2009

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ON THE AUTHORITY OF THE TWO-MEMBER NLRB: STATUTORY INTERPRETATION APPROACHES AND JUDICIAL CHOICES

Ronald Turner*

"quorum: The minimum number of members (usu. a majority of all the members) who must be present for a deliberative assembly to legally transact business."1

"[J]udging is both robotic and discretionary. When precedent or text provides a judge with a genuine external command, a judge’s job is to obey . . . . But when neither clear precedent nor firm textual guidance is present, judicial choices must be made. There are no ties in judging."2

I. INTRODUCTION

Is the National Labor Relations Board ("NLRB" or "Board") statutorily empowered to issue decisions and orders when the membership of this five-member agency falls below three? This important question has been considered by federal courts of appeals in recent rulings addressing challenges to the Board’s adjudicatory power and decision-making authority.

On December 16, 2007, the term of Board Chairman Robert J. Battista expired. Thereafter, on December 20, 2007, Board Members Wilma Liebman, Peter Schaumber, Peter Kirsanow, and Dennis Walsh delegated to Liebman, Schaumber, and Kirsanow, “as a three-member group, all of the Board’s powers in anticipation of the expiration of the

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1. BLACK'S LAW DICTIONARY 1284 (8th ed. 2008).

terms of Members Kirsanow and Walsh on December 28, 2007;" that
debtation was effective midnight December 28, 2007.3 As stated in
the Board’s December 20 minutes, the agency took this action because “in
the near future [the Board] may for a temporary period have fewer than
three Members,” and the two remaining Members would be able to
“issue decisions and orders in unfair labor practice and representation
cases after [the] departure of Members Kirsanow and Walsh . . . .”4 The
Board also relied on a March 2003 opinion from the Department of
Justice’s Office of Legal Counsel (“OLC”) which concluded that “if the
Board delegated all of its powers to a group of three members, that
group could continue to issue decisions and orders as long as a quorum
of two members remained.”5 The Board “agreed to be bound by” the
OLC’s opinion.6

The terms of Members Kirsanow and Walsh, both serving recess
appointments by President George W. Bush, expired on December 31,
2007. Thus, beginning on January 1, 2008 and continuing to date, the
NLRB has had only two members, Member (now Chairman) Liebman7
and Member Schaumber.8 That duo announced that they “constitute a
quorum of the three-member group” to which the Board’s power was
delegated in December 2007, and that “[a]s a quorum, they have the
authority to issue decisions and orders in unfair labor practice and

the 2007 delegation), petition for review granted, 564 F.3d 469 (D.C. Cir. 2009).
4. Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB, 564 F.3d 469, 471 (D.C. Cir.
2009) (quoting the Board’s December 20, 2007 meeting minutes).
5. Quorum Requirements, 27 Op. Off. Legal Counsel 1, 2; see also infra note 96 and
accompanying text.
6. Quorum Requirements, supra note 5, at n.1 (citing Letter from Henry S. Breiteneicher,
Acting Solicitor, National Labor Relations Board, to Jay Bybce, Assistant Attorney General, Office
of Legal Counsel (May 16, 2002) (on file with author)).
7. Liebman was designated Chairman of the Board by President Barack Obama on January
file with the Hofstra Labor and Employment Law Journal). The Obama administration nominated
Craig Becker, Mark Gaston Pearce, and Brian Hayes as Board members. See White House
Announces Two Board Member Nominees, US FED. NEWS, Apr. 20, 2009; President Obama
Announces Intent to Nominate Brian Hayes as National Labor Relations Board Member, US FED.
NEWS, July 10, 2009. In October 2009 the United States Senate’s Health, Education, Labor and
Pensions Committee approved the nominations by a vote of 15-8, and Senator John McCain (R.-
Ariz.) placed a hold on the nomination of Becker. See Seth Stern, Labor Board Nominee Faces
Opposition From McCain, CQ TODAY Oct. 21, 2009. Becker’s nomination was not confirmed
before Congress adjourned in December 2009, President Obama will renominate Becker and seek
Senate confirmation in the second session of the 111th Congress. See Charlie Savage, President is
(discussing that Members Liebman and Schaumber are the only remaining members of the NLRB).
representation cases." Making clear their "dedication to resolving cases and to avoiding a decisional backlog," Liebman and Schaumber have issued more than 400 two-member Board decisions.

Parties aggrieved by the Liebman-Schaumber decisions have challenged those rulings in the federal courts of appeals, arguing that the two-member panel does not constitute a quorum of the Board as mandated by section 3(b) of the National Labor Relations Act ("NLRA" or "Act"). Section 3(b) provides, in pertinent part:

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

Does the Liebman-Schaumber panel constitute a valid quorum of the Board under and within the meaning of section 3(b)? The United States Courts of Appeals for the First, Second, Fourth, Seventh, and Tenth Circuits, have answered that question in the affirmative. Reaching a contrary conclusion, the United States Court of Appeals for the District of Columbia Circuit has ruled that the two active Board members do not constitute a section 3(b) quorum and are therefore not authorized to issue decisions and orders.

The aforementioned circuit split presents a cutting-edge issue of federal labor law. If the quorum findings of the NLRB and the First, Second, Fourth, Seventh, and Tenth Circuits are correct, the two-member panel’s decisions were lawful exercises of the agency’s authority and are insulated from the procedural challenges raised by aggrieved parties subject to the Board’s rulings and orders. The converse view expressed by the D.C. Circuit—that two-member decisions are unlawful and therefore unenforceable actions by an unduly

9. Id. (citing National Labor Relations Act § 3(b), 29 U.S.C. § 153(b) (2006)).
11. See, e.g., Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB, 564 F.3d 469 (D.C. Cir. 2009); Ne. Land Servs., Ltd. v. NLRB, 560 F.3d 36 (1st Cir. 2009); New Process Steel, L.P. v. NLRB, 564 F.3d 840 (7th Cir. 2009).
12. See Laurel Baye, 564 F.3d at 476.
constituted Board—provides a basis for challenging the large number of cases decided by the Liebman-Schaumber Board. As the “question regarding the jurisdiction of the NLRB’s two-member panel is one ultimately to be resolved by the Supreme Court,” an examination of the quorum issue and the courts’ resolutions thereof is timely and warranted.

This essay’s consideration of the two-member panel’s power and authority, or lack thereof, unfolds as follows. Answering the question whether the two-member Board is a valid quorum under and within the meaning of the Act is ultimately a query requiring judicial construction of section 3(b). As discussed in Part II, courts engaged in the enterprise of resolving disputes regarding the contested readings and meanings of statutory provisions select from a menu of statutory interpretation theories and methodologies. Part II’s overview of certain interpretive theories and approaches serves as a prefatory framing of Part III’s examination of the section 3(b) quorum analyses and rulings of the First, Second, Fourth, Seventh, Tenth and District of Columbia Circuits. Part III’s discussion and evaluation of this circuit split focuses on the interpretive theories adopted, methodologies employed, and adjudicative choices made by the courts, and argues that section 3(b) is best read and understood as deauthorizing the two-member NLRB.

II. STATUTORY INTERPRETATION: THEORIES AND METHODOLOGIES

In this “age of statutes,” the federal judiciary performs the critical institutional role and function of interpreting and applying statutes in cases and controversies brought to the courts for adjudication and decision. It has been urged that the judiciary, acting within the separation-of-powers structure of the Constitution (a structure

15. Snell Island, 568 F.3d at 419.
17. The United States Congress legislates and passes laws via the process of bicameral enactment and presentment to the President. See U.S. CONST. art. I, § 7, cl. 2. The executive branch enforces those duly enacted laws, see U.S. CONST. art. II, § 3, and the judiciary interprets and applies those laws in deciding specified cases and controversies, see U.S. CONST. art. III, § 2; see generally INS v. Chadha, 462 U.S. 919 (1983) (discussing the functions of Congress and the President in the legislative process); Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) (Supreme Court’s explication of the judicial power and power of judicial review of legislative enactments). Professor John Manning notes that the “bicameralism and presentment requirements of Article I give political minorities extraordinary power to block legislative change or to insist upon compromise as the price of assent.” John F. Manning, Federalism and the Generality Problem in Constitutional Interpretation, 122 HARV. L. REV. 2004, 2016 (2009) (citation omitted) [hereinafter Manning, Federalism]. The legislative process thus “necessitates compromise. And any theory of interpretation that rests on a theory of the legislative process must deal with that reality…” Id.
popularized by Baron de Montesquieu prior to the founding of the United States), 18 is subordinate to the legislature. 19 From that posited lower ranked position, the judiciary should and must only declare what the law is, and should not make law or “substitute [its] own policy preferences through the creation and application of public values canons for the preferences of Congress as articulated in the words and history of the statute.” 20

Viewing the judicial function and power differently, others have argued that it is inevitable and necessary that judges do and will make law and policy. 21 This is true because it is predictable that legislators cannot anticipate all of the post-enactment issues and questions that will arise with regard to the operative meaning of a statutory provision in specific cases, circumstances, and contexts. 22 As stated by H.L.A. Hart:

[H]uman legislators can have no . . . knowledge of all the possible combinations or circumstances which the future may bring. This inability to anticipate brings with it a relative indeterminacy of aim. . . .


21. See James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 546 (1991) (White, J., concurring) (stating that “judges in a real sense ‘make’ law”); RICHARD A. POSNER, HOW JUDGES THINK 81 (Harvard Univ. Press 2008) (arguing that appellate judges “are occasional legislators”); RICHARD A. POSNER, LAW, PRAGMATISM, AND DEMOCRACY 61 (Harvard Univ. Press 2003) (“[J]udges make up much of the law that they are purporting to be merely applying . . . . [W]hile the judiciary is institutionally and procedurally distinct from the other branches of the government, it shares lawmaking power with the legislative branch.”); Ray Forrester, Truth in Judging: Supreme Court Opinions as Legislative Drafting, 38 VAND. L. REV. 463, 464 (1985) (positing that “it is commonplace to recognize that the Supreme Court is a lawmaking body”); Erwin N. Griswold, Cutting the Cloak to Fit the Cloth: An Approach to Problems in the Federal Courts, 32 CATH. U. L. REV. 787, 801 (1983) (“Everyone knows that judges do make law, and should make law. It is rather a question of how much law they should make.”).


No Member of Congress can anticipate all questions that will come to light; and a body containing hundred of members with divergent agendas can't answer even a small portion of the questions that do occur to its members. That is one reason why Congress frequently delegates power to executive officials.

Id.
When the unenvisaged case does arise, we confront the issues at stake and can then settle the question by choosing between the competing interests in the way that best satisfies us. In doing so, we shall have rendered more determinate our initial aim, and shall incidentally have settled a question as to the meaning, for the purposes of the rule, of a general word.  

Where unenvisaged cases arise, courts may be called on to fill statutory gaps and must sometimes decide cases on grounds, rules and standards not explicitly found in statutory text. In those circumstances, judges—engaged in the enterprise of interpreting and construing statutes in cases presenting adversarial parties’ contested readings and applications of statutory provisions—have developed and may select from a menu of interpretive approaches as they seek to “reach accurate outcomes or promote other policy goals in deciding cases and controversies.” Some of these methodologies are discussed in this part.  

23. H.L.A. HART, THE CONCEPT OF LAW 128-29 (2d ed., Clarendon Press 1994); see also FRIEDRICH A. HAYEK, RULES AND ORDERS 119 (Univ. of Chicago Press 1973) (noting that as “new situations in which the established rules are not adequate will constantly arise,” judges must make new rules). Adrian Vermeule, while agreeing with Hart that “legislative foresight is necessarily limited,” has “notice[d] Hart’s apparently unself-conscious use of the word ‘we’ to identify the interpreting authority.” ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION 25 (Harvard Univ. Press 2006). “Of course, Hart’s readers do not constitute a community of ‘we’s’ who have the power to adopt a mutually agreeable approach to interpretation . . . . [A] system of interpretation must be established that some ‘they’ must apply—‘they’ being judges, agencies, and other officials . . . .” Id. at 25-26.  

24. Ruth Bader Ginsburg & Peter W. Huber, The Intercircuit Committee, 100 HARV. L. REV. 1417, 1420 (1987). The national legislature expresses itself too often in commands that are unclear, imprecise, or gap-ridden . . . . [Such statutes] are susceptible of diverse interpretation, they inspire litigation and, as D.C. Circuit Judge Harry Edwards observed, they prompt “disagreement among different judges and panels,” yielding “inconsistency and unpredictability in the interpretation of the law.”  


27. This discussion of interpretive approaches and methodologies is not and is not intended to be exhaustive. For additional materials and sources, see FRANK B. CROSS, THE THEORY AND PRACTICE OF STATUTORY INTERPRETATION (Stanford Univ. Press 2009); REED DICKERSON, THE
A. Intentionalism

One approach to statutory interpretation, known as intentionalism, seeks to discern the meaning and understanding of a statutory provision as held by the legislature and the legislators who enacted the law.\(^2\) That intent may be found in the statutory text and/or in legislative history (conference and committee reports, floor debates, statements by a bill’s sponsors and cosponsors, etc.).\(^2\) “The primary rationale for crediting legislative history as helping to resolve or amplify textual meaning is that statutes are more than disembodied textual products—they are a form of communication that reflects a purposive group effort.”\(^3\) Intent may be determined by a reconstruction analysis in which a judge attempts to “put himself in the shoes of the enacting legislators and figure out how they would have wanted the statute applied to the case before him.”\(^3\)

Intentionalism has been criticized for the methodology’s search for the “obvious fiction” of the intent of a multimember legislature whose participants did not have or may not have had any specific intent with regard to the particular issue before the court.\(^3\) And the Supreme Court


\(^3\) See Stephen Breyer, On the Uses of Legislative History in Interpreting Statutes, 65 S. Cal. L. Rev. 845, 848 (1992) (“Legislative history helps a court understand the context and purpose of a statute. Outside the law we often turn to context and purpose to clarify ambiguity.”); see also Eskridge & Frickey, supra note 28, at 326-27; James N. Landis, A Note on “Statutory Interpretation”, 43 Harv. L. Rev. 886, 888-89 (1930).

\(^4\) See Larry Alexander & Emily Sherwin, The Rule of Rules: Morality, Rules, and the Dilemmas of Law 119 (Duke Univ. Press 2001); Eskridge, supra note 27, at 16 (“[L]egislators usually do not have a specific intention on more than a few issues (if that) in any bill
has expressed the view that legislative history is not "subject to the requirements of Article I" of the Constitution and "may give unrepresentative committee members—or, worse yet, unelected staffers and lobbyists—both the power and the incentive to attempt strategic manipulations of legislative history to secure results they were unable to achieve through the statutory text." 33 Furthermore, and because "legislative history is itself often murky, ambiguous, and contradictory . . . judicial investigation of legislative history has a tendency to become, to borrow Judge Leventhal’s memorable phrase, an exercise in ‘looking over a crowd and picking out your friends.’” 34

**B. Purposivism**

As another interpretive approach, purposivism identifies a statute’s purpose and objective “and then . . . determin[es] which interpretation is most consistent with that purpose or goal. Purposivism . . . allows a statute to evolve . . . while ensuring legitimacy by tying interpretation to original legislative expectations.” 35 The purposivist thus focuses on statutory purpose “derive[d] not only from the text simpliciter, but also from an understanding what social problems the legislature was addressing and what general ends it was seeking.” 36

As Judge Richard Posner has noted, “American judges have been
engaged in purposive interpretation since before there was a United States.\textsuperscript{37} An early and prominent illustration of judicial determination of statutory purpose is found in \textit{Church of the Holy Trinity v. United States.}\textsuperscript{38} In that case the Court concluded that a contract prohibited by the text of the relevant statute\textsuperscript{39} did not violate the law because “a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers.”\textsuperscript{40} Although the statute prohibited the migration of aliens to the United States to “perform labor or service of any kind,”\textsuperscript{41} the Court determined that in passing the law Congress only sought “to stay the influx of . . . cheap unskilled labor.”\textsuperscript{42} “It was never suggested that we had in this country a surplus of brain toilers, and, least of all, that the market for the services of Christian ministers was depressed by foreign competition.”\textsuperscript{43} \textit{Holy Trinity} thus serves as an exemplar of the way in which court-determined purpose can override and, in effect, nullify an explicit textual legislative mandate.\textsuperscript{44}

The purposivist approach assumes that a jurist can and should determine a statute's pertinent purpose. Where the legislature has explicitly codified a law's purpose, this purpose-determination may be easily found and bounded by the lawmaking body's declaration of the statute's goals.\textsuperscript{45} But where a statute does not identify the purpose of the

\begin{thebibliography}{99}
\bibitem{37} Posner, How Judges Think, \textit{supra} note 21, at 215.
\bibitem{38} 143 U.S. 457 (1891). The Holy Trinity Church entered into a contract with a minister, E. Walpole Warren, who was “an alien residing in England,” and Warren “was to remove to the city of New York, and enter into its services as rector and pastor; and, in pursuance of such contract, Warren did so remove and enter upon such service.” \textit{Id.} at 457-58.
\bibitem{39} The Alien Contract Labor Act of 1885 outlawed contracts with aliens who would migrate to the United States to “perform labor or service of any kind in the United States, its Territories, or the District of Columbia.” Alien Contract Labor Act, ch. 164, § 1, 23 Stat. 332 (repealed 1952). The Court opined, “It must be conceded that the act of the corporation is within the letter of this section, for the relation of rector to his church is one of service, and implies labor on the one side with compensation on the other.” \textit{Holy Trinity}, 143 U.S. at 458.
\bibitem{40} \textit{Holy Trinity}, 143 U.S. at 459.
\bibitem{41} Alien Contract Labor Act § 1, 23 Stat. at 332.
\bibitem{42} \textit{Holy Trinity}, 143 U.S. at 465.
\bibitem{43} \textit{Id.} at 464.
\bibitem{44} See also United Steelworkers of Am. v. Weber, 443 U.S. 193, 201 (1979) (noting that an argument resting on “a literal interpretation” of certain antidiscrimination provisions of Title VII of the Civil Rights Act of 1964 was “not without force” in plaintiff's challenge to a race-conscious affirmative action plan). In this case, the Court looked to “Congress' primary concern in enacting” the statute and “the goals of the Civil Rights Act—the integration of blacks into the mainstream of American society . . . .” \textit{Id.} at 202; United States v. American Trucking Ass'ns, 310 U.S. 534, 543 (1940) (stating that “when the plain meaning” of the words of a statute produce results “plainly at variance with the policy of the legislation as a whole’ this Court has followed that purpose, rather than the literal words” (quoting Ozawa v. United States, 260 U.S. 178, 194 (1922))).
\bibitem{45} See, \textit{e.g.}, Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 (2006) (example of

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law, or has or may have more than one stated purpose, the assumption that a judge can authoritatively determine the law's relevant and operative purpose or purposes is a problematic proposition. In the contexts noted in the preceding sentence, judicially-determined purpose may effectuate a purpose not contemplated or desired by the legislature, thereby undoing compromises made and agreements reached by legislators in their votes to enact law. Given these concerns and realities, interest groups and others unable to convince a legislative majority of the correctness of their positions may instead look to the judiciary for the very benefits and desired policy outcomes they did not obtain from the legislature.

C. Textualism

Under another and currently prominent interpretive approach championed by Justice Antonin Scalia and others, "[t]he text is the law, and it is the text that must be observed." Textualism posits that "the authoritative statement is the statutory text, not the legislative history or any other extrinsic material," and that "it is ultimately the provisions of a federal statute containing declarations of statutory purpose; National Labor Relations Act, 29 U.S.C. § 151 (2006) (declaring Congressional findings and policy reasons for the statute).

46. "Statutes are seldom crafted to pursue a single goal, and compromises necessary to their enactment may require adopting means other than those that would most effectively pursue the main goal." Landgraf v. USI Film Prods., 511 U.S. 244, 286 (1994); see generally Exxon Corp. v. Hunt, 475 U.S. 355 (1986) (noting the competing purposes of the federal Comprehensive Environmental Response Compensation and Liability Act).

47. See Manning, Federalism, supra note 7 at 2016 ("[R]eliance on purpose threatens to upset necessary legislative compromises because it arbitrarily shifts the level of generality at which the lawmakers have expressed their policy.").


49. Scalia, supra note 27, at 22; see also Frank H. Easterbrook, The Role of Original Intent in Statutory Construction, 11 HARV. J.L. & PUB. POL’Y 59, 59 (1988) (explaining that the Supreme Court has created a formula for statutory construction which always begins with examining the language of the statute); John F. Manning, What Divides Textualists from Purposivists?, 106 COLUM. L. REV. 70, 73 (2006) ("[N]ew textualism . . . requires judges to treat the clear import of an enacted text as conclusive . . ."); John F. Manning, Textualism and Legislative Intent, 91 VA. L. REV. 419, 420 (2005) ("[T]extualism . . . in practice is associated with the basic proposition that judges must seek and abide by the public meaning of the enacted text . . ."); John F. Manning, Textualism and the Equity of the Statute, 101 COLUM. L. REV. 1, 3-4 (2001) ("[T]extualists, . . . give precedence to semantic context; judges must enforce the conventional meaning of a clear text, even if it does not appear to make perfect sense of the statute’s overall policy.").

50. Exxon Mobil Corp. v. Allapatah Servs., Inc., 545 U.S. 546, 568 (2005). Interestingly, textualist judges have resorted to and relied upon extrinsic and extra-textual sources when considering and deciding textual meaning and signification, including dictionaries, case law, related statutory provisions, clear statement rules, and canons of construction. See ESKRIDGE, supra note 27, at 42. On clear statement rules, see Gregory v. Ashcroft, 501 U.S. 452, 461 (1991); see generally Manning, Federalism, supra note 17, at 2025-29 (stating that clear statement rules
our laws rather than the principal concerns of our legislators by which we are governed.”51 These propositions are consistent with the textualist’s premises “that legislatures have authority only to pass statutes, not to form abstract ‘intentions,’”52 and that judicial interpretation, construction, and application are limited to and by the plain meaning of the statutory text: “that is, given the ordinary meanings of words and accepted precepts of grammar and syntax, what does the provision signify to the reasonable person?”53 Plain meaning analysis calls for the interpretation of statutes “literally, that is, according to the ‘plain meaning’ of their words, without recourse to considerations of legislative history, real-world context or consequences, or other indicia of legislative purpose.”54 Consider, for example, Pennsylvania Department of Corrections v. Yeskey,55 wherein the Supreme Court held that the “plain text”56 of the statutory definition of “public entity” in Title II of the Americans with Disabilities Act of 199057 “unambiguously extends to state prison inmates.”58

Of course, the “plain” and “ordinary” meaning of text may be (in litigation, will be) contestable and contested. “[F]or any statute of consequence, the legislative drafting process ensures textual ambiguities, which only multiply over time.”59 That language may be ambiguous and words may have more than one meaning is not a novel insight.60 As Chief Justice John Marshall observed in McCulloch v. Maryland61:

53. Eskridge, supra note 27, at 38.
56. Id. at 213.
58. Yeskey, 524 U.S. at 213. Title II prohibits discrimination by “a public entity” against qualified individuals with a disability. See 42 U.S.C. § 12132. The Court reasoned that “[s]tate prisons fall squarely within the statutory definition of ‘public entity,’ which includes ‘any department, agency, special purpose district, or other instrumentality of a State or States or local government.’” Yeskey, 524 U.S. at 210 (quoting 42 U.S.C. § 12131(1)(B)).
59. Eskridge, supra note 28, at 38.
61. 17 U.S. 316 (1819).
Such is the character of human language, that no word conveys to the
mind, in all situations, one single definite idea; and nothing is more
common than to use a word in a figurative sense. Almost all
compositions contain words, which, taken in their rigorous sense,
would convey a meaning different from that which is obviously
intended.62

Plain meaning analysis is thus subject to the critique that, because
"English as a language lacks precision," it "possesses a chameleonic
quality that spans the color spectrum."
63 And a reader of a statute may
have to make a temporal interpretive choice: whether the plain and
ordinary meaning of the text is fixed at the time of legislative adoption
and enactment, or if the focus should instead be "concerned with how a
contemporary reader would understand the language employed, in
relation also to the law of the current day?"64

D. Deference to Administrative Agencies

When, and under what circumstances, should courts defer to the
rulings, determinations and statutory interpretations of administrative
agencies?

Under one approach, known as Skidmore deference, an agency's
views concerning statutory meaning "constitute a body of experience
and informed judgment to which courts and litigants may properly resort
for guidance."65 The weight given to the agency's judgment by a court

62. Id. at 414.
63. JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL
MODEL 54 (Cambridge Univ. Press 2002). "Virtually all words have a multiplicity of meanings, as
the most nodding acquaintance with a dictionary will attest." Id.
64. Strauss, supra note 36, at 228.
deerence, see generally 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, 1109-10 (2008); Kristin E. Hickman & Matthew D. Krueger, In Search of the Modern
Skidmore Standard, 107 COLUM. L. REV. 1235 (2007); Ronald J. Krotoszynski, Jr., Why
Deference?: Implied Delegation, Agency Expertise, and the Misplaced Legacy of Skidmore, 54
ADMIN. L. REV. 735 (2002); Jim Rossi, Respecting Deference: Conceptualizing Skidmore Within
the Architecture of Chevron, 42 WM. & MARY L. REV. 1105 (2001). Skidmore deference is not the
same as and should be distinguished from Seminole Rock deference. In Bowles v. Seminole Rock &
Sand Co., 325 U.S. 410 (1945), the Supreme Court instructed courts to "look to the administrative
construction of the regulation if the meaning of the words used is in doubt. . . . [T]he ultimate
criterion is the administrative interpretation, which becomes of controlling weight unless it is
plainly erroneous or inconsistent with the regulation." Id. at 414. Under this approach, "an
agency's interpretation of its own regulations are conclusive and binding on the courts, so long as
the agency's interpretation is neither arbitrary nor capricious." Rebecca Hanner White, Deference
"will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."\(^{66}\)

A separate and critically important deferential analysis was announced by the Supreme Court in its 1984 decision in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*\(^{67}\) *Chevron* instructed that an administrative agency's power to administer a program created by Congress "necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly . . . ."\(^{68}\)

Where a statutory gap has explicitly been left by Congress "for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation.\(^{69}\)" Where Congressional delegation "is implicit rather than explicit . . . a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.\(^{70}\)

Judicial review of certain administrative agency constructions of a statute is guided by and must be conducted in accordance with the well-known *Chevron* two-step inquiry.\(^{71}\) First, a court must ask, "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed

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66. *Skidmore*, 323 U.S. at 140.

67. 467 U.S. 837 (1984). It should be noted that in reviewing NLRB decisions, the Supreme Court has sometimes cited, not *Chevron*, but *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27 (1987). For example, in *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359 (1998), the Court, citing *Fall River*, stated that "[c]ourts must defer to the requirements imposed by the Board if they are 'rational and consistent with the Act' and if the Board's 'explication is not inadequate, irrational or arbitrary."

68. Id. at 364 (citations omitted); see also NLRB v. City Disposal Sys., Inc., 465 U.S. 822, 829 (1984) (citing *NLRB v. Iron Workers*, 434 U.S. 335, 350 (1978), when holding that "on an issue that implicates its expertise in labor relations, a reasonable construction by the Board is entitled to considerable deference").

69. Id. at 843 (quoting *Morton v. Ruiz*, 415 U.S. 199, 231 (1974)).

70. *Chevron*, 467 U.S. at 844.

71. See id. at 842-43. However, Cass Sunstein has posited a three-step inquiry that he refers to as the "*Chevron Step Zero,*" an "initial inquiry into whether the *Chevron* framework applies at all." Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 191 (2006); see also Richard W. Murphy, *A 'New' Counter-Marbury: Reconciling Skidmore Deference and Agency Interprettive Freedom*, 56 ADMIN. L. REV. 1, 18 (2004) (naming the "threshold inquiry regarding" whether *Chevron* or *Skidmore* "applies Chevron's 'step zero'") (citation omitted). For the argument that the *Chevron* two-step framework is properly understood as having only one step, see generally Matthew C. Stephenson & Adrian Vermeule, *Chevron Has Only One Step*, 95 VA. L. REV. 597 (2009).
intent of Congress.\textsuperscript{72} If this initial inquiry is answered in the negative, a court, going to the second step of the analysis:

[D]oes not simply impose its own construction of the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.\textsuperscript{73}

Chevron’s deference regime was discussed in United States v. Mead Corp.,\textsuperscript{74} wherein the Court held:

[T]hat administrative implementation of a particular statutory provision qualifies for Chevron deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority. Delegation of such authority may be shown in a variety of ways, as by an agency’s power to engage in adjudication or notice-and-comment rulemaking, or by some other indication of a comparable congressional intent.\textsuperscript{75}

The Court further opined:

[W]ether or not they enjoy any express delegation of authority on a particular question, agencies charged with applying a statute...
necessarily make all sorts of interpretive choices, and while not all of those choices bind judges to follow them, they certainly may influence courts facing questions the agencies have already answered. . . . The fair measure of deference to an agency administering its own statute has been understood to vary with circumstances, and courts have looked to the degree of the agency’s care, its consistency, formality, and relative expertness, and to the persuasiveness of the agency’s position. The approach has produced a spectrum of judicial responses, from great respect at one end, to near indifference at the other.\textsuperscript{76}

In the view of the \textit{Mead} Court, \textit{Chevron} deference is warranted where Congress has expressly authorized an agency “to engage in the process of rule-making or adjudication that produces regulations or rulings for which deference is claimed.”\textsuperscript{77} The absence of such formal agency procedures and processes “does not alone . . . bar the application of \textit{Chevron}” as the Court has “sometimes found reasons for \textit{Chevron} deference even when no such administrative formality was required and none was afforded . . . .”\textsuperscript{78}

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As “no provision [of the Constitution] sets out explicit instructions to judges about the limits of interpretive flexibility or about what other sources or considerations are admissible or relevant to help interpret the text,”\textsuperscript{79} no one single statutory interpretation approach is mandated. Accordingly, “a judge may embrace all the available tools as theoretically legitimate and selectively employ those that are best suited for the particular case.”\textsuperscript{80} With this point and the foregoing discussion

\textsuperscript{76} Id. at 227-28 (footnotes and citations omitted).

\textsuperscript{77} Id. at 229.

\textsuperscript{78} Id. at 231; see also Nat’l Cable & Telecommns. Ass’n. v. Brand X Internet Servs., 545 U.S. 967, 981 (2004) (holding that \textit{Chevron} applies to cases involving an agency’s inconsistent interpretations of the statute it administers, and opining that “the whole point of \textit{Chevron} is to leave the discretion provided by the ambiguities of a statute with the implementing agency.” (quoting Smiley v. Citibank (S. D.), N.A., 517 U.S. 735, 742 (1996)).

\textsuperscript{79} VERMEULE, supra note 23, at 31.

\textsuperscript{80} CROSS, supra note 27, at 17; see also id. at 46 (“A judge could, in his or her judgment, rely on statutory text in one case, legislative history in the next, and perhaps rely on some broad invocation of legislative purpose or pragmatic consideration in the following decision.”). Reliance on several interpretive methodologies can even be found in one case. For example, in NLRB v. Town & Country Electric, Inc., 516 U.S. 85 (1995), the Supreme Court addressed the question (answered in the affirmative by the NLRB) whether an individual simultaneously employed by an employer and by a labor union can be an “employee” under section 2(3) of the Act and therefore protected by the NLRA. Section 2(3) of the Act provides that the “term ‘employee’ shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise . . . .” 29 U.S.C. § 152(3) (2006). A unanimous Court
of interpretative methodologies in mind, the discussion now turns to the
specific subject of this essay: the debate over section 3(b) and the
decisionmaking authority of the two-member NLRB.

III. THE (WHICH) QUORUM: TWO OR THREE?

In 1935 the United States Congress passed and President Franklin
D. Roosevelt signed into law the NLRA. As enacted, the Act created the
NLRB, an administrative agency empowered to administer and enforce
the Act’s unfair labor practice and representation election provisions.81
The Board was initially composed of three members appointed to
staggered five-year terms by the President with the advice and consent
of the United States Senate,82 with two of those members constituting a
quorum.83

Twelve years later, in the Taft-Hartley Act,84 Congress overrode the
holding that the individual was a statutory employee cited Chevron, noting that “the Board often
possesses a degree of legal leeway when it interprets its governing statute.” Town & Country, 516
U.S. at 89-90. Referencing ordinary and legal dictionary definitions of the word “employee,” the
Court concluded that the Board’s position “is consistent with the broad language of the [statute]
itself;” that the agency’s “broad, literal interpretation of the word ‘employee’ is consistent with
several of the Act’s purposes;” that legislative history sources were “consistent with the Board’s
broad interpretations of the word;” that the Board’s reading was consistent with Court precedent;
and that another “provision of the 1947 Labor Management Relations Act seems specifically to
contemplate the possibility that a company’s employee might also work for a union.” Id. at 90-92;
see also id. at 92-96 (rejecting the employer’s argument for an interpretation of “employee” under
common-law agency principles and deferring to the Board’s construction of the term). For
additional discussion of Town & Country, see generally Ronald Turner, Reactions of the Regulated,
17 LAB. LAW. 479 (2002).

81. See 29 U.S.C. § 158 (2006) (the Act’s prohibition of unfair labor practices); id. § 159(a)
(“Representatives designated or selected . . . by the majority of the employees” in a bargaining unit
“shall be the exclusive bargaining representative of all the employees in [the] unit for the purposes
of collective bargaining . . . .”); id. § 159(c) (provision governing NLRB processing of election
petitions, secret ballot elections, and certification of election results); see also ROBERT A. GORMAN
& MATTHEW W. FINKIN, BASIC TEXT ON LABOR LAW: UNIONIZATION AND COLLECTIVE
BARGAINING 9 (2d ed. 2004) (“Congress in 1935 created an administrative agency, the National
Labor Relations Board, to implement both the unfair labor practice provisions . . . and the
representation provisions . . . of the Labor Act.”).

82. See National Labor Relations Act, ch. 372, § 3(a), 49 Stat. 449, 451 (1935) (“There is
hereby created a board . . . which shall be composed of three members . . . .”) (codified as amended at
scattered sections of 29 U.S.C.); FRANK W. MCCULLOCH & TIM BORINSTEIN, THE NATIONAL
LABOR RELATIONS BOARD 23 (1974).

83. See National Labor Relations Act § 3(b), 49 Stat. at 451 (1935) (“A vacancy in the Board
shall not impair the right of the remaining members to exercise all of the powers of the Board, and
two members of the Board shall, at all times, constitute a quorum.”).

84. See Labor Management Relations (Taft-Hartley) Act, ch. 120 61 Stat. 136 (1947)
(codified as amended at scattered sections of 29 U.S.C.); see also Catherine L. Fisk & Deborah C.
Malamud, The NLRB in Administrative Exile: Problems With Its Structure and Function and
Suggestions for Reform, 58 DUKE L.J. 2013, 2033 (2009) (“The NLRA is an amalgam of two
veto of President Harry S. Truman and amended the NLRA. The statutory changes and additions included an expansion of the Board’s membership from three to five members and, in section 3(b), the following delegation, vacancy, and quorum provisions:

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

Does section 3(b) mandate that the Board must, at all times, have at least three active members? Has the Board lacked a quorum beginning on January 1, 2008, when its active membership fell to two members?

A. Two

1. The First Circuit’s View

In Northeastern Land Services, Ltd. v. NLRB, the United States Court of Appeals for the First Circuit considered and rejected the employer’s argument that then-Member Liebman’s and Member Schaumber’s determination that certain conduct by the company violated the Act “could not be properly issued because the Board lacked a quorum under section 3 of the NLRA.”

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statutes, the Wagner Act (1935) and the Taft-Hartley Act (1947).
86. See generally id. at 41-47 (discussing the shifted emphasis of federal labor law as a result of amendments to the Labor Management Relations Act of 1947).
87. See 29 U.S.C. § 153(a) (1935); Ronald Turner, Ideological Voting on the National Labor Relations Board, 8 U. PA. J. LAB. & EMP. L. 707, 714 (2006) (“As a matter of custom, and not law, no more than three of the five NLRB members may belong to the President’s political party.”); see also James J. Brudney, Isolated and Politicized: The NLRB’s Uncertain Future, 26 COMP. LAB. L. & POL’Y J. 221, 244 n.109 (2005) (noting that a “tradition has developed of appointing both Democrats and Republicans to the Board, with the President’s party holding a three-to-two majority of the seats and also the chair”) (citation omitted).
88. 29 U.S.C. § 153(b).
89. See supra notes 7-10 and accompanying text.
90. 560 F.3d 36 (1st Cir. 2009).
91. Id. at 40. The challenged Board decision concluded that the employer’s maintenance and discharge of an employee for violating an overly broad confidentiality provision was unlawful, and
Pointing out that the issue was one of first impression and concluding that the court “owe[d] some deference to the agency’s view,” the First Circuit stated that the Board’s December 2007 “delegation of its institutional power to a panel that ultimately consisted of a two-member quorum because of a vacancy was lawful under the plain text of section 3(b).” Accordingly, the court concluded, “[t]he vacancy, which left the two-member quorum remaining, may not, under the terms of section 3(b), impair the right of the two-member quorum to exercise all powers of the Board.” The First Circuit noted that its position was consistent with the conclusions reached by the OLC in 2003 and by the Ninth Circuit in its 1982 decision in Photo-Sonics, Inc. v. NLRB.

ordered the employee’s reinstatement and other remedial measures. See Ne. Land Servs., Ltd., 352 N.L.R.B. 744, 746 (2008). Interestingly, in a footnote in the Board’s opinion, Member Schaumber questions the theory that an employer’s imposition of discipline pursuant to an unlawfully overbroad rule is necessarily unlawful, such as in situations where the discipline imposed is for a lawful reason albeit under an overly broad, unlawful rule. Nonetheless, [Schaumber] applies precedent for institutional reasons for the purpose of deciding this case. Id. at 746 n.9. This footnote reveals one way in which a litigant can be disadvantaged by a two-member Board decision: the inability to convince a majority of a three-member panel of the correctness of its position. The difference between Liebman and Schaumber on the question of whether an overly broad rule is necessarily illegal did not result in a “tie” between the two members because Schaumber openly added to his decisional calculus and acted on institutional concerns in casting his ultimate vote. For additional cases in which Member Schaumber applied and adhered to Board precedent for institutional reasons, see generally Fremont-Rideout Health Group, 354 N.L.R.B. No. 68 (Aug. 27, 2009); Brighton Retail, Inc., 354 N.L.R.B. No. 62 (July 31, 2009); Superior Prot., Inc., 354 N.L.R.B. No. 12 (Apr. 30, 2009).

92. Ne. Land Servs., Ltd., 560 F.3d at 37.
94. Id. at 41.
95. Id.
96. In a 2003 legal opinion, the OLC responded to an inquiry from the Board regarding the agency’s authority to issue decisions and orders in unfair labor practice and representation cases “once three of the five seats on the Board have become vacant.” Quorum Requirements, supra note 5, at 1. The OLC construed and applied the “plain terms” of section 3(b) and determined that “if the Board delegated all of its powers to a group of three members, that group could continue to issue decisions and orders so long as a quorum of two members remained.” Id. at 2. Section 3(b)’s “provision for a two-member quorum” of the delegated group of three “is an express exception to the requirement that a quorum of the Board shall be three members . . . .” Id. In reaching this conclusion the OLC recognized that “the Board would be creating a three-member ‘group’ with the intent that it operate as a two-member group upon the departure of the third member,” and that “the Board itself would lack its quorum of three members, and the proposed arrangement would be designed with the purpose of dealing with that situation.” Id. at 4. That intent and arrangement did not violate section 3(b), the OLC reasoned: that provision “imposes no requirement that the group continue to have three members, as long as the two-member quorum continues.” Id.
97. 678 F.2d 121 (9th Cir. 1982). Photo-Sonics rejected the employer’s contention that an NLRB unfair labor practice decision was invalid because one member of the three-member panel resigned effective the same day as and before the issuance of the Board’s ruling. Id. at 122. As all
2. The Seventh Circuit's Approach

The United States Court of Appeals for the Seventh Circuit considered the section 3(b) quorum issue in New Process Steel, L.P. v. NLRB. Contending that a Board decision and order should not be enforced, the employer argued that the Board's December 2007 delegation to a three-member group was improper because the "third member, whose term was about to expire, was . . . a phantom member who would not actually consider cases before the Board." That action violated the plain meaning of section 3(b), the employer urged, because the delegation was to two and not to three members of the agency. The Board countered that section 3(b) "is clear that the vacancy of one member of a three-member panel does not impede the right of the remaining two members to execute the full delegated powers of the NLRB." The Seventh Circuit agreed with the Board:

As we read it, § 3(b) accomplished two things: first, it gave the Board the power to delegate its authority to a group of three members, and second, it allowed the Board to continue to conduct business with a quorum of three members but expressly provides that two members of the Board constitutes a quorum where the Board has delegated its authority to a group of three members. The plain meaning of the statute thus supports the NLRB's delegation procedure.

In support of this reading, the court relied on the First Circuit's Northeastern Land Services and the Ninth Circuit's Photo-Sonics

three Board members concurred in the decision, the court concluded that "we need not determine whether [the member's] resignation precluded his participation in the Board's decision." Moreover, the court opined, the Board's decision would be valid even if the member who resigned had not participated in the ruling. Id. Quoting section 3(b) and looking to analogous "quorum" practices in the federal courts of appeals, the court concluded that "quorum' means the number of members that may legally transact business . . . ." Id. at 123. Because two of the three members of the Board's panel supported the ruling, the member's resignation "did not invalidate the decision." Id.; see also Ne. Land Servs., Ltd., 560 F.3d at 42 (noting and citing court decisions upholding analogous quorum rules and approaches by other administrative agencies).

98. 564 F.3d 840 (7th Cir. 2009), enforcing 353 N.L.R.B. No. 13 (Sep. 25, 2008). The employer sought judicial review of the Board's determination that the employer violated the Act by unlawfully repudiating a collective bargaining agreement the company had negotiated with its employees' union representative and by illegally withdrawing recognition from the union during the term of a valid labor agreement. See id. at 842.

99. See supra notes 7-10 and accompanying text.

100. New Process Steel, 564 F.3d at 845.

101. Id.

102. Id. at 845-46 (emphasis added and footnote omitted).
decisions. 103

Having decided the quorum issue on the ground of (its understanding of) the plain meaning of section 3(b), 104 the Seventh Circuit remarked that the legislative history of section 3(b) did not support the employer's reading of that provision. 105 The "primary concern" of the framers of the Taft-Hartley Act in expanding the Board's membership from three to five members "was increasing the efficiency of the Board. . . . The purpose of the revisions, then, was to allow the NLRB to hear more cases by creating panels of the entire Board." 106 The Seventh Circuit found "no suggestion in the relevant reports that the Board is restricted from acting when its membership falls below a certain level. . . . Indeed, a court interpreting the statute that way would hinder the efficient panel operation that Congress intended to
create."

The employer needed, but did not produce, statements in the legislative history “establishing that the Board was forbidden from operating with a quorum of two, or that Congress was particularly concerned about delegating authority to Board members whose term was about to expire.” With this posited efficiency-promoting legislative intent animating its analysis, the court concluded that “[f]oridding the NLRB to sit with a quorum of two when there are two or more vacancies on the Board would thus frustrate the purposes of the act, not further it.”

The Seventh Circuit then considered and rejected the employer’s argument that the Supreme Court had invalidated similar quorum procedures in *Nguyen v. United States*. *Nguyen* was distinguishable in two respects, the Seventh Circuit reasoned. First, the statute interpreted in that case, 28 U.S.C. section 46, “contains no delegation or quorum clauses, simply a requirement that panels consist of three judges.” Second, *Nguyen*, examining the legislative history of section 46, found that Congress was concerned about the routine assignment of cases to

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108. Id. Interestingly, Senator Joseph C. O’Mahoney, arguing in favor of sustaining President Truman’s veto of the Taft-Hartley Act, expressed his concern that giving the Board the authority to delegate its power to three members would allow “any two members of that group of three [to] speak for the Board. So we have a bill . . . which not only authorizes the Board to delegate its power, but authorizes the Board to delegate its powers, and all of them, to less than a quorum of the Board.” 93 CONG. REC. 7525 (June 23, 1947) (remarks of Sen. O’Mahoney), 2 LEG. HIST. at 1632. Thus, at least one legislator was concerned that the power of the NLRB could be delegated to and exercised by two and only two Board members.
110. 539 U.S. 69 (2003). The *Nguyen* Court, by a vote of 5-4, held that a three-member Ninth Circuit panel consisting of two life-tenured Article III judges and one Article IV judge who was appointed to a ten-year term did not have the authority to decide an appeal. Id. 28 U.S.C. § 46(b) mandates “the hearing and determination of cases and controversies by separate panels, each consisting of three judges.” 28 U.S.C. § 46(b) (2006). Section 46(d) provides that a “majority of the number of judges authorized to constitute a court or panel thereof . . . shall constitute a quorum.” Id. § 46(d). The Court stated that it is “true that two judges of a three-judge panel constitute a quorum legally able to transact business,” and that “settled law permits a quorum to proceed to judgment when one member of the panel dies or is disqualified.” *Nguyen*, 539 U.S. at 82. In the Court’s view, section 46(b) required a panel of at least three Article III judges in the first instance as “Congress apparently enacted § 46(b) in part ‘to curtail the prior practice under which some circuits were routinely assigning some cases to two-judge panels.’” Id. at 83 (quoting Murray v. National Broadcasting Co., 35 F.3d 45, 47 (2d Cir. 1994)). Given this apparent reason for the passage of the statute, the Court concluded that “although the two Article III judges who took part in the decision of petitioners’ appeals would have constituted a quorum if the original panel had been properly created, it is at least highly doubtful whether they had any authority to serve by themselves as a panel.” Id.
112. *New Process Steel*, 564 F.3d at 848.
Section 3(b) of the Act "was not motivated by similar concerns, and indeed contains quorum and delegation clauses that cover the scenario at issue here." 114

The Seventh Circuit also referred to Supreme Court and District of Columbia Circuit rulings from which it gleaned the principle "that a public board has the authority to act despite vacancies because the board, rather than the individual members, has the authority to act... so long as they have satisfied the quorum requirements." 115 That principle "suggests the NLRB has the authority to act so long as they have satisfied the quorum requirements." 116

Additionally, the Seventh Circuit discussed the employer's reliance on Assure Competitive Transportation, Inc. v. United States. 117 In that case, vacancies on the Interstate Commerce Commission ("ICC" or "Commission") had reduced the number of members from the full complement of eleven to six. The ICC requested and Congress passed an amendment giving the Commission the authority to act with a quorum of active commissioners when addressing certain matters. 118 "Because the amendment was intended to establish the Commission's ability to act with only six members in office," the Assure court found that it was "clear that Congress used the language 'a majority of the Commission' to mean a majority of the existing Commission." 119 The employer in New Process Steel argued that, unlike the ICC, the NLRB did not seek Congressional permission to act with a quorum of the two remaining members. 120 The Seventh Circuit responded that the employer's argument presumed that the Board was not acting within its statutory authority. 121 "Given that the plain meaning of the statute supports NLRB's reading of the statute, New Process Steel's interpretation of Assure is unpersuasive." 122

113. See id.; Nguyen, 539 U.S. at 83.
114. New Process Steel, 564 F.3d at 848.
115. Id.; see, e.g., FTC v. Flotill Prods., Inc., 389 U.S. 179 (1967); see also Falcon Trading Group, Ltd. v. SEC, 102 F.3d 579 (D.C. Cir. 1996); Railroad Yardmasters of Am. v. Harris, 721 F.2d 1332 (D.C. Cir. 1983)).
116. New Process Steel, 564 F.3d at 848.
117. 629 F.2d 467 (7th Cir. 1980); see also New Process Steel, 564 F.3d at 848.
118. See Assure, 629 F.2d at 474 (discussing amendment of 49 U.S.C. § 10327).
119. Id.
120. New Process Steel, 546 F.3d at 848.
121. Id.
122. Id.
3. The Fourth Circuit’s Reading

Narricot Industries, L.P. v. NLRB\textsuperscript{123} examined and denied an employer’s petition for review of the two-member Board’s decision and holding that the company engaged in certain conduct violative of sections 8(a)(1) and (5) of the Act.\textsuperscript{124} Before addressing the merits of the Board’s decision, the court asked whether that decision “was properly issued by a two-member quorum.”\textsuperscript{125}

Focusing on the text of section 3(b), the court opined that three provisions of that section—the delegation, vacancy, and quorum clauses—were pertinent. The Board delegated all of its powers to a three-member group in December 2007. Upon the expiration of the term of one of those three members,\textsuperscript{126} “the remaining two members constituted a quorum of the three-member group, empowered to act with all of the Board’s powers in light of the ‘vacancy’ and ‘quorum’ provisions.”\textsuperscript{127} Thus, the court reasoned, “[u]nder the plain and unambiguous text of § 3(b) . . . the designated three-member group was empowered to act with a two-member quorum.”\textsuperscript{128}

The court thus disagreed with and rejected the view that section 3(b) contains two separate and distinct quorum requirements, one for the Board and another for a delegee three-member group.\textsuperscript{129} While section 3(b) provides that the three-member quorum requirement for the Board applies “at all times,”\textsuperscript{130} the court noted the section’s modifying phrase.
“except that two members shall constitute a quorum of any” delegatee three-member group. The phrase “‘except that’ ordinarily introduces an exception.” Congress would have omitted the words “except that” if the legislature sought to put in place two separate and independent quorum clauses, the court reasoned. As Congress included those words in section 3(b), two of the three members of a delegatee group are empowered to and can decide cases even though three of the Board’s five seats are vacant.

4. The Second Circuit Speaks

In *Snell Island SNF LLC v. NLRB*, the United States Court of Appeals for the Second Circuit addressed the question whether the two-member Board panel was without statutory authority to issue a decision and order concluding that the employer had unlawfully refused to negotiate with the union representative of its employees. The court recounted the circumstances surrounding the Board’s December 2007 delegation of powers to a three-member panel. The employer conceded that a duly constituted three-member Board panel could continue with a quorum of two if one of the panel members was no longer available. But no three-member panel was effectively constituted in December 2007, the employer argued, as “there was never any intent that the three-member group consisting of Liebman, Schaumber, and Kirsanow would actually issue decisions and orders.” Because the Board knew that Member Kirsanow “would not be around to exercise the powers being delegated,” the employer asserted that the delegation was “an acknowledged sham.”

Considering, first, the employer’s “sham” argument, the Second Circuit examined the text of section 3(b). Agreeing with the conclusion reached by the First Circuit in *Northeastern Land Services*, the Second Circuit found that section 3(b) expressly authorized the Board to delegate any or all of its powers to three or more members; thus, “the delegation to a panel plenipotentiary was within the NLRB’s

131. Id.
132. Narricot Industries, 587 F.3d at 660.
133. See id.
134. 568 F.3d 410 (2d Cir. 2009).
135. See 352 N.L.R.B. No. 106 (July 18, 2008), petition for review denied and cross-petition for enforcement granted, 568 F.3d 410 (2d Cir. 2009).
136. See Snell Island, at 412.
137. Id. at 415 (quoting employer’s brief, brackets omitted).
138. Id.
That delegation, done with knowledge of a member's imminent departure, did not call for a different reading of section 3(b), the court opined. That the NLRB knew that the membership of the panel would soon be reduced from three to two—and that the Board's membership would also decrease to two—has no bearing on the fact that the panel was lawfully constituted in the first instance.

The court then turned to what it viewed as the "more difficult question [of] whether the NLRB panel lost its authority once the NLRB as a whole lost its quorum." In considering this issue the Second Circuit engaged in a *Chevron* deferential standard of judicial review. Asking the step one query—"whether Congress has directly spoken to the precise question at issue"—the court noted that two circuit courts of appeals examining the quorum issue did not agree on the "plain meaning" of section 3(b). For the Second Circuit, this circuit split suggested statutory ambiguity with regard to the issue of a Board panel's residual power when the Board no longer has a quorum.

Still at *Chevron* step one, the Second Circuit concluded that section 3(b) was silent on the specific question of the authority of a duly constituted Board panel once a quorum of the Board itself is lost, and found no helpful canon of statutory construction shedding light on Congress's intent. Turning to the legislative history of the Taft-Hartley Act, the court opined that Congress added section 3(b) "to enable the Board to handle an increasing caseload more efficiently."

139. *Id.* at 419.
140. *Ne. Land Servs. v. NLRB*, 560 F.3d 36, 41 (1st Cir. 2009).
141. *Snell Island*, 568 F.3d at 419.
142. *Id.*
143. *Id.* (quoting *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984)). Referring to the Second Circuit's approach to the *Chevron* two-step analysis set out in *N.Y. State Office of Children & Family Servs. v. U.S. Dep't of Health & Human Servs. Admin. for Children & Families*, 556 F.3d 90 (2d Cir. 2009), the court stated that ascertaining Congressional intent at step one begins with the text of the statute and ends there if the statute is not ambiguous. If the court determines that "Congress has not directly addressed the precise question at issue" the court will look to canons of construction and legislative history "to see if those interpretive clues permit us to identify Congress's clear intent." *Id.* at 97 (quoting *Cohen v. JP Morgan Chase & Co.*, 498 F.3d 111, 116 (2d Cir. 2007).
144. *Snell Island*, 568 F.3d at 419. Compare *New Process Steel, L.P. v. NLRB*, 564 F.3d 840, 845 (7th Cir. 2009) ("As the NLRB delegated its full powers to a group of three Board members, the two remaining Board members can proceed as a quorum despite the subsequent vacancy."). *with* *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469, 472 (D.C. Cir. 2009) ("Reading the two quorum provisions harmoniously, . . . a three-member Board may delegate its powers to a three-member group, and this delegee group may act with two members so long as the Board quorum requirement is, 'at all times,' satisfied." (citations omitted)).
145. *See Snell Island*, 568 F.3d at 420.
146. *Id.*
147. *Id.* at 421 (quoting *Hall-Brooke Hosp. v. NLRB*, 645 F.2d 158, 162 n.6 (2d Cir. 1981)).
The court quoted from a Senate report which concluded that:

There is no field in which time is more important, yet the Board is from 12 to 18 months behind in its docket . . . . The expansion of the Board . . . would permit it to operate in panels of three, thereby increasing by 100 percent its ability to dispose of cases expeditiously in the final stage. 148

Thus, “one of the purposes of the Taft-Hartley amendments was to increase the Board’s efficiency.” 149

The court also considered the NLRB’s argument that the pre-Taft-Hartley Board, with three members and a two-member quorum requirement, decided hundreds of cases even though only two of the three seats were filled. 150 “However, while this history seems to support the Board’s reading of the Act, it does not definitively answer the precise question at issue in the instant case—whether, in the name of efficiency, a panel of the Board may continue to operate once the Board itself loses its quorum.” 151 While one senator did express his concern that the Board could delegate all of its powers “to less than a quorum of the Board,” 152 the Second Circuit decided that “[w]ithout more, we are unable to conclude that delegation to less than a quorum of the Board was an intended or unintended consequence of the Taft-Hartley amendments.” 153

Concluding that Congressional intent was not clear enough to end the *Chevron* analysis at step one, the court proceeded to *Chevron* step two. “The NLRB’s interpretation of the Act is straightforward,” the

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149. Id. at 423. This efficiency enhancing purpose was not the only purpose of the Taft-Hartley Act discerned by the court. See id. at 420 (“the broad animating purpose of the legislation was to equalize the balance of power between employers and employees in response to the widespread feeling that the unions had gotten too much power during the Roosevelt years” (quotation marks and citation omitted)).
150. Id. at 422.
151. Id.
152. Id. (quoting 93 CONG. REC. 7677, 7679 (June 23, 1947) (remarks of Sen. O’Mahoney), 2 LEG. HIST. 1724; see also supra note 108 and accompanying text. The court was “reluctant to draw much significance from a lone remark by a single senator opposing a bill, made after the Taft-Hartley Act initially passed and only just before the Senate voted to override President Truman’s veto.” *Snell Island*, 568 F.3d at 422.
court opined. Section 3(b) expressly allows the delegation of the Board’s power to a three-member panel and does not indicate that a Board panel does or does not retain jurisdiction in the event the Board itself loses a quorum. “In light of the animating purpose of the Taft-Hartley amendments . . . to increase the Board’s overall efficiency, the NLRB interprets the Act as permitting the two remaining members of the Board to issue labor decisions despite the Board’s lack of a quorum.” That “is a reasonable interpretation of the statute,” the Second Circuit wrote, as is the interpretation that a Board panel’s authority ends when the full Board loses its quorum. Because the Board’s interpretation of section 3(b) need not be “the only possible interpretation, nor even the interpretation deemed most reasonable by the courts,” Snell held that the Board lawfully delegated to and convened a three-member panel, and that the two members remaining after the end of the term of one of the panel members constituted a section 3(b) quorum even though the membership of the entire Board subsequently dropped to two.

5. The Tenth Circuit’s Interpretation

In Teamsters Local Union No. 523 v. NLRB, the United States Court of Appeals for the Tenth Circuit joined the debate over the decisionmaking authority of the two-member NLRB. There, a labor union challenged the Board’s determination that the union committed an unfair labor practice when it insisted placing a worker at the bottom of the bargaining unit’s seniority roster because the worker was not a union member. Affirming the Board’s ruling, the Tenth Circuit addressed the

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154. Id.
155. Id.
156. Id.
157. Id. at 424. The court “commend[ed] the Board for its conscientious efforts to stay ‘open for business’ in the face of vacancies that it did not create and for which it lacked the authority to fill.” Id. While one can applaud the agency for continuing to function and for making what it deems to be the best of problematic circumstances, those considerations do not and should not influence the outcome of the Chevron analysis.
158. Id. (quoting Entergy Corp. v. Riverkeeper, Inc., 129 S.Ct. 1498, 1505 (2009)).
159. Id.
160. 590 F.3d 849 (10th Cir. 2009).
161. See Teamsters Local Union No. 523, 353 N.L.R.B No. 14 (Sep. 25, 2008), aff’d, 590 F.3d 849 (10th Cir. 2009).
162. The Board concluded that the union’s conduct violated section 8(b)(2) of the Act, 29 U.S.C. § 158(b)(2), and that the employer’s acquiescence in the union’s actions were prohibited by section 8(a)(3), 29 U.S.C. § 8(a)(3). The employer did not appeal the Board’s order.
quorum issue under the *Chevron* deferential standard of review. The court noted and summarized the First, Second, Fourth, and Seventh Circuits’ construction of section 3(b) and pointed out that three of the circuits based their rulings on the plain language of that statutory provision. The court continued, the D.C. Circuit’s *Laurel Baye* decision was also based on that court’s interpretation of the plain language of section 3(b). “We are hard-pressed in the wake of this split of opinion in our respected sister circuits to find that the statutory language is clear on its face. Indeed, this very split is evidence of the statute’s ambiguity.”

Proceeding to *Chevron* step two, the court reasoned that the Board’s interpretation of section 3(b) was a “permissible” interpretation of the statute and was consistent with First, Fourth, and Seventh Circuits’ constructions of the quorum provision. Accordingly, the Tenth Circuit deferred to the Board and upheld the agency’s authority “to act with only two members, both of whom were part of a three-member group to which the Board validly delegated all of its authority.”

**B. Three**

In *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB* the United States Court of Appeals for the District of Columbia Circuit considered the employer’s argument that the two-member NLRB was not properly constituted and did not have the authority to issue an unfair labor practice decision and order.

The challenged Board ruling was invalid, the employer argued, because (1) the Board did not have the authority to delegate its power to a three-member panel that the Board knew would be reduced to two as the result of the expiration of one member’s term, and (2) assuming that the initial delegation was valid, the delegation to the panel did not survive the loss of the NLRB’s quorum. As it had done in the cases previously discussed, the Board’s counter-argument posited that section 3(b) contains a general quorum requirement of three Board members, with an exception for the delegation of agency powers to a three-

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163. *See Teamsters Local 523, 590 F.3d* at 852.
164. *Id.; see infra note 174 and accompanying text.*
165. *Id.* (internal quotation marks, brackets, and citation omitted).
166. *Id.*
167. 564 F.3d 469 (D.C. Cir. 2009).
168. *See id.*
169. *See id. at 472.*
The employer’s second argument convinced the court that the Board’s order was not lawfully issued. The District of Columbia Circuit focused on the interaction between section 3(b)’s delegation, vacancy,\(^\text{171}\) and quorum provisions.\(^\text{172}\) Section 3(b) mandates that “three members of the Board shall, at all times, constitute a quorum of the Board”;\(^\text{173}\) in the court’s view, the Board’s position ignored this Board quorum (as distinguished from panel quorum) requirement.\(^\text{174}\) The delegee quorum provision setting the quorum of a three-member Board panel at two members “does not eliminate the requirement that a quorum of the Board is three members. Rather, it states only that the quorum of any three-member delegee group shall be two.”\(^\text{175}\)

The court then reasoned that the text following the Board quorum provision—"except that two members shall constitute a quorum" of any three-member panel—"is therefore present in the statute only to indicate that the delegee group’s ability to act is measured by a different numerical value.”\(^\text{176}\) Reading the Board quorum and delegee quorum provisions harmoniously, the court stated that “the result is clear: a three-member Board may delegate its powers to a three-member group, and this delegee group may act with two members so long as the Board quorum requirement is, ‘at all times,’ satisfied.”\(^\text{177}\)

Did Congress intend that a Board reduced to two active members would be authorized to act as if the agency had a quorum of the full

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\(^{170}\) See id.

\(^{171}\) The vacancy provision provides that “[a] vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board . . . .” National Labor Relations Act, 29 U.S.C. § 153(b) (2006). While that provision could be read as suggesting “the Board’s ability to act is impaired if there is more than one vacancy on the Board,” the court considered section 3(b)’s vacancy and quorum provisions “in tandem” and determined that “it is clear that the vacancy provision allows the Board to function fully with at most two vacancies. That is the maximum number of vacancies that the Board can sustain and still maintain a quorum.” *Laurel Baye Healthcare*, 564 F.3d at 475.

\(^{172}\) *Laurel Baye Healthcare*, 564 F.3d at 475.

\(^{173}\) 29 U.S.C. § 153(b) (emphasis added); see also 564 F.3d at 473 (“A modifying phrase as unambiguous as this denotes that there is no instance in which the Board quorum requirement may be disregarded.”).

\(^{174}\) See *Laurel Baye Healthcare*, 564 F.3d at 472. The court argued that the Board’s interpretation of section 3(b) violated a “cardinal principle of interpretation” requiring the construction of “a statute so that no provision is rendered inoperative or superfluous, void or insignificant.” *Id.* (citation omitted).

\(^{175}\) *Id.*

\(^{176}\) *Id.*

\(^{177}\) *Id.* at 472-73; see also *id.* at 473 (“[T]he Board cannot by delegating its authority circumvent the statutory Board quorum requirement, because this requirement must always be satisfied.”).
complement of five members (i.e., three members)? The reasoning supporting the District of Columbia Circuit’s negative answer to that question warrants quotation:

Though the delegee group quorum provision is preceded by the prepositional phrase “except that,” . . . Congress’ use of differing object nouns within the two quorum provisions indicates clearly that each quorum provision is independent from the other. The establishment of a two-member quorum of a subordinate group does not logically require any change in the provision mandating a three-member quorum for the Board as a whole. In fact, it does not seem odd at all that a sub-unit of any body would have a smaller quorum number than the quorum of the body as a whole. Quorums, after all, are usually majorities. A majority of three is smaller than a majority of five. It therefore defies logic as well as the text of the statute to argue, as the Board does, that a Congress which explicitly imposed a requirement for a three-member quorum “at all times” would in the same sentence allow the Board to reduce its operative quorum to two without further congressional authorization.\(^\text{178}\)

Additionally, the court opined that agency and corporate law supported its construction of section 3(b). The delegated authority of an agent ends at the time of the suspension of the powers of the entity bestowing authority on the agent;\(^\text{179}\) the agent’s power ceases when the delegating authority resigns or is terminated;\(^\text{180}\) and the powers of a delegating board of directors are suspended when the membership of the board does not meet a quorum requirement.\(^\text{181}\) Thus, the authority of a “board-like entity . . . ceases the moment that vacancies or disqualifications on the board reduce the board’s membership below a quorum.”\(^\text{182}\) Applying this principle, Laurel Baye declared that the only authority of the delegee committee created by section 3(b) “is that of the Board. If the Board has no authority, it follows that the committee has none. The delegee’s authority to act on behalf of the Board therefore ceased the moment the Board’s membership dropped below its quorum requirement of three members.”\(^\text{183}\)

In the remaining pages of its opinion, the court rejected the Board’s

\(^{178}\) Id.

\(^{179}\) See id. (citing RESTATEMENT (THIRD) OF AGENCY § 3.07(4) (2006)).

\(^{180}\) See id. (citing 2 MEADE FLETCHER, FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS § 504 (2008)).

\(^{181}\) Id. (citing FLETCHER, supra note 180, at § 421).

\(^{182}\) Id.

\(^{183}\) Id.
argument that its authority to act with two members was supported by District of Columbia Circuit precedent\(^{184}\) and by the First Circuit’s decision in *Northeastern Land Services*.\(^{185}\) Furthermore, the court recognized “that the case before us presents a close question,” and conceded that the OLC’s interpretation of section 3(b) and the Board’s desire to continue to exercise its decision-making function and not have its “adjudicatory wheels grind to a halt” were not “entirely indefensible.”\(^{186}\) “Nevertheless, we may not convolute a statutory scheme to avoid an inconvenient result. Our function as a court is to interpret the statutory scheme as it exists, not as we wish it to be. Any change to the statutory structure must come from the Congress, not the courts.”\(^{187}\)

184. The Board relied on *Railroad Yardmasters of Am. v. Harris*, 721 F.2d 1332 (D.C. Cir. 1983), and *Falcon Trading Group, Ltd. v. SEC*, 102 F.3d 579 (D.C. Cir. 1996). In *Yardmasters* the court held that two members of the three-member National Mediation Board (“NMB”) lawfully delegated power to one of that board’s members. The quorum provision of the relevant statute provided that “[t]wo of the members in office shall constitute a quorum for the transaction of the business of the Board.” 45 U.S.C. § 154 (2006) (quoted in *Yardmasters*, 721 F.2d at 1334). *Yardmasters* noted that its holding was a narrow one and emphasized that, unlike the NLRB, the NMB did not adjudicate unfair labor practices and enforce the rights of individual workers. See *Yardmasters*, 721 F.2d at 1345. Limiting *Yardmasters* “to its statutory context,” *Laurel Baye Healthcare*, 564 F.3d at 474, *Falcon Trading* similarly rejected a challenge to a two-member ruling by the Securities and Exchange Commission. See generally *Falcon*, 102 F.3d 579. An SEC-promulgated quorum rule provided that a quorum of that five-member commission “shall consist of three members; provided, however, that if the number of Commissioners in office is less than three, a quorum shall consist of the members in office.” 17 C.F.R. § 200.41 (2009). The *Falcon Trading* court held that “[i]f not otherwise constrained by statute, an agency sufficiently empowered by its enabling legislation may create its own quorum rules.” *Falcon*, 102 F.3d at 582. *Laurel Baye* correctly pointed out that Congress gave the SEC but not the NLRB the power to make quorum rules. “Congress provided that a quorum of the Board is three members. The Board does not have three members. It cannot act.” *Laurel Baye Healthcare*, 564 F.3d at 475.

185. The District of Columbia Circuit argued that the issue before it was not the same as the one decided by the First Circuit—the validity of a three-member delegate group subsequent to the expiration of one member’s term. Said the *Laurel Baye* court: “The determination of that issue is not necessary to our decision, given that we have determined that the lack of a quorum on the Board as a whole is the determining factor.” *Id.* at 476. “In any event,” the court concluded, “the First Circuit’s decisions are not binding precedent upon us. We are bound only by the decisions of our circuit and the Supreme Court.” *Id.*

186. *Id.*

187. *Id.* The court suggested the possibility of a Board or Congressional response to the quorum issue. “Perhaps a properly constituted Board, or the Congress itself, may also minimize the dislocations engendered by our decision by ratifying or otherwise reinstating the rump panel’s previous decisions, including the case before us.” *Id.*
C. Two or Three?

The court decisions discussed in the preceding section display a variety of interpretive approaches to solving the section 3(b) quorum puzzle. Four courts of appeals, the First, Fourth, Seventh, and District of Columbia Circuits, found their answers in the "plain meaning" of the statutory text. But those courts split 3-1 on the operative meaning of the text in the context of litigation presenting the question whether the two-member panels decisions and orders were enforceable. The Second Circuit, seeing a statutory ambiguity as evidenced by the First Circuit's and District of Columbia Circuit's different "plain meaning" constructions of section 3(b),188 did not side with either of its sister circuits' plain meaning readings. Instead, the Second Circuit invoked *Chevron* and deferred to what it believed to be the Board's reasonable interpretation of the statute, one that permitted the two members to issue decisions even through there was no quorum of the full NLRB.189 The Tenth Circuit also invoked and applied *Chevron*; having found statutory ambiguity in the circuit split on the quorum issue, that court similarly deferred to the Board.

Does section 3(b) authorize a two-member quorum to exercise the decisionmaking of the Board? Or does that section mandate that the Board's authority, and the authority of the group to which it has delegated power, ends in the event the agency has two and only two active members?190 Is the pertinent quorum number two (a majority of a three-member panel) or three (a majority of the five-member NLRB)? What did Congress intend? What exactly did Congress say? Did Congress have any discernable or discoverable purpose relevant to and/or suggestive or dispositive of the quorum question? Should the courts defer to Chairman Liebman's and Member Schaumber's (not surprising) position that their decisions are the authorized and official

189. Id. at 415.
190. See John C. Truesdale, Battling Case Backlogs at the NLRB: The Continuing Problem of Delays in Decision Making and the Clinton Board's Response, 16 LAB. LAW. 1 (2000). The author of this article was a Board member during the Carter administration and a member and chairman in the Clinton administration. Discussing the problem of Board member turnover and vacancies, Truesdale wrote: "The problem was at its worst in the first year of the Clinton presidency when the Board actually fell to two members, less than the necessary quorum." *Id.* at 6; see also John E. Higgins, Jr., Labor Czar-Commissars—Keeping Women in the Kitchen—The Purpose and Effects of the Administrative Changes Made by Taft-Hartley, 47 CATH. U. L. REV. 941, 954 (1998) (the author, a career NLRB attorney, notes that in "a short period in 1993, the Board actually fell to two members, one short of its statutory quorum"); *Id.* at 954 n.43 ("During this period, the Board could not act on contested cases. Anticipating the loss of a quorum, the Board delegated the [injunctive] authority to the General Counsel.").
acts of a properly constituted agency?

If section 3(b) "provides a judge with a genuine textual command," be it a required quorum of a panel or a quorum of the full Board, the judge must obey that command.\textsuperscript{191} In the absence of "firm textual guidance" or clear precedent, however, the judge must make a choice.\textsuperscript{192} Is the correct or best or better choice a quorum of two or three? Much rides on the answer to that consequential question: hundreds of two-member decisions could have been wrongly issued by a panel not empowered to adjudicate and decide cases.

1. The "Plain Meaning" Analytic

Does section 3(b) have a "plain meaning"?\textsuperscript{193} The statute makes two references to "quorum" that are consistent with the common understanding and usual dictionary definition and use of that term: a majority of a body or entity.\textsuperscript{194} For example, the United States Constitution provides that "a Majority of each [House] shall constitute a Quorum to do Business."\textsuperscript{195} And by statute and institutional rules, six members of the United States Supreme Court constitute a quorum.\textsuperscript{196} But the question still remains: are the two active Board members authorized to decide cases because they are a quorum of the delegee group, or are they not authorized to issue decisions and orders because there is no three-member-minimum quorum of the full NLRB?

The District of Columbia Circuit's interpretation and application of section 3(b) in \textit{Laurel Baye} is the best plain-meaning reading of the statute. The court determined that section 3(b) has four separate provisions: (1) delegation, (2) vacancy, (3) the "at all times" three-member quorum of the Board, and (4) the two-member quorum of the three-member delegee group.\textsuperscript{197} Reading and giving effect to each and all of these provisions, \textit{Laurel Baye} did not render invisible or

\textsuperscript{191.} Neuborne, \textit{supra} note 2, at 43.
\textsuperscript{192.} \textit{Id.}
\textsuperscript{193.} On plain meaning textual analysis, see \textit{supra} notes 21, 27 and accompanying text.
\textsuperscript{194.} \textit{See} \textit{BLACK'S LAW DICTIONARY} 1370 (9th ed. 2009); FTC v. Flotill Prods., Inc., 389 U.S. 179, 183 (1967) (in the absence of a statutory provision "a majority of a quorum constituted of a simple majority of a collective body is empowered to act for the body").
\textsuperscript{195.} U.S. CONST. art. I, § 5, cl. 1 (bracketed material added); \textit{see also} United States Senate Rule VI ("A quorum shall consist of a majority of the Senators duly chosen and sworn.").
\textsuperscript{196.} See 28 U.S.C. § 1 (2006) ("The Supreme Court of the United States shall consist of a Chief Justice of the United States and eight associate justices, any six of whom shall constitute a quorum."); SUP. CT. R. 4 ("Six Members of the Court constitute a quorum.").
\textsuperscript{197.} \textit{See} \textit{Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB}, 564 F.3d 469, 470-71 (D.C. Cir. 2009).
inoperative the full Board quorum requirement in effect “at all times,”
including before and after- delegation.\textsuperscript{198} Recognizing that section 3(b)
speaks of two separate and independent quorum provisions, the court
determined that two active members did not and could not satisfy the
statute’s Board-quorum mandate of three.\textsuperscript{199}

Compare and contrast Laurel Baye’s plain meaning analysis with
that of the First, Fourth, and Seventh Circuits. In \textit{Northeastern Land
Services} the First Circuit (after stating, confusingly, that “[w]e owe some
deference to the agency’s view”)\textsuperscript{200} grounded its approach in the “plain
text” of section 3(b), and referenced that section’s delegation, vacancy,
and two-member delegee group quorum provisions.\textsuperscript{201} Notably absent
from the court’s analysis is the three-member Board quorum provision
mandating the minimum number of members the Board itself must have
“at all times.” Because the court’s “plain text” reading did not include a
 provision critical to discerning the applicative meaning of section 3(b),
the implications arising from Congress’ “at all times” language are not
addressed in the court’s opinion.

The Seventh Circuit’s \textit{New Process Steel} decision and the Fourth
Circuit’s ruling in \textit{Narricot Industries} exhibit and suffer from the same
interpretive flaw. Recall that the Seventh Circuit concluded that the
“plain meaning” of section 3(b) supported the NLRB’s delegation of
agency authority to three members, and that two members of that group
of three constitute a quorum.\textsuperscript{202} That is a correct reading and
interpretation of the statute as far as it goes.\textsuperscript{203} But the issue presented to
the court was not the quorum of two for the delegee group but the lack
of a quorum of three members seated on the NLRB. As did the First
Circuit, the Seventh Circuit’s analysis focused solely on the former and
did not discuss or shed any light on why the latter did not de-authorize
the Board and, consequently, the delegee panel. And the Fourth Circuit,

\textsuperscript{198} \textit{Id. at} 472-75.
\textsuperscript{199} \textit{Id. at} 473-75.

\textsuperscript{200} \textit{Ne. Land Servs., Ltd. v. NLRB}, 560 F.3d 36, 40 (1st Cir. 2009) (citing \textit{Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.}, 467 U.S. 837 (1984)). The First Circuit’s reference to \textit{Chevron} deference and what the court means by “some deference” are problematic. If, as the court concluded, the plain text of section 3(b) did not impair the right of the two-member quorum to exercise the Board’s powers, then at \textit{Chevron} step one Congress “has directly spoken to the precise question at issue,” and no deference to the agency is required. \textit{Chevron}, 467 U.S. at 842. And is “some deference” the same as or something less than the agency’s “permissible construction the statute” if the analysis reaches \textit{Chevron} step two? \textit{Id. at} 843.

\textsuperscript{201} \textit{Ne. Land Servs.}, 560 F.3d at 40.

\textsuperscript{202} \textit{See New Process Steel}, L.P. v. NLRB, 564 F.3d 840, 845-46 (7th Cir. 2009); \textit{see also supra} notes 49-64 and accompanying text.

\textsuperscript{203} \textit{See Snell Island SNF LLC v. NLRB}, 568 F.3d 410, 419 (2d Cir. 2009) (Board’s December 2007 delegation to three-member panel “was lawfully constituted in the first instance”).
noting its agreement with the conclusions reached by the First and Seventh Circuits, problematically rendered inoperative section 3(b)’s “at all times” language.\footnote{Narricot Indus., L.P. v. NLRB, 587 F.3d 654, 659-60 (4th Cir. 2009).}

A court engaged in the interpretive enterprise must recognize and consider all of the terms and provisions of a statute before declaring “plain meaning” and employing that meaning to resolve a litigated dispute. Laurel Baye’s reading did just that and does not suffer from the aforementioned deficiencies of the First, Seventh, and Fourth Circuits’ contrary analyses and conclusions as to the “plain meaning” of section 3(b).

2. Legislative History and Purpose

Moving beyond statutory text, in \textit{New Process Steel} and \textit{Snell Island} the Seventh and Second Circuits determined that the legislative history of the Taft-Hartley Act reveals a Congressional intent to increase the efficiency of the Board.\footnote{See supra notes 28-34 and accompanying text for discussion of intentionalism and statutory interpretation.} Both courts opined that the expansion of the Board’s membership from three to five members enhanced the agency’s efficiency,\footnote{See supra notes 98-102, 134-38 and accompanying text.} and that nothing in the legislative history suggested that the Board was prohibited from operating with a quorum of two.\footnote{See supra notes 90-97, 123-33 and accompanying text.} In addition, both courts looked to statutory purpose. \textit{New Process Steel} concluded that “[t]he purpose of the [Taft-Hartley Act] revisions . . . was to allow the NLRB to hear more cases” and that forbidding a two-member quorum to sit when the Board has two or more vacancies “would frustrate the purposes of the act, not further it.”\footnote{\textit{New Process Steel,} 564 F.3d at 847.} \textit{Snell Island} expressed the view that “one of the purposes of the Taft-Hartley amendments was to increase the Board’s efficiency.”\footnote{\textit{Snell Island,} 568 F.3d at 423.}

Even if one agrees that legislative history demonstrates or at least suggests that the intent and purpose of the Taft-Hartley Act was the promotion of the Board’s efficiency, it is by no means clear that this productivity-enhancement rationale supports the argument that a two-member panel may continue to decide cases when the Board itself loses its quorum. The Second Circuit rightly noted that this history “does not definitively answer” the question of the panel’s authority in the post-December 2007 delegation and circumstances discussed in this article.
Thus, the creation of a delegee panel system does not inexorably lead to the conclusion that a Board with less than three members is authorized to decide cases.

3. To Defer or Not to Defer?

While the First Circuit’s *Northeastern Land* decision made a passing reference to the *Chevron* standard of review, the Second Circuit’s *Snell Island* ruling employed the *Chevron* two-step review standard and held that the Board’s position “is a reasonable interpretation of the statute.” To what did the court defer?

The Second Circuit’s opinion noted that “[a]nticipating that no replacement appointments were forthcoming, and that it would lose its three-member quorum, the Board delegated all of its powers to a three-member panel consisting of Liebman, Schaumber, and Kirsanow, effective December 28, 2007.” According to the court, the Board “relied on the plain language of the Act” and on:

> [T]he March 4, 2003 opinion issued by the Office of Legal Counsel of the U.S. Department of Justice (OLC) in response to the Board’s May 16, 2002 request for OLC’s opinion whether the Board may issue decisions during periods when three or more of the five seats on the Board are vacant. OLC’s opinion concluded that “if the Board delegated all of its powers to a group of three members, that group could continue to issue decisions and orders as long as a quorum of two members remained.”

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OLC’s opinion stands for the proposition that the Board has the authority to issue two-member decisions and orders, but that it is within the Board’s discretion whether or not to exercise that authority.

As noted in the OLC’s opinion, the Board “agreed to be bound by” the OLC’s determination.

Recall the earlier discussion in which it was noted that *Chevron’s*

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211. *Snell Island*, 568 F.3d at 424; *supra* notes 134-59 and accompanying text.
212. *Id.* at 412 (alteration in original).
213. *Id.*
214. *Id.* (citing Dec. 20, 2007 Minutes of Board Action).
step two instructs that "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute."\(^{216}\) And in its post-*Chevron* decision in *United States v. Mead*\(^{217}\) the Supreme Court explained that an agency’s implementation of a statutory provision “qualifies for *Chevron* deference when . . . the agency interpretation claiming deference was promulgated in the exercise of” that agency’s delegated authority.\(^{218}\) The Court held that “[d]elegation of such authority may be shown in a variety of ways, as by an agency’s power to engage in adjudication or notice-and-comment rulemaking, or by some other indication of a comparable congressional intent.”\(^{219}\) *Mead* stated, further, that the “fair measure of deference to an agency administering its own statute var[ies] with circumstances” with courts “look[ing] to the degree of the agency’s care, its consistency, formality, and relative expertness, and to the persuasiveness of the agency’s position.”\(^{220}\)

*Snell Island* did not defer to an NLRB interpretation and application of section 3(b) done in contested litigation and adjudication of the quorum issue, or to a quorum rule formulated and implemented pursuant to the Board’s rulemaking authority.\(^{221}\) Rather, the court deferred to a Board that requested and agreed to be bound by the OLC’s 2003 opinion recognizing the authority of two members to decide cases while three of the agency’s seats are vacant.\(^{222}\) The OLC’s opinion may be a plausible reading of section 3(b), and it is not surprising that the Board relied on an opinion which allows the agency to continue to function with only two of five members.\(^{223}\) But that reliance on the OLC’s position is decidedly not the Board’s own construction of section 3(b). Compelled Board acceptance of the OLC’s view is not and should in no way be equated with an independent assessment and discretionary determination of the quorum issue reflecting the Board’s expertise, informed judgment, and articulated and persuasive reasoning and explanation. Judicial deference under these circumstances does not satisfy the requirements and further the goals of the *Chevron* regime.

To what did the Tenth Circuit defer in *Teamsters Local Union No.*

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218. *Id.* at 226-27.
219. *Id.* at 227.
220. *Id.* at 228 (bracketed material added).
221. *See* 29 U.S.C. § 156 (2006) (“The Board shall have authority from time to time to make, amend, and rescind, in a manner prescribed by the Administrative Procedure Act, such rules and regulations as may be necessary to carry out the provisions of this Act.”).
222. *See* *Snell Island SNF v. NLRB*, 568 F.3d 410, 412 (2d Cir. 2009).
223. *See id.* at 412.
Noting the differing views in the federal court of appeals, the Tenth Circuit found *Chevron* ambiguity in the circuit split and took no sides in the debate over the best or better reading of the plain language of section 3(b). While a circuit split on the issue of the meaning of the plain language of a statutory provision can be suggestive of *Chevron* ambiguity, the Tenth Circuit’s move to *Chevron* step two was taken without any independent analysis of the initial *Chevron* determination: whether Congress had spoken directly to the issue presented in the section 3(b) quorum cases. Thus, the court took no position on the question whether the two-member NLRB is authorized by section 3(b)’s plain language. That is not to say that the court could not or would not have ultimately deferred, as it did, to the NLRB; it is to say that an examination of the text, and an explanation of why the plain language thereof does or does not mandate authorization or deauthorization of the two-member Board, could have shed useful analytical light on the proper resolution of the important quorum issue.

IV. CONCLUSION

This essay argues that the best reading of section 3(b) is one which terminates the NLRB’s power to decide cases when there are only two active Board members. This posited best reading of the statute is not presented as the only “right” answer, for defensible interpretations of section 3(b) have been presented by the courts addressing what *Laurel Baye* correctly calls the close question of the validity of the challenged two-member rulings.\(^{224}\) As evidenced by the cases discussed in the preceding part, close questions are answered differently by courts employing various interpretive theories and methodologies. Given the NLRB’s longstanding tradition of not acquiescing to the contrary view of a federal court of appeals, such as that expressed in the District of Columbia Circuit’s *Laurel Baye* decision,\(^ {225}\) only the Supreme Court can definitively resolve the circuit split discussed in this essay, declare a uniform approach, and answer the section 3(b) quorum question.

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\(^{224}\) See *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469, 476 (D.C. Cir. 2009).

\(^{225}\) See Ross E. Davies, *Remedial Nonacquiescence*, 89 IOWA L. REV. 65, 98 (2003) ("The NLRB's long tradition of nonacquiescence is perhaps best viewed as a by-product of the Board's commitment to act on its own interpretation of the federal labor laws, come what may from the federal courts of appeals."); Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 YALE L.J. 679, 706 (1989) ("the Board has reserved the right to continue its disagreement with circuit court rulings that are contrary to the Board's interpretation of national labor policy, even where it is not prepared to seek Supreme Court review in the particular case.").