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# The Courts and the Labor Agencies

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## Cover Page Footnote

The author gratefully acknowledges the assistance of Samuel Estreicher, Esq.

# THE COURTS AND THE LABOR AGENCIES*

*Harold Leventhal***

The overarching question of whether, and to what extent, a democratic society should call on the law in the field of labor relations, presents both profound and complex issues, going deep into the taproots of political philosophy and public administration. This commentary accepts the reality that American democracy has made a substantial and increasing call on the law in the regulation of labor relations. This tendency builds on the civilizing function of the law to permit the resolution of disputes without violence. Labor disputes reflect deep tensions, and require difficult choices of values. Resolution of conflicting forces through the medium of law, rather than in pitched battle, presents both opportunity and risk in the development of pertinent principles.

To harness the emotion-charged centrifugal forces that tend to pull labor and management apart, and to bring them together effectively without counterproductive hostility, calls for more than mere rules of law. The focus must be to an equal, or even greater extent, upon men and machinery to evolve and apply sound approaches.

The lens of the law on labor relations was once focused almost exclusively by judges using court machinery. The emphasis is not ancient history; it describes the state of things only fifty years ago. The court developed labor law as a special case of the law of torts. There were actions at law, notoriously in the *Danbury Hatters* case,[1] but for the most part pertinent procedures were part of the domain of equity.[2] The classic Frankfurter and Greene work, *The Labor Injunction*,[3] describes how the federal courts were invoked by employers to intervene in labor disputes.

Today the federal field finds the first line of legal machinery in the administrative agency, and more recently in the executive official. The courts are secondary, essentially a reviewing mechanism to assure general fairness. In sum, federal labor relations has become essentially a special case of the field of federal administrative law. At least, that has been the dominant feature of the landscape

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1. Loewe v. Lawlor, 208 U.S. 274 (1908).

2. For a brief summary of the interrelationship between organized labor and the courts of equity see, J. WILLIAMS, LABOR RELATIONS AND THE LAW 24-25 (3rd ed. 1965).

3. F. FRANKFURTER & N. GREENE, THE LABOR INJUNCTION (1930).

since the Wagner Act of 1935,[4] when the National Labor Relations Board was established.

It is the purpose of this article to review some developments in labor law as a branch of administrative law, with particular emphasis, not on content, but on structure—addressing in particular: (1) the dominant role of the agency with some swing in the pendulum of judicial review; (2) the furtherance of that role through emphasis on federal preemption; and (3) the agency's latitude to defer to arbitration. In addition, there will be a peek at new problems under the Landrum-Griffin Act.

## I. A Special Case of Administrative Law

The salient principles of the rule of administrative law are available in a number of texts and opinions. For convenience, I refer to my own summary in *Greater Boston Television Corp. v. FCC*[5] where the usual facts required a particularly careful and probing inquiry into the integrity of the administrative decision.[6] The opinion sets out the court's "supervisory" function in the review of agency decisions. The implementation of this function begins with the enforcement of reasonable agency procedure. "It continues into examination of the evidence and agency's findings of facts, for the court must be satisfied that the agency's evidentiary fact findings are supported by substantial evidence, and provide rational support for the agency's inferences of ultimate fact."[7] The function culminates with the all-important requirement of reasoned decisionmaking.[8]

The court must not intrude into the administrative function. "If the agency has not shirked this fundamental task . . . the court [should] exercise restraint and affirm the agency's action even though the court would on its own account have made different

4. Wagner Act, ch. 372, 49 Stat. 449 (1935) (current version at 29 U.S.C. §§ 151-168 (1970)).

5. 444 F.2d 841, 850 (D.C.Cir. 1970), *cert. denied*, 403 U.S. 923 (1971).

6. The FCC in effect dislodged a Boston newspaper from a television station it had operated for 12 years.

7. 444 F.2d at 850 (footnotes omitted).

8. Assuming consistency with law and the legislative mandate, the Agency has latitude not merely to find facts and make judgments, but also to select the policies deemed in the public interest. The function of the Court is to assure that the Agency has given reasoned consideration to all the material facts and issues. This calls for insistence that the Agency articulate with reasonable clarity its reasons for decision, and identify the significance of the crucial facts, a course that tends to assure the agency's policies effectuate general standards, applied without unreasonable discrimination.

444 F.2d at 851.

findings or adopted different standards."[9]

Overall, the balance of agency and court action in the field of labor relations is in the public interest:

> The process thus combines judicial supervision with a salutary principle of judicial restraint, an awareness that agencies and courts together constitute a "partnership" in furtherance of the public interest, and are "collaborative instrumentalities of justice." The court is in a real sense part of the total administrative process, and not a hostile stranger to the office of first instance. . . . Reasoned decision promotes results in the public interest by requiring the agency to focus on the values served by its decisions, and hence releasing the clutch of unconscious preference and irrelevant prejudice. It furthers the broad public interest of enabling the public to repose confidence in the process as well as the judgments of its decision-makers.[10]

### A. *The Integrity of Agency Fact-Findings*

Without question, the finding of the facts is the single most crucial aspect of decisionmaking in the field of labor relations law. Accordingly, the transfer of the fact-finding function from the courts to administrative bodies was at first acceded to grudgingly, and only under the pressure of numbers. Resistance characterized earlier transfers involving agencies regulating railroad rates or administering workmen's compensation awards. But it was almost tangible emotion which emerged when, in the 1930's, the rights of collective bargaining were set for implementation by the National Labor Relations Board. Charges of bias were common. Justice Harlan Stone, in his epochal address, *The Common Law,* warned the courts against the kind of resistance to administrative agencies that had led the old courts of law into an outraged and futile resistance against the upstart, Equity.[11] He did not identify the Labor Board by name, but that was the agency most in contention at the time.

The Supreme Court soon made it clear that the Board's role must be rooted in reason and not absolute prerogative. The Wagner Act provided that "[t]he findings of the Board as to the facts, if supported by evidence, shall be conclusive."[12] Very soon after the Court upheld the Act's validity, it read "evidence" to mean "substantial evidence."[13] It soon added that "substantial evidence

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9. *Id.*

10. 444 F.2d at 851-52 (footnotes omitted).

11. Stone, *The Common Law In The United States,* 50 HARV. L. REV. 4 (1936). The thought recurs in United States v. Morgan, 313 U.S. 409, 422 (1941).

12. Act of July 5, 1935, Pub. L. No. 74-198 § 1(e), 49 Stat. 449, 454 (1935).

13. Washington, Va. & Md. Coach Co. v. NLRB, 301 U.S. 142 (1937).

is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[14] It "must do more than create a suspicion" and must be enough to justify sending an ordinary case to the jury.[15]

In the following term, however, the Supreme Court rebuked a circuit court that had refused to enforce a National Labor Relations Board order on the ground that the order rested on mere suspicion rather than substantial evidence.[16] The Board's petition for certiorari had complained that in a number of instances the Fifth Circuit had failed to respect the Board's findings. The Supreme Court emphasized the "paramount importance" of the Board's fact-finding power "if effect is to be given the intention of Congress to apply an orderly, informed and specialized procedure to the complex administrative problems arising in the solution of industrial disputes . . . . Congress has deemed it wise to entrust the finding of facts to these specialized agencies."[17]

The drumbeat of complaint against the Board and its processes and against judicial "abdication" rolled on. If labor law had become an arm of administrative law, the passions of labor law led to the modification of the principles underlying administrative law—the history of which is developed in the opinion by Justice Frankfurter in *Universal Camera Corp. v. NLRB.*[18] Specifically, there was demand for a standard of judicial review, as broad as the power to reverse "clearly erroneous" findings of a trial judge. With much pulling and hauling, the Administrative Procedure Act of 1946[19] passed with a "substantial evidence" test made applicable to administrative agencies generally. In addition, Congress identified a further requirement that "the court shall review the whole record."[20] At about the same time, Congress was considering and subsequently passed the Taft-Hartley Act of 1947,[21] which contained a similar provision of "substantial evidence" review based on a canvassing of "the whole record."

In *Universal Camera,* Justice Frankfurter recognized the lack of clarity in this legislative development. He found a "mood" in the legislation, which imposed a duty on the courts that is subtle but

14. Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938).
15. NLRB v. Columbian Enameling & Stamping Co., 306 U.S. 292, 300 (1939).
16. NLRB v. Waterman S.S. Corp., 309 U.S. 206 (1940).
17. *Id.* at 208-09.
18. 340 U.S. 474 (1951).
19. 5 U.S.C. §§ 556(d) and 706(2)(E) (1976).
20. 29 U.S.C. § 160(e) (1970).
21. 29 U.S.C. §§ 141-49 (1970).

nonetheless real. While this review obligation did not mean usurpation of the role of the Labor Board as an agency "presumably equipped or informed by experience to deal with a specialized field of knowledge," it authorized the reviewing court to assess the Board's finding not only in terms of the evidence supporting the Board but against "whatever in the record fairly detracts from its weight."[22]

*Universal Camera* identified the significance of the report of the trial examiner, now called the administrative law judge, as a part of the whole record. If it disagrees with his findings of fact, the Board must show it has taken his report into consideration. In effect, the Board must explain why it disagrees.[23] In addition, there is the imponderable weight of the finding of the examiner, since "evidence supporting a conclusion may be less substantial when an impartial, experienced examiner who has observed the witnesses and lived with the case has drawn conclusions different from the Board's . . . ."[24]

Finally, the Supreme Court made it clear that judicial review of findings of fact was a task for the courts of appeal and not the Supreme Court. "This Court will intervene only in what ought to be the rare instance when the standard appears to have been misapplied."[25]

Twenty-five years later, *Universal Camera's* delicate balancing of the scales seems to have resulted in a workable equilibrium. The Supreme Court typically has a full platter of Labor Board cases. For the most part, however, they do not turn on evidentiary support for fact findings.

The Court has cautioned that the "substantial evidence" rule applies to findings of fact, and does not undercut the reviewing court's responsibility to discern governing principles of law and legislative intent.[26] The distinction is not always easy to apply since

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22. It is fair to say that in all this Congress expressed a mood. And it expressed its mood not merely by oratory but by legislation. As legislation that mood must be respected, even though it can only serve as a standard for judgment and not as a body of rigid rules assuring saneness of application. Enforcement of such broad standards implies subtlety of mind and solidity of judgment. But it is not for us to question that Congress may assume such qualities in the federal judiciary.

340 U.S. at 487.

23. American Fed. of Television & Radio Artists v. NLRB, 395 F.2d 622, 628 (D.C.Cir. 1968); Retail Store Employees Union, Local 400 v. NLRB, 360 F.2d 494 (D.C.Cir. 1965).

24. 340 U.S. at 496.

25. 340 U.S. at 491.

26. Compare Volkswagenwerk Aktiengesellschaft v. FMC, 390 U.S. 261, 272 (1968): "The deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia . . . ." *quoting* American Ship Building Co. v. NLRB, 380 U.S. 300, 318 (1964).

some of the issues that are governed by the "substantial evidence" standard of review, *e.g.*, whether newsboys are "employees,"[27] might be considered legal issues in other contexts, but in the context of this Act are part of the industry background on which agency experience is more important than judicial learning in the common law of master-servant.

There is also confusion concerning the concepts that are part of the lore. When I had the luxury of a separate opinion, I voiced some doubt as to whether I could distinguish realistically between the "substantial evidence" and "clearly erroneous" standards of review.[28] It is important to remember that one is dealing with the "mood" of code words in the statute. The same difficulty in analytical distinction exists between finding a fact as established "beyond a reasonable doubt," the standard for criminal cases, or only "by clear and convincing evidence," the standard for fraud cases, deportation, and soforth.[29]

In any event, the courts are aware of their responsibility to ensure the fact-finding integrity of the Labor Board. My perception is that the courts do not often set aside Board findings of fact. Whether their power to do so under *Universal Camera* may affect the fact findings in the first instance, and hence affect the result in many more cases than are reversed or even appealed, is a separate question.

### *B. Reasoned Decisionmaking*

A core requirement of administrative law is that of reasoned decisionmaking. In my view, the rulings of the National Labor Relations Board in complaint cases generally satisfy the requirement. The corps of administrative law judges (ALJ's) produce a body of decisions and opinions that strike me, after some twelve years of reasonably broad judicial exposure, as considered rulings that are reasonably careful as to the facts. The Board's order is often, probably typically, a summary affirmance. What is particularly instruc-

27. NLRB v. Hearst Publications, Inc., 322 U.S. 111 (1944). This might be more cautiously put as a situation where the "substantial evidence" standard is predominant, if not the sole test. The Court used the formulation that the Board's determination whether a person is an "employee" under the Act is "to be accepted if it has 'warrant in the record' and a reasonable basis in law." *Id.* at 131. But the inquiry is identified as belonging "to the usual administrative routine" of the Board; it is heavily fact-laden; and is an inquiry to be addressed in light of the Board's familiarity with various employment relationships, and the adaptability of collective bargaining for peaceful settlement of disputes with employees.

28. IBEW, Local 68 v. NLRB, 448 F.2d 1127 (D.C.Cir. 1971) (dissenting).

29. Woodby v. Immigration & Naturalization Serv., 385 U.S. 276 (1966); Collins Sec. Corp. v. SEC, No. 75-220 (D.C.Cir., Aug. 12, 1977).

tive, in my view, is the care the ALJ's take to follow pertinent rulings of the Board and of the courts, and to explicate the legal issues they discern. This all makes for a body of well reasoned decisions.

Occasionally, the Board's counsel in the appellate court will endeavor to support its decision on a ground not set forth in the Board's decision. Counsel may develop some position, often sensible enough, to resolve what appear to be inconsistencies between rulings of the Board. The law on the subject is plain enough; it is the Board that has the obligation to resolve seeming inconsistencies, and this cannot be done by substituting the rationale offered by counsel in place of that articulated by the Board.[30]

One encounters appellate opinions remanding cases for an explanation of inconsistencies or apparent inconsistencies in Board rulings.[31] No less can be demanded in the interest of even-handed justice. Occasionally, more has been sought. The courts have frequently expressed approval of the view of scholars[32] that rulemaking is preferable to individual adjudications in the common law tradition.

In an opinion involving another agency, I have voiced "uneasiness lest an excessively individuated approach may be a seed bed that is too favorable to the rank weed of discrimination."[33] Similarly, Judge Friendly has been articulate on the subject, in lectures,[34] and opinions.[35]

The Supreme Court has insisted in *SEC v. Chenery Corp.*, however, that while an agency with rulemaking powers has less

30. NLRB v. Food Store Employees Union, 417 U.S. 1, 9 (1974). The doctrine is clear enough. K.C. DAVIS, ADMINISTRATIVE LAW IN THE 70's, § 1707-4, at 413-17 (1976). It applies to agencies generally. Atchison, T. & S.F.Ry. Co. v. Wichita Bd. of Trade, 412 U.S. 800, 808 (1973); Secretary of Agriculture v. United States, 347 U.S. 645, 653 (1954); Chem-Haulers, Inc. v. ICC, No. 76-1488, slip op. at 11 (D.C.Cir. Sept. 19, 1977); The Second National Natural Gas Rate Cases, (APGA et al. v. FPC) No. 76-2000 *et al.*, slip op. at 23 (D.C.Cir. June 16, 1977); Continental Air Lines v. CAB, 551 F.2d 1293, 1303 (D.C.Cir. 1977).

31. *See, e.g.*, UAW v. NLRB, 459 F.2d 1329, 1341 (D.C. Cir. 1972).

32. *See, e.g.*, Peck, *A Critique of The National Labor Relations Board Performance in Policy Formulation: Adjudication and Rule-Making*, 117 U. PA. L. REV. 254 (1968); Shapiro, *The Choice of Rule-Making or Adjudication in the Development of Administrative Policy*, 78 HARV. L. REV. 921 (1965); Peck, *The Atrophied Rule-Making Powers of the National Labor Relations Board*, 70 YALE L.J. 729 (1961).

33. City of Chicago v. FPC, 385 F.2d 629, 644 (D.C.Cir. 1967), *cert. denied* 390 U.S. 945 (1968).

34. H. FRIENDLY, THE FEDERAL ADMINISTRATIVE AGENCIES: THE NEED FOR BETTER DEFINITION OF STANDARDS (1962).

35. *See, e.g.*, dissenting opinion in NLRB v. Lorben Corp., 345 F.2d 346, 349 (2d Cir. 1965), pointing out that the NLRB decision which was denied enforcement in that case clearly would have been valid if established in a rulemaking proceeding.

reason than a court to rely upon *ad hoc* adjudication to formulate new standards of conduct, the administrative process includes the power to proceed case-by-case.[36] Furthermore, this holding outweighs the earlier dictum in that opinion that "the function of filling in the interstices of the Act should be performed, as much as possible, through this quasi-legislative promulgation of rules to be applied in the future."[37]

The vitality of the *Chenery* decision has been reaffirmed quite recently. In *Bell Aerospace Co. Division of Textron v. NLRB,*[38] Judge Friendly held that while the Labor Board might reverse its earlier ruling that buyers for retail stores were not "managerial employees" excluded from the Act, it was required to do so in a rulemaking proceeding in which it could have all available information before it.[39] The Supreme Court reversed on this point, holding it was within the Board's discretion whether to announce new principles in an adjudicative proceeding rather than rulemaking.[40] The Court observed, however, that "there may be situations where the Board's reliance on adjudication would amount to an abuse of discretion,"[41] but it did not suggest which considerations would point in this direction.

The courts, then, must defer to the Board's judgment that its range of activities is so broad, the variety of industry situations so immense, the field so fact-specific, that rulemaking is not useful. "It is doubtful whether any generalized standard could be framed which would have more than marginal utility."[42] Yet the thousands of cases decided annually by the Board and the shadings of facts, continue to raise the specter of *ad hoc* rulings, not even-handed in application, with an unnecessarily unfair retroactive cast. The agency-court tension remains.

### C. *Remedies*

Remedies are so important in the field of labor relations as to warrant separate discussion. In general, administrative law doctrine

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36. 332 U.S. 194, 202-03 (1947):
In other words, problems may arise in a case which the . . . agency may not have had sufficient experience with a particular problem to warrant rigidifying its tentative judgment into a hard and fast rule. Or the problem may be so specialized and varying in nature as to be impossible of capture within the boundaries of a general rule.
37. 332 U.S. at 202.
38. 475 F.2d 485 (2d Cir. 1973).
39. 475 F.2d at 495-96.
40. NLRB v. Bell Aerospace Co., 416 U.S. 267, 294 (1974).
41. *Id.*
42. *Id.*

has provided a lesser scope for court review when the issue is one of remedy rather than right,[43] although the issue of remedy is not less important than the substantive determination. It is a question of institutional competence. For various reasons, including the lack of knowledge of the overall state of affairs in the real world of labor-industry conflict and of the mechanics of compliance, courts are not equipped to make the pragmatic judgments necessary for a workable remedial order.

There is an occasional instance, in the context of other agencies, of a court advancing a greater judicial role in the field of remedies.[44] However, the preeminent postion of the NLRB in the matter of remedies has been and continues to be respected by the courts. Justice Frankfurter's opinion in the *Seven-Up* case[45] staked out the governing principles when the Court upheld the decision to award both reinstatement and back pay in a case of discriminatory discharge. Quoting Justice Holmes, the Court concluded that judgments as to appropriate remedies may "express an intuition of experience which outruns analysis and sums up many unnamed and tangled impressions."[46] The Court rejected the complaint that the formula used by the Board did not rest on data derived in the course of the pending proceeding:

> In devising a remedy the Board is not confined to the record of a particular proceeding. "Cumulative experience" begets understanding and insight by which judgments not objectively demonstrable are validated or qualified or invalidated . . . . Administrative competence could not be exercised if in fashioning remedies the administrative agency were restricted to considering only what was before it in a single proceeding.[47]

The voice of the courts is muted as to remedies, but not completely stilled. One important instance of judicial interposition is *Phelps Dodge Corp. v. NLRB*,[48] where the Court held that an order making workers whole for their loss of pay is subject to a deduction not only for actual earnings during the period but also for losses willfully incurred. The Board contended that this "abstractly just" doctrine of mitigation would be too burdensome for effective admin-

43. Consolo v. FMC, 383 U.S. 607, 622 (1966); FCC v. Woko, Inc., 329 U.S. 223 (1946).

44. *See* Arthur Lipper Corp. v. SEC, 547 F.2d 171, 184 (2d Cir. 1976) (judicial modification of penalty imposed by SEC upon broker-dealer for violation of the securities laws).

45. NLRB v. Seven-up Bottling Co., 344 U.S. 344 (1953).

46. 344 U.S. at 348, *quoting from* Chicago, B & Q R.R. v. Babcock, 204 U.S. 585, 598 (1966).

47. 344 U.S. at 349.

48. 313 U.S. 177 (1941).

istration by the Board. The Court responded: "But the advantages of a simple rule must be balanced against the importance of taking fair account, in a civilized legal system, of every socially desirable factor in the final judgment. The Board, we believe, overestimates administrative difficulties and underestimates its administrative resourcefulness."[49] The Court indicated the Board could reject speculative claims by employers, and "give appropriate weight to a clearly unjustifiable refusal to take desirable new employment."[50]

This was an assertion by the Court on administrative capability, and I am not at all certain that Justice Frankfurter would have arrived at the same ruling if he could have foreseen the consequences for the Board and the courts.[51] But *Phelps Dodge* stands as an indication that administrative burden does not loom large as against the claim of manifest justness unless it is sharply supported by factual demonstration.

In at least one recent instance, an initial Board claim of administrative infeasibility was reconsidered by the Board on a court remand in order to take account of all material elements of remedial policy. In the *Tiidee Products* case,[52] our court considered a union request for additional relief where an employer's refusal to bargain was considered based on "patently frivolous" objections to an election, so that the refusal to bargain was found to be "a clear and flagrant violation of the law."[53] We remanded for further Board consideration of the possibility of supplementary remedies, and outlined possibilities for Board consideration.[54] On remand, the Board ordered reimbursement of litigation expenses to discourage future frivolous litigation.[55] This was an example of court respect for the administrative agency's role, and of the agency's appreciation of the seriousness of the factors identified by the court, culminating in a modification of the agency's initial view. It is an instance of the agency-court partnership working collaboratively, in Justice Stone's phrase, in furtherance of the legislative objective.

An outpost of judicial deference to the Board's remedy determi-

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49. *Id.* at 198.

50. *Id.* at 199-200.

51. For an example of difficulties in applying the mitigation doctrine, and the possibility that it may engender a greater disposition on the court to displace the Board's approach to remedy, see Int'l Brotherhood of Electrical Workers, Local 68 v. NLRB, 448 F.2d 1127 (D.C.Cir. 1971).

52. Union of Elec. Radio & Mach. Workers, v. NLRB [Tiidee Products, Inc.], 426 F.2d 1243 (D.C.Cir. 1970), *cert. denied*, 400 U.S. 950 (1970).

53. *Id.* at 1248.

54. *Id.* at 1249-53.

55. Tiidee Products, Inc., 194 N.L.R.B. 1234 (1972).

nations is *NLRB v. Gissel Packing Co.*[56] The Court upheld the Board's authority to issue a bargaining order even in the absence of the primary mechanism contemplated by the Act—a secret ballot election by unit employees. The Court held that a bargaining order was appropriate where the employer rejects a request to bargain based on a presentation of authorization cards from a majority of the unit, and commits unfair labor practices undermining the conditions of a fair election. The issuance of a bargaining order on the basis of cards was an administrative response to a recurring problem — of employer conduct polluting the atmosphere for holding a bargaining election (the optimal approach) — which Congress had not considered. With some hesitancy, but ultimate deference, the *Gissel* court gave recognition to the administrative judgment of the necessity for a remedy not enjoying explicit congressional authorization.

Overall, the vitality of the Board's discretion in the matter of remedies is captured by Chief Justice, then Chief Judge, Burger's opinion upholding a novel Board remedy with the phrase: "In the evolution of the law of remedies, some things are bound to happen for the 'first time'."[57]

## II. The Structure of Labor Law Decisionmaking

We have examined how administrative law principles have been applied to liberate the exercise of NLRB expertise in the field of industrial law. The courts have also played a structural role, which has served to enlarge the latitude of the Board through various doctrines by: (1) insulating from review a decision not to file a complaint; (2) diminishing the role of state law, through the doctrine of preemption; and (3) by permitting both Board deference to arbitration and recognizing Board supremacy over arbitral outcomes.

### *A. A Centralized Forum*

Federal labor Acts, i.e., the Wagner Act as amended by the Taft-Hartley Act, embody a system of centralized agency control of the dispute resolution process. The Board does not enjoy a roving commission. The processes of the Act do not come into play until private parties file charges. The decision whether or not to issue a complaint on such charges is a matter of virtually unreviewable discretion under section 10(e) of the Act.[58] The rule of finality en-

56. 395 U.S. 575 (1969).

57. International Bhd. of Operative Engineers v. NLRB, 320 F.2d 757, 761 (D.C. Cir. 1963).

58. Utility Workers v. Consolidated Edison Co. of New York, 309 U.S. 261 (1940).

sures a time for administrative judgment unhampered by premature judicial oversight; and in election and representation proceedings, perhaps a key function of the Board, there is particular assurance against any early call on the court.[59] Pre-enforcement review is generally unavailable,[60] except in the case of a patently unauthorized assumption of jurisdiction.[61]

The Board is the first-line guardian of the public rights created by the Act. Once the Board has exercised its discretion to issue a complaint, however, the right of private intervention and the duty of judicial review ripens. Dismissals of complaints are judicially reviewable.[62] Similarly, parties who are successful in unfair labor practice proceedings before the Board have a right to intervene in the court of appeals review proceedings, in order to assist the court in the process of defining the public interest in the particular case. In *UAW Local 283 v. Scofield,* the Court noted:

> In short, we think that the statutory pattern of the Labor Act does not dichotomize "public" as opposed to "private" interest. Rather, the two interblend in the intricate statutory scheme . . . . We find nothing inconsistent in denying the right of a private party to institute a contempt proceeding — where the Board's expertness in achieving compliance with orders is challenged — and, on the other hand, in permitting intervention in a proceeding already in the court for decision. When the court is to rule on the merits of the Board's order, the Act supports the view that it is the court and not the agency which will define the public interest. . . .[63]

### *B. Preemption*

Ordinarily the Supreme Court requires a showing of actual conflict with a federal program, before it will raise the Supremacy Clause as a bar to the exercise of concurrent state jurisdiction. In the labor area, however, the Court has been particularly solicitous of the expertise of the National Labor Relations Board and of the value of uniformity in lawmaking and fact-finding. Subject to certain narrow exceptions, the rule is one that finds federal preemption of state

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(NLRB is exclusively vested with the power and duty to enforce the Act, *e.g.* to petition the court of appeals for an order adjudging an employer in contempt for failure to abide by a previous cease and desist order).

59. American Federation of Labor v. NLRB, 308 U.S. 401 (1940) (review of certification decisions must await the proceeding in the court of appeals to enforce or set aside an unfair labor practice determination).

60. Myers v. Bethlehem Shipbuilding Corp., 300 U.S. 41 (1938).

61. Leedom v. Kyne, 358 U.S. 184 (1958).

62. Garment Workers Local 415 v. NLRB, 501 F.2d 823 (D.C.Cir. 1974); Lees & Northrup Co. v. NLRB, 357 F.2d 527 (3d Cir. 1966).

63. 382 U.S. 205, 220-21 (1965).

regulation in the event of merely arguable conflict.[64] There is no denial of the capacity of state courts fairly to adjudicate disputes governed by federal law,[65] but the Court has acted to ensure a centralized administration of the Act. Justice Frankfurter explained:

> We have necessarily been concerned with the potential conflict of two law-enforcing authorities, with the disharmonies inherent in two systems, one federal and the other state, of inconsistent standards of substantive law and differing remedial schemes. But the unifying consideration of our decisions has been regard to the fact that Congress has entrusted administration of the labor policy for the Nation to a centralized administrative agency, armed with its own procedures, and equipped with its specialized knowledge and cumulative experience . . . .
>
> Administration is more than a means of regulation; administration is regulation. We have been concerned with conflict in its broadest sense; conflict with a complex and interrelated federal scheme of law, remedy, and administration. Thus, judicial concern has necessarily focused on the nature of the activities which the States have sought to regulate, rather than on the method of regulation adopted. When the exercise of state power over a particular area of activity threatened interference with the clearly indicated policy of industrial relations, it has been judicially necessary to preclude the States from acting.[66]

The preemptive boundaries of the Act are enforced not only by the Court but by the NLRB's injunctive actions to restrain state proceedings.[67]

The preemption rulings have carved out a vast area of primary conduct where the Board, at least in the first instance, is the exclusive expositor of law and finder of facts. The Court has recognized in the Board a spacious jurisdiction to fashion a coherent body of regulatory law.

### C. *Arbitration*

Much like the preemption rulings, the Supreme Court's arbitration decisions have refined the statutory framework so as to permit the Board an enviable freedom to promulgate regulatory policy. In the "Steelworkers Trilogy" the Court recognized a presumption in favor of arbitrability and a rule of judicial deference to arbitral determinations.[68] In addition, the power of the federal court in eq-

64. San Diego Unions v. Garmon, 359 U.S. 236, 244 (1959).
65. Testa v. Katt, 330 U.S. 386 (1947).
66. 359 U.S. at 242-43.
67. NLRB v. Nash-Finch Co., 404 U.S. 138 (1971).
68. United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960); United Steelwork-

uity has been made available to enforce promises to arbitrate.[69]

The express rationale of these decisions has been a recognition of the congressional preference for arbitral resolution of contract disputes. But it cannot be ignored that the effect of these decisions is to delegate a substantial part of the Board's fact-finding burden to the dispute resolution agents that the parties have voluntarily chosen. The Board remains in control, to give ultimate vindication to statutory policies, but it has been freed of much of the minutiae of regulation.[70]

The preference for arbitration serves as a principle that complements the jurisdiction of the National Labor Relations Board but does not oust the Board from its central role. Under section 10 of the Act, the Board's power is not "affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise."[71] The Board is free to disagree with the arbitrator's determination; its ruling "would, of course, take precedence . . . ."[72] In *NLRB v. Acme Industrial* the Court made clear that the rule of accomodation announced in the "Steelworkers Trilogy" dealt with the relationship of courts to arbitrators, "and recognized "the arbitrator's greater institutional competency . . . ."[73] Justice Stewart noted: "The relationship of the Board to the arbitration process is of a quite different order."[74] *Acme Industrial* holds that there is no requirement of automatic deference to arbitral outcomes. This is a matter for the sound exercise of the Board's discretion. The Board may act to vindicate statutory policies even when there is some overlap with contract issues and inconsistency with contractual remedies.[75]

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ers v. Warrier & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).

69. Boys Market, Inc. v. Retail Clerks Local 770, 398 U.S. 235 (1970); Gateway Coal Co. v. UMW, 414 U.S. 368 (1974). *But see* Buffalo Forge Co. v. United Steelworkers, 428 U.S. 397 (1976).

70. The Board has not been unmindful of this unexpressed benefit of the "Steelworkers Trilogy" and related decisions. As early as 1955, the Board articulated a policy of deference to arbitration awards — the "Spielberg Doctrine." Spielberg Mfg. Co., 112 N.L.R.B. 1080 (1955). This rule of deference has been expanded to require initial resort to the arbitration process. Collyer Insulated Wire, 192 N.L.R.B. 837 (1971). Recent developments indicate a partial retreat from *Spielberg-Collyer* with respect to claims of employer interference with basic employee rights or union coercion, *see, e.g.*, General American Transp. Corp., 228 N.L.R.B. No. 102 (1977), but the basic doctrine is still alive, *see, e.g.*, Roy Robinson, Inc. 228 N.L.R.B. No. 103 (1977).

71. National Labor Relations (Wagner) Act, § 10(a), 29 U.S.C. § 160(a) (1970).

72. Carey v. Westinghouse Elec. Corp., 375 U.S. 261, 272 (1964).

73. 385 U.S. 432, 436 (1967).

74. *Id.* at 436.

75. *See* Carey v. Westinghouse Elec. Corp., 375 U.S. 261 (1964); NLRB v. Acme In-

The arbitration decisions give the Board the best of both worlds. The primacy of its regulatory role is undisturbed, but it enjoys the administrative convenience of channeling cases to alternative forums, and in a sense exercises a kind of discretionary jurisdiction with respect to cases which have gone through the arbitration process.

## III. New Fields — The Landrum-Griffin Analogy

The passage in 1959 of the Labor-Management Reporting and Disclosure Act (Landrum-Griffin Act)[76] opens up a new field for examining the interaction of agency and court in the sphere of industrial law. Unlike the National Labor Relations Act, the Landrum-Griffin Act combines the principles of private enforcement and agency stewardship of the public interest. With respect to the privately enforced titles, the court's role is to review the determinations of labor unions in resolving internal disputes. With a few exceptions,[77] the Department of Labor is not involved. If there is a rule of deference, it is responsive not to considerations of expertise but to the congressional desire to minimize judicial interference with the internal affairs of labor unions.[78]

The closest parallel to NLRB cases is Title IV of the Landrum-Griffin Act, the title governing the procedures for conducting internal union elections. In *Calhoon v. Harvey*,[79] the Court held that the exclusive method for the enforcement of Title IV rights is a suit at the behest of the Secretary of Labor. Justice Black noted:

> It is apparent that Congress decided to utilize the special knowledge and discretion of the Secretary of Labor in order best to serve the public interest. Cf. *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 242 . . . . Reliance on the discretion of the Secretary is in harmony with the general congressional policy to allow unions great latitude in resolving their own internal controversies, and, where that fails, to utilize the agencies of Government most familiar with union problems to aid in bringing about a settlement through discussion before resort to the courts.[80]

The reference to Justice Frankfurter's decision in *Garmon* is instructive, for in *Garmon* the Court has announced a rule of

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dustrial Co., 385 U.S. 432 (1967); NLRB v. C & C Plywood Corp., 385 U.S. 421 (1967); NLRB v. Strong, 393 U.S. 357 (1969).

76. 29 U.S.C. §§ 401-539 (1970).

77. Brennan v. District 50, 499 F.2d 1051 (D.C.Cir. 1974).

78. *See, e.g.*, Ritz v. O'Donnell, 566 F.2d 731 (D.C. Cir. Sept. 6, 1977).

79. 379 U.S. 134 (1964).

80. *Id.* at 140.

preemption. The sound application of agency expertise requires a measure of centralization of the dispute resolution process and uniformity of prescriptive rules—a sphere of "primary jurisdiction." The court plays a definite role because the agency's determination is not self-enforcing. Here, the agency (the Department of Labor) must go to court to set aside a union election. The court owes no deference with respect to the findings of facts, however, because there has been no initial adjudication at the agency level. But, as with the National Labor Relations Board,[81] due recognition is given to the regulatory determinations of the Secretary of Labor, *e.g.*, that a particular union election requirement constricts unduly the participation rights of union members.[82]

The parallel to the NLRB is not exact. The Secretary of Labor is not responsible for conducting an ongoing regulatory program, but intervenes in union affairs solely to overturn elections violative of the Act. There is no claim to special competence in fact-finding. With respect to the Secretary's decision whether or not to bring suit, for example, he must give a statement of reasons sufficient to "inform the court and the complaining union member of both the grounds of decision and the essential facts upon which the Secretary's inferences are based."[83] As with any agency determination, the courts are not to substitute their judgment; their review obligation is satisfied upon finding that the Secretary has not abused his discretion.[84] But the requirement of a statement of reasons for the Secretary's exercise of prosecutorial discretion provides more scope for judicial overseeing than is available for the NLRB General Counsel's decision whether or not to issue a complaint.

The private complainant enjoys a right of participation under Title IV which is not significantly different from that of his counterpart under the National Labor Relations Act. *Trbovich v. UMW*[85] recognized a limited right of intervention once the Secretary has exercised his discretion to challenge a union election. The intervenor may urge grounds in support of the Secretary's position and may assist the court upon the finding of a violation in fashioning an appropriate remedial order. Reasonable attorney's fees may be available for this assistance.[86]

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81. *Cf.* NLRB v. Hearst Publications, 322 U.S. 111 (1944).

82. *See* Local 3489, United Steelworkers v. Usery, 429 U.S. 305 (1977).

83. Dunlop v. Bachowski, 421 U.S. 560, 573-74 (1975).

84. *See, e.g.*, Usery v. Local 639, Teamsters, 543 F.2d 369 (D.C.Cir. 1976), *cert. denied* 97 S.Ct. 1159 (1977).

85. 404 U.S. 528 (1972).

86. *See* Usery v. Local 639, Teamsters, 543 F.2d 369 (D.C.Cir. 1976), *cert. denied*, 429

The Landrum-Griffin developments reflect differences from the basic federal statutes in the field of labor relations, but the central point is the same: an active agency-court partnership serves to improve agency determinations by refining the details of a statutory scheme and by fashioning procedures to enhance rational decision-making.

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U.S. 1123 (1977); Sadlowski v. United Steelworkers, 554 F.2d 586 (3d Cir. 1977), *cert. filed*, No. 77-643, November 2, 1977.