NLRB Rulemaking: Political Reality Versus Procedural Fairness

Under the Administrative Procedure Act (APA), federal administrative agencies have a choice between rulemaking and adjudication as procedures for formulating agency policy. The National Labor Relations Board (NLRB) traditionally has relied on adjudication to develop its policy. Although this exclusive reliance on adjudication has been sharply criticized, the Supreme Court unanimously has affirmed

2. The APA provides for two rulemaking procedures, formal and informal. Formal rulemaking, governed by §§ 556 and 557, generally requires an oral hearing. Id. § 556. Informal rulemaking is governed by § 553. Under informal rulemaking the agency is required to give general notice of the proposed rulemaking and to provide an opportunity for interested parties to participate through written submissions. Id. § 553.
3. Under the APA, adjudication involves more elaborate procedures than either formal or informal rulemaking. In addition to providing an oral hearing, id. § 556, the agency must give timely notice to parties entitled to notice and must insulate hearing examiners from ex parte consultation, id. § 554.

Because the APA's definitions of rulemaking and adjudication are quite broad, see 5 U.S.C. § 551(4)-(7) (1976), it is difficult to draw a workable distinction between the two. See, e.g., Shapiro, The Choice of Rulemaking or Adjudication in the Development of Administrative Policy, 78 Harv. L. Rev. 921, 924-25 (1965) (rulemaking is open-ended process addressing classes of persons or practices, whereas adjudication determines legal status of particular parties or of their acts or practices).

5. The NLRB is an independent agency charged with the administration of the National Labor Relations Act, 29 U.S.C. §§ 151-166 (1976).

the Board's decision to proceed through adjudication rather than rule-making.\footnote{7}

Congress recently has begun to consider proposals that would require the NLRB to engage in some rulemaking.\footnote{8} The debate over whether the NLRB should formulate policy by rulemaking or adjudication has focused on the procedural benefits and disadvantages of a shift to rulemaking. Although commentators have examined the political climate in which the NLRB operates and the ways in which adjudicatory lawmaking\footnote{9} shields agency policies from congressional and judicial scrutiny, these factors have never been evaluated systematically in light of the NLRB's role in developing national labor policy.

This Note reviews the NLRB's stated reasons for relying on adjudication and the scholarly attack on the Board's rationale. The Note shows that the effect of the NLRB's reliance on adjudication has been to minimize congressional and judicial intervention in the Board's policies. The Note argues that any attempt to mandate NLRB rule-making (former Chairman of NLRB) (judicial function of NLRB should be given to courts), by the Court of Appeals for the Second Circuit, see, e.g., Bell Aerospace Co. v. NLRB, 475 F.2d 485, 495-97 (2d Cir. 1973) (Friendly, J.), rev'd in part, 416 U.S. 267 (1974); NLRB v. Majestic Weaving Co., 355 F.2d 854, 859-61 (2d Cir. 1966) (Friendly, J.), and by several United States Supreme Court Justices, see NLRB v. Wyman-Gordon Co., 394 U.S. 759, 762-66 (1969) (Fortas, Stewart & White, JJ., & Warren, C.J.); \textit{id.} at 775-80 (Douglas, J., dissenting); \textit{id.} at 780-83 (Harlan, J., dissenting) (NLRB violating APA in issuing new standard through adjudicatory proceeding).

\footnote{7. See NLRB v. Bell Aerospace Co., 416 U.S. 267, 290-95 (1974).}

\footnote{8. See p. 987 infra.}

\footnote{9. Adjudicatory lawmaking is the process of formulating and articulating agency policy in adjudicatory proceedings.}
making will increase this intervention and undercut the flexibility required by the Board to adapt its policies to changing political conditions. Because a politically responsive Board has several advantages for the development of national labor policy, the Note recommends that Congress not require NLRB rulemaking without first determining whether the procedural benefits of rulemaking outweigh the disadvantages of a less politically responsive national labor policy.

I. Perspectives on NLRB Rulemaking

The NLRB's choice between policymaking by adjudication or by rulemaking traditionally is perceived in terms of a trade-off between administrative flexibility and procedural fairness. This limited perspective obscures the political implications of rulemaking and the effect these political factors have on the NLRB's ability to develop national labor policy. Analysis of the political ramifications of a shift to rulemaking is necessary to understand the full impact of NLRB rulemaking.

A. The Traditional Perspective: Flexibility Versus Fairness

Agency choices between informal rulemaking and adjudication are often controversial, in part because the APA's directions on the use of each procedure are ambiguous. No agency has taken as extreme a position in choosing between the two as the NLRB. Courts and commentators who have urged NLRB rulemaking have advanced three arguments: that rulemaking is a more equitable process than adjudication; that rulemaking increases the agency's access to relevant information and facilitates future planning; and that rulemaking provides an important political check on agency discretion.

The issue of procedural fairness and equity is at the core of the

10. See note 6 supra.

Section 6 of the National Labor Relations Act empowers the NLRB "to make . . . , 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 (1976).

There has been speculation that the NLRB's rulemaking authority does not permit it to issue rules determinative of legal status. See Shapiro, supra note 4, at 960-61. The legislative history of the Taft-Hartley Act indicates, however, that the language of § 6 of the NLRA gave the Board substantive rulemaking powers. See Peck, supra note 6, at 732. The issue of the Board's authority to engage in rulemaking was settled by NLRB v. Wyman-Gordon Co., 394 U.S. 799 (1969), in which six Justices stated that the NLRB should use its rulemaking authority when issuing new standards. Id. at 702-66, 775-83.
NLRB Rulemaking controversy. It is argued that NLRB rulemaking would better protect interested parties than does adjudication by providing notice of proposed policy changes and an opportunity to present written comments or testimony. Rulemaking is said to promote more uniform treatment of parties because irrelevant fact distinctions are ignored. Finally, proponents contend that making policy by rulemaking reduces the problem of retroactive lawmaking.

Advocates of NLRB rulemaking also maintain that rulemaking provides the agency with fuller information. Administrators may have greater freedom under rulemaking to consult informally with outside parties. Rulemaking also may reduce litigation over ambiguities and inconsistencies in Board policy. Rulemaking presumably facilitates


The NLRB contends that its policy of accepting amicus briefs and issuing press releases meets the fairness criticism. McCulloch, Procedures Employed by NLRB in Determining Policy, reprinted in 1968 Hearings, supra note 6, at 1237, 1239. See generally Peck, supra note 6, at 735-39 (tracing use of NLRB press releases). Most commentators reject the Board's argument. See, e.g., Bernstein, supra note 6, at 582-87 (most labor law specialists unable to keep abreast of Board's caseload); Peck, supra note 6, at 757 (amicus briefs inadequate substitute for publishing proposed rules).


15. See Bernstein, supra note 6, at 592.


17. K. Davis, supra note 16, § 6.03; Bernstein, supra note 6, at 591.

18. K. Davis, supra note 16, § 6.03. The law is not settled on the permissibility of these outside contacts. The Court of Appeals for the District of Columbia Circuit has recently indicated that certain ex parte consultations in an informal rulemaking proceeding may violate due process guarantees. See, e.g., Home Box Office, Inc. v. FCC, 567 F.2d 9, 54-57 (D.C. Cir), cert. denied, 434 U.S. 829 (1977). But see Action for Children's Television v. FCC, 564 F.2d 458, 468-78 (D.C. Cir. 1977) (refusing to apply Home Box Office rule to formulation of general agency policy). For a discussion of ex parte contacts in informal rulemaking, see Note, Due Process and Ex Parte Contacts in Informal Rulemaking, 89 Yale L.J. 194 (1979).

19. See Bernstein, supra note 6, at 591. The impact of rulemaking on the amount of litigation is, however, unclear. Rulemaking may encourage litigation by permitting individuals to challenge a regulation without first violating it if they can show that they are plainly affected by its existence. Shapiro, supra note 4, at 941; cf. note 57 infra (discussing delay that might result from preenforcement review of new Board rules).
the agency's planning because policymaking would be less affected by
the accidental order and type of cases presented to the agency.\textsuperscript{20}

Finally, proponents of NLRB rulemaking argue that rulemaking
serves as a political check on agency power. They contend that the
greater specificity and clarity of promulgated rules, as well as the ad-
vance notice that rulemaking requires, makes agency rules more sus-
ceptible to scrutiny by other governmental bodies\textsuperscript{21} and by indi-
viduals,\textsuperscript{22} and thereby promotes more responsible and democratic
administrative action.

The NLRB defends its use of adjudicatory lawmaking by citing the
breadth of its mandate and its need to develop complex rules with
maximum flexibility.\textsuperscript{23} The Board views rulemaking as a cumbersome
process that would impede its ability to respond to changing condi-
tions;\textsuperscript{24} adjudication permits rules to be developed gradually as new
fact patterns emerge. In addition, the NLRB maintains that a shift to
rulemaking would increase litigation, further exacerbating its already
heavy workload.\textsuperscript{25}

With the exception of the Supreme Court's opinion in \textit{NLRB v. Bell Aerospace Co.},\textsuperscript{26} which upheld the Board's decision to proceed
through adjudication, the NLRB's rationale has been received with
open skepticism.\textsuperscript{27} A number of commentators have demonstrated that

\textsuperscript{20} See Shapiro, supra note 4, at 932-33. Because the General Counsel has unreviewable
authority to refuse to issue a complaint, \textit{NLRB v. Sears, Roebuck & Co.}, 421 U.S. 132, 138-
39 (1975), he theoretically is able to determine in part the type of cases presented to the
Board. He cannot, however, initiate unfair labor practice cases on his own motion. B.

Rulemaking also facilitates planning by permitting administrators to focus on a few
critical policy issues rather than spreading their efforts over hundreds of cases. Bernstein,
supra note 6, at 591. At present, the Board issues almost 1,800 decisions in contested

\textsuperscript{21} See K. Davis, supra note 16, \S 6.03 (congressional committees ineffective in
supervising adjudicatory lawmaking).

\textsuperscript{22} See, e.g., \textit{NLRB v. Wyman-Gordon Co.}, 394 U.S. 759, 777-80 (1969) (Douglas, J.,
dissenting) (viewpoints and orientations of government administrators toward under-
privileged will not be adequately challenged without public airing of agency policy).

\textsuperscript{23} McCulloch, supra note 15, at 1237 (rulemaking too inflexible technique for diverse
factual situations governed by National Labor Relations Act).

\textsuperscript{24} 1968 \textit{Hearings}, supra note 6, at 1662-63 (supplemental memorandum of NLRB).
It has been noted, however, that adjudication and rulemaking require roughly equal
amounts of time for developing agency policy. Bernstein, supra note 6, at 594.

\textsuperscript{25} 1968 \textit{Hearings}, supra note 6, at 1662-63 (supplemental memorandum of NLRB);
see note 19 supra (rulemaking may encourage litigation).

\textsuperscript{26} 416 U.S. 267 (1974). For a discussion of the Court's decision, see note 7 supra.

\textsuperscript{27} Many scholars believe that "with the exception of the SEC, the NLRB is in the
best position to engage in rulemaking." 1968 \textit{Hearings}, supra note 6, at 917 (Henry J.
Friendly). The Chairman's Task Force on the NLRB identified several areas that might
best be governed by rulemaking: supervisory status; time limits in misrepresentation/
rebuttal situations; payments to observers; unit determinations; expanding units; voting
rights of laid-off employees; and technical employees. \textit{Chairman's Task Force on the
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the NLRB arguments against rulemaking are specious, that many NLRB policies are highly inflexible, and that the Board mimics rulemaking procedures when it believes that a particular case requires them.28

Congress recently has begun to consider proposals that would require some NLRB rulemaking. The Labor Reform Act,29 defeated by filibuster in the Senate,30 provided for extensive rulemaking in several highly controversial areas.31 It appears likely that future labor legislation will include rulemaking provisions.

B. The Alternative Perspective

The NLRB's reluctance to engage in rulemaking raises perplexing questions that previous analyses fail to answer. Commentators have not explained why the Board categorically refuses to engage in rulemaking despite apparent efficiencies inherent in the rulemaking process. The failure to analyze why the NLRB so tenaciously resists academic and judicial pressures to engage in rulemaking appears to result from the limited framework within which the rulemaking issue has been studied—that of administrative flexibility versus procedural fairness.

A broader perspective that incorporates the political factors considered by an agency in choosing between rulemaking and adjudication overcomes this analytical defect. Such a perspective suggests that by making policy solely through adjudication the NLRB is able to minimize congressional and judicial intervention in its policies and to mitigate the impact of those intrusions that do occur. The inadequacy of the present analytical framework is all the more acute in light of the NLRB's role in developing national labor policy amidst the politically volatile setting of American industrial relations.

28. E.g., K. Davis, supra note 6, § 6.17 (1970 Supp.); Bernstein, supra note 6, at 587-98; Peck, supra note 6, at 752-81; cf. 1968 Hearings, supra note 6, at 1662 (supplemental memorandum of NLRB) ("[I]n appropriate cases, the NLRB follows procedures which incorporate the asserted advantages of formal rule-making.")


Labor relations is one of the most polarized and controversial subjects of national political debate. It is an area in which labor and management exert tremendous political pressures in support of their interests. Well aware of the political sensitivity of labor legislation, Congress has enacted only two major labor reforms since the National Labor Relations Act (NLRA) of 1935. These legislative efforts are both expansive in their mandates and remarkably ambiguous. The NLRB thus has had to apply statutes with often cryptic and conflicting legislative guidance. But the Board’s role has been more than that of an agency merely fleshing out legislative standards; it has served

32. 1968 Hearings, supra note 6, at 522 (Howard Lesnick).
33. Id. at 522; Bernstein, supra note 6, at 597-98 (Board is “whipping boy without rival”); cf. 1968 Hearings, supra note 6, at 818-19 (Frank W. McCulloch) (criticizing emotional attacks to which both management and labor subject Board). See generally D. Bok & J. Dunlop, Labor and the American Community 384-426 (1970); A. McAdams, Power and Politics in Labor Legislation (1964).
34. See 1968 Hearings, supra note 6, at 522 (Howard Lesnick) (high intensity controversy surrounding labor legislation makes it “too hot to handle”); Congress acts only when public opinion solidifies behind major theme over extended period); cf. H. Friendly, The Federal Administrative Agencies 168-71 (1962) (Congress unwilling to become involved in controversial matters even if acutely dissatisfied with status quo).
38. 1968 Hearings, supra note 6, at 522-24, 526 (Howard Lesnick); Winter, supra note 37, at 56-60, 65.

For an example of conflicting legislative guidance within the NLRA, compare § 8(a)(5), 29 U.S.C. § 158(a)(5) (1976) (employer required to bargain collectively with representatives of his employees), with § 8(d), 29 U.S.C. § 158(d) (1976) (good-faith bargaining requirement does not compel parties to agree to proposals or make concessions). Both the NLRB and the federal courts have had difficulty reconciling these two provisions. See, e.g., NLRB v. American Nat’l Ins. Co., 343 U.S. 395 (1952); Borg-Warner Controls, 198 N.L.R.B. 726 (1972).
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as a means for adapting national labor policy to a continually shifting political climate.\textsuperscript{39} Adjudicatory lawmaking, by enabling the Board to minimize conflict with Congress and the judiciary, has permitted the NLRB the flexibility to modify its policies as political conditions change.\textsuperscript{40}

II. Minimizing Conflict Through Adjudication

To understand the effect of rulemaking on the political responsiveness of the NLRB, it is necessary to analyze how rulemaking would alter the roles of the federal judiciary and Congress in developing national labor policy. Such an analysis shows that a shift to rulemaking would increase judicial and congressional intervention in NLRB policies, and thereby inhibit the Board from responding to changing political circumstances.

A. Minimizing Conflict With the Federal Judiciary

Adjudicatory lawmaking permits the NLRB to develop its rules in a form most likely to survive the keen judicial scrutiny to which labor policy is subjected. NLRB rulemaking would give the judiciary a greater role in developing national labor policy and thus would produce a less politically responsive labor policy.

The appealability of all final Board judgments\textsuperscript{41} and the NLRB's need to seek judicial enforcement of its orders\textsuperscript{42} have guaranteed an influential role for the federal circuit courts in formulating industrial relations policy. Virtually every Board decision is influenced by the ubiquitous presence of the federal judiciary.\textsuperscript{43} In the recent past, more than half the Board's unfair labor practice decisions have been reviewed by the federal appellate courts.\textsuperscript{44} Although the circuit courts acknowledge the NLRB's unique expertise in industrial relations,\textsuperscript{45}

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\footnote{39. See Winter, \textit{supra} note 37, at 56-60, 64-67 (Board has often responded to political change by reinterpreting its policies in manner consistent with political shift). Evidence of the Board's political responsiveness can be found in the rapid reversal of NLRB precedents as the Board's composition changes. \textit{See 1968 Hearings, supra} note 6, at 136 (Cornelius J. Peck) (Kennedy Board overruled Eisenhower Board so quickly that labor reporting service opened index entitled "Prior decisions overruled by the Board"); cf. \textit{id.} at 17 (Sen. Robert P. Griffin) (criticizing NLRB's "shifting interpretations of the law" from election to election).
\footnote{40. See pp. 998-99 \textit{infra}.
\footnote{42. \textit{Id.} § 160(e).
\footnote{44. \textit{Id.} at 116.
\footnote{45. See Getman & Goldberg, \textit{The Myth of Labor Board Expertise}, 39 U. Chi. L. Rev. 681, 681-84 (1972) (court opinions abound with references to Board expertise, although discussion of how such special competence was acquired is rare).

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such judicial deference is only nominal. Roughly one-third of the 300 NLRB judgments annually ruled on by the federal judiciary are reversed, modified, or remanded. The federal judiciary’s traditional activism in determining national labor policy results in it frequently substituting its perception of how the American industrial relations system should operate for that of the NLRB.

An agency subject to such exacting judicial review would prefer to formulate policy through adjudication instead of rulemaking for several reasons. One advantage of adjudication is that it permits the agency to make policy decisions in the guise of fact determinations. The likelihood of judicial acquiescence to policy decisions is higher when the decisions are submerged in the facts of a given case. When an agency can stress its role as the original trier of fact, the chances of its decision prevailing are greater.

In addition, the NLRB can use adjudicatory proceedings to “promulgate” ambiguous, flexible rules that do not present the court with a clear and precise statement of policy. The agency can thereby avoid having a rule that the judiciary strongly favors transformed into inflexible doctrine from which the agency can neither advance nor retreat. Similarly, a court uncomfortable with a rule is far more likely to overturn the rule on the ground that it is beyond the agency’s statutory authority if the rule is clear and firm. Policy made by rulemaking is generally more precise and more carefully articulated than policy made by adjudication, and thus is more vulnerable to such attack.

Adjudicatory lawmaking has the further advantage of allowing an agency to choose the case in which a policy will first be appealed to the

46. 43 NLRB Ann. Rep. 282 (1978) (in fiscal year 1978, circuit courts of appeals affirmed in full 218 (65.5%) Board orders, modified 53 (15.9%), remanded in full 8 (2.4%), affirmed in part and remanded in part 7 (2.1%), and set aside 47 (14.1%).

47. See F. McCulloch & T. Bornstein, supra note 43, at 117-20 (judicial intervention in affairs of NLRB too extensive); Winter, supra note 37, at 67-74 (criticizing willingness of judiciary, particularly Supreme Court, to second-guess Board); cf. H. Friendly, supra note 34, at 36-52 (discussing effect of various judicial decisions on Board’s specification of its standards).

48. Shapiro, supra note 4, at 946-47. What an agency views as a per se rule may be read by the court as resting on a particular set of facts. Id. at 946; see NLRB v. Truitt Mfg. Co., 351 U.S. 149 (1956) (upholding NLRB’s final order on basis of Board’s position as original factfinder); NLRB v. Local 294, Int’l Bhd. of Teamsters, 284 F.2d 887 (2d Cir. 1960) (same).

49. See Winter, supra note 37, at 72-73 (rigid distinction between mandatory and non-mandatory subjects of bargaining is result of such judicial behavior).

50. See H. Friendly, supra note 34, at 146-47. Friendly cites Local 357, Int’l Bhd. of Teamsters v. NLRB, 365 U.S. 667 (1961), as one instance in which the Board was accused of “legislating” because it overspecified its standards. H. Friendly, supra note 34, at 48-51.
federal judiciary. Unlike policy made by rulemaking, which may be challenged in the first case in which the rule is at issue, policy announced in an adjudicatory proceeding is tied to a certain case. An agency thus can present the court with a result of which the court may approve despite its doubts about the desirability of the policy articulated in reaching that result. Because an agency is free to give alternative rationales for its decision in an adjudicatory proceeding, the agency's decision may be upheld even though the court rejects its primary rationale. Even if the court states its reservations while affirming the agency's holding, the agency often can proceed with little or no modification of its policies.

Moreover, adjudicatory lawmaking permits the agency to administer policies more flexibly than under rulemaking. Adjudication reduces the need for accurate foresight by allowing an agency to apply new policy to prior conduct. Indeed, when the agency fails to apply a new rule retroactively it may find itself accused of legislating rather than adjudicating. The agency also is freer to ignore its own precedents and rules if it proceeds through adjudication. The ambiguity and doctrinal subtlety of policy announced in a decision gives the agency the flexibility to disregard its own rules selectively in individual cases.

51. See, e.g., NLRB v. Local 294, Int'l Bhd. of Teamsters, 284 F.2d 887 (2d Cir. 1960) (rejecting NLRB's reasoning that picketing at neutral premises is not to be regarded as privileged primary picketing absent showing that primary employer has permanent establishment nearby, but enforcing NLRB order on basis of alternative rationale that requests and threats, when accompanying such picketing, can be used as basis for finding that Local sought to induce concerted pressure on secondary employer).

52. See Shapiro, supra note 4, at 944-45. An example is NLRB v. Truitt Mfg. Co., 351 U.S. 149 (1956), in which the Supreme Court upheld the Board's ruling that the employer had committed an unfair labor practice by claiming that he could not afford to pay higher wages but refusing to produce information substantiating his claim. The Court, in accepting the Board's findings of fact that the employer had failed to bargain in good faith in the particular case, was careful to indicate that it did not automatically follow that employees are entitled to substantiating evidence in all such circumstances, but that each case would have to turn upon its facts. Id. at 153-54. The Board nevertheless continued to impose a duty to disclose such evidence without regard to the employer's good or bad faith. See Tennessee Chair Co., 120 N.L.R.B. 1357 (1960); Tennessee Coal & Iron Div., U.S. Steel Corp., 122 N.L.R.B. 1519 (1959).

53. See SEC v. Chenery Corp., 312 U.S. 194, 203 (1947) ("[W]e refuse to say that the Commission, which had not previously been confronted with the problem . . . , was forbidden from utilizing [an adjudicatory] proceeding for announcing and applying a new standard of conduct. . . . That such action might have a retroactive effect was not necessarily fatal to its validity.") (citation omitted); Shapiro, supra note 4, at 952-57 (discussing distinction between adjudication and rulemaking in terms of retroactivity).

54. See NLRB v. Wyman-Gordon Co., 394 U.S. 759, 780 (1969) (Harlan, J., dissenting) (because rule does not take effect until after Board's decision, Board must use rulemaking procedure).

55. See, e.g., NLRB v. Grace Co., 184 F.2d 126, 129 (8th Cir. 1950) (NLRB may apply or waive rule as facts of given case demand); Shapiro, supra note 4, at 947-52 (agencies
Finally, adjudicatory lawmaking avoids potential sources of delay that would prevent the Board from applying new policies as quickly as it may desire. The Board’s ability to apply retroactively rules developed in adjudication permits an immediate enforcement of policy changes that would be impossible under rulemaking. Unlike rulemaking, adjudicatory lawmaking does not require the Board to delay applying a new standard until it reviews conduct committed subsequent to the rule’s issuance.

In issuing its policies through adjudication, the NLRB employs a lawmaking mechanism that maximizes the likelihood that its rules and holdings will survive judicial review. Rulemaking, by contrast, increases the chances of judicial intervention. A rule promulgated through an NLRB rulemaking proceeding could be challenged either in a preenforcement review of the rule or as the Board sought to enforce an order based on the rule. Although in theory the findings made in the rulemaking proceeding would be subject to the less stringent “arbitrary and capricious” standard of judicial review instead of the more exacting “substantial evidence” standard used to review adjudication, the difference in the standards has little practical im-

freer to disregard policies developed through adjudication than in rulemaking proceeding. Nevertheless, courts do not always accept such behavior by an agency, and may indicate in no uncertain terms their displeasure with inconsistently applied standards. E.g., Seafarers Int’l Union of N. America, Local 777 v. NLRB, 84 Lab. Cas. (CCH) ¶ 10,865, at 19,373 (D.C. Cir. 1978); see note 80 infra (discussing Seafarers).

56. See PBW Stock Exch., Inc. v. SEC, 485 F.2d 718, 722 (3d Cir. 1973), cert. denied, 416 U.S. 969 (1974) (“[R]ules ordinarily look to the future and are applied prospectively only . . . .”); cf. Citizens to Save Spencer County v. EPA, 600 F.2d 844, 879-81 (D.C. Cir. 1979) (rules promulgated through rulemaking proceedings may be applied retroactively only in limited circumstances).

57. It could also be argued that because promulgated rules are subject to preenforcement review, see Abbott Laboratories v. Gardner, 387 U.S. 136, 149 (1967), rulemaking would further delay new policies by increasing the probability of a split in the federal circuit courts on the propriety of any particular NLRB rule. Although such review, by providing another avenue for challenging new Board policies, might result in some additional circuit splits, existing appellate review of NLRB orders is already a preenforcement review of sorts. Because the Board must seek enforcement of its orders, see p. 989 supra, a split in the circuits is possible under the present system when the NLRB issues orders based on a new standard in cases arising in different circuits. Moreover, there is little incentive for a party concerned about a new rule to engage in a costly and potentially unnecessary preenforcement challenge under Abbott Laboratories when it can obtain the equivalent of preenforcement review after the NLRB actually applies the rule and attempts to have it enforced against the party.

58. See note 57 supra.

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Rulemaking, moreover, would prevent the Board from enforcing a new rule retroactively or inconsistently. The NLRB could not choose the decisions within which the rule would first be appealed, or as freely formulate its rules in the guise of fact determinations. A shift to rulemaking thus would result in the courts increasingly substituting their beliefs on industrial relations for those of the Board.

B. Minimizing Conflict With Congress

Congressional intervention is a second influence on NLRB policies that is minimized by adjudicatory lawmaking. Rulemaking, by subjecting the Board’s standards to congressional oversight, inevitably would inhibit the NLRB from issuing new rules as freely as it presently does.61

Most of the NLRB’s relations with Congress have little public visibility and operate on a highly informal, unstructured basis. The only formal and regular contacts are the confirmation process,62 the appropriation process,63 and the NLRB’s annual report to Congress.64 The insignificance of these formal contacts is readily apparent: every presidential nomination for the Board or General Counsel has been confirmed,65 appropriations are approved routinely with little or no debate,66 and the annual report is largely ignored.67 The congressional conflicts with the NLRB that do occur are of two types: general criticism of the Board, its methods, and its fundamental ideology; and close examination of specific labor policies that Congress finds trou-

60. See Associated Indus. of N.Y. State, Inc. v. United States Dep’t of Labor, 487 F.2d 342, 349-50 (2d Cir. 1973) (Friendly, J.) (substantial evidence standard and arbitrary and capricious standard “tend to converge”); K. DAVIS, supra note 59, § 29.01-3 (1977 Supp.) (difference between substantial evidence standard and arbitrary and capricious standard is of decreasing importance).
61. See pp. 995-98 infra.
62. See 29 U.S.C. § 153(a), (d) (1976) (President nominates Board members, who serve staggered five year terms, and General Counsel, who serves for four years); F. McCulloch & T. Bornstein, supra note 43, at 107-09 (discussing confirmation process).
64. See 29 U.S.C. § 153(c) (1976) (Board each fiscal year shall report on cases heard, decisions rendered, moneys disbursed); F. McCulloch & T. Bornstein, supra note 43, at 107, 110 (discussing annual report).
65. This record is not particularly unique; the Senate rarely challenges a presidential nomination for membership on a regulatory agency. F. McCulloch & T. Bornstein, supra note 43, at 107-09. Nevertheless, the White House is generally careful to clear its nominees with Senate leaders. Id. Only one Board nominee has been seriously challenged by the Senate. Id.
66. Id. at 109-10. In the recent past, final appropriations have matched appropriations requests exactly. Id.
67. Id. at 110.
Informally Congress and the NLRB meet during oversight hearings, substantive hearings on labor legislation, or when individual congressmen contact the agency. Of these, the oversight hearings, which attempt to survey the policies of the agency over a number of years, are the most problematic for the Board. Even if the hearing results in little substantive change, the probing frequently is embarrassing and often paralyzes the agency for months as its top personnel prepare for it. Oversight hearings on the NLRB, though rare, have been used to harass and embarrass the Board. Congressional hearings on specific policies of the Board are a more frequent source of intervention. A policy-specific hearing may either be prompted by heavy lobbying or develop out of a substantive hearing on related legislation.

68. See id. at 110-12.
71. Such contacts may involve courtesy visits of Board nominees, informal communication arising from congressional investigations, or most typically, letters of inquiry requesting information on a constituent’s case pending before the Board. F. McCulloch & T. Bornstein, supra note 43, at 108, 112.
73. See note 69 supra (only two such hearings in last two decades).
74. F. McCulloch & T. Bornstein, supra note 43, at 110-12. The 1961 oversight hearings of the House Subcommittee on the NLRB, 1961 Hearings, supra note 69, were conducted primarily to embarrass the Republicans and the Eisenhower Board. Scher, Conditions for Legislative Control, in R. Wolfinger, Readings on Congress 404, 417 (1971). The subcommittee’s investigation hindered the NLRB so acutely that the White House, the AFL-CIO, and the Kennedy Board all pressured the Chairman to cut short the investigation and leave the agency alone in the future. Id. at 414-15. For an indication of how antagonistic such hearings can be, see 1968 Hearings, supra note 6, at 776-805 (Chairman Sam Ervin’s interrogation of Board Chairman Frank W. McCulloch); F. McCulloch & T. Bornstein, supra note 43, at 111 (describing hearings as “attack by promangement representatives on what they saw as the prolabor, Kennedy-Johnson NLRB of the 1960’s”).
75. General oversight hearings are highly unpopular. Scher, supra note 74, at 407-16, 419. This unpopularity is due largely to the low political payoff of engaging in such hearings as compared to promoting constituent services or enacting legislation, id. at 409-10, and to the view that participation in hearings is tedious work that invariably makes powerful enemies and rarely finds new friends, id. at 411-16.
76. See F. McCulloch & T. Bornstein, supra note 43, at 110-12. A hearing conducted to develop a legislative solution to a substantive problem can lead to a full investigation of the agency involved as the committee becomes aware of how the law is being administered. See Scher, supra note 74, at 423 (79th and 80th Congresses started out to regulate overly aggressive union activity but ended up overhauling NLRB).
The advantages of adjudicatory lawmaking for an agency concerned with congressional review are substantial. Adjudicatory lawmaking permits the agency to adopt rules without clearly articulating its policies and their implications. By developing a rule gradually over several years, the agency can in effect “hide the ball.”77 In leaving its doctrine ambiguous, often seemingly restricted to the facts of a certain case, the Board can legislate in controversial areas without giving critics a clear and final rule to attack.78

Adjudication also gives the agency the opportunity to avoid clarifying the many issues underlying the rule. Unlike the rulemaking process, in which an agency is required to specify the analytical and empirical grounds for its decision,79 adjudication permits major policy changes to be made with little or no explanation. Indeed, it is a common criticism of the Board that it often will announce such changes in an apparently innocuous manner, frequently limiting its analytical discussion to one or two paragraphs.80 The Board thereby not only avoids

77. Shapiro, supra note 4, at 940. The NLRB's contract-bar rules, under which existing collective agreements may bar a petition for a certification election, are an example of an instance when the Board has hidden the ball “from those who are not initiated into the mysteries of [the NLRB] and its works.” Id. Shapiro reasons that even the most experienced practitioner must have difficulty in correctly stating a rule that has been developed over a number of decisions and for which no clear codification exists. Id. at 941. The validity of his observation is confirmed by Bernstein's study of the labor bar. Bernstein, supra note 6, at 582-87.

78. See Bernstein, supra note 6, at 591-92 (Board puts “fuzz” on its rules by fastening onto peculiarities of cases rather than developing clear statements of agency policy); cf. 1968 Hearings, supra note 6, at 528 (Howard Lesnick) (NLRB's timidity has led to “passion” for case-by-case decisionmaking that permits it to state facts “without really attempting to come to grips with concrete issues”).

79. 5 U.S.C. § 553(c) (1976) (“[T]he agency shall incorporate in the rules adopted a concise general statement of their basis and purpose.”); see 1968 Hearings, supra note 6, at 146 (statement of Cornelius J. Peck) (discussing how NLRB's use of adjudication results in decisions that have little empirical basis); cf. Getman & Goldberg, supra note 45, at 681-84 (NLRB has no special expertise to determine impact of employer speech or conduct on exercise of employee rights).

80. See 1968 Hearings, supra note 6, at 146 (statement of Cornelius J. Peck). In many of its decisions immediately following NLRB v. Gissel Packing Co., 395 U.S. 575 (1969), in which the Board's right to issue bargaining orders was affirmed, the NLRB provided little or no discussion of the issues, but simply used “the language of the Supreme Court as a formula to be invoked when the Board chose to issue a bargaining order.” Getman & Goldberg, supra note 45, at 684.

A number of courts have expressed frustration with the Board's unwillingness to provide analytical bases for its decisions. See, e.g., Seafarers Int'l Union of N. America, Local 777 v. NLRB, 84 Lab. Cas. (CCH) ¶ 10,865, at 19,373 (D.C. Cir. 1978) (“Not only has the NLRB repeatedly reached diametrically opposite conclusions on the basis of virtually identical fact situations . . . . but moreover, it has done so in a series of opinions which typically offer no explanation for their result other than a recitation of the pertinent facts . . . .”) (citations omitted); NLRB v. General Stencils, Inc., 438 F.2d 894, 901 (2d Cir. 1971) (Friendly, J) (quoting NLRB v. American Cable Sys., Inc., 427 F.2d 446, 449 (5th Cir.),
antagonizing powerful interests that may disagree with its assumptions regarding industrial relations, but also prevents attacks on the validity of a rule's empirical and analytical foundation.

Perhaps the greatest advantage of adjudication in avoiding congressional scrutiny is that it presents no firm and final resolution of a policy issue, but only an incremental and ambiguous step. Unlike a promulgated rule, which generally represents a firm statement of agency policy that can be amended only through new rulemaking proceedings, a rule announced in an adjudicatory proceeding may appear as only a step in the gradual evolution of a general doctrine. It is difficult for a congressional committee to justify spending valuable time on a matter for which the agency has announced no clear and final standard. By the time a doctrine is fully developed, however, it often has been incorporated into the system too completely to arouse much organized opposition.

Moreover, adjudicatory lawmaking permits an agency to adopt a new policy without giving notice to powerful interest groups that would have lobbied intensely to prevent the rule's official promulgation. Once a rule is a fait accompli, congressional committees often lack the leverage to pressure a reversal.

Adjudication has the additional advantage of carrying with it the aura of fact determination and impartial application of the law. Un-
like rulemaking, in which a congressional committee may intercede in the preliminary stages, procedural due process considerations prohibit the use of political pressure to influence an adjudicated ruling.

The NLRB thus avoids many congressional challenges to its specific policies simply by failing to present a clear target. Given the inherent divisiveness of labor politics and the potential for intervention by the congressional committees specializing in labor relations, it is doubtful that the Board's rules would survive as readily if the agency were to formulate policy through rulemaking rather than adjudication.

The contentious nature of labor politics is apparent in the operations of the congressional committees that oversee the Board and its policies. Members attracted to service on the House Education and Labor Committee are typically stubborn and ideologically committed, resulting in a highly partisan and unstable committee willing to bicker endlessly on even trivial issues. Although the Committee members

86. See W. CARY, supra note 72, at 45-55 (listing cases when Congress has interfered in agency rulemaking proceedings); K. DAVIS, supra note 16, § 6.03 (congressional supervision can be quite effective in reaching contemplated rulemaking); cf. Pillsbury Co. v. FTC, 354 F.2d 952, 964 (5th Cir. 1966) (Congress may intervene in legislative but not in judicial function of agency).

87. See Pillsbury Co. v. FTC, 354 F.2d 952, 963-65 (5th Cir. 1966) (committee's pressure on two commissioners with regard to divestiture decision violates due process of law); cf. D.C. Fed'n of Civic Ass'ns v. Volpe, 459 F.2d 1231, 1246 (D.C. Cir. 1971), cert. denied, 405 U.S. 1030 (1972) (congressional pressure on Secretary of Transportation to approve bridge project is invalid influence under relevant statutory scheme).

88. To Congress, this evasion may not be entirely undesirable. So long as the NLRB refuses to assume the clear, controversial positions that would invite powerful interest groups to demand specific legislation, Congress is relieved of a problematic and divisive issue. See note 106 infra.

89. The House Education and Labor Committee and the Senate Human Resources Committee, the parent committees of the NLRB, are responsible for oversight of the Board. F. MCCULLOCH & T. BORNSTEIN, supra note 43, at 110. Nevertheless, other committees, such as the Senate Judiciary Committee in 1968, occasionally engage in oversight of the NLRB. 1968 Hearings, supra note 6. Most labor legislation, of course, is within the jurisdiction of the two Labor Committees. See F. MCCULLOCH & T. BORNSTEIN, supra note 43, at 112.

90. R. FENNO, CONGRESSMEN IN COMMITTEES 84-87 (1973); FENNO, The House Committee on Education and Labor, in R. WOLFINGER, READINGS ON CONGRESS 180, 180-81 (1971). One Democratic member of the Committee is quoted as stating, "It's a very discouraging Committee. You can't get a resolution praising God through that Committee without having a three day battle over it. . . . It's about the most difficult Committee around." Id. at 180. Fens' identifies three reasons why the House Education and Labor Committee has great difficulty arriving at a consensus: the controversial and partisan issues under its jurisdiction, id. at 181-83; the issue-oriented, contentious, and deeply committed personalities of its members, id. at 184-88; and the fiercely competitive way it makes decisions, id. at 188-92.

Fenno's study analyzed six House committees between 1955 and 1966, and for comparison looked briefly at the corresponding Senate committees. R. FENNO, supra, at xv-xvi. In a follow-up study of the period 1967 to 1972, the author concluded that, at least for the House Education and Labor Committee, the decisionmaking process had not changed. Id. at xvii, 288.
generally adhere to party positions, any ambiguity in party doctrine shatters the Committee into numerous factions. The Senate Human Resources Committee is less divisive, but both Committees are among the most partisan committees within their respective houses:

Several commentators have recognized the importance of avoiding political conflict if an agency is to function effectively. Given the congressional labor committees' proclivity for lengthy debates, policies developed through rulemaking could be stifled if the NLRB, like most agencies, sought unofficial congressional blessing before promulgating a controversial rule. Although congressional committees might refrain from organized participation in the rulemaking process, it is unlikely that highly partisan committee members would fail to attempt to exert their influence individually. The prospect of such congressional intervention almost certainly would inhibit an agency as politically timid as the NLRB from promulgating rules that might generate political confrontation.

III. Conflict Minimization and the Development of National Labor Policy

As public attitudes toward labor relations change, the NLRB frequently conforms its policies to the new national sentiment. The primary source of the NLRB's political responsiveness is the appointment of new Board members by each administration and their con-

91. R. Fenno, supra note 90, at 76-79; see Fenno, supra note 90, at 180-81 (many Republican members seek to promote such internal discord).
92. Formerly this committee was the Senate Labor and Public Welfare Committee.
93. R. Fenno, supra note 90, at 175-76.
94. Id. at 84-87, 174-75. The Senate Labor and Public Welfare Committee is described as the only one of the six Senate committees studied that displayed a noteworthy degree of partisanship in its decisionmaking. Id. at 174-75.
95. See 1968 Hearings, supra note 6, at 528-29 (Howard Lesnick) (NLRB's fear of political conflict and controversy has lead to excessive timidity in formulating labor policy); cf. id. at 924 (Ralph K. Winter) (NLRB overly cautious in making policy).
96. See W. Cary, supra note 72, at 53 ("[A]gencies seldom take controversial steps under their rule making power which do not have some support from Congress."). Regulatory commissions are especially careful not to take action if the chairman of one of their parent committees objects. Id.

Unless the NLRB could find a coalition within each committee that would support its rule, the Board would face the dilemma of either issuing a rule and risking a hostile legislative reaction, or negotiating with various Committee members to make the rule more palatable, a prospect that would also present difficulties, given the contentious nature of the House Committee.
97. See note 95 supra.
98. See note 39 supra.
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firmation by the Senate. The Board therefore often changes its views dramatically within several years after a new President is elected. Adjudicatory lawmaking, by minimizing conflicts with Congress and the federal courts, has permitted the Board the flexibility to modify its rules. A shift to rulemaking would expose the Board to increased congressional and judicial intervention that would inevitably hamper its ability to respond quickly to new political conditions.

By making the NLRB more susceptible to judicial intervention, NLRB rulemaking would result in the courts more frequently substituting their beliefs on labor policy for those of the Board. Because the courts are inherently less politically responsive than the NLRB, national labor policy would conform more slowly to changing political circumstances. Increased congressional oversight would subject the Board to delay, administrative inconvenience, and harassment that would inhibit the NLRB from promulgating new policies that might generate political conflict. The NLRB, already timid and cautious, would become increasingly hesitant to modify its policies. Thus a shift to rulemaking would have the paradoxical result of creating a less politically responsive national labor policy by exposing newly formulated NLRB standards to greater congressional scrutiny.

In addition to promoting continuity and harmony in American industrial relations, a partial insulation of labor policy from the factious environment of congressional labor politics may have substantial advantages for Congress. A national labor policy that responds quickly to political developments reflects the balance of power in the industrial relations system. A shift to rulemaking, by hampering the ability of the Board to respond to new political conditions, would result in a disequilibrium between these conditions and national labor policy that eventually would have to be resolved by Congress.

100. Although Board members are rarely challenged in their confirmation hearings, see p. 993 supra, the Executive generally clears its nominees with relevant Senate leaders and also makes "inquiries in labor-management circles." F. McCulloch & T. Bornstein, supra note 43, at 107-08.

101. See Summers, supra note 99, at 99-101 (new NLRB members "are children of the ballot box"); Winter, supra note 37, at 65-66 (citing examples of NLRB policies that have been reversed soon after new administration appoints new Board members); cf. 1968 Hearings, supra note 6, at 135-36 (Cornelius J. Peck (Kennedy Board rapidly reversed many of Eisenhower Board's rulings).

102. The Norris-LaGuardia Act, 47 Stat. 70 (1932) (current version at 29 U.S.C. §§ 101-115 (1976)), was an example of congressional response to such a disequilibrium. Congress,
gress, though clearly sensitive to changes in popular sentiments toward labor relations, has had great difficulties in enacting labor legislation. Reform invariably have been enacted only after public dissatisfaction had reached sufficient proportions that consensus could be found for legislative change. A politically responsive NLRB allows national labor policy to be modified without requiring public dissatisfaction to reach the high level necessary for legislative reform. In addition, the NLRB as a politically responsive agency relieves Congress of the contentious and burdensome chore of reforming labor policy as public attitudes toward industrial relations change. The ability of the Board to modify labor policy before public dissatisfaction peaks, and thus to defuse conditions that might otherwise require legislative reform, may be impaired if it is required to proceed through rulemaking.

Nevertheless, there are obvious benefits associated with closer judicial and congressional supervision of NLRB decisionmaking. Such review serves as a check on arbitrary behavior. Rulemaking is more democratic than adjudication because it requires agencies to issue their rules with greater clarity and specificity and permits the participation of all interested parties. The need of Congress to obtain a clear and precise statement of agency policy to determine whether the legislative mandate is being administered in accordance with congressional intent is better satisfied by agency rulemaking than by adjudication.

prompted by growing popular dissatisfaction with the antilabor bias of federal judges, severely limited the jurisdiction of the federal courts to issue injunctions in labor disputes. See Note, Labor Injunctions and Judge-made Labor Law: The Contemporary Role of Norris-LaGuardia, 70 YALE L.J. 70, 71-76 (1960).

103. See notes 32, 34 & 95 supra.

104. See note 34 supra.

105. See Summers, supra note 99, at 100 (Board, "by bending to the wind," can make "small shifts or gradual changes" that Congress is incapable of making, "thereby preserving a measure of continuity and stability" between major legislative enactments); Winter, supra note 37, at 65 (politically responsive NLRB may be desirable in light of difficulties that Congress has in enacting labor legislation, and resulting lengthy delays between legislative directives).

106. See 1968 Hearings, supra note 6, at 526 (Howard Lesnick) ("[W]e should always bear in mind that the Legislature has the discretion not to legislate, and that in an area so characterized by sharply conflicting and emotion-laden issues it may be the wiser course to exercise that discretion... [T]he Board serves as a lightning rod for the Legislature."); cf. H. Friendly, supra note 34, at 166-68 (congressmen realize that legislative inaction is often safest political strategy); Scher, supra note 74, at 413-14 (congressmen will tend to avoid agency review if it might provoke powerful interests).


108. See pp. 995-96 supra.


110. See 1968 Hearings, supra note 6, at 906 (Henry J. Friendly) (quoting former FCC
Clearly, there is no simple answer to whether rulemaking or adjudication should be employed. But to analyze the question of NLRB rulemaking solely in terms of procedural fairness is to disregard the critical issue of the NLRB's relationship to Congress and the federal judiciary. Unfortunately, Congress in its recent attempt to require some NLRB rulemaking\(^\text{111}\) nowhere signified its awareness of the critical trade-off between procedural fairness and politically responsive development of national labor policy.\(^\text{112}\) If Congress is to require rulemaking, it should first determine that the benefits of increased procedural fairness and greater congressional and judicial oversight of the NLRB outweigh the disadvantages of inhibiting politically responsive policymaking. For Congress to require NLRB rulemaking solely on the basis of procedural considerations would be to use the wrong analytical framework to resolve a far more complex dilemma.

Commissioner Lee Loevinger\(^\text{111}\) ("'It is a good working hypothesis that the agencies have uniformly failed to promulgate specific and clear policies and standards not from an inability, ignorance, or ineptitude, but from unwillingness to limit themselves in the exercise of power.'")

\(^{111}\) See p. 987 supra.