ERRORS AND OMISSIONS: APPLYING LESSONS FROM HISTORY TO DECIDE THE FUTURE OF ADMINISTRATIVE DEFERENCE WITH RESPECT TO THE NATIONAL LABOR RELATIONS BOARD

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INTRODUCTION

"Yeah, now, well, the thing about the old days, they the old days."[1]

A majority of the current members of the Supreme Court have expressed an interest in altering or entirely doing away with deference to administrative agencies.[2] This article will show how the history of the courts and Congress with respect to labor unions should support continuing administrative deference to the National Labor Relations Board. Prior to upending the existing regime, it is useful to understand what the world would look like without administrative deference and at the same time as a cautionary tale about how courts will behave when unrestrained. Labor law and the judicial treatment of labor unions provide a particularly vivid illustration in this regard. Much of the scholarship up to this point has focused on the merits of deference, its role in the separation of powers, the proper allocation of power between the three branches of government, and the practical effects of deference on administrative decision-making.[3]

In the area of labor law, the Supreme Court has a long history of engaging in statutory interpretation free of any constraints, with objective evidence of the Court getting it wrong. This objective evidence comes in the form of statutory

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1. *The Wire, Home Rooms* (HBO September 24, 2006).

2. *See* Loper Bright Ent. v. Raimondo, 2023 WL 3158352 (2023) (granting writ of certiorari on the issue of whether Chevron v. National Resources Defense Council should be modified or overruled); West Virginia v. E.P.A., 597 U.S. ___, 19 (2022); Pereira v. Sessions, 138 S. Ct. 2105, 2120-21 (2018) (Kennedy, J., concurring); Michigan v. E.P.A., 576 U.S. 473, 760 (2015) (Thomas, J. Concurring); Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1149-54 (10th Cir. 2016) (Gorsuch, J., concurring).

3. *See* Jonathan R. Siegel, *The Constitutional Case for* Chevron *Deference*, 71 VAND. L. REV. 937, 959 (2018); Philip Hamburger, Chevron *Bias*, 84 GEO. WASH. L. REV. 1187 (2016); Charles J. Cooper, *The Flaws of* Chevron *Deference*, 21 TEX. REV. L. & POL'Y 307, 310–11 (2016); Douglas H. Ginsburg & Steven Menashi, *Our Illiberal Administrative Law*, 10 N.Y.U. J. L. & LIBERTY 475, 497–507 (2016); Jack M. Beermann, *End the Failed* Chevron *Experiment Now: How* Chevron *Has Failed and Why it Can and Should Be Overruled*, 42 CONN L. REV. 779, 843–50 (2010). The author is also cognizant that "four gazillion other people have written about [*Chevron*], creating a huge pile of scholarship and precious little left to say," but here we are. *See* Michael Herz, Chevron *is Dead, Long Live* Chevron, 115 COLUM. L. REV. 1867 (2015).

responses to Supreme Court interpretations of various statutes.[4] Part I of this essay will trace the history of statutory interpretation of cases involving labor unions and the various congressional responses. Part II will look at how Congress applied these lessons dealing with labor unions in light of Supreme Court decisions. Part III will show how these lessons should apply when evaluating administrative deference as applied to the National Labor Relations Board (NLRB).

I. COURTS VERSUS CONGRESS ON LABOR UNIONS

A. *Sherman Antitrust Act*

The greatest machinations brought to bear against labor unions in the first thirty years of the twentieth century did not spring forth from an outward hostility by business to the rights of workers to engage in self-organization. Rather, the most potent weapon of this era was borne out of a justified fear from ordinary citizens of overly large businesses gaining control over American lives.[5] Section 1 of the Sherman Anti-Trust Act broadly declared that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."[6] The Act carried with it serious fines and terms of imprisonment for both restraints on trade and the individuals who engineered them.[7]

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4. *See* Loewe v. Lawlor, 208 U.S. 274 (1908) (finding the Sherman Antitrust Act of 1890 to be applicable to labor unions); 15 U.S.C. § 17 (Section 6 of the Clayton Act declaring labor unions to not be engaged in interstate commerce and thus outside the purview of the Sherman Antitrust Act and explicitly excluding labor unions from the coverage of the Sherman Antitrust Act); 29 U.S.C. § 52 (Section 20 of the Clayton Act placing procedural restrictions on the use of injunctions against labor unions); Duplex Printing v. Deering, 254 U.S. 443 (1921) (limiting the scope of lawful conduct permitted under the Clayton Act to conduct that was lawful without it); 29 U.S.C.§ 101 (Anti-Injunction Act broadly defined lawful labor disputes and restricted the use of preliminary injunctions and restricting the reach of the *Duplex Printing* decision); *accord* United States v. Hutcheson, 312 U.S. 219 (1941) (recognizing the congressional dissatisfaction with the *Loewe* and *Duplex Printing* decisions and congressional efforts to address these decisions through the Clayton Act and the Anti-Injunction Act respectively); *see also* San Diego Building Trades Council v. Garmon, 359 U.S. 236, 244–45 (1959) (noting courts are not the primary vehicle for resolving unfair labor practice cases); *see also* 29 U.S.C. §160(b) (vesting the General Counsel with the authority to litigate violations of the Act before the Board); 29 U.S.C. §160(c) (authorizing the Board, as opposed to courts, with the authority to remedy violations of the Act); 29 U.S.C. §159 (no direct appeal from representation decisions issued by the Board) *accord* H.R. Rep. No. 1147, 74th Cong., 1st Sess., pp. 23 (deciding against providing a direct appeal from representation determinations issued by the Board); *see also* O. L. Clark, *Application of the Sherman Anti-Trust Act to Unions since the Apex Case*, 2 Sw. L. J. 94, 95–96 (1948) (summarizing history and collecting cases); *see also* Nicholas Ohanesian, *Administrative Deference and the National Labor Relations Board: Survey and Analysis*, 56 CREIGHTON L. REV. 43, 68 n.172 (2022).

5. *See* Clark, *supra* note 4, at 94; 15 U.S.C. §§ 1–7 (Sherman Anti-Trust Act).

6. 15 U.S.C. §1 (Sherman Anti-Trust Act).

7. *Id.*

B. *Loewe v. Lawlor*

In the face of this broadly worded statute, the courts quickly curbed their enforcement against businesses.[8] In marked contrast to this winnowing of the application of the law against businesses, the courts embraced a robust application of this same law against labor unions.[9] The Supreme Court followed suit in the Danbury Hatters case.[10] The Court in this case relied upon the broadly worded language in Section 1 of the Sherman Antitrust Act to find the statute reached labor unions.[11] This conclusion was reached despite the contrary intent noted in the debates over the Act.[12]

C. *Clayton Act*

1. Sections 6 and 20

In 1914, Congress registered their displeasure with the Supreme Court's application of the Sherman Antitrust Act to labor unions with their passage of

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8. *See* E.C. Knight v. United States, 156 U.S. 1, 16–18 (1895) (finding manufacturing of products beyond the reach of the commerce clause and therefore beyond the reach of the Sherman Anti-Trust Act); *Sherman Anti-Trust Act*, SOC'Y HUM. RES. MGMT. (2016), https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/sherman-anti-trust-act.aspx (last accessed August 14, 2022) (noting the defendants controlled 98% of the sugar refining in the United States); *see also* S. Rep. No. 74-1 at 32 (1935) (Hearing on Senate Bill 1958, the National Labor Relations Act) (Testimony of Bill Sponsor Senator Wagner commenting on the "rule of reason" adopted by the Supreme Court in Standard Oil v. United States, 221 U.S. 1 (1911): "The rule of reason enunciated in that famous case soon came to mean that the courts found little reason in the antitrust laws.")

9. United States v. Workingman's Council of New Orleans, 54 F. 994, 996 (C.C. E.D. 1893) (finding the Sherman Anti-Trust Act applicable to strike by a labor union); Mayo v. Dean, 82 F.2d 554 (5th Cir. 1936) (same); Dowd v. United Mine Workers Union, 235 F. 1, 6 (8th Cir. 1916) (same).

10. Loewe v. Lawlor, 208 U.S. at 301–302.

11. 15 U.S.C. § 1; *see also* United States v. Workingman's Council of New Orleans, 54 F. at 996.

12. 51 Cong. Rec. 13661–13668 (1890); Clark, supra note 4, at 94. While an amendment seeking to exempt labor unions from the reach of Section 1 of the Sherman Antitrust Act was defeated, the importance of this fact in determining the reach of Section 1 has been widely disputed. *See* Archibald Cox, *Labor and the Antitrust Laws—A Preliminary Analysis*, 104 U. PA. L. REV. 252, 256 n.15 (1955); EDWARD BERMAN, LABOR AND THE SHERMAN ACT 11-54 (1930); Boudin, *The Sherman Act and Labor Disputes*, 39 COLUM. L. REV. 1283, 1285–93 (1939); *see also* S. Rep. No. 74-1 at 32 (Testimony of Senator Wagner, "One may rake the debates preceding the passage of the Sherman Act with a fine-toothed comb and not find any indications that the law might be used to harass and impede the laborers and consumers it was designed to protect."); John R. Stockham, Note, *The Hutcheson Case*, 26 WASH. U. L. Q. 375, 376 (1941) (noting that the Supreme Court construed the Sherman Antitrust Act applicable to labor unions by strictly construing the word "every" in Section 1 of the Act and then three years later held that "every" actually meant "some" when it announced its "rule of reason" to limit the application of the Sherman Antitrust Act to businesses).

Sections 6 and 20 of the Clayton Act.[13] Section 6 expressly excluded labor unions from the ambit of the Sherman Antitrust Act, providing:

> The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor . . . organizations, instituted for the purposes of mutual help . . . or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.[14]

And if Article 6 was not emphatic enough with respect to the desire of Congress to exclude labor unions from the ambit of the Sherman Antitrust Act, Congress also acted to limit court remedies by limiting the use of injunctions against labor unions, "unless necessary to prevent irreparable injury to property, or to a property right . . . ."[15] Congress also barred injunctions:

> from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value; or from peaceably assembling in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States.[16]

Taken together, Sections 6 and 20 excluded labor unions from coverage of the Sherman Antitrust Act and further limited the use of injunctions against labor unions when engaging in otherwise lawful activities such as striking, communicating their labor dispute to others, or providing benefits to employees engaged in a strike.[17] The enactment of these tandem provisions was well received when President Wilson cited the Act as a "veritable emancipation [of the working men of America]."[18] American Federation of Labor President Samuel Gompers heralded the Act as an "Industrial Magna Charta."[19] Congress

13. 15 U.S.C. § 17; 29 U.S.C. § 52.
14. 15 U.S.C. § 17.
15. 29 U.S.C. § 52.
16. *Id.*
17. *Id.*; 15 U.S.C. § 17; *see* Cox, *supra* note 12, at 254.
18. FELIX FRANKFURTER & NATHAN GREEN, THE LABOR INJUNCTION 143 (1930).
19. *Id.*

in effect answered the complaint the Supreme Court registered in *Loewe v. Lawlor* that the language is broadly inclusive by specifically carving out labor unions from the reach of the statute.[20]

D. Duplex Printing v. Deering

Following the passage of the Clayton Act, the Supreme Court was confronted again with the application of the Sherman Antitrust Act to labor unions and did so with the seemingly definitive statement from Congress concerning its proper scope.[21] In *Duplex Printing v. Deering*, the Supreme Court first considered the Congressional response to its decision to apply the Sherman Antitrust Act to labor unions in *Loewe v. Lawlor*.[22] Against this backdrop we can now turn to the Supreme Court decision in *Duplex Printing*.[23] The Court noted at the outset that the exception worked to the detriment of the public and therefore should be construed narrowly.[24] The Court also seized upon the qualifiers of "lawful," "peaceful," and "legitimate objects" in construing Sections 6 and 20 of the Clayton Act as narrowly as possible.[25] The Court majority then went on to hold the exceptions granted under Section 6 and 20 to only apply to a labor dispute between the employees and their employer.[26] In the eyes of the Court, the Clayton Act did not prohibit the application of the Sherman Antitrust Act to secondary boycotts in *Duplex Printing*.[27] Thus, labor unions could be enjoined from appeals to the other employers to cease doing business with the employer of the employees with whom they had a labor dispute.[28] Similarly, the employees could be lawfully enjoined from appealing to the public to cease doing business with their employer.[29] The Court reached these constructions despite the explicit prohibition in Section 20 enjoining workers from "peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute;

20. *See supra* notes 13−17.

21. Duplex Printing v. Deering, 254 U.S. 443, 468 (1921).

22. *Id*.; Loewe v. Lawlor, 208 U.S. 274 (1908).

23. *Duplex Printing,* 254 U.S. at 443.

24. *Id*. at 471.

25. *Id*. at 466, 469–70; *see also* S. Rep. No. 74-1 at 32 (Statement of Senator Wagner commenting on this decision on testing in support of the National Labor Relations Act: "Thus the learned justice [Pitney] reasoned that Congress, in excluding from the prohibition of the antitrust laws all lawful acts of labor organizations, had intended to exclude only those acts that were lawful under the antitrust laws."); Michal R. Belknap, *Mr. Justice Pitney and Progressivism*, 16 SETON HALL L. REV. 381, 407–410 (1986) (discussing Justice Pitney's hostility to labor unions as the author of the majority opinion in *Duplex Printing*).

26. *Duplex Printing*, 254 U.S. at 470–472.

27. *Id*.

28. *Id*. at 471–72.

29. *Id*.

or from recommending, advising, or persuading others by peaceful and lawful means so to do."[30]

The Court's response to this explicit and direct language was to first note that there was no committee report addressing the precise issue involved; it instead cited a colloquy during the debates in which the Court itself noted its prior reticence to read too deeply into these types of statements from the floor during a legislative debate.[31] In the end, the majority found that Sections 6 and 20 combined only to protect what was already found lawful by the courts.[32] Put another way, the provisions in question did not alter the application of the Sherman Antitrust Act to labor unions in any way.[33]

The dissenters in this case noted that it was not up to the courts to set the boundaries of public policy in this matter: "[I]t is not for judges to determine whether such conditions exist, nor is it their function to set the limits of permissible contest and to declare the duties which the new situation demands. This is the function of the legislature…."[34]

The Supreme Court later expanded upon the logic of its decision in *Duplex Printing* to find that a labor union could be enjoined from picketing an employer to persuade replacement workers from working for it during a strike.[35] The Court asserted that more than one employee engaging in picketing was in and of itself intimidation, and any attempt at persuasion or communication was unlawful and therefore enjoinable.[36]

E. Norris-LaGuardia Act

Congress was ultimately undeterred, and in 1932, President Hoover signed the Norris-LaGuardia Act into law. The Act again took aim at restricting the use of injunctions in labor disputes by broadly holding that:

> No court of the United States, as defined in this chapter, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute,

30. 29 U.S.C. § 52.

31. *Duplex Printing*, 254 U.S. at 474–78 n.2.

32. *Id*. at 473–74; *see also* James M. Landis, *Apex Case*, 26 CORNELL L. REV. 191, 198 (1941) (describing the Supreme Court's view of the Clayton Act as, "sound and fury, signifying nothing").

33. *Duplex Printing*, 254 U.S. at 473–74.; James M. Landis, *A Note on "Statutory Interpretation*,*"* 43 HARV. L. REV. 886, 891–92 (1930) (discussing judicial mutilation of the Clayton Act).

34. *Duplex Printing*, 254 U.S. at 488 (Brandeis, J., dissenting).

35. American Steel Foundries v. Tri-City Central Trades Council, 257 U.S. 184, 205 (1921).

36. *Id.*; *see* Frances J. Connell, *Labor Law—Antitrust Liability of Labor Unions—Clear Proof Standard of Norris- LaGuardia Act*—Ramsey v. United Mineworkers of America, 13 B.C. L. REV. 383, 386 (1971); *see also* St. John's Law Review, *Further Development of the Doctrine of* Duplex Printing v. Deering, 1 ST. JOHN'S L. REV. 189, 195 (1927) (noting that the Supreme Court, while limiting the reach of the Clayton Act and thus keeping labor unions liable under the Sherman Antitrust Act, also permitted United States Steel Corporation to control greater than half of the steel trade in the United States).

> except in a strict conformity with the provisions of this chapter; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this chapter.[37]

The Act then further specifies what conduct cannot be enjoined.[38]

These restrictions on injunctions are broader than Section 20 of the Clayton Act.[39] The Norris-LaGuardia Act also enacted additional procedural limitations such as requiring specific threshold findings in an open court proceeding with an opportunity to cross examine witnesses[40] and limiting the injunction to the precise conduct complained of.[41]

The views of Congress on the application of the Sherman Antitrust Act to labor unions ultimately prevailed.[42] In *United States v. Hutcheson*, the Supreme Court finally declared that labor unions engaged in peaceful labor disputes with employers were beyond the reach of the Sherman Antitrust Act when viewed through the compound lens of the Clayton Act and the Norris-LaGuardia Act.[43]

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37. 29 U.S.C. § 101.

38. 29 U.S.C. § 104; *see also* H. REP. NO. 72-669, at 3 (1929–30) ("The purpose of the [Norris-LaGuardia Act] is to protect the rights of labor in the same manner the Congress intended when it enacted the Clayton Act, October 15, 1914, 38 Stat. L. 738, which act, by reason of its construction and application by the Federal courts, is ineffectual to accomplish the congressional intent.").

39. *Compare* 29 U.S.C. § 101 ("No court of the United States . . . shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute.") *with* 15 U.S.C. § 17 (specifying certain conduct as beyond the reach of an injunction).

40. 29 U.S.C. § 107.

41. 29 U.S.C. § 109.

42. Professional sports have different considerations with respect to antitrust law. Barry S. Roberts & Brian A. Powers, *Defining the Relationship Between Antitrust Law and Labor Law: Professional Sports and the Current Legal Background*, 19 WM. & MARY L. REV. 395, 397–414 (1978) (discussing history of professional sports antitrust exemption); *see generally* Theodore St. Antoine, Connell*: Antitrust Law at the Expense of Labor Law*, 62 VA. L. REV. 603, 630 (1976) (discussing the conflicting goals of reconciling antitrust law and labor law).

43. United States v. Hutcheson, 312 U.S. 219, 234–36 (1941); *Jurisdictional Disputes and the Sherman Act-* United States v. Hutcheson, 10 FORDHAM L. REV. 268 (1941); John S. Dobson, *Labor Unions- Application of Sherman Act Where Refusal of Union to Admit Employees to Membership Tends to Diminish Employer's Inter-State Business*, 44 MICH. L. REV. 666, 667 (1946) (discussing the extent of the labor union exemption to antitrust law post Hutcheson); Martin I. Kaminsky, *The Antitrust Labor Exemption: An Employer Perspective*, 24 SETON HALL L. REV. 4, 9–15 (1986) (same); Robert W. Smith, Connell*, Five Years after: Labor's Antitrust Exemption and the Scope of the Construction Industry Proviso to Section 8(e)*, 29 CATH. U. L. REV. 799, 803 (1980) (noting the change in the Supreme Court's attitude towards the antitrust exemption for labor unions following the Hutcheson decision).

II. CONGRESSIONAL LESSONS

A. National Labor Relations Act

Following on the heels of the Norris-LaGuardia Act, but prior to judicial acquiescence to the views of Congress expressed therein, Congress passed, and President Franklin Delano Roosevelt signed, the National Labor Relations Act ("NLRA") into law.[44] At the core of the NLRA was Section 7, which originally provided:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . .[45]

Section 8 of the NLRA sets forth a list of prohibited actions by employers and labor unions referred to under the NLRA as unfair labor practices.[46] Section 2 defines which employees and what types of employers fall within the subchapter covered by the NLRA and who is not within the jurisdiction of the NLRA.[47] The General Counsel of the NLRB is empowered under Section 10(b) to investigate unfair labor practices and issue complaints based upon the outcome of those investigations.[48] Adjudication of unfair labor practice complaints brought by the General Counsel are adjudicated under the five-member National Labor Relations Board.[49] Elections to determine whether employees desire union representation are also provided for.[50] Judicial review of unfair labor practice cases is only available to an aggrieved party upon a final order of the Board.[51] The Board can also petition for enforcement of its order in this regard under Section 10(e).[52] Court review, whether under 10(e) or 10(f), of an order was carefully circumscribed by Congress.[53] Findings of fact by the Board, "with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive."[54] Findings of law are also considered conclusive if supported by substantial evidence.[55] Substantial evidence is an easier standard for the Board to satisfy than the normal de novo

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44. *Id.*; 29 U.S.C. § 151 *et. seq.*

45. 29 U.S.C. § 157.

46. 29 U.S.C. §158(a)(1)–(5) (unfair labor practices by employers); 29 U.S.C. § 158(b)(1)(A)–(7)(C) (unfair labor practices by labor unions).

47. 29 U.S.C. § 152; *see also* Sanjukta M. Paul, *The Enduring Ambiguities of Antitrust Liability for Worker Collective Action*, 47 LOY. U. CHI. L. J. 969, 1030 (2016) (discussing independent contracts being outside labor law exemption for antitrust law).

48. *See* 29 U.S.C. § 160(b); 29 C.F.R. 101.2–101.9 (investigation regulations).

49. 29 U.S.C. § 160(c).

50. 29 U.S.C. § 159.

51. 29 U.S.C. § 160(e)–(f).

52. 29 U.S.C. § 160(e).

53. *See supra* notes 48–49.

54. *Id*.

55. *Id*.

standard for appellate review of questions of law.[56] Conversely, parties challenging the Board order face a higher hurdle under substantial evidence than under the de novo standard.[57] Notably, Congress did not provide for direct judicial review of decisions regarding elections administered under the NLRB.[58]

B. Comparison with Railway Labor Act

The Railway Labor Act of 1926 (RLA) is the older and much smaller brother of the National Labor Relations Board.[59] The RLA was enacted at the joint request of labor unions and management and originally governed labor relations between railroads and labor unions.[60] Critically, the RLA lacks the

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56. *See* Paul R. Verkuil, *An Outcomes Analysis of Scope of Review Standards*, 44 WM. & MARY L. REV. 679, 688 (2002) (comparing de novo and substantial evidence); Brian C. Whipps, *Substantial Evidence Supporting the Clearly Erroneous Standard of Review: The PTO Faces Off Against the Federal Circuit*, 24 WM. MITCHELL L. REV. 1127, 1130 (1998) ("The spectrum . . . from most deferential to the fact finder's determinations to least deferential to fact finder's determinations, is (1) arbitrary, capricious, (2) substantial evidence, (3) clearly erroneous, (4) *de novo* review.").

57. *Id.*

58. *See* 29 U.S.C. § 160(e)–(f) (noting the lack of provisions for enforcement by the NLRB or aggrieved parties review of NLRB elections); *accord* N.L.R.B. v. Service American Corp., 841 F.2d 191 n.3 (7th Cir. 1988) (acknowledging the lack of direct review of election decisions by the Board and explaining that the only avenue for obtaining judicial review of election decisions is to refuse to bargain in violation of 29 U.S.C. § 158(a)(5), therefore requiring the Board to seek judicial enforcement of the refusal to bargain and necessarily providing for review of the election decision underlying the requirement of employer to bargain); Anchor Inns Inc. v. N.L.R.B., 644 N.L.R.B. 292, 293 (3d Cir. 1981) (same); Pittsburgh Plate Glass Co. v. N.L.R.B., 313 U.S. 146, 154 (1941) (same); *see also* Michael C. Harper, *The Case for Limiting Judicial Review of Labor Board Certification Decisions*, 55 GEO. WASH. L. REV. 262, 280–81 (1987) (discussing the intent of Congress to avoid direct review of NLRB election decisions); S. Rep. No. 74-1 at 32 (Statement of Senator Wagner discussing problems of Courts enjoining the holding of elections before they were held.); *accord* Hearings before Senate Committee on Education and Labor on S. 1000 et al., 76th Cong., 1st Sess., pp. 584–87 (rejecting an amendment to the National Labor Relations Act providing for direct judicial review of elections decisions under Section 9 of the NLRA.); *See* H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess., pp. 56–57 (rejecting an amendment by the House of Representatives to Taft-Hartley Act to provide for direct review of election decisions under Section 9); *see also* Frank Frio, *Union Access to the Courts on NLRB Representation Decisions: The Potential for Declaratory Judgement Procedure to Provide Review*, 37 CATH. U. L. REV. 119, 127–29 (1988) (discussing the asymmetrical available of judicial review of NLRB elections between employers and labor unions); Michael C. Harper, *The Case for Limiting Judicial Review of Labor Board Certification Decisions,* 55 GEO. WASH. LAW REV. 262, 276–79 (1987) (same); Jeffrey M. Hirsch, *Defending the NLRB: Improving the Agency's Success in the Federal Courts of Appeals*, 5 FIU L. REV. 437, 461–63 (2010) (discussing availability of interim injunctive relief under Section 10(e); *see also* Lee Modjeska, *Recognition Picketing Under the NLRA*, 35 FLA. L. REV. 633, 634–36 (1983) (discussing picketing for recognition and relationship with NLRB elections).

59. 45 U.S.C. § 151 *et. seq.*

60. *See* Herbert R. Northrup, *The Railway Labor Act- Time for Repeal?*, 13 HARV. J.L. & PUB. POL'Y 441, 442 (1990).

unfair labor practice provisions contained in the NLRA.[61] There is no comparable provision under the RLA to the unfair labor practice provisions under Section 8 of the NLRA.[62] Instead, parties must resort to a private right of action brought directly in federal court to enforce the rights and duties provisions contained in Section 2 of the RLA.[63]

Faced with an existing template in the form of the RLA, Congress charted a different path under the NLRA.[64] There was no private right of action for any unfair labor practices under the NLRA originally.[65] There was later a limited exception carved out for unlawful secondary boycotts.[66] However, unfair labor practice complaints could only be issued by the General Counsel for the NLRB.[67] In addition, the complaints were litigated before administrative law judges and the Board and not in federal court.[68] Appeals from the decisions of the administrative law judges can only be appealed to the Board.[69]

C. Court recognition

1. Leedom and Garmon

In *Leedom v. Kyne*, a labor union brought suit in federal court challenging the Board's decision to include a group of professional employees in a group of non-professional employees contrary to 29 U.S.C. §159(b)(1).[70] Importantly, the union did not seek review at the end of the administrative process and left the final order of the Board unmolested.[71] The Supreme Court granted relief based upon the narrow ground that to not do so would be in derogation of the

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61. *See* Charles J. Morris, *A "Tale of Two Statutes" Redux*, 40 BERKELEY J. OF EMP. & LAB. L. 295, 306 (2019).

62. *Compare* 45 U.S.C. § 151 *et. seq.* (RLA) *with* 29 U.S.C. § 151 *et seq.* (NLRA).

63. *See* Morris, *supra* note 61, at 306; *see also* T.N.O. v. Brotherhood of Steamship and Railway Clerks, 281 U.S. 548, 567–68 (1930) (upholding right of party to obtain injunctive relief to enforce Section 2 of the RLA); Catherine A. Vance, *Secondary Picketing in Railway Labor Disputes: A Right Preserved Under the Norris-LaGuardia Act*, 55 FORDHAM L. REV. 203, 212–13 (1986) (noting that secondary boycotts are permissible under the Railway Labor Act).

64. *See supra* note 62.

65. 29 U.S.C. § 158.

66. 29 U.S.C. § 187.

67. 29 U.S.C. § 160(b).

68. 29 U.S.C. § 160(c); *see also* 29 C.F.R. § 101.08–10 (trial procedure before administrative law judges).

69. 29 U.S.C. § 160(c); 29 U.S.C. § 160(f); *see also* 29 C.F.R. § 101.12 (appellate procedure before the Board); 29 C.F.R. § 101.12 (providing appeal to United States Circuit Courts only upon issuance of a final order of the Board).

70. Leedom v. Kyne, 358 U.S. 184, 185–86 (1958).

71. *See* 29 U.S.C. § 160(f) (providing review of final orders under 29 U.S.C. § 158 concerning unfair labor practice cases prosecuted under 29 U.S.C. § 160(b) and adjudicated by the Board under 29 U.S.C. § 160(c)); *see also* 29 U.S.C. § 159 (noting the absence of direct review of election matters under Section 9).

rights of professional employees to decide whether they want to be included in a bargaining unit with non-professional employees.[72]

If the Supreme Court's decision in *Leedom v. Kyne* was a narrow passage by which parties could bypass the processes of the Board and seek direct relief, the Court refused to expand this relief further in *San Diego Building Trades Council v. Garmon*.[73] The Court barred the employer from seeking relief for picketing by the labor union arguably done in violation of Sections 8(b)(2) and 8(b)(4) through state court.[74]

III. Application of Lessons to Administrative Deference

A. Administrative deference explained

1. Chevron

Chevron v. Natural Resources Defense Council represents the current state of the law on deference to administrative agencies.[75] The test has two[76] questions.[77] The first requires a court to ask whether Congress has spoken precisely about the issue, and if so, then the court applies the unequivocal intent of Congress.[78] If the first inquiry does not yield an answer, the court turns to the second question and asks whether the interpretation provided by the agency is based on a permissible construction of the statute.[79]

2. Skidmore

Skidmore v. Swift and Co. is the intellectual predecessor of *Chevron* and was the first attempt by the Supreme Court to formalize how courts should review statutory interpretation performed by administrative agencies.[80] The

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72. The Board does have a procedure to determine whether a group of professional employees want to be included in a group of non-professional employees for collective bargaining purposes. This is known as a *Sonotone* election. *See* Sonotone Corp. 90 N.L.R.B. 1236 (N.L.R.B. 1950).

73. *See supra* notes 69–71; 353 U.S. 26 (1957).

74. San Diego Building Trades Council v. Garmon, 353 U.S. 26, 28–29 (1957).

75. 467 U.S. 837 (1984).

76. Given that courts are required to apply the unambiguous intent of Congress in any event, it is arguable that the first step lacks any independent meaning. *See* Richard J. Pierce Jr., *What Do the Studies of Judicial Review of Agency Actions Mean?*, 63 ADMIN. L. REV. 77, 78 (2011); *see also* Richard J. Pierce Jr., Matthew Stephenson & Adrian Vermeule, Chevro*n Has Only One Step*, 95 VA. L. REV. 597, 599 (2009).

77. *Chevron*, 467 U.S. at 842–43.

78. *Id.*

79. *Id.; see* Amy Semet, *Statutory Interpretation and* Chevron *Deference in the Appellate Courts: An Empirical Analysis,* 12 U.C. IRVINE L. REV. 621, 664–88 (2022) (surveying application of application of *Chevron* deference to NLRB); Lisa Bressman and Kevin Stack, Chevron *is a Phoenix*, 74 VAND. L. REV.. 465, 482 (2021) (discussing *Chevron*'s future).

80. 323 U.S. 134 (1944).

Skidmore Court adopted a multi-factor test looking at "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."[81]

Initially, it was unclear how and if *Skidmore* survived after *Chevron* was decided.[82] In *U.S. v. Mead Corp.*,[83] the Supreme Court reconciled these two tests, finding that where the *Chevron* test did not apply, then the *Skidmore* test did.[84] The deference under *Chevron* was narrowed to circumstances where "Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority."[85]

After the *Mead* Court's reorientation of *Skidmore*, the *Chevron* test looks different.[86] The *Chevron* test now includes a "step zero" where the court must inquire whether the agency has the authority to issue binding legal rules.[87] If the answer to this step zero inquiry is in the negative, then the *Skidmore* test applies, and the *Chevron* test does not.[88] If the step zero prong is answered in the affirmative, then the court proceeds with the remainder of the *Chevron* test.[89]

3. Substantial evidence

The substantial evidence test is the standard of review for findings of fact made by administrative agencies. The Supreme Court first explained the test in *Consolidated Edison v. National Labor Relations Board*: "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."[90]

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81. *Id.*

82. *See* EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 259 (1991) (Scalia, J., concurring); *see also* Jim Rossi, *Respecting Deference: Conceptualizing* Skidmore *Within the Architecture of* Chevron, 42 WM. & MARY L. REV. 1105, 1105–10 (2001).

83. 533 U.S. 218 (2001).

84. *See id.* at 234.

85. *Id.* at 239.

86. *See id.* at 240.

87. *See id.*; Dan Farber, *Everything You Always Wanted to Know About the* Chevron *Doctrine*, YALE J. ON REGUL. NOTICE & COMMENT (Oct. 17, 2013), https://www.yalejreg.com/nc/everything-you-always-wanted-to-know-about-the-chevron-doctrine-by-dan-farber/ [https://perma.cc/UWV2-H6N5]; Thomas W. Merrill & Kristin E. Hickman, Chevron's *Domain*, 89 GEO. L. J. 833, 889–92 (2001) (discussing reasons courts do not apply to *Chevron* is not applied to NLRB decisions).

88. *See id.*; *see also* Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 189 (2006).

89. *See supra* notes 75–79; *see* Sunstein, *supra* note 88; *see* also Kristin Hickman, *Categorizing* Chevron, 81 OHIO ST. L.J. 611, 655–56 (2020) (discussing *Chevron* being modified rather than overruled because it is properly viewed as a standard of review).

90. 305 U.S. 197, 229 (1938) (citing Appalachian Electric Power Co. v. National Labor Relations Board, 93 F.2d 985, 989 (4th Cir. 1938)); National Labor Relations Board v. Thompson Products, 97 F.2d 13, 15 (6th Cir. 1938); Ballston-Stillwater Knitting Co. v. National Labor Relations Board, 98 F.2d 758, 760 (2d Cir. 1938).

The Court went on to qualify this definition further in *Universal Camera v. National Labor Relations Board* by noting that in evaluating substantial evidence, as further informed by the intervening Administrative Procedures Act and the Labor Management Relations Act, the courts must also take into account the evidence that detracts from the agency's determination when deciding whether the evidence is sufficient to support the conclusions drawn.[91] Notwithstanding this broadening of the standard of review to include "the whole record" to include findings by the administrative law judge *and* the Board, the Court was careful to also note that courts should continue to defer to the specialized knowledge developed by the Board with respect to labor relations.[92] The Court further cautioned that reviewing courts "may [not] 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."[93]

B. Criticism of Administrative Deference

The main attack on administrative deference generally and *Chevron* deference specifically, particularly from an Article III perspective, boils down to the role of the judiciary to "say what the law is."[94] There are also derivations of this argument that raise due process and equal protection arguments that assert deference impermissibly tilts the balance of power towards the federal bureaucracy.[95]

The Article I argument against *Chevron* is that it encourages Congress to delegate its legislative power to the executive branch agencies and, in so doing, violates the non-delegation doctrine.[96] The non-delegation doctrine has its origins in the Supreme Court decision *Schechter Poultry v. United States*, which held that Congress could not delegate its legislative authority to non-governmental trade organizations to adopt fair competition codes that would then be approved by the President.[97] The Court took issue with the lack of guidance provided.[98] In its modern iteration, scholars have identified a perverse incentive for Congress to pass vague laws and then have the agencies fill in the details that Congress would normally work out in the legislative process.[99]

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91. 340 U.S. 474, 488 (1951).

92. *Id.*

93. *Id.*

94. Marbury v. Madison 5 (1 Cranch) 137, 177 (1803); Christopher J. Walker, *Attacking* Auer *and* Chevron *Deference: A Literature Review*, 16 GEO. J.L. & PUB. POL'Y 103, 112 n.44 (2018).

95. Walker, *supra* note 94, at 112; Philip Hamburger, Chevron *Bias*, 84 GEO. WASH. L. REV. 1187, 1189 (2016); Michigan v. EPA, 135 S.Ct. at 2712–14 (Thomas, J., concurring).

96. Walker, *supra* note 94, at 112–13.

97. 295 U.S. 495, 541–42 (1935).

98. *Id.*

99. Walker, *supra* note 94, at 112–13, n.49–51; Neomi Rao, *Administrative Collusion: How Delegation Diminishes the Collective Congress*, 90 N.Y.U. L. REV. 1463, 1504 (2015); James J.

C. As applied to the NLRB

1. Response to Article III

Congress and the courts have a history here with respect to the NLRA. While the obligatory citation to *Marbury v. Madison* provides a facial cover for larger intentions, the more basic question looms: Will the Court get questions involving labor law right at all?[100] First, the Court misapplied the Sherman Anti-Trust Act in *Loewe v. Lawlor* in a manner that exposed labor unions to massive financial liability.[101] Congress identifies this error and corrects it with the passage of Sections 6 and 20 of the Clayton Act.[102] The Supreme Court, having been suitably informed about the views of Congress on the precise meaning of the Sherman Anti-Trust Act, proceeds to get it wrong. . .[103] again.[104] This time, not merely by filling in a blank with an incorrect answer, but this time by crossing out the explicit statutory answer written by Congress in the Clayton Act and rewriting it to their own preferred policy design.[105] Lest there be any question about the deliberateness of this action, the misconstruction of the Clayton Act and the earlier construction of the Sherman Anti-Trust Act both tilted in the same direction: against the interests of labor unions and workers and in favor of business.[106] Not until the passage of the Norris La-Guardia Act[107] did the Court acquiesce to the intent of Congress to exclude labor unions from coverage in *U.S. v. Hutcheson*.[108] Congress further registered their discontent

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Brudney, Chevron *and* Skidmore *in the Workplace: Unhappy Together*, 83 FORDHAM L. REV. 497, 502–24 (2014) (discussing the willingness of courts to disregard administrative deference with respect to the NLRB).

100. Marbury v. Madison 5 (1 Cranch) at 177.

101. *See supra* note 12; *see also* Loewe v. Lawlor 208 U.S. at 291 (describing the criminal penalties, treble damages and attorney fees available for violations of the Sherman Anti-Trust Act applicable to labor unions and their members); Joseph M. Jacobs, *The Wandering Labor Exemption under Antitrust Law*, 15 J. MARSHALL L. REV. 591, 593 (1982) (noting that the litigation lasted seven years and resulted in the attachment of the homes and bank accounts of 248 union members with liability affixed at over $250,000).

102. *See supra* notes 14–19.

103. *See supra* notes 21–33.

104. *See supra* notes 13–18.

105. *Compare supra* note 14 (holding that labor unions and their members can pursue lawful and legitimate objectives) and note 15 (restricting a court from enjoining the "peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute") *with supra* note 26 (construing the Clayton Act to permit the enjoining of secondary boycotts); *accord* U.S. v. Hutcheson, 312 U.S. at 234–36 (recognizing Congressional dissatisfaction with *Duplex Printing* decision misconstruing the intent of Congress with respect to Section 20 of the Clayton Act).

106. *See supra* notes 11–12, 32–33.

107. *See supra* note 37.

108. *See supra* note 42.

with the Court in their construction of the NLRA itself.[109] Rather than vest federal courts with jurisdiction over unfair labor practices, Congress fashioned a parallel administrative system that excluded the court from the process until the Board finished its process.[110] The consciousness of this decision by Congress is reinforced by the existence of an alternative way to organize the NLRB where the federal judiciary would take a more front-and-center role utilizing the Railway Labor Act as a template.[111] It is in light of this thirty-five year history that informed the intent of Congress 'decisions regarding the latitude of the Courts with respect to the NLRA should be viewed.[112]

2. Response to Art I

It is similarly difficult to argue that Congress has not carefully delineated the scope of the NLRA and somehow ceded too much to the executive branch. Congress carefully crafted the NLRB's jurisdiction in terms of which classes of employers are covered.[113] It decided which types of employees were included and excluded.[114] It provides for which types of employers were covered and which were not.[115] Congress specified what conduct was rendered unlawful under the NLRA.[116] It then set out a detailed set of procedures on how elections were to be conducted and who would form the plebiscite.[117] Finally, Congress specified who would be setting labor policy within the boundaries prescribed by Congress, mainly the Board.[118] On this last point, it is worth reiterating that Congress set up the Board explicitly as an alternative to further permitting the courts to set national labor policy.[119] Congress saw what happened when the

109. *See supra* note 43.

110. *See supra* notes 48–49.

111. *Compare supra* note 49 (vesting Circuit Courts with jurisdiction to review final orders of the NLRB) *with supra* note 60 (finding a private right of to enforce the rights under Section 2 of the RLA).

112. *See supra* notes 99–100.

113. *See supra* note 46.

114. *Id.*

115. *Id.*

116. *See supra* note 46.

117. *See supra* notes 49–57.

118. *See supra* notes 52–57.

119. *See* S. REP NO. 74-593, at 5–6 (1935) (recognizing weakness of predecessor legislative attempts to provide for industrial peace and specifically noting judicial review enjoining any elections from ever being held.); H.R. REP NO. 74-1371 at 5 (recognizing the harm of lengthy delays brought about by judicial review), 203–208 (testimony of American Federation of Labor President William Green expressing dissatisfaction with judicial injunctions brought against elections ordered under the predecessor to the current NLRB, their damage to the rights of employees to select a labor union and a need for national labor policy); *see also supra* notes 8, 15, 25, 57 (statements from Sen. Wagner as sponsor of the National Labor Relations Act with respect to judicial interpretation of anti-trust laws and federal labor laws).

courts set labor policy, and they clearly wanted none of it.[120] In this way, Congress explicitly chose the executive branch through the NLRB over the courts for the purposes of setting national labor policy.[121] It is not enough here to state that the Congress was clear-eyed when delegating authority to the NLRB; it was in fact reclaiming authority that the courts had aggrandized unto themselves.[122] It is difficult in this respect to separate out the construction of the NLRB by Congress from its larger interactions with the Court on the repeated misapplication of the Sherman Antitrust Act to labor unions.[123]

3. The particular case of secondary boycotts

Secondary boycotts are illustrative of why deference to decisions of the NLRB matters. Prior to the NLRA election procedures providing a mechanism for unions to become the representatives of employees of an employer, the only remedy against a recalcitrant employer was economic warfare in the labor parlance.[124] In a labor dispute, the union would withhold its labor from the employer in which it has a dispute in attempt to force the employer to accede to the demands of the union on behalf of its workers.[125] At the same time, the union would attempt to dissuade other people from going to work for the employer, commonly through picketing the employer, communicating with the public to convince them to cease doing business with their employer, and communicating with potential employees who would be tempted to cross the picket line and go to work for the employer during a strike.[126] When direct persuasion would not convince an employer to accede to the union member's

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120. *See supra* notes 8–12 (Supreme Court finding the Sherman Anti-Trust Act applicable to the actions of labor unions and their members); *supra* notes 13–20 (Congress explicitly disagrees with the Supreme Court with respect to the application of the Sherman Anti-Trust Act to labor unions and passes Sections 6 and 20 to explicitly address the decision by the Court); *supra* notes 21–32 (finding the Clayton Act did not alter the application of the Sherman Anti-Trust Act to labor unions or their members); *supra* notes 37–41 (Congress enacts the Norris-LaGuardia Act to (again) attempt to restrict the use of injunctions against labor unions and their members).

121. *See supra* notes 50–57; *see also* S. REP. NO. 74-1 at 32 (statement of Senator Wagner discussing the need for labor policy to be set on a national level as opposed to regionally or by industry); *see also* BERMAN,11-54 (arguing that Congress did not intend the Sherman Antitrust Act to apply to labor); Herbert Hovenkamp, *Labor Conspiracies in American Law, 1880-1930*, 66 TEX. L. REV. 919, 919–20 (1988) (describing the Court's condemnation of labor activities under the Sherman Act as a very "successful union-busting device").

122. *Compare supra* note 118 with *supra* note 119 (discussing the impact of the judiciary effective setting policy as contrasted with having the executive branch do so).

123. *Id*.

124. *See* Irving Kovarsky, A Social and Legal Analysis of the Secondary Boycott in Labor Disputes 17–25 (1953) (Master's Thesis, Loyola University Chicago) (Loyola University Chicago eCommons) (discussing what makes for an effective secondary boycotts).

125. *See* Richard A. Bock, *Secondary Boycotts: Understanding NLRB Interpretation of Section 8(b)(4)(B) of the National Labor Relations Act*, 7 J. BUS. L. 905, 907–08 (2005) (distinguishing between a primary and secondary labor dispute).

126. *See* Joseph R. Landry, Note, *Fair Responses to Unfair Labor Practices: Enforcing Federal Labor Law Through Non-Traditional Forms of Labor Action*, COLUM. L. REV. 147, 147–48 (2016).

demand for recognition, a labor union could then resort to attempting to persuade suppliers or customers to cease doing business with the employer upon which labor union had a dispute.[127] This is a secondary boycott. It was widely accepted as the most effective method of pressuring an employer.[128]

As a result of this effectiveness and because employers were seeking a way to counteract secondary boycotts, they sought refuge in the Sherman Anti-Trust Act.[129] Despite congressional expressions to the contrary, the Supreme Court granted the relief that employers were seeking.[130] Congress responded, and the Supreme Court all but ignored this course correction.[131] Congress eventually curtailed judicial relief from secondary boycotts with the Norris-LaGuardia Act.[132] This effective tool was once again made available to the labor unions.[133]

Under the Taft-Hartley Act and again under the Landrum-Griffith Act, the NLRA was amended to once again prohibit secondary boycotts.[134] A superficial analysis might lead one to conclude that maybe the Supreme Court was right all along in Duplex Printing.[135] To draw this conclusion is to elevate form over substance, because it is not the end result here that secondary boycotts were again made unlawful. Rather, it is the process. Instead of the Supreme Court enacting the restriction by fiat and therefore setting labor policy for millions of workers, the elected members of Congress did so.[136] They held hearings, considered amendments and enacted modifications that, while banning secondary boycotts, also contained nuanced exceptions accommodating lawful activity.[137]

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127. *See* Bock, *supra* note 125, at 907–08; FRANKFURTER & GREENE, *supra* note 18, at 43 (1930).

128. *See* Bock, supra note 125, at 907; RALPH M. DERESHINSKY ET. AL., THE NLRB AND SECONDARY BOYCOTTS 1 (1981).

129. *See supra* notes 8–12 and accompanying text.

130. *See supra* note 12.

131. *See supra* notes 13–20.

132. *See supra* notes 37–42.

133. *See* Bock, *supra* note 125, at 911; HAROLD W. METZ, LABOR POLICY OF THE FEDERAL GOVERNMENT 40–57 (1945) (discussing the ability of unions to strike and picket after passage of the Norris-LaGuardia Act).

134. 29 U.S.C. § 158(b)(4); *see also* Bock, *supra* note 125, at 912–16 (describing the 8(b)(4) amendments, loopholes and subsequent adjustments under the Landrum-Griffith Act).

135. *Compare* 29 U.S.C. § 158(b)(4) *with supra* notes 21–33 (comparing the statutory bar for secondary boycotts versus the judicial bar for secondary boycotts).

136. *Id*.

137. *See* S. REP. 80-105, 7–8 (summarizing the debates concerning the secondary provisions of the Taft-Hartley Act); H. REP. 80-510 at 44–45 (discussing reconciliation of secondary boycott provisions proposed in the Senate and House versions of the Taft-Hartley Act); National Labor Relations Board v. Fruit Packers (Tree Fruits), 377 U.S. 58, 71 (1964) (discussing the consumer boycott exception to the secondary boycott provision container in Section 8(b)(4)); A.W.W., Jr., Note, *Section 8(b)(4) of Amended Taft-Hartley Act Held to Forbid Union to Induce Any Supervisor to Boycott Primary Employer*, 63 COLUM. L. REV. 749, 750 (1963) (discussing history of secondary

CONCLUSION

Assessing the continued validity of administrative deference to decisions of the NLRB cannot take place without considering the historical interplay between Congress and the courts on the labor question. Congress has made its intentions plain about who sets policy and where the courts should be involved and where they should not. Ultimately, the question is not whether the courts should defer under *Chevron* to the NLRB's interpretation of the law, the question is whether the courts or the agency designated by Congress will continue to set national labor policy.

boycott provisions under the Taft-Hartley and Lamdrum-Griffith Acts); Bock, *supra* note 125, at 912–16 (same); *see also* Jeffrey H. Spiegler, Note, *Primary v. Secondary Labor Boycotts: Is There a Rational Basis for the Distinction*, 22 CLEV. ST. L. REV. 531 (1973) (discussing early difficulties defining prohibited conduct under the secondary boycott provisions of the Taft-Hartley Act).