DEATH BY TEXTUALISM: THE NLRB'S "INCIDENTAL TO PATIENT CARE" SUPERVISORY STATUS TEST FOR CHARGE NURSES

EDWIN A. KELLER, JR.*

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* Attorney, Kamer & Zucker, B.A., 1992, The American University, J.D., 1996, American University, Washington College of Law; Member, State Bar of Nevada; Member, The American University Law Review, 1994-1996. My thanks to Edwin and Catherine Keller for their unwavering support; to Stephen P. Hanson, Esq. and Tom Goldstein, Esq. for sharing their insight; and to Gregory Kamer, Esq. for giving me the opportunity to practice labor and employment law in the "Wild West."
INTRODUCTION

On May 23, 1994, in *NLRB v. Health Care & Retirement Corp. of America*, the United States Supreme Court struck down the National Labor Relations Board's ("NLRB" or "the Board") supervisory status test for charge nurses, thereby endangering the collective bargaining and organizational rights of nurses as well as all professionals. Although the supervisory test was a reasonable agency interpretation of an ambiguous statutory phrase—an interpretation supported by legislative history and the policies underlying the National Labor Relations Act ("NLRA" or "the Act")—the textualist-minded Supreme Court refused to consider any extrinsic evidence, instead focusing exclusively on the phrase's literal meaning. Because of the textualist method used to resolve the statutory issue, the *Health Care* decision has dramatic implications both within and far beyond the labor law arena.

This Comment illustrates why decisions like *Health Care* present a clear and growing threat to all federal administrative agencies. The increasing use of textualism, which largely disregards legislative history, as the preferred method of statutory interpretation is the antithesis of *Chevron* deference. In its extreme form, textualism...
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threatens to violate the separation of powers doctrine. If left unchecked, the unpredictable and haphazard nature of textualism will exact great financial, economic, and social costs, wreaking havoc in an already less-than-efficient federal administrative system. Prompt action is needed to stop the spread of this destructive form of statutory interpretation. As Judge Patricia Wald has warned:

The issue of whether and how to use legislative history in determining the meaning of statutes ought to be a pressing concern to all of us who care about how laws are made and interpreted; it implicates the respective roles of legislators and judges in our constitutional system. We need to worry about it . . . .

This Comment also elucidates the importance of the Health Care decision to the labor law arena. Because the case profoundly affects the status of professionals, it deserves special attention. Although during the past twenty years the overall proportion of workers in unions has dramatically decreased, the number of professional workers in unions has increased substantially. Some analysts view professional employees as the last hope to reinvigorate the American labor movement. Additionally, Health Care serves as another example of the inherent tension between the NLRA's definitions of supervisor and professional. This Comment demonstrates that under current law, the NLRB's supervisory status test for charge nurses was a rational decision, well within the NLRB's power to implement and squarely based on prior case law and the NLRA's legislative history. Any correction of the NLRB's "incidental to patient care" supervisor status test should have come from Congress and not from the Supreme Court and its questionable textualist approach. This Comment illustrates how the Supreme Court's decision will affect all professionals despite Justice Kennedy's prediction that the Health Care decision will affect only the nursing industry. Finally, this


7. See id.; see also Robert L. Aronson, Unionism Among Professional Employees in the Private Sector, 38 INDUS. & LAB. REL. REV. 352, 361-62 (1985) (concluding that unionism among private professionals has grown more rapidly than generally assumed, but that overall number of unionized professionals is relatively small).

8. See infra Part I.A.

9. See NLRB v. Health Care & Retirement Corp. of Am., 114 S. Ct. 1778, 1785 (1994) ("Because the Board's interpretation of 'in the interest of the employer' is for the most part confined to nurse cases, our decision will have almost no effect outside that context. Any parade of horrors about the meaning of this decision for employees in other industries is thus quite misplaced . . . .").
Comment reveals that the NLRB's new supervisory status test for charge nurses is fraught with problems.

Part I of this Comment traces the development of the Board's "incidental to patient care" test and examines the legislative history and case law on which it is based. Part II relates how the Sixth Circuit, by applying a textualist interpretation, struck down the test. Part III examines the Supreme Court's opinion affirming the Sixth Circuit's ruling. Part IV analyzes how and why the NLRB's test was invalidated and illuminates the larger ramifications of the Court's approach. In Part V, the NLRB's new test is examined and critiqued. Finally, Part VI offers several recommendations in the form of legislative amendments to counter the deference-deteriorating effects of textualism.

I. DEVELOPMENT OF THE "INCIDENTAL TO PATIENT CARE" TEST

Congress enacted the National Labor Relations Act to curb the impairment of commerce attendant upon labor disputes and to give most employees legal protection to freely associate, organize, and bargain collectively "for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection." Through the NLRA, Congress created the NLRB, the administrative agency in charge of ensuring that employees' organizational rights are protected and that employers are free from unnecessary industrial strife.

The NLRA, however, does not protect all types of employees. Workers who are closely aligned with management and deemed to possess managerial, confidential, or supervisory sta-

12. See id. §§ 151, 153 (listing polices of NLRA and duties of NLRB).
13. See NLRB v. Yeshiva Univ., 444 U.S. 672, 682 (1980) (holding that managerial employees are so obviously excluded from Act's protection that express exclusion is not needed); NLRB v. Bell Aerospace Co., 416 U.S. 267, 283-89 (1974) (holding that because managerial employees formulate and effectuate management policies by expressing and making operative decisions of their employers, they are excludable from NLRA); Palace Laundry Dry Cleaning Corp., 75 N.L.R.B. 320, 328 & n.4 (1947).
are stripped of the Act’s protections. Therefore, a threshold status determination is necessary to determine one’s coverage under the NLRA.

A. Supervisory Status under the National Labor Relations Act

Originally, the NLRA did not contain an exclusion for employees who acted as supervisors. NLRB holdings in cases addressing supervisory status determinations oscillated between inclusion and exclusion. In the 1947 decision Packard Motor Car Co. v. NLRB, the Supreme Court confronted the difficult issue of whether to afford the Act’s protections to employees who acted as supervisors. In upholding the NLRB’s decision to certify a bargaining unit of foremen, the Court rejected the employer’s contention that the foremen were excluded from organizing because the Act’s definition of employer included anyone who acted in the “interest of the employer.” The Court reasoned that the phrase, as used in section 2(2) of the NLRA, did not demarcate various types of employees because “[e]very employee, from the very fact of employment in the master’s business, is required to act in his interest.” The Court noted that this phrase was present in section 2(2) merely to ensure

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15. See 29 U.S.C. § 152(3) (stating that “employee” does not include any individual employed as a “supervisor,” thus making the two mutually exclusive for purposes of the Act’s protections).

16. See Wagner Act, ch. 372, 49 Stat. 449, 450, 452 (1935) (current version at 29 U.S.C. §§ 151-169 (1994)) (extending labor rights to all employees except those who are “employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse,” but not creating an exclusion for those working as supervisors).

17. See NLRB v. Bell Aerospace Co., 416 U.S. 267, 277 (1974) (citing and discussing NLRB’s inconsistent decisions during time period before Taft-Hartley Act); see also Rabban, supra note 14, at 1783 & n.18 (acknowledging Board’s struggle with exclusion of supervisory employees).


19. See Packard Motor Car Co. v. NLRB, 330 U.S. 485, 493 (1947). The Supreme Court noted that unlike other employees, the foremen were in charge of maintaining the quantity and quality of production. See id. at 487. Further, the foremen were authorized to discipline other employees by applying penalties and initiating recommendations for promotion and demotion. See id.

20. Id. at 488-89 (discussing employer’s argument and Act’s original definition of employer at § 2(2)). The employers argued that the language of section 2(2) “reads foreman out of the employee class and into the class of employers.” Id. at 488. Employers were concerned with the inherent conflicts in loyalty a supervisor would face if allowed to organize under a union, thereby swearing allegiance to the union. See Rabban, supra note 14, at 1785 & nn.27-32 (discussing views of those who oppose allowing supervisors to organize).

21. Packard, 330 U.S. at 488. The Court explained its comment by stating that the employee owes to the employer faithful performance of service, protection of the employer’s property, and a duty to act in the employer’s interest in relation to third parties. See id. at 489. These statements were later heavily relied on by the Court in Health Care. See NLRB v. Health Care & Retirement Corp. of Am., 114 S. Ct. 1778, 1782 (1994) (rejecting NRLB’s interpretation that nursing supervisory activity is not acting in employer’s interest as inconsistent with Packard).
that the courts would apply the tort principle of respondeat superior to employers whose agents had committed unfair labor practices under the Act.\textsuperscript{22}

Justice Douglas, writing for the dissent, poignantly illustrated the fallacies inherent in the majority's opinion.\textsuperscript{23} He argued that the Act separated the two warring camps of management and labor by defining who is to be considered an employer and who is to be deemed an employee.\textsuperscript{24} Because the Act defined an employer not only as that person who actually owned the company but also as "any person who acted in the interest of the employer," the phrase was meant to distinguish between certain workers.\textsuperscript{25} The Act was created solely to address labor relations, not to create a new system of vicarious liability for those involved in industry.\textsuperscript{26}

Justice Douglas emphasized that the Act's employer category encompassed all those workers who formulate and execute labor policy,\textsuperscript{27} thereby excluding them from the Act's protections.\textsuperscript{28} The focus, said Justice Douglas, must be whether the worker represents or acts for management on labor policy matters.\textsuperscript{29}

\begin{itemize}
\item \textsuperscript{22} See Packard, 330 U.S. at 489.
\item \textsuperscript{23} See id. at 493-501 (Douglas, J., dissenting).
\item \textsuperscript{24} See id. at 495 (Douglas, J., dissenting) ("[T]he Act on its face seems to classify the operating group of industry into two classes; what is included in one group is excluded from the other."). Justice Douglas found no evidence that one personnel group may be both employers and employees as the majority's rationale would necessitate. See id. at 495-96 (Douglas, J., dissenting) (stating that it does not make sense to say that every employee while on duty performing her job is employer in statutory sense).
\item \textsuperscript{25} See id. at 496 (Douglas, J., dissenting) (relating that term "employee" is used in opposition to term "employer," which is defined specifically to encompass more individuals than just actual owners of the company).
\item \textsuperscript{26} See id. at 496 (Douglas, J., dissenting).
\item \textsuperscript{28} See Packard, 330 U.S. at 496-501 (Douglas, J., dissenting) (discussing reasons why supervisory employees are not protected by Act). Justice Douglas noted that in addition to the apparent meaning of the phrase, other important factors supported his interpretation. See id. at 494 (Douglas, J., dissenting). If foremen had a dual status of employer and employee, it would create serious conflicting loyalties and would be "one of the most important and conspicuous problems." Id. at 498 (Douglas, J., dissenting). The failure of Congress to address such a glaring problem suggests that it never intended to bring supervisors under the Act's protection in the first instance. See id. at 499 (Douglas, J., dissenting). Justice Douglas also noted that when Congress decided to include managerial and supervisory workers within the category of employees in other statutes, it did so expressly. Congress' failure to do the same with the NLRA, therefore, carries some significance. See id. (Douglas, J., dissenting).
\item \textsuperscript{29} See id. at 500 (Douglas, J., dissenting) (clarifying that although he used terms foreman and supervisor synonymously, employee's actions in connection with management and its labor policies will determine worker's actual category).
\end{itemize}
Congress responded quickly to the *Packard* decision by enacting the Taft-Hartley Act of 1947, which expressly excluded supervisors from the Act’s coverage.\(^{30}\) The main purpose of the amendment was to avoid the problem of “divided loyalties” that would exist if supervisors were afforded the Act’s protections to bargain collectively and to join unions.\(^{31}\) Specifically, Congress sought to avoid the imbalance of power in the collective bargaining process that would result if unions could exert control over supervisory personnel who traditionally have been treated as part of management and have been thought to owe undivided loyalty to management in the implementation and execution of its labor policies.\(^{32}\)

The Act’s definition of “supervisor” comes from the Senate’s version of the legislation.\(^{33}\) This version omitted several categories of employees that the House had included in its version because the Senate sought to protect employees with “minor supervisory duties” as distinguished from those with “genuine management prerogatives.”\(^{34}\) The Act, in final form, defines a supervisor as

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32. See S. REP. No. 80-105, at 3-4 (discussing upset in balance of power in collective bargaining process by unions’ ability to organize supervisory personnel); H.R. REP. No. 80-245, at 16 (maintaining that supervisors are management people and do not need the ‘security’ that collective action would provide); 93 CONG. REC. 5014 (1947) (statement of Sen. Ball) (stating that such divided loyalties would prove harmful to free-enterprise system); id. at 3836 (statement of Sen. Taft) (opining that allowing supervisors to organize would result in disruption of both discipline and productivity of industrial workers); see also NLRB v. Bell Aerospace Co., 416 U.S. 267, 279-83 (1974) (relating purpose behind supervisory exclusion).

The House Report reveals that Congress also was concerned with not subjecting supervisors to the “leveling processes of seniority, uniformity, and standardization” inherent in unionism. H.R. REP. NO. 80-245, at 16-17. It viewed supervisors as motivated, ambitious, and talented individuals who worked hard to move up through the rank and file, abandoning “collective security” because opportunities with management appeared more attractive than maintaining such security. See id.; see also *Bell Aerospace*, 416 U.S. at 281-82 n.11 (discussing Congress’ reasons for excluding supervisors).

33. See S. REP. No. 80-105, at 4 (discussing Act’s definition of supervisor); see also NLRB v. Hendricks County Rural Elec. Membership Corp., 454 U.S. 170, 181-84 (1981) (discussing Senate bill’s more limited definition of supervisor).

34. See S. REP. No. 80-105, at 5-4. The committee stated:

In drawing an amendment to meet this situation, the committee has not been unmindful of the fact that certain employees with minor supervisory duties have problems which may justify their inclusion in that act. It has therefore distinguished between straw bosses, leadmen, set-up men, and other minor supervisory employees, on the one hand, and the supervisor vested with such genuine management prerogatives as the right to hire or fire, discipline, or make effective recommendations with respect to such action. *Id.* at 4; see Brief for Respondent, 1993 WL 625966, at *14, NLRB v. Health Care & Retirement Corp. of Am., 114 S. Ct. 1778 (1994) (No. 92-1964) (discussing legislative history pertinent to definition of supervisor under NLRA); see also *Bell Aerospace*, 416 U.S. at 279-83 (providing detailed discussion of differences between House and Senate bills’ language pertaining to definition of supervisor); Beverly Enters., 313 N.L.R.B. 491, 491 (1993) (discussing Taft-Hartley...
any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.\textsuperscript{35}

To be a supervisor under the Act, therefore, one must: (1) exercise authority in the interest of the employer; (2) use independent judgment; and (3) perform any one of the twelve functions listed in the definition.\textsuperscript{36}

From the outset, numerous courts recognized that, in light of Congress' legislative reversal of the *Packard* decision,\textsuperscript{37} the term "in the interest of the employer" clearly meant more than what was afforded by a "sheerly literal reading of section 2(11)."\textsuperscript{38} The courts

\textsuperscript{35} Amendments' legislative history); see also Rabban, supra note 14, at 1796 & nn.85-86 (discussing legislative history surrounding Taft-Hartley Amendments).

\textsuperscript{36} 29 U.S.C. § 152(11).


The Fourth, Sixth, and Seventh Circuits also give considerable weight to these secondary factors. See *Beverly Cal. Corp. v. NLRB*, 970 F.2d 1548, 1555 (6th Cir. 1992) (utilizing secondary indicia of ratio and highest person in charge); *NLRB v. Res-Care, Inc.*, 705 F.2d 1461, 1468 (7th Cir. 1983) (utilizing secondary indicia of ratio); *NLRB v. St. Mary's Home*, 690 F.2d 1062, 1067-68 (4th Cir. 1982) (using highest person in charge as indicia of supervisory status); see also *Beverly Enters.*, 313 N.L.R.B. at 499-500 (discussing use of secondary indicia by circuit courts).

\textsuperscript{38} See *Taft-Hartley Act*, ch. 120, 61 Stat. 136 (1947); see also *Bell Aerospace*, 416 U.S. at 278 (stating that Taft-Hartley Act was "subsequent legislative reversal of *Packard* decision"); S. REP. No. 80-105, at 3-4 (discussing reasons for amendments); H.R. REP. NO. 80-245, at 3-5 (same). But see *Health Care*, 114 S. Ct. at 1783 (stating that when statute changes result reached by judicial decision it does not automatically follow that statute changes meaning of language interpreted in that decision (citing Public Employees Retirement Sys. v. Betts, 492 U.S. 158, 168 (1989))).

\textsuperscript{38} NLRB v. Master Stevedores Ass'n, 418 F.2d 140, 142-43 (5th Cir. 1969) (relating that because entire work force, from company president to messenger boy, in one sense acts "in the interest of the employer," some other test was surely contemplated); see also *Food Store Employees Union Local 347 v. NLRB*, 422 F.2d 685, 690 (D.C. Cir. 1969) (discussing meaning of phrase "in the interest of the employer" as used in NLRA definition of supervisor); *NLRB v. Security Guard Serv.*, Inc., 384 F.2d 143, 147-48 (5th Cir. 1967) (stating that supervisory exclusion requires "real power," and "meaningful action" with respect to statutory test, so that person in question is in effect part of management); *NLRB v. Southern Bleachery & Print Works, Inc.*, 257 F.2d 235, 239 (4th Cir. 1958) (stating that when determining supervisory status of worker, court must look to see if worker shares power of management); *NLRB v. Quincy Steel Casting Co.*, 200 F.2d 293, 296 (1st Cir. 1952) (stating that court cannot rely on label given to employee, but must look to see if person has exercised duties in such a way as to evidence sharing power of management); *NLRB v. Leland-Gifford Co.*, 200 F.2d 620, 625 (1st Cir. 1952) (stating that to be statutory supervisor worker must have genuine power to perform supervisory function and be clothed with real power to discipline and to direct responsibly).
reasoned that Congress, when defining the term supervisor, intended to exclude only supervisory personnel truly regarded as part of management and not all employees an employer invests with any one of the twelve statutory authorities of section 2(11). Noting that the responsibilities enumerated in the definition of supervisor are capable of "infinite possible variations," the courts concluded that Congress intended that the phrase "in the interest of the employer" modify the twelve functions, requiring "meaningful action" to be exercised in regard to those enumerated functions. Some courts characterized the phrase to require "genuine power," "real power," or the possession of "true managerial type responsibility." According to these courts, Congress intended that only those who undertake to formulate and execute labor policy and share the power of management should be deemed supervisors.

B. Emergence of the "Incidental to Patient Care" Test

It was not until 1967, after jurisdiction was extended to for-profit hospitals and nursing homes, that the NLRB considered the Act's

39. See Food Store, 422 F.2d at 690 (rejecting literal reading as to Congress' intent); International Union of United Brewery Workers v. NLRB, 298 F.2d 297, 303 (D.C. Cir. 1961) (stating that Congress surely contemplated more than what literal meaning of § 2(11) reveals).

40. Food Store, 422 F.2d at 690; see also International Union of United Brewery Workers, 298 F.2d at 303 (discussing existence of multitude of variations of § 2(11)'s enumerated responsibilities).

41. See Security Guard, 384 F.2d at 147-48 (stating that to be supervisor one must exercise "meaningful action" with respect to statutory test); International Union of United Brewery Workers, 298 F.2d at 303 (noting that supervisors act "in the interest of the employer" only when they take "meaningful action with respect to the statutory tests").

42. See Leland-Gifford Co., 200 F.2d at 625 (stating that true supervisor must have genuine power to perform statutory supervisory functions).

43. See id.

44. See International Union of United Brewery Workers, 298 F.2d at 303 (stating that statutory supervisor must possess true managerial power).

45. See id. (discussing Congress' intent); NLRB v. Southern Bleachery & Print Works, Inc., 257 F.2d at 235, 239 (4th Cir. 1958). In making this determination, the Fourth Circuit took language from Justice Douglas' dissenting opinion in Packard. See Packard Motor Car Co. v. NLRB, 330 U.S. 485, 500 (1947) (Douglas, J., dissenting); see also supra notes 18-29 and accompanying text (discussing Packard decision). The language is consistent with Justice Ginsburg's comments in her dissenting opinion in Health Care. See NLRB v. Health Care & Retirement Corp. of Am., 114 S. Ct. 1778, 1792 n.15 (1994) (Ginsburg, J., dissenting) (questioning majority's reliance on Packard decision in light of Congress' legislative reversal of that case through Taft-Hartley amendments and concluding that proper focus should be on Justice Douglas' dissent in Packard). But see id. at 1783 (stating that when statute changes result reached by judicial decision it does not automatically follow that statute changes meaning of language interpreted in that decision (citing Public Employees Retirement Sys. v. Betts, 492 U.S. 158, 168 (1989))).

supervisory test in relation to "charge nurses." A charge nurse is "responsible for seeing that . . . medicines are administered to the patients, that the proper charts are kept, and that the patients receive whatever treatment has been prescribed." Because either a registered nurse ("RN"), a professional employee, or a licensed practical nurse ("LPN"), a technical employee, can be a charge nurse, the determination of supervisory status in the charge nurse context necessarily implicates both section 2(12) of the Act, which contains an express congressional mandate that professional employees not be automatically excluded from the Act's protection, and the Board's


48. Id.


50. Licensed practical nurses are not professionals, but rather they are technical employees as defined by the Board. See Beverly Enters., 275 N.L.R.B. 943, 945 (1985) (holding that LPNs are technical employees); Beverly Enters., 264 N.L.R.B. 966, 966 & n.4 (1982) (stating that LPNs are not professionals because they do not meet strict requirements of Act, but that they do possess technical skill and use independent judgment); Clarion Osteopathic Community Hosp., 219 N.L.R.B. 248, 248-49 (1975) (placing LPNs in technical employee bargaining unit); Barnert Mem'l Hosp. Ctr., 217 N.L.R.B. 775, 780-81 (1975) (deciding that LPNs fit properly into technical employee category); Valley Hosp., Ltd., 220 N.L.R.B. 1399, 1392 (1975) (holding that LPNs are not professionals); see also NLRB v. Res-Care, Inc., 705 F.2d 1461, 1466 (7th Cir. 1983) (stating that LPNs "if not full-fledged professionals [are] at least sub-professionals").


The Act defines a professional employee as:

(a) any employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work; (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual, or physical processes; or

(b) any employee, who (i) has completed the courses of specialized intellectual instruction and study described in clause (iv) of paragraph (a), and (ii) is performing related work under the supervision of a professional person to qualify himself to become a professional employee as defined in paragraph (a).

29 U.S.C. § 152(12). The Taft-Hartley Amendments, by excluding supervisors and including professionals, created significant ambiguities because both supervisors and professionals use independent judgment in their work. See NLRB v. Yeshiva Univ., 444 U.S. 679, 692 (1980) (Brennan, J., dissenting) ("[T]he statute evidences significant tension as to congressional intent in this respect by its explicit inclusion, on the one hand, of 'professional employees' under § 2(12), 29 U.S.C. § 152(12), and its exclusion, on the other, of 'supervisors' under § 2(11), 29 U.S.C. § 152(11).") NLRB v. Lewis Univ., 765 F.2d 616, 611 (7th Cir. 1985) (discussing tension in NLRA with regard to supervisors and professionals); Res-Care, 705 F.2d at 1465 (discussing
definition of technical workers. Merely because professional RNs and technical LPNs possess expertise and exercise independent judgment, they should not lose the protection of the NLRA. Thus, in order to carry out its statutory mandate, the Board had to make a determination as to when professionals and technicals exercise independent judgment and direct subordinates based on their professional or technical expertise and when they exercise independent judgment based on supervisory authority.

Between 1967 and 1974, the Board decided numerous charge nurse cases, generally determining that the charge nurses in question were not supervisors. The rationales presented in the cases...
varied.55 Often, when the nurse in question was an LPN, the Board concluded that the nurse’s actions were not performed with independent judgment, thereby excluding the nurse from the statutory definition of supervisor.56 When the nurse was an RN, the Board
drew a distinction between those nurses who directed aides on the basis of the RN's highly developed professional skills, which it concluded did not constitute an exercise of supervisory authority in the interest of the employer, and those nurses who, in addition to their professional duties, possessed the authority to make effective recommendations as to job status and pay. Thus, the exercise of authority over nonprofessional employees simply could be a “manifestation of an RN’s professional skill and training,” not an exercise of supervisory power in the interest of the employer.

C. NLRA Amendments of 1974

In 1974, Congress passed the “Health Care Amendments” to the NLRA, extending Board jurisdiction to non-profit hospitals. During the hearings concerning the amendments, the American Nurses Association (“ANA”) urged Congress to exempt expressly health care professionals from the Act’s definition of supervisor, fearing that if a broad interpretation of the term supervisor developed over aides was not exercised in manner that required independent judgment).

199 N.L.R.B. at 850 (holding that LPN who merely followed instructions of Director of Nursing written out beforehand did not approach level of supervisory authority within meaning of Act); Evangelical Lutheran Good Samaritan Soc'y, 191 N.L.R.B. at 39, 41 (finding that LPN who performed perfunctory duties was not supervisor within meaning of Act); Convalescent Ctr. of Honolulu, 180 N.L.R.B. at 461-62 (holding that registered nurses who assigned work to aides were not supervisors because they did not do so in manner requiring exercise of independent judgment); New Fern Restorium Co., 175 N.L.R.B. at 871-72 (holding that authority exercised by LPNs over aide was not exercised in manner that required independent judgment).

57. See Sherwood Enters., 175 N.L.R.B. at 354. The Board found:

Registered nurses are a highly trained group of professionals who normally inform other, lesser skilled, hospital employees as to the work to be performed for patients, but... their duties and authority in this regard are solely a product of their highly developed professional skills and do not constitute an exercise of supervisory authority in the interest of their employer.

Id.

58. See Doctors' Hosp. of Modesto, 193 N.L.R.B. 833, 833-35 (1971) (drawing distinction between nurses who exercise authority as product of professional duties and those who are vested with true supervisory authority such as power to affect job and pay status (citing Westinghouse Elec. Corp., 163 N.L.R.B. 723, 726-27 (1967))); Doctors' Hosp. of Modesto, 183 N.L.R.B. at 951-52, 957 (same).


The National Labor Relations Act governs the collective bargaining relationship of millions of workers including employees of proprietary hospitals, proprietary nursing homes and nonprofit nursing homes. This bill repeals the present exemption. The Committee could find no acceptable reason why 1,427,012 employees of these non-profit, non-public hospitals, representing 56% of all hospital employees, should continue to be excluded from the coverage and protections of the Act.


60. See Extension of NLRA to Nonprofit Hospital Employees: Hearings on H.R. 1236 Before the Special Subcomm. on Education and Labor, 93d Cong. 21-24 (1973) (hereinafter Hearings on H.R. 1236) (testimony of Charles E. Hargett, Representative, ANA).
oped, nurses automatically would be classified as supervisors. By law, patient care supervision is a primary duty of RNs. Moreover, state nursing laws require RNs to exercise independent judgment and discretion in relation to patients' needs. The ANA argued that if a broad reading of the Act's definition of supervisor were adopted, it would defy Congress' expressed intention that RNs, as professionals, be protected under the Act based on a factor (the use of independent judgment) that is necessary to qualify a RN as a professional in the first instance.

Separate bills were under consideration in the House and the Senate. The committee reports for both bills addressed the ANA's concerns and stated that no express amendment to section 2(11) was needed given the NLRB's existing decisions. Both congressional committees agreed with the Board's determination that when a health care professional gives direction to other employees in the exercise of professional judgment, incidental to the professional's treatment of patients, it is not an exercise of supervisory authority in the interest of the employer. The committees went on to state that they intended that the Board continue to evaluate nursing cases in this manner.

The committees' statements and Congress' failure to amend section 2(11) take on exceptional importance because the Supreme Court has

62. See Hearings on H.R. 1236, supra note 60, at 22-23; see also Beverly Enters., 313 N.L.R.B. at 492 (discussing Health Care Amendments).
63. See Hearings on H.R. 1236, supra note 60, at 22-23.
64. See id.
65. See S. REP. No. 93-766, at 6 (1974) (relating that express amendment was not needed given Board's past decisions); H.R. REP. NO. 93-1051, at 7 (1974) (stating that amendment to supervisor definition was unnecessary given Board's prior precedent).
66. See S. REP. No. 93-766, at 6; H.R. REP. NO. 93-1051, at 7. The Senate Report stated: Various organizations representing health care professionals have urged an amendment to Section 2(11) of the Act so as to exclude such professionals from the definition of "supervisor". The Committee has studied this definition with particular reference to health care professionals, such as registered nurses, interns, residents, fellows, and salaried physicians and concludes that the proposed amendment is unnecessary because of existing Board decisions. The Committee notes that the Board has carefully avoided applying the definition of "supervisor" to a health care professional who gives direction to other employees in the exercise of professional judgment, which direction is incidental to the professional's treatment of patients, and thus is not the exercise of supervisory authority in the interest of the employer.
The Committee expects the Board to continue evaluating the facts of each case in this manner when making its determinations.
held that great weight is accorded to an agency's statutory interpretation, especially when Congress has reenacted the statute without any pertinent change.68 The Court has held that Congress' failure to revise the agency's interpretation is persuasive evidence that the agency's construction is the one intended by Congress.69 Additionally, subsequent legislation declaring the intent of an earlier statute, stated the Court, is entitled to significant weight.70

D. The Rise of the "Incidental to Patient Care" Test

Consistent with the congressional intent expressed in the committee reports accompanying the Health Care Amendments,71 the Board has utilized the "incidental to patient care" test to determine the supervisory status of charge nurses in order to ensure that they are not excluded from the Act's protections merely because of their professional responsibility in assigning and directing aides.72 As the
NRLB stated in *Newton-Wellesley Hospital Ass'n*,\(^{73}\) "the test for determining whether a health care professional is a supervisor is whether that individual, who may give direction to other employees in the exercise of professional judgment which is incidental to the professional's treatment of patients, also exercises supervisory authority in the interest of the employer."\(^ {74}\) This test is not unique to the health care field.\(^ {75}\) It is similar to the Board's approach to cases concerning architects, engineers, editors, and television directors, in which it makes a distinction between functional and operational duties.\(^ {76}\)

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any statutory indicia of supervisory status); Misericordia Hosp. Med. Ctr., 246 N.L.R.B. 351, 357 (1979) (holding that head nurse was not supervisor under Act when authority was exercised primarily in providing patient care, not in supervising employees "in the interest of the employer"), enforced, 623 F.2d 808 (2d Cir. 1980); Eventide South, 239 N.L.R.B. 287, 289 (1978) (concluding that charge nurses "perform[ed] their duties . . . in the exercise of professional judgment incidental to their treatment of patients" and that their authority was "directed toward quality treatment of patients and [did] not, without more, constitute supervisory authority in the Employer's interest"); Turtle Creek Convalescent Ctrs., Inc., 235 N.L.R.B. 400, 400 & n.3 (1978) (concluding that RNs were not statutory supervisors); Brattleboro Mem'l Hosp., Inc., 226 N.L.R.B. 1036, 1037 (1976) (holding that head nurses perform their functions and duties almost exclusively in exercise of professional judgment incidental to their treatment of patients); Sutter Community Hosps., 227 N.L.R.B. 181, 192 (1976) (concluding that head and assistant head nurses performed duties predominantly in exercise of professional judgment incidental to their treatment of patients and not to general supervision of employees in subordinate positions, as they possess none of traditional indicia of supervisory status); Valley Hosp., Ltd., 220 N.L.R.B. 1399, 1341 (1975) (finding that head nurses were not like administrative supervisors in that their duties and functions embrace professional judgment incidental to patient treatment); Newton-Wellesley Hosp. Ass'n, 219 N.L.R.B. 699, 699-700 (1975) (using "incidental to patient care" test to find that nurse supervisors, nurse leaders, and assistant supervisors were statutory supervisors, but that head nurses, assistant head nurses, and senior staff nurses were not); Trustees of Noble Hosp., 218 N.L.R.B. 1441, 1442-44 (1975) (finding that head nurses performed duties predominantly in exercise of professional judgment incidental to their treatment of patients and concluding that nurses did not possess any traditional indicia of supervisory authority cognizable under Act); Presbyterian Med. Ctr., 218 N.L.R.B. 1266, 1268-69 (1975) (concluding that team leaders and charge nurses were not statutory supervisors because their duties were limited to giving directions in performance of their professional duties); Wing Mem'l Hosp. Ass'n, 217 N.L.R.B. 1015, 1015-16 (1975) (holding that head nurses' duties and authority in assigning employees and directing their work were principally product of highly professional skill and did not, without more, constitute an exercise of supervisory authority "in the interest of the employer").

\(^{73}\) 219 N.L.R.B. 699 (1975).

\(^{74}\) Id. at 699-700 (using "incidental to patient care" test to find that nurse supervisors, nurse leaders, and assistant supervisors were statutory supervisors, but that head nurses, assistant head nurses, and senior staff nurses were not) (citing *Wing Mem'l Hosp. Ass'n*, 217 N.L.R.B. at 1016)).

\(^{75}\) See Rabban, *supra* note 14, at 1802-04 (discussing cases in which Board applied similar test and found variety of professionals outside health care field not to have supervisory status).

\(^{76}\) See id. (discussing distinctions between supervisory and professional duties). Professor Rabban cites various cases in which the Board has differentiated between individuals who exercise authority in connection with professional judgment and those who exercise authority in connection with functional supervisory duties such as hiring, firing, promoting, and granting leave. See id. at 1802-04 & nn.14, 117-18 (citing Washington Post Co., 254 N.L.R.B. 168, 205 (1981) (holding that editors who assign and edit stories are not supervisors because these actions fall within scope of news writing profession); Ohio State Legal Servs. Ass'n, 299 N.L.R.B. 594,
When examining the issue of supervisory status, the Board determines if the individual or individuals in question possess any of the twelve indicia of statutory authority. Next it looks to see if the exercise of authority entails the use of independent judgment or is merely routine. If independent judgment is used, the Board inquires whether the individual exercised authority in the interest of the employer.

The NLRB maintains that the statutory term "in the interest of the employer" denotes the employer's expectation of unqualified loyalty from individuals in whom the employer has endowed certain authorities to carry out management prerogatives. When charge nurses exercise responsibility in assigning and directing others to provide sound patient care, they do so based on professional or technical skill and status. This type of direction does not create
conflict between the interests of the employer and the interests of other employees that would force an employer to demand the nurses' undivided loyalty. A direction is given simply to provide quality and efficient service. An analogy can be drawn between charge nurses and leadmen who assign and direct the work of less skilled helpers. The NLRB maintains that just because such assignment and direction is in accord with the business goals of the company, it does not negate the fact that such actions stem from the individual's professional or technical skill and status.

E. Application of the "Incidental to Patient Care" Test to Licensed Practical Nurses

The NLRB's "incidental to patient care" test developed from a line of cases distinguishing protected professionals, such as RNs, from supervisors. It was not always clear, therefore, that the test was applicable to situations involving technicals, like LPNs. This issue was addressed by the NLRB and the Sixth Circuit in the early 1980s.

In 1981, the United States Court of Appeals for the Sixth Circuit remanded an unfair labor practice case, Beverly Enterprises v. NLRB, to the Board to determine the status of the LPNs at issue. The Board was directed to ascertain whether the LPNs assigned and directed employees as an exercise of independent professional stemming from their exercise of independent professional judgment).
judgment incidental to discharging their patient care responsibilities or as an exercise of supervisory authority in the interest of their employer.90 The court's holding reflected its apparent conclusion that the "incidental to patient care" test was applicable to LPNs as well as to RNs.91

On remand, the Board applied the "incidental to patient care" test and determined that the LPNs did assign and direct aides and orderlies in the interest of the patient, not in the interest of the employer.92 In a footnote, the Board observed that LPNs are technicals and not professionals, but nonetheless concluded that the "incidental to patient care" test was appropriate because both RNs and LPNs "perform work requiring the use of independent judgment and specialized training."93

Before Beverly Enterprises, the resolution of supervisory status cases involving LPNs usually hinged on the presence or absence of the exercise of independent judgment.94 Following the Sixth Circuit's remand in Beverly Enterprises, the NLRB has supplanted the "absence or presence of independent judgment" test with the "incidental to patient care" test in LPN charge nurse cases with little thoughtful discussion as to why a test used to distinguish between professional authority and supervisory authority is appropriate to use with respect to non-professionals.95 Although it appears entirely appropriate to

90. See id. at 1104-05.
91. See id. at 1101-04 (discussing "incidental to patient care" test and concluding that Regional Director did not analyze facts clearly or properly use supervisory status).
93. Id. at 966 n.4.
94. See supra notes 55-57 and accompanying text (discussing different rationales used in LPN and RN supervisory status cases).
95. See Manor West, Inc., 313 N.L.R.B. 956, 957-59 (1994) (applying "incidental to patient care" test to LPN in statutory supervisory status determination); Beverly Enters., 313 N.L.R.B. 491, 504-05 (1993) (using "incidental to patient care" test to determine LPNs' supervisory status and concluding that directions were given in interest of providing for patients' needs, not in consideration of employer's best financial interest); Riverchase Health Care Ctr., 304 N.L.R.B. 861, 863-64 (1991) (concluding that LPNs' assignment of work was both routine and primarily concerned with patient care); Ohio Masonic Home, Inc., 295 N.L.R.B. 390, 394-95 (1989) (concluding that LPNs' direction of employees is motivated by patient care needs, not personnel authority more directly promoting interest of employer); Phelps Community Med. Ctr., 295 N.L.R.B. 486, 490 (1989) (finding that LPNs' day-to-day direction is primarily in connection with patient care and not in interest of employer); Extendico-Prof'l Care, Inc., 272 N.L.R.B. 599, 599 (1984) (concluding that LPNs direct aides in routine nature emanating from LPNs high level of training and experience in caring for patients, rather than from managerial judgment on behalf of employer's best interests (citing NLRB v. Res-Care, Inc., 705 F.2d 1461, 1468 (7th Cir. 1983))); Colonial Manor 1977, Inc., 267 N.L.R.B. 525, 527 (1983) (applying test but concluding LPNs actually were supervisors); St. Mary's Home, Inc., 258 N.L.R.B. 1024, 1039 (1981) (applying "incidental to patient care" test to LPN and concluding that LPN's exercise of judgment arises from training and experience inherent in position of LPN and related exclusively to care of patients), enforced, 690 F.2d 1062 (4th Cir. 1982).
apply this test to LPNs, the cases surprisingly are devoid of a thorough discussion on this point.\(^\text{96}\)

\[\text{F. Courts' Acceptance of the NLRB's "Incidental to Patient Care" Test}\]

The Supreme Court\(^\text{97}\) and the Second,\(^\text{98}\) Seventh,\(^\text{99}\) Eighth,\(^\text{100}\) Ninth,\(^\text{101}\) and Eleventh\(^\text{102}\) Circuit Courts of Appeals all have agreed with the Board's "incidental to patient care" test. The Fourth Circuit originally endorsed the Board's test but recently has wavered. Only the Sixth Circuit has rejected the NLRB's "incidental to patient care" test completely.\(^\text{103}\) It is indeed ironic that the Sixth Circuit, largely responsible for expanding the "incidental to patient care" test to encompass LPNs,\(^\text{105}\) would become its major nemesis.

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96. See St. Mary's Home, 258 N.L.R.B. at 1089 (applying "incidental to patient care" test to LPN and concluding LPN's exercise of judgment arises from training and experience inherent in position of LPN and related exclusively to care of patients), enforced, 690 F.2d 1062 (4th Cir. 1982).

In a 1993 decision, written in preparation for the Supreme Court's examination of the test, the Board again chose to leave unresolved the issue of applying the "incidental to patient care" test to LPNs. See Beverly Enters., 313 N.L.R.B. at 493 n.10 (providing cursory discussion of application of test to LPNs).


99. See St. Francis Hosp. of Lynwood, 690 F.2d 1062, 1070 (9th Cir. 1982) (denying enforcement but recognizing applicability of Board's "incidental to patient care" test), enforcing 258 N.L.R.B. 1024 (1981); Methodist Home v. NLRB, 596 F.2d 1173, 1177-78 (4th Cir. 1979) (finding that ALJ erred in focusing on whether charge nurse was engaging in patient care).

100. See Beverly Cal. Corp. v. NLRB, Nos. 92-1068, 92-1205, 1992 WL 223815, at *1-2 (4th Cir. Sept. 11, 1992) (recognizing that other circuits have found LPNs not to be supervisors, but on facts of instant case concluding that LPNs were supervisors), denying enforcement to No. 10-CA-25599, 1991 WL 280399 (1991); NLRB v. St. Mary's Home, Inc., 690 F.2d 1062, 1070 (4th Cir. 1982) (denying enforcement but recognizing applicability of Board's "incidental to patient care" test), denying enforcement in relevant part to 258 N.L.R.B. 1024 (1981); Methodist Home v. NLRB, 596 F.2d 1173, 1177-78 (4th Cir. 1979) (affirming Board's conclusion that charge nurses were not supervisors).

101. See Health Care & Retirement Corp. v. NLRB, 987 F.2d 1256, 1260 (6th Cir. 1993) (stating that Board's supervisory test for nurses is invalid), aff'd, 114 S. Ct. 1778 (1994); Beverly Cal. Corp. v. NLRB, 970 F.2d 1548, 1552-53 (6th Cir. 1992) (finding no separate exception for supervisors in health care field and concluding that just because direction was related to quality of treatment of patients did not mean direction was not supervisory authority); NLRB v. Beacon Light Christian Nursing Home, 825 F.2d 1076, 1079-80 (6th Cir. 1987) (finding that ALJ erred in focusing on whether charge nurse was engaging in patient care).

102. See supra notes 88-96 and accompanying text (discussing Beverly Enters. v. NLRB, 661 F.2d 1095 (6th Cir. 1981), and expansion of "incidental to patient care" test). The Sixth Circuit
In *NLRB v. Yeshiva University*, the Supreme Court held that the faculty members in question, although professionals protected under section 2(12) of the Act, were in fact excludable due to their managerial duties in determining all central policies of the university including course selection, course offerings, teaching methods, grading policies, and matriculation standards, and in effectively deciding which students would be admitted, retained, and graduated. The Court rejected the Board’s position that the faculty members’ decision-making authority was in the routine discharge of professional duties. The Court held that only when “an employee’s activities fall outside the scope of the duties routinely performed by similarly situated professionals will he be found aligned with management.” The Court explicitly recognized that the NLRB had properly distinguished between the routine discharge of professional duties and the exercise of supervisory authority in other settings. The Court cited Board cases dealing with architects, engineers, and health care providers, and expressly mentioned the congressionally approved “incidental to patient care” test.

The circuit courts of appeals that have approved the Board’s use of the “incidental to patient care” test have used a similar rationale. They acknowledge that the test is an attempt to resolve the overlapping directives of sections 2(11) and 2(12) of the Act that, respectively, exclude supervisors and include professionals. They also note
that the Supreme Court has recognized that Congress expressly approved the test.\textsuperscript{115} The courts perceive that the goal of section 2(11) is to prevent dividing the loyalty of persons who, while belonging to a union with the other employees, may have to fire, discipline, or lay off those fellow employees.\textsuperscript{116} The exercise of authority by professionals over others in accordance with professional norms, not business norms or profit maximizing objectives, does not raise an issue of divided loyalties.\textsuperscript{117}

II. \textsc{The Sixth Circuit's Disenchantment with the "Incidental to Patient Care" Test}

\textit{A. Pre-Health Care Cases}

In 1987, the Sixth Circuit departed from its acceptance of the Board's "incidental to patient care" test\textsuperscript{118} when the court rejected the test's application to a group of LPNs in \textit{NLRB v. Beacon Light Christian Nursing Home.}\textsuperscript{119} In \textit{Beacon Light}, the Board determined that the LPNs were not supervisors in part because there was an absence of responsible direction in the interest of the employer; only responsible direction related to "mere patient care" was present.\textsuperscript{120} The Sixth Circuit denied enforcement and held that patient care is the business of a nursing home.\textsuperscript{121} The court held that when nurses otherwise meet the statutory definition of supervisor, their supervisory
role connected to patient care does not entitle them to protection under the Act.\textsuperscript{122}

Subsequently, in 1992 the Sixth Circuit reaffirmed and strengthened its \textit{Beacon Light} holding in \textit{Beverly California Corp. v. NLRB}.\textsuperscript{123} In \textit{Beverly California}, the Board affirmed the Regional Director’s finding that a group of RNs were not statutory supervisors because their duties were “generally limited to giving directions toward the quality treatment of patients” and thus did not constitute supervisory authority in the interest of the employer.\textsuperscript{124} Applying its \textit{Beacon Light} analysis, the Sixth Circuit concluded that the RNs did indeed fall within the statutory definition of supervisor.\textsuperscript{125} The court stated that the “notion that direction given to subordinate personnel to ensure that the employer’s nursing home customers receive ‘quality care’ somehow fails to qualify as direction given ‘in the interest of the employer’ makes very little sense.”\textsuperscript{126} The court held that, as a “matter of economics,” it is self-evident that it is in the best interest of an employer to do a superior job in serving the health care needs of its customers.\textsuperscript{127} The Sixth Circuit stated further that the use of independent judgment does not become “merely routine” when used in the interest of patients,\textsuperscript{128} apparently using the same incorrect statement of the “incidental to patient care” test it faulted the NRLB Regional Director for using in \textit{Beverly Enterprises}; the case that extended the “incidental to patient care” test to LPNs.\textsuperscript{129} Finally, the Sixth Circuit attempted to demonstrate that its \textit{Beverly California}

\begin{footnotes}
\textsuperscript{122} See \textit{id.} The court concluded that neither the Taft-Hartley Act’s text or legislative history nor the legislative history of the Health Care Amendments of 1974 supported the Board’s position. \textit{See id.}
\textsuperscript{123} 970 F.2d 1548 (6th Cir. 1992).
\textsuperscript{124} \textit{See Beverly Cal. Corp. v. NLRB, 970 F.2d 1548, 1549 (6th Cir. 1992).}
\textsuperscript{125} \textit{Id.}
\textsuperscript{126} \textit{Id. at 1552.}
\textsuperscript{127} \textit{Id. at 1553.}
\textsuperscript{128} \textit{Id.}
\textsuperscript{129} \textit{See Beverly Enters. v. NLRB, 661 F.2d 1095, 1101-05 (6th Cir. 1981) (discussing Regional Director’s confused application of “incidental to patient care” test). In \textit{Beverly Enterprises}, the Sixth Circuit took issue with the NRLB Regional Director’s inclusion of LPNs in a bargaining unit because the LPNs’ duties were primarily those concerned with patient care and not a product of independent judgment. \textit{See id. at 1101. The Sixth Circuit, in correcting the Regional Director, stated that “[t]he distinction must be made, not because professional care is a matter of routine involving no independent judgment, but because the independent judgment which is necessarily involved in patient care, even if otherwise supervisory in character, is not always strictly ‘in the interest of the employer.’” \textit{Id. The Sixth Circuit concluded that “[e]ither the LPNs are not supervisors because they do not exercise independent judgment in their assignment and direction of the aides and orderlies, or they are not supervisors because they exercise independent judgment professionally,” but not “in the interest of the employer.” \textit{Id.; see also Beverly Enters., 313 N.L.R.B. 491, 494 n.12 (1993) (discussing instances in which “incidental to patient care” test was not clearly articulated when “mere patient care” terminology was used in its decisions).}
holding was consistent with its decision in Beverly Enterprises.\(^{130}\) Even a cursory review of these two cases, however, reveals that the court's statements in Beverly California were disingenuous.\(^{131}\) Given the court's thorough explanation of the NLRB's supervisory test in Beverly Enterprises, it is impossible to conclude that the court in Beverly California believed that the two decisions were consistent.

B. NLRB v. Health Care & Retirement Corp. of America

The Sixth Circuit's attack on the Board's "incidental to patient care" test continued with its decision in NLRB v. Health Care & Retirement Corp. of America.\(^{132}\) At issue was the supervisory status of several LPNs who allegedly were discharged for their "uncooperative attitude."\(^{133}\) Coincidentally, the discharge occurred less than two days after the LPNs had aired their grievances with the nursing home's management to the company's Director of Human Resources and Vice President of Operations.\(^{134}\) The employer argued that the discharges were not connected to the employees' meeting with company officials.\(^{135}\)

Writing for the majority in an openly hostile tone, Senior Circuit Judge Celebrezze chastised the Board for failing to apply Sixth Circuit case law, which holds that the Board's "incidental to patient care" test cannot create an exception for supervisors in the health care field that is unsupported by the Act's language or legislative history.\(^{136}\) Although the administrative law judge ("ALJ") and the NLRB did a poor job of articulating the test used to determine supervisory status in this instance,\(^{137}\) the Sixth Circuit quickly recognized it as the

\(^{130}\) See Beverly Enters., 661 F.2d at 1101.

\(^{131}\) Compare id. (discussing proper test to be applied to LPNs and how it differs from Regional Director's application), with Beverly Cal., 970 F.2d at 1553-55 (using selective quotes from Beverly Enterprises to create impression that it is consistent with court's current analysis and holding).

\(^{132}\) 987 F.2d 1256 (6th Cir. 1993), aff'd, 114 S. Ct. 1778 (1994).

\(^{133}\) NLRB v. Health Care & Retirement Corp. of Am., 987 F.2d 1256, 1258-59 (6th Cir. 1993), aff'd, 114 S. Ct. 1778 (1994).

\(^{134}\) See id. at 1259.

\(^{135}\) See id.

\(^{136}\) See id. at 1260-61 (stating reasons why Board's determination of supervisory status was incorrect). The court was especially blunt with the NLRB. See id. (admonishing Board for steadfastly refusing to follow Sixth Circuit law). The court revealed that it was "unfortunate" that it had to "repeatedly remind the Board" that the court, not the NLRB, has the final responsibility for interpreting the law and that only Congress can create exceptions to the Act's definition of supervisor. See id.

\(^{137}\) See id. at 1259 (commenting that Board addressed issue only in footnote); see also Health Care & Retirement Corp. of Am., 306 N.L.R.B. 63, 63 & n.1 (1992) (rejecting employer's argument that Beacon Light is controlling law on issue of test for determining supervisory status). The ALJ did an even poorer job of articulating the basis for his supervisory status determination. See id. at 72 (containing ALJ's brief assessment of supervisory status).
“incidental to patient care” test. The Sixth Circuit again misconstrued the test as an exception for all nurses whose functions were related to “mere patient care.” Accordingly, citing its Beacon Light and Beverly California decisions, the Sixth Circuit vacated the Board’s order.

III. THE SUPREME COURT’S RULING IN HEALTH CARE

In a 5-4 decision, the Supreme Court in Health Care affirmed the Sixth Circuit’s decision and struck down the Board’s “incidental to patient care” test as inconsistent with both the NLRA’s plain meaning and Supreme Court precedent.

A. Justice Kennedy’s Majority Opinion

While recognizing that the Board had developed the “incidental to patient care” test to address the Act’s inclusion of professional employees, the Court held that the test was similar to the one it had rejected in NLRB v. Yeshiva University and therefore could “fare no better.” The Court concluded that the Board’s test created a false dichotomy that was illogical because patient care is the business of a nursing home. Attending the needs of patients, the employer’s customers, is absolutely in the employer’s interest.

138. See Health Care, 987 F.2d at 1260 (recognizing Board’s position that “a nurse is not a supervisor when her conduct is in the furtherance of the patient’s interests”).

139. See supra notes 123-31 and accompanying text (relating how Sixth Circuit apparently chose to mischaracterize Board’s test in Beverly Enterprises).

140. See Health Care, 987 F.2d at 1261.


142. See id. at 1785. The Supreme Court acknowledged that there is a three part test for determining whether an employee is a statutory supervisor. See id. at 1780. First, does the employee have the authority to engage in one of the twelve listed activities? See id. Second, does the exercise of such authority require independent judgment, and is it of a merely routine or clerical nature? See id. Third, does the employee hold the authority “in the interest of the employer”? See id. The Supreme Court addressed the third question by discussing its interpretation of the phrase “in the interest of the employer.” See id.; see also 29 U.S.C. § 152(11) (1994) (providing statutory definition of supervisor).

143. 444 U.S. 672 (1980) (holding that faculty who had absolute control over academic policies were managers because their duties fell outside scope of tasks routinely performed by similarly situated professionals); see supra notes 106-12 and accompanying text (discussing Yeshiva Univ. decision).

144. Health Care, 114 S. Ct. at 1782. But see id. at 1792 (Ginsburg, J., dissenting) (stating that majority’s reliance on Yeshiva is puzzling because Court expressly approved of Board’s test, and that test is consistent with holding in that decision).

145. See id. at 1782. To try to separate acts taken in connection with patient care and acts taken in connection with the interests of the employer, wrote Justice Kennedy, creates a false dichotomy when patient care is the business service the employer is providing. See id.

146. See id.
The definition of the phrase "in the interest of the employer," on which the Court elaborated in *Packard*, still controls, stated the Court, because Congress did not indicate that it changed the meaning of the phrase when it modified the NLRA in 1974. The *Packard* definition, not the Board's, wrote Justice Kennedy, is consistent with the plain meaning of the Act. Although the Supreme Court acknowledged that ambiguity may exist in other parts of the statutory definition, such as in the phrases "independent judgment" and "responsibly direct," it concluded that the meaning of the phrase "in the interest of the employer" was clear. Additionally, the majority

147. See *Packard Motor Car Co. v. NLRB*, 330 U.S. 485, 488-89 (1945) (holding that § 2(2) of the original act provides that every employee, by the very nature of employment in master's business, is responsible for acting in master's interest). The Court, however, stated that the only reason why this phrase was included in the definition was to make sure that courts apply the tort principle of respondeat superior to employers' agents who commit unfair labor practices. See *id.* at 489; see also supra notes 18-29 and accompanying text (discussing *Packard* decision).

148. See *Health Care*, 114 S. Ct. at 1782-83 (stating that when statute changes result reached by judicial decision it does not automatically follow that statute changes meaning of language interpreted in that decision (citing Public Employees Retirement Sys. v. Betts, 492 U.S. 158, 168 (1989))). Courts that have confronted the issue of the phrase's meaning, however, have adopted the definition that Justice Douglas set forth in his dissent in *Packard*, concluding that the phrase certainly means more than what is contained in its literal meaning given Congress' legislative reversal of *Packard*. See *id.*; see also *Food Store Employees Union Local 347 v. NLRB*, 422 F.2d 685, 689-90 (D.C. Cir. 1969) (discussing meaning of phrase "in the interest of the employer" as used in NLRA definition of supervisor); NLRB v. Master Stevedores Ass'n, 418 F.2d 140, 142 (5th Cir. 1969) (relating that "entire work force from the president [of the company] down to the messenger boy in one sense acts in the interest of the employer," and therefore that some other test surely was contemplated); NLRB v. Security Guard Serv., Inc., 384 F.2d 143, 148 (5th Cir. 1967) (stating that supervisory exclusion requires "real power" and "meaningful action" with respect to statutory test, such that person in question is in effect part of management); International Union of United Brewery Workers v. NLRB, 298 F.2d 297, 303 (D.C. Cir. 1961) (stating that Congress contemplated something more than what is "afforded by sheerly literal reading" of supervisory exclusion, that is, person in question must have "real power" such that he is in effect a part of management); NLRB v. Southern Bleachery & Print Works, Inc., 257 F.2d 239 (4th Cir. 1958) (stating that when determining supervisory status of worker, court must look to see if worker shares power of management); NLRB v. Quincy Steel Casting Co., 200 F.2d 293, 296 (1st Cir. 1952) (stating that court cannot rely on label given to employee, but must look to see if person has exercised duties in such a way as to evidence sharing power of management); NLRB v. Leland-Gifford Co., 200 F.2d 620, 625 (1st Cir. 1952) (stating that to be statutory supervisor, worker must have genuine power to perform supervisory function and be clothed with real power to discipline and direct responsibly).

These cases are consistent with Justice Ginsburg's comments in her dissenting opinion in *Health Care* in which she questions the majority's reliance on the *Packard* decision in light of Congress' legislative reversal of the case through the Taft-Hartley Amendment and concludes that the proper focus should be on Justice Douglas' *Packard* dissent. See *Health Care*, 114 S. Ct. at 1791 n.15 (Ginsburg, J., dissenting); see also supra notes 18-29 and accompanying text (discussing *Packard* decision).

149. See *Health Care*, 114 S. Ct. at 1782-83.

150. See *id.* at 1783. But see *id.* at 1786-87 (Ginsburg, J. dissenting) (pointing out tensions between § 2(11) and § 2(12) of Act that Board must resolve); supra note 51 and accompanying text (discussing tensions and ambiguities created by Taft-Hartley Amendments).
felt that following the Board’s test would render portions of the statutory definition meaningless.\footnote{See Health Care, 114 S. Ct. at 1783. But see id. at 1792-98 (Ginsburg, J., dissenting) (predicting that in time majority decision would render Act’s protection of professionals virtually meaningless).}

The Supreme Court rejected the Board’s policy arguments because they would create legal categories inconsistent with the meaning of the Act.\footnote{See id. at 1783-84. But see id. at 1786-88 (Ginsburg, J., dissenting) (stating that tension existed and that Board’s resolution was rational and consistent).} The Court stated that “tensions” between sections 2(11) and 2(12) of the NLRA could not be resolved by distorting statutory language.\footnote{See id. at 1784.} The Court dismissed the “test-affirming” statements contained in the Health Care Amendments of 1974 committee reports, characterizing them as “isolated statements” without “any force of law.”\footnote{Id. The Court, however, failed to address its own contrary precedent that requires courts to accord “great weight” to an agency’s interpretation if Congress fails to modify such interpretation when reenacting the Act and to subsequent congressional declarations of intent of the earlier Act when passing amending legislation. See NLRB v. Bell Aerospace Co., 416 U.S. 267, 274-75 (1974) (discussing instances in which agency interpretation is to be given “great weight”); see also supra notes 68-70 and accompanying text (same).} The Court also dismissed the vast number of Board cases applying a similar supervisory status to fields outside the health care industry, asserting that they were distinguishable because their holdings did not rest on an interpretation of the phrase “in the interest of the employer.”\footnote{See Health Care, 114 S. Ct. at 1785. But see id. at 1789 (Ginsburg J. dissenting) (listing industries and citing cases in which Board applies similar test). Even a cursory review will demonstrate that the majority’s statement is unfounded. See, e.g., The Washington Post Co., 254 N.L.R.B. 168, 205 (1981) (holding that editors who assign and edit stories are not supervisors because these actions fall within scope of news writing profession); Ohio State Legal Servs. Ass’n, 239 N.L.R.B. 594, 598 (1978) (holding that lawyers who serve as unit heads were not supervisors); Musical Theatre Ass’n, 221 N.L.R.B. 872, 873 (1975) (finding that directors’ and choreographers’ relationships with actors and dancers were artistic and professional, not supervisory); General Dynamics Corp., 213 N.L.R.B. 851, 859 (1974) (finding that project engineer’s directions stemmed from professional expertise, not managerial authority); Wurster, Bernardi & Emmons, Inc., 192 N.L.R.B. 1049, 1051 (1974) (finding that project architects responsibly directed others in professional sense, not within meaning of supervisor under Act); Westinghouse Broad. Co., 215 N.L.R.B. 123, 125 (1974) (holding that television directors motivated by artistic effect are not supervisors); Post-Newsweek Stations, Inc., 203 N.L.R.B. 522, 524 (1973) (finding that editors with final authority as to story content were professionals and not statutory supervisors); National Broad. Co., 160 N.L.R.B. 1440, 1441-42 (1966) (stating that editors who assign and edit stories are not supervisors because these actions fall within scope of news writing profession).} Finally, the majority predicted that its ruling would affect only the health care industry because, in the Court’s judgment, the Board had applied this unique definition of the phrase “in the interest of the employer,” only to the health care industry.\footnote{See Health Care, 114 S. Ct. at 1785. But see id. at 1791-92 (Ginsburg, J., dissenting) (noting that reading given to this phrase by Court allows overly broad application). Justice Ginsburg’s prediction will ring true because the Board, despite the majority’s assertion to the}
B. Justice Ginsburg's Dissent

Justice Ginsburg’s dissent clearly articulated the tensions and ambiguities inherent in the NLRA. She explained that section 2(11), which excludes supervisors from the Act’s protection, and section 2(12), which includes professionals in the Act’s protection, overlap. Both sections focus on individuals who exercise judgment in assigning and directing others in some fashion. Individuals who possess characteristics of both a supervisor and a professional are excluded from the Act’s protection. Therefore, a broader statutory definition of supervisor will narrow the class of individuals protected as professionals. The separation of excludable supervisors from sheltered professionals, wrote Justice Ginsburg, is a task Congress delegated to the NLRB and should not be disturbed if it is rational and consistent with the Act.

Justice Ginsburg further stated that to harmonize the dueling statutory sections, the Board properly focused on the policies that motivated Congress to pass this legislation. The test, she asserted, properly distinguishes between professional authority and authority encompassing “front-line” management prerogatives. The test resembles tests the Board has used with respect to doctors, faculty members, pharmacists, librarians, social workers, lawyers, television
station directors, architects, and engineers. Justice Ginsburg concluded that the Board's "incidental to patient care" test is both rational and consistent with the Act and its persuasive legislative history.

In addition, Justice Ginsburg found the majority's holding puzzling for several reasons. First, the majority's definition of supervisor would exclude most professionals from the Act's protection because it would reach all professionals who use independent judgment to assign and responsibly direct others, which most do. This result would contravene Congress' intent to limit the supervisor category. Second, Justice Ginsburg argued that the majority's reliance on Packard was questionable because Congress legislatively reversed the Supreme Court's holding in that case, and the definition of the phrase was a primary part of the Court's analysis. Most courts that have confronted the issue utilized Justice Douglas' definition in Packard's dissenting opinion. Third, the majority's attempt to use Yeshiva University in support of its decision does not make sense because one cannot credibly equate faculty members, who had absolute power in all academic matters, to LPNs, whose power was severely restricted. The majority's reliance on Yeshiva University was especially troubling to Justice Ginsburg due to the fact that the Court specifically endorsed the Board's "incidental to patient care" test in that case. Moreover, even if Yeshiva University could be applied to the LPNs in Health Care, the Yeshiva University holding is consistent, not inconsistent, with the Board's test. In Yeshiva University, the Court held that, when distinguishing between managerial and professional status, the Board should determine whether the

165. See id. at 1789 (Ginsburg, J., dissenting); see also Rabban, supra note 14, at 183-84 (discussing similar rule used by NLRB in other industries and providing case law citations).
166. See Health Care, 114 S. Ct. at 1786-88 (Ginsburg, J., dissenting) (discussing legislative history and Board's successful effort in fulfilling statutory mandate).
167. See id. (Ginsburg, J., dissenting) (noting that broad definition of supervisor will adversely affect countless professionals, all of whom exercise independent judgment, and most of whom assign and direct work of others).
168. See id. at 1791 (Ginsburg, J., dissenting) (asserting that majority definition directly contravenes expressed congressional intent).
169. See id. at 1792 (Ginsburg, J., dissenting) (discussing majority's misguided reliance on majority opinion in Packard instead of on dissent).
170. See supra note 148 and accompanying text (listing cases in which courts have adhered to Packard dissent in interpreting statutory phrase).
171. See Health Care, 114 S. Ct. at 1792 (Ginsburg, J., dissenting); see also supra notes 106-112 and accompanying text (discussing Court's decision in Yeshiva Univ.).
172. See Health Care, 114 S. Ct. at 1792 (Ginsburg, J., dissenting).
173. See id. (Ginsburg, J., dissenting).
174. See id. at 1789 (Ginsburg, J., dissenting) (citing majority's endorsement of Board's test in Yeshiva Univ. and applying Yeshiva Univ. holding to Health Care despite the fact that Yeshiva Univ. concerned managerial status, not supervisory status under NLRA).
person's duties fall outside the duties routinely performed by similarly situated professionals.175 By invalidating the Board's test in this manner, the majority's opinion will have the effect of denying most professionals the Act's protection.176

C. Reaction to and Predicted Legal Effects of the Health Care Opinion

Reaction to the Health Care opinion has been markedly negative.177 Most commentators agree that the Court misapplied or

176. See Health Care, 114 S. Ct. at 1792 (Ginsburg, J., dissenting) (predicting effect of majority's ruling).
177. See AFL-CIO, Employers Spar over Reform of Labor Laws Before Dunlop Commission, 1994 Daily Lab. Rep. (BNA) No. 173, at D-25 (Sept. 9, 1994) (relating opinion of Lewis Maltby, Director of National Task Force on Civil Liberties in the Workplace, who feels that NLRA should be amended because "with the way that management is involving employees in day-to-day operations, it won't be long before everyone is a supervisor under the NLRA, and no one has even the theoretical right to join a union"); ANA Convention Calls for Legislation to Overturn Supreme Court Decision, 1994 Daily Lab. Rep. (BNA) No. 119, at D-23 (June 23, 1994) (stating that ANA seeks congressional action to overturn Health Care decision that acts as gag rule preventing nurses from being advocates for their patients); ANA Delegates Call for Legislation to Overturn Supreme Court Decision, 32 Gov't Empl. Rel. Rep. (Warren, Gorham & Lamont) No. 1571, at 809 (June 27, 1994) (relating ANA efforts to seek legislative reversal of Health Care case); Peter Blackman, Challenge To Labor: Employers Hope to Capitalize on High Court Ruling, N.Y. L.J., Aug. 18, 1994, at 5 (stating that Court's ruling potentially affects all professionals who assign work to other employees and who use independent judgment); Joseph R. Grodin, Report on the 1993-1994 Supreme Court Labor and Employment Law Term, 10 LAB. LAW. 693, 697-99 (1994) (commenting that Court's holding exacerbates tension between statutory definitions of supervisor and professional and arguably will have effects beyond health care industry); Christina M. Lyons, 1993-94 Annual Survey of Labor and Employment Law, 36 B.C. L. REV. 307, 316 (1995) (concluding that Court's interpretation is clearly contrary to congressional intent and will serve to 'limit greatly professionals' inclusion under Act); Robin E. Margolis, Supreme Court Strikes Blow at Health Care Unions, 11 HEALTHSPAN 19, 19-20 (1994) (stating that Court's decision will have grave consequences for health care unions and unions in other industries and predicting that many nurses will now be beyond reach of union organizing campaigns); Charles J. Morris, A Blueprint for Reform of the National Labor Relations Act, 8 ADMIN. L.J. AM. U. 517, 558-60 (1994) (stating that Court's decision compounded problem of employee coverage under Act and should be amended such that employee will not be supervisor unless supervisory functions consume predominant part of employee's working time); William Priest, Collective Bargaining for Nurses Under the National Labor Relations Act, 16 J. LEGAL MED. 277, 305-10 (1995) (concluding that Court ignored legislative history and ambiguity in statute, and as a result nearly all professionals may fall within supervisor category); The Supreme Court, 1993 Term, Leading Cases, 108 HARV. L. REV. 139, 342, 350 (1994) [hereinafter Leading Cases] (concluding that Court improperly imposed judicially preferred interpretation of Act by ignoring legislative history and engaging in strained analysis of Yeshiva Univ. and Packard); Women Would Benefit from Lifting Supervisor Exclusion, Panel Told, 1994 Daily Lab. Rep. (BNA) No. 142, at D-8 (July 27, 1994) (discussing ANA's belief that Court's decision will exclude from NLRA protection nurses who do not have control over job and pay status resulting in chilling effect on unionization of nurses); Laura Bailey, Note, Health Care & Retirement Corp. of America—"In the Interest of the Employer": Broadening the Scope of the Supervisor Exclusion Under the NLRA, 4 WIDENER J. PUB. L. 533, 545 (1995) (opining that Court misconstrued nature of supervisory function in health care field and misapplied policies that motivated Congress, thereby eliminating protections of Act for many workers); Christopher J. Lawhorn, Note, NLRB v. Health Care & Retirement Corp.: One Less Hurdle to Finding "Supervisor" Status, 39 ST. LOUIS U. L.J. 619, 666-67 (1995) (positing that majority's over-formalistic interpretation of phrase "in the interest of the employer" thwarts objectives of Congress, and as a result many workers who are not truly supervisors will lose their
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ignored the policies motivating Congress to enact the provisions and effectively eliminated the protections of the NLRA for many people both inside and outside the health care industry.\footnote{See supra note 177 and accompanying text (providing articles that explain detrimental implications of \textit{Health Care} decision).} A thorough review of the Board's status determination cases concerning professionals in other industries reveals that the majority's assertions were incorrect. Because the Board's analysis in such cases is extremely similar to that applied in cases concerning the supervisory status of health care professionals, professionals in those industries are in danger of losing their protection under the Act as well.\footnote{See supra note 155 and accompanying text.}

The Supreme Court, by invalidating the Board's twenty-year-old "incidental to patient care" test despite the test's solid basis in the NLRA's legislative history and notwithstanding the great deference due the NLRB's interpretation of the Act, has dealt a serious blow to thousands of professionals in America's work force. The questions that remain are how, why, and at what cost will \textit{Health Care} affect the federal administrative system? Is it true, as one commentator has predicted, that the only impact that the \textit{Health Care} decision will have is that the Board will be required merely to change its "phraseology" in deciding such cases, or is there a more damaging result?\footnote{See \textit{Labor Law Developments} \S 1.02[2] (Carol J. Holgren & Anita M. Stover eds., 1995) (stating that Board may circumvent \textit{Health Care} by changing wording of test).}
IV. ANALYSIS OF THE SUPREME COURT'S DECISION

A. Chevron Deference

Amazingly enough, neither the majority nor the dissent in *Health Care* quoted *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*,\(^{181}\) the landmark case in which the Supreme Court resolved a longstanding and highly contentious dispute concerning judicial deference to an agency's reasonable interpretation of an ambiguous statute.\(^{182}\) In fact, one commentator accused the Supreme Court of purposely avoiding a discussion of *Chevron* deference in *Health Care* so that it improperly could impose a judicially preferred interpretation of the NLRA on the Board.\(^{183}\)

Prior to *Chevron*, the tension between the judiciary's law-declaring role, which includes ensuring that agencies stay within their statutory boundaries,\(^{184}\) and the need to defer to broad congressional delegations of power to government agencies, the hallmark of our modern administrative state,\(^{185}\) resulted in erratic application of the deference doctrine in the federal courts.\(^{186}\) To remedy this, the Court in *Chevron* decreed that a two-part test should be used by courts when reviewing agency constructions of a statute.\(^{187}\) First, the reviewing court must determine "whether Congress has directly spoken on the

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182. See generally Quincy M. Crawford, Comment, Chevron Deference to Agency Interpretations that Delimit the Scope of the Agency's Jurisdiction, 61 U. CHI. L. REV. 957 (1994) (discussing importance and effect of *Chevron* decision).
183. See Leading Cases, supra note 177, at 342.
184. See Kenneth W. Starr, Judicial Review in the Post-Chevron Era, 3 YALE J. ON REG. 283, 283 (1986) (discussing soundness of policy of judicial restraint in interpretation of statutes with aim of promoting and preserving federalism). As Starr notes, agency deference seems facially contrary to the holding in *Marbury v. Madison*, 5 U.S. (Cranch) 137, 177 (1803), because it is "emphatically the duty of the judicial department to say what the law is." *Id.* Deference to agency rulemaking, therefore, usurps the role of the courts in an area that is guarded jealously. See *id.*
185. See Antonin Scalia, Judicial Deference to Administrative Interpretations of Law, 1989 DUKE L.J. 511, 516-17 (discussing *Chevron* and concluding that deference of courts to legislative intent is proper when Congress intended to leave interpretation of statute to legislative agency).
186. See Richard J. Pierce, Jr., The Supreme Court's New Hypertextualism: An Invitation to Cacophony and Incoherence in the Administrative State, 95 COLUM. L. REV. 749, 749 (1995) (stating that prior to *Chevron*, courts rarely explained why they sometimes would give deference to agency construction and other times would substitute their own construction for that of the agency); Starr, supra note 184, at 283 (citing reasons for erratic application of deference doctrine in federal courts).
187. See *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984) (holding that judicial review of agency's statutory interpretation must ask whether Congress has addressed issue directly and, if not, must determine whether agency's interpretation is based on "a permissible construction of the statute") (footnote omitted).
precise question at issue." If the intent of Congress is clear, the inquiry ends, for the unambiguously expressed intent of Congress must be given effect. If, however, the court concludes that Congress has not spoken directly on the issue and if the statute is silent or ambiguous with respect to the specific issue, the second question for the court is whether the agency’s interpretation is based on a permissible construction of the statute.

The Chevron deference test provides for enhanced political accountability for policy decisions. It evidences the Court’s recognition that the resolution of statutory ambiguities often requires policy choices that are better left to administrative agencies. The Chevron test also cured a split between circuits as to the proper standard for judicial review of agency interpretations. Its analysis replaces a myriad of distinctly different tests.

Chevron deference, by its own definition, is based on determining and effectuating congressional “intent.” The process used to

188. Id. In a footnote, the Court stated that courts are to employ “traditional tools of statutory construction” to ascertain if Congress “had an intention on the precise question at issue.” Id. at 843 n.9. Unfortunately, the court’s failure to state what exactly are the “traditional tools of statutory construction” has provided textualists with the opportunity to obliterate the Chevron doctrine. See Pierce, supra note 186, at 750 (attributing inconsistency in applying Chevron test to footnote nine).

189. See Chevron, 467 U.S. at 842.

190. See id. at 843. Later in its decision, the Court made clear that a “permissible construction” simply means a reasonable one. See id. at 844; Starr, supra note 184, at 288.

191. See Pierce, supra note 186, at 749-50 (stating that Chevron test would enhance political accountability because decisions would be made by agencies rather than by insulated judges).

192. See Starr, supra note 184, at 292-93 (discussing legal effects of Chevron decision).

193. See, e.g., Children’s Habilitation Ctr., Inc., v. NLRB, 887 F.2d 130, 132 (7th Cir. 1989) (stating that court must review Board’s determinations with “a lightish hand,” and simultaneously noting “the Board’s well-attested manipulativeness in the interpretation of the statutory test for ‘supervisor’”); NLRB v. Res-care, Inc., 705 F.2d 1461, 1466 (7th Cir. 1983) (claiming that Board’s determination is factual rather than legal and thus should get “deferential” treatment, and also charging that Board’s ad hoc policy determinations leave it open to attacks of “opportunism”); NLRB v. St. Mary’s Home, Inc., 690 F.2d 1062, 1067 (4th Cir. 1982) (stating that rule is to uphold Board’s interpretation of supervisory status if supported by “substantial evidence on the record as a whole” but acknowledging Board’s inconsistency and concluding that “courts must carefully scrutinize” Board’s determinations); Misericordia Hosp. Med. Ctr. v. NLRB, 623 F.2d 808, 816 (2d Cir. 1980) (applying “substantial evidence on the record” test); NLRB v. St. Francis Hosp. Lynwood, 601 F.2d 404, 422 (9th Cir. 1979) (deferring to Board’s finding of fact although acknowledging that outcome would have been different if decided de novo); Methodist Home v. NLRB, 596 F.2d 1173, 1177-78 (4th Cir. 1979) (suggesting that Board’s decision should be overturned only when it is “without support in the record or contrary to law”).

194. See Starr, supra note 184, at 292-93 (asserting that Chevron “cast substantial doubt upon several well-established doctrines”).

195. See Chevron, 467 U.S. at 842-44 & nn.9-11 (establishing two-part test). The first part of the test requires that if the “intent of Congress is clear,” it must be given effect. Id. at 842-43. The intent is ascertained by “employing traditional tools of statutory construction.” Id. at 843 n.9. The decision states that if an agency’s interpretation “represents a reasonable accommodation of conflicting policies that were committed to the agency’s care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation
discover "intent" is referred to as "intentionalism." It consists of searching for legislative purpose through legislative history, which consists of floor debates, committee reports, hearing testimony, and presidential messages, so that courts can implement the original intent of the enacting Congress. In the United States, the practice of reviewing extra-textual sources to ascertain an act's meaning dates back at least one hundred years.

B. Textualism

The Health Care decision was devoid of any discussion of the Chevron mandate because Justice Kennedy employed a method of statutory interpretation called "textualism," which seeks objectivity in interpreting statutes by focusing not on the legislature's intent, but rather on what an ordinary reader would have understood the words to mean at the time of the law's enactment.

is not one that Congress would have sanctioned." Id. at 845 (quoting United States v. Shimer, 367 U.S. 374, 382-83 (1961)).

196. See Thomas W. Merrill, Textualism and the Future of the Chevron Doctrine, 72 WASH. U. L.Q. 351, 357 (1994) (stating that Chevron opinion "speaks the language of legislative intent and was authored by Justice Stevens, the last true-blue holdout in favor of intentionalism and legislative history in statutory interpretation").

197. See Pierce, supra note 186, at 750 & n.10 (discussing intentionalism and its tools).


199. See id.; Wald, supra note 5, at 280 (tracing use of legislative history (citing Patricia M. Wald, Some Observations on the Use of Legislative History in the 1981 Supreme Court Term, 68 IOWA L. REV. 195, 196-97 (1983))).

In the vast majority of cases during the Warren and Burger Courts, the Court consulted an act's legislative history to reassure itself that its interpretation of clear text was not inconsistent with the legislature's intent. See Eskridge, supra note 198, at 627. Additionally, when a subsequent Congress relies on particular assumed interpretations that clearly are not incorrect, intentionalists believe that it makes good sense to credit these interpretations. See id. at 635-36 (stating that Supreme Court has given weight to subsequent legislative history).

champion this form of statutory analysis. Textualists generally repudiate approaches to statutory interpretation that employ legislative history to determine statutory intent, believing that legislators and staff manipulate legislative history and that judges selectively focus on portions of legislative history to advance their own policy preferences. Textualists argue that such an approach violates the constitutional doctrine of the separation of powers.

To elaborate on the proper way to view the relationship among author, text, and interpreter, textualists focus on an act’s internal linguistic structure and, when necessary, the impinging external background assumptions, including those cultural, political, and ideological in nature, surrounding an act’s meaning. Textualists focus on the text, rather than on the author’s intentions, because the process of trying to leap into the author’s mind is viewed as a futile task, amounting to nothing more than “wild guesses” and, as such, constitutes an impermissible exercise in judicial creativity.

201. See Eskridge, supra note 198, at 640 (stating that Justice Scalia is major proponent of textualism); Wald, supra note 5, at 281 (stating that Justices Scalia and Kennedy are textualists’ “spiritual leaders”).

202. See Karkkainen, supra note 200, at 414-22 (relating Justice Scalia’s criticisms of intentionalist approach to statutory interpretation); Taylor, supra note 200, at 322-23 (stating textualists’ objections to use of legislative history as reliable indicator of congressional intent); Wald, supra note 5, at 285 (discussing textualists’ attack on extra-statutory materials).

203. See Eskridge, supra note 198, at 643-45, 650-56 (stating that specific explanation in committee reports may be more strategic than sincere expressions of statute’s meaning); see also Daniel A. Farber & Philip P. Frickey, Legislative Intent and Public Choice, 74 Va. L. Rev. 423, 423 (1988) (stating that U.S. legal system: (1) allows congressional staff members to concoct rationales about laws and place them in committee reports to deceive courts; (2) tolerates legislators who contrive to smuggle their own interpretations of laws into later committee reports concerning other matters; and (3) endures courts that foolishly give credence to such deceptive evidence).

204. See Eskridge, supra note 198, at 660 (relating that Justice Kennedy believes that “rummaging” through unauthoritative materials to consult spirit of legislation in order to discover alternative interpretation of act that makes the Court more comfortable does not foster “democratic exegesis”); Karkkainen, supra note 200, at 415-22 (discussing Justice Scalia’s view of intentionalist approach to statutory interpretation); Taylor, supra note 200, at 322-23 (criticizing judicial use of legislative history to advance its own interpretations); Wald, supra note 5, at 285 (discussing textualists’ attack on use of all extra-statutory materials).

205. See Eskridge, supra note 198, at 650, 671 (stating that Justice Scalia objects to use of legislative history on separation of powers grounds including theories of bicameralism and presentment); Taylor, supra note 200, at 323 (discussing grounds on which textualists reject use of legislative history).

In Thompson v. Thompson, 484 U.S. 174, 191-92 (1988) (Scalia, J., concurring in the judgment), Justice Scalia commented that “[c]ommittee reports, floor speeches, and even colloquies between Congressmen, are frail substitutes for bicameral vote upon the text of a law and its presentment to the President.”

206. See Taylor, supra note 200, at 324-25 (discussing textualists’ evaluation of text’s meaning).

207. See Eskridge supra note 198, at 643 (relating that Judge Easterbrook has stated that reliance on legislative history to discern intent amounts to “wild guesses”).

208. See Taylor, supra note 200, at 327, 367 (discussing impermissibility of interpretist/intentionalist approach).
Meaning, textualists contend, is not a matter of private language or subjective mental intentions, but is necessarily a public and social occurrence. Judge Easterbrook expressed the concept of textualism best when he stated that the proper statutory inquiry "is not what the drafters thought their rule would accomplish . . . , but what their rule is." Textualists believe that the text achieves meaning distinguishable from what the author may have intended. The public and social process of "inscripting meaning" in language disconnects the written work from the author's subjective intention. Consequently, a written work has an autonomous space of meaning apart from the author's intended meaning. The interpretation of meaning, textualists assert, must come from such public and social inscriptions of meaning, not from the incommunicable subjective intent or "psychic experience" of the author.

Moreover, textualists argue that meaning must be derived from the words themselves because it is impossible to talk of a single intent of a multi-member legislative body. There can be hundreds of intents, or there may be none, as in those instances in which the issue never was contemplated by legislators. Textualists reject the notion that it is permissible to use legislative history to construct artificially a "median legislator" by which to gauge intent. "A statute is a public act whose meaning is not necessarily the same as the sum of the private intentions of those who voted in its favor." All that can be safely relied on when interpreting a statute, textualists conclude, is the statutory language that was approved by both chambers of Congress and signed by the President.

For textualists, finding the meaning of any problematic statutory term should be approached as a holistic endeavor focusing on the

209. See id. at 327-28 (discussing insights of textualism).
211. See Taylor, supra note 200, at 334-36 (discussing the "intentional fallacy" of confusing "a work with its origins").
212. See id. at 337 (discussing insights of textualism).
213. See id. at 336-38 (discussing text's separate existence from author's intent).
214. See id. at 339. Additionally, a legislature may vote for a bill purely for the purpose of securing support of party leadership for some other initiative. When this is the case, there is motive, but no intent. See id. at 339 & n.80 (discussing presence and absence of legislator's motive and intent).
216. Id. at 340-41.
217. See Eskridge, supra note 198, at 654 (relating that when looking for meaning one can safely rely solely on language); Wald, supra note 5, at 282 (stating that textualists believe statutory language is only definitive source of congressional intent).
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structural and linguistic context of the entire statute and other related statutes. Textualists consider the formal relationships between parts of a statute, such as syntax, grammar, and design of the statute as a whole. The meaning of a word or phrase is qualified both by the sentence in which it appears and by the nature of the entire document. The textualist looks to see if one meaning of a word would render other provisions duplicative or superfluous, or if one meaning comports with a pattern of assumptions supported by the statute's structure.

Textualists, however, do concede that words are not self-defining, natural or original, but acquire meaning from their background principles, perspectives, and relevant culture. One understands what another says not just because of the literal meaning of the words, but also because of an understanding of the contextual relationship underlying those words. Most of the time, a shared command of language allows one to recognize another's meaning without resorting to interpretation. Difficulty develops when two or more sets of background assumptions conflict. Textualists have yet to resolve this issue. Some have suggested that legislative history could be re-incorporated into the statutory interpretation process to provide guidance as to the meaning of the language. The inquiry would be to determine what competent individuals of the time understood the words to mean, not what the legislators intended.

Critics of textualism assert that to reject completely all legislative history and to rely on the text alone, as some textualist proponents

218. See Eskridge, supra note 198, at 655-56, 666-69 (discussing how meaning is to be determined under textualist approach); Taylor, supra note 200, at 341-54 (relating methods of textual analysis); Wald, supra note 5, at 282 (stating that textualists find meaning of particular words within four corners of statute itself).
219. See Taylor, supra note 200, at 342-43 (relating methods of textual analysis); Wald, supra note 5, at 282 (stating that textualists consider statutory language as exclusive source of congressional intent).
220. See Taylor, supra note 200, at 341-54; Wald, supra note 5, at 282.
221. See Eskridge, supra note 198, at 667.
222. See Taylor, supra note 200, at 363-64 (stating that external context of words is factor that must be acknowledged and somehow integrated into textualist approach).
223. See id. at 365 (discussing background assumptions inherent in meaning of words).
224. See id. at 371-73 (stating that shared customs, institutions, and practices often prepare us to know each other's meaning without resorting to interpretation).
225. See id. at 373-82 (stating that when there is conflict between common background assumptions, external reference sources are needed to resolve issue).
226. See id. at 377 (stating that textualists do not pay enough attention to external contexts).
227. See id. at 378-82.
228. See id. at 378-82 (suggesting that legislative history could assist in statutory interpretation by identifying proper background assumptions and meanings of certain words).
leads to the same inaccuracies that textualists argue plague intentionalism. Reliance solely on the text can lead to a "hyper-literal reading and blinders-jurisprudence."  

Furthermore, critics argue that a majority of the Supreme Court has adopted textualism to promote a "hidden agenda." By deferring only to Republican-controlled agencies and narrowly construing liberal laws, textualists endeavor to reduce the power of the federal government. Critics also contend that external context has not been integrated adequately into the textualist approach. Other critics argue that textualism is subject to the same objections it levels against intentionalism—specifically, that textualist interpretation is not supported by rigorous constitutional requirements. These critics maintain that "result-oriented" jurists will not be constrained under either intentionalism or textualism.  

Given, however, that the Constitution contemplates deliberate study and debate in both chambers, to the extent that legislative history reflects this discourse, the "constitutional procedures of legislation" seem to tolerate some use of legislative history. Judge Patricia Wald asserts that legislative history is an authoritative product of the institutional work of Congress and represents the way Congress has chosen to communicate with the outside world. To second guess Congress' chosen form of organization and delegation or to cast doubt on Congress' ability to oversee its own constitutional functions responsibly, Judge Wald contends, approaches violating the separation of powers doctrine.

229. See Eskridge, supra note 198, at 623 (stating that Justice Scalia practices "new textualism," which rejects consideration of legislative history once Court ascertains plain meaning of statute); Pierce, supra note 186, at 752 (characterizing "hypertextualism" as textualist approach that ignores evidence that suggests Congress' intended result is inconsistent with Court's construction).  

230. See Taylor, supra note 200, at 378-82 (suggesting that interpreting meaning of text through legislative history does not contradict basic themes of textualism).  

231. Pierce, supra note 186, at 752; cf. Taylor, supra note 200, at 381 (suggesting that exclusion of legislative history altogether is unwise); Wald, supra note 5, at 303 (arguing that alternative sources used by textualists are not necessarily better than legislative history).  

232. See Eskridge, supra note 198, at 668-69 (relating critics' objections to textualist approach).  

233. See id. at 669 (relating critics' objections to textualist approach); Wald, supra note 5, at 302 (stating that textualists do the public a disservice by suggesting that statutory construction can be performed successfully without using external sources for context).  

234. See Eskridge, supra note 198, at 668-71.  

235. See id. at 675.  

236. See id. at 673; see also Wald, supra note 5, at 306-07 (stating that "legislative history is the authoritative product . . . of the Congress" and should be utilized).  

237. See Wald, supra note 5, at 308-09.  

238. See id. (arguing that although textualists cite separation of powers doctrine as reason to avoid using legislative history, textualist approach itself borders on violating separation of powers doctrine).
C. The Effect of Textualism on Chevron Deference

Very little legal scholarship has focused on the relationship between textualism and Chevron deference. Professor Thomas Merrill of Northwestern University sought to address this void with a thorough examination of recent Supreme Court cases. His findings should be of great concern to proponents of Chevron deference. Textualism, argues Professor Merrill, is a threat to the future of the doctrine of deference. Professor Merrill notes that, at a minimum, adherence to textualism requires a reformulation of the Chevron two-step deference test to purge its intentionalist language. A more fundamental consequence of textualism is the Court's rejection of the notion that its proper role is to be a faithful agent of the legislature and agencies. Instead, the Court is beginning to act as an autonomous interpreter seeking to find statutory meaning through the "ordinary reader perspective."

Whereas during its 1981 Term the Court substantially used legislative history in all of its statutory construction cases, in its 1988 Term, the Court substantially used legislative history in only seventy-five percent of such cases. Indeed ten of the Court's 1988 statutory interpretation decisions made no reference to legislative history whatsoever. In 1992, of the sixty-six statutory interpretation cases, forty made no reference to legislative history. As this data demonstrates, in less than a decade, the Court has relegated the use of legislative history to a small minority of opinions.
This abandonment of legislative history is related to the steady rise of textualism. In fact, there are cases in which the Court has reformulated the *Chevron* test into a textualist-driven inquiry. In *National Railroad Passenger Corp. v. Boston & Maine Corp.*, for example, the Court restates *Chevron* as follows:

If the agency interpretation is not in conflict with the plain language of the statute, deference is due. In ascertaining whether the agency's interpretation is a permissible construction of the language, a court must look to the structure and language of the statute as a whole. If the text is ambiguous and so open to interpretation in some respects, a degree of deference is granted to the agency, though a reviewing court need not accept an interpretation which is unreasonable.

This textualist reformulation adversely affects the frequency with which the Court defers to agency construction. The Court's 1992 Term reflects a dramatic reduction in the adherence to the deference doctrine. The marginalization of the deference doctrine can be viewed as the progression of the trend that emerged in 1989-90; although the number of cases applying *Chevron* actually increased during that period, most were resolved at the first prong of the test, thereby not requiring deference to be accorded to the agency.

The symbolic difference between resolving statutory cases at the first step of the *Chevron* test on the one hand, and not mentioning the *Chevron* test at all on the other, is that in the first instance, by referring to *Chevron*, the Court acknowledges that deference to agencies is a major factor in the analysis.

Professor Merrill doubts that the rise of textualism is due to a general conversion by the Justices to textualist tenets. Rather, Professor Merrill posits that Justice Scalia's refusal to join any part of an opinion that utilizes legislative history forces other Justices to write opinions without any reference to legislative history in their analysis in order to gain Justice Scalia's vote. Moreover, intentionalist Justices have not stood equally firm in refusing to join an opinion that...
fails to consider legislative history.\textsuperscript{256} The need for consensus building discourages the use of legislative history, and therefore, deference; if one ignores \textit{Chevron}, one only can gain votes, not lose them.\textsuperscript{257} Further, each of the two camps, textualists and intentionalists, argue that the other’s approach opens the field of possible interpretations instead of narrowing the range of alternative meanings.\textsuperscript{258} Until the debate is settled, both sides will avoid deferring to agency interpretations so as not to weaken their positions.\textsuperscript{259}

Furthermore, Professor Merrill opines that textualism approaches the issue of statutory construction as a puzzle with only one correct answer.\textsuperscript{260} This active and creative approach to statutory construction is “subtly incompatible with the attitude of deference to other institutions,” namely Congress and administrative agencies.\textsuperscript{261} The congressional approach tacitly rejects its role as a “faithful agent” of congressional intent and reasonable agency interpretations of ambiguous statutes and adopts an autonomous interpreter role.\textsuperscript{262} Textualists lose sight of deference because they are consumed with finding imaginative and creative ways of applying the few tools of statutory construction to which they have limited themselves in their quest to discern the statute’s plain meaning.\textsuperscript{263} By its very nature, textualism inhibits several generally desirable results of deference, including: (1) ensuring that policy is made by politically accountable actors; (2) ensuring that policy is made by individuals who have specialized knowledge; (3) providing flexibility in statutory interpretation; and (4) assuring a nationally uniform approach to statutory constructions.\textsuperscript{264}

\textbf{I. The Health Care decision as an example of the impact of textualism}

Even though the Supreme Court overruled the Board’s interpretation of the NLRA in \textbf{Health Care}, the Court avoided any discussion of \textit{Chevron} deference by concluding that the statutory language had a clear meaning that foreclosed all other possible interpretations.\textsuperscript{265}

\begin{itemize}
  \item \textsuperscript{256} See id.
  \item \textsuperscript{257} See id. (discussing results of consensus building).
  \item \textsuperscript{258} See id. at 366-71 (discussing reasons why neither side will defer to agency until dispute as to valid way of interpreting statutes is resolved).
  \item \textsuperscript{259} See id.
  \item \textsuperscript{260} See id. at 372-73.
  \item \textsuperscript{261} \textit{Id}.
  \item \textsuperscript{262} See id.
  \item \textsuperscript{263} See id.
  \item \textsuperscript{264} See id.
  \item \textsuperscript{265} See \textit{Leading Cases}, supra note 177, at 347 (analyzing how Court arrived at its decision in \textit{Health Care}).
\end{itemize}
In effect, the Court imposed a judicially preferred interpretation of the NLRA by circumventing the *Chevron* mandate of deference to the NLRB's reasonable interpretation of an ambiguous statutory phrase.

As Professor Merrill predicted, Justice Kennedy distorted the first prong of *Chevron* by not asking "whether Congress has directly spoken to the precise question at issue," but instead whether the text had an ordinary meaning. Justice Kennedy found this "ordinary meaning" only after severely straining the holdings in *Yeshiva University* and *Packard*. Having found an "ordinary meaning," Justice Kennedy did not have to proceed to *Chevron*'s second prong.

In apparent agreement with Professor Merrill, Judge Wald recently commented that the NLRA's language was susceptible to either the majority's or dissent's (hence the NLRB's) construction, but that it "was the Court's own rhetorical description of its test that would become the determinative factor in future cases." *Health Care*, therefore, represents a more extreme form of the textualism and a continuation of the trend by the Court to accelerate the erosion of the deference doctrine.

2. *The Supreme Court's questionable textualist approach in Health Care*

Professor Richard J. Pierce, Jr., of Columbia University argues that the *Health Care* decision is an example of textualist-friendly justices failing to apply textualism faithfully and choosing instead to engage in "hypertextualism." He defines "hypertextualism" as a technique that finds linguistic precision where it does not exist, that ignores statutory inconsistencies, and that relies on the abstract meaning of a word or phrase despite evidence that Congress intended

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266. *See id.* (concluding that Court improperly substituted its own preferred interpretation of phrase "in the interest of the employer").
267. *See id.* at 948-50 (analyzing how Court circumvented *Chevron*).
269. *See Leading Cases, supra* note 177, at 349-50 (describing why and how Justice Kennedy distorted *Chevron* test); Merrill, * supra* note 196, at 353, 357-58 (predicting that textualists will reformulate first prong of *Chevron*).
270. *See Leading Cases, supra* note 177, at 340-50; * see also supra* notes 167-76 and accompanying text (discussing Court's questionable interpretation of its holding in *Yeshiva Univ.* and *Packard*).
273. *See Leading Cases, supra* note 177, at 347.
274. *See Pierce, supra* note 186, at 751, 759.
a different result.\textsuperscript{275} According to Professor Pierce, the statutory language in \textit{Health Care} could have supported the majority's construction.\textsuperscript{276} Such a construction, however, ignores the context in which the language was used, thereby violating a major tenet of textualism and creating a meaning inconsistent with the statutory scheme as a whole.\textsuperscript{277} This approach affords even less deference to administrative agencies than existed before the \textit{Chevron} test.\textsuperscript{278} The inevitable result, says Professor Pierce, is "cacophony and incoherence throughout the administrative state."\textsuperscript{279}

V. THE NLRB'S APPROACH AFTER \textit{HEALTH CARE}

The NLRB recently decided two nurse supervisory status cases,\textsuperscript{280} the first such cases since the Supreme Court struck down the "incidental to patient care" test in \textit{Health Care}.\textsuperscript{281} A divided Board found the charge nurses in question not to be supervisors.\textsuperscript{282} The decisions were long overdue as a backlog of seventy cases dealing with this issue exists.\textsuperscript{283}

The Board asserted that its new test is merely the same supervisory test used with other employee classifications, namely "whether such direction [of other workers] requires the use of independent judgment or whether such directions are merely routine."\textsuperscript{284} The Board further asserted that "[t]his is the approach we have always used in leadperson cases."\textsuperscript{285} In adopting this approach, the Board has linked its new test to the phrase "independent judgment" because the Supreme Court in \textit{Health Care} recognized the ambiguity

\textsuperscript{275} See id. at 752.
\textsuperscript{276} See id. at 759.
\textsuperscript{277} See id. (explaining why author believes that \textit{Health Care} is example of hypertextualism); see also supra notes 218-21 and accompanying text (discussing tenets of textualism including finding interpretation that avoids statutory inconsistencies).
\textsuperscript{278} See Pierce, supra note 186, at 751-52 (discussing how hypertextualism has emasculated \textit{Chevron} deference).
\textsuperscript{279} Id. at 752.
\textsuperscript{282} See Nymed, 151 L.R.R.M. (BNA) at 1200; Providence Hosp., 151 L.R.R.M. (BNA) at 1179.
\textsuperscript{283} See Amber, supra note 281, at D-4 (quoting NLRB Executive Secretary John J. Toner as to number of cases backlogged and awaiting Board's new test).
\textsuperscript{284} Nymed, 151 L.R.R.M. (BNA) at 1203 (stating that new test is same as test used in other employee classifications).
\textsuperscript{285} Id.; see also Providence Hosp., 151 L.R.R.M. (BNA) at 1186-87, 1191 (relating policy and principles behind excluding leadmen and drawing similarity between LPNs and leadmen).
of the phrase. Apparently, the Board hoped that this recognized ambiguity would shield the new test from the textualist-driven courts.

Under the new test, the Board holds that "[w]hen a professional gives directions to other employees, those directions do not make the professional a supervisor merely because the professional used judgment in deciding what instructions to give."\(^{286}\) Although developing a treatment plan involves "substantial professional judgment," directions to staff who implement that plan usually are routine.\(^{287}\) The Board drew a tenuous distinction between the use of judgment in one area of a professional's work, such as creating treatment plans, and the use of independent judgment in performing the statutory duties of a supervisor, such as assigning personnel to implement the treatment plan.\(^{288}\) Independent judgment, said the Board, must be exercised in connection with a section 2(11) function if the worker is to be deemed a supervisor.\(^{289}\) Although making decisions is the "quintessence of professionalism," the Board contends that communication of those decisions and coordination of their implementation do not render the professional a supervisor.\(^{290}\)

The Board's new test appears to draw a distinction without a difference. It is one thing to use judgment to think through a problem, to solve it, and then to routinely assign implementation tasks to subordinates, but it is quite another thing to use independent judgment in the actual assignment and direction. The Board has articulated a rule that unsuccessfully attempts to differentiate between the use of professional judgment and supervisory "independent judgment."\(^{291}\) In the end, one cannot distinguish the two forms of judgment in any satisfactory way. They are essentially the same thing and any attempt to draw distinctions separating the two is futile.

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286. *Providence Hosp.*, 151 L.R.R.M. (BNA) at 1189-90 (stating that direction to others is not indicum of supervisory authority just because professional judgment was used in deciding what instruction to give).

287. *See id.* (drawing distinction between using judgment to develop patient care plan and directions given in carrying out plan).

288. *See id.* at 1190 (stating that distinction exists between use of judgment in one area of professional's work and use of judgment in performing statutory duties of supervisor).

289. *See id.*

290. *See id.* at 1191 (recognizing that quintessence of professionalism is judgment, but communication of directions does not necessarily involve such judgment).

291. *Cf. id.* at 1187 (discussing difficulties faced in developing new test). The Board recognized that its task here is difficult because both section 2(11), defining supervisor, and section 2(12), defining professional, qualify the respective class of workers as those who use judgment. *See id.* The goal of the test was to distinguish what quantity of additional authority renders a charge nurse a supervisor and to do so without taking anything away from the definition of a professional that would, in the nursing context, have the effect of compromising the quality of care. *See id.* (noting added difficulty when dealing with two sections of statute that contain term "judgment").
Ultimately, the impossibility of drawing such a distinction will become apparent as the test is applied in future cases. The specious rebuttal offered by the majority of the Board in response to the dissent's criticism that the majority ignored the substantial degree of independent judgment the charge nurses possessed underscores this point. The majority states that RNs, not just charge nurses, regularly exercise judgment. "The essence of professionalism requires the exercise of expert judgment and the essence of supervision requires the exercise of independent judgment." The question, then, becomes: What is the defining difference? The intuitive answer is that one form of judgment is more closely linked to management prerogatives than the other. Grounding that intuitive answer in the current language of the statute, however, does not seem possible.

In his dissent, Board Member Charles Cohen confirms the fallacy inherent in the Board's new test. He asserts that the Board has replaced one misinterpretation with another. The essence of independent judgment is that the individual's actions are based on the thought processes of the individual, rather than on some outside force or person. Certainly, an individual who makes a "personal judgment" based on personal experience, training, and ability is making an independent judgment.

The Board cannot escape the fact that the true distinction between professionals and supervisors, close alignment with management prerogatives, is not articulable using the existing components of the statutory definition of supervisor. The Supreme Court struck down what had been the best distinction that incorporated the

292. See id. at 1191 (responding to dissent's criticism).
293. See id.
294. Id.
295. See id. at 1197 (Member Cohen dissenting) (discussing majority's new misinterpretation of NLRA).
296. See id. (Member Cohen dissenting).
297. See id. (Member Cohen dissenting) (challenging majority's interpretation of when independent judgment is and is not used); Nymed, Inc., 151 L.R.R.M. (BNA) 1198, 1208 (N.L.R.B. Feb. 2, 1996) (Member Cohen dissenting) (same).
298. See Providence Hosp., 151 L.R.R.M. (BNA) at 1196-97 (Member Cohen dissenting) (discussing majority's new misinterpretation of NLRA); Nymed, 151 L.R.R.M. (BNA) at 1208 (Member Cohen dissenting) (same).
299. See Providence Hosp., 151 L.R.R.M. (BNA) at 1187 (explaining why some assignments are routine and why others encompass independent judgment). In reading the Board's explanation, it appears that the true distinction is really about how close the assignments are to the "genuine management prerogatives." See id. at 1186-91 (explaining nature of supervisory and routine assignments).
existing words in the statute. Twisting the phrase "independent judgment" does not work. Given that the NLRB's distinction between professional judgment and supervisory independent judgment is insupportable by the Act's statutory language, the Board faces the prospect of the future opposition from textualist-minded courts. The Board would be well advised to seek an amendment to the NLRA, the Administrative Procedure Act ("APA"), or both.

VI. RECOMMENDATIONS

Even if the courts accept the Board's new distinctions between professional judgment and independent judgment, the Board's test is not necessarily the best way to address the rise of textualism. To protect the integrity of the NLRA and, on a larger scale, the integrity and effectiveness of administrative agencies, legislative amendments to the NLRA and APA are advisable.

Although many commentators and labor unions recently called for amending the NLRA's definition of supervisor, few have publicly offered specific amendatory language. One legal scholar, Professor Morris, has opined that section 2(3) of the NLRA should be amended by adding a proviso reading: "Provided, an employee who exercises managerial or supervisory functions shall not cease to be an employee by virtue of those functions unless they consume the predominate part of that person's working time." Professor Morris believes that the NLRA is out of step with the emerging models of labor-management cooperation and such rigid categorizations are only adding an unnecessarily adversarial element to the workplace. A student commentator has suggested adding the following language to the definition of supervisor: "The term shall not include those employees who exercise the foregoing authority as a result of participation in a labor-management cooperative plan in which all employees have an opportunity to participate." Like Professor Morris, he premises this amendment on his belief that the decentralization of workplaces and the resulting expansion of worker participa-

300. See NLRB v. Health Care & Retirement Corp. of Am., 114 S. Ct. 1778, 1785 (1994) (striking down Board's interpretation of "in the interest of the employer").
302. Morris, supra note 177, at 560.
303. See id. at 558-60 (discussing need to amend NLRA to correct courts' unnecessarily rigid application of statutory definition of supervisor).
tion in the management and control of the workplace necessitates such an approach.305

This Comment offers yet another possible proposal, that is, revise section 2(11) by adding: “Professionals or technicals who give direction to other employees in the exercise of professional or technical judgment, which is not directly related to formulating or executing genuine management prerogatives, policies, or business objectives, is not an exercise of supervisory authority in the interest of the employer.” By amending the statute in this way, the Supreme Court no longer can misconstrue the term “in the interest of the employer,” and the policy behind the statutory exclusion is stated directly and thereby effectuated.

Although amending sections of the NLRA will effectuate Congress’ intent as it pertains to professionals, technicals, and supervisors, the amendments neither protect other reasonable interpretations by the NLRB of ambiguous language in the NLRA from textualist attacks nor stop the continual erosion of the deference doctrine. Some commentators maintain that when a plurality of justices, through the use of textualism, succeeds in making statutory tests conform to its own ideological preferences at the expense of the doctrinal determinacy and political accountability accomplished by Chevron, it should be clear that the judiciary is incapable of creating reasonably determinate doctrines of deference.306 To remedy this situation, Professors Shapiro and Levy of the University of Kansas recommend that Congress compel determinate doctrines by amending the APA to include them.307 Specifically, they propose a new APA section 706 that reads:

The reviewing court shall . . . (2) hold unlawful and set aside agency actions, findings, and conclusions if the court determines that
(A) the agency decision violates a constitutional right, power, privilege, or immunity;
(B) the agency decision was made without observance of procedure required by law;
(C) the agency decision violates its statutory mandate or other statutory provisions because:
   (1) the issue has been specifically resolved by explicit statutory language;

305. See id. at 580, 608-09 & n.169.
307. See id. at 1071-72 (containing text of proposed amendment).
(2) the issue has been specifically resolved by legislative history manifesting an unmistakable congressional intent; or

(3) a contrary interpretation of the statute is unequivocally required by the traditional tools of statutory construction;

(D) the agency has not offered a valid policy explanation for its decision because:

(1) it relied on policy concerns that were precluded by statute; or

(2) entirely failed to consider an important aspect of the problem; or

(E) the agency has not offered a logically coherent explanation in terms of agency expertise, credibility determinations, or policy considerations, of

(1) why the evidence in the record supports its decision; or

(2) why the contrary evidence does not preclude the decision.\textsuperscript{308}

Although any amendment requires the right political conditions and is certain to meet with some criticism,\textsuperscript{309} such an attempt is a valid, vital, and appropriate response to the Court's current hypertextualist tendencies and will prevent further machinations in the future. To be certain, the Shapiro and Levy proposal is not flawless.\textsuperscript{310} They disaggregate the multiple factors the federal courts use to review agency action.\textsuperscript{311} Without the addition of some hierarchial scheme, there is no clear guidance as to the proper degree of deference if the various factors point in different directions. Nevertheless, the Shapiro and Levy proposal is a necessary first step in perfecting a workable statutory scheme that will be less malleable than the current statutory tests.

\textsuperscript{308} Id.


\textsuperscript{310} See id. (questioning whether courts will utilize amendments defining adjectives and adverbs in meaningful manner given courts' tendency to ignore similar language already in APA).

\textsuperscript{311} See id. (noting that given Supreme Court's reasoning used in recent statutory interpretation cases, real possibility exists that certain amendment factors could indicate resolution of statutory question one way and other factors could indicate contrary resolution).
CONCLUSION

In Health Care, the Supreme Court improperly invalidated a twenty-year-old test created by the NLRB. The "incidental to patient care" test was a reasonable interpretation of an ambiguous statutory phrase grounded in legislative history and a wealth of prior case law. In addition, the NLRB test was true to the policies underlying the NLRA. The textualist-minded Supreme Court, ignoring all legislative history and policy arguments, struck down this important test and compromised the organizational rights of thousands of professionals and further endangered our administrative system. The Health Care decision represents textualism's continuing deterioration of judicial deference to both Congress and the administrative agencies.

As Judge Wald points out, legislative history is an authoritative product of the work of Congress and represents the way Congress has chosen to communicate with the outside world. To second guess Congress' chosen form of communication or to cast doubt on Congress' ability to ensure that its intent is not compromised arguably infringes on the separation of powers doctrine.

The textualist movement, quickly evolving into a hypertextualist movement, must be curtailed. To mitigate the effects of textualism effectively and quickly in the context of the NLRB's supervisory status test, Congress should amend the NLRA's definition of supervisor. To stem the erosion of judicial deference to the statutory interpretations of administrative agencies in general, Congress should amend the APA to provide courts with a reasonably determinate standard of deference.

312. See Wald, supra note 5, at 308-09.
313. See id. (arguing that although textualists cite separation of powers doctrine as reason to avoid using legislative history, textualist approach itself borders on violating separation of powers doctrine).