Beyond *Loper Bright*: Iterative Construction at the National Labor Relations Board

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"[The agency's actions] express an intuition of experience which outruns analysis and sums up many unnamed and tangled impressions—impressions which may lie beneath consciousness without losing their worth. The board was created for the purpose of using its judgment and its knowledge."[1]
- Justice Oliver Wendell Holmes, 1907

Trust matters. In the 1935 National Labor Relations Act, Congress entrusted the heavy responsibility of protecting labor peace to a board of experts and an administrative agency, both steeped with experience in resolving labor disputes and fluent in the science of industrial relations. This was no accident. For decades prior, federal courts obstructed labor activity, using their injunctive power to enjoin strikes and make peaceful protest contumacious. To prevent this obstruction from occurring under the new federal labor law, Congress gave the National Labor Relations Board broad power to implement the Act through adjudication and limited the courts' role to equitable supervision.

The Act deliberately employed general statutory language to empower the Board with discretion to resolve questions of union representation, police unfair labor practices, and develop remedies for unlawful actions. At Congress's direction, the Board builds national labor policy in common-law court style, one case at a time. It relies on evolutionary factfinding, accumulated expertise, and the identification of commonalities across thousands of labor disputes. Its work is only marginally statutory interpretation in the traditional sense of divining meaning from ambiguous text; rather, it implicates statutory construction, bringing life to long-settled congressional delegations. We call the Board's statutory charge "iterative construction." Over

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1. Chi., Burlington, & Quincy. Ry. Co. v. Babcock, 204 U.S. 585, 598 (1907).

the next ninety years, the courts respected this delegation and deferred to the Board's reasonable constructions of the Act.

In 1984, the United States Supreme Court issued its decision in Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, which required courts to defer to administrative agencies' reasonable interpretations of ambiguous statutory language. Courts applied this doctrine to NLRB decisions but primarily held to pre-*Chevron *NLRA-specific precedent.*

Flash forward to 2024: The Supreme Court's decision in Loper Bright Enterprises v. Raimondo *reasserted judicial supremacy over matters of statutory interpretation under the Administrative Procedure Act, overturning the venerable* Chevron *doctrine. We contend that the Board's iterative construction of the NLRA—as a reflection of congressional intent and delegation—falls outside of* Loper Bright*'s domain. The Court recognized in* Loper Bright *that Congress may delegate agencies the power to fill up the details of a statutory scheme. When it does, the agency's policymaking falls outside of the APA's de novo review.* Loper Bright *does not transfer the power to develop national labor policy under the NLRA to the courts. Instead, it stays where Congress wanted it, and where the courts have long recognized it belongs—with experts in labor relations who understand the importance to a healthy nation of protecting worker rights and preventing labor strife.*

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INTRODUCTION

Chevron is out.[2] The Supreme Court's decision in *Loper Bright Enterprises v. Raimondo* overruled the *Chevron* doctrine requiring deference to reasonable agency statutory interpretations of ambiguous statutes in favor of *de novo* judicial review.[3] By abandoning a uniform approach to agency deference, *Loper Bright* birthed a multiverse of agency deference regimes, where deference turns on an organic statute's unique text, history, and precedent.[4]

For long-established agencies like the National Labor Relations Board, there is ample text, history, and precedent to consider. Decades before *Chevron v. Natural Resources Defense Council, Inc*, in decisions contemporaneous with the Act's 1935 passage and 1947 Taft-Hartley amendments, the Supreme Court consistently held that the Board's decisions should be enforced so long as they have "a reasonable basis in law."[5] This deference enabled the Board to effectuate the mission Congress embedded in the National Labor Relations Act—protecting labor peace and interstate commerce by promoting collective bargaining and employee choice.[6]

The mere existence of precedent before *Chevron* deferring to the Board's interpretation of the Act does not necessarily mean that deference to the NLRB survives *Loper Bright.* Indeed, business and legal websites promoted clickbait headlines galore, shouting out both glee and fear regarding the decision's potential effect on the NLRB and labor relations.[7] In the months since *Loper*

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2. Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984) (creating the *Chevon* doctrine), *overruled by*, Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244 (2024).

3. *Loper Bright*, 144 S. Ct. at 2273.

4. *See* Adrian Vermeule, Chevron *by Any Other Name: From "*Chevron *Deference" to "*Loper Bright *Delegation*,*"* THE NEW DIGEST SUBSTACK (June 28, 2024), https://thenewdigest.substack.com/p/chevron-by-any-other-name (predicting that, after *Loper Bright*, "judges will now have to decide, statute by statute and problem by problem, whether a *Loper Bright* delegation is the best reading of the statute"); *see also* Ralph K. Winter, Jr., *Judicial Review of Agency Decisions: The Labor Board and the Court*, 1968 SUP. CT. REV. 53, 53 (1968) (explaining in a pre-*Chevron* analysis of judicial review of NLRB decisions that "[t]he scope of judicial review of the decisions of administrative agencies . . . can be made in large part only by examining each agency individually, for each has its unique characteristics and its unique functions, determined by the nature of the matter to be regulated, the private interests involved, the character of the basic legislation . . . the structure of the agency itself," and "the role each agency has in fact played throughout its history.").

5. NLRB v. Hearst Publ'ns, Inc., 322 U.S. 111, 131 (1944); *see infra* notes 196–207 and accompanying text.

6. *See* 29 U.S.C. § 151.

7. *See, e.g.*, Eric Reicin, *Six Months After* Loper Bright*: Examining Its Aftershocks*, FORBES (Jan. 14, 2025, at 07:00 ET), https://www.forbes.com/councils/forbesnonprofitcouncil/2025/01/14/six-months-after-loper-bright-examining-its-aftershocks; Andrew Strom, *Here's How* Loper Bright *is Stripping Away Workers' Rights*, ONLABOR (Oct. 4, 2024), https://onlabor.org/heres-how-loper-bright-is-stripping-away-workers-rights; Braden Campbell, *Employers Open Debate Over NLRB Deference Post*-Loper, LAW360 (Aug. 8, 2024, at 20:39 ET), https://www.law360.com/employment-authority/articles/1867911; Tucker Arensberg, P.C., *The* Chevron *Doctrine Has Been Overturned: What That Means for Employers*, JDSUPRA (July 31, 2024), https://www.jdsupra.com/legalnews/the-chevron-doctrine-has-been-9648848; Tascha Shahriari-Parsa, *How to Save the NLRB from* Loper Bright, ONLABOR (July 12, 2024), https://onlabor.org/how-to-save-the-nlra-from-loper-bright; Michael D. Berkheimer & Jennifer L. Mora, *Are Bright Times Ahead for Employers at the NLRB?*, SEYFARTH SHAW: MANAGEMENT WRITES—PRACTICAL LAW UPDATES (July 1, 2024), https://www.employerlaborrelations.com

Bright, the courts haven't helped much to decide whether to embrace glee or fear. The Supreme Court remanded two NLRB cases to the lower courts in single-sentence orders without explanation.[8] The federal courts have yet to confront an NLRB case in which the decision is determinative, so their discussions are just speculative.[9] Other circuit courts have affirmed the old rules without comment.[10] One court seems to get it.[11] It's a jumble.

/2024/07/01/are-bright-times-ahead-for-employers-at-the-nlrb; Tim Ryan, *Employers Preparing for Post-*Chevron *World in NLRB Cases*, LAW360 (May 8, 2024, at 20:59 ET), https://www.law360.com/employment-authority/articles/183493.

8. Hosp. Menonita de Guayama, Inc. v. NLRB, 145 S. Ct. 982 (2024) (mem.); United Nat. Foods, Inc. v. NLRB, 144 S. Ct. 2708, 2708 (2024).

9. *See* Home Depot U.S.A., Inc. v. NLRB, 158 F.4th 910, 920 (8th Cir. 2025) (declining to decide "whether the Board's decision that Home Depot failed to demonstrate the claimed special circumstances is a legal conclusion we review de novo and if review is not *de novo*, whether a less deferential standard of review is mandated by the Supreme Court's recent decision in *Loper Bright*"); Miller Plastic Prods. Inc v. NLRB, 141 F.4th 492, 503 (3d Cir. 2025) ("As in *Alaris Health*, we need not here resolve whether any deference attaches to the Board's assessment of what constitutes concerted activity."); 3484, Inc. v. NLRB, 137 F.4th 1093, 1104 (10th Cir. 2025) (opining that "deference is no longer owed" to the NLRB after *Loper Bright*); Alaris Health at Boulevard E. v. NLRB, 123 F.4th 104, 121 (3d Cir. 2024) (questioning whether "deference to the Board's designation of mandatory bargaining subjects under the Act survives the Supreme Court's rejection of *Chevron* deference in *Loper Bright*"), *cert. denied*, 145 S. Ct. 2682 (2025); Rieth-Riley Constr. Co. v. NLRB, 114 F.4th 519, 528–29 (6th Cir. 2024) ("We do not defer to the NLRB's interpretation of the NLRA, but exercise independent judgment in deciding whether an agency acted within its statutory authority. . . . We pay 'careful attention' to the judgment of the agency to inform that inquiry.") (quoting Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2273 (2024)); NLRB v. McLaren Macomb, No. 23-1335, 2024 WL 4240545, at *3 (6th Cir. Sep. 19, 2024) (same); Hudson Inst. of Process Rsch. Inc. v. NLRB, 117 F.4th 692, 700 (5th Cir. 2024) ("The Supreme Court has recently clarified that we use traditional tools of statutory interpretation when so assessing; we do not simply defer to an agency's interpretation of 'ambiguous' provisions of their enabling acts."); Lion Elastomers, L.L.C. v. NLRB, 108 F.4th 252, 255 n.1 (5th Cir. 2024) ("After this case was argued, the Supreme Court issued *Loper Bright* . . . which formally overturned *Chevron*. . . . Although we discuss how an agency has understood a question of statutory interpretation, we resolve this case on other grounds and need not reach the validity of the agency's interpretation."). *But see* United Nat. Foods, Inc. v. NLRB, 138 F.4th 937, 946 (5th Cir. 2025) (applying *Loper Bright* to exercise independent judgment to matter of pure statutory interpretation), *cert. denied*, No. 25-369, 2026 WL 79627 (U.S. Jan. 12, 2026).

10. *See* Acumen Cap. Partners v. NLRB, 122 F.4th 998, 1003 (D.C. Cir. 2024) (reaffirming that the Supreme Court "acknowledged that '[t]he 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.'") (quoting NLRB v. Ins. Agents' Int'l Union, 361 U.S. 477, 499 (1960)); Int'l Union of Operating Eng'rs, Loc. 150 v. NLRB, 109 F.4th 905, 915 (7th Cir. 2024) ("For legal conclusions, our scrutiny of the Board's decision is deferential out of respect for Congress's broad delegation of responsibility for developing national labor policy to the Board. Therefore, 'we accept the Board's legal conclusions unless they are irrational or inconsistent with the Act.'") (internal citations omitted); Hosp. de la Concepcion v. NLRB, 106 F.4th 69, 76 (D.C. Cir. 2024) ("We review Board decisions with a 'very high degree of deference.' We set aside a Board order only 'when it departs from established precedent without reasoned justification, or when the Board's factual determinations are not supported by substantial evidence.'") (internal quotations omitted); *see generally* Robert Iafolla, *Circuit Court Rift Forming on Respect for Labor Board Rulings*, BLOOMBERG L.: DAILY LAB. REP. (Aug. 22, 2024, at 14:45 PT), https://news.bloomberglaw.com/daily-labor-report/circuit-court-rift-forming-on-respect-for-labor-board-rulings (discussing whether circuit splits will change the "longstanding deferential approach to assessing the [NLRB]'s findings.").

11. *See* Int'l Union of Operating Eng'rs, Stationary Eng'rs, Loc. 39 v. NLRB, 127 F.4th 58, 84 n.14 (9th Cir. 2025) (explaining that respecting the Board's expertise in constructing remedies under the Act "is not *Chevron* deference," but instead "is a reflection of the discretion afforded by Congress to allow the Board to award remedies it deems fit to effectuate policies of the Act"); *see infra* notes 248–250 and accompanying text.

Given this confusing state of the law, what's a new administration to do? In 2025, with President Trump's firing of Board Member Wilcox and his appointment a year later of two new Board members, the Board is likely to switch parties for the fourth time in eight years.[12] Every new administration comes into power with policy preferences, and whoever takes the reins at the NLRB will be no exception. Because the United States Courts of Appeals are equally divided in political composition[13] and the Supreme Court barely has a labor docket of which to speak,[14] the judiciary's newfound *Loper Bright* authority threatens the Board's power to settle labor disputes through legal means, regardless of who is in power.[15] New leadership attempting to move NLRB precedent to a presumably more business-friendly posture may face courts of appeals loaded for bear to review the Board's statutory interpretations *de novo*. Thus, it may stymie the new majority's agenda, just as the Biden NLRB's decisions faced in its waning days.

This Article contends that the end of *Chevron* does not mean the end of deference to the National Labor Relations Board. *Loper Bright* may have claimed statutory *interpretation* for the judiciary, but agencies retain the power of statutory *construction*. Interpreting statutory language determines its meaning; constructing language determines its legal effect. Interpretation tells you "what," but construction tells you "how."[16] Because construction implements policy, it requires politically responsive actors with subject matter expertise. *Loper Bright* recognizes that when Congress delegates the power to

12. *See* Press Release, Office of Public Affairs, NLRB, James Murphy and Scott Mayer Sworn in as Board Members (Jan. 7, 2026), https://www.nlrb.gov/news-outreach/news-story/james-murphy-and-scott-mayer-sworn-in-as-board-members-0; *Members of the NLRB since 1935*, NLRB, https://www.nlrb.gov/about-nlrb/who-we-are/the-board/members-of-the-nlrb-since-1935 (last visited Oct. 23, 2025).

13. *Circuit Status*, BALLS AND STRIKES, https://ballsandstrikes.org/circuit-status (last visited Oct. 23, 2025).

14. Since 2000, the Supreme Court has only heard ten cases involving the National Labor Relations Act (NLRA). *See generally* Starbucks Corp. v. McKinney, 144 S. Ct. 1570 (2024) (evaluating whether the NLRB is entitled to request preliminary injuctions under the NLRA); Glacier Nw., Inc. v. Int'l Bhd. of Teamsters, Loc. Union No. 174, 1404 S. Ct. 1404 (2023) (reviewing state law preemption under the NLRA); Epic Sys. Corp. v. Lewis, 584 U.S. 497 (2018) (finding the NLRA cannot be interpreted to replace the Federal Arbitration Act); NLRB v. Sw. Gen., Inc., 580 U.S. 288 (2017) (evaluating the appointment of the NLRB's Acting General Counsel under the Federal Vacancies Reform Act); NLRB v. Noel Canning, 537 U.S. 513 (2014) (reviewing whether recess appointments to the NLRB comported with the Constitution's Appointments Clause); New Process Steel, L.P. v. NLRB, 560 U.S. 674 (2010) (interpreting the quorum requirement of the amended NLRA); Chamber of Com. v. Brown, 554 U.S. 60 (2008) (reviewing preemption under the NLRA); Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137 (2002) (reviewing the validity of an NLRB order interpreting the NLRA); BE&K Constr. Co. v. NLRB, 534 U.S. 1074 (2002) (same); NLRB v. Ky. River Cmty. Care, Inc., 532 U.S. 706 (2001) (same).

15. *See* THE C. BOYDEN GRAY CENTER GEORGE MASON UNIVERSITY, Chevron *on Trial: The Supreme Court and the Future of Agency Authority and Expertise*, at 35:24–36:19 (YouTube, Oct. 27, 2023), https://youtu.be/IEHwhU9-IPY?t=2115 (minimizing concerns with NLRB policy oscillation because, "[w]hen the labor board was created, the River Rouge plant was being occupied by the nascent UAW adherents, there was violence in the streets, and the Board's charge was to make all of that into a legal proceeding in which the lawyers would speak instead of the people on the street. And it did it. . . . That's [the Board's] job—to manage conflict.") (quoting District of Columbia Circuit Senior Judge Douglas H. Ginsburg).

16. *See infra* notes 53─59 and accompanying text.

construct, an agency operates outside the realm of *de novo* review[17]—outside *Loper Bright*'s domain, as Professors Thomas Merrill and Kristin Hickman might say.[18]

The Board's statutory construction sits beyond *Loper Bright*'s domain. In the Wagner and Taft-Hartley Acts, Congress adopted an adjudicative model to protect worker rights and resolve labor conflict. The model was based on common law tradition, labor arbitration, and prior successful federal experiments in resolving labor disputes. It provided for limited judicial review. Congress employed general language delegating broad authority to the Board, as it intended that the Board would make that language specific through its precedential administration of the Act. As U.S. Secretary of Labor, Frances Perkins, testified before Congress in support of the NLRA, the Board would build a "common law of industrial relations" one case at a time.[19]

We call the Board's delegated authority *iterative construction.* As Congress wanted, the Board resolves labor disputes by reviewing myriad fact patterns, identifying commonalities, and establishing legal rules that advance the Act's statutory goals consistent with its continuum of experience. Unlike agencies that develop policy primarily through prospective quasi-legislative rulemaking—the methodology of civil law—Congress wanted the Board to prevent industrial strife and protect organizing rights through adjudication—the methodology of common law. A civil law regime turns primarily on the drafting and interpretation of codes; a common law regime, such as the NLRA's, turns primarily on experience.[20] Courts may have expertise in reading codes. They may even have experience with criminal and civil legal disputes. But they do not have expertise in resolving labor conflicts.

The Board's policymaking, as a reflection of common law precedent building, emanates from the well-settled semantic meanings of the Act's text. When the Board decides that employers need not permit employees to engage in

17. *See* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2263 (2024); *see also* Ellen P. Aprill, *Unpacking the Most Important Paragraph in* Loper Bright, YALE J. ON REGUL. (Jan. 15, 2025), https://www.yalejreg.com/nc/unpacking-the-most-important-paragraph-in-loper-bright-by-ellen-p-aprill ("The opinion also acknowledged that in many statutory provisions, Congress delegates discretionary authority to administrative agencies. If so, agencies rather than courts have primary responsibility for interpreting the statutory language.").

18. *See* Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 GEO. L.J. 833, 913 (2001). Following Professors Merrill and Hickman's seminal article, a healthy body of scholarship exploring the "domains" of *Chevron* and other agency review schemes developed. *See* Kristin E. Hickman & Aaron Nielson, *Narrowing* Chevron*'s Domain*, 70 DUKE L.J. 931 (2021); Todd Phillips & Beau J. Baumann, *The Major Questions Doctrine's Domain*, 89 BROOK. L. REV. 747 (2024); Kent Barnett & Christopher J. Walker, Chevron *Step Two's Domain*, 93 NOTRE DAME L. REV. 1441 (2018); Mila Sohoni, *King's Domain*, 93 NOTRE DAME L. REV. 1419 (2018); Jonathan H. Adler, *Restoring* Chevron*'s Domain*, 81 MO. L. REV. 983 (2016); Matthew C. Stephenson & Miri Pogoriler, *Seminole Rock's Domain*, 79 GEO. WASH. L. REV. 1449 (2011).

19. *Hearings Before the Committee on Education and Labor on S. 2926*, 73rd Cong. 19 (1935) (statement of Hon. Frances Perkins, Secretary of Labor), *reprinted in* LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935, VOLUME 1 49 (1949).

20. Oliver Wendell Holmes, THE COMMON LAW 3 (Harv. Univ. Press ed. 2009) ("The life of the law has not been logic: it has been experience.").

protected activity on company email,[21] determines that unions must clearly and unmistakably waive their right to bargain,[22] or requires employers to file for an election when presented with a bargaining demand,[23] the Board is only marginally interpreting the text of the Act. Instead, the Board is engaging in iterative construction, building precedent to implement the Act's broad statutory directions. It operates where "the law runs out, and [the] policy-laden choice is what is left over."[24] The courts' historical deference to the Board emerged out of respect for the Act's policy-making machinery of iterative construction. For better or worse, ninety years after its enactment in 1935, the meaning of most of the NLRA's language is clear. The Board's iterative construction of that language, however, is an ongoing enterprise, as society, its economy, and technological change continually transform American workplaces.

This is about trust. Throughout the late eighteenth and early nineteenth centuries, the courts' aggressive use of injunctive power, dubious interpretations of antitrust law, and novel application of now-discredited, free-market constitutional theory landed union activists in prison and fomented violence in the streets.[25] After decades of judicial interference with labor organizing, Congress did not trust the courts to make labor policy. Congress instead trusted a board of labor-management experts and an agency with accumulated institutional expertise to implement a workers' rights statute and resolve labor conflict. The courts recognized this division of labor and demarcated broad policymaking turf for the Board, reflecting the Act's empowering statutory language. Employing *Loper Bright* to invade the Board's turf would run contrary to statutory language, congressional purpose, and settled precedent. Congress did not envision labor policy made by those whose primary claim to labor relations expertise is that they've held a job.

Our argument proceeds in three steps. In Part I, the Article reviews the Court's path from the Court's 1984 *Chevron* decision to its 2024 *Loper Bright* decision. *Chevron* represents the pinnacle of agency deference, with the following four decades reflecting declining judicial deference for administrative agencies in general. In Part II, the Article explains how Congress charged the Board with developing the National Labor Relations Act as a common-law-style regime and the nature of the Board's iterative construction. Finally, in Part III, we argue that the Board's iterative construction of the Act falls outside of *Loper Bright*'s domain, ensuring that difficult questions of labor relations remain in the hands of labor experts, as Congress intended.

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21. Caesars Ent., 368 NLRB No. 143, 2019 WL 6896714, at *1 (2019).

22. Endurance Env. Sols., LLC, 373 NLRB No. 141, 2024 WL 5057785, at *8 (2024).

23. Cemex Constr. Materials Pac., LLC, 372 NLRB No. 130, 2023 WL 5506930, at *24—*38 (2023), *motion for reconsideration denied*, 372 NLRB No. 157, 2023 WL 7648946 (2023).

24. Kisor v. Wilkie, 139 S. Ct. 2400, 2415 (2019).

25. *See infra* notes 61—73 and accompanying text.

I. *CHEVRON* TO *LOPER BRIGHT*: FADING DEFERENCE TO AGENCY INTERPRETATION OF STATUTORY TEXT

There has always been judicial deference to administrative agencies,[26] and there likely always will be.[27] The issue is determining the form deference takes and how deference may change over time. When Congress enacts a statutory program and vests primary responsibility for effectuating that program with an administrative agency rather than the courts, it directs specialist agencies to take the first pass at bringing the law to life. This empowers agencies with the authority to construct and implement. The power to go first is the power to frame the questions, identify the law's normative values, and build a framework for its execution. The power of judicial review is inherently reactive and secondary; it plays a supporting role to the agency's above-the-title billing. By this very choice, Congress prioritizes agencies over courts.

In *Chevron*, the Supreme Court synthesized its prior precedent by directing lower courts to give binding deference to agencies' reasonable statutory interpretations of ambiguous statutory language.[28] The Court explained that the existence of a statutory gap—whether express or silent—constitutes a delegation of interpretive authority.[29] When an expert agency fills in those statutory gaps by interpreting ambiguous language in a statute, it exercises delegated legislative power with Congress's consent. *Chevron* directs that this exercise must be affirmed unless its reading is flatly inconsistent with unambiguous statutory language or arbitrary and capricious.[30]

Chevron's chief virtue was to provide a unifying framework for judicial deference,[31] harmonizing the statute-specific strains of deference that previously

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26. *See* Henry P. Monaghan, Marbury *and the Administrative State*, 83 COLUM. L. REV. 1, 14–15 (1983); Brief of Respondent at 22–27, Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244 (2024) (No. 22-451) (citing United States v. Vowell, 9 U.S. (5 Cranch) 368 (1809) and Edwards' Lessee v. Darby, 25 U.S. (12 Wheat.) 206 (1827) as proof of the historical trend of judicial deference to administrative agency decisions); *see also* The Honorable Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 512 (1989) ("It should not be thought that the *Chevron* doctrine—except in the clarity and seemingly categorical nature of its expression—is entirely new law.").

27. *See* Daniel E. Walters, *Four Futures of* Chevron *Deference*, 31 GEO. MASON L. REV. 635, 638 (2024) (contending that judicial deference doctrine is politically contingent and "it will be only a matter of time until the Supreme Court gains the confidence to bring deference back to life" when the political incentives align); Lisa Schultz Bressman & Kevin M. Stack, Chevron *Is a Phoenix*, 74 VAND. L. REV. 465, 466 (2021) ("While *Chevron* has its problems, overruling the decision, we believe, will have little effect on the deference courts give to agencies for interpretations of their own statutes. Judicial deference is a foundational principle of administrative law. Perhaps more importantly, judicial deference is a foundational principle of the administrative state."); Nicholas R. Bednar & Kristin E. Hickman, Chevron*'s Inevitability*, 85 GEO. WASH. L. REV. 1392, 1398 (2017) ("[U]nless Congress chooses to assume substantially more responsibility for making policy choices itself or the courts decide to seriously reinvigorate the nondelegation doctrine—neither of which seems remotely likely—at least some variant of *Chevron* deference will be essential to guide and assist courts from intruding too deeply into a policy sphere for which they are ill-suited.").

28. Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, 467 U.S. 837, 838 (1984).

29. *Id.* at 843–44.

30. *Id.*

31. Scalia, *supra* note 26, at 516 ("*Chevron* . . . replaced this statute-by-statute evaluation (which was assuredly a font of uncertainty and litigation) with an across-the-board presumption that, in the case of

existed. By allocating gap-filling discretion to agencies, *Chevron* curtailed judges from imposing their personal policy preferences on administrative agencies by means of statutory interpretation.[32] *Chevron* further allocated the risk of statutory misinterpretation to the political branches. The democratic responsiveness of the legislature and executive is better equipped to respond to the real-world consequences of a poor statutory interpretation.[33]

Like a pop star or influencer sensation, though, *Chevron*'s fame brought out the haters.[34] *Chevron*'s critics complained that it required judges to abdicate their Article III duty to use their independent judgment "to say what the law is," in *Marbury*'s famous words.[35] *Chevron*'s delegation theory came under fire as a fiction, with scholars challenging *Chevron*'s premise that Congress implicitly delegates legislative authority to administrative agencies to fill in interstitial gaps caused by silence or ambiguous statutory language.[36] As criticism ramped up, it wasn't too long before *Chevron* became a conservative target. The ideological convergence between the conservative courts and the Reagan administration gave way to an ideological divergence between the conservative courts and the Obama administration.[37] The Supreme Court seemingly

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ambiguity, agency discretion is meant."); Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 972 (1992) ("Prior to 1984, the Supreme Court had no unifying theory for determining when to defer to agency interpretations of statutes.").

32. *See* Kent Barnett, Christina L. Boyd & Christopher J. Walker, *Administrative Law's Political Dynamics*, 71 VAND. L. REV. 1463, 1468 (2018) ("*Chevron* deference significantly curbs (but does not fully constrain) judicial discretion. For instance, the most liberal panels agree with conservative agency statutory interpretations only 18% of the time when they do not use *Chevron* deference but 51% when they do. Similarly, the most conservative panels agree with liberal agency interpretations only 18% of the time without *Chevron* deference but 66% with it.").

33. *Chevron*, 467 U.S. at 865─66.

34. *See* Philip Hamburger, Chevron *Bias,* 84 GEO. WASH. L. REV. 1187, 1189─90 nn.4─5 (2016) (collecting literature criticizing *Chevron*'s delegation theory, contending that *Chevron* undermines Article III independence, and propounding theory that *Chevron* creates pro-government bias); Ilan Wurman, *The Specification Power*, 168 U. PA. L. REV. 689, 698─99 (2020) ("Ever since *Chevron* was decided, there have been scholars who have argued that deference to agency statutory interpretation violates Article III, which vests the judicial power 'to say what the law is' in life-tenured, salary-protected judges.") (footnotes omitted).

35. *See* Kenneth W. Starr, *Judicial Review in the Post*-Chevron *Era,* 3 YALE J. ON REG. 283, 283 (1986) ("Affording deference to an agency's legal analysis, however, seems facially contrary to the fundamental principle, incorporated in Chief Justice John Marshall's broad dictum in *Marbury v. Madison*, that '[i]t is emphatically the duty of the judicial department to say what the law is.'" (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)); Hamburger, *supra* note 34, at 1189 n.4, 1205─10; *see also* Wurman, *supra* note 34, at 699 (discussing Justice Scalia's conflicting views on *Chevron* deference and his "not[ing] the apparent inconsistency between deference to agency legal interpretations and the requirements of Article III").

36. *See, e.g.*, David J. Barron & Elena Kagan, Chevron*'s Nondelegation Doctrine*, 2001 SUP. CT. REV. 201, 212 (2001); Scalia, *supra* note 26, at 517; Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 370 (1986).

37. *See* Walters, *supra* note 27, at 643─45 (collecting scholarly accounts, including Professors Elinson and Gould's observation "point[ing] to a conservative backlash against a surge of rulemaking by administrative agencies during the Obama administration, all of which 'increased *Chevron*'s overall salience' and highlighted the ways that *Chevron* could support an ambitious progressive regulatory agenda") (quoting Gregory A. Elinson & Jonathan S. Gould, *The Politics of Deference*, 75 VAND. L. REV. 475, 524─30 (2022)).

abandoned *Chevron* through silence,[38] while Justices Thomas and Gorsuch called for its demise.[39]

In *Loper Bright*, the Court was straightforward: "*Chevron* is overruled."[40] Its coup de grâce against *Chevron*: the 75-year-old Administrative Procedure Act ("APA"), which requires courts to "decide all relevant questions of law."[41] As the Court explained, "[t]he APA thus codifies for agency cases the unremarkable, yet elemental proposition reflected by judicial practice dating back to *Marbury*: that courts decide legal questions by applying their own judgment."[42] *Chevron*, in turn, conflicts with the APA by requiring courts to give binding deference to an agency's interpretation of ambiguous statutory language.[43] Ambiguity, according to the Court, is expected when Congress drafts statutory language; but *Chevron*'s presumption that ambiguity implicitly delegates interpretive authority to agencies "cannot be reconciled with the APA."[44] Courts (unlike agencies) have "special competence in resolving statutory ambiguities."[45] They "understand that [ambiguous] statutes, no matter how impenetrable, do—in fact, must—have a single, best meaning."[46] And "if it is not the best, it is not permissible."[47] The Court acknowledged, however, that under the venerable *Skidmore* doctrine, courts may seek "aid from the interpretations of those responsible for implementing particular statutes." Agencies may possess "'a body of experience and informed judgment to which courts and litigants may properly resort for guidance.'"[48]

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38. *See* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2252 (2024) ("The Court, for its part, has not deferred to an agency interpretation under *Chevron* since 2016."). This is not the only time the Court has employed silence as a method of abandonment. *See* Kennedy v. Bremerton Sch. Dist., 597 U.S. 507, 534 (2022) (holding that the Court implicitly overruled Lemon v. Kurtzman, 403 U.S. 602 (1971), when it "long ago abandoned *Lemon* and its endorsement test" by non-citation).

39. *See* Michigan v. EPA, 576 U.S. 743, 761 (2015) (Thomas, J., concurring); Buffington v. McDonough, 143 S. Ct. 14, 22 (2022) (mem.) (Gorsuch, J., dissenting from denial of cert.) ("We should acknowledge forthrightly that *Chevron* did not undo, and could not have undone, the judicial duty to provide an independent judgment of the law's meaning in the cases that come before the Nation's courts.").

40. *Loper Bright*, 2244 S. Ct. at 2273.

41. *Id.* at 2302 ("To the extent necessary to decision and where 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.") (quoting 5 U.S.C. § 706)).

42. *Id.* at 2261.

43. *Id.* at 2265 ("And although exercising independent judgment is consistent with the 'respect' historically given to Executive Branch interpretations, . . . *Chevron* insists on much more. It demands that courts mechanically afford *binding* deference to agency interpretations, including those that have been inconsistent over time.") (emphasis in original).

44. *Id.*

45. *Id.* at 2250.

46. *Id.* at 2266.

47. *Id.*; *see also id.* at 2271 ("The statute still has a best meaning, necessarily discernible by a court deploying its full interpretive toolkit.").

48. *Id.* at 2262 (quoting Skidmore v. Swift, 323 U.S. 134, 140 (1944)). *Skidmore* permits courts to grant *weight* to agency interpretations but does not require *deference*. *Skidmore*, 323 U.S. at 140; *see* Peter L. Strauss, *"Deference" Is Too Confusing—Let's Call Them "*Chevron *Space" and "*Skidmore *Weight*,*"* 112 COLUM. L. REV. 1143, 1145 (2012) ("'*Skidmore* weight' addresses the possibility that an agency's view on a given statutory question may in itself warrant respect by judges who themselves have ultimate interpretive authority."). And,

The Court, however, drew the non-deference line at statutory *interpretation*. The Court recognized that some statutes "expressly delegat[e]" agencies the power to give effect to a statutory term. Some give power to an agency to "fill up the details' of a statutory scheme," and others grant regulatory authority subject to statutory language that "leaves agencies with flexibility."[49] Through these delegations, Congress can "authorize [an agency] to exercise a degree of discretion,"[50] moving the statutory work at hand from interpretation to policymaking. When Congress has made such a delegation, the Court admits that the APA "mandate[s] that judicial review of agency policymaking and factfinding be deferential."[51] The Court's role in deciding questions of law is then limited to "recognizing constitutional delegations, fixing the boundaries of the delegated authority, and ensuring the agency has engaged in 'reasoned decisionmaking' within those boundaries."[52]

By drawing the line in this way, the Court reserves statutory interpretation for itself and vests statutory construction to agencies, contingent on delegation and reasoned decisionmaking.[53] Interpretation discovers a statute's linguistic meaning or semantic content. Conversely, construction determines the statute's legal effect and how it applies to the fact patterns adjudicators confront.[54] To quote Professor Lawrence Solum, "[s]ome legal texts are drafted in language that supplies bright line rules; other texts use general, abstract, and vague language that frequently requires construction that goes beyond mere translation of semantic content into legal content."[55] When Congress intentionally employs underdetermined language and assigns an administrative agency to explicate it, as it did in the Wagner and Taft-Hartley Acts, it delegates construction power.[56]

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this "weight . . . depend[s] on the thoroughness evident in [the agency's] 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." *Skidmore*, 323 U.S. at 140.

49. *Loper Bright*, 144 U.S. at 2263 (citations omitted); *see* Donald R. Goodson, *Discretion Is Not (*Chevron*) Deference*, 62 HARV. J. ON LEG. 12, 14 (2024).

50. *Loper Bright*, 144 U.S. at 2236.

51. *Id.* at 2261 (citing 5 U.S.C. § 706(2)(A) (allowing agency action to be set aside if "arbitrary, capricious, [or] an abuse of discretion"), and 5 U.S.C. § 706(2)(E) (requiring courts to defer to agency factfinding supported by substantial evidence)).

52. *Id.* at 2249 (citing Michigan v. EPA, 576 U.S. 743, 750 (2015) (internal citations omitted)).

53. *See* Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95, 95─96, 100─08 (2010); Wurman, *supra* note 34, at 703 (discussing the interpretation-construction distinction); *see also* Chad Squiteri, *Trump's Agencies After* Chevron, AM. COMPASS (Dec. 9, 2024), https://americancompass.org/trumps-agencies-after-chevron ("Courts (both before and after *Loper Bright*) should therefore respect the distinction between law and policy, and avoid intruding upon the policy discretion afforded to administrative agencies tasked with carrying out the president's policy objectives.").

54. Solum, *supra* note 53; *see also* Garden State Tanning, Inc. v. Mitchell Mfg. Grp., Inc., 273 F.3d 332, 335 (3d Cir. 2001) ("When an ambiguity exists in the agreement, the problem is one of interpretation. If, however, the terms are clear, construction of the contract determines its legal operation.") (citing Ram Constr. Co. v. Am. States Ins. Co., 749 F.2d 1049, 1052–53 (3d Cir. 1984)); Wurman, *supra* note 34, at 703 (collecting scholarship on statutory interpretation and construction).

55. Solum, *supra* note 53, at 95─96, 108.

56. *Id.* at 108.

Even before *Loper Bright,* numerous scholars pointed to the distinction between interpretation and construction—although they may have used different terminology—arguing that the latter constitutes policymaking that does not implicate the kind of statutory interpretation with which *Chevron* was concerned.[57] Professor Solum, writing with Professor Cass Sunstein, posited that, "[b]ecause *Chevron* used the word 'ambiguity,' it reinforced the natural tendency to read its framework as applicable to both interpretation and construction—to both the discovery of meaning and the creation of implementation rules or the effort to specify a vague and open-textured language."[58] *Chevron*'s theory that statutory ambiguity constituted an implicit delegation was big enough to embrace both meanings. In reclaiming interpretation for itself, however, the Court in *Loper Bright* requires us to think of them separately, with construction—and the concomitant agency policymaking discretion—dependent on identifying tangible delegations. Since *Loper Bright*, the delegation to construct has become the threshold inquiry, for both courts[59] and agencies,[60] to determine the standard of review for agency action under specific statutory schemes.

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57. *See* Goodson, *supra* note 49, at 18–19; John F. Duffy, Chevron*, De Novo: Delegation, Not Deference*, 31 GEO. MASON L. REV. 541, 551–52 (2024); Wurman, *supra* note 34, at 698–99; Lawrence B. Solum & Cass R. Sunstein, Chevron *as Construction*, 105 CORN. L. REV. 1465, 1471 (2020); Michael Herz, Chevron *Is Dead; Long Live* Chevron, 115 COLUM. L. REV. 1867, 1891 (2015); Elizabeth V. Foote, *Statutory Interpretation or Public Administration: How* Chevron *Misconceives the Function of Agencies and Why It Matters*, 59 ADMIN. L. REV. 673, 691 (2007).

58. Solum & Sunstein, *supra* note 57, at 1473–74.

59. *See* Vanda Pharms., Inc. v. U.S. Food & Drug Admin., 123 F.4th 513, 521 (D.C. Cir. 2024) ("This judicial inquiry includes a determination as to whether the statute in question 'delegates discretionary authority' to the agency and whether the agency 'engaged in reasoned decisionmaking within [the] boundaries' of that statutory delegation.") (quoting Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2263 (2024)) (internal quotation marks and citations omitted); Mayfield v. U.S. Dep't of Lab., 117 F.4th 611, 617 (5th Cir. 2024) (upholding DOL's delegated authority to promulgate minimum salary rule under FLSA and noting that "because there is an uncontroverted, explicit delegation of authority, the question is whether the Rule is within the outer boundaries of that delegation"); Bernardo-De La Cruz v. Garland, 114 F.4th 883, 890 (7th Cir. 2024) (noting that "Congress has granted the Attorney General broad discretion over voluntary departure procedures" and reviewing under traditional deferential standards); Kansas v. U.S. Dep't of Lab., 749 F. Supp. 3d, 1363, 1373 (S.D. Ga. 2024) (upholding Congressional grant of authority to DOL to issue labor organizing protections for the H2-A agricultural workers as threshold issue, while striking down the regulation as inconsistent with the NLRA); Barton v. U.S. Dep't of Lab., 757 F. Supp. 3d, 766, 782 (E.D. Ky. 2024) (same); Ventura Coastal, LLC v. United States, 736 F. Supp. 3d 1342, 1356 (Ct. Int'l Trade Nov. 7, 2024) (finding, as threshold issue, no indication that Congress gave Department of Commerce authority to define word "partner"); United States v. Reedy, No. 18 CR 00087-2, 2024 WL 5247954, at *2 (N.D. Ill. Dec. 30, 2024) (mem.) (upholding deference to sentencing commission policy guidelines due to express delegation); Lowmaster v. Director, Bureau of Prisons, No. 24-3178, 2024 WL 5135970, at *3 (D. Kan. Dec. 17, 2024) (mem.) (finding that the statute grants Bureau of Prisons discretion to deny sentence reductions) (citing Lopez v. Davis, 531 U.S. 230 (2001)); Hansen v. Lab'y Corp. of Am., No. 24-CV-807, 2024 WL 4564357, at *6 (E.D. Wis. Oct. 24, 2024) (mem.) (giving deference to Department of Labor payroll rule where "ERISA specifically confers on the Department of Labor the authority to prescribe regulations the Secretary finds 'necessary or appropriate to carry out the provisions of this subchapter'") (citing 29 U.S.C. § 1135).

60. *See* Consolidated Brief for Respondent Securities and Exchange Commission at 28, Iowa v. SEC, No. 24-1522, 2024 WL 3706890, at *28 (8th Cir. Aug. 6, 2024) ("Each of these statutory authorities thus 'expressly delegate[s]' to the Commission 'discretionary authority' both to 'fill up the details of a statutory scheme' and to

II. THE BOARD'S ITERATIVE CONSTRUCTION OF THE NLRA

In the Wagner Act, Congress deliberately granted the authority to protect labor rights and interstate commerce *to the Board* in the first instance and acted with precision in limiting the judiciary's role.[61] Congress wanted labor law made by those with regular hands-on experience working with the law. Relying on successful private and governmental models for resolving labor disputes, Congress directed the Board to do its work in common-law fashion. As we explain below, the combination of common law adjudication and delegated power to specify general statutory text is *iterative construction*. Iterative construction turns on policy and factfinding but rarely on the semantic meaning of unclear statutory language. Since 1935, courts have identified *subject* after *subject* after *subject* delegated to the Board's primary constructive discretion. The Board thus enters *Loper-Bright*-land with extensive territory committed to its judgment.

A. THE NLRA AS REACTION TO JUDICIAL OVERREACH

In 1886, a handmade dynamite bomb thrown into a protest for a ten-hour workday at Haymarket Square in Chicago started a riot, killed four protestors and seven police officers, and led to the execution of eight labor leaders for ostensibly inciting the incident through their impassioned labor speech.[62] In 1914, private guards hired by mine owners fired rounds of machine gun artillery into a tent camp in Ludlow, Colorado, occupied by workers and their families who had been evicted from their company-owned housing after striking for union recognition, murdering twenty-one people, including miners' wives and children.[63] In 1921, mine owners hired private planes to drop bombs on striking workers marching towards a jail in Mingo County, West Virginia, to release union leaders arrested after the Governor declared martial law.[64] In 1934,

'regulate subject to the limits imposed by a term or phrase that leaves agencies with flexibility.'" (quoting Loper Bright, 144 S. Ct. 2244, 2263 (2024)); Brief for the National Labor Relations Board at 8–10, Amazon.com Services, LLC v. NLRB, Nos. 24-1548, 24-1619, 2024 WL 4477316, at *9 (7th Cir. Apr. 8, 2024) ("The Court recently affirmed that it 'accept[s] the Board's legal conclusions unless they are irrational or inconsistent with the Act,' a standard of review that reflects the Court's 'respect for Congress's broad delegation of responsibility for developing national labor policy to the Board.'" (quoting Int'l Union of Operating Eng'rs v. NLRB, 109 F.4th 905, 915 (7th Cir. 2024))).

61. *Accord* Fred B. Jacob, *The National Labor Relations Act, the Major Questions Doctrine, and Labor Peace in the Modern Workplace*, 65 B.C. L. REV. 1381, 1440 n.365 (2024) (collecting scholarship); *id.* at 1439 ("The tradition of judicial deference to Board policy making recognizes Congress's acute awareness of the courts' pervasive hostility to labor from the post-industrial era through 1928's Norris-LaGuardia Act, which was recent history when Congress passed the NLRA in 1935. To avoid judicial intrusion on labor policy, Congress deliberately broke away from the judicial model that predated the Wagner Act, vesting an administrative agency, not the courts, with primary responsibility for developing a common labor law."); *see* Winter, *supra* note 4, at 59 n.5 ("The creation of the Board, therefore, may fairly be viewed as the result of congressional dissatisfaction with judicial lawmaking in the area of labor law.").

62. *See, e.g.*, PHILIP DRAY, THERE IS POWER IN A UNION 140–45 (2010).

63. *Id.* at 339–44.

64. JAMES GREEN, THE DEVIL IS HERE IN THESE HILLS 265–85 (2015).

longshoremen on the West Coast went on strike, again over union recognition, shutting down the ports, leading to the death of two strikers on a day deemed afterward as "Bloody Thursday," and resulting in a general strike involving 130,000 workers.[65]

State and federal courts abetted these actions through outright hostility to labor organizing.[66] Courts utilized injunctive power to crush labor activities as criminal and civil conspiracies.[67] Courts held that such organizing amounted to restraint of trade in violation of antitrust laws.[68] Courts enforced "yellow dog" contracts prohibiting employees from joining unions, and the Supreme Court repeatedly struck down legislative attempts to restrict these coercive agreements under *Lochner v. New York*'s free-market constitutional theory.[69] The Court stymied orders certifying representation election results under the NLRB's predecessor agencies.[70] And unions' contempt of these court orders—they had no other choice if they were to survive—gave owners and their municipal allies license to employ the machinery of government to bring down the hammer on peaceful labor activity. At this time, courts were as destructive to labor as management obstreperousness, if not more.[71]

In this shadow, and in the wake of widespread strike activity directed in substantial part toward union recognition, Congress enacted the NLRA in 1935.[72] The NLRA is a conflict-resolution statute. As the Supreme Court

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65. JEREMY BRECHER, STRIKE! 156–65 (50th anniversary ed. 2020); RONALD L. FILIPPELLI, ED., LABOR CONFLICT IN THE UNITED STATES: AN ENCYCLOPEDIA 458–61 (1990) (describing "Bloody Thursday").

66. *See generally* Anne Marie Lofaso, *The Persistence of Union Repression in an Era of Recognition*, 62 ME. L. REV. 199 (2010) (discussing the hostility of the Bush II Board to union activity).

67. HARRY A. MILLIS & EMILY CLARK BROWN, FROM THE WAGNER ACT TO TAFT-HARTLEY 7–19 (1950) (describing the use of courts in labor disputes); *see generally* FELIX FRANKFURTER & NATHAN GREENE, THE LABOR INJUNCTION (1930) (examining the role of courts and labor injunctions).

68. *See* Duplex Printing Press Co. v. Deering, 254 U.S. 443, 483–88 (1921); Loewe v. Lawlor, 208 U.S. 274, 308–09 (1908).

69. *See* Hitchman Coal & Coke Co. v. Mitchell, 245 U.S. 229, 251 (1917) ("This court repeatedly has held that the employer is as free to make non-membership in a union a condition of employment, as the working man is free to join the union, and that this is a part of the constitutional rights of personal liberty and private property, not to be taken away even by legislation, unless through some proper exercise of the paramount police power." (citing Adair v. United States, 208 U.S. 161, 174 (1908); Coppage v. Kansas, 236 U.S. 1, 14 (1915))).

70. *See* Am. Fed'n of Lab. v. NLRB, 308 U.S. 401, 410 (1940).

71. Starbucks Corp. v. McKinney, 144 S. Ct. 1570, 1581 (2024) (Jackson, J., dissenting in part) ("To put it bluntly, courts exercising their equitable discretion amidst labor disputes today do so against the backdrop of an ignominious history of abuse.") (citing FRANKFURTER & GREENE, *supra* note 67); *see generally* Nicholas M. Ohanesian, *Errors and Omissions: Applying Lessons from History to Decide the Future of Administrative Deference with Respect to the National Labor Relations Board*, 37 NOTRE DAME J. L., ETHICS & PUB. POL'Y ONLINE SUPP. 540 (2023) (discussing the Court's prohibition on picketing in Duplex Printing v. Deering, 254 U.S. 443 (1908)).

72. According to the Department of Labor, the two biggest causes of the almost 4,000 strikes in 1934 and 1935 were wages and representation, where employees struck to force employers to recognize their designated union as their exclusive representative. FLORENCE PETERSON, STRIKES IN THE UNITED STATES: BULLETIN NO. 651, 1880-1936 61–63 (U.S. Dep't of Lab.: Bureau of Lab. Stat. 1938), https://fraser.stlouisfed.org/files/docs/publications/bls/bls_0651_1938.pdf; *see also* Jacob, *supra* note 61, at 1387 n. 31 (noting that, in 1934, the United States experienced 1,856 strikes sidelining 1,466,695 workers, and in 1935, the year of the NLRA's passage, there were 2,014 strikes involving 1,117,213 workers).

recognized, in passing the Act, Congress "sought to find a broad solution, one that would bring industrial peace by substituting, so far as its power could reach, the rights of workers to self-organization and collective bargaining for the industrial strife which prevails where these rights are not effectively established."[73] The first words of the Act make Congress's intent clear: This is a law about preventing "industrial strife or unrest."[74]

The NLRA guarantees American workers the right to join a union and establishes a system of industrial democracy supported by the muscle of the federal government. The Act declares it "the policy of the United States to . . . encourag[e] the practice and procedure of collective bargaining" and to "protect[] 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."[75] The NLRA's core is Section 7, which guarantees that "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities."[76] It protects those rights in two significant ways. First, it makes unlawful certain unfair labor practices, including employer discrimination against workers for engaging in union activity, refusal to bargain in good faith with a union selected by employees, and interference with employees' Section 7 rights.[77] Second, it creates a process for securing industrial democracy by majority rule, empowering the Board to conduct elections for employees in appropriate bargaining units to select union representation.[78]

To accomplish this mission, Congress established the Board as a primarily adjudicative agency.[79] The Board's proceedings are arbitral in nature, designed to resolve workplace strife quickly, which it typically does through settlement.

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73. NLRB v. Hearst Publ'ns, 322 U.S. 111, 125 (1944); *see also* Douglas H. Ginsburg, *Appellate Courts and Independent Experts*, 60 CASE W. RSRV. L. REV. 303, 318 (2010) ("The genius of the Act was to proceduralize what theretofore had been violent labor disputes, getting them out of the streets, literally, and into hearing rooms where the parties could tell their stories and let their lawyers do their fighting for them.").

74. 29 U.S.C. § 151 ("The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce . . . ."); Tropicana Prods., Inc., 122 NLRB No. 29, 123 (1958) ("The Board's overriding function is to carry out the policies of the Act in order to minimize industrial strife which interferes with the normal flow of commerce.").

75. 29 U.S.C. § 151.

76. 29 U.S.C. § 157.

77. 29 U.S.C. § 158.

78. 29 U.S.C. § 159.

79. 29 U.S.C. § 153; *see* Ida Klaus, *The Taft-Hartley Experiment in Separation of NLRB Functions*, 11 INDUS. LAB. RELS. REV. 372, 378 (1957) (explaining that when Congress amended the Act in 1947 it intended for the Board "to act solely in a quasi-judicial capacity, deciding only those cases which were brought to it by the General Counsel").

Alternatively, if a dispute proceeds to adversarial litigation, it is resolved through administrative law judge hearings, not bound by the formal rules of evidence and civil procedure.[80] As originally enacted in 1935, the Act gave the Board control over both prosecution and adjudication, and the Board conducted its own economic research to support its policymaking agenda.[81] In 1947, however, Congress restructured the Board to focus primarily on its adjudicative function by operating more like a court, and it transferred prosecutorial authority to an independent General Counsel.[82] This primarily adjudicative mission—along with three significant amendments to the Act that expanded the Board's jurisdiction—has remained constant since 1947.[83]

Congress directed the Board to bring individual and institutional expertise to its adjudicative mission, consistent with the New Deal vision of the expert administrative agency.[84] In the New Deal era and immediately thereafter, judges, practitioners, and academics viewed industrial relations as a technical field, a new discipline arising out of modern problems requiring expert problem-solving.[85] That Board member appointments have become more partisan over the years[86] does not detract from the fact that a Board appointment is often the capstone of an illustrious career.[87] Nor does it diminish modern

80. 29 U.S.C. § 160(c).

81. *See* John E. Higgins, Jr., *Labor Czars—Commissars—Keeping Women in the Kitchen—the Purpose and Effects of the Administrative Changes Made by Taft-Hartley*, 47 CATH. L. REV. 941, 951–52 (1998); Hiba Hafiz, *Economic Analysis in Labor Regulation*, 2017 WISC. L. REV. 1115, 1119 (2018); Klaus, *supra* note 79, at 372–74.

82. Section 3(d) of the Act creates a General Counsel of the Board, also appointed by the President and confirmed by the Senate, who possesses final authority to investigate unfair labor practices, issue complaints, and prosecute unfair labor practices before the Board. 29 U.S.C. § 153(d); *see* Jacob, *supra* note 61, at 1389 n.45; Klaus, *supra* note 79, at 378.

83. MILLIS & BROWN, *supra* note 67, at 409, 411–16; *see* Jacob, *supra* note 61, at 1436 n.343 (observing that Representative Hartley described the effect of his law as "radically" altering the Board into "a semijudicial body charged with the responsibility of administering, enforcing, and interpreting" the Act (quoting FRED A. HARTLEY, JR., OUR NEW NATIONAL LABOR POLICY 139 (1948))); *see also* Higgins, *supra* note 81, at 960 ("One of the first acts of business for the new Board was to structure it along the quasi-judicial lines mandated by the Taft-Hartley Act.").

84. James O. Freedman, *Expertise and the Administrative Process*, 28 ADMIN. L. REV. 363, 364 (1976) (discussing expert administrative agencies, in that "[t]hose who rationalized the New Deal's regulatory initiatives regarded expertise and specialization as the particular strengths of the administrative process").

85. *See* RONALD W. SCHATZ, THE LABOR BOARD CREW: REMAKING WORKER-EMPLOYER RELATIONS xi (Univ. of Ill. ed. 2021) (noting that, in addition to the Cornell School of Industrial Relations, "[m]any other universities also created industrial relations programs in the 1940s," as it was "that era's equivalent of the black studies and women's studies programs of the late 1960s and 1970s and environmental studies, feminist, queer and sexuality studies, and ethnic studies programs today: interdisciplinary programs that challenged traditional academic opinions and attracted students eager to change the world.").

86. *See* Joan Flynn, *A Quiet Revolution at the Labor Board: The Transformation of the NLRB, 1935–2000*, 61 OHIO ST. L.J. 1361, 1363 (2000).

87. *See Board Members Since 1935*, NAT'L LAB. RELS. BD.: ABOUT NLRB, https://www.nlrb.gov/about-nlrb/who-we-are/board/board-members-1935 (containing biographies of Board Members Wilma B. Liebman (D), Craig Becker (D), Mark G. Pearce (D), Brian Hayes (R), Sharon Block (D), Terence F. Flynn (R), Nancy J. Schiffer (D), Kent Y. Hirozawa (D), Philip A. Miscimarra (R), Harry I. Johnson, III (R), Lauren McFerran (D), Marvin E. Kaplan (R), William J. Emanuel (R), John F. Ring (R), Gwynne A. Wilcox (D), and David M. Prouty (D)) (last visited Jan. 2, 2025).

Board Members' depth of knowledge in traditional labor law at the time of their appointments, which typically reflects decades of labor or management representation in all facets of industrial relations.[88] The Board's career staff bolsters the Members' individual wisdom; as Professor James Freedman noted, it is "the experience and specialization of a large and dedicated staff that has permitted agencies to channel the diverse expertise of many individuals into the process of institutional decisionmaking—one of the unique contributions of the modern administrative process."[89] The Board is thus specially positioned to resolve conflicts between labor and management, consistent with the Act's broad statutory prescriptions.

Due to the history of judicial hostility to labor organizing, Congress stripped the federal courts entirely of jurisdiction to issue labor injunctions in the 1932 Norris-LaGuardia Act,[90] and it took a similar path with the NLRB three years later. Confirming its desire to minimize the courts' role, Congress employed statutory language granting courts only limited review over NLRB common law. The Act's judicial review provision allows the courts only "to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the [unfair labor practice] order of the Board."[91] It denied direct review of Board orders in representation cases.[92] This is not the language Congress uses when it desires to confer plenary judicial review power.[93]

B. THE NLRB: BUILDING A COMMON LAW OF LABOR RELATIONS

Congress drew on a centuries-old tradition of judge-made common law when it created the National Labor Relations Board and then doubled down on the model as it amended the Act over the twentieth century.[94] Common law differs from the statutory interpretation and textual analyses that *Loper Bright* and *Chevron* primarily address. It embraces an equity tradition, empowering adjudicators to build a body of law based on the continuous examination of individual disputes. Developing common law is inherently a fact-bound inquiry, and it is impossible to divorce it from the patterns of conflict from which each

88. *Id.*

89. Freedman, *supra* note 84, at 376.

90. 29 U.S.C. § 102 (originally enacted as 47 Stat. 70 (1932)).

91. 29 U.S.C. §§ 160(e)–(f).

92. Am. Fed'n of Lab. v. NLRB, 308 U.S. 401, 411 (1940).

93. *See* Jacob, *supra* note 61, at 1439 n.362 (citing Garner v. Teamsters Union, 346 U.S. 485, 490–91 (1953) (conceding that Congress "confide[d] primary interpretation and application of [the NLRA] to a specific and specially constituted tribunal" and "prohibit[ed] federal courts from intervening in such cases, except by way of review or on application of the federal Board"), and comparing the expansive language granting plenary review in the Administrative Procedure Act, 5 U.S.C. § 702, and the statute granting federal question jurisdiction, 28 U.S.C. § 1331, to the Act).

94. Demag v. Better Power Equip., Inc., 102 A.3d 1101, 1110 (Vt. 2014) ("[M]aintenance and modernization of the common law is [the court's] responsibility until and unless the Legislature decides otherwise.").

case arose. It applies retrospectively and imposes few proscriptive duties on parties outside the immediate dispute.

It is no accident that in constructing the Wagner Act, along with its Taft-Hartley successor, Congress chose adjudication to secure labor peace during turbulent industrial strife. Senator Wagner and his cohort came of age in "a legal system dominated by the common law, divined by courts," as then-Professor Guido Calabresi wrote in 1982.[95] Although the Board was part of the "statutorification" of American law,[96] Congress erected a labor relations program that mimicked common law,[97] drawing from a host of successful antecedents to support its new program for labor dispute resolution. A straight line runs from these sources—the common law, labor arbitration, and prior federal experiments in labor dispute resolution—to the National Labor Relations Act. In the Act, Congress alchemically combined rights-based policy and common law adjudicative process into the NLRB. The Board was designed to resolve disputes on a case-by-case basis and construct a labor law precedent based on cumulative factfinding and institutional expertise, all with limited judicial review.

1. The Common Law Tradition

Common law judges make law one case at a time.[98] In traditional English and American common law, judges repeatedly confronted identical fact patterns

95. GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 1 (1982); *id.* (describing an "orgy of statute making" in the early twentieth century (quoting GRANT GILMORE, THE AGES OF AMERICAN LAW 95 (1977))); Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 527 (1947) (noting that, given the proliferation of statutes in the first half of the twentieth century, "[i]t is . . . accurate to say that courts have ceased to be the primary makers of law in the sense in which they 'legislated' the common law. It is certainly true of the Supreme Court that almost every case has a statute at its heart or close to it.").

96. CALABRESI, *supra* note 95 (noting the "fundamental change" in the American legal system "in which statutes, enacted by legislatures, have become the primary source of law").

97. Cass Sunstein, *Beyond* Marbury: *The Executive's Power To Say What the Law Is*, 115 YALE L.J. 2580, 2593 (2006) (observing that "[a]gency-made common law dominated the early days of the administrative state"); *id.* ("To take just one example, the NLRB was required to decide a number of fundamental questions about national labor policy. The [Act] did not speak plainly, and . . . the elaboration of the labor enactments of the New Deal was inevitably founded on the work of the NLRB" even as "the federal courts . . . played a significant and sometimes aggressive role . . . .").

98. H. PATRICK GLENN, LEGAL TRADITIONS OF THE WORLD: SUSTAINABLE DIVERSITY IN LAW 258 (2014) (noting that "the nineteenth century saw [an] important idea[] emerge, that of judges actually making law (and binding law at that)"); Joseph Dainow, *The Civil Law and the Common Law: Some Points of Comparison*, 15 AM. J. COMP. L. 419, 426 (1967) (explaining that, under "common law, the decisions are themselves the source of law and 'make' law 'from the whole cloth'"); Charles E. Carpenter, *Court Decisions and the Common Law*, 17 COLUM. L. REV. 593, 593–96 (1917) ("[T]he orthodox common law theory of pre-existent law does not accord with the facts of the law's origin and growth."); HOLMES, *supra* note 20 ("The law embodies the story of a nation's development through many centuries."); *see also* ANTONIN SCALIA, *Common Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 6 (Amy Gutmann ed., 1997) ("Common-law courts performed two functions: One was to apply the law to the facts. All adjudicators—French judges, arbitrators, even baseball umpires and football referees—do that. But the second function, and the more important one, was to *make* the law.") (emphasis in original).

in cases for nearly a millennium. As Professor Charles Carpenter observed over a century ago, "[w]ith the development of the concept of equality and justice, the similarity of essential facts was observed in the earlier cases and made the basis of a formulated rule to serve as a guide for future cases."[99] Like folklore, these rules embedded themselves in English legal culture. They were passed down through generations to descendent jurists through the bar and Inns of Court, which taught these rules as foundational legal principles to resolve interpersonal conflicts over land, business, personal injury, and crime.[100] They brought these rules, as needed, to the United States as the new country built a legal framework grounded in the Anglo-legal tradition.[101]

Of course, as time and society evolved, cases arose that didn't fit nicely into extant common law precedent. So, the judges made new rules to fit the new facts.[102] One common law court expressed it this way: "The fact that no case remotely resembling the one at issue is uncovered does not paralyze the common-law system, which is endowed with judicial inventiveness to meet new situations."[103] With the doctrine of *stare decisis* as a ballast, but not an inviolable one, the common law evolves like the improv game "yes, and," in which each player accepts their predecessor's contribution and builds on it, all to craft a coherent legal story.[104] In developing appropriate new precedents, judges rely on contemporaneous logic, community custom, and equity.[105] As Justice Oliver Wendell Holmes wrote in *The Common Law*: "The felt necessities of the time,

99. Carpenter, *supra* note 98, at 595.

100. Dainow, *supra* note 98, at 429.

101. Van Ness v. Pacard, 27 U.S. 137, 144 (1829) ("The common law of England is not to be taken in all respects to be that of America. Our ancestors brought with them its general principles, and claimed it as their birthright; but they brought with them and adopted only that portion which was applicable to their situation."); Letter from John Marshall to St. George Tucker (Nov. 27, 1800), *reprinted in* Stewart Jay, *Origins of Federal Common Law: Part Two*, 133 U. PA. L. REV. 1231, 1327 (1985) ("My own opinion is that our ancestors brought with them the laws of England both statute & common law as existing at the settlement of each colony, so far as they were applicable to our situation.").

102. *See, e.g.*, RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 22–31 (1977).

103. Beech Grove Inv. Co. v. C.R. Comm'n, 157 N.W.2d 213, 224 (Mich. 1968).

104. *Yes, and…*, WIKIPEDIA, https://en.wikipedia.org/wiki/Yes,_and. . . (last updated July 22, 2025) ("'Yes, and…', also referred to as 'Yes, and…' thinking, is a rule-of-thumb in improvisational comedy that suggests that an improviser should accept what another improviser has stated ('yes') and then expand on that line of thinking ('and')."). Or, as Justice Scalia observed, "the common law grew . . . rather like a Scrabble board. No rule of decision previously announced could be *erased*, but qualifications could be *added* to it." SCALIA, *supra* note 98, at 8. *See also* Anne E. Ralph, *Narrative-Erasing Procedure*, 18 NEV. L.J. 573, 585 (2018) ("Ronald Dworkin compares judges deciding cases and writing in the common law tradition to the position of 'chain novelists,' an artificial literary genre made up of 'a group of novelists writ[ing] a novel seriatim': '[E]ach novelist in the chain interprets the chapters he has been given in order to write a new chapter, which is then added to what the next novelist receives, and so on.'" (quoting RONALD DWORKIN, LAW'S EMPIRE 229 (1986))).

105. *See* Senna v. Florimont, 958 A.2d 427, 440 (N.J. 2008) ("In judging how to apply the common law to new circumstances, generally, we consider principles of fairness and public policy and the social realities of the day."); *see also* WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND: BOOK THE FIRST 68 (Harper & Bros. Pub., 1st ed. 1857) ("For the authority of [the common law] rests entirely upon general reception and usage . . . that it hath been always the custom to observe it."); *id.* at 10 ("The common law of England has fared like other venerable edifices of antiquity, which rash and inexperienced workmen have ventured to new-dress and refine, with all the rage of modern improvement."); Carpenter, *supra* note 98, at 596.

the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed."[106] In modern systems, courts may draw from legislatively enacted public policy to inform common law development.[107] Those rules become part of the fabric of the law. Through this iterative process, the common law reflects "the *accumulated* expressions of . . . judicial tribunals in their efforts to ascertain what is right and just," as the Supreme Court has explained in the context of traditional common law[108] and in relation to the NLRB itself.[109]

Common law is particularly adept at the development of conflict resolution principles.[110] Common law is nimble; it responds to contemporary norms, personal values, modern morality, and emerging industrial practices; it holds out equity as a preeminent value.[111] Its expertise is grounded. It comes from the adjudicative hive-mind's collective expertise, as earned by review of innumerable factually similar cases and identification of similarities and distinctions, drawing inferences from those fact patterns. With that epistemic certainty, common law constructs rules to resolve individual disputes in line with modern public policy. Moreover, as scholars have recognized, the common law

106. Holmes, *supra* note 20.

107. Beech Grove Inv., 157 N.W.2d 213, 224–25 (Mich. 1968) ("[T]he social and economic mutations need not be purely evolutionary changes in customs, usages, and industrial practices; they may spring from legislation which has given direction to our social development, though in the beginning such enactments were not designed to supplant the common law outside the range of their specific application. Statutes, including those of recent origin, play a part in the formation of the common law, and like court decisions that are not strictly analogous, sometimes point the way into other territory when the animating principle is used as a guide.'"); *see also* Bailey v. Scott-Gallaher, Inc., 480 S.E.2d 502, 504 (Va. 1997) (finding exception to common law presumption of at-will employment for tortious discharge in violation of state public policy against racial discrimination in employment, based on policy embraced in Virginia Human Rights Act).

108. Kansas v. Colorado, 206 U.S. 46, 97 (1907) (emphasis added); *see also* 15A C.J.S. Common Law § 1 ("Common law is the collection of judicially crafted principles, developed in the crucible of the adversarial process . . . ."); Hous. Fin. & Dev. Corp. v. Ferguson, 979 P.2d 1107, 1115–16 (Haw. 1999) (explaining that, "'[t]he common law,' after all, is not limited to published judicial precedent, but includes the entire wealth of received tradition and usage, 'fundamental principles, modes of reasoning, and the substance of its rules as illustrated by the reasons on which they are based, rather than the mere words in which they are expressed.'" (quoting Territory v. Alford, 39 Haw. 460, 466 (1952))).

109. NLRB v. Seven-Up Bottling Co. of Mia., 344 U.S. 344, 349 (1953) (explaining that the Board's "competence could not be exercised if in fashioning remedies the administrative agency were restricted to considering only what was before it in a single proceeding").

110. VIVIENNE O'CONNOR, INTERNATIONAL NETWORK TO PROMOTE THE RULE OF LAW, COMMON LAW AND CIVIL LAW TRADITIONS, at 13–14 (2012) (noting that common law "look[s] more to the solution of concrete problems than the construction of grand general principles" (quoting Christie Warren, *Introduction to the Major Legal Systems* 20 (2005) (unpublished manucript) (on file with the US Institute of Peace))).

111. Price v. High Pointe Oil Co., 828 N.W.2d 660, 663–64 (Mich. 2013) ("The common law is always a work in progress and typically develops incrementally, i.e., gradually evolving as individual disputes are decided and existing common-law rules are considered and sometimes adapted to current needs in light of changing times and circumstances."); *see also* Beech Grove Inv. Co. v. C.R. Comm'n, 157 N.W.2d 213, 224–25 (Mich. 1968) ("It is generally agreed that two of the most significant features of the common law are: (1) its capacity for growth and (2) its capacity to reflect the public policy of a given era.").

provides more efficient policymaking and legal predictability than regulatory or statutory methods.[112]

2. Common Law Labor Dispute Resolution in the Pre-Wagner Act Era

The NLRA represents a vision of dispute resolution and law creation rooted in the common law era. At its heart, labor law is about conflict—over wages, over hours, over safety—but mainly over the surrender of capital to the workers that fuel its engine.[113] The conundrum has been how to channel this strife away from work stoppages, property destruction, and violence, and towards peaceful means of resolution. Over seven decades, an adjudicative approach to achieving labor peace congealed, employing common law tools of value, equity, and morality—first to resolve private conflicts and then to materialize the Act's public rights. Labor peace depended on labor relations experts recognizing behavior patterns and establishing rules to govern future action.

a. Labor Arbitration and the Industrial Common Law of the Shop

Arbitration is a means of voluntary dispute resolution, in which parties agree to abide by a neutral arbiter's final and binding ruling.[114] "[A]rbitration is the substitute for industrial strife."[115] American labor arbitration found its purchase in the mid-nineteenth century, amid violent strikes that tore apart local communities and disrupted their economies. One historian described it as the "middle class panacea" for nineteenth-century labor disputes.[116] By the early twentieth century, grievance procedures culminating in binding arbitration resolved by a single neutral or a tripartite board (consisting of labor,

112. *See, e.g.*, Paul H. Rubin, *Why Is the Common Law Efficient?*, 6 J. LEGAL STUD. 51, 61 (1977) (agreeing with Professor Richard Posner that settlement and litigation incentives create economic efficiencies in the development of the common law); Frank B. Cross, *Identifying the Virtues of the Common Law*, 15 SUP. CT. ECON. REV. 21, 52–57 (2007) (analyzing theories of common law superiority and concluding that common law regimes provide for more legal predictability and judicial independence); *see generally* RICHARD POSNER, ECONOMIC ANALYSIS OF LAW (1972) (discussing the various theoretical and empirical methods of economics that overlap with other issues in the common law).

113. *See* Desirée LeClercq, *Labor Strife and Peace*, 15 U.C. IRVINE L. REV. 216, 224–31 (2024) (describing strife as a necessary component of labor action).

114. *See* Edna Asper Elkouri & Frank Elkouri, *Chapter 1. Arbitration and Its Setting*, *in* ELKOURI & ELKOURI: HOW ARBITRATION WORKS CH. 1, §1.1 (Elizabeth J. Fabrizio ed., 2021) (ebook) ("Arbitration, to use the words of one writer, is a 'simple proceeding voluntarily chosen by parties who want a dispute determined by an impartial judge of their own mutual selection, whose decision, based on the merits of the case, they agree in advance to accept as final and binding.'") (quoting Matthew N. Chappell, *Arbitrate . . . and Avoid Stomach Ulcers*, 2 ARB. MAG., Nos. 11–12, 1944, at 6, 7).

115. United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574, 578 (1960).

116. *See* Dennis R. Nolan & Roger I. Abrams, *American Labor Arbitration: The Early Year*s, 35 FLA. L. REV. 373, 379 (1983) [hereinafter Nolan & Abrams, *The Early Years*] (citing William E. Akin, *Arbitration and Labor Conflict: The Middle Class Panacea*, *1886-1900*, 29 HISTORIAN 565 (1967)).

management, and neutral representatives) were standard in collective bargaining agreements.[117]

While arbitration spans centuries and genres as a method of dispute resolution,[118] it holds a special place in labor relations and influenced the development of the Board as an administrative agency in two unique ways.[119] First, when management and labor agree to contractual grievance arbitration, they do so in the name of industrial peace. By operation of law, grievance arbitration is the *quid pro quo* for a no-strike promise.[120] Labor arbitration substitutes a quasi-legal process for explosive strife, resolving disputes large and small with a final and binding arbitral decision. In turn, labor need not employ work stoppages, its most potent and disruptive weapon. In a comparable manner, Congress established the Board to channel industrial strife to peaceful legal channels.

Second, labor arbitration influenced the Board's jurisprudential approach. Due to the ongoing nature of the parties' relationship, arbitrators interpreting a contract build "an industrial common law" of the shop.[121] The labor contract is a foundational document, a workplace constitution. Over a years-long relationship between a union and management, arbitrators interpret the agreement to resolve individual grievances, and their accumulated knowledge evolves into a body of precedent and practice to govern the parties' relationship. As the Supreme Court explained:

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117. *Id.* at 411–19; *see also* Dennis R. Nolan & Roger I. Abrams, *American Labor Arbitration: The Maturing Years*, 35 FLA. L. REV. 557, 558 (1983) (observing that, by 1941, "[a]rbitration was a widespread practice, with arbitration clauses found in two-thirds or more of all collective bargaining agreements").

118. *See* Elkouri & Elkouri, *supra* note 114 (describing incidents of arbitral activity dating back to the biblical era).

119. One groundbreaking arbitration agreement was described as having a tremendous "ideological influence on American industry" and as serving as a precursor to "contemporary institutions as the National Labor Relations Board, the Railway Mediation Board and even the War Labor Boards of both World Wars." Nolan & Abrams, *The Early Years*, *supra* note 116, at 393 n.109 (quoting BENJAMIN STOLBERG, TAILOR'S PROGRESS: THE STORY OF A FAMOUS UNION AND THE MEN WHO MADE IT 91 (1944)).

120. *See* Boys Markets, Inc. v. Retail Clerk's Union, Loc. 770, 398 U.S. 235, 248 (1970) (holding that "a no-strike obligation, express or implied, is the *quid pro quo* for an undertaking by the employer to submit grievance disputes to the process of arbitration"); Loc. 174 v. Lucas Flour Co., 369 U.S. 95, 105 (1962) (holding that "a strike to settle a dispute which a collective bargaining agreement provides shall be settled exclusively and finally by compulsory arbitration constitutes a violation of the agreement"); Textile Workers Union of Am. v. Lincoln Mills of Ala., 353 U.S. 448, 455 (1957) ("Plainly the agreement to arbitrate grievance disputes is the *quid pro quo* for an agreement not to strike.").

121. United Steelworkers of Am. v. Warrior & Gulf Nav. Co., 363 U.S. 574, 581–82 (1960) ("The labor arbitrator's source of law is not confined to the express provisions of the contract, as the industrial common law—the practices of the industry and the shop—is equally a part of the collective bargaining agreement although not expressed in it."); *see id.* at 579–80 ("Within the sphere of collective bargaining, the institutional characteristics and the governmental nature of the collective-bargaining process demand a common law of the shop which implements and furnishes the context of the agreement.") (quoting Archibald Cox, *Reflections Upon Labor Arbitration*, 72 HARV. L. REV. 1482, 1498–99 (1959)); *see also* Clyde W. Summers, *Labor Arbitration: A Private Process With a Public Function*, 34 REV. JUR. U.P.R. 477, 485 (1965) (discussing the significant role that the common law of the shop plays in serving industrial justice).

> The collective bargaining agreement states the rights and duties of the parties. It is more than a contract; it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate. . . . The collective agreement covers the whole employment relationship. It calls into being a new common law—the common law of a particular industry or of a particular plant.[122]

Arbitral law is thus based on experience and values inherent to each workplace.[123] Like the common law, the law of the shop speedily resolves disputes based on inherited communal norms, with the credibility that constituent buy-in lends. Due to these interests, the Supreme Court has clarified that judicial review of arbitral decisions is extremely limited.[124] We contend that review of NLRB decisions should be as well.

b. The Feds Get In on the Act: Federal Precursors to the NLRB Continue the Common Law Approach

Building on the success of labor arbitration, three significant federal experiments helped pave the way for the National Labor Relations Act—the World War I War Labor Board ("WLB"), the New Deal's National Labor Board ("NLB"), and its successor, the "Old" National Labor Relations Board ("Old NLRB"). As with contract arbitration, these agencies found success in limiting labor strife through common law construction, which Congress built into the Board's DNA.

Arising out of national crises, the three labor boards that preceded the NLRB were creatures of executive action designed to resolve industrial strife and ensure economic harmony. Akin to labor arbitration's collective bargaining agreement, the three boards built a common law of labor relations from a foundational legal document designed to encourage industrial peace by protecting concerted action and collective bargaining. President Wilson's 1918 executive order establishing the World War I War Labor Board guaranteed

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122. *Warrior & Gulf Nav. Co*., 363 U.S. at 578–79 (internal citations omitted).

123. *Id.* at 582 ("The labor arbitrator is usually chosen because of the parties' confidence in his knowledge of the common law of the shop and their trust in his personal judgment to bring to bear considerations which are not expressed in the contract as criteria for judgment."); United Steelworkers of Am. v. Enter. Wheel & Car Corp., 363 U.S. 593, 597 (1960) ("[A]n arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement.").

124. United Steelworkers of Am. v. Am. Mfg. Co., 363 U.S. 564, 567–68 (1960) ("The function of the court is very limited when the parties have agreed to submit all questions of contract interpretation to the arbitrator."); *Warrior & Gulf Nav. Co*., 363 U.S. at 585 (noting that "[t]he judiciary sits in these cases to bring into operation an arbitral process which substitutes a regime of peaceful settlement for the older regime of industrial conflict. Whether contracting out in the present case violated the agreement is the question. It is a question for the arbiter, not for the courts."); *see generally* David L. Gregory, Michael K. Zitelli & Christina E. Papadopoulos, *The Fiftieth Anniversary of the* Steelworkers Trilogy*: Some Reflections on Judicial Review of Labor-Arbitration Decisions—Will Gold Turn to Rust?*, 60 CATH. U. L. REV. 47, 48 (2010) ("The Court made it very difficult, albeit not impossible, for those challenging adverse arbitration results to subsequently persuade federal courts to set aside labor-arbitration decisions rendered in conformance with *Trilogy* principles.").

workers' rights to organize and bargain collectively, prohibited antiunion discrimination,[125] and banned strikes and lockouts.[126] Section 7(a) of President Franklin Roosevelt's 1933 National Industrial Recovery Act ("NIRA")[127] guaranteed employees "the right to organize and bargain collectively through representatives of their own choosing" and to "be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."[128] These guarantees provided a lodestar to frame the boards' dispute resolution efforts.

Applying labor policy through the fact-intensive prism of a quasi-arbitral process—investigation, hearing, decision—the WLB built a body of labor law one case at a time during the Great War. Taking the simple prohibition on interference with employees' right to organize, the WLB prohibited interrogation and surveillance of union activities,[129] banned company unions,[130] and permitted employees to wear union buttons "even while . . . on duty."[131] Interpreting the prohibition on antiunion discrimination, the WLB ordered reinstatement with backpay for antiunion conduct,[132] guaranteed reemployment after participating in a strike,[133] and banned yellow dog contracts.[134] The Board required collective bargaining with groups of employees, even if it did not require employers to bargain with the union directly,[135] and set forth subjects of bargaining.[136]

125. U.S. DEP'T OF LAB., *Principles and Policies to Govern Relations Between Workers and Employers in War Industries for the Duration of the War*, *in* NATIONAL WAR LABOR BOARD: LABOR AS AFFECTED BY THE WAR SERIES–A HISTORY OF ITS FORMATION AND ACTIVITIES, TOGETHER WITH ITS AWARDS AND THE DOCUMENTS OF IMPORTANCE IN THE RECORD OF ITS DEVELOPMENT, BULLETIN NO. 287, H.R. Doc. 269, 67th Cong., 2d Sess., at 32 (1921) (hereinafter "NATIONAL WAR LABOR BOARD: A HISTORY"); *see also* HARRY A. MILLIS & EMILY CLARK BROWN, FROM THE WAGNER ACT TO TAFT-HARTLEY 16 (1950) (noting that the Board's "agreed-upon statement of principles and policies provided that there should be no strikes or lockouts and that the right of workers to organize and bargain collectively was not to be denied or interfered with" and that "employers were not to engage in discrimination").

126. NATIONAL WAR LABOR BOARD: A HISTORY, *supra* note 125.

127. National Industrial Recovery Act, Pub. L. No. 67, § 7(a), 48 Stat. 195, 198 (1933), *declared unconstitutional in*, A.L.A. Schechter Poultry Corp. v. U.S., 295 U.S. 495 (1935).

128. *Id.* at 198–99 (providing that employees had no obligation to join company unions, and they had the right to refrain from joining any union but one of their own choosing).

129. NATIONAL WAR LABOR BOARD: A HISTORY, *supra* note 125, at 55.

130. *Id.* at 54–55.

131. *Id.* at 55.

132. *Id.* at 53–54 (collecting awards).

133. *Id.* at 54.

134. *Id.*

135. *Id.* at 56–57.

136. *Id.* at 62–64.

Like the WLB, the NLB, which administered NIRA Section 7(a),[137] quickly found itself responsible for fashioning legal principles[138] to resolve the underlying conflicts that led to industrial strife during the Great Depression, even though it believed its function to be "primarily that of mediation."[139] As such, the NLB transformed from an agency concerned with adjusting individual labor disputes into a quasi-judicial body concerned with broad statutory policy. In pursuit of this duty, the NLB began holding hearings, crafting written decisions, and issuing precedential orders directing parties to resolve their disputes.[140] In carrying out its Presidential mandate, the NLB was forced to deal with a myriad of conflicts that led to labor strife, establishing basic principles of labor law that would carry over into the National Labor Relations Act.[141]

Having learned the lessons of the WLB and NLB, President Roosevelt created the NLB's successor in 1934, a temporary executive agency—now blessed by Congress to enforce NIRA Section 7(a)—that he called the National Labor Relations Board.[142] The Executive Order charged the Old NLRB with investigating issues arising out of potential breaches of Section 7(a) that interfere with the free flow of interstate commerce, conducting representation elections to determine union preference, seeking judicial enforcement of representation orders, and adjudicating complaints of discrimination, discharge, or other violations of Section 7(a).[143] In contrast to the NLB, the Old NLRB did not mediate labor disputes, it adjudicated them.[144] Firmly in an adjudicative role, the Old NLRB continued to develop a common law of federal labor relations to eliminate strike activity and other barriers to the free flow of interstate commerce.[145] "In its decisions[,] [the Old] NLRB carved the details into the

137. National Industrial Recovery Act, Pub. L. No. 67, § 7(a), 48 Stat. 195, 198 (1933), *declared unconstitutional in*, A.L.A. Schechter Poultry Corp. v. U.S., 295 U.S. 495 (1935).

138. *Id.* at 198–99 (guaranteeing that "employees shall have the right to organize and bargain collectively through representatives of their own choosing, and shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection").

139. S. Dresner & Son, 1 NLB 26, 26 (1934). As pre-eminent NLRB scholar Professor James A. Gross observed, the NLB "chose to decide policy questions only as a last resort and then only on a case-by-case basis in dealing with actual controversies." JAMES A. GROSS, THE MAKING OF THE NATIONAL LABOR RELATIONS BOARD 33 (1974) (ebook) (citations omitted).

140. *See* Jacob, *supra* note 61, at 1432 n.321.

141. *See id.* (describing the NLB's establishment of the principle of majority rule, anti-discrimination law, company unions, duty to bargain, and the mechanics for conducting representation elections). President Roosevelt adopted the Board's actions in two executive orders. Exec. Order Nos. 6511 (Dec. 16, 1933), 6580 (Feb. 1, 1934), *reprinted in* DECISIONS OF THE NATIONAL LABOR BOARD, AUGUST 1933–MARCH 1934, VI–VII (U.S. Gov't Printing Off. 1934).

142. Exec. Order No. 6763 (June 29, 1934), *reprinted in* DECISIONS OF THE NATIONAL LABOR BOARD, DECEMBER 1, 1934–JUNE 16, 1935, VII–IX (U.S. Gov't Printing Off. 1935) (establishing the Old NLRB).

143. *Id.* at VII § 2.

144. GROSS, *supra* note 139, at 77 (explaining that the three members of the Old NLRB "determined to sit as judges and not to engage in mediation") (quoting Lloyd K. Garrison, *The National Labor Boards*, 184 ANNALS AM. ACAD. POL. SCI. 138, 140 (1936)).

145. IRVING BERNSTEIN, THE NEW DEAL COLLECTIVE BARGAINING POLICY 85 (1950).

rough slab of 'common law' passed on by NLB."[146] In further contrast to the NLB, the Old NLRB viewed its primary task as vindicating workers' statutory right to organize under Section 7(a).[147] Within six months, acting as a judicial body interpreting the broad language of Section 7(a), the Old NLRB had "yielded a unique body of authority on peacetime regulation of labor relations."[148] Yet, due to the federal courts' delays with the Old NLRB's orders, speedy recognition of employee rights was never achieved.[149]

C. CONGRESSIONAL DELEGATION AND JUDICIAL APPROVAL OF THE NLRB'S ITERATIVE CONSTRUCTION

The common law, labor arbitration, and three successful presidentially created labor dispute agencies set the stage for Congress's enactment of the National Labor Relations Act.[150] The Act combined the best elements of these prototypes—legal protection of workers' fundamental rights to organize, democratic processes to resolve questions concerning union representation by exclusive, majority rule, machinery to prosecute bad actors who interfere with those rights, and an adjudicative process that allows for common law style development of legal principles to guide parties' future actions.

The Act's broad language delegated significant authority to the Board to conduct representation elections and to police employer and union unfair labor practices. For representation matters, the Act empowers the Board to "decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof."[151] Further, the Act permits the Board to issue regulations governing the filing of election petitions and directs the Board to "investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists" to "provide for an appropriate hearing upon due notice."[152] Finally, "[i]f the Board finds upon the record of such hearing that such a question of representation exists," the Act requires the Board to "direct an election by secret ballot" and "certify the results thereof."[153] For the full gamut of unfair labor practices in Section 8 of the Act—such as interference with Section 7 rights, antiunion discrimination, failures to bargain

146. *Id.*

147. Note, *The Decisions of the National Labor Relations Board*, 48 HARV. L. REV. 549, 653 (1935); SECOND REPORT OF THE NATIONAL LABOR RELATIONS BOARD I (Sep. 26, 1934).

148. Note, *supra* note 147, at 630; Jacob, *supra* note 61, at 1432 n.322 (collecting decisions).

149. *See* GROSS, *supra* note 139, at 123–26; Am. Fed'n of Lab. v. NLRB, 308 U.S. 401, 409–10 (1940) ("The reports of the Congressional committees upon the bill which became the Wagner Act refer to the long delays in the procedure prescribed by Resolution 44, resulting from applications to the federal appellate courts for review of orders for elections.").

150. 29 U.S.C. §§ 151–69.

151. 29 U.S.C. § 159(b).

152. 29 U.S.C. § 159(c)(1)(B).

153. *Id.*

in good faith, or engaging in unlawful secondary strike activity—Congress broadly empowered the Board "to prevent any person from engaging in any unfair labor practice (listed in section 158 of this title) affecting commerce."[154] And it instructs the Board, upon finding an unfair labor practice, to issue an "order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter."[155]

With this text, the Act's drafters deliberately "broadened the NLRB's administrative discretion by employing general enabling language."[156] This "broaden[ed] . . . discretion" reflected Congress's delegations to the Board of wide-ranging power to administer the core provisions of the Act, a homage to the Board's judicial, arbitral, and federal common law antecedents.[157] Since the Wagner Act's enactment, the Supreme Court has repeatedly and explicitly acknowledged the scope of the Board's delegated authority. Some amuse-bouche exemplars:

- In 1941, affirming the Board's precedent that employers could not prevent union speech in nonworking areas on nonworking time, the Court noted that the Act "did not undertake the impossible task of specifying in precise and unmistakable language each incident which would constitute an unfair labor practice."[158] Rather, it "left to the Board the work of applying the Act's general prohibitory language [in Section 8(a)(1)] in the light of the infinite combinations of events which might be charged as violative of its terms."[159]
- That same year, in affirming the factors the Board developed to determine the composition of a bargaining unit under Section 9(b), the Court held that the Act constitutes a "delegation of authority" that "places upon the Board the responsibility of determining the appropriate group of employees for the bargaining unit."[160]
- In 1957, agreeing with the Board's approval of a multi-employer bargaining association's use of a temporary lockout to fight a union strike, the Court deemed "[t]he function of striking th[e] balance [between the right to strike and productive collective bargaining] to effectuate national labor policy . . . a difficult and delicate responsibility,

154. 29 U.S.C. § 160(a); 29 U.S.C. § 158 (delineating unfair labor practices for Board to police).

155. 29 U.S.C. § 160(c).

156. GROSS, *supra* note 139, at 133 (internal quotation omitted).

157. *See generally* Goodson, *supra* note 49, at 17 ("There are many . . . terms or phrases that convey similarly broad power of free decision or latitude of choice within certain legal bounds.").

158. Republic Aviation Corp. v. NLRB, 324 U.S. 793, 798 (1945). Indeed, Congress intended Section 8(a)(1) to serve as a "blanket prohibition . . . intended to perform a general policing function" and to "permit the [B]oard to prevent activities for which . . . experience provided no precedent." BERNSTEIN, *supra* note 145, at 94.

159. *Id.*

160. Pittsburgh Plate Glass Co. v. NLRB, 313 U.S. 146, 152 (1941).

which the Congress committed primarily to the National Labor Relations Board."[161]

- In 1979, in enforcing the Board's order that vending machine prices in company cafeterias were terms and conditions of employment, the Court observed that, under Section 8(a)(5) and 8(d) of the Act, "Congress made a conscious decision [in Taft-Hartley] to continue its delegation to the Board of the primary responsibility of marking out the scope of the statutory language and of the statutory duty to bargain."[162]
- In 1994, reviewing the Board's allocation of remedies for perjurious discriminatees, the Court reaffirmed that Congress made "an express delegation" to the Board of "the primary responsibility for making remedial decisions that best effectuate the policies of the Act when it has substantiated an unfair labor practice."[163]

Under these sorts of statutory delegations, the Board has defined the substance and contours of the Act.

This is *iterative construction*. It is *iterative* because, like its arbitral and federal predecessors, the Board executes its responsibility "to effectuate national labor policy"[164] like a common law court.[165] The Board relies on experience accumulated through intertemporal evaluation of industrial disputes and reasonable inferences drawn over time.[166] It analyzes history.[167] It considers

161. NLRB v. Truck Drivers Loc. Union No. 449, 353 U.S. 87, 96 (1957).

162. Ford Motor Co. v. NLRB, 441 U.S. 488, 496 (1979).

163. ABF Freight Sys., Inc. v. NLRB, 510 U.S. 317, 323–24 (1994).

164. *Truck Drivers Loc. Union No. 449*, 353 U.S. at 96.

165. *See* BERNSTEIN, *supra* note 145, at 95 (conveying that the NLRA's drafters hoped that the NLRB would develop significant labor policies on the duty to bargain "on a common law basis as its predecessors had under similar circumstances").

166. Republic Aviation Corp. v. NLRB, 324 U.S. 793, 800 (1945) ("One of the purposes which lead to the creation of such boards is to have decisions based upon evidential facts under the particular statute made by experienced officials with an adequate appreciation of the complexities of the subject which is entrusted to their administration."); F.W. Woolworth Co., 90 NLRB 289, 291–92 (1950) ("The cumulative experience of many years discloses that this form of remedial provision falls short of effectuating the basic purposes and policies of the Act. We have noted in numerous cases that employees, after having been unemployed for a lengthy period following their discriminatory discharges, have succeeded obtaining employment at higher wages than they would have earned in their original employments. This, under the Board's previous form of back-pay order, resulted in the progressive reduction or complete liquidation of back pay due."); NLRB v. Seven-Up Bottling Co. of Mia., 344 U.S. 344, 346 (1953) (affirming *F.W. Woolworth* quarterly calculation rule and holding that the Board's "[remedial] power, which is a broad discretionary one, is for the Board to wield, not for the courts. In fashioning remedies to undo the effects of violations of the Act, the Board must draw on enlightenment gained from experience."); *see also* NLRB. v. J. Weingarten, Inc., 420 U.S. 251, 265–66 (1975) ("The use by an administrative agency of the evolutional approach is particularly fitting."); *id.* at 266 ("'Cumulative experience' begets understanding and insight by which judgments . . . are validated or qualified or invalidated. The constant process of trial and error, on a wider and fuller scale than a single adversary litigation permits, differentiates perhaps more than anything else the administrative from the judicial process.'") (quoting *Seven-Up Bottling Co.*, 344 U.S. at 349)); Ralph, *supra* note 104, at 585–86 ("As judges write in the common-law tradition, legal rules and principles become refined through telling and re-telling, testing against new sets of facts, in a similar fashion to the way stories told and retold become powerful cultural master narrative.").

167. *See* Gen. Cable Corp., 139 NLRB 1123, 1124–25 (1962) (evaluating history of contract bar rule); *see also* Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 185–86 (1941) (affirming the Board's rule that the Act prohibits denial of employment to initial applicants as well as discrimination against current employees, noting

public policy, as set forth in the Act and other federal laws.[168] It eschews rigidity in favor of a nimble process aimed at reducing strife and protecting interstate commerce.[169] And it considers equity and the public interest.[170] As the Supreme Court recognized in assessing the Board's job, in words taken from Justice Holmes, "'[t]he Board was created for the purpose of using its judgment and its knowledge,'" and its "conclusions may 'express an intuition of experience which outruns analysis and sums up many unnamed and tangled impressions . . . '; and they are none the worse for it."[171]

It is *construction* because the Board's work focuses on giving the Act legal effect, not on construing its text. The "interpretation-construction distinction," as discussed above, is critical to understanding the Board's statutory discretion. Construction is *not* value neutral.[172] Construction is policymaking—it requires the adjudicator to employ normative values to implement vague language. As Professor Solum explained:

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that "[u]nlike mathematical symbols, the phrasing of such social legislation as this seldom attains more than approximate precision of definition. That is why all relevant aids are summoned to determine meaning. Of compelling consideration is the fact that words acquire scope and function from the history of events which they summarize.").

168. *See Phelps Dodge Corp.*, 313 U.S. at 188 ("Attainment of a great national policy through expert administration in collaboration with limited judicial review must not be confined within narrow canons for equitable relief deemed suitable by chancellors in ordinary private controversies. . . . To differentiate between discrimination in denying employment and in terminating it, would be a differentiation not only without substance but in defiance of that against which the prohibition of discrimination is directed."); *Gen. Cable Corp.*, 139 NLRB at 1125–26 (evaluating "recent developments in the labor movement, in Federal labor legislation, and in the labor law handed down by the Supreme Court" and "economic developments resulting from unemployment, the international setting, and technological changes"); *F.W. Woolworth*, 90 NLRB at 292 (discussing quarterly backpay periods, noting that "[t]he consequent desire of the victim of discrimination to recoup the maximum amount possible in order to offset such losses, even if this must be accomplished at the price of relinquishing the right to be returned to his former position, may readily be anticipated. The Board has viewed these results with concern because we, as well as the courts of review, have long regarded the remedy of reinstatement as one of the most effective measures expressly provided by the Act for expunging the effects of unfair labor practices and maintaining industrial peace.").

169. *See Republic Aviation*, 324 U.S. at 798 (noting the Board's broad authority to construe the Act's purpose, given that "a 'rigid scheme of remedies' is avoided and administrative flexibility within appropriate statutory limitations obtained to accomplish the dominant purpose of the legislation"); *Seven-Up Bottling Co*., 344 U.S. at 351–52 (affirming *F.W. Woolworth* and noting that Congress granted the Board in "the language of the statute . . . the discretionary power to mould remedies suited to practical needs" and to change them as it sees necessary); *J. Weingarten, Inc.*, 420 U.S. at 266 ("The responsibility to adapt the Act to changing patterns of industrial life is entrusted to the Board."); *Gen. Cable Corp.*, 139 NLRB at 1128 ("[W]e deem it more prudent administrative practice to apply our new 3-year rule at once to the proceedings now before us for decision.").

170. *See Gen. Cable Corp.*, 139 NLRB at 1125 (relying on strong public interest in extending the contract bar rule); *F.W. Woolworth*, 90 NLRB at 292–93 ("The public interest in discouraging obstacles to industrial peace requires that we seek to bring about, in unfair labor practice cases, 'a restoration of the situation, as nearly as possible, to that which would have obtained but for the illegal discrimination.'"); *cf. Phelps Dodge*, 313 U.S. at 198 (reversing Board on the duty to mitigate damages, noting that the Board must consider "the importance of taking fair account, in a civilized legal system, of every socially desirable factor in the final judgment").

171. *Seven-Up Bottling Co.*, 344 U.S. at 348 (1953) (quoting Chi., Burlington, & Quincy. Ry. Co. v. Babcock, 204 U.S. 585, 598 (1907)).

172. *Id.*

> [W]e might say that interpretation is "value neutral," or only "thinly normative." The correctness of an interpretation does not depend on our normative theories about what the law should be. But construction is not like interpretation in this regard—the production of legal rules cannot be "value neutral" because we cannot tell whether a construction is correct or incorrect without resort to legal norms. And legal norms, themselves, can only be justified by some kind of normative argument.[173]

The Board finds its normative values in Sections 1, 7, 8, 9, and 10 of the Act, its accumulated experience confronting and resolving countless labor disputes over the last ninety years, the facts found over that time, and the President's power to appoint individuals with simpatico beliefs to the Board. Construction is what common law judges do.

For an example of the interpretation-construction distinction in action, take the Board's power to determine the composition of bargaining units under Section 9(b) of the Act. Recall that Section 9(b) states that "[t]he Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof."[174] In 1950's *Morland Brothers Beverage Co.,* the Board employed a close reading of the statutory language and resorted to dictionary definitions in concluding that "[t]here is nothing in the statute which requires that the unit for bargaining be the *only* appropriate unit, or the *ultimate* unit, or the *most* appropriate unit; the Act requires only that the unit be 'appropriate.'"[175] This was a value-neutral interpretive exercise focused on using etymological and grammatical tools to ascertain the law's linguistic meaning.

In contrast, look at the hundreds of Board cases establishing rules governing the determination of appropriate bargaining units throughout the diffuse landscapes of American business.[176] As a single example, in 1947's *Garden State Hosiery Co.*, the Board considered "appropriate" bargaining units in the textile industry and the weight to be given to the extent of the union's organizing.[177] Figuring out the answer turned on the Act's preference for speedy resolution of representation cases; the application of factors requiring that "the

173. Solum, *supra* note 53, at 104; *see also* Charles H. Koch, FCC v. WNCN *Listeners Guild: An Old-Fashioned Remedy for What Ails Current Judicial Review Law*, 58 ADMIN. L. REV. 981, 987–88 (2006) ("In policymaking, agencies are not to parse language, delve into legislative history, or engage in the other interpretive strategies. Rather, they are to make permissible, but not mandated, judgments based on legislative facts developed for that purpose. Courts may not ignore Congress and take over this function by converting into interpretation. . . . [especially when] the policy expressed in the statute is inchoate, incomplete, or insufficiently specific and the agency must actually make policy, not just find it in the statutory language.").

174. 29 U.S.C. § 159(b).

175. 91 NLRB No. 58, 418 (1950); *accord* Am. Steel Const. Inc., 372 NLRB No. 23, 2022 WL 17974956, at *2–*3, nn.10–14 (2022) (collecting cases).

176. *See* NLRB, NATIONAL LABOR RELATIONS BOARD: AN OUTLINE OF LAW AND PROCEDURE IN REPRESENTATION CASES 185–212 (2025) (describing caselaw for determining appropriate units in nineteen different industries, including banking, construction, gaming, and funeral homes).

177. 74 NLRB 318, 320–21 (1947).

unit sought must itself be homogeneous, identifiable, and distinct," and a policy encouraging smaller bargaining units to give other employees "an opportunity to observe whether collective bargaining will work well or badly in the enterprise of which they are a part."[178] It did not implicate linguistic meaning, grammar, or other tools intended to divine the meaning of unclear text. Rather, it implicated policy considerations to develop, via adjudication, pragmatic and mission-related rules of conduct—*construction* work.

To be sure, the interpretation-construction line is not always clear. Empirical evidence, however, shows that the Board's statutory work primarily falls into the construction zone. Professor Amy Semet studied the Board's statutory methodology over twenty-four years of cases, coding all precedent-setting Board decisions issued between 1993 and 2017.[179] She built a dataset based on those decisions' use of eight tools: (1) analyses where the Board relies on text in subordinate or supportive part; (2) plain meaning (where text controls); (3) Latin/language canons; (4) substantive canons; (5) legislative history; (6) precedent; (7) policy; and (8) practical considerations.[180] Tools two through four provide utility in divining meaning from language; the final four help identify a statute's normative values and are hallmarks of common law construction. The first tool plays a hybrid role of using text to support a particular construction of the Act but not to divine meaning.

The value-divination tools dominate the Board's toolbox. The Board cites precedent in ninety-nine percent of cases; policy in eighty-four percent; practical considerations in fifty-seven percent; and legislative history in thirty percent.[181] In contrast, subordinate or supportive (not controlling) textual analysis appears in sixty-one percent of cases; Latin/language canons in thirty-six percent; substantive canons at fourteen percent; and plain text as a controlling factor at only six percent.[182] When isolated as the *primary* method of statutory analysis in a particular decision, Professor Semet's study demonstrates that precedent, policy/practical considerations, and legislative history are dispositive to the Board an overwhelming seventy-seven percent of the time, but textual analysis and plain language control in only a mere twenty-two percent of cases.[183] There is no statistically significant variation between Republican- and Democratic-dominated panels, either.[184] If you can figure out what carpenters are building

178. *Id.* at 322–25.

179. Amy Semet, *An Empirical Examination of Agency Statutory Interpretation*, 103 MINN. L. REV. 2255, 2282 (2019).

180. *Id.* at 2286, 2288.

181. *Id.* at 2289.

182. *Id.*

183. *Id.* at 2295 (finding that the Board employs as primary methods precedent in 35.7% of cases; policy in 39.3%; legislative history in 2.4%; text in 19.6%; and plain text in only 3%). Professor Semet cautions, however, that, due to dataset limitations, her study may "underestimate the extent to which the Board uses pure policymaking to guide statutory interpretations." *Id.* at 2284.

184. *Id.* at 2293.

from the tools they use, the Board's tools make clear that it's not *interpreting* the Act but *constructing* it.

This is what Congress wanted. Although the Board has the power to issue substantive regulations,[185] Congress directed the Board to use iterative construction as its primary means of policymaking,[186] and it knew that the process of developing standards through common law adjudication is evolutionary.[187] Rejecting the Board's delegated authority to iteratively construct policies under the Act would not only be a rejection of congressional intent but also of the English common law tradition.

III. THE BOARD'S ITERATIVE CONSTRUCTION OF THE NLRA FALLS OUTSIDE *LOPER BRIGHT*'S DOMAIN

For twenty-five years, "domain" literature has asked a common question about regimes of statutory review: When do they apply?[188] Because every legal rule that purports to offer categorical uniformity becomes pockmarked with exceptions, the domain literature has been instrumental in defining the contours of *Chevron*, *Skidmore*, and *West Virginia v. EPA*.[189] In *Loper Bright*, the Court purportedly flipped the *Chevron* script from a presumption of agency deference to *de novo* review, disempowering agencies and "stem[ming] the vast tide of federal agencies' overreach," according to some.[190] But this popular conception of *Loper Bright* doesn't accurately reflect its domain, certainly not over the Board.

The Court in *Loper Bright* left a pretty clear roadmap for a narrow domain over the NLRB. *Loper Bright* set forth four basic principles: (1) It is the

185. 29 U.S.C. § 156; Am. Hosp. Ass'n v. NLRB, 499 U.S. 606, 609–10 (1991).

186. *See supra* notes 79–82 and accompanying text (discussing Taft-Hartley Act amendments that focused the Board on a quasi-judicial mission).

187. NLRB v. Bell Aerospace Co. Div. of Textron, 416 U.S. 267, 294 (1974) (holding that, where "[i]t is doubtful whether any generalized standard could be framed which would have more than marginal utility," the Board "has reason to proceed with caution, developing its standards in a case-by-case manner with attention to the specific character of . . . each company"); Elec. Workers UE Loc. 761 v. NLRB, 366 U.S. 667, 674 (1961) ("The nature of the problem, as revealed by unfolding variant situations, inevitably involves an evolutionary process for its rational response, not a quick, definitive formula as a comprehensive answer."); *accord* SEC v. Chenery Corp., 332 U.S. 194, 202–03 (1947) ("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 lies primarily in the informed discretion of the administrative agency.").

188. Merrill & Hickman, *supra* note 18, at 835 ("To what sorts of statutes and what sorts of agency interpretations should the mandatory deference doctrine of *Chevron* apply? In other words, what exactly is *Chevron*'s domain?"); *accord* Phillips & Baumann, *supra* note 18, at 748 (asking "to what agency actions does [the major questions doctrine] apply and how does it interact with preexisting judicial precedent?"); Hickman & Nielson, *supra* note 18, at 936 (describing "*Chevron*'s domain" as "the contexts in which such deference is available"); *id.* at 936 n.29 (quoting Kent Barnett & Christopher J. Walker, Chevron *in the Circuit Courts*, 116 MICH. L. REV. 1, 4 (2017), which define's "*Chevron*'s domain" as "when *Chevron* applies in judicial review").

189. *See supra* note 18 (citing domain literature).

190. Press Release, Virginia Foxx, Chairwoman, House Committee on Education & the Workforce, Chair Foxx Promises Robust Oversight if Biden Admin Fails to Heed the Limits Placed on its Authority Following Chevron Reversal (July 11, 2024) (emphasis added), https://edworkforce.house.gov/news/documentsingle.aspx?DocumentID=411794 (documenting letters to agency leaders on *Loper Bright*).

judiciary's role under the APA to interpret statutes *de novo* (with appropriate *Skidmore* weight for agency interpretations); (2) statutory ambiguity does not constitute an implicit delegation of binding interpretive authority to an agency; but (3) Congress may delegate an agency authority to give meaning to an ambiguous statutory term, to "fill up the details' of a statutory scheme," or grant agencies "flexibility"; and (4) when it does, the APA's "questions of law" for the court are limited to ensuring the agency acted reasonably, within its delegated authority, and with substantial evidence supporting its factfinding.[191] *Loper Bright*'s first two principles reserve *interpretation* for the judiciary's *de novo* review, but the latter two vest delegated statutory *construction* with the agency, subject to limited, deferential review.[192] For this reason, Justice Kavanaugh recently cautioned the bench and bar not to "over read" *Loper Bright.*[193]

Because deference turns on delegation, we must figure out *Loper Bright*'s domain one statute at a time.[194] For the NLRA, this question is well-settled. *Loper Bright*'s *de novo* domain "does not extend to unambiguously broad, open-ended terms or phrases that explicitly convey broad grants of authority to federal agencies"[195]—exactly the kind of delegation the Supreme Court has long recognized that Congress made to the Board.[196] When the Board works in its delegated iterative construction zone, *de novo* review is inapposite, as the Supreme Court recognized long ago in *NLRB v. Hearst Publications*.[197] *Hearst* considered whether the Wagner Act's definition of "employee"[198] included

191. Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2261–63 (2024).

192. *Id.*

193. Lydia Wheeler, *Court's* Chevron *Ruling Shouldn't Be Over Read, Kavanaugh Says*, BLOOMBERG L. (Sep. 26, 2024, at 15:46 PT), https://news.bloomberglaw.com/us-law-week/courts-chevron-ruling-shouldnt-be-over-read-kavanaugh-says?context=search&index=11 ("'To be clear, don't over read *Loper Bright,*' Kavanaugh said . . . 'Oftentimes Congress will grant a broad authorization to an executive agency so it's really important, as a neutral umpire, to respect the line that Congress has drawn when it's granted broad authorization not to unduly hinder the executive branch when performing its congressional authorized functions, but at the same time not allowing the executive branch, as it could with *Chevron* in its toolkit, to go beyond the congressional authorization.'").

194. *Loper Bright*, 144 S. Ct. at 2263 (explaining that, prior to *Chevron*, courts "identified delegations of discretionary authority to agencies on a 'statute-by-statute basis'") (quoting Scalia, *supra* note 26, at 516); Process Gas Consumers Grp. v. USDA, 694 F.2d 778, 791 (D.C. Cir. 1982) (en banc) ("The extent to which courts should defer to agency interpretations of law is ultimately 'a function of Congress' intent on the subject as revealed in the particular statutory scheme at issue.") (quoting Constance v. Sec'y of Health & Hum. Servs., 672 F.2d 990, 995 (1st Cir. 1982)).

195. *See* Goodson, *supra* note 49, at 19; Kristin E. Hickman, *Anticipating a New Modern* Skidmore *Standard*, 74 DUKE L.J. ONLINE 111, 134 (2025) ("[T]he Court in *Loper Bright* approved of judicial deference under *State Farm* and APA § 706(2)(A) for some unspecified, poorly-defined, and potentially quite broad subset of agency interpretations of statutes that represent exercises of congressionally-delegated policymaking discretion. Mere interpretations are to be resolved by judges employing traditional tools of statutory interpretation using their independent judgment.").

196. *See supra* notes 149–158 and accompanying text.

197. *See* 322 U.S. 111 (1944).

198. At the time of *Hearst*, "Section 2(3) of the Act provide[d] that 'The term "employee" shall include 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,

"newsboys" who distributed papers on the streets of Los Angeles,[199] as the Board had found.[200] Reviewing the Board's decision, the Court laid down the markers of judicial review:

> 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.[201]

It's no accident that the Court cited *Hearst* approvingly in *Loper Bright*,[202] because *this is Loper Bright*—questions of statutory interpretation for the court, as informed by the agency's considered opinions, and questions of statutory construction for the agency.[203]

The Court's application of these standards in *Hearst* offers an example of post-*Loper Bright* deference to the NLRB. To determine whether "employee" should be limited to the traditional master-servant relationship, it examined mostly *de novo* the "history, terms, and purposes of the legislation," adopting an "economic realities" test instead.[204] But that interpretive work was narrow and limited. Construction (application of the economic realities test to particular classifications of employees) was the heavy lift. That was *the Board's* job, subject only to deferential review:

> That task has been assigned primarily to the agency created by Congress to administer the Act. Determination of "where all the conditions of the relation require protection" involves inquiries for the Board charged with this duty. Everyday experience in the administration of the statute gives it familiarity with the circumstances and backgrounds of employment relationships in various industries, with the abilities and needs of the workers for self

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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.'" *Hearst*, 322 U.S. at 113 n.1 (quoting 29 U.S.C. § 152(3) (1946)).

199. Yes, like in *Newsies*. NEWSIES, Disney+ (Walt Disney Studios 1992) (thrilling musical loosely depicting the 1899 newsboy strike against Joseph Pulitzer).

200. *Hearst*, 322 U.S. at 114 (citing S'holders Pub. Co., 28 NLRB 1006, 1022–24 (1941)).

201. *Id.* at 130–31; *accord* SEC v. Chenery Corp., 318 U.S. 80, 94 (1943) ("If the action rests upon an administrative determination—an exercise of judgment in an area which Congress has entrusted to the agency—of course it must not be set aside because the reviewing court might have made a different determination were it empowered to do so. But if the action is based upon a determination of law as to which the reviewing authority of the courts does come into play, an order may not stand if the agency has misconceived the law.").

202. Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2259–60 (2024).

203. Adrian Vermeule, *The Deference Dilemma*, 31 GEO. MASON L. REV. 619, 633 (2024) (presciently suggesting that *Loper Bright* "would reinstate *Hearst Publications* by saying that it is for judges to say what the law means, but that sometimes, the law itself means that Congress has entrusted to agencies, not courts, the power in the first instance to make reasonable determinations of vague, ambiguous, or general statutory standards, so long as the agency's view has a 'reasonable basis in law'").

204. *Hearst*, 322 U.S. at 124, 129 (quoting Gray v. Powell, 314 U.S. 402, 411 (1941)).

> organization and collective action, and with the adaptability of collective bargaining for the peaceful settlement of their disputes with their employers. The experience thus acquired must be brought frequently to bear on the question who is an employee under the Act. Resolving that question, like determining whether unfair labor practices have been committed, "belongs to the usual administrative routine" of the Board.[205]

The Court enforced the Board's inclusion of newsboys in the Act, holding that "[t]he record sustains the Board's findings and there is ample basis in law for its conclusion."[206] *Hearst* thus instructed lower courts to defer to the Board's delegated adjudicative discretion.[207]

Then-Professor (and future Second Circuit Judge) Ralph Winter recognized that the Board's work is primarily construction subject to limited judicial review in 1968—decades before *Chevron*.[208] In *Judicial Review of Agency Decisions: The Labor Board and the Court*, Professor Winter contended that, "[t]he quality and quantity of ambiguities in the [NLRA] . . . amount[] in effect to a broad delegation of authority."[209] Like a common law court, the Board "would have the benefit of seeing the different factual patterns in which issues arose and would be able to strike consistent balances between the various purposes of the act in fashioning legal rules."[210] Professor Winter makes a case for limited judicial review of the NLRB where the Board is "fleshing out" the Act's generalities, due to the Board's experience in reviewing similar fact patterns across scores of labor disputes, its ability to experiment, and its political responsiveness.[211] Experience, experimentation, and responsiveness to changing public policy are hallmarks of common law iterative construction; as Professor Winter observed, this construction work is outside the domain of *de novo* judicial review.

Decades after the APA's enactment, the Court reinforced the Board's broad construction power in cases culminating in 1978's *Beth Israel Hospital v. NLRB*.[212] There, the Court affirmed the Board's precedent guaranteeing hospital workers the right to organize in cafeterias on non-work time, rejecting the hospital's argument to abandon deference to the Board in a health-care setting.[213] That argument, according to the Court, "fundamentally misconceives

205. *Id.* at 130.

206. *Id.* at 132.

207. *Loper Bright*, 144 S. Ct. at 2262–63; *see* Solum & Sunstein, *supra* note 57, at 1486 (describing the Board's work in *Hearst* as construction).

208. Winter, *supra* note 4, at 67–74.

209. *Id.* at 58.

210. *Id.*; *see also id.* at 61 ("[A] specialized agency is better equipped than a court to find the necessary facts and to make, initially at a least, a realistic application of general legal principles.").

211. *Id.* at 70 (noting that the court's approach is limited to evaluating the Board for "the clarity of its articulation, the reasonableness of the rationales supplied in terms of the Board's stated experience, and the consistency of that rationale and experience with related matters in the total body of law developed by the agency").

212. 437 U.S. 483, 501 (1978).

213. *Id.*

the institutional role of the Board" because "[i]t is the Board on which Congress conferred the authority to develop and apply fundamental labor policy."[214] And, the Board, "if it is to accomplish the task which Congress set for it, necessarily must have authority to formulate rules to fill the interstices of the broad statutory provisions."[215] When it does, the Court explained citing both the NLRA and the APA, "the judicial role is narrow: The rule which the Board adopts is judicially reviewable for consistency with the Act, and for rationality, but if it satisfies those criteria, the Board's application of the rule, if supported by substantial evidence on the record as a whole, must be enforced."[216] *Loper Bright* echoes *Beth Israel* in directing courts "to stay out of discretionary policymaking left to the political branches" by deferring to agencies when they operate in a delegated construction zone.[217]

NLRA Supreme Court jurisprudence reveals the distinction between constructing the law and interpreting it, as it has been refined over the past ninety years. Those cases can be divided into three groups in ascending order of deference: judicial primary cases, *de novo* statutory interpretation cases, and construction cases. The first group of cases, judicial primary cases, are those cases involving areas in which the Constitution or statute plainly gives the judiciary unhindered authority.[218] These cases stretch to the very first NLRB cases before the Supreme Court in 1937 on the question of the NLRA's constitutionality and continue to this day. The question of whether the Act is constitutionally valid can itself be divided into three groups: (1) Is the Act constitutionally valid?[219] (2) Is the Act constitutional as applied to a specific

214. *Id.* at 500.

215. *Id.* at 501.

216. *Id.* at 500–01, 502 n.18 (citing "§ 10(e), NLRA, 29 U.S.C. § 160(e); Administrative Procedure Act, 5 U.S.C. § 706(2)(E) (1976 ed.); Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951)"); *accord* NLRB v. Erie Resistor Corp., 373 U.S. 221, 236 (1963) ("Although the Board's decisions are by no means immune from attack in the courts as cases in this Court amply illustrate, its findings here are supported by substantial evidence, its explication is not inadequate, irrational or arbitrary, and it did not exceed its powers or venture into an area barred by the statute.") (internal citations omitted).

217. Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2268 (2024); *see also* Red Lion Broad. Co. v. FCC, 395 U.S. 367, 381 (1969) ("[T]he construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong.") (collecting cases); Solum & Sunstein, *supra* note 57, at 1471 ("When agencies engage in statutory construction, they are not impinging on the judicial responsibility to interpret any statute. The courts can interpret the statute and determine whether the agency's implementation rule is consistent with the statutory text.").

218. A thorough analysis is beyond the scope of this Article, which is focusing on the distinction between court interpretation and agency construction of the Act. A more in-depth discussion of the full spectrum of standards of review governing NLRB cases is forthcoming. *See generally* Fred B. Jacob & Anne Marie Lofaso, *Spectrums of Review: The NLRB in* Loper Bright*'s World* (forthcoming) (on file with the authors).

219. A first group of cases, all decided on July 5, 1937, reviewed the question whether the NLRA is constitutional under the Commerce Clause. The Court found it was. *See, e.g.*, NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 29–43 (1937) (holding that the NLRA is constitutional under the Commerce Clause). In these cases, the Court answered other constitutional questions. The Court found that the Act does not violate the Seventh Amendment. *See id.* at 47–49 (explaining that the Seventh Amendment "has no application to cases where recovery of money damages is an incident to equitable relief even though damages might have been recovered in an action at law" and finding that a case under a statute is not a case at common law and has no

business or industry?[220] (3) Are portions of the Act unconstitutional[221] and, if so, can those portions be severed from the NLRA?[222] This group also includes cases that present a conflict between the NLRA and another federal statute[223] or involve the interpretation of a collective bargaining agreement.[224]

The second group of cases, *de novo* statutory interpretation cases, are those involving the interpretation of the Act's language. They define the meaning of the NLRA's statutory text and police the boundaries of statutory authority.[225] These cases answer broad questions of law, including *Loper Bright*'s recognized judicial duty to "'fix the boundaries of the [agency's] delegated authority.'"[226] Thus, the Court has considered the following types of questions: Did the Board

common law equivalents). The Court also found that the NLRA's application to the Associated Press did not violate the First Amendment without even referencing the NLRB's view on the question. Assoc. Press v. NLRB, 301 U.S. 103, 130–31 (1937).

220. *See generally Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) (finding constitutional the NLRA's application to a company engaged in manufacturing steel by drawing raw materials from several states and shipping through states); NLRB v. Fruehauf Trailor Co., 301 U.S. 49 (1937) (same; manufacturing, assembling, selling, and distributing commercial trailers, trailer parts, and accessories throughout several states); NLRB v. Friedman-Harry Marks Clothing Co., 301 U.S. 58 (1937) (same; purchasing raw materials and manufacturing, selling and distributing men's clothing throughout several states); *Assoc. Press*, 301 U.S. 103 (same; gathering and distributing news to newspapers in United States and foreign countries); Wash., Va. & Md. Coach Co. v. NLRB, 301 U.S. 142 (1937) (same; operating motorbuses in interstate transportation). Over the next several years, the Court found that the NLRA was constitutional as applied to several other types of businesses. *See* Santa Cruz Fruit Packing Co. v. NLRB, 303 U.S. 453, 460–61, 463–69 (1938) (applying NLRA to business engaged in "canning, packing, and shipping fruit and vegetables, the bulk of which are grown in [one] state"); NLRB v. Fainblatt, 306 U.S. 601, 602, 605–06 (1939) (applying Act to "employers, not themselves engaged in interstate commerce, who are engaged in a relatively small business of processing materials which are transmitted to them by the owners through the channels of interstate commerce and which after processing are distributed through those channels"); Polish Nat'l All. v. NLRB, 322 U.S. 643, 644–45, 649–50 (1944) (applying NLRA to insurance companies).

221. *See, e.g.*, AFL v. NLRB, 308 U.S. 401, 412 (1940) (holding that Section 9(c) proceedings are constitutional); NLRB v. Int'l Bhd. Elec. Workers, 308 U.S. 413, 414–15 (1940) (same); NLRB v. Mackay Radio & Tel. Co. 304 U.S. 333, 350 (1938) (rejecting Fifth Amendment claim that hearings lacked due process; although "the allegations of the complaint and the Board's findings" did not match precisely, the issues and contentions were clearly defined).

222. *See* Am. Commc'ns Ass'n v. Douds, 339 U.S. 382, 415 (1950) (concluding that NLRA Section 9(h)—requiring union officials to take an oath swearing that they are not associated with the Communist party or communist ideology—was constitutional). Congress repealed Section 9(h) in the Landrum-Griffin Act of 1959, PUB. L. No. 86-257, § 201(d), 73 Stat. 525 (1959), and the Court formally overruled *Douds* in *United States v. Brown*. 381 U.S. 437 (1965).

223. *See* S. S.S. Co. v. NLRB, 316 U.S. 31, 39, 46 (1942) (conflict between NLRA and mutiny statute); NLRB v. Bildisco & Bildisco, 465 U.S. 513, 534 (1984) (showing a conflict between NLRA and Bankruptcy Act); Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 891–94 (1984) (finding no conflict because Congress did not make hiring undocumented workers an illegal activity); Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 140, 146 (2002) (holding that federal immigration policy expressed in the Immigration Reform and Control Act of 1986 "forecloses" back pay remedy for undocumented workers); Epic Sys. Corp. v. Lewis, 584 U.S. 498, 510–20 (2018) (holding that NLRA language does not "clearly and manifestly" suggest "a wish to displace the Arbitration Act").

224. Litton Fin. Printing Div. v. NLRB, 501 U.S. 190, 203 (1991).

225. *See supra* notes 197–204 and accompanying text.

226. Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2263 (2024) (citing Monaghan, *supra* note 26, at 27).

exceed its statutory remedial authority?[227] Did the Board act ultra vires?[228] It also includes cases that present questions of statutory interpretation such as: "Does the term independent contractor contemplate a test involving common law agency principles or other law?"[229] (but not, as discussed above, whether any individual meets that definition). It would also include cases defining the meaning of statutory terms, such as "independent judgment,"[230] and secondary boycott cases interpreting Section 8(b)(4).[231]

The third group of cases, construction cases, are those involving the Board's construction of the NLRA based on delegation and experience. The Board has an exceptionally large construction zone. The courts have identified (and reviewed deferentially) congressional delegations to the Board running the gamut of the Board's statutory responsibilities, the collective bargaining lifecycle, and policies, both pro-union and pro-management. Here's but a sample:

- The scope of "employee," as in *Hearst*;[232]
- The rules for determining appropriate bargaining units;[233]
- Allocating responsibilities between unions and employers for initiating the Board's representation procedures;[234]

227. The Court has long held that "[t]he power to command affirmative action [under Section 10(c)] is remedial, not punitive, and is to be exercised in aid of the Board's authority to restrain violations and as a means of removing or avoiding the consequences of violation where those consequences are of a kind to thwart the purposes of the Act." Consol. Edison Co. v. NLRB, 305 U.S. 197, 235–36 (1938); *accord* NLRB v. Pennsylvania Greyhound Lines, 303 U.S. 261, 267–268 (1938); NLRB v. Fansteel Metallurgical Corp., 306 U.S. 240, 257 (1939); *see also Hoffman Plastic Compounds*, 535 U.S. at 152 n.6 (commenting "it is an open question whether awarding backpay to undocumented aliens, who have no entitlement to work in the United States at all, might constitute a prohibited punitive remedy against an employer"); Loc. 60, United Bhd. of Carpenters v. NLRB, 365 U.S. 651, 652, 654–55 (1961) (refusing to enforce Board order—directing union to reimburse union dues to remedy union "enforcing an agreement which established closed-shop preferential hiring conditions and in causing the Company to refuse to hire the two applicants"—because remedy was punitive where there was no evidence that union coerced employees into joining it); Republic Steel Corp. v. NLRB, 311 U.S. 7, 13 (1940) (holding that "payments to governmental agencies was beyond the Board's authority").

228. *See* Leedom v. Kyne, 358 U.S. 184, 198 (1958) (holding that the Board cannot certify a bargaining unit of professionals and nonprofessionals without a majority vote by professionals for inclusion under § 9(b)(1) because that act is contrary to the statutory language); New Process Steel, L.P. v. NLRB, 560 U.S. 674, 688 (2010) (holding that the Board cannot decide cases without a three-member quorum under § 3(b)).

229. *See* NLRB v. United Ins. Co., 390 U.S. 254, 256 (1968) (holding that the Board must use the "common-law agency test . . . in distinguishing an employee from an independent contractor").

230. 29 U.S.C. § 152(11); *see* NLRB v. Ky. River Cmty. Care, Inc., 532 U.S. 706, 719 (2001).

231. 29 U.S.C. § 158(b)(4).

232. 29 U.S.C. § 152(3); s*ee* NLRB v. Hearst Publ'ns, Inc., 322 U.S. 111, 135 (1944) (affirming the Board's conclusion that newsboys are statutory employees and stating that "we cannot say the Board's conclusions are lacking in a 'rational basis'"); *see also* Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 891–92 (1984) (finding that undocumented immigrants are considered employees by the statute); Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 186 (1941) (holding that job applicants are employees for purposes of the NLRA).

233. May Dep't Stores Co. v. NLRB, 326 U.S. 376, 380 (1945); South Prairie Constr. Co. v. Loc. No. 627, Int'l Union of Operating Eng'rs, 425 U.S. 800, 806 (1976); *accord* Macy's, Inc. v. NLRB, 824 F.3d 557, 570–71 (5th Cir. 2016) (approving Board's "overwhelming" community of interest test).

234. Linden Lumber Div. v. NLRB, 419 U.S. 301, 309–10 (1974).

- Rules for organizing and distributing literature on employer property;[235]
- The test for litigating unlawful discrimination cases;[236]
- Deciding when employer rules undermine employees' right to strike;[237]
- Deciding when employees are entitled to a representative at a meeting that could reasonably lead to discipline;[238]
- Managing the duty to bargain in good faith by requiring unions and employers to share information during contract negotiations;[239]
- Regulating the use of strikes, lockouts, and unilateral implementation of bargaining proposals as economic weapons during contract negotiations;[240]
- The boundaries of unlawful secondary and recognitional picketing;[241] rules governing union security agreements and the constitutionally permissible payment of fair share fees;[242]
- Rules for an employer's withdrawal of recognition from a certified bargaining representative;[243] and
- The bargaining obligation of successor employers.[244]

The Board's development and selection of remedies for unfair labor practices is particularly within its constructive discretion.[245] In all these instances—whether

235. Eastex, Inc. v. NLRB, 437 U.S. 556, 568 (1978); Republic Aviation Corp. v. NLRB, 324 U.S. 793, 798–99 (1945).

236. NLRB v. Transp. Mgmt. Corp., 462 U.S. 393, 401–03 (1983).

237. NLRB v. Erie Resistor Corp., 373 U.S. 221, 235–36 (1963).

238. NLRB v. J. Weingarten, Inc., 420 U.S. 251, 267 (1975) (finding a right to union representation in investigatory interviews); Epilepsy Found. of Ne. Ohio v. NLRB, 268 F.3d 1095, 1100 (D.C. Cir. 2001) (determining that non-union representation at an investigatory interview an acceptable construction of the statute).

239. NLRB v. Truitt Mfg. Co., 351 U.S. 149, 151–53 (1951).

240. *Erie Resistor Corp.*, 373 U.S. at 235–36; NLRB v. Katz, 369 U.S. 736, 747 (1962); *see also* Am. Ship Bldg. Co. v. NLRB, 380 U.S. 300, 316–17 (1965) (recognizing that "the Board is entitled to the greatest deference in recognition of its special competence in dealing with labor problems," including evaluating the permissibility of employer lockouts, but that its holding restricting them as an economic weapon exceeded its statutory authority).

241. NLRB v. Loc. Union No. 103, Int'l Assoc. of Bridge, Structural & Ornamental Iron Workers, 434 U.S. 335, 341 (1978) (holding that a minority union participating in recognitional picketing violates statutory authority); Loc. 761, Int'l Union of Elec., Radio & Machine Workers v. NLRB, 366 U.S. 667, 674 (1961) (discussing the parameters of common situs picketing).

242. Int'l Assoc. of Machinists & Aerospace Workers v. NLRB, 133 F.3d 1012, 1015 (7th Cir. 1998) ("It is hard to think of a task more suitable for an administrative agency that specializes in labor relations, and less suitable for a court of general jurisdiction, than crafting the rules for translating the generalities of the *Beck* decision . . . into a workable system for determining and collecting agency fees.*"*) (enforcing Ca. Saw & Knife Works, 320 NLRB No. 11, 332 (1995)); Thomas v. NLRB, 213 F.3d 651, 657–58 (D.C. Cir. 2000).

243. Allentown Mack Sales & Serv., Inc. v. NLRB, 522 U.S. 359, 362, 367–68 (1998) (affirming Board's construction of the Act by applying same "good faith doubt" standard for withdrawals of recognition, RM petitions, and employer polling; rejecting Board's application of the standard because it applied a non-dictionary irrational definition of "good faith doubt").

244. Fall River Dyeing & Finishing Corp. v. NLRB, 482 U.S. 27, 42 (1987) (upholding Board's successor bar rule, even as to non-newly certified unions).

245. ABF Freight Sys., Inc. v. NLRB, 510 U.S. 317, 324 (1994) (describing the Board's remedial authority to "make specific policy determinations" as an "express delegation"); Phelps Dodge Corp. v. NLRB, 313 U.S.

the Board won or lost, both before and after *Chevron*—the courts reviewed the Board's decisions consistent with *Beth Israel*'s respect for the Board's iterative construction policymaking authority. Or, to reverse engineer, the courts confirmed that Congress delegated these subjects to the Board's construction because they employed the deferential standard of review reserved for policymaking.

Hearst and *Beth Israel* acknowledge the Board's broad power to implement statutory language beyond an initial determination of linguistic meaning. *Chevron* deference rested on a theory of implied delegation to agencies of binding interpretative authority from ambiguous statutory language. *Loper Bright* rejected implied delegations of authority as a mere fiction—or, at the very least, a fiction insufficient to deprive the judiciary of its traditional powers. *Hearst* and *Beth Israel*, however, turn on the Court's repeated holdings that the Board's authority emanates from Congress's express and broad delegation of iterative construction power in the Act's substantive and procedural commands. Because of this, "[e]ven after *Chevron*, the [Supreme] Court and the courts of appeals [were] more likely to apply NLRB-specific deference than *Chevron*."[246] *Chevron* did not displace *Beth Israel* and *Hearst*'s NLRB-specific deference.[247] There is no reason for *Loper Bright* to do so now.

At least one court articulated this principle after *Loper Bright*. In *International Union of Operating Engineers, Local 39 v. NLRB*, the Ninth Circuit cited precedent, holding that "'[t]he Board is entitled to considerable deference in crafting remedies for unfair labor practices.'"[248] But the court cautioned that "[t]his is not *Chevron* deference."[249] Instead, according to the court, "it is a reflection of the discretion afforded by Congress to allow the Board to award remedies it deems fit to effectuate policies of the Act."[250] In the term

177, 194 (1941) ("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.").

246. Jacob, *supra* note 61 at 1442; *id.* at nn.381–82 (collecting cases and citing Amy Semet, *Statutory Interpretation and* Chevron *Deference in the Appellate Courts: An Empirical Analysis*, 12 UC IRVINE L. REV. 621, 653 (2022) (explaining that, in the author's review of over 2,500 courts of appeals decisions involving the NLRB, "[o]f all the statutory interpretation cases, courts expressly cited and applied *Chevron* only about one-quarter of the time")).

247. *See* William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to* Hamdan, 96 GEO. L.J. 1083, 1107 (2008) (concluding, based on an analysis of post-*Chevron* Supreme Court cases, that "[g]iven the similarities between the deference tests found in *Beth Israel*-type cases and the *Chevron* test itself, one would have expected *Beth Israel* deference to have died in *Chevron*'s wake," but "this has not been the case"); Juan Caballero, Note, *Administering the Spectrum of Deference in the Administrative Age*, 10 N.Y.U. J. L. & LIBERTY 810, 830–31 (2016) ("While this may lead one to conclude that *Beth Israel* constitutes a proto-*Chevron* which would likely be consumed in the conflagration of *Chevron*, it continues to be cited as a distinct deference precedent by courts in NLRB cases.").

248. Int'l Union of Operating Eng'rs, Loc. 39 v. NLRB, 127 F.4th 58, 84 (9th Cir. 2025) (quoting King Soopers, Inc. v. NLRB, 859 F.3d 23, 37 (D.C. Cir. 2017)).

249. *Id.* at 58 n.14.

250. *Id.*

after it decided *Loper Bright*, the Supreme Court reached a similar conclusion in construing agency action implementing the National Environmental Policy Act, distinguishing between agency interpretation of statutory language, which a court reviews *de novo*, and agency construction of statutory language, a fact-laden inquiry for which an agency receives deference.[251]

Simply put, the Board's common law iterative construction of the Act through fact-intensive adjudications does not implicate the *Loper Bright* Court's "most fundamental[]" criticism: that "*Chevron*'s presumption is misguided because agencies have no special competence in resolving statutory ambiguities. Courts do."[252] This is a civil-law-centric view of the Court's role, turning on the meaning of codes and language.[253] The premise of the Act, however, is that labor disputes are not susceptible to resolution based on deciphering statutory text. That's why the Wagner Act Congress used broad, non-technical language to define rights, prescriptions, and prohibitions in the Act. That general language allows the Board to carry on the common law/arbitral/War Labor Board/National Labor Board/Old NLRB tradition, which Congress viewed as the most efficient means for reducing labor strife. If, as *Loper Bright* alleges, "'every statute's meaning is fixed at the time of enactment,'"[254] Congress's design of a labor board with broad constructive authority and limited judicial review should be "fixed" too.

Resolution of actual industrial disputes provides the Board its "special competence."[255] Experience and expertise are important in iterative construction and making common law, as they implicate value judgments drawn from familiar fact patterns, contact with injured parties, and statutory mission. For each unfair labor practice charge or representation petition, NLRB staff talk to parties, build records, settle cases or issue complaints, hear witness and documentary testimony, and, when necessary, develop legal rules. These rules are based on the institutional cumulative experience assessing the effects of objectionable conduct on livelihoods and labor organizing. It's just common sense that an agency, its staff, and its political leadership gain institutional knowledge from a multi-stage adjudicative process repeated tens of thousands

251. Seven Cnty. Infrastructure Coal. v. Eagle Cnty., Colorado, 605 U.S. 168, 180–81 (2025) ("In practice, judicial deference in NEPA cases can take several forms. For example, NEPA says that the EIS should be 'detailed.' 42 U.S.C. § 4332(2)(C). Of course, the meaning of 'detailed' is a question of law to be decided by a court. . . . But what details need to be included in any given EIS? For the most part, that question does not turn on the meaning of 'detailed'—instead, it 'involves primarily issues of fact.' Marsh, 490 U.S. at 377, 109 S.Ct. 1851. The agency is better equipped to assess what facts are relevant to the agency's own decision than a court is.").

252. Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2251 (2024).

253. *See* Dainow, *supra* note 98 (explaining that, under civil law, "utilization of prior decisions is mainly on points of interpretations of the written texts").

254. *Loper Bright*, 144 S. Ct. at 2266 (quoting Wisconsin Cent. Ltd. v. United States, 139 S. Ct. 2067, 2074 (2018) (emphasis removed)).

255. Am. Ship Bldg. Co. v. NLRB, 380 U.S. 300, 316 (1965).

of times each year over nine decades.[256] As the Court has acknowledged, the Board is "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."[257] Experience matters.[258]

Without question, the Board sometimes must decipher semantic meaning from the Act's general language. When it has done so, courts have reviewed the Board's interpretation using various standards of review: *de novo* (as in *Hearst*),[259] an NLRB-specific kind of *Skidmore* weight (but not *Skidmore* itself),[260] or *Chevron* deference (especially in *Chevron*'s early years).[261] This Article, however, need not take a position on how the courts should approach the Board's work in the interpretation zone after *Loper Bright*. After ninety years, the statutory interpretation zone is largely settled, especially when it comes to the Board's core mission.[262]

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256. *But see* Neal Devins & David E. Lewis, *The Independent Agency Myth*, 108 CORN. L. REV. 1305, 1310 (2023); Julius G. Getman & Stephen B. Goldberg, *The Myth of Labor Board Expertise*, 39 U. CHI. L. REV. 681, 681–82 (1972).

257. Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1951)*; see generally* Anya Bernstein & Cristina Rodríguez, *Working With Statutes*, 103 TEX. L. REV. 921, 927 (2025) (positing a quasi-fiduciary duty between agencies and the statutes they administer, in which they "have a general duty to act in the statute's interest" and a more specific duty to make reasonable, workable decisions).

258. *Cf.* James J. Brudney, Sara Schiavoni & Deborah J. Merritt, *Judicial Hostility Toward Labor Unions? Applying the Social Background Model to A Celebrated Concern*, 60 OHIO ST. L.J. 1675, 1720 (1999) (finding that federal judges with experience representing management in labor disputes before joining the bench scrutinized the Board's pro-management decisions more heavily).

259. *See* Starbucks Corp. v. McKinney, 144 S. Ct. 1570, 1577 (2024) ("In sum, because nothing in § 10(j)'s text overcomes the presumption that traditional equitable principles govern, district courts considering the Board's request for a preliminary injunction must apply the *Winter* framework, which embodies those traditional principles."); New Process Steel, L.P. v. NLRB, 560 U.S. 674, 683 (2010) ("[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.").

260. NLRB v. Town & Country Elec., Inc., 516 U.S. 85, 89–90 (1995) (noting that the Board "often possesses a degree of legal leeway when it interprets its governing statute, particularly where Congress likely intended an understanding of labor relations to guide the Act's application"); Allied Chem. & Alkali Workers of America, Loc. Union No. 1 v. Pittsburgh Plate Glass Co., 404 U.S. 157, 166 (1971) ("To the contrary, the legislative history of § 2(3) itself indicates that the term 'employee' is not to be stretched beyond its plain meaning embracing only those who work for another for hire.").

261. NLRB v. Ky. River Cmty. Care, Inc., 532 U.S. 706, 714 (2001) (dissecting Section 2(11)'s text, syntax, and grammar to conclude that the Board did not properly interpret the statutory text because the statute speaks of "routine" and "clerical" judgment being excluded); NLRB v. United Food & Com. Workers Union, Loc. 23, 484 U.S. 112, 123–24 (1987) (interpreting the Board's regulations); UC Health v. NLRB, 803 F.3d 669, 673–76 (D.C. Cir. 2015) (granting *Chevron* deference to the Board's interpretation of Section 3(b) of the Act's delegation of authority in representation cases to Regional Directors).

262. Indeed, showing how difficult it is to cast the Board's iterative construction as interpretation, a panel of the D.C. Circuit recently tried to criticize the Board for "focus[ing] its analysis . . . not on the statutory text." Stern Produce Co. v. NLRB, 97 F.4th 1, 11 (D.C. Cir. 2024). Yet, the court had to ignore key words in the Act's general prohibitory language to foist a constructive peg into an interpretative hole. *Id.* at 10 (omitting the words "interfere with" and "restrain" from "interfere with, restrain, or coerce" in its "textual" criticism that the Board's unfair labor practice finding did not constitute "coercion").

The Board's power of constructive iteration does not violate the non-delegation doctrine, which "bars Congress from transferring its legislative power to another branch of Government."[263] The non-delegation doctrine does not mean that all delegation from Congress to an administrative agency is unconstitutional, of course. The Supreme Court has repeatedly instructed that "a statutory delegation is constitutional as long as Congress 'lay[s] down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform.'"[264] And, indeed, in the first test of the Board's constitutionality in 1937, the Supreme Court distinguished arguments that Congress unlawfully delegated unbounded legislative power to the Board,[265] and it subsequently rejected a nondelegation challenge to the Board's authority over representation elections.[266]

Loper Bright instructs that interpreting the statute for its constitutional boundaries is a core element of judicial power and that the power to interpret is non-delegable.[267] Using that power, the court must determine whether the agency's action fits within properly delegable legislative powers. Where that line falls may be challenging to define in some cases—especially as non-delegation doctrine may be in a transformative moment[268]—but under *Loper Bright*, the Court holds the power to draw that line, as it always has. This eliminates the possibility that the Board will cross into the judicial lane without the appropriate check.

Finally, to truly narrow *Loper Bright*'s domain over the Board, we return to Professor Semet's empirical study. According to Professor Semet, only 168 cases out of 7,000 "interpreted the NLRA in majority opinions as a matter of first impression,"[269] fewer than two percent. In most instances, the Board engaged in its core conflict resolution mission—resolving labor disputes one at a time by applying existing law to found facts. In those cases, *Loper Bright* recognizes that the standard of review is well-settled and highly deferential; the Board's decision must be upheld if supported by "substantial evidence on the

263. Gundy v. United States, 139 S. Ct. 2116, 2121 (2019).

264. *Id.* at 2119.

265. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 41 (1937).

266. Pittsburgh Plate Glass Co. v NLRB, 313 U.S. 146, 165 (1941) (rejecting nondelegation challenge to the Board's authority to determine an appropriate unit under Section 9 of the Act); *see also* Brown v. Roofers & Waterproofers Union, Loc. No. 40, 86 F. Supp. 50, 55 (N.D. Cal. 1949) (turning away nondelegation challenge to the Board's authority under Section 10(k) to resolve jurisdictional disputes as bounded by the requirement that such disputes interfere with interstate commerce).

267. Loper Bright v. Raimondo, 144 S. Ct. 2244, 2283 (2024) (Gorsuch, J., concurring) ("[J]udges 'have neither FORCE nor WILL but merely judgment'—and an obligation to exercise that judgment independently. . . . No matter how 'disagreeable that duty may be,' . . . a judge 'is not at liberty to surrender, or to waive it.'") (first quoting THE FEDERALIST NO. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961); then United States v. Dickson, 40 U.S. (15 Pet.) 141, 162 (1841)).

268. *See Gundy*, 139 S. Ct. at 2135–42 (Gorsuch, J., dissenting) (proposing a more robust nondelegation doctrine). *But see* FCC v. Consumers' Rsch., 145 S. Ct. 2482, 2491 (2025) (declining Justice Gorsuch's proposal).

269. Semet, *supra* note 179, at 2288.

record considered as a whole."[270] So, assuming that *Loper Bright* is confined to interpretation, and does not touch construction, over ninety-eight percent of the NLRB's work is beyond *Loper Bright*'s domain.[271]

CONCLUSION

When Congress enacted the NLRA, labor unrest was a serious national problem that called for a national public policy solution. To ease that unrest, Congress chose collective bargaining over wages, hours, and other terms and conditions of employment through elected union representatives, based on its findings that freedom of association and workplace democracy would best resolve workplace tensions.[272] Congress also chose to establish a Board with adjudicative powers to use its expertise in labor relations to decide labor disputes within the confines of the NLRA's statutory language and in a manner that gives meaning to its words within the context of a specific dispute.

As complex as the world was in Depression-time 1935 and post-World-War II 1947, the world has only become increasingly complex. In 1935, the United States was in the midst of a five-year manufacturing expansion (1932–1937), from a low in 1929, the year the Great Depression began, when manufacturing slowed to 1913 levels.[273] After a dip in 1938, manufacturing more than doubled by 1944.[274] By 1965, the United States had transitioned from an industrialized manufacturing economy to a service economy, an economy in which "more than half of the employed population is not involved in the production of food, clothing, houses, automobiles, and other tangible goods."[275] Overlapping with the rise of service industries was the rise of the knowledge economy, an economy in which "production and services based on knowledge-intensive activities . . . contribute to an accelerated pace of technological and scientific advance as well as equally rapid obsolescence."[276]

This history leads naturally to the question: Which institution is in the best position to construct the NLRA and apply it to these ever-evolving circumstances? Given that Congress chose a market solution—collective

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270. 29 U.S.C. § 160(e); *see also* 5 U.S.C. § 706(2)(E); Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1951) (holding that a court may not "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*"); *id*. at 489 (holding that the substantial evidence standard of review for factfinding under the Act and APA are the same).

271. *Loper Bright*, 144 S. Ct. at 2261 (conceding that the APA "does mandate that judicial review of agency . . . factfinding be deferential") (citing 5 U.S.C. § 706(2)(E)).

272. 29 U.S.C. § 151.

273. *See* SOLOMAN FABRICANT, MANUFACTURING OUTPUT, 1929–1937 5 (1940).

274. *See Interwar Period: Manufacturing of Selected Countries in the Americas Between 1923 and 1944*, STATISTA (Dec. 31, 1993), https://www.statista.com/statistics/1315175/americas-manufacturing-index-interwar-period.

275. Victor R. Fuchs, THE GROWING IMPORTANCE OF THE SERVICE INDUSTRIES 1 (1965).

276. Walter W. Powell & Kaisa Snellman, *The Knowledge Economy*, 30 ANNU. REV. SOCIOL. 199, 201 (2004).

bargaining—to combat industrial unrest, the answer turns on whether the administrative agency or the courts can best effectuate the NLRA's policies.

We have argued throughout this Article that Congress made a choice in 1935, reaffirmed in 1947, to delegate authority to the NLRB, an independent executive agency, to administer the NLRA and give life to its policies. Board members are experts in analyzing workplace relationships and applying a law, passed during a time when the United States had a primarily industrialized manufacturing economy, to labor-management relationships in manufacturing, service, and knowledge industries—workplaces complicated by increasingly multifaceted technological developments. We have relied primarily on *Loper Bright*'s simultaneous articulation of its interpretive domain and reaffirmation of long-standing court jurisprudence such as *Hearst*, which delineates the agency's construction domain over the NLRA. This is not new.

Congress made the correct choice. The NLRB is the comparatively more competent institution to effectuate the NLRA's policies because of its members' accumulated expertise, as bolstered by career lawyers whose sole job it is to understand and advise those members on one single Act of Congress.[277] Within the NLRB, Board members—who are all politically accountable—have the final say as to the NLRA. By contrast, the courts are dispute resolution tribunals of general jurisdiction. Their expertise lies in the linguistic exercise of interpretation—of the Constitution and of statutes. And none of them are politically accountable.

We not only live in an increasingly complex society, but also one in which the public is losing faith in its government institutions. To help restore public confidence in both the courts and the administrative state, it is important to ensure that those institutions stay in their lane. The NLRB is an executive agency, whose main policy drivers are chosen by the President. In this way, the NLRB members are accountable to the voting citizens. Not so for the courts, whose judges have lifetime tenure. By remaining in their respective lanes, these legal actors will help restore the confidence necessary to maintaining a well-ordered society—one in which our citizens have a shared vision of justice, including workplace justice.[278]

277. *See generally* NEIL K. KOMESAR, IMPERFECT ALTERNATIVES (1994). In this way, we distinguish ourselves from Professor Eskridge's seminal 2013 article, in which he argued for expanding *Chevron*'s domain based on Komesar's theory that agencies are better positioned to interpret their organic statutes than courts. *See generally* William N. Eskridge Jr., *Expanding* Chevron*'s Domain: A Comparative Institutional Analysis of the Relative Competence of Courts and Agencies to Interpret Statutes*, 2013 WIS. L. REV. 411, 427 (2013). We concede that, following *Loper Bright*, in the case of administrative adjudication by industry experts, courts should defer while maintaining domain over statutory linguistic interpretation. Accordingly, we are no longer within *Chevron*'s orbit, but within *Hearst*'s instead.

278. JOHN RAWLS, A THEORY OF JUSTICE 4 (rev. ed. 1999).

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