National Labor Relations Act

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CURRENT LEGISLATION

NATIONAL LABOR RELATIONS ACT.—Hailed by the American Federation of Labor as the "Magna Carta of Labor," derogated by the employers as a pernicious instrument of oppression, and relegated to the limbo of unconstitutionality by the Liberty League, the National Labor Relations Act takes its place as a statute of predominant importance in the history of labor legislation. Its fate is fraught with momentous consequences not only to employer and employee, but also to lawyer and layman, for unfavorable treatment of the statute by the Supreme Court will lead to repercussions which may find their way into our very Constitution. It is for these reasons that this Act requires the careful consideration of every student of current affairs.

Section 7(a) of the N. I. R. A.

With the advent of the New Deal came the promulgation of an ostensibly new principle in industrial affairs—the industrial partnership between employer and employee. Seeking, in the main, to give industrial self-government the chance to assert itself, the N. I. R. A. sought to safeguard the rights of employees to organize and bargain collectively through representations of their own choosing. The statute imposed on employers the obligation to enter into negotiations with the employees and attempt to consummate an agreement. If the negotiative process failed because of a bona fide difference, the statutory obligation was discharged.

Hailed by labor and by many commentators on the industrial situation as the "Magna Carta" of the employee, Section 7(a) turned out to be a parva carta which failed completely of its purpose. The numerous vagaries—interference, restraint or coercion—embodied in the legislation made for a proliferation of interpreta-

1 Tread and Metcalf, Labor Relations Under the Recovery Act (1933), c. I.
3 See Kleeck and Fledderus (Editors), On Economic Planning (1935), c. 8, Collective Bargaining (7A) and Trade Union Recognition Under the National Recovery Administration, by Milton Handler, formerly General Counsel of the National Labor Board. It should be noted that the term "collective bargaining" was not defined by Section 7 (a). However, the NLRB defined it "as a means to an end, the end being the execution of a collective agreement. Negotiations were to be entered into with that in view." In the case of In re Houde Engineering Corp., 1 NLRB 35, Aug. 30, 1934, the NLRB explained that the end of collective bargaining is the making of collective agreements.
4 Note (1934) 8 St. John's L. Rev. 5.
tions, which in turn made for great uncertainty. Another severe indictment against 7(a) was that under it, contrary to expectations, the company unions virtually blossomed forth. A third weakness of 7(a) was the failure to invest the old NLRB with enforcement powers. With the realization of these glaring defects came a concerted attempt to remedy the "negotiative process" initiated by the N. R. A.

The Wagner Labor Relations Act is unquestionably a logical extension of the policy of 7(a). Salvaging the best features of the former statute and avoiding its vagaries, the new statute is both specific in its promulgations and potent in its method of attaining the aims set forth.

National Labor Relations Act.

The National Labor Relations Act is designed to diminish the causes of labor disputes burdening or obstructing interstate and foreign commerce. Being, in the main, a clarification and amplification of the generalities of Section 7(a), it guarantees to the employees the right to self-organization, to form, join, or assist labor organizations, and to bargain collectively.

The most significant substantive provisions of the statute are those concerned with the unfair labor practices of the employer. The first unfair-labor-practice forbids the employer from interfering with, restraining, or coercing employees in the exercise of their right

See Kleeck and Fledderus, op. cit. supra note 3, at p. 157: "The chief problem under 7 (a) has been the definition of the words interference, restraint and coercion." The Brookings Institute has stated that "7 (a) of the Recovery Act is uncertain in purpose, vague in its contents, and ambiguous in language."

The report of the National Industrial Conference Board stated that the number of members of company unions rose from 432,000 in 1932 to 1,164,000 in 1933, representing a gain of 169%. More than 61% of the company unions were inaugurated after the passage of the Recovery Act.

The old NLRB was not vested with enforcement powers. It referred all recommendations to the National Recovery Administration. The latter frequently overlooked 7 (a) in order to compromise with industry in the adoption of the codes of fair competition. A further weakness was the fact that 7 (a) was applicable only where there was a code, thereby putting recalcitrants in a favorable position. Furthermore, the original Board had no power of subpoena investigation except in connection with elections. Although it had power to conduct elections, it had no power to compel compliance with its decisions. Cong. Rec., 74th Cong., 1st Sess., Vol. 79, No. 101, May 15, 1935, pp. 7849-7850.

Francis Biddle, Chairman of the old National Labor Relations Board, stated that the "Labor Disputes Act was a logical extension of the policy of Section 7 (a)." Hearings before Senate Committee on Education and Labor, pt. 1, March 11, 1935, p. 76.

10 Id. § 158.
to collective bargaining and similar concerted activities.12 The second unfair-labor-practice concerns the problem of the company union. The employer is specifically forbidden "to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it."13 This provision aims to propagate the principle of collective bargaining through representatives of the employees' own choosing and to prevent the domination and interference of the employer. The third unfair-labor-practice deals with the problem of the closed shop. The employer is forbidden to encourage or discourage membership in any labor organization by discrimination in regard to hire or tenure of employment or any other term or condition of employment.14 The closed shop agreement is valid only when the employee's organization has been free from company influences from its very inception. Furthermore, the validity of the agreement depends on the acquiescence of the organization representing a majority of the employees. The fourth unfair-labor-practice proviso makes it unlawful to discharge or discriminate against an employee because he has filed charges or given testimony under the Act.15 The fifth and last provision makes it

12 Id. § 158, subd. 1. This language virtually follows verbatim the principles embedded in the Railway Labor Act of 1926, § 2; Norris-LaGuardia Act, § 2; Bankruptcy Act of 1932, § 77 (p) and (q); National Industrial Recovery Act, § 7 (a); the Act creating the office of the Federal Coordinator of Transportation, § 7 (e). Cong. Rec., 74th Cong., 1st Sess., Vol. 79, No. 101, May 15, 1935, p. 7851.

13 Id. § 158, subd. 2. This section has its counterpart in the Railway Labor Act Amendments of 1934, § 2; Bankruptcy Act Amendments of 1933-34; Emergency Transportation Act, § 7 (e). A pertinent appraisal of company unions and their derogatory influence on labor relations can be found in 1 NLRB 181 et seq. (1934). For a discussion of the defects of the company union, see Hearings before Senate Committee on Education and Labor, March 18, 1935, pp. 164-65; also REPORT No. 573 OF THE SENATE COMMITTEE ON EDUCATION AND LABOR, May 2, 1935, p. 19. The latter report states that Section 7 (a) gave rise to 70% of the company unions. An impartial investigation of the company union by the Twentieth Century Fund disclosed that, at best, "it is not well suited to extend its cooperative activities beyond the bounds of a single employer unit." This survey presents irrefragable evidence in support of the fact that the company union is the mere creature of the employer and is unsuited to deal with a problem of hours and wages, problems which are national in scope. LABOR AND THE GOVERNMENT, TWENTIETH CENTURY FUND (1935) 323-334.

14 Id. §158, subd. 3. This provision reiterates and extends the principles propounded in the Norris-LaGuardia Act which makes "yellow dog" contracts unenforceable in the federal courts. This provision does not interfere with the status quo of the debatable subject of the closed shop. It holds that nothing shall preclude the consummation of closed shop agreements. There are two limitations to the closed shop agreements. First, the agreement must be made with a labor organization that represents the majority of employees in the appropriate collective bargaining unit covered by such agreement. Second, the agreement cannot be entered into with any organization defined as an unfair labor practice. SENATE COMMITTEE ON EDUCATION AND LABOR, REP. No. 573, May 2, 1935, p. 11.

15 Id. § 158, subd. 4. This is similar to Executive Order 6711 of May 15, 1934, forbidding an employer operating under a Code to dismiss an employee for complaining or furnishing evidence with regard to a violation of the Code.
illegal to refuse to bargain collectively with the representatives of his employees.\textsuperscript{16}

For the purpose of facilitating the procedure of collective bargaining, the Act advocates the principle of majority rule. Only those representatives selected by a majority of the employees shall be the exclusive representatives of all the employees in the unit for the purpose of collective bargaining.\textsuperscript{17}

Provision is made for the creation of a National Labor Relations Board, composed of three members, who shall be appointed by the President with the consent of the Senate.\textsuperscript{18} The function of this Board is quasi-judicial in nature. It is charged with the investigation and determination of charges of unfair-labor-practices and questions of representation for the purpose of collective bargaining.\textsuperscript{19} The law stipulates a procedure designed to prevent employers from being deprived of their rights. Each employer is entitled to three open hearings—a local one, an appeal to the National Labor Relations Board, and a final appeal to the Circuit Court of Appeals before the cease and desist order against unfair-labor-practices can be granted.\textsuperscript{20} To prevent the continuance of unfair-labor-practices the Board is empowered to issue cease and desist orders requiring em-

\textsuperscript{16} \textit{Id.} § 158, subd. 5. This provision stipulates correlative rights and duties as to employers and employees. Each is under a duty to enter into \textit{bona fide} negotiations and to exert every reasonable effort to reach an agreement. There is no compulsion whatever to enter into a compact which is deemed unsatisfactory to any party. \textit{Cong. Rec.}, supra note 12, at 7852.

\textsuperscript{17} \textit{Id.} § 159. The principle of majority rule is based on solid precedent. It was applied during the World War in the National War Labor Board of 1918 and has been consistently applied in the Railway Labor Board created by the Transportation Act of 1920. The 1934 Amendment to the Railway Labor Act provided for it. Although not specifically provided in Public Resolution No. 44, it was unquestionably contemplated therein. \textit{Cong. Rec.}, supra note 12, at 7852-3. With regard to the matter of election of representatives for the purpose of bargaining, § 159 (d) attempts to rectify the undue delay under Public Resolution No. 44. The efficacy of this resolution was greatly impaired by the provision for court review of elections prior to the holding of the election. Subdivision (d) specifies that there shall be no right to court review anterior to the holding of an election. Senator Wagner, \textit{Hearings before Senate Committee on Education and Labor}, March 11, 1935, pp. 49-50. For a discussion and explanation of the doctrine of collective bargaining as a means to an end, see Matter of Houde Engineering Corp., 1 NLRB 35, Aug. 30, 1934; \textit{House Committee on Labor, Rep. No. 1147}, June 10, 1935, pp. 19-22.

\textsuperscript{18} \textit{Id.} § 153. Under the N. R. A. the first national agency to handle labor disputes was the National Labor Board, created Aug. 5, 1930. By Executive Order 6763 of June 29, 1934, under authority of the Joint Congressional Resolution of June 19, 1934 (73d Cong., Pub. Res. No. 44, H. J. Res. 375) the President established the NLRB. Powerless to enforce its own decisions, its findings and orders were nothing more than recommendations. NLRB, Release, Feb. 13, 1935, p. 7. Section 153 stipulates the creation of a new board which replaces the old NLRB.

\textsuperscript{19} \textit{Id.} §§ 160-61.

\textsuperscript{20} \textit{Id.} § 160 (b), (c), and (d). See World-Telegram, Dec. 23, 1935, 16:1 (ed.).
ployers to refrain from such unfair labor practices and to petition any circuit court of appeals for the enforcement of such orders by appropriate temporary relief or restraining order.

Constitutionality.

Lacking the omniscience of the Liberty League, we, in discussing the constitutionality of this new legislation, are compelled to resort to that laconism of dubiety— if. If the Supreme Court should resort to a reiteration of those ancient and familiar principles professed in Adair v. United States, Coppage v. Kansas, Lochner v. New York and Adkins v. Children's Hospital of District of Columbia, then the Act is doomed. The very mention of the words boycott, picketing, and "yellow-dog" contracts call to mind a

21 Id. § 160 (c). See House Committee on Labor, Rep. No. 1147, June 10, 1935, pp. 5-7. The Board is also empowered to take such affirmative action as will effectuate the policies of the Act—reinstatement of employees with or without pay.

22 Id. § 160 (c). The form and nature of the Board's orders will be subject to court review along with the other determinations and actions of the Board. The findings of the Board as to facts, if supported by evidence, shall be conclusive.


25 236 U. S. 1, 35 Sup. Ct. 240 (1915).


28 The Supreme Court has frequently condemned the boycott as an unlawful weapon. See Loewe v. Lawlor, 208 U. S. 274, 28 Sup. Ct. 301 (1908), the Danbury Hatters' case; Gompers v. Bucks Stove and Range Co., 221 U. S. 418, 31 Sup. Ct. 492 (1911). In the latter case an injunction was issued against the boycott of the products of the Bucks Stove and Range Co. by the American Federation of Labor and its affiliated unions. See also LaFLEUR, BOYCOTTS AND THE LABOR STRUGGLE (1913) 174-77.

29 In the American Steel Foundries Co. v. Tri-City Central Trades' Council, 257 U. S. 184, 42 Sup. Ct. 72 (1921), the Court held all picketing to be unlawful and, at the same time, stated that the legality of this method of persuasion depended on the facts and circumstances of each case. In this case the union was permitted to place a picket at each factory entrance. In the same year the case of Truax v. Corrigan, 257 U. S. 312, 42 Sup. Ct. 124 (1921) decided that mass picketing is violative of the constitutional guarantees of liberty and property, and that no state can legalize such conduct. Commons and Andrews, Principles of Labor Legislation (revised ed. 1927) 119-22.

30 In Adair v. United States, 208 U. S. 161, 28 Sup. Ct. 227 (1908), the Court declared Section 10 of the Erdman Act unconstitutional. The Act made it a misdemeanor for interstate carriers or their agents to discharge or discriminate against employees because of membership in a trade union. The Court regarded this as a denial of due process under the Fifth Amendment. In Coppage v. Kansas, 236 U. S. 1, 35 Sup. Ct. 240 (1915), the Court declared unconstitutional a Kansas statute which made it a misdemeanor for an employer to require an employee not to become or remain a member of a labor organization during the time of his employment as an unreasonable restriction upon the liberty of contract. Chief Justice Hughes, then an associate justice, dissented
host of decisions wherein the interests of labor were treated sum-
marily. These decisions, exemplary of the philosophy of a by-gone
ear, attempt to perpetuate that shibboleth of our pioneering days—
freedom of contract between employer and employee. One cannot help
but comment on the irony of this tender solicitude for the right of the
employee to contract with the employer in a free and open market
—a solicitude which saves for him the right to contract for long
hours and low wages. The attempt of the court to deal with this
new legislation on the basis of this out-moded theory would be to
overlook facts familiar to and appreciated by high school students.

If, however, the court pursues the liberality of interpretation dis-
played in Holden v. Hardy, Bunting v. Oregon, and in Texas &
New Orleans R. R. v. Brotherhood of Railroad Clerks, then there
is a decided probability that the court will take cognizance of the find-
ings of Congress and its declaration of policy in the Act—a recog-
nition which would bode well for its validity.

most vigorously. In Hitchman Coal and Coke Co. v. Mitchell, 245 U. S.
229, 38 Sup. Ct. 65 (1917), the Court sustained an injunction enjoining the
United Mine Workers' Union from trying to bring into its organization
employees of the Hitchman Co. who had signed a contract not to join the
union while in the employ of the company. In the Red Jacket case (United
Mine Workers of American v. Red Jacket Consolidated Coal and Coke Co.,
18 F. [2d] 839 [1927]), the Court granted an injunction enjoining a labor
organization from advising or persuading employees to break their contract of
employment. See Note (1935) 9 St. John's L. Rev. 462.

With reference to the Adair case, Dean Roscoe Pound of Harvard said:
"To every one acquainted at first hand with actual industrial conditions, the
latter statement (statement made by Ward in his Applied Sociology that 'much
of the discussion about equal rights' is utterly hollow. All the ado made over
the system of contract is surcharged with fallacy') goes without saying. Why,
then, do courts persist in the fallacy? Why do so many of them force upon
legislation an academic theory of equality in the face of practical conditions
of inequality? Why do we find a great and learned Court in 1908 taking the
long step in the past of dealing with the relations between employer and
employee in railroad transportation as if the parties were individuals—as if they
were farmers haggling over the sale of a horse? Why is the legal conception
of the relation of employer and employee so at variance with the common
knowledge of mankind." Quoted in Commons, Trade Unionism and Labor
Problems (2d Series) 579. See also Cummins, The Labor Problem in the
United States (1932) 619-22; Pound, Liberty of Contract (1909) 18 Yale
L. J. 454.

169 U. S. 366, 18 Sup. Ct. 383 (1898). This case affirmed the constitu-
tionality of legislation reducing the hours of labor of men who worked in
smelters and underground. In this decision "the Court recognized what had
been dimly seen or implied from the beginning of labor legislation, that
inequality of bargaining power is a justification under which the state may
come to the protection of the weaker party to the bargain." Commons and

243 U. S. 241, 37 Sup. Ct. 435 (1917). In this case the Supreme Court
upheld an Oregon statute limiting the hours of labor of any person in industries
not peculiarly unhealthful or dangerous. This decision, in effect, set aside the
Lochner case. Only four of the justices who decided the Lochner case sat in
the Bunting case and three of these had been dissenters.

Let us now turn to a consideration of the technical questions confronting the court:

I. Does the Act violate the due process clause of the United States Constitution? The proponents of the legislation place all their faith in the Clerks case. They contend that a perusal of the case discloses judicial recognition of the authority of Congress to guarantee freedom of organization, to prohibit the company-dominated union, and to prevent employers from requiring membership or non-membership in any union. They further see in that decision not only a reversal of the Adair and Coppage cases but a presage of a new tolerant attitude of the court towards organized labor and labor legislation. The opponents of the Act base their

35 U. S. Const. Amendt. V.
36 Texas & New Orleans R. R. v. Brotherhood of Railroad Clerks, 281 U. S. 548, 50 Sup. Ct. 427 (1930). This action was commenced by a labor union to enjoin the railroad from interfering, in violation of the Railway Act of 1926, with the right of its employees to self-organization and the designation of representatives. A perusal of the case discloses that the Court took a position in essential contradiction to that taken in the Adair case. The Court considered the taking away of railway passes from the union leaders, the discharge of union leaders, and the paying of the expenses of recruiting members of the company union as being unlawful coercion on the part of the railroad. Although the anti-union contract was not involved, Senator Wagner thinks it reasonable to infer that, since the aforementioned acts were unlawful coercion, it would also have regarded the anti-union contract in the same light. Cong. Rec., supra note 12, at 7853.
37 The Railway Clerks case held that the discharge of union leaders by the railroad is an act that constitutes the use of coercion to prevent employees from exercising their right of self-organization and designation of representatives granted them under the Railway Labor Act. The Adair case held invalid a provision forbidding the railroads to discharge union men because of their membership. The only difference between the two cases is that in the former, union leaders were involved, and in the latter union members. This is undeniably a difference without a distinction. For a study of the effect of the Clerks case on the Adair and Coppage cases, see Berman, The Supreme Court Interprets the Railway Labor Act (1930) 20 Am. Econ. Rev. 619, at 628 et seq.; Cummins, The Labor Problem in the U. S. (1932) 630, 631; Note (1935) 2 Geo. Wash. L. Rev. 230.
38 It is of interest to observe that the opinion in the Clerks case was rendered by Chief Justice Hughes, an opinion which is similar in reasoning to his dissent in the Coppage case, and that the two cases are really identical in principle.
39 Chief Justice Hughes, writing for a unanimous Court in the Texas & New Orleans R. R. v. Brotherhood of Railroad Clerks, supra note 36, at 570, stated: "The power to regulate commerce is the power to enact 'all appropriate legislation' for its 'protection and advancement'; to adopt measures to promote its growth and insure its safety; to foster, protect, control and restrain. Exercising this authority, Congress may facilitate the amicable settlement of disputes which threaten the service of the necessary agencies of interstate transportation. In shaping its legislation to this end, Congress was entitled to take cognizance of actual conditions and to address itself to practical measures. The legality of collective action on the part of employees in order to safeguard their proper interests is not to be disputed. It has long been recognized that employees are entitled to organize for the purpose of securing the redress of grievances and to promote agreements with employers relating to rates of pay and conditions of work. American Steel Foundries v. Tri-City
CURRENT LEGISLATION

365

attack on the principles enunciated in the *Adair* and *Coppage* cases. In this issue of theory versus reality, there is every reason to believe that the court will face the facts. It is of interest to note that Judge Otis, in holding the statute unconstitutional, based his decision on the commerce clause and did not consider the due process argument.

II. Can federal jurisdiction over this relationship be sustained under the commerce clause? In view of the limited interpretation placed on the commerce clause by the *Schechter* case, this issue furnishes the acid test. The fact that strikes burden commerce has been constantly reiterated by the Supreme Court. Since Congress is authorized to prevent any burden whatsoever upon interstate commerce, Congress can enjoin unfair practices which tend to disrupt commerce. Since strikes burden interstate commerce, the proponents reason that Congress has the power to enjoin unfair labor practices even before strikes occur. By invalidating these unfair-labor-practices, Congress aims to eliminate those practices which destroy

Central Trade Council, 257 U. S. 184, 209. Congress was not required to ignore this right of the employees but could safeguard it and seek to make their appropriate collective action an instrument of peace rather than of strife. Such collective action would be a mockery if representation were made futile by interferences with freedom of choice. Thus the prohibition by Congress of interference with the selection of representatives for the purpose of negotiation and conference between employers and employees, instead of being an invasion of the constitutional right of either, was based on the recognition of the rights of both.39


40 12 F. Supp. 864, Dec. 21, 1935. In the recent decision handed down by Judge J. P. Barnes declaring the Wagner Act unconstitutional, much emphasis was placed on the due process argument. The judge found the stipulation in the Act requiring the employer to bargain with the majority unit of his employees as representative of all his employees a flagrant deprivation of the property rights guaranteed by the Fifth Amendment—the right of an employer to deal freely with each and all of his employees. N. Y. Times, March 25, 1936, 1:5. See infra note 49.

41 U. S. Const. Art. I, § 8, cl. 3.


43 For a careful analysis of the constitutionality of the statute under the commerce clause, see Note (1935) 35 Col. L. Rev. 1098 at 1114 et seq.


45 *United Mine Workers v. Coronado Coal Co.*, 259 U. S. 344, 42 Sup. Ct. 570 (1922). In this case Chief Justice Taft stated: "If Congress deems certain recurring practices, although not really part of interstate commerce, likely to obstruct, refrain, or burden it, it has the power to subject them to national supervision or restraint."
equality of bargaining power and cause strikes, thereby removing obstructions to interstate commerce.

A further argument is based on the complicated nature of our economic structure, a structure wherein prices and wages and interstate commerce are so inextricably interwoven into one fabric that any maldistribution of buying power immediately affects the standard of living, which, in turn, unbalances the structure and exercises a devastating effect on commerce. Since the statute aims to maintain and advance wage rates, it aims to mitigate obstructions to commerce and therefore, it is reasoned, the Act is valid.

Two actions testing the validity of the statute have been tried in the federal courts, and the two divergent opinions furnish an index to the constitutional issue. In the case of Stout et al. v. Pratt et al., District Judge Otis declared the Act unconstitutional. Complainants owned a small mill in Aurora, Missouri. They purchased most of their wheat in Missouri, and some of it in Kansas. Some of the flour manufactured was sold in Aurora and elsewhere in Missouri, and some was shipped and sold in other states. Complainants refused to bargain collectively with their employees. Judge Otis declared the Act inapplicable to this “intrastate” mill because the refusal of the owners to bargain collectively did not directly affect commerce among the states. Basing his decision on the premise that manufacturing is not commerce, the judge decided that Congress

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46 In Appalachian Coals, Inc. v. United States, 288 U. S. 344 at 372, 53 Sup. Ct. 471 (1933), Chief Justice Hughes said: “The interests of producers and consumers are interlinked. When industry is grievously hurt, when producing concerns fail, where unemployment mounts, and communities dependent upon profitable production are prostrated, the wells of commerce go dry.” This argument is, in part, based on the case of Chicago Board of Trade v. Olsen, 262 U. S. 1 at 40, 43 Sup. Ct. 470 (1922), wherein the Court said: “The question of price dominates trade between the States. Sales of an article which affect the country-wide price of the article directly affect the country-wide commerce in it. For this reason Congress has the power to provide the appropriate means adopted in this act by which this abuse may be restrained and avoided.” The proponents claim that wages are indistinguishable from prices in their effect on commerce. Cong. Rec., supra note 12, at 7853.

47 12 F. Supp. 864, Dec. 21, 1935, W. D. Missouri. See N. Y. Times, Dec. 22, 1935, 1:1. This was an action by complainants for a temporary injunction against Pratt, Regional Director of the National Labor Relations Board. Complainants prayed for injunctive relief against the prosecution of the Board’s complaint that complainants refused to bargain collectively in respect to rates of pay, wages, hours of employment and other conditions of employment with Federal Union No. 20, 028 as the exclusive representative of all the employees in said unit.

48 Judge Otis buttresses his position with dicta from A. L. A. Schechter Poultry Corp. v. United States, 295 U. S. 459, 496, 55 Sup. Ct. 837, 850 (1935): “If the commerce clause were construed to reach all enterprises and transactions which could be said to have an indirect effect upon interstate commerce, the federal authority would embrace practically all the activities of the people, and the authority of the state over its domestic concerns would exist only by sufferance of the federal government. Indeed, on such a theory, even the development of the state’s commercial facilities would be subject to federal control.”
cannot regulate under the commerce clause the relations between employers and employees in manufacturing. The findings and the statement of policy contained in the statute Judge Otis labeled as

49 "Manufacturing is not commerce, nor any part of commerce. Nothing is more firmly established in constitutional law than that. Congress, therefore, under the commerce power cannot regulate manufacturing. Hence it cannot regulate the relations between employers and employees in manufacturing, as commerce. Never can these relations be any part of commerce." Stout et al. v. Pratt et al., 12 Supp. 864 (Dec. 21, 1935) at 867. See supra-note 44 for cases reiterating the fact that strikes do burden and obstruct commerce between the states.

As this note was going to press, Federal Judge John P. Barnes of Chicago handed down a decision wherein he declared the Wagner Act unconstitutional in its entirety. The trend of his argument is very similar to that of Judge Otis. In this case the Bendix Products Corporation sought an injunction to restrain the National Labor Relations Board from interfering with its business, that is, to enjoin the Board from ordering the petitioner to bargain with the unit selected by the majority of its employees. Judge Barnes found the Act violative of the due process clause of the Fifth Amendment and the commerce clause. The tenor of the judge's economic philosophy and his constitutional views can be readily inferred from his answer to the defendant's contention that the economic existence of business is completely tied up with the constant flow of materials and products from and into the channels of interstate commerce. Says Judge Barnes: "This is the familiar but fallacious argument which would, by judicial interpretation and construction, amend the commerce clause of the Constitution by striking therefrom the words 'with foreign nations and among the several states, and with the Indian tribes,' so that it shall read, simply, 'Congress shall have the power to regulate commerce,' and which would broaden the definition of 'commerce' to include manufacturing, mining, agriculture and, in fact, most of the activities of modern life. The relationship with which the defendants propose to deal is a relationship between the plaintiff and its production employees, who are engaged in making for plaintiff, in its plant in Indiana, finished automobile and airplane parts and accessories from raw materials, that is, manufacturing. Manufacturing is not commerce, nor does the fact that the things manufactured are afterward to be shipped or used in interstate commerce make their production a part thereof." N. Y. Times, March 25, 1936, 1:5, 5:3, 4, 5, 6; N. Y. Times, March 26, 1936, 22:2 (editorial).

29 U. S. C. A. § 151. "Findings and Policy. The denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

"The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries."

"It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and
syllogistic reasoning and not worthy of very much consideration. The defendants, invoking the term "affecting commerce" as used in the Act, maintained that Congress could regulate that which, not itself a part of commerce among the states, directly affected commerce. The defendant's reference to the "stream of commerce" cases was deemed untenable on the ground that the applicability of the phrase has been limited to situations wherein the thing moving in commerce (cattle or grain) has been the same at the beginning and at the end of the journey. Not content with the issuance of an injunction against the National Labor Relations Board, Judge Otis felt it incumbent on him to comment on the pending Congressional resolution to amend the Constitution—dicta on which one can to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection."

29 U. S. C. A. § 2 (7). "The term 'affecting commerce' means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce." Obviously, the purpose of this section is to give the Act as extensive an application as possible.

The defense placed great reliance on the "stream of commerce" cases. In a number of cases the Supreme Court decided that Congress could regulate that which is in a "stream of commerce", "current of commerce" or "flow of commerce" among the states, even though the thing so regulated is an intrastate transaction. In Swift & Co. v. United States, 196 U. S. 375, 25 Sup. Ct. 276 (1905), the United States succeeded, pursuant to the Sherman Act, in restraining a conspiracy in restraint of trade. The Court concluded that a combination of six large meat-packing houses, dealers, and commission men to refrain from bidding against each other was a conspiracy aimed to impede the movement of interstate commerce. The case of Stafford v. Wallace, 258 U. S. 495, 42 Sup. Ct. 397 (1922) involved the Stockyards and Packers Act, an Act literally regulating the local activities of the Chicago stockyards, the fees and activities of commission men and dealers and related activities. The Court sustained the Act on the "stream of commerce" theory. The case of Chicago Board of Trade v. Olsen, 262 U. S. 1, 43 Sup. Ct. 470 (1923) sustained the Grain Futures Act, although it regulated activities of a purely local character (practices of grain exchanges and their members) on the ground that failure to control would have a most deprecatory effect on the flow of interstate commerce. It is of interest to observe that in the case of Hill v. Wallace, 259 U. S. 44, 42 Sup. Ct. 453 (1922), the Court invalidated the Future Trade Act, legislation similar to the Grain Futures Act. Judicial recognition of Congressional investigations led the Court to change its position. On the basis of these decisions the defendants contended that "if wheat is exported from Kansas to a Missouri mill and flour is exported from the Missouri mill to Iowa, that is a stream of commerce, and, therefore, that the business of the mill, including the relations of employers and employees therein, may be regulated by Congress."

The pending Congressional resolution, H. J. Res. 323, introduced June 12, 1935, and referred to the Committee on the Judiciary, reads: "The Congress shall have power by laws uniform in their geographical operation to regulate commerce, business, industry, finance, banking, insurance, manufactures, transportation, agriculture, and the production of natural resources." Judge Otis finds that under such an amendment the statute would be constitutional but
that the citizen will have become a subject. The irrelevancy of this statement is too obvious for further comment.

64 The report of this case has not as yet been published, and therefore our information is based wholly on the account of the case as reported in the N. Y. Times, Jan. 24, 1936, 4:6. It appears that the Labor Board hearing was scheduled on the complaint of the Bemis local of the United Textile Workers of America that the company sought to interfere with the rights of its employees to bargain collectively under the Act.


"The subject is the execution of those great powers on which the welfare of a nation essentially depends. It must have been the intention of those who gave these powers to insure, as far as human prudence could insure, their beneficial execution. This could not be done by confining the choice of means to such narrow limits as not to leave it in the power of Congress to adopt any which might be appropriate and which were conducive to the end. This provision is made in a Constitution intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs. To have prescribed the means by which government should, in all future time, execute its powers, would have been to change entirely the character of the instrument and give it the properties of a legal code. It would have been an unwise attempt to provide, by immutable rules, for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur. To have declared that the best means shall not be used, but those alone without which the power given would be nugatory, would have been to deprive the legislature of the capacity to avail itself of experience, to exercise its reason, and to accommodate its legislation to circumstances."

65 "It would be utterly inconsistent with the firm principle held by this court to invade the powers of the legislative and executive departments of the national government, by staying the proceedings of an important executive board established by act of Congress, except upon a conclusion reached by the court that such act is unconstitutional beyond the shadow of a doubt." N. Y. Times, Jan. 24, 1936, 4:6. In line with this reasoning is the decision of Federal Judge Rippey sustaining the validity of the Wagner Act. This decision is summarized in the N. Y. Times, March 8, 1936, 15:1, 2, 3. Actions were begun by the Precision Castings Company of Fayetteville, E. I. duPont de Nemours & Co., and duPont Rayon Co. of Tonawanda, seeking temporary injunctions restraining the Labor Relations Board from proceeding with hearings on complaints by the Iron Molders' Union in the Precision case and the United Textile Workers in the other cases. Both unions alleged violations of Section 7 of the statute. Although the constitutionality of the Act was not passed upon directly, Judge Rippey held that a presumption of constitutionality obtained in the absence of a showing by the complainants beyond all reasonable doubt that the Act was as a whole unconstitutional.
courts to enjoin the government from carrying out the express will of Congress, the judge took his stand with all those opposed to "judicial legicide."  

These two opinions furnish an index to the constitutional issue. Which position the Justices of the Supreme Court will take will depend on their economic views. A reiteration of "familiar principles," such as formed the basis of the Schechter case, will be fatal. However, a recognition of the economic exigencies engendered by the frequent clashes between employer and employee may be the decisive factor in the validation of the Act.

It is of interest to observe that this legislation is considered so salutary and desirable in its implications that Mayor LaGuardia intends to offer it as a city labor law, if the United States Act is declared unconstitutional and a state labor bill embodying the principles of the Wagner Statute has already been introduced into the New York State Assembly.

Conclusion.

In its attempt to ameliorate industrial strife, the government must seek a modus operandi, a procedure which lies somewhere between laissez faire and compulsory arbitration. Mediation or conciliation is unquestionably unsuited to the settlement of important disputes. The other extreme, compulsory arbitration, has been used most extensively in Australia and New Zealand. The only experiment in compulsory arbitration in the United States was instituted in Kansas, an experiment which not only proved unsatisfactory but

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57 "Between 1915 and 1931 there were 4,856 strikes, involving the surrender of 2,795,000 jobs and the loss of 72,957,000 working days. At least $1,000,000,000 per year have been wasted because of these controversies." Cong. Rec., supra note 12, at 7853.
58 N. Y. Times, Jan. 8, 1936, 1:5.
60 "By mediation or conciliation is usually meant the bringing together of employers and employees for a peaceable settlement of their differences by discussion or negotiation. The mediator may be either a private or an official individual or board, and may make inquiries without compulsory powers, trying to induce the two parties by mutual concessions to effect a settlement." Commons and Andrews, Principles of Labor Legislation (revised ed. 1927) 136. This method has met with indifferent success. It is being applied in the present elevator strike. N. Y. Times, March 8, 1936, 1:1.
61 "Compulsory arbitration consists in the government's directly or indirectly compelling employers and employees to submit their disputes to an outside agency for decision." Commons and Andrews, op. cit. supra note 60, at 137.
63 The Kansas Industrial Relations Act of 1920 provided for compulsory arbitration of labor disputes in railroads and other public utilities, the clothing, coal, and food industries. Strikes, picketing, and boycotts were forbidden.
was subsequently declared unconstitutional by the Supreme Court.64

Organized labor has consistently opposed compulsory arbitration largely on the ground that it takes away the right to strike. In choosing a middle road the Wagner Act attempts to combine voluntary arbitration and the best features of compulsory investigation.65 It is believed that the procedure outlined by the Act will safeguard equality of collective bargaining and thereby promote industrial peace. Vergeing away from any form of compulsory arbitration, the statute places no restraint on the right to strike. It seeks merely to subordinate this weapon to the negotiative process. The American Federation of Labor has acquiesced readily in this subordination of its most potent weapon in the belief that the outlawry of the unfair practices and the enunciation of collective bargaining and majority rule are worth the loss.

Opposed by workers and employers, in 1925 the Industrial Relations Court was replaced by the Kansas Public Service Commission, later succeeded by the Commission of Labor and Industry. Labor and the Government, op. cit. supra note 13, at 120-22; Commons and Andrews, op. cit. supra note 60, at 185-86.

64 In Wolff Packing Co. v. Court of Industrial Relations, 262 U. S. 522, 43 Sup. Ct. 630 (1923), the Court declared unconstitutional that part of the Act which gave the Industrial Relations Court the power to fix wages so far as industries not classed as public utilities were concerned. The fixing of wages by compulsory arbitration in the packing industry was held inconsistent with the due process clause of the Fourteenth Amendment. In Wolff Packing Co. v. Court of Industrial Relations, 267 U. S. 552, 45 Sup. Ct. 441 (1925), the Court held that the meat-packing industry was not affected with public interest, and held unconstitutional that part of the Act which empowered the industrial court to fix the hours of work on the ground that it infringed the liberty of contract and the rights of property guaranteed by the due process clause of the Fourteenth Amendment. As a result of these decisions, it appears that because of constitutional limitations, compulsory arbitration could not be practiced in the United States in industries not affected with public interest.

65 Under the Railway Labor Act of 1926, a statute which combines the principles of voluntary arbitration and compulsory investigation, there has been "an almost unbroken record of peaceful settlement of labor disputes on the railroads. Since the enactment of the Railway Labor Act of 1926 it has become the established policy of practically all railroads to enter into such collective labor contracts with their employees." In 1935, 3,021 collective agreements were made under the guidance of the Mediation Board. N. Y. Times, Dec. 30, 1935, 2:5. "Voluntary arbitration occurs when the two parties, unable to settle the controversy by themselves or with the assistance of a mediator agree to submit the points at issue to an umpire or arbitrator, by whose decision they promise to abide. Arbitration remains strictly voluntary even if at every step the state uses its compulsory power. Under the system of compulsory investigation, a board created by the state summons witnesses and takes testimony on the initiative of one party to the dispute without the consent of the other." Commons and Andrews, op. cit. supra note 60, at 136-37.

Judge Barnes, in his recent nullification of the Wagner Act, characterizes as one of its unconstitutional features, the requirement that employers bargain collectively with their employees. He finds in this requirement a system of compulsory unilateral arbitration violative of the Fifth Amendment. N. Y. Times, March 25, 1936, 5:3, 4, 5, 6. See supra note 49.
It is with great trepidation that organized labor anticipates the decision of the Supreme Court on this legislation. The peculiar twist given to the Sherman Anti-Trust Act and the judicial repeal of the Clayton Act have not been forgotten. An index to labor's fears concerning the invalidation of this new legislation is found in the almost daily demands of its leaders for a new amendment to the Constitution.

Although organized labor is at present rent asunder by the fundamental problem of craft versus industrial unionism, there is unanimity of opinion as to the desirability of the Wagner Act, a unanimity which does not bode well for an unfavorable ruling.

Isidore Starr.

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67 Clayton Act, 38 STAT. 730 (1914), 15 U. S. C. A. §§ 12-27 (1927). Section 6 of the Act declared that the "labor of a human being is not a commodity or article of commerce" and Section 20 provided that no injunction shall prohibit the quitting of work, the refusal to patronize, peaceful picketing or peaceful persuasion, whether these Acts are done singly or in concert, and that these Acts shall not be considered violations of any law of the United States. In commenting on the Clayton Act, Blum, in his Labor Economics (1925) at 96-97 stated: "Never has a more futile legislative gesture been made nor have higher hopes been wrecked by judicial interpretation. * * * Since the passage of the Clayton Act, the Courts have in reality become the legislators." In American Steel Foundries Co. v. Tri-City Central Trades Council, 257 U. S. 184, 42 Sup. Ct. 72 (1921) and Duplex Printing Press Co. v. Deering, 254 U. S. 443, 41 Sup. Ct. 172 (1921), the Court construed the Clayton Act as having made no change in the previously existing law. See also Truax v. Corrigan, 257 U. S. 312, 42 Sup. Ct. 124 (1921).

68 The late Miss Jane Addams reported: "From my own experience I should say, perhaps, that the one symptom among workingmen which most definitely indicates a class feeling is a growing distrust of the integrity of the courts—the belief that the present judge has been a corporation attorney, that his sympathies and experience and his whole view of life is in the corporation side." Quoted in Commons, Trade Unionism and Labor Problems 613. The justifiability of labor's hostility to judicial emasculation of statutes aimed to safeguard their rights is appreciated by many commentators. Professor Corwin, in his Twilight of the Supreme Court (1934) at 112, states: "Nor when the constitutional views of Congress and those of the Court have clashed is it the latter which have usually prevailed in the long run." See Goldberg and Levenson, Lawless Judges (1935).

71 "To present-day economic and social conditions the doctrines alluded to [by the Supreme Court in the past] have little if any relevance for a community which tends to remain democratic; and if 'realities must dominate the judgment,' as the Court has said (288 U. S. at 360) they must, the outlook for such doctrines is not bright. 'Back to the Constitution'? The first requirement of the Constitution of a progressive society is that it keep pace with that society." Corwin, Twilight of the Supreme Court (1934) 184.