NOTIFICATION OF EMPLOYEE RIGHTS UNDER THE NATIONAL LABOR RELATIONS ACT: A TURNING POINT FOR THE NATIONAL LABOR RELATIONS BOARD

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CONTENTS

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INTRODUCTION

Virtually every employee is familiar with the workplace bulletin board festooned with government notices. That workplace rules and rights are thus communicated is a foregone conclusion. So it is odd that a new rule proposing a workplace poster for labor rights would be vociferously opposed[1] and that the dispute would culminate in fierce multi-circuit litigation.[2] But if the recent attempt to require National Labor Relations Act (NLRA) notice posting[3] ultimately falls flat, this rather unremarkable issue could prove the last straw for the beleaguered National Labor Relations Board (NLRB).[4] Union strength has already reached its nadir,[5] and the Board has long been the target of criticism by business, unions, and legal scholars.[6] If business and employer interests invalidate this modest rule, U.S. industrial democracy as we know it may end

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[1] Dave Jamieson, *Wilma Liebman, Outgoing NLRB Chair, Finds "Silver Lining" in Political Rancor*, HUFFINGTON POST (Nov. 5, 2011, 6:12 AM), http://www.huffingtonpost.com/2011/09/05/wilma-liebman-nlrb-chairwoman-interview_n_947258.html ("Liebman found [the reaction to the poster rule] 'kind of silly,' given all the hoopla over 11-by-17-inch placards.").

[2] The NLRB was sued in 2011 by the National Association of Manufacturers, the U.S. Chamber of Commerce, National Right to Work Foundation, and others, resulting in opposing decisions in South Carolina and D.C. District Courts in 2012, culminating in D.C. and 4th Circuit appeals in 2013 and a distinct possibility of U.S. Supreme Court review. *See* Order granting emergency injunction pending appeal, Nat'l Ass'n of Mfrs. v. NLRB, No. 12-5068, 2012 WL 4328371, at *1 (D.C. Cir. Apr. 17, 2012) (granting an emergency injunction that was denied below against the NLRB); *see also* Order granting injunctive relief to plaintiffs, Chamber of Commerce v. NLRB, 856 F. Supp. 2d 778, 780 (D.S.C. 2012) (granting an injunction against the NLRB).

[3] Notification of Employee Rights Under the NLRA, 76 Fed. Reg. 54,006 (Aug. 30, 2011) (to be codified at 29 C.F.R. pt. 104).

[4] Protecting worker rights has long been a struggle, but most recently, the NLRB has had difficulty simply maintaining a quorum for day-to-day adjudications. *See* Steven Greenhouse, *More Than 300 Labor Board Decisions Could Be Nullified*, N.Y. TIMES, Jan. 26, 2013, at A10; *see also* Dorian T. Warren, *The American Labor Movement in the Age of Obama: The Challenges and Opportunities of a Racialized Political Economy*, 8 PERSP. ON POL. 847, 849–50 (2010) (discussing the political causes for increasing NLRB weakness); *see also* Charles J. Morris, *How the National Labor Relations Act Was Stolen and How It Can Be Recovered: Taft-Hartley Revisionism and the National Labor Relations Board's Appointment Process*, 33 BERKELEY J. EMP. & LAB. L. 1, 5–6 (2012).

[5] Private-sector union density was 6.6% in 2012, the lowest level since the NLRB was established. *See infra* Section I.B.

[6] *See, e.g.*, ELLEN DANNIN, TAKING BACK THE WORKERS' LAW: HOW TO FIGHT THE ASSAULT ON LABOR RIGHTS 4–5 (2006) (discussing why even union leaders are so negative about the NLRA and NLRB: "The AFL-CIO's Web site is full of condemnations of the NLRA and NLRB as worthless" and quoting former President of the United Mine Workers of America Richard Trumka, who described the NLRB as "clinically dead" in 1992 and advised Congress to abolish the NLRA). *See also* Morris, *supra* note 4, at 5 ("[T]he Board is simply ineffective—in other words broken. It does not adequately enforce the Act's core provisions").

"[n]ot with a bang but a whimper."[7] On the other hand, affirmation of the notice-posting rulemaking would mark a turning point for the Board, providing latitude for other broadly applicable labor rules[8] and offering greater policy stability in the controversial realm of industrial relations.[9]

Substantively, the 2011 notice-posting rule sought to raise employee awareness of labor rights under the NLRA;[10] procedurally, the rule was a much-needed foray into administrative rulemaking for the NLRB.[11] Because defeat of both objectives would be a devastating blow for labor law, the dispute is worthy of wide-ranging and nuanced analysis. This Note endeavors to place the NLRA notice-posting controversy into a historic context by examining it through four different lenses: labor law, administrative rulemaking, economic theory, and management practice. In so doing, this Note seeks to emphasize the significance of labor rights, workplace information, and unionization at a critical juncture for industrial democracy.

First, this Note sets the controversy in its legal context. In 2010, the NLRB decided that informing employees of their statutory rights was fundamental to employees' exercise of those rights.[12] The Board developed the notice-posting rule to fill both a statutory gap and an actual awareness gap attributable to dwindling union density.[13] Following notice and comment, the NLRB announced the final rule in August 2011 and met immediate legal challenge from business and employer groups.[14] Section I explains the background of the NLRA rights in dispute and describes the modern industrial relations context

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[7] T.S. ELIOT, *The Hollow Men*, *in* THE COMPLETE POEMS AND PLAYS 56, 59 (1952).

[8] Abigail Rubenstein, *NLRB's Rulemaking Power Hinges on Union Poster Case*, LAW 360 (Sept. 10, 2012, 10:36 PM), www.law360.com/articles/376777/nlrb-s-rulemaking-power-hinges-on-union-poster-case.

[9] *See Emerging Trends at the NLRB: Hearing Before the H. Comm. on Education and the Workforce Subcomm. on Health, Employment, Labor and Pensions*, 112th Cong. 3 (2011) [hereinafter *Hearing*] (testimony of Cynthia L. Estlund, Catherine A. Rein Professor of Law, N.Y.U. School of Law), *available at* http://edworkforce.house.gov/uploadedfiles/02.11.11_estlund.pdf.

[10] *See* Notification of Employee Rights Under the NLRA, 76 Fed. Reg. 54,006 (Aug. 30, 2011) (to be codified at 29 C.F.R. pt. 104).

[11] *Hearing*, *supra* note 9, at 2–3. *See also* Catherine L. Fisk & Deborah C. Malamud, *The NLRB in Administrative Law Exile: Problems with Its Structure and Function and Suggestions for Reform*, 58 DUKE L.J. 2013, 2079 (2009); Samuel Estreicher, *Policy Oscillation at the Labor Board: A Plea for Rulemaking*, 37 ADMIN. L. REV. 163, 178–81 (1985).

[12] Proposed Rules Governing Notification of Employee Rights Under the NLRA, 75 Fed. Reg. 80,410–11 (Dec. 22, 2010) (to be codified at 29 C.F.R. pt. 104).

[13] *See id.* Union density refers to the percentage of the labor force that is unionized. THOMAS HYCLAK ET AL., FUNDAMENTALS OF LABOR ECONOMICS 310 (2005).

[14] Lawsuits and fuming public statements followed the Notice of Final Rule on August 30, 2011. *See, e.g.*, Press Release, U.S. Chamber of Commerce, U.S. Chamber Sues NLRB to Block Notification Rule (Sept. 20, 2011), *available at* http://www.uschamber.com/press/releases/us-chamber-sues-nlrb-block-notification-rule; Press Release, Anthony Riedel, Nat'l Right to Work Legal Def. Found., Inc., Worker Advocate Files Motion in Federal Labor Board Posting Notice Case (Oct. 26 2011) [hereinafter Riedel, Press Release], *available at* http://www.nrtw.org/en/press/2011/10/worker-advocate-files-motion-nlrb-notification-1026 2011; Press Release, Nat'l Ass'n of Mfrs., Manufacturers File Lawsuit to Stop NLRB's Overreach (Sept. 10, 2011) [hereinafter Nat'l Ass'n of Mfrs., Press Release], *available at* http://www.nam.org/communications/articles/2011/09/manufacturers-file-lawsuit-to-stop-nlrbs-overreach.aspx.

necessitating greater awareness of employee rights. Section II discusses the development, promulgation, and ongoing litigation about the posting rule.

Next, the Board's promulgation of the notice-posting rule marked a significant departure from an almost exclusively adjudicatory function into administrative rulemaking. Scholars and courts have long urged the Board to act through rulemaking,[15] so judicial validation of this rule would affirm a new modus operandi and revitalize the dated labor law regime.[16] Section III discusses the Board's history with rulemaking and recent judicial review of the Board's authority to promulgate the notice-posting rule.

Finally, this Note offers economics and management insight to elucidate structural and practical dynamics underlying the notice-posting controversy. Section IV examines unions in their macroeconomic and microeconomic contexts. Economic theory explains that it is rational for firms to oppose union activity,[17] and union power is a "countervailing" force against corporations,[18] but "information asymmetries" render labor markets "always and everywhere imperfect,"[19] so workplace information is a key economic issue. Section V looks at some of the management realities surrounding workplace communication. Companies' human resources and communications departments seek to improve the quality of employee relations[20] at the same time that intense management opposition to unions and a whole "union-busting" industry are key factors in declining union density.[21] Given the current reality of workplace communication, an NLRB notice would be a mere drop in an ocean of management communication.

There seems much to gain in communicating NLRA rights to employees, especially in a nation whose citizens proudly claim, understand, and exercise a host of civil rights. This Note unreservedly supports the new notice-posting rule as essential to democracy in the workplace and an effective economy. One poster will not, by itself, save U.S. labor law, but affirmation of this NLRB rulemaking could lead to a much-needed invigoration of statutory labor rights.

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[15] *See, e.g.*, Estreicher, *supra* note 11, at 178–81; Fisk & Malamud, *supra* note 11, at 2079; Mark H. Grunewald, *The NLRB's First Rulemaking: An Exercise in Pragmatism*, 41 DUKE L.J. 274, 274–75 (1991); Cornelius J. Peck, *A Critique of the National Labor Relations Board's Performance in Policy Formulation: Adjudication and Rule-Making*, 117 U. PA. L. REV. 254, 260 (1969).

[16] Rubenstein, *supra* note 8 ("[T]he stakes [are] high for the board and for employers since the outcome of the cases could ultimately decide the board's ability to engage in broad rulemaking in the future.").

[17] Morris M. Kleiner, *Intensity of Management Resistance: Understanding the Decline of Unionization in the Private Sector*, 22 J. LAB. RES. 519, 522 (2001).

[18] JOHN KENNETH GALBRAITH, AMERICAN CAPITALISM: THE CONCEPT OF COUNTERVAILING POWER 115 (1956).

[19] Kenneth G. Dau-Schmidt, *Promoting Employee Voice in the American Economy: A Call for Comprehensive Reform*, 94 MARQ. L. REV. 765, 780 (2011) (emphasis omitted) [hereinafter Dau-Schmidt, *Employee Voice*].

[20] There is abundant advice on employee relations in the management, human resources, industrial relations, and communications literature. I cite to this literature in Section V.A.

[21] *See* Kleiner, *supra* note 17, at 519.

I. NLRA Labor Rights—Background

The National Labor Relations Act (NLRA) of 1935, also known as the Wagner Act, is the federal statute that regulates private-sector labor-management relations in the United States, and it thereby affects more than 100 million workers.[22] The crux of this Note relates to section 7 of the NLRA, which guarantees that:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities . . . .[23]

The Act recognized that protecting the right of employees to organize and bargain collectively would promote the flow of commerce by not only removing sources of industrial strife and encouraging the friendly adjustment of industrial disputes, but also restoring equality of bargaining power between employers and employees.[24] The NLRA provides in section 3 that the National Labor Relations Board (NLRB) will ensure that employers and unions[25] respect the exercise of employees' rights under the NLRA.[26] Section 8 designates certain actions of employers and labor organizations as unfair labor practices, section 9 outlines procedures for representative elections, and section 10 empowers the Board to prevent unfair labor practices.[27]

A. History, Constitutionality, and Context of NLRA Rights

Early cases affirmed the constitutionality of NLRA rights. In 1937, the Supreme Court declared section 7 of the NLRA to be "a fundamental right" in *NLRB v. Jones & Laughlin Steel Corp*.[28] "Employees have as clear a right to organize and select their representatives for lawful purposes as the respondent has to organize its business and select its own officers and agents."[29] Shortly after the Supreme Court validation of the NLRB, the Seventh Circuit held in *Jefferson Electric Co. v NLRB*,[30] that the right of workers to organize was "a natural right of equal rank with the great right of free speech, protected by the

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[22] Press Release, U.S. Bureau of Labor Statistics, Union Members—2012 (Jan. 23, 2013), *available at* http://www.bls.gov/news.release/pdf/union2.pdf [hereinafter BLS 2012].

[23] 29 U.S.C. § 157 (2012). (Section 7 of the NLRA is codified at 29 U.S.C. § 157. Therefore, section 7 and § 157 are used interchangeably in court and academic discussions of the NLRA because they represent the same statutory language of the NLRA. The same nomenclature applies to other provisions of the NLRA).

[24] *Id.* § 151.

[25] The Taft-Hartley Act added unfair labor practices by unions, among other amendments to the NLRA. *See* Labor Management Relations Act of 1947, 29 U.S.C. §§ 141–97 (2012).

[26] 29 U.S.C. §§ 153, 156 (2012). *See also* Notification of Employee Rights Under the NLRA, 76 Fed. Reg. 54,006 (Aug. 30, 2011) (to be codified at 29 C.F.R. pt. 104) (requiring employers and labor organizations "to post notices informing their employees of their rights as employees under the NLRA").

[27] 29 U.S.C. §§ 158–60 (2012).

[28] NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 33 (1937).

[29] *Id.*

[30] Jefferson Elec. Co. v. NLRB, 102 F.2d 949 (7th Cir. 1939).

Constitution."[31] Later, in *Inland Steel Co. v. NLRB*,[32] the same court regarded such employee rights as "not a Congress-created right but the recognition of a constitutional right, which Congress provided the means to protect."[33]

Former NLRB Chairman Wilma Liebman[34] has noted that the explicit premise of the New Deal-era labor law was to stimulate the economy, and the NLRA was enacted less as a favor to labor, than to "save capitalism from itself" by introducing a system of governance to resolve decades of bitter disputes and industrial strife.[35] Of course, the country had only recently emerged from the Great Depression, "widely viewed as a failure of capitalism."[36] Union membership and collective bargaining gradually became an established part of American economic life,[37] and private-sector union density peaked around thirty-six percent in 1953.[38] Congress passed other worker-protection statutes subsequent to the NLRA, largely as a result of union influence.[39]

Mid-century, legal protections for labor were scaled back in response to perceived abuses by strong unions in the post-World War II period.[40] The NLRA was substantially amended by the Taft-Hartley Act in 1947, which emphasized the section 7 right *not* to organize or engage in concerted activity and added a host of *union* unfair labor practices to complement the original employer unfair labor practices under section 8. Taft-Hartley also authorized state "right to work" laws and national emergency presidential provisions.[41] The last significant congressional amendment to labor law occurred with the Landrum-Griffin Act of 1959, which imposed a regime to regulate internal union affairs but merely tinkered with the NLRA provisions.[42] Since then, the political sensitivity of labor relations has rendered Congress "relatively incapa-

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[31] *Id.* at 956.

[32] Inland Steel Co. v. NLRB, 170 F.2d 247 (7th Cir. 1948), *aff'd*, 339 U.S. 382 (1950).

[33] *Id.* at 258.

[34] Wilma Liebman served on the NLRB from 1997–2011. *See Board Members Since 1935*, NLRB, http://www.nlrb.gov/who-we-are/board/board-members-1935 (last visited May 3, 2013).

[35] Wilma B. Liebman, *Labor Law During Hard Times: Challenges on the 75th Anniversary of the National Labor Relations Act*, 28 HOFSTRA LAB. & EMP. L.J. 1, 1–2 (2010).

[36] Barry T. Hirsch, *Sluggish Institutions in a Dynamic World: Can Unions and Industrial Competition Coexist?*, 22 J. ECON. PERSP. 153, 155 (2008).

[37] *See* ROBERT H. ZIEGER, AMERICAN WORKERS, AMERICAN UNIONS, 1920–1985, at 137 (1986).

[38] Hirsch, *supra* note 36, at 156 ("There is no definitive, fully time-consistent series on union density."); *but see* Dau-Schmidt, *Employee Voice*, *supra* note 19, at 775 (union density peaked at 33.2% in 1955).

[39] Wilma B. Liebman, *The Revival of American Labor Law*, 34 WASH. U. J.L. & POL'Y 291, 308 (2010).

[40] KENNETH G. DAU-SCHMIDT ET AL., LABOR LAW IN THE CONTEMPORARY WORKPLACE 66–67 (2009) (workers felt they had sacrificed more than employers during wartime, and responded with unprecedented strike activity—1946 saw 5,000 strikes involving 4.6 million workers); *see also* Hirsch, *supra* note 36, at 155 ("Following World War II, high inflation and strike activity shifted majority opinion toward support for greater limits on union power.").

[41] DAU-SCHMIDT ET AL., *supra* note 40, at 68–71.

[42] Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1535 (2002). For example, the Act was amended in 1974, but that amendment merely extended NLRA coverage to employees of health care institutions. *Id.* at n.32.

ble of amending the NLRA."[43] The text has been virtually untouched due to "longstanding political impasse"[44] and labor law has "stood still in the face of decades of social, economic, and legal change[.]"[45] Congress essentially gave up on reforming the collective-action model and shifted focus to an individual-rights model to regulate the workplace.[46]

A key clarification is helpful at this point. Labor law governs labor management relations primarily (but by no means exclusively[47]) in unionized workplaces, and protects the rights of workers to engage in collective bargaining and other forms of concerted activity.[48] In contrast, employment law encompasses a body of federal, state, and common law regarding individual employment rights.[49] This dichotomy is somewhat peculiar to the United States.[50] There is a "veritable alphabet soup" of *individual* employment rights legislation.[51] The most familiar federal statutes include the Civil Rights Act of 1964, OSHA, FLSA, ADA, and FMLA, and there are also state statutes. But such regimes are not a cure-all: individual employment rights laws place a growing regulatory burden on employers, result in overlapping protections, and provide only minimal, standard terms.[52] Often these statutory rights have limited effect because individual employees have difficulty enforcing them.[53] Scholars have pointed out that many management-side attorneys actually prefer the NLRA legal structure to the individual employment rights regime,[54] and applaud the "genius" of labor rights as providing flexible, workplace-centered bargaining between the parties themselves[55]: "Employees often know better than Washington bureaucrats how to improve their workplace."[56]

B. Declining Unionization and Income Inequality

Today's level of unionization is lower than it was before the NLRA.[57] In 2012, only 6.6% of the private-sector workforce was unionized,[58] a decline that

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[43] Rebecca Hanner White, *The Stare Decisis "Exception" to the* Chevron *Deference Rule*, 44 FLA. L. REV. 723, 739 (1992).
[44] Estlund, *supra* note 42, at 1530.
[45] *Id.* at 1540.
[46] William R. Corbett, *Waiting for the Labor Law of the Twenty-First Century: Everything Old Is New Again*, 23 BERKELEY J. EMP. & LAB. L. 259, 272 (2002).
[47] Recall that section 7 encourages "other concerted activities" for "other mutual aid or protection," which contemplates exercise of labor rights in non-union workplaces. *See supra* text accompanying note 23; *see also* NLRB v. Wash. Aluminum Co., 370 U.S. 9, 12–15 (1962) (workers' actions in walking out of a frigid factory shop were protected because even though the workers were not members of a union their walkout grew out of a labor dispute).
[48] Corbett, *supra* note 46, at 263.
[49] *Id.*
[50] *Id.*
[51] *Id.* at 271.
[52] *Id.* at 273–76.
[53] Dau-Schmidt, *Employee Voice*, *supra* note 19, at 778.
[54] Corbett, *supra* note 46, at 268.
[55] *See* William B. Gould IV, *The Third* Way*: Labor Policy Beyond the New Deal*, 48 U. KAN. L. REV. 751, 754 (2000).
[56] Eugene Scalia, *Ending Our Anti-Union Federal Employment Policy*, 24 HARV. J.L. & PUB. POL'Y 489, 493 (2001).
[57] *See* Hirsch, *supra* note 36, at 155–56.
[58] BLS 2012, *supra* note 22, at 1.

began in the 1970s.[59] Although the overall union membership rate is 11.3%, if public-sector union density of 35.9% is factored in,[60] the economic and management dynamics explored in this Note are more relevant to private-sector unionization and affect far more workers, so the lower density statistic is most salient. Union density is highest for older workers and lowest for younger workers.[61] States vary from the highest union density in New York (23.2%) and the lowest in North Carolina (2.9%).[62] Mirroring the declining membership trends, the NLRB has seen fewer unfair labor practices complaints filed and has imposed correspondingly fewer monetary awards and reinstatements to remedy such violations, as well as less litigation for union representation and elections.[63] With extremely low union density in some states and for the youngest workers, and the statutory enforcement of collective action in similar decline, the demise of unions altogether seems a distinct possibility.[64]

Scholars have articulated many reasons for the precipitous decline in union density.[65] The definitive answer is not necessary for this analysis, but a list of factors is illustrative. Leading contributors are structural economic shifts such as the movement away from a manufacturing to a service economy and growth in the female workforce.[66] Next, increasingly competitive markets due to globalization and deregulation have constrained labor costs and made it more difficult for higher wage union companies to prosper.[67] The dynamic U.S. economy also results in substantial "deaths and births" of firms; union firms die

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[59] Hirsch, *supra* note 36, at 156.

[60] BLS 2012, *supra* note 22, at 1.

[61] Density is 14.9% for workers aged 55–64 and 4.2% for those aged 16–24. *Id.* at 2.

[62] *Id.* at 1. Other high-density states included Alaska (22.4%), Hawaii (21.6%), Washington (18.5%), California (17.2%), and Michigan (16.6%); other low-density states included Arkansas (3.2%), South Carolina (3.3%), Mississippi (4.3%) and Georgia (4.4%). *Id.* at 11.

[63] *See* NLRB, GRAPHS & DATA: CHARGES AND COMPLAINTS, http://www.nlrb.gov/news-outreach/graphs-data/charges-and-complaints/charges-and-complaints (last visited May 3, 2013) (2,247 complaints were issued in 2001, but that number fell to only 1,314 by 2012); NLRB, GRAPHS & DATA: MONETARY REMEDIES, http://www.nlrb.gov/news-outreach/graphs-data/remedies/monetary-remedies (last visited May 3, 2013) (NLRB issued monetary remedies totaling $220.7 million in 2001, but by 2011 that number fell to only $60.4 million); NLRB, GRAPHS & DATA: REINSTATEMENT OFFERS, http://www.nlrb.gov/news-outreach/graphs-data/remedies/reinstatement-offers (last visited May 3, 2013) (4,225 reinstatement offers were extended in 2001, and in 2011, only 1,644 were offered); NLRB, GRAPHS & DATA: APPELLATE COURT DECISIONS, 1974–2011, http://www.nlrb.gov/news-outreach/graphs-data/litigations/appellate-court-decisions-1974-2011 (last visited May 3, 2013) (appellate courts issued 298 labor decisions in 1974, by 2001 that number had dropped to 106, and in 2011 there were none).

[64] Harold Meyerson, *If Labor Dies, What's Next?*, AM. PROSPECT (Sept. 13, 2012), http://prospect.org/article/if-labor-dies-whats-next ("In much of America unions have already disappeared.").

[65] *See, e.g.*, Hirsch, *supra* note 36, at 153; Michael L. Wachter, *Labor Unions: A Corporatist Institution in a Competitive World*, 155 U. PA. L. REV. 581, 581 (2007); Henry S. Farber, *Union Membership in the United States: The Divergence Between the Public and Private Sectors* 1 (Princeton Univ. Indus. Relations Section, Working Paper No. 503, 2005); *see also* Seymour Martin Lipset & Ivan Katchanovski, *The Future of Private Sector Unions in the U.S.*, 22 J. LAB. RES. 229 (2001).

[66] Hirsch, *supra* note 36, at 159; Lipset & Katchanovski, *supra* note 65, at 230.

[67] Hirsch, *supra* note 36, at 161.

at a disproportionate rate and "all new firms are born nonunion."[68] Institutional factors include changing "worker sentiment for union representation, management opposition to unions, the interpretation and enforcement of labor law," and other workplace regulations that substitute for union representation.[69]

Unions themselves are dwindling, but there appears growing and unmet demand for some form of worker representation and voice according to the leading survey of workers.[70] Freeman and Rogers' Worker Representation and Participation Survey found "a large gap between the kind and extent of representation and participation workers had and what they desired."[71] Subsequent surveys indicated "a large increase in workers wanting to unionize,"[72] and the proportion of the public disapproving of unions dropped sharply from 1995 through 2005.[73] The extent of unmet demand for union representation is unclear, but appears suppressed by employer opposition to union organizing.[74] A recent poll suggested a majority of workers would vote for a union in an election.[75] Freeman and Rogers' latest estimate for the desired rate of private-sector unionization is fifty-eight percent.[76]

Finally, the lowest union density in a century is accompanied by growing income inequality and there is clearly some correlation between the two phenomena. Technology and globalization are thought to be the major contributors to growing income inequality,[77] but the bargaining power of workers has also been weakened by declining support for public education and labor unions.[78] A recent study suggests the decline of unionization explains from a fifth to as much as a third of the growth in income inequality.[79] Decline of unions could be comparable in magnitude to the effect of rising education levels on the stratification of wages.[80] The definitive work on wage inequality by Piketty and Saez acknowledges that changes in unionization account for part of the increase in income inequality.[81] Certainly, the decline of unions featured prominently in

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[68] Farber, *supra* note 65, at 8.

[69] Hirsch, *supra* note 36, at 163.

[70] RICHARD B. FREEMAN & JOEL ROGERS, WHAT WORKERS WANT 17–18 (updated ed. 2006) (Freeman and Rogers conducted their Worker Representation and Participation Survey (WRPS) in 1994–1995. The authors analyzed dozens of subsequent polls and studies in their revised 2006 edition).

[71] *Id.* at 1.

[72] *Id.* at 19.

[73] *Id.* at 18.

[74] Jack Fiorito & Paul Jarley, *Union Organizing and Membership Growth: Why Don't They Organize?*, 33 J. LAB. RES. 461, 482 (2012).

[75] Richard Freeman, *Do Workers Still Want Unions? More Than Ever* 6 (Econ. Pol'y Inst., Briefing Paper No. 182, 2007), *available at* http://www.sharedprosperity.org/bp182/bp182.pdf.

[76] *See id.*

[77] Dau-Schmidt, *Employee Voice*, *supra* note 19, at 795.

[78] *Id.* at 796.

[79] Bruce Western & Jake Rosenfeld, *Unions, Norms, and the Rise in U.S. Wage Inequality*, 76 AM. SOC. REV. 513, 514 (2011).

[80] *Id.* at 528.

[81] Thomas Piketty & Emmanuel Saez, *Income Inequality in the United States 1913–1998*, 118 Q.J. ECON. 1, 34 (2003). Interestingly, Piketty & Saez attribute the increase in the highest incomes to social norms accepting income inequality, which seems indirectly related to union weakness.

recent social justice protests about inequality of income and wealth. Unions endorsed the "Occupy Wall Street" social movement in criticizing the great wealth of the top one percent of Americans compared to the economic weakness of the bottom ninety-nine percent.[82]

Unions may have weakened, but it remains the official public policy of the United States to encourage the practice and procedure of collective bargaining and protect workers' freedom of association and self-organization.[83] NLRA rights are established constitutional rights, enforceable by the NLRB. Although the individual employment rights regime offers a host of protections for employees, current rock-bottom private-sector union density and diminished exercise of collective labor rights correlate with growing income inequality. This state of affairs calls for a new approach to the protection of workers' rights. The academy has proposed various ways to revitalize U.S. labor law. Scholars have called for retiring or overhauling the NLRA,[84] reframing labor rights as human rights,[85] and using litigation practices to persuade courts to hark back to the purpose of the Wagner Act.[86] This is the context in which the NLRB decided to take action to ensure private-sector employees were aware of their rights.

II. HISTORY, PROMULGATION, AND CHALLENGE OF THE NOTICE-POSTING RULE

The notice-posting rule sought to inform employees of their statutory rights under the NLRA.[87] The full scope of protection under the Act has been described as "one of the best-kept secrets of labor law."[88] There has never been a blanket requirement for NLRA rights to be communicated to employees,[89] making the NLRA "almost unique" among those agencies that administer workplace law and routinely post notices of statutory rights.[90] The NLRB

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[82] *See, e.g.*, Steven Greenhouse, *Standing Arm in Arm*, N.Y. TIMES, Nov. 9, 2011, at B1.

[83] 29 U.S.C. § 151 (2012) (Findings and Declarations of Policy).

[84] *See, e.g.*, Forum: *At 70, Should the National Labor Relations Act Be Retired?*, 26 BERKELEY J. EMP. & LAB. L. 221, 221–308 (2005) (collected papers addressing reform and repeal options for the NLRA).

[85] *See, e.g.*, RUBEN J. GARCIA, MARGINAL WORKERS: HOW LEGAL FAULT LINES DIVIDE WORKERS AND LEAVE THEM WITHOUT PROTECTION 24 (2012) ("[A] new way of approaching workers' rights is necessary—one that views workers' rights as fundamental human rights.").

[86] *See, e.g.*, DANNIN, *supra* note 6, at 41–43 (suggesting that to "take back the workers' law," NLRB cases must be litigated in a wholly new way, because few judges have studied labor law; more fundamentally, cases need to refer to specific NLRA goals from section 1 and section 7, instead of the broader, easy goals of labor peace or interstate commerce).

[87] Notification of Employee Rights Under the NLRA, 76 Fed. Reg. 54,006 (Aug. 30, 2011) (to be codified at 29 C.F.R. pt. 104).

[88] Corbett, *supra* note 46, at 267. DANNIN, *supra* note 6, at 52 ("NLRA values and policies have too often been forgotten, their power untapped").

[89] *See* Notification of Employee Rights Under the NLRA, 76 Fed. Reg. at 54,006 & n.5. (posting of rights has only been required in certain narrow circumstances such as three days before representative elections, or as a penalty for NLRA violations).

[90] *Id.* at 54,006–07 & n.6. It is common practice to post notices about workplace rights under federal legislation. *See, e.g.*, Title VII of the Civil Rights Act, 42 U.S.C. § 2000e-10 (2012); the Family and Medical Leave Act, 29 U.S.C. §§ 2601, 2619(a) (2012); and the Fair

determined that, for a variety of reasons, most employees were largely unaware of their rights,[91] stating: "[f]or employees to fully exercise their NLRA rights . . . they [need to] know that those rights exist and that the Board protects those rights."[92]

A. History of the Rule and Employee Rights Awareness

Scholars have called for employee rights notice posting since Charles Morris petitioned the NLRA for such a rule twenty years ago.[93] After decades of declining union density, employees seemed largely unaware of their labor rights and "it appears that most are even unaware of the existence of the Board and have no knowledge of what it is supposed to do. This is especially true of unorganized employees . . . [who] are granted important and extensive rights under section 7 of the Act."[94] Absence of a notice requirement under the NLRA was "remarkable given the significance of the Act as the cornerstone of private-sector labor law in this country."[95] Professor Dannin believes NLRA values and policies are too often forgotten and untapped.[96] "But these policies are still the law, and the time has come to use and promote them if the NLRA is to be effective."[97] Professor Corbett urges particular attention to section 7 rights: "If broadly interpreted and vigorously enforced, section 7 could obviate the need for . . . additional individual rights statutes."[98]

There are several explanations for the lack of awareness of NLRA rights. First, with a low proportion of private-sector workplaces represented by unions, the vast majority of workers lack a key source of information about labor rights.[99] At the peak of unionization, it was logical to assume that millions of workers learned about their labor rights from their shop steward and that labor rights knowledge spread from union households throughout communities.

Labor Standards Act, 29 C.F.R. § 516.4 (2012). Indeed, President Obama's 2009 Executive Order 13,496 requires federal contractors and subcontractors to post notices of NLRA rights. Exec. Order No. 13,496, 29 C.F.R. pt. 471 (2010) (Notification of Employee Rights Under Federal Labor Laws), *available at* http://www.dol.gov/olms/regs/compliance/EO13496.htm.

[91] Notification of Employee Rights Under the NLRA, 76 Fed. Reg. at 54,006 (reasons for low awareness of NLRA rights included: the low percentage of employees represented by unions, the increasing proportion of immigrants, and young people unfamiliar with workplace rights).

[92] *Id.*

[93] Charles J. Morris, *Renaissance at the NLRB—Opportunity and Prospect for Non-Legislative Procedural Reform at the Labor Board*, 23 STETSON L. REV. 101, 111–14, 134 (1993). Professor Morris petitioned the Board to develop a posting rule in 1993, and filed amicus briefs in support of this rule in both district court cases. *See, e.g.*, Chamber of Commerce v. NLRB, 856 F. Supp. 2d 778, 785 (D.S.C. 2012); Brief of Charles J. Morris as Amicus Curiae Supporting Defendants' Cross Motion for Summary Judgment and Motion to Dismiss Plaintiffs' Amended Complaint's Fifth Cause of Action, Nat'l Ass'n. of Mfrs. v. NLRB, 846 F. Supp. 2d 34 (D.D.C. 2012) (No. 1:11-cv-01629-ABJ).

[94] Morris, *supra* note 93, at 111.

[95] Peter D. DeChiara, *The Right to Know: An Argument for Informing Employees of Their Rights Under the National Labor Relations Act*, 32 HARV. J. ON LEGIS. 431, 433 (1995).

[96] DANNIN, *supra* note 6, at 52.

[97] *Id.*

[98] Corbett, *supra* note 46, at 268.

[99] Notification of Employee Rights Under the NLRA, 76 Fed. Reg. 54,006, 54,014–15 (Aug. 30, 2011) (to be codified at 29 C.F.R. pt. 104).

"Threat effects"[100] furthered common understanding of labor rights: labor economics theory posits that the threat of unionization causes non-union workplaces to offer better wages and benefits, implying that even non-union workplaces understood labor rights in times of greater union density.[101]

Second, today's workplaces are populated with an increasing proportion of immigrants and a new generation of young workers, neither group likely to be familiar with U.S. worker rights.[102] (Recall that the youngest workers are least likely to be unionized.[103]) Former NLRB chairwoman Liebman commented that "[m]ost people are surprised to learn that the Act's basic protections . . . apply outside . . . unionized [workplaces]."[104]

Third, people in general have low levels of legal knowledge.[105] Although ignorance of the law is no excuse for most criminal and civil violations, the NLRA is a remedial statute to protect constitutional rights of employees, and knowledge of these rights is an essential precondition to exercising them.[106] "[A] striking level of misunderstanding [has been identified among workers] of the most basic legal rules governing the employment relationship."[107] In studies of worker perceptions of the rule of at-will employment, Professor Pauline Kim found that "workers systematically overestimate their legal protections against arbitrary and unjust discharge,"[108] and were seriously mistaken about their legal rights.[109] Kim concluded that workers' mistaken beliefs about the law likely result from confusion between norms and law.[110] In particular, workers' strong beliefs about fair play led to persistent mistaken beliefs about the law.[111]

It is unlikely that workers overestimate their NLRA rights. Given the low rates of unionization, workers most likely underestimate their rights to any concerted activity or are completely ignorant that the law promotes and protects labor rights. In recognition of the widespread ignorance of labor rights, the NLRB launched a website in 2012 to communicate the rights of employees to act together for their mutual aid and protection, even if they are not in a

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100 HYCLAK ET AL., *supra* note 13, at 348.

101 *Id.*

102 Notification of Employee Rights Under the NLRA, 76 Fed. Reg. at 54,006.

103 *See* BLS 2012, *supra* note 22, at 2.

104 Liebman, *supra* note 35, at 4.

105 *See generally* Pauline T. Kim, *Norms, Learning, and Law: Exploring the Influences on Workers' Legal Knowledge*, 1999 U. ILL. L. REV. 447 (discussing a variety of surveys documenting low levels of legal knowledge among the general population) [hereinafter Kim, *Norms*]. *See also* Cynthia L. Estlund, *How Wrong Are Employees About Their Rights, and Why Does It Matter?*, 77 N.Y.U. L. REV. 6, 6–7 (2002) ("Whatever its source, the gap between employer and employee beliefs and legal reality needs to be reckoned with.").

106 *See* Notification of Employee Rights Under the NLRA, 76 Fed. Reg. at 54,006. Although a six-month statute of limitations usually applies even in the NLRA context. *Id.* at 54,010.

107 Pauline T. Kim, *Bargaining with Imperfect Information: A Study of Worker Perceptions of Legal Protection in an At-Will World*, 83 CORNELL L. REV. 105, 133 (1997).

108 *Id.* at 155.

109 Kim, *Norms*, *supra* note 105, at 465.

110 *Id.* at 452.

111 *Id.*

union.[112] Announcing the website, which told the stories of more than a dozen recent cases regarding protected concerted activity, NLRB Chairman Mark Gaston Pearce noted that a right only had value if people knew it existed.[113]

> We think the right to engage in protected concerted activity is one of the best kept secrets of the National Labor Relations Act, and more important than ever in these difficult economic times. Our hope is that other workers will see themselves in the cases we've selected and understand that they do have strength in numbers.[114]

B. Promulgation of the Rule

To address the perceived gap in awareness of labor rights, in December 2010, the NLRB issued a proposed rule to require employers to post notices informing employees of their NLRA rights.[115] The notice, titled *Employee Rights Under the National Labor Relations Act*, states:

> The National Labor Relations Act (NLRA) guarantees the right of employees to organize and bargain collectively with their employers, and to engage in other protected concerted activity or to refrain from engaging in any of the above activity. Employees covered by the NLRA are protected from certain types of employer and union misconduct. This Notice gives you general information about your rights, and about the obligations of employers and unions under the NLRA. Contact the National Labor Relations Board (NLRB), the Federal agency that investigates and resolves complaints under the NLRA, using the contact information supplied below, if you have any questions about specific rights that may apply in your particular workplace.[116]

The notice goes on to outline the basic section 7 rights in clear, explanatory language, lists employer and union activities that are illegal, and provides contact details and further sources of information.[117] The notice must be at least eleven inches by seventeen inches in size and posted in conspicuous locations where management typically posts employee notices.[118]

As the enforcement agency for the NLRA, the NLRB has statutory authority to prevent unfair labor practices. The new rule deemed failure or refusal to post the notice to be an unfair labor practice or violation of section 8(a)(1),[119] that is, to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title"[120] (listed in Section I and highlighted in summary form in the notice above). The rule also stated that a failure to post violation could be grounds for tolling the statute of limitations, and a

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[112] Press Release, NLRB, NLRB Launches Webpage Describing Protected Concerted Activity (June 18, 2012), *available at* http://www.nlrb.gov/news-outreach/news-releases/nlrb-launches-webpage-describing-protected-concerted-activity.

[113] *Id.*

[114] *Id.*

[115] *See* Proposed Rules Governing Notification of Employee Rights Under the NLRA, 75 Fed. Reg. 80,410 (Dec. 22, 2010) (to be codified at 29 C.F.R. pt. 104).

[116] *Employee Rights Under the National Labor Relations Act*, NLRB (Sept. 2011), https://www.nlrb.gov/sites/default/files/documents/1562/employee_rights_fnl.pdf (emphasis added).

[117] *See* Appendix A.

[118] Notification of Employee Rights Under the NLRA, 76 Fed. Reg. 54,006, 54,027 (Aug. 30, 2011) (to be codified at 29 C.F.R. pt. 104).

[119] *Id.* at 54,031.

[120] 29 U.S.C. § 158(a)(1) (2012).

knowing and willful failure to post the notice could be used as evidence of unlawful motive in a related unfair labor practices case.[121]

The NLRB followed the requirements of the Administrative Procedure Act (APA)[122] to invite comments on its proposed rule and received responses from 7,034 employers, employees, unions, employer organizations, and individuals.[123] After considering comments received, the Board made some changes[124] and issued its final rule in August 2011 to take effect on November 14, 2011.[125]

While no study expressly addressed employee knowledge of NLRA rights,[126] dozens of comments challenging the necessity of the posting rule, provided clear evidence of the lack of NLRA awareness.[127] Individual workers discussed personal experiences regarding lack of knowledge about the NLRA, and such ignorance of labor rights was echoed by those who represent and assist workers.[128] Further, rule challengers' frequently misunderstood the constitutionality of NLRA rights. And numerous comments openly opposed any increase in employee knowledge of the NLRA.[129] Indeed, the Board felt that after reviewing the comments, the notice-posting rule "may have the beneficial side effect of informing *employers* concerning the NLRA's requirements."[130] Some comments opposed the rule precisely because they believed greater awareness of NLRA rights would increase unionization and result in employees filing more unfair labor practices complaints.[131] The Board had a simple retort to such comments: "[F]ear that employees may exercise their statutory rights is not a valid reason for not informing them of their rights."[132]

The vehemence of opposition to notifying employees of their labor rights is a compelling reason in itself for the rule. Although many regard NLRA ideals as quintessentially American values,[133] the rule challengers demonstrated an obvious distaste for the NLRA. The National Right to Work Legal Defense Foundation, for example, announced that as a consequence of the rule: "Mom

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[121] Notification of Employee Rights Under the NLRA, 76 Fed. Reg. at 54,031.
[122] 5 U.S.C. § 553 (2012).
[123] Notification of Employee Rights Under the NLRA, 76 Fed. Reg. at 54,007.
[124] *Id.* (the Board responded to the comments in detail in the final rule).
[125] *Id.* at 54,006.
[126] *Id.* at 54,018 n.96 (based on the comments received, the Board found it unnecessary to conduct a study to determine the extent of employees' knowledge of NLRA rights).
[127] *Id.* at 54,015.
[128] *Id.* at 54,015–16 (Comments included: "I had no idea that I had the right to join a union, and was often told by my employer that I could not do so;" and "As an employee at-will, I was not aware of my rights to form a union or any rights that I may have had under the NLRA.").
[129] *Id.* at 54,016.
[130] *Id.* at 54,017 (emphasis added) (Employer comments included: "Belonging to a union is a privilege and a preference—not a right;" and "If my employees want to join a union they need to look for a job in a union company.").
[131] *Id.* at 54,016.
[132] *Id.*
[133] *See* DANNIN, *supra* note 6, at 51 (NLRA values are "emphatically pro-democracy. Its policies set out steps to give us workplaces consistent with a democracy and to empower workers by giving them the skills needed to be citizens of a democracy.") (citing Cynthia Estlund, *Reflections on the Declining Prestige of American Labor Law Scholarship*, 23 COMP. LAB. L. & POL'Y J. 789, 792 (2002)).

and Pop shops . . . are now under the Obama Labor Board's microscope and will feel the pressure to hand over their employees to forced unionism . . . ."[134] The National Association of Manufacturers expressed its commitment "to fighting this rule in order to rein in the NLRB" and encouraged Congress to "act soon to stop this rogue agency."[135]

While the Board is meant to be impartial, it is often forgotten that the Wagner Act was designed to favor labor.[136] "When critics accuse the labor laws and the NLRB of being pro-union . . . it is a sign that the Act is performing as intended and that the Board is following its mandate."[137] There is obvious irony in business and employer associations (collective groups themselves) going to great lengths to prevent employees enjoying the benefits of association:

> Despite the image of U.S. residents as rugged individualists, most Americans are group-oriented when they endeavor to advance their economic interests. . . . [Why are] those persons who most lack individual bargaining power and who most need a collective voice to advance their interests . . . expected and even encouraged to eschew organizational strength.[138]

With dwindling union density and low awareness of workplace law, requiring employers to post notices informing workers of their labor rights seems eminently reasonable—indeed, the courts have been unable to invalidate the rule on reasonableness grounds, as we shall see.

C. Legal Challenges

In September 2011, the rule was challenged in the D.C. District Court by the National Association of Manufacturers (NAM), the National Federation of Independent Business, and the National Right to Work Legal Defense Foundation.[139] Similar suit was brought in the South Carolina District Court by the U.S. Chamber of Commerce and the South Carolina Chamber of Commerce.[140] The chief complaint was that the NLRB exceeded its statutory authority to issue the rule because Congress failed to include a specific notice-posting

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[134] Riedel, Press Release, *supra* note 14, at 1 (quoting Mark Mix, President of National Right to Work) (internal quotation marks omitted).

[135] Nat'l Ass'n of Mfrs, Press Release, *supra* note 14.

[136] Abner J. Mikva, *The Changing Role of the Wagner Act in the American Labor Movement*, 38 STAN. L. Rev. 1123, 1126 (1986).

[137] *Id.*

[138] Charles B. Craver, *Rearranging Deck Chairs on the Titanic: The Inadequacy of Modest Proposals to Reform Labor Law*, 96 MICH. L. REV. 1616, 1642–43 (1995) (reviewing WILLIAM B. GOULD IV, AGENDA FOR REFORM: THE FUTURE OF EMPLOYMENT RELATIONSHIPS AND THE LAW (1993)).

[139] Nat'l Ass'n of Mfrs. v. NLRB, 846 F. Supp. 2d 34, 41 (D.D.C. 2012). Consolidating cases Nat'l Ass'n of Mfrs. v. NLRB (No. 1:11-cv-1629-ABJ) (D.D.C. Sept. 8, 2011) and Nat'l Right to Work Found. Inc. v. NLRB (No. 1:11-cv-1683-ABJ) (D.D.C. Sept. 16, 2011). These actions were joined by Coal. for a Democratic Workplace v. NLRB (No. 1:11-cv-2262) (D.D.C. Dec. 20, 2011).

[140] Chamber of Commerce v. NLRB, 856 F. Supp. 2d 778 (D.S.C. 2012). No doubt South Carolina was hoped to be a hostile forum for the NLRB, given the anti-union feeling regarding the NLRB suit against Boeing for relocating their assembly line to the state in response to union activity in the state of Washington. *See* Steven Greenhouse, *Labor Board Drops Case Against Boeing After Union Reaches Accord*, N.Y. TIMES, Dec. 10, 2011, at B3.

requirement in the NLRA.[141] Proposed enforcement penalties and tolling of the statute of limitations for failure to comply with the rule were also challenged.[142] Plaintiffs NAM et al. alternatively alleged that the rule was arbitrary and capricious under the Administrative Procedure Act because it was promulgated without empirical support,[143] and that the notice violated employers' First Amendment right to speak or refrain from speaking.[144]

Facing litigation, the Board twice postponed implementation, initially until January 2012 to allow further outreach and education, and later to April 2012 to allow resolution of the district court cases.[145] In March 2012, the rule was upheld in part and invalidated in part by the D.C. District Court,[146] however, in April 2012, the South Carolina District Court held the Board lacked authority to promulgate the entire rule.[147] Once appeals were filed, the rule was subsequently enjoined by the D.C. Circuit,[148] and the Board postponed the rule pending resolution in the circuit courts or the Supreme Court.[149] As this journal went to press, the D.C. Circuit vacated the rule for invalid enforcement provisions,[150] and the Fourth Circuit appellate decision was pending.[151]

D.C. District Court Judge Amy Berman Jackson held in March 2012 that the NLRA granted the Board broad rulemaking authority to implement the provisions of the Act and this authority was not exceeded in the notice-posting provision.[152] However, Judge Jackson also held as invalid as a matter of law[153] separate enforcement provisions deeming any failure to post the notice an unfair labor practice[154] and tolling the statute of limitations for non-compliance with the rule.[155] A month later, South Carolina District Court Judge David Norton found the rule as a whole exceeded the Board's authority in violation of

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[141] Complaint at 5–8, Nat'l Ass'n of Mfrs. v. NLRB, 846 F. Supp. 2d 34 (D.D.C. 2012) (No. 1:11-cv-01629-ABJ).

[142] *Id.* at 6–8.

[143] *Nat'l Ass'n of Mfrs.*, 846 F. Supp. 2d at 49; *see also Chamber of Commerce*, 856 F. Supp. 2d at 784 (arguing that the rule violated the APA).

[144] *Nat'l Ass'n of Mfrs.*, 846 F. Supp. 2d at 58; *Chamber of Commerce*, 856 F. Supp. 2d at 785 (arguing that the notice poster violates the First Amendment).

[145] *See* Press Release, NLRB, Posting of Employee Rights Notice Now Required on Jan. 31 (Oct. 5, 2011) [hereinafter NLRB, Press Release], *available at* http://www.nlrb.gov/news-outreach/news-releases/posting-employee-rights-notice-now-required-jan-31-board-postpones-deadl; *see also* Press Release, NLRB, NLRB Postpones Effective Date of Rights Posting Rule to April 30 (Dec. 23, 2011), *available at* https://www.nlrb.gov/news/nlrb-postpones-effective-date-rights-posting-rule-april-30.

[146] *Nat'l Ass'n of Mfrs.*, 846 F. Supp. 2d at 38.

[147] *Chamber of Commerce*, 856 F. Supp. 2d at 780.

[148] Nat'l Ass'n of Mfrs. v. NLRB, No. 12-5068, 2012 WL 4328371, at *1 (D.C. Cir. Apr. 17, 2012) (order granting temporary injunction).

[149] Letter from Eric G. Moskowitz, Assistant Gen. Counsel for Special Litig., NLRB, to Benjamin P. Glass Esq., Attorney, U.S. Chamber of Commerce (Apr. 27, 2012) (noting that declaratory judgments against the government are honored without need for injunction).

[150] Nat'l Ass'n of Mfrs. v. NLRB, No. 12-5068, 2013 WL 1876234, at *13 (D.C. Cir. May 7, 2013).

[151] *Id*. at *3.

[152] *Nat'l Ass'n of Mfrs.*, 846 F. Supp. 2d at 38.

[153] *Id.*

[154] *Id.*

[155] *Id.*

the APA.[156] Because statutory authority is an administrative law issue, analysis relating to the Board's authority to issue the rule is discussed below in Section III. Here, the discussion briefly reviews the reasonableness of the rule, given that *both* district courts agreed the rule was reasonable,[157] and examines the First Amendment issue, which failed in the D.C. District Court, was not reached in South Carolina, but dominated the recent D.C. Circuit decision.[158]

1. District Courts Agreed the Rule Was Reasonable

Judge Jackson prefaced her opinion by noting the NLRA contained an "unequivocal declaration of national policy" to encourage collective bargaining and protect workers' exercise of "full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection."[159] At the outset, such preamble shows an attempt to adhere to the core values of the NLRA. Judge Jackson affirmed NLRB rulemaking authority, then proceeded to address the reasonableness of the notice posting rule, finding not only that there was substantial evidence to justify the rule, but also that the agency action demonstrated a "rational connection between the facts found and the choice made."[160] In contrast, Judge Norton's opinion stressed the extraordinary nature of the rule by stating that after seventy-five years without requiring notice posting, the NLRB changed course in 2010 with its proposed rule.[161] Judge Norton's analysis reached an administrative law finding of insufficient authority for the notice-posting rule.[162] But the South Carolina court had no dispute with Judge Jackson's verdict on reasonableness: Judge Norton said in a footnote he would have agreed with Judge Jackson's "fine opinion" on reasonableness had he proceeded beyond administrative authority analysis.[163]

At trial, the NLRB had no difficulty providing a reasonable explanation for why its notice-posting rule was " 'necessary' to carry out [NLRA policies]: it concluded that in order for employees to fully exercise their NLRA rights" they must "know that those rights exist."[164] Timely awareness of employee rights was directly related to the Board's ability to protect and enforce the

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156 Chamber of Commerce v. NLRB, 856 F. Supp. 2d 778, 780, 797 (D.S.C. 2012).

157 In the D.D.C. Judge Jackson found the rule to be reasonable under *Chevron* Step Two *See* discussion in Section III *infra*; *see also Nat'l Ass'n of Mfrs.*, 846 F. Supp. 2d at 49, and declined to find the rule arbitrary and capricious. *Id.* at 52. In the S.C.D.C. Judge Norton noted that if he had proceeded past *Chevron* Step One, he would have agreed with Judge Jackson's "fine opinion" on *Chevron* Step Two reasonableness. *Chamber of Commerce*, 856 F. Supp. 2d at 797 n.20.

158 The D.D.C. refused to overturn the notice-posting rule on First Amendment grounds, *Nat'l Ass'n of Mfrs.*, 846 F. Supp. 2d at 61, and the D.S.C. deemed the issue moot. *Chamber of Commerce*, 856 F. Supp. 2d at 797 n.20. The D.C. Circuit felt the free speech issue controlled much of the case. Nat'l Ass'n of Mfrs. v. NLRB, No. 12-5068, 2013 WL 1876234, at *5 (D.C. Cir. May 7, 2013).

159 *Nat'l Ass'n of Mfrs.*, 846 F. Supp. 2d at 38.

160 *Id.* at 49 (internal quotation marks omitted).

161 *Chamber of Commerce*, 856 F. Supp. 2d at 780.

162 *Id.* at 797 & n.20.

163 *Id.*

164 *Nat'l Ass'n of Mfrs.*, 846 F. Supp. 2d at 49.

rights, and posting notices would raise employee awareness.[165] Judge Jackson noted that the NLRB interpretation was so reasonable the plaintiffs had not even proffered an argument that the rule was unreasonable.[166]

Surmounting the arbitrary and capricious standard on the question of employees' awareness of their rights was another easy task for the Board in the D.C. District Court. Arbitrary and capricious review is highly deferential, and an "agency may rely on [notice and comment]" submissions and "general analysis based on informed conjecture."[167] The Board's determination that many employees were unaware of their NLRA rights was based on studies, law review articles, and comments submitted—and no counter-submission debunked the Board's findings.[168] Similarly, Judge Jackson found notice posting to be a reasonable means of promoting greater knowledge among employees, given the benefits of a poster, the modest cost to employers, and the content and manner of posting.[169] Judge Jackson noted that the relative number of people informed about their labor rights now and in the past was not particularly important.[170] All that mattered to survive arbitrary and capricious analysis was "whether it is reasonable to think that there are a significant number of employees who are uninformed about their rights under the NLRA now and whether it is reasonable to believe that the notice posting rule will decrease that number."[171] Thus, there was little dispute the notice-posting rule was reasonable.

2. The First Amendment and NLRA Section 8(c)

Challengers argued the notice-posting rule violated the First Amendment because it compelled employers to speak.[172] This seemingly ancillary argument failed in the D.C. District Court and was moot in South Carolina.[173] However, the D.C. Circuit elevated employers' right "not to speak" above all else.[174] The appellate panel was persuaded by plaintiff's objection to "the message the gov-

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165 *Id.*
166 *Id.*
167 *Id.*
168 *Id.* at 50.
169 *Id.* at 51.
170 *Id.* at 51 n.13.
171 *Id.*
172 *Id.* at 58.
173 *See id.* at 60; Chamber of Commerce v. NLRB, 856 F. Supp. 2d 778, 797 n.20 (D.S.C. 2012). In seeking to enjoin the notice, NAM claimed violation of First Amendment rights constituted irreparable harm. Denying the injunction, Judge Jackson noted that plaintiff's litigation strategy suggested their First Amendment argument was their weakest because it received summary treatment in their pleadings, and was put aside entirely at the hearing. Memorandum Opinion on parties' cross-motion for summary judgment at 37–42, Nat'l Ass'n of Mfrs. v. NLRB, No. 11-1629, 2012 WL 1929889 (D.D.C. Mar. 7, 2012) (denying injunction pending appeal).
174 Nat'l Ass'n of Mfrs. v. NLRB, No. 12-5068, 2013 WL 1876234, at *5 (D.C. Cir. May 7, 2013). The panel did not decide whether NLRB had the regulatory authority to require notice posting, choosing instead to invalidate the proposed enforcement mechanisms and conclude that the Rule was not severable. However, the D.C. Circuit concurrence would have also held the Board lacked authority for its "aggressively prophylactic" regulation because the NLRA was "manifestly remedial." *Id*. at *16.

ernment has ordered them to publish . . . as one-sided, as favoring unionization."[175] Under this characterization, employers who refuse to post are expressing their views about labor law, which merits section 8(c) protection, that is, "express[ion] of any views . . . shall not . . . be evidence of an unfair labor practice . . . if such expression contains no threat of reprisal or promise of benefit."[176] Challengers relied on *Wooley v. Maynard* for the right to refrain from speaking.[177] In *Wooley,* the Supreme Court found New Hampshire's requirement that vehicle license plates bear the motto "Live Free or Die" was compelled speech because it interfered with plaintiff's religious beliefs.[178] The D.C. Circuit thus concluded that both the First Amendment and section 8(c) protect the right of employers (and unions) not to speak.[179] But an ideological slogan is a far cry from established labor law. Indeed, as Judge Jackson noted in the district court, since the notice simply recites what the law says, "employers could not possibly have an alternative message" that the notice could affect.[180] Whereas the D.C. District Court regarded the NLRA poster as "government speech . . . not subject to scrutiny under the Free Speech Clause,"[181] the circuit court drew no distinction between creation and dissemination of a message.[182] Even when disseminating the messages of others, "a 'compelled-speech violation' occurred when 'the complaining speaker's own message was affected by the speech it was forced to accommodate.' "[183]

The D.C. Circuit decision is far-reaching, and if not reversed by the Supreme Court, could quickly render the NLRB irrelevant.[184] In *National Association of Manufacturers v. NLRB*, the D.C. Circuit qualified its earlier dicta that "an employer's right to silence is sharply constrained in the labor context, and leaves it subject to a variety of burdens to post notices of rights and risks."[185] Now, despite the fact that countless government mandated workplace notices withstand the First Amendment, any NLRB posting mandates are in question because section 8(c) has been interpreted to protect employers and create a zone of unregulated speech in every workplace. For good or ill, section

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[175] *Id*. at *8. Indeed, in oral argument, Judge Randolph stressed the poster was viewpoint discriminatory. Transcript of Oral Argument at 26–27, Nat'l Ass'n of Mfrs. v. NLRB, 2013 WL 1876234 (D.C. Cir. May 7, 2013) (No. 12-5068).

[176] 29 U.S.C. § 158(c).

[177] Wooley v. Maynard, 430 U.S. 705, 714 (1977) ("the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all.").

[178] *See Nat'l Ass'n of Mfrs.*, 846 F. Supp. 2d at 59 (discussing *Wooley*).

[179] *Nat'l Ass'n of Mfrs*, 2013 WL 1876234, at *9.

[180] *Nat'l Ass'n of Mfrs.*, 846 F. Supp. 2d at 59–60.

[181] *Id.* at 58 (quoting Pleasant Grove City v. Summum, 555 U.S. 460, 464 (2009)) (internal quotation marks omitted).

[182] *Nat'l Ass'n of Mfrs.*, 2013 WL 1876234, at *6 (citing Sorrel v. IMS Health Inc., 131 S. Ct. 2653, 2667 (2011).

[183] *Id*. at *8 (quoting Rumsfeld v. Forum for Academic & Institutional Rights, Inc., 547 U.S. 47, 63 (2006)).

[184] What is the future for NLRB prohibition of captive audience meetings within 24 hours of an election, or mandated notice postings following adjudications of unfair labor practice?

[185] *Nat'l Ass'n of Mfrs.*, 2013 WL 1876234, at *9 (quoting UAW-Labor Emp't & Training Corp. v. Chao, 325 F.3d 360, 365 (D.C. Cir. 2003)) (internal quotation marks omitted) (Judge Randolph noted the 8(c) right to silence was only against the Board's finding an unfair labor practice).

8(c) has long been interpreted as a free speech right for employers.[186] Now, a mere notice-posting requirement is deemed too much of an imposition on employer freedom to speak about unionization or remain silent about labor rights. Yet, as Section V will explain, most employers are not shy about expressing their opinions about unionization. Somewhat disingenuously, the D.C. Circuit noted that no one "has even suggested that the posting rule was needed because employers [were] misleading employees about their rights under the [NLRA]."[187] Respectfully, this Note submits that a great deal of misleading is occurring in workplaces, and litigation to preserve ignorance about NLRA rights is just the tip of the iceberg.

Following the trial court decisions in 2012, reasonableness of notice-posting was no longer in dispute, and the First Amendment issue also appeared to be moot. Challengers' appellate briefs focused on statutory authority and perceived congressional intent.[188] Before moving to the question of rulemaking authority, it is important to remember that this "unprecedented" rulemaking seeks to promulgate a simple, reasonable workplace poster requirement.

III. NLRB RULEMAKING AUTHORITY

The notice-posting rule was only the second time in seventy-six years that the NLRB promulgated a substantive rule.[189] This departure from formulating law and policy almost exclusively through adjudicating unfair labor practices was historic and appeared to open a new avenue for labor law.[190] Affirming NLRB authority to require notice posting would revitalize labor law; rulemaking may be arduous, but the results would be more enduring for labor rights.

A. National Labor Policy and Rulemaking

The Supreme Court has emphasized that the NLRB "has the primary responsibility for developing and applying national labor policy."[191] Thus, the Board "necessarily must have authority to formulate rules to fill the interstices of the broad statutory provisions."[192] The Court has also stated that Congress

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[186] DANNIN, *supra* note 6 at 109 ("[Section 8(c)] is commonly referred to as a free speech right for employers, even though it does not mention employers . . . . It simply says that certain sorts of speech cannot be a violation of the NLRA."); *see also* Alan Story, *Employer Speech, Union Representation Elections, and the First Amendment*, 16 BERKELEY J. EMP. & LAB. L. 356, 394 (1995) (arguing that employer speech is really corporate commercial speech and entitled to less First Amendment protection than political speech).

[187] *Nat'l Ass'n of Mfrs*, 2013 WL 1876234, at *9 n.18.

[188] *See* Brief of Petitioner-Appellant at 29, Nat'l Ass'n of Mfrs. v. NLRB, Nos. 12-5068 & 12-5138, 2012 WL 3152145, at *29 (D.C. Cir. Aug. 3, 2012); *see also* Brief for Thirty-one Members of the U.S. House of Representatives as Amici Curiae Supporting Appellants National Association of Manufacturers at 26, Nat'l Ass'n of Mfrs. v NLRB, No. 12-5068 (D.C. Cir. May 29, 2012) [hereinafter Brief for Thirty-one Members of the U.S. House of Representatives].

[189] The Board's first rule established health care bargaining units in 1991. *See* Notification of Employee Rights Under the NLRA, 76 Fed. Reg. 54,006, 54,008 (Aug. 30, 2011) (to be codified at 29 C.F.R. pt. 104).

[190] Rubenstein, *supra* note 8.

[191] NLRB v. Curtin Matheson Scientific, Inc., 494 U.S. 775, 786 (1990).

[192] *Id.* (quoting Beth Israel Hosp. v. NLRB, 437 U.S. 483, 500–01 (1978)).

met the difficulties of applying the "broadly phrased" NLRA by "leaving the adaptation of means to end to the empiric process of administration . . . subject to limited judicial review."[193] The Court has also recognized the many advantages of rulemaking: issuing a proposed rule, soliciting and considering public comments, and then issuing a final rule, provides the Board "a forum for soliciting the informed views of those affected in industry and labor before embarking on a new course."[194]

Key differences between rulemaking and adjudication animate any new rule of law. Rulemaking can be distinguished from adjudication largely on the basis of whom the rule affects: adjudications affect specific persons, while rulemaking affects a class of persons.[195] Further, adjudication produces an order, whereas rulemaking is a legislative process.[196] Because of general applicability, procedural due process does not apply to rulemaking.[197] Naturally, controversies over fairness take place in advance of the application of a rule, so the prospective, legislative nature of rulemaking in the fraught realm of labor relations is a lightning rod for contention. Leading labor scholar Cynthia Estlund has testified on Capitol Hill that rulemaking offers greater policy stability than adjudicatory precedents, but more permanent rules are earned through a time-consuming process.[198] With adjudications routinely reversed by an incoming Board of opposing political persuasion,[199] it is not surprising that labor rulemaking is deeply controversial.

The Board has traditionally interpreted the NLRA exclusively through adjudications of individual cases.[200] This is atypical for a federal agency.[201] Indeed, in 1978, when he was a professor of administrative law, future Justice Antonin Scalia described the "flight . . . from individualized, adjudicatory proceedings to generalized disposition through rulemaking" as "perhaps the most notable development in federal government administration during the past two decades."[202] Clearly the NLRB missed the revolution, although not for want of

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[193] Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 194 (1941). The Court noted that "Congress could not catalogue all the devices and stratagems" to circumvent the Act's policies, nor define the "whole gamut of remedies to effectuate these policies in an infinite variety of specific situations." *Id.*

[194] NLRB v. Bell Aerospace Co., 416 U.S. 267, 294–95 (1974) ("the choice between rulemaking and adjudication lies in the first instance within the Board's discretion.").

[195] MICHAEL ASIMOW & RONALD M. LEVIN, STATE AND FEDERAL ADMINISTRATIVE LAW 62 (3d ed. 2009).

[196] *Id.* at 192.

[197] *Id.* at 192–93.

[198] *See Hearing*, *supra* note 9, at 3.

[199] Harold J. Datz, *When One Board Reverses Another: A Chief Counsel's Perspective*, 1 AM. U. LAB. & EMP. L.F. 67, 68–69 (2011) (noting the increased practice of a Democratic Board reversing important precedents of a Republican Board and vice versa).

[200] Note, *NLRB Rulemaking: Political Reality Versus Procedural Fairness*, 89 YALE L.J. 982, 982 (1980) [hereinafter Note, *NLRB Rulemaking*].

[201] Local Joint Exec. Bd. of Las Vegas v. NLRB, 657 F.3d 865, 872 (2011). *See also* BERNARD SCHWARTZ, ADMINISTRATIVE LAW 167 (3d ed. 1991). In fact, a current labor law casebook features neither a chapter nor even an index entry on rulemaking; DAU-SCHMIDT ET AL., *supra* note 40, at xxiii–xxxiv, 1052, 1056 (2009).

[202] ASIMOW & LEVIN, *supra* note 195, at 192 (quoting Antonin Scalia, *Vermont Yankee: The APA, the D.C. Circuit, and the Supreme Court*, 1978 SUP. CT. REV. 345, 376) (internal quotation marks omitted).

trying: the failed Labor Reform Act of 1977, which provided for extensive NLRB rulemaking, passed in the House before failing in the Senate.[203] For several decades, a chorus of scholars and courts, regardless of ideological leanings, has encouraged the Board to act through rulemaking[204] because the Board unquestionably has the authority to do so, and rulemaking offers many benefits.[205] Policymaking through rulemaking would also be viewed by many as "a victory for transparency and administrative regularity in Board decisionmaking."[206]

Rulemaking can be arduous, however. The Board proposed its first substantive rule in 1987 to define the scope of health care bargaining units.[207] The American Hospital Association challenged that rule in 1989, and it was not upheld until 1991, almost four years after the rulemaking process began.[208] The Board proposed two other substantive rules in the 1990s but withdrew them due to political pressure.[209] Progress of the notice-posting rule has been as glacial and contentious as the Board's prior attempts at rulemaking. The rule was proposed in December 2010 and published in August 2011 as a 144-page Final Rule after the Board considered over 7,000 comments submitted during the notice and comment period (from Dec. 2010 to Feb 2011).[210] The rule was twice delayed to respond to legal challenges before it was finally enjoined pending appeal.[211] A more recent attempt at rulemaking did not fare any better. The Board in 2012 also suspended a 2011 rule to amend election procedures, which drew more than 65,000 comments and a legal challenge.[212]

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[203] Note, *NLRB Rulemaking*, *supra* note 200, at 987 & n.29, n.30 & n.31.

[204] *See, e.g.*, Samuel Estreicher, *Policy Oscillation at the Labor Board: A Plea for Rulemaking*, 37 ADMIN. L. REV. 163, 170 & n.29 (1985); Fisk & Malamud, *supra* note 11, at 2015–16; Grunewald, *supra* note 15, at 274–75; Peck, *supra* note 15, at 260.

[205] *See* Peck, *supra* note 15, at 260–61; *see also Hearing*, *supra* note 9, at 2–3 (outlining the benefits of rulemaking).

[206] *Hearing*, *supra* note 9, at 3.

[207] MEL HAAS ET AL., U.S. CHAMBER OF COMMERCE, THE "OBAMA" NATIONAL LABOR RELATIONS BOARD: THE POTENTIAL USE OF RULEMAKING TO ENHANCE UNION ORGANIZING 6 (2010).

[208] *Id.* at 6–7; *see also* Am. Hosp. Ass'n v. NLRB, 499 U.S. 606, 608–09 (1991).

[209] HAAS ET AL., *supra* note 207, at 7.

[210] Notification of Employee Rights Under the NLRA, 76 Fed. Reg. 54,006 (proposed Dec. 21, 2010) (to be codified at 29 C.F.R. pt. 104); *see also Final Rule for Notification of Employee Rights*, NLRB, http://www.nlrb.gov/news-outreach/fact-sheets/final-rule-notification-employee-rights (last visited May 4, 2013) (noting that the Board received over 7,000 comments about the proposed rule).

[211] *See Employee Rights Poster Requirement Delayed—Again*, AM. HOTEL & LODGING ASS'N, http://www.ahla.com/content.aspx?id=34072 (last visited May 4, 2013); *see also* NLRB, Press Release, *supra* note 145; *NLRB Chairman Mark Gaston Pearce on Recent Decisions Regarding Employee Rights Posting*, NLRB (Apr. 17, 2012), http://www.nlrb.gov/news-outreach/news-releases/nlrb-chairman-mark-gaston-pearce-recent-decisions-regarding-employee-rig (announcing that the D.C. Circuit Court of appeals "temporarily enjoined the NLRB's rule"); Fact Sheets, *Employee Rights Notice Posting*, NLRB, www.nlrb.gov/poster (last visited May 4, 2013) (noting the D.C. Circuit Court enjoining the rule).

[212] Press Release, NLRB, NLRB Suspends Implementation of Representation Case Amendments Based on Court Ruling (May 15, 2012) (announcing the Board's temporary suspension of the new rule), *available at* http://www.nlrb.gov/news-outreach/news-releases/nlrb-suspends-implementation-representation-case-amendments-based-court-; *see also* Press Release, NLRB, Board Adopts Amendments to Election Case Procedures (Dec. 21, 2011),

The protracted nature of agency rulemaking has been likened to the decades-long development of bone tissue. Scholars describe this as the "ossification" of rulemaking.[213] Although still an effective tool to elicit public participation in agency policy, "the rulemaking process has become increasingly rigid and burdensome . . . and evolving judicial doctrines have obliged agencies to take greater pains to ensure the technical bases for rules are capable of withstanding judicial scrutiny."[214] But traditional adjudication is not necessarily speedy or efficient, and NLRB opponents themselves acknowledge that because the courts generally defer to agency rules, the Board could "[w]ith little effort" write a "logical, reasoned argument [to support promulgating] a pro-union substantive rule of law."[215]

Had the Board established a track record of rulemaking, perhaps there would be less of a brouhaha over the notice-posting rule. "The NLRB has the power to engage in rulemaking, and has even done so (exactly once) with considerable success, if success can be measured by the Supreme Court's satisfaction with the process."[216] The Board's first successful rulemaking, in 1987,[217] was unanimously upheld by the Supreme Court in *American Hospital Association v. NLRB*.[218] The Court found a general grant of rulemaking authority in section 6[219] "unquestionably sufficient to authorize the rule at issue in this case unless limited by some other provision in the Act."[220] Broad rulemaking powers have been granted to many other federal administrative bodies using similar language to NLRA section 6.[221] Although the Board has at times engaged in quasi-rulemaking through adjudication,[222] it conducted such rulemaking without the benefits and protections offered by compliance with the APA and was therefore susceptible to judicial disapproval.[223] An NLRB rulemaking would be presumed valid under APA procedures if the Board conducted extensive notice and comment, carefully analyzed comments received, and justified the

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available at http://www.nlrb.gov/news-outreach/news-releases/board-adopts-amendments-election-case-procedures (noting that over "65,000 comments were submitted" related to the proposed rule).

[213] *See* Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385, 1385–86 (1992); Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59, 60 (1995). *See also* Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1530 (2002).

[214] McGarity, *supra* note 213, at 1385.

[215] HAAS ET AL., *supra* note 207, at 7.

[216] Fisk & Malamud, *supra* note 11, at 2017.

[217] HAAS ET AL., *supra* note 207, at 6; *see* Grunewald, *supra* note 15, at 275–76.

[218] Am. Hosp. Ass'n v. NLRB, 499 U.S. 606, 608 & 620 (1991).

[219] *See* discussion *infra* Section III.B.1.

[220] *Am. Hosp. Ass'n*, 499 U.S. at 609–10.

[221] *See, e.g.*, Thorpe v. Hous. Auth., 393 U.S. 268, 277, 280–81 (1969) (where the empowering provision of a statute states simply that the agency may "make . . . such rules and regulations as may be necessary to carry out the provisions of this Act,' " the Court has held that the validity of a regulation promulgated thereunder will be sustained so long as it is "reasonably related to the purposes of the enabling legislation."); *see also infra* Section III.B.1.

[222] *See, e.g.*, NLRB v. Wyman-Gordon Co., 394 U.S. 759, 764–65 (1969); NLRB v. Bell Aerospace Co., 416 U.S. 267, 295 (1974).

[223] Peck, *supra* note 15, at 271–72.

rule based on a reasoned analysis of an extensive record.[224] NLRB rulemaking is all very well in theory, but APA procedure was not the chief concern in this instance, as the following discussion will explain.

B. Authority for Notice Posting

The Board's statutory authority to promulgate the notice-posting rule was the crux of the instant controversy. Recall that the D.C. District Court held that the NLRB did *not* exceed its statutory authority to require employers to post the notice (though it invalidated two enforcement provisions),[225] but the South Carolina District Court held the Board *did* exceed its authority.[226] On appeal in the D.C. and Fourth circuits, parties, and amici argued various interpretations of the Board's statutory authority. Rather than rehash the appellate briefs, this section examines two central, intertwined issues: the validity of the posting rule under the NLRA section 6 rulemaking provision and the appropriateness of judicial deference to NLRB statutory interpretation under the *Chevron* doctrine.

1. NLRA Section 6 Rulemaking Authority

Because the NLRA lacks an express notice-posting provision, an alternative source of authority is required for the posting rule. The U.S. Chamber of Commerce and National Association of Manufacturers (NAM) each asserted that the posting rule exceeded NLRB authority because Congress omitted any notice-posting requirement in the NLRA.[227] NAM argued the Board only had authority to establish rules for elections and the adjudication of unfair labor practice charges, not the authority to promulgate general rules for the workplace.[228] It is true that the NLRA lacks a notice-posting provision, but it does provide the Board authority to make rules and regulations necessary to effectuate any of the provisions of the NLRA.[229]

> Section 6 of the NLRA . . . provides that "the Board shall have authority from time to time to make, amend, and rescind, in the manner prescribed by [the Administrative Procedure Act, 5 U.S.C. §§ 551–559], such rules and regulations as may be necessary to carry out the provisions of this Act."[230]

With general rulemaking authority assured, the question becomes whether a rule is necessary to carry out provisions of the NLRA. Here the district courts diverged.

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[224] Grunewald, *supra* note 15, at 278 & n.16; *see also* NLRB Rules and Regulations, 29 U.S.C. § 156 (2012) (granting the Board authority to enforce its enacting statute following the procedures set out in the APA); *Wyman-Gordon Co.*, 394 U.S. at 763–64 (outlining APA requirements for proper rulemaking, "[t]he [APA] requires, among other things, publication in the Federal Register of notice of proposed rulemaking and of hearing; opportunity to be heard; a statement in the rule of its basis and purposes; and publication in the Federal Register of the rule as adopted." (citing the Administrative Procedure Act, 5 U.S.C. § 553)).

[225] Nat'l Ass'n of Mfrs. v. NLRB, 846 F. Supp. 2d 34, 38 (D.D.C. 2012).

[226] Chamber of Commerce v. NLRB, 856 F. Supp. 2d 778, 780 (D.S.C. 2012).

[227] *Id.* at 789–90; *Nat'l Ass'n of Mfrs.*, 846 F. Supp. 2d at 44.

[228] *Nat'l Ass'n of Mfrs.*, 846 F. Supp. 2d at 44.

[229] 29 U.S.C. § 156.

[230] Notification of Employee Rights Under the NLRA, 76 Fed. Reg. 54,006, 54,008 (Aug. 30, 2011) (to be codified at 29 C.F.R. pt. 104).

The lack of a notice-posting provision was not dispositive for the D.C. District Court. Judge Jackson said the rule challengers "read too much into Congress's silence" regarding the omission of a notice-posting requirement in the NLRA.[231] The court found the stated purpose of the rule directly related to NLRA policy in section 1 and the language of section 7, each of which were "provisions of the Act" under section 6.[232] NLRB dissemination of information about employee rights was "well within its bailiwick," unlike the Federal Trade Commission's failed attempt to regulate the legal profession in *American Bar Association v. FTC*.[233] Further, *American Hospital Association* affirmed that the section 6 rulemaking authority was "unquestionably sufficient" unless limited by some other provision in the NLRA.[234] "Plaintiffs complain loudly about the lack of Board authority here, but they fail to point to any limiting provision."[235]

The South Carolina District Court acknowledged the wide discretion to enact rules granted by section 6, but failed to find notice posting *necessary* to carry out provisions of the Act.[236] Judge Norton adopted a strict definition of necessary, guided by statutory structure rather than plain language.[237] In Judge Norton's view, the NLRB confused a necessary rule with one that was simply useful.[238] Even if the rule aided or furthered the aspirational goals of section 1 by notifying employees of their section 7 rights, the rule was not necessary to carry out any other provisions because the NLRA did not place an affirmative obligation on employers to post notices of employee rights.[239] The court interpreted *American Hospital* to only authorize a rule tailored to an NLRA provision, in that case making section 9(b) bargaining unit determinations.[240] Under such an interpretation of rulemaking authority, the notice-posting rule could not be "necessary" to carry out a nonexistent notice provision.

The South Carolina approach is more than a pedantic definition of necessary. According to Professor Morris, the original proponent of notice posting,[241] Judge Norton's extreme test for agency rulemaking would effectively repeal section 6 by judicial fiat.[242] This selective approach to qualifying provisions of the NLRA seems to lean heavily on NLRB publicity materials. Judge Norton quoted a "Basic Guide" to the NLRA as proving Congress intended the Board to have "two main functions: to conduct representation elections and

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[231] *Nat'l Ass'n of Mfrs.*, 846 F. Supp. 2d at 44.
[232] *Id.* at 45, 49.
[233] *Id*. at 44–45. NAM urged the court to follow *American Bar Association v. FTC*, 430 F.3d 457 (D.C. Cir. 2005), which refused to accord deference to the FTCs interpretation of a new financial regulation. *Id.* at 44.
[234] *Id.* at 45.
[235] *Id.*
[236] Chamber of Commerce v. NLRB, 856 F. Supp. 2d 778, 789–90 (D.S.C. 2012).
[237] *Id.* at 789.
[238] *Id.*
[239] *Id.*
[240] *Id.* at 788–89.
[241] Professor Morris initiated the notice-posting rule with a rulemaking petition in 1993, and filed amicus briefs in both district court cases. Charles J. Morris, *Are Employers Afraid of Employees Learning of their NLRA Rights?*, CHARLES J. MORRIS ON LAB. REL. (Apr. 18, 2012), http://charlesjmorris.blogspot.com/2012/04/are-employers-afraid-of-employers.html.
[242] *See id.*

certify the results, and to prevent employers and unions from engaging in unfair labor practices."[243] Further, NLRB annual reports and memoranda acknowledged that it does not initiate cases, that it lacks "roving investigatory powers," and that its proceedings are invoked only by an unfair labor practice charge or representative petition.[244] On this basis, Judge Norton interpreted the NLRB to be a "reactive" agency whose authority must be triggered by an outside party, and therefore the notice-posting rule could not be necessary under section 6 because it proactively dictated employer conduct prior to any petition or charge.[245]

The South Carolina District Court's restrictive interpretation of NLRB rulemaking authority is unprecedented. Professor Morris found Judge Norton's opinion incredible in terms of settled law.[246] In its appeal, the NLRB argued the district court's reading of the term necessary was at odds with the Supreme Court's generous construction of the Constitution's "necessary and proper" clause.[247] NLRB stated that labor caselaw regards the term "necessary" as ambiguous, primarily entrusted to agency expertise, and typically construed as " 'reasonably related' to the purposes and policies of the statute."[248] Judge Norton's view of necessary regulation is at odds with most of administrative law. This Note predicts that such a contorted definition of necessity will not survive appellate review.[249]

On appeal, the Chamber of Commerce predictably reiterated the South Carolina court's holding that the "structure of the [NLRA] . . . places the Board in a reactive role in relation to employers covered by the Act."[250] Such a role only authorized the Board to "dictate" employers' conduct after an unfair labor practice charge or a petition for representation is filed.[251] Legislative history was parsed to argue that "Congress intended a reactive role for the Board,"[252] and express notice provisions in other workplace statutes were presented as evidence that Congress did not intend for any NLRA notice posting.[253] Relying on *Brown & Williamson Tobacco v. FDA*,[254] the Chamber of Commerce acknowledged that the Board's justification for the rule may be "laudable," but no matter "how serious the problem," NLRB could not "exercise its authority

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243 *Chamber of Commerce*, 856 F. Supp. 2d at 782.

244 *Id.*

245 *Id.* at 790–91 & n.11.

246 Morris, *supra* note 241.

247 Brief of Appellant at 17–18, NLRB v. Chamber of Commerce, No. 12-1757 (4th Cir. Sept. 28, 2012) [hereinafter Brief, NLRB].

248 *Id.* at 17.

249 Moreover, this extremely limited view of NLRB jurisdiction is a predictable product of unfavorable forum for labor in the Carolinas. *See supra* note 140. This should be mitigated in the Fourth Circuit.

250 Corrected Brief of Appellees at 22, Chamber of Commerce v. NLRB, No. 12-1757 (4th Cir. Dec. 4, 2012) [hereinafter Brief, Chamber of Commerce] (internal quotation marks omitted).

251 *Id.* at 21.

252 *Id.* at 24.

253 *Id.* at 27–29.

254 FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 131, 161 (2000) (holding that the FDA did not have jurisdiction to regulate tobacco products).

in a manner inconsistent with the administrative structure" enacted by Congress.[255]

If the Board's rulemaking function is to be tightly proscribed to a few reactive provisions, the logical outcome will be a withering of NLRB functionality. Rather than follow Judge Norton's highly selective approach to the NLRA provisions, it is logical that all nineteen sections of this Act are recognized as provisions for the purpose of any rulemaking, from the broad policies of section 1 to the most specific and technical latter provisions. A rule supported by an extensive record should be deemed "necessary" under the ordinary standard that it is reasonably related to the purposes and policies of the statute. Here, the posting rule is both reasonably related and necessary to carry out sections 1, 7, 8, 9, and 10 of the Act, because the effectiveness of all these provisions depends on employees knowing their rights and how to enforce them.[256] To exercise rights to concerted activity or to join a union, file representative petitions, and charge unfair labor practices, the Act "presupposes employee awareness of and participation in the Board's processes."[257] The necessity of employee awareness of NLRA rights is not "circular logic"[258] but common sense.

2. *Deference to the NLRB Under the* Chevron *Doctrine*

Under the well-known test articulated by the Supreme Court in *Chevron U.S.A. v. Natural Resources Defense Council*,[259] courts will defer to a reasonable interpretation of a gap left by Congress in the statutes they administer.[260] *Chevron* deference was accorded to the Board's notice-posting rule by the D.C. District Court, but denied in the South Carolina court. Application of the *Chevron* doctrine will thus be a decisive factor on appeal. This section evaluates the parties' *Chevron* arguments in light of two administrative law themes: first, appropriateness of *Chevron* deference for the NLRB, and second, overuse of the "One Congress" fiction in statutory interpretation. This Note argues that the notice-posting rule was an ideal candidate for *Chevron* deference, which should be confirmed at the appellate level.

After extensive analysis established the "manifest necessity" of the notice-posting requirement, the NLRB concluded the rule filled a *Chevron* gap in the NLRA statutory scheme.[261] Here, the statutory gap arises in part because of declining union density when "unions have been a traditional source of information about the NLRA's provisions."[262] The "administrative machinery" of the NLRA depends on employers and employees having knowledge of their rights in order to privately initiate proceedings, however the statute "has no

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[255] Brief, Chamber of Commerce, *supra* note 250, at 18 (internal quotation marks omitted).
[256] Notification of Employee Rights Under the NLRA, 76 Fed. Reg. 54,006, 54,010 (Aug. 30, 2011) (to be codified at 29 C.F.R. pt. 104).
[257] Brief, NLRB, *supra* note 247, at 12.
[258] *Contra* Brief, Chamber of Commerce, *supra* note 250, at 22.
[259] Chevron U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837, 842–43 (1984).
[260] Chamber of Commerce v. NLRB, 856 F. Supp. 2d 778, 786 (D.S.C. 2012).
[261] Notification of Employee Rights Under the NLRA, 76 Fed. Reg. at 54,011.
[262] *Id.*

provision [for] making that knowledge available."[263] The Board relied on its ability to "adapt the Act," in light of recent realities, to the "changing patterns of industrial life," and "the Board's cumulative experience"[264] as urged in *NLRB v. J. Weingarten, Inc*.[265]

The *Chevron* two-step test presents the reviewing court with two questions:

> First, always, is the question whether Congress has *directly spoken* to the precise question at issue. If the intent of Congress is *clear*, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, . . . Congress has not directly addressed the precise question . . . the question [under step two] is whether the agency's answer is based on a permissible construction of the statute.[266]

The NLRB acknowledged that Congress did not speak directly to the Board's authority to promulgate a notice-posting rule, and argued it reasonably interpreted section 6 to authorize the rulemaking.[267] In the D.C. District Court, Judge Jackson could not find that "Congress unambiguously intended to preclude the Board from promulgating" a notice-posting rule.[268] Neither the statutory text nor any binding precedent supported such narrowing of rulemaking authority.[269] Prior cases only constrained the Board's adjudicative functions, and did not consider the scope of its general rulemaking authority under section 6.[270]

The South Carolina District Court took a different tack, framing the issue as whether Congress intended to *delegate* such authority, instead of whether Congress evidenced a clear intent to *withhold* jurisdiction.[271] The delegation approach was crafted in *Brown & Williamson Tobacco v. FDA*.[272] Because the NLRA was "silent"[273] as to notice posting, the South Carolina court determined that searching analysis was necessary to "ascertain congressional intent" which required looking at "the overall statutory scheme, legislative history, the history of evolving congressional regulation in the area, and a consideration of

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263 *Id.*

264 *Id.*

265 NLRB v. Weingarten, Inc., 420 U.S. 251, 266 (1975) ("The responsibility to adapt the Act to changing patterns of industrial life is entrusted to the Board. . . . It is the province of the Board, not the courts, to determine whether or not the 'need' [for a Board rule] exists in light of changing industrial practices and the Board's cumulative experience in dealing with labor-management relations. For the board has the 'special function of applying the general provisions of the Act to the complexities of industrial life,' . . . and its special competence in this field is the justification for the deference accorded its determination.").

266 Chevron U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837, 842–43 (1984) (emphasis added).

267 Nat'l Ass'n of Mfrs. v. NLRB, 846 F. Supp. 2d 34, 43 (D.D.C. 2012).

268 *Id.* at 48.

269 *Id.*

270 *Id.* at 47.

271 Chamber of Commerce v. NLRB, 856 F. Supp. 2d 778, 786–87 (D.S.C. 2012).

272 *Id.* (citing Brown & Williamson Tobacco Corp. v. FDA, 153 F.3d 155, 161 (4th Cir. 1998), *aff'd*, 529 U.S. 120 (2000)). *Williamson* was affirmed by the Supreme Court; the district court likely emphasized the Fourth Circuit analysis in *Williamson* to withstand review in that circuit.

273 *Id.* at 792.

other relevant statutes."[274] Judge Norton did not find authority delegated to the Board to regulate employers in the manner proposed (by requiring notice posting). "The Board cannot simply hang its hat on Congress's silence, especially when the authority asserted here conflicts with the Board's historic 'quasi-judicial' role in relation to employers . . . ."[275] The court rejected the idea of giving the NLRB "unbridled rulemaking discretion"[276] and warned against deference to agencies " 'slip[ping] into a judicial inertia,' resulting in the 'unauthorized assumption by an agency of major policy decisions properly made by Congress.' "[277]

The notice-posting rule's failure to surmount *Chevron* step one in the South Carolina decision raises the question: How much deference should be given to agency interpretations of their enabling statutes? Under step one of *Chevron*, the Government is meant to have "a built-in advantage in a dispute"[278]: "[T]he agency does not have to demonstrate that the statute actually endorses its position—only that that statute does not rule it out."[279] *Chevron* should allocate crucial policy decisions to a politically responsive branch of government.[280] The more politically responsive an agency, especially one charged with overseeing administration of a statute day-to-day, the more defensible is judicial deference to the agency.[281] The NLRB is particularly deserving of *Chevron* deference because the NLRA is a "broadly drafted, frequently ambiguous statute address[ing] fundamental policy concerns."[282] Congress determined that concerted activities deserve protection, "but the parameters of that protection are strikingly amorphous."[283] Given that "Congress created the NLRB to [enforce] the NLRA against a backdrop of hostility toward judicially-created labor [law], . . . the *Chevron* 'fiction' " preferring the agency "resolve statutory ambiguities appears [to be] grounded in fact."[284] The South Carolina District Court erred by misusing *Chevron* and overemphasizing the NLRA silence on a notice requirement.

In its appellate argument, the Chamber of Commerce relied heavily upon *Williamson Tobacco*. This argument regards context as "crucial" and requires

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[274] *Id.* at 787 (quoting *Williamson*, 153 F.3d at 162) (internal quotation marks omitted).
[275] *Id.* at 791.
[276] *Id.* at 791–92.
[277] *Id.* at 792 (quoting Am. Ship Bldg. Co. v. NLRB, 380 U.S. 300, 318 (1965)). Judge Norton's obvious disdain for NLRB discretion shines through the penultimate footnote of his decision: "Perhaps the Board should have heeded the admonition of Simon and Garfunkel: 'And no one dared / disturb the sound of silence.' " *Id.* at 797 n.19.
[278] ASIMOW & LEVIN, *supra* note 195, at 536.
[279] *Id.* (citing Nat'l Fed'n of Fed. Emps. v. Dep't of the Interior, 526 U.S. 86 (1999)).
[280] Rebecca Hanner White, *The Stare Decisis "Exception" to the* Chevron *Deference Rule*, 44 FLA. L. REV. 723, 735 (1992). Professor White is current Dean of the University of Georgia Law School. *See Rebecca H. White*, UNIV. OF GA. LAW, http://www.law.uga.edu/profile/rebecca-h-white/ (last visited May 4, 2013).
[281] White, *supra* note 280, at 737.
[282] *Id.* at 738.
[283] *Id.*
[284] *Id.* at 739; *see also* Michael C. Harper, *Judicial Control of the National Labor Relations Board's Lawmaking in the Age of* Chevron *and* Brand X, 89 B.U. L. REV. 189, 192 (2009) (noting a succession of Supreme Court decisions, before and after *Chevron*, that uphold Board statutory constructions).

that a court not only interpret a statute as a "symmetrical and coherent regulatory scheme," but that it also "look to the provisions of the whole law, and to its object and policy."[285] It should be remembered that *Williamson* was a controversial 5–4 decision denying FDA jurisdiction over tobacco products on the basis of a legislative analysis that "roamed widely."[286] In response to this judicial narrowing of agency authority, Congress subsequently gave jurisdiction to the FDA to regulate tobacco.[287]

In seeking to withhold rulemaking power from the NLRB, the Chamber of Commerce and the National Association of Manufacturers make liberal use of the "one-Congress fiction," particularly when they draw heavily upon a case like *Williamson Tobacco*.[288] The folly of the "one-Congress" approach ignores the reality of the "inevitably shifting legal and political terrain" that comes with different Congresses and instead attempts to "justify a particular interpretation of a disputed statutory provision by [referring] to other statutes' identical, similar, or different provisions."[289] Faced with the Herculean task of making sense of the law as a whole, the one-Congress interpretive practice frees judges to make "unpredictable and unprincipled ends-oriented interpretation" which threatens to become a "random and roving 'clear statement' doctrine."[290] Judge Harold Leventhal noted that when judges resort to legislator-created legislative history they often manipulate the process in a way that is similar to "looking over a crowd and picking out your friends."[291]

Here, the challengers and Judge Norton left no stone unturned to try to prove that Congress never intended for the NLRB to require workplace notice posting. Two vivid examples of the one-Congress approach in this controversy are the multiple references to the legislative history of the NLRA and the inclusion of notice-posting requirements in numerous other statutes. The Chamber of Commerce appellate brief notes that in seventy-six years, "Congress has regularly included notice-posting provisions in nine other labor or employment statutes . . . but never gave such authority to the NLRB."[292] The one-Congress fiction is particularly inapt given not only that labor relations are widely acknowledged as "one of the most polarized and controversial subjects of national political debate," but also that successive Congresses have enacted only two major labor relations reforms since 1935.[293]

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[285] Brief, Chamber of Commerce, *supra* note 250, at 15 (internal quotation marks omitted).

[286] William W. Buzbee, *The One-Congress Fiction in Statutory Interpretation*, 149 U. PA. L. REV. 171, 195 (2000).

[287] *See* Family Smoking Prevention & Tobacco Control Act, Pub. L. No. 111-31, 123 Stat. 1776, 1776 (June 22, 2009) (codified as amended at 21 U.S.C. § 301 (2012)).

[288] *See* Buzbee, *supra* note 286, at 194 (discussing the idea of a one-Congress fiction as it related to the *Brown & Williamson Tobacco Corp.* decision) ("[T]he *Brown & Williamson* majority opinion contains an essential strain of logic that looks at Congress as a unitary, unchanging principal . . . .").

[289] *Id.* at 173.

[290] *Id*. at 176–77.

[291] *Id.* at 231 (citing Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 846 (1992)).

[292] Brief, Chamber of Commerce, *supra* note 250, at 28.

[293] *See* Note, *NLRB Rulemaking*, *supra* note 200, at 988 (citing to Congressional hearings urging the NLRB to engage in greater rulemaking).

It was error for the South Carolina District Court to rely primarily upon silence in the NLRA to prohibit the notice-posting rule. Silence cannot be evidence that Congress considered the matter because there are too many other plausible explanations for legislative silence.[294] Moreover, "[t]here is nothing whatsoever in the NLRA itself or its legislative history on the specific subject of this Rule."[295] The Board argued that explaining congressional non-action when Congress itself sheds no light is to "venture into speculative unrealities."[296] Given the tensions inherent in labor policy, the NLRB is particularly deserving of *Chevron* deference for its expert interpretation of the NLRA. And broad statutory rulemaking authority coupled with a comprehensive factual record should speak louder than random and heavily partisan interpretations of historic legislative intent that occur under the "one-Congress fiction."

C. Failure to Post the Notice

To enforce notice posting, the NLRB wanted to designate an employer's failure to post the notice as an unfair labor practice.[297] In addition, the Board wished to deem willful failure to post the notice as evidence of unlawful motive in any unfair labor practice case and toll the statute of limitations for filing unfair labor practice charges where employers have failed to post.[298] In declaring that the entire rule lacked authority, the South Carolina court did not single out the enforcement provisions for analysis. However, the D.C. District Court found the Board exceeded its authority with provisions to deem failure to post an unfair labor practice and toll the statute of limitations.[299] In contrast, the unlawful-motive evidentiary provision was validated by the district court, because the question of whether there had been a knowing and willful refusal to post the notice would be determined on a case-by-case basis should the facts and circumstances show interference[300] and was neither a blanket finding nor presumption of anti-union animus.[301] Judge Jackson acknowledged the Board was seeking to provide some teeth to enforce the notice-posting provision, and she noted that "severing" enforcement provisions from the main rule would not completely deprive the Board of its desired bite[302] because the Board could still use failure to post as evidence for an unfair labor practice charge and equitable tolling would still be available where justified.[303]

Deeming failure to post an unfair labor practice exceeded the Board's authority because Congress had specifically defined and limited the conduct that could constitute an unfair labor practice in sections 8 and 10 of the NLRA and so the enforcement provision was "limited by some other provision of the

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294 Brief, NLRB, *supra* note 247, at 31.
295 *Id.* at 33.
296 *Id.* at 34.
297 Notification of Employee Rights Under the NLRA, 76 Fed. Reg. 54,006, 54,031 (Aug. 30, 2011) (to be codified at 29 C.F.R. pt. 104).
298 *Id.*
299 Nat'l Ass'n of Mfrs. v. NLRB, 846 F. Supp. 2d 34, 55 (D.D.C. 2012).
300 *Id.* at 54–55.
301 *Id.* at 63 n.26.
302 *Id.* at 62.
303 *Id.*

Act" and could not survive the *Chevron* analysis.[304] Although the Board had contended that failure to post the notice qualified as an unfair labor practice under section 8(a)(1) "to interfere with, restrain, or coerce employees in the exercise of . . . rights,"[305] the D.C. District Court rejected the argument because interference was "getting in the way" of employees' exercise of their rights, not a mere failure to facilitate exercise of the rights.[306] Similarly, the Board was not authorized to toll the statute of limitations because Congress did not leave such a gap to be filled but instead plainly mandated a short six-month period for filing an unfair labor practice charge.[307]

The enforcement provisions hang in the same limbo as the posting rule itself, so the reviewing courts must consider which provisions are supported by regulatory authority in order to effectuate the posting requirement.[308] Both tolling and deeming failure-to-post an unfair labor practice appear to exceed NLRB authority because they fall under other limiting provisions of the NLRA.[309] In contrast, there is no provision to limit authority for the Board to find knowing and willful failure to post as evidence of unlawful "anti-union animus."[310] At least one enforcement provision should be upheld, or hostile employers will thwart with impunity not only the implementation of the notice-posting rule but ultimately the NLRA.

The actions of the NLRB are inevitably viewed through a partisan lens and the rulemaking process brings all the controversy to the fore. The notice-posting rule was only a modest step to communicate NLRA rights and was based on an extensive factual and administrative record. Other rules are likely to be more contentious. For instance, the subsequent election-amendments rule to streamline election procedures attracted ten times the feedback of the notice-posting rule.[311] It had been so long since election procedures had been updated that they still required carbon copies and lacked any form of electronic filing or communications.[312] Issues of far greater import await NLRB attention following these initial forays into rulemaking. It is essential to the effectiveness of modern labor law that the Board has some assurance of its general rulemaking authority going forward.

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[304] *Id.* at 52–53.

[305] *Id.* at 52.

[306] *Id.* at 54.

[307] *Id.* at 56.

[308] As discussed in section II, at the time of publication, the D.C. Circuit had just vacated the rule by invalidating all three enforcement provisions, and the Fourth Circuit decision was still pending.

[309] *See supra* text accompanying notes 234–35 for the discussion on limiting provisions.

[310] *Nat'l Ass'n of Mfrs.*, 846 F. Supp. 2d at 63 n.26 (Judge Jackson noted that unlawful animus provision neither created an unfair presumption nor relieved the Board of making a case-by-case determination of knowing and willful failure to post).

[311] *See supra* note 212.

[312] Ellin Dannin, *Public Commentary: Why the Amendments to the NLRB's Proposed Election Regulations Should Be Approved*, ECON. POL'Y INST. (Aug. 19, 2011), *available at* http://www.epi.org/publication/approving_amendments_to_the_nlrbs_election_regulations.

IV. Insights from Economics

A thorough economic analysis of the notice-posting controversy is beyond the scope of this Note, but several insights from economic theory are germane. There are macroeconomic elements in the rationale of the NLRA, classic microeconomic forces influencing firm and union behavior, competing economic theories of unionism, and idiosyncrasies of information and other imperfections in labor markets. In the spirit of Louis Brandeis,[313] these theories are explored to go beyond pure legal analysis and provide broader context for the rule.

A. The NLRA and Macroeconomics

The preamble to the NLRA describes macroeconomic and industrial conditions not dissimilar to those existing in the American economy during promulgation of the notice rule. Widespread current business and employer opposition to unionization paralleled the original NLRA recognition of "denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining . . . ."[314] Although strikes are rare today (because judicial interpretation has narrowed the scope of protection under the Act[315]) and commerce continues to flow, there has clearly been "diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods."[316] As was also true in the Depression years, inequality of bargaining power between employees and employers of late has tended "to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry."[317] A shortfall in aggregate demand that dampened the goods market was undoubtedly a factor in the latest lingering recession.[318] In short, Congress enacted the NLRA in part to resolve severe macroeconomic problems, similar to the problems facing the economy today.

Nevertheless, unions are often caught in the crosshairs of the efficient markets ideal, in practice as well as theory. For instance, a classic macroeconomic concept blamed on inefficient unions is the idea of sticky wages—the tendency for wages to stay high when other prices fall.[319] As a recent *New York Times* blog described: "[T]he unwillingness of the employed to lower their wages is what creates the unemployment. Instead of everyone

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[313] Black's Law Dictionary 200 (8th ed. 2004) (A Brandeis brief "makes use of social and economic studies in addition to legal principles and citations.").

[314] 29 U.S.C. § 151 (2012).

[315] Dau-Schmidt et al., *supra* note 40, at 611 (discussing replacement of striking workers in *NLRB v. Mackay Radio & Tele. Co.*, 304 U.S. 333 (1938)).

[316] 29 U.S.C. § 151(d).

[317] *Id.*

[318] R.A., *Recovery: Is it the Aggregate Demand?*, Economist (Apr. 19, 2010, 6:40 PM), http://www.economist.com/blogs/freeexchange/2010/04/recovery_1.

[319] *Sticky Wage Theory Definition*, Investopedia.com, http://www.investopedia.com/terms/s/sticky-wage-theory.asp#axzz2Lr2ot4tb (last visited May 4, 2013).

receiving less pay, some receive none. That's what makes unreasonable unions so inhumane. They benefit members at the expense of the unemployed."[320]

Another macroeconomic observation relevant to the NLRA is that establishment of the legal framework for labor management relations in 1935 led to an explosion of union density.[321] Leading labor economist Richard Freeman's analysis of a century of union membership demonstrated growth in discontinuous "spurts," interspersed with periods of gradual erosion of union density.[322] Such spurts have been partially due to either exogenous shocks to the macroeconomy, such as law reform or political changes, or endogenous responses of employees' collective grievances and loss of faith in business.[323] Freeman predicted that future resurgence of union density would likely be induced by employee-driven bursts of union activity rather than any plausible labor law reform.[324] While scholars may differ on the impact of union activity on the macroeconomy,[325] there is scarcely a doubt that the existence of the NLRA and the level of awareness and exercise of labor laws all play roles in macroeconomic dynamics. Rather astutely, in dissenting to the final rule, NLRB member Brian Hayes viewed the Board as seeking to "reverse the steady downward trend in union density among private sector employees."[326] It seems logical that any future spurts in union density will emanate from employees' awareness of their labor rights.

B. Microeconomics of Unionization

At the microeconomic level, firms respond to union activity with classic economic motivations. In theory, a firm makes economically rational choices based on cost-benefit analysis; in the context of unionization, firms put resources into preventing organizing drives in order to decrease labor costs and enhance managerial discretion.[327] Essentially, employers oppose the reallocation of their resources away from the owners of capital and toward additional labor costs.[328] The neoclassical view sees the union as an anticompetitive monopoly on labor services delivering workers generous union wage premi-

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[320] Ben Schott, *Sticky Wages: The Tendency for Wages To Remain High During Recessions*, N.Y. TIMES: SCHOTT'S VOCAB (Apr. 21, 2011, 11:26 AM), http://schott.blogs.nytimes.com/2011/04/21/sticky-wages/.

[321] Richard B. Freeman, *Spurts in Union Growth: Defining Moments and Social Processes*, *in* THE DEFINING MOMENT: THE GREAT DEPRESSION AND THE AMERICAN ECONOMY IN THE TWENTIETH CENTURY 265, 265 (Michael D. Bordo et al. eds., 1998).

[322] *Id.* at 267–68.

[323] *See, e.g.*, *id.* at 278–80.

[324] *Id.* at 288.

[325] *See, e.g.*, Dau-Schmidt, *Employee Voice*, *supra* note 19, at 779–81 (discussing a proud intellectual tradition which advocates for freedom of contract and individual bargaining with a minimum of government regulation, but noting the critique of neoclassical economics acknowledging several "market failures" "all of which have relevance to the labor market and the employment relationship").

[326] Notification of Employee Rights Under the NLRA, 76 Fed. Reg. 54,006, 54,037, 54,042 (Aug. 30, 2011) (to be codified at 29 C.F.R. pt. 104) (dissenting view of Member Brian E. Hayes).

[327] Kleiner, *supra* note 17, at 522.

[328] *Id.*

ums.[329] It is generally accepted, however, that unions vary in the extent to which they are able to raise the wages of their members, and pay gaps vary with economic conditions.[330] The union wage gap averaged around fifteen percent in the United States throughout the twentieth century.[331] However, studies conducted more recently have shown smaller wage effects of unions but greater influence on job security, grievance procedures, and family-friendly workplace policies.[332] Many economists recognize another side of unions: their productivity-enhancing collective voice.[333] Two theories explain this notion of voice. One theory predicts that employees engaging with management as equals results in greater input into the methods of production, while another theory is that unions promote efficient expression that helps prevent the costly exit of workers who are dissatisfied with their job.[334]

C. Institutional Economics and Labor Markets

In 1952, institutional economist John Galbraith coined the famous term "countervailing power" to conceptualize unions as an essential check on corporate power.[335] Countervailing power exists when unions (or other institutions) push back against corporate power.[336] Whereas the neoclassical ideal assumes efficient and fair markets where union pressure inevitably results in distortions, institutional economics[337] recognizes that labor markets are "*always* and *everywhere* imperfect" and that they are a long way from the "finely tuned mechanism for allocating resources and rewards . . . in neoclassical economic[s]."[338] Institutional economics readily acknowledges that unions exert market power in labor markets, but this can be good or bad depending on whether firm governance and wage determination are efficient and fair or "problem-prone,

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[329] *See, e.g.*, Bruce E. Kaufman, *Institutional Economics and the Theory of What Unions Do* 6 (Andrew Young School of Pol'y Stud. Research Paper Series, Working Paper 10-06, 2010), *available at* http://aysps.gsu.edu/sites/default/files/documents/AYS_10-06_Kaufman.pdf.

[330] HYCLAK ET AL., *supra* note 13, at 352 (reaching this conclusion after generalizing over 200 studies analyzing union wage effects in the United States).

[331] *Id.* at 353.

[332] John DiNardo & David S. Lee, *Economic Impacts of New Unionization on Private Sector Employers: 1984–2001*, 119 Q.J. ECON. 1383, 1430 (2004); *see also* HYCLAK ET AL., *supra* note 13, at 355 (describing how unions might have had a greater effect on improving "fringe benefits" even than they have had on wages).

[333] HYCLAK ET AL., *supra* note 13, at 359; Dau-Schmidt, *Employee Voice*, *supra* note 19, at 805; *see also* RICHARD B. FREEMAN & JAMES L. MEDOFF, WHAT DO UNIONS DO? 3 (1984) (proposing the two faces of unions: a monopoly face and collective voice face).

[334] *See* Dau-Schmidt, *Employee Voice*, *supra* note 19, at 805.

[335] GALBRAITH, *supra* note 18, at 114–15.

[336] *See* Wachter, *supra* note 65, at 632 (union federations are pivotal because they offer a counterweight to the largest corporations).

[337] Merriam-Webster dictionary defines "institutional economics" as "a school of economics that emphasizes the importance of nonmarket factors . . . in influencing economic behavior, economic analysis being subordinated to consideration of sociological factors, history, and institutional development." *See Institutional Economics*, MERRIAM-WEBSTER ONLINE, http://www.merriam-webster.com/dictionary/institutional%20economics (last visited May 4, 2013).

[338] Dau-Schmidt, *Employee Voice*, *supra* note 19, at 780.

oppressive and unbalanced."[339] Comparatively withered private-sector unions exert little countervailing power today, and the recent Occupy Wall Street movement provides some evidence of pent-up demand to "counter" corporations.[340] But even institutionalists don't leap to the conclusion that greater unionization is always for the best.[341] As Freeman and Medoff put it: "Because . . . unions do much social good . . . the 'union-free' economy desired by some business groups would be a disaster . . . [but] [w]e also think that 100 percent . . . unionization would also be economically undesirable."[342]

D. Information Economics

Underlying the notice-posting controversy is the larger issue of information in labor markets, long a fertile topic in economics.[343] Imbalance in information between workers and employers is well established[344]: while neoclassical economic theory assumes perfect information for market equilibrium, the real world is bedeviled with information asymmetries that result in some of the worst cases of market failure.[345] Businesses and employers who clamor for laissez-faire labor markets are effectively seeking to benefit from such market failure when workers lack basic information about their legal rights. Therefore, communicating labor rights is a "modest step"[346] to address the information asymmetries in American workplaces.

Many scholars have studied information asymmetries in labor management relations.[347] Particular need has been shown for information disclosure vis-à-vis union representation.[348]

> [T]he critical role of information—information necessary to make an efficient representation decision—has been neglected. . . . There are many reasons to believe that the market fails to provide this information, especially in cases where it would be

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339 Kaufman, *supra* note 329, at 49.

340 OCCUPYWALLSTREET.ORG, http://occupywallst.org/about/ (last visited May 5, 2013) (Occupy Wall Street "is fighting back against the corrosive power of major banks and multinational corporations over the democratic process").

341 *See* Kaufman, *supra* note 329, at 47.

342 FREEMAN & MEDOFF, *supra* note 333, at 250.

343 *See, e.g.*, George J. Stigler, *The Economics of Information*, 69 J. OF POL. ECON. 213 (1961); George J. Stigler, *Information in the Labor Market*, 70 J. POL. ECON. 94 (1962).

344 Dau-Schmidt, *Employee Voice*, *supra* note 19, at 782 ("The criticism of the neoclassical analysis that economists rarely discuss, but that occurs almost immediately to everyone else, is that employers generally have much more bargaining power than their employees.").

345 *See* Bruce C. Greenwald & Joseph E. Stiglitz, *Externalities in Economies with Imperfect Information and Incomplete Markets*, 101 Q.J. ECON. 229, 258–59 (1986); *see also* Joseph E. Stiglitz, Nobel Laureate in Economics & University Professor at Columbia University, Prize Lecture: Information and the Change in the Paradigm in Economics (Dec. 8, 2001), *available at* http://www.nobelprize.org/nobel_prizes/economics/laureates/2001/stiglitz-lecture.pdf (Stiglitz received the Nobel Prize for his work on markets with information asymmetries).

346 *See* Notification of Employee Rights Under the NLRA, 76 Fed. Reg. 54,006, 54010–11 (Aug. 30, 2011) (to be codified at 29 C.F.R. pt. 104).

347 *See, e.g.*, Matthew T. Bodie, *Information and the Market for Union Representation*, 94 VA. L. REV. 1, 69 (2008) (acknowledging "rampant information difficulties in the market for union representation"); *see also* HYCLAK ET AL., *supra* note 13, at 190; Dau-Schmidt, *Employee Voice*, *supra* note 19, at 781.

348 *See generally* Bodie, *supra* note 347.

> most critical. Considering these failures, it is worthwhile to explore ways of dealing with this information gap.[349]

In NLRB elections for instance, the Board excludes certain kinds of information from representation campaigns but has not made efforts to include relevant information.[350] An obvious solution to information deficiencies would be a system of mandatory disclosure that would directly "force the information out into the market."[351] Such mandatory disclosure should address specific information problems, be cognizant of other disclosure regimes, and avoid information overload.[352]

As discussed above, employee rights under various labor and employment laws are routinely posted by mandate in American workplaces.[353] Beyond notice posting, some laws mandate or encourage training sessions to communicate critical information on topics such as health and safety or sexual harassment.[354] Already under the NLRA there is authority for more intrusive communication of worker rights—such as the "notice reading" remedy when a manager must read a notice to assembled employees during a bargaining round or in the event of an adjudicated unfair labor practice.[355]

Compared with other possible forms of mandated information disclosure, the NLRB notice-posting rule is straightforward and rudimentary. The D.C. District Court found the Board had not only drafted language that conveyed information employees were likely to have been unaware of, but also had "made the notice readily available to employers and made compliance uncomplicated."[356] Further, the court noted that increasing awareness of the law was undoubtedly in the public interest.[357] Any increase in employee awareness resulting from the poster could hardly be considered "irreparable harm" to employers.[358] Given the deferential standard of review, the D.C. District Court could not find promulgation of the notice to be arbitrary and capricious.

There are several key economic forces at play in the labor rights arena. At the macroeconomic level, weak unions are unable to counter corporate power, resulting in depressed wage rates that weaken aggregate demand and exacerbate recessions. At the microeconomic level, firms have powerful incentives to

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[349] *Id.* at 78.
[350] *See id.* at 56.
[351] *Id.* at 69.
[352] *Id.* at 70–72.
[353] *See supra* Part II.C.2.
[354] *See, e.g.*, U.S. DEP'T OF LABOR, OCCUPATIONAL SAFETY & HEALTH ADMIN., TRAINING REQUIREMENTS IN OSHA STANDARDS AND TRAINING GUIDELINES 20 (1998) (General Industry Training Requirement excerpted from 29 C.F.R. pt. 1910); *CA Harassment Prevention Training—2 Hour Supervisor Version*, CALCHAMBER, http://www.calchamber.com/store/products/pages/sexual-harassment-training.aspx (last visited May 4, 2013).
[355] Memorandum from Lafe E. Solomon, Acting General Counsel, Office of the Gen. Counsel to All Regional Directors, Officers-in-Charge, and Resident Officers 2 (Feb. 18, 2011), *available at* http://www.laborrelationsupdate.com/GC%20Memorandum%2011-06%20(February%2018,%202011).pdf (First Contract Bargaining Cases: Regional Authorization to Seek Additional Remedies).
[356] Nat'l Ass'n of Mfrs. v. NLRB, 846 F. Supp. 2d 34, 52 (D.D.C. 2012).
[357] Memorandum Opinion and Order at 2, Nat'l Ass'n of Mfrs. v. NLRB, No. 11-1629, 2012 WL 1929889, at *2 (D.D.C. 2012) (denying injunctive relief pending appeal).
[358] *Id.*

avoid any form of organization, from the mere exercise of concerted activity to full-blown collective bargaining. Finally, there are significant information asymmetries that distort labor markets in favor of employers, which can be addressed by mandated information disclosures.

V. Management Opposition to Unions

Management hostility to unions was obvious in the challenge to the notice-posting rule. Behind the litigation, employer opposition has been a major factor in the decline of unions, and continues to hamper workers' exercise of their constitutional labor rights.[359] Anti-union animus is the 900-pound gorilla in the workplace. The legal arguments in *National Association of Manufacturers v. NLRB* tiptoed around this gorilla,[360] but a law review Note need not. It is impossible to examine the purpose and procedures of the NLRB without some recognition of the intensity of business animosity toward unions. This section examines the extent and nature of management opposition to collective action, the "union-busting" industry, and human resource and communications techniques that seek to manage employee relations without unions.

A. Management "Union Free" Strategies

The NLRB poster would hardly communicate labor rights in a vacuum, so it is incongruous to conclude a government notice would infringe employers' First Amendment rights. Not only would the NLRB notice share space with many other government agency notices on federal and state employment laws,[361] but any message of workers' rights would compete with vigorous management communications urging a "union-free" workplace.[362]

During the notice and comment period for the proposed rule, the Board received many hundreds, if not thousands, of opposing comments in form let-

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[359] Warren, *supra* note 4, at 849 (discussing the reasons why employer opposition has been a crucial factor in declining unionization rates and noting that American employers are "exceptionally antagonistic towards unions").

[360] Transcript of Oral Argument at 31, Nat'l Ass'n of Mfrs. v. NLRB, 846 F. Supp. 2d 34 (D.C. Cir. 2012) (No. 11-1629) (arguing that the issue is whether a rule is supported by administrative record and whether it exceeds statutory authority; "[w]hether it's a good idea is immaterial"); *see id.* at 44–48 (explaining that a finding of anti-union animus was "an important thing in the labor law world," which opened up "a whole Pandora's box of additional penalties.").

[361] *See* Notification of Employee Rights Under the NLRA, 76 Fed. Reg. 54,006, 54,007 (Aug. 30, 2011) (to be codified at 29 C.F.R. pt. 104); *see also* Edwin R. Levin, *NLRB Rulemaking on Employee Rights Notice: Is It a Double Edged Sword for the Unions?*, 17 CUE Network News, Jan. 2011, at 4, *available at* http://www.saul.com/media/article/1070_PDF_2891.pdf ("[S]ome employers might just hang the notice in the thick forest of all the other mandated postings . . . where no one will bother to read it.").

[362] *See, e.g.*, CUE: An Organization for Positive Employee Relations, http://www.cueinc.com/index.php (last visited May 4, 2013) ("When a Union Comes Calling[,] [u]se our decades of knowledge to help you maintain your companys [sic] union-free environment."); *Stay Union-Free*, Projections, http://www.projectionsinc.com/stay_union_free.html (last visited May 4, 2013) [hereinafter Projections] (this company sells union avoidance videos with titles like: *The Nightmare* and *Push Back Kit*, claiming "[e]mployees that understand their rights—including their right not to join a union—can be the most powerful force in an ongoing effort to remain union-free.").

ters from human resource professionals.[363] Such comments included the phrase, "As an HR professional, I understand employee rights under the National Labor Relations Act . . . ."[364] These comments are ironic, because the purpose of the notice is to enhance *worker* knowledge of the NLRA and an HR manager would be expected to understand labor and employment laws as a matter of professional competence. In fact, many comments showcased glaring information asymmetries between labor and management, and revealed the vastly different worldviews of managers. "If they don't like the way I treat them, then go get another job. That is what capitalism is about," one employer declared.[365] "Belonging to a union is a privilege and a preference—not a right," proclaimed another comment.[366] And one boss blustered: "If my employees want to join a union they need to look for a job in a union company."[367]

In the modern workplace, employers seek to manage employee relations with various management, communication, and human resources programs.[368] The management literature is replete with studies seeking to improve the quality of employee relations and communications.[369] A full discussion of manage-

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[363] *See Proposed Rules Governing Notification of Employee Rights Under the NLRA*, REGULATIONS.GOV: YOUR VOICE IN FEDERAL DECISION-MAKING, http://www.regulations.gov/#!docketDetail;dct=PS;rpp=10;po=270;D=NLRB-2010-0011 (last visited May 5, 2013).

[364] *Id.*

[365] *Employee Rights Under the National Labor Relations Act: Comment on FR Doc # 2010-32019*, REGULATIONS.GOV: YOUR VOICE IN FEDERAL DECISION-MAKING, http://www.regulations.gov/#!documentDetail;DNLRB-2010-0011-5548 (last visited May 5, 2013). A complete listing of public comments is available at Regulations.gov. The spectrum of feeling on unions is presented in the comments, a selection of which are excerpted here:

- "Where in your charter are you given the right to present a biased point of view that supports unions?";
- "Unions have brought our economy to its knees, and your notice is only sustaining the damage they've caused";
- "People do not need to be reminded of all this union bullshit!";
- "While the notice is long and detailed, it completely ignores the right of employees to object to paying union dues or fees for political purposes";
- "I'm afraid that posting this document will promote more union organization attempts which costs organizations a lot of money to campaign against";
- "Expanding unions is not the best strategy for the economy";
- "[W]e need to assure that all employees are informed of their rights under the NLRA";
- "It's the right of the workers to organize";
- "Doesn't seem like something to fear . . . if you believe in basic human rights";
- "In my experience, workers are typically unaware of their rights under the NLRA";
- "It is vitally important that workers know about their rights";
- "While workers are entitled to protections, they are often not aware of them."

[366] *Id.*

[367] *Id.*

[368] FREEMAN & ROGERS, *supra* note 70, at 120.

[369] *See, e.g.*, Zia Ahmed et al., *Managerial Communication: The Link Between Frontline Leadership and Organizational Performance*, 14 J. ORGANIZATIONAL CULTURE, COMM. & CONFLICT 107, 118 (2010) (stressing the importance of managerial communication to influence goodwill among employees, and recommending "establishing an environment of trust through fair, free, and informal communication networks" and empowerment); Boris Groysberg & Michael Slind, *Trusted Conversation: Use It to Power the Organization*, 29 LEADERSHIP EXCELLENCE 5, 5 (2012); Adrian Wilkinson & Charles Fay, *New Times for Employee Voice?*, 50 HUM. RESOURCE MGMT. 65, 65–66 (2011) (conceptualizing employee voice, and

ment theory and practice in the area of employee relations is beyond the scope of this Note—it suffices to acknowledge that there is a significant body of literature and much organizational effort to manage employee relations. Many employee relations programs are designed explicitly to keep workplaces union-free.[370] One guide to management discussed the importance of two-way communication techniques, such as open-door complaint procedures, top-down communication to "show[ ] employees that they are a part of the company . . . rather than 'just employees,' " attitude surveys, and new employee orientation that contains a "frank statement about why the company does not believe that a union is necessary or desirable."[371] In a study of communication techniques during an America West Airlines anti-union drive, front-line managers were trained to control and promote "the company's image while casting doubt and negativity on the ethos of the Teamsters."[372] Using "open communication," managers responded to "employee concerns or comments . . . [with] carefully constructed Q&A scripts strategically provided by the company."[373] Managers were also "trained in the context of corporate optimism" and encouraged to use "threat appeals" such as reminding employees of the dues they would have to pay the union and the negotiation flexibility they would lose with unionization.[374] Despite the aggressive strategy to fight unionization, Teamsters won that campaign by a four percent vote margin.[375]

"[M]anagerial incentives to stop unionization are formidable because unions raise wages and reduce profits."[376] The intensity of management opposition may "account for as much as 40 percent of the decline in private sector" unionization.[377] And hostility to union organizing is increasingly vigorous despite low union density. Labor scholar Kate Bronfenbrenner found that employer opposition to union organizing has intensified in recent decades.[378] "[T]he incidence of elections in which employers used 10 or more tactics more than doubled compared to the three earlier periods we studied, and the . . . focus is on more coercive and punitive tactics designed to intensely monitor and punish union activity."[379] Coercive and retaliatory tactics included threatening to close and actually closing plants, surveillance and harassment of workers, altered benefits and conditions, and increased discipline and firings.[380] Bronfenbrenner found employer opposition to unions was constant and

new channels, vehicles and philosophies behind management practices and structures for a formal voice regime).

[370] For examples of union-free programs see PROJECTIONS, *supra* note 362.

[371] LITTLER MENDELSON, CHAPTER 31: UNION ORGANIZING 2504–06 (2009), *available at* http://wwwdev.elt.com/documents/Union_Organizing.pdf.

[372] Lorelei A. Ortiz & Julie D. Ford, *The Role of Front-Line Management in Anti-Unionization Employee Communication*, 13 J. COMM. MGMT. 136, 150 (2009).

[373] *Id.* at 151 (internal quotation marks omitted).

[374] *Id.* (internal quotation marks omitted).

[375] *Id.* at 152.

[376] Kleiner, *supra* note 17, at 535.

[377] *Id.*

[378] Kate Bronfenbrenner, *No Holds Barred—The Intensification of Employer Opposition to Organizing* 3–4 (Econ. Pol'y Inst., EPI Briefing Paper 235, 2009), *available at* http://www.epi.org/publication/bp235/.

[379] *Id.* at 2.

[380] *Id.*

cumulative, and "some of the most egregious employer opposition starts long before the union has even filed the petition."[381] Most anti-union campaigns began much earlier.[382]

Management opposition to unions is aided and abetted by a multi-million dollar union-busting industry of labor management consultants who "undoubtedly" contribute to the stridency in management opposition to unionization and are a major cause of not only the growth in unfair labor practices but also the decline in union membership.[383] Such consultants help employers circumvent the NLRA "through a vast array of union-busting tactics, implemented before the union arrives and continuing until after it is defeated: tactics that are designed, at every juncture, to undermine employees' free choice of bargaining representatives."[384]

Scholars have documented "militant employer opposition to unionisation [sic] in the US" which turns organizing campaigns into a war.[385] Over three-quarters of employers are reported to recruit outside consultants and law firms, spending "between $2,000 and $4,000 per vote to defeat unions in NLRB elections."[386] Examining consultant literature, legislative hearings, and NLRB reports, researchers have studied the adverse effects that a typical counter-organizing campaign has on supervisors, employees, and work.[387] "Primed by the consultant's demands, supervisors proceed to 'make life a nightmare' for workers considering unionization," and "supervisors 'spend virtually their entire time interrogating employees and threatening them about their [u]nion activities and [u]nion support.' "[388] Specific employer tactics during union organizing drives or contract negotiations include harassment or intimidation of employees, instigating NLRB investigations, employer "captive-audience" speeches, surface rather than good-faith bargaining, and termination of employees for union activity.[389]

As insidious as union-busting consultants may be, the "devil they know" within the firm may be more of an issue. "The real problem facing American unions . . . is not only the tremendous size and scope of the professional union-busting industry, but the general intensification of management hostility to collective bargaining since the 1970s."[390] The stakes are high in union organizing drives because the outcome of NLRB elections can be critical for employers. One economist found that when unions barely won NLRB elections, they main-

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[381] Kate Bronfenbrenner & Dorian Warren, *The Empirical Case for Streamlining the NLRB Certification Process: The Role of Date of Unfair Labor Practice Occurrence* 7 (Columbia Univ. Inst. for Soc. & Econ. Res. & Pol'y, Working Paper No. 2011.01, 2011), *available at* http://www.rooseveltinstitute.org/sites/all/files/working_paper_cover_2011-01-final.pdf.

[382] *Id.* at 8.

[383] Charles T. Joyce, Comment, *Union Busters and Front-Line Supervisors: Restricting and Regulating the Use of Supervisory Employees by Management Consultants During Union Representation Election Campaigns*, 135 U. PA. L. REV. 453, 455, 456 n.8 (1987).

[384] John Logan, *Consultants, Lawyers, and the "Union Free" Movement in the USA Since the 1970s*, 33 INDUS. REL. J. 197, 198 (2002).

[385] *Id.* at 213.

[386] *Id.* at 198.

[387] Joyce, *supra* note 383, at 460; Kleiner, *supra* note 17, at 526.

[388] Joyce, *supra* note 383, at 464.

[389] Kleiner, *supra* note 17, at 528.

[390] Logan, *supra* note 384, at 213.

tained their recognition for long periods, but when unions barely lost elections, there was scant evidence unions ever tried to organize the workplace again.[391] "[E]mployers face a minimal risk of ever entering collective bargaining negotiations after a union loses a closely contested election."[392] Thus, intensity of managerial opposition varies with the probability of union success: "If unions have either an extremely high or low chance of winning an election, managers would be less likely to use the organization's resources to stop the campaign to unionize . . . if the election outcome is uncertain, then the firm is more likely to fight the union."[393]

B. The Problem with Unions

Management opposition to unions is economically rational behavior but such opposition is also understandable. Unions are not without flaws and failings. The 1947 Taft-Hartley amendments to the Wagner Act responded to "labor's excesses" including more than 5,000 strikes in 1946 involving 4.6 million workers and a loss of 107 million "man-days of work."[394] Unsavory memories of "big labor" inhabit the collective conscience. Even recently, the America West Airlines campaign against the Teamsters used solid evidence of unscrupulous practices, corruption, and kickbacks against the union, and the notoriety of Jimmy Hoffa was frequently invoked.[395] This is why the NLRA protects workers from unfair labor practices committed by *unions*, as well as those committed by employers.

Unions are the only major workplace institution that workers control, but with only 6.6% union density, over 90% of private-sector workers are essentially excluded from the promise of NLRA protection. So unions are not really meeting the needs of contemporary workers. Yet according to Freeman and Rogers, the vast majority of union members want their unions and a third of non-union members want a union.[396]

> Despite the widely publicized flaws of unions and the unease that many members feel about the role of unions on the national scene, 44 percent of private-sector American workers would like to be represented by a union . . . . The workers who want a union but do not have one receive lower wages, are disproportionately black, report particularly poor labor-management relations at their workplace and . . . the main reason these workers are not unionized is that the managements of their firms does not want them to be represented by a union.[397]

A key question is how employer hostility to unions can be so pervasive when the NLRA is intended to pack some punch against animosity to unions. "Anti-union animus" is the legal term of art for evidence of employer opposition to unionism,[398] and employers wish to avoid the label at all costs. As

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391 DiNardo & Lee, *supra* note 332, at 1386.
392 *Id.*
393 Kleiner, *supra* note 17, at 520.
394 DAU-SCHMIDT ET AL., *supra* note 40, at 67–68.
395 Ortiz & Ford, *supra* note 372, at 150.
396 FREEMAN & ROGERS, *supra* note 70, at 97.
397 *Id.* at 117.
398 *See, e.g.*, NLRB v. Transp. Mgmt. Corp., 462 U.S. 393, 403–05 (1983) (an unfair labor practice claim can be proven by a preponderance of the evidence that anti-union animus contributed to a violation).

counsel for National Right to Work noted in oral arguments, evidence of anti-union animus was important in the labor law world: "[I]f an employer, in addition to committing a violation . . . is found guilty of anti-union animus, there can be increased penalties, . . . a whole Pandora's box of additional penalties."[399] Yet many employers appear to express anti-union animus with near impunity.[400] The answer to the question is that the labor law system is broken: "[N]ot just broken, but . . . operating in direct violation of the law."[401]

C. Cynicism and Distrust of Management

Management scholars urge power sharing—that is, involving and informing employees through their supervisors.[402] And several studies of employee loyalty have suggested that most workers were loyal to their work unit, immediate colleagues, and team leader *first*.[403] But a large gap exists between workers' sense of loyalty and their trust in management.[404] Unfortunately, much of the "state of the art" in human resource and employee communication techniques may be a waste of time and money if employees simply do not trust management.

A study of how employees read corporate communications showed an "unerring and persistent expression of anti-management attitudes by participants."[405] For a majority of employees, " 'us and them' remains the central discursive axis for discussing and engaging with managerial text and practice."[406] Organizations could be paying large amounts of money each year to produce documents that either "further alienate employees or are flatly ignored."[407] Another study found that a fairly large percentage of the workforce was somewhat cynical, especially those in the profit-seeking sector.[408] Research indicates that principal sources of cynicism focus on how workplace policies are implemented and the self-interested behavior of corporate executives.[409] "[W]hen employees believe that they are constantly misled and taken advantage of, cynicism is rampant and overall corporate performance suffers."[410]

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399 Transcript of Oral Argument, *supra* note 360, at 44.

400 Bronfenbrenner, *supra* note 378, at 24–25 (noting that "the overwhelming majority of U.S. employers are willing to use a broad arsenal of legal and illegal tactics to interfere with the rights of workers to organize, and that they do so with near impunity").

401 *Id.* at 25.

402 David J. Therkelson & Christina L. Fiebich, *The Supervisor: The Linchpin of Employee Relations*, 8 J. COMM. MGMT. 120, 122 (2003).

403 *Id.* at 123.

404 FREEMAN & ROGERS, *supra* note 70, at 6.

405 Nick Llewellyn & Alan Harrison, *Resisting Corporate Communications: Insights into Folk Linguistics*, 59 HUM. REL. 567, 589 (2006).

406 *Id.* at 590 (citation omitted).

407 *Id.* at 591.

408 DONALD L. KANTER & PHILIP H. MIRVIS, THE CYNICAL AMERICANS 63–64 (1989). Given the popularity of television shows like *The Office*, Americans are likely as cynical, if not more cynical, in 2013.

409 M. Ronald Buckley et al., *Ethical Issues in Human Resources Systems*, 11 HUM. RESOURCE MGMT. REV. 11, 21 (2001).

410 *Id.*

Billions of dollars are spent on external consultants and internal programs to attempt to bridge the obvious divide between workers and management. Perhaps instead of openly detesting and resisting the presence of unions—in contravention with established federal labor policy—employers should be encouraged to accept the rights of workers to organize for mutual aid and protection. Far from posting a notice in an information vacuum, or infringing employers' freedom of speech, a single NLRB notice in a workplace would be but a drop in the ocean of managerial communication. At the same time, notice posting sends an important message to employers about long-established, constitutional law and public policy encouraging collective bargaining, freedom of association and self-organization.

CONCLUSION

The NLRB has the statutory authority to require employers to post a notice of employee labor rights and has proposed a reasonable notice rule. There is a long, unquestioned tradition of posting statutory notices in workplaces. And there is obvious need for 100 million private sector workers to know they have labor rights protected by statute: only 6.6 percent of these workers belong to a union, but millions more employees want some form of workplace association and representation. Moreover, US employers have compelling economic incentives to oppose collective action and many are openly and intensely opposed to unionization, spending millions on consultants to keep workplaces "union-free." This Note has shown the most robust logical and factual support for the NLRA employee rights poster: Employees must have formal, accessible notice of their rights if they are to exercise them. Further, it is established U.S. labor policy to encourage freedom of association, self-organization and collective bargaining for the overall good of the economy.

Courts and commentators have repeatedly urged the NLRB to engage in administrative rulemaking and with this thoroughly reasonable notice-posting rule the Board is entitled to broad rulemaking authority under NLRA section 6, and a healthy level of *Chevron* deference. Denial of the Board's reasonable interpretation of a gap in its statutory scheme can only be viewed as a misuse of the *Chevron* doctrine.

Alternatively, overturning the rule on First Amendment grounds would grant employers unprecedented freedom to speak against unionization or to refrain from speaking on the topic of labor rights. Most employers already speak quite freely of their distaste for collective action. One NLRA notice would be a mere drop in an ocean of managerial communication against unions. But like the employer and trade associations who banded together to litigate this issue, somewhere, some marginalized workers may have seen the NLRA notice and realized that American law protected their right to concerted activity for mutual aid and protection.

Unions and collective bargaining are part of the natural order of the industrial economy; a countervailing force against corporate excess, and perhaps the last bastion against pervasive, enduring income inequality. The NLRA was established to save capitalism from itself, by not only removing sources of industrial strife and encouraging the friendly adjustment of industrial disputes,

but also restoring equality of bargaining power between employers and employees. When, as now, union density is historically low, and the NLRB is beleaguered by successive, adverse judicial decisions, there is scarce optimism for natural balance and equality between workers and capital.

The NLRA notice posting rule was a modest step to embody the ideals outlined in the Wagner Act and ensure the future efficacy and success of the NLRB. The 2010 rule was reasonable and necessary, and statutory authority to promulgate it should be affirmed in the highest court. Whatever the eventual outcome of the notice-posting rule, this rulemaking controversy will mark a turning point for the Labor Board.

APPENDIX A[411]

Employee Rights

Under the National Labor Relations Act

The National Labor Relations Act (NLRA) guarantees the right of employees to organize and bargain collectively with their employers, and to engage in other protected concerted activity or to refrain from engaging in any of the above activity. Employees covered by the NLRA* are protected from certain types of employer and union misconduct. This Notice gives you general information about your rights, and about the obligations of employers and unions under the NLRA. Contact the National Labor Relations Board (NLRB), the Federal agency that investigates and resolves complaints under the NLRA, using the contact information supplied below, if you have any questions about specific rights that may apply in your particular workplace.

Under the NLRA, you have the right to:

- Organize a union to negotiate with your employer concerning your wages, hours, and other terms and conditions of employment.
- Form, join or assist a union.
- Bargain collectively through representatives of employees' own choosing for a contract with your employer setting your wages, benefits, hours, and other working conditions.
- Discuss your wages and benefits and other terms and conditions of employment or union organizing with your co-workers or a union.
- Take action with one or more co-workers to improve your working conditions by, among other means, raising work-related complaints directly with your employer or with a government agency, and seeking help from a union.
- Strike and picket, depending on the purpose or means of the strike or the picketing.
- Choose not to do any of these activities, including joining or remaining a member of a union.

Under the NLRA, it is illegal for your employer to:

- Prohibit you from talking about or soliciting for a union during non-work time, such as before or after work or during break times; or from distributing union literature during non-work time, in non-work areas, such as parking lots or break rooms.
- Question you about your union support or activities in a manner that discourages you from engaging in that activity.
- Fire, demote, or transfer you, or reduce your hours or change your shift, or otherwise take adverse action against you, or threaten to take any of these actions, because you join or support a union, or because you engage in concerted activity for mutual aid and protection, or because you choose not to engage in any such activity.
- Threaten to close your workplace if workers choose a union to represent them.
- Promise or grant promotions, pay raises, or other benefits to discourage or encourage union support.
- Prohibit you from wearing union hats, buttons, t-shirts, and pins in the workplace except under special circumstances.
- Spy on or videotape peaceful union activities and gatherings or pretend to do so.

Under the NLRA, it is illegal for a union or for the union that represents you in bargaining with your employer to:

- Threaten or coerce you in order to gain your support for the union.
- Refuse to process a grievance because you have criticized union officials or because you are not a member of the union.
- Use or maintain discriminatory standards or procedures in making job referrals from a hiring hall.
- Cause or attempt to cause an employer to discriminate against you because of your union-related activity.
- Take adverse action against you because you have not joined or do not support the union.

If you and your co-workers select a union to act as your collective bargaining representative, your employer and the union are required to bargain in good faith in a genuine effort to reach a written, binding agreement setting your terms and conditions of employment. The union is required to fairly represent you in bargaining and enforcing the agreement.

Illegal conduct will not be permitted. If you believe your rights or the rights of others have been violated, you should contact the NLRB promptly to protect your rights, generally within six months of the unlawful activity. You may inquire about possible violations without your employer or anyone else being informed of the inquiry. Charges may be filed by any person and need not be filed by the employee directly affected by the violation. The NLRB may order an employer to rehire a worker fired in violation of the law and to pay lost wages and benefits, and may order an employer or union to cease violating the law. Employees should seek assistance from the nearest regional NLRB office, which can be found on the Agency's Web site: **http://www.nlrb.gov.**

You can also contact the NLRB by calling toll-free: **1-866-667-NLRB (6572)** or **(TTY) 1-866-315-NLRB (1-866-315-6572)** for hearing impaired.

If you do not speak or understand English well, you may obtain a translation of this notice from the NLRB's Web site or by calling the toll-free numbers listed above.

*The National Labor Relations Act covers most private-sector employers. Excluded from coverage under the NLRA are public-sector employees, agricultural and domestic workers, independent contractors, workers employed by a parent or spouse, employees of air and rail carriers covered by the Railway Labor Act, and supervisors (although supervisors that have been discriminated against for refusing to violate the NLRA may be covered).

This is an official Government Notice and must not be defaced by anyone.

SEPTEMBER 2011

411 *E.g.*, *Employee Rights Notice Posting*, NLRB, http://www.nlrb.gov/poster (last visited May 5, 2013).