

2015

## The NLRB, the Courts, the Administrative Procedures Act, and Chevron: Now and Then

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### Recommended Citation

Theodore J. St. Antoine, *The NLRB, the Courts, the Administrative Procedures Act, and Chevron: Now and Then*, 64 Emory L. J. 1529 (2015).

Available at: <https://scholarlycommons.law.emory.edu/elj/vol64/iss0/5>

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# THE NLRB, THE COURTS, THE ADMINISTRATIVE PROCEDURE ACT, AND *CHEVRON*: NOW AND THEN

Theodore J. St. Antoine\*

## ABSTRACT

*Decisions of the National Labor Relations Board (NLRB), like those of other administrative agencies, are subject to review by the federal judiciary. Standards of review have evolved over time. The Administrative Procedure Act of 1946 provides that administrative decisions must be in accord with law and required procedure, not arbitrary or capricious, not contrary to constitutional rights, within an agency's statutory jurisdiction, and supported by substantial evidence. In practice, more attention is paid to two Supreme Court decisions, Skidmore (1944) and Chevron (1984). For many years Chevron seemed the definitive test. A court must follow a clear intent of Congress, but if a statute is silent or ambiguous on the precise issue, then the court will defer to an agency's determination that is a permissible construction of the statute. More recently there has been a revival of interest in the earlier, more flexible Skidmore approach. That would call for considering a variety of factors, including whether the issue was one of "pure law" or the application of law to facts and the formality or informality of the agency's decisional process. It has even been suggested that these deference tests could be reduced to a single inquiry: was the agency's decision "reasonable"?*

*Empirical studies have indicated not only that the political backgrounds of NLRB members substantially affect its decisions but also that the political backgrounds of judges substantially affect the decisions of reviewing courts. Recent examples of hotly contested issues include registered nurses and university faculty members as "employees" entitled to organizing rights under the National Labor Relations Act; union access to employees on employer property that is generally open to the public, such as parking lots; "pure" consumer picketing at retail stores; and the required posting of notices about organizing and bargaining rights at nonunion establishments. All these raise fundamental questions about federal neutrality in union-management relations versus government encouragement of collective bargaining.*

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## INTRODUCTION

The federal judiciary was reviewing the government's administrative actions as early as *Marbury v. Madison*.<sup>1</sup> Although the political storm following that pivotal constitutional decision eventually subsided,<sup>2</sup> the debate continues to this day on the standards the courts should employ in reviewing administrative rules and rulings. After a brief historical overview, I shall focus on some current major issues concerning judicial review and deference to agency decisions, with principal attention on the National Labor Relations Board (NLRB or Board).

## I. PRE-APA ERA

During the nineteenth century, such common law writs as mandamus, prohibition, and ejectment or tort suits were used to review administrative actions.<sup>3</sup> This generally led the courts to resolve matters of both fact and law, in effect providing de novo review.<sup>4</sup> But the primary issue was usually jurisdictional: that is, had the Constitution authorized or Congress properly delegated the power that an administrator was exercising.<sup>5</sup> If not, the action was illegal and subject to remedy. Otherwise, in what Professor Thomas Merrill terms an “all-or-nothing” approach, the courts tended to back off from intervening in areas held to be within an agency's legitimate domain.<sup>6</sup> Yet when the courts did act, they might act so thoroughly on both law and fact,

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<sup>1</sup> 5 U.S. (1 Cranch) 137 (1803) (holding that the judicial power under Article III of the U.S. Constitution includes authority to declare an act of Congress void and unenforceable as contrary to the Constitution, in the course of reviewing a Justice of the Peace appointment).

<sup>2</sup> Compare RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION 135–36, 144 (2004) (“[T]he original public meaning of ‘judicial power’ . . . included judicial review.”), with ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH 5–6 (1962) (“Article III does not purport to describe the function of the Court . . .”). *But cf.* Letter from Thomas Jefferson to Judge Spencer Roane (Sept. 6, 1819), reprinted in THOMAS JEFFERSON, WRITINGS 1426, 1427 (Merrill D. Petersen ed., 1984) (“[E]ach of the three departments has equally the right to decide for itself what is its duty under the constitution, without any regard for what the others may have decided . . .”). See generally 1 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 231–69 (1928) (discussing the Supreme Court's decision in *Marbury* and the Congressional reaction).

<sup>3</sup> Jerry L. Mashaw, *Recovering American Administrative Law: Federalist Foundations, 1787-1801*, 115 YALE L.J. 1256, 1258 (2006); Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 COLUM. L. REV. 939, 947–53 (2011).

<sup>4</sup> *United States v. Ritchie*, 58 U.S. (17 How.) 525, 534 (1855). Even when a statute provided for an “appeal” from decisions of a special commission on land grants, the Supreme Court held that “[t]he district court is not confined to a mere re[e]xamination of the case as heard and decided by the board of commissioners, but hears the case de novo.” *Id.*

<sup>5</sup> Merrill, *supra* note 3, at 944.

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

with so little, if any, deference to the agency ruling, that the first Justice Harlan lamented, “[t]aken in connection with other decisions defining the powers of the Interstate Commerce Commission, the present decision . . . goes far to make that commission a useless body, for all practical purposes.”<sup>7</sup>

All that began to change around the turn of the twentieth century. In a series of decisions, first involving the Interstate Commerce Commission (ICC) and then the Federal Trade Commission (FTC), the Supreme Court moved away from *de novo* review to what has been called an “appellate review model.”<sup>8</sup> A leading scholar of the time, John Dickinson, likened this modified form of review to the relationship of judge and jury in civil proceedings, although he was too sophisticated to make this turn entirely on a simple law–fact distinction: “[A]ny factual state or relation which the courts conclude to regard as sufficiently important to be made decisive for all subsequent cases of similar character becomes thereby a matter of law for formulation by the court.”<sup>9</sup>

The separate roles of courts and agencies in interpreting the law and mixed questions of law and fact were a key issue in *Skidmore v. Swift & Co.*<sup>10</sup> Certain employees were paid a salary for a normal forty-hour work week but agreed to stay over several nights a week.<sup>11</sup> Their only duties were to answer infrequent fire alarms for which they received a set amount for each alarm.<sup>12</sup> The employees sued the company for overtime pay under the Fair Labor Standards Act (FLSA).<sup>13</sup> The district court decided as a “conclusion of law” that time spent awaiting alarm calls “does not constitute hours worked.”<sup>14</sup> The court of appeals affirmed. In the Supreme Court, the Administrator of the Labor

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<sup>7</sup> *ICC v. Ala. Midland Ry.*, 168 U.S. 144, 176 (1897) (Harlan, J., dissenting).

<sup>8</sup> Merrill, *supra* note 3, at 959–72; *see, e.g.*, *FTC v. Gratz*, 253 U.S. 421, 424–29 (1920) (determining as a matter of law what were “unfair methods of competition”), *overruled in part*, *FTC v. Brown Shoe Co.*, 384 U.S. 316 (1966); *ICC v. Union Pac. R.R.*, 222 U.S. 541, 546–48 (1912) (holding that courts should go no further than determining “whether there was substantial evidence” to sustain the agency’s action); *ICC v. Ill. Cent. R.R.*, 215 U.S. 452, 470 (1910) (construing Hepburn Act, ch. 3591, 34 Stat. 584 (1906), which amended the Interstate Commerce Act of 1887, ch. 104, 24 Stat. 379, and discussing judicial review).

<sup>9</sup> JOHN DICKINSON, *ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW IN THE UNITED STATES* 312 (3d prtg. 2006).

<sup>10</sup> 323 U.S. 134, 137 (1944). “*Facts* may show that the employee was engaged to wait, or they may show that he waited to be engaged.” *Id.* (emphasis added) (suggesting that the remand was actually more for the purpose of determining the facts rather than any general principle of law).

<sup>11</sup> *Id.* at 135.

<sup>12</sup> *Id.* at 135–36.

<sup>13</sup> 29 U.S.C. § 207(a)(1) (2012) provides for overtime pay in excess of forty hours per week “at a rate not less than one and one-half times the regular rate.” *Id.*

<sup>14</sup> *Skidmore*, 323 U.S. at 136 (some internal quotation marks omitted).

Department's Wage and Hour Division submitted an amicus brief urging reversal on the grounds that all "on-call time," except time spent sleeping or eating, should be counted as working time.<sup>15</sup> The Court reversed and remanded for further proceedings, stating:

[T]he rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.<sup>16</sup>

The multifactored, flexible, ad hoc, and rather indeterminate *Skidmore* test is said to have "enjoyed prominence [for forty years] as perhaps the Supreme Court's best expression of its policy of judicial deference toward many if not most agency interpretations of law."<sup>17</sup> For a time judicial review then moved in a different direction.<sup>18</sup> In the last decade and a half, however, *Skidmore* has been revived to an extent not yet fully understood.<sup>19</sup> Yet the earlier period of

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<sup>15</sup> *Id.* at 139.

<sup>16</sup> *Id.* at 140.

<sup>17</sup> Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern Skidmore Standard*, 107 COLUM. L. REV. 1235, 1236–37 (2007); *see also id.* at 1237 n.2 (citing cases). In the same year as *Skidmore*, the Court decided *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111 (1944) (upholding Board in finding newsboys "employees" under the National Labor Relations Act, 29 U.S.C. § 152(3) (1940), and thus entitled to bargain collectively with the publishers of the newspapers they sold). Congress subsequently overruled that classification in the Labor Management Relations (Taft-Hartley) Act amendments. Labor Management Relations Act, ch. 120, sec. 101, § 2(3), 61 Stat. 136, 137–38 (1947) (codified as 29 U.S.C. § 152(3) (2012)) (excluding "independent contractors"). Said the *Hearst* Court:

Undoubtedly questions of statutory interpretation, especially when arising in the first instance in judicial proceedings, are for the courts to resolve, giving appropriate weight to the judgment of those whose special duty is to administer the questioned statute. But where 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.

322 U.S. at 130–31 (citations omitted); *see also* John H. Reese, *Bursting the Chevron Bubble: Clarifying the Scope of Judicial Review in Troubled Times*, 73 FORDHAM L. REV. 1103, 1109–15 (2004) (using the terms "macromeaning" and "micromeaning" to characterize the respective inquiries and to divide the appropriate functions of courts and agencies as discussed in *Hearst* and other cases).

<sup>18</sup> *See infra* Part II.

<sup>19</sup> *See* United States v. Mead Corp., 533 U.S. 218, 230–33 (2001); Hickman & Krueger, *supra* note 17, at 1236–39.

*Skidmore* primacy produced several additional developments of continuing importance, though of disputed meaning. They still deserve attention.

## II. FROM THE ADMINISTRATIVE PROCEDURE ACT TO *CHEVRON*

The New Deal era of the 1930s saw a vast expansion of the federal administrative apparatus designed to regulate and stabilize the deeply depressed American economy.<sup>20</sup> To standardize and provide for the oversight of these variegated and often controversial agencies, Congress unanimously passed the Administrative Procedure Act (APA) in 1946.<sup>21</sup> The provision on the scope of judicial review states

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

- (1) compel agency action unlawfully withheld or unreasonably delayed; and
- (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
  - (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
  - (B) contrary to constitutional right, power, privilege, or immunity;
  - (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
  - (D) without observance of procedure required by law;
  - (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

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<sup>20</sup> See, e.g., JAMES M. LANDIS, *THE ADMINISTRATIVE PROCESS* 14–15, 150 (1938); PRESIDENT'S COMM. ON ADMIN. MGMT., *ADMINISTRATIVE MANAGEMENT IN THE GOVERNMENT OF THE UNITED STATES* (1937).

<sup>21</sup> Administrative Procedure Act, ch. 324, 60 Stat. 237 (1946). See generally 1 RICHARD J. PIERCE, JR., *ADMINISTRATIVE LAW TREATISE* 155–274 (5th ed. 2010) (discussing judicial review under the APA); J. Lyn Entrikin Goering, *Tailoring Deference to Variety with a Wink and a Nod to Chevron: The Roberts Court and the Amorphous Doctrine of Judicial Review of Agency Interpretations of Law*, 36 J. LEGIS. 18, 32–36 (2010) (same).

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.<sup>22</sup>

Courts and commentators have subsequently treated—or ignored—the reviewing criteria set forth in the APA or in court pronouncements as if there were as many as six separate judicial deference standards or as few as just one: the “reasonableness” of the agency action.<sup>23</sup>

Several cases involving the NLRB have enunciated major principles regarding judicial review. In the much-cited *Universal Camera* case, the Supreme Court held that an agency’s factual findings had to be supported by “substantial evidence on the record considered as a whole.”<sup>24</sup> That included consideration of a hearing examiner’s factual determinations.<sup>25</sup> *Packard Motor Car Co. v. NLRB*’s meaning has divided scholars.<sup>26</sup> Relying on the “plain terms” of the National Labor Relations Act (NLRA), the Court concluded that “employees” included foremen, entitling them to bargaining rights.<sup>27</sup> The decision aligned the Court with the Board’s ruling but appears to be an independent judgment in interpreting the Act rather than a deferral in the technical sense. *NLRB v. Bell Aerospace Co.*,<sup>28</sup> a case in which the Court disagreed with the Board, also raised the question of deferral versus independent judgment. The Board held that the buyers at a plant were not excluded from unionizing simply because they were “managerial employees” unless that would create a conflict with their job responsibilities.<sup>29</sup> The Court paid no heed to the APA standards for review of an agency’s decisions but seems to have set out on its own to determine the status of “managerial employees.”<sup>30</sup> Board precedent was merely considered along with other legal sources. Declared the Court:

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<sup>22</sup> 5 U.S.C. § 706 (2012).

<sup>23</sup> See *infra* note 60 and accompanying text.

<sup>24</sup> *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 493 (1951) (quoting 29 U.S.C. § 160(e) (Supp. III 1949)); see also *id.* at 492–97 (explaining this standard).

<sup>25</sup> *Id.* at 496–97.

<sup>26</sup> 330 U.S. 485 (1947). On divergent opinions, see Reese, *supra* note 17, at 1122–25.

<sup>27</sup> This decision on the merits in *Packard*, 330 U.S. at 490–91, was overruled by the Taft-Hartley Act in 1947. See *supra* note 17.

<sup>28</sup> 416 U.S. 267 (1974).

<sup>29</sup> *Id.* at 272.

<sup>30</sup> *Id.* at 268–69, 274–89.

In sum, the Board's early decisions, the purpose and legislative history of the Taft-Hartley Act of 1947, the Board's subsequent and consistent construction of the Act for more than two decades, and the decisions of the courts of appeals all point unmistakably to the conclusion that "managerial employees" are not covered by the Act. We agree with the Court of Appeals below that the Board "is not now free" to read a new and more restrictive meaning into the Act.<sup>31</sup>

In 1984 came *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,<sup>32</sup> which is probably the most important administrative law decision of the modern era. Justice Stevens spoke for a six-person unanimous Court in formulating what became the famous and for a while seemingly definitive "two-step" (with variations)<sup>33</sup> deference test.

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. If, however, the court 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.<sup>34</sup>

The Court added that, for an agency's statutory interpretation or rulemaking to be entitled to deference, it must be authorized by Congress either expressly or implicitly.<sup>35</sup> If expressly, the agency action is "controlling" unless "arbitrary, capricious, or manifestly contrary to the statute."<sup>36</sup> If authorized implicitly, an administrator's "reasonable interpretation" is binding

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<sup>31</sup> *Id.* at 289 (footnote omitted).

<sup>32</sup> 467 U.S. 837 (1984).

<sup>33</sup> Commentators have suggested there should also be a Step Zero or Step 1.5 to account for the need of delegation from Congress of the authority that the agency is exercising. *See* Entekin Goering, *supra* note 21, at 44 & n.232, 45; Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 191 & n.19 (2006).

<sup>34</sup> *Chevron*, 467 U.S. at 842-43 (footnotes omitted). *See generally* STEPHEN G. BREYER, RICHARD B. STEWART, CASS R. SUNSTEIN & ADRIAN VERMEULE, *ADMINISTRATIVE LAW AND REGULATORY POLICY* 247-48 (6th ed. 2006) (discussing *Chevron's* two-step analysis).

<sup>35</sup> *Chevron*, 467 U.S. at 843 (citing *Morton v. Ruiz*, 415 U.S. 199, 231 (1974)).

<sup>36</sup> *Id.* at 843-44.

on a court.<sup>37</sup> Arguable questions left by this language are (1) whether the same standard of review applies to both expressly and implicitly authorized delegations, and (2) whether *Chevron* deference applies only to an agency's delegated authority to make policy and law and *not* to "pure" questions of law: that is, the meaning intended by Congress.<sup>38</sup> On the second issue, comments later in the *Chevron* opinion would seem to narrow the reach of mandated deference. The Court stressed that the Environmental Protection Agency had construed "stationary sources" where the states had to limit air pollution "not in a sterile textual vacuum, but in the context of *implementing policy decisions* in a technical and complex arena."<sup>39</sup> Significantly, the Court made no mention of the APA in its analysis.

### III. THE CONTEMPORARY PERIOD

The evolving deference doctrine took another turn with *United States v. Mead Corp.*<sup>40</sup> in 2001. Speaking through Justice Souter, with only Justice Scalia dissenting, the Court held as follows:

[A] tariff classification [by the U.S. Customs Service] has no claim to judicial deference under *Chevron*, there being no indication that Congress intended such a ruling to carry the force of law, but we hold that under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944),<sup>41</sup> the ruling is eligible to claim respect according to its persuasiveness.

This resuscitation of *Skidmore* meant the Court was going to focus on a variety of factors in determining the extent to which either deference or attention would be accorded to agency views or actions. Regarding informal agency interpretations in particular, one scholar has suggested two broad categories are foremost in determining the deference that is due: "first, the nature, scope, and clarity of the legislative authority delegated to the agency; and second, the specific rulemaking procedures the agency used and the format of the resulting interpretation."<sup>42</sup>

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<sup>37</sup> *Id.* at 844.

<sup>38</sup> See Michael C. Harper, *Judicial Control of the National Labor Relations Board's Lawmaking in the Age of Chevron and Brand X*, 89 B.U. L. REV. 189, 198–205 (2009).

<sup>39</sup> 467 U.S. at 863 (emphasis added).

<sup>40</sup> 533 U.S. 218 (2001). Justice Scalia argued strenuously for *Chevron* deference. *Id.* at 239 (Scalia, J., dissenting); see also, e.g., *Christensen v. Harris Cnty.*, 529 U.S. 576, 589 (2000) (Scalia, J., concurring in part and concurring in the judgment) (arguing again for only applying *Chevron* deference).

<sup>41</sup> *Mead*, 533 U.S. at 221.

<sup>42</sup> Entrikin Goering, *supra* note 21, at 56. *But cf. Mead*, 533 U.S. at 231 ("[W]e have sometimes found reasons for *Chevron* deference even when no such administrative formality [as notice-and-comment] was

In the *Brand X* case, the Court held that a court of appeals owed *Chevron* deference to a Federal Communications Commission (FCC) interpretation of “telecommunications services,” which exempted cable companies providing Internet service from regulation under the Communications Act.<sup>43</sup> This was true even though the FCC itself and the same appeals court had earlier adopted a contrary position, so long as the court had not previously held that the statute was unambiguous, requiring a single legitimate interpretation.<sup>44</sup> One observer also noted that *Brand X* “seemed to strengthen the protections offered by *Chevron* from judicial oversight of [agency] policy reversals.”<sup>45</sup> In short, when *Chevron* applies, it can trump stare decisis.

More recent cases illustrate the continuing deep divisions among the Justices about fundamental issues concerning *Chevron*. *Negusie v. Holder* is an example.<sup>46</sup> Negusie was a dual citizen of Ethiopia and Eritrea. Eritrean authorities beat and imprisoned him for refusing to fight against Ethiopia. Negusie was then forced to work as a prison guard where he involuntarily participated in persecuting other prisoners. Negusie escaped and sought asylum in the United States.<sup>47</sup> A provision of the Immigration and Naturalization Act (INA) known as the “persecutor bar” denies refugee status to “any person who . . . participated in the persecution of any person on account of [various protected grounds].”<sup>48</sup> The statute did not expressly state whether the persecutor bar applied to coerced or involuntary participation. Did the INA’s silence on this issue make it ambiguous as it affected Negusie? The Bureau of Immigration Appeals (BIA) and the Fifth Circuit concluded that the persecutor bar applied to Negusie, precluding refugee status.<sup>49</sup>

The Supreme Court decision split four ways. For the majority, Justice Kennedy asserted that *Chevron* deference would ordinarily be due, but the BIA had erroneously felt bound by an earlier decision the Court considered distinguishable.<sup>50</sup> Since the Court then found “substance” in both parties’ opposing contentions about the relevance of the undisputed coercion of

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required and none was afforded.” (citing *NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 256–57, 263 (1995)).

<sup>43</sup> *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967 (2005).

<sup>44</sup> *Id.* at 982.

<sup>45</sup> Harper, *supra* note 38, at 192.

<sup>46</sup> 555 U.S. 511 (2009).

<sup>47</sup> *Id.* at 514–15.

<sup>48</sup> *Id.* at 513–14 (quoting 8 U.S.C. § 1101(a)(42) (2006)).

<sup>49</sup> *Id.* at 515–16.

<sup>50</sup> *Id.* at 521.

Negusie, it concluded that “the statute has an ambiguity that the agency should address in the first instance.”<sup>51</sup> Justice Scalia concurred with Justice Alito in the remand but on the limited ground that the BIA should have the opportunity to explain whether it felt controlled by the case the Court had distinguished.<sup>52</sup> Otherwise, Justice Scalia believed that the BIA’s initial decision was a reasonable interpretation of an ambiguous statute.<sup>53</sup>

Justice Stevens, joined by Justice Breyer, concurred in part and dissented in part.<sup>54</sup> It is a subtle opinion, calling for close reading. Justice Stevens stated:

[W]e have sometimes described the court’s role as deciding pure questions of statutory construction and the agency’s role as applying law to fact. . . . Certain aspects of statutory interpretation remain within the purview of the courts, even when the statute is not entirely clear, while others are properly understood as delegated by Congress to an expert and accountable administrative body.<sup>55</sup>

Concluding that the “threshold” issue in *Negusie* was a “pure question of statutory construction for the courts to decide,” Justice Stevens would have ruled that the “persecutor bar” applied only to “culpable, voluntary acts” and remanded for further proceedings.<sup>56</sup> Notably, Justice Stevens (the author of *Chevron*) closed by objecting to the “broader view [of *Chevron*] the Court adopts today.”<sup>57</sup>

Justice Thomas dissented “[b]ecause the INA unambiguously precludes any inquiry into whether the persecutor acted voluntarily, *i.e.*, free from coercion or duress.”<sup>58</sup> He thus aligned himself with Justice Stevens to the extent of complaining that “[t]he majority makes no attempt to apply the ‘traditional tools of statutory construction’ to the persecutor bar before retreating to ambiguity.”<sup>59</sup>

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<sup>51</sup> *Id.* at 517.

<sup>52</sup> *Id.* at 525 (Scalia, J., concurring).

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 528 (Stevens, J., concurring in part and dissenting in part).

<sup>55</sup> *Id.* at 531.

<sup>56</sup> *Id.* at 529 (quoting *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 (1987)) (internal quotation marks omitted).

<sup>57</sup> *Id.* at 538.

<sup>58</sup> *Id.* at 538–39 (Thomas, J., dissenting).

<sup>59</sup> *Id.* at 550.

## IV. ASSESSMENT AND CRITIQUE

The Supreme Court over the years has approved a bewildering array of standards for judicial review of agency decisions. Sharp differences among the Justices add another layer of complexity. One scholar has identified six separate doctrinal review standards, although he is skeptical of the practical importance of the variations.<sup>60</sup> Three of the review standards apply to issues of law and two to issues of fact. For law, there is the more deferential *Chevron* standard, the less deferential *Skidmore* standard as revived by *Mead*, and de novo review when agencies interpret the Constitution and statutes they have no special responsibility for administering.<sup>61</sup> Facts found in formal adjudicatory proceedings “on the record” are subject to *Universal Camera*’s “substantial evidence” requirement.<sup>62</sup> Facts found in informal adjudicatory proceedings not on the record or in notice-and-comment rulemaking are subject to the “arbitrary, capricious” standard.<sup>63</sup> Finally, the same “arbitrary, capricious” language under the APA that is applicable to such fact-finding is also applicable to *all* agency actions, substantive and procedural.<sup>64</sup> The elucidator of the six review standards ultimately insisted, backed in part by other observers and various courts, that these multiple tests could all be subsumed under a single banner such as “reasonableness.”<sup>65</sup>

In many instances, “reasonableness” is probably as plausible a review standard as any. But the search for a general unified theory could be a fruitless academic quest. Pragmatic decisionmakers may find new factual situations that call for new or additional verbal formulations of the test to be applied.

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<sup>60</sup> David Zaring, *Reasonable Agencies*, 96 VA. L. REV. 135, 143–53 (2010). For other analyses of review standards, see, for example, Harper, *supra* note 38 (equating judicial review of statutory construction with review of supplementary lawmaking); Hickman & Krueger, *supra* note 17 (discussing *Skidmore* “sliding scale” of review); Merrill, *supra* note 3 (discussing appellate form of review); and Reese, *supra* note 17 (arguing that the “micromeaning” of a statute is left to the agency if reasonable but that the “macromeaning” is reviewed independently by the court).

<sup>61</sup> Zaring, *supra* note 60, at 143–47.

<sup>62</sup> *Id.* at 148.

<sup>63</sup> *Id.* at 149–50; see also *Ass’n of Data Processing Serv. Orgs. Inc. v. Bd. of Governors*, 745 F.2d 677, 683 (D.C. Cir. 1984) (Scalia, J.) (declaring that the substantial evidence test was “only a specific application” of the arbitrary or capricious test).

<sup>64</sup> Zaring, *supra* note 60, at 150–51; see also *Motor Vehicle Mfrs. Ass’n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42–44 (1983) (noting that “the agency must examine the relevant data and articulate a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made’”—often called the “hard look” doctrine (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962))).

<sup>65</sup> Zaring, *supra* note 60, at 153–68.

Consider, for example, the helpful factors set forth in *Skidmore* for a reviewing court to take into account.<sup>66</sup>

More important, a “reasonableness” test would not resolve the most basic initial step in any *Chevron* analysis: Is the issue one of “pure law” that only a court is entitled to decide? As long ago as *Marbury*, Chief Justice Marshall declared that it was the function of the courts “to say what the law is.”<sup>67</sup> The often-ignored APA also states flatly that “the reviewing court shall decide all relevant questions of law.”<sup>68</sup> The widely varying opinions in *Negusie*, the refugee case, show how far the Justices are from agreeing on just what that means in practice or what constitutes an appropriate standard of review.<sup>69</sup> And, if the issue is a constitutional or “pure” statutory question, it makes no difference how “reasonable” the agency’s interpretation is; the court’s contrary one should prevail. In a touch of legal realism, John Dickinson, the pioneering theorist of judicial review, may have had it right when he observed that “any factual state or relation” courts consider important enough to be precedent for future cases “becomes thereby a matter of law for formulation by the court.”<sup>70</sup>

An entirely different aspect of legal realism is studied by Professors Thomas J. Miles and Cass R. Sunstein in their empirical analysis of federal courts of appeals judges’ political affiliation and their validation of the decisions of the NLRB and the Environmental Protection Agency (EPA).<sup>71</sup> Among other findings were those regarding so-called “hard look” or “arbitrariness” reviews:

When the agency decision is liberal, the Democratic validation rate is 72 percent and the Republican validation rate is 58 percent. When the agency decision is conservative, the Democratic validation rate drops to 55 percent and the Republican validation rate rises to 72 percent.<sup>72</sup>

These ideological biases are further enhanced when the reviewing panels are either all Democratic or all Republican (a twenty-percent difference between

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<sup>66</sup> See *supra* note 16 and accompanying text.

<sup>67</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

<sup>68</sup> 5 U.S.C. § 706 (2012).

<sup>69</sup> See *supra* notes 46–59 and accompanying text.

<sup>70</sup> See DICKINSON, *supra* note 9, at 312.

<sup>71</sup> Thomas J. Miles & Cass R. Sunstein, *The Real World of Arbitrariness Review*, 75 U. CHI. L. REV. 761 (2008) (discussing the practical impact of the “hard look” doctrine).

<sup>72</sup> *Id.* at 767.

the two sets of appointees).<sup>73</sup> Miles and Sunstein regard these biases as having “serious consequences” for the “rule of law.”<sup>74</sup>

In the remainder of this article, I shall concentrate on the application of these various tests or principles to the judicial review of some leading NLRB decisions under the amended NLRA.<sup>75</sup>

## V. SOME MAJOR NLRB DECISIONS IN THE COURTS

### A. *Preliminary Note*

Apart from the predisposed pro-union or pro-management sympathies of many persons approaching the NLRA as decisionmakers or commentators, there are legitimate reasons based on the text and the legislative history of the statute for quite differing attitudes. The original NLRA, the Depression-era Wagner Act of 1935, was plainly pro-union, declaring the policy of the United States to be “encouraging the practice and procedure of collective bargaining.”<sup>76</sup> Employers, but not unions, were subject to unfair labor practice prohibitions. A dozen years later, however, the national mood had changed dramatically in the wake of the massive wave of strikes that swept the country after World War II. Senator Taft announced that the purpose of the Taft-Hartley amendments was to ensure a “balance” of power so that “the parties can deal equally with each other.”<sup>77</sup> Unions too became subject to unfair labor practice provisions; some of these provisions, such as the secondary boycott prohibitions, were unique to unions.<sup>78</sup> But, despite efforts to repeal the Wagner Act’s language of “encouraging . . . collective bargaining,” the language was retained.<sup>79</sup> Therefore, one can reasonably argue that the federal government should play the role of impartial referee between labor and

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<sup>73</sup> *Id.*

<sup>74</sup> *Id.* On the politicization of the Board itself, see James J. Brudney, *Isolated and Politicized: The NLRB’s Uncertain Future*, 26 COMP. LAB. L. & POL’Y J. 221, 243–52 (2005). *But cf.* Jeffrey M. Hirsch, *Defending the NLRB: Improving the Agency’s Success in the Federal Courts of Appeals*, 5 FIU L. REV. 437, 438–39 (2010) (asserting that the Board’s performance is substantially similar to that of other agencies but could be improved by better format and explanations in its decisions, more emphasis on standards of review, more rulemaking, and other strategies under its control).

<sup>75</sup> 29 U.S.C. §§ 141–187 (2012).

<sup>76</sup> ch. 372, § 1, 49 Stat. 449, 449 (1935) (codified as amended at 29 U.S.C. § 151 (2012)).

<sup>77</sup> 93 CONG. REC. 7537 (1947).

<sup>78</sup> 29 U.S.C. § 158(b)(4), (e).

<sup>79</sup> *See* 29 U.S.C. § 151.

management; otherwise, it should continue to take steps to promote collective bargaining.

B. “Employee”

The threshold question about an individual’s entitlement to the rights and protections of the NLRA is whether the individual qualifies as an “employee” under the Act. The statute expressly excludes, among others, an “agricultural laborer,” “independent contractor,”<sup>80</sup> or “supervisor.”<sup>81</sup> The NLRB has had special difficulty with the relationship between registered nurses and other caregivers. In *NLRB v. Kentucky River Community Care, Inc.*, the Supreme Court rejected the Board’s argument that “judgment even of employees who are permitted by their employer to exercise a sufficient *degree* of discretion is not independent judgment<sup>82</sup> if it is a particular *kind* of judgment, namely, ordinary professional or technical judgment in directing less-skilled employees to deliver services.”<sup>83</sup> For the majority, Justice Scalia recognized that the Board had the authority to determine the degree of discretion required for supervisory status and the extent to which employer limits on discretion would prevent that status.<sup>84</sup> In that concession, Justice Scalia, a champion of *Chevron*, most likely had that case in mind, but he did not cite it, maybe to avoid dividing his narrow majority. When it came to a decision, however, he viewed the Board’s exclusion of persons from supervisory status simply because they were exercising “ordinary professional or technical judgment” as contrary to the text and structure of the statute and thus unlawful.<sup>85</sup> This seems a separate and independent judicial judgment with no deference due under *Chevron*.

Justice Stevens, with whom Justices Souter, Ginsburg, and Breyer joined, dissented from the Court’s holding. Said Justice Stevens, “Given the Regional Director’s findings that the RNs . . . ‘for the most part, work independently and by themselves without any subordinates,’ it is absolutely clear that the nurses in question are covered by the NLRA.”<sup>86</sup> This opinion turned largely on the

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<sup>80</sup> This was the Taft-Hartley Congress’s response to the *Hearst* newsboys case. See *supra* note 17.

<sup>81</sup> 29 U.S.C. § 152(3).

<sup>82</sup> “Independent judgment” is a critical element of the NLRA’s definition of “supervisor.” 29 U.S.C. § 152(11).

<sup>83</sup> 532 U.S. 706, 714 (2001) (internal quotation marks omitted) (5–4 decision).

<sup>84</sup> *Id.* at 713–14.

<sup>85</sup> *Id.* at 714, 721.

<sup>86</sup> *Id.* at 729–30 (Stevens, J., dissenting) (quoting *Ky. River Cmty. Care, Inc. v. NLRB*, 193 F.3d 444, 457 (6th Cir. 1999)).

dissenters' reading of the facts, however, and added little to the doctrinal struggle over the right approach to judicial review of agency decisions.

Universities, like hospitals, have generated much dispute over who is an "employee."<sup>87</sup> In *NLRB v. Yeshiva University*, the Supreme Court again disagreed with the Board, this time on the status of the full-time faculty of a "mature" private university.<sup>88</sup> The Board had treated the faculty as "professional employees" entitled to collective bargaining.<sup>89</sup> The Court held the faculty members were also "managerial employees" or "supervisors" because their authority in academic matters was "absolute": they set the curriculum; determined teaching methods, schedules, grading policies, and matriculation standards; and effectively decided which students would be admitted, retained, and graduated.<sup>90</sup> In the course of Justice Powell's opinion for the majority, he noted that Board counsel presented a rationale before the Court that had not been the basis for the agency's decision. The position, that faculty authority was "exercised in the faculty's own interest rather than in the interest of the university," could not be entertained.<sup>91</sup>

Under the *Chenery* doctrine, "a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency."<sup>92</sup> In line with this doctrine, Justice Brennan dissented in *Yeshiva*, along with Justices White, Marshall, and Blackmun, stating:

Through its cumulative experience in dealing with labor-management relations in a variety of industrial and nonindustrial settings, it is the Board that has developed the expertise to determine whether coverage of a particular category of employees would further the objectives of the Act. . . . The Board's decision may be reviewed for its rationality and its consistency with the Act, but once these criteria are satisfied, the order must be enforced.<sup>93</sup>

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<sup>87</sup> See generally Marion Crain, *The Transformation of the Professional Workforce*, 79 CHI-KENT L. REV. 543 (2004) (discussing unionization in the medical and legal professions and collective bargaining by professional employers); David M. Rabban, *Can American Labor Law Accommodate Collective Bargaining by Professional Employees?*, 99 YALE L.J. 689 (1990) (discussing the implications of collective bargaining by professional employees).

<sup>88</sup> 444 U.S. 672, 680 (1980) (internal quotation marks omitted) (5–4 decision).

<sup>89</sup> *Id.* at 678.

<sup>90</sup> *Id.* at 686.

<sup>91</sup> *Id.* at 685 & n.22.

<sup>92</sup> SEC v. *Chenery Corp.* (*Chenery II*), 332 U.S. 194, 196 (1947).

<sup>93</sup> *Yeshiva*, 444 U.S. at 693–94 (Brennan, J., dissenting).

These four Justices, all now departed, may have taken the most expansive position on judicial deference in any of these cases. But it is hard to tell whether they did it on doctrinal grounds or on the basis of the particular facts. The four were hardly the least favorably disposed Justices toward labor unions.

What about graduate student assistants who perform compensated teaching or research functions for their university? The NLRB has decided the question both ways. The Clinton-appointed Board, in *New York University*, held that graduate students doing compensated teaching were employees.<sup>94</sup> That position was overruled by *Brown University* in a 3–2 decision.<sup>95</sup> For the latter majority, the key was that the relationship of the students to the university was “primarily educational, not economic,” with “teaching . . . so integral to their education that they will not get the degree until they satisfy that requirement.”<sup>96</sup> In a searching analysis of *Brown*, Professor Michael Harper concluded that “a reviewing court could easily demand more of the Board [e.g., empirical studies, experience in the public sector] before accepting its reversal of *New York University*.”<sup>97</sup> He added that requiring more for a reversal of precedent might appropriately discourage “Board policy or lawmaking oscillations without demanding inflexible constancy or denying the political nature of the Executive Branch.”<sup>98</sup>

### C. *Union Access to Employees*

From the beginning, the NLRB and the courts have wrestled with the balancing of conflicting employer property and managerial rights and the organizational rights of employees. In *NLRB v. Babcock & Wilcox Co.*, the Supreme Court overruled the Board’s decision allowing union organizers to distribute union literature on an employer parking lot and exterior walkways.<sup>99</sup> The Court drew a sharp distinction between the rights of nonemployee organizers and those of employees, who could discuss unionization among themselves at the site so long as they did not interfere with company production.<sup>100</sup>

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<sup>94</sup> 332 N.L.R.B. 1205 (2000), *overruled by* *Brown Univ.*, 342 N.L.R.B. 483 (2004).

<sup>95</sup> 342 N.L.R.B. 483 (2004). A 2–1 majority in *Beth Israel Med. Ctr.*, Case No. 02-RC-121992, 2014 WL 2612758 (N.L.R.B. June 11, 2014), declined to follow *Brown* in a case dealing with medical interns and residents.

<sup>96</sup> *Brown Univ.*, 342 N.L.R.B. at 487–88.

<sup>97</sup> Harper, *supra* note 38, at 221.

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

<sup>99</sup> 351 U.S. 105, 112 (1956).

<sup>100</sup> *Id.* at 113.

Allowance for nonemployee access has been recognized when a plant and the employees' living quarters are so isolated that there are no reasonable alternative means for the union to communicate.<sup>101</sup> In *Lechmere, Inc.*, a unanimous panel of Reagan-appointed Board members found such a situation.<sup>102</sup> The union had placed handbills on a parking lot jointly owned by a retail store in a shopping plaza in a large metropolitan area.<sup>103</sup> When ordered to leave, the organizers relocated to a grass strip of public property abutting a four-lane divided turnpike and tried to pass out leaflets to cars entering the parking lot. The union also sent mailings to about 40 of the store's 200 employees, whose addresses it had obtained by checking license plates in the employee parking area.<sup>104</sup> There were also some attempts to contact employees by telephone or home visits; none of these efforts were fruitful.<sup>105</sup> The Board concluded the employees were effectively inaccessible to the union by means other than on-site approaches and held the employer violated the NLRA by barring organizers from its parking lot.<sup>106</sup>

The Supreme Court disagreed.<sup>107</sup> Speaking for the Court, Justice Thomas declared that "the exception to *Babcock's* rule is a narrow one" and the burden of establishing the "isolation" necessary to justify access to an employer's property was "a heavy one."<sup>108</sup> It wasn't satisfied by "mere conjecture or the expression of doubts concerning the effectiveness of nontrespassory means of communication."<sup>109</sup> "[S]igns or advertising" were suggested as "reasonably effective."<sup>110</sup> Justices White, Blackmun, and Stevens dissented on the grounds that *Babcock* did not require an exception limited to a single circumstance involving physical isolation and instead called for a "neutral and flexible rule of accommodation" of "§ 7 rights and property rights."<sup>111</sup> Justice Stevens did not join the other two Justices, however, in asserting "*Babcock* is at odds with modern concepts of deference to an administrative agency charged with

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<sup>101</sup> See, e.g., *id.* at 112; *NLRB v. S & H Grossinger's, Inc.*, 372 F.2d 26, 29 (2d Cir. 1967) (remote mountain resort hotel).

<sup>102</sup> 295 N.L.R.B. 92 (1989), *rev'd*, *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992).

<sup>103</sup> *Id.* at 92.

<sup>104</sup> *Id.* at 92–93.

<sup>105</sup> *Id.* at 97.

<sup>106</sup> *Id.* at 94.

<sup>107</sup> *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992) (6–3 decision).

<sup>108</sup> *Id.* at 539–40 (quoting *Sears, Roebuck & Co. v. San Diego Dist. Council of Carpenters*, 436 U.S. 180, 205 (1978)) (internal quotation marks omitted).

<sup>109</sup> *Id.* at 540.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at 543–44 (White, J., dissenting).

administering a statute,” citing *Chevron*.<sup>112</sup> The majority did not deign even to mention *Chevron*.

In light of the realities of the wide dispersal of employees throughout large metropolitan areas and the difficulty of luring them from their television sets or backyard barbeques to gather at a union meeting hall, one might fairly ask whether the workplace is not the most natural forum for the exchange of views about the merits of unionization. At the same time, however, Justice Thomas may be entitled to more than “mere conjecture.” A national union could be well advised to invest in some genuine sociopsychological studies to demonstrate empirically the futility of attempting to reach today’s urban, suburban, and ambulatory work force by the conventional methods that the majority of the Supreme Court apparently feels are still adequate.

#### *D. Consumer Picketing*

The most sanitized version of consumer picketing one could imagine was charged as a secondary boycott in *NLRB v. Fruit & Vegetable Packers & Warehousemen, Local 760 (Tree Fruits)*.<sup>113</sup> The union’s primary dispute was with a packing firm selling Washington State apples. Distributors included Safeway Stores. The union usually had two picketers walk back and forth at Safeway’s customer entrances. The picketers wore placards rather than carrying signs on sticks. The placards and handbills passed out made clear the only request was that customers not purchase Washington State apples, not that they refrain from purchasing any of the many other products on sale at Safeway. Safeway employees were not asked to cease work nor were outside truckers asked to cease deliveries.<sup>114</sup>

Section 8(b)(4)(ii)(B) of the amended NLRA makes it an unfair labor practice for a union “to threaten, coerce, or restrain any person” with the object of “forcing or requiring any person to cease using . . . or otherwise dealing in the products of any other producer . . . or to cease doing business with any other person.”<sup>115</sup> A proviso, however, excepts “publicity, *other than picketing*, for the purpose of truthfully advising the public . . . that a product or products are produced by an employer with whom the labor organization has a primary

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<sup>112</sup> *Id.* at 545; *id.* at 548 (Stevens, J., dissenting).

<sup>113</sup> 377 U.S. 58 (1964) (6–2 decision).

<sup>114</sup> *Id.* at 59–61.

<sup>115</sup> 29 U.S.C. § 158(b)(4)(ii)(B) (2012).

dispute and are distributed by another employer, as long as such publicity does not” induce any secondary employees to cease performing services.<sup>116</sup>

Relying on legislative history and the “publicity proviso” with its exclusion of picketing, the NLRB found the union’s picketing an unfair labor practice under Section 8(b)(4)(ii)(B).<sup>117</sup> The Supreme Court directed the Board’s order to be set aside in an opinion by Justice Brennan. He stated, “Both the congressional policy and our adherence to this principle of interpretation [requiring clearest intent] reflect concern that a broad ban against peaceful picketing might collide with the guarantees of the First Amendment.”<sup>118</sup> After an examination of the legislative history that appears quite independent of the Board’s, Justice Brennan concluded that

it does not reflect with the requisite clarity a congressional plan to proscribe all peaceful consumer picketing at secondary sites, and, particularly, any concern with peaceful picketing when it is limited, as here, to persuading Safeway customers not to buy Washington State apples when they traded in the Safeway stores.<sup>119</sup>

Instead, the “isolated evil[]” requiring a prohibition of certain peaceful consumer picketing was that which pressured the secondary employer directly to cease dealing with the primary employer, as distinct from declining to order the primary products because of a drop in customer demand.<sup>120</sup>

Justice Black concurred but on the grounds that the prohibition of peaceful consumer picketing here was an unconstitutional infringement of free speech.<sup>121</sup> Justice Harlan, joined by Justice Stewart, dissented.<sup>122</sup> Finding the statutory provision “invulnerable to constitutional attack,” Justice Harlan said that congressional “attempts to effect an accommodation between the right of unions to publicize their position and the social desirability of limiting a form of communication likely to have effects caused by something apart from the message communicated, are entitled to great deference.”<sup>123</sup> “Deference” to the NLRB was not mentioned by any of the Justices, all of whom seem to have

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<sup>116</sup> *Id.* (emphasis added).

<sup>117</sup> *Tree Fruits*, 377 U.S. at 62.

<sup>118</sup> *Id.* at 63.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 71–72 (internal quotation marks omitted).

<sup>121</sup> *Id.* at 77 (Black, J., concurring).

<sup>122</sup> *Id.* at 80 (Harlan, J., dissenting).

<sup>123</sup> *Id.* at 93.

made entirely independent judgments about the statutory and constitutional questions.

A different Supreme Court registered a different set of independent judgments about consumer picketing, leading to a different result in *NLRB v. Retail Store Employees Union, Local 1001 (Safeco)*.<sup>124</sup> The union represented the employees of Safeco Title Insurance Company, which underwrites real estate title insurance. Five local title companies offered various services, but ninety percent of their income was derived from the sale of Safeco insurance. When the union went on strike over contract negotiations, it picketed not only Safeco but also the five local title companies. Picketers carried signs stating that Safeco had no contract with the union and distributed handbills asking customers to cancel their Safeco policies.<sup>125</sup> The Board found the picketing amounted to a secondary boycott in violation of Section 8(b)(4)(ii)(B).<sup>126</sup> The Supreme Court agreed, declaring that this was different from *Tree Fruits* because, here, product picketing that affects ninety percent of a business “reasonably can be expected to threaten neutral parties with ruin or substantial loss.”<sup>127</sup> Justice Powell, speaking for a plurality of the Court, rejected First Amendment concerns on the ground that “a prohibition on ‘picketing in furtherance of [such] unlawful objectives’ did not offend the First Amendment.”<sup>128</sup> The “unlawful objectives” were left vague but “spread[ing] labor discord” was mentioned.<sup>129</sup> How did the personal choices of individual consumers fit in, assuming they were truly uncoerced?<sup>130</sup>

Justice Blackmun concurred in the result, but he was troubled by the “plurality’s cursory discussion of what for [him were] difficult First Amendment issues.”<sup>131</sup> Yet he was “reluctant to hold unconstitutional Congress’ striking of the delicate balance between union freedom of expression and the ability of neutral employers, employees, and consumers to remain free from coerced participation in industrial strife.”<sup>132</sup> Justice Stevens

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<sup>124</sup> 447 U.S. 607 (1980).

<sup>125</sup> *Id.* at 609–10.

<sup>126</sup> *Id.* at 610.

<sup>127</sup> *Id.* at 614.

<sup>128</sup> *Id.* at 616 (alteration in original) (quoting *Int’l Bhd. of Elec. Workers, Local 501 v. NLRB*, 341 U.S. 694, 705 (1951)).

<sup>129</sup> *See id.*

<sup>130</sup> *See, e.g.,* Theodore J. St. Antoine, *Free Speech or Economic Weapon? The Persisting Problem of Picketing*, 16 SUFFOLK U. L. REV. 883 (1982).

<sup>131</sup> 447 U.S. at 616 (Blackmun, J., concurring).

<sup>132</sup> *Id.* at 617–18.

also concurred in the result, expressing somewhat similar reservations about the plurality's handling of the constitutional issue.<sup>133</sup>

Lastly, Justice Brennan, joined by Justices White and Marshall, dissented, declaring, "By shifting its focus from the nature of the product boycotted to the composition of the secondary firm's business, today's decision substitutes a confusing and unsteady standard for *Tree Fruits*'s clear approach to secondary site picketing."<sup>134</sup> Surprisingly, Justice Brennan made no reference to constitutional problems in the plurality's opinion—perhaps in order to hold Justice White's vote. In any event, all the Justices, in addressing either constitutional or statutory issues seemed to act, quite properly in this context, independently of the Board's treatment of the issues.

### *E. Posting of Notices*

The NLRB rarely uses rulemaking and ordinarily operates through case adjudication. In 2011, however, after a notice-and-comment period in accordance with the APA, it issued *Notification of Employee Rights under the National Labor Relations Act*.<sup>135</sup> This rule would require employers subject to the NLRA to post a Board-supplied written notice advising employees of their rights under the Act and explaining how to enforce those rights. Two federal courts of appeals held the rule invalid. The District of Columbia Circuit found the notice requirement violated the "free speech" Section 8(c) of the NLRA<sup>136</sup> because "[t]he right to disseminate another's speech necessarily includes the right to decide not to disseminate it."<sup>137</sup> The Fourth Circuit reasoned more plausibly:

[T]here is no function or responsibility of the Board not predicated upon the filing of an unfair labor practice charge or a representation petition. We further note that Congress, despite having enacted and amended the NLRA at the same time it was enabling sister agencies to promulgate notice requirements, never granted the Board the statutory authority to do so.<sup>138</sup>

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<sup>133</sup> *Id.* at 618 (Stevens, J., concurring).

<sup>134</sup> *Id.* at 623 (Brennan, J., dissenting).

<sup>135</sup> 76 Fed. Reg. 54,006 (Aug. 30, 2011) (codified at 29 C.F.R. pt. 104 (2014)).

<sup>136</sup> 29 U.S.C. § 158(c) (2012).

<sup>137</sup> *Nat'l Ass'n of Mfrs. v. NLRB*, 717 F.3d 947, 956 (D.C. Cir. 2013), *overruled in part on other grounds* by *Am. Meat Inst.*, 760 F.3d 18 (D.C. Cir. 2014) (en banc) (overruling discussion of scope of *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985)).

<sup>138</sup> *Chamber of Commerce of the U.S. v. NLRB*, 721 F.3d 152, 154 (4th Cir. 2013).

Professor Charles J. Morris joined amici briefs supporting the NLRB in these cases, and his views must be considered in that light. But he has presented a powerful, point-by-point refutation of the District of Columbia Circuit and Fourth Circuit decisions.<sup>139</sup> To counter the District of Columbia Circuit's reliance on the First Amendment, he quotes from *United States v. O'Brien* that a challenged regulation

is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.<sup>140</sup>

To meet the Fourth Circuit's position on notice requirements, Professor Morris discusses the wording, legislative history, and subsequent judicial treatment of the NLRA's Section 6: "The Board shall have the authority from time to time to make, amend, and rescind, in the manner prescribed by [the Administrative Procedure Act], such rules and regulations as may be necessary to carry out the provisions of this [Act]."<sup>141</sup> Explicit authorization shouldn't be necessary to require notice posting.

#### CONCLUSION

The blunt truth is most Supreme Court Justices pay heed to *Chevron* and the APA only when it suits them, and otherwise they ignore both. That would not be so troublesome if the issues were solely constitutional or "pure" ("sufficiently important" or "macromeaning") statutory questions that the courts must ultimately decide anyway. But even then, the views of the agency charged with administering a particular statute could be worth listening to. That might justify, for example, the remand in *Negusie*,<sup>142</sup> the refugee case.

I do not expect the Court to come up soon with a single definitive review standard. As recently as May 2013, the Court split 5–1–3 on "whether an agency's interpretation of a statutory ambiguity that concerns the scope of its regulatory authority (that is, its jurisdiction) is entitled to deference under

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<sup>139</sup> Charles J. Morris, *Notice-Posting of Employee Rights: NLRB Rulemaking and the Upcoming Backfire*, 67 RUTGERS L. REV. (forthcoming Spring 2015), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2529699](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2529699).

<sup>140</sup> *United States v. O'Brien*, 391 U.S. 367, 377 (1968); Morris, *supra* note 139 (manuscript at 46).

<sup>141</sup> 29 U.S.C. § 156 (2012); Morris, *supra* note 139 (manuscript at 11).

<sup>142</sup> See *supra* text accompanying note 51.

*Chevron*.<sup>143</sup> That may not be all bad. The *Chevron* test has a critical operational flaw in its first-step assumption. As its author acknowledged,<sup>144</sup> and many conflicting opinions demonstrate, statutes often do not exhibit a bright line between clarity and ambiguity. It may well be that *Skidmore*'s multifactored sliding scale is the more realistic gauge for most cases. Ideally, the APA should have a thoughtful, thorough-going overhaul with emphasis on the standards for judicial review. But that seems wishful thinking in these days of a dubiously functional Congress and bitter interparty warfare.

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<sup>143</sup> *City of Arlington v. FCC*, 133 S. Ct. 1863, 1866 (2013); *see also id.* at 1877 (Roberts, C.J., dissenting) (“A court should not defer to an agency until the court decides, on its own, that the agency is entitled to deference.”).

<sup>144</sup> *See Negusie v. Holder*, 555 U.S. 511, 531 (Stevens, J., concurring in part and dissenting in part).