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Toward Politically Stable NLRB Lawmaking: Rulemaking vs. Adjudication

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TOWARD POLITICALLY STABLE NLRB LAWMAKING: RULEMAKING VS. ADJUDICATION

*Charlotte Garden**

ABSTRACT

For the last several decades, there have been two constants with respect to the National Labor Relations Board. First, the modern Board has been notoriously reluctant to use its rulemaking authority; until recently, it had made only one significant substantive rule via the notice-and-comment process. Second, commentators—academics, lawyers, judges, and politicians—have issued a steady stream of calls for the Board to make law via rulemaking rather than through adjudications, arguing for the rulemaking process on both pragmatic and normative grounds. In recent years, however, the first of these has changed: the Board has engaged in two significant rulemaking processes. Each of these processes was both time intensive and politically and judicially fraught, calling into question whether the Board can achieve the process benefits of rulemaking in the current contentious political environment. This Symposium Essay explores the extent to which the Obama Board has been able to achieve the purported benefits of rulemaking, and therefore whether the benefits of making labor law through the rulemaking process exceed the costs, especially where the Board could alternatively make law via adjudication.

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INTRODUCTION

For decades now, academics and courts have been calling on the National Labor Relations Board (NLRB) to use its rulemaking authority, rather than relying nearly exclusively on announcing legal principles through adjudication.¹ This suggestion mostly fell on deaf ears, with the notable exception of a 1987 Board rule governing bargaining unit determinations in the health care context.² But recently, the NLRB has promulgated two new substantive rules through the notice-and-comment rulemaking process. First, in 2011, the Board issued a rule requiring employers to post a notice of employee rights; this rule was intended to remedy employee ignorance of the rights and protections contained in the National Labor Relations Act (NLRA).³ However, the Fourth and District of Columbia Circuits struck down the rule,⁴ and the Board eventually withdrew it.⁵ Then, in December 2014, the Board issued a rule intended to streamline union representation elections.⁶ The rule took effect in April 2015 amid tremendous controversy, with industry groups filing lawsuits aimed at invalidating it,⁷ and both houses of Congress passing resolutions (since vetoed by the President) disapproving the rule.⁸

This Essay uses these two recently promulgated rules as case studies to discuss the relative merits and drawbacks of NLRB rulemaking as compared to

¹ See, e.g., Jeffrey S. Lubbers, *The Potential of Rulemaking by the NLRB*, 5 FIU L. REV. 411, 414 & nn.20–22 (2010) (compiling sources). This literature is discussed in greater detail *infra* Part I.

² Mark H. Grunewald, *The NLRB's First Rulemaking: An Exercise in Pragmatism*, 41 DUKE L.J. 274, 275 (1991). The Board has also issued a handful of non-substantive rules through the notice-and-comment rulemaking process. Lubbers, *supra* note 1, at 412 (noting that the Board has “issued a smattering of procedural, privacy, and housekeeping rules” during the last twenty years).

³ Notification of Employee Rights Under the National Labor Relations Act, 76 Fed. Reg. 54,006 (Aug. 30, 2011).

⁴ Chamber of Commerce of the U.S. v. NLRB, 721 F.3d 152 (4th Cir. 2013); Nat'l Ass'n of Mfrs. v. NLRB, 717 F.3d 947 (D.C. Cir. 2013), *overruled in part on other grounds by* Am. Meat Inst. v. U.S. Dep't of Agric., 760 F.3d 18 (D.C. Cir. 2014) (en banc) (overruling discussion of scope of *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985)).

⁵ *Employee Rights Notice Posting*, NLRB, <http://www.nlr.gov/poster> (last visited May 9, 2015).

⁶ Representation—Case Procedures, 79 Fed. Reg. 74,308 (Dec. 15, 2014) (to be codified at 29 C.F.R. pts. 101–103).

⁷ Complaint, Chamber of Commerce of the U.S. of Am. v. NLRB, No. 1:15-cv-000009 (D.D.C. Jan. 5, 2015), ECF No. 1, available at <http://www.chamberlitigation.com/sites/default/files/cases/files/2015/Complaint%20--%20U.S.%20Chamber%20of%20Commerce%20v.%20NLRB%20%28U.S.%20District%20Court%20for%20the%20District%20of%20Columbia%29.pdf> [hereinafter Chamber Complaint]; Complaint, Associated Builders & Contractors of Tex., Inc. v. NLRB, No. 1:15-cv-00026 (W.D. Tex. Jan. 13, 2015), ECF No. 1, available at <http://www.vorysonlabor.com/files/2015/01/ABC-v.-NLRB.pdf> [hereinafter ABC Complaint].

⁸ *Infra* note 100.

adjudication in an environment in which labor law is heavily politicized. It explores the extent to which the Board—a flashpoint for controversy—has been able to realize the advantages of rulemaking over adjudication in its recent attempts.⁹ It concludes that whereas the Board’s rulemakings have potential to yield benefits, such as improved certainty and consistency for unions and employers, those benefits can easily be overshadowed by the risk of judicial invalidation on constitutional or administrative law grounds. Moreover, judicial rejection of high-profile NLRB rules—particularly when based on ideas with public resonance, like free speech—in turn feeds a political narrative of an out-of-control Board that must be throttled by the legislative and judicial branches of government.¹⁰ As a case-in-point, the Board’s notice-posting rule was struck down by the District of Columbia Circuit as an infringement of employers’ speech rights, and the elections procedure rule has been challenged on the same grounds. In both instances, the free speech arguments seemed to come as something of a surprise to the rules’ public proponents. This is not to say that the choice of rulemaking over

⁹ The phrase “Obama Board” refers to the NLRB during the Obama administration. When President Obama assumed office in 2009, the Board had only two members, Democrat Wilma Liebman and Republican Peter Schaumber. In 2010, the Supreme Court held that decisions issued by the two-member Board were invalid because the Board lacked a statutorily required quorum. *New Process Steel, L.P. v. NLRB*, 560 U.S. 674 (2010). Shortly thereafter, President Obama made two recess appointments to the Board, Mark Pearce and Craig Becker; Member Pearce was later confirmed by the Senate along with Republican Brian Hayes. In 2012, the Board again fell to two members, and President Obama made three additional recess appointments. These appointments were later deemed invalid by the Supreme Court. *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014). However, the Board has included at least three Senate-confirmed members continuously since August 2013. See *Members of the NLRB Since 1935*, NLRB, <http://www.nlr.gov/who-we-are/board/members-nlr-1935> (last visited May 9, 2015).

As under prior administrations, the Obama Board’s decisions have frequently caused political controversy. See, e.g., William B. Gould IV, *A Century & Half Century of Advance and Retreat: The Ebbs and Flows of Workplace Democracy*, 86 ST. JOHN’S L. REV. 431, 439–40 (2012); Wilma B. Liebman, Foreword, *Labor Law During Hard Times: Challenges on the 75th Anniversary of the National Labor Relations Act*, 28 HOFSTRA LAB. & EMP. L.J. 1, 5–6 (2010) (characterizing political controversies related to Bush II and Obama Boards as “a record accumulation of difficulties”). Some of these controversies have resulted in existential threats to the Board. In recent years, Republican lawmakers have repeatedly called for the Board to be defunded, and in 2011, Member Hayes reportedly considered resigning from the Board in order to deprive it of a quorum and render it unable to act. Pete Kasperowicz, *GOP Lawmaker: Defund the NLRB*, HILL (Apr. 3, 2014, 11:03 AM), <http://thehill.com/blogs/floor-action/government-oversight/202556-gop-lawmaker-defund-the-nlr-1935>; Melanie Trotman, *NLRB Defunding Fails, but Agency Remains GOP Target*, WALL ST. J. WASH. WIRE BLOG (Feb. 17, 2011, 4:43 PM ET), <http://blogs.wsj.com/washwire/2011/02/17/nlr-1935-defunding-fails-but-agency-remains-gop-target/>; see also Steven Greenhouse, *Republican Might Quit Labor Board*, N.Y. TIMES, Nov. 23, 2011, at B1, available at <http://www.nytimes.com/2011/11/23/business/brian-e-hayes-threatens-to-quit-labor-board.html>.

¹⁰ See Thomas O. McGarity, *Administrative Law as Blood Sport: Policy Erosion in a Highly Partisan Age*, 61 DUKE L.J. 1671, 1679–80 (2012) (describing high-stakes rulemakings in controversial areas of law in which politics dominates the administrative process).

adjudication is responsible for the injection of these and other arguments into the debate. However, incremental adjudications may run less risk of judicial invalidation than rulemaking, which might reasonably lead the Board to conclude that it should proceed via adjudication whenever it is free to do so, given that the benefits of rulemaking may prove illusory. Further, the Board has adopted adjudicatory procedures that mimic some benefits of rulemaking, especially in high-profile cases. Thus, where the Board is free to choose between adjudication and rulemaking, adjudication may be both the more pragmatic choice and one that carries relatively little downside.

The Essay proceeds in three parts. It begins with a brief discussion of the benefits and drawbacks of rulemaking versus adjudication and surveys the literature calling for the NLRB to engage in rulemaking. Then, it describes the Obama Board's recent rulemakings, including the early demise of the notice-posting rule and the looming challenges facing the election-procedures rule. Finally, it discusses what might be learned from the Board's recent forays into notice-and-comment rulemaking.

I. CALLS FOR NLRB RULEMAKING

For decades, scholars and courts have debated the relative merits of rulemaking and adjudication.¹¹ However, in the context of the NLRB, "debate" is perhaps a misnomer: commentators have almost universally called for the Board to exercise its rulemaking authority more often.¹² This Part explores the reasons for this rare near-unanimity, which in turn provide the backdrop for a more thorough exploration and evaluation of the Obama Board's recent experience with rulemaking.

It is black-letter law that agencies have discretion to choose between rulemaking and adjudication. In articulating this principle in *SEC v. Chenery Corp.*,¹³ the Supreme Court generated a list of reasons that an agency might choose to announce legal principles through adjudication rather than rulemaking; these largely pertained to the need to maintain agency flexibility

¹¹ See, e.g., Richard K. Berg, *Re-examining Policy Procedures: The Choice Between Rulemaking & Adjudication*, 38 ADMIN. L. REV. 149 (1986); Charles J. Morris, *The NLRB in the Dog House—Can an Old Board Learn New Tricks?*, 24 SAN DIEGO L. REV. 9 (1987); Cornelius J. Peck, *A Critique of the National Labor Relations Board's Performance in Policy Formulation: Adjudication & Rule-making*, 117 U. PA. L. REV. 254 (1968).

¹² See Lubbers, *supra* note 1, at 414 & n.20 (accumulating list of articles calling for NLRB rulemaking).

¹³ *SEC v. Chenery Corp. (Chenery II)*, 332 U.S. 194, 203 (1947).

when dealing with new or multi-faceted problems.¹⁴ Nonetheless, the Court also urged that “[t]he function of filling in the interstices of the Act should be performed, as much as possible, through this quasi-legislative promulgation of rules to be applied in the future.”¹⁵ The Court affirmed this principle in *NLRB v. Bell Aerospace Co.*,¹⁶ though it added, without elaboration, that there “may be situations where the Board’s reliance on adjudication would amount to an abuse of discretion or a violation of the Act.”¹⁷

As the *Chenery II* Court suggested, advantages of agency adjudication over rulemaking include increased speed as well as the flexibility to adjust standards as novel situations arise or as the agency gains experience.¹⁸ In addition, adjudications may pose less chance of attracting political heat¹⁹—though NLRB adjudications, and even charging decisions, are far from immune to political controversy.²⁰ Finally, gradual changes brought about through adjudications may be less likely to be overturned by courts, and, in any event, “there is far more at stake when a rule is rejected by a federal court than when an adjudicated decision is reversed.”²¹

Yet, many have called for the NLRB to limit its reliance on adjudication, particularly where it is announcing broad, new standards. They describe the benefits of the rulemaking process as follows:

¹⁴ *Id.* at 202–03.

¹⁵ *Id.* at 202.

¹⁶ 416 U.S. 267 (1974).

¹⁷ *Id.* at 294.

¹⁸ This argument has also been advanced by numerous commentators. *E.g.*, Lubbers, *supra* note 1, at 420–27 (listing applicable rulemaking requirements in addition to those found in the Administrative Procedure Act); David L. Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 HARV. L. REV. 921, 927–28 (1965).

¹⁹ See James J. Brudney, *Isolated & Politicized: The NLRB’s Uncertain Future*, 26 COMP. LAB. L. & POL’Y J. 221, 235 (2005).

²⁰ Steven Greenhouse, *Labor Board Drops Case Against Boeing After Union Reaches Accord*, N.Y. TIMES, Dec. 10, 2011, at B3, available at <http://www.nytimes.com/2011/12/10/business/labor-board-drops-case-against-boeing.html> (discussing the “political conflagration ignited by” the NLRB General Counsel’s decision to charge Boeing with an unfair labor practice after an executive with the company implied that the decision to relocate work was due to union activity at Boeing facilities in Washington state).

²¹ Brudney, *supra* note 19, at 235; Note, *NLRB Rulemaking: Political Reality Versus Procedural Fairness*, 89 YALE L.J. 982, 989, 993 (1980) (arguing adjudication minimizes conflict between the federal judiciary and Congress); see also Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1565 (2002); cf. Morris, *supra* note 11, at 34 (arguing that, in the aggregate, rulemaking reduces litigation).

- *More & Better Information*²²: The rulemaking process allows all interested constituencies to submit comments, and the resulting empirical record could lead to better decisionmaking by the Board.²³ In other words, the rulemaking process allows for greater public participation than the adjudicatory process—a feature that offers advantages in terms of democratic process, as well as the final result. In contrast, adjudication is limited to the parties before the Board, plus amici.²⁴ Even where amicus participation in adjudication is robust—and therefore yields much of the same information that a rulemaking process would—there is some loss from a public participation standpoint; amici will probably be insiders, as it is simply more difficult to figure out how to draft and file an amicus brief than a comment.²⁵ Further, the Board’s response to submitted comments (both for and against) is likely to be quite thorough, which might prompt “increased deference from courts.”²⁶
- *Forward-Looking Lawmaking*²⁷: Whereas Board adjudications are necessarily confined to issues that happen to arise and to be pursued by the Board’s General Counsel, rulemaking allows the Board to decide which issues to tackle, when to tackle them, and how broadly or narrowly to address them.²⁸ Further, while these advantages relate to the efficacy of rulemaking, one might also characterize this interest in terms of fairness to regulated parties. In fact, as the Supreme Court recently emphasized, this consideration takes on a constitutional valence; enforcement proceedings premised on abrupt changes in regulatory policy violate parties’ due

²² E.g., Berg, *supra* note 11; Brudney, *supra* note 19, at 235; Shapiro, *supra* note 18, at 930–32.

²³ The Board is statutorily banned from hiring economic experts, 29 U.S.C. § 154(a) (2012), so one advantage of the notice-and-comment process is an expanded opportunity for outside groups to submit economic analyses.

²⁴ As discussed in Part II, the relevance of amici submissions should not be understated. The Board regularly issues calls for amicus participation in cases involving the announcement of new standards. See *Invitations to File Briefs*, NLRB, <http://www.nlr.gov/cases-decisions/invitations-file-briefs> (last visited May 9, 2015).

²⁵ See Arthur Earl Bonfield, *State Administrative Policy Formulation and the Choice of Lawmaking Methodology*, 42 ADMIN. L. REV. 121, 128 (1990) (observing, in context of state agencies, that rulemaking is preferable when many members of the regulated community are unlikely to have lawyers).

²⁶ Jeffrey M. Hirsch, *Defending the NLRB: Improving the Agency’s Success in the Federal Courts of Appeals*, 5 FIU L. REV. 437, 457–58 (2010).

²⁷ Bonfield, *supra* note 25, at 128; Shapiro, *supra* note 18, at 932.

²⁸ Bonfield, *supra* note 25, at 128 (rulemaking is desirable because “[t]he agency may make that law whenever it desires, in advance of any violations, and as a means of avoiding the occurrence of such circumstances in the first place”).

process rights when they occur without reasonable notice.²⁹ To deal with this problem, the Board sometimes uses adjudication to announce rules that will apply only prospectively, meaning that they do not apply to the party before the Board.³⁰ But this forward-looking focus that essentially repurposes adjudicative decisions as policy statements sits awkwardly with the commonly understood purpose of adjudication: the correction of past wrongs.

- *Stability & Consistency*³¹: The Board has been criticized for frequent policy reversals that tend to follow changes in its political composition.³² For example, Professors Catherine Fisk and Deborah Malamud argue that much of the Board's decisionmaking consists of ideologically tinged policy judgments, and that it would be better if the Board acknowledged that fact and accordingly turned to a non-adjudicative lawmaking process.³³ In addition, some areas of Board law generate a lot of litigation because they are simply confusing or unclear; rulemaking could help clarify the contours of the law.³⁴ Moreover, rules might be more stable than adjudicatory decisions, and policy changes would be more likely perceived as legitimate when accomplished through rulemaking. This stability could both improve Board legitimacy and improve employers' and unions' abilities to plan for the future. In addition, it is easier for

²⁹ *FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2318–19 (2012) (agency's failure to give notice to television station that agency had adopted new interpretation of statute as forbidding "fleeting moments of indecency" before bringing enforcement proceeding based on that interpretation violated the station's Due Process rights).

³⁰ *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 763 (1969); see also Bonfield, *supra* note 25, at 129.

³¹ Samuel Estreicher, *Policy Oscillation at the Labor Board: A Plea for Rulemaking*, 37 ADMIN. L. REV. 163, 173 (1985); Peck, *supra* note 11, at 270; see also Bonfield, *supra* note 25, at 129–30; Brudney, *supra* note 19, at 235–36; William B. Gould, IV, *New Labor Law Reform Variations on an Old Theme: Is the Employee Free Choice Act the Answer?*, 70 LA. L. REV. 1, 42 (2009).

³² Peck, *supra* note 11, at 254; see also Gould, *supra* note 31, at 44 (arguing terms in NLRA "lend themselves to policy judgments").

³³ Catherine L. Fisk & Deborah C. Malamud, *The NLRB in Administrative Exile: Problems With its Structure and Function and Suggestions for Reform*, 58 DUKE L.J. 2013, 2015, 2078–79 (2009); see also Joan Flynn, *The Costs and Benefits of "Hiding the Ball": NLRB Policymaking and the Failure of Judicial Review*, 75 B.U. L. REV. 387, 399 (1995) (arguing that the Board disguises policymaking in adjudications to prevent effective judicial review or congressional oversight); Peck, *supra* note 11, at 257 (noting that "generalized provisions" of NLRA inevitably require policy decisions).

³⁴ Gould, *supra* note 31, at 42–43 (rulemaking is appropriate "where there has been enormous litigation because of confusion about certain issues that come up time and time again," such as regarding the definition of appropriate bargaining units within healthcare facilities); William B. Gould, IV, *The Employee Free Choice Act of 2009, Labor Law Reform, and What Can Be Done About the Broken System of Labor-Management Relations Law in the United States*, 43 U.S.F. L. REV. 291, 337 (2008) (arguing that rulemaking regarding unit determinations for multiple location facilities would reduce "wasteful litigation" and promote stability).

Congress to maintain oversight over rulemaking processes than adjudications.

This Part has briefly reviewed the overlapping and mutually reinforcing reasons commonly advanced in support of calls for the Board to engage in rulemaking. The next Part discusses the Obama Board's substantive rulemakings and their outcomes, laying a foundation for discussion of whether the Board has been able to realize the potential benefits of rulemaking over adjudication.

II. RULEMAKING UNDER THE OBAMA BOARD

The Obama Board has announced two major substantive rules: one requiring employers to post a notice of employee rights (the notice-posting rule), and the other adjusting the various aspects of the NLRB election process (the election-procedures rule).³⁵

A. The Short Life and Untimely Death of the NLRB's Notice-Posting Rule

In December 2010, the NLRB—then composed of three democratic appointees and one republican appointee³⁶—issued a proposed rule that would require employers to post a notice regarding employees' rights under the NLRA.³⁷ Commentators had repeatedly called for the Board to enact such a rule, dating back to at least 1987,³⁸ and it was the second time the Board considered rulemaking in this area.³⁹ The first came in the early 1990s, when the Board considered a rule that would have required unions to notify employees of their rights to opt out of a portion of union dues;⁴⁰ following that proposal, a group of professors petitioned for the rule to be expanded so that

³⁵ Notification of Employee Rights Under the National Labor Relations Act, 76 Fed. Reg. 54,006 (Aug. 30, 2011); Representation—Case Procedures, 79 Fed. Reg. 74,308 (Dec. 15, 2014) (to be codified at 29 C.F.R. pts. 101–103).

³⁶ *Members of the NLRB Since 1935*, *supra* note 9.

³⁷ 76 Fed. Reg. 54,006.

³⁸ *E.g.*, Morris, *supra* note 11, at 38.

³⁹ Lubbers, *supra* note 1, at 412.

⁴⁰ This proposal followed the Supreme Court's decision in *Communications Workers of America v. Beck*, 487 U.S. 735 (1988), in which the Court held that the NLRA's language permitting unions and employers to require workers to pay union dues as a condition of employment was limited to the portion of union dues that was germane to collective bargaining and grievance administration. Accordingly, the rule would have required unions to notify employees of their rights to opt out of the non-germane portion of union dues by mail or notice posting. Union Dues Regulations, 57 Fed. Reg. 43,635, 43,639 (Sept. 22, 1992).

the notice would include a more general statement of employee rights.⁴¹ However, the Board ultimately withdrew the proposed rule in 1996.⁴²

This time, the Board pressed forward and enacted a final rule.⁴³ In explaining the need for the rule, the Board cited the ignorance of many employees of their rights under the NLRA, especially immigrants and graduating high school students.⁴⁴ The Board had elaborated on this theme in its Notice of Proposed Rulemaking, linking employees' ignorance of their rights to "underutilization of legitimate workplace protests, of the voicing of group grievances, and of requests for outside help from government agencies or other third parties."⁴⁵ In addition, the Board observed that most other agencies responsible for administering other employment laws require employers to post notices.⁴⁶

Before enacting the final rule, the Board considered a number of objections submitted during the rule's comment period coming both from individuals and groups, and from Republican Board Member Hayes who also opposed the rule.⁴⁷ These objections raised both policy and legal questions. As to the former, commenters variously questioned the Board's premise that workers were unaware of their rights under the NLRA (and, consequently, whether there was any need for the rule),⁴⁸ suggested the notices would be useless,⁴⁹ and argued that the rule would damage the American economy by prompting employees to unionize or file unfair labor practice (ULP) charges.⁵⁰ As to the latter, commenters questioned both whether the Board had statutory authority to enact the rule at all,⁵¹ and argued that the rule violated employers' First Amendment rights⁵² and Sections 8(c), 9, or 10 of the NLRA,⁵³ among other arguments.

⁴¹ Charles J. Morris, *Renaissance at the NLRB—Opportunity and Prospect for Non-Legislative Procedural Reform at the Labor Board*, 23 STETSON L. REV. 101, 110–11 (1993).

⁴² Lubbers, *supra* note 1, at 412.

⁴³ Notification of Employee Rights Under the National Labor Relations Act, 76 Fed. Reg. 54,006 (Aug. 30, 2011).

⁴⁴ *Id.* at 54,015.

⁴⁵ Proposed Rules Governing Notification of Employee Rights Under the National Labor Relations Act, 75 Fed. Reg. 80,410, 80,411 (Dec. 22, 2010).

⁴⁶ 76 Fed. Reg. at 54,006–07.

⁴⁷ *Id.* at 54,007.

⁴⁸ *Id.* at 54,015.

⁴⁹ *Id.* at 54,017.

⁵⁰ *Id.* at 54,016.

⁵¹ *Id.* at 54,008.

⁵² *Id.* at 54,010, 54,012, 54,014.

⁵³ *Id.* at 54,011–12.

The Board did not reverse course in light of these objections. Rather, it promulgated a final rule that both set the text for the required notice—a short description of employee rights under Section 7 of the NLRA—and imposed penalties for employer noncompliance.⁵⁴ Specifically, failure to post the required notice was an ULP in itself. In addition, it could toll the statute of limitations and provide evidence of unlawful motive in separate ULP cases.⁵⁵ Each aspect of the rule was immediately controversial. For example, commenters argued that the text of the notice should include information about various aspects of employees' rights to refrain from unionizing.⁵⁶ In addition, they argued that the Board's suite of remedies went beyond what the NLRA allowed.⁵⁷

Ultimately, this rule was short lived.⁵⁸ Business groups sued to overturn it, and the Fourth and District of Columbia Circuits agreed with them, issuing decisions resting on different rationales five weeks apart.⁵⁹ First, the District of Columbia Circuit struck down the rule on the grounds that it violated employers' free speech rights, as guaranteed by Section 8(c) of the NLRA.⁶⁰ Its decision focused primarily on compelled speech precedents, concluding that the Board's notice-posting rule was indistinguishable from these cases.⁶¹ In addition, the court held that the NLRB lacked statutory authority to toll the statute of limitations for filing a ULP charge based on failure to post the required notice.⁶² Then, having concluded that none of the three remedies for failure to post the notice were permitted, the court struck down the posting

⁵⁴ *Id.* at 54,006, 54,010, 54,029–30.

⁵⁵ 29 C.F.R. §§ 104.213–104.214 (2015).

⁵⁶ 76 Fed. Reg. at 54,020.

⁵⁷ *Id.* at 54,032.

⁵⁸ For an account of the timing of the litigation challenges to this rule, see Charles J. Morris, *Notice-Posting of Employee Rights: NLRB Rulemaking & the Upcoming Backfire*, 67 RUTGERS L. REV. (forthcoming Spring 2015) (manuscript at 2 n.5), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2529699###. Professor Morris argues that both circuit decisions were wrong, a conclusion to which I am sympathetic—though I do not share his confidence that the Supreme Court would have upheld the rule. *Cf. id.* (manuscript at 4) (stating that “failure to seek certiorari review was a serious mistake”).

⁵⁹ Chamber of Commerce of the U.S. v. NLRB, 721 F.3d 152 (4th Cir. 2013); Nat'l Ass'n of Mfrs. v. NLRB, 717 F.3d 947 (D.C. Cir. 2013), *overruled in part on other grounds by* Am. Meat Inst. v. U.S. Dep't of Agric., 760 F.3d 18 (D.C. Cir. 2014) (en banc) (overruling discussion of scope of *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985)).

⁶⁰ *Nat'l Ass'n of Mfrs.*, 717 F.3d at 954, 964. After the Board withdrew its notice-posting rule, the District of Columbia Circuit issued an en banc decision that limited the compelled speech holding in *National Association of Manufacturers*. *Am. Meat Inst. v. Dep't of Agric.*, 760 F.3d 18, 22–23 (D.C. Cir. 2014) (en banc).

⁶¹ *Nat'l Ass'n of Mfrs.*, 717 F.3d at 957.

⁶² *Id.* at 962.

requirement itself, concluding it was not severable from the remedies portion of the rule.⁶³

About a month later, the Fourth Circuit followed suit, also holding that the notice-posting rule was invalid because it exceeded the Board's rulemaking authority.⁶⁴ It construed that grant of authority—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 [the NLRA]”⁶⁵—narrowly, concluding that the Board could not create a new ULP through rulemaking.⁶⁶ In reaching this conclusion, the court held that the NLRB was confined to an “expressly reactive” role: “there is no function or responsibility of the Board not predicated upon the filing of an [ULP] charge or a representation petition.”⁶⁷ Taken at face value, this vision of NLRB rulemaking is a sharply circumscribed one: not only could the Board not create a new ULP through rulemaking, it also could not take steps to prevent the commission of existing ULPs.⁶⁸

The Board did not seek Supreme Court review of the two circuit court decisions, and now simply notes on its website that the poster can still be disseminated voluntarily.⁶⁹ In addition, it launched a smartphone application containing information about the NLRA.⁷⁰

B. The NLRB's Election-Procedures Rule

In June 2011, the Board issued a second notice of proposed rulemaking, this time concerning the Board's union election procedures.⁷¹ After a procedural stumbling block that ultimately resulted in the Board conducting two full rounds of rulemaking,⁷² the final rule was issued on December 15,

⁶³ *Id.* at 963–64. Concurring, Judges Henderson and Brown indicated they would have struck down the rule as exceeding the scope of the Board's rulemaking authority. *Id.* at 966 (Henderson, J., concurring).

⁶⁴ *Chamber of Commerce*, 721 F.3d at 154.

⁶⁵ 29 U.S.C. § 156 (2012).

⁶⁶ *Chamber of Commerce*, 721 F.3d at 155–56.

⁶⁷ *Id.* at 154, 162.

⁶⁸ *Id.* at 162 (stating that NLRA “rights are not functions or provisions to be ‘carried out’”).

⁶⁹ Press Release, NLRB Office of Public Affairs, The NLRB's Notice Posting Rule (Jan. 6, 2014), available at <http://www.nlr.gov/news-outreach/news-story/nlrbs-notice-posting-rule>.

⁷⁰ *NLRB Mobile Apps*, NLRB, <http://www.nlr.gov/apps> (last visited May 9, 2015).

⁷¹ Representation—Case Procedures, 79 Fed. Reg. 74,308, 74,311 (Dec. 15, 2014) (to be codified at 29 C.F.R. pts. 101–103).

⁷² The Board first held a comment period during 2011 and issued the final rule in December. *Id.* However, a district court later held that the Board lacked a quorum when it issued the final rule. *Id.* (citing *Chamber of Commerce of the U.S. v. NLRB*, 879 F. Supp. 2d 18, 28–30 (D.D.C. 2012)). The Board then

2014. The final rule adjusted the Board's process for handling representation petitions and related legal challenges in a list of ways.⁷³ In general, many of the changes were aimed at condensing preelection hearing procedures that could otherwise extend the period between the filing of a representation petition and an actual union election.⁷⁴ For example, the rule puts off the litigation of certain issues until after the election has been held, requires the party opposing the election (usually the employer) to identify key preelection legal challenges in a single statement, and eliminates an automatic stay of an election when the opposing party seeks discretionary Board review of a regional director's preelection decision.⁷⁵ The Rule also requires the employer to post a notice containing information about employees' rights within two days of the petition filing, and to provide the union with employee e-mail addresses in addition to their home addresses.⁷⁶ Taken together, the Board stated that these procedures would result in "[s]implifying, streamlining and, in some cases, bolstering" existing election procedures.⁷⁷ The Board further explained that the rule served agency interests in efficiency, particularly in light of technological advances, as well as employee interests in fair and informed voting, and in a transparent and uniform election process.⁷⁸

There is a key difference between the Board's reasoning and that of academics and unions who have argued that the Board should shorten the union election process.⁷⁹ These commentators have focused in part on limiting employers' opportunities to lobby their employees (through legal and illegal means) to vote against union representation.⁸⁰ For example, Professor Benjamin Sachs has argued that employers have outsized influence over their

reissued the proposed rule in February 2014, and held a second comment period, while also reconsidering the comments made during the 2011 rulemaking. *Id.* at 74,312.

⁷³ *Id.* at 74,308.

⁷⁴ *See id.*; see also Jeffrey M. Hirsch, *NLRB Elections: Ambush or Anticlimax?*, 64 EMORY L.J. 1647, 1654–64 (2015) (describing key changes in NLRB's election-procedures rule).

⁷⁵ These and other changes implemented in this rulemaking are summarized on the Board's website. *NLRB Representation Case-Procedures Fact Sheet*, NLRB, <http://www.nlr.gov/news-outreach/fact-sheets/nlr-representation-case-procedures-fact-sheet> (last visited May 9, 2015).

⁷⁶ *Id.*

⁷⁷ 79 Fed. Reg. at 74,315.

⁷⁸ *Id.* at 74,315.

⁷⁹ *See, e.g.*, Benjamin I. Sachs, *Enabling Employee Choice: A Structural Approach to the Rules of Union Organizing*, 123 HARV. L. REV. 655 (2010); Kate Bronfenbrenner & Dorian Warren, *The Empirical Case for Streamlining the NLRB Certification Process: The Role of Date of Unfair Labor Practice Occurrence* (Columbia Univ. Inst. for Soc. & Econ. Research & Policy, Working Paper No. 2011.01, 2011), available at <http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1158&context=workingpapers>.

⁸⁰ *See* Sachs, *supra* note 79, at 701.

employees' decisions about union representation given their constant access to employees during the workday, their obvious influence over their employees' livelihoods, and their sophisticated legal "union avoidance" strategies coupled with weak remedies for violations of labor law.⁸¹ Accordingly, Sachs continued, minimizing the time during which an employer can bring these tools to bear in its campaign against unionization is desirable because it makes it more likely that employees will vote their true desires concerning unionization.⁸²

In contrast, the NLRB stated categorically that "the problems caused by delay have nothing to do with employer speech,"⁸³ instead linking efficient election procedures with employee confidence in the Board.⁸⁴ The Board also situated its rulemaking in history, noting its "decades" long practice of seeking to decrease representation petition processing time, while also taking care to note that its past success in this area did not obviate the need for continued improvements.⁸⁵ Thus, for the Board members who favored this rule, it was simple good governance reform aimed at improving procedural efficiency.

The Board's disavowal of any intent to limit employer speech is likely to become a significant issue in legal challenges to the new rule. The argument is anticipated in both the comments opposing the new rule and in the exchange among the three Board members who voted in favor of the new rule and the two dissenting members.⁸⁶ In short, the argument is that shortening the time between the filing of a representation petition (which may also be when the employer first learns of the existence of the union drive) and the election violates the employer's First Amendment and statutory rights to campaign against unionization. This is either because the true intent of the rule was to limit employer speech (despite the majority's statement to the contrary) or because the rule will have that effect.⁸⁷ More specifically, the dissenting Board members argued that the time between the representation petition and the election is a long-recognized "critical period" during which employer and union communications are particularly salient.⁸⁸ This view is premised on the idea that, although employers may communicate with employees about unions

⁸¹ See *id.* at 710; see also *supra* note 40 and accompanying text.

⁸² *Id.* at 701.

⁸³ 79 Fed. Reg. at 74,316.

⁸⁴ *Cf. id.*

⁸⁵ *Id.*

⁸⁶ *Id.* at 74,439–40.

⁸⁷ *Id.* at 74,440.

⁸⁸ *Id.*

on a regular basis long before becoming aware of a union drive, the representation petition will both sharpen the employer's sense of urgency and permit it to discuss its opposition to the specific union that stands to become its employees' exclusive bargaining representative.⁸⁹ Thus, the dissenters argued that shortening this time period "essentially embraces an 'anti-distortion' theory—justifying speech restrictions to prevent an 'unfair advantage' in campaigning."⁹⁰

The Board members in the majority offered a multipronged response. The majority began by observing that the "final rule does not change any rules regarding speech."⁹¹ It also argued that the rule left employers, employees, and unions with "a meaningful opportunity" for speech, particularly given advances in communication technology and the fact that an employer can convey its views about unionization at any time, both before and after a representation petition is filed.⁹² Finally, the Board distanced itself from comments that urged the Board to expedite election procedures in order to limit employers' opportunities to oppose the union drive, characterizing them as "inappropriate or irrelevant reasons for wanting the Board to issue a sound rule."⁹³

I have emphasized the free-speech-related aspect of this rulemaking both because of its prominence in the exchange between the Board majority and dissenters and because the First Amendment is becoming increasingly salient in lawsuits challenging Board rulemakings and adjudications—including in a pending lawsuit challenging this rule.⁹⁴ However, other comments focused variously on every other aspect of the rulemaking, and the Board responded at length in its final rule, which took effect on April 14, 2015.⁹⁵

⁸⁹ 29 U.S.C. § 159(a) (2012) (stating that a union elected by the majority of the employees within a bargaining unit "shall be the exclusive representatives of all the employees in such unit").

⁹⁰ *Id.* (citing *Citizens United v. FEC*, 558 U.S. 310 (2010)). In addition to the First Amendment argument, the dissenting Board members and some commenters argued that the revised procedures would violate employers' constitutional due process rights. These arguments focused on the faster hearing timetables under the rule, which the dissenters argued involved a "potential deprivation in every election proceeding of the statutorily assured right of parties to full pre-hearing litigation . . . and the fundamental right of an employer to pursue its interests in maintaining autonomous control of a business operation in which it has a substantial capital investment." *Id.* at 74,451.

⁹¹ *Id.* at 74,423.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ Chamber Complaint, *supra* note 7, at 6–7; *see also infra* notes 141–43 and accompanying text.

⁹⁵ 79 Fed. Reg. at 74,308.

Within weeks of the Board's issuance of its final rule, several employer-side groups filed two lawsuits to invalidate the rule.⁹⁶ The lead suit, filed by the U.S. Chamber of Commerce in district court in the District of Columbia, includes a suite of claims mirroring the arguments made by commenters and the two dissenting Board members during the rulemaking process.⁹⁷ Namely, the suit includes claims that the rule violates the NLRA and employers' free speech and due process rights, and that the rule is arbitrary and capricious in violation of the Administrative Procedure Act.⁹⁸ In addition, both houses of Congress have taken action to nullify the Board's rule under the Congressional Review Act,⁹⁹ although the President vetoed the resulting Joint Resolution disapproving the rule.¹⁰⁰

This Part has reviewed the Board's two recent rulemaking efforts. The next Part offers some observations about the challenges that the Board faces in realizing the benefits of rulemaking in light of the repeated calls for it discussed above.¹⁰¹ These observations are necessarily preliminary given that the Board's notice-posting rule was struck down and then withdrawn before it could take effect and the election-procedures rule has just recently taken effect.¹⁰²

III. RULEMAKING'S RESULTS

This Part reprises the benefits and drawbacks of rulemaking that have been advanced by courts and in the scholarly literature, as discussed in Part I, and discusses them in the context of the Board's most recent rulemakings. It focuses on whether the Board was able to realize the benefits of rulemaking over adjudication as a lawmaking process. This discussion is necessarily contingent; the benefits of rulemaking would be achieved far more easily in an environment in which labor law was less politically charged or courts were

⁹⁶ See *supra* note 7.

⁹⁷ See Chamber Complaint, *supra* note 7, at 4.

⁹⁸ See *id.* at 4.

⁹⁹ 5 U.S.C. §§ 801–808 (2012).

¹⁰⁰ The Senate passed a resolution disapproving the Board's election-procedures rule, which was adopted by the House and vetoed by the President. S.J. Res. 8, 114th Cong. (vetoed Mar. 31, 2015); Memorandum of Disapproval, 2015 DAILY COMP. PRES. DOC. 216 (Mar. 31, 2015). Under the Congressional Review Act, Congress may nullify a regulation by joint resolution, subject to presidential veto. 5 U.S.C. §§ 801(a)(3)(B), 802.

¹⁰¹ *Supra* notes 22–34 and accompanying text.

¹⁰² Representation—Case Procedures, 79 Fed. Reg. 74,308 (Dec. 15, 2014) (to be codified at 29 C.F.R. pts. 101–103); Press Release, *supra* note 69.

more receptive to Board policymaking. Nonetheless, it suggests that in an environment characterized by intense and politicized criticism of the Board and judicial hostility to Board policies—and considering that the Board has found ways to import aspects of rulemaking into its adjudications—the risks of rulemaking can outweigh its benefits when the Board is free to choose between the two processes.

A. More and Better Information?

There are two aspects to the argument that rulemaking is superior to adjudication because the rulemaking process is likely to yield more information on which the agency might rely in making its decision. First, a rule may be perceived as more legitimate when the public has had a chance to comment, and the Board has considered and responded to those comments.¹⁰³ Second, an agency might make a rule substantively better and explain it more thoroughly because of useful information or perspectives received during the comment period.¹⁰⁴

Indeed, the two recent rulemaking processes yielded a tremendous amount of public commentary, which the Board duly considered and responded to as discussed above.¹⁰⁵ In fact, recent technological advancements—notably, an online system for submitting comments on proposed federal rules—has potential to yield even more public participation than academics writing in prior decades could have imagined.¹⁰⁶ The eRulemaking program, and the site “www.regulations.gov,” has helped tens of thousands of people to submit their own comments on hotly contested rules.¹⁰⁷

By way of comparison, the NLRB’s 1987 rulemaking regarding hospital bargaining units yielded more than 5,000 pages of hearing transcripts and

¹⁰³ See David Fontana, *Reforming the Administrative Procedure Act: Democracy Index Rulemaking*, 74 *FORDHAM L. REV.* 81, 102–04 (2005) (discussing, in the context of notice-and-comment rulemaking, evidence that public participation in decisionmaking results in more public support for eventual decision).

¹⁰⁴ See Beth Simone Noveck, *The Electronic Revolution in Rulemaking*, 53 *EMORY L.J.* 433, 436 (2004) (“Participation improves the quality of rules and makes regulatory rulemaking more legitimate and accountable.”).

¹⁰⁵ See *supra* Part II.

¹⁰⁶ Noveck, *supra* note 104, at 439 (arguing that, if structured correctly, technological advances in rulemaking have the potential to be “revolutionary” or “the savior of citizen participation”).

¹⁰⁷ Cary Coglianese, *Citizen Participation in Rulemaking: Past, Present and Future*, 55 *DUKE L.J.* 943, 946 (2006) (discussing evidence that the eRulemaking process has resulted in greater citizen participation in rulemaking).

written comments.¹⁰⁸ That volume—while substantial—pales in comparison to the volume of comments submitted on the two Obama Board rules.¹⁰⁹ To wit, the Board received 7,034 comments on the notice-posting rule¹¹⁰ and “tens of thousands” of comments on the election-procedures rule¹¹¹—the latter in addition to testimony offered during four days of public hearings.¹¹² However, the effect of this change should not be overstated, as a large number of comments were cumulative at best and sometimes identical to other submissions.¹¹³

However, this experience does not necessarily establish that notice-and-comment rulemaking yields substantively more useful information than adjudication. This is mostly because of the Board’s practice of soliciting amicus briefs, which contain much of the same information as would otherwise be included in comments, when it is considering making a substantial change.¹¹⁴ Of course, the Board is not required to solicit these briefs, whereas the notice-and-comment process is mandatory;¹¹⁵ likewise, it is possible that comments might be aimed at a broader range of situations than amicus briefs. However, the Board’s recent calls for amicus briefs, including in cases regarding aspects of union election practices and procedures, have specifically invited interested persons to submit wide-ranging briefs.¹¹⁶ For example, consider *Specialty Healthcare & Rehabilitation Center of Mobile, Inc.*—the highly controversial so-called “micro units” decision—in which the Board held that it would sometimes permit union elections among subgroups of employees

¹⁰⁸ Grunewald, *supra* note 2, at 301.

¹⁰⁹ *Cf. supra* Part II.

¹¹⁰ Notification of Employee Rights Under the National Labor Relations Act, 76 Fed. Reg. 54,006, 54,007 (Aug. 30, 2011).

¹¹¹ Representation—Case Procedures, 79 Fed. Reg. 74,308, 74,311 (Dec. 15, 2014) (to be codified at 29 C.F.R. pts. 101–103).

¹¹² *Id.*

¹¹³ See, e.g., *SHRM A-Team: Submit Comments to NLRB on “Ambush Election” Proposed Rule*, PENINSULA CHAPTER OF SHRM (Apr. 2, 2014), <http://virginiapeninsula.shrm.org/news/2014/04/team-submit-comments-nlr-ambush-election-proposed-rule> (calling on members to “copy and paste the suggested comments below”).

¹¹⁴ See *Archived Notices for Briefs and Invitations*, NLRB, <http://www.nlr.gov/cases-decisions/invitations-file-briefs/archived-notices-briefs-and-invitations> (last visited May 9, 2015); see also, e.g., *Babcock & Wilcox Constr. Co.*, 361 N.L.R.B. No. 132, 2014 WL 7149039, at *17 (Dec. 15, 2014) (noting the Board had solicited amicus briefs and discussing arguments in union and employer side amicus briefs submitted in response); *Lamons Gasket Co.*, 357 N.L.R.B. No. 72, 2011 WL 3916075, at *2 (Aug. 26, 2011) (noting that Board had solicited amicus briefs and listing parties that submitted briefs in response).

¹¹⁵ See 5 U.S.C. § 553 (2012).

¹¹⁶ *Supra* note 114.

within a workplace.¹¹⁷ The Board's six-page invitation to file amicus briefs discussed the issues presented in the case and the Board's reasons for reconsidering its earlier standard, and it specifically invited parties to submit a broad range of information concerning their experiences with the relevant issues.¹¹⁸ Put another way, the Board's invitation fulfilled the purposes of a Notice of Proposed Rulemaking and apparently satisfied the statutory requirements for such a Notice.

Even if rulemaking does not result in substantially more information, it could result in a final product that enjoys greater public legitimacy. It is impossible to say in any individual case that the public would have regarded either a Board rulemaking or adjudication as being more democratically legitimate had it been the product of another process. This is because both Board rulemakings and adjudications are often attacked as illegitimate by their opponents. For example, employers attacked both the Board's (adjudicated) presumptions regarding employee solicitation and distribution in hospitals and its (notice-and-comment) rule regarding hospital bargaining units as being insufficiently sensitive to individual circumstances¹¹⁹—so while granular decisions can be attacked as leaving too much indeterminacy, broader rules may be attacked for precisely the opposite reason. Moreover, it was certainly not the case that the Board's two recent rules were generally received as legitimate exercises of the Board's authority. Both rules were the targets of strong reactions (one might say overreactions) from both liberal and conservative groups, with the latter attacking the rules as illegitimate agency overreach. For example, the National Federation of Independent Business said the Board's notice-posting rule showed the NLRB's "spite for job creators by setting a trap for missions of businesses."¹²⁰ And, writing in the *National*

¹¹⁷ 357 N.L.R.B. No. 174, 2011 WL 7052274, at *1 (Dec. 30, 2011).

¹¹⁸ Notice and Invitation to File Briefs, Specialty Healthcare & Rehab. Ctr. of Mobile, Inc., 357 N.L.R.B. No. 174 (Dec. 22, 2010) (No. 15–RC–8773), available at <http://www.nlr.gov/sites/default/files/attachments/basic-page/node-3253/356-56.pdf>.

¹¹⁹ Brief for Beth Isr. Hosp., Beth Isr. Hosp. v. NLRB, 437 U.S. 483 (1978) (No. 77-152), 1978 WL 206686, at *6 ("The Board has not accorded due weight to the unique considerations inherent in health care institutions which must act in consonance with the needs of their patients as those needs are perceived by those who possess the medical expertise which the Board lacks."); see also Am. Hosp. Ass'n v. NLRB, 499 U.S. 606, 611–12 (1991) (rejecting employer's argument that the NLRA's requirement that the Board exercise discretion in determining bargaining units meant that the Board could not promulgate an industry-wide rule regarding these units).

¹²⁰ Kevan Chapman, *NLRB Overreaches its Authority with Punitive New Rule*, NFIB (Aug. 25, 2011), <http://www.nfib.com/article/nlr-overreaches-its-authority-with-punitive-new-rule-58046/> (internal quotation marks omitted); see also Steven Greenhouse, *New Rules Seen as Aid to Efforts to Unionize*, N.Y. TIMES, Aug. 26, 2011, at B1, available at <http://www.nytimes.com/2011/08/26/business/labor-agency-to-require-posting->

Review Online, former Board Member Peter Schaumber described the rule as “an unwarranted usurpation of congressional authority [that] undermines the very purpose it purportedly serves.”¹²¹ Similarly heated rhetoric surrounds the Board’s election streamlining rule, which the President of the National Association of Manufacturers characterized as “rais[ing] serious questions about whether the NLRB is advocating an outcome rather than acting as an impartial adjudicator.”¹²² Thus, the potential for NLRB rulemaking to result in a final product that enjoys public legitimacy seems doubtful in the highly politically charged moment in which Board actions of all stripes are likely to be targeted with allegations of illegitimacy and union favoritism.¹²³

In sum, it is unlikely that the Board’s recent experiments with rulemaking left it with a more complete and useful factual record upon which to proceed than it generally receives in high-profile adjudications. And, while public participation in the Board’s rulemakings has been robust—possibly yielding intangible benefits in terms of democratic deliberation and legitimacy¹²⁴—it

unionization-rights.html (noting the U.S. Chamber of Commerce described the rule as a “gift[]” to “organized labor”); Press Release, Nat’l Ass’n of Mfrs., Manufacturers File Lawsuit to Stop NLRB’s Overreach (Sept. 10, 2011), *available at* <http://www.nam.org/Newsroom/Press-Releases/2011/09/Manufacturers-File-Lawsuit-to-Stop-NLRBs-Overreach/> (“This rule is just another example of the Board’s aggressive overreach to insert itself into the day-to-day decisions of businesses – exerting powers it doesn’t have.” (internal quotation marks omitted)).

¹²¹ Peter Schaumber, *The NLRB’s Unlawful Rule*, NAT’L REV. ONLINE (Sept. 2, 2011, 4:00 AM), <http://www.nationalreview.com/article/276116/nlrbs-unlawful-rule-peter-schaumber>.

¹²² Press Release, Nat’l Ass’n of Mfrs., NLRB: If at First You Don’t Succeed, Try Again (Dec. 12, 2014), <http://www.nam.org/Newsroom/Press-Releases/2014/12/NLRB-If-at-First-You-Dont-Succeed-Try-Again/>; *see also* Press Release, Nat’l Right to Work Legal Def. Found., Inc., New Regulations Would Allow Union Bosses to Ambush Workers Into Forced-Dues-Paying Ranks (Dec. 12, 2014), <http://www.nrtw.org/en/press/2014/12/worker-advocate-blasts-obama-nlr-ambush-elections-12122014> (“Christmas came early for Big Labor as the Obama Labor Board has once again given union bosses increased power to ambush workers into dues-paying union ranks.”).

¹²³ This is not to say that Board adjudications are likely to be regarded as any *more* legitimate than rulemakings. Recent high-profile Board decisions, and even procedural steps short of decisions, such as the General Counsel’s recent issuance of a complaint charging McDonald’s corporation as a joint employer with several of its franchises, have also been targets for charges of illegitimacy. *See, e.g.*, Steven Greenhouse, *McDonalds Ruling Could Open Doors for Unions*, N.Y. TIMES, July 30, 2014, at B1, *available at* <http://www.nytimes.com/2014/07/30/business/nlr-holds-mcdonalds-not-just-franchisees-liable-for-worker-treatment.html> (quoting National Retail Federation official as saying the Board is “just a government agency that serves as an adjunct for organized labor”).

¹²⁴ The benefits of public participation in democratic discourse are beyond the scope of this Essay, though others have argued that these benefits are significant. *See, e.g.*, Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342, 374 (2004) (“[T]he overall goal of participation [in administrative governance] is broader than simply ensuring the achievement of policy goals; it enhances the ability of citizens to participate in political and civic life.”). I have previously discussed aspects of this issue in the labor organizing context. *See* Charlotte Garden, *Labor Values*

seems at best doubtful that the increased opportunity for public participation has resulted in improved public perception of the legitimacy of the final product. Instead, heightened political polarization means that virtually any Board action is likely to result in charges of illegitimacy and, if anything, the rulemaking process provides a more focused target for opponents.

B. Forward-Looking Lawmaking?

A second set of reasons often advanced for rulemaking centers on the opportunity for the Board to set its own top priorities and then deal with them in a comprehensive way that ensures adequate advance notice to affected parties, rather than simply deciding cases that happen to be filed by parties and pursued by NLRB regional directors or the Board's General Counsel. Conversely, adjudication can permit gradual responses to new or complex problems, and deflect political heat. This set of benefits and drawbacks—in a sense, mirror images of each other—is reflected in the Board's recent rulemakings.

First, consider the Board's election-procedures rule. While the Board can and does adjust some aspects of election procedures by adjudication, as well as by simply changing its own internal practice, it would undoubtedly be difficult for the Board to make a suite of simultaneous changes through any mechanism but rulemaking; among other impediments, those procedures that are set forth in the Code of Federal Regulations may only be changed via rulemaking.¹²⁵ Thus, once the Board set streamlining election procedures as a priority, it had to further choose between a single rulemaking or a less comprehensive series of adjustments to its procedures in disparate proceedings, which could include not only adjudications but also guidance documents and changes to internal case-handling procedures.¹²⁶

The advantages of proceeding by a single rulemaking rather than a series of piecemeal steps—for the Board and for workers, unions, and employers—are evident. Putting aside the substantive results of the two processes, compliance with a single rule that clearly sets forth the new process is far easier (especially for an unrepresented employer) than tracking a series of decisions and internal process changes that may be located in different places. And, for the Board,

are First Amendment Values: Why Union Comprehensive Campaigns are Protected Speech, 79 *FORDHAM L. REV.* 2617, 2652–58 (2011).

¹²⁵ See 29 C.F.R. § 101.17 (2015).

¹²⁶ See Gould, *supra* note 34, at 341 (discussing adoption of internal deadlines for processing cases).

rulemaking could prompt more comprehensive consideration of how a set of changes will work together.

Yet, it is the comprehensive nature of the rule's changes that has ratcheted up public and political attention—it defies imagination that a series of small administrative adjustments could maintain the public's (and lawmakers') attention over time. To be sure, there may have been significant reaction to certain aspects of the new rule—for example, the new requirement that employers include employees' e-mail addresses with the *Excelsior* list—no matter how they were implemented.¹²⁷ But it is doubtful that other aspects of the rule, considered alone, would have received the same attention. Relatedly, the crux of the pending lawsuit aimed at invalidating the election-procedures rule is that the changes, taken together, deprive employers of adequate opportunity to oppose a union drive and to due process.¹²⁸ While employers likely would have also challenged smaller, piecemeal changes, their charge—that the new election rule significantly shortens the overall election timeframe—would have had less force in the context of individual changes. To put it bluntly, the Board's rulemaking will have significantly greater impact than a more piecemeal course of action would have, but only if it survives the gauntlet of judicial challenges and congressional review.

Hindsight suggests a similar dynamic regarding the Board's notice-posting rule. Consider a counterfactual scenario in which the Board had begun by building on its existing practice of requiring employers who have committed ULPs to post notices regarding employees' labor rights as part of the remedy. That might have led the Board to begin requiring employers to post notices in cases involving pending elections, as it has now done as part of the election-procedures rule. Or, the Board might have provided employers charged with ULPs an incentive to post notices while the charges were pending, perhaps by offering a procedural advantage to employers who agreed to do so.

One can imagine any number of ways in which the Board might have gradually expanded the universe of employers required to post notices—the point is that a gradual expansion might have met with a kinder reception in the

¹²⁷ This change has been the subject of particular public attention. See, e.g., Editorial, *Quickie Gifts to Big Labor*, WALL ST. J., Dec. 13, 2014, at A12, available at <http://www.wsj.com/articles/quickie-gifts-to-big-labor-1418429121>.

¹²⁸ Chamber Complaint, *supra* note 7, at 2 (describing the rule as implementing “sweeping changes” and “rapidly (and needlessly) accelerating the election process”).

appellate courts. In fact, in *National Association of Manufacturers v. NLRB*, the District of Columbia Circuit implied that it may have come out differently in a case where a posted notice was required because “employers are misleading employees about their rights under” the NLRA.¹²⁹ Had the court considered (and approved) a rule arising in that context, it would have created notice-friendly precedent on which the Board could then build. This would have left the Board in a more favorable position than the one in which it now finds itself; contending with negative precedent from the Fourth and District of Columbia Circuits as it attempts to defend the notice-posting aspect of its election-procedures rule (a fact not lost on the plaintiffs in *Chamber of Commerce of the U.S. of America v. NLRB*).¹³⁰

To be clear, this is not to argue that the *public* is better off if the Board makes incremental changes in order to avoid public or court scrutiny—that question involves weighing the benefits of the substantive rule changes (which will be positive from some perspectives, and negative from others) against the loss of advance notice, transparency, and ease of compliance. Rather, it is simply to make the point that from the *Board’s* perspective, recent experience suggests that the benefits of rulemaking can easily be rendered illusory. Further, the Board has been able to mitigate some of the costs of adjudication, particularly in terms of providing fair notice to regulated entities, through its practice of issuing decisions that apply only prospectively in cases adopting new interpretations of the law.¹³¹

C. *Stability and Consistency?*

A third and final set of reasons often advanced for rulemaking over adjudication concerns relative stability and longevity of rules over adjudicated decisions. Rules are both procedurally harder for agencies to reverse and perhaps less amenable to gradual drifts in meaning or application. In addition,

¹²⁹ 717 F.3d 947, 959 n.18 (D.C. Cir. 2013), *overruled in part on other grounds by* Am. Meat Inst. v. U.S. Dep’t of Agric., 760 F.3d 18 (D.C. Cir. 2014) (en banc) (overruling discussion of scope of *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985)).

¹³⁰ Chamber Complaint, *supra* note 7, at 15 (alleging that the elections procedures rule violates the First Amendment “by compelling employers to engage in certain speech during the election process, specifically a new mandatory workplace notice to be posted after the filing of the representation petition”).

¹³¹ See, e.g., *Babcock & Wilson Constr. Co.*, 361 N.L.R.B. No. 132, 2014 WL 7149039, at *19 (Dec. 15, 2014) (adopting new standard for Board deferral to arbitral decisions, but holding that the new standard will apply only prospectively in interest of fairness); *Alan Ritchey, Inc.*, 359 N.L.R.B. No. 40, 2012 WL 6800789 (Dec. 14, 2012) (adopting prospectively a rule that discretionary discipline is mandatory subject of bargaining).

it is easier for Congress to maintain oversight over rules, helping to ensure better consistency between agency practice and statutory requirements.

Will the Board's election-procedures rule be less amenable to change than its adjudicated rules? It is possible that time will tell, if the rule is upheld by the courts and left unchanged by Congress. Of course the notice-posting rule's early demise at the hands of the District of Columbia and Fourth Circuits means that rule provides little useful data on this point.

The notice-posting rule does, however, offer some lessons on congressional oversight, as Republicans in Congress have launched multiple attempts to legislatively reverse the Board.¹³² Before the appellate courts ruled and the Board withdrew the rule, the Republican-led House Committee on Education and the Workforce held a hearing about that rule,¹³³ and House and Senate Republicans introduced at least three bills to undo it,¹³⁴ in addition to a House bill to remove the Board's rulemaking authority altogether,¹³⁵ and budget proposal to defund the Board.¹³⁶ (The latter two were only partially in response to the notice-posting rule.)

The Board's election-procedures rule has received similar treatment—it has already been the subject of multiple congressional hearings,¹³⁷ and a resolution

¹³² As this section details, Congress engaged in significant debate over the Board's recent rulemakings. However, this is not to suggest that Congress has typically ignored Board adjudication. To the contrary, congressional hearings have been held regarding both Board decisions and on complaints issued by the Board's General Counsel. For example, *Specialty Healthcare* was discussed during a hearing of the House Subcommittee on Health, Education, Labor and Pensions. *The Future of Union Organizing: Hearing Before the S. Comm. on Health, Emp't, Labor, and Pensions of the H. Comm. on Educ. and the Workforce*, 113th Cong. (2013), available at <http://www.gpo.gov/fdsys/pkg/CHRG-113hhrg82792/pdf/CHRG-113hhrg82792.pdf>. Likewise, the General Counsel's decision to issue a complaint alleging that Boeing opened a factory in South Carolina in order to retaliate against workers' collective action in Washington state was the subject of both congressional hearings and proposed legislation. See *Congressional Correspondence in the Boeing Case*, NLRB, <http://www.nlr.gov/news-outreach/fact-sheets/fact-sheet-archives/boeing-complaint-fact-sheet/congressional> (last visited May 9, 2015); see also H.R. 2587, 112th Cong. (2011).

¹³³ *Culture of Union Favoritism: Recent Actions of the National Labor Relations Board: Hearing Before the H. Comm. on Educ. and the Workforce*, 112th Cong. (2011), available at <http://www.gpo.gov/fdsys/pkg/CHRG-112hhrg68366/pdf/CHRG-112hhrg68366.pdf>.

¹³⁴ H.R. 2833, 112th Cong. (2011); H.R. 2854, 112th Cong. (2011); S. 1666, 112th Cong. (2011).

¹³⁵ H.R. 2978, 112th Cong. (2011).

¹³⁶ 157 CONG. REC. 2181 (2011).

¹³⁷ *Rushing Union Elections: Protecting the Interests of Big Labor at the Expense of Workers' Free Choice: Hearing Before the H. Comm. on Educ. and the Workforce*, 112th Cong. (2011), available at <http://www.gpo.gov/fdsys/pkg/CHRG-112hhrg67240/pdf/CHRG-112hhrg67240.pdf>; Press Release, U.S. House of Representatives Comm. on Educ. & the Workforce Comm., Committee Examines NLRB Ambush Election Rule (Mar. 5, 2014), available at <http://edworkforce.house.gov/news/documentsingle.aspx?DocumentID=371844>.

expressing the disapproval of both houses of Congress.¹³⁸ Of course, the outcome of these efforts is still indeterminate—and, as Cynthia Estlund has documented, statutory change in the area of labor law is nearly impossible.¹³⁹ Thus, while the Board’s recent rulemakings have drawn considerable congressional ire, they are unlikely to result in major statutory change.

CONCLUSION

The District of Columbia Circuit began its opinion in *National Association of Manufacturers v. NLRB* by observing that the “Board’s action departs from its historic practice.”¹⁴⁰ Given the decision that followed, one might be inclined to read a follow-up question—*why now?*—into this statement. Or, to put a finer point on it, eighty years of resisting pressure to engage in rulemaking has left the current Board in a difficult position: deviation from that well-trod path risks charges of activism, but continuing on that path means more of the same criticism.

At the same time, one of the greatest threats to the Obama Board’s regulatory agenda is entirely external to the choice of rulemaking or adjudication—it is the risk of judicial invalidation. While the merits of judicial challenges to the Board’s recent rules are mostly beyond the scope of this Essay, it may be a fruitful avenue for future research. In particular, it is significant that recent Supreme Court rulings, including *Citizens United v. FEC*¹⁴¹ and *Sorrell v. IMS Health Inc.*,¹⁴² have opened new avenues for employers to challenge Board actions on First Amendment grounds.¹⁴³ The

¹³⁸ *Supra* note 100.

¹³⁹ Estlund, *supra* note 21, at 1532–44 (discussing decades-long imperviousness of labor law to statutory change).

¹⁴⁰ 717 F.3d 947, 949 (D.C. Cir. 2013), *overruled in part on other grounds by* *Am. Meat Inst. v. U.S. Dep’t of Agric.*, 760 F.3d 18 (D.C. Cir. 2014) (en banc) (overruling discussion of scope of *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985)).

¹⁴¹ 558 U.S. 310 (2010).

¹⁴² 131 S. Ct. 2653 (2011).

¹⁴³ I discuss some of these arguments in Charlotte Garden, *Citizens United and the First Amendment of Labor Law*, 43 STETSON L. REV. 571 (2014); *see also* Robert Post & Amanda Shanor, *Adam Smith’s First Amendment*, 128 HARV. L. REV. F. 165 (2015) (discussing impact of recent First Amendment cases, including *Citizens United* and *Sorrell*, on commercial speech doctrine); John C. Coates IV, *Corporate Speech & the First Amendment: History, Data, & Implications* (unpublished manuscript) (manuscript at 1–2), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2566785 (“Nearly half of First Amendment legal challenges now benefit business corporations and trade groups . . . Such cases represent examples of a particular kind of corruption, defined here as a form of rent seeking: the use of legal tools by business managers in specific cases to entrench reregulation in their personal interests at the expense of shareholders, consumers, and employees.”).

result is that invalidation by the judiciary has become a preferred method of undoing Board lawmaking, overtaking other avenues of oversight (including congressional oversight or popular disapproval). This dynamic is likely to continue to impact the efficacy of NLRB lawmaking of all types. As a result, the benefits that are likely to be achieved through the choice of rulemaking over adjudication are limited, particularly given the Board's efforts to make the adjudication process in controversial cases more like a rulemaking process. Thus, the Board's recent experience with this judicial bottleneck will likely drive it away from onerous and risky rulemaking, and back to familiar (if still often risky) adjudication.