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Justice Scalia's Labor Jurisprudence- Justice Denied

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JUSTICE SCALIA’S LABOR JURISPRUDENCE – JUSTICE DENIED?

BY
ANNE MARIE LOFASO*

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* Arthur B. Hodges Professor of Law, West Virginia University College of Law. This article grew out of a blog posted on the Oxford Human Rights Hub Blog. See Anne Marie Lofaso, *Justice Scalia’s Record on Labour Rights as Human Rights: Justice Denied*, OXHRHUB BLOG (Apr. 8, 2016), <<http://ohrh.law.ox.ac.uk/scalias-record-on-labour-rights-as-human-rights-justice-denied/>>, reprinted in GLOBAL PERSPECTIVES IN HUMAN RIGHTS: OXFORD HUMAN RIGHTS HUB BLOG (Richard Martin et al., eds., 3d ed. 2016), <<http://ohrh.law.ox.ac.uk/wordpress/wp-content/uploads/2015/08/OxHRH-Blog-Anthology.pdf>>. As always, the author is grateful to comments received from her colleagues, both at Oxford and at WVU, especially Sandra Fredman, Richard Martin, Rachel Wechsler, and Bob Bastress. The author finally wishes to thank the WVU Law Hodges Summer Research fund for financial assistance in finishing this article. All errors are the author’s alone.

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I. INTRODUCTION

On June 17, 1986, President Ronald Reagan announced that he would nominate the Honorable Antonin Gregory Scalia, from the United States Court of Appeals for the District of Columbia Circuit, to serve as an associate justice on the United States Supreme Court.¹ On September 26, 1986, Scalia rose to the High Bench. Scalia had just turned fifty years young, leaving many conservatives salivating at the enormous influence President Reagan would have on U.S. policy beyond his eight-year presidency.

Justice Scalia served nearly thirty years on the Supreme Court. His influence as a jurist is profound. He is associated with the school

1. See, e.g., Al Kamen, *Burger Quits; Rehnquist Chosen to Lead Court; President Intends to Nominate Appellate Judge Scalia*, WASH. POST, June 18, 1986, at A1.

of legal formalism – a normative belief that judges should logically apply uncontroversial rules (legalism) to the facts of a case to determine the outcome in much the same way that a mathematician would apply true mathematical principles (such as axioms) to either derive other mathematical principles or draw conclusions.² It is only in this way, the formalist believes, that judges will rise above politics and avoid the rule of person in favor of the rule of law. He is also strongly associated with textualism, a school of thought whereby the jurist arrogates the constitutional, statutory, or regulatory text to prominence over other canons of construction.³

This article uses private-sector labor law cases decided during Justice Scalia's tenure on the Supreme Court to draw conclusions about Scalia's labor law legacy and the ways in which his administrative law jurisprudence influenced his decision making in those cases. Unlike the great Justice, I do not believe that law can be reduced to axioms and internal logic. Instead, law is influenced by context – the context of the case, the context of who is deciding the case, and the context of the legal system itself. Denial of such context often means that justice is denied. Accordingly, in part II, *Background*, I explore the biographical details of Justice Scalia's life and also important events that occurred during his lifetime to shed light on his jurisprudence. While Scalia often ignored context, which he considered outside the law's four corners, context including historical events and biographical details of his own life still influenced both who he was as a justice and how the case ultimately came to him for decision.

Part III, *Scalia's Labor Law Legacy*, is the heart of this article. With the knowledge that labor law is public law and cannot be understood outside the context of labor law's relationship to administrative law, Part III is divided into three sections along the lines of administrative law principles. Section III.A discusses Scalia's labor law cases on separation of powers. Section III.B delves into the

2. See, e.g., ANTONIN SCALIA, A MATTER OF INTERPRETATION 25 (1997); Richard A. Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. RES. L. REV. 179, 182-86 (1986); Ernest J. Weinrib, *The Jurisprudence of Legal Formalism*, 16 HARV. J. L. & PUB. POL'Y 583 (1993); Ernest J. Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 YALE L. J. 949, 952 (1988) ("For the formalist, the law's inner rationality reflects the possibility of its coherence.").

3. See, e.g., William N. Eskridge, Jr., *Textualism, the Unknown Ideal?*, 96 MICH. L. REV. 1509 (1998); Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in THE TANNER LECTURES ON HUMAN VALUES 77, 88 (1995).

Court's relationship to the National Labor Relations Board (NLRB or Board) in interpreting the National Labor Relations Act (NLRA) through the *Chevron* lens. Section III.C explores the Court's review of the Board's factual findings through the substantial-evidence test and the extent to which those views affected labor law jurisprudence.

II. BACKGROUND: JUSTICE IN THE MAKING

Antonin Gregory Scalia (Nino) was born on March 11, 1936, in Trenton, New Jersey, to an immigrant Italian-Catholic father and second-generation Italian-Catholic mother.⁴ It was a year of many firsts, especially, but not exclusively, in the realm of technological and commercial development. The Hoover Dam was completed.⁵ The first alcohol power plant was formed. The *N.Y. Herald Tribune* became the first newspaper to microfilm its current issues. The United States army adopted semi-automatic rifles. A Florida race track installed the first ever photo-finish camera. Radium E became the first radioactive substance produced synthetically. The Hindenburg launched commercial service across the North Atlantic, between Germany and the United States. Not to be outdone, air flight earned several firsts: the first transatlantic round-trip air flight; the first commercial flight from the mainland U.S. to Hawaii. Aviation gasoline was produced commercially in New Jersey for the first time. The year witnessed medical firsts such as intravenous injection of a human with a radioisotope, X-ray photo of arterial circulation, and administration of radioactive isotope medicine. Parking meters were invented. The ICC issued its first common carrier license. The United Auto Workers Union staged its first sit-down strike at the Fisher Body Plant in Detroit. Canada elected its first female mayor. The Federal Register published its first issue. The United States experienced record low and record high temperatures; twelve of those record highs still stand today.⁶

4. The personal details of Justice Scalia's life are very well documented. I used the following sources: *Antonin Scalia*, OYEZ, IIT CHICAGO-KENT COLLEGE OF LAW, <https://www.oyez.org/justices/antonin_scalia> (last visited Mar. 17, 2017); Paris Schutz, *University of Chicago Reflects on Justice Antonin Scalia's Death*, CHICAGOTONIGHT (Feb. 15, 2016, 1:54 PM), <<http://chicagotonight.wttw.com/2016/02/15/university-chicago-reflects-justice-antonin-scalias-death>> (last visited Mar. 17, 2017).

5. A list of the historical events and those described in the following three paragraphs can be found at *Historical Events in 1936*, ON THIS DAY, <<http://www.onthisday.com/events/date/1936>> (last visited Mar. 20, 2017) and *Historical Events in 1936 (Part 2)*, ON THIS DAY, <<http://www.onthisday.com/events/date/1936?p=2>> (last visited Mar. 20, 2017).

6. North Dakota (-60° F) and South Dakota (-58° F) set record low temperatures. Sixteen

It was also a year of many sports and entertainment firsts and significant events. *Billboard* published its first music hit parade. The Baseball Hall of Fame elected its first players, which included Babe Ruth and Ty Cobb. The National Football League conducted its first draft. The first ski jumping tournament was held. Willy den Ouden set a women's world record (1:04.6) in the 100-meter free style, which was not broken for twenty years. Daytona Beach, Florida, hosted the first stock car race. The first professional baseball game in Japan was played, while the Olympics held its first basketball game. Nazi Germany hosted the Fourth Winter Olympic Games and the Eleventh Summer Olympic Games in Berlin. The first issue of *Life* magazine was published. The first live panda cub entered the U.S. Later in the year, the first giant panda, Su Lin, travelled to the States.⁷ The first superhero, the Phantom, appeared in cartoon strips. The Radio Corporation of America showed the first television program. The British Broadcasting Company in London broadcasted the first radio quiz show, first television gardening show, and first high-definition television. The Canadian Broadcasting Company was established.

Not everything, however, contributed to an optimistic atmosphere of never-ending progress. While Franklin Delano Roosevelt was in his first term as president, (later that year, he won re-election in a landslide), and trying to lead the United States out of the Depression, Europe was preparing itself for war. British King George V died; Edward VIII succeeded to the throne but abdicated later in that year to marry American Wallace Simpson. His brother, George VII, ascended to the throne and would reign through World War II and until his death when his daughter, Queen Elizabeth II, succeeded him. Hitler announced the building of the Volkswagon (the People's Car). Japan experienced a military coup. President Franklin D. Roosevelt signed the Second Neutrality Act, extending for fourteen months the 1935 Neutrality Act's prohibition on trading in arms with all warring parties. Italian Prime Minister Benito Mussolini described the alliance between Italy and Germany as the

states – Maryland (109° F), New Jersey (110° F), Pennsylvania (111° F), Michigan (112° F), West Virginia (112° F), Louisiana (114° F), Minnesota (114° F), Wisconsin (114° F), Indiana (116° F), Iowa (117° F), Missouri (118° F), Nebraska (118° F), Arkansas (120° F), Oklahoma (120° F), Kansas (121° F), and North Dakota (121° F) – hit record highs. *Historical Events in 1936*, *supra* note 5; *Historical Events in 1936 (Part 2)*, *supra* note 5.

7. See Chris Heller, *How America Fell in Love with the Giant Panda*, SMITHSONIAN (Sept. 21, 2015), <<http://www.smithsonianmag.com/history/how-america-fell-love-giant-panda-180956692/?no-ist>>.

Axis, around which the other European nations would revolve. In November, the thirty-month Battle of Madrid began. Perhaps most ominously, we were only three years away from the time that German scientists would learn how to split a uranium atom – the precursor to the atomic bomb.

On March 11, 1936, the NLRB, still in its infancy at 249 days old, decided one case – one of 107 cases that it would ultimately decide that year. The case, *Atlanta Woolen Mills*, concerned a cotton and wool textile manufacturing company that allegedly supported a sham union called the Good Will Club to replace the employees' chosen representative, Local 2307, United Textile Workers of America, by requiring its employees to join the Club and by firing supporters of Local 2307.⁸ The Board found that the Good Will Club was a labor organization⁹ within the meaning of the National Labor Relations Act (NLRA or the Wagner Act),¹⁰ but that the company did not unlawfully support the Good Will Club.¹¹ The Board further found that the company violated the NLRB by discharging some of the employees.¹² The case is known primarily for establishing the principle that an organization less formal than a union could meet the definition of labor organization within the meaning of the NLRA. On April 12, 1937, when Scalia was thirteen months old, the Supreme Court held the NLRA constitutional.¹³

Scalia grew up during the Great Depression, World War II, the invention of the atomic bomb, the initiation of the Cold War, the

8. 1 N.L.R.B. 316, 316 (1936).

9. *Id.* at 318.

10. 29 U.S.C. § 151-59 (2012) (popularly known as the Wagner Act).

11. *Atlanta Woolen Mills*, 1 N.L.R.B. at 320-21, 326 (citing section 8(2), 29 U.S.C. § 158(2) (1940) (codified as amended at 29 U.S.C. § 158(a)(2) (2012))).

12. *Id.* at 320-26 (citing section 8(3), 29 U.S.C. § 158(3) (1940) (codified as amended at 29 U.S.C. § 158(a)(3) (2012))).

13. The following five cases, all decided on the same day, upheld the NLRA's constitutionality under the Commerce Clause, U.S. CONST. art. I, § 8. *See* *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 25-32 (1937) (upholding the constitutionality of the NLRA in the context of the fourth largest producer of steel in the United States); *NLRB v. Fruehauf Trailer Co.*, 301 U.S. 49, 53 (1937) (same; in the context of "the manufacture, assembly, sale, and distribution of commercial trailers and of trailer parts and accessories"); *NLRB v. Friedman-Harry Marks Clothing*, 301 U.S. 58, 72 (1937) (same; in the context of "in the purchase of raw materials and the manufacture, sale and distribution of men's clothing"); *Associated Press v. NLRB*, 301 U.S. 103, 128 (1937) (same; in the context of a news clearing house and news supplier using interstate and foreign communication channels); *Wash., Va. & Md. Coach Co. v. NLRB*, 301 U.S. 142, 144 (1937) (same; in the context of an interstate motorbus company, which transported passengers between the District of Columbia and Virginia).

Korean War, and McCarthyism.¹⁴ He grew up knowing two presidents – Franklin Delano Roosevelt and Harry S. Truman. He started college just after the Korean War ended. He attended college and law school while Dwight Eisenhower was president – the first Republican to hold that post since March 4, 1933, when Herbert Hoover left office, three years before Scalia was born.

In 1957, Scalia graduated first in his class at Georgetown.¹⁵ By that time, twenty-two years had passed since Congress had enacted the Wagner Act and ten years since it passed the Taft-Hartley amendments. In that year, the Court decided three NLRB cases.¹⁶ All three were statutory construction cases. First, *Lion Oil Company*, dealt with the Board's interpretation of ambiguous language in one of the provisos to Section 8(d)'s definition of collective bargaining, which prohibits parties to a collective-bargaining agreement from

terminat[ing] or modify[ing] such contract, unless the party desiring such termination or modification . . . (4) continues in full force and effect, without resorting to strike or lockout, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or *until the expiration date of such contract, whichever occurs later* . . .¹⁷

An employee who strikes within the specified sixty-day period loses his status as an employee for the purposes of sections 8, 9, and 10 of the Act.¹⁸ The Court upheld the Board's construction of the term "expiration date," such that "a strike in support of [midterm] modification demands [that] occurs after the date on which such modifications may become effective – and after the 60-day notice period has elapsed – but prior to the terminal date of the contract" is not prohibited by section 8(d).¹⁹ Second, *Office Employees International Union, Local No. 11*,²⁰ dealt with the Board's

14. On McCarthyism, see KEVIN HILLSTROM, *DEFINING MOMENTS: MCCARTHYISM AND THE COMMUNIST THREAT* (2011); William S. White, *McCarthy Issue Is Far Bigger than the Senator Himself*, N.Y. TIMES, Jun. 6, 1954, at E4 (defining McCarthyism as "an assault upon the American tradition or a dedicated hunt for subversives who might destroy that tradition").

15. The biographical facts in this paragraph were taken from two sources: Maira Garcia & Amisha Padnani, *Justice Antonin Scalia: His Life and Career*, N.Y. TIMES (Feb. 14, 2016), <<http://www.nytimes.com/interactive/2016/02/14/us/scalia-timeline-listy.html>>; *Antonin Scalia: Supreme Court Justice, Lawyer (1936–2016)*, BIOGRAPHY, <<http://www.biography.com/people/antonin-scalia-9473091#synopsis>> (last visited Mar. 20, 2017).

16. See *NLRB v. Lion Oil Co.*, 352 U.S. 282 (1957); *Office Emp. Int'l Union, Local No. 11, AFL-CIO v. NLRB*, 353 U.S. 313 (1957); *NLRB v. Truck Drivers Local Union No 449, Int'l Bhd. of Teamsters, Chauffeurs Warehousemen, & Helpers of Am. AFL*, 353 U.S. 87 (1957).

17. 29 U.S.C. § 158(d)(4) (2012) (emphasis added).

18. *Id.* The final sentence of this part of section 8(d) has since been amended.

19. See *Lion Oil Co.*, 352 U.S. at 285, 287-93.

20. See 353 U.S. at 316-20.

construction of the statutory definition of employer. The Court held that the Board acted outside its discretion in concluding that unions, when acting as employers, are not covered by NLRA section 2(2), which excludes “labor organizations (other than when acting as an employer)” from the definition of employer.”²¹ The Court explained that the NLRA’s plain language and its legislative history compelled that conclusion. It further held that the Board did not have discretion to refuse to assert its jurisdiction over an entire class of employers.²² Third, *Truck Drivers Local Union No. 449*,²³ dealt with a statutory silence regarding the conflicting interests between the union and employers in a multiemployer bargaining context. The Court upheld the Board’s rule that “nonstruck members of a multi-employer bargaining association” did not act unlawfully “when, during contract negotiations, they temporarily locked out their employees as a defense to a union strike against one of their members which imperiled the employers’ common interest in bargaining on a group basis.”²⁴

The years 1960 and 1961 were big years for both Scalia and for labor law. In 1960, Scalia graduated from Harvard Law School and married Radcliffe student, Maureen McCarthy, with whom he later had nine children.²⁵ The following year, he began his career as a lawyer at the firm, Jones, Day, Cockley & Reavis in Cleveland, Ohio.²⁶ The Court also decided fourteen NLRB cases in those years – five in 1960²⁷ and eight in 1961²⁸ – not to mention the Steelworkers

21. *Id.* (citing 29 U.S.C. § 152(2)).

22. *See id.*

23. *See* NLRB v. Truck Drivers Local Union No. 449, Int’l Bhd. of Teamsters, Chauffeurs Warehousemen, & Helpers of Am. AFL, 353 U.S. 87, 89, 97 (1957).

24. *See id.*

25. The biographical facts in this paragraph were taken from two sources: Garcia & Padnani, *supra* note 15; Antonin Scalia: *Supreme Court Justice, Lawyer (1936–2016)*, *supra* note 15. Radcliffe College was the all-women’s liberal arts institution and functional equivalent of the all-men’s Harvard College at Harvard University. *See* Helen Lefkowitz Horowitz, Lecture on the History of Women at Harvard in Honor of Harvard’s 375th Anniversary: It’s Complicated: 375 Years of Women at Harvard (April 23, 2012), *available at* <<https://www.radcliffe.harvard.edu/news/in-news/remarks-its-complicated-375-years-women-harvard>>.

26. *See The Reavis Era*, JONES DAY, <<http://www.jonesday.com/principlesandvalues/firm-history/therevisera/>> (last visited Mar. 22, 2017).

27. *See* Commc’ns Wkrs. of Am. AFL-CIO v. NLRB, 362 U.S. 479 (1960); NLRB v. Ins. Agents’ Int’l Union, AFL-CIO, 361 U.S. 477 (1960); Local Lodge No. 1424 v. NLRB, 362 U.S. 411 (1960); NLRB v. Deena Artware, Inc., 361 U.S. 398 (1960); NLRB v. Drivers, Chauffeurs, Helpers, Local Union No. 639, 362 U.S. 274 (1960).

28. *See* NLRB v. Ochoa Fertilizer Corp., 368 U.S. 318 (1961); Int’l Ladies’ Garment Workers’ Union, AFL-CIO v. NLRB, 366 U.S. 731 (1961); Local 761, Int’l Union of Elec., Radio & Mach. Workers, AFL-CIO v. NLRB, 366 U.S. 667 (1961); Int’l Typo. Union v. NLRB, 365 U.S. 705 (1961); NLRB v. News Syndicate Co., 365 U.S. 695 (1961); Local 357, Int’l Bhd. of

Trilogy.²⁹

In 1967, Scalia began his teaching career at the University of Virginia.³⁰ In that year, the Court decided seven NLRB cases. All seven cases were major victories for unions and working class people. These cases established the union's right to enforce work-preservation clauses; the employer's duty to furnish information to unions where the information is relevant to processing a grievance; the striker's right to reinstatement before new employees are hired; the union's right to fine members who crossed picket lines; and the Board's authority to interpret collective-bargaining agreements to determine whether an employer unlawfully implemented unilateral changes without notice or bargaining with the union.³¹ Perhaps most significantly of all, the Court affirmed the principle that "conduct, [which] is so 'inherently destructive of employee interests' . . . may be deemed proscribed without need for proof of an underlying improper motive."³²

Teamsters, Chauffeurs, Warehousemen & Helpers of Am. v. NLRB, 365 U.S. 667 (1961); Local 60, United Bhd. of Carpenters & Joiners of Am, AFL-CIO v. NLRB, 365 U.S. 651 (1961); NLRB v. Radio & Television Broad. Eng'rs Union, 364 U.S. 573 (1961).

29. See *Steelworkers v. Enter. Wheel & Car Corp.*, 363 U.S. 593 (1960); *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S.574 (1960); *Steelworkers v. Am. Mfg. Co.*, 363 U.S.564 (1960). For a discussion of the Steelworkers Trilogy, see Anne Marie Lofaso, *Deflategate: What's the Steelworkers Trilogy Got to Do with It?* 6 BERKELEY J. ENT. & SPORTS L (2017).

30. The biographical facts in this paragraph were taken from two sources: Garcia & Padnani, *supra* note 15; *Antonin Scalia: Supreme Court Justice, Lawyer (1936–2016)*, *supra* note 15; see also *Our History, Former Faculty, Scalia, Antonin (1967–1974)*, UNIV. OF VA. SCH. OF LAW, <<http://libguides.law.virginia.edu/faculty/scalia>> (last updated Dec. 7, 2016, 12:00 PM).

31. See *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 380 (1967) (holding that, absent substantial business justification, employer must rehire former strikers before hiring new employees where "employees continued to make known their availability and desire for reinstatement, and that 'at all times' respondent intended to resume full production to reactivate the jobs and to fill them"); *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 192-93 (1967) (holding that a union may lawfully threaten and impose fines, and bring suit for the collection of those fines, against members who crossed the union's picket line to work during an authorized strike against their employer) ; *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 32-33 (1967) (holding that employer violates § 8(a)(3) and (1) – even in the absence of union animus – when it refuses to pay striking employees vacation benefits accrued under a terminated collective-bargaining agreement while announcing its intention to pay such benefits to striker replacements, returning strikers, and nonstrikers who had been at work on a certain date during the strike); *Houston Insulation Contractors Ass'n v. NLRB*, 386 U.S. 664, 666-67 (1967) (holding that Union A may lawfully order its members not to handle pre-cut steel bands where such work was normally handled in shop by members of Union B); *Nat'l Woodwork Mfrs. Ass'n v. NLRB*, 386 U.S. 612, 635-38 (1967) (holding that work-preservation clauses do not violate § 8(e)'s prohibition on hot-cargo agreements); *NLRB v. Acme Indus. Co.*, 385 U.S. 432, 439 (1967) (holding that an employer has a duty under § 8(a)(5) to furnish union with information necessary to determine whether to file a grievance); *NLRB v. C & C Plywood Corp.*, 385 U.S. 421, 428-30 (1967) (concluding that the Board may interpret a collective-bargaining agreement to determine whether an employer implemented unilateral changes in violation of § 8(a)(5) and (1)).

32. See *Great Dane Trailers, Inc.*, 388 U.S. at 33.

Scalia took a brief hiatus from the academic life to enter public service in 1972, when President Nixon appointed Scalia General Counsel for the Office of Telecommunications Policy. There, Scalia helped to develop policy for the cable TV industry.³³ He was later appointed Assistant Attorney General for the Office of Legal Counsel; in that role he provided congressional committee testimony about executive privilege for the Ford Administration. He also argued as *amicus curiae* for the United States and won his only case before the Supreme Court, *Alfred Dunhill of London, Inc. v. Republic of Cuba*.³⁴

In 1972, the year Scalia entered public service, the Supreme Court decided five NLRB cases.³⁵ These cases declared some victories for employers and some for unions. *NLRB v. Burns International Security Services, Inc.* established the important labor law principle that a successor employer was not required to subsume the terms and conditions of its predecessor's collective-bargaining agreement, although the successor must bargain with the incumbent union.³⁶ *Central Hardware Company v. NLRB* reaffirmed *NLRB v. Babcock & Wilcox's* principle that employers were not necessarily required to yield their property rights to nonemployee union organizers.³⁷ Twenty years later, the Court would draw a much firmer, less flexible line in the sand, when it reaffirmed that principle in *Lechmere Inc. v. NLRB*,

33. During this time of public service, Scalia was on leave from the University of Virginia. Between 1977 and 1982, Scalia returned to academia primarily teaching at the University of Chicago School of Law. See *Former Faculty, Scalia, Antonin (1967–1974)*, *supra* note 30.

34. 425 U.S. 682 (1976). The biographical facts in this paragraph were taken from two sources: Garcia & Padnani, *supra* note 15; *Antonin Scalia: Supreme Court Justice, Lawyer (1936–2016)*, *supra* note 15.

35. See *NLRB v. Granite State Joint Bd., Textile Workers Union of Am., Local 1029, AFL-CIO*, 409 U.S. 213, 217 (1972) (union is prohibited from fining members for lawfully resigning from the union); *NLRB v. Int'l Van Lines*, 409 U.S. 48, 52-53 (1972) (upholding Board's finding that employer violated Section 8(a)(3) when it refused to reinstate strikers who had offered to return to work and no permanent replacement workers had yet been hired); *Cent. Hardware Co. v. NLRB*, 407 U.S. 539, 547 (1972) (rejecting Board's application of *Logan Valley Plaza's* principle – that the First Amendment sometimes applies to expressive conduct on private property – to nonemployee union organizing on an employer's private parking lot; remanding for application of *Babcock & Wilcox* to the facts); *NLRB v. Burns Int'l Sec. Servs., Inc.*, 406 U.S. 272, 278, 281-82, 284 (1972) (holding that, although a successor employer has no obligation to retain the collective-bargaining agreement between it and its predecessor, it must bargain with the incumbent over terms and conditions of employment); *NLRB v. Scrivener*, 405 U.S. 117, 120-21 (1972) (upholding the Board's interpretation of Section 8(a)(4), which prohibits employers from “discharg[ing] or otherwise discriminat[ing] against an employee because he has filed charges or given testimony under [the NLRA]” as “encompass[ing] discharge of employees for giving written sworn statements to Board field examiners”).

36. 406 U.S. at 284.

37. 407 U.S. at 544-45, 547-48 (citing *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956)).

a case onto which Scalia signed.³⁸ In *NLRB v. Scrivener*, the Court accepted the Board's extension of section 8(a)(4)'s anti-retaliation protections³⁹ to those who give sworn statements to Board agents during the investigatory stages of a case.⁴⁰ In *NLRB v. International Van Lines*, the Court upheld the principle that employers must reinstate both economic and unfair labor practice strikers who have not been permanently replaced.⁴¹ *NLRB v. Granite State Joint Board, Textile Workers, Local 1029*, sharpened the holding of *NLRB v. Allis-Chalmers Manufacturing Company* – although unions may fine their members (*Allis-Chalmers*) they may not fine those who lawfully relinquish their membership (*Granite State Joint Board*).⁴²

President Reagan nominated Scalia to the United States Court of Appeals for the District of Columbia Circuit, where he was sworn in on August 17, 1982. In that year, the Supreme Court decided two important NLRB cases.⁴³ *Woelke & Romero Framing, Inc. v. NLRB* is a case about the construction proviso to NLRA Section 8(e),⁴⁴ which exempts construction industry employers from its general prohibition against labor-management agreements requiring the employer to cease doing business with a third party. It is more famous, however, for the procedural rule it applied under Section 10(e), which provides that “[n]o objection that has not been urged before the Board . . . shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances.”⁴⁵ That section bars judicial review where the party seeking court review fails to raise the objection to the Board in the first instance. In *Woelke*, the employer asked the Supreme Court to reverse the lower court's “holding that unions do not violate § 8(b)(4)(A) when they picket to obtain a subcontracting clause sheltered by the construction industry proviso.”⁴⁶ Applying Section 10(e)'s plain language, the Court held that the lower court was “without jurisdiction to consider that question” because “[t]he issue

38. See *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992).

39. See 29 U.S.C. § 158(a)(4) (2012).

40. 405 U.S. at 120-21.

41. 409 U.S. 48, 52-53 (1972).

42. 409 U.S. 213, 215-17 (1972) (citing *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 196 (1967)).

43. See *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645 (1982); *Charles D. Bonanno Linen Serv., Inc. v. NLRB*, 454 U.S. 404 (1982).

44. See 29 U.S.C. § 158(e) (2012).

45. *Id.* § 160(e).

46. *Woelke & Romero Framing, Inc.*, 456 U.S. at 665.

was not raised during the proceedings before the Board, either by the General Counsel or by [the employer].”⁴⁷ The Court further explained that the “§ 10(e) bar applie[d] even though the Board held that the picketing was not banned by § 8(b)(4)(A).”⁴⁸ In such cases, the employer “could have objected to the Board’s decision in a petition for reconsideration or rehearing” to preserve the question. “The failure to do so prevents consideration of the question by the courts.”⁴⁹

The second NLRB case decided in 1982, *Charles D. Bonanno Linen Service, Inc. v. NLRB*, is a pre-*Chevron*⁵⁰ *Chevron* case. There, a member of a multiemployer bargaining unit withdrew when the parties hit impasse in negotiations.⁵¹ At the time this case was decided, it had been long settled that a multiemployer bargaining unit member may “withdraw prior to the date set for negotiation of a new contract or the date on which negotiations actually begin, provided that adequate notice is given.”⁵² But “[o]nce negotiations for a new contract have commenced, . . . withdrawal is permitted only if there is ‘mutual consent’ or ‘unusual circumstances’ exist.”⁵³ The case presented the legal question whether impasse was an unusual circumstance sufficient to permit withdrawal. The Court agreed with the Board that impasse does not constitute an unusual circumstance.⁵⁴

Four years later, Scalia himself would be deciding cases such as these. The NLRA was over half a century old at this point. Because the Board had chosen to use its adjudicatory powers, rather than its rulemaking authority, to regulate industrial and labor relations, many administrative law principles were decided or created within the context of labor law cases. Indeed, the Board became the model for policy making through adjudication in much the same way as the Securities and Exchange Commission has become the model for policy making through rule making. In the context of the SEC exercising its policy making powers, the Court long ago explained:

47. *Id.*

48. *Id.* at 667.

49. *Id.* at 666 (citing *Int’l Ladies’ Garment Workers’ Union v. Quality Mfg. Co.*, 420 U.S. 276, 281, n.3 (1975)).

50. The full name of the case is *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), and it established a doctrine of deference to administrative agency interpretations of statutes that those agencies enforce.

51. *Charles D. Bonanno Linen Serv., Inc. v. NLRB*, 454 U.S. 404, 406, 407 (1982).

52. *Id.* at 410-11.

53. *Id.* at 411.

54. *See id.* at 412.

Since the Commission, unlike a court, does have the ability to make new law prospectively through the exercise of its rule-making powers, it has less reason to rely upon ad hoc adjudication to formulate new standards of conduct within the framework of the [statute]. The function of filling in the interstices of the Act should be performed, as much as possible, through this quasi-legislative promulgation of rules to be applied in the future. But any rigid requirement to that effect would make the administrative process inflexible and incapable of dealing with many of the specialized problems which arise. . . . Not every principle essential to the effective administration of a statute can or should be cast immediately into the mold of a general rule. Some principles must await their own development, while others must be adjusted to meet particular, unforeseeable situations. In performing its important functions in these respects, therefore, an administrative agency must be equipped to act either by general rule or by individual order. To insist upon one form of action to the exclusion of the other is to exalt form over necessity.⁵⁵

[P]roblems may arise in a case which the administrative agency could not reasonably foresee, problems which must be solved despite the absence of a relevant general rule. Or the agency may not have had sufficient experience with a particular problem to warrant rigidifying its tentative judgment into a hard and fast rule. Or the problem may be so specialized and varying in nature as to be impossible of capture within the boundaries of a general rule. In those situations, the agency must retain power to deal with the problems on a case-to-case basis if the administrative process is to be effective. There is thus a very definite place for the case-by-case evolution of statutory standards. And the choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies⁵⁶ primarily in the informed discretion of the administrative agency.

The NLRB lives by this creed, making nearly all of its policymaking through “case-by-case evolution of statutory standards” and “individual, ad hoc litigation.” As a result, the NLRA had a long line of interpretive case progeny by the time Scalia reached the High Bench. In light of the New Deal advocates’ penchant for purposivism in statutory construction and judicial deference to the Board under pre-*Chevron* *Chevron* jurisprudence, this long line of labor cases would have reached Scalia in a manner that he would likely have viewed as messy from the textualist’s point of view. His instinct surely would have been to clean up that mess. But there would be obstacles.

55. *SEC v. Chenery Corp.*, 332 U.S. 194, 202 (1947) (citing REPORT OF THE ATTORNEY GENERAL’S COMMITTEE ON ADMINISTRATIVE PROCEDURE IN GOVERNMENT AGENCIES, S. Doc. No. 77-8, at 29 (1941)).

56. *Id.* at 202-03 (citing *CBS v. United States*, 316 U.S. 407, 421 (1942)).

While the role of *stare decisis* in reviewing administrative agency cases is complex,⁵⁷ it still would serve as a hindrance to change at the reviewing court level.⁵⁸ The following part describes Scalia's attempt to straighten up labor jurisprudence, by making it more closely reflect what Scalia viewed as the plain meaning of the statutory text.

III. SCALIA'S LABOR LAW LEGACY

During Justice Scalia's nearly thirty-year term, the Court decided nineteen private-sector labor law cases to which the NLRB was a party. Three cases dealt primarily with the limits of government power – Did the government – meaning the Court,⁵⁹ the NLRB,⁶⁰ or the President⁶¹ – have authority to act? Sixteen cases dealt with agency discretion: Is the NLRB's construction of the NLRA reasonable?⁶² Does substantial evidence support its factual findings?⁶³

57. Under basic administrative law principles, an agency may change its interpretation of the statute it has been charged with administering and therefore oscillate among various policies so long as it gives reasons for its changes. See Samuel Estreicher, *Policy Oscillation at the Labor Board: A Plea for Rulemaking*, 37 ADMIN. L. REV. 163 (1982); see also *Chenery Corp.*, 332 U. S. at 194; *SEC v. Chenery Corp.*, 318 U. S. 80 (1943).

58. “Once we have determined a statute’s clear meaning, we adhere to that determination under the doctrine of *stare decisis*, and we judge an agency’s later interpretation of the statute against our prior determination of the statute’s meaning.” *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 536-37 (1992) (quoting *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 131 (1990)).

59. See *NLRB v. United Food & Commercial Workers, Local 23, AFL-CIO*, 484 U.S. 112 (1987).

60. See *New Process Steel v. NLRB*, 560 U.S. 674 (2010).

61. See *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014).

62. See *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 149-52 (2002) (upholding the Board’s construction of the statutory term employee as including undocumented workers but finding that federal immigration law prohibited the Board from awarding backpay as a remedy); *NLRB v. Ky. River Cmty. Care, Inc.*, 532 U.S. 706, 721 (2001) (holding that the Board’s construction of the statutory term “independent judgment” is not reasonable); *Holly Farms Corp. v. NLRB*, 517 U.S. 392, 401 (1996) (upholding the Board’s conclusion that live-haul workers were employee entitled to the statutory protections of the NLRA rather than being exempted agricultural workers); *NLRB v. Town & Country Elec., Inc.*, 516 U.S. 85, 94-95 (1995) (upholding the Board’s construction of the statutory term employee as including paid union organizers); *NLRB v. Health Care & Retirement Corp. of America*, 511 U.S. 571, 581-82 (1994) (holding that Board’s construction of the statutory term, “in the interest of the employer” is not a reasonable interpretation of the NLRA).

63. *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359 (1998).

Of these cases, Scalia penned two majority opinions,⁶⁴ five concurrences,⁶⁵ and one dissent.⁶⁶ He joined the majority ten times,⁶⁷ concurred in judgment six times,⁶⁸ dissented twice,⁶⁹ and split the issues in one case.⁷⁰

These statistics, standing alone, reveal little about Scalia's record regarding those wishing to exercise their human right to free association.⁷¹ Even a close reading of these cases reveals only a small part of Scalia's views on labor; there are simply too few cases. Patterns, however, do emerge.⁷² First, Scalia was wedded to a strong

64. See *Ky. River Cmty. Care, Inc.*, 532 U.S. at 706; *Allentown Mack Sales & Serv., Inc.*, 522 U.S. at 359.

65. See *Noel Canning*, 134 S. Ct. at 2550; *BE & K Constr. Co. v. NLRB*, 536 U.S. 516, 537 (2002) (Scalia, J., concurring); *ABF Freight Sys., Inc. v. NLRB*, 510 U.S. 317, 326 (1994) (Scalia, J., concurring); *NLRB v. Int'l Bhd. of Elec. Workers, Local 340*, 481 U.S. 573, 596 (1987) (Scalia, J., concurring); *NLRB v. United Food & Commercial Workers Union, Local 23, AFL-CIO*, 484 U.S. 112, 133 (1987) (Scalia, J., concurring).

66. See *NLRB v. Curtin Matheson Sci., Inc.*, 494 U.S. 775 (1990).

67. Justice Scalia joined the majority opinion ten times. See *New Process Steel, L.P. v. NLRB*, 560 U.S. 674 (2010); *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002); *Ky. River Cmty. Care, Inc.*, 532 U.S. at 706; *Allentown Mack Sales & Serv., Inc.*, 522 U.S. at 359; *Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781 (1996); *NLRB v. Town & Country Elec., Inc.*, 516 U.S. 85 (1995); *NLRB v. Health Care & Ret. Corp. of Am.*, 511 U.S. 571 (1994); *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992); *Am. Hosp. Ass'n v. NLRB*, 499 U.S. 606 (1991); *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27 (1987).

68. He concurred in judgment six times. See *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 588 (1988) (Scalia, J., concurring in judgment without opinion); *supra* note 65, for the five cases in which Scalia wrote a concurring opinion.

69. See *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 211 (1991) (Marshall, J., dissenting); *id.* at 218 (Stevens, J., dissenting); *NLRB v. Curtin Matheson Sci., Inc.*, 494 U.S. 775, 801 (1990) (Scalia, J., dissenting).

70. See *Holly Farms Corp. v. NLRB*, 517 U.S. 392, 409 (1996) (O'Connor, J., concurring in part and dissenting in part).

71. *International Labour Standards on Freedom of Association*, ILO, <<http://www.ilo.org/global/standards/subjects-covered-by-international-labour-standards/freedom-of-association/language-en/index.htm>> (last visited Mar. 25, 2017); Constitution of the International Labour Organization pmbl., Oct. 9, 1946, 62 Stat. 3490, 3490, 15 U.N.T.S. 40, 40; Declaration Concerning the Aims and Purposes of the International Labor Organization (Declaration of Philadelphia) 1944, art. 1, [Oct. 9, 1946, 15 U.N.T.S. 35], available at <<http://www.ilo.org/public/english/about/iloconst.htm#annex>>; Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc A/810 (1948); Int'l Labour Org., International Labour Conference: ILO Declaration on Fundamental Principles and Rights at Work and Annex, June 18, 1998, 37 I.L.M. 1233, 1237.

72. The following opinions decided during Scalia's tenure are not discussed in this paper because they do not reveal much about Scalia's legacy: *Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781 (1996); *Am. Hosp. Ass'n v. NLRB*, 499 U.S. 606 (1991); *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 588 (1988) (Scalia, J., concurring in judgment without opinion); *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27 (1987). In *Auciello*, the Court unanimously upheld as reasonable the Board's conclusion that an employer violates sections 8(a)(1) and (5) when it disavows a collective-bargaining agreement because of a good-faith doubt about a union's majority status at the time the contract where the employer learned about the facts giving rise to doubt before the union accepted the contract. 517 U.S. at 783-85. In *American Hospital Ass'n*, the Court unanimously upheld the Board's rule

view of separation of powers with the judiciary often playing a significantly stronger role in the administrative law context than most of the other justices would ever have accepted. Second, Scalia merged his textualism with *Chevron* to expand the role of *Chevron* prong one – plain meaning⁷³ – at the expense of *Chevron* prong two – judicial deference to the agency’s interpretation of statutory ambiguities and silences.⁷⁴ Third, in cases where the plain text argument was too much of a stretch, Scalia was comfortable with using the substantial evidence test to push back on agency action. These three patterns coalesce to form a Scalia-esque brand of labor law, where Scalia imposed his world view and judicial philosophy on labor relations, a view that ironically usurps the power of the administrative agency.⁷⁵

A. Separation of Powers and the Government’s Limited Authority to Act

The NLRB is an administrative agency created by Congress as part of the New Deal. While Scalia served on the Supreme Court, he heard three cases dealing with the government’s authority and power in relation to the NLRB. Taken together, these cases support the

“applicable to acute care hospitals . . . that eight, and only eight, units shall be appropriate in any such hospital.” 499 U.S. at 608. The Court rejected the employer’s challenges that (1) the Board lacked statutory authority to promulgate the rule under section 9(b); (2) the rule was contrary to congressional intent; and (3) the rule was arbitrary and capricious. *Id.* at 608-09. In *DeBartolo*, the Court refused to defer to the Board’s interpretation of section 8(b)(4)(ii)(B) (which forbids a union to “threaten, coerce, or restrain” any person to cease doing business with another person), as applied to union handbilling in a Mall asking customers to boycott Mall stores, because such interpretation raised serious constitutional issues under the First Amendment. 485 U.S. at 573-74.

73. See *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984) (“When a court reviews an agency’s construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.”).

74. See *id.* at 843 (If . . . the court [under *Chevron* prong one] determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.”).

75. Professor Eric Posner recently made a similar, albeit more general, observation: “Scalia refused to acknowledge that originalism does not enable justices to decide cases neutrally. If they choose to adopt this methodology, and manage to figure out a way to make it constrain them, they are committed to enforcing mostly 18th-century values – which are, by definition, conservative.” Eric Posner, *The Tragedy of Antonin Scalia*, SLATE (Feb. 15, 2016, 1:10 PM), <http://www.slate.com/articles/news_and_politics/jurisprudence/2016/02/the_tragedy_of_antoni_n_scalia.html>

well-accepted view that the United States federal government is a government of limited powers with checks and balances that serve to retard legal change and protect individual liberties.

1. Limits on the Court's Power to Review Agency Actions

The original NLRA, popularly known as the Wagner Act, did not create a legal separation of prosecutorial and adjudicative powers. Combining these functions, although legal, presented “a delicate matter so far as public confidence in the integrity and independence of the final decision was concerned.”⁷⁶ In particular, NLRB advocates were concerned about the possibility of prejudgment and “the danger . . . that the Board's decisions might ‘lie under the suspicion of being rationalizations of the preliminary findings’ which the Board ‘in the role of prosecutor, presented to itself.’”⁷⁷ To avoid these problems, the Board “devise[d] a system of effective internal ‘separation of functions’ by isolating those of its staff who performed the characteristic tasks of a prosecutor from those whose work was an incident of the adjudicative process.”⁷⁸

Notwithstanding the fact that reviewing courts upheld the integrity of the Board's internal procedural mechanisms from employer challenges,⁷⁹ the newly minted Republican-majority Eightieth Congress sought to substantially reconfigure the Board's structure by dividing it into two separate agencies.⁸⁰ Congress abandoned that plan when it amended the NLRA in what is popularly known as the Taft-Hartley Act of 1947, which instead formalized the Board's informal division of power. One such amendment created the Office of General Counsel:

There shall be a General Counsel of the Board who shall be appointed by the President, by and with the advice and consent of

76. Ida Klaus, *The Taft-Hartley Experiment in Separation of NLRB Functions*, 11 INDUS. & LAB. REL. REV. 371, 373 (1957) (citations omitted). Significantly, the author of this article, Ida Klaus was an employee of the NLRB from 1937 through 1954 and the NLRB's Solicitor from 1948 to 1954. See *id.* She was “[k]nown by the press in the 1950s and 1960s as the woman ‘who thinks with a man's brain.’” Suzanne Kling, *Ida Klaus: 1905–1999*, ENCYCLOPEDIA OF JEWISH WOMEN'S ARCHIVE, <<https://jwa.org/encyclopedia/article/klaus-ida>> (last visited Jun. 10, 2017).

77. Klaus, *supra* note 76, at 373 (citations omitted).

78. *Id.*

79. See, e.g., *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 224-29 (1938) (rejecting employer's contentions that the Board's procedures in administering the case from complaint to hearing were constitutionally defective under the due process clause). For additional cases, see generally Klaus, *supra* note 76, at 374-75 n.21.

80. See Klaus, *supra* note 76, at 375-77 nn.26-33 (citing legislative history of the Taft-Hartley Act).

the Senate, for a term of four years. The General Counsel . . . shall exercise general supervision over all attorneys employed by the Board (other than [ALJs] and legal assistants to Board members) and over the . . . employees in the regional offices. He shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 160 . . . , and in respect of the prosecution of such complaints before the Board, and shall have such other duties as the Board may prescribe or as may be provided by law. In case of vacancy in the office of the General Counsel the President is authorized to designate the . . . employee who shall act as General Counsel during such vacancy, but no . . . persons so designated shall so act (1) for more than forty days when the Congress is in session unless a nomination to fill such vacancy shall have been submitted to the Senate, or (2) after the adjournment sine die of the session of the Senate in which such nomination was submitted.⁸¹

This statutory grant of power authorized the General Counsel to supervise and manage the prosecutorial functions of the Board. A formal agreement between the Board and the General Counsel completed the separation.⁸²

Forty years later, the separation of the prosecutorial and adjudicatory powers would once again become relevant. *NLRB v. United Food and Commercial Workers Union (UFCW), Local 23, AFL-CIO* presented the question “whether a federal court has authority to review a decision of the National Labor Relations Board’s General Counsel dismissing an unfair labor practice complaint pursuant to an informal settlement in which the charging party refused to join.”⁸³ The Court held that “such a dismissal is not subject to judicial review.”⁸⁴

The Court based its conclusion in part on two important legal principles. First, the General Counsel’s statutory “authority” is “final” with respect to “the investigation of charges and issuance of complaints,” and “the prosecution of such complaints before the Board.”⁸⁵ Second, any “settlement [whether formal or informal] that ultimately results in Board approval” is a final order “subject to judicial review.”⁸⁶ The case presented an in-between scenario; namely,

81. 29 U.S.C. § 153(d) (2012) (emphasis added).

82. Statement of Delegation of Certain Powers of National Labor Relations Board to General Counsel of National Labor Relations Board, 13 Fed. Reg. 654-02 (Feb. 13, 1948), amended by 15 Fed. Reg. 1088 (Feb. 28, 1950).

83. 484 U.S. 112, 114 (1987).

84. *Id.*

85. *See id.* at 118 (citing 29 U.S.C. § 153(d)).

86. *Id.* at 123.

whether a “postcomplaint, prehearing informal settlement” was subject to judicial review.⁸⁷ The Court explained that these types of settlements were non-appealable to the Board by its own regulations. Those regulations were entitled to *Chevron* deference because they fulfill the statute’s purpose of dividing the agency’s function between the General Counsel and the Board along prosecutorial/adjudicatory lines.⁸⁸ Although the complaint triggers the Board’s adjudicatory function, “until a hearing is held . . . no adjudication has yet taken place.”⁸⁹ The case is an extension of the by-then well-settled rule that the NLRB General Counsel, in his or her prosecutorial capacity, has unreviewable discretion to issue and dismiss complaints.⁹⁰ Judicial review is, however, available for final orders issued by the Board in its adjudicatory capacity. Justice Scalia wrote a separate concurrence, joining the Court’s opinion, and endorsing the highly deferential standard of review set forth in *Chevron*.⁹¹

2. Limits on the Agency’s Power to Adjudicate Cases

On January 20, 2005, President George W. Bush commenced his second term as President, a term that would expire on January 20, 2009. The 110th United States Congress sat from January 3, 2007, to January 3, 2009, during the final two years of the George W. Bush presidency. During that session, the Republicans controlled the Executive Branch, including all the administrative agencies, and the Democrats held an operational majority in both chambers with Nancy Pelosi, a Democrat from California, serving as Speaker of the House. The President could only appoint Board members with the advice and consent of the Senate. This meant that agreement on Board members was unlikely where the Presidency and Senate were controlled by different parties – a situation that played into the hands of ideological conservatives opposed to unions and extreme right-wing libertarians who were happy to witness government dysfunction.

87. *Id.*

88. *See id.* at 123-25 (citing *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-843 & n.9 (1984)).

89. *Id.* at 125-26 (holding “that it is a reasonable construction of the NLRA to find that until the hearing begins, settlement or dismissal determinations are prosecutorial”).

90. *See NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 148 (1975); *Vaca v. Sipes*, 386 U.S. 171, 182 (1967).

91. *See UFCW, Local 23*, 484 U.S. at 133-34 (Scalia, J., concurring).

In 2007, the NLRB had a full complement of five Board members:⁹²

Board Member	Term	Party Affiliation
Robert J. Battista	12/17/02–12/16/07	Republican
Wilma B. Liebman	11/14/97–08/27/11	Democrat
Peter C. Schaumber	09/01/05–08/27/10	Republican
Peter N. Kirsanow	01/04/06–12/31/07	Republican
Dennis P. Walsh	01/17/06–12/31/07	Democrat

As anticipated, that complement did not last for very long. The Board understood that on December 16, 2007, when Chairman Battista's term ended, it would be down to four members – still a quorum, but that on December 31, 2007, when Members Kirsanow's and Walsh's recess appointments expired, the Board would be down to two members – ostensibly not a quorum.⁹³ Without a quorum, the Board could not issue decisions, which meant that it could not enforce the NLRA, a law whose primary purpose is to “encourage[e] the practice and procedure of collective bargaining and [to] protect[] the exercise by workers of full freedom of association.”⁹⁴

On December 20, 2007, the Board delegated “to Members Liebman, Schaumber and Kirsanow, as a three-member group, all of the Board's powers, in anticipation of the adjournment of the 1st Session of the 110th Congress.”⁹⁵ The Board opined that, once Members Kirsanow and Walsh departed on December 31, 2007, this delegation would authorize the remaining two members – Schaumber and Liebman – to issue decisions as a two-member quorum of a three-member group.⁹⁶ The Board also delegated to the General Counsel “continuing authority to initiate and conduct litigation that would normally require case-by-case approval of the Board.”⁹⁷

The Board based its decision on two pieces of authority. First, it concluded that it could delegate its authority to this three-member group because NLRA section 3(b) said that it could. That statutory

92. See *Board Members Since 1935*, NLRB, <<https://www.nlr.gov/who-we-are/board/board-members-1935>> (last visited Mar. 24, 2017).

93. See *New Process Steel, L.P. v. NLRB*, 560 U.S. 674, 676 (2010).

94. 29 U.S.C. § 151 (2012).

95. *New Process Steel*, 560 U.S. at 677.

96. *Id.*

97. *Id.*

language “authorized” the Board “to delegate to any group of three or more members any or all of the powers which it may itself exercise.”⁹⁸ The Board also based its decision on an opinion issued by the Office of Legal Counsel (OLC), the arm of the United States Department of Justice that advises executive branch agencies, such as the NLRB.⁹⁹ The OLC opinion explained that the Board may use its delegation authority “to ‘issue decisions during periods when three or more of the five seats on the Board are vacant.’”¹⁰⁰ It concluded that “‘if the Board delegated all of its powers to a group of three members, that group could continue to issue decisions and orders as long as a quorum of two members remained.’”¹⁰¹ The Board decided that, although it was not bound to make such a delegation, it was bound by the OLC opinion if it “‘exercised its discretion’ to do so.”¹⁰²

On March 27, 2010, President Obama made two recess appointments to the Board – Craig Becker and Mark Pearce.¹⁰³ By June 2010, the NLRB had a full complement of five Board members once again:¹⁰⁴

98. 29 U.S.C. § 153(b). That Section provides:

The Board is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise. . . . A vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board, and three members of the Board shall, at all times, constitute a quorum of the Board, except that two members shall constitute a quorum of any group designated pursuant to the first sentence hereof. The Board shall have an official seal which shall be judicially noticed.

99. By delegation from the Attorney General, the Assistant Attorney General in charge of the Office of Legal Counsel provides authoritative legal advice to the President and all the Executive Branch agencies. The Office drafts legal opinions of the Attorney General and also provides its own written opinions and oral advice in response to requests from the Counsel to the President, the various agencies of the Executive Branch, and offices within the Department. Such requests typically deal with legal issues of particular complexity and importance or about which two or more agencies are in disagreement. The Office also is responsible for providing legal advice to the Executive Branch on all constitutional questions and reviewing pending legislation for constitutionality.

Office of Legal Counsel: About the Office, U.S. DEP'T OF JUSTICE, <<https://www.justice.gov/olc>> (last visited Mar. 24, 2017).

100. *New Process Steel*, 560 U.S. at 677.

101. *Id.*

102. *Id.*

103. Press Release, The White House, President Obama Announces Recess Appointments to Key Administration Positions (Mar. 27, 2010), <<https://obamawhitehouse.archives.gov/the-press-office/president-obama-announces-recess-appointments-key-administration-positions>>.

104. See *Board Members Since 1935*, *supra* note 92.

Board Member	Term	Party Affiliation
Wilma B. Liebman	11/14/97–08/27/11	Democrat
Mark G. Pearce	04/07/10–present	Democrat
Peter C. Schaumber	09/01/05–08/27/10	Republican
Brian Hays	06/29/10–12/16/12	Republican
Craig Becker	04/05/10–1/03/12	Democrat

The decision to delegate its authority to a two-member group of a three-member quorum allowed the Board to issue over 600 decisions over twenty-seven months under the leadership of Board Members, Peter Schaumber¹⁰⁵ and Wilma Liebman.¹⁰⁶ This was no easy task considering that Members Schaumber and Liebman were members of different political parties and had divergent ideological beliefs about how the NLRA should be interpreted. Nevertheless, the two Board members collegially worked on cases about which they could agree. In all likelihood, these 600-plus cases were so-called easy cases – cases that did not present a gray area of interpretation.¹⁰⁷

For example, one of those 600-plus cases, *New Process Steel, L.P. v. NLRB*, presented a standard contract-bar case. There the employer withdrew recognition from a union while a valid collective-bargaining agreement was in place.¹⁰⁸ Under well-settled law, a union enjoys an irrebuttable presumption of majority status for the duration of a valid collective-bargaining agreement, up to three years.¹⁰⁹ The collective-bargaining agreement thereby serves as a bar to an election for the term of the contract up to three years.¹¹⁰ Accordingly, an employer violates NLRA section 8(a)(5) and (1)¹¹¹ when it withdraws recognition from a union during the contract-bar period. Relying on these long-settled principles, on September 30, 2008, the Board (Chairman Schaumber and Member Liebman) easily found that the employer violated the Act because it withdrew recognition during the binding contract period.¹¹²

105. Schaumber served as Chairman for the remainder of President Bush's term, from March 19, 2008 through January 19, 2009. *See id.*

106. Liebman served as Chairman once President Barack Obama took office on January 20, 2009. *See id.*

107. *See* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 17 (1977).

108. *New Process Steel, L.P.*, 353 N.L.R.B. 254 (2008).

109. *Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781, 786 (1996).

110. *General Cable Corp.*, 139 N.L.R.B. 1123, 1125 (1962).

111. *See* 29 U.S.C. §§ 158(a)(5), (a)(1) (2012).

112. *See New Process Steel, L.P.*, 353 N.L.R.B. at 255.

At the Supreme Court level, *New Process Steel* presented the question “whether, following a delegation of the Board’s powers to a three-member group, two members may continue to exercise that delegated authority once the group’s (and the Board’s) membership falls to two.”¹¹³ The Court, Justice Stevens writing for the majority in which Justice Scalia joined, held that the “two remaining Board members cannot exercise such authority.”¹¹⁴ The Court explained:

[R]eading the delegation clause to require that the Board’s delegated power be vested continuously in a group of three members is the only way to harmonize and give meaningful effect to all of the provisions in § 3(b). . . . Those provisions are: (1) the delegation clause; (2) the vacancy clause . . . ; (3) the Board quorum requirement . . . ; and (4) the group quorum provision¹¹⁵

The Court’s deconstruction can be visually summarized in the following chart (emphasis added):

The Delegation Clause	“The Board is authorized to <i>delegate to any group of three or more members</i> any or all of the powers which it may itself exercise”
The Vacancy Clause	“A <i>vacancy</i> in the Board <i>shall not impair</i> the right of the remaining members to exercise all of the powers of the Board”
The Quorum Clause	“three members of the Board shall, <i>at all times</i> , constitute a quorum of the Board . . .”
The Group Quorum Provision	“. . . except that two members shall constitute a quorum of any group designated pursuant to the first sentence hereof.”

The Court explained that its interpretation “gives material effect to the three-member requirement in the delegation clause,” allows the vacancy clause to “operate[] to provide that vacancies do not impair the ability of the Board to take action,” “is consonant with” the “quorum requirement, which requires three participating members ‘at all times’ for the Board to act,” and “does not render inoperative the group quorum provision, which still . . . authorize[s] a three-member delegee group to issue a decision with only two members participating, so long as the delegee group was properly

113. *New Process Steel, L.P. v. NLRB*, 560 U.S. 674, 676 (2010).

114. *Id.*

115. *Id.* at 680 (quoting 29 U.S.C. § 153(b); other citations omitted).

constituted.”¹¹⁶ The Court concluded that “a straightforward understanding of the text, which requires that no fewer than three members be vested with the Board’s full authority, coupled with the Board’s longstanding practice, points us toward an interpretation of the delegation clause that requires a delegee group to maintain a membership of three.”¹¹⁷ This interpretation allows two members of a three-member panel to issue a decision when the third member must recuse him or herself or is incapacitated, but not when the third member’s term has expired.

Justice Stevens’s opinion has many of the hallmarks of Justice Scalia’s *modus operandi*. The opinion is formalistic, textualist, and legalistic. As Justice Scalia explains:

Of all the criticisms leveled against textualism, the most mindless is that it is “formalistic”. The answer to that is, *of course it’s formalistic!* The rule of law is about form . . . A murderer has been caught with blood on his hands, bending over the body of his victim; a neighbor with a video camera has filmed the crime and the murderer has confessed in writing and on videotape. We nonetheless insist that before the state can punish this miscreant, it must conduct a full-dress criminal trial that results in a verdict of guilty. Is that not formalism? Long live formalism. It is what makes us a government of laws and not of men.¹¹⁸

For Scalia, textualism, legalism (following the rules), and formalism constrain the judge from capricious and erratic decision making. By focusing on the text, the judge focuses on the rules. By focusing on the rules, the judge focuses on the rule of law. And by analyzing the case logically, by applying the rules to the specific facts and using logic to draw a conclusion, the judge as legal official promotes a “government of laws and not of men.”

3. Limits on the President’s Appointment Power

NLRB v. Noel Canning, the final case in this governmental-authority trinity once again concerns executive power – presidential power, in particular. The case was prompted by President Obama’s use of his constitutional recess appointment power during an intra-session of the 112th Congress. By way of background, as of April 5, 2010, the Obama-appointed Board had a three-member quorum, which was due to end on January 3, 2012, when Member Craig’s

116. *Id.* at 680-81.

117. *Id.* at 681.

118. SCALIA, *supra* note 2, at 25.

Becker's recess appointment expired.

Board Composition Immediately Before the Recess Appointments¹¹⁹

Board Member	Term	Party Affiliation
Mark G. Pearce	04/07/10–present	Democrat
Brian Hayes	06/29/10–12/16/12	Republican
Craig Becker ^r	04/05/10–01/03/12	Democrat
Vacant	Vacant since 08/27/11	Previously held by Liebman (Democrat)
Vacant	Vacant since 08/27/10	Previously held by Schaumber (Republican)

This was the very same day that the 112th Congress would convene. More specifically, the 112th Congress convened on January 3, 2011, and ended on January 3, 2013. It held two sessions – (1) January 3, 2011 to January 3, 2012, and (2) January 3, 2012 to January 3, 2013.¹²⁰

To avoid having another quorum problem, President Obama decided to appoint three Board members – two Democrats and one Republican – to fill all three vacancies. The President appointed Sharon Block, Terrance Flynn, and Richard Griffin to the Board on January 4, 2012.¹²¹ As of that date, the Board's composition was as follows:

Board Composition During Recess Appointment Controversy¹²²

Board Member	Term	Party Affiliation
Mark G. Pearce	04/07/10–present	Democrat
Brian Hayes	06/29/10–12/16/12	Republican
Sharon Block ^r	01/09/12–08/12/13	Democrat
Terrence F. Flynn ^r	01/09/12–07/24/12	Republican
Richard G. Griffin, Jr. ^r	01/09/12–08/12/13	Democrat

119. See *Board Members Since 1935*, *supra* note 92. The superscripted “r” denotes a recess appointment.

120. *Dates of Sessions of Congress*, U.S. SENATE, <<https://www.senate.gov/reference/Sessions/sessionDates.htm>> (last visited Mar. 24, 2017).

121. Press Release, White House, President Obama Announces Recess Appointments to Key Administration Posts (Jan. 4, 2012), <<https://obamawhitehouse.archives.gov/the-press-office/2012/01/04/president-obama-announces-recess-appointments-key-administration-posts>>.

122. See *Board Members Since 1935*, *supra* note 92. The superscripted “r” denotes a recess appointment.

Significantly, the President made these appointments while the Senate was in a three-day recess under “a December 17, 2011, resolution providing for a series of brief recesses punctuated by ‘pro forma session[s],’ with ‘no business . . . transacted,’ every Tuesday and Friday through January 20, 2012.”¹²³

These circumstances – intra-session appointments made during a very brief recess – resulted in a controversy over the interpretation of two constitutional secondary rules, to use Hart’s parlance.¹²⁴ Article II of the United States Constitution authorizes the President to appoint officers of the United States with “the Advice and Consent of the Senate.”¹²⁵ The Recess Appointments Clause creates an exception to this rule. In particular, it grants power to the President “to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.”¹²⁶ In general, then, the President has authority to appoint important government officials “with the Advice and Consent of the Senate.” The President is normally without power to appoint important government officials without “the Advice and Consent of the Senate.” But if a vacancy arises when the Senate is in recess, the President may make a temporary appointment – valid only until the end of Congress’s next session, so that the government can continue to function notwithstanding the legislative respite.

The President’s recess appointments of Block, Flynn, and Griffin during an intra-session and very brief recess period of only three days resulted in a debate over the meaning of the Recess Appointments Clause to determine whether those appointments were constitutional. If unconstitutional, any decision the Board made during that time

123. *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2556-2557 (2014) (citing S. J., 112th Cong., 1st Sess., 923 (2011)).

124. See H.L.A. HART, *THE CONCEPT OF LAW* 79 (1994). One of Hart’s most significant contributions to legal philosophy is his distinction between primary and secondary rules. According to Hart, law is “the union of primary and secondary rules.” *Id.* at 107. Secondary rules are

on a different level from the primary rules, for they are all *about* such rules; . . . while primary rules are concerned with the actions that individuals must or must not do, . . . secondary rules are all concerned with the primary rules themselves. They specify the way in which the primary rules may be conclusively ascertained, introduced, eliminated, varied, and the fact of their violation conclusively determined.

Id. at 94. Secondary rules come in three types: rules of recognition, change, and adjudication. The constitutional rules at issue here are second-order rules of recognition, insofar as they are rules that are used to determine the legal validity of primary rules. *Id.* at 94-97.

125. U.S. CONST., art. II, § 2, cl. 2.

126. *Id.* cl. 3.

would be void qua *New Process Steel* because it would mean that there were only two valid Board members making decisions at that time.

As with *New Process Steel*, the case that led the Court to resolve this constitutional penumbra arose out of a run-of-the-mill labor dispute in which one Pepsi-Cola distributor, Noel Canning, refused to reduce to writing and execute a collective-bargaining agreement with a labor union.¹²⁷ The company's conduct is indisputably unlawful by the very words of the statute, which expressly requires "the execution of a written contract incorporating any agreement reached if requested by either party."¹²⁸ On February 8, 2012, a majority-Republican panel of the Board (Hayes, Flynn, Block) issued its decision, finding that the company had violated the NLRA.¹²⁹

The company petitioned the United States Court of Appeals for the District of Columbia Circuit to review the Board's decision,¹³⁰ asserting that the Board's order was void *ab initio* either because "the Board lacked authority to act for want of a quorum, as three members of the five-member Board were never validly appointed because they took office under putative recess appointments which were made when the Senate was not in recess" or because "the vacancies these three members purportedly filled did not 'happen during the Recess of the Senate,' as required for recess appointments by the Constitution."¹³¹ The D.C. Circuit interpreted the clause in the most narrow possible way, holding that the constitutional term "recess" is limited to intersession recesses and therefore does not extend to intra-session recesses.¹³² Applying its constitutional construction to the President's appointments of Block, Flynn, and Griffin, the court explained that those appointments were void because they were made during an intra-session recess. Because those appointments were void, the Board was composed of only two members, members Pearce and Hayes. Accordingly, all decisions made by the Board during this time were void qua *New Process Steel*.

The Supreme Court granted certiorari, affirming the D.C. Circuit

127. Noel Canning, 358 N.L.R.B. 16, 16-17, 22-23 (2012).

128. 29 U.S.C. § 158(d) (2012).

129. *Noel Canning*, 358 N.L.R.B. at 16, 23 (citing 29 U.S.C. §§ 158(a)(5) and (1)).

130. See 29 U.S.C. § 160(f) (providing that review of Board decisions may be brought in the D.C. Circuit, the circuit wherein the aggrieved party resides or transacts business, or the circuit in which the unfair labor practice arose).

131. *Noel Canning v. NLRB*, 705 F.3d 490, 493 (D.C. Cir. 2013) (quoting U.S. CONST. art. II, § 2, cl. 3), *aff'd but criticized*, 134 S. Ct. 2550 (2014).

132. *Id.* at 506 (D.C. Cir. 2013).

on different grounds. The Court clarified three phrases in the Recess Appointments Clause. First, the Court concluded that the constitutional phrase, “*Recess of the Senate*,”¹³³ referred to both “an inter-session recess (i.e., a break between formal sessions of Congress)” and “an intra-session recess, such as a summer recess in the midst of a session.”¹³⁴ By not limiting Senate recesses to inter-session recesses, the Court legally expanded the President’s appointment power by ensuring that the President can keep the administration running even when the Senate takes “substantial” intra-session recesses, which are fairly common.¹³⁵ This holding was consistent with past political practice and therefore had little impact on real politics.

Second, the Court concluded that the constitutional phrase, “*Vacancies that may happen*,”¹³⁶ referred to both “vacancies that first come into existence during a recess,” and “vacancies that arise prior to a recess but continue to exist during the recess.”¹³⁷ Once again, the Court’s interpretation of this phrase legally expanded the President’s recess appointment power by allowing the President to use his or her recess appointment power to fill vacancies whenever they arise. Once again, this holding was consistent with the political practice.

Third, the Court concluded that, in calculating the length of a recess, reviewing courts must include pro forma sessions. Applying that rule in this context, the Court concluded that “the President lacked the power to make the recess appointments here at issue,” because the three-day recess, during which the President appointed Block and Griffin, was “too short a time to bring a recess within the scope of the Clause.”¹³⁸ The Court’s interpretation here, thereby limited the application of this capacious presidential power.

Justice Scalia, concurring in result but disagreeing in the analysis, would have severely limited the presidential power, by upholding the D.C. Circuit’s reasoning:

To prevent the President’s recess-appointment power from nullifying the Senate’s role in the appointment process, the Constitution cabins that power in two significant ways. First, it may be exercised only in “the Recess of the Senate,” that is, the

133. U.S. CONST., art. II, § 2, cl. 3.

134. NLRB v. Noel Canning, 134 S. Ct. 2550, 2556 (2014).

135. *Id.* at 2561.

136. U.S. CONST., art. II, § 2, cl. 3 (emphasis added).

137. *Noel Canning*, 134 S. Ct. at 2556.

138. *Id.* at 2557.

intermission between two formal legislative sessions. Second, it may be used to fill only those vacancies that “happen during the Recess,” that is, offices that become vacant during that intermission. Both conditions are clear from the Constitution’s text and structure, and both were well understood at the founding. The Court of Appeals correctly held that the appointments here at issue are invalid because they did not meet either condition.¹³⁹

Justice Scalia had two main concerns with the majority’s broad reading of the President’s recess appointment power. First, in his view, the majority’s interpretation re-defined the delicate checks and balances designed by the founding fathers to ensure structural protection of liberty:

[T]he Constitution’s core, government-structuring provisions are no less critical to preserving liberty than are the later adopted provisions of the Bill of Rights. Indeed, “[s]o convinced were the Framers that liberty of the person inheres in structure that at first they did not consider a Bill of Rights necessary.” . . . Those structural provisions reflect the founding generation’s deep conviction that “checks and balances were the foundation of a structure of government that would protect liberty.” . . . It is for that reason that “the claims of individuals – not of Government departments – have been the principal source of judicial decisions concerning separation of powers and checks and balances.”¹⁴⁰

Second, Scalia was concerned with preserving the Court’s function to say what the law is:

[W]hen questions involving the Constitution’s government-structuring provisions are presented in a justiciable case, it is the solemn responsibility of the Judicial Branch “to say what the law is.” . . . This Court does not defer to the other branches’ resolution of such controversies; . . . our role is in no way “lessened” because it might be said that “the two political branches are adjusting their own powers between themselves.” . . . Since the separation of powers exists for the protection of individual liberty, its vitality “does not depend” on “whether ‘the encroached-upon branch approves the encroachment.’” . . . Rather, policing the “enduring structure” of constitutional government when the political branches fail to do so is “one of the most vital functions of this Court.”¹⁴¹

Here we see Scalia’s strong sense of separation of powers and his strong views about each government branch’s functions. These views were a running theme throughout Scalia’s tenure. Particularly with respect to administrative agencies, Scalia often demonstrated great

139. *Id.* at 2578 (Scalia, J., concurring).

140. *Id.* at 2578-2593 (citations omitted).

141. *Id.* at 2593 (citations omitted).

apprehension about Article I adjudicators encroaching on Article III judicial functions. These concerns play out in the Court's statutory interpretation cases, discussed in the section II.B., below.

4. The Administrative-Judicial Continuum

*ABF Freight System, Inc.*¹⁴² is a relatively obscure case with a significant concurrence from Justice Scalia. There, the Court held that the Board acted within its broad remedial discretion under Section 10(c)¹⁴³ in declining to adopt a categorical exception to the reinstatement-and-backpay remedy for employees who are discharged because of union animus, where such employees give false testimony under oath in an administrative hearing before an administrative law judge.¹⁴⁴

Justice Scalia concurred in judgment but wrote separately to discuss what he viewed as the Board acting not well within its broad remedial discretion but at “the very precipice of the tolerable”:¹⁴⁵

It is ordinarily no proper concern of the judge how the Executive chooses to exercise discretion, so long as it be within the scope of what the law allows. . . . The context changes, however, when the exercise of discretion relates to *the integrity of the unitary adjudicative process that begins in an administrative hearing before a federal administrative law judge and ends in a judgment of this or some other federal court*. Agency action or inaction that undermines and dishonors that process undermines and dishonors the legal system – undermines and dishonors the courts. Judges may properly protest, no matter how lawful and hence unreversible) the agency action or inaction may be. Such a protest is called for in the present case, in which the Board has displayed – from its initial decision through its defense of that decision in this Court – an unseemly toleration of perjury in the course of adjudicative proceedings.¹⁴⁶

Justice Scalia's commentary, admittedly dicta, is important for two reasons. First, it foreshadows the Court's attitude toward undocumented workers as having “unclean hands” and therefore not entitled to backpay in *Hoffman Plastic Compounds, Inc. v. NLRB*.¹⁴⁷

142. *ABF Freight System, Inc. v. NLRB*, 510 U.S. 317 (1994).

143. 29 U.S.C. § 160(c) (2012) (authorizing the Board “to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of [the Act]”).

144. *ABF Freight System, Inc.*, 510 U.S. at 324-25.

145. *ABF Freight System, Inc.*, 510 U.S. at 329 (Scalia, J., concurring).

146. *ABF Freight System, Inc.*, 510 U.S. at 326-27 (emphasis added).

147. See *infra* notes xx-xx and accompanying text discussing *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002).

Second, it highlights the importance that Justice Scalia places on the judicial branch and the extent to which the three powers, while separated by function, do interact in significant ways.

B. Chevron and the Court's Relationship to the NLRB in Interpreting the NLRA

The vast majority of labor cases decided by the Court during Scalia's tenure were cases testing the relationship between the reviewing courts and the NLRB, primarily under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,¹⁴⁸ and its progeny. The *Chevron* line of cases decrees that, when an administrative agency interprets the statute that Congress charged it with administering, reviewing courts must defer to the agency's reasonable and permissible interpretations of gaps and ambiguities in that statute.¹⁴⁹ For purposes of private-sector labor law, this means that courts reviewing NLRB decisions must defer to the Board's reasonable and permissible interpretation of ambiguous NLRA language.

Although the Court decided *Chevron* in 1984, a full two years before Justice Scalia's appointment to the High Bench, reviewing courts had been deferring to administrative agencies' statutory interpretations since the New Deal. Thus, while *Chevron* has proven controversial in academic circles, its principle is long-settled law. Scalia, a former administrative law professor and a former judge on the D.C. Circuit, which routinely reviews agency decisions, would have been intimately familiar with these administrative law principles.

1. Not All Workers Are Statutory Employees Entitled to Statutory Remedies

The most significant *Chevron* cases decided during Scalia's tenure dealt with the question whether a particular category of worker was a statutory employee under the NLRA. The answer to this question is important because the NLRA only protects those workers who meet the statutory definition of employee.¹⁵⁰ Between 1994 and 2002, the Court decided five cases in this category.¹⁵¹ In only

148. 467 U.S. 837 (1984).

149. *Id.* at 843.

150. *See* 29 U.S.C. § 152(3) (2012).

151. *See Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 151-52 (2002) (upholding the Board's construction of the statutory term employee as including undocumented workers

one of those cases, *Town & Country Electric*,¹⁵² did Scalia side with those seeking to maintain the strikingly broad definition of employee.¹⁵³ Although Justice Breyer – not Scalia – drafted the opinion in that case, it captures much of Scalia’s essence – his literal, textual approach to statutory interpretation, his legalism, and his formalism.

a. Salts Are Employees Protected Under the NLRA Because a
Literal Reading of the Statutory Term, Employee, Reveals that It Is
Strikingly Broad

In *Town & Country Electric*, the Court unanimously held that a salt¹⁵⁴ – a worker paid by a union to work at a nonunion shop to legally organize its workers – was an employee under NLRA section 2(3).¹⁵⁵ In so holding, the Court took four approaches to analyzing the case: literal/textual, purposive, jurisprudential/precedential, and structural. Providing a textualist analysis first, the Court observed that including salts within the statutory definition of employee as “any employee,” unless otherwise exempted, would be consistent

but finding that federal immigration law prohibited the Board from awarding backpay as a remedy); *NLRB v. Ky. River Cmty. Care, Inc.*, 532 U.S. 706, 721 (2001) (holding that the Board’s construction of the statutory term “independent judgment” is not reasonable); *Holly Farms Corp. v. NLRB*, 517 U.S. 392, 408-09 (1996) (upholding the Board’s conclusion that live-haul workers were employees entitled to the statutory protections of the NLRA rather than being exempted agricultural workers); *NLRB v. Town & Country Elec., Inc.*, 516 U.S. 85, 87 (1995) (upholding the Board’s construction of the statutory term employee as including paid union organizers); *NLRB v. Health Care & Ret. Corp. of Am.*, 511 U.S. 571, 584 (1994) (holding that Board’s construction of the statutory term, “in the interest of the employer” is not a reasonable interpretation of the NLRA).

152. 516 U.S. at 85.

153. “The Supreme Court has characterized the statutory definition of ‘employee’ as very ‘broad.’” Anne Marie Lofaso, *The Persistence of Union Repression in an Era of Recognition*, 62 ME. L. REV. 199, 205 (2010) (citing *Town & Country Elec.*, 516 U.S. at 91; *NLRB v. Action Auto., Inc.*, 469 U.S. 490, 497-98 (1985); *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 891 (1984)).

154. See Jane Slaughter, *Organizers Worth Their Salt*, LABORNOTES (Feb. 26, 2014), <<http://www.labornotes.org/2014/02/organizers-worth-their-salt>>.

155. 516 U.S. at 96. The NLRA defines employee as

any employee, and shall not be limited to the employees of a particular employer, unless [the Act] explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but 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 employed by an employer subject to the Railway Labor Act.

29 U.S.C. § 152(3) (2012).

with the breadth of the definition.¹⁵⁶ Reviewing dictionary definitions of that term highlighted its breadth as describing essentially anyone in the service of another.¹⁵⁷ The Court then noted that no exceptions applied in the circumstances of this case.¹⁵⁸ Second, the Court observed that the Board's broad construction of the term employee to include salts was consistent with several of the Act's purposes. In particular, it fulfilled the purpose of "protecting 'the right of employees to organize for mutual aid without employer interference,'"¹⁵⁹ and "encouraging and protecting the collective-bargaining process."¹⁶⁰ Third, the Court explained that the Board's construction was consistent with Supreme Court jurisprudence, whereby the Court had consistently remarked on the "breadth of § 2(3)'s definition [a]s striking: the Act squarely applies to 'any employee.'"¹⁶¹ Fourth, the Court remarked that the 1947 Labor Management Relations Act contemplated that workers can serve both a union and work for a company.¹⁶²

The Court readily rejected the company's arguments. In particular, the Court rejected the policy argument, allegedly grounded in the common law, that salts could not be employees because they could never be loyal to the employer. The Court explained that the common law actually did not support this position.¹⁶³ In any event, at least with respect to Scalia, given the language's breadth, which includes all workers unless expressly exempted, it would have been hard for the strict textualist to have found otherwise.

156. *Town & Country Elec.*, 516 U.S. at 97.

157. *Id.* at 90.

158. *Id.* at 98.

159. *Id.* at 91 (quoting *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 798 (1945) and citing 29 U.S.C. § 157).

160. *Id.* at 91 (quoting *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 892 (1984)).

161. *Id.* at 91-92 (quoting *Sure-Tan*, 467 U.S. at 891 and collecting the following cases in which the Court upheld various categories of workers as statutory employees: *Sure-Tan*, 467 U.S. at 891 (undocumented aliens); *NLRB v. Hendricks County Rural Elec. Membership Corp.*, 454 U.S. 170, 189-90 (1981) ("confidential employees" unless they deal with personnel matters); *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 185-86 (job applicants)).

162. *Town & Country Elec.*, 516 U.S. at 91-92 (citing 29 U.S.C. § 186(c)(1)).

163. A "person may be the servant of two masters . . . at one time as to one act, if the service to one does not involve abandonment of the service to the other." *Town & Country Elec.*, 516 U.S. at 94-95 (quoting RESTATEMENT (SECOND) OF AGENCY § 226 (1958)) (emphasis omitted).

b. Scalia Would Have Expanded the Agricultural Laborer Exemption
Based on a Textualist Analysis of FLSA Section 3(f)
and NLRA Section 2(3)

Scalia was not so hard pressed in the next statutory construction case, which rather than focusing on the affirmative aspects of the definition employee focused on the negative aspects of that definition comprising the exemptions. In *Holly Farms Corp. v. NLRB*, the Court examined the agricultural laborer exemption in the context of holding that live-haul workers, “chicken catchers, forklift operators, and truck drivers, who collect for slaughter chickens” and transport them to a processing plant were employees within the meaning of Section 2(3).¹⁶⁴

The Board’s construction of the statutory term, agricultural laborer, is more circumscribed than usual. The term “agricultural laborer” is not defined in the NLRA, which would suggest that the Board’s construction would receive *Chevron*-like deference.¹⁶⁵ And

164. 517 U.S. 392, 394-95 (1996).

165. Although *Chevron* was not decided until 1984, the Court generally deferred to the Board’s reasonable interpretation of the NLRA in what I call pre-*Chevron Chevron* cases. *See, e.g., Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 891 (1984) (“Since the task of defining the term ‘employee’ is one that ‘has been assigned primarily to the agency created by Congress to administer the Act,’ . . . the Board’s construction of that term is entitled to considerable deference, and we will uphold any interpretation that is reasonably defensible.”); *NLRB v. City Disposal Sys. Inc.*, 465 U.S. 822, 829 (1984) (“[O]n an issue that implicates its expertise in labor relations, a reasonable construction by the Board is entitled to considerable deference.”); *Bill Johnson’s Rests., Inc. v. NLRB*, 461 U.S. 731, 742 (1983) (“[I]n light of the Board’s special competence in applying the general provisions of the Act to the complexities of industrial life, its interpretations of the Act are entitled to deference, even where, as here, its position has not been entirely consistent.”); *NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393, 402-03 (1983) (“[T]he Board’s construction here, while it may not be required by the Act, is at least permissible under it . . .”, and in these circumstances its position is entitled to deference.”); *Charles D. Bonanno Linen Serv., Inc. v. NLRB*, 454 U.S. 404, 419 (1982) (“[T]he Board in this case has developed a rule which, although it may deny an employer a particular economic weapon, does so in the interest of the proper and pre-eminent goal, maintaining the stability of the multiemployer unit. Because the Board has carefully considered the effect of its rule on that goal, we should defer to its judgment.”); *Ford Motor Co. v. NLRB*, 441 U.S. 488, 497 (1979) (“[T]he judgment of the Board is subject to judicial review; but if its construction of the statute is reasonably defensible, it should not be rejected merely because the courts might prefer another view of the statute.”); *Eastex, Inc. v. NLRB*, 437 U.S. 556, 568 (1978) (“[The task of defining the scope of section 7] is for the Board to perform in the first instance as it considers the wide variety of cases that come before it.”); *Beth Israel Hosp. v. N.L.R.B.*, 437 U.S. 483, 500 (1978) (“[T]he Board’s construction of the statute’s policies would be entitled to considerable deference.”); *NLRB v. Local Union No. 103, Int’l Ass’n of Bridge, Structural & Ornamental Iron Workers*, 434 U.S. 335, 350 (1978) (“The Board’s resolution of the conflicting claims in this case represents a defensible construction of the statute and is entitled to considerable deference.”); *NLRB v. Enter. Ass’n of Steam, Hot Water, Hydraulic Sprinkler, Pneumatic Tube, Ice Mach. & Gen. Pipefitters, Local Union No. 638*, 429 U.S. 507, 528 (1977) (“The Board’s reading and application of the statute involved in this case, however, are long established, have remained undisturbed by Congress, and fall well within that category of situations in which the courts

indeed, that's exactly what happened for the first decade of the Board's construction of that term.¹⁶⁶ But starting in 1946, Congress constrained the Board in how it may interpret the term.¹⁶⁷ In

should defer to the agency's understanding of the statute which it administers."); *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 266 (1975) ("[T]he Board has the 'special function of applying the general provisions of the Act to the complexities of industrial life,' . . . and its special competence in this field is the justification for the deference accorded its determination."); *NLRB v. Boeing Co.*, 412 U.S. 67, 75 (1973) ("[A] consistent and contemporaneous construction of a statute by the agency charged with its enforcement is entitled to great deference by the courts"); *NLRB v. Nat. Gas Util. Dist. of Hawkins Cty., Tenn.*, 402 U.S. 600, 605 (1971) ("The Board's construction of the broad statutory term [political subdivision] is, of course, entitled to great respect."); *Am. Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 316 (1965) ("There is of course no question that the Board is entitled to the greatest deference in recognition of its special competence in dealing with labor problems."); *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 236 (1963) (Where Congress has in the Statute given the Board a question to answer, the courts will give respect to that answer."); *NLRB v. Truck Drivers Local Union No 449, Int'l Bhd. of Teamsters, Chauffeurs Warehousemen, & Helpers of Am.*, 353 U.S. 87, 96 (1957) ("The ultimate problem is the balancing of the conflicting legitimate interests [between management and labor]. The function of striking that balance to effectuate national labor policy is often a difficult and delicate responsibility, which the Congress committed primarily to the National Labor Relations Board, subject to limited judicial review."); *NLRB v. Denver Bldg. & Constr. Trades Council*, 341 U.S. 675, 692 (1951) ("[T]he Board's interpretation of the Act and the Board's application of it in doubtful situations are entitled to weight."); *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 798 (1945) (explaining 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"); *NLRB v. Hearst Publ'ns*, 322 U.S. 111, 131 (1944), *superseded by statute*, Labor Management Relations Act of 1947 (Taft-Hartley Act), ch. 120, § 101, 61 Stat. 137 ("[W]here the question is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially, the reviewing court's function is limited."); *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941) ("The exercise of the process [of determining remedy] was committed to the Board, subject to limited judicial review. Because the relation of remedy to policy is peculiarly a matter for administrative competence, courts must not enter the allowable area of the Board's discretion and must guard against the danger of sliding unconsciously from the narrow confines of law into the more spacious domain of policy.").

166. For example, in *Idaho Potato Growers, Inc.*, the Board held that "warehouse and cellar crews" were not agricultural laborers because the

services of these employees are not rendered in the fields. Their work looks not toward the production of potatoes but toward their marketing. Their services are devoted entirely to the sorting of potatoes, and their grading, weighing, sacking, preparation for shipment, and loading. The work is of such a nature that it can be done in the dealer's warehouse as well as in the farmer's cellar.

48 N.L.R.B. 1084, 1094-95 (1943), *enforced sub nom.*, *Idaho Potato Growers v. NLRB*, 144 F.2d 295, 301 (9th Cir. 1944). In *North Whittier Heights Citrus Ass'n*, in the context of holding that packing-house workers who handled fruit were not agricultural laborers, the Board explained:

that an individual is engaged in handling farm products does not of itself make the services performed by him "agricultural." Services are often performed by employees in connection with the packing, processing, and other preparation of farm products for sale to consumers which are not a part of ordinary farming operations but a part of commercial or manufacturing operations.

10 N.L.R.B. 1269, 1281 (1939), *enforced sub nom.*, *N. Whittier Heights Citrus Ass'n v. NLRB*, 109 F.2d 76, 81 (9th Cir. 1940); *see NLRB v. Edinburg Citrus Ass'n*, 147 F.2d 353, 354 (5th Cir. 1945) (holding that employees of a co-operative that packed its own fruit were not agricultural laborers).

167. *See Kirsten Zerger, The NLRA Agricultural Exemption: A Functional or Mechanical Approach*, 2 INDUS. REL. L.J. 131, 137-42 (1977).

particular, in annual riders to appropriations acts for the NLRB since 1946, Congress has instructed that “‘agricultural laborer,’ for NLRA § 2(3) purposes, shall derive its meaning from the definition of ‘agriculture’ supplied by § 3(f) of the Fair Labor Standards Act of 1938 (FLSA),”¹⁶⁸ which defines “agriculture” as:

[F]arming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural, or horticultural commodities, . . . raising of livestock, bees, furbearing animals, or poultry, and any practices . . . performed by the farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.¹⁶⁹

This complication presents two legal questions: (1) to what extent may the Board interpret or deviate from the FLSA section 3(f) definition?¹⁷⁰ and (2) what deference do reviewing courts owe the Board in how it incorporates the FLSA section 3(f) definition of agriculture into NLRA section 2(3)’s use of the term, “agricultural laborer”? The Board has taken the view that it should read FLSA section 3(f)’s definition of agriculture as narrowly as possible.¹⁷¹ The *Holly Farms* majority deferred to the Board’s narrow construction of section 3(f), much as it would any legislative term subject to disambiguation.¹⁷²

Although a unanimous court held that the truck drivers were statutory employees, the Court split five to four on the other two categories of live-haul workers – the chicken catchers and the forklift operators. Justice O’Connor, writing an opinion dissenting in pertinent part in which Justice Scalia joined, would have expanded the “agricultural laborer” exemption to include these particular workers.¹⁷³ Once again, we see Scalia’s influence in the dissent’s

168. *Holly Farms Corp. v. NLRB*, 517 U.S. 392, 397 (1996) (*Bayside Enters., Inc. v. NLRB*, 429 U.S. 298, 300 & n.6 (1977)); see Pub. L. No. 94-206, 90 Stat. 23 (1976), available at <<http://uscode.house.gov/statutes/pl/94/206.pdf>>.

169. 29 U.S.C. § 203(f) (2012).

170. This question is also raised in *Zerger*, *supra* note 167, written nearly two decades before *Holly Farms*.

171. *Holly Farms*, 517 U.S. at 399 (noting that “administrators and reviewing courts must take care to assure that exemptions from NLRA coverage are not so expansively interpreted as to deny protection to workers the Act was designed to reach”); see *id.* (citing *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960) (exemptions from the FLSA “are to be narrowly construed against the employers seeking to assert them”); *Mitchell v. Ky. Fin. Co.*, 359 U.S. 290, 295 (1959) (“It is well settled that exemptions from the Fair Labor Standards Act are to be narrowly construed.”)).

172. *Id.* at 409.

173. *Id.* at 411 (O’Connor, J., dissenting).

analysis.

The dissent commenced its discussion with *Chevron's* standard of review, but emphasized prong one: "First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."¹⁷⁴ Rather than considering what leeway the Board had in incorporating FLSA section 3(f)'s definition of agriculture into its analysis of the "agricultural laborer" exemption, the dissent reviewed the text of FLSA section 3(f), because "the coverage intended by Congress under both the FLSA and the NLRA is best determined by consulting the language of the statute at issue"¹⁷⁵ The dissent then concluded that "because the relevant portions of § 3(f) are perfectly plain and 'directly [speak] to the precise question at issue,' I would hold that the chicken catchers and forklift operators are agricultural laborers and that the Board's contrary conclusion does not deserve deference."¹⁷⁶

c. Scalia Joined the Majority in Holding that Many Nurses Are Supervisors under NLRA Section 2(11) and Therefore Not Protected

In an infamous pair of cases, the Court rejected the Board's definition of the supervisory exemption found in NLRA section 2(11), which excludes workers from protection where workers use "independent judgment" that is not "routine" or "clerical" when they exercise any one of twelve enumerated powers¹⁷⁷ ("or effectively to recommend such action") "in the interest of the employer."¹⁷⁸ Those cases are *NLRB v. Health Care & Retirement Corp. of America*¹⁷⁹ and *NLRB v. Kentucky River Community Care, Inc.*¹⁸⁰

In *Health Care & Retirement*, Justice Kennedy, writing for the five to four majority that included Justice Scalia, rejected the Board's interpretation of the statutory phrase, "in the interest of the employer."¹⁸¹ The Board previously had held that "a nurse's direction

174. *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-843 (1984).

175. *Holly Farms*, 517 U.S. at 410-11.

176. *Id.* at 411 (quoting *Chevron*, 467 U.S. at 842).

177. Those powers are: "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." 29 U.S.C. § 152(11) (2012).

178. *Id.*

179. 511 U.S. 571 (1994).

180. 532 U.S. 706 (2001).

181. 511 U.S. at 576.

of less-skilled employees, in the exercise of professional judgment incidental to the treatment of patients, is not authority exercised ‘in the interest of the employer.’”¹⁸² The Court took a textualist approach, explaining that the Board’s construction of the supervisory exemption – that nurses do not exert power “in the interest of the employer” but rather in the interest of “patient care” – was inconsistent with the plain language of section 2(11) because patient care *is* the employer’s interest. In the Court’s words:

[T]he Board has created a false dichotomy – in this case, a dichotomy between acts taken in connection with patient care and acts taken in the interest of the employer. That dichotomy makes no sense. Patient care is the business of a nursing home, and it follows that attending to the needs of the nursing home patients, who are the employer’s customers, is in the interest of the employer. . . . We thus see no basis for the Board’s blanket assertion that supervisory authority exercised in connection with patient care is somehow not in the interest of the employer.¹⁸³

The issue returned to the Court a few years later after the Board clarified the term supervisor by distinguishing between independent judgment that is supervisory in nature, which makes a worker an exempt supervisor, and professional judgment, use of which does not. In particular, the Board excluded “ordinary professional or technical judgment in directing less-skilled employees to deliver services” from the definition of “independent judgment.”¹⁸⁴ In *Kentucky River*, the Court unanimously agreed that the Board’s interpretation of the ambiguous term “independent judgment” is normally entitled to deference.¹⁸⁵ Nevertheless, the Court struck down the Board’s definition as contrary to the plain language of that term and therefore not permissible under *Chevron* prong two. Justice Scalia, writing for the majority, observed that, the Board’s interpretation inserted “a startling categorical exclusion into statutory text that does not suggest its existence.”¹⁸⁶ By striking down the Board’s distinction, the Court punched a gaping hole in the definition of employee, making it difficult for professional workers, who often use professional

182. *Id.* at 574.

183. 511 U.S. at 577-78.

184. See *Providence Hosp.*, 320 N.L.R.B. 717, 729 (1996), *enforced sub nom.*, *Providence Alaska Med. Ctr. v. NLRB*, 121 F.3d 548 (9th Cir. 1997) (“Section 2(11) supervisory authority does not include the authority of an employee to direct another to perform discrete tasks stemming from the directing employee’s experience, skills, training, or position”).

185. 532 U.S. at 726.

186. *Id.* at 714.

expertise to direct others, to meet that definition.¹⁸⁷

d. Undocumented Workers Have Section 7 Rights but No Remedy

It has been a part of American jurisprudence from its inception that the law provides remedies for harms inflicted. In *Marbury v. Madison*, Chief Justice John Marshall presaged that the “very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury” and counselled that the newly minted United States government would cease to be called a “government of laws, and not of men . . . if the laws furnish no remedy for the violation of a vested legal right.”¹⁸⁸

The importance of the maxim – the law must remedy all breaches of legal rights – is nowhere more important than in the context of the most vulnerable members of our society. After all, the law nearly always protects the privileged. The law loses its moral authority when it fails the most vulnerable.¹⁸⁹ Yet this is precisely what happened in *Hoffman Plastic Compounds*. There, Justice Rehnquist writing for the majority held that, although under Supreme Court precedent undocumented workers were statutory employees,¹⁹⁰ they were not entitled to backpay when their employers (who illegally hired them under immigration law) unlawfully fired them for exercising their right to organize.¹⁹¹ Although Scalia silently joined the majority, he was not so silent at oral argument.¹⁹² There, Scalia infamously remarked that, because an undocumented worker cannot legally work in the U.S. and therefore cannot mitigate the harm caused by his or her employer’s unlawful conduct, a “smart” undocumented worker would simply “sit home,” “eat chocolates,” and collect “back pay.”¹⁹³

187. Anne Marie Lofaso, *The Vanishing Employee: Putting the Autonomous Dignified Worker Back To Work*, 5 F.I.U. L. REV. 495, 534-43 (2010).

188. 5 U.S. (1 Cranch) 137, 163 (1803). For an excellent history of the development of this maxim, see Thomas R. Phillips, *The Constitutional Right to A Remedy*, 78 N.Y.U. L. REV. 1309 (2003).

189. See generally JOHN RAWLS, A THEORY OF JUSTICE (1971); STEVEN H. SHIFFRIN, DISSENT, INJUSTICE, AND THE MEANINGS OF AMERICA (1999); STEVEN H. SHIFFRIN, THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE (1990).

190. See *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 891-94 (1984).

191. *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 149-51 (2002) (upholding the Board’s construction of the statutory term employee as including undocumented workers but finding that federal immigration law prohibited the Board from awarding backpay as a remedy).

192. See Transcript of Oral Argument, *Hoffman Plastic Compounds*, 535 U.S. at 137 (No. 00-1595), available at <https://www.supremecourt.gov/oral_arguments/argument_transcripts/00-1595.pdf>.

193. *Id.* at 31-32.

Those remarks provoked ridicule from labor scholars.¹⁹⁴ Remarketing on Justice Scalia's commentary, I wrote:

Scalia's view of people who are so impoverished that they risk life or limb to cross the border into the U.S. for the opportunity to work rightly provoked ridicule from labour scholars.

Labour law's purpose is to promote the practice of collective association among workers. . . . When justices use word games to thwart that purpose, justice is denied.¹⁹⁵

To be fair, Justice Scalia was known for his banter on the bench. But the rub here is severe. Immigrants cross borders for work. Certainly the undocumented workers who are the subject of unfair labor practices are crossing the border for work. The fact that they may, in crossing those borders, break the positive law of the receiving country says nothing about that person's moral virtue as a person. These undocumented workers, now labelled illegal aliens, are only criminals in the sense that they broke U.S. domestic law, which makes a noncitizen's improper entry in the United States punishable by fine or imprisonment¹⁹⁶ akin to a Class B misdemeanor for a first offense and a Class E felony for a subsequent offense.¹⁹⁷ But this act alone – improper entry into the U.S. to seek work – is hardly criminal in nature. Indeed, it is often virtuous – a person risking personal security so that his or her family back in the mother country can survive. And it is closer to a parent stealing a loaf of bread or medicine for his or her starving or sick children than it is to other Class B misdemeanors, such as driving while intoxicated, or Class E felonies, such as driving while intoxicated resulting in harm to an individual.¹⁹⁸

2. *Allentown Mack*: The Prominence of Textualism and Formalism in Scalia's Non-Chevron Chevron Case

In *Allentown Mack Sales and Service, Inc. v. NLRB*,¹⁹⁹ Justice Scalia, writing for the majority, reviewed the Board's test for determining whether a successor employer had a reasonable good-

194. See, e.g., Ellen Dannin & Ann Hodges, *The So-called Strict Constructionist Justices: Lessons from Hoffman Plastic*, TRUTHOUT (Sept. 5, 2013), <<http://www.truth-out.org/news/item/18296-the-so-called-strict-constructionist-justices-lessons-from-hoffman-plastics>>; Timothy R. Koch, *Beware the Bonbon Eating*, L.J. FOR SOC. JUST. (Oct. 27, 2010), <<https://ljsj.wordpress.com/2010/10/27/beware-the-bonbon-eating-immigrants/>>.

195. See Lofaso, *supra* note *.

196. See 18 U.S.C. § 1325 (2012).

197. See *id.* § 3559.

198. See, e.g., W. VA. CODE § 17C-5-2 (2016) (laying out penalties for driving under the influence of alcohol or while impaired by drugs).

199. 522 U.S. 359 (1998).

faith doubt of a union's majority status.²⁰⁰ In establishing the standard of review, Scalia used pre-*Chevron* language to state the deference owed to the Board's construction of the NLRA, explaining that "[c]ourts must defer to the requirements imposed by the Board if they are 'rational and consistent with the Act,' . . . and if the Board's 'explication is not inadequate, irrational or arbitrary.'"²⁰¹

Using that test, the Court upheld the Board's test:

While the Board's adoption of a unitary standard for polling, RM elections, and withdrawals of recognition is in some respects a puzzling policy, we do not find it so irrational as to be "arbitrary [or] capricious" within the meaning of the Administrative Procedure Act, 5 U.S.C. § 706. The Board believes that employer polling is potentially "disruptive" to established bargaining relationships and "unsettling" to employees, and so has chosen to limit severely the circumstances under which it may be conducted.²⁰²

Given that *Allentown Mack* was decided fourteen years after *Chevron*, it may seem odd for the Court not to cite the seminal case for judicial deference to an administrative agency's interpretation of the statute that Congress charged that agency with administering.²⁰³ This is, however, in line with Justice Scalia's contempt for *Chevron* as creating a serious separation-of-powers question:

Heedless of the original design of the APA, we have developed an elaborate law of deference to agencies' interpretations of statutes and regulations. Never mentioning § 706's directive that the "reviewing court . . . interpret . . . statutory provisions," we have held that *agencies* may authoritatively resolve ambiguities in statutes.²⁰⁴

In Justice Scalia's view, *Chevron* allows administrative agencies to evade the more stringent standard that the APA had in mind.

200. *Id.* at 367-71. Justice Scalia also reviewed whether substantial evidence supported the Board's factual findings as applied in that test. *Id.* at 377-79.

201. *Id.* at 364 (quoting *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 42 (1987), and *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 236 (1963)).

202. *Id.* at 364-65.

203. To be fair, the Court has only cited *Chevron* in nine Board cases since it was decided in 1984. See *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 161 (2002) (Breyer, J., dissenting); *NLRB v. Kentucky River Cmty. Care, Inc.*, 532 U.S. 706, 713 (2001); *Holly Farms Corp. v. NLRB*, 517 U.S. 392, 398, 410-11, 413-14 (1996); *NLRB v. Town & Country Elec., Inc.*, 516 U.S. 85, 90 (1995); *ABF Freight Sys., Inc. v. NLRB*, 510 U.S. 317, 324 (1994); *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 536-37 (1992); *Am. Hosp. Ass'n v. NLRB*, 499 U.S. 606, 614 (1991); *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 574 (1988); *NLRB v. United Food & Commercial Workers Union, Local 23, AFL-CIO*, 484 U.S. 112, 123 (1987).

204. *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1211 (2015) (emphasis in original) (citing *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984)).

For Scalia, reasoned decision making was of paramount importance, including and perhaps especially in the agency context:

The Administrative Procedure Act, which governs the proceedings of administrative agencies and related judicial review, establishes a scheme of “reasoned decisionmaking.” . . . Not only must an agency’s decreed result be within the scope of its lawful authority, but the process by which it reaches that result must be logical and rational. Courts enforce this principle with regularity when they set aside agency regulations which, though well within the agencies’ scope of authority, are not supported by the reasons that the agencies adduce.²⁰⁵

The value that Scalia placed on reasoned decision making fit well with his judicial philosophy of formalism and legalism. For Scalia, it was imperative to get the legal rules and the internal logic right. Both were necessary; neither was sufficient. *Allentown Mack* captures that philosophy like no one other labor law case. Justice Scalia essentially told the Board, “Hey dummies, you barely got the rule right. Your interpretation is strange but not so irrational that we can’t defer to you on it. But you misapplied it in this context. Try again.” The Board took Scalia’s opinion to heart. In *Levitz Furniture Co. of the Pacific, Inc.*, the Board held that “an employer may unilaterally withdraw recognition from an incumbent union only where the union has actually lost the support of the majority of the bargaining unit employees.”²⁰⁶ In so holding, the Board “overrule[d] *Celanese*²⁰⁷ and its progeny insofar as they permit withdrawal on the basis of good-faith doubt.”²⁰⁸ Under this standard, an employer can defeat a post-withdrawal refusal-to-bargain allegation “if it shows, as a defense, the union’s actual loss of majority status.”²⁰⁹ In this way, Justice Scalia’s formalism and textualism served a useful purpose by compelling the Board to clarify its standard.

205. *Allentown Mack Sales & Serv., Inc.*, 522 U.S. at 374 (citing *Motor Vehicle Mfrs. Assn. of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 52 (1983); *SEC v. Chenery Corp.*, 332 U. S. 194 (1947); *SEC v. Chenery Corp.*, 318 U. S. 80 (1943)).

206. 333 N.L.R.B. 717, 717 (2001).

207. *Celanese Corp.*, 95 N.L.R.B. 664 (1951).

208. *Levitz Furniture*, 333 N.L.R.B. at 717.

209. *Id.*

3. The Limits of *Chevron* Deference: Plain Language (Textualism), an Agency's Interpretation of Supreme Court Jurisprudence, and the Problem with Flawed Precedent Serving as Faulty Premises (Formalism)

Given Scalia's concerns about *Chevron*, it should come as no surprise that Scalia would want to clarify that *Chevron* deference is not owed to agency interpretations of the Court's cases. *NLRB v. International Brotherhood of Electrical Workers (IBEW), Local 340* represents such a case.²¹⁰ There, the Court held, in disagreement with the Board, that a union does not violate NLRA section 8(b)(1)(B) when it disciplines two union members who worked as supervisors for an employer that did not have a collective-bargaining agreement with the union.²¹¹ The Board had previously interpreted section 8(b)(1)(B)'s prohibition on union "restrain[t] or coerc[ion]" of "an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances,"²¹² as permitting unions to discipline supervisory members when engaging in collective-bargaining or grievance adjustment activities.²¹³ The Board extended section 8(b)(1)(B)'s reach here to cases where a union did not even have a collective-bargaining agreement with the employer, on the theory that a union's enforcement of a "no-contract-no-work rule against its supervisor-members would restrain or coerce [employers] by affecting the way in which the supervisor members performed their § 8(b)(1)(B) tasks and by restricting the selection of § 8(b)(1)(B) representatives."²¹⁴ The Court disagreed, holding that because the union here did not have a collective-bargaining agreement with the employer, the union's discipline of its supervisory members did not trigger section 8(b)(1)(B).²¹⁵

Scalia wrote separately for three reasons. First, Scalia emphasized his agreement with the Court that section 8(b)(1)(B), by its plain terms, governs the relationship between unions and

210. See *NLRB v. Int'l Bhd. of Elec. Workers (IBEW), Local 340*, 481 U.S. 573, 596 (1987) (Scalia, J., concurring); see also *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190 (1991) (the majority and both dissenting opinions agreed that the Board is not entitled to deference in interpreting the Supreme Court's case, *Nolde Bros., Inc. v. Bakery Workers*, 430 U.S. 243 (1977)).

211. *IBEW, Local 340*, 481 U.S. at 579.

212. 29 U.S.C. § 158(b)(1)(B) (2012).

213. See *Fla. Power & Light Co. v. Int'l Bhd. of Elec. Workers, Local 641*, 417 U.S. 790, 800-01 (1974) (collecting Board decisions).

214. *IBEW, Local 340*, 481 U.S. at 589.

215. *Id.* at 595-96.

employers (not the relationship between unions and their members) and only one aspect of that relationship – the employer’s selection of representatives.²¹⁶ Second, Scalia explained that any deference owed to the NLRB was owed to its interpretation of ambiguous terms or gaps in the NLRA, not in its interpretation of the Court’s own case law:

If the question before us were whether, given the deference we owe to agency determinations, the Board’s construction of this Court’s opinion in *ABC* is a reasonable one, I would agree with the Government that it is. We defer to agencies, however (and thus apply a mere “reasonableness” standard of review) in their construction of their statutes, not of our opinions. The question before us is not whether *ABC* can reasonably be read to support the Board’s decision, but whether § 8(b)(1)(B) can reasonably be read to support it. It seems to me that *ABC* and the Board’s prior decision in [*San Francisco-Oakland Mailers’ Union No. 18*], which held that unions violate § 8(b)(1)(B) by disciplining member-representatives for the manner in which they interpret collective-bargaining contracts, represent at best the “outer limits,” [*Florida Power & Light Co.*], of any permissible construction of § 8(b)(1)(B). I would certainly go no further, and would accordingly limit the Board’s indirect restraint theory to circumstances in which there is an actual contract between the union and affected employer, without regard to whether the union has an intent to establish such a contract. Of course, as the Court’s opinion points out: “Direct coercion [*i.e.*, real coercion] of an employer’s selection of a § 8(b)(1)(B) representative would always be a § 8(b)(1)(B) violation, whether or not the union has or seeks a bargaining relationship with an employer.”²¹⁷

Scalia’s third point is perhaps the most important because it reveals Scalia’s adherence to both textualism and formalism.

The Board’s approach is the product of a familiar phenomenon. Once having succeeded, by benefit of excessive judicial deference, in expanding the scope of a statute beyond a reasonable interpretation of its language, the emboldened agency presses the rationale of that expansion to the limits of its logic. And the Court, having already sanctioned a point of departure that is genuinely not to be found within the language of the statute, finds itself cut off from that authoritative source of the law, and ends up construing not the statute but its own construction. Applied to an erroneous point of departure, the logical reasoning that is ordinarily the mechanism of judicial adherence to the rule of law perversely carries the Court further and further from the meaning of the

216. *Id.* at 596 (Scalia, J., concurring).

217. *Id.* at 597 (citing *Am. Broad. Cos. v. Writers Guild, Inc.*, 437 U.S. 411 (1978) (*ABC*); *San Francisco-Oakland Mailers’ Union No. 18* (Northwest Publications, Inc.), 172 N.L.R.B. 2173 (1968); and *Florida Power & Light Co. v. IBEW, Local 641*, 417 U.S. 790, 805 (1974)).

statute. Some distance down that path, however, there comes a point at which a later incremental step, again rational in itself, leads to a result so far removed from the statute that obedience to text must overcome fidelity to logic.²¹⁸

Justice Scalia is essentially saying this. In a previous case, the Court deferred to the Board's stretched construction of the NLRA (an interpretation that nearly flies in the face of the plain language). Accordingly, although the Board's extension in this case may be logical, it is too far removed from the plain language as to be enforceable: "Logic is on the side of the Board, but the statute is with the respondent."²¹⁹

Although it appears that textualism is trumping formalism here, that is not the case. What Scalia is really saying is that the Board's previous interpretations were wrong because they violated the NLRA's plain language or at the outer limits of statutory construction such that any more extension would conflict with the NLRA's plain language. When the Board applied those cases here, its internal logic may have been correct but it relied on erroneous assumptions in the form of previous cases wrongly decided or at least off the mark. The Board's decision thereby fell apart in much the same way that a mathematical proof that begins with faulty premises would fall apart even with impeccable logic.

4. Clash of the Titans: Tension Between Textualism and *Chevron* Deference

In theory, there should be no tension between *Chevron* and textualism. After all, *Chevron* demands that the Court first ask whether Congress has directly spoken to the issue. If so, and the language is plain, then the agency and reviewing courts must give effect to the plain language of the statute. Under *Chevron* prong one, courts reign supreme. Deference is not even an issue unless the reviewing court determines that the statute is ambiguous or silent. In that case, courts must defer to the agency's reasonable and permissible construction.

Lechmere, Inc. v. NLRB presents an excellent account for how these seemingly compatible doctrines might clash in the world of extreme textualism. In that case, nonemployee union organizers trespassed on a company parking lot to try to organize the company's

218. *Id.* at 597-98.

219. *Id.* at 598.

employees.²²⁰ The Board applied its *Jean Country* test:

“[I]n all access cases our essential concern will be [1] the degree of impairment of the Section 7 right if access should be denied, as it balances against [2] the degree of impairment of the private property right if access should be granted. We view the consideration of [3] the availability of reasonably effective alternative means as especially significant in this balancing process.”²²¹

Lechmere presented a fact pattern similar to *NLRB v. Babcock & Wilcox Co.*²²² But intervening law since *Babcock & Wilcox*, including, two Supreme Court cases, *Central Hardware Co.*²²³ and *Hudgens*,²²⁴ suggested that the balance to be struck between Section 7 rights and an employer’s property rights fell on a continuum, the locus of which depended on the context of the case. All of this was pointed out by the dissent, which would have upheld the Board’s construction of Section 7.²²⁵

Justice Clarence Thomas, writing for a majority that included Justice Scalia, saw the case very differently. In an opinion, which reads like a poor-man’s effort at channeling Scalia, Justice Thomas used three main statutory canons to explain the Court’s holding that nonemployee union organizers normally do not have access to an employer’s property: (1) statutory language; (2) Supreme Court precedent; (3) *stare decisis*. First, Justice Thomas commenced with a statement of the text of Section 7, which makes it an unfair labor practice for an employer to “interfere with, restrain or coerce employees in the exercise of [their Section 7 rights],”²²⁶ explaining that, “[b]y its plain terms, . . . the NLRA confers rights only on employees, not on unions or their nonemployee organizers.”²²⁷ Second, the Court reviewed four relevant Supreme Court cases. It initially reviewed *Babcock & Wilcox*, in which the Court “recognized

220. *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 529-30 (1992).

221. *Id.* at 536 (quoting *Jean Country*, 291 N.L.R.B. 11, 14 (1998)).

222. *See id.* at 532 (discussing *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956)).

223. *See Cent. Hardware Co. v. NLRB*, 407 U.S. 539, 544 (1972) (explaining that *Babcock* was a “guiding principle” for adjusting conflicts between employees’ section 7 rights and employers’ property rights).

224. *See Hudgens v. NLRB*, 424 U.S. 507, 522 (1976) (explaining that “[t]he locus of that accommodation . . . may fall at differing points along the spectrum depending on the nature and strength of the respective § 7 rights and private property rights asserted in any given context. In each generic situation, the primary responsibility for making this accommodation must rest with the Board in the first instance”).

225. *Lechmere*, 502 U.S. at 543-44 (White, J., dissenting).

226. *Id.* at 531 (majority opinion) (quoting 29 U.S.C. § 157 (1988) (emphasis added)).

227. *Id.* at 532.

that insofar as the employees' 'right of self-organization depends in some measure on [their] ability . . . to learn the advantages of self-organization from others,' . . . , § 7 of the NLRA may, in certain limited circumstances, restrict an employer's right to exclude nonemployee union organizers from his property."²²⁸ The Court next distinguished *Central Hardware* and *Hudgens*. To be sure, the Court acknowledged that both cases "quoted approvingly *Babcock's* admonition that accommodation between employees' § 7 rights and employers' property rights 'must be obtained with as little destruction of one as is consistent with the maintenance of the other.'"²²⁹ It proceeded to explain, however, that "[t]here is no hint in *Hudgens* and *Central Hardware* . . . that our invocation of *Babcock's* language of 'accommodation' was intended to repudiate or modify *Babcock's* holding that an employer need not accommodate nonemployee organizers unless the employees are otherwise inaccessible."²³⁰ The Court then relied on dicta in *Sears, Roebuck & Co. v. Carpenters*,²³¹ which explained *Babcock & Wilcox* as follows:

"While *Babcock* indicates that an employer may not always bar nonemployee union organizers from his property, his right to do so remains the general rule. To gain access, the union has the burden of showing that no other reasonable means of communicating its organizational message to the employees exists or that the employer's access rules discriminate against union solicitation. That the burden imposed on the union is a heavy one is evidenced by the fact that the balance struck by the Board and the courts under the *Babcock* accommodation principle has rarely been in favor of trespassory organizational activity."²³²

Third, the Court relied on the doctrine of stare decisis to explain why it was sticking with its holding in *Babcock & Wilcox*, rather than deferring to the Board's construction of section 7 in *Jean Country*:

Before we reach any issue of deference to the Board, however, we must first determine whether *Jean Country* – at least as applied to nonemployee organizational trespassing – is consistent with our past interpretation of § 7. "Once we have determined a statute's clear meaning, we adhere to that determination under the doctrine of stare decisis, and we judge an agency's later interpretation of the statute against our prior determination of the statute's meaning."²³³

228. *Id.* at 532 (quoting *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 113 (1956)).

229. *Id.* at 534 (citing *Cent. Hardware Co. v. NLRB*, 407 U.S. 539, 544 (1972) and *Hudgens*, 424 U.S. at 521, 522 (quoting *Babcock & Wilcox*, 351 U.S. at 112)).

230. *See Id.* at 534.

231. 436 U.S. 180 (1978).

232. *Lechmere, Inc.*, 502 U.S. at 535 (quoting *Sears*, 436 U.S. at 205).

233. *Id.* at 536-37 (quoting *Maislin Indus., U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 131

Notwithstanding this three-part approach – statutory language, Supreme Court case law, and stare decisis – the take away point here is textualism. As the Court explained: “In *Babcock*, . . . we held that the Act drew a distinction ‘of substance’ . . . between the union activities of employees and nonemployees.”²³⁴

Here’s where an obsession with the statutory text becomes problematic. *Lechmere* is perhaps the worst reasoned opinion of all the NLRB cases during Scalia’s tenure (perhaps of all time). Scalia’s formalism takes pride in its strict adherence to the internal logic of the opinion’s reasoning. *Lechmere* essentially takes the language of section 7, which grants positive rights to employees, and greatly diminishes the role that unions play in securing those rights. The NLRA’s preamble explains:

It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.²³⁵

Although employees are the primary holders of section 7 rights, those rights cannot be understood absent the role that unions, self-organization, full freedom of association, collective bargaining, and other concerted activity for the purpose of mutual aid or protection play in securing those rights. Like a law school student who reads only part of the case to grasp the holding only to learn that he has unwittingly read the dissent, *Lechmere* eviscerates the fundamental meaning of the NLRA as granting collective as well as individual rights.

Lechmere is also wrong on its own terms. As the Court recognized in *Eastex, Inc. v. NLRB*,²³⁶ the statutory term “‘employees’ who may engage in concerted activities for ‘mutual aid or protection’ are defined by § 2(3) of the Act . . . to ‘include any employee, and shall not be limited to the employees of a particular employer . . .’ This definition was intended to protect employees when they engage in otherwise proper concerted activities in support of employees of

(1990)).

234. *Id.* at 37 (quoting *Babcock & Wilcox*, 351 U.S. at 113).

235. See 29 U.S.C. § 151 (2012).

236. 437 U.S. 556 (1978).

employers other than their own.”²³⁷ Reading Section 7 in light of Section 2(3)’s definition of employee renders Section 7’s grant of positive rights to employees ambiguous at best. This places Section 7 in the *Lechmere* context – that is, the context as to whether nonemployee union organizers have some trespassory rights to communicate with employees on those employees’ own employer’s private property – squarely within the Board’s interpretative powers under *Chevron* prong two.

C. The Court’s Review of the Board’s Findings of Fact

1. History of the Making of the Substantial Evidence Test in the NLRA Context

NLRA sections 10(e) and 10(f)²³⁸ empower the United States courts of appeals to review the Board’s final decisions and orders. Section 10(e) also provides the standard by which those courts must review the Board’s findings of fact: “The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive.”²³⁹

NLRA section 10(e) of the original Wagner Act required only that the Board’s factual findings were to be “supported by evidence” to “be conclusive.”²⁴⁰ Shortly thereafter, the Court inserted “substantial” into the courts’ determination whether the Board’s findings were supported by evidence. In particular, the Court first mentioned “substantial evidence” in dicta in *Washington, Virginia & Maryland Coach Co. v. NLRB*, where it explained that it was without jurisdiction to review the factual findings because “[t]he petition for certiorari made no mention of any claim with respect to the sufficiency of the evidence to support the findings. In the light of this

237. *Id.* at 564.

238. *Id.* §§ 160(e), (f). Sections 10(e) and (f) grant jurisdiction to various courts to hear cases, known as applications for enforcement and petitions for review, regarding the enforceability of the Board’s orders. Section 10(e) grants a “power” to the Board “to petition any court of appeals of the United States . . . wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order . . .” Section 10(f) permits “[a]ny person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought [to] obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside.”

239. *Id.* § 160(e).

240. 29 U.S.C. § 160(e) (1940).

fact the question is not open for decision here. But, were this not so, we [would apply the substantial evidence test].”²⁴¹ This was the birth of the substantial evidence test in the labor context.

The Court squarely defined “substantial evidence” in the context of an NLRB case the very next year in *Consolidated Edison Co. of New York v. NLRB*.²⁴² There the Court explained that substantial evidence is “more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”²⁴³ The following year, after explaining that the Board’s findings of fact are conclusive if supported by substantial evidence, the Court elaborated:

But as has often been pointed out, this, as in the case of other findings by administrative bodies, means evidence which is substantial, that is, affording a substantial basis of fact from which the fact in issue can be reasonably inferred. . . . Substantial evidence is more than a scintilla, and must do more than create a suspicion of the existence of the fact to be established. . . .²⁴⁴

In line with language defining substantial evidence as “do[ing] more than create a suspicion of the existence of the fact,” the Fifth Circuit began to deny enforcement of Board decisions and orders for lack of substantial evidence.²⁴⁵ As a recurring federal issue of “high importance,” the Court took certiorari to clarify the standard:

The Court below, upon petition . . . to set aside an order of the [NLRB], decided that the Board’s order was not supported by substantial evidence, said the order was based on mere suspicion, and declined to enforce it. Whether the court properly reached that conclusion is the single question here. We do not ordinarily grant certiorari to review judgments based solely on questions of fact. In its petition, however, the Board earnestly contended that the record before the Court of Appeals had presented “clear and overwhelming proof” that the [company] had been guilty of a most flagrant mass discrimination against its employees in violation of the [NLRA], and that the court had unwarrantedly interfered with the exclusive jurisdiction granted the Board by Congress.²⁴⁶

Accordingly, the Court took this particular case because “[i]t is of paramount importance that courts not encroach upon this

241. 301 U.S. 142, 146-47 (1937).

242. 305 U.S. 197 (1938).

243. *Id.* at 229.

244. *NLRB v. Columbian Enameling & Stamping Co.*, 306 U.S. 292, 299-300 (1939).

245. *See NLRB v. Waterman S.S. Corp.*, 309 U.S. 206, 208 n.1 (1940) (citing *NLRB v. Bell Oil & Gas Co.*, 98 F.2d 406 (5th Cir. 1938); *Peninsular & Occidental S.S. Co. v. NLRB*, 98 F.2d 411 (5th Cir. 1938); *Globe Cotton Mills v. NLRB*, 103 F.2d 91 (5th Cir. 1939)).

246. *Waterman S.S. Corp.*, 309 U.S. at 207-08 (citation omitted).

exclusive power of the Board if effect is to be given the intention of Congress to apply an orderly, informed and specialized procedure to the complex, administrative problems arising in the solution of industrial disputes.”²⁴⁷ The Court viewed this issue as a separation-of-powers question: “Congress has deemed it wise to entrust the finding of facts to these specialized agencies. It is essential that courts regard this division of responsibility which Congress as a matter of policy has embodied in the very statute from which the Court of Appeals derived its jurisdiction to act.”²⁴⁸

In 1947, Congress amended NLRA section 10(e) in two ways. First, Congress inserted the word, “substantial” before the word, “evidence,” ostensibly adopting the “substantial evidence” standard adopted by the Court in *Consolidated Edison*. Second, Congress inserted the words, “on the record as a whole.” The appellate standard of review of the Board’s factual findings thereby changed as follows:

Wagner Act 1935 Language ²⁴⁹	Taft-Hartley 1947 Language ²⁵⁰
“The findings of the Board as to the facts, if supported by evidence, shall be conclusive.”	“The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive.”

*Universal Camera Corp. v. NLRB*²⁵¹ was the first case in which the Supreme Court reviewed the amended standard. There, the Court identified two criticisms that resulted in Congress amending the NLRA’s language. First, the Court determined that the standard of proof reviewing courts expected of the NLRB (in contrast with other administrative agencies) was not sufficiently rigorous. The Court concluded that Congress, in response, added the statutory term, “substantial,” to ensure that the evidence supporting the agency’s factual findings were, in fact, substantial. In putting that standard in the context of the legislative amendments, the Court added, “[a]nd so

247. *Id.* at 208.

248. *Id.* at 208-09.

249. National Labor Relations Act, § 10(e), 49 Stat. 449, 454 (1935) (codified at 29 U.S.C. § 160(e) (1940)).

250. Labor Management Relations Act of 1947 (Taft-Hartley Act), ch. 120, § 101, 61 Stat. 137, 147 (codified at 29 U.S.C. § 160(e)).

251. 340 U.S. 474 (1951).

we hold that the standard of proof specifically required of the [NLRB] by the Taft-Hartley Act is the same as that to be exacted by courts reviewing every administrative action subject to the Administrative Procedure Act.”²⁵² Second, the Court repeated congressional concerns that some judges were only superficially reviewing the record in search of “substantial evidence,” without accounting for countervailing evidence. In the perception of at least some members of Congress, this nonsystematic method of reviewing the record resulted in “inconsistency and uncertainty.”²⁵³ To remedy this problem, Congress added the words, “on the record considered as a whole,” to ensure the “kind of scrutiny which a court of appeals must give the record before the Board to satisfy itself that the Board’s order rests on adequate proof.”²⁵⁴

Having identified these criticisms and having explained just how Congress dealt with these criticisms, the Court then did some back peddling, in defense of the administrative state:

To be sure, the requirement for canvassing “the whole record” in order to ascertain substantiality does not furnish a calculus of value by which a reviewing court can assess the evidence. Nor was it intended to negative the function of the [NLRB] as one of those agencies presumably equipped or informed by experience to deal with a specialized field of knowledge, whose findings within that field carry the authority of an expertness which courts do not possess and therefore must respect. *Nor does it mean that even as to matters not requiring expertise a court may displace the Board’s choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it de novo.* Congress has merely made it clear that a reviewing court is not barred from setting aside a Board decision when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board’s view.²⁵⁵

It further back peddled in defense of its own institution: “From this it follows that enactment of [Taft-Hartley and the APA] does not require every Court of Appeals to alter its practice. Some – perhaps a majority – have always applied the attitude reflected in this legislation.”²⁵⁶

252. *Id.* at 487.

253. *Id.* at 481, 487.

254. *Id.* at 487.

255. *Id.* at 488 (emphasis added).

256. *Id.* at 490.

The Court ended its discussion explicating its own role reviewing Board findings of fact vis-à-vis the courts of appeals:

Our power to review the correctness of application of the present standard ought seldom to be called into action. Whether on the record as a whole there is substantial evidence to support agency findings is a question which Congress has placed in the keeping of the Courts of Appeals. This Court will intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied.²⁵⁷

Over the next sixty-five years, the Court demonstrated that it meant what it said – that Congress placed the substantial evidence test “in the keeping of the Courts of Appeal” and that its own “power to review the correctness of the [lower courts’] application of [that standard] ought seldom to be called into action.” The Court invoked the words “substantial evidence” in precisely forty-two NLRB cases.²⁵⁸ Most of those cases simply applied the standard to uphold the

257. *Id.* at 490-91.

258. *See* BE & K Const. Co. v. NLRB, 536 U.S. 516, 524, 538 (2002); Allentown Mack Sales & Serv., Inc. v. NLRB, 522 U.S. 359, 361, 366, 372, 376-80 (1998); Lechmere, Inc. v. NLRB, 502 U.S. 527, 541, 547 (1992); Am. Hosp. Ass'n v. NLRB, 499 U.S. 606, 619 (1991); NLRB v. Curtin Matheson Sci., Inc., 494 U.S. 775, 797 (1990); *id.* at 801-05, 812-13, 815-16, 818 (Scalia, J., dissenting); Fall River Dyeing & Finishing Corp. v. NLRB, 482 U.S. 27, 35, 42, 44 (1987); NLRB v. Int'l Longshoremen's Ass'n, AFL-CIO, 473 U.S. 61, 72, 78 (1985); *id.* at 93 (Rehnquist, J., dissenting); Bill Johnson's Rests., Inc. v. NLRB, 461 U.S. 731, 748 (1983); NLRB v. Transp. Mgmt. Corp., 462 U.S. 393, 405 (1983); NLRB v. Hendricks Cty. Rural Elec. Membership Corp., 454 U.S. 170, 191 (1981); NLRB v. Int'l Longshoremen's Ass'n, AFL-CIO, 447 U.S. 490, 529 (1980) (Burger, C.J., dissenting); NLRB v. Baptist Hosp., Inc., 442 U.S. 773, 782, 785-86, 790 (1979); NLRB v. Baylor Univ. Med. Ctr., 439 U.S. 9, 9 (1978) (per curiam); Beth Israel Hosp. v. NLRB, 437 U.S. 483, 501, 507 (1978); *id.* at 510 (Powell, J., concurring); Am. Broad. Cos., Inc. v. Writers Guild of Am., W., Inc., 437 U.S. 411, 433, 438 (1978); NLRB v. Enter. Ass'n of Steam, Hot Water, Hydraulic Sprinkler, Pneumatic Tube, Ice Mach. & Gen. Pipefitters of N.Y. & Vicinity, Local Union No. 638, 429 U.S. 507, 520, 522, 528, 531 (1977); NLRB v. Bell Aerospace Co. Div. of Textron, 416 U.S. 267, 273 (1974); NLRB v. Savair Mfg. Co., 414 U.S. 270, 289 (1973); Golden State Bottling Co. v. NLRB, 414 U.S. 168, 172-73 (1973); Cent. Hardware Co. v. NLRB, 407 U.S. 539, 548 (1972); Allied Chem. & Alkali Workers of Am., Local Union No. 1 v. Pittsburgh Plate Glass Co., Chem. Div., 404 U.S. 157, 171 (1971); Magnesium Casting Co. v. NLRB, 401 U.S. 137, 143 (1971); NLRB v. J. H. Rutter-Rex Mfg. Co., 396 U.S. 258, 267 (1969) (Douglas, J., dissenting); NLRB v. Gissel Packing Co., 395 U.S. 575, 586 (1969); NLRB v. Great Dane Trailers, Inc., 388 U.S. 26, 35 (1967); *id.* at 40 (Harlan, J., dissenting); Nat'l Woodwork Mfrs. Ass'n v. NLRB, 386 U.S. 612, 646 (1967); Houston Insulation Contractors Ass'n v. NLRB, 386 U.S. 664, 667-68 (1967); NLRB v. Brown, 380 U.S. 278, 291-92 (1965); Am. Ship Bldg. Co. v. NLRB, 380 U.S. 300, 308 (1965); *id.* at 318, 326 (White, J., concurring); *id.* at 335-36, 341 (Goldberg, J., concurring); NLRB v. Burnup & Sims, Inc., 379 U.S. 21, 22 n.2 (1964); NLRB v. Erie Resistor Corp., 373 U.S. 221, 236 (1963); NLRB v. Washington Aluminum Co., 370 U.S. 9, 15 (1962); NLRB v. Walton Mfg. Co., 369 U.S. 404, 406 (1962); *id.* at 409-10, 415, 417 (Frankfurter, J., dissenting); NLRB v. Ochoa Fertilizer Corp., 368 U.S. 318, 320 n.3 (1961); Local Lodge No. 1424 v. NLRB, 362 U.S. 411, 417 n.6, 421 n.13 (1960); NLRB v. United Steelworkers of Am., CIO, 357 U.S. 357, 366 (1958) (Warren, C.J., concurring in part, dissenting in part); Local 1976, United Bhd. of Carpenters & Joiners of Am., AFL v. NLRB, 357 U.S. 93, 96 n.1 (1958); Amalgamated Meat Cutters & Butcher Workmen of Am. AFL-CIO v. NLRB, 352 U.S. 153, 157 (1956) (Frankfurter, J., concurring); NLRB v. Truitt Mfg. Co., 351 U.S. 149, 157 (1956) (Frankfurter, J., concurring in part, dissenting in part); NLRB v. Babcock & Wilcox

Board's findings of fact.²⁵⁹ One case was remanded to court of appeals to apply the substantial-evidence test.²⁶⁰ One of those cases admonished the court of appeals for not fulfilling its duty to defer to the Board's findings of fact if supported by substantial evidence on the record as a whole.²⁶¹ One of those cases upheld the lower court's finding that the Board's factual findings lacked substantial evidence.²⁶² When the Court rejected the Board's conclusion, it was often because of a misapplication of the law or an erroneous legal foundation, as opposed to insufficiency of the evidence.²⁶³ A few of those cases cited

Co., 351 U.S. 105, 112 (1956); *Radio Officers' Union of Commercial Telegraphers Union, AFL v. NLRB*, 347 U.S. 17, 29, 33, 48, 50(1954); *id.* at 60 & n.4 (Black, J., dissenting); *NLRB v. Denver Bldg. & Constr. Trades Council*, 341 U.S. 675, 691 (1951).

259. See *Allentown Mack Sales & Serv.*, 522 U.S. at 372; *Am. Hosp. Ass'n*, 499 U.S. at 619; *Fall River Dyeing & Finishing Corp.*, 482 U.S. at 44; *Transp. Mgmt. Corp.*, 462 U.S. at 405; *Hendricks Cty. Rural Elec. Membership Corp.*, 454 U.S. at 191; *Baylor Univ. Med. Ctr.*, 439 U.S. at 9 (not reaching the question); *Beth Israel Hosp.*, 437 U.S. at 501; *Am. Broad. Cos.*, 437 U.S. at 433; *Enter. Ass'n of Steam, Hot Water, Hydraulic Sprinkler, Pneumatic Tube, Ice Mach. & Gen. Pipefitters*, 429 U.S. at 531-32; *Golden State Bottling Co.*, 414 U.S. at 172-73; *Magnesium Casting Co.*, 401 U.S. at 143; *Gissel Packing Co.*, 395 U.S. at 586 (rejecting lower court's conclusion that the Board's factual findings were not supported by substantial evidence); *Great Dane Trailers, Inc.*, 388 U.S. at 35; *Nat'l Woodwork Mfrs. Ass'n*, 386 U.S. at 645-46; *Houston Insulation Contractors Ass'n*, 386 U.S. at 666-68; *Burnup & Sims, Inc.*, 379 U.S. at 22-23 n.2 (not reaching the question); *Erie Resistor Corp.*, 373 U.S. at 235-37; *Washington Aluminum Co.*, 370 U.S. at 15-16; *Ochoa Fertilizer Corp.*, 368 U.S. at 320 n.3; *Local Lodge No. 1424*, 362 U.S. at 416; *Local 1976, United Bhd. of Carpenters & Joiners of Am., AFL*, 357 U.S. at 96 n.1 (not reaching the question); *Radio Officers' Union of Commercial Telegraphers Union*, 347 U.S. at 48-50; *Denver Bldg. & Constr. Trades Council*, 341 U.S. at 691-92.

260. See *Cent. Hardware Co.*, 407 U.S. at 547-48; see also *Gissel Packing Co.*, 395 U.S. at 586 (reversing lower court's conclusion that the Board's factual findings were not supported by substantial evidence).

261. See *Walton Mfg. Co.*, 369 U.S. at 406-09.

262. See *Baptist Hosp.*, 442 U.S. at 785-87 (upholding lower court's conclusion that Board's finding that company failed to justify its solicitation ban lacked substantial evidence, but reversing lower court's conclusion that other factual findings lacked substantial evidence).

263. See *Int'l Longshoremens Ass'n*, 473 U.S. at 79 (upholding the Board's factual findings but explaining that "the Board committed two fundamental [legal] errors"); *Bill Johnson's Rests., Inc.*, 461 U.S. at 748 ("[B]ecause, in enforcing the Board's order, the Court of Appeals ultimately relied on the fact that 'substantial evidence' supported the Board's finding that the prosecution of the lawsuit violated the Act, 660 F.2d, at 1343, the Board's error has not been cured."); *Bell Aerospace Co.*, 416 U.S. at 272-73 ("[A]gree[ing] with the Court of Appeals below that the Board 'is not now free' to read a new and more restrictive meaning into the Act" and explaining that "the case must be remanded to permit the Board to apply the proper legal standard in determining the status of these buyers"); *Pittsburgh Plate Glass Co.*, 404 U.S. at 171-72 ("[T]he Board's findings of fact, if supported by substantial evidence, are conclusive. . . . But the Board's powers in respect of unit determinations are not without limits, and if its decision 'oversteps the law,' . . . it must be reversed."); *Am. Ship Bldg. Co.*, 380 U.S. at 308 ("[W]e put to one side cases where the Board has concluded on the basis of substantial evidence that the employer has used a lockout as a means to injure a labor organization or to evade his duty to bargain collectively."); *id.* at 318 (White, J., concurring) ("[T]he Court applies legal standards that cannot be reconciled with decisions of this Court defining the Board's functions in applying these sections of the Act and does so without pausing to ascertain if the Board's factual premises are supported by substantial evidence."); *Brown*, 380 U.S. at 292 (quoting *Am. Ship Bldg. Co.*, 380 U.S. at 318) ("Of course due deference is to be rendered to agency

to the substantial evidence test in a dissent or concurrence in a noncontroversial manner.²⁶⁴

2. Scalia's Use of the Substantial Evidence Test

Of the five substantial-evidence cases decided during Scalia's tenure,²⁶⁵ three are noteworthy for what Justice Scalia had to say. First, in *NLRB v. Curtin Matheson Scientific, Inc.*, Scalia showcased the myopia of his formalism. There, in the context of determining whether an employer had a good-faith doubt of majority status during a strike when the majority of current employees were striker replacement workers, the Court upheld as reasonable the Board's rule that it would not adopt a presumption that striker replacements were against the union.²⁶⁶ Justice Scalia dissented, and would have held that such a non-presumption is really fact-finding in policy-making disguise.²⁶⁷ Because Scalia simply could not believe that

determinations of fact, so long as there is substantial evidence to be found in the record as a whole. But where, as here, the review is not of a question of fact, but of a judgment as to the proper balance to be struck between conflicting interests, '[t]he deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress.'"); *Babcock & Wilcox Co.*, 351 U.S. at 112-13 (1956) ("The determination of the proper adjustments rests with the Board. Its rulings, when reached on findings of fact supported by substantial evidence on the record as a whole, should be sustained by the courts unless its conclusions rest on erroneous legal foundations. Here the Board failed to make a distinction between rules of law applicable to employees and those applicable to nonemployees.").

264. See *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 547 (1992) (White, J., dissenting) ("The Board's conclusion as to reasonable alternatives in this case was supported by evidence in the record. Even if the majority cannot defer to that application, because of the depth of its objections to the rule applied by the Board, it should remand to the Board for a decision under the rule it arrives at today, rather than sitting in the place Congress has assigned to the Board."); *NLRB v. Curtin Matheson Sci., Inc.*, 494 U.S. 775, 797 (1990) (Rehnquist, J., dissenting) ("The Court of Appeals did not consider, free from the use of any presumption, whether there was substantial evidence on the record as a whole to support the Board's determination here, and I believe that is a question best left for the Court of Appeals on remand."); *id.* at 801 (Scalia, J., dissenting); *Int'l Longshoremen's Ass'n*, 447 U.S. at 529 (Burger, J., dissenting); *NLRB v. Savair Mfg. Co.*, 414 U.S. 270, 289 (1973) (White, J., dissenting); *J. H. Rutter-Rex Mfg. Co.*, 396 U.S. at 266-68 (Harlan, J., concurring in part, dissenting in part); *NLRB v. United Steelworkers of Am.*, 357 U.S. 357, 365 (1958) (Warren, J., dissenting in part, concurring in part); *Amalgamated Meat Cutters & Butcher Workmen of Am. AFL-CIO v. NLRB*, 352 U.S. 153, 157 (1956) (Frankfurter, J., concurring); *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 157-58 (1956) (Frankfurter, J., concurring in part, dissenting in part). *But see* *BE & K Constr. Co. v. NLRB*, 536 U.S. 516, 538 (Scalia, J., dissenting); *Great Dane Trailers, Inc.*, 388 U.S. at 40 (Harlan, J., dissenting) (explaining that the dissent would have overturned the Board's factual findings as not supported by substantial evidence).

265. See *BE & K Constr. Co.*, 536 U.S. at 516; *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359 (1998); *Lechmere, Inc.*, 502 U.S. at 527; *Am. Hosp. Ass'n v. NLRB*, 499 U.S. 606 (1991); *NLRB v. Curtin Matheson Sci., Inc.*, 494 U.S. 775 (1990).

266. *Curtin Matheson Sci., Inc.*, 494 U.S. at 788-89.

267. *Id.* at 812-13, 818 (Scalia, J., dissenting).

striker replacement workers would support the union, that factual finding was not supported by substantial evidence.

Second, in *Allentown Mack Sales and Service, Inc. v. NLRB*, Justice Scalia, writing for the majority, reviewed the question whether substantial evidence supported the Board's factual findings as applied to the following question: Did the successor employer have a good-faith reasonable doubt as to the Union's majority status such that it was lawful for it to poll its employees to determine majority status.²⁶⁸ As a precursor to determining the factual question, the Court reviewed and upheld the Board's rule whereby employers with a good-faith reasonable doubt as to a union's majority status may (1) request a Board-conducted secret-ballot election to test majority status, (2) poll their employees for the express purpose of determining majority status, or simply (3) withdraw recognition.²⁶⁹

Having concluded that the Board's good-faith reasonable doubt test was itself reasonable, the Court moved to the question whether substantial evidence supported the Board's finding that antiunion statements by approximately six of Allentown's thirty-two employees were sufficient to create an objective reasonable doubt of union majority support.²⁷⁰ "Put differently, we must decide whether on this record it would have been possible for a reasonable jury to reach the Board's conclusion."²⁷¹ The Court ultimately answered in the negative: "The Board's finding to the contrary rests on a refusal to credit probative circumstantial evidence, and on evidentiary demands that go beyond the substantive standard the Board purports to apply."²⁷²

The Court's conclusion, that a reasonable jury would never reach this conclusion and therefore substantial evidence does not support the Board's finding, turns on the Court's interpretation of the words, "doubt" and "uncertainty." In particular, the Court used ordinary dictionary meanings of these words to reject the Board's assertion that "the word 'doubt' may mean either 'uncertainty' or 'disbelief,' and that its polling standard uses the word only in the latter sense."²⁷³

268. 522 U.S. at 361.

269. The Court deferred to the Board's construction of that test in the context of a poll. *Id.* at 364. For an in-depth discussion, see *supra* notes 199-209 and accompanying text.

270. *Id.* at 368-69.

271. *Id.* at 366-67.

272. *Id.* at 368.

273. *Id.* at 367 (citing WEBSTER'S NEW INTERNATIONAL DICTIONARY 776 (2d ed.1949) (def. 1: "A fluctuation of mind arising from defect of knowledge or evidence; uncertainty of judgment or mind; unsettled state of opinion concerning the reality of an event, or the truth of

The Court added, “If the subject at issue were the existence of God, for example, ‘doubt’ would be the disbelief of the agnostic, not of the atheist.”²⁷⁴

Accepting the Board’s apparent (and in our view inescapable) concession that Allentown received reliable information that 7 of the bargaining-unit employees did not support the union, the remaining 25 would have had to support the union by a margin of 17 to 8—a ratio of more than 2 to 1—if the union commanded majority support. . . . The Board cannot covertly transform its presumption of continuing majority support into a working assumption that *all* of a successor’s employees support the union until proved otherwise. Giving fair weight to Allentown’s circumstantial evidence, we think it quite impossible for a rational factfinder to avoid the conclusion that Allentown had reasonable, good-faith grounds to doubt – to be *uncertain about* – the union’s retention of majority support.²⁷⁵

Showcasing his deep commitment to formalism, Scalia shows why he cannot give the Board a pass on the substantial evidence test:

The question arises, then, whether, if that should be the situation that obtains here, we ought to measure the evidentiary support for the Board’s decision against the standards consistently applied rather than the standards recited. As a theoretical matter . . . , the Board could certainly have raised the bar for employer polling or withdrawal of recognition by imposing a more stringent requirement than the reasonable-doubt test, or by adopting a formal requirement that employers establish their reasonable doubt by more than a preponderance of the evidence. Would it make any difference if the Board achieved precisely the same result by formally leaving in place the reasonable-doubt and preponderance standards, but consistently applying them as though they meant something other than what they say? We think it would.²⁷⁶

For Scalia, calling a test by one name but then doing something else, even if that something else is done consistently, is like scratching the blackboard. It doesn’t matter that the Board might very well accept the remand and just rename its test – which is what it essentially did do – it was Scalia’s job to clean up the Board’s illogical mess.

an assertion, etc.”); 1 THE NEW SHORTER OXFORD ENGLISH DICTIONARY 734 (1993) (def. 1: “Uncertainty as to the truth or reality of something or as to the wisdom of a course of action; occasion or room for uncertainty”); AMERICAN HERITAGE DICTIONARY 555 (3d ed.1992) (def. 1: “A lack of certainty that often leads to irresolution”).

274. *Id.* at 367.

275. *Id.* at 371.

276. *Id.* at 373-74.

3. Scalia's Substantial Evidence Test: Aftermath

Four years after *Allentown Mack* was decided, Justice Scalia wrote a separate concurring opinion in another case, *BE & K Construction Company v. NLRB*. There, the Court held that an employer's unsuccessful lawsuit against a union or its members in retaliation for their union activity was not unlawful under the NLRA, absent the additional finding that the employer's lawsuit was objectively baseless.²⁷⁷ In so holding, the Court reversed the Sixth Circuit's enforcement of the Board's decision that it was unlawful for an employer to sue a union or its members in retaliation for their protected activity regardless of the merits of the lawsuit.²⁷⁸ Justice Scalia wrote separately to clarify two points. First, "the implication of our decision [in *BE & K*] is that, in a future appropriate case, we will construe the [NLRA] in the same way we have already construed the Sherman Act: to prohibit only lawsuits that are both objectively baseless and subjectively intended to abuse process."²⁷⁹ This is significant. Retaliation against unions or those they represent because of their union activities is normally unlawful. But in this context, the Court recognized that it must balance employees' section 7 rights against the employers' First Amendment right to file a law suit. Hence, the balance struck – no protection for employees unless the lawsuit is objectively baseless. Second and relatedly, Scalia clarified that this balanced result is *more* important in the NLRB context because the entity making the finding of retaliation is not an Article III court but an Article I agency:

Under the Sherman Act, the entity making the factual determination whether the objectively reasonable suit was brought with an unlawful motive would have been an Article III court; even with that protection, we thought the right of access to Article III courts too much imperiled. Under the NLRA, however, the entity making the factual finding that determines whether a litigant will be punished for filing an objectively reasonable lawsuit will be an executive agency, the [NLRB].... At the very least, [this difference] poses a difficult question under the First Amendment: whether an *executive agency* can be given the power to punish a reasonably based suit filed in an Article III court whenever *it* concludes – insulated from *de novo* judicial review by the substantial-evidence standard . . . – that the complainant had one

277. *BE & K Constr. Co. v. NLRB*, 536 U.S. 516, 536-377 (2002).

278. *BE & K Constr. Co. v. NLRB*, 246 F.3d 619, 630-31 (6th Cir. 2001), *rev'd* 536 U.S. 516 (2002).

279. *See BE & K Const. Co.*, 536 U.S. at 537 (Scalia, J., concurring) (citing *Prof'l Real Estate Inv'rs, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 60-61 (1993)).

motive rather than another. This makes resort to the courts a risky venture, dependent upon the findings of a body that does not have the independence prescribed for Article III courts. It would be extraordinary to interpret a statute which is silent on this subject to intrude upon the courts' ability to decide *for themselves* which postulants for their assistance should be punished.²⁸⁰

IV. CONCLUSION

A. Summary

I recall my law professor, Clyde Summers, once telling our Employment Law class that a failure to take into consideration the purposes of a social-justice statute, such as the NLRA or the Occupational Safety and Health Act (about which he was referring), is judicial activism. It frees the courts from at least one standard – the purpose standard – which may confine its interpretation of statutory language. Ironically, and contrary to Scalia's plea that formalism keeps the rule of man in check, Scalia's focus on textualism expands judicial capacity to interpret statutory text. In particular, it usurps the legislative function by ignoring statutory purpose language that the legislator intentionally enacts to cabin judicial and agency interpretation on vague statutory language. Cloaked with legalism (logical analysis) and formalism (application of legalism to specific facts), Scalia has sometimes erased the very purpose of the statutory text, often forsaking law's humanity. Logic and reasoning were his forte; storytelling and empathy were not. This formalistic approach often meant that justice was denied for many workers, such as the undocumented workers of *Hoffmann Plastic*, whom Scalia characterized at oral argument as "eat[ing] chocolates" while "sit[ting] home" waiting for a "back pay" check.²⁸¹ That day, humanity was forsaken.

280. *Id.* at 538.

281. *See supra* note 193 and accompanying text.

B. Closing Thoughts

No man is an island,
 Entire of itself,
 Every man is a piece of the continent,
 A part of the main.
 If a clod be washed away by the sea,
 Europe is the less,
 As well as if a promontory were,
 As well as if a manor of thy friend's
 Or of thine own were:
 Any man's death diminishes me,
 Because I am involved in mankind,
 And therefore never send to know for whom the bell tolls;
 It tolls for thee.²⁸²
 – John Donne

From our years together at the D.C. Circuit, we were best buddies. We disagreed now and then, but when I wrote for the Court and received a Scalia dissent, the opinion ultimately released was notably better than my initial circulation. Justice Scalia nailed all the weak spots – the “applesauce” and “argle barge” – and gave me just what I needed to strengthen the majority opinion.²⁸³
 – Justice Ruth Bader Ginsburg

On February 13, 2016, the sea washed away this judicial promontory. There were no labor law cases decided that day. Indeed, as he died peacefully in his Texas hotel room early Saturday morning, it is likely that no law was made on that day. But just as there was law before Scalia, there continues to be law after him. While he was here on this earth, Scalia stood upon the shoulders of other great jurists, law makers, jurisprudes, and legal practitioners to build a jurisprudence that obsessed over textualism, legalism, and formalism in a manner that sometimes left behind the humanity of law. His strict adherence to logic meant that those who disagreed with him, whether in the majority or in the dissent, made better arguments. So while

282. See John Donne, *Devotions Upon Emergent Occasions, and Several Steps in My Sicknes*, MEDITATION XVII (1624), available at <<http://www.online-literature.com/donne/409/>>.

283. Elisha Fieldstadt & Pete Williams, *Justice Ruth Bader Ginsburg on Justice Antonin Scalia: “We Were Best Buddies.”* NBC NEWS (Feb. 14, 2016), <<http://www.nbcnews.com/news/us-news/justice-ruth-bader-ginsburg-justice-antonin-scalia-we-were-best-n518671>>.

Justice Scalia's jurisprudence sometimes resulted in justice denied, it also resulted in tidying up the law as an analytical pursuit.

To be sure, the clods of this world are often less concerned with the niceties of analytical thinking and more with the end results of a just system. For this, Justice Scalia can be faulted. He was insensitive to undocumented workers, for example, and often placed form over substance. But, as Justice Ginsberg pointed out, he made the opposition stronger. For that, we all should be grateful. For these reasons, the bell tolls not only for this great jurist, the promontory, but for all the rest of us clods, for together we constitute our American legal system and we make that system better, stronger, and eventually . . . more just.