**An Empirical Examination of Agency Statutory Interpretation**

**By Amy Semet****[[1]](#footnote-1)**

How does an administrative agency actually interpret statutes? In recent years, there have been increased calls to empirically examine the administrative state. Scholars have done surveys of both congressional drafters and agency personnel to discern what they know and think about statutory interpretation. There is still much to learn about what agencies actually do when they interpret statutes. This Article looks behind the black box of agency statutory interpretation to review how administrative agencies use canons and other tools of statutory interpretation to decide cases. I empirically analyze National Labor Relations Board (“NLRB”) cases from 1993-2016 to study what statutory methodologies the Board uses in its decisions in an attempt to uncover patterns of how the Board has interpreted statutes over time. I find that Board members largely interpret statutes to advance a policy agenda, switching between methods depending upon the partisan outcome the Board seeks. For instance, Republican Board members use textualist canons to narrowly construe the statute when the case involves a suit alleging wrongdoing by an employer, but then switch to a purposive method to find a violation when litigants argue that a labor union is in violation of law. Democratic Board members are no different in their selective use of statutory methodologies to arrive at the result most pleasing to labor. In addition, Board members use statutory methodologies to dueling purposes, with majority and dissenting Board members often using the same statutory methodology to support contrasting outcomes. The Board has also changed how it interprets statutes over time, relying less on legislative history and more on policy concerns. Majority Board members have also increasingly “dueled” with dissenting members over the use of statutory canons, with each side advancing different statutory philosophies to argue their case. In addition to empirically analyzing how the NLRB interprets statutes, the Article also looks briefly at how reviewing appellate courts rule on Board decisions interpreting statutes. I find that the largely conservative appellate courts often use textualist methods to overturn the Board’s decisions. After analyzing the empirical data, I set forth policy recommendations for how agencies should interpret statutes as well as for how appellate courts should in turn review those interpretations.

Administrative agencies are the primary interpreters of federal statutes[[2]](#footnote-2) and have taken on the task of “updating” the law to current conditions—a practice that has long been the province of traditional common law courts.[[3]](#footnote-3) Although scholars have advanced theories on how judges in the federal courts review agency’s decisions on statutory interpretation, they have paid scant attention to how administrative agencies review the statutes that Congress delegates to them to interpret. Toward this end, Jerry Mashaw of the Yale Law School called on scholars to quantitatively study statutory construction by administrative agencies.[[4]](#footnote-4) As he argues, “[s]urely, in a legal world where agencies are of necessity the primary official interpreters of federal statutes and where that role has been judicially legitimized as presumptively controlling, attention to agencies’ interpretative methodology seems more than warranted.”[[5]](#footnote-5) Indeed, there has been an increased shift in recent years to empirically study agency statutory construction with two path-breaking surveys in the past three years concerning statutory construction among congressional staffers and agency personnel, respectively[[6]](#footnote-6) providing a glimpse behind the black box. Yet, we still know very little about how any particular agency actually interprets statutes in any systematic way in its adjudications. This is all the more troubling given that *Chevron*[[7]](#footnote-7) validated agency statutory interpretation as an “autonomous enterprise,” with appellate courts simply charged to ensure that the agency’s construction is a “reasonable” and defensible construction of the statute.[[8]](#footnote-8)

This Article reviews the statutory construction techniques employed by the NLRB in the last 23 years through the presidencies of William Jefferson Clinton, George W. Bush (“Bush II”) and Barack Obama. Discussion centers around three empirical questions: First, to what extent do Board members use statutory methods in a consistent or partisan fashion? Second, do majority and dissenting opinions “duel” with each other with respect to the statutory constructions they apply, that is, do they use contrasting methods to interpret the same statute or do they use the same method to different ends?[[9]](#footnote-9) Third, do appellate courts reviewing decisions of the Board defer to the Board’s interpretation of the statute by resorting to the same statutory methods? After exploring these questions, I look at the issue normatively by asking how the Board—and administrative agencies generally—should interpret statutes as well as how reviewing appellate courts should in turn exercise judicial review.

The Article’s findings are of import to scholars of statutory constructions. Much like the analysis by Abbe Gluck and Lisa Bressman[[10]](#footnote-10) and Christopher Walker[[11]](#footnote-11) gave an insight into real-world understandings of statutory interpretation, this Article is an attempt to contribute to that debate by showing in an empirical fashion how at least one agency interprets statutes in its adjudications. I find that Board members do not consistently use interpretive methods.[[12]](#footnote-12) Majority and dissenting writers bicker over the breath of the statutory words, invoke different parts of the whole act or the whole code to advance an interpretation, argue that related statutes are more or less relevant to interpretation and disagree over the purpose of the statute and the statutory scheme. Both Democratic and Republican Board members employ both textualist and purposivist methods in their analysis to advance a particular policy approach. The methods the Board uses have changed over time, with the current Obama Board relying more on policy and less on legislative history to advance the Board’s statutory mandate. The type of dueling between majority and dissenting Board members has also shifted over time; whereas during the Clinton administration, opposing sides argued over policy differences, in more recent opinions in the Obama Board, members quarreled over whether a textual or purposive method is most appropriate to resolve the interpretative dilemma at hand.

These empirical findings contribute to the debate about how agencies should construe statutes. Columbia Law professor Karl Llewellyn challenged the view that statutory canons lead decision-makers to arrive at a consistent, non-ideological—and most importantly—“correct” reading of the underlying statute.[[13]](#footnote-13) This studies’ findings support that claim somewhat as Board members continually switch their interpretive method depending on the procedural posture of the case. Moreover, the somewhat inconsistent usage of legislative history by the Board calls into question whether legislative history—especially the legislative history of a 75-year old statute that has not been updated since the beginnings of the Cold War—can serve as a useful tool to help courts act as a “faithful delegate” to the legislature.[[14]](#footnote-14) Rather, agencies should first focus on the language of the text, in line with how the text aligns with other parts of the statute. If the text does not dictate meaning, then the agency should use its expertise in line with its responsibility to be politically accountable.[[15]](#footnote-15) Legislative history should serve as an anchor to inform the agency of the statute’s background, but it should not be used to limit the text or to infuse the statute with the meaning expected by the statute’s enacting coalition.[[16]](#footnote-16) For a policymaking agency charged to implement the President’s agenda, we might expect to see agencies interpreting statutes quite differently than what we might expect of courts.[[17]](#footnote-17) Agencies, for instance, should be more explicit about how they incorporate policy and practical reasoning in their statutory interpretation calculus.[[18]](#footnote-18) They could do this by embracing their role as experts and basing their legal reasoning on that expertise.[[19]](#footnote-19) Moreover, the Board’s more explicit acknowledgement of itself as a policymaking body as opposed to a court would do much to ensure that the Board’s statutory interpretations best effectuate the statutory mandate of the Board. I propose, for instance, that the Board embrace its policymaking mandate by relying more on social science data to inform statutory meaning and to update to the NLRA to current times. I also argue that the NLRA should also embrace rulemaking to make decisions on some of the matters it currently leaves to case-by-case adjudication.

In Part I, I survey the scholarly literature. I first review the literature on statutory methodologies generally in Part I.A, and then in Part I.B, I orient the study within the broader scholarship concerning statutory methodologies applied specifically to the administrative state. In Part II, I turn to the empirical study at hand. I provide background on the NLRB in Part II.A and then in Part II.B, I set forth the empirical methodology employed. In Part II.C, I present and analyze the data regarding the statutory methodologies the Board used in its majority opinions during the 23-year period under study. I provide summary statistics and I also set forth, in a doctrinal fashion, different typologies on how the Board analyzed specific cases. I next turn in Part II.D to an analysis of the statutory methodologies used by dissenting Board members to assess how the methods used by dissenting members differed from those used by the majority. I also analyze the extent to which the majority and dissent “dueled” with each other over statutory methods. I move on in Part II.E to briefly review what methods appellate courts use in their review of the NLRB’s statutory interpretation decisions. Finally, I devote Part III to discussing the analysis’s conclusions, before making policy recommendations and proposals in Part III.A and III.B, respectively, to inform statutory decision-making for both the NLRB and the administrative agencies generally. In so doing, I present a normative argument about the role that statutory methods should play in administrative decision-making and I advocate that the Board embrace its policymaking role by basing its decisions more on expert evidence on the economic effects and ramifications of its policymaking. I also argue that the Board should reduce its reliance on legislative history and that it should more affirmatively embrace rulemaking as part of its policymaking mission. I end by arguing that appellate courts should in turn defer more to agencies and review statutory interpretation under the more deferential arbitrary and capricious standard of review.

1. **Statutory Interpretative Methodologies**
2. **Background on Statutory Methods**

Scholars have debated how courts and other law-making bodies should construe statutes.[[20]](#footnote-20) The issue of statutory construction is often highlighted during Supreme Court confirmation hearings when Senators grill prospective justices on the statutory methodologies they will use to interpret cases. How a statute is construed can be critical to the outcome of a case; a narrow construction of a given term could foreclose relief to the plaintiff while a broad construction, relying on a full arsenal of materials like legislative history to back it up, could result in a decision in the opposite direction. Two competing theories of statutory construction dominate debate: textualism and purposivism. The first theory, textualism, popularized by Justice Antonin Scalia, interprets statutes by looking at the text’s literal meaning.[[21]](#footnote-21) Another view, purposivism, focuses more on interpreting the statute by looking at the overall purpose of the statutory scheme.[[22]](#footnote-22)

1. **Textualism**

Textualism places an emphasis on the statute’s text, looking only to find “objective meaning.”[[23]](#footnote-23) It calls for judges to look at the ordinary meaning, at the time of enactment, of the statutory term in question, putting an emphasis on predictability and constancy.[[24]](#footnote-24) A “pure textualist” would see the statute as a “command[] from the sole politically legitimate statutory law-creating body,” and as such the role of the judge is “simply to apply the command verbatim” such that “[i]nterpretation that goes beyond statutory text operates in an extra-legal domain.”[[25]](#footnote-25) Textualists dismiss the role of the legislative process as a resource to discern statutory meaning and as such they do not consider legislative history as important.[[26]](#footnote-26) Textualists believe that legislative proponents of a given view, for instance, could pick and choose what piece of legislative history to use to advance certain policy preferences.[[27]](#footnote-27) Moreover, general legislative purpose may be so “general and malleable” so as to be effectively meaningless in informing statutory meaning.[[28]](#footnote-28) Textualists think that it is near impossible to discern any singular “legislative intent” given the multiplicity of political actors involved in a statute’s construction.[[29]](#footnote-29)

Textualists embrace textual or semantic statutory canons as tools that enhance predictability.[[30]](#footnote-30) Textualists often rely on “textualist canons” to serve as “rules of thumb” in how to interpret the actual text.[[31]](#footnote-31) The most common textualist canon is the “plain meaning rule” whereas the reviewing body will interpret the words according to their everyday meaning.[[32]](#footnote-32) Other textualist canons concern a rule against superfluities so as to construe statutes to avoid redundancy and to give independent meaning to overlapping terms.[[33]](#footnote-33) There are also a host of Latin-named textualist canons: *ejusdem generis*,[[34]](#footnote-34) which states that when there is a list of two or more specific descriptors followed by general descriptors,[[35]](#footnote-35) the general descriptors must be restricted to the same class; *expressio/inclusio unius est exclusio*, which states that items not on a list are impliedly assumed to be excluded; *in pari materi*, which states similar statutory provisions should be interpreted in a similar way; and *noscitur a sociis*, which states that when a word is ambiguous, one should discern its meaning by looking at references to the surrounding text.[[36]](#footnote-36) Another interpretive tool looks at the way courts in other cases have interpreted similar language in other statutes—the whole code rule.[[37]](#footnote-37) Likewise, the whole act rule refers to the inferences a reviewing court may make about the meaning of one section of a statute based on how other sections are structured.[[38]](#footnote-38) It calls for reviewing courts to assume that differences in similar or parallel statutory provisions to be deemed deliberate and to presume that statutory provisions have consistent meaning through the statute.[[39]](#footnote-39)

1. **Purposivism**

Although the theory can have many variations,[[40]](#footnote-40) the second approach, purposivism or dynamic interpretation as popularized by William Eskridge,[[41]](#footnote-41) contends that interpreters should take public values into consideration and construe statutes dynamically to reflect current social, political and legal contexts.[[42]](#footnote-42) For purposivists, the interpreter looks at three perspectives: 1) the statutory text; 2) the historical perspective as reflected in the original legislature’s explorations of policy; and 3) the evolutive perspective considering the evolution of the statute and the present role that the statute’s plays in the world, with a particular emphasis on how the statue fits in with the current societal and legal environment.[[43]](#footnote-43) Unlike textualists, purposivists argue that judges should discern statutory meaning by first identifying the purpose of the statute and then selecting the meaning that best effectuates the stated (or implied) purpose.[[44]](#footnote-44) Purposivists argue that this view defers more to the views of the democratically-elected branches, placing more emphasis on democratic accountability.[[45]](#footnote-45) As Stephen Breyer notes, “overemphasis on text can lead courts astray, divorcing law from life—indeed, creating law that harms those whom Congress meant to help.”[[46]](#footnote-46) Dynamists elevate courts to be the primary arbiters of how the law should be interpreted with the emphasis on evolving legal principles as well as changing social and economic changes.[[47]](#footnote-47) As such, the interpretation given by a dynamic court could conceivably differ much from what the enacting coalition might want.[[48]](#footnote-48) Such an approach can foster greater judicial autonomy because courts have the power to elevate their own policy preferences ahead of the preferences of the original enacting coalition.

Purposivism has its limitations. Most particularly, it can be difficult to discern statutory meaning. A statute can have multiple and cross-cutting purposes.[[49]](#footnote-49) Moreover, reliance on legislative history to guide in discerning that purpose can be problematic. Legislative history may not always be reliable as staff can hide the true intent behind a bill with the use of clever language.[[50]](#footnote-50) Statements in legislative history could be a tool to provide political cover rather than a blueprint on what the original enacting coalition intended the statute to mean.[[51]](#footnote-51) Moreover, legislative history can take many forms—ranging from conference committee reports to stray remarks made by Congressman on the House floor or in the Congressional Record. Committee reports are often seen as the most authoritative source of legislative history, followed by conference reports yet the context can often matter.[[52]](#footnote-52) Who actually says the remarks can also matter, with statements by party leadership seen as least reliable.[[53]](#footnote-53) Floor statements by those opposed to the bill are often seen as the least reliable.[[54]](#footnote-54) In all, legislative history that takes the form of showing a “shared consensus” is often seen as most reliable.[[55]](#footnote-55)

1. **Substantive Canons**

Furthermore, any empirical examination of statutory construction would not be complete without mentioning the use of substantive canons. Substantive canons are judicially-created “rules of thumb” based on overriding legal norms, policies and conventions.[[56]](#footnote-56) All told, there are more than 100 substantive canons.[[57]](#footnote-57) For instance, the “Rule of Lenity” espouses that any ambiguity be resolved in favor of the defendant.[[58]](#footnote-58) The oddly named “Charming Betsy” doctrine states that national statutes be construed so as to not conflict with international law. Other statutory canons opine that statutes be interpreted so as to not violate so-called “fundamental values,” or so as to not abrogate sovereign immunity or not to preempt state law.[[59]](#footnote-59)

1. **Recent Empirical Studies of Statutory Interpretation**

The scholarship, particularly the empirical-oriented scholarship, analyzing statutory methods falls into two camps.[[60]](#footnote-60) Traditionally, scholars focus their empirical study on how the Supreme Court interprets statutes.[[61]](#footnote-61) In the past few years, however, scholars have shifted the focus beyond the Supreme Court to assess in a quantitative fashion how administrative agencies interpret statutes.[[62]](#footnote-62) Some investigate how administrative agencies interpret statutes through the use of surveys asked of administrators and congressional staff,[[63]](#footnote-63) while others embark on a more qualitative analysis of agency-specific statutory interpretations, picking out a few examples of actual cases to illustrate given points.[[64]](#footnote-64) No study has yet merged the various lines of inquiry to see how administrative agencies use statutory methods in their day-to-day decision-making in any sort of systematic way. Moreover, no study has examined how political principals (such as higher-level appellate courts) charged to oversee the legal decision-making body oversee the use of statutory canons employed by the decision-maker.

1. **Statutory Analysis of Supreme Court Decisions**

There have been many excellent studies of statutory analysis at the Supreme Court and the federal courts generally, with most of the analysis focused on deference as opposed to statutory construction. William Eskridge and Lauren Bauer compiled a comprehensive dataset of Supreme Court decisions involving a statutory interpretation issue between the time *Chevron* was decided in 1984 and the end of 2005.[[65]](#footnote-65) They found no evidence to indicate when the Court will invoke particular deference regimes in whether to defer to the agency.[[66]](#footnote-66) Moreover, there have been many follow-up studies studying how federal courts apply *Chevron*.[[67]](#footnote-67)

In addition to the *Chevron-*inspired literature, another strain of the literature looks at how federal judges use tools of statutory construction, such as canons and legislative history, to assess how those sources constrain judges from reaching outcomes in apposite to what one would predict from looking at their political background. In a book, Frank Cross tested plain meaning and legislative history methods finding that legislative history was more constraining than plain meaning.[[68]](#footnote-68) He also found a marked increase in the use of pragmatism in the federal circuit courts.[[69]](#footnote-69) Cross further traced the use of linguistic canons over time and that found a distinct increase in their usage between 1990 and 2000, a period that corresponded to the time when the use of legislative history was on the decline.[[70]](#footnote-70)

A few of the studies look specifically at interpretive canons, and in particular, rates of dueling canons in majority and dissenting opinions. One study, by James Brudney and Corey Ditslear, looked at interpretive canons in every Supreme Court decision in workplace matters from 1969-2003.[[71]](#footnote-71) In the limited subject matter studied, they notably found there to be no relationship between ideology and the canons employed by a justice, concluding that “in divided decisions, the Justices themselves are more prone to view the canons as reasonable amenable to supporting either side.”[[72]](#footnote-72) Nonetheless, they found that conservative justices tend to use canons to reach conservative outcomes, while liberal justices often use the same canon to reach a liberal result.[[73]](#footnote-73) In follow-up work, they narrowed their claim a bit, finding that liberal justices were more likely to vote in favor of employer interest when employing legislative history but that the use of canons and legislative history by conservatives was more mixed.[[74]](#footnote-74)

Another study by David Law and David Zaring analyzes the use of legislative history in Supreme Court cases from 1953 to 2006.[[75]](#footnote-75) They looked at legal factors that impacted what made the Court rely on legislative history.[[76]](#footnote-76) They found that dissenting judges were more likely to cite legislative history when a majority opinion also cited legislative history, thus suggesting that judges are sensitive to their colleagues’ arguments.[[77]](#footnote-77)

More recently, Anita Krishnakumar analyzed the role that “dueling canons” played in Supreme Court decisions in the Roberts court from 2005 through 2010.[[78]](#footnote-78) She found there to be a strong correlation between ideology and use of interpretive canons, with conservative justices in particular using the canons to reach conservative outcomes in about 60% of cases, while conservative justices using those same canons to reach a liberal outcome.[[79]](#footnote-79) She also found that the canons do not constrain the judges to vote against their ideology and that practical reasoning led to greater rates of dueling than traditional methods of construction.[[80]](#footnote-80)

1. **Empirical Studies of Administrative Law**
2. **Theoretical Accounts**

Scholars have offered some solutions for how to tackle the puzzle of how agencies, as

opposed to courts, should interpret statutes. Jerry Mashaw and Peter Strass argue that we should not expect agencies to necessarily construe statutes like courts do.[[81]](#footnote-81) Mashaw sets forth normative guidelines for how an agency should interpret a statute differently than a court as a result of its unique constitutional role and practical necessity.[[82]](#footnote-82) Rather, Mashaw contends we might expect agencies to “energize” a statutory program and engage in more activist policymaking in line with the wishes of political principals.[[83]](#footnote-83) Mashaw also argues that unlike courts, who are more constrained by norms like *stare decisis* and who seek to impose coherence to the legal order, agencies need not always be consistent in how they interpret statutes as they must be cognizant of present political realities.[[84]](#footnote-84)

Strauss too argues that “agencies essentially *live* the process of statutory interpretation,” and that the political nature of the task of interpretation takes on a special role in the context of agency statutory interpretation.[[85]](#footnote-85) As such, agencies, much more so than courts, are able to use legislative history to much greater effect.[[86]](#footnote-86) As Strauss notes, “The enduring and multifaceted character of the agency’s relationship with Congress contributes to the agency’s capacity to distinguish reliably those conservations that served to shape the legislation, legislative history wheat, from the more manipulative chaff.”[[87]](#footnote-87) Agencies can use legislative history in the context of its relationship to the White House, Congress and congressional committees.[[88]](#footnote-88) This special “institutional memory” thus provides agencies with a unique perspective and a “crucial resource” in which to discern congressional intent.[[89]](#footnote-89)

More recently, Kevin Stack argued that agencies should adopt a purposive method in interpreting regulations and that agencies “are purposive by statutory design.”[[90]](#footnote-90) He argues that agencies’ institutional capacities such as their expertise, political accountability and their ability to effectively evaluate and vet proposals makes them uniquely capable of interpreting statutes in a purposive way by looking at the purpose of the regulatory scheme and selecting actions that best effectuate those purposes.[[91]](#footnote-91) He further contends that agencies are guided by an “intelligible principle” of the agency’s purpose and thus have a duty to 1) develop an understanding of that purpose; 2) evaluate alternatives for action in relation to the purpose; and 3) then act in ways that best furthers that purpose; and adopt only interpretations of the statute that effectuate that purpose.[[92]](#footnote-92)

1. **Empirical Studies of Statutory Interpretation**

In the past three years, two detailed and comprehensive studies have been done empirically looking at how Congress and administrative agencies embark on statutory interpretation. Abbe Gluck and Lisa Bressman conducted a comprehensive and detailed study of agency interpretive practices by surveying members of Congress.[[93]](#footnote-93) They surveyed 137 congressional staffers with 171 questions to inquire into what members of Congress involved in drafting thought of agency practices.[[94]](#footnote-94) The study was the largest major empirical study related to statutory interpretation, and the only comprehensive empirical analysis of congressional staffers with respect to what they think about such aspects of statutory interpretation such as legislative history, *Chevron*, *Mead*, *Skidmore* and other issues.[[95]](#footnote-95) They found that legislative drafters were unfamiliar with the names of certain doctrines, but they nevertheless incorporated the assumptions of those doctrines in how they drafted legislation.[[96]](#footnote-96) The Gluck and Bressman survey found some canons to be out of favor; for instance, congressional respondents seemed to reject the whole code rule and *in pari materia.[[97]](#footnote-97)* Their respondents said that legislative history was the most important interpretive tool after the text.[[98]](#footnote-98)

More recently, Christopher Walker conducted a comprehensive survey of agency rule drafters at seven executive departments and two independent agencies to shed light on the approaches that agency rule drafters use when they interpret statutes and draft regulations.[[99]](#footnote-99) He found that drafters believed the canons to be the “key indicia of interpretive fidelity” and that rule drafters were frequently very familiar with the canons, even by the Latin names.[[100]](#footnote-100) His respondents noted that they frequently used some of the Latin canons (particularly *noscitur a sociis* (associated word canon) and *ejusdem generis* (residual clause canon) and the whole act rule, but that they did not often use the whole code rule or *in pari materia* (interpret similar statutory provisions alike).[[101]](#footnote-101) Moreover, a little than half of the respondents reported that the assumptions behind *expressio unius* and the rule against superfluities were often or always true.[[102]](#footnote-102) Walker reached many of the same conclusions as did Gluck and Bressman, though there were some differences.[[103]](#footnote-103) For instance, similar to Gluck and Bressman, his survey also found legislative history to be an important aid to interpretation (having the sixth highest response rate), though, in contrast to congressional drafters, agency decision-makers had somewhat different views on legislative history. For instance, agency drafters were less likely to believe legislative history was used to facilitate political deals.[[104]](#footnote-104) Walker also found that agency rule drafters that their interpretations could be subject to judicial review.[[105]](#footnote-105)

1. **Analysis of Statutory Interpretation at the NLRB**

How then can we apply these theories of statutory interpretation in practice? In this Part, I analyze how one specific agency—the NLRB—interprets statutes over a 23-year period. I first provide background on the NLRB in Part II.A. Then, in Part II.B, I set forth the methodology I employed as well as how I collected the data. In Part II.C, I present summary statistics on my findings and I also offer a conceptual framework setting forth what I see as separate typologies of how the NLRB interprets statutes in its majority decisions. I turn in Part II.D to look at how dissenters on the Board “duel” with the majority in how they interpret statutes. Finally, in Part II.E, I look at the next step in the process—how the reviewing courts interpret the cases heard by the Board and how their statutory methods “duel” with those used by the Board.

1. **Background on the National Labor Relations Board**

In 1935, Congress enacted the National Labor Relations Act (“NLRA”), also known as the Wagner Act, to protect the rights of employee to organize and bargain collectively.[[106]](#footnote-106) Congress created the Board to try 1) to reduce strikes and industrial strife which had burdened commerce and 2) to increase employee bargaining power which could have the effect of raising wages in the height of the Great Depression.[[107]](#footnote-107) During the New Deal era, the NLRB was one among many new administrative agencies created to handle the responsibilities of a burgeoning administrative state.[[108]](#footnote-108) Judicial aversion to unions had caused many to be fearful of using courts as a vehicle to combat labor abuses so Congress deliberately created an administrative agency to handle disputes as an express alternative to courts.[[109]](#footnote-109) As such, through the Wagner Act, Congress created the Board to both prosecute NLRB cases as well as to supervise union elections.[[110]](#footnote-110) As reflected in its legislative history, Senator Robert Wagner, architect of the NLRA, intended the Board to be a non-partisan tribunal that would make decisions detached from the whims of changing administrations.[[111]](#footnote-111) The new Board differed from its predecessor, the National Labor Board, an arbitral body composed of two members each from labor and industry, with a final seat as representative of the public interest.[[112]](#footnote-112) The new Board would have no pre-reserved seats, because there was a feeling that it would represent the public interest.[[113]](#footnote-113) Appointments in the first half-century reflected this spirit with many appointees rising from academia or government.[[114]](#footnote-114) Also, despite efforts by the Department of Labor to include the Board within its ambit, Congress created the Board as an independent agency so as to give it some distance from the political branches.[[115]](#footnote-115) Creators of the Board wanted a body that would be flexible enough to respond to changing circumstances while at the same time be responsive to political overseers.[[116]](#footnote-116) The legislative history indicates that Congress deliberately meant for Board member terms to be short and for there often to be turnover so as to ensure that responsiveness.[[117]](#footnote-117)

After widespread labor strife and claims by opponents that the NLRB acted too much in a pro-labor fashion, Congress amended the Wagner Act in 1947 through the Taft-Hartley amendments to apply certain provisions to union abuses, among other changes.[[118]](#footnote-118) The NRLA has somewhat of an inconsistent mandate in that it represents somewhat of an “odd marriage” between the Wagner Act and the Taft-Hartley Act.[[119]](#footnote-119) The Act itself is a reflection of different standards and operates somewhat at cross-purposes. As Catherine Fisk and Deborah Malamud question, “How radically pro-union was the Wagner Act, and how radically anti-union was Taft-Hartley”?[[120]](#footnote-120) Some labor scholars contend that the Wagner Act was a “transformative, pro-union, pro-collective bargaining ‘super statute’ with Taft Hartley being merely an amendment to reduce the power of unions and NLRB abuses of power, but which did not alter fundamentally the liberal basis of the Wagner Act.[[121]](#footnote-121) Other scholars see Taft-Hartley as altering the pro-union bent of the Wagner Act by imposing significant changes on the power of the Board.[[122]](#footnote-122)

In addition to providing for unfair labor charges to be brought against unions as well as employers, the Taft-Hartley Act expanded the size of the Board and created an Office of General Counsel so as to separate out adjudicative from prosecutorial functions—a unique feature of the NLRB among federal agencies.[[123]](#footnote-123) The President appoints members for staggered five year terms with the advice and consent of the Senate.[[124]](#footnote-124) Although early Board members largely hailed from academia or the government, more recent appointees come from a clear labor or management background.[[125]](#footnote-125)

Unlike many other agencies, the NLRB has chosen to proceed primarily through adjudication in its policymaking, only engaging in rulemaking in one instance in its 75-year history.[[126]](#footnote-126) The General Counsel brings cases on a region-based system, where they are heard by an Administrative Law Judge (“ALJ”).[[127]](#footnote-127) The Board, sitting in three-member panels randomly assigned, hears appeals to the ALJ decision if any party files what is known as “exceptions” to the ALJ opinion.[[128]](#footnote-128) Board decisions are free from the constraints of *stare decisis*, although the full Board of five-members can meet and decide cases to have precedential value before the Board itself.[[129]](#footnote-129) A party losing before the Board can seek relief in the federal appellate courts, although the Board largely subscribes to the doctrine of nonacquiescence whereby it rejects relying on the federal courts of appeals as binding precedent so as to ensure uniform application of law throughout the country.[[130]](#footnote-130) The Board’s orders are not self-enforcing; unless the parties voluntarily agree to abide by the Board’s orders, the General Counsel must go to federal court to seek enforcement.[[131]](#footnote-131) Only 1% of cases are appealed.[[132]](#footnote-132)

Unlike most other agencies who are charged to enforce many federal programs, the NLRB largely has essentially one statute to interpret — the NLRA. “[L]ongstanding political impasse[s] at the national level has blocked” substantial revisions to the Act, resulting in the NLRA not being amended in any major way since 1959.[[133]](#footnote-133) As such, the NLRB does not have to engage in much new statutory interpretation because it basically reviews the same statute. The NLRB hears two main types of cases: unfair labor practice disputes[[134]](#footnote-134) and election representation cases.[[135]](#footnote-135) The first type, unfair labor practice disputes, are claims brought by aggrieved parties that some entity (usually an employer) violated the unfair labor practice provisions of the NLRA, by, for instance, unlawfully discharging someone because they engaged in union activity, or altering the terms and conditions of the union contract in a unilateral matter or refusing to bargain with the union in “good faith.” Unfair labor disputes are not limited to actions just against employers (so-called “CA” cases), although disputes against employers represent the vast majority of cases heard by the Board. A party can also bring a claim against a union for unfair labor practices (“CB,” “CC,” “CD” or “CE” case). Moreover, in addition to unfair labor practice disputes, the Board hears cases arising out of disputes relating to union elections and representation petitions, such as cases about certifying the appropriate bargaining unit.

Voting on the Board in general is highly ideological, with Republican members voting in favor of management and Democratic members being more likely to vote in favor of labor.[[136]](#footnote-136) In some cases, the Board simply reverses many of the decisions of the prior administration when a new partisan majority takes hold at the Board.[[137]](#footnote-137) Critics of the Board commonly cite these frequent flip-flops as cause for concern as undermining the stability of labor law.[[138]](#footnote-138) The ideological nature of appointments to the Board since the Reagan years has increased the instability.[[139]](#footnote-139) Former Board member William Gould has argued that this sea change in the nomination process and the “batching” of nominees “frequently means the lowest common denominator,” with appointments being concentrated among Washington insiders.[[140]](#footnote-140) Today, there is an informal tradition of appointing both Democrats and Republicans to the Board so as to always ensure that the President’s party have a 3 to 2 majority of the seats as well as being the chair.[[141]](#footnote-141) At the turn of the twenty-first century, the Board consisted of two ex-management lawyers, two former union lawyers, a former law professor and a career Board employee— exactly the type of Board Congress expressly rejected when designing the NLRB.[[142]](#footnote-142)

1. **Methodology of Analyzing Statutory Interpretation**

To analyze how the Board interprets statutes, I first created a dataset consisting of the cases in which the Board engages in statutory interpretation of the NLRA. The Board, in some respects, engages in statutory interpretation every time it adjudicates a case; it must decide whether any given fact scenario fits within the violations set forth by the NLRA. Most of these cases, however, fit into predictable fact patterns that the Board can easily look to past precedent and apply. Most interesting, however, is to try to understand how exactly the NLRB newly construes statutes and what interpretive methodologies it uses to understand those cases. As such, I limited the analysis to only those few cases where the Board can fairly be said to engage in statutory interpretation as a matter of impression to serve as a model for ALJs and Regional Officers to use to direct case outcomes as opposed to simply applying a set rule to new factual circumstances.

To address this issue, I look at NLRB cases through the Bush, Clinton and Obama years. As part of another project looking at partisan panel effects, I read and coded over 3,000 NLRB cases during a 16-year time frame (1993-2007) and I extended the present statutory interpretation analysis to include cases up to August 2016.[[143]](#footnote-143) When reading each case, I coded the statutory methodology employed. To make sure I captured all the cases, I did a word search on Westlaw to capture all cases in which the Board engaged in statutory interpretation, and I similarly looked at all NLRB appellate cases that discussed either *Chevron* or statutory interpretation. [[144]](#footnote-144)

I found that the Board engages in some measure of statutory interpretation in less than 5% of all cases during the indicated time frame as in most instances it simply applies existing caselaw. This finding is not unsurprising. As Fish and Malamud note, a large proportion of the Board’s decision do not rely on any specific statutory language, a result of the lack of any recent legislative activity.[[145]](#footnote-145) Moreover, there is no “helpful” legislative history as the Supreme Court’s statutory interpretation in NLRB cases “often turn on nothing more than statements about the underlying purposes of the statute, and shows the same incapacity the Board manifests itself when it comes to how to prioritize Wagner Act versus Taft-Hartley formulation of those purposes.”[[146]](#footnote-146)

The results may be underinclusive in some respects. Two groups of cases are excluded. First, I only included cases in which the Board, acting as a three or five-member entity, itself actually engaged in statutory interpretation. By that I mean there are a fair share of cases in which the Board merely blesses the opinion of the ALJ by issuing a short order upholding the opinion. The ALJ may have set forth a statutory interpretation, but because there is no Board opinion it is impossible to know whether the Board simply affirmed the ALJ because they just agreed with the result or whether they in fact favored the statutory methodologies employed by the ALJ. Indeed in some cases, the Board even notes in a footnote that while they uphold the Board, they do not necessarily agree with the ALJ’s approach.

Second, I also did not include cases in which the Board “implicitly” interpreted the statute. For instance, the Board has a well-developed precedent to guide how to determine whether an employee was unlawfully terminated — the so-called *Wright Line[[147]](#footnote-147)* analysis where the Board analyzes a three-factor test of employer conduct and motivation to discern whether the conduct was unlawful. The Board hears literally hundreds of *Wright Line* cases where the Board applies the precedent to determine whether a violation occurred. Similarly, in hundreds of cases, the Board reviews whether or not someone is an “employee” under the Act’s provisions. In my database, I include the major Board case where the Board as a matter of impression devises the *Wright Line* test or determines the test to ascertain whether or not someone is an “employee” but I do not include the hundreds of cases applying facts to discern whether or not an employer satisfied its burden under *Wright Line* or someone is an “employee” as those cases concern fact-specific analysis of a test developed in another prior Board decision. In those cases, the Board cannot safely be said to be engaging in statutory interpretation, because the Board is simply applying facts to law. Indeed, there is no dispute concerning whether the challenged practice is in violation of law; rather the inquiry is whether there is sufficient evidence to sustain a violation. I also did not include cases where the NLRB interprets a different statute or is deciding a jurisdictional issue.[[148]](#footnote-148)

Some cases do not really make clear their interpretive strategy. The Board sets forth a fact scenario, makes a determination, but does not specify their reasoning except to rely on caselaw. To the extent one believes that these “caselaw only” decisions represent implicit policy determinations, the database would necessarily underestimate the extent to which the Board uses pure policymaking to guide statutory interpretations. However, one needs to draw the line somewhere, and there are a few reasons why I excluded such cases. None of the cases involved any discussion of the text itself (other than a reference to what the text actually said), legislative history, policy or practical considerations. Moreover, unlike the vast majority of the cases I included in my database, hardly any of these cases involved a dissent or concurrence, which, given the propensity of Board members to frequently dissent, especially in important cases, the cases in question most likely concerned an easy to analyze factual situation clearly fitting within established precedent. Finally, these cases were decided by three-judge panels. Although not strictly a rule (and there are three-panel Board decisions I included in the database), the Board generally does not decide important cases using three-judge panels; most “important” cases are decided by the full Board and as such full Board cases represent a disproportionate amount of the statutory interpretations done by the Board. In any event, to the extent the study is underinclusive it is underinclusive in the sense that it may exclude some cases where the NLRB’s sole method of interpreting is to piece together some sort of statutory interpretation from its own or Supreme Court caselaw laced together with a policy prescription.[[149]](#footnote-149)

The analysis rests on the assumption that the Board is transparent and that the opinions actually reflect the statutory methodology used by the Board. In many cases, the Board may choose not to set forth in writing what statutory methodology it employed, or it may set forth parts of its methodology and hide other parts. There is no way to know for sure whether the opinion itself accurately represents an accurate or complete transcription of how the Board interprets statutes. The same concern, however, can be said of any empirical analysis of statutory interpretation or even analysis of judicial voting generally. We never know for sure, for instance, if a liberal vote represents the judge’s ideological preferences. Judges may choose to dissent in one case but not others. These concerns are endemic to any study of judicial politics, but they by no means lead to the conclusion that we should not study these issues empirically. Rather, so long as we set forth the limitations, we can still gain useful information about judicial voting and judicial interpretation with the information we have available to us.

Having set forth the limitations, I next analyze the different interpretive methodologies employed by the Board. I first made a general finding of whether the decision was more textual or purposive. Then I coded for specific types of statutory tools: plain meaning rule; the Latin canons; dictionary definition; legislative history (as well as source of legislative history); substantive/textual canons, mentions of policy and references to practical implications. These interpretive rules are similar to those used in other empirical studies of statutory interpretation.[[150]](#footnote-150) Practical consequences concerned such things as the workability of the proposed ruling, the effect such a ruling would have on labor relations, the burdens imposed on the worker or the employer under the proposed ruling or the overall effects that may occur in labor law generally should the Board’s rule stand. Like other scholars, I included absurdity under policy or practical consequences.[[151]](#footnote-151) I only coded an interpretive rule if it was relied on by the Board; if the opinion only mentions a rule in passing or if it rejected a particular tool as being of probative value, I did not code for it. Likewise, if the decision ranked-ordered interpretive tools, I made note of it. In my analysis, I also coded for the use of “dueling” canons by which the majority and dissent both employed the same interpretive canon to advance their viewpoint. Board members may “duel” with each other in a textual matter by 1) focusing on different words; 2) focusing on the text of different statutes; or 3) focusing on the same word but ascribe a different meaning to the text.[[152]](#footnote-152) Purposivists can also “duel” with each other by 1) focusing on different, competing purposes; 2) focusing on the same purpose but draw different conclusions about that purpose; or 3) focusing on a broad, general statutory purpose while another one focuses on narrowly drawn specific purposes.[[153]](#footnote-153) If a case had multiple dissents, I combined the dissents into one for purposes of this analysis as there were no mixed partisan dissents, that is, there were no cases in which both a Democrat and Republican Board member both dissented on a statutory interpretation issue.[[154]](#footnote-154) Any dissents came from members of the same political party.

1. **Overview of Results of Statutory Interpretation at the NLRB**

The Board engaged in a mix of interpretative techniques in its decisions in the near 25-year period under study. In Part II.C.i, I detail the general trends, pointing out differences in interpretive methodology based on partisan composition of the panel, presidential administration, case type and whether the Board found a violation of law. I then turn to a detailed empirical and doctrinal discussion of the Board’s use of each interpretive method. In Part II.C.ii, I discuss the use of textualism by the Board, detailing in particular how the Board uses textual, language and substantive canons of interpretation before reviewing in Part II.C.iii, the Board’s use of legislative history. Part II.C.iv discusses the Board’s use of policy and practical considerations in its decision-making. Finally, in Part II.C.v, I summarize my findings.

1. **General Trends in Statutory Interpretation of Majority Opinions**

Table 1 lists descriptive statistics of the 137 cases that interpreted statutes in majority opinions. Each case often employed multiple types of methods, as, for instance, a Board decision could employ text, legislative history, policy and practical all in one decision. Figure 1 details the mean value for each methodology, by case type. “General Text” refers to cases in which the Board analyzes the text in part but the use of text is equal to or secondary to other interpretive methods. “Primary Text” in turn references cases in which the Board either primarily rests its conclusions on the text, using, by for instance, one of the textual canons, or if the Board argues that the text has a plain meaning that controls the outcome of the case.

**Table 1: Methods of Statutory Interpretation, by Case Type (Percent)**

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
|  | **General Text** | **Primary**  **Text** | **Latin**  **And**  **Language Canons** | **Legislative History** | **Policy** | **Practical** |
| **All Cases** | 50 | 21 | 29 | 47 | 84 | 40 |
| **CA (against employer)** | 52 | 20 | 31 | 45 | 88 | 40\* |
| **CB/CC/CD/**  **CE (against unions)** | 39 | 18 | 21 | 54 | 82 | 27\* |
| **Election/**  **Bargaining Unit** | 53 | 28 | 33 | 44 | 83 | 53\* |

**Figure 1**



In majority opinions, Board members cited to the text or engaged in some type of textual analysis in part about half of the time. However, the Board placed the textual analysis front and center in its interpretation strategy in only 21% of cases by either adopting a plain meaning approach or by relying on a textualist method such as the whole act rule or other textualist canons in interpreting the statute at hand. Even when advancing a “primarily textualist” interpretation, the Board did not rely solely on the text. In 69% of the “primary text” cases, the Board buttressed its textual argument by relying on legislative history. Moreover, in 86% of these same cases, the Board complemented its textual analysis by referring to policy considerations while in about 52% of the cases, the Board referenced practical implications of its rulings. The Board seems to engage in slightly less text interpretations in unfair labor practice cases against unions, but the results are not statistically significant. Similarly, the Board used Latin/language canons in slightly less than a third of their cases. The Board used these canons more in unfair labor union practices against employers as well as election or bargaining unit cases, though again the differences between case types are not statistically significant.

The Board used non-textualist methods, at least in part, in about 95% of its decisions. In 47% of its decisions, the Board majority referred in part to legislative history. Indeed, the Board most frequently cited to legislative history in cases containing allegations of union abuses. The Taft-Hartley Act extended the Wagner Act’s prohibitions to unions, so legislative history on these provisions in particular is rich so this difference is not entirely unexpected. In cases alleging abuses by unions, as detailed more fully below, the Board sometimes used legislative history as the primary method of interpretation to serve as a limiting influence on the meaning of a given statutory term.

In addition, the Board most frequently referred to policy more so than any other method, as in almost nine out of ten cases, the Board voiced some sort of policy implication explicitly or implicitly, at least in part. Given that the Board is, at its heart, a policymaking body, it is of no surprise that policy considerations often animate choice where Congress left a discernible “gap” in the law. Finally, practical considerations also played some role in decision-making, especially in election representation and bargaining unit cases (53%). As detailed more fully below, these cases often concern broader issues than unfair labor practice cases. As an example, many of these cases dealt with interpreting who was an “employee” under the NLRA, a conclusion that would have far-reaching implications about the reach of the Board’s jurisdiction into labor policymaking. As such, it is not surprising that in those cases in particular, the Board would often resort to consideration of practical implications, with about 40% of all cases referring to practical considerations at least in part. The Board differed, to a statistically significant degree at 90% confidence, in the extent to which it relied on practical considerations depending on case type. It relied on practical considerations the least in unfair labor practice cases against unions (27%).

Additional tables and figures look at the data broken down by party of the panel and/or the presidential administration. Table 2 looks at the methodologies broken down by the majority party of the panel hearing the case. During the entire period under study, 76% of the panels had Democratic-majorities and just 24% had a Republican-majority. While Democratic panels slightly favored a textual analysis over Republican-dominated panels and Republican panels used legislative history and policy more than Democrats, the results were not statistically significant. At 95% confidence, however, we can say that Republican panels were more likely than Democratic panels to cite to practical considerations (35% v. 55%), an interesting finding considering that scholars often argue that Republicans are more likely to be textualists than Democrats. Table 3 breaks down the data by the presidential administration. Although there seems to be a jump in the use of textualism during the Bush II administration, the results are not statistically significant to a high degree of confidence. Table 4 and Figure 2 merges the data and looks at the data broken by both party and presidential administration. Although again the sample size precludes a finding of statistical significance for many of the results, of note is the fact that panels composed of Board members from the opposing party of the President seem to decide cases in line with the methodology most popularly associated with the opposing party.[[155]](#footnote-155) For instance, during the Bush II administration, majority Democratic Boards decided 67% of decisions using a textualist methodology in part—a large jump from the 47% of the Clinton administration. Likewise, Republicans panels used legislative history more often during the Clinton administration (78%) than under the Bush II administration (43%), a result statistically significant at 90% confidence. Moreover, contrary to popular wisdom associating certain methodologies with ideological predisposition, it is Republican-dominated panels that seem to use practical reasoning more, especially during the Bush II administration, where the difference between Democratic-majority panels (20%) and Republican-majority panels (59%) is statistically significant at 90% confidence. These results of course must be taken with a grain of salt since the sample size is small but they nonetheless pose some interesting questions for future research about the amount of “control” that the presidential administration may pose for influencing interpretive methodology.

**Table 2: Methods of Statutory Interpretation, by Majority Party (Percent)**

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
|  | **General Text** | **Primary**  **Text** | **Latin and Language Canons** | **Legislative History** | **Policy** | **Practical** |
| **Democratic** | 51 | 22 | 29 | 46 | 83 | 36\*\*[[156]](#footnote-156) |
| **Republican** | 45 | 18 | 30 | 53 | 92 | 55\*\* |

**Table 3: Methods of Statutory Interpretation, by Administration (Percent)**

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
|  | **General Text** | **Primary**  **Text** | **Latin and Language Canons** | **Legislative History** | **Policy** | **Practical** |
| Clinton | 47 | 17 | 26 | 57 | 85 | 36 |
| Bush II | 54 | 23 | 36 | 42 | 87 | 44 |
| Obama | 50 | 25 | 28 | 40 | 85 | 43 |

**Table 4: Methods of Statutory Interpretation, by Majority Party of Panel and Administration (Percent)**

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
|  | **General Text** | **Primary**  **Text** | **Latin and Language Canons** | **Legislative History** | **Policy** | **Practical** |
| Dem./Clinton | 47 | 18 | 29 | 53 | 84 | 35 |
| Rep./Clinton | 44 | 11 | 11 | 78\* | 89 | 44 |
| Dem. /Bush II | 67 | 27 | 33 | 40 | 80 | 20\* |
| Rep./Bush II | 46 | 21 | 38 | 43\* | 92 | 59\* |
| Dem./Obama | 50 | 25 | 28 | 40 | 85 | 43 |

**Figure 2**



Table 5 and Figure 3 turn to detailing what was the single *primary* method of interpretation in a given case. I assigned each case to one of three groups: 1) Primarily Textual; 2) Textual/Legislative History+ (cases which may or may not also include considerations of policy or practical considerations but which rely first and foremost on the text and legislative history); and 3) Caselaw/Policy. I characterized a case as primarily textual as opposed to the second category of textual/legislative history/policy if the Board found the text to be dispositive of the issue in question. In most of these cases, the Board still referred to legislative history, policy and/or practical considerations, but the references to these methods was supplementary rather than necessitated as part of the statutory interpretation. In all, the Board decides most cases using exclusively a caselaw/policy-based approach (54%), a result that may be even underinclusive to the extent that the database did not capture every instance of statutory interpretation. The Board decides 20% and 26% of its cases respectively, using a primarily text-based or text/legislative history/policy based approach. Table 6 and Figure 4 breaks down the data by partisan composition of the panel, showing that the breakdowns are almost identical by dominant party of the panel hearing the case

**Table 5: Primary Method of Statutory Interpretation, by Party of Majority Panel (Percent)**

|  |  |  |  |
| --- | --- | --- | --- |
|  | **Primarily Text** | **Text/Legislative History +** | **Policy/Caselaw** |
| **All Cases** | 20 | 26 | 54 |
| **Democrat** | 20 | 25 | 54 |
| **Republican** | 18 | 30 | 51 |

**Figure 3**



**Figure 4**



Table 6 displays the primary methodology broken down by presidential administration. In particular, we see a marked decrease in the use of legislative history over time. Whereas 38% of Clinton-era Board decisions employed text/legislative history plus analysis as the primary interpretive method, only 12% of decisions in the Obama period used this method, a result statistically significant at 95% confidence. Rather, Obama-era decisions most frequently invoked policy/caselaw considerations as the primary interpretive method, with almost two-thirds of decisions from 2008 to the present using a policy-based approach as the primary interpretive method. Textualism also seems to have taken a marked turn upward in the Obama era, though the results on textualism and policy are not statistically significant. These differences may be explained by the makeup of the Obama Board. Unlike Boards during the Clinton and Bush II presidencies, it was not possible to get a Republican-dominated panel at any time during the Obama presidency. The Board, at the beginning of the Obama presidency, only had two members, forcing a constitutional showdown at the Supreme Court over the legitimacy of its decision using a two judge quorum.[[157]](#footnote-157) Moreover, statutory interpretation cases at the Obama Board seem to employ a predictable pattern: the three liberal Board members use primarily a policy-based approach to rule in favor of the liberal side, with Board members Philip Miscimarra and Harry Johnson writing a detailed dissent debunking every point they want. Moreover, more so than other Boards, the Obama Board proceeded to overrule more of the Bush-era NLRB decisions, decisions that had been issued less than a decade earlier.

**Table 6: Primary Statutory Methodology, by Administration (Percent)**

|  |  |  |  |
| --- | --- | --- | --- |
|  | **Primarily Text** | **Text/Legislative History +** | **Policy/Caselaw** |
| **Clinton** | 14 | 38\*\* | 48 |
| **Bush II** | 23 | 23\*\* | 53 |
| **Obama** | 25 | 12\*\* | 63 |

Table 7 and Figure 5 provide further detail on the breakdowns by both party of the panel and administration. Here, again we see noticeable differences based on the administration, particularly with respect to the text/legislative history plus method. In all, 56% of Republican-dominated panels during the Clinton administration relied on legislative history, whereas Democratic-panels through the three administrations generally relied on legislative history less than a quarter of the time. In turn, Republican-majority panels rarely relied on policy during the Clinton administration even when in the majority, but in the Bush II era, they decided most cases with a policy-based approach. The results underscore that the party in charge of the presidency is most likely to make its decisions with policy considerations at the forefront, and this trend has increased over time from the Clinton to the Obama presidencies. Moreover, text analysis as the primary method of interpretation seems to have increased over time at the expense of using a text/legislative history plus analysis. Democratic-majority panels in the Obama administration in particular seem especially likely to eschew legislative history in favor of a more policy-based approach.

**Table 7: Primary Statutory Methodology, by Majority Party and Administration**

|  |  |  |  |
| --- | --- | --- | --- |
|  | **Primarily Text** | **Text/Legislative History +** | **Policy/Caselaw** |
| **Dem./Clinton** | 14 | 25\*\* | 51 |
| **Rep./Clinton** | 11 | 56\*\* | 33 |
| **Dem./Bush II** | 26 | 26\*\* | 47 |
| **Rep./Bush II** | 21 | 21\*\* | 58 |
| **Dem./Obama** | 25 | 12\*\* | 62 |

**Figure 5**



1. **Board’s Use of Textualism and Latin/Language Canons**

The Board engaged in different types of textual analysis. In this section I set forth and explore in a doctrinal fashion each of the three typologies in turn: 1) plain meaning textualism; 2) expansive textualism; and 3) textualism by reliance on language/Latin/textual canons (particularly the whole act rule).

1. **Plain Meaning Textualism**

In the “primarily textualist” cases cited above, the Board sometimes read the text as mandating a certain interpretation by the clear import of the text. This analysis is similar to a *Chevron* Step 1 analysis where the Board found the text to be unambiguous. Plain meaning textualism had little influence in influencing how the Board interprets statutes on the whole as the Board found the meaning plain and dispositive in less than 4% of the cases. Further, even when the Board adopts a “plain meaning” approach with the text clearly necessitating a given result, the Board’s inquiry did not stop at the text; rather, even though the Board found the text to be clear, they went further and examined the legislative history (45%), caselaw (90%) or policy considerations (66%) to back up its textual analysis.

The Board adopted a plain meaning textualist approach, as an example, in *Alexandra Clinic, P.A., et al*.[[158]](#footnote-158) In the case, the Board reversed the ALJ’s finding that the employer violated sections 8(a)(1) and 8(a)(3) of the NLRA by terminating striking nurses.[[159]](#footnote-159) The Board relied on the plain language of section 8(g) of the statute, which expressly stated that nurses must give ten days advance notice in order to strike.[[160]](#footnote-160) The Board made clear that the text controlled: “[s]ince the text of the statute is the law and that text is crystal clear and unambiguous, no further discussion is necessary.”[[161]](#footnote-161) In so ruling, they overruled the Board’s prior decision in *Greater New Orleans*,[[162]](#footnote-162) which had used the legislative history to change the meaning to give strikers more flexibility in the notice requirements.[[163]](#footnote-163) The Board here referenced section 8(g)’s history by noting how in 1974 Congress amended the Act to extend collective bargaining rights to health care workers.[[164]](#footnote-164) Congress had to make a trade-off; while it wanted to extend benefits, it also had to face the realities of modern healthcare and the disruption that would ensue should health care workers be allowed to strike with impunity.[[165]](#footnote-165) The Board however stated that the section’s notice requirement was “clear and absolute,” in that it was clearly mandatory rather than discretionary,[[166]](#footnote-166) and that the plain text made clear that it applied regardless of the nature of the picketing as the statute clearly stated that notice was required in advance of “any strike, picketing or other concerted refusal to work at any health care institution.”[[167]](#footnote-167) The Board further noted that the section contained no modifying language respecting the nature of the picketing, and that as such, the provision should be interpreted to apply to the conduct at issue in the case.[[168]](#footnote-168) The Board criticized the *Greater New Orleans* Board by using legislative history to “rewrite the statute” to make the notice requirement discretionary rather than mandatory.[[169]](#footnote-169) Even though the Board found the text to be clear warranting “no further discussion,” as is the Board’s usual practice, the Board still went on to note that “policy considerations underlying Section 8(g) are effectuated” by applying it to the strikers workers in the case.[[170]](#footnote-170)

1. **Expansionist Textualism**

Instead of the plain language mandating a specific result, the Board often adopted textualist approaches to argue that the text did not forbid a certain interpretation or that the language of the text, when read together with surrounding language or text of other sections, either necessitated a given result or offered one among many permissible interpretations of the statute. The Board had a habit of adopting an expansive textualist approach whereby it argued that no language in the statute limited the Board’s flexibility in fashioning a given rule. In this way, the Board used the *expressio unius* approach. Under the Latin canon of *expressio unius*, something not expressly mentioned is excluded, and in about 17% of cases, the Board adopted this expansionist “no limits” textualist philosophy where it delved into the language of the statute to contend that it should be read without limits.

The Board, for instance, must frequently used an expansionist textual method to rule on the breadth of coverage under the NLRA. Critics of the Board have frequently criticized the Board for its frequent flip-flopping on the NLRA’s reach, especially with respect to interpreting who falls under the umbrella of being an “employee” under the Act. In recent years, the Board has heard a flurry of cases concerning with whether medical residents and interns (otherwise known as “house staff”) and graduate student teaching assistants are considered “employees” for purposes of protection under the NLRA. After amendments to the NLRB in the 1970s to allow the Board jurisdiction over private hospitals, the Board held that house staff and teaching assistants fell outside the Act’s protection.[[171]](#footnote-171) By 1999, the Board, now in control by Democrats, flip-flopped, overturning the NLRB rulings from the 1970s and extending protection to residents and TAs.[[172]](#footnote-172) By 2004, once the Board switched to Republican, the Board overturned the decisions regarding TAs once again.[[173]](#footnote-173) Then, by 2016, the Board, now again controlled by Democrats, once again overturned the 2004 ruling and found that graduate TAs in private universities are indeed covered under the protections of the NLRA.[[174]](#footnote-174)

The Board’s decision in *Columbia University* in August 2016 shows how the Board frequently expansively interprets the Act’s words to bring additional people within the ambit of the NLRA.[[175]](#footnote-175) For at least the third time in a decade, the Board had to address whether graduate teaching assistants who perform services for the university are “employees” under the meaning of the NLRA as defined by section 2(3) of the Act.[[176]](#footnote-176) If graduate students qualified as employees, they would come within the ambit of the Act with respect to engaging in concerted activity and collective bargaining—a major expansion of the role of TAs in private universities. The Board noted that the Act specifically states “any employee,” listing several exceptions such as independent contractors. Because the statute did not expressly list residents as an exception, the Board reasoned, residents did not fall outside the coverage of the Act which expressly covered “any employee.”[[177]](#footnote-177) Moreover, applying *expressio unius*, the inclusion of a list of persons who are not employees suggests that a graduate student, not being identified, should be considered within the definition.[[178]](#footnote-178) The Board similarly used an expansionist textualism in other cases as well. The Board often, for instance, would recite that “nothing in the text limits” the Board’s interpretation, another way of saying that the text does not foreclose the Board from adopting a specific interpretation. The Board rarely relied on a textualist only approach in interpreting cases; rather textualism may have been the heart of the statutory methodology employed by the Board but it was by no means the exclusive method employed. Even when using a textualist approach, the Board would also often refer to legislative history (78%) or policy (87%) as well to supplement its expansionist reading of the statute.[[179]](#footnote-179)

1. **Textualism By Reference to Latin/Language/Textual Canons**

The Board on occasion would also inform statutory meaning by resort to other textualist and Latin/language canons, though it never mentions any of the Latin canons expressly by name.[[180]](#footnote-180) Figure 6 details he Latin/Language/Textual/Substantive Canons used by the Board. The Board’s majority invoked Latin canons in slightly under a third of all cases. The Board most frequently invoked the whole act rule, relying on other parts of the statute that were similar to interpret the statute about 23% of the time. This is of no surprise given that the NLRA is part of a single statutory scheme so it would be important to use other parts of the statute to inform meaning.

**Figure 6**



In addition to the whole act rule, the Board most commonly used the whole code rule to inform statutory meaning in about 18% of cases. The whole code rule most often came up in reference to cases which called for the Board to interpret the Railway Act, which, the Supreme Court has stated is an “analogous” statute to the NLRA.[[181]](#footnote-181) Much of the debate concerning the Railway Act concerned whether the two acts are statutory equivalents (as the Supreme Court said), so as to use the Act to inform statutory meaning of the NLRA.[[182]](#footnote-182) Among the other Latin canons, the Board relied on *noscitur* the most (9%), while other Latin canons such as *ejusdem* (1%) and *in pari materi* (2%) were used much less frequently. Moreover, as noted, use of the *expressio unius* was the most popular interpretive Latin canon used by the Board (17%). For clarity, I specified that the Board here used the *expressio unius* canon to include what was not expressly excluded, not to exclude; thus I labeled it “modified *expressio unius*. Further, in addition to use of the Latin canons, the Board also on occasion would use other rules of language or grammar to inform meaning. In about 4% of cases, the Board expressly noted that the statute’s text should be read so as to avoid redundancy.

Finally, the Board also adopted two other techniques in its statutory interpretation that are of note with respect to the relationship between the Board and Congress. First, in 5% of cases, the Board informed its statutory interpretation by expressly noting that Congress failed to “clearly state” one interpretation, and so, by implication, the opposite interpretation must stand. Second, in a small minority of cases (5%), the Board referenced congressional inaction to respond to the Board’s longstanding interpretation of a statute as contributing to the Board believing, by implication, that Congress agreed with said interpretation. That is, the Board noted that because Congress did not act to amend the statute, it must have been pleased with the way that the Board has been interpreting the statute.

The Board used language and textual canons primarily to advance a text-based argument. In *Lincoln Lutheran of Racine*, for instance, the Board relied on other provisions of the NLRA to assist in interpreting the statute.[[183]](#footnote-183) The Democratic-majority Board broadly interpreted section 8(a)(5) of the NLRA, in part, by referring to other parts of the statute, which it said “create no obstacle to finding that an employer violates the act by unilaterally discontinuing dues cutoff after contract expiration.”[[184]](#footnote-184) Indeed, other provisions contained an express requirement that there be “written agreement.”[[185]](#footnote-185) The Board reasoned that “Congress’ explicit decision to condition the lawfulness” of another activity on a “written agreement with the employer” and the “conspicuous absence of this requirement in Section 302(c)(4)” demonstrates that “Congress did not intend the dues-checkoff arrangement to rely on whether the collective bargaining agreement expired.[[186]](#footnote-186) The Board went on to chide the prior Board for ignoring the statutory language to two other sections of the statue which were “enacted by the same Congress at the same time” that treated dues checkoffs “quite differently.”[[187]](#footnote-187) As the Board stated, “[t]he language of the proviso to [another section] makes clear that when Congress wanted to make an employment term, such as union security, dependent on the existence of a contract, Congress knew how to do so.”[[188]](#footnote-188) The Board continued its analysis by following up on policies that supported its finding as well as the legislative history.[[189]](#footnote-189)

Finally, as a side note, the Board rarely relied on any of the substantive canons. In two cases, the Board invoked the canon against construing a statute so as to conflict with the Constitution to guide its decision-making. Some cases, for instance, raised First Amendment concerns. An employer may argue that a statement it made was something protected under the First Amendment free speech clause, and the Board in some instances would use the rule of constitutional avoidance to guide its determinations. Moreover, the Board, in a handful of cases, invoked the substantive canon on Native American sovereignty as well as the principle against interpreting a statute so as to extend beyond the territorial boundaries of the United States. These cases, however, concerned jurisdiction issues, and were not included in the database for this particular project.

1. **Use of Legislative History**

Majority Board decisions frequently invoke legislative history, as about half (47%) of the decisions at least refer to legislative history in some respect, with legislative history playing a prominent and primary part in the majority’s interpretation in about 16% of the cases. The Board relied on a mix of legislative materials as source for its analysis of legislative history. I coded for six sources of legislative history: 1) conference reports (often considered to be the most authoritative source of legislative history); 2) statements by sponsors, conference chairman, committee chairman or other Congressman in the Congressional Record; 3) House or Senate Committee reports; 4) general references to the amendment process or to the process by which Congress created the statute; 5) indirect or direct references to the legislative history noted in Board or Supreme Court caselaw but no specific citation to a traditional source of legislative history such as conference reports or statements in the Congressional Record; and 6) references to legislative history of other statutes to inform meaning. With respect to fifth type of legislative history, the Board often did not directly cite legislative history, relying instead on former Boards or the Supreme Court to do the work from them. If the indirect citation referred directly to one of the other legislative sources (such as the Conference Report or House Report), I counted the source as the Conference or House report. However, in most instances, the Board simply said that the Board or Supreme Court found the legislative history to say something or another, without providing specifics of the actual congressional source. Other times, the Board simply stated “The legislative history says” but without citing the source. I coded these indirect vague references as coming from caselaw generally. As shown in Figure 7, the Board most frequently only indirectly referenced legislative history by citation to other Board or Supreme Court opinions or to law reviews that mentioned legislative history. Indeed, 43% of the citations to legislative history concerned broad, indirect references to congressional intent gathered from statements in caselaw or law reviews, a finding that may trouble those who advocate use of legislative history to aid agencies in being “faithful delegates” of the legislature. Many of these cases relied on other cases recounting of legislative history to inform statutory meaning

Other findings regarding the source of legislative history raise even more questions. Only 15% of the citations to legislative history were to what is often hailed as the most authoritative source of legislative intent—Conference Committee Reports. More often, the Board cited to statements in the Congressional Record (29%) or to House or Senate Committee Reports (42%). In about 22% of legislative history cases, the Board cited to the amendment process or to the procedure that the statute undertook as being important in informing meaning. Equally of concern, although the Board mostly cited to statements by the sponsors, floor manager or sponsor of the Taft-Hartley Act or its amendments, the Board occasionally also referred to congressional debate about the issue, referencing colloquies in the Congressional Record debating between two Congressman debating different parts of the bill. In all, the use of legislative history was quite varied, and given that the legislative history of Taft-Hartley and its amendments is so vast, one can seriously question whether, if merely saying a statement on the House floor can qualify as legislative history to inform statutory meaning, whether the Board persuasively uses legislative history.

**Figure 7**



The Board generally invoked legislative history to inform of the statute’s scope and purpose (63%), make broad references to general congressional purpose or intent (22%) or to simply note that nothing in the legislative history foreclosed the majority’s given reading of the text (15%).[[190]](#footnote-190) The cases themselves could be divided into four different legislative history typologies, each of which will be discussed below: 1) legislative history as limiting the text; 2) legislative history as a “plus factor” in informing the statute’s scope and purpose; 3) legislative history as a not forbidding the Board’s policy-based approach; and 4) legislative history as irrelevant.

1. **Legislative History as Limiting Text**

In a small subset of cases, the Board relied on legislative history as the primary interpretive method in informing case meaning. In just 6% of the cases, the Board cited to and extensively documented legislative history to set forth the interpretation of the statute. In most of these cases, the Board invoked legislative history to narrowly interpret the statute, using examples or statements from the legislative history to inform the scope of the statutory provision. For instance, in *Northeast Ohio District Council of the Untied Brotherhood of Carpenters and Joiners of America et al*.[[191]](#footnote-191), the Board invoked legislative history to interpret the meaning of section 8(e) of the statute.[[192]](#footnote-192) The union alleged another union violated section 8(b)(3) of the NLRA by insisting to impasse on an anti-dual shop clause in the parties’ collective bargaining agreement.[[193]](#footnote-193) In deciding the case, the Board looked at the plain text but relied primarily on the legislative history to inform the meaning of the statute.[[194]](#footnote-194) Due to the somewhat temporary and haphazard nature of construction work, Congress carved out an exception to the law regarding the construction industry by giving them more leeway to engage in secondary activity.[[195]](#footnote-195) In interpreting this exception, the so-called “construction proviso,” the Board contended that it should be narrowly construed so as to only include within its ambit construction practices as of the year of its enactment — 1959.[[196]](#footnote-196) The Board reasoned “[a] careful examination of the legislative history of the proviso reveals little affirmative evidence that Congress would have chosen to protect the anti-dual-shop clause if such clause existed in 1959.”[[197]](#footnote-197) In so doing, the Board picked and chose from snippets of legislative history, citing some parts and stating that contrary parts were simply irrelevant.[[198]](#footnote-198) Relying on that narrow slice of legislative history, the Board found the union to be in violation of law, and set forth the precedent that in interpreting section 8(e), the Board should be guided by Congress’ intent set forth in the legislative history to “preserve the status quo and the pattern of collective bargaining in the construction industry at the time the legislation was passed,” that is, in 1959.[[199]](#footnote-199) Of note is the fact that only Republican-dominated Boards used legislative history as a limiter to narrowly foreclose relief to the affected party.

1. **Legislative History as “Plus” Factor**

In the vast majority of cases in which the Board relies on legislative history, the Board uses it as a “plus” factor to inform statutory scope and purpose beyond what the Board’s text and/or policy-based analysis dictates. In about a quarter of all cases in the database, legislative history served as a major cornerstone of the analysis, and in particular in about 11% of all cases, the Board relied on legislative history almost equally to the text or policy in inferring meaning. Sometimes, the Board found that legislative history made clear ambiguous text while in other cases, the Board relied on legislative history as a “plus” factor in confirming what the Board interpretation based on the text’s clear import from the language or surrounding words themselves.

For instance, in the *Lincoln Lutheran* case discussed above concerning whether dues checkoff can survive expiration of the collective bargaining agreement, the Board not only relied on the plain text and language/textual canons to inform meaning; rather the Board cited the direct statement of Senator Robert Taft, chairman of the Senate Labor Committee, where he expressly stated during debate on the Taft-Hartley amendments that the employer’s “obligation may continue indefinitely until revoked.”[[200]](#footnote-200) Thus, while legislative history did not form the cornerstone of the Board’s analysis, the Board cited and relied on it as further evidence that its interpretation of the Act’s scope was reasonable.

1. **Legislative History as Not Foreclosing a Certain Interpretation**

In about 15% of cases, the Board used legislative history in a negative way, arguing that since nothing in the legislative history contradicted the majority’s interpretation, the statute must, by implication, be interpreted a particular way. This particular use of legislative history is perhaps the most troubling. The legislative history of the NLRA, for instance, occupies several library bookshelves, so it is a tall order to say that nothing in the entire legislative history contradicts a given interpretation. Nonetheless, the Board often used this technique so as to anchor its policy-based argument to perhaps give it greater legitimacy by reference to congressional intent.

1. **Legislative History as Irrelevant**

Finally, in some cases, the Board wholly ignored legislative history, even if the text appeared unclear. In *Service Employees International Union et al*.,[[201]](#footnote-201) the Republican-dominated Board had to decide whether a party was a “neutral” under the common law because if they were were not neutral, they would be in violation of the NLRA’s secondary boycott provisions.[[202]](#footnote-202) The Board extensively cited to Senator Robert Taft’s statements in the legislative history on his interpretation of the word neutral as being “wholly unconcerned” in the disagreement.[[203]](#footnote-203) The Board, however, decided to apply a different test, nothing that while on the surface, “the legislative history of these provisions would seem to be relatively clear and similarly argue for an extremely narrow interpretation of the word ‘neutral,’” policy concerns predominated to interpret the provision in a broader sense to be violative of the law.[[204]](#footnote-204)

1. **Policy and Pragmatic Based Approaches**

The Board frequently engaged in a policy-based approach in informing statutory meaning, with more than half of cases primarily relying on policy as the cornerstone of its choice between two or more permissible constructions of the statute. The Board’s use of policy-based statutory approaches falls into two main camps: 1) an “all hands on deck” approach where the Board equally looks at text, legislative history, policy and practical considerations to inform the meaning, with the “purpose” of the statutory scheme occupying center stage in the analysis; and 2) a policy-based approach where the Board either expressly or implicitly decides the case by making a policy choice with little to no discussion of the text or legislative history. These choices, for instance, may include decisions concerning what caselaw to apply or whether one policy is better than another. In all, 51% of all cases are made with policy considerations being paramount, either expressly or implicitly.[[205]](#footnote-205) When the Board engages in this primarily caselaw/purposive approach, it only cites practical considerations in 32% of cases. The Obama Board especially has often adopted this caselaw based/policy approach.

1. **“All Hands on Deck” Purposive Approach**

Under the first approach, the statute’s “purpose” seems to be the central lynchpin of the analysis, with the text and legislative history providing a backdrop in which to offer insight into congressional purpose. The issue with this methodology, however, is that both Democratic and Republican Boards act like the Act only has one purpose; they fail to acknowledge let alone reconcile the fact the Act has multiple and somewhat competing purposes.[[206]](#footnote-206) Framing the statutory interpretation in terms of “purpose” thus leads to the unfortunate consequence that the Board frequently shifts in its interpretation of the statute.

As will be discussed more *infra*, both Republican and Democratic Boards may in fact rely on the same interpretive techniques to inform the statutory meanings but they look at them completely differently because each has a different view of the statute’s purpose.In *Brown University*, discussed above, and overruled by the recent *Columbia University* case, the Board had to decide whether graduate TAs qualified as “employees” under the Act.[[207]](#footnote-207) The predecessor case *NYU* and the subsequent case *Columbia University* applied a textualist approach, looking at the plain meaning of the statute. However, in *Brown*, the Republican-majority Board also adopted a textualist approach but framed the decision largely in terms of congressional purpose. The Board opined that the NLRA’s fundamental purpose is to cover “economic relationships” and as such collective bargaining by students at schools would not further the purpose of the Act as intended by Congress.[[208]](#footnote-208) The Board also reasoned that to include TAs within the ambit of the Act would infringe upon academic freedom.[[209]](#footnote-209) By contrast, in *Columbia University*, the Board adopted a “all hands on deck” approach where it used textualism, legislative history, policy, and practical considerations to give meaning to the statute.[[210]](#footnote-210) It too adopted a text-based purposive analysis, but the Democratic-Board thought the “purpose” of the NLRA was different from the purpose envisioned by the Republican *Brown* Board. As the *Columbia* Board reasoned, “[p]ermitting students assistants to choose whether they wish to engage in collective bargaining—not prohibiting it— would further the Act’s policies.”[[211]](#footnote-211) Both sides read the text in light of completely different purposes.

The Board also used this approach in deciding whether house staff (or medical residents) qualified as employees under the NLRA. In *Boston Medical Center*, the Board relied on a multi-factor analysis, using text, legislative history, policy and pragmatic considerations. First, the Board emphasized the text, noting the language of the NLRA was broad, and that the term ‘employee’ specifically says “shall include any employee.”[[212]](#footnote-212) It went further to discuss resident’s job functions in light of the dictionary definition of employee.[[213]](#footnote-213) The Board went on to look at other statutory language, such as section 2(12)(b) as well as by involving the canon of *expressio unius*.[[214]](#footnote-214) The Board buttressed its conclusion by referring to the legislative history.[[215]](#footnote-215) Finally, the Board looked to caselaw, policy and pragmatic considerations. It noted that “without exception, every other court, agency, and legal analyst to have grappled with this issue has concluded that interns, residents, and fellows, are, in large measure, employees.”[[216]](#footnote-216) The Board also detailed the role of residents in hospitals.[[217]](#footnote-217)

1. **Policy-Only Driven Purposivism**

Likewise, in other cases, the Board largely rested its decision on policy, eschewing text and legislative history in its analysis. These cases are different than the former as there is a clear gap in the law that never even contemplated by the enacting Congress or even addressed in the legislative history. As an example, the Board applied a completely policy-driven, purposive-driven approach in *Browning-Ferris Industries*, where the Board adjusted the standard applied to determine whether an entity qualified as a “joint employer” so that the caselaw would better effectuate the NLRA’s purpose.[[218]](#footnote-218) The Board stated that it was adjusting the test for determining joint-employer status to “best serve the Federal policy of ‘encouraging the practice and procedure of collective bargaining.’”[[219]](#footnote-219) In so doing, the Board looked to modern realities of how the prior test had been implemented in practice and decided to abandon limiting requirements under the prior caselaw to adopt a broader standard to effectuate the Act’s purpose of facilitating collective bargaining.[[220]](#footnote-220) The Board noted that the nature of the workplace has changed, citing statistics from the Bureau of Labor Statistics detailing how common temporary and subcontracting arrangements had become.[[221]](#footnote-221) To not broaden the standard, the Board argued, would amount to an abdication of its responsibilities to “adapt the Act to the changing patterns of industrial life.”[[222]](#footnote-222) Following Supreme Court caselaw dictating that the Board should follow the common law agency test in determining employment relationships, the Board reasoned that the NLRA did not foreclose the Board from adopting the broader standard.[[223]](#footnote-223) A robust dissenting opinion in the case criticized the majority on the legal issues involved with respect to what the common law means.[[224]](#footnote-224) As the Board argued “reevaluating doctrines, refining rules, and sometimes reversing precedent are familiar parts of the Board’s work—and rightly so.”[[225]](#footnote-225)

Similarly in *Auciello Iron Works, Inc. et al.*, the Board made a policy choice buttressed by Board and Supreme Court precedent.[[226]](#footnote-226) In that case, the Board had to determine whether the employer could present evidence of its good faith doubt as to the level of the union’s majority support.[[227]](#footnote-227) The First Circuit remanded the case for the Board to provide “policy guidance” and to address other circuit caselaw.[[228]](#footnote-228) In ruling the Board reasoned that both policy and “practicalities support the rule that, if an employer is aware of objective evidence to support a good-faith doubt before the union accepts its offer [to bargain in good faith], it must, for the defense to be timely raised, act on this doubt before the union accepts its offer.”[[229]](#footnote-229)

1. **Conclusions About Board Majority’s Use of Statutory Methods**

In all, the Board uses a mix of methods to inform meaning to statutory terms. While policy concerns and caselaw predominate in informing statutory meaning, the Board also engages in more traditional statutory interpretation processes, relying on the plain meaning of the text itself, or how the text relates to other parts of the statute or code. Moreover, the Board frequently invokes legislative history, but such invocation has been somewhat uneven being more as a disguise to veil policy arguments rather than a legitimate source of informing meaning of the statute. Majority boards cite to widely varying sources of legislative history, ranging from conference reports to Senate committee reports. In many instances, however, the Board simply pronounced that the legislative history is one thing or another, often without any citation except to another Board or Supreme Court case. All in all, Republican Board members as a whole were no more likely than Democratic Board members to engage in a textualist approach, and Democrats were no more likely to be purposivists than Republican. Ideology does not dictate methodological choice. Rather, the evidence showed that Board members selectively use statutory modes of interpretation to advance policy objectives.

Moreover, certain methods changed over time. Making decisions based solely on policy considerations has increased during the Obama Board. Use of legislative history in general has markedly decreased since the Clinton administration, a trend that Walker found as well among his survey respondents.[[230]](#footnote-230) Finally, although the sample size is small and we must take the results with caution, it is interesting to note that the minority Boards often used the methodological choice most often associated with the current administration. For instance, Republican panels during the Clinton administration used legislative history more and Democratic panels during the Bush II administration tended to like to use textualism more than normal. Again, given the small sample size of these panels during these time periods, we cannot make much of the results, but it would be interesting to see if longer term and over more cases whether out of party Board members will adopt the statutory methodological choice most traditionally associated with the in-party president (that is, Democrats being more textualist during Republican administrations, and Republicans being more purposive during Democratic administrations).

The Board frequently referred to the whole code and whole act rules, though not in name. That the Board often interprets words consistently throughout a statute may be problematic. Respondents in the Gluck and Bressman survey, for instance, noted “significant organizational barriers that the committee system, bundled legislative deals, and lengthy, multidrafter statutes pose to the realistic operation of these rules.”[[231]](#footnote-231) While “consistent usage” of a similar term may be the “goal,” in reality, Congress is not organized to always make that happen in any kind of systematic way. [[232]](#footnote-232) Thus, in construing the text, the Board may believe that the NLRA is written more consistently than it actually is in practice. Concern over using the whole act rule may be especially problematic when the Board uses parts of the law directed at union abuses to inform meaning about employer abuses. The legislative history of those sections were written at different times in dramatically different political climates, and as such, the Board should be cautious in extrapolating from one section to another.[[233]](#footnote-233)

1. **“Dueling” Statutory Interpretations**

About 80% of the Board majority decisions concerning statutory interpretation had a dissent in the database. The dissent “teams” are somewhat consistent. During the Clinton administration, Board members Hurtgen and Brame often united in dissent, whereas during the Bush II administration, Liebman and Walsh differed from the majority. In the Obama years, Republicans Miscimarra and Johnson frequently write long detailed dissents. The proclivity to dissent has increased over time; whereas Board members dissented in just 69% of cases during the Clinton administration, the number of dissents rose to 90% and 88%, respectively, during the Bush II and Obama administrations, at least among the statutory interpretation cases included in the database. As such, we have a rich treasure trove in which to explore how dissenting Board members responded to the statutory methodologies relied on by majority Board members.

Part II.D.i provides the general background of the methodologies dissenting members used followed by a detailed assessment in Part II.D.ii concerning the extent to which the majority and dissenting Board members used either similar or conflicting methodologies in interpreting precedent. Board members may “duel” with each other in a textual matter by 1) focusing on different words; 2) focusing on the text of different statutes; or 3) focusing on the same word but ascribe a different meaning to the text.[[234]](#footnote-234) Purposivists can also “duel” with each other by 1) focusing on different, competing purposes; 2) focusing on the same purpose but draw different conclusions about that purpose; or 3) focusing on a broad, general statutory purpose while another one focuses on narrowly drawn specific purposes.[[235]](#footnote-235)

1. **General Dissenting Methodologies**

Compared to the majority opinions, dissenting Board employs use similar interpretive methodologies, as shown in Table 8 and Figure 8. Percentages are within a few points of the numbers given previously for majority opinions with two notable exceptions: Dissenting opinions rely somewhat less on a primarily textual methodology (9% v. 21% for majority opinions), but in turn dissenting opinions use practical considerations to support its reasoning more so than majority decisions (48% v. 36%). Moreover, dissenting opinions use legislative history more in election/bargaining unit cases than in unfair labor practice cases to a statistically significant degree, and they resort to practical considerations in dissenting cases involving unfair labor practices levied against unions compared to other types of cases.

**Table 8: Dueling Methodologies, by Case Type (Percent)**

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
|  | **General Text** | **Primarily Text** | **Latin/Language Canons** | **Legislative History** | **Policy** | **Practical** |
| **All Cases** | 45 | 10 | 33 | 43 | 89 | 48 |
| **ULP Against Employer** | 39 | 9 | 37 | 36\*\* | 95 | 54\*\*\* |
| **ULP Against Union** | 49 | 8 | 35 | 38\*\* | 83 | 22\*\*\* |
| **Election/Bargaining Unit** | 55 | 13 | 25 | 63\*\* | 94 | 60\*\*\* |

**Figure 8**



The tables in the next section breaks down the data by both partisan ideology of the dissent as well as the presidential administration. Broken down by party in Table 9, Democratic dissents and Republican dissents use methodologies in similar ways; the only difference being that Democratic dissents use legislative history more than Republican dissents overall (58% v. 38%). Table 10 divides the data broken up by presidential administration. Clearly, the use of both policy and practical reasoning in the dissent has increased markedly since the Clinton administration. To a 99% degree of confidence, we can say there is a statistically significant difference between administrations based on the dissent’s use of policy and practical considerations, with dissents during the Clinton era evoking such considerations much less than during the Bush II and Obama eras. A text-based approach to dissents also appears to be higher during the Bush II administration, but the results are not statistically significant. Board members Liebman and Walsh often dissented to decisions during this Republican-dominated period.

**Table 9: Dissenting Methodologies, by Dissenting Party (Percent)**

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
|  | **General Text** | **Primarily Text** | **Latin/Language Canons** | **Legislative History** | **Policy** | **Practical** |
| **Dem.** | 67 | 12 | 33 | 58\* | 97 | 48 |
| **Rep.** | 51 | 9 | 32 | 38\* | 87 | 47 |

**Table 10: Dissenting Methodologies, by Administration (Percent)**

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
|  | **General Text** | **Primarily Text** | **Latin/Language Canons** | **Legislative History** | **Policy** | **Practical** |
| **Clinton** | 36 | 7 | 31 | 44 | 77\*\*\* | 26\*\*\* |
| **Bush II** | 56 | 18 | 26 | 34 | 97\*\*\* | 56\*\*\* |
| **Obama** | 47 | 6 | 43 | 51 | 97\*\*\* | 69\*\*\* |

Table 11 and Figure 9 shows the data interacting both the party of the dissent as well as the presidential administration. Although textualism seems to have increased during the Bush II administration, the differences between panel types and administration is not statistically significant. There are, however, a great deal of variation between dissents and administrations on the last three factors: legislative history, policy and practical reasoning. Democrats in dissenting opinions tend to use legislative history more than Republicans, but Republicans have increased in more recent years to using legislative history more in dissents. Use of legislative history, however, during the Obama administration may be due, however, to the personal proclivities of Board member Miscimarra and Johnson to use a “all hands on deck” approach to writing dissents, where they analyze the text, legislative history, policy and practical reasoning. Thus, it is not a surprise that we see an increase in the use of these methods over time, especially by Republican dissents. In all, as with Board majority opinions, we see an increase over time in the use of policy and practical considerations in guiding decision making at the Board.

**Table 11: Dissenting Methodologies, by Party and Administration (Percent)**

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
|  | **General Text** | **Primarily Text** | **Latin/Language Canons** | **Legislative History** | **Policy** | **Practical** |
| **Dem./Clinton** | 67 | 8 | 42 | 75\*\* | 92 | 17\*\*\* |
| **Rep./Clinton** | 43 | 7 | 23 | 33\*\* | 73\*\*\* | 30\*\*\* |
| **Dem./Bush II** | 67 | 14 | 29 | 47\*\* | 100 | 67\*\*\* |
| **Rep./Bush II** | 62 | 23 | 23 | 15\*\* | 92\*\*\* | 38\*\*\* |
| **Rep./Obama** | 54 | 6 | 43 | 51\*\* | 97\*\*\* | 66\*\*\* |

**Figure 10**



As we did with the Board majority opinions, Table 12 and Figure 11 display the *primary* interpretive method used by dissenting opinions. The results mirror majority opinions almost exactly, with 52% of dissenting opinions relying primarily on a policy/caselaw approach, and 22% and 26% of dissenting opinions using either a primarily textualist or text/legislative history plus approach, respectively. Figure 12 display the results broken down by presidential administration and party of the dissent. Among parties that are out of power, Board members employ a primarily textualist methodology about a quarter of the time in their dissents. Moreover, the use of the text/legislative history plus method decreased during the Bush II administration, whereas a pure textual or policy-based approach to the dissent increased particularly in the Bush II years. This is of course of no surprise because during the Bush II years, Board members Liebman and Walsh or Liebman and Fox often wrote scathing based either on a text analysis or a policy-based approach. Liebman and Walsh’s chosen method depended on what the Republican majority did. The use of an exclusively policy-based in dissents decreased again during the Obama years as Board members Miscimarra and Johnson tend to adopt a “all hands on deck” approach to their dissents, which is reflected in the increase of the Text/Legislative plus method during the Obama years and the decline in the policy/caselaw based approach from the Bush II years.

**Table 12: Primary Dissenting Interpretation, by Dissenting Party and Administration (Percent)**

|  |  |  |  |
| --- | --- | --- | --- |
|  | **Primarily Textual** | **Text/Legislative History+** | **Policy/Caselaw** |
| **Dem./Clinton** | 50 | 50\* | 50\* |
| **Rep./Clinton** | 25 | 25 | 75 |
| **Dem./Bush II** | 23 | 19\* | 81\* |
| **Rep./Bush II** | 33 | 8 | 92 |
| **Rep./Obama** | 23 | 31 | 69 |

**Figure 11**



**Figure 12**



1. **Dueling Interpretations**

In this next part, we turn now to look at how dissenting opinions actually differed in the statutory methodologies employed. I coded cases according to one of six “dueling” possibilities: 1) textual to purposive (that is, the majority opinion is primarily textual, but the dissenting opinion is more purposive); 2) purposive to textual; 3) policy/caselaw, indicating that the majority and dissenting “dueled” primarily over caselaw and/or policy; 4) textual to textual, meaning that the majority and dissenting party both adopted a textual interpretation, but they differed as to what exactly the text meant; 5) purposive to purposive, meaning that the majority and dissenting opinions differed in the use of different purposive methodologies; for instance, the majority opinion could rely more on legislative history while the dissent relied more on policy; or 6) disputes about application of which statute to apply.

Table 13 and Figure 13 lists the percentages broken down by type of “duel.” The most frequent type of “duel” concerned disputes between the majority and dissent based on policy, encompassing almost half of the majority/dissent combinations. Given that the Board is at its heart a policymaking agency, this of course is not a surprise. In the remaining cases, the Board used a mixture of switching techniques from a textualist method to a purposive one (13%), a purposive one to a textualist (13%), a text to a text dispute (9%) or a primarily legislative history to policy dispute or a policy to legislative history dispute (2%). Moreover, in about 2% of all cases, the majority and dissent quarreled over which statute to apply. These cases primarily concerned whether the Board should or should not apply the Railway Act to assist in interpreting the unfair labor dispute claims.[[236]](#footnote-236) These numbers are similar when broken down by case type, with some interesting differences. We see that policy duels are most apparent in unfair labor dispute cases against employers. These cases are by far the most frequent, so the Board already has a great deal of precedent in which to rely on. As such, the Board does not often need to engage in much textual interpretation in these cases. Moreover, there is not much legislative history to review concerning unfair labor practices against employers as they are covered by the Wagner Act, not the newer Taft-Hartley Act. Moreover, in about half of election representation or bargaining unit cases, the Board has some sort of duel over the text, whether it be a text to purposive duel, a purposive to text duel or a text to text duel. In unfair labor disputes against unions, the Board often “duels” with the dissent over whether the Railway Act should guide its determinations. Moreover, looking at it by party of the majority and administration in Table 14 and Figures 14-15, respectively, we see a decline over time in the use of policy disputes and an increase in the text to purposive or text to purposive disputes. As noted before, this may be a reflection of the individual proclivity of Obama Board minority members to write very long and detailed dissents where they systematically attack the majority on all fronts—text, legislative history, policy and pragmatic considerations. Indeed, no matter what approach the Board adopted, the dissenters in the Obama Board often dueled using a different statutory approach. We see in Figure 15 for instance, the large increase in the blue (as opposed to purple or grey) shaded areas compared to the Clinton Board. In all, “dueling” over statutory methodology seems to have increased over time.

**Table 13: Dueling Methodologies, by Case Type**

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
|  | **T>P** | **P>T** | **Policy** | **T>T** | **P>P** | **Statute** |
| **All Cases** | 13 | 14 | 52 | 11 | 5 | 6 |
| **ULP- Employer (CA)** | 13 | 13 | 61 | 9 | 2 | 2 |
| **ULP- Union (CB)** | 8 | 8 | 46 | 12 | 4 | 21 |
| **Election/Bargaining Unit** | 16 | 16 | 42 | 12 | 10 | 3 |

**Figure 13**



**Table 14: Dueling Methodologies, by Majority of Panel and Administration**

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
|  | **T>P** | **P>T** | **Policy** | **T>T** | **P>P** | **Statute** |
| **Dem. Maj/Clinton** | 8 | 5 | 57 | 8 | 8 | 14 |
| **Rep. Maj./Clinton** | 0 | 50 | 50 | 0 | 0 | 0 |
| **Dem. Maj./Bush II** | 17 | 17 | 42 | 0 | 25 | 0 |
| **Rep. Maj./Bush II** | 17 | 13 | 52 | 8 | 4 | 4 |
| **Dem. Maj/ Obama** | 14 | 17 | 51 | 11 | 3 | 3 |

**Figure 14**



**Figure 15**



I broke down the categories further into two categories: disputes about method (text v. purposive, purposive v. text or text v. text) versus policy only disputes in Table 15 and Figure 16. I group the “statutes” category in with the “policy” disputes category because which statute to apply in any given chance is most likely a policy choice based on how you read the statute. We see that in this new characterization about 63% of the cases amount to policy disputes, with 11% being about text alone and another 26% of cases concerning a dispute between the text and policy or policy and the text, with the majority and Board taking opposite sides in the argument. These numbers are also similar broken down by case type, party of the panel and the presidential administration, though there are some differences. When we look at the differences by majority party of the panel and administration, we see the marked decrease in Democratic panels in policy only duels. The Democratic majority in the Clinton administration bargained with the dissent over text or purpose only 22% of the time; that number is 43% during the Obama administration.

**Table 15: Dueling Methodologies, Text/Pur v. Policy**

|  |  |  |
| --- | --- | --- |
|  | **Text v. Purposive or Text v. Text** | **Policy** |
| **All Cases** | 40 | 63 |
| **Dem. Maj. /Clinton** | 22 | 78\*\* |
| **Rep. Maj./Clinton** | 50 | 50 |
| **Dem. Maj./Bush II** | 58 | 42\*\* |
| **Rep. Maj./Bush II** | 39 | 61 |
| **Dem. Maj./Obama** | 43 | 57\*\* |

**Figure 16**



In addition to the overall method, Tables 16 and 17 details how often the majority and Board “duel” on each type of methodology. Each case can have multiple methodologies; for instance, both the majority and dissent may “duel” on legislative history, text and policy. We see that the majority and the dissent duel in most cases, at least in part, on policy (86%). But they also often “duel” on textual meaning (67%), at least in part. Dueling over text almost always occurs if there is a Republican majority. In most cases these duels on textual meaning take one of three forms: 1) one side argues for an expansionist interpretation of a term while another side contends that the term should be interpreted more narrowly or argues that policy considerations should predominate; 2) one side argues that certain Latin/language canons should be applied to inform the textual meaning of the term while the dissent feels the opposite; or 3) one side feels that the text’s meaning is plain while the other feels that it is ambiguous.

For instance, in *Alexandria Clinic, P.A.,* discussed above, the Republican-dominated made clear that the text was “clear and unambiguous” and that the Board’s earlier decision in *Greater New Orleans* to rely on the legislative history to inform meaning concerning the scope of the notice provision of section 8(g) was inappropriate.[[237]](#footnote-237) The Democratic dissenters, however, said the opposite, arguing that the text was “ambiguous” and that the statute is “unclear.” The three graduate student TA cases likewise show how the Board flip-flops, with the majority and dissent following different approaches. Democratic Board members in NYU, Brown and Columbia all favored an expansionist, textual approach, while Republican Board members relied on policy considerations to contend that graduate students were not TAs, contending that the non-economic nature of the relationship necessitated that TAs fall outside the coverage of the Act.

Likewise, about 20% of cases involve direct dueling over legislative history and another 30% on top of the 20% of the cases are ones in which one side cites legislative history and another does not. In most cases in which the sides “duel” over legislative history, the majority and dissent cite to different statements of the legislative history to illustrate contrasting points. Again, the nature of dueling over legislative history can take a few forms: 1) one side argues that legislative history informs meaning while the other side disputes this characterization; 2) both sides feel legislative history aids in interpretation but they disagree about its purpose or the sources that should be employed; or 3) as mentioned above, one side cites to legislative history and the other side completely ignores the opposing side’s reference to it (which happens a plurality of the time). As some examples, in *Alexandria Clinic, P.A*., the striking nurses case, the Board found the text clear while the Democratic dissenters relied in part on policy and legislative history to guide its interpretation.[[238]](#footnote-238) The dissenters noted that the House Committee on Education and Labor and the Senate Committee on Labor and Public Welfare expressly stated that “[i]t is not the intention of the Committee that a labor organization shall be required to commence a strike or picketing at the precise time specified in the notice…”[[239]](#footnote-239) As such, they argued that the Board should abandon its text-based approach and adopt a rule of reason analysis.[[240]](#footnote-240)

**Table 16: Dueling Methodologies, by Case Type (Percent)**

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | **Duel Text** | **Duel Legislative History** | **Duel Policy** | **Duel Practical** |
| **All Cases** | 67 | 19 | 86 | 37 |
| **ULP Against Employers** | 71 | 13 | 91 | 42\*\* |
| **ULP Against Unions** | 64 | 23 | 79 | 16\*\* |
| **Election/Bargaining Unit** | 69 | 28 | 78 | 45\*\* |

**Table 17: Dueling Methodologies, by Majority Party and Administration**

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | **Duel Text** | **Duel Legislative History** | **Duel Policy** | **Duel Practical** |
| **Dem. Maj./Clinton** | 57\*\*\* | 19 | 76 | 26 |
| **Rep. Maj./Clinton** | 100\*\*\* | 67 | 75 | 25 |
| **Dem. Maj./Bush II** | 75\*\*\* | 8 | 92 | 25\*\* |
| **Rep. Maj./Bush II** | 100\*\*\* | 19 | 96 | 56\*\* |
| **Dem. Maj./Obama** | 60\*\*\* | 20 | 86 | 40\*\* |

Likewise, majorities and dissents battle over the use of policy. In the case about the notice requirement for striking nurses, the Board and the dissent battled over the primacy of text over policy.[[241]](#footnote-241) Although the Board majority discussed the policy considerations that animated its interpretation, it made clear that the text alone was dispositive in that the striking nurses had a mandatory duty to give notice under the plain language of the text.[[242]](#footnote-242) It reiterated its own policy argument that Congress deliberately created the notice requirement to be mandatory so as to ensure that a sudden strike did not impair patient health.[[243]](#footnote-243) The Democratic dissenters, on the other hand, wanted to interpret the Act more loosely, arguing that it is “[l]ooking beyond the text [of a statute] for guidance is perfectly proper when the result it apparently decrees is difficult to fathom or where it seems inconsistent with Congress’ intent.”[[244]](#footnote-244) The dissenters thought it “absurd” that Congress “intended to put employees’ jobs in peril simply because their union was not absolutely punctual.”[[245]](#footnote-245) As such, they advanced a rule of reason approach to guide interpretation of section 8(g).[[246]](#footnote-246) They argued that the majority could not advance any reason why a short delay would impair patient care: “Where a union’s delay in striking is so short that an institution’s arrangements for continuity of care are almost certainly still in place… application of the loss-of-statute provision is simply punitive.”[[247]](#footnote-247) They ended with the notion that “Congress made the policy choice” in advancing a “rule of reason” and as such the Board was duty bound to honor that choice.[[248]](#footnote-248)

Finally, both majority and dissent duel over practical considerations. To 95% confidence, there has been an increase over time with the Board more frequently dueling over practical considerations than it did during the Clinton administration. Part of this may be due to the fact that the Board seems to interpret cases more with a policy-based focus, and as such, the dissent tends to use practical reasoning to attack the policy-based focus of the majority opinion. Another reason may be due to the personal proclivities of the Obama Board, as Board members Miscimarra and Johnson frequently write long dissents where they discuss practical consideration, as one among many reasons for their dispute with the majority.

1. **Appellate Court Statutory Review**

I next looked at the case history to review very briefly how appellate courts later ruled on the same cases. I only address the matter in a preliminary way here as it is the subject of another more detailed article I am writing on appellate court review of NLRB decisions where the issue is addressed in a more in-depth and comprehensive fashion.[[249]](#footnote-249) There is a robust literature on appellate court review of agency decisions under *Chevron*. This study is unique in that it focuses exclusively on how the statutory methodologies used by the appellate court mirror or duel with those used by the Board. In this section, in Part II.E.i, I first discuss the summary statistics and detail the methodology. Then, in Part II.E.ii, I analyze briefly the statutory methods used by appeals courts and how they “duel” with those of the Board.

1. **Summary Statistics**

Scholars studying the issue find that appellate courts overall largely defer to

agencies.[[250]](#footnote-250) The results here indicate that courts fail to apply deference standards in a consistent fashion.[[251]](#footnote-251) Agencies largely operate under two deference regimes: *Chevron*[[252]](#footnote-252) or the less generous *Skidmore*[[253]](#footnote-253)standard where courts defer to agencies on a sliding scale. There has been much confusion over how to apply *Chevron* and the results in the present bear out that the courts seem conflicted over which deference regime to apply.[[254]](#footnote-254) As Fisk and Malamud argue, appellate courts often apply an entirely different deference regime in NLRB cases.[[255]](#footnote-255) They contend that courts typically cite the *Fall River[[256]](#footnote-256)* standard as to whether the Board’s decision is “rational and consistent” with the Act, a less deferential standard than *Chevron*.[[257]](#footnote-257) This standard makes it easier to find clear congressional intent under Chevron Step 1 and then reverse the agency without deferring.[[258]](#footnote-258)

The courts here apply a myriad of deference regimes.[[259]](#footnote-259) Of note is the fact that the court of appeals rarely even cited to *Chevron* or any *Chevron*-style deference regime. Only 32% of the appellate court cases cited *Chevron* and another 10% cited to a similar standard in another case*.*[[260]](#footnote-260) Most of the statutory interpretation cases made some vague reference to “reasonable interpretation” of the statute but only a plurality actually cited to *Chevron* or expressly engaged in a *Chevron* step-wise analysis even if they cited *Chevron* or a *Chevron*-like case for the standard. Some cases even used an arbitrary and capricious standard or the substantial evidence standard. A few courts expressly stated that they may not agree with the Board’s decision but still must nonetheless defer. Further, when courts did cite and apply *Chevron*, they upheld the agency interpretation about half of the time, finding it a permissible interpretation of the statute.

About 29% of the cases in this particular database (but 41% of the appeal-eligible cases) were eventually appealed to the federal courts of appeals, and surprisingly, appellate courts reversed the statutory interpretation in about 60% of those cases —a disproportionate amount considering and a number that should be considered with the limitations of the database.[[261]](#footnote-261) Given the fact that under *Chevron*, courts should defer to reasonable interpretations of the statute, it is striking that appellate courts so often overturn statutory interpretations of the Board. This alarm must of course be taken with a grain of salt given that the sample size is small and the limitations of this particular sample, but nonetheless, it raises an issue as to whether courts even properly know how to review the policymaking decisions of the Board.

The figures here should be taken cognizant of certain limitations. That 26% of the courts were appealed number is a bit misleading in some respects. First, election representation and bargaining unit cases cannot be appealed to the federal courts,[[262]](#footnote-262) so given that those cases make up about 26% of the database, we are not able to make any conclusions about those cases. Second, since the database only includes cases in which the Board engaged in statutory interpretation, there may be some cases in which the Board merely issued a summary decision blessing the ALJ opinion, and the court, on review, ruled on a statutory interpretation issue.[[263]](#footnote-263) In still other cases, the Board may feel that the statutory issue is a closed one, and thus not discuss the issue in the opinion, but the courts, who are not bound by the Board’s precedent, may feel differently. As such, the losing litigants could raise statutory arguments on appeal that were defeated or ignored by the Board. These cases would not be included in the analysis because the Board did not interpret the statute in its opinion.[[264]](#footnote-264) Further, the data may be censored in that I included Board statutory interpretations up to August 2016, so some of the cases in the last few years may not have made their way through the appeal process yet to merit a decision from the appeals court. Finally, in many cases the appellate courts engage in statutory interpretation when they are not supposed to, that is, even neither the Board nor the ALJ did not do a statutory interpretation analysis, the court, instead of relying on the substantial evidence standard, decides instead to embark on a full-fledged statutory interpretation analysis to decide the case. To the extent there was no hint of statutory interpretation in a Board decision the database would not cover these “mistaken” statutory interpretation cases.[[265]](#footnote-265) Nonetheless, even though the data may be limited, we can at least follow the path forward to see what happened to our cases at the courts of appeals and whether the court engaged in a similar type of statutory methodology.

1. **Appellate Court “Dueling”**

With these caveats in order, we turn briefly to our data to see how in fact courts rule on the statutory methodologies used by the Board. As shown in Figures 17 and 18, the court most often disagreed with the purposive analysis of the Board; in about 55% of cases in which the court differed from the Board, the court rested its decision primarily on textual grounds. In nearly all of the cases where this happened, the appellate court largely adopted the reasoning of the dissent from the Board. Moreover, most cases concerned a liberal Board decision being overturned in a conservative manner using a textualist approach as shown in both Figures 17 and 18. This is not altogether surprising given that the appellate courts are more conservative in orientation that liberal given their composition. Nonetheless, that the appeals court would decide so many of these —sometimes even under what amounts to a *Chevron* Step 1—analysis raises alarm bells as to whether the court itself is overstepping its authority and using policymaking to overturn the Board saying that the text is clear. In over half of the cases where the appellate courts reversed, it relied on the text or the legislative history and the text as the basis for its opinion. In another quarter of cases, the courts relied on a caselaw/policy-based argument to reverse the Board. Further, as noted in Figure 17, in a small number of cases, the courts applied the substantial evidence standard to decide the case, side-stepping the statutory interpretation altogether. In all, the results underscore the lack of consistency by the appellate courts in interpreting NLRB cases.

**Figure 17**



**Figure 18**



1. **How Should the Board and Appellate Courts Review Statutes?**

What can we say about how the Board interprets statutes and what lessons can we glean for administrative agencies more generally? The results here provide support to the Llewellyn view that since the canons do not constrain voting against preferences, Board members may not be basing their decisions on neutral legal rules.[[266]](#footnote-266) In all, it seems that Board members strategically employ the canons to advance policy views.[[267]](#footnote-267) The fact that Board members often use the same statutory methodology to advance opposing points lends support to textualists who bemoan the unpredictability that purposive interpretive canons imply. But the results here undermine the textualist approach as well; a statute can be read so that its terms are construed broadly or narrowly.[[268]](#footnote-268) This leads to the question: How should the Board (and policy-oriented administrative agencies in general) interpret statutes? In turn, how should appellate courts review the decisions of a policymaking body?

1. **How Should the Board Interpret Statutes?**

Given the prevalence of purposivism at the Board and the tendency of Board members to selectively use whatever technique accomplishes the given result, what can we say about how statutory interpretation should ideally be done at the Board? The answer may come down to what one views as the role of a given administrative agency. Should it be a faithful delegate of the political principals or should it be the “guardian” of the interpretation of the relevant overarching statute or is the answer lie in some mixture of the two?

A pure textualist reading of the NLRA seems at odds with the NLRB’s structure and purpose. If the text itself were the primary criteria for interpreting the NLRB, what indeed would be the purpose of having a specialized body? Why not just have the cases heard in the regular district courts? If the political system is not going to take advantage of the specialized expertise of the NLRB, it would seem superfluous for the NLRB to interpret statutes in ways that are inconsistent with its very being. Textualism may especially be an approach that is inimical to interpretation of labor statutes in particular given how the labor movement has advanced so much in the last eighty years. Strict adherence to a text constructed by congressional leaders who intended to curb a labor-friendly Board 75 years ago may constrain the Board in how it approaches policymaking and updating labor policy to current economic conditions.[[269]](#footnote-269) Moreover, a textualist approach seems at odds with the Board’s frequent flip-flops on important issues of policy. If the few words of the NLRA actually have a clear and unambiguous meaning, once the five-member Board interprets a term, it would be unnecessary for the Board to engage in statutory interpretation of that term again. The issue would be settled, and there would be no flips-flops. Frequent flip flops seem only compatible with a purposive approach. Moreover, Cass Sunstein and Adrian Vermeule have argued that attention to institutional considerations shows why agencies should be given authority to abandon textualism even if the courts use it.[[270]](#footnote-270) To the extent the Board engages in a textualist approach, it should look to the text to *permit* a construction, as opposed to a narrowing constraint on policy choices, as many of the Board’s textualism cases reveals.

As such, a statutory construction method focused on purposivism with a faithful rendering to the text when clear seems to be the only method of statutory interpretation consistent with the purposes, aims and history of the NLRB, and indeed, administrative agencies generally.[[271]](#footnote-271) Formed during the New Deal, the NLRB was charged to be an expert body to fashion labor policy. Its founders deliberately isolated the NLRB from the reach of the federal courts due to the long-standing tension between labor and the courts regarding labor policy. Agencies like the NLRB should use that expertise to update the statute to reflect current realities. Moreover, with changing times and shifting economic winds, the Board, advancing a purposive approach, would be best able to effectuate the purposes and aims of an expert labor body to do what is best for society.[[272]](#footnote-272)

How then should it apply a purposive method and how should the Board change how it construes statutes? I discuss below three changes. First, the Board should change how it looks at legislative history. Legislative history can be a useful tool to get a sense of the statute’s purpose, but the Board at present probably relies too much on legislative history as a shield for disguising policymaking. Second, the Board should use its expertise to buttress its policy arguments with real facts. Rather than merely opine that a given decision will have a certain effect on policy, the Board should use empirics to competently evaluate the ramifications of its decisions. Finally, the time is ripe to discuss whether the Board should engage more in rulemaking or issue binding policy statements to guide statutory decisions.

1. **Legislative History as Anchor not as Limiter**

To engage in a view focused on putting legislative history at the forefront would seem to subvert the role of the NLRA to merely be an interpreter of what the Congress of 1947 had in mind regarding labor law. Such a view would seem to be at odds with the general set up of the NLRB. If adherence to legislative history were seen as the sole duty of the NLRB that would seem at odds with the NLRB scheme put in place. In other words, what would be the purpose of letting politics play some role in NLRB decision-making if NLRB members were slaves to the original understanding of the NLRA? Why not just have a federal court do it? The Taft-Hartley Act is, at its heart, anti-union in some respects and the long history preceding Taft- Hartley underscores how it was actually fear of the labor movement that motivated Congress to change the Board’s structure and to change the statutory scheme. Congress specifically wanted agencies to do the work, because they believed courts had done a poor job, and were not flexible enough to adopt to changing circumstances.[[273]](#footnote-273) As such, in this particular statutory scheme, advocates of labor may find it very troubling to rely on legislative history as a means to informing the NLBR about adjudicating labor practice disputes. Moreover, the Board occasionally uses legislative history to preclude the Board from updating itself to modern times. For instance, why should a provision be interpreted with respect to what the standard was in the construction industry in 1959? Indeed, rather, the Board should not use legislative history to hamstring it to employment practices of a bygone era.

The results in this study indicate that the Board’s selective use of legislative history is troubling. The Board focuses almost exclusively on the wishes of the enacting Congress of 75 years ago. Instead of looking at the original enacting coalitions’ purpose, we must instead look to the role of the agency in the present world with the legislative history as a starting point to inform understanding. Even more significant that the legislative history, the Board should instead rely on its current dealings with Congress and the President to inform its understanding of what they envision of labor policy. Labor policy need not have a fixed and coherent framework; it is intrinsic to the nature of having a specialized administrative agency that the agency change along with the ebb and flow of changing administrations. At the same time, however, the legislative history should, in one sense, serve as an anchor for the agency to use to base its understanding as it is the “guardian or custodian of the legislative scheme as enacted.” [[274]](#footnote-274) Instead of relying on “text parsing, dictionary definitions, and a search for a fixed intent of the enacting Congress” legislative history should instead be used as the beginning inflection point to examine “policy and expert considerations, pressures from the current Congress or White House, and bureaucratic management concerns.”[[275]](#footnote-275)

1. **More Expertise**

In addition, the Board should use its expertise to craft legal doctrine that advances the agency’s purpose, collecting evidence on policy and pragmatic consequences for a given decision.[[276]](#footnote-276) As Mashaw argues, “[a]gency control of …its interpretive agenda argues for an interpretive approach that engages in a wider-ranging set of policy considerations and a more straightforward approach to political context than would be constitutionally appropriate for the judiciary.”[[277]](#footnote-277)At present, the NLRB chooses between “competing constructions…within the range of meanings that the statutory language can support” when interpreting statutes.[[278]](#footnote-278) This results in a formalistic style of adjudication where questions of policy are deemed questions of law and social science data is deemed irrelevant.[[279]](#footnote-279) But if the NLRB is truly going to serve its founding mission, it needs to start acting more like a policymaking court rather than a court who does policymaking on the side.[[280]](#footnote-280) Board decisions often predict dire consequences of a given decision, yet never lay out the empirical evidence to back it up. For instance, in *Browning-Ferris Industries, Inc.*, Board members Miscimarra and Johnson argued that the Board’s revamp of the “joint employer” test would wreck havoc on the workplace as it would “subject countess entities to unprecedented new joint-bargaining obligations that most do not know have, to potential joint liability for unfair labor practices and breaches of collective bargaining agreements, and to economic protest activity, including what have heretofore been unlawful secondary strikes, boycotts, and picketing.”[[281]](#footnote-281) The dissenters spent page after page bemoaning the negative consequences that could ensure, but they offer no social scientific evidence to back up the claims, nor for the most part do they make any citations at all to buttress the claims about the decision’s ramifications. In all, the majority and dissent come down to a policy dispute over how broadly to interpret the word ‘employee.’

In these and other cases, the NLRB can be reformed to give it more power to engage in policymaking in a more explicit (and fairer) way. For instance, if the NLRB were to truly embrace its policymaking role, it would ask parties that appear before it to brief the economic effects that could ensure should the Board rule one way or another. Rather than mere vague assertions of “policy” or pontifications about a given case’s possible ramifications, the Board can consider different viewpoints of experts so as to be able to have a solid foundation in which to use its expertise to make labor policy to serve the aim of 1) avoiding strikes; and 2) increasing wages. Appellate courts would then not have to guess on the standard of review. For instance, in the *Columbia University* graduate TA case, the Board would consider what impact on strikes or collective bargaining would expansion of the pool to include students as employees actually have.

New Dealers envisioned agencies as being based on expertise and professionalism so that they could analyze social and economic problems and rely on scientific and empirical information that courts and legislatures could not otherwise consider.[[282]](#footnote-282) The Board never developed the kind of non-legal expertise that administrative agencies were supposed to have due to historical circumstances.[[283]](#footnote-283)In the 1940s, widespread opposition to the Board resulted in Congress gutting the Board’s Division of Economic Research, which had gotten a reputation as being “biased” for labor.[[284]](#footnote-284) Further, an early turf war with the Department of Labor (“DOL”) resulted in the Board not having access to DOL’s empirical research on labor.[[285]](#footnote-285) The DOL has the ability to produce “high quality empirical analysis of the myriad questions that arise in NLRB cases”[[286]](#footnote-286) yet currently the Board has no access to this valued information. Moreover, the Board is not able to coordinate data gathering and policy analysis with DOL, EEOC or state labor agencies.[[287]](#footnote-287) Giving NLRB back its policy tools would do much to make its statutory interpretation more reasoned and more consistent.

The results in this study led credence to the view that the Board should rely even more so

that it does on an explicitly purposive analysis that incorporates practical considerations more so than it currently does. In its opinions, the Board uses a textual or legislative history analysis in a *Chevron* step 1 formula. This is not necessary a wise strategy for a public administration. As Elizabeth Foote argues, over the years, “[j]udge-made norms displayed statutes as sources of law, and those judge-made canons are both overly intrusive in declaring the meaning of statutes and overly indifferent to the administrative reasonableness of operational programs by public bureaucracies.”[[288]](#footnote-288) Moreover, given the inconsistency in which the Board cites legislative history and the mangled way it interprets the text (varying to the extent to which the Board interprets the very same phrase broadly or narrowly), one wonders what place, if any, such methods should play in the Board’s or any agencies’ interpretive handbook in interpreting a statute over 75-years old written in a dramatically different political climate. Rather, the Board should return to its roots as a policymaking body, and make clear the policymaking choices it makes, instead of “hiding the ball” behind a text or legislative history analysis that a reviewing appellate court may find itself more comfortable with. Agencies are expert bodies not courts and interpretive methodologies should follow suit.

1. **Rulemaking/Policy Statements**

Finally, it is time to consider whether the Board should change its method of

policymaking and rely more on rulemaking or guidance documents.[[289]](#footnote-289) The Board needs to engage in policymaking, and one questions whether an institutional body acting like a court can ever really be a policymaking body through case-by-case adjudications. We see here that when the Board tries to do that it necessarily infuses its policymaking with case decisions such that it is impossible to draw the line between case decision and policymaking. Case decisions (and statutory interpretation) is so intermixed with policymaking that it is almost impossible for the Board to have any precedents in which to rely on, resulting in confusion before the appellate courts, who frequently cite to NLRB caselaw only to find out later that the NLRB changed its law.[[290]](#footnote-290)

The Board could set up a clearer boundary between policymaking and case decisions

if it relied more on rulemaking or guidance documents to set forth some of its policy-fused statutory interpretations. For instance, instead of relying on adjudication to define “employee,” the Board could engage in notice-and-comment rulemaking or issue policy statements to set forth clear standards on who falls within the coverage under the Act.[[291]](#footnote-291) In so doing, the Board should adopt “evolving, iterative, [and] practical application[]” to “effectuate a statutory program” by looking at inputs such as: “technical assessment of on-the ground facts; expert prediction; the policy views of administrators and staff; input from the public, especially from affected interests; political influence and control from the White House and the current Congress; the agency’s own understanding of the statutory provisions in its organic act; and the practical needs of the bureaucracy to manage and enforce a statutory program.”[[292]](#footnote-292) All of these actions could best be accomplished if the Board used rulemaking. Using rulemaking would also bring the NLRB more in line with how most other administrative agencies conduct their business, and offer a chance to use its expertise to collect and analyze information to foster best practices.[[293]](#footnote-293)Appellate courts may be more likely to defer to the rulemaking process because rulemaking by necessity is more inclusive.[[294]](#footnote-294) In all, engaging in rulemaking would reduce the propensity of the Board to act like lawyers “balancing rights rather than policy analysis studying social and economic regulatory problems.”[[295]](#footnote-295)

1. **How Should Appellate Courts Review the Board?**

The issue also raises concern about the proper scope of judicial review. The preliminary results here are troubling, as it indicates the appellate courts simply do not merely defer to agencies on their statutory constructions. Indeed, it seems like appellate courts do not quite know what to do when they get a statutory case, resulting in “deference practice[s] [being] an unpredictable muddle.”[[296]](#footnote-296) Although the sample size is limited and the universe of cases limited to the most important ones, it nonetheless raises alarm bells that in nearly half of the cases courts seem to, in essence, ignore *Chevron* and its progenyand either interpret the statute *de novo* without regard to the agency’s interpretation or rely on improper standards. Some courts interpret statutory cases using the substantial evidence or even the arbitrary and capricious standard. Somewhere there is a mix-match. This raises the question: if statutory construction is primarily based on statutory “purpose,” how should reviewing courts apply judicial review? Is the current standard of *Chevron* deference appropriate? A purposive approach to agency statutory interpretation gives considerably more discretion to an agency, akin to “lawmaking power” to construe the statute.[[297]](#footnote-297) Given the confusing way in which *Chevron* or its progeny have been applied in the courts,[[298]](#footnote-298) courts should abandon it and adopt the arbitrary and capricious standard.

As Elizabeth Foote argues, *Chevron* misinterprets the nature of agency work as statutory interpretation as opposed to public administration.[[299]](#footnote-299) Agencies are very different from courts in that agencies must “implement public policies through operational programs.”[[300]](#footnote-300) The current practice of dissecting linguistic meaning, for instance “undermines the purposeful perspective and policy orientation of administrative agencies when they work with statutory text in developing expert policy or applying law to fact. Agencies make connections and think about features in different ways… with their own institutional mixture of expertise, policy, politics, and management and enforcement concerns.”[[301]](#footnote-301)

Before *Chevron*, courts used the arbitrary and capricious test or its close relative, the substantial evidence test, to oversee agency implementation of statutory directives.[[302]](#footnote-302) Under this standard, the court looked at the completeness of the administrative record, how the agency evaluated and weighed statutory factors and how well-reasoned the agency’s opinion was.[[303]](#footnote-303) “The pre-*Chevron* court did not assess administrative action as if it were a judicial-style exercise in text-parsing and a neutral parsing of legislative history.”[[304]](#footnote-304) Returning to this standard seems most compatible with a purposive-driven approach to statutory interpretation. Moreover, under the current standard, Chevron step 1 gives the agency no discretion to interpret statutory language that is unambiguous. As such, when the NLRB interprets statute, although it does not do this expressly, it tries to improperly fit the language within Chevron step 1.[[305]](#footnote-305) It disguises its policymaking as Chevron step 1 statutory interpretation, resulting later in confusion before the appellate courts and resulting in many cases being overturned on appeal. Indeed, the focus of judicial review is on the ambiguousness of the text, rather than the wisdom and evidence underlying the agency’s choice of policy. A standard of review that better considers the Board’s policymaking inclinations would better serve the agency and the public as the Board could use its policymaking abilities to choose an interpretation that would reduce strikes and other forms of industrial strife and increase employee bargaining power to raise wages.[[306]](#footnote-306) As such, the appellate courts could better judge the sufficiency of the evidence on the agency’s policy choices. As scholar Michael Harper put it,   
“the courts can demand that the Board justify the creation of new legal doctrine with more than a claim that the new doctrine offers a plausible interpretation of ambiguous statutory language” as the courts can mandate that the Board “explain how the new doctrine better advances goals and interests accommodated by the Labor Act…”[[307]](#footnote-307) Such a review may serve to slow the frequent flip-flops in policy at the Board as courts would focus review on how the Board undertook its policymaking role rather than what the text or legislative history says.[[308]](#footnote-308)

**Conclusion**

Formed during the New Deal, the NLRB of 2016 is at its heart a policymaking body behaving like a court. We might expect statutory interpretation to be different at an agency than at a court.[[309]](#footnote-309) As Adrian Vermeule argues, agencies’ institutional position justifies different interpretive measures.[[310]](#footnote-310) For instance, an agency has to be responsive to political principals while a court must focus on achieving coherence to the law.[[311]](#footnote-311) The fact that the NLRB frequently flip-flops on issues when presidential administrations change is something we should expect in a democratic system. As such, we should embrace the NLRB (and administrative agencies generally) as policymaking adjudicators and accept that the way that the Board may interpret statutes may very well differ from the way a rights-protecting court may analyze statutory text. In order to fulfill its role as a policymaking body, the Board should adapt its technique of statutory interpretation to fully embrace its role as a policymaking body and to better guide judicial review. As it currently stands, the Board makes ideological decisions dressed up in the language courts want to hear, yet, it turns out, when the court actually gets a chance to review, it frequently overturns what the Board rules anyway. Such a system is not what we want in a democratic system. Rather, the Board should make more transparent what factors it relies on for its policymaking. It should make more explicit the policymaking aspects of its decisions and rely and weigh more expert evidence on the ramifications of its rulings. Courts in turn should rework the *Chevron* framework, and defer more to agency’s expert capabilities by reviewing decisions under the more deferential arbitrary and capricious standard that was in existence prior to the *Chevron* decision.

1. Postdoctoral Research Associate, Center for the Study of Democratic Politics, Woodrow Wilson School of Public and International Affairs, Princeton University; Visiting Fellow, Yale Law School Information Society Project; J.D. Harvard Law School, Ph.D., Political Science Columbia University. [↑](#footnote-ref-1)
2. *See, e.g.,* William N. Eskridge, Jr. et al, Legislation and Statutory Interpretation 322-23 (2nd ed. 2006) (“Most government-based statutory interpretations are nowadays tendered by administrative agencies and departments and courts are second-order interpreters…”); 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) [hereinafter *Norms*] (“[A]gencies are, by necessity, the primary official interpreters of federal statutes….”); Jerry F. Mashaw, *Agency-Centered or Court-Centered Administrative Law? A Dialogue with Richard Pierce on Agency Statutory Interpretation*, 59 Admin. L. Rev. 889, 892 (2007); Cass 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.”); *cf* 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, 2004-05 (2007) (arguing that agencies do not actually engage in statutory interpretation when they select among multiple interpretations of a statute; they are actually engaging in policymaking). [↑](#footnote-ref-2)
3. *See* Sunstein, *supra* note 2, at 1053; Michael W. Spicer and Larry D. Terry, *Administrative Interpretation of Statutes: A Constitutional View on the ‘New World Order’ of Public Administration*, 56 Pub. Admin. Rev. 38, 38 (1996). [↑](#footnote-ref-3)
4. *See* Jerry Mashaw, *Between Facts and Norms: Agency Statutory Interpretation as an Autonomous Enterprises*, 55 U of Toronto L. Rev. 497, 497 (2005). [↑](#footnote-ref-4)
5. *Id.* at 499; *see also* Cass Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 Mich. L. Rev. 885, 919 (2003) (“precisely because the empirical study of interpretation remains in an extremely primitive state, there is every reason to think that much will be gained by further empirical efforts”). [↑](#footnote-ref-5)
6. *See* Abbe R. Gluck and Lisa Schulz Bressman, *Statutory Methodologies from the Inside- An Empirical Study of Congressional Drafting, Delegation and the Canons: Part I*, 65 Stan. L. Rev. 901 (2013); Abbe R. Gluck and Lisa Schulz Bressman, *Statutory Methodologies from the Inside- An Empirical Study of Congressional Drafting, Delegation and the Canons: Part 2*, 66 Stan. L. Rev. 725 (2013); Christopher Walker, *Inside Agency Statutory Interpretation*, 67 Stan. L. Rev. 999 (2015). [↑](#footnote-ref-6)
7. *See* Chevron USA, Inc. v. Natural Res. Def. Council Inc., 407 U.S. 827-28 (1984) (“[If 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.”). [↑](#footnote-ref-7)
8. *See* Mashaw, *supra* note 4, at 498. [↑](#footnote-ref-8)
9. *See* Anita S. Krishnakumar, *Dueling Canons*, 65 Duke L. J. 909, 913 (2016). [↑](#footnote-ref-9)
10. Gluck & Bressman, *supra* note 6. [↑](#footnote-ref-10)
11. Walker, *supra* note 6. [↑](#footnote-ref-11)
12. *See* Krishnakumar, *supra* note 9,at 914 (finding that “none of the canons or tools seemed capable of constraining the Justices’ tendency to vote consistently with their ideological preferences…”). [↑](#footnote-ref-12)
13. *See* Karl N. Llewellyn, *Remarks on the Theory of Appellate Decisions and the Rules or Canons About How Statutes Are to Be Construed,* 3 Vand. L. Rev. 395, 401-06 (1950). Llewellyn lists 28 pairs of canons and countercanons (“thrusts” and “parries”). *See id.* [↑](#footnote-ref-13)
14. *See* William N. Eskridge, Jr., *Textualism: The Unknown Ideal?* 96 Mich. L. Rev. 1509, 1548-49 (1998); Krishnakumar, *supra* note 9, at 914. [↑](#footnote-ref-14)
15. Mashaw, *supra* note 4, at 510; Kevin Stack, *Purposivism in the Executive Branch: How Agencies Interpret Statutes*, 109 N.W. U. L. Rev. 871, 871, 876 (2015). [↑](#footnote-ref-15)
16. *See* Peter Strauss, *When the Judge Is Not the Primary Official with Responsibility to Read: Agency Interpretation and the Problem of Legislative History*, 1990 Chi-Kent L. Rev. 321, 321 (1990); Daniel P. O’Gorman, *Construing the National Labor Relations Act: The NLRB and Methods of Statutory Construction*, 81 Temple L. Rev. 178 (2009). [↑](#footnote-ref-16)
17. Mashaw, *supra* note 4, at 519. [↑](#footnote-ref-17)
18. *See* Catherine L. Fisk & Deborah C. Malamud, *The NLRB in Administrative Law Exile: Problems with Its Structure and Function and Suggestions for Reform*, 58 Duke L. J. 2013, 2020 (2009). [↑](#footnote-ref-18)
19. *Id.* [↑](#footnote-ref-19)
20. *See, e.g.,* Abbe Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 Yale L. J. 1750, 1761-68 (2010) (discussion of debate between purposivism and textualism); *see also* John F. Manning, *What Divides Textualists from Purposivists?*, 70 Colum. L. Rev. 106 (2006) (same). [↑](#footnote-ref-20)
21. *See, e.g.,* Antonin Scalia, A Matter of Interpretation: Federal Courts and the Law 25-27 (1997). For more on textualism, see John F. Manning, *Textualism and Legislative Intent*, 91 Va. L. Rev. 419, 423-24 (2005); Caleb Nelson, *A Response to Professor Manning*, 91 Va. L. Rev. 451, 452-53 (2005); John F. Manning, *Textualism and the Equity of the Statute*, 101 Colum. L. Rev. 1, 8-9 (2001); John F. Manning, *Deriving Rules of Statutory Interpretation from the Constitution*, 101 Colum. L. Rev. 1648 (2001). [↑](#footnote-ref-21)
22. *See* William N. Eskridge, Dynamic Statutory Interpretation 27 (1994). [↑](#footnote-ref-22)
23. *See* Caleb Nelson, *What Is Textualism?,* 91 Va. L. Rev. 347, 348 (2005). [↑](#footnote-ref-23)
24. *See, e,g*., Scalia, *supra* note 21, at 17; W. David. Slawson, *Legislative History and the Need to Bring Statutory Interpretation Under the Rule of Law*, 44 Stan. L. Rev. 383, 416 (1992); David A. Strauss, *Why Plain Meaning?*, 72 Notre Dame L. Rev. 1565, 1565 (1997). [↑](#footnote-ref-24)
25. Carlos E. Gonzalez, *Reinterpreting Statutory Interpretation*, 74 N.C. L. Rev. 585, 595 (1996). [↑](#footnote-ref-25)
26. *See* Scalia, *supra* note 21, at 16-25. [↑](#footnote-ref-26)
27. *See* *id.* at 36 (“In any major piece of legislation, the legislative history is extensive, and there is something for everybody.”); Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 Iowa L. Rev. 195, 205-06 (1983). [↑](#footnote-ref-27)
28. Eskridge, *supra* note 22, at 230. [↑](#footnote-ref-28)
29. *See* Scalia, *supra* note 21, at 16-23. [↑](#footnote-ref-29)
30. *See id.* at 25-27. [↑](#footnote-ref-30)
31. John F. Manning & Matthew C. Stephenson, Legislation and Regulation: Cases and Materials 202 (2nd ed. 2013) (noting how semantic canons “are generalizations about how the English language is conventionally used and understood, which judges may use to ‘decode’ statutory terms. The use of semantic canons can therefore be understood simply as a form of textual analysis.”). [↑](#footnote-ref-31)
32. Walker, *supra* note 6, at 1023. [↑](#footnote-ref-32)
33. *Id.* [↑](#footnote-ref-33)
34. *Id.* [↑](#footnote-ref-34)
35. *See, e.g.,* William N. Eskridge, Jr., Philip Frickey & Elizabeth Garrett, Cases and Materials on Legislative Statutes and the Creation of Public Policy 852-54 (4th ed. 2007). [↑](#footnote-ref-35)
36. Walker, *supra* note 6, at 1023. [↑](#footnote-ref-36)
37. *See*, *e.g.,* Deborah A. Wildiss, *Undermining Congressional Overrides: The Hydra Problem in Statutory Interpretation*, 90 Texas L. Rev. 859, 871 (2012). [↑](#footnote-ref-37)
38. *See* Eskridge et al., *supra* note 35, at 862-65. [↑](#footnote-ref-38)
39. *See id.* It also includes the rule that both the title and preamble of a statute can be relevant in determining statutory meaning. *See id.* [↑](#footnote-ref-39)
40. Eskridge, *supra* note 22, at 221-30 (describing categories of intentionalist interpretations). [↑](#footnote-ref-40)
41. *See id.; see also* Stephen Breyer, Active Liberty: Interpreting Our Democratic Constitution85-101 (2005) (advancing a purposive approach to the Constitution). [↑](#footnote-ref-41)
42. *See* William N. Eskridge, Jr. & Philip P. Frickey, *An Historical and Critical Introduction*, in Henry M. Hart, Jr. and Albert M. Sacks, The Legal Process: Basic Problems in the Making and Application of Law, at xcii (William N. Eskridge, Jr. & Phillip P. Frickey, eds., 1994), at 321; William N. Eskridge, Jr. *Dynamic Statutory Interpretation*, 135 U. Pa. L. Rev. 1479, 1479 (1987); T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 Mich. L. Rev. 20, 46 (198) (“[S]tatutes ought to be responsive to today’s world. They ought to be made to fit, as best they can, into the current legal landscape.”). [↑](#footnote-ref-42)
43. Eskridge, *supra* note 42, at 1483. [↑](#footnote-ref-43)
44. *See* Eskridge & Frickey, *supra* note 42, at 321. [↑](#footnote-ref-44)
45. *See* Breyer, *supra* note 41, at 101 (noting that purposive-driven theories “help[] statutes match their means to their overall public policy objectives, a match that helps translate the popular will into sound policy”). [↑](#footnote-ref-45)
46. *See id.* at 85. [↑](#footnote-ref-46)
47. *See* Eskridge, *supra* note 22, at 26 (purposivism “allows a statute to evolve to meet new problems”). [↑](#footnote-ref-47)
48. *See* Breyer, *supra* note 41, at 88 (nothing that purposive theories try to ascertain how Congress “would have wanted a court to interpret the statute in light of present circumstances in the particular case”). [↑](#footnote-ref-48)
49. *See* Fisk & Malamud, *supra* note 18, at 2020 (noting multiple purposes of labor law). [↑](#footnote-ref-49)
50. *See* Eskridge, *supra* note 22, at 27 (“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 purpose of a statute”). [↑](#footnote-ref-50)
51. *See* Gluck & Bressman, *supra* note 6, at 976. [↑](#footnote-ref-51)
52. *See* *id.* at 976-78 (noting that committee-produced legislative history is the most reliable); Walker, *supra* note 6, at 1044 (finding committee and conference reports most reliable, with floor statements and hearing transcripts less reliable); Jorge L. Carro & Andrew R. Brann, *The U.S. Supreme Court and the Use of Legislative Histories: A Statistical Analysis*, 22 Jurimetrics 294,299 (1982) (noting that the Supreme Court cites to committee reports more than other types of legislative history); Michael H. Koby, *The Supreme Court’s Declining Reliance on Legislative History: The Impact of Scalia’s Critique*, 36 Harvard J. on Legis. 369, 390 (1999); Krishnakumar, *supra* note 9, at 237. [↑](#footnote-ref-52)
53. Gluck & Bressman, *supra* note 6, at 979. [↑](#footnote-ref-53)
54. *Id.* at 978. [↑](#footnote-ref-54)
55. *Id.* at 978. As Gluck & Bressman note, “these group-produced pieces of legislative history often convey bipartisan, multimember understandings, and disagreeing members typically will have an opportunity to respond to them. These reports also seem likely to have agencies and other members as at least part of their intended audiences— that is, they are more likely to have internal institutional and implementation-related functions. Groups reports also are particularly unlikely to be focused on the reelection prospects of a single member.” [↑](#footnote-ref-55)
56. *See* *id.* at 934 (examining the use of dueling canons of construction in Supreme Court majority and dissenting opinions) (“They reflect judicially preferred policy positions, expressed as rules of thumb about how to treat statutory text in light of constitutional priorities, common-law practices, or specific statute-based policies.”); Manning & Stephenson, *supra* note 31, at 247 (noting that substantive canons “do not purport to be neutral formalizations of background understandings about the way people use and understand the English language. Instead, these substantive canons ask interprets to put a thumb on a scale in favor of some value or policy that courts have identified as worthy of special protection.”); Henry M. Hart, Jr. & Albert M. Sacks, The Legal Process: Basic Problems in the Making and Application of Law 1376 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (noting that substantive canons “promote objectives of the legal system which transcend the wishes of any particular session of the legislature.”). [↑](#footnote-ref-56)
57. *See* Gluck & Bressman, *supra* note 6, at 940. [↑](#footnote-ref-57)
58. *Id.* [↑](#footnote-ref-58)
59. *See* Walker, *supra* note 6, at 1005. [↑](#footnote-ref-59)
60. *See* James J. Brudney & Corey Ditslear, *Canons of Construction and the Elusive Quest for Neutral Reasoning*, 58 Vand. L. Rev. 1, 4 (2005); David S. Law & David Zaring, *Law Versus Ideology: The Supreme Court and the Use of Legislative History*, 51 Wm. & Mary L. Rev. 1653, 1654 (2010); *see also* Nicholas S. Zeppos, *The Use of Authority in Statutory Interpretation: An Empirical Analysis,* 70 Tex. L. Rev. 1073, 1074-75 (1992). [↑](#footnote-ref-60)
61. *See* Krishnakumar, *supra* note 9, at 934 (examining the use of dueling canons of construction in Supreme Court majority and dissenting opinions). [↑](#footnote-ref-61)
62. *See id.*; *see also* Brudney & Ditslear, *supra* note 60, at 4; Law & Zaring, *supra* note 60, at 1654. [↑](#footnote-ref-62)
63. *See* Gluck & Bressman, *supra* note 6 (conducting survey among congressional staffers); Walker, *supra* note 6 (conducting survey among agencies). [↑](#footnote-ref-63)
64. *See, e.g.* O’Gorman, *supra* note 16, at 178 (providing examples of how the NLRB interprets statutes and offering theories for how the Board should interpret statutes). [↑](#footnote-ref-64)
65. William N. Eskridge & Lauren E. Bauer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 Geo. L. J. 1083 (2008). The database consisted of 1,014 cases in all. *Id.* For other empirical studies of this sort, see Thomas Merrill, *Judicial Deference to Executive Precedent*, 101 Yale L.J. 969 (1992); Thomas J. Miles & Cass Sunstein, *Do Judges Make Regulatory Policy?*, 73 U. Chi. L. Rev. 623 (2006); Connor R. Raso & William N. Eskridge, *Chevron as a Canon, Not a Precedent*, 110 Colum. L. Rev. 1727 (2010). For studies at the court of appeals, see Lisa Schultz Bressman, *How Mead Has Muddled Judicial Review of Agency Action*, 58 Vand. L. Rev. 1443 (2005); Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern Skidmore Standard*, 107 Colum. L. Rev. 1235 (2007); Orin S. Kerr, *Shedding Light on Chevron: An Empirical Study of the Chevron Doctrine in the U.S. Courts of Appeals*, 15 Yale J. on Reg. 1 (1998); Peter H. Schuck & E. Donald Elliot, *To the Chevron Station: An Empirical Study of Federal Administrative Law*, 1990 Duke L. J. 984 (1990). [↑](#footnote-ref-65)
66. Eskridge & Bauer, *supra* note 65, at 1091. [↑](#footnote-ref-66)
67. *See, e.g.,* Kerr, *supra* note 65, at 32; (finding that courts upheld regulations 58% of regulations a year after Chevron to 82% 2-4 years after Chevron then back to 72%); Miles & Sunstein, *supra* note 65, at 849 (noting validation rates); Schuck & Elliot, *supra* note 61, at 1039 (noting affirmance rate of 71% in 1984, then 81% in 1986, then 75% in 1988); Reul E. Schiller, *The End of Deference: Courts, Expertise, and the Emergency of New Deal Administrative Law*, 106 Mich. L. Rev. 399, 436-37 (2007) (noting circuit court deference to NLRB decisions regarding statements made by employees during union elections). [↑](#footnote-ref-67)
68. Frank B. Cross, The Theory and Practice of Statutory Interpretation 160-77 (2009). [↑](#footnote-ref-68)
69. *Id.* at 189. [↑](#footnote-ref-69)
70. *Id.* at 190. [↑](#footnote-ref-70)
71. Brudney & Ditslear, *supra* note 60, at 1 (little constraint by linguistic and substantive canons); James J. Brudney & Corey Ditslear, *Liberal Justices’ Reliance on Legislative History: Principle, Strategy and the Scalia Effect*, 29 Berkeley J. Emp. & Lab. L. 117 (2008) (looking at constraining effects of legislative history on workplace cases); James J. Brudney & Corey Ditsclear, *The Warp and Woof of Statutory Interpretation: Comparing Supreme Court Approaches on Tax and Workplace Law*, 58 Duke L. J. 1231 (2009) (showing use of legislative history). [↑](#footnote-ref-71)
72. Brudney & Ditsclear, *supra* note 60, at 1. [↑](#footnote-ref-72)
73. *Id.* [↑](#footnote-ref-73)
74. *Id.* [↑](#footnote-ref-74)
75. Law & Zaring, *supra* note 60, at 1738. [↑](#footnote-ref-75)
76. *Id.* [↑](#footnote-ref-76)
77. *Id.* [↑](#footnote-ref-77)
78. Krishnakumar, *supra* note 9, at 909. [↑](#footnote-ref-78)
79. *Id*. [↑](#footnote-ref-79)
80. *Id*. [↑](#footnote-ref-80)
81. Mashaw, *supra* note 4, at 519; Strauss, *supra* note 16, at 329. [↑](#footnote-ref-81)
82. Mashaw, *supra* note 4, at 503. [↑](#footnote-ref-82)
83. *Id.*  [↑](#footnote-ref-83)
84. *Id.* [↑](#footnote-ref-84)
85. Strauss, *supra* note 16, at 329. [↑](#footnote-ref-85)
86. *Id.* at 346-48. [↑](#footnote-ref-86)
87. *Id.* at 347. [↑](#footnote-ref-87)
88. *Id.* at 349. [↑](#footnote-ref-88)
89. Mashaw, *supra* note 4, at 511 (discussing Strauss, *supra* note 16). [↑](#footnote-ref-89)
90. Stack, *supra* note at 16, at 876. [↑](#footnote-ref-90)
91. *Id.* at 871. [↑](#footnote-ref-91)
92. *Id.* at 876. [↑](#footnote-ref-92)
93. *See* Gluck & Bressman, *supra* note 6, at 905-06. The Gluck and Bressman study was preceded by a smaller study done by Victoria and Jane Schacter. *See* Victoria Nourse & Jane S. Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 N.Y.U. L. Rev. 575 (2002). [↑](#footnote-ref-93)
94. Gluck & Bressman, *supra* note 6, at 905. [↑](#footnote-ref-94)
95. *Id.* [↑](#footnote-ref-95)
96. *Id.* at 907. [↑](#footnote-ref-96)
97. *Id.* at 933-34. [↑](#footnote-ref-97)
98. Walker, *supra* note 6, at 1000. [↑](#footnote-ref-98)
99. *Id.* [↑](#footnote-ref-99)
100. *Id.* at 1004. [↑](#footnote-ref-100)
101. *Id.* [↑](#footnote-ref-101)
102. *Id.* at 1028. [↑](#footnote-ref-102)
103. Gluck and Bressman, for instance, found greater supporter for *expressio unius*, but classified the rule against superfluities as a canon that was known but rejected. Gluck & Bressman, *supra* note 6, at 932 & fig.4, 933-36. [↑](#footnote-ref-103)
104. Walker, *supra* note 6, at 1041. [↑](#footnote-ref-104)
105. *Id.* at 1003. [↑](#footnote-ref-105)
106. *See* National Labor Relations (Wagner) Act, Pub. L. No. 74-198, 49 Stat. 449 § 3 (1935) (codified as amended at 29 U.S.C. §§ 151-69 (2006)). [↑](#footnote-ref-106)
107. 49 Stat. 449, Section 3 (codified as amended at 29 U.S.C. § 151); *see also* Irving Bernstein, The New Deal Collective Bargaining Policy 90 (1950) (noting the two-fold purpose “to voice an economic philosophy and to lay a constitutional foundation for the Act”). [↑](#footnote-ref-107)
108. *See* Paul R. Verkuil, *The Independence of Independent Agencies: The Purposes and Limits of Administrative Agencies*, 1988 Duke L.J. 257, 257 (noting that NLRB was one of many administrative agencies created during the New Deal era). [↑](#footnote-ref-108)
109. *See* 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 [NLRA], Congress continued the process of diminishing the role of courts in the labor area by creating an *alternative* to the courts…”); Ralph P. Winters, Jr. *Judicial Review of Agency Decisions: The Labor Board and the Court*, 1968 Sup. Ct. Rev. 53, 59 n.5 (“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.”). [↑](#footnote-ref-109)
110. 29 U.S.C.§ 153. [↑](#footnote-ref-110)
111. *See* 1 Nat’l Labor Relations Bd., Legislative History of the National Labor Relations Act of 1935, at 1428 (1949) (noting Senator Wagner 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.”). [↑](#footnote-ref-111)
112. *See* Judy Flynn, *A Quiet Revolution at the Labor Board: The Transformation of the NLRB*, *1935-2000,* 61 Ohio St. L.J. 1361, 1363 (2000). [↑](#footnote-ref-112)
113. *See id.* [↑](#footnote-ref-113)
114. *See* James A. Gross, The Making of the National Labor Relations Board: A Study in Economics, Policy, and the Law 150 (1974); James A. Gross, The Reshaping of the National Labor Relations Board: National Labor Policy in Transition 1937-1947 226 (1981). [↑](#footnote-ref-114)
115. *Id.* [↑](#footnote-ref-115)
116. *See* Samuel Estreicher, *Policy Oscillations at the Labor Board: A Plea for Rulemaking*, 37 Admin. L. Rev. 163, 167 (1985). [↑](#footnote-ref-116)
117. For instance, legislators thought that expanding the term to five years would prevent Board members “from being subject to immediate political reactions at elections.” Flynn, *supra* note 109, at 1363. [↑](#footnote-ref-117)
118. Labor Management Relations (Taft-Hartley) Act, Pub. L. No. 80-101, 61 Stat. 136 (1947) (codified at 29 U.S.C. §§ 141-44. [↑](#footnote-ref-118)
119. *See* Fisk & Malamud, *supra* note 18, at 2036. [↑](#footnote-ref-119)
120. *Id.* at 2034. [↑](#footnote-ref-120)
121. *Id.* at 2034; William N. Eskridge, Jr. and John Ferejohn, *Super-Statutes*, 50 Duke L. J. 1215, 1217 (2001) (using the NLRB as an example of a super-statute). [↑](#footnote-ref-121)
122. Fisk & Malamud, *supra* note 18, at 2034; *see also* Nelson Lichtenstein, *Politicized Unions and the New Deal Model: Labor, Business and Taft-Hartley*, in The New Deal and the Triumph of Liberalism135, 138 (Sidney M. Milkis & Jerone M. Mileur, eds. 2002); Cynthia Estlund, *The Ossification of American Labor* Law, 102 Colum. L. Rev. 1527, 1533-35 (2002) (noting that Taft-Hartley set back the labor movement and arguing that the Taft-Hartley amendments work “largely by addition, not subtractions; they left the core provisions of the original New Deal text—and in particular the existing employer unfair labor practices—essentially intact.”); *cf* Archibald Cox, *Some Aspects of the Labor Management Relations Act*, 1947, 61 Harvard L. Rev. 274, 274 (1961) (arguing that Taft-Hartley “appears to reject the policy of encouraging the spread of collective bargaining, [and] accepts the institution where it already exists.”). [↑](#footnote-ref-122)
123. Labor Management Relations Act of 1947, ch.120, 61 Stat. 136 (1947) (codified at 29 U.S.C. sections 141-187). Taft-Hartley states the following concerning its purpose. “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.”). Unlike other agencies, the Board has an independent General Counsel, who is appointed by the President, and who is separate from the Board, with adjudicatory and prosecutor functions being divided. [↑](#footnote-ref-123)
124. 29 U.S.C. § 153(a) (2006). The Taft-Hartley Act of 1947 expanded the Board from three to five members. *See id.* [↑](#footnote-ref-124)
125. *See* Flynn, *supra* note 112, at 1364-65. [↑](#footnote-ref-125)
126. *See* Estreicher, *supra* note 116, at 175 (noting that the Board uses adjudication to make policy as opposed to rulemaking); Flynn, *supra* note 106, at 470 n.21 (same). NLRB has faced criticism of its failure to use rulemaking, with critics contending that an adjudicatory approach results in the Board frequently changing policies. *See id.* [↑](#footnote-ref-126)
127. 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) (noting role of General Counsel); Robert A. Gorman & Matthew W. Finkin, Basic Text on Labor Law: Unionization and Collective Bargaining 11-12 (2d ed. 2004) (noting procedures). [↑](#footnote-ref-127)
128. Less than 1% of decisions ever reach the Board as most cases are resolved by a regional hearing officer on or before they are heard by ALJs, who are bound by Board precedent in issuing their decisions. [↑](#footnote-ref-128)
129. *See* Winter, *supra* note 109, at 55. [↑](#footnote-ref-129)
130. *See* Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 Yale L. J. 679, 681 (1989); Judy Flynn, *Costs and Benefits of ‘Hiding the Ball’: NLRB Policymaking and the Failure of Judicial Review*, 75 BU L. Rev. 387, 421 (1995) (noting that the General Counsel does not look to circuit precedent in deciding whether or not to issue a complaint); Rebecca Hanner White, *Time for a New Approach: Why the Judiciary Should Disregard the ‘Law of the Circuit’ When Confronting Nonacquiescence by the National Labor Relations Board*, 69 N.C. L. Rev. 639 (1991). [↑](#footnote-ref-130)
131. Losing parties can seek judicial review of an adverse Board decision in the federal court where they petition for relief or seek enforcement of a Board order. 29 U.S.C. §160(e)-(f) (2012). The General Counsel can also seek enforcement of a Board order. *Id.* Parties can file appeals “wherein such person resides or conducts business” or in the D.C. Circuit. *Id.* § 160(f). [↑](#footnote-ref-131)
132. *See* Flynn, *supra* note 130, at 426 n.165. [↑](#footnote-ref-132)
133. Estlund, *supra* note 122, at 1530. The last major change was in 1959. *See* Labor-Management Reporting & Disclosure (Landrum-Griffin) Act, Pub. L. No. 86-257, 73 Stat. 519 (1959) (codified at 29 U.S.C. §§ 401-503). [↑](#footnote-ref-133)
134. 29 U.S.C. § 160. [↑](#footnote-ref-134)
135. 29 U.S.C. § 159. [↑](#footnote-ref-135)
136. *See, e.g.,* Fisk & Malamud, *supra* note 18, at 2020 (noting that “[a]cross a range of doctrinal areas, it is apparent that Bush II labor policy made a decisive shift in favor of protecting managerial prerogatives and augmenting the ability of employers and employees to oppose unionization”); Ronald Turner, *Ideological Voting on the National Labor Relations Board*, 8 U. Pa. Lab. & Emp. L. 707, 712 (2006) (noting the predictive value of ideology in votes at the Board); Flynn, *supra* note 112, at 1411 (noting the partisan-based voting patterns); William N. Cooke & Frederick H. Gautschi III, *Political Bias in NLRB Unfair Labor Practice Decisions*, 35 Indus. & Lab. Rel. Rev. 539, 549 (1982). [↑](#footnote-ref-136)
137. *See* Tuck, *supra* note 127, at 1153 (noting how after there is a change in presidential administration, resulting in new Board members, the Board often reverses many of the precedents made by the prior Board). [↑](#footnote-ref-137)
138. *See* Cooke & Gautschi, *supra* note 136, at 549 (noting how the inconsistency and ambiguity that plagues Board’s decisions can hinder labor management relations). [↑](#footnote-ref-138)
139. Flynn, *supra* note 112, at 1366. Changes in the appointment process over the years—including the rise of “package” appointments where groups of nominees for different governmental posts are “packaged” together for a Senate vote—exacerbated the trend of a more partisan nomination process. *See id.* at 1366. Indeed, with one exception, all of President Clinton’s appointees have been package nominations. *Administration Faces Possibility pf Four Vacancies, No Quorum on NLRB*, 1997 Daily Lab. Rep. (BNA) No. 202, at A-8 (Oct. 20, 1997) (noting that Clinton had to make recess appointments to keep the agency up and running). [↑](#footnote-ref-139)
140. William P. Gould, IV, *Politics and the Effects of the National Labor Relations Board’s Adjudicative and Rulemaking Processes*, 64 Emory L. J. 1501, 1526 (2015); Gilliam E. Metzger, *Agencies, Polarization and the States*, 115 Colum. L. Rev. 1739, 1762 & n.112 (2015) (noting how insiders composed many of the appointments). [↑](#footnote-ref-140)
141. *See* Turner, *supra* note 136, 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.”); Estreicher, *supra* note 116, at 170 (noting how the Board’s law-making is often seen as “unstable”); Tuck, *supra* note 127, at 1118 (arguing that the Board’s flip-flops “undermine[] the stability, certainty and efficiency of …. policies…because neither party can rely on Board precedent”). [↑](#footnote-ref-141)
142. *See* Turner, *supra* note 136, at 74 (listing experience of Board members in the Appendix). [↑](#footnote-ref-142)
143. See Amy Semet, *Political Decision Making at the National Labor Relations Board: An Empirical Examination of the Board’s Decisions through the Clinton and Bush Years,* 37 Berkeley J. Emp. & Lab. Law. 2 (2016). In the prior analysis, I only looked at unfair labor practice cases. [↑](#footnote-ref-143)
144. These words include “statutory construction,” “statutory interpretation,” “plain meaning,” “dictionary,” “statutory canons,” “redundancy,” “exclusion,” “clear statement,” “canons of construction,” searches for the Latin canons and the names of other substantive and textual cases as well as searches for “ambiguous” or “text” within the same sentence as “statute” or “statutory.” I also did searches under “concerted action,” and various iterations of the word “violations” or “violate” and “statute.” I separately did a search in the federal courts of appeals to see cases where courts applied *Chevron* or other deference regimes to see I could pick up additional cases. As part of another project, I coded over 1,000 appellate court decisions referencing the NLRB from 1993-2012 and I referred to that database as an additional check. [↑](#footnote-ref-144)
145. *See* Fisk & Malamud, *supra* note 18, at 2039. [↑](#footnote-ref-145)
146. *See id.* [↑](#footnote-ref-146)
147. Wright Line et al., 343 N.L.R.B. 344 (1996). [↑](#footnote-ref-147)
148. As an example, the Board may have to decide whether its jurisdiction extends to employee practices at Native American casinos. [↑](#footnote-ref-148)
149. The Board rarely relies on circuit court cases as precedent in guiding decision-making. The Board occasionally cites circuit court cases and it sometimes uses their reasoning to guide decision-making, but its use is usually supplementary to Board or Supreme Court decisions. This is not all together surprising given that the Board engages in a policy of nonacquiescence of appellate court decisions. My data reveals that this policy is not merely theoretical; in actuality, my own observation after reading over 4,000 NLRB cases it that the Board rarely will voice concern that its ruling will conflict with a precedent set by whatever regional court will likely review the case. [↑](#footnote-ref-149)
150. *See. e.g.,* Krishnakumar, *supra* note 9, at 922; Cross, *supra* note 68, at 148 (analyzing Roberts’ Court use of statutory interpretive tools); [↑](#footnote-ref-150)
151. *But see* Krishnakumar, *supra* note 9, at 922. [↑](#footnote-ref-151)
152. *See id.* at 961. [↑](#footnote-ref-152)
153. *See* *id.* at 971. [↑](#footnote-ref-153)
154. In any event, the results likely would not differ. Most dissent writers employed the same methodology as their fellow dissent writer; in only four or five cases did one dissent use a statutory methodology that was not employed by the other dissents. Often, this methodology was legislative history, with one dissent writer employing legislative history to buttress their point to a limited extent. Moreover, about 80% of cases concerned a single dissent, and nearly 90% of cases in the Bush II and Clinton years concerned a single or joint dissent. Recent Board members Philip Miscimarra and Harry Johnson have a habit of writing very long and detailed separate dissents, a pattern that contrasts with the single dissents written during the Bush II and Clinton year. During the earlier period, Hurtgen/Brame and Liebman/Walsh often wrote joint dissents. [↑](#footnote-ref-154)
155. Miles & Sunstein, *supra* note 65, at 828-29 (“[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 …have embraced ‘plain meaning’ approaches and the more liberal justices have not.”). [↑](#footnote-ref-155)
156. \* signifies statistical significance at 90% confidence; \*\* 95% confidence; and \*\*\* 99% confidence. The standard benchmark is to use 95% confidence to imply statistical significance. [↑](#footnote-ref-156)
157. *See* New Process Steel, L.P. v. N.L.R.B., 560 U.S. 674 (2010) (holding in a five-justice majority decision that two members hearing NLRB cases were insufficient for a quorum). [↑](#footnote-ref-157)
158. Alexandria Clinic, P.A. et al., 339 N.L.R.B. 162, 2003 WL 22027491 (Aug. 21, 2003). [↑](#footnote-ref-158)
159. *Id.* at 1. [↑](#footnote-ref-159)
160. *Id.* (“We view this case as covered by the clear language of Section 8(g).” Section 8(g) requires that strikers give ten days written notice and that “notice, once given, may be extended by written agreement of the parties.”). [↑](#footnote-ref-160)
161. *Id.* at 7. [↑](#footnote-ref-161)
162. Greater New Orleans Artificial Kidney Center, 240 N.L.R.B. 432 (1979) (finding no violation under section 8(g). [↑](#footnote-ref-162)
163. Alexandria Clinic, 2003 WL 22027491, at 3. [↑](#footnote-ref-163)
164. *Id*. [↑](#footnote-ref-164)
165. *Id.* [↑](#footnote-ref-165)
166. *Id.* The Board noted that the use of the word “shall” made it mandatory. *Id.* [↑](#footnote-ref-166)
167. *Id.* [↑](#footnote-ref-167)
168. *Id.* (noting that “Congress intended that the 10 day notice provision of Section 8(g) be interpreted according to its literal meaning”). [↑](#footnote-ref-168)
169. *Id.* at 5. [↑](#footnote-ref-169)
170. *Id.* at 7. [↑](#footnote-ref-170)
171. See St Clare’s Hosp. & Health Ctr., 226 NLRB 1000, 1003-04 (1977) (holding that house staff are employees but cannot bargain); Cedar’s Sinai Med. Ctr., 223 NLRB 251, 251 (1976) ((holding that house staff are not ‘employees’ under the NLRA); Leland Stanford Junior Univ., 214 NLRB 621, 621 (1974) (holding that TAs are not employees); Cornell Univ., 183 NLRB 329, 331 (1971) (asserting jxn over private, nonprofit universities). [↑](#footnote-ref-171)
172. Boston Med. Ctr. Corp., 330 NLRB 152 (1999); N.Y. Univ., 332 NLRB 1205 (2000). [↑](#footnote-ref-172)
173. Brown Univ., 342 NLRB 483, 490 (2004). [↑](#footnote-ref-173)
174. Colum. Univ. et al., Case No. 02-RC-143012, 364 N.L.R.B. 90 (Aug. 26, 2016) (NLRB website). [↑](#footnote-ref-174)
175. *Id; see also New York University et al*., 332 N.L.R.B. 1205, 1209 (2006) which, like Columbia University, advanced a textualist approach to find TAs as covered. In turn, Columbia University reversed Brown in August 2016. [↑](#footnote-ref-175)
176. Colum. Univ., 364 N.L.R.B. 90, Case No. 02-RC-143012 (Aug. 23, 2016), at 1. [↑](#footnote-ref-176)
177. *Id.* at 1-2. [↑](#footnote-ref-177)
178. *Id.* at 4-6 (“The absence of student assistants from the Act’s enumeration of categories excluded from the definition of employee is itself strong evidence of statutory coverage.”). [↑](#footnote-ref-178)
179. When the Board advanced an expansionist “no limits” reading of the statute, it only referred to practical implications 39% of the time. [↑](#footnote-ref-179)
180. Interestingly, the only time the Board expressly invoked any of the Latin terms was in contract interpretation cases. In those cases, the Board would on occasion note that methods of statutory interpretation— such as *expression unius*, etc.— could also be used to interpret the language of the contract. [↑](#footnote-ref-180)
181. In *Ellis v. Brac,* 460 U.S. 433 (1984) the Supreme Court held that the Railway Labor Act and the NLRA were statutory equivalents, thus spawning disputes about when the NLRA case is analogous to a Railway Labor Act case so as to come within the Ellis holding. Some cases consider whether standards applied for the Railway Labor Act should also apply to Taft-Hartley labor unions. *See* Roger C. Hartley, *Constitutional Values and the Adjudication of Taft-Hartley Act Dues Objector Cases*, 1989 Hastings L. J. 1, 12 (1989). [↑](#footnote-ref-181)
182. *Id.* [↑](#footnote-ref-182)
183. Lincoln Lutheran of Racine et al., 2015 WL 5047778, at 5. [↑](#footnote-ref-183)
184. *Id*. at 5. [↑](#footnote-ref-184)
185. *Id.* (“Congress’ treatment of employer payments to employee trust funds [in another provision of the statute] further illustrates that Congress contemplated that dues-checkoff arrangements could survive contract expiration.” [↑](#footnote-ref-185)
186. *Id.* [↑](#footnote-ref-186)
187. *Id*. at 7. [↑](#footnote-ref-187)
188. *Id.* [↑](#footnote-ref-188)
189. *Id.* at 6 & n17 (“the policies of the Act strongly support a finding that dues checkoff should be included with the overwhelming majority of terms and conditions of employment that remain in effect even after the contract containing them expires”) [↑](#footnote-ref-189)
190. Gluck & Bressman and Walker similarly found that legislative history helps explain the purpose of the statute, with 80% of respondents in the Walker survey also finding that legislative history also helped define terms. Gluck & Bressman, *supra* note 6, at 971 fig. 7; Walker, *supra* note 6, at 1040. As one respondent in the Walker survey put it, “Legislative history can help to clarify Congress’s purpose in enacting particular provisions, which in turn can help the Agency resolve ambiguities in a way that is consistent with legislative intent.” Walker, *supra* note 6, at 1044. [↑](#footnote-ref-190)
191. Northeast Ohio District Council of the United Brotherhood of Carpenters and Joinders of America et al., 310 N.L.R.B. 172, 1993 WL 104853, at 1(1993). [↑](#footnote-ref-191)
192. *Id.* [↑](#footnote-ref-192)
193. *Id.* [↑](#footnote-ref-193)
194. *Id.* at 7. [↑](#footnote-ref-194)
195. *Id.* at 6. [↑](#footnote-ref-195)
196. *Id.* [↑](#footnote-ref-196)
197. *Id.* [↑](#footnote-ref-197)
198. *Id.* at 8. For instance, the Board said that a somewhat contrary statement by the bill’s sponsor, Senator Kennedy were too “ambiguous” to support a contrary reading of the statute, despite what the dissent argued. *Id.* at 9. [↑](#footnote-ref-198)
199. *Id.* at 7. Specifically, the Board relied on a statement from the House Conference Report that the construction proviso was not meant to “change the present state of the law” as signifying that the proviso should be interpreted according to the “status quo” of the enacting legislature. *Id.* at 8. [↑](#footnote-ref-199)
200. Lincoln Lutheran of Racine, 2015 WL 5047778, at \*5 n17 (citing 93 Cong. Rec. 4876, reprinted in 2 NLRB, Legislative History of the Labor Management Relations Act, 1947, at 1311 (1948). [↑](#footnote-ref-200)
201. Service Employees International Union et al., 329 N.L.R.B. 64, 1999 WL 958483, at 14 (Sept. 30, 1999). [↑](#footnote-ref-201)
202. *Id.* at 1. [↑](#footnote-ref-202)
203. *Id.* at 14. [↑](#footnote-ref-203)
204. *Id.* (noting that “[a]s clear as the legislative intent may appear, its boundaries … have consequently produced much additional gloss.”). [↑](#footnote-ref-204)
205. Because much of the Board’s interpretation is so caselaw-based it is difficult to tease out exactly how they are interpreting statutes as they cite to Supreme Court or Board decisions, which in turn have internal citations to statutory interpretation or references to legislative history. Moreover, in about 35% of cases, the Board advances concerns for practical implications of its rulings, such as the impact imposing a strict deadline will have on striking words if they strictly read the text. [↑](#footnote-ref-205)
206. Fisk & Malamud, *supra* note 18, at 2020. [↑](#footnote-ref-206)
207. Brown Univ., 342 N.L.R.B. at 483. [↑](#footnote-ref-207)
208. *Id.* at 27. [↑](#footnote-ref-208)
209. *Id.* at 36. [↑](#footnote-ref-209)
210. Colum. Univ., Case No. 02-RC-143012, 364 N.L.R.B. 90 (Aug. 23, 2016). [↑](#footnote-ref-210)
211. *Id.* at 7. [↑](#footnote-ref-211)
212. *Id.* at 159. [↑](#footnote-ref-212)
213. *Id.* at 159-60. [↑](#footnote-ref-213)
214. *Id.* at 163. [↑](#footnote-ref-214)
215. *Id.* at 163. [↑](#footnote-ref-215)
216. *Id.* [↑](#footnote-ref-216)
217. *Id.* at 153-156. [↑](#footnote-ref-217)
218. Browning-Ferris Industries of California, Inc. et al., 326 N.L.R.B. 186 (2015). [↑](#footnote-ref-218)
219. *Id*. at 2. [↑](#footnote-ref-219)
220. *Id.* [↑](#footnote-ref-220)
221. *Id.* at 15. [↑](#footnote-ref-221)
222. *Id.* [↑](#footnote-ref-222)
223. *Id.* at 17. [↑](#footnote-ref-223)
224. *Id.* at 20-21. [↑](#footnote-ref-224)
225. *Id.* at 24. The Board cited to the Supreme Court in noting that “[t]he use by an administrative agency of the evolutional approach is particularly fitting. To hold that the Board’s earlier decisions froze the development … of the national labor law would misconceive the nature of administrative decisionmaking.” *Id.* at 24 (internal citations omitted). [↑](#footnote-ref-225)
226. Auciello Iron Works, Inc. et al., 317 N.L.R.B. 60, 369, 1995 WL 291061, at \*7 (1995). [↑](#footnote-ref-226)
227. *Id.* at 1. [↑](#footnote-ref-227)
228. N.L.R.B. v. Aucielle Iron Works, 980 F.2d 804, 812 (1st Cir. 1992). [↑](#footnote-ref-228)
229. *Id.* at 812 (noting that “we reaffirm as consistent with our statutory mandate and the practicalities of case litigation the rule that once the union accepts the employer’s offer, in the absence of a previous assertion of good faith doubt or other changed circumstance to call into question the union’s competence to enter into a contract, the parties have formed a valid contract precluding the employer from raising a good faith doubt or refusing to bargain with the union…”). [↑](#footnote-ref-229)
230. In his survey, Walker found that many rule drafters commented on the declining usefulness of legislative history. Walker, *supra* note 6, at 1040. As one respondent noted: “Legislative history is sometimes useful, but it is becoming less so. Congress puts less time into drafting legislative history that is useful to interpretation of the statute and leaving more of the work to agencies. The administrative rulemaking process is taking on a larger role in shaping the rules that actually apply to the country.” *Id.* [↑](#footnote-ref-230)
231. Gluck & Bressman, *supra* note 6, at 936. [↑](#footnote-ref-231)
232. *Id.* at 937. [↑](#footnote-ref-232)
233. Fisk & Malamud, *supra* note 18, at 2020. [↑](#footnote-ref-233)
234. See Krishmanuar, *supra* note 9, at 961. [↑](#footnote-ref-234)
235. *See* *id.* at 971. [↑](#footnote-ref-235)
236. This is why we see the sharp uptake up to 21% in CB cases under “Statute” in Table 13. [↑](#footnote-ref-236)
237. Alexandria Clinic, P.A. et al, 339 N.L.R.B. 162, 2003 WL 22027491, at \*5. [↑](#footnote-ref-237)
238. *Id.* at 15. [↑](#footnote-ref-238)
239. *Id*. at 16 (citing S. Rep. 93-766, 93d Cong., 2d Sess, at 4; H.R. Rep. 93-1051, 93d Cong., 2d Sess., at 5, as reprinted in Legislative History of the Coverage of Nonprofit Hospitals under the National Labor Relations Act, 1974, at 11 & 273 (1974). [↑](#footnote-ref-239)
240. *Id.* at 16. [↑](#footnote-ref-240)
241. Alexandria Clinic, P.A. et al., 339 N.L.R.B. 162, 2003 WL 22027491, at \*5 (2003). [↑](#footnote-ref-241)
242. *Id.* at 7. [↑](#footnote-ref-242)
243. *Id.* [↑](#footnote-ref-243)
244. *Id.* at 14. [↑](#footnote-ref-244)
245. *Id.* [↑](#footnote-ref-245)
246. *Id.* at 15. [↑](#footnote-ref-246)
247. *Id.* at 16. [↑](#footnote-ref-247)
248. *Id.* at 17. [↑](#footnote-ref-248)
249. *See* Amy Semet, Appellate Court Decisionmaking in NLRB Cases, Unpublished Manuscript. [↑](#footnote-ref-249)
250. *See* Jason Czarnezki, *An Empirical Investigation of Judicial Decisionmaking, Statutory Interpretation, and the Chevron Doctrine in Environmental Law*, 79 U. Colo. L. Rev. 767, 770-71 (2008) (noting that “there remains confusion and conflation in the circuits over how to apply the Chevron doctrine). [↑](#footnote-ref-250)
251. *See* Eskridge & Bauer, *supra* note 65, at 1090; Raso & Eskridge, *supra* note 65, at 1740. [↑](#footnote-ref-251)
252. Chevron, 467 U.S. 637. [↑](#footnote-ref-252)
253. Skidmore v. Swift & Co., Inc., 323 U.S. 134 (1944). [↑](#footnote-ref-253)
254. *See* Jack M. Beerman, *End the Failed Chevron Experiment Now: How Chevron Has Failed and Why It Can and Should Be Overruled,* 42 Conn. L. Rev. 779, 784 (2010); Czarnezki, *supra* note 250, at 770-71 (noting that “there remains much confusion and conflation in the circuits over how to apply the Chevron doctrine”) [↑](#footnote-ref-254)
255. Fisk & Malamud, *supra* note 18, at 2020. [↑](#footnote-ref-255)
256. Fall River Dyeing & Finishing Corp. v. N.L.R.B., 482 U.S. 27 (1987). [↑](#footnote-ref-256)
257. N.L.R.B. v. Health Care & Ret. Corp. of Am., 511 U.S. 571, 576 (1994); *see also* N.L.R.B. v. Ky. River Cmty Care, Inc., 532 U.S. 706, 725 (2001) (applying “rational and consistent” standard). [↑](#footnote-ref-257)
258. *See* Beerman, *supra* note 254, at 831. [↑](#footnote-ref-258)
259. *See* Eskridge & Bauer, *supra* note 65, at 1090 (noting at least five deference regimes, including Seminole Rock, Curtiss-Wright and Beth Israel). [↑](#footnote-ref-259)
260. This is not altogether surprising given that Chevron is only cited in a minority of Supreme Court opinions. *See* Eskridge & Baer, *supra* note 65, at 1121 (noting that Chevron two-step process was cited 8.3%; in about 40% of cases, some other form of deference applied). [↑](#footnote-ref-260)
261. This database is somewhat limited in that it only includes cases where the Board itself engaged in statutory interpretation. As part of another Article, see supra note 249, I am examining appeals court decisions from 1993-2012 and found that about a third of the cases involving statutory interpretation are reversed on appeal. This lowered number may be due to the fact that in the other analysis, I included cases where the ALJ did a statutory interpretation but the Board did not, or where neither the Board nor ALJ did a statutory interpretation, but the court of appeals nonetheless felt that interpreting the statute was appropriate to resolve the case. Further, we might assume that cases in which the full Board hears a case and spends a great deal of time writing an analysis of the statute are probably the most important cases that the Board hears, and thus, may be more likely to be overturned on appeal. As such, the current database is overpopulated with cases heard by the full Board. [↑](#footnote-ref-261)
262. *See* Leedom v. Kyne, 358 U.S. 184, 188 (1958) (explaining that such decisions are not for “review” but rather to “strike down an order…made in excess of [the Board’s] delegated powers.”). [↑](#footnote-ref-262)
263. In particular, the Board is not often clear in summary judgment cases that it is actually doing a statutory interpretation analysis. Oftentimes, the Board uses a set template in summary judgment cases and simply says there is no genuine issue of material fact without explaining that there is a statutory analysis at the heart of the case. On appeal, the courts often rule on statutory interpretation for these cases, but because the Board did not engage in a clear analysis the database would not include those cases. [↑](#footnote-ref-263)
264. These type of cases, however, are included in the dataset I use in my other article on appellate court review of NLRB decisions. [↑](#footnote-ref-264)
265. Moreover, I did a search for *Chevron* and other deference cases so as to capture all statutory interpretation cases. However, courts of appeals in NLRB cases rarely even cite to *Chevron*, even when doing statutory interpretation. In the analysis I am doing of the appellate courts for the other article, I capture those cases. I find that there are under fifty cases where courts, particularly those in the 4th Circuit, engage in statutory interpretation where they are really supposed to be engaging in a “substantial evidence” analysis. [↑](#footnote-ref-265)
266. *See* Krishnakumara, *supra* note 9, at 959. [↑](#footnote-ref-266)
267. Krishnakumara found that for most canons used during the Roberts court, “reliance by a majority opinion is not resulting in a dissenting opinion countering that *same* canon or tool most of the time (in roughly 75 percent of the cases.”). *Id.* at 960*.* She found that only the plain meaning rule and Supreme Court precedent to be used in a dueling manner, while other canons commonly seen as susceptible to multiple interpretations — such as legislative history- were often not invoked in a dueling way by justices. *Id.* at 960. [↑](#footnote-ref-267)
268. James Brudney, *Isolated and Politicized: The NLRB’s Uncertain Future*, 26 Comp. Lab. L. & Pol’y, 221, 244 & n.10 (2005). [↑](#footnote-ref-268)
269. *See* O’Gorman, *supra* note 16, at 200. [↑](#footnote-ref-269)
270. *See* Sunstein & Vermeule, *supra* note 5, at 928. [↑](#footnote-ref-270)
271. *See* O’Gorman, *supra* note 16, at 200. [↑](#footnote-ref-271)
272. *Id.* at 216. [↑](#footnote-ref-272)
273. *Id.* at 217, 219 (noting that agencies should give “different weight to the sometimes conflicting purposes, policies and principles with and without the Act. And this is exactly what we expect from an administrative agency, and …is arguably what Congress expected from the Board”). [↑](#footnote-ref-273)
274. Walker, *supra* note 6, at 1067 (“federal agencies play a critical role in the legislative process such that rule drafters have the intimate understanding of legislative history that Strauss hypothesized nearly a quarter century ago”). [↑](#footnote-ref-274)
275. *See* Elizabeth V. Foote, *Statutory Interpretation or Public Administration: How Chevron Misconstrues the Function of Agencies and Why It Matters*, 59 Admin. L. Rev. 673, 707 (2007). [↑](#footnote-ref-275)
276. O’Gorman, *supra* note 16, at 215-216; Mashaw, *supra* note 4, at 510. [↑](#footnote-ref-276)
277. Mashaw, *supra* note 4, at 510. [↑](#footnote-ref-277)
278. *See* Pierce, *supra* note 2, at 200. [↑](#footnote-ref-278)
279. Fisk & Malamud, *supra* note 18, at 2019. [↑](#footnote-ref-279)
280. *Id.* at 2057 (“The Board continues to operate like a court, limiting itself to the specific issues brought to it by its general counsel, failing to bring multiple areas of Board doctrine together to enrich its understanding and amplify its remedial capacities, and most of all, using rights rhetoric as a way to mask what would otherwise be its obligation to seek out (let alone generate) empirical assessments of the effects of its policies.”). [↑](#footnote-ref-280)
281. Browning-Ferris Industries, Inc.*,*362 N.L.R.B. at 26. The dissenters continued: “We believe the majority’s test will actually foster substantial bargaining instability by requiring nonconsensual presence of too many entities with diverse and conflicting interests on the ‘employer’ side.” *Id.* at 25. [↑](#footnote-ref-281)
282. James Landis, The Administrative Process 38-39 (1938). [↑](#footnote-ref-282)
283. *See* Fisk & Malamud, *supra* note 18, at 2015. The NLRB for instances states that “Nothing in this Act shall be construed to authorize the Board to appoint individuals for the purpose of conciliation or mediation, or for economic analysis.” N.L.R.B., 29 U.S.C. § 154(b) (2006) (added by Taft-Hartley Act, Pub. L. No. 80-101, 61 Stat. 136 (1947); James Gross, The Remaking of the National Labor Relations Board: National Labor Policy in Transition, 1937-1947, at 5-225 (1981) (recounting history of Taft-Hartley). [↑](#footnote-ref-283)
284. Fisk & Malamud, *supra* note 18, at 2048 n.134. In the 1940s, the Smith Committee held hearings about the NLRB, concerned that was acting too much in a pro-labor direction. *Id.* [↑](#footnote-ref-284)
285. *Id.* at 2045, 2049. Labor Secretary Francis Perkins campaigned for the NLRB to be a part of the DOL instead of an independent agency. *Id.* at 2045. [↑](#footnote-ref-285)
286. *Id.* at 2051. [↑](#footnote-ref-286)
287. *Id.* at 2045. [↑](#footnote-ref-287)
288. Foote, *supra* note 275, at 678. [↑](#footnote-ref-288)
289. *See, e.g.,* Alexander Acosta, *Rebuilding the Board: An Argument for Structural Change, Over Policy Prescription*, *at the NLRB*, 5 Fla. Int’l L. Rev. 347, 359 (2010) (arguing that rulemaking “will help stabilize Board law and restore public and judicial confidence in the agency”).; Charlotte Garden, *Toward Politically Stable NLRB Lawmaking: Rulemaking vs. Adjudication*, 64 Emory L. J. 1469, 1473-77 (2015). There are of course disadvantages to rulemaking as well, as it involves more time and cost and offers less flexibility to respond to changing circumstances in the near term. *See* Acosta, *supra* note 289, at 357-58. [↑](#footnote-ref-289)
290. For instance, the Board so frequently chooses who qualifies as an “employee” under the NLRA that no doubt the appellate courts find it difficult to keep up. [↑](#footnote-ref-290)
291. *See* Acosta, *supra* note 289, at 359; Tuck, *supra* note 119, at 1117 (proposing policy statements as alternative to rulemaking). [↑](#footnote-ref-291)
292. Foote, *supra* note 275, at 681. [↑](#footnote-ref-292)
293. *See* Acosta, *supra* note 289, at 352. [↑](#footnote-ref-293)
294. *See* Garden, *supra* note 289, at 1475. [↑](#footnote-ref-294)
295. Fish & Malamud, *supra* note 18, at 2019. [↑](#footnote-ref-295)
296. Jud Mathews, *Deference Lotteries*, 91 Tex. L. Rev. 1349, 1349 (2013) (arguing that agencies cannot predict what deference standard an appellate court will apply). [↑](#footnote-ref-296)
297. *See* O’Gorman, *supra* note 16, at 179. [↑](#footnote-ref-297)
298. *See* Czarnezski, *supra* note 265, at 770-771 (2008) (noting that “there remains much confusion and conflation in the circuits over how to apply the Chevron doctrine”). [↑](#footnote-ref-298)
299. *See* Foote, *supra* note 275, at 722-23 (2007) (“Through its *Chevron* doctrines, the Supreme Court reconceived the core function of administrative agencies as statutory construction, modeled in the judicial process, instead of the actual legal function of public administration, which is operational implementation of statutory programs.”). [↑](#footnote-ref-299)
300. *Id.* at 674. [↑](#footnote-ref-300)
301. *Id.* at 707. [↑](#footnote-ref-301)
302. *Id.* at 674. [↑](#footnote-ref-302)
303. *Id.* at 675. [↑](#footnote-ref-303)
304. *Id.* at 675. [↑](#footnote-ref-304)
305. Fisk & Malamud, *supra* note 18, at 2040. [↑](#footnote-ref-305)
306. Fisk & Malamud, *supra* note 18, at 2040 (“[I]n many cases, the issue is more accurately described as a a question of policy rather than as a question of law, and the arbitrary-and-capricious standard for discretionary policymaking is the standard the Court should be applying.”). [↑](#footnote-ref-306)
307. Michael C. Harper, *Judicial Control of the National Labor Relations Board’s Lawmaking in the Age of Chevron and Brand X*, 89 B.U. L. Rev. 189, 192 (2009). [↑](#footnote-ref-307)
308. *Id.* at 195 (noting that a change in the standard of review will “ensure the adopted changes have greater legitimacy, and even stabilize agency-formulated law in cases where empirical evidence resists the agency’s assumptions”). [↑](#footnote-ref-308)
309. Mashaw, *supra* note 4, at 519. [↑](#footnote-ref-309)
310. Adrian Vermeule, Judging Under Uncertainty: An Institutional Theory of Legal Interpretation 213-14 (2006) (suggesting that agencies’ expertise justifies wider interpretive methods than what may apply for courts); Michael Herz, *Purposivism and Institutional Competence in Statutory Interpretation*, 2009 Mich. St. L. Rev. 89, 94-106 (2009) (arguing that agencies’ institutional position justifies a purposive approach to statutory construction); William N. Eskridge, Jr., *Expanding Chevron’s Domain: A Comparative Institutional Analysis of the Relative Competence of Courts and Agencies to Interpret Statutes*, 2013 Wis. L. Rev. 411, 420-27 (arguing that agencies expertise and accountability renders them better able to interpret statutes broadly). [↑](#footnote-ref-310)
311. Mashaw, *supra* note 4, at 519. [↑](#footnote-ref-311)