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# A Critique of Supplying the NRLB with Social Science Expertise Through Party/ Amicus Briefs

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# A Critique of Supplying the NLRB with Social Science Expertise Through Party/Amicus Briefs

By Xenia Tashlitsky\*

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\* J.D. Candidate at the University of California, Irvine School of Law. This Note won the third-place prize in the Louis Jackson National Student Writing Competition in Employment and Labor Law. Since the contest, I have edited this Note for a general-interest audience. I would like to thank Professor Catherine L. Fisk, my faculty advisor. Thanks for seeing this Note's potential even when I didn't quite see it. I would also like to thank my editors on the *UC Irvine Law Review*. This Note wouldn't have been the same without you! Finally, I would like to dedicate this Note to my grandfather.

## I. INTRODUCTION

Established in 1935 to administer the National Labor Relations Act (NLRA),<sup>1</sup> the National Labor Relations Board (NLRB) is an independent agency entrusted with conducting union elections and investigating and remedying any unfair labor practices by unions and employers. Once the NLRB's Regional Director issues a complaint of unfair labor practices, an Administrative Law Judge (ALJ) holds a hearing that resembles a trial, where the NLRB's General Counsel prosecutes the complaint and the accused party defends its actions. During the fact-finding phase, the parties can bolster their arguments with evidence, witnesses, and experts.<sup>2</sup>

The ALJ's initial decision is subject to review. Before the case may reach the Court of Appeals and ultimately the U.S. Supreme Court, the parties must take the case to the Board, an arm of the NLRB usually composed of five members nominated by the President and confirmed by the Senate. In general, the Board will adopt the ALJ's factual findings. However, when considering a significant or potentially precedential proceeding, the Board may supplement the record by "invit[ing] briefs from any interested parties to gather an array of viewpoints and experiences."<sup>3</sup>

In the 1930s, the Board's original membership was almost exclusively composed of nonpartisan government employees and academics.<sup>4</sup> Further, the NLRB's employees included a Division of Economic Research (DER), a staff of economists that developed policy analyses to assist the Board in deciding labor disputes.<sup>5</sup> By relying on social science statistics from both the economists from the DER and an assortment of parties, agencies, and academics from outside the division, this early Board enriched its understanding of complex labor questions, established a practice of considering diverse perspectives, and acknowledged the importance of rigorously assessing the socioeconomic impact of labor policy.

Over the years, the agency's ability to evaluate data has eroded drastically. In 1939, a congressional committee confiscated the DER's economic files and branded the Board's Chief Economist a Communist; in 1940, Congress summarily banned the NLRB from employing economic experts.<sup>6</sup> Since the 1950s, presidents

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1. NAT'L LABOR REL. BD., BASIC GUIDE TO THE NATIONAL LABOR RELATIONS ACT 33 (1997).

2. *What We Do: Decide Cases*, NAT'L LABOR REL. BD., <https://www.nlrb.gov/what-we-do/decide-cases> (last visited Sept. 26, 2011).

3. *Id.*

4. Joan Flynn, *A Quiet Revolution at the Labor Board: The Transformation of the NLRB*, 61 OHIO ST. L.J. 1361, 1367 (2000). While the reader might conceptualize the DER as a board within a Board, I will only refer to the NLRB's appellate panel as the capital-B "Board."

5. Robin Stryker, *Limits on Technocratization of the Law: The Elimination of the National Labor Relations Board's Division of Economic Research*, 54 AM. SOC. REV. 341, 344 (1989).

6. 29 U.S.C. § 154(a) (2006 & Supp. 2010–2011) (stating that "[n]othing in this subchapter shall be construed to authorize the Board to appoint individuals . . . for economic analysis").

have politicized the Board's nomination process<sup>7</sup> by proposing mostly attorneys with connections to labor or management<sup>8</sup> and with virtually no social science training or experience.<sup>9</sup> Accordingly, the NLRB now employs neither economic nor social science experts to research labor realities,<sup>10</sup> and fails to enjoy independent access to social science studies.<sup>11</sup>

Thus, in order to set the national labor policy, the Board is forced to rely on appellate-level party and amicus case briefs for social science evidence.<sup>12</sup> The absence of scientific support undermines the accuracy and legitimacy of difficult NLRB decisions. For example, in *Dana Corp. (Dana II)*<sup>13</sup> and several related cases, the Board twice reversed its decision on whether unions' reliance on card check campaigns would violate the NLRA by interfering with free employee choice on union representation issues. By citing just three NLRB sources of social science statistics on employee decision making<sup>14</sup> and failing to examine new evidence to justify the reversal, the Board exposed itself to accusations of erroneousness and politicization.

In this Note, I argue that in order to recall the era of scientifically supported adjudications, Congress should accommodate the NLRB's unique needs by authorizing an economic research unit to generate policy analyses, and by approving a cross-disciplinary Board to evaluate these analyses. By expanding the pool of Board members to include lawyers and social scientists, Congress may succeed in cultivating a spirit of cooperation across specializations while utilizing the members' combined expertise in legal rights issues and social science statistics. In turn, this will empower the Board to promulgate more rational, less volatile labor policy.

In Part II, I examine the NLRB's reliance on amicus briefs for expert evidence. Part II explains the means of gathering evidence in Board adjudications, the rules for applying evidence in administrative agencies, and standards for evaluating evidence under *Daubert* precedent. In Part III and Part IV, I evaluate the Board's decision making before and after the DER was disbanded through a brief case study of the card recognition cases. After defining a card recognition campaign and detailing the recognition-bar challenge, Part IV discusses the use of social science statistics and critiques the quality and quantity of data in three recent

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7. Flynn, *supra* note 4, at 1392.

8. Catherine L. Fisk & Deborah C. Malamud, *The NLRB in Administrative Law Exile: Problems with Its Structure and Function and Suggestions for Reform*, 58 DUKE L.J. 2013, 2019 (2009).

9. James A. Gross, *Economics, Politics, and the Law: The NLRB's Division of Economic Research, 1935-1940*, 55 CORNELL L. REV. 321, 347 (1970).

10. Stryker, *supra* note 5, at 344.

11. *Id.*

12. *Id.*

13. *Dana Corp. (Dana II)*, 351 N.L.R.B. 434 (2007).

14. These sources were a former chairman, an operation summary, and an annual report. *See id.* at 439; *id.* at 439 n.25; *id.* at 440 n.26.

card recognition cases. Finally, in Part V and Part VI, I describe my proposal and conclusion on restoring the accuracy and legitimacy of the Board by incorporating scientific evidence into its adjudications.

## II. THE NLRB'S RELIANCE ON AMICUS BRIEFS FOR EXPERT EVIDENCE

### *A. Evidence Gathering in NLRB Adjudications*

Unlike other federal regulatory agencies, the Board creates policy by deciding disputes, not writing regulations.<sup>15</sup> Because the Board no longer employs any experts to research labor realities<sup>16</sup> or enjoys independent access to social science studies,<sup>17</sup> it must rely on appellate-level party and amicus case briefs for social science evidence to inform its conclusions on weighty national issues.<sup>18</sup>

Without the expertise to evaluate data independently, Board members could theoretically delegate the task of gathering and testing this evidence to the fact-finding phase of the ALJ proceeding, relying on the parties to subject it to rebuttal, counterevidence, and cross-examination. However, the ALJ-level option is ill-suited to meeting the Board members' need for expensive economic evidence.

During NLRB decisions, ALJs behave like trial courts enforcing the Board's policies, while members behave like appellate courts evaluating its precedent. Once the parties file appeals, the Board can choose to revisit the policies or merely to review the parties' appeals.<sup>19</sup> Thus, when prosecuting multiple cases that involve similar issues, the General Counsel cannot predict which case will become the vehicle for reexamining the regulations. Considering the cost of generating specialized evidence, the General Counsel lacks the resources to incorporate statistics assessing the NLRB's existing policy into every labor case.

Instead of relying on trials, the Board has bridged the gap by admitting appellate briefs as social science evidence. Given the members' special qualifications on thorny legal issues, most analysts agree that "greater laxity may be permitted in a court which adjudicates both on the law and on the fact,"<sup>20</sup> allowing the Board to admit expert input without observing the formalistic procedural requirements of rules of evidence, including the Federal Rules of Evidence (FRE).<sup>21</sup> Accordingly, the Board can rely on evidence "of a type reasonably relied upon by experts in the particular field in forming opinions or

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15. Myron Roomkin & Roger L. Abrams, *Using Behavioral Evidence in NLRB Regulation: A Proposal*, 90 HARV. L. REV. 1441, 1462–63 n.89 (1977).

16. See Stryker, *supra* note 5, at 344.

17. *Id.*

18. *Id.*

19. See NAT'L LABOR REL. BD., *supra* note 1, at 35–36.

20. 2 RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE 911 (5th ed. 2010).

21. *Id.* at 912.

inferences upon the subject,”<sup>22</sup> even if the evidence would be inadmissible in a federal court case under the FRE.<sup>23</sup>

Because the absence of clear-cut rules can raise the risk of arbitrariness or bias, this discretionary standard increases the importance of assessing when and how the NLRB engages evidence. In *Dana II*, the Board admitted four party briefs, twenty-four amicus briefs, and four reply briefs, but cited three sources of social science statistics, all from within the NLRB;<sup>24</sup> in *Dana III*, the Board admitted three party briefs, fourteen amicus briefs, and two reply briefs, but cited no social science statistics.<sup>25</sup> While some imagine the NLRB encounters a “gaping hole” in relevant research,<sup>26</sup> the admission/citation imbalance may challenge this conjecture and create an inference that when the Board members lack the expertise to evaluate scientific evidence, increasing the amount of evidence is unlikely to increase its utility.

Recognizing the disadvantages of relying on amici, certain scholars suggest that Congress should authorize a social science unit that evokes the Board’s “early days.”<sup>27</sup> However, the NLRB is different from similar agencies that employ economists for specialized analysis. First, Congress’s standard criteria for qualified Board members have evolved to limit the ability of academics without industrial workplace experience to influence national policy. Second, the Board’s adjudicatory body only requires economic research on specific appellate issues, not general policy inquiries. Third, the Board receives a substantial quantity of expert evidence from amicus briefs, not internal sources. Thus, I argue that assuming Congress authorizes a social science unit, it should maximize the Board members’ odds of applying science properly by expanding the pool of members to include social scientists.

### *B. Evidentiary Rules for Administrative Agencies*

Given federal agencies’ great discretion on many evidentiary matters, it is essential that adjudicators have the expertise to evaluate scientific evidence. Under

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22. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 597 (1993).

23. PIERCE, *supra* note 20, at 912.

24. *Dana Corp. (Dana II)*, 351 N.L.R.B. 434 (2007). For a list of links to all briefs in *Dana II*, see *Case 08-RD-001976*, NAT’L LABOR REL. BD., <http://www.nlr.gov/case/08-RD-001976> (last visited Dec. 20, 2011) (discussed in detail in *infra* Part IV). While the website lists twenty-five amicus briefs, this appears to be an error because the Brief of International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO, and Amicus American Federation of Labor & Congress of Industrial Organizations is listed twice.

25. *Dana Corp. (Dana III)*, 356 N.L.R.B. 49 (2010). For a list of links to all briefs in *Dana III*, which are listed under *Lamons Gasket Co.* because the original employer withdrew its request for review, see *Lamons Gasket Co. Invitation to File Briefs*, NAT’L LABOR REL. BD., <http://www.nlr.gov/node/384> (last visited Dec. 20, 2011) (discussed in detail in *infra* Part IV).

26. Adrienne E. Eaton & Jill Kriesky, *NLRB Elections Versus Card Check Campaigns: Results of a Worker Survey*, 62 INDUS. & LAB. REL. REV. 157, 160 (2009).

27. Roomkin & Abrams, *supra* note 15, at 1459–60 n.79.

the Administrative Procedure Act, agencies are not subject to the FRE.<sup>28</sup> Instead, the ALJ may receive “[a]ny oral or documentary evidence . . . , but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence.”<sup>29</sup> Indeed, the NLRB’s rules require the Board to obey the FRE only “so far as practicable.”<sup>30</sup>

To justify this distinction, analysts observe that evidentiary rules for judicial trials are designed with juries in mind. Accordingly, these evidentiary rules assume that triers of fact are: (1) separate from judges who adjudicate the issue of admissibility, (2) lacking in knowledge on legal psychology or technical reliability, (3) susceptible to error in assessing probative value, (4) inclined to emotionality, and (5) hence restrainable only by restricted exposure to prejudicial evidence.<sup>31</sup>

By contrast, agencies entrust fact-finding to professionals, not laypeople.<sup>32</sup> (For example, the NLRB employs mostly labor lawyers as Board members.<sup>33</sup>) Considering their “specialized expertise in the subject matter,” they do not share the aforementioned five characteristics of juries: separation of responsibility, inexperience on topic, susceptibility to error, inclination toward emotionality, and restraint through lack of exposure. Consequently, they are trusted to examine the evidence without strong FRE safeguards against misuse.<sup>34</sup>

Because an agency adjudicator “is equally exposed to evidence whether he admits it or excludes it,” reviewing courts reason that rigorous exclusionary rules for agency proceedings make little sense.<sup>35</sup> Given the adjudicator’s presumptive competence to disregard or discount the information found inadmissible or inapplicable, courts see little harm in letting agencies receive disputed evidence. By contrast, they discern great danger in eliminating “that which is competent and relevant by mechanistic application” of exclusionary rules.<sup>36</sup>

Accordingly, courts advocate a highly “critical view of exclusionary rulings by administrative agencies”<sup>37</sup> and admonish that exclusions “may well result” in due process reversals.<sup>38</sup> Simply put, they “strongly advise administrative law judges: if in doubt, let it in.”<sup>39</sup> By effectively eliminating the procedural protections against admitting incompetent evidence, these cases increase the importance of evaluating the evidence—without affording an alternative for agencies that lack the requisite

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28. PIERCE, *supra* note 20, at 909.

29. Administrative Procedure Act, 5 U.S.C. § 556(d) (2010).

30. 29 C.F.R. § 102.39 (2010).

31. PIERCE, *supra* note 20, at 910–11.

32. *Id.* at 912.

33. Fisk & Malamud, *supra* note 8, at 2019.

34. PIERCE, *supra* note 20, at 911.

35. *U.S. Steel Mining Co. v. Dir., Office of Workers’ Comp. Programs*, 187 F.3d 384, 388 (4th Cir. 1999).

36. *Multi-Med. Convalescent & Nursing Ctr. v. NLRB*, 550 F.2d 974, 977 (4th Cir. 1977).

37. *Id.*

38. *Id.*

39. *Id.* at 978.

scientific expertise to resolve technical ambiguities.

### C. *The Daubert Standard for Evaluating Evidence*

In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, the Supreme Court used the assumption of professional adjudicator expertise to establish a highly relaxed standard for assessing scientific evidence in the absence of a jury.<sup>40</sup> Specifically, *Daubert* cited FRE 703, which permits experts to base their opinion testimony on evidence “of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject,”<sup>41</sup> even if that evidence would itself be inadmissible. The “spirit of *Daubert*”<sup>42</sup> renders FRE 703 relevant to advising administrative agencies.<sup>43</sup>

When analyzing the scientific validity of specialized evidence, the Supreme Court admonished trial courts to assess two factors: reliability and relevance.<sup>44</sup> To do so, the Supreme Court envisioned a “flexible” inquiry<sup>45</sup> and identified five generally relevant issues: (1) Can (and has) the theory or technique been tested? (2) Has it been subjected to peer review/publication? (3) What is the known or potential error rate? (4) Does it have standards of operation? How are they being maintained? and (5) Does it enjoy “general acceptance”?<sup>46</sup>

Applying these principles to current NLRB cases may pose two problems. First, vigorous cross-examination and strong counterevidence “are the traditional and appropriate means of attacking shaky but admissible evidence.”<sup>47</sup> However, evidence introduced in amicus briefs is never subject to cross-examination. Additionally, briefs filed last or simultaneously are unlikely to receive a response. As a result, amicus briefs can always avoid cross-examination and often avoid rebuttal.

Second, *Daubert* requires the agency’s evidentiary inquiries to “focus . . . solely on principles and methodology, not on the conclusions that they generate.”<sup>48</sup> However, critics might infer that Board members lacking the expertise to focus on social science principles and methodology have no choice but to focus on their conclusions. NLRB “flip-flops” that apparently result from ideological voting may challenge the perception of specialized Board expertise and call the agency’s perceived legitimacy into question.<sup>49</sup>

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40. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993).

41. *Id.* at 597.

42. PIERCE, *supra* note 20, at 912.

43. *Id.*

44. *Daubert*, 509 U.S. at 595.

45. *Id.* at 594.

46. *Id.* at 593–94.

47. *Id.* at 596.

48. *Id.* at 595.

49. Ronald Turner, *Ideological Voting on the National Labor Relations Board*, 8 U. PA. J. LAB. & EMP. L. 707, 760 (2006).



Considering the complexity of the NLRA and the sophistication of the NLRB's policy problems, the Board has encountered an array of occasions for social science statistics. However, without a social science staff, the NLRB often relies on agency experience, not scientific evidence. When the Board does attempt to incorporate specialized input, it finds itself "poorly equipped to evaluate it."<sup>50</sup> Thus, the NLRB has filled the gap by relying on data from party/amicus briefs.

In relying on amici, the agency encounters two important critiques. Proponents of social science scholarship are wary of basing NLRB decisions on "untested suppositions" about human behavior.<sup>51</sup> Instead, they urge the Board to use "the best available data"<sup>52</sup> to conduct empirical studies, and employ expert theory and research to assess the assumptions of cause and effect in regulated labor processes.<sup>53</sup> This way the NLRB could determine the impact of potential workplace policies,<sup>54</sup> especially in areas that exceed the Board members' experiences.

Second, opponents of amici are skeptical of NLRB decisions relying on briefs that implicate factual issues. Since the Board usually solicits amicus briefs on appeal, they possess the potential to derail a litigation. Because amicus briefs can introduce factual information without obeying the rules of evidence or receiving vigorous cross-examination, the NLRB cannot rely on parties' adverse interests to keep them honest. Instead, it must evaluate evidence independently—a challenge for lay Board members in hypertechnical cases.

### III. DECISIONMAKING UNDER DER

In the 1930s, the Board's original membership was almost exclusively composed of nonpartisan government employees and academics.<sup>55</sup> Further, the NLRB's employees included a Division of Economic Research (DER), a staff of economists that developed policy analyses to assist the Board in deciding labor disputes.<sup>56</sup> By relying on social science statistics from both the economists from the DER and an assortment of parties, agencies, and academics from outside the division, this early Board enriched its understanding of complex labor questions, established a practice of considering diverse perspectives, and acknowledged the importance of rigorously assessing the socioeconomic impact of labor policy.

To aid the Board in producing good policy, DER economists performed independent research and wrote detailed reports that provided an economic-

50. Stryker, *supra* note 5, at 344.

51. JAMES A. GROSS, *THE RESHAPING OF THE NATIONAL LABOR RELATIONS BOARD* 265 (1981).

52. Derek C. Bok, *Foreword* to JULIUS G. GETMAN, ET AL., *UNION REPRESENTATION ELECTIONS* xi, xii (1976).

53. Stryker, *supra* note 5, at 344.

54. Gross, *supra* note 9, at 345.

55. Flynn, *supra* note 4, at 1367.

56. Stryker, *supra* note 5, at 344.

history explanation for pressing labor problems. After the NLRB's General Counsel had introduced these reports into evidence, they appeared in opinions from NLRB Board members and reviewing appellate justices, often without opposition.<sup>57</sup> When parties did object to general DER statistics, they argued the data was immaterial, unverified hearsay "of no evidentiary value."<sup>58</sup> Rejecting this reasoning, the Eighth Circuit noted the well-settled "propriety of introducing in evidence economic data . . . obtained from governmental or other authoritative sources."<sup>59</sup>

For example, in *NLRB v. Crowe Coal Co.*, the General Counsel charged a bituminous coal company with discharging two employees for joining a union, thereby affecting interstate commerce and violating NLRA § 8(1).<sup>60</sup> When the company denied operating a business that affected interstate commerce, the opinion cited a DER bulletin entitled *The Effect of Labor Relations in the Bituminous Coal Industry upon Interstate Commerce*, which specifically stated that "production is customarily not undertaken until orders are received and a supply of cars [for interstate coal shipments is] assured."<sup>61</sup>

Likewise, in *H.J. Heinz Co. v. NLRB*, the General Counsel charged an employer that reached a unionized workplace agreement but declined to sign a contract with refusing to bargain in violation of sections 8(1) and 8(5) of the NLRA.<sup>62</sup> To explain why failure to sign a contract necessarily violated the duty to bargain and undercut the NLRA's express aims, the opinion cited a DER bulletin entitled *Written Trade Agreements in Collective Bargaining*, which itemized the growth and extent of signed trade agreements and inferred they serve "both as recognition of the union with which the agreement is reached and as a permanent memorial of its terms."<sup>63</sup>

In addition to citing DER studies, NLRB Board members and reviewing appellate justices also enriched their analyses by supporting substantive statements with non-DER sources. In *Crowe*, the opinion demonstrated the respondent's effect on interstate commerce by citing the parties' agreed statement of facts, which described the transactions for one representative year. The statement's

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57. See, e.g., *H.J. Heinz Co. v. NLRB*, 61 S. Ct. 320, 323 (1941) (citation to DER by Board); *Virginian Ry. Co. v. Sys. Fed'n*, 300 U.S. 515, 545 n.4 (1937) (citation to DER by National Mediation Board, which covers workplace disputes under the Railway Labor Act, 45 U.S.C. § 152).

58. *NLRB v. Crowe Coal Co.*, 104 F.2d 633, 634 (8th Cir. 1939).

59. *Id.* at 634 n.1 (citing *NLRB v. Pa. Greyhound Lines*, 303 U.S. 261, 267 n.2 (1938); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 43 n.8 (1937); *Virginian*, 300 U.S. at 545–46 nn.4–5).

60. *Id.* at 633.

61. *Id.* at 635 (citing Dep't of Econ. Research, NLRB, BULL. NO. 2 (1938)).

62. *Heinz*, 61 S. Ct. at 323.

63. *Id.* at 324 n.1. The footnote reads, in part: "Concerning the growth and extent of signed trade agreements, see National Labor Relations Board, Division of Economic Research Bull. No. 4, *Written Trade Agreements in Collective Bargaining*, pp. 213–236, 49–209; U.S. Dept. of Labor, Bureau of Labor Statistics, *Five Years of Collective Bargaining*, pp. 5–7; Saposs and Gamm, *Rapid Increase in Contracts*, 4 Labor Relations Reporter No. 15, p. 6." *Id.*

statistics showed, for example, that 98,583.32 tons of respondent's coal (or 36.8 percent of total production) had entered interstate commerce or been used to enable interstate commerce to function.<sup>64</sup>

Similarly, the *Heinz* opinion used agency statistics and scholarly studies to illustrate the importance of written agreements to peaceful workplaces. Specifically, sources showed that: (1) the number of signed trade contracts had grown over time,<sup>65</sup> (2) written contracts served as a recognition of the union and a record of the terms,<sup>66</sup> (3) employers often declined to sign written contracts in order to frustrate the process of bargaining,<sup>67</sup> and (4) unlike unilateral policies, signed labor contracts were considered "effective instrument[s] of stabilizing labor relations and preventing, through collective bargaining, strikes and industrial strife."<sup>68</sup>

By incorporating the DER's rigorous labor policy research, the 1930s NLRB led federal agencies by enriching its understanding of complex labor questions with social science evidence. For example, in *Virginian Railway Co. v. System Federation*, the National Mediation Board (NMB) borrowed information from a DER bulletin entitled *Governmental Protection of Labor's Right to Organize* to justify the Railway Labor Act.<sup>69</sup> When other agencies adopted the DER's economic data, they implicitly acknowledged its unique expertise on contentious labor questions and lent an air of legitimacy to other Board opinions. By contrast, when they stopped citing the NLRB's specialized evidence, they signaled its irrelevance on cutting-edge issues.

Further, the early NLRB established a practice of considering non-DER perspectives with strong scientific support. For example, the Board used data to show that employer interference with employee unionization often induced labor unrest and impaired interstate commerce. In *Santa Cruz Fruit Packing Co. v. NLRB*,

64. NLRB v. Crowe Coal Co., 104 F.2d 633, 635 (8th Cir. 1939).

65. *Heinz*, 61 S. Ct. at 324 n.1. The footnote reads, in part: "Concerning the growth and extent of signed trade agreements, see National Labor Relations Board, Division of Economic Research Bull. No. 4, Written Trade Agreements in Collective Bargaining, pp. 213-236, 49-209; U.S. Dept. of Labor, Bureau of Labor Statistics, Five Years of Collective Bargaining, pp. 5-7; Saposs and Gamm, *Rapid Increase in Contracts*, 4 Labor Relations Reporter No. 15, p. 6." *Id.*

66. *Id.* The footnote reads, in part: "Lewis L. Lorwin, *The American Federation of Labor*, p. 309; Commons and Associates, *History of Labor in the United States*, vol. II, pp. 179-181, 423, 424, 480; Perlman and Taft *History of Labor in the United States, 1806-1932*, vol. IV, pp. 9, 10; Paul Mooney, *Collective Bargaining*, pp. 13, 14; Twentieth Century Fund, Inc., *Labor and the Government*, p. 339." *Id.*

67. *Id.* at 325 n.2. The footnote reads, in part: "Sumner H. Slichter, *Annals of the American Academy* (March, 1935), pp. 110-120; R. R. Brooks, *When Labor Organizes*, p. 224." *Id.*

68. *Id.* at 325 n.3. The footnote reads: "Carroll R. Daugherty, *Labor Problems in American Industry* (Rev. ed. 1938), pp. 936, 937; Mitchell, *Organized Labor*, p. 347; George G. Groat, *An Introduction to the Study of Organized Labor in America*, 2d Ed.1926, pp. 337-339, 341, 345, 346; First Annual Report, National Mediation Board, pp. 1-2." *Id.*

69. *Virginian Ry. Co. v. Sys. Fed'n*, 300 U.S. 515, 545-46 nn.4-5 (1937) (citing Dep't of Econ. Research, NLRB, BULL. NO. 1 (1936)).

it cited an eighteen-month Department of Labor (DOL) study that blamed anti-union activities for eight of fifteen canning-industry work stoppages, which affected 7,484 employees.<sup>70</sup> In *Mooreville Cotton Mills v. NLRB*, it cited another eighteen-month DOL study that blamed anti-union activities for ninety-four textile-industry work stoppages affecting 290,154 employees and costing the industry 3,958,891 man-days of idleness.<sup>71</sup>

Additionally, the 1930s NLRB engaged the evidence by scrutinizing whether statistics actually supported the party briefs' points. Occasionally, the Board repurposed one party's studies to support another party's statements. For example, in *NLRB v. National Motor Bearing Co.*, the Board cited the defendant's data on plant productivity to disprove its claims of declines in production and suggest a proscribed motive for partially closing.<sup>72</sup> Similarly, in *Montgomery Ward & Co. v. NLRB*, the court cited a company's data on seasonal hiring to show its unjustified departure from standard practice and thus to support the NLRB's inference of anti-union animus for failing to rehire.<sup>73</sup>

In 1939, however, a congressional committee confiscated the DER's economic files and branded the Board's Chief Economist a Communist.<sup>74</sup> In 1940, Congress "unceremoniously" banned the NLRB from employing economic experts.<sup>75</sup> By attacking the DER's political ideology (not the unit's scientific methodology), Congress implied that some perspectives are simply forbidden, regardless of whether they receive scientific support. Although the specific political attack that motivated this ban was discredited and faded from America's political culture, the ban itself persists in affecting NLRB processes.

Finally, the early NLRB recognized the importance of studying social science when setting labor policy. In keeping with the spirit of the NLRA, whose proponents feared that partisan appointees were probably partial to specific sides and possibly driven by future reemployment with certain interests,<sup>76</sup> presidents nominated scholars and nonpartisan government workers "nearly exclusively."<sup>77</sup> When presidents assumed that career academics were uniquely qualified and inherently impartial, they implied that social science expertise was integral to setting labor policy. However, when presidents abandoned this nomination tradition, they intimated that social science expertise was secondary to partisan

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70. *Santa Cruz Fruit Packing Co. v. NLRB*, 303 U.S. 453, 462–63 (1938).

71. *Mooreville Cotton Mills v. NLRB*, 94 F.2d 61, 63 (4th Cir. 1938) (citing to "Board Exhibit No. 16, under the title 'Strikes and lockouts in the Cotton Textile Industry in 1934, and in January to July, inclusive, 1935, by Major Issues Involved'").

72. *NLRB v. Nat'l Motor Bearing Co.*, 105 F.2d 652, 657–58 (9th Cir. 1939).

73. *Montgomery Ward & Co. v. NLRB*, 107 F.2d 555, 561 (7th Cir. 1939).

74. Stryker, *supra* note 5, at 350; 25.6 NLRB, RECORDS RELATING TO THE SMITH COMMITTEE INVESTIGATION OF THE NLRB (1934–1941).

75. Stryker, *supra* note 5, at 344; 29 U.S.C. § 154(a) (2006 & Supp. 2010–2011).

76. Flynn, *supra* note 4, at 1368, 1368 n.25.

77. *Id.* at 1367.

industry experience—an important impediment to achieving legitimacy.

#### IV. DECISIONMAKING AFTER DER: AN NLRB CASE STUDY

##### *A. Card Recognition Campaigns*

The NLRB is currently confronting a high-stakes debate: whether the NLRA should protect a union organizing process that excludes an official Board election and allows recognition of a union by a majority sign-up process. By conducting a brief case study of card recognition cases, I argue that the disbanding of the DER and the restaffing of the Board have undermined the accuracy and legitimacy of difficult NLRB decisions. First, I define a card recognition campaign and detail the recognition-bar challenge. Next, I discuss the use of social science statistics and critique the quality and quantity of data in three recent card recognition cases. Finally, I describe my proposal and conclusion on restoring the accuracy and legitimacy of the Board by incorporating scientific evidence into its adjudications.

Traditionally, a union would organize a workplace by collecting authorization cards from employees who supported union representation. Once the union had cards from a third of the workplace's eligible employees, it would submit these cards to the NLRB and request a secret ballot election. If the union won the election by majority vote, the employer would have to recognize the union and engage in good faith bargaining. In order to give the union a chance to negotiate its initial bargaining agreement, the NLRB would apply an un rebuttable presumption that the union represented a majority of the employees until the expiration of a reasonable waiting period.<sup>78</sup> This would protect the winning union from rival unions.

Today, a union that collects valid cards from a majority of the employees at a site typically does not request an official NLRB election. Instead, it asks the employer for voluntary recognition in the form of a neutrality agreement or "card check." Studies show that more employees support unions during card check campaigns than secret ballot elections.<sup>79</sup> Accordingly, some employers state that ballots best reflect the preferences of employees and argue that unions behave coercively during the organizing drives preceding the card check campaigns.<sup>80</sup> Conversely, some unions state that cards best reflect the preferences of employees and argue that employers behave coercively between the card check campaigns and the secret ballot elections.<sup>81</sup>

Both proponents and opponents of card recognition campaigns can cite social science that supports their standpoint. On one hand, some studies show

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78. Michael E. Aleo, *Card Check Recognition: The Ongoing Legal and Legislative Battle 2–3* (bepress Legal Series, Working Paper No. 957, 2006), available at <http://law.bepress.com/expresso/eps/957>.

79. *Id.*

80. *Id.*

81. *Id.*

that employers opposing unions have considerably more opportunities for dissuading their employees from voting for unions and often commit poorly remedied unfair labor practices against unions between demand and election.<sup>82</sup> However, other sources suggest that unions gathering cards take advantage of workers' wishes to "avoid offending the person who asks them to sign, often a fellow worker, or simply to get the person off their back."<sup>83</sup> Further, employees who sign cards might simply change their minds.<sup>84</sup>

In other words, the current legal contest over whether or when a union should be able to receive recognition with a card recognition majority instead of a secret ballot election hinges on several empirical questions, for example: Are cards or elections more reliable indicators of employee preferences? Are unions more likely to misinform or coerce the employees into submitting cards supporting the representation? Or are employers more likely to misinform or coerce the employees who submitted cards supporting the representation into voting against unionization?

Although the Board recognizes cards as bases for measuring employee support for unionization, it expresses a long-standing preference for secret ballot elections.<sup>85</sup> However, the labor community continues to debate the question of whether this preference is based on sound social science and reflects a practical public policy. Given the evidence that card recognition campaigns are easier for unions to organize and harder for employers to stop, the stakes are high for industries, employers, and employees.

### B. The Recognition-Bar Challenge

Recently, the Board was forced to confront these hot topic questions head on. In *Dana I*, an automotive workers' union successfully conducted a card check campaign and convinced the employer to confer voluntary recognition by signing a standard neutrality agreement.<sup>86</sup> Under the recognition-bar doctrine, a union that secures good faith employer support on basis of demonstrated majority status can receive a three-year reprieve from official Board elections.<sup>87</sup> In *Dana I*, this prevented a rival labor union from seeking to represent the same bargaining unit.<sup>88</sup>

In order to defeat the recognition-bar doctrine, the rival union complained that the acting union lacked the status of majority bargaining representative and could not enter a neutrality agreement on behalf of Dana's employees. Generally,

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82. Paul Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1784 (1983).

83. NLRB v. Village IX, Inc., 723 F.2d 1360, 1371 (7th Cir. 1983).

84. Alliant Foodservice, 335 N.L.R.B. 695, 695 (2001).

85. See NLRB v. Gissel Packing Co., 395 U.S. 575, 602 (1969).

86. Dana Corp. (*Dana I*), JD-24-05 (NLRB Div. of Judges Apr. 8, 2005).

87. Aleo, *supra* note 78, at 2–3.

88. *Dana I*, JD-24-05 at 3.

the ALJ is charged with enforcing agency policy, while the Board is capable of evaluating its desirability.<sup>89</sup> Accordingly, the *Dana I* ALJ used a mere ten pages to apply the recognition-bar doctrine and dismiss the complaint.<sup>90</sup> Despite the quantity and complexity of issues that impact the recognition-bar discussion, the ALJ cited no social science statistics and made no mention of whether it represented sound policy.

On appeal from *Dana I*, the reviewing Board in *Dana II* reframed the issue from descriptive (whether the parties had obeyed the recognition-bar doctrine) to normative (whether the doctrine should exist at all). To answer the legal question of whether the recognition-bar doctrine is compatible with statute and commendable as policy, the Board addressed the factual question of whether card check elections are more prone than secret ballot elections to coercion and manipulation.<sup>91</sup> As a result, the NLRB admitted four party briefs, twenty-four amicus briefs, and four reply briefs, many of which emphasized the social science evidence and couched their challenges in data analysis terms.<sup>92</sup>

Using this evidence, the Board reconsidered the balance between two competing interests: protecting employee preference and promoting stable bargaining. Upon holding the recognition-bar doctrine to undervalue the employees' statutory right to choose their representation through official NLRB elections, the Board lowered the recognition bar and modified the restrictions on rival unions' power to challenge the representativeness of voluntarily recognized unions.<sup>93</sup>

Three years later, the Board used *Rite Aid Store #6473* to solicit amicus briefs regarding "the actual experience of employees, unions, and employers under *Dana III*";<sup>94</sup> several months later, it reaffirmed the ALJ's dismissal in *Dana I*.<sup>95</sup> The following year, the Board overturned *Dana II* and reinstated the recognition bar.<sup>96</sup> Considering the number of times the agency has changed its policy in just the last six years, this development underscores the need for reliable statistics to justify the NLRB's decisions.

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89. See NAT'L LABOR REL. BD., *supra* note 1, at 35–36.

90. *Dana I*, JD-24-05 at 3.

91. *Dana Corp. (Dana II)*, 351 N.L.R.B. 434, 434 (2007).

92. *Id.* at 434 n.2; *Case 08-RD-001976*, NAT'L LABOR REL. BOARD, <http://www.nlr.gov/case/08-rd-001976> (last visited Dec. 20, 2011).

93. *Dana II*, 351 N.L.R.B. at 434.

94. *Rite Aid Store #6473*, 355 N.L.R.B. No. 157, 1 (Aug. 27, 2010).

95. *Dana Corp. (Dana III)*, 356 N.L.R.B. No. 49 (Dec. 6, 2010).

96. *Lamons Gasket Co.*, 357 N.L.R.B. 72 (Aug. 26, 2011), *available at* <http://mynlrb.nlr.gov/link/document.aspx/09031d458060afd7>. In *Lamons*, the Board overruled the substantive conclusion of *Dana II*. As my case study of the *Dana* decisions only examines the Board's use of scientific evidence without judging its ultimate conclusions, I will not discuss *Lamons*.

*C. Dana II's Amicus Evidence**1. Citations to Social Science Statistics*

To answer the legal/normative question of whether card recognition campaigns should receive NLRA protection, *Dana II* assessed the factual/empirical question of whether card recognition campaigns are inherently less reliable than official NLRB elections.<sup>97</sup> Despite admitting twenty-four amicus briefs that represented a variety of interests,<sup>98</sup> the Board relied largely on three NLRB sources: a former chairman,<sup>99</sup> an operational summary,<sup>100</sup> and an annual report.<sup>101</sup>

First, the Board cited a 1962 presentation by Frank McCulloch, who served as chairman from 1961 to 1970<sup>102</sup>—a source mentioned in “several” *Dana II* briefs<sup>103</sup> and other court opinions.<sup>104</sup> While *Dana II* failed to specify McCulloch’s strategy for obtaining the statistics he cited, the speech’s transcript suggests that McCulloch had examined 202 elections: fifty-eight with recognition rates<sup>105</sup> of thirty to fifty percent, eighty-seven with fifty to seventy percent, and fifty-seven with over seventy percent.<sup>106</sup>

The statistics showed a “significant disparity” between card recognition rates and official election results: Unions with fifty to seventy percent recognition won only forty-eight percent of elections, and unions with over seventy percent recognition won only seventy-four percent of elections.<sup>107</sup> (For fifty to seventy percent recognition, “[t]he study itself gives the figure fifty-two percent, but this is evidently an arithmetical error, since the study reports that the union won forty-two out of eighty-seven elections, which is forty eight percent.”<sup>108</sup>)

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97. *Dana II*, 351 N.L.R.B. at 439.

98. *Dana II* lists the amici who oppose the recognition-bar doctrine: (1) twenty-one Republican representatives; (2) federal and state chambers of commerce; (3) employer industry associations; (4) contract security companies; (5) anti-union advocacy organizations; and (6) labor/employment attorneys. 351 N.L.R.B. at 435 n.8. Additionally, *Dana II* lists the amici who support the recognition-bar doctrine: (1) forty-eight Democratic congressmen; (2) companies; (3) unions; (4) labor advocacy organizations; and (5) professors. *Id.* at 436 n.9.

99. *Id.* at 439.

100. *Id.* at 439 n.25.

101. *Id.* at 440 n.26.

102. *Board Members Since 1935*, NAT’L LAB. REL. BOARD, [http://www.nlr.gov/about\\_us/overview/board/board\\_members\\_since\\_1935.aspx](http://www.nlr.gov/about_us/overview/board/board_members_since_1935.aspx) (last visited Jan. 12, 2011).

103. *Dana II*, 351 N.L.R.B. at 439.

104. *See, e.g.*, *NLRB v. Village IX, Inc.*, 723 F.2d 1360, 1371 (7th Cir. 1983); *Retail, Wholesale, & Dep’t Store Union v. NLRB*, 385 F.2d 301, 308 (D.C. Cir. 1967); *NLRB v. S.S. Logan Packing Co.*, 386 F.2d 562, 565 (4th Cir. 1967); *NLRB v. Johnnie’s Poultry*, 344 F.2d 617, 620 (8th Cir. 1965); *Cnty. of Du Page v. Ill. Labor Relations Bd.*, 231 Ill. 2d 593, 625 (2008).

105. The percentage of employees who submitted cards supporting the union.

106. Frank McCulloch, *A Tale of Two Cities: Or Law in Action*, 1962 PROCEEDINGS OF ABA SECTION OF LAB. REL. LAW 14, 17 (1962).

107. *Dana II*, 351 N.L.R.B. at 439 (citing McCulloch, *supra* note 106, at 17).

108. *Village IX*, 723 F.2d at 1371; *accord Du Page*, 231 Ill. 2d at 625.



Next, the Board cited two NLRB sources. In 2007, the General Counsel released an operational summary memorandum for fiscal year 2006, which revealed that once the NLRB received an election petition, the median delay was thirty-nine days. In fact, 94.2 percent of elections occurred within fifty-six days.<sup>109</sup> The year before, the NLRB gave an annual report for fiscal year 2005, which only showed an objection rate<sup>110</sup> of five percent.<sup>111</sup>

Finally, the Board cited an article by James Brudney, which surveyed several dozen social science studies (and even a *Dana II* brief) on card-recognition issues, many published within the last ten years.<sup>112</sup> However, it did not utilize Brudney's article to communicate a labor policy argument or convey an expert insight/evidence. Instead, it used Brudney simply to supply a list of voluntary-recognition objectives "that will remain unaffected by our decision today."<sup>113</sup>

## 2. Use of Social Science Statistics

Surprisingly, neither the majority nor the dissenting opinion discussed whether McCulloch's statistics constituted good science. That is, neither opinion checked the study for compliance with *Daubert's* evidentiary benchmark for testing, peer review, error rate, operational standards, and general acceptance. Instead, they confined their inquiry to questioning its relevance to determining the significance of receiving card recognition.

Specifically, the majority argued that elections represent an instantaneous snapshot of employee preference.<sup>114</sup> However, recognition cards are regularly collected over protracted periods (e.g., over a year in one union drive), during which time "employees can and do change their minds."<sup>115</sup> Because these cards merely provide a basis for conducting an election, the reasons for questioning their reliability "become moot once an election is held."<sup>116</sup>

By contrast, the dissent insisted the study had "prove[d] nothing" about whether cards or elections are more reliable. This is because the disparity could "just as easily" have resulted from employer coercion during election campaigns as

109. *Dana II*, 351 N.L.R.B. at 439 n.25 (citing Office of the Gen. Counsel, NLRB, Memorandum GC 07-03 Revised, Summary of Operations (Fiscal Year 2006) (2007)).

110. The percentage of elections in which the losing party filed an objection to the winner's campaign manner and asked the NLRB to invalidate the outcome.

111. *Id.* at 440 n.26 (citing 70 NLRB Ann. Rep. 130 (2005)).

112. *Id.* at 442 n.34 (citing James Brudney, *Neutrality Agreements and Card Check Recognition: Prospects for Changing Paradigms*, 90 IOWA L. REV. 819, 832-41 (2005)). The brief in question is Brief for Kaiser Foundation Health Plan as Amicus Curiae, *Dana Corp. (Dana II)*, 351 N.L.R.B. 434 (2007) (No. 8-RD-1976) (supporting voluntary recognition). See Brudney, *supra*, at 886 n.54.

113. *Dana II*, 351 N.L.R.B. at 442.

114. *Id.* at 439.

115. *Id.* at n.23 (citing Alliant Foodservice, 335 N.L.R.B. 695, 695 (2001), where sixteen employees who signed cards for one union later signed cards for another union).

116. *Id.* at n.24 (citing Ne. Univ., 218 N.L.R.B. 247, 248 (1975), which states that "it is the election, not the showing of interest, which decides" the issue of representation).

union coercion during card collections. Depending on who coerced whom, the cards (not the votes) may “truly [have] reflected the employees’ free choice.”<sup>117</sup>

Similarly, the opinions never questioned the admissibility or reliability of internal NLRB evidence and concentrated their arguments on examining its applications. Since 94.2 percent of elections occur within three months of the filing of the election petition, the majority argued that providing orderly processes for gauging electoral fairness may only cause a “substantial delay in a small minority” of union drives.<sup>118</sup> Because ninety-five percent of elections lack objections, the statistics belie suggestions that anti-union employers enjoy “a one-sided advantage” which allows them to exert pressure on employees throughout an election campaign.<sup>119</sup>

Without disputing the 94.2 percent figure, the dissent declared the delay unacceptable because union status can remain unresolved for three months after voluntary recognition and because objections may cause the delay to snowball.<sup>120</sup> Likewise, without disputing the five percent figure, the dissent maintained that “[t]o the extent the majority is suggesting that employer coercion is rare in election campaigns, the majority’s statistics do not account for situations in which employer conduct was not known to the union or in which the union, for whatever reason, chose not to file objections.”<sup>121</sup>

Finally, the opinions never probed the Brudney survey article for admissibility or relevance. Interestingly, Brudney argued that “an array of findings and studies indicate that the NLRB elections regime regularly tolerates, encourages, and effectively promotes coercive conditions that preclude the attainment of employee free choice,”<sup>122</sup> which directly challenges the majority preference for NLRB elections.<sup>123</sup>

Without scrutinizing these studies or engaging these arguments, the majority utilized Brudney merely to supply the various reasons for voluntary recognition “that will remain unaffected by our decision today.”<sup>124</sup> By contrast, the dissent used the article to support a substantive factual statement: that “employer anti-union conduct, and attendant delays, can undermine union support during lengthy election campaigns.”<sup>125</sup>

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117. *Id.* at 448 n.19 (Liebman & Walsh, dissenting in part but concurring in result).

118. *Id.* at 439 n.25 (citing Office of the Gen. Counsel, NLRB, Memorandum GC 07-03 Revised, Summary of Operations (Fiscal Year 2006) (2007)).

119. *Id.* at 440 n.26 (citing 70 NLRB Ann. Rep. 130 (2005)).

120. *Id.* at 447 n.15 (Liebman & Walsh, dissenting in part but concurring in result).

121. *Id.* at 448 n.19 (Liebman & Walsh, dissenting in part but concurring in result).

122. Brudney, *supra* note 112, at 819.

123. *See Dana II*, 351 N.L.R.B. at 434.

124. *Id.* at 442 (citing Brudney, *supra* note 112, at 832–41).

125. *Id.* at 448 n.19 (Liebman & Walsh, dissenting in part but concurring in result) (citing Brudney, *supra* note 112, at 824).

*D. Rite Aid's Amicus Evidence*

In *Rite Aid*, the Board switched gears on card-check campaigns. In granting the request to review *Dana II*'s modification of recognition-bar protection, *Rite Aid* refrained from reaching the merits or citing any statistics without "giving any interested party any opportunity to present any evidence" on whether *Dana II* was working to effectuate the employees' choices regarding union representation.<sup>126</sup> Thus, it opted to solicit amicus briefs in order to "consider the actual experience of employees, unions, and employers under *Dana Corp.*, before arriving at any conclusions."<sup>127</sup>

By contrast, the concurrence and dissent both cited the NLRB's election statistics as compiled by its General Counsel. These statistics showed an official election rate of five percent and a union rejection rate of one percent. Specifically, as of June 1, 2010, the NLRB received some 1,111 notices of voluntary recognition and fifty-four petitions for traditional election. The voting employees refused the union fifteen times, a number that included two elections that chose a petitioning union over the recognized union.<sup>128</sup>

Again, neither opinion disputed the General Counsel's data as inadmissible or unreliable. Instead, they disagreed on whether it showed that *Dana II* was doing its job. The concurrence contended that since the rejection rate was just one percent, *Dana II* served no "clear purpose" in ninety-nine percent of total cases.<sup>129</sup> Further, the data had failed to capture those neutrality agreements that were not signed as a result of the parties' concerns about *Dana II*. Finally, it had failed to address *Dana II*'s impact on collective bargaining after voluntary recognition.<sup>130</sup>

The dissent responded that since the data reported at least 1,111 post-*Dana II* neutrality agreements (not including the ones with no posted notices), "[t]here has been no apparent deterrent to voluntary recognition."<sup>131</sup> Accordingly, the Board had empirical evidence that *Dana II* protected the employees' preferences without discouraging either voluntary recognition or collective bargaining. By contrast, it lacked "a scintilla of objective evidence to the contrary."<sup>132</sup>

Finally, despite soliciting briefs on *Dana II* issues, and despite admitting three party briefs, fourteen amicus briefs, and two reply briefs that represented a variety of interests,<sup>133</sup> the majority, the concurrence, and the dissent all failed to cite any

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126. Rite Aid Store #6473, 355 N.L.R.B. No. 157, 1 (Aug. 27, 2010).

127. *Id.*

128. *Id.* at 2 n.5 (Liebman, concurring); *id.* at 5 (Schaumber & Hayes, dissenting).

129. *Id.* at 2 n.5 (Liebman, concurring).

130. *Id.* at 2 (Liebman, concurring).

131. *Id.* at 5 (Schaumber & Hayes, dissenting).

132. *Id.* at 5 (Schaumber & Hayes, dissenting).

133. *Invitations to File Briefs*, NAT'L LAB. REL. BOARD, <http://www.nlr.gov/cases-decisions/invitations-file-briefs> (last visited Dec. 20, 2011). The amici who oppose the recognition-bar doctrine are (1) chambers of commerce; (2) employer industry associations; and (3) anti-union advocacy organizations. The amici who support the recognition-bar doctrine are (1) congressmen; (2)

social science statistics. Instead, they concentrated on comparing and contrasting the *Dana II* issues to past precedent, particularly the prohibition on pre-hiring agreements outside construction workplaces under *Majestic Weaving Co. of New York*.<sup>134</sup> In doing so, Board members reasoned “like lawyers balancing rights rather than policy analysts studying social and economic regulatory problems.”<sup>135</sup>

### F. Critique of Card Recognition Cases

#### 1. Quality of Data

Throughout the card recognition cases, the Board fell short of engaging with social science studies in the spirit of *Daubert*, which suggests that adjudicators who evaluate specialized evidence should interrogate its testing, peer review, error rate, operational standards, and general acceptance.<sup>136</sup> Because labor conditions are “rapidly changing,”<sup>137</sup> several legal scholars have updated McCulloch’s study with more recent material.<sup>138</sup> However, although his speech was forty-five years old at the time of the *Dana II* decision, neither the majority nor the dissent ever raised issues regarding its reliability. Likewise, both opinions accepted the General Counsel’s statistics without addressing this issue.

Initially, the absence of *Daubert* analysis might not appear unduly alarming. As a former NLRB chairman, McCulloch lacked incentive to falsify his findings to favor either party. As a federal labor office, the General Counsel had expertise on labor issues in general and NLRB proceedings in particular. As “several” submitters cited the former chairman’s speech,<sup>139</sup> it probably enjoyed a general consensus of undisputed correctness. Consequently, analysts might assert that Board members refrained from questioning its reliability simply because reliability was not an issue.

However, critics should consider the studies’ two sources: the NLRB’s former chairman and the NLRB’s General Counsel. Lacking internal expertise in social science techniques,<sup>140</sup> the Board must rely on briefs from parties to supply specialized data<sup>141</sup>—and likely also to evaluate this data. Notwithstanding the data’s true quality, the uniquely symbiotic relationship between the NLRB’s lawyer

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companies; (3) unions; and (4) professors. It is worth noting that *Dana III* lists different amici. See *Dana Corp. (Dana III)*, 356 N.L.R.B. No. 49 (2010). This is likely because they had responded to a March 30, 2006, request for briefs that occurred a year before *Dana II*. Accordingly, I analyze these entities under *Dana II*.

134. *Majestic Weaving Co.*, 147 N.L.R.B. 859 (1964).

135. Fisk & Malamud, *supra* note 8, at 2019.

136. PIERCE, *supra* note 20, at 924.

137. Christopher P. Yost & John H. Fanning, *The Worker Adjustment and Retraining Notification Act of 1988: Advance Notice Required?*, 38 CATH. U.L. REV. 675, 677 (1989).

138. See *infra* Part II.

139. *Dana Corp. (Dana II)*, 351 N.L.R.B. 434, 439 (2007).

140. Gross, *supra* note 9, at 344–45.

141. Fisk & Malamud, *supra* note 8, at 2065.

members as adjudicators, the NLRB's General Counsel as researcher, and the NLRB's General Counsel as prosecutor may encourage the members to weigh their opinions more heavily, letting older data from NLRB actors trump newer data from outside entities.<sup>142</sup>

The Board is likeliest to encounter the issue of symbiosis when the beliefs of members and researchers are aligned. That is, the Board is unlikely to complete a rigorous *Daubert* analysis or conduct a resource-intensive review of specialized opposing arguments when the adjudicators agree with the ideological implications of the information's conclusions. However, the parties and the public would prefer the Board to articulate its reasons for accepting or rejecting these arguments, especially when authors and adjudicators both serve a single agency and support the same outcome.

The existence (or appearance) of undesirable incentives implicates two issues: reliability and legitimacy. The assumption underlying the adversarial system is that clashes between counterparties will expose the truth<sup>143</sup>—an assumption critical to adjudicators lacking the technical knowledge to evaluate the evidence without input from parties. If the Board develops patterns of weighing certain viewpoints more heavily, this may cause the quality of evidence to decline, while leaving the Board ill-equipped to detect the defects.

Commentators also claim that courts mainly derive their legitimacy and authority from persuading the public by justifying their decisions.<sup>144</sup> As agency adjudicators are expressly encouraged to admit most evidence,<sup>145</sup> the inquiry will likely shift from admissibility to reliability. In this context, the absence of analysis regarding the reliability of social science statistics may leave the Board's decisions unfounded, thus inviting an assumption of political/ideological motivations.

## 2. *Quantity of Data*

Although the Board members appeared to agree that McCulloch's election statistics were admissible and reliable, they disagreed on whether (and how) the statistics were relevant to showing employee coercion by unions (or employers). In

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142. Indeed, several scholarly studies have detected a nexus between the identities of the parties and the reception of their pleadings. *See, e.g.*, Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. PA. L. REV. 743, 749–50 (2000) (arguing that courts usually cite large institutional players); S. Sidney Ulmer, *Selecting Cases for Supreme Court Review: An Underdog Model*, 72 AM. POL. SCI. REV. 902, 903 (1978) (arguing that courts will cite some parties (“upperdogs,” including businesses as well as federal, state, and local governments and their agents) more frequently than others (“underdogs,” including labor unions, employees, minority group members, aliens, and criminals)).

143. Kenneth B. Nunn, *The Trial as Text: Allegory, Myth and Symbolism in the Adversarial Process—A Critique of the Role of the Public Defender and a Proposal for Reform*, 32 AM. CRIM. L. REV. 743, 748 (1995).

144. Micah Schwartzman, *Judicial Sincerity*, 94 VA. L. REV. 987, 990–91 (2008).

145. *Multi-Med. Convalescent & Nursing Ctr. v. NLRB*, 550 F.2d 974, 978 (4th Cir. 1977).

order to illuminate these issues, they might have asked: (1) Fifty years later, does McCulloch's data still reflect labor realities? (2) How do employees receive information regarding unions? and (3) How do employees make decisions on whom to support? Ignoring this invitation to incorporate specialized evidence, the opinions cited almost no social science studies to prove substantive points.

To explain this omission, one may assert the existence of “gaping hole[s]” in empirical comparisons between the pressure on employees by unions and employers.<sup>146</sup> Since scientific studies often require investments of time and money, the demand for data might exceed its supply from independent research communities. Considering the NLRB's express interest in ascertaining “the actual experience of employees, unions, and employers,”<sup>147</sup> and analyzing “what members of the labor management community . . . have to say about this data and its lessons,”<sup>148</sup> critics might contend the Board is citing the best information available.

However, *Dana's* admission-to-citation imbalance calls the information hole argument into question. In *Dana II*, the Board admitted four opening briefs and four reply briefs from parties, as well as twenty-four briefs from amici. The briefs cited thirty-nine different sources of social science statistics that appeared in academic publications or agency reports from 2000 to 2010. These current citations featured in three of four (seventy-five percent) of the party briefs, eleven of twenty-four (forty-six percent) of the amicus briefs, and one of four (twenty-five percent) of the reply briefs—a range of zero to twelve citations per brief, and an average of 1.6 current citations per brief.<sup>149</sup> Nevertheless, the *Dana II* decision utilized just three sources of social science statistics, all from within the NLRB.

Likewise, in *Dana III*, the Board admitted three party briefs, fourteen amicus briefs, and two reply briefs. The briefs cited twenty-nine different sources of social science statistics that appeared in academic publications or agency reports from 2000 to 2010. These figured in one of three (thirty-three percent) of the party briefs, eight of fourteen (fifty-seven percent) of the amicus briefs, and one of two (fifty percent) of the reply briefs—a range of zero to ten citations per brief, and an average of 1.8 current citations per brief.<sup>150</sup> However, despite the Board's stated interest in “the actual experience of employees, unions, and employers,”<sup>151</sup> *Dana III* used no social science statistics at all.

To explain this absence, critics should consider the shortage of rebuttal for

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146. Eaton & Kriesky, *supra* note 26, at 160.

147. Rite Aid Store #6473, 355 N.L.R.B. No. 157, 1 (Aug. 27, 2010).

148. *Id.* at 3 (Liebman, concurring).

149. *Case 08-RD-001976*, NAT'L LABOR REL. BOARD, <http://www.nlr.gov/case/08-rd-001976> (last visited Dec. 20, 2011) (Excel data sets that describe the briefs on file with author).

150. *Invitations to File Briefs*, NAT'L LABOR REL. BOARD, <http://www.nlr.gov/cases-decisions/invitations-file-briefs> (last visited Dec. 20, 2011) (Excel data sets that describe the briefs on file with author).

151. *Rite Aid*, 355 N.L.R.B. No. 157 at 1.

social science statistics from party and amicus briefs. In *Dana II*, just five<sup>152</sup> current sources appeared in multiple entities' briefs, with only three<sup>153</sup> cited in briefs that took opposite sides on recognition-bar issues. In *Dana III*, just seven<sup>154</sup> appeared in multiple briefs—only two<sup>155</sup> of them opposing. Given the overlap between the sources cited in the *Dana II* briefs and the *Dana III* briefs, the combined *Dana* briefing contributed only four<sup>156</sup> different current sources that even potentially received an opponent's rebuttal. This increased the difficulty of evaluating them critically.

By reducing its citations to social science statistics, the Board might hope to prevent lay members who lack a background in social science scholarship from inadvertently placing authority in pseudoscience. However, this practice also prevents the Board from accumulating experience/expertise in analyzing this type of information. Further, it permits a somewhat dated study to frame the discussion and dominate the debate, rather than sparking a dialogue that uses the knowledge of the past and the present. As a result, the Board runs the risk of rendering data irrelevant to reaching its decisions, thus raising an inference of arbitrariness or incompetence.

#### V. PROPOSAL

Finally, I describe my proposal and conclusion on restoring the accuracy and legitimacy of the Board by incorporating scientific evidence into its adjudications. Because the amendment which prohibits the NLRB from employing any economists arguably permits the employment of general social scientists,<sup>157</sup> some scholars suggest the agency should hire a social science unit to evaluate party

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152. These five sources were cited in the briefs: JAROL P. MANHEIM, *THE DEATH OF A THOUSAND CUTS* (2001), Charles I. Cohen, *Neutrality Agreements: Will the NLRB Sanction Its Own Obsolescence?*, LAB. LAW. (2000), Adrienne E. Eaton & Jill Kriesky, *Union Organizing Under Neutrality and Card Check Agreements*, 55 INDUS. & LAB. REL. REV. 42 (2001), Roger C. Hartley, *Non-Legislative Labor Law Reform and Pre-Recognition Labor Neutrality Agreements: The Newest Civil Rights Movement*, 22 BERKELEY J. EMP. & LAB. L. 369 (2001), and Memorandum from Arthur F. Rosenfeld, Gen. Counsel, to Office of the Gen. Counsel, NLRB (Dec. 5, 2003) (on file with author).

153. These sources were cited in the briefs: Eaton & Kriesky, *supra* note 152, Hartley, *supra* note 151, and Arthur F. Rosenfeld, *supra* note 152.

154. These sources were cited in the briefs: MANHEIM, *supra* note 152, Cohen, *supra* note 152, Joel Dillard & Jennifer Dillard, *Fetishing The Electoral Process: The National Labor Relations Board's Problematic Embrace of Electoral Formalism*, 6 SEATTLE J. SOC. JUST. 819 (2008), Eaton & Kriesky, *supra* note 150, Fisk & Malamud, *supra* note 8, *New Survey Says Union Members Prefer Secret-Ballot Elections over Card Check*, DAILY LAB. REP., July 22, 2004, and Kate Bronfenbrenner, *No Holds Barred: The Intensification of Employer Organizing*, ECON. POL'Y INST., Briefing Paper No. 235 (2009).

155. These sources were cited in the briefs: Eaton & Kriesky, *supra* note 152, and Fisk & Malamud, *supra* note 8.

156. These sources were cited in the briefs: Eaton & Kriesky, *supra* note 152, Fisk & Malamud, *supra* note 8, Hartley, *supra* note 152, and Arthur F. Rosenfeld, *supra* note 152.

157. 29 U.S.C. § 154(a) (2006 & Supp. 2010–2011) (stating that “[n]othing in this subchapter shall be construed to authorize the Board to appoint individuals . . . for economic analysis”).

evidence and initiate independent investigations.<sup>158</sup> However, the NLRB is different from similar agencies that employ economists for scientific analysis.

Specifically, Congress's standard criteria for qualified Board members have evolved to limit the ability of academics without industrial workplace experience to influence national policy. Second, the Board's adjudicatory body only requires economic research on specific appellate issues, not general policy inquiries. Third, the Board receives a substantial quantity of expert evidence from amicus briefs, not internal sources. Accordingly, Congress should accommodate the NLRB's unique needs by authorizing an economic research unit to produce scientific evidence and approving a cross-disciplinary Board to evaluate this evidence.

To this end, I argue that presidents and Congress should expand the Board member pool to include social scientists. Originally, presidents accepted that career academics were uniquely qualified and inherently impartial. However, since the Eisenhower administration, presidents abandoned this nomination tradition in order to limit the ability of academics without industrial workplace experience to influence national policy. Despite initial protests, Congress approved these appointments and apparently accepted the underlying arguments.

Specifically, when Eisenhower expanded the Board's membership to include political appointees, proponents suggested that partisans possessed: (1) an expertise in real-world labor relations, (2) the integrity to render fair verdicts, and (3) the ability to follow federal judges in rejecting their old roles as private parties and assuming their new roles as representatives of the public interest.<sup>159</sup> They also alleged the impossibility of finding "anyone . . . entirely free" from allegedly prejudicial experiences.<sup>160</sup> By approving these appointments, Congress lent credence to the arguments in their favor.

When Nixon nominated a career management lawyer named Edward B. Miller, his supporters amplified the Eisenhower-era arguments to argue that since private-sector experience yields practical expertise, Miller's management background was not a minus, but a plus. Instead, Congress's true concern should be the NLRB's overwhelming inclusion of appointees from government and academia.<sup>161</sup> Again, Congress appeared to accept these arguments by approving these appointments.

The Miller nomination marked a turning point in perceived acceptability of partisan appointments. By reacting to antipartisan arguments with profound indifference (not one senator voted against it), Congress exhibited "complete acquiescence to the appointment of management partisans to the Labor Board."<sup>162</sup> Accordingly, Congress also implicitly acknowledged the concerns over permitting

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158. Roomkin & Abrams, *supra* note 15, at 1459.

159. Flynn, *supra* note 4, at 1372–74.

160. *Id.*

161. *Id.* at 1379–81.

162. *Id.* at 1382–83.



government employees and academics who lacked industry experience to influence labor policy. With the exception of Carter, the succeeding presidents continued this practice.<sup>163</sup>

Supporting Miller's appointment, one Senator expressed concern that the Board "has had a deficiency by not having anyone on it who has had direct practical experience in the field."<sup>164</sup> This rhetoric reflects an unflattering assumption about academic experts. Specifically, it suggests that professional researchers lack the industrial workplace expertise to understand their theories' actual effects. By contrast, political appointees possess the practical life experience to temper academics' impact on national labor policy. This establishes an inherently adversarial relationship between the contributions of the academics and the competency of the agency.

If Congress were to reauthorize the DER, the tension between the lawyers on the Board and the social scientists employed by it could undermine its ability to use this evidence effectively. Assuming Congress's attempts to ensure the reconstituted DER's independence by rendering it separate from the Board (much like the NLRB's General Counsel), it might hamper the economic unit's integration into existing Board processes by making it all too easy for members to ignore its evidence and analyses.

By contrast, if Congress augments the Board's membership with professional academics, they may develop a dialogue between lawyers and researchers and foster mutual assistance between law and science. At minimum, the Board members trained in social science would be able to write majority, concurring, or dissenting opinions assessing the Board's evidentiary engagement, thereby forcing the Board members trained in law to address the specialized evidence submitted.

Further, since current Board members serve a five-year term before rejoining the ranks of attorneys for corporations and unions, their labor industry roots could influence their ideologies (either because the interests of employability might affect their opinions or because their side-specific ties might indicate their preexisting labor philosophies). Accordingly, some argue that "because of their bias, neither the Board as an institution nor the public will really reap the benefit of the great practical expertise that union and management-side lawyers turned Board members bring to the job . . . [because] their partisan ties will trump their expertise every time."<sup>165</sup>

Assuming this argument has merit, the members' partisan ties could equally well trump the unit's economic research. While Congress is unlikely to find a perfectly impartial nominee, it may locate a professional researcher lacking a

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163. *Id.* at 1393–94.

164. *Id.* at 1455 n.91 (quoting Miller testimony).

165. Joan Flynn, "Expertness for What?": *The Gould Years at the NLRB and the Irrepressible Myth of the "Independent" Agency*, 52 ADMIN. L. REV. 465, 478 (2000).

connection to unions or corporations. Further, unlike an attorney Board member, a scholarly Board member who evaluates technical evidence must adhere to scientific community standards. Accordingly, his presence may counteract the politicization of controversial labor questions by encouraging the NLRB to engage the facts. Through persuading his colleagues to engage party evidence, a scholarly Board member could promote the spirit of *Daubert* and push a thorough, rigorous approach to justifying technical decisions. Indeed, since the original DER existed a decade before Congress began approving any partisan Board members, a proposal to evoke the Board's early days should encompass both elements of early NLRB adjudications: nonpartisan researchers *and* nonpartisan decisionmakers.

Further, the NLRB's research needs are narrow in scope. For example, since the Department of Labor (DOL) is charged with promulgating labor regulations, its Division of Economic and Labor Research offers advice regarding the relevance, application, and interpretation of current economic research to international economic policy. Further, it fills DOL requests for research results and economic analyses to facilitate the formulation of international economic policies and programs.<sup>166</sup> By contrast, the Board's adjudicatory body only requires economic research on specific issues relevant to adjudications, not general labor policy.

Given the NLRB's narrow interests, opponents of employing interagency economists may argue that the DER's exploratory research is incompatible with the NLRB's adjudicatory function. Without a background in law, academics might expand their inquiries into questions not raised by real-world litigants, who may prefer to leave these issues to legislatures or resolve them independently. Yet, if NLRB adjudicators included a mix of lawyers and scholars, the agency could utilize the attorneys' unique expertise in limiting the deliberations to legally relevant issues. To maximize these benefits of interdisciplinarity, the NLRB should change its composition to include three labor lawyers and two social scientists. (Ideally, the Board would implement this proposal upon reaching its quorum of five acting members.) In setting the number of scientists at two of five, the NLRB could include sufficient experts to permit a debate, thus preventing one person from becoming the arbiter of real scientific truth. Simultaneously, it could maintain the Board's lawyer majority, thus reflecting its role of adjudicating legal disputes.

Finally, the Board receives a substantial quantity of scientific evidence from amicus briefs. However, while staffed exclusively by lawyers, the Board is ill-prepared to evaluate the quality of amicus evidence.<sup>167</sup> Consequently, "the only kind of expertise [the Board] possesses [is] the logical coherence of doctrine and

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166. *Division of Economic and Labor Research (ELR)*, DEP'T OF LABOR, <http://www.dol.gov/ilab/programs/otla/economic.htm> (last visited Dec. 20, 2011).

167. Gross, *supra* note 9, at 346–47.

an intuitive sense about whether particular rules generate productive or unproductive litigation.”<sup>168</sup> This “type of expertise . . . is quite different from what generally counts as administrative agency expertise,” that is, expertise in the subject of the adjudication.<sup>169</sup>

Considering these characteristics of modern Board members, a social science staff could enhance the NLRB by filling the expert evaluator void. If Congress did nothing other than reauthorize the DER, it would create the problem of a single party serving as both a source and an evaluator, and give this party an advantage over external sources, only partially addressing the agency’s structural issues. By contrast, if Congress also expanded the Board to include social scientists, it would ensure that separate groups generate and evaluate specialized evidence.

On the one hand, a dominant interagency DER might reap the benefits of economies of scale, allowing its economists to afford larger, more expensive research. On the other, it may reduce competition for Board citations, thus undermining accountability and encouraging complacency. By separating the generators and evaluators of information, the NLRB could establish an incentive for employees and amici to submit their very best research, thus increasing the agency’s scientific relevance and improving its impartiality and legitimacy.

## VI. CONCLUSION

In defending agencies’ exemption from strict FRE standards for evaluating expert evidence, scholars suggest that agency ALJs have: (1) extensive experience and specialized expertise in specific subjects, and (2) political accountability for policy choices regarding certain industries. Although the current NLRB lacks a staff of social science experts, the Board still requires specialized expertise to formulate labor policies that address real-world problems.<sup>170</sup> To bridge this gap, the *Dana* Boards admitted numerous briefs with social science statistics, but cited very few of them. The pool of perspectives necessarily impacted the Board’s data quality and quantity, and thus its deliberations and decisions.

Scholars have faulted the NLRB for its ignorance about the impact of its decisions, its isolation from the policymaking in other areas of the law of the workplace (including the policymaking of the Department of Labor and the Equal Employment Opportunity Commission), and “the tendency of Board members, who recently have been drawn almost entirely from the ranks of labor and management attorneys, to reason like lawyers balancing rights rather than policy analysts studying social and economic regulatory problems.”<sup>171</sup> Although many agree the NLRB’s recent approach to evaluating scientific evidence is less than

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168. Fisk & Malamud, *supra* note 8, at 2066.

169. *Id.*

170. Stryker, *supra* note 5, at 344.

171. Fisk & Malamud, *supra* note 8, at 2019.

perfect, they disagree on what the problems are—and how to fix them.

Accordingly, some state the NLRB should minimize its use of social science to honor Congress's intent in excluding economist employees while upholding superior interests, such as legal realism and *stare decisis*. Others suggest the NLRB should maximize its use of social science beyond simply employing social scientists. Finally, some argue the NLRB should expand its role to encompass both adjudication and rulemaking, thereby reducing its dependence on *amicus* briefs altogether.

To support the role of science, I argue that bringing experts aboard will enrich the analysis by offering an alternative to reasoning like lawyers. However, assuming the NLRB then becomes more qualified to analyze specialized evidence, it does not need to give this evidence dispositive weight. If the expert analysis clashes with popular labor policy or existing market reality (for example, the interest in maintaining stable rules), the Board could exercise its discretion to minimize its impact.

To support the limits on economic experts, I argue the NLRB is entrusted with balancing competing interests. Accordingly, the Board should create a culture that incorporates specialized evidence without marginalizing alternative outlooks, such as law and politics. By developing a reputation for justifying its decisions in rational, empirical terms, the Board will increase its relevance and pave the way for expanding into new policymaking avenues—perhaps even rulemaking.

When proposing novel solutions to pervasive social problems, some scholars suggest that since the smaller government entities are more abundant, more adaptable, and less likely to radically affect a large constituency, such “laboratories of democracy”<sup>172</sup> serve as ideal test subjects. Thus, investigating a proposal for improving the NLRB's evidentiary policy could inspire a more universal debate about whether *amicus* briefs are sufficient for courts to fill the social science gap without sacrificing relevance and reliability. Ultimately, exploring these issues could expand our ability to fashion a mutually beneficial relationship between law and science.

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172. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (explaining the argument for states as laboratories of democracy).

