LABOR LAW: SUPREME COURT PROVIDES AN IMPRIMATUR FOR EXPANDED PROTECTION OF THE PAROCHIAL INTERESTS OF PRIVATE DISPUTANTS UNDER THE NLRA

The Supreme Court held that a party wholly successful in an unfair labor practice proceeding before the NLRB has a right to intervene in appellate review or enforcement proceedings. The Court recognized the existence of strong, albeit subordinate, private interests under the NLRA and seemingly utilized a balancing test to determine the nature and extent of the protection to be accorded such interests. The reasoning employed may also presage expanded procedural and remedial protection for private interests at every adjudicatory level.

AT THE TIME of the enactment of the National Labor Relations Act,[1] the Labor Board created by that statute was viewed as "the custodian of the 'public interest' to the exclusion of the so-called 'private interests' at stake."[2] One procedural manifestation of this philosophy has been a refusal to allow the successful party in a Board proceeding to intervene as a party in appellate review of that proceeding. The processes of the Board have been viewed as mechanisms by which the public interest in labor peace was to be effectuated, and thus it accrued to the public, as represented by the Board, to prosecute or defend appeals from the determinations of that public agency.[3] The rights of parties who were successful in Board hearings, be they parties charging unfair labor practices or the parties so charged, were viewed as distinctly subordinate to the public weal[4] and were consequently relegated to amicus status in

[1] 49 Stat. 449 (1935) (amended by 61 Stat. 136 (1947), and 73 Stat. 525, 541 (1959), as amended, 29 U.S.C. § 150-68 (1964)).

[2] UAW v. Scofield, 382 U.S. 205, 218 (1965).

[3] See notes 20-26 *infra* and accompanying text.

[4] According to the traditional theory, the National Labor Relations Act exists for the effectuation of the public interest, and the only private interests recognized and protected by the act were those coextensive with the "public interest." See, *e.g.*, Nathanson v. NLRB, 344 U.S. 25 (1952); Phelps Dodge Corp. v. NLRB, 313 U.S. 177 (1941); National Licorice Co. v. NLRB, 309 U.S. 350 (1940). Thus, private interests theoretically received protection only incidentally to the promotion of the public policies of the act because an incompatible private interest asserted by an individual, if recognized independently, might subvert the express public interest. The issue therefore is not whether "private interests" in general are recognized within the statutory scheme, but whether "private interests" which are distinct from or conflict

appellate proceedings.[5]

The "public rights doctrine" has been steadily eroded by the notion that the NLRA does in fact extend some recognition and protection to independent private interests. A continuing source of confusion, however, has been the inability of the courts to delineate clearly the procedural or remedial safeguards for those interests. In the recent decision of *UAW v. Scofield*,[6] the Supreme Court resolved one aspect of the controversy by finding that parties who are wholly successful in unfair labor practice proceedings before the NLRB should have the procedural right to intervene in courts of appeals review proceedings. The reasoning employed by the Court may also presage expanded procedural and remedial protection in other contexts for the parochial interests of the private parties to a labor dispute.

The *Scofield* decision subsumed two consolidated cases arising from prior Labor Board proceedings.[7] In *Scofield v. NLRB*,[8] the Board dismissed an unfair labor practice complaint previously filed on behalf of four employees protesting certain actions of Local 238 of the UAW.[9] The employees sought review in the Seventh Circuit and the union, the successful *charged* party below, filed a timely motion for intervention. Despite the fact that neither the employees nor the Board opposed the motion, the court denied the union's request.[10] In *Fafnir Bearing Co. v. NLRB*,[11] the Board

with the "public interest" should be accorded such recognition and protection given their subordinate status.

[5] See note 10 *infra*.

[6] 382 U.S. 205 (1965).

[7] The cases presented "converse sides of a single question—whether parties who are wholly successful in unfair labor practice proceedings before the National Labor Relations Board have a right to intervene iu the Court of Appeals review proceedings." *Id.* at 207.

[8] 50 CCH Lab. Cas. 32595 (7th Cir. 1964), *rev'd and remanded sub nom.* UAW v. Scofield, 382 U.S. 205 (1965).

[9] UAW (Wisconsin Motor Corp.) 145 N.L.R.B. 1097, *motion to intervene denied sub nom.* Scofield v. NLRB, 50 CCH Lab. Cas. 32595 (7th Cir. 1964), *rev'd and remanded sub nom.* UAW v. Scofield, 382 U.S. 205 (1965).

[10] The court merely authorized the Union to file a brief as amicus curiae without leave to participate in oral argnment. 382 U.S. at 207. However, the privileges granted to an amicus are not adequate substitutes for those accorded an intervening party in appellate proceedings. Typically, an intervenor, but not an amicus, is permitted "to participate in the designation of the record"—viz., make additions thereto. See, *e.g.*, 7TH CIR. R. 14. The intervenor, as a party, is allowed to participate in oral argnment—an amicus cannot. See, *e.g.*, D.C. CIR. R. 18 (i). An intervenor, but not an amicus, is permitted to petition for a rehearing. See, *e.g.*, 7TH CIR. R. 25. An intervenor has the right to appeal and seek reversal of any adverse judgment. See Fishgold v. Sullivan Drydock & Repair Corp., 328 U.S. 275, 283 (1946); International Union, of

had found the company guilty of an unfair labor practice and issued a cease and desist order.[12] The company petitioned the Second Circuit for review and the union, the successful *charging* party below, moved to intervene. In this case, both the company and the Board opposed the union's motion and the court denied intervention. The Supreme Court reversed both denials of intervention, holding that the recognition of such a private right would be neither inconsistent with nor obstructive of the "public interest" sought to be effectuated by the National Labor Relations Act.[13] The Court noted that it would be unfair to deny intervention to the beneficiary of a Board order merely because section 10 of the act[14] did not expressly allow such a procedure.[15]

Section 10 provides a comprehensive grant of remedial powers to the NLRB,[16] which includes exclusive primary jurisdiction over unfair labor practice complaints and the power to initiate, on its own motion, enforcement proceedings in the circuit courts.[17] On the other hand, section 10 accords rather cursory attention to the rights of the private participants in the dispute-settling process. For ex-

Mine Workers v. Eagle-Picher Mining & Smelting Co., 325 U.S. 335, 338-39 (1945); United States v. California Cooperative Canners, 279 U.S. 553, 559 (1929). An amicus, on the other hand, has no right to appeal. See *Ex parte* Leaf Tobacco Bd. of Trade, 222 U.S. 578 (1911); *Ex parte* Cutting, 94 U.S. 14 (1876). See generally 4 MOORE, FEDERAL PRACTICE ¶ 24.15, at 104 (2d ed. 1963).

[11] 339 F.2d 801 (2d Cir. 1964), *rev'd sub nom.* UAW v. Scofield, 382 U.S. 205 (1965).

[12] 146 N.L.R.B. 1582 (1964), *motion to intervene denied*, 339 F.2d 801 (2d Cir. 1964), *rev'd sub nom.* UAW v. Scofield, 382 U.S. 205 (1965).

[13] 382 U.S. at 212-16.

[14] National Labor Relations Act § 10(f), 49 Stat. 455 (1935), as amended, 29 U.S.C. § 160(f) (1964).

[15] 382 U.S. at 208-10, 213.

[16] The unparalleled comprehensiveness of the remedial powers conferred upon the National Labor Relations Board by § 10 of the Wagner Act was the direct result of the relative impotence of the preceding National Labor Board. The NLB's inability to enforce its own orders or to obtain prompt judicial enforcement thereof enabled employers to flout the act with relative impunity. Note, 53 HARV. L. REV. 472, 473 (1940). Moreover, the retention of overlapping jurisdiction by other administrative agencies emasculated the NLB's primary function of guaranteeing industrial harmony through the development of a unified system of labor relations law. See Brief for Petitioner (Fafnir Bearing Co.), p. 20, UAW v. Scofield, 382 U.S. 205 (1965); Comment, 32 U. CHI. L. REV. 786, 795 (1965); Note, 53 HARV. L. REV. 301 (1939). See generally Garner v. Teamsters Union, 346 U.S. 485, 490 (1953); S. REP. NO. 573, 74th Cong., 1st Sess. 1-6, 15 (1935); H.R. REP. NO. 972, 74th Cong., 1st Sess. 1-6, 15 (1935); LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT 4, 534, 2295, 2650 (1935); Rothman, *The National Labor Relations Board and Administrative Law*, 29 GEO. WASH. L. REV. 301-04 (1960); Note, 51 HARV. L. REV. 722, 733 (1938).

[17] National Labor Relations Act § 10(a), (e), 49 Stat. 453, 454 (1935), as amended, 29 U.S.C. § 160(a), (e) (1964).

ample, while an "aggrieved party" can seek judicial review of a Board order,[18] the section is silent as to whether a similar right to participate as a party to a review is afforded a beneficiary of that order.[19]

An early interpretation of section 10 by the Supreme Court accentuated the primacy of the public interest over private rights and remedies when, in the 1940 case of *Amalgamated Util. Workers v. Consolidated Edison Co.*,[20] the Court propounded the "public rights doctrine." In *Amalgamated*, the Court denied a union petition to have the employer adjudged in contempt of a lower court decree enforcing a Board cease and desist order, reasoning that the Wagner Act was intended to protect the public interest and not to create independent private remedial rights. "What Congress said at the outset [of section 10], that the power of the Board to prevent any unfair practice . . . is exclusive, is . . . fully carried out at every stage of the proceeding."[21] Consequently, the courts were deemed to have "no jurisdiction to . . . entertain a petition for violation of . . . [their decrees] of enforcement save as the Board presents [them]."[22] Thus, the pristine "public rights doctrine" was framed so as to deny independent *remedial* rights to the private participant in a labor dispute and, to compound the isolation of the private party, section 10 was construed to deny him all *procedural* rights except those unambiguously accorded him as a charged or "aggrieved" party.[23]

[18] "Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States . . . ." National Labor Relations Act § 10(f), 49 Stat. 455 (1935), as amended, 29 U.S.C. § 160(f) (1964).

[19] See Brief for Petitioner (Scofield), pp. 13-15, UAW v. Scofield, 382 U.S. 205 (1965); Comment, 32 U. CHI. L. REV. 786 (1965).

[20] 309 U.S. 261 (1940).

[21] *Id.* at 266.

[22] *Id.* at 270.

[23] A "remedial right" is a legally guaranteed remedy or redress for the deprivation or breach of interests and duties recognized by substantive law. On the other hand, "procedural rights" are prescribed methods for protecting interests or enforcing remedial rights. *Cf.* Barker v. St. Louis County, 340 Mo. 986, 1001-03, 104 S.W.2d 371, 377-79 (1937). Section 10(b) of the NLRA provides that the charged party shall be given notice of the charges against him, the place and time of the hearing and that "the person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint." 49 Stat. 453 (1953), 29 U.S.C. § 160(b) (1964). Similarly, § 10(f) provides that "any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals in the United States . . . ." 49 Stat. 455 (1953), as amended, 29 U.S.C. § 160(f) (1964).

Despite weighty criticism,[24] this doctrine has permeated judicial determinations of private remedial and procedural rights under the NLRA for more than two decades.[25] The *Amalgamated* rule has often been applied to preclude intervention at the appellate level by the beneficiary of a Board order. Since such a beneficiary could not qualify as an "aggrieved party" under section 10, a court of appeals was viewed as *lacking the power* under the NLRA to grant intervention rights.[26]

The rigidity of the "public rights doctrine," notwithstanding its pervasive influence, was somewhat eroded by later decisions. In *International Union of Mine Workers v. Eagle-Picher Mining & Smelting Co.*,[27] for example, the Supreme Court held that unions which had been *permitted* to intervene as parties in the lower court had standing to petition for certiorari to seek review of an adverse decision from which the Board did not prosecute an appeal.[28] Thus, while it reaffirmed *Amalgamated*'s holding that a beneficiary of a NLRB order could not *institute* enforcement proceedings, the Court implied that the NLRA did not absolutely prohibit intervention and that the courts could, in their discretion, permit the successful charged or charging party at the Board level to intervene on appeal. This erosion of the doctrine by the judiciary also received added impetus from the Taft-Hartley amendments of 1947.[29] Congress

[24] See, *e.g.*, Jaffe, *The Public Right Dogma in Labor Board Cases*, 59 HARV. L. REV. 720 (1946). See also Garner v. Teamsters Union, 346 U.S. 485 (1953). See generally Hall, *The Taft-Hartley Act v. State Regulation*, 1 J. PUB. L. 97 (1952); Rose, *The Labor Management Relations Act and the State's Power to Grant Relief*, 39 VA. L. REV. 765 (1953).

[25] See Comment, 32 U. CHI. L. REV. 786, 794 (1965).

[26] For example, in one of the earliest intervention cases, Stewart Die Casting Corp. v. NLRB, 132 F.2d 801 (7th Cir. 1942), the court relied on *Amalgamated*'s "public rights doctrine" to deny an employee's motion to intervene in order to contest the entering of a compliance stipulation between the Board and the company for less than the full amount of back pay due. The court said that while it seemed "unreasonable and illogical" to deny a hearing to the employees who are entitled to the money for their unlawful discharge, under § 10 a private party could invoke the jurisdiction of the court of appeals *only* if he brought his case within § 10(f) as an "aggrieved party." *Id.* at 804. See note 18 *supra*. Since the employees had been the beneficiaries of the Board's order and were therefore not "aggrieved," their motion to intervene was "beyond the power of this court to grant." Stewart Die Casting Corp. v. NLRB, *supra* at 804.

[27] 325 U.S. 335 (1945).

[28] *Id.* at 338-39.

[29] Labor Management Relations Act, 61 Stat. 136 (1947), as amended, 29 U.S.C. §§ 141-44, 151-68, 171-87 (1964).

In Taft-Hartley, Congress may have withdrawn the keystone of the *Amalgamated* decision by deleting the phrase "this power shall be exclusive . . ." from § 10(a). See note 21 *supra* and accompanying text. In *Amalgamated*, "the Court placed great

demonstrated therein that the recognition of independent private interests and the accordance of private remedial rights was not inconsistent with the policies of the NLRA. For example, labor and management were accorded the right to bring suit in the district courts to enforce collective bargaining agreements[30] and to recover damages caused by violations of these agreements.[31]

As a result of the relaxation of the "public rights doctrine" evinced by *Eagle-Picher* and the Taft-Hartley amendments, the courts of appeals began to adopt a more liberal posture towards intervention. A majority of the courts abandoned the view that section 10 was absolute in its implicit denial of circuit court power to permit intervention.[32] Rather, intervention was generally allowed if certain conditions were met: (1) the participation of the potential intervenor should promote the public interest by providing a more complete exposition of the competing factors at issue;[33] and (2) both

weight upon the language and legislative history behind § 10(a) . . . as it read at that time . . . . The . . . [this power shall be exclusive] portion of § 10(a) was deleted in the Taft-Hartley amendments to the Wagner Act in 1947, when Congress added the union unfair labor practice provisions and enacted § 301(a). While it is true that the Labor Board does not confer a private administrative remedy, it is equally true that, since 1947, it serves substantially as an organ for adjudicating private disputes." 382 U.S. at 221 n.18. However, the deletion was obviously necessary to maintain the internal consistency of the act in light of the provisions for private suits in the district court, note 31 *infra*, and it may have been intended to serve no other purpose. See LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT RELATIONS ACT 499, 556 (1947). No mention was made in the committee hearings as to liberalizing the role of the private disputant in pre-existing procedure.

[30] "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties . . . ." Labor Management Relations Act § 301(a), 61 Stat. 156 (1947), 29 U.S.C. § 185 (1964).

This section has been interpreted not only to allow suits between employers and unions, but also to permit an individual employee to sue his employer to enforce the collective bargaining contract. See, *e.g.*, Humphrey v. Moore, 375 U.S. 335 (1964); Smith v. Evening News, 371 U.S. 195 (1962). Thus, judicial construction of § 301(a) further illustrates the evolving recognition and protection of private interests within the regulatory scheme of the NLRA.

[31] "Whoever shall be injured in his business or property by reason or [*sic*] any violation of subsection (a) may sue therefor in any district court . . . and shall recover the damages by him sustained and the cost of the suit." Labor Management Relations Act § 303(b), 61 Stat. 159 (1947), 29 U.S.C. § 187(b) (1964).

[32] See, *e.g.*, Carrier Corp. v. NLRB, 311 F.2d 135 (2d Cir.), *rev'd on other grounds*, 376 U.S. 492 (1962); Great Western Broadcasting Corp. v. NLRB, 310 F.2d 591 (9th Cir. 1962); Selby-Battersby & Co. v. NLRB, 259 F.2d 151 (4th Cir. 1958); American Newspaper Publishers Ass'n v. NLRB, 190 F.2d 45 (7th Cir. 1951). *Contra*, NLRB v. Santa Clara Lemon Ass'n, 274 F.2d 492 (9th Cir. 1960); Haleston Drug Stores, Inc. v. NLRB, 190 F.2d 1022 (9th Cir. 1950).

[33] "In such proceedings [review of a Board order], private parties have no rightful place except as the court may desire to avail itself of helpful suggestions." Aluminum

the Board and the "aggrieved" party acquiesced in the motion.[34] Yet the failure of the Supreme Court to re-evaluate the "public rights doctrine" during this period forced the lower courts to pay it continued lip service and produced continued conflict among the circuits.[35]

In *Scofield*, the Supreme Court perfected the evolution of the standing of the successful party in a Board proceeding to intervene in appellate review or enforcement proceedings by guaranteeing him a *right* to intervene.[36] Implicit in this decision was a recognition that independent, albeit subordinate, private interests are to be recognized under the NLRA.[37] Theoretically, the recognition of strong private interests would be accomplished by according them substantive protection. By guaranteeing intervention rights, however, *Scofield* accorded private interests only a procedural right and did not purport to extend a protective mantle to remedies

Ore Co. v. NLRB, 131 F.2d 485, 488 (7th Cir. 1942). See Amalgamated Meat Cutters v. NLRB, 267 F.2d 169, 170 (1st Cir. 1959); NLRB v. Retail Clerk Int'l Ass'n, 243 F.2d 777, 783 (9th Cir. 1956).

[34] Mutual agreement upon intervention by both the Board and the "aggrieved" party has often been the determinative factor. In these cases, intervention was generally granted without judicial comment in the text of the opinions. See, *e.g.*, West Texas Util. Co. v. NLRB, 184 F.2d 233 (D.C. Cir. 1950); cases cited note 33 *supra*. However, in a few cases intervention was denied even thougb the other parties had not challenged the motion. See, *e.g.*, Amalgamated Meat Cutters v. NLRB, *supra* note 33, at 170.

[35] Emblematic of the conflict between the Supreme Court's position in *Amalgamated*, see text accompanying notes 21-23 *supra*, and the recurring desire of lower courts to accord a procedural or remedial protection to a legitimate private interest was the resort to the "private Attorneys General" concept. This doctrine had its roots in the Second Circuit, where Judge Frank rationalized the accordance of such a right by asserting that "nothing constitutionally . . . [prohibits] Congress from empowering any person, official or not, to institute a proceeding involving such a controversy, even if the sole purpose is to viudicate the public interest. Such persons, so authorized, are, so to speak, private Attorney Generals [*sic*]." Associated Industries v. Ickes, 134 F.2d 694, 704 (2d Cir. 1943). The courts utilized this concept to justify permitting a private party to institute a proceeding, under other administrative acts, even where Congress had not expressly authorized such a procedure. See, *e.g.*, Scripps-Howard Radio v. FCC, 316 U.S. 4, 14-15 (1942); FCC v. Sanders Bros. Radio Station, 309 U.S. 470, 477 (1940); W. R. Grace & Co. v. CAB, 154 F.2d 271, 286 n.2 (2d Cir. 1946).

[36] 382 U.S. at 208.

[37] Under the "public rights doctrine," the NLRA is viewed as exclusively designed to promote and protect the "public" interest. The only protections accorded "private" interests under the act are those expressly conferred in the statute or those which incidentally accrue to a private interest in the course of furthering the "public" interest. See notes 4, 21-23 *supra* and accompanying text. Thus, before a court can reach the question of whether an asserted "private interest" should receive procedural or remedial protection, it must first decide whether the NLRA permits the recognition of such a parochial interest.

which might ameliorate a substantive deficiency in Board determinations. Thus, *Scofield* merely ensures that a private party will have an opportunity to apprise the court of his interest.[38] To this extent, the decision represents a compromise between the need to accord some protection to acknowledged private interests and the more basic tenet of the "public rights doctrine" that the primacy of the public interest precludes recognition of *all* conflicting private remedial rights.[39]

[38] The primary source of confusion over the permissible role of the private disputant under the NLRA has been the Court's repeated failure to clearly differentiate between an "interest" and a "right." The legislative history of the Wagner Act, see, *e.g.*, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT (1935), and the principal cases interpreting the act, see, *e.g.*, Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 194 (1941); *Amalgamated Util. Workers;* NLRB v. Fansteel Metallurgical Corp., 306 U.S. 240, 258 (1939), all emphasize that the NLRA was not designed to protect private *rights.* Similarly, when the later cases began to soften the rigidity of that concept the courts used the terms "rights" and "interest" indiscriminately. However, these courts were necessarily referring to two distinct concepts. While it was clear that under the original NLRA no private *remedial rights* were created, it was equally obvious that the existence of *private interests* was recognized and that private *procedural rights* were, in some instances, accorded those interests. Nevertheless, the courts, including the Supreme Court in *Scofield,* consistently refused to make these distinctions clear.

The distinction between a "right" and an "interest" is implied in jurisprudential writing. See AUSTIN, LECTURES ON JURISPRUDENCE 410 (3d ed. 1869); HOLLAND, ELEMENTS OF JURISPRUDENCE 83 (13th ed. 1928); SALMOND, JURISPRUDENCE 237-38 (10th ed. 1947); TERRY, SOME LEADING PRINCIPLES OF ANGLO-AMERICAN LAW 97 (1884); Cook, *The Utility of Jurisprudence in the Solution of Legal Problems,* in LECTURES ON LEGAL TOPICS, 1923-24, at 333-58 (1928); Jaffe, *Standing to Secure Judicial Review: Private Actions,* 75 HARV. L. REV. 255 (1961); Terry, *Duties, Rights and Wrongs,* 10 A.B.A.J. 123 (1924). More recently, Roscoe Pound isolated three categories of interests: "For the purposes of the science of law we may say that an interest is a claim, a want, a demand, of a human being . . . which the human being . . . seeks to satisfy and of which social engineering in civilized society must therefore take account. So defined, the interests which the legal order secures may be . . . [those] of individual human beings [individual interests] . . . [those] of the political organization of society [public interests] or [those] of the whole social group [social interests] . . . ." Pound, *A Theory of Social Interests,* in READINGS IN JURISPRUDENCE 241 (Hall ed. 1938). *Cf.* BENTHAM, THEORY OF LEGISLATION 144-45, 163 (Hildreth ed. 1876). Thus a party may have a parochial interest, distinct from the "public interests," yet that interest does not become a "right" unless, and until, it is accorded remedial or procedural protection. *Cf.* Jaffe, *Standing to Secure Judicial Review: Private Actions,* 75 HARV. L. REV. 255, 256 (1961).

[39] The court observed that in earlier decisions it had recognized "the existence of private rights within the statutory scheme." 382 U.S. at 218. See, *e.g.*, Smith v. Evening News Ass'n, 371 U.S. 195 (1962); Nathanson v. NLRB, 344 U.S. 25, 27 (1952); Phelps Dodge Corp. v. NLRB, *supra* note 38, at 194; NLRB v. Fansteel Metallurgical Corp., *supra* note 38, at 258. See generally Jaffe, *The Public Right Dogma in Labor Board Cases,* 59 HARV. L. REV. 720, 728-31 (1946). "These cases have, to be sure, emphasized the 'public interest' factor. To employ the rhetoric of 'public interest,' however, is not to imply that the public right excludes recognition of parochial private interests." 382 U.S. at 218. Later the *Scofield* Court tendered this statement: "In short, we think that the statutory pattern of the Labor Act does not dichotomize

The recognition of subordinate private interests, however, does not *require* the accordance of private procedural safeguards,[40] since a court might simply make an independent assessment of the private interest in its decisional process. In granting a procedural right of intervention in *Scofield*, therefore, the Court seemingly employed the balancing process familiar in other contexts.[41] It is arguable that the procedural right of intervention was extended to the beneficiaries of Board orders only after a determination that the importance of the asserted private interests outweighed the foreseeable adverse impact which the conferral of the private procedural right would have on the Board's effectuation of the predominant public interest.[42]

'public' as opposed to 'private' interests. Rather, the two interblend in the intricate statutory scheme." *Id.* at 220. See Retail Clerks Union v. Food Employers Council, Inc., 351 F.2d 525 (9th Cir. 1965).

A similar observation had been made by the Supreme Court in Garner v. Teamsters Union, 346 U.S. 485 (1953). "Perhaps the clearest thing to emerge from the best-considered literature on this subject is that the two terms are not mutually exclusive, that the two classifications overlap . . . ." *Id.* at 500. Similarly, Professor Jaffe argued that "reflection and examination alike will demonstrate that these very useful shorthands, 'private' and 'public' right, are not mutually exclusive categories, a twain bound by the legal proprieties never to meet. In the sense of the end which legal action has in view or the interests which are to be secured, there is no clear and shining line between so-called private rights enforced by individual litigants and so-called public rights enforced by an agency like the National Labor Relations Board. Jaffe, *The Public Right Dogma in Labor Board Cases*, 59 HARV. L. REV. 720 (1946). "It is, I think, one of the fundamental insights or premises of democratic theory that all lines of value lead back to the individual. The public is individnals, separately and in groups." *Id.* at 724.

[40] An "interest" might include anything from a mere preference for one outcome or state of affairs over another to some actual but remote adverse impact on the party asserting the "interest." In the former, the courts would rarely provide remedial or procedural protection. An analogous problem arises in regard to questions of standing to sue. See Massachusetts v. Mellon, 262 U.S. 447 (1923). See generally 3 DAVIS, ADMINISTRATIVE LAW TREATISE § 22 (1958); Jaffe, *Standing to Secure Judicial Review: Private Actions*, 75 HARV. L. REV. 255 (1961). In the latter, while a court might grant such protection, it would not be compelled to do so. *Cf.* Shaughnessy v. Pedreiro, 349 U.S. 48 (1955); Niles-Bement-Pond Co. v. Iron Moulders Union, 254 U.S. 77 (1920); Williams v. Bankhead, 86 U.S. (19 Wall.) 563 (1873); Horn v. Lockhart, 84 U.S. (17 Wall.) 570 (1873); Shields v. Barrow, 58 U.S. (17 How.) 130 (1854); ICC v. Blue Diamond Prods. Corp., 192 F.2d 43 (8th Cir. 1951); White v. Douds, 80 F. Supp. 402 (S.D.N.Y. 1948). In *Scofield*, the potential adverse impact to the charged party was not remote, for he stood to incur liability in case of an adverse ruling and remand by the reviewing court. 382 U.S. at 212. The adverse impact to the charging party, though remote, was foreseeable because of the probable negative impact of an adverse decision upon his suit under § 301(a). *Id.* at 220; see Brief for Petitioner (Scofield), pp. 17-27.

[41] See Frantz, *The First Amendment in the Balance*, 71 YALE L.J. 1424 (1962).

[42] "If, then, individual remedial interests can be protected under the NLRA without infringing upon the public interest, they should definitely be so served. The fact that victims of unfair labor practices are completely dependent upon the adequacy of

However, the manner in which this balancing test was applied in *Scofield* indicates a solicitude for the protection of private interests which might permeate decisions in other areas where recognition and protection of a private interest are sought.[43] For example, the Board contended that the charging party should have no right to intervention because he could only become the beneficiary of an order entered by the Board. Accordingly, he would have no greater interest in the outcome of the review than any other member of the public.[44] The *Scofield* Court emphasized, however, the foreseeable adverse impact a decision as to the unfair labor practice complaint might have on the union's potential civil suit under section 301 (a).[45] Since the claim in the instant case conceivably involved a breach of the parties' collective bargaining agreement, the Union could, under section 301 (a), institute a separate suit for breach of contract in the district court. While it is true that the rights and duties created by section 301 are not coextensive with those redressed in unfair labor practice proceedings, a determination in the latter proceedings that the employer had not impinged upon the Union's statutory rights would surely have a precedential impact upon the Union's contractual claim.[46] However, while this observation was applicable to the case at bar, the possibility of such potential suits will not be present in unfair labor practice proceedings such as organizational disputes where perforce no collective bargaining agreement exists. In the absence of the aforementioned interest, the charging party appears to be adequately represented by the Board's defense of its own order.

Board proceedings for relief argues strongly in favor of affording full procedural protections whenever possible." Comment, 32 U. CHI. L. REV. 786, 797 (1965).

[43] However, the recent case of Reynolds v. Marlene Indus. Corp., 250 F. Supp. 722 (S.D.N.Y. 1966), may indicate that the courts will restrict the *Scofield* decision and its reasoning to the narrow holding of that case. In *Reynolds*, the union, as charging party, sought to intervene in a proceeding brought by the NLRB in the district court for a temporary injunction pursuant to § 10 (j). Both the Board and the charged party opposed the intervention, and the court denied the motion. The court expressly distinguished *Scofield*: "The case of . . . [Automobile Workers] . . . v. Scofield . . . is not in point. The possibility of multiplicity of appeals was present there. The Court was reviewing a final order pursuant to section 160 (f). The determination by the Court of Appeals could affect a charging party, the applicant for intervention, who at some later stage could appeal to the courts if the order was reversed." *Id.* at 723.

[44] 382 U.S. at 218. See Brief for NLRB, pp. 25-34. As to the charged party, the Board itself had urged the recoguition and protection of his undeniable interest. He stood to incur liability for an unfair labor practice in the case of an adverse ruling and remand by the reviewing court. 382 U.S. at 217-18; see Brief for NLRB, pp. 21-25.

[45] 382 U.S. at 220.

[46] *Ibid.*

Solicitude for the asserted private interest was also indicated by the Court's cursory assessment of the foreseeable adverse impact such a private right would have on the public interest involved.[47] For example, the Court noted that intervention would have the desirable effect of preventing wasteful "duplication of proceedings."[48] It is submitted, however, that such economies are largely illusory and appear to have been proferred only to add makeweight to support the Court's solicitude for protection of the private interests at issue.[49] While an appellate court's reversal of an NLRB decision to dismiss a complaint would determine the existence of a

[47] The Court did not discern *any* inhibiting effects on the public interest resulting from a bestowal of intervention rights on the private disputant. The examination of the potential counterfactors to the acknowledged strength of the private interest was primarily devoted to cataloging the uncontroverted benefits that would ensue from permitting the *charged* party to intervene. In contrast, the Court accorded rather cursory attention to the Board's argument that, as to the *charging* party, such a right would severely impede the effective administration of the act, 382 U.S. at 221-22, for such a right would enable a private participant to "substitute his discretion for that of the Board in a range of crucial strategic decisions with respect to the administration of the NLRA . . . ." Brief for NLRB, p. 30.

[48] The Court asserted that the avoidance of "unuecessary duplication of proceedings" was consistent with the policies of the NLRA. "'The aim of the Act is to attain simplicity and directness both in the admiuistrative procedure and on judicial review. . . . The purpose of the judicial review is consonant with that of the administrative proceeding itself,—to secure a just result with a minimum of technical requirements . . . .'" 382 U.S. at 211-12, quoting Ford Motor Co. v. NLRB, 305 U.S. 364, 369, 373 (1939). Thus the avoidance of "duplication" was designed not merely to protect adjudicative efficiency but was dictated by, and formulated to promote, the public policies of the act.

[49] Similarly, the Court rather curtly rejected the Board's contention that the accordance of intervention rights to a private disputant, and the concomitant right to independently petition for certiorari, would seriously interfere with the development of a unified system of labor relations law through administrative expertise. See Brief for NLRB, pp. 28-29. In response, the Court observed that the Board was free to advise the denial of certiorari and, moreover, that Congress had entrusted the Court, not the NLRB, with "discretionary jurisdiction to review cases decided by the Court of Appeals." 382 U.S. at 221-22. Arguably, however, since the Board is bound by the Supreme Court's determinations as to the legal issue involved, the NLRB's quasi-legislative power is somewhat specious if the Board is unable to control the cases reviewed by the Court and is thus unable to ensure that the issues will be presented in the best possible factual context. Yet, in reality, the right of an intervenor to petition for certiorari would not significantly undermine the Board's control. The NLRB's opposition to such a petition would, in all probability, guarantee its rejection in most cases. See *id.* at 221. Therefore, by implication, the Board's opposition would be disregarded only when it was contraposed to a strong private interest. Since *Scofield* posited that the NLRA was designed to protect *both* public and private interests, such infrequent results would be consistent with and not opposed to the policies of the act. The Court has, consequently, placed the burden upon the Board to demonstrate the particular circumstances which make a specific case an inappropriate vehicle for the consideration of the legal issue involved therein. By so allocating the burden of proof, the Court again illustrated the deference accorded private interests. See also notes 43, 47 *supra* and accompanying text.

violation of the NLRA, it remains the Board's function to construct the cease and desist order. In so doing, the Board might require the filing of additional arguments and/or a hearing, thereby prolonging the proceedings, and, conceivably, partially relitigating the issues. Furthermore, after a cease and desist order is issued, the charged party would be free to attack the specific provisions of that order. Such an attack would inevitably involve a reargument of the nature and extent, although not the existence, of the party's violation as it is "remedied" by the order. Thus despite the allowance of the right to intervene and appeal in the initial proceeding, the issues could still be twice litigated.[50] As to the charging party, the Board pointed out in its brief that it was, at best, speculative that section 10 (f) could be interpreted to permit an appeal from a dismissal of his complaint by the Board pursuant to an appellate court's reversal of a previously issued cease and desist order.[51] "So clear is this that we [the Board] know of no case in which a charging party has ever attempted to appeal from a Board order dismissing a complaint pursuant to the reviewing court's mandate."[52] Therefore, unless the Supreme Court intends to permit such an appeal and thereby intro-

[50] This is not to say that the party could relitigate the question of his violation of the act; the principles of res judicata would foreclose that possibility. See 382 U.S. at 213. However, the Board's final order would specify the precise conduct of the party which was prohibited and/or require a specific amount of back pay to be given to workers unlawfully discharged. In challenging such an order, the party would be free to argue that the order was too broad in relation to the extent or nature of his violation, which would depend upon the extent of the findings by the appellate court in the original review proceeding. Once this issue is raised, the facts of the violation once again come into dispute.

[51] Implicit in the Board's argument is its dependence on the underlying theory of the "private Attorneys General" concept. See note 35 *supra*. The NLRB observed that permitting the charging party to appeal an order dismissing his complaint is intended only to serve the public interest by ensuring that the Board's interpretation of the statute is consistent with the intent of Congress. The parochial interests of the charging party thus do not constitute the imprimatur for private appeal. Consequently, since the public interest is served by the first appeal, a second appeal on the same issue following a dismissal pursuant to a reviewing court's decision would be inappropriate. See Brief for NLRB, pp. 32-33. Yet the "private Attorneys General" doctrine was developed at a time when prevailing labor theory held that private interests were not recognized under the NLRA and the doctrine was designed to circumvent the rigidity of that theory. See note 35 *supra*. Accordingly, its application, particularly as a restrictive device, to post-*Scofield* determinations would seem to be inconsistent with recoguition accorded private interests by that decision. However, since a second appeal would not appear to be necessary to adequately protect the private disputant, if he has had an adjudication on the merits in his first review, the refusal to apply the public rights doctrine would not necessarily lead to a recognition of such a right to a second appeal.

[52] Brief for NLRB, pp. 32-33.

duce yet another avenue for duplication, the "avoidance-of-duplication" postulate is immaterial as to the charging party.

The Court has thus utilized a balancing approach to accord an independent procedural right to intervene. Moreover, the decision may also presage the utilization of this approach in similar contexts where the protection of a private interest is sought under the NLRA.[53] While the Court explicitly restricted its holding to the narrow issue of the right to intervene in appellate proceedings,[54] its emphasis upon the private interest asserted would likewise seem to compel the increased recognition of additional procedural rights for private parties in *administrative proceedings* before the NLRB.[55] The extension of *Scofield* to this area would similarly entail only the conferral of a procedural right and would therefore necessitate no erosion of the "public rights doctrine" in regard to administrative treatment of private remedial rights. The balancing process, however, would require greater recognition of the public interest in this situation since the need for exclusive control by the NLRB is much

[53] Avoidance or cursory examination of the factors indicating the existence of a public interest which militates against intervention in *Scofield* may be explainable as a product of previous determination by the court that these factors were not sufficiently significant to warrant detailed consideration. On the other hand, the solicitude given the private interest asserted may indicate a willingness to establish a presumption in favor of recognizing and protecting the private interest, which the Board can rebut only by assuming the burden of showing that recognition of the private interest will effectively subvert the public interest. Unlike the allocation of burdens under the balancing approach, such a burden would mean that if the presumption is recognized, the private litigant need only establish the existence and cogency of the private interest. The Board must then estahlish not only that a specific public interest exists but also that it will clearly be subverted if the private right is recognized. The Court seemingly adopts this approach in at least one limited phase of the intervention proceedings. In answering the Board's assertion that intervention undermines NLRB discretion in petitioning for certiorari only where public interest dictates, the court observed that the Board could advise the court of the inappropriateness of the case for review in opposing the petition. See note 49 *supra*.

[54] The Court's holding is couched in very precise and narrow language. 382 U.S. at 208. The Court emphasized that in an appellate proceeding the Board no longer has exclusive, or even primary, control over the effectuation of the "public interest." *Id.* at 221. Thus there is greater flexibility for the protection of private interests without impinging upon the Board's function of initially developing a foundation of expert labor-management law. Moreover, the Court expressly distinguished the issue of the rights of private disputants at the administrative level from the question of what rights are available to said disputants at the appellate level. *Id.* at 219-20 n.15. See note 56 *infra*.

[55] Recently, both the courts and commentators have called for greater procedural rights for the private party before the NLRB. See generally Comment, *The Charging Party Before the NLRB: A Private Right in the Public Interest*, 32 U. CHI. L. REV. 786 (1965). *Scofield* gave added impetus to this plea by expressly recognizing that the private party may have "vital 'private rights' in the Board proceeding." 382 U.S. at 220.

stronger at the administrative than at the appellate level.[56] Recently, the Third Circuit in *Leeds & Northrup Co. v. NLRB*[57] extended the *Scofield* rationale[58] by holding that while the charging party had no right to have a complaint issued, he did have a *right* to a hearing before the Board entered into a settlement which effectuated a withdrawal of an issued complaint.[59] The result seems consistent with the balancing test inferred from the *Scofield* opinion in that the factual context discloses no adverse effect upon the public interest in expeditious administrative resolution of labor disputes which would be subverted by affording the complainant a pre-settlement hearing. It has been empirically shown that the conferral of such a right *after* the issuance of the complaint would neither seriously undermine the Board's control over its docket nor its manpower and budgetary considerations.[60]

[56] "Of course, the considerations involved in determining whether the charging party has certain rights before the Board are not dispositive on the question of appellate intervention. In the first place, the need for centralized control over the agency hearings and the standards under which they operate is much greater at the administrative than the appellate level, where perforce an adequate record has been made for adjudication. Also . . . 97% of the unfair labor practice charges are resolved before the circuit court has entered a decree. . . . This winnowing process diminishes once a case is lodged in the circuit court and falls within our supervisory power over the federal courts. Then, too, manpower and budgetary considerations are of great concern at the administrative level. These factors are not nearly as great when a labor dispute reaches the appellate courts since the Board will invariably appear to defend its order." 382 U.S. at 219-20 n.15.

[57] 4 CCH LAB. L. REP. (53 CCH Lab. Cas.) ¶ 11060 (3d Cir. Feb. 3, 1966).

[58] The Third Circuit proceeded from the proposition that "the Board and its Agents act in the public interest. However, not exclusively so, or in utter disregard of private interests." 4 CCH LAB. L. REP. (53 CCH Lab. Cas.) ¶ 11060, at 16298. After the issuance of a complaint, the court asserted that the charging party has a *right* to a hearing before his complaint is, in effect, dismissed. *Id.* at 16299. The court noted the Board's legitimate interest in controlling its docket and manpower, but implied that the "arbitrariness" that would result from a summary dismissal outweighed any slight adverse impact upon the Board's efficiency. *Id.* at 16298-99. On the other hand, the court clearly indicated that the balance favored exclusive Board control over the original issuance of the complaint. *Id.* at 16299. Thus the court appears to have utilized the balancing test of *Scofield* to determine the procedural rights to be accorded a private interest at the administrative level.

[59] *Id.* at 16298-99.

[60] The vast bulk of unfair labor practice cases are disposed of at the regional office level and most of them are handled without formal proceedings. For example, in 1958, 6,654, or 91.3% of the 7,289 cases closed were disposed of without the issuance of a formal complaint. Short of the issuance of a complaint, a charge may be disposed of by (1) withdrawal (50% of the cases in 1958); (2) dismissal (30% of the cases in 1958); or (3) adjustment (10% of the cases in 1958). Moreover, another 249, or 3.4% of the cases were settled without a hearing before a trial examiner. 23 NLRB ANN. REP. 150 (1959). See Silverburg, *Informal Procedures of the National Relations Board*, 6 SYRACUSE L. REV. 72 (1954); Weyand & Zarky, *Informal Procedures Before the National Labor Relations Board*, Prac. Law. Jan. 1955, p. 31.

Under the *Scofield* decision, a private party might also be granted the right to independently seek enforcement of the Board's orders.[61] The act's policy of centralizing decision-making so as to produce a body of labor-management law developed through the expertise of an administrative agency would not be subverted by such a procedure. The Board's primary jurisdiction over unfair labor practice proceedings, and thus its fundamental responsibility for the development of labor relations law, would be unaffected, for private enforcement rights would not give the private party the opportunity to participate in and interfere with the Board's decisional process. Moreover, in any judicial review or enforcement proceeding, no matter by whom it is instituted, the court and not the NLRB, assumes the responsibility for effectuating the policies of the NLRA.[62] Further, a private right to effectuate enforcement independently would have the salutary effect of providing an additional sanction to the act's prohibitions and would facilitate the prompt resolution and redress of unfair labor practices.[63]

[61] While this result would be contrary to the holding in *Amalgamated Util. Workers*, see text accompanying notes 20-22 *supra*, it has been espoused by Professor Jaffe in an article cited in the *Scofield* opinion, 382 U.S. at 218 n.12. "[T]he reasons . . . which may account for the Board's exclusive power to initiate proceedings do not justify to the same degree a sole power to enforce its orders, at least after the Board has seen fit to secure a judicial order of enforcement." Jaffe, *The Public Right Dogma in Labor Board Cases*, 59 HARV. L. REV. 720, 727-28 (1946). Jaffe also argued that "once a body of doctrine has been developed, jurisdiction [at the Board level] could conceivably, if there were any strong reason for it, be placed on a non-discretionary basis, as with the ICC and the workmen's compensation boards." *Id.* at 728.

[62] Undeniably however, the recoguition of a private right to initiate enforcement proceedings would narrow the NLRB's discretion in deciding when and how to enforce its orders. A decision by the Board not to seek enforcement is generally based upon a "weighing of the likelihood of a repetition of the illegal conduct against the time and expense of litigating . . . and the prospects of losing . . . ." Brief for NLRB, p. 28. Yet, conceivably, neither of the aforesaid factors would invariably counterbalance the charging party's interest in enjoining or redressing the unfair labor practice involved. Moreover, a decision not to enforce based upon either of the above factors is, arguably, inconsistent with the "public interest." If, in fact, the courts would determine that a particular order was unjustified under the provisions of the NLRA, compliance therewith by the charged party, regardless of how achieved, would be contrary to the "public interest." See note 64 *infra*. On the other hand, if the order was in fact valid and thus conducive to the "public interest," the act's purposes would seem to be furthered irrespective of which party prosecuted and bore the expense for the order's enforcement.

[63] Where regulated conduct has been expressly proscribed by Congress, the courts as a general rule have readily inferred or recognized the existence of a private remedy to aid in the public enforcement of the statute. See, *e.g.*, United Constr. Workers v. Laburnum Constr. Corp., 347 U.S. 656, 663-65 (1954); Tunstall v. Bhd. of Locomotive Firemen, 323 U.S. 210 (1944); Steele v. Louisville & N. R.R., 323 U.S. 192 (1944); Deckert v. Independence Shares Corp., 311 U.S. 282 (1940); Wills v. Trans World Airlines, 200 F. Supp. 360, 363-65 (S.D. Cal. 1961); Aerovias Interamericanas

While *Scofield*'s approach of balancing to determine whether a private procedural right should be granted may thus have application in procedural contexts other than intervention in a circuit court, the decision may indicate an even more basic reformulation of the "public rights doctrine." The Court acknowledged the primacy of public over private rights under the NLRA, but simultaneously observed that the existence of a public interest does not preclude protection of independent, although subordinate, private interests.[64] Arguably, increased recognition can be accorded to an asserted private interest in *all* cases where the Board is unable to show that protection of that interest will seriously impinge upon the public interest involved.[65] Such deference for private interests would seem to follow from the *Scofield* decision since increased procedural protection for the interests of the private disputant is a rather hollow right if the mere incantation of the "public interest" by the NLRB would continue to be sufficient to foreclose substantive redress of those interests.[66] If the ambit of *Scofield* in fact proves to

de Panama, S.A. v. Board of County Comm'rs, 197 F. Supp. 230, 250 (S.D. Fla. 1961), *rev'd on other grounds sub nom.*, Board of County Comm'rs v. Aerolineas Peruamasa, S.A., 307 F.2d 802 (5th Cir.), *cert. denied*, 371 U.S. 961 (1962); *cf.* Wheeldin v. Wheeler, 373 U.S. 647, 664-66 (1963) (Brennan, J., dissenting); Northeast Airlines, Inc. v. Weiss, 113 So. 2d 884 (Fla. Dist. Ct. App.), *cert. denied*, 116 So. 2d 772 (Fla. 1959); Northridge Cooperative Section No. 1 v. 32nd Ave. Constr. Corp., 2 N.Y.2d 514, 530, 533-34, 141 N.E.2d 802, 810, 812 (1957). Specifically, "a private action may especially be favored where, as the Supreme Court suggested in [Hewitt-Robins Inc. v. Eastern Freight-Ways, Inc., 371 U.S. 84, 88 (1962)] . . . it may have a 'healthy deterrent effect' upon practices outlawed by the statute." O'Neil, *Public Regulation and Private Rights of Action*, 52 CALIF. L. REV. 231, 262 (1964). At the same time, however, "the broader and more detailed . . . [the act], the more reluctant the courts are to take interstitial action in the regulated sector." *Id.* at 264. Exclusive public enforcement powers are especially likely to be found where the statutory purpose appears to be a "public" rather than a "private" one. See *id.* at 266. Thus the public rights doctrine not only operates to force a narrow construction of the statutory enforcement provision, but serves to foreclose the courts from recognizing or preserving private rights of action.

[64] 382 U.S. at 220. The Court said that "in short, we think that the statutory pattern of the Labor Act does not dichotomize 'public' as opposed to 'private' interests. Rather, the two interblend in the intricate statutory scheme." *Ibid.*

[65] In light of the profound changes in labor-management relations which have occurred since Congress in 1935 expressly disclaimed any intent to create private rights under the NLRA, see note 38 *supra*, such antiquated expressions should not impede an *ad hoc* determination of the rights to be accorded a subsequently acknowledged private interest. The substance of the regulatory scheme would not thereby be subverted, for private procedural or remedial rights would be denied where they would seriously impinge upon the effectuation of the public policies embodied in the NLRA. See note 42 *supra* and accompanying text. However, the burden would be upon the NLRB to demonstrate such a conflict between the "public interest" and the potential private right. See also note 49 *supra*.

[66] Increased procedural protection for the private disputants can be rationalized as

be this pervasive, an assertion of a private remedial right could not be summarily dismissed on the grounds that the NLRA exists solely to effectuate the public interest. For example, the NLRB has persistently refused to recognize the validity of union "no-raiding agreements" on the grounds that such agreements conflict with the "public" interest in preserving the employees' freedom of choice of representatives and that to recognize such agreements would permit private contracts to limit the policies of the act.[67] While an extension of the *Scofield* rationale to this area would not ensure complete recognition and protection of such private agreements, it would curtail the Board's general practice of summarily dismissing complaints or defenses based upon the provisions of a "no-raiding agreement." Rather, the General Counsel would be required to demonstrate how, in a particular case, the enforcement of a specific agreement would seriously circumscribe the employees' rights in light of the salutary effect such intra-union compacts have on industrial harmony.

Scofield may represent the belated maturing of American labor law. It cannot be gainsaid that, initially, a workable legal framework within which to promote labor-management harmony was developable only by according primacy to the "public" rather than to "private" interests. Today, however, that framework has been welded, and experience thereunder has evolved rules which have substantially stabilized labor-management relations and have created justifiable private expectations. Consequently, the NLRB has become essentially an "organ for the adjudication of private dis-

consistent with and promotive of the "public interest" by insuring a full disclosure of the competing factors at every adjudicatory level. Similarly, such protection at least assures the private party that his arguments will be heard. However, it does not guarantee that those arguments will be listened to by either the Board or the courts. Nor does the accordance of procedural protection alone provide any assurance to the private party that he will ever receive substantive redress for his complaint.

[67] "[I]n accordance with established policy, the Board has held that a 'no-raiding' agreement between the petitioner [raiding union] and the intervenor [raided union] in a case is not grounds for dismissal." 21 NLRB ANN. REP. 52 (1956). The reasons for this position were: "'A no-raiding agreement operates to limit the right guaranteed employees under the Act to full freedom in their choice of [a] bargaining representative. . . . Section 10(a) . . . provides that the Board's regulation under the Act shall not be limited by the effect of private agreements.'" Aaron, *Interunion Representation Disputes and the NLRB*, 36 TEXAS L. REV. 846, 858 (1958) (quoting the Board's brief filed in Personal Prods. Corp., 122 N.L.R.B. 563 (1958)). See Cadmium Div. of Great Lakes Indus., 124 N.L.R.B. 353 (1959). *Compare* Steck Co., 122 N.L.R.B. 12 (1958), *with* International Gloveworkers' Union v. Amalgamated Clothing Workers, 44 L.R.R.M. 2775 (N.D. Ill. 1959). See also Cox, *Some Current Problems in Labor Law: An Appraisal*, 35 L.R.R.M. 48, 57 (1955).

putes."[68] Despite this maturing process, however, private interests rarely receive independent consideration under the NLRA, and because of the preemption doctrine they are not protected elsewhere.[69] The consideration given the private interest asserted in *Scofield* could thus provide the impetus for according the private litigant a larger role in the development of national labor policy.

[68] 382 U.S. at 221 n.18. "While it is true that the Labor Board does not confer a private administrative remedy, it is equally true that, since 1947, it serves substantially as an organ for adjudicating private disputes." *Ibid.*

[69] Through the interaction of the doctrine of preemption, which removes state jurisdiction over most unfair labor practices, and the rule of primary jurisdiction, which forecloses the federal courts from this area, "victims of unfair labor practices are completely dependent upon the adequacy of Board proceedings for relief . . . ." Comment, 32 U. CHI. L. REV. 786, 797 (1965). The Supreme Court reemphasized this virtual exclusiveness of the federal administrative remedies in San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959). The Court asserted that "when an activity is arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted . . . . Even the States' salutary effort to redress private wrongs or grant compensation for past harm cannot be exerted to regulate activities that are potentially subject to the exclusive federal regulatory scheme." *Id.* at 245, 247. See also Comment, *supra* at 796 n.62. For the development of the preemption doctrine see Cox, *Federalism in the Law of Labor Relations*, 67 HARV. L. REV. 1297 (1954); Di Fede, *Problems of Federal-State Jurisdiction in Labor-Management Disputes*, 11 N.Y.U. CONF. ON LABOR 85 (1958); Meltzer, *The Supreme Court, Congress, and State Jurisdiction Over Labor Relations: I*, 59 COLUM. L. REV. 6 (1959); Ratner, *Problems of Federal-State Jurisdiction in Labor Relations*, 3 LAB. L.J. 750 (1952); Smith, *The Taft-Hartley Act and State Jurisdiction Over Labor Relations*, 46 MICH. L. REV. 593 (1948).