuperscript{1} DAvis & PIERCE, supra note 1, § 6.8, at 270. They go on, however, to argue that the plurality opinion in Wyman-Gordon is not quite the exercise in futility it first appears to be. The plurality's point is that the order addressed to Wyman-Gordon would be valid with or without the "rule" announced in Excelsior. The Excelsior "rule" did not depend for its validity on the resolution of any contested issue of material fact. The agency announced the "rule" in Excelsior solely because it comported with the agency's conception of fair electoral procedure. NLRB could have announced and applied the Excelsior "rule" for the first time in Wyman-Gordon.}
\footnotesize{\textsuperscript{136} See Wyman-Gordon, 394 U.S. at 769-70 (Black, J., concurring in the result).}
\footnotesize{\textsuperscript{137} See id. at 770-71 (Black, J., concurring in the result).}
promulgated under the APA's rulemaking procedures. Moreover, the APA "confer[s] on ... administrative agencies the power to proceed by adjudication ... and ... specifie[s] a distinct procedure by which this adjudicatory power is to be exercised." Turning to the text of the NLRA, Justice Black pointed out that it expresses no preference between rulemaking and adjudication as vehicles for promulgating rules. Thus, he concluded that the NLRA and APA confer on the Board the authority to decide whether to proceed by rulemaking or adjudication.

Not until NLRB v. Bell Aerospace Co. in 1974 did the Court recognize decisively the NLRB's power to make rules through adjudication. In Bell Aerospace, the Court reversed a Second Circuit decision holding that the Board could determine whether buyers are managerial employees only by invoking its rulemaking procedures.

138. See id. at 771 (Black, J., concurring in the result).
139. Id. (Black, J., concurring in the result).
140. See id. (Black, J., concurring in the result).
141. See id. at 772 (Black, J., concurring in the result); 1 DAVIS & PIERCE, supra note 1, § 6.8, at 271 (noting that Black's opinion "explicitly acknowledges the legitimacy of an agency decision to make new 'rules' solely through the process of adjudication").

Justices Douglas and Harlan each issued a dissent in Wyman-Gordon. See Wyman-Gordon, 394 U.S. at 775 (Douglas, J., dissenting); id. at 780 (Harlan, J., dissenting). The two Justices agreed that an agency does not adjudicate where, as in Excelsior, it announces a rule that is prospective only, and that any rule so announced is invalid. See id. at 777 (Douglas, J., dissenting); id. at 780 (Harlan, J., dissenting). Citing concerns about notice, Justice Douglas opined that because the rule in Excelsior was "a statement of far-reaching policy covering all future representation elections," the Board should have been compelled to subject the rule to the "public hearing prescribed by the [APA]." Id. at 777 (Douglas, J., dissenting). Justice Harlan argued that to permit the NLRB to enforce an invalid order of the sort contained in Excelsior would be to trivialize the APA's rulemaking provisions. See id. at 781 (Harlan, J., dissenting). The Justices nonetheless conceded that an agency may announce a rule in an order adjudicating a case and apply it in subsequent cases. See id. at 777 (Douglas, J., dissenting); id. at 780 (Harlan, J., dissenting).

143. See id. at 290. Whether buyers are "managerial employees" is an issue of some importance, at least to the buyers, since the NLRA does not cover managerial employees. See id. at 275. This "managerial employee" exception to the Act's protections is rooted in the Act's exclusion of supervisory employees from its purview. See 29 U.S.C. § 152(3) (1994). The Act defines "supervisor" as follows:

The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Id. § 152(11). The Board deems managerial employees to be supervisors within the meaning of § 152(11) because they "are in a position to formulate, determine and effectuate management policies." Ford Motor Co., 66 N.L.R.B. 1317, 1322 (1946). For
After reviewing prior case law, the Court determined that the Board is free to promulgate labor policy through either its adjudicatory or rulemaking function and that the choice of which to use is left to the Board's discretion.144

Despite its willingness to allow the Board to announce rules through adjudication, the Court has sometimes shown little respect for the rules themselves. In general, the Court has deferred to the Board's findings of fact;145 however, at one time the Court tended to substitute its judgment for the Board's on legal questions.146 In _NLRB v. Radio & Television Broadcast Engineers Local 1212_,147 the Court rejected the Board's longstanding interpretation of its duties under § 10(k) of the NLRA.148 This section directs the NLRB to "hear and determine the dispute out of which [an] unfair labor practice shall have arisen."149 The issue in _Radio & Television

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144. See _Bell Aerospace_, 416 U.S. at 295. The Court came close to distorting the Wyman-Gordon decision in its review of precedent. First, it ignored the fact that a majority of Justices did not agree on the Board's authority to make policy by adjudication. More particularly, it ignored parts of the plurality opinion contesting the Board's authority to make policy through adjudication. Instead, the Court rather misleadingly quoted Justice Fortas's admission that adjudicated cases "'generally provide a guide to action that the agency may be expected to take in future cases.'" _Id._ at 294 (quoting _Wyman-Gordon_, 394 U.S. at 766 (plurality opinion)). This admission was hardly a ringing endorsement of rulemaking by adjudication.

Despite this disingenuity, _Bell Aerospace_ is apparently the last word on the issue of agency rulemaking by adjudication. See 1 _DAVIS & PIERCE, supra_ note 1, § 6.8, at 272-73 ("The [Supreme] Court has not even suggested that a court can constrain an agency's choice between rulemaking and adjudication in any opinion since _Bell Aerospace._").

145. The NLRA dictates as much; when a Board decision is reviewed by a federal court, the "findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive." 29 U.S.C. § 160(e). The _APA_ makes the substantial evidence test applicable to all formal agency findings, whether adopted through adjudication or rulemaking. See 5 U.S.C. § 706(2)(E); 2 _DAVIS & PIERCE, supra_ note 1, § 11.2, at 176.

Through Justice Frankfurter, the Court provided the definitive explication of § 706(2)(E) in _Universal Camera Corp. v. NLRB_, 340 U.S. 474 (1951). Prior to _Universal Camera_, some courts had interpreted the substantial evidence test to require the exclusion of any evidence inconsistent with agency findings of fact. See _id._ at 487-88; 2 _DAVIS & PIERCE, supra_ note 1, § 11.2, at 176. The Court rejected this interpretation of § 706(2)(E), holding that "'[t]he substantiality of evidence must take into account whatever in the record fairly detracts from its weight." _Universal Camera_, 340 U.S. at 488. In other words, the courts must consider the "whole record" when applying the substantial evidence test. See _id._

146. See _2 HARDIN, supra_ note 103, at 1891 (noting that "many courts tended to substitute their judgment for the Board's if they found the Board in error on a legal issue").


148. See _id._ at 586.

149. 29 U.S.C. § 160(k).
Broadcast Engineers was whether § 10(k) requires the Board to resolve a dispute between two unions when that dispute is the underlying cause of an unfair labor practices charge filed by an employer against one of the unions. Relying on its prior cases interpreting § 10(k), the Board simply ordered the union against which the charge was brought to cease striking. The Court interpreted the Board’s duties under § 10(k) more broadly, however, and held that § 10(k) authorized and obligated the Board to settle the underlying dispute between the two unions. The Court thus overruled the Board’s own interpretation of its duties under the NLRA.

NLRB v. Gissel Packing Co. signaled the beginning of a more deferential approach by the Court to the Board’s resolution of legal issues. At issue in Gissel was whether the NLRB may, as a remedy for serious and pervasive unfair labor practices, order an employer to bargain with a union whose representative status derives solely from union authorization cards acquired from a majority of employees. The employers argued that the Board could compel bargaining only after a certification election in which the unions proved victorious because Board-supervised elections are the preferred means of establishing majority support for a union. The Board ordered the employers to cease and desist the unfair labor practices and to bargain with the unions. A unanimous Court upheld the Board’s order. The Court agreed with the Board that the employers’ behavior had destroyed the opportunity for certification elections and

150. See Radio & Television Broad. Eng’rs, 364 U.S. at 578.
151. See id. at 578.
152. See id. at 579.
153. 395 U.S. 575 (1969). Chief Justice Warren authored the Court’s opinion. See id. at 569. In Gissel, the Court consolidated four cases raising the same issue. See id.
154. See id. at 579. The tactics employed by the employers to weaken the drive for unionization included questioning employees about union activities, threatening to fire employees working towards unionization, and promising benefits to employees opposing unionization. See id. at 583.
155. See id. at 596. The NLRA outlines the steps to be followed for union certification. First, a petition must be filed by an employer or, if the employer refuses, by the employees. See 29 U.S.C. § 159(c)(1) (1994). The Board then investigates the petition to determine if a “question of representation affecting commerce exists.” Id. If such a question does exist, the Board “shall provide for an appropriate hearing upon due notice.” Id. Finally, “[i]f the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.” Id.
156. See Gissel, 395 U.S. at 585.
157. See id. at 615-16. The Court upheld the Board’s order in one case, but remanded the other three because the Board had failed to make findings of unlawful refusal to bargain in those cases. See id.
that the Board could therefore order them to bargain with the unions once authorization cards had been signed by a majority of employees.158

The Court continued this emerging policy of deference in *Beth Israel Hospital v. NLRB*159 by upholding the Board’s invalidation of a hospital’s rule that drastically restricted the areas of the hospital in which the union could solicit employee support.160 Recognizing that Congress has explicitly entrusted the NLRB with developing and applying the nation’s labor policy, the Court dismissed the hospital’s argument that the principle of limited judicial review does not apply to Board decisions.161 The Court delineated a narrow “judicial role” in labor policy: Courts may review rules adopted by the Board only for rationality and consistency with the NLRA.162 Moreover, the Board’s applications of its rules must be enforced, according to the majority in *Beth Israel*, “if supported by substantial evidence on the record as a whole.”163

In *NLRB v. Curtin Matheson Scientific, Inc.*,164 the Court offered a powerful endorsement of the Board’s authority under the NLRA to develop and apply labor policies. The issue in *Curtin Matheson* was whether an employer can have the good faith doubt required for withdrawing recognition of a union when the union is on strike and over half of the employer’s workers are replacement workers.165 Earlier in its history, the Board had adopted the presumption that replacement workers do not support unions.166 It later adopted the opposite presumption that replacement workers do support the union whose members they replace.167 In *Curtin Matheson*, the Board

158. See id. at 610-13 (citing NLRB v. Dahlstrom Metallic Door Co., 112 F.2d 756, 757 (2d Cir. 1940)); GOULD, supra note 14, at 82-83.


160. See id. at 488-89. The employer limited the distribution of union literature to certain employee locker rooms and restrooms. See id. at 486. The Board found that the employer’s “no distribution” rule violated the NLRA. See Beth Isr. Hosp., 223 N.L.R.B. 1193, 1199 (1976), enforced in part, 554 F.2d 477 (1st Cir. 1977), aff’d, 437 U.S. 483 (1978). The Court agreed: “We have long accepted the Board’s view that the right of employees to self-organize and bargain collectively [under the Act] necessarily encompasses the right effectively to communicate with one another regarding self-organization at the jobsite.” Beth Isr. Hosp., 437 U.S. at 491.

161. See Beth Isr. Hosp., 437 U.S. at 500-01 (citing Republic Aviation Corp. v. NLRB, 324 U.S. 793, 798 (1945)).

162. See id. at 501.

163. Id.


165. See id. at 777.

166. See id. at 779 (citing Stoner Rubber Co., 123 N.L.R.B. 1440, 1444 (1959)).

167. See id. at 780 (citing Cutten Supermarket, 220 N.L.R.B. 507, 509 (1975)).
refused to apply any presumption regarding union support among replacement workers and found the employer lacked the good faith doubt required for withdrawing union recognition. The Court approved of the NLRB's refusal to presume anything about whether replacement workers support the union. While acknowledging that the interests of replacement workers and union members are often diametrically opposed, the Court agreed with the Board's determination that economic necessity may cause a replacement worker to cross the picket line even though he supports the union. The Court emphasized that the Board has the "primary responsibility for developing and applying national labor policy" and stated that it will uphold any Board rule that is "rational and consistent" with the NLRA. This result will occur even when the rule "represents a departure from the Board's prior policy" and the Justices "would have formulated a different rule had [they] sat on the Board."

Justice Scalia issued a portentous dissent. Describing the NLRB's decision as "a counterfactual policy determination," he accused the Board of "disguis[ing] policymaking as factfinding . . . to escape the legal and political limitations to which policymaking is subject." Conceding that the Board is free to forbid rational inferences or to require nonrational inferences, Justice Scalia contended that the Board had done neither in this case. Rather, the Board had explicitly determined not to require any presumption about whether replacement workers support the union. After ostensibly eschewing any presumptions, however, the Board had

169. See Curtin Matheson, 494 U.S. at 777.
170. See id. at 789.
171. Id. at 786.
172. Id. at 787.
173. Id. As one observer notes, the Court upheld the Board's refusal to presume that replacement workers oppose the union "in the face of unanimous opposition in the circuits." Flynn, supra note 16, at 405.
174. See Curtin Matheson, 494 U.S. at 819 (Scalia, J., dissenting).
175. Id. at 817 (Scalia, J., dissenting).
176. Id. at 819 (Scalia, J., dissenting). This practice of disguising policymaking as factfinding to evade effective legislative and judicial oversight is precisely the type of adjudicatory legerdemain that Justice Scalia condemns in Allentown Mack. See supra notes 69-82 and accompanying text.
177. See Curtin Matheson, 494 U.S. at 816 (Scalia, J., dissenting).
refused to draw the inferences dictated by the facts of the case.\textsuperscript{179} Justice Scalia thought the facts of the case compelled a finding that the employer had a good faith reasonable doubt about union support since more than half of its employees were replacement workers with interests inimical to those of the striking workers.\textsuperscript{180}

The above history of the Board's relationship with the Supreme Court reveals a trend of increased judicial deference to the Board over time. The judiciary's treatment of the polling standard stands in marked contrast to this trend.

The Board first applied the unitary standard to employer polling in \textit{Montgomery Ward & Co.}\textsuperscript{181} There, the ALJ held that the company committed an unfair labor practice when it polled its employees.\textsuperscript{182} In reaching this decision, the ALJ accepted the view that an employer may poll its employees only when it entertains the kind of good faith doubt about a union's majority status necessary for an RM election or a withdrawal of recognition.\textsuperscript{183} If polling were otherwise unchecked, employers could repeatedly use polls to challenge the majority status of unions.\textsuperscript{184} Such activities would create a "recurrent state of turbulence" in labor relations.\textsuperscript{185} The Board affirmed the ALJ's decision, agreeing that an employer must have "objective considerations justifying a belief in the Union's lack of continuing majority status" before polling its employees.\textsuperscript{186}

The good faith reasonable doubt (or objective reasonable doubt) test has been criticized on a variety of grounds.\textsuperscript{187} The central criticism is that it is unclear what the standard requires of an employer. The Board's case-by-case approach creates a fluid standard that changes with the views of the Board and courts.\textsuperscript{188}

Some commentators argue that the Board will find a good faith doubt

\textsuperscript{179} \textit{See} \textit{Curtin Matheson}, 494 U.S. at 816 (Scalia, J., dissenting).
\textsuperscript{180} \textit{See id.} (Scalia, J., dissenting).
\textsuperscript{181} 210 N.L.R.B. 717 (1974).
\textsuperscript{182} \textit{See id.} at 717.
\textsuperscript{183} \textit{See id.} at 724.
\textsuperscript{184} \textit{See id.}
\textsuperscript{185} \textit{Id.}
\textsuperscript{186} \textit{Id.} at 717.
\textsuperscript{187} \textit{See generally} Joan Flynn, \textit{A Triple Standard at the NLRB: Employer Challenges to an Incumbent Union}, 1991 \textit{Wis. L. Rev.} 653 (arguing that the standard for RM elections should be lowered); Manuel, \textit{supra} note 12, at 913 (advocating the abolition of employers' ability to withdraw unilaterally recognition of unions).
\textsuperscript{188} \textit{See} Manuel, \textit{supra} note 12, at 921. This fluidity is problematic for the employer because it inhibits the employer's ability to predict whether the evidence it has gathered will satisfy the Board that it acted with a good faith reasonable doubt as to the union's majority status. \textit{See id.} at 922.
only where the employer's evidence also shows a loss of majority in fact.189 In other words, the Board has "collapsed the good faith doubt test into the loss of majority in fact test."190

The courts of appeals have been highly critical of the NLRB's unitary standard. The Fifth Circuit was the first circuit to address the polling standard directly. In *NLRB v. A.W. Thompson, Inc.*,191 the employer withdrew recognition from the union after conducting a poll, which revealed that a majority of employees did not support the union.192 The Board argued on appeal that the employer committed an unfair labor practice when it conducted the poll.193 The court interpreted the NLRB's polling standard to mean that an employer may conduct a poll only when it has the reasonable doubt requisite for withdrawal of recognition.194 According to the Fifth Circuit, the Board's standard makes polling useless;195 the standard ignores the fact that polling could be a useful tool when an employer sincerely doubts a union's majority status but lacks the objective evidence necessary for withdrawing recognition.196 The court rejected the objective reasonable doubt standard for polling in favor of a "substantial, objective evidence" test.197 This test, as articulated by the court, allows an employer who has not engaged in unfair labor practices to poll employees if there is substantial, objective evidence of a loss of union support insufficient to sustain a withdrawal of recognition.198 Additionally, the employer must give the union advance notice of the poll and then conduct it in accordance with the procedural safeguards that the Board set forth for pre-certification polls in *Strusknes Construction Co.*199 The court concluded, however,

189. *See* Flynn, *supra* note 187, at 679; Manuel, *supra* note 12, at 922. The Board maintains that the two tests are still distinct. *See*, e.g., Sofco, Inc., 268 N.L.R.B. 159, 159-60 (1983) (noting that the good faith doubt test, as opposed to the loss of majority in fact test, depends on the totality of circumstances).
191. 651 F.2d 1141 (5th Cir. Unit A Sept. 1981).
192. *See* id. at 1142.
193. *See* id. at 1143.
194. *See* id. at 1144.
195. *See* id.
196. *See* id. at 1145.
197. Id.
198. *See* id.
199. *See* id. *Strusknes Construction Co.*, 165 N.L.R.B. 1062 (1967), while permitting employers to conduct pre-certification polls at will, outlined procedures to be observed in pre-certification polls in an effort to prevent employer intimidation of employees. The *Strusknes* restrictions are: (1) the poll's purpose must be to determine whether the union enjoys majority support; (2) the employer must communicate that purpose to the employees; (3) the employer must give assurances against reprisal; (4) the employees must
that the employer in *A.W. Thompson* had failed to satisfy the substantial, objective evidence test because of its history of repeated unfair labor practices.\textsuperscript{200}

The substantial, objective evidence test established in *A.W. Thompson* was embraced by the Sixth Circuit in *Thomas Industries, Inc. v. NLRB.*\textsuperscript{201} In *Thomas*, the Board found that the employer committed an unfair labor practice when it polled its employees to determine the level of union support.\textsuperscript{202} The employer had argued that it had a good faith reasonable doubt when it conducted the poll because of "negative employee comments, employee resignations from the Union, resignations by Union officials, and a sharp decrease in the number of employees on Union dues check-off."\textsuperscript{203} The court agreed with the Fifth Circuit that the Board's unitary standard allows an employer to take a poll only where no poll is needed.\textsuperscript{204} The sole purpose of a poll under the unitary standard is to act as a "double-check" on the "employer's already sufficient evidence to refuse to bargain."\textsuperscript{205} The court determined that the evidence that the employer had offered was sufficient to satisfy the substantial, objective evidence test and refused to enforce the Board's order.\textsuperscript{206}

The Ninth Circuit addressed the polling standard controversy in
Mingtree Restaurant, Inc. v. NLRB.\(^{207}\) There, the NLRB had held that the employer polled its employees to determine the level of union support.\(^{208}\) The court characterized the Board's polling standard as "tantamount to an outright prohibition of employer-sponsored polls."\(^{209}\) Unconvinced by the Board's argument that a lower polling standard might result in widespread employer abuse of polling,\(^{210}\) the court reasoned that the Strusknes guidelines for pre-certification polling adequately protect employee interests in post-certification polling.\(^{211}\) Polls, according to the court, are "objective, minimally disruptive mechanism[s] for obtaining evidence of the level of union support."\(^{212}\) The Ninth Circuit proceeded to adopt the substantial, objective evidence test articulated in A.W. Thompson and Thomas.\(^{213}\)

The NLRB reaffirmed its commitment to its polling standard in \textit{Texas Petrochemicals Corp.}\(^{214}\) There, an employer polled its employees after receiving anti-union statements from twenty-three of 103 employees.\(^{215}\) The Board held that these statements alone did not satisfy the objective reasonable doubt standard.\(^{216}\) The Board excepted to the respective analyses of its polling standard by the three courts of appeals.\(^{217}\) Declaring that the NLRA's ultimate goal is to promote stability in collective-bargaining relationships,\(^{218}\) the Board cited the similar purposes and consequences of polling, RM elections, and withdrawals of recognition as the basis for the unitary standard.\(^{219}\) Polling, like elections and withdrawals of recognition, is potentially

\(^{207}\) 736 F.2d 1295 (9th Cir. 1984).
\(^{208}\) See id. at 1296. Mingtree Restaurant had previously withdrawn a representation petition after being advised that it would be dismissed for insufficient evidence of the union's loss of majority support. See id.\(^{209}\) Id. at 1297.
\(^{210}\) See id. at 1298.
\(^{211}\) See id. The Ninth Circuit explained:

In Strusknes, the Board stated that these guidelines, in the pre-recognition stage, would serve as a "warranty" to the employees that a poll would not have some unlawful object, contrary to the lawful purpose stated by the employer. We see no reason why they would not serve just as well as a warranty in the post-recognition situation.

\(^{212}\) Mingtree Restaurant, 736 F.2d at 1298.
\(^{213}\) See id. at 1299 (citing Thomas Indus., Inc. v. NLRB, 687 F.2d 863, 867-69 (6th Cir. 1982); NLRB v. A.W. Thompson, Inc., 651 F.2d 1141, 1145 (5th Cir. Unit A Sept. 1981)).
\(^{215}\) See id. at 1057-58.
\(^{216}\) See id. at 1058.
\(^{217}\) See id. at 1059-63.
\(^{218}\) See id. at 1061.
\(^{219}\) See id. at 1060-61.
disruptive of the collective-bargaining relationship and unsettling to the employees involved.\textsuperscript{220} Moreover, the "relative informality" of polls, as opposed "to the strict procedural formality of Board-conducted RM elections" is a reason for keeping the polling standard high.\textsuperscript{221} The NLRB criticized the courts of appeals for recognizing the disruptive effects of polling while at the same time lowering the polling standard.\textsuperscript{222}

The Board offered reasons why an employer might want to conduct a poll, rather than withdraw recognition of a union, under the unitary standard. First, an employer with a reasonable doubt about union support necessarily retains "an inherent uncertainty about whether the union has actually lost support."\textsuperscript{223} A poll provides more precise and reliable information about the union's support than does an employer's reasonable doubt.\textsuperscript{224} Second, a properly conducted poll minimizes damage to the employer-employee relationship and evinces the employer's good faith to its employees in a way that a sudden withdrawal of union recognition does not.\textsuperscript{225} Ultimately, then, the Board not only refused to acquiesce to the contrary views expressed by the courts of appeals about its polling standard, but it also adduced reasons for the rationality of the standard, one of which found its way into the Supreme Court's opinion in \textit{Allentown Mack}.\textsuperscript{226}

The D.C. Circuit's approach to the polling standard controversy in \textit{Allentown Mack} reflects that court's dislike of the Board's unitary standard. The court was critical of the Board's decision to apply the same standard to polling that it applies to RM elections and employer withdrawals of recognition and suggested that a tripartite standard might be the best approach.\textsuperscript{227} Nevertheless, the D.C. Circuit declined, unlike other circuits, to translate its policy preferences into

\begin{itemize}
\item \textsuperscript{220} See \textit{id.} at 1062.
\item \textsuperscript{221} \textit{Id.} at 1060.
\item \textsuperscript{222} See \textit{id.} at 1062.
\item \textsuperscript{223} \textit{Id.} at 1063.
\item \textsuperscript{224} See \textit{id.}
\item \textsuperscript{225} See \textit{id.}
\item \textsuperscript{226} The \textit{Allentown Mack} Court agreed that polling is potentially less dangerous to the employer-employee relationship than abrupt withdrawals of recognition. See \textit{Allentown Mack Sales & Serv., Inc. v. NLRB}, 522 U.S. 359, 365 (1998).
\item \textsuperscript{227} See \textit{Allentown Mack Sales & Serv., Inc. v. NLRB}, 83 F.3d 1483, 1487 (D.C. Cir. 1996), rev'd, 522 U.S. 359 (1998). The majority reasoned that, since the Board maintains that elections are the preferred method of testing union support, the standard for RM elections should be less demanding than that for polling. See \textit{id.} Likewise, the lack of procedural safeguards governing employer withdrawals of recognition led the court to hold that the standard for such withdrawals should be more demanding than that for polling. See \textit{id.}
\end{itemize}
Indeed, the D.C. Circuit took the other circuits to task for lowering the standard. It questioned the assumption entertained by the other courts that the polling standard must do more than make polling "only marginally useful to employers." Since the NLRA contains no provision specifically governing polling and because polling can disrupt and unsettle the workplace, the Board is free to restrict the use of polling as it sees fit. Therefore, the D.C. Circuit reasoned, the other courts should have deferred to the Board's expertise in labor matters and left the polling standard intact. The court further criticized the other circuits for the means they used to accomplish their objective of making the polling standard lower than the standard for employer withdrawals of recognition. While it might be true that the polling standard should be lower than the standard for withdrawing recognition, it does not follow that the polling standard should be lowered. Instead, the court suggested that its fellow circuits accomplish their objective by raising the standard for employer withdrawals of recognition.

The Supreme Court's opinion in Allentown Mack evinces the kind of blatant judicial policymaking of which the D.C. Circuit complained, though the Court's holding that the unitary standard is not irrational initially masks its overreaching. This first holding conforms to the APA's deference requirement. As Texas Petrochemicals, shows, the standard is based on policy considerations that can hardly be labeled irrational. The Board

228. Judge Sentelle dissented from the majority in Allentown Mack. See id. at 1489 (Sentelle, J., dissenting). Characterizing the Board's polling standard as an example of a law "divorced from logic and from the common sense of people who live under it," he decried the majority's acceptance of the Board's polling standard. Id. at 1489-90 (Sentelle, J., dissenting). The Board's application of its polling standard in Allentown Mack, he noted, resulted in the union's continued representation of the very employees that had rejected it 19 to 13 in the employer's poll. See id. at 1489 (Sentelle, J., dissenting). Judge Sentelle agreed with the other circuits that the Board's polling standard renders polling meaningless and after locating "no suggestion of unfairness" in the record and "overwhelming objective evidence" of the union's loss of majority support, he concluded that the Board reached the wrong decision in Allentown Mack. Id. at 1489-91 (Sentelle, J., dissenting).

229. See id. at 1486-87.
230. Id. at 1486.
231. See id.
232. See id. at 1487.
233. See id.
234. See id.
235. See id.
offered several justifications for the unitary standard in that case. The Board argued that polls, like RM elections and withdrawals of recognition, present "a challenge to the union in its role as representative." Moreover, all three activities are "unsettling to the employees involved." The Board also cited the nature of polls as a reason for the unitary standard: polls are essentially employer-initiated and controlled. Additionally, the NLRB does not directly supervise polls like it does RM elections. This distinction is important because employers often conduct polls in bad faith. Although the immediate effects of polling might be less cataclysmic than those of RM elections, the polling standard should remain at least as demanding as the standard for elections because of the real threat that employers will abuse polls. Whatever the merit of the individual reasons proffered by the Board for the unitary standard, the standard appears on balance to be neither capricious nor arbitrary. Consequently, the Court's conclusion that it was bound under the APA to apply the unitary standard to the facts of the case seems correct.

The mirage of deference that the Court's first holding creates evaporates when the Court substitutes its interpretation of the objective reasonable doubt standard for that of the Board's. Perhaps more disturbing than the Court's decision to replace the Board's interpretation with its own is the authority the Court cited as the basis for its interpretation—the dictionary. Accusing the Board of "linguistic revisionism," the Court replaced a "[k]ey [word] of a technical sort," developed by an agency with a specialized knowledge of labor relations, with an ordinary jury standard. The
Court's position amounts to a challenge to the Board's authority to give content to its rules in the course of deciding cases. Yet the judiciary has engaged in this very practice for centuries. One has but to browse through Black's Law Dictionary to find evidence that words often attain a legal significance that goes far beyond their literal meanings.\textsuperscript{247} A court articulates a rule. The contours of the rule are indefinite. Over time, the courts fill in these contours by applying the rule to the facts of particular cases.\textsuperscript{248} In \textit{Allentown Mack}, the Court seems to object to its own time-honored practice and to imply that the Board may announce rules by adjudication but may not interpret them through adjudication. This argument ignores that, if adjudication involves anything, it involves the interpretation of the dictionary definitions, rules of grammar, and canons of construction to derive the objective meaning of statutory words or phrases) that the Court has employed in recent years to dilute \textit{Chevron} deference by invalidating agency interpretations of statutes at \textit{Chevron}'s first-step. \textit{See id.} Hypertextualism occurs when a court invalidates an agency's statutory interpretation based on linguistic precision that does not really exist, or when a court, relying exclusively on the abstract meaning of a particular word or phrase, invalidates an agency interpretation even though other evidence strongly suggests that the legislature intended a meaning inconsistent with that which the court assigns. \textit{See id.} at 752.

The Court's decision to replace the Board's unitary standard in \textit{Allentown Mack} is an example of the latter type of hypertextualism applied in a \textit{Seminole Rock} context. The Court was correct that doubt is better defined as uncertainty rather than disbelief. \textit{See} \textit{Cambridge International Dictionary of English} 414 (1995) (defining "doubt" as "uncertainty about something, esp. about how good or true it is"); 1 \textit{Johnson's Dictionary of the English Language} (1819) (defining "doubt" as "1. Uncertainty of mind; suspense; undetermined state of opinion.... 2. Question; point unsettled.... 3. Scruple; perplexity; irresolution.... 4. Uncertainty of condition.... 5. Suspicion; apprehension of ill.... 6. Difficulty objected")}; \textit{The Oxford English Dictionary} 983 (2d ed. 1989) (defining "doubt" as "1.a. The (subjective) state of uncertainty with regard to the truth or reality of anything; undecidedness of belief or opinion.... b. The condition of being uncertain.... 2. A matter or point involved in uncertainty; a doubtful question; a difficulty.... 3.a. Apprehension, dread, fear.... b. A thing to be dreaded; danger, risk"). By lowering the Board's unitary standard solely on the "abstract meaning" of doubt, however, the Court ignored the policy considerations (such as the tendency of employers to conduct polls in bad faith) that led the Board to permit polling only in the limited instances where employers could satisfy its more rigorous standard.

\textsuperscript{247} Take, for example, the word "consideration." Most people would not define it as "[t]he inducement to a contract .... Some right, interest, profit or benefit accruing to one party, or some forbearance, detriment, loss, or responsibility, given, suffered, or undertaken by the other." \textit{Black's Law Dictionary} 306 (6th ed. 1990). While courts assign this definition as the meaning of "consideration," the \textit{American Heritage Dictionary} (2d ed. 1982) defines it as "1. Careful thought; deliberation. 2. A factor to be considered in forming a judgment or decision. 3. Thoughtful concern for others; solicitude. 4. A thought produced by considering .... 5. .... [R]ecompense. 6. \textit{Law}. Something promised, given, or done that has the effect of making an agreement a legally enforceable contract. 7. High regard.

\textsuperscript{248} \textit{See}, e.g., \textit{Oliver Wendell Holmes, The Common Law} 100-03 (Mark DeWolfe Howe ed., Little Brown & Co. 1963) (1881) (discussing the development of negligence principles in tort law).
rule pertinent to the case before the adjudicating body.

It might be argued that the Court's position amounts simply to a "plain statement" requirement. This argument is unsatisfactory given the Court's approach to the unitary standard. First, the Board's case law established clearly that the unitary standard was more demanding than the jury trial reasonable doubt standard. Neither the Court nor Allentown Mack disputed this assessment. True, the Board's interpretation of the unitary standard failed to tell employers exactly what they had to prove to satisfy it; however, this lack of precision is common to almost all legal rules. Consider the jury trial reasonable doubt standard, for instance. Case law implies that its meaning is not as clear-cut as the Court has suggested. Certainly the standard cannot be understood fully by looking up "reasonable" and "doubt" in an ordinary dictionary. Moreover, by basing its decision on semantics alone, the Court ignored completely the policies behind the Board's interpretation of the unitary standard. As Texas Petrochemicals shows, the Board's more demanding interpretation is grounded in policy considerations like stability in the workplace.

249. See supra note 16 and accompanying text.
250. Judicial attempts to define reasonable doubt are notable for their inadequacy. Perhaps the most famous attempt to define reasonable doubt is contained in the Massachusetts case, Commonwealth v. Webster, 59 Mass. 5 (Cush.) 295 (1850):

Then, what is reasonable doubt? It is a term often used, probably pretty well understood, but not easily defined. It is not mere possible doubt; because every thing relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the minds of jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge.

Id. at 320; see also WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., HANDBOOK ON CRIMINAL LAW § 8, 52 n.59 (1972) (noting this passage as the "most famous definition" of reasonable doubt). The evidentiary value of this definition is, to put it mildly, questionable. What, for instance, is a "moral certainty"?

Problems with defining reasonable doubt have led the Fourth Circuit to hold that district courts need not attempt to define the phrase when issuing instructions to the jury. See United States v. Williams, 152 F.3d 294, 298 (4th Cir. 1998) ("[E]fforts to define reasonable doubt are likely to confuse rather than clarify the concept . . . ."); United States v. Adkins, 937 F.2d 947, 950 (4th Cir. 1991) ("This circuit has repeatedly warned against giving the jury definitions of reasonable doubt, because definitions tend to impermissibly lessen the burden of proof."). This problem remains true even where the jury requests such a definition. As the court noted in United States v. Reives, 15 F.3d 42 (4th Cir. 1994):

If there is a definition that can clarify the meaning of reasonable doubt, common sense suggests that such a definition be offered to all juries, even those that do not venture a request. But until we find a definition that so captures the meaning of "reasonable doubt" that we would mandate its use in all criminal trials in this circuit, we cannot hold that it is error to refuse to give some definition.

Id. at 46.

251. See Texas Petrochemicals Corp., 296 N.L.R.B. 1057, 1062 (1989); supra notes 214-
The Court's approach undermines those considerations, and, in so doing, illustrates the dangers of divorcing text from context.

Whatever the wisdom of the Court's methodology, the Court's authority to rewrite the Board's standard is fairly doubtful. The *Seminole Rock* principle as expressed in *Thomas Jefferson* required the Court to defer substantially to the Board's interpretation of the reasonable doubt standard unless the Board's interpretation was plainly erroneous or inconsistent with the rule. The Court's determination in *Allentown Mack* that the Board's interpretation was inconsistent with the rule is premised on the Board's inability to give content to its rules through the adjudicatory process and unsupported by the policy reasons that the Board has given as the rationale for its interpretation.

The Court's application of its reformulated standard to the facts of *Allentown Mack* raises additional issues. Although it declared that the Board could "forthrightly and explicitly" adopt evidentiary presumptions, the Court proceeded to ignore two such rules in its evaluation of the evidence. In one breath the Court both upheld the Board's authority to enact evidentiary presumptions and disregarded those presumptions germane to the case before it. Because Congress charged the Board, not the courts, with developing and applying the national labor policy, the Court's actions seem inappropriate. The courts' experiences with labor disputes are extremely limited. Of the cases filed with the NLRB, only one percent makes it to federal court. The relatively limited experience that the federal courts have with labor issues argues strongly against judicial policymaking in this area. The *Allentown Mack* Court would have done well to remember Justice Frankfurter's counsel that administrative law is "law in the making" and that the courts should be "wary against the danger of premature synthesis."
To the extent that *Allentown Mack* might signal an era of more stringent judicial scrutiny of Board actions, undesirable consequences could result. The most obvious consequence is that labor law cases will take up a larger share of the judiciary's limited resources. Less obvious is that more stringent review of Board actions is unlikely to encourage the Board to make its rules more explicit. Ironically, the Court's treatment of the Board's unitary standard in *Allentown Mack* illustrates precisely why the Board is sometimes less than explicit in modifying preexisting rules: "The federal courts' tend to substitute their views for those of the Board—"deference be damned." This tendency to make, rather than simply review, labor policy means that more stringent judicial review of Board actions will only increase the Board's reluctance to formulate clear policies and discourage the promulgation of unambiguous rules. The early indicators from the circuit courts are that *Allentown Mack* will lead to more rigorous judicial review of NLRB actions.

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259. Flynn, *supra* note 16, at 433. As Professor Flynn explains:

The rulemaking agencies' treatment at the hands of the federal courts is hardly encouraging. To the contrary, their experience suggests that when presented with a clear policy "target," the courts are all too prone to substitute their views for those of the agency—deference be damned. A central problem is that doctrines of judicial review of agency action are extremely malleable; as with the canons of statutory construction, judges can generally find one that gets them where they want to go. The combination of the courts' tendency toward overreaching and these varied and flexible doctrines is so lethal...that whether the agency's policy stands or falls often turns on little more than the circuit panel's ideological bias.

260. See *Krent, supra* note 5, at 1230 (arguing that increased judicial review of administrative actions could result in fewer and more discretionary rules).

261. See *id.* at 1213-14 (contending that agencies are sensitive to judicial review and that increased judicial review will discourage agencies from promulgating rules).

262. See *Matthews Readymix, Inc.* v. NLRB, No. 97-1696, 1999 U.S. App. LEXIS 1159, at *8-*9 (D.C. Cir. Jan. 29, 1999); *Mid-America* v. NLRB, 148 F.3d 638, 643 (6th Cir. 1998). At issue in *Mid-America* was whether licensed practical nurses ("LPNs") employed by the nursing home were supervisors and therefore not covered by the NLRA. *See Mid-America*, 148 F.3d at 639. Though the LPNs performed a variety of supervisory functions, the Board found that these activities were strictly regulated by employer policy. *See id.* at 643. Relying on its rule that the mere performance of supervisory activities strictly regulated by employers does not make one a supervisor, the Board found that the LPNs were not supervisors within the meaning of the Act. *See id.* Conceding that the NLRB's rule is entitled to deference, the Sixth Circuit nevertheless vacated the Board's decision. *See id.* The court listed several supervisory activities that the LPNs performed without strict employer regulation, including evaluating nursing
Overly stringent judicial review could impinge greatly on the Board's ability to adapt its rules to changing circumstances—to exercise the very expertise that entitles its decisions to deference. Such judicially mandated inflexibility could make it more difficult for the Board to provide guidance to the ALJs charged with resolving the myriad and complex labor problems presented them. Thus, the cumulative effect of Allentown Mack might well be to increase, rather than decrease, the uncertainties in labor policy.

Regardless of its other effects, Allentown Mack's most immediate impact is to lower the standard that employers must satisfy before they may petition successfully for RM elections or unilaterally withdraw recognition from unions. Allentown Mack thus threatens to disrupt labor relations across the country. The Board, realizing the gravity of the situation, appears poised to overturn Celanese Corp. of America, the decision giving employers the right to unilaterally withdraw union recognition. Employers would then be left with RM elections as the only way they can attempt to rid themselves of unions.

Allentown Mack represents a deviation from the Supreme
Court's tradition of deference to Board decisions. The Court ignored the dictates of the APA and its own precedent when it rewrote the Board's polling standard. In so doing, the Court substituted its own policy preferences for those of the NLRB even though, like all the federal courts, it is poorly equipped to address labor law's highly complex issues. The Court revealed this inability in *Allentown Mack* by reaching a conclusion that is likely to produce, rather than reduce, uncertainties in our national labor policy. It is difficult to avoid the conclusion that the *Allentown Mack* Court should have heeded Curtin Matheson's admonition to refrain from substituting Board policies with those that the Justices "would have formulated had [they] sat on the Board."  

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268. Indeed, Congress was motivated in part to pass the NLRA because "[t]he case law demonstrated that the courts were not institutionally capable of formulating or implementing a workable labor policy." 1 HARDIN, supra note 103, at 3. The judiciary proved inadequate for several reasons. First, the multitudinous conflicts between labor and management resulting from the combinations of labor and capital brought about by the Industrial Revolution "called for broad legislative solutions." 1 Id. at 4. Second, those remedies that the judiciary did attempt to fashion for labor disputes proved "too inflexible . . . to effectuate whatever substantive standards the courts announced." 1 Id.