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INTRODUCTION

THE NATIONAL LABOR RELATIONS BOARD AND THE POLITICS OF LABOR LAW[†]

DAVID L. GREGORY*

The decade of the 1980's will be remembered as the most significant in the past half century for its profound impact on labor and employment law, theory, and practice. It is a decade of rapid transition, especially influenced by the political ideology of the Reagan Administration, the Burger Court, and the National Labor Relations Board (NLRB or Board). In August, 1981, the managerial tenor of labor relations for the decade was politically established when President Reagan ordered the discharge of thousands of striking air traffic controllers from federal employment.¹ Concomitantly, in 1981, the Supreme Court firmly set the decade's jurisprudential tone in favor of institutional employers, largely exempting unilateral ownership prerogatives from the statutory duty to bargain.²

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¹ The federal air traffic controllers' union called an illegal strike against their federal employer, the Federal Aviation Administration, after collective bargaining agreement negotiations had collapsed. The strike was actively supported by approximately 13,000 of the 16,400 air traffic controllers within the bargaining unit represented by PATCO. The strikers violated the express no-strike oath required for each federal employee prior to commencement of employment. See 5 U.S.C. § 3333 (1982). For comprehensive analysis of the PATCO strike and its legal ramifications, see Meltzer & Sunstein, *Public Employee Strikes, Executive Discretion, and the Air Traffic Controllers*, 50 U. CHI. L. REV. 731 (1983). See also S. ARONOWITZ, *WORKING CLASS HERO: A NEW STRATEGY FOR LABOR* 70 (1983) ("Relying on its economic power, the union failed to understand that Reagan was an ideologue speaking for a faction of capital prepared to reverse the legacy of the New Deal.").

² See *First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981). The Supreme Court stated:

We conclude that the harm likely to be done to an employer's need to operate freely in deciding whether to shut down part of its business purely for economic reasons outweighs the incremental benefit that might be gained through the union's participation in the decision, and we hold the decision itself is *not* part of Section 8(d)'s "terms and conditions"

Id. at 686. In February, 1984, the Court further expanded the scope of employer prerogatives, holding that the chapter 11 debtor-in-possession could unilaterally abrogate its collective bargaining agreement without prior court approval and without prior bargaining with the union. *NLRB v. Bildisco*, 465 U.S. 513 (1984). See Gregory, *Labor Contract Rejection in Bankruptcy: The Supreme Court's Attack on Labor in NLRB v. Bildisco*, 25 B.C.L. REV. 539 (1984). In June, 1984, however, these elements of the *Bildisco* decision were legislatively overruled, now requiring prior collective bargaining and court approval in order for the debtor in possession (employer) in bankruptcy to abrogate the labor contract. Bankruptcy Amendments and Federal Judgship Act of 1984, Pub. L. No. 98-353, § 541(a), 98 Stat. 390 (codified at 11 U.S.C. § 1113 (1984)). See Gregory, *Legal Developments Since NLRB v. Bildisco: Partial Resolution of Problems Surrounding Labor Contract Rejection in Bankruptcy*, 62 U. DEN. L. REV. 615 (1985).

If the ideologies of the Reagan administration and the Burger Court³ were the proverbial handwriting on labor's wall, the controversial decisions of the NLRB in 1984 and 1985 certainly provided many of the footnotes. Several of the thoughtful essays in this Annual Survey meticulously analyze these crucially important NLRB decisions.

Labor law scholars and practitioners have long been frustrated with often mercurial, unpredictable Board adjudication. That collective discomfort has been exacerbated by the salient decisions of the Reagan Board. This article will not directly address the substance of these decisions; this is done in the student comments which outline the broad substantive contours of contemporary labor law. Rather than attempt to cull a unifying substantive labor law theme from the Reagan Board decisions, this essay will examine the broader issues of NLRB process, policy, and politics by focusing on the administrative difficulties of the Board's case backlog, the efficacy and role of the NLRB adjudicatory instruments, and the substantive political choices made by the Board in making labor law policy.

The labor policy set by the Reagan Board represents an overtly pro-employer transition in labor law,⁴ an ironic commentary on the golden anniversary of the National Labor Relations Act (NLRA).⁵ Yet the cumulative message of the Reagan Board is far more complex, reflecting a fluid hierarchy of choices favoring not only institutional ownership elites, but also enhancing the section 7 individual employee choice against organization.⁶ The institutional interests of organized labor and the core section 7 employee right to organize are relegated to subordinate status, but not completely vitiated. By better appreciating the process and policy functions of the Board, perhaps even pro-union individual employees and organized labor can survive the eighties and again ascertain strategic means to prosper and mature under the NLRA in the coming decades.

³ The jurisprudence of the Burger Court is not uniformly anti-labor. For example, the Court has upheld the near-sacrosanct status of the collective bargaining agreement traditional seniority system, one of the cornerstones of the organized labor movement. Of course, these pyrrhic victories for seniority principles may have come at the expense of affirmative action. See *Memphis Fire Dept. v. Stotts*, 104 S. Ct. 2576 (1984); *W. R. Grace v. Local 759, Int'l Union of the United Rubber Workers*, 461 U.S. 757 (1983); see also Gregory, *Conflict Between Seniority and Affirmative Action Principles in Labor Arbitration, and Consequent Problems of Judicial Review*, 57 *TEMP. L.Q.* 47 (1984). In 1986, the Court may finally resolve the controversy surrounding the viability of *Weber*-type affirmative action plans in public sector employment in *Wygant v. Jackson Bd. of Educ.*, 746 F.2d 1152 (6th Cir. 1984), *cert. granted*, 105 S. Ct. 2015 (1985).

⁴ See *Changes in NLRB Law*, 118 *LAB. REL. REP.* (BNA) 237 (Mar. 25, 1985), which states: [c]hanges in NLRB law during the last year and a half have been as dramatic and as deep as those of any other period in Board history . . . the changes represent more than just a shift from one administration to another; they require, in some instances "a whole new way of looking at a particular issue."

⁵ 29 U.S.C. § 151 (1982). The NLRA, the Wagner Act, was enacted in 1935. Section 1 of the Act enunciated congressional policy designed to bring relatively helpless employees into rough parity with corporate employers through collective bargaining.

⁶ Section 7 of the Act, 29 U.S.C. § 157 (1982), provides:

Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

I. THE CASE BACKLOG AT THE BOARD: CAUSES AND CURES

Fortunately, the serious administrative problems that afflicted the Reagan Board throughout much of its tenure have been partially alleviated. The Board will finally operate with the full statutory complement of five members. While the case backlog due to internal and external administrative snafus will probably haunt the Board well into 1986, there is potential for improved administrative functioning of the Board now that it has finally returned to full membership. Nevertheless, this case backlog has fueled much of the criticism of the Board, which undoubtedly will continue until its caseload is under better control.⁷

The Board was understaffed throughout most of President Reagan's first term. Since President Reagan took office in 1981, Chair Fanning and Members Jenkins, Miller, Truesdale, and Zimmerman left the Board as their terms expired. By not reappointing any of these persons, including Chair Fanning, who had been reappointed by several prior Presidents, President Reagan deprived the Board of administrative stability, continuity, and a valuable body of labor law expertise. President Reagan's initial nominee as Chair, John Van de Water, failed to obtain Senate approval.⁸ Current Chair Dotson and Member Dennis have served only since the spring of 1983. Members Babson and Johansen were confirmed by the Senate and began their new terms in May, 1985. Member Hunter, the senior Board member with service since August, 1981, recently left the Board when his term expired in August, 1985. He did not seek reappointment.⁹ Since 1979, the Board has had fifteen different members. Chair Dotson understandably regards this turnover in Board membership as the "first and foremost" problem of the Board.¹⁰

The novice Reagan Board, deprived of continuity and stability by the President's failure to reappoint senior members, was further crippled from August, 1983 until May, 1985. Because the vacancy caused by the expiration of Member Jenkins' term in August, 1983 was not filled, the Board was forced to operate with four members.¹¹ The Board then was reduced to only three members¹² from December, 1984 until May, 1985, with

⁷ Even political conservatives recommended that the Board be maintained at full strength, via the conservative Heritage Foundation's 600 page report to the Reagan administration, "Mandate for Leadership II." See *Heritage Foundation Report on Labor Policy*, 1984 LAB. REL. YEARBOOK 245. Two congressional reports, highly critical of the administrative backlog at the NLRB, were also issued in 1984. See HOUSE COMMITTEE ON GOVERNMENT OPERATION, DELAY, SLOWNESS IN DECISIONMAKING AND THE CASE BACKLOG AT THE NATIONAL LABOR RELATIONS BOARD, H.R. REP. NO. 1141, 98th Cong., 2d Sess. (1984). The Committee stated: "The National Labor Relations Board is in a crisis. Delays in decisionmaking at the Board level and a staggering and debilitating case backlog have resulted in workers being forced to wait years before cases . . . are decided The case backlog at the Board has risen to a record level . . ." See also STAFF OF HOUSE LABOR-MANAGEMENT RELATIONS SUBCOMMITTEE, 98TH CONG., 2D SESS., FAILURE OF THE LABOR LAW — A BETRAYAL OF AMERICAN WORKERS (Comm. Print 1984).

⁸ See *Senate Labor Committee Rejects Pres. Reagan's Nomination of John R. Van de Water to Head NLRB*, N.Y. Times, Nov. 20, 1981, at A20. For criticism of the Senate Committee's rejection, see Walther, *Suggestions and Comments on the Future Directions of the NLRB*, 34 LAB. L.J. 215, 228 (1983); see also Irving, *The Crisis at the NLRB: A Call for Reordering Priorities*, 7 EMPL. REL. L.J. 47 (1981).

⁹ *NLRB Departure*, 119 LAB. REL. REP. (BNA) 291 (Aug. 8, 1985).

¹⁰ Dotson, *Processing Cases at the NLRB*, 35 LAB. L.J. 3, 5 (1984).

¹¹ After the August, 1983 expiration of Member Jenkins' term, the four Board members were Chair Dotson and Members Hunter and Dennis, all appointed by President Reagan, and Member Zimmerman, appointed by President Carter.

¹² The three members were Chair Dotson and Members Hunter and Dennis.

the expiration of Member Zimmerman's term. The Senate confirmation in May, 1985, of the nominations of Wilford Johansen and Marshall Babson to fill the two vacancies, briefly brought the Reagan Board to its full five person strength for the first time in almost two years. This was quickly undone with Member Hunter leaving the Board in August, 1985.¹³ Finally, for the first time since December, 1982, the Board was restored to full five member strength in October, 1985, with Senate confirmation of James Stephens to fill the seat of former Member Hunter.¹⁴ Barring unusual departures, the Board should maintain this full five member complement for the next year, at least until August 27, 1986 when the term of member Dennis expires. During this time period from 1983 until the fall of 1985 the chronically understaffed Board has been further debilitated by allegations of bitter in-fighting and lack of collegiality among the members.¹⁵ Given the negative synergy of the understaffed and badly fragmented Board, it is not surprising that the case backlog exceeded a record 1,600 cases by early 1984,¹⁶ in contrast to the pre-Reagan Board's normal backlog of 400 to 500 pending unfair labor practice cases.¹⁷ In addition to the tremendous case backlog, only 602 unfair labor practice decisions were rendered in 1983, as compared to the 1,185 decisions issued in 1979.¹⁸

Since the administrative nadir was reached in early 1984, the Board has gradually improved case handling, issued more decisions, and reduced its case backlog.¹⁹ With Chair Dotson's ongoing efforts to improve administration,²⁰ both case backlog and the in-fighting should be substantially reduced²¹ in 1986. The administrative rectification of the case backlog can be effected in relatively expeditious fashion.

II. WHY ADJUDICATION REMAINS PREFERABLE TO RULEMAKING: THE NLRB AS LABOR POLICY MAKER

Unlike the relatively common problem of administrative backlog at the Board, there is a far more important structural criticism of NLRB process which presents a much

¹³ Following the most recent musical chairs episode at the Board with senior Member Hunter's departure in August, 1985, the current Board is comprised of five Reagan appointees: Chair Dotson and Member Dennis, appointed in 1983; new Members Babson and Johansen, appointed in the spring of 1985; and Member Stephens, appointed in the fall of 1985.

¹⁴ *Labor Confirmations*, 120 LAB. REL. REP. (BNA) 191 (Oct. 28, 1985).

¹⁵ Member Zimmerman was especially critical of the lack of collegiality on the Board during 1984. *Interview With Retiring NLRB Member*, 117 LAB. REL. REP. (BNA) 326 (Dec. 24, 1984). For overviews of the internal disputes among Board members, see Keller, *Infighting at Labor Board is Reported*, N.Y. Times, Jul. 11, 1984, at A21, col. 4; Middleton, *NLRB: An Agency in Turmoil*, Nat'l L.J., Jul. 2, 1984 at 1; Walther, *supra* note 8, at 228; *Letter Writing Contest Over NLRB Case Backlog*, 117 LAB. REL. REP. (BNA) 289 (Dec. 10, 1984).

¹⁶ In February, 1984, a record backlog of 1,647 cases awaited decision by the Board. *Criticism of NLRB Politicization Backlog*, 117 LAB. REL. REP. (BNA) 121, 123-24 (Oct. 15, 1984) [hereinafter cited as *Backlog*].

¹⁷ 116 LAB. REL. REP. (BNA) 41-42 (May 21, 1984).

¹⁸ *Id.*

¹⁹ In fiscal year 1984, the Board issued 1,346 decisions, a 53% increase over the number of decisions issued in 1983. *Backlog*, *supra* note 16, at 123-24. By the summer of 1985, the NLRB had reduced its case backlog from almost 1,700 cases in early 1984 to approximately 1,200 cases.

²⁰ *NLRB's Dotson on First Year*, 115 LAB. REL. REP. (BNA) 163 (Feb. 27, 1984); 115 LAB. REL. REP. (BNA) 186 (Mar. 5, 1984) (Dotson maintained that the 1984 case backlog would dissipate following the issuance of the Board's most controversial and important lead cases).

²¹ *Defense of Board Decisions and Nominees*, 118 LAB. REL. REP. (BNA) 266 (Apr. 8, 1985) [hereinafter cited as *Defense of Board*]; see also *supra* note 20.

more difficult problem. With only rare, exceptional resort to rulemaking,²² the Board has otherwise routinely utilized adjudication²³ to set policy and to determine the course of labor law. Many critics of the Board periodically have called for NLRB rulemaking.²⁴ This argument recently resurfaced because advocates of rulemaking believe that displacing the Board's traditional use of adjudication with rulemaking presents the best available method to stabilize NLRB law and to obtain greater harmony between the Board and the circuit courts. Rulemaking more closely represents a legislative rather than a judicial process, with greater opportunity for input into the agency's policy making by a broad spectrum of interested persons. It is purportedly more deliberative and more informed than ad hoc case-by-case adjudication.²⁵ Further, rulemaking, unlike adjudication, has only prospective effect.²⁶ Therefore, rulemaking is championed as a more stable, balanced mode to chart new developments in labor law.

²² Pursuant to the Administrative Procedure Act (APA), rulemaking is the "agency process for formulating, amending, or repealing a rule." 5 U.S.C. § 551(5) (1982). A rule is "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy." *Id.* § 551(4). For a rare instance of NLRB rulemaking, see Menard & DiGiovanni, *NLRB Jurisdiction over Colleges and Universities: A Plea for Rulemaking*, 16 WM. & MARY L. REV. 599, 614 (1975).

Section 6 of the NLRA expressly provides that "the Board shall have authority from time to time to make, amend, and rescind, in the manner prescribed by the Administrative Procedure Act, such rules and regulations as may be necessary to carry out the provisions of this Act." 29 U.S.C. § 156 (1982). Despite this express statutory authorization, the rulemaking power of the Board has remained dormant.

²³ Adjudication is defined in the APA as an "agency process for the formulation of an order." 5 U.S.C. § 551(7) (1982). NLRB adjudication occurs in the context of an adversarial hearing between parties to actual cases and controversies.

²⁴ See, e.g., Bernstein, *The NLRB's Adjudication — Rulemaking Dilemma Under the Administrative Procedure Act*, 79 YALE L.J. 571, 589–93 (1970); Bierman, *Judge Posner and the NLRB: Implications for Labor Law Reform*, 69 MINN. L. REV. 881, 892–93 (1985) [hereinafter cited as Bierman, *Judge Posner and the NLRB*]; Bierman, *Reflections on the Problem of Labor Board Instability*, 62 U. DEN. L. REV. 551, 562–65 (1985); Estreicher, *Policy Oscillation at the Labor Board: A Plea for Rulemaking*, 37 N.Y.U. CONF. ON LAB. 10–1 (1985); Fuchs, *Agency Developments of Policy Through Rulemaking*, 59 NW. U.L. REV. 781 (1965); Gomberg & Samoff, *Improving Administrative Effectiveness of the NLRB*, 24 LAB. L.J. 201, 213–17 (1973); Kahn, *The NLRB and Higher Education: The Failure of Policymaking Through Adjudication*, 21 UCLA L. REV. 63, 167–75 (1973); Menard & DiGiovanni, *supra* note 22, at 614–19; Peck, *A Critique of the National Labor Relations Board's Performance in Policy Formulation: Adjudication and Rule-Making*, 117 U. PA. L. REV. 254, 268–75 (1968); Peck, *The Atrophied Rule-Making Powers of the National Labor Relations Board*, 70 YALE L.J. 729, 752–61 (1961); Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 HARV. L. REV. 921, 929–42 (1965); Silverman, *The Case for the National Labor Relations Board's Use of Rulemaking in Asserting Jurisdiction*, 25 LAB. L.J. 607, 608–10 (1974); Summers, *Politics, Policy Making and the NLRB*, 6 SYRACUSE L. REV. 93, 105–06 (1954).

In 1958, the American Bar Association Labor Law Section recommended that the NLRB make greater use of rulemaking. *ABA Comm. on NLRB Practice and Procedure Proceedings*, at 116, 121, 42 LAB. REL. REP. (BNA) 482, 513 (1958).

THE LABOR REFORM ACT OF 1977, H.R. REP. NO. 8410, 95th Cong., 1st Sess. (1977), would have provided for NLRB rulemaking regarding bargaining unit determinations, voter eligibility, and union organizer access to employer property. The bill passed the House, but was defeated via Senate filibuster.

In addition, congressional committee reports have advocated NLRB use of rulemaking. See H.R. REP. NO. 1141, *supra* note 7; *Hearings on Congressional Oversight of Independent Administrative Agencies Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 90th Cong., 2nd Sess. 916–18 (1968).

²⁵ Compare 5 U.S.C. § 553 (1982) (rulemaking procedures), with 5 U.S.C. § 554 (1982) (adjudication procedures).

²⁶ See generally *Our Way Inc.*, 268 N.L.R.B. No. 61, 115 L.R.R.M. 1009 (1983).

The many controversial decisions of the Reagan Board, reversing several precedents, were all effected through adjudication. The repeated reversals in some areas have sparked especially intense criticism of the seemingly revolving door nature of Board decision-making. The most prominent example of Board reversals is the state of the law regarding the scope of permissible factual misrepresentations during union election campaigns. In 1982, after the Board reversed the applicable law for the third time in five years,²⁷ Judge Posner of the Seventh Circuit excoriated the Board for these spasmodic, continual, and retroactive reversals:²⁸

[T]he parties [were] unaware of the extent of the Board's fickleness
 [T]he Board announced in a footnote that the new rule would apply to all pending cases [B]y twice during this proceeding changing its mind as to the applicable standard the Board has put Mosey [the employer] through the hoops, subjecting it to protracted legal expense and uncertainty. . . .
 [T]he Board's [is unable] to decide what standard to use in policing elections — it has changed its collective mind three times in the last five and a half years.²⁹

Other circuits have also criticized the destabilizing ad hoc nature of recent Board decisions.³⁰

Although cavalier adjudication can certainly foster the Board's whirling dervish image, NLRB adjudication per se is not inherently flawed. Indeed, many of the 1984 decisions of the Reagan Board were favorably received by the courts of appeals.³¹ Some

²⁷ See *Midland*, 263 N.L.R.B. 127, 130–31 (1982), which reinstated *Shopping Kart*, 228 N.L.R.B. 1311 (1977), which had overruled *Hollywood Ceramic*, 140 N.L.R.B. 221 (1962). *Shopping Kart* had itself been overruled in *General Kent of California, Inc.*, 239 N.L.R.B. 619 (1978), which had reinstated the *Hollywood Ceramic* rule. See Comment, *A Look at the Revolving NLRB Policies Governing Union Representation Election Campaigns*, 19 WAKE FOREST L. REV. 417 (1983).

²⁸ *Mosey Mfg. v. NLRB*, 701 F.2d 610, 612–13 (7th Cir. 1983).

²⁹ *Id.* See Bierman, *Judge Posner and the NLRB*, *supra* note 24.

³⁰ *New Jersey Bell Tel. v. NLRB*, 720 F.2d 789, 792, 114 L.R.R.M. 3337, 3340 (3d Cir. 1983) ("Supreme Court precedent, Board precedent, and common sense all militate against the Board's decision in this case"); *Yellow Taxi of Minneapolis v. NLRB*, 721 F.2d 366, 383 n.39, 114 L.R.R.M. 3060, 3074–75 n.39 (D.C. Cir. 1983) (the court criticized the Board's "illogical and cryptic conclusions").

³¹ In 1984, the Board won in whole or in part in over 80% of the 259 Board decisions appealed to the circuits. *NLRB General Counsel's Summary of Operations for Fiscal Year 1984*, 118 LAB. REL. REP. (BNA) 145, 146 (Feb. 25, 1985) (259 NLRB cases were decided by the courts of appeals in 1984, 338 in 1983, and 424 in 1982; in 1984, the Board won in whole or in part in 81.1% of the cases, 81.7% in 1983, and 79.7% in 1982). Meanwhile, outright Board losses occurred in little more than 10% of the appealed cases, which is the lowest level since 1976. *Id.* (in 1984, the Board lost entirely in 10.4% of the cases taken to the courts of appeals, 12.4% in 1983, and 12.5% in 1982). See also *NLRB General Counsel's Summary of Operations for Fiscal Year 1983*, 114 LAB. REL. REP. (BNA) 301 (Dec. 19, 1983). See also *infra* note 32; *Prill v. NLRB*, 755 F.2d 941, 118 L.R.R.M. 2649 (D.C. Cir. 1985). In *Prill*, the court, by the 2–1 majority of Judges Edwards and Wald over Judge Bork's dissent, remanded the case to the Board. The Board was ordered to reconsider its prior ruling in *Meyers Industries*, 115 L.R.R.M. 1025 (1984), that a nonunion employee's activity is not concerted within the meaning of § 7 of the NLRA unless it is undertaken with or on the authority of other employees. The court majority found that the Board in *Meyers Industries* had "failed to rely on its own judgment and expertise, and instead based its decision on an erroneous view of the law." *Prill*, 755 F.2d at 956, 118 L.R.R.M. at 2661. *But see* *Hotel Employees Local 11 v. NLRB*, 706 F.2d 1006, 119 L.R.R.M. 2624 (9th Cir. 1985) (the court affirmed and enforced the Board's return to a totality of the circumstances standard in *Rossmore House*, 116 L.R.R.M. 1025 (1984), for determining the

courts of appeals maintain that the series of reversals by the Reagan Board, rather than exploring uncharted new waters, have restored labor law to sound principles and corrected the radical leftist deviance of Carter Board decisions.³² The circuit courts were more often incensed with the decisions of the Carter Board than with those of the Reagan Board. Chair Dotson maintains that the Reagan Board has properly responded to the appellate courts' chagrin with the Carter Board decisions. The Reagan Board's decisions repudiating ill-considered, tenuous Carter Board precedents have restabilized, rather than further radicalized, labor law.³³ This favorable response by the courts of appeals certainly militates against the wholesale or precipitous repudiation of Board adjudication. With many Reagan administration appointees now on the courts of appeals, it is not surprising that the recent NLRB decisions have been, for the most part, favorably received by the circuits.

The Reagan Board's adjudication cannot be held responsible for the collapse of labor law and loss of Board credibility. Admittedly, adjudication can be mercurial and

legality of an employer's questioning of an employee concerning union sentiments); *UAW v. NLRB*, 765 F.2d 175, 119 L.R.R.M. 2801 (D.C. Cir. 1985) (the court affirmed the Board's decision in *Milwaukee Spring Division II* that the employer could relocate work during the contract mid-term without violating § 8(d), following bargaining with the union).

³² *Case Backlog at Labor Board*, 115 LAB. REL. REP. (BNA) 186, 188 (Mar. 15, 1984) (where the courts of appeals have "squarely rejected" NLRB decisions, the Reagan Board will now conform and back away from previous "outright defiance of court decisions, with which they have become impatient"); see also Zimmerman & Dunn, *Relations Between the NLRB and the Courts of Appeals: A Tale of Acrimony and Accommodation*, 8 EMP. REL. L.J. 4 (1982). More recently, in *Debating Merits of Current NLRB Decisions*, 118 LAB. REL. REP. (BNA) 281 (Apr. 15, 1985) as management attorney maintained that the Reagan Board decisions have restored Board credibility in the courts of appeals. "The fact of the matter . . . is this Board was confronted with . . . a continuous across-the-board hostility in the circuits." The Carter Board "had gone so far and done so many things that the circuits were fundamentally hostile to the NLRB and their decisions What this Board had done is reestablish credibility with the circuits." *Id.* at 284. In *Rulemaking as Aid in NLRB Policy Reversals*, 116 LAB. REL. REP. (BNA) 142 (June 25, 1984), former NLRB General Counsel Peter Nash defended recent controversial decisions of the Reagan Board as correcting the pro-labor excesses of the Carter Board: "the 'fervor' over the Board's recent policy reversals is the 'result of a larger political agenda' on the part of labor advocates. 'There has not been a substantial reversal of Board doctrine if you read and analyze the decisions.'" *Id.* at 144. See also *Defense of NLRB Rulings*, 116 LAB. REL. REP. (BNA) 3 (May 7, 1984) (Member Dennis, appointed by President Reagan in 1983, characterized Reagan Board decisions as "a return to 'normalcy' rather than a curtailment of the rights of unions and individual employees"). In Walther, *supra* note 8, at 228, the author stated:

I do not believe that over the years ahead we will find a major or strong tilt toward management or the right at the Board. I do predict that there will be a leveling of the Board or a movement back from the tilt to the left that has occurred, especially since the late seventies.

Id. In *Defense of Board*, *supra* note 21, the author stated:

15 of 16 decisions handed down by the "prior liberal Board" but reversed by the current Board, have been overturned by appeals courts [T]he Board has gotten "rid of bad law that has not been acceptable to the appellate courts" [T]he Board's reversals have returned the law to what it was, and are in line with appeals court rulings

Id. See also Dotson, *Remarks to Textile Manufacturers*, 120 LAB. REL. REP. (BNA) 6, 7 (Sept. 2, 1985) ("At last . . . we no longer have circuit courts referring, as some have in the recent past, to the Board's lack of 'common sense'").

³³ See *supra* note 32.

capricious, with potentially pernicious, retroactive application. But it has the virtues which more ponderous rulemaking cannot provide: flexibility, dynamism, and the ability to respond to contextually fluid circumstances. These are necessary attributes for any effective decision-making instrument in the real world of volatile labor relations.

Displacing adjudication with rulemaking would unwisely depoliticize the NLRB, directly counter to Congress' design of the Board as a politically responsive agency. Board members are appointed by the President for staggered terms, and properly reflect majoritarian political preferences³⁴ in setting labor policy. Board ability to adapt to continually changing labor relations is the primary benefit of adjudication.³⁵

Through adjudication, the Board properly functions as a labor policy maker, and not just as a resolver of immediate, individual case disputes. It serves as a means for adopting national labor policy to a continually shifting political climate.³⁶ To paraphrase Justice Marshall's constitutional aphorism,³⁷ it is a living labor law that the Board expounds, and a living labor policy that it elucidates. This goal is best effected through adjudication, which is much better suited to respond quickly to political and labor developments than is the far more cumbersome rulemaking.³⁸ Even informal rulemaking lacks the necessary fluidity of adjudication. With adjudication, if the policy direction proves unwise, it can be readily reversed by subsequent adjudication. While subsequent reversals may occasionally result in doctrinal chaos, this is a necessary price to preserve the Board's contextual flexibility, which is vital to shaping dynamic labor policy. Admittedly, this can be frustrating. But policy is not formed in a vacuum; it is contingent upon the Board's ability to assess live facts and to shape policy interstitially around the broad statutory terms of art in the Act.

The choice of continued adjudication over rulemaking is not, however, an absolute win-lose proposition. Each mode has considerable assets and liabilities. Policy making by the Board will never be a paragon of jurisprudential clarity because volatile, real-world labor relations are far removed from the realm of pure theory. On balance, Board adjudication has proved to be the more efficacious policy instrument in the imperfect but real world. Despite some earlier equivocation,³⁹ the Supreme Court has also endorsed Board adjudication⁴⁰ to allow the Board to deal with the infinite vagaries of evolving

³⁴ 29 U.S.C. § 153(a) (1982). See Bernstein, *supra* note 24: "The unavoidable periodic selection of a President enables new majorities (coalitions of minorities) to obtain political power which carries the authority to make appointments to agencies. These new appointees reflect the most recent political alignment . . ." *Id.* at 575 n.10.

³⁵ See Note, *NLRB Rulemaking: Political Reality Versus Procedural Fairness*, 89 YALE L.J. 982, 984 (1980) [hereinafter cited as Note, *NLRB Rulemaking*]; *Rulemaking as Aid in NLRB Policy Reversals*, 116 LAB. REL. REP. (BNA) 142, 145 (June 25, 1984) ("complaint by labor law practitioners about the 'instability' of Board rulings are 'not really justified' because Congress intended [the] NLRB to be a flexible decisionmaker").

³⁶ Summers, *supra* note 24, at 100.

³⁷ See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

³⁸ Note, *NLRB Rulemaking*, *supra* note 35, at 999.

³⁹ See *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 763-65 (1969).

⁴⁰ See *NLRB v. Bell Aerospace*, 416 U.S. 267, 294 (1974) ("the Board is not precluded from announcing new principles in an adjudicative proceeding and that the choice between rulemaking and adjudication lies in the first instance within the Board's discretion"). See also *SEC v. Chenery Corp.*, 332 U.S. 194 (1947). The Court indicated a general preference that the administrative agency (SEC) normally use rulemaking, but recognized the need for agency adjudication to respond quickly to unforeseen exigencies. "In those situations, the agency must retain power to deal with the problems on a case to case basis if the administrative process is to be effective." *Id.* at 203.

labor relations under the Act.⁴¹ To freeze the Board's policy making effectiveness by turning to rulemaking would unwisely exalt administrative law theory over the reality and substance of labor law practice.⁴² The Board must continue to make labor policy, rather than routinely and mechanically apply the Act.⁴³ As Professor Summers forcefully concluded in his important article over thirty years ago:

The Board, in deciding cases arising under the statute, must exercise the power of choice. The choice is between alternatives which represent not only conflicting interests of the immediate parties but also conflicting views as to labor policy. The new members may make the same choices as the old members, or they may make different choices and order changes, but willy-nilly they must choose. The Board could not, if it would, escape its functions of policy making.⁴⁴

Despite its recognized weaknesses, adjudication, rather than rulemaking, remains the preferable NLRB labor policy and law-making instrument.

CONCLUSION

The labor policy direction of the Reagan Board has infuriated much of organized labor.⁴⁵ Rather than call for abolition of the Board and of the Act and return to the "law

⁴¹ See *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941). The Court stated that: in the very nature of things Congress could not catalogue all the devices and stratagems for circumventing the policies of the Act. Nor could it define the whole gamut of remedies to effectuate these policies in an infinite variety of specific situations. Congress met these difficulties by leaving the adoption of means to end to the empiric process of administration. The exercise of the process was committed to the Board, subject to limited judicial review.

Id. at 194.

⁴² Note, *NLRB Rulemaking*, *supra* note 35, at 1000.

⁴³ Summers, *supra* note 24, at 96:

It is evident that the Board cannot "administer the statute as written and as intended by Congress." The words of the statute and the intent of Congress provide some limitations and guides, but there still remains a substantial area of discretion within which the Board must make choices between competing values and policies.

Id.

⁴⁴ *Id.* at 98.

⁴⁵ AFL-CIO President Lane Kirkland castigated the Reagan Board as "anti-labor ideologues," and as advocates of "the most narrow, retrograde employer interests." *Criticism of Labor Department*, 115 LAB. REL. REP. (BNA) 195 (Mar. 5, 1984).

The AFL-CIO Executive Council categorized the Reagan Board's policy as one of "malevolence" toward labor.

An NLRB controlled by two employer lawyers and a Heritage Foundation consultant, each hand-picked by this administration, has no intention of enforcing the national labor policy with an even hand The present NLRB's legal theory is that employers . . . should be able to do whatever they want whenever they want

AFL-CIO Views on NLRB Actions, 116 LAB. REL. REP. (BNA) 46 (May 21, 1984).

In three days of hearings before the Labor Advisory Committee, several union advocates sharply criticized NLRB decisions and the labor policies of the Reagan administration. Thomas Gleason, president of the Longshoremens' Union, said, "the pendulum in Labor Board decisions has swung so rapidly and erratically over the recent past that volumes of Board precedents no longer can be relied upon by unions or employers and their legal counsel." *Criticizing NLRB at Republican Hearings*, 116 LAB. REL. REP. (BNA) 189 (Jul. 9, 1984).

of the jungle," the Act and its administration should be improved and strengthened on its Golden Anniversary.⁴⁶ For example, exploring the viability of a proposed federal labor court of appeals to stabilize labor law theory and practice, while allowing the politically responsive NLRB to function unaltered, would be far more productive than

Prominent union leaders sharply criticized Reagan Board decisions in testimony before a House oversight hearing held by the Labor Subcommittee on Labor-Management Relations and the Government Operations Subcommittee on Manpower and Housing. William Wynn, president of the United Tool and Commercial Workers Union, the AFL-CIO's largest union, stated that labor "cannot rely on the NLRB for justice . . . Labor-Management relations are back in the jungle . . . [L]abor has been stripped of the weapons we need for our self-defense." William Bywater, president of the Electrical Workers, said, "the Reagan Administration is so anti-labor that 'they make Nixon and Ford look great. I swear they'd make even Hoover look good.'" *Challenging Impartiality of NLRB*, 116 LAB. REL. REP. (BNA) 179 (Jul. 2, 1984). John Sweeney, President of the Service Employees, said, "the people who are sworn to uphold a law do their most to subvert it." *Unions' Opposition to St. Francis Decision*, 117 LAB. REL. REP. (BNA) 131 (Oct. 15, 1984).

At the thirty-first annual institute on labor law by the Southwestern Legal Foundation, union attorney Lawrence Cohen advised labor clients to avoid going to the Board. He termed the Reagan appointees "'a gang of three' . . . who are methodically scuttling the Act which they are charged to protect." *Impact on NLRB of Chairman Dotson*, 117 LAB. REL. REP. (BNA) 164 (Oct. 29, 1984). See also *Debating Merits of Current NLRB Decisions*, 118 LAB. REL. REP. (BNA) 281 (Apr. 15, 1985) (SMU law professor Charles Morris charged the NLRB with interpreting the Act to infringe on specific Congressional objectives); Veihar, *Labor Law Reform: Do Labor Organizations Have Equal Access to the System?*, 62 U. DEN. L. REV. 571 (1985); Noble, *In 50 Years, Unions Move from Fans to Foes of Labor Board*, N.Y. Times, Jul. 9, 1985, at A14, col. 2.

On related fronts, organized labor has opposed most of the Reagan administration's nominees to the Board. The Teamsters Union led demands on the White House to fire Donald Dotson as Chair of the NLRB. *Labor Letter*, Wall St. J., May 22, 1984, at 1, col. 5. Labor had initially opposed the appointment of Dotson to the Board. *Labor Letter*, Wall St. J., Feb. 2, 1983, at 3, col. 4.

The organized labor lobby successfully blocked appointment of President Reagan's first nominee as Chair of the NLRB. *Senate Labor Committee Rejects Pres. Reagan's Nomination of John R. Van de Water to Head NLRB*, N.Y. Times, Nov. 20, 1981, at A20; Walther, *supra* note 8, at 228.

Before the Senate's surprising confirmation of Rosemary Collyer as the NLRB General Counsel by voice vote on April 4, 1985, her nomination had been bitterly opposed by organized labor. See *Approval of Collyer as NLRB General Counsel*, 118 LAB. REL. REP. (BNA) 287 (Apr. 15, 1985). See also *AFL-CIO Opposition to Collyer Nomination*, 116 LAB. REL. REP. (BNA) 30 (May 14, 1984). AFL-CIO President Lane Kirkland said that Collyer had "no visible qualifications in the field of labor law" and that her appointment is another example of the Reagan administration's "contempt for the rights and concerns of working people." *Id.* Regarding the Reagan nomination of Collyer as General Counsel, see also *Delayed Vote On NLRB Nominee*, 116 LAB. REL. REP. (BNA) 44 (May 21, 1984); *AFL-CIO Views on NLRB Actions*, 116 LAB. REL. REP. (BNA) 145 (June 25, 1984); *Labor Letter*, Wall St. J., June 12, 1984, at 1, col. 5.

Prior to his Senate confirmation in May 1985, organized labor took a skeptical preliminary view of management attorney Marshall Babson's nomination to the NLRB. *Nominations for Two NLRB Vacancies*, 118 LAB. REL. REP. (BNA) 201 (Mar. 18, 1985).

⁴⁶ Gould, *Mistaken Opposition to the NLRB*, N.Y. Times, June 20, 1985, at A27, col. 2:

Lane Kirkland, President of the AFL-CIO, is toying with a misguided proposal by advocating the repeal of the National Labor Relations Act . . . Labor is in no position to discard the protections under the Act and to return to bare-fisted scuffles with management. The law, for the most part, has served labor well, and union leadership should work to strengthen it, not abolish it . . . Repeal of the Act on its 50th anniversary would sacrifice the benefits of law without eliminating its burdens.

Id. See also Estreicher, *Workers Still Need Labor Law's Shield*, N.Y. Times, Jul. 21, 1985, at F2, col. 3; *Pacific Coast Labor Law Conference*, 119 LAB. REL. REP. (BNA) 47 (May 20, 1985) (Arthur Goldberg, General Counsel of the Textile Workers Union, said deregulating labor law and repealing the Act is unwarranted and would leave employees and unions unprotected and operating under a regime

simplistic resort to rulemaking.⁴⁷ While labor law policy should evolve in stable, coherent fashion, it is of paramount importance that it be permitted to evolve. Rulemaking may stabilize Board administration, but it would seriously debilitate the flexibility required for Board policy making. Stultification of policy cannot be countenanced.

The administrative difficulties of the Board's case backlog and internal discord should substantially dissipate now that the Board is restored to the full five person complement. History has demonstrated that most radical criticisms of prior Board changes in labor law and policy were exaggerated.⁴⁸ Over the past fifty years, the Act,

of employer-imposed rules); *Discussion of NLRB Policies at New York Bar Association*, 119 LAB. REL. REP. (BNA) 71 (May 27, 1985) (Samuel Kaynard, Regional Director of the NLRB in Brooklyn, New York, said the NLRA has worked well for fifty years and "the absence of either the Act or the Board would serve no purpose"). See also *infra* note 50.

⁴⁷ More than a decade ago, several scholarly and legislative proposals for a federal labor court to centralize and stabilize labor law practice and administration received considerable attention. It is time to re-examine the merits of these earlier proposals, and perhaps to refine and finally implement them via limited reform legislation. See generally Bartosic, *Labor Law Reform — The NLRB and a Labor Court*, 4 GA. L. REV. 647 (1970); Farmer, *Problems of Organization and Administration of the National Labor Relations Board*, 29 GEO. WASH. L. REV. 353, 356 (1960) ("ultimate transfer of the Board's judicial functions to a labor court or even to the existing federal district courts may now be reasonably predicted"); Lyme, *The NLRB and Suggested Alternatives*, 22 LAB. L.J. 408 (1971); Miller, *Administrative Prosecution but Decisions by the Court — A Way Out of the Procedural Morass of U.S. Labor Law?*, 12 GONZAGA L. REV. 19 (1976); Morris, *Procedural Reform in Labor Law — A Preliminary Paper*, 35 J. AIR L. & COMM. 537 (1969); Morris, *The Case for Unitary Enforcement of Federal Labor Law*, 26 SW. L.J. 471 (1972); Morris, *The NLRB: Its Future*, 26 LAB. L.J. 334, 336 (1975) ("unitary system of enforcement which would interrelate, . . . identify and vitalize the various laws which regulate employee relations, would be the proper course for labor reform generally"); Powell & Goerlich, *An Invitation to Improve a Government Service*, 25 ADMIN. L. REV. 49 (1973); Schutkin, *One Nation Indivisible — A Plea for a United States Court of Labor Relations*, 20 LAB. L.J. 94 (1969); Seligson, *The National Labor Relations Board: A Proposal*, 6 LAB. L.J. 103 (1955). Various legislative proposals for some form of a federal labor court or other radical restructuring of NLRA administration were advanced more than a decade ago by Senators Tower, Griffin and Dole, and Congressperson Thompson. See S. 1384, 89th Cong., 1st Sess. (1965); S. 3671, 91st Cong., 2nd Sess. (1970); *District Court Jurisdiction Over Unfair Labor Practice Cases: Hearings on S. 3671 Before the Subcomm. on Separation of Power of the Senate Comm. on the Judiciary*, 91st Cong., 2d Sess. (1970); H.R. 7152, 92nd Cong., 1st Sess. (1971); S. 560, 92nd Cong., 1st Sess. (1971).

⁴⁸ The Board has been sharply criticized throughout its history. For its first seventeen years, all Board members were appointed by Democratic presidents. Union unfair labor practices were not added until the Act was amended by the Taft-Hartley Labor Management Relations Act of 1947. The classic early employer criticism of the Board as the tool of labor was *The G-D Labor Board*, 18 FORTUNE 52 (Oct. 1938). In 1940, a special committee of the House concluded the Board had "radical tendencies" and "pronounced C.I.O. sympathies." SPECIAL COMMITTEE TO INVESTIGATE THE NATIONAL LABOR RELATIONS BOARD, FINAL REPORT, at 149, No. 3109, Part I, 76th Cong., 3rd Sess. (1940). For a compendium of early employer opposition to the Board, see Gellhorn & Linfield, *Politics and Labor Relations: An Appraisal of Criticisms of NLRB Procedure*, 39 COLUM. L. REV. 339 (1939).

Labor and management alternated their support and criticism of the Board, depending on the policies and politics the particular White House incumbent effectuated through Board law. For balanced commentary on the Eisenhower Board, see Note, *The NLRB Under Republican Administration: Recent Trends and Their Political Implications*, 55 COLUM. L. REV. 852 (1955). Regarding the Kennedy-Johnson Board, see Murphy, *The National Labor Relations Board — An Appraisal*, 52 MINN. L. REV. 819, 844 (1968) ("[c]ertainly the Board is not pro-union in any invidious or opprobrious sense, however, the Board may fairly be said to be pro-union"); cf. Petro, *Expertise, the NLRB, and the Constitution: Things Abused and Things Forgotten*, 14 WAYNE L. REV. 1126, 1146, 1151 (1968) [hereinafter cited as Petro, *Expertise*], stating: "The Board seems to want every employee in the

the Board, and the parties have never yet been *in extremis*. The controversy surrounding the 1984 and 1985 decisions of the Reagan Board will gradually subside.⁴⁹ Even the current radical critics will probably recover from various stages of intellectual apoplexy. While the balance of the eighties will probably solidify "management's decade," it will probably not toll the death knell of either the Board, the Act, or of organized labor.⁵⁰

nation to wear a union label President Kennedy had a blatantly pro-union majority within a year or so of his accession." Regarding the Nixon Board, see Beaird & Player, *Whither the Nixon Board?*, 7 GA. L. REV. 607 (1973); Isaacson, *Discernible Trends in the "Miller" Board — Practical Considerations for the Labor Counsel*, 23 LAB. L.J. 531 (1972). Supporters of the Reagan Board argue that it has properly corrected the radical pro-labor excesses of the Carter Board. See Van de Water, *The NLRB . . . New Directions*, 12 STETSON L. REV. 297 (1983); Walther, *supra* note 8. Cf. Modjeska, *The Reagan Board: Phase I*, 46 OHIO ST. L.J. 95 (1985). For commentary on the propriety and role of criticism of the Board, see Booker & Coe, *An Analysis of the Objectivity of the Criticisms of the NLRB*, 6 AM. BUS. L.J. 535 (1968); Booker & Coe, *The NLRB and its Critics*, 17 LAB. L.J. 522 (1966); Dunav, *The Role of Criticism in the Work of the National Labor Relations Board*, 16 N.Y.U. CONF. ON LAB. 205 (1963).

⁴⁹ See *supra* note 20.

⁵⁰ For examples of persons with opposite views, see Weiler, *Promises To Keep: Securing Worker's Rights To Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1769 (1983) ("contemporary labor law more and more resembles an elegant tombstone for a dying institution" — Professor Weiler argues for a revitalization of labor protections under the Act).

Leftist critical scholars have argued that the NLRA was murdered in its crib long ago by the New Deal Court and by liberal theory. According to this leftist critique, even if the Reagan Board wanted to administer the *coup de grace* to organized labor, it would be shooting a corpse. See J. ATLESON, *VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW* (1983); Klare, *The Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937–1941*, 62 MINN. L. REV. 265 (1978); Stone, *The Post War Paradigm in American Labor Law*, 90 YALE L.J. 1509 (1981).

Even more recently, criticism of the Reagan Board has produced a bizarre, unholy alliance between some elements of organized labor and the radical right, arguing for abolition of the Act and the Board and a return to the free, unregulated law of the market (jungle). For example, on June 20, 1984 Robert Pleasure, Associate General Counsel of the United Brotherhood of Carpenters & Joiners of America stated:

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

Vehar, *Labor Law Reform: Do Labor Organizations Have Equal Access to the System?*, 62 U. DEN. L.J. 571, 571 n.3 (1985) (quoting STAFF OF HOUSE LABOR MANAGEMENT RELATIONS SUBCOMMITTEE, *FAILURE OF THE LABOR LAW — A BETRAYAL OF AMERICAN WORKERS*, 98th Cong., 2d Sess. at 23 (Comm. Print 1984)). The President of the United Mine Workers of America, Richard L. Trumka, in a statement before the same subcommittee, similarly stated: "The time has come for us to question whether the National Labor Relations Act . . . has become an albatross on the labor movement." *Id.* (quoting STAFF OF HOUSE LABOR MANAGEMENT RELATIONS SUBCOMMITTEE, *FAILURE OF THE LABOR LAW — A BETRAYAL OF AMERICAN WORKERS*, 98th Cong., 2d Sess. at 23 (Comm. Print 1984)). See also *Pacific Coast Labor Law Conference*, 119 LAB. REL. REP. (BNA) 48 (May 20, 1985) (James Herman, President of the International Longshoremen's Union, urged unions to avoid resort to the NLRB).

Epstein, *A Common Law for Labor Relations: A Critique of the New Deal Labor Legislation*, 92 YALE L.J. 1357, 1357 (1983) (NLRA "is in large measure a mistake that, if possible, should be scrapped in favor of the adoption of a sensible common law regime relying heavily upon tort and contract law"); Epstein, *Abolish the Board, Deregulate Unions*, N.Y. Times, Jul. 21, 1985, at F2; see also Petro, *Expertise*, *supra* note 48; Petro, *What Will the New Congress Do About the Taft-Hartley Act*, 4 LAB. L.J. 156 (1953); REYNOLDS, *POWER AND PRIVILEGE* (1984); Seligson, *supra* note 47, at 105 ("the flow of events in the past 20 years has minimized the importance of the Board to the extent that serious

If the Act and the Board are not abolished or otherwise radically transmogrified in the heat of the passions of the moment, one can be cautiously optimistic that the doom sayers can be proven wrong. Reports of the death of the Act are greatly exaggerated.⁵¹ The destiny and continued relevance of the Act remains, for the next few years, in the hands of the Reagan Board.

As the following essays demonstrate, contemporary labor and employment law is not monolithically aligned against employees and their unions, despite an obvious pro-employer tilt. With careful refinement, most of these recent NLRB decisions provide a realistic, albeit employer-oriented, framework for future developments.

Labor law policy is inherently controversial. Present heated criticism of the Board certainly is not unprecedented. It is difficult but indispensable to maintain doctrinal stability without rigidity and NLRB political responsiveness without caprice. The Board deserves an opportunity to preserve this delicate balance without immediate legislative interference. If the Board is allowed to continue to fashion evolving labor law policy through adjudication, and does so in a more deliberate and thoughtful fashion than evidenced in some of the 1984 and 1985 decisions, NLRA theory and Board administration can not only survive, but also learn from and grow beyond this latest flashpoint period in the history of modern labor law.

It is a simplistic generalization to say that "law is politics"⁵² and politics is law. This would short-circuit the important intellectual process of carefully analyzing the salient labor and employment law decisions of the Board and the judiciary. Simplistic political platitudes certainly cannot exculpate the Board from responsibility for its at least occasionally frenetic and precipitous decision-making.⁵³ There is, however, some degree of very real truth in this generalization, especially when applied to contemporary labor and employment law. They are undeniably permeated with political values. Rather than

consideration should be given to its abolition"). *But see* Bartosic, *supra* note 47, at 647, in which Dean Bartosic called these radical abolitionists "Bourbons . . . who use the Board as a whipping boy when their actual purpose is to attack ruthlessly the institution of collective bargaining." *See* Getman & Kohler, *The Common Law, Labor Law and Reality: A Response to Professor Epstein*, 92 *YALE L.J.* 1415, 1416 (1983), which asserts: "Professor Epstein reiterates many of the same propositions, syllogisms, and rationalizations of those who opposed the enactment of the NLRA and the Norris-LaGuardia Act in the first place. . . ." Irving, *Do We Need A Labor Board?*, 30 *LAB. L.J.* 387 (1979); Jenkins, *What is the National Labor Relations Board?*, 12 *U. FLA. L. REV.* 354, 355 (1959) (the NLRB "or a similar institution is absolutely essential to the proper functioning of an industrial democracy"); Ratner, *The Quasi-Judicial NLRB Revisited*, 12 *LAB. L.J.* 685, 686 (1961) ("Under the guise of attacking the Board as one-sided and biased, what they were really attacking was the statutory scheme itself"). *See also supra* note 46.

⁵¹ Of course, if the Reagan Board is unable to coalesce and to self-monitor its case law adjudication to insure more stability, NLRB law could certainly collapse into total irrelevancy. If that occurs, labor relations would quickly return *de facto* to the pre-Act "law of the jungle."

⁵² D. KAIRYS, *LEGAL REASONING IN THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* (1982).

Law is simply politics by other means [T]he law has provided a falsely legitimizing justification for a decision that is ultimately social and political [U]nstated and lost in the mire of contradictory precedents and justifications was the central point that none of these cases was or could be decided without ultimate reference to values and choices of a political nature.

Id. at 11, 13, 14. This manifesto of the leftist critical legal studies movement echoed many of the earlier themes of American Legal Realism, through a thick screen of Marxist and continental philosophy. *See* Gregory, *Book Review*, 1983 *ARIZ. ST. L.J.* 205.

⁵³ *See supra* notes 27-30.

being exclusively negative influences, however, the political choices by the Board can be a positive, actualizing force. The Board must continue to reflect, in thoughtful and careful fashion consonant with the spirit of the Act, contemporary political values in the process of adjudicating cases and continually shaping our evolving labor law and labor policy. Although it surely merits careful study, and while there is always room for improvement and reform, the Board must be permitted the freedom to administer the Act and to shape labor law in a politically responsible fashion. The unpalatable alternative of shackling the politics of the Board through rulemaking would pose a far more serious threat to the future of labor law than would any of the decisions of the Reagan Board.

Fortunately, this too shall pass, and the Board, the Act, employers, unions, and employees shall progress, however fitfully, into the twenty-first century under the key-stone National Labor Relations Act.