

## AN EMPIRICAL EXAMINATION OF AGENCY STATUTORY INTERPRETATION

*Amy Semet*\*

How do administrative agencies interpret statutes? Despite the theoretical treatment scholars offer on how agencies construe statutes, far less is known empirically about administrative statutory interpretation even though agencies play a critical role in interpreting 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. Surveying over 7,000 cases heard by the National Labor Relations Board (“NLRB”) from 1993-2016, I analyze the statutory methodologies the Board uses in its decisions in order to uncover patterns of how the Board interprets statutes over time. Overall, I find no ideological coherence to statutory methodology. Board members switch between textualist or purposive methods depending upon the partisan outcome sought. Indeed, Board members often use statutory methodologies to dueling purposes, with majority and dissenting Board members using the same statutory methodology to support contrasting outcomes. The Board has also changed how it interprets statutes over time, relying in recent years more on vague pronouncements of policy and less on precedent or legislative history. Moreover, despite scholars arguing that agencies should interpret statutes differently than courts, in practice, this study indicates that the NLRB interprets its governing statute in similar fashion to how courts do. After analyzing the empirical data, I set forth policy recommendations for how agencies should interpret statutes. The balance required—between policy coherence, stability and democratic accountability—is fundamentally different in the context of agency statutory interpretation than for interpretation by a judicial body. Rather than acting like a court, adjudicative agencies like the NLRB should leverage their expertise to arrive at an interpretation that best effectuates the purpose of the statute. For an agency like the NLRB that makes decisions almost exclusively through adjudication

---

\* Center for the Study of Democratic Politics, Woodrow Wilson School of Public and International Affairs, Princeton University, Postdoctoral Research Associate; J.D. Harvard Law School, Ph.D., Political Science, Columbia University. This paper was selected as one of six papers for inclusion in the Association of American Law Schools (“AALS”) New Voices in Legislation program for which I received extensive comments on my paper from Aaron Bruhl, James Brudney and Mark Seidenfeld. I also presented this paper at the 2017 Quantlaw conference at the University of Arizona Law School as well as the Law and Society Conference, for which I received many comments from the audience that I incorporated.

this may necessitate that the agency reveal its statutory interpretation in a more transparent fashion through rulemaking.

## INTRODUCTION

Administrative agencies are the primary interpreters of federal statutes<sup>1</sup> and have taken on the task of “updating” the law to reflect current conditions.<sup>2</sup> 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 analyzing how administrative agencies actually review the statutes that Congress delegates to them to interpret. Analyzing statutory interpretation beyond the realms of the federal courts is long overdue.<sup>3</sup> Toward this end, Professor Jerry Mashaw of the Yale Law School calls on scholars to quantitatively study statutory construction by administrative agencies.<sup>4</sup> 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

---

<sup>1</sup> See, e.g., 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) [hereinafter, *Agency-Centered*]; 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...”); 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).

<sup>2</sup> Sunstein, *supra* note 1, 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).

<sup>3</sup> For studies of statutory interpretation beyond the federal courts see Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L. J. 1750, 1755 (2010) (analyzing statutory interpretation in the state supreme courts); see also Frank B. Cross, THE THEORY AND PRACTICE OF STATUTORY INTERPRETATION 180-200 (2009) (reviewing statutory interpretation in the federal courts).

<sup>4</sup> Jerry Mashaw, *Between Facts and Norms: Agency Statutory Interpretation as an Autonomous Enterprise*, 55 U OF TORONTO L. REV. 497, 497 (2005) [hereinafter, *Between Facts and Norms*].

than warranted.”<sup>5</sup> Indeed, there has been an increased shift in recent years to empirically study agency statutory interpretation with scholars conducting surveys in the past few years concerning statutory interpretation among congressional staffers and agency personnel to provide a glimpse behind the black box.<sup>6</sup> Several scholars also offer interesting theoretical explorations on how agencies should interpret statutes.<sup>7</sup> Yet, we still know very little about how any particular agency actually interprets its governing statutes in its adjudications. This is concerning as *Chevron*<sup>8</sup> validates agency statutory interpretation as an “autonomous enterprise,” with appellate courts charged to ensure that the agency’s construction is a “reasonable” and defensible construction of the statute.<sup>9</sup> But how do agencies arrive at the interpretations the statutes that courts defer to under *Chevron*? This issue is all the more relevant given recent attempts by congressional Republicans to introduce legislation that would eliminate *Chevron* deference, requiring courts to review agency statutory interpretations *de novo*.

This Article reviews the statutory interpretation techniques employed by the NLRB in the last 24 years through the presidencies of William Jefferson Clinton, George W. Bush (“Bush II”) and Barack Obama. Discussion centers around two 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

---

<sup>5</sup> *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”).

<sup>6</sup> 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) [hereinafter, *Part I*]; 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) [hereinafter, *Part II*]; Christopher Walker, *Inside Agency Statutory Interpretation*, 67 STAN. L. REV. 999 (2015) [hereinafter, *Inside Agency*]; Christopher J. Walker, *Legislating in the Shadows*, 165 U. OF PENN L. REV. 1377 (2017); see also Adoption of Recommendations, 80 FED. REG. 76, 161 (Dec. 16, 2015) (summarizing ACUS’s findings).

<sup>7</sup> See, e.g., Aaron Saiger, *Agencies’ Obligation to Interpret the Statute*, 69 VAND. L. REV. 1231, 1231 (2016) (arguing that an agency has an obligation to set forth the “best” interpretation of a statute); Kevin Stack, *Purposivism in the Executive Branch: How Agencies Interpret Statutes*, 109 N.W. U. L. REV. 871, 876 (2015); see also Evan Criddle, *The Constitution of Agency Statutory Interpretation*, 69 VANDERBILT L. REV. EN BANC 325, 325 (2016) (responding to Saiger piece).

<sup>8</sup> *Chevron USA, Inc. v. Natural Res. Def. Council Inc.*, 407 U.S. 827, 828 (1984) (“[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.”).

<sup>9</sup> Mashaw, *Between Facts and Norms*, *supra* note 4, at 498.

contrasting methods to interpret the same statute or do they use the same method to different ends?<sup>10</sup> After exploring these questions, I look at the issue normatively by asking how the Board—and administrative agencies generally—should interpret statutes.

The Article's findings are of import to scholars of statutory interpretation. Much like the analysis by Abbe Gluck and Lisa Bressman<sup>11</sup> and Christopher Walker<sup>12</sup> 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 its governing statute in its adjudications. I find that Board members do not consistently use interpretive methods.<sup>13</sup> 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, dispute the applicable statute and disagree about statutory purpose. 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 Obama Board relying more on broad pronouncements of policy goals 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 argue over precedent differences, in more recent opinions before the Obama Board, members quarrel over whether a textual or purposive method is most appropriate to resolve the interpretive dilemma at hand.

The results underscore issues worthy of further exploration regarding agency statutory interpretation and our assumptions underlying its study. Existing theories of statutory interpretation are overly simplistic with a one size fits all approach to statutory methodology. In addition to significant substantive differences between agencies, decision-makers must balance competing considerations of stability, coherence and democratic accountability in infusing statutes with meaning. Judicial methods of interpretation should not simply be so easily transposed to the administrative context as institutional differences among statutory deciders may influence interpretive method.<sup>14</sup> The decider's place in the hierarchical structure, its

---

<sup>10</sup> Anita S. Krishnakumar, *Dueling Canons*, 65 DUKE L. J. 909, 913 (2016).

<sup>11</sup> Gluck & Bressman, *Part I & Part II*, *supra* note 6.

<sup>12</sup> Walker, *Inside Agency*, *supra* note 6.

<sup>13</sup> See Krishnakumar, *supra* note 10, at 914 (finding that “none of the canons or tools seemed capable of constraining the Justices’ tendency to vote consistently with their ideological preferences...”).

<sup>14</sup> See 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); see also William N. Eskridge,

expertise and its democratic pedigree can all influence interpretation.<sup>15</sup>

Far too often, these unique institutional features and challenges faced by administrative agencies are ignored. For a policymaking agency charged to implement the President’s agenda, we should expect to see agencies interpreting statutes quite differently than courts.<sup>16</sup> For instance, judges may cite precedent to infuse statutory meaning in pursuit of the twin aims of stability and coherence. But when agencies rely on precedent from appellate bodies to the exclusion of other tools, agencies may abdicate their responsibility to be democratically accountable to consider the true practical consequences of their decisions, a result that may be particularly troubling in the administrative context where litigation concerns real-life decisions such as social security benefits, veterans claims or patent rights.<sup>17</sup> Moreover, recent studies call into question some of the assumptions underlying the textual canons—such as the whole act rule or the whole code rule—so commonly employed by courts in interpreting statutes.<sup>18</sup> This fiction that when Congress writes statutes it speaks with a consistent and coherent voice—across and within discrete issue areas—may be especially inapposite in the agency context, where a disjointed group of statutes, regulations and caselaw inform how statutes are implemented.<sup>19</sup> In addition, 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.<sup>20</sup>

These empirical findings contribute to the wider debate about how agencies should construe statutes. Karl Llewellyn challenged the view that textual canons lead decision-makers to arrive at a consistent, non-ideological

---

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 (2013) (arguing that agencies expertise and accountability renders them better able to interpret statutes broadly); Aaron-Andrew P. Bruhl, *Hierarchy and Heterogeneity: How to Read a Statute in a Lower Court*, 97 CORNELL L. REV. 433, 434 (2012); 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); Mashaw, *Between Facts and Norms*, *supra* note 4, at 504 (same).

<sup>15</sup> *Id.* at 504.

<sup>16</sup> *Id.* at 519.

<sup>17</sup> Lawrence M. Solan, *Precedent in Statutory Interpretation*, 94 N.C. L. REV. 1165, 1165 (2016).

<sup>18</sup> Gluck & Bressman, *Part I*, *supra* note 6, at 954.

<sup>19</sup> *Id.*

<sup>20</sup> William N. Eskridge, Jr., *Textualism: The Unknown Ideal?* 96 MICH. L. REV. 1509, 1548-49 (1998); Krishnakumar, *supra* note **Error! Bookmark not defined.**, at 914.

and “correct” reading of the underlying statute.<sup>21</sup> This study’s findings support that claim as the results indicate that Board members continually switch their interpretive method depending on the procedural posture of the case. Indeed, many noted administrative law scholars advocate for agencies to advance a purposive approach.<sup>22</sup> 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 clearly dictate meaning, then the agency should use its expertise in line with its responsibility to be politically accountable.<sup>23</sup> 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 a meaning unexpected by the statute’s enacting coalition.<sup>24</sup>

Agencies need to be more explicit on how they incorporate policy and practical reasoning in their statutory interpretation calculus.<sup>25</sup> They could do this by embracing their role as experts and base their legal reasoning on that expertise to make clear the basis for decisions.<sup>26</sup> 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.<sup>27</sup> The Board could do this by embracing its policymaking mandate by relying more on social science data to inform statutory meaning to update the NLRA to current times. Moreover, agencies should leverage their expertise to make decisions in accord with “background” principles unique to the substantive area under the agency’s

---

<sup>21</sup> 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”). *Id.*

<sup>22</sup> See, e.g., Walker, *supra* note 6 at 1399-1401 (summarizing scholars’ approach to purposive interpretation); Saiger, *supra* note 7, at 1231 (arguing that agencies have an ethical duty to set forth the “best interpretation” of the statute); Stack, *supra* note 7, at 887-900 (2015) (advocating for a purposive approach); see also Mashaw, *Between Facts and Norms*, *supra* note 4, at 511 (noting purposive approach); Richard J. Pierce, Jr., *What Factors Can an Agency Consider in Making a Decision?*, 2009 MICH. ST. L. REV. 67, 67 (2009) (same); William N. Eskridge, *Expanding Chevron’s Domain: A Comparative Institutional Analysis of the Relative Competence of Courts and Agencies to Interpret Statutes*, 2013 WIS. L. REV. 411, 427 (2013) (same).

<sup>23</sup> Mashaw, *Between Facts and Norms*, *supra* note 4, at 510; Stack, *supra* note 7, at 887-90.

<sup>24</sup> 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); see also Daniel P. O’Gorman, *Construing the National Labor Relations Act: The NLRB and Methods of Statutory Construction*, 81 TEMPLE L. REV. 178, 178 (2009).

<sup>25</sup> 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).

<sup>26</sup> *Id.*

<sup>27</sup> See Stack, *supra* note 7, at 887-900.

purview.<sup>28</sup> The NLRA should also embrace rulemaking to make decisions on some of the matters it currently leaves to case-by-case adjudication. Reliance on rulemaking to advance statutory directives would be a better vehicle to balance policy coherence, stability and democratic accountability.<sup>29</sup>

In Part I, I survey the scholarly literature. I first review the literature on statutory methodologies 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 24-year period under study. I provide summary statistics and I also set forth 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. 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 court-centered modes of statutory interpretation and that it should more affirmatively embrace rulemaking as part of its policymaking mission.

## I. Statutory Interpretative Methodologies

### A. Background on Statutory Methods

Scholars have debated how courts and other law-making bodies should construe statutes.<sup>30</sup> The issue of statutory construction is often

---

<sup>28</sup> Jonathan R. Siegel, *Guardians of the Background Principles*, 2009 MICH. ST. L. REV. 123, 136 (2009) (“the most important consideration in an agency’s interpretation of a statute may be neither the text of the statute, nor the apparent intent or purpose behind it, but the background principles of the area of law that the agency administers”).

<sup>29</sup> See *infra* Part III.B.3.

<sup>30</sup> See, e.g., Gluck, *supra* note 3, at 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).

highlighted during appellate court confirmation hearings when Senators grill prospective justices on the statutory methodologies they will use to interpret cases.<sup>31</sup> 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 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, advocates interpreting statutes by looking at the text's literal meaning.<sup>32</sup> Another view, purposivism, focuses more on interpreting the statute by looking at the overall purpose of the statutory scheme.<sup>33</sup>

### 1. Textualism

Textualism places an emphasis on the statute's text, looking only to find "objective meaning."<sup>34</sup> 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.<sup>35</sup> A "pure textualist" would see the statute as a "command[] from the sole politically legitimate statutory law-creating body," with the judge called "to apply the command verbatim" such that "[i]nterpretation that goes beyond statutory text operates in an extra-legal domain."<sup>36</sup> Textualists dismiss the role of the legislative process as a resource to discern statutory meaning and as such they do not consider legislative history important.<sup>37</sup> Textualists believe that legislative proponents advance policy preferences by picking and choosing select parts of the legislative history.<sup>38</sup> They also think that it is near impossible to discern any singular

---

<sup>31</sup> See Aimee Brown, *Shaping Scotus: The Impact of the 2016 Presidential Election on the Future of the Supreme Court*, 80 ALB. L. REV. 807, 812 (2016).

<sup>32</sup> 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).

<sup>33</sup> William N. Eskridge, DYNAMIC STATUTORY INTERPRETATION 27 (1994).

<sup>34</sup> Caleb Nelson, *What Is Textualism?*, 91 VA. L. REV. 347, 348 (2005).

<sup>35</sup> See, e.g., Scalia, *supra* note 32, at 17 (explaining textualism); David A. Strauss, *Why Plain Meaning?*, 72 NOTRE DAME L. REV. 1565, 1565 (1997) (same); W. David. Slawson, *Legislative History and the Need to Bring Statutory Interpretation Under the Rule of Law*, 44 STAN. L. REV. 383, 416 (1992) (same).

<sup>36</sup> Carlos E. Gonzalez, *Reinterpreting Statutory Interpretation*, 74 N.C. L. REV. 585, 595 (1996).

<sup>37</sup> Scalia, *supra* note 32, at 16-25.

<sup>38</sup> *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).



“legislative intent” given the multiplicity of political actors involved in a statute’s construction.<sup>39</sup> Moreover, general legislative purpose may be so “general and malleable” so as to be effectively meaningless in informing statutory meaning.<sup>40</sup>

Textualists embrace textual or semantic statutory canons as tools that enhance predictability.<sup>41</sup> Textualists often rely on “textualist canons” to serve as “rules of thumb” in how to interpret the actual text.<sup>42</sup> The most common textualist canon is the “plain meaning rule” whereby the reviewing body interprets the words according to their everyday meaning.<sup>43</sup> Other textualist canons concern the rule against superfluities so that statutes are construed to avoid redundancy and to give independent meaning to overlapping terms.<sup>44</sup> There are also a host of Latin-named textualist canons: *ejusdem generis*,<sup>45</sup> which states that when there is a list of two or more specific descriptors followed by general descriptors,<sup>46</sup> 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.<sup>47</sup> The whole code rule looks at the way courts in other cases have interpreted similar language in other statutes.<sup>48</sup> Likewise, the whole act rule refers to the inferences a reviewing court makes about the meaning of one section of a statute based on how other sections are structured.<sup>49</sup> The rule calls for reviewing courts to assume that differences in similar or parallel statutory provisions are deliberate and to presume that statutory provisions have

---

<sup>39</sup> Scalia, *supra* note 32, at 16-23.

<sup>40</sup> Eskridge, *supra* note 33, at 230.

<sup>41</sup> *Id.* at 25-27.

<sup>42</sup> 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.”).

<sup>43</sup> Walker, *Inside Agency*, *supra* note 6, at 1023.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *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).

<sup>47</sup> *See, e.g.*, Walker, *Inside Agency*, *supra* note 6, at 1023.

<sup>48</sup> *See, e.g.*, Deborah A. Wildiss, *Undermining Congressional Overrides: The Hydra Problem in Statutory Interpretation*, 90 TEX. L. REV. 859, 871 (2012).

<sup>49</sup> Eskridge et al., *supra* note 46, at 862-65.

consistent meaning through the statute.<sup>50</sup>

## 2. Purposivism

Although the theory can have many variations,<sup>51</sup> the second approach, purposivism or dynamic interpretation as popularized by William Eskridge,<sup>52</sup> contends that interpreters should take public values into consideration and construe statutes dynamically to reflect current social, political and legal contexts.<sup>53</sup> 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 plays in the world, with a particular emphasis on how the statute fits in with the current societal and legal environment.<sup>54</sup> 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.<sup>55</sup> Purposivists argue that this view defers more to the views of the democratically-elected branches, placing more emphasis on democratic accountability.<sup>56</sup> 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.”<sup>57</sup> Purposivists often 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.<sup>58</sup>

---

<sup>50</sup> *Id.* It also includes the rule that both the title and preamble of a statute can be relevant in determining statutory meaning. *Id.*

<sup>51</sup> Eskridge, *supra* note 33, at 221-30 (describing categories of purposive interpretations).

<sup>52</sup> *Id.*; see also Stephen Breyer, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION 85-101 (2005) (advancing a purposive approach).

<sup>53</sup> 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 (1998) (“[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.”).

<sup>54</sup> Eskridge, *supra* note 53, at 1483.

<sup>55</sup> Eskridge & Frickey, *supra* note 53, at 321.

<sup>56</sup> Breyer, *supra* note 52, 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”).

<sup>57</sup> *Id.* at 85.

<sup>58</sup> Eskridge, *supra* note 33, at 26 (purposivism “allows a statute to evolve to meet new

Purposivism has its limitations. A statute can have multiple and cross-cutting purposes and it can be difficult to discern the purpose.<sup>59</sup> Reliance on legislative history to help in discerning that purpose can also 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.<sup>60</sup> Statements in legislative history could also be a tool to provide political cover rather than a blueprint on what the original enacting coalition intended the statute to mean.<sup>61</sup> Legislative history can also take many forms—ranging from conference committee reports to stray remarks made by Congressman on the House floor or in the Congressional Record.<sup>62</sup> Committee reports are often seen as the most authoritative source of legislative history, followed by conference reports, yet the context can often matter.<sup>63</sup> Who actually says the remarks can make a difference. Statements by party leadership<sup>64</sup> as well as floor statements by those opposed to the bill are often seen as the least reliable.<sup>65</sup> In turn, legislative history that takes the form of showing a “shared consensus” is often seen as most reliable.<sup>66</sup>

### 3. Substantive Canons

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

---

problems”).

<sup>59</sup> See, e.g., Fisk & Malamud, *supra* note 25, at 2020 (noting multiple purposes of labor law).

<sup>60</sup> Eskridge, *supra* note 33, 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”).

<sup>61</sup> Gluck & Bressman, *Part I*, *supra* note 6, at 976.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 976-78 (noting that committee-produced legislative history is the most reliable); Walker, *Inside Agency*, *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).

<sup>64</sup> Gluck & Bressman, *Part I*, *supra* note 6, at 979.

<sup>65</sup> *Id.* at 978.

<sup>66</sup> *Id.* 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.” *Id.*

norms, policies and conventions.<sup>67</sup> All told, there are more than 100 substantive canons.<sup>68</sup> For instance, the “rule of lenity” espouses that any ambiguity be resolved in favor of the defendant.<sup>69</sup> 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.<sup>70</sup>

### **B · Empirical Studies of Statutory Interpretation**

The empirical-oriented scholarship analyzing statutory methods falls into two camps.<sup>71</sup> Traditionally, scholars focus their empirical study on how the Supreme Court interprets statutes.<sup>72</sup> 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.<sup>73</sup> Some investigate how administrative agencies interpret statutes through the use of surveys asked of congressional staff and administrators,<sup>74</sup> while others embark on a more qualitative analysis of agency-specific statutory interpretations, picking out a few examples of actual cases to illustrate given

---

<sup>67</sup> *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 42, 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 interpreters 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”).

<sup>68</sup> Gluck & Bressman, *Part I*, *supra* note 6, at 940.

<sup>69</sup> *Id.*

<sup>70</sup> Walker, *Inside Agency*, *supra* note 6, at 1005.

<sup>71</sup> *See, e.g.*, 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); Nicholas S. Zeppos, *The Use of Authority in Statutory Interpretation: An Empirical Analysis*, 70 TEX. L. REV. 1073, 1074-75 (1992).

<sup>72</sup> *See* Krishnakumar, *supra* note 10, at 934 (examining the use of dueling canons of construction in Supreme Court majority and dissenting opinions).

<sup>73</sup> *See, e.g.*, Gluck & Bressman, *Part I & Part II*, *supra* note 6; Walker, *Inside Agency*, *supra* note 6.

<sup>74</sup> Gluck & Bressman, *Part I & Part II*, *supra* note 6 (conducting survey among congressional staffers); Walker, *Inside Agency*, *supra* note 6 (conducting survey among agency staffers).

points.<sup>75</sup> 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.

### 1. Statutory Analysis of Supreme Court Decisions

There are 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.<sup>76</sup> They find no evidence to indicate when the Court will invoke particular deference regimes in whether to defer to the agency.<sup>77</sup> In the wake of the Eskridge and Bauer analysis, there have been many follow-up studies studying how federal courts apply *Chevron*.<sup>78</sup>

In addition to the *Chevron*-inspired literature, another strain of the literature looks at how federal judges use tools of statutory construction, such as textual and substantive canons and legislative history, to assess how those sources constrain judges from reaching outcomes inapposite to what one would predict from looking at their political background. Frank Cross concludes that legislative history is more constraining than plain meaning.<sup>79</sup>

---

<sup>75</sup> See, e.g. O’Gorman, *supra* note 24, at 178 (providing examples of how the NLRB interprets statutes and offering theories for how the Board should interpret statutes).

<sup>76</sup> 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, 1083 (2008). The database consists of 1,014 cases. *Id.* For other empirical studies, see Connor R. Raso & William N. Eskridge, *Chevron as a Canon, Not a Precedent*, 110 COLUM. L. REV. 1727 (2010); Thomas J. Miles & Cass Sunstein, *Do Judges Make Regulatory Policy?*, 73 U. CHI. L. REV. 623 (2006); Thomas Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969 (1992). For studies at the court of appeals, see Kent Barnett & Christopher Walker, *Chevron in the Circuit Courts*, 116 MICH. L. REV. 1 (2017); Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern Skidmore Standard*, 107 COLUM. L. REV. 1235 (2007); Lisa Schultz Bressman, *How Mead Has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443 (2005); 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).

<sup>77</sup> Eskridge & Bauer, *supra* note 76, at 1091.

<sup>78</sup> See, e.g., Kerr, *supra* note 76, at 32 (finding that courts upheld regulations at rate of 58% after *Chevron* to 82% 2-4 years after *Chevron* then back to 72%); Miles & Sunstein, *supra* note 76, at 849 (noting validation rates); Schuck & Elliot, *supra* note 76, at 1039 (noting affirmance rate of 71% in 1984, then 81% in 1986, then 75% in 1988); see also Reull 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).

<sup>79</sup> Cross, *supra* note 3, at 160-77.

He also finds a marked increase in the use of pragmatism by federal judges analyzing statutes in the circuit courts.<sup>80</sup> Cross also discovers a distinct increase in the use of linguistic canons between 1990 and 2000, a period that corresponds to a time when the use of legislative history was on the decline.<sup>81</sup>

A few of the studies look specifically at interpretive canons, and in particular, analyze rates of dueling canons in majority and dissenting opinions. One study of workplace cases, by James Brudney and Corey Ditslear, looks at interpretive canons in every Supreme Court decision in workplace matters from 1969-2003.<sup>82</sup> In the limited subject matter studied, they notably find 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 reasonably amenable to supporting either side.”<sup>83</sup> They discover that conservative justices tend to use canons to reach conservative outcomes, while liberal justices often use the same canon to reach a liberal result.<sup>84</sup> In follow-up work, they narrow their claim a bit, finding that liberal justices are more likely to vote in favor of employer interest when using legislative history but that the use of canons and legislative history by conservatives is more mixed.<sup>85</sup>

Another study by David Law and David Zaring analyzes the use of legislative history in Supreme Court cases from 1953 to 2006.<sup>86</sup> They look at legal factors that impact what made the Court rely on legislative history.<sup>87</sup> Law and Zaring find that dissenting judges are more likely to cite legislative history when a majority opinion also cites legislative history, thus suggesting that judges are sensitive to their colleagues’ arguments.<sup>88</sup>

Other scholars analyze statutory decisions in both the majority and dissenting opinions. Anita Krishnakumar has undertaken two empirical analysis of Supreme Court statutory interpretation. In one article, she analyzes the role that “dueling canons” play in Supreme Court decisions in

---

<sup>80</sup> *Id.* at 189.

<sup>81</sup> *Id.* at 190.

<sup>82</sup> Brudney & Ditslear, *supra* note 76, at 1 (little constraint by linguistic and substantive canons); *see also* James J. Brudney & Corey Ditslear, *Liberal Justices’ Reliance on Legislative History: Principle, Strategy and the Scalia Effect*, 29 BERKELEY J. EMP. & LAB. L. 117, 117 (2008) (looking at constraining effects of legislative history on workplace cases); James J. Brudney & Corey Ditslear, *The Warp and Woof of Statutory Interpretation: Comparing Supreme Court Approaches on Tax and Workplace Law*, 58 DUKE L. J. 1231, 1231 (2009) (showing use of legislative history).

<sup>83</sup> Brudney & Ditslear, *supra* note 76, at 1.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> Law & Zaring, *supra* note 76, at 1738.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

the Roberts Court from 2005 through 2010.<sup>89</sup> She finds that conservative justices use the canons to reach conservative outcomes in about 60% of cases, with liberal justices using those same canons to reach a liberal outcome.<sup>90</sup> She also finds that the canons do not constrain the judges to vote against their ideology and that practical reasoning led to greater rates of dueling between the majority and the dissent than traditional methods of construction.<sup>91</sup> Krishnakumar also looks more thoroughly at the Roberts Court's use of substantive canons, finding that they are infrequently invoked as a justification in statutory construction.<sup>92</sup> Rather, she uncovers that Supreme Court precedent as well as reliance on practical considerations serve as the “real gap-filling interpretive tools” that the Court relies on.<sup>93</sup>

More recently, Lawrence Solan explores the use of precedent in guiding statutory decisions.<sup>94</sup> Examining the use of precedent in 5-3 or 5-4 decisions before the United States Supreme Court, Solan paints a “chaotic picture” on the use of precedent in statutory interpretation.<sup>95</sup> He concludes that judges on opposing sides cite contrasting precedent, or strategically cite precedent to advance their preferred outcome.<sup>96</sup>

Scholars have also begun to study statutory interpretation by the appellate courts. Kent Barnett and Christopher Walker analyze over 1,500 appellate court decisions reviewing agency statutory interpretation from 2003-2013.<sup>97</sup> They find that agencies win more in the circuit courts when courts apply *Chevron* deference than other forms of review such as *de novo* review, leading them to hypothesize that *Chevron* review in the appellate courts differs significantly from the way it is conducted at the Supreme Court.<sup>98</sup> The study also finds a nearly 25-point difference in agency win rates when courts review decision under *Chevron* from when they do not.<sup>99</sup> Barnett and Walker are not alone in their study of appellate courts. Orin Kerr studies how contextual, political and interpretive models describe how *Chevron* operates in the circuit courts.<sup>100</sup> Studying 256 decisions over a two year period, Kerr analyzes how often agencies prevail on their given

---

<sup>89</sup> Krishnakumar, *supra* note 10, at 909.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> Anita Krishnakumar, *Reconsidering Substantive Canons*, 84 U. CHI. L. REV. 825, 825

(2017)

<sup>93</sup> *Id.* at 887.

<sup>94</sup> Solan, *supra* note 17, at 1172.

<sup>95</sup> *Id.* at 1173.

<sup>96</sup> *Id.*

<sup>97</sup> Barnett & Walker, *supra* note 76, at 5.

<sup>98</sup> *Id.* at 6.

<sup>99</sup> *Id.* at 6.

<sup>100</sup> Kerr, *supra* note 76, at 3-4.

interpretation.<sup>101</sup> James Czarnezki also evaluates how appellate courts apply *Chevron* in environmental cases from 2003-2005.<sup>102</sup> Richard Re too empirically analyzes how appellate court cite *Chevron* in their opinions in 2011, focusing on how courts apply the *Chevron* framework.<sup>103</sup>

In addition to these scholars, James Brudney and Lawrence Baum compare the use of dictionaries and legislative history between the court of appeals and the United States Supreme Court in three doctrinal areas: criminal law, business and commercial law and labor and employment law.<sup>104</sup> They find that the court of appeals relies far less on legislative history and dictionaries than the Supreme Court does.<sup>105</sup> They also note that the two bodies used legislative history in different ways, with circuit courts using it to resolve ambiguities, confirm meaning or reveal legislative intent, while the Supreme Court relies on history to channel changes in the statutory text.<sup>106</sup> Brudney and Baum surmise that these differences in approach are due to political and institutional factors.<sup>107</sup> The heightened exposure of the Supreme Court to media and the wider political arena prompt them to rely more on dictionaries to deflect charges of judicial activism.<sup>108</sup> In addition, the more routine aspects of circuit court review along with lack of permanent membership may result in circuit courts adopting less of an institutional culture regarding the use of specific interpretive resources such as dictionaries.<sup>109</sup>

## 2. Statutory Analysis of Administrative Law Decisions

### a. Theoretical Accounts

Scholars offer 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.<sup>110</sup> Mashaw sets forth normative guidelines for how an

---

<sup>101</sup> *Id.* at 4.

<sup>102</sup> James J. Czarnezki, *An Empirical Investigation of Judicial Decisionmaking, Statutory Interpretation, and the Chevron Doctrine in Environmental Law*, 79 U. COLO. L. REV. 767, 784 (2008).

<sup>103</sup> Richard M. Re, *Should Chevron Have Two Steps?*, 89 IND. L. J. 605, 637-39 (2014).

<sup>104</sup> James L. Brudney & Lawrence Baum, *Protean Statutory Interpretation in the Courts of Appeals*, 58 WM. & MARY L. REV. 681, 681 (2017).

<sup>105</sup> *Id.* at 682.

<sup>106</sup> *Id.* In addition, the Supreme Court relies more on “vertical” legislative history (changes to the text) while appellate courts look more to committee reports. *Id.* at 686.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 686.

<sup>109</sup> *Id.*

<sup>110</sup> Mashaw, *Beyond Facts and Norms*, *supra* note 4, at 519; Strauss, *supra* note 24, at



agency should interpret a statute differently than a court as a result of its unique constitutional role and practical necessity.<sup>111</sup> 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.<sup>112</sup> 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.<sup>113</sup>

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.<sup>114</sup> As such, agencies, much more so than courts, are able to use legislative history to much greater effect.<sup>115</sup> As Strauss notes, “[t]he 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.”<sup>116</sup> Agencies can use legislative history in the context of its relationship to the White House, Congress and congressional committees.<sup>117</sup> This special “institutional memory” provides agencies with a unique perspective and a “crucial resource” in which to discern congressional intent.<sup>118</sup>

More recently, Kevin Stack argues that agencies “are purposive by statutory design.”<sup>119</sup> He argues that agencies’ 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.<sup>120</sup> 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

---

329.

<sup>111</sup> Mashaw, *Beyond Facts and Norms*, *supra* note 4, at 503.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> Strauss, *supra* note 24, at 329.

<sup>115</sup> *Id.* at 346-48.

<sup>116</sup> *Id.* at 347.

<sup>117</sup> *Id.* at 349.

<sup>118</sup> Mashaw, *Beyond Facts and Norms*, *supra* note 4, at 511 (discussing Strauss, *supra* note 24).

<sup>119</sup> Stack, *supra* note at 7, at 876.

<sup>120</sup> *Id.* at 871.

purpose.<sup>121</sup>

Aaron Saiger too argues that agencies interpreting regulations have an ethical obligation to espouse what it deems to be the “best” interpretation of the statute.<sup>122</sup> He contends that it is wrong for agencies to advance a statutory interpretation that solely advances its policy preferences; rather it must use “interpretive criteria” to arrive at the “best” interpretation of the statute, even if such interpretation departs from those preferences.<sup>123</sup> In particular, when the court defers to the agency, the duty is incumbent on the agency to “say what the law is,” a responsibility akin to that of a court.<sup>124</sup>

### **b. Empirical Studies of Administrative Statutory Interpretation**

In the past three years, a few detailed and comprehensive empirical studies have been done looking at how Congress and administrative agencies embark on statutory interpretation. Abbe Gluck and Lisa Bressman conducted a comprehensive study of agency interpretive practices by surveying members of Congress.<sup>125</sup> They survey 137 congressional staffers with 171 questions to inquire into what members of Congress involved in drafting thought of agency practices.<sup>126</sup> The study is one of the largest empirical study related to statutory interpretation, and the only 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.<sup>127</sup> They find that legislative drafters are unfamiliar with the names of certain doctrines, but they nevertheless incorporate the assumptions of those doctrines in how they draft legislation.<sup>128</sup> The Gluck and Bressman survey find some canons to be out of favor; for instance, congressional respondents seemed to reject the whole code rule and *in pari materia*.<sup>129</sup> Their respondents said that legislative history was the most important interpretive tool after the text.<sup>130</sup>

---

<sup>121</sup> *Id.* at 876.

<sup>122</sup> Saiger, *supra* note 7, at 1232.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> Gluck & Bressman, *Part I*, *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).

<sup>126</sup> Gluck & Bressman, *Part I*, *supra* note 6, at 905.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at 907.

<sup>129</sup> *Id.* at 933-34.

<sup>130</sup> Walker, *Inside Agency*, *supra* note 6, at 1000.

Two recent surveys have looked at the role that agencies play in legislative drafting. Christopher Walker, in conjunction with the Administrative Conference of the United States (“ACUS”), 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.<sup>131</sup> He finds that drafters believe the canons to be the “key indicia of interpretive fidelity” and that rule drafters are frequently familiar with the canons, even by the Latin names.<sup>132</sup> His respondents note that they frequently use some of the Latin canons (particularly *noscitur a sociis* (associated word canon) and *eiusdem generis* (residual clause canon) and the whole act rule, but that they do not often use the whole code rule or *in pari materia* (interpret similar statutory provisions alike).<sup>133</sup> Moreover, a little more than half of the respondents report that the assumptions behind *expressio unius* and the rule against superfluities are often or always true.<sup>134</sup> Walker reaches many of the same conclusions as Gluck and Bressman, though there are some differences.<sup>135</sup> For instance, similar to Gluck and Bressman, his survey also finds legislative history to be an important aid to interpretation (having the sixth highest response rate), though, in contrast to congressional drafters, agency decision-makers have somewhat different views on legislative history. For instance, agency drafters are less likely to believe legislative history is used to facilitate political deals.<sup>136</sup> In addition, Walker provides extensive evidence demonstrating how agencies provide “technical drafting assistance” to Congress, underscoring how agencies play an “active ...but opaque” role in devising the governing statutory scheme.<sup>137</sup>

Like Walker, Jarod Shobe debunks long-standing assumptions of legislative drafting, concluding that agencies often play a large role *a priori* in legislative drafting.<sup>138</sup> He survey fifty-four agency officials who reveal that agencies participate in the drafting process such that Congress and the agency agree *ex ante* on statutory meaning.<sup>139</sup> Shobe also details how agencies work collaboratively with Congress throughout the drafting process, with agencies

---

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* at 1004.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* at 1028.

<sup>135</sup> Gluck and Bressman, for instance, find greater supporter for *expressio unius*, but classified the rule against superfluities as a canon that was known but rejected. Gluck & Bressman, *Part I*, *supra* note 6, at 932 & fig. 4, 933-36.

<sup>136</sup> Walker, *Inside Agency*, *supra* note 6, at 1041.

<sup>137</sup> Walker, *Legislating*, *supra* note 6, at 1377.

<sup>138</sup> Jarrod Shobe, *Agencies as Legislators: An Empirical Study of the Role of Agencies in the Legislative Process*, 85 GEO WASH. L. REV. 451, 451 (2017).

<sup>139</sup> *Id.*

frequently offering extensive changes to legislative texts.<sup>140</sup> The results of Shobe’s survey much like Walkers reveal a drafting process that is a lot more fragmented than commonly thought, with agencies being intimately involved in legislative drafting and who often even provide samples of statutory text to overseeing congressional committees.<sup>141</sup>

## II. Analysis of Statutory Interpretation at the NLRB

In this Part, I analyze how one specific agency—the NLRB—interprets statutes over a 24-year period. I first provide background on the NLRB in Part II.A. Then, in Part II.B, I set forth the methodology I employ 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.

### A. 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.<sup>142</sup> 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.<sup>143</sup> During the New Deal era, the NLRB was one among many new administrative agencies created to handle the responsibilities of a burgeoning administrative state.<sup>144</sup> 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.<sup>145</sup> As such, through the

---

<sup>140</sup> *Id.* at 455.

<sup>141</sup> *Id.* at 452.

<sup>142</sup> 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 (2012)).

<sup>143</sup> 49 Stat. 449 § 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”).

<sup>144</sup> 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).

<sup>145</sup> 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:*

Wagner Act, Congress designed the Board to both prosecute NLRB cases as well as to supervise union elections.<sup>146</sup> 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.<sup>147</sup> 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.<sup>148</sup> The new Board would have no pre-reserved seats so as to better represent the public interest.<sup>149</sup> Appointments in the first half-century reflected this spirit with many appointees rising from academia or government.<sup>150</sup> Also, despite efforts by the Department of Labor to include the Board within its purview, Congress created the Board as an independent agency so as to give it some distance from the political branches.<sup>151</sup> 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.<sup>152</sup> The legislative history indicates that Congress deliberately meant for Board member terms to be short and for turnover to be rapid so as to ensure that responsiveness.<sup>153</sup>

After widespread labor strife and claims by opponents that the NLRB ruled too much in a pro-labor fashion, Congress amended the Wagner Act in 1947 through the Taft-Hartley amendments to apply certain provisions to combat union abuses, among other changes.<sup>154</sup> The NLRA has somewhat of

---

*The Labor Board and the Court*, 1968 SUP. CT. REV. 53, 59 n.5 (1968) (“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.”).

<sup>146</sup> 29 U.S.C. § 153.

<sup>147</sup> 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.”).

<sup>148</sup> Judy Flynn, *A Quiet Revolution at the Labor Board: The Transformation of the NLRB, 1935-2000*, 61 OHIO ST. L.J. 1361, 1363 (2000).

<sup>149</sup> *Id.*

<sup>150</sup> 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).

<sup>151</sup> *Id.*

<sup>152</sup> Samuel Estreicher, *Policy Oscillations at the Labor Board: A Plea for Rulemaking*, 37 ADMIN. L. REV. 163, 167 (1985).

<sup>153</sup> 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 148, at 1363.

<sup>154</sup> LABOR MANAGEMENT RELATIONS (TAFT-HARTLEY) ACT, Pub. L. No. 80-101, 61

an inconsistent mandate in that it represents an “odd marriage” between the Wagner Act and the Taft-Hartley Act.<sup>155</sup> 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?”<sup>156</sup> 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.”<sup>157</sup> 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.<sup>158</sup>

In addition to providing for charging unfair labor against unions in addition to 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.<sup>159</sup> The President appoints members for staggered five year terms with the advice and consent of the Senate.<sup>160</sup> Although early Board members largely hailed from academia or the government, more recent appointees come from a clear labor or management background.<sup>161</sup>

Unlike many other agencies, the NLRB proceeds primarily through adjudication in its policymaking, only engaging in rulemaking in a few

---

Stat. 136 (1947) (codified at 29 U.S.C. §§ 141-44).

<sup>155</sup> Fisk & Malamud, *supra* note 25, at 2036.

<sup>156</sup> *Id.* at 2034.

<sup>157</sup> *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).

<sup>158</sup> Fisk & Malamud, *supra* note 25, 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 LIBERALISM 135, 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 the Taft-Hartley Act 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”).

<sup>159</sup> LABOR MANAGEMENT RELATIONS ACT OF 1947, ch. 120, 61 Stat. 136 (1947) (codified at 29 U.S.C. §§ 141-187). 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. *Id.*

<sup>160</sup> 29 U.S.C. § 153(a) (2012). The Taft-Hartley Act of 1947 expanded the Board from three to five members. *Id.*

<sup>161</sup> Flynn, *supra* note 148, at 1364-65.

instances in its 75-year history.<sup>162</sup> The General Counsel brings cases on a region-based system, where they are heard before an Administrative Law Judge (“ALJ”).<sup>163</sup> 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.<sup>164</sup> 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.<sup>165</sup> 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.<sup>166</sup> 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.<sup>167</sup> Only 1% of cases are appealed.<sup>168</sup>

Unlike most other agencies charged to enforce federal programs, the NLRB has only one statute to interpret—the NLRA. “[L]ongstanding political impasse[s] at the national level has blocked” substantial revisions to the NLRA, resulting in the law not being amended in any major way since 1959.<sup>169</sup> As such, the NLRB does not have to engage in much new statutory

---

<sup>162</sup> Estreicher, *supra* note 152, at 175 (noting that the Board uses adjudication to make policy as opposed to rulemaking); Judy Flynn, *Costs and Benefits of ‘Hiding the Ball’: NLRB Policymaking and the Failure of Judicial Review*, 75 B.U. L. REV. 387, 470 n.21 (1995). NLRB has faced criticism of its failure to use rulemaking, with critics contending that an adjudicatory approach results in the Board frequently changing policies. *Id.*

<sup>163</sup> Claire Tuck, *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 (2nd ed. 2004) (noting procedures).

<sup>164</sup> 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. Flynn, *supra* note 162, at 426 & n.165.

<sup>165</sup> Winters, *supra* note 145, at 55.

<sup>166</sup> Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 YALE L. J. 679, 681 (1989); Flynn, *supra* note 162, at 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, 639 (1991) (same).

<sup>167</sup> 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).

<sup>168</sup> Flynn, *supra* note 162, at 426 & n.165.

<sup>169</sup> Estlund, *supra* note 152, at 1530. The last major change was in 1959. See LABOR-MANAGEMENT REPORTING & DISCLOSURE (LANDRUM-GRIFFIN) ACT, Pub. L. No. 86-257,

interpretation because it basically reviews the same statute. The NLRB hears two main types of cases: unfair labor practice disputes allegations against employers or unions<sup>170</sup> and election representation cases or bargaining unit determinations.<sup>171</sup> 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.”<sup>172</sup> 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).<sup>173</sup> 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.<sup>174</sup>

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.<sup>175</sup> 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.<sup>176</sup> Critics of the Board commonly cite these frequent flip-flops as cause for concern as undermining the stability of labor law.<sup>177</sup> The ideological nature of appointments to the Board since the Reagan years has increased the instability.<sup>178</sup> Former Board member William

---

73 Stat. 519 (1959) (codified at 29 U.S.C. §§ 401-503).

<sup>170</sup> 29 U.S.C. § 160.

<sup>171</sup> 29 U.S.C. § 159.

<sup>172</sup> 29 U.S.C §§ 158(a)(1)-(5).

<sup>173</sup> 29 U.S.C § 158.

<sup>174</sup> 29 U.S.C. § 159.

<sup>175</sup> See, e.g., Fisk & Malamud, *supra* note 25, 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 148, 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).

<sup>176</sup> Tuck, *supra* note 163, 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).

<sup>177</sup> Cooke & Gautschi, *supra* note 175, at 549 (noting how the inconsistency and ambiguity that plagues Board’s decisions can hinder labor management relations).

<sup>178</sup> Flynn, *supra* note 148, at 1366. Changes in the appointment process over the years—including the rise of “package” appointments where groups of nominees for different



Gould argues that the increasing partisan nature of the nomination process and the “batching” of nominees to consider multiple nominations at once “frequently means the lowest common denominator,” with appointments being concentrated among Washington insiders.<sup>179</sup> 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.<sup>180</sup> 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.<sup>181</sup>

### B. Methodology of Analyzing NLRB 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 understand how exactly the NLRB newly construes its governing statute and what interpretive methodologies it uses to understand those cases. As such, I limit 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

---

governmental posts are “packaged” together for a Senate vote—exacerbated the trend of a more partisan nomination process. *Id.* at 1366. Indeed, with one exception, all of President Clinton’s appointees have been package nominations. *Administration Faces Possibility of 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).

<sup>179</sup> 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).

<sup>180</sup> See Turner, *supra* note 175, 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 152, at 170 (noting how the Board’s law-making is often seen as “unstable”); Tuck, *supra* note 163, 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”).

<sup>181</sup> *Id.* at 74 (listing experience of Board members in the Appendix).

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 extend the present statutory interpretation analysis to include cases up to August 2016.<sup>182</sup> In all, I read over 7,000 cases on Westlaw to discern which ones involved statutory interpretation. When reading each case, I coded the statutory methodology employed. I also did a word search on Westlaw to capture all cases in which the Board engaged in statutory interpretation, and I similarly look at all NLRB appellate cases that discussed either *Chevron* or statutory interpretation.<sup>183</sup>

I find that the Board engages in some measure of statutory interpretation in less than 2% 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 decisions do not rely on any specific statutory language, a result of the lack of any recent legislative activity.<sup>184</sup> 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."<sup>185</sup>

The results may be underinclusive in some respects. Two groups of cases are excluded. First, I only include cases in which the Board, acting as a three or five-member entity, itself actually engaged in statutory interpretation.<sup>186</sup> There are some cases where the Board merely blesses the

---

<sup>182</sup> 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. *Id.*

<sup>183</sup> 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 1993-2016 and I referred to that database as an additional check.

<sup>184</sup> Fisk & Malamud, *supra* note 25, at 2039.

<sup>185</sup> *Id.*

<sup>186</sup> I exclude cases where the majority applied well-settled precedent but the dissent advocated an overturning of that precedent. I also did not double count cases issued the same day where the Board made identical statutory interpretation issues. See Yukon Koshokwim Health Corp., 329 N.L.R.B. 86 (1999) (case issued same day as another case discussing jurisdiction under NLRA).

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 affirm the ALJ because they just agree with the result or whether they in fact favor 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. In addition, I do not include summary judgment cases unless it is clear in the text that the Board interpreted a statute as a matter of first impression. However, it is highly unlikely that the Board would interpret a statute as a matter of first impression without making clear its interpretation in a full-fledged opinion; in nearly all cases, it seems like the Board merely applied pre-existing statutory interpretations. Thus, the fact that I do not include either summary orders or summary judgment opinions does not cloud my analysis.

Second, I also do not include cases in which the Board “implicitly” interprets 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*<sup>187</sup> 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 other than its governing statute, the NLRA.<sup>188</sup>

---

<sup>187</sup> *Wright Line et al.*, 343 N.L.R.B. 344 (1996).

<sup>188</sup> For instance, in *Firstline Transportation Security, Inc.*, 347 N.L.R.B. 40 (2006), the Board defers to another administrative agency in how to interpret the Aviation and Transportation Security Act. *Id.* at 40. In other cases, the Board interprets a different statute. See *Times Herald Printing Co.*, 315 N.L.R.B. 100 (1994) (interpreting the Worker Adjustment and Training Renotification Act of 1988). I also do not include cases where the Board rules on its own procedures or processes or interprets its own regulations regarding the conduct of internal adjudicative matters. For instance, I do not include cases where the

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 exclude such cases. None of the cases involve any discussion of the text of the NRLA 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 include in my database, hardly any of these cases have a dissent or concurrence, which, given the propensity of Board members to frequently dissent, especially in important cases, the cases in question most likely concern an easy to analyze factual situation clearly fitting within established precedent. Finally, these cases are decided by three-judge panels. Although not strictly a rule (and there are three-panel Board decisions I include 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 my database. 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.<sup>189</sup>

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

---

Board interprets the format of briefs or how a subpoena should issue. I do, however, include the small number of cases where the Board rules on its own jurisdiction. Some of these cases concern whether the Board could exercise jurisdiction over disputes at Native-American owed casinos.

<sup>189</sup> 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. *See e.g.*, Estreicher & Revesz, *supra* note 166, at 681. My data reveals that this policy is not merely theoretical; in actuality, my own observation after reading over 7,000 NLRB cases is 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. That said, I include cases remanded from the court of appeals. Sometimes the court of appeals remands for the Board to either 1) adopt the statutory interpretation of the court of appeals; or to 2) make clear what the Board’s statutory interpretation actually was. I do not, however, double count cases. In the few situations where the Board hears a case multiple times, I include either the first case in which the Board interprets the statute.

statutory methodology it employs, 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. We never know for sure if a liberal vote represents the judge's ideological preferences. Judges may choose to dissent in one case but not others. The same concern, however, can be said of any empirical analysis of statutory interpretation or even analysis of judicial voting generally. 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. Selection effects could also be at work; only a select number of cases end up reaching the NLRB.<sup>190</sup> Recognizing this limitation, the purpose of the study is not to draw wider inferences but to show, in a descriptive fashion, how an agency interprets its governing statute.

Having set forth the limitations, I next analyze the different interpretive methodologies employed by the Board. I first make a general finding of whether the decision was more textual or purposive. Then I code 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; use of precedent; mentions of policy and references to practical implications. These interpretive rules are similar to those used in other empirical studies of statutory interpretation.<sup>191</sup> In some cases, Board, circuit court or Supreme Court precedent dictate how the Board decides to interpret the statute. In coding policy, I look to statements about how the Board balanced competing policy needs or whether a given statutory interpretation would effectuate the stated goal of the NLRA to reduce inequality in bargaining or to inhibit strikes. Practical consequences concern 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.<sup>192</sup> Like other scholars, I include absurdity under policy or practical consequences.<sup>193</sup> I only code an interpretive rule if the Board relies on it; if the opinion only mentions a rule in passing or if it rejects a particular tool as being of probative value, I do not code for it. Likewise, if the decision rank-ordered interpretive tools, I make note of it. In my analysis, I also code for the use of "dueling" canons by which the majority and dissent both employ the same interpretive canon to advance

---

<sup>190</sup> See George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1, 1 (1984).

<sup>191</sup> See, e.g., Krishnakumar, *supra* note 10, at 922; Cross, *supra* note 3, at 148 (analyzing Roberts' Court use of statutory interpretive tools).

<sup>192</sup> See, e.g., Krishnakumar, *supra* note 10, at 922.

<sup>193</sup> *Id.*

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.<sup>194</sup> 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 decision-maker focuses on narrowly drawn specific purposes.<sup>195</sup> If a case has multiple dissents, I combine the dissents into one for purposes of this analysis so there are no mixed partisan dissents, that is, there are no cases in which both a Democrat and Republican Board member both dissent on a statutory interpretation issue.<sup>196</sup>

### **C. Overview of Results of Statutory Interpretation at the NLRB in Majority Opinions**

The Board engages in a mix of interpretative techniques in its decisions in the near 25-year period under study. In Part II.C.1, 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 finds 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.2, 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.3, the Board’s use of legislative history. Part II.C.4 details the use of precedent and Part II.C.5 discusses the Board’s use of policy and practical considerations in its decision-making. Finally, in Part II.C.vi, I summarize my findings.

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

Table 1 lists descriptive statistics of the 121 cases that interpreted

---

<sup>194</sup> *Id.* at 961.

<sup>195</sup> *Id.* at 971.

<sup>196</sup> In any event, the results likely would not differ. Most dissent writers employ 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 in the database concern a single dissent, and nearly 90% of cases in the Bush II and Clinton years have 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, Peter Hurtgen/J. Robert Brame and Wilma Liebman/Dennis Walsh often write joint dissents.

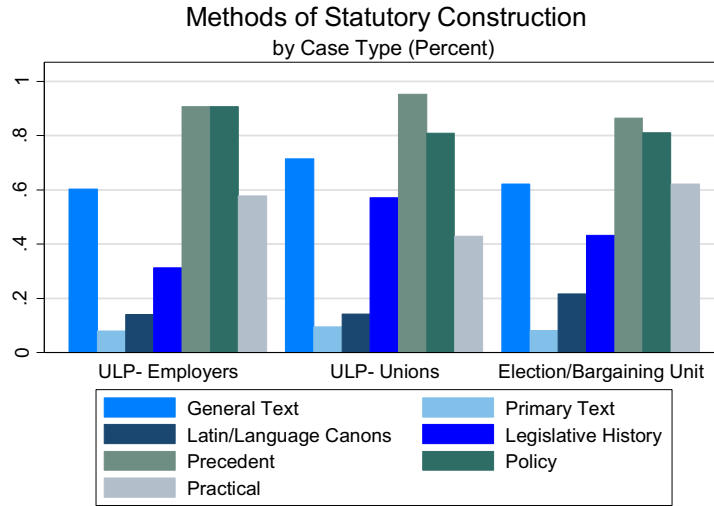
statutes in majority opinions as a matter of first impression. Not surprisingly, the full four or five member Board heard 74% of the cases in the database. Each case often employs multiple types of methods, as, for instance, a Board decision could employ text, legislative history, precedent, policy and practical all in one decision. Figure 1 details the percent 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” references cases in which the Board either primarily rests its conclusions on the text, by, for instance, arguing that the text has a plain meaning that controls the outcome of the case.<sup>197</sup>

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

	General Text	Primary Text	Latin And Language Canons	Legislative History	Precedent	Policy	Practical
<b>All Cases</b>	63	8	20	39	90	86	56
<b>CA (against employer)</b>	60	8	20	31* <sup>198</sup>	91	90	57
<b>CB/CC/CD/CE (against unions)</b>	71	10	19	57*	95	81	42
<b>Election/Bargaining Unit</b>	62	8	22	43*	86	81	62

<sup>197</sup> Some scholars do not conduct significance tests because their database, like the present one, consists of the entire population of cases under study. See Eskridge & Bauer, *supra* note 76, at 1095-1096; see also Barrett & Walker, *supra* note, at 76 n.145. In statistics, one can assess whether a difference in two sample means is statistically significance by conducting various statistical tests, such as t-tests. The present study, however, consists of the full population of cases, not simply a randomly drawn sample. Nonetheless, I conduct hypothesis testing by using chi-squared analysis to determine whether the means of select groups differ from one another.

<sup>198</sup> \* signifies statistical significance at 90% confidence; \*\* 95% confidence; and \*\*\* 99% confidence. The standard benchmark is to use 95% confidence to imply statistical significance.

**Figure 1**

In majority opinions, Board members cite to the text or engage in some type of textual analysis about two-thirds of the time. However, the Board finds the text to be the most important determinative factor in only 8% of cases. Even when advancing a “primarily textualist” interpretation, the Board does not rely solely on the text. In 60% of the “primary text” cases, the Board buttresses its textual argument by relying on legislative history. Moreover, in 90% of these same cases, the Board complements its textual analysis by referring to policy considerations while in about 80% of the cases, the Board references the practical implications of its rulings. The Board seems to engage in a textualist interpretation more in cases alleging abuses against unions than in cases alleging employer abuse or cases dealing with elections or bargaining unit determinations but the differences are slight. The Board uses Latin/language canons in slightly less than a fifth of their cases. They use these canons more in election or bargaining unit cases, though the differences between case types are not statistically significant. This result is not surprising because in many election or bargaining unit cases, the Board must determine who qualifies as an “employee” under the Act.<sup>199</sup>

The Board uses non-textualist methods, at least in part, in about 95% of its decisions in the database. In 39% of the decisions studied, the Board majority refers in part to legislative history. Indeed, the Board most frequently cites to legislative history in cases containing allegations of union abuses though the result is not statistically significant. In addition, the Board also frequently references precedent, seeing other caselaw as determinative

<sup>199</sup> See *infra* Part II.C.2.b.



or influential in the outcome in 90% of cases. Most frequently, the Board references other Board cases. Either circuit court or Supreme Court precedent, however, influence a surprising number of interpretations; indeed, in some cases, the court of appeals decision is determinative of the statutory construction. In 10% of cases, the Board mirrors the statutory construction given by an appeals court. Given the Board's stated policy of nonacquiescence,<sup>200</sup> this finding is surprising. Moreover, the Board cites at least one Supreme Court decision as influencing its construction in almost 75% of cases.

In addition to legislative history and precedent, the Board frequently cites policy and practical considerations. In nine out of ten cases, the Board voices 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 leaves a discernible "gap" in the law. Practical considerations also play some role in decision-making, especially in election representation and bargaining unit cases (56%). As detailed more fully below, these cases often concern broader issues than unfair labor practice cases do. As an example, many of these cases concern who qualifies for protection under the NLRA, a conclusion that has 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 often resorts to consideration of practical implications, with about 62% of all cases referring to practical considerations at least in part.

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.<sup>201</sup> During the period under study, 61% of the panels have Democratic-majorities and 40% have a Republican-majority. While Republican panels use legislative history, the Latin/language canons and precedent more than Democrats, the results are not statistically significant. Indeed, most striking is the fact that there are so few differences based solely on party. Table 3 breaks down the data by the presidential administration. Although there seems to be a jump in the use of textualism starting in 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. Of note is the fact that we see Democratic panels being more textualist over time, using language or Latin canons. This is an interesting finding considering the popular wisdom

---

<sup>200</sup> Estreicher & Revesz, *supra* note 166, at 681.

<sup>201</sup> Figures denotes percentages. There was only one Republican panel that heard relevant cases during the Obama administration.

associating certain methodologies with ideological predispositions with Democrats being viewed as more purposive in approach.<sup>202</sup> There is a statistically significant increase in the use of both precedent and practical reasoning starting with the Bush administration. Both Democratic and Republican panels generally are more textualist during the Bush administration, with Republican panels being especially hospitable to using Latin or language canons or adopting a primarily textual approach, perhaps due to the fact they faced a friendly administration. There is also a gradual increase in the use of precedent, policy and practical reasoning over time. Of note further is the fact that parties in power tend to use policy and practical reasoning to ground their statutory interpretations. These results 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 how presidents may influence interpretive methodology.

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

	General Text	Primary Text	Latin and Language Canons	Legislative History	Precedent	Policy	Practical
<b>Democratic</b>	65	7	15	36	88	86	58
<b>Republican</b>	61	11	20	45	96	87	54

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

	General Text	Primary Text	Latin and Language Canons	Legislative History	Precedent	Policy	Practical
<b>Clinton</b>	57	7	10*	38	85*	85	47*
<b>Bush II</b>	68	14	26*	38	97*	88	68*
<b>Obama</b>	67	4	17*	42	95*	88	67*

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

	General Text	Primary Text	Latin and Language Canons	Legislative History	Precedent	Policy	Practical
<b>Dem./Clinton</b>	58	8	11	34	78	89	53
<b>Rep./Clinton</b>	56	4	9	43	96	78	39*
<b>Dem./Bush II</b>	82*	9	18	18*	100	72	55
<b>Rep./Bush II</b>	67*	19*	33*	43	95	95	71
<b>Dem./Obama</b>	69	5	18	42	100	90	68
<b>Rep./Obama</b>	0	0	0	0	100	0	0

<sup>202</sup> Miles & Sunstein, *supra* note 76, 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.”).

Figure 2

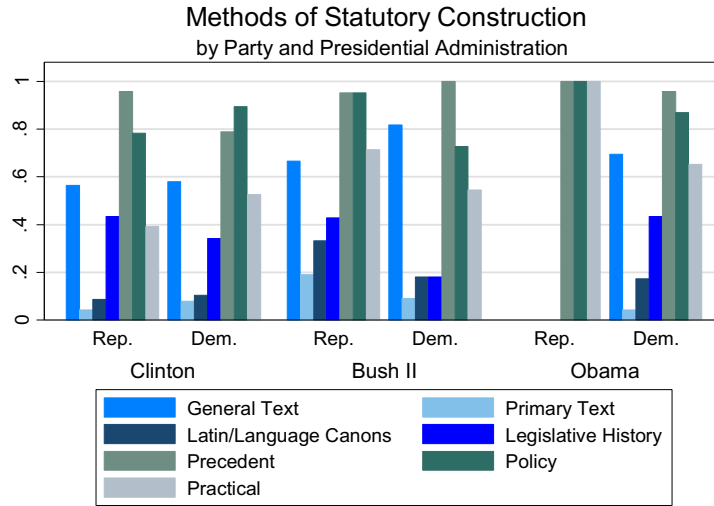
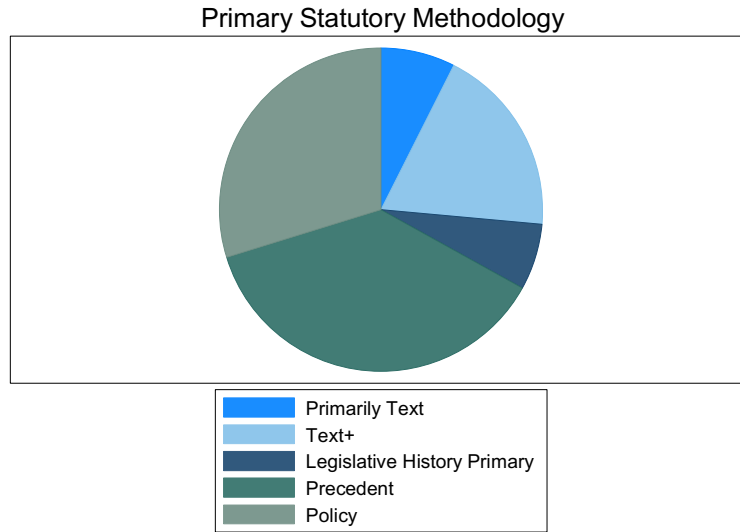


Table 5 and Figure 3 turn to detailing the single *primary* method of interpretation in a given case. I assign each case to one of five groups: 1) primarily textual; 2) text plus (cases which may or may not also include considerations of policy or practical considerations but which rely first and foremost on the text and/or text plus legislative history); 3) legislative history (cases in which the Board reverts to using legislative history as the primary method to fill a gap in the law to construe a statute); 4) precedent primary cases (cases in which the Board uses some combination of Board, circuit court or Supreme Court precedent as the anchor for their statutory construction); and 4) policy/balance cases (cases in which the Board acknowledges that there is a gap in the law and the Board makes a policy-based decision either by balancing competing priorities or by considering various policy rationales and/or practical consequences to inform statutory meaning). I characterize a case as primarily textual as opposed to the second category of textual/legislative history/policy if the Board finds the text to be dispositive of the issue in question. In most of these cases, the Board still refers to legislative history, policy and/or practical considerations, but the references to these methods is supplementary rather than necessitated as part of the statutory interpretation.

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

	Primarily Text	Text Plus Leg. History	Legislative History	Precedent	Policy/Practical
<b>All Cases</b>	8	19	7	38	29
<b>Democrat</b>	5	25**	2***	38	28
<b>Republican</b>	11	10**	13***	37	28

**Figure 3**

In all, reliance on precedent is the most common primary tool for interpretation (37%), followed by a policy-based approach (30%). In only 6% of cases, the Board relies only on its own (Board) precedent approach while in 11% of cases, the Board uses Supreme Court or circuit precedent as the determinative or sole factor in its analysis. In about a quarter of cases, the Board relies primarily on some sort of textual analysis, though the text alone is the primary method in only 7% of cases while a mixed method approach relying on the text and legislative history or policy concerns animates decision-making in 19% of cases. While Republican Boards are more likely to use primarily a text-only approach, Democratic Boards are more likely to use the text plus analysis, looking at policy and legislative history in addition to text, a result that is statistically significant. Finally, the Board resorts to legislative history as the primary source for interpreting the statute in about 6% of cases. Republican Boards use legislative history as the definitive source to a statistically significant degree more than Democratic Boards (13% v. 2%). Table 5 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

Figure 4

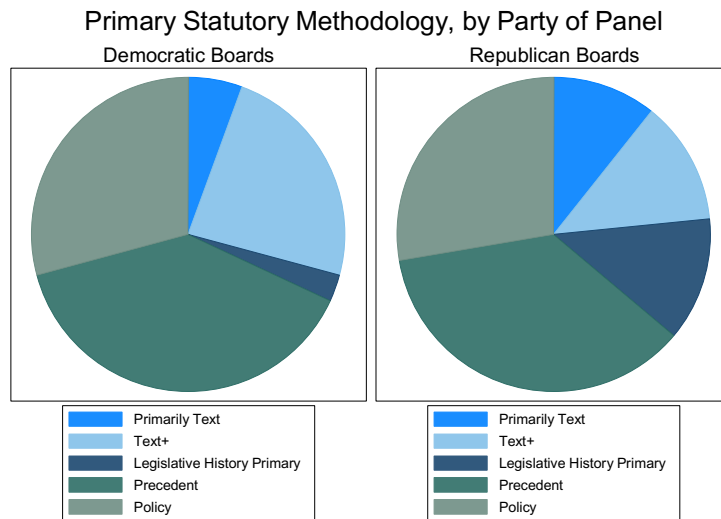


Table 6 displays the primary methodology broken down by presidential administration. In particular, there is a marked increase in the text plus methodology over time. Whereas 12% and 18% of Clinton-era and Bush II-era Board decisions employ text/legislative history plus analysis as the primary interpretive method, 42% of decisions in the Obama period use this method, a result statistically significant at 99% confidence. In turn, the Bush II Board uses a primarily textual method to a statistically significant degree, with the Board deciding nearly 15% of the cases during this period on a textual reading alone, compared to no cases during the Obama era relying only on the text. There is also a noticeable decline in the use of precedent as the primary interpretive source; whereas the Clinton-era Board decides nearly half of its statutory decisions by cobbling together precedent, the Obama Board relies on this method in just about a fifth of its statutory cases of first impression. Obama-era decisions also frequently invoke policy/caselaw considerations as the primary interpretive method, with about 40% of decisions from 2008 to the present using a policy-based approach as the primary interpretive method, though these results do not statistically distinguish the Obama Board from the Clinton or Bush II-era Boards. Moreover, statutory interpretation cases at the Obama Board seem to employ a predictable pattern: the three liberal Board members use primarily a text plus legislative history or 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 using a text plus approach. Moreover, more so than other Boards, the Obama Board proceeds to overrule more of the Bush-era NLRB decisions that had been issued less than a decade earlier.

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

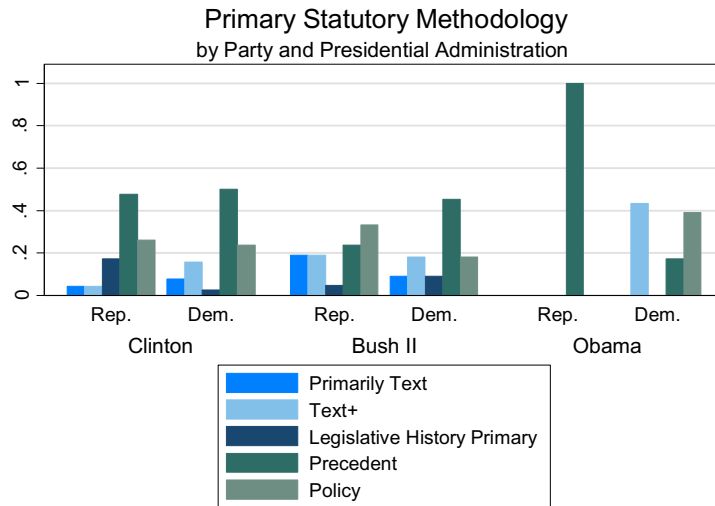
	Primarily Text	Text Plus Legis. History	Legislative History	Precedent	Policy/Practical
<b>Clinton</b>	7*	12***	8	49**	25
<b>Bush II</b>	15*	18***	6	29**	32
<b>Obama</b>	0*	42***	0	21**	38

Table 7 and Figure 5 provide further detail on the breakdowns by both party of the panel and administration. Here, again there are noticeable differences based on the administration, particularly with respect to the text/legislative history plus method. 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 plus based analysis as the primary method of interpretation increases over time. Democratic-majority panels in the Obama administration in particular seem especially likely to eschew legislative history in favor of a more policy-based approach while Republican Boards during the Bush administration often resort to the nearly 75 year old legislative history to impose limits on labor rights.

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

	Primarily Text	Text Plus Legis. History	Legislative History	Precedent	Policy
<b>Dem./Clinton</b>	8	16*	3	50**	24
<b>Rep./Clinton</b>	4*	4*	17	48	26
<b>Dem./Bush II</b>	9	18*	9	45**	18
<b>Rep./Bush II</b>	19*	19*	5	24	33
<b>Dem./Obama</b>	0	40*	0	17**	39
<b>Rep./Obama</b>	0	50*	0	100	0

Figure 5



## 2. NLRB's Use of Textualism and Latin/Language Canons

The Board engages 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).

### a. Plain Meaning Textualism

In the “primarily textualist” cases cited above, the Board sometimes reads 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 finds the text to be unambiguous.<sup>203</sup> Plain meaning textualism had little influence in influencing how the Board interprets statutes on the whole in the database as the Board adopts a plain meaning approach in only 8% of the majority opinions studied. Further, even when the Board adopts a “plain meaning” approach with the text clearly necessitating a given result, the Board’s inquiry does not stop at the text; rather, even though the Board considers the text clear, they go further and examine the legislative history (56%), caselaw (100%), policy (78%) or practical consideration (67%) to back up the plain meaning textual analysis.

The Board adopts a plain meaning textualist approach, as an example, in *Alexandra Clinic, P.A., et al.*<sup>204</sup> In the case, the Board reverses the ALJ’s

<sup>203</sup> *Chevron*, 407 U.S. at 828.

<sup>204</sup> *Alexandria Clinic, P.A. et al.*, 339 N.L.R.B. 162, 2003 WL 22027491 (Aug. 21,

finding that the employer violated sections 8(a)(1) and 8(a)(3) of the NLRA by terminating striking nurses.<sup>205</sup> The Board relies on the plain language of section 8(g) of the statute, which expressly states that nurses must give ten days advance notice in order to strike.<sup>206</sup> The Board makes clear that the text controls: “[s]ince the text of the statute is the law and that text is crystal clear and unambiguous, no further discussion is necessary.”<sup>207</sup> In so ruling, they overrule the Board’s prior decision in *Greater New Orleans*,<sup>208</sup> which had used the legislative history to change the meaning to give strikers more flexibility in the notice requirements.<sup>209</sup> The Board references section 8(g)’s history by noting how in 1974 Congress amended the Act to extend collective bargaining rights to health care workers.<sup>210</sup> 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.<sup>211</sup> The Board, however, states that the section’s notice requirement is “clear and absolute,” in that it is clearly mandatory rather than discretionary,<sup>212</sup> and that the plain text makes clear that it applies regardless of the nature of the picketing as the statute clearly states that notice is required in advance of “any strike, picketing or other concerted refusal to work at any health care institution.”<sup>213</sup> The Board further notes that the section contains 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.<sup>214</sup> The Board criticizes the *Greater New Orleans* Board by using legislative history to “rewrite the statute” to make the notice requirement discretionary rather than mandatory.<sup>215</sup> Even though the Board finds the text to be clear warranting “no further discussion,” 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.<sup>216</sup>

---

2003).

<sup>205</sup> *Id.* at 1.

<sup>206</sup> *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.”).

<sup>207</sup> *Id.* at 7.

<sup>208</sup> *Greater New Orleans Artificial Kidney Center*, 240 N.L.R.B. 432 (1979) (finding no violation under section 8(g)).

<sup>209</sup> *Alexandria Clinic*, 2003 WL 22027491, at 3.

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

<sup>212</sup> *Id.* The Board notes that the use of the word “shall” made it mandatory. *Id.*

<sup>213</sup> *Id.*

<sup>214</sup> *Id.* (noting that “Congress intended that the 10 day notice provision of Section 8(g) be interpreted according to its literal meaning”).

<sup>215</sup> *Id.* at 5.

<sup>216</sup> *Id.* at 7.



## b. Expansionist Textualism

Instead of the plain language *mandating* a specific result, the Board often adopts textualist approach 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 the text of other sections, either necessitated a given result or offered one among many permissible interpretations of the statute. Of the 62% of cases in which the Board refers at least in part to the text, in 38% of the cases the Board makes clear the text either does not limit an interpretation or does not foreclose an alternative interpretation. Thus, unlike the plain meaning approach, in almost half of the cases where the Board makes reference to the text it only cites the text to make clear that the text cannot be read so as to proscribe a given interpretation, leaving the gap to be filled by either reliance on precedent, policy concerns or guidance from the legislative history. In about 11% of cases, the Board adopts this expansionist “no limits” textualist philosophy to contend that the statute should be read without limits.

The Board most frequently uses an expansionist textual method to rule on the breadth of coverage under the NLRA. Critics of the Board have frequently criticized it 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.<sup>217</sup> In recent years, the Board has heard a flurry of cases concerning whether medical residents and interns and graduate student teaching assistants are considered “employees” for purposes of protection under the NLRA. After amendments to the NLRA in the 1970s to allow the Board jurisdiction over private hospitals, the Board held that residents and teaching assistants fell outside the Act’s protection.<sup>218</sup> 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.<sup>219</sup> By 2004, once the Board switched to Republican, the Board overturned the decisions regarding TAs once again.<sup>220</sup> Then, by 2016, the Board, now controlled by Democrats, once again overturned the 2004 ruling and found

---

<sup>217</sup> Flynn, *supra* note 148, at 1363.

<sup>218</sup> See, e.g., St. Clare’s Hosp. & Health Ctr., 226 N.L.R.B. 1000, 1003-04 (1977) (holding that house staff are employees but cannot bargain); Cedar’s Sinai Med. Ctr., 223 N.L.R.B. 251, 251 (1976) (holding that house staff are not ‘employees’ under the NLRA); Leland Stanford Junior Univ., 214 N.L.R.B. 621, 621 (1974) (holding that TAs are not employees); Cornell Univ., 183 N.L.R.B. 329, 331 (1971) (asserting jxn over private, nonprofit universities).

<sup>219</sup> Boston Med. Ctr. Corp., 330 N.L.R.B. 152 (1999); N.Y. Univ., 332 N.L.R.B. 1205 (2000).

<sup>220</sup> Brown Univ., 342 N.L.R.B. 483, 490 (2004).

that graduate TAs in private universities were covered under the protections of the NLRA.<sup>221</sup>

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.<sup>222</sup> 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.<sup>223</sup> If graduate students qualified as employees, they would come within the ambit of the Act—a major expansion of the role of TAs in private universities. In the decision, the Board notes that the Act specifically states the Act covers "any employee," listing several exceptions such as independent contractors.<sup>224</sup> Because the statute does not expressly list residents as an exception, the Board reasons, residents do not fall outside the coverage of the Act which expressly covers "any employee."<sup>225</sup> Moreover, applying a modified version of *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.<sup>226</sup> The Board similarly uses an expansionist textualism in other cases as well. The Board often, for instance, recites 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. Even when using this particular textualist approach, the Board also often refers to legislative history (78%) or policy (87%) as well to supplement its expansionist reading of the statute.<sup>227</sup>

### c. Textualism and Latin/Language/Textual Canons

The Board also informs statutory meaning by resort to other textualist and Latin/language canons, though it never mentions any of the Latin canons by name.<sup>228</sup> Figure 6 details the Latin/Language/Textual/Substantive Canons

<sup>221</sup> Colum. Univ. et al., Case No. 02-RC-143012, 364 N.L.R.B. 90 (Aug. 26, 2016) (NLRB website).

<sup>222</sup> *Id.*; see also New York Univ. 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.

<sup>223</sup> Colum. Univ., 364 N.L.R.B. 90, Case No. 02-RC-143012 (Aug. 23, 2016), at 1.

<sup>224</sup> *Id.*

<sup>225</sup> *Id.* at 1-2.

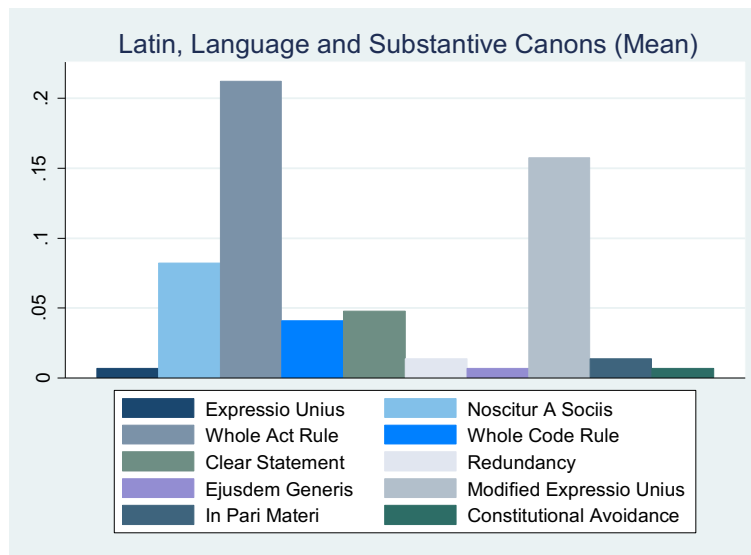
<sup>226</sup> *Id.* at 4-6 ("The absence of student assistants from the Act's enumeration of categories excluded from the definition of employee is itself strong evidence of statutory coverage.").

<sup>227</sup> When the Board advances an expansionist "no limits" reading of the statute, it only refers to practical implications 39% of the time.

<sup>228</sup> Interestingly, the only time the Board expressly invokes any of the Latin terms is in

used by the Board. The Board’s majority invokes Latin or other language related canons such as avoiding superfluities in about 20% of the cases in the database. The Board most frequently invokes the whole act rule, relying on other parts of the statute that are similar to interpret the statute about 22% 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. For instance, in interpreting whether a union committed an unfair labor practice, the Board may refer to the provisions governing unfair labor practices against employers.

**Figure 6**



In addition to the whole act rule, the Board most commonly uses the whole code rule to inform statutory meaning in about 6% of cases in the database. The whole code rule most often comes up in reference to cases which call for the Board to interpret the Railway Act, which, the Supreme Court has stated is an “analogous” statute to the NLRA.<sup>229</sup> Much of the debate

contract interpretation cases. In those cases, the Board notes that methods of statutory interpretation—such as *expression unius*, etc.—could also be used to interpret the language of the contract.

<sup>229</sup> 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, e.g., Roger C. Hartley, *Constitutional Values and the Adjudication of Taft-Hartley Act Dues Objector Cases*, 1989 HASTINGS L. J. 1, 12 (1989). About 5% of the cases in the dataset concern applicability of the Railway Act.

concerning the Railway Act concerns 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.<sup>230</sup> The Board rarely relies on any of the Latin canons and never mentions any of them by their formal name. For clarity, I specify that the Board here uses the *expressio unius* canon to include what was not expressly excluded; thus, I label it “modified *expressio unius*.” In about 11% of cases the Board uses this modified approach. Most of the cases in which the Board uses this method concern cases where the Board rules on whether a given “employee” comes within the ambit of the Act.<sup>231</sup> Further, in addition to use of the Latin canons, the Board also uses other rules of language or grammar to inform meaning. In about 3% of cases, the Board notes that the statute’s text should be read so as to avoid redundancy, for instance.

Finally, the Board adopts two other techniques in its statutory interpretation that are of note with respect to the relationship between the Board and Congress. First, in 7% of cases, the Board informs 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 infers congressional inaction as indicating congressional acceptance of the way the Board interpreted the statute in prior decisions. That is, the Board notes 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 uses language and textual canons primarily to advance a text-based argument. As an example, in *Lincoln Lutheran of Racine*, the Board relies on other provisions of the NLRA to interpret the statute.<sup>232</sup> The Democratic-majority Board broadly interprets section 8(a)(5) of the NLRA, in part, by referring to other parts of the statute, which it says “create no obstacle to finding that an employer violates the act by unilaterally discontinuing dues cutoff after contract expiration.”<sup>233</sup> Indeed, other provisions contain an express requirement that there be “written agreement.”<sup>234</sup> The Board reasons 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

---

<sup>230</sup> *Id.*

<sup>231</sup> *See infra* Part II.B.2.b.

<sup>232</sup> *Lincoln Lutheran of Racine et al.*, 2015 WL 5047778, at 5.

<sup>233</sup> *Id.* at 5.

<sup>234</sup> *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.”).

arrangement to rely on whether the collective bargaining agreement expired.”<sup>235</sup> The Board goes on to chide the prior Board for ignoring the statutory language of two other sections of the statute which were “enacted by the same Congress at the same time” that treated dues checkoffs “quite differently.”<sup>236</sup> As the Board states, “[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.”<sup>237</sup> The Board buttresses its analysis by reliance on policy and legislative history.<sup>238</sup>

Finally, the Board rarely relies on any of the substantive canons, a finding consistent with what Krishkanumar found in her study of the Roberts Court.<sup>239</sup> In two cases, the Board invokes the canon against construing a statute so as to conflict with the Constitution to guide its decision-making. Some cases in the database raise First Amendment concerns. An employer may argue that a statement it made is protected under the First Amendment’s free speech clause, and the Board in some instances uses the rule of constitutional avoidance to guide its determinations. Moreover, the Board, in a handful of cases, invokes the substantive canon on Native American sovereignty contending that a statute should be interpreted so as to guard Native sovereignty as well as the principle against interpreting a statute so as to extend beyond the territorial boundaries of the United States. Interestingly, in both cases, the majority adopts a policy-based approach and the dissent argued that the substantive canon applied instead.

### 3. NLRB’s Use of Legislative History

Majority Board decisions frequently invoke legislative history, as about 40% of the decisions in the database 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 20% of the cases in the database. The Board relies on a mix of legislative materials. I code for five 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

---

<sup>235</sup> *Id.*

<sup>236</sup> *Id.* at 7.

<sup>237</sup> *Id.*

<sup>238</sup> *Id.* at 6 & n.17 (“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”).

<sup>239</sup> Krishkanumar, *supra* note 10, at 825.

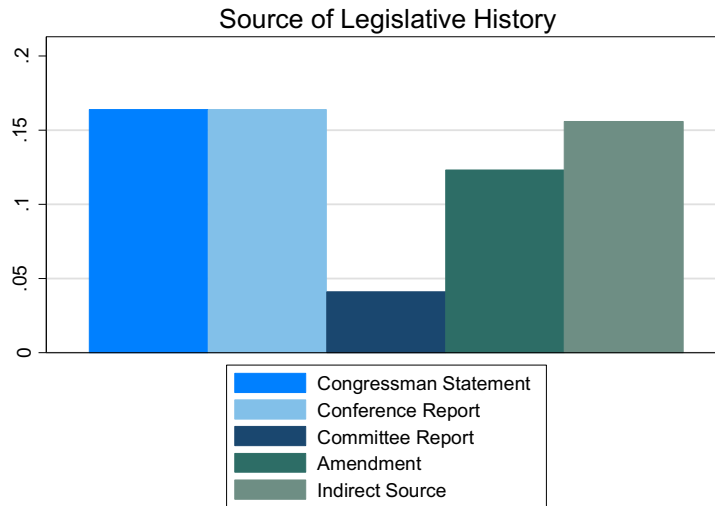
references to the amendment process or to the process by which Congress creates the statute; and 5) indirect or direct references to the legislative history noted in Board or Supreme Court caselaw but with no specific citation to a traditional source of legislative history such as conference reports or statements in the Congressional Record. With respect to the fifth type of legislative history, the Board often does not directly cite legislative history, relying instead on former Board or Supreme Court opinions to do the work from them. If the indirect citation refers directly to one of the other legislative sources (such as the conference report), I count the source as the conference report. Other times, the Board simply states “The legislative history says” but without citing the source. On two occasions, the Board cites to President Harry Truman’s veto message as a source of legislative history. I code these indirect vague references as coming from caselaw generally.

The use of legislative history by the Board in its decisions may raise some concerns. About 40% of the citations to legislative history concern 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 since it is clear that the Board relies on second-hand sources to garner legislative meaning. Moreover, only 17% of the citations to legislative history are to what is often hailed as the most authoritative source of legislative intent—conference committee reports.<sup>240</sup> More often, the Board cites to statements in the Congressional Record (38%) or to House or Senate committee reports (50%). In about 31% of legislative history cases, the Board cites to the amendment process or to the procedure that the statute undertook to inform meaning. Although the Board mostly cites to statements by the floor manager or sponsor of the Taft-Hartley Act or its amendments, the Board occasionally also refers to congressional debate about the issue, referencing colloquies in the Congressional Record between two Congressman debating different parts of the bill.

---

<sup>240</sup> Gluck & Bressman, *Part I*, *supra* note 6, at 976-78.

Figure 7



The Board generally invokes legislative history to inform the statute’s scope and purpose (55%), make broad references to general congressional purpose or intent (22%) or to simply note that nothing in the legislative history forecloses the majority’s given reading of the text (34%).<sup>241</sup> 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 mandating the Board’s policy-based approach; and 4) legislative history as an irrelevant factor.

#### a. Legislative History as Limiting Text

In a small subset of cases, the Board relies on legislative history as the primary interpretive method in informing case meaning. In just 7% of the cases, the Board cites to and extensively documents legislative history to set forth the interpretation of the statute. In most of these cases, the Board invokes legislative history to narrowly interpret the statute. For instance, in *Northeast Ohio District Council of the Untied Brotherhood of Carpenters*

<sup>241</sup> Gluck & Bressman and Walker similarly find that legislative history helps explain the purpose of the statute, with 80% of respondents in the Walker survey also noting that legislative history also helped define terms. Gluck & Bressman, *Part I, supra* note 6, at 971 fig. 7; Walker, *Inside Agency, 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.” *Id.* at 1044.

*and Joiners of America et al.*,<sup>242</sup> the Board invokes legislative history to interpret the meaning of section 8(e) of the statute.<sup>243</sup> The union alleged another union violated section 8(b)(3) of the NLRA by insisting to impose on an anti-dual shop clause in the parties' collective bargaining agreement.<sup>244</sup> In deciding the case, the Board looks at the plain text but relies primarily on the legislative history to inform the meaning of the statute.<sup>245</sup> 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 boycotts.<sup>246</sup> In interpreting this exception, the so-called "construction proviso," the Board contends that it should be narrowly construed to only include within its ambit construction practices as of the year of its enactment—1959.<sup>247</sup> The Board reasons "[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."<sup>248</sup> In so doing, the Board picks and chooses from snippets of legislative history, citing some parts and stating that contrary parts are simply irrelevant.<sup>249</sup> Relying on that narrow slice of legislative history, the Board finds the union in violation, and sets 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.<sup>250</sup> Of note is the fact that only Republican-dominated Boards in the database use legislative history as a limiter to narrowly foreclose relief to the affected party.

### **b. 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

---

<sup>242</sup> *Northeast Ohio District Council of the United Brotherhood of Carpenters and Joiners of America et al.*, 310 N.L.R.B. 172, 1993 WL 104853, at 1(1993).

<sup>243</sup> *Id.*

<sup>244</sup> *Id.*

<sup>245</sup> *Id.* at 7.

<sup>246</sup> *Id.* at 6.

<sup>247</sup> *Id.*

<sup>248</sup> *Id.*

<sup>249</sup> *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.

<sup>250</sup> *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.



purpose beyond what the plain meaning may dictate. In about half of the cases where the Board cites legislative history, it does so in a non-trivial matter. Moreover, in about a quarter of all cases in the database, legislative history serves as a major cornerstone of the analysis, and in particular in about 11% of all cases, the Board relies on legislative history almost equally to the text or policy in inferring meaning. Sometimes, the Board finds that legislative history makes clear ambiguous text while in other cases, the Board relies on legislative history as a “plus” factor in confirming the Board’s plain meaning analysis.

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 relies on the plain text and language/textual canons to inform meaning but the Board also cites the direct statement of Senator Robert Taft, chairman of the Senate Labor Committee, where he states during debate on the Taft-Hartley amendments that the employer’s “obligation may continue indefinitely until revoked.”<sup>251</sup> Thus, while legislative history does not form the cornerstone of the Board’s analysis, the Board cites and relies on it as further evidence that its interpretation of the Act’s scope is reasonable.

### **c. Legislative History as Not Foreclosing a Certain Interpretation**

In about 17% of cases in the database where the Board invokes legislative history, it does so in a negative way, arguing that since nothing in the legislative history contradicts 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 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 uses this technique so as to anchor its policy-based argument to perhaps give it greater legitimacy by reference to congressional intent.

### **d. Legislative History as Irrelevant**

Finally, in some cases, the Board wholly ignores legislative history, even if the text is unclear. In *Service Employees International Union et al.*,<sup>252</sup>

<sup>251</sup> *Lincoln Lutheran of Racine*, 2015 WL 5047778, at \*5 n.17 (citing 93 CONG. REC. 4876, reprinted in 2 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 1311 (1948)).

<sup>252</sup> *Service Employees International Union et al.*, 329 N.L.R.B. 64, 1999 WL 958483, at 14 (Sept. 30, 1999).

the Republican-dominated Board opines whether a party was a “neutral” under the common law because if they are not neutral, they would be in violation of the NLRA’s secondary boycott provisions.<sup>253</sup> The Board extensively cite to Senator Robert Taft’s statements in the legislative history on his interpretation of the word neutral as being “wholly unconcerned” in the disagreement.<sup>254</sup> The Board, however, applies a different test, noting 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 predominate to interpret the provision in a broader sense to be violative of the law.<sup>255</sup>

#### 4. NLRB’s Use of Precedent

The Board uses precedent to inform statutory meaning. Oftentimes, the issue is one of first impression, and the Board must look to Supreme Court, circuit court or Board precedent to see if it imposes any limits on the policy choice the Board must make. In other instances, the Board looks to precedent as an authoritative source to guide the Board in making the right decision. For instance, in *International Paper*, a three member panel of the Board answer a question of first impression: whether an employer that has already locked out its bargaining unit and subcontracted work out on a temporary basis can take the further step of subcontracting out work on a more permanent basis.<sup>256</sup> To answer the question the Board looks to Supreme Court precedent to ascertain whether the scenario presented was analogous to other scenarios where the Board found such conduct to be unlawful.<sup>257</sup> In this case, the appellate court disagrees with the Board’s ruling, finding that it misapplies Supreme Court precedent to arrive at the wrong answer.<sup>258</sup>

Rulings from the appellate court can also prompt the Board to alter policy. In *Mississippi Power & Light*, the Board rules on whether dispatchers are “supervisors” within the meaning of the NLRA.<sup>259</sup> As part of its reasoning, the Board references many other circuit court decisions finding that dispatchers are not supervisors.<sup>260</sup> As another example, in *Martin Luther*, the Board looks to the United States Court of Appeals for the District of

---

<sup>253</sup> *Id.* at 1.

<sup>254</sup> *Id.* at 14.

<sup>255</sup> *Id.* (noting that “[a]s clear as the legislative intent may appear, its boundaries ... have consequently produced much additional gloss.”).

<sup>256</sup> *Int’l Paper Co.*, 319 N.L.R.B. 150 (1995).

<sup>257</sup> *Id.*

<sup>258</sup> *Int’l Paper Co. v. N.L.R.B.*, 115 F.3d 1045 (1997) (refusing to enforce Board order, disagreeing with application of Supreme Court precedent).

<sup>259</sup> *Mississippi Power & Light Co.*, 328 N.L.R.B. 146 (1999).

<sup>260</sup> *Id.*

Columbia Circuit for guidance on whether certain work rules chill section 7 rights.<sup>261</sup> Moreover, in some cases, the Board rejects the guidance of the court of appeals.<sup>262</sup>

## 5. NLRB's Use of Policy and Practical Considerations

The Board frequently engages in a policy-based approach to inform statutory meaning, with almost a third of the cases in the database primarily relying on policy as the cornerstone of its choice between two or more permissible constructions of the statute, with another fifth of cases relying on policy considerations as a secondary source to buttress the text and/or the text and legislative history. 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. In most of these cases, the Board rests its analysis on a balancing of competing factors. These choices may include decisions concerning whether a given policy will foster inequality in bargaining power or whether it could potentially lead to more uproar in the workplace or increase the number of strikes in derogation of congressional intent. In all, in about 40% of cases in the database, policy considerations were an important part of the analysis, either expressly or implicitly.<sup>263</sup> When the Board engages in a primarily policy-based approach, it cites practical considerations in 80% of cases.

### a. "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

---

<sup>261</sup> *Martin Luther Memorial Home, Inc.*, 343 N.L.R.B. 75 (2004).

<sup>262</sup> *Murphy Oil USA, Inc.*, 361 N.L.R.B. 72 (2014) (rejecting guidance of Fifth Circuit).

<sup>263</sup> 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 in the database, the Board opines on the practical implications of its rulings, such as the impact imposing a strict deadline will have on striking words if they strictly read the text. *See Alexandria Clinic, P.A. et al.*, 339 N.L.R.B. 162, 2003 WL 22027491 (Aug. 21, 2003), at 1.

alone reconcile the fact the Act has multiple and somewhat competing purposes.<sup>264</sup> 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. In most cases in which the Board adopts this approach, it finds that the statute neither mandates nor forecloses a given interpretation. Legislative history is often of no help as it is used by both the majority and dissent to competing ends, with each side finding something in the legislative history in which to anchor its policy-based prescription. In such a way, the Board, unfettered from the text of the statute with only vague references to legislative intent to guide it, can then fashion a statutory analysis based on competing policy aims.

As discussed *supra*, both Republican and Democratic Boards may 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.<sup>265</sup> In *Brown*, overruled by the recent *Columbia* case, the Board rules on whether graduate TAs qualified as “employees” under the Act.<sup>266</sup> The predecessor case *NYU* and the subsequent case *Columbia* apply a textualist approach, looking at the plain meaning of the statute. However, in *Brown*, the Republican-majority Board also adopts a textualist approach but frames the decision largely in terms of congressional purpose. The Board opines that the NLRA’s fundamental purpose is to cover “economic relationships” and as such collective bargaining by students at schools does not further the purpose of the Act as intended by Congress.<sup>267</sup> The Board also reasons that to include TAs within the ambit of the Act infringes upon academic freedom.<sup>268</sup> By contrast, in *Columbia*, the Board adopts a “all hands on deck” approach where it uses textualism, legislative history, policy, and practical considerations to give meaning to the statute.<sup>269</sup> It too adopts a text-based purposive analysis, but the Democratic-Board thought the “purpose” of the NLRA is different from the purpose envisioned by the Republican *Brown* Board. As the *Columbia* Board reasons, “[p]ermitting students assistants to choose whether they wish to engage in collective bargaining—not prohibiting it—would further the Act’s policies.”<sup>270</sup> Both sides read the text in light of completely different purposes.

The Board also uses this approach in deciding whether medical residents qualify as employees under the NLRA. In *Boston Medical Center*,

---

<sup>264</sup> Fisk & Malamud, *supra* note 24, at 2020.

<sup>265</sup> See *supra* Part II.B.2.b.

<sup>266</sup> *Brown Univ.*, 342 N.L.R.B. at 483.

<sup>267</sup> *Id.* at 27.

<sup>268</sup> *Id.* at 36.

<sup>269</sup> *Colum. Univ.*, Case No. 02-RC-143012, 364 N.L.R.B. 90 (Aug. 23, 2016), at 6.

<sup>270</sup> *Id.* at 7.

the Board relies on a multi-factor analysis, using text, legislative history, policy and pragmatic considerations. The Board emphasizes the text, noting the language of the NLRA is broad, and that the term ‘employee’ specifically says “shall include any employee.”<sup>271</sup> It goes further to discuss resident’s job functions in light of the dictionary definition of employee.<sup>272</sup> The Board then looks at other statutory language, such as section 2(12)(b) as well as by invoking the canon of *expressio unius*.<sup>273</sup> The Board buttresses its conclusion by referring to the legislative history.<sup>274</sup> Finally, the Board looks to caselaw, policy and pragmatic considerations. It notes 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.”<sup>275</sup> The Board also details the role of residents in hospitals.<sup>276</sup>

### **b. Balancing Policy Concerns**

In other cases, the Board largely rests its decision on policy, eschewing text and legislative history in its analysis. These cases are different from the former as there is a clear gap in the law that was never contemplated by the enacting Congress or even addressed in any significant way in the legislative history. As an example, the Board applies a completely policy-driven, purposive approach in *Browning-Ferris Industries*, where the Board adjusts the standard to determine whether an entity qualifies as a “joint employer.”<sup>277</sup> The Board states 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.’”<sup>278</sup> In so doing, the Board looks to modern realities of how the prior test had been implemented in practice and decides to adopt a broader standard than the previous caselaw so as to effectuate the Act’s purpose of facilitating collective bargaining.<sup>279</sup> The Board notes that the nature of the workplace has changed, citing statistics from the Bureau of Labor Statistics detailing the prevalence of temporary and subcontracting arrangements.<sup>280</sup> To not broaden the standard, the Board argues, would amount to an abdication of its responsibilities to “adapt the Act

---

<sup>271</sup> *Id.* at 159.

<sup>272</sup> *Id.* at 159-60.

<sup>273</sup> *Id.* at 163.

<sup>274</sup> *Id.* at 163.

<sup>275</sup> *Id.*

<sup>276</sup> *Id.* at 153-56.

<sup>277</sup> *Browning-Ferris Industries of California, Inc. et al.*, 326 N.L.R.B. 186 (2015).

<sup>278</sup> *Id.* at 2.

<sup>279</sup> *Id.*

<sup>280</sup> *Id.* at 15.

to the changing patterns of industrial life.”<sup>281</sup> Following Supreme Court caselaw dictating that the Board should follow the common law agency test in determining employment relationships, the Board reasons that the NLRA does not foreclose the Board from adopting the broader standard.<sup>282</sup> A robust dissenting opinion in the case criticizes the majority on the legal issues involved with respect to what the common law means.<sup>283</sup> As the Board argues “reevaluating doctrines, refining rules, and sometimes reversing precedent are familiar parts of the Board’s work—and rightly so.”<sup>284</sup>

Similarly in *Auciello Iron Works, Inc. et al.*, the Board makes a policy choice buttressed by Board and Supreme Court precedent.<sup>285</sup> In that case, the Board rules on whether the employer could present evidence of its good faith doubt as to the level of the union’s majority support.<sup>286</sup> The First Circuit remanded the case for the Board to provide “policy guidance” and to address other circuit caselaw.<sup>287</sup> The Board reasons 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.”<sup>288</sup>

## 6. Conclusions About NLRB 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 precedent predominate in informing statutory meaning, the Board also engages in more traditional statutory interpretation processes, relying on the plain meaning of the text itself, and on how the text relates to other parts of the statute or code. Moreover, the

---

<sup>281</sup> *Id.*

<sup>282</sup> *Id.* at 17.

<sup>283</sup> *Id.* at 20-21.

<sup>284</sup> *Id.* at 24. The Board cites to the Supreme Court in noting that “[t]he use by an administrative agency of the evolutionary 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).

<sup>285</sup> *Auciello Iron Works, Inc. et al.*, 317 N.L.R.B. 60, 369, 1995 WL 291061, at \*7 (1995).

<sup>286</sup> *Id.* at 1.

<sup>287</sup> N.L.R.B. v. *Aucielle Iron Works*, 980 F.2d 804, 812 (1<sup>st</sup> Cir. 1992).

<sup>288</sup> *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...”).

Board frequently invokes legislative history, but such invocation has been somewhat uneven. 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 appellate 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 Republicans. Ideology does not dictate methodological choice. Rather, the analysis indicates that Board members selectively use statutory modes of interpretation to advance legal or policy objectives.

Moreover, certain methods seem to change over time. Making decisions based solely on policy considerations 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.<sup>289</sup> Finally, although the sample size is small and one must take the results with caution, it is interesting to note that the Boards of the party not in power often use the methodological choice most often associated with the stereotypical ideology of the current administration. For instance, Republican panels during the Clinton administration use legislative history more and Democratic panels during the Bush II administration tend 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 refers to the whole act and whole code 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 note “significant organizational barriers that the committee system, bundled legislative deals, and lengthy, multidrafter statutes pose to the realistic operation of these rules.”<sup>290</sup> While “consistent usage” of a similar

---

<sup>289</sup> In his survey, Walker finds that many rule drafters commented on the declining usefulness of legislative history. Walker, *Inside Agency*, *supra* note 6, at 1040. As one respondent notes: “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.*

<sup>290</sup> Gluck & Bressman, *supra* note 6, at 936.

term may be the “goal,” in reality, Congress is not organized to always make that happen in any kind of systematic way.<sup>291</sup> Thus, in construing the text, the Board may believe that the NLRA is written more consistently than it actually is in practice.

#### D. “Dueling” Statutory Interpretations

About 77% 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 J. Peter Hurtgen and J. Robert Brame often united in dissent, whereas during the Bush II administration, Wilma Liebman and Dennis Walsh differ 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 dissent in just 76% of the statutory interpretation cases in the database during the Clinton administration, the number of dissents rises to almost 90% 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 respond to the statutory methodologies relied on by majority Board members.

Part II.D.1 briefly provides the general background of the methodologies dissenting members use followed by a detailed assessment in Part II.D.2 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.<sup>292</sup> 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.<sup>293</sup>

##### 1. General Dissenting Methodologies

Compared to the majority opinions, dissenting Board employs use similar interpretive methodologies, as shown in Figure 8 detailing the *primary* interpretive method used by dissents. Percentages are within a few points of the numbers given previously for majority opinions with two

---

<sup>291</sup> *Id.* at 937.

<sup>292</sup> Krishmanuar, *supra* note 10, at 961.

<sup>293</sup> *Id.* at 971.



notable exceptions: Dissenting opinions rely more on a primarily textual methodology (12% v. 7% for majority opinions); they also adopt a text plus analysis more (23% v. 19%). Contrary to majority opinions, dissenting opinions tend to also focus their analysis less on precedent (30% of dissenting opinions use precedent as the primary motivating factor while 37% of majority opinions do). About a third of both majorities and dissents have policy as the cornerstone of their analysis, though only 4% of dissenting opinions (compared to 7% of majority opinions) use legislative history to limit the text.

**Figure 8**

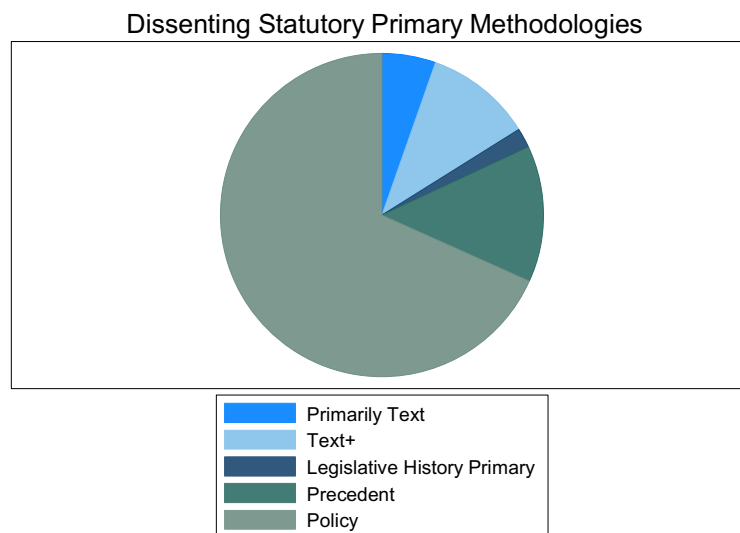


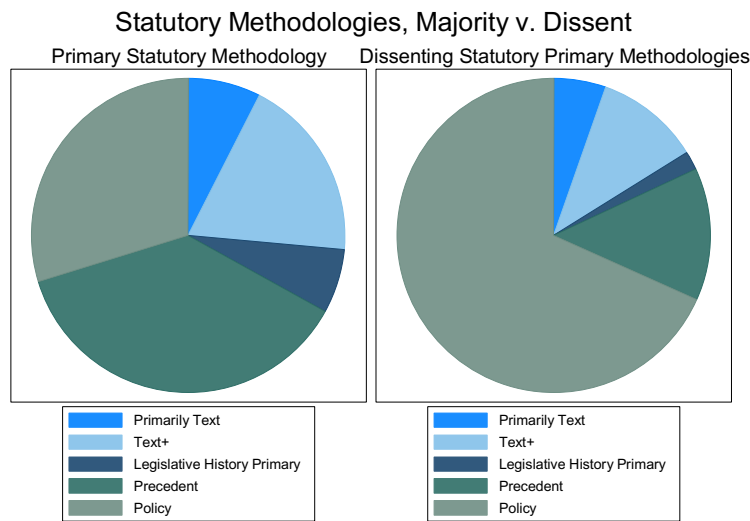
Table 9 and Figures 9 and 10 detail the breakdowns by political party and presidential administration of the primary interpretive method used for dissenting opinions. There are some noticeable changes over time. Republicans rely on precedent in over half of their dissents when out of power in the 1990s, but by the Bush administration, Republican dissenters eschew precedent by engaging in more text-based debates with the majority. Decline in the use of precedent occurs among Democratic majority panels. Text-based debates are more common during the Bush II years. Although we must take these results with a grain of salt, they suggest that dissenting panel members tend to use the statutory methodology most popularly associated with their party during times in which their party possesses presidential power. Figure 9 also makes readily apparent how the use of policy as the main interpretive tool declines during the Bush II administration and to some extent in the Obama administration as well. The increase in the use of the text plus method is especially notable in the Obama administration, though this change may be

due more to the personal proclivities of Board members Miscimarra and Johnson, who frequently write very long dissents touching on text, legislative history, precedent, policy and practical considerations. In addition, there is a decline in precedent over time, as Board members opt to look at the text, legislative history and policy more to form their dissents.

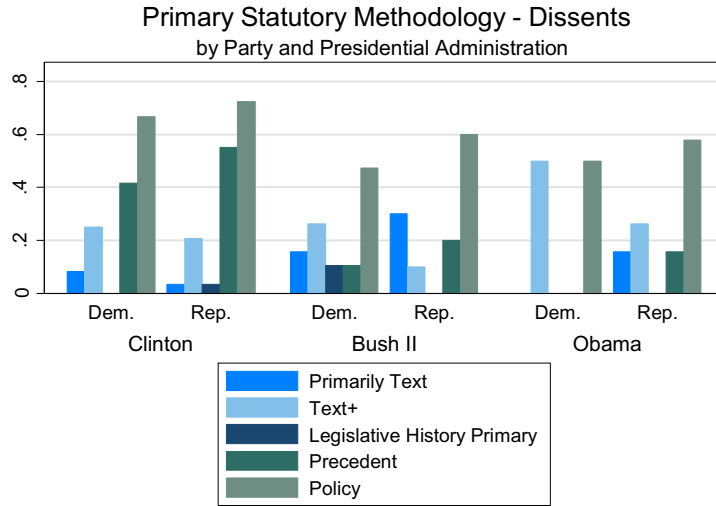
**Table 9: Primary Statutory Methodology, by Dissenting Majority Party and Administration**

	Primarily Text	Text Plus	Legislative History Primary	Precedent	Policy
Dem./Clinton	15	25	0	42*	67
Rep./Clinton	30*	21	3	55***	72
Dem./Bush II	8	26	11	11*	47
Rep./Bush II	3*	10	0	20***	60
Rep./Obama	16*	0	0	16***	58
Dem./Obama	0	50	0	0 <sup>294</sup>	50

**Figure 9**



<sup>294</sup> As noted, there was only one Democratic dissenting panel during the Obama administration.

**Figure 10**

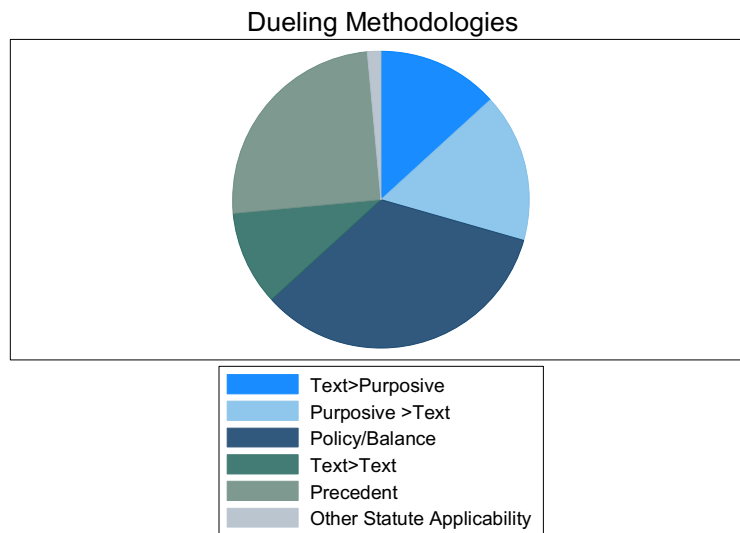
## 2. Dueling Interpretations in the Majority and Dissent

While the summary information provides some interesting information on the statutory interpretation tools used by dissents, the analysis cannot occur in a vacuum. By necessity, the statutory method used by the dissent may in part depend on how the Board majority interprets the case and which statutory methodologies it uses. The next part looks at how dissenting opinions differ in the statutory methodologies employed. I code cases according to one of six “dueling” possibilities: 1) textual to purposive/policy (that is, the majority opinion is primarily textual, but the dissenting opinion is more purposive/policy); 2) purposive to textual; 3) policy, indicating that the majority and dissenting “duel” primarily over how to balance a given policy, with the majority favoring one favor while the dissent favor another; 4) textual to textual, meaning that the majority and dissenting party both adopt a textual interpretation, but they differ as to what exactly the text meant; 5) debates about the use of precedent, with both the dissent and majority advancing different precedents to make their case; and 6) disputes about which statute to apply.

Figure 11 lists the percentages broken down by type of “duel.” The most frequent type of “duel” concern disputes between the majority and dissent based on policy, encompassing almost a third of the majority/dissent combinations, with about 23% of all cases in the database concerning some debate between the majority and the dissent on the appropriate balance between competing goals. Given that the Board is at its heart a policymaking agency, this of course is not a surprise. Majority and dissenting Board members also quarrel over precedent about 25% of the time as the primary

interpretive duel, with debates about Board precedent in particular occurring about 28% of the time while 18% of the cases involve debates concerning whether a Supreme Court or circuit court case control the outcome. In 8% of cases, one side argues that precedent controls the outcome while the other side reasons that the case should be decided in line with text, policy and/or legislative history. In the remaining cases, the Board uses a mixture of dueling techniques from a textualist method to a purposive one (13%), a purposive one to a textualist (16%), a text to a text dispute (10%) or a primarily legislative history to policy dispute or a policy to legislative history dispute (2%). On occasion, the majority and dissent also debate about the use of textual canons. Majority and dissenting Board boards quarrel over whether the text should be interpreted in an expansionist or narrow fashion in 17% of cases. In other words, one side argues that the text is clear and unlimited while the other side contends that the language dictated the outcome. In 5% of cases the majority and dissent debate the whole act rule (though it is not referred to by name), as one side finds it applicable while the other side disagrees. Moreover, in about 2% of all cases, the majority and dissent quarrel over which statute to apply. These cases primarily concern whether the Board should or should not apply the Railway Act to assist in interpreting an unfair labor dispute claim.<sup>295</sup>

**Figure 11**



These numbers are similar when broken down by case type, with some interesting differences as shown in Table 10 and Figure 12. Policy duels

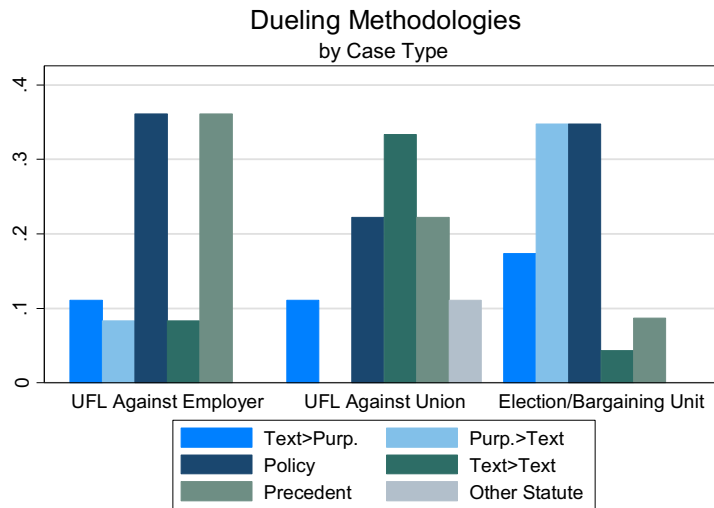
<sup>295</sup> This is why we see the sharp uptake up to 21% in CB cases under “Statute” in Table 13.

are most common 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.<sup>296</sup> In over a third of unfair labor cases concerning union abuses, the majority and dissent too quarrel over text, a difference statistically significant at 99% confidence.<sup>297</sup> Similarly, in about a third of election or bargaining unit cases, we see one side advancing a purposive approach and one side making a textual argument, a result that is statistically significant.

**Table 10: Dueling Methodologies, by Case Type**

	T>P	P>T	Policy	T>T	Precedent	Statute
All Cases	13	16	34	10	25	2
ULP- Employer (CA)	11	8***	36	8***	36**	0
ULP- Union (CB)	11	0***	22	33***	22**	11
Election/Bargaining Unit	17	35***	24	4***	9**	0

**Figure 12**



Looking at it by party of the majority and administration in Table 11 and Figure 13, there is a decline over time in the use of policy disputes and an increase in text to purposive or purposive to text disputes, especially

<sup>296</sup> 29 U.S.C. § 158.

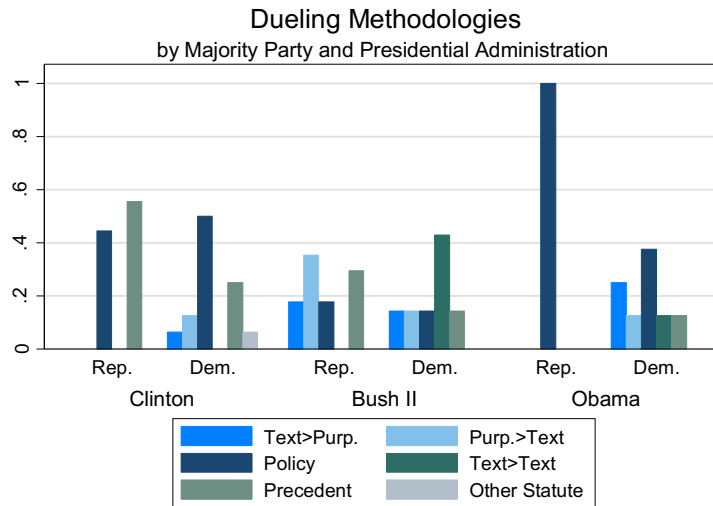
<sup>297</sup> In unfair labor disputes against unions, the Board often “duels” with the dissent over whether the Railway Act should guide its determinations. *See supra* Part II.2.c.

during the Bush II years among Republican majority panels. In particular, purposive to text debates occur most often with Republican majority/Democratic minority panels during the Bush II years, while text to purposive debates happen more with Democratic majority/Republican minority panels in the Obama years. By contrast, text to text debates are most prevalent among Democratic majority/Republican minority Boards during the Bush II administration, with nearly 44% of panels with dissents in the database of that partisan mixture arguing about text, a result statistically significant at 99% confidence. Policy battles are more common during Democratic administrations. There is indeed a statistically significant and noticeable decline in the use of policy by Republican-dominated Boards; whereas 44% of Republican Boards use policy as the primary interpretive tool during the Clinton years, that figure drops to 18% in the Bush administration, with Republican Board members turning instead to relying more on text. Note should also be made of the decline of the use of precedent over time. Whereas precedent battle are quite frequent during the Clinton years, in recent years, policy battles have replaced precedent battles as the lightning rod between partisans on the Board.

**Table 11: Dueling Methodologies, by Majority of Panel and Administration**

	T>P	P>T	Policy	T>T	Precedent	Statute
<b>Dem. Maj./Clinton</b>	6	13	50	0***	25	6
<b>Rep. Maj./Clinton</b>	0	0*	44*	0	56	0
<b>Dem. Maj./Bush II</b>	14	14	14	43***	13	0
<b>Rep. Maj./Bush II</b>	18	35*	18*	0	29	4
<b>Dem. Maj./Obama</b>	25	13	38	13***	14	0
<b>Rep. Maj./Obama</b>	0	100*	100*	0	0	0

Figure 13



In addition to the overall method, the Board also duels over different methodologies. 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%), though in most cases policy considerations only buttress either a text-based or precedent-based argument. But majority and dissenting Board members also often “duel” on textual meaning (33%), 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.<sup>298</sup>

For instance, as discussed previously, in *Alexandria Clinic, P.A.*, discussed above, the Republican-dominated argue that the text is “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.<sup>299</sup> The Democratic dissenters, however, argued to the contrary that the text is “ambiguous” and “unclear.”<sup>300</sup> The three graduate student TA cases likewise show how the Board flip-flops, with the majority and dissent following different

<sup>298</sup> See *supra* Part II.B.2.a.

<sup>299</sup> *Alexandria Clinic, P.A. et al*, 339 N.L.R.B. 162, 2003 WL 22027491, at 5.

<sup>300</sup> *Id.*

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.<sup>301</sup>

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) 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 finds the text clear while the Democratic dissenters rely in part on policy and legislative history to guide its interpretation.<sup>302</sup>

Both the majority and dissent duel over the use of precedent, and especially whether appellate court precedent should govern a given case. In 12% of cases, the majority cites a given precedent but the dissent comes back making either a policy argument or contending that the text and/or the text and legislative history dictate the outcome. Board members also bicker over which precedent to apply. In 18% of cases in the database, one side argues that Board precedent applies while the other side contends that either the Supreme Court or the appellate courts should govern the outcome of the case. Further, in 28% of cases, the Board’s battle concerning precedent is internal—both sides agree that Board precedent dictates the outcome but the two sides quarrel over how the precedent should be applied. For instance, the Board frequently argues whether Railway Act cases should apply to provide insight into a given dispute.<sup>303</sup> Thus, the Board’s disagreements about precedent might be seen somewhat as disagreement about policy.

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.<sup>304</sup> Although the majority discusses the policy considerations that animate its interpretation, it makes

---

<sup>301</sup> See *supra* Part II.B.2.a.

<sup>302</sup> *Alexandria Clinic, P.A. et al*, 339 2003 WL 22027491 at 15.

<sup>303</sup> See *supra* Part II.B.2.c.

<sup>304</sup> *Alexandria Clinic, P.A. et al.*, 339 N.L.R.B. 162, 2003 WL 22027491, at 5 (2003).



clear that the text alone is dispositive in that the striking nurses had a mandatory duty to give notice under the plain language of the text.<sup>305</sup> It reiterates the 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.<sup>306</sup> The Democratic dissenters, on the other hand, interpret the Act more loosely, arguing that “[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.”<sup>307</sup> The dissenters thought it “absurd” that Congress “intended to put employees’ jobs in peril simply because their union was not absolutely punctual.”<sup>308</sup> As such, they advance a rule of reason approach to guide interpretation of section 8(g).<sup>309</sup> They argue 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.”<sup>310</sup> They end with the notion that “Congress made the policy choice” in advancing a “rule of reason” and as such the Board is duty bound to honor that choice.<sup>311</sup>

Both majority and dissent also duel over practical considerations. There is an increase over time in the citation of practical considerations to a statistically significant degree 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 has increasingly viewed cases with a more 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.

### III. How Should the Board Interpret Statutes?

What can we say about how the Board interprets statutes and what lessons from the analysis of the NLRB can we glean to aid in statutory interpretation for administrative agencies more generally? The results here

---

<sup>305</sup> *Id.* at 7.

<sup>306</sup> *Id.*

<sup>307</sup> *Id.* at 14.

<sup>308</sup> *Id.*

<sup>309</sup> *Id.* at 15.

<sup>310</sup> *Id.* at 16.

<sup>311</sup> *Id.* at 17.

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.<sup>312</sup> In all, it seems that Board members have no rhyme or reason in using canons to advance policy views.<sup>313</sup> 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.<sup>314</sup> This leads to the question: How should the Board (and policy-oriented administrative agencies in general) interpret statutes? Part III.A addresses some of the pitfalls that agencies face in statutory interpretation. Then, Part III.B analyzes how the results in this analysis lend further support that agencies should adopt a purposive method of interpretation. In particular, this part explores how a purposive approach works in practice at the NLRB, arguing that agencies should leverage their considerable expertise in interpreting statutes using relevant social science data available to them. Finally, the Article makes the case for why rulemaking may be the best vehicle for agencies to advance important statutory interpretation so as to best balance the competing objectives of policy coherence, stability and democratic accountability.

### A. Pitfalls in Construing Statutes Like Courts

The results of this study underscore possible problems with how agencies may interpret statutes. While scholars have long contended that agencies should interpret statutes differently than courts do, in practice, agencies interpret statutes like courts as this study reveals. Administrative statutory interpretation may simply be too judicialized. This judicialization extends to all aspects of the litigation process.<sup>315</sup> In particular, the empirical results of this study point to three potential problems in how the NLRB

---

<sup>312</sup> Krishnakumara, *supra* note 10, at 959.

<sup>313</sup> Krishnakumara finds 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 notes 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.

<sup>314</sup> James Brudney, *Isolated and Politicized: The NLRB’s Uncertain Future*, 26 COMP. LAB. L. & POL’Y, 221, 244 & n.10 (2005).

<sup>315</sup> In an examination of briefs given to Solicitor General, Margaret Lemos notes that the Solicitor General’s screening process “perpetuates a court-centered rather than agency-centered mode of statutory interpretation.” Margaret H. Lemos, *The Solicitor General as Mediator Between Court and Agency*, 2009 MICH. ST. L. REV. 185, 185 (2009).

interprets statutes. First, its reliance on precedent to justify decisions may simply be a veil to disguise policymaking. Second, the Board’s overreliance on certain textual canons—in particular the whole act and the whole code rules—may result in the Board making decisions that bear little relationship to congressional intent about statutory purpose. Finally, the Board’s selective use of legislative history—especially when it uses history as a limiter on the text—results in the Board making decisions that may stray from statutory purpose.

### 1. Use of Precedent to Hide Policymaking

Agencies may rely too much on precedent created by judicial bodies to assist in interpreting their own governing statutes. In a large percentage of cases in the database, the NLRB makes its statutory interpretation by cobbling together snippets of caselaw in its “quest for coherence... to advance[] a narrative that is...part of the American legal tradition.”<sup>316</sup> But using precedent to ground first impression statutory decisions may not be appropriate in the administrative law context.<sup>317</sup> In addition to the fact that there is rarely one precedent that mandates a given result, law is not as path dependent in the administrative context.<sup>318</sup> Indeed, Karl N. Llewellyn noted there were at least 64 ways in which courts can apply prior precedent.<sup>319</sup> In particular, agencies’ citation of federal courts may be especially problematic.<sup>320</sup> The NLRB may cite a Sixth Circuit case as the basis for its statutory construction, even though that particular precedent has no bearing as far as precedent and the NLBR in general has long had a policy of nonacquiescence to appellate decisions.<sup>321</sup> Board members should be more circumspect in the use of precedent to justify statutory reasoning. They should make a distinction between citing cases simply because they must be adhered to as opposed to being simply persuasive authority.<sup>322</sup>

Moreover, there is necessarily a tension between statutory *stare decisis* and the benefit that ensures in ensuring that the meaning of a statute is settled and can be consistently relied upon.<sup>323</sup> Adherence to statutory *stare*

---

<sup>316</sup> *Id.* at 1172.

<sup>317</sup> *See, e.g.,* Jeffrey A. Pojanowski, *Reading Statutes in the Common Law Tradition*, 101 VA. L. REV. 1357, 1374 (2015).

<sup>318</sup> Solan, *supra* note 17, at 1187.

<sup>319</sup> Karl N. Llewellyn, *THE COMMON LAW TRADITION: DECIDING APPEALS* 77-91 (Little, Brown 1990).

<sup>320</sup> Vermeule, *supra* note 14, at 200-02.

<sup>321</sup> *See* Estreicher & Revesz, *supra* note 166, at 681.

<sup>322</sup> *See* Solan, *supra* note 17, at 1175.

<sup>323</sup> *Id.* at 1176. Solan cites Justice Brandeis who advocates statutory *stare decisis*. *See* *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406-07 (1932) (Brandeis, J., dissenting)

*decisis* may be especially important in cases when it is more important that the law be settled than be settled right. Statutory *stare decisis* may really be on a continuum, with it being most important in constitutional cases, where the legislature lacks an effective means to override a displeasing interpretation, to a “middle ground” in common law adjudication, to possibly an even lower level of deference in agency interpretation cases, where the legislature has numerous means at its disposal to right a statutory interpretation it finds troubling.<sup>324</sup> The same rationale, however, does not apply to administrative agencies. If a statutory interpretation is akin to policymaking, the decision may be best left up to the executive branch, with the judiciary confined to questioning whether the interpretation is a reasonable one upheld by evidence.<sup>325</sup>

## 2. Overreliance on Whole Act Rule and Whole Code Rule

In addition, the Board’s overreliance on textual canons like the whole act rule or the whole code rule may not be appropriate given the realities of statutory drafting. Statutory drafting is a lot more fragmented than previously realized. As detailed by the comprehensive study by Gluck and Bressman and Walker, false assumptions about the legislative process abound, especially with respect to the roles that agencies play in the drafting process.<sup>326</sup> In practice, application of the whole code rule may depend on the agency itself, with agencies having their own terms of art with specific meaning.<sup>327</sup> Moreover, interpretation of like terms in the same statute may not be consistent. Gluck and Bressman argue usage may be more consistent across committees overseeing the drafting as opposed to consistency in the act as a whole.<sup>328</sup> As Abbe Gluck argues, “[t]he idea that similar phrases mean the same thing across statutes or that variation of terms is meaningful even across multiple statutes does not comport with the structural separation of committees and the lack of communication between them, even when they

---

(citation omitted) (“*Stare decisis* is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right.”)

<sup>324</sup> See *id.* at 1176.

<sup>325</sup> *Id.* at 887-88.

<sup>326</sup> See Gluck & Bressman, *Part II*, *supra* note 6, at 801 (showing that Congress often does not abide by assumptions judges make about legislative drafting); *id.* at 725 (same); Walker, *supra* note 6 (same); see also Abbe R. Gluck, *Congress, Statutory Interpretation, and the Failure of Formalism: The CBO Canon and Other Ways that Courts Can Improve on What They Are Already Trying to Do*, 84 U. CHI. L. REV. 177 (2016) (setting forth ways in which Congress works differently than assumptions predict)

<sup>327</sup> Shobe, *supra* note 138, at 518-19.

<sup>328</sup> Gluck & Bressman, *Part II*, *supra* note 6, at 747.

work on the same statute.”<sup>329</sup>

The empirical study here reveals that the Board frequently uses the whole act and whole code rules to interpret the NLRA. As detailed *supra*, in many cases, the Board relies on interpretation and legislative history of other statutory sections drafted by different Congresses in different time periods to advance a narrative.<sup>330</sup> The Board also frequently refers to the Supreme Court’s interpretation of an entirely different statutes—the Railway Labor Act—to interpret section 8(b) cases. 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 was written at different times in dramatically different political climates, and as such, the Board should be cautious in extrapolating from one section to another.<sup>331</sup> More attention to the realities of congressional drafting process would do much to improve interpretive assumptions.<sup>332</sup>

### 3. Selective Reliance on Legislative History

Finally, the Board’s selective reliance on legislative history—particularly citation of legislative history to limit the clear language of the text—is misplaced. On the one hand, as Peter Strauss argues, agencies may be in a better position than courts to understand and absorb the legislative history.<sup>333</sup> This may be particularly the case for statutes enacted before the professionalization of Congress began in earnest in the 1960s and 1970s.<sup>334</sup> Congress did not even have its own internal administrative capacity until the passage of the Legislative Reorganization Act of 1946 and up to that time, House and Senate standing committees had no regular professional staff.<sup>335</sup> During the time period of the NLRA’s drafting, Congressman and committees were almost completely reliant on the agencies themselves to provide advice on drafting and legislative history.<sup>336</sup> Indeed, for many statutes during this period, scholars hypothesize that agencies essentially “ghost-wrote” the statute and/or its legislative history, even going so far as to

---

<sup>329</sup> Gluck, *supra* note 326, at 188.

<sup>330</sup> See *supra* Part II.B.2.c.

<sup>331</sup> Fisk & Malamud, *supra* note 25, at 2020.

<sup>332</sup> Gluck, *supra* note 326, at 188.

<sup>333</sup> Strauss, *supra* note 24, at 321.

<sup>334</sup> Nicholas R. Pariollo, *Leviathan and Interpretive Revolution: The Administrative State, the Judiciary, and the Rise of Legislative History, 1890-1950*, 123 YALE L. J. 266, 338 (2014)

<sup>335</sup> *Id.* In the 1940s, the House and Senate Office of Legislative Counsel had only five lawyers, a figure seven times less than comparable figures today. *Id.* at 339.

<sup>336</sup> *Id.*

draft mock debates to put into the Congressional Record.<sup>337</sup>

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, a result that some Board decisions argued was shaped by the legislative history?<sup>338</sup> The Board should not use legislative history to hamstring it to employment practices of a bygone era. To do so subverts the role of the agency as the living, breathing embodiment of statutory interpretation. Further, all legislative history is not the same. In a majority of cases, the NLRB relies on legislative history other than the conference committee mark-up, which often can be the most “illuminating” part of the legislative history.<sup>339</sup> Moreover, while some of the statements cited in the cases in the database were scripted colloquies—which are often seen as important to demonstrate a “shared understanding of statutory meaning—most citations were to random statements by single Congressman in the Congressional Record.<sup>340</sup> This lack of reliance on “consensus legislative history” is troubling since it may not necessarily refer to clear congressional intent about statutory purpose. Moreover, the frequent indirect citations of legislative history in the cases in the database, with the Board frequently citing to other court decisions that refer to legislative history, underscores the limited utility legislative history may have in informing meaning.

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. 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, the Board should 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 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.”<sup>341</sup> Instead of

---

<sup>337</sup> *Id.*

<sup>338</sup> *See supra* Part II.B.3 a.

<sup>339</sup> Gluck, *supra* note 326, at 207.

<sup>340</sup> *Id.* at 208.

<sup>341</sup> Walker, *Inside Agency*, *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

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.”<sup>342</sup>

### **B. Purposivism at the NLRB and Proposals for Reform**

Given the results of this study, what can we say about how the Board should interpret statutes? The answer may come down to what one views as the role of an 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 does 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 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 seems superfluous for the NLRB to interpret statutes in ways that are inconsistent with its very being as Congress wanted to limit the power of courts to rule in labor disputes.<sup>343</sup> Strict adherence to a text constructed by congressional leaders 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.<sup>344</sup> 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 argue that attention to institutional considerations shows why agencies should be given authority to abandon textualism even if the courts use it.<sup>345</sup> To the extent the Board engages in a textualist approach, it should look to the text to *permit* a construction, as

---

history that Strauss hypothesized nearly a quarter century ago”).

<sup>342</sup> 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).

<sup>343</sup> Hayes, *supra* note 145, at 554.

<sup>344</sup> O’Gorman, *supra* note 24, at 200.

<sup>345</sup> Sunstein & Vermeule, *supra* note 5, at 928.

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.<sup>346</sup> Agencies are in a unique institutional position to best understand the agency's purpose, even when its conflicting.<sup>347</sup> Formed during the New Deal, the NLRB is charged to be an expert body to fashion labor policy. Agencies like the NLRB should use that expertise to update the statute to reflect current realities. 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.<sup>348</sup>

In this section, I propose three solutions for reform. First, 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. Second, the Board should make decisions in line with background principles of substantive law. Third, the time is ripe to discuss whether the Board should engage more in rulemaking or issue binding policy statements to guide statutory decisions.

### 1. Leverage NLRB Expertise Grounded in Real-World Implications

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.<sup>349</sup> 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."<sup>350</sup> At present, the NLRB chooses between "competing constructions...within the range of meanings that the statutory language can support" when interpreting statutes.<sup>351</sup> In essence, the conflict boils down to one side advocating that a term be construed broadly with the other arguing for a narrow construction. For instance, in the case of whether graduate

---

<sup>346</sup> O'Gorman, *supra* note 24, at 200.

<sup>347</sup> Herz, *supra* note 14, at 99, 104.

<sup>348</sup> *Id.* at 216.

<sup>349</sup> O'Gorman, *supra* note 24, at 215-216; Mashaw, *Between Facts and Norms*, *supra* note 4, at 510.

<sup>350</sup> *Id.*

<sup>351</sup> Pierce, *supra* note 1, at 200.



student TAs qualify as “employees” under the NLRA, the battle can basically be stripped down to whether one thinks that the statutory purpose of the NLRA is best effectuated by a broad or narrow reading of the statute.<sup>352</sup> Traditional methods of statutory interpretation resorting to the text or legislative history are simply of no consequence in answering that question since the answer boils down to a political calculation of whether you think that the NLRA should be interpreted broadly to cover a broader array of workers in disadvantaged positions.

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.<sup>353</sup> 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 predicted that the Board’s revamp of the “joint employer” test would wreck havoc on the workplace as it would “subject countless 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.”<sup>354</sup> The dissenters spend page after page bemoaning the negative consequences that would ensue, without offering any social scientific evidence to back up the claims, nor do they make any citations 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.” This same pattern—of both the majority and dissent making arguments without citation on the consequences of a given decision—is prevalent throughout the statutory interpretation cases studied.

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 ensue should the Board rule one way or another. Rather than mere vague assertions of “policy” or

---

<sup>352</sup> See *supra* Part II.B.2.b.

<sup>353</sup> Fisk & Malamud, *supra* note 25, 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.”).

<sup>354</sup> *Browning-Ferris Industries, Inc.*, 362 N.L.R.B. at 26. The dissenters continue: “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.

pontifications about a given case's possible ramifications, the Board can consider different viewpoints of experts so as 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, the twin aims that Congress states as the underlying purpose of the NLRA. Appellate courts would then not have to guess the standard of review. For instance, in the *Columbia* graduate TA case, the Board could consider what the impact that inclusion of TAs on on strikes or collective bargaining.

New Dealers envisioned agencies as based on expertise and professionalism so that agencies could analyze social and economic problems and rely on scientific and empirical information that courts and legislatures could not otherwise consider.<sup>355</sup> The Board never developed the kind of non-legal expertise that administrative agencies were supposed to have due to historical circumstances.<sup>356</sup> 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.<sup>357</sup> 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.<sup>358</sup> The DOL has the ability to produce "high quality empirical analysis of the myriad questions that arise in NLRB cases"<sup>359</sup> 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, Equal Employment Opportunity Commission or state labor agencies.<sup>360</sup> Giving NLRB back its policy tools would do much to make its statutory interpretation more reasoned and more consistent.

Of course, critics of this approach may argue that social science data may itself be tinged with political calculations. Each side could surely hire experts to advance their preferred policy position. However, by creating a nonpartisan body within the NLRB akin to the Congressional Budget Office to offer economic advice on the economic ramifications of a given decision

---

<sup>355</sup> James Landis, *THE ADMINISTRATIVE PROCESS* 38-39 (1938).

<sup>356</sup> Fisk & Malamud, *supra* note 25, 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) (2012) (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).

<sup>357</sup> Fisk & Malamud, *supra* note 25, 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.*

<sup>358</sup> *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.

<sup>359</sup> *Id.* at 2051.

<sup>360</sup> *Id.* at 2045.

would do much to leverage the agency’s expertise to make stable and consistent decisions. Statutory directives often have cross-cutting purposes, but if it happens to be the case that the “story” of a given statute is “rewritten” to emphasize different factors during different time periods that may not necessarily be a “bad thing” from a democratic accountability perspective.<sup>361</sup>

The problem thus far is that the NLRB changes its interpretation too much with changing political realities. Since 2000, the NLRB has changed who qualifies as a graduate TA three times.<sup>362</sup> While such a change may on occasion be something that may be preferential or mandated from a democratic accountability perspective, too much change—especially when such change is not grounded in sound social science data—results in lack of stability in interpreting the labor laws. Mandating some empirical evidence to back up claims about policy increases the transaction cost for policy change, making it less likely that agencies make frivolous or unsubstantiated policy changes. But requiring changes in interpretation to at least be minimally grounded in evidence that the decision accomplishes the statute’s purpose would do much to ensure that decisions affecting the everyday lives of millions of people are not grounded simply in the ideological preferences of a given presidentially-appointed Board member. It prevents the executive from getting too much power at the expense of the other branches. In essence, reforming the process to include more voices would be a better alternative than the present system to best balance the goals of policy coherence, stability and democratic accountability.

## **2. Ground Statutory Interpretation in Substantive Background Principles**

As part of using its expertise to interpret statutes, agencies should interpret statutes to make sense in light of background principles of substantive law.<sup>363</sup> As Jonathan Siegal argues, “this distinctive degree of knowledge puts agencies in a particularly good position to utilize an interpretive method which gives special weight to substantive background principles of law and which understands the meaning of statutory text in light of such background principles.”<sup>364</sup> These substantive principles may tilt the result toward a given result, in line with how the law is usually interpreted in similar cases.<sup>365</sup> For instance, in an environmental law case, in interpreting whether a substance is “hazardous,” the EPA may give particular weight to

---

<sup>361</sup> Herz, *supra* note 14, at 106.

<sup>362</sup> See *supra* Part II.B.2.b.

<sup>363</sup> Siegel, *supra* note 28, at 124.

<sup>364</sup> *Id.*

<sup>365</sup> *Id.*

the concentration of the chemical, because of the background principle that as a substantive matter, knowing the concentration is an important consideration in determining whether something is hazardous, even if the statutory text is unclear or ambiguous on the topic.<sup>366</sup> These “field specific canons of construction” are based on scientific study<sup>367</sup> and their usage would do much to ensure that statutes within substantive areas are interpreted consistently and in line with the expertise of the agency.

The NLRB is uniquely positioned to understand the nuances of workplace discrimination and harassment. For instance, in interpreting whether conduct is “protected” under the statute or whether the employer or union acts in a “concerted” fashion, the NLRB can apply background norms of labor laws to elucidate understanding of those terms. The experience of hearing and ruling on thousands of cases gives the NLRB the unique perspective to understand when employer or union conduct directed at employees is truly egregious enough to warrant reprimand under the NLRA.

### **3. Use Rulemaking as a Tool to Advance Key Statutory Interpretations**

Finally, the Board should change its method of policymaking and rely more on rulemaking or guidance documents to advance statutory directives.<sup>368</sup> The Board needs to engage in policymaking, and one questions whether an institutional body acting like a court can ever really be a reliable policymaking body through case-by-case adjudications. Scholars argue that an agency’s statutory interpretation is probably not invariant to forum.<sup>369</sup> An agency’s ability to incorporate political preferences and budgetary concerns into decisions may be greater in rulemaking as opposed to adjudication, a consideration that is particularly relevant to statutory interpretation.<sup>370</sup> When

---

<sup>366</sup> *Id.* Siegal cites the case of *National Resources Defense Council v. United States Environmental Protection Agency*, 907 F.3d 1146 (D.C. Cir. 1990) as an example. *Id.* at 132-135.

<sup>367</sup> *Id.* at 135.

<sup>368</sup> 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) (same). 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 368, at 357-58.

<sup>369</sup> Mashaw, *Between Facts and Norms*, *supra* note 4, at 525 (2005); see also Kevin M. Stack, *Agency Statutory Interpretation and Policymaking Form*, 2009 MICH. ST. L. REV. 225, 226 (2009).

<sup>370</sup> *Id.*

an agency interprets statutes, it acts like a court.<sup>371</sup> Yet, at the same time, agency adjudicators are not judges per se; rather they are political actors, and as such, their role is different.<sup>372</sup> Case decisions (and statutory interpretation) at the Board 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.<sup>373</sup>

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.<sup>374</sup> 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.”<sup>375</sup> Using rulemaking would also bring the NLRB 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.<sup>376</sup> Appellate courts may be more likely to defer to the rulemaking process because rulemaking by necessity is more inclusive.<sup>377</sup> Engaging in statutory interpretation through rulemaking might also lead to greater national uniformity<sup>378</sup> and might provide more notice to litigants of legal rules, ensuring better compliance.<sup>379</sup> Moreover, rulemaking

---

<sup>371</sup> *Id.* at 226.

<sup>372</sup> *Id.* at 227; *see also* Strauss, *supra* note 24, at 329 (“agency officials are concededly political actors, unlike judges”).

<sup>373</sup> 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.

<sup>374</sup> Acosta, *supra* note 368, at 359; Tuck, *supra* note 163, at 1117 (proposing policy statements as alternative to rulemaking).

<sup>375</sup> Foote, *supra* note 342, at 681.

<sup>376</sup> Acosta, *supra* note 368, at 352.

<sup>377</sup> Garden, *supra* note 368, at 1475.

<sup>378</sup> Peter L. Strauss, *One-Hundred Fifty Cases per Year: Some Implications of the Supreme Court’s Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093, 1112 (1987) (noting the value of national uniformity in agency statutory interpretation).

<sup>379</sup> Richard E. Levy & Sidney A. Shapiro, *Administrative Procedure and the Decline of the Trial*, 51 U. KAN. L. REV. 473, 479-80 (2003).

would help Congress better monitor agencies since it would be easier to raise the “fire alarm” when an agency departs from political preferences.<sup>380</sup> Of course, engaging in rulemaking to interpret statutes may alter the way an agency reviews statutes, with there being some support for the notion that agencies may interpret a statute more aggressively if it feels “confident” that the appellate court will apply *Chevron* deference.<sup>381</sup> But engaging in rulemaking may reduce the propensity of the Board to act like lawyers “balancing rights rather than policy analysis studying social and economic regulatory problems.”<sup>382</sup> This greater degree of certainty may give both litigants and agencies more comfort.<sup>383</sup>

## CONCLUSION

Formed during the New Deal, the NLRB of 2018 is at its heart a policymaking body behaving like a court. There are several problems with this approach. The Board’s unique institutional position in the separation of powers system necessitates that it interpret statutes differently than a court might, taking into consideration the consequences of policy as opposed to simply engaging in a text-based analysis of the statute backed up by the legislative history. The Board should adapt its techniques of statutory interpretation to fully embrace its role as a policymaking body and to better guide judicial review. It can do this by making its policymaking more explicit grounded in social science data and substantive labor law specific background principles and by using the rulemaking process to make its statutory interpretation more transparent. Doing so would allow agencies to better balance the aims of achieving stability, coherence and democratic accountability in statutory interpretation.

\* \* \*

---

<sup>380</sup> Lisa Schulz Bressman, *Reclaiming the Legal Fiction of Congressional Delegation*, 97 VA. L. REV. 2009, 2043-45 (2011).

<sup>381</sup> Walker, *Inside Agency*, *supra* note 6, at 1059-60 (noting study found that 40% of agency drafters thought that the agency would be “more aggressive” in interpreting a statute if they felt *Chevron* applies); Barnett & Walker, *supra* note 76, at 43 (finding that agencies interpreting statutes through adjudication win more than agencies interpreting statutes through rulemaking under *Chevron*).

<sup>382</sup> Fish & Malamud, *supra* note 25, at 2019.

<sup>383</sup> Barnett & Walker, *supra* note 76, at 72 (noting that giving more guidance to courts in interpreting statutes would be a “comforting swaddling blanket rather than handcuffs”).