NOTE

THE NEW MEANING OF *NEW PROCESS STEEL, L.P. V. NLRB*

INTRODUCTION

On June 17, 2010, the United States Supreme Court overturned more than five-hundred decisions issued by the National Labor Relations Board ("Board") with one decision. In so doing, the Court also overturned a decision by the United States Court of Appeals for the Seventh Circuit and affected decisions made by federal courts of appeals in four other circuits. While this decision is significant in the arena of labor law, it is more significant for its impact on the Court's future philosophy toward statutory interpretation.

In *New Process Steel, L.P. v. NLRB*, the Court held that the National Labor Relations Act ("NLRA")—the enabling statute for the Board—did not allow a two-member group of the Board's members to exercise the Board's power to decide cases.[1] The Board had previously delegated its authority to a three-member group of the five-member Board, and that three-member group continued to decide cases when its membership decreased to two because the third member's appointment expired.[2] In *New Process Steel*, the five-justice majority of the Court held that under the NLRA, the delegated group could only exercise the Board's authority with three (not two) members and held that all of the orders issued by the two-member group were invalid.[3]

The majority's decision demonstrates the current trend of formalistic statutory interpretation. This method of interpretation involves examining the text of a statute to interpret its meaning and ignoring congressional intent, even if the effect of the formalistic interpretation seems contrary to that congressional intent.[4] The Court in *New Process Steel* chose to avoid a functionalistic interpretation, in which one interprets a statute by considering both the text and the impact of the interpretation and chose instead an

1. New Process Steel, L.P. v. NLRB, 130 S. Ct. 2635, 2638 (2010).
2. *Id.* at 2638–39.
3. *Id.* at 2638, 2644.
4. *See* John F. Manning, *Competing Presumptions About Statutory Coherence*, 74 FORDHAM L. REV. 2009, 2026 (2006) (discussing the Court's approach of the past several decades with regard to statutory interpretation).

interpretation that best accomplishes the apparent congressional intent. Justice Stevens wrote the opinion for the majority, despite his personal history of functionalistic interpretation.[5]

This Note considers the impact of *New Process Steel* on the future interpretative philosophy of the United States Supreme Court. Part I examines the majority and dissenting opinions of the *New Process Steel* decision. Part II explores the historical background of the Board and the NLRA and the circuit split regarding the Board's delegation policy before the Court's decision in *New Process Steel*. Part III explains three types of statutory interpretation: formalism, functionalism, and *Chevron* deference. Part IV analyzes the interpretive methods used by the majority and the dissent in *New Process Steel* and considers the absence of the *Chevron* doctrine. Finally, Part V concludes by examining Justice Stevens's break from his history as a functionalist and a consideration of the impact of *New Process Steel* on future Supreme Court statutory interpretation.

I. *NEW PROCESS STEEL, L.P. V. NLRB*

In *New Process Steel*, the United States Supreme Court held that two members of the Board could not exercise the Board's delegated authority.[6] This decision invalidated almost six-hundred cases previously decided by two members of the Board over a twenty-seven month period and resolved a split among the federal circuits.[7]

The Board consists of five members appointed for five-year terms by the President and confirmed by the Senate.[8] The Board members' terms are staggered, and because the Senate must confirm the President's appointees, the Board sometimes consists of fewer than five members.[9]

Under the Board's delegation clause, "[t]he Board is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise."[10] The Board's enabling statute also provides as follows:

5. *See id.* at 2009–10.
6. *New Process Steel*, 130 S. Ct. at 2644.
7. *See id.* at 2638–39; *see also infra* Part II.C.
8. *See* 29 U.S.C. § 153(a) (2006).
9. *See id.* ("Of the two additional members so provided for, one shall be appointed for a term of five years and the other for a term of two years. Their successors, and the successors of the other members, shall be appointed for terms of five years each . . . ."); *see also* National Labor Relations Act, Pub. L. No. 74-198, § 3(a), 49 Stat. 449, 451 (1935) ("One of the original members shall be appointed for a term of one year, one for a term of three years, and one for a term of five years, but their successors shall be appointed for terms of five years each . . . .").
10. 29 U.S.C. § 153(b).

> 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.[11]

In 2007, the Board had four active members and one vacancy.[12] On December 20, 2007, these four members delegated to the general counsel the ongoing authority to conduct litigation that would normally require the Board's case-by-case approval.[13] They also delegated to three Board members—Wilma Liebman, Peter Schaumber, and Peter Kirsnaow—"all of the Board's powers, in anticipation of the adjournment of the 1st Session of the 110th Congress."[14] Peter Kirsanow's recess appointment expired on December 31, 2007.[15]

From January 1, 2008 until March 27, 2010, Liebman and Schaumber were the only two members of the Board.[16] Relying on the language of the Board's enabling legislation and an opinion by the U.S. Department of Justice's Office of Legal Counsel, these two members concluded that they constituted a two-member quorum of the three-member delegee group.[17] Under this delegation, they exercised the Board's authority and decided almost six-hundred cases.[18]

During this period, the Board issued decisions against New Process Steel, L.P., which challenged the Board's orders in the U.S. Court of Appeals for the Seventh Circuit.[19] New Process Steel claimed that two members did not constitute a valid quorum of the Board and thus the decisions against it were not proper; the court of appeals did not agree.[20] Other employers had similarly challenged the validity of the Board's decisions during this time period in other circuits, and the circuit courts had come to different conclusions.[21] The United States Supreme Court granted certiorari to resolve the conflicting decisions.[22]

The Supreme Court held that the delegation to members

11. *Id.*
12. *New Process Steel*, 130 S. Ct. at 2638.
13. *Id.*
14. *Id.* (quoting Minutes of Board Action, Brief for Petitioner at 5a, *New Process Steel*, 130 S. Ct. 2635 (No. 08-1457)) (internal quotation marks omitted).
15. *Id.* at 2639.
16. *Id.*
17. *Id.* at 2638–39.
18. *Id.* at 2639.
19. *Id.*; New Process Steel, L.P. v. NLRB, 564 F.3d 840, 845 (7th Cir. 2009), *rev'd*, 130 S. Ct. 2635 (2010).
20. *New Process Steel*, 130 S. Ct. at 2639; *New Process Steel*, 564 F.3d at 845, 848.
21. *See infra* Part II.C.
22. *New Process Steel*, 130 S. Ct. at 2639.

Liebman, Schaumber, and Kirsanow terminated when Kirsanow's term ended, and thus the two-member delegee group could not exercise the Board's authority to decide cases.[23] The Court reached this decision by interpreting the delegation clause of the NLRA, which is the Board's enabling statute. The Court concluded that there were two ways to interpret this clause: either read it to require only that a delegee group contain three members at the time of delegation (and not necessarily during the time the delegee group exercises its power), or read it to require that "the delegee group *maintain* a membership of three in order for the delegation to remain valid."[24]

The Court concluded that the proper interpretation was to require the delegee group *to maintain* three members and supported its conclusion with three reasons.[25] First, the Court determined that this interpretation was the only way to give meaningful effect to section 3(b) of the NLRA,[26] which is titled "Delegation of powers to members and regional directors; review and stay of actions of regional directors; quorum; seal."[27] Under this section, the quorum requirement mandates the participation of three members "at all times" for the Board to act.[28] Further, this section 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,"[29] which the Court held should be read in conjunction with the quorum clause, meaning that vacancies would not impair the Board from acting so long as the three-member quorum requirement was satisfied.[30] The Court found that, as a whole, section 3(b) meant that a three-member delegee group could still issue decisions with only two members participating "so long as the delegee group was properly constituted."[31]

Second, the Court reasoned that "if Congress had intended to authorize two members alone to act for the Board on an ongoing basis, it could have said so in straightforward language."[32] In 1947, Congress amended the NLRA to increase the membership of the Board from three to five.[33] Congress also changed the NLRA's original two-member Board-quorum provision to the current three-member quorum requirement.[34] The Court found this change

23. *Id.* at 2640.
24. *Id.*
25. *Id.* at 2640–42.
26. *Id.* at 2640–41.
27. 29 U.S.C. § 153(b) (2006).
28. *Id.*
29. *Id.*
30. *New Process Steel*, 130 S. Ct. at 2640.
31. *Id.*
32. *Id.* at 2641.
33. *Id.* at 2638 (citing 29 U.S.C. § 153(a)).
34. *See id.* at 2641.

significant and noted that it would only contravene the three-member quorum requirement if it found evidence of congressional intent to do so.[35]

The Court's third reason for choosing this interpretation was the lack of historical practice authorizing a two-member quorum. Prior to the period at issue, the Board had not allowed two members to act as a quorum of the three-member delegee group.[36] Previously, the Board's practice was to reconstitute a delegee group when one group member's term expired and to stop issuing decisions when the membership fell to two members.[37] The Court reasoned that this past practice indicated that the two-member group did not possess the Board's delegated authority.[38]

The Court also provided reasons why interpreting the delegation clause to allow delegation to a group of three members at the time of delegation only—without regard to the delegee group's subsequent membership—was improper. It examined the NLRA as a whole and concluded that allowing this type of delegation would undercut the significance of the quorum requirement by allowing two members to act as the Board ad infinitum.[39] The majority wrote that this interpretation ignored the three-member requirement in the delegation clause, which allows the Board to delegate authority "to any group of three or more members," because, in effect, the Board was delegating its authority to a group of two members.[40]

The Court also disagreed with the Board's interpretation of the NLRA. It recognized that while two members can act as a quorum of a properly delegated group and "participate to transact business in the name of the group," this fact "does not establish that the group itself can exercise the Board's authority when the group's membership falls below three."[41] The Court noted that the quorum provisions and the vacancy clause are separate; it read "the quorum provisions merely to define the number of members who must participate in a decision," and the vacancy clause to determine whether vacancies in excess of the number in the quorum provision have any effect on the entity's authority to act.[42] Thus, in the Court's view, these provisions applied in different situations, and allowing two members to constitute a quorum of a delegee group did not mean that two members could exercise the powers of the Board.

Lastly, the Court dismissed the Board's other arguments for allowing delegation under the circumstances. It distinguished the

35. *Id.*
36. *Id.*
37. *Id.* at 2641 & n.3.
38. *Id.* at 2641–42 (citing Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 214 (1988)).
39. *Id.* at 2640–41.
40. 29 U.S.C. § 153(b) (2006); *New Process Steel*, 130 S. Ct. at 2640–41.
41. *New Process Steel*, 130 S. Ct. at 2642–43.
42. *Id.* at 2643.

NLRA's membership group from appellate panels, for which the Court had previously allowed two out of three judges to decide cases in extreme circumstances.[43] In so doing, it noted "the difference between a panel constituted to decide particular cases and the creation of a standing panel plenipotentiary, which will decide many cases arising long after the third member departs," and it also noted the "longstanding practice" of allowing two appellate judges to hear cases.[44] Finally, the Court reasoned that achieving a congressional objective of Board efficiency did not trump the change to the text of the NLRA that required a three-member quorum, and stated that "[i]f Congress wishes to allow the Board to decide cases with only two members, it can easily do so."[45]

Justices Kennedy wrote the dissenting opinion, and was joined by Justices Ginsburg, Breyer, and Sotomayor.[46] The dissenting Justices felt that "the statute's plain terms permit[ted] a two-member quorum of a properly designated three-member group to issue orders" and that Congress intended to allow the sort of delegation that was at issue.[47] The dissent relied on its interpretation of the vacancy clause and noted that the majority had "reject[ed] a straightforward reading that it acknowledge[d was] 'textually permissible.'"[48]

The dissent disagreed with the Court's interpretation of the NLRA, criticizing the majority for giving some provisions a greater weight than others.[49] The dissent also noted that the delegation clause is distinct from the group-quorum provision,[50] but reasoned that allowing a two-member quorum of a delegee group did not render the delegation clause obsolete.[51] Under the dissent's interpretation, a quorum of the full Board—which is three or more members—may delegate its authority to a three-member group. This three-member quorum is required by the Board-quorum provision, which applies "at all times" to the Board acting as a whole.[52] A delegee group with two members present may act on behalf of the Board, as permitted by the group-quorum provision,

43. *Id.* at 2643–44 (quoting Nguyen v. United States, 539 U.S. 69, 82 (2003) (allowing a two-judge "quorum to proceed to judgment when one member of the panel dies or is disqualified")).

44. *Id.* at 2644.

45. *Id.* at 2644–45.

46. *See id.* at 2645 (Kennedy, J., dissenting).

47. *Id.*

48. *Id.* at 2646.

49. *Id.* at 2647.

50. The dissent divided the quorum provisions into two parts: (1) the Board-quorum provision, which states that "three members of the Board shall, at all times, constitute a quorum of the Board"; and (2) the group-quorum provision, which provides that "two members shall constitute a quorum of any group designated pursuant to the first sentence hereof." *Id.* at 2646.

51. *Id.* at 2648.

52. *Id.* at 2647 (quoting 29 U.S.C. § 153(b) (2006)).

which states that "two members shall constitute a quorum of any group designated pursuant to the first sentence hereof."[53]

The dissent explained that its interpretation also gave effect to the vacancy provision. The vacancy clause applies to Board members exercising all the powers of the Board and, as the dissent explained, "This clause thus instructs that a vacancy in the Board shall not impair the right of members to exercise the Board's powers, an authority that members of delegee groups possess."[54] Furthermore, "[t]he delegation clause establishes what is required for delegation in the first instance, while the vacancy clause and the group quorum provision allow the delegee group to proceed in the event that a member's term expires or a member resigns."[55] Thus, the dissent's interpretation allowed three or more members of the Board to delegate authority to a group of three members and allowed two members of that three-member group to constitute a quorum, no matter what happened to the third member.

The dissent also noted that the majority's interpretation of section 3(b) would allow two members of a delegee group to act for the Board as long as "they [were] part of a delegee group that ha[d] fallen to two members due to any reason other than vacancy."[56] The dissent criticized the Court's conclusion that Congress did not intend to allow two members to act for the Board for extended periods of time but did intend to allow two members to act for the Board temporarily. To counter the Court's conclusion that Congress could have expressly allowed for a two-member quorum of a delegee group, the dissent stated that the vacancy clause *is* an explicit rejection of a three-member requirement in a delegee group.[57] The dissent pointed out that "Congress could have required a delegee group to maintain three members, but it did not do so."[58] The dissent admitted that Congress likely did not intend to allow two members to act for the Board for an extended period but noted that section 3(b) allows two-member quorums of delegee groups in extraordinary circumstances.[59]

The dissent also countered the majority's third reason in favor of disallowing this delegation—the Board's historical practice—as the dissent did not find this practice to be significant. While the dissent noted that the Board did reconstitute three-member panels when one member was absent, it only read from this history that the Board respects the superiority of three-member groups to two-member quorums of those groups.[60] The dissent also examined the

53. 29 U.S.C. § 153(b); *New Process Steel*, 130 S. Ct. at 2647.
54. *New Process Steel*, 130 S. Ct. at 2648.
55. *Id.*
56. *Id.* at 2649.
57. *Id.* at 2648.
58. *Id.*
59. *Id.* at 2649.
60. *Id.* at 2650–52.

1947 Taft-Hartley Act, which amended the NLRA to increase the Board's membership from three to five members. This amendment also allowed the Board to exercise its powers through three-member groups, which the dissent noted had the purpose of "increasing by 100 percent its ability to dispose of cases expeditiously."[61] The dissent concluded that allowing two members of a three-member delegee group to exercise the Board's powers would further this congressional objective.[62]

II. HISTORICAL BACKGROUND AND THE CIRCUIT SPLIT

A. The National Labor Relations Act

The Board was first created in 1935 by the NLRA—also known as the Wagner Act—which was billed as an act "[t]o diminish the causes of labor disputes burdening or obstructing interstate and foreign commerce, to create a National Labor Relations Board, and for other purposes."[63] Under this legislation, the Board was "empowered . . . to prevent any person from engaging in any unfair labor practice . . . affecting commerce."[64] The Board could carry out this power by initiating and conducting hearings and by issuing orders.[65]

Under the original version of the NLRA, the Board was composed of three members, appointed for five-year staggered terms.[66] The Act provided that "[a] vacancy in the Board [would] not impair the right of the remaining members to exercise all the powers of the Board, and [that] two members of the Board [would], at all times, constitute a quorum."[67] The Act did not include a delegation provision.

Congress amended the NLRA in 1947 with the Labor Management Relations Act, also known as the Taft-Hartley Act. Congress passed this amendment "to provide additional facilities for the mediation of labor disputes affecting commerce, to equalize legal responsibilities of labor organizations and employers, and for other purposes."[68] This amendment changed the membership of the Board so that "the Board [would] consist of five instead of three members."[69] The amendment also gave the Board the power to delegate its authority, providing as follows:

61. *Id.* at 2651 (quoting S. REP. NO. 80-105, at 8 (1947)).
62. *Id.*
63. National Labor Relations Act, Pub. L. No. 74-198, pmbl., 49 Stat. 449, 449 (1935).
64. § 10(a), 49 Stat. at 453.
65. *See id.* §§ 9(c)–(d), 10(b)–(c), 49 Stat. at 453–54.
66. *See id.* § 3(a), 49 Stat. at 451.
67. § 3(b), 49 Stat. at 451.
68. Labor Management Relations Act, Pub. L. No. 80-101, pmbl., 61 Stat. 136 (1947).
69. § 3(a), 61 Stat. at 139.

> 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.[70]

From the perspective of the amendment's drafters, the expansion of the Board's membership was intended to "permit it to operate in panels of three, thereby increasing by 100 percent its ability to dispose of cases expeditiously."[71] Thus, the increased size of the Board, combined with its new power of delegation, allowed the Board to more efficiently prevent unfair labor practices. The delegation and quorum provisions of the Board's enabling legislation have not been amended since the enactment of the Taft-Hartley Act.[72]

B. Historical Precedent

In the early 1980s, the Board was exercising its authority through a three-member panel.[73] However, in 1981, before issuing a decision about the employment practices of Photo-Sonics, Inc., one member of the three-member panel resigned.[74] The remaining two members of the Board issued a decision against Photo-Sonics.[75] Photo-Sonics challenged the decision, asserting that the decision was—in the words of the circuit court—"unenforceable because it was not made by a properly constituted three-member panel."[76]

The U.S. Court of Appeals for the Ninth Circuit, in *Photo-Sonics, Inc. v. NLRB*, concluded that the decision was valid and enforceable. The court reasoned that the resigning member, John Penello, concurred in the decision before his resignation, so the decision was made by all three members of the panel.[77] However, the court went on to state that "[e]ven if Penello did not participate, a decision by two members of the panel would still be binding."[78] The court interpreted the group-quorum provision to provide that two members constituted a quorum of a delegated three-member panel, so a decision by two members of the three-member panel would be valid, since a "quorum" of two panel members supported

70. § 3(b), 61 Stat. at 139.
71. S. REP. NO. 80-105, at 8 (1947).
72. *See* 29 U.S.C. § 153(b) (2006).
73. *See* Photo-Sonics, Inc. v. NLRB, 678 F.2d 121, 122 (9th Cir. 1982).
74. *Id.*
75. *Id.*
76. *Id.*
77. *Id.*
78. *Id.*

the decision.[79] It also cited cases allowing a quorum of two judges to issue decisions when the third died or became ill.[80]

C. The Circuit Split

After the Board's membership dropped to two members in 2008, employers receiving unfavorable decisions began challenging the Board's validity in the federal circuit courts of appeals. The courts of appeals for the First, Second, Fourth, Seventh, and Tenth Circuits all held that a two-member panel constituted a valid quorum of the Board; only the Court of Appeals for the District of Columbia Circuit did not. However, these courts relied on different reasons to come to these conclusions.

On March 13, 2009, the United States Court of Appeals for the First Circuit became the first circuit court to uphold the validity of the Board's two-member panel in *Northeastern Land Services, Ltd. v. NLRB*.[81] The court reasoned that the Board's interpretation of its own enabling statute should be entitled to deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,[82] and deferred to the Board's interpretation of section 3(b) of the NLRA.[83] The court held that section 3(b) expressly authorizes the delegation of decisional authority to a three-member group and that the vacancy clause means that a vacancy may not impair the right of the two-member quorum of the three-member group to exercise all of the powers of the Board.[84] The First Circuit also found support for this interpretation in a DOJ memorandum and in the Ninth Circuit's decision in *Photo-Sonics*.[85] Finally, the court analogized the Board's quorum to permissible quorums of other administrative agencies, such as the Securities and Exchange Commission ("SEC") and the National Mediation Board.[86]

On May 1, 2009, the Court of Appeals for the Seventh Circuit became the next court to issue a decision about the Board's two-member quorum, and also found the Board's authority to be valid—in the case that was ultimately appealed to the United States Supreme Court.[87] The court did not apply *Chevron* deference to the

79. *Id.* at 122–23.

80. *Id.* (citing TRW, Inc. v. NLRB, 654 F.2d 307 (5th Cir. 1981); Minniefield v. Alabama, 542 F.2d 947 (5th Cir. 1976); Litton Sys., Inc. v. Sw. Bell Tel. Co., 539 F.2d 418 (5th Cir. 1976); Wirth Ltd. v. S/S Acadia Forest, 537 F.2d 1272 (5th Cir. 1976); and United States v. Allied Stevedoring Corp., 241 F.2d 925 (2d Cir. 1957)).

81. 560 F.3d 36, 40–41 (1st Cir. 2009), *vacated by* Ne. Land Servs., Ltd. v. NLRB, 130 S. Ct. 3498 (2010). This decision was appealed to the United States Supreme Court, but the Court chose instead to hear *New Process Steel*.

82. 467 U.S. 837 (1984); *see infra* Part III.

83. *Ne. Land Servs.*, 560 F.3d at 40–41.

84. *Id.* at 41.

85. *Id.* at 41–42.

86. *Id.* at 42.

87. New Process Steel, L.P. v. NLRB, 564 F.3d 840, 848 (7th Cir. 2009),

Board's interpretation of section 3(b), but instead interpreted the statute itself. The court first looked to the plain meaning of the text and concluded that the Board had the power to delegate its authority to a group of three members and that the Board could continue to conduct business with a quorum of three members.[88] Based on this proposition, it held that two members constituted a quorum when the Board had delegated its authority to a group of three members.[89] In applying these legal principles to the facts of the case, the court found that the Board had met these conditions during the time period at issue.[90]

New Process Steel, the employer challenging the Board's authority, argued that this interpretation would deprive the NLRA's delegation clause of its meaning by allowing the Board to delegate its authority to two, not three, members.[91] The court disagreed, reasoning that the delegation clause and the quorum provisions had to be read independently and that New Process Steel's interpretation "sap[ped] the quorum provision of any meaning because it would prohibit a properly constituted panel of three members from proceeding with a quorum of two."[92] The court noted that *Northeastern Land Services*, *Photo-Sonics*, and the DOJ memorandum all supported this interpretation.[93]

The Seventh Circuit then looked at the legislative history of the NLRA. The court concluded that the purpose of the Taft-Hartley Amendment—which increased the Board's membership from three to five members—was to allow the Board to hear more cases, so it reasoned that a court should not interpret the statute in a way that would hinder the Board's ability to hear more cases.[94] It then distinguished the case at hand from a prohibition on two-judge quorums in the Article III context that had been imposed by the United States Supreme Court in *Nguyen v. United States*.[95] The court reasoned that the statute at issue in *Nguyen*, which gave authority to Article III judges, had no delegation or quorum clauses, and noted that the statute's legislative history indicated that Congress did not intend to allow delegations to panels of two.[96] It noted that the Board's enabling legislation, on the other hand, did include delegation and quorum provisions, and that the legislative history of the Board demonstrated no animus against a two-member

rev'd, 130 S. Ct. 2635 (2010).

88. *Id.* at 845–46.
89. *Id.*
90. *Id.* at 848.
91. *Id.* at 846 n.2.
92. *Id.*
93. *Id.* at 846.
94. *Id.* at 846–47.
95. 539 U.S. 69 (2003); *New Process Steel*, 564 F.3d at 847–48.
96. *New Process Steel*, 564 F.3d at 847–48.

quorum.[97]

Finally, the Seventh Circuit analogized the *New Process Steel* case to other administrative law opinions that had allowed public boards to act despite vacancies. The court reasoned that in this context, the public board—rather than the individual members—has the authority to act; therefore, so long as the quorum requirements are met, the public board should be able to act.[98] The court also distinguished the case at hand from one in which an agency, the Interstate Commerce Commission ("ICC"), had asked Congress to amend its enabling legislation to allow a depleted board of members (six of eleven) to act with merely a quorum of its remaining members.[99] The court noted that this precedent did not apply to the Board since the Board already had statutory authority to let two members act for a three-member group, and that it did not need to ask Congress for permission to do so.[100] Thus, based on all these reasons, the Seventh Circuit upheld the authority of the Board's two-member quorum.[101]

On the same day that the Seventh Circuit addressed the issue—May 1, 2009—the U.S. Court of Appeals for the District of Columbia issued a decision that came to the opposite conclusion.[102] In *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, the court disagreed with the Board's interpretation of section 3(b) because it eschewed various portions of the statutory language.[103] To the court, section 3(b) meant that a three-member Board could delegate its power to a three-member group and that this delegee group could act with two members "so long as the Board quorum requirement is, 'at all times,' satisfied."[104] The court reasoned that the word "except" in the group-quorum provision meant that the delegee group's ability to act was "measured by a different numerical value," and that "at all times" meant that there must be three members present before the Board could act.[105] It went on to state, "Though the delegee group quorum provision is preceded by the prepositional phrase 'except that,' Congress's use of differing object nouns within the two quorum provisions indicates clearly that each quorum provision is

97. *Id.* at 848.

98. *Id.*; *see also* Falcon Trading Grp., Ltd. v. SEC, 102 F.3d 579, 582 (D.C. Cir. 1996) (upholding SEC quorum rules permitting the SEC to operate with only two of five members); R.R. Yardmasters of Am. v. Harris, 721 F.2d 1332, 1344 (D.C. Cir. 1983) (upholding actions of National Mediation Board taken through only one of its three members).

99. *New Process Steel*, 564 F.3d at 848 (citing Assure Competitive Transp., Inc. v. United States, 629 F.2d 467 (7th Cir. 1980)).

100. *Id.*

101. *Id.*

102. Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB, 564 F.3d 469, 470, 476 (D.C. Cir. 2009).

103. *Id.* at 472.

104. *Id.* at 472–73 (quoting 29 U.S.C. § 153(b) (2006)).

105. *Id.*

independent from the other."[106]

The court found support for its interpretation in an analogy to agency law. An agent's delegated authority ceases "upon the resignation or termination of the delegating authority."[107] By extension of this principle, the power of a delegated group of Board members (the collective agent) ceases when vacancies or disqualifications on the Board reduce the Board's membership below a quorum, terminating the delegating authority. The court reasoned that section 3(b) confers no authority on the delegated group and that the only authority under which the group could act was that of the Board.[108] Therefore, the court concluded that when the Board's membership fell below three, it had no authority to act; thus, a delegee group could not act on its behalf.[109]

The D.C. Circuit distinguished the authorities on which the Seventh Circuit relied when coming to the opposite conclusion. The court noted that the case allowing the National Mediation Board to act through only one member was very limited and did not apply to the Board, because the Board makes substantive adjudications.[110] Further, the case allowing the SEC to create its own quorum rule was inapplicable to the Board, because Congress gave the SEC the power to create that rule.[111] Finally, the First Circuit's decision in *Northeastern Land Services* did not influence the court's decision, because that court decided whether the delegee group was valid after one member left the Board, not whether the lack of a quorum on the Board as a whole invalidated the delegation.[112] Thus, the D.C. Circuit found the failure to meet the overall Board-quorum requirement of three members to be dispositive and held the Board could not act with two members.[113]

The U.S. Court of Appeals for the Second Circuit tackled this issue on June 17, 2009, and held that the Board had the authority to act during the relevant time period.[114] Like the First Circuit, this court applied the *Chevron* analysis and found that the text of section 3(b) was ambiguous regarding whether the properly constituted panel of three members retained jurisdiction when the Board lost its quorum of three members.[115] The court found the circuit split over

106. *Id.* at 473 (citation omitted) (quoting 29 U.S.C. § 153(b)).
107. *Id.*
108. *Id.*
109. *Id.*
110. *Id.* at 474.
111. *Id.* at 474–75.
112. *Id.* at 475–76.
113. *Id.* at 476. While it found the Board's interpretation to be improper, the court did "acknowledge that the case before [it] present[ed] a close question, and that neither [the DOJ's] interpretation nor the Board's desire to continue to function is entirely indefensible." *Id.*
114. Snell Island SNF LLC v. NLRB, 568 F.3d 410, 410, 424 (2d Cir. 2009).
115. *Id.* at 419–20. Even though the statute's language was ambiguous, the court noted that the Board's interpretation was entitled to deference. *Id.* at

the meaning of this provision itself to be evidence of the ambiguity.[116] Faced with an ambiguous statute, the Second Circuit turned to the statute's legislative history, unlike the D.C. Circuit, which instead had looked to another area of law.

Like the Seventh Circuit, the Second Circuit noted that Congress increased the size of the Board with the Taft-Hartley Act for the purpose of increasing the Board's efficiency.[117] However, the court did not find that legislative history to be dispositive and went on to the second step of the *Chevron* analysis, which is to ask whether the Board's interpretation was reasonable.[118] The court concluded that the Board's interpretation of section 3(b) was straightforward and promoted efficiency, and so was reasonable enough to be entitled to deference.[119] Finally, the court critiqued the D.C. Circuit and noted that while that court's interpretation is *also* reasonable, under *Chevron*, the administrative agency's interpretation is entitled to deference as long as it is reasonable.[120]

On November 20, 2009, the U.S. Court of Appeals for the Fourth Circuit joined the First, Second, and Seventh Circuits in allowing the Board's two-member delegee group to act.[121] Like the Second Circuit, the Fourth Circuit applied the *Chevron* analysis, but it concluded that the text of section 3(b) was plain and unambiguous.[122] Under the Fourth Circuit's interpretation, the delegation provision means that the Board can delegate any or all of its power to a three-member group; the vacancy provision means that a vacancy shall not impair the authority of the remaining Board members to act; and the quorum provision means that three members constitute a quorum of the Board, except that two members constitute a quorum of any group designated under the delegation provision.[123] The court concluded that the Board's delegation to the three-member group was proper, and that two members made a quorum.

The court rejected the D.C. Circuit's narrow construction of the statute's language because "it [was] based on an overly narrow construction of the modifying phrase that directly follows the three-member quorum requirement."[124] The court disagreed with the D.C.

423–24. It also noted that in light of the text of the statute, the initial delegation was proper, and it did not matter that the Board knew when it delegated to those three members that the panel's membership would soon decrease to two members. *Id.* at 419.

116. *Id.* at 420.

117. *Id.* at 422–23.

118. *See* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 (1984).

119. *Snell Island*, 568 F.3d at 423–24.

120. *Id.* at 424.

121. Narricot Indus., L.P. v. NLRB, 587 F.3d 654, 660 (4th Cir. 2009), *abrogated by* New Process Steel, L.P. v. NLRB, 130 S. Ct. 2635 (2010).

122. *Id.* at 660 n.3.

123. *Id.* at 659–60.

124. *Id.* at 659.

Circuit's interpretation of the statutory phrase "except that" and concluded that had Congress desired to write the statute as the D.C. Circuit had read it, then Congress "would have simply omitted the words" from section 3(b).[125] Finally, the court noted that reading the statute to require the three-member group to cease to exist when one of the members leaves would mean that a two-member quorum could never exist.[126] Therefore, the Fourth Circuit allowed the two-member group to act.[127]

On December 22, 2009, the U.S. Court of Appeals for the Tenth Circuit—the last circuit to rule on this issue—allowed the two-member group to act.[128] Like the First, Second, and Fourth Circuits, this court used the *Chevron* analysis and concluded that the statutory language is not clear on its face. The court looked at the prior decisions on the issue and concluded that "this very split 'is evidence of [the statute's] ambiguity.'"[129]

Proceeding to the second step of the *Chevron* analysis, the court held that the Board's construction of section 3(b) was permissible. It noted that the Board read the phrase, "except that," as modifying the three-member quorum provision, which the court concluded was a permissible reading.[130] Thus, the Tenth Circuit joined the First, Second, Fourth, and Seventh Circuits in holding that the Board's two-member delegee group properly exercised the Board's authority by continuing to decide cases.

III. METHODS OF STATUTORY INTERPRETATION

Scholars typically divide methods of statutory interpretation into two categories: formalism (also known as textualism) and functionalism (also known as realism).[131] These types of statutory interpretation differ in their consideration or avoidance of congressional intent and in their adherence to or redrafting of statutory text.[132] Even when applied to seemingly straightforward statutes, these approaches can yield completely opposite results.

Formalism has been defined as the interpretation of a statute using "deductive logic to derive the outcome of a case from premises accepted as authoritative."[133] Formalist judges believe they must

125. *Id.* at 660.
126. *Id.*
127. *Id.* at 667.
128. Teamsters Local Union No. 523 v. NLRB, 590 F.3d 849, 850 (10th Cir. 2009), *vacated*, 131 S. Ct. 109 (2010).
129. *Id.* at 852 (alteration in original) (quoting State Ins. Fund v. S. Star Foods, Inc. (*In re* S. Star Foods, Inc.), 144 F.3d 712, 715 (10th Cir. 1998)).
130. *Id.*
131. *See, e.g.*, BRIAN Z. TAMANAHA, BEYOND THE FORMALIST-REALIST DIVIDE 1 (2010).
132. *Id.* at 1–2.
133. Richard A. Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. RES. L. REV. 179, 181

adhere to the precise terms of statutory texts and do not look to "legislative intent" when the meaning of a statute is clearly expressed by the text.[134] These judges do not think they should try to understand Congress's intentions behind a statute and only support enforcing the clear terms of the statute. The United States Supreme Court has applied this method of statutory interpretation in recent years, "emphasizing that legislation routinely has unintended consequences and that judges must give effect to the actual commands embedded in clearly worded statutes rather than to the apparent background intent of the legislators who voted for them."[135]

On the other hand, realism, or functionalism,[136] is not just a blind application of the words of a statute, but enables judges to decide cases so that their outcomes will best promote public welfare and public policy.[137] Functionalist judges view themselves as agents of Congress and strive to carry out congressional intentions.[138] Like formalists, functionalist judges will adhere to the words of a statute if those words clearly convey Congress's meaning. However, if the statute does not clearly evince congressional intent—due to drafting errors, poor foresight, or limited resources—they will interpret a statute to achieve what they believe is the best result for society.[139] Under this theory, "If a given statutory application sharply contradicts commonly held social values, then the Supreme Court presumes that this absurd result reflects imprecise drafting that Congress could and would have corrected had the issue come up during the enactment process."[140] In this situation, a functionalistic judge will interpret the statute in a way that avoids a socially harmful result—a result that he or she assumes could not be what Congress intended.

A common example used to illustrate the difference between these two approaches involves a local ordinance that states "no dogs in the park."[141] A formalist would interpret this ordinance literally and would prohibit a blind person's guide dog from entering the park because the ordinance states that no dogs are allowed in the park. However, this formalist would allow a pet tiger to enter the park (assuming there is no ordinance about jungle cats), because a tiger is not a dog. On the other hand, a functionalist would look at

(1987).

134. John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2390 (2003).

135. *Id.*

136. *See generally id.* (noting that some scholars call this type of interpretation the absurdity doctrine).

137. *See* Posner, *supra* note 133, at 181.

138. *See* Manning, *supra* note 134, at 2389.

139. *Id.* at 2389–90.

140. *Id.* (footnote omitted).

141. *See id.* at 2396 & n.26.

the purpose behind the ordinance and would determine that the ordinance was intended to protect park goers from disruptive pets.[142] Interpreting the ordinance with that purpose in mind, the functionalist would allow the guide dog to enter the park, but not the pet tiger, even though the guide dog is a dog and the tiger is not. Therefore, even though the ordinance seems clear on its face, the formalist and the functionalist would interpret it differently.

The United States Supreme Court attempted to take the burden of statutory interpretation off the judiciary when the interpretation of a federal administrative agency's statute is at issue. In *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, the Court set up a process under which courts can defer to an agency's interpretation of its own statute.[143] "If the intent of Congress is clear," as evidenced through an unambiguous statute, then the court and the agency "must give effect to the unambiguously expressed intent of Congress."[144] However, if the statute is ambiguous and Congress's intent is not clear, "the question for the court is whether the agency's answer is based on a permissible construction of the statute."[145] If the agency's interpretation of the statute is reasonable and permissible, then the court should defer to the agency's interpretation.[146] Thus, even though a formalistic or functionalistic approach may factor into the reasonableness of an agency's interpretation, the *Chevron* doctrine saves courts from deciding on a method of statutory interpretation when interpreting an administrative agency's statute.

IV. THE TREND OF FORMALISTIC STATUTORY INTERPRETATION

In *New Process Steel*, the majority and the dissent of the United States Supreme Court utilized several methods of statutory interpretation. The majority's method of interpretation also differed from the various circuit courts' approaches. The majority's use of formalism—and the surprising absence of the *Chevron* doctrine in both the majority's and the dissent's opinions—signals a future of Supreme Court decisions using formalistic, rather than functionalistic, statutory interpretation.

A. Statutory Interpretation in New Process Steel

The majority opinion in *New Process Steel* is an example of formalistic statutory interpretation. The majority looked to the text of the NLRA, specifically section 3(b), to determine the meaning of

142. *Id.*
143. Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984).
144. *Id.*
145. *Id.* at 843.
146. *Id.* at 844.

the delegation and quorum provisions.[147] The Court concluded that its interpretation—prohibiting two members of the three-member delegee group from exercising the Board's powers—was "the only way to harmonize and give meaningful effect to all of the provisions in § 3(b)."[148] Thus, to determine the meaning of one provision of section 3(b), it looked at the language of section 3(b) as a whole, and came up with an interpretation based on the meaning of the statute derived from examining the text of the statute.

The majority also refused to infer congressional intent beyond what the text of the statute actually said. The Court concluded that "if Congress had intended to authorize two members alone to act for the Board on an ongoing basis, it could have said so in straightforward language."[149] The majority supported the conclusion that the text of section 3(b) does not allow two members to act for the Board within the plain-meaning definition of "quorum" looking to both legal and English dictionaries.[150] Furthermore, the majority rejected the argument that Congress amended the NLRA to "keep the Board operating at all costs" and definitively held that the *text* of section 3(b) does not allow two members of a three-member delegee group to exercise the authority of the Board.[151]

The dissent took the opposite approach by displaying a functionalistic interpretation of section 3(b). This opinion started by looking at the text of section 3(b) and concluding that "the statute's plain terms permit a two-member quorum of a properly designated three-member group to issue orders."[152] However, the dissent also looked at Congress's purpose behind enacting section 3(b). First, the dissent inferred that "Congress did not intend to allow two members to [exercise the powers of the Board] for protracted periods of time" but noted that "unintended consequences are typically the result of unforeseen circumstances."[153] Thus, even though Congress did not intend for two members to act for the Board all the time, it had created a mechanism by which two members could exercise the Board's powers if the need arose. The dissent also inferred that Congress did not intend for the Board to stop operating entirely for an extended period, even when the Board had only two members.[154]

The dissent next looked at Congress's intent in amending the NLRA with the Taft-Hartley Act in 1947. The purpose of this amendment, according to Justice Kennedy, was "to increase the Board's efficiency by permitting multiple three-member groups to

147. *See* New Process Steel, L.P. v. NLRB, 130 S. Ct. 2635, 2639–40 (2010).
148. *Id.* at 2640.
149. *Id.* at 2641.
150. *Id.* at 2642.
151. *Id.* at 2644.
152. *Id.* at 2645 (Kennedy, J., dissenting).
153. *Id.* at 2649.
154. *Id.*

exercise the full powers of the Board."[155] The dissent concluded that its interpretation of section 3(b), which would allow the two members of the delegee group to act, furthered that congressional objective. The dissent, in true functionalist fashion, stated:

> [T]he new statutory language in § 153(b) complements the congressional intent to preserve the ability of two members of the Board to exercise the Board's full powers, in limited circumstances, by permitting the Board to delegate "any or all" of its powers "to any group of three or more members," two members of which would constitute a quorum.[156]

Therefore, the dissent not only looked at the plain meaning of the text of section 3(b), but also considered the intent of Congress and used an interpretation that was consistent with that congressional intent.

B. Where Is the Chevron *Doctrine?*

Neither the majority nor the dissent in *New Process Steel* even mentioned the *Chevron* doctrine. This omission is very curious considering that this is a case in which a court is evaluating the validity of an administrative agency's interpretation of its own statute—the prototypical *Chevron* case.[157] Furthermore, four of the six circuit courts to address the two-member quorum of the Board's delegee group used *Chevron* deference when deciding the issue.[158] Counsel for the Board even relied on some of these circuit court decisions in their brief and argued that if the Court found the language of section 3(b) ambiguous, it "should defer to the Board's understanding of that provision."[159]

The missing *Chevron* analysis could indicate *Chevron*'s inapplicability to agency decisions when an agency is interpreting the reach of its own jurisdiction.[160] It could also mean that the parties did not focus heavily on that argument. Neither the Seventh Circuit, which heard the *New Process Steel* case before it went to the Supreme Court, nor the D.C. Circuit, which was the only circuit court to hold the two-member quorum to be invalid, addressed the *Chevron* issue.

Either way, the majority and the dissent used this case to

155. *Id.* at 2651.

156. *Id.* (quoting 29 U.S.C. § 153(b) (2006)).

157. *See* WILLIAM F. FUNK, SIDNEY A. SHAPIRO & RUSSELL L. WEAVER, ADMINISTRATIVE PROCEDURE AND PRACTICE 145 (4th ed. 2010).

158. The circuits to apply *Chevron* were the First, Second, Fourth, and Tenth Circuits. *See supra* Part II.C.

159. Brief for the NLRB at 32, *New Process Steel*, 130 S. Ct. 2635 (No. 08-1457).

160. *See The Supreme Court, 2009 Term—Leading Cases*, 124 HARV. L. REV. 380, 380 (2010).

illustrate formalistic and functionalistic interpretations, respectively, and neither appeared to find *Chevron* deference to be necessary or appropriate. The conspicuous absence of the *Chevron* doctrine suggests a deliberate choice to use this case to display the Justices' interpretative philosophies, instead of deferring to the Board's judgment. This choice could impact the Court's future decisions on statutory interpretation, as the *Chevron* doctrine may continue to be absent from similar cases.

C. The Legacy of Justice Stevens

Justice Stevens, the author for the majority in *New Process Steel*, had previously been viewed as a functionalist judge.[161] Historically, Justice Stevens believed that federal courts must discern and apply Congress's intended meaning, that statutes are often poorly drafted, and if applied literally, may produce outcomes that appear unreasonable in light of the statutes' purposes.[162] He "presume[d] that Congress [was] (understandably) error prone in linguistic expression but quite coherent in the substantive framing of policies that serve some overarching purpose."[163] As a result of this presumption, Justice Stevens has interpreted statutes to avoid what he viewed as unintended results and has attempted to stay true to the congressional purposes behind statutes.[164]

Justice Stevens seems to have parted with his functionalist past when writing the *New Process Steel* majority opinion. There is no doubt that the NLRA was not the most clearly drafted statute, as illustrated by the various interpretations of the statute by six circuit courts and the United States Supreme Court. Stevens's jurisprudential history indicates that when faced with a less-than-clear statute, like the NLRA, he would determine whether Congress had misspoken and inadvertently drafted a statute that produced a result contrary to its intent.[165] One could imagine that, like the dissent from *New Process Steel*, Justice Stevens could have concluded that Congress did not intend for section 3(b) of the NLRA to prevent the Board from acting for more than two years and would

161. *See* Manning, *supra* note 4, at 2009–26.

162. *Id.* at 2009–10.

163. *Id.* at 2010.

164. *See, e.g.*, Barnhart v. Sigmon Coal Co., Inc., 534 U.S. 438, 462–72 (2002) (Stevens, J., dissenting) (arguing that a narrow reading of the Coal Act produced an incoherent result, which was likely not what Congress intended); W. Va. Univ. Hosps., Inc. v. Casey, 499 U.S. 83, 134–43 (1991) (Stevens, J., dissenting) (arguing that denying the award of expert fees to the prevailing party in a § 1983 suit was contrary to the congressional purpose of making the prevailing party whole in such litigation); United States v. Locke, 471 U.S. 84, 117–29 (1985) (Stevens, J., dissenting) (arguing that it was understandable that the author of the statute might inadvertently use the words "prior to December 31" when that author intended to refer to the end of the calendar year).

165. *See, e.g.*, *Locke*, 471 U.S. at 117–23.

have interpreted the statute in a way that would prevent this type of prolonged shutdown of the Board.

However, Justice Stevens did not follow his own interpretative legacy. First, instead of inferring that Congress meant that two members could act for the Board under the circumstances presented, he would require Congress to "sa[y] so in straightforward language."[166] Next, he ignored the implication that with the Taft-Hartley Act, Congress intended "to preserve the ability of two members of the Board to exercise the Board's full powers, in limited circumstances," and that this purpose should be considered when interpreting the text of the NLRA.[167] Finally, Justice Stevens stated that the majority was "not insensitive to the Board's understandable desire to keep its doors open despite vacancies,"[168] but then ignored a reading of the text that was "textually permissible in a narrow sense," which in fact *would* have helped the Board keep its doors open.[169] Thus, while Justice Stevens may have a history as a functionalist,[170] he seems to have wanted to leave a final legacy as a formalist.

D. Impact on Future Cases

Because Justice Stevens retired shortly after the *New Process Steel* decision,[171] his inconsistent interpretative philosophy cannot help predict how *he* will decide cases in the future. However, the *New Process Steel* decision does solidify a trend of formalistic statutory interpretation. This decision illustrates that the United States Supreme Court will tend to interpret statutes or other documents by looking almost exclusively at the text without considering the impact of the interpretation or the context of the statutory language. Even if the Court does not cite to *New Process Steel* when reaching that kind of conclusion, the case's presence will still be felt.

This shift on the Court is illustrated by *Free Enterprise Fund v. Public Company Accounting Oversight Board*, decided by the Court eleven days after *New Process Steel*.[172] In *Free Enterprise Fund*, the Court held unconstitutional a provision of the Sarbanes-Oxley Act.[173]

166. New Process Steel, L.P. v. NLRB, 130 S. Ct. 2635, 2641 (2010).

167. *Id.* at 2644 n.6 (quoting *id.* at 2651 (Kennedy, J., dissenting)) (internal quotation marks omitted).

168. *Id.* at 2644–45.

169. *Id.* at 2641.

170. *See, e.g.*, Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).

171. Robert Barnes, *Justice Stevens To Step Down*, WASH. POST, Apr. 10, 2010, at A1 (announcing Justice Stevens's retirement less than one month after the *New Process Steel* decision).

172. Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138 (2010).

173. *Id.* at 3147.

The challenged portion of the statute provided that members of the Public Company Accounting Oversight Board could not be removed at will but instead only "for good cause shown" and "in accordance with certain procedures."[174] The Court found that these removal procedures contravened the Constitution's separation-of-powers requirement and contradicted Article II's vesting of the executive power in the President.[175] The Court noted that even if this removal structure was more efficient or convenient than any alternative, "the 'fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution,' for '[c]onvenience and efficiency are not the primary objectives—or the hallmarks—of democratic government.'"[176] Thus, the Court ignored the practical benefits of upholding this statute and used a formalistic interpretation when determining the statute's meaning.

As they did in *New Process Steel*, the dissenting justices engaged in a functionalistic interpretation.[177] Justice Breyer, who also joined in the dissent in *New Process Steel*, wrote the dissenting opinion and stated that "if the Court were to look to the proper functional and contextual considerations, it would find the Accounting Board provision constitutional."[178] The dissent also noted that "[w]here a 'for cause' provision is so unlikely to restrict presidential power and so likely to further a legitimate institutional need, precedent strongly supports its constitutionality."[179] Therefore, the dissent found the statute to be constitutional not based on a reading of its text and the text of the Constitution, but by considering the impact of the statute and its necessity. Although neither the majority nor the dissent referenced *New Process Steel*, both decisions were divided into a majority engaging in formalistic interpretation and a dissent engaging in functionalistic interpretation.

As *New Process Steel* and *Free Enterprise Fund* illustrate, the dominant interpretative philosophy of the Court will likely dictate how the Court will decide cases in the future. Although Justice Stevens's replacement, Justice Kagan, *might* follow the functionalist

174. *Id.* at 3147–48 (quoting 15 U.S.C. § 7211(e)(6) (2006)) (internal quotation marks omitted). Chief Justice Roberts wrote the majority decision, which was also joined by Justices Scalia, Kennedy, Thomas, and Alito. Justice Stevens joined with the dissent. *See id.* at 3146.

175. *Id.* at 3147.

176. *Id.* at 3156 (quoting Bowsher v. Synar, 478 U.S. 714, 736 (1986)) (internal quotation marks omitted).

177. The dissent was comprised of Justices Breyer, Stevens, Ginsburg, and Sotomayor. *Id.* at 3146. Unlike in *New Process Steel*, Justice Stevens joining the dissent seems consistent with his functionalistic track record.

178. *Id.* at 3184 (Breyer, J., dissenting).

179. *Id.* at 3175.

model,[180] and Justice Kennedy does not seem to know to which theory he subscribes,[181] formalistic interpretation appears to be the trend for the current Court. The Court is likely to use formalistic interpretation in future cases requiring statutory interpretation, and these cases can be used to support the notion that statutes can be interpreted by looking only at their text and not considering their context, their impact, or congressional intent.

As a result, *New Process Steel* will affect more than the nearly six-hundred labor cases it overturned, because it solidified the formalistic approach of the Supreme Court. It may also encourage independent statutory interpretation by the courts when *Chevron* deference would have been appropriate in the past. Overall, *New Process Steel* may have started out as a case about the jurisdiction of the Board when it only had two members, but it ended up representing the prevailing interpretative philosophy of the current Court.

CONCLUSION

In *New Process Steel v. NLRB*, five Justices of the United States Supreme Court decided that the Board lacked the authority to decide cases with only two of its five members present. The majority based this decision on its interpretation of the Board's enabling statute, and did so without regard for the overall purpose of the Board, which is to resolve labor disputes. The four dissenting Justices disagreed with the majority about the interpretation of the Board's statute, but agreed with four circuit courts of appeals in arguing that the two Board members did have the authority to decide cases.

The present effects of the *New Process Steel* decision are significant: overturning almost six-hundred cases decided by the Board, reversing a circuit court of appeals decision, and affecting decisions from four other circuit courts of appeals. However, the future impact of *New Process Steel* lies in its illustration of the Court's views on methods of statutory interpretation. The current majority of the Court prefers to engage in a formalistic approach to statutory interpretation, focusing on the text of the statute and ignoring the purpose of the statute or the impact of the interpretation. Functionalistic justices are in the minority of the Court, indicating that the trend of formalistic interpretation will continue. Therefore, this decision is more than just a labor law case;

180. Brandon J. Almas, Note, *From One [Expletive] Policy to the Next: The FCC's Regulation of "Fleeting Expletives" and the Supreme Court's Response*, 63 FED. COMM. L.J. 261, 286–87 (2010) (discussing the difficulty in predicting Justice Kagan's interpretative philosophy).

181. Like Justice Stevens, Justice Kennedy switched sides in *Free Enterprise Fund* and wrote the dissenting opinion in *New Process Steel*, but joined with the majority in *Free Enterprise Fund*.

it instead signals a trend in Supreme Court jurisprudence and may be used by the formalistic majority to support statutory interpretations in the future.

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