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**JUDICIAL CONTROL OF THE NATIONAL LABOR RELATIONS BOARD'S
LAWMAKING IN THE AGE OF CHEVRON AND BRAND X**

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Michael C. Harper

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JUDICIAL CONTROL OF THE NATIONAL LABOR
RELATIONS BOARD'S LAWMAKING IN THE AGE
OF *CHEVRON* AND *BRAND X*

Michael C. Harper

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**JUDICIAL CONTROL OF THE NATIONAL LABOR
RELATIONS BOARD'S LAWMAKING IN THE AGE OF
CHEVRON AND BRAND X**

MICHAEL C. HARPER*

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INTRODUCTION

Like that of prior Boards, the lawmaking of the President Bush-appointed National Labor Relations Board has generated criticism and controversy. Although some of the criticism has been directed at the substance of the law and policy made by the Board,¹ much of it has highlighted the extent to which

* Professor of Law, Boston University School of Law. I have benefited from comments from former Board Member Marshall Babson, current Board Member Wilma Liebman, and my colleagues Professors Joan Flynn, Jack Beermann, and Sam Estreicher.

¹ See, e.g., James J. Brudney, *Isolated and Politicized: The NLRB's Uncertain Future*, 26 COMP. LAB. L. & POL'Y J. 221, 223 (2005); William B. Gould IV, *Independent Adjudication, Political Process, and the State of Labor-Management Relations: The Role of the National Labor Relations Board*, 82 IND. L.J. 461, 470-77 (2007); Jonathan P. Hiatt & Craig Becker, *At Age 70, Should the Wagner Act Be Retired?*, 26 BERKELEY J. EMP. & LAB. L. 293, 295-98 (2005); Wilma B. Liebman, *Decline and Disenchantment: Reflections on the Aging of the National Labor Relations Board*, 28 BERKELEY J. EMP. & LAB. L. 569, 580-88 (2007).

the Bush-appointed Board has overturned prior decisions, thereby unsettling reliance on Board doctrine and respect for the Board as an expert administrative agency at least somewhat insulated from political shifts.² This critique of excessive policy oscillation echoes criticism of earlier Boards,³ and recalls earlier exhortations⁴ for the Board to pronounce major doctrinal shifts through use of rulemaking authority as expressly granted in section 6 of the National Labor Relations Act ("NLRA").⁵

Criticisms of the Bush-appointed Board decisions, including those stressing the Board's policy oscillation, however, generally have neither advocated greater judicial control over the Board's exercise of law- and policymaking nor assumed its availability.⁶ Instead, the Board's critics seem to accept that the only thing that will reverse the Labor Board's substantive decisions is a political shift in the White House.⁷ The critics assume the Board's readiness to

² See, e.g., Brudney, *supra* note 1, at 250-52; Kenneth R. Dolin, *Estreicher Urges Reforms to Address NLRB "Policy Oscillation,"* 2005 A.B.A. SEC. LAB. & EMP. L. 2, 2; Claire Tuck, Note, *Policy Formulation at the NLRB: A Viable Alternative to Notice and Comment Rulemaking,* 27 CARDOZO L. REV. 1117, 1118 (2005).

³ See, e.g., Andrew M. Kramer, *The Clinton Labor Board: Difficult Times for a Management Representative,* 16 LAB. LAW. 75, 80 (2000); Bernard D. Meltzer, *Organizational Picketing and the NLRB: Five on a Seesaw,* 30 U. CHI. L. REV. 78, 78 (1962); Edward B. Miller, *NLRB Forum: Strikes, Lockouts, and Boycotts,* 51 LAB. L.J. 89, 95 (2000).

⁴ See Samuel Estreicher, *Policy Oscillation at the Labor Board: A Plea for Rulemaking,* 37 ADMIN. L. REV. 163, 170 (1985); see also Merton C. Bernstein, *The NLRB's Adjudication-Rule Making Dilemma Under the Administrative Procedure Act,* 79 YALE L.J. 571, 590 (1970); Charles J. Morris, *The NLRB in the Dog House - Can an Old Board Learn New Tricks?,* 24 SAN DIEGO L. REV. 9, 29-41 (1987); Cornelius J. Peck, *The Atrophied Rule-Making Powers of the National Labor Relations Board,* 70 YALE L.J. 729, 760 (1961).

⁵ National Labor Relations Act § 6, 29 U.S.C. § 156 (2000) ("The Board shall have the authority . . . to make, amend, and rescind . . . such rules and regulations as may be necessary.").

⁶ But see Ronald Turner, *Ideological Voting on the National Labor Relations Board,* 8 U. PA. J. LAB. & EMP. L. 707, 761 (2006) (positing that where a Board ruling appears to be the product of "management or union-inclined members favoring unions or employees, . . . reviewing courts should take a hard look at the basis or bases for the agency's ruling").

⁷ There is a consensus that the Bush-appointed Board's significant decisions have generally favored management interests. See sources cited *supra* note 1. This is certainly the view of the critics of the Bush-appointed Board's doctrinal shifts, and there seem to be no dissents from management-aligned lawyers. See, e.g., John N. Raudabaugh, *National Labor Relations Board 2007 Year in Review: Fueling Unions' Demand for Euro-Centric Labor Law Reform,* 59 LAB. L.J. 16, 17-24 (2008). Professor Turner's analysis of major doctrinal reformulations of the Bush-appointed Board concludes that the opinions in these decisions, like those in many of the significant formulations made by prior Boards, reflect the management or union allegiances of the Board members. Turner, *supra* note 6, at 711.

Since Professor Turner wrote, the Bush-appointed Board has pronounced many other significant doctrinal reformulations in closely divided three-two decisions, with the same

implement reversals on the basis of such a political shift can only be inhibited by its self-restraint and an appreciation of the damage continuing policy shifts may do to the Board's credibility and that of the NLRA, which it implements.

In my view, these assumptions – while understandable – are wrong. The judiciary is not without power to moderate the frequent swings in Board-made labor law. Given the Supreme Court's 1974 decision in *NLRB v. Bell Aerospace Co.*,⁸ the courts cannot require the Board to employ its rulemaking authority to establish significant legal doctrine, even in situations where that doctrine overturns previously established Board policy.⁹ The judiciary can, however, apply the same kind of meaningful "arbitrary or capricious" review to Board lawmaking through adjudicatory statutory interpretations that the courts can apply to review the Board's exercise of its power to make supplementary law through rulemaking.¹⁰ Thus, the courts can demand that the Board justify the creation of new legal doctrine with more than a claim that the new doctrine offers a plausible interpretation of ambiguous statutory language. The courts also can require the Board to explain how the new doctrine better advances goals and interests accommodated by the Labor Act, in light of the actual contemporary reality regulated by the doctrine.

The assumption that judicial review does not afford an effective means to moderate Board doctrinal shifts is based in large part on the limited review of agency interpretive discretion supposedly promised by the Court's ubiquitously cited decision in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*¹¹ In *Chevron*, the Court asserted that where the "intent

alignment of Board members in each case and the majority position at least ostensibly more favorable to management. See, e.g., *Guard Publ'g Co.*, 351 N.L.R.B. No. 70, 2007 WL 4540458, at *1 (Dec. 16, 2007) (holding an employer does not commit unfair labor practice by prohibiting employees from using the employer's e-mail system for "non-job related solicitations"); *Dana Corp.*, 351 N.L.R.B. No. 28, 2007 WL 2891099, at *2 (Sept. 29, 2007) (overturning forty-year Board precedent by holding that no election bar is to be imposed after a card-based recognition until forty-five days after employees are notified); *Toering Elec. Co.*, 351 N.L.R.B. No. 18, 2007 WL 2899733, at *1 (Sept. 29, 2007) (requiring the Board's General Counsel to prove an applicant for employment is "genuinely interested" in the employment relationship as an element of a hiring discrimination unfair labor practice claim); *Oakwood Healthcare, Inc.*, 348 N.L.R.B. 686, 686 (2006) (formulating the meaning of terms in the statutory definition of "supervisor" that are exempt from the Labor Act's coverage). See also *infra* Part II.E for further discussion.

⁸ 416 U.S. 267 (1974).

⁹ *Id.* at 294-95. The Court in *Bell Aerospace* emphasized that "the choice made between proceeding by general rule or by individual, *ad hoc* litigation is one that lies primarily in the informed discretion of the administrative agency." *Id.* at 293 (quoting *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947)).

¹⁰ National Labor Relations Act § 6, 29 U.S.C. § 156 (2000); see *Am. Hosp. Ass'n v. NLRB*, 499 U.S. 606, 617-19 (1991) (applying an arbitrary or capricious standard of review).

¹¹ 467 U.S. 837 (1984).

of Congress" on "the precise question" is not "clear" or "unambiguously expressed," a reviewing court should accept reasonable "construction[s] of the statute" made by an administrative agency entrusted with its implementation.¹² Under the *Chevron* standard, the Board may claim it is insulated from judicial control as long as it chooses some interpretation of the Labor Act that is not precluded by the Act's generally open-ended and ambiguous language – at least in the absence of binding legislative history or other clear indication of legislative intent. This claim is supported by a succession of Supreme Court decisions, before as well as after *Chevron*, that uphold Board statutory constructions while assuming that variant constructions could also be upheld as reasonable.¹³

The Court's 2005 decision in *National Cable & Telecommunications Ass'n v. Brand X Internet Services*¹⁴ seemed to strengthen the protections offered by *Chevron* from judicial oversight of Board policy reversals. In *Brand X*, the Court held the Ninth Circuit Court of Appeals should have provided *Chevron* deference to the Federal Communications Commission's interpretation of the term "telecommunications service" to exempt cable companies providing Internet service from regulation under the Communications Act.¹⁵ The Court concluded *Chevron* deference was appropriate, despite an earlier decision of the same appellate court that a contrary interpretation of the Communications Act was also permissible or even the "best reading" of the statute, provided the court had not held that the statute was unambiguous and allowed only one

¹² *Id.* at 836-37. This is often articulated as *Chevron's* "two-step" process. At Step One, the court determines whether the statute is clear. If not, the court proceeds to Step Two, where the court asks whether the construction is "permissible" or "reasonable." See, e.g., STEPHEN G. BREYER, RICHARD B. STEWART, CASS R. SUNSTEIN & ADRIAN VERMEULE, ADMINISTRATIVE LAW AND REGULATORY POLICY 247 (6th ed. 2006).

¹³ See, e.g., NLRB v. Curtin Matheson Scientific, Inc., 494 U.S. 775, 787 (1990) (upholding a Labor Board rule "as long as it is rational and consistent with the [Labor] Act"); Fall River Dyeing & Finishing Corp. v. NLRB, 482 U.S. 27, 42 (1987) (holding "rational" Board rules should be given deference); NLRB v. Transp. Mgmt. Corp., 462 U.S. 393, 401-02 (1983) (finding that although the Board's construction of the Act may not be required, it is permissible); Charles D. Bonanno Linen Serv., Inc. v. NLRB, 454 U.S. 404, 413 (1982) (writing that although the "Board might have struck a different balance from the one it has . . . we cannot say that the Board's current resolution of the issue is arbitrary or contrary to law"); Beth Israel Hosp. v. NLRB, 437 U.S. 483, 501 (1978) (finding that the Board "must have authority to formulate rules to fill the interstices of the broad statutory provisions"); Republic Aviation Corp. v. NLRB, 324 U.S. 793, 798 (1945) (asserting that the Wagner Act "left to the Board the work of applying the Act's general prohibitory language in the light of the infinite combinations of events which might be charged as violative of its terms"). But see *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 541 (1992) (effectively refusing to give deference, even after *Chevron*, to the Board's construction of ambiguous statutory language). For further discussion of *Lechmere*, see *infra* note 64.

¹⁴ 545 U.S. 967, 974 (2005).

¹⁵ *Id.* at 980.

acceptable interpretation.¹⁶ The *Brand X* Court further explained that "[a]gency inconsistency is not a basis for declining to analyze the agency's interpretation under the *Chevron* framework. Unexplained inconsistency is, at most, a reason for holding an interpretation to be an arbitrary and capricious change from agency practice under the Administrative Procedure Act."¹⁷ The *Brand X* Court stressed that change is not invalidating per se; "[o]n the contrary, the agency . . . must consider varying interpretations and the wisdom of its policy on a continuing basis . . . for example, in response to changed factual circumstances, or a change in administrations . . ."¹⁸ The Court thereby seemed to accept the functioning of agencies like the Board as parts of a politically responsive branch of government whose constitutionally permitted actions are to be limited by the judiciary only through enforcement of boundaries clearly set by Congress.¹⁹

The Court's analysis in *Brand X*, however, also offered significant support for an interpretation of *Chevron* that would permit meaningful judicial review of all Labor Board formulations of open-ended and ambiguous provisions of the Labor Act, especially those that reverse the Board's prior formulations. Under this interpretation, the standard for review of an agency's delegated discretion to formulate law that it claims to be embodied in ambiguous statutory provisions should be the same as the standard for review of an agency's delegated discretion to develop acknowledged supplementary law. Examples of such acknowledged supplementary law include the Board's rulemaking-developed presumptions on appropriate bargaining units in acute care hospitals²⁰ and the Board's adjudication-developed *Excelsior* rule, which requires employers to provide the names and addresses of all eligible voters

¹⁶ *Id.* at 982.

¹⁷ *Id.* at 981.

¹⁸ *Id.* (citations omitted).

¹⁹ As explained decades ago by Judge Winter, there are good reasons to view the Board as the paradigm of an agency that Congress would intend to be responsive to "shifts in the locus of political power." Ralph K. Winter, Jr., *Judicial Review of Agency Decisions: The Labor Board and the Court*, 1968 SUP. CT. REV. 53, 55. These reasons include, in addition to the "generality of the statutory provisions" in the Labor Act, the "dynamic" nature of collective bargaining, and "the limitations Congress faces in legislating labor law." *Id.* More recently, Professor Stephenson has argued that rational legislators would be more likely to want lawmaking discretion delegated to an agency rather than to the courts if the lawmakers are willing to sacrifice intertemporal consistency for interissue consistency. Matthew C. Stephenson, *Legislative Allocation of Delegated Power: Uncertainty, Risk, and the Choice Between Agencies and Courts*, 119 HARV. L. REV. 1035, 1037-38 (2006). This is more likely to be true where legislators and relevant interest groups have longer time horizons and more focused, "narrow" interests, which is often the case in labor-management law. *Id.* at 1063.

²⁰ 29 C.F.R. § 103.30 (2007) (explicating appropriate bargaining units in the health care industry and providing for Board adjudication in the event of extraordinary circumstances).

within seven days of the Board's approval or direction of a certification election.²¹

This standard of review, as stated in § 706(2)(A) of the Administrative Procedure Act ("APA"), is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."²² Numerous Supreme Court decisions elaborate on this standard, including most prominently *Motor Vehicle Manufacturers' Ass'n v. State Farm Mutual Automobile Insurance Co.*,²³ where the Court reviewed the Secretary of Transportation's modification of regulations requiring passive restraints in new motor vehicles. The Court held:

[A]n agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.²⁴

The Court in *Brand X* gave this kind of meaningful review to the FCC's formulation of the meaning of the statutory phrase, "telecommunications service," in the Communications Act.²⁵ The *Brand X* Court did so both as part of its *Chevron* Step Two analysis to determine whether the Commission's formulation was a "reasonable policy choice" given its potential consequences in the contemporaneous world of information and telecommunication services,²⁶ and also in response to the argument of telephone providers that the Commission's exemption from regulation of cable modem Internet service was inconsistent with the Commission's prior decision to regulate the telephone companies' digital Internet service.²⁷

²¹ *Excelsior Underwear, Inc.*, 156 N.L.R.B. 1236, 1239 (1966).

²² 5 U.S.C. § 706(2)(A) (2000). The Court in *American Hospital Ass'n v. NLRB* applied this standard in its consideration of the Board's rule on acute care hospital bargaining units. *Am. Hosp. Ass'n v. NLRB*, 499 U.S. 606, 617-19 (1991). The standard is also applicable to the review of Board-made legal doctrine pronounced in adjudications. See, e.g., *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 374-75 (1998) (Scalia, J.) (writing that the Board's "adjudication is subject to the requirement of reasoned decisionmaking" that is applied under the APA).

²³ 463 U.S. 29 (1983).

²⁴ *Id.* at 43.

²⁵ *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 974 (2005).

²⁶ *Id.* at 997-1000.

²⁷ *Id.* at 1000-02. The *Brand X* Court did state in a footnote that the requirement that the agency provide a "reasoned explanation," as articulated in *State Farm*, is not part of *Chevron* review. *Id.* at 1001 n.4. Whether or not the Court will hold to this doctrinal position seems irrelevant, however, as long as *State Farm* arbitrary or capricious review can be applied to agency policymaking through statutory construction as it was in *Brand X*. See *infra* text accompanying notes 83-84 and note 84.

The rejection of any real distinction between two theoretically distinct forms of agency discretionary lawmaking – (i) lawmaking through construction of the direct force of an ambiguous statute; and (ii) lawmaking through the elaboration of law beyond that which is embodied in the statute – and the application of the same meaningful arbitrary or capricious standard of review to both is significant for judicial review of Labor Board doctrinal formulations, including those that reverse prior formulations. Applying meaningful arbitrary or capricious review of the kind articulated in *State Farm* to Board decisions that purport to construct the direct commands of the Labor Act precludes the Board from gaining automatic judicial approval of any plausible reading of the Act's ambiguous and open-ended language. Since such readings can pass Step One of the *Chevron* review framework, the level of review appropriate after passing Step One is critical.²⁸ If any plausible construction of statutory language is acceptable, without consideration of whether the Board has given reasonable consideration to how statutory goals can be best balanced in light of the "factual circumstances" confronting the agency,²⁹ judicial review cannot meaningfully constrain agency doctrinal reversals or reformulations.

By contrast, if Board constructions of the Labor Act must meet the kind of "arbitrary or capricious" review set forth in *State Farm*, courts can require the Board to do more than simply defend its doctrinal reversals or reformulations with plausible interpretations of ambiguous statutory language. Regardless of whether the Board proceeds by adjudication or by rulemaking, the courts can require it to consider all important aspects of the policy decision that its construction addresses, including the impact the decision may have on the world the agency regulates in light of relevant contemporary "factual circumstances." The courts can require the agency to address the evidence before it and can perhaps demand that it take reasonable steps to garner additional relevant evidence.³⁰ As the Court's approval of policy reversals in

²⁸ Step One of *Chevron* looks to whether the "intent of Congress" is "clear" or "unambiguously expressed." *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984). For an articulation of *Chevron*'s two-step process, see *supra* note 12 and accompanying text.

²⁹ The phrase "factual circumstances" is used by the Court in *Brand X* to explain what might be relevant to an agency considering "varying interpretations and the wisdom of its policy on a continuing basis." *Brand X*, 545 U.S. at 981 (quoting *Chevron*, 467 U.S. at 863-64).

³⁰ The court cannot require the Board to formulate new policy or legal doctrine through the exercise of its legislative rulemaking power rather than through adjudication. See *supra* notes 8-10 and accompanying text. This does not prevent a court, however, from requiring the same kind of support for any doctrinal reformulations pronounced in adjudications that it would require for reformulations made through the informal rulemaking process. A court cannot require the Board to develop that support through any particular supplementary procedures, cf. *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council Inc.*, 435 U.S. 519, 543-44 (1978) (finding that absent statutory or constitutional constraints, agencies "should be free to fashion their own rules of procedure"), but it can require the support to be

both *Brand X* and *Chevron* illustrates, such review does not prevent an agency like the Board from reversing significant policy decisions, even when those policy reversals are based at least in part on a different weighting of conflicting permissible goals. Such review can, however, slow the oscillation of policy, ensure that adopted changes have greater legitimacy, and even stabilize agency-formulated law in cases where empirical evidence resists the agency's assumptions.

Part I of this Article explains why the *Chevron* decision should be read to have anticipated the arbitrary or capricious standard of review as being part of the framework for judicial review of agency lawmaking through statutory constructions, whether or not those constructions purport to do more than interpret commands embodied in the statute. Part I elaborates why this reading is supported not only by the *Brand X* decision, but also by the Court's delineation, in *Christensen v. Harris County*³¹ and *United States v. Mead Corp.*,³² of the kind of agency actions that warrant review under the relatively deferential *Chevron* framework.

Part II provides an examination of five significant decisions of the Bush-appointed Labor Board. These cases illustrate how the application of meaningful arbitrary or capricious review of Board statutory constructions can moderate policy reversals and reformulations. The Board should be able to change course within its statutory boundaries as long as the goals being rebalanced are consistent with the statute, and the balance is based on reasonable empirical assumptions after appropriate attempts to gather relevant information. Nonetheless, for several reasons, courts should require the Board to provide more consideration of the actual impact of its policy choices when it formulates a change in prior policy. First, the Board cannot rely on statutory interpretation tools alone to defend its reformulations, especially in the most common situations where the doctrine being reformulated also reflects an acceptable construction of an ambiguous statute. Second, the Board cannot rely primarily on deference to its purported expertise in order to justify its

there. I therefore disagree with Professor Flynn's conclusion that the Board can effectively escape judicial review of its legislative fact-finding by making policy through adjudication. See Joan Flynn, *The Costs and Benefits of "Hiding the Ball": NLRB Policymaking and the Failure of Judicial Review*, 75 B.U. L. REV. 387, 417 (1995). If a Board majority makes assertions of legislative fact that are disputed by Board dissenters and some parties, and if the adjudication is "devoid of empirical data," *id.*, a court should be able to require the Board to reconsider its reformulation as readily as if it were reviewing a controversial rule pronounced without adequate evidentiary support.

³¹ 529 U.S. 576, 587-88 (2000) (finding that opinion letters issued by agencies "do not warrant *Chevron*-style deference" but that interpretations formed through formal adjudication or notice-and-comment rulemaking receive deference).

³² 533 U.S. 218, 230-31 (2001) (deciding that though the lack of the formal notice-and-comment process does not bar *Chevron* deference, the tariff classification at issue had no formal process, nor did Congress contemplate such classifications as "deserving the deference claimed for them").

reformulations because the Board's policies, and thus its application of any expertise, have not been consistent. Third, an agency reformulating doctrine cannot base its reformulation on the presumption that its rejected prior precedent strikes the correct policy balance, whether that precedent has been upheld in the courts or not.

Finally, the Article concludes by considering the possibility of future Labor Board policy reversals from a new Board appointed by President Obama. The Article recommends that the federal judiciary, by meaningful review of doctrine reformulated by the Bush-appointed Board, encourage the new Board to consider carefully the current reality of labor relations, as well as its breadth of statutory discretion, before effecting such reversals. Fuller consideration of the current reality of labor relations would enable the new Board to establish less reversible and thus more stable and accepted doctrine. By supporting its policy reformulations, where appropriate, with the kind of consideration of legislative facts that it would have provided in a rulemaking proceeding, the Board should be able to achieve as much stability through adjudicatory lawmaking as it can achieve through rulemaking.

I. EQUATING JUDICIAL REVIEW OF STATUTORY CONSTRUCTION WITH REVIEW OF SUPPLEMENTARY LAWMAKING

The assumption that judicial review cannot moderate rapid swings or oscillations of Labor Board doctrine derives in part from a more general assumption about the nature of agency authority to formulate law. Many assume that the authority an administrative agency exercises in construing an ambiguous provision of a statute is distinct from the authority such an agency exercises when it formulates law beyond that embodied in the statute. Acceptance of the more general latter assumption, which is reflected in most texts on administrative law,³³ enables an agency like the Board to claim

³³ See, e.g., RONALD A. CASS, COLIN S. DIVER & JACK M. BEERMANN, *ADMINISTRATIVE LAW: CASES AND MATERIALS* 130-48, 188-201 (5th ed. 2006) (treating *Chevron* under review of questions of law and *State Farm* under review of questions of fact or policy); LISA HEINZERLING & MARK V. TUSHNET, *THE REGULATORY AND ADMINISTRATIVE STATE* 378-88, 438-49 (2006) (treating *Chevron* under statutory interpretation and *State Farm* under review of agency rulemaking). A number of texts, while separating their treatment of *Chevron* review of agency statutory interpretation from that of review of agency policymaking, however, do consider the relevance of *State Farm* and arbitrary or capricious review to *Chevron* analysis. See, e.g., BREYER ET AL., *supra* note 12, at 328-29 (discussing the overlap between *Chevron* Step Two analysis and "arbitrary or capricious" review in recent D.C. Circuit cases); GARY LAWSON, *FEDERAL ADMINISTRATIVE LAW* 614-28 (4th ed. 2007) (describing the relationship between *Chevron* and "arbitrary or capricious" review as a "hot topic" in law reviews and federal reporters); RICHARD J. PIERCE, JR., *ADMINISTRATIVE LAW TREATISE* § 7.4, at 453 (4th ed. 2002) (positing that "courts should use the same approach to answer the question [of agency statutory construction], whether it is characterized as the *State Farm* test or Step Two of the *Chevron* test"); JOHN M. ROGERS ET AL., *ADMINISTRATIVE LAW* 572 (2008) ("The analysis of reasonableness required by Step II of

insulation from judicial review of *any* reasonable interpretation of an ambiguous statutory phrase. The agency, citing *Chevron*, can claim that where a statutory command is ambiguous, it is required only to provide a reasonable analysis of the text of the statute, and perhaps of any other evidence of congressional intent in passing the statute that may be relevant to the agency's interpretative methodology.

Under this assumed agency authority, the agency can claim that such statutory analysis suffices, without having to provide the thorough consideration of the actual impact of its "reasonable" interpretation that it would need to provide to satisfy judicial review of regulatory choices beyond those made by Congress. The corollary assumption, that more demanding judicial review is warranted for administrative supplementary lawmaking (such as that embodied in the acute care hospital bargaining unit rule or the *Excelsior* rule)³⁴ than for administrative construction of ambiguous congressional intent, is significant for an agency like the Labor Board. This is especially important because the Board's enabling statute is filled with many open-ended ambiguous commands such as the protection of "concerted activities" for "mutual aid" from employer interference that can be read to embody a comprehensive doctrinal framework with little need for supplementary lawmaking.³⁵

The assumption that Congress generally provides administrative agencies with two different kinds of authority — one by enacting ambiguous statutory terms and a second by the explicit grant of rule- or lawmaking authority, like that embodied in Section 6 of the National Labor Relations Act³⁶ — is open to question, however. The former authority in most cases is not distinct from the latter authority because most statutory ambiguities reflect the absence of specific legal doctrine rather than unclearly expressed doctrine. Most ambiguities in statutes concerning a particular issue indicate Congress either has not considered the issue or has decided to defer its resolution to the governmental authority that implements the statute, be it an agency like the Board with delegated authority or the judiciary in the absence of such an agency. In such cases, one would think that a reasonable member of Congress who supported the statute would have wanted the ambiguity resolved through the same kind of analysis as that expected when the agency exercises its

Chevron may perhaps best be thought of as arbitrary-or-capricious review."). Indeed, while Professor Lawson seems to accept the dichotomy between lawmaking through the construction of ambiguous statutory commands and lawmaking through supplementary rulemaking, *infra* note 85, Professor Pierce seems to equate the two. RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 7.4, at 145 (rev. 4th ed. Supp. 2007) ("[T]he question whether an agency engaged in reasoned decisionmaking within the meaning of *State Farm* often is identical to the question a court must answer under Step Two of the test announced in *Chevron*.").

³⁴ See *supra* notes 20-21 and accompanying text.

³⁵ National Labor Relations Act §§ 7-8, 29 U.S.C. §§ 157, 158(a)(1) (2000).

³⁶ National Labor Relations Act § 6, 29 U.S.C. § 156 (2000).

explicitly granted rulemaking or lawmaking power. Whether the grant of authority is through the explicit grant of lawmaking powers or is implicit through ambiguous language, a reasonable legislator would want the implementer of the statute to consider how the statutory goals could be best advanced in light of the factual circumstances before it.

This should be the case regardless of whether actual congressional intent or the meaning of the statutory text to some reasonable hypothetical legislator is assumed to be controlling. A statutory provision might be considered ambiguous because its wording is sufficiently unclear or open-ended so that a reasonable and conscientious legislator — or any other contemporaneous reader of the text — would be assumed to have no particular position on its meaning.³⁷

³⁷ Justice Breyer uses the construct of a reasonable legislator to formulate his mode of statutory interpretation, asking how a "reasonable member of Congress[] . . . would have wanted a court to interpret the statute in light of present circumstances in the particular case." STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION 88 (2005). Interpretive textualists who reject the relevance of actual subjective legislative intent to statutory meaning may claim the standard for interpretation is not what would be inferred by an idealized reasonable legislator, but rather what would be inferred by any reasonable contemporary reader of the statute. See, e.g., ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 17 (Amy Gutmann ed., 1997) (remarking that courts "do not really look for subjective intent" but rather "the intent that a reasonable person would gather from the text of the law").

In practice, the distinction between a "reasonable legislator" and a reasonable contemporary reader of the statute should probably matter little. Conceptually, however, the understanding of an ideal-type legislator provides a standard that both better illuminates the distinction between legislatively-made and legislatively-deferred law and also better supports the argument that textualism protects the power of democratically elected legislatures. See *id.* at 17-18 (stating that courts look to objective intent because it is "incompatible with democratic government . . . to have the meaning of the law determined by what the lawgiver meant, rather than by what the lawgiver promulgated"). In order to distinguish the legal doctrine that has been set by the legislature at the time of a statute's passage from that which has been deferred for later decision, it is necessary to tie the statutory text to legislators at the time of passage, if only by positing some sort of constructive intent inferred from the text. Furthermore, the construction of the objectified reasonable legislator ties textual interpretation to the concept of democratically elected legislators. If an ideal-type legislator would read a statute that he or she passed to not decide a particular issue, a court's resolution of that issue based on what it deems to be the most plausible reading of the text is judge-made law (however guided by contemporaneous dictionaries) that cannot claim the legitimacy conferred by a democratically elected legislature.

For a thorough treatment of the relevance of different methods of statutory interpretation to Board decision making, see Daniel P. O'Gorman, *Construing the National Labor Relations Act: The NLRB and Methods of Statutory Construction*, TEMP. L. REV. (forthcoming 2009) (manuscript at 47-53, on file with author). Professor O'Gorman argues that the Board "should not interpret the Act like a court, except for . . . identifying and selecting permissible constructions Traditional tools of statutory interpretation — looking at text and congressional intent — should play no role." *Id.* at 51.

Alternatively, it could be considered ambiguous because of the combination of such unclear language *and* legislative history establishing there was no consensus among actual legislators as to its meaning, either because (i) that meaning was not given attention; or (ii) there were conflicting assumptions by various supporters.

Whether ambiguity turns on the text's meaning for an *idealized* reasonable legislative supporter or on the intent of *actual* supportive legislators, ambiguity usually indicates that no relevant legal doctrine has been made by the passage of the statute. Instead, it directs the statutory implementer to resolve the ambiguity by determining how the statute could be best implemented in the actual regulated world. An ideal conscientious legislator, finding no clear meaning in an ambiguous statutory provision, would not want an administrative implementer of a statute to construe the provision with more cursory consideration of the impact of that construction than the legislator would expect the implementer to give in the formulation of supplementary regulations. Similarly, actual legislators who consider an issue to be unresolved by a statute would want an implementer of the statute to make that resolution through the use of all the tools it would normally utilize in formulating legal doctrine under an explicit grant of rulemaking authority.

The Court's decision in *Chevron* indeed equated (i) the authority invested in an agency through an ambiguous statutory provision requiring construction; and (ii) the explicit authority invested in the same agency to engage in supplementary rulemaking. It did so, moreover, in a manner that indicated the standard of judicial review of both should be the same. The *Chevron* Court stated:

If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.³⁸

To read this frequently quoted passage to set a higher standard of review for explicit delegations than for implicit delegations of lawmaking authority denies the thrust of its meaning. Moreover, it creates a curious anomaly under which Congress is assumed to delegate *more* discretion to an agency when its conferral of authority can only be inferred through ambiguity than when Congress explicitly confers the authority. The more sensible reading of this passage equates the "reasonable interpretation" standard of review for implicit

³⁸ *Chevron U.S.A. Inc. v. Natural Res. Def. Council Inc.*, 467 U.S. 845, 843-44 (1984).

delegations with the arbitrary or capricious standard of review for explicit delegations.

Furthermore, the Court's analysis in *Chevron* makes clear that it upheld the Environmental Protection Agency's ("EPA") construction of an ambiguous statutory term as reasonable policymaking or lawmaking rather than as an adequate discernment of actual or theoretical legislative intent. The Court first determined that "parsing" the "text of the statute" does not "reveal an actual intent of Congress" to "confine" rather than "enlarge" the "scope of the agency's power to regulate."³⁹ The Court then reviewed the potentially relevant legislative history and found it "unilluminating."⁴⁰ The Court concluded the EPA had appropriately construed the word "source" — "not in a sterile textual vacuum, but in the context of implementing policy decisions in a technical and complex arena."⁴¹

The Court expressly upheld the EPA's regulation as a policy choice, applying standards of review appropriate for agency policymaking rather than for textual interpretation. The regulatory construction "represent[ed] a reasonable accommodation of manifestly competing interests . . . [because] the agency considered the matter in a detailed and reasoned fashion, and the decision involves reconciling conflicting policies."⁴² The Court, moreover, expressly rejected the idea that there was any congressional intent to be determined, suggesting instead three reasons for the statutory ambiguity:

Perhaps [Congress] consciously desired the Administrator to strike the balance at this level, thinking that those with great expertise and charged with responsibility for administering the provision would be in a better position to do so; perhaps it simply did not consider the question at this level; and perhaps Congress was unable to forge a coalition on either side of the question, and those on each side decided to take their chances with the scheme devised by the agency. For judicial purposes, it matters not which of these things occurred.

. . . [A]n agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments.⁴³

Of course, there may be cases where statutory ambiguity reflects poor draftsmanship rather than the implicit delegation of lawmaking authority described in *Chevron*. In these cases, the ambiguity presents a pure question of

³⁹ *Id.* at 861-62.

⁴⁰ *Id.* at 862.

⁴¹ *Id.* at 863. The EPA's construction determined the meaning of the "stationary sources" on which the Clean Air Act required the states to impose air pollution limitations. *Id.* at 840.

⁴² *Id.* at 865.

⁴³ *Id.*

statutory interpretation that is quite different from the kind of policy issues the Court reviewed in *Chevron*.⁴⁴ Justice Scalia explained the distinction in a published talk delivered a few years after the decision:

An ambiguity in a statute committed to agency implementation can be attributed to either of two congressional desires: (1) Congress intended a particular result, but was not clear about it; or (2) Congress had no particular intent on the subject, but meant to leave its resolution to the agency. When the former is the case, what we have is genuinely a question of law, properly to be resolved by the courts. When the latter is the case, what we have is the conferral of discretion upon the agency, and the only question of law presented to the courts is whether the agency has acted within the scope of its discretion – i.e., whether its resolution of the ambiguity is reasonable.⁴⁵

Thus, for purposes of the first kind of ambiguity, an agency can claim to look only at statutory text and legislative history for purposes of resolving actual, albeit unclear, congressional intent; however, the agency should not be able to claim *Chevron* deference to its delegated authority to make policy or law. For the second kind of case, the agency can claim *Chevron* deference, but it must meet the same requirements for reasonable policymaking that it would have to meet if it were engaging in supplemental lawmaking.

To be sure, even before delivering the talk quoted above, Justice Scalia had embraced *Chevron* as justification for agencies to claim judicial deference in decisions that purported to do no more than discern congressional intent or statutory meaning through a textual analysis, without the consideration of how

⁴⁴ See, e.g., *Young v. Cmty. Nutrition Inst.*, 476 U.S. 974, 980-81 (1986) (holding that while Congress was “speaking directly to the precise question at issue in this case,” the ambiguity arose because of poor drafting of the statute). Justice O’Connor’s majority opinion expressly recognized that Congress possessed a particular, albeit ambiguous, intent, and thus was not delegating discretion to the Secretary. *Id.* at 980 (stating she “cannot agree . . . that Congress unambiguously expressed its intent through its choice of statutory language”). Justice O’Connor did not explain, however, why the Secretary was better able to resolve the grammatical ambiguity than she and the other Justices. *Id.* (finding that the agency’s interpretation was “sufficiently rational to preclude a court from substituting its judgment for the FDA”). Moreover, she did not discuss the tension between the authority of courts to determine existing law and her acceptance of the FDA’s authority to determine law already set by Congress. For a more refined elaboration of how the ambiguity in *Young* differed from the type of ambiguity treated in *Chevron*, see Note, *A Pragmatic Approach to Chevron*, 112 HARV. L. REV. 1723, 1735-37 (1999) (arguing that the *Young* Court “wrongly deferred to the agency’s interpretation” because the statute “did not create the implicature that the legislature delegated . . . the task of choosing between grammatical readings”). For a discussion of the tension between “judicial abdication” and deference to administrative agencies, see *infra* note 80.

⁴⁵ Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 516. For a clear example of the first type of ambiguity described by Justice Scalia, see *Young*, 476 U.S. at 975-76.

statutory policies can be best balanced and implemented in the regulated world for which the *Chevron* Court commended the EPA.⁴⁶ Moreover, Justice Scalia’s expansive view of the kind of decisions for which *Chevron* deference is appropriate accords with some of the Court’s earlier post-*Chevron* decisions.⁴⁷

More recent significant Supreme Court elaborations of *Chevron*, however, issued over strenuous dissents from Justice Scalia, can be best understood as a confirmation that agencies can claim *Chevron* deference for the kind of policy- or lawmaking authority that can be judicially constrained by meaningful arbitrary or capricious review, but not for the mere declamation of the law made by Congress. Consider first the Court’s holdings that agency statutory interpretations contained in administrative pronouncements that “lack the force of law” do not warrant *Chevron*-style deference.

In *Christensen v. Harris County*,⁴⁸ the Court, in an opinion authored by Justice Thomas, interpreted a somewhat ambiguous provision of the Fair Labor Standards Act (“FLSA”) as only preventing states from denying reasonable employee requests to use compensatory time – granted in lieu of overtime payments – rather than also preventing states from requiring employees to use such compensatory time.⁴⁹ Justice Thomas rebuffed an argument that the Court should defer under *Chevron* to an opinion letter issued by the Department of Labor – the executive bureau responsible for implementing the FLSA – interpreting the contested statutory provision.⁵⁰ Justice Thomas explained that “like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law,” an “interpretation contained in an opinion letter, [as opposed to] one arrived at after . . . a formal adjudication or notice-and-comment rulemaking[,] . . . do[es]

⁴⁶ For example, see Justice Scalia’s concurring opinion in *INS v. Cardoza-Fonseca*, where he objected to the majority’s assertion that courts “may substitute their interpretation of a statute for that of an agency whenever they face ‘a pure question of statutory construction for the courts to decide.’” *INS v. Cardoza-Fonseca*, 480 U.S. 421, 454-55 (1987) (Scalia, J., concurring). Justice Stevens’s majority opinion assumed the issue in the case – whether the proof standards in two provisions of the Immigration and Nationality Act were the same – must have been decided by Congress and thus was subject to the courts’ “final authority.” *Id.* at 448 (majority opinion) (“If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.” (quoting *Chevron*, 467 U.S. at 843 n.9)); see also *NLRB v. United Food & Commercial Workers Union*, 484 U.S. 112, 123 (1987) (“On a pure question of statutory construction, our first job is to try to determine congressional intent, using ‘traditional tools of statutory construction.’” (quoting *Cardoza-Fonseca*, 480 U.S. at 446)).

⁴⁷ See, e.g., *Young*, 476 U.S. at 975-76. For further discussion of *Young*, see *supra* note 44.

⁴⁸ 529 U.S. 576 (2000).

⁴⁹ *Id.* at 585.

⁵⁰ *Id.* at 587.

not warrant *Chevron*-style deference.⁵¹ The message of *Christensen* to agencies should have been easily understandable: to obtain *Chevron* deference you must make policy or law through a process – like adjudication or legislative rulemaking – by which you have authority to make policy or law; if you purport only to opine on the meaning of the law made by Congress, you are subject to being trumped by a judiciary that is as skilled as any executive bureau in divining such meaning.⁵²

Thus, the *Christensen* opinion is a direct rejection of Justice Scalia's interpretation of *Chevron* to apply to cases in which the agency does no more than analyze the law made by Congress. In his concurring opinion in *Christensen*, for which he garnered the support of no other Justice, Justice Scalia asserted that any "authoritative view" or "official position" of an agency on the meaning of a statute for which it is responsible should be given *Chevron* deference, because the agency should be presumed to possess delegated authority to determine the law made by Congress in addition to delegated authority to make further law to advance the statutory system.⁵³

In *United States v. Mead Corp.*⁵⁴ the Court, in an opinion by Justice Souter for seven other Justices, again rejected Justice Scalia's reading of *Chevron*.⁵⁵

⁵¹ *Id.* Justice Thomas's opinion also notes the existence of a Department of Labor regulation that the Department claims is interpreted by the opinion letter, *id.* at 588, but stresses that the regulation unambiguously supports the Court's interpretation of the contested provision rather than that of the Department's opinion letter. *Id.* Justice Thomas tellingly does not indicate that the statutory language would prevent the Department from amending its regulation to make new law in line with the position taken in the opinion letter.

⁵² Some did read *Christensen* somewhat differently, however. See, e.g., Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833, 881 (2001) (arguing that *Chevron* should only apply where the agency's action "of its own force and effect, . . . commands certain behavior and subjects parties to penalties or sanctions if they violate this command"). This covers most agency adjudication, as well as agency legislative rulemaking; but as acknowledged by the authors, notwithstanding the Court's reliance on *Chevron* in the judicial review of Labor Board decisions, it does not cover Board adjudications because they are not self-enforcing. *Id.* at 891-92 ("Because the order is not legally binding of its own force, the factual and legal basis of the order is subject to judicial review . . ."); see also 29 U.S.C. § 160(e) (2000) (granting the Board the "power to petition any court of appeals of the United States . . . for the enforcement of [the Board's] order[s]"). Merrill's and Hickman's misinterpretation of *Christensen*, and thus their focus on the irrelevant consideration of whether an adjudication must be enforced in court, derives from their failure to distinguish between an agency action that has the force of law through processes by which the agency is authorized to make law and an agency action that purports to do no more than discover and then apply law that has already been made by Congress.

⁵³ *Christensen*, 529 U.S. at 590-91 (Scalia, J., concurring in part and concurring in the judgment) ("[W]e have accorded *Chevron* deference not only to agency regulations, but to authoritative agency positions set forth in a variety of other formats.")

⁵⁴ 533 U.S. 218 (2001).

⁵⁵ *Id.* at 237-38. Justice Scalia wrote a long and vehement dissent. *Id.* at 252 (Scalia, J., dissenting) ("Congress could not . . . have acted in reliance on a background assumption that

The Court in *Mead* held that rulings of the United States Customs Service that set tariff classifications for particular imports do not warrant *Chevron*-style deference because of the lack of any "indication that Congress meant to delegate authority to Customs to issue classification rulings with the force of law."⁵⁶ As later confirmed by the Court, *Mead* stands for the proposition that "[d]eference in accordance with *Chevron* . . . is warranted only 'when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.'"⁵⁷ The Court in *Mead* looked beyond the fact that the tariff rulings are not issued pursuant to the Customs Service's formal rulemaking or adjudicatory authority, and found the rulings rely on law made by Congress and do not purport to make additional law that could bind the government and other parties.⁵⁸ The Court concluded that in the absence of at least "implicit congressional delegation" of "authority to fill a specific statutory gap,"⁵⁹ an agency like the Customs Service can claim for its opinions on congressional intent only the respect, under the older *Skidmore v. Swift* precedent,⁶⁰ warranted by the opinions' "power to persuade."⁶¹

Justice Scalia's lone dissent in *Mead* never directly addressed the importance of the majority's distinction between: additional or supplementary law made by an agency with delegated authority, for which *Chevron* deference is appropriate; and the agency's opinion on what law already has been made by Congress, for which *Chevron* deference is not appropriate.⁶² That distinction clarifies not only the meaning of the line drawn in *Christensen* and elaborated on in *Mead*, but also why agencies must justify any legal policy they formulate with full consideration of the actual impact of the choices the policy embodies.⁶³

Chevron deference would generally be accorded only to agency interpretations arrived at through formal adjudication [or] notice-and-comment rulemaking . . .").

⁵⁶ *Id.* at 231-32 (majority opinion).

⁵⁷ *Gonzales v. Oregon*, 546 U.S. 243, 255-56 (2006) (quoting *Mead*, 533 U.S. at 226-27). This language also has been cited by lower courts to limit the scope of *Chevron* deference. See, e.g., *Michigan v. EPA*, 268 F.3d 1075, 1081 (D.C. Cir. 2001) (holding that EPA has no authority to promulgate rules beyond the boundary set by Congress).

⁵⁸ *Mead*, 533 U.S. at 231-34 ("It is difficult . . . to see in the agency practice any indication that Customs ever set out with a lawmaking pretense in mind when it undertook to make classifications like these.")

⁵⁹ *Id.* at 237.

⁶⁰ *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

⁶¹ *Mead*, 533 U.S. at 235 (quoting *Skidmore*, 323 U.S. at 140).

⁶² *Id.* at 239-61 (Scalia, J., dissenting).

⁶³ Justice Scalia's willingness to join in the Court's later unanimous decision in *Long Island Care at Home, Ltd. v. Coke*, 127 S. Ct. 2339 (2007), however, may suggest he is finally willing to relent to the Court's recognition of the distinction between an agency making new law by filling a statutory gap and an agency determining the law made by

The Court's decision in *Brand X* also reflects the Court's acceptance of the importance of this distinction to the scope and meaning of *Chevron* review. Much to the dismay of Justice Scalia, in *Brand X* the Court held, in another opinion by Justice Thomas, that "[a] court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion."⁶⁴ It made no difference to the Court that the prior judicial construction – on which the lower appellate court had relied in *Brand X*⁶⁵ – was not issued in review of an administrative proceeding and thus was not based on the grant of *Chevron* deference to an agency construction.⁶⁶ In order to receive deference to its own construction of a statute, the agency must

Congress. *Id.* at 2345-46 ("When an agency fills [a statutory gap] reasonably, and in accordance with other applicable . . . requirements, the courts accept the result as legally binding." (citing *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984))). In *Long Island*, the Court granted *Chevron*-style deference to a regulation of the Department of Labor exempting third-party-employed companionship workers from the FSLA's coverage. The Court engaged an argument from one of these workers that the regulation was only "an 'interpretative' regulation, a kind of regulation that may be used, not to fill a statutory 'gap,' but simply to describe an agency's view of what a statute means," and thus does not "bind" a reviewing court. *Id.* at 2349. The Court did not dismiss as irrelevant the worker's argument, which had been adopted in the appellate decisions being reviewed. *Coke v. Long Island Care at Home, Ltd.*, 462 F.3d 48, 50 (2d Cir. 2006) (concluding that the regulation "was meant to be an interpretive rule"), *rev'd*, 127 S. Ct. 2339 (2007); *Coke v. Long Island Care at Home, Ltd.*, 376 F.3d 118, 131 (2d Cir. 2004) ("We find § 552.109(a) to be an interpretive rather than a legislative regulation."), *vacated*, 546 U.S. 1147 (2006). Rather, the Court rejected the argument's premise that the regulation only interpreted already formulated law by carefully explaining that the Department's actions in developing the rule indicated that the Department intended to create new binding law. The Court concluded that "the ultimate question is whether Congress would have intended, and expected, courts to treat an agency's rule, regulation, application of a statute, or other agency action as within, or outside, its delegation to the agency of 'gap-filling' authority." *Long Island*, 127 S. Ct. at 2350 (emphasis omitted).

⁶⁴ *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005). The Court distinguished several of its previous decisions, including *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992), as having held, under Step One of *Chevron*, that an executive agency's new construction of a statute was contrary to a construction that the Court had previously found to be required because the statute was not ambiguous and allowed the agency no discretion. *Brand X*, 545 U.S. at 984. In *Lechmere*, the Court interpreted its earlier decision in *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956), as "saying, in *Chevron* terms, that section 7 speaks to the issue of nonemployee access to an employer's property." *Lechmere*, 502 U.S. at 537. While this interpretation of *Babcock & Wilcox* is both forced and inconsistent with the ambiguous general words of section 7 of the National Labor Relations Act, 29 U.S.C. § 157 (2000), it does establish that the Court's decision in *Lechmere* was not inconsistent with its decision in *Brand X*.

⁶⁵ *Brand X*, 545 U.S. at 982.

⁶⁶ *Id.* at 979-80.

formulate that construction through appropriate lawmaking proceedings;⁶⁷ but contrary to an assumption made by Justice Scalia in his dissent in *Mead*,⁶⁸ it need not do so before a judicial construction is pronounced.⁶⁹

As suggested above, the lessons of *Brand X* for agencies concerned about judicial review of their constructions and reconstructions of statutory provisions are not all liberating. While Justice Thomas's opinion explicitly addressed concerns expressed by Justice Scalia in his *Mead* dissent about the "ossification" of administrative law by judicial constructions,⁷⁰ it also implicitly underscored the power of courts to moderate the oscillation of such constructions. It did so by highlighting that judicial review under *Chevron* includes consideration of whether a new agency formulation is irrationally inconsistent with other agency legal formulations, and whether it reasonably takes into account all relevant factors about the contemporary world the agency regulates. *Brand X* gave the same kind of review to the FCC's construction of the ambiguous meaning of a "telecommunications service" subject to regulation as a common carrier under the Communications Act as the Court would have given to the FCC's exercise of some expressly delegated lawmaking authority,⁷¹ such as the authority to set the details of the regulation to which such common carriers are subject.

Applying Step Two of *Chevron* review, Justice Thomas closely examined the FCC's "understanding of the nature of cable modem service" that the Commission found not to be a "telecommunications service."⁷² Justice Thomas found this understanding to be "reasonable" and thus worthy of deference only after determining that it was based on a consideration of the actual contemporaneous technical operation of this service;⁷³ he did not end the

⁶⁷ *See id.* at 1004 (Breyer, J., concurring).

⁶⁸ *United States v. Mead*, 533 U.S. 218, 247-49 (2001) (Scalia, J., dissenting) (suggesting an agency will now be required "to act by rulemaking (rather than informal adjudication) before the issue is presented to the courts").

⁶⁹ *See Brand X*, 545 U.S. at 983 ("[W]hether Congress has delegated to an agency the authority to interpret a statute does not depend on the order in which the judicial and administrative constructions occur.").

⁷⁰ Justice Scalia argued in his dissent in *Mead* that restricting the scope of *Chevron* will ossify statutory law because judicial decisions that grant *Chevron* deference to an agency decision do not preclude a later alternative reasonable construction of the statute by the agency, while judicial decisions that do not grant such deference do not allow such modifications. *Mead*, 533 U.S. at 247-49 (Scalia, J., dissenting). Justice Thomas's opinion in *Brand X* addresses this concern in part by rejecting Justice Scalia's assumption that a judicial decision that interprets an ambiguous statute outside the processes of agency review necessarily precludes the agency from formulating new law under the statute. *Brand X*, 545 U.S. at 983.

⁷¹ *See* 47 U.S.C. § 153(46) (2006).

⁷² *Brand X*, 545 U.S. at 997-1000.

⁷³ *Id.* (finding that the "nature of cable modem service" is "not a transparent ability . . . to transmit information").

Court's review with a consideration of the language and history of the provision applied by the FCC. Furthermore, Justice Thomas addressed the argument that the FCC's exemption of cable internet service was "arbitrary and capricious" because it was inconsistent with the FCC's regulation of internet service over digital telephone lines.⁷⁴ He responded not by reviewing again whether this differential treatment might reasonably have been intended by actual or ideal legislators, but rather by considering the history of the development of the FCC's views on the regulation of internet services.⁷⁵

The understanding of the *Brand X* Court that *Chevron* review embodies, or at least is to be supplemented by,⁷⁶ the arbitrary or capricious review standard of *State Farm* is in accord with its understanding that *Chevron* deference is appropriate only for review of agency supplementary lawmaking and not for agency determinations of the law actually made by Congress. The latter understanding is reflected in the Court's response to Justice Scalia's argument that it is "probably unconstitutional" for an agency to refuse to follow a construction of a statute provided by a court de novo rather than through deference to the agency's construction.⁷⁷ Justice Scalia's argument is based on the premise that executive agencies must follow the judgments of courts and on his view that a court's de novo construction of a statute, unlike its decision "to defer to an agency's position," constitutes a judgment on what that statute must mean.⁷⁸ Justice Thomas does not dispute the former premise, but he rejects Justice Scalia's view concerning the force of a de novo judicial construction of an ambiguous statute for which the court does not purport to determine a particular intended meaning. Justice Thomas asserts that "the agency's decision to construe [the] statute differently from a court does not say that the court's holding was legally wrong. Instead, the agency may, consistent with the court's holding, choose a different construction, since the agency remains the authoritative interpreter (within the limits of reason) of such statutes."⁷⁹ As a response to Justice Scalia, this passage must be read to apply only to administrative "interpretations" or "constructions" of statutes made within the agency's delegated discretion to fill in gaps created by statutory ambiguities. It cannot apply to determinations of law on which Congress can be said to have had a particular meaning, however difficult that meaning is to discern.⁸⁰ For such determinations, Justice Scalia's view of the force of a judicial determination must be correct.⁸¹

⁷⁴ *Id.* at 1000-02.

⁷⁵ *Id.*

⁷⁶ See *infra* note 85 and accompanying text.

⁷⁷ *Brand X*, 545 U.S. at 1017 (Scalia, J., dissenting).

⁷⁸ *Id.* at 1017 & n.12.

⁷⁹ *Id.* at 983 (majority opinion).

⁸⁰ This is indeed made clear in section 706 of the APA, which pronounces that "the reviewing court shall decide all relevant questions of law." 5 U.S.C. § 706 (2006). More importantly, applying Justice Thomas's response to cases where a court determines

Congress has in fact set particular law, however inartfully and thus ambiguously, would raise a more fundamental constitutional problem that seems to have escaped Justice Scalia: whether the judiciary can abdicate its constitutional authority to determine what law has been made by the other branches of government. As stated in a frequently cited passage from *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), "[i]t is emphatically . . . the duty of the judicial department to say what the law is." *Id.* at 177. This problem did not escape the attention of Professors Henry Hart and Henry Monaghan. See Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1362-63 (1953) (discussing the constitutional problems that stem from Congress's ability to "regulate the jurisdiction of the federal courts"); Henry P. Monaghan, *Marbury and the Administrative State*, 83 COLUM. L. REV. 1, 5 (1983) ("Our inquiry is the extent to which the Constitution controls the allocation of functions between court and administrative agency in statutory interpretation."). As Professor Monaghan explains, the constitutional problem with judicial deference to administrative statutory constructions can be resolved as long as the courts retain discretion to determine legal boundaries actually set by Congress:

A statement that judicial deference is mandated to an administrative "interpretation" of a statute is more appropriately understood as a judicial conclusion that some substantive lawmaking authority has been conferred upon the agency. Where deference exists, the court must specify the boundaries of agency authority, within which the agency is authorized to fashion authoritatively part, often a large part, of the meaning of the statute.

Monaghan, *supra*, at 6. In other words, judicial deference to administrative statutory interpretation is consistent with the constitutionally imposed duty of the judiciary, where that deference expresses acceptance of congressional delegation of lawmaking authority to the executive agency. Courts would ignore their duties if they were to defer to the executive's determination of law set by Congress, including the boundaries of the executive's lawmaking authority. See Michael Herz, *Deference Running Riot: Separating Interpretation and Lawmaking Under Chevron*, 6 ADMIN. L.J. AM. U. 187, 199, 202 (1992).

⁸¹ Justice Thomas's opinion in *Brand X* states that a "court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference . . . if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion." *Brand X*, 545 U.S. at 982. Although the opinion does not expressly address the case of a judicial determination that an ostensibly ambiguous and poorly drafted statute, like that in *Young v. Community Nutrition Institute*, 476 U.S. 974 (1986), was intended by Congress to have a particular meaning, the thrust of the Court's analysis would indicate that such a judicial determination would be controlling on the agency as well. In such a case, the Court would announce its decision as what Congress intended, not merely as the Court's own view on the best way to advance congressional intent.

Furthermore, the Court has relied on *Brand X*, as well as on *Mead*, to state that as a precondition for *Chevron* deference, the "ambiguity in the statute" must mean "Congress has not previously spoken to the point at issue." *Global Crossing Telecomms., Inc. v. Metrophones Telecomms., Inc.*, 127 S. Ct. 1513, 1522 (2007); see also *Long Island Care at Home, Ltd. v. Coke*, 127 S. Ct. 2339, 2345-46 (2007). Justice Breyer's opinions for the Court in both *Global Crossing* and *Long Island Care* were not surprising in light of the skepticism he had expressed about the desirability of reading *Chevron* broadly soon after its pronouncement. See generally Stephen Breyer, *Judicial Review of Questions of Law and*

After *Brand X*, it thus should be clear to courts, if it was not clear before, that their review of agency formulations of legal doctrine should include the serious arbitrary or capricious review delineated in decisions like *State Farm*. This is true even in cases where the agency formulations are embodied in statutory constructions for which *Chevron* deference is claimed. Meaningful arbitrary or capricious review is available for such cases whether it is applied as part of *Chevron* Step Two analysis, as anticipated by the Court in *Chevron*, or as a supplementary step, as in *Brand X*.

Indeed, a number of lower court decisions have recognized that *Chevron* and arbitrary or capricious review can be combined when considering agency constructions of ambiguous statutory terms.⁸² Opinions from the District of Columbia Circuit Court of Appeals, in particular, have highlighted the applicability of arbitrary or capricious review to agency statutory construction. These opinions have differed somewhat over whether this review overlaps with or is part of *Chevron* Step Two, or whether it provides an additional, somewhat distinct type of supplementary review.⁸³ This disagreement, while

Policy, 38 ADMIN. L. REV. 363 (1986). In this article, Justice Breyer recognized the anomaly of courts deferring "to administrative interpretations of regulatory statutes," while reviewing "agency decisions of regulatory policy strictly." *Id.* at 364-65. More significantly, he recognized that a theory of deference that is based on Congress "delegating the power to the agency . . . gives the agency flexibility to adapt or to modify past policies. By contrast, a theory of deference based upon the agency knowing original congressional intent 'better' than the court, tends to insulate administrative policies adopted early in a statute's history from later change." *Id.* at 371.

⁸² See, e.g., *Yale-New Haven Hosp. v. Leavitt*, 470 F.3d 71, 79 (2d Cir. 2006); *United States Telecom Ass'n v. FCC*, 227 F.3d 450, 460-61 (D.C. Cir. 2000) (finding it unnecessary to "address the Commission's plea for *Chevron* deference" where there exists "a classic case of arbitrary and capricious agency action"); *Allied Local & Reg'l Mfrs. Caucus v. EPA*, 215 F.3d 61, 68 (D.C. Cir. 2000) (applying the standards set forth in *Chevron* as well as those in *State Farm* to petitioner's challenge of an EPA rule); *Cincinnati Bell Tel. Co. v. FCC*, 69 F.3d 752, 761-62 (6th Cir. 1995) (reviewing "challenges to an agency's construction of its organic statute under *Chevron*" and "a substantive challenge to the FCC's rules" under the arbitrary and capricious standard); *Nat'l Mining Ass'n v. EPA*, 59 F.3d 1351, 1354, 1362 (D.C. Cir. 1995) (discussing the application of arbitrary or capricious review as well as *Chevron* Step Two); *Nat'l Ass'n of Regulatory Util. Comm'rs v. ICC*, 41 F.3d 721, 726 (D.C. Cir. 1994) ("[T]he inquiry at the second step of *Chevron* overlaps analytically with a court's task . . . in determining whether agency action is arbitrary and capricious (unreasonable)."; see also Laurence H. Silberman, *Chevron - The Intersection of Law & Policy*, 58 GEO. WASH. L. REV. 821, 827-28 (1990) ("It may well be that the second step of *Chevron* is not all that different analytically from the APA's arbitrary and capricious review.").

⁸³ Compare *Animal Legal Def. Fund, Inc. v. Glickman*, 204 F.3d 229, 235 (D.C. Cir. 2000) (explaining that "the explanation that renders the Secretary's interpretation of the statute reasonable also serves to establish that the final rule was not arbitrary and capricious"), with *Arent v. Shalala*, 70 F.3d 610, 615-16 (D.C. Cir. 1995) (finding that although "*Chevron* review and arbitrary and capricious review overlap at the margins," the

conceptually interesting,⁸⁴ is of no practical consequence as long as courts have the authority to demand that an agency like the NLRB defend any policy made through the construction of ambiguous or open-ended statutory terms, not only by showing it to be a reasonable interpretation of those terms, but also by providing the "reasoned explanation" required by *State Farm*.⁸⁵

latter provides a separate ground for challenging an agency's construction of ambiguous statutory language). See also *Indep. Petroleum Ass'n of Am. v. Babbitt*, 92 F.3d 1248, 1258 (D.C. Cir. 1996) (holding that arbitrary or capricious review is "functionally equivalent" to *Chevron* review when applied to agency statutory construction); *Republican Nat'l Comm. v. Fed. Election Comm'n*, 76 F.3d 400, 407 (D.C. Cir. 1996) (using separate application of arbitrary or capricious review).

⁸⁴ The disagreement derives in part from different conceptions as to what is settled under *Chevron* Step One. If Step One settles not only that the statute is ambiguous, but also that the ambiguity encompasses the "precise" position taken by the agency, then all that is left for Step Two is to address whether the agency has reasonably justified its position as a matter of policy - the precise question addressed under arbitrary or capricious review. However, if Step One review settles only that the relevant statutory provision has some degree of ambiguity, then Step Two review must address whether the agency's particular construction of the provision is reasonable, and a supplementary arbitrary or capricious review can determine whether this construction was reasonably justified by the agency.

In my view, the Court should clarify that *Chevron* Step One review is to settle whether the agency's position is within the scope of the ambiguity intended by Congress; and that Step Two review thus has no function beyond incorporating the arbitrary or capricious standard. As Professor Ronald Levin has well argued, settling all the questions of legislative intent under *Chevron* Step One and using Step Two to determine whether the agency can satisfy the arbitrary or capricious review standard for policymaking has the virtues of clarity and simplicity without sacrificing any tool of judicial control. See Ronald M. Levin, *The Anatomy of Chevron Step Two Reconsidered*, 72 CHI.-KENT L. REV. 1253, 1255 (1997). This approach divides the analysis at Step One, of whatever the court may find relevant to statutory meaning at the time of the passage of the statute, from the analysis at Step Two, of the agency's use of reasoning and evidence to advance the statute's purposes and accommodated interests at the time of the agency's law or policymaking.

For other commentary advocating making *Chevron* Step Two and arbitrary or capricious review equivalent, see, for example, RICHARD J. PIERCE, JR., *ADMINISTRATIVE LAW* § 7.4, at 453 (4th ed. 2002), which recognizes that "[t]he two tests ask the same question, and courts should use the same approach to answer the question." See also Mark Seidenfeld, *A Syncopated Chevron: Emphasizing Reasoned Decisionmaking in Reviewing Agency Interpretations of Statutes*, 73 TEX. L. REV. 83, 127-30 (1994) (advocating, through analysis of democratic theory, that courts require "reasoned decisionmaking" as part of *Chevron* Step Two review); Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071, 2105 (1990) (arguing that in *Chevron*'s Step Two, the "reasonableness inquiry should probably be seen as similar to the inquiry into whether the agency's decision is 'arbitrary' or 'capricious' within the meaning of the APA").

⁸⁵ While recognizing that traditional arbitrary or capricious policymaking review is appropriate in some cases after *Chevron* Step One review of an agency's construction of a statute, Professor Lawson argues that in many other cases the agency should be able to defend its construction as the "best resolution to the question of statutory meaning" through

The fact that courts do have this authority is significant for review of Board decisions that reject prior Board precedent or otherwise formulate new legal doctrine. This authority enables courts to prevent the Board from justifying the formulation of new doctrine by claiming the doctrine is a plausible interpretation of the statutory language, and that as a politically responsive executive agency it has delegated discretion to choose any plausible interpretation. A court's analysis of congressional meaning as embodied in the words of the statute is only sufficient to determine whether Congress can be said to have enacted the particular doctrine, and only the particular doctrine, chosen by the Board. If a reviewing court does not agree that such specific congressional meaning existed – if it believes Congress instead delegated to the Board the discretion to choose or reject the doctrine under review – the Board must offer a reasoned explanation satisfying the *State Farm* arbitrary or capricious standard for its choice of such doctrine.⁸⁶

This "reasoned explanation" must do more than consider material – such as clues to the meaning of statutory words or legislative history – relevant to congressional intent. It must consider how the doctrine under review will advance or impede the fulfillment of the statute's policies, goals, and commands in the contemporary world, as well as any other "important aspect of the problem" that Congress meant it to consider.⁸⁷ The Board majority must also consider any relevant evidence of the doctrine's contemporary impact presented by any of the Board's members or by the parties.

Clearly, the kind of judicial review described above demands more from the Board when it formulates doctrine that departs from or overturns precedent. Support for doctrine as applied in a particular case can be derived from the Board members' experience with the practical impact of the doctrine as applied in other cases. Where Board precedent is being revised or overturned,

the "traditional tools of statutory interpretation." Gary Lawson, *Reconceptualizing Chevron and Discretion: A Comment on Levin and Rubin*, 72 CHI.-KENT L. REV. 1377, 1382 (1997); see also Gary Lawson, *Outcome, Procedure and Process: Agency Duties of Explanations for Legal Conclusions*, 48 RUTGERS L. REV. 313, 331 (1996). This argument assumes, in my view incorrectly, that *Chevron* directs courts to defer not only to an agency's exercise of policymaking expertise, but also to an agency's divination of congressional meaning. See *supra* note 80 and accompanying text. Instead, the courts should decide whether Congress intended a specific meaning, and if so, what that meaning was. In most cases of ambiguity Congress does not have such intent, and the courts should defer to reasoned analysis by an agency with delegated authority to resolve the ambiguity. *But see supra* note 44 and accompanying text.

⁸⁶ See *supra* note 24 and accompanying text.

⁸⁷ *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) ("Normally, an agency rule would be arbitrary and capricious if the agency . . . entirely failed to consider an important aspect of the problem . . ."); see also *PDK-Labs., Inc. v. DEA*, 362 F.3d 786, 797-98 (D.C. Cir. 2004) ("[I]t is incumbent upon the agency not to rest simply on its parsing of the statutory language. It must bring its experience and expertise to bear in light of competing interests at stake.")

however, and especially when current Board members dissent, the weight of Board expertise must be considered slight. In such cases of controversial reversals, the courts can demand that the Board act only at a studied pace, after the collection and consideration of the best evidence reasonably available on the impact of the old doctrine that is being overturned.

Admittedly, whether the Board uses rulemaking or adjudication to pronounce new legal doctrine, the courts cannot realistically require the Board to have definitive or even suggestive empirical support for all of its assumptions of legislative fact. The NLRA prohibits the Board from employing "individuals for the purpose of . . . economic analysis."⁸⁸ The Board does not have the resources or means to monitor systematically the impact of doctrine on industrial relations, and there is limited outside research available on labor relations practices.⁸⁹ Where a Board majority rests its policy balance on a questionable assumption of legislative fact that is contested by some Board members, however, a court certainly can require the Board to at least review systematically its experience with prior doctrine and to consider any relevant data or studies that could be readily garnered by the Board's staffs or by interested parties.⁹⁰

II. EXAMPLES OF BOARD POLICYMAKING THROUGH STATUTORY CONSTRUCTION

Drawing from the above analysis, an examination of several of the more prominent decisions of the Bush-appointed Labor Board can be used to demonstrate that the current standards for judicial review of the Board's exercise of administrative discretion afford the federal courts adequate tools to discourage the Board's continuing reversal of doctrine without totally eliminating the Board's policymaking flexibility. These cases also demonstrate that courts should not allow the Board to distinguish between Congress' implicit delegation of lawmaking power through the use of ambiguous statutory language, and the more explicit delegation of discretion as expressed in the Act's grant of rulemaking authority.⁹¹ The exercise of both

⁸⁸ 29 U.S.C. § 154(a) (2000).

⁸⁹ See Bernstein, *supra* note 4, at 578 ("What the Board lacks notably is . . . specific information about labor-management practices and employee attitudes and reactions that may be pertinent to its work . . .").

⁹⁰ As acknowledged *supra* note 30, the courts cannot require the Board to utilize any particular procedures, such as its common practice of solicitation of amicus briefs, to collect relevant empirical data relevant to the debates on important legislative facts in adjudications. However, since the courts should be able to require the Board to provide the same kind of substantive support for any policy formulated in adjudication as if the same policies had been formulated in a rulemaking, the Board can be required to utilize in an adjudication some means of its choosing for insuring review of relevant available empirical studies.

⁹¹ See 29 U.S.C. § 156.

these formally distinct forms of discretion requires the Board to make policy decisions, and in doing so to consider the impact on actual labor relations.

The first two of these cases illustrate how the judiciary could moderate oscillations of Board doctrine by employing the meaningful arbitrary or capricious judicial review elaborated above. The second two cases illustrate that such judicial review need not restrict the ultimate discretion of Boards appointed by different Presidents to set different policy balances through reasoned decision making. The fifth case demonstrates the type of judicial review that should be given to significant Board resolutions of statutory ambiguity, even where those resolutions do not directly reverse prior Board doctrine.

A. *Reversing a Policy Judgment Without Consideration of Relevant Legislative Facts; Graduate Students as Employees?*

In *Brown University*,⁹² the Board in a 3-2 decision held that graduate students whose relationship with their university is "primarily educational" are not employees protected by the NLRA, even if they perform compensated teaching or research responsibilities for and under the control of their university.⁹³ The Board asserted this holding was mandated by the statute⁹⁴ and required a reversal of a prior ruling of the Clinton-appointed Board, *New York University*,⁹⁵ which had held that graduate students performing compensated teaching assignments were employees.⁹⁶ For the Board in *Brown*, graduate student teachers or research assistants have a primarily educational rather than economic relationship with a university if "they spend only a limited number of hours performing their duties, . . . their principal time commitment . . . is focused on obtaining a degree and, . . . their service as a graduate student assistant is part and parcel of the core elements" of the degree.⁹⁷ The Board held that it cannot protect such students as employees under the Act,⁹⁸ even if they satisfy the common-law definition of "employee" and even though the Act's list of express exclusions from the definition of "employee" do not include one for students who have alternative primary relationships with their putative employers.⁹⁹ The Board based its finding of

⁹² 342 N.L.R.B. 483 (2004).

⁹³ *Id.* at 487, 494.

⁹⁴ *Id.* at 487.

⁹⁵ 332 N.L.R.B. 1205 (2000), *overruled by* *Brown University*, 342 N.L.R.B. 483 (2004).

⁹⁶ *Id.* at 1209.

⁹⁷ *Brown*, 342 N.L.R.B. at 488.

⁹⁸ *Id.* at 494.

⁹⁹ Section 2(3) of the Act states:

The term "employee" . . . shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual

an implied exclusion of graduate student assistants on its interpretation of the NLRA as being "designed to cover economic relationships" rather than those that are primarily educational.¹⁰⁰

The *Brown* Board's claim that the statute affords it no discretion to treat as employees those who have a "primarily educational" relationship with the entity that pays them for their work is a claim that Congress decided such workers are to be excluded from coverage.¹⁰¹ It is not merely a claim that Congress did not decide the question of coverage of such workers and thereby delegated to the Board the discretion to answer this question. The *Brown* Board's claim about the meaning of the statute thereby subsumes an additional claim that the coverage of such workers under the Board's earlier *New York University* decision would have been reversible by a court under *Chevron* Step One review.¹⁰²

Whatever its view of the ultimate result in *Brown*, and whatever its mode of statutory interpretation, a reviewing court should have little difficulty rejecting the claim that this result was mandated by the statute and that the contrary position taken in *New York University* could not have survived *Chevron* Step One review. The statute does not define the word "employee" except by certain express exclusions, none of which are relevant to graduate students who are paid for work by the universities that also offer them education.¹⁰³ Furthermore, the *Brown* Board could cite no legislative history even indirectly referring to the coverage of those in an educational relationship with a possible employer.¹⁰⁴ In other cases not governed by statutory language or clear legislative history, the Supreme Court has repeatedly confirmed that the statute's "broad" and open-ended definition of employee should be read to afford the Board considerable discretion or "legal leeway" in setting the meaning of the term, at least when it does so consistent with the common law of agency.¹⁰⁵

Prior Supreme Court decisions, because of their stress on the common law,¹⁰⁶ might be read to support the argument that the statute requires the

employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

29 U.S.C. § 152(3) (2000).

¹⁰⁰ *Brown*, 342 N.L.R.B. at 488.

¹⁰¹ *See id.*

¹⁰² *See* *Chevron U.S.A. Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842-43 (2004).

¹⁰³ *See* 29 U.S.C. § 152(3) (describing the exceptions required by statute).

¹⁰⁴ *See Brown*, 342 N.L.R.B. at 483-93.

¹⁰⁵ *See* *NLRB v. Town & Country Elec., Inc.*, 516 U.S. 85, 90-94 (1995) (upholding the Board's inclusion of union organizers as statutory employees of employers for whom they simultaneously provide services and attempt to organize); *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 891-92 (1984) (upholding the Board's inclusion of undocumented aliens).

¹⁰⁶ *See, e.g.,* *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322-23 (1992) (interpreting the Employment Retirement Income Security Act under the principle that courts should infer that Congress uses the term "employee" to conform to its common-law

Board to exclude at least certain graduate students from coverage if the common-law definition of employee does not cover those in a "primarily educational" relationship with an entity that would otherwise be their employer. But this argument was not made by the three-Member majority of the Board in *Brown*. It was made by only one of those Members in a separate footnote;¹⁰⁷ and it would, in any event, ultimately have to fail for the simple reason that the common law recognizes no such exclusion.¹⁰⁸ There is no doubt, for instance, that a graduate student acting as a teaching fellow in a geology class would subject her university to liability as an employer for her negligent driving of a van of students to a geological site. An individual providing service to an entity that both accepts and controls the manner and means of that service is an employee of the entity under the common law regardless of whether the relationship is primarily "economic."¹⁰⁹

definition); *NLRB v. United Ins. Co. of Am.*, 390 U.S. 254, 256 (1968) (using common law to exclude independent contractors from coverage).

¹⁰⁷ *Brown*, 342 N.L.R.B. at 490 n.27.

¹⁰⁸ See *United Faculty of Fla. v. Bd. of Regents*, 417 So. 2d 1055, 1058-59 (Fla. Dist. Ct. App. 1982) (using common law standards to interpret use of "employee" in Florida state constitution).

¹⁰⁹ Member Schaumber argues that graduate teaching assistants are not common-law employees because they are "admitted" to a program and are not "hired" by a university. *Brown*, 342 N.L.R.B. at 490 n.27. He cites no common-law decisions under which this formal distinction resulted in a non-employee classification for students providing work for a school under that school's control. *Id.* He cites only *Town & Country*, 516 U.S. at 92-94, where the Court relied in part on the common law to hold that a union organizer can simultaneously be the employee of an employer that she is being paid to organize as well as the union for whom she is organizing. The *Town & Country* Court, in recognizing that the common law accepts a worker having two simultaneous roles as employees of two employers, relied on the Restatement (Second) of Agency. *Id.* at 94-95 (citing RESTATEMENT (SECOND) OF AGENCY § 226 (1957)). However, the Restatement does not require that an employee who provides service to a consenting employer be formally "hired" by that employer. See RESTATEMENT (SECOND) OF AGENCY § 221 (1958). Section 221 of the Restatement requires only that "the one for whom the service is rendered must consent or manifest his consent to receive the services." *Id.* Furthermore, section 225 of the Restatement clarifies that even volunteers may be employee-servants under the common-law test; it states that "[o]ne who volunteers services without an agreement for or expectation of reward may be a servant of the one accepting such services." *Id.* § 225; see, e.g., *Fils-Aime v. Ryder TRS, Inc.*, 837 N.Y.S.2d 199, 200 (2007) (finding that a student volunteering services to his university may be an employee-servant). The Restatement (Third) of Agency does not depart from these positions. Section 7.07(3) states that "an employee is an agent whose principal controls or has the right to control the manner and means of the agent's performance of work," and "the fact that work is performed gratuitously does not relieve a principal of liability." RESTATEMENT (THIRD) OF AGENCY § 7.07(3) (2007). Section 1.02 of the tentative draft of the Restatement Third of Employment Law, for which I serve as a Reporter, excludes true volunteers from the class of employees covered by employment laws, but expressly treats compensated students as employees rather than volunteers. See RESTATEMENT (THIRD) OF EMPLOYMENT § 1.02 cmt.

Indeed, given the common law's clear coverage of graduate student fellows as employees, the absence of any express exclusion in the statute, the lack of any discussion in the legislative history relating to education or to relationships that are not primarily economic, and the Court's repeated references to the "breadth" of the statutory definition, a stronger argument can be made for the Board's decision in *New York University* being compelled by the statute than can be made for its decision in *Brown*.¹¹⁰ This argument is not necessarily defeated by the Court's holding in *NLRB v. Bell Aerospace Co.* that the Board must exclude from coverage all "managerial employees" who "formulate and effectuate management policies," whether or not they are covered by the express exclusion of supervisory employees.¹¹¹ The *Bell Aerospace* holding was based on strong legislative history of the Taft-Hartley Act of 1947, and there is no such history relevant to the exclusion of those whose relationship with a putative employer can be characterized as "primarily educational."¹¹² The *Brown* decision, thus, might not be able to withstand *Chevron* Step One review.

Nevertheless, there are strong arguments that the statute's coverage vel non of graduate student teaching fellows is an issue Congress did not decide, but rather left for the Board to resolve. While *Bell Aerospace* is clearly distinguishable, it does suggest that statutory policies may be the basis for exclusions from the common-law baseline definition of employee, even in the absence of express statutory language.¹¹³ The Court has not asserted since *Bell Aerospace* that, in the absence of an express exclusion, the common-law definition must control those protected by the Act. It has instead reiterated the Board's "legal leeway" with respect to the open-ended word "employee" even

d (Tentative Draft No. 1, 2008) (treating compensated students as employees because "such compensation encourages the students to work for more than educational benefits and thereby establishes an employment as well as an educational relationship"). Courts have accepted the dual roles of graduate student research and teaching assistants as both students and employees, protected in the latter role by the anti-employment discrimination laws. See, e.g., *Cuddeback v. Fla. Bd. of Educ.*, 381 F.3d 1230, 1234-35 (11th Cir. 2004); *Ivan v. Kent State Univ.*, 863 F.Supp. 581, 585-86 (N.D. Ohio 1994).

¹¹⁰ The dissenters in *Brown* take this position: "[T]he Board simply is not free to create an exclusion from the Act's coverage for a category of workers who meet the literal statutory definition of employees." *Brown*, 342 N.L.R.B. at 496 (Liebman & Walsh, Members, dissenting). As the dissent points out, the university grants these students compensation; contrary to the characterization of the *Brown* majority, moreover, this compensation is part of the total bargain between the university and the graduate students and in that sense is consideration for their services, whether or not it can also be characterized as "financial aid." *Id.* at 497.

¹¹¹ *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 288-89 (1974).

¹¹² See *id.* at 280-84.

¹¹³ See *id.* at 284 (inferring an exclusion for "managerial employees" due to statutory policies).

as it has referred to the relevance of the common law.¹¹⁴ That relevance seems most clear for explicating the meaning of the express exclusion of independent contractors, as the common law was most concerned with distinguishing employees from independent contractors for the purposes of vicarious liability.¹¹⁵ Inasmuch as those purposes and the purposes of the Labor Act are quite different, it may be reasonable to conclude that, however congressional intent is defined,¹¹⁶ Congress has delegated discretion to the Board to exclude (for good reason and after appropriate consideration) coverage of some workers who would be treated as employees by the common law and who are not excluded by some express provision in the Act.

As explained above, however, the capacity of an administrative decision like *Brown* to survive *Chevron* Step One review does not mean it must be quickly approved by a court.¹¹⁷ An acceptance, in other words, that the holding in *New York University* was not compelled by the Act does not require accepting the holding in *Brown* as permissible. For the reasons elaborated above, if the statute does not settle the issue, the *Brown* holding was an exercise of delegated lawmaking by the Board and as such it is open to challenge as arbitrary or capricious under standards like those set forth in *State Farm*.¹¹⁸ A reviewing court can ask whether the Board in *Brown* not only offered a rational explanation for its decision, but also weighed appropriate goals under the statute and did so based on the best relevant evidence available to it through some reasonable process within its discretion.¹¹⁹

It is not clear whether the decision in *Brown* could withstand such meaningful review. This is not because *Brown* balanced inappropriate goals, but rather because it refused to even consider available evidence relevant to how coverage or exclusion would actually serve or disserve these goals. The Board based its decision to exclude graduate student assistants like those involved in the *Brown* case from the Act's protection on its conclusions that: (i) those who are primarily in a student relationship with the entity they serve are not in the kind of adversarial and unequal economic relationship that Congress sought to give workers the opportunity to modify through the NLRA; and (ii) the educational goals of the relationship, such as close faculty-student

¹¹⁴ See *supra* note 105.

¹¹⁵ See, e.g., *State Farm Ins. Fund v. Brown*, 38 Cal. Rptr. 2d 98, 103 (Ct. App. 1995) ("[T]he concept of 'independent contractor' arose at common law to limit an employer's vicarious liability for the misconduct of a worker; thus, the degree to which the employer had the right to control the worker's actions was directly pertinent to the employer's exposure to liability.").

¹¹⁶ See *supra* note 37 (explaining different approaches for discerning congressional intent behind a statute).

¹¹⁷ See *supra* text accompanying notes 28-30.

¹¹⁸ See *supra* text accompanying note 24.

¹¹⁹ See *supra* text accompanying note 24.

relationships and academic freedom, are threatened by collective bargaining.¹²⁰ If the Board does have authority to exclude common-law employees from the Act's coverage, these seem to be the type of considerations that it would be appropriate to weigh. Workers who do not fit within the model the Act was framed to address should arguably be excluded from the Act's coverage if that coverage would threaten other goals or values the Act was not designed to subordinate. Clearly, the latter goals or values do not include holding down wages or labor costs, or maximizing managerial discretion, as the Act directly subordinates these goals to the protection of collective worker action. Arguably, however, the Act was not intended to subordinate educational goals and values like close faculty-student relationships and academic freedom. Therefore, it would be appropriate to weigh threats to such values against the values of collective worker action intended to be secured by the Act.

The primary vulnerability of the Board's decision to serious judicial review under the arbitrary or capricious standard derives not from what goals it finds relevant, but from its refusal to consider any available evidence about how these goals are affected by exclusion or coverage. By contrast, the dissenting Members cited a rich academic literature examining how collective bargaining has developed among graduate students, particularly in public universities not within the jurisdiction of the NLRA.¹²¹ The dissenters also cited examples of the success of collective bargaining under the *New York University* decision, including at New York University itself.¹²² The dissenters stressed that state law has protected academic freedom effectively, in a manner open to the Board for private sector universities, by limiting the scope of collective bargaining to topics like pay and hours rather than course content or teaching methods.¹²³

¹²⁰ *Brown University*, 342 N.L.R.B. 483, 493 (2004). The *Brown* majority, in a brief paragraph, also claimed the discretion, based on its understanding of the "national labor policy" and "the purposes and policies" of the Act, to deny "collective bargaining rights" to graduate student assistants even if they are "statutory employees," and thus presumably protected from unfair labor practices by section 8 of the Act. *Id.* This claim can be bracketed here as the existence of such discretion is far from clear, and the Board did not articulate any further policies that might be relevant to its exercise in this case.

¹²¹ *Id.* at 497-99 (Liebman & Walsh, Members, dissenting).

¹²² *Id.* at 499.

¹²³ *Id.* Under section 8(d) of the NLRA the parties must bargain "in good faith with respect to wages, hours, and other terms and conditions of employment." 29 U.S.C. § 158(d) (2000). The Supreme Court has recognized that the ambiguity of these words affords the Board, based in part on "industrial practices" and "experience," considerable discretion in setting the topics over which employers must bargain. See *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 211 (1964). Moreover, the Court has further held that the Board must construe the Act to protect from the pressures of collective bargaining core entrepreneurial decisions that define the nature of the good or service produced by the employer. See *First Nat'l Maint. Corp. v. NLRB*, 452 U.S. 666, 686 (1981) (holding that an employer may decide to close part of its business without bargaining with a union representing employees affected by the closure). This suggests the Board may not even

The dissenters also emphasized that bargaining has not resulted in impairments in faculty-student relationships.¹²⁴ They further cited research explaining the economic pressures on modern universities and how those pressures may move the schools to demand more and more of graduate students as a condition of granting their degrees, resulting in adversarial relationships more akin to the traditional employer-employee relationships at the core of the concerns that resulted in passage of the Act.¹²⁵

The Board majority in *Brown* asserted that such "empirical evidence" and "examples of collective-bargaining agreements in which there is assertedly no intrusion into the educational process" were not relevant simply because "graduate student assistants are not statutory employees."¹²⁶ For the majority, that was "the end of the inquiry."¹²⁷

Based on the above analysis, it should be clear why these assertions are not adequate responses. If the NLRA does allow the Board discretion to exclude some classes of common-law employees from coverage based on a weighing of the service of statutory goals against other values not subordinated by the Act, that weighing must be done in light of the best available evidence of the actual impact of alternative Board policies. No one in Congress would have wanted the Board to determine which workers may be protected by the Act on the basis of mere suppositions without consideration of how statutory or other goals would be served in practice by exclusion or coverage. The authority of the Board in one President's administration to weigh goals differently than the Board in another President's administration need not include the authority to make that weighing on the basis of ideology without consideration of available relevant evidence.¹²⁸ This would be true if the Board exercised its authority to

have discretion to require bargaining over topics like course content or teaching methods that define the education offered by universities. For a theoretical basis for this position, see Michael C. Harper, *Leveling the Road from Borg-Warner to First National Maintenance: The Scope of Mandatory Bargaining*, 68 VA. L. REV. 1447, 1501 (1982).

The majority in *Brown* noted that several states have limited bargaining subjects for public academic employees, but claimed section 8(d) allowed no such limitations. *Brown*, 342 N.L.R.B. at 492. The majority's claim seems curious for most of the topics cited in the supporting footnote discussing state law. *See id.* at 492 n.31. These include, for instance, in the primary example of California law, "[a]dmission requirements for students, conditions for award of certificates and degrees to students, and content and supervision of courses, curricula, and research programs." CAL. GOV'T CODE § 3562(q)(1)(C) (West 2008). None of these topics should be subject to mandatory bargaining under the NLRA.

¹²⁴ *Brown*, 342 N.L.R.B. at 499-500 (Liebman & Walsh, Members, dissenting).

¹²⁵ *Id.* at 497-99. The dissent stated, based on a report in the Chronicle of Higher Education, that "23.3 percent of college instructors were graduate student teaching assistants . . . [b]y December, 2000." *Id.* at 497 & n.20.

¹²⁶ *Id.* at 492-93 (majority opinion).

¹²⁷ *Id.* at 493.

¹²⁸ *See, e.g.,* Rust v. Sullivan, 500 U.S. 173, 186-87 (1991) (citing Chevron U.S.A. Inc. v. Natural Res. Def. Council, 467 U.S. 837, 862 (1984); Motor Vehicle Mfrs. Ass'n v. State

settle legal questions left open by Congress through rulemaking, and it is equally true for the exercise of lawmaking authority through adjudication.

The Board's responsibility to apply legal doctrine in an adjudication based on the record in that adjudication,¹²⁹ and its authority to formulate new doctrine in the same adjudication,¹³⁰ does not mean that its new formulations can be based on only the records of that case without Board members using what they can learn from other cases, from other interested parties, and from other available empirical studies. The level and kind of evidentiary support that should be required of the Board for its adjudicatory policy- or lawmaking should vary with several factors. These include: whether the Board is formulating doctrine that overturns precedent; the type of evidence that was or could have been easily available to the Board; whether the Board can claim greater deference to its expertise because of the consistency of its empirical assumptions over time and between Board Members; and the level of surface plausibility of the assumptions necessary to the Board's analysis. In *Brown*, the Board majority departed from the most relevant precedent, effectively refused to engage any available evidence, and disagreed with the dissenters and with the *New York University* decision in a way that vitiated any claim for special deference to its expertise in labor relations.¹³¹ Furthermore, the majority opinion's determination that educational goals not subordinated by the Act are threatened by the coverage of graduate student research assistants was based on assumptions that were far from obvious in the absence of empirical support, especially in the face of the research cited in the dissenting opinion.¹³²

Concluding that a reviewing court could easily demand more of the Board before accepting its reversal of *New York University* demonstrates how modern levels of judicial review could permit discouragement of Board policy or lawmaking oscillations without demanding inflexible constancy or denying the political nature of the Executive Branch. The *Brown* decision in several ways illustrates why judicial review of reversals of prior doctrine can often be more demanding and why the exclusion of graduate student teaching assistants would have been easier for the Bush-appointed Board had *New York University* never been decided. First, the Board in *Brown* could not convincingly rely on

Farm Mut. Auto. Ins. Co., 463 29, 42 (1983)) (affirming that an executive agency may, on a continuing basis, review and change policy after reasoned analysis, including consideration of experience with old policy).

¹²⁹ The standard of judicial review for "questions of fact" in adjudications is "substantial evidence on the record considered as a whole." 29 U.S.C. § 160(e)-(f) (2000).

¹³⁰ *See supra* note 8 and accompanying text.

¹³¹ *See Brown*, 342 N.L.R.B. at 492-93.

¹³² *Compare id.* at 493 (reasoning that "there is a significant risk, and indeed a strong likelihood, that the collective-bargaining process will be detrimental to the educational process"), *with id.* at 499-500 (Liebman & Walsh, Members, dissenting) (citing a study that found that collective bargaining did not negatively affect faculty mentors' relationships with their graduate students at schools where graduate students were a party to such bargaining).

any clear statement of congressional intent, either in the text or legislative history of the Labor Act;¹³³ the earlier decision in *New York University* probably could not have been written in the face of such a clear statement. Second, the Board could not claim special expertise in labor relations in light of its reversal of the prior decision. Third, the Board in *Brown* could not convincingly claim it was following precedent rather than rescinding recently established contrary law.¹³⁴

B. *Setting a Policy-Based Presumption Without Consideration of Relevant Legislative Facts; Bargaining Units with Jointly-Employed Employees?*

The Board's decision in *H.S. CARE*¹³⁵ is a second case where a closely divided, Bush-appointed Board overruled a decision of a Clinton-appointed Board.¹³⁶ In *H.S. CARE*, as in *Brown*, the Board claimed its overruling was mandated by the Act, because the overruled decision, *M.B. Sturgis*,¹³⁷ had approved as appropriate a type of non-consensual bargaining unit not contemplated by the Act. The *H.S. CARE* Board stressed the language in section 9(b) of the Act authorizes the Board to decide whether "the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof."¹³⁸ In *M.B. Sturgis*, the Board had held that a unit combining employees jointly employed by two employers with employees solely employed by one of the two employers could fit within the statutory definition of "employer unit" if all the employees were performing work together for the employer that solely employed some.¹³⁹ This could be the case, for example, where the jointly-employed employees were provided, perhaps on a temporary basis, by a "supplier" employer that determined some of the terms of their employment, such as wages and benefits, for a "user" employer that controlled their working conditions.¹⁴⁰ The *M.B. Sturgis* Board's interpretation of "employer unit" in the statute to refer to the scope of the work being performed enabled it to consider the appropriateness of units combining such jointly employed workers with the "user" employer's solely-employed employees, without requiring the consent

¹³³ See *id.* at 483-93 (majority opinion).

¹³⁴ The Board majority did attempt to make this claim by stressing decisions before *New York University* that had excluded graduate assistants from faculty bargaining units and had held at least some graduate research assistants outside the coverage of the Act. *Id.* at 486-87 (citing *Leland Stanford Junior Univ.*, 214 N.L.R.B. 621 (1974); *Adelphi Univ.*, 195 N.L.R.B. 639 (1972)). The Board, however, acknowledged its decision required the overruling of *New York University*. *Id.* at 483.

¹³⁵ 343 N.L.R.B. 659 (2004).

¹³⁶ *Id.* at 663.

¹³⁷ 331 N.L.R.B. 1298 (2000), overruled by *H.S. CARE*, 343 N.L.R.B. 659 (2004).

¹³⁸ *H.S. CARE*, 343 N.L.R.B. at 661.

¹³⁹ *M.B. Sturgis*, 331 N.L.R.B. at 1304.

¹⁴⁰ *Id.* at 1304-05.

of both the "supplier" and "user" as would be necessary if the unit were treated as a multiemployer unit.¹⁴¹

The *H.S. CARE* Board held that the *M.B. Sturgis* Board's interpretation of "employer unit" was contrary to the statutory directive embodied in section 9(b) of the NLRA.¹⁴² The *H.S. CARE* Board reasoned that units of all jointly-employed employees, without combination with those solely employed, are permissible without the consent of each employer because all jointly-employed employees "work for a single employer, i.e., the joint employer entity A/B."¹⁴³ The *H.S. CARE* Board contrasted this with the combination of those employed by "A/B," the jointly-employed entity, and those whose terms and conditions of employment are set and are thus employed only by "A," the "user" employer.¹⁴⁴ The Board, over the dissent of two Members who would have adhered to the *M.B. Sturgis* holding,¹⁴⁵ concluded that a unit combining jointly-employed and solely-employed employees must thus be treated as a multiemployer unit, requiring the consent of all employers.¹⁴⁶

As the facts of *H.S. CARE* suggest, the meaning of the phrase "employer unit" in section 9(b) is somewhat ambiguous. Abstracting from the purpose of this provision, the constructions of the phrase in *H.S. CARE* and *M.B. Sturgis* both seem plausible. "Employer unit" could refer either to the scope of the work performed by the bargaining unit, as held in *M.B. Sturgis*,¹⁴⁷ or to the formal definition of the party with whom there is a bargaining obligation, as held in *H.S. CARE*.¹⁴⁸ The Congress that enacted section 9(b) did not anticipate the problems of setting appropriate bargaining units for employees with joint employers,¹⁴⁹ often supplied and compensated by one and directed and otherwise controlled by the other. Given the plausibility of alternative

¹⁴¹ *Id.* at 1304-05, 1308. The Supreme Court has accepted the Board's recognition of multiemployer bargaining units that are consented to by all employers and the union. See, e.g., *NLRB v. Truck Drivers Local 449*, 353 U.S. 87, 95-96 (1957) (concluding that Congress intended to allow the Board to continue certifying multiemployer units at its discretion).

¹⁴² *H.S. CARE*, 343 N.L.R.B. at 663 (concluding that the *Sturgis* decision "contravenes Section 9(b) by requiring different employers to bargain together regarding employees in the same unit").

¹⁴³ *Id.* at 662.

¹⁴⁴ *Id.* ("The critical point is that the one group has its terms set by A/B. The other group has its terms set only by A. Thus, the entity that the two groups of employees look to as their employer is not the same.")

¹⁴⁵ *Id.* at 663-64 (Liebman & Walsh, Members, dissenting).

¹⁴⁶ *Id.* at 663 (majority opinion).

¹⁴⁷ *M.B. Sturgis*, 331 N.L.R.B. 1298, 1304-05 (2000) (finding that "[t]he scope of a bargaining unit is delineated by the work being performed for a particular employer"), overruled by *H.S. CARE*, 343 N.L.R.B. 659 (2004).

¹⁴⁸ *H.S. CARE*, 343 N.L.R.B. at 662 (looking to whom the party has a bargaining obligation to define what constitutes an "employer unit").

¹⁴⁹ The legislative history of the NLRA includes no references to joint employers.

meanings of "employer unit," Congress should be assumed to have delegated to the Board the task of setting the meaning of "employer unit" for such units and the issue should not be resolvable by a court through *Chevron* Step One review.

This does not mean, however, that reviewing courts, without further analysis, must accept both constructions as two reasonable interpretations of the Act by two different Boards weighing statutory goals somewhat differently. In accord with the standards for review elaborated above,¹⁵⁰ a court reviewing either construction should demand that the Board satisfy its obligation to set the law based on how the goals of the statute would be served in practice. Each construction must be reviewed not simply in the abstract, but also in light of the statute's goals and their potential effectuation in the real world that the Board confronted when rendering the decision.

Doing so requires an appreciation of the purpose and effect of the phrase being construed. That purpose and effect is to limit the generally conferred discretion of the Board to set "in each case . . . the unit appropriate for the purposes of collective bargaining";¹⁵¹ it is not to determine what unit is appropriate in any particular case. A unit may be an "employer unit" and still be determined by the Board to be inappropriate in a particular case. Determining that a unit is a multiemployer rather than an employer unit, by contrast, renders it per se inappropriate, at least in the absence of consent by each employer; it thereby denies the Board discretion to consider the unit's suitability "to assure to employees the fullest freedom in exercising the rights guaranteed by [the] Act."¹⁵²

The interpretation of "employer unit" in *M.B. Sturgis* offers a practical reason for not allowing the Board discretion to approve broader "multiemployer" units. The Board in *M.B. Sturgis* accepted the Board's prior holding in *Greenhoot, Inc.*¹⁵³ that treated as a multiemployer unit any unit that combined employees jointly employed by a supplier employer and a user employer with employees jointly employed by the same supplier employer and another user employer.¹⁵⁴ Accepting the unit in *Greenhoot* would have meant that user employers in potential product market competition with each other would be forced to bargain jointly with employees doing work for their potential rival.¹⁵⁵ This in turn would have meant that employers could be forced by the Board's approval of a bargaining unit to compete less directly by implementing different and perhaps more efficient labor policies. Inasmuch as

¹⁵⁰ See text accompanying notes 87-91.

¹⁵¹ 29 U.S.C. § 159(b) (2000).

¹⁵² See *id.*

¹⁵³ 205 N.L.R.B. 250 (1973).

¹⁵⁴ *M.B. Sturgis*, 331 N.L.R.B. 1298, 1298 (2000), *overruled by* H.S. CARE, 343 N.L.R.B. 659 (2004).

¹⁵⁵ The office rental properties in *Greenhoot* were owned by fourteen separate entities and were all located within the same city. *Greenhoot, Inc.*, 205 N.L.R.B. at 250 & n.1.

the Act is not read to subordinate inter-employer competition in labor policies, this seems a strong reason for the Board not to have discretion to impose industry-wide or multiemployer bargaining on resistant employers. If this in fact was the reason Congress did not approve nonconsensual multiemployer bargaining, the kind of bargaining unit approved in *M.B. Sturgis* should not be problematic. Combining jointly- and solely-employed employees who all do work for one user employer does not compromise that employer's, or any potentially competitive employer's, discretion to compete through its labor policies, beyond of course the compromises that the Act clearly intends to be imposed through collective bargaining. Thus, the bright line drawn around the term "employer unit" in *M.B. Sturgis* seems consistent with statutory purposes.

By contrast, the Board in *H.S. CARE* did not provide a convincing rationale for the bright line it drew between acceptable pure joint-employer units and unacceptable *Sturgis*-combined units.¹⁵⁶ The Board's contrast of pure A/B units with units that combine A/B's employees with A's employees is formalistic and conclusory.¹⁵⁷ When one employer supplies employees to another employer for use in the second employer's business, the two employers do not become a single entity either as a matter of economic reality or for any other legal purpose. As a matter of economic reality, jointly-employed employees have two employers, and requiring both employers to bargain with units of such employees is requiring bargaining units that deal with multiple employers. Thus, the Board must have had some other reason that articulates with some plausible statutory purpose to distinguish acceptable joint-employer bargaining units from the kind of units approved in *Sturgis* but rejected in *H.S. CARE*.¹⁵⁸

The Board in *H.S. CARE* did offer several "policy" arguments for finding *Sturgis* units per se inappropriate. However, none explain why the Board should not have discretion to find *Sturgis* units appropriate in at least some cases, while, on the other hand, having the discretion to require traditional

¹⁵⁶ H.S. CARE, 343 N.L.R.B. 659, 662 (2004).

¹⁵⁷ See *id.* (relying mainly on this contrast to overrule *Sturgis*).

¹⁵⁸ The *H.S. CARE* Board's reasoning seems even more formalistic and conclusory in light of its distinction of a series of cases in which the Board before *Sturgis* had held that a bargaining unit could combine the employees of a department store, employees jointly employed by the department store, and licensees of the store that operated sales operations on the store's premises. *Id.* (citing *Kresge*, 169 N.L.R.B. 442 (1968), *enforced in part sub nom.* *S.S. Kresge Co. v. NLRB*, 416 F.2d 1225 (6th Cir. 1969); *S.S. Kresge*, 162 N.L.R.B. 498 (1966), *enforced in part sub nom.* *Gallenkamp Stores v. NLRB*, 402 F.2d 525 (9th Cir. 1968)). The *H.S. CARE* Board claimed that these cases were distinguishable because the department store and its licensees were engaged in a "joint enterprise," a term the Board did not define. See *id.* (describing "joint enterprise" as a "unique relationship" but not defining it). Regardless of what the Board meant by the term, it did not dispute that the licensees were independent firms and that the unit approved by the Board in the earlier cases therefore combined employees of employer "A" with employees of the "joint enterprise" of employer "A/B." See *id.*

joint-employer bargaining. For instance, the Board expressed concern that *Sturgis* units placed "employers in the position of negotiating with one another as well as with the union. The user employer's status as the customer of the supplier may effectively restrict the supplier's options in bargaining as to those subjects that appear to be within its purview."¹⁵⁹ But employers in pure joint-employer units will always have to negotiate with each other, to some extent. Plausibly, some *Sturgis* units may lead to greater complications. However, the Board did not explain why it should not weigh the degree of these potential complications in each case against the possibility of leaving the jointly-employed employees who are denied a *Sturgis* unit with no real bargaining option at all. Section 9(b) demands that the Board weigh the latter possibility to assure employees "the fullest freedom in exercising the rights guaranteed" by the Act.¹⁶⁰ This "possibility" will usually be a strong probability both because user and supplier employers are unlikely to consent to the inclusion of jointly-employed employees in a *Sturgis*-type unit, and because the organization of temporary employees in a separate unit at a particular user employer's work site is impractical.¹⁶¹ Presumably, insuring the option of collective bargaining for employees should outweigh increased administrative burdens of bargaining for employers, so long as those burdens themselves are not so great as to preclude the bargaining option.

The *H.S. CARE* Board also expressed concern that the interests of the jointly-employed employees may conflict with the interests of the solely-employed employees, and that a single-unit bargaining agent may sacrifice one for the other.¹⁶² The potential for conflicts of interests within a bargaining unit is not unique to multiemployer units, however. It is a factor the Board must always weigh when deciding whether a proposed unit is appropriate in "each

¹⁵⁹ *Id.* at 663.

¹⁶⁰ National Labor Relations Act § 9, 29 U.S.C. § 159(b) (2000) (giving the Board, under certain restrictions, the ability in each case to determine the proper unit for collective bargaining).

¹⁶¹ The Board, in dicta, further reduced the temporary employees' ability to choose collective bargaining by apparently rejecting the possibility of having jointly-employed temporary employees in a bargaining unit defined by only one of the employers. *H.S. CARE*, 343 N.L.R.B. at 663 (stating that the "concept profoundly diminishes employee Section 7 rights"). Such a rejection would preclude employees supplied by an employer that supplies to multiple users from forming a bargaining unit to bargain alone with the supplier employer. Such a bargaining unit might be more easily organized, than would a joint-employer unit, among temporary employees who are frequently transferred between user employers. The Board's rejection of a supplier employer unit is not fully clear, however, because the example of inappropriateness the Board offered is a unit of jointly-employed employees that names only a user employer. *Id.* Furthermore, the Board offered no reason it would not have discretion to find a supplier employer unit appropriate in particular cases.

¹⁶² *Id.*

case."¹⁶³ In the case of *Sturgis* units, presumably this potential for conflicts must be weighed against the threat that, without inclusion in the same unit, the lower wages or reduced benefits of the jointly-employed workers would threaten those of the solely employed, more permanent workers. Such a threat of part of a workforce being divided against another part doing similar work is exactly the kind of threat that moves employees to choose collective bargaining in units combining the parts. In any event, it does not seem plausible that Congress refrained from approving units wider than "employer units" because it was concerned that employees could never benefit from wider bargaining units.

The *H.S. CARE* decision's greatest vulnerability to close judicial review, however, derives from the Board's failure to consider any empirical evidence to test its concerns about the potential costs of *Sturgis* units or for the need for them in the current economy. The Board's majority opinion cited no examples of *Sturgis* units in which collective bargaining proved administratively infeasible for the employers or where a union sacrificed the interests of the jointly-employed employees for those of the solely employed (or the reverse).¹⁶⁴ Further, the majority did not consider in its policy analysis even the possibility that without *Sturgis* units, a significant portion of the American contingent work force would not have a practical option to choose collective bargaining. As stated in the dissenting opinion, "the Board did not even solicit the public's views on the practical effects of *Sturgis*."¹⁶⁵

Such a solicitation could possibly have offered support for the Board's contested assumptions about collective bargaining in units by combining temporary-supplied and more-permanent-solely-employed employees. But without such support, it is hard to understand how the *H.S. CARE* decision's rejection of a prior Board decision could withstand close judicial review under the *State Farm* arbitrary or capricious standard.¹⁶⁶ The Board did not "consider an important aspect of the problem": the possibility that *Sturgis* units are needed to offer temporary employees the "fullest freedom" to exercise the "rights guaranteed by the [Act]."¹⁶⁷ Nor did it examine "relevant data" and articulate a satisfactory explanation for its action.¹⁶⁸ Instead, the Board unconvincingly asserted that it had no discretion under the statute, and then

¹⁶³ See, e.g., *Friendly Ice Cream Corp. v. NLRB*, 705 F.2d 570, 575-76 (1st Cir. 1983) (discussing the Board's use of criteria to determine whether employees in a proposed single-store unit all have a "community of interest").

¹⁶⁴ The fact that the parties in *H.S. CARE* "stipulated that a joint bargaining unit would be appropriate . . . unless *Sturgis* is overruled," *H.S. CARE*, 343 N.L.R.B. at 659, suggests the Board could not even draw from the facts of the case before it to support its analysis.

¹⁶⁵ *Id.* at 664 (Liebman & Walsh, Members, dissenting).

¹⁶⁶ See *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

¹⁶⁷ See National Labor Relations Act § 9, 29 U.S.C. § 159(b) (2000).

¹⁶⁸ See *State Farm*, 463 U.S. at 43.

offered policy arguments supported neither by evidence, by compelling reason, nor by an exercise of uncontested expertise in labor relations.¹⁶⁹

The "policy" arguments advanced by the majority in *H.S. CARE* could potentially be relevant to the Board's exercise of the broad discretion conferred by section 9(b) for deciding whether a *Sturgis* unit would be appropriate in a particular case. Thus, a court's rejection of the *H.S. CARE* Board's interpretation of "employer unit" in section 9(b) would not prevent the Board from regularly disapproving *Sturgis* units. It would not even prevent the Board from adopting some sort of presumption that such units generally do not "assure employees the fullest freedom in exercising the rights guaranteed by [the Act]."¹⁷⁰ However, the adoption of such a presumption would also constitute law or policymaking, subject to judicial review under the arbitrary or capricious standard applied by the Court in *American Hospital Ass'n v. NLRB*.¹⁷¹ This would be true whether the presumption were adopted through adjudication or, as in the case of the *American Hospital Ass'n*-approved rules setting presumptively appropriate bargaining units in acute care hospitals, through rulemaking. This judicial review would also appropriately require that the Board provide some substantial evidentiary support for its factual presumptions about the effect of *Sturgis* units on supplier and user employers, on employees, and on collective bargaining (as it provided for its acute care hospital rules after the solicitation of comments and evidence in its rulemaking proceeding).¹⁷² That support would have to be based on a broad review of relevant employment practices as researched by Board staff and solicited from outside the Board, and not solely on the kind of speculations cited briefly by the Board in *H.S. CARE*.¹⁷³

¹⁶⁹ See *H.S. CARE*, 343 N.L.R.B. at 662-63.

¹⁷⁰ § 159(b); see also *Am. Hosp. Ass'n v. NLRB*, 499 U.S. 606, 614 (1991) (confirming the discretion of the Board under section 9(b) to set reasonable, rebuttable presumptions about what kind of bargaining units are appropriate).

¹⁷¹ *Am. Hosp. Ass'n*, 499 U.S. at 619; see also 29 C.F.R. § 103.30 (2008) (identifying the appropriate bargaining units in the health care industry).

¹⁷² The Court in *American Hospital*, citing *State Farm*, concluded that the acute care hospital rules were "based on substantial evidence and supported by a reasoned analysis." *Am. Hosp. Ass'n*, 499 U.S. at 619.

¹⁷³ *H.S. CARE* in fact may not be subjected to judicial review because unions have great difficulty securing review of the Board's unit determinations. Board decisions under section 9 are not "final orders" reviewable under section 10 of the Act. See *Am. Fed'n of Labor v. NLRB*, 308 U.S. 401, 409 (1940) (limiting the review afforded by section 10 to "orders of the Board prohibiting unfair labor practices"). Although the Court has also held that a federal court has general jurisdiction to review the denial of a right secured by the Act, see *Leedom v. Kyne*, 358 U.S. 184, 191 (1958), section 9 does not seem to guarantee the right to have a bargaining unit of a particular scope. However, when a union has not effectively organized jointly-employed leased employees, an employer might want the leased employees to be part of the bargaining unit, and the employer could seek judicial review of the employees' exclusion by the Board. Cf. *Santa Fe Healthcare LLC*, No. 21-CA-37593,

C. *Modifying a Policy Judgment Not Based on Legislative Facts; Neutral, Reasonable Rules that May Chill Concerted Activity*

The examples of *H.S. CARE* and *Brown University* do not establish that all Board departures from prior law or policy require the kind of solicitation of evidence on the current practical impact of alternative doctrine that the Board garnered in its hospital rulemaking. Since section 8 directly, if ambiguously, defines certain employer and union conduct to be illegal,¹⁷⁴ and section 9 directs the Board to make decisions about bargaining units and elections,¹⁷⁵ the Board often cannot avoid exercising its delegated authority to make law or policy by delaying resolution of an issue until it can collect more evidence before imposing new legal directives on regulated parties.¹⁷⁶ A court can only ask the Board to make reasonable efforts to garner support for its factual assumptions; what is reasonable may vary with the law or policy being set. For instance, the Board, before approving collective bargaining by graduate students in *New York University*, could consider the experience in the public sector. However, the Board in *Sturgis* would have had more difficulty considering the practicality of single employer-joint-employer units without any research or experience on which to draw.

In some cases, moreover, a Board's modification or development of law or policy can turn almost fully on a discretionary policy balance rather than on the particular accuracy of different assumptions about the current reality of labor

2008 NLRB LEXIS 43, at *6-*8 (NLRB Division of Judges Feb. 22, 2008) (rejecting an employer's attempt to accrete an unorganized subcontractor's employees to a bargaining unit, in order to allow the employer to justify refusing to bargain). An employer can of course secure judicial review of any unit determination by refusing to bargain with the union that the Board has certified to represent that unit and thereby securing an unfair labor practice "final order." See § 159(d) (providing that where an order of the Board on an unfair labor practice charge is based in part on a section 9 certification, the certification shall be part of the reviewed record). Unions have no such clear path. See generally Michael C. Harper, *The Case for Limiting Judicial Review of Labor Board Certification Decisions*, 55 GEO. WASH. L. REV. 262 (1987).

¹⁷⁴ See National Labor Relations Act § 8, 29 U.S.C. § 158 (2000) (defining employer and union unfair labor practices).

¹⁷⁵ See National Labor Relations Act § 9, 29 U.S.C. § 159 (empowering the Board to determine the appropriateness of bargaining units, to direct representation elections, and to certify the results of such elections).

¹⁷⁶ For example, the Board must decide whether graduate students who are assigned compensated teaching duties are employees covered by the Act when a group of such students present a petition for a certification election, under section 9 of the Act, or claim discrimination against their concerted activities, under section 8 of the Act. On the other hand, the Board, like any executive agency, could delay for the collection of additional evidence before imposing a defined supplementary duty on employers like that imposed by *Excelsior Underwear, Inc.*, 156 N.L.R.B. 1236, 1239-40 (1966) (requiring an employer to supply the Regional Director with the names and addresses of all members of a bargaining unit within seven days after the direction of a representation election).

relations. The Board's decision in *Martin Luther Memorial Home, Inc.* is such a case.¹⁷⁷ In *Martin Luther*, the Board, in another 3-2 decision, held that an employer did not violate section 8(a)(1) of the NLRA¹⁷⁸ by maintaining rules prohibiting "abusive and profane language," "harassment," and "verbal, mental and physical abuse" in the workplace.¹⁷⁹ The *Martin Luther* Board's holding limited the Clinton-appointed Board's previous pronouncement in *Lafayette Park Hotel* that an employer may commit a section 8(a)(1) violation by maintaining a work rule that, although not explicitly directed at protected activity, might chill employees' exercise of their section 7 rights.¹⁸⁰ The Board in *Martin Luther* clarified that rules that are not "promulgated in response to union activity" and that are not "applied to restrict the exercise of Section 7 rights" are not prohibited by the Act unless "employees would reasonably construe the language to prohibit Section 7 activity."¹⁸¹

The majority's refusal to accept the dissenters' application of *Lafayette Park* in *Martin Luther* primarily reflects a different balance of competing interests recognized under the Act, rather than different factual assumptions. As asserted by the Board in *Lafayette Park*, determining the legality of particular employer rules requires "working out an adjustment between the undisputed right of self-organization assured to employees under the Wagner Act and the equally undisputed right of employers to maintain discipline in their establishments."¹⁸² The dissenters in *Martin Luther* quoted this statement and did not deny that the work rules found legal by the majority could serve the latter employer interest in maintaining discipline as well as the legitimate employer interest in avoiding liability for employee-on-employee harassment.¹⁸³ The dissenters, rather, concluded that these legitimate interests

¹⁷⁷ *Martin Luther Mem'l Home, Inc.*, 343 N.L.R.B. 646, 648 (2004) (justifying the Board's decision as one which strikes a more "realistic balance").

¹⁷⁸ Section 8(a)(1) of the NLRA defines as an unfair labor practice an employer acting "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7," 29 U.S.C. § 158(a)(1) (2000), which includes the right to engage in "concerted activities" for "mutual aid or protection," 29 U.S.C. § 157.

¹⁷⁹ *Martin Luther*, 343 N.L.R.B. at 646 (holding the rules lawful because their intent was to maintain order in the workplace and they did not prohibit section 7 activity).

¹⁸⁰ *Lafayette Park Hotel*, 326 N.L.R.B. 824, 825 (1998).

¹⁸¹ *Martin Luther*, 343 N.L.R.B. at 647. This clarification was fully consistent with the Board's statement in *Lafayette Park* that "the appropriate inquiry is whether the rules would reasonably tend to chill employees in the exercise of their Section 7 rights." *Lafayette Park*, 326 N.L.R.B. at 825. The Board in *Martin Luther*, moreover, did not purport to overrule any of the particular applications of this standard in *Lafayette Park*, though it did reserve judgment on the "validity" of the latter decision, which held unlawful a rule prohibiting "false, vicious, profane, or malicious statements." *Martin Luther*, 343 N.L.R.B. at 647 n.9.

¹⁸² *Lafayette Park*, 326 N.L.R.B. at 825 (quoting *Republic Aviation v. NLRB*, 324 U.S. 793, 797-98 (1945)).

¹⁸³ *Martin Luther*, 343 N.L.R.B. at 650 (Liebman & Walsh, Members, dissenting) (describing the majority's purported balancing as a one-sided analysis).

could be served by less restrictive rules articulated with "sufficient specificity" to make clear that they do not prohibit the "free exercise of Section 7 rights."¹⁸⁴

The majority in *Martin Luther* did not expressly acknowledge that the rules it found legal could discourage section 7-protected conduct as well as serve legitimate employer interests. Its holding and doctrinal pronouncement reflect policy balancing, however, by recognizing that neutral rules that may be intended to address legitimate employer interests might be illegal because of their discouraging effect on the protected activity of "reasonable" employees. First, the majority upheld the administrative law judge's finding that certain of the employer's neutral rules, including those that prohibit "loitering" and "soliciting" on company property without permission, were "unlawfully overbroad."¹⁸⁵ Second, the doctrine pronounced in *Martin Luther* prohibits facially-neutral rules that "employees would reasonably construe . . . to prohibit Section 7 activity," presumably even when such rules served legitimate employer interests.¹⁸⁶

Furthermore, the majority's analysis in *Martin Luther* can be understood best as finding that legitimate employer interests in reasonably stated rules outweigh the possible chilling of section 7-protected activity, rather than simply finding that such chilling does not exist. The majority's conclusion that the employer's prohibitions of "abusive language," "profane language," and "harassment," are not facial violations of the Act is based on a determination that it would not be "reasonable" for employees to refrain, because of the rules, from concerted activity protected by section 7.¹⁸⁷ This standard of reasonableness is based primarily not on a factual assumption about how employees are likely to respond to such rules, but rather on how they can and should respond. They can and should respond, in the majority's view, by conducting organizing and other section 7 activity without egregious, abusive, profane, or harassing activity.¹⁸⁸ The majority's standard thus reflects a balance of the employer's legitimate interests against the possible chilling of certain forms of robust employee workplace complaints and organizing activity.¹⁸⁹

¹⁸⁴ *Id.* at 651. Member Liebman stated in a footnote that it would be sufficient to include a provision in the rule exempting from coverage "conduct that is protected under the National Labor Relations Act." *Id.* at 652 n.7.

¹⁸⁵ *Id.* at 646 (majority opinion).

¹⁸⁶ *Id.* at 647.

¹⁸⁷ *Id.* (finding no basis to believe "that a reasonable employee would interpret a rule prohibiting such language as prohibiting Section 7 activity").

¹⁸⁸ *Id.* at 647-48 (contending that employees are capable of exercising their statutory rights without resorting to profane or harassing language).

¹⁸⁹ Thus, the Board's decision in *Martin Luther* can be read to implicitly adopt the position taken by Member Hurtgen in *Lafayette Park*: that a rule can chill the exercise of section 7 rights and still be justified by significant employer interests. This position seems correct: "[A] rule against solicitation during working time chills Sec. 7 exercise for that

Therefore, without making questionable factual assumptions, the majority can respond to the dissenters' suggestion that employer interests can be adequately protected by more specific rules that clearly do not cover section 7-protected activity. The majority need not claim that general rules could never discourage such activity. Rather, it can challenge the dissenters' policy-based finding that any chilling of what some employees might fear will be treated as "abusive" or "profane" language or "harassment" warrants the restriction of employer authority. Having struck a different balance, the majority may conclude that an employer cannot easily draft more specific rules exempting such language or conduct if used as part of protected activity, because the "use of abusive or profane language may be sufficiently egregious to deprive an employee of the protection of the Act even if used during the course of Section 7 activity."¹⁹⁰

A court should be more willing to accept the Board's *Martin Luther* decision because it primarily turns not on a dispute about the likely effect of workplace rules, but rather on differences between Board members about how the goals of section 7 and the Act should be balanced against legitimate employer interests. A court certainly could not find in the Act an "unambiguously expressed intent of Congress"¹⁹¹ to grant a level of protection to "abusive and profane language" or "harassment" that would otherwise qualify as section 7-protected activity. Furthermore, as recognized by the *Martin Luther* dissenters, the Board has discretion to set the level of appropriate protection to weigh the legitimate employer interests in maintaining discipline and avoiding liability for workplace injuries.¹⁹² A court can ask only whether the Board's exercise of this discretion in the *Martin Luther* decision was arbitrary or capricious. Moreover, even in the absence of Board solicitation of evidence about the effects on union organization of workplace rules, it would be difficult to make the case that it was arbitrary or capricious. The Board did not rely on any inappropriate considerations, fail to at least consider important aspects of the issue, or base its decision on factual

period. But, the rule is valid because the employer has a significant interest in having work time set aside for work." *Lafayette Park Hotel*, 326 N.L.R.B. 824, 825 n.5 (1998).

¹⁹⁰ *Martin Luther*, 343 N.L.R.B. at 648. The majority's rejection of Member Liebman's suggestion that employers should be required to specify that work rules do not apply to protected conduct is therefore based not on a prediction about the effects of such rules but rather on its valuation of the preservation of employer authority to control "egregious" abusive or profane language, even during the course of activity otherwise protected by section 7.

¹⁹¹ See *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984).

¹⁹² *Martin Luther*, 343 N.L.R.B. at 650 (Liebman & Walsh, Members, dissenting) (citing *Republic Aviation v. NLRB*, 324 U.S. 793, 797-98 (1945)).

assumptions that were either implausible or subject to contradiction by any readily obtainable evidence.¹⁹³

D. *Reversing a Policy Judgment on the Basis of Reasonable Assumptions of Legislative Fact; Weingarten Rights in the Non-Union Sector?*

The probable invulnerability of the legal doctrine formulated in *Martin Luther* to meaningful arbitrary or capricious judicial review does not depend primarily on the decision purporting to follow, rather than overturn, its primary precedent. That precedent, and the Board's unanimous acceptance of a "reasonable tend to chill" standard therein, does provide support for the reasonableness of the Board's analysis in *Martin Luther*.¹⁹⁴ But the Board's discretion to delineate the bounds of that precedent without significant empirical support also derived from the nature of its policy-based analysis. Similar analysis can justify other, sharper changes in Board doctrine.

The Board's decision in *IBM Corp.* is an example of a Board reversal of law or policy that a court could uphold, after meaningful judicial review, as based primarily on the Board's rebalancing of legitimate goals.¹⁹⁵ In *IBM*, the Board, overruling a Clinton-appointed Board's decision in *Epilepsy Foundation of Northeast Ohio*,¹⁹⁶ retracted the extension to the nonunion workplace of the right to a representative's presence at an investigatory interview that may end in discipline,¹⁹⁷ as accepted by the Supreme Court for unionized employees in *NLRB v. J. Weingarten, Inc.*¹⁹⁸ Citing both a court of appeals decision that rejected a Reagan-appointed Board's assertion that the Act does not permit a

¹⁹³ Since the Board's decision in *Martin Luther*, several courts of appeals have accepted that decision's reformulation of the Board's "chilling effect" doctrine. See, e.g., *UAW v. NLRB*, 520 F.3d 192, 196 (2d Cir. 2008) (accepting the *Martin Luther* analysis, but finding that the Board was "certainly unreasonable" in applying the analysis to the facts of the case); *Cintas Corp. v. NLRB*, 482 F.3d 463, 467 (D.C. Cir. 2007) (describing the proper method of inquiry as that taken in *Martin Luther*); *Guardsmark, LLC v. NLRB*, 475 F.3d 369, 372 (D.C. Cir. 2007). However, two of these decisions – *UAW* and *Guardsmark* – found a Board application of the doctrine to be unreasonable both because it rested on an implausible reading of a challenged rule and because it ignored how a more narrow rule could serve legitimate employer interests. *UAW*, 520 F.3d at 197; *Guardsmark*, 475 F.3d at 380.

¹⁹⁴ *Lafayette Park*, 326 N.L.R.B. at 826.

¹⁹⁵ *IBM Corp.*, 341 N.L.R.B. 1288, 1290 (2004).

¹⁹⁶ 331 N.L.R.B. 676, 679 (2000) (holding that nonunion employees should have the same rights as union employees regarding union representation during investigatory interviews which may result in discipline), *enforced in relevant part*, 268 F.3d 1095 (D.C. Cir. 2001), *overruled by IBM Corp.*, 341 N.L.R.B. 1288 (2004).

¹⁹⁷ *IBM Corp.*, 341 N.L.R.B. at 1294.

¹⁹⁸ 420 U.S. 251, 267 (1975) (affirming a Board holding that it is an unfair labor practice for an employer to discipline an employee for refusing to participate without union representation in a hearing "which the employee reasonably believed might result in disciplinary action").

recognition of the *Weingarten* right in the nonunion workplace,¹⁹⁹ and the Board's subsequent acceptance of this appellate holding on remand,²⁰⁰ the Board in *IBM* expressly acknowledged that the extension was "also a permissible interpretation of the Act."²⁰¹ In a 3-2 decision, the *IBM* Board nonetheless set aside the law pronounced in *Epilepsy Foundation* in favor of another "permissible" interpretation.²⁰² The new interpretation was based on balancing the applicable "policy considerations" in light of "changes in the workplace environment, including ever-increasing requirements to conduct workplace investigations, as well as new security concerns raised by incidents of national and workplace violence."²⁰³ The Board held that the best construction of the Act, at least for the current time, is to protect from employer discipline the right of non-unionized employees to seek the assistance of a coworker at an investigatory interview, but not to require employers "to accede" to such requests.²⁰⁴

Both the Board's protection of non-unionized employees' requests for assistance and its recognition that the *Epilepsy Foundation* holding was a permissible construction of the Act represent an acknowledgement that non-unionized employees' attempts to enlist coworkers' aid fit within the language of section 7 as "concerted activities . . . for mutual aid or protection."²⁰⁵ The Board's determination that a non-unionized employee's refusal to submit to an investigatory interview without the assistance of a coworker is not protected by section 7 is instead based on the same sort of judicially-approved balancing that denies section 7 protection to other activity, like partial strikes²⁰⁶ and product disparagements,²⁰⁷ which themselves may fit within the language of section 7.²⁰⁸

¹⁹⁹ *IBM Corp.*, 341 N.L.R.B. at 1289 (citing *Slaughter v. NLRB*, 794 F.2d 120 (3d Cir. 1986)); see also *Epilepsy Found.*, 268 F.3d at 1095 (upholding the Board's discretion to apply *Weingarten* to a nonunion workplace).

²⁰⁰ *IBM Corp.*, 341 N.L.R.B. at 1288 (citing *E. I. DuPont & Co.*, 289 N.L.R.B. 627 (1988)).

²⁰¹ *Id.* at 1289. This acknowledgment was in contrast to the Board's claims in both *Brown University*, 342 N.L.R.B. 483, 492 (2004), and *H.S. CARE*, 343 N.L.R.B. 659, 659 (2004), that its decisions were dictated by the statute. See *supra* Part II.A-B.

²⁰² *IBM Corp.*, 341 N.L.R.B. at 1289.

²⁰³ *Id.* at 1290.

²⁰⁴ *Id.* at 1294.

²⁰⁵ National Labor Relations Act § 7, 29 U.S.C. § 157 (2000).

²⁰⁶ See, e.g., *Machinists v. Wis. Employment Relations Comm'n*, 427 U.S. 132, 149 (1976) (holding that Congress intended certain employee activity, such as peaceful partial strikes, not to be regulated as either protected or prohibited by either federal or state law).

²⁰⁷ See, e.g., *NLRB v. Local Union No. 1229, Int'l Bhd. of Elec. Workers*, 346 U.S. 464, 477-78 (1953) (holding that workers' public disparagement of their employer's product is not protected by section 7 if not connected to a labor dispute).

²⁰⁸ Indeed, the Board in *IBM* directly stated it was weighing an employee right against the legitimate needs of employers: "Our examination and analysis . . . lead us to conclude

The Board's balancing in *IBM* distinguished the unionized from the non-unionized workplace both by weighing less heavily the importance of assistance in the nonunion workplace and by weighing more heavily the impact of nonunion assistance on legitimate employer interests. From the employee-protection perspective, the Board concluded that a nonunion representative would generally be less effective, both for the worker under investigation and for the rest of the work force.²⁰⁹ The Board reached this conclusion by reasoning that nonunion coworkers have no duty or incentive to represent the rest of the work force, cannot call on the assistance of the union to redress the imbalance of power with the employer, and probably do not have skills equal to those of union representatives.²¹⁰ From the employer-interest perspective, the Board concluded that a nonunion coworker's presence is more likely to compromise the confidentiality of information and otherwise disrupt an employer's investigation than is that of an "experienced union representative with fiduciary obligations and a continuing interest in having an amicable relationship with the employer."²¹¹ All these comparisons might be considered to be based on generalities and probabilities, but the Board was able to defend drawing a bright-line distinction of the non-unionized workplace by stressing the goals of avoiding "extensive litigation" and "uncertainty on the shop floor."²¹²

The Board's *IBM* decision highlights why judicial review should make no distinction between an agency's formulation of legal doctrine through the construction of ambiguous statutory language, on one hand, and its formulation of doctrine through supplementary policymaking or lawmaking, on the other. On one hand, the Board in *IBM* purports to be construing or interpreting the Act, rather than exercising delegated policymaking authority.²¹³ On the other hand, the Board's interpretation or construction does not rest on a parsing of statutory language, or on an analysis of legislative history, or of any other clues as to how Congress might have wanted to delineate doctrine around the *Weingarten* issue. The Board's formulation of doctrine here is based instead on the same kind of policy balancing it would engage in were it exercising its authority overtly (as in setting the *Excelsior Underwear*²¹⁴ rule): to fill in the gaps or interstices of the Act through the elaboration or specification of supplementary law that best advances the Act's policies. The Congressional framers of the NLRA probably gave no thought to whether there should be

that, on balance, the right of an employee to a coworker's presence in the absence of a union is outweighed by an employer's right to conduct prompt, efficient, thorough, and confidential workplace investigations." *IBM Corp.*, 341 N.L.R.B. at 1294.

²⁰⁹ *Id.* at 1291.

²¹⁰ *Id.* at 1291-92.

²¹¹ *Id.* at 1293.

²¹² *Id.* at 1295.

²¹³ See generally *id.*

²¹⁴ 156 N.L.R.B. 1236, 1239 (1966); see *supra* text accompanying note 21.

something like the *Weingarten* right in either the non-unionized or the unionized workplace.²¹⁵ The framers probably did not intend a particular result in either case, nor did they likely think about the specific issue at all. They did intend, however, to generally delegate discretion to the Board to determine how best to define the scope of the statute's protection.²¹⁶

Furthermore, classifying the Board's *IBM* decision as statutory interpretation, or instead as discretionary policymaking or lawmaking, is irrelevant to the appropriate scope of judicial review of the decision. If the decision is treated as policymaking or lawmaking, a reviewing court should ask only whether the policy is contrary to some statutory limitation or right and whether it is arbitrary or capricious or otherwise an abuse of discretion under the standards elaborated in cases like *State Farm*.²¹⁷ As explained above, these are the same questions a reviewing court should ultimately ask if it treats its decision as statutory interpretation. If the decision is somehow contrary to a statutory directive, it fails the *Chevron* Step One analysis; if it is arbitrary or capricious or an abuse of discretion, it cannot be considered reasonable under Step Two.

The *IBM* decision seems to be an example of a reasonable Board reversal of prior doctrine that was upheld as reasonable by a reviewing court. As in *Martin Luther*, the Board in *IBM* weighed appropriate considerations: the possible protection of employee section 7 rights and the possible effect on legitimate employer interests in maintaining disciplinary control of the workplace.²¹⁸ The rationality of the Board's policy choice in *IBM* turned primarily on how these policies should be balanced,²¹⁹ a question presumably delegated by Congress to the discretion of the agency. To be sure, empirical information about the level of protection afforded nonunion workers by the *Epilepsy Foundation* holding, or about this holding's impact on employer disciplinary investigations, would be relevant to a rational balancing, but it seems that such information was not available to the Board.²²⁰ Furthermore, the Board in *IBM* made policy free of any presumption, such as that in favor of

²¹⁵ The legislative history of the Act includes no discussion of the possible role of concerted employee mutual assistance, whether through unions or otherwise, in disciplinary or investigatory hearings or investigations by employers. See generally 1 LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935 (1949); 2 LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935 (1949).

²¹⁶ Revealingly, the Court's decision in *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975), rested not on a parsing of the language of the statute or of its legislative history, but rather on a determination that the Board had appropriately discharged its delegated "responsibility to adapt the Act to changing patterns of industrial life." *Id.* at 266.

²¹⁷ See *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

²¹⁸ *IBM Corp.*, 341 N.L.R.B. at 1293-94.

²¹⁹ *Id.*

²²⁰ See *id.* at 1305 (Liebman & Walsh, Members, dissenting).

coverage of common-law employees (relevant to the issue in *Brown*),²²¹ or such as that in favor of Board discretion to define appropriate bargaining units in each case (relevant to the issue in *H.S. CARE*).²²²

The dissenters in *IBM* contended that the majority did not have discretion to balance the "efficacy of a right" that fits within the language of section 7 against legitimate employer interests, at least when setting the boundaries of section 7 as opposed to defining illegal employer activity under section 8(a).²²³ However, the dissenters cite no authority for this contention beyond the majority opinion in *Epilepsy Foundation*, and it also seems inconsistent with the Court's approbation of employer legitimate interests being accounted for in defining the scope of section 7,²²⁴ and in defining illegal practices under section 8.²²⁵ Although there may be no clear precedent for considering the efficacy of a possible employee right under section 7 when delineating that section's scope,²²⁶ it would seem odd to weigh employer interests without also adjusting the weight of the possible value of the right to employees. The language of section 7 is broad enough to cover illegal and other forms of employee concerted action for mutual aid or protection which would be extremely disruptive to the general discipline and managerial control of the American workplace. Not surprisingly, therefore, the courts and the Board have assumed that Congress intended the Board to have the discretion to refine the language through a balancing of employer interests against the goals of the Act.²²⁷

²²¹ See *supra* text accompanying notes 103-116.

²²² See *supra* text accompanying notes 159-172.

²²³ *IBM Corp.*, 341 N.L.R.B. at 1308-09 (Liebman & Walsh, Members, dissenting).

²²⁴ See, e.g., *NLRB v. Wash. Aluminum Co.*, 370 U.S. 9, 17 (1962) (explaining "[section] 7 does not protect all concerted activities . . . such as those that are unlawful, violent or in breach of contract [or] . . . 'indefensible' because they were found to show disloyalty to the workers' employer"); *NLRB v. Local Union No. 1229, Int'l Bhd. of Elec. Workers*, 346 U.S. 464, 473-74 (1953).

²²⁵ See, e.g., *NLRB v. Baptist Hosp., Inc.*, 442 U.S. 773, 786 (1979) (holding that the employer's interest in the "immediate patient-care" areas justifies restrictions on union activity); *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 34 (1967) ("[I]f the adverse effect of the discriminatory conduct on employee rights is 'comparatively slight,' an antiunion motivation must be proved to sustain the charge if the employer has come forward with evidence of legitimate and substantial business justifications for the conduct.").

²²⁶ *But see Lechmere, Inc. v. NLRB*, 502 U.S. 527, 537 (1992) (stating that section 7 may protect trespassing activity by non-employee union organizers only where employees are otherwise inaccessible).

²²⁷ See, e.g., *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 798 (1945) (upholding such Board balancing and noting that the Act left to the Board the "administrative flexibility" necessary to protect both the employee "right of self-organization" secured by the Act and employers' rights to "maintain discipline").

The dissenters' strongest argument in *IBM*, like their telling arguments in *Brown*²²⁸ and in *H.S. CARE*,²²⁹ was based on the majority's failure to support its balancing through any specific empirical support.²³⁰ The dissenters stressed that there was "no evidence before the Board that coworker representatives have interfered with a single employer investigation since *Epilepsy Foundation* issued in 2000" or, for that matter, "that unions have interfered with employers' investigatory obligations since 1975, when *Weingarten* was decided."²³¹ On the other hand, in contrast to *Brown*, the dissenters cited no evidence demonstrating *Weingarten* had been effective in the nonunion workplace. The *IBM* majority, moreover, did not claim its decision could be justified without reference to the reality of labor relations, nor did it reject the relevance of any empirical evidence concerning the efficacy and effect of *Weingarten* in the absence of a union. It may be that such evidence simply did not exist, perhaps because nonunion employees were not aware of the right or were afraid to invoke it in the absence of a union.²³² In the absence of any presumption of coverage of nonunion workers, it is hard to conclude that the *IBM* Board had to have specific empirical support for its plausible conclusions about the relative benefits and costs of *Weingarten* rights in the nonunion workplace versus the relative benefits and costs of these rights in the unionized workplace.²³³ The distinction of the two workplaces can be

²²⁸ See *supra* text accompanying notes 121-134.

²²⁹ See *supra* text accompanying notes 164-173.

²³⁰ *IBM Corp.*, 341 N.L.R.B. 1288, 1305-11 (2004) (Liebman & Walsh, Members, dissenting).

²³¹ *Id.* at 1305, 1310.

²³² See *Epilepsy Found. of Ne. Ohio*, 331 N.L.R.B. 676, 678 (2000).

²³³ Member Schaumber's concurring opinion in *IBM*, 341 N.L.R.B. at 1295 (Schaumber, Member, concurring), although somewhat difficult to parse, by contrast to the majority's opinion, suggests interpretations of the Act that could be more readily reversed by a reviewing court pursuant to *Chewron* review. Member Schaumber's concurring opinion questions whether a non-unionized employee's request for a coworker's presence at an investigatory interview should be treated as concerted activity that can be protected under section 7. *Id.* at 1299. The opinion also seems to suggest that the Act should not be read to subordinate a non-unionized employer's "common law right to deal with its employees on its own terms and on an individual basis." *Id.* The latter suggestion could be reversed by a court as contrary to the Act's clear restrictions on the personnel decisions of nonunion employers to protect the rights of employees to organize unions and to engage in other "concerted activities" for "mutual aid or protection." National Labor Relations Act § 7, 29 U.S.C. § 157 (2000). Restricting an employer's discretion to discipline an employee for insisting on the presence of a coworker at an investigatory interview does not compel an employer to bargain with the two employees. The rights secured in section 7 through the unfair labor practices specified in section 8 are not limited to employees who are in unions or who are considering joining unions. The Supreme Court confirmed this in *NLRB v. Wash. Aluminum*, 370 U.S. 9, 17-18 (1962), by upholding the Board's protection from employer retaliation for a group of employees who spontaneously walked off their job because of an extraordinarily cold work place.

accepted as rational by those who would make a different policy balance in the nonunion sector than that made in *IBM*.²³⁴

E. *Formulating New Statutory Constructions Without Consideration of Relevant Legislative Facts; Defining the Supervisory Exclusion*

Notwithstanding the probable invulnerability of the majority decision in *IBM* to meaningful judicial review of administrative policymaking,²³⁵ a court should generally be able to require more empirical support for a decision that pronounces significant new doctrine when the decision overturns Board precedent. The precedent itself may have been based on adequate empirical support, and even when that support is lacking, if the Board's factual assumptions are consistent and plausible, they should be respected as an exercise of administrative expertise. This is particularly true, as noted above,²³⁶ because the Labor Act's statutory scheme requires the Board to make regulatory choices, both by directly defining activity as illegal and by requiring the Board to define bargaining units and regulate elections. However, some Board decisions may require empirical support because of their pronouncement of significant new doctrine even when no precedent is overturned. Some such decisions attempt to reformulate or refine doctrine by the reinterpretation of earlier precedent for future cases.

The first of Member Schaumber's statutory interpretations – that the word "concerted" in section 7 requires more "interaction" between employees than just one employee's request to an employer for the assistance of a coworker – seems more plausible because the word "concerted" is both somewhat ambiguous and has been treated as limiting the scope of section 7. See *NLRB v. City Disposal Sys., Inc.*, 465 U.S. 822, 822 (1984) (holding that the Board may treat a sole employee's invocation of a collective bargaining agreement as concerted and thus possibly protected activity). Furthermore, while a unionized employee who requests the assistance of a union representative is invoking a system created by concerted employee efforts, a non-unionized employee's request for assistance may not be part of any pre-existing agreement between employees to help each other. The Board, however, has never taken the position that one employee's efforts to engage another in collective action does not qualify as "concerted," and a request for the help of a coworker would always seem to be at least a potential step toward interaction. Not providing protection to requests therefore must somewhat sacrifice the Act's goal of insulating collective-employee efforts from employer retaliation. Before accepting any Board interpretation of "concerted" that allows such a sacrifice, a court should require the Board to go beyond the abstract analysis of statutory language to consider the actual impact of its interpretation on labor relations.

²³⁴ I would place myself in this category. In the absence of empirical evidence, I would assume that the likely reduced efficacy of a nonunion *Weingarten* right is still worth the risk of potentially greater disruptions of that right for nonunion employers. However, I would have to acknowledge that the call is closer than that for the union workplace, where the union representative is likely to be both more effective for the employee and more responsible toward the employer than the average coworker.

²³⁵ *IBM Corp.*, 341 N.L.R.B. at 1288.

²³⁶ See *supra* text accompanying notes 174-176.

The Board's decisions in the fall of 2006²³⁷ interpreting several critical phrases in the Labor Act's definition of "supervisor"²³⁸ – a category of employee expressly excluded from the Act's coverage²³⁹ – are good examples of the Board making a significant doctrinal formulation without directly overturning viable precedent. The Board issued these decisions in the wake of two Supreme Court decisions that rejected two prior Board interpretations of the "supervisor" definition under *Chevron* Step One review.²⁴⁰ Through the interpretations rejected by the Court in these two decisions, the Board had attempted to preserve a larger domain for the coverage of professional employees contemplated by the statute:²⁴¹ first, by holding that authority over other employees controlled by "professional or technical status" is not "in the interest of the employer" (an element of the statutory definition of supervisor),²⁴² and; second, by holding that "ordinary professional or technical judgment in directing less-skilled employees" is not "independent judgment" (another element of the statutory definition of supervisor).²⁴³ The Court stated that both of these holdings "contradict both the text and structure of the

²³⁷ *Oakwood Healthcare, Inc.*, 348 N.L.R.B. 686, 686 (2006); *Croft Metals, Inc.*, 348 N.L.R.B. 717, 717 (2006) (applying the standard set forth in *Oakwood Healthcare* to determine whether lead persons were supervisors under section 2(11) of the Act); *Beverly Enters.-Minn., Inc.*, 348 N.L.R.B. 727, 727 (2006) (applying the standard set forth in *Oakwood Healthcare* to determine whether charge nurses were supervisors under section 2(11) of the Act).

²³⁸ 29 U.S.C. § 152(11) (2000). Section 152 states:

The term 'supervisor' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature but requires the use of independent judgment.

Id.

²³⁹ The definition of "employee" in the Act expressly excludes "any individual employed as a supervisor." *Id.* § 152(3).

²⁴⁰ *NLRB v. Ky. River Cmty. Care, Inc.*, 532 U.S. 706, 721 (2001) (holding the Board's interpretation unlawful because it "contradict[s] both the text and structure of the statute, . . . as well the rule of *Health Care* that the test for supervisory status applies no differently to professionals than to other employees"); *NLRB v. Health Care & Retirement Corp. of Am.*, 511 U.S. 576, 584 (1994) ("[T]he Board's test for determining supervisory status of nurses is inconsistent with the statute and our precedents.").

²⁴¹ The Act clearly contemplates the coverage of at least some professionals, notwithstanding the supervisory exclusion, by including a separate definition for "professional employee," 29 U.S.C. § 152(12), and by directing the Board not to determine a bargaining unit to be appropriate if it includes both professional and non-professional employees "unless a majority of such professional employees vote for inclusion in such unit." *Id.* § 159(b)(1).

²⁴² *Health Care*, 511 U.S. at 590 (Ginsburg, J., dissenting).

²⁴³ *Ky. River*, 532 U.S. at 714.

statute" and that "the test for supervisory status applies no differently to professionals than to other employees."²⁴⁴

The Supreme Court noted the anomaly in the Board's limitation of its "professional judgment" exceptions to only one of the statute's twelve listed supervisory functions, "responsibly to direct," and stressed that both the "interest of the employer" and the "independent judgment" elements applied to all twelve functions.²⁴⁵ Justice Scalia's opinion for the Court in *Kentucky River*, however, did allow that "[p]erhaps the Board could offer a limiting interpretation of the supervisory function of responsible direction by distinguishing employees who direct the manner of others' performance of discrete tasks from employees who direct other employees, as §152(11) requires."²⁴⁶ This allowance might have served as an invitation to the Board to develop a significant limitation on the "responsibly to direct" function that would not apply differently to professional employees, but that might nonetheless preserve a larger domain for their coverage, in accord with the Board's efforts to advance the goals of the statute.

The Board's decisions in the fall of 2006 on the scope of the supervisory exclusion did not accept this invitation. In the lead case, *Oakwood Healthcare*, the Board limited the meaning of "direct" only by noting in a footnote that "[t]he de minimis principle obviously applies. For example, if a charge nurse gives a single ad hoc instruction to an employee to perform a discrete task, that would not, without more, establish supervisory status."²⁴⁷ The Board instead offered a definition of "responsibly" to limit somewhat the exclusionary force of the "responsibly to direct" function:

[F]or direction to be 'responsible,' the person directing and performing the oversight of the employee must be *accountable* for the performance of the task by the other, such that some adverse consequence may befall the one providing the oversight if the tasks performed by the employee are not performed properly.²⁴⁸

This important part of the *Oakwood Healthcare* Board's interpretation of the supervisory exclusion does not seem vulnerable to *Chevron* Step One review. First, the interpretation of "responsibly," which the Board noted was suggested

²⁴⁴ *Id.* at 721; *accord Health Care*, 511 U.S. at 584.

²⁴⁵ *Ky. River*, 532 U.S. at 715-17.

²⁴⁶ *Id.* at 720.

²⁴⁷ *Oakwood Healthcare, Inc.*, 348 N.L.R.B. 686, 691 n.28 (2006). The *Oakwood Healthcare* Board did not even acknowledge Justice Scalia's invitation, stating only in another footnote that "[t]o the extent that *Providence Hospital* is inconsistent with any aspect of our decision in this case, *Providence Hospital* and those cases relying on it are overruled." *Id.* at 691 n.29. Justice Scalia cites the Board's decision in *Providence Hospital*, 320 N.L.R.B. 717, 729 (1996), as a possible basis for his invitation. *Ky. River*, 532 U.S. at 720.

²⁴⁸ *Oakwood Healthcare*, 348 N.L.R.B. at 691-92 (emphasis added).

by several decisions in various courts of appeals,²⁴⁹ accords both with one normal usage of the word and also with what seems to be the purpose of the supervisory exclusion: the protection of uncompromised employer control over those employees to whom it has delegated significant discretionary authority over other employees. If an employer does not hold an employee accountable for his or her authority to direct other employees, the employer cannot claim as strong a need to protect its uncompromised control over the first employee. Second, Justice Scalia's allowance that the Board could "perhaps" limit the meaning of "direct" was offered only as a suggestion of what the Board might reasonably do within its discretionary authority to interpret the meaning of the statutory definition; it was not a mandate for what the Board had to do. No such mandate can be found in the words of the statute and it would be difficult for a court to extract it from legislative history.

To be sure, as stressed by the dissenters in *Oakwood Healthcare*, Senator Flanders, who offered the "responsibly to direct" language in an amendment, stated that he wanted to ensure the exclusion of a supervisor "with the responsible direction of his department and the men under him Such men are above the grade of 'straw bosses, lead men, set-up men, and other minor supervisory employees'"²⁵⁰ But this kind of explanation of the purpose behind words is much more convincing when offered as a defense of a reasonable administrative interpretation of a statute, rather than in support of a judicial mandate of a particular interpretation. Senator Flanders's statement, for instance, does not require the particular distinction between "employee" and "discrete task" direction noted by Justice Scalia. Such a distinction at most would be supported by Senator Flanders's statement of purpose. Senator Flanders's statement can be more readily used to support an interpretation of "direct" that requires something on the level of authority over a department or comparable work unit, an interpretation endorsed by the *Oakwood Healthcare* dissenters.²⁵¹ Yet, it is difficult to conclude that the statement requires such an interpretation in the absence of any word other than "responsibly" to qualify "direct" in the statute. Ultimately, the question of the level of accountable authority to "direct" that may place an employee in the supervisory category is a question of degree. Answering this question must be within the discretion of the Board, as long as it exercises that discretion in a reasonable rather than arbitrary or capricious manner.

The *Oakwood Healthcare* Board's interpretation of another of the functions listed in the definition of supervisor, the authority to "assign," might present a closer issue for *Chevron* Step One review:

²⁴⁹ See, e.g., *NLRB v. KDFW-TV, Inc.*, 790 F.2d 1273, 1278 (5th Cir. 1986); *NLRB v. Adam & Eve Cosmetics, Inc.*, 567 F.2d 723, 727-28 (7th Cir. 1977).

²⁵⁰ *Oakwood Healthcare*, 348 N.L.R.B. at 706 (Liebman & Walsh, Members, dissenting) (quoting 2 NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT RELATIONS ACT, 1947, at 1303 (1947)).

²⁵¹ *Id.*

[We construe] the term "assign" to refer to the act of designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks, to an employee The assignment of an employee to a certain department (e.g., housewares) or to a certain shift (e.g., night) or to certain significant overall tasks (e.g., restocking shelves) would generally qualify as "assign" within our construction. However, choosing the order in which the employee will perform discrete tasks within those assignments (e.g., restocking toasters before coffeemakers) would not be indicative of exercising the authority to "assign." . . . In sum, to "assign" for purposes of Section 2(11) refers to the charge nurse's designation of significant overall duties to an employee, not to the charge nurse's ad hoc instructions that the employee perform a discrete task.²⁵²

At least in the abstract, this would seem to be a plausible interpretation of the term "assign." Furthermore, to the extent the interpretive issue concerns the level of significance of an instruction to the employers, the meaning of "assign," like the meaning of "direct," becomes a question of degree that must be answered by the Board and not by a court imposing an interpretation. For the meaning of "assign," however, unlike that for the meaning of "direct," the words of the statute arguably suggest a particular level of significance other than that chosen by the *Oakwood Healthcare* Board. The "assign" function is included in section 2(11) in a series of other functions.²⁵³ As argued by the dissenting Board members, "[t]he terms in this series speak either to altering employment tenure itself ('hire,' 'suspend,' 'lay off,' 'recall,' 'discharge') or to actions that affect an employee's overall status or situation ('promote,' 'reward,' 'discipline,' 'transfer')."²⁵⁴ Based on the other terms in the series, it is thus possible to argue that Congress intended "assign" only to "denote authority to determine the basic terms and conditions of an employee's job," such as "job classification," "work site," "work hours," or "shift."²⁵⁵ If Congress did use "assign" with such an intent, it would be beyond the Board's discretion to interpret it as it did in *Oakwood Healthcare*, to include the assignment of overall tasks for the day or shift; and whether Congress had such an intent is a question for a court to decide under *Chevron* Step One review,

²⁵² *Id.* at 689 (majority opinion).

²⁵³ 29 U.S.C. § 152(11) (2000).

²⁵⁴ *Oakwood Healthcare*, 348 N.L.R.B. at 703 (Liebman & Walsh, Members, dissenting).

²⁵⁵ *Id.* This argument also is supported by the legislative history of the addition of the "responsibly to direct" function. As mentioned by the dissenters in *Oakwood Healthcare*, Senator Flanders asserted that the latter function should be added because the other functions, presumably including to "assign," are sometimes performed by the modern personnel office. *Id.* at 704. That would not be the case for the assignment of daily work duties, even if more "significant" than "discrete tasks."

regardless of the ambiguity in the statutory language. As explained above,²⁵⁶ *Chevron* should be interpreted to require deference only in cases where Congress did not decide an issue, not in cases where it did decide, however ambiguously.

Nonetheless, comparing the "assign" function to other functions in the statutory definition of supervisor does not seem to be a sufficient way to determine whether Congress intended the word "assign" to have the particular meaning used by the dissenters. The word "assign," like the word "direct," can mark many points along a continuum of responsibility. It seems probable that Congress intended the Board to refine the meaning of both terms in service of the goals of the Act without the sacrifice of managerial authority. Furthermore, the *Oakwood Healthcare* Board offers a plausible reason why Congress would have wanted to exclude any employee with the authority to designate any "significant overall duties," even if such designation falls short of a job classification of the sort involved in transfers or promotions. As explained by the Board, any assignment of "significant overall duties" could be "of some importance to the employee and to management as well."²⁵⁷ There are "plum" daily assignments and "bum" daily assignments.²⁵⁸ Thus, just as Congress was apparently concerned to protect an employer's control over those with authority to reward by promotion or to punish by discipline, it may have been concerned about protecting employers' control over those who can assign "significant overall duties." Put differently, a union that includes those with authority to parcel out "plum" and "bum" assignments can compromise the employer's managerial control without a bargaining agreement. A reviewing court therefore probably ought not reject the *Oakwood Healthcare* decision's plausible interpretation of "assign," as it should not reject its plausible interpretation of "direct," under Step One of *Chevron*.

A court applying meaningful review under Step Two of *Chevron*, however, could be dissatisfied with the Board's mode of analysis in construing "assign" and "direct." The reason is that the *Oakwood Healthcare* Board, by declining to weigh the possible impact of its doctrine on the number and kind of workers that are excluded from coverage as supervisors, failed to consider a critical "aspect of the problem" that Congress presumably has delegated it authority to address. After offering plausible reasons why the lines drawn by its constructions distinguish employees whom management has more of an interest in controlling, the *Oakwood Healthcare* majority claimed, in response to the dissent, that calculating the "possible consequences of its reading of the Act"²⁵⁹ on classes of workers in the modern workplace would be "results-

²⁵⁶ See *supra* text accompanying note 44-46.

²⁵⁷ *Oakwood Healthcare*, 348 N.L.R.B. at 689.

²⁵⁸ *Id.*

²⁵⁹ *Id.* at 690 n.26

oriented" and thus improper.²⁶⁰ Yet, the type and number of workers excluded by any construction of the supervisory exclusion must be relevant to the rationality of the construction. As the *Oakwood Healthcare* majority acknowledged, Congress intended the breadth of the exclusion to be limited so that those performing "minor supervisory functions," such as "lead employees, straw bosses, and set-up men," would not lose the Act's protections.²⁶¹ Any authority delegated by Congress to the Board to interpret the somewhat ambiguous words in the supervisory exclusion thus must weigh not only the employer's interest in managerial control but also the impact on workers whose "supervisory functions" are not more than "minor." An executive agency like the Board cannot both claim discretion to elaborate the meaning of a statute and also claim that it is forced to do so without consideration of the developing reality that it regulates.

The majority in *Oakwood Healthcare*, in response to criticism from the dissenters, does address a concern that its construction of "responsibly to direct" will result in the supervisory exclusion covering many more workers than necessary to ensure managerial control. The majority asserts that its emphasis on accountability will ensure the exclusion only of those workers whose interests the employer determines must be aligned with management.²⁶² The majority also notes the statutory requisite that excluded supervisors have to use "independent judgment" in the exercise of their authority, which it interprets to not include judgments "dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective-bargaining agreement."²⁶³

Yet the Board made no effort to consider the impact in the modern workplace of these limitations on the exclusionary force of the "responsibly to direct" function. It cites no social science studies or assessments made in the amicus briefs it solicited and obtained in the proceeding. The dissenters stressed that most nurses who work on the staffs of hospitals or nursing homes have authority over and direct some health care aides.²⁶⁴ Could employers use

²⁶⁰ *Id.* at 699 ("In deciding this case, moreover, we intentionally eschewed a results-oriented approach . . .").

²⁶¹ *Id.* at 690.

²⁶² *Id.* at 689-92.

²⁶³ *Id.* at 693. The majority also stressed that the statutory definition "provides a baseline for the degree of discretion required" by contrasting actions that entail "independent judgment" with actions that are "of a merely routine or clerical nature." *Id.* at 693 (quoting 29 U.S.C. § 152(11) (2000)).

²⁶⁴ *Id.* at 705 (Liebman & Walsh, Members, dissenting). The dissenters relied on a study finding that "2.3 million unlicensed health care workers . . . supplement the work of licensed nurses by performing basic patient care activities under the supervision of an RN [registered nurse] or LPN/LVN [licensed practical nurse/licensed vocation nurse]." *Id.* at 705 n.25 (quoting COMM. ON THE WORK ENV'T FOR NURSES AND PATIENT SAFETY, KEEPING PATIENTS

the "responsibly to direct" function, as defined by the Board, to negate the protection of all such nurses simply by making them at least somewhat accountable for the performance of their subordinates? Could employers do so for other professionals, who likewise have some authority over aides like secretaries? It may be that few employers want to evaluate skilled professionals by the performance of any other less skilled employees they direct, rather than just by the professionals' own more significant performance;²⁶⁵ but the Board did not even consider the possibility, as suggested by the dissenters,²⁶⁶ that some employers might manipulate the Board's construction of the "responsibly to direct" function to effect the general exclusion of their professional employees.²⁶⁷

The Board in *Oakwood Healthcare* and in a companion case treating manufacturing workers, *Croft Metals*,²⁶⁸ also did not consider the possibility that employers could use the Board's interpretation of "responsibly to direct" to exclude from coverage most of their even relatively unskilled workers in a production facility. Employers could conceivably do so either by granting accountable authority to the typical worker on the shop floor to direct some "men under him"²⁶⁹ with respect to certain tasks, or by using work teams that have collective but accountable authority to direct the members of the team. Again, it may be that few employers have or would delegate such authority to

SAFE: TRANSFORMING THE WORK ENVIRONMENT OF NURSES 66 (Ann Page ed., National Academies Press 2004)).

²⁶⁵ I have never known a dean, for instance, who wanted to evaluate law professors on how well they directed secretaries to help complete tasks.

²⁶⁶ *Oakwood Healthcare*, 348 N.L.R.B. at 707 (Liebman & Walsh, Members, dissenting) ("[E]mployers eager to take nurses out of the Act's protection might well choose to hold them accountable for . . . minor matters.").

²⁶⁷ The Board in *Oakwood Healthcare* indeed found that the employer had not demonstrated that the "charge nurses," whom it claimed should be excluded from a collective bargaining unit as statutory supervisors, had been held accountable for the performance by other employees of the tasks that they directed. *Id.* at 695 (majority opinion). Similarly, in a companion case addressing the inclusion of charge nurses in a collective bargaining unit of nurses at a nursing home, the Board found the "prospect of adverse consequences" for their subordinates' performance "merely speculative and insufficient to establish accountability." *Beverly Enters.-Minn., Inc.*, 348 N.L.R.B. 727, 731 (2006); see also *I.H.S. Acquisition No.114, Inc.*, 350 N.L.R.B. No. 44, slip op. at 2 (July 31, 2007) (finding nurses were not shown to have accountability or to exercise "independent judgment" because reassignment of aides from an overstaffed unit to an understaffed unit was not more than routine or clerical). In *Oakwood Healthcare*, however, the Board found that the permanent charge nurses were supervisors because of their authority to "assign" nursing personnel to particular patients during their shifts, even though they did not have authority to assign the personnel to particular shifts or positions in the hospital. *Oakwood Healthcare*, 348 N.L.R.B. at 694.

²⁶⁸ 348 N.L.R.B. 717 (2006).

²⁶⁹ See *Oakwood Healthcare*, 348 N.L.R.B. at 691.

workers without sharply controlling their "independent judgment,"²⁷⁰ but the Board's failure to consider the possibility of such delegation and its impact on the coverage of the Act is troubling.

As stressed above,²⁷¹ the Board must sometimes refine doctrine in the absence of sufficient evidence about the refinement's likely impact; and it may be that it could draw no clear conclusions on the practical impact in this case. This, however, does not excuse its failure to press its analysis beyond a formal consideration of statutory language and legislative history. Furthermore, the Board in *Oakwood Healthcare* also fails to explore fully the practical impact of the dissenters' alternative construction of "responsibly to direct," to cover only those like department heads with primary accountable responsibility over the direction of other employees, rather than just accountable authority to direct some of their tasks. Given the uncertain impact on the American workforce of the majority's broader construction of "responsibly to direct," a rational construction of the meaning of this phrase should have included analysis of whether the dissenters' more narrow construction would have adequately protected managerial control of the modern workplace, even if adopted in tandem with the dissenters more narrow construction of "assign" to cover only basic terms and conditions of employment, rather than the day-to-day assignment of tasks.

The Board in *Oakwood Healthcare* stated it "will continue to assess each case on its individual merits."²⁷² Doing so will afford it further opportunity to consider the practical impact of its exercise of discretion in *Oakwood Healthcare*. If the Board refuses to take this opportunity, especially in cases that indicate its refinement of the supervisory exclusion has significantly contracted the Act's coverage, and if it claims it is constrained by the dictates of the statute or by its own precedent, and that the problem thus can be addressed only by Congress, it would be appropriate for any reviewing court with jurisdiction to reject exclusions based on the Board's *Oakwood Healthcare* constructions.²⁷³ *Oakwood Healthcare*, as well as the Board's

²⁷⁰ The Board, for instance, held in *Crofts Metals* that the employer failed to establish that "lead persons" with accountable authority to "direct" other employees had been delegated discretion to use "independent judgment" that rises above the "routine or clerical" in doing so. *Croft Metals*, 348 N.L.R.B. at 722. In later cases, the Board has found manufacturing and construction workers not to be statutory supervisors notwithstanding their authority over other workers, because the authority was not shown to require the use of "independent judgment." See *Shaw, Inc.*, 350 N.L.R.B. No. 37, WL 2220274, at *2 (July 30, 2007) (finding that an employee did not exercise independent judgment where his projects involved "recurrent and predictable" tasks and were "carried out in conformance with supervisors' specifications and oversight"); *Austal USA, L.L.C.*, 349 N.L.R.B. No. 51, 2007 892506, at *1-2 n.6 (Mar. 21, 2007).

²⁷¹ See *supra* text accompanying notes 174-176, 236-237.

²⁷² See *Oakwood Healthcare*, 348 N.L.R.B. at 699.

²⁷³ Just as it is unlikely that a union will obtain judicial review of a Board decision to refuse to recognize a *Sturgis* bargaining unit, see *supra* note 173, so is it unlikely that a

direct reversals of precedent in *Brown* and *H.S. Care*, illustrate that the Board's delegated discretion to determine how the statute can be best implemented carries with it the responsibility to consider not just plausible, or even the most plausible, meanings of the words of the statute, but also how those meanings advance statutory goals in the current world it regulates.

CONCLUSION

Barack Obama's election as President presents the prospect of another round of reversals of policymaking by Board majorities appointed by a previous President of the other political party. Given the general slant of the decisions of Bush-appointed Board majorities away from positions favored by unions supportive of President Obama,²⁷⁴ such reversals would be both expected and also subject to criticism as politically driven by management advocates. Critics who lament how the Board's policy oscillation has undermined its stature and respect as an expert independent agency would have occasion to again sound their concerns.

The federal judiciary, however, could do much to address such concerns and to abate the escalation of policy swings in Board-formulated labor doctrine. The judiciary need not accept every plausible Board reinterpretation of the ambiguous and open-ended statutory terms of the Labor Act. The judiciary can require the Board to explain why new doctrine is needed based on a reasonable level of analysis of the experience with the doctrine that it intends to modify and of how the new doctrine will better advance goals and interests accommodated by the Labor Act. It is of course reasonable to expect a federal judiciary that has been predominantly appointed by Republican Presidents to be more demanding of policymaking by a Labor Board appointed by a Democratic President.²⁷⁵ Both the standards of judicial review and the interests in having a more respected and independent Labor Board, however,

union will secure judicial review of any Board decision to exclude employees as supervisors from prospective bargaining units. Inasmuch as supervisors are not protected from unfair labor practices, however, the scope of the supervisory exclusion can be presented in a Board decision in a section 8 case for which a union or the excluded employee can seek judicial review. See, e.g., *Austal USA*, 349 N.L.R.B. No. 51, 2007 WL 892506, at *1-2 (finding an employer committed an unfair labor practice by terminating an employee who was not a statutory supervisor). An employer can also assert an employee is not a statutory supervisor in a section 8 case in order to claim it was not responsible for the employee's inhibition of section 7 activity. See, e.g., *Shaw*, 350 N.L.R.B. No. 37, 2007 WL2220274, at *5 ("In view of our determination that the Respondents' foremen are not supervisors, we reverse the judge's findings that certain of their actions violated Section 8(a)(1).").

²⁷⁴ See *supra* note 7 (discussing the general slant of Bush-appointed Board majorities favoring management interests).

²⁷⁵ See generally Thomas J. Miles & Cass Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of Chevron*, 73 U. CHI. L. REV. 823, 851 (2006) (finding empirical support in an analysis of NLRB cases for the proposition that the "political predisposition of the judges influences the judicial review of agency decisions").

transcend party and interest group affiliation. Courts could send a message to the Obama-appointed Board by meaningful judicial review of some of the decisions of Bush-appointed Board majorities, without waiting for decisions by the new President's Board.

Some might be skeptical that a politically conservative federal judiciary is likely to give meaningful judicial review to doctrinal reformulations of the management friendly Bush-appointed Board. Some might also believe, based on the historical resistance to labor unions of judges steeped in traditional American values of individualism,²⁷⁶ that closer judicial review of Board policymaking would inevitably lead to the frustration of the more collectivist values of the Labor Act, at least when those values are weighed more heavily in Board policy choices.²⁷⁷ Indeed, I once cited judicial suspicion of collective action to support an argument for the restriction of all judicial review of the Board's exercise of its authority under section 9 of the Act to set appropriate bargaining units and conduct certification elections.²⁷⁸ Yet, I now think serious judicial review of Board policymaking, if not the Board's application of policy under section 9, is to be desired. Although making the case for this review is beyond the scope of an Article that only purports to establish that such review is both appropriate and possible under current law, it is worth noting that skepticism of the benefits of this review rests on broad and debatable generalizations about how judges currently exercise review and the relative importance to this exercise of the various judges' substantive views on labor policy on one hand, and on the administrative decision-making process and discretion on the other hand. Suffice it here to note that even in a period when labor-management issues were more salient in the general political dialogue, there was no predictable alignment of the various Justices in labor cases that came before the Supreme Court.²⁷⁹ In the long run, in my view, the original goals of the National Labor Relations Act may be better served by a more even development of Board doctrine that is disciplined by the expectation of serious judicial review of policy reformulations.

²⁷⁶ See CHRISTOPHER L. TOMLINS, *THE STATE AND THE UNIONS: LABOR RELATIONS, LAW, AND THE ORGANIZED LABOR MOVEMENT IN AMERICA, 1880-1960*, at 44-52, 117-18 (1985).

²⁷⁷ See, e.g., Flynn, *supra* note 30, at 443-46.

²⁷⁸ See Harper, *supra* note 173, at 298.

²⁷⁹ See, e.g., *Buffalo Forge Co. v. United Steelworkers of Am.*, 428 U.S. 397, 413-14 (1976) (Stevens, J., dissenting) (joined by Justices Brennan, Marshall, and Powell, disagreeing with the majority opinion's restriction on the authority of federal courts to enjoin sympathy strikes); *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 295 (1974) (White, J., dissenting) (joined by Justices Brennan, Stewart, and Marshall, disagreeing with the majority opinion's restriction on the Board's authority to limit the managerial exemption from employees covered by the Act); cf. *Ky. Retirement Sys. v. EEOC*, 128 U.S. 2361, 2371 (2008) (Kennedy, J., dissenting) (joined by Justices Scalia, Ginsburg, and Alito, dissenting from the majority opinion allowing an employer covered by age discrimination prohibitions to consider age indirectly in setting disability retirement benefits).

Moreover, the new Board should not wait for such messages from the judiciary to operate under such discipline. The new Board should decide cases with an eye toward courts providing the meaningful arbitrary or capricious review that the courts are authorized to give under both *Chevron* and its progeny, as well as under decisions like *State Farm* interpreting the review standards provided by the Administrative Procedure Act. The new Board, in other words, should not hide behind arguments that an ambiguous, open-ended statutory text requires a reformulation of doctrine, or that its expertise warrants in policymaking adjudications the assumption of any legislative fact, no matter how implausible. The new Board instead should carefully consider the best evidence available on the comparative impact of alternative doctrinal formulations. As acknowledged above, illuminating evidence will not always be available or obtainable. Yet where the issue is whether to make another swing back to old doctrine, the Board can at least consider cases decided and studies conducted under alternative doctrinal regimes. Better supported and more carefully framed doctrine is more likely to withstand not only meaningful judicial review, but also the inevitably shifting political winds and accompanying criticism.