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Union Access to the Courts on NLRB Representation Decisions: The Potential for Declaratory Judgement Procedure to Provide Review

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COMMENTS

UNION ACCESS TO THE COURTS ON NLRB REPRESENTATION DECISIONS: THE POTENTIAL FOR DECLARATORY JUDGMENT PROCEDURE TO PROVIDE REVIEW*

In 1935, Congress enacted the National Labor Relations Act (LMRA or the Act)[1] in an effort to bring the democratic process to industrial relations.[2] The Act is premised on the belief that workers' freedom to bargain collectively provides a peaceful and equitable method for determining terms and conditions of employment.[3] Accordingly, Congress explicitly announced that our national labor policy should encourage the practice and procedure of collective bargaining and protect workers in the exercise of their full freedom of association, self organization, and designation of bargaining repre-

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1. National Labor Relations (Wagner) Act, ch. 395, 49 Stat. 449 (1935), *amended by* Labor-Management Relations (Taft-Hartley) Act, ch. 120, 61 Stat. 136 (1947) (codified as amended at 29 U.S.C. §§ 141-169 (1982)). The National Labor Relations Act and the Labor-Management Relations Act are commonly referred to singularly. This Comment will refer to both as LMRA or the Act.

2. Statements made by Senator Robert F. Wagner indicate that the Wagner Act aimed to bring democracy to industry:

> The principles of my proposal were surprisingly simple. They were founded upon the accepted facts that we must have democracy in industry as well as in government; that democracy in industry means fair participation by those who work in the decisions vitally affecting their lives and livelihood; and that the workers in our great mass production industries can enjoy this participation only if allowed to organize and bargain collectively through representatives of their own choosing.

Summers, *Past Premises, Present Failures, and Future Needs in Labor Legislation,* 31 BUFFALO L. REV. 9, 12 (1982) (quoting Senator Wagner in M. DERBER, THE AMERICAN IDEA OF INDUSTRIAL DEMOCRACY, 1865-1965, at 321 (1970)). Senator Wagner also said:

> The development of a partnership between industry and labor in the solution of national problems is the indispensable complement to political democracy. And that leads us to this all important truth: there can no more be democratic self-government in industry without workers participating therein, than there could be democratic government in politics without workers having the right to vote . . . .

Id. (quoting Keyserling, *Why the Wagner Act?,* in THE WAGNER ACT: AFTER TEN YEARS 13 (1945)).

3. Summers, *supra* note 2, at 13-14.

sentatives of their own choosing.[4] Congress aspired that freedom to select bargaining representatives for the purpose of collective bargaining would assure industrial peace.[5]

The freedom to select bargaining representatives, therefore, is a critical step towards realizing the ambitions of the Act. Section 9(d)[6] of the LMRA provides the statutory procedure by which workers select their exclusive bargaining representatives.[7] The Act vests the National Labor Relations Board (NLRB or the Board)[8] with the responsibility of administering the representation provisions of the statute.[9] Section 9(d)[10] details the method for obtaining judicial review of an NLRB representation decision. The Act's review provisions, however, do not permit direct judicial review of representation decisions because appeals delay and interrupt the collective bargaining process.[11]

Considering the importance of the representation process to our national labor policy, it is curious that unions do not have a viable method for obtaining judicial review of NLRB representation decisions. The LMRA permits employers,[12] but not unions,[13] to seek appellate review of NLRB

4. 29 U.S.C. § 151.

5. *Id.* § 141(b).

6. *Id.* § 159(d).

7. An election for representation is decided by a majority of the votes cast. NATIONAL LABOR RELATIONS BOARD, CASEHANDLING MANUAL pt. 2, § 11340.4, at 152 (1984). This method of determining election results reflects the "majority rule" principle. *See* 29 U.S.C. § 159(a). When a unit of employees elects a labor organization as its bargaining representative, that labor organization is the exclusive representative for the entire unit of employees. Therefore, even if an employee within the unit decides against joining the union, the employee is still represented by the union. This rule requires the employer to bargain only with the certified labor organization; the employer may not enter into a separate contract with an individual working within the designated bargaining unit. J.I. Case Co. v. NLRB, 321 U.S. 332, 337-38 (1944).

8. 29 U.S.C. § 153.

9. *Id.* § 159. Section 9(a) of the Act provides that the bargaining representative selected shall be the exclusive representative of all employees in the appropriate bargaining unit. *Id.* § 159(a). Section 9(b) of the Act instructs the National labor Relations Board (NLRB or the Board) to determine the appropriate unit for bargaining. *Id.* § 159(b). Section 9(c) directs the Board to investigate any petition for an election, filed by either an employee, a labor organization, or an employer, to determine whether there is a legitimate question concerning representation. *Id.* § 159(c). Section 9(d) provides the scheme for judicial review, *id.* § 159(d), and § 9(e) provides the procedure by which the employees in a bargaining unit can request an election to rescind a union shop agreement. *Id.* § 159(e). For a detailed discussion of representation proceedings and the election process, see generally 1 C. MORRIS, THE DEVELOPING LABOR LAW 341-412 (2d ed. 1983).

10. 29 U.S.C. § 159(d).

11. *See infra* notes 92-109 and accompanying text.

12. *See infra* notes 47-52 and accompanying text.

13. *But see infra* notes 53-62 and accompanying text.

representation decisions in the federal circuit courts of appeals. Additionally, in *Leedom v. Kyne*,[14] the Supreme Court foreclosed district court review. The Court held that absent some narrow, "extraordinary circumstances," parties are precluded from repairing to federal district courts for injunctive relief.[15] The Court's reasoning, in *Kyne* and its progeny,[16] for precluding review in the district courts focused on injunctive relief's potential discordance with congressional intent to avoid delays and interruptions in the election and collective bargaining processes.[17]

Wholly unaddressed by the Supreme Court, however, was the availability of review for declaratory relief. Declaratory relief may permit examination of rights and legal relations when alternative relief is unavailable.[18] Arguably, *Kyne* bars declaratory relief if it engenders the same harms to the election[19] and collective bargaining processes as injunctive relief causes. This Comment explores the availability of declaratory relief in federal district courts to unions seeking judicial review of representation proceedings. The Comment proceeds from the premise that Congress could not have intended to permit declaratory relief if it provokes the harms Congress sought to avoid by enacting limited and indirect review provisions. Accordingly, this Comment will identify the preferred values and policy considerations underlying the LMRA's representation election review provisions. An evaluation of declaratory relief's potential to disrupt these value and policy choices per-

14. 358 U.S. 184, 188-91 (1958).

15. *Id.; accord* Boire v. Greyhound Corp., 376 U.S. 473, 479-80 (1964) (adopting the "extraordinary circumstances" language).

16. *Boire*, 376 U.S. at 473.

17. *See, e.g., id.* at 478-80; *see also* Physicians Nat'l House Staff Ass'n v. Fanning, 642 F.2d 492, 499 (D.C. Cir. 1980) (en banc), *cert. denied*, 450 U.S. 917 (1981); Bishop v. NLRB, 502 F.2d 1024, 1027 (5th Cir. 1974).

18. Declaratory Judgments Act, 28 U.S.C. §§ 2201-02 (1982), provides:

> In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1954 or a proceeding under section 505 or 1146 of title 11, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

Id. § 2201(a).

19. There are three common types of elections. First, there is the election for choice of bargaining representatives. 29 U.S.C. § 159(a). Second, there is the election to decertify a union that is a certified bargaining representative. *See* 2 C. MORRIS, *supra* note 9, at 1614-15. Third, there is an election to rescind a union shop agreement. 29 U.S.C. § 159(e). In general terms, a union shop agreement requires that employees in the bargaining unit, within thirty days of commencement of employment, pay union dues. *See generally* H. MILLIS & E. BROWN, FROM THE WAGNER ACT TO TAFT-HARTLEY: A STORY OF NATIONAL LABOR POLICY AND LABOR RELATIONS 515-16 (1950) (discussing types of elections).

mits a principled judgment as to whether the declaratory judgment procedure should be available to unions seeking judicial review.

I. THE SCOPE OF THE PROBLEM CREATED BY LIMITED ACCESS TO THE COURTS

Section 10(e) and (f) of the LMRA[20] creates federal jurisdiction in the federal circuit courts of appeals to review final orders issued by the NLRB following an unfair labor practice. A representation order is not a final order within the meaning of the Act's review provisions.[21] However, section 9(d)[22] permits the federal appellate courts to review a representation order when it is the basis of an unfair labor practice decision. Consequently, an NLRB representation order can be reviewed only by triggering the Act's unfair labor practice review provisions.

Typically, in the representation election process, unions and employers raise legal issues concerning the NLRB's authority to order a representation election,[23] the appropriateness of the bargaining unit for which the election is sought,[24] and the eligibility of certain classes of employees to vote in the

20. 29 U.S.C. § 160(e)-(f).

21. A representation order is not a final order within the meaning of § 10(c), 29 U.S.C. § 160(c), and, therefore, does not trigger the Act's review provisions. AFL v. NLRB, 308 U.S. 401, 409-11 (1940); *see also infra* notes 70-75 and accompanying text.

22. 29 U.S.C. § 159(d).

23. The NLRB may lack statutory jurisdiction to order a representation election. The Board's statutory jurisdiction encompasses labor relations matters which affect commerce. *See* NLRB v. Fainblatt, 306 U.S. 601, 607 (1939) (Board's jurisdiction is coextensive with congressional power to legislate under the Commerce Clause). The Board's jurisdiction, however, is limited by certain statutory exclusions. Certain employers, for example, are not covered by the Act. Section 2(2) of the Act specifically states that the word employer "shall not include the United States or any wholly owned Government corporation." 29 U.S.C. § 152(2). Similarly, the Act excludes certain employees from coverage. Among the employees excluded from coverage are domestic servants, independent contractors, supervisors, and agricultural workers. 29 U.S.C. § 152(3).

Furthermore, § 14(c)(1) of the Act authorizes the Board to decline to assert jurisdiction over any labor dispute when "the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction." 29 U.S.C. § 164(c)(1). Section 14(c)(1) permits the Board to decline jurisdiction over any class or category of employers. *Id.; see, e.g.,* Cleveland Ave. Medical Center, 209 N.L.R.B. 537 (1974) (declining jurisdiction over a small medical practice because its activities were local in nature and did not warrant Board procedure). For a thorough discussion of NLRB jurisdiction, see J. FEERICK, H. BAER & J. ARFA, NLRB REPRESENTATION ELECTIONS—LAW, PRACTICE, AND PROCEDURE 37-56 (1980). The Board may also lack authority to order a representative election when there is no question concerning representation. *See id.* at 106-12. For a discussion of questions concerning representation, see *infra* note 151.

24. "A bargaining unit is a group of employees who may properly be grouped together for the purposes of participating in an NLRB election and for collective bargaining." J. FEERICK, H. BAER & J. ARFA, *supra* note 23, at 265. Section 9 of the Act authorizes the Board to

requested election.[25] If, after deciding these issues, the NLRB orders an election and the union wins, the employer may respond by refusing to bargain with the union.[26] The union can be expected to file a timely refusal-to-bargain charge, and the NLRB will find that the employer refused to bargain in good faith.[27] The employer's refusal to bargain, a violation of section 8(a)(5)[28] of the Act, is an unfair labor practice. When the employer seeks appellate review of the NLRB's bargaining order, the underlying certification, which motivated the refusal to bargain, becomes part of the record of the unfair labor practice proceeding and subject to review.[29] On review, the court of appeals will consider the employer's previously unsuccessful position on the challenged representation issue to determine if the election was valid and created a duty to bargain with the winning union.[30]

Unions, however, do not have a parallel method for triggering the unfair labor practice review provisions when they lose a representation election because their responsive conduct would be unlikely to precipitate an unfair labor practice.[31] Consequently, in the absence of a violation of the Act, unions have no means of gaining access to the courts to review the union's position on the representation issue.

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determine whether the unit set out in the petition is appropriate for purposes of engaging in collective bargaining. 29 U.S.C. § 159(b). The Board has developed a community of interests test for making appropriate bargaining unit determinations. 15 NLRB ANN. REP. 39 (1950). Under the community of interests doctrine, "the Board will weigh the similarities and differences with respect to wages, hours and other conditions of employment among the members of a proposed unit, rather than relying solely on traditional job classifications." J. FEERICK, H. BAER & J. ARFA, *supra* note 23, at 270 (footnote omitted).

25. F. BARTOSIC & R. HARTLEY, LABOR RELATIONS LAW IN THE PRIVATE SECTOR 143 (2d ed. 1986).

26. Section 8(a)(5) of the Act imposes on the employer the duty to bargain with a certified union. 29 U.S.C. § 158(a)(5).

27. Section 8(d) of the Act requires parties to bargain in good faith. 29 U.S.C. § 158(d). Section 8(d) defines collective bargaining as "the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment." *Id.* In determining good faith bargaining, the Supreme Court has stated that "[t]he inquiry must always be whether or not under the circumstances of the particular case the statutory obligation to bargain in good faith has been met." NLRB v. Truitt Mfg. Co., 351 U.S. 149, 153-54 (1956). Although good-faith bargaining is difficult to define, it requires " 'the serious intent to adjust differences and to reach an acceptable common ground.' " NLRB v. Insurance Agents' Int'l Union, 361 U.S. 477, 485 (1960) (quoting 1 NLRB ANN. REP. 85-86 (1935)). The Act, however, does not "compel either party to agree to a proposal or require the making of a concession." 29 U.S.C. § 159(d).

28. 29 U.S.C. § 158(a)(5).

29. *Id.* § 159(d).

30. *See generally* F. BARTOSIC & R. HARTLEY, *supra* note 25, at 171-72 (discussing judicial review of representation decisions).

31. *But see infra* notes 53-62 and accompanying text.

A statutory scheme providing limited judicial review makes Board decisions in representation matters, to some extent, unchallengeable. Two competing policy considerations support Congress' adoption of a limited and indirect route for judicial review: (1) the need to minimize delay in initiating the collective bargaining process and (2) the need to protect individual rights from unrestrained administrative power.[32] The clash of these policies creates tension every time a party, such as a union statutorily denied judicial review, loses a representation election.

Although the unavailability of judicial review for unions is not a central issue in contemporary labor relations, it may be inhibiting the full achievement of the LMRA's goal. Congress enacted the LMRA to avoid industrial strife by encouraging the practice and procedure of collective bargaining.[33] This policy implicitly assumes that collective bargaining would become, if workers so desired, the dominant method for determining terms and conditions of employment.[34] The aspirations of the Act, however, have not reached fruition. With the percentage of the nonagricultural workers represented by a labor organization and covered by a collective bargaining agreement declining at a significant rate, collective bargaining is not the dominant industrial relations model in this country.[35]

Labor supporters explain sliding union support by pointing to employer union-busting tactics,[36] employer tamperings with the Act,[37] and an anti-

32. Note, *Judicial Review of Preliminary Orders of National Labor Administrative Agencies after* Leedom v. Kyne, 8 BUFFALO L. REV. 372, 372 (1959).

33. 29 U.S.C. § 151.

34. Summers, *supra* note 2, at 14.

35. The union density rate—the ratio of union members to the nonagricultural work force—has steadily declined. Prior to the enactment of the Wagner Act, union density was about 13%. Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA,* 96 HARV. L. REV. 1769, 1771 (1983). Within the decade following the passage of the Act, union density rose to 35%. *Id.* Within the last 10 years, however, union density has steadily declined. In 1975, 28.9% of the nonagricultural work force were union members. By 1980, the figure slipped to 23.2%. In 1982 union density was only 21.9%, and by 1984 less than one of every five nonagricultural workers (19.4%) was a union member. L. TROY & N. SHEFLIN, UNION SOURCE BOOK: MEMBERSHIP, STRUCTURE, FINANCE, DIRECTORY § 3.10 (1985); *see also* BUREAU OF THE CENSUS, U.S. DEPARTMENT OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1987, at 408 (107th ed. 1986). From the pre-Wagner Act period to 1984, union density has risen from 13% to 19.4%. A 6% increase in the number of workers covered by a collective bargaining agreement suggests that the inequality in the availability of judicial review may obstruct realization of the Act's goals.

The Railway and Airline Clerks, the Machinists, the Steelworkers, the Nurses Association, and the Auto Workers suffered the sharpest losses in union membership. L. TROY & N. SHEFLIN, *supra* § 3.1. The 1984 statistics for union density by industry are: (1) manufacturing—26%; (2) mining—17.7%; (3) construction—23.5%; (4) transportation—38.7%; and (5) services—7.3%. *Id.* § 3.9.

36. It has become common-place for employers to engage in a union-busting effort to

defeat an organizing drive. Presently, seminars, sponsored by employer associations and taught by professional labor relations consulting firms, on how to defeat unions are widely offered. Summers, *supra* note 2, at 15 n.24. Furthermore, management-side law firms advertise their special skills for defeating unions. *Id.* Also, several texts are available to teach employers to defeat a union campaign. *See generally* J. HUNT, EMPLOYER'S GUIDE TO LABOR RELATIONS (1979) (providing general guides to combating campaign organizing); R. LEWIS & W. KRUPMAN, WINNING NLRB ELECTIONS, MANAGEMENT'S STRATEGY AND PREVENTIVE PROGRAMS (1979) (discussing tactics and strategies for employers to win elections). While the instruction offered may not be unlawful, many of the tactics suggested reflect and encourage a confrontational hostility towards the collective bargaining process. *See generally* R. LEWIS & W. KRUPMAN, *supra,* at 88 (supervisors advised to aid the employer in opposing the union).

37. Congress enacted the Wagner Act to encourage collective bargaining in order to avoid industrial unrest. *See supra* notes 2-5 and accompanying text. In order to achieve this purpose, employees must have the opportunity to freely elect, or choose not to elect, their bargaining representatives without coercion. *See generally* F. BARTOSIC & R. HARTLEY, *supra* note 25, at 93-107 (discussing several ways employers interfere with workers' free choice). The need for free and uncoerced elections is reflected in the rule that Board elections are to be conducted in "laboratory conditions," free from coercion and threats of reprisal. General Shoe Corp., 77 N.L.R.B. 124, 127 (1948). An election can serve its true purpose only if the surrounding conditions enable employees to register a free and untrammeled choice for or against a bargaining representative. *Id.* at 126. Under the laboratory conditions rule, the test of conduct which may interfere with the laboratory conditions is considerably more restrictive than the test of conduct amounting to an unfair labor practice. Dal-Tex Optical Co., 137 N.L.R.B. 1782, 1786-87 (1962). Conduct not rising to an unfair labor practice can still be conduct warranting a new election. *Id.* Despite this protective rule, there is evidence indicating that employers have increasingly engaged in coercive tactics. *See generally* Weiler, *supra* note 35, at 1779-81 (documenting the rise in employer unfair labor practice charges). One of the most harmful coercive tactics is the dismissal of an employee for union support. The discriminatory discharge, a violation of § 8(a)(3) of the Act, 29 U.S.C. § 158(a)(3), has a threefold effect: (1) it prevents the union supporter from voting; (2) it removes a potential union campaigner from the plant; and (3) it chills employees supporting, or considering supporting, the union. Weiler, *supra* note 35, at 1778. The number of § 8(a)(3) discharge cases has increased substantially over the years. In 1975, 13,426 § 8(a)(3) charges were filed. *Id.* at 1780. By 1980, the figures increased to 18,315. *Id.* Furthermore, the NLRB has estimated that 90% of all discriminatory discharges take place during either organizing campaigns or first contract negotiations. *Id.* at 1781 n.35.

Interestingly, as § 8(a)(3) charges have risen, the union victory rate in representation elections has dropped: (1) 1965—61% victory rate; (2) 1970—56% victory rate; (3) 1975—50% victory rate; (4) 1980—48% victory rate. *Id.* at 1776. By 1984, the union success rate had dropped to a low 43%. 48 NLRB ANN. REP. 197 (1983). While the correlation between an increasing number of § 8(a)(3) charges and decreasing union victory rate may not alone prove cause and effect, there is further evidence indicating that coercive conduct affects election results.

In a study performed by Dr. William Dickens, it was determined that unfair labor practices reduced the number of prounion votes by 4%. W. Dickens, Union Representation Elections: Campaign and Vote (Oct. 1980) (unpublished Ph.D. dissertation) (available at the Department of Economics, Massachusetts Institute of Technology) [hereinafter Dickens dissertation], *discussed in* Weiler, *supra* note 35, at 1784. When the unfair labor practice was a threat or action against a union supporter, the figure rose to 15%. Weiler, *supra* note 35, at 1784 (citing Dickens dissertation). Comparing the union victory rates in the United States with the union victory rates in Canada, where representation campaigns have been eliminated, provides

union Labor Board.[38] While commentators disagree about the merits of these accusations,[39] many cite these as reasons for the decline in organized labor.[40] Furthermore, the truth of any of these allegations would suggest the need for union access to appellate courts.

Establishing the anti-union bias of the Labor Board, however, is not essential to justifying use of declaratory relief. The severity of the public debate itself, with union leaders instructing their members to avoid the Board[41] and the American workers' apparently losing confidence in the laws designed for their protection,[42] indicates a crisis. If the existing congressional scheme for judicial review permits declaratory relief in representation cases, the declaratory judgment procedure could alleviate whatever contribution the Act's remedial inadequacies add to the crisis.

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additional support for the argument that coercive tactics during a representation campaign affect the outcome of the election. *Id.* at 1786 n.61.

38. The Reagan Board has been publicly criticized for its decisions overruling firmly established rules and precedents. *See* Greenberger, *Reagan NLRB Tilts Toward Management,* Wall St. J., Aug 2, 1982, at 17, col. 3. For a listing of some of the cases, see Cohen & Bor, *The National Labor Relations Act Under Seige: A Labor View of the Reagan Board,* in LABOR LAW DEVELOPMENTS 1983 § 4.02 (1983); Estreicher, *Policy Oscillation at the Labor Board: A Plea for Rulemaking,* 37 ADMIN. L. REV. 163, 163 n.1 (1984).

In Professor Weiler's opinion, a major factor in the decline in unionism is employer opposition to unions coupled with the law's failure to respond to unfair labor practice charges against employers. Weiler, *supra* note 35, at 1771-74 & n.7. Other authorities have not been as kind:

> [T]he authors agree with the criticism which has been directed at the Board and submit that a conclusive case has been made that the present Board is probably the most result-oriented, antilabor, and antiworker Board in the history of the Act. Indeed, it is the authors' conclusion that the Board, as an administrative vessel, is not only off course, it has been taken over by pirates who are methodically scuttling the Act which they are charged to protect.

Cohen & Bor, *supra* § 4.01.

39. Professor Paul Weiler supports the position that the decline in organized labor stems primarily from coercive employer tactics and a Labor Board condoning such conduct. *See* Weiler, *supra* note 35, at 1771-86. Professor William Gould, in contrast, claims that labor's position is based on mistaken assumptions. *See* Gould, *Mistaken Opposition to the N.L.R.B.,* N.Y. Times, June 20, 1985, at A27, col. 2.

40. Another often cited reason for the decline in organized labor is that "the stronghold of American unionism—older, male, blue-collar workers employed in manufacturing industries in the northern United States—has constituted a declining fraction of the work force." Weiler, *supra* note 35, at 1773 n.6.

41. Trost & Apcar, *AFL-CIO Chief Calls Labor Laws a Dead Letter,* Wall St. J., Aug. 16, 1984, at 8, col. 2.

42. Summers, *supra* note 2, at 17.

II. THE LMRA'S JUDICIAL REVIEW PROVISIONS: LIMITED REVIEW OF NLRB REPRESENTATION DECISIONS IN THE COURTS OF APPEALS

Section 9 of the LMRA[43] regulates the procedures by which bargaining representatives are selected.[44] As a general rule, there is no direct judicial review of representation decisions in the courts of appeals. Section 9(d), the only provision of the Act expressly relating to the review of representation proceedings, provides for appellate court review of certifications under section 10(e) or (f) in connection with unfair labor practice orders.[45] Section 9(d) provides that whenever an unfair labor practice order is based in whole or in part on a representation proceeding, the representation decision becomes part of the record for appeal on the unfair labor practice order.[46]

For all practical purposes, an employer's loss of a representation election triggers section 9(d). The dissatisfied employer may refuse to bargain with the Board-certified union, forcing the union to file a section 8(a)(5)[47] unfair labor practice charge against the employer. Generally, the Board issues a complaint, finds a violation for refusal to bargain, and issues cease and desist and bargaining orders pursuant to section 10(c).[48] The employer, in turn, either appeals the Board's orders to the circuit court of appeals pursuant to section 10(f),[49] or refuses to comply with the orders, causing the Board to petition the court of appeals under section 10(e) for enforcement.[50] Whether review is through the employer's section 10(f) appeal or the Board's section 10(e) petition for enforcement, section 9(d) provides that the underlying certification becomes part of the record considered by the court of appeals re-

43. 29 U.S.C. § 159.

44. For a description of the statutory provisions governing the representation election process, see *supra* note 9.

45. *See generally* 2 C. MORRIS, *supra* note 9, at 1714 (discussing the Act's review provisions).

46. Section 9(d) provides in full:

> Whenever an order of the Board made pursuant to section 10(c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under section 10(e) or 10(f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

29 U.S.C. § 159(d).

47. *Id.* § 158(a)(5).

48. *Id.* § 160(c).

49. *Id.* § 160(f).

50. *Id.* § 160(e).

viewing the unfair labor practice order.[51] The operation of these sections assures the employer the opportunity for appellate review of a representation order.[52]

A union, in contrast, does not have a viable method for obtaining review when it has lost an election. Theoretically, section 8(b)(7)(B)[53] provides unions an indirect method of appellate review because it prohibits picketing for recognition following a "valid election."[54] A union might intentionally violate section 8(b)(7)(B) by picketing for recognition after losing an election, thereby causing the NLRB to issue a cease and desist order.[55] Section 10(f) treats the Board's section 8(b)(7)(B) order as an appealable final order.[56] To establish the section 8(b)(7)(B) unfair labor practice, the General Counsel must prove that the union picketed for recognition following a "valid election."[57] Thus, the underlying representation proceedings would become part of the record for the court of appeals to review to determine the validity of the election.[58]

The judiciary, however, has not embraced section 8(b)(7)(B) as a mechanism for unions to obtain judicial review. For example, in *NLRB v. Interstate Dress Carriers, Inc.*,[59] the Court of Appeals for the Third Circuit gave three reasons for denying review under section 8(b)(7)(B). First, an employee can be discharged for cause if he pickets in violation of section 8(b)(7)(B).[60] Second, the employer must file the unfair labor practice charge, and he or she may find the picketing insufficiently disruptive to warrant filing a section 8(b)(7)(B) charge.[61] Third, recognition of section 8(b)(7)(B) review encourages disruptive picketing and is inconsistent with

51. *Id.* § 159(d). *See generally* F. BARTOSIC & R. HARTLEY, *supra* note 25, at 170-74 (discussing judicial review of representation proceedings).

52. The underlying representation order does not automatically become part of the record of the unfair labor practice charge. The representation proceeding must be predicated on the same actions giving rise to the unfair labor practice. As the Supreme Court has stated, the representation case becomes part of the record only when the representation proceeding and the complaint on unfair labor practices "are really one." Pittsburgh Plate Glass Co. v. NLRB, 313 U.S. 146, 158 (1941).

53. 29 U.S.C. § 158(b)(7)(B).

54. *Id.*

55. The Board's remedial powers for § 8(b)(7)(B) charges are limited to injunctive relief, 29 U.S.C. § 160(*l*), and a cease and desist order upon a determination of the charge on the merits. *Id.* § 160(c).

56. *But see infra* notes 59-62 and accompanying text.

57. 29 U.S.C. § 158(b)(7)(B).

58. *Id.* § 159(d).

59. 610 F.2d 99 (3d Cir. 1979).

60. *Id.* at 108, *cited in* Note, Leedom v. Kyne *and the Implementation of a National Labor Policy*, 1981 DUKE L.J. 853, 859-60.

61. *Interstate Dress Carriers*, 610 F.2d at 109.

that section's purpose of limiting disturbance of industrial peace.[62] While all the reasons offered by the Third Circuit are compelling, the most convincing is the court's admonition of disruptive picketing. Permitting unions to obtain review of representation decisions through section 8(b)(7)(B) only serves to fuel industrial strife.

Although the Act limits access to the federal appellate courts, virtually precluding unions' from obtaining appellate review, its representation review provisions are silent as to district court jurisdiction.[63] Administrative law doctrine recognizes the general jurisdiction of federal district courts[64] to hear requests for equitable relief by parties statutorily foreclosed from review.[65] Congress, however, may enact statutes completely precluding a party from district court review.[66] On its face, the LMRA leaves open the question whether a party may seek injunctive or declaratory relief for representation decisions in the federal district courts.[67] When addressing this question, however, courts have narrowly construed the Act and, in cases such as *Leedom v. Kyne,*[68] have produced the rule of nonreviewability for injunctive relief and its narrow exceptions.[69]

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62. *Id.*

63. For a thorough discussion of the district courts' subject matter jurisdiction to review NLRB representation decisions, see *infra* note 117.

64. The federal district courts exert jurisdiction over administrative agency action under three types of statutes. First, a federal district court may exercise jurisdiction under the Judicial Code. 28 U.S.C. §§ 1331-1337 (1982). The Judicial Code provides for several types of review, including district court review based upon a general federal question, 28 U.S.C. § 1331, and original jurisdiction of actions arising under a federal law regulating interstate commerce. 28 U.S.C. § 1337. *See generally* 5 B. MEZINES, J. STEIN & J. GRUFF, ADMINISTRATIVE LAW § 45.03 (1987) (general discussion of district court jurisdiction to review administrative agency action). Second, district court jurisdiction exists when the action arises under one of the public information sections of the Administrative Procedure Act. *Id.* § 45.03. Finally, a district court has jurisdiction to review agency action when an agency statute specifically grants such jurisdiction. *Id.*; *see also* Cutaiar v. Marshall, 590 F.2d 523, 527-28 (3d Cir. 1979).

District court jurisdiction over Board representation decisions arguably arises under § 1331 or § 1337 of the Judicial Code. *See* Physicians Nat'l House Staff Ass'n v. Fanning, 642 F.2d 492, 495 n.3 (D.C. Cir. 1980) (en banc), *cert. denied,* 450 U.S. 917 (1981).

65. *See, e.g.,* Shields v. Utah Idaho Cent. R.R., 305 U.S. 177, 183-84 (1938); *see also* K. DAVIS, ADMINISTRATIVE LAW 176 (1977); Jaffe, *The Right to Judicial Review II,* 71 HARV. L. REV. 769, 772 (1958).

66. Califano v. Sanders, 430 U.S. 99, 105 (1977).

67. *See* Goldberg, *District Court Review of NLRB Representation Proceedings,* 42 IND. L.J. 455, 458-60 (1967) (Professor Goldberg provides a facial analysis of the Act).

68. 358 U.S. 184 (1958).

69. *Id.* at 188-91; *accord* Boire v. Greyhound Corp., 376 U.S. 473, 479-80 (1964) (describing the narrow, "extraordinary circumstances" that comprise the exceptions to the rule of nonreviewability). There are three exceptions to the rule of nonreviewability. For a discussion of the *Kyne* exception, see *infra* text accompanying notes 83-90. For a discussion of all three exceptions, see *infra* note 89. *See generally* 2 C. MORRIS, *supra* note 9, at 1714-19 (discussing review of representation decisions).

III. District Court Review: Nonreviewability with its Narrow Exceptions

*A. Pre-*Kyne *Decisions*

Soon after the passage of the Wagner Act, unions challenged the exclusivity of the Act's statutory review procedures. In *AFL v. NLRB,*[70] the Supreme Court ruled that a representation order is not a "final order"[71] appealable directly to the court of appeals.[72] The Court recognized Congress' intent[73] to allow judicial review of representation decisions only when such decisions are part of a final Board order made in an unfair labor practice proceeding.[74] In so ruling, the Court defined the parameters of appellate review on board representation decisions. The Court did not, however, foreclose the district court from hearing an independent suit because "that question [was] not presented for decision by the record."[75]

Almost twenty years passed before the Court squarely addressed the question left open in *AFL v. NLRB.* In the interim, however, the lower federal courts split on the issue.[76] Most notable of the pre-*Kyne* decisions was *Fay v.*

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70. 308 U.S. 405 (1940).

71. *Id.* at 504. It is a common occurence in administrative law for the availability of judicial review to depend on the definition attached to a reviewable "order." Professor Jaffe elaborates:

> The representation case is but one example of a not uncommon situation in which by reason of the definition of a reviewable "order" in a given statute certain definitive administrative acts do not qualify for review as "orders." The statute may require a "final" order. The statute may provide for review of an "order" upon a record made at a hearing, from which it may be inferred that an order not based on a hearing is nonreviewable. Many actions not qualifying as "orders" will be preliminary and would normally be denied review because administrative remedies have not been exhausted. But some rulings pendente lite may cause serious injury which cannot be undone by later review: for example, the compulsory production of documents may expose secrets entitled to be protected against unauthorized disclosure. In such cases the restrictive statutory definition of "order" should not be—and in that situation was not—construed as foreclosing review.

Jaffe, *supra* note 65, at 772.

72. AFL v. NLRB, 308 U.S. at 411.

73. See *infra* notes 92-109 and accompanying text for a discussion of the legislative history of the Act.

74. AFL v. NLRB, 308 U.S. at 410 nn.2-3.

75. *Id.* at 412.

76. Among the cases finding district court jurisdiction were Farmer v. United Elec. Workers, 211 F.2d 36, 39 (D.C. Cir. 1953), *cert. denied,* 347 U.S. 943 (1954); Worthing Pump & Mach. Co. v. Douds, 97 F. Supp. 656, 660 (S.D.N.Y.), *aff'd,* 28 L.R.R.M. 2267 (S.D.N.Y. 1951); R.J. Reynolds Employees' Ass'n v. NLRB, 61 F. Supp. 280, 281 (M.D.N.C. 1943); Reilly v. Millis, 52 F. Supp. 172, 173 (D.D.C. 1943), *aff'd,* 144 F.2d 259 (D.C. Cir. 1944), *cert. denied,* 325 U.S. 879 (1945); Klein v. Herrick, 41 F. Supp. 417, 420-23 (S.D.N.Y. 1941). Cases in which district court jurisdiction was not found include De Pratter v. Farmer, 232 F.2d 74, 76 (D.C. Cir. 1956); Volney Felt Mills v. LeBus, 196 F.2d 497, 498 (5th Cir. 1952); Norris Inc.

Douds.[77] In *Fay,* a union was denied a place on an election ballot, and the Board's regional director[78] refused to hold a preelection hearing.[79] The union sought injunctive relief in district court alleging the Board denied the union due process by refusing to hold a hearing before the election.[80] The United States Court of Appeals for the Second Circuit ruled that a constitutional claim, not "transparently frivolous," vests the district court with jurisdiction to hear the claim on the merits.[81]

While *Fay* instructs that a district court, in exercise of its equity jurisdiction, can hear a constitutional claim not transparently frivolous,[82] no decision addressed whether an independent, nonconstitutional claim could be brought in district court until *Kyne.*

B. The Leedom v. Kyne *Exception to the Rule of Nonreviewability*

In *Kyne*, a suit for injunctive relief, the Supreme Court addressed the sole issue of federal district court jurisdiction to vacate a Board representation order made in excess of its statutory authority.[83] The Court held that a district court had jurisdiction to enjoin a Board representation order only when the order is made in excess of the Board's delegated power and contrary to a specific prohibition of the Act.[84]

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v. NLRB, 177 F.2d 26, 28 (D.C. Cir. 1949); Fitzgerald v. Douds, 167 F.2d 714, 716-17 (2d Cir. 1948); Madden v. Brotherhood & Union of Transit Employees, 147 F.2d 439, 445 (4th Cir. 1945).

77. 172 F.2d 720 (2d Cir. 1949).

78. Section 3(b) of the Taft-Hartley Act authorizes the NLRB to delegate powers to regional directors under § 9 of the Act:

> (b) The Board is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise. The Board is also authorized to delegate to its regional directors its powers under section 9 to determine the unit appropriate for the purpose of collective bargaining, to investigate and provide for hearings, and determine whether a question of representation exists, and to direct an election or take a secret ballot under subsection (c) or (e) of section 9 and certify the results thereof, except that upon the filing of a request therefore with the Board by any interested person, the Board may review any action of a regional director delegated to him under this paragraph, but such a review shall not, unless specifically ordered by the Board, operate as a stay of any action taken by the regional director.

29 U.S.C. § 153(b).

79. For a discussion of preelection hearings and procedure, see generally J. FEERICK, H. BAER & J. ARFA, *supra* note 23, at 147-92.

80. *Fay,* 172 F.2d at 723.

81. *Id.*

82. *Id.* The Board has not challenged the *Fay* decision. Instead, "in suits claiming constitutional violations, the Board has defended on the merits." Goldberg, *supra* note 67, at 467-68.

83. 358 U.S. 184, 185 (1958).

84. *Id.* at 188.

While *Kyne* permits unions to obtain district court review, its holding is extremely limited. Unions can invoke the *Kyne* rule only when the Board violates a clear and explicit statutory directive.[85] In addition, the Act's legislative history compels courts to narrowly read *Kyne*.[86] In *Boire v. Greyhound Corp.*,[87] a suit to enjoin a representation election, the Supreme Court gave *Kyne* its most restrictive interpretation, carving out the general rule of nonreviewability[88] and defining the parameters of the "extraordinary circumstances" when *Kyne* applies.[89]

The *Boire* Court noted that the legislative history of the Act's review provisions plainly reveals Congress' intent to avoid delays in the commencement of collective bargaining. The Court reasoned that a restrictive interpretation of *Kyne,* significantly limiting access to the district courts for injunctive relief, would be consistent with the legislative intent and purposes of the Act because injunctive relief would result in the delays in collective bargaining that Congess intended to prevent.[90] A suit for declaratory relief, however, may not cause delays in collective bargaining and, therefore, may be consistent with the legislative intent underlying the Act's review

85. In *Kyne,* the statutory directive was the § 9(b)(1) prohibition against ordering a unit comprised of professional and nonprofessional employees unless a majority of such professionals vote for inclusion in such unit. *Id.* at 188-89; *see also* Physicians Nat'l House Staff Ass'n v. Fanning, 642 F.2d 492, 495-96 (D.C. Cir. 1980) (en banc) (discussing the required strict specificity of a statutory command for invoking *Kyne* jurisdiction), *cert. denied,* 450 U.S. 917 (1981). *Kyne,* however, left open the issue of whether its holding should apply to the Board's failure to act in violation of an affirmative mandate. For a discussion of this issue, see F. BARTOSIC & R. HARTLEY, *supra* note 25, at 172-73.

86. Judge Goldberg reflects these sentiments in Bishop v. NLRB, 502 F.2d 1024 (5th Cir. 1974):

> Nowhere in the statutory scheme does Congress mention district court review of NLRB orders in representation cases, and there is a reason for that profound silence. The underlying purpose of the Act is to maintain industrial peace, and to allow employers and unions to rush into federal district court at will to prevent or nullify certification elections would encourage *dilatory tactics* by dissatisfied parties and lead to industrial unrest.

Id. at 1027 (emphasis added) (citation omitted).

87. 376 U.S. 473 (1964).

88. *Id.* at 481-82.

89. *Id.* at 479-80. Courts recognize three narrow exceptions to the general rule of nonreviewability. The first is where the lawsuit presents "public questions particularly high in the scale of our national interest because of their international complexion." McCullock v. Sociedad Nacionel de Marineros de Honduras, 372 U.S. 10, 17 (1963). The second is when the plaintiff makes a clear and strong showing that the Board violated his or her constitutional right. Fay v. Douds, 172 F.2d 720, 723 (2d Cir. 1949). The third is that of *Kyne* and *Boire. See* Florida Bd. of Business Regulation v. NLRB, 686 F.2d 1362, 1368 n.12 (11th Cir. 1982); *Bishop,* 502 F.2d at 1027-28.

90. *Boire,* 376 U.S. at 477-79.

provisions.[91]

IV. Legislative History of the Act

The limited-access review provisions adopted by Congress in the Wagner Act were largely influenced by Congress' dissatisfaction with the Act's predecessor, Public Resolution 44.[92] Public Resolution 44 created the first Labor Board, which administered the provisions of the National Industrial Recovery Act.[93] The resolution allowed for immediate judicial review of representation elections "with the result that efforts to certify representatives and get the bargaining process going were readily thwarted by the employer's taking of any certification to court for review."[94] The House Report for the Wagner Act states that "under [Public Resolution 44's] provision for review of election orders employers have a means of holding up the election for months by an application to the circuit court of appeals. . . . The ability of employers to block elections has been productive of a large measure of industrial strife."[95]

The legislative history of the Wagner Act suggests that due to the experience with Public Resolution 44, Congress intended to prevent the delays in workers' selections of bargaining representatives precipitated by direct appellate review. Consequently, Congress passed section 9(d) of the Wagner Act permitting only indirect review.[96] Congress hoped indirect review would alleviate Public Resolution 44's problems while providing "an exclusive, complete, and adequate remedy whenever an order of the Board made pursuant to section 10(c) is based in whole or in part on facts certified following an election or other investigation pursuant to section 9(c)."[97]

The complete and adequate remedy referred to by the House Report is

91. For an analysis of whether declaratory relief would result in delays in the collective bargaining process, see *infra* text accompanying notes 143-62.

92. H.R.J. Res. 375, 73d Cong., 2d Sess., 78 CONG. REC. 12453 (1934) (repealed 1966).

93. National Industrial Recovery Act, ch. 90, 48 Stat. 195 (1933) (repealed 1966).

94. Note, *supra* note 32, at 377.

95. H.R. REP. NO. 972, 74th Cong., 1st Sess. 5 (1935), *reprinted in* 2 LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935, at 2960 (1985).

96. 29 U.S.C. § 159(d).

97. H.R. REP. NO. 972, *supra* note 95, at 20, *reprinted in* 2 LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935, at 2977 (1985). The applicable part of the House Report on the Wagner Act states in full:

> As previously stated in this report, the efficacy of Public Resolution 44 has been substantially impaired by the provision for court review of election orders prior to the holding of the election. Section 9(d) of the bill makes clear that there is to be no court review prior to the holding of the election, and provides an exclusive, complete, and adequate remedy whenever an order of the Board made pursuant to secion 10(c) is based in whole or in part on facts certified following an election or other investigation pursuant to section 9(c).

available only to aggrieved employers.[98] Section 9(d) provides no method for unions to obtain review of election orders.[99] Consequently, the members of the 76th Congress introduced two bills providing labor organizations and other aggrieved parties with direct review in the courts of appeals.[100] Testifying before the Senate, Charles Fahy, former general counsel of the NLRB, described his objections to the proposed bills: "Whereas prior to the present act the employers used this review of certifications or direction of elections as a means of defeating collective bargaining, *rival unions* would now do so."[101] Congress ultimately rejected both bills,[102] leaving labor organizations without a viable method for obtaining judicial review.

Some years later, Congress again attempted to amend the Act's review provisions. In 1947 Congress passed the Taft-Hartley amendments to the Wagner Act.[103] In considering the amendments,[104] Congress examined a House bill containing an amendment to section 10(f) to provide direct review of Board representation orders for any aggrieved party.[105] The Conference Committee omitted the House amendment to section 10(f), leaving the Wagner Act's review provisions substantially intact. The Conference Committee apparently heeded Senator Taft's warning that this proposal "would permit dilatory tactics in representation proceedings."[106]

Id., reprinted in 2 LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935, at 2977 (1985).

98. Goldberg, *supra* note 67, at 466.

99. *But see supra* text accompanying notes 53-62.

100. Goldberg, *supra* note 67, at 463.

101. *National Labor Relations Act and Proposed Amendments: Hearings on S. 1000, 1264, 1392, 1550, 1580, and 2123 Before the Senate Comm. on Education and Labor,* 76th Cong., 1st Sess. 462 (1939) (emphasis added).

102. *See* Goldberg, *supra* note 67, at 464.

103. Labor-Management Relations (Taft-Hartley) Act, ch. 120, 61 Stat. 136 (1947) (codified as amended at 29 U.S.C. §§ 141-169 (1982)).

104. Among other changes to the Wagner Act, Taft-Hartley added an unfair labor practice sections specifically applicable to union activity. 29 U.S.C. § 158(b).

105. The House Report offered these comments in support of the proposed amendment to § 10(f):

> *Appeals from certification.* . . . The present act permits appeals from certifications by the Board only by employers . . . . This procedure is unfair to everyone; the union that wins, which frequently must wait for many months to exercise its rights; [and] *the union that loses, which as no appeal* at all no matter how wrong the certification may be . . . .

H.R. REP. NO. 245, 80th Cong., 1st Sess. 43 (1947), *reprinted in* LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 334 (1974) (emphasis added).

106. 93 CONG. REC. 6602 (1947). The House Minority Report stated similar objections to the proposed House Bill:

> If this proposal is enacted into law it would have serious adverse consequences on collective bargaining. It is conservatively estimated that [one] year would be the average time necessary to obtain court review of a Board certification . . . . Delay

The Act's legislative history suggests that Congress recognized the disparity and tensions created by the Act's review provisions.[107] Nevertheless, when Congress weighed the advantages of direct appellate review for employees and their unions against the potential disruptions in industrial peace direct review might create,[108] Congress decided that the latter outweighed the former.[109]

In sum, enlightened by its experience with Public Resolution 44, Congress sought to promote industrial stability by restricting the opportunity for using judicial review to: (1) delay the commencement of collective bargaining and (2) block or disrupt existing bargaining relationships. Congress did not, however, consider whether the statutory scheme of review would permit declaratory relief as opposed to injunctive relief.

V. The Distinction Between Declaratory and Injunctive Relief

As a practical matter, a prayer for declaratory relief is often joined with a request for injunctive relief.[110] The Supreme Court, however, has indicated that district court equity jurisdiction may depend on the remedy requested.[111] In *Steffel v. Thompson,*[112] the Court ruled that in cases challenging the constitutionality of a state statute, declaratory relief is appropriate if a state proceeding has not yet commenced, but injunctive relief is improper.[113] The Court reasoned that an injunction would prevent all suits from being prosecuted by the state, whereas a declaratory judgment would give the court the option of declaring unconstitutional a particular application of the statute.[114] In *Steffel,* the Court's decision was influenced by principles of federalism.[115] While the principles of federalism do not affect judicial review of Board representation decisions, *Steffel* offers a valuable principle: "requests for injunctive and declaratory relief [should not be

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would be piled upon delay, during which time collective bargaining would be suspended pending determination of the status of the bargaining agent. Such delays can only result in industrial strife.

H.R. Rep. No. 245, *supra* note 105, at 94 (1947), *reprinted in* Legislative History of the Labor Management Relations Act, 1947, at 385 (1974).

107. Goldberg, *supra* note 67, at 465.

108. *Id.*

109. *Id.*

110. *See* B. Mezines, J. Stein & J. Gruff, *supra* note 64, § 46.03.

111. *See* Steffel v. Thompson, 415 U.S. 452, 475 (1974).

112. *Id.*

113. *Id.*

114. *Id.* at 469-71.

115. *Id.* at 472-73.

treated] as a single issue."[116]

Steffel indicates that the type of relief sought by the plaintiff can be determinative of the district court's jurisdiction.[117] Applying the *Steffel* principle

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116. *Id.* at 463.

117. A district court is authorized to grant declaratory relief pursuant to § 2201 of the Declaratory Judgment Act, 28 U.S.C. §§ 2201-02. Section 2201, however, is a purely remedial statute and does not confer jurisdiction. Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667, 671 (1950); *see also* Jarrett v. Reson, 426 F.2d 213, 216 (9th Cir. 1970); Hatridge v. Aetna Causualty & Surety Co., 415 F.2d 809, 812 (8th Cir. 1966); Buckley v. United States, 494 F. Supp. 1000, 1002 (E.D. Ky. 1980); A & M Gregos, Inc. v. Robertory, 384 F. Supp. 187, 189 n.4 (E.D. Pa. 1974). District court jurisdiction, therefore, must be obtained through some other statute.

District court jurisdiction to review administrative agency conduct often arises under § 1331 or § 1337 of the Judicial Code. 28 U.S.C. §§ 1331, 1337 (1982). Section 1331, referred to as the federal question jurisdiction statute, states that "the district court shall have original jurisdiction of all actions *arising under* the Constitution, laws, or treatises of the United States." 28 U.S.C. § 1331 (emphasis added). The mere fact, however, that a complaint is pleaded so as to bring the action under a federal statute, such as the Wagner Act, does not necessarily mean that action "arises under" that statute within the meaning of § 1331. *See generally* Note, *Federal Question Jurisdiction of Federal Courts and The Declaratory Judgment Act,* 4 VAND. L. REV. 827 (1951) (analyzing "arising under").

Any attempt to define "arising under" must give consideration to the 1976 amendments to § 1331 and the Administrative Procedure Act. Administrative Procedure Act, 5 U.S.C. § 552a-552b (1982). In 1976 Congress amended § 1331 by removing the $10,000 jurisdiction requirement for actions against the United States or an agency, officer, or employee thereof. 28 U.S.C. § 1331(a) (1982), *amending* 28 U.S.C. § 1331 (1964). The Supreme Court interpreted the 1976 amendments as having an obvious effect on district court jurisdiction over agency action. In Califano v. Sanders, 430 U.S. 99 (1977), the Court declared that Congress' removal of the jurisdictional amount permitted the use of § 1331, subject only to other statutory limitations, as a jurisdictional foundation for all actions challenging federal agency conduct:

> On October 21, 1976, Congress enacted Pub. L. No. 94-574, 2721, which amends 28 U.S.C. § 1331(a) to eliminate the requirement of a specified amount in controversy as a prerequisite to the maintenance of "any [§ 1331] action brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity." The obvious effect of this modification, subject only to preclusion-of-review statutes created or retained by Congress, is to confer jurisdiction on federal courts to review agency action, regardless of whether the [Administrative Procedure Act (APA)] of its own force may serve as a jurisdictional predicate. We conclude that this amendment now largely undercuts the rationale for interpreting the APA as an independent jurisdictional provision.

Id. at 105.

The Supreme Court, therefore, has ruled that district court jurisdiction to review agency actions will lie, subject only to a preclusion-of-review statute. Consequently, the question whether a district court can hear a claim for declaratory relief of a Board representation order will depend on whether the NLRA is a preclusion-of-review statute.

Determining whether an Act is a preclusion-of-review statute is a matter of statutory interpretation. In Boire v. Miami Herald Publishing Co., 343 F.2d 17 (5th Cir. 1965), the court considered whether the district court had properly exercised jurisdiction over a Board representation proceeding. The court made clear that such jurisdictional determinations are dictated by congressional intent:

> The question whether the complaint asserts a claim upon which equitable relief may

to district court review of NLRB representation decisions suggests that district court jurisdiction may depend on the type of relief sought.

VI. Declaratory Relief in Representation Cases

A. Florida Board of Business Regulation v. NLRB

While the question raised herein is novel, the federal courts have begun to address it. In 1982, for example, the United States Court of Appeals for the Eleventh Circuit decided *Florida Board of Business Regulation v. NLRB*[118] and offered some important insights. *Florida Business* arose from the NLRB's decision to assert jurisdiction over the jai alai industry.[119] Two rival unions initiated organizing drives for representation of two different units of employees, jai alai players and pari-mutuel employees.[120] The Board asserted jurisdiction over both units and directed an election, despite protest by the employer that the Board should deny jurisdiction over the jai alai industry.[121] The State of Florida, like the employer, also considered the Board's decision erroneous.[122] The state extensively regulated the jai alai industry and feared that Board regulation of the jai alai industry would create insurmountable conflicts.[123] Accordingly, the state filed suit in the district court to enjoin the election and to obtain a declaratory judgment that

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be properly granted, however, is, affected by the general congressional policy to afford "review" of matters arising under section 9 of the Act only after the Board has ordered the complaining party to take some affirmative action based upon the certification.

Id. at 20; *see also* Jaffe, *supra* note 65, at 770-74 (drawing references from a statute silent on district court review); Note, *supra* note 32, at 375 (availability of review is largely a matter of interpreting congressional intent). Accordingly, district court jurisdiction to grant declaratory relief for a Board representation decision can only be accepted if the declaratory relief procedure does not disrupt the legislative intent to avoid the dilatory tactics that postpone the commencement of bargaining or disrupt bargaining relationships. Therefore, the premise this Comment depends on appears sound: the declaratory judgment mechanism can be an accepted method for unions to obtain judicial review only if its does not result in the harms Congress sought to avoid by enacting indirect and limited review provisions.

Section 1337 of the Judicial Code permits the district courts to assert jurisdiction over any action "*arising under*" a federal law regulating commerce. 28 U.S.C. § 1337 (emphasis added). The test for "arising under" required by § 1337 is the same as those demanded by § 1331. Jersey Cent. Power & Light Co. v. Local Union 327, Int'l Bhd. of Elec. Workers, 508 F.2d 687, 699 n.34 (3d Cir. 1975), *vacated on other grounds sub nom.* EEOC v. Jersey Cent. Power & Light Co., 425 U.S. 987 (1976).

118. 686 F.2d 1362 (11th Cir. 1982).

119. *Id.* at 1365.

120. *Id.* at 1364, 1367.

121. *Id.* at 1365.

122. *Id.* at 1366-67.

123. *Id.* at 1366.

the Board lacked authority under section 14(c)(1)[124] of the Act to regulate labor disputes involving jai alai players and pari-mutuels.[125] The district court asserted that it had subject matter jurisdiction over the suit, but declined to enjoin the election because the Board had not abused its discretion under section 14(c)(1).[126] On appeal, the Board challenged the district court's subject matter jurisdiction,[127] and the state asked for reversal of the district court on the section 14(c)(1) issue.[128] The United States Court of Appeals for the Eleventh Circuit affirmed the district court on the jurisdiction issue.[129] The court held that while a district court, absent the extraordinary circumstances rule of *Kyne*[130] and *Boire,*[131] could not enjoin an election or the certification of election results, the district court did have subject matter jurisdiction to hear the claim for declaratory relief.[132]

The Eleventh Circuit's reasoning focuses on the distinction between injunctive and declaratory relief. In *Florida Business* the state asked for injunctive and declaratory relief.[133] As to the injunctive relief, the court ruled that the extraordinary circumstances rule set out in *Boire*[134] and *Kyne*[135] clearly applied and, because the facts did not qualify as an extraordinary circumstance, denied injunctive relief.[136] As to the declaratory relief, however, the court held that the extraordinary circumstances rule did not act to

124. 29 U.S.C. § 164(c)(1).

125. *Florida Business,* 686 F.2d at 1366.

126. *Id.* at 1368.

127. *Id.*

128. *Id.*

129. *Id.* at 1370.

130. *Id.* (citing to Leedom v. Kyne, 358 U.S. 184, 190 (1958)).

131. *Id.* at 1369 (citing to Boire v. Greyhound Corp., 376 U.S. 473, 479 (1964)).

132. *Id.* at 1370. It appears that *Florida Business* has not generated much interest in the legal community. In a brief analysis, commentators suggested that *Florida Business* stood for the proposition that the Board does not have unbridled discretion to assert jurisdiction over an industry heavily regulated by the state. Boisseau and Carlson, *Labor Law,* 34 MERCER L. REV. 1319, 1345-46 (1983). The Second Circuit, in New York Racing Ass'n v. NLRB, 708 F.2d 46 (2d Cir.), *cert. denied,* 464 U.S. 914 (1983), gave the case cursory attention in a footnote. *Id.* at 57 n.6. The Second Circuit decided, without elaboration, that *Florida Business* gave *Kyne* too narrow a reading. *Id.*

In Seafarers Int'l Union v. NLRB, 114 L.R.R.M. (BNA) 3284 (D.D.C. 1983), the District of Columbia Circuit distinguished *Florida Business* because the plaintiff in *Seafarers,* although seeking declaratory relief, had a means of getting appellate review by filing an unfair labor practice charge. *Id.* at 3286.

Because the plaintiff in *Florida Business* was the state, the case arguably could be limited to those situations where the state claims injury by a Board representation order; however, no court has yet limited *Florida Business* to those parameters.

133. 686 F.2d at 1366.

134. *Id.* at 1369 (citing to Boire v. Greyhound Corp., 376 U.S. 473, 479 (1964)).

135. *Id.* (citing to Leedom v. Kyne, 358 U.S. 184, 190 (1958)).

136. *Id.*

limit district court jurisdiction.[137] The Eleventh Circuit noted that the Act's legislative history and the extraordinary circumstances rule limit district court jurisdiction when an employer or a rival union attempt to use the district court to delay a Board-ordered election.[138] The court reasoned that a suit for declaratory relief would not permit the use of the dilatory tactics the legislature sought to avoid by limiting judicial review.[139] Consequently, the Eleventh Circuit concluded that the district court had subject matter jurisdiction over a claim for declaratory relief.[140] Based on this reasoning, the court held that "a plaintiff who cannot seek review of the Board's order in the court of appeals but who claims that the Board violated his federal rights has the right to repair to the district court under any statute that may grant the district court the power to hear the claim."[141]

The Eleventh Circuit posits the proposition that a suit for declaratory relief would not cause the harmful delays in the collective bargaining process Congress sought to avoid.[142] The merits of this theory rest on whether declaratory relief provokes these harms.

B. Testing the Theory

If a union's challenge of a certification in a suit for declaratory relief would not delay the collective bargaining process or disrupt existing bargaining relationships, then the Act does not prevent unions from seeking such relief in district courts. Testing the appropriateness of the declaratory judgment remedy requires examination of two possible scenarios. The first considers a single union organizing drive. The second envisions two or more unions battling for the representation of a unit of employees.

The first scenario presumes that a losing union, dissatisfied with election results, claims the Board erred in its appropriate bargaining unit determina-

137. *Id.* The Eleventh Circuit repeatedly noted that the declaratory relief/injunctive relief distinction influenced its decision:

> It is true that in each case the State asked the district court to enjoin the Board-ordered representation election. As to that prayer for relief the Board's position is correct, for the extraordinary circumstances rule of [*Boire*] and [*Kyne*] was clearly applicable. But the State's complaint asked for more than an injunction against a Board election order; it sought a declaration that the Board lacked statutory and constitutional authority to regulate labor disputes in the jai alai industry as a whole. As to this prayer for relief, the extraordinary circumstances rule had no application.

Id.

138. *Id.*

139. *Id.* at 1370.

140. *Id.*

141. *Id.*

142. *See supra* text accompanying note 139.

tion[143] thereby costing the union the election. Regardless of the correctness of the Board's unit determination, the Act's election bar would prevent the NLRB from holding another election for one year after the earlier election.[144] Consequently, declaratory relief would not permit a union with its declaration of law defining the bargaining unit in hand to rush back onto the scene to request another election. In this scenario, the union's suit for declaratory relief would not cause delays in the collective bargaining process because the workers rejected collective bargaining by voting against the union as their bargaining representative. Thus, the union would not be certified[145] as the bargaining representative, and the employer would not be obligated to engage in collective bargaining.

The second scenario presumes that two unions are engaged in an organizing effort to represent the same group of employees. The losing union, believing that the NLRB's erroneous bargaining unit determination cost it the election, will file for declaratory relief in a federal district court. If the court agrees the Board erred in its unit determination and grants the losing union's prayer for declaratory relief, that union could not rush back onto the scene demanding a new election because the same election bar present in the one-union scenario operates here. The losing union would be precluded from filing a new election petition for one year.[146] Consequently, declaratory relief would not disrupt the bargaining relationship[147] between the winning, certified union and the employer for at least one year. Additionally, meaningful bargaining between the employer and the winning union would not be delayed[148] by the losing union's suit for declaratory relief because the election bar protects the validity of their bargaining relationship for one year. Moreover, because the winning union is certified by the NLRB following the election, the NLRB's certification bar would also be in effect.[149] The certifi-

143. The Board is vested with the authority to make determinations of appropriate bargaining units pursuant to § 9(b). 29 U.S.C. § 159(b).

144. *Id.* § 159(c)(3).

145. *See generally* 1 C. MORRIS, *supra* note 9, at 411-12 (discussing certification of election results).

146. 29 U.S.C. § 159(c)(3).

147. Congress fashioned the Act's review provisions to avoid disruptions in bargaining relationships. *See supra* text accompanying notes 100-01.

148. Congress intended the Act's review provisions to avoid delays in the commencement of collective bargaining. *See supra* text accompanying notes 92-97. In the two union scenario, declaratory relief would not cause delays in the commencement of bargaining. The winning union would be certified and the employer would be obligated to bargain with the certified union. 29 U.S.C. § 158(a). Because of the election bar, the validity of that bargaining relationship could not be challenged by the losing union for one year. Therefore, bargaining could commence without delay.

149. Ray Brooks v. NLRB, 348 U.S. 96, 104 (1954) (approving of Board's certification bar).

cation bar prevents rival unions from filing a valid representation petition for at least one year following the board certification of another union.[150] Furthermore, this rival union scenario might invoke an additional protection of the collective bargaining process—the contract bar.[151] Pursuant to the contract bar, the rival union could not file a representation petition during the life of the contract between the employer and the certified union, except after a three-year period and during some other narrowly defined open periods of the contract.[152] In short, the existing bargaining relationship continues to be guaranteed at least twelve months of insulation from external threats by the election and certification bars[153] and, in many instances, up to three years of insulation due to the contract bar doctrine.[154] Therefore, the harms Congress sought to prevent are not provoked by the district court's granting of declaratory relief.

These two scenarios illustrate that the declaratory judgment remedy does not cause delays and disruptions in collective bargaining which Congress sought to avoid. A grant of declaratory relief does not permit a union to postpone or delay elections, nor does it allow a union to demand a new election. Instead, the union must wait until federal labor laws permit the filing of a new representation petition. Accordingly, there are no delays in the collective bargaining process and no disruptions in existing bargaining rela-

150. *Id.*

151. When a labor organization files an election petition, it essentially asserts that there is a question concerning representation (QCR). Generally, a QCR exists when a labor organization seeks exclusive representation of a unit of employees, but the employer refuses to recognize the union. *See* 1 C. MORRIS, *supra* note 9, at 341-43. There are four bars that preclude a labor organization from raising a QCR: the election bar, the certification bar, the voluntary recognition bar, and the contract bar. *See id.* at 352-66. While each of these bars independently operates within their own set of rules, all four share the common objectives of promoting industrial stability and encouraging stable labor relations. *See* F. BARTOSIC & R. HARTLEY, *supra* note 25, at 147-50. Under the contract bar rule, a contract will operate to bar an election for a period of three years. General Cable Corp., 139 N.L.R.B. 1123, 1125 (1962).

152. The contract bar doctrine allows for a 30 day open period during which a petition (raising a QCR) may be filed. The open period begins 90 days and ends 60 days prior to the expiration of the contract or after three years, whichever comes first. Another open period arises after every three years or at the expiration of a contract provided no new contract is executed. *See* F. BARTOSIC & R. HARTLEY, *supra* note 25, at 150. Further, if no QCR is raised during the appropriate open period, a new contract will operate to reactivate the bar. Shen-Valley Meat Packers, 261 N.L.R.B. 958, 960 (1982).

The declaratory judgment theory will not give rival unions the opportunity to disrupt existing bargaining relationships during an open period as an incumbent union can demand that an employer continue bargaining during the open period. *See* RCA Del Caribe, 262 N.L.R.B. 963, 965 (1982). However, if the employer knows, in good faith based on objective evidence, that the incumbent no longer enjoys majority status, the employer must refuse to renegotiate with the incumbent. NLRB v. Pepsi Cola Bottling Co., 454 F.2d 5, 6 (6th Cir. 1972).

153. *See supra* notes 144, 149-50 and accompanying text.

154. *See supra* note 152 and accompanying text.

tionships. It appears that the declaratory judgment theory satisfies congressional standards.

The previous discussion of the election bar, however, reveals another compelling value underlying our national labor policy. The election bar allows an employer the opportunity to regroup and settle his business for one year following the onslaught of a union organizing drive,[155] and it encourages business stability and economic prosperity by safeguarding the employer for one year against another organizing drive.[156] Although a union's suit for declaratory relief would not join the employer as a party, an employer could choose to intervene in the action.[157] Assuming such employer intervention, the unions suit for declaratory relief would entangle the employer in costly and time-consuming litigation. This litigation would deny the employer an opportunity to settle and stabilize his business. The declaratory judgment theory, therefore, might conflict with the values promoted by the election bar.

Regardless of the soundness of this reasoning, the election bar values probably would not operate to strike down the declaratory relief theory for two reasons. First, any conflict between the election bar values and the declaratory judgment procedure created by employer intervention in the union's declaratory judgment action is the same conflict Congress allows to exist between the LMRA's present review provisions and the election bar values. As previously noted, under the LMRA's present review provisions, an employer can obtain judicial review of an NLRB representation decision by refusing to bargain with the winning, certified union.[158] The refusal to bargain violates section 8(a)(5) and entangles the employer in the costly and time-consuming litigation required to defend the section 8(a)(5) charge.[159] Under such circumstances, the employer, following the election, would have no opportunity to settle and stabilize his business. Consequently, the LMRA's existing review provisions permit the sort of disruptions in business

155. 29 U.S.C. § 159(c)(3).

156. Congress included § 9(c)(3), the election bar, in the Taft-Hartley amendments out of the concern that the Wagner Act permitted a labor organization to subject an employer to election upon election. Congress viewed this potential onslaught as both unfair to the employer and inconsistent with the Act's objective of promoting industrial stability. *See* 93 CONG. REC. 7529 (1947).

157. The Act confers intervention rights upon a successful charging party and a successful respondent. United Auto. Workers Local 283 v. Scofield, 382 U.S. 205, 211, 216 (1965); *see also* 2 C. MORRIS, *supra* note 9, at 1700 (intervention rights).

158. *See supra* text accompanying notes 47-52 (discussing employer's method for obtaining judicial review).

159. *See supra* notes 47-52 and accompanying text (discussing employer § 8(a)(5) violations).

that the election bar values seek to prevent.[160] Second, the NLRB, not the employer, is the defendant in the declaratory judgment action, and the NLRB carries the legal burden of defending its decision in the representation case.[161] Also, the NLRB is likely to support the same positions as the employer would because the NLRB decided the representation issue in the employer's favor. Accordingly, the employer may elect not to intervene because the NLRB will defend its representation decision, and the informed employer will know that courts give great deference to Board decisions.[162]

C. "Further Relief" Under 28 U.S.C. Section 2202

One additional problem must be resolved before the declaratory procedure can be accepted as a method for unions to obtain judicial review. Section 2202 of the Judicial Code[163] states that "[f]urther necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment."[164] Thus, arguably, a district court judge could order a new election as "further relief" to the declaratory judgment.[165] The decision to give further relief is discretionary[166] and subject to various limitations.[167]

In the arena of public and administrative law, there are two limitations that prevent a federal district court from ordering a new election as further relief. First, the doctrine of judicial restraint instructs a federal district court judge to avoid unwarranted interference with a coordinate branch of government.[168] Accordingly, whatever the scope of a district court's authority under section 2202, it must not unduly interfere with other congressional policy, such as Congress' national labor policy.[169] As discussed previously, Congress specifically fashioned the LMRA's review provisions to avoid dis-

160. For a discussion of the election bar values, see *supra* notes 155-56 and accompanying text.

161. *See* F. BARTOSIC & R. HARTLEY, *supra* note 25, at 20-24.

162. *See infra* text accompanying notes 185-93.

163. 28 U.S.C. § 2202.

164. *Id.*

165. District courts are authorized to grant coercive relief in connection with a final declaratory judgment entered. *See* Stephenson v. Equitable Life Assurance Soc'y of the United States, 92 F.2d 406, 410 (4th Cir. 1937); Motor Terminals, Inc. v. National Car Co., 92 F. Supp. 155, 161 (D. Del. 1949); *see also* Beacon Const. Co. v. Matco Elec. Co., 521 F.2d 392, 399-400 (2d Cir. 1975) (further relief awardable in a declaratory judgment action includes an award for damages).

166. *See* Abbott Laboratories v. Gardner, 387 U.S. 136, 148 (1967).

167. *See, e.g.*, Cole v. McClellan, 439 F.2d 534, 533-36 (D.C. Cir. 1970).

168. *Id.*

169. See *supra* notes 2-5 and accompanying text for Congress' national labor policy.

ruptions in existing bargaining relationships.[170] The question a federal district court judge should address is whether an order directing a new election would respect Congress' labor policy regarding judicial review. In the two-union scenario,[171] if the court granted the losing union's request for declaratory relief and, as further relief, ordered a new election, the existing bargaining relationship between the winning, certified union and the employer would be interrupted. Consequently, the court's order directing a new election would violate Congress' policy to prevent disruptions in existing bargaining relationships. Furthermore, Congress included the election bar in the LMRA to promote industrial stability.[172] An order by the district court directing a new election, at a time when the election bar had not yet passed, would clearly violate Congress' policy to ensure industrial stability and, therefore, would be an improper exercise of remedial authority under section 2202.

Second, before a court can properly exercise its discretion to grant declaratory and further relief, it must take into account whether its action would improperly intrude on matters committed to an administrative body.[173] The NLRB, statutorily vested with the authority to create rules "as may be necessary to carry out the provisions of [the Act],"[174] crafted the certification and contract bars[175] to advance the LMRA's objective to promote the collective bargaining process.[176] These bars represent firmly entrenched NLRB policies which have been given the stamp of approval by the judiciary.[177] A federal district court order directing a new election, made at a time when the certification or contract bars had not expired, would undermine and improperly intrude on NLRB and congressional policy to promote the collective bargaining process.

VII. The Role of the Judiciary and the Standard of Review

One potential problem with accepting the theory offered herein is that the court's expanded jurisdiction might result in an unwise shift of authority over labor disputes from the Board to the courts. By congressional design,

170. *See supra* text accompanying notes 92-109.

171. *See supra* notes 146-54 and accompanying text.

172. *See supra* notes 155-56 and accompanying text.

173. Public Serv. Comm'n v. Wycoff Co., 344 U.S. 237, 246 (1952).

174. 29 U.S.C. § 156 (1982).

175. *See supra* text accompanying notes 150-52.

176. *See supra* text accompanying notes 2-5.

177. Brooks v. NLRB, 348 U.S. 96, 104 (1954) (approving certification bar); Bell & Howell Co. v. NLRB, 598 F.2d 136, 149 n.44 (D.C. Cir. 1979) (citing with approval the contract bar rule set forth by the NLRB in General Cable Corp., 139 N.L.R.B. 1123, 1125 (1962) and Deluxe Metal Furniture Co., 121 N.L.R.B. 995, 997-1004 (1958)).

the NLRB, and not the courts, has been assigned the primary role of umpire in representation disputes.[178] Election proceedings often involve difficult and complex questions regarding labor relations that are unfamiliar to district court judges.[179] Furthermore, the Board is an "expert" agency with extensive, day-to-day experience in the administration of the Act.[180] The NLRB possesses a familiarity with the circumstances, backgrounds, and relationships comprising labor disputes and, therefore, is better equipped to settle disputes than a district court judge.[181] The courts, however, provide the immediate check against arbitrary agency conduct. Ample congressional signals[182] and judicial opinions[183] exist supporting the notion that Congress did not intend to preclude the judiciary from exercising its checking function in settling labor disputes.[184]

Difficulty arises in striking a balance between the need for the NLRB to exercise its expertise and the need for a functional judiciary, checking arbitrary agency conduct.[185] *Florida Business* suggests striking the balance by allowing access to the judiciary for declaratory relief, while truncating the district court's authority by requiring a deferential standard of review.[186] In *Florida Business*, the NLRB asserted jurisdiction over the jai alai industry notwithstanding the state's objection that the NLRB declines jurisdiction over the dog racing industry, an industry similar to jai alai.[187] Accordingly, the Eleventh Circuit struck down the Board's decision to assert jurisdiction over the pari-mutuel employees only because the Board arbitrarily treated the jai alai industry differently than the similarly situated dog racing industry without offering good reasons.[188] The court asserted that the case could

178. Bishop v. NLRB, 502 F.2d 1024, 1027 (5th Cir. 1974).

179. Goldberg, *supra* note 67, at 479.

180. NLRB v. Hearst Publications, 322 U.S. 111, 130 (1944).

181. *Id.*

182. *See supra* text accompanying notes 47-52 (Congress permits employers to trigger the Act's review provisions, thereby giving the judiciary the opportunity to check Board actions).

183. *See* American Ship Bldg. Co. v. NLRB, 380 U.S. 300, 316 (1965).

184. *Id.*

185. Congress can, and does, delegate its authority to administrative agencies. Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 398 (1940). Congress delegated its authority to the NLRB to administer the process by which workers select bargaining representatives. 29 U.S.C. § 159. Although Congress can preclude judicial review of agency action, *see* Califano v. Sanders, 430 U.S. 99, 105 (1977), Congress has not completely precluded the judiciary from exercising its checking function over NLRB representation decisions. *See supra* text accompanying notes 182-84. The question, therefore, is how much deference Congress intended the courts to display when reviewing NLRB representation decisions. Judicial deference is manifested in the scope or standard of review employed by a court. *See generally* 2 C. MORRIS,, *supra* note 9, at 1704-13 (scope of review of NLRB decisions).

186. 686 F.2d 1362, 1372 (11th Cir. 1982).

187. *Id.* at 1367.

188. *Id.* at 1372.

have easily been decided differently "if the NLRB had given even scant justification for its different treatment of jai alai and race track pari-mutuel employees."[189]

Finding that the statutory scheme for judicial review fashioned by Congress permits declaratory relief does not create risks of judicial overreaching. The standard of review, rather than the district court's jurisdiction, presents risks of judicial overreaching. The Eleventh Circuit's standard appears to be the accepted standard for review of representation decisions.[190] Generally, the Supreme Court has held that decisions with respect to these matters are "rarely to be disturbed."[191] *Local 1325, Retail Clerks International Association*[192] sets out the precise standard of review. The United States Court of Appeals for the District of Columbia Circuit instructed that a reviewing court should assure that the Board has articulated the factors underlying its decision and determine whether these factors are sufficiently substantial to defend a claim of unreasoned arbitrariness.[193]

VIII. CONCLUSION

The LMRA's provisions for review of NLRB representation decisions create a disparity in our federal labor laws. An employer can trigger the Act's review provisions and obtain review by committing a section 8(a)(5) refusal to bargain violation. Although a union may potentially trigger the Act's review provisions by committing a section 8(b)(7)(B) unlawful recognitional picketing violation, the judiciary frequently does not permit review of a representation decision through the 8(b)(7)(B) mechanism. Therefore, a union may find itself without a method of obtaining review.

The disparities created by the Act's review provisions may add to the tensions presently existing in American labor relations. Employer coercive conduct appears to be increasing, and the NLRB has been more responsive to employers than to workers and their unions. As a result, workers and un-

189. *Id.* The Eleventh Circuit further indicated that the standard of review should be based on arbitrary agency conduct:

> [W]e think it enough that the State has shown that the NLRB treated two industries, identical in all comparable respects, differently, and *gave no reasons for doing so.* The NLRB's actions in this case "fall somewhere *on the distant side of arbitrary,*" and violate the "fundamental principles of reasoned explanation."

Id. (emphasis added) (citation omitted).

190. *See id.* (for standard applied by the Eleventh Circuit).

191. Packard Motor Car Co. v. NLRB, 33 U.S. 485, 491 (1947).

192. 414 F.2d 1194 (D.C. Cir. 1969).

193. *Id.* at 1201; *see also* J. ABODEELY, R. HAMMER & A. SANDLER, THE NLRB AND THE APPROPRIATE BARGAINING UNIT 7-8 (Labor Relations and Public Policy Series No. 3, 1981).

ions, without a judicial forum in which to challenge NLRB representation decisions, appear to have lost faith in the Act.

These tensions may be alleviated by the availability of declaratory relief in the district courts. The congressional scheme governing judicial review manifests an intent to avoid delays and disruptions in the collective bargaining process. Consequently, the efficacy of the declaratory judgment theory hinges on whether granting declaratory relief creates any of these harms. Because a suit for declaratory relief would not result in these harms, declaratory relief is consistent with Congress' intent and should be given serious consideration.

Frank Frio