

## CONSTRUING THE NATIONAL LABOR RELATIONS ACT: THE NLRB AND METHODS OF STATUTORY CONSTRUCTION

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In this “age of legislation,”<sup>1</sup> theories of how judges should construe statutes have received considerable attention.<sup>2</sup> This focus on judges, however, fails to appreciate that most of the government’s statutory construction is by administrative agencies.<sup>3</sup> And because courts are expected to defer to agency constructions of statutes,<sup>4</sup> agencies often have the final say on what a statute

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1. ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 13 (1997).

2. See Frank B. Cross, *The Significance of Statutory Interpretive Methodologies*, 82 NOTRE DAME L. REV. 1971, 1971 (2007) (“The proper method of interpreting statutes . . . has seen enormous theoretical discussion . . .”).

3. See WILLIAM N. ESKRIDGE, JR. ET AL., *LEGISLATION AND STATUTORY INTERPRETATION* 322-23 (2d ed. 2006) (“Most government-based statutory interpretations are nowadays rendered by administrative agencies and departments, and courts are second-order interpreters . . .”); Elizabeth Garrett, *Teaching Law and Politics*, 7 N.Y.U. J. LEGIS. & PUB. POL’Y 11, 17 (2003) (“A sophisticated understanding of statutory interpretation includes an awareness that courts are not the only institutions that interpret statutes . . . . In fact, administrative agencies resolve many statutory questions . . . .”); Jerry L. Mashaw, *Norms, Practices, and the Paradox of Deference: A Preliminary Inquiry into Agency Statutory Interpretation*, 57 ADMIN. L. REV. 501, 502-03 (2005) (“[A]gencies are, by necessity, the primary official interpreters of federal statutes . . . .”); Cass R. Sunstein, *Is Tobacco a Drug? Administrative Agencies as Common Law Courts*, 47 DUKE L.J. 1013, 1055 (1998) (“In the modern era, most of the key work of statutory interpretation is, of course, not done by courts, but rather by federal agencies.”); Edward Rubin, *Dynamic Statutory Interpretation in the Administrative State*, ISSUES IN LEGAL SCHOLARSHIP 2 (2002), <http://www.bepress.com/ils/iss3/art2> (“[T]he great bulk of adjudication under these statutes, and thus the great bulk of adjudication in the modern state, is not performed by courts, but by administrative agencies.”). Professor Richard J. Pierce, Jr., takes issue with the assertion that agencies are the primary interpreters of federal statutes. See Richard J. Pierce, Jr., *How Agencies Should Give Meaning to the Statutes They Administer: A Response to Mashaw and Strauss*, 59 ADMIN. L. REV. 197, 200, 204-05 (2007) (asserting that when agencies select between permissible constructions of statute, they are not engaging in interpretation).

4. See *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984) (“[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.”). The extent to which the judiciary heeds this directive is, of course, a matter of contention.

means. “Absent judicial intervention, ‘the law’ is what agencies say it is.”<sup>5</sup> Most scholarship addressing administrative agencies and the construction of statutes, though, concerns the level of deference the judiciary should give such constructions, not the methods of statutory construction that are, or should be, used by administrative agencies.<sup>6</sup>

This Article addresses statutory construction by the National Labor Relations Board (“NLRB” or “Board”), the agency that administers the National Labor Relations Act (“NLRA” or “Act”).<sup>7</sup> Of course, most Board cases will not require it to use a specific method of statutory construction. Usually the Board’s task will be to apply its precedent to the facts of the case. There will, however, be some cases in which the outcome depends on the method of statutory construction used by the Board.

But how should the Board approach statutory construction? Should it approach this task like a court, and, if it fails to do so, is it acting illegitimately? Should it approach this task in some manner different from a court, and, if it acts like a court, is it failing to do its job? And how do Board members approach statutory construction in practice? If they approach it like a court, do Republican members apply a method of statutory construction commonly associated with conservative jurists and Democratic members a method commonly associated with liberal jurists?

This Article attempts to answer these questions. Part I discusses the Board and how it functions. Part II discusses the primary competing theories of statutory construction that are currently advocated by jurists: (1) textualism, which focuses primarily on the statute’s text, and which is generally associated with conservative jurists such as Justice Antonin Scalia; and (2) intentionalist theories, which focus on Congress’s intent or the statute’s purpose, and which

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5. Robert R.M. Verchick, *Toward Normative Rules for Agency Interpretation: Defining Jurisdiction Under the Clean Water Act*, 55 ALA. L. REV. 845, 848 (2004).

6. See Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2383 (2001) (“For too long, administrative law scholars focused on judicial review . . . .”); Verchick, *supra* note 5, at 847 (“[A]dministrative law scholarship has focused mainly on the judiciary. . . . The proper role of agencies in statutory interpretation is a surprisingly under-examined field of law. Only a handful of law review articles address the issue in any substantial way.” (footnote omitted)). As one commentator has noted, “[a] judge’s review of agency interpretation concerns what readings are permitted; the study of agency interpretation concerns what readings, among those permitted, are desirable.” Verchick, *supra* note 5, at 848. With recent scholarship by Professor Jerry L. Mashaw, Professor Richard J. Pierce, Jr., and Dean Edward Rubin, the lack of scholarship on the methods of statutory construction that should be employed by administrative agencies is fortunately starting to change. See generally Jerry L. Mashaw, *Agency-Centered or Court-Centered Administrative Law? A Dialogue with Richard Pierce on Agency Statutory Interpretation*, 59 ADMIN. L. REV. 889 (2007) (critiquing Richard Pierce’s view that when agencies give meaning to ambiguous statutory provisions they are not involved in process of statutory interpretation but in policymaking process); Mashaw, *supra* note 3 (discussing normative and positive features of agency statutory construction); Pierce, *supra* note 3 (asserting that when agencies give meaning to ambiguous statutory provisions they are not involved in process of statutory interpretation but in policymaking process); Rubin, *supra* note 3 (asserting that so-called “dynamic statutory interpretation” is only plausible approach to statutory construction by administrative agencies).

7. 29 U.S.C. §§ 151-169 (2006).

are generally associated with liberal jurists such as Justice Stephen Breyer.<sup>8</sup>

Part III discusses administrative agencies and statutory construction and demonstrates that administrative agencies should not use any of the theories of statutory construction currently advocated by jurists, other than to determine if Congress's intent on the interpretive question is clear and, if not, to identify permissible constructions of the statute. After identifying the permissible constructions of the statute, an agency, instead of using any of the theories of statutory construction currently advocated by jurists, should eschew interpretive tools, such as examining statutory text and congressional intent (except when necessary to determine the statute's general purpose), and should select the interpretation it believes best promotes the statute's purpose.

However, because no statutory purpose should be pursued at any cost (and thus relevant policies and principles external to the statute must be identified),<sup>9</sup> and because a statute will often have competing purposes (the relative importance of which were not clearly specified by Congress), an administrative agency must assign weight to those purposes, policies, and principles. This in turn means an agency in many cases should, and will, select the construction it believes is best for society. This model of statutory construction gives an administrative agency more discretion than any of the theories of statutory construction currently advocated by jurists, and essentially gives the agency lawmaking power when construing a statute.

Part IV, drawing on the model of administrative agency statutory construction advocated in Part III, addresses how the NLRB should approach statutory construction. Part V analyzes two recent and prominent Board decisions involving statutory construction that were each decided three-to-two

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8. See Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of Chevron*, 73 U. CHI. L. REV. 823, 828-29 (2006) ("[T]here is no logical or necessary connection between adoption of 'plain meaning' approaches and being 'liberal' or 'conservative.' But as an empirical matter, the more conservative justices (Justices Antonin Scalia and Clarence Thomas) have embraced 'plain meaning' approaches and the more liberal justices have not."). See generally STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* 85-101 (2005) (advocating intentionalist approach to statutory interpretation); SCALIA, *supra* note 1, at 23-25 (advocating textualist approach to statutory interpretation). I acknowledge that identifying conservatives with textualism and liberals with intentionalist theories is a generalization that will not be the case with all judges.

9. For example, Professor Ronald Dworkin, when explaining his theory of statutory construction for courts, notes that a judge interpreting the Endangered Species Act could appropriately give weight to the policy that public funds not be wasted. RONALD DWORKIN, *LAW'S EMPIRE* 339 (1986) [hereinafter DWORKIN, *LAW'S EMPIRE*]. In this Article, when referring to purposes, policies, and principles, I use the term "purpose" to refer to any objective of the statute that is being construed; I use the term "policy" to refer to any goal of government that is external to the statute being construed; and I use the term "principle" to refer to any external standard of justice, fairness, or morality. With respect to policies and principles, I have relied on Professor Dworkin's distinction. See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 22-23 (1977) (providing distinction between policies and principles). An external policy or principle would be relevant if Congress had not intended it to be considered in the context of the interpretive question facing the interpreter, and that policy or principle were implicated or affected by one of the permissible constructions of the statute.

along party lines—*Brown University*<sup>10</sup> and *Oakwood Healthcare, Inc.*<sup>11</sup>—and addresses the methods of statutory construction used by the Board members. The analysis of these cases shows that the Board members approached the task of statutory construction like a court, using judicial methods of statutory construction. The analysis also shows, however, that the individual Board members applied inconsistent methods of statutory construction in the two cases, and thus Republican Board members did not consistently apply a conservative method of statutory construction and Democratic members did not consistently apply a liberal method of statutory construction.

Part VI concludes that the Board members in *Brown University* and *Oakwood Healthcare, Inc.* selected the method of statutory construction that reached the policy result they believed was best. I argue that, while it is unlikely Board members will change this practice, the Board would increase its legitimacy if it abandoned judicial methods of statutory construction (except to determine if Congress's intent on the interpretive question is clear, and, if not, to identify the permissible constructions) and openly based its decisions on policy grounds.

## I. THE NLRB

### A. *The NLRA and Its Purposes*

In 1935, Congress enacted the NLRA (also known as the Wagner Act),<sup>12</sup> the purposes of which, according to the Act's findings and declaration of policy in section 1,<sup>13</sup> were to protect the right of employees to organize and collectively bargain and to encourage those practices.<sup>14</sup> According to the declaration of policy, by doing so, it was Congress's hope to (1) reduce strikes and other forms of industrial strife that had burdened or affected commerce; and (2) increase

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10. 342 N.L.R.B. 483, 500 (2004). The Board's decision in *Brown University* led to considerable academic commentary. See, e.g., Sarah J. Bannister, Note, *Low Wages, Long Hours, Bad Working Conditions: Science and Engineering Graduate Students Should Be Considered Employees Under the National Labor Relations Act*, 74 GEO. WASH. L. REV. 123 (2005) (criticizing decision); Elizabeth Butler Baum, Casenote, *NLRB Refuses to Harm "Academic Freedom" at Universities by Permitting Graduate Student Assistants to Unionize*, 56 MERCER L. REV. 793, 803 (2005) (concluding decision was "fair"); Ryan Patrick Dunn, Comment, *Get a Real Job! The National Labor Relations Board Decides Graduate Student Workers at Private Universities Are Not "Employees" Under the National Labor Relations Act*, 40 NEW ENG. L. REV. 851 (2006) (criticizing decision); Robert A. Epstein, Note, *Breaking Down the Ivory Tower Sweatshops: Graduate Student Assistants and Their Elusive Search for Employee Status on the Private University Campus*, 20 ST. JOHN'S J. LEGAL COMMENT. 157, 180-81 (2005) (same).

11. 348 N.L.R.B. 686 (2006).

12. National Labor Relations Act, ch. 372, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-169 (2006)); see also ROBERT A. GORMAN & MATTHEW W. FINKIN, BASIC TEXT ON LABOR LAW: UNIONIZATION AND COLLECTIVE BARGAINING 6 (2d ed. 2004) (noting that NLRA was enacted in 1935).

13. 49 Stat. 449, § 1 (codified as amended at 29 U.S.C. § 151). Congress's declaration of policies "had a twofold purpose: to voice an economic philosophy and to lay a constitutional foundation for the Act." IRVING BERNSTEIN, THE NEW DEAL COLLECTIVE BARGAINING POLICY 90 (1950).

14. 49 Stat. 449, § 1 (codified as amended at 29 U.S.C. § 151).

employee bargaining power and thereby raise wages, which in turn would hopefully temper recurrent business depressions.<sup>15</sup>

Although the Act's findings and declaration of policy were amended by the Taft-Hartley Act of 1947<sup>16</sup> to indicate that certain union practices had interfered with commerce,<sup>17</sup> the Taft-Hartley Act retained the Wagner Act's declaration that it was the government's official policy to encourage collective bargaining.<sup>18</sup> Importantly, though, the Taft-Hartley Act took a more neutral position on collective bargaining.<sup>19</sup>

### B. *The Board's Functions*

As part of the Act, Congress created the Board<sup>20</sup> to (1) prosecute and hear unfair labor practice cases<sup>21</sup> and (2) hold union elections.<sup>22</sup> In 1947, with the creation of the Board's General Counsel,<sup>23</sup> the Board's prosecutorial and

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15. *Id.* According to Leon H. Keyserling, Senator Robert F. Wagner's legislative assistant at the time of the Act's drafting, and its principal draftsman, increasing employee purchasing power was the more important of the two purposes, at least to him. Kenneth M. Casebeer, *Holder of the Pen: An Interview with Leon Keyserling on Drafting the Wagner Act*, 42 U. MIAMI L. REV. 285, 308 (1987). Irving Bernstein explained the reasoning behind the desire to raise employee wages as follows:

Industrial concentration, the declaration argued, destroyed the worker's bargaining power, leaving him with an inadequate share of the national wealth. A redistribution of income by collective bargaining would raise those at the bottom and remove inequalities within the wage structure. This would benefit society as a whole by creating mass purchasing power to fill in the troughs in the business cycle.

BERNSTEIN, *supra* note 13, at 90.

16. Labor Management Relations Act of 1947, ch. 120, 61 Stat. 136 (1947) (codified at 29 U.S.C. §§ 141-187).

17. *See* 29 U.S.C. § 151 ("Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.").

18. MICHAEL C. HARPER ET AL., *LABOR LAW: CASES, MATERIALS, AND PROBLEMS* 92 (5th ed. 2003) ("Taft-Hartley retained . . . the Wagner Act's original findings and declaration of policy emphasizing the need to redress the inequality of bargaining power between labor and management and declaring it to be official U.S. policy to 'encourag[e] the practice and procedure of collective bargaining.'" (quoting 29 U.S.C. § 151)).

19. *See id.* ("The 1947 amendments marked a clear shift in tone from the original Wagner Act, from a measure reflecting affirmative support of unionization and collective bargaining to one that appeared to take a more neutral position as to whether unions and collective bargaining were truly in the interests of all workers.").

20. 29 U.S.C. § 153.

21. *Id.* § 160.

22. *Id.* § 159.

23. "The General Counsel is appointed by the President, is the top prosecutorial official at the NLRB, and is responsible for supervising the enforcement of the NLRA through the regional offices across the country." Claire Tuck, Note, *Policy Formulation at the NLRB: A Viable Alternative to Notice and Comment Rulemaking*, 27 CARDOZO L. REV. 1117, 1137-38 n.162 (2005).

adjudicatory functions were divided.<sup>24</sup> The General Counsel investigates and prosecutes unfair labor practice cases, and the Board adjudicates them.<sup>25</sup> Unfair labor practice cases are tried before an administrative law judge (“ALJ”),<sup>26</sup> and the Board reviews the ALJ’s decision if either party files exceptions to the decision.<sup>27</sup>

C. *Why Congress Created an Administrative Agency to Administer the Act*

The Act does not indicate why Congress chose an administrative agency to administer the Act instead of having courts do so. There appears, however, to have been four reasons. First, there is evidence Congress believed courts did not have the time or expertise to address labor matters. For example, Senator Robert F. Wagner, who introduced into the Senate the bill that became the NLRA,<sup>28</sup> favored an administrative agency administering the Act because he believed courts lacked the time and “special facilities” to address labor issues.<sup>29</sup> Second, commentators have asserted that administration was given to an agency because Congress was dissatisfied with the courts’ development of labor policy.<sup>30</sup> Third, a leading commentator has stated that Congress could not agree on many issues of national labor policy and desired to have the Act administered by a body that could be flexible and “experiment” with labor policies, while at the same time being “political[ly] responsive[.]”<sup>31</sup> Similarly, another leading commentator has asserted that Congress wanted the Act administered by a body that was relatively free from the constraints of *stare decisis*, a doctrine that limits the ability of courts to be flexible.<sup>32</sup> Fourth, it was commonplace during the New

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24. GORMAN & FINKIN, *supra* note 12, at 9.

25. *Id.*

26. *Id.* at 11.

27. *Id.* at 12.

28. BERNSTEIN, *supra* note 13, at 90.

29. See 1 NAT’L LABOR RELATIONS BD., LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT OF 1935, at 1428 (1949) (recording Senator Wagner as stating, “[f]or years lawyers and economists have pleaded for a dignified administrative tribunal, detached from any particular administration that happens to be in power, and entitled to deal quasi-judicially with issues with which the courts have neither the time nor the special facilities to cope”).

30. See Samuel Estreicher, *The Second Circuit and the NLRB 1980-1981: A Case Study in Judicial Review of Agency Action*, 48 BROOK. L. REV. 1063, 1070-71 (1982) (asserting that Congress did not want courts to make supplementary labor policy under Act); Michael J. Hayes, *After “Hiding the Ball” Is Over: How the NLRB Must Change Its Approach to Decision-Making*, 33 RUTGERS L.J. 523, 554 (2002) (“[I]n passing the National Labor Relations Act, Congress continued the process of diminishing the role of courts in the labor area by creating an *alternative* to the courts, the National Labor Relations Board . . . .”); Ralph K. Winter, Jr., *Judicial Review of Agency Decisions: The Labor Board and the Court*, 1968 SUP. CT. REV. 53, 59 n.5 (“Congressional dissatisfaction with the judicial exercise of delegated power became self-evident by the 1930’s. . . . [T]he Wagner Act established broad lines of labor policy, the further elaboration of which was left to the Labor Board rather than the courts. The creation of the Board, therefore, may fairly be viewed as the result of congressional dissatisfaction with judicial lawmaking in the area of labor law.”).

31. Samuel Estreicher, *Policy Oscillation at the Labor Board: A Plea for Rulemaking*, 37 ADMIN. L. REV. 163, 167 (1985).

32. Winter, *supra* note 30, at 55.

Deal to create an administrative agency to enforce a new regulatory statute.<sup>33</sup>

*D. The Independence of the Board*

The Congress that enacted the NLRA intended the Board to be independent in two senses. First, Congress intended each Board member to be nonpartisan and to represent the public, in contrast to the NLRB's predecessor, the National Labor Board, which, in addition to a nonpartisan chair, had representatives from labor and management.<sup>34</sup> The Act's drafters excluded representatives from labor and management "to avoid compromise and inconsistency in" Board decisions.<sup>35</sup> Also, it was believed that a quasi-judicial body should not have representatives of labor and management but should have "purely public responsibility."<sup>36</sup>

Second, Congress wanted the Board to be independent of the executive branch,<sup>37</sup> and Congress thus established the Board as an independent agency.<sup>38</sup> The Board was made independent of the executive branch "to give it stature with the public";<sup>39</sup> to attract high quality members;<sup>40</sup> to avoid the claim that its purpose was to promote employee interests;<sup>41</sup> to remove it from the budgetary

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33. See Casebeer, *supra* note 15, at 321 (quoting Leon H. Keyserling as stating, "[t]he administrative provisions are merely commonplace to any administrative statute that has to be enforced").

34. Joan Flynn, *A Quiet Revolution at the Labor Board: The Transformation of the NLRB, 1935-2000*, 61 OHIO ST. L.J. 1361, 1363 (2000).

35. BERNSTEIN, *supra* note 13, at 93.

36. Casebeer, *supra* note 15, at 357-58 (quoting Leon H. Keyserling as stating that Board, as quasi-judicial body, was to have "purely public responsibility").

37. BERNSTEIN, *supra* note 13, at 93.

38. See Paul R. Verkuil, *The Independence of Independent Agencies: The Purposes and Limits of Independent Agencies*, 1988 DUKE L.J. 257, 257 (noting that NLRB was one of several important independent agencies created during New Deal); Tuck, *supra* note 23, at 1117 n.1 (noting that Board is "an independent federal agency"). Whether independent agencies are part of the executive branch or part of a "fourth branch" of government is now a subject of debate. See, e.g., Fed. Mar. Comm'n v. S.C. State Ports Auth., 535 U.S. 743, 773 (2002) (Breyer, J., dissenting) ("Constitutionally speaking, an 'independent' agency belongs neither to the Legislative Branch nor to the Judicial Branch of Government. Although Members of this Court have referred to agencies as a 'fourth branch' of Government, the agencies, even 'independent' agencies, are more appropriately considered to be part of the Executive Branch." (citation omitted) (citing *FTC v. Ruberoid Co.*, 343 U.S. 470, 487 (1952) (Jackson, J., dissenting))). Although the Board is an "independent" agency," Congress has oversight power over the NLRB and authorizes appropriations. Tuck, *supra* note 23, at 1136-37 & n.147; see also Joan Flynn, "Expertness for What?": *The Gould Years at the NLRB and the Irrepressible Myth of the "Independent" Agency*, 52 ADMIN. L. REV. 465, 470 (2000) ("No federal agency—whether 'independent' or 'executive'—operates independently of Congress, which controls its budget and therefore its lifeblood, and has an array of other weapons at its disposal for use against 'uncooperative' agencies." (footnote omitted)). "Commentators have emphasized that 'independent' agencies may be more independent from the executive than other agencies but may also be subject to stronger Congressional oversight than other agencies." Tuck, *supra* note 23, at 1137 n.155.

39. BERNSTEIN, *supra* note 13, at 93.

40. *Id.*

41. *Id.*

and personnel controls of the Department of Labor,<sup>42</sup> as the Department had not been particularly supportive of the Act;<sup>43</sup> to conform with the independent status of other quasi-judicial agencies;<sup>44</sup> to keep the Board free from “politics or political influences”;<sup>45</sup> and because a quasi-judicial body should be independent.<sup>46</sup> Senator Wagner and other supporters of an independent Board did not want the Board to be charged with promoting the aims of the Department of Labor or to be pressured by the administration to reach results consistent with the current administration’s policies.<sup>47</sup>

*E. Board Members*

The President appoints Board members by and with the advice and consent of the Senate.<sup>48</sup> The Board originally consisted of three members<sup>49</sup> but was increased to five members with the passage of the Taft-Hartley Act of 1947.<sup>50</sup> Members serve staggered five-year terms<sup>51</sup> and may be removed by the President only “for neglect of duty or malfeasance in office.”<sup>52</sup> Initially, most Board members were appointed from academia or the government, but since the Nixon administration a majority of members have had either management or union backgrounds.<sup>53</sup> Currently, the members tend to have backgrounds as lawyers for either management or unions.<sup>54</sup>

*F. The Board’s Power to Make Labor-Relations Policy*

When performing its functions, the Board makes labor-relations policy. The Supreme Court and scholars agree that this policymaking role is legitimate based on Congress’s intent when passing the Act. For example, the Supreme Court has

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42. *Id.*

43. See Leon H. Keyserling, *The Wagner Act: Its Origin and Current Significance*, 29 GEO. WASH. L. REV. 199, 208 (1960) (“[T]he relationships between the Department of Labor and the Boards which preceded the Wagner Act made it abundantly clear that the new statute would not have been used so promptly and unequivocally to vindicate the rights incorporated therein if the new Board had been subject to control by the Secretary [of Labor] and under the watchful eye of her . . . advisers.”).

44. BERNSTEIN, *supra* note 13, at 93.

45. 1 NAT’L LABOR RELATIONS BD., *supra* note 29, at 1491 (recording Senator Wagner as stating, “I think for the Department of Labor to have control of the personnel carrying out quasi judicial functions might inject politics or political influences into a board that ought to be free”).

46. Casebeer, *supra* note 15, at 345 (“As Senator Wagner and I believed, a quasi-judicial body, particularly in the early years of its life, should be independent. It should really run its show.” (quoting Leon H. Keyserling)).

47. BERNSTEIN, *supra* note 13, at 105.

48. 29 U.S.C. § 153(a) (2006).

49. GORMAN & FINKIN, *supra* note 12, at 9.

50. *Id.*

51. See 29 U.S.C. § 153(a) (providing that members “shall be appointed for terms of five years each”); Dunn, *supra* note 10, at 857 (noting that “[o]ne member’s term expires every year”).

52. 29 U.S.C. § 153(a).

53. Flynn, *supra* note 34, at 1364-65.

54. Tuck, *supra* note 23, at 1141.



stated that Congress conferred on the Board “the authority to develop and apply fundamental national labor policy,”<sup>55</sup> and Judge (then Professor) Ralph K. Winter believed Congress intended the Board to have policymaking power “in a broadly legislative sense.”<sup>56</sup> Professor Samuel Estreicher has asserted that Congress intended the Board to be flexible and “political[ly] responsive[.]”<sup>57</sup> For example, the Supreme Court has recognized that the Board is to change policy based on “changing industrial practices.”<sup>58</sup> The Act’s broad and general language supports the conclusion that Congress intended the Board to engage in policymaking.<sup>59</sup>

Not only does the Board engage in policymaking, it acts as “the chief policymaker” of labor relations.<sup>60</sup> In fact, Congress intended the Board to act as a “Supreme Court” of labor relations.<sup>61</sup> The Board has even supplanted Congress as the primary maker of labor-relations policy. Because Congress has not amended the NLRA since 1959, the Board, not Congress, has acted as the primary vehicle for making and implementing labor-relations policy.<sup>62</sup> The Board is thus the “de facto policymaking arena” for such matters.<sup>63</sup>

The Supreme Court has, however, imposed limits on the Board’s policymaking authority. The Court has stated that “the Act’s provisions are not indefinitely elastic, content-free forms to be shaped in whatever manner the Board might think best conforms to the proper balance of bargaining power [between unions and employers].”<sup>64</sup> The Court has thus concluded that “the Board construes its functions too expansively when it claims general authority to define national labor policy by balancing the competing interests of labor and management.”<sup>65</sup> The Court has stated that “[t]he deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made

55. *Beth Isr. Hosp. v. NLRB*, 437 U.S. 483, 500 (1978).

56. Winter, *supra* note 30, at 55; *see also* Dunn, *supra* note 10, at 882 (“Congress delegated the task of annunciating national labor relations policy to the Board . . .”).

57. Estreicher, *supra* note 31, at 167.

58. *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 266 (1975).

59. James J. Brudney, *Isolated and Politicized: The NLRB’s Uncertain Future*, 26 *COMP. LAB. L. & POL’Y J.* 221, 234 (2005); Hayes, *supra* note 30, at 552-53.

60. Hayes, *supra* note 30, at 557.

61. J. JOSEPH HUTHMACHER, *SENATOR ROBERT F. WAGNER AND THE RISE OF URBAN LIBERALISM* 191 (1968).

62. *See* Brudney, *supra* note 59, at 254 (“Congress’s inability or unwillingness to act since 1959 [with respect to amending the Act] has left the NLRB as the default channel for those seeking to affect labor relations policy.”); *see also* Hayes, *supra* note 30, at 525 (“Congressional amendment of the National Labor Relations Act has occurred only a handful of times since its original enactment, with the latest revision occurring more than 20 years ago.”); Tuck, *supra* note 23, at 1120 n.29 (“Since Congress has not made substantial revisions to the NLRA since 1959, the difficulty of convincing Congress to amend the NLRB [sic] cannot be overestimated. Currently, Congress is hopelessly divided on labor issues and it is unlikely that any labor law reform will be enacted.”).

63. Brudney, *supra* note 59, at 254.

64. *Am. Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 310 (1965).

65. *Id.* at 316.

by Congress.”<sup>66</sup> The Supreme Court has also directed the Board to heed congressional objectives other than those set forth in the Act.<sup>67</sup>

Although the Board has the authority to issue regulations,<sup>68</sup> it has chosen to engage in its policymaking primarily through adjudication,<sup>69</sup> a process the Supreme Court has approved.<sup>70</sup> In fact, the Board makes virtually all of its policy through adjudicating individual cases.<sup>71</sup> Accordingly, the Board essentially (though not literally) engages in rulemaking by adjudication.<sup>72</sup>

The adjudicatory method of formulating policy, however, fosters a judicial policymaking style,<sup>73</sup> and the Board has been criticized for not approaching its task as experts in labor relations would but for approaching its task like a court, and by engaging in a judicial method of reasoning.<sup>74</sup> Thus, commentators have criticized the Board for acting more like a court than an expert agency.<sup>75</sup>

### G. *The Board as a Political Body*

Though the Board acts like a court, it also resembles a political body in the sense that it seems to decide cases in a highly partisan fashion. Republican members and Republican administration boards tend to vote in favor of management, and Democratic members and Democratic administration boards tend to vote in favor of unions and employees,<sup>76</sup> and prior Board rulings are

66. *Id.* at 318.

67. *S. Steamship Co. v. NLRB*, 316 U.S. 31, 47 (1942).

68. 29 U.S.C. § 156 (2006) (“The Board shall have authority from time to time to make, amend, and rescind, in the manner prescribed by the [Administrative Procedure Act], such rules and regulations as may be necessary to carry out the provisions of this subchapter.”).

69. *See Dunn*, *supra* note 10, at 857 (noting that Board interprets Act primarily through adjudication and rarely engages in informal rulemaking); *Estreicher*, *supra* note 31, at 175 (noting that Board primarily uses adjudication to make policy); *Flynn*, *supra* note 38, at 470 n.21 (same); *Joan Flynn*, *The Costs and Benefits of “Hiding the Ball”: NLRB Policymaking and the Failure of Judicial Review*, 75 B.U. L. REV. 387, 388 (1995) [hereinafter, *Flynn, Costs and Benefits*] (same); *M. Elizabeth Magill*, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383, 1385 (2004) (same); *Tuck*, *supra* note 23, at 1153 (same).

70. *See NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294-95 (1974) (holding that Board can choose to announce new principles through adjudication rather than rulemaking). The Board’s use of adjudication to engage in policymaking has been criticized by commentators. *See, e.g.*, *Estreicher*, *supra* note 31, at 170 (criticizing Board’s use of adjudication to frequently change labor policies, and recommending use of rulemaking to overturn a prior Board rule).

71. *See Flynn*, *Costs and Benefits*, *supra* note 69, at 391 (noting that Board makes “almost all of its policy in the course of individual adjudications”).

72. *See Estreicher*, *supra* note 31, at 179 (noting that “[m]uch of what the Board presently does is, functionally, rulemaking in adjudicative clothing”).

73. *Id.* at 172.

74. *Id.*

75. *Id.* at 173; *see also Winter*, *supra* note 30, at 62 (“[E]ven in relatively elementary situations the Board has often reacted in a highly legalistic . . . way.”).

76. *See NLRB Voting Patterns — An Update*, EMP. L. ALERT (Nixon Peabody, LLP, San Francisco, Cal.), Jan. 2006, at 6, available at [http://www.nixonpeabody.com/linked\\_media/publications/ELA\\_01002006.pdf](http://www.nixonpeabody.com/linked_media/publications/ELA_01002006.pdf) (providing results of study showing that Board members tend to vote along partisan lines); *Ronald Turner*, *Ideological Voting on the National Labor Relations Board*, 8 U. PA. J.

often overturned when the political composition of the Board changes.<sup>77</sup> Thus, the Board, throughout its history, has frequently shifted between a pro-management posture and a pro-union/employee posture.<sup>78</sup> The Board's decisions therefore seem as much a product of ideology or politics as a product of applying law.<sup>79</sup>

The Board's political nature is the result of several factors. First, because of their limited terms, Board members are, unlike federal judges, more susceptible to politics and the "swings of the political process,"<sup>80</sup> presumably because of their desire for reappointment or because they want to be viewed in a favorable light by their political friends and future clients.<sup>81</sup> Second, because in recent times Board members usually have been lawyers who have represented management or unions in labor law matters, most members come to the Board with strong views on labor issues.<sup>82</sup> Third, because a different member's term expires each year, each President has the power "to reshape the Board's membership."<sup>83</sup> As a result, Board membership shifts between a Republican majority and a Democratic majority based on the current administration, and the President's power to appoint members thus has a significant impact on how Board cases will be decided.<sup>84</sup> (As a matter of custom, however, only three

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LAB. & EMP. L. 707, 712 (2006) ("[I]n 'important, complex cases,' Republican administration Boards have ruled in favor of management, and Democratic administration Boards have ruled in favor of unions and employees." (quoting William N. Cooke et al., *The Determinants of NLRB Decision-Making Revisited*, 48 INDUS. & LAB. REL. REV. 237, 254 (1995))). Professor Joan Flynn, referring to the Nixon Peabody study, has stated that "[a]n extremely striking aspect of the [study] . . . is just *how* one-sided the voting of the most recent appointees from management and union-side practice has been." Flynn, *supra* note 34, at 1411.

77. Tuck, *supra* note 23, at 1153 ("After a change in presidential administration and a corresponding change in Board membership, the new Board often simply reverses many of the prior Board's controversial decisions though [sic] adjudication.").

78. *See id.* at 1122 ("Historically, the NLRB has cycled through periods of policy change whenever the Presidency has transitioned from one party to another, regardless of which political party enters office.").

79. *See* Turner, *supra* note 76, at 711 (analyzing several areas of Board-declared law and policy and concluding that "ideology has been a persistent and, in many instances, a vote-predictive factor when the Board decides certain legal issues").

80. Winter, *supra* note 30, at 54.

81. *See, e.g.*, Flynn, *supra* note 38, at 477-78 (noting that, because of member's limited tenure, most members will return to private practice and thus have incentive to issue rulings favoring their future clients); Tuck, *supra* note 23, at 1141 (same).

82. *See* Tuck, *supra* note 23, at 1141 ("[M]ost members possess very strong viewpoints on labor policy issues, as molded by their professional experiences prior to serving on the NLRB."). The same type of argument could be made generally with respect to federal judicial appointments by the President, but the life tenure of federal judges likely lessens the role of opinions formed by judges when representing particular clients before taking the bench. *See* U.S. CONST. art. III, § 1 (noting judges "shall hold their Offices during good Behaviour"); Alexandra D. Lahav, *The Law and Large Numbers: Preserving Adjudication in Complex Litigation*, 59 FLA. L. REV. 383, 433 (2007) (observing that "federal judges are less subject to capture because they have life tenure and a professional ethos of neutrality").

83. Dunn, *supra* note 10, at 857.

84. *See* William N. Cooke & Frederick H. Gautschi III, *Political Bias in NLRB Unfair Labor*

members are from the President's party.<sup>85</sup>)

Although Congress intended the Board to act as a "Supreme Court" of labor relations,<sup>86</sup> and although Congress envisioned the Board as a nonpartisan body in the sense it would not be under the executive branch's power, commentators have argued that the Act's provision for short terms for Board members shows Congress intended the Board to be politically responsive.<sup>87</sup> This view—that Congress intended the Board to be politically responsive—is not necessarily inconsistent with Congress's intent that the Board act as a Supreme Court of labor relations and also be independent of the current administration.

Congress, by keeping the Board independent of the current administration, apparently sought to avoid the current administration from pressuring the Board to reach particular results.<sup>88</sup> This, however, does not mean Congress intended the Board to be so independent it would not be politically responsive. In fact, Congress's dissatisfaction with the courts' development of labor relations policy, the creation of an administrative agency to administer the Act, and limited terms for members each suggest that Congress intended the Board to be more "in touch" with current societal needs and popular opinion than courts had been.<sup>89</sup> Thus, while Congress intended the Board to be independent in the sense that it would be independent of the political branches, unions, and management, Congress still expected it to be politically responsive in that it would represent the public<sup>90</sup> and be responsive to its needs.<sup>91</sup>

There is, of course, a distinction between political responsiveness and recurrent political swings, though when the former becomes the latter might not always be easy to discern. Congress, however, was aware that the short term of appointment for Board members would make the Board susceptible to political swings based on changes in the presidential administration.

During the Senate hearings on what would become the NLRA, Senator Robert M. La Follette, Jr., a member of the Progressive Party at the time and a

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*Practice Decisions*, 35 INDUS. & LAB. REL. REV. 539, 549 (1982) (concluding that "the presidential appointment process has a substantial influence on the adjudication of ULP complaints").

85. See Brudney, *supra* note 59, at 244 n.109 ("[A] tradition has developed of appointing both Democrats and Republicans to the Board, with the President's party holding a three-to-two majority of the seats and also the chair."); Turner, *supra* note 76, at 714 ("As a matter of custom, and not law, no more than three of the five NLRB members may belong to the President's political party.").

86. HUTHMACHER, *supra* note 61, at 191.

87. See Estreicher, *supra* note 31, at 167 ("Congress . . . sought in an agency whose membership would change periodically with new administrations in the White House a measure of built-in flexibility, of political responsiveness."); Winter, *supra* note 30, at 54 (stating that Board members were deliberately made subject to swings of political process by giving them short terms).

88. BERNSTEIN, *supra* note 13, at 105.

89. See GORMAN & FINKIN, *supra* note 12, at 4 (describing courts' hostility to unions prior to Wagner Act).

90. See, e.g., Flynn, *supra* note 34, at 1363 (noting that Congress intended Board to represent public).

91. See Estreicher, *supra* note 31, at 167 (noting that Congress expected Board to be politically responsive).

champion of labor,<sup>92</sup> expressed concern about the short term of appointment, stating, “I would like to see [the five-year] term extended, because I would like to see this Board independent of immediate reversal of political fortune.”<sup>93</sup> The next day, Senator La Follette again raised the issue, this time when questioning Francis Biddle, chairman of the first NLRB,<sup>94</sup> stating:

The 5-year term would result in the entire membership of the Board expiring during the administration of any President who had two terms. Now, as far as the Interstate Commerce Commission and some of the other independent agencies are concerned, the Congress has provided longer terms, largely, as I believe, in an effort to assure their independence insofar as that is possible, and to prevent them from being subject to immediate political reactions at elections.<sup>95</sup>

In response, Biddle testified that, while he agreed with La Follette that the term should be longer, he noted that others were of the view that a longer term would make it difficult to find “good men” to serve.<sup>96</sup> Biddle also noted that short terms might prevent the Board from becoming “a rather formal and dead system” and getting “into a rut,” as “often happens with administrative tribunals.”<sup>97</sup> Later, Lloyd K. Garrison, a former chairman of the first NLRB,<sup>98</sup> testified that he believed five years was long enough and “that even with a 5-year term you may have some difficulty in getting highly competent people to take it on for that length of time.”<sup>99</sup> Thus, it is possible to conclude that Congress either intended the Board to be subject to political swings based on changes in the presidential administration (thereby avoiding the Board from getting “into a rut”) or at least expected the Board to be subject to such swings and considered the benefits of a short term of appointment to outweigh its detriments.

The Board’s frequent reversal of precedent, however, while perhaps not completely unanticipated by the Congress that enacted the NLRA, has led to criticism by commentators. Commentators have argued that the frequent reversal of precedent results in the Board and its body of law being viewed as unstable, making it difficult for management and labor to rely on Board precedent when determining the lawfulness of their actions, hindering stable labor relations, and even threatening the Board’s continuing relevance.<sup>100</sup>

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92. Biographical Directory of the United States Congress: Robert Marion La Follette, Jr., <http://bioguide.congress.gov/scripts/biodisplay.pl?index=L000005> (last visited Nov. 28, 2008); see also Keyserling, *supra* note 43, at 208 (noting that La Follette was strong supporter of NLRA).

93. 1 NAT’L LABOR RELATIONS BD., *supra* note 29, at 1440.

94. See BERNSTEIN, *supra* note 13, at 84 (noting that Francis Biddle became chairman of first NLRB after Lloyd K. Garrison resigned midterm).

95. 1 NAT’L LABOR RELATIONS BD., *supra* note 29, at 1467.

96. *Id.*

97. *Id.*

98. See BERNSTEIN, *supra* note 13, at 84 (noting that Lloyd K. Garrison was named first chairman of first NLRB).

99. 1 NAT’L LABOR RELATIONS BD., *supra* note 29, at 1518.

100. See Cooke & Gautschi, *supra* note 84, at 549 (“[I]nconsistency and ambiguity in interpreting legal and factual parameters in ULP cases impede stable labor-management relations. Neither party can clearly judge the appropriateness of the other party’s actions.”); Estreicher, *supra* note 31, at 170

*H. The Board and Statutory Construction*

The Board's construction of the Act is particularly important for multiple reasons. First, courts are required to defer to the Board's construction of the Act as long as it is "reasonably defensible."<sup>101</sup> Second, "the extraordinary vagueness of the NLRA"<sup>102</sup> provides the Board with ample opportunity to exercise that discretion. Third, the Board, under its "nonacquiescence" doctrine, does not treat decisions by the courts of appeals as binding precedent.<sup>103</sup> Fourth, the Board's General Counsel usually considers only Board precedent when deciding whether to issue an unfair labor practice complaint.<sup>104</sup> Fifth, an ALJ's duty is to decide cases based on Board precedent, not courts of appeals precedent.<sup>105</sup> Sixth, the great majority of Board actions are resolved at the agency level.<sup>106</sup> Seventh, because the Supreme Court hears only about one labor case a year, its impact on developing federal labor policy is necessarily limited.<sup>107</sup>

The Act does not, however, identify any particular method of statutory construction for the Board to use when interpreting the Act. This raises the issue of how the Board should go about statutory construction. To explore this issue, it is first necessary to address judicial theories of statutory construction.

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(asserting that Board's frequent reversal of precedent results in Board and its body of law being viewed as unstable, threatening Board's continuing relevance.); Tuck, *supra* note 23, at 1118 (asserting that Board's frequent overturning of precedent "undermines the stability, certainty and efficiency of [the Board's] policies. . . . [and] injures employees and employers because neither party can rely on Board precedent").

101. *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 891 (1984); *see also* *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 536 (1992) ("Like other administrative agencies, the NLRB is entitled to judicial deference when it interprets an ambiguous provision of a statute that it administers."); *NLRB v. United Food & Commercial Workers Union, Local 23*, 484 U.S. 112, 123 (1987) ("[W]e have traditionally accorded the Board deference with regard to its interpretation of the NLRA as long as its interpretation is rational and consistent with the statute."); *Ford Motor Co. v. NLRB*, 441 U.S. 488, 497 (1979) ("Of course, the judgment of the Board is subject to judicial review; but if its construction of the statute is reasonably defensible, it should not be rejected merely because the courts might prefer another view of the statute.").

102. Flynn, *Costs and Benefits*, *supra* note 69, at 393.

103. *See* Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 *YALE L.J.* 679, 681 (1989) (noting that Board asserted its "nonacquiescence" policy as early as 1940s).

104. *See* Flynn, *Costs and Benefits*, *supra* note 69, at 421 ("[T]he General Counsel does not ordinarily consider circuit law in deciding whether to issue a complaint.").

105. *See id.* ("ALJs are bound to decide cases on the basis of current Board law . . . ."); Tuck, *supra* note 23, at 1144 n.212 (noting that ALJs "are obligated to decide cases based on current Board law, regardless of circuit court decisions").

106. *See* Brudney, *supra* note 59, at 238 (noting that ninety-seven percent of Board's actions are disposed of at agency level).

107. *See* Tuck, *supra* note 23, at 1144-45 (stating that, because "on average the Supreme Court grants certiorari to only one labor case a year, it cannot possibly effectively 'police [the] federal labor policy'" (alteration in original) (quoting Flynn, *Costs and Benefits*, *supra* note 69, at 422)).

## II. THEORIES OF JUDICIAL STATUTORY CONSTRUCTION

Although “[t]he hard truth of the matter is that American courts have no intelligible, generally accepted, and consistently applied theory of statutory interpretation,”<sup>108</sup> there are two primary methods of judicial statutory construction: (1) textualism, which relies primarily and sometimes exclusively on the text of the statute, the context of the text, and canons of construction; and (2) intentionalist theories, which rely primarily on Congress’s actual or constructed intent (intentionalism) or the statute’s purpose or “spirit” (purposivism).<sup>109</sup> Of current judges, textualism is most often associated with conservative jurists such as Justice Antonin Scalia,<sup>110</sup> and, in discussing textualism, I will rely primarily on Scalia’s theory of textualism advocated in his book, *A Matter of Interpretation: Federal Courts and the Law*.<sup>111</sup> Justice Stephen Breyer, a liberal jurist, is perhaps the leading supporter of intentionalist theories,<sup>112</sup> and, in discussing such theories, I will rely primarily on the theory advocated in his book, *Active Liberty: Interpreting Our Democratic Constitution*.<sup>113</sup>

### A. Textualism

Textualists emphasize a statute’s text<sup>114</sup> and are not concerned with the legislature’s subjective intent, but only with the text’s “objective” meaning.<sup>115</sup> Textualists try to identify the meaning a reasonable person would give to the text.<sup>116</sup>

Because textualists are not seeking to discover Congress’s subjective intent, they generally reject reliance on legislative history.<sup>117</sup> Textualists believe that

108. HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 1169 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994), quoted in SCALIA, *supra* note 1, at 14.

109. See WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* 14-47 (1994) [hereinafter ESKRIDGE, *DYNAMIC STATUTORY INTERPRETATION*] (discussing textualism, intentionalism, and purposivism); ESKRIDGE ET AL., *supra* note 3, at 219-45 (discussing textualism and intentionalist theories).

110. See Caleb Nelson, *What Is Textualism?*, 91 VA. L. REV. 347, 347 (2005) (“One of the leading approaches [to statutory interpretation], championed by Justices Scalia and Thomas on the Supreme Court and by Judge Easterbrook on the Seventh Circuit, goes by the name of ‘textualism.’”).

111. See generally SCALIA, *supra* note 1, at 1-36 (advocating textualist approach to statutory construction).

112. Michael L. Culotta, Comment, *The Use of Committee Reports in Statutory Interpretation: A Suggested Framework for the Federal Judiciary*, 60 ARK. L. REV. 687, 689 (2007) (noting that Justice Breyer has emerged as leading advocate of intentionalist theories of statutory interpretation).

113. See generally BREYER, *supra* note 8, at 85-101 (advocating intentionalist approach to statutory construction).

114. Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 3 (2006).

115. Nelson, *supra* note 110, at 348.

116. See SCALIA, *supra* note 1, at 17 (noting that textualists “look for a sort of ‘objectified’ intent—the intent that a reasonable person would gather from the text of the law”).

117. See, e.g., *id.* at 29-37 (rejecting reliance on legislative history as authoritative meaning of statute).

legislative history is not law<sup>118</sup> and that reliance on legislative history also promotes rather than discourages judges' use of personal policy preferences to decide cases.<sup>119</sup> Textualists believe that a statute's legislative history is usually so extensive that support can be found for any of the competing interpretations of a statute.<sup>120</sup> Textualists argue that intentionalist theories, which they believe give judges too much discretion to interpret a statute based on the judge's own "objectives and desires," are "not compatible with democratic theory."<sup>121</sup> According to the textualist, a theory other than textualism permits judges to engage in lawmaking.<sup>122</sup> Thus, textualism supports the notion that the United States is "a government of laws and not of men."<sup>123</sup>

Textualists' concern with intentionalist theories enabling judges to reach results based on their own policy preferences is supported by Professor William Eskridge's criticism of intentionalist theories.<sup>124</sup> Eskridge argues that legislators rarely had a specific intent about a particular issue that confronts a court; the historical record rarely discloses the specific intent even when they had one; and it is difficult if not impossible to attribute a single intent to each body of Congress and to then match it up with the intent of a President who signed the bill.<sup>125</sup>

Also, Eskridge argues that modern theories of how laws are created suggest that identifying a statute's purpose is as difficult as determining congressional intent on a particular issue, because legislators might have incentives to not disclose a statute's real purpose.<sup>126</sup> Furthermore, a statute's purpose is often too general to be helpful in deciding specific cases.<sup>127</sup> Additionally, "the political process all but ensures a complex array of purposes, none of which will be

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118. *See id.* at 29-30 ("My view that the objective indication of the words, rather than the intent of the legislature, is what constitutes the law leads me, of course, to the conclusion that legislative history should not be used as an authoritative indication of a statute's meaning.").

119. *See id.* at 35 (asserting that judges' reliance on legislative history "has facilitated rather than deterred decisions that are based upon the courts' policy preferences, rather than neutral principles of law").

120. *See id.* at 36 ("In any major piece of legislation, the legislative history is extensive, and there is something for everybody.").

121. SCALIA, *supra* note 1, at 17-18, 22 ("The *practical* threat is that, under the guise or even the self-delusion of pursuing unexpressed legislative intents, common-law judges will in fact pursue their own objectives and desires, extending their lawmaking proclivities from the common law to the statutory field."); *id.* at 22 ("It is simply not compatible with democratic theory that laws mean whatever they ought to mean, and that unelected judges decide what that is.").

122. *See id.* at 25 (asserting that theory of statutory construction other than textualism "render[s] democratically adopted texts mere springboards for judicial lawmaking").

123. *Id.*

124. ESKRIDGE, *DYNAMIC STATUTORY INTERPRETATION*, *supra* note 109, at 16.

125. *Id.*

126. *See id.* at 27 (stating that modern theories of how laws are created "suggest[] that identifying the actual or even conventional purpose of a statute is just as difficult as identifying the actual or conventional intent of the legislature, or perhaps even more so, since legislators may have incentives to obscure the real purposes of the statute").

127. *See* ESKRIDGE ET AL., *supra* note 3, at 230 (asserting that statute's attributed policy purpose is often "too general and malleable" to dictate result in particular case).



desired at any price, all of which will be compromised, and some of which may undercut others.”<sup>128</sup>

Textualists often disagree about the basis for textualism. Some base textualism on the theory that only the statutory text is law.<sup>129</sup> Other textualists argue that the text is the best evidence of what Congress intended (making them similar to intentionalists in purpose but not in means).<sup>130</sup>

In determining how a reasonable person would interpret the statutory text, textualists usually consider the context in which the language is used.<sup>131</sup> Textualists are also known for using canons of construction to assist with statutory construction.<sup>132</sup>

### B. *Intentionalist Theories (“Intentionalism” and “Purposivism”)*

Intentionalist theories include “intentionalism” and “purposivism,” which are distinct, but related, theories of statutory construction.<sup>133</sup> They are similar in that each permits a judge to go beyond the semantic context of a statute’s text and consider other evidence of congressional intent to ascribe meaning to the text.

Traditional intentionalist theory permitted judges to construe a statute contrary to a text’s clear meaning as derived from its semantic context if that meaning deviated severely from congressional intent, as determined by evidence other than the text’s semantic context.<sup>134</sup> Intentionalist theories currently advocated by jurists generally only permit reliance on evidence of congressional intent beyond the semantic context of a statute’s text if an analysis of the text’s semantic context leaves the text’s meaning unclear.<sup>135</sup> Also, even if the text’s

128. ESKRIDGE, *DYNAMIC STATUTORY INTERPRETATION*, *supra* note 109, at 27.

129. *See, e.g.*, SCALIA, *supra* note 1, at 22 (“The text is the law, and it is the text that must be observed.”); *id.* at 29 (asserting that statute’s text, and not legislature’s intent, is “the law”); Carlos E. González, *Reinterpreting Statutory Interpretation*, 74 N.C. L. REV. 585, 595 (1996) (“The pure textualist considers statutes to be commands from the sole politically legitimate statutory law-creating body. The role of the judge is simply to apply that command verbatim. Interpretation that goes beyond statutory text operates in an extra-legal domain.”).

130. *See* González, *supra* note 129, at 597 (noting that some textualists look to statutory text not as exclusive source of law but as best device for ascertaining intent of legislature); *see also* William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1480 n.3 (1987) (noting that textualists can argue that text is “the best evidence of what the legislature actually meant when it enacted the statute”).

131. *See* SCALIA, *supra* note 1, at 23-24 (noting how interpretation of phrase “uses . . . a firearm” in particular criminal statute should be interpreted in accordance with context of statute).

132. *Id.* at 25.

133. *See* ESKRIDGE ET AL., *supra* note 3, at 221-30 (classifying and describing numerous categories of intentionalist theories of interpretation).

134. *See* John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 72 (2006) (pointing out established Supreme Court practice of giving primacy to congressional purpose over statutory text when text “deviated sharply from its purpose”).

135. *See* BREYER, *supra* note 8, at 85 (noting that intentionalist theories apply “in difficult cases of interpretation in which language is not clear”). One of the effects of Justice Scalia’s so-called “new textualism” is general agreement “that neither citizens nor judges should consider legislative history to

semantic context leaves its meaning unclear, contemporary intentionalists or purposivists still give weight to the semantic context of ambiguous statutory language when determining its meaning.<sup>136</sup>

Intentionalism and purposivism differ in the level of generality in which they characterize Congress's intent.<sup>137</sup> Intentionalism seeks to determine how the enacting legislature would have decided the issue of interpretation presented to the court.<sup>138</sup> Thus, intentionalism requires the court "to discover or replicate the legislature's original intent as the answer to an interpretive question."<sup>139</sup> Purposivism provides that judges should identify the statute's purpose and then determine which interpretation would best effectuate that purpose.<sup>140</sup> Henry Hart and Albert Sacks advocated purposivism in their famous legal process materials.<sup>141</sup>

Intentionalist theories maintain that overemphasis on text "divorc[es] law from life" and thereby harms those the law was intended to benefit.<sup>142</sup> According to proponents of intentionalist theories, an intentionalist approach helps promote sound policy because such an approach interprets a statute to match its overall policy objectives.<sup>143</sup> Supporters of intentionalist theories believe that this method of interpretation, which implements the public's will, is consistent with democratic principles.<sup>144</sup> Not surprisingly, intentionalist theories look at the consequences of a particular statutory construction because the advocates of such theories consider a relevant question to be whether Congress would have wanted a statute that produces the consequences that result from a particular interpretation.<sup>145</sup>

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be *authoritative* in the same way the statutory text is authoritative: the latter is and has the force of *law*; the former is, at best, evidence of what law means." ESKRIDGE ET AL., *supra* note 3, at 238.

136. Manning, *supra* note 134, at 76; *see also* BREYER, *supra* note 8, at 88 ("The judge will ask how this person (real or fictional), aware of the statute's *language*, structure, and general objectives (actually or hypothetically), would have wanted a court to interpret the statute in light of present circumstances in the particular case." (emphasis added) (emphasis omitted)); Molot, *supra* note 114, at 3 (noting that purposivists, in addition to textualists, place great weight on statutory text).

137. ESKRIDGE ET AL., *supra* note 3, at 229.

138. Martin H. Redish & Theodore T. Chung, *Democratic Theory and the Legislative Process: Mourning the Death of Originalism in Statutory Interpretation*, 68 TUL. L. REV. 803, 813 (1994).

139. ESKRIDGE, DYNAMIC STATUTORY INTERPRETATION, *supra* note 109, at 14.

140. *Id.* at 25-26.

141. ESKRIDGE ET AL., *supra* note 3, at 229; HART & SACKS, *supra* note 108, at 1374.

142. BREYER, *supra* note 8, at 85 ("[O]veremphasis on text can lead courts astray, divorcing law from life—indeed, creating law that harms those whom Congress meant to help."); *id.* at 100 (arguing that use of intentionalist theories "means that laws will work better for the people they are presently meant to affect" as "[l]aw is tied to life, and failure to understand how a statute is so tied can undermine the very human activity that the law seeks to benefit").

143. *See id.* at 101 (asserting that intentionalist theories "help[] statutes match their means to their overall public policy objectives, a match that helps translate the popular will into sound policy").

144. *Id.* at 99.

145. *See id.* at 88 (noting that judge following intentionalist theory will try to determine how Congress "would have wanted a court to interpret the statute in light of present circumstances in the particular case" (emphasis omitted)).

An important distinction between the two intentionalist theories is that purposivism, more so than intentionalism, has a dynamic quality. Because purposivism states Congress's purpose in more general terms than identifying what Congress's intent was or would have been with respect to the particular issue, purposivism allows statutory interpretation to be more flexible and to thereby change a statute's meaning in response to new circumstances.<sup>146</sup> Therefore, purposivism, while still originalist because it is tied to the enacting Congress's purpose,<sup>147</sup> promotes a dynamic approach to statutory interpretation.<sup>148</sup> For example, purposivism would allow for an interpretation that the enacting Congress would not have reached at the time it enacted the statute, if circumstances have changed that would now make Congress's original intent on the issue contrary to the statute's purpose.

Intentionalism generally does not permit a statute's meaning to change over time, because the judge will be seeking to determine how the enacting Congress wanted the statute interpreted. Even when there is no specific congressional intent on a particular issue, intentionalists will generally employ so-called imaginative reconstruction under which "a judge ought to put himself in the shoes of the enacting Congress and determine what it *would have done* had it squarely faced the novel issue."<sup>149</sup>

Justice Breyer, who is perhaps more of a purposivist than an intentionalist,<sup>150</sup> has a version of imaginative reconstruction that seemingly conforms to purposivism's dynamic quality. Breyer believes a judge should ask how a "reasonable member of Congress" . . . would have wanted a court to interpret the statute *in light of present circumstances* in the particular case."<sup>151</sup> Like purposivism generally, this version of imaginative reconstruction appears to provide more flexibility than intentionalism's version because the judge can seemingly update (and thus alter) the views of the enacting Congress based on changed circumstances.

### III. ADMINISTRATIVE AGENCIES AND STATUTORY CONSTRUCTION

Although considerable attention has been given to how judges should construe statutes<sup>152</sup> and to how much deference courts should give to agency

146. ESKRIDGE, DYNAMIC STATUTORY INTERPRETATION, *supra* note 109, at 26 (stating that "[b]ecause an inquiry into legislative purpose is set at a higher level of generality than an inquiry into specific intentions, statutory interpretation becomes more flexible and is better able to update statutes over time," and observing that purposivism therefore "allows a statute to evolve to meet new problems").

147. See Eskridge, *supra* note 130, at 1480 (noting that purposivism is an "originalist" approach).

148. See ESKRIDGE, DYNAMIC STATUTORY INTERPRETATION, *supra* note 109, at 142 (noting that "[l]egal process theory invites dynamic statutory interpretation").

149. González, *supra* note 129, at 608 (emphasis added).

150. See Cass R. Sunstein, *Justice Breyer's Democratic Pragmatism*, 115 YALE L.J. 1719, 1720 (2006) (noting that Justice Breyer's theory is rooted in purposivism espoused in legal process materials of Henry Hart and Albert Sacks).

151. BREYER, *supra* note 8, at 88 (emphasis omitted) (emphasis added).

152. See Cross, *supra* note 2, at 1971 ("The proper method of interpreting statutes . . . has seen

constructions of statutes,<sup>153</sup> less attention has been given to how administrative agencies should go about the task of statutory construction. This is a deficiency in need of correction, because, as former NLRB Chairman William B. Gould IV once stated, “[a] permissible interpretation [of a statute] is quite different . . . from a preferable interpretation.”<sup>154</sup>

Should a member of an administrative agency who is tasked with statutory construction select a particular method of construction and then consistently apply that method, much like a judge (hopefully) would do? If so, what method should an agency actor adopt?

A likely candidate would be one of the methods used by judges. For example, a commentator has noted that if courts adopt a particular method, agencies might be likely to adopt that method as well.<sup>155</sup> In fact, another commentator has recognized that a “prevailing assumption” is that administrative agencies “can and should employ the judicial canons of statutory interpretation.”<sup>156</sup> With respect to independent agencies such as the NLRB, they are “designed to emulate the appellate courts,”<sup>157</sup> which might lead one to believe they should act like appellate courts when construing statutes.

But the issue will be complicated by any fundamental differences between courts and administrative agencies. If rules of statutory construction should be based in a theoretical foundation,<sup>158</sup> any differences might justify different approaches to statutory construction.

Thus, to decide how administrative agencies ought to construe statutes, and whether they should approach statutory construction like a court, one must first discover the institutional role of administrative agencies, and then decide whether that role is different from a court’s. If it is, judicial theories of statutory construction—which are each premised on the courts’ role in our constitutional structure<sup>159</sup>—are probably not appropriate models for administrative agencies.

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enormous theoretical discussion . . .”).

153. See William R. Andersen, *Chevron in the States: An Assessment and a Proposal*, 58 ADMIN. L. REV. 1017, 1018 (2006) (“The *Chevron* doctrine has generated an enormous volume of critical literature in the twenty-plus years since its formulation.”).

154. *Myth, Inc.*, 326 N.L.R.B. 136, 139 n.22 (1998) (Gould, Member, dissenting).

155. Rubin, *supra* note 3, at 2 (“If the courts adopt textualism, purposivism, or some other approach to their general interpretive style, agencies may be likely to follow suit. As a result, the theory of interpretation that the courts adopt may tend to be the theory that dominates agency adjudication as well.”).

156. Trevor W. Morrison, *Constitutional Avoidance in the Executive Branch*, 106 COLUM. L. REV. 1189, 1192 (2006).

157. Verkuil, *supra* note 38, at 267.

158. See González, *supra* note 129, at 590 (“Rules of statutory interpretation . . . must be rooted in a solid theoretical foundation.”). As one commentator stated with respect to statutory interpretation by courts: “Before deciding how the federal courts ought to interpret statutes, one must first discover the normatively proper institutional role of the federal courts and how the relationship between the federal courts and Congress ought to be structured.” *Id.*; see also Jerry Mashaw, *As if Republican Interpretation*, 97 YALE L.J. 1685, 1686 (1988) (“Any theory of statutory interpretation is at base a theory about constitutional law.”).

159. Mashaw, *supra* note 158, at 1686.

*A. The Difference Between Administrative Agencies and Courts*

Institutionally, administrative agencies are unlike courts.<sup>160</sup> A fundamental difference is that administrative agencies, more so than courts, legitimately make policy choices.<sup>161</sup> For example, the Supreme Court in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,<sup>162</sup> approved of an agency's statutory construction that involved "reconciling conflicting policies."<sup>163</sup> The Court has acknowledged that filling in the gaps of ambiguous statutory terms "involves difficult policy choices that agencies are better equipped to make than courts."<sup>164</sup> In contrast, many persons believe a court's role when construing statutes should not involve assigning weight to conflicting legislative purposes to answer the interpretive question presented.<sup>165</sup> Also, whereas courts are often viewed as protecting individual rights and limiting governmental power, agencies are viewed as agents of governmental change.<sup>166</sup>

An agency should also take into account circumstances that have changed since the adoption of a statute,<sup>167</sup> an approach many judicial theories of statutory construction do not allow. In fact, a commentator has suggested that agencies, unlike courts, must take into account changing circumstances or risk being viewed as ineffective.<sup>168</sup> A dynamic approach by agencies to statutory construction was arguably approved by the Supreme Court in *Chevron*: "An initial agency interpretation is not instantly carved in stone. On the contrary, the agency . . . must consider varying interpretations and the wisdom of its policy on

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160. Garrett, *supra* note 3, at 17.

161. A notable exception to the general rule that courts are not expected to make policy choices is the courts' power to make common law. See MELVIN ARON EISENBERG, *THE NATURE OF THE COMMON LAW* 26-37 (1988) (arguing that judges can legitimately implement variety of policy decisions when creating common law).

162. 467 U.S. 837 (1984).

163. *Chevron*, 467 U.S. at 865.

164. *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005).

165. See Winter, *supra* note 30, at 58 ("It would seem to many persons quite unjudicial for a court to undertake to weigh and choose between . . . conflicting legislative purposes . . . and to attempt, by subordinating some purposes to others in concrete cases, to answer the statutory questions posed.").

166. See Mashaw, *supra* note 3, at 517-18 ("In the American constitutional machine, . . . courts have long been viewed as rights-protecting, institutional brakes, while Executive departments and administrative agencies are institutional accelerators."); see also Verchick, *supra* note 5, at 863 ("Agencies are delegated authority with the understanding that they will use it. Administrators should, therefore, favor regulatory action that seeks in broad and robust ways the fulfillment of congressional will.").

167. See Peter L. Strauss, *When the Judge Is Not the Primary Official with Responsibility to Read: Agency Interpretation and the Problem of Legislative History*, 66 CHI.-KENT L. REV. 321, 334 (1990) ("The processes by which agencies generate statutory readings permit, yet tend to smooth, understanding complex, interdependent, and intricate statutory schemes and adapting them to the changing circumstances of society and of the legal order as a whole.").

168. Mashaw, *supra* note 3, at 518 (noting that, whereas "judicial legitimacy is more often called into question by activism than by avoidance," agencies "that are unresponsive to new issues by providing reinterpretation of statutory terms . . . are likely to be viewed as ineffective, and to that degree, illegitimate").

a continuing basis.”<sup>169</sup>

As a result of an agency’s legitimate policymaking role, it acts like a quasi legislature, even though agencies technically do not “legislate,”<sup>170</sup> and the Supreme Court has held that this role is constitutional. Though the Constitution provides that “[a]ll legislative Powers herein granted shall be vested in a Congress of the United States,”<sup>171</sup> Congress can delegate powers to agencies as long as it lays down by statute an “intelligible principle” to guide and restrict the agency’s exercise of delegated discretion.<sup>172</sup>

An agency’s policymaking function extends to its role as the “authoritative interpreter”<sup>173</sup> of the statute it administers. Under *Chevron*, an agency’s construction of an ambiguous statute will be deferred to by the courts as long as it is a permissible construction and “a reasonable policy choice for the agency to make.”<sup>174</sup> Although at one time it was questionable whether *Chevron* deference applied to so-called “pure question[s] of statutory construction,” as opposed to the application of a statutory provision to particular facts,<sup>175</sup> *Chevron* deference is now generally considered to apply to such questions.<sup>176</sup> Thus, *Chevron* permits agencies, when choosing between permissible constructions of an ambiguous statutory term, to select the construction based on the agency’s view of wise policy, as long as the policy choice is “reasonable.”<sup>177</sup> Also, although *Chevron*

169. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 863-64 (1984).

170. *See Whitman v. Am. Trucking Ass’ns, Inc.*, 531 U.S. 457, 472 (2001) (stating that Constitution permits no delegation of legislative power to agency).

171. U.S. CONST. art. I, § 1.

172. *Mistretta v. United States*, 488 U.S. 361, 372 (1989) (internal quotation marks omitted) (quoting *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928)). *See generally* Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1819-21 (1996) (discussing demise of nondelegation doctrine—which prohibits Congress from delegating its legislative powers to other branches of government—in context of delegations to administrative agencies).

173. *See Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 983 (2005) (stating that administrative agency that administers statute is “the authoritative interpreter (within the limits of reason)” of statute).

174. *Id.* at 986 (quoting *Chevron*, 467 U.S. at 845).

175. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 (1987) (suggesting that *Chevron* deference does not apply to “a pure question of statutory construction” and is limited to application of statutory provision to particular set of facts).

176. *See NLRB v. United Food & Commercial Workers Union, Local 23*, 484 U.S. 112, 133-34 (1987) (Scalia, J., concurring) (suggesting that *Chevron* analysis applies to “pure question of statutory construction” (quoting *Cardoza-Fonseca*, 480 U.S. at 446)); *Nationwide Mut. Ins. Co. v. Cisneros*, 52 F.3d 1351, 1359 n.2 (6th Cir. 1995) (rejecting argument that *Chevron* deference does not apply to questions of pure statutory construction); Melissa Hart, *Skepticism and Expertise: The Supreme Court and the EEOC*, 74 FORDHAM L. REV. 1937, 1942 n.13 (2006) (noting that Justice Stevens’s suggestion in *Cardoza-Fonseca* that *Chevron* deference does not apply to questions of pure statutory construction “has been somewhat ignored both in the courts and among scholars”). On the sometimes difficult distinction between the “interpretation” and “application” of statutes, *see* KENT GREENAWALT, LEGISLATION: STATUTORY INTERPRETATION: 20 QUESTIONS 18 (1999), and Michael Herz, *Deference Running Riot: Separating Interpretation and Lawmaking Under Chevron*, 6 ADMIN. L.J. AM. U. 187, 222-23 (1992).

177. Whether the Administrative Procedure Act’s (“APA”) arbitrary and capricious standard also applies to an agency’s statutory construction is a more complicated question, which is beyond the

did not address the issue, the Supreme Court subsequently made it clear that *Chevron* deference applies not only to agency rulemaking but also to statutory construction made during agency adjudication.<sup>178</sup>

In sum, administrative agencies play a different role in our governmental structure than courts. Administrative agencies are expected to make policy choices much more so than courts, a role that has been upheld by the Supreme Court.<sup>179</sup>

*B. Administrative Agencies and Judicial Models of Statutory Construction*

The different roles played by administrative agencies and courts in our governmental structure does not, of course, bode well for judicial theories of statutory construction being suitable to agencies.<sup>180</sup> If an agency's role, within the confines of the discretion provided in *Chevron*, is to make policy choices, it becomes clear that none of the theories of judicial statutory construction currently advanced by jurists is an appropriate theory for administrative agencies.

For example, textualism is designed to implement the understanding a reasonable person would have of the statute from reading its text, a task different from the policymaking role provided to the agency. Similarly, intentionalism's emphasis on trying to divine how the enacting legislature would have decided the particular issue does not comport with the agency's policymaking role. If Congress intended the administrative agency to employ textualism or intentionalism, it would have given the primary interpretive role to courts, who are experts in those methods of interpretation. The fact that Congress gives an agency policymaking power suggests Congress desires something other than textualism or intentionalism.

Also, to the extent textualism is premised solely on the legislature being the supreme lawmaking body, that rationale has less applicability to administrative agencies, because Congress has delegated quasi-legislative powers to them. Likewise, to the extent intentionalism is premised on enforcing Congress's will, that rationale does not support the use of intentionalism by administrative agencies because of the agency's delegated quasi-legislative powers.

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scope of this Article. *See generally* 5 U.S.C. § 706 (2006) (providing arbitrary and capricious standard of review); Ronald M. Levin, *The Anatomy of Chevron: Step Two Reconsidered*, 72 CHI.-KENT L. REV. 1253, 1254-55 (1997) (proposing that APA's "arbitrary and capricious" standard and *Chevron*'s step two are identical); Michael C. Harper, *Judicial Control of the National Labor Relations Board's Lawmaking in the Age of Chevron and Brand X*, 89 B.U. L. REV. 189, 210 (2009) (arguing that arbitrary and capricious standard should, and does, apply to agency statutory construction made in adjudications as well as in rulemaking).

178. *See* Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 574 (1988) (applying *Chevron* deference to adjudication by agency).

179. Whether this policymaking role for administrative agencies is in fact constitutional is an issue beyond the scope of this Article.

180. *See, e.g.*, Mashaw, *supra* note 3, at 521 (concluding that courts and administrative agencies should approach statutory construction differently); Verchick, *supra* note 5, at 848 (same).

Thus, both textualism and intentionalism fail as models for agency statutory construction because they are premised on the interpreting body simply seeking to determine what the law already is. Because administrative agencies have been given the power to act as a quasi legislature within the confines of *Chevron* deference, the model of statutory construction for them must reflect this role.

Purposivism is more promising. Purposivism, with its greater flexibility than intentionalism and its ability to update statutes to reflect changing circumstances, would enable an administrative agency to engage in its intended policymaking role. Nevertheless, a modern purposivist approach like Breyer's that is premised on asking how a reasonable member of Congress "would have wanted a court to interpret the statute in light of present circumstances in the particular case"<sup>181</sup> is not a perfect fit. Such an approach asks the agency to determine how Congress would have wanted the matter decided, which, like intentionalism's use of "imaginative reconstruction," denies the agency the policymaking discretion it is granted. Also, current purposivism seems to give substantial weight to the statute's text, even when the statutory language does not clearly answer the interpretive question,<sup>182</sup> which would likewise improperly constrain the agency's policymaking discretion. Thus, none of the judicial models of statutory construction currently in use appears to be a perfect fit for administrative agencies.

### C. *Theories of Administrative Agency Statutory Construction*

Not until recently have commentators started to give substantial attention to how administrative agencies should approach statutory construction. Prior to the recent exploration of the issue, the attention given to the issue was sporadic and limited.

In 1990, Professor Peter L. Strauss published an article in which he argued that administrative agencies should rely on legislative history to construe statutes, regardless of one's opinion as to whether judges should.<sup>183</sup> In 1994, Professor Eskridge, in his book *Dynamic Statutory Interpretation*, noted that the *Chevron* opinion (with its acknowledgement that agencies appropriately engage in policymaking when choosing between permissible constructions of a statute and that agencies can change position as circumstances change) was describing the purposivism of Henry Hart and Albert Sacks's legal process theory.<sup>184</sup> Eskridge noted, however, an important limitation legal process followers would likely place on administrative agency statutory construction: identifying a

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181. BREYER, *supra* note 8, at 88 (emphasis omitted).

182. Manning, *supra* note 134, at 76; *see also* BREYER, *supra* note 8, at 88 ("The judge will ask how this person (real or fictional), aware of the statute's *language*, structure, and general objectives (actually or hypothetically), would have wanted a court to interpret the statute in light of present circumstances in the particular case." (emphasis added) (emphasis omitted)); Molot, *supra* note 114, at 3 (noting that purposivists, in addition to textualists, place great weight on statutory text).

183. Strauss, *supra* note 167.

184. ESKRIDGE, *DYNAMIC STATUTORY INTERPRETATION*, *supra* note 109, at 164.



statute's purpose is the judicial branch's domain.<sup>185</sup>

In 1998, Professor Cass Sunstein, as a result of agencies' dynamic role, likened administrative agencies to common-law courts.<sup>186</sup> As Sunstein acknowledged, however, administrative agencies are not completely comparable to common-law courts, because administrative agencies can more legitimately undertake rapid change than courts.<sup>187</sup> More so than administrative agencies, common-law judges are constrained by precedent.<sup>188</sup>

Recently, commentators have started to pay substantial attention to the issue of agency statutory construction. For example, Professor Mashaw, while not articulating or defending any particular method of agency statutory construction, set forth some normative propositions about how an agency should interpret statutes differently from a court as a result of its constitutional role and the practical necessities of administration.<sup>189</sup> Mashaw believes agencies should use legislative history as a primary interpretive guide; he thinks courts should not.<sup>190</sup> Agencies should interpret so as to give energy to their programs; courts should not.<sup>191</sup> Agencies should engage in activist lawmaking; courts should not.<sup>192</sup> Courts should seek to give coherence to the legal order; agencies should not.<sup>193</sup> Agencies should pay constant attention to the contemporary political milieu; courts should not.<sup>194</sup>

Dean Edward Rubin has recently argued that William Eskridge's theory of dynamic statutory interpretation, which would permit judges to alter the meaning of statutes over time, should be used by administrative agencies.<sup>195</sup> According to Eskridge's theory, statutory construction should involve the interpreter reconciling three different perspectives: (1) the textual perspective, which refers to the statutory text; (2) the historical perspective, which refers to the original legislative expectations; and (3) the evolutive perspective, which refers to a statute's evolution and its present context, taking into account any material changes in the societal and legal environment.<sup>196</sup>

Under Eskridge's theory, the traditional understanding of the "rule of law" requires that the statute's text be the most important interpretative factor, and

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185. *See id.* ("Legal process theory should not be sympathetic to *Chevron* deference when the agency's interpretation gets the statutory purpose wrong . . . Figuring out statutory purpose . . . [is] the traditional strength[] of judges, who are statutory generalists; *Chevron*-mandated deference to administrators (statutory specialists) in such instances is not appropriate.").

186. Sunstein, *supra* note 3, at 1019.

187. *Id.* at 1069.

188. *See generally* EISENBERG, *supra* note 161, at 47-49 (discussing importance of stare decisis in common-law judging).

189. Mashaw, *supra* note 3, at 503.

190. *Id.* at 522.

191. *Id.*

192. *Id.*

193. *Id.*

194. Mashaw, *supra* note 3, at 522.

195. Rubin, *supra* note 3, at 5.

196. Eskridge, *supra* note 130, at 1483.

thus if the statute's text clearly answers the interpretive question, it will generally be the most important factor.<sup>197</sup> The more detailed the text, the greater weight to be given to textual considerations.<sup>198</sup> When, however, the statute's language is general, the textual perspective should be of little importance.<sup>199</sup> The text will generally control if the statute is recent and the context of enactment discloses "considered legislative deliberation and decision on the interpretive issue."<sup>200</sup>

Because the legislature is the supreme lawmaking body, the next most important interpretive consideration for Eskridge is the historical expectation of the legislature.<sup>201</sup> The more detailed the text, the greater weight that should be given to the historical expectation perspective.<sup>202</sup> When, however, society's needs and values have substantially changed since the statute was enacted, the historical perspective should not be given great weight.<sup>203</sup>

In those cases in which neither the textual perspective nor the historical perspective clearly answers the interpretive question, and the societal and legal contexts since enactment have changed materially, the evolutive perspective will control.<sup>204</sup> In particular, the evolutive perspective should control when the statute is old, the statute's text is generally phrased, and the original legislative expectations have been overtaken by subsequent material changes in society and law.<sup>205</sup>

When the evolutive perspective controls, Eskridge believes a statute should be interpreted dynamically, meaning it should be interpreted "in light of [its] present societal, political, and legal context."<sup>206</sup> Nevertheless, the evolutive perspective will not control if the textual perspective and historical perspective support another interpretation.<sup>207</sup> Whereas the textual perspective is based on "rule of law" values, and the historical perspective is based on the assumption that the legislature is the supreme lawmaking body, the evolutive principle is based on values of justice.<sup>208</sup>

Rubin, in support of his argument that Eskridge's theory of dynamic statutory interpretation should be used by administrative agencies, argues that an agency is expected to monitor a particular subject matter area continuously and adjust its rules when necessary.<sup>209</sup> He believes that an objection to an agency's use of dynamic statutory interpretation is, in essence, simply an objection to the administrative state, a position that takes issue with

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197. *Id.*

198. *Id.* at 1496.

199. *Id.* at 1488.

200. *Id.* at 1496.

201. Eskridge, *supra* note 130, at 1483-84.

202. *Id.* at 1496.

203. *Id.* at 1488.

204. *Id.* at 1496.

205. *Id.* at 1481, 1484.

206. Eskridge, *supra* note 130, at 1479.

207. *Id.* at 1495.

208. *Id.* at 1494 (internal quotation marks omitted).

209. Rubin, *supra* note 3, at 3.

administrative agencies acting as policymakers.<sup>210</sup>

Rubin notes that the primary objections to dynamic statutory interpretation do not apply to agency statutory construction.<sup>211</sup> For example, whereas an objection to dynamic statutory interpretation is that it violates separation of powers because it allows courts to alter the original intent of the statute,<sup>212</sup> this argument does not apply to administrative agencies because Congress will usually explicitly authorize agency rulemaking.<sup>213</sup> The agency is not infringing on Congress's powers when it is engaging in a task Congress expected it to perform.<sup>214</sup>

With respect to arguments that dynamic statutory interpretation is "countermajoritarian," Rubin believes that such a method of construction by an agency comports with majoritarianism because Congress authorized the agency to interpret the statute dynamically by granting it rulemaking power.<sup>215</sup> In fact, Rubin believes that denying an agency the power to engage in dynamic statutory construction would frustrate the majoritarian process.<sup>216</sup>

With respect to the public-choice argument that legislation is a bargain among competing interest groups, and that courts must enforce the bargain, Rubin believes that because agency rulemaking inevitably involves dynamic statutory interpretation, dynamic statutory interpretation was part of the bargain.<sup>217</sup> Additionally, whereas it is asserted that courts are not competent to make public policy, dynamic statutory interpretation involves an agency acting within its area of expertise.<sup>218</sup>

Rubin, however, does not appear to be arguing that Eskridge's theory of dynamic statutory interpretation should be applied by administrative agencies exactly the way a court would apply it. Rubin argues that *Chevron's* step one, where it is determined if Congress's intent is clear on the particular issue of interpretation (hereinafter referred to as "*Chevron's* step one"), is "essentially equivalent" to applying Eskridge's textual and historical perspectives.<sup>219</sup> *Chevron's* step two, which is reached if Congress's intent is not clear, and which permits an administrative agency to choose a construction that is reasonable (hereinafter referred to as "*Chevron's* step two"), is "essentially equivalent" to the evolutive perspective, according to Rubin.<sup>220</sup> This would suggest that, under Rubin's argument, the textual and historical perspectives should have no role in an agency's choice between two permissible constructions of an ambiguous

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210. *Id.* at 13.

211. *Id.* at 4-7.

212. *Id.* at 5.

213. *Id.*

214. Rubin, *supra* note 3, at 5.

215. *Id.* at 6.

216. *Id.*

217. *Id.*

218. *Id.*

219. Rubin, *supra* note 3, at 8; *see also* *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984) (describing step one).

220. Rubin, *supra* note 3, at 8; *see also* *Chevron*, 467 U.S. at 843 (describing step two).

statutory provision, though Rubin's use of the phrase "essentially equivalent" leaves some doubt on this issue.

Professor Richard J. Pierce, Jr., has also recently addressed the issue of agency statutory construction. Pierce argues that an administrative agency, when acting within the confines of *Chevron* deference and choosing between competing constructions, can only make that choice by engaging in policymaking.<sup>221</sup> According to Pierce, this is not really interpretation at all.<sup>222</sup> Rather, the agency is simply choosing the permissible construction that furthers the statute's purpose.<sup>223</sup> The basis for Pierce's conclusion that the agency's task is to make a policy choice (i.e., not interpret the statute) when choosing between permissible constructions is premised on the Supreme Court's language in *Chevron* in which the Court seemingly equated an agency's choice to a policy decision.<sup>224</sup>

Pierce, however, by acknowledging that the agency must seek to further the statute's purpose, is conceding that the agency must engage in interpretation to an extent, provided the statute's purpose is not clearly identified in the statute or clearly identified by the judiciary. The task of attributing a purpose to a statute is itself interpretive.<sup>225</sup> Pierce also acknowledges that an agency must engage in interpretation to determine which decisional factors the statute permits the agency to consider when making its policy choice.<sup>226</sup> Pierce further notes that, because a reviewing court will apply *Chevron*'s step one, a "prudent" agency will engage in statutory interpretation to determine which constructions of the statute are permissible under *Chevron*.<sup>227</sup>

Professor Mashaw has recently responded to Pierce's article.<sup>228</sup> Mashaw takes issue with Pierce's interpretation of *Chevron* and believes *Chevron* should not be read as meaning that interpretation should play no role when an agency chooses between permissible constructions of a statute.<sup>229</sup> Mashaw believes that the process of an agency construing a statute is so entwined with identifying the statute's purpose and determining why a particular choice best carries out that purpose that any policy choice is inevitably a process of interpretation.<sup>230</sup>

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221. Pierce, *supra* note 3, at 200.

222. *Id.*; see also Elizabeth V. Foote, *Statutory Interpretation or Public Administration: How Chevron Misconceives the Function of Agencies and Why It Matters*, 59 ADMIN. L. REV. 673, 722-23 (2007) (asserting that *Chevron* misconceives agency work as statutory construction instead of public administration).

223. Pierce, *supra* note 3, at 204-05.

224. *Id.* at 199-201.

225. See, e.g., Edward Rubin, *It's Time to Make the Administrative Procedure Act Administrative*, 89 CORNELL L. REV. 95, 141 (2003) ("There is no question that the agency, in carrying out its statutory authority to make rules, is interpreting the statute itself, because its rules are supposed to implement the statute's policy.").

226. Pierce, *supra* note 3, at 204.

227. *Id.* at 202.

228. Mashaw, *supra* note 6, at 898.

229. *Id.* at 896-97.

230. *Id.* at 898.

Mashaw also disagrees with Pierce regarding an agency applying the *Chevron* doctrine. Mashaw believes that agencies have no responsibility to apply *Chevron*'s step one.<sup>231</sup>

*D. A Proposed Method for Agency Statutory Construction*

In proposing a method for agency statutory construction, it is helpful to distinguish between three different functions an agency might perform when it chooses a particular construction of a statute. These functions are (1) interpreting, (2) predicting consequences, and (3) policymaking.<sup>232</sup> A model of agency statutory construction must identify which of these functions has a role to play, and when in the process of statutory construction each function has a role.

In the first part of this section, I will discuss the difference between interpretation, predicting consequences, and policymaking. In the second part, I will address when each of these functions should play a role and propose a method of agency statutory construction.

1. The Distinction Between Interpretation, Predicting Consequences, and Policymaking

To “interpret” is “to explain or tell the meaning of” something.<sup>233</sup> This definition suggests that the job of the interpreter is to identify the true meaning, which in turn suggests a lack of discretion. If this suggestion is accepted, when someone is asked to interpret the text of a statute, we expect the interpreter to try to identify the text’s true meaning. Although different interpreters might reach different conclusions, we would still agree that there is only one right answer.

We might defer to the interpreter’s conclusion even if we disagree with it, but we would defer only because we acknowledge that different interpreters will disagree on the text’s true meaning, not because we believe there is actually more than one right answer and not because we believe the interpreter has the discretion to not seek the text’s true meaning. If the interpreter had such discretion, we would consider the interpreter to be doing something other than interpretation. Of course, interpreters will often disagree on the relevance of certain evidence bearing on the interpretive question, and they will also often disagree on the weight to be given to evidence they agree is relevant. When an agency attempts to determine a statute’s true meaning, it is interpreting, and we can call this the agency’s “interpreting role.”

Predicting consequences refers to the interpreter trying to determine the

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231. *See id.* at 894 (“Courts apply the *Chevron* doctrine, at least some of the time, but agencies have no responsibility to do so.” (footnote omitted)).

232. *See Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005) (acknowledging that agency interpretations “involve[] difficult policy choices”); BREYER, *supra* note 8, at 101 (noting importance of prediction of consequences in statutory interpretation).

233. MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 654 (11th ed. 2003). This Article uses the term “something” because “[p]eople interpret in many different contexts.” DWORKIN, *LAW’S EMPIRE*, *supra* note 9, at 50.

practical effects of a particular construction of a statute's text. Obviously, the more expertise the interpreter has in the particular subject matter, and the more evidence the interpreter has obtained regarding the matter, the more likely the prediction will be correct. The likely or possible consequences of any given construction will necessarily be the subject of contention, and the agency, when predicting consequences, will probably use its expertise in the subject matter to predict the consequences better than the legislative or judicial branches (or the executive branch, if the agency is an independent agency). When an agency predicts the consequences of a particular construction of a statute's text, we can call this the agency's "expert role."

"Policy" is defined as "a high-level overall plan embracing the general goals and acceptable procedures esp[ecially] of a governmental body."<sup>234</sup> If government's basic goal is to improve the general welfare,<sup>235</sup> policy in its most general sense refers to plans designed to make society better. This necessarily means that policy does not include plans to promote the interests of the interpreter or the interests of favored persons or groups. Of course, policies also include plans that are designed to implement goals that are stated more specifically than the general goal of improving the general welfare, such as the goals of reducing violence or improving the economy. When an agency makes policy choices, we can call this the agency's "policymaking role."

A policy choice, to be considered such, must, unlike interpretation, include an element of discretion or judgment. A policy choice is unlike interpretation in this regard because we do not treat the "general welfare" as something on whose meaning we can all agree. Even if we could agree on the meaning of "general welfare," we would still disagree whether the consequences of a particular policy choice would have a positive or negative effect on the general welfare. Thus, the discretion involved in policymaking involves both the policymaker's definition of general welfare and the policymaker's judgment about whether particular consequences will have a positive or negative effect on the general welfare.

Of course, the policymaker need not have complete discretion for the choice to still properly be characterized as a policy choice. As previously mentioned, a policy choice under our system of government must seek to improve the general welfare, and the U.S. Constitution has been interpreted as including an implicit requirement that all laws be rationally related to a legitimate government interest (a limitation on discretion).<sup>236</sup> Congress's policy choices are also limited by, for example, the First Amendment's prohibition on enacting laws that abridge freedom of speech (a further limitation on discretion).<sup>237</sup> But even when a policy choice is subject to limitations, the decision maker still has a measure of discretion and is entitled to use her

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234. MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY, *supra* note 233, at 960.

235. THE FEDERALIST No. 43, at 246 (James Madison) (E.H. Scott ed., Chicago, Scott, Foresman & Co. 1898) (stating "that the safety and happiness of society[] are the objects at which all political institutions aim").

236. *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 441-42 (1985).

237. U.S. CONST. amend. I.

judgment in making a decision.

## 2. The Agency's Roles When Engaging in Statutory Construction

When construing a statute, an agency might use its interpreting role, expert role, or policymaking role, or a combination of any of the three. Thus, the agency might seek to determine what the statute actually means, it might predict the consequences of various constructions, and it might decide which construction is best for society.

When an agency construes a statute, its first task is interpretive. Under *Chevron*, if Congress's intent on the particular issue is clear, the agency is required to adopt that construction of the statute.<sup>238</sup> Accordingly, the agency is required to perform *Chevron*'s step one to determine the limits of its power. To believe that an agency is not required to perform *Chevron*'s step one is to suggest, for example, that Congress has no obligation to determine, when deciding whether to pass a bill, if it would be constitutional, because it is the judiciary's role to assess the constitutionality of legislation. Surely we expect all governmental actors to determine before they act whether they have the requisite power.

There is a sense, however, in which the agency's task of determining if Congress's intent is clear is not interpretation. Because the judiciary has the ultimate authority to determine whether Congress's intent on a particular issue is clear, the agency will, for strategic reasons, rely on the judiciary's judgment as to which pieces of evidence are relevant to the interpretive question, and the weight to be given to each piece of relevant evidence.<sup>239</sup> In fact, because the judiciary has the ultimate authority over this issue, the agency is required to replicate the judiciary's method of statutory interpretation at *Chevron*'s step one under constitutional principles.

But does the fact that the agency is required to, or will for strategic reasons, replicate the judiciary's model of statutory interpretation when performing *Chevron*'s step one make the agency's task not one of interpretation but simply a matter of predicting how a court would rule, and thus simply implementing someone else's interpretation? While having to determine what pieces of evidence can be used, and the weight that must be given to those pieces, certainly makes the task look less like interpretation than if free of such constraints, the agency will not be constrained to such an extent that it will not in some sense still be engaging in its own act of interpretation. For example, the guidance from the judiciary will be too general to provide a clear answer to the interpretive question. Further, if the agency's task was not considered interpretation, it would suggest that lower courts do not interpret statutes, because they are required to replicate the process of statutory interpretation used by the Supreme Court. Under this reasoning, only the Supreme Court interprets statutes; everyone else is simply trying to replicate what the Supreme

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238. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984).

239. *Pierce*, *supra* note 3, at 202.

Court would do. I think it is therefore still appropriate to call the agency's task at *Chevron's* step one "interpretation."

The agency must also engage in interpretation to select the constructions of the statute that are permissible, meaning the constructions of the statute that are reasonable.<sup>240</sup> Like the agency's task when applying *Chevron's* step one, this task is arguably not interpretation because the judiciary ultimately determines which constructions are permissible, and thus the agency will seek to replicate the judiciary's decision-making process.<sup>241</sup> But, as discussed above, it is still appropriate to call the agency's task interpretation because the guidance from the judiciary will often be too general to provide a clear answer to the question of which constructions are permissible.

The agency's task at *Chevron's* step two is, however, in another sense removed from interpretation. The agency is not seeking to determine the statute's actual meaning but merely identifying all of the meanings of the statute that are reasonable.<sup>242</sup> This task resembles the role of a judge when deciding whether the evidence would permit a reasonable juror to reach more than one conclusion on a question of fact, such as whether the defendant ran a red light.<sup>243</sup> The court is not seeking to determine whether the defendant in fact ran the red light or did not run the red light but whether the evidence would permit a reasonable juror to reach either conclusion.<sup>244</sup>

But the nature of the agency's task is still sufficiently interpretive that we can use that term to describe it. The agency will employ methods of interpretation to identify the permissible (i.e., reasonable) constructions of the statute, so its process will be identical to the process of interpretation to a point. A thorough process of interpretation will necessarily include identifying all plausible interpretations and then selecting the most plausible. The only difference will be that the agency, when identifying permissible constructions of the statute, will not complete the process of interpretation and select the most plausible interpretation. Instead, the agency will simply stop its process of interpretation with the identification of plausible interpretations.

During this interpretive task, the agency might engage in its expert role and predict the consequences of potential constructions of the statute. The agency will do this, however, only if the judicial method of interpretation that the agency is replicating would do so. Thus, if the agency were replicating a textualist model, it would be less likely to perform this function. If the agency were replicating an

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240. *Chevron*, 467 U.S. at 842-43.

241. *Pierce*, *supra* note 3, at 202-03.

242. See ESKRIDGE, DYNAMIC STATUTORY INTERPRETATION, *supra* note 109, at 14 (asserting that "actual practice of federal agencies" diverges from search for legislature's intent); *Pierce*, *supra* note 3, at 200 (noting that agencies must choose between "competing constructions . . . within the range of meanings that the statutory language can support" when interpreting statutes).

243. See FED. R. CIV. P. 56(c) (stating that summary judgment may only be granted absent "genuine issue as to any material fact"); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (holding that issue is "genuine" if presented evidence would allow "a reasonable jury" to "return a verdict for [either] party").

244. *Anderson*, 477 U.S. at 248.



intentionalist model, it would be more likely to perform this function. To determine which model to adopt, the agency is required to follow Supreme Court precedent, because the Supreme Court is the ultimate authority on statutory interpretation in the judicial system.

Once the agency has performed this interpretive task, it will then have to select from the various constructions of the statute. This raises the issue of which of the three functions can play a role and which of them must play a role.

The policymaking function can play a role. The Supreme Court in *Chevron*, in deferring to the Environmental Protection Agency's ("EPA") statutory construction of the term "source" in the Clean Air Act Amendments of 1977,<sup>245</sup> characterized the EPA's choice as a policy choice.<sup>246</sup> By policy choice, the Supreme Court meant the agency's accommodation of two sometimes-competing purposes in the Act—to reduce air pollution and to allow for economic growth.<sup>247</sup>

It might be argued, however, that an agency cannot make policy when choosing between competing constructions of the statute, because the agency is required to implement a goal identified by Congress and cannot select its own goal. But this argument would mean that policymaking is never involved when the decision maker is attempting to fulfill a previously stated goal. This view cannot be the case because that would mean policymaking is not involved if the decision maker were required to formulate a plan to make society better, because the goal of making society better has previously been established.

It might also be argued that an agency cannot make policy when choosing between competing constructions of the statute because the agency is arguably required to select the construction that best promotes the statute's purpose.<sup>248</sup> If the agency is required to choose the construction that best promotes the statute's purpose, the agency arguably lacks discretion, which is a necessary condition to make a decision a policy choice.<sup>249</sup> This is particularly the case because if a statute does not explicitly identify its purpose, it is the judiciary's role (not the agency's) to identify a statute's purpose. Thus, there will be a "right answer" to the question of which construction best promotes the statute's purpose, and the agency is simply required to find it. Although not everyone will agree on the answer, just as not everyone will agree on the correct interpretation of a statute, there will still be a right answer.

It is true that situations could exist in which policymaking will be absent from the choice, even when permissible constructions of the statute are available.

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245. Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685 (1977).

246. *Chevron*, 467 U.S. at 866.

247. *Id.*

248. See *Cont'l Air Lines, Inc. v. Dep't of Transp.*, 843 F.2d 1444, 1450-51 (D.C. Cir. 1988) (recognizing that agency's role is to interpret statute in way that "'best promotes' the Congressional 'goal' in question," and stating that *Chevron* requires that "the agency's interpretation [be] compatible with Congress' purposes informing the measure").

249. See *supra* note 233 and accompanying text for an explanation of why a decision without discretion is not a policy choice.

Assume a statute has a single purpose, which is either clearly identified in the statute or has been clearly stated by the Supreme Court. Assume further that two permissible constructions of the statute exist under *Chevron's* step one analysis. The first permissible construction is more likely the correct choice from an interpretive standpoint (i.e., the statute's text and the legislative history suggests this is more likely the interpretation Congress intended), and the consequences of the first construction will promote the statute's purpose. The consequences of the second permissible construction will neither promote nor hinder the statute's purpose (and there are no relevant purposes, policies, or principles external to the statute involved).

In such a situation, the decision of which permissible construction better promotes the government's goal is clear, and, because policymaking connotes at least a degree of discretion, the policymaking role is absent. (The reason why I stated that the first interpretation was more likely the correct choice from an interpretive standpoint based on text and legislative history is because an argument can be made that even when selecting between permissible constructions of a statute, evidence of Congress's intent—derived either from the statute's text or from legislative history—is still a relevant consideration to be weighed in the selection process. If that is so, the agency must balance the importance of that consideration against the importance of promoting the statute's purpose, which returns a degree of discretion to the agency, and thus renders the agency's task a policymaking function.)

But agency policymaking will usually have a role to play, even if the agency is required to choose the construction that best promotes the statute's purpose.<sup>250</sup> In the discussion above, I assumed that the statute had a single purpose that was clearly identified and that the agency simply had to select the construction of the statute that best promoted that purpose. That assumption, however, does not accurately describe the situation that will most likely confront the agency. Often, statutes will have multiple purposes, and these purposes will sometimes run in different directions.<sup>251</sup> This was the situation confronting the EPA in *Chevron*, where the agency had to accommodate the goal of reducing air pollution with the goal of economic growth.<sup>252</sup>

Also, even if a statute has only a single purpose, no statutory purpose is expected to be pursued at all costs, which means that the agency must take into consideration policies and principles external to the statute.<sup>253</sup> Thus, the agency will be required to determine which external policies and principles should be considered by the agency.

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250. Agencies may or may not be required to choose such a construction. See *infra* notes 269-70 and accompanying text for a discussion of agencies' responsibilities to adhere to legislative purpose.

251. ESKRIDGE, DYNAMIC STATUTORY INTERPRETATION, *supra* note 109, at 27.

252. *Chevron*, 467 U.S. at 866.

253. See, e.g., *S. Steamship Co. v. NLRB*, 316 U.S. 31, 47 (1942) (directing NLRB to heed congressional objectives other than those set forth in NLRA). For the distinction between purposes, policies, and principles, see *supra* note 9.

The existence of competing purposes, policies, and principles is what brings out an agency's policymaking role when construing a statute. The agency will be required to give weight to the competing purposes, policies, and principles and to then balance them. It is true that the agency's discretion in assigning weight to these competing factors will be limited to an extent. For example, if it is clear that Congress intended a particular purpose to carry great weight and another purpose to carry very little weight, the agency would be required to follow Congress's intent. Thus, an agency could not give little weight to the Clean Air Act's purpose of reducing air pollution, because Congress clearly felt that this objective was an important purpose of the statute.<sup>254</sup> Also, the agency should not consider any factors that Congress has indicated the agency is not to consider.<sup>255</sup>

But often the weight to be given competing purposes, policies, and principles will be unclear. Thus, the range of weight that the agency can assign to the competing purposes, policies, and principles will be considerable—considerable enough to enable the agency to permissibly choose between the competing constructions. In fact, it is arguable that if permissible constructions are available from which to choose, the agency has the power under *Chevron* to simply select any of the permissible constructions, which would mean the agency can give any weight it wants (even no weight) to the competing purposes, policies, and principles.<sup>256</sup> The task of giving weight to the competing purposes, policies, and principles will necessarily involve the agency implementing its own view of what is best for society. It is this discretion—the assigning of weight based on the agency's view of what is best for society—that makes the agency's choice a policy choice.

Knowing that an agency can use its policymaking role when choosing between permissible constructions of a statute does not answer, however, the question of whether it must use that role and, if so, whether it must use that role to the exclusion of its interpretive role. (There is no question an agency should use its expert role if it uses its policymaking role, because the agency cannot properly engage in its policymaking role without predicting the consequences of the competing constructions.<sup>257</sup> If the agency only used its interpreting role to select between competing constructions of the statute, it would use its expert role if it believed intentionalist theory would be the correct method of interpretation

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254. *Chevron*, 467 U.S. at 866.

255. See *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 469 (2001) (holding that EPA was not permitted to make trade-offs between public safety and cost to national economy because Congress had not intended cost to be factor for agency to consider).

256. See Harper, *supra* note 177 (noting that administrative agency might claim that its choice is insulated from judicial review as long as it chooses permissible construction of statute). Such an agency position would be weakened, however, by the Supreme Court's finding in *Chevron* that the EPA had "advanced a reasonable explanation for its conclusion that the regulations serve the environmental objectives [of the Clean Air Act]." *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 863 (1984).

257. This does not mean administrative agencies always use their expert role when using their policymaking role. For example, the NLRB has been criticized for failing to do so. See, e.g., Estreicher, *supra* note 31, at 172 (criticizing Board for not using its expert role often enough).

because consequences would then be relevant. It would not use its expert role if it believed textualism would be the correct method, because consequences would not usually be relevant.)

As previously discussed, Rubin has perhaps suggested that text and congressional intent should not play a role in any agency's selection between permissible constructions of a statute, when he equated Eskridge's evolutive perspective with *Chevron's* step two.<sup>258</sup> Similarly, Pierce suggests that the Court in *Chevron* directed that agencies engage in this policymaking function when choosing between permissible constructions of an ambiguous statute and not engage in interpretation.<sup>259</sup> Pierce argues that an agency can only choose between permissible constructions "by engaging in a policymaking process."<sup>260</sup> Pierce draws this conclusion from *Chevron* because the Court: (1) reviewed and approved the EPA's choice as a policy decision, and thereby endorsed such an approach; (2) recognized that the EPA must consider the wisdom of its choice on a continuing basis; (3) characterized the dispute over the statute's meaning as a dispute "center[ed] on the wisdom of the agency's policy"; and (4) stated that "policy arguments" against the EPA's choice were "more properly addressed to legislators or administrators, not to judges."<sup>261</sup>

While *Chevron* approved of an agency using its policymaking function when choosing between permissible constructions of a statute,<sup>262</sup> it would read too much into *Chevron* to conclude that the agency's choice between permissible constructions of the statute would be subject to reversal if the agency gave weight to what the correct choice would be from an interpretive standpoint. This issue was not addressed, and *Chevron* is therefore better read as simply authorizing an agency to rely only on its policymaking role.

Mashaw also takes issue with Pierce's conclusion but only because he believes that the agency's policymaking role necessarily contains an element of interpretation, since the agency must seek to promote the statute's purpose.<sup>263</sup> Mashaw, relying on the Court's statement in *Chevron* that the EPA had "advanced a reasonable explanation for its conclusion that the regulations serve the environmental objectives [of the Clean Air Act],"<sup>264</sup> argues that the Court's opinion can be read as holding "that the EPA made a reasonable, purposive interpretation of the Clean Air Act."<sup>265</sup> According to Mashaw, "[t]he Court's

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258. See *supra* notes 195-220 and accompanying text for a discussion of Rubin's comparison of Eskridge's evolutive perspective and *Chevron's* step two.

259. See Pierce, *supra* note 3, at 200 ("*Chevron* does not instruct or *authorize* agencies to 'interpret' statutes in any way that fits within the dictionary definition of 'interpret.'" (emphasis added)).

260. *Id.*

261. *Id.* at 200-01 (alteration in original) (quoting *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 863-64, 866 (1984)).

262. *Chevron*, 467 U.S. at 866.

263. See Mashaw, *supra* note 6, at 897-98 (noting that agency's adoption of policy that carries out statute's purpose "precisely . . . give[s] concrete meaning to the abstract commands of the statute").

264. *Chevron*, 467 U.S. at 863.

265. Mashaw, *supra* note 6, at 896.

position is not that interpretation disappears when policy intrudes, but that the connection between interpretation and policy choice is sufficiently close that courts should defer to the agency's interpretation."<sup>266</sup> Mashaw further argues that "[i]f agencies must explain to reviewing courts why their policy choices carry out the purposes of the statutes that they administer, they unavoidably must explain their interpretation of the statute."<sup>267</sup>

Mashaw's argument relates to a more fundamental issue as to whether purposivism qualifies as interpretation. Textualists would likely argue that it does not, and the fact that it is the province of the judiciary to identify a statute's purpose<sup>268</sup> makes the agency's task appear even less like interpretation. In any event, this is simply a debate as to whether an agency's policymaking role necessarily includes an element of interpretation if the agency must choose the construction that best promotes the statute's purpose. Thus, this is really a semantic debate, and Mashaw's criticism of Pierce does not reach the more significant issue, which is whether an agency can and should give weight to the traditional tools of statutory interpretation other than the statute's purpose—statutory text and congressional intent (both actual intent and constructed intent)—when choosing between permissible constructions of a statute.

Several commentators have addressed this issue but only in passing. Professor Kent Greenawalt has stated that when choosing between two permissible constructions of an ambiguous statutory term, "administrators *should* give some weight to the apparent force of the language."<sup>269</sup> Thus, if the statute's text favors a particular construction (but does not compel it), Greenawalt presumably believes that an agency should take that into consideration (and presumably Congress's intent too), along with matters of policy, when deciding between competing constructions. Professor Strauss apparently disagrees, at least from a descriptive standpoint, about agency practice.<sup>270</sup>

This Article contends that only the agency's policymaking role (and its related expert role) should apply and that its interpreting role has no place in selecting between permissible constructions of a statute. In other words, text and congressional intent become irrelevant. This result is demonstrated by Congress's intent in giving agencies discretion to choose between permissible constructions of an ambiguous statutory term.

Although different agencies are likely to be given policymaking power for different reasons, and although legislators are likely to have different reasons for

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266. *Id.* at 896-97.

267. *Id.* at 897.

268. ESKRIDGE, DYNAMIC STATUTORY INTERPRETATION, *supra* note 109, at 164 ("Figuring out statutory purpose . . . [is] the traditional strength[] of judges, who are statutory generalists; *Chevron*-mandated deference to administrators (statutory specialists) in such instances is not appropriate.")

269. GREENAWALT, *supra* note 176, at 62 n.79.

270. *See id.* ("Peter Strauss has suggested to me that an administrative agency, believing that its interpretation will be sustained by courts because statutory language is indecisive, might well decide on the basis of policy objectives without regard to whether the language points weakly in a different direction.").

vesting power within a particular agency, various reasons have been identified as to why Congress might delegate power to an administrative agency to resolve statutory ambiguities. First, Congress might believe agencies, as experts in the subject matter, are in a better position to accommodate competing interests.<sup>271</sup> Second, members of Congress might be unable to forge a coalition on the particular issue, and each side may decide to take its chances with the agency's answer.<sup>272</sup> Third, Congress might not want to create a solution that will quickly become outdated.<sup>273</sup> Fourth, Congress might seek to shift to another entity responsibility for unpopular decisions.<sup>274</sup>

If an agency is expected to act in accordance with Congress's intent, each of these reasons points to the conclusion that an administrative agency, when choosing between permissible constructions of a statute, should rely solely on its policymaking and expert roles and should give no weight to the statutory text or actual or constructed congressional intent. If Congress delegated power to an agency because the agency had expertise in the subject matter, Congress would be expecting the agency to use its expertise in the subject matter, not its expertise in statutory interpretation (which it would not have). If Congress were unable to forge a coalition and decided to take its chances with the agency or sought to avoid political responsibility for an unpopular decision, Congress intended the agency to make the policy choice instead of Congress, not to interpret the statute. If Congress did not want to create a solution that would quickly become outdated, Congress would be acknowledging that the answer should not be found in the statute's text or legislative history but should be decided as a matter of policy based on changing circumstances. Though this last reason—Congress not wanting to create a solution that will quickly become outdated—might perhaps support the use of imaginative reconstruction if the reasonable legislator were envisioned in the present, even when this reason for delegating is present, another reason for the delegation will surely be the administrative agency's expertise, which would then negate the role of imaginative reconstruction.

A pragmatic reason further supports the conclusion that interpretive tools have no role to play in an agency selecting between permissible constructions of the statute. Once policy is injected as a legitimate consideration when selecting between permissible constructions, it becomes difficult for an agency to decide how much weight should be given to interpretive tools and how much weight should be given to policy.

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271. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984).

272. *Id.*

273. See GEOFFREY R. STONE ET AL., *CONSTITUTIONAL LAW* 415-16 (2d ed. 1991) (noting that Congress may be concerned about creating solution that becomes quickly outdated).

274. See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 131-32 (1980) (“[O]n most hard issues our representatives quite shrewdly prefer not to have to stand up and be counted but rather to let some executive-branch bureaucrat, or perhaps some independent regulatory commission, ‘take the inevitable political heat.’”); STONE ET AL., *supra* note 273, at 415-16 (noting that Congress might be seeking to avoid political liability for unpopular decisions).

This method of statutory construction, which gives no weight to text or congressional intent when choosing between permissible constructions of a statute, is somewhat different from Eskridge's model of dynamic statutory interpretation that is advocated by Rubin for administrative agencies. Even if Rubin were asserting that the textual perspective and the historical perspective are irrelevant when an agency is selecting between permissible interpretations of a statute and the evolutive perspective controls completely (and it is not clear he is), Eskridge's evolutive perspective would not be equivalent to an administrative agency making a policy choice. Whereas the evolutive perspective applies when circumstances have changed, an administrative agency should legitimately be able to change its construction of a statute when it believes a prior construction was an incorrect policy choice, even if circumstances have not changed (and even if the statute is not old). Thus, an agency's legitimate policymaking and quasi-lawmaking function means an appropriate method of statutory construction for an agency is one that grants the agency even more discretion than Eskridge's model appears to provide.<sup>275</sup> In other words, Eskridge's theory of statutory construction, while perhaps a radical and controversial approach when applied by judges, does not go far enough to be a perfect fit for administrative agencies.

There is, however, a theory of statutory construction that appears to be a perfect fit: a pure form of purposivism as advocated by legal process theory that asks the interpreter to select the interpretation that best promotes the statute's purpose (as long as the interpretation does not give the statute's words "a meaning they will not bear, or a meaning which would violate any established policy of clear statement").<sup>276</sup> It is important to recognize, however, that this is a form of purposivism that gives no role to text or congressional intent (beyond determining a statute's purpose) once the agency is choosing between permissible constructions of a statute (though weight is given to external policies and principles). Thus, this form of purposivism differs from the type of purposivism that would likely be employed by a current purposivist judge, who would still give weight to text and congressional intent, in addition to the statute's purpose, when the interpretive answer is unclear. Also, it does not ask how a reasonable legislator would want the issue to be decided under present circumstances, because this inquiry would be contrary to Congress's intent that the agency make the policy choice.

On examination, this pure form of purposivism is essentially what Pierce is advocating for administrative agencies.<sup>277</sup> This form of purposivism is indistinguishable from his argument that agencies, when selecting between permissible interpretations of a statute, should simply make the policy choice

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275. See Eskridge, *supra* note 130, at 1483 (describing theory of dynamic statutory interpretation, which directs interpreters to look to statute's textual perspective, historical perspective that gave rise to statute's enactment, and evolutive perspective).

276. HART & SACKS, *supra* note 108, at 1374.

277. See Pierce, *supra* note 3, at 205 (arguing that agencies appropriately engage in policymaking by choosing to interpret statutes in textually plausible manner that furthers statute's purpose).

that furthers the statute's purpose.<sup>278</sup>

Because of the different roles played by administrative agencies and courts in our governmental structure, the traditional objections to purposivism when used by courts carry no weight with respect to administrative agencies. For example, the argument that purposivism gives judges too much discretion to make policy<sup>279</sup> does not apply to administrative agencies, because they are expected to use their discretion and make policy choices. The argument that it is often difficult to discern a statute's purpose<sup>280</sup> is not a valid objection with respect to an administrative agency, because, again, this simply means that the administrative agency will have discretion to make policy, which is what administrative agencies are expected to do. The argument that statutes will often have conflicting purposes<sup>281</sup> is also not a valid objection with respect to an administrative agency, because this argument simply means that an administrative agency will have discretion to balance those policies, a proper function of policymaking.

In fact, the primary objection to purposivism, as expressed by Eskridge, demonstrates that purposivism is a perfect fit for administrative agencies. Eskridge summed up the leading objection to purposivism as follows: "As the inquiry [into legislative intent] becomes steadily more abstracted from specific intent, . . . not only does its democratic legitimacy fade, but the inquiry becomes less determinate and perhaps more driven by nonlegislator value choices, hence in tension with the rule of law."<sup>282</sup> These are the types of value choices that we expect agencies to make.

In conclusion, an administrative agency should pursue the following course when construing a statute: The agency should first engage in statutory interpretation and determine if Congress's intent on the interpretive question is clear. If it is not, the agency, again through statutory interpretation, should identify the permissible constructions of the statute available to it under *Chevron*. The agency should then use its expert role to predict the consequences of each construction. It should then identify the statute's purpose or purposes and identify any relevant policies or principles external to the statute. It should then assign weight to each of these purposes, policies, and principles (taking into consideration any evidence of the weight given to them by Congress). It should then select the construction the predicted consequences of which are best for society ("best for society" in this context being based on the values assigned by the agency to the identified purposes, policies, and principles). When making this decision, the agency should give no weight to statutory text or congressional

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278. *Id.*

279. See ESKRIDGE ET AL., *supra* note 3, at 230 (criticizing purposivism as implicating political and policy considerations more suitable to democratically accountable branches when interpretation involves choosing from among different purposes).

280. ESKRIDGE, DYNAMIC STATUTORY INTERPRETATION, *supra* note 109, at 27; SCALIA, *supra* note 1, at 32-34.

281. ESKRIDGE, DYNAMIC STATUTORY INTERPRETATION, *supra* note 109, at 27.

282. ESKRIDGE ET AL., *supra* note 3, at 222.



intent (actual or constructed).

#### IV. HOW THE NLRB SHOULD INTERPRET THE NLRA

The above analysis applies fully to an agency such as the NLRB. Thus, when the Board is confronted with an issue of statutory construction, the members should first determine whether Congress's intent on the interpretive question is clear and, if not, determine the permissible constructions of the Act available to it under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*<sup>283</sup> Once the Board has identified the permissible constructions, it should use its expertise to predict the consequences of each construction and then adopt the construction that it believes best furthers the Act's purposes, taking into consideration, however, relevant policies and principles external to the Act.<sup>284</sup> In undertaking this task, the Board necessarily must assign weight to these purposes, policies, and principles. The Board should not place any reliance on statutory text or congressional intent when choosing between permissible constructions of the Act.

The use of such a method of statutory construction is consistent with the reasons Congress likely created the Board, including the belief courts lacked the "special facilities" to address labor issues, the belief courts have done a poor job of developing labor policy, the inability of Congress to agree on many issues of labor policy, and the desire for a body to administer the Act that could be flexible and experiment with labor policies. All of these potential reasons support the conclusion Congress intended the Board to have policymaking power (a conclusion supported by the Supreme Court and commentators), thus demonstrating that the method of statutory construction that this Article proposes generally for administrative agencies should apply to the NLRB. Also, this purposivist approach is particularly well suited to the Board (and less objectionable by those concerned with administrative agencies making policy

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283. 467 U.S. 837, 843-44 (1984). It is clear that the deference the Supreme Court gives to the Board's construction of the Act is the same level of deference described in *Chevron*. See *supra* note 101 and accompanying text for a discussion of the deference given by courts to Board interpretations of the Act. In fact, the Court, when discussing the level of deference owed to the Board's construction of the Act, has cited to *Chevron*. See *NLRB v. Ky. River Cmty. Care, Inc.*, 532 U.S. 706, 713 (2001) (citing to *Chevron* to support proposition that Court will defer to Board's construction of Act if reasonable); *NLRB v. Town & Country Elec., Inc.*, 516 U.S. 85, 89-90 (1995) (citing to *Chevron* to support proposition "that the Board often possesses a degree of legal leeway when it interprets its governing statute"); *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 536 (1992) (citing to *Chevron* to support proposition that, "[l]ike other administrative agencies, the NLRB is entitled to judicial deference when it interprets an ambiguous provision of a statute that it administers"); *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 574 (1988) (citing to *Chevron* to support proposition that Board's construction of Act is normally entitled to deference unless construction is clearly contrary to Congress's intent); *NLRB v. United Food & Commercial Workers Union, Local 23*, 484 U.S. 112, 123 (1987) (citing to *Chevron* when discussing deference owed to Board's construction of Act).

284. Whether the appellate courts have failed to give the Board the amount of discretion it is due under *Chevron*, and whether appellate courts have thereby improperly limited the Board's ability to engage in policymaking, are issues beyond the scope of this Article.

choices) because the Act contains an explicit declaration of policy to guide the Board members.<sup>285</sup>

As long as the Board is acting within the confines of its discretion under *Chevron*, its discretion should be subject only to the limitation that it seeks to effectuate the Act's purposes, while at the same time giving weight to appropriate policies and principles external to the Act. At that point, the Board should not consider the Act's text or congressional intent, except to the extent necessary to determine Congress's general purpose in passing the Act.

Thus, when confronted with permissible constructions of the Act, the Board should select the construction that it believes best (1) reduces strikes and other forms of industrial strife and (2) increases employee bargaining power to help raise wages.<sup>286</sup> Naturally, to effectuate these purposes, the Board is limited to the specific means identified by Congress in the Act, including administering elections and "protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection."<sup>287</sup> Also, the Board must give weight to the Taft-Hartley Act purpose that employees have the right to refrain from concerted activities.<sup>288</sup> Additionally, the right of an employer to operate its business in a way it deems best must be given weight.<sup>289</sup>

Of course, the relevant purposes, policies, and principles will often be conflicting, and certainly no purpose or policy should be pursued at any cost. It is therefore the Board's task to give weight to these competing purposes, policies, and principles, and select the construction of the statute that is deemed best for society (based on the weight assigned by the agency to each purpose, policy, and principle). The Board should, however, be cautious about giving too much weight to external policies and principles because Congress did not explicitly identify them in the Act as being relevant to the interpretive question. In deciding what is the best choice, the Board, as a policymaker and quasi legislature, should not feel bound by the doctrine of *stare decisis* to the same extent as a court and should be able to reverse precedent even when circumstances have not changed.<sup>290</sup>

Two common objections to Board practices should be addressed, because this method of statutory construction could potentially aid these practices. The first objection is that Board members engage in results-oriented decision making based on management or union biases. Such decision making would, of course,

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285. 29 U.S.C. § 151 (2006).

286. *Id.*

287. *Id.*

288. *Id.* § 157.

289. *David R. Webb Co. v. NLRB*, 888 F.2d 501, 506 n.7 (7th Cir. 1989) ("The Act is also concerned with the rights of the employer to run his business . . ."). This Article does not make any attempt to identify all of the relevant external policies and principles that might apply to an interpretive question arising under the Act.

290. Winter, *supra* note 30, at 55 (noting that NLRB is not constrained by *stare decisis* to same extent as courts).

be inconsistent with the obligation to interpret the Act in a manner to effectuate the Act's purposes.<sup>291</sup> The ability of a Board member to engage in biased decision making would be aided by the method of statutory construction that this Article proposes, because the competing purposes of the Act would give the Board substantial discretion. As Judge Winter observed: "The very statement of [the Act's] purposes . . . indicates the many different directions in which the statute looks and the many different legal results possible under a very general statutory provision, depending on the extent to which one purpose is thought to outweigh another in a concrete factual situation."<sup>292</sup>

But it is not clear that the tendency of Republican Board members to rule in favor of management and Democratic Board members in favor of unions is because of a management or union "bias." These tendencies might stem from Republican Board members and Democratic Board members giving different weight to the sometimes conflicting purposes, policies, and principles within and without the Act. And this is exactly what we expect from an administrative agency, and, as previously discussed, is arguably what Congress expected from the Board.

Of course, to the extent Board members are deciding cases in particular ways because they oppose the Act's purposes, such decision making would likely be illegitimate.<sup>293</sup> Thus, a Republican Board member cannot interpret the Act in a particular way because she believes protecting the right to collective bargaining is unwise labor policy, and a Democratic Board member cannot interpret the Act in a particular way because she believes giving an employee the right to not engage in concerted activities is unwise labor policy.

The second objection is that the Board, although entitled to make labor-relations policy, too often reverses precedent, and this practice causes instability in labor-management relations.<sup>294</sup> The theory of statutory construction that this Article proposes would likely continue, and perhaps encourage, such instability because Republican Boards and Democratic Boards will give different weight to the various relevant purposes, policies, and principles within and without the Act and, when not constrained by judicial methods of statutory construction, will select different constructions of the Act.

As previously discussed, however, this was arguably anticipated by the Congress that passed the Act. Furthermore, such practices are consistent with an agency's function as a quasi legislature. Reversing precedent should not be viewed like a court reversing precedent but should be viewed more like a legislature changing the law. Although stability in statutory law is desirable (and

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291. See, e.g., Cooke & Gautschi, *supra* note 84, at 549 ("To inject either pro-union or pro-management biases into the law . . . patently violates the very spirit of the Act.").

292. Winter, *supra* note 30, at 56.

293. See DWORKIN, *LAW'S EMPIRE*, *supra* note 9, at 339 ("No interpretation that disavowed [a statute's motivating] policy or ranked it of little importance could even begin to justify the provisions of the act . . ."); Estreicher, *supra* note 30, at 1065 (noting that Board's policymaking function that was delegated by Congress was power "to supplement the broad commands of the statute with rules advancing the purposes of the statute").

294. Cooke & Gautschi, *supra* note 84, at 549.

while perhaps we do not have enough stability in Board-created labor law), a lack of such stability is not as objectionable as a lack of stability in court-made law. We do not consider it objectionable when a legislature changes the law to reflect changed factual circumstances, a different political philosophy, or a change in public opinion.

Although commentators have argued that the Board's ability to use adjudication to change policy makes it too easy for such policy reversals, and that the longer process of passing a regulation should be used,<sup>295</sup> or that nonbinding statements of policy should be used,<sup>296</sup> this Article is operating within the framework established by the Supreme Court, which is that the Board may legitimately make policy via adjudication.<sup>297</sup> Whether that principle should be reversed is an issue beyond the scope of this Article. The important point for present purposes is that an administrative agency like the NLRB changing policy based on the political makeup of the agency is an expected and not necessarily troubling aspect of the administrative state.

V. THE NLRB AND METHODS OF STATUTORY CONSTRUCTION IN ACTION—  
*BROWN UNIVERSITY AND OAKWOOD HEALTHCARE, INC.*

Part IV of this Article explained a normative method for NLRB statutory construction. Under this method, the Board should not construe the Act like a court, except for determining if Congress's intent on the interpretive question is clear and, if not, identifying the permissible constructions available to it. Once the permissible constructions are identified, the Board should select the construction that it believes best promotes the Act's purposes, while also taking into account any applicable policies or principles outside of the Act. Traditional tools of statutory interpretation—considering the Act's text and congressional intent—should play no role in making this choice.

But that was a normative argument. How does the Board approach statutory construction in practice? Does the Board, as this Article has recommended, eschew a judicial method of statutory construction and choose from permissible constructions by selecting the construction that best promotes the Act's general purposes? Or does it act like a court, giving weight to text and congressional intent even when different constructions are permissible? And if it acts like a court, what method of judicial statutory construction is the Board using? Also, if the Board is approaching statutory construction like a court, can the results that are reached along party lines be explained by different methodologies of statutory construction typically used by conservative and liberal jurists? Are Republican members applying a textualist theory of statutory construction, and Democratic members intentionalist theories?

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295. Estreicher, *supra* note 31, at 170-71.

296. Tuck, *supra* note 23, at 1121.

297. NLRB v. Bell Aerospace Co., 416 U.S. 267, 294-95 (1974).

Two recent cases involving many of the same members and involving issues of statutory construction—*Brown University*<sup>298</sup> and *Oakwood Healthcare, Inc.*<sup>299</sup>—provide an opportunity to explore these questions. While an analysis of two cases certainly cannot provide conclusive answers to these questions (and this Article’s analysis does not purport to do so), these cases are particularly good candidates for a preliminary inquiry into these issues. Each decision involved what some would consider questions of pure statutory construction; each required the Board to choose between permissible constructions of the Act; each included discussions of statutory interpretation; and each was decided three to two and they involved many of the same Board members.<sup>300</sup>

#### A. Brown University

In *Brown University*, decided in 2004, the Board addressed whether graduate student assistants who perform services for, and are paid by, the university, are “employees” as that term is defined under section 2(3) of the Act.<sup>301</sup> If graduate student assistants were not “employees,” they would not be extended the right under the Act to engage in concerted activities and collective bargaining.<sup>302</sup>

The Act defines “employee” in a general and expansive way, providing that the term “shall include any employee.”<sup>303</sup> The definition then includes some specific exclusions, including agricultural laborers, domestic servants, anyone employed by her parent or spouse, independent contractors, supervisors, and anyone employed by an employer subject to the Railway Labor Act.<sup>304</sup>

A textualist approach to the issue of whether graduate student assistants are “employees” under section 2(3) of the Act would determine whether a reasonable person would construe the term “employee” to include graduate student assistants.<sup>305</sup> When the term “employee” has been defined in general terms, textualists such as Justices Scalia and Thomas have joined opinions applying the common law’s definition of employee, which focuses on the control the employer has over the person.<sup>306</sup> A textualist generally employs canons of statutory construction, and in this case might rely on the canon of construction,

298. 342 N.L.R.B. 483 (2004).

299. 348 N.L.R.B. 686 (2006).

300. *Oakwood Healthcare*, 348 N.L.R.B. at 686, 699; *id.* at 700 (Liebman & Walsh, Members, dissenting in part and concurring in part in the result); *Brown Univ.*, 342 N.L.R.B. at 483, 490-91, 493; *id.* at 493 (Liebman & Walsh, Members, dissenting).

301. *Brown Univ.*, 342 N.L.R.B. at 483.

302. *Id.*

303. 29 U.S.C. § 152 (2006).

304. *Id.*

305. See SCALIA, *supra* note 1, at 17 (noting that textualists “look for a sort of ‘objectified’ intent—the intent that a reasonable person would gather from the text of the law”).

306. See, e.g., *Clackamas Gastroenterology Assocs., P.C. v. Wells*, 538 U.S. 440, 448 (2003) (relying on common-law definition of “employee” for guidance in interpreting term “employee” under Title VII); *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 319 (1992) (applying common-law definition of “employee” to Employee Retirement Income Security Act of 1974).

*expressio unius est exclusio alterius*, which provides “that to express or include one thing implies the exclusion of the other, or of the alternative.”<sup>307</sup> The inclusion of a list of persons who are not employees suggests that a graduate student assistant, not being identified, should be considered within the definition (even if the thought never actually crossed the minds of the individual legislators). More likely than not, a textualist would conclude that the plain meaning of “any employee,” coupled with a list of exclusions that does not include graduate student assistants (or anyone similar), includes such persons.

A judge following an intentionalist theory would attempt to determine how the Congress that passed the Act would have decided the issue.<sup>308</sup> In doing so, the court would look to the Act’s text, legislative history, purpose, and the consequences of a particular result.<sup>309</sup>

An approach as this Article proposes for administrative agencies would first determine whether Congress’s intent on the issue was clear, and, if not, identify the permissible constructions. In this case, the permissible constructions would likely include a decision either way, and the Board would then proceed to reach a decision that best effectuates the Act’s general purposes (promoting industrial peace and raising wages by promoting collective bargaining), while still giving weight to relevant purposes and principles external to the Act. No weight, however, would be given to the text and congressional intent.

In a three-to-two decision, the majority opinion reversed the Board’s prior decision in *New York University*<sup>310</sup> that had granted graduate student assistants “employee” status and concluded that graduate student assistants are not “employees” under the Act.<sup>311</sup> The majority opinion was joined by Chairman Robert J. Battista, Member Peter C. Schaumber, and Member Ronald Meisburg,<sup>312</sup> each a Republican.<sup>313</sup> The dissenting members were Wilma B. Liebman and Dennis P. Walsh,<sup>314</sup> each a Democrat.<sup>315</sup> If the Board members approached the issue like a court would, and if conservatives are generally textualists and liberals generally follow intentionalist theories, one would expect that the majority followed a textualist approach and the dissenting members an

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307. BLACK’S LAW DICTIONARY 620 (8th ed. 2004).

308. See *supra* Part II.B for an explanation of the intentionalist theory of statutory construction.

309. *Id.*

310. 332 N.L.R.B. 1205, 1209 (2006).

311. *Brown Univ.*, 342 N.L.R.B. 483, 483, 490 (2004). The majority also concluded that, even if graduate student assistants were “employees” under the Act, the Board would invoke its power “to determine whether it would effectuate national labor policy to extend collective bargaining rights to such a category of employees,” and it would deny them such rights. *Id.* at 492. This alternative holding, however, had no impact on the Board’s initial holding that graduate student assistants were not “employees” under the Act, and thus the initial issue was one of pure statutory interpretation.

312. *Id.* at 483.

313. See National Labor Relations Board, Board Members Since 1935, [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 Nov. 28, 2008) (identifying Battista, Schaumber, and Meisburg as Republicans).

314. *Brown Univ.*, 342 N.L.R.B. at 493.

315. See National Labor Relations Board, *supra* note 313 (identifying Liebman and Walsh as Democrats).

intentionalist theory.

1. Did the Board Members Approach the Case Like a Court?

The majority approached the case like a court would. The majority stated that “[t]he issue of employee status under the Act turns on whether Congress intended to cover the individual in question,”<sup>316</sup> a proposition that failed to acknowledge the Board’s role as a policymaker and quasi lawmaker and not simply as a body seeking to divine Congress’s intent.

Although the majority referred to prior Board case law that opined that collective bargaining by students who performed services at their educational institutions would not work and therefore would not further the policies and purposes of the Act (an approach consistent with a proper agency analysis that seeks to further the Act’s general purposes),<sup>317</sup> this rationale was not explicitly adopted by the majority when defining “employee.”<sup>318</sup> Rather, the majority indicated that this factor would be relevant to the Board using its discretion to decline extension of collective bargaining rights to persons within the definition of “employee” when such rights would not effectuate the Act’s purposes.<sup>319</sup> The Board did not seem to use this factor to help define “employee.” Instead, the primary rationale behind the majority’s definition of “employee” was that it believed Congress did not intend the Act to cover persons such as graduate student assistants.<sup>320</sup>

The majority also relied on judicial maxims of statutory construction, citing a Supreme Court case discussing statutory interpretation and a treatise on statutory interpretation.<sup>321</sup> Also, the majority, in response to the dissent’s argument that the majority was engaging in policymaking reserved to Congress, denied the charge and accused the dissenting members of such conduct.<sup>322</sup> Thus, rather than acknowledging its policymaking role, the majority viewed policymaking as illegitimate. Although the majority did state at one point that its decision was based on a weighing of the benefits of finding the students to be “employees” under the Act against the negative consequences for academic freedom (a possible relevant external policy or principle),<sup>323</sup> overall, the majority approached the case like a court and not like an administrative agency.

The Democratic dissenting members also approached the case like a court.

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316. *Brown Univ.*, 342 N.L.R.B. at 491.

317. *Id.*

318. *Id.* at 490 n.25.

319. *Id.* at 492.

320. *Id.* at 488.

321. *Brown Univ.*, 342 N.L.R.B. at 488 & n.23 (citing *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000); NORMAN J. SINGER, 2A SUTHERLAND STATUTORY CONSTRUCTION § 46.05 (5th ed. 1994)).

322. *See Brown Univ.*, 342 N.L.R.B. at 493 (“The dissent also faults us . . . for allegedly engaging in policymaking reserved to Congress. . . . It is our dissenting colleagues who are intruding on the domain of the Congress.”).

323. *Id.* at 493.

As will be discussed more fully below, the dissenting members placed primary reliance on the judicial doctrine that statutes should be interpreted according to their plain meaning and that common-law definitions, i.e., ones created by courts, should be used to interpret statutory terms.<sup>324</sup> The dissenting members also used the language of the entire Act to determine the meaning of “employee,”<sup>325</sup> the type of contextual approach to statutory construction that would be employed by a court. The dissenting members even stated the Board was not free to decide the case on essentially policy grounds,<sup>326</sup> the type of statement to be expected from a court, not an administrative agency.

The dissenting members did, however, discuss the consequences of the majority’s construction, and addressed the effect of those consequences on the Act’s purposes. The dissenting members relied on empirical evidence regarding contemporary graduate student organizing, which they believed showed that collective bargaining in such an environment could be successful and thus promoted the Act’s purposes.<sup>327</sup> The dissenting members defended their use of recent empirical evidence by stating that “[l]ike other regulatory agencies . . . the Board is ‘neither required nor supposed to regulate the present and the future within the inflexible limits of yesterday,’ but rather must ‘adapt [its] rules and practices to the Nation’s needs in a volatile changing economy.’”<sup>328</sup>

In this respect, the dissenting members acted more like an administrative agency, looking at the consequences of a particular construction in today’s society and how those consequences related to the Act’s purposes. The primary approach by the dissenting members to the interpretive question, however, was the type of approach a court would take, not the type of approach an administrative agency would be expected to take. In fact, the dissenting members only addressed the empirical evidence after stating that it did not believe it was free to decide the case on policy grounds.<sup>329</sup>

Neither the majority members nor the dissenting members identified the range of permissible constructions of the term “employee” (which would include both of the competing constructions advanced by the members) or explicitly made a decision solely on policy grounds. Rather, text and congressional intent always remained the pivotal issues, even though the Act’s purposes played a role. Although it could be argued that each side felt it was constrained to decide the case under *Chevron’s* step one, and thus was only required to employ the Board’s interpreting role, the fact that the decision was three to two makes it difficult to believe either party truly felt there was only one permissible construction of the Act.

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324. *Id.* at 495 (Liebman & Walsh, Members, dissenting).

325. *Id.*

326. *Id.* at 497.

327. *Brown Univ.*, 342 N.L.R.B. at 497-98.

328. *Id.* at 498 (quoting *Am. Trucking Ass’ns v. Atchison Topeka & Sante Fe Ry.*, 387 U.S. 397, 416 (1967)).

329. *Id.* at 497.



## 2. What Methods of Statutory Construction Did the Board Members Use?

Having established that the Board members approached the case like a court by relying primarily on the Board's interpreting role, the next question is which methods of judicial statutory construction did the Board members use? Interestingly, the majority, consisting of Republicans, eschewed a conservative, textualist approach and applied a liberal, intentionalist theory. The dissenting members, consisting of Democrats, employed a conservative, textualist approach.

With respect to the majority's approach, it stated that "[t]he issue of employee status under the Act turns on whether Congress intended to cover the individual in question,"<sup>330</sup> an approach consistent with intentionalism<sup>331</sup> and inconsistent with Scalia's textualism, which holds that the text of the statute, not the intent of the legislature, controls.<sup>332</sup>

Also, at the outset of its analysis, the majority announced that statutory terms should not be construed in isolation, and the context in which the term is used should be considered. The majority stated that it is a "fundamental rule that 'a reviewing court should not confine itself to examining a particular statutory provision in isolation,'"<sup>333</sup> and that it would "follow that principle here."<sup>334</sup> For this proposition, the Board relied on authority that indicated certain words or phrases or parts or sections of a statute should be read "in their context and with a view to their place in the overall statutory scheme,"<sup>335</sup> and should "should be construed in connection with every other part or section so as to produce a harmonious whole."<sup>336</sup>

Using context to give meaning to a statutory term is not, of course, inconsistent with textualism. For example, Scalia will look to the context in which a word is used to determine its meaning.<sup>337</sup> On closer examination,

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330. *Id.* at 491.

331. See BREYER, *supra* note 8, at 99 ("[A]n interpretation of a statute that tends to implement the legislator's will helps to implement the public's will and is therefore consistent with the Constitution's democratic purpose.").

332. See SCALIA, *supra* note 1, at 17 ("It is the *law* that governs, not the intent of the lawgiver. That seems to me the essence of the famous American ideal set forth in the Massachusetts constitution: A government of laws, not of men. Men may intend what they will; but it is only the laws that they enact which bind us.").

333. *Brown Univ.*, 342 N.L.R.B. at 488 (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-33 (2000)). Note that the majority not only relied on a judicial maxim of statutory construction, it even kept the term "reviewing court" in the phrase, suggesting that the Board was approaching its task like a court. *Id.*

334. *Id.*

335. *Id.* at 488 n.23 (quoting *Brown & Williamson*, 529 U.S. at 132-33).

336. *Id.* (quoting SINGER, *supra* note 321, § 46.05).

337. See SCALIA, *supra* note 1, at 23-24 (discussing his dissenting opinion in *Smith v. United States*, 508 U.S. 223 (1993), in which he interpreted the word "uses" in statute that provided for increased penalty if defendant "uses . . . a firearm" during a drug-trafficking crime as limited to situations in which firearm was used as weapon).

however, the majority was not so much advocating contextual textualism as it was advocating intentionalism. The majority stated that, as a result of the fundamental rule previously identified, it would therefore “look to the underlying fundamental premise of the Act” and stated that the fundamental premise was that it was “designed to cover economic relationships.”<sup>338</sup> Although this might appear closer to purposivism than intentionalism, the specificity of the stated purpose (to cover economic relationships) shows that this was really intentionalism. The majority was arguing that Congress had a specific intent to cover only economic relationships. The majority then stated that the Board’s long-standing rule prior to *New York University* was that it would “not assert jurisdiction over relationships that are ‘primarily educational,’”<sup>339</sup> and that such an approach “‘is consistent with these principles.’”<sup>340</sup> The majority then set forth those facts that supported the conclusion “that the relationship between Brown’s graduate student assistants and Brown is primarily educational.”<sup>341</sup>

Not only did the majority use intentionalist theory, it never even addressed the plain meaning of the phrase “any employee.”<sup>342</sup> In fact, of the members in the majority, only Member Schaumber addressed whether the graduate student assistants were “employees” under the common-law definition (he concluded they were not).<sup>343</sup> The majority stated that “[t]he issue is not to be decided purely on the basis of older common-law concepts.”<sup>344</sup>

The majority also rejected the dissent’s reliance on *expressio unius est exclusio alterius*, stating that “the absence of ‘students’ from the enumerated exclusions of Section 2(3) is not the end of the statutory inquiry. Rather, although Section 2(3) contains explicit exceptions for groups that must be excluded from the statutory definition of ‘employee,’ other groups also have been held to be excluded.”<sup>345</sup> Thus, the majority rejected reliance on a canon of construction, which is more in keeping with intentionalist theories.

Also, the Board relied on the nonlabor policy consideration that imposing collective bargaining on universities with graduate student assistants would have a deleterious impact on academic freedom.<sup>346</sup> This approach is consistent with Breyer’s version of intentionalist theory, which looks at consequences and asks, “Why would Congress have wanted a statute that produces those consequences?”<sup>347</sup>

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338. *Brown Univ.*, 342 N.L.R.B. at 488.

339. *Id.* at 487.

340. *Id.* at 488.

341. *Id.*

342. See, e.g., Dunn, *supra* note 10, at 885 (“The *Brown University* majority evaded discussion of whether the graduate student workers should be considered ‘employees’ under common law agency doctrine.”).

343. *Brown Univ.*, 342 N.L.R.B. at 490 n.27.

344. *Id.* at 491.

345. *Id.* at 492.

346. *Id.* at 493.

347. BREYER, *supra* note 8, at 101.

The majority acknowledged its decision was not based on the statutory text when it stated: “[O]ur decision turns on our fundamental belief that the imposition of collective bargaining on graduate students would improperly intrude into the educational process”—an approach consistent with intentionalist theory’s consideration of consequences—“and would be inconsistent with the purposes and policies of the Act”—a clear intentionalist theory approach.<sup>348</sup> In response to the dissent’s argument that it never addressed the language of section 2(3), the majority was even more candid about its intentionalist theory approach:

[O]ur colleagues say that we never address the language of Section 2(3). In fact, we do. The difference is that our colleagues stop their analysis with the recitation of the statutory words, “the term ‘employee’ shall include any employee.” We go further than this tautology. We examine the underlying purposes of the Act.<sup>349</sup>

With respect to the method of statutory construction used by the Democratic dissenting members, they used a textualist approach. The dissenting members stated that

[t]he principle applied in [*New York University*]<sup>350</sup>—and the one that should be followed here—is that the Board must give effect to the plain meaning of Section 2(3) of the Act and its broad definition of “employee,” which “reflects the common law agency doctrine of the conventional master-servant relationship.”<sup>350</sup>

The dissenting members noted that section 2(3) defined “employee” to include “any employee”<sup>351</sup> and also relied on the fact that the Act’s language showed that professional employees were intended to be covered by the Act, the type of context a textualist would consider.<sup>352</sup> The dissenting members argued that the majority’s opinion “disregards the plain language of the statute—which defines ‘employees’ so broadly that graduate students who perform services for, and under the control of, their universities are easily covered—to make a policy decision that rightly belongs to Congress.”<sup>353</sup>

The dissenting members also noted that there is “[n]othing in Section 2(3) [that] excludes statutory employees from the Act’s protections, on the basis that the employment relationship is not their ‘primary’ relationship with their employer.”<sup>354</sup> The dissenting members felt that “[a]bsent compelling indications of Congressional intent, the Board simply is not free to create an exclusion from the Act’s coverage for a category of workers who meet the literal statutory definition of employees.”<sup>355</sup> In fact, the dissenting members criticized the

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348. *Brown Univ.*, 342 N.L.R.B. at 493.

349. *Id.* at 491 (quoting 29 U.S.C. § 152(3) (2000)).

350. *Id.* at 495 (Liebman & Walsh, Members, dissenting) (quoting *New York Univ.*, 332 N.L.R.B. 1205, 1205 (2000)).

351. *Id.* (quoting 29 U.S.C. § 152(3)).

352. *Id.*

353. *Brown Univ.*, 342 N.L.R.B. at 493.

354. *Id.* at 496.

355. *Id.*

majority for “never address[ing] the language of Section 2(3)” and for “proceed[ing] directly to consult ‘Congressional policies for guidance.’”<sup>356</sup> This is the language of textualism.

As previously mentioned, the dissenting members also relied on empirical evidence to show that collective bargaining by graduate student assistants could be effective and that allowing them to organize thus promoted the Act’s purposes.<sup>357</sup> This approach, while consistent with intentionalist theory, as well as being a dynamic approach, was only used by the dissent after stating that it did not believe the Board had the authority to decide the case on policy grounds.<sup>358</sup> Accordingly, the dissent’s discussion of the Act’s purposes did not detract from its primarily textualist approach.

Of course, it can be argued that the dissenting members’ reliance on statutory text was consistent with intentionalist theory because even under such an approach the text is followed when it is clear.<sup>359</sup> But the Act’s lack of a particularly illuminating definition of “employee” and the fact that a majority of the Board members disagreed with the dissenting members’ opinion, suggests the language is not so clear that intentionalist theory would give as much weight to the text as was given by the dissenting members. Accordingly, contrary to what would be expected, the Republican members adopted a liberal, congressional-intent approach,<sup>360</sup> and the Democratic members adopted a conservative, textualist approach.

#### B. Oakwood Healthcare, Inc.

In *Oakwood Healthcare, Inc.*,<sup>361</sup> decided in 2006, the Board addressed how to interpret the term “supervisor” as defined under section 2(11) of the Act.<sup>362</sup> If a person is a “supervisor” she is not an “employee” and does not have a right to engage in concerted activities and collectively bargain.<sup>363</sup> Section 2(11) provides that a “supervisor” is a person who (1) engages in any one of twelve listed supervisory functions (including the authority to “assign” or “responsibly to direct” other employees), provided her “exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment”; and (2) holds authority “in the interest of the employer.”<sup>364</sup> The issue in

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356. *Id.*

357. *See id.* at 497-98 (citing empirical evidence to support contention that collective bargaining between graduate student assistants and universities can be successful).

358. *Brown Univ.*, 342 N.L.R.B. at 497.

359. *See* BREYER, *supra* note 8, at 85 (“The interpretive problem arises when statutory language does not clearly answer the question of what the statute means or how it applies.”).

360. One commentator has argued that “the majority-Republican NLRB’s hostility to collective bargaining led it to hold that graduate teaching or research assistants are not ‘employees’ of a university for purposes of the NLRA.” Bannister, *supra* note 10, at 143.

361. 348 N.L.R.B. 686 (2006).

362. 29 U.S.C. § 152(11) (2006).

363. *Oakwood Healthcare, Inc.*, 348 N.L.R.B. at 687. Section 2(3) of the Act provides that the term “employee” does not include “any individual employed as a supervisor.” 29 U.S.C. § 152(3).

364. 29 U.S.C. § 152(11).

*Oakwood Healthcare* involved how to interpret the terms “assign,” “responsibly to direct,” and “independent judgment.”

As previously discussed, a textualist approach to the issue would determine how a reasonable person would construe those terms. A judge following intentionalist theory would attempt to determine how the Congress that passed the Taft-Hartley Act, which adopted the definition of “supervisor,” would have wanted those terms interpreted and would look to the Act’s general purposes, legislative history, and the consequences of a particular construction. An approach as this Article proposes for administrative agencies would first determine whether Congress’s intent on the issue was clear, and, if not, identify the permissible constructions. If there were multiple permissible constructions, the Board would proceed to reach a decision that best effectuated the Act’s purposes, while still giving weight to relevant purposes and principles external to the Act. No weight, however, would be given to the text and congressional intent.

In a three-to-two decision, the majority held that the term “assign” includes assigning tasks to employees,<sup>365</sup> whereas the dissenting members believed that the term “assign” should be limited to acts that affect basic terms and conditions of employment or an employee’s overall status or situation.<sup>366</sup> The majority held that the term “responsibly to direct” involves situations in which “the employer delegated to the putative supervisor the authority to direct the work and the authority to take corrective action, if necessary,”<sup>367</sup> provided “that there is a prospect of adverse consequences for the putative supervisor if he/she does not take these steps.”<sup>368</sup> The dissenting members believed the term “responsibly to direct” should be limited to situations in which the putative supervisor has oversight with respect to a work unit.<sup>369</sup> The majority and the dissenting members agreed on the definition of “independent judgment.”<sup>370</sup>

The majority opinion was joined by Chairman Robert J. Battista (a member of the majority in *Brown University*), Member Peter C. Schaumber (also a member of the majority in *Brown University*), and Member Peter N. Kirsanow, each a Republican.<sup>371</sup> The dissenting members were Wilma B. Liebman and Dennis P. Walsh,<sup>372</sup> both Democrats<sup>373</sup> and members of the dissent in *Brown*

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365. *Oakwood Healthcare, Inc.*, 348 N.L.R.B. at 689-90.

366. *Id.* at 703 (Liebman & Walsh, Members, dissenting in part and concurring in part in the result).

367. *Id.* at 692 (majority opinion).

368. *Id.*

369. *Id.* at 705-07 (Liebman and Walsh, Members, dissenting in part and concurring in part in the result).

370. *Oakwood Healthcare, Inc.*, 348 N.L.R.B. at 692-94 (majority opinion); *id.* at 707-08 (Liebman & Walsh, Members, dissenting in part and concurring in part in the result).

371. See National Labor Relations Board, *supra* note 313 (identifying Battista, Schaumber, and Kirsanow as Republicans).

372. *Oakwood Healthcare, Inc.*, 348 N.L.R.B. at 700.

373. See National Labor Relations Board, *supra* note 313 (identifying Liebman and Walsh as Democrats).

*University.*

1. Did the Board Members Approach the Case Like a Court?

Like the majority opinion in *Brown University*, the majority again approached the case primarily like a court would. The majority began its analysis by indicating that its starting point must be the language used by Congress in the Act, citing to a Supreme Court case and a treatise on statutory construction for that proposition.<sup>374</sup> The majority also relied extensively on legislative history.<sup>375</sup>

The dissenting members also approached the case essentially like a court would. Although the dissent placed more reliance on policy than the majority, and thus came closer to acting like an administrative agency, the dissenting members for the most part still acted like a court. For example, they cited to a Supreme Court case addressing statutory interpretation and relied on “[t]he language of the Act, its structure, and its legislative history”<sup>376</sup> to reach their result. In fact, the dissenting members relied extensively on legislative history in an effort to divine Congress’s original intent.<sup>377</sup>

Neither the majority members nor the dissenting members identified the permissible constructions of the terms “assign” and “responsibly to direct,” which would likely include all of the constructions advanced by the members, or explicitly made a decision on policy grounds. Rather, text and congressional intent always remained the pivotal issues.

2. What Methods of Statutory Construction Did the Board Members Use?

Having established that the Board members primarily approached the case like a court would, the next question is which methods of statutory construction did the Board members use? Interestingly, the Republican and Democratic Board members used methods of statutory construction different from the ones they respectively used in *Brown University*.<sup>378</sup> This time, the majority, consisting of Republicans, followed a textualist approach, which one would expect from conservative jurists. The dissenting members, consisting of Democrats, followed an intentionalist theory, which one would expect from liberal jurists. Thus, while the majority and the dissenting members used the methods of statutory construction one might expect each of them to use, they used methods different from the ones they had each used in *Brown University*.

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374. *Oakwood Healthcare, Inc.*, 348 N.L.R.B. at 688 (majority opinion) (citing *INS v. Phinpathya*, 464 U.S. 183, 189 (1984), *superseded by statute*, Immigration Reform and Control Act of 1986, Pub. L. 99-603, 100 Stat. 3359 (codified as amended at 8 U.S.C. §1101 (2006)); NORMAN SINGER & SHAMBIE SINGER, 2A SUTHERLAND STATUTORY CONSTRUCTION § 47.28, at 354 (6th ed. 2000)).

375. *Id.* at 687-89.

376. *Id.* at 700 (Liebman & Walsh, Members, dissenting in part and concurring in part in the result).

377. *Id.* at 702, 704.

378. See *supra* Part V.A.2 for an analysis of the Republican majority’s intentionalist approach and Democrat dissent’s textualist approach in *Brown University*, 342 N.L.R.B. 483 (2004).

The majority began its “analysis with a first principle of statutory interpretation that ‘in all cases involving statutory construction, our starting point must be the language employed in Congress, . . . and we assume that the legislative purpose is expressed by the ordinary meaning of the words used.’”<sup>379</sup> The Board then cited a treatise on statutory construction for the proposition that “[d]ictionaries . . . do provide a useful starting point for determining what statutory terms mean, at least in the abstract, by suggesting what the legislature could have meant by using particular terms.”<sup>380</sup> The majority stated that it therefore “eschew[ed] a results-driven approach and [started], as [it] must, with the words of the statute.”<sup>381</sup> This is the language of textualism.

The majority also noted that “canons of statutory interpretation caution us to eschew a construction [of the Act] that would result in redundancy.”<sup>382</sup> Thus, consistent with a textualist approach, the majority relied on a canon of statutory interpretation. The majority did, however, also rely on legislative history to bolster this conclusion, an intentionalist approach.<sup>383</sup>

To define “assign,” the majority began with the definition in *Webster’s Third New International Dictionary*, which is “to appoint to a post or duty.”<sup>384</sup> As a result, the majority felt that the term “assign” included assigning employees to a task, not simply assigning them to a department or job classification.<sup>385</sup> In rejecting the dissent’s argument that the term “assign” “must affect ‘basic’ terms and conditions of employment or an employee’s ‘overall status or situation,’” the majority argued that such an assertion was not “in accord with the statutory language.”<sup>386</sup> The majority held that it was “enough that the assignment affect the employment of the employee in a manner similar to the other supervisory functions in the series set forth in Section 2(11),”<sup>387</sup> thus relying on the meaning of the other terms with which “assign” was placed, invoking, though not explicitly, a canon of construction.

In response to the dissent’s argument that the majority failed to take into consideration the consequences of its holding, the majority responded, “we decline to start with an objective—for example, keeping all staff nurses within the Act’s protection—and fashioning definitions from there to meet that targeted objective.”<sup>388</sup> The majority then stated that it had “given ‘assign’ the meaning we believe Congress intended,” and “[w]e are not swayed to abandon

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379. *Oakwood Healthcare, Inc.*, 348 N.L.R.B. at 688 (majority opinion) (quoting *Phinpathya*, 464 U.S. at 189).

380. *Id.* at 688 n.20 (quoting SINGER & SINGER, *supra* note 374, § 47.28, at 354).

381. *Id.* at 688.

382. *Id.*

383. *Id.* at 689.

384. *Oakwood Healthcare, Inc.*, 348 N.L.R.B. at 689 (quoting WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 132 (1981)).

385. *Id.*

386. *Id.*

387. *Id.*

388. *Id.* at 690.

that interpretation by predictions of the results it will entail.”<sup>389</sup> The majority defended its approach as “results-neutral” and stated, “what the Board must do, and what we have done, is interpret the statutory term ‘assign,’ to the best of our ability, as we believe Congress intended.”<sup>390</sup> Thus, the majority applied the version of textualism that is premised on the text being the best evidence of Congress’s intent.

With respect to interpreting the phrase “responsibly to direct,” the majority began by relying on legislative history to refute the dissent’s argument that “responsibly to direct” is limited to employees who are department heads.<sup>391</sup> Relying on legislative history, the majority held that any employee has authority “to direct” if he or she has “men under him” and if the employee decides “what job shall be undertaken next or who shall do it.”<sup>392</sup> In this respect, the majority applied intentionalist theory, so its overall opinion can be viewed as a textualist approach that gives some weight to congressional intent.

The majority then held that “for direction to be ‘responsible,’ the person directing and performing the oversight of the employee must be accountable for the performance of the task by the other, such that some adverse consequence may befall the one providing the oversight if the tasks performed by the employee are not performed properly.”<sup>393</sup> While the majority felt this interpretation was supported by precedent, it also felt it “was consistent with the ordinary meaning of the word”<sup>394</sup> and cited two dictionary definitions of “responsible.”<sup>395</sup> The majority thus used textualism to support its conclusion.

With respect to interpreting the term “independent judgment,” the majority concluded that “a judgment is not independent if it is dictated or controlled by detailed instructions,”<sup>396</sup> but also held that “the mere existence of company policies does not eliminate independent judgment from decision-making if the policies allow for discretionary choices.”<sup>397</sup> To reach this result, the majority’s approach was primarily textualist. The majority stated that “[t]o ascertain the contours of ‘independent judgment,’ we turn first to the ordinary meaning of the term,”<sup>398</sup> and cited a court of appeals decision for the proposition that “statutory language should be interpreted according to its plain meaning.”<sup>399</sup> The majority then relied on the dictionary definitions of “independent” and “judgment” in

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389. *Oakwood Healthcare, Inc.*, 348 N.L.R.B. at 690.

390. *Id.* at 690 n.26.

391. *Id.* at 690-91.

392. *Id.* at 691 (internal quotation marks omitted).

393. *Id.* at 691-92.

394. *Oakwood Healthcare, Inc.*, 348 N.L.R.B. at 691.

395. *Id.* at 691 n. 35 (citing definitions in WEBSTER’S NEW WORLD DICTIONARY 1221-22 (4th College ed. 1999) and AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1486 (4th ed. 2000)).

396. *Id.* at 693.

397. *Id.*

398. *Id.* at 692.

399. *Oakwood Healthcare, Inc.*, 348 N.L.R.B. at 692 n.40 (citing *United States v. Ripa*, 323 F.3d 73, 81 (2d Cir. 2003)).



*Webster's Third New International Dictionary*.<sup>400</sup> The majority thus continued to use a textualist approach.

The majority did not end the analysis with those definitions but instead took into consideration the fact that the Act contrasted “independent judgment” with acts of a “merely routine or clerical nature,”<sup>401</sup> which would be consistent with a textualist’s use of the context in which statutory language is used. The majority therefore held that, although the dictionary definitions provided a starting point for determining which actions used “independent judgment,” an action falling within that definition would be excluded if it was of a “merely routine or clerical nature.”<sup>402</sup>

The majority’s overall approach was therefore essentially a textualist approach. The majority argued that it was required to begin its analysis with the ordinary meaning of the words used in the statute and relied extensively on dictionary definitions.

In contrast to the majority, the dissenting members rejected a textualist approach, accusing the majority of a “largely dictionary-driven approach.”<sup>403</sup> The dissenting members stated that “[w]here statutory language is ambiguous, it is not enough to consult the dictionary,”<sup>404</sup> and quoted Judge Learned Hand for the proposition that “it is one of the surest indexes of mature and developed jurisprudence not to make a fortress of the dictionary; but to remember that statutes always have some purpose or object to accomplish.”<sup>405</sup> The dissenting members argued that the meaning of an ambiguous term should be determined by reviewing the whole statutory text, considering the Act’s context and purpose, consulting authoritative legislative history,<sup>406</sup> and considering “policy concerns.”<sup>407</sup> The dissenting members also stated that “the reasonableness of the majority’s interpretation can surely be tested by its real-world consequences.”<sup>408</sup> This is the language of intentionalist theory.

Consistent with an intentionalist approach, the dissenting members relied extensively on the legislative history of the Taft-Hartley Act. They argued that the legislative history showed Congress intended to include in the definition of “supervisor” those employees who were foremen and exclude “straw bosses, leadmen, set-up men, and other minor supervisory employees.”<sup>409</sup>

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400. *Id.* at 692.

401. *Id.* at 693 (quoting 29 U.S.C. § 152(11) (2000)).

402. *Id.* at 693 (quoting 29 U.S.C. § 152(11)).

403. *Id.* at 701 (Liebman & Walsh, Members, dissenting in part and concurring in part in the result).

404. *Oakwood Healthcare, Inc.*, 348 N.L.R.B. at 700.

405. *Id.* at 700 n.6 (quoting *Cabell v. Markham*, 148 F.2d 737, 739 (2d Cir. 1945), *aff'd*, 326 U.S. 404 (1945), *superseded by statute*, 50 U.S.C. § 34(a) (2006)).

406. *Id.* at 700-01.

407. *Id.* at 701.

408. *Id.* at 700.

409. *Oakwood Healthcare, Inc.*, 348 N.L.R.B. at 701 (emphasis omitted) (quoting S. REP. No. 105, 80th Cong., 1st Sess. 4-5 (1947)).

The dissenting members included in their discussion of the construction of “assign” a discussion of the consequences of the majority’s holding, including the exclusion of a substantial number of employees from the Act’s coverage:

[E]ven if the statutory text permitted such a drastic result, what reasons of federal labor policy would support it? Denying the Act’s protection to workers who have only minor supervisory responsibilities, and who are closely aligned not with management but with rank-and-file employees, is both contrary to Congressional intent and a recipe for workplace discord. . . . [T]he Board’s proper function in this case . . . must be to calculate the possible consequences of its reading of the Act and to weigh them against the evidence of Congressional intent.<sup>410</sup>

This discussion of consequences was fully consistent with an intentionalist approach to statutory interpretation.

The dissenting members did not, however, entirely eschew reliance on the statute’s text, which is still consistent with a contemporary intentionalist approach.<sup>411</sup> For example, the dissenting members relied on the statutory context in which the term “assign” was used, which is the type of context a textualist would consider. The dissent argued that the majority failed to interpret the term “assign” in context by failing to recognize that the word “employees” serves as the grammatical object of the verb “assign,” and thus the term “assign,” in context, referred to assigning employees, not assigning tasks.<sup>412</sup> The dissent also reasoned that the other supervisory functions listed in section 2(11) each related to affecting employee tenure and status<sup>413</sup> and, “[v]iewed as a member of this series, ‘assign’ must denote authority to determine the *basic* terms and conditions of an employee’s job, i.e., position, work site, or work hours.”<sup>414</sup>

The dissenting members also relied on canons of statutory construction, the use of which is generally associated with textualists. The dissenting members stated that they believed the majority’s interpretation of “assign,” which included task assignments, violated the canon of statutory construction that counsels against redundancy because “assigning” tasks would essentially be the same thing as “directing” employees to do them, and “responsibly to direct” employees was already identified as one of the twelve supervisory functions.<sup>415</sup>

With respect to interpreting the term “responsibly to direct,” the dissent believed that legislative history, and not a dictionary definition, provided “the

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410. *Id.* at 705.

411. As previously mentioned, one of the effects of Justice Scalia’s so-called “new textualism” is general agreement “that neither citizens nor judges should consider legislative history to be *authoritative* in the same way the statutory text is authoritative: the latter is and has the force of *law*; the former is, at best, evidence of what the law means.” ESKRIDGE ET AL., *supra* note 3, at 238; *see also* BREYER, *supra* note 8, at 88 (noting that his “reasonable member of Congress” used for purposes of imaginative reconstruction will consider statute’s text).

412. *Oakwood Healthcare, Inc.*, 348 N.L.R.B. at 703.

413. *Id.* at 703 & n.18.

414. *Id.* at 703.

415. *Id.* at 704.

best guide to Congressional intent.”<sup>416</sup> The dissent believed that legislative history showed “that the phrase ‘responsibly to direct’ refers to the general supervisory authority delegated to foremen overseeing an operational department.”<sup>417</sup> The dissent reasoned that “[w]hat is missing from the majority’s interpretation . . . is the recognition of the scope and scale of the supervisory function that ‘responsibly to direct’ was intended to capture.”<sup>418</sup> This is intentionalist theory. The dissenting members concluded by stating that “the majority has followed a mistaken approach to statutory interpretation that, not surprisingly, leads it far beyond what Congress contemplated in 1947 when it addressed the unionization of foremen.”<sup>419</sup>

In sum, the dissenting members, while not completely eschewing textualism and some of textualism’s tools, used a method of statutory construction that was primarily intentionalist. Thus, unlike the opinions in *Brown University*, and consistent with what one would expect, the Republican members adopted a conservative, textualist approach, and the Democratic members adopted a liberal, congressional-intent approach.

#### VI. CONCLUSION

An analysis of *Brown University*<sup>420</sup> and *Oakwood Healthcare, Inc.*,<sup>421</sup> shows that the Board essentially approached the issues of statutory construction like a court would, giving too much emphasis to the Board’s interpreting role and not enough emphasis on its policymaking role. The decisions also suggest that the tendency of Republican Board members to rule in favor of management, and the tendency of Democratic Board members to rule in favor of unions and employees, is perhaps not the product of differing theories of statutory construction. Rather, if these cases are representative of Board practice in general, Republican and Democratic Board members seem to use, in different cases, whatever tools of statutory construction aid them in reaching the desired outcome. While the Board thus purports to act like a court and purports to use judicial methods of statutory construction, the Board is perhaps engaging in policymaking under the guise of interpretation. This practice is similar to its practice of engaging in policymaking under the guise of fact-finding, a practice condemned by the Supreme Court.<sup>422</sup>

The fact that Board members might be using different methods of statutory construction to disguise policy decisions is not necessarily, however, as serious as a similar charge made against the judiciary. As previously discussed,

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416. *Id.* at 706.

417. *Oakwood Healthcare, Inc.*, 348 N.L.R.B. at 706.

418. *Id.*

419. *Id.* at 709.

420. 342 N.L.R.B. 483 (2004).

421. 348 N.L.R.B. 686 (2006).

422. See *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 376 (1998) (“An agency should not be able to impede judicial review, and indeed even political oversight, by disguising its policymaking as factfinding.”).

administrative agencies, the Board included, should base their decisions on policy. What is disappointing is not that Board members might be reaching results based on what they believe is sound labor-relations policy but rather the fact that Board members downplay in their opinions their legitimate policymaking role and draft their opinions like a court. Although the Board, as a quasi-judicial body, resembles a court, it is not a court, it is an administrative agency, and it should not feel compelled to act like a court when construing the Act.

Because courts are expected to defer to reasonable constructions of the Act by the Board, and because the Board's construction of the Act can legitimately be based on policy decisions, the Board should not feel it is necessary to select the method of statutory construction that allows it to reach the desired policy result. Rather, the Board should use judicial methods of statutory construction to simply determine if Congress's intent on the interpretive question is clear and, if not, identify the permissible constructions of the Act available to it under *Chevron*, and then discard methods of statutory construction. Once the permissible constructions have been identified, the Board should reach a result based on what it believes best promotes the Act's purposes, taking into account any relevant external policies and principles.

It might be argued that this issue is irrelevant, because the Board's decisions will be the same, and the reasoning will simply be different. But process matters. If the Board's statutory construction openly disclosed policy choices, its decisions would have more legitimacy. If "[t]he Board's behavior—abrupt changes in policy appearing to rework in wholesale major areas of Board law, often undone three or four years later—sows disrespect for the agency,"<sup>423</sup> flip-flopping on methods of statutory construction similarly sows disrespect for the agency. The Board, drafting its opinions in the style of a court, creates the perception that it should act like an appellate court when engaging in statutory construction. This persona leads to the incorrect perception that it should only apply law (instead of essentially also making law), and its flip-flopping on methods of statutory construction then sows disrespect for the agency.

Because federal appellate courts review Board decisions to ensure the Board's construction of the Act is permissible, the Board has an incentive to phrase its decisions in the language of judicial statutory construction. For example, if the APA's arbitrary and capricious standard is held to apply to statutory construction,<sup>424</sup> or if the Board is not permitted to consider factors that Congress did not intend it to consider,<sup>425</sup> basing decisions solely on policymaking

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423. Estreicher, *supra* note 31, at 171.

424. As previously mentioned, whether the APA's arbitrary and capricious standard also applies to an agency's statutory construction is a complicated question, which is beyond the scope of this Article. See generally Levin, *supra* note 177, at 1255 (proposing that APA's "arbitrary and capricious" standard and *Chevron's* step two are identical); Harper, *supra* note 177 (arguing that arbitrary and capricious standard should, and does, apply to agency statutory construction made in adjudications as well as in rulemaking).

425. See *Whitman v. Am. Trucking Co.*, 531 U.S. 457 (2001) (holding that EPA was not permitted to make trade-offs between public safety and cost to national economy, because Congress

could be risky. For example, two commentators have argued that the Board used textualism to decide *Oakwood Healthcare, Inc.*, because that would be the type of decision the Supreme Court would uphold.<sup>426</sup> Thus, the reality is that the Board is unlikely to base its holdings solely on policy grounds, even when that policy choice involves selecting between permissible constructions of the Act.

By recognizing, however, that the Board should not act like a court, and should not employ methods of statutory construction currently used by courts beyond defining the permissible constructions of the Act available to it under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,<sup>427</sup> we are at least able to focus on the relevant issues when critiquing Board decisions, i.e., policy issues. Debating whether a Board decision was correct by arguing whether textualism or intentionalist theory is the correct method of statutory construction fails to recognize that once the permissible constructions of the Act are identified, current judicial methods of statutory construction have no place in administrative agency statutory construction.

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had not intended cost to be factor for agency to consider).

426. See Michael W. Hawkins & Shawn P. Burton, *Oakwood Healthcare, Inc.*, 348 *N.L.R.B. No. 37* (2006): *How Textualism Saved the Supervisory Exemption*, 9 *U. PA. J. LAB. & EMP. L.* 1, 15-17 (2006) (arguing that Supreme Court would likely employ textualism in interpreting statute, so textualist decision would have better chance of surviving Supreme Court scrutiny).

427. 467 U.S. 837 (1984).

