Michigan Law Review

Volume 110 | Issue 1

2011

Deconstructing 'Just and Proper': Arguments in Favor of Adopting the 'Remedial Purpose' Approach to Section 10(J) Labor Injunctions

William K. Briggs
University of Michigan Law School

NOTE

DECONSTRUCTING "JUST AND PROPER": ARGUMENTS IN FAVOR OF ADOPTING THE "REMEDIAL PURPOSE" APPROACH TO SECTION 10(J) LABOR INJUNCTIONS

*William K. Briggs**

Congress, through the 1947 addition of section 10(j) to the National Labor Relations Act, authorized district courts to grant preliminary injunctive relief for unfair labor practices if they deem such relief "just and proper." To this day a circuit split persists over the correct interpretation of this "just and proper" standard. Some circuits interpret "just and proper" to require application of the traditional equitable principles approach that normally governs preliminary injunctions. Other circuits interpret "just and proper" to require an analysis of whether injunctive relief is necessary to preserve the National Labor Relations Board's remedial power. This Note examines the justifications behind these two interpretations in light of section 10(j)'s statutory structure—most notably, the use of the just and proper standard in two other provisions of the National Labor Relations Act. It also considers the legislative history of section 10(j) and the public policy consequences underlying Congress's mandate granting the Board exclusive jurisdiction to seek injunctive relief in court under section 10(j). This Note argues that an examination of these factors reveals that Congress intended for courts to focus their section 10(j) analysis on the preservation of the National Labor Relations Board's remedial power rather than on traditional equitable principles.

TABLE OF CONTENTS

INTRODUCTION

On September 30, 2010, the general counsel of the National Labor Relations Board ("the Board") issued a memorandum to all of its regional offices. This memorandum announced an initiative to expedite the processing of section 10(j) requests for interim injunctive relief in cases involving unlawful discharges during union organizing campaigns.[1] Section 10(j) is a provision in the National Labor Relations Act ("NLRA") that authorizes the Board to seek a preliminary injunction in federal court on behalf of a private party who has filed a complaint of an unfair labor practice with the Board.[2] In addition to unlawful discharges, unfair labor practices governed by section 10(j) include interfering with an organizational campaign, undermining a bargaining representative, refusing to permit protected activity, and refusing to bargain in good faith.[3] Although the Board possesses the jurisdiction to rule on the merits of these unfair labor practices, an injunction is often necessary because of the length of time the Board's adjudicative process takes.[4] The general counsel's initiative aims to shorten the Board's timeline in determining whether to seek this type of injunction by implementing strict time limits for each step of the process.[5] If the Board

---

* J.D. Candidate, May 2012. I would like to thank my note editors, Matthew Miller and Adam Teitelbaum, for their helpful suggestions. I would also like to thank Professor James J. Prescott for his insight and feedback. I am additionally grateful to Professor Nicholas Bagley and Rohan Pai, who graciously provided comments on drafts, as well as the Honorable Robert Holmes Bell and his staff, who provided the experience that served as the inspiration behind this Note. Most importantly, I would like to thank my parents and Suzanne Cambou for their support throughout this process. This Note is dedicated to my late grandfather, the Honorable Stephen W. Karr.

1. Philip A. Miscimarra et al., *Acting NLRB General Counsel Announces a "Renewed Agency-Wide Focus on Interim Injunctive Relief"*, MONDAQ (Oct. 11, 2010), http://www.mondaq.com/unitedstates/article.asp?articleid=112010.

2. 29 U.S.C. § 160(j) (2006). This provision was included in the Taft-Hartley amendments to the NLRA in 1947. *See* Labor-Management Relations (Taft-Hartley) Act, ch. 120, sec. 101, § 10(j), 61 Stat. 136, 149 (1947). Note that the statutory language is codified under a different section number in the United States Code. This Note will follow previous scholars in using the applicable session law section number in text while using the United States Code section number in citations.

3. OFFICE OF THE GEN. COUNSEL, U.S. NAT'L LABOR RELATIONS BD., ELECTRONIC REDACTED SECTION 10(J) MANUAL USERS GUIDE 4–9 (2002).

4. *See* S. REP. NO. 80-105, at 8 (1947), *reprinted in* 1 U.S. NAT'L LABOR RELATIONS BD., LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 414 (1948). Without an injunction, there is often a significant danger of irreparable harm occurring before the Board can put a stop to an unfair labor practice. *Id.* at 433; *see also* Catherine L. Fisk & Deborah C. Malamud, *The NLRB in Administrative Law Exile: Problems with Its Structure and Function and Suggestions for Reform*, 58 DUKE L.J. 2013, 2028 (2009) (arguing that judicial limitations on section 10(j) injunctive relief "create[] a huge incentive for employers to deliberately violate the statute knowing that they will reap the benefit of illegal conduct for a long time, if not permanently in the case of a successful defeat of an organizing campaign").

5. OFFICE OF THE GEN. COUNSEL, NAT'L LABOR RELATIONS BD., EFFECTIVE SECTION 10(j) REMEDIES FOR UNLAWFUL DISCHARGES IN ORGANIZING CAMPAIGNS 2 (2010), *available*

were able to process section 10(j) requests faster, it would have the opportunity to bring suit in court more often, which would likely lead to an increase in the number of section 10(j) petitions for injunctive relief the Board seeks. This likely increase should carry with it a renewed focus on the standards courts use to resolve section 10(j) petitions.

Section 10(j) provides as follows:

> The Board shall have power, upon issuance of a complaint . . . charging that any person has engaged in or is engaging in an unfair labor practice, to petition any United States district court . . . for appropriate temporary relief or restraining order. Upon the filing of any such petition the court . . . shall have jurisdiction to grant to the Board such temporary relief or restraining order *as it deems just and proper*.[6]

A circuit split exists over the proper interpretation of this just and proper standard.[7] Although many different approaches have been adopted since the passage of section 10(j) in 1947, the federal courts of appeals currently follow two distinct approaches.[8] The Third, Fifth, Sixth, Tenth, and Eleventh Circuits currently favor the "remedial purpose" approach, which requires the court to consider only whether injunctive relief is necessary to preserve the remedial powers of the Board.[9] In contrast, the First, Second, Fourth, Seventh, Eighth, and Ninth Circuits favor the traditional "equitable principles" approach, which is used for general injunctions.[10] This approach asks the court to consider (1) the petitioning party's likelihood of success on the merits, (2) the possibility of irreparable harm to the petitioning party if relief is not granted, (3) the extent to which the balance of hardships favors the

---

at http://op.bna.com/dlrcases.nsf/id/ldue-89sqj2/$File/NLRB%20GC%20Memo%2010-07.pdf. The new process's expedited timeline requires regional directors to, inter alia, obtain all of the charging party's evidence within fourteen days and make a decision on the merits of the case within forty-nine days. *Id.* at 2–3.

6. 29 U.S.C. § 160(j) (2006) (emphasis added).

7. Some courts incorporate a "reasonable cause" prong. However, this prong is ignored for the sake of this Note because "the 'reasonable cause' test is generally a non-factor for all the circuits." Richard B. Lapp, *A Call for a Simpler Approach: Examining the NLRA's Section 10(j) Standard*, 3 U. PA. J. LAB. & EMP. L. 251, 268 (2001).

8. Previous standards used include (1) the irreparable harm standard, (2) the status quo standard, (3) the public interest standard, and (4) the legislative purpose standard. Leslie A. Fahrenkopf, Note, *Striking the "Just and Proper Balance": A Call for Traditional Equitable Criteria for Section 10(j) Injunctions*, 80 VA. L. REV. 1159, 1172 (1994).

9. *See, e.g.*, Overstreet *ex rel.* NLRB v. El Paso Elec. Co., 176 F. App'x 607 (5th Cir. 2006); Ahearn *ex rel.* NLRB v. Jackson Hosp. Corp., 351 F.3d 226 (6th Cir. 2003); Sharp *ex rel.* NLRB v. Webco Indus., Inc., 225 F.3d 1130 (10th Cir. 2000); Hirsch *ex rel.* NLRB v. Dorsey Trailers, Inc., 147 F.3d 243 (3d Cir. 1998); Arlook *ex rel.* NLRB v. S. Lichtenberg & Co., 952 F.2d 367 (11th Cir. 1992). This approach is often confusingly called the "just and proper" approach. For clarity's sake, I refer to it as the "remedial purpose" approach instead.

10. *See, e.g.*, McDermott *ex rel.* NLRB v. Ampersand Publ'g, L.L.C., 593 F.3d 950 (9th Cir. 2010); Mattina *ex rel.* NLRB v. Kingsbridge Heights Rehab. & Care Ctr., 329 F. App'x 319 (2d Cir. 2009); Muffley *ex rel.* NLRB v. Spartan Mining Co., 570 F.3d 534 (4th Cir. 2009); Pye *ex rel.* NLRB v. Excel Case Ready, 238 F.3d 69 (1st Cir. 2001); Sharp *ex rel.* NLRB v. Parents in Cmty. Action, Inc., 172 F.3d 1034 (8th Cir. 1999); Kinney *ex rel.* NLRB v. Pioneer Press, 881 F.2d 485 (7th Cir. 1989).

respective parties, and (4) whether the public interest will be advanced by granting the relief.[11] As a practical matter, the remedial purpose approach results in greater judicial deference to the Board's determinations than the equitable principles approach.

This Note argues that courts that have adopted the equitable principles approach have inappropriately removed the just and proper standard of section 10(j) from its structural and historical context. This context reveals the remedial purpose approach as the best representation of congressional intent. Part I examines the two major judicial approaches and the justifications behind them. It then reviews these justifications in light of the use of the just and proper standard in two other provisions of the NLRA, concluding that the statutory structure supports the remedial purpose reasoning. Part II expands this structural argument by examining the public policy consequences of the unique congressional mandate embodied in section 10(j). Congress's mandate means that section 10(j) injunctions are different from ordinary injunctions in ways that support Part I's finding that congressional intent favors the remedial purpose approach. Next, Part III looks at section 10(j)'s legislative history and finds that this history reinforces the conclusion that Congress intended for courts to apply the remedial purpose approach. Lastly, Part IV addresses a common concern that the remedial purpose approach removes courts from the section 10(j) process altogether, allowing Board bias to unfairly influence injunction decisions. This Part finds such a concern unwarranted.

I. THE USE OF "JUST AND PROPER" IN NLRA SECTIONS 10(E) AND 10(F)

Both judicial approaches to the just and proper standard of section 10(j) recognize the congressional purpose to preserve the Board's remedial powers. Both sides also agree that by forcing a return to the previolation status quo, section 10(j) relief preserves the Board's powers by preventing the occurrence of irreparable harm that would make final Board adjudication on the merits meaningless.[12] However, they disagree on Congress's other purposes in enacting section 10(j). Proponents of the remedial purpose approach argue that section 10(j) was passed to limit judicial discretion.[13] In

11. *See, e.g.*, *Ampersand Publ'g*, 593 F.3d at 957; *Parents in Cmty. Action*, 172 F.3d at 1038 n.2; Rivera-Vega *ex rel.* NLRB v. ConAgra, Inc., 70 F.3d 153, 164 (1st Cir. 1995).

12. *Compare* Glasser *ex rel.* NLRB v. ADT Sec. Servs., Inc., 379 F. App'x 483, 485 (6th Cir. 2010) ("The purpose of a § 10(j) injunction is 'to give the Board a means of preserving the status quo pending completion of its regular procedures which might be ineffective if immediate relief cannot be granted.' " (quoting Calatrello *ex rel.* NLRB v. Automatic Sprinkler Corp. of Am., 55 F.3d 208, 214 (6th Cir. 1995))), *with* Hoffman *ex rel.* NLRB v. Inn Credible Caterers, Ltd., 247 F.3d 360, 368 (2d Cir. 2001) ("One of the underlying purposes of § 10(j) is to preserve the status quo . . . .").

13. *See* Sarah Pring, Note, *Justice Delayed, Justice Denied: The Detroit Newspaper Strike and the Future of Section 10(j) Injunctions in the Sixth Circuit*, 47 WAYNE L. REV. 277, 303–04 (2001) (arguing that section 10(j) was intended to focus judicial scrutiny on protecting the remedial powers of the Board rather than vindicating the rights of private parties).

contrast, proponents of the equitable principles approach believe section 10(j) was passed to curtail labor power.[14] Though these two differing views of congressional intent are not facially incompatible, the two judicial approaches they underlie have proved to be incompatible in practice. While proponents of both approaches look to the language of section 10(j) for support, section 10(j)'s structural context—the use of the just and proper standard in two other provisions of the NLRA—reveals that the remedial purpose approach is most compatible with Congress's intent.

The remedial purpose approach claims to more accurately reflect the congressional intent of section 10(j) because it results in the limited judicial discretion intended by the Taft-Hartley Act, which amended the NLRA in 1947.[15] The approach encourages courts to defer to administrative findings and establishes a presumption in favor of granting injunctive relief. It requires the Board to demonstrate only that injunctive relief is necessary to preserve the remedial purpose of the NLRA.[16] Under this approach, courts should defer to the Board's determination of whether an unfair labor practice has occurred in lieu of considering the merits of the case itself.[17] This deference requires courts to determine whether the Board's legal theory is supported by the facts and not to substitute their own legal theory or analysis.[18]

In contrast, the equitable principles approach is supported by the view that the Taft-Hartley amendments were enacted to curtail labor power.[19] According to the Eighth Circuit, section 10(j) "is a limited exception to the federal policy against labor injunctions."[20] Deference to administrative findings, according to proponents of the equitable principles approach, unfairly tips the scales in favor of labor, contrary to Congress's statutory intent to

---

14. *See* Lapp, *supra* note 7, at 262 (arguing that "preventing union abuses" was one of the main rationales underlying the enactment of section 10(j)).

15. *See* Lysa M. Saltzman & Antonio Salazar-Hobson, *The Ultimate Hangup on the NLRA: Denial of Section 10(J) Injunctive Relief for La Conexion Familiar*, 32 CAL. W. L. REV. 225, 234–35 (1996). Section 10(j) was added to the NLRA as part of the Taft-Hartley Act. *See supra* note 2.

16. *See, e.g.*, Ahearn *ex rel.* NLRB v. Jackson Hosp. Corp., 351 F.3d 226, 237 (6th Cir. 2003); Sharp *ex rel.* NLRB v. Webco Indus., Inc., 225 F.3d 1130, 1133–34 (10th Cir. 2000); Hirsch *ex rel.* NLRB v. Dorsey Trailers, Inc., 147 F.3d 243, 247 (3d Cir. 1998); Arlook *ex rel.* NLRB v. S. Lichtenberg & Co., 952 F.2d 367, 371 (11th Cir. 1992); Boire *ex rel.* NLRB v. Pilot Freight Carriers, Inc., 515 F.2d 1185, 1188–89 (5th Cir. 1975). While courts following the remedial purpose approach do not specify the level of deference owed to the Board's findings concerning whether injunctive relief is necessary to preserve the remedial purpose of the NLRA, I advocate for the use of the substantial-evidence level. *See infra* Part IV.

17. *See* Pring, *supra* note 13, at 290–91 (citing Frye *ex rel.* NLRB v. Specialty Envelope, Inc., 10 F.3d 1221, 1224 (6th Cir. 1993)).

18. *See* Glasser *ex rel.* NLRB v. ADT Sec. Servs., Inc., 379 F. App'x 483, 485 n.2 (6th Cir. 2010).

19. *See* Fahrenkopf, *supra* note 8, at 1189; *see also* Sharp *ex rel.* NLRB v. Parents in Cmty. Action, Inc., 172 F.3d 1034, 1037 (8th Cir. 1999); Kinney *ex rel.* NLRB v. Pioneer Press, 881 F.2d 485, 488 (7th Cir. 1989).

20. *Parents in Cmty. Action*, 172 F.3d at 1037.

protect the rights of management as well as labor.[21] However, many courts that apply this approach advocate for keeping the congressional purpose to preserve the Board's remedial powers in mind while applying the four prongs of the equitable principles approach.[22] When discussing the standard of review, these courts often claim that deference toward the Board's findings *is* appropriate.[23] When it comes to actually applying the equitable principles, however, these courts make no mention of deference and treat the Board as if it were any other party.[24] In any event, most proponents of the equitable principles approach agree that section 10(j) relief is a remedy reserved for serious and extraordinary circumstances.[25]

Both camps in the circuit split argue that the language of section 10(j) supports their approach.[26] Central to this debate is the Supreme Court's decision in *Weinberger v. Romero-Barcelo*, which, although it did not address section 10(j) in particular, discussed injunctive relief in general.[27] *Romero-Barcelo* held that if Congress wanted courts to avoid using the equitable principles approach, it could "intervene and guide or control the exercise of the courts' discretion."[28] This language has been interpreted to mean that "when a federal statute authorizes injunctive relief, the presumption is that Congress intends the courts to exercise their traditional equitable discretion."[29] Therefore, both sides have looked to the language of section 10(j) to determine whether Congress provided any guidance.[30]

---

21. *See* Fahrenkopf, *supra* note 8, at 1189; *see also* Michael C. Duff, *Embracing Paradox: Three Problems the NLRB Must Confront to Resist Further Erosion of Labor Rights in the Expanding Immigrant Workplace*, 30 BERKELEY J. EMP. & LAB. L. 133, 185 (2009) ("[T]he Seventh Circuit's formulation [which includes the traditional equitable principles] is reasonably representative of the standard the NLRB often finds most difficult to meet.").

22. *See, e.g.*, Mattina *ex rel.* NLRB v. Kingsbridge Heights Rehab. & Care Ctr., 329 F. App'x 319 (2d Cir. 2009); Muffley *ex rel.* NLRB v. Spartan Mining Co., 570 F.3d 534 (4th Cir. 2009); Miller *ex rel.* NLRB v. Cal. Pac. Med. Ctr., 19 F.3d 449 (9th Cir. 1994).

23. *See, e.g.*, *Kingsbridge*, 329 F. App'x at 321 (quoting *Silverman v. Major League Baseball Player Relations Comm., Inc.*, 67 F.3d 1054, 1059 (2d Cir. 1995)); *Cal. Pac. Med. Ctr.*, 19 F.3d at 460.

24. *See, e.g.*, *Kingsbridge*, 329 F. App'x at 321 (making no more references to deference after stating in the standard of review that deference was appropriate); *Cal. Pac. Med. Ctr.*, 19 F.3d at 460 (same).

25. *See* Fahrenkopf, *supra* note 8, at 1189. *Contra Pioneer Press*, 881 F.2d at 493 ("[N]o rule of law limits injunctive relief to 'serious and extraordinary circumstances.' ").

26. *Compare* Ahearn *ex rel.* NLRB v. Jackson Hosp. Corp., 351 F.3d 226, 235 (6th Cir. 2003) (dismissing respondent's argument that Sixth Circuit precedent in a Title VII case compelled the use of the equitable principles approach in section 10(j) cases on the ground that Title VII does not have the same "just and proper" language as section 10(j)), *with Spartan Mining*, 570 F.3d at 541–42 (arguing that "just and proper" in section 10(j) is just another way of saying "equitable").

27. 456 U.S. 305 (1982).

28. *Romero-Barcelo*, 456 U.S. at 313.

29. Sharp *ex rel.* NLRB v. Parents in Cmty. Action, Inc., 172 F.3d 1034, 1038 (8th Cir. 1999).

30. *See supra* note 26.

According to proponents of the equitable principles approach, the words "just and proper" are not enough to overcome the *Romero-Barcelo* presumption.[31] For example, the Ninth Circuit has held that " 'just and proper' is another way of saying 'appropriate' or 'equitable.' "[32] Likewise, the Fourth Circuit, in agreement, has held that "the phrase 'just and proper' does not evince a 'necessary and inescapable' congressional intent to depart from traditional equitable standards."[33]

These arguments have yet to be convincingly countered by proponents of the remedial purpose approach. For example, in response to a party's argument that the remedial purpose approach was in violation of *Romero-Barcelo*, the Sixth Circuit unpersuasively responded that "[i]f the current [Sixth Circuit] 10(j) standard were in clear contravention of Supreme Court precedent, it seems unlikely that this or any other circuit would have continued to adhere to it for two decades without concern."[34]

However, the lack of an adequate judicial argument does not necessarily mean that proponents of the equitable principles approach are correct. *Romero-Barcelo* provided that a "necessary and inescapable inference" of Congress's desire to have the courts avoid the use of the equitable principles approach would be sufficient to overcome the presumption in favor of those principles.[35] Courts searching for evidence of a "necessary and inescapable inference" in other statutes have held that a statute's language, purpose, history, structure, and underlying policy are relevant factors to consider.[36]

Looking at other uses of "just and proper" in the NLRA provides evidence of a "necessary and inescapable inference" that "just and proper" does not mean equitable. For example, the structures of NLRA sections 10(e) and (f) are parallel to that of section 10(j).[37] Section 10(e) provides as follows:

> The Board shall have power to petition any court of appeals of the United States . . . for the enforcement of [a Board] order and for appropriate temporary relief or restraining order, and . . . . the court . . . shall have

---

31. *See, e.g.*, *Spartan Mining*, 570 F.3d at 542; Miller *ex rel.* NLRB v. Cal. Pac. Med. Ctr., 19 F.3d 449, 456–60 (9th Cir. 1994).

32. *Cal. Pac. Med. Ctr.*, 19 F.3d at 458.

33. *Spartan Mining*, 570 F.3d at 542 (quoting *Romero-Barcelo*, 456 U.S. at 313).

34. Ahearn *ex rel.* NLRB v. Jackson Hosp. Corp., 351 F.3d 226, 235 (6th Cir. 2003).

35. *Romero-Barcelo*, 456 U.S. 305, 313 (1982) (quoting Porter v. Warren Holding Co., 328 U.S. 395, 398 (1946)) (internal quotation marks omitted).

36. *See, e.g.*, United States v. Lane Labs-USA Inc., 427 F.3d 219, 233 (3d Cir. 2005); Bedrossian v. Nw. Mem'l Hosp., 409 F.3d 840, 843 (7th Cir. 2005); United States v. Mass. Water Res. Auth., 256 F.3d 36, 50–51 (1st Cir. 2001).

37. *See* 29 U.S.C. § 160(e)–(f), (j) (2006). This language also appears in section 10(*l*), which governs specific unfair labor practices by unions. § 160(*l*). As section 10(*l*) also governs district court jurisdiction over the Board's petitions for preliminary injunctions and has led to a similar debate over which standards to apply, this use of "just and proper" offers little insight.

> power to grant such temporary relief or restraining order as it deems just and proper . . . .[38]

Similarly, section 10(f) provides that "[u]pon the filing of such petition [for review of a final order of the Board], the court shall . . . have the same jurisdiction [as under section 10(e)] to grant . . . such temporary relief or restraining order as it deems just and proper."[39] All three sections thus include the same standard, instructing the court to grant such injunctive relief "as it deems just and proper."[40] However, sections 10(e) and (f) govern situations in which the equitable principles approach is inappropriate and in which deferential review of Board adjudications is required.[41]

There is a presumption in statutory construction that "equivalent words have equivalent meaning when repeated in the same statute."[42] Moreover, sections 10(e) and (f) were passed twelve years before section 10(j).[43] The parallel structure of all three sections makes it likely that Congress viewed section 10(j) as a parallel situation to sections 10(e) and (f) and looked at those sections in constructing section 10(j).[44] While no Board adjudication is made under section 10(j), there is a Board decision—the decision, after a thorough investigation, to seek section 10(j) relief.[45] It is not uncommon for courts to treat nonadjudicatory agency decisions with deference.[46]

---

38. § 160(e).

39. § 160(f).

40. § 160(e)–(f), (j).

41. *See, e.g.*, Beth Isr. Hosp. v. NLRB, 437 U.S. 483, 501 (1978) ("The judicial role [under section 10(e)] is narrow: The rule which the Board adopts is judicially reviewable for consistency with the Act, and for rationality, but if it satisfies those criteria . . . [it] must be enforced."); Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1951) (concluding that section 10(f)'s requirements do not mean "that even as to matters not requiring expertise a court may displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*"). It is noteworthy that Congress would have been aware of this practice of deferential review for sections 10(e) and (f) before the passage of section 10(j) in 1947. *See, e.g.*, Boeing Airplane Co. v. NLRB, 140 F.2d 423, 433 (10th Cir. 1944) ("[The Board] has the exclusive province [under section 10(f)] of appraising conflicting and circumstantial evidence, the weight and credibility of testimony and of drawing inferences from established facts."); NLRB v. Lion Shoe Co., 97 F.2d 448, 452 (1st Cir. 1938) ("The findings of fact by the Board [under section 10(e)] are conclusive if supported by any substantial evidence.").

42. Cohen v. De La Cruz, 523 U.S. 213, 220 (1998).

43. Sections 10(e) and (f) were original provisions of the National Labor Relations (Wagner) Act of 1935, ch. 372, sec. 10(e)–(f), 49 Stat. 449, 454–55, while section 10(j) was added in 1947 as part of the Labor-Management Relations (Taft-Hartley) Act, ch. 120, sec. 101, § 10(j), 61 Stat. 136, 149 (1947).

44. *See* Lapp, *supra* note 7, at 284. *See generally*, United States v. Vogel Fertilizer Co. 455 U.S. 16 (1982) (using statutory structure to determine congressional intent).

45. *See* OFFICE OF THE GEN. COUNSEL, *supra* note 3, at 10 (discussing the Board's investigatory process after receiving a complaint and detailing the factors the Board considers before seeking section 10(j) relief in court).

46. *See* Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) ("The fact that the Administrator's policies and standards are not reached by trial in adversary form does not mean that they are not entitled to respect."). The Board's decision is the result of a formal process. *See*

While this parallel structure supports the use of the remedial purpose approach for section 10(j), it may not on its own merit a *Romero-Barcelo* "necessary and inescapable inference" that Congress desired courts to avoid the use of the equitable principles approach. It is possible that Congress did not intend a single meaning for "just and proper" but instead simply desired that courts apply the normal standards they would traditionally apply for each situation.[47] However, as Part II demonstrates, this argument is not viable. Part II explores the public policy ramifications of the congressional mandate embodied in section 10(j) that further support the existence of a "necessary and inescapable inference" that Congress intended courts to apply the remedial purpose approach rather than the equitable principles approach.

II. CONGRESS'S UNIQUE MANDATE TO THE BOARD IN SECTION 10(J)

Congress's grant of permissive power to the Board to seek injunctive relief under section 10(j) supports the use of the remedial purpose approach. This mandate resulted in two differences between section 10(j) injunctions and general injunctions that, when considering Congress's delegation of adjudicatory power to the Board, support a *Romero-Barcelo* "necessary and inescapable inference" of congressional intent to avoid the use of the equitable principles approach and support the use of a deferential standard of review.

First, section 10(j) petitions are screened by the Board before reaching the court, unlike general injunctions that reach the judiciary without any prior screening.[48] Because Congress provided for this screening process (through the permissive nature of its delegation of authority in section 10(j)),[49] the Board's findings should receive deference as an exercise of its special expertise.

Second, unlike with ordinary injunctions,[50] Congress has entrusted someone other than the judiciary to protect the public policy concerns at stake in section 10(j) petitions.[51] Congress's mandate that the Board have exclusive jurisdiction to bring section 10(j) claims[52] demonstrates

---

OFFICE OF THE GEN. COUNSEL, *supra* note 3, at 10–11 (laying down formal rules and guidelines for the Board to follow in determining whether to seek section 10(j) relief in court). However, even if the Board's decision in these instances were considered the result of informal processes, an argument also exists that they should receive deference. *See* Bradley Lipton, Note, *Accountability, Deference, and the* Skidmore *Doctrine*, 119 YALE L.J. 2096, 2101 (2010) ("Informal agency decisions deserve substantial deference from courts because agency officials are politically accountable even when acting informally.").

47. *See, e.g.*, Lapp, *supra* note 7, at 264 ("Congress assumed that labor injunction cases should be decided like any preliminary injunction case—using traditional equitable notions to come to a conclusion that is just and proper.").

48. OFFICE OF THE GEN. COUNSEL, *supra* note 3, at 11.

49. *See infra* note 57 and accompanying text.

50. *See infra* note 60 and accompanying text.

51. *See infra* notes 76–79 and accompanying text.

52. *See infra* notes 54–55 and accompanying text.

Congress's belief that the public interest at stake would be best protected by the Board, which, as an administrative agency, is publicly accountable.[53] This accountability supports the use of a deferential standard of review.

In light of these differences, it is unlikely that Congress intended for courts to apply the normal injunction standard. Moreover, both differences support the contention that Congress intended for courts to follow the remedial purpose approach and, concomitantly, to defer to the Board.

A. *Pre-Court Screening of Petitions*

The first important difference between section 10(j) injunctions and general injunctions is that section 10(j) petitions are screened before reaching a court. This screening comes about because an aggrieved party is unable to seek relief individually under section 10(j).[54] After an unfair labor practice complaint has been filed, only the Board has standing to seek an injunction under section 10(j) on behalf of an aggrieved party.[55] However, the Board need not exercise its power to seek an injunction under section 10(j) in every case. Congress provided that the Board "shall have power" to seek injunctive relief under section 10(j),[56] indicating support for a Board screening process.[57] In line with this statutory language, the Board screens the complaints it receives, in order to focus its resources on the complaints it deems most meritorious.[58] The end result is that, unlike with ordinary petitions for injunctive relief, many complaints for section 10(j) relief are dismissed in a screening process and never brought before a judge.[59]

This type of procedure is unique in the context of injunctions. In no other situation is a party's petition for injunctive relief mandatorily subjected to a screening process not applied by a court.[60] This provision for Board in-

---

53. *See, e.g.*, BE & K Constr. Co. v. NLRB, 536 U.S. 516, 542 (2002) (calling the Board a "politically accountable administrative agency"). The specific public policy concerns at stake are discussed *infra* in Part II.B.

54. *See* Amalgamated Clothing Workers of Am. v. Richman Bros., 348 U.S. 511, 517 (1955) ("To hold that the Taft-Hartley Act also authorizes a private litigant to secure interim relief would be to ignore the closely circumscribed jurisdiction given to the District Court and to generalize where Congress has chosen to specify.").

55. *See id.* (noting Congress's desire to curtail private plaintiffs' ability to sue for "interim relief").

56. 29 U.S.C. § 160(j) (2006).

57. *See* George Schatzki, *Some Observations About the Standards Applied to Labor Injunction Litigation Under Sections 10(j) and 10(l) of the National Labor Relations Act*, 59 IND. L.J. 565, 569 (1984) (arguing that Congress "clearly" intended the choice to be made by the Board). In contrast, NLRA section 10(*l*) provides that the Board "shall" petition a district court for injunctive relief. § 160(*l*).

58. *See* OFFICE OF THE GEN. COUNSEL, *supra* note 3, at 10–11.

59. *See id.* at 9–14 (discussing the numerous evaluations that complaints of unfair labor practices must successfully undergo before the Board will seek section 10(j) relief in court).

60. The closest comparison comes up under Title VII Section 706(f)(2) of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified at 42 U.S.C. §§ 2000e–2000e-

volvement at this stage of the process indicates congressional intent for the Board to use its special expertise. The use of this expertise provides support for treating labor injunctions differently than ordinary injunctions and using a standard of review that defers to this initial screening process.

The Board takes its congressional mandate seriously by employing an intensive screening process for deciding which unfair labor practice complaints merit section 10(j) relief. If a dispute is proposed for section 10(j) relief, local Board agents do significant research, including questioning witnesses about the impact of the alleged violations and gathering objective and subjective evidence.[61] In addition to considering the gathered evidence, these local agents consider the gravity of the alleged violations as well as the threat of remedial failure in light of the "just and proper" theories set forth in precedent.[62] If a dispute is still considered worthy of section 10(j) relief after all this research, local agents prepare a memorandum highlighting the relevant facts, legal arguments, and authorities.[63] This memorandum is then presented to an Injunction Litigation Branch ("ILB") attorney for an independent review and evaluation, during which time the local agents continue to monitor the effects of the unfair labor practice and to pursue settlement.[64] After reviewing the local agents' continuing evaluations and the ILB's independent evaluation, if the Board is satisfied that secsection 10(j) relief is merited, only then does the Board petition a district court on behalf of the aggrieved party.[65]

The remedial purpose approach recognizes the need for deference to this screening process.[66] By contrast, the equitable principles approach views deference as inappropriate, which is most evident in its determination that

---

17 (2006)), which authorizes the EEOC to seek a preliminary injunction on behalf of a discriminated-against employee after a preliminary investigation. However, the key difference is that section 706(f)(2) does not preclude employees from bringing a private cause of action for a preliminary injunction and, thus, avoiding the EEOC's screening process. *See* Jan Lesly Lettes, Note, *Irreparable Injury: Improper Standard for Preliminary Injunctive Relief in EEOC Cases?*, 38 STAN. L. REV. 1163, 1164 (1986) ("To obtain a preliminary injunction, either the employee or the EEOC acting on the employee's behalf petitions a federal court under section 706(f)(2) of Title VII.").

61. OFFICE OF THE GEN. COUNSEL, *supra* note 3, at 10–11.

62. *Id.* at 11.

63. *Id.* at 12–13. This memorandum also includes defenses and arguments raised by the party accused of unfair labor practices, responses to each defense and argument, and an analysis of why injunctive relief is necessary to preserve the remedial power of the Board. *Id.*

64. *Id.* at 14.

65. *See id.*

66. *See, e.g.*, Pascarell *ex rel.* NLRB v. Vibra Screw Inc., 904 F.2d 874, 881 (3d Cir. 1990) ("[T]here is a certain leniency that the Board must be afforded, stemming from the deference to the Board that is built into the statutory scheme."); Maram *ex rel.* NLRB v. Universidad Interamericana de P.R., Inc., 722 F.2d 953, 960 (1st Cir. 1983) ("[The Board's] decision is entitled to presumptive weight."); Silverman *ex rel.* NLRB v. 40–41 Realty Assocs., 668 F.2d 678, 681 (2d Cir. 1982) ("[S]ound administration of the Act requires appropriate deference to the expertise of the Board.").

section 10(j) relief is worthy only in extraordinary cases.[67] When determining a petition's merits under each prong of the equitable principles approach, a circuit applying this approach would take into account whether a petition's underlying facts are extraordinary.[68]

Judging the extraordinariness of such facts in order to determine a petition's worthiness for injunctive relief undermines Congress's delegation of power to the Board. The Board, acting pursuant to Congress's mandate, has already deemed the facts underlying a section 10(j) petition that passes its screening process worthy enough to merit relief.[69]

Having two standards of worthiness[70] violates delegation principles because the Board uses its labor relations expertise in its determination; courts are required to give deference to agency decisions and interpretations that are based upon their expertise.[71] When an agency employs its special expertise, a difference of opinion is not enough to overcome the presumption of

---

67. The equitable principles approach has traditionally viewed injunctive relief in general—not just under section 10(j)—as an extraordinary remedy. *See, e.g.*, Winter v. Natural Res. Def. Council, 555 U.S. 7 (2008).

68. *See* Kobell *ex rel.* NLRB v. Suburban Lines, Inc., 731 F.2d 1076, 1091 n.26 (3d Cir. 1984) (noting that "an argument" could be made for recognizing "that section 10(j) was reserved for the extraordinary case"). *Suburban Lines* suggested that the district court could have applied the guiding principle that section 10(j) is reserved for the extraordinary case and dismissed the petition for not being extraordinary enough to warrant undermining the normal processes of labor law adjudication. *Id.*; *see also* Bloedorn *ex rel.* NLRB v. Francisco Foods, Inc., 276 F.3d 270, 297 (7th Cir. 2001) ("Section 10(j) is itself an extraordinary remedy." (quoting Szabo *ex rel.* NLRB v. P*I*E* Nationwide, Inc., 878 F.2d 207, 209 (7th Cir. 1989)) (internal quotation marks omitted)); Sharp *ex rel.* NLRB v. Parents in Cmty. Action, Inc., 172 F.3d 1034, 1037 (8th Cir. 1999) ("[Section 10(j)] is reserved for serious and extraordinary cases." (quoting Minn. Mining & Mfg. Co. v. Meter *ex rel.* NLRB, 385 F.2d 265, 270 (8th Cir. 1967)) (internal quotation marks omitted)). For a scholarly take, see Catherine Hodgman Helm, Comment, *The Practicality of Increasing the Use of NLRA Section 10(j) Injunctions*, 7 INDUS. REL. L.J. 599, 631 (1985) (arguing that because judges are not very receptive to section 10(j) petitions they view section 10(j) as an extraordinary remedy that must rest on extraordinary facts). While this consideration primarily occurs in circuits that apply the equitable principles approach, it also arises in circuits applying the "remedial purpose" test. *See, e.g.*, Overstreet *ex rel.* NLRB v. El Paso Elec. Co., 176 F. App'x 607 (5th Cir. 2006); Arlook *ex rel.* NLRB v. S. Lichtenberg & Co., 952 F.2d 367, 371 (11th Cir. 1992).

69. *See* OFFICE OF THE GEN. COUNSEL, *supra* note 3, at 4.

70. The two standards of worthiness are the courts' standard—facts extraordinary enough to merit injunctive relief—and the NLRB's standard—facts possessing enough merit to satisfy the Board's internal evaluation process.

71. *See generally* United States v. LaBonte, 520 U.S. 751, 778 (1997) ("[W]e would give the Commission considerable interpretive leeway in light of the fact that the choice here at issue lies at the very heart of the Commission's policy-related 'expertise.' "); Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633, 651–52 (1990) ("[P]ractical agency expertise is one of the principal justifications behind . . . deference."); Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 845 (1986) ("An agency's expertise is superior to that of a court when a dispute centers on whether a particular regulation is 'reasonably necessary to effectuate any of the provisions or to accomplish any of the purposes' of the Act the agency is charged with enforcing; the agency's position, in such circumstances, is therefore due substantial deference.").

deference that must be applied to its interpretation.[72] Moreover, deference is not precluded just because a decision or interpretation is nonadjudicatory.[73] While a valid worry exists that the NLRB could abuse its power and seek section 10(j) relief in unworthy cases, the courts, with their discretion to grant or deny the petition,[74] are still able to serve as a check on this potential abuse of power.[75]

B. *Protection of Public Policy Concerns*

Public policy concerns are at stake in every section 10(j) petition. Unlike with ordinary injunctions, Congress, through the mandate of section 10(j), entrusted the Board to protect these concerns.[76] As Congress explained, "We have provided that the Board, acting in the public interest and not in vindication of purely private rights, may seek injunctive relief in the case of all types of unfair labor practices . . . ."[77] The public interest at stake is the "interest in the peaceful 'settlement of labor disputes through the collective bargaining [process].' "[78] The remedial purpose approach does a superior job of protecting these public interest concerns because it focuses on the preservation of the Board's remedial powers and leaves the decisionmaking in the hands of the Board, which, unlike the court, is publicly accountable.[79]

It is important that the preservation of the Board's remedial powers be at the forefront of a court's analysis, because these powers are essential to the Board's ability to vindicate the public interest in the peaceful resolution of labor disputes.[80] A reduction of the Board's remedial powers diminishes the

---

72. *See* NLRB v. S. Cal. Edison Co., 646 F.2d 1352, 1367 (9th Cir. 1981) (finding that the Board's interpretation of labor contracts falls within its area of special expertise and that inferences are insufficient to overcome the required deference).

73. *See supra* note 46 and accompanying text.

74. 29 U.S.C. § 160(j) (2006).

75. The nature of the deference required under the remedial purpose approach is discussed *infra* in Part IV, as is the courts' ability under this approach to serve as a check on potential Board abuses of power.

76. An argument could be made that if Congress truly intended to entrust the Board to protect these interests, it would have authorized the Board to issue injunctions and leave the courts out of the process. However, this argument ignores the value of having both the courts and the Board involved in the injunction process. Preserving the power to issue an injunction in the hands of the judiciary provides a system of checks and balances and limits Board bias. *See infra* Part IV.

77. S. REP. NO. 80-105, at 8 (1947), *reprinted in* 1 U.S. NAT'L LABOR RELATIONS BD., LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 414 (1948).

78. Pring, *supra* note 13, at 289 (quoting Kobell *ex rel.* NLRB v. Beverly Health & Rehab. Servs., Inc., 987 F. Supp. 409, 414 (W.D. Pa. 1997), *aff'd*, 142 F.3d 428 (3d Cir. 1998)) (arguing that the Board's determination should thus be afforded deferential treatment).

79. *See, e.g.*, BE & K Constr. Co. v. NLRB, 536 U.S. 516, 542 (2002) (calling the Board a "politically accountable administrative agency").

80. *See infra* notes 81–82 and accompanying text. There is also some scholarship that the equitable principles are an inappropriate tool for addressing a statutory injunction intended to remedy public wrongs. *See* Fahrenkopf, *supra* note 8, at 1174 ("Critics assert that the traditional equitable principles used for private relief are inappropriate for addressing a statutory

likelihood that labor disputes will be resolved peacefully. As Congress explained, "Time is usually of the essence in these matters."[81] If an injunction is not ordered in a case of a real unfair labor practice, there is a serious danger that the alleged violator could reap the benefits of its violation. Congress explicitly warned of the need to avoid this situation, stating as follows:

> Experience under the National Labor Relations Act has demonstrated that by reason of lengthy hearings and litigation enforcing its orders, the Board has not been able in some instances to correct unfair labor practices until after substantial injury has been done. . . . Since the Board's orders are not self-enforcing, it has sometimes been possible for persons violating the act to accomplish their unlawful objective before being placed under any legal restraint and thereby to make it impossible or not feasible to restore or preserve the status quo pending litigation.[82]

Perhaps recognizing these concerns, many courts applying the equitable principles approach advocate taking into account the need to preserve the Board's remedial powers.[83] Nonetheless, the equitable principles approach does not preclude these courts from dismissing petitions without ever taking that need into account. For example, a petition can be dismissed for failing to satisfy the first prong of the equitable principles approach—the likelihood of success on the merits—without the court ever reaching the issue of whether or not injunctive relief is necessary to prevent irreparable harm to the Board's remedial powers.[84] In contrast, the remedial purpose approach

---

injunction intended to remedy public wrongs."); Note, *Temporary Injunctions Under 10(j) of the Taft-Hartley Act*, 44 N.Y.U. L. REV. 181, 195 (1969) ("It is well established that when a federal court derives jurisdiction over a proceeding for injunctive relief solely by reason of a statute, the traditional standards governing the issuance of such relief in private actions . . . are not pre-requisites for the granting of statutory relief unless the congressional enabling act so provides."); *see also* Boire *ex rel.* NLRB v. Pilot Freight Carriers, Inc., 515 F.2d 1185, 1192 (5th Cir. 1975) ("[T]raditional rules of equity may not control the proper scope of 10(j) relief . . . ."). However, this debate relies on antiquated arguments and has never been widely accepted.

81. S. REP. NO. 80-105, at 8 (1947), *reprinted in* 1 U.S. NAT'L LABOR RELATIONS BD., LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 414 (1948).

82. *Id.* at 433; *accord* Fisk & Malamud, *supra* note 4, at 2028 (arguing that judicial limitations on section 10(j) injunctive relief "create[] a huge incentive for employers to deliberately violate the statute knowing that they will reap the benefit of illegal conduct for a long time, if not permanently in the case of a successful defeat of an organizing campaign").

83. *See supra* note 22 and accompanying text.

84. *See, e.g.*, Scott *ex rel.* NLRB v. Stephen Dunn & Assocs., 241 F.3d 652, 666 (9th Cir. 2001) ("Because the district court held that the Board had not shown a likelihood of success . . . it did not assess whether the failure to issue an injunction would cause irreparable harm to the Board's remedial authority."). While *Stephen Dunn* reversed the district court, it did so on the grounds that the Board *had* shown a sufficient likelihood of success, not because the district court had not considered irreparable harm to the Board's remedial power. *Id.*; *see also* Small *ex rel.* NLRB v. Swift Transp. Co., No. CV 09-4751 PSG (FMOx), 2009 WL 3052637 (C.D. Cal. Sept. 18, 2009). *Swift Transportation Co.* denied the Board's section 10(j) petition for failure to show a likelihood of success on the merits without addressing the remaining three prongs of the test, including, notably, the possibility of irreparable harm to the Board's remedial authority. *Swift Transp. Co.*, 2009 WL 3052637, at *16.

requires the issuance of injunctive relief in every case in which such relief is deemed necessary.[85] Therefore, the remedial purpose approach allows for better preservation of the Board's remedial powers and the associated public interest at stake.

The use of the remedial purpose approach is also supported by the fact that its implicit deference leaves the decisionmaking in the hands of the Board, which is publicly accountable.[86] According to Congress, when the Board seeks injunctive relief under section 10(j), it is making a "public interest" decision.[87] In order to ensure consistency with the preferences of the majority of Americans, a policymaking body must be accountable to voters.[88] According to the Supreme Court, the Board satisfies this requirement.[89] Although Board members are not directly elected by voters, they are appointed to five-year terms by the president, who is elected.[90] This type of presidential influence, along with the concomitant power to remove agency members for cause, fosters accountability.[91] Moreover, accountability for agencies comes from the "demanding expectations that reasons will be given in public and subjected to intense scrutiny."[92]

---

85. *See supra* note 16 and accompanying text.

86. *See, e.g.*, BE & K Constr. Co. v. NLRB, 536 U.S. 516, 542 (2002) (calling the Board a "politically accountable administrative agency that acts as a screen for meritless complaints").

87. S. REP. NO. 80-105, at 8 (1947), *reprinted in* 1 U.S. NAT'L LABOR RELATIONS BD., LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 414 (1948); *see also* Lipton, *supra* note 46, at 2101 ("Informal agency decisions deserve substantial deference from courts because agency officials are politically accountable even when acting informally.").

88. Glen Staszewski, *Reason-Giving and Accountability,* 93 MINN. L. REV. 1253, 1254 (2009) ("[V]oters must be able to hold public officials accountable for their *specific policy choices* to ensure that those decisions are consistent with the preferences of a majority.").

89. *BE & K Constr. Co.*, 536 U.S. at 542.

90. *The Board*, NLRB.GOV, http://www.nlrb.gov/who-we-are/board (last visited Apr. 2, 2011).

91. *See generally* Chevron U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837, 865 (1984) ("While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices . . . ."). In addition to the influence of the appointment power, other reasons for this accountability include presidential pressure to follow specific policy recommendations and the president's ability to remove support in negotiations in Congress over agency budget and other matters. *See* Lisa Schultz Bressman & Robert B. Thompson, *The Future of Agency Independence*, 63 VAND. L. REV. 599, 632 (2010). *Contra* Jody Freeman & Adrian Vermeule, Massachusetts v EPA*: From Politics to Expertise*, 2007 SUP. CT. REV. 51, 88 (2007) (arguing that presidential oversight might actually taint an administrative agency's accountability); Nina A. Mendelson, *Disclosing "Political" Oversight of Agency Decision Making*, 108 MICH. L. REV. 1127, 1130 (2010) (suggesting that the question of whether presidential influence increases or decreases the accountability of an agency's decision depends on the content of the influence).

92. Stephen Macedo, *Against Majoritarianism: Democratic Values and Institutional Design*, 90 B.U. L. REV. 1029, 1037 (2010).

By contrast, the judicial branch's design does not promote accountability.[93] Article III of the Constitution provides that "Judges . . . shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."[94] These provisions, which provide federal judges with lifetime tenure and a fixed compensation, are incompatible with political accountability.[95] In fact, the very purpose of these provisions was to ensure that the judiciary would be "insulated from majoritarian pressures."[96] The remedial purpose approach thus ensures that it is the publicly accountable Board that is making decisions about the peaceful resolution of labor disputes and not the unaccountable courts.

III. THE LEGISLATIVE HISTORY OF SECTION 10(J)

Section 10(j)'s legislative history reinforces the structural and policy support for the "necessary and inescapable inference" that Congress intended courts to avoid the use of the equitable principles approach and instead apply the remedial purpose approach. The proper understanding of the legislative history behind section 10(j) requires knowledge of the judicial treatment of labor injunctions in the periods leading up to section 10(j)'s adoption. This judicial history can be divided into three major stages: (1) excessive repression of union activities (pre-1932), (2) excessive indulgence of union activities (1932–1947), and (3) attempted balance between repression and indulgence (post-1947).[97] Much of the change in the judicial treatment of labor injunctions over time can be attributed to Congress, which has passed four distinct acts altering the jurisdiction and standard

---

93. Juan Alberto Arteaga, Note, *Juvenile (In)Justice: Congressional Attempts to Abrogate the Procedural Rights of Juvenile Defendants*, 102 COLUM. L. REV. 1051, 1087 n.199 (2002) ("Allowing courts to make public policy decisions precludes the ability of the citizenry to hold its government accountable because Article III of the Constitution grants federal judges life tenure during good behavior . . . ."); *see also* Tory A. Weigand, *Lost Chances, Felt Necessities, and the Tale of Two Cities*, 43 SUFFOLK U. L. REV. 327, 332 (2010) ("Judges and the case-specific adjudicatory system are poorly designed for broad policymaking.").

94. U.S. CONST. art. III, § 1.

95. *See* N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 59 (1982) ("[T]hese [life tenure and compensation] provisions were incorporated into the Constitution to ensure the independence of the Judiciary from the control of the Executive and Legislative Branches of government.").

96. United States v. Raddatz, 447 U.S. 667, 704 (1980) (Marshall, J., dissenting) ("[T]he Framers of the Constitution believed that those [life tenure and compensation] protections were necessary in order to guarantee that the judicial power of the United States would be placed in a body of judges insulated from majoritarian pressures . . . .").

97. *See* Fahrenkopf, *supra* note 8, at 1161–67 (summarizing these three stages and quoting Justice Frankfurter's view that section 10(j) was the result of Congress seeking "the appropriate balance to be struck between the uncontrolled power of management and labor to further their respective interests" (quoting Local 1976, United Bhd. of Carpenters & Joiners of Am. v. NLRB, 357 U.S. 93, 99–100 (1958)) (internal quotation marks omitted)).

requirements for labor injunctions.[98] These acts distinguished labor injunctions from general injunctions and culminated with the unique mandate in section 10(j).[99] The historical judicial excess that led to the necessity of section 10(j) reinforces the conclusion that it is truer to congressional intent for courts to apply the remedial purpose approach rather than the traditional equitable principles approach.

A. *Pre-1932*

Labor injunctions were initially treated the same as ordinary preliminary injunctions in that courts would use the equitable principles approach to determine the merit of granting an injunction.[100] Under that approach, courts are afforded considerable leeway in weighing the relative importance of each prong.[101] In the early twentieth century, courts used this flexibility to repress the organization of workers.[102] Courts of this period were "unnecessarily unsympathetic to the labor movement" and used injunctions to enjoin union activities regardless of their circumstances.[103]

Congress attempted to remedy this problem by explicitly distinguishing labor injunctions from ordinary injunctions. In section 20 of the Clayton Act,[104] Congress provided that, except to avoid irreparable injury, courts could not use injunctions to prevent labor unions from carrying out lawful union activity, which included strikes, picketing, and boycotts.[105] However, this provision was ineffective at preventing the judicial misuse of labor injunctions. One reason for this ineffectiveness was that courts used a definition of "irreparable injury" that could not have been intended by Congress. Courts considered any interference with business or trade an

98. *See* Clayton Act, ch. 323, sec. 6, 38 Stat. 730, 731 (1914) (codified at 15 U.S.C. § 17 (2006)); Norris-LaGuardia Act, ch. 90, 47 Stat. 70 (1932) (codified as amended at 29 U.S.C. §§ 101–113); National Labor Relations (Wagner) Act, ch. 372, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151–169); Labor-Management Relations (Taft-Hartley) Act, ch. 120, 61 Stat. 136 (1947) (codified as amended at 29 U.S.C. §§ 141–144).

99. *See supra* notes 55–57 and accompanying text.

100. *See, e.g.*, Lapp, *supra* note 7, at 254 (explaining that during this time period, with little statutory guidance in regard to labor injunctions, "the courts relied on existing rules of equity"). The use of the equitable principles is the most common standard for preliminary injunctions as the result of "several hundred years of history." Hecht Co. v. Bowles, 321 U.S. 321, 329 (1944). However, other standards may be prescribed by federal statute. *See* Weinberger v. Romero-Barcelo, 456 U.S. 305, 313 (1982) ("Congress may intervene and guide or control the exercise of the courts' discretion . . . ."). The prongs of the traditional equitable principles approach are listed *supra* note 11 and accompanying text.

101. *See* 2 DAN B. DOBBS, LAW OF REMEDIES § 2.11(2) (2d ed. 1993).

102. *See* Fahrenkopf, *supra* note 8, at 1161–62; Schatzki, *supra* note 57, at 565–67 (arguing that courts during this time were "unnecessarily unsympathetic to the labor movement").

103. Schatzki, *supra* note 57, at 567.

104. Ch. 323, sec. 20, 38 Stat. 730, 738 (1914) (codified at 29 U.S.C. § 52 (2006)).

105. *See* 29 U.S.C. § 52; *see also* Dylan M. Carson, Note, *The* Browning *of Sports Law: Defining the Survival of the Labor Exemption after the Expiration of Bargaining Agreements*, 30 SUFFOLK U. L. REV. 1141, 1150–51 (1997) (discussing 29 U.S.C. § 52).

irreparable injury.[106] This definition allowed courts to enjoin labor unions on strike regardless of the particular facts of the situation, despite Congress's stated intent to allow lawful union strikes.[107] Section 20 was also ineffective because courts narrowly construed it. The Supreme Court limited the application of section 20's exemption to only those employees directly affected by the terms or conditions of employment at issue.[108] In essence, this interpretation meant that courts were free to issue injunctions against peaceful secondary boycotts.[109] Other court interpretations limited the exemption only to situations where the purpose of the strike was the immediate betterment of working conditions.[110] Ultimately, there remained a deep concern that courts were resolving labor disputes without ever seriously addressing the merits of the dispute.[111]

B. *1932–1947*

Recognizing the Clayton Act's failure to limit injunctions against labor unions,[112] Congress further distinguished labor injunctions through the passage of two pro-labor acts: the Norris-LaGuardia Act of 1932[113] and the NLRA of 1935.[114] The Norris-LaGuardia Act partially removed judicial jurisdiction over labor injunctions, stating that "[n]o Court of the United States . . . shall have jurisdiction to issue any . . . temporary or permanent injunction in a case involving or growing out of a labor dispute" without satisfying strict requirements.[115] Additionally, the NLRA enhanced adminis-

---

106. *See* Helen V. Davis, Comment, *Clayton Act: Injunctions in Labor Disputes*, 8 CAL. L. REV. 174, 177 (1920) (citing Washingtonian Home of Chi. v. City of Chicago, 117 N.E. 737 (1917), and Parkinson Co. v. Bldg. Trades Council, 98 P. 1027 (1908)) (noting that the loss occurring from a strike could not "be measured by any pecuniary standard").

107. *See supra* note 105 and accompanying text.

108. *See, e.g.*, Duplex Printing Press Co. v. Deering, 254 U.S. 443, 472 (1921) (declining to extend section 20 "beyond the parties affected in a proximate and substantial . . . sense").

109. *See id.* (declining to extend section 20 to cover "merely a sentimental or sympathetic" strike). However, *Deering* left union activity against an employee's direct employer protected by the Clayton Act. *See id.*

110. *See* Felix Frankfurter & Nathan Greene, *Legislation Affecting Labor Injunctions*, 38 YALE L.J. 879, 906 (1929) (explaining that this limited interpretation meant that an attempt to unionize a factory or to refuse to work on nonunion products would not be sheltered by the Clayton Act). One district court even held that the Clayton Act did not change preexisting law. *See* Stephens v. Ohio State Tel. Co., 240 F. 759 (N.D. Ohio 1917).

111. *See* Schatzki, *supra* note 57, at 567.

112. It is also possible that Congress recognized that "judges were ill equipped to pass judgment upon the social and economic issues involved in labor disputes." Fahrenkopf, *supra* note 8, at 1162 (quoting STATUTORY HISTORY OF THE UNITED STATES: LABOR ORGANIZATION 162 (Robert F. Koretz ed., 1970)).

113. Ch. 90, 47 Stat. 70 (1932) (codified as amended at 29 U.S.C. §§ 101–113 (2006)).

114. National Labor Relations (Wagner) Act, ch. 372, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151–169).

115. 29 U.S.C. § 101. The Supreme Court has interpreted these statutory requirements as prohibiting courts from issuing a labor injunction unless the following conditions

trative jurisdiction[116] by creating the Board to govern collective relations between unions and management in the private sector.[117]

Although there were fears that the Norris-LaGuardia Act and the NLRA would be " 'construed' [by courts] into ineffectiveness as was § 20 of the Clayton Act before it,"[118] these concerns were unfounded.[119] In *New Negro Alliance*, Justice Roberts wrote that "[t]he legislative history of the [Norris-LaGuardia] Act demonstrates that it was the purpose of the Congress further to extend the prohibitions of the Clayton Act respecting the exercise of jurisdiction by federal courts and to obviate the results of the judicial construction of that [Clayton] Act."[120] However, this legislation was perhaps too effective and unintentionally resulted in courts becoming too indulgent with labor unions.[121] During this time period, the judiciary became unwilling to impose injunctions against labor unions regardless of the nature of their activities.[122]

---

were satisfied:

> [U]pon findings of fact to the effect (a) that unlawful acts have been threatened and will be committed unless restrained, or have been committed and will be continued, unless restrained, and then only against the person or persons, association or organization making the threat or permitting the unlawful act or authorizing or ratifying it; (b) that substantial and irreparable injury to complainant's property will follow; (c) that, as to each item of relief granted, greater injury will be inflicted upon the complainant by denial of the relief than will be inflicted on the defendant by granting it; (d) that complainant has no adequate remedy at law; and (e) that the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection.

New Negro Alliance v. Sanitary Grocery Co., 303 U.S. 552 (1938).

116. *See* Ahmed A. White, *The Depression Era Sit-Down Strikes and the Limits of Liberal Labor Law*, 40 SETON HALL L. REV. 1, 69 (2010) ("[T]he Wagner Act undertook to regulate labor relations by the positive assertion of administrative jurisdiction . . . .").

117. Patrick Morvan, *A Comparison of the Freedom of Speech of Workers in French and American Law*, 84 IND. L.J. 1015, 1027 (2009) ("The National Labor Relations Act . . . governs collective relations between unions and management in the private sector.").

118. *See* Erwin B. Ellmann, Comment, *Labor Law—When a "Labor Dispute" Exists Within Meaning of the Norris-La Guardia Act*, MICH. L. REV. 1146, 1147 (1938).

119. *See infra* note 120 and accompanying text.

120. *New Negro Alliance*, 303 U.S. at 562 (footnotes omitted).

121. *See* Fahrenkopf, *supra* note 8, at 1163 (citing STATUTORY HISTORY OF THE UNITED STATES: LABOR ORGANIZATION 548–49 (Robert F. Koretz ed., 1970)) (noting that during the period of time between the passage of the Norris-LaGuardia Act and the passage of the Taft-Hartley Act many people believed that the judiciary had become too indulgent with labor unions).

122. *See id.* (noting that judicial decisions during this time period "revealed an unwillingness to impose restrictions on labor union activity" despite union abuses such as undemocratic procedures, racketeering, and the denial of equal rights for non-Caucasians).

C. *Post-1947*

Congress's response was to pass the Taft-Hartley Act in 1947,[123] amending the NLRA. Calling the existing laws "inadequa[te]," the Senate report explained as follows:

> The need for such legislation is urgent. Supreme Court interpretations of the Norris-LaGuardia Anti-injunction Act and the Clayton Act seem to have placed union activities, no matter how destructive to the rights of the individual workers and employers who are conforming to the National Labor Relations Act, beyond the pale of Federal law. Moreover, the administration of the National Labor Relations Act itself has tended to destroy the equality of bargaining power necessary to maintain industrial peace.[124]

One of the Senate's expressed goals was to include amendments that would "equalize legal responsibilities of labor organizations and employers."[125] Included in these amendments were sections 10(j) and (*l*).[126] Section 10(*l*) governs specific, enumerated alleged unfair labor practices by unions;[127] section 10(j) governs all other alleged unfair labor practices by both unions and employers.[128]

Under section 10(j), federal courts regained full jurisdiction to adjudicate labor disputes, but this jurisdiction was contingent upon the Board petitioning for relief on behalf of an aggrieved party who had filed a complaint with it.[129] This contingency meant that courts could not issue injunctive relief for an unfair labor practice unless the Board was the party bringing the suit,

---

123. Taft-Hartley Act, ch. 120, 61 Stat. 136 (1947).

124. S. REP. NO. 80-105, at 2 (1947), *reprinted in* 1 U.S. NAT'L LABOR RELATIONS BD., LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 407–08 (1948).

125. *Id.* at 407.

126. 29 U.S.C. § 160(j), (*l*) (2006).

127. *See* § 160(*l*) (noting that its scope is restricted to "unfair labor practice[s] within the meaning of paragraph (4)(A), (B), or (C) of section 158(b) of this title, or section 158(e) of this title or 158(b)(7) of this title," all of which refer only to unfair labor practices by labor organizations).

128. *See* § 160(j) (providing no restrictions on its scope, stating that it applies whenever there is a charge that "any person has engaged in or is engaging in an unfair labor practice"). However, today section 10(j) is primarily used only against employers. Lapp, *supra* note 7, at 264 n.62 ("[T]oday nearly every section 10(j) injunction is filed against an employer."). Courts apply the same standard to both sections 10(j) and 10(*l*). *E.g.*, Burlington N. R.R. Co. v. Bair, 957 F.2d 599, 603 n.4 (8th Cir. 1992) (citing Minn. Mining & Mfg. Co. v. Meter *ex rel.* NLRB, 385 F.2d 265, 269 & n.5 (8th Cir. 1967)) ("[T]he standards applied under sections 10(j) and 10(*l*) are the same."); Gottfried *ex rel.* NLRB v. Sheet Metal Workers' Int'l Ass'n, Local Union No. 80, 927 F.2d 926, 927 (6th Cir. 1991) (citing Levine *ex rel.* NLRB v. C & W Mining Co., 610 F.2d 432, 435 (6th Cir. 1979)) ("[T]he same standards apply under §§ 10(j) and 10(*l*).").

129. *See* § 160(j). Section 10(*l*) also returns full jurisdiction to the federal courts and makes relief contingent upon the Board petitioning for relief on behalf of an aggrieved party. *See* § 160(*l*).

enabling the Board to provide a buffer from an overreaching judiciary.[130] Additionally, it allowed the Board to preserve its remedial powers despite its slow adjudication process.[131] This consideration was important for Congress.[132]

Despite the existence of the equitable principles approach, after the passage of section 10(j) courts initially defined "just and proper" to require deference to the Board's administrative judgment in determining the propriety of section 10(j) relief.[133] Rather than using the equitable principles approach, courts tended to grant relief as long as the Board demonstrated that its request was not insubstantial or frivolous.[134] Between 1947 and the 1960s, "[i]n obedience to [the objectives of the NLRA] and similar intent of Congress and the desire to effectuate a statutory policy, the courts . . . consistently held that the grant of the injunction depend[ed] upon the standards set forth in the statute and not upon traditional equity criteria."[135] Such early judicial interpretation of congressional intent is

---

130. *See* Lapp, *supra* note 7, at 259 ("[T]he Board would provide a buffer from an overreaching judiciary by picking and choosing the cases a district court could adjudicate.").

131. *See* Pring, *supra* note 13, at 304 ("The legislative history of section 10(j) demonstrates that the section was passed to protect the Board's limited remedial powers."); Saltzman & Salazar-Hobson, *supra* note 15, at 234–35 ("[Section 10(j)] vested federal courts with limited injunctive authority to assure the effective enforcement of Board remedies for unfair labor practices.").

132. A Senate report explained as follows:

> Time is usually of the essence in these matters, and consequently the relatively slow procedure of Board hearing and order, followed many months later by an enforcing decree of the circuit court of appeals, falls short of achieving the desired objectives . . . . Hence we have provided that the Board, acting in the public interest and not in vindication of purely private rights, may seek injunctive relief in the case of all types of unfair labor practices . . . .

S. REP. NO. 80-105, at 8 (1947), *reprinted in* 1 U.S. NAT'L LABOR RELATIONS BD., LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 414 (1948).

133. Fahrenkopf, *supra* note 8, at 1171 (noting that until the 1960s courts "tended to defer to administrative judgment on the question of the propriety of section 10(j) relief").

134. *See* Fusco *ex rel.* NLRB v. Richard W. Kaase Baking Co., 205 F. Supp. 465, 476 (N.D. Ohio 1962) ("[T]he Court need find only that the Regional Director of the National Labor Relations Board had reasonable cause to authorize the issuance of a complaint and that the relief sought is appropriate."); Jaffee *ex rel.* NLRB v. Henry Heide, Inc., 115 F. Supp. 52, 57 (S.D.N.Y. 1953) ("Accordingly, the issue here is only whether on the evidence presented the Board could reasonably find that Heide committed [the] unfair labor practices alleged.").

135. Douds *ex rel.* NLRB v. Anheuser-Busch, Inc., 99 F. Supp. 474, 477 (D.N.J. 1951); *accord* Lebus *ex rel.* NLRB v. Manning, Maxwell & Moore, Inc., 218 F. Supp. 702, 705 (W.D. La. 1963) ("The Court is cognizant that the injunctive relief here sought is for the protection of the public interest and in aid of a policy which Congress has made plain. For this reason, the area for the exercise of the traditional discretion not to grant an injunction is much more limited." (citations omitted)); *Henry Heide*, 115 F. Supp. at 57 (deferentially reviewing the Board's decision); Douds *ex rel.* NLRB v. Local 294, Int'l Bhd. of Teamsters, 75 F. Supp. 414, 418 (N.D.N.Y. 1947) ("The relief provided [under section 10(j)] is entirely statutory. The common law requirements do not apply. The statutory scheme is complete in itself. 'As the issuance of an injunction in cases of this nature has statutory sanction, it is of no moment that

considered appropriate evidence of congressional intent with regard to statutory standards to be applied.[136]

It was not until the 1960s that courts started construing the just and proper standard to mean more than a merely nonfrivolous claim.[137] Courts in this decade were the first to treat section 10(j) relief as an extraordinary remedy and the first to turn to the equitable principles approach.[138] However, many circuits continued to apply the deferential remedial purpose approach.[139]

D. *Striking a Balance*

A narrow view of this history supports the claim of proponents of the equitable principles approach that section 10(j) was passed to curtail labor power. Indeed, the Taft-Hartley amendments were necessary only because of the judiciary's overindulgence of labor union activities under both the Norris-LaGuardia Act and the NLRA.[140] However, this argument fails to consider why the Norris-LaGuardia Act and the NLRA were passed originally. As demonstrated above, these two acts were designed to prevent courts from overcurtailing labor power.[141] Thus, though section 10(j) was certainly meant to curtail labor power to some extent, it did not intend a return to the status quo that existed before the Norris-LaGuardia Act and the NLRA.

The conclusion that Congress intended section 10(j) to strike a balance between the pre-1930s overinvolvement and post-1930s underinvolvement of courts is supported by the report of the Senate committee that proposed the bill.[142] While acknowledging the need to avoid the then-existing state of court underinvolvement under the Norris-LaGuardia Act and the NLRA,[143]

---

the plaintiff has failed to show threatened irreparable injury or the like . . . .' " (quoting SEC v. Torr, 87 F.2d 446, 450 (2d Cir. 1937))).

136. *See generally* Mary Van Vort, Note, *Controlling and Deterring Frivolous In Forma Pauperis Complaints*, 55 FORDHAM L. REV. 1165, 1175–77 (1987) (arguing that pre-filing dismissal of in forma pauperis applications is supported by early judicial interpretation of congressional intent).

137. Fahrenkopf, *supra* note 8, at 1171 (noting that in the 1960s the courts "reinvigorat[ed] the just and proper requirement to demand more than a mere non-frivolous claim").

138. *See* McLeod *ex rel.* NLRB v. Gen. Elec. Co., 366 F.2d 847, 849 (2d Cir. 1966) ("[T]he issuance of [a section 10(j)] injunction is an extraordinary remedy indeed."). This case is the earliest case recorded on Westlaw that advocates for the use of the equitable principles.

139. *See, e.g.*, NLRB v. Aerovox Corp., 389 F.2d 475 (4th Cir. 1967); Angle v. Sacks *ex rel.* NLRB, 382 F.2d 655 (10th Cir. 1967).

140. *See supra* Sections III.B–C.

141. *See supra* Section III.B.

142. S. REP. NO. 80-105, *reprinted in* 1 U.S. NAT'L LABOR RELATIONS BD., LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 407–08 (1948).

143. *Id.* at 408 (noting the "inadequacy of existing laws on industrial relations" and the fact that the Supreme Court's interpretation of the Norris-LaGuardia Act "placed union activities, no matter how destructive to the rights of the individual workers and employers . . . beyond the pale of federal law").

the committee's report also emphasized the need to avoid the overinvolvement of pre-1932 courts.[144] The report explained that it did "not believe that social gains which industrial employees have received by reason of [the Norris-LaGuardia Act and the NLRA] should be impaired in any degree."[145] This language is evidence that Congress intended judicial restraint to avoid the judicial excess of the pre-1930s.

This conclusion is further supported by the three acts that preceded section 10(j)'s enactment. All three acts were designed to achieve the aforementioned "social gains" by limiting the judiciary's power in the context of labor disputes.[146] With the Clayton and Norris-LaGuardia Acts, Congress sought to expand labor power by limiting judicial jurisdiction to grant injunctive relief against union activity.[147] Similarly, Congress sought to expand labor power by creating an administrative agency, the Board, to govern collective relations between employers and employees instead of the courts.[148] To return to the same approach that did not result in judicial restraint before the 1930s contravenes Congress's desire to preserve the social gains these acts achieved.

Thus, the argument that section 10(j) was intended to curtail labor power, while technically correct, is misleading. Congress intended section 10(j) to curtail labor power while simultaneously promoting judicial restraint. Unlike the equitable principles approach, the remedial purpose approach achieves both of these intentions. It preserves the necessary curtailing of labor power by returning jurisdiction to the courts yet also achieves judicial restraint by giving the courts less power than they had pre-1932. In contrast, the equitable principles approach would return the courts to the same approach they abused before the 1930s. Therefore, legislative history supports the remedial purpose approach to labor injunctions as the best reflection of congressional intent.

IV. Concerns About the Role of the Courts Under the Remedial Purpose Approach

While returning to section 10(j)'s structural and historical context reveals the remedial purpose approach as more representative of congressional intent than the traditional equitable principles approach, returning to this context fails to address a common concern: the courts' role, or lack thereof, under such a deferential approach. Critics fear that the remedial purpose approach removes courts from the section 10(j) process altogether, allowing

144. *Id.* at 407 (implying that the existing laws before 1932 had allowed courts to keep "labor organizations . . . relatively weak and ineffective" and emphasizing the positive nature of the social gains that industrial workers were able to achieve after the Norris-LaGuardia Act of 1932).

145. *Id.* at 407.

146. *See supra* Sections III.A–B.

147. *See supra* Sections III.A–B.

148. *See supra* Section III.B.

Board bias to unfairly influence injunction decisions.[149] This concern is unwarranted. As demonstrated by the circuits currently following this approach, courts continue to play an important role in the section 10(j) process under the remedial purpose approach, and the level of deference required does not prevent courts from effectively safeguarding against Board bias.

Numerous courts have expressed the concern that the remedial purpose approach will lead to courts serving as a "rubber stamp" for the Board.[150] However, this concern ignores the important role that courts have played in circuits that already apply this approach.[151] Courts are able to use their power of judicial review to ensure that the Board is acting within its legislatively delegated authority.[152]

While courts applying the remedial purpose approach have not spelled out the level of deference to apply, there is textual support for the use of the "substantial evidence" level of deference. Courts adjudicating petitions filed under sections 10(e) and (f)—which have the same just and proper standard as section 10(j)—use this level of deference.[153] Because of the parallel structure of these three NLRA sections, it follows that courts adjudicating a section 10(j) petition should use the same level of deference as courts adjudicating a petition under sections 10(e) or (f).

Under the substantial-evidence level of deference, a court must defer to the Board when the Board's findings are supported by substantial

---

149. *See supra* note 132 and accompanying text.

150. Maram *ex rel.* NLRB v. Universidad Interamericana de P.R., Inc., 722 F.2d 953, 958 (1st Cir. 1983) ("[T]he whole panoply of discretionary issues with respect to granting preliminary relief must be addressed by the court [lest the court become] a 'rubber stamp' for the Director."); *accord* Pye *ex rel.* NLRB v. Teamsters Local Union No. 122, 875 F. Supp. 921, 928 (D. Mass. 1995); Rivera-Vega *ex rel.* NLRB v. ConAgra, Inc., 876 F. Supp. 1350, 1356 (D.P.R. 1995). Many other courts have also addressed this concern in regard to the parallel situations presented by section 10(*l*) petitions. *See, e.g.*, Danielson *ex rel.* NLRB v. Joint Bd. of Coat, Suit, & Allied Garment Workers' Union, 494 F.2d 1230, 1239 (2d Cir. 1974); Solien *ex rel.* NLRB v. Miscellaneous Drivers Union, 440 F.2d 124, 131 (8th Cir. 1971); Retail Clerks Union Local 137 v. Food Emp'rs Council, Inc., 351 F.2d 525, 530 (9th Cir. 1965).

151. Courts have not been a rubber stamp for the Board in the Third, Fifth, Sixth, Tenth, and Eleventh Circuits, which currently apply the remedial purpose approach. In the past ten years, district courts within these circuits have denied section 10(j) injunctive relief in four out of fifteen cases. *See* Glasser *ex rel.* NLRB v. ADT Sec. Servs., Inc., No. 1:09-CV-223, 2009 WL 1383291 (W.D. Mich. May 14, 2009), *rev'd*, 379 F. App'x 483 (6th Cir. 2010); Kendellen v. Interstate Waste Servs., No. 06-5694(SRC), 2007 WL 121435 (D.N.J. Jan. 11, 2007); Calatrello v. Am. Church, Inc., No. 1:05 CV 797, 2005 WL 1389042 (N.D. Ohio June 9, 2005); Johnson *ex rel.* NLRB v. Sunshine Piping, Inc., 238 F. Supp. 2d 1297 (N.D. Fla. 2002). *Glasser* was the only one of these cases overruled by an appellate court.

152. *See generally* Carl T. Bogus, *The Battle for Separation of Powers in Rhode Island*, 56 ADMIN. L. REV. 77, 114 (2004) ("The courts have the power of judicial review to ensure that the agency is acting within its legislatively-delegated authority, following legislatively-prescribed procedures, and not acting arbitrarily or capriciously . . . .").

153. *See, e.g.*, Beth Isr. Hosp. v. NLRB, 437 U.S. 483, 501 (1978) (applying the substantial-evidence level of deference to a section 10(e) petition); Universal Camera Corp. v. NLRB, 340 U.S. 474, 477 (1951) (applying the substantial-evidence level of deference to a section 10(f) petition).

evidence.[154] While following the remedial purpose approach and using the substantial-evidence level of deference may provide an easier burden of proof for the Board than under the equitable principles approach, a court still has the authority to determine whether that burden is met. Moreover, even if a court feels compelled to issue injunctive relief because of the deferential nature of the approach, if it, "in its discretion, does not believe that far-reaching mandatory relief would serve the purposes of the Act, it need not grant the full remedy requested by the Board" and may instead issue only a partial injunction.[155]

This judicial review is especially important since the Board has not been immune to bias. Shortly after its creation, the Board demonstrated a pro-labor bias.[156] Even today, there is evidence that the Board's ideology reflects the ideology of the administration that appointed its members.[157] Under the substantial-evidence level of deference, courts are free to deny section 10(j) relief when they believe it is not supported by the evidence and instead driven by bias.[158] Thus, the court's role under the remedial purpose approach is not insignificant.

CONCLUSION

In view of the likely increase in the number of section 10(j) petitions for injunctive relief following the NLRA general counsel's memorandum, the judicial interpretations of the just and proper standard merit renewed consideration. Focusing on section 10(j)'s structural and historical context reveals that the remedial purpose approach is a better representation of Congress's intent than the equitable principles approach. First, the fact that section 10(j) is parallel in structure to sections 10(e) and (f) provides evidence of congressional intent to avoid the use of the equitable principles approach and to use instead a deferential approach. Second, the fact that

154. NLRB v. Auciello Iron Works, Inc., 980 F.2d 804, 807 (1st Cir. 1992) ("A court must enforce the Board's order if the Board correctly applied the law and if its findings of fact are supported by substantial evidence on the administrative record viewed as a whole."). According to *Universal Camera*, "substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." 340 U.S. at 477 (quoting Consol. Edison Co. v. NLRB, 305 U.S. 197, 229 (1938)) (internal quotation marks omitted).

155. Boire *ex rel.* NLRB v. Pilot Freight Carriers, Inc., 515 F.2d 1185, 1193 (5th Cir. 1975).

156. *See* HUGH DAVIS GRAHAM, THE CIVIL RIGHTS ERA 130–31 (1st ed. 1990) (discussing the "pro-labor prejudice" of the early NLRB); *see also* Fisk & Malamud, *supra* note 4, at 2035 (referring to the "perceived NLRB pro-union bias").

157. *See* Terry M. Moe, *Control and Feedback in Economic Regulation: The Case of the NLRB*, 79 AM. POL. SCI. REV. 1094, 1102 (1985) ("[C]hange in presidential administration from Republican to Democrat gives rise to a pro-labor shift in NLRB performance, and a change from Democrat to Republican produces a pro-business shift."); William N. Cooke & Frederick H. Gautschi III, *Political Bias in NLRB Unfair Labor Practice Decisions*, 35 INDUS. & LAB. REL. REV. 539 (1982) (describing a correlation between Board voting behavior and the ideology of the administration that appointed Board members).

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

section 10(j) includes a congressional mandate supports the use of the remedial purpose approach, given the Board's labor relations expertise and its accountability to the public. Third, section 10(j)'s legislative history reveals a congressional intent to impose judicial restraint. Each of these three pieces of evidence on its own would be insufficient to establish a "necessary and inescapable inference" that Congress intended courts to apply the remedial purpose approach rather than the traditional equitable principles approach. However, when considered together, this evidence about section 10(j)'s structure, underlying policy, and history is more than enough to find such an inference.