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# The National Labor Relations Act: Structuration and the Interaction of Policy and the Hermeneutics of Case Law

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THE NATIONAL LABOR RELATIONS ACT: STRUCTURATION AND THE  
INTERACTION OF POLICY AND THE HERMENEUTICS OF CASE LAW

A Dissertation

Submitted to the School of Graduate Studies and Research

in Partial Fulfillment of the

Requirements for the Degree

Doctor of Philosophy

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May 2015

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The National Labor Relations Act (NLRA) is a statute that contains a data-rich history rested upon a very controversial policy issue – that is, has the NLRA’s primary policy directive fundamentally changed? The crux of this controversy is predicated upon a divergent policy interpretation that has manifested ever since the original law was amended in 1947 (Morris, 2012). While scholars, such as Gross (1985), have affirmed that policy directives have altered throughout the law’s history, little attention has been given to the specific language used to infer judicial actors’ interpretation of the law and previous scholarship has failed to provide a historical narrative of different policy strains throughout the NLRA’s existence. That is, little attention has been given to the creation and recreation of policy with relation to the law.

Informed by Giddens’ structuration theory (1979), this dissertation explored the policy narrative of the NLRA as communicated through its body of related judicial and National Labor Relations Board (NLRB) case law. A qualitative content analysis was conducted that seeks to highlight the specific statements of policy directives found in judicial actors’ interpretation of the law. Data were sampled across the entire history of the statute and strains of policy were constructed to demonstrate the recreation of legal doctrines across time.

The data revealed that labor policy functions at three levels, which include base policy, mid-policy, and supra policy. Base policy is a relatively chaotic domain of policy that effectuates legal doctrines related to the day-to-day issues that arise with respect to the NLRA. Mid-policy

encompasses ideologically informed dyad policies of the NLRA as being either a statute to promote collective bargaining or protect employee free choice to refrain from joining labor organizations. Supra policy constitutes the central policy of the NLRA as preventing industrial strife. These three layers of policy interact to create a socially constructed reality of U.S. labor law that is perpetuated by the NLRB, jurists, and Supreme Court.

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## CHAPTER I

### INTRODUCTION

In 1881, Supreme Court Justice Oliver Wendell Holmes brazenly declared that “The life of the law has not been logic; it has been experience” (p. 1). In these thirteen words, Holmes encapsulated the applied essence of jurists’ biased reasoning that the legal realist school, an early 20<sup>th</sup> Century legal philosophy movement preoccupied with explaining how the tangible outcomes of judges’ decisions come into being, later critiqued as being the informing disposition of much legal opinion in Western jurisprudence (Fisher, Horwitz, & Reed, 1993). More broadly, Holmes (1881) was making a declaration about the subjective and value-laden approach that judicial bodies applied to their legal opinions – a divergent, albeit parsimonious, theory from the positivist school that had dominated earlier legal philosophical thought and theorized that structured rules and objective logic were the primary mechanisms through which judges reached legal conclusions (Hart, 1997; Schauer & Sinnott-Armstrong, 1996).

Taking a nod from Justice Holmes, intellectuals in the legal realist school were primarily attentive to how judicial bodies reached their conclusions (Schauer & Sinnott-Armstrong, 1996). The central point of inquiry from the realists’ perspective investigated how judges fashioned legal opinions with regard to the laws, statutes, policies, constitutions, and codes that they interpreted. The legal realists rejected the rationalist theories of the legal positivists, who held that legal opinions were actualized through an application of legal rules that judges applied to cases that were brought before them and provided an interpretative lens that existed a priori to any specific case, ideally rendering judicial bias null. Instead, the realists, and later the critical legal studies intellectuals, argued that judicial interpretation was

an inherently biased endeavor, informed by judges' individual preferences, ethics, political dispositions, education, and life experiences. In essence, much of the debate between positivists and realists can be reduced to whether individual psychology or instead formalized structures existing at the macro-level of the legal world are integral to the actual outcomes of legal interpretation.

Although the realists were concerned with personal dispositions informing judicial decision making (Fisher et al., 1993), their understanding of decision making within the greater legal and political sphere was somewhat shortsighted. That is, the realists were highly focused upon the individualized inclinations of judges, while largely ignoring many of the grander structural components that may have influence upon the outcomes of legal interpretation. The positivists dealt somewhat better with structural concepts. Perhaps most notably, Hart's (1997) theory of primary and secondary rules gave legal philosophy a sociological flavor by introducing structural thinking to the field. Primary rules refer to statements about what specifically is the law as a matter of policy – for example, stealing is illegal. Secondary rules deal with how to practice the law, such as the process and guidelines for serving a writ of certiorari. However, once again, the positivists' approach to the structural components of the legal sphere was normative rather than empirical.

Both the realist and positivist schools lacked a firm empirical basis to their theories. Further, both positions struggled to fully integrate micro- and macro-level analysis into a comprehensive understanding of the legal arena. The realists, being concerned with the personal dispositions of judicial actors (Fisher et al., 1993), did not attempt to move their theories into the areas of higher level policy analysis or into consideration of statutory and constitutional implications. On the other hand, the positivists were not concerned with the

individualized, discreet motivations of judicial actors, instead, believing that judges would simply interpret what a law implicitly or explicitly communicates rather than apply their own meaning to a legal text (Scalia, 1998; Schauer, 1988). This particular positivist view is known as formalism.

Social theory may be able to better deal with the limitations imposed by legal philosophy. The legal realists were interested in sociology (Fisher et al., 1997), and the peak of their intellectual output did come after much of Emile Durkheim's (e.g., 1895/2007) writing in the late 19<sup>th</sup> century. Durkheim's theory on structure, which is primarily concerned with how social constraints guide human behavior, would have provided a larger macro basis for the realists' thinking. However, his theory generally neglects individual psychology in favor of social sanctions – referred to as social facts – as being the driving force behind social action – a position that would have been contradictory to the realists' interest in individualized dispositions. Talcott Parson's (1961/2007) structural-functionalist theory, developed in the mid 20<sup>th</sup> century and coming after the realists' leading body of work, may perhaps be better suited than Durkheim's (1895/2007) thinking with regard to understanding the recreation of institutional social patterns. This is because Parson's theory placed greater emphasis on cultural factors, as well as agency, and their effect on social systems; however, while both Durkheim's and Parson's theories may provide some corroboration to the positivists' thinking with regard to how the legal system is structured at an aggregate level, neither provide the theoretical sensitivity that is required at the individual level to understand specifically how judicial actors deal with the complexity of a system of laws and how these actors then influence the greater institution of law at a macro-level. Specifically, little theoretical attention was given by either school of legal philosophy when dealing with the

creation and recreation of the legal institutions and the policies and laws that it perpetuates through judicial decision making.

In order to synthesize the understanding of structural foundations found in the legal positivist-formalist school with the agentic and individualized considerations signature to realist thinking, a social theory that can easily move between micro- and macro-level of analysis is needed. Further, such a theory would need to be able to take a dynamic view of how structure is created and how social institutions change over time to account for instances in which the law may change. Giddens's (1976/2007, 1979, 1984) theory of structuration may furnish a theoretical valance for an empirical study into how judicial bodies interpret and create law and to the extent this fabricates a judicial – and social – reality. More specifically, structuration theory examines the duality of structure – that is, how structure is constructed by social actors, and then subsequently, how actors are bound by this structure.

When Holmes (1881) made his statement concerning judges' opinions being constructed from experience, he was explicitly writing about common law – that is, case law. It is through case law that the legal reasoning of judicial opinion can be deduced to its logical properties and analyzed as an item of intellectual inquiry. Does the case law reinforce or contradict in whole or part the original policy intentions of the law as stated by its legislative framers? This relates to Giddens's (1984) structuration theory insofar that law becomes socially constructed structure. That is, prior to a legal interpretation that is actualized through case law and then becomes precedent, theoretically, the judicial actor is bound only by the defining rules of the practice of law itself – Hart's (1997) secondary rules. However, as more case law surrounds a statute, constitution, or code, judicial actors should become constrained by the structure imposed by the body of case law and become more uniform in their

interpretation of the original law. Once again, this relates back to the debate between positivist-formalist and realists – the former arguing that, yes, judicial actors would become consistent in interpretation of a legal text (Scalia, 1998) while the realists may be more reluctant to agree (Fisher et al., 1993). This debate is why a more empirically driven approach to analyzing judicial interpretation is necessary to gain a fuller understanding of the legal system.

To this date, Edelman and Suchman (1997) have been the only scholars to attempt an application of structuration theory to the legal environment. Their study primarily focuses on how legal structures influence economic decision making within the private sector organizations that interface with the legal system rather than examine how social and structural realities are created and recreated within the legal system. A dearth of scholarship exists in the literature concerning the possibilities that structuration theory provides as a theoretical tool for understanding the creation of a body of legal texts. On its face, for the reasons delineated above, structuration theory presents an applicable framework for analyzing legal structures that legal philosophy has struggled to elucidate. Following that logic, this research agenda is an attempt to apply structuration to an examination of a system of law. Specifically, I entailed to explore the domain of labor law and examine how certain policy narratives are created and recreated through the body of its associated case law. That is, I planned to apply structuration principles as an explanatory framework to describe how certain policy narratives continue to survive within an administrative and judicial environment. Additionally, legal realism and legal positivism play a role, as will be examined later in this dissertation, in that actor dispositions, such as political and professional

background, influence case decision making, while legal rules, such as the doctrine of stare decisis, guide specific case law outcomes.

### **Choice of Law**

Applying structuration theory to the legal field requires taking an empirical snapshot of a particular area of law. This approach is largely informed by Giddens's (1984) skepticism of uncovering universal sociological truths that transverse discreet societies, cultures, and social institutions. His anti-positivist approach to social analysis is germane to the sociological study of law and policy, where each law is going to have a unique legislative and judicial history. While all laws and policies may develop along different trajectories, the validity of structuration as a theoretical policy analysis tool may transcend any particular law. In other words, this research agenda is not aimed at developing a grand theory of law informed by structuration theory; rather, it seeks to apply structuration as a theoretical tool to the analysis of a socio-historical narrative of the development of a particular law over the course of time.

In order to move forward with such an undertaking, a law must be chosen that would serve as a vehicle that could provide a deep and multi-faceted platform for data collection. The National Labor Relations Act (NLRA or "the Act") may be one such policy. Passed into law in 1935 (Cox, Bok, Gorman, & Finkin, 2006), the NLRA has been in existence for over seven decades and has experienced two legislative changes, first in 1947 and then again in 1959. Additionally, the policy has become associated with a large body of case law that has been generated by the Supreme Court of the United States, various appellate courts, administrative law judges (ALJs), and the overseeing agency of the NLRA, the National Labor Relations Board (NLRB or "The Board"). These diverse origins of case law provide an

assorted nexus of judicial reasoning that may be compared and contrasted in order to gain a bird's eye view of how the NLRA has changed throughout the years via judicial interpretation.

With a robust legislative and legal history, the NLRA provides an excellent initial subject of inquiry to begin establishing a socio-legal research agenda - with structuration theory being the driving analytical lens – examining how judicial actors fashion legal opinions and, subsequently, how these legal opinions become established structure within the extant legal environment of a particular law. A policy analysis of the Act has the potential to reveal latent themes inherent in the judicial mechanisms that recreate the legal reality that reinforce and renegotiate the socially constructed and judicially agreed upon meaning and intention of the law.

### **Overview of the Policy**

In 1935, the United States Congress ratified the NLRA as the governing policy regulating management-labor relations in the private sector (Arouca & Perritt, 1985; MacDonald, 1936). Specifically, the NLRA confers upon private sector employees the right to organize and collectively bargain with employers through a chosen labor organization over wages, benefits, and working conditions (Cox, et al., 2006). Additionally, the NLRA grants employees the right to engage in concerted activity without the representation of a labor organization to improve working conditions and wages. The NLRA is jurisdictionally distinct from public sector labor policies that oversee labor-management relations within various local, state, and federal organizations (Ricucci, 2011), and the Railway Labor Act (RLA), which regulates transportation labor-management relations in the private sector (Northrup, 1971).

Throughout its history, the NLRA has experienced two additional statutory amendments (Cox et al., 2006). First, in 1947, the Labor Management Relations Act – known colloquially as the Taft-Hartley Act (Kohn, 1964) – modified the original legislation by placing more stringent regulations on labor organizations’ behavior while conferring more rights to management in the arena of labor relations (Brinker, 1949). Next, the Landrum-Griffin Act of 1959 sought to curtail labor organization corruption by instilling regulations over union governance (Witwer, 2002). A number of other amendments have been proposed over the years (e.g., Weiler, 1983), which have all failed to become legislation. The latest proposed amendment, the Employee Free Choice Act (EFCA) (2007), sought to streamline union organization by giving employees the option to use a card check procedure to obtain labor representation in lieu of a representation election. Further, EFCA would have allowed punitive damages to be levied against employers who disciplined employees for their union activities during an organizing drive and would have required that management and unions engage in mandatory arbitration if a first contract could not be successfully negotiated in a timely manner (Livingston, 2011).

Section 3. [§ 153.] of the NLRA (1959) established the NLRB as the overseeing agency of the Act. The NLRB is a quasi-judicial body that serves two primary purposes (Cox et al., 2006). First, it investigates allegations of employer and union violations of the Act. These violations are referred to as unfair labor practices (ULPs). Second, the agency coordinates and supervises union representation elections. The NLRB is comprised of two distinct structural components: the General Counsel and the Board itself. The General Counsel, which includes a number of Regional offices all over the U.S., is responsible for investigating ULP allegations and, in the event that the evidence suggests a ULP violation

has occurred, tries the case in front of an ALJ. Additionally, the General Counsel is responsible for overseeing representation elections. The Board comprises of three to five Presidentially-appointed individuals who decide the outcomes of cases in the event that one of the parties involved in a decision made by an ALJ appeals the case.

### **Statement and Significance of the Problem**

Traditionally, unions have been viewed within the public sphere as workers' institutions that act, not only as bargaining agents for increasing rank-and-file employees' wages and benefits, but also as purveyors of industrial democracy (Godard & Frege, 2013; Sinyai, 2006). In that regard, a decrease in union presence may arguably also reflect a decrease in democracy (Godard & Frege, 2013; Kochan, 2005). Union organizing has indeed slowed down quite considerably over the past couple of decades (Raudabaugh, 2012). Union membership peaked in 1979 with approximately 21 million employees holding membership with union density peaking in 1954 with membership comprising 28.3% of the workforce (Mayer, 2004). In 2012, union membership density had fallen to 6.6% of the private sector workforce (Hirsch & MacPherson, 2013).

Typically, unionized workers have enjoyed higher wages than their nonunionized counterparts (Belman & Voos, 2006), but the drop in unionization may have had adverse effects on workers' wages while significantly contributing to increasing wage inequality (Asher & DeFina, 1997; Krashinsky, 2008; Western & Rosenfeld, 2011). Unions in the public sector, that are not covered under the NLRA, have fared much better, with union density climbing from 10% in the 1960s to approximately 36% in 2012 (Lewin, Keefe, & Kochan, 2012).

Scholars have engaged in vigorous debate over the factors leading to the decline in union density over the recent decades (Allen, 1988; Clawson & Clawson, 1999; Holt, 2007). Globalization and the need for firms to remain competitive have been posited as a major contributing factor to decreasing numbers of organized workers (Clawson & Clawson, 1999). Specifically, Hirsch and Schumacher (2001) argue that unions are caught in a paradox in which their attempts to organize employees within a highly competitive economy with the intent of increasing wages, rather than promoting industrial democracy, will continually assure small unionization numbers; however, while they may be implying that unions have less money over which to bargain due to the emphasis on firm competitiveness, the authors do not provide a cogent theoretical explanation of how firms' profit-seeking motive and unions' wage-increasing motive directly lead to lower union density. Demographic factors may also have had an effect on union density (Clawson & Clawson, 1999). That is, as industrial centers have shifted their geographic locations, lackluster efforts to organize new employees has crippled union energy. This may be mediated by cultural influences. For instance, Avent (2003) argues that decreases in unionization might be founded in employees' ideology that values individualism over collectivism. Unions themselves may also be a contributing variable to the decline in their own membership (Clawson & Clawson, 1999; Holt, 2007). Many unions may be more interested in maintaining current contracts rather than exerting effort to organize new bargaining units. Milkman (1985, as cited by Clawson & Clawson, 1999) contends that unions have also fared poorly in marshalling support from women and minorities, while Holt (2007) places bureaucratic union structures that exist to facilitate compliance with management rather than emphasize rank-and-file employee representation as contributing to the decline of unionism.

Throughout the world, union density has declined somewhat over the years, though nowhere to the extent that density has eroded in the U.S. (Addison, Bryson, Teixeira, & Pahnke, 2011; Disney, Gosling, & Machin, 1995; Holt, 2007; Warner, 2013). While a pluralist approach, such as that forwarded by Clawson and Clawson (1999), encompassing numerous variables, would most likely give a more comprehensive view of the factors influencing a decline in unionization in the U.S., these elements may not necessarily explain why America has experienced a somewhat disproportional amount of decline as compared to other nations. Unions in countries outside of the U.S. also experience many of the economic and structural factors that influence union density. National cultural differences may account for variation in union membership (Posthuma, 2011). Still, empirical research suggests that a large number of U.S. employees would vote for a union if given a chance (Freeman, 2007).

Therefore, while many of the aforementioned elements may contribute to decreases in unionization in some way, they may not provide a complete picture of why unionization appears to be declining, especially at a much faster rate in the U.S. than in other similarly situated countries. Many commentators argue that labor law itself may be a key influence in declining rates of unionization (Avent, 2003; Chaison & Dhavale, 1990; Clawson & Clawson, 1999; Logan, 2008). Labor scholars contend that the NLRA has reduced employees' rights and power while concurrently expanding the rights and power of employers (Clawson & Clawson, 1999; Tomlins, 1985). More specifically, empirical research has focused on how long bureaucratic election procedures and workers' weak strike rights in relation to employers' comparably stronger strike rights have negatively influenced union and worker power in the U.S. (McCammon, 1994; Weiler, 1983). The observation that U.S. labor policy seems to favor capital over labor has led many labor interests to call for the

NLRA's repeal while business interests wish to maintain the status quo due to an advantage afforded by the current effectuated labor policies (Flanagan, 1989).

While these discreet issues of labor law are important to consider, such legal power differentials between labor and business may actually be symptomatic of a greater issue with labor law itself. Estlund (2002, 2006) laments that labor law has become ossified. That is, modern labor law has become paralyzed by its own provisions and the precedents set forth by the Supreme Court that do not allow judicial actors and the NLRB to respond appropriately and expediently to the everyday realities of industrial relations. Although Estlund's thesis contains merit, she largely ignores that the NLRA does have a dynamic component (Gross, 1995). Specifically, the policy narrative of the Act continually changes, which has macro-level influences on labor law (O' Gorman, 2008) – and consequently, labor relations.

As discussed earlier, the NLRA has received two additional amendments since its inception in 1935 (Cox et al., 2006). Throughout the Act's lifetime, controversy has arisen regarding its policy interpretation (Delaney, Lewin, & Sockell, 1985). This contention has generally centered on the Taft-Hartley amendment. Specifically, scholars such as Gross (1985) posit that the Taft-Hartley amendment introduced ambiguity into the statutory interpretation of the NLRA. Whereas the original intention of the NLRA as delineated above sought to promote collective bargaining, actors within the modern labor relations discipline have changed the policy dialogue regarding the NLRA's intention. For instance, in a press conference, former NLRB Chairman Robert Battista stated that the purpose of the NLRA is to protect "employee free choice" (as quoted by Morris, 2012) with regard to workers deciding whether or not to be represented by a labor organization. Morris (2012) argues that this change in the policy narrative originates from a revisionist interpretation of the Taft-

Hartley amendment. He states that certain political interests within the labor relations sphere have latched onto language drafted into the Taft-Hartley Act emphasizing that unions are to refrain from coercing employees in their choice to be represented by a labor organization. This language has then been usurped by political interests who have promoted the managerial rights narrative delineated in the Taft-Hartley Act by appointing NLRB officials who are sympathetic to business interests while concurrently failing to adequately protect employee rights and promote collective bargaining.

Morris (2012) further contends that the Taft-Hartley Amendment did not necessarily change the original essence of the NLRA for two reasons. First, he explains that all three iterations of the NLRA have emphasized employee protection from coercion. Second, Morris holds that because the original preamble of the NLRA that forwarded its intention to promote collective bargaining was retained without any change throughout both the Taft-Hartley Act and Landrum-Griffin Act amendments, the substantive meaning of the NLRA is unchanged.

This contention is not a new argument. Through an analysis of statements made by former NLRB Chairs during a conference, Gross (1985) finds that Board members could choose an interpretative narrative that allows them to make decisions that promote collective bargaining or instead, emphasize protecting employees' right to choose whether or not to be represented by a labor organization. Gross concludes that these interpretative narratives are contingent upon how Board members view the Taft-Hartley Act's statutory role in relation to the legislative intention of the NLRA – that is, whether they view the Taft-Hartley Act as fundamentally changing the purpose of the Act or if they simply rather see it as an augmentation to the original policy without changing the Act's substantive essence. Gross (1985) corroborates Morris' (2012) contention that the Taft-Hartley amendment has become

a political football, stating that liberal and conservative Boards may be able to cherry pick their favored interpretation while hiding within the ambiguous language added by the Taft-Hartley Act. Despite having differing interpretations, both liberal and conservative Boards can inoculate themselves from criticism, claiming that they are still following the intention of the Act as set forth by Congress.

Gross (1985) emphasizes that such a volatile interpretation of the NLRA may have wide-ranging negative implications for the people whom the Act purports to protect:

For that reason [i.e., interpretation of the Act based upon contradictory narratives], there have not been merely revisions in NLRB case law (that would be expected and even necessary over the years), but radical changes that swing labor policy from purpose to antithetical purpose. These swings determine whether the scope of collective bargaining will expand or contract, alter the relative bargaining power of the parties, and affect the ability of unions to organize and managements to resist organization – in sum, they determine the extent to which there will be mutuality of decision making at the workplace. (p. 18)

Gross (1985) and Morris (2012) note that a further controversy surrounding the interpretation of the NLRA is a dispute over whether or not the Act is intended to equalize the power between labor and management. This narrative was largely informed by Taft's declaration on the Senate floor that the Taft-Hartley bill was primarily a measure to provide equality in bargaining between unions and managements (U.S. Congress, 1974). The impetus for passage of the Taft-Hartley Act largely came from a public and political perception that labor had gained too much power over the intervening years after the passage of the original

NLRA (Cox et al., 2006). By establishing union ULPs, the balance of power between labor and management could be fostered and the two interests could meet at the table on equal footing. Of note, though, Taft continued to emphasize collective bargaining and quelling labor strife as the two important factors driving an attempt to equalize power between the two sides of the bargaining table (U.S. Congress, 1974).

While some scholars have approached NLRA-based research with the assumption that its intention is to promote collective bargaining (e.g., Chepaitis, 1997), other analysts have emphasized the employee choice narrative concerning the NLRA (e.g., Greer & Baird, 2004). For instance, Specter and Nguyen (2008) highlight a problem with employee intimidation and coercion that originates from both the managerial and union sides during union organization drives. Their framing of the issue infers an importance on the free choice doctrine that Taft-Hartley interpreters have argued to be manifested within the language and spirit of the NLRA. Likewise, when EFCA was being discussed within the scholarly literature, the primary emphasis was placed on protecting employees' right to choose to be represented by labor organizations rather than collective bargaining (e.g., Nissen, 2009). In some intellectual circles, the NLRA has been approached from the viewpoint that its policy intentions have qualitatively changed from a promotion of collective bargaining to securing employees' right to choose to be represented by labor organizations – and many scholars argue that the NLRA has largely failed to do the latter (Specter & Nyugen, 2008).

This problem relates to the discussion posited earlier concerning the legal realists and legal positivist-formalists schools. The changing policy narrative and its influence on industrial reality is a living, breathing example of social change within a legal system. Studying this phenomenon takes legal philosophy thinking from the world of theoretical

abstraction and places it within an empirical paradigm to be examined. Structuration theory relates to the change of labor law insofar that it provides an analytical framework for a dynamic system. The Act itself may be a rather static structure, but the NLRB and courts are able to create structure and fashion policy through their primary vehicle of adjudication that then becomes manifested in case law. This case law then acts as structure that is recreated through legal precedent that is followed whenever the NLRB encounters fact patterns that resemble the leading case. Understanding exactly how the Act changes through its case law may ultimately help inform policymakers, judges, and future NLRB staff in making the most cogent decisions possible in the arena of labor law.

### **Research Questions**

The controversy surrounding the intention of the NLRA raises a number of questions that would be germane to an empirical and analytical approach to understanding how the NLRA has changed. The overarching theme in the literature concerned with interpretation of NLRA posits that the interpretation has indeed changed – or at the very least, the overall policy intention of the Act is dynamic (Gross, 1985; Morris, 2008, 2012). However, no scholars have provided a rigorous sociological analysis of the Act, specifically with regard to how Board members and jurists have used statutory language and Congressional intent to reproduce policy intentions. From this absence of inquiry, an overarching question addressed in this dissertation is

1. Have statements of policy been reflective of the language inherent in the Act and/or statements of Congressional intent, or have they instead been statements of policy that are not related to the original intentions of the Act?

From this question, a second question naturally proceeds. If judicial actors are impacting the direction of policy through their decisions, specific language would be inherent in the decisions. Therefore:

2. What statements of policy and themes have Board members and jurists communicated in their interpretative decisions?

Structuration's emphasis on social reproduction of structures is essential to this research project; therefore, the research addresses a question related to reproduction of policy. This leads to the third research question:

3. Have legal opinions stated in cases become precedent setting in subsequent cases that deal with legal questions similar to those found in the leading cases?

Case law pertaining to the NLRA originates from three primary sources – the Supreme Court, administrative law judges (ALJs), and the Board of the NLRB (Cox et al., 2006). Each of these bodies brings its own assumptions, cultures, and dispositions with regard to judicial interpretation. This difference in judicial bodies leads to the research question:

4. Has it been the courts, the NLRB, or all judicial and quasi-judicial bodies that have either affirmed or diverged from the Congressional intention of the Act?

Finally, Gross (1985) states that NLRB members have been able to cherry pick a specific policy interpretation based upon the ambiguity in policy directive that was introduced after the Taft-Hartley amendment. Further, Gould (2000) states that in his experience, Board members were often beholden to partisan interests that would influence their approach to case handling. He reasons that this was often done to assure job security as well, either through reappointment to the Board or other Washington, D.C. positions at term expiration or by securing the confidence of management and labor law firms. Posner (2008) argues, however, that partisan influences play a lesser role when jurists are given lifetime

appointments. Taking these points into consideration, Board members, who do not have lifetime appointments and are appointed by the Presidents of the Republican and Democratic Parties, statements of policy in their legal opinions would have an effect on the structuration of the NLRA insofar that more ambiguous language would continue to recreate the discrepancy of policy direction that has been a feature of the Act for numerous decades – that is, actors may be more forthcoming with their statements of what the Act intends to accomplish with regard to policy. This issues leads to a final question:

5. To what extent is there evidence that labor law judicial actors’ statements of policy direction are inherent in the written opinions of case law (i.e., have actors provided statements regarding their interpretation of the Act’s overarching purpose)?

### **Statement of Positionality**

This research is largely informed by my experience as a field examiner for the NLRB. Throughout my tenure at the agency, I became somewhat confused with what I saw as an almost contradictory approach to applying an interpretive lens via precedent setting case law to the specific investigation files that came across my desk. For instance, I became incredibly frustrated by the number of times I was required to defer ULP charges to the parties’ grievance-arbitration procedure under *Collyer Insulted Wire* (1971). I found that the procedure for dealing with employees who were alleged to have experienced discrimination for union activities was to require them to engage in further union activities (i.e., going through their collective bargaining agreement’s grievance procedure) analogous to “kicking lung cancer by smoking.”

This is not to say that I think negatively about the NLRB at any structural level. I hold immense respect for it as an organization. I also have the utmost respect for its employees, who often perform a job that, in my experience, is greatly misunderstood by both labor and

management (and incredibly misunderstood by the general public). One of these misunderstandings is that an agent cannot recommend an opinion on the merits of an allegation after an investigation based upon how that agent “feels” or “thinks.” In my experience, one thing parties who are not legally sophisticated fail to realize is that the agent is often informed and constrained when given an opinion on whether or not to litigate an alleged ULP by the precedent setting case that may have been formed by an ALJ, the Supreme Court, or the Board itself.

Throughout my doctoral studies, I became increasingly interested in Giddens’s (1979/2007) theory of structuration, which I felt was an exciting sociological framework that synthesized both structuralist and constructionist perspectives into an all-encompassing theoretical approach. This experience with theory, along with my background in labor law, prompted me to consider how structure and agency exists within the overarching legal system – specifically, I became interested in how statutes, constitutions, policies, and codes interacted with interpretative case law and, subsequently, defined legal reality and legal knowledge. I have often stated that “Law is the discipline of applied postmodernism.” More specifically, I mean that law holds no inherent truth, but rather, legal actors argue over law in order to cement a socially-constructed truth that is consequently adapted into the larger legal sphere – a position not far removed from Foucault’s (1977/2007) theory on truth being branded by those who hold enough power in the social world to impose their ideas of truth upon others.

Labor relations is almost always a politically-charged domain, and I believe, as the policy scholar Deborah Stone (2002) forwarded, all policy discussions are inherently value-laden. I grew up in a working-class household that often struggled financially, which

undeniably shaped a significant portion of my political worldview. On most political issues, I find myself advocating a center-left position. With regard to labor relations, I find the positions of being either pro-union or anti-union to be a false dichotomy, since this binary negates a neutral position or a position that advocates unionism in certain circumstances. I prefer to state that I respect the institution of collective bargaining and believe it to be a legitimate and an important means for employees to assert control over their economic and professional destinies.

### **Relevance to the Literature**

Research on the change in the judicial dialogue around the NLRA will add to the literature insofar that while scholars, such as Gross (1974, 1981, 1995), have mapped the historical narrative of the policy meaning behind the NLRA, nobody has provided a systematic and theoretical analysis for investigating the specific language and policy narratives that have originated through the interpretation of the policy and textualized in its related case law. To date, Gross' (1985) analysis of former NLRB Chairs' statements with regard to their understanding of the Act's policy intention is the closest attempt of a systematic study concerning legal interpretation of the text. This study seeks to map the legal interpretative history of the Act, which is in contrast to Gross's (1981) research that was limited to discussing the phenomenon that legal actors (i.e., NLRB Board members) often – and consciously – choose competing policy interpretations. Scholars and legal professionals alike argue that the meaning of the NLRA has changed (e.g., Morris, 2012), as highlighted by the above discussion, but little research informed by a social science paradigm has been conducted with regard to this debate. Additionally, structuration theory has not been forwarded as a possible theoretical framework for understanding the NLRA or any other

policy. Therefore, this dissertation will add to the literature in two important respects. First, it will provide a systematic analysis of the legislative intentions of the Act and how the interpretation of these intentions has changed over the years. Second, it will attempt to establish structuration theory as a legitimate theoretical framework for analyses of judicial actors' decision making and policy history.

### **Key Terms**

Throughout this dissertation, a number of important technical terms will be used that are related to the study and practice of labor relations as well as law in general. These terms are defined below.

**Collective Bargaining** – Collective bargaining is a process in which employers and employees negotiate conditions of employment, such as a wages and benefits (Bureau of Labor Statistics, 2008). This agreement is generally ratified into a contract known as a collective bargaining agreement (CBA).

**Critical Legal Studies** – Critical legal studies is a branch of legal theory that evolved from legal realism (Schauer & Sinnott-Armstrong, 1996). Whereas legal realism was concerned with social tides and judges' psychology as being important to judicial decision making, scholars in the critical legal studies movement placed particular emphasis on judges' ideology and political dispositions informing their conclusions.

**Landrum-Griffin Act (Labor Management Reporting and Disclosure Act)** – Passed in 1959, the Landrum-Griffin Act was the final major legislative amendment to the NLRA. Specifically, this amendment closed some loopholes related to secondary boycotts and hot cargo agreements that the Taft-Hartley Act failed to address (Cox et al., 2006). Further, it limited unions' picketing abilities for the purpose of organizing workers, while

giving employees who had been replaced by strikebreakers during an economic strike the right to vote in union elections. The latter provision was intended to prevent employers from simply replacing union workers with non-union workers to subsequently vote out the incumbent labor organization.

**Legal Positivism** – Legal positivism is a legal philosophy that posits that the practice of law should be disassociated from morality (Schauer & Sinnott-Armstrong, 1996). That is, what the judicial system considers legally correct may not necessarily be what the public sphere considers moral or ethical. Legal positivism places emphasis on the applied structural practice of law, largely through what Hart (1997) referred to as primary and secondary rules. Primary rules are statements of what the law is – for example, murder is illegal. Secondary rules govern how law is performed, such as issuing a writ of certiorari.

**Legal Pragmatism** – Legal pragmatism is a legal theory often associated with Richard Posner (2008). Posner argued that judges often make decisions as part of a balancing act that takes into consideration their political and social dispositions, previous case law, and societal desires. Pragmatism holds that judges may have a desired outcome when deciding a case and will often work backwards in order to produce a legal opinion that is legally congruent with established law.

**Legal Realism** – Legal realism refers to a school of legal philosophy that found prominence in the 1930s (Fisher et al., 1993). Largely influenced by Supreme Court Justice Holmes' intellectual output focusing on judicial decision making, the realists rejected the formalists and positivists' normative ideas of how law ought to be practiced as quixotic, and instead, focused their attention on how judges and judicial bodies actually made legal

decisions. The realists argued that judges were often influenced by personal dispositions, such as cultural background, that informed their decisions.

**National Industrial and Recovery Act (NIRA)** – The NIRA was the spiritual predecessor law to the NLRA (Vittoz, 1987). Passed as part of New Deal policy in the early 1930s, it sought to stabilize markets through government regulation, minimum wages, and legalized business cartels (Anderson, 2000). The NIRA is noteworthy in this discussion because, in addition to the aforementioned policies, it also established a somewhat comprehensive industrial relations policy that sowed the seeds for the NLRA (Cox et al., 2006; Gross, 1974). The Supreme Court ruled the NIRA unconstitutional in 1935.

**National Labor Relations Act (NLRA or “the Act”)** – Legislated in 1935, the NLRA legitimized private sector labor relations in the U.S. by guaranteeing employees the right to join labor organizations and bargain collectively with their employers (Cox et al., 2006). The Act has been amended two times – first in 1947 with the Taft-Hartley Act and again in 1959 with the Landrum-Griffin Act.

**National Labor Relations Board (NLRB)** – Created by Sec. 3. [§ 153.] of the Act, the NLRB is the overseeing agency of the NLRA (Cox et al., 2006). It is comprised of two distinct organizational parts: the General Counsel, which encompasses a number of small Regional offices throughout the U.S. that investigate unfair labor practice allegations and, subsequently, litigate unfair labor practice charges, as well as oversee union certification and decertification elections, and the Board itself, which is a 3 – 5 quasi-judicial panel that overhears and rules on charges that have been appealed after a litigation ruling by an ALJ.

**Taft-Hartley Act (Labor Management Relations Act)** – The Taft-Hartley Act was the first statutory amendment applied to the NLRA (Cox et al., 2006), which codified into

Section 8 of the Act a number of union unfair labor practices, such as secondary boycotting. The Taft-Hartley Act remains a controversial amendment, specifically due to it being a potential catalyst that may have changed the interpreted policy intention of the NLRA (e.g., Morris, 2012).

**Stare Decisis** – Stare decisis is a legal term that refers to judicial bodies' requirement to follow the precedent set by other courts' decisions regarding similar cases (Waldron, 2012).

**Structuration theory (i.e., structuration)** – Structuration theory refers to the social theory primarily forwarded by Giddens (1979/2007, 1984) that frames society in terms of the relationship between agency and structure. Specifically, structuration theory is concerned with the duality of structure – that is, it conceptualizes structure as institutions that are socially constructed and reconstructed by social actors while concurrently constraining and facilitating the agency of these actors. Giddens' work examines both micro- and macro-level social phenomena and is largely informed by an anti-positivist ontology.

**Unfair Labor Practice (ULP)** – An unfair labor practice is a violation of the NLRA (Cox et al., 2006). Codified into Section 8 of the Act, ULPs may be committed by employers and unions.

**Wagner Act** – Named after Senator Robert Wagner, the Congressional sponsor of the NLRA (Wagner, 1939), the Wagner Act is the colloquial name given to the first iteration of the Act before the Taft-Hartley Amendment of 1947.

### **Chapter Summary**

Previous legal philosophy has posited stopping off points for deep analysis of socio-legal issues (Schauer & Sinnott-Armstrong, 1996), but much of it has lacked a strong

empirical basis and a theoretical framework. Augmenting previous legal philosophy, this research project seeks to apply Giddens's (1979/2007) structuration theory to an analysis of the NLRA, a labor law statute that has been historically controversial due to its diverging interpretations originating from judicial actors and its overseeing agency, the NLRB (e.g., Gross, 1985; Morris, 2012). Specifically, the project attempts to answer a number of research questions by using structuration theory as a framework for analysis of different statements of policy that have been created and recreated throughout the Act's associated case law corpus.

Chapter II will dive more deeply into structuration theory and its application to the sociology of jurisprudence. Additionally, a brief history of the Act will be discussed, along with its philosophical origins and the organizational implications of the NLRB that provides context to the overarching analysis of the data. Chapter III shall provide an in depth blueprint of this project's methodology, as well as the ontological assumptions and epistemological tools driving its analysis. Chapters IV through VIII will delineate findings from the data and then contextualize them in an abstract analysis. Finally, Chapter XI will summarize the key findings, discuss the study's limitations and implications, and lay forth a future research agenda.

## CHAPTER II

### LITERATURE REVIEW

#### **Introduction**

The purpose of this study is to lay forth a socio-historical map of the interpretation of the NLRA and arrive at an understanding of the statements of policy that have been created and recreated over the course of the Act's lifetime. This undertaking is largely informed by the judicial and Board opinions that have been actualized through the policy's associated body of case law. This case law has become precedent setting and informs future NLRB investigations and decision making (Schmidt, 2002). The following research questions are driving this project:

1. Have statements of policy been reflective of the language inherent in the Act and/or statements of Congressional intent, or have they instead been statements of policy that are not related to the original intentions of the Act?
2. What statements of policy and themes have Board members and jurists communicated in their interpretative decisions?
3. Have legal opinions stated in cases become precedent setting in subsequent cases that deal with legal questions similar to those found in the leading cases?
4. Has it been the courts, the NLRB, or all judicial and quasi-judicial bodies that have either affirmed or diverged from the Congressional intention of the Act?
5. To what extent is there evidence that labor law judicial actors' statements of policy direction are inherent in the written opinions of case law (i.e., have actors provided statements regarding their interpretation of the Act's overarching purpose)?

This chapter provides an in-depth discussion of the theoretical implications of the analysis, along with specific philosophical and historical examinations that will give context to the research project. First, social theory is reviewed, with particular attention paid to Giddens's (1984) theory of structuration. Specific consideration is then given to how structuration relates to scholarship conducted in the legal philosophy domain. To fully understand the

original legislative intentions behind the Act, an account of the factual events leading up to its ratification is necessary and is the focus of the next section of this chapter. Following this, a critical examination is applied to the Congressional theory and socio-historical events surrounding both passage of the original Wagner Act, as well as the Taft-Hartley and Landrum-Griffin Acts. A structural and procedural overview of the NLRB is then delineated. Following the discussion of the NLRB, attention is given to the NLRB's choice to use adjudication over rulemaking and what implications this choice has on macro-level policy. Finally, the chapter concludes with a historical examination of the socio-political elements that have influenced policy interpretation and a research design that illustrates how my research focus fits into a model of factors that impact labor policy.

### **Structuration Theory**

Giddens's (1979) theory of structuration, which is particularly useful in understanding many aspects of the legal environment, accommodates the analytical lens for this research. Structuration theory provides an analytical mechanism that can move comfortably between micro- and macro-level social phenomena, while concurrently explaining how both of these often theoretically distinct social spheres are frequently treated separately by scholars (Giddens, 1984). This is important when considering how individual and small groups of actors within the judicial and administrative system must interact with a larger judicial-political apparatus. With Edelman and Suchman (1997) providing to date the only piece of legal sociological work to apply structuration theory, in addition to investigating the policy narrative of the NLRA, this dissertation aims to establish Giddens's (1976/2007) work as a legitimate scholarly framework for investigating matters of the sociology of law and jurisprudence.

Structuration is used in the analysis presented in this research due to its ability to provide a theoretical framework for understanding how legal interpretation and policy directives are recreated and perpetuated or changed and destroyed throughout the history of a law. Specifically, legal precedent, legal rules, and other forms of political influence act as structure that constrain and facilitate legal interpretation (Hart, 1997; Schauer & Sinnott-Armstrong, 1996). Case law is the vehicle of communication that perpetuates legal doctrines and can be analyzed by the language contained within it to glean an understanding of how jurists reproduce legal doctrines, which become systematic components of legal reality. This is especially relevant to an examination of the NLRA, which primarily experiences policy changes or policy reproduction through Board and court adjudication (Lubbers, 2010).

### **General Overview**

Structuration theory was actualized largely as a response to what Giddens (1979) saw as shortcomings with previous structural theory, particularly the theoretical writings of Durkheim (1895/2007) and Parsons (1948/2007). Giddens rejects the structural-functionalist tenet that a teleological component exists at the core of social institutions. Reasoning that because structural components may facilitate unintended consequences that diverge from their supposed original teleological intentions, Giddens is skeptical that society becomes structured in an effort to meet some form of social need. Related to this critique, Giddens also rejects the positivist idea that societies follow an evolutionary pattern, such as from agrarian societies to industrialized societies to information societies. He argues that the notion of societal evolution is problematic because, first, it subsumes an objective set of criteria that may be used to conceptualize differing societies as being hierarchically superior to one another based simply on their organizational structure, and second, it requires

empirically predictable patterns of organization that can be universally applied across organizations – a proposition that Giddens rejects due to his contention that most societies have followed discreet and individualized trajectories of change. Further, Giddens also states that the biological metaphor often employed by structural-functionalists – that societies contain purposeful and adaptive components to perpetuate their own existence, much like the organelles of a biological cell – is conceptually incongruent with how societies actually function – again, on the basis that the biological conception is rested upon the axiom that societies operate in teleological ways (e.g., to promote their own existence much in the same way living organisms engage in behaviors of self-preservation). Social systems have no needs or purposes (Giddens, 1976/2007); however, the individuals who comprise social systems do have needs and purposes.

Comprehending structuration theory requires a delineation of the specific terminology that constitutes Giddens’s thinking on sociological organization. Previous theorists have often amalgamated and used two words that have been ubiquitous throughout the history of social theory: system and structure (Calhoun, Gerteis, Moody, Pfaff, & Virk, 2007a). Giddens, however, conceptualizes these as two separate but related elements of the social world. In structuration terminology, systems are stable patterns that are organized across time-space and reproduced between social actors or collectivities (Giddens, 1984). Structures, on the other hand, are the “rules and resources” (p. 25) that provide the interpretative arrangement for social actors to interact with their social worlds. Giddens likens structures to social practices in a similar way that speech relates to language (Calhoun et al., 2007a). More specifically, language is a set of constructed rules that provide the semantic organization of speech. Without these rules, people would be unable to interpret

speech. Likewise, structure provides the rules that organize social interaction and allow actors to interpret their social worlds. Giddens states that while structures have a tangible effect on social organization, their very existence is intangible and can only be observed through their effects on social practices.

Giddens (1984) argues that structures are positioned more internally than externally in relation to individuals. This is a major theoretical departure from Durkheim's (1895/2007) structuralist thinking. Durkheim's primary catalyst for social organization, the social fact, can be conceptualized as an external pressure that is placed upon people and, consequently, transcends the individual and influences behavior that can be observed at the macro-level. Failure to adhere to a social fact may trigger sanctions in order to bring forth conformity to the dominant set of values and cultural patterns. Social facts are conceptualized as being purely external to individuals, and their operation is not contingent upon an individual's psychology. Giddens (1984), on the other hand, places an extraordinary amount of importance on individual psychology and how it relates to structures. Particularly, Giddens is interested in what he refers to as discursive consciousness - that is, what actors are able to articulate about their social conditions and actions. In other words, Giddens holds that actors are able to comprehend, interpret, and respond to structures in an active rather than a passive way: "Every social actor knows a great deal about the conditions of reproduction of the society of which he or she is a member" (Giddens, 1979, p. 5).

Giddens's (1984) theory is built upon what he sees as the day-to-day life of social actors – literally, the mundane tasks and events with which social actors at the micro-level engage within their individual lives. Day-to-day life is bound within the dimensional construction of time-space, and as such, is situated within people's geographic surroundings

that inhibit and facilitate social action. Throughout day-to-day life, practices are replicated to the point that they become routines. In other words, social practices, regardless of how seemingly banal, are reproduced. Through the analysis of everyday social reproduction, the relationship between structure and system becomes discernable. That is, people create patterns of observable behavior that become embedded within the overarching societal typology. These represent the system components of structuration theory. While social actors engage with their social worlds, they inevitably create rules, resources, and semantic cues that facilitate people's ability to interact with society. These are the structural components of structuration theory.

Structuration theory can be framed as an analysis of the duality of structure (Calhoun et al., 2007a). That is, structuration theory examines how social actors create structural components of society while simultaneously being influenced by the structures that they create:

By the duality of structure, [Giddens] mean[s] the essential recursiveness of social life, as constituted in social practices; structure is both medium and outcome of the reproduction of practices. Structure enters simultaneously into the constitution of the agent and social practices, and "exists" in the generating moments of this constitution. (Giddens, 1976, p. 5)

In addition to the consideration of individual psychology, a major point of difference between Giddens (1984) and structuralist thinkers such as Durkheim and Parsons is the role structure plays vis-à-vis action. Whereas Durkheim (1885/2007) and Parsons (1948/2007) largely view structures as constraining forces, Giddens (1976/2007, 1984) argues that structure can be facilitative as well as inhibiting. Giddens rejects what he sees as theorists'

treatment of agency and structure as two separate concepts, and instead, advocates that they are “both sides of the same coin” (p. 221) that cannot be independently analyzed (Calhoun et al., 2007a). For instance, he argues that power can be both facilitating as well as inhibiting depending upon whether people are having power wielded against themselves or if they are instead the ones wielding the power. In the former case, social action is constrained by the resource of power insofar that people must act within the direction that the power compels them and, therefore, are constrained from acting in a way that power does not allow them; on the other hand, those who are able to wield power can enact forms of social reproduction that may not otherwise align in the absence of the resource of power.

While social practices are actualized throughout day-to-day life, structures often outlive the actors who create them (Giddens, 1984). This is due to structures becoming institutionalized when they reach a certain point of saturation in time-space expansion across a social system. Through agents’ usage of consciousness that allows them to interface with social structures by providing a point of institutional reference, they can recreate structures that have preceded any specific individual or collectivity. This is why Giddens argues that the optimal level of sociological analysis should not be people, groups of people, or even society itself, but rather, social practices (Calhoun et al., 2007a). Because of actors’ ability to engage in thinking and become knowledgeable about their social surroundings, Giddens contends that the role of the sociologist is to interpret a social world that has already been interpreted by the people who are a part of it – a concept he refers to as the double hermeneutic.

## **Structuration and Law**

The emphasis placed on interpretation and structure gives structuration theory the very unique feature of bridging the theoretical implications of symbolic-interactionism, which posits that people act according to the meaning they ascribe and derive from their social worlds (Blumer, 1998/2007), with the organizing elements of structural and post-structural thought, that examines how social forces guide behavior (Calhoun et al., 2007a; Calhoun, Gerteis, Moody, Pfaff, & Virk, 2007b). The implications that actors create structure through discursive interaction and interpretation of their social worlds generalize quite saliently to an analysis of the sociological jurisprudence of law and policy studies. Legal scholars have held interpretation of legal artifacts as being an important facet of jurists' duties (e.g., Dworkin, 1986; Hart, 1997; Schauer & Sinnott-Armstrong, 1996). But legal interpretation has relevance beyond the phenomenological aspects of jurisprudence with which many previous legal philosophers have engaged. Legal interpretation is in essence the creation of social structure. Specifically, jurists fashion legal opinions based upon the interpretation of legal texts (e.g., statutes, constitutions, ordinances); as a matter of precedent, jurists are then compelled to use these opinions to inform future legal reasoning to be applied to similar instances (Schauer & Sinnott-Armstrong, 1996; Waldron, 2012). As Schauer and Armstrong note, "Any time a court interprets a statute or a constitutional provision, its interpretations themselves carry precedential weight, and are treated as sources of law by other courts" (p. 162).

Precedent can function at two levels (Schauer & Sinnott-Armstrong, 1996). In English law, jurists are bound by the decisions made by higher courts – a concept referred to as vertical precedent. However, jurists are also expected to follow the precedents set forth

earlier by themselves or an equivalent court – a concept known as horizontal precedent or stare decisis. Precedent relates to Giddens’s (1984) thinking regarding systems insofar that it creates a longitudinal legal procession of stability and consistency that is facilitated through legal reasoning (Schauer & Sinnott-Armstrong, 1996). In other words, precedent ensures a creation and re-creation of a social practice related to the domains of law and jurisprudence – that is, the continued application of a particular legal doctrine created through legal reasoning that is carried across time-space and applied to categorically similar fact patterns that emerge through a legal proceeding such as a trial or a hearing.

Structural components exist in law, perhaps the most obvious being Hart’s (1997) secondary rules that provide jurists with the necessary protocols to fulfill their duties. But the law itself, which is interpreted by legal actors, also imparts some of the most far-reaching structure. Precedents are codified within the legal vehicle of case law. Case law adheres to Giddens’s (1984) definition of structure in that it provides a resource for jurists to engage with the legal domain. Specifically, it provides the necessary informing legal information that jurists require to apply legal reasoning to a fact pattern (Sunstein, 1992/1996). Likewise, structure exists vis-à-vis the original laws (e.g., statutes, constitutions, ordinances, etc.) that jurists interpret. All of these forms of law meet Giddens’s (1979, 1984) duality of structure criterion in that they can be both constraining and facilitative. Law – and by extension, precedent in case law – may be constraining in that the language, as interpreted purely on its face, could provide an explicit and unwavering statement of meaning. For instance, the Twenty-Second Amendment of the U.S. Constitution forbids an individual from serving a third term in the office of Presidency (Schauer & Sinnott-Armstrong, 1996). Little room exists in this language to fashion a legal opinion that does not adhere to the explicit meaning

of the text. However, law can be facilitative insofar that it often remains silent on specific issues or will not provide a clear meaning, which in turn prompts jurists to fashion opinions that require interpretative reasoning that extends beyond the literal text of the law (Posner, 1987/1997).

This latter scenario is of great interest and is very important to the central inquiry of this research project. To say that because a law is silent or unclear on a matter provides jurists and judicial bodies with unfettered reign to interpret the law however way they wish would be misleading. However legal structure, through secondary rules and the law itself (i.e., statutory law, precedent communicated in case law, etc.), provides a facilitative mechanism when law is not settled. Giddens (1976) predicates much of his theory on how people use symbolic language to interpret their worlds and convey social information across time-space. Language plays a vital role in legal interpretation, and regarding this theoretical point, Giddens's (1984) emphasis on individual psychology and the function of discursive consciousness becomes apparent.

A great deal of legal philosophy deals explicitly with how and why jurists interpret legal texts (e.g., Dworkin, 1987; Scalia, 1998; Schauer & Sinnott-Armstrong, 1996). Posner (1987/1997) makes a distinction between the philosophical underpinnings informing the interpretation of common (e.g., case) law when compared to statutory and constitutional law. According to Posner, case law interpretation is not contingent upon the explicit language that judges have written into their decisions; rather, the application of precedent through case law is actualized through an interpretation of general concepts that are formulated over time and comprise a specific doctrine related to an issue of law that may arise. Posner states, however, that this approach to case law interpretation and application is fundamentally different than

the interpretation of statutory and constitutional law: “Statutory and constitutional law differs fundamentally from common law in that every statutory and constitutional text...is in some important sense not to be revised by the judges” (p. 152). That is, judges are not liberated to simply impose some form of legal concept divorced from the original text when interpreting it. When legal texts are clearly written by the legislature, jurists are compelled to submit to the explicit language present in the law. Posner, however, states that interpretation of these texts can become problematic when dealing with language that may be ambiguous. Ergo, he contends that arriving at legal conclusions through logical deduction is not possible since judges are unable to easily apply syllogistic processes of reasoning when interpreting these texts.

Posner (1987/1996) posits that when jurists are unable to provide an interpretation of statutory or constitutional texts, they must rely upon contextual cues to inform their legal opinions. This approach to law has far-reaching policy implications, since, as Posner says, it takes into account the material legal and social results of the law that were intended by the legislature. The division over interpreting the explicit text or the legislature’s intention may be framed in terms of constitutional theories that Brest (1980/1996) delineates as textualism and originalism – the former referring to judicial interpretation that focuses on the explicit wording of laws and the latter referring to interpretation that places an emphasis on framers’ policy intentions of the law. Brest does not conceptualize these two theories as completely dichotomous and far removed from one another. Instead, he states that jurists often invoke both theories to certain extents when interpreting texts; however, most jurists will commonly favor one approach over the other.

How does an overview of these aspects on the legal environment relate to Giddens's (1976, 1984) theory of stucturation? Individual jurists must take into account the everyday realities of their work. They deal with the precedents set forth by previous jurists and courts; the language inherent to statutes, constitutions, ordinances, and other codes of law; legislative intention, and; the secondary rules handed to them as a matter of legal procedure (Brest, 1980/1996; Hart, 1997; Posner, 1987/1996). These aspects of the legal environment serve as structure, as they facilitate and constrain the interpretative actions of jurists, who are able to subsequently reflect upon, implement, and deduce vis-à-vis their own discursive consciousness. Through repeated interpretation and application of precedent, legal reality, as it pertains to a specific question of law that may arise, is created and recreated with respect to the subsequent legal opinions and case law that arise. This continued application of legal principles that are communicated via case law compose a systematic legal reality that recursively informs the legal decision making of future jurists.

An example of legal structuration may be borrowed from labor law's close cousin, employment law. Title VII of the Civil Rights Act of 1964 (Pub.L. 88-352, 78 Stat. 241) established that employer discrimination against people on the basis of their race, religion, gender, and ethnicity was illegal. However, the particular legal framework for the trying of fact in discrimination was an issue left up to the courts to decide. A question of determining if an employment action was racially motivated when direct evidence was not apparent arose in *McDonnell Douglas Corp. v. Green* (1973). The Supreme Court had to first engage with the legislative intention of the Civil Rights Act, which the Justices affirmed: "The language of Title VII makes plain the purpose of Congress to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered

racially stratified job environments to the disadvantage of minority citizens.” This statement had systematic and structural implications, not only insofar as the original statute is concerned, but also with relation to the intention of law as affirmed in prior case law, most notably *Griggs v. Duke Power* (1971) which found that: “Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed. What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.” With the question of the intention of the law ascertained, *McDonnell Douglas* (1973) instituted a very specific process of burden shifting that first requires the plaintiff to establish a prima-facie case by proving that he or she is a member of a protected class as ascribed by Title VII and has experienced a discriminatory employment action (e.g., termination, demotion, etc.), after which the burden of production falls upon the employer to show that the employment action was due to a non-discriminatory business reason (e.g., an infraction for insubordination); after the employer presents evidence of the employment action being due to a business reason, once again the burden of persuasion shifts to the plaintiff, who must convincingly establish pretext that the employment decision was motivated by discriminatory reasons (e.g., the employer had made racist remarks in the past).

The burden-shifting doctrine in *McDonnell Douglas* (1973) established a legal framework for determining discrimination in subsequent disparate treatment cases (Seyferth, 1999). The Supreme Court had effectively established a structural rule that succeeding jurists have used to inform their decisions and effectively recreate the legal principle over the past number of decades that was first decided in *McDonnell Douglas* (1973) with regard to burden shifting in the face of employment discrimination. Establishing such a seemingly

clear rule of law does not infer that legal practitioners simply accede to passive Durkheimian (1895/2007) modes of action without reflective mechanisms. Jurists still engage in discursive consciousness, even when dealing with what appears to be a decided and established legal doctrine such as the burden shifting in discrimination cases. Specifically, they must engage with the facts laid before them and determine whether or not *McDonnell Douglas* is an appropriate legal test in light of the specific issues of law brought to court. For instance, jurists must decide if the legal tests laid forth in *Griggs* (1971) – a case that dealt with seemingly innocuous employment practices, such as aptitude assessments, that may have an unfair latent effect on a protected class – are more appropriate than the burden-shifting doctrine in *McDonnell Douglas* (1973). Jurists are constantly engaged in an active and conscious process of ascertaining the best approach to deciding cases, even when dealing with precedent (Posner, 1987/1996).

Considering the above discussion of structuration and the legal domain, theoretically, as a precedent becomes established, its application should be traceable across time through subsequent court decisions; little divergence should be observed with regard to a specific question of law. However, scholarship in the legal philosophy field reveals that legal decision making is not always so clearly actualized as delineated in the above discussion (Fisher et al., 1993). Legal realists, such as Frank (1930/1996), contend that judges dilute the language of previous decisions simply on the basis that the rendering of a legal decision is a unique experience, and succeeding jurists do not have access to the cognitive discourse in which previous jurists engaged when reaching their conclusions. Further, the legal realists place greater emphasis on the personal dispositions of jurists than any of the more legal positivist and formalist precepts of secondary rules and strict precedent (Fisher et al., 1993). This issue

is central to the inquiry put forth in this dissertation. The doctrine of stare decisis is much less hallowed with respect to the NLRA as it is with other statutes, because the NLRB – primarily, the Board itself - is only bound to follow precedent under certain circumstances – namely when the Supreme Court has ruled on an issue of labor policy (Estlund, 2006; McGuinness, 1963). This facet of the NLRA is interactive with the political nature of the Board. Despite Posner’s (2010) argument that jurists, particularly those who receive lifetime appointments, are less influenced by partisanship, the Board is incredibly partisan (Gould, 2000; Gross, 1995). As this dissertation later argues, this partisanship, when compounded with the ambiguous language of the Taft-Hartley Act, has provided a legal-political environment that makes precedent setting and its relationship to the structuration of the NLRA a very complex phenomenon.

### **History of the Policy**

The circumstances predating the passage of the NLRA could best be construed as an exercise in incrementalism. Incrementalism refers to an approach to policy in which legislative goals are reached through a series of very small, pragmatic changes to existing laws, institutions, and policies (Kantowicz, 1985). In the NLRA’s case, the question of labor’s legitimacy as a social movement in the eyes of the law was dealt with by both the courts and Congress through a series of discreet actions both planted within the immediate influence of judicial motion and the long-reaching power of legislated policy (Cox et al., 2006). These changes were often a corollary to some significant event or change in the public’s attitudes towards unions, and as such, could be framed as reactionary.

Difficulty exists with discussing the NLRA without first touching upon the labor movement in America due to the two topics being inherently intertwined. The history of

labor is also very much a history of capitalism, as each stage of capitalism is associated with a change in specific forms of union structures, such as craft shops giving rise to craft unions and assembly line manufacturing creating an environment for industrial unionism to grow (Clawson & Clawson, 1999). Long before the enactment of legislation that rationalized their relationship with employers, labor unions already existed in America during the late 1700s, primarily in the trades of shoemaking and printing (Perlman, 1922). Journeyman trades workers often organized as a reaction to piece rate prices (Cox et al., 2006). Later, in the 1800s, more diverse trades, such as carpenters, bricklayers, tailors, and handloom weavers began organizing themselves into labor unions (Perlman, 1922). The early employee-employer relationship was characterized by a hierarchal affiliation between a craftsman and an owner (Cox et al., 2006); however, as the country became more industrialized and the factory system became more prevalent, the relationship was modified from the craftsman-owner affiliation to the worker-foreman relationship.

Craft unionism began in America during the mid-1800s with the Knights of Labor being the first major labor organization in the states (Cox et al., 2006). While the Knights of Labor originally functioned as a secret society of sorts that also focused on political action, it soon became an organization affiliated with union activity (Fink, 1983). This labor organization initiated a number of early strikes carried out by employees working in railroad shops and as telegraphers. However, in a few short years, the Knights of Labor lost momentum and dissipated (Cox et al., 2006).

The next major labor organization in the U.S. did not form until 1886 with the American Federation of Labor (AFL) (Cox et al., 2006). Whereas the Knights of Labor primarily leveraged its power through political action, the AFL turned to economic power as

its instrument of change. This approach is inherent in the AFL's more Marxist consciousness that placed enlarging the worker's wage potential in the employer-employee transaction at the forefront of the labor organization's agenda (Perlman, 1922). An emphasis on increasing wages made collective bargaining the primary mode through which the AFL staked its power (Cox et al., 2006). AFL president, Samuel Gompers, reasoned that the individual worker was often powerless when dealing with an employer; therefore, collective bargaining rather than individual bargaining would be a better mechanism for enacting workplace change (Cox et al., 2006). The AFL made wages, hours, and job security paramount in its bargaining agenda. This was reflective in the organization's philosophy of helping worker's change their immediate situations, which was in contrast to the Knights of Labor's more longitudinal goals of fundamental, wide-scale labor change.

Despite workers organizing in order to better their wages and working conditions in the 1800s, the judicial and political system was unfriendly to laborers choosing to unionize (Cox et al., 2006). The American judiciary often considered repugnant the tactics used by unions to forward their ends. As a measure to enact power in the labor-management dynamic, unions used economic weapons to facilitate change – for instance, strikes. Criminal law, originally derived from English common law, was often applied to unions as a way of curbing their activities. In *Commonwealth v. Pullis* (1806), the court found that, by striking, workers were engaging in an illegal conspiracy. The defendants were required to each pay a fine equaling a week's wage in addition to court costs (Schwartz, 2004). Criminal law later fell out of disuse for stopping collective action as result of a Massachusetts court decision in *Commonwealth v. Hunt* (1842) that held unions were legally recognized organizations that had a right to strike. Antiunion sentiment still remained in the courts, and tort law was

applied in lieu of criminal law to halt union efforts (Cox et al., 2006). For instance, in *Vegeahn v. Guntner* (1896), the court ruled that, in an effort to facilitate higher wages, a union's picketing attempt to dissuade current employees and applicants from entering the employer's establishment was an infringement on the employer's right to hire whomever the employer pleases. Supreme Court Justice Holmes dissented, stating that the use of unionized action to obtain higher wages was analogous to employers' otherwise legal use of competitive instruments in the market.

Until the late 1800s, courts largely curbed union activity without the aid of specific statutory law. This changed with the creation of the Sherman Act (Cox et al., 2006). The Sherman Trust Act of 1890 was enacted as an effort for the federal government to terminate business cartels and monopolies. In the name of protecting interstate commerce, the Sherman Act allowed the government to investigate contracts or allegations of efforts to constrain trade and provide injunctions against businesses found to be illegally engaged in trusts. Despite later scholarship that suggests that the Sherman Act was not intended to cover labor organizations in its definition of a trust (Bork, 1966), courts soon recognized that they could implement the Sherman Act as a judicial mechanism against union actions on the basis that their efforts were constraining trade (Cox et al., 2006). In *United States v. Debs* (1894), the court stated that a union's implementation of a strike against the Pullman Company constituted a violation under the Sherman Act. The court, though, did not use injunctive relief against the union (Cox et al., 2006). However, two decades later in *Loewe v. Lawlor* (1908), the court ruled that the union's use of a secondary boycott as a coercive tool against an employer claiming open shop status (i.e., not requiring its employees to be union

members) was a violation under the Sherman Act and, subsequently, enjoined the union from enacting a secondary boycott against the company.

As the early 20th Century continued, political attitudes towards labor unionism became somewhat more favorable (Cox et al., 2006). President Wilson initiated the United States Strike Commission, which, subsequent to a study of the *United States v. Debs* (1894) case, concluded that individual freedoms were not lost within the institution of collective bargaining (Cox et al., 2006). Further, Wilson stressed that industrial peace could be attainable if labor and management were better able to understand the interests of one another. He reasoned that strikes and lockouts would be less likely through a collective bargaining process. Largely as a tactic to garner labor's support during WWI, Wilson enacted the National War Labor Board, which protected the rights of workers to organize and bargain collectively with their employers without any restraint or interference on part of the employer (Cox et al., 2006). The government successfully seized ownership of factories of employers who refused to collectively bargain with employees. However, economic strife between labor and management was not fully ameliorated, particularly towards the end of the war. Withdrawal of large government funded projects and demand for supplies and equipment led many people to believe that production would greatly decrease (Perlman, 1922). When the post-armistice economy continued to soar, unions became aggressive in securing higher wages, despite their compensation demands often being inadequate with regard to keeping up with the inflating cost of living. In 1919, the AFL led an enormous organizing campaign to unionize the United States Steel Corporation. Mass employee discharge took place, which culminated in a violent strike (Cox et al., 2006).

While Wilson emphasized industrial peace, unions could still not exercise any bargaining power as long as the Sherman Act delegitimized collective organization. As a remedy, the Clayton Act was legislated as a second generation trust statute (Cox et al., 2006). Specifically, the Clayton Act sought to establish union activities as distinct from the trusts delineated in the Sherman Act (Clayton Antitrust Act, 1914). The hope within the labor movement was that the new Act would expunge precedents concerning union activities that were previously set by common law and the interpretation of the Sherman Act (Cox et al., 2006).

Despite its intention to differentiate between corporate trusts and unions as two legally distinct forms of collectivization, the Clayton Act was used in some instances to continue the restraint of union activities (Cox et al., 2006). In *Duplex Printing Press Co. v. Deering* (1921), a labor organization had engaged in a secondary boycott as an attempt to institute a closed union shop at the employer's place of business. Specifically, the union attempted to prevent transportation of the employer's products to its customers. The court stated that an action solely between employers and employees is legal and has immunity from injunctions. However, the court went on to state that a secondary boycott would be enjoined under the language of the Clayton Act. More precisely, Section 20 of the Clayton Act, which affirms that persons engaged in a labor action with respect to employment will not have their actions enjoined, was interpreted to only be pertinent to those directly engaged in the dispute at hand. Therefore, the court reasoned that those not directly involved in the dispute but had labor actions committed against them, such as a secondary boycott, had a claim for injunction against the acting labor organization.

The first true American labor relations law came in 1926 with the Railway Labor Act (RLA) (Cox et al., 2006). The majority of the RLA was created through a negotiation between railroad companies and unions with little input from Congress. The RLA's primary focus was on the peaceful resolution of disputes between railroads and the unions. A mediating board was formed with the intention of settling disputes regarding the interpretation of contracts (Arouca & Perrit, 1985; Cox et al., 2006). Additionally, the RLA contained stipulations intended for management and labor to make a good faith effort to maintain agreements concerning items such as wages and working conditions. The RLA was later amended in 1934 (Cox et al., 2006). Additions included provisions that suppressed company-controlled unions by making it illegal for rail companies to use their funds to assist unions. The National Mediation Board was tasked with carrying out representation elections, and the National Railroad Adjustment Board was created as a singular adjudication entity to resolve grievances, which was in marked contrast to the previous multiple adjudication boards that made disparate decisions.

The Norris La-Guardia Act of 1932 sought to close the injunctive loopholes apparent in the Clayton Act (Cox et al., 2006). Among other things, the Norris-LaGuardia Act outlawed the practice of yellow-dog contracts, which were stipulations employers put forth to job candidates, making employment contingent upon the promise not to join a union. The legislation also affirmed that employees had the right of association and to organize (Norris La-Guardia Act, 1914). Additionally – and perhaps most powerfully - under the Clayton Act, federal courts were no longer allowed to hand down an injunction to parties for simply engaging in a labor dispute. The statute was affirmed through case law in *New Negro Alliance vs. Sanitary Grocery Co.* (1938), in which the court found that the employees were

engaged in the legal meaning of a labor dispute, and therefore were protected in their labor activities under the Norris-LaGuardia Act.

Further evidence of the affirmation of the Norris-LaGuardia Act and judicial disuse of the Sherman Act as an injunctive mechanism to quell labor disputes began in the late 1930s. For instance, in *Apex Hosiery Co. v. Leader* (1940), the union engaged in a sit-in as an effort to persuade the employer to sign a closed-shop agreement. The employer argued that the union was disrupting interstate commerce by restraining the transportation of the employer's goods. However, the court reasoned that the Sherman Act's interstate provision only applied when the purpose was to affect commercial competition. The purpose of the union's sit-in strike was to persuade the employer to acquiescent to the union's demands rather than affect its competitive virility. Therefore, the court reasoned that the Sherman Act did not apply. Likewise, in *United States v. Hutcheson* (1941), the union called for a strike, which the employer contended was a restraint of trade that fell under the purview of the Sherman Act. However, the court reasoned that, under the Norris-LaGuardia Act, previous precedent set with the narrow interpretation of the Sherman and Clayton Acts was immaterial due to the intended purpose of the new legislation to apply a broad definition of lawful union activities. The court applied a similar logic to *Burlington Northern Railroad v. Brotherhood of Maintenance of Way Employees* (1987) and *Trainmen v. Jacksonville Terminal Co.* (1969).

The National Industrial Recovery Act (NIRA) of 1934 was the final piece of major labor legislation to be enacted before the NLRA (Cox et al., 2006). The NIRA provided a number of progressive protections to employees and unions, specifically the right for employees to organize into unions of their own choosing and to bargain collectively without restraint or coercion on part of employers. In addition, the NIRA granted employees the right

to not join a union or refuse to join a union as a condition of employment. The NIRA was short-lived and was struck down as being unconstitutional by the Supreme Court in *A.L.A. Schechter Poultry Corp. v. United States* (1935). Although *A.L.A. Schechter* was not a labor law case per se, it effectively ended the labor relations provisions granted by the NIRA.

Following the NIRA, Congress passed the NLRA in 1935 (Cox et al., 2006). Sponsored by Senator Robert Wagner, a Democrat from New York (Wagner, 1939), the NLRA created a foundation upon which employees could bargain collectively with their employers (Cox et al., 2006). The NLRA – or the Wagner Act, as the first iteration of the legislation is known – gave employees the right to collectively organize, choose a bargaining representative, and engage in peaceful strikes. Section 8 of the NLRA outlawed subversive and coercive techniques that employers used to curb employee organization, such as threats for joining unions and promises if employees refused to join, as well as more overt actions, such as lockouts to destroy unions and violence against organizers. Additionally, Section 8 made company-controlled unions illegal, and hiring, firing, and disciplinary actions against employees based upon their union activities were outlawed. The NLRA also required employers to bargain with employees' unions over the mandatory items of wages, benefits, and working conditions. Like the NIRA, the NLRA was challenged as being unconstitutional. However, unlike its predecessor, the constitutionality of the NLRA was upheld in *NLRB v Jones & Laughlin Steel Corporation* (1937). The court reasoned that the NLRA was constitutional, since it ultimately dealt with interstate commerce, which is the legally sanctioned domain of the federal government.

The NLRA was amended twice. First, the Taft-Hartley Act of 1947, which Congress passed despite a veto by President Truman, amended the NLRA by delineating a number of

illegal union activities (Cox et al., 2006), most notably secondary boycotts. In addition, the Taft-Hartley Act made a union coercing an employer to commit a violation of the NLRA an illegal activity. Additionally, strikes over union jurisdiction were outlawed under the new amendment. Further, the Taft-Hartley Act outlawed the closed shop agreement, which marked the first time that Congress took a specific interest in the nature and terms of collective bargaining agreements. The Taft-Hartley Act was passed during a time in which the public had grown uneasy about labor unions, particularly after AFL leader John Lewis had led two long strikes during World War II (WWII) that halted production at steel mills and auto plants.

The final major legislative amendment to the NLRA came in 1959 with the Landrum-Griffin Act. A relatively minor augmentation to the original legislation, the Landrum-Griffin Act closed some loopholes dealing with secondary boycotts. Additionally, it outlawed hot cargo agreements and added provisions requiring unions to adhere to financial disclosure requirements (Cox et al., 2006). The amendment placed limitations on employees' ability to strike for union recognition. Labor made a gain with the Landrum-Griffin Act insofar that the amendment allowed striking workers who had been replaced by strikebreakers to vote in union elections. This provision was created to prevent employers from inducing a strike, only to oust the union through hiring strikebreakers who would decertify the incumbent labor organization through an election.

Since 1959, the Act has not received any major statutory amendments (Estlund, 2002). However, two minor Congressional changes have been applied. The most notable change came in 1970 with the Postal Reorganization Act (U.S.C. § 1209), which dismantled the United States Post Office Department (USPOD), and in its place, created the United

States Postal Service (USPS), a quasi-independent mail carrier housed within the Executive branch of the federal government that holds a legal monopoly over letter delivery (Geddes, 2005). Coming off the heels of a major illegal wildcat strike across the U.S. postal system, the Postal Reorganization Act sought to reduce financial inefficiencies and bureaucratic excess that had previously plagued the USPOD (Bostick & Collier, 1972; Rubio, 2010). The overhauling of the postal system had important implications for labor relations as the Postal Reorganization Act also placed collective bargaining jurisdiction under the auspice of the NLRA and the NLRB (Goldfield, 1987).

The second change came in 1974 with the Health Care Amendments (29 U.S.C. §§ 152(14), 158(d)). The original Wagner Act was silent on the NLRB's jurisdictional oversight of non-profit hospitals and charitable organizations (Pointer, 1975). However, with the notable exception of *NLRB v. Central Dispensary & Emergency Hospital* (1945), in which the court agreed with the NLRB's contention that non-profitability was immaterial to a jurisdictional question with regard to the spirit of the Act of being concerned with interstate commerce (Pointer, 1975; Ringer, 1976), courts generally viewed non-profit hospitals as exempt organizations from the Act's provisions. The courts largely reasoned that non-profit, private hospitals should be exempt under the NLRA because...

(1) the operation of hospitals is of such importance that their exclusion is warranted; (2) the enterprise is non-profit in character; (3) the facility is semipublic in character and engaged in functions that if not performed would have to be assumed by the government; and (4) the charitable nature of the organization insures fair dealing with employees. (Pointer, 1975, p. 351)

The Taft-Hartley Act further clarified the jurisdictional question between non-profit hospitals and the NLRA by redrafting the language of Section 2(2) to exempt “...any corporation or association operating a hospital if no part of the net earnings inures to the benefit of any private shareholder or individual” (Pub. L. 93-360, § 1(a), 1974). Despite both case law and statutory law mandates absolving NLRB jurisdiction over non-profit hospitals, many hospitals viewed inclusion under the NLRA as a beneficial alternative to the fractured and confusing state labor laws under which many health care facilities were obligated (Pointer, 1975). In response, Congress passed the Health Care Amendments (29 U.S.C. §§ 152(14), 158(d), 1974) to instate NLRB jurisdiction over non-profit hospitals and other health care facilities (Ringer, 1976). This amendment served a two-pronged agenda (Miller, 1976). First, it helped to ensure a greater number of employees would engage in collective bargaining. Second, it was intended to help allay disruptive labor disputes that may harm the public good. Specifically, healthcare organizations are required to provide ten days notice before engaging in a strike. Further provisions require one party to provide written notice 90 days prior to the expiration of a contract rather than the typical 60-day requirement placed upon non-health care organizations.

Congress has not modified any of the language of the NLRA subsequent to the Health Care Amendments. The latest major attempt to amend the Act came in 2007 with the Employee Free Choice Act (EFCA) (H.R. 800, 2007). EFCA would have changed the NLRA in three fundamental ways (Twomey, 2009). First, under the proposal, unions would have still retained the right to a secret-ballot election under the NLRA after a 30% showing of interest. However, EFCA would have allowed unions to engage in a card-check procedure if a majority of employees within the proposed bargaining unit were to sign showing of interest

cards. Second, if the parties could not reach a final contract within 90 days, the dispute would be given to the Federal Mediation and Conciliation Service (FMCS); afterwards, if the dispute could not be settled within the next 30 days, the matter would be sent to mandatory arbitration. Finally, EFCA mandates that employees who were illegally fired for engaging in union activities during a union organizing drive or the negotiation of a first contract would be entitled to triple backpay. EFCA has not come to fruition – and evidence infers that Congress will not be moving forward on its passage (Arnold & Bain, 2011; Mack, Keenan, & Bolt, 2009). Until Congress is successful in passing further labor law, the statutory language of the Act remains fundamentally unchanged.

### **Vehicle of Policy Change**

Since passage of the Landrum-Griffin Act, along with EFCA, numerous legislative attempts have arisen to modify the Act's existing language (e.g., Flynn, 1994; Gordon, 1991; Logan, 2008; Moore, 2009; Myers, 1986; Rathblott, 1991). The majority of these proposals have been incremental in scope and intention and have, for the most part, not been wide-scale attempts to transform the substantive spirit of the NLRA. Most of these bills and proposals have focused on minute procedural implications related to how the NLRB approaches the policing of the policy, such as subscribing the meaning of a supervisory employee within the scope of the Act (e.g., Sandler, 2007). This may be in part due to general agreement within the political and legal community that the overall statutory protections of collective bargaining and right of association couched within the law are philosophically uncontested (Estlund, 2002).

However, normative discussions in the public sphere concerning changing labor law and Board decisions have been somewhat more hotly debated (e.g., Lafer, 2012; Seaton &

Ruhsam, 2009; Swanton, 2012). In addition to bills introduced to Congress, numerous calls have been put forth within the academic literature to augment or otherwise alter the NLRA through the government's legislative mechanism (e.g., Bayer, 2012; Block, 1995; Roukis & Farid, 1993). These dialogues often originate from the authors' perceptions of what constitutes problems with the Act that can be best remedied through Congressional legislation rather than relying upon the NLRB to remedy a perceived wrong with the administration of the current labor law apparatus already in place.

Despite such a consistent effort from both Congress and academic circles to rewrite parts of the policy, the statutory components of the Act have remained relatively unchanged since the final health care amendments of 1974 (Estlund, 2002). According to Estlund, this legislative inertia is largely manifested through a perpetual political stalemate in which both pro-management and pro-labor special interests are able to marshal enough power within Congress to block further attempts to amend the NLRA in ways that may be harmful to their respective sides. Estlund noted that this phenomenon does not infer that business and labor hold equal political capital at any given time. Rather, she emphasized that being able to block legislation comes from having a large enough minority to obstruct Congressional channels through mechanisms such as filibusters in order to prevent laws from passing via the required supermajority vote.

Even with the constant stalemate within the legislature, the NLRA does indeed change over the course of time (Gross, 1985, 1995). While the fundamental language of the statute itself does not change per se, the policy of the Act is dynamic. To understand this phenomenon, an actual definition of policy should be put forth. Hart (1997) defines law as a system of primary and secondary rules – the former being the material language of laws

themselves and the latter being formalized guidelines in applying the former – that are legitimized through a sovereign government. However, Hart is rather silent on how law and policy interact. Dworkin (1967) articulates perhaps the most compelling explanation of what constitutes policy: a “standard that sets out a goal to be reached, generally an improvement in some economic, political, or social feature of the community” (p. 23). Policy is a feature of Dworkin’s definition of law, which is arguably more holistic than Hart’s (1997) primary emphasis on rules as the defining feature of law. Therefore, policy can be viewed as a distinct component of law that can be given special empirical attention as a subject of inquiry – in the NLRA’s case, how its policy has changed.

But if the material language of the NLRA has remained otherwise unchanged for half a century, how can the policy associated with the Act change? The answer is that it changes through its associated body of case law that is fashioned by the NLRB and court system (Rachlinski, 2005; O’ Gorman, 2008; Yale Law Journal, 1980). While the language of the Act remains consistent, its interpretation, particularly with regard to its stated policy, is subject to change. Therefore, adjudication is a form of policymaking and becomes materialized through the creation of case law (Bernstein, 1970). This case law then becomes an informing structure that helps a judicial body decide similar cases in the future (Dworkin, 1986).<sup>1</sup> Having this judicial history provides a traceable narrative for analyzing how the policy of the NLRA has been modified throughout the years and the implications this has for developing further theory with regard to sociological jurisprudence. Understanding how the NLRA’s policy has changed first requires an overview of the original theories and legislative intentions that informed the passage of the Act and its amendments.

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<sup>1</sup> However, the NLRB is somewhat unique in this regard due to the ability to circumvent its own precedents – a subject given further attention in this chapter and dissertation.

## Theories and Philosophies Informing the NLRA

### The Wagner Act

Articulating an overview of the values and ideas that frame the onset and continuation of American labor law is essential to analyzing how the historical narrative labor policy has transitioned throughout the decades. Although they may not be congruent with the Act's succeeding policy interpretation, the theories and philosophies informing the passage of the NLRA are diverse and were rooted in the material conditions of the American public and workforce during the 1930s (Cameron, 2005; Cox et al., 2006). These theories are also quite qualitatively different than the ideologies and circumstances that were at play when the Act's amendments came to fruition, particularly the Taft-Hartley Act (Gross, 1995).

Bernstein (1950) argues that the general policy direction of the NLRA had been pervasive in American labor relations prior to the actual passage of the Wagner Act. The underlying principles of collective bargaining being socially desirable that were inherent in the original NLRA had been expressed through court decisions, such as in *Commonwealth v. Hunt* (1842), as well as statutory laws such as the Clayton, Railway Labor, and Norris-LaGuardia Acts (Bernstein, 1950). The need for a new labor law was effectuated by a lack of a mandatory compulsion to bargain with a majority union, as well as a pervasiveness of company-dominated unions that effectively gave any preceding labor law little teeth with regard to changing employees' economic conditions or giving labor law administrative boards or councils the ability to successfully enforce their policies. This ineffectiveness was quite salient with regard to the NIRA and the ambiguity in its language. However, despite the NIRA's ineffectiveness, the spirit of its policy was carried over into the Congressional intentions of the NLRA and what legislators hoped to accomplish in the U.S. economy and

society with a collective bargaining law – that is, to promote industrial peace through the process of collective bargaining (Cox et al., 2006).

Economic considerations were at the heart of the Act's passage (Cox et al., 2006). These concerns manifested over two related social issues - labor strife and the Great Depression – and in an almost curious way, each of these material conditions inspired arguments for the NLRA's ratification that could be conceptualized as respectively politically right and politically left. Curtailing labor strife – for instance, the violent strikes that took place during the late 19th Century in Homestead, Pennsylvania and Coeur d'Alene, Idaho (Jenkins, 2005; Taft & Ross, 1969) – was at the forefront of the Act's passage (Cox et al., 2006). Prior to instatement of the NLRA, employees who chose to form and join unions were often subject to legal retaliation by employers and the court system, which sometimes led to violent and rebellious actions on part of employees that in turn created economic disruptions (e.g., Beamis, 1896). This volatile time period in labor history was exacerbated by a legal environment that allowed employers to hire spies and agitators to undermine organizing effects, as well as establish company unions and company towns that kept employees economically and socially reliant upon the factories in which they worked (Bernstein, 1950). Legislators reasoned that by providing a policy that legitimatised collective bargaining, labor and managerial interests in the U.S. would choose to reconcile differences peacefully at the bargaining table rather than through violent strikes that may create ripple effects in the economy (Cox et al., 2006; Gross, 1985). This idea was reinforced by the public's interest in stabilizing wages, hours, and working conditions (Tomlins, 1985).

Libertarianism, a political philosophy that advocates the concept of self-ownership in place of government intervention regarding social and economic issues and seeks free-market

based solutions to policy with minimal government involvement (McLavery, 2005; Olsaretti, 2013), even has some relationship to the philosophy informing the Act. Interestingly, the proposition to eliminate or reduce labor strife through collective bargaining had a right-libertarian angle imbedded into its informing ideology insofar that the Act's proponents reasoned that the policy of collectively bargaining was the most desirable approach to gaining industrial peace "without undue sacrifice of personal and economic freedom" (Cox et al., 2006, p. 77). While such an ideological component preceded the seminal work of Robert Nozick's (1974) libertarian philosophical tract, *Anarchy, State, and Utopia*, which brought libertarian principles to the intellectual forefront, the Act's informing philosophy did – perhaps implicitly – take a nod from Smith's (1776/2007) classical liberalism that advocates laissez-faire market ideals in lieu of government intervention. That is, the Act attempted to make the labor dispute largely a private rather than a public affair (Cox et al., 2006; Weiler, 1983). It sought to minimize the need for government regulation in the labor-management relationship after a union had organized and gained recognition as a bargaining unit's representative.

One primary purpose of the NLRA was therefore to protect employees' right to unionize, after which, it took a hands-off approach in governing the relationship between unions and employers. Negotiating wages, working conditions, and conditions of employment were largely left up to labor and management parties, and the Act did not specify any governmental mechanism to solve disputes (Cox et al., 2006). The unions themselves had already internalized this philosophy, as labor leader Gompers advocated the idea of voluntarism, which was a self-help approach to economic life that maintained a suspicion of government intervention (Bernstein, 1950). The theory behind such a libertarian

approach to labor relations was that both management and labor would come to agreement in disputes more often than not because both parties were privy to the economic costs that would likely result in impasse (Cox et al., 2006). These costs would be incurred through the economic weapon of a strike, and the NLRA's framers reasoned the threat of a strike would be motivation enough for the parties to come to agreement. Therefore, while suppressing labor strife was one reason collective bargaining was proposed as national labor policy, ironically, its driving theoretical mechanism was the strike, an economic weapon that would exacerbate labor disputes that may affect macro-economic conditions.

Despite this contradiction between the initial labor policy of the strike being the private mechanism to reduce labor disputes and reducing labor strife being a key reason to establish an official labor policy, Cox et al. (2006) argues that the Act has been successful at reducing labor unrest for four specific reasons:

- (1) Collective bargaining enables employers and employees to dig behind their prejudices and exchange their views to such an extent that on many points they reach agreement while on others they discover that the area of disagreement is so narrow that it is cheaper to compromise than to do battle.
- (2) Recognition experience in bargaining, and the resulting maturity bring a sense of responsibility to labor unions.
- (3) Because collective bargaining replaces the weakness of the individual in bargaining and better enables employees to raise wage and improve labor standards, strikes to secure these objectives tend to be eliminated.
- (4) Collective bargaining substitutes what may be called industrial democracy – joint consensual determination of

wages and other conditions of employments – for the unilateral and sometimes arbitrary power of the employer. (p. 77)

Related to the policy of reducing labor strife, collective bargaining was also posited as a remedy for reducing communist inroads to the American economic system (Bernstein, 1950). Legislators reasoned that by providing a legitimate grievance mechanism and some control over their economic destinies, workers would be less likely to resort to radical revolutionary means to usurp the dominant capitalist system. Perlman (1922) notes that despite outlying incidences of radicalism, historical analysis has revealed that organized labor has been a rather conservative force in economics by securing wage earners' gains that would otherwise be upset through communist revolution. Labor leader David Dubinsky (1957, as cited by Bernstein, 1950), who originally began his career as a Marxist, once stated, "trade unionism needs capitalism like a fish needs water" (p. 136).

Although, labor strife was a primary motivation behind codifying and legitimizing collective bargaining, the legislative purposes that drove passage of the Act extended beyond societal protection from violent labor strife and economic self-determination (Cox et al., 2006). Macro-level economic factors played into the legislative logic that informed the policy. The NLRA was passed as a part of New Deal legislation (Tomlins, 1985), a package of policies advocated by President Roosevelt with the intention of stimulating the economy after the Great Depression, an event that devastated workers' income, particularly the wage component of income (Bernstein, 1950). New Deal legislation was largely informed by Keynesian economic theory (Phillips, 2009), which posits that employment levels are determined by spending within the economy rather than through self-correcting labor markets, which was in contrast to the theoretical macro-economic mechanism of stabilization

largely advocated by classical economists (Keynes, 1936; Rosselli, 1999). As a result of the Keynesian influence, a large number of New Deal initiatives sought to inject capital into the United States economy through governmental interventions, such as public works programs and the Social Security Act of 1935 (Trattner, 1999).

Legislators reasoned that collective bargaining would be an efficient means through which the working class could accumulate wealth and help pull itself out of poverty as a result of the Great Depression (Cox et al., 2006). This approach to collective bargaining was informed by the theoretical reasoning forwarded by thought leaders such as John Commons (1921) and William Leiserson (1922), who held that industrialization had created a situation in which employees and employers were placed in unequal power positions due to the growth of markets that took place during the 19th Century (Tomlins, 1985). That is, market factors provided an environment where employers were able to collectivize into corporate aggregations, which consequently deprived employees, who had to bargain on an individual level, the power to deal with employers on an equal bargaining platform (Commons, 1921). Tomlins (1985) notes that this explanation of discrepancies of power in labor bargaining did not follow the traditional Marxist thought that argued the capitalist system created inherent power differentials between labor and capital (Calhoun, Gerteis, Moody, Pfaff, & Virk, 2007b); rather, bargaining power – and labor strife – was an effect of changes in the historic-economic landscape. Consequently, Commons (1921) advocated for collectivization of the workforce in order to deal with employers from an equal position of bargaining.

Although it came after what has historically been considered the Progressive Era of the U.S., the time period from the beginning of the 1910s to roughly the conclusion of WWI (Muhs, 1982), many scholars consider the New Deal and its central policies as being

progressive in essence (e.g., Weatherford & Sergeyev, 2000). Progressivism refers to the political ideology that a common good exists between people within a society and this good can be obtained through governmental intervention (Nugent, 2010). Lazarowitz (1991) forwards a somewhat modified view of New Deal progressivism, stating that the New Dealers were interested in balancing the public good with private interests. This view of 1930s progressivism becomes somewhat more confounded when considering the work of Vittoz (1987), who delineates two ideologically distinct analytical lenses that have been historically used to view the social and economic legislative philosophy informing the New Deal, and by extension, the NLRA. The first treats New Deal labor policy as being largely sympathetic to labor interests and repugnant to capital. However, the second position advocates that New Deal labor policy was much more conservative in scope than the progressive labeling of the policies would suggest. Vittoz contends that the second analytical interpretation of New Deal labor policy, which has largely been informed by a contingent of radical scholars critical of the progressive philosophy of the New Deal, argues that the NIRA and NLRA were passed in an effort to stabilize markets that had become volatile during the Great Depression and maintain the status quo of laissez-fair capitalism. This viewpoint holds that the factory system had created a precarious situation between business and labor due to the public's perception of the former taking advantage of the latter – a reality that was exacerbated by industrial strife. The New Deal labor policy is argued to have provided some stability to businesses through federal regulation of the employment relationship, which has been hypothesized to have the ability to curtail price deflation and allow businesses to once again become profitable after the Great Depression. Interestingly, this approach to New Deal

labor philosophy was embraced by certain industries and businesses that viewed themselves as benefiting from the NIRA, whereas almost all firms universally opposed the NLRA.

Tugwell's (1950) scholarship on the etymology of political words suggests that Vittoz and the radical scholars may have been making a semantic error with regard to their definition of progressivism, though. Specifically, Tugwell states that progressivism is fundamentally different from the often-interchangeable word, liberalism, whereas the former suggests a "return to orthodoxy" (p. 391) – that is, maintenance of the status quo – and the latter is defined as being open to political experimentation with policy. The New Deal and the Wagner Act were indeed experimental, but their policy goals were to continue previous social and economic paradigms, as evidenced by the above discussion concerning the Wagner Act's aims at maintaining American individualism and perpetuating market demand through macro-economic policy. This conclusion about New Deal policy is corroborated by Box's (2007) thesis that the goal of public administration in a liberal-democratic state that contains a market structure is to perpetuate the *laissez faire* economic institution.

### **The Taft-Hartley and Landrum-Griffin Acts**

Although the original Wagner Act had a large theoretical underpinning, its statutory successor was less philosophical or theoretical in the strain of intellectualism that argued for its passage. Rather, the Labor Management Relations Act – or Taft-Hartley Act as it is commonly called – was informed much more by a reactionary sentiment that followed subsequently to the Wagner Act's enforcement (Lee, 1966). Aaron (1958) deduces three primary threads that led to the passage of the amendment: the public's distrust of labor, the increase in Republican political power, and a belief that communists had infiltrated the labor

movement. All of these threads were tempered by capital's distaste of the original Wagner Act that had lingered since its passage in 1935 (Gross, 1981).

The public was originally enamored with the labor movement, but the honeymoon period became strained as the nation reached the 1940s (Gross, 1981). Throughout the latter half of the 1930s and early 1940s, labor experienced a surge in growth (Weiler, 1983). Prior to the Act's passage, union density of the nonagricultural workforce in the United States increased from 13% to 35% within a decade. In 1935, only three million workers belonged to unions as compared to fifteen million in 1947 (Cox et al., 2006). Labor played a significant part in the war effort during the Second World War as membership in both the Congress of Industrial Organizations (CIO) and the AFL – two conglomerations of individual unions – expanded (Lichenstein, 2003). Organized labor was given further political legitimization during the conflict when President Roosevelt re-instituted the National War Labor Board (NWLB) in an effort to expedite industrial disputes between labor and management to ensure continuous production through a form of binding arbitration (Lichenstein, 1982; Workman, 2000).

Following the war, the American public became somewhat disillusioned with organized labor, believing that unions had gained too much power over the subsequent decade (Aaron, 1958) - a sentiment that was further amplified by an immense wave of strikes that took place in 1946 (Searls, 1992). A powerful new economic weapon being used by labor exaggerated these labor disputes: the sit-down strike (Lee, 1966). The public also blamed inflation on labor's gains insofar that wage increases were passed onto consumers in the form of higher prices for commodities (Aaron, 1958; Gross, 1981). The public grew uneasy with what it saw as concentrated power in the hands of a few "union bosses," such as

John L. Lewis (Cox et al., 2006). Even though they were pleased with the economic gains in a post post-Wagner Act time period, some labor-friendly commentators detailed what they saw as legitimate problems that had arisen due to labor gaining power in the late 1930s and early 1940s:

(1) Too many strikes were called under circumstances threatening serious injury to the public health or safety...; (2) some unions were primarily used as vehicles for racketeering; (3) strikes and picketing were too often marked by violence; (4) many building trades unions refused during the war to admit new members and charged them exorbitant fees for issuing working permits; (4) the construction industry was also hampered by strikes resulting from jurisdictional disputes between competing craft groups; (6) the secondary boycott had become an exceedingly powerful weapon in the hands of certain unions...., and; (7) a number of unions abused closed and union shop contracts, by limiting union membership (and thus jobs) to family members by expulsion of members for improper reasons (such as criticizing union officials of testifying adversely to the union in an arbitration proceeding). (p. 81)

Despite the general public's growing criticism of labor, the NLRA had been opposed by capital long before labor's post-Wagner Act gains. After the NLRA's passage, conservative and business political interests immediately protested and attempted to undermine the policy (Gross, 1974; Olson & Becker, 1990). Almost immediately, a number of anti-Wagner Act bills were introduced in Congress, though none of them gained any serious traction (Gross, 1981). Hostility towards the NLRA was exacerbated by critics' perceptions of the NLRB as a leftwing organization that was staffed by communists.

Despite positive public opinion of labor dwindling after the war, the initiation of the Taft-Hartley Act began prior to WWII (Gross, 1981). In the late 1930s Congress held an adverse series of hearings known as the Smith Committee to investigate the practices of the NLRB. Ironically, these hearings originated as a marriage between capital and labor. The AFL had been engaged in a turf war with the CIO, whom it perceived the NLRB as being favorable towards. AFL President William Green colluded with business interests after the Board certified a rather large CIO bargaining unit, which the AFL perceived as the NLRB displaying allegiance towards its rival. At that point, Green felt that, despite the gains afforded to the AFL by the Wagner Act, industrial relations would more desirable in a world in which the NLRA was heavily modified or completely repealed. The Smith Committee attempted to expose light on NLRB practices to reveal that the agency had allegedly failed in its duty of impartiality and had been sympathetic to labor interests at the expense of business interests. Additionally, the committee hoped to uncover leftwing extremism and paint the agency as a hotbed for communist activity in the U.S. government. After a series of grueling interrogations, testimony, and newspaper headlines, the committee concluded that the NLRB had been abusing its power by forwarding policy that largely benefited labor at the expense of business.

While the Smith Committee fueled some public outrage towards the NLRB and NLRA, it did not immediately cause a legislative change to the NLRA (Gross, 1981). Smith did forward some recommended NLRA amendments to President Roosevelt, who agreed with the proposals. A bill was drafted but died in the Senate Labor Committee, while Roosevelt's reelection guaranteed that no significant labor law reform would take place before WWII. Recommendations put forth by Smith included,

...separation of the NLRB's judicial and prosecuting functions, provisions pertaining to the Board's discretionary power to determine collective bargaining units, a provision preventing the Board from certifying one union as the representative of several plants or units without the consent of each unit involved, tightening the rules of evidence applicable to the NLRB hearings,... a free speech provision permitting employees to discuss labor matters with their employees [and] ...the possibility of a shake-up in NLRB personnel and the substitution of a new five-man [sic] Board for the three-man set-up then in effect. (pp. 180 – 181)

Amidst the rise in Republican power that had not existed since prior to New Deal (Aaron, 1958), the Taft-Hartley Act was passed in 1947 (Cox et al., 2006). Many of the Smith Committee recommendations did eventually find their way into the Taft-Hartley Act (Gross, 1981). Particularly, the decision to divide the organization between the judiciary-like Board and a prosecuting General Counsel was implemented as a way of establishing a method of checks and balances at the NLRB.

Cox et al., (2006) lays forth four specific changes that the new amendment brought to U.S. labor policy. First, the Taft-Hartley Act established that the law itself does have a prominent role in handling labor disputes. This was accomplished by reviving the labor injunction in cases where employees had engaged in violence or intimidation towards employers. Second, the amendment proscribed the government to more closely monitor the bargaining relationship between unions and employers under the theory that the public also has a stakeholder interest in how collective negotiations are carried forth. Third, it placed more power upon the government to oversee how collective agreements are administered.

For instance, Section 301 allows for legal suits in violation of CBAs that may be brought against labor organizations in situations where economic weapons may have been used. Finally, Cox et al. argues that the Taft-Hartley Act changed the government's view on the overarching policy of the Act to promote collective bargaining to protecting employees' right to choose whether or not to be represented by a labor organization.

The final change mentioned above is the point of contention with scholars such as Morris (2012) and Gross (1985), who argue that the Section 7 provision that emphasizes the right to refrain from joining a labor organization does not change the fundamental policy inherent in the Act. Regardless, the primary arguments posited by Congress, the public, and other stakeholders for the passage of the Taft-Hartley Act were largely an effort to curb union power and pacify violent labor actions (Gross, 1981; Lee, 1966). Little discussion exists in the literature that suggests Congressional intent to pass the Taft-Hartley Act was an effort to ensure that workers were allowing their voices to be heard with regard to their preferences for labor representation. An overview of the intellectual themes that led to the amendment suggest that curtailing labor strife and protecting the macro economy were still at the heart of the Act, particularly with regard to ending secondary boycotts and creating sanctions against unions for statutory violations. Interestingly, Congressional critics of the Taft-Hartley Act believed that the amendment would introduce further governmental intrusion into industrial relations (Lee, 1966). President Truman even made this a point of contention in his famous veto of Taft-Hartley.

Congress made its final major amendment to the NLRA in 1959 with the ratification of the Labor-Management Reporting and Disclosure Act, also known as the Landrum-Griffin Act (Cox et al., 2006). As a result of a hearing by a Senate Committee that examined union

corruption, such as embezzlement and engaging in sweetheart contracts with management, the Landrum-Griffin Act originally sought to provide more regulatory oversight upon internal union affairs. Later drafts included further reaching implications, such as outlawing hot cargo agreements (i.e., agreements that prevented unionized employers from handling products manufactured by a nonunion workforce). Unions also benefited from the amendment, which allowed economic strikers to vote in union elections as a precaution against employers hiring nonunion workers who would decertify the incumbent labor organization.

The Landrum-Griffin Act is an arguable less controversial law than the original Wagner Act or the Taft-Hartley Act. It provided a more neutral approach to amending the NLRA, giving some gains to both capital and labor. As such, very little scholarship exists regarding how it changed labor policy, particularly when considering Board case decision making. From a statutory standpoint, the NLRA remains unchanged until this day. The majority of changes to the Act have come about primarily due to policy-making from the NLRB and courts in the form of case law (Gross, 1985; Grunewald, 1991), which lies at the heart of this research project. Next, this Chapter lays forth a discussion about the NLRA's overseeing agency, the NLRB.

## **The NLRB**

### **Role and Structure**

The NLRA is implemented through its overseeing agency, the NLRB, which has the primary duties of investigating and adjudicating ULP cases and coordinating representation elections (Cox et al., 2006). The NLRB is one of many regulatory agencies that were established in the wake of the New Deal (Witte, 1942; Schiller, 2007). Rather than rely on

administration via the already entrenched governmental departments, many of the architects of the New Deal vested the oversight of their policies into new independent agencies (Postell, 2012). These agencies have become associated with a brand of progressivism that places power into what some scholars consider almost a fourth branch of government with rulemaking and judicative powers. Legislators reasoned that an assemblage of these new agencies would be better equipped than the preceding government apparatus in terms of dealing with the dynamic environment of the U.S. welfare system (Fisk, 2009; Tushnett, 2011). They could expedite decisions more quickly than the courts and legislative branch and could employ research to inform decision making rather than tilt to the desires of the current political tide. For the most part, these agencies have been successful at advancing and administering their respective policies while remaining inoculated from political pressures (Weir et al., 1988); although, the NLRB is perhaps a unique case in that it is highly susceptible to political influence (Gregory, 1985) – a point of interest addressed further in this manuscript.

The decision to fashion the NLRB as an independent agency rather than a division of the DOL was met with some contentiousness from legislators and other interested parties (Gross, 1974). The choice to create the Board in the image of other independent administrative agencies had practical and political motivations. Bernstein (1950) articulates that the DOL had historically been viewed as a friend to labor with its primary function to protect the rights of wage earners. Placing the NLRB within the DOL may have called into question the independency of the organization and would have compromised attempts to obtain support from both labor and management with regard to the NLRA. The AFL did officially support the NLRB becoming a part of the DOL, particularly due to previous

positive experiences the union federation had with the department and its Secretary, Frances Perkins; however, AFL President Green's support of such a measure was simply, as Senator Wagner's legislative assistant, Leon Keyserling stated, a "tactical gesture" (Gross, 1974, p. 145). Congress voted overwhelmingly to organize the NLRB as an independent agency during the initial hearings of the original labor bill.

Despite the legislative attention paid to the establishment of the agency that would administer the NLRA, a prototype version of the NLRB existed prior to the Wagner Act as a conflict resolution agency for issues that arose in application of the NIRA's industrial relations policy (Gross, 1974). A continuation of another NIRA board, the National Labor Board (NLB), this NLRB was established under Republic Resolution Number 44, which authorized the President to create investigative boards in labor disputes arising under Section 7(a) that were deemed to be potentially harmful to commerce. This Board, known colloquially as the 44 NLRB, had the ability to conduct secret ballot elections and subpoena documents and witnesses in an effort to fulfill its election obligations. While the previous NLB was primarily a mediation Board, the 44 NLRB was granted judicial powers to solve disputes. Unfortunately, vagueness in Section 7(a) of the NIRA, as well as ambiguity over the Board's actual authority in adjudicating labor disputes and ability to secure enforcement of its decisions, made the 44 NLRB somewhat ineffective. The 44 NLRB was dismantled when the NIRA was ruled unconstitutional in *A.L.A. Schechter Poultry Corp.* (1935).

The modern NLRB was created under Sections 3 and 4 of the Act, while Section 10 established ULP investigation procedures for the Board and gave it the ability to act as both a prosecutor and a judge (Cox et al., 2006). The agency is comprised of two organization components, the General Counsel and the Board itself (Cox et. 2006). The General Counsel,

who is appointed by the President, is in charge of the investigation and issuance of complaint regarding ULPs (Kleeb, 1964). The General Counsel also oversees a number of Regional NLRB offices throughout the various states. The Board, on the other hand, is a five-member quasi-judicial Presidential-appointed committee who rules on the merits of ULP cases that have been appealed from an ALJ decision (Cox et al., 206; Kleeb, 1964). This organizational arrangement was produced via the Taft-Hartley Act (Gross, 1981). Prior to the amendment, the Board and General Counsel were originally housed within the same administrative apparatus. Legislators created separation between the Board and General Counsel because they believed that the Board required its own checks-and-balances procedures.

### **ULP Procedures and Law**

The Board itself does not always have an opportunity to hear all of the cases that are initiated by the General Counsel; in fact, the Board will never hear a case if the General Counsel does not wish to issue complaint against a charged party (Kleeb, 1964). ULP investigations, however, do go through a rationalized and predictable process (see Figure 1).

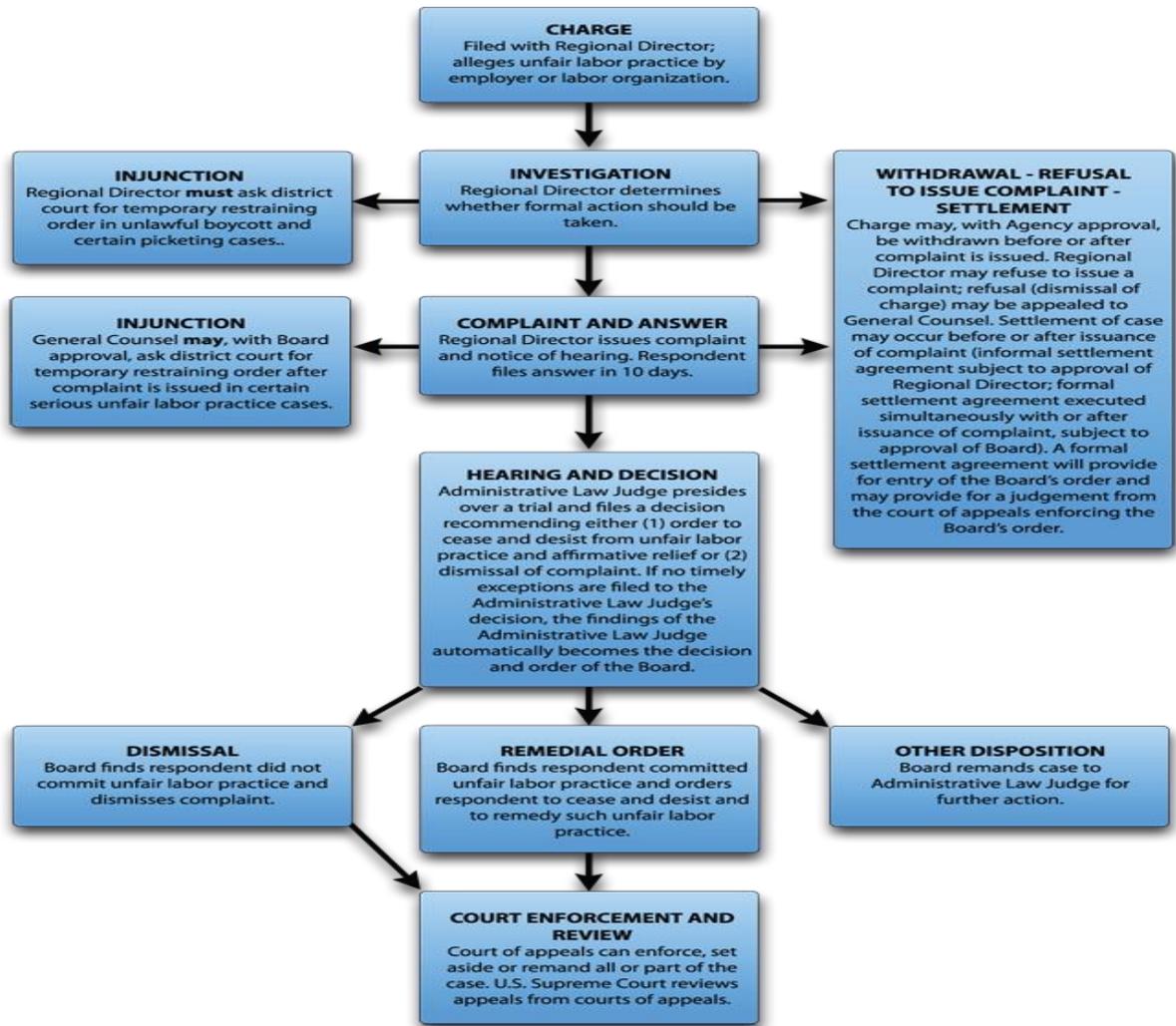


Figure 1. NLRB's ULP procedure (NLRB, n.d.).

The ULP investigation and prosecution procedure begins with an allegation charge being filed with the agency (NLRB, 2013a). The NLRB cannot self-initiate its own investigations (Kleeb, 1964). Instead, its investigatory mechanism is engaged when an outside party, such as an employer, employee, or a union, files a ULP charge with the agency. At this stage, the NLRA does have a statute of limitations. Section 10(b) of the NLRA states that a charge must be filed no later than six months after the alleged ULP has been committed (Cox et al., 2006). After the formal charge has been filed, the NLRB engages in an investigation at the Regional level (NLRB, 2013a). Investigation procedures

are codified and rationalized in the NLRB's investigation case handling manual. At this stage, the Regional Director collects evidence from the charging parties through affidavits, witnesses, and other supporting evidence (Cox et al., 2006). Afterwards, a field examiner or field attorney will ask for a response from the charged party with regard to the allegations previous set forth.

Next, the Regional office will consider the collected evidence and make a decision concerning the prima facie merits of the case (Cox et al., 2006). At this point, several outcomes may occur. If the Region determines that the evidence does not rise to the level for the agency to conclude a ULP violation has occurred, the charging party may be given the opportunity to withdraw the charge before a formal dismissal is issued (NLRB, 2013a). Absent withdrawal, the Regional Director may issue a formal dismissal, detailing the appeals process if the charging party wishes to appeal the Region's decision.

If the evidence suggests a ULP violation has taken place, the Region may then decide to issue complaint (Cox et al., 2006). At this point in the ULP process, before going to a hearing, the parties may wish to engage in an informal settlement procedure (NLRB, 2013a). If the parties reach a settlement that meets the criteria set forth in the agency's compliance provisions (NLRB, 2013b), then the process ends. However, if the parties do not reach a settlement, the Regional Director will continue with issuing complaint and the parties will litigate the case in front of an ALJ, pursuant under Section 10(b) of the Act (Cox et al., 2006). The General Counsel wing of the NLRB acts as the prosecutor in the case with a Regional attorney acting as an advocate. Both parties may submit briefs and give oral arguments.

At both the investigation and complaint level, in order to suspend potential ULP activities until a formal decision regarding the merits of a case have been made, the NLRB may seek injunctive relief from an outside court for certain employer or union practices via Section 10(j) of the Act (Cox et al., 2006). Common reasons for injunctive relief include discriminatory discharges, surface bargaining (e.g., bargaining in bad faith), and violent strikes.

Subsequent to a hearing, the ALJ submits a decision to the Board wing of the NLRB and the charged party (Cox et al., 2006). If no exceptions of the ALJ's decision are filed, then the hearing decision becomes the decision of the Board (NLRB, n.d.). After the ALJ renders a decision, any party, including the General Counsel, may then file an appeal to the Board to reconsider the merits of the case (Cox et al., 2006). Exceptions are then forwarded by the Executive Secretary of the Board to one of the Board members. Afterwards, one of the Board members files a draft decision. Cox et al. notes that three Board members generally consider typical and routine cases. When draft opinions are created, they are also sent to NLRB members not on the Board who then consider whether or not a decision would require a full Board. If cases require a full Board, then a conference is held. After this process, the Board formalizes an opinion.

Board orders themselves do not carry sanctions (Cox et al., 2006). However, each Regional office has a compliance officer on staff who facilitates voluntary compliance regarding a Board decision. Like the investigation procedures, compliance procedures are codified in a compliance manual (NLRB, 2013b). If the charged party refuses to comply with a Board order, the NLRB must then file a petition in a federal court of appeals (Cox et al., 2006). Additionally, a respondent party, either charged or charging, may have the Board's

decision reviewed by a court of appeals. The court then hears the case presented forth, and makes a decision based upon the facts presented within the NLRB's investigation.

Specifically, the court considers whether or not the NLRB's evidence is sufficient to support its conclusion. The ALJ's decision is given considerable weight, as Cox et al. states: "The deference given to the Board's findings is based in part on the fact that the administrative law judge [ALJ] is in a position to observe the witnesses at first hand" (p. 102). The court of appeals may then enforce the original prescriptions of the case or remand the entire or specific parts of the original order (NLRB, 2013b); finally, the Supreme Court may consider the decision rendered by the court of appeals.

As part of the General Counsel wing, the Regional offices are responsible for elections (Cox et al., 2006). Specifically, they investigate representation petitions, hold hearings regarding issues such as jurisdiction, and then oversee the actual election process. However, the Board wing also has the ability to review Regional Director election decisions for the following items:

1. Where a substantial question of law or policy is involved.
2. Where the Regional Director's decision on a substantial factual issue is clearly and prejudicially erroneous.
3. Where the conduct of a hearing in an election case or any ruling made in connection with the proceeding has resulted in prejudicial error.
4. Where there are compelling reasons for reconsidering an important Board rule of policy. (p. 106)

One of the primary features of the NLRB's decision- and case-making function is that the Board is not necessarily required to follow its own precedent (McGuiness, 1963). This

has implications for the analysis and theoretical understanding of this particular research agenda insofar that the Board may follow policy trajectories that historically diverge from one another, particularly if these trajectories interact with an external influence, such as Board member ideology or political influence placed upon the agency (e.g., Gould, 2000; Gross, 1995). For instance, McGuiness (1963) states that former Board Chair, Gerald A. Brown, saw the NLRB as undoubtedly a policy-making tribunal and “would not hesitate, therefore, to reverse a prior policy when it becomes outmoded, is recognized as having been unsound initially, has not worked out as expected, or when experience indicates a better approach” (p. 2). Not being constrained by its former precedent has created much unpredictability with regard to NLRB decision making, even when cases are brought forward that may be factually similar (Flanagan, 1989). However, while the Board is not under an obligation to follow its own precedents, it must still abide by the decisions made by the Supreme Court, which critics argue has helped make the NLRB outdated on some policy issues (Estlund, 2006).

### **Rulemaking Versus Adjudication**

Despite this analysis’s emphasis on the NLRB as a quasi-judicial body that formulates case law, the agency actually has two tools at its disposal for formulating further policy ends (Silverman, 1974). The first is the adjudication method highlighted in the above section. Referred to as the case-by-case method (McGuiness, 1963), this has been the traditional means that the Board has used to create policy when an ALJ decision has been appealed (McHenry, 2011). However, the NLRB is also vested with the power to create agency policy through a process known as rulemaking. The Administrative Procedure Act

(2000) proscribes to certain government agencies the ability to devise rules through a number of procedures that are qualitatively different from adjudication methods.

This section takes a detailed view of administrative rulemaking and its implications regarding the NLRB. The importance of rulemaking is relevant to this project's central thesis insofar that it highlights that the agency has a tool that provides a rather stable and static statement of policy in contrast to the somewhat unpredictable method of adjudication (Estlund, 2002) – a difference that becomes salient and important when consideration is given to how the method of adjudication allows for divergent policy interpretations and opens the door for ideological interests to control outcomes of labor law (Gross, 1985). This section also highlights how rulemaking may actually make policy interpretations of the Act much more of a public affair than would be normally allowed in adjudication, which has relevance when further analysis is given with regard to the external influences upon the Board's interpretation the statute.

O'Connell (2008) delineates four specific forms of rulemaking: formal rulemaking, notice-and-comment rulemaking, legislative rulemaking without comment, and nonlegislative rulemaking. Generally, the first three types of rulemaking have legally binding implications, while the fourth typically lacks legal teeth. Agencies taking part in formal rulemaking often have to satisfy a number of statutory requirements, and the rule is fashioned through a number of "trial-like mechanisms" (p. 900). In *United States v. Florida East Coast Railway Co.* (1973) the Supreme Court held that a statute's inclusion of the words, "...on the record after opportunity for [a] ... hearing" (p. 901) would normally be sufficient for an agency's requirement to engage in formal rulemaking. This legal test was affirmed in *Mobil Oil Corp v. Fed. Power Comm'n* (1973).

According to O'Connell (2008), due to most agencies' statutes lacking this necessary language, most rulemaking actually takes place through more informal means, such as the notice-and-comment or legislative procedures. Notice-and-comment rulemaking begins when an agency posts to the Federal Register an intention to promulgate a new rule. Afterwards, it collects comments from the public, including interested parties and organizations, for the next sixty days. After a consideration of the comments, the agency either withdraws the rule or promulgates a new rule informed by the comments. The final rule must be considered a "logical outgrowth" (p. 901, citing *Weyerhaeuser Co. v. Costle*, 1978) of the original draft, and the agency must issue to the public a discussion of all relevant materials and a concise statement of the rule at least thirty days before it becomes effective. Per requirement of Executive Order 12,866 (1993), agencies promulgating a legally binding rule through the notice-and-comment mechanism must seek approval from the Office of Management and Budget (OMB) prior to final issuance. An agency may skip the comment instrument if it can publicly explain that such a procedure would be "impractical, unnecessary, or contrary to the public interest" (Administrative Procedural Act, 5 U.S.C. § 553(b)(3)(B), 2000).

O'Connell (2008) is rather ambiguous about the definition of legislative rulemaking without comment, though she mentions two relatively recent forms of legally binding rulemaking. First, agencies may issue direct final rules that become effective after the publication of the Federal Register unless "adverse comments are received" (p. 903). These types of rules are issued in order to expedite change with regard to rules that would be considered otherwise noncontroversial. Second, agencies may issue "interim final rules" (p. 903, citing Asimow, 1991) that can be implemented almost immediately and comments may be received afterwards. Agencies generally issue these types of rules in extremely unique

situations, such as emergencies. These informal rulemaking procedures fall under the APA's "arbitrary and capricious" standard (Administrative Procedural Act, 5 U.S.C. § 706(2)(A), 2000). That is, if an agency interprets a statute that is otherwise ambiguous and Congress has allowed the agency to make binding rules, the agency's interpretation will generally be upheld as long as it is not repugnant to the statute (*Chevron U.S.A, Inc. v. Natural Resources Defense Council, Inc.*, 1984).

Finally, agencies are able to publish nonlegislative rules, such as guidance documents, policy statements, and interpretative rules (O'Connell, 2008). While agencies do not have to give prior notice or allow the public to comment on these rules, they are required to publish these statements in the Federal Register. Like the other informal rulemaking procedures, these rules are also subject to the APA's "arbitrary and capricious" standard (Administrative Procedural Act, 5 U.S.C. § 706(2)(A), 2000); however, if any agency interprets an ambiguous statute, rather than receiving deference under *Chevron* (1984), it will most likely receive deference under *Skidmore v. Swift & Co.* (1944) (O'Connell, 2008). That is, it will only receive deference if its rule change is persuasive.

The NLRB's rulemaking powers manifest in the form of the notice-and-comment mechanism (Fisk & Malamud, 2009). However, the NLRB has been extremely reticent to proceed through the rulemaking apparatus as a means of creating policy (Lubbers, 2009). Much of the agency's rulemaking has been used to amend or clarify otherwise noncontroversial or housekeeping items and issues such as appropriate bargaining unit determination. The NLRB's most recent attempt at rulemaking, however, was a divergence from this norm, as it proposed some controversial changes to its election procedures that were intended to streamline the election process, reduce unnecessary litigation, and

implement electronic documenting and filing (McHenry, 2011; Jones, 2011). These proposed changes were subsequently curtailed by judicial injunction (Kisicki, 2012).

The NLRB's preference for adjudication over rulemaking is not surprising, at least when examined through a contemporary lens. While *NLRB v. Bell Aerospace Co.* (1974) prescribed wide discretion to the Board to choose rulemaking or adjudication as its primary policy means, *NLRB v. Wyman-Gordon Co.* (1969) affirmed the Supreme Court's preference for the NLRB to use adjudication instead of rulemaking in most circumstances. The court's reasoning was that the NLRB's rulemaking and adjudication procedures were qualitatively almost inseparable. Such a quasi-form of rulemaking was observed in an earlier case, *Excelsior* (1966), in which the NLRB mandated a new rule that employers were to furnish a list of the names and addresses of employees in a proposed bargaining unit to the union prior to an election so that the union may be able to contact employees and state its case for organization (Bernstein, 1970). This case was unique insofar that the Board did not retroactively require the employer to provide a list to the union. Rather, the Board stated that further procedural election doctrine would require employers to furnish such a list to the union in future representation cases with *Excelsior* (1966) being the precedent-setting case for the rule. In *NLRB v. Wyman-Gordon Co.* (1969), the court viewed the previous *Excelsior* (1966) decision as being an example of the Board making new rules while concurrently engaging in adjudication. The *Excelsior* decision was not wholly setting precedent through the traditional means of stare decisis since the parties to the case were not required to follow the new rule (Bernstein, 1970). Additionally, the new rule was, for the most part, a change in the administrative procedure of operating an election rather than a guiding directive for legal interpretation with regard to a future fact pattern. Perhaps of particular note, this form of

rulemaking does not resemble any of the traditional forms of agency rulemaking (see O'Connell, 2002).

Throughout its history, the NLRB has received criticism from the academic community concerning its choice to largely abandon rulemaking in favor of adjudication (Bernstein, 1970; Estlund, 2002; Estreicher, 1985; Grunewald, 1991 Kahn, 1973; Peck, 1968; Silverman, 1974). Some of this criticism has focused on the rather cumbersome and inefficient mode of change that comes through adjudication rather than its supposed more streamlined counterpart of rulemaking (e.g., Subrin, 1981). However, a vast amount of scholarship has concentrated on the lack of political transparency that would be present with the rulemaking mechanism (Yale Law Journal, 1980). Specifically, commentators argue that rulemaking provides a greater amount of political oversight than adjudication while remaining a more equitable choice of policy creation. This criticism of a lack of a check and balance is not without merit. Board case decisions are often short and shallow in substance (Bernstein, 1970). The primary mode of challenging an adjudication decision would be to appeal the case either to the Board if the decision were made by an ALJ or to a higher court if the decision has come from the Board itself (Cox et al., 2006). This is in contrast to the public dialogue component of the notice-and-comment approach to rulemaking or the legislative influence on other forms of rulemaking (O'Connell, 2002).

The Board's historical predisposition towards adjudication over rulemaking has implications for the themes of this research agenda. Adjudication provides the agency with the ability to formulate policy under the guise of fact-finding (Fisk & Malamud, 2009; Flynn, 1995; Hayes, 2002). By forwarding policy within the nebulous patchwork of facts, the Board inoculates itself from much judicial review and the likelihood of its decision being

overturned becomes less likely (Yale Law Journal, 1980). This may be psychologically desirable for Board members, as judges and judicial bodies often dislike having their decisions overturned by higher courts (Posner, 2010). However, it serves a functional purpose; the NLRB can promulgate ambiguous rules that present flexibility for future cases while concurrently failing to present the courts with a specific statement of policy (Yale Law Journal, 1980). This may prevent the NLRB from having its decision altered by the courts into an inflexible and rigid rule to which it will be bound in the future (Winter, 1968). Related to this idea, proceeding through adjudication may allow the Board to selectively apply certain case law rules to unique circumstances (Yale Law Journal, 1980), such as in *NLRB v. Grace Co.* (1950). Although, the courts have been somewhat perturbed by such inconsistent application of administrative precedent (Yale Law Journal, 1980).

Discussion of adjudication versus rulemaking with regard to the NLRB is inherently a discussion about the political implications of the national labor relations dialogue. Commentators have traditionally thought of the NLRB as a political institution that makes decisions that reflect the changing political tides of the nation (Cooke & Gautschi, 1982; Fisk & Malamud, 2009; Morris, 2012). Through adjudicating under the guise of fact-finding, the agency can successfully hide the ball over the course of many years as it fully develops a policy prerogative (Bernstein, 1970; Yale Law Journal, 1980; Shapiro, 1965). This allows the Board to circumvent a judicial or legislative response to a potentially controversial area of labor law. While the NLRB does have some oversight from the judicial and legislative branches in the form of appeals and Congressional reviews respectively, ambiguity through adjudicating helps prevent external political influence from seeping into the Board's labor law agenda.

This discussion of rulemaking highlights specifically why the NLRB may choose adjudication over rulemaking. Adjudication over rulemaking is a germane topic to this research project since laying it forth in a discussion provides some contextual background on how the soft and dynamic status of competing policy interpretations is allowed to be created and recreated. Adjudication may also provide some barriers to the public when controlling policy that rulemaking may afford. This would have implications to policy interpretation. This thesis is discussed below.

Whereas some political influence may be pervasive in self-contained Board decisions (Gould, 2000), the rulemaking procedure has vast political implications (Yale Law Journal, 1980). The crux of the argument for political transparency with regard to rulemaking centers on creating fairness in the labor relations environment by giving interested parties an opportunity to comment on proposed changes while also having advanced notice of alterations in labor law. Rulemaking, particularly of the notice-and-comment flavor, effectively expands the political scope of the decision making from the Board, which may be politically influenced through the Board members being chosen by the President (Cooke & Gautschi, 1982), to being influenced by members of the general labor relations universe. While the NLRB does accept amicus briefs from parties outside of its cases (Yale Law Journal, 1980), the influence of the public is rather minimal in adjudication when compared to rulemaking that may take into account day-to-day labor relations realities from which the Board finds itself far removed (Estlund, 2002).

Habermas' (1996/2007) theory on the public sphere may have explanatory validity regarding the Board's rulemaking procedures and their implications for directing the interpretation of the Act beyond the scope of the Board and courts. Habermas theorizes that a

political trajectory is often changed through an exchange of ideas within a “network for communicating information and points of view (i.e., opinions expressing affirmative or negative attitudes)” (p. 389) that then become synthesized into a set of attitudes that exist over and beyond any individual. These attitudes then become “public opinions” (p. 389). Public opinions do not directly change political trajectories; instead, that change is facilitated through the structural political apparatus, such as the legislative system. These opinions are not necessarily institutional in their actualization (e.g., a result of specific institutional influence, such as religion). Instead, they operate in a communicative structure that exists within a specifically created social space. While opinions may not necessarily be part of the formal political change mechanism, they do indeed influence political change through their absorption by the political sphere.

The NLRB’s notice-and-comment approach to rulemaking represents an iteration of Habermas (1996/2007) public sphere dialogue. Social space is created through the APA providing an avenue for interested parties to have a dialogue with regard to their views on policy and how best it should proceed. While the public provides commentary on the proposal, ultimately, the agency makes the final decision regarding the rule’s implementation (O’Connell, 2008), which is inline with Habermas’ (1996/2007) statement that the public discourse does not directly enact political change, but rather, influences it through communication.

The implications of notice-and-comment rulemaking to a discussion about NLRA interpretation centers on how public discourse may affect the interpretation of the Act’s purposes. That is, by opening the channels of influence to policy change, the interpretation of the Act’s directives may become further diluted. This is particularly important considering

that the scholarly community, who may have an important and influential voice in a notice-and-comment process, is rather divided about the contemporary purposes of the Act (e.g., Specter and Nguyen, 2008) with many advocating a politically-charged position (e.g., Greer & Baird, 2004). Such advocacy may shape the policy in ways far removed from the Board's original intentions behind proposed changes, especially since rulemaking invites greater Congressional oversight before a new rule is put into effect (Tuck, 2005). Therefore, whereas Board decisions were usually products almost wholly of the Board itself, notice-and-comment synthesizes both the viewpoints of the public and Congress into the decision. While the choice on whether or not to implement a new rule after receiving comments falls primarily on the NLRB, the Board is heavily influenced by how it anticipates Congress' reaction (Yale Law Journal, 1980). Empirical evidence suggests that Congressional members are highly influenced by their constituents (Chressanthis, Gilbert, & Grimes, 1991; McArthur & Marks, 1988).

### **The NLRB and the Law: A Closer Look**

The NLRB is one of a myriad of administrative agencies, including the Securities and Exchange Commission (SEC), that arose during the 1930s as a way of carrying out the intentions of New Deal policy (Tushnet, 2011). While the NLRB is an independent agency in the academic sense, it interacts with the Executive, Legislative, and Judicial branches in a constant assemblage of policy application (e.g., Gross, 1981). Attempts have been made in the past to bring the NLRB under the oversight of the DOL, but these attempts have been curtailed on the grounds that placing the agency within the DOL would then make it a part of the Executive branch and, thus, more open to partisan influence (Gross, 1974; Gross, 1981). This may be a somewhat myopic argument against absorbing the agency into the DOL

insofar that history has revealed that the NLRB can become highly politicized as a result of the Executive branch's influence on the choice of Board members (Gregory, 1985).

While the subject of inquiry in this dissertation primarily deals with Board and court judicial interpretation of the law, an understanding of the macro-level landscape is important to formulating a theoretical imprint of what events and actions influence policy direction after the initial law is put into place – particularly, how the government and public interact to shape the NLRB's approach to legal interpretation. The following sections provide circumstantial and theoretical background that will place the analysis component of this research into a socio-historical context. While this examination is quite in depth, it is done with the purpose of showing how seemingly fickle the Board may appear with diverging interpretations, which paints a background for the deeper analysis entailed in this research. It also articulates a micro-level view of the Board that my data analysis may not necessarily be sensitive enough to explore. I put the historical examination of the Board's administrative history into an empirical context by discussing research findings related to how partisanship and other factors influence policy interpretation, and I finally show how this project fits into a larger theoretical model of factors related to NLRA interpretation.

This section draws primarily draw upon James Gross's (1974, 1981, 1995) volume of books that detail the history of the NLRB, from its inception to its state in the mid-1990s. To date, Gross's history remains the only accessible exhaustive and encompassing narrative of the NLRB. The relevance of this section is to provide an overview of the political and organizational pressures that have been placed upon the agency over the years and have had a major impact on how the Board has changed in its interpretation of the statute and its policy directives. The purpose of this section is to provide a meta-explanation of the factors that

may drive Board interpretation and how policy is created and recreated through its related case law. This section supports my research by showing many of the historical and socio-political factors that have an influence on how Board members interact with the NLRA. In that regard, it provides context for my data analysis.

### **The Board's Administrative History**

The early changes of the Board can be attributed to political pressure as equally – or perhaps more so – than tangible legislation. The original post-NIRA Board in 1935, comprised of Chairman J. Warren Madden and members Edwin Smith and Donald Wakefield Smith, remained rather politically unsavvy with respect to the executive and legislative branches' influence on the agency's organizational destiny (Gross, 1981). Madden, a liberal-minded law professor, often believed, perhaps naively, that by honorably implementing the NLRA, the Board would be immune to partisan influences taking place in Washington, D.C. Arguably the most neutral member of the first Board, Madden was respected and spoke of in the highest terms by parties in both labor and management camps. Unfortunately, Madden's likeableness and loyalty to duty was not enough to prevent the Board from coming under political fire in the later part of the 1930s.

While the early NLRB was primarily staffed with young liberals, Madden's Board colleagues were perhaps a bit further left and more dedicated to activism than the Chairman. The first Board was dedicated to a literal interpretation of the NLRA's stated policy of promoting collective bargaining (Gross, 1981). Board member Edwin Smith exhibited particular zeal for this directive. When he first arrived at the NLRB, Smith displayed no outward ideology informing his interpretation of the Act. However, Board Secretary Nathan Witt, a radical member of the Communist Party, soon influenced Smith and played a major

role in how the Board member saw labor relations playing out in the U.S. Smith almost always advocated a pro-labor position when hearing ULP cases and became noted as someone who consorted with leftist people and causes. While Smith, Witt, and other NLRB employees' dedication to far-left causes was known throughout the NLRB, Madden chose not to take any action regarding these individuals, either because he thought that such allegations were unsubstantiated hearsay or he believed that the political leanings of the Board's members and staff were immaterial unless they had a profound effect on policy interpretation and implementation.

Smith's approach to promoting collective bargaining did earn him the ire of pro-business interests, but ironically enough, much of the criticism mounted against him and the early Board came from labor (Gross, 1981). One of the earliest controversies concerning Board decision making centered on the NLRB's repeated intention to determine appropriate bargaining unit size and structure. The Wagner Act was silent on how to construct bargaining units of employees. Even with a prior history of bargaining between a union and an employer, when a labor organization would petition the agency for certification, the NLRB would place the employees into what it considered the most appropriate unit for bargaining.

This approach to structuring bargaining units had huge implications for the AFL (Gross, 1981), with the federation experiencing a mutiny within a number of its labor organizations that conglomerated and subsequently formed the CIO. Whereas the AFL favored smaller craft unions with specific employee classifications, the CIO primarily consisted of larger industrial unions that represented numerous employee types within single economic sectors. While his colleagues initially disagreed, throughout his tenure at the Board, Smith advocated for the certification of larger bargaining units as a way of promoting

increased collective bargaining (see Smith's dissent in *Allis Chalmers Manufacturing Co.*, 1937). Being structured in a way that favored industrial unionism, the CIO benefited much more than its federation counterpart from this approach to unit appropriation (Gross, 1981). Throughout the second half of the 1930s, the AFL was critical of Smith's philosophy on unit construction and accused him of unfairly favoring the CIO.

Despite earlier disagreements with Smith on the question of appropriate bargaining unit size, Madden and Board member Donald Wakefield Smith eventually concurred with the policy of structuring employees into larger aggregates rather than smaller, craft-specific units (Gross, 1981). In 1938, the Board certified the CIO's International Longshoremen and Warehousemen's Union as the bargaining representative for a large number of employees stationed at five Pacific job locations. In one fell swoop, the Board had placed an almost industry-wide bargaining unit appropriation on employees working for different employers – a move that infuriated the small craft-oriented AFL.

Until the Longshoremen decision, the AFL had supported the NLRB, while still remaining critical towards what it saw as Edwin Smith's – and by extension, the agency's – favoritism of the CIO (Gross, 1981). During early attempts from capital to amend the nascent labor legislation, the AFL had always rallied behind the NLRA and the Board to fortify what labor considered a just and needed law. However, the Longshoremen bargaining unit decision impelled the labor federation to advocate for Wagner Act reformation, even going as far to align with capital in an effort to fully repeal the NLRA – an action that would ironically sow the legislative seeds for the eventual passage of the much less labor-friendly Taft-Hartley Act.

Coming under heavy criticism from numerous interests in the public over how the Board was interpreting and enforcing the new labor law, President Roosevelt, who was originally lukewarm towards the Wagner Act, chose rather than to reappoint Board member Donald Wakefield Smith at the conclusion of his term to instead appoint William Leiserson, who was the chairman of the National Mediation Board (Gross, 1981). Leiserson's confirmation came in June of 1939, prior to a Congressional investigation into the NLRB as a result of labor and capital creating an alliance to dismantle the NLRB and rescind the Wagner Act. Leiserson largely saw his appointment as an opportunity to oust some of the more radical members of the agency, particularly Smith and Board Secretary Witt. Leiserson often accused Witt of incompetence and attempted to persuade his Board colleagues to fire the Secretary. Madden and Smith remained unmoved by Leiserson's arguments to remove Witt, stating that the new Board member had failed to produce persuasive evidence that the Secretary was incapable of performing his job duties.

Leiserson would later deliver critical testimony against the NLRB during the Smith Committee investigation of the agency (Gross, 1981). Headed by Representative Howard W. Smith, along with a few Democrats who were sympathetic to labor, the committee primarily consisted of a number of Republicans who were antagonistic towards labor causes and the Wagner Act. The investigation was largely an attempt to discredit the NLRB in the eyes of the public and fellow politicians rather than an attempt to reach any meaningful understanding of how the agency operated or whether or not it was fulfilling its duty to administer the Act and promote collective bargaining. Committee members were adversarial to NLRB employees that gave testimony while being friendly with witnesses who were critical of the Board and Wagner Act. Testimony favoring the agency was often cast aside,

ignored, or quelled, while committee member Edmund Toland orchestrated evidence unfavorable to the agency to come to light at the hearing just in time for the newspapers to print that day's revelations.

The purpose behind the committee's investigation was to provide the basis for a major legislative overhaul of the Wagner Act (Gross, 1981). Significant proposed amendments included a removal of some of the language guaranteeing employees the right to bargain collectively; increased free speech rights for employers; removal of the Board's ability to conduct economic research; a separation of the General Counsel wing from the Board, and; language that would state employers do not have an obligation to bargain with a union (Bernstein, 2010). While the amendment proposed by the Smith Committee would not come to pass, eventually stalling in the Senate, many of the proposals would later find their way into the Taft-Hartley Act (Gross, 1981).

Despite many of its members, including Chairman Madden, believing the agency to be fully independent and insulated from influence from other areas of government (Gross, 1981), the NLRB experienced its first major shock from something outside of its own sphere of operation. While policy had not been explicitly changed by the Smith committee investigation, ripple effects pervaded throughout the agency and political sphere that would eventually lead to a major change in the policy and instigate a continually modifying narrative with regard to the purpose of the Act. Political pressure had prompted the President to make a change in Board makeup before the hearings, and this pressure remained after the hearings. Marred by the controversial history of the Board of the 1930s, Roosevelt chose to appoint NIRA-era Board member Harry Millis to the Chairman position rather than reappoint Madden, whom the President instead appointed to the Court of Claims.

The appointments of new Board members after the House's investigatory committee hearings marked the first substantial changes to new Board direction and would set the tone for the continually changing interpretation and reinterpretation of the Act that would follow until the present day. Millis's Board, which was more politically conservative than the Madden Board, reversed some of the precedents established by its predecessor (Gross, 1981). Whereas the Madden Board was informed by an almost ideological predisposition to deciding cases, Millis stated that "enforcing a law should never become a crusade" (p. 228). The Chairman and Leiserson took a methodological approach that stressed practicality in decision making – an approach that often put the two Board members at odds with Edwin Smith. A notable disagreement between Smith and his colleagues came about when Millis and Leiserson overturned an NLRB precedent that strike-breakers who took struck employees' jobs during an economic strike were not permitted to participate in the election of a new union. In *Rudolph Wurlitzer Company*, (1941) Millis and Leiserson reasoned that if strike-breakers were denied the right to vote in elections, the economic power scale would be tipped towards unions and employers would be placed at a disadvantage. Smith dissented, stating that the NLRB was not concerned with equalizing the relative rights of employers and employees during a labor dispute.

Further decisions made by Millis and Leiserson, often over the protest of Smith, bestowed greater rights upon management (Gross, 1981). For instance, the Millis Board reversed a Madden Board precedent that unilateral changes over wages and working conditions, even when they were arguably beneficial to employees, was a ULP. The Madden Board reasoned that allowing employers to make unilateral changes, even when ultimately beneficial to employees, would undermine the credibility of the incumbent union. The Millis

Board, however, decided that such unilateral changes would be permissible as long as the employer continued to bargain in good faith with the union (*Western Printing Company*, 1941). Even before the passage of the Taft-Hartley Act and a codified set of union ULPs was created, the Millis Board established responsibilities upon unions while rejecting statutory protection for unions and union employees (Gross, 1981). For example, the Board allowed an employer to discharge an employee who presented a demand for a wage increase on behalf of a group of employees, to discharge picketing employees when labor relations between the employer and union were amicable and the employees had not exhausted contractual remedies, and to fire a leader of a union during a dispute for disrupting production while still wearing a union button.

The White House reacted favorably to what it saw as Millis and Leiserson's "warm moderate" (Gross, 1981, p. 239) approach to the Wagner Act's interpretation. When Smith's term expired, President Roosevelt chose not to reappoint him, agreeing with Secretary of Labor Perkins that "it was essential that we be rid of Smith" (p. 239). Perkins believed that over the years Smith had fundamentally changed in his political outlook from being a moderate Democrat to a radical – an allegation that Smith confirmed to his friend Perkins, stating that seeing the great injustices of the American industrial complex had caused a shift in his ideology and in turn, his application of the NLRA. Roosevelt felt that a Board comprised of members completely removed from the original Madden Board would be the best course of action in the current political climate. In lieu of renewing Smith for another term, the President instead appointed Gerard D. Reilly, solicitor, of the DOL – a move that garnered support from both management, who had been highly critical of the NLRA and

Madden Board, and the AFL, who saw a complete change in Board membership as being an important move away from what the federation had seen as a pro-CIO NLRB.

Reilly originally began his career as a liberal but had grown disillusioned with what he saw as a far leftism in many of the people whom he admired (Gross, 1981). His appointment represented the first time in which an ideological conservative was commissioned to the Board. Herbert Fuchs characterized Reilly's Board tenure as being a "spokesman for industry" (p. 241). Whereas Millis and Leiserson approached case decision making from a practical standpoint, hoping to inoculate the NLRB from external pressures originating from Congress, business, and the AFL, Reilly took on an almost legalistic approach to deciding ULP disputes. This philosophy often created friction between the Millis-Leiserson dyad and the new Board member, which may have been exacerbated by Leiserson's general distaste for lawyers and their approach to dispute settlement. Millis and Leiserson found a legalistic approach to ULP cases rather inflexible and incompatible to a practical application of the Act; more so, they saw Reilly as being influenced by a conservative ideology, which they believed was just as destructive to the NLRB as was the left ideology that permeated the previous Board and its staff.

Before the conclusion of World War II, Leiserson resigned from the Board to return to his previous post at the National Mediation Board and was replaced by John Houston (Gross, 1981). Prior to his appointment to the Board, Houston was an industrialist who had been engaged in the lumber business and then served as a mayor in Kansas, followed by a tenure as a Democratic member of Congress. Initially, Houston's Board decision making record was marked by consistent agreement with Reilly. However, later in his tenure, he

began to form a majority with Houston and became what Business Week (n.d., as cited by Gross, 1981) referred to as “the most consistent pro-labor member of the Board” (p. 246).

When Millis resigned in 1945, President Harry Truman appointed Paul Herzog as Chairman of the NLRB (Gross, 1981). With his practical experience in labor relations as a mediator and arbitrator, Millis had been a stabilizing force for the NLRB by garnering approval from both management and labor, which was especially important to the Board after navigating the political pressures brought upon the agency around the time of the Smith Committee investigation. His successor would also act as a stabilizing force for different reasons. Herzog was a very adroit bureaucrat who understood how to successfully move within the complex bureaucratic apparatus of the U.S. government. This was in stark contrast to the previous Chairmen, such as Madden, who were uninterested in the political dimensions of operating an administrative agency. Herzog criticized both Madden and Millis for not taking more pro-active roles in the political aspect of NLRB operation. While he considered Madden honorable, he thought the first Chairman’s approach to remain out of the political spotlight was naive. Herzog reasoned that Millis, on the other hand, simply detested publicity and that Millis would have thought that pandering to the public would have been below the former Chairman’s station. In contrast to the former Chairs, Herzog saw public relations for the NLRB as being “utterly essential” (p. 147), and therefore, worked hard to improve the NLRB’s image with the Washington press corps and Congress.

In addition to his bureaucratic and public relations experience, Herzog was not an ideologue (Gross, 1981). The Chairman criticized the Warren and Millis Boards, saying that they had moved too quickly in applying the NLRA in a way that was ideologically more progressive than the public. In order to assure a more moderate production of decision

making, Herzog stated that “the great problem was to slow it down in such a way that we didn’t swing over into the Reilly position, which would have been terribly reactionary had we gone that far” (p. 147). Herzog’s dedication to consummate neutrality was evidenced in his concurring opinion in *Packard Motor Car Company* (1945), in which the Board determined that foremen were not supervisory employees under the Act and were therefore able to organize into an appropriate bargaining unit. He stated that opinion was an “attempt to sit on the fence without having the spikes going into me” (Gross, 1981, p. 147). As someone who viewed himself as a neutral, Herzog also wanted to avoid editorializing or lecturing in Board decisions, criticizing previous Boards for being self-righteous when delivering ULP case opinions.

Herzog’s conscientiousness regarding the Board’s public image informed many of his case decisions (Gross, 1981). Reilly’s replacement, James Reynolds, remarked that Herzog was extremely sensitive to how an NLRB decision would be embraced by actors within “the political community, the labor community, business community, etc.” (p. 248). Due to such case-making strategy, many of the Board’s decisions moved interpretation into a more conservative direction. Herzog simply saw such movement as a flexible change in the precedent of NLRB casehandling. The Chairman viewed the making of new labor policy as being inline with historically changing conditions in the workplace and economic world, which helped distance his Board from the precedents set by previous Boards:

The present members of the Board are acutely aware of the fact that all the solutions that seemed appropriate under the industrial conditions that existed some years ago need no longer be followed in administering an act [sic] that wisely permits flexibility and gradual change. (p. 248).

Even before the passage of the Taft-Hartley Act, Herzog's Board began fashioning case law that granted more rights to employers (Gross, 1981) – of particular note was a liberalization of employer's free speech rights. Madden's Board had maintained a strict policy that employers were to remain neutral during a union organization campaign, since the Board reasoned that any anti-union communication from the employer was ultimately coercive and interfered with the employees' right of free choice to choose a union. The Millis Board had eased this precedent by declaring that not all employer speech necessarily adulterates the union selection process, which was a decision affirmed by the Supreme Court in *NLRB v. Virginia Electric and Power Company* (1941). The Herzog Board permitted employer's to distribute a myriad of types of communication critical of unionization (Gross, 1981). Further restrictions were placed upon unions and employees in the domains of striking, trespassing, and bargaining. These precedents represented a fundamental change from previous NLRB doctrine that held protecting employees' right to bargain collectively as paramount to an "equalization" (p. 249) of the Wagner Act that balanced the rights of employers, employees, and unions.

Herzog's attempts at portraying a more neutral Board to the public's eye were not transparent, especially to Millis. The former Chairman criticized his successor's Board as bending to political interests and adhering to a conservative mode of enforcement of the Act (Gross, 1981). Specifically, Millis stated that the Board had become so influenced by outside political forces that it would consciously time the issuance of case decisions regarding certain important questions of policy in relation to Congressional actions. Further, the former Chairman charged that the Board had fallen back into a legalistic interpretation of the Act that waited for the courts to comment on interpretative issues rather than "seeking to lead the

courts as an expert agency as the Board had done earlier by its decision” (p. 250). In essence, Millis criticism centered upon a belief that the Board had become less militant in its application of the NLRA and instead had become a politically reactionary agency. Ironically, as Gross pointed out, the Board’s political sensitivity began with Millis’ tenure after he had the task of rebuilding the NLRB’s image after the Smith Committee investigation. The Board had substantially changed in its approach to effectuating policy as a result of both Millis and Herzogs’ influence as Chairmen.

Eventually, the consequences of the Smith Committee investigation became actualized in the form of the Taft-Hartely Act (Gross, 1981). World War II had taken the government’s attention away from the NLRB’s issues raised during the investigation, but with the war subsiding and unpopularity with labor unions growing due to a series of strikes and increase in wages – and therefore, costs of commodities – the U.S. was adjusted towards a major change in labor policy. Always the savvy politician, Herzog attempted to prevent a change in national labor policy by addressing the House and Senate labor committees. Unlike the Madden Board’s adversarial tone when brought before the Smith Committee, Herzog made a point to be peaceable:

I thought the only thing to do was to save the institution. The Board simply had to be saved...and the only thing to do was not try to convince them that we were always right and not to refuse to admit for a moment that we were wrong where I thought we were wrtong...if we could only get out of this thing regarded as resonable men...not wild-eyed crusaders. (p. 256)

Herzog reasoned that if the Board’s case had been presented in a more belligerent manner, the agency would have been “swept away” (p. 256). Unlike the high level of publicity

surrounding the testimony of NLRB Board members and staff during the Smith Committee investigations, Herzog's testimony received very little attention in press. The Chairman even secretly met with a number of President Truman's advisors in order to plead his case against amending the Wagner Act. Herzog told Truman that the impact of the Taft-Hartley Act's amendments would not only change the Wagner Act "as a shield for workingmen [sic] but converted it into a sword used to combat their collective action" (Gross, 1995, p. 11), while making administration of the law difficult for the NLRB. However, he soon realized that many of the major political players did not share his views on labor policy and an amendment to the Act was most likely inevitable (Gross, 1981).

The Taft-Hartley's provisions concerning employee free choice immediately came to the attention of the Chairman. Herzog believed that, if all of the individual components of the Taft-Hartley Act were cumulative, the consequence would be an undermining of the Act's philosophy that collective bargaining should be encouraged (Gross, 1995). Paying special attention to Section 7 of the Taft-Hartley bill, he observed that the new Act attempted to garner the attention of Congress to treat the right to refrain from joining a union as just as important as the right to join a union. Herzog disagreed with this policy, stating that "such [equalizing provisions] do not belong in an Act [ i.e., the Wagner Act] which was intended to equalize bargaining power by encouraging the self-organization of workers, and not to equalize all rights as between members of the community" (p. 13).

Even before the Taft-Hartley Act had gone into effect, supporters and opponents of the amendment positioned themselves to influence the NLRB (Gross, 1995). Unions strongly considered boycotting the agency, though the AFL and CIO eventually put more serious thought into a policy of purposefully violating the new NLRA as the federations ramped up

their legal counsel to challenge the constitutionality of the Taft-Hartley Act. Congress also planned for a post-Wagner Act landscape, hoping to expel members of the Board – Herzog, Houston, and Reynolds – who had administered the NLRA prior to the new amendment, and instead, place members on the Board who would vigorously carry out Taft-Hartley while consulting with a Joint Congressional Committee on Labor-Management Relations. Herzog feared that troubling times laid ahead for the Board, especially since Hartley had publicly admonished the current Board, believing that they were unfit to administer the NLRA in its new form. The Chairman also feared that his influence on drafting some more liberal Republican bills to curtail passage of the Taft-Hartley Act would come to public light.

Herzog put his political abilities to work and engaged in a tour of congressional visits to portray the image that the NLRB was a moderate agency (Gross, 1981). As a political play to convince Taft, who still remembered the evidence of CIO bias revealed during the Smith Committee hearings, of the Board's neutrality, he attempted to rally support of labor and asked President Green of the AFL to testify that the NLRB no longer held a disposition towards the CIO. The opposition to maintaining incumbent Board members greatly increased after the amendment's passage. Having serious reservations about his ability to administer what he saw as an anti-labor law, Herzog remained ambivalent on whether or not he should resign from the Board. President Truman asked him not to resign, and Taft told labor-friendly Republican senator Irving Ives that he trusted the Chairman and would refrain from attacking Herzog or Truman. In light of these meetings, Herzog decided to remain at the Board.

One of the major structural changes to the NLRB brought about by the Taft-Hartley Act was a division between the Board and the General Counsel (Gross, 1995). Previously, Board members had been chosen by the President, which created political implications for

how the Act was interpreted and enforced. Additionally, the new General Counsel position was to be filled by a Presidential appointee. Controversy erupted then when Truman chose a highly aggressive conservative NLRB trial examiner, Robert Denham, to be the first General Counsel of the post-Taft-Hartley NLRB. Board member Reynolds had recommended Denham to the President because, as Herzog stated, “he wanted a more pro-employer administration of the Act” (p. 19). Reynolds stated that he recommended Denham and believed that the first General Counsel “had to be a very direct, tough guy, with a deep conviction that Taft-Hartley was the greatest thing since the Magna Carta” (p. 19). Despite initial reservations, Herzog and Houston agreed that Denham would be a good choice. However, Herzog and Denham would often come to blows over their interpretation of the Act as amended by Taft-Hartley. Political actors at the time speculated that Truman had appointed a person as conservative as Denham, not only as a move to shield himself from allegations that he was leaving implementation of the Act in the hands of someone anti-Taft-Hartley, but to subvert the amendment by appointing a General Counsel who was a conservative ideologue, thus leading to public outcry for a repeal of the Act due to Denham’s zealous application of the law.

In addition to separating the functions of the Board and the General Counsel, the Taft-Hartley Act also expanded the Board from three members to five members (Gross, 1995). Copeland Gray and Abe Murdock were appointed to the two newly created vacancies. A Senate Labor Committee, chaired by Taft himself, took part in the confirmation hearings to fill the Board and General Counsel vacancies. During these hearings, Taft-Hartley supporters rallied to establish power over the new Board and General Counsel. This power permeated insofar as interpretation of the new NLRA. For instance, when asked if he believed that his

responsibilities as General Counsel were in line with a requirement to consult with the Joint Committee regarding the interpretation of the Act before he took a final position on the question of interpretation, Denham answered that “it would be a privilege to do it” (p. 22).

The Committee did not question Gray and Murdock about their philosophies on reporting to the Joint Committee but did probe their ideological perspectives with regard to the new amendment (Gross, 1995). Gray displayed only a very elementary understanding of the law and stated that his primary interest in administering the Act was helping to improve labor relations between employers and employees so that the former may garner higher profits while the latter concurrently accrued higher wages. Despite the ambiguity of his answer, Senator Joseph Ball was the only committee member to display any concern about Gray’s position towards the Act. Murdock brought forth much questioning from Ball. The former House Representative and Senate member stated that his basic disposition towards labor relations was more congruent with a Wagner Act-era philosophy. Ball criticized Murdock for being a holdover of the New Deal era and asked how he, who had been historically opposed to the Taft-Hartley Act, could give the new NLRA “sympathetic administration” (p. 24). The former Congressman replied that the law did not need sympathy, but rather, objective administration. Congress did not act one way or another regarding confirmation of the three new nominees before adjourning. Instead, President Truman gave them recess appointments and they were sworn to their respective offices in August of 1947. Truman was accused of attempting to undermine the Taft-Hartley Act by filling the Board with members who were critical of the Taft-Hartley Act or who were otherwise incompetent to successfully administer it.

Conflict immediately arose as the Board began administering the NLRA with the new Taft-Hartley amendment (Gross, 1995). Congressional members were critical of the Joint Committee's influence on the NLRB's ability to interpret and enforce the Act. The initial friction that arose between the newly separated Board and General Counsel further exacerbated this distrust. In the first year of the Taft-Hartley Act's existence, the Board only decided cases that were pending before the amendment. The Board did not decide any case that dealt with the nascent union ULP provisions that had been added to the Act.

Congressional members' distrust of the political influences on the NLRB contained merit. Joint Committee criticisms subsequent to a Board decision were explicitly intended to push NLRB interpretation and NLRA policy into a specific direction (Gross, 1995). The Committee began commenting simultaneously with each and every Board decision. This influence became most salient in 1948, when Senator Taft and the Joint Committee's chief counsel, Thomas Shroyer, intervened on the behalf of a number of newspaper employers after a union had been served with an injunction for violating the new NLRA provision that outlawed the closed shop arrangement. The press and politicians had viewed the union's ULP as a purposeful violation in protest to the Taft-Hartley Act, and Taft wished to assure the newspaper employers that this case was the Board's most integral case, because "it stood as a symbol to many members of the Congress and he believed, to the public, of the effectiveness of the enforcement machinery of the statute" (p. 38). Without personally calling the Senator out by name, President Truman admonished Taft for putting pressure upon the NLRB and stated that it was improper for the Legislative branch to overstep its bounds in such matters. Truman concluded his statement by reminding the NLRB to remain cognizant of that statement while exercising its duties.

Earlier critics of the Board had posited that the agency was under the undue influence of liberals, labor, and other politically left interests (Gross, 1995). However, the Joint Committee's influence revealed that the Board's external pressures had not been ameliorated. They simply originated from different political interests. Attempts were made in the late 1940s to amend the NLRA to have its language align more closely with that as first laid forth in the Wagner Act. Senator Taft even offered concession to alleviate some of the Taft-Hartley provisions. The proposals during this time period either failed to become law or were instead amended a decade later into the Landrum-Griffin Act. During this time, Congress had the opportunity to dispel any ambiguity that was present in the NLRA and U.S. labor policy over the concern of collective bargaining versus individual rights. Unfortunately, it failed to provide clarification and for the ensuing decades, the interpretation of the Act became predicated upon the partisan interests that held control of the NLRB at any given time with Republican administrations appointing Board members that interpreted the NLRA to be a policy of protecting employees' right to choose and Democrats appointing members who believed the Act was a policy to promote collective bargaining (e.g., Gould, 2005; Gross, 1995; McGuinness, 1963). This trend has continued to the present day (Morris, 2012).

### **Politics and Empirical Findings**

While the above discussion delineated how macro-level political pressures can influence Board composition, which in turn affects Board interpretation, in the post-Taft-Hartley era, political interests have had an influence on individual Board members' decision making. Former Clinton-era NLRB Chairperson, William Gould (2000) provided some insight into how day-to-day Board operations interacted with partisan politics in Washington, D.C. He observed that because the Board has traditionally been comprised of labor attorneys

and career bureaucrats rather than academics or promoted Regional staff, they would make decisions that may be perceived as favorable to one or another ideological interest that held the possibility of future employment after the expiration of a Board member's term. For instance, Board members who fashioned decisions that were favorable towards business may have been looking to impress law firms that represent management, while members who decided cases friendly towards labor may be hoping to impress unions that would be looking to hire counsel. Likewise, career bureaucrats may have been attempting to curry favor with a particular political administration that had placed a former Board member in a government position.

Gould's (2000) experience at the NLRB relates to Posner's (2000) argument that judges are less likely to follow a political party line when reappointment or reelection is not a consideration with respect to their tenure. Gould (2000) found that recess appointments in which the President appoints Board members while Congress is out of session were oftentimes problematic. The President would appoint Board members with the hope that the legislature would confirm them when it met again for a new session. Gould stated that recess appointed Board members would often stall on issuing controversial decisions until their confirmation because they did not want to raise the ire of the partisans in Congress to whom a decision may infuriate and, thus, block their confirmation.

While the Executive branch, for the most part, took a hands-off approach to the Board during his tenure, Gould (2000) experienced significant attempts from Congress to influence Board case decision making. This attempt at influence increased when Republicans became the Congressional majority during the Clinton administration. Congressional members would infer that certain outcomes should take place with regard to cases on the Board's docket,

either by sending letters directly to the Board or through articles in the press. Gould, however, found that the majority of pressure on Board decision making came during annual Congressional budget committee meetings, where the Chairman would feel animosity from an unfriendly Republican majority that may not have been pleased with certain Board decisions. Interestingly, Gould inferred that Congress would often put pressure on the Board in order to satisfy their constituents. In that regard, the public was in a round about way trying to influence Board policy.

Gould's (2000) experience of political ideology influencing Board member voting preferences has been corroborated by numerous studies (Cooke, Mishra, Spreitzer, & Tschirhart, 1995; Delorme, Hill, & Wood, 1981; Delorme & Wood, 1978; Flynn, 2000; Moe, 1985; Scher, 1961; Turner, 2006). However, when did ideology begin to play such a salient role in NLRB politics? Partisan ideology, while always quietly in the background of labor board appointments, was relatively noncontroversial during the first two decades that the Act was in existence (Flynn, 2000; Moe, 1987). Presidents chose appointees who had work experience in the government or academia rather than in management or labor law firms, and aside from the initial post-Taft-Hartley hearings as discussed above, the Senate rarely raised an eyebrow when confirming candidates. This arrangement became upset during Eisenhower's administration when the President appointed former management attorney Guy Farmer to the Chairman position and industrial relations director Albert Beeson to another Board opening. While Farmer's appointment was confirmed without much dissent, labor criticized Beeson's selection, contending that his management background would negatively influence his partiality. Labor went on to state that it had never pursued the appointment of a labor representative. Despite the controversy of Beeson's appointment, Eisenhower chose the

first ever management attorney, Theophil Kammholz, to fill the vacant General Counsel position.

More than a decade later, over the protests of the AFL-CIO, President Nixon followed Eisenhower's lead by appointing management lawyer Edward Miller to the Board, while President Ford continued the trend of culling Board members from industry (Flynn, 2000). Despite the attorney appointment pattern set forth by Eisenhower, Nixon, and Ford, Presidents Kennedy, Johnson, and Carter chose to fill vacant Board seats with people who did not originate from management or labor backgrounds. Although they did choose some Board members from areas of management, until this point, the Republican Presidents did not attempt to staff all vacant seats with members from industry. This changed during President Ronald Reagan's administration – a move that arguably set the pattern and tone for highly ideological Board appointments made by both Republican and Democratic administrations to this day.

Up until the 1980s, both major political parties did not want to appoint overly controversial Board members and General Counsels because they believed that doing so may be political disadvantageous when attempting to appoint latter candidates (Flynn, 2000; Semet, 2013). Reagan broke with the tradition of appointing recognizable and mainstream Board members who, while sympathetic to an incumbent administration's political disposition, were firmly rooted in the everyday reality of labor-management relations and not highly ideological in their approach to dealing with management or unions (Flynn, 2000; Moe, 1987). Instead, he appointed members such as John Van de Water, Donald Dotson, and Robert Hunter, who were largely unknown in the industrial relations community and had professional histories of operating union avoidance campaigns and maintaining close ties

with anti-union politicians such as Jesse Helms and organizations such as the Heritage Foundation. The AFL-CIO helped successfully block Water's confirmation after he served a year and a half recess appointment, as well as conservative Rosemary Collyer's nomination for General Counsel; however, labor was less successful with blocking other Reagan appointments. Upon the President staffing the NLRB with highly ideological management-side professionals, the AFL-CIO President Lane Kirkland wrote a letter to Senate Labor Committee Chair, Orrin Hatch, stating that labor would no longer respect the defacto unspoken rule of seeking Board appointments from government and academia and would instead seek the appointment of ideologically-driven members:

In the past . . . we sought [the] appointment of individuals who . . . had not been the agents of management or labor. It has been our considered position that this degree of forbearance is necessary in the interest of assuring both justice and the appearance of justice in a highly adversary field. . . . These nominations . . . are the final evidence that ... there will be no reciprocal restraint. I wish, therefore, to state that as a matter of practical self-protection we hereby renounce our prior position in this regard. Like our management counterparts, we will no longer bind ourselves with any limitations and we will act on the premise of this Administration - that appointees to the Board need not have a significant record in the field but only need be ideological supporters of the tendency in power. (Kirkland, 1983 as quoted by Flynn, 2000, p. 5)

The pattern of appointing ideologically acceptable NLRB members continued during President H. W. Bush's administration, with the appointment of Board members Clifford

Oviatt and John Raudabaugh and General Counsel Jerry Hunter, all whom were recruited from management attorney ranks (Flynn, 2000). The AFL-CIO, perhaps experiencing a sense of defeat, chose not to oppose any of Bush's selections. The President did not entirely select all candidates from areas of management, however. He nominated a member of the Labor Department, Donald Rodgers, who, prior to joining government service, had extensive experience with the Teamsters and Operating Engineers. The National Right to Work Council opposed Rodgers's nomination. He appeared set to be confirmed until an allegation arose accusing him of pressuring the NLRB to settle a pending case against the Teamsters during his tenure as a White House aide.

By the 1990s, President Clinton's Board and General Counsel choices continued in much the same way as those of his Republican predecessors, and as Flynn (2000) points out, at this point, the selection of partisans had become routine. Clinton chose both management- and labor-side attorneys to fill vacant Board seats, while choosing two labor attorneys to fill the General Counsel position during his presidency.

Flynn (2000) argues that during the Clinton years, Senatorial control over the Board appointments dramatically increased, which has led to the existence of highly partisan Boards. During earlier confirmations, interest groups, such as the AFL-CIO and Chamber of Commerce, often influenced Senators insofar that they received short lists of potential nominees from constituents or, in lieu of this list, were able to exercise a limited veto over the opposition's candidates. Any extreme candidate choices were tempered by the President's desire to choose more moderate candidates. Flynn theorizes that the President's more moderate appointment selection is a function of having to appeal to a wider demographic of voters than what Senators generally experience. For instance, while a Republican President

may want to choose a management-friendly Board member to appease the party's pro-business base, the AFL-CIO still remains a major player in national politics and could cause headaches for the Executive in the future. Ergo, it is in the President's best interest to select Board and General Counsel candidates that the opposition party approves or at least tolerates. Senators, however, deal with much narrower constituencies, which can make pressures from regional special interest groups particularly persuasive. This arrangement may place Senators in a position to be more likely to endorse candidates who hold extreme industrial relations views.

Prior to the Clinton years, appointments were chosen by the President on an individual basis and then confirmed one at a time by the Senate (Flynn, 2000); even when multiple vacancies existed, concurrently considered candidates were each given a separate confirmation hearing. During the mid-to-late 1980s, NLRB vacancies began to be filled via packages – a practice that then became routine during the Clinton era. The package process represents a fundamental change from the single-nominee process in which Presidents and Senates previously engaged. Senators began using their power to forestall Presidential nominations by exercising Senatorial holds, which are requests often backed by a threat of filibuster, for the Senate leadership to delay going forward with a specific action. Senators may exercise holds over Presidential NLRB nominations until a list of the opposite party's candidates are generated, thus compelling the President to acquiescent to the Senate's nomination demands in order to push the original candidate's nomination through a successful confirmation. In recent years, Senators have requested holds, even after Senate Labor Committees have approved nominations, in order to generate packages that are desirable to their constituencies. Flynn contends that this package system has been

instrumental in appointing ideologues to the Board by ensuring that the President's more moderate choices are bundled with the Senate's more extreme choices.

While Flynn (2000) posits a cogent theory explaining how an increase in partisan members to the Board took place over the years and Gould (2000) and Gross (1981, 1995) provide experiential and historical accounts of ideology informing NLRB decision making, how much does ideology actually play a role in NLRB policy creation? Scher (1961) provided one of the very first examinations of NLRB decision making. Reviewing Board selection during the Eisenhower years, he concludes that the President's choice of Board members was politically motivated and an attempt to change labor policy. However, as Taratoot (2013) notes, Scher's (1961) work does not necessarily explore policy outcomes of Board selection. DeLorme and Wood (1978) do probe policy outcomes as a function of Board selection. Through examining member voting during the Eisenhower, Kennedy, Johnson, and Nixon administrations, they conclude that partisanship is predictive of case decision making – an effect that continues even after the appointing President was no longer in office.

Earlier studies were rather simple in design, with few variables under consideration. Contemporary research into the ideology question has introduced complex multivariate studies that provide the basis for deeper analysis while perhaps introducing further ambiguity into understanding how the role of ideology influences decision making. Delorme et al. (1981) finds that in addition to Board members' party affiliation, their history of previously being Board staff members also contributes to case voting. In a later study, Cooke and Gautschi (1982) find that even when building a model including other variables, such as member age and area of origin, partisanship is still a salient predictor of voting record.

However, Cooke and Gautschi's model may suffer from multicollinearity that could have reduced the observable effect of individual independent variables while still preserving the explanatory power of the model.

Moe's (1985) study represents an introduction of systems thinking into investigations of Board decision making and outcomes. Whereas previous scholars (e.g., DeLorme & Wood, 1978; Scher, 1961) primarily examined how President's chose Board members who were ideologically-desirable, which led to votes in ULP cases that favored either business or labor, Moe theorizes that public and economic circumstances in the external environment influence political actors in controlling Board voting outcomes. This conceptualization mirrors much of Flynn's (2000) thinking with regard to how, Presidents and Senators, influenced by their different constituents, engage in a sometimes-contentious struggle to appoint favored Board members and General Counsels. Moe (1985) conceives a top-down system in which the external environment produces shocks that filter through politicians, down to the Board, which then drives labor policy. When Board members make decisions on a policy question, these decisions permeate the rest of the agency, all of the way down to the Regional level, and the NLRB then becomes homogenous in its position on a particular policy question.

Whereas Moe (1985) produced a top-down theory of NLRB decision making, Taratoot (2013) instead conceptualizes a bottom-up explanation, giving particular attention to ALJs' influence on Board voting. He found that, while partisanship does play a role in Board voting, ALJs' decisions have a greater effect on appealed outcomes with Boards usually concurring with the original ALJ decision, regardless if the decision favors management or labor. Cooke et al. (1995) reach a similar finding, but argue that ideology may play a greater

role in complex cases when the NLRB is held accountable to the public. Taratoot (2013) tested this assumption using Cooke et al.'s original model and finds that ideology does factor in decision making during complex cases, but partisan influence is still overshadowed by the ALJ rulings.

In his qualitative study, Secunda (2004) concludes that ideology plays very little role in Board decision making. He theorizes that through collegial decision making, individual Board members reach conclusions that are not necessarily reflective of their political allegiances. However, it is important to note that Secunda's case sampling examined a very narrow legal issue, the inherently-destructive conduct test. Taratoot's (2004) and Cooke et al.'s (1995) examination of ALJ decision making may provide understanding of these findings. The inherently-destructive standard is more or less a legal test for determining if, in lieu of evidence of animus, a party's actions are destructive to employer or employee rights (*NLRB v. Great Dane Trailers*, 1967). While the NLRB can overrule prior precedent (Turner, 2006), its policy is to not overturn ALJ decisions on the basis of factual matters (*Standard Dry Wall Products*, 1950). While applying the inherently-destructive standard does require an examiner to make a value judgment, reaching such a conclusion is largely contingent upon the factual circumstances brought forth. Therefore, Board members may be less likely to disagree with ALJ decisions (e.g., Taratoot, 2013). While Secunda's (2004) study provides a unique counter-perspective to previous findings that suggest partisanship plays a role in board decisions (e.g., Scher, 1961), a wider range of case types need to be considered using his method.

Corroborating Taratoot (2013) and Cooke et al. (1995), Semet (2013) finds that both ideology and ALJs' original decision are influential in case outcomes. Whereas much

previous research has examined ideology or partisanship simply as an independent variable to determine if it has an impact on cases (e.g., Scher, 1961), Semet (2013) compares voting patterns between parties. Somewhat predictably, she finds that adding a Democrat to an otherwise majority Republican panel had the effect of increasing the likelihood of overruling an ALJ decision that favors management, while adding a Republican to an otherwise majority Democrat panel increased the likelihood of overruling an ALJ decision that favors labor. All Republican panels and all Democrat panels were more likely to affirm an ALJ decision that favored their respective party lines. This finding may lend credence to Secunda's (2004) contention that congeniality plays an important role in Board decisions, since homogenous panels would have less reason to engage in congeniality due to already having ideological similarity. Interestingly, while many scholars studying NLRB policymaking have targeted their criticism towards Republicans (Flynn, 2000; Gross, 1981; Morris, 2012), Semet (2013) found that even though Republicans were more likely to vote in favor of management when considering all case types, they still did not vote along ideological lines nearly as often as did Democrats.

The review of literature on ideological voting reveals evidence that the Board has engaged in partisan decision making even though its original design was to be non-partisan. This has been particularly apparent during the latter part of the Twentieth Century and continues into the Twenty First Century (e.g., Flynn, 2000; Turner, 2006). The studies addressed above have been mainly preoccupied with decisional outcomes – that is, whether decisions benefit labor or management. None of these studies have given substantial attention to the NLRB's specific statements of policy, particularly with regard to the ambiguity introduced by the Taft-Hartley Act to which historical thinkers, such as Gross (1995) and

Morris (2012), have given global attention. My research aims to contextualize the empirical studies on NLRB decision making, along with the historical policy work, to provide a structuration analysis of the changing policy narrative. The following section considers the literature and couches my research agenda within an outlined framework.

### **Research Design**

The preceding historical overview of the NLRB and its engagement with the NLRA provides context for the more specified research core of this research project (see Figure 2). One of the inherent themes that arose from the historical narrative was that the NLRB, when left to its own devices, is a relatively self-sufficient organization. It generally only requires occasional Board member and General Counsel appointments from the President and budgetary appropriations from Congress (Gould, 2000; Gross, 1995). This level of equilibrium is keeping in spirit with the Board's status as an independent agency. Nonetheless, in practice, the Board does not operate independently. Its creation and enforcement of policy is highly influenced by elements that exist outside its immediate organizational and social sphere. These influences may directly influence how the Board produces policy in the form of case law.

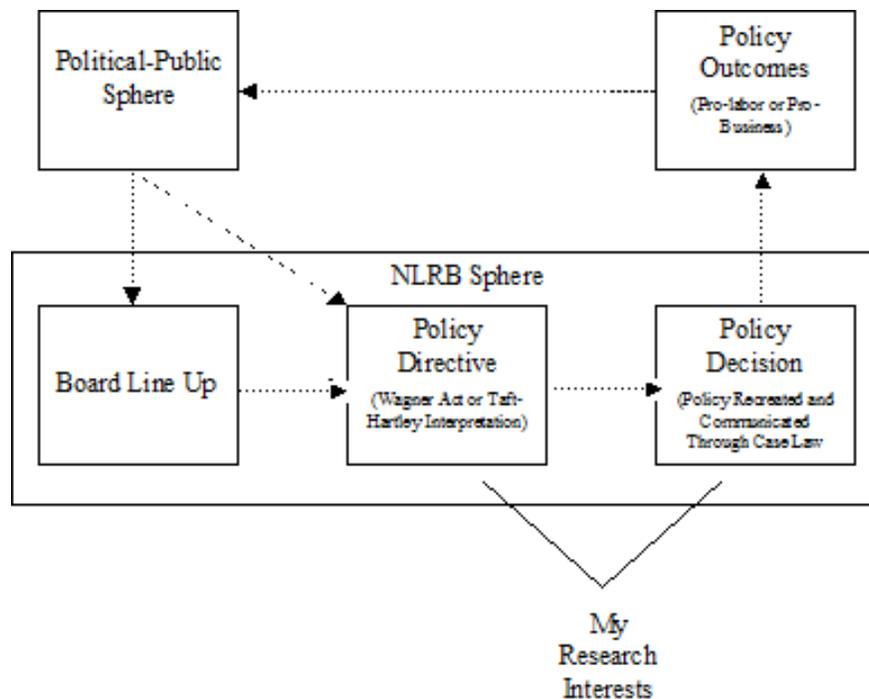


Figure 2. Socio-political map of policy influence.

The political-public sphere comprises all three branches of the U.S. government, as well as the public domain, which includes private individuals, businesses, and unions. While these systems and actors can be deduced further and their relationships analyzed, for the conceptual purposes of this research, they can be treated as a monolith that has a direct influence on the NLRB. For instance, while individual actors may not have direct influence on the NLRB, they can still influence it through election of politicians that do produce direct pressure upon the agency due to a policy outcome that resulted from a policy decision.

The political-public sphere influences Board policy in two very salient ways. First, the Executive branch appoints or reappoints Board members, while the Legislative branch confirms the President’s choices (Gould, 2000). This has an effect on the NLRA insofar as Board members have shown that they are often informed by a political or ideological disposition (e.g., Gross, 1995). In essence, the policy directive represents the predisposition

of a case decision. Once Board members are confirmed, their influence becomes self-contained within the NLRB system. That is, they create and recreate policy that is reinserted into the agency in the form of a narrative of case law. The policy directive represents the Board members' political disposition and ideological dispositions, and more specifically, their interpretation of the NLRA as being informed largely by the original Wagner Act or by the latter Taft-Hartley Amendment. The policy decision represents the tangible product produced by the NLRB: case law and the policy that is inherent within it.

The political-public sphere influences Board policy in another way. The Legislative Branch has been shown to attempt to influence policy by making direct demands upon the agency (Gould, 2000). It often does this by creating an intimidating situation during budget appropriations hearings. This is represented in the model by the diagonal arrow approaching the policy directive, creating what may be a case law predisposition. Further influence in the political-social sphere originates from the Judicial branch. While the Board has great freedom to reverse its own precedents, it must often follow the precedents set forth by the courts, specifically the Supreme Court (Estlund, 2006). Therefore, the diagonal line also represents judicial influence upon the policy directive of the Board.

This is an incredibly simplified model. It does not consider the policy implications that take place at the NLRB's Regional level, which adds much complexity and is beyond the scope of this research project. However, it provides a causal explanation of how policy interpretation may change when couched within the larger domain of U.S. labor law. The intricacy and magnitude of what causes the interpretation of the NLRA to change is beyond the availability of the data available to me, but this model provides context for the relatively small snapshot of my research. Whereas the model informed by the scholarly literature

provides an explanation of *why*, my research will incorporate the application of structuration theory to provide an explanation of *how* policy is influenced. Specifically, my interests deal with the policy directive and policy decision boxes in the above model. With respect to the policy directive box, my analysis is poised to reveal whether certain interpretations were informed by a Wagner Act policy of promoting collective bargaining or a Taft-Hartley Act policy of protecting employees' rights to choose labor representation and equalization of rights between employers and unions (or perhaps some other policy interpretation). With respect to the policy decision box, I plan on determining if the language confirms specific policy interpretations and how this has created a policy narrative throughout the history of the Act. Chapter III describes the methods that will be used to conduct this research.

### **Chapter Summary**

Giddens's (1979/2007) structuration theory will provide the theoretical framework for the analysis of this research. Structuration theory facilitates deep contextualization of many of the principles inherent in previous legal philosophy thinking and can be very useful for summarizing how the creation and recreation of policy takes place in a social world, such as the U.S. administrative and judicial systems.

The socio-historical narrative of the NLRA is one fraught with controversy and contentiousness between varying interests (Cox et al., 2006). Its origin was largely a reaction to the economic and social upheavals that took place in the U.S. during the early and mid 1930s. Various philosophical, economic, and social theories informed the passage of its original iteration, the Wagner Act, as well as its subsequent amendments, most notably the Taft-Hartley Act.

The NLRB oversees the NLRA and polices the business and labor interests over which the Act holds jurisdiction (Cox et al., 2006). Comprising of two organizational components, the Board and the General Counsel, the NLRB investigates and rules on ULP allegations, in the process fashioning case law and policy directives that impact the labor relations domain in the U.S. The NLRB has traditionally chosen adjudication over rulemaking as its primary policymaking vehicle (McHenry, 2011). This choice has far reaching implications, since adjudication allows for more dynamic and unpredictable policy, as well as recreating the Board's penchant for choosing competing statutory interpretations.

Historically, the Board has experienced pressures from other governmental bodies, such as Congress, during the fulfillment of its duties (Gould, 2000; Gross, 1995). These impacts may have an influence on case law and policy outcomes. Scholars have contended that the Board is receptive to partisan and ideological influences (e.g., Moe, 1985), which have an impact throughout the entire agency when creating and recreating policy. A model of internal and external influences produces a research design that highlights the specific area of interest with regard to this project.

## Chapter III

### METHODS

#### **Introduction**

This research project seeks to examine the varying policy narratives inherent in the associated body of NLRA case law. Specifically, the following research questions are considered:

1. Have statements of policy been reflective of the language inherent in the Act and/or statements of Congressional intent, or have they instead been statements of policy that are not related to the original intentions of the Act?
2. What statements of policy and themes have Board members and jurists communicated in their interpretative decisions?
3. Have legal opinions stated in cases become precedent setting in subsequent cases that deal with legal questions similar to those found in the leading cases?
4. Has it been the courts, the NLRB, or all judicial and quasi-judicial bodies that have either affirmed or diverged from the Congressional intention of the Act?
5. To what extent is there evidence that labor law judicial actors' statements of policy direction are inherent in the written opinions of case law (i.e., have actors provided statements regarding their interpretation of the Act's overarching purpose)?

The data collection and analysis of this project was based on a qualitative foundation. Specifically, legal artifacts were coded and the emergent themes used to inform my analysis of the data. I conceptualized this as a policy research initiative informed by a qualitative content analysis that takes both deductive and inductive approaches to answering the research questions.

Rentko and Anderson (n.d.) define policy research as a subcategory of the broader discipline of policy studies. Largely developed by Weir et al., (1988), policy research examines the socio-historical factors that have influenced the trajectory of policies of interest. Rentko and Anderson (n.d.) contrast this with policy evaluation, which seeks to

determine whether or not a policy is effectively meeting its goals and servicing its intended stakeholders, and policy analysis, which attempts to determine if an alternative policy from the incumbent policy would be better suited to solving a specific social problem. This research project falls under the policy research category insofar that it is primarily interested in the social construction and reconstruction of policy directives over the course of time.

A qualitative content analysis is the driving analytical mechanism of this policy project. Content analysis is a research methodology that allows an investigator to make inferences from text to the contexts in which these texts reside (Krippendorff, 2013). Originating from studies on propaganda and political opinion research, content analysis has become an important epistemological tool for researchers to deduce the deeper meanings communicated through text material that may not otherwise become readily available to an observer engaged in a casual reading of the documents.

Krippendorff (2013) lays forth six primary components of a content analysis:

1. Unitizing: relying on definitions of relevant units
2. Sampling: relying on sampling plans
3. Recording/coding: relying on coding instructions
4. Reducing data to manageable representations: relying on established statistical techniques or other methods for summarizing or simplifying data
5. Abductively inferring contextual phenomena: relying on established analytical constructs of presume models of the chosen contexts as warrants

6. Narrating the answer to the research question: relying on narrative traditions or discursive conventions established within the discipline of the content analysts (p. 84)

Some content analysts, such as Berelson (1952), posit that content analysis should be a quantitative endeavor; such approaches to content analysis largely adhere to postpositivist axioms in which coded data is converted into numerical data and analyzed via statistics (Hsieh & Shannon, 2005). For this project, such an approach to content analysis may be somewhat problematic due to the constructivist elements of the research questions and subject of inquiry. However, Krippendorff (2013) states that while quantification can often be applied successfully to a content analysis, qualitative approaches to data analysis are also valid. Whereas researchers conducting quantitative content analysis rely on statistics for analytical conclusions, researchers approaching content analysis from a qualitative viewpoint place more emphasis on language meanings and the content and context of words (Hsieh & Shannon, 2005).

Hsieh and Shannon (2005) delineate three specific approaches to qualitative content analysis: conventional, directive, and summative. Conventional content analysis shares some similarities with grounded theory (GT) insofar that researchers begin with few preconceived ideas about the nature of the data, instead choosing to discover what categories arise through coding of the texts (Birks & Mills, 2011; Hsieh & Shannon, 2005). In contrast, directive content analysis takes a much more deductive approach in which the analyst uses preconstructed coding categories, often informed by theory or the literature, that is applied to the data. Finally, summative content analysis requires the analyst to engage in word

frequency counts and then further interpret the meaning of these words as used by their authors.

This research project synthesized both the conventional and directive approaches in order to help answer the prescribed research questions. I chose a dual-approach in order to gain a fuller understanding of the subject of inquiry that using a singular approach may not have provided. Since much scholarship has discussed policy judgments made by jurists and Board members over the course of the NLRA's history (e.g., Gross, 1985; Gould, 2000; McGuinness, 1963; Morris, 2012), working from a purely inductive perspective, such as the conventional approach proscribes, would be somewhat intellectually dishonest by ignoring the extant body of literature when applying an analysis; this is the reason I did not consider GT, which seeks to build theory from the data in the absence of prior knowledge (Birks & Mills, 2011), an appropriate method for this study. On the other hand, policy themes may exist in the data corpus that have not been widely considered by previous scholars.

Discovering some of these possible themes would help answer some of the research questions and provide another avenue to analyze the NLRA via structuration theory. A directive method allows me to work deductively with prescribed themes to answer research questions 1, 4, and 5, while a conventional method would aid an inductive approach to answer research question 1, 2, and 3.

### **Ontological Considerations**

This research project is conducted from a social constructivist ontological point of view. Social constructivism assumes that people seek to understand the worlds they inhabit (Creswell, 2013). This ontology assumes that human experience is subjective and people may

hold different meanings and interpretations with respect to their social worlds. Crotty (1998, as cited by Creswell, 2013) outlines three important assumptions of constructivism:

1. Meanings are constructed by human beings as they engage with the world they are interpreting.
2. Humans engage with their world and make sense of it based on their historical and social perspectives.
3. The basic generation of meaning is always social, arising in and out of interaction with human community. (pp. 8 – 9)

Constructivism is often contrasted with postpositivism, which assumes a universal reality that, while not wholly knowable due to the fallibility of human knowledge, can be measured through systematic inquiry and logical deduction to arrive at some understanding of the world (Creswell, 2013; Monette, Sullivan, & DeJong, 2011). Although methodology does not necessarily imply a specific ontology and vice-versa, postpositivist research is often quantitative, and seeks to predict phenomena whereas qualitative research often seeks to explain or understand it (Richards & Morse, 2007). I am primarily dealing with how people have constructed, deduced, and replicated and modified meaning over the course of time. Therefore, the constructivist paradigm is most easily applicable to a research agenda that is primarily concerned with how people create meaning within a socially constructed system – that system in this case being a quasi-judicial social apparatus predicated upon people's understanding of the texts and symbolic language that reside within that particular social sphere. In that regard, I am not interested in seeking any form of universal truth that exists outside of the intersections of human interaction.

## **Methodological Congruence**

Richards and Morse (2007) state that the investigator should ensure that congruence is maintained throughout a qualitative research study. In other words, a researcher should make certain that the research questions, theory, data type, methodology, and analysis all logically conform to one another in order to drive the research agenda and produce defensible knowledge. While a phenomenological study assessing Board members' and judges' thought processes when deciding cases would provide an excellent insight into the process of how policy is communicated through legal reasoning, I do not have access to that type of data. Therefore, I used artifacts and archival data in the form of case law, Congressional hearings, and the NLRA itself as data. These types of data are theoretically congruent insofar that they provide a socio-historical narrative that demonstrates how policy has been communicated throughout the lifetime of the law. Applying a qualitative content analysis informed by constructivist ontology helps to ensure that the study maintains methodological congruence. Finally, the research questions drive the methodology and sampling strategies rather than the inverse.

## **Structuration and Research**

Giddens (1984) suggests that all social research has a “cultural, ethnographic, or anthropological aspect to it” (p. 284). This personal ontology informs what he refers to as the double hermeneutic. Giddens conceptualizes the double hermeneutic as the predisposition that cultural symbols, languages, processes, and institutions are interpreted at two different levels. The first level describes how social actors interpret their worlds and the symbols and institutions that reside and facilitate interaction within these worlds. The second level describes how social researchers interpret actors' interpretations and then provide analytical

context for how actors interact with their social worlds. With consideration of the double hermeneutic, Giddens forwards that the aim of social science research is to communicate new knowledge that may have been otherwise inaccessible to social actors.

Giddens (1984) is rather liberal in his philosophy of structuration theory's relationship towards specific methodological paradigms. He has been hesitant to advocate that structuration has a monopoly on any specific method or mode of analysis and in his advocacy of the theory and has provided examples of both qualitative and quantitative research that were heavily informed by structuration principles. However, Giddens largely views quantitative and qualitative research as encompassing a false dichotomy; specifically, he argues that all forms of so-called quantitative data still require qualitative interpretation. Therefore, applying structuration theory to a qualitative research undertaking, such as this project, is not ontologically or methodologically problematic.

This research project is largely based upon what Giddens (1984) refers to as an institutional analysis. An institutional analysis is an analytical paradigm that holds in suspension the awareness of social actors and examines institutions as continually reproduced rules and resources. This is in contrast to what Giddens refers to as an analysis of strategic conduct, which works in much the opposite way of institutional analysis, instead holding in suspension the reproduction of systems, rules, and resources, while giving particular attention to actors' usage of discursive consciousness as they interact with their worlds. Since the available data for this research project preclude a more phenomenological approach to analysis which would allow for an examination of individual actors' cognitive processes as they interact with the labor law domain, an institutional analysis is more desirable than an analysis of strategic conduct. That is, this project investigates and analyzes

how policy is created and recreated, treating it as a dynamic system of social reproduction. While actors' discursive consciousness cannot be considered with this particular project, political disposition, which is theoretically important to this research, can be collected and is part of my analysis.

Although institutional analysis is a powerful approach to applying structuration theory to research, Giddens (1984) cautions researchers from making a fatal error with this paradigm. He states that those who view institutional analysis as largely being the goal of all sociology are confusing a methodological approach with an ontological predisposition. That is, institutional analysis, since it holds actors' discursive consciousness in abeyance, may lead investigators to overemphasize predictability at the cost of social agency. Giddens maintains that social phenomena may indeed be predictable, but researchers must keep in mind that the actors perpetuating such phenomena are not static, even if the analysis is not concerned with their individual psychology. All analyses should be treated as though social phenomena happen because of actors' intentionality within the flow of social life.

### **Conventional Sampling**

As stated earlier, the content analysis of this study derives its application from both inductive conventional and deductive directive approaches (Hsieh & Shannon, 2005). Each approach was applied to both the analytical and sampling strategies of this study. With regard to the conventional approach, purposeful sampling was used to create a body of data from a number of legal cases that are important in the industrial and labor relations case law sphere. Purposeful sampling refers to the inclusion of an item or participant in a sample based upon some predetermined feature or criteria that the item or participant possesses (Monette et al., 2011). Purposeful sampling is appropriate for this study, because while much research is

interested in representing a collectivity of people whose data can be generalized from a sample to a population, content analysis seeks to focus on the specific texts that are relevant to answering the research questions (Krippendorff, 2013). Case importance was determined by a case's inclusion in significant labor law texts, such as Cox et al.'s (2006) labor law primer. Cases were obtained from the NLRB database located within the Westlaw research architecture (Westlaw, 2014). Westlaw's NLRB database includes case decisions made by the Board and ALJs. Court cases were sampled from law textbooks as well as Westlaw. In instances where these cases are abridged, full versions were located from other origins. Sampled cases were then included in the conventional content analysis (see Figure 3).

### **Conventional Areas of Inquiry**

The NLRA has a vast area of case law with which it is associated. Much of it is rather pedestrian and non-controversial. However, a number of cases exist within the policy's history that are controversial, precedent-setting, defining of NLRB investigatory procedure, or are otherwise relevant to an analysis of the socially constructed reality of the policy. However, a number of areas of case law are important to creating an analytical narrative of the policy; these cases drive the conventional content analysis portion of this research project. The following list includes the cases that were chosen for the conventional wave of the content analysis.

*National Labor Relations Board v. Jones & Laughlin Steel Corporation* (1937) – In this case, the Supreme Court confirmed that the NLRA was constitutional. Of specific interest is the court's reasoning that the NLRA is constitutional on grounds that overseeing interstate commerce is within the purview of the federal government. More precisely, the court reasoned that even if the nature of the business is largely intrastate, Congress still has

an interest in overseeing what could be construed as obstructions to interstate commerce.

Regarding this dissertation, this case is of interest due to it confirming the part of the intention of the NLRA as defined in its preamble to protect shocks to interstate commerce.

*United Steelworkers v. American Mfg. Co.* (1960); *United Steelworkers v. Warrior & Gulf Navigating Co.* (1960); *United Steelworkers vs. Enterprise Wheel & Car Corp.* (1960) – Known colloquially as the Steelworker’s Trilogy, the court affirmed in these three cases that arbitration would be the primary method of solving labor disputes. Of specific interest, these cases deal with the movement to ultimately make labor strife a private, rather than a public, affair.

*Dubo Manufacturing Corp.* (1963); *Collyer Insulated Wire* (1971) – These two cases, along with their associated case law histories, established an NLRB procedure to defer certain ULP allegations back to the parties’ grievance-arbitration procedure. This has analytical interest for two reasons. First, as noted above, it deals with making labor strife a private affair. Second, it deals with the promotion of collective bargaining, since deferrals take place after a collective bargaining agreement has been established between parties.

*NLRB v. Gissel* (1969) – This case dealt with two important policy issues. First, it affirmed an employer’s right to voice opinions about unionization during an organizing drive so as long as those opinions are not coercive or false. Second, it laid forth the circumstances in which the Board may secure a mandatory bargaining order without an election. This case is important due to its ubiquity throughout labor law history.

*Wright Line* (1980) – This case established an NLRB procedure for dealing with dual-motive cases. That is, *Wright Line* set a precedent that employers who discipline employees for union activities may not have committed a ULP if they can establish that they also had a

legitimate business reason for disciplining employees, such as for poor performance. This case is important to this research insofar that it deals with an attempt to equalize power between unions and employers, which was something the Taft-Hartley attempted.

*Communications Workers of America v. Beck* (1988) – This case established that employees covered under collective bargaining agreements that contain union security clauses and require dues or agency fees can ask to have these monies diverted away from investments not directly related to collective bargaining – for instance, support of certain political candidates. This case has analytical interest due to balancing the promotion of collective bargaining rights with the individual rights of employees.

*Dana Corp.* (2007) – This case established the practice of employers voluntarily recognizing a union without a secret-ballot election. If an employer chooses to do so, the NLRB will post a 45-day waiting period in which employees can petition to decertify the union or certify a rival union. In *Lamons Gasket Co.* (2011), the NLRB reversed its original decision and established that a secret ballot election will be the primary method of determining employees' desire to be represented by a labor organization. The *Dana Corp.* history is interesting to this analysis due to it dealing with the policy contention between employees' choice and promoting collective bargaining. Also noteworthy is the NLRB reversed its decision after the failed EFCA bill stalled in Congress. EFCA would have also modified the secret ballot election doctrine (Nissen, 2009).

### **Directive Sampling**

Since this research will largely strive to show the creation and recreation of policy over time, the directive portion of the content analysis contains a much more complex sampling strategy (see Figure 4). First, cases were purposefully sampled from Westlaw using

two criteria. The first criterion led to cases that feature policy issues and directives that have been articulated in the scholarly literature. Krippendorf (2013) advocates using predetermined search terms when sampling from electronic databases. Search terms and phrases for this study included, “promote collective bargaining,” “reduce labor strife,” or “employee free choice.” Search terms and phrases were modified during sampling to return increased results. The purpose of the strategy of using specific search terms was to reduce the dataset by including cases with policy issues that would help answer the research questions while screening out cases that may not be relevant to the research questions or the scholarly literature. The second criteria for purposeful sampling was based upon the Presidential administration during which the cases were decided. Since the President appoints NLRB Board members and General Counsel, NLRB decisions have often been reflective of the ideological predispositions of the Executive branch administration (Gross, 1995). Sampling based upon Presidential administration helped ensure that cases are represented throughout the history of the NLRA.

After cases had been sampled and analyzed, a snowball sample informed by many of the original cases was taken. Snowball sampling refers to a strategy in which the inclusion of participants or cases in a study will lead to acquiring more participants or cases (Monette et al., 2011). The name of a case that has been analyzed was used as a search term to discover further cases that have cited the original case. Likewise, cases cited in the original case that have implications of policy or a relationship to the stated legal opinion were often sampled. These new cases served for further analysis and used as sources for additional snowball sampling. The purpose of this approach was to construct a legal opinion thread across cases that represents the communication of policy intentions over time. Related cases that were

sampled during the original purposeful sampling procedure were simply aggregated in the data without necessarily being derived from a snowball sample.

### **Unitizing**

Unitizing is an aspect of sampling specific to content analysis. Unitizing refers to the choice of what area of text upon which to focus analysis after an item has been included within the sample (Krippendorff, 2013). For this study, all sections of a case had been read; however, the legal opinion and any concurring or dissenting opinions (if present) were unitized for coding since these sections were most likely to contain legal reasoning and statements of policy interpretation that important to answering the research questions.

Any additional materials needed for analysis, such as Congressional hearings, the NLRA itself, and my own memorandum, were purposefully sampled from their relevant archives.

### **Coding and Analysis**

Coding was the primary tool exercised to facilitate data analysis in both the conventional and directional waves of this study. Codes are simply symbolic annotations applied to textual or visual data as a means of delineating a summarization or essence of the object of inquiry (Saldana, 2009). Coding is the transitional step in qualitative research that prepares data for deeper analysis and helps the investigator recognize patterns within the data. As codes are applied and developed, similar or patterned observations can be grouped into categories. These categories can then be used to form the basis of thematic interpretation of the data or as the building blocks from which theory may be constructed. A process known as code weaving was used during the analytical portions of this study as a means of reconstructing the data. Code weaving refers to taking key code words and categories and

arranging them into a narrative form that helps explain the themes and outcomes of the data analysis. A codebook was constructed during data analysis that provides my own coding rules and guidelines, code descriptions, and a brief example of specific coded texts (see Appendix A).

The purpose of applying a conventional approach during the first phase of the study was to investigate if other policy motifs have arisen in the NLRB case law that may not have been considered in previous scholarship. No predetermined codes or categories were applied to the data at this stage. Instead, first cycle and second cycle coding had been used to develop analytical categories and derive themes from the data (Saldana, 2009). First cycle coding includes those codes that are applied during the initial stages of data coding. They generally do not facilitate deep analysis, and instead, help to break down the data into more manageable analytical units. Second cycle codes are advanced coding approaches that allow synthesis and reanalysis of the data that was first organized through first cycle coding. The ultimate goal of second cycle coding is to create a coherent narrative of the data.

When sampling, coding, analysis, and consideration of the research questions are configured together, a methodological model of a content analysis may be derived. Texts and research questions exist within a specific context (Krippendorff, 2013). The context refers to the world that texts inhabit and in which they are able to communicate meaning. An analyst must be able to take this context into consideration when reaching inferences about a data corpus. The context in this study is the socio-political world of United States private sector labor law.

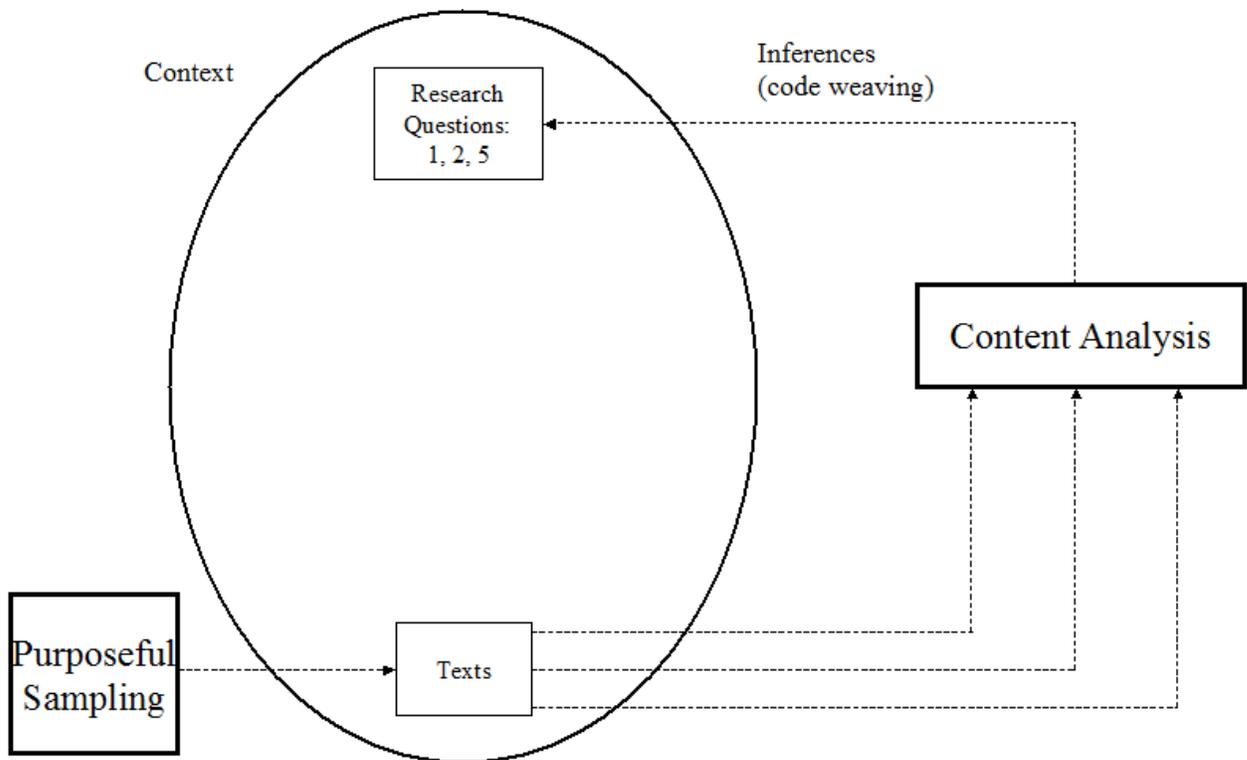


Figure 3. Conventional content analysis model (modified from Krippendorff, 2013).

From the conventional content analysis, themes were derived from codes and then constructed and analyzed with respect to the context in which the texts inhabit. While many quantitative content analysts report findings in tables or as numerical figures, Krippendorff (2013) states that qualitative analysts generally choose to report findings by providing quotations of the texts and constructing a narrative that contextualizes the data.

The purpose of the directive content analysis is to answer the research questions that deal more specifically with structuration and the continued recreation of policy through case law. I worked more deductively during this wave of the study by deriving my sampling and coding strategies from knowledge present in the literature. Elaborative coding, a secondary cycle coding strategy, facilitate much of the data analysis during the directive content analysis (Saldana, 2009). Elaborative coding is a coding approach that is informed by prior

research and facilitates a top-down rather than a bottom-up position of analysis (Auerbach & Silverstein, 2003, as cited by Saldana, 2009). Categories were derived from the literature as well as reused from the emergent categories developed during the conventional content analysis phase of the study.

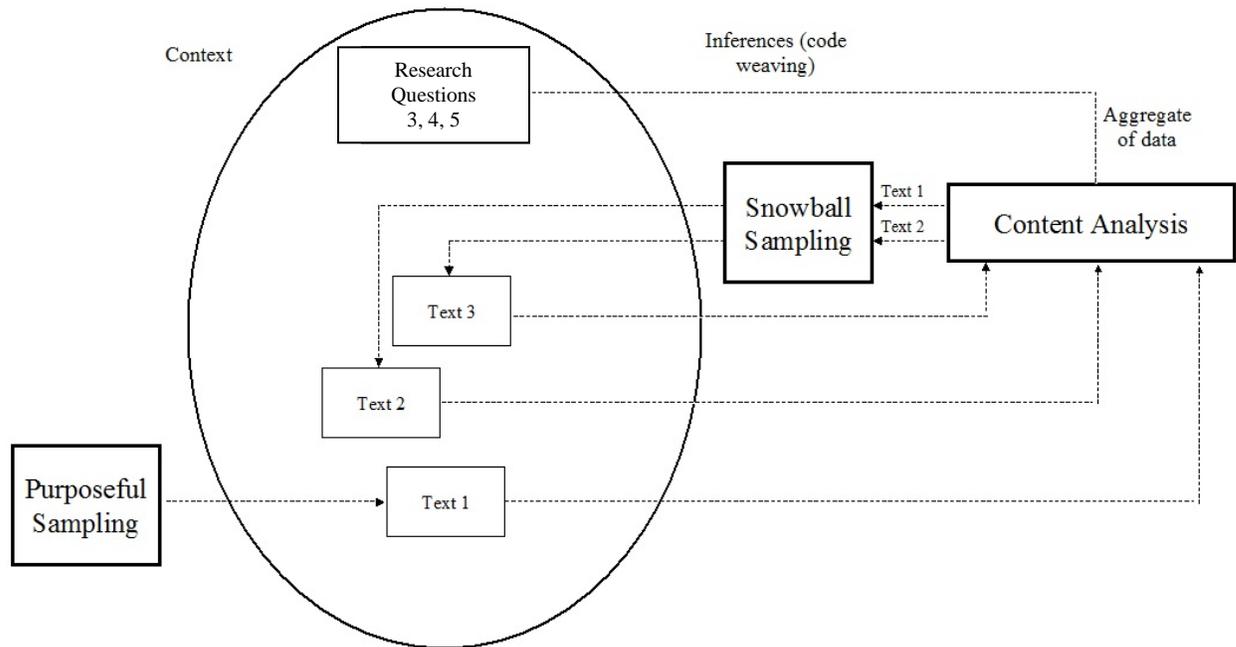


Figure 4. Directive content analysis model (modified from Krippendorff, 2013).

The main feature of the directive content analysis model in this study is the continual snowball sampling that provides the necessary data to make inferences about the creation and recreation of policy. Specifically, when a case is sampled and analyzed, the cases that the jurists or Board members cite in support of their legal opinions, as well as the future cases that cite the originally sampled case, can be coded to determine if similar categories and themes are inherent throughout that particular thread of cases. In such circumstances, these cases were then reconstructed through code weaving and a narrative of their salient policy themes were constructed.

## **Credibility**

Content analysts who perform research from a postpositivist perspective with quantitative methods treat reliability and validity much like other quantitative researchers (Krippendorff, 2013; Monette et al., 2011). Emphasis is placed on establishing internal, content, convergent, and predictive validity. Additionally, quantitative content analysts strive to be completely transparent in order to ensure that their findings are replicable by other independent researchers (Krippendorff, 2013). However, since this study follows a qualitative paradigm, many of the methods used to validate a quantitative content analysis may be inappropriate and lack congruence with the other aspects of the research. Therefore, I find that establishing research validity that is traditionally established in qualitative projects to be a more desirable course of action. Validity – or credibility as it sometimes is known – in qualitative research refers to the extent that an investigator can be assured of the correctness of description, conclusions, and interpretation of the research undertaken (Maxwell, 2005). This application of validity does not necessarily seek to establish a universal truth, but rather, “give [researchers] some grounds for distinguishing accounts that are credible from those that are not” (p. 106).

Maxwell (2005) outlines two broad categories of qualitative validity threats: reactivity and researcher bias. Similar to the problem of demand characteristics that can occur in quantitative research (Monette et al., 2011), reactivity takes place in a qualitative study when the presence of the investigator influences how participants behave or respond to observer inquiries (Maxwell, 2005). Since my study does not deal with actual participants, reactivity does not play a role in validating my findings. Researcher bias becomes a factor in qualitative research when either data is chosen to fit the investigator’s theory or data is

chosen due to appearing salient to the investigator. Maxwell maintains that while these issues need to be considered, the goal of qualitative research is not focused on eliminating the biases of researchers, but rather, to highlight these biases and contextualize them with regard to the project and describe how to attend to them.

I took a pluralistic approach to establishing this project's credibility. Triangulation is an often-used method of substantiating a qualitative study's credibility in which the investigator will compare research results with previous reported studies on the same topic (Richards & Morse, 2007). This approach would normally be ideal for this study; however, since the directive content analysis is informed by previous scholarship dealing with this subject, triangulation creates an almost tautological impact on credibility. Respondent validation is also used in qualitative research. Investigators use this technique by analyzing data and then asking participants if they agree with investigator conclusions (Maxwell, 2005). Being a content analysis that examines artifacts, I could not ask participants to read my analysis after coding and conclude whether or not they agree as if I were conducting ethnography.

Since pure triangulation creates a tautology problem with respect to my design and I am not actually studying individuals that would allow for respondent validation, I dealt with credibility from an approach modified from these two validity strategies. Specifically, I interacted with two Regional NLRB members and one Assistant Professor of Employment and Labor Relations who acted as subject matter experts (SMEs). I presented a small write up of my findings and analysis to these individuals (see Appendix B) and asked if they agreed with my interpretation of the case law, legislation, and the socio-historical narrative of the Act. I should note that these credibility checks were not interviews but rather an exchange

concerning a third party's considerations of my interpretation of the data. Data and analysis were presented to these individuals in an easily understandable format and I answered to the best of my abilities any questions the credibility check participants had with regard to my findings.

I employed two other validity techniques to the study. First, with respect to highlighting researcher biases (Maxwell, 2005), I presented a Statement of Positionality in the first chapter of this dissertation. A positionality statement is a section in a research proposal or report that articulates the biases and social lens through which the investigator approaches a specific research project (Monifa, 2011). Second, I maintained an audit trail when making all important research-related decisions (see Appendix C). An audit trail ensures that major research events and decisions are recorded and may be accessed by an independent observer (Richards & Morse, 2007).

### **Ethical Considerations**

This research does not use any live human research participants; therefore, no participants were placed at risk. No approval was acquired from an Internal Review Board (IRB). All of the data collected is publically available.

### **Chapter Summary**

This chapter provided a detailed methodological plan for collecting data and conducting the subsequent analysis, as well as ontological considerations. Specifically, a qualitative content analysis, couched in a policy research paradigm, was chosen as a desirable approach to answering the research questions. Both inductive and deductive approaches to sampling and data analysis were used in order to gain a fuller picture of policy issues that arose in the case law corpus. An emphasis has been placed on case law snowball

sampling in order to convey the creation and recreation of policy. This research was conducted from a constructivist perspective in which the emphasis is on explanation rather than prediction. The next five chapters present the findings and analysis of this study.

## CHAPTER IV

### FINDINGS AND ANALYSIS: QUESTION 1

#### **Introduction**

The following five chapters report the findings and analysis of this study. Each chapter contains reported data related to answering an individual research question, along with a theoretically informed analysis with abstraction.

This qualitative content analysis of published case law actualized by the Board and ALJs of the NLRB and Supreme Court intended to analyze the various policy narratives that have originated within U.S. labor policy since the passage of the NLRA in 1935 to 2015. Special attention was given to Board members' and judges' interpretation of the macro policy of the Act – that is, what the overarching policy goals are of the NLRA. Various other policy strains were given consideration, particularly if these emergent strains supported the larger macro policy analysis or provided meta-information regarding how Boards and judges reach their conclusions. Giddens's (1979) structuration theory provided the analytical framework that drove both data collection and analysis.

Two distinct content analysis paradigms were used to facilitate a holistic view of the data. First, a conventional content analysis was conducted in which cases were purposefully sampled ( $n = 11$ ) based upon their importance in labor policy as defined by their inclusion in major labor law texts. These cases were coded and recoded, after which, the unitized text was reduced to analytical memos for further abstraction. Next, a directive content analysis was conducted in which cases were randomly sampled ( $n = 283$ ) from the entire NLRB and Supreme Court labor law corpus based upon key word searches informed by previous scholarship. Codes that emerged during the conventional content analysis were used during

the directive content analysis. After initial analysis of all collected data, analytically important cases were used to conduct snowball sampling ( $n = 132$ ) to find other cases with similar policy strains that had been cited by Boards and jurists. This step was completed in order to track policy across time. Not all collected and coded data appear in the following findings and analyses chapters. While most data offered some theoretical and analytical value, a few cases did not contain enough information to facilitate meaningful analysis. Other cases presented similar policy and data findings as those reported, and adding them to the narrative would have simply been redundant. All data presented in the findings and analyses chapters are represented in a separate reference list apart from other people's scholarship and cases cited in the literature review of this dissertation (see Appendix D).

Data analysis was informed by the research questions, which are as follows:

1. Have statements of policy been reflective of the language inherent in the Act and/or statements of Congressional intent, or have they instead been statements of policy that are not related to the original intentions of the Act?
2. What statements of policy and themes have Board members and jurists communicated in their interpretative decisions?
3. Have legal opinions stated in cases become precedent setting in subsequent cases that deal with legal questions similar to those found in the leading cases?
4. Has it been the courts, the NLRB, or all judicial and quasi-judicial bodies that have either affirmed or diverged from the Congressional intention of the Act?
5. To what extent is there evidence that labor law judicial actors' statements of policy direction are inherent in the written opinions of case law (i.e., have actors provided statements regarding their interpretation of the Act's overarching purpose)?

Many of the emergent codes were placed into conceptually related categories (see Figure 5). These categories will be further reduced in the findings and analyses chapters. The data's theoretical implications will be explored in greater detail during the final chapter of this dissertation. From the categories and data, a number of themes emerged. These themes

will be presented underneath their related research question throughout the remainder of this chapter. Data will be communicated using a codeweaving framework in which the codes drive the narrative of the findings.

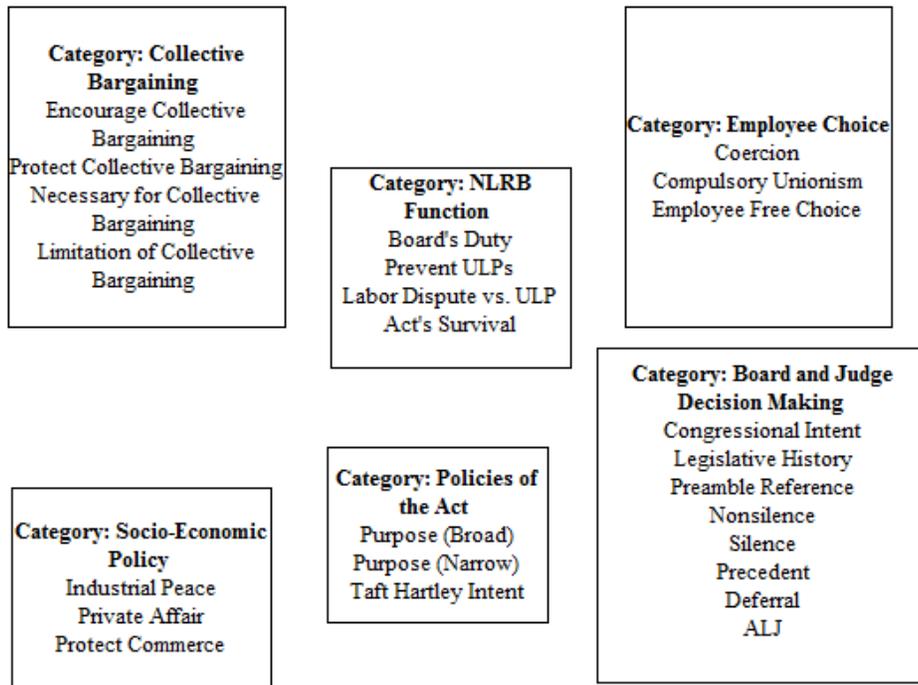


Figure 5. Categories.

In order to illustrate policy narratives that are created and recreated across time through the vehicle of interpretative case law, the findings and analysis sections will include a number of policy strain figures. These strains are indicative of structuration theory's principle of structural recreation across time-space (Giddens, 1979). The data indicate that policy strains generally manifest in two arrangements. The first arrangement includes linear strains in which policy is created and then recreated through a successive line of cases, each citing the one before it (see Figure 6).

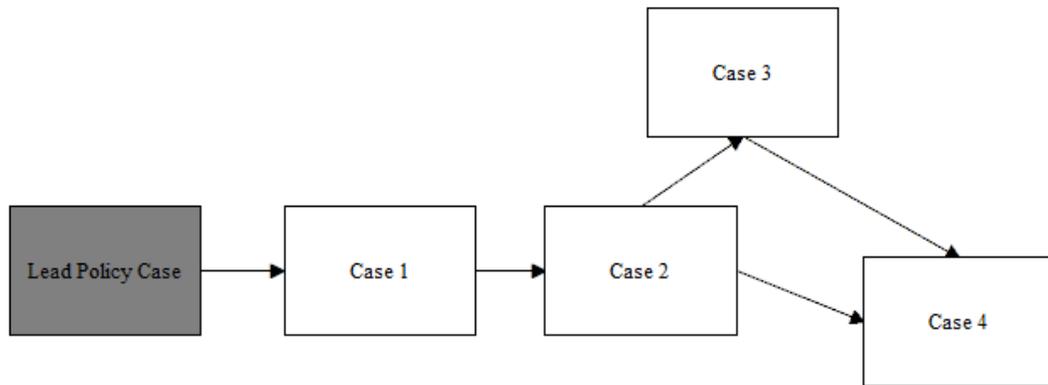


Figure 6. Policy strain example 1.

The second arrangement includes strains where policy is derived from a lead case that is then cited by the Board or jurists in cases later during the NLRA’s history (see Figure 7). Gray boxes designate lead cases or policy motifs, while white boxes designate subsequent cases. Cases included in strains are representative of a specific line of policy rather than citation over unrelated policy questions that may be inherent in further cases.

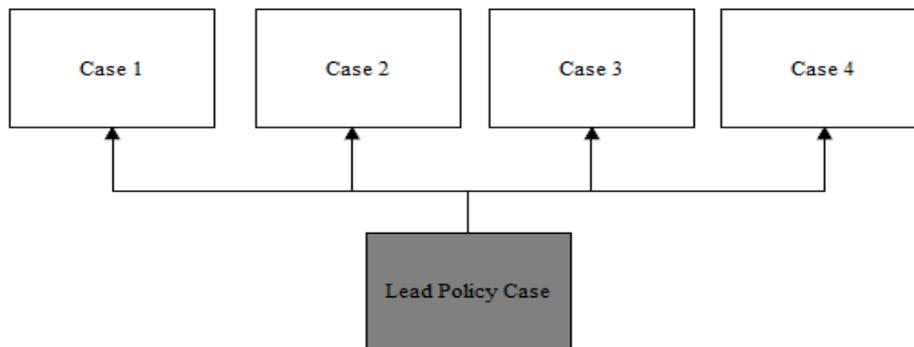


Figure 7. Policy strain example 2.

### Findings

Have statements of policy been reflective of the language inherent in the Act and/or statements of Congressional intent, or have they instead been statements of policy that are not related to the original intentions of the Act?

This research question was theoretical informed by extant legal philosophy that deals with interpretative legal reasoning vis-à-vis the policy intentions behind a legislature’s passage of law. Posner (1987/1996) argues that explicit language written into a law

constrains jurists' legal reasoning to a narrow interpretation. However, more ambiguous language provides a wider framework for legal conclusions. In essence, the language of a law serves as a second order of structure with which jurists and quasi-judicial boards must contend. The first structural order would include Hart's (1997) secondary rules that govern the meta-processes of law itself (e.g. the process of filing a post-hearing brief).

The data revealed that Boards and jurists are sensitive to both the Congressional intent behind the words of the Act as well as the naked words themselves. These findings are included in the first two themes, Congressional and Legislative Intent, and Act's Language, which are discussed below. The data failed to reveal much evidence that Boards or judges put forth interpretations of the Act that are far removed from Congressional intent or statutory language. However, the data shows that the Board sometimes creates its own meta-policy in order to resolve some sort of legal question put before it. These policies are not necessarily interpretations of the Act itself, but rather, are legal heuristics that are instructive to Boards when contemplating a specific fact pattern. This theme was dubbed Policy Tests. Finally, instances arose in the dataset where the Board and judges considered laws outside of immediate labor policy – primarily the U.S. Constitution. This data suggest that Boards and courts sometimes venture outside of the Act when administering labor law – a theme called Constitutional Considerations. A summary and analysis of the emergent themes and data related to this research question is put forth after its related findings.

### **Theme 1: Congressional and Legislative Intent**

The data reveal numerous instances in which the Board and jurists rely on an interpretation of Congressional intention to forward policy. As a basic example of deferral to Congress, the Supreme Court in *NLRB v. Fibreboard Paper Products Corp.* (1964), states:

To hold, as the Board has done, that contracting out is a mandatory subject of collective bargaining would promote the fundamental purpose of the Act by bringing a problem of vital concern to labor and management within the framework established by Congress...

Other times, the Board also relies on Congressional intent when making serious policy proclamations, such as the use of arbitration to resolve disputes amongst parties in *United Technologies Aeronautical Industrial District 91* (1984):

Congressional intent regarding the use of arbitration is abundantly clear: Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement.

The data fail to reveal many instances where the Board or Courts fashion or effectuate policy that is far divorced from an interpretation of Congressional intent or is clearly repugnant to Congressional intention. In contrast, the Board and jurists, such as in *Local 833* (1956), often affirm a strict guiding principle of effectuating the NLRA based upon Congressional intention:

The Board's function is to carry out the mandate of Congress embodied in the National Labor Relations Act, as amended. The Board cannot modify the statute to conform to its own notion of desirable policy.

Administrative agencies were given quasi-judicial powers to oversee specific legal domains (Postell, 2012). The theory behind this vestment of power was that the agencies had specific expertise in their respective areas of law that the courts may not have. However, the Supreme Court remains the final legal authority in the U.S. If the Supreme Court finds that the Board has reached a conclusion that the Justices believe is inconsistent with Congressional intent, it will reverse the Board's decision, reaffirming a policy that the Board must adhere to Congressional goals when making a decisions. For example, in a series of cases (see Figure 8), the Court states: "It is not necessary for us to justify the policy of

Congress. It is enough that we find it in the statute. That policy cannot be defeated by the Board's policy.” The data revealing that this same strain of policy – specifically, the same plain text words – provides evidence of the Supreme Court being bound by horizontal precedent. That is, the case law it creates is constraining on its future decisions.

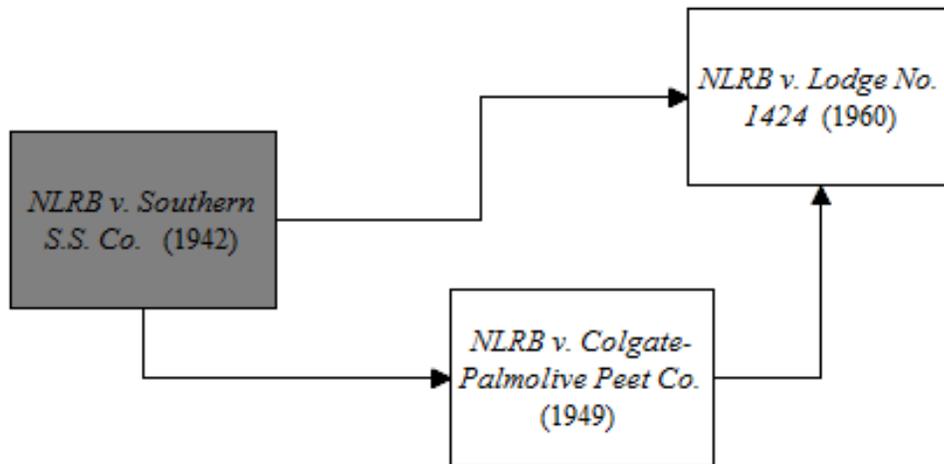


Figure 8. Supreme Court congressional policy strain.

Although the data suggest that courts and Boards wish to adhere to an informed reading of Congressional intent in decision-making, instances exist in the data corpus that indicate judicial frustration with ambiguity. When dealing with a question about state’s power, the Court declares in *Garner v. Teamsters* (1953):

The national . . . Act . . . leaves much to the states, though Congress has refrained from telling us how much. We must spell out from conflicting indications of Congressional will the area in which state action is still permissible.

The Board sometimes relies on an ambiguous reading of Congressional intent in order to justify a decision for which no clear instructive direction was given by the Act or preceding case law. In *Multi-Hydromatic Welding* (1955), the Board rejects a defense forwarded by the union, instead assuming that Congress had already considered a similar fact pattern: “It is presumed that the Congress weighed this matter when the legislation creating

these sections of the Act was under consideration.” An ALJ similarly relies on Congressional authority in *Joe Costa Trucking Co. (1979)* when he cites a previous case dealing with an analogous fact pattern:

The Court, holding that maintenance and enforcement of a contract more than 6 months after recognition of a minority union did not violate the Act, relied in part on the legislative history indicating that Congress specifically intended Section 10(b) to apply to agreements with minority unions in order to stabilize bargaining relations.

While explicit direction by Congress and the legislative history of the Act is informing as to how to effectuate policy, Congressional silence may provide greater discretion with respect to legal decision making. Dealing with a question about the legality of a union displaying banners in the workplace indicating that a labor dispute was taking place, the Board in *United Brotherhood of Carpenters (2010)* uses Congressional silence to help reach a legal conclusion: “Nothing in the language of the Act or its legislative history requires the Board to find a violation and thus present for judicial review the constitutionality of Section 8(b)(4)(ii)(B) as applied to the peaceful display of a stationary banner.”

Citing Congressional intent provides the judicial function of giving credible weight to a decision. This may serve the purpose of preventing the likelihood of a decision being overturned by a higher court. However, Board members also use Congressional intent as a way of justifying a decision to other Board members who may have written a dissent. For example, in *Electronic Reproduction Service Corp. (1974)*, the majority admonishes the dissent during a policy dispute over the appropriateness of deferral to an employer and union’s grievance-arbitration procedure by stating:

Their [i.e., the dissent’s] fundamental error lies in the narrowness of their vision which has led them to ignore that the Board’s jurisdiction is intended as but one means of achieving that peaceful, orderly, and fair resolution of industrial disputes which was the primary Congressional focus...

The data indicates that dissenting colleagues also use legislative authority to support their opinions. In *United Dairy Farmers* (1979), dissenting Board Member John A. Pennello disagrees with the other Board members regarding a question concerning a bargaining order and its relationship to a majority rule doctrine: "...its [i.e., the Act's] legislative history confirm the correctness of the Board's prior practice and establish that the Board's remedial authority is limited by the majority rule doctrine."

Further, to give itself credibility, the Board cites Congressional intent with respect to its own jurisdictional borders. For instance, in *Local Lather's Local 252* (1958), the Board states: "The Congress, has, however, reposed in the Board complete discretionary power to determine in each case whether the public interest requires it to act." This statement was informed by a previous case, *NLRB v. Newark Morning Ledger Co.* (1941) in which the Supreme Court laid forth the language cited by the Board. By citing a case from the Supreme Court, whose precedent the Board must adhere, it is recreating the structure of the policy while preserving its own existence.

Other times, the Supreme Court has relied on Congress to define the jurisdictional border of the NLRB and affirm the agency as the primary enforcer of labor policy, such as in *NLRB v. Falk* (1940), when the Court states:

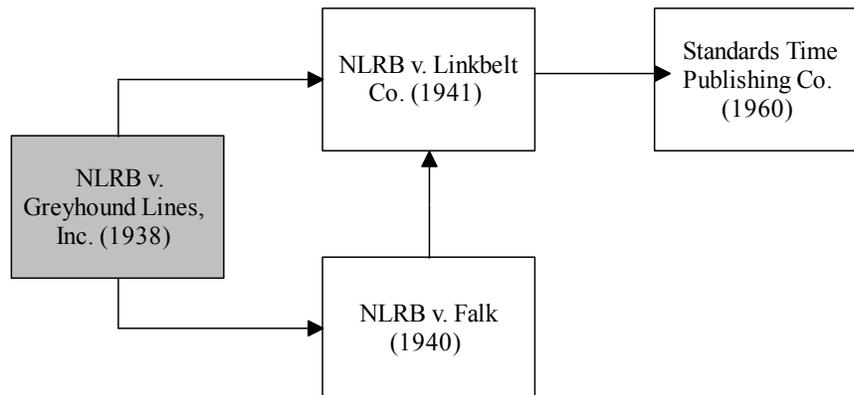
Congress has intrusted [sic] the power to draw such inferences to the Board and not to the courts. In order that 9(c) might be an effective means of selecting freely chosen representatives for collective bargaining as guaranteed by Section 7, the Board acted within its power...

The court was affirming that the NLRB had the ability to rely on circumstantial evidence when making legal decisions. Snowball sampling reveals that *Falk* (1940) is actually part of a series of cases that reaffirmed the policy that Congress had given the Board power to

effectuate the policies of the Act (see Figure 9). In these cases, the Court cites Congressional intention as a basis of policy – for instance *NLRB v. Greyhound Lines, Inc.* (1938):

Congress, in enacting the National Labor Relations Act, had in mind the experience in the administration of the Railway Labor Act, and declared that the former was ‘an amplification and further clarification of the principles’ of the latter.

These cases form a policy chain in which the court creates and recreates an affirmation of policy concerning the role of the Board that originated with Congress. The policy strain was recreated over a span of twenty years, showing that a single policy strain can exist over decades.



*Figure 9.* Board inference policy.

Much of the scholarship dealing with interpretation of the Act centers on the effect of ideology on legal decision making (e.g., Morris, 2012). Specifically, scholarship has centered upon whether Board members have approached the NLRA as having a policy to encourage collective bargaining or instead, protect employees’ right to choose to be represented by labor organizations. Somewhat surprisingly, the data contain little evidence that the Board cites Congressional intention or legislative history when stating a narrative of promoting collective bargaining or protecting employees’ freedom of choice. In *Electromation* (1992), during a discussion of employer-dominated unions, the Board states: “The legislative history

reveals that the provisions outlawing company dominated labor organizations were a critical part of the Wagner Act's purpose of eliminating industrial strife through the encouragement of collective bargaining.”

In *Hydromatic Welding* (1955), the Board invokes Congressional intent insomuch that the purpose of the Act is to protect employee free choice:

Although the conduct of the company and the association in this case was a violation of those provisions of the Act which Congress thought would protect the individual employee in his right of free choice of bargaining representative, at most, however, it would only remotely interfere with the freedom of choice...

Other than this example, very few instances arise in the data where a Board member rely on Congressional intent to justify a policy of encouraging collective bargaining or protecting employees' free choice. Even in the data containing pre-Taft-Hartley cases, a dearth of such statements exists.

## **Theme 2: Act's Language**

The data reported with respect to the preceding theme illustrates that the Board and courts often consider Congressional intention when effectuating the policies of the NLRA. While phenomenological data is unavailable to explore the cognitive processes of Board members' and jurists' legal reasoning, the data suggest that decision making requires methods of deduction to determine specifically how Congress wished the Act's policies to be carried out. As explored with respect to the preceding theme, one method is relying on the legislative history to determine Congressional intention. For example, when deciding if medical interns were employees as defined by the Act, the majority in *Boston Medical Corp.* (1999) states:

The legislative history of the Taft-Hartley amendments .... supports the conclusion that this section of the Act [i.e., § 2(12)(b)] was crafted to include

‘such persons as legal, engineering scientific and medical personnel along with their junior professional associates.’ I Leg. Hist. 540 (LMRA 1947)

The data suggest that Boards and jurists have another heuristic tool for determining Congressional intent – the language of the Act itself. While forwarding a policy of private dispute resolution between businesses and unions, the Board in *Local Union No. 7, International Longshoremen's and Warehousemen's Union* (1988) cites the plain words of the Act:

There can be no doubt that our national labor policy encourages resort to the grievance-arbitration procedure as the preferred method of resolving labor-management disputes. Congressional intent is clearly set forth in Section 203(d) of the Act, which states: Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement.

In this case, the Board is able to justify a policy based upon the relatively unambiguous words of the statute. Another example of interpreting Congressional intent through statutory language is found in *General American Transportation Corp.* (1977) in which the Board considers the appropriateness of deferral to the parties’ grievance-arbitration procedure:

Such a lack of power in the Board to make the public interest in the vindication of statutory rights . . . is further underlined by the decision of Congress, reflected in Section 14(c)(1), limiting the extent to which the Board may exercise its discretion to refuse jurisdiction over any ‘class or category of employers.’

Data in the case law corpus suggest that legal decision making regarding a provision in the Act may require consideration of Congressional intent and legislative history. This may take place when the language is more ambiguous. For example, citing a previous court case, the Supreme Court in *New Process Steel v. NLRB* (2010) considers the number of Board members required to have a legal quorum:

The court ruled in favor of the Government [sic]. After a review of the text and legislative history of § 3(b) ... the court concluded that the then-sitting two members constituted a valid quorum of a three-member group to which the Board had legitimately delegated all its powers.

The Supreme Court again relies on Congressional intent when interpreting a provision dealing with union security in *Communication Workers of America v. Beck* (1988):

”...Congress authorized compulsory unionism only to the extent necessary to ensure that those who enjoy union-negotiated benefits contribute to their cost...”

Evidence in the data indicates that decision making with respect to specific provisions is sometimes contingent upon Congressional silence on a policy. When deciding the definition of a an individual person and an employer with respect to a legal question concerning a secondary boycott, the Board in *UAW, Local 833* (1956) considers:

If Congress had intended “employer” and “person” to be interchangeable wherever used in Section 8(b)(4)(A), it could have indicated as much by adding ‘or other person to ‘any employer’ in part (1) just as that phrase was added in part (2).

Thus, the Board assumes that Congress would have communicated that one of the competing policies should be overriding of the other if it intended such. Arguing that Congress would have explicitly indicated if it wanted one policy to override the other gives the Board wider discretion in making a decision with respect to the case.

The concurring Board members’ opinion in *United Dairy Farmers Cooperative Assoc.* (1979) indicates a similar principle of fashioning policy via silence in the Act: “We should issue a bargaining order because we agree with Members Murphy and Truesdale that the statute does not preclude the Board from issuing bargaining orders in the absence of a prior showing of majority support...” With the Act being silent on the appropriateness of

issuing a bargaining order, the majority considers both the statutory appropriateness of the action as well as the overarching statutory implications:

Resolution of that issue [i.e., whether to issue a bargaining order with respect to a union holding minority support] presents two questions for consideration: (1) whether the Board's remedial powers encompass the authority to issue a bargaining order in the absence of a prior showing of majority support by the Union, and (2) if so, whether it will effectuate the policies of the Act to issue such an order.

When the Act was not instructive, the Board in this case based its decision upon whether or not issuing the bargaining would further the overall policies of the Act. Deciding against a bargaining order, the Board issues different remedies based upon what the members conclude would effectuate the Act:

Respondent's unfair labor practices tend to restrain employees in the exercise of their Section 7 rights long after the violations have occurred and thus render impossible a fair election. In order to dissipate as much as possible the lingering atmosphere of fear and coercion created by these unfair labor practices, we shall order additional remedial action designed to accomplish two objectives in the restoration of employee rights. First, such remedial action must ... inform employees of their Section 7 rights and assure employees that Respondent will respect those rights. Second, the Union must be afforded an opportunity to participate in this restoration and reassurance of employee rights by engaging in further organizational efforts, if it so chooses, in an atmosphere free of further restraint and coercion.

In this case, the Board sees protection of employee rights and noncoercion as the overriding policies that help it determine the appropriate remedy when the Act or Congress are not informing. The ALJ in *Local Union 136* (1967) uses a similar logic, stating that employees must be afforded protection to file charges under a specific section of the Act; otherwise, the Board cannot effectuate the policies set forth by Congress:

However, an employee's right to file charges and otherwise participate in Board proceedings is protected by Section 7 of the Act. Such protection is essential if the unfair labor practices outlawed by Congress are to be prevented, since the Board ... is powerless to proceed unless a charge is filed.

Although the data reveal few similar instances, sometimes Congressional intent and legislative history are not instructive when dealing with a specific policy issue. The data suggest that when confronted with such an issue, Boards and judges may rely on plain text language. In *United Association of Journeymen. v. Local 334, United Association of Journeymen* (1981), the Court struggles with lack of Congressional direction and legislative history with respect to a question concerning resolving jurisdictional dispute between unions:

If the plain meaning of the ‘contracts between labor organizations’ clause of § 301(a) supports jurisdiction in the instant case, its legislative history hardly upsets such an interpretation. That is because there is no specific legislative history on that phrase to explain what Congress meant.

In the preceding case, the Court is able to make a decision based upon the plain language of the Act, and justifies its decision, stating that it had to use this heuristic since legislative history was in no way instructive. Therefore, it would strain credulity to posit an argument that the Court was not following Congressional direction.

Previous research detailing the controversy over whether the Act is intended to promote a policy of encouraging collective bargaining or employee free choice theorizes the two narratives originate from a reading of the Act (e.g., Gross, 1985; Morris, 2012). Specifically, language exists in the Findings and Policies section of the NLRA that states U.S. labor policy should focus on encouraging collective bargaining, while other language that was inserted during the Taft-Hartley Act indicates a policy of protecting employees’ right to choose whether or not to be represented by labor organizations. Scholars argue that Boards and jurists can cherry pick whatever narrative takes precedence over the other when making decisions. The data reveal scenarios in which NLRB rely on the language of the Act to promote either policy.

The ALJ in *DiMarc Broadcasting Corp.* (1973) indicates the former policy in his decision: “Section 1 of the Act states, inter alia, that the basic purpose of the Act is to ‘encourage the practice and procedure of collective bargaining.’” The data also reveal instances where the Board cites the entire first section of the Act, laying forth a policy of encouraging collective bargaining. The Board in *Boss Manufacturing Co.* (1939) invokes the entire section in its decision:

Section 1 of the Act states in part: Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

Board member Wilma Liebman cites a previous Supreme Court case during her dissent in *Dana Corp.* (2007) that invokes the opening of the NLRA to support a policy of encouraging collective bargaining:

Sec. 1 of the Act states that the goal of industrial peace is to be achieved by ‘encouraging the practice and procedure of collective bargaining’ as well as by ‘protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing.’

The data also indicates that statutory language is used to forward a policy of protecting employee’s free choice. The Supreme Court in *NLRB vs. Savair Manufacturing Co.* (1973) states:

Any procedure requiring a ‘fair’ election must honor the right of those who oppose a union as well as those who favor it. The Act is wholly neutral when it comes to that basic choice. By § 7 of the Act employees have the right not only to ‘form, join, or assist’ unions but also the right ‘to refrain from any or all of such activities.’

While both competing narratives are present in the dataset, the data also suggest that the Board sometimes recognizes the ambiguity with respect to each narrative and the language of the Act. In *MV Transportation* (2002), the Board states:

It is well established that two of the fundamental purposes of the Act are (1) the protection and promotion of employee freedom of choice - choice with respect to the initial decision to engage in or refrain from collective bargaining, and choice regarding the selection of a bargaining representative; and (2) the preservation of the stability of bargaining relationships... The first of these is explicitly set forth in Section 7 of the Act. The second is a matter of policy and operates with respect to those situations where employees have chosen a bargaining relationship. When these two objectives conflict, it is the Board's obligation to strike an appropriate balance between them.

Here, the Board recognizes that the language is not clearly instructive. Therefore, it must balance what it perceives as two competing interests – employee free choice and maintaining bargaining relationships.

### **Theme 3: Policy Tests**

The data reveal instances in which the Board and courts fashion specific legal rules to help resolve case outcomes or policy questions related to specific fact patterns. The data suggest that the Board will rely upon Congressional intent or a reading of the Act in order to fashion a policy test. The Board considers legislative history in *Wright Line* (1980), a case that establishes that a ULP has not been committed if an employee would have been disciplined for cause regardless of any alleged union activity. *Wright Line* sets forth a test for determining a violation of the Act based upon a charging party providing evidence of being disciplined for union activity, after which, the charged party provides evidence that discipline would have taken place irrespective of union activity. The Board affirms that a prior case, which lays forth the shifting burden procedure in *Wright Line*, is congruent with legislative

intent: “We further find the *Mt. Healthy* test to be in harmony with the Act's legislative history...”

The Board in *Wright Line* (1980) goes on to consider the explicit wording of the Act with respect to the policy test:

Initially, support for the *Mt. Healthy* test of shifting burdens is found in the 1947 amendment of Section 10(c). That amendment provided that: ‘No order of the Board shall require the reinstatement of any individual as employee who has been suspended or discharged, or the payment to him of any backpay, if such individual was suspended or discharged for cause.’

In addition to the naked language of the Act, the Board again returns to a reading of the legislative history to construct its policy test, this time relying upon the words of Senator Taft:

In explaining the amendment [i.e., the Taft-Hartley Act] Senator Taft stated: ‘The original House provision was that no order of the Board could require the reinstatement of any individual or employee who had been suspended or discharged, unless the weight of the evidence showed that such individual was not suspended or discharged for cause.’

Although neither Congress nor the Act state that a ULP fails to have taken place if the charging party would be disciplined regardless of union activity, the Board creates a policy test that synthesizes Taft’s words and the words of the Act into a doctrine that acts as a heuristic and carries out a policy as interpreted by that Board.

*Wright Line* (1980) is somewhat of an anomaly in the dataset with respect to a policy test, being largely informed by legislative history and a reading of the NLRA’s explicit language. While the Board does not often fashion a policy test based upon a formula explicitly set by Congress or the Act, it does consider policy goals as defined by Congress. The data reveal that the Board relies upon Congressional direction when attempting to resolve two competing issues. For example, when setting forth a jurisdictional test for

exempt contractors, by citing a previous case, the Board in *National Maritime Union of America* (1976) balances such two competing policies through a policy test:

By so doing [i.e., implementing the policy test] the Board is enabled to strike a balance between the congressional [sic] policy of excluding the noncommercial charitable and educational activities of institutions and the policy of the statute to encourage collective bargaining...

In the above case, the Board resolves two policy issues that are well established. However, Boards and courts sometimes decide policy issues upon which there is no clear basis to provide direction. The data suggest that when ambiguity exists in the Act and Congress is not informing with respect to a legal question, the Board may create a policy tests to resolve an issue. For example, in *Levitz Furniture Co. of the Pacific* (2001) the Board states:

In our view, there is no basis in either law or policy for allowing an employer to withdraw recognition from an incumbent union that retains the support of a majority of the unit employees, even on a good-faith belief that majority support has been lost. Accordingly, we shall no longer allow an employer to withdraw recognition unless it can prove that an incumbent union has, in fact, lost majority support.

Many policy rules generally are not based upon an explicit command from Congress but rather are informed by an interpretation of overarching policy doctrines. For example, when determining whether or not an election should be set aside, the ALJ in *Bauer Welding And Metal Fabricators, Inc.* (1984) states:

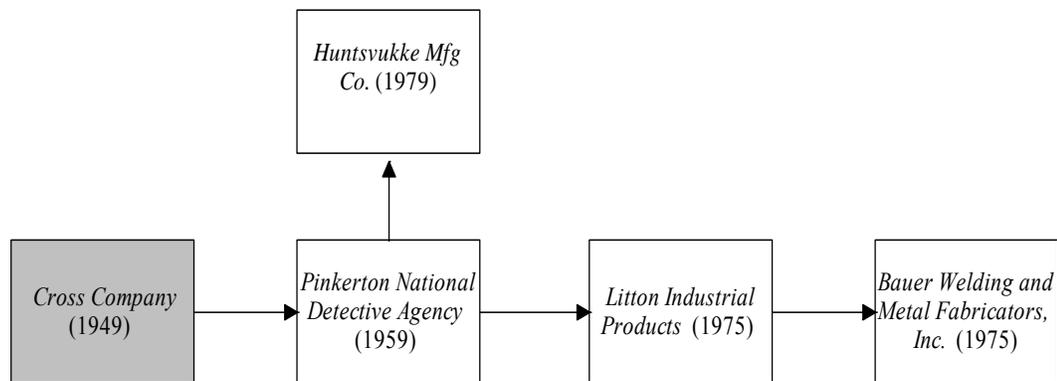
The Board normally makes its determination whether to set aside an election 'on an objective basis—i.e., on whether the alleged misconduct would reasonably tend to prevent the holding of a fair and free election—rather than on the subjective statements of the employees as to whether they were 'coerced' or 'misled' into voting as they did.'

Here the ALJ states an overall policy goal – holding a fair and free election – and uses a policy test – determining on an objective basis what alleged misconduct would comprise a

free and fair election – to conclude whether or not the policy goal was compromised. The objective basis for the decision is whether or not statements would have misinformed and led employees to vote for union representation:

Likewise insufficient to show that the Union's misstatement misled employees into believing that the Union could get increased benefits without negotiations or that benefits could not be decreased after negotiations is the testimony of the three employee witnesses on this point.

Policy tests are important to this analysis because they provide salient evidence of structure being created through precedent-setting case law. Snowball sampling reveals data showing that the ALJ's decision to use an objective test for determining a free and fair election is based upon informing case law (see Figure 10).



*Figure 10.* Objective test policy strain.

This policy strain provides evidence that policy tests are created and recreated throughout the extant body of case law. That is, not only are overarching policy narratives, such as encouraging collective bargaining or protecting employee free choice, created and recreated, but so are the heuristics that serve almost as meta-policy that are informing to subsequent Boards and courts.

#### **Theme 4: Constitutional Considerations**

Throughout the dataset, instances arise where the Board or Supreme Court deal with a legal issue that goes beyond the purview of the NLRA. These issues are often related to a reading of another law not directly related to the Act. Occasionally, Board members or jurists have to engage with a state law or statute other than the NLRA, such as the Supreme Court does in *De Veau v. Braisted* (1960). The Court has to resolve a question about the legality between the NLRA and the Water Commission Act:

...we come to consider appellant's objection that § 8 [of the Water Commission Act] is in conflict with and therefore pre-empted by the National Labor Relations Act, specifically §§ 1 and 7 of that Act, 29 U.S.C. 151, 157, 29 U.S.C.A §§ 151, 157.

However, the data reveal very little instances in which statutes other than the NLRA are considered in labor cases. On the other hand, Board members and jurists often engage with the U.S. Constitution. *Jones and Laughlin Steel Corp.* (1937) is the earliest case in the dataset that indicates constitutional consideration in a legal decision. The Supreme Court affirms the constitutionality of the Act based upon a determination that the statute affects interstate commerce, which Congress has the constitutional right to oversee. Specifically, the Court bases its decision upon legislative history and the Act's language indicating that interstate commerce is relevant to its statutory policies:

It is asserted that the references in the Act to interstate and foreign commerce are colorable, at best; that the Act is not a true regulation of such commerce or of matters which directly affect it, but, on the contrary, has the fundamental object of placing under the compulsory supervision of the federal government all industrial labor relations within the nation. The argument seeks support in the broad words of the preamble ...and in the sweep of the provisions of the Act, and it is further insisted that its legislative history shows an essential universal purpose in the light of which its scope cannot be limited by either construction or by the application of the separability clause.

The Court then goes on to affirm that the commerce with which the Act affects is interstate and thus constitutionally relevant: “There can be no question that the commerce thus contemplated by the Act ... is interstate and foreign commerce in the constitutional sense.” However, the Court is cautious in how it frames the interstate commerce doctrine with respect to the Act. The Court states that the Act does not force collective bargaining upon the working sector, but rather, it seeks to remedy obstructions to commerce which fall within the purview of Congress:

Its [i.e., the Act’s] terms do not impose collective bargaining upon all industry regardless of effects upon interstate or foreign commerce. It purports to reach only what may be deemed to burden or obstruct that commerce, and, thus qualified, it must be construed as contemplating the exercise of control within constitutional bounds. It is a familiar principle that acts which directly burden or obstruct interstate or foreign commerce, or its free flow, are within the reach of the congressional [sic] power. Acts having that effect are not rendered immune because they grow out of labor disputes.

Evidence suggests that the Board remains cognizant of the constitutionality of its decision making. That is, when ruling on a case and establishing doctrine, the Board gives consideration to whether or not the decision would be repugnant not only to the Act but to the Constitution as well. When considering an issue of whether or not employees displaying a banner indicating a labor dispute was a ULP, the Board in *United Brotherhood of Carpenters* (2010) considers the constitutional implications of their decision: “...none of the foregoing authority leads to the conclusion that the holding of a stationary banner ‘threaten[s], coerce[s], or restrain[s]’ and that conclusion is reinforced by our duty to avoid creating serious constitutional questions.” The majority opinion members go on to chastise the dissent, indicating that the Board has a constitutional duty: “The dissent’s position flies in the face of any reasonable understanding of the term ‘coercion,’ ... and would cut to the

heart of the First Amendment in a manner that we believe it is our constitutional duty as members of the Executive Branch [sic] to avoid...”

As evidenced by the preceding data, much of judicial and Board decision making with respect to the Constitution centers on employee and employer First Amendment free speech rights. The data reveal that judicial decision making often relies upon an intersection between the First Amendment and the Act. For instance, the judge in *VM Industries, Inc.* (1988), states:

It is equally well established that, notwithstanding an employer's right, protected by the first amendment [sic] to the Constitution, to express a preference for one union over another, it may not, in the face of competing demands, abandon its neutrality by overt acts that favor one union over another, since that would amount to interference in violation of Section 8(a)(5) of the Act with the employees' statutorily protected right to choose their own representative.

The nexus between the First Amendment and the Act is explicitly solidified in the Court's reasoning in *NLRB v. Allentown Mack Sales and Services, Inc.* (1998). When dealing with a question about an employer's right to communicate his views about unionism to employees, the Court, citing *Gissell* (1942) concludes:

...§ 8(c), 29 U.S.C. § 158(c) merely implements the First Amendment by requiring that the expression of ‘any views, argument, or opinion’ shall not be ‘evidence of an unfair labor practice,’ so long as such expression contains “no threat of reprisal or force or promise of benefit” in violation of § 8(a)(1).

Section 8(c), 29 U.S.C. § 158(c) of the Act states:

The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit.

The Court thus interprets part of the Act as being an effectuating mechanism for the First Amendment of the Constitution.

However, when considering a nexus between the Act and the First Amendment, the Board also finds instances in which speech or actions are not constitutionally protected while a party is engaged in labor relations. In *National Plastic Products Co.* (1942), the Board determines that an employer's actions are unconstitutional because they were coercive and violated the Act:

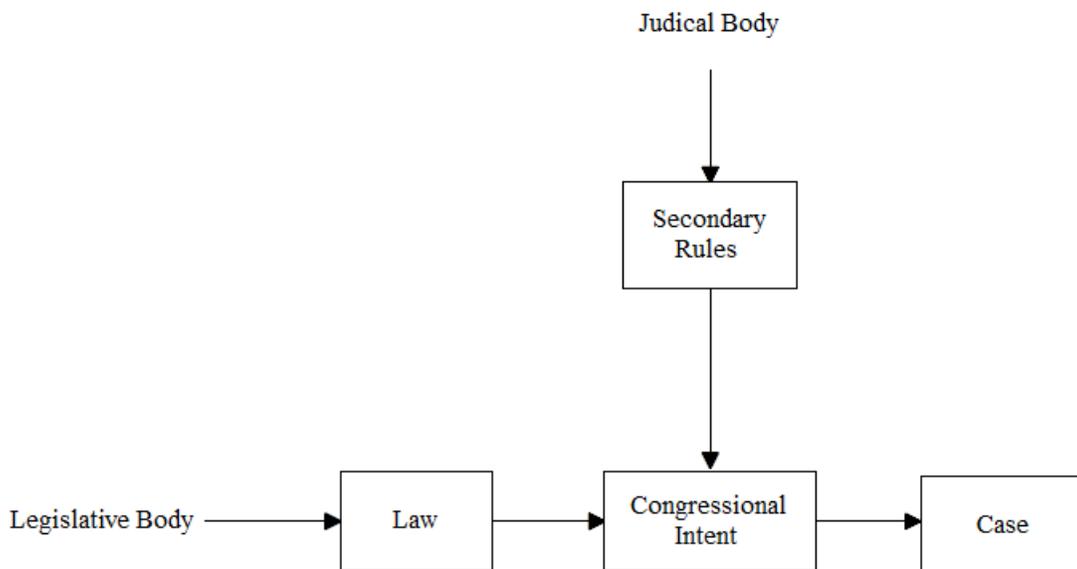
The speech being in this respect violative of the Act and constitutionally unprotected, it follows, and the undersigned also finds, that the respondent's compulsion of the employees to attend the meeting and to listen to the speech constituted interference with, restraint and coercion of the exercise by the employees of their rights guaranteed by Section 7 of the Act.

### **Summary and Analysis**

The data revealed that Boards and jurists rely heavily on Congressional intent when fashioning decisions. Evidence suggests that decision making is highly influenced by legislative history, which Boards and jurists use as a heuristic tool when seeking direction for a specific policy question that may arise. This phenomenon may occur since jurists are bound by secondary rules (Hart, 2007), which provide the meta-structure for the legal environment. That is, jurists are not free to simply fashion any legal doctrine or rule that they wish based upon a casual reading of the law. In essence, Congressional intent and legislative history serve as a second order of structure with respect to legal interpretation (see Figure 11). The first order of structure constitutes the secondary rules that exist a priori to any specific law or scenario that requires application of law.

A law itself – in this case, the NLRA – holds no facilitative or constraining structural properties prior to its existence. This is a somewhat tautological statement, but it serves a conceptual starting point to examine how structuration principles explain legal reasoning. Secondary rules exist prior to any law coming into existence. At this stage of legal

structuration, structure already exists in the form of the secondary rules; however, these rules require a law upon which to be applied. Therefore, their existence is purely in the abstract prior to any law that requires application. When a legislative body creates a law, jurists are then directed by secondary rules and Congressional intent with respect to effectuating policy. Thus, the only structure that exists prior to a law are secondary rules, after which, a law comes into being – fashioned as structure by a legislative body. From this structure, judicial bodies interpret legislative intent and apply the law. The intention of Congress is then recreated through a case.



*Figure 11.* Legislative and secondary rules structuration.

The data revealed that sometimes Congressional intent is not always informing of how the Board or jurists should proceed with effectuating the policies of the Act. In these situations, the data suggested that Board members and jurists rely on a reading of the Act’s language. Oftentimes, by taking the words of the Act into consideration along with its legislative history, the Boards and jurists are able to fashion legal doctrine and effectuate the

policies of the NLRA. Relying on both Congressional intent and the words of the law itself requires Board members and jurists to engage in discursive consciousness, which is the psychological component of structuration theory (Giddens, 1984). Specifically, discursive consciousness are agents' reflection upon the world in which they inhabit and whether or not they are constrained by the structures that surround them. The data suggest that Boards and jurists engage in discursive consciousness by considering both legislative history and the words of the statute to inform their interpretation of the Act. This discursive consciousness is filtered through secondary rules that provide the interpretive structure that informs how the judiciary is to apply Congressional intent and the provisions of the Act. The data revealed that by engaging in discursive consciousness, the Board and jurists are able to use legislative intent as informing of the Act's language and vice-versa (see Figure 12).

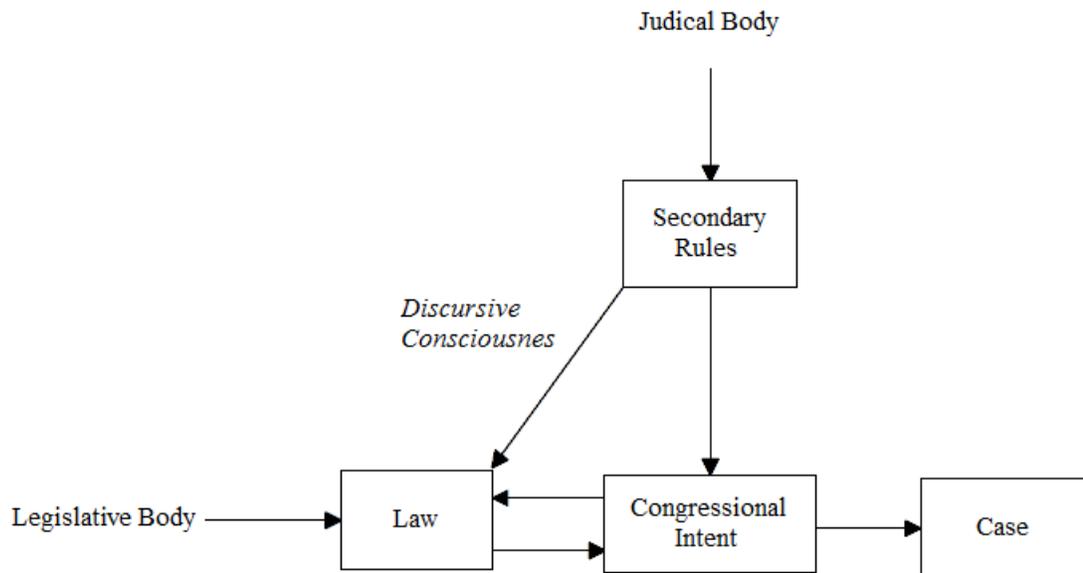


Figure 12. Discursive consciousness and law's language considerations.

In a few instances, the data also revealed that decision making is informed solely by the naked words of the Act. This has implications for the sometimes conflicting narratives of the Act containing a policy of promoting collective bargaining or, instead, protecting

employee free choice to join labor unions. The data revealed very little instances in which Boards or jurists based a decision with regard to these two narratives solely on invoking Congressional intent. At first glance, this is surprising, since an intuitive prediction may lead an investigator to assume that judicial bodies wish to give weight to their decisions with respect to one of these narratives by relying on Congressional intent. However, deeper analysis suggests that not basing such decisions on Congressional intent may actually be a legal strategy. Posner (2010) states that jurists do not like to have their decisions overturned. By invoking Congressional intent, a Board may easily have its decision overturned by the Supreme Court due to a different reading of Congressional intent. This is because relying solely on Congressional intent is an abstraction, particularly if the legislative history does not reveal an explicit directive of Congress to favor one policy over the other. The Board can overturn its own precedent or the decision of an ALJ; however, it must abide by a Supreme Court decision. If the Board invokes Congressional intent with respect to either narrative, it runs the risk of the case being appealed through the courts until it reaches the Supreme Court, after which, the Supreme Court overrules the Board, invoking Congressional intent with respect to the opposite narrative.

The data did reveal, on the other hand, that invoking explicit language in the Act was more prevalent to support the collective bargaining or employee free choice narrative. This approach poses less legal risk, since any appeal should be based upon an interpretation of the provision cited. An overturn on the interpretation of the specific provision does not change the Act's policy on a macro level. That is to say that a higher court cannot state one way or another that Congressional intent favors one narrative over the other, since the legal question would pertain to an explicit reading of a provision. As scholars, such as Morris (2012),

allude, the provisions when read by themselves to forward either narrative are explicit on their face with regard to promoting collective bargaining and protecting employee free choice. Without diving into Congressional intent or a more complex reading of the statute, the Act appears to prima facie support one narrative or the other. The driving force upon which narrative to choose may then come from an outside source, such as personal dispositions as argued by legal realists (Fischer et al., 2003). In this case, the disposition may be political ideology (e.g., Flynn, 2000; Morris, 2012).

Finally, the data revealed two policy areas in which the Board and courts would go outside of the immediate language of the Act or instructions from Congress: policy tests and constitutional considerations. With respect to the first theme, Boards and courts are tasked with the duty of interpreting the Act. Fact patterns arise in the labor relations world that are brought to the Boards and courts that may not be explicitly addressed by Congress or the NLRA itself. The judicial bodies tasked with resolving a policy issue must then rely upon heuristic tests in order to reach legal conclusions. The data revealed that Congress still provides structural direction insofar that Boards and jurists consider macro-level policy directives, such as protecting employees from coercion, when constructing policy tests. These tests then serve as structure that further judicial decision makers consider through discursive consciousness in order to effectuate policy.

The Constitution is the controlling law of the U.S. Arguably all laws – particularly federal laws – are derived from the Constitution. While the data suggest that its structural influence is not immediately controlling on labor policy, data did reveal that the Supreme Court and the Board consider some constitutional matters when effectuating labor policy. Much of the data revealed that most of the constitutional policy questions that arise deal with

the First Amendment. Additionally, many of the cases that deal with First Amendment issues have taken place after the Taft-Hartley Act. This may be due to the Taft-Hartley Act granting wider-reaching free speech rights to employers (Gross, 1981). Prior to the Taft-Hartley Act, the Board and courts often ruled employer speech as coercive with regard to unionization. As employers were given more rights with the Taft-Hartley amendment, more cases may have arisen in which employer First Amendment rights were considered by the Board and courts.

This research question and its related themes dealt with whether or not Boards and jurists adhered to Congressional intent and the language in the Act when making legal decisions. The data revealed that they almost certainly consider these two things when fashioning policy, and may only diverge when fashioning a legal heuristic through a policy test or are required to engage with a law outside of the NLRA in order to effectuate labor policy. These findings do not preclude scholars' arguments that the Act has multiple interpretations with respect to its macro-policy (e.g., Flynn, 2000; Morris, 2012) or the legal realists' and critical legalists' argument that jurists often effectuate law based upon their own personal or ideological dispositions (Fisher et al., 2003; Schauer & Sinnott-Armstrong, 1996). As the data will reveal further in the following findings, the interpretation of the Act and effectuation of its policy is a complex phenomenon.

The next chapter and research question consider some of the policies that are articulated in the dataset.

## CHAPTER V

### FINDINGS AND ANALYSIS: QUESTION 2

#### **Introduction**

What statements of policy and themes have Board members and jurists communicated in their interpretative decisions?

This research question explores the various policy narratives that are communicated by the Board and jurists. The data revealed numerous policy strains, that when considered individually, appear to be mutually exclusive to one another. However, when they are synthesized, a picture of the overall effectuated policy of the NLRA becomes clearer.

Emergent themes arose from the data. Data reported with respect to the first theme – Promote Collective Bargaining and Employee Free Choice – presents data in support of previous scholars' (e.g. Gross, 1995; Morris, 2012) contention that dual policy narratives exist with respect to interpretation of the major policies of the Act. However, sensitive analysis of this phenomenon suggests that subtle nuances exist with the dual policy narratives. These more specific findings are reported as three sub-themes – Maintenance of Collective Bargaining, Employee Free Choice as Policy Shift, and Not Always a Dichotomy. Next, the data suggest that protecting rights is a significant policy effectuated by the Board and jurists. This data is reported under the theme Employee and Employer Rights and its related subtheme, Equalization and Interests. Next, much of the dataset provides instances where the duty of the NLRB is delineated. These findings are reported under the theme, Role of the Board. Finally, the data reveal that protecting the public is a major effectuated policy. This data is reported under the theme, Public Interest: Private Disputes, Industrial Peace, and Commerce.

## Findings

### Theme 1: Promote Collective Bargaining and Employee Free Choice

The data reveal many instances in which the Board and courts communicate in their decisions a policy of encouraging collective bargaining. In *Uga* (1974), during a discussion about the role of a discriminatee in a Board proceeding, the Board states: “We realize, however, that the remedial relief that may be awarded to an individual by virtue of his status under the Act as a discriminatee is but one facet of a comprehensive scheme to encourage collective bargaining...” Similar statements arise throughout much of the dataset. In *Grossman* (1982), the Board states during contemplation of a previous case: “We have reviewed the Board's experience with *Midwest Piping* with a desire to accommodate the view of the courts of appeals in light of our ... statutory mandate to encourage collective bargaining.”

The *Grossman* case suggests that Boards derive a policy of encouraging collective bargaining from an interpretation of the Act. This supports Gross's (1985) research that indicates this major policy narrative is based on the words of the statute. In discussing the appropriateness of certifying the bargaining unit of a business's employees who are contracted by an organization that is exempt under the Act, the Board citing a previous case in *Rural Fire Protection Co.* (1975) similarly invokes a statutory policy of encouraging collective bargaining: “...the Board is enabled to strike a balance between the congressional policy of excluding the noncommercial charitable and educational activities of institutions and the policy of the statute to encourage collective bargaining...” Contemporary cases also contain policy statements with respect to encouraging collective bargaining. For instance, the

Board in *Levitz* (2001) communicates: “The Act has always encouraged the practice of collective bargaining...”

Dissents have also invoked a policy of encouraging collective bargaining. When the Board majority in *Brown University* (2004) ruled that university graduate assistants were not employees as defined by the Act, and thus, could not bargain collectively, the dissent, including Liebman and Dennis P. Walsh state: “...the policies of the Act - increasing the bargaining power of employees, encouraging collective bargaining, and protecting freedom of association - apply in the university context, too.” Similarly, Board member Edwin Smith in *Allis-Chalmers* (1937), chastises the majority’s opinion to certify a specific bargaining unit that may be hostile to industrial organization:

The decision vests in the hands of a small group of employees the choice of determining whether in this mass-production plant, employing nearly 10,000 workers, a complete industrial unit, or one from which one or more crafts have been severed, is most appropriate to promote collective bargaining.

The data reveal that jurists also articulate a policy of promoting collective bargaining. In *Jackson-Vinton* (2004), the ALJ writes: “It is useful to reiterate that an important policy of the Act is to promote collective bargaining between parties...” The dataset reveal examples of the Supreme Court stating a policy of promoting or encouraging collective bargaining. The Court in *De Veau* (1960) cites the Act’s opening: “Section 1 of the Act declared as its purpose to encouraging collective bargaining.” Also informed by the preamble of the Act, the Court in *NLRB v. Hearst Publications* (1944), states: “Hence the avowed ... purpose[s] of the Act [is] to encourage collective bargaining.”

The data reveal an almost equal number of cases in which Boards and jurists communicate a policy of protecting employee free choice to join labor organizations. The Board in *United Rentals, Inc.* (2007), when discussing employer speech to employees about

unionization states: "...truthful statements that identify for employees the changes unionization will bring inform employee free choice which is protected by Section 7 and the statements themselves are protected by Section 8(c)." Instances in the data also suggest that the Board determines the validity of an election informed by a test of whether or not the outcome was based upon a true representation of employee free choice. In *Thompson Products, Inc.* (1944), the Board deduces: "we could not certify ... an organization incapable of genuine collective bargaining with the employer, nor could we find that the ... election validly reflected the employees' free choice of collective bargaining representatives." Similarly, in *Virco Mfg. Corp.* (1958), the Board finds: "In view of the foregoing, we find that the strike information in the Intervenor's bulletin was substantially true, and neither so misleading or inaccurate as to have impaired the employee's free choice in the election."

Evidence suggests that the Board also considers a policy of employee free choice with respect to other policy issues. In *Umass General Hospital* (2007), the Board reasons with respect to a doctrine in a previous case:

We find that *Federal Mogul*, supra, properly balances the concerns of preventing unilateral application of contract terms to a group of employees who were not represented when the collective bargaining agreement was negotiated, on the one hand, and allowing for employee free choice, on the other.

Other times, the Board applies a seemingly subjective test to determine whether or not employee free choice has been comprised, such as in *NuSkin International Inc.* (1992) where the Board considers the effect of a Union providing free t-shirts during an organizing campaign:

...in the present case, it was undoubtedly clear to all concerned that the T-shirts offered by the Union were inexpensive items. As the hearing officer properly found that the T-shirts were of such little value that their free distribution in itself would not interfere with employee free choice.

Similarly, the Board in *Reiss Associates, Inc.* (1956) considers a Regional hearing officer decision that the Union passing out wage information the day before an election affected employee free choice:

The hearing officer found that the wage information circulated by the Petitioner the day before the election was inaccurate and misleading and interfered with the employees' free choice of a bargaining representative, hence he recommended that the election be set aside and that a new election be directed.

The Board then goes on to agree with the hearing officer that employee free choice was comprised:

Upon the basis of the entire record in this case, the Board finds, in accord with the recommendation of the hearing officer, that the inaccuracies as to wages in the handbill circulated by the Petitioner the day before the election were deliberate misrepresentations and exceeded the limits of legitimate campaign propaganda, thus inhibiting the exercise of a free choice by the employees in the election

Like the policy of encouraging collective bargaining, jurists have engaged with a policy of employee free choice. In *Gissel* (1969), an important case that set the precedent for issuing a mandatory bargaining order when an employer's actions are so destructive as to impede employee free choice, the Supreme Court states: "...effectuating ascertainable employee free choice becomes as important a goal as deterring employer misbehavior." Other instances exist in the dataset where the Supreme Court considers employee free choice, such as Justices White and Brennan's dissent in *UAW v. ITT Lighting Fixtures* (1984): "There is no doubt that the participation of supervisors in union elections may in some circumstances so undermine employees' freedom of choice as to warrant setting aside the election."

Examination of this theme affirms that Boards and jurists do effectuate policies of encouraging collective bargaining and protecting employee free choice. The evidence reveals that they promote these policies based upon an interpretation of the Act. However, the data presented in this theme's section is disparate. The data will be given greater contextualization in the Summary and Analysis section of this chapter. A deeper parsing of the data, however, suggests that the two narratives of promoting collective bargaining and employee free choice are more complex than previous research demonstrates (e.g., Flynn, 2000). The following three subthemes explore the nuances of these policies.

**Subtheme 1: Maintenance of Collective Bargaining.** Data concerning a policy of collective bargaining suggest that interpretation of the Act encompasses a greater consideration than just simply whether or not the Act requires the NLRB and jurists to encourage collective bargaining. Rather, the data indicates that an underlying policy of protecting collective bargaining exists. For example, in *B.M. Reeves Co.* (1960), the Board states: "...the employer may continue to deal with the incumbent [union] so as not to deprive the employees of the benefits of uninterrupted collective bargaining whenever a clearly unsupportable or specious rival claim is made on the employer." In other words, the Board determines that if an intervener union seeking to represent an already organized group of employees comes along, a policy of perpetuating the existing bargaining relationship supercedes a policy of disrupting the incumbent bargaining relationship if the intervenor's claim is not already supported by the employees. In *Allentown Mack Sales* (1998), the Supreme Court, considering prior Board law, contemplates a similar doctrine: "The Board believes that employer polling is potentially 'disruptive' to established bargaining relationships and 'unsettling' to employees, and so has chosen to limit severely the

circumstances under which it may be conducted,” as does the Board in *Indianapolis Mack Sales and Service* (1988): “A mere change in ownership should not uproot bargaining units that have enjoyed a history of collective-bargaining unless the units no longer conform reasonably well to other standards of appropriateness.”

The data suggest that protecting collective bargaining and maintenance of bargaining relationships may even lead the NLRB to fashion policy that appears to favor one party or the other. For instance, the ALJ in *Raytheon Company* (2013) articulates a Board principle with respect to parties reaching impasse: “The Board has told us that its rationale for permitting an employer to unilaterally implement its final offer after impasse is that such an action breaks the impasse and therefore encourages future collective bargaining.” In that respect, the Board is willing to allow the employer to force a contract upon the Union, because it may help maintain the bargaining relationship.

Throughout the dataset are instances where the NLRB lays forth the requirements to sustain collective bargaining, and where so failing to adhere to these requirements constitutes a ULP. In *Renal Care of Buffalo* (2005), the ALJ declares: “Section 8(a)(5) of the Act provides that an employer commits an unfair labor practice by refusing to bargain collectively with the exclusive representative of its employees.” The Board articulates the importance of collective bargaining and why bargaining in good faith is integral to the policies of the Act in *McDonald Douglas Corp.* (1976): “...the act of extending the opportunity of good-faith bargaining will generally contribute to stable labor relations and industrial peace.” Data indicate that the NLRB places collective bargaining for benefits as superior to a policy of an simply granting employees benefits if such an action by an

employer is intended to circumvent collective bargaining. For example, in *American Oil Company* (1942), the Board states in agreement with a preceding ALJ decision that:

...we are of the opinion and we find, as did the Trial Examiner [i.e., ALJ], that the wage increase was granted for the purpose of persuading the respondent's employees that wage increases could be obtained without collective bargaining, and thus influencing them to vote against the Union [sic].

In that instance, the Board may have viewed the wage increase as repugnant to the Act, regardless if the policy was to encourage collective bargaining or protect employee free choice. With regard to the former policy, the wage increase may discourage collective bargaining; with regard to the latter policy, the wage increase may have been coercive, and thus, adulterated employee free choice.

Data related to this subtheme suggest that the Board, while not stating an explicit policy of encouraging collective bargaining, fashions and effectuates policies that do protect the institution of collective bargaining. The next subtheme explores Board and judicial statements concerning employee free choice and how it has changed as a policy throughout the years of the Act's existence.

**Subtheme 2: Employee Free Choice as Ideological Shift.** Previous research suggests that Board members who forward a policy of protecting employee free choice are informed by an ideological disposition (e.g., Flynn, 2000; Gross, 1985; Moe, 1987; Morris, 2012). Specifically, Board members who forward a policy of employee free choice are thought to be pushing a more business-friendly – and thus, more conservative – narrative of the Act's statutory intention. The data reveal that in many instances, this is true. For example, the majority in *Dana Corp.* (2007), which consisted of a large number of Republicans, including Chair Robert Battista, states: “It is not the Board's province to provide incentives for parties to enter into voluntary recognition agreements, particularly if their reasons for

doing so give short shrift to affected employees' statutory rights of free choice.” *Dana Corp* sets forth a short-lived precedent that provided employees an avenue to contest a union’s majority within a set period of time if the employer voluntarily recognized a petitioning labor organization as the exclusive bargaining representative of its employees. The ends of this policy could have the consequence of reducing collective bargaining or providing an outcome that is favorable towards employers.

Scholars, such as Morris (2012), argue that the employee free choice narrative comes about from the Board focusing on a policy of whether or not employees wish to be represented by a union, as the above *Dana Corp* data demonstrates. This interpretation is based upon specific language that was added in 1947 by the Taft-Hartley amendment. However, employee free choice statements are made throughout all of the dataset, which encompasses the entire active history of the NLRA. The data suggest that there are actually two specific policy narratives with respect to employee free choice. The first is a policy of determining whether employer and union behavior affects employee free choice; the second is the more widely recognized policy of employee free choice to refrain from joining labor organizations.

All sampled data from before the 1947 Taft-Hartley Amendment that relate to the policy of employee free choice in Board case law deal with the policy in relation to employer behavior. Specifically, the data reveal instances in which the Board wrestles with questions of employee free choice with respect to employer behavior. For example, in *Donnelly Garment Co.* (1942), the Board states:

We find, however, that the testimony in question does not overcome more positive evidence in the record that the respondent committed acts of interference and assistance in the formation and administration of the [union] which subjected that organization to the respondent's domination and which

removed from the employees' selection of the [union] the complete freedom of choice which the Act contemplates.

In the above case, the Board is concerned that the employer had usurped the independent incumbent union with an employer-dominated union. The Board's concern is not that employee free choice to refrain from joining a labor organization had been comprised, but rather, that employees were coerced into joining a union that may be representing employer interests rather than their interests. The Board in *A.W. Silver* (1943) makes a similar statement with regard to the employer coercing employees into joining a more favored union:

...the respondent had unlawfully interfered with his employee's free choice of representatives by attempting to interest them in transferring their affiliation to another union, and by indicating to them his unwillingness to continue dealing with the United [Electrical, Radio, and Machine Workers of America, Local no. 1143].

The dataset also contains cases after the passage of the Taft-Hartley Act in which the Board contemplates employer behavior that affects employee free choice. In *F.W. Woolworth Co.* (1952), the Board agrees with an ALJ's statement about employer actions affecting employee free choice:

...the address of Store Manager Brebner was to the effect that the employees could expect a loss of wages, if they elected the Union, and that the Company [sic] was ready to give them all the benefits which they might attain by union membership, if they rejected the Union [sic]. Under the circumstances this speech was clearly coercive, and interfered with the employees' free choice of a representative.

Relatively contemporary cases also deal with employer conduct affecting employee free choice. In *E.A. Nord Co.* (1985), the Board affirms an ALJ decision with respect to an employer holding a raffle affecting employee free choice: "We conclude that, under the circumstances of this case, the voters' freedom of choice was impaired by the conduct of the raffle."

After passage of the Taft-Hartley Act, instances began to arise in the data where the Board would consider whether or not union activity constrained employee free choice. *Reiss* (1956) is the earliest case in the sampled employee free choice data where a question of union conduct on employee free choice is contemplated. The Board reviews a hearing officer's decision: "The hearing officer found that the wage information circulated by the Petitioner [sic] the day before the election was inaccurate and misleading and interfered with the employees' free choice of a bargaining representative..." The Board then goes on to agree with the hearing officer's conclusion, thus effectuating that strain of policy. A number of somewhat similar cases arise around the same time as *Reiss*, such as *General Electric* (1957), in which the Board decides:

...we find that the alleged false and misleading statements the Employer [sic] has attributed to the Petitioner [i.e., the Union] have not been shown to exceed the standards of legitimate campaign propaganda so as to impair the employee's free choice in the election.

The majority of the Board members in both of these decisions were Republicans. However, while they considered if union behavior had an effect on employee free choice, they ruled against the union in the former case and for the union in the latter case – decisions that could respectively and arguably be seen as pro-management and pro-labor. These findings with respect to political ideology are not conclusive, but they do support Flynn's (2000) findings that heavy conservative ideology in Board decisions did not arise until the Reagan administration.

Boards consider union actions with respect to employee free choice in much the same way for the next four decades – that is, the data indicates that the Board simply considers whether or not alleged union activities are coercive or restraining on employee free choice without a stated policy of employees having the right to choose not to join labor

organizations. For example, in *YKK Inc.* (1984), the Board considers a hearing officer's determination with respect to a union's racial statements: "The hearing officer, assuming that all of the racially oriented acts were attributable to the Union, still found that they 'were not so extensive or pervasive so as to prevent or impede' employee free choice." Likewise, the Supreme Court in *NLRB v. Teamsters Local 357* (1961) contemplates that both union and employee actions can be constraining on employee free choice: "The Act deals with discrimination either by the employers or unions that encourages or discourages union membership."

The first instance in the dataset where the Board infers a policy that employee free choice may mean something other than freedom from coercion from either an employer or union is in *Kalamazoo Paper Box Corp.* (1962): "... the Board must maintain the two-fold objective of insuring to employees their rights to self-organization and freedom of choice in collective bargaining ... stability through collective bargaining." However, the Board is somewhat ambiguous with what it means by freedom of choice in collective bargaining.

Statements that employee free choice means freedom to choose not to be represented by a labor organization begin to become ubiquitous in the 2000s portion of the dataset. In *Fessler and Bowman, Inc.* (2004), the Board makes a declaration of such policy: "Further, Section 7 of the Act assures employees the basic right to choose whether or not they wish to be represented by a labor organization for collective bargaining purposes." Other cases in the beginning of the new millennium contain similar decisions. In his dissent in *Aljud Licensed Home Care Services* (2005), Republican Battista argues over a contract bar issue (i.e., a doctrine that prevents a decertification election happening in the middle of an active

contract): “Since a finding of contract bar operates to preclude employee choice, we must be careful in its application.”

The evidence suggests that Boards began to consider union effect on employee free choice after the Taft-Hartley Act. This is intuitive, since no union ULPs existed prior to the 1947 amendment. Therefore, Boards, regardless of ideological disposition, would be statutorily required to consider union behavior with respect to employee free choice after union ULPs came into being. However, the data suggest the Board rarely made statements throughout most of the 20<sup>th</sup> Century indicating that employee free choice meant that employees could choose not to be represented by labor organizations. Perhaps because the language is already explicit in the Act that employees can refrain, Boards decided not to reiterate the policy. Unfortunately, the data are unable to be informing in that respect. The data, however, suggest that the policy to protect employees’ rights to refrain from collective bargaining became prevalent with the Board under the Bush II administration in the 2000s.

While the Reagan era Boards were arguably much more ideologically conservative than previous Boards (Flynn, 2000; Gross, 1995), this analysis examines language and the recreation of policy, not case outcomes. Therefore, a dearth of communicated policy to protect the right to refrain from joining labor organizations does not preclude a large number of cases containing decisions that are more favorable to business. Ultimately, deeper knowledge about the interaction between employee free choice policy, ideology, and the history of the Act requires quantitative analysis, which is beyond the scope of this dissertation; therefore, caution should be used when generalizing these findings. However, the data do reveal some nuances with this phenomenon that augments previous research with

respect to the policy to protect employees' right to refrain from collective bargaining as a matter of free choice.

**Subtheme 3: Not Always a Dichotomy.** Previous research suggests that Boards and courts treat encouragement of collective bargaining and employee free choice as two separate and distinct policies (e.g., Morris, 2012). Specifically, these two policies are conceptualized as being dichotomous. That is, favoring one policy precludes the other policy. The data reveal decisions that promote this dichotomy - for example, *Electromation, Inc.* (1992): “Taft-Hartley emphasized (1) employee free choice rather than governmental encouragement of unionism.” Citing a circuit court decision, the concurring opinion then goes on in this case to clarify that the definition of employee free choice means employees have the right to refrain from collective bargaining: “ The Act encourages collective bargaining, as it should, in accordance with national policy. The Act does not encourage compulsory membership in a labor organization.” In this case, the Board does not deny a policy of encouraging collective bargaining, but it emphasizes that employees still have a free choice to refrain from joining a labor organization. Some nuance exists with this stated policy. The Board does not view encouraging collective bargaining and employee free choice as two completely dichotomous policies, but it does suggest that one policy is controlling – employee free choice – and overrides the other.

Despite the above discussed case, the data suggest that the encouragement of collective bargaining and employee free choice policies are not always viewed as being mutually exclusive. For example, citing the opening provision of the Act, the Supreme Court in *Hill et al. v. State of Florida* (1945) says: “The declared purpose of the Wagner Act, as shown in its first section, is to encourage collective bargaining, and to protect the ‘full

freedom' of workers in the selection of bargaining representatives of their own choice.” This case is prior to the Taft-Hartley Act, which arguably changed the meaning of employee free choice (Gross, 1985). However, the Board in the post-Taft-Hartley case, *Abraham Grossman* (1982), contemplates a balancing of the two policies with respect to a previous case:

We have reviewed the Board's experience with *Midwest Piping* with a desire to accommodate the view of the courts of appeals in light of our statutory mandate to protect employees' freedom to select their bargaining representatives and in harmony with our statutory mandate to encourage collective bargaining. Having identified the difficult problems in this area, it is the Board's task to reconcile the various interests of policy and law involved in fashioning a rule which will give, as far as possible, equal consideration to each of those interests in the light of industrial reality.

The Board similarly considers striking a balance in *MV Transportation* (2002): “We conclude that in a successor employer context, the position articulated by the Board in ... represents the appropriate balance between employee freedom of choice and the maintenance of stability in bargaining relationships.”

Other times, NLRB decisions state that both policies are equally valid purposes of the Act. In *HTH Inc.* (2011), the ALJ states: “The fundamental policies of the Act are to protect employees' right to choose or reject collective-bargaining representatives, to encourage collective bargaining, and to promote stability in bargaining relationships.” In their dissent in *Dana Corp* (2007), Board members Liebman and Walsh state a policy of both employee free choice and encouraging collective bargaining: “Today's decision ... undercuts the process of voluntary recognition as a legitimate mechanism for implementing employee free choice and promoting the practice of collective bargaining.

The data suggest that Boards and courts do not always view each of these policies as a dichotomy. In some instances, the Board may favor one policy over the other – that is, one policy is controlling and the other is a consideration that makes up part of the decision

making process. Perhaps not surprisingly, more conservative Boards appear to favor a dual-policy where employee free choice is controlling while more liberal Board members place each policy on equal footing. Of course, many Board members may personally see the policies as dichotomous; this reasoning just may not necessarily be communicated in their decisions. Board members and jurists may be reluctant to state these policies in dichotomous terms since doing so opens their decisions to being overturned if another Board disagrees with the interpretation. While not a statement of pure dichotomy, the Board in *MV Transportation* (2002) rejects a previous Board doctrine with respect to a contract bar doctrine due to its effect on employee free choice:

Although the Board majority in *St. Elizabeth Manor* purported to strike a balance between these two objectives, we find that the successor bar rule, by providing the union with an irrebuttable presumption of majority status and denying the employees the opportunity to change or reject their bargaining representative for a “reasonable period of time,” promotes the stability of bargaining relationships to the exclusion of the employees' Section 7 rights to choose their bargaining representative.

However, the reason why Boards and courts may not always treat the two policies as mutually exclusive in their decisions is because that language for both policies is present in the NLRA. Therefore, decision making may be contingent upon an entire reading of the purposes of the Act. Understanding this area of statutory interpretation, however, may require more phenomenological methods.

## **Theme 2: Employee and Employer Rights**

Numerous instances of the NLRB and jurists considering both employee and employer rights are present in the dataset. However, case reasoning and decisions in the dataset that originate from the Wagner Act era of the NLRA are primarily focused on employee rights. For example, in *Field Packing Co.* (1943), the Board, citing the ALJ who

first heard the case, states: "...the respondent ... coerced its employees in the exercise of their rights guaranteed in Section 7 of the Act." Thus, the data suggest that the Wagner Act was focused on giving and protecting the rights of employees. Therefore, by considering employee rights, the Board is effectuating Section 7 of the Act, which proscribes 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...

Consideration and protection of employee rights is a theme prevalent throughout the entire dataset of cases, including cases that were decided after the Taft-Harley amendment. Scrutinizing an employer's statements to an employee in *Wichita Eagle and Beacon Publishing Co.* (1972), the ALJ concludes: "...the statements conveyed a threat and thus constituted interference, restraint, and coercion of an employee in the exercise of her statutory rights to join a union and to engage in union activity." In this case, the "statutory rights" the judge considers are those proscribed in Section 7 of the Act. Contemporary cases also focus on employee rights, such as the Supreme Court's reasoning concerning the intersection of a state law with the Act in *J.A. Croson* (2011): "...the State regulatory regime directly conflicts with Section 7 rights we have reaffirmed today."

Numerous instances in the data indicate that the general test for whether or not an employee's rights have been violated is if the action on part of the charged party was coercive – for example, *Northern States Beef* (1976): "It is well settled that interrogation that seeks to place an employee in the position of acting as an informer regarding the union activity of her fellow employees is coercive." Throughout the data, all judicial actors make mention of correcting actions that are coercive towards employees, such as the ALJ reviewing previous Board decisions in *Shoppers Drug Mart, Inc.* (1976): "No proof of

coercive intent or effect is necessary under Section 8(a)(1) of the Act, the test being ‘whether the employer engaged in conduct which, it may be reasonably said, tends to interfere with the free exercise of rights under the Act.’” The Board has gone as far to indicate that coercion is destructive to the entire NLRA – for example, *Rutland Court Owners Inc.* (1942): “The discharge of the very employees whose representation is in issue, because they have placed their representation in question, is clearly inconsistent with the whole policy and general scheme of the Act.” This data suggest that protecting employees from being coerced is integral to effectuating other policies of the Act.

The data reveal that the Board and courts do not give employer rights much consideration in pre-Taft-Hartley cases. In *Precision Scientific Co.* (1943), the Board declares:

“Since it is the agent of the employees who is being chosen and not the agent of the employer, the employer is expected to observe a policy of strict neutrality both during and before the election and to refrain from influencing or inhibiting the will of employees.”

The data indicates that employee rights are entwined with the NLRA doctrine of protected concerted activity. Protected concerted activity is the right for employees to engage with employers to improve wages, benefits, and working conditions without necessarily seeking the aid of a union (Cox et al., 2006). Protected concerted activity as an explicit policy is not found anywhere in the actual language of the NLRA, except a line in the Findings and Policies section stating that it has been shown to cause industrial unrest; however, it is found in the abstract through a reading of Section 7: “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*... [emphasis added]. In *Staffing Network Holdings, LLC* (2015), the employer is required to place a notice posting in its facility that states: “WE WILL NOT [sic] discharge or otherwise discriminate against you for engaging in protected concerted activities protected under Section 7 of the Act.” Therefore, the Board is stating that protected concerted activity is ultimately a policy that flows from employee proscribed Section 7 rights. The protected concerted activity doctrine is specifically determined by an interpretation of a fact pattern that is applied to employees. For instance, the order in *Arlington Electric, Inc.* (2000) states for the employer to “Cease and desist from ... [c]oercively interrogating employees concerning their union or other protected, concerted activities.”

Some of the data discussed regarding the previous research question addressed First Amendment right concerns. Speech issues are indicative of employers being granted greater labor relations rights under the NLRA since the passage of the Taft-Hartley Act. The data indicates that employers had very little right to interfere with the election process, instead were required to remain wholly neutral during the campaign. However, after the passage of the 1947 amendment, the data suggest that employers were granted more opportunity to take an active part in the election process. The Court in *Gissel* (1969) affirms employers’ right to voice their opinions on unionization. This policy is then recreated through subsequent cases, such as *Be-Lo Stores* (1995):

...an employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a ‘threat of reprisal or force or promise of benefit.’

In essence, this change in policy turns employee free choice into almost a competition between employers and unions who are able to state their respective arguments, much like politicians during election campaigns.

Cases that appear later in chronology also give consideration to managerial rights to oversee the business, such as in *Loray* (1970):

However, a ‘wide range of employer actions taken to serve legitimate business interests in some significant fashion, even though the act committed may tend to discourage union membership,’ are permitted under Section 8(a)(3) as ‘essential if due protection is to be accorded the employer's right to manage his enterprise.’

The Board and jurists may at times have to balance employee rights and employer rights – specifically, employees’ rights to organize and employers’ rights to manage their organizations. The data suggest that the balancing rights policy is a legal consideration that has become more prevalent over time – for example, *Barney’s Club, Inc.* (1976):

Over the years, the Board and the courts have attempted to reconcile these conflicts through the formulation of rules of law which attempt to maximize the scope of the rights of each to the extent that they do not unduly diminish the rights of the other.

The Board following the trial examiner’s recommendation elucidates the need for such balancing in *Northwest Engineer* (1966):

Perhaps a possible approach to determining whether in this situation, the Respondent's [sic] right to due process, as contrasted with the purposes and policies of the Act, which the courts have interpreted to mean, inter alia, that the prime purpose of the statute is to protect employees, requires an evaluation and balancing of the conflicting legal rights involved in arriving at a judgment as to which right is paramount.

When such a scenario arises, the data suggest that the Board may weigh a decision in favor of effectuating employee rights. For instance, when considering a union organizer’s ability to reach employees, the Court in *NLRB v. Babcock and Wilcox* (1955), theorizes:

The right of self-organization depends in some measure on the ability of employees to learn the advantages of self-organization from others. Consequently, if the location of a plant and the living quarters of the employees place the employees beyond the reach of reasonable union efforts to communicate with them, the employer must allow the union to approach his employees on his property.

Likewise, the Board considers a similar balance and rules in favor of employee rights in *Nova South Eastern* (2011):

...we find that Nova's asserted security and other interests, although legitimate, are not likely to be adversely affected when contractors' employees, lawfully on the premises, also pass out flyers in the exercise of their organizational rights in exterior, nonwork areas.

Therefore, while the Act and its subsequent interpretation have proscribed more rights towards management, the data suggest that the Act is still more employee-centric. Therefore, the judicial actors treat labor relations rights as distributive amongst parties.

**Subtheme 1: Interests and Equalization.** Much of the data reveal judicial actors' concerns with party interests and how they play out in labor relations. The Board in *Brown University* (2004) states: "...the Act is designed to cover economic relationships." In other words, the data infer that the Act is designed specifically to cover the relationship between employees and employers as they engage with one another for their respective economic benefit. Thus, each party to the labor relationship has specific interests. The Board and jurists consider specific employee and employer interests when deciding cases. For example, in *Winn-Dixie Stores* (1976), the ALJ considers employee interests with respect to giving up employer-sponsored benefit plans when they join a union:

The vice in such exclusionary provision obviously stems from the fact that employees who join or select a union, in consequence of such an exercise of Section 7 rights, sustain an immediate loss of an existing interest, without assurances that such benefit or its equivalent will subsequently be restored through the bargaining process.

The above data is illustrative of the judge considering one party's interest – specifically, the employee interests. Very little instances in the data reveal the Board or judges considering employer interests individually. However, the data suggest that the Board and courts concurrently consider party interests when creating and effectuating policy. For instance, in *NLRB v. Charles D. Bonanno Linen Service, Inc.* (1982), the Supreme Court discusses multiemployer bargaining:

...multiemployer bargaining encourages both sides to adopt a flexible attitude during negotiations; ...employers can make concessions 'without fear that other employers will refuse to make similar concessions to achieve a competitive advantage,' and a union can act similarly 'without fear that the employees will be dissatisfied at not receiving the same benefits which the union might win from other employers.'

In this case, the Court is weighing the interests of each party and then using this balance to fashion policy.

For parties to pursue and actualize their interests, they must be able to meet at the bargaining table. A major legislative theory informing the Act is that employees as individuals do not have the necessary strength to bargain with their employers; rather bargaining collectively gives employees the strength to negotiate with employers (Cox et al., 2006). The data reveal instances in which the Board or jurists forward policy with respect to equalizing perceived inequity between the parties. In *Laughlin Steel* (1937), the Supreme Court, referencing a previous case decided by the Court, declares:

...we stated the reason for labor organizations. We said that they were organized out of the necessities of the situation; that a single employee was helpless in dealing with an employer; that he was dependent ordinarily on his daily wage for the maintenance of himself and family; that, if the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and resist arbitrary and unfair treatment; that union was essential to give laborers opportunity to deal on an equality with their employer.

This statement of policy effectuates part of the opening preamble of the Act that states in Section 1.[§151.]:

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce...

A policy of equalization was carried forth through much of the early Board law, such as in *Lennox Furnance Co., Inc.* (1940): “The whole policy of the law is to redress an inequality of bargaining power by forbidding employers to interfere with the development of employees ... which the employer cannot trade upon the economic weakness of his employee.”

While the data include other instances in which the literal statutory policy of equalizing bargaining power between employees and employers is invoked, the data also suggest that this policy is applied in a more abstract fashion. For example, in *Electronic Reproduction Service Corp.* (1974), Board members John H. Fanning and Jenkins consider the power differential between parties that could manifest in a contract provision: “...the stronger party can compel the weaker to abandon the protection of the Act through insistence on an arbitration clause, and that ‘sweetheart’ agreements can flout the Act with impunity.” The NLRB may also consider the differential in power between a union and an employer, such as in *Grossinger’s* (1965): ...company distribution of literature on premises does not normally put a union at the same disadvantage as speeches to massed groups of employees on company premises during paid working time.”

The data reveal that the Board and courts consider both party interests and equalization of bargaining power when fashioning policy. With respect to the former consideration, the NLRB and courts may recognize that parties must be able to pursue their interests as part of industrial reality. However, in order to pursue those interests, both parties

need to be able pursue their interests within a statutory framework that allows them to meet at the bargaining table as equals. In part of effectuating the policies of the Act, the Board and jurists forward a policy of maintaining equalization between management and labor.

### **Theme 3: Role of the Board**

Section 3. [§ 153.] of the Act created the NLRB. The data reveal statements affirming the role and duty of the Board. For instance, while discussing delays in proceedings, the Board in *Medallion Kitchens* (1986) considers the General Counsel’s argument: “Such delays undermine the confidence ... in the Board's ability and determination to promptly and effectively administer the Act.” The Supreme Court also forwards this doctrine in *NLRB v. Foodstore Employees Union* (1974): “The integrity of the administrative process demands no less than that the Board, not its legal representative, exercise the discretionary judgment which Congress has entrusted to it,” and acknowledges the Board in *NLRV v. Link-Belt* (1941) as the premiere venue for dealing with ULP charges: “The Board not the courts determines under this statutory scheme how the effect of unfair labor practices may be expunged.”

Throughout the dataset, instances arise where jurists or the Board itself discusses its statutory role in effectuating labor policy. As a matter of basic duties carrying out the Act, the data suggest that the NLRB’s purpose is to settle disputes – for example, *Dow Chemical Co.* (2007): “...the Board's primary purpose is to resolve actual disputes.” However, this is a broad construing of the Board’s duties. Specifically, the decisions prevalent in the data conceptualize these disputes as ULPs. For example, the Board in the *Plumber Contractor’s Association of Baltimore* (1951) elucidates: “the legislative history of the amended Act clearly establishes the intent of Congress in 1947 that the Board should assert jurisdiction in

that industry for the purpose of preventing certain unfair labor practices by labor organizations.” The data goes as far as to suggest that the purpose of the Board to remedy ULPs as to restore the status quo; the concurring opinion in *NLRB v. Local 60* (1961) states: “The primary purpose of the provision ... has been held to be to enable the Board to take measures designed to recreate the conditions and relationships that would have been had there been no unfair labor practice.”

The data suggest that the effectuated policy holds the Board should not enter into a dispute that is private in nature, even when there is a potential statutory issue at hand. For example, the Court states in *William E. Arnold Co. v. Carpenters District of Jacksonville and Vicinity, etc.* (1974): “Indeed, Board policy is to refrain from exercising jurisdiction in respect of disputed conduct arguably both an unfair labor practice and a contract violation when, as in this case, the parties have voluntarily established by contract a binding settlement procedure.” This statement suggests that the Board is primarily concerned with public interests while concurrently being mindful of the private relationships between parties.

Numerous examples in the data indicate that the Board is interested in protecting the public at large as well as public rights. In *Gannett Rochester Newspaper* (1996), the Board states: “Nevertheless, we have a responsibility to vindicate the public’s interests by discouraging and prohibiting unfair labor practices.” Even during the early incarnation of the Act, a philosophy of the Board being concerned about the public rather than private rights was forwarded, such as by the Supreme Court in *NLRB v. National Licorice Co.* (1940): “The proceeding authorized to be taken by the Board under the National Labor Relations Act is not for the adjudication of private rights.” The Court then goes on to state: “The Board acts in a public capacity to give effect to the declared public policy of the Act...” The consideration of

private disputes being out of the Board's scope of interest even extends to hiring halls, which the Supreme Court addresses in *NLRB v. Teamsters* (1961): "Moreover, the hiring hall, under the law as it stands, is a matter of negotiation between the parties. The Board has no power to compel directly or indirectly that the hiring hall be included or excluded in collective agreements."

#### **Theme 4: Public Interest: Private Disputes, Industrial Peace, and Commerce**

While much of the previous scholarship examining legal interpretation and policy of the NLRA focuses on the encouragement of collective bargaining and employee free choice narratives (e.g., Gross, 1985), the data collected in this study suggest that the NLRB and courts are also interested in effectuating other policies related to the Act. Many of these policies concern the public and private aspects of carrying out labor law. For example, when discussing employee status beyond what is stipulated in a contract in *Field Packing Co.* (1943), the Board explicates: "Public interest in the administration of the Act permits an inquiry into the material facts and substance of the relationship [of the employees and employer]." The data also reveal instances in which the public interest policy is recreated throughout case law, such as the ALJ in *Goodyear Tire and Rubber Co.* (1984):

I further note the case of *Teamsters Local 294 (Island Dock Lumber)*, [NLRB v. Teamsters] 145 NLRB 484, 492 (1963), enfd. 342 F.2d 18 (2d Cir. 1965), where the Board stated that the "cleanhands doctrine" of equity does not operate against a charging party (or alleged discriminatee) since proceedings such as this are not for the vindication of private rights but are brought in the public interest and to effectuate statutory policy.

The judge applies a doctrine in this case that is intended to serve the public's interests over private rights (i.e., rights guaranteed by a contract). In essence, he recreates a policy that holds the public interests above private interests.

The data also reveal times that the Board rejects a legal argument based upon whether or not accepting it would support the public interests, such as it did in the adoption of the ALJ's decision in *M and B Contracting Corp.* (1979):

While Respondent asserts that the release signed by [the charging party] constitutes a defense to the discrimination against him, such argument is without merit and is hereby rejected inasmuch as the rights guaranteed under the Act are in the public interest rather than private rights.

In the above case, the employer contends that no ULP against the charging party for union activity had taken place since the charging party had signed a waiver that the complaint against the employer was not properly filed since the issue was a contractual dispute. The ALJ disagrees, holding that the issue at hand needed to be considered in light of the public interest. That is, since the charge was filed with the General Counsel of the Board, it became a matter in the public interest. Snowball sampling reveals data that shows this policy has been created and recreated over time, going back far into the past (see Figure 13).

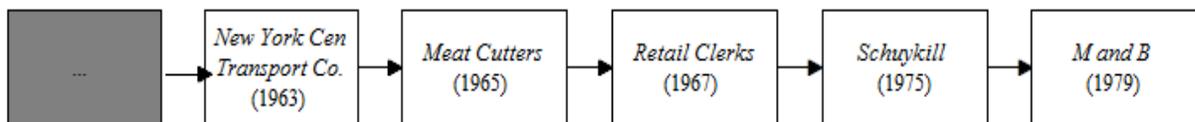


Figure 13. General counsel public policy strain.

While the Board is interested in vindicating public rights and protecting public interests, the data suggest that it is also interested in privatizing public disputes. For example, when discussing private tribunals, the Board states in *Professional Porter and Window Cleaning Co.* (1984):

Because parties may be justifiably unwilling to try the statutory question before private tribunals ... the single-forum litigation requirement might actually discourage resort to contractual grievance and arbitration proceedings. This result would fly in the face of the Board's statutory mandate to promote the private resolution of collective-bargaining disputes.

The data also reveal that the NLRB takes a hands-off approach to labor disputes and issues, so as long as parties' actions are not coercive towards employees – for instance, when dealing with campaign propaganda in *Virco Manufacturing Corp.* (1958): “As a general rule in a case such as this, the Board will not undertake to police or censor the campaign propaganda used by the participants in a Board election.”

The Supreme Court in the so-called Steelworkers Trilogy affirms a policy of privatizing the labor dispute. Specifically, the Court affirms that labor disputes arising under a collective bargaining agreement are properly the jurisdiction of arbitrators, such as in *Steelworkers of America v. Enterprise Wheel Co.* (1960): “As we there emphasized, the question of interpretation of the collective bargaining agreement is a question for the arbitrator.” In *Steelworkers of America v. Warrior and Gulf Navigation Co.* (1960), the Court provides reasoning as to the private nature of collective bargaining agreements: “A collective bargaining agreement is an effort to erect a system of industrial self-government,” and later goes on to state:

Arbitration is the means of solving the unforeseeable by molding a system of private law for all the problems which may arise and to provide for their solution in a way which will generally accord with the variant needs and desires of the parties. The processing of disputes through the grievance machinery is actually a vehicle by which meaning and content are given to the collective bargaining agreement.

The Court finally explicates why an arbitration is a better vehicle for resolving private labor disputes than litigation: “The labor arbitrator performs functions which are not normal to the courts; the considerations which help him fashion judgments may indeed be foreign to the competence of courts.” Through the Steelworkers cases, the Court delineates the functional role of a collective bargaining agreement – the codification of a private agreement with private rights. In essence, it is the privatization of the labor dispute.

Numerous instances exist throughout the dataset in which the Board states a policy of avoiding industrial strife or promoting industrial peace. This policy is often explained as the basis for a decision with regard to a fact pattern or a specific policy. The ALJ in *Alba-Waldensian, Inc.* (1967) discussing an employer's proposal states:

Hence, the proposal of a similar waiting period by Respondent [sic], for the clear purpose of enabling it to review its decision and possibly resolve the dispute acceptably to the Union [sic] is not lethal to the right to strike, but merely delays ultimate use of that weapon, and in this respect is not inconsistent with modern governmental policy of avoiding industrial strife, and tends to increase rather than diminish the chances of labor peace.

Oftentimes, the data suggest that one of the methods of encouraging industrial peace is to promote stable labor relations, such as the Board in *General Box Company* (1949) discussing a rule for preventing finicky changes of bargaining representatives:

This rule operates to limit the freedom of the employees to select and change their bargaining representative at will, once they have selected a union in a secret ballot conducted by the Board; it derives from the statutory policy of encouraging and stabilizing collective bargaining in the interest of industrial peace...

An ALJ in *South Texas Chapter* (1971) forwards a similar policy when discussing the employer's failure to respond to the union's letter about a contract issue:

...failure of the [the employer's representative] to respond in any way to the letter of March 26 until well into May when the contract would have automatically renewed is faintly suggestive of sharp practice and inconsistent with the statutory objective of good-faith negotiations looking to a preservation of industrial peace.

The overwhelming amount of data revealing discussion about industrial peace is suggestive that maintaining industrial peace is an incredibly important policy. The data infer that industrial peace is related to a policy of protecting commerce. All throughout the data, the Board and courts consider labor strife's influence on U.S. commerce. These statements

are often made in boilerplate language – for example, *Southwestern Bell Telephone Co.* (1984):

The activities of the Respondent set forth in section III, above, found to constitute unfair labor practices occurring in connection with the operations of the Respondent [sic] described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States [sic] and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof.

Presented is a sample from the dataset of a number of cases that use similar boilerplate language when discussing that a charged party’s actions affect commerce (see Figure 14). While these cases do not cite one another with respect to this language, the same – or very similar – boilerplate is used throughout all of them. Therefore, the recreation of policy may not necessary be derived from each individual case, but rather, is simply recreated through Boards using the same language over a number of cases. As can be observed from the data, this boilerplate was no longer used in more contemporary cases. This may be due to the policy that ULPs affect commerce being well established by the 1980s.

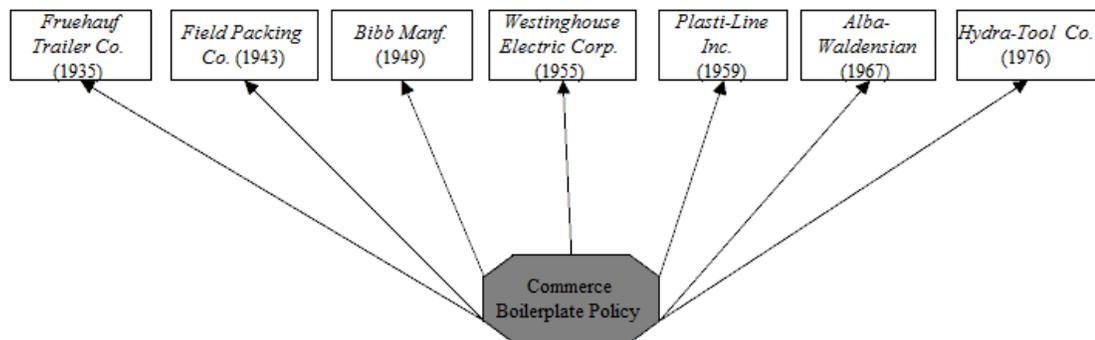


Figure 14. Commerce boilerplate policy.

The data suggest that policy is effectuated with respect to preventing industrial strife to inoculate the economy from being shocked. This corresponds with early legislative history (Cox et al., 2006) in which the Act was intended to prevent labor strife that affected

commerce. The Supreme Court later affirmed this policy when ruling on the constitutionality of the Act in *McLaughlin Steel* (1937). Therefore, in order to reaffirm the Supreme Court's ruling, the Board may have chosen to continue to reaffirm this policy in subsequent cases in order to protect itself and the Act's existence – that is, to reaffirm that the NLRB and NLRA are constitutional due to protecting the economic status quo.

### **Summary and Analysis**

This research question investigated what policy themes are ubiquitous in the extant NLRB and Supreme Court case law. The data affirmed previous scholars' research that two major policies are weaved throughout the case law corpus: encouragement of collective bargaining and protecting employee free choice. The data also suggest that forwarding either one of these narratives is somewhat related to the political or ideological disposition of Board members. However, the data infer that nuance exists with respect to these policies. Specifically, the data indicate that the employee free choice narrative has only recently become a policy of affirming employees' right to refrain from joining labor organizations – at least this policy has only recently been explicitly articulated in case law decisions. The language that employees are free to choose not to be represented by unions has been present in the Act since it was amended in 1947.

An employee free choice policy was present in very early case law. Rather than focusing on employees' right to choose to refrain from joining labor organizations, this policy focused on assuring that employees were not coerced by their employers to join an employer-dominated union or reject collective bargaining when they otherwise wished to be represented by a union. Application of the employee free choice doctrine throughout much of the post-Taft-Hartley era simply took the same policy of preventing coercion by employers in

employee choice and applied it to union coercion. The data revealed that the Board and jurists still contemporaneously applied a coercion policy to employers' activity that constrained employee free choice, and such a policy did not necessarily preclude a policy of collective bargaining. The evidence describes instances in which the NLRB does not see employee free choice and encouraging collective bargaining as a pure dichotomy.

The policy of employee free choice meaning the right to refrain from joining labor organizations did not become explicit until much later in time, after the Taft-Hartley amendment. The data revealed that most of the cases that were a statement of employee free choice indicated a policy to choose to refrain from joining labor organizations. The policy that employee free choice was explicitly in contrast to a policy of encouraging collective bargaining did not become prevalent in the dataset until the first Bush administration. On first glance, this does not support the findings in Gross's (1985) earlier study in which Board members from previous decades indicated disparity in a reading of the post-Taft-Hartley NLRA based upon the employee free choice and collective bargaining doctrines. However, Board members simply may not have explicitly made statements of such policy in their decisions. Doing so could have opened their decisions up to a greater likelihood of being overturned - again a strong possibility with administrative law not strictly adhering to stare decisis. Also, previous Board members may not have seen the policies as being pure dichotomies, but rather, saw one policy as controlling. In other words, whether the Act's policy is to encourage collective bargaining or to protect employee free choice may be a matter of degree rather than an all-or-nothing policy. For instance, when discussing employee free choice and union security - an arguably very union-friendly policy - the Supreme Court in *NLRB v. Lodge No. 1424* (1960) states:

It is well known, and the legislative history of the 1947 Taft-Hartley amendments plainly shows, that Section 8(a)(3) ... represented the Congressional response to the competing demands of employee freedom of choice and union security. Had Congress thought one or the other overriding, it would doubtless have found words adequate to express that judgment. It did not do so; it accommodated both interests, doubtless in a manner unsatisfactory to the extreme partisans of each, by drawing a line it thought reasonable.

Regardless of a policy encouraging collective bargaining or protecting employee free choice, the data suggest that the statute is employee-centric. That is, much of NLRA policy is directed towards protecting employees from coercion. This trend extends to cases dealing with the doctrine of protected concerted activity. Even after passage of the Taft-Hartley Act, which is arguably more beneficial to employers than the previous Wagner Act, the Board appeared to be more concerned with employee rights. This may be in part because employers do not have any equivalent of Section 7 rights in the Act. The Taft-Hartley Act codified union ULPs, which offer employers more protections from union actions, but union rights are not necessarily employee rights. That is because the Act proscribes employees the right to be represented by unions for the purposes of collective bargaining – unions are simply the consequent of employees' right to bargain collectively. Therefore, modifying the relationship between unions and employers does not necessarily preclude a change in employee rights or the policy of protecting them.

The data also revealed many instances dealing with the Board's role. The data with respect to this theme suggest that the Board primarily maintains a policy of protecting public rights – that is, the rights proscribed in Section 7 of the Act. It does this through investigation and prosecuting the ULPs codified in Section 8 of the NLRA. Both Board and Supreme Court law are directing of this area of Board oversight. However, the Supreme Court should be accredited more weight, since it is an outside authority. As Weber (1922/2011) notes,

bureaucratic organizations, which the NLRB is one, serve to perpetuate their own existence. Therefore, it follows that the Board would try to adjudicate its own jurisdiction and role in labor policy. The data suggest a reluctance of the Board and courts to enter into the private affairs of unions and employers – a topic given consideration in earlier themes of this research question and in the reporting of data and analysis in the next chapter.

Although the data revealed that encouraging collective bargaining and protecting employee rights and free choice were significant policies effectuated by the NLRA and Supreme Court, the data revealed a major policy concerning the Act's relationship with the public and economic world outside of private parties' labor relationships. Specifically, the data indicated policies fashioned to protect the public from labor disputes. This was evident in the data that divulged a strong preference of the Board and jurists for labor disputes to be resolved through private channels, such as arbitration.

The data suggest that the Act is focused towards protecting interstate commerce and the economy. This is accomplished through preventing industrial strife. By invoking a policy of preventing industrial strife - or at least privatizing it between management and labor parties – the NLRB or courts can actually effectuate other policy. For example, in *Plasti-Line, Inc.* (1959), the Board forwards a policy of encouraging collective bargaining as a means of protecting commerce: “This strikes at the very heart of the fundamental purpose of the Act, i.e., to foster and promote collective bargaining in order to avoid disruption to the free flow of commerce.” Likewise, in *Tiidee Products, Inc.* (1972): the Board states: “The policy of the Act to insure industrial peace through collective bargaining can only be effectuated when speedy access to uncrowded Board and court dockets is available.” Decisions in modern cases also formulate a nexus between collective bargaining and

industrial peace, such as a statement by an ALJ about a bargaining order in *Monogram Comfort Foods, LLC* (2011): “An affirmative bargaining order also serves other policies of the Act by fostering meaningful collective bargaining and industrial peace.” Considering the nexus between industrial stability and collective bargaining is not necessarily surprising. The ALJ in *United Paperworkers International Union* (1989) elucidates that considering this nexus should actually be a matter of general policy:

The text of the two acts and the Supreme Court decisions makes it clear that when the statutory policy is discussed, it is not sufficient to rest merely on the simple assertion that the policy is to promote collective bargaining. That is but a means to achieve the declared objective of the Act, which the promotion of industrial peace by equalization of bargaining strength and the promotion of collective bargaining between the parties

Instances arise in the data where employee free choice narratives are supported by invoking a policy of avoiding industrial strife. For example, the ALJ in *Joe Costa Trucking Company* (1979) states:

Noting that labor legislation traditionally entails compromise, the Court observed that the interest in employee freedom of choice is one of those given large recognition by the Act as amended. But neither can one disregard the interest in ‘industrial peace’ which it is the overall purpose of the Act to secure.’

Similarly, the Board in *Met Electrical Testing Company* (2000) states:

In balancing the goals of employee free choice and bargaining stability, the Board has determined that even a 1-year bargaining history on a multiplant basis can be sufficient to bar a petition seeking an election in a segment of that unit

And in dealing with a policy related to a contract bar issue in *RCA Del Caribe* (1982), the Board States: “This new approach affords maximum protection to the complementary statutory policies of furthering stability in industrial relations and of insuring employee free choice.”

Further analysis of the policies of encouraging collective bargaining, employee free choice, and industrial stability suggests that previous thinking with regard to the first two policies is somewhat shortsighted. That is, scholarship has focused simply on legal interpretation of the Act as a function of promoting either the collective bargaining or free choice narrative (e.g., Morris, 2012). However, the data suggest that, as a matter of statutory interpretation, these policies are not the central purpose of the Act. Rather, the primary purpose of the Act is to protect commerce by promoting industrial stability. Board members and jurists may then choose a policy promoting collective bargaining or employee free choice to support the policy of ensuring industrial peace (see Figure 15).

Structuration principles explain this phenomenon insofar that, despite whatever narrative is chosen, the decision is still congruent with the policy laid forth in the opening Findings and Policies section of the Act: “Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce ... promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest...” This section goes on to describe in similar language union activity that affects commerce: “ Experience has further demonstrated that certain practices by some labor organizations ... have the intent or the necessary effect of burdening or obstructing commerce by preventing...” Finally, the section concludes with the ambiguous statement:

It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self- organization, and designation of representatives of their own choosing...

Relying on the policies stated in this section, Boards and jurists are able to make decisions regarding promoting collective bargaining or protecting employee free choice that

is informed by the final sentence of the Findings and Policies section. However, they will never be in violation of the policy of protecting commerce through industrial stability. This policy is a supra policy of the Act, and the data suggest that it has been relatively static throughout the history of the NLRA. It should be noted, however, that the theory behind collective bargaining does not necessarily preclude industrial peace as the primary policy of the Act. More specifically, the theory informing collective bargaining is that parties are compelled to agree upon a contract through negotiations, because the alternative is to use economic weapons, such as a strike or lockout, to force one another's hand (Cox et al., 2006). Arguably, this creates economic strife. However, the data indicate that prevention of industrial strife is not simply the purpose of the Act; rather, the purpose is to prevent as much industrial strife as possible from becoming a matter of wide-spread public concern. This is a policy of believing it better to bestow rationalized, legal processes for labor relations than letting it up to a might-makes-right doctrine that could potentially be violent. The outlawing of secondary boycotts with the passage of the Taft-Hartley Act is indicative of the legislator's desire to contain labor strife to the smallest economic unit possible.

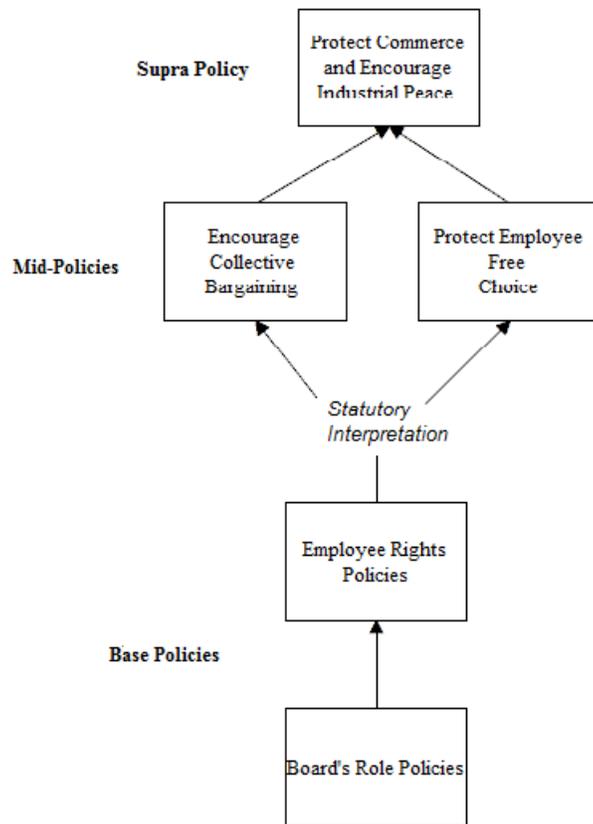


Figure 15. Policy structure of the NLRA.

The collective bargaining and free choice policies are mid-policies of the Act, and they have been dynamic throughout the history of the Act, particularly after 1947 amendment. Applying structuration principles, the Board and courts are bound by the commerce and industrial peace policy, because it is explicitly written into the Act. It does not facilitate structure for movement; rather, it is constraining in scope. The mid-policies, however, have ambiguous legislative origins and are written in ambiguous, contradictory language in the Act. Therefore, these policies are more facilitative and allow the Boards and courts to exercise greater agency with respect to their interpretation.

Finally, the data suggest that there are base policies. These are policies that serve the mid-policies and supra policy, and upon which the higher-level policies are contingent. Protecting employee rights is one such base policy. By extensions, protecting nonunion

concerted activity is also a base policy, since it is tied to Section 7 rights. The data suggest that effectuation of the mid-policies is ultimately based upon whether or not employee rights are being served. That is, does effectuating one policy or another ensure that employees' are not being coerced in their exercise of Section 7 rights? Policies concerning the Board's duty also serve at the base level, because the entire effectuation of the Act is contingent upon the NLRB's ability to fill its statutory role. In essence, base policies attempt to resolve basic legal issues that arise in the effectuation of the NLRA. They deal with the day-to-day problems that come about over the course of the Act's history. They are often not derived overtly from Congressional intentions, legislative history, or the bare language of the Act. Rather, they manifest through NLRB and court reading of these statutory cues. Therefore, the policy tests described in the previous chapter are part of the area of base policy.

The next research question and chapter explores the application of structuration theory in greater detail by examining what policy strains have been created and recreated over the course of time.

## CHAPTER VI

### FINDINGS AND ANALYSIS: QUESTION 3

#### **Introduction**

Have legal opinions stated in cases become precedent setting in subsequent cases that deal with legal questions similar to those found in the leading cases?

This research question explores some of the policy narratives throughout the history of the NLRA and tracks their progression over time. Specifically, it applies structuration theory as a means of deducing whether or not the NLRB and courts have applied similar legal reasoning and doctrines as communicated by case law to similar fact patterns. Analysis of the data reveals some themes that are explored within this chapter. The first section, Precedents and New Policy, examines examples of case law in which legal principles are created, recreated, and sometimes overturned. The second section, Role of the Supreme Court, details how cases decided by the highest court of the U.S. may ultimately have the most influence on the structuration of labor policy.

#### **Findings**

##### **Precedents and New Policy**

The data clearly reveal that the Board and ALJs cite previous case law in order to effectuate policy. When affirming the jurisdictional power to rule on a case involving a news organization, the ALJ in *Ampersand Publishing* (2007) cites Supreme Court precedent: “Seventy years ago the United States Supreme Court held that the Act constitutionally applies to news organizations such as the News-Press. *Associated Press v. NLRB*, 301 U.S. 103 (1937).” This example demonstrates that doctrine inherent to case law can exist over the span of decades to be culled upon to give weight to a decision years later. In that regard, the doctrine is recreated through time. Other instances exist in the data illustrating the same

phenomenon. For example, in determining the employment status of individuals, the ALJ in *Stamford Taxi, Inc.* (1996) invokes a much older case: “In determining whether individuals are employees or independent contractors, the Board applies the common law of agency, specifically the right-of-control test set forth in *News Syndicate Co.*, 164 NLRB 422, 423-24 (1967).”

The data also reveal countless instances in which previous case law is cited to inform a decision regarding the legality of actions that arose in the fact pattern. The ALJ in *Koronis Parts, Inc.* (1996) cites a circuit court decision with respect to employer threats of a plant closure: “A threat of plant closure should employees become represented, of course, is regarded under the Act as one of the ‘hallmark’ and most serious violations of the Act. See, e.g., *Chemvet Labs, Inc. v. NLRB*, 497 F.2d 445, 448 (8<sup>th</sup> Cir. 1974).” This case is illustrative of applying a principle to which the Act is silent. Specifically, the NLRA does not contain any language that states that it is a ULP to threaten a plant closing in response to unionism. The principle came about as a matter of statutory interpretation. Specifically, the antecedent decision makers interpreted a broad principle of preventing coercive threats in Section 8(a)(1) of the Act, and then determined that a threat of plant closure fell within the purview of the provision. This is supportive of Posner’s (1987/1997) theory that jurists read provisions broadly and then apply principles to specifically narrow fact patterns. The ALJ in *Koronis* then applied the interpretation of a plant closing being coercive, thus recreating the policy that threatening plant closures is a coercive action against employee and, thus, a ULP.

Through snowball sampling, the data reveal that policies are created and recreated through the application of case law over significant distances of time. For example, in *Renal Care of Buffalo* (2005), by citing a previous case, the ALJ applies a principle to determine if

an employee has lost the protection of the Act: “The Board has long held that employees are privileged to engage in protected conduct as long as it is not egregious so as to lose its protection under the Act. *Felix Industries*, 331 NLRB 144, 146 (2000).” The Board in *Felix Industries* (2000) derives from another case the test for determining whether or not an employee loses the protection of the Act:

Applying the four-factor test of *Atlantic Steel Co.*, 245 NLRB 814 (1979), the judge found that the subject matter of Yonta's telephonic discussion with his supervisor (Felix Petrillo) about the night differential pay was protected, but that Yonta lost protection of the Act by calling Petrillo a f...ing [sic] kid during the discussion. The factors considered for determining whether an employee engaged in protected activity loses the protection of the Act by opprobrious conduct are: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practice.

The principle elucidated in *Atlantic Steel Co.* (1979) as cited in the data above was a policy fashioned by the Board and then recreated over the subsequent two cases (see Figure 16).



Figure 16. Act's protection policy strain.

The data indicates that it is common for policy strains to transverse decades. For example, when applying a test concerning closeness in proximity to an employee's union activity and subsequent discharge as a basis for a ULP, the Board in *Toll Manufacturing Co.* (2004) cites a previous case, *NLRV v. Abbey's Transportation* (1988). *Abbey's Transportation* quotes a case from the 1950s with respect to the same policy issue (see Figure 17).

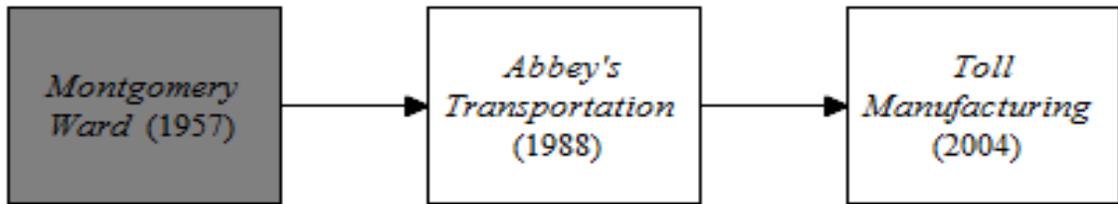


Figure 17. Union activity proximity policy strain.

The majority of policy strains reported in this chapter show policy being recreated through a lineage of subsequent cases that are decided in chronological order. However, the data also indicates that sometimes a case has such importance to labor policy that it is continually cited throughout the case law corpus. This is in contrast to recreating policy through a chain of progressive case law. *Wright Line* (1980), which establishes the policy of determining if a ULP has taken place based upon a question of whether an employee would have been disciplined regardless of union activity, may best illustrate this phenomenon (see Figure 18). Although *Wright Line* was sampled as part of the conventional content analysis, which does not feature snowball sampling, cases in the directive content analysis cited the case with such ubiquity that snowball sampling subsequent cases is appropriate here.

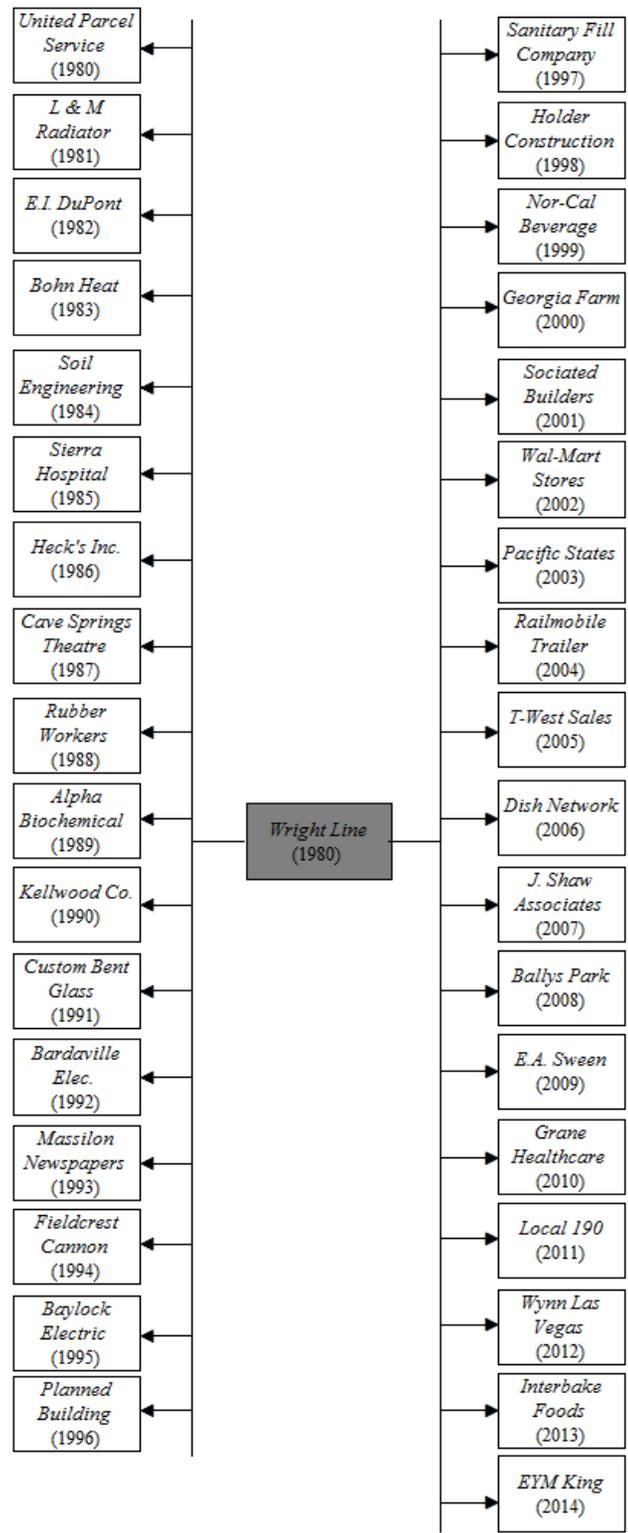


Figure 18. Wright Line policy strain.

To depict the recreation of policy over time, I sampled for each year, a Board or ALJ case that used the analysis first formulated in *Wright Line*. Each of these cases cites *Wright Line* when applying the dual-motive test to an alleged ULP. For example, in *T-West Sales and Services* (2005), the Board when determining whether or not an employee's termination was legal applies *Wright Line* in their analysis: "...we find that the Respondent discharged Galindo in violation of Section 8(a)(3) and (1). Our analysis of whether the discharge violated the Act is governed by the test articulated in *Wright Line*." In most *Wright Line* cases, legal conclusions are made applying the dual-motive analysis in a similar way as the original case – that is, determining whether or not a negative action towards an employee, such as a disciplinary write-up, would have occurred absent of union activity. However, the data reveal that a Board or ALJ may apply the test slightly differently, such as determining if an employer would have still withheld a benefit in the absence of union activity. For instance, in *Cave Springs Theatre* (1987), the ALJ, when considering if skilled movie projectionists would have been offered floor manager positions absent of engaging in union activity, states: "...I also conclude that Respondent has in no way shown that, aside from the union-inspired motivation, it would not in any event have hired them for any of these positions. See *Wright Line*, 251 NLRB 1083, 1089 (1980)." In that regard, the original case law is facilitative insofar that the judge can fashion a broader principle that still adheres to the policy first laid out in *Wright Line*.

The data reveal very little evidence that the Board or jurists apply case law to fact patterns that are far removed from the antecedent case being cited. However, the data suggest that sometimes the Board can obfuscate the policy it is intending to forward by unclear citations. For example, in *United Rentals* (2007), the Board considers a question concerning

the legality of an employer explaining that it will not be able to deal directly with individual employees if they become unionized. The Board then affirms that such an action does not constitute a ULP: "...truthful statements that identify for employees the changes unionization will bring ... are protected by Section 8(c)." The Board cites a string of case law to support its position; however, the citation infers that the Board is forwarding a policy of nondirect dealing rather than a policy of employers being able to communicate organizational changes that unionization brings:

See *Tri-Cast, Inc.*, 274 NLRB 377, 377 (1985), citing *NLRB v. Sacramento Clinical Laboratory*, 623 F.2d 110, 112 (9th Cir. 1980) (the court, citing with approval *Textron, Inc.*, 176 NLRB 377 (1969). The Board there said that "[I]t is a fact of industrial life' that when a union represents employees, they will deal with an employer indirectly, through a shop steward.

The Board in *Tri-Cast* (1985) does forward a policy of employers being able to communicate changes that unionization will bring to the employment relationship:

For an employer to tell its employees about this change during the course of an election campaign cannot be characterized as an objectionable retaliatory threat to deprive employees of their rights, but rather is nothing more or less than permissible campaign conduct.

But this is not the language or policy invoked by the Board in *United Rentals*. Therefore, for a reviewing court or subsequent Board or ALJ to perpetuate this policy, clear diligence would need to be paid to specifically what legal principles are being communicated in the case law. It would be overreaching to suggest that the data reveal a teleological reason for this obfuscation (i.e., the Board is purposefully hiding its intentions). However, through sloppy citation methods, the Board may affect how subsequent policy is effectuated if future decision making is misinformed by the manner in which antecedent cases are presented.

Until now, the data reported in response to this research question reveal that Boards and jurists perpetuate policy through precedent. However, the data reveal that, while

infrequent, precedents are also overturned. For example, in *Brown University* (2004), the Board overturns a precedent that held university graduate assistants are employees as defined by the Act, and instead returns to a previous standard:

The Board in [*New York University* (2000)] concluded that graduate student assistants are employees under Section 2(3) of the Act and therefore are to be extended the right to engage in collective bargaining. That decision reversed more than 25 years of Board precedent. That precedent was never successfully challenged in court or in Congress. In our decision today, we return to the Board's pre-*NYU* precedent that graduate student assistants are not statutory employees.

The data reveal that precedents may be overturned for a very short time once the purveyors of a minority opinion in the antecedent case gain enough intra-Board power, such as through Board attrition, to overturn a case. For instance, in *Collyer Insulated Wire* (1971), a case which set forth the standards for deferring alleged ULP charges to the parties' grievance-arbitration process, Board members Jenkins and Fanning both wrote dissents, admonishing the majority for providing a standard that compelled employees to give up their statutory rights to have an alleged ULP decided by an arbitrator. Jenkins writes in his dissent:

The Board majority is imposing a sort of 'waiver' of statutory rights-the right of access to the Board-arising from a provision for arbitration. But the courts have long and plainly held that such statutory rights of the individual employee cannot be waived by agreement between the union and employer.

*Collyer* became a precedent-setting case that the Board used to determine if an alleged ULP violation should be deferred to an arbitrator (see Figure 19). The data reveal that Fanning and Jenkins would often dissent in these cases – for instance, Fanning's dissent in *Gary-Hobart Water Corp.* (1972): "For reasons set forth by Member Jenkins and me in our dissents in *Collyer Insulated Wire*... where the Board majority extended its *Collyer* doctrine to encompass alleged violations of Section 8(a)(3), the Board should not abdicate its authority to an arbitrator."

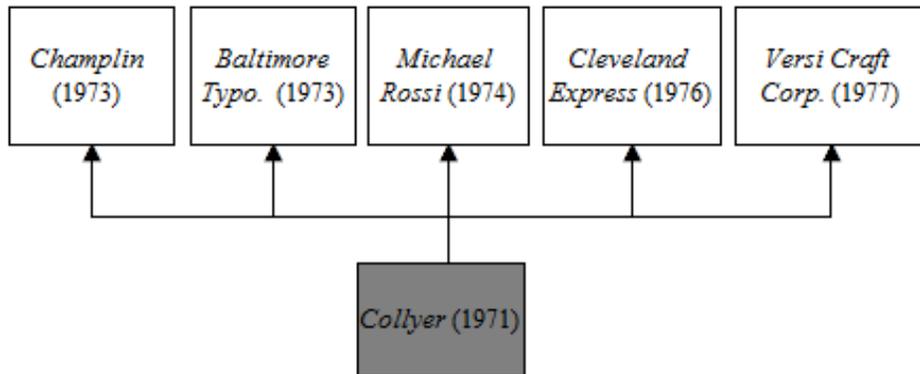


Figure 19. Collyer policy strain.

In *General American Transportation Corp.* (1977) the majority, including Fanning and Jenkins, agree with a previous ALJ decision not to defer a matter to grievance-arbitration and explicitly reject the doctrine set forth in *Collyer*: “...our rejection of deferral is predicated on our longstanding opposition to the policy established by *Collyer* and its progeny, and is not based merely on the particular circumstances of the instant case.” Specifically, the majority states that deferral under 8(a)(5) allegations is appropriate, since 8(a)(5) is concerned with contractual disputes; however, the deferral mandated by *Collyer* for other alleged provisional violations are not appropriate: “...violations of sections of the Act other than Section 8(a)(5), we believe that the Board has a statutory duty to hear and to dispose of unfair labor practices...” *General American Transportation Corp.* (1977) then became the leading case to instruct Boards and ALJs in determining if deferral is appropriate (see Figure 20).

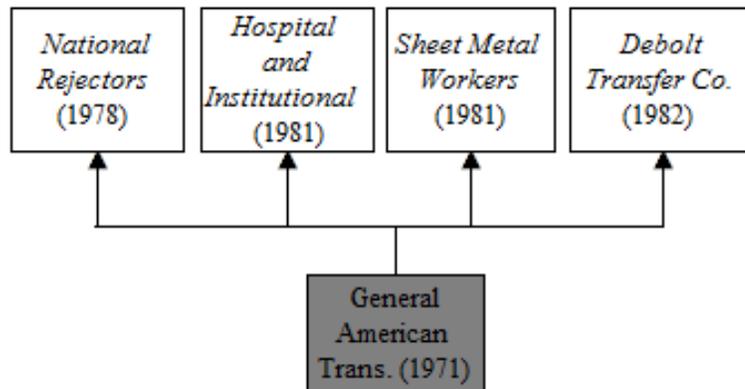


Figure 20. General American Transportation Corp. policy strain.

Eventually, the Board overturns *General American Transportation Corp.* in the subsequent case *United Technologies Corp.* (1984), returning to the Collyer doctrine of deferring ULP charges other than just in instances of 8(a)(5) allegations. First, the Board considers the case that set the current standard:

Despite the universal judicial acceptance of the *Collyer* doctrine, however, the Board in *General American Transportation* abruptly changed course and adopted a different standard for arbitral deferral, one that we believe ignores the important policy considerations in favor of deferral.”

The Board concludes in its decision by reversing *General American Transportation Corp.* and reaffirming the *Collyer* standard: “...we conclude that the issues raised ... should be deferred to the grievance-arbitration provisions of the collective-bargaining agreement under the principles of *Collyer*.” *Collyer* and *General American Transportation Corp.* are illustrative of how the Board can establish a policy, recreate it through case law as a matter of precedent, overturn that precedent, and then eventually reestablish the policy as laid forth in the original case.

While perhaps less prevalent than expected, the NLRB does cite its own precedent regarding the mid-policies of encouraging collective bargaining and protecting employee free

choice. In *Wolf Trap Foundation* (1988), the ALJ directly quotes *Harvey Herbert, Inc.* (1968): "...the policy of the statute to encourage collective bargaining - one of the fundamental purposes of the Act." 171 NLRB at 240." Likewise, in *Big Ridge, Inc.* (2012), the Board cites *Randell Warehouse of Arizona* (2006): "In order to establish that such conduct warrants overturning the election, the objecting party must show that that the conduct has "a reasonable tendency to interfere with employee free choice."

This data suggest that while the Board and ALJs do perpetuate policy with regard to encouraging collective bargaining and employee free choice through case law, they do not often do this. Also, the data does not contain much in the way of long policy strains across multiple cases with respect to either policy. This suggests that the structural influence of both policies is arrived at from an interpretation of legislative intent and the Act itself – as was examined with respect to the first research question. Further, the data indicates that when a case is cited regarding either policy, the statement of policy is usually accompanied by a more tangible matter of policy in the form of a policy test or instruction with regard to a fact pattern. For example, the Board in the aforementioned *United Technologies Corp.* (1984) cites precedent in *Consolidated Aircraft* (1943):

We are of the opinion ... that it will not effectuate the statutory policy of 'encouraging the practice and procedure of collective bargaining' for the Board to assume the role of policing collective contracts between employers and labor organizations by attempting to decide whether disputes as to the meaning and administration of such contracts constitute unfair labor practices under the Act.

The preceding data reveal that the Board and ALJs do create and recreate policy through the vehicle of case law. The following theme examines the role of the Supreme Court and how it interacts with precedent.

## **Role of the Supreme Court**

The Supreme Court of the U.S. has an important role in the structuration of labor policy. Article III of the Constitution established the Supreme Court as the highest court in the U.S. (U.S. Const. art. III Sec. 1). Although the Constitution does not explicitly proscribe judicial review powers to the Supreme Court (Corwin, 1910), *Marbury v. Madison* (1803) affirmed the Court's ability to engage in judicial review of lower courts. As the highest court in the country, the Supreme Court's decisions are final; ergo, its decisions set the final precedent with respect to a legal principle related to a specific legal question or fact pattern.

The Supreme Court can review administrative agencies' judicial decisions (Dame, 2002). However, the Court in *Chevron* (1984) and *Skidmore* (1944) established that administrative agencies are the experts on the policies that they oversee and the Supreme Court would only overrule these agencies when a prior decision is clearly repugnant to a statute. The data reveal that the Supreme Court can be reluctant to overrule the NLRB and often defers to the agency's expert authority. In *Link-Belt* (1941), the Court states: "...Congress has deemed it wise to entrust the finding of facts to these specialized agencies. It is essential that courts regard this division of responsibility..." Likewise, in *NLRB v. Financial Institution Employees of America* (1986), the Supreme Court states: "Our cases have previously recognized the Board's broad authority to construe provisions of the Act..." Here the Court provides affirmation that the Board has statutory power to interpret the provisions of the Act and does not necessarily have to rely on other courts in order to effectuate the Act's policies.

When making decisions and invoking precedent, the data reveal that the Supreme Court almost always cites its own cases rather than previous Board law. For example, while

discussing the resolution of 10(k) jurisdictional disputes, the Court in *Carey vs.*

*Westinghouse* (1964) cites a number of its own cases:

We think the same policy considerations are applicable here; and that a suit either in the federal courts, as provided by §301(a) of the Labor Management Relations Act of 1947 (61 Stat. 156, 29 U.S.C. §185(a); *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 77 S.Ct. 912, 1 L.Ed.2d 972), or before such state tribunals as are authorized to act (*Charles Dowd Box Co. v. Courtney*, 368 U.S. 502, 82 S.Ct. 519, 7 L.Ed.2d 483; *Local 174, Teamsters, Chauffeurs, Warehousemen & Helpers of America v. Lucas Flour Co.*, 369 U.S. 95, 82 S.Ct. 571, 7 L.Ed.2d 593) is proper...

However, the Court may invoke Board cases when it is attempting to recite procedural

history or expound upon a legal issue that it has decided. For instance, in *Lodge 76 v.*

*Wisconsin Employment Relations Commission* (1976) the Court cites a number of Board

cases dealing with an overtime issue:

See *Prince Lithograph Co.*, 205 N.L.R.B. 110 (1973). Compare *Ibid.*; *Dow Chemical Co.*, 152 N.L.R.B. 1150 (1965), with *Decision, Inc.*, 166 N.L.R.B. 464, 479 (1967); *John S. Swift Co.*, 124 N.L.R.B. 394 (1959). See also *Polytech, Inc.*, 195 N.L.R.B. 695, 696 (1972). The Board in those cases placed emphasis on whether the decision to work overtime was voluntary with the individual in deciding whether a concerted refusal to work overtime is protected by Section 7.

This data may suggest that the Supreme Court primarily wishes to only perpetuate policy that it has previously ruled upon and does not want to enter into other areas of policy that have not yet been brought forth but exist yet in lower law (i.e., Board law). It may also suggest that, while the NLRB is viewed as the expert on labor policy, the Supreme Court does not want to simply rubber-stamp other cases. That is, by citing previous Board law, the Court may be perpetuating the decided policy in those cases. Thus, those cases gain the structural power that accompany a Supreme Court ruling – they become precedent setting and a matter of undisputed labor policy and do not give the Court a chance to cogently consider their policy implications in depth.

The last point in the above paragraph is incredibly salient when considering the Supreme Court's role in labor policy structuration. The data indicate that Court precedent is extremely powerful. When the Supreme Court makes a decision, the NLRB is compelled to follow this decision as a matter of vertical precedent. For example, when deciding the appropriateness of allowing a lockout of employees to preserve a multi-employer bargaining status, the Court in *NLRB v. Teamsters Local 449* (1957), overturns a Court of Appeals and holds: "...that in the circumstances of this case the Board correctly balanced the conflicting interests in deciding that a temporary lockout to preserve the multiemployer [sic] bargaining basis from the disintegration threatened by the Union's strike action was lawful." When similar fact patterns arise later in the statute's history, the Board adopted this case. For instance, in *El Cerrito Mill* (1995), the Board invokes a previous Board case reaffirming the antecedent Supreme Court case: "...the Board emphasized in *Bonanno Linen*, our 'statutory mandate is to balance not economic weapons, but 'conflicting legitimate interest.' 243 NLRB at 1097, quoting *NLRV v. Teamsters Local 449*."

On first glance, this evidence of precedent does not appear different than the other examples presented in other findings in which the Board sets forth a principle that is then created through case law. However, the difference is the Board cannot overturn a Supreme Court precedent the same way it can overturn its own decisions. Perhaps the best way to illustrate the permanency of Supreme Court precedent in labor law is to examine the ubiquity of a case's influence. While *Gissel* (1969) was included as part of the conventional content analysis, much like *Wright Line* (1980) snowball sampling with respect to its related cases is appropriate since it is cited many times in cases sampled as part of the directive content analysis. *Gissel* establishes the standard for issuing a bargaining order when the Board is

confronted with pre-election ULPs that are far too significant to surmise that an election’s final outcome is indicative of employees’ free choice. This case has been informing on a significant number of NLRB decisions (see Figure 21). Because of the ubiquity of the fact patterns upon which *Gissel* attempts to resolve – that is, significant ULPs of a large number meant to discourage employee attempts to unionize – the Board is compelled to continue following a Supreme Court precedent that it simply cannot overturn, even if it were to so desire.

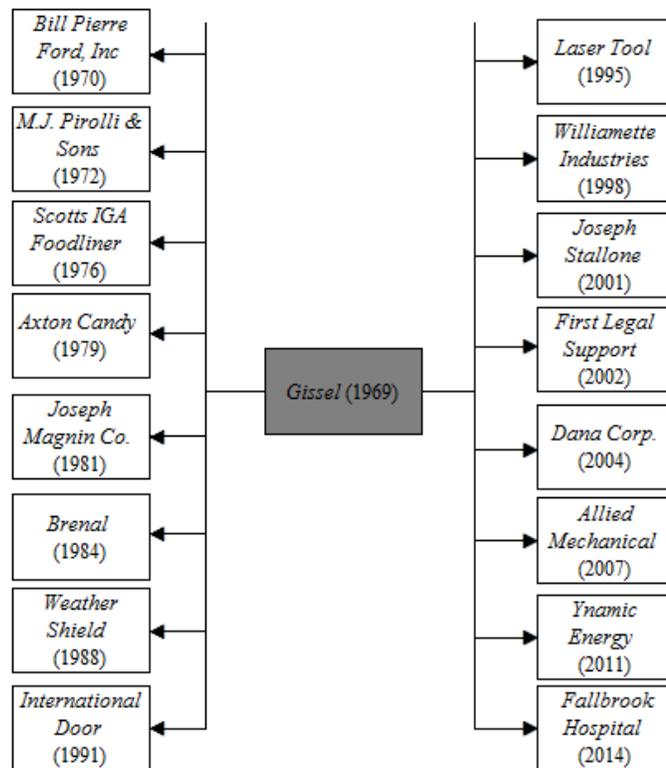


Figure 21. Gissel bargaining order policy strain.

A similar example of the Supreme Court’s ability to create an almost immutable policy strain is exemplified by its decision in *Vaca v. Sipes* (1967), which lays forth the standard for determining whether or not a union has violated its duty of fair representation to its employee constituents. The court states: “A breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective

bargaining unit is arbitrary, discriminatory, or in bad faith.” This policy became precedent setting across decades of subsequent cases (see Figure 22). The significance of the policy set forth by *Vaca* is that it creates a policy test that has the teleology of giving unions wide discretion to choose how to approach grievance and arbitration matters. Specifically, the case led forth a precedent that unions could choose to not pursue a bargaining unit member’s grievance if the allegation were meritorious on its face. Because the Supreme Court settled the leading case using very specific language, the policy became locked in across the history of the NLRA.

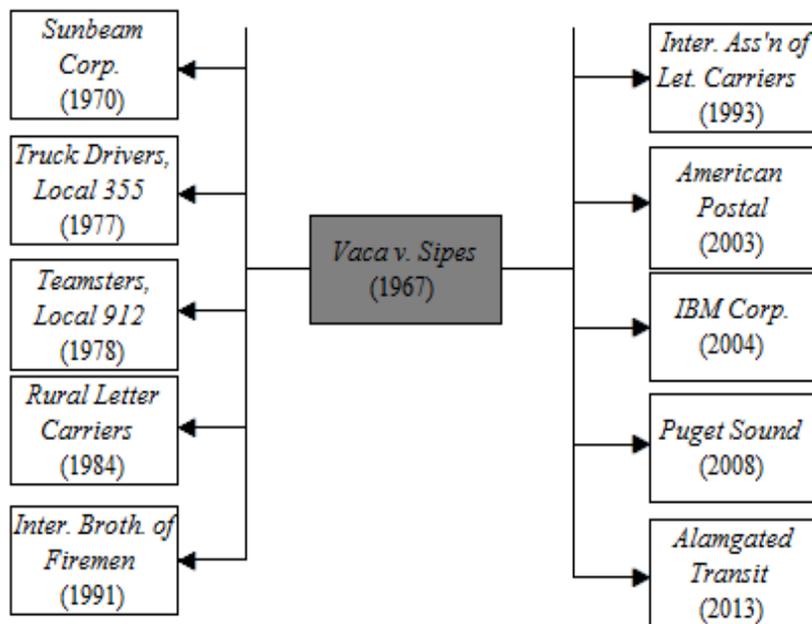


Figure 22. Duty of fair representation policy strain.

*Vaca v. Sipes* (1967) is illustrative of how the usage of language can create a principle that is so broad as to be almost wholly constraining, but not all instances of Supreme Court decision making binds the NLRB to such an extent. Although Supreme Court cases may be instructive, they still allow some form of agency for the Board or jurists when making decisions. Specifically, the NLRB or jurists must engage in what Giddens (1984) refers to as

discursive consciousness. That is, they must reflect on how the structure presented in previous case law constrains or facilitates their decision making. For example, when considering whether an employer's actions necessitate an issuance of a bargaining order in *Bill Pierre Ford, Inc.* (1970), the ALJ considers the instructions set forth in *Gissel*: "If ...the employer commits independent and substantial unfair labor practices disruptive of election conditions, the Board may withhold the election or set it aside and issue instead a bargaining order as a remedy for the various violations." The Board then concludes that based upon the fact pattern and in application of *Gissel*, a bargaining order should not issue: "Respondent has not committed independent and substantial unfair labor practices disruptive of election conditions."

While the data reveal that Supreme Court decision making is precedent-setting and largely informs future Board and ALJ decision making, one troubling area exists in the data – the narratives concerning encouraging collective bargaining and employee free choice. In post-Taft-Hartley Act cases, the data contain instances in which the NLRB has cited Supreme Court cases in support of a policy of promoting collective bargaining, such as the dissenting opinion in *Boston Medical Center Corp.* (1999):

...the Court approved the Board's finding that illegal aliens were employees entitled to the protection of the Act because 'extending the coverage of the Act to such workers is consistent with the Act's avowed purpose of encouraging and protecting the collective-bargaining process.' *Sure-Tan*, supra 467 U.S. at 892.

Even though the language used is not as explicit as affirming employee free choice, the data also reveal a few instances in which the Board has cited the Supreme Court with respect to employee free choice – for instance, in *Dana* (2007), the Board cites a case:

[The Court] spoke in the specific context of why protections should be accorded a union whose majority status was certified after a Board election, 'a

solemn and costly occasion, conducted under safeguards to voluntary choice. [*Brooks v. National Labor Relations Board* (1954)] Id. 99’

While this data is somewhat theoretically troubling since it violates the secondary rule that the Board must adhere to Supreme Court precedent, close consideration may explain this phenomenon. Extremely few instances in the data exist in which the Supreme Court explicitly forwards a policy of protecting collective bargaining or promoting employee free choice. No examples exist in the data of the Court stating that one policy overrides the other. Thus, the Board may rely on ambiguous statements, such as in *Brooks* (1954) to forward the policy. Other times, the data reveal the Board citing Supreme Court case law with respect to forwarding a mid-policy, when in actuality, its using the Court case to effectuate another policy – for example, *Oakland Scavenger Company* (1979):

The policy underlying Section 9(a) is to encourage collective bargaining in the interests of promoting industrial peace and stability. *Medo Photo Supply Corp. v. N.L.R.B.*, 321 U.S. 678 (1944); *J. I. Case Co. v. N.L.R.B.*, 321 U.S. 332 (1944); *N.L.R.B. v. Allis-Chalmers Mfg. Co.*, et al., 388 U.S. 175, 180 (1967).

None of the cases cited in *Oakland* explicitly state a policy of encouraging collective bargaining. They are primarily concerned with enforcement of 9(a). However, by citing these cases, the Board is able to forward a policy of encouraging collective bargaining in its decision. A few instances exist in the data where a post-Taft-Hartley Board cites pre-Taft-Hartley Supreme Court case law forwarding a policy of collective bargaining – for example, *Seamprufe, Inc.* (1954): “The primary purpose of the Act is to promote collective bargaining. *NLRB v. Sands Manufacturing Co.*, 306 U. S. 332.”

Other times, the data suggest that the NLRB may appear to cite precedent with respect to one of the mid-policies, but in actuality is effectuating more nuanced policy, such as in *Priced-Less Discount Foods* (1966): “The purpose of the National Labor Relations Act

and its underlying objective is to promote collective bargaining agreements. *James B. Carey v. Westinghouse Electric Corporation*, 375 U.S. 261, 265.” The policy of promoting collective bargaining agreements may not necessarily be the same as promoting collective bargaining, because this particular policy may be focused on getting parties with an established relationship to reach agreement. This is arguably a different policy than promoting collective bargaining where prior unionization does not exist.

Another explanation about the precedent issue with respect to the Supreme Court and mid-policies is that, as the data suggest, the Court is primarily motivated to engage in judicial review of Board cases that may be statutorily or constitutionally repugnant. For the most part, the data suggest that the Supreme Court’s decision are informing insofar as how to proceed with specific fact patterns, such as the bargaining order precedent set in *Gissel*. That is, despite being the determinative authority of U.S. law, Supreme Court law appears primarily concerned with base policy – that is, concerned with the legality of issues. The data and research strongly suggest that the Court defers to the NLRB as the expert on labor policy. Therefore, questions about mid-policy - and even supra policy - may be best left to the administrative agency. Thus, whether or not the Board creates case law that is opposed with a passing statement in a Supreme Court case is immaterial since it generally will not relate to solving a base policy issue.

### **Summary and Analysis**

The data indicates that policy is communicated and recreated through case law. That is, legal principles are established when the NLRB is presented with a novel fact pattern, which leads to a formulation of some type of legal rule – a primary rule as Hart (2007) describes. Whenever a subsequent Board or ALJ is presented with a similar fact pattern, the

Board or ALJ then apply the prior case law to reach a conclusion. Thus, with consideration of structuration theory, the Board or ALJ is constrained in the application of law, since prior case law is informing of how to proceed with a case based upon the similarity of fact pattern.

While administrative law precedent can be overturned more readily than other forms of legal precedent, the data suggest that the NLRB does not overturn its own precedent very often. This is somewhat of a counterintuitive conclusion, considering that research suggests that the Board, especially the modern Board, is highly ideological in its decision making (Gross, 1995). It would follow that if the Board can overturn its own precedent, the case law corpus would be littered with countless instances of bad law and dead precedents. A closer examination of the data suggests that when precedents are overturned, they are done so with respect to mid-policy.

Some case law, such as *Wright Line* (1980), is ubiquitous in the dataset and case law corpus. Such cases have enjoyed a long history with no sign of being overturned in the foreseeable future by a Board. So what is the difference between a case like *Wright Line* (1980) and a case like *New York University* (2000), which was overturned by *Brown University* (2004)? On their face, all of these cases deal with employee rights. *Wright Line* is concerned with whether or not an employee's rights have been violated if disciplined for arguable union conduct. *New York University* and *Brown University* deal with whether or not graduate assistants are employees under the Act and are able to exercise the right to partake in collective bargaining.

On first glance, all of these cases appear to be base policies – that is, they are instructive with concern to the day-to-day effectuation of the NLRA. They inform the Board and ALJs as how to proceed with a specific fact pattern. However, the university cases have

greater implications for mid-policy than does *Wright Line* (2000). *Wright Line* is applicable to all subsequent cases in which a person has been disciplined for alleged union activity. This test can be applied to alleged union activity in cases in which a union is already present, such as *M.D. Miller Trucking and Topsoil* (2014). Therefore, by applying a *Wright Line* analysis to these types of cases, there is no effect on mid-policy. Collective bargaining is not promoted or curtailed and employee free choice is immaterial, since the union is already present. Likewise, in a case where an employee is disciplined for organizing efforts, both mid-policies are equivalent. By disciplining an employee for union support during organization, an employer is discouraging collective bargaining and coercing employee free choice. Thus, overturning a precedent such as *Wright Line* is not beneficial for any Board, especially when it is an incredibly useful policy test for reaching a legal conclusion.

On the other hand, *New York University* (2000) and *Brown University* (2004) are ultimately concerned with collective bargaining. By determining whether or not graduate assistants are employees, this policy has a teleological influence on the ubiquity of collective bargaining. The policy that the Board effectuated in *New York University* that graduate assistants are statutory employees provides the opportunity for greater unionization in the country; the Board decision in *Brown University* reversing *New York University* curtails unionization by default. Ideology may play a role. The panel that decided *New York University* was comprised of two Democrats and one Republican. The decision was arguably pro-labor inasmuch that it provided the avenue for people to choose unionization. The panel that decided *Brown University* consisted of three Republicans and two Democrats – both whom wrote dissents. This decision precludes employee free choice, since if graduate assistants are not considered statutory employees, they cannot vote. However, the decision is

arguably pro-employer, since the policy requires the NLRB to dismiss an election petition received by a proposed bargaining unit of graduate assistants. Therefore, the employer does not even have to contend with the possibility of unionization. This is inline with research that suggests Boards consisting of Republicans, particularly since the Regan administration, are much more sympathetic to business interests than their predecessors (Flynn, 2000).

Other overturned precedents share a similar relationship with mid-policy. For example, in *Levitz* (2001), the Board overturned a longstanding precedent from the 1950s that an employer could withdraw recognition of an incumbent union without a decertification election if it had a good-faith belief that the union no longer had union support by instead requiring a submission of objective evidence such as a petition from employees stating that they no longer wish to be represented (Eigen, 2011). Through overturning the previous policy, the Board creates an environment more favorable to labor that could result in the continuation of bargaining relationships. The panel in that case comprised of primarily Democrats. Similarly, by creating a policy that allowed employees to file a decertification petition 45 days after an employer voluntarily recognized a union in *Dana Corp.* (2007), the Board overturned a previous precedent set forth in *Keller Plastics Eastern* (1966) that held a decertification petition could not be filed with the NLRB for approximately one year after recognition. Through overturning the doctrine in *Keller*, the Board arguably forwarded a policy of employee free choice, since the possibility exists that voluntary recognition was granted when the union did not have majority support. The panel in *Dana Corp.* consisted of three Republicans and two Democrats – the Democrats again dissenting. The Board in *Lamons Gas Co.* (2011), consisting of a panel heavily loaded with Democrats, then overturned *Dana Corp.*

Despite the cases discussed directly above, the data suggest that most pure base policy that is not directly related to mid-policy is less chaotic with regard to precedent. This may be because the policy decided at this level is more or less concerned with resolving legal questions regarding fact patterns rather than effectuating large level Congressional objectives. Levy and Glicksman (2011) suggest that this may be due to the bureaucratic nature of administrative agencies to create bodies of case law that serve their own ends. Applying that idea to the NLRB, base policy facilitates the functional purpose of reaching legal and policy conclusions a more efficient endeavor. If the NLRB were constantly creating policy with regard to a specific base policy question – for example whether employees’ right to use profanity during work to protest working conditions outweighs an employer’s right to manage its employees’ language in front of customers – the Board would be mired in a never-ending sea of changing precedents. By focusing on new policy tests and mid-policy, the Board can quickly dispatch cases that contain fact patterns that are not novel.

Surprisingly, the data revealed that the mid-policies of encouraging collective bargaining and protecting employee free choice were not perpetuated through case law – at least on a large-scale basis. Rather, the data infer that these policies are forwarded by interpretation of legislative intent and the language in the Act itself. Therefore, these policies are not perpetuated through vertical policy strains over time. Rather, they are perpetuated horizontally across time from a narrow point of structural origin that is the Act. When considering the entirety of the data thus far, this makes theoretical sense. Much of the established precedent throughout the case law corpus deals with base policies. As an administrative agency, the NLRB is interested in effectuating the NLRA. This means dealing with the day-to-day realities of labor relations and formulating policy to resolve legal

questions related to fact patterns. Simply citing statements about the NLRA having a purpose of encouraging collective bargaining or protecting employee free choice is somewhat empty from a policy standpoint unless such a statement is used as justification to forward some other legal ruling. This may be why the instances in which these mid-policies are cited in previous cases as a matter of precedent are often accompanied by another statement of policy. In that regard, mid-policy and base policy are interactive (see Figure 23). Even so, the examples of accompanied policy phenomenon are sparse in the data. Boards may still be reluctant to effectuate policy this way, since doing so would open the possibility of a subsequent Board overturning the decision as a matter of the base policy being misinformed.

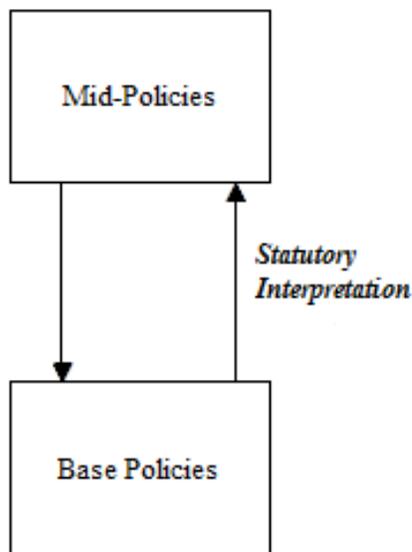


Figure 23. Mid-policy and base policy interaction.

The data revealed that the Supreme Court often defers to the Board with respect to effectuating the policies of the Act. This is largely a continuation of the doctrines first laid forth in *Chevron* (1984) and *Skidmore* (1944) that instructed the Court to defer to administrative agencies' expertise unless a decision during judicial review is repugnant to the statutes that the agencies oversee. The data suggest that the Supreme Court, however, prefers

to rely primarily on its own prior decisions when deciding cases that come before it. This creates almost a second body of labor case law that is ultimately precedent setting on all of the U.S. courts and the NLRB. While the data suggest that the NLRB is, for the most part, left up to its own devices by the Supreme Court, the data indicate that precedents set by the Court are binding on the Board and are informing, such as *Gissel's* (1969) bargaining order test. This has structural importance insofar that while base law and mid-policy can be chaotic when determined by the NLRB, it becomes much more static when the Supreme Court hands down a ruling. However, the data suggest that discursive consciousness does play a role in effectuating Supreme Court law. That is, Boards must still engage in reasoning in order to appropriately apply the legal concepts and doctrines inherent to the Supreme Court cases. Some of the structural essence of these cases is facilitative rather than constraining.

Structuration is a useful theoretical tool when analyzing this data. Clear examples of case law acting as both a constraining and facilitative force upon Board and judicial legal reasoning is apparent. Further, the data infer that policy is carried across time. This happens either as a matter of horizontal communication of policy through subsequent cases in a policy strain or vertically by a number of cases existing across time that derive their informing reasoning from a single case or interpretation of the Act. While conclusively attributing ideology to case decision making requires quantitative analysis that goes beyond the scope of this study, the findings, particularly those concerned with overturning precedent, do suggest that ideology plays a role in decision making. Specifically, the data suggest that Board members may overturn precedents if it serves a partisan end. In that regard, Board members are informed by both their own ideologies and the constraining-facilitative dual nature of structure in certain prior labor law decisions.

The next chapter examines what, if any, differences exist between the Board, ALJs, and Supreme Court when effectuating labor law policy.

## CHAPTER VII

### FINDINGS AND ANALYSIS: QUESTION 4

#### **Introduction**

Has it been the courts, the NLRB, or all judicial and quasi-judicial bodies that have either affirmed or diverged from the Congressional intention of the Act?

The data presented with respect to this question illustrate the interaction between labor policy and the specific judicial players who interface with the NLRA. Specifically, it imparts if and what differences exist between the Board, ALJs, and the Supreme Court with respect to a reading and interpretation of the Act's policies. The data suggest that the Board serves as the primary purveyor of policy, particularly supra policy, whereas ALJs generally do not fashion novel policy and, instead, primarily affirm previous precedent. The data infer that the Supreme Court, while having the final authority on legal interpretation in the U.S., is perhaps the most restrained in its effectuation of policy.

#### **Findings**

Arguably, as the previously presented data infer, no actor tasked with effectuating the NLRA has significantly diverged from forwarding policies that are far removed from the intentions of the Act – or at least what has been construed through the years by interpretative case law as being the intentions of the Act. The Board, ALJs, and Supreme Court have all forwarded policies that are qualitatively similar, though specific policies and policy outcomes may be distinct based upon Board or judicial make up; however, these policies can still reasonably be arrived at through a reading of the Act or legislative history. For instance, the Board, ALJs, and Supreme Court have all forwarded a policy of encouraging collective bargaining. The Board in *Andersen Prestress* (1985) states: "...the Board ... achieves one of the primary objectives of the Act - to encourage collective bargaining." The ALJ in *Dimarc*

*Broadcasting Corp.* (1973) states: “There is not here a scintilla of probative evidence that Respondent attempted to ... subvert the Act's policy to foster and encourage collective bargaining...” The Supreme Court in *Hearst Publications* (1944) states: “Hence the ... purposes of the Act are to encourage collective bargaining and to remedy the individual worker's inequality of bargaining power...”

The data also indicate that all three types of actors forward a policy of employee free choice. In its legal conclusion, the Board in *Midwest Stock Exchange* (1979) finds: “...the Union interfered with the employees’ free choice by acts of coercion...” Likewise, the ALJ in *Salem Village* (1988) concludes that: “...there was sufficient confusion concerning the waiver of [union] initiation fees to interfere with the employees' free choice.” In *ITT* (1984), the Supreme Court declares: “...the participation of supervisors in union elections may in some circumstances so undermine employees' freedom of choice as to warrant setting aside the election.” The proceeding data indicate that the Board, ALJ, and Supreme Court forward both mid-policy narratives.

The data also reveal little discrepancy between the three actors with respect to the supra policy of preventing industrial strife and protecting commerce. For instance, in *The First Church of Christ* (1972), the Board states: “The Act has as its objective, the protection of society by the avoidance or minimization of industrial strife which interferes with the flow of commerce.” The ALJ in *Michigan State Employees Association* (2013) declares: “The National Labor Relations Act seeks to reduce industrial strife.” Finally, the Supreme Court in *Financial Institution of Employees of America* (1986) concludes: “Industrial peace ... is the primary objective of the federal labor laws.” As illustrated by this data, all actors readily forward a policy of promoting industrial peace.

## AJLs and Policy

While a farsighted overview of the data suggests that the Board, ALJs, and Supreme Court are in lockstep with one another when effectuating policy, differences exist with respect to how all of these actors approach effectuating the Act; these differences have implications for the structuration of labor policy. As has been illustrated when answering previous research questions, the Board uses legislative history and interpretation of Congressional intent, along with interpretation of the NLRA itself, to fashion and forward policy. The previously reported data also reveal that the Board effectuates policy through precedent by citing previous cases with similar fact patterns. However, the data indicates that these cited cases are almost always Board or court cases rather than ALJ cases. For instance, the Board in *United Dairy Farmers* (1979) cites a number of court cases when discussing the meaning of a statutory provision:

[Section 10(c) of the Act] ‘charges the Board with the task of devising remedies to effectuate the policies of the Act. *Labor Board v. Seven-Up Bottling Co.*, 344 U.S. 344, 346. The Board's power is a broad discretionary one, subject to limited judicial review. *Ibid.* ‘[T]he relation of remedy to policy is peculiarly a matter for administrative competence... *Phelps Dodge Corp. v. Labor Board*, 313 U.S. 177, 194. ‘In fashioning remedies to undo the effects of violations of the Act, the Board must draw on enlightenment gained from experience.’ *Labor Board v. Seven-Up Bottling Co.*, 344 U.S. 344, 346. The Board's order will not be disturbed ‘unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act.’

Snowball sampling fails to reveal instances in which the Board cites ALJ cases as a matter of precedent. That is, ALJ decisions are not informing of subsequent Board decisions. On the other hand, the data infer that ALJs' decision making is largely informed by Board case law. Instead, the data suggest that ALJs cannot fashion their own novel decisions. The judge in *Capitol EMI Music, Inc.* (1991) explicitly states that he must follow Board and Court

precedent: “I am bound by Board precedence until the Board or Supreme Court overrules such.”

While being unable to fashion novel policy, the data infer that previous Board and Court law largely informs ALJs. For example, when defining impasse in *American Golf Corp.* (2004), the ALJ calls upon Board case law:

By definition, an impasse occurs whenever negotiations reach that point at which the parties have exhausted the prospects of concluding an agreement and further discussions would be fruitless. *Laborers Health and Welfare Trust Fund v. Advanced Lightweight Concrete*, 484 U.S. 539, 543 (1988); *Jano Graphics, Inc.*, 339 NLRB No. 38 (June 12, 2003)...

Defining impasse is important when effectuating policy related to negotiations; when posed with the conundrum of defining the situation, the ALJ relies on Board precedent rather than fashioning his own. Without prior Board law defining impasse, he may have been compelled to apply his own definition. In that regard, he was constrained by previous Board law while concurrently recreating the structure of the two cases he cites. Similarly, the data also reveal that ALJs will cite court case law in addition to Board law, such as in *Chesapeake, Inc.* (1995):

For a working foreman or lead to provide directions to others performing the same tasks, on the basis of his greater job experience, is not enough to confer supervisory authority. See *McCullough Environmental Services, Inc.*, 306 NLRB 565 (1992), *enfd.* in relevant part, 5 F.3d 923 (5th Cir. 1993)

This suggests that ALJs are informed by a myriad of case law from both the Board and the courts. Although the data suggest that ALJs simply recreate policy through citing prior Board and court law, further analysis reveals that these judges are able to rule on legal questions that become precedent setting. ALJs are the first judicial step when a charge has been brought before the NLRB (Cox et al., 2006). After an initial investigation, if the General Counsel believes that a violation of the NLRA has taken place, the case is tried in front of an

ALJ. Either the General Counsel or the charged party may appeal an ALJ decision to the Board. The data reveal many instances in which the Board simply affirms the ALJ decision after a consideration of the facts and extant policy. For example, in *South Texas Chapter* (1971), the Board states:

The Board has reviewed the rulings of the Trial Examiner [i.e., ALJ] made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner...

Other than a slight change to the remedy, the Board does not introduce any new policy or analysis to the case. The ALJ's fact record and analysis is published in its entirety as the case's decision. The data reveal that this case then acts as informing case law, thus recreating across time the legal principles forwarded by the ALJ and affirmed by the Board (See Figure 24).

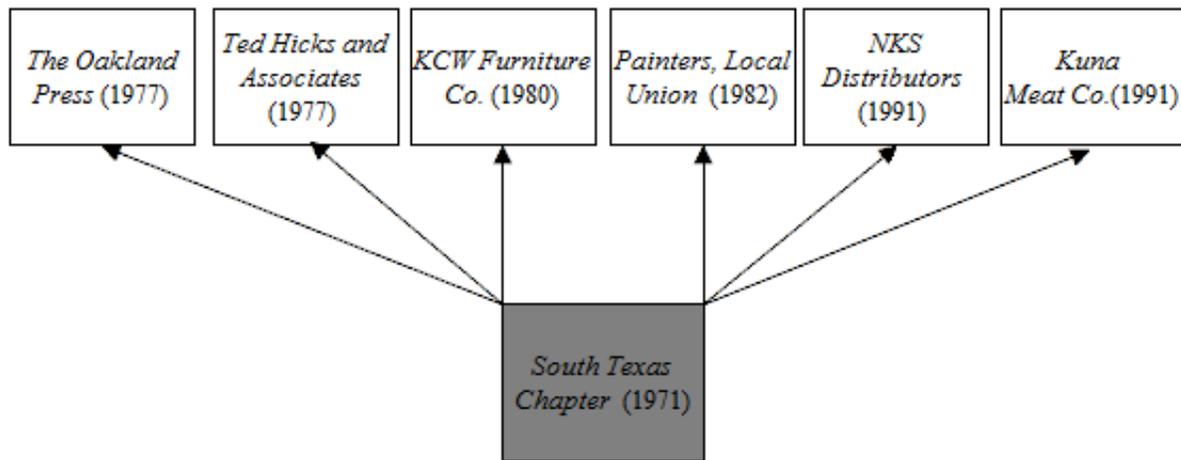


Figure 24. ALJ policy strain.

The data reveal that other times the Board may modify the ALJ decision in part. For example, in *Southwestern Bell Telephone Company* (1984), the Board modifies the previous ALJ remedy based upon a recent change in precedent:

...we overruled [the case cited by the ALJ] and held that Section 10(c) of the Act precludes a make-whole remedy for *Weingarten* violations where the discipline of an employee is for cause. Accordingly, consistent with *Taracorp*, we shall modify the judge's recommended order to delete the make-whole and expunction remedies...

The data also provide instances in which the Board completely overturns a related ALJ decision. In *PCMC* (2013), the ALJ dismisses the complaint that employees were laid off from an employer's place of business and hired back the following day by the employer under a new name, negating an obligation to bargain over the layoffs. The Board reverses, stating:

Based on the parties' stipulation that [both employers] were at all times material a single employer, we find that the Respondent Employer was obligated to bargain with the Machinists over the layoff of the unit employees from PPMC and the terms and conditions under which they would be offered continued employment with PPMC...

The data suggest that most Board affirmation and reversal of appealed ALJ decisions is concerned with the application of legal reasoning to fact patterns, policy tests, and other similar base policies. The data reveal little evidence that the Board will reverse based upon a different interpretation of mid-policy or supra policy. Therefore, the data continue to suggest that ALJs do not diverge from the interpretation of the Act as stated either by the statute's language or through legislative history. By not being required to follow ALJ precedent and being able to overrule an appealed ALJ decision, the Board is in a strong position to quash a decision that falls greatly out of line with NLRA policy intentions.

The data suggest that ALJs are the actors primarily concerned with the clarification of facts and testimony in a ULP proceeding. This is evidenced by the numerous times throughout the data in which the Board defers to the ALJ on matters related to witness credibility. For example, when the respondent party asks for review of the ALJ's credibility

findings in *Allied Mechanical Services* (2004), the Board affirms: “The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect.” The data reveal that this policy was first formulated in *Standard Dry Wall Products* (1950):

... the demeanor of witnesses is a factor of consequence in resolving issues of credibility, and as the Trial Examiner, but not the Board, has had the advantage of observing the witnesses while they testified, it is our policy to attach great weight to a Trial Examiner's credibility findings insofar as they are based on demeanor. Hence we do not overrule a Trial Examiner's resolutions as to credibility except where the clear preponderance of *all* [sic] the relevant evidence convinces us that the Trial Examiner's resolution was incorrect.

Snowball sampling indicates that a long policy strain originates from *Standard Dry Wall Products* (see Figure 25). These findings suggest that the Board is more interested in effectuating policy than resolving credibility issues and investigating facts, instead, leaving these tasks to the ALJ. In that regard, the data suggest that a division of labor exists between the Board and judges.

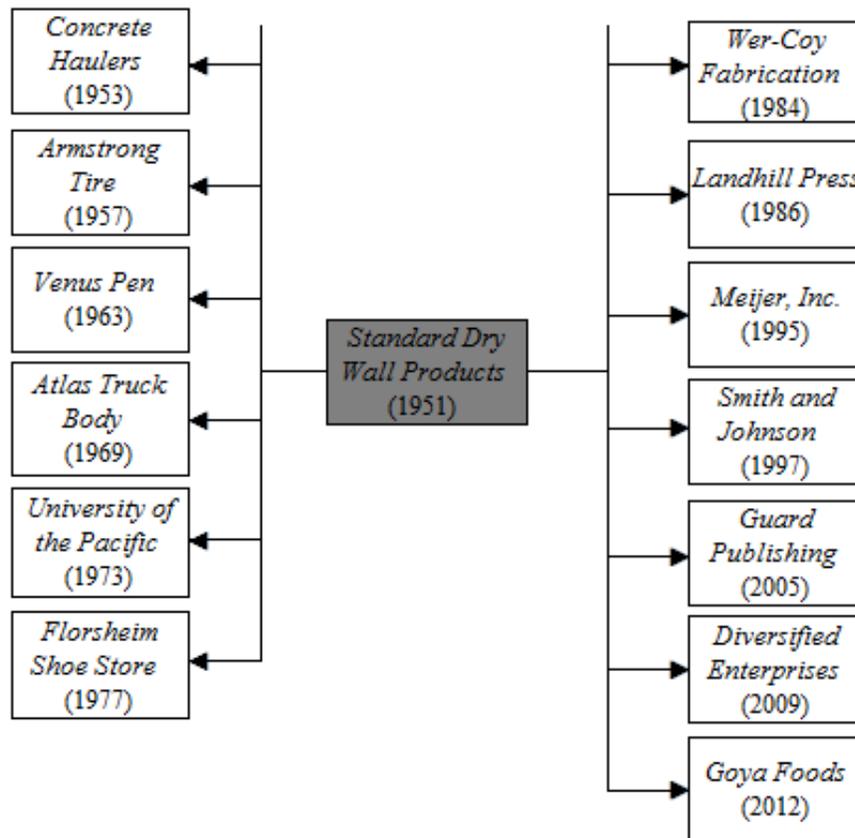


Figure 25. ALJ credibility policy strain.

### The Supreme Court and Policy

The previously reported data strongly suggest that the Supreme Court is relatively reticent to overrule the Board unless a decision is a demonstrable statutory misinterpretation or is clearly repugnant to the NLRA. Thus, this data infer that the Court is interested in insuring that the legislative policies of the Act are carried out. For instance, in *Bethlehem Shipbuilding Corp.* (1938), the Court states: “The Act establishes standards to which the Board must conform.” However, the previously reported data also indicates that the Court seems less interested in engaging in a policy discussion about whether the Act seeks to encourage employee free choice or collective bargaining.

The majority of Supreme Court cases within the dataset deal almost exclusively with base policy decisions. For instance, when deciding two combined cases in *NLRB v. Hearst*

*Publication, Inc.* (1944), the Court lays forth the issue: “These cases arise from the refusal of respondents, publishers of four Los Angeles daily newspapers, to bargain collectively with a union representing newsboys who distribute their papers on the streets of that city.” On its face, this appears to be a policy question concerning the encouragement of collective bargaining. However, the case is actually concerned with a policy test concerning employment status as defined by the Act, which would determine if collective bargaining can take place: “The principal question is whether the newsboys are ‘employees’.” Although the outcome of the case may determine whether or not collective bargaining increases, the data does not suggest that the Court was necessarily informed by that policy. The Court, rather, was very conservative in its implementation of policy, choosing to stay very focused on the specific issue and not overextending the higher policy implications of its decision.

Additionally, the data suggest that the Supreme Court will also deal with jurisdictional issues or issues concerned with the relationship of the NLRA or other laws. The Court in *Lodge 76 v. Wisconsin Employment Relations Commission* (1976) delineates the issue:

The question to be decided in this case is whether federal labor policy pre-empts the authority of a state labor relations board to grant an employer covered by the National Labor Relations Act an order enjoining a union and its members from continuing to refuse to work overtime pursuant to a union policy to put economic pressure on the employer in negotiations for renewal of an expired collective-bargaining agreement.

Therefore, the Court may exercise authority in matters where the Board has little expertise or is otherwise ill-equipped to judicially deal with the legal issue.

The data regarding the Supreme Court suggest that it does not defer from an interpretation of the Act that is inconsistent with Congressional intention. Instead, the data

infer that it acts as a review court to ensure that the NLRB and courts below it are following Congressional intent. Therefore, while a possibility exists that the Board may not fully adhere to an accurate reading of the NLRA, the Supreme Court has structural significance insofar that it can quash such decisions and then set a precedent that will need to be followed from that time onward.

### **Summary and Analysis**

The data indicated that the Board and jurists largely adhere to a reading of the Act and an effectuation of its policies that closely aligns with Congressional intent and the plain language of the statute. In that regard, little evidence suggests that any of the actors associated with execution of the NLRA diverge widely from Congressional intent or apply an incredibly broad interpretation to the statute. For example, the data does not reveal a point in which a judicial actor indicates that the purpose of the Act is to ensure employment opportunities for workers or that it seeks to make the U.S. more competitive in global markets.

Curiously, the data fail to reveal instances in which the Board or jurists affirm that one of the theoretical purposes informing the legislation is to increase the economic power of the workforce and help labor more easily obtain upward mobility. Intellectuals forwarded such ideas during the creation of the Wagner bill (Cox et al., 2006). Obviously, instances exist in the data in which the Board and judicial actors promulgate a policy of promoting collective bargaining, which was the theorized vehicle through which workers could obtain upward mobility. Additionally, there are instances in the data where the Board and judges state that NLRA policy is to equalize the inherent power differential between labor and

management. However, little evidence exists in the data to indicate that the Board or jurists explicitly forward a policy of employee enrichment.

The upward mobility legislative theory was closely related to the Great Depression, which the NLRA attempted to address along with other New Deal legislation (Cox et al., 2006). Therefore, it would seem intuitive that pre-WWII case law would be more likely to promulgate this policy more than contemporary case law. However, even the early case law is silent on this matter. A few related reasons may exist for this silence. The Act itself does not explicate such a policy. Therefore, a Board or judicial body has little language upon which to hang its hat if making a decision that includes a policy statement of employee upward mobility. Arguably, the upward mobility doctrine could have been a supra policy – that is, one of the overall purposes could have been improving employees' economic situations. This, however, is different than industrial stability and protecting interstate commerce from a policy effectuation standpoint, because the latter policies have explicit language in the Act supporting them. Because no language exists in supporting a policy of upward mobility, the early Board would have risked being overturned by stating such a narrative – a legitimate concern during the early years of the statute when the NLRB's formation was highly controversial (Gross, 1981). If the purpose of collective bargaining was to promote upward mobility, then the Board could have just treated such an end as a *fait accompli*. While the Supreme Court cannot be overturned, it may have simply chosen not to entertain such a policy; this would be congruent with the data that suggest the Court is reticent to engage in high-level policy interpretation with respect to the NLRA.

The tenets of structuration theory provide a very useful explanation for framing this data. Evidence suggests that the Board, ALJs, and Supreme Court all adhere to a similar

reading of the NLRA. In essence, this is archetypical of what Giddens (1984) refers to as a system – that is, a set of social practices agreed upon by discreet social actors and recreated through time-space. The data more than hint that a series of policy has been agreed upon by numerous Boards and judges, which has congealed into a socio-legal reality that constitutes U.S. labor policy. This extant policy, while not static, has become relatively stable throughout the history of the NLRA. The data support the conclusion that supra level policy has remained unchanged for the entire existence of the Act. Mid-policy has wavered between narratives of encouraging collective bargaining and protecting employee free choice, but the data suggest that the controversy of shifting interpretations of the Act has been primarily regulated to these two policies. The data suggest that the primary chaos related to the Act manifests with respect to base policy. That is, the majority of changing labor precedent is centered upon practical policy matters rather than wide-scale disagreement over Congressional intent. This is why the Supreme Court may appear to be less interested in high-level policy decision making. While supra and mid-policy is contingent upon the effectuation of base policy, the Supreme Court may see higher level policy as already established in meaning and scope. Therefore, it is simply interested in effectuating base policy from a narrow reading of higher policy that would be the least constraining on any future legal decision making. The Supreme Court is able to forward policy concerning the day-to-day policing of the Act while not impinging upon the legal territory of the NLRB, which is the proscribed expert on the Act.

The reason for this creation and adherence to a narrow policy body may be due to the structure inherent to the legal system and the case law corpus itself. Through following secondary rules (Hart, 2007), Boards and jurists apply legal conceptual analysis to policy

issues that arise in the everyday life of industrial relations. As these issues become resolved and legal precedent less ambiguous, later Boards and judges can take cues from the established case law on the direction in which to proceed with similar fact patterns and legal questions. This phenomenon is evidenced by the data reported in policy strains derived from the dataset. As a legal principle becomes recreated more and more throughout the history of the statute, it then becomes a matter of settled law with deviations only occurring if significant precedent is overturned. In that regard, the system of policy also has structural policies. More specifically, a policy that is recreated through time-space is also structural insofar that it establishes a precedential basis for its own recreation. The seeds of policy recreation flow from the policy itself and its communicative vehicle, case law.

The data suggest that policy regeneration is chiefly the domain of the Board. This finding is not surprising considering that the policy idea behind the creation of an administrative apparatus is so that agencies are placed into the position of being the designated experts of the statutes they are tasked with overseeing (Burnham, 2006). Further, administrative agencies, such as the NLRB, are the quasi-judicial and rulemaking bodies that serve as the first level of a policy effectuation scheme, keeping the courts free from the inundation of suits. The data suggest that the role of courts, most notably the Supreme Court, is to function as a quasi-feedback loop by applying judicial review of appealed Board decisions. The courts are somewhat like quality control inspectors, ensuring that Board decision making falls inline with a reasonable interpretation of Congressional intent and forwards the policies of the Act. In that regard, the courts prevent overly incongruous policy from being promulgated. While the majority of Board decisions will most likely never be appealed to a circuit court, let alone the Supreme Court, the ever-looming prospect of a

decision being overturned may serve as a structural force compelling Board members from fashioning policies that extend beyond the statutory limits of the NLRA.

The role of ALJs is one of the more curious findings to arise from the data. The data suggest that ALJs are policy recreators rather than policy creators. This finding relates to a theoretical disagreement between Moe (1985) and Taratoot (2013). Moe produced what is most likely the first systematic and holistic analysis of NLRB policy making. A causal model concerned with predictive and explanatory appraisal, Moe's control and feedback scheme conceptualizes downward forces acting upon the NLRB, which permeate the agency at the Board and filter down to the Regional offices. These forces originate outside of the NLRB's organizational membrane and act through the manifestation of public pressure. In that regard, policy flows top-down, with the Board making decisions that are then carried out by other organizational components and actors, such as ALJs and Regional offices. Taratoot (2013) critiques Moe's (1985) top-down model, instead conceptualizing a bottom-up causal stream of force that produces labor policy outcomes. Whereas Moe gives particular attention to Board members and political pressures placed upon them as being the driving forces of labor policy, Taratoot (2013) argues that ALJs are the primary originators of policy. This argument is theoretically intuitive, since ALJs are arguably the first judicial or quasi-judicial decision makers in the policy stream that travels through the NLRB (Cox et al., 2006).

While analyzing socio-political pressures acting upon the NLRB as Moe (1985) conceptualizes goes beyond the scope of this research project, the data supports a top-down model of policy formulation more so than a bottom-up model, such as that envisioned by Taratoot (2013). The findings suggest that ALJs make decisions based upon prior Board and court case law. On the other hand, the data strongly infer that the Board does not rely on ALJ

decisions when effectuating policy, instead only considering an ALJ's decision in an appealed case brought before it.

This finding has important theoretical implications. While the data supports the conclusion that ALJs do not fashion much of their own policy and that policy travels downward through the agency, the administrative and judicial processing of a case travels upward. A ULP case begins its administrative existence as a charge filed at one of the NLRB's Regional offices (e.g., Cox et al., 2006). If the Region determines that the charge has prima facie merit and it cannot facilitate a settlement agreement with the parties, the case is then tried before an ALJ. The case only comes within the review of the Board if the charged party or General Counsel files an appeal.

Therefore, while an ALJ is the first judicial actor to hear a labor case, the judge must rely on previous Board precedent when fashioning a decision. This creates the proverbial chicken-or-the-egg paradox, since almost all cases are first heard by an ALJ. Taratoot and Howard (2014) argue that ALJs exhibit strong authority on policy as evidenced by the Board affirming their decisions 95 percent of the time. However, many of these cases may fail to raise unusual legal questions. Judicial decision making is then based upon an application of a rich history of prior Board law. With respect to structuration theory, if ALJs are acting more conservative in their application of law, they are ensuring the recreation of prior precedent. Thus the system of labor policy becomes more stabilized.

While the data suggest that ALJs serve a primary role in recreating policy more so than formulating it, structuration principles also facilitate an explanation of social change (Giddens, 1984). Herein is where the paradox manifests. If ALJs are compelled to primarily effectuate established law, then how are they instructed when faced with novel fact patterns

and legal questions? The data is limited in its sensitivity to completely answer this question insofar that due to the long history of the Act, few very truly novel cases arise. That is, while a specific fact pattern may not have been encountered, an ALJ can often rely on other broadly situated Board and court case law to fashion a decision. A possibility exists that the Board or a latter court may completely disagree with this decision, but the ALJ is at least able to become informed enough to make a decision. Unfortunately, while ALJ decisions were publicly available in some cases around the 1950s, they were not published in mass in the case law corpus until the 1960s. Therefore, difficulty exists when examining how these judges engaged with very novel legal questions when labor law was in its nascent stage and labor policy had not become saturated with countless precedents upon which to cite. Questions related to this problem may serve as an excellent platform upon which to conduct future research.

Data reported in the next and final findings and analysis chapter help answer the question as to whether judicial actors state policy conclusions in concrete or more abstract language.

## CHAPTER VIII

### FINDINGS AND ANALYSIS: QUESTION 5

#### **Findings**

To what extent is there evidence that labor law judicial actors' statements of policy direction are inherent in the written opinions of case law (i.e., have actors provided statements regarding their interpretation of the Act's overarching purpose)?

The data associated with this research question is reported and analyzed in an attempt to determine whether Board members and jurists state policy directives in concrete terms or instead use more ambiguous language when making policy decisions. Specifically, the data collected to answer this question is focused on judicial actors' statements of overarching policy – that is, statements of the intention of the Act that are either broad or narrow.

Throughout the dataset, cases are present in which the Board or jurists make a broad statement about the policies of the Act. Such statements may be indicative of an overall purpose of the Act, but the essence of these policies remains ambiguous in the written words of judicial actors. These statements are often framed in terms of how an action by the Board, judge, or court may effectuate the policies of the Act. For example, the Board in *Banknote Corp. of America* (1994) states: "...the Board has consistently held that long-established bargaining relationships will not be disturbed where they are not repugnant to the Act's policies." In that regard, the Board is not explicit with respect to which policies are under consideration. Similarly, when discussing the contractually agreed upon dispute resolution method between two parties, the Board in *United Technologies Corp.* (1984) states:

Where an employer and a union have voluntarily elected to create dispute resolution machinery culminating in final and binding arbitration, it is contrary to the basic principles of the Act for the Board to jump into the fray prior to an honest attempt by the parties to resolve their disputes through [the grievance-arbitration] machinery.

Analysis suggests that the Boards or jurists in these cases are considering policy from a meta-level – that is, how a decision affects the overall policies of the Act – but they are sometimes silent on what constitutes those policies. Even though these policies may be explained in further detail in other units of the case, they may also exist simply as boilerplate.

Although the data exposes the Board and jurists making ambiguous statements about policy, many occasions exist in the data in which a declared purpose of the Act is articulated. Perhaps startlingly, very few examples arise in which the NLRB states a declared and singular purpose of encouraging collective bargaining. For instance, when recounting a Supreme Court decision concerned with the definition of an employee, a Regional Director concludes in *Boston Medical Center Co.* (1999): “...the Supreme Court found that workers who are also paid union organizers are nonetheless ‘employees’ under the Act, noting that a broad, literal interpretation of the word ‘employee’ is consistent with the Act’s purpose to encourage collective bargaining...” In *Crawford Clothes, Inc.* (1959), discussing the effect of laying off a shop steward and placing a barrier between the employee and employer, the ALJ states: “To place such an obstacle in the path of parties to a collective bargaining contract would negate the basic principle of the Act, to promote collective bargaining.” These examples come from post-Taft-Hartley cases. As can probably be predicted, pre-Taft-Hartley cases feature more statements that encouraging collective bargaining is the principal policy of the Act, such as in *Gate City Cotton Mills* (1946): “It will therefore be recommended that the Board’s order be broad enough to insure that the Respondent will cease and desist from all acts and utterances which oppose the central purpose of the Act to promote collective bargaining.” This case was decided in right before the 1947 amendment to the NLRA was passed, which introduced ambiguity into the intended policies of the statute.

While few instances exist in the dataset that show the Board or ALJs declaring the purpose of the Act is to promote collective bargaining, many exist in which statements are made that promoting or encouraging collective bargaining is a policy of the NLRB (as opposed to the central purpose). When reasoning why an employer should negotiate over bonus pay, the Board in *Niles Bement Pond Co.* (1951) states: "...the policy of the Act to encourage collective bargaining ... is best served by requiring an employer to negotiate on the subject matter of such a bonus." Additionally, in *Loray* (1970), the ALJ makes a determination about policy ends of promulgating a bargaining order to remedy the consequences of employee threats during an organizing campaign: "Thus, the underlying objective of the Act to promote collective bargaining will be obtained."

While the observation that the NLRB is reticent to make a statement that the fundamental purpose of the Act is to encourage collective bargaining while easily declaring that collective bargaining is a policy of the Act appears to be splitting hairs, a subtle theoretical nuance exists here. Specifically, if actors within the NLRB state that encouraging collective bargaining is a policy of the Act, they are not precluded from inferring that other policies exist with respect to the statute. For example, when discussing deferral to arbitration in *Andersen Prestress* (1985) the Board states: "By adopting a broadly based deferral policy ... the Board endorses the national labor policy favoring arbitration and achieves one of the primary objectives of the Act – to encourage collective bargaining." In that regard, the Board is not beholden to a single policy interpretation that may prevent it from effectuating other policies in the future due to the decision being overturned based upon a narrow reading of the statute.

A similar trend is observable concerning the employee free choice narrative. For example, Board members Fanning and Jenkins in *United Dairy Farmers* (1979) state: “The paramount purpose of the Act is to protect the employees' freedom of choice to select or reject a union as their collective-bargaining representative.” Other statements are somewhat more ambiguous, not necessarily indicating that employee free choice is a central policy of the Act. Addressing an employer’s promises of benefits during an organizing drive, the ALJ in *Black Hills* (1996) says: “It is that very benefit which makes Respondent's resultant promises and actions unlawful by inherently interfering with the employee free choice guaranteed by the Act.” Here, the judge does not state that employee free choice is the central policy of the Act or even an intention of the Act, but rather, it is a right guaranteed by the Act. In that regard, the policy may even be considered a base policy that supports some higher statutory goal.

With that said, instances arise in the data where the NLRB implies that employee free choice has greater policy importance. The Board in *Electromation* (1992) declares: “The focus of Taft-Hartley was to assure employees of their right to make a free choice for or against unionization.” This finding provides substantial evidence that the Board – or at least, some Boards – saw a change in policy intentions after the passage of the Taft-Hartley Act. The majority of the Board panel in that case consists of Republican members, which is congruent with research that states Republicans are more likely to forward a policy of employee free choice, particularly when it deals with the choice of whether or not to select unionism (e.g., Flynn, 2000). Still, the data reveal that most declarations of employee free choice are more ambiguous. For instance, the Board in *MV Transportation* (2002) asserts:

It is well established that two of the fundamental purposes of the Act are (1) the protection and promotion of employee freedom of choice—choice with

respect to the initial decision to engage in or refrain from collective bargaining, and choice regarding the selection of a bargaining representative; and (2) the preservation of the stability of bargaining relationships.

In the above datum, the Board first infers that multiple fundamental purposes exist, since it says, "...two of the fundamental purposes..." rather than the less ambiguous "...the two fundamental purposes." The Board then introduces ambiguity by stating that, in addition to protecting employee free choice, preservation of bargaining relationships is a fundamental policy of the NLRA. That is, while employee free choice is an important policy, once employees have chosen a bargaining representative, the Board views maintaining stability as an important policy goal.

Upon further reexamination, the reason behind this ambiguity seems clear. Once again, the data suggest that industrial stability is the primary policy of the Act as interpreted by the Board rather than employee free choice or collective bargaining. For instance, in *Rutland Court Owners, Inc.*, the Board declares: "That the Act was designed to avert industrial strife, however, is clear beyond dispute." The data divulges that the Supreme Court forwards similar policy, such as in *Allentown Mack Sales* (1998): "The primary objective of the National Labor Relations Act is to secure labor peace." This case in point demonstrates the Board stating a policy of industrial peace as standing on its own. However, much of the data reveal the Board pairing industrial peace or protecting commerce with a mid-policy. The ALJ, citing a previous case in *Kings Terrace Nursing Home and Health Facility* (1976), states: "The policy of the Act to insure industrial peace through collective bargaining can only be effectuated when speedy access to uncrowded Board and court dockets is available." The Board explicitly outlines in this case that the policy of the Act is industrial peace and this is achieved through collective bargaining. In that regard, collective bargaining serves the

supra policy of industrial peace. The data reveal that employee free choice policies are also considered with respect to industrial peace. The Board in *Levitz Furniture Co.* (2001) states: “...from the earliest days of the Act, the Board has sought to foster industrial peace and stability in collective-bargaining relationships, as well as employee free choice...”

Although the aforementioned mid-policy and supra policy statements surface in the dataset as being unambiguous, the data also contain statements concerning other overarching policy goals. The Supreme Court in *NLRB v. Hearst Publications* (1941) provides a dual-purpose statement of the overarching policy of the Act is “to encourage collective bargaining and to remedy the individual worker's inequality of bargaining power.” The Board later invokes this policy in *AmeriHealth Inc.* (1999). An affirmation of this statement is recreation of the original legislative intentions behind the Act concerned with collective bargaining providing the avenue through which workers could assert economic power (Cox et al., 2006). In other words, it calls upon the theoretical arguments that inform the NLRA.

Throughout the data, judicial actors also have written opinions related to the intentions of the Act that go beyond industrial peace, collective bargaining, and employee free choice. Citing a court case, the Board in *Boss Manufacturing Co.* (1939) states: “...the purpose of the Act is remedial rather than punitive...” This statement relates to other data reported throughout the research question sections that the NLRA and NLRB exist to serve the public rather than private interests. In other words, the intention is to ensure that charged parties come into compliance with the Act’s policies rather than simply punishing them in order to vindicate a private right.

Finally, some of the data suggest judicial decision makers view preventing ULPs as fundamental to the purpose of the Act. In *Tygart Sportswear Co.* (1948), the ALJ states:

The preventive purpose of the Act will be thwarted unless the undersigned's recommendations are coextensive with the threat. In order, therefore, to make effective the interdependent guarantees of Section 7, to prevent a recurrence of unfair labor practices, and thereby to minimize industrial strife, which burdens and obstructs commerce, and thus effectuate the policies of the Act, the undersigned will recommend that the respondents cease and desist from in any manner infringing upon the rights guaranteed in Section 7 of the Act.

Even in this example, the Board sees preventing ULPs as a means to an end of effectuating a supra policy of minimizing industrial strife. The ALJ makes a similar statement in *Littlerock Downtowner, Inc.* (1963):

The preventive purposes of the Act will be thwarted unless the Order is coextensive with the threat. In order therefore to make more effective the interdependent guarantees of Section 7, to prevent a recurrence of unfair labor practices, and thereby minimize industrial strife which burdens and obstructs commerce...

These findings support the theory that most policies effectuated by the Act are done in order to prevent industrial strife and protect the economic stability of the U.S. Related, the data reveal that the preventive policy is done in the public interest rather than protecting employee rights – for instance, *Andrew Jergens Co. of California* (1940): “The Board is ‘charged in the public interest with the duty of preventing unfair labor practices’ defined in the Act, and Board proceedings thereunder are ‘narrowly restricted to the protection and enforcement of public rights,’ ...” Therefore, the data suggest that while the Board may be interested in protecting individual employees’ Section 7 rights, it may do this as a means to an end in effectuating higher level policy.

### **Summary and Analysis**

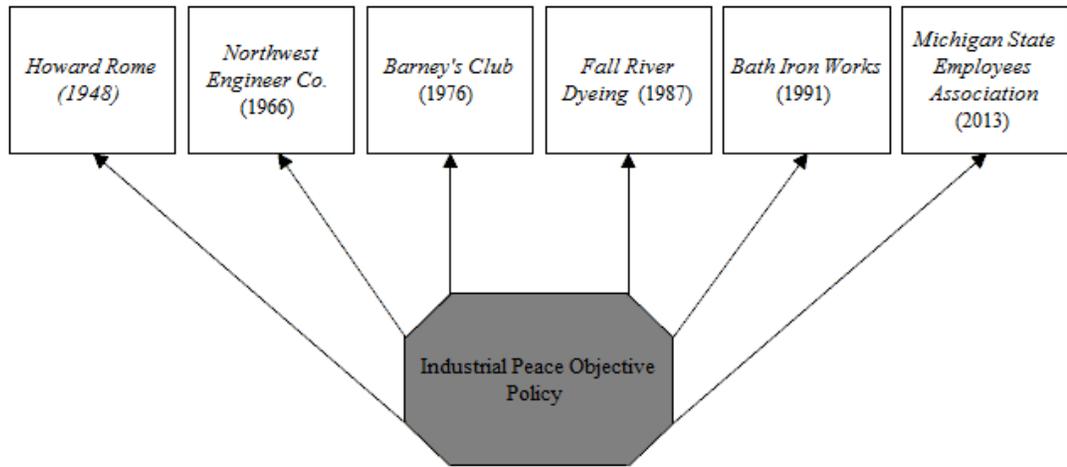
The data suggest that while Board members and jurists do sometimes speak in ambiguous language about the overarching policies of the Act, an overwhelming number of decisions contain expressions delineating interpretations of the overarching intention of the

NLRA. However, the data also suggest that these expressions do not necessarily infer that the Act contains one policy. Instead, the data corroborates findings reported with respect to other research questions that industrial peace is the overarching policy of the Act and the mid-policies of promoting collective bargaining and employee free choice exist to serve this end.

Snowball sampling of these findings reveals very little data to suggest that these stated policies are carried through via precedent. A small number of examples are present, such as the ALJ in *Independence Residences, Inc.* (2011) citing a Supreme Court case: “...the basic purpose of the National Labor Relations Act is to preserve industrial peace’ *NLRB v. Financial Institution Employees (Seattle First National Bank)*, 475 US 192, 208 (1986).” This appears to be largely an exception in the data. Cases analyzed to answer this research question are cited, but the precedent carried forth is generally a matter of base policy rather than overarching policy intentions. Therefore, little opportunity exists to create direct policy strains to show how such legal reasoning has been recreated over the years.

With that said, this troubling data can still be explained within a structuration framework. While these specific policy statements are not necessarily recreated through precedent, they do exist across time-space. In essence, they still have an influence on the system components of labor policy – and related, labor law reality. Specifically, their very existence gives tangibility to a policy strain that exists across time but is not necessarily directly connected. Even though statements of policy intention concerning promoting collective bargaining, protecting employee free choice, and protecting industrial peace are inherent in the Act, the data reveal that Boards and judges may not always directly cite the statute to lend legal weight to these conclusions. Still, these policies are created and exist in time-space and are part of the labor law legal system insofar that no proceeding Board or

court decisions come forth and explicitly overturn these statements as a matter of them not representing the overarching intentions of the Act. For instance, while many cases throughout the history of the Act contain statements that the goal of labor policy is to prevent industrial strife (see Figure 26), these statements are not overturned. By their very untouched existence, they perpetuate policy.



*Figure 26.* Industrial peace intention policy strain.

The preceding data and analysis chapters reported the findings of this content analysis and couched the collected evidence in a structuration theory framework. The final chapter of this dissertation will contextualize these findings, discuss the scholarly and practical implications of this study, examine limitations of the study, and delineate a future research agenda.

CHAPTER IX  
SUMMARY AND CONCLUSIONS

**Introduction**

This chapter provides a review of the study and a discussion of its major findings. This research used a qualitative content analysis methodology to determine the major policies of the NLRA as interpreted by judges and the Board of the NLRB and how these policies changed or remained constant over the course of the statute's lifetime. First, historically important case law was purposefully sampled as part of a conventional content analysis approach and emergent coding and recoding was completed in order to target theoretically significant subject matter. Next, cases were sampled from the Westlaw legal database using keyword searches based upon important policy concepts informed by the extant literature. Historical time criteria were applied to the sampling methodology to ensure that cases were equally represented across the eight-decades that the Act has been in existence. During this directive content analysis approach, the previously constructed codes were applied deductively to the data to facilitate category and theme recognition. During analysis, theoretically important cases served to inform snowball sampling in which related cases – either those cited by the original coded case or subsequently cited the originally coded case – were then collected and analyzed. Often, these related cases were constructed to form policy strains that were reported as a way to demonstrate how a policy doctrine was recreated or changed over time.

The remainder of this chapter begins with a reflection of structuration theory as a theoretical framework for legal analysis. Following is a section presenting summary and concluding remarks of the study's major findings. Next, credibility and limitations of the

research are addressed. The chapter concludes with a section on the scholarly and practical implications of these findings and a final section laying forth a future research agenda.

### **Structuration and the NLRA**

The research conducted herein was informed by Giddens's (1984) structuration theory, which posits that all structures are socially constructed and perform a dual function of both constraining and facilitating social actors' behavior. Testing the overall usefulness of structuration to a study of the sociology of law and jurisprudence was an underlying objective of this project. Giddens's theory was exceptionally valuable as a meta-explanatory tool for deducing the phenomena related to the creation and recreation of labor policy. Structuration theory holds that socially created structures in certain instances impede certain movements by social actors. The data showed that by adhering to policies set forth by Congress and the wording of the Act itself, legal actors were constrained in forwarding decisions that were repugnant to legislative intentions. However, structure can also be facilitative. The findings can also be framed in terms of less restricted decision making in some circumstances. For instance, the ambiguity of the employee free choice and encouragement of collective bargaining directives laid forth in Congressional intent and the words of the NLRA provide some agency in allowing actors to choose a legal interpretation and forward a specific policy narrative. With that said, structure is still constraining insofar that actors cannot reach beyond what is stated in either the Act or Congressional intent. While penumbras can be interpreted behind certain words, they cannot be so far removed as to call the interpreter's decision making into question. This is because the possibility of judicial review also serves as structure, maintaining a feedback loop that ensures interpretations eventually narrow into a specific genus of policies.

Structuration theory conceives social structures being created and recreated over the course of time through continual social practice (Giddens, 1984). These practices then become ingrained and routine within the social arrangement and outlive their originators. This is why Giddens believes that social analysis should focus on practices rather than individual actors (Calhoun et al., 2007a). Throughout the findings, policy strains were continually created and recreated through the vehicle of interpretative case law as a matter of precedent. As these precedents were repeated over the course of time, they became congealed into a number of policies that compose a shared reality of what constitutes labor policy both historically and in the moment – in structuration terms, the system of U.S. labor policy. However, administrative law’s flexibility with *stare decisis* as compared to other areas of laws ensures that this system will always experience a certain threshold of chaos - a subject given further review in the chapter. Thus, hypothetically, an area of law with longevity should present a very stabilized system and legal reality when precedents by similarly-situated courts cannot as a matter of horizontal precedent overturn past decisions. A similar phenomenon was observed in this study with respect to Supreme Court precedents, which the Board cannot overturn. The evidence indicated that Supreme Court decisions are wide-reaching and stabilizing on labor policy, such as can be observed by the ubiquity of *Gissel* (1969) and *McLaughlin Steels’* (1937) prevalence in the data.

Discursive consciousness, which is social actors’ reflection and mindful engagement with structures and systems, is an important component of structuration theory (Giddens, 1984). While the methodology precluded a phenomenological approach where the thought processes that led judges and Board members to reach decisional conclusions are analyzed, the data did provide enough analytical sensitivity to demonstrate that actors do wrestle with

legal questions and are acutely aware of the structural patterns with which they must contend in the form of previous case law, Congressional intent, and the plain language of the Act. This is evidenced by the legal analyses present in the data where judges and Boards delineate the history of certain policies and sometimes show frustration with a lack of Congressional directive on a novel policy issue.

Although this research only examined a very small part of the legal system and how policy is recreated over time, the far-reaching implications of structuration theory to labor law decision making does warrant some discussion. The decisions that are created and recreated by the NLRB and courts are not simply part of a self-replicating closed system. Their influence on structured reality extends outwards, beyond the permeable membrane of the administrative bureaucracy and judicial branch. Estlund (2006) argues that the chaotic nature of labor policy creates uncertainty in the law profession, since attorneys and labor relations professionals may not always be confident about what law is good law. This is indicative insofar that what the courts and NLRB decide as a matter of labor policy creates constraining and facilitative structural influences that occupy outside domains. What becomes a socially constructed legal reality amongst the NLRB and courts thus become the systematic legal reality of labor relations actors, such as attorneys, human resource professionals, union representatives, and labor academics. Harkening back to the proclamation in this dissertation's Statement of Positionality that law is the practice of applied postmodernism, the legal reality of labor law exists purely as a socially constructed system of replicated labor law that derives its absoluteness from the structural influence that compels people invested in that domain to act in certain ways. Despite the intangibility of

labor policy, it is very much a *thing* featuring a property of realness by virtue of its ability to influence behavior.

For example, if hypothetically the Board were to make a ruling that if employers and a newly certified union do not reach a first contract in six months, the incumbent union could be decertified after that time period rather than after the traditional one-year period for a decertification vote, that ruling would influence how both parties operate. With the decision promulgated through trade periodicals, law reviews, and law books, labor relations professionals would become cognizant of the policy and advise their respective stakeholders of a strategy to forward their respective interests. Employers may stall in negotiations or engage in surface bargaining and other tactics to avoid a first contract. Unions may negotiate more aggressively or be more prone to striking when reaching impasse than they normally would if that policy were not in place. This would be due to decided labor policy creating constraining and facilitative structure. It outlines the landscape of how parties and individuals may act. It is reality and exerts an influence upon actors until the precedent is overturned and a new reality takes hold. Thus, structuration of labor policy influences life outside of the immediate legal system.

### **Summary of Major Findings and Conclusions**

The study examined five specific research questions:

1. Have statements of policy been reflective of the language inherent in the Act and/or statements of Congressional intent, or have they instead been statements of policy that are not related to the original intentions of the Act?
2. What statements of policy and themes have Board members and jurists communicated in their interpretative decisions?
3. Have legal opinions stated in cases become precedent setting in subsequent cases that deal with legal questions similar to those found in the leading cases?

4. Has it been the courts, the NLRB, or all judicial and quasi-judicial bodies that have either affirmed or diverged from the Congressional intention of the Act?
5. To what extent is there evidence that labor law judicial actors' statements of policy direction are inherent in the written opinions of case law (i.e., have actors provided statements regarding their interpretation of the Act's overarching purpose)?

The data revealed that Board and judicial decision makers closely adhere to a reasonable reading of the Act based upon an interpretation of Congressional intent and the plain meaning of the statute. Very little of the data inferred that any judicial explanation for a policy decision was far removed from intentions laid forth by the legislature. Actually, the data revealed that the Board or courts may show some frustration with areas of law in which Congress or the Act is silent or ambiguous. These findings fit with a legal positivist view that jurists make decisions based upon legislative and statutory instruction (Schauer & Sinnott-Armstrong, 1996). This is not to deny the legal realist doctrine that personal disposition or ideology lacks presence in judicial decision making (Fischer et al., 1993). The findings suggest that Boards are able to cherry pick statutory interpretations that may be ideologically informed or relate to a personal disposition. However, these interpretations are constrained to a limited number of viable interpretations that are contained within a structural casing. Violating the structural instruction to include a novel interpretation may trigger judicial review by a higher court, most notably the Supreme Court, which could lead to the overturning of the decision and an immovable precedent being set.

Two viable interpretations of the Act are that its intention is to promote collective bargaining or that it seeks to protect and promote employee free choice. This research was largely sparked by a controversy in the literature that holds these two narratives compete in labor law policy as being the true legislative intention of the Act (Morris, 2012). Specifically, the original Wagner Act was passed to promote collective bargaining as a solution to

economic situations caused by the Great Depression and labor strife, while the Taft-Hartley Act introduced language that included protection of employee free choice as a central policy of the NLRA. The findings revealed that both of these interpretations are present in Board and judicial interpretation, but the data suggest that the effectuation of these policies show much more nuance than previous literature describes. The employee free choice narrative has been present in almost all NLRB and court case law, including Wagner Act era decisions. These statements about employee free choice largely refer to a policy of preventing employers – and later unions – from coercing employees from exercising their rights prescribed by Section 7 of the Act and discouraging the voicing of their true preference in an election. The more controversial employee free choice policy in which the emphasis is placed upon employees being able to abstain from labor representation if they so desire did not come into prominence until around the Reagan administration. In that regard, employee free choice is interpreted to be – at the least – controlling over a policy of promoting collective bargaining. This finding corroborates Flynn’s (2000) conclusion that Boards began to display more ideologically informed decision making at the time of the Reagan administration. The difference between the employee free choice policy concerned with preventing coercion and the employee free choice narrative that centralizes a policy of workers being free to refrain from choosing to be represented by labor organizations is that the former does not necessarily preclude a policy of promoting collective bargaining. The latter does by default, since it places employee free choice on a platform that supercedes a policy of collective bargaining.

The data also suggest that a policy of promoting collective bargaining is not so easily understood on its face. Rather, much of the data suggest that Boards and jurists see ensuring stability in bargaining relationships as an important component of labor policy perhaps just

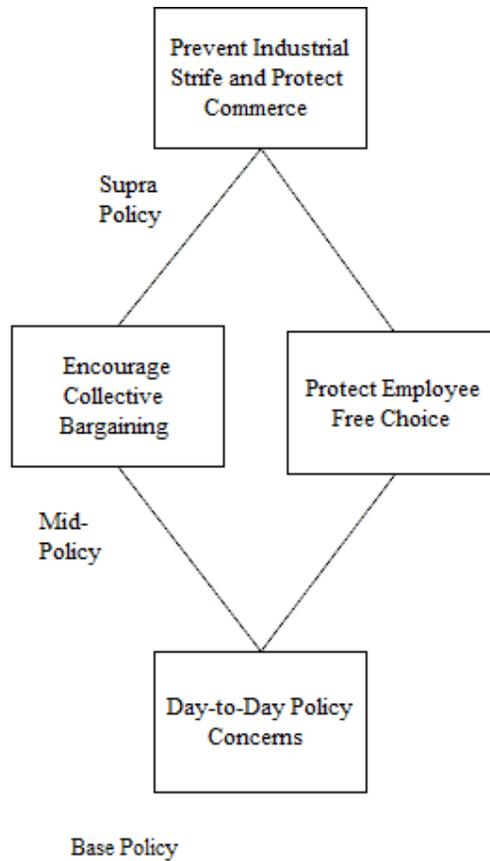
as much as purely promoting a policy of collective bargaining. Decision makers reason that promoting stability in bargaining relationships serves to reduce industrial strife and privatize labor disputes.

Throughout the data, instances arose in which the Board or courts would use employee free choice or promoting collective bargaining narratives as a heuristic tool to inform effectuation of other policy. The data would often suggest that this was a policy of preventing industrial strife or protecting commerce. Whereas the policies of promoting collective bargaining or employee free choice appear to display some chaos, the policy of preventing industrial strife remains constant throughout the data and case law corpus. With so many other policies appearing to be contingent upon an effectuation of a policy of industrial peace, the data strongly suggest that industrial peace is the central policy of the Act. That is, all effectuation of the policies of the Act are to serve a policy of maintaining industrial peace.

Industrial peace functions as one layer of policy, while employee free choice and encouraging collective bargaining function as another layer of policy. However, the data revealed that a third layer of policy exists as well. These third layer policies deal with the day-to-day effectuation of the Act and serve to resolve tangible legal issues that are brought before the NLRB and courts. Many of these policies manifest as a taxonomy dubbed policy tests, which are legal heuristics that Boards and jurists apply in order to resolve fact patterns. For instance, *Wright Line* (1980) is instructive insofar as applying a policy test to determine if a ULP has taken place. Specifically, does an employer commit a ULP if an employee who has been disciplined for union activity would have been similarly disciplined for actions regardless of the union activity? Other policies related to this third layer of policy include

questions about whether or not a charge should be deferred to the parties' grievance-arbitration procedure; who is an employee under the Act, and; what are the Board's duties under the NLRA.

These layers of policy constitute a three-level policy model of the NLRA, which is the central original finding of this research project (see Figure 27). Industrial peace and commerce protection make up the top, supra level of policy. This level of policy is almost completely inactive. Precedents regarding it are almost never overturned and little controversy exists in the case law corpus about its relationship to Congressional intent or status as a central policy of the Act. Employee free choice and promotion of collective bargaining narratives make up mid-policy. This policy shows some dynamics insofar that legal decision makers, primarily the Board, engage in some contentiousness with choosing one policy over the other. However, this level of policy remains in the abstract. That is to say that neither narrative manifests in a way that could be considered tangible. That Board invoking a policy of encouraging collective bargaining does not automatically result in an end of increased collective bargaining throughout the economy. Rather, much like supra policy, mid-policy is informing of other policy. On the other hand, the third layer, base policy, has a tangible effect on labor relations. It is the manifestation of policy ends. Base policy also displays chaos, since precedents may be readily overturned and are sometimes done so due to it being the most tangible policy in scope. Disagreeing with a prior decision that concludes the purpose of the Act is to promote collective bargaining does not necessarily change the impact of labor policy unless it is also altering a contingent base policy.



*Figure 27.* Three-level policy model.

However, the data also revealed that many base policies remain constant throughout the history of the Act. Further analysis suggests that policies that are universally functional to the Board are often not overturned. They generally make the NLRB’s job to effectuate policy easier and the agency cannot busy itself with constantly overturning precedents when resolving basic day-to-day charges and legal questions. The data does indicate that ideological disposition plays a role in what policy strains are recreated and that Boards containing majorities that are ideologically or intellectual opposed to a previously established precedent may attempt to overturn them when presented with a chance. This is why mid-policy is important to the model. Boards and jurists can establish a base policy decision upon a mid-policy narrative. However, without mid-policy, NLRA case decisions are then situated upon a reading of supra policy or simply the statutory plain language that may or may not be

instructive to a particular legal question. Boards and jurists need mid-policy to justify an ideologically informed reading of the Act that is manifested in base policy but yet still adheres to the central policy of the Act of protecting interstate commerce from industrial strife. If mid-policy were absent from U.S. labor law via silence in legislative intent and the plain language of the Act, hypothetically, base policy may be much different if it were contingent just on supra policy.

It should be noted that the three-level policy model is an abstraction of interacting labor policy. It is not necessarily a cognitive model. In other words, each and every Board member or judge does not necessarily balance these three layers of policy to arrive at a legal conclusion in all cases. Rather, this model arose from generalizations that can be made from the data that do show an interaction of each level of policy that can be understood once the analyzed data is aggregated.

Finally, much of the research examined some of the processes of labor policy creation and the roles of the different judicial actors with respect to policy effectuation. The data suggest that the Board is the primary purveyor of labor policy. While the Supreme Court exercises final review on cases brought before it, the data revealed that the Court often defers to the Board as the authority on labor law matters and is rather reticent to make sweeping policy decisions. However, the Supreme Court does serve a very important purpose in effectuating labor policy insofar that it acts as a feedback loop. Specifically, the Supreme Court decides whether or not a Board or lower court decision is repugnant to the Act. Since a Supreme Court decision cannot be overturned, it behooves the Board not to make decisions outside of the legislative or plain language bounds of the Act or else the Supreme Court may overturn the decision and create a piece of policy that is for all intents and purposes written

in stone. This has the overall effect of creating a system or reality that constitutes labor law. It is a system that has a clearly definable border and a number of specific narratives and precedents at any other time that facilitate and constrain both legal behavior as well as behavior of practitioners in the labor relations world. The data support the conclusion of a legal reality insofar that ALJs promulgate already decided policy rather than create their own interpretations.

### **Credibility Check**

Once the data was coded and placed into an analytical framework, I sent a summary of findings to three subject matter experts (SMEs) to check the credibility of my conclusions. These SMEs included an NLRB field examiner, an NLRB field attorney who has also taught labor law, and an Assistant Professor of Employment and Labor Relations with expertise in collective bargaining history. All SMEs have over five years experience in their respective disciplines or careers. They provided short written responses to my summary, and follow-up discussion occurred via electronic and telephone communication.

All SMEs strongly agreed with my overall conclusions. Each one felt that the three-level policy model was an accurate portrayal of how U.S. NLRA labor policy functions. The field examiner stated that policy tests are the cornerstone of NLRB investigations and serve to create consistency between decisions across the agency. The field attorney agreed that the multiple layers of policy purveyors (i.e., ALJs, the Board, and the Supreme Court) act as a mechanism of checks and balances with the Supreme Court being the final legal authority that solidifies a strain of policy.

The field attorney indicated that I may want to consider the area of policy dealing with unions' duty of fair representation, which in her experience is an aspect of labor law

with which the NLRB often deals. I agreed and purposefully sampled the primary case associated with duty of fair representation doctrine, *Vaca v. Sipes* (1967) into the conventional content analysis portion of the data and coded it for analysis. The Associate Professor indicated that I may wish to clarify the distinction between a purpose of preventing industrial strife and the theory behind collective bargaining that holds parties are compelled to reach agreement due to the potential to unleash economic weapons. I ensured clarity of this point in the written manuscript.

### **Limitations**

Although stringent sampling techniques were applied to the main case law corpus in order to create the dataset, the possibility exists that theoretically interesting policy strains not sampled had escaped review. This is because the case law corpus is vast and analysis of even a quarter of the cases available would not be realistically feasible. However, the purpose of the dual-approach of using both traditional and directive content analyses was to ensure that historically important cases and policy were included in the dataset while allowing enough freedom to sample cases that may be theoretically interesting albeit not widely known in the labor relations world. Therefore, while not offering a sample of every policy strain in labor law, the data collected is vast enough to generalize to the findings and theoretical principles elucidated in this research.

Additionally, an argument may be posited that since much of the directive content analysis sampling was based upon key word searches, the findings are circular. That is to say that because certain words related to policy were used to generate data, then of course the findings would relate to these policy themes. On the contrary, as stated in other parts of this dissertation, the sampling was intended to be informed by policy concepts related to

legislative history and prior research in order to generate data that were theoretically sensitive. Sampling based upon any type of general key word search may have generated data, but data that may not have been focused towards answering the research questions. Further, the findings revealed much more nuance related to the processes of policy effectuation than the bare key word search terms themselves indicate. Only a very small number of key word terms were used to generate the data, while the much larger number of codes – many that are not directly related to the key word search terms – is indicative of a fine distinction in analysis. Ultimately, the importance of this research is the final product, which are the findings regarding how policy is generated and recreated across time, as well as novel conclusions, such as the three-level policy model. The sampling procedures were instrumental in these products.

The main limitation of this research is a danger in overextending conclusions further than what the data actually state. As indicated many times throughout this research, the methodology used was not phenomenological. The data sometimes do reveal instances in which Board members and judges appear to be wrestling with the law in an attempt to reach a sound conclusion. Times in which the data were sensitive enough to show this phenomenon were represented in the findings and analysis, but this study cannot dive deeply into the cognitive processes of the judicial decision makers' minds when attempting to reach a conclusion. Further, this research was not overtly concerned with policy ends. In other words, this research did not focus primarily on whether or not a case decision was ultimately beneficial to labor or management or what the real world implications were for a legal conclusion. Rather, it primarily focused on the process of policy creation and recreation across time. Many interesting findings could be derived from the data, but they would require

quantitative analysis in order to reach defensible conclusions. For example, scholars have found that ideology is predictive of Board decisions (Flynn, 2000). Partisanship was considered in this study's analysis, but it was often couched in the language of its corroboration with preceding research. Making conclusive remarks about partisanship's correlative or causal relationship with specific policy strains requires quantitative analysis and statistical-based sampling techniques. Instead, ideology as an item of inquiry in this study serves more as a contextual consideration and a possible meta-explanation for the policy processes taking place rather than as a predictive variable for emerging and recreated policy statements and strains.

### **Implications**

Numerous studies and law review articles examine changing labor policy in the U.S. (e.g., Hayes, 2002; Livingston, 2013; Lubbers, 2010; Peck, 1968). A sub-body of this scholarship focuses on how Boards contend over what is perceived as the intent and central policy of the Act: encouragement of collective bargaining or employees' freedom to choose not to be represented by labor organizations (e.g., Flynn, 2000; Gross, 1985; Morris, 2012). The essential thesis of much of this scholarship is that prior to 1947, the Act lacked ambiguity and clearly instructed the NLRB and courts to effectuate a policy to encourage collective bargaining; the Taft-Hartley Act then introduced vagueness by inserting language into the Act that employees have the right to refrain from joining labor organizations while maintaining the previous language about encouraging collective bargaining. The result is that ideologically informed Boards could then cherry pick whatever narrative suited their specific policy narrative.

The data demonstrated that these two narratives do exist as a part of statutory interpretation, but the findings of this study indicate that greater nuance is present than has been previously thought, particularly with respect to the latter narrative. The employee free choice narrative has always existed in Board and court case law decisions – even as far back as the 1930s after the NLRA was passed into law. However, employee free choice traditionally referred to a policy of preventing parties - first employers and then later unions as well - from coercing employees in their voting preferences. This is qualitatively different than a paternalistic policy of simply affirming that the purpose of the Act is to ensure employee free choice not to join unions. Even after the passage of the Taft-Hartley Act, the second employee free choice narrative did not become salient in rulings until the 1980s. This affirms Flynn's (2000) finding that the Board did not become overtly partisan until the Reagan administration. Board members who were business-friendly could then forward a policy of employee free choice, while those who were labor-friendly could forward a policy of promoting collective bargaining. The difference between the early employee free choice narrative and the later one is that the former was focused upon means that ensured employees were not being unfairly coerced. The latter was focused on ends of assuring employees that they are not required to join unions. A statement of such a policy is not necessarily contingent upon actions taken against employees that may be coercive; it is a policy that stands by itself.

The study adds to the current body of research by providing greater understanding of the employee free choice narrative, but it also adds to the research by presenting the three-level model of NLRA policy. Previous scholarship has primarily focused on the two narratives discussed above (e.g., Morris, 2012) or has been preoccupied with small areas of

labor policy that affect practitioners (e.g., Pinarchick, 2008; Simon-Rose, 1976; Twomey, 2014). Much attention has been given to *what* is labor policy at any given time, but not as much attention has been given to the *why* it is or *how* it comes into being. Applying structuration theory to a study of legal jurisprudence and a specific statute helped produce a model that illustrates an abstraction of how policy is created and recreated over time. While previous scholars have lamented that U.S. labor law is in a perpetual state of flux due to constantly changing precedents (e.g., Estlund, 2006) that only tells a part of the story. The data strongly suggest that certain facets of labor law – namely, base law - are dynamic, while the supra policy of the Act has remained constant across time. The mid-policies may change based upon shifting ideological tides, but they are regulated to collective bargaining and employee choice narratives. The mid-policy membrane never expands to include any other narratives. Therefore, to say that labor policy is chaotic is somewhat inaccurate, since only certain facets of labor policy easily change while others remain constant through the decades.

Practical implications arising from this study concentrate on future policy making. The judicial branch and administrative agency network are tasked with effectuating policy. As can be gleaned from this study, some statutory interpretation can become congealed over time and provide an unambiguous legal reality. However, other areas of policy related to a single law may be chaotic, particularly in the administrative world. Therefore, understanding the potential aftermath of bill passage may be better informing to legislators. This could help remedy a problem of passing a law with vague language and simply allowing the judiciary to interpret its meaning.

The implications of this study for labor professionals are that it highlights some of what processes leads a policy to become static or dynamic. Many base policies, particularly

policy tests, are static. That is possibly because they make judicial cognition and decision making easy for the NLRB and courts. Rather than getting bogged down in high-minded policy questions, these policy tests are applied with a standardized approach in order to resolve applied legal issues. Labor professions can rest more easily that the possibility of these precedents being overturned is unlikely. Base policy that is ideologically informed and is arrived at through application of mid-policy may be less stable. Unless affirmed by the Supreme Court, these precedents may be more likely to be overturned by future Boards that are less sympathetic to the original precedent.

Gould's (2000) memoir of Board-level decision making infers that Boards demonstrate acute meta-reasoning with their decision making. They are very much aware of the political pressures and other forms of structure that impact how and why they make certain decisions. However, when coupled with additional research, the implications of this study for the NLRB may be shown to be valuable to stakeholders and actors in other parts of the agency. The final section discusses this future research agenda.

### **Future Research**

This study was mainly preoccupied with the function of policy narratives at a global level. That is to say that this study examined case law documents actualized by court and Board-level NLRB actors. This level of policy creation and effectuation by high-level quasi-judicial and judicial decision makers has received notable attention elsewhere in the literature (e.g., Estlund, 2006; Gould, 2000; Gross, 1981; Grunewald, 1991; Peck, 1968). Nevertheless, analysis of Board-level and court-level decision making is but a small snapshot of a much larger labor policy picture and an investigation of one organizational component of the NLRB. Almost all case processing begins with decision making at the Regional offices of the

agency (Cox et al., 2006). These offices serve as agents of the General Counsel wing of the NLRB, and they are tasked with the investigation of charges along with their prosecution before ALJs.

The NLRB closely adheres to Weber's (1922/2011) ideal-type of bureaucracy. It is a rationalized organizational system, structured to meet the administrative needs of overseeing a particular federal statute. Organizational actors have fixed official duties that are proscribed and legitimized within the specific offices they hold. NLRB actors observe a system of rules, many of which are codified and promulgated within a number of manuals and memos throughout the organization (Tomkins, 2005; NLRB, 2013a, 2013b). While the Board and General Counsel are elected positions, the NLRB is primarily staffed with career service employees who exercise technical expertise throughout their job duties (Cruz, 1991; Flynn, 2000). These actors must be able to deal effectively with a large number of policy issues that arise in the day-to-day execution of their responsibilities.

Moe's (1985) top-down framework of policy making – a framework he refers to as a control and feedback model - was given a cursory examination in the review of the literature and in an earlier chapter when analyzing data with respect to the fourth research question. The reported data in this study suggest that intra-organizational policy making flows downward from the Board to ALJs rather than upwards. That is, policy and case law that contain informing structure is inherent to Board decisions rather than ALJ decisions. ALJs, in many ways, are the executors of previously decided Board law. This data and Moe's model may be informing of a future research agenda on Regional decision making.

Moe (1985) conceives an influence on Board policy making that he dubs the endogenous core. This core is comprised of the organizational components and actions that

exist within the boundaries of the NLRB, such as the Regional offices and their processes and Board and ALJ decision making. In Moe's model, these components are arranged top-down, much like the NLRB's official organizational structure. In that regard, the Board and General Counsel are principals and the Regional offices and staff are agents. Likewise, Moe also conceives an exogenous core that includes outside pressures, such as political influence and the country's current macro economic status, that may affect case filing and processing.

Regional staff are still able to exercise agency insofar that they are often the most knowledgeable about particular charges and cases brought forth to them, and thus, can apply a set of criteria in investigating and deciding upon the merits of cases that may be removed from the actions of staffs that operate at higher levels of the agency (Moe, 1985). However, Regional staffs' actions are directed – at least in theory - through typical organizational and firm control mechanisms, such as pay, promotion, and task assignment, to help ensure that Regional decision making is congruent with upper-level policy decisions. Moe notes that Regional staff may have different interests than their principals – for instance, the Regional staff being more focused on following legal precedent and the Board more concerned with the political implications of their decision making. Moe states that Regional staff may be able to take advantage of the knowledge gap between themselves and higher organizational levels with regard to policy decisions. This ability to exercise agency may be compounded by Board case law decisions that are vague and ambiguous, thus leading to Regional decisions that diverge from Board desires.

Moe's (1985) control and feedback model provides a causal outline of how both endogenous and exogenous pressures largely originate from the top of the inter and intraorganizational environment and proceed downwards, facilitating a feedback loop that

ensures the NLRB becomes congruent in its policy making (see Figure. 28). The data reported in this dissertation corroborates this conclusion. Political authorities control Board policy outcomes and offer a level of policy predictability by choosing ideologically informed appointees who provide policy directives that are codified into formal case law – a point given consideration in this research as well as other scholarship (e.g., Flynn, 2000). These directives are then interpreted at the Regional staff level, which follows precedents set forth by the Board in its decision making – that is, whether or not to find filed charges meritorious and litigate them in front of ALJs based upon prior Board decisions (Cox et al., 2006). However, both staff and Board decisions may influence labor and business parties’ charge filing strategy (Moe, 1985). Labor may file a larger number of charges if it perceives the Board as being labor friendly and employers may file more charges if it perceives the Board as being business-friendly. The Regional staff influence party filing insofar that it can decide which allegations are prima facie possible to fall within the purview of the established labor policy at any given time. Finally Board, staff filtering, and party filing decisions are tempered by the current economic climate.

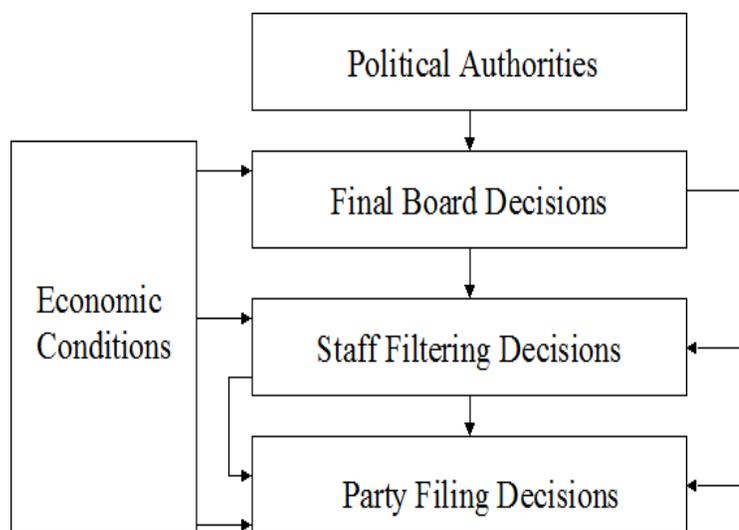


Figure 28. Control and feedback model (adapted from Moe, 1985).

Moe (1985) does consider Regional offices in his model; however, they are treated more or less as conceptual constructs that exist within the model as an entry point through which parties file charges. NLRB ideological profile is considered in the top-down model with regard to Regions, but it is conceptualized in terms of how Regions direct case processing in response to a pro-labor or pro-employer Board rather than how it informs case investigation and Regional decision making. That is, little attention is given to how Regions engage in agentic organizational behavioral that affects policy. Moe does conceptualize Regions and Regional agents as exercising agency insofar that they may be able to engage in decision making that runs contrary to Board desires, but he states this more in terms of being an axiomatic assumption. The Regional offices and their staff are treated as a proverbial black box.

Despite Moe (1985) including Regional offices as an integral component in his feedback and control model, little research has actually been conducted on the day-to-day procedures of the Regional offices. Cruz's (1992) article on Regional cultural stands as one of the few scholarly reports about the inner workings of the offices. Using the theoretical assumptions that informed this project – that is, case law is structure – future research may be focused upon how Regional actors apply precedents from case law and recreate the policies decided by the Board and courts. More precisely empirical exploration can evaluate how professional staff including field attorneys and examiners are informed in their trial preparations and investigations by extant policy. For instance, is precedent-setting case law instructive of what facts an investigator attempts to represent in a charging party's affidavit? Further, do attorneys and examiners compartmentalize policy issues into specific domains or do they instead think of policy in a holistic manner. For example, would recommendations

that a charge be deferred to parties' grievance-arbitration procedure be viewed by the staff as simply applying the standard set forth in *Collyer* (1970) or *Dubo* (1963) or would they consider it an effectuation of a policy to privatize labor disputes and prevent industrial strife from becoming public? More so, would a difference in policy approaches exist between professional staff and managerial staff, such as field attorney and examiner approaches as compared to Regional Attorneys and Regional Directors?

Much of this study was informed by prior research that framed a contention between competing policy narratives (e.g., Gross, 1985; Morris, 2012). Moe (1985) infers that ideology plays a role at the Regional level insofar that Board-level decisions that are informed by partisanship permeate the rest of the agency, thus recreating the ideological views of the deciding Board members. Even so, this does not give attention to the phenomenological aspects of Regional ideology. If policy decision makers in both Board positions have been shown to exercise ideology in decision making, it stands to reason that Regional staff, including Regional management, also exercise some amount of ideology when investigating charges and making decisions. Schmidt (1992, 2002), who has conducted the majority of the few studies examining Regional ideology, finds that Regional staff do make decisions that could be viewed as partisan (i.e., pro-labor or pro-management). However, Schmidt's analysis strictly examines outcomes and how these outcomes relate to Board ideology as a predictive variable. In other words, while Schmidt confirms Moe's (1985) model insofar that Board-level ideology influences Regional case processing, her study does not examine how exactly ideological processes work at the Regional level. This is an obscure, albeit important, area of NLRB processing that may warrant further examination.

One of the major tenets of this research project dealt with Giddens's (1984) principle of structure and agency. That is, how does structure constrain or facilitate agency? The data and previous literature (e.g., Gould, 2000) suggest that Board and judicial decision making is constrained or facilitated by legal, social, and political structure. This logically raises the question of how much agency are individual Regional field agents afforded. Surprisingly, little research exists concerning how much agency public employees are able to exercise with respect to policy implementation. Some evidence suggests that public sector employees are able to operate with a fair amount of agency with respect to a bureaucratic policy system. For instance, Tummers, Steijn, and Bekkers (2012) found that in addition to a personal belief in policy content, personality factors, and organizational environment also have a predictive relationship with how much public sector employees are willing to fulfill policy goals. Specifically, Tummers et al. found that employees who believed that the policy was important and who were less rebellious and more rule obedient were more likely to work towards fulfilling policy goals. Further, management and peer attitudes were found to affect employee attitudes towards policy implementation. As part of a research endeavor, attention given to Regional field agents' autonomy with respect to structure may shed much light on this question.

Such a research project could be conducted as a grounded theory or ethnographic study in which central processes of Regional case handling are deduced and framed in a theoretical context. While the NLRB can no longer conduct its own socio-economic research (Gross, 1981), nothing precludes the agency from conducting its own organizational development or internal action research initiatives. If an embedded investigator or an external

investigator could gain entrée to the NLRB, the opportunity for data collection would be immense.

The practical implications for an organizational analysis of Regional processes and human resources would provide a deeper understanding for internal stakeholders on how to best effectuate policy and improve case processing. The scholarly implications are that it would give greater insight into the Regional level policy effectuation component of Moe's (1985) theory. Along with the conclusions reached in this dissertation about the processes of policy creation and recreation by the Board, ALJs, and court system, understanding the role that the Regions play in policy effectuation would be a major starting point for devising a grand theory of the NLRB. That is to say the NLRB is an incredibly unique organization insofar that it comprises two distinct apparatuses in the Board and General Counsel that simultaneously manufacture U.S. labor policy while at the same time being constrained or facilitated by its own product. Increased knowledge of how this product is created within such a complex institute would be enriching to both policy and organizational studies.

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Appendix A  
Coding Manual

Table 1

*Codes and Descriptions*

<b>Code</b>	<b>Code Description</b>	<b>Code Example</b>
1. Private Affair	Indication in the text that collective bargaining, industrial relations, or their related activities should be a private rather than a public affair	“Historically, in this country voluntarism has been the essence of private arbitration of labor disputes.”
2. Industrial Peace	Sometimes an in-vivo code, reference in the text about maintaining a policy of industrial peace or preventing industrial strife.	“The immediacy and directness of the effect of industrial strife upon interstate commerce is the test of jurisdiction, and unfair labor practices fall within the scope of the Act by reason of the fact that long and painful experience teaches that in the generality of cases, if not in particular instances, they lead to such strife.”
3. Public Interest	Reference in text to the interests of the public (i.e., those not necessarily engaged in commerce or industrial relations)	“In my view, permitting the withdrawal of the charge at this late date would be inconsistent with the public interest and would not effectuate the policies of the Act”
4. Encourage Collective Bargaining	Statements that infer or explicitly state that the policy of Congress or the Act is to promote collective bargaining (can also be stated in the negative)	“...the <i>raison d'etre</i> of the National Labor Relations Act is to encourage collective bargaining.”
5. Purpose of the Act (Broad)	Ambiguous statements made by the court or Board about the purpose of the Act without actually stating what is that purpose	“...the decision of the arbitration panel is not clearly repugnant to the purposes and policies of the Act.”
6. Employee Free	Statements concerning the	“The existence of that

Choice	free choice of employees to choose whether or not to be represented by a labor organization	interference must be determined by careful scrutiny of all the factors, often subtle, which restrain the employee's choice and for which the employer may fairly be said to be responsible.”
7. Equalization	Statements concerning either the disparity of power between parties (i.e., capital and labor) or statements of policy of equalizing power between parties	“In Section 1 of the Act, Congress found that the strikes, industrial strife and unrest that preceded the Act were caused by the “inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership...”
8. Congressional Intent	Reference to the statutory intention of Congress with regard to the Act	“It would certainly frustrate the intent expressed by Congress if the Board were now to per“...we conclude that the current recognition bar doctrine should be modified to provide greater protection for employees' statutory right of free choice of the use of the Board's processes to enable the parties to avoid their contractual obligations as interpreted by the court.”
9. Board’s Duty	Statements of what entails the Board’s duty, whether spoken of in statutory terms or lay terms	“...the Board's primary purpose is to resolve actual disputes;”
10. Individual Rights	Discussion of individual employee rights in contrast to collective rights	“...as noted by the majority, but further provides that the grievance procedure is ‘subject to the rights of individual employees as provided for in the Labor-Management Act of 1947’”

11. Coercion	Often an in-vivo code, but refers to any discussion about coercion towards an employee or a policy of minimizing coercion	“[W]e find that Section 8(b)(1)(A)'s proper scope, in union discipline cases, is to proscribe union conduct against union members that impacts on the employment relationship, impairs access to the Board's processes, pertains to unacceptable methods of union coercion, such as physical violence in organizational or strike contexts, or otherwise impairs policies imbedded in the Act.”
12. Interests	Statements in reference to party or individual interests	“I found above, in dismissing the Section 8(b)(1)(A) allegation based on the same conduct by the Respondent, that the Respondent had a legitimate interest in work preservation for its members that outweighed any impact on Williamson's status as an employee.”
13. Provisional Reference	Specific reference to a provision or section of the Act (Not to preamble/policies and finding)	“We are guided by certain basic principles, grounded in Section 10(c) of the Act...”
14. Preamble Reference	An explicit reference to the Act's preamble/policies and findings section	“The policy of the Act is set forth in the opening sections of both the National Labor Relations Act and the Labor Management Relations Act of 1947, also known as the Taft-Hartley Act. The policy has been elucidated at length by the Supreme Court...”
15. Silence On Policy	Using the Act's silence on a matter to justify, create, or argue against policy	“...nothing in the Act intimates that the Board must exercise jurisdiction where such methods exist.”
16. Nonsilence on Policy	Referencing a provision to justify, create, or argue against policy	“The action of an employee in seeking to have the assistance of his union

		representative at a confrontation with his employer clearly falls within the literal wording of §7 that '(e)employees shall have the right . . . to engage in . . . concerted activities for the purpose of . . . mutual aid or protection."
17. Taft-Hartley Intent	Statements specifically in reference to the intention of the Taft-Hartley Act (rather than statements of the Act's intention in the Board sense)	"As further discussed below, the 1947 Taft-Hartley amendments to Section 9 of the Act reflect the preference for Board elections by limiting Board certification of exclusive collective-bargaining representatives, and the benefits that inure from certification, to unions that prevail in a Board election."
18. Legislative History	Reference to the legislative history of the Act	"We further find the <i>Mt. Healthy</i> test to be in harmony with the Act's legislative history as well as pertinent Supreme Court decisions."
19. Free Speech	Statements concerning free speech (either employees', unions', or employers') or the policy of	"The starting point in this analysis is the First Amendment protection of Freedom of the Press."
20. Compulsory Unionism	Usually an in-vivo code, statements of compulsory unionism or otherwise employees having to join unions	"...all forms of compulsory unionism, including the closed shop, were permitted."
21. Precedent	Referral to established precedent or stare decisis	"The Board decision in <i>Crown Cork &amp; Seal</i> was consistent with preexisting and well established case law."
22. No contract	Statements that the Act, the Board, courts, or policy requires parties to actually reach a contract or agreement	"The National Labor Relations Act only creates the structure for the parties' exercise of their respective economic strengths; it leaves definition of the precise

		contours of the employment relationship to the collective-bargaining process.”
23. Industrial Practice	Statements referring to industrial practice, usually as a matter of precedent or as establishing a legal rule	“The statutory right confirmed today is in full harmony with actual industrial practice.”
24. Concerted Activities	Reference to concerted activities	“The Board, importantly, did not in any manner revisit or retreat from its analysis that job targeting programs amount to concerted employee activity engaged in for the purpose of collective bargaining or other mutual aid or protection.”
25. Constitution	Discussion or statements related o the United States Constitution	“There can be no question that the commerce thus contemplated by the Act (aside from that within a Territory or the District of Columbia) is interstate and foreign commerce in the constitutional sense.”
26. Voluntary	Statements concerning employees engaging in some form of activity that is voluntary	“Voluntary recognition is a favored element of national labor policy.”
27. Act’s Survival	Statements about the Act’s survival, protecting the Act, or believing the Act is broken or ossified	“The deterrent purpose of the Act will be defeated unless the Board’s order is as comprehensive as the probability of the commission of the unfair labor practices indicated by the proven offenses of the Respondents.”
28. Protect commerce	Statements concerning a policy of protecting commerce	“Whether or not particular action does affect commerce in such a close and intimate fashion as to be subject to federal control, and hence to lie within the authority conferred upon the Board, is left by the statute to be determined as individual cases arise.”

29. Fair	In-vivo code, statements of “Fair” or “Fairness”	“The 1947 Congress was equally concerned, however, that without such agreements, many employees would reap the benefits that unions negotiated on their behalf without in any way contributing financial support to those efforts.”
30. Collective Rights	Reference to collective rights (as opposed to individual rights)	“First, the right inheres in Section 7's guarantee of the right of employees to act in concert for mutual aid and protection.”
31. Deferral	Deferral to another court or a prior Board decision on a matter	“In <i>The Ohio Calcium Company</i> case, <sup>[FN9]</sup> the Board dismissed the 8 (3) allegations of the complaint in respect to eight employees who were discharged by the respondent for insubordination in refusing to work after the respondent's refusal of their demands for an increased crew, and where their refusal to work was not authorized by the union, which was their statutory representative operating under an exclusive recognition agreement with the respondent.”
32. Purpose of the Act (narrow)	Explicit statements of the purpose or policy of the Act (though not specific reference to amendments unless case is pre-1947, since Wagner Act may be used colloquially in those instances)	“But neither can one disregard the interest in industrial peace which it is the overall purpose of the Act to secure.”
33. Affirm ALJ	Instances in which the Board confirms the prior ALJ decision	“Upon consideration of the entire record, we affirm and adopt the findings of the Trial Examiner, except insofar as they are inconsistent with our

		findings hereinafter set forth.”
34. Limitation of Collective Bargaining	Discussion that the Act or union activities should only be limited to collective bargaining or concerted activity	“Thus, in its present application, the statute goes no further than to safeguard the right of employees to self-organization and to select representatives of their own choosing for collective bargaining or other mutual protection without restraint or coercion by their employer.”
35. Members vs. Nonmembers	Discussion in which a distinction is made between union and nonunion members as a matter of policy, or a statement that there shouldn’t be a policy distinction.	“The legislative history of § 8(a)(3) shows that Congress was concerned with the dues and rights of union members, not the agency fees and rights of nonmembers.”
36. Party Interests	Discussion of interests, whether employee, employer, or union	“Thus, the student-teacher relationship is based on the ‘mutual interest in the advancement of the student’s education’” while the employer-employee relationship is ‘largely predicated on the often conflicting interests’ over economic issue.”
37. Clarity	The Court or Boards’ attempt to clarify a policy question or issue	“The <i>Arlington Heights</i> decision is instructive in one other respect as well. For in its decision, the Court recognized that efforts to determine what is the “dominant” or “primary” motive in a mixed motivation situation are usually unavailing.”
38. Employee Rights	Statements concerning the rights of employees that may not necessarily refer to specific collective bargaining or union rights	“We find, as did the Trial Examiner, that the respondents dominated and interfered with the formation and administration of Western Utility Employees’ Union and contributed

		support to it, and that they thereby, and by the other acts and conduct set forth above, interfered with, restrained, and coerced their employees in the exercise of the rights guaranteed in Section 7 of the Act.”
39. Employer Rights	Statements concerning the rights and prerogatives of management	“Upon the entire record we find that the respondent terminated the services of the eight miners on May 22, 1938, not because they engaged in concerted activity protected by the Act, but because of their insubordination in refusing to obey a legitimate order of the respondent.”
40. Collective Power	Statements that employees can enact industrial change through organizing (rather than acting individually)	“When all the other workmen in a shop make common cause with a fellow workman over his separate grievance, and go out on strike in his support, they engage in a ‘concerted activity’ for ‘mutual aid or protection,’ although the aggrieved workman is the only one of them who has any immediate stake in the outcome. The rest know that by their action each of them assures himself, in case his turn ever comes, of the support of the one whom they are all then helping; and the solidarity so established is ‘mutual aid’ in the most literal sense, as nobody doubts.”
41. Protection Under the Act	Statements regarding employees be protected by the Act or their statutory rights under the Act	“Contrary to the judge, we find that union job targeting programs, including those funded in part by voluntary

		deductions from the wages of union members employed on State-funded public works projects, are <i>clearly</i> protected under Section 7 of the Act.”
42. Necessary for Collective Bargaining	Statements or policy of circumstances	“The Board, <i>id.</i> At 587, dismissed the complaint, reasoning that, like situations involving certifications, Board orders, and settlement agreements, the parties must be afforded a reasonable time to bargain and to execute the contracts resulting from such bargaining.”
43. Obligation	Statements concerning a party’s obligations under the Act or a CBA	“That the employer and union are bound by their agreement is fundamental to collective bargaining.”
44. Protect Collective Bargaining	Discussion about a policy or duty to protect collective bargaining (as opposed to promote or encourage it)	“By protecting the voluntary bargaining relationship from attack in its formative stages, the recognition bar effectuates the Act’s interest in stability of labor management relations.”
45. Majority vs. Minority	Comparisons of the majority vs. minority and the policy implications there of	“Furthermore, even if an employer does choose to recognize a union voluntarily, the majority’s new window period leaves the parties’ bargaining relationship open to attack by a minority of employees at the very outset of the relationship.”
46. Labor Policy	Discussion regarding labor policy in an ambiguous sense (i.e., not direct reference to the Act)	“First, the majority appears to give no weight to the principle that voluntary recognition is ‘a favored element of national labor policy.’”
47. Favoritism	Statements concerning favoritism to capital or labor, often as critical of a prior decision or a majority	“Yet, the majority has never suggested that the Act’s parallel unfair labor practice protections

	decision during a dissent	against <i>employer</i> coercion are inadequate and require bolstering or a rethinking of representation procedures.”
48. Labor Dispute vs. ULP	Discussion about whether actions constitute a legal labor dispute or are actually ULPs	“The argument confuses a current labor dispute with an unfair labor practice defined in section 8 of the act.”
49. Prevent ULP	Any statement that it is the policy of the NLRB or NLRA to prevent ULPs from being committed	“The Board not the courts determines under this statutory scheme how the effect of unfair labor practices may be expunged.”
50. ALJ	Code indicating whether or not the Board affirmed an ALJ decision and adopted it as its own	<ol style="list-style-type: none"> <li>1. Adopt ALJ Decision</li> <li>2. Did Not Adopt ALJ Decision</li> <li>3. Adopt ALJ Decision in Part</li> <li>4. No Previous ALJ Decision</li> </ol>

## Appendix B

### Credibility Check

#### **Background**

Throughout the history of the National Labor Relations Act (NLRA or “the Act”), two specific policy strains have arisen with respect to the interpretative intention of the statute. Specifically, judicial decision makers have been engaged in a policy contention that holds the Congressional and legislative intent of the Act has been to encourage collective bargaining or contrastingly has been to ensure that employees’ right to choose not to be represented by labor organizations is upheld. Scholars contend that this difference has arisen as a consequence of language added into the 1947 Taft-Hartley Act amendment that reinforces a policy of protecting employee free choice, while still maintaining language in the Act’s Policy and Findings section that promotes a policy of encouraging collective bargaining. Scholars argue that judicial decision makers can then cherry pick an interpretation based upon ideological disposition. That is, liberals choose an arguably more labor-friendly policy of encouraging collective bargaining, while conservatives choose an arguably more management-friendly policy of protecting employee free choice (which has the tangible end of reducing unionism).

This research examined policy that emerged from statutory interpretation and has been codified in case law. It went forth with the assumption that case law acts as structure that can be both constraining and facilitative upon future decisions – a framework made more complex by the nature of administrative law not being as tightly bound by stare decisis as other areas of law. I tracked specific policy strains over the course of time and analyzed how judicial decision making creates and recreates policy through the vehicle of case law.

#### **Methodology Summary**

This research initiative was conducted as a content analysis of numerous policy strains throughout the history of U.S. federal-level labor policy. Through a series of sampling techniques, National Labor Relations Board (NLRB or “the Board”), Administrative Law Judge (ALJ), and court cases were sampled from the case law corpus that comprises the entire 80-year history of the Act. Qualitative codes were applied to this case law to derive emergent themes and target specific policy strains that have become ubiquitous throughout the years.

#### **Major Findings**

**Adherence to Congressional Intent and the Act’s Language:** One major research question I investigated was whether or not legal decision making was based upon an interpretation of Congressional intent, legislative history, and the naked words of the Act itself. The data revealed that policy intentions of the Act closely adhered to these three things. Board and judicial statement of policy intentions include preventing industrial strife, privatizing labor disputes, encouraging collective bargaining, protecting employee free choice, and equalizing bargaining power between parties.

Little evidence exists that statutory interpretation is far divorced from Congressional intent of the Act's language. The data revealed the Board experiencing frustration over specific legal questions upon which either Congress or the Act is silent or ambiguous.

**Policy Tests:** The data revealed that much legal decision making and precedent falls into a category I refer to as policy tests. Policy tests are simply legal heuristics used by jurists and the Board to consistently resolve some sort of fact pattern and reach a legal conclusion. For example, *Wright Line* (1980) is a policy test insofar that it is instructing as to whether or not disciplinary action for union activity is an unfair labor practice if the charging party would have been disciplined regardless of union activity.

**Board's Duty:** The data revealed that the primary duty of the NLRB is to effectuate the policies of the Act to prevent industrial strife and protect employees Section 7 rights. During the Wagner Act era, the Board and courts were primarily concerned with employee rights. After the passage of the Taft-Hartley Act, more emphasis was given to employer rights. The Board's duty is to enforce public rights, not private rights – that is to say it serves to protect rights proscribed by the Act, not what is present in a collective bargaining agreement.

**Employee Free Choice and Encourage Collective Bargaining:** The data suggested that these two narratives have always existed in legal interpretation. Protecting employee free choice has always been a policy of the Act, even before the Taft-Hartley Act was passed. However, in early case law, employee free choice usually referred to a policy of preventing coercion of employee's Section 7 rights by employers – and later unions - that would have precluded workers from voicing their true preference in an election. Employee free choice as an affirmation that employees could choose not to be represented by labor organizations if they so desire did not come into prominence until around the time of the Reagan Board, which signaled a paradigm shift of Boards becoming more ideological in their duties.

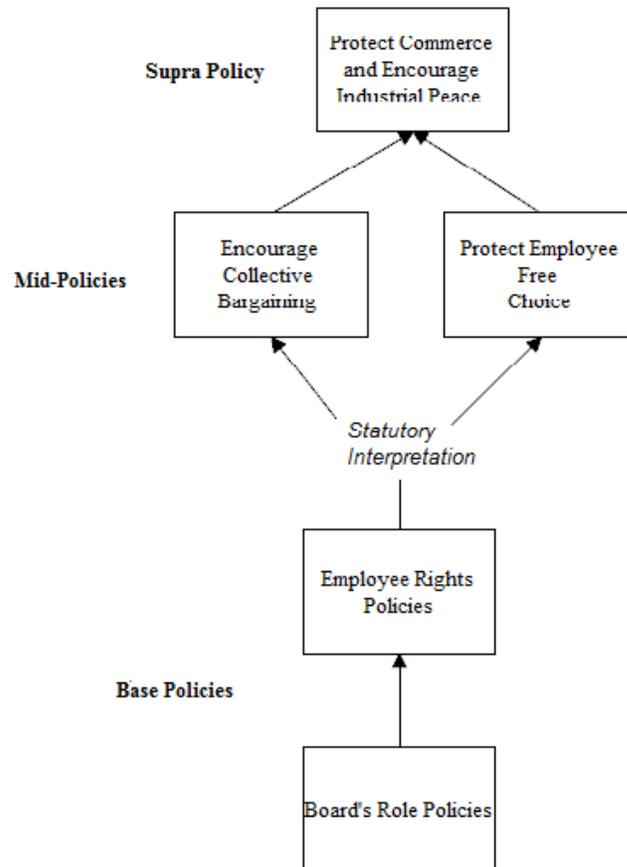
The data also inferred that Boards and jurists do not always see encouraging collective bargaining and employee free choice as a dichotomy. Sometimes one policy was interpreted to be controlling over the other. Further, encouraging collective bargaining is sometimes viewed as a policy of maintaining stable bargaining relationships to prevent further industrial strife.

**Precedents and Creation of Policy:** The data revealed that many precedents are carried over across time. The most stable precedents are ones that were not ideologically beneficial to conservatives or liberals. Precedents that serve some form of practical purpose and help Boards and jurists resolve day-to-day legal issues are often very stable. Precedents that overtly favor management over labor or vice-versa are less stable. The data inferred that ALJs are policy promulgators rather than policy creators and primarily serve to reinforce prior Board precedent rather than fashion novel policy of their own. The data revealed that the Supreme Court is a stabilizing force in precedent, since its decisions are final. The Supreme Court serves almost as a feedback control system that ensures that NLRB and appellate court decisions are not repugnant to the Act. Because of this control feedback system, most Board and judicial decisions are not far divorced from a reasonable reading of

the Act due to the potential of a decision being overturned by the Supreme Court's review and then becoming precedent.

The data revealed that Boards and jurists often engage in statements that reveal what they believe to be the overall policies of the Act. Often, different policy interpretations are synthesized (e.g., "...the overriding policy of the Act is to encourage collective bargaining as a means of reducing labor strife...").

**Three-Level Policy Model:** The central findings of the study culminated in a three-level model of policy that includes base policy, mid-policy, and supra policy. Base policies include the aforementioned policy tests and generally all other precedents and policies that serve to inform decision-making on a day-to-day basis. They answer questions such as: Who are employees under the Act? What types of actions constitute unfair labor practices? When should a charge be deferred to the parties' grievance-arbitration? Mid-policy refers to the narratives of encouraging collective bargaining and employee free choice. Mid-policy is often informing of base policy. That is, a legal interpretation of whether an end of encouraging collective bargaining or employee free choice is often the basis of a decision in mid-policy. Therefore, these levels of policy exhibit the most chaos. Supra policy refers to maintaining industrial stability and protecting macro-level commerce. It is very static and unchanging. It is the central policy of the Act. The effectuation of mid-policy and its underlying base policy are to support supra policy.



## Appendix C

### Audit Trail

Entry 1: Began initial coding for traditional wave of study. When choosing data to code, I am coding data that has large-scale policy implications (e.g., the purpose of the Act), rather than procedural policy implications (e.g., appropriate bargaining unit size). While the latter are important, particularly for Regional staff who may be on the ground floor, interpreting and applying the Act, I need to make a subjective judgment on what data to include so the analysis does not become bogged down. Sticking with big policy implications allows me to tie themes back to discussions given attention in the study's literature review.

Entry 2: Most cases have footnotes. On deciding whether or not to unitize these parts of cases for data analysis, I have decided to only include them if they have direct statements of policy that are not articulated in the body of the decision. Footnotes often expound upon a decision to cite a particular case to support the jurist or Board member's decision. This is often done via a direct quotation. While this is important for applying structuration theory, I feel that it is best that the cited cases are coded by themselves so that I will have the decisional context of those cases. When I start to string together cases during the directive portion of the analysis to apply structuration theory, codes can be applied to show the longitude of a narrative. Attempting to apply structuration via case footnotes could become analytically and pragmatically messy.

Entry 3: While using top-down search terms for the sampling of the directive aspect of this research, I have had to make some subjective decisions on whether or not to use certain cases depending upon how the key terms are used within the case. Specifically, I have been searching cases with the phrase "Promote Collective Bargaining." In some instances, the term is being used in reference to employee actions within the facts of the case, for instance, employees wearing unions buttons to promote collective bargaining. Since my current research focus is how jurists and Board members view collective bargaining as a matter of labor policy, I have chosen not to include these cases as part of the sample, since "Promote Collective Bargaining" is not being used in a context that facilitates answering the research questions and conducting the analysis.

Entry 4: I have begun recoding of the conventional content analysis data. Many codes have been collapsed or discarded, while others have been made more specific. Since I am dealing with legal text, more simple and to the point codes are desirable since, ideally, legal writing should be crisp and unambiguous.

Entry 5: I am currently coding direct quotations that Boards and courts cite in their opinions. My reasoning is that if they are citing these statements in the affirmative, they are adopting them as their policy and thus are relevant. These differ from footnotes as discussed above insofar that since they reside in the body of text, they will not be as analytically messy. Again, this is not to discount footnotes, but rather, to code those footnote citations separately.

Entry 6: When determining Board member ideology for further analysis, I will be using the website on the NLRB website, <http://www.nlr.gov/who-we-are/board/board-members-1935>, which lists every Board member by political affiliation. It is not perfect, since political party is not necessarily indicative of ideology (i.e., Jenkins was a Republican but often voted liberal or pro-labor in decisions), but it does help give some reference when considering ideology with respect to data analysis.

Entry 7: Throughout the Directive wave of the study, I have come across a number of studies in which the Board simply affirms the original Administrative Law Judge's (ALJ) decision with very little of their own analysis. Since the question of which part of the administrative quasi-judicial apparatus are effectuating policy is a component of my study and related to one of my research questions, I will be considering this in my analysis. Whether a Board affirms, overturns, or affirms in part an ALJ's decision will be given an attribute code at the beginning of each Board case in which an ALJ decision was considered. I am currently coding reprinted ALJ analyses in Board decisions. Generally, when a Board accepts an ALJ's decision, the ALJ decision is officially adopted as the policy of the Board. In that regard, both the Board and the ALJ are creating policy. The implications for this will best be dealt with during the sensitivity afforded by my actual analysis rather than through any coding or sampling procedures; therefore, I will continue to code ALJ decisions restated in Board decisions, regardless if they are affirmed by the Board.

Entry 8: When sampling for court cases, I have decided to only include federal Supreme Court decisions. My reasoning for this is for two reasons. First, the NLRB rarely bases its policy off of appellate and state Supreme Court decisions, but it must abide by federal Supreme Court decisions. Second, the political ideology of state and district court judges is not as readily available as federal Supreme Court Justices' ideology, and therefore, would force me to omit what could potentially be an important area of analysis. Some appellate court decisions may arise through snowball sampling, however.

Entry 9: When sampling under the search string "Employee Free Choice," Westlaw returned over 1,500 results. I needed to break down this sample into something manageable. Therefore, I decided to sample based upon every President's term. Specifically I sampled three cases for every President's term. When a President served two terms, I sampled six cases. For Presidents who did not serve out a full term, such as Kennedy, I still chose to sample three cases. From the purposeful sampling, I then randomly sampled using a random number generator to determine which specific cases to include from the Westlaw search return. The sampler I used is at [www.random.org](http://www.random.org). For instance, if Westlaw returned 73 cases between a specific number of years, I instructed the generator to produce a number between 1 and 73. If it produced the number 42, then I selected the 42<sup>nd</sup> case in the Westlaw list to include in the sample. The reasoning for choosing three cases per term is that this method will generate roughly the same number of cases that were sampled for the search terms related to encouraging collective bargaining ( $n =$  approximately 60).

Entry 10: When sampling for industrial strife-related cases, the Supreme Court case law corpus was significantly larger than other Supreme Court case law samples for other search terms included in the purposeful sampling portion of this project. Specifically, most Supreme

Court key word searches return approximately  $n = 9$  cases. This search returned an  $n$  of 35. Therefore, I randomly sampled 9 cases from this return in order that the samples are similar in size.

Entry 11: Rarely, a sampling search term will return a result in which the term is found in the facts of the case and does not relate directly to a jurist's or the Board's statement of policy. These cases still generate other items of inquiry that can be coded. Therefore, they are included in the dataset.

Entry 12: With respect to snowball sampling, additional related cases will be sampled when there is a policy strain that is important to the analysis. That is, there is some strain that is related to emergent themes or theory about the Act. This will help maintain the dataset to a manageable size and help focus the analysis.

Entry 13: In order to break the dataset down to be more manageable for analysis and writing Chapter 4, I first copied and pasted all of the unitized coded data into analytical memos that were placed, along with their retrospective full cases, into individual folders. The original cases are maintained to facilitate locating the context in which the coded text is placed (e.g., what is the legal issue in the case; was the coded data from the majority's opinion or the dissent's opinion; etc.). From that point, I copied and pasted a table in each analytical memo that contained all of the research questions. I went through each analytical memo, and placed an X next to each research question that the data in that case would help answer. I then copied and pasted each analytical memo into a folder that contained other analytical memos that also helped answer each respective question. Many individual cases contain data that could help answer multiple questions. These cases were copied and pasted into each respective folder. When generating emergent themes, I maintained a list for each research question and its respective underlying themes, along with the cases that provided data to support the themes. Again, many cases were able to support multiple themes.

Entry 14: While I specified certain research questions to be answered by data generated by the Traditional and Directive content analyses, the data is much too deep and rich to simply assign it to a specific analysis. Therefore, I will use all of the generated data to help answer all of the research questions

Entry 15: When writing the Employee Free Choice as Ideological Shift theme, I felt it important to track the change over time. To represent this, I used the data that I collected with "employee free choice" as the search term. This made more sense to me than using all data with an "employee free choice" code, because it allowed me to look at all data in one structured place to determine time. I applied a sampling rule to ensure that all data across the history of the Act was equally represented. Some "employee free choice" codes did not theoretically fit with this part of the analysis (e.g., "employee free choice" appeared in the case because the respondent or petitioner mentioned it in a legal argument rather than being a policy considered by the Board in its decision). I left these cases out of the analysis and numerical reporting of cases. I left Supreme Court cases out of this part of the analysis because I wanted to examine ideology. Boards move much quicker along ideological lines

than does the Supreme Court due to the former's short appointments and the latter's lifetime appointments.

Entry 16: In order to illustrate recreation of policy with respect to *Wright Line*, I conducted a snowball sample across all years since the case was first decided. I used "Wright Line" as part of a key word search in West Law. I conducted 35 individual searches for each individual year. When I received the results from the search, I randomly selected a case to sample using a randomization program. I then affirmed by reading the unitized data that the Board or ALJ was applying the analysis of *Wright Line* rather than it appearing in the General Counsel's argument or another context. I used a similar sampling methodology when showing other policy strains that exists over time and have countless cases.

Entry 17: When reporting very early Board cases (i.e., 1935 – 1955), if the trial examiner or ALJ decision is present and the Board adopts it, this will be stated as a Board decision. The reason I am approaching the data reporting in this manner is because the prevalence of ALJ decisions being reported is spotty until 1970. Therefore, doing any comparison of ALJs in early decision making is difficult. Therefore, this is a matter of semantics that makes reporting the data less messy.

Entry 18: I revisited all of the data that I reported in my findings and analysis sections to ensure that I am properly giving credit to all citations. That is, a case may include a Board and ALJ decision. I want to ensure that I am properly citing an ALJ rather than the Board is the coded data was derived from the judge's decision rather than that of the Board.

Entry 19: Based upon a suggestion from one of my credibility readers, I added *Vaca v. Sipes* to the conventional content analysis data. This is to show how the duty of fair representation doctrine, which is important to labor policy, has remained virtually unchanged for five decades. I then created a policy strain over the years, sampling data for each five year period since the original case came into being. I used a randomizer program to randomly select each case from each data search.

## Appendix D

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