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Drafting Wagner's Act: Leon Keyserling and the Precommittee Drafts of the Labor Disputes Act and the National Labor Relations Act

Kenneth Casebeer†

This Article analyzes the development of the National Labor Relations Act through the drafts of the original Act. The author traces the evolution of Senator Wagner's ideas through numerous policy and political battles to the passage of the NLRA in 1935. The author explores the development of the drafts and the historical context surrounding their creation to reveal the social theory of the drafters and illuminate previously unexplored undercurrents in the text of the Act itself. The author, through this novel approach to the NLRA, sets up a new way to view the 1935 Act, and evaluates subsequent amendments and legal developments.

I
APPRAISING THE DRAFTS

Late in 1933, Senator Robert Wagner told his young and new assistant Leon Keyserling[1] that he wanted a bill establishing a labor court to

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1. Leon Keyserling graduated from Harvard Law School in 1931 and studied economics at Columbia University under Rexford Tugwell. On Tugwell's recommendation, Jerome Frank gave him his first government job in the Agriculture Adjustment Administration. He was Senator Wag-

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enforce Section 7(a) of the National Industrial Recovery Act ("NIRA").[2] That Section guaranteed the right of employees to organize and bargain collectively. In January of 1934, Wagner held a summit meeting to discuss preliminary ideas and proposals. Present in Senator Wagner's office were William Green, President of the American Federation of Labor ("AFL"); John L. Lewis, President of the United Mine Workers; Henry Warrum, Counsel for the AFL; Charles Wyzanski, Solicitor for the Department of Labor; the Senator; and Keyserling.[3] Shortly thereafter, or contemporaneously, Keyserling prepared a document labeled, "Proposals for National Labor Board—January 31, 1934—Substantive Principles."[4] It included seven topics:

(1) Recognition of right to bargain collectively
(2) Employee and employer limits for purposes of bargaining collectively
    (a) Majority rule for employees
(3) Representation
    (a) Right to elect outside representatives
    (b) Mention of representative union in contract
(4) Elections
    (a) How frequently, and upon what occasion
    (b) Effect of elections
(5) Terms of agreements
    (a) Obligation to reach agreement
    (b) Right to have closed shop
    (c) Effect of prior union contracts
    (d) Personal responsibility of individuals for union contracts
(6) Problem of company unions

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ner's sole legislative aide from 1933 to 1938 and became general counsel of the National Housing Agency. President Truman later appointed him Chairman of the Council of Economic Advisers. Besides the Wagner Act and the National Housing Act, he drafted the Full Employment Act of 1946, and ghost-wrote many of the Humphrey-Hawkins amendments to that statute. A persistent and strong voice for Keynesian economic policy, which advocates governmental social spending and monetary policies to stimulate the economy, Leon Keyserling worked for his beliefs until his death on August 9, 1987.

2. Ch. 90, 48 Stat. 195, 198-99 (1933) (ruled unconstitutional in Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935)).

3. For a description of the people, political climate, strategy and design of the Wagner Act, see Casebeer, *Holder of the Pen: An Interview with Leon Keyserling on Drafting the Wagner Act*, 42 U. MIAMI L. REV. 285 (1987). *See also* Keyserling, *The Wagner Act: Its Origin and Current Significance*, 29 GEO. WASH. L. REV. 199 (1960); Keyserling, *Why the Wagner Act?*, in THE WAGNER ACT AFTER TEN YEARS 8 (L. Silverberg, ed. 1945).

4. The drafts discussed in and appended to this Article, and the papers discussed in the Article, unless otherwise noted, are in the personal files of Leon Keyserling, which are in the possession of his family in Washington D.C. A copy of the drafts and files on the Wagner Act are held by the Project in Labor Theory, University of Miami Law Library.

For changes in drafts occurring after the introduction of the bills, see 1 NATIONAL LABOR RELATIONS BOARD, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT 1935 (1949).

(a) Definition of company union
(b) Prohibition of interference, influence, coercion or restraint
(c) Prohibition of specified other activities of company unions
(7) The right to strike
(a) Effect of failure to utilize existing machinery before striking

Between January 31, 1934 and the printing of the first confidential committee draft of the Labor Disputes Act, on February 27, 1934, Keyserling produced eight, or perhaps nine,[5] different drafts based on these principles.[6] Following substantial changes by Wagner's office during consideration before the Senate Committee on Education and Labor, the Chairman, David Walsh of Massachusetts, struck the entire Wagner/Keyserling draft and substituted a draft by Labor Department Solicitor Wyzanski. An embarrassed Senator Wagner withdrew this bill, still bearing his name, in June of 1934 when President Roosevelt's preference for a mixture of ad hoc industry boards and temporary approaches to the NIRA became a reality with Joint Resolution 44.

In November 1934, Keyserling, having been ordered to redraft a stronger bill, began working from the final Wagner version of the Labor Disputes Act, dated May 5, 1934. In basically two drafts, but with substantial input via memoranda from the staff of the nonstatutory National Labor Board ("NLB"), Keyserling produced the National Labor Relations Act ("NLRA" or "Wagner Act"). Senator Wagner introduced this bill on February 15, 1935, and Congress passed it with little structural change that June.[7]

This Article analyzes the texts of Leon Keyserling's drafts, explicating their evolution based on his personal files. Little attempt will be made to review the legislative history and politics of the Act's passage contained in other works.[8] Rather, this analysis will be based on the texts themselves, supplemented by a few correlative texts surrounding

5. The confusion of the exact number of drafts concerns Drafts 2(a) and 2(b). *See infra* Appendix, pp. 102-11. One version of the second draft was dated February 19, 1934. All the other drafts after it were not dated. The confidential committee draft, while substantially identical to the last preprinted draft, Draft 8, *infra* pp. 116-20, did contain some wording changes.

6. Of the seven substantive principles: (1) appears in Draft 2(a), *infra* p. 103; (2)(a), Draft 2(a), *infra* pp. 104-05; (3)(a), Draft 1, *infra* p. 102; (4)(a), Draft 3, *infra* p. 113; (4)(b), Draft 2(a), *infra* pp. 104-05; (5)(a) & (b), Draft 2(a), *infra* p. 104; (5)(c), Draft 3, *infra* p. 112; (6)(a), Draft 2(a), *infra* p. 103; (6)(b) & (c), Draft 1, *infra* p. 102; (7), Draft 8, *infra* p. 120.

7. National Labor Relations Act, ch. 372, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-169 (1982).

8. For the best review of the legislative history, see I. BERNSTEIN, THE NEW DEAL COLLECTIVE BARGAINING POLICY (1950).

On the administrative history, see 1 J. GROSS, THE MAKING OF THE NATIONAL LABOR RELATIONS BOARD (1974). On political and legal culture, see P. IRONS, THE NEW DEAL LAWYERS (1982). On both, see C. TOMLINS, THE STATE AND THE UNIONS: LABOR RELATIONS, LAW AND THE ORGANIZED LABOR MOVEMENT IN AMERICA: 1880-1960 (1985), and S. VITTOZ, NEW DEAL LABOR POLICY AND THE AMERICAN INDUSTRIAL ECONOMY (1987).

the drafts. Several reasons suggest this concentration. First, and most simply, the drafts document the origins of the language of the National Labor Relations Act. Second, the drafts provide evidence that the intent of the draftsmen went beyond what has normally been attributed to the legislative history in academic circles.[9] Third, the drafts permit identifying interpretive and social tensions attending the Act's passage and prefiguring issues of importance for administrative and judicial constructions of the Act.

Existing academic accounts diminish the appreciation of the intellectual and political achievement of the Wagner Act's sponsor and drafters even as the statute continues to receive tribute as Labor's Magna Carta. Specifically, the following related observations have been underemphasized when they appear in current literature. First, a serial review of the texts demonstrates Keyserling's overarching concern for developing a labor policy that promotes economic recovery. Second, the economic and legal philosophies of Keyserling and Wagner differ in important areas from those of the Presidential New Deal. Third, the issues of authorship between Keyserling and Wyzanski, and jurisdiction over administrative enforcement between an independent agency and the Labor Department, concern differences in labor policy and constitutional argument as much as battles over political turf. Fourth, Keyserling and Wagner believed that freeing workers required restructuring the state and its economic roles more than writing a labor relations policy subject to bureaucratic logrolling.

Usually, and probably inherently, such a self-contained study as this risks mistakes of historical emphasis and causality, attributing too much of the result to the intent of the drafters. But in the case of the Wagner Act, several variables reduce the usual interpretive leaps. First, Senator Wagner was an active and powerful legislator with a long background in labor law and policy.[10] Second, the Senator insisted upon keeping control over the drafting process of virtually all legislation that he introduced.[11] Third, particularly in 1935, the anti-New Deal constitutional vision secured by the striking down of the NIRA led many congressmen to acquiesce in the legislation on the belief that the courts would find it invalid.[12] Fourth, the massive Democratic congressional majorities produced in 1934 reduced the need for compromise after the second bill's introduction.[13] Fifth, the AFL and organized labor willingly ceded the

9. *See* Casebeer, *supra* note 3.

10. Wagner litigated the first case outlawing labor injunctions in New York, Interborough Rapid Transit Co. v. Lavin, 247 N.Y. 65, 159 N.E. 863 (1928), sponsored unemployment insurance proposals in the late 1920s and sponsored the NIRA, including section 7(a).

11. I. BERNSTEIN, *supra* note 8, at 63 & 88.

12. P. IRONS, *supra* note 8, at 231.

13. I. BERNSTEIN, *supra* note 8, at 88.

drafting specifics to Wagner's office, supporting any legitimization of organizing and bargaining.[14] Collectively, these variables suggest an extraordinary degree of control over the drafting process. Moreover, given Wagner's and Keyserling's control over drafting, it is extraordinary that none of the standard works on the NLRA reproduce or closely analyze the drafts.[15]

II
THE DRAFTS

Structurally, the drafting process involved three separate functional components: (1) The preamble established the predicate for the Act's constitutionality. (2) The specification of unfair labor practices altered incentive structures to encourage bargaining and increase labor's countervailing economic power to redistribute the wage bargain. (3) The establishment of an independent labor board facilitated enforcement of bargaining rights through self-contained powers, avoiding reliance on the historically somewhat hostile Justice Department. Furthermore, the three functions interrelated quite specifically as a response to the Great Depression. Keyserling believed strengthening labor essential to a proto-Keynesian attack on underconsumption.[16] Overcoming the lack of demand as a barrier to economic recovery comfortably fit Robert Wagner's commitment to central, democratic planning for economic stability and economic progress. State supervision of labor relations in order to increase labor's bargaining power would in turn redistribute the wage bargain, and deter management adventures, thus removing the economic drag particularly of recognition strikes. Thus, the particular practices specified—determination of bargaining units, supervision of representation elections and fair bargaining practices—constituted natural points of leverage most effectively translated into union power when enforced by a speedy, specialized board. From this perspective, the drafts' sustained emphasis on the preamble and the unfair labor practices belie such proffered drafting motivations as strengthening enforcement of Section 7(a) or modest reform and extension of the "common law" of the nonstatutory boards.[17] These motivations certainly influenced specific language and topics of the draftsmen, but were subordinated to their chief aim of strengthening labor's power.

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14. *Id.* at 63.

15. Bernstein analyzes and outlines in detail only the penultimate draft, Draft 8, of the Labor Disputes Act. *Id.* The other works do not discuss the drafts at all.

16. For the anticipation of governmentally planned demand strategies stabilizing and expanding economic growth, see Finegold & Skocpol, *State, Party, and Industry: From Business Recovery to the Wagner Act in America's New Deal*, in STATEMAKING AND SOCIAL MOVEMENTS 159 (C. Bright & S. Harding eds. 1984).

17. See traditional analysis of drafting motivations in J. GROSS, *supra* note 8, at 67 & 132; and I. BERNSTEIN, *supra* note 8, at 60-62, 85 & 88.

A. *Draft 1*[18]

The chronological development of the drafts reveals a coherent core of main characteristics. The focus of the brief first draft is telling. Draft 1 consists entirely of one section which prohibits company unions and specifies five illegal circumventions of the prohibition. Two subsections prevent direct or indirect company sponsorship of unions, and three prevent interference with independent organizing activity.

The prohibition of company unions prevents employer participation in any organization concerned with bargaining over wages, hours and conditions of employment. Keyserling and Wagner thought that company unions posed the chief barrier to voluntary organizations having any real power to substantially affect wage redistribution and job security.[19] The initial appearance of the wages, hours and conditions of employment language as the natural object of union activity within such an anti-company union proviso seemingly eliminates the suggestion that the "wages, hours" terminology was intended to limit the subject matter of collective bargaining.[20]

B. *Draft 2(a)*[21]

Draft 2(a) introduces a declaration of policy, definitions, protection of a right to organize, and further specification of employer responsibilities. Most of the key provisions are recognizable as they appear in the final draft, and the nonprocedural provisions mainly codify the so-called common law of the nonstatutory National Labor Board.[22]

The Declaration of Policy,[23] however, broadens the scope of the Act beyond the mere elimination of company unionism and support for inde-

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18. *See infra* p. 102.

19. The strength of Keyserling's concerns about company unions reemerging is reflected in his rejection of this later Department of Labor suggestion to modify the NLRA draft: "Section 2, Sub. 5. Strike the word 'dealing' on page 3, line 21, and substitute 'bargain collectively'."

> This is an extremely important amendment, and a very bad one. Most company unions do not consider themselves as engaging in collective bargaining except in a vague way. Their principal purpose is the "adjustment" of individual grievances. If the definition of labor organizations is to be confined to organizations which bargain collectively, then most of the activity of employers in connection with company unions which we are seeking to outlaw would fall outside the scope of the Act. If, as employers insist, such "plans", etc., are lawful representatives of employees, then employers activity relative to them should clearly be included, whether they merely "adjust" or exist as a "method of contract", or engage in genuine collective bargaining. It is for this reason that the bill uses the broad term "dealing with".

Keyserling Papers, *supra* note 4.

20. *See* Casebeer, *supra* note 3, at 356.

21. *See infra* pp. 102-05.

22. Bernstein identifies four central ideas of the NLB: (1) the right of employees to associate and choose representatives, (2) the injunction to employers not to interfere in organizing, including through company unions, (3) the right to choose outside representatives by majority rule, and (4) the duty to bargain in good faith. I. BERNSTEIN, *supra* note 8, at 60-62.

23. Section 5, *infra* pp. 102-03.

pendently organized unions in Draft 1. Predicated on the NIRA's permission to corporations to cooperate under industrial codes, thus adding leverage over the isolated individual's lack of economic power and the resulting disparity in bargaining power, the Act intended to equalize bargaining power. The declared policy also went beyond equalizing bargaining power to encourage collective bargaining agreements and to discourage industrial strife. Attention thus turns from unions to their consequences for workers.

The definitions in Section II[24] are broad and inclusive. Important terms are "employer," which applies the Act to an employer of one or more employees, and "company union."

Section III, labeled General Policies,[25] begins with the first affirmative guarantee of the right to organize. It closely tracks the first guarantees of Section 7(a) of the NIRA: to bargain collectively, to choose representatives, and to engage in concerted activities for mutual aid or protection. The second paragraph prevents employer interference with organization, prohibits company unions, and for the first time affirmatively permits a closed shop.[26] The closed shop contains a proviso that seventy-five percent of the employees of the employer belong to the union and that the union place no inequitable restrictions on membership.[27] The second paragraph closes with a rewording of the prohibited practices in Draft 1.

The third paragraph creates for the first time a duty to bargain: the duty to use "every reasonable effort to make and maintain agreements concerning rates of pay, rules and working conditions."[28] This language appears broader than "wages, hours and conditions of employment" sometimes construed to limit the remaining terms to issues capable of being translated into a form of wages.[29]

The fourth Section makes the "National Labor Board," also appearing for the first time, the determining body for representatives in any dispute by two or more groups of employees, and authorizes the Board to conduct elections by secret ballot and to prohibit employer interference.[30] Subsection (b) authorizes the Board to determine bargaining unit

24. *See infra* p. 103.

25. *See infra* pp. 103-05.

26. Section III, Second, (a), *infra* p. 104.

27. This provision was attacked by Leonard Boudin and others who feared discrimination by unions against racial and ethnic minorities which would find themselves without representation or recourse. *See* Casebeer, *supra* note 3, at 356; I. BERNSTEIN, *supra* note 8, at 67. Keyserling reports that Wagner was sympathetic but felt that the bill had to concentrate solely on employer practices lest those opposed to broad labor protections, such as Labor Solicitor Wyzanski, use this precedent to argue for including a more general bill of particulars against unfair labor practices of unions. *Id.*

28. Section III, Third, *infra* p. 104.

29. Casebeer, *supra* note 3, at 330-31 & 352.

30. Section III, Fourth, (a), *infra* p. 104.

by employer, craft, or plant, and to settle disputes over the sole representatives chosen by elections.[31] Thus, for the first time it states the principle of majority rule of those employees eligible to participate, and implicates the government in craft versus industrial organizational disputes.

C. *Draft 2(b)*[32]

Draft 2(b) contains the title "Labor Disputes Act" and consists solely of Title III, the creation of the National Labor Board and the specification of its powers and procedures. Its models were the Federal Trade Commission Act,[33] the Securities and Exchange Act of 1934,[34] and the Railway Labor Act.[35] The National Labor Board was to be composed of five members who, with a separate administrator known as the executive secretary, hired and supervised the agency's staff.[36] A separate panel of six employer and six employee representatives were to serve as associate members who could be invited in equal numbers to participate in Board decisions.[37]

In Draft 2(b), the Board is empowered to investigate, hold hearings on, prevent, and remedy any unfair labor practice (undefined), if that practice has led or tends to lead to a labor dispute that might burden commerce.[38] Penalties are provided for failure to respond or testify and enforcement could be obtained in any federal district court with competent jurisdiction.[39] Aggrieved persons could appeal for review and modification of the Board's orders, although the Board's findings of fact were given deference.[40] The Board is empowered to act as an arbitrator in labor disputes.[41] Section 307[42] copies the Board unit determination and representative election procedures of Draft 2(a).[43] This is its only overlap with any other draft until the last draft.

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31. *Infra* pp. 104-05.

32. *See infra* pp. 105-11.

33. Ch. 311, 38 Stat. 717 (1914) (codified as amended at 15 U.S.C. §§ 41-58 (1982 & Supp. IV 1986)).

34. Ch. 404, 48 Stat. 881 (1934) (codified as amended at 15 U.S.C. §§ 78a-78hh (1982 & Supp. IV 1986)).

35. Railway Labor Act, ch. 347, 44 Stat. 577 (1926) (codified as amended at 45 U.S.C. §§ 151-163 & 181-188 (1982)).

36. Sections 301 & 302(a), *infra* p. 105.

37. Section 302(b), *infra* pp. 105.

38. Section 304(a)-(c), *infra* pp. 106-07.

39. Section 304(d), *infra* p. 107.

40. Section 304(e), *infra* pp. 107-08.

41. Section 306, *infra* p. 108-09.

42. *See infra* pp. 109-110.

43. *See supra* note 31 and accompanying text.

D. Draft 3[44]

Draft 3 returns to the format of Draft 2(a). It begins with a threefold preface: to remove obstructions to interstate commerce, to equalize bargaining power, and to encourage amicable settlement of labor disputes. A National Labor Board enforces its provisions.[45] The preface is followed by the first full preamble, Section 8,[46] which markedly broadens the scope of the Act. At this point, the problems of strikes and inequality of bargaining power are seen as both independent and part of the larger, historical pattern of economic development. This viewpoint is in sharp contrast with the sparse reference to strikes obstructing commerce of Draft 2(b). It begins by noting the integration and centralization of corporate control over economic resources and the impact on individual bargaining power. The preamble finds that this imbalance eliminates actual liberty of contract (the prevailing definition of constitutionally protected liberty), and treats the resulting wage as inadequate to preserve the worker's standard of living. These trends result in a failure of consumer welfare to match production surpluses in periodic depressions caused by overproduction. It is this depression, not strikes per se, that burdens interstate commerce. Strikes resulting from the attempt to achieve union recognition to redress the inequality of bargaining power add to the diminishment of the total economic output and prevent the redress of power imbalances. In short, the first full preamble describes a Keynesian approach to economic recovery, of which a labor organization policy is a crucial component.

The definitions section follows with few changes: employees subject to the Railroad Labor Act are exempted, and the term company union is dropped.[47] The guarantee of the right to organize is reworded in Section 10, but its content remains the same.[48] The prohibitions on practices interfering with the right to organize are the same as those in Draft 2(a) with two changes. Most importantly, the closed shop provision, now Section 11(b)(5), requires only a sixty-percent majority, and discriminatory practices specify that employers may not by written or oral statements interfere, or by soliciting or maintaining membership lists, coerce membership decisions.[49] A new Section 11(c) abrogates contracts entered into before the Act's enactment that are in conflict with the Act.[50]

The duty to bargain is referred to twice in this draft. The first reference is to a duty to bargain rather than a reasonable effort to reach agree-

44. *See infra* pp. 111-13.
45. *Infra* p. 111.
46. *Infra* p. 111.
47. Section 9, *infra* p. 111-12.
48. *Infra* p. 112.
49. *Infra* p. 112.
50. *Infra* p. 112.

ments as in the first version.[51] The second reference, however, retains the reasonable effort to reach agreements language.[52] Any organization that imposes inequitable restrictions upon membership is not entitled to represent nonmembers.[53] Finally, Section 7(a) of the NIRA is repealed.

E. Draft 4[54]

Draft 4 changes the definition of employee to include any employee, not employees of any particular employer.[55] It also adds a new Section 12(c) providing that where no representative has been selected by a majority, any representative of two or more employees may bargain. This experiment was thought to be a safe concession to supporters of some form of company union alternative, and perhaps also a safeguard for minority viewpoints. The Board's settlement of employee disputes over representation binds the employees for one year.

F. Draft 5[56]

Draft 5 changes the definition of employer to restrict it to one of five or more employees; exempts federal, state and municipal governments, and labor organizations; and changes the term "employees" to include those unemployed by virtue of work stoppages.[57] Section 11(b)(4) reinstates a seventy-five-percent majority requirement for a closed shop.[58] Section 12(b) provides for a sole representative upon election by a majority of those who are eligible, or by a majority of those participating in a vote if forty percent of those are eligible.[59] Concomitantly, Section 12(c) drops the previous draft's experiment of multiple bargaining units.[60]

G. Draft 6[61]

Draft 6 adds to the preamble partial governmental responsibility under the NIRA industrial codes for the tendency of economic concentration. It condenses some of the language on underconsumption and depression.[62] The term "employer" is defined once again as one who employs one or more employees.[63] Section 11 for the first time uses the

51. Section 12(a), *infra* p. 112.
52. Section 13, *infra* p. 113.
53. Section 12(b), *infra* p. 112-13 (second proviso).
54. *See infra* p. 113 (changes only).
55. Section 9, *infra* p. 113.
56. *See infra* pp. 114-15 (changes only).
57. Section 9, *infra* p. 114.
58. *Infra* p. 114.
59. *Infra* p. 114.
60. *Infra* p. 115; *see* Draft 4, § 12(c), *infra* p. 113.
61. *See infra* pp. 115-16 (changes only).
62. *Infra* p. 115.
63. Section 9, *infra* p. 115.

phrase "unfair labor practice" to describe the practices prohibited to employers.[64] Many subsections are reordered, and Section 12 retains only subsection (b). The section describing the effect of preexisting contracts is reworded. Contracts made within two months of enactment are conclusively presumed to be in anticipation of it.[65]

H. Draft 7[66]

Draft 7 only changes some of the wording of early drafts.

I. Draft 8[67]

Draft 8 substantially represents the bill sent to committee on February 27, 1934. The most significant change is the addition of Section 303, guaranteeing that nothing in the Act should be construed to impair the right to strike.[68] Wagner and Keyserling felt the economic power of the strike would be the chief enforcement of the Act's provisions once organization was in place, and agreed to add this guarantee to emphasize the point. Following a renumbering of sections, Section 3 adds a definition of interstate commerce.[69] Section 5 removes the prohibition of membership lists. It also limits the closed shop to contracts of less than one year and is triggered by simple majority.[70] New Section 6(a) creates a catchall unfair labor practice which tends to lead to a labor dispute that might burden commerce and makes it a criminal misdemeanor subject to a $500 fine for each day of violation.[71] New Section 6(b) vests federal district courts with authority to prevent unfair labor practices burdening commerce but prevents this power from interfering with the National Labor Board's powers defined in Title II.[72]

Title II is substantially the same as Draft 2(b) with a streamlining of language. However, the five member National Labor Board becomes a tripartite group with one representative each of employers and employees, and three neutrals, one of whom is designated chairman.[73] A mediation function is introduced.[74] Most importantly, the majority rule principle of choosing sole representatives is changed in Section 207 to

64. *See infra* p. 115.
65. Section 13(b), *infra* p. 116.
66. *See infra* p. 116 (changes only).
67. *See infra* pp. 116-20.
68. *Infra* p. 120.
69. *Infra* p. 117.
70. Section 5(e), *infra* p. 118 (second proviso).
71. *Infra* p. 118.
72. *Infra* p. 118.
73. Section 201, *infra* p. 119.
74. Section 204, *infra* p. 119. Senator Wagner believed a tripartite board would contribute to mediation based on his National Labor Board experience. *See* I. BERNSTEIN, *supra* note 8, at 64 n.42.

leave the Board discretion in certifying representatives following a supervised election.[75] A new Title III creates the United States Conciliation Service in the Department of Labor, a concession to that Department.[76]

J. Labor Disputes Act of 1934[77]

The Labor Disputes Act as introduced differs only in the following respects. Governmental responsibility for economic concentration drops out of the preamble. In Section 5 an unfair labor practice occurs by failure to notify employees pursuant to Section 304(b) of the statute's effects on contracts. The criminalization of unfair labor practices is dropped from Section 6, and the district courts may intervene solely by request of representatives of the National Labor Relations Board ("NLRB" or "Board"). The election of representatives under Board supervision moves to Title II.

In Title II, the Board expands to seven members, two employers, two employees, and three neutrals. The neutrals serve five year terms, and the others serve one year terms. The panels of associate members of employers and employees are dropped. Section 204 on mediation is streamlined, and there is ambiguity as to whether mediation extends to all contract disputes or just unfair practices. Hearings before the Board are not subject to the rules of evidence. The Board's remedial powers are inclusive: cease and desist orders, affirmative actions, back pay and damages, and reinstatement or other acts to achieve substantial justice under the circumstances.

K. National Labor Relations Act, Draft 1[78]

The 1935 bill, or National Labor Relations Act, already changed substantially by Wagner's office during Senate Committee deliberation from March through May 1934, is changed further in Keyserling's first draft in November 1934. Basically he used the May 5, 1934 bill as a chronology of subjects and sections in working toward a more flexible, generalized enabling language for the Board's powers.[79]

Keyserling had already rewritten the preamble or Declaration of Policy, copying almost verbatim Section 2 of the Norris-LaGuardia Act.[80] The preamble begins with a reference to prevailing economic conditions, developed with government involvement, pitting owners aggregated in corporations against the individual worker helpless to protect

75. Section 207, *infra* pp. 119-20.

76. Section 301, *infra* p. 120.

77. The bill of the Labor Disputes Act is found in NATIONAL LABOR RELATIONS BOARD, *supra* note 4, at 1.

78. *See infra* pp. 120-30.

79. I. BERNSTEIN, *supra* note 8, at 88.

80. Ch. 90, 47 Stat. 70 (1932) (codified as amended at 29 U.S.C. §§ 101-115 (1982)).

freedom of labor or contract and therefore unable to achieve a decent living standard. It asserts that such living standards precipitate strikes and burden commerce. It refers to underconsumption as the cause of economic depressions, but it is not the explicit policy of the Act to attack this condition.[81]

Definitions in Section 2 remain virtually identical and as inclusive as the limits of the commerce clause, except that the term "employees" excludes agricultural labor and domestic service.[82] In order to prevent employer domination, the term "labor organizations" includes company unions. For the same reason, grievances are added to those subjects of concern to labor organizations.

The unfair labor practices of Section 8 are linguistically simplified and limited to: (1) interfering with the right to organize of section 7; (2) acting as a company union, but also providing that employers could still confer with individual employees; (3) discriminating against the membership decision; (4) disciplining an employee for making charges to the Board; and (5) as added by Francis Biddle, chairman of the old National Labor Relations Board, refusing to bargain collectively.[83]

Section 9 provides for majority rule. If no majority prevails, minority bargaining groups are allowed. But if a majority does prevail, minority groups would still be allowed to present grievances. Subsection (b) retains Board supervision of elections and unit determination, and (c) provides for court enforcement.[84]

This Draft creates a neutral three-person board with most of the specific procedures of enforcement removed from the Labor Disputes Act drafts.[85] Staff employees of the old Board transfer to the new Board with their files and records.[86] Section 10(a) empowers the Board simply to prevent any unfair labor practices under Section 8.[87] Section 10(b) permits the Board to decline jurisdiction over an unfair labor practice in favor of alternative dispute resolution mechanisms.[88] The district court

81. Section 1, *infra* p. 121.

82. Section 2(3), *infra* p. 121. Senator Wagner had been willing to include agricultural workers if Secretary of Agriculture Wallace had joined the fight for their inclusion. He declined. *See* Casebeer, *supra* note 3, at 334. In a 1935 memorandum, Keyserling analyzed the main revision suggestions of Secretary of Labor Frances Perkins, including one on including agricultural workers: "This amendment is submitted by the Secretary in a half-hearted way, i.e., by enclosing the words in a parenthesis followed by a question mark. Of course, we favor this amendment in principle, but it is Senator Wagner's view that the bill could not pass with such an amendment included." Keyserling Papers, *supra* note 4.

83. *Infra* pp. 123-24.

84. *Infra* p. 124.

85. Section 3(a), *infra* p. 122.

86. Section 4(b), *infra* p. 123.

87. *Infra* p. 124.

88. *Infra* p. 125.

enforcement and appeal provisions largely carry over.[89] Section 12 adds a new arbitration section.[90] Section 16 preserves the right to strike.[91] In short, the National Labor Relations Act follows the pattern of the Labor Disputes Act. Moreover, few changes of substance occurred from this first draft until its introduction in February 1935.

L. National Labor Relations Act, Draft 2[92]

The final draft represents the National Labor Relations Act as introduced February 15, 1935, together with amendments of the Committee on Education and Labor annotated by Keyserling as to their source or sponsor.[93] These annotations indicate how thoroughly Wagner's office controlled the legislation in 1935. The preamble once again separates the inequality of bargaining power and the resulting disequilibrium of wages and production causing depression, from industrial strife and cumulative interference with recovery.[94] Section 11 on district court prevention of unfair labor practices, and Section 12 on arbitration are removed.[95]

III
ESTABLISHING CONSTITUTIONALITY OF THE NLRA

The preambles of the drafts described the aims of state intervention in civil society in its express linkage of congressional power to regulate market participants with individual constitutional rights permitting resort to political bodies and economic markets to achieve personal interests. Furthermore, protection of organization plus a duty to bargain and a guaranteed right to strike would naturally lead, without government dictation, to economic power that would increase wages and create industrial peace.[96]

What most commentators fail to recognize is that unionization and labor power were instruments serving state planning within an interdependent economic-political web.[97] Keyserling believed that the Congress

89. *See* § 10(f), *infra* p. 125-26.

90. *See infra* pp. 127-28.

91. *Infra* p. 129.

92. *See infra* pp. 130-31.

93. For the bill as introduced, see 1 NATIONAL LABOR RELATIONS BOARD, *supra* note 4, at 1295.

94. Section 1, *infra* p. 130.

95. *Infra* p. 131.

96. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 MINN. L. REV. 265, 281 n.53 (1978).

97. C. TOMLINS, *supra* note 8, at 124 ("[i]n Wagner's bills, however, 'labor' was conceived of not as a set of organizations but as the mass of individual employees which constituted the labor force"); *see* J. ATLESON, VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW 43 (1983).

See also Wagner, et al., *Labor's Charter of Rights*, 42 AM. FEDERATIONIST 361 (1935). Lloyd Garrison, Chairman of the nonstatutory NLRB, argues that company unions make industry-wide agreements impossible by definition and therefore interfere with effective economic planning. *Id.* at

exercised central planning in its power to regulate interstate commerce, intervening by action *or* inaction in a national economic market.[98] In fact, imbalances in aggregate individual investment and consumption decisions that prevented market clearing created identical economic drags as previously recognized objects of congressional regulation: strikes in key industries,[99] unsafe transportation equipment,[100] or price fixing.[101] If so recognized, then governmental action redistributing the consequences of market activity, in part structured by previous political decisions, could not violate due process. Since inequalities of bargaining power skewed supply and demand to the detriment of economic recovery for all, the state's constitutional power to regulate the economy matched legitimate constitutional expectations of economic right.[102]

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398. Dr. H.A. Mills, a member of the old NLRB, argues that inequality of bargaining power discourages consumption, and therefore investment, and that codes like those of the NIRA depend upon effectively organized labor unions as pressure groups balanced against other pressure groups. *Id.* at 406-07.

98. Senator Wagner stated in a radio broadcast:

> The main obstacle to recovery was an outworn philosophy of government that had been suited to the oxcart era, but that was totally unadjusted to the machine age. It was a dogma insisting upon extreme individualism at a time when the individual had become the helpless victim of forces too big and too powerful for him to control. It was a dogma that failed to perceive the need for national action although our mighty industries had burst the bounds of conventional State lines and were country-wide or even international in their scope. It scoffed at the possibilities of Nation-wide cooperation although cooperation was the only safeguard against social disintegration on one hand or radical overthrow on the other.

The Future of the National Industrial Recovery Act (National Radio Forum Broadcast, June 13, 1935), *reprinted in* 79 CONG. REC. 9417-18 (1935).

99. *See* Clayton Act §§ 7 & 8, ch. 323, 38 Stat. 730, 731 (1914) (codified as amended at 15 U.S.C. §§ 18 & 19 (1982 & Supp. IV 1986)) (upheld in Coronado Coal Co. v. United Mine Workers I, 259 U.S. 344 (1922) (strike in restraint of trade violates antitrust laws)).

100. *See* Safety Appliance Acts, ch. 196, 27 Stat. 531 (1893), *amended by* ch. 976, 32 Stat. 943 (1903) (codified as amended at 45 U.S.C. §§ 1-10 (1982)) (upheld in Southern Ry. Co. v. United States, 222 U.S. 20 (1911) (case concerning defective couplers on intrastate rail cars)); Employers' Liability Act, ch. 149, 35 Stat. 65 (1908), *amended by* ch. 143, 36 Stat. 291 (1910) (codified as amended by 45 U.S.C. §§ 51-60 (1982)) (upheld in Second Employers' Liability Cases, 223 U.S. 1 (1912) (railroad company liable for negligence to another railroad company's employee)).

101. *See* Interstate Commerce Act § 3, ch. 104, 24 Stat. 379, 380 (1887), *repealed by* Pub. L. No. 95-473, § 4(b) & (c), 92 Stat. 1466, 1470 (1978) (upheld in Houston, E. & W. Tex. Ry. Co. v. United States (The Shreveport Case), 234 U.S. 342 (1914) (finding that intrastate railroad rates affect interstate rates)).

102. In introducing the Wagner Act in 1935, the Senator declared:

> I want to emphasize even more strongly the constitutional power and the intent of Congress to prevent these unfair labor practices even where they do not lead or threaten to lead to strikes. As economic conditions have changed, courts on the whole have shown an increasing willingness to recognize that unsound business practices are a direct burden upon the regularity and volume of commerce . . . .
>
> . . . When wages sink to low levels, the decline in purchasing power is felt upon the marts of trade. And since collective bargaining is the most powerful single force in maintaining and advancing wage rates, its repudiation is likely to intensify the redistribution of buying power, thus reducing standards of living, unbalancing the economic structure, and inducing depression with its devastating effect upon the flow of commerce.

79 CONG. REC. 7572 (May 15, 1935).

This constitutional innovation, however, extended beyond justifying a new regime of social and economic coordination by the state. It implied a new constitutional jurisprudence.[103] The view of the relation of state and civil society that makes the private sphere primary and independent inevitably derives public good from an aggregate of private interests. It defines liberty solely in terms of restraints on governmental intrusion, and defines regulation as negation of individual choices. Replacing the laissez-faire state derived from liberty of contract with a welfare state derived from positive entitlements of organization and solidarity, maintained the interrelationship of public and private spheres but reversed the primacy of the good to that of community or societal welfare. The public goods of economic progress and stability required planning, and that planning specifically required increased consumption supported by governmentally guaranteed adequate wages and improved living standards. But such macroeconomic planning could only be fully achieved by the microeconomic coordination that would result from social democracy being written into so-called private relations of production.[104]

A quite different constitutional jurisprudence overthrew the "Lochner era"[105] under the liberal-pluralist ideal of opposition of public interest and private interests. Concomitantly, each person schizophrenically shifted between personal economic and political power to serve her needs and define herself.[106] Nor is this choice merely of philosophic import. This jurisprudential difference separates the structure and style of the

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103. In an article ostensibly authored by Senator Wagner, Leon Keyserling argued the correctness of the NIRA coordinated state-private planning for recovery:

> It may seem paradoxical that the gospel for freedom of business enterprise nurtured a legal system which indulged solely in restraints and prohibitions. But this was inevitably the case. You could not define the terms of free competition. You could not regulate laissez-faire. You could not schematize planlessness. You could merely outlaw practices which were deemed to interfere with the inordinate play of enterprise.

Wagner, *Planning in Place of Restraint*, 22 SURV. GRAPHIC 395, 396 (1933).

104. See the News Release of Senator Wagner concerning the Supreme Court's upholding of the Wagner Act in NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937):

> The principles of my proposal were surprisingly simple. They were founded upon the accepted facts that we must have democracy in industry as well as in government; that democracy in industry means fair participation by those who work in the decisions vitally affecting their lives and livelihood; and that the workers in our great mass production industries can enjoy this participation only if allowed to organize and bargain collectively through representatives of their own choosing . . . .
>
> But when I made the effort to get these principles embodied in an Act of Congress, I was confronted by the most difficult fight in my whole public career. The powerful few who could benefit by keeping the worker disorganized and helpless rallied to the attack.

Keyserling Papers, *supra* note 4.

105. For a discussion of the rise of substantive due process after *Lochner v. New York*, see Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873 (1987).

106. For an argument that the public-private distinction proves incoherent, see Casebeer, *Toward a Critical Jurisprudence—A First Step by Way of the Public-Private Distinction in Constitutional Law*, 37 U. MIAMI L. REV. 379 (1983). This incoherence masks the degree to which the private as primary model still controls legal doctrine despite its supposed replacement. *See* Casebeer, *Teaching*

Wagner Act as a component of state planning from the more traditional and limited legal restraints approach of the Labor Department and its solicitor, Charles Wyzanski.

The preamble to Wyzanski's bill which supplanted the Labor Disputes Bill in the congressional committee in 1934, limited its constitutional justification and regulation to restraint of labor practices leading to strikes which hinder interstate commerce. It prevented some property owners, including owners of labor and capital, from interfering with maximum economic advantage of all. His definition of unfair labor practices restrained market interfering behavior of both labor and management as if they represented formally equal and atomistic utility maximizers.[107] While Wyzanski's bill died in 1934, and Wagner's labor relations doctrine eventually prevailed, Keyserling's constitutional vision did not resonate in the Wagner Act's constitutional test in 1937.[108] Furthermore, the jurisprudential road taken in post-1937 constitutional law read back into labor law assumptions contained in statutory interpreta-

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an Old Dog Old Tricks: Coppage v. Kansas *and At-Will Employment Revisited*, 6 CARDOZO L. REV. 765 (1985).

107. I. BERNSTEIN, *supra* note 8, at 72.

108. Chief Justice Hughes' opinion in *Jones & Laughlin Steel* upholds the Wagner Act's constitutionality under two rationales articulated in the Act's preamble. 301 U.S. at 22-23 n.2. The more traditional justification was that strikes in vertically integrated, basic industries potentially shut down the interstate economy:

> When industries organize themselves on a national scale, making their relation to interstate commerce the dominant factor in their activities, how can it be maintained that their industrial labor relations constitute a forbidden field into which Congress may not enter when it is necessary to protect interstate commerce from the paralyzing consequences of industrial war?

Id. at 41. Less traditional was the theory that labor relations are a part of an economic process of manufacturing, a part of a well understood course of business, and therefore, like stockyards, a part of the flow of interstate commerce which Congress could supervise in the public interest. *Id.* at 35.

Thus, in an instrumental sense, Keyserling succeeded. Not only did the Act survive against all predictions, but the Court's rationale recognized both strikes' burden on commerce and the legitimacy of countervailing power assurances in an increasingly integrated economy.

> [The Act recognizes] that a single employee was helpless in dealing with an employer; that he was dependent ordinarily on his daily wage for the maintenance of himself and his family; that if the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and resist arbitrary and unfair treatment; [and] that [the] union was essential to give laborers opportunity to deal on an equality with their employer.

Id. at 33.

But the key to the Hughes opinion was the steel company's voluntary choice to take advantage of interstate operations. An affirmative responsibility of the national political process for individual welfare in an interdependent economic grid depended upon seeing the imbalances of investment and consumption as partially constituted by government policy and government sanctioned divisions of labor and relations of production. Hughes declared:

> The act does not interfere with the normal exercise of the right of the employer to select its employees or to discharge them . . . . [T]he Board is not entitled to make its authority a pretext for interference with the right of discharge when that right is exercised for other reasons than such intimidation and coercion.

Id. at 45-46. In short, Hughes' approach is consistent with the public power defined by restraints of private prerogative.

tion removed much of the planning potential of the Wagner Act even before the substantial revisions in the Taft-Hartley Act.[109]

The politically ingenious structure of a new constitutional order, articulated as an economic recovery program, and implemented by a substantial reordering of labor policy and labor relations might have comprised a radical change in American political life.[110] But it did not,[111] as subsequent legal and historical accounts of the Act, built through the hindsight of Board and court interpretations, obscured the ideas behind the drafting process.[112]

IV
CONFLICT OVER POLICY: WAGNER, THE DEPARTMENT OF LABOR, AND WYZANSKI

The two most significant controversies about the drafting process concern the role of labor and the Department of Labor. Actually, the first creates interest because it did not become a controversy. In the early 1930s organized labor meant the AFL. It was clear from the early drafts of the Labor Disputes Act that the Board would have authority to set bargaining unit size by employer, craft, plant, or industry. Fledgling industrial unions were beginning in the steel and automobile industries and the craft-based AFL attempted to have this provision changed, correctly prophesizing that the statute would legitimate the future industrial union. Yet, when Senator Wagner insisted on flexibility, the AFL backed away and staunchly fought for both bills.[113] The drafters felt they had no viable alternative. Leaving the unit decision to the employer would invite gerrymandering and coercion, while leaving it to the employees might defeat the majority rule principle as well as create inefficiencies.

The controversy involving the Labor Department arose in part from

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109. *See* Klare, *supra* note 96. For the standard post Taft-Hartley vision, see, *e.g.*, Cox, *Some Aspects of the Labor Management Relations Act*, 61 HARV. L. REV. 1 (1947); Feller, *A General Theory of the Collective Bargaining Agreement*, 61 CALIF. L. REV. 663 (1973); Shulman, *Reason, Contract, and Law in Labor Relations*, 68 HARV. L. REV. 999 (1955).

For a critique of postwar labor law, see Stone, *The Post War Paradigm in American Labor Law*, 90 YALE L. J. 1509 (1981); Rogers, Divide and Conquer: The Legal Foundations of Postwar U.S. Labor Policy (1984) (unpublished doctoral dissertation, Princeton University).

110. *See* Finegold & Skocpol, *supra* note 16.

111. Klare, *supra* note 96; Klare, *Traditional Labor Law Scholarship and the Crisis of Collective Bargaining Law: A Reply to Professor Finkin*, 44 MD. L. REV. 731 (1985); C. TOMLINS, *supra* note 8.

112. Casebeer, *supra* note 3.

113. Possible reasons for the AFL's deference to Wagner might include: (1) Senator Wagner's long championing of union causes, (2) Wagner's chairmanship of the first National Labor Board with William Green and John L. Lewis, (3) Wagner's and Keyserling's rapport with AFL counsels Charlton Ogburn and Henry Warrum, (4) labor's recent turn away from its traditional anti-statism to supporting the promise of a social wage and other New Deal benefits, and (5) the overriding importance of an enforceable set of § 7(a) rights.

an independent rivalry between Leon Keyserling and Labor Department Solicitor Charles Wyzanski.[114] The Roosevelt administration notoriously abdicated a coherent labor policy.[115] Roosevelt's National Recovery Act ("NRA") and his own settlement in the automobile industry killed the 1934 act and only after the NLRA passed the Senate did it receive the President's full blessing.[116] The Department of Labor had not put forth an alternative strategy. Rather Secretary Perkins fought for control over specific changes or approaches to the ideas initiated by Wagner's office.

Most importantly, the Department wanted the NLRB to be located within the Labor Department.[117] Those in charge of policy within the

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114. *See* P. IRONS, *supra* note 8, at 325.

115. Because Senator Wagner sponsored much of the New Deal legislation, such as the Social Security Act and the NIRA, his policy beliefs are often amalgamated with the New Deal. Yet particularly in his planning approach to recovery through labor relations, housing, and public works, Wagner championed causes shunned by Roosevelt. Ellis Hawley and those who rely on his work downplay this factor. *Cf.* E. HAWLEY, THE NEW DEAL AND THE PROBLEM OF MONOPOLY (1966); Klare, *supra* note 96, at 283-84 n.58. Klare finds aspects of corporate liberalism (coordinated responses to overproduction), central planning (balancing consumption and investment by redistribution) and antitrust enforcement in the Wagner Act's preamble. He notes that President Roosevelt never chose between these alternatives, but sampled from all of them. *Id.* To the extent Senator Wagner accepted the first and third strategies, however, he subordinated them to attacking underconsumption under governmental supervision.

116. Casebeer, *supra* note 3, at 325; *cf.* P. IRONS, *supra* note 8, at 231 (Roosevelt still undecided on NLRA even after Senate passage).

117. In addition to the annotations to the second 1935 draft, *see infra* pp. 328-30, in an undated memorandum in 1935, Keyserling analyzed suggested changes received by Wagner's office from Labor Secretary Frances Perkins. The chief dispute centered on the Board's location: in § 3(a), Perkins struck the words "as an independent agency in the executive branch of the Government" and substituted "in the Department of Labor." Keyserling commented:

> It is best to consider also at this point the amendments offered to Section 4(a), providing that employees shall be appointed by the Board "with the approval of the Secretary of Labor"; that "nothing in this Act shall be construed to authorize the Board to appoint persons to engage in mediation, conciliation, or statistical work, when the services of such persons may be obtained from other bureaus or divisions in the Department of Labor". To be considered here also is the amendment striking from this subsection the specific reference to the appointment by the Board of "regional directors".
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> It is extremely important to note at the outset that even if the Secretary should yield on the express amendment requiring her approval for the appointment of personnel, this would work no change in substance, so long as the Board is "in the Department of Labor", the Secretary will have complete control of the budgetary allowance, and in this way will be in a position to dictate not only the salary of specific employees and officers, but also, and far more important, the purposes for which such employees or officers are to be engaged. With this power, she could deny substantial funds paid regional directors, an adequate staff of field examiners, and an adequate staff of attorneys to assist the Board in the work at Washington. In this way, by control over the purse-strings, the Secretary has full power to establish the Board solely as an adjudicating body, or in any other way she sees fit.
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> The result is not greatly changed by providing that the Board shall be "in connection with the Department of Labor". This is a make-shift device in the Executive Order, without precedent in federal law. It has some meaning so long as the Board obtains its funds through emergency appropriations like that of the NRA, and so long as there is an administrative arrangement such as that between Mr. Garrison and the Secretary. But if the Board is to be a permanent agency, its appropriation will necessarily move through the Departmental budget, and the results above mentioned will ensue. Moreover, an adminis-

Department also favored a mediation or conciliation approach to labor disputes. This fit more closely their past experience than did Wagner's

trative "agreement" is subject to repudiation by the Secretary, and to executive action, as witness the recent difficulty with regard to Executive Order No. 8906. This point is stressed here because the Secretary has undoubtedly asked for far more than she expected to get, probably hoping that in the end, without express provision in the bill, she will have in substance all the powers she presently asks for. There is no question therefore, of a "compromise", for anything less than a complete divorcement from the Department or establishment as an independent agency will amount in reality to a complete defeat of our fundamental policies, as to prestige and independence of personnel and budget, regional agencies, and mediation.

Summarized briefly, the argument against the Secretary's position is as follows: (1) The Board must be independent and impartial. The Department's function, in fact and in the public view, is to look after the interest of labor. The Board could not under these circumstances have the confidence of industry or the public at large. This is the view taken by the *20th Century Report*, signed by distinguished students, government officials, and employers.

(2) The Board should be independent of the policies of any particular administration and free of control by the Executive Departments. This has been the undeviating policy of Congress when boards of this type have been established with clearly defined powers and responsibilities. For example, the Interstate Commerce Commission, the Federal Trade Commission, the Communications Commission, the Securities Exchange Commission, the National Mediation Board, and agencies more nearly administrative in nature, much as the Federal Housing Administration, and the Reconstruction Finance Corporation.

(3) The multiplication of functions of cabinet officers has proceeded to a point where the practical supervision of further agencies would necessarily be exercised by subordinates.

(4) The Board should not be in a department whose function in regard to labor relations is to mediate and conciliate, for otherwise, there would be an inevitable tendency to confuse mediation and conciliation in respect to wages, and hours, the present function of the Conciliation Service, with enforcement of the present law, the function of the new Board. It is admitted on all sides that you cannot mediate an unfair labor practice. But if both agencies are in the Department, then it will inevitably come about that mediation will be attempted first through the conciliation service. This is in fact the view expressed by the Secretary and even Mr. Davis in their testimony, and is expressly as stated in the committee report last year, as well as in the language of the Bill itself (requiring all complaints to clear through the Secretary of Labor). If conciliation is attempted first, no case would come to the Board except upon a prior record of failure, in an attempt to compromise rather than vindicate the law. Moreover, there would be duplication of effort and long delays before a complaint of unfair labor practice finally reached the Board.

(5) The Board must have control of a complaint of unfair labor practice from the very beginning (see testimony of Leiserson). This requires field agencies, permanently established, so that injured parties will know precisely where to turn, and will not be required to search after a traveling examiner who flits from place to place. Investigations carried on at the scene of the dispute by conciliators or others in other departments or branches are futile for the purposes of the Bill, since the report of such investigators cannot be substituted for the testimony given before the regional agencies of the Board by both parties, and are not the records contemplated by the Bill to be made the basis of cease and desist orders. That this is probably the intent of the Secretary's amendment as to regional directors is indicated by the remarks in the committee report last year that "It is not intended to have the Board create numerous paid tribunals throughout the country subordinate to it . . . . Indeed, Section 5(d) . . . emphasizes the importance of utilizing existing agencies of the Government".

(6) Over-lapping of function as to statistical work is of such minor significance that it should not be determinative. As for overlapping in regard to mediation and conciliation, the Board will consent to an amendment similar to that proposed by the Secretary and now incorporated in Section 1(b) of the Executive Order. This amendment might be improved upon by saying flatly that the Board shall not be authorized to appoint persons to engage in mediation or conciliation under any circumstances.

Keyserling Papers, *supra* note 4.

mixture of mediation and a quasi-judicial labor court, based on his experience and frustration while Chairman of the National Labor Board.

These general differences with the Labor Department paralleled Wyzanski's two fundamental objections to Keyserling's drafts. First, Wyzanski favored an emphasis on labor strikes in language and policy so as to fit within the Supreme Court's commerce clause precedent under the antitrust laws. Second, he favored including unfair labor practices against unions to soften business opposition and seemingly to permit reformed company unions.

Wyzanski presented several objections in a February 26, 1934 memorandum to Secretary Perkins,[118] the day before the Labor Disputes Act was introduced. First, he objected to the economic recovery premises of the preamble and the broad guarantee of organization that eventually became Section 7 of the NLRA. Second, he objected to the criminalization of unfair labor practices, a provision which was dropped before the bill was introduced. Third, he raised a concern about the wisdom of the majority rule provision for sole representation in bargaining which had been patterned on NLB practice.[119] Fourth, he strongly questioned the Board's ability both to adjudicate unfair practices and to engage in mediation. Finally, he argued that the parameter of the Board's power to intervene in unfair practices should be limited to those tending to lead to disputes burdening interstate commerce.

In a second, similar memorandum dated March 1, 1934, Wyzanski objected to the closed shop proviso because it failed to adequately protect minorities against inequitable membership requirements.[120] Wyzanski also supported the idea of a tripartite Board consisting of labor, management, and neutrals. An anonymous memorandum in his files, dated March, 6, 1934, analyzes each section of the bill, again objecting to the closed shop proviso and interestingly noting that it allows a vertical (majority of employees of an employer) rather than a horizontal (majority of craft) closed shop election.

The Labor Department suggested numerous changes directly to Senator Wagner before gaining total control over the bill when Senator Walsh asked Wyzanski for a replacement draft in April. In an undated

118. Wyzanski, Documents Regarding the Origins of the National Labor Relations Act of 1933 [sic] and the Origins of the Policy of Admitting Refugees or other Immigrants upon the Basis of Affidavits Guaranteeing that they will not Become Public Charges (June 20, 1984) (available at the Library of Congress and the Project in Labor Theory, University of Miami Law Library).

119. The National Recovery Administration had opposed majority rule. The Department of Labor generally criticized the Wagner bill's provisions allowing the NLRB discretion to determine representatives following a supervised election without explicitly requiring majority rule. *See* I. BERNSTEIN, *supra* note 8, at 66.

120. *See* Wyzanski, *supra* note 118. This objection is curious, given that all drafts included such a provision but that the bill upon introduction inexplicably does not. It would seem that reincluding this provision would not have met serious opposition.

memorandum,[121] the Labor Department suggested three changes rejected by Keyserling. First, the Department wanted to change the introduction to promote collective bargaining and maintenance of sound relations between employers and employees. Keyserling thought the change would create a wedge for the Act to be transformed into compulsory arbitration. Second, the Department proposed that the closed shop provision allow company unions as long as they were not set up through unfair labor practices. Third, the Department wanted to incorporate Federal Trade Commission procedures by reference rather than in parallel detailed description. Interestingly, Wagner had by this time agreed to raise no objection to the suggestion of locating the National Labor Board in the Labor Department.

The Wyzanski draft, reported out of committee by Senator Walsh,[122] began with a short Declaration of Policy eliminating the concentration of economic power observation and limited to removing obstructions to interstate commerce caused by labor disputes. It defined coverage to exclude any employer with less than ten employees, included labor unions acting as employers, and excluded strikers unless on strike due to an unfair practice. Furthermore, the Wyzanski draft outlawed four limited unfair labor practices: (1) interference with a general guarantee of organizing similar to Section 7(a), (2) interference by employers with employee rights to organize for collective bargaining, (3) employer dominance of a union, whether a company or an independent union, and (4) interference with the membership decision except for the closed shop.

Finally, the Wyzanski draft created a National Labor Board similar to that of the Wagner draft. Board powers were restricted, and only initiated by the Secretary of Labor following failed conciliation. There was no duty to bargain, and employers did not need to sign a closed shop agreement. Either majority rule or proportional representation could be certified. Significantly, the right to strike was not explicitly guaranteed, the drafter preferring instead a parallel to the thirteenth amendment.[123] Of course, the thirteenth amendment had never been construed to make constitutional the right to strike, and thus the statutory language seemed to be a retreat. Also of importance, Wyzanski's closed shop provision curiously omitted a restriction on inequitable membership requirements. Wyzanski had earlier vehemently criticized the Wagner drafts for lacking such a restriction.

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121. Keyserling Papers, *supra* note 4.

122. For the substitute National Industrial Adjustment Act, see 1 NATIONAL LABOR RELATIONS BOARD, *supra* note 4, at 1070.

123. Section 14 of the substitute National Industrial Adjustment Act stated: "Nothing in this Act shall be construed to require any employee to render labor or service without his consent, or to authorize the issuance of any order or injunction requiring such service, or to make illegal the failure of employees collectively, to render labor or service." *Id.* at 1097.

The Senate Report Wyzanski wrote to accompany the bill[124] emphasized the narrow constitutional justification and the evenhandedness of promoting both employee and employer organization for collective bargaining. Wyzanski was apparently unconcerned about inequality of bargaining power as a barrier to economic recovery.

In 1935 Wagner's office shut out entirely the Labor Department from the drafting process. This time, the Labor Department pressed Congressman Connery to move the NLRB into the Labor Department. That proposal was then defeated on the House floor.

More than substance separated Keyserling and Wyzanski. For years, Wyzanski claimed considerable drafting responsibility. Indeed in his papers he claims to have produced Draft 2(b).[125] On balance, it is impossible to tell with whom the original language about specific administrative provisions originated.[126] Given the Department's positions and Wyzanski's writing and actions following the bill's introduction, it seems extremely likely that whatever contributions he made were as a result of requests from the Senator's office rather than as Labor Department initiatives. Finally, if Draft 2(b) was indeed written by Wyzanski, the completely different legal philosophy in his draft for Walsh suggests that the ideas of Draft 2(b) originated in a group process which was not under his control.

While at the time Senator Wagner and his aide were crushed by their defeat in 1934, their stunningly thorough triumph a year later produced a statute significantly stronger in many respects. The statute revamped procedure and administrative functions with clearer, stronger statements of unfair labor practices and undivided independent enforcement powers. Moreover, there was a separation of adjudication and mediation, elimination of arbitration, and a Board composed entirely of

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124. *Id.* at 1099.

125. I. BERNSTEIN, *supra* note 8, at 88.

126. Factors favoring Wyzanski's claim include: (1) the draft is done on a different typewriter; (2) it is the only draft to include a date; (3) the date is bracketed in the style of other papers from his office; (4) the date, February 19, is a while after Keyserling's first draft dated January 31, and would leave little time to complete Drafts 3 through 8 prior to February 27; (5) the draft includes no preamble and no unfair labor practices provision and contains only an administrative apparatus; and (6) in 1935 Keyserling relied heavily on Phillip Levy for procedural suggestions but completely excluded Wyzanski.

Factors favoring Keyserling's claim include: (1) the separate file Keyserling maintained on the Labor Department's suggestions, which contains extensive replies or analysis of the changes by Keyserling, does not have any comments on this draft; (2) there are differences between this draft and the bill Senator Walsh asked Wyzanski to draft which would replace Keyserling's draft; (3) Wyzanski strongly criticized Keyserling's final 1934 draft which included much of Draft 2(b); (4) Wyzanski had filed this draft among other drafts clearly from Keyserling's office; (5) Draft 2(b) describes an independent agency, yet Wyzanski had prepared numerous memoranda reciting the consistent demand of the Labor Department that the National Labor Relations Board be in the Labor Department; and (6) Wagner kept control over his own legislation and he explicitly designated the key role in drafting the bill to Keyserling.

neutrals. Strong explicit guarantees of the right to organize, bargain, and strike, and the prohibition of company unions gained legal status. In these features, the experience of the National Labor Board and the old National Labor Relations Board provided an almost common law basis for the enactment of general enabling language, and underlined the new Board's independence.

V
CONTEMPORARY IMPLICATIONS

Subsequent legislation, principally the Taft-Hartley amendments[127] and the Landrum-Griffin Act,[128] preempt much of the direct application of the Wagner Act drafts for present statutory construction. Particularly, the addition of unfair union labor practices,[129] an idea expressly rejected by Wagner and Keyserling, have recast the interpretation of Section 7 labor rights. Section 301 and the addition of federal court jurisdiction to enforce the collective agreement[130] have shifted the act's center of gravity to course of agreement issues. In that sense, the drafts' contents often indicate roads not taken.[131] Furthermore, the draftsmen's primary concerns aimed at legal recognition and enforcement of collectively organized bargaining on the one hand, and at redefining and redistributing economic power within a macroeconomic plan on the other. The dominant emphasis of postwar labor law on the private constitution of the collective bargain and the rule of arbitration, if it occurred to the drafters at all, was to be left to the economic power of labor and management.[132]

Two examples illustrate these postwar shifts in emphasis. First, the enforcement failures of the NIRA and old NLRB required independent agency supervision of organization campaigns. The courts were hostile and the Justice Department skeptical of the lack of priority and waste of resources in NIRA enforcement actions deemed lost causes.[133] Labor

127. Labor-Management Relations (Taft-Hartley) Act, ch. 120, 61 Stat. 136 (1947) (codified as amended at 29 U.S.C. §§ 141-187 (1982)).

128. Labor-Management Reporting and Disclosure (Landrum-Griffin) Act, 73 Stat. 519 (1959) (codified as amended at 29 U.S.C. §§ 401-531 (1982)).

129. *See, e.g.*, National Labor Relations Act § 8 (b)(4), 29 U.S.C. § 158(b)(4) (1982).

130. *See* United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).

131. The drafters' distrust of federal court involvement led them to excise a proposed provision for direct resort to district courts to enforce unfair labor practices. *See supra* note 95 and accompanying text. While that principle survives, it also remains unlikely the drafters would have approved the whipsaw effects of § 301 contract enforcement. That they did not need to remove what was never included is simply consistent with their lack of concern over course of contract issues.

132. *Compare* Feller, *supra* note 109, *with* Keyserling in Casebeer, *supra* note 3, at 331.

133. P. IRONS, *supra* note 8, at 220-25. In a 1935 memorandum, Keyserling comments:

> I need not labor the point that if prosecution is to go through the Department, the purpose of the bill would be entirely nullified. Sentiment on this point is probably much stronger

Board supervision of elections and unit determination seemed a faster, more efficient mechanism. Contemporary administrative procedure, bureaucracy and delay involved in judicial review and enforcement depart in fact, if not in intent, from speedy government enforcement of organization. The drafts then parallel the policy behind contemporary efforts to streamline the organization process.[134]

Second, the drafters' experiment with, and eventual rejection of the notion of, nonexclusive representation bargaining with a given employer[135] may cut several ways regarding contemporary issues of minority interests and individual grievance proceedings. Present practice treats the individual interest as subordinate to union or group solidarity[136] whether dealing with divided employee interests,[137] with individual claims under the duty of fair representation,[138] or of union-individual unfairness under Landrum-Griffin.[139] On the one hand, does the Act's commitment to exclusive representation suggest present practice has properly reflected the framer's intent? Or on the other hand, does the possible consideration of multiple units bargaining with a single employer suggest that the removal of such a possibility occurred for reasons remotely related to individual interest representation?

In fact, the exclusive representation provision probably reflected policy judgments only indirectly related to fair representation. First, as a political judgment about passing the Wagner Act, pressure was brought to bear by people such as General Hugh Johnson and Donald Richburg[140] to permit employees to choose some forms of company unions—not unions openly dominated by the employer, but limited to a specific employer or plant. Multiple unit recognition would permit some employees to choose a bargaining representative relating to a specific location, while others could choose a craft or industry or multi-employer organization. Of course, this would increase difficulties of enforcement of unfair labor practices concerning company domination of employee

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this year than it was last year, in view of the deplorable record of the Department in 7(a) cases.

Keyserling Papers, *supra* note 4; *see also supra* note 117.

134. *See* Weiler, *Promises to Keep: Securing Workers' Rights to Self Organization Under the N.L.R.A.* 96 HARV. L. REV. 1769 (1983).

135. *See infra* Drafts 4 and 5, pp. 113 (§ 12(c)) & 115 (§ 12(c) deleted).

136. *See* Emporium Capwell Co. v. Western Addition Comm. Org., 420 U.S. 50 (1975).

137. Labor-Management Relations Act § 9, 29 U.S.C. § 159(a) (1982). *See generally* Schatzki, *Majority Rule, Exclusive Representation, and the Interests of Individual Workers: Should Exclusivity Be Abolished?*, 123 U. PA. L. REV. 897 (1975).

138. *See generally* Finkin, *The Limits of Majority Rule in Collective Bargaining*, 64 MINN. L. REV. 183 (1980); Goldberg, *The Duty of Fair Representation: What the Courts Do in Fact*, 34 BUFFALO L. REV. 89 (1985).

139. 29 U.S.C. §§ 411-412 (1982). *See generally* Summers, *The Law of Union Discipline: What the Courts Do in Fact*, 70 YALE L.J. 175 (1960).

140. Johnson and Richburg were the Administrator and General Counsel of the NRA.

bargaining by permitting many current employee representation plans to remain in existence with minor cosmetic leadership changes, and perhaps to suggestively coerce membership choices in that direction rather than toward an independent union. In Keyserling's view this would have led to jurisdictional strife.

Second, while the drafters were concerned about minority racial and ethnic groups,[141] ultimately, a compromise on this basis would substantially weaken the potential economic power of unions and, therefore, diminish the economic recovery rationale behind the Act. Thus, even governmentally supervised unit certification to assure as fair as possible union independence from the employer would not serve to maximize countervailing bargaining strength. This is a much different emphasis on the need for solidarity than present fears that individual grievance or interest representation might divide the union, regardless of size, over bargaining strategy or contract implementation.[142]

Collaterally, this drafting concern also partly explains the lack of more fair representation emphasis in the Wagner Act. After all the Act did guarantee a right to directly present grievances to management willing to discuss the issues. Senator Wagner and Keyserling believed that unfair labor practices must be directed solely against employers despite the political capital given to the Act's opponents in this apparent one-sidedness. To include union duties to employees, while theoretically fair, would create legal weapons for employers to hamstring and delay recognition and bargaining, and to encourage company rather than independent unions. Subsequently, of course, even this avenue for individual employees has been treated more as a right of management to hear grievances if it wishes, and which it can waive or bargain away over to the exclusive representative of the bargaining unit.[143]

This subsequent development represents one of the clearest ironic deviations from the drafters' intent. When the Department of Labor suggested the addition to Section 9(a) of an individual right to present grievances to their employer, Keyserling enthused:

> I am not advised of the purpose of this amendment but its effect is to limit the operation of the proviso to the majority rule. Thus a closed shop agreement under Section 8(3) may deprive individuals or minority groups of the right to present grievances through their own representatives. In view of the fact that the typical activity of company unions is the presentation of grievances, I think the amendment is excellent, and

141. *See* Casebeer, *supra* note 3, at 356.

142. *See generally* R. FREEMAN & J. MEDOFF, WHAT DO UNIONS DO? (1984); Freed, Polsby & Spitzer, *Unions, Fairness, and the Conundrums of Collective Choice*, 56 S. CAL. L. REV. 461 (1983).

143. *See* Black-Clawson Co. v. International Ass'n of Machinists Lodge 355, 313 F.2d 179 (2d Cir. 1962).

should be approved.[144]

Finally the drafters' idea of the importance of the right to strike focused heavily on organization. The problems of strikes during the depression was to them the two edged sword of lost production and battles over the recognition of bargaining units capable of redistributing wages to increase consumption. The need was to establish economic power for labor and thereafter allow the economic weapon of the strike to police course of bargaining relationship issues.[145] Taft-Hartley revisions[146] removed important economic weapons, such as secondary boycotts. Together with changes in the enforcement of contracts, this virtually forced private dispute resolution on the parties. Importantly, this removed the ability of unions to air their aims and strategies in public forums and economic arenas. Nor did the contractual model merely limit labor's economic weapons. It also reduced the power of Board intervention by limiting enforceable employee interests to contractualized notions of wage protection.[147]

Thus, the difference between a labor law regime aimed at structuring the power relationships of labor and management under the Wagner Act versus the postwar labor law regime of private governance—arbitration and the no-strike quid pro quo—renders the attempt to read the drafts of the Wagner Acts into contemporary constructs of legislative intent questionable. The drafts may rather suggest critiques of statutory and judicial directions since taken and reminders that an alternative labor law is conceivable, practicable, and in some sense betrayed.

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144. Keyserling Papers, *supra* note 4.

145. Casebeer, *supra* note 3, at 353-55. Contrast with the courts' view in NLRB v. McKay Radio & Telegraph Co., 304 U.S. 373 (1938), and its progeny.

146. *See e.g.*, 29 U.S.C. § 158(b)(4) (1982).

147. For the drafters' contrary vision, see Keyserling's rejection of the Department of Labor's suggestion to strike lines 3 to 7 of § 10(d), and to substitute the following: ". . . and cause to be served on such person an appropriate order. Such order may require such person to cease and desist from such unfair labor practice, to restore a worker to his employment, to pay to him such compensation as he would have received if he had not been wrongfully discharged, and to make reports from time to [time] . . . ."

> This amendment greatly narrows the scope of the Board's power to make corrective orders, and should be strongly disapproved. Under the familiar rule of construction, the stipulation of specific powers or items will be taken to limit the scope of a general grant of power to those specifically enumerated. The Board will thus be limited, in its orders for affirmative action, to the reinstatement of employees with back-pay and the making of compliance reports. Obviously we mean by "restitution" and "affirmative action" a host of other types of corrective orders which will be adapted to the needs of the individual case. Reference is had here to the discussion of this point in the "Comments" previously submitted to the committee. The proposed amendment is far more restrictive than the comparable language in the committee draft last year, which read: "or to take such affirmative action or to perform any other acts that will achieve substantial justice under the circumstances".

Keyserling Papers, *supra* note 4.

VI
SOCIAL CONFLICT IN THE NLRA

One final observation remains. The Act's complexity extended well beyond its governmental administrative backdrop, as well as beyond the specific actors' political differences and in-fighting, and beyond the political strength of labor and capital as opposing social forces in pitched battle over the charter of modern labor relations.[148] Beyond the usual reasons of interest group compromise, the general nature of the Act's language encoded social change and social conflict at several levels subsequently affecting the Act's history. First, bargaining unit determination permitted the union movement to develop opposing craft and industry organizing strategies.

Second, the duty to bargain language of wages, hours and conditions of employment seemed to channel industrial conflict to wage decisions rather than control over the nature and processes of work. On the one hand, the drafters left this language general because they did not intend to legally impose substantive terms of bargaining. But on the other hand, they insured that these future social issues would not only appear but would be decided by force of economic power.[149]

Third, they conceived of labor policy as more than an issue of public good set against work stoppages and their consequences. Labor should be concerned about wage rates and benefits as part of national economic health, encouraging labor's new found interest in channeling state power to address broader social issues and the post-New Deal Democratic coalition.[150] At the same time, the general economic policy was not stated

148. *See* Wagner, *supra* note 103; I. BERNSTEIN, *supra* note 8, at 75 & 100-06. Bernstein summarizes the arguments of proponents and opponents of the Labor Disputes Act, *id.* at 68-71, and of the National Labor Relations Act, *id.* at 100-11.

For a strong but not hysterical argument opposing the National Labor Relations Act, see 1 National Association of Manufacturers, Labor Relations Bulletin, at 3-4 (March 1935). For a less balanced approach, consider the May 26, 1934 circular of the Illinois Manufacturers Association: "Wagner Labor Union Dictatorship Bill . . . The Handling of Industrial Disputes by Labor Boards Promotes Confusion, Unrest, and Industrial Strife . . . In most instances the employers have been the victims of star-chamber methods . . . ." Keyserling Papers, *supra* note 4.

Employees often sent copies of posted management anti-Wagner Act propaganda with notes such as the following written in the margins:

> This circular was sent out in a store mail. We of the laboring class want this bill passed. The right of collective bargaining belongs to us, but under present set ups it is impossible for us to be without fear of losing our position. Give the two-thirds buyers of all national production a break by passing the Wagner Bill.

Id.; *see also* Casebeer, *We of the Laboring Class Want this Bill Passed: Worker's Messages on the Fight for the Wagner Act in the Files of Leon Keyserling*, 1 LAB. HERITAGE issue no. 3 (forthcoming July 1989).

149. Tomlins argues that the planning function of the Act would primarily be implemented by the Board imposition of industry-wide bargaining through unit certification. C. TOMLINS, *supra* note 8, at 127.

150. Wagner received many messages like this one indicating rank and file labor support for the Act: "The whole country is looking to the President and you to help us in this crises [of company

so specifically as to extend beyond wage bargaining and workplace organization.

Yet, fourth, and skewed from Keyserling's and Wagner's vision to some extent, the labor statutes became the prototype example of the new constitutional political order of the postdepression era. This order assumes everyone's liberty became someone else's nuisance, and that everyone interdependently produces the resources and problems upon which each person's liberty and welfare depends. At the same time, this insight does not preempt a bargained private control over society's resources. In short, the statute has imbricated conflicts simultaneously affecting an array of social and political issues and groups, including: the bureaucratic—Labor Department versus independent agency; the legal—adjudication versus mediation; the organizational—craft versus industrial union; the state—privatized versus political planning and the social wage, and public versus management control over resource investment; the political-economic—aggregate labor versus capital; and the constitutional—laissez faire versus welfare state versus socialized economic structure.

CONCLUSION

That all of these social struggles could be mirrored in a discrete political event of a year and a half speaks of the extraordinary time. That all of these issues should be connected at some level in the mind of one actor in position to shape the political outcome must rank as one of the most remarkable achievements of our legal history. No one ever writes alone, without history or personal context, but the drafts of Wagner's Act document Leon Keyserling's singular brilliance and an unmatched fortuity and import of his political partnership with Robert Wagner. More deserves to be known of the ideas and actions of these men whose motto proclaimed: "Men versed in the tenets of freedom will become restive when not allowed to be free."[151]

unionism], for I am convinced that we have reached the turning point in the whole recovery program. Its success or failure depends upon the results of the action taken on this bill." Letter to Senator Wagner from the Secretary of Local 234, International Association of Oil Field, Gas Well and Refinery Workers of America, Chester, Pennsylvania (March 9, 1934) (located in Keyserling Papers, *supra* note 4).

151. 79 CONG. REC. 7565, 7570 (1935) (statement by Senator Wagner introducing NLRA on the Senate floor).

APPENDIX—DRAFTS

Draft 1 Labor Disputes Act
January 31, 1934

SECTION ——

(a) No employer shall participate in, supervise, or influence, directly or indirectly, the formation or operation of any organization of any kind when such organization exists for the purpose, among others, of representing employees in their efforts to bargain collectively with regard to wages, hours, or other conditions of employment.

(b) In order to make the provisions of the above paragraph effective, it shall be illegal for any employer:

(1) To establish or maintain any measure of participation in, supervision of, or influence over the constitution, by-laws, other governing rules, collection of dues, fees and assessments, and/or elections of any such organization; (2) to contribute financial support, directly or indirectly, to any such organization, or to pay, directly or indirectly, the salaries, wages, or expenses of officers, agents, representatives, and/or members of committees of any such organization when engaged exclusively in the business of such organization; (3) to extend or to withhold special privileges, such as group insurance, donations to relief funds, and the like, depending upon whether an employee or employees belong or do not belong to any such organization; (4) either by written or oral statements, or by discriminatory practices as to wage and hour differentials, advancement, demotion, job tenure, or any other condition of employment, to encourage employees to join, or to attempt to dissuade them from joining, any such organization; (5) to solicit and/or maintain lists of names of employees who are members of any such organization, when such lists would tend to, or are for the purpose of, administering discipline or otherwise coercing or influencing employees with respect to membership or non-membership in any such organization.

Draft 2(a)

Be it enacted by the Senate and House of Representatives of the United States of America in Congress Assembled.

Declaration of Policy

Section 5. Whereas under prevailing economic conditions, employers of labor are aided by governmental authority to organize into trade groups for the purpose of cooperative action, and

Whereas the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and

Whereas these conditions have tended to create a great disparity in the bargaining power of employers and employees in the processes of bargaining for terms and conditions of employment,

It is hereby declared to be the policy of Congress to equalize the bargaining

power of employers and employees, to encourage the making of collective bargaining agreements, and to discourage the use of strikes, lockouts and similar weapons of industrial strife, as means of composing industrial disputes.

Definitions

Section II. When used in this act and for the purposes of this Act:

First, the term "employer" includes any person (whether acting as an individual, or jointly with other individuals or corporations), firm or corporation who hires any individual or individuals to regularly perform services in the conduct of the employer's business; or persons, firms or corporations who are owned in whole or in part by, or who own, wholly or in part, or who are controlled, directly or indirectly, by, or who control, directly or indirectly, any such person, firm or corporation, or any association of such persons, firms or corporations.

Second, The term "employee" as used herein includes every person in the service of a person, firm, or corporation (subject to the continuing authority of such person, firm or employer to supervise and direct the manner of rendition of his service) who regularly performs any work for such employer.

Third, The term "representative" includes a person or persons, labor union, organization, corporation or unincorporated association.

Fourth, The term "company union" means any group or association of employees, whether or not the same shall be formally organized, which was so formed at the suggestion, aid or under the influence of any employer, or its officers or agents and/or whose constitution or by-laws are under any control or influence of any employer or its officers or agents and/or whose actions are participated in, supervised, controlled by or influenced by any employer, or its officers or agents.

Fifth, The term "working conditions"

Sixth, The term "National Labor Board" means the National Labor Board created by this Act.

General Policies

Section III.

First: Employees shall have the right to organize and to join labor organizations, and to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of choosing and designating representatives, for the purpose of collective bargaining, and for other mutual aid or protection.

Second: No employer, its officers or agents shall interfere with, influence, restrain or coerce its employees, or in any other way attempt to abrogate the right of its employees to organize, to choose representatives for the purpose of collective bargaining, to engage in collective or in other concerted activities for their mutual aid or protection, whether such interference, influence, restraint or coercion is exercised (a) by requiring employees or anyone seeking employment to join a company union, or refrain from joining, organizing, or assisting a labor organization; it being understood, however, that an employer may require any

one seeking employment, as a condition of employment, to join a labor organization to which 75% of his employees belong, provided that such labor organization places no inequitable restrictions upon those seeking to join it, or (b) by the employer's establishing, maintaining, participating in, initiating, supervising, or influencing, in any manner or degree whatsoever, any organization or association composed in whole or in part of its employees, or over the constitution, bylaws, other governing rules, or elections of such organization, or (c) by paying or contributing to any such organization any sums of money or financial support, whether in the form of compensation for time spent by employees at meetings or other activities of such organization, or in the form of use of the company property or services, or in any other form whatsoever; or (d) by making the extension or withholding of special privileges to any employee or group of employees dependent upon whether such employee or group of employees belong or do not belong to any organization of any kind whatsoever; or (e) by the use of differentials of wages or hours, or advancement or demotion, tenure of employment, or any other condition of employment in such a manner as to differentiate in any way between employees who belong to any particular organization and those who do not belong, or between employees who belong to any organization and those who do not belong to any organization; or (f) by any other means whatsoever.

Third: It shall be the duty of all employers, their officers, agents and employees through their duly chosen representatives to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the applications of such agreements or otherwise, in order to avoid industrial strife, and further, to seek the services of the governmental bodies established under this title for aid in making agreements concerning rates of pay, rules and working conditions, and for aid in settling disputes, when all other reasonable efforts have failed.

Fourth: (a) If any dispute shall arise between an employer and its employees, or between two groups of employees employed by the same employer, as to who are the duly chosen representatives of such employees, it shall be the duty of the National Labor Board, upon the request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute. In such an investigation, the National Labor Board shall be authorized to take a secret ballot of the employees, or to utilize any other appropriate method of ascertaining the names of their duly chosen representatives in such a manner as shall insure the choice of representatives by the employees without interference, influence, restraint or coercion exercised by the employer.

(b) Representatives chosen by the majority of the employees eligible to participate in the choice of representatives, shall, for the purposes of this Act, be the sole representatives of all of the employees who were eligible to participate in such choice. In case of any dispute arising as to whether such eligibility shall be determined on the basis of employer unit, craft unit or plant unit, the National

Labor Board, upon the request of any of the parties to the dispute, shall decide such disputed question.

*Draft 2(b)**
February 19, 1934

Labor Disputes Act
Title III

Section 301. A Board is created and established, to be known as the National Labor Board (hereinafter referred to as the "Board," which shall be composed of five members who shall be appointed by the President, by and with the advice and consent of the Senate. Two members of the Board shall constitute a quorum. The first members appointed shall continue in office for the terms of 1, 2, 3, 4, & 5 years respectively from July 1, 1934, the term of each to be designated by the President, but their successors shall be appointed for terms of five years, except that any person chosen to fill a vacancy shall be appointed only for the unexpired term of the member whom he shall succeed. The President shall designate the Chairman of the Board. No member of the Board shall engage in any other business, vocation or employment. A vacancy in the Board shall not impair the right of the remaining members to exercise all the powers of the Board. The Board shall have an official seal which shall be judicially noticed.

Section 302. (a) Each member shall receive a salary of $10,000 a year, payable in the same manner as salaries of the judges of the courts of the United States. The Board shall appoint an executive secretary, who shall receive a salary, payable in like manner, and it shall have authority to employ and fix the compensation of such attorneys, special experts, examiners, conciliators, clerks and other employees as it may from time to time find necessary for the proper performance of its duties and as may be from time to time appropriated for by Congress. In employing such persons, the Board may act without regard to the provisions of the civil service laws and without regard to the Classification Act of 1923 as amended.

(b) The President shall also appoint as associate members, for terms of one year each, six persons as a panel to represent employers and six persons as a panel to represent employees. The Board may, in its discretion, from time to time, invite associate members drawn in equal numbers from each of these panels to participate in its deliberations, or its findings or its orders; but such associate members shall not be considered in computing a quorum. Associate members shall receive $25 per diem and necessary traveling and subsistence expenses when attending meetings of the Board.

(c) All of the expenses of the Board, including all necessary expenses for

* There are two drafts labeled second. This dated draft is substantially identical to sections labeled first draft accompanying Draft 2(a) which are labeled second draft.

Draft 2(b) has been claimed by Charles Wyzanski to be his work. In a June 20, 1984 letter of transmission to the Librarian of Congress, the Chairman of the National Labor Relations Board, and librarians at F.D.R., Columbia, Harvard Law School, Stanford Law School, Yale, and the Massachusetts Historical Society, Wyzanski provides copies of his files on the Wagner Act. *See supra* notes 125-26 and accompanying text.

transportation incurred by the Board, by the associate members, or by employees of the Board under its orders in any places other than in the City of Washington, shall be allowed and paid on the presentation of itemized vouchers therefore approved by the Board. The General Accounting Office shall receive and examine all accounts of expenditures of the Board.

Section 303. The principal office of the Board shall be in the District of Columbia but it may meet and exercise all its powers at any other place. The Board may, by one or more of its members or by such employees as it may designate, prosecute any inquiry necessary to its duties in any part of the United States. A member who participates in such an inquiry shall not be disqualified from subsequently participating in a decision of the Board in the same case.

Section 304. (a) The Board is empowered and directed to prevent any person from using any unfair labor practices if that practice has led or tends to lead to a labor dispute that might burden commerce, or obstruct the free flow of commerce, or dissipate natural resources, or affect the general welfare.

(b) Whenever the executive secretary (or any person designated by the Board) from information acquired through any source whatsoever, shall have reason to believe that any person has been or is using any unfair labor practice that has led or tends to lead to such a labor dispute, he shall in his discretion issue and cause to be served upon such person a complaint stating the general nature of the charges in that respect, and containing a notice of hearing before either an examiner or the Board at a place therein fixed at least twenty-four hours after the service of said complaint, provided that the examiner or the Board shall have discretion to adjourn such hearing from time to time. Said complaint may be amended by the executive secretary or any member of the Board at any time prior to the issuance of an order based thereon; and the original complaint shall not be regarded as limiting the scope of the inquiry. The person so complained of shall have the right to file an answer, to appear and give testimony at the place and time fixed in the complaint, and to avail himself of the compulsory process of the Board in summoning witnesses to show cause why an order relative to any violation disclosed in the complaint or the complaint as amended should not be entered by the Board. Any officer or employee of the United States, and, in the discretion of the examiner or the Board, any other person shall be allowed to appear in said proceeding by counsel or in person to present testimony. The examiner or the Board shall have authority to receive and act upon testimony which would not be competent under rules of evidence prevailing in courts of law or equity.

(c) The testimony taken by an examiner or the Board shall be authorized in writing and filed with the executive secretary. Thereafter, in its discretion, the Board may itself take further testimony and/or hear argument based upon this summary. If upon all the testimony taken before the examiner and itself, the Board shall be of the opinion that persons named in the complaint as amended have used or are using an unfair labor practice that has led or tends to lead to a labor dispute that might burden commerce, or obstruct the free flow of commerce, or dissipate natural resources, or affect the general welfare, then it shall state its findings as to the facts and shall issue an appropriate order directed to such persons. Such order may require the person to cease and desist from an

unfair labor practice, or to take affirmative action, or to pay damages, or to reinstate employees, or to perform any other acts that will achieve substantial justice under the circumstances. Such order may further require the respondent to make a report from time to time showing the extent to which he has complied with the order. Until a transcript of its findings of fact and its order shall have been filed in a court, as hereinafter provided, the Board may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it.

(d) If such person fails or neglects to obey such order of the Board while the case is in effect, the Board may petition the District Court of the United States, within any district where the unfair labor practice in question was used or where such person resides or carries on business, or the Supreme Court of the District of Columbia, for a court order applying the order of the Board, and shall certify and file with the petition a transcript including a summary of the evidence, the Board's findings and its own order. Upon such filing of the petition and transcript, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon the evidence, findings, and order set forth in such transcript its own order applying, modifying, or setting aside in whole or in part the order of the Board. No objection to the order to the Board shall be considered by the court unless such objection shall have been urged before the Board. The findings of the Board as to the facts, if supported by evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, the court may order such additional evidence to be taken before the Board and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Board may modify its findings as to the facts, by reason of the additional evidence so taken, and it shall file a summary of each additional evidence and also such modified or new findings, which, if supported by evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decrees, applying, modifying, or setting aside, in whole or in part, any order of the Board, shall be final, subject to review only by the Supreme Court of the United States in the manner provided in section 238 of the Judicial Code as amended, United States Code, Supp. VI, Title 28, section 345. The commencement of proceedings under this subsection shall not, unless specifically ordered by the court, operate as a stay of the Board's order.

(e) Any person aggrieved by an order of the Board may obtain a review of such order in said district court or Supreme Court of the District of Columbia by filing in such court, within ten days after the entry of such order, a written petition praying that the order of the Board be modified or be set aside in whole or in part. A copy of such petition shall be forthwith served upon the Board, and thereupon the Board shall certify and file in the court a transcript including a summary of the evidence, the Board's findings of facts and its order as herein-

before provided. No objection to the order of the Board shall be considered by the court unless such objection shall have been urged before the Board. The finding of the Board as to the facts, if supported by evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the hearing before the Board, the court may order such additional evidence to be taken before the Board and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Board may modify its findings as to the facts, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The jurisdiction of the court shall be exclusive and its judgment and decree, applying, modifying, or setting aside, in whole or in part, any order of the Board, shall be final, subject to review only by the Supreme Court of the United States in the manner provided in section 238 of the Judicial Code as amended, United States Code, Supp. VI, Title 28, section 345. The commencement of proceedings under this subsection shall not, unless specifically ordered by the court, operate as a stay of the Board's order.

(f) The jurisdiction of the district courts and of the Supreme Court of the District of Columbia to issue orders enforcing, setting aside or modifying orders of the Board shall be exclusive and shall be subject to review only in the Supreme Court. No court shall have any jurisdiction to enjoin the Board or an examiner from taking proceedings and holding hearings under a complaint.

(g) Petitions made pursuant to this statute in the district courts and in the Supreme Court of the District of Columbia shall be heard expeditiously and if possible within ten days after they have been docketed.

(h) Complaints, orders and other processes of the Board and its agents may be served by anyone duly authorized by the Board, either (a) by delivering a copy thereof to the person to be served, or to a member of the partnership to be served, or to the president, secretary, or other executive officer, or a director of the corporation to be served; or (b) by leaving a copy thereof at the principal office or place of business of such person, partnership, or corporation; or (c) by registering and mailing a copy thereof addressed to such person, partnership, or corporation at his or its principal office or place of business; or (d) by sending a telegraphic copy thereof addressed to such person, partnership, or corporation at his or its principal office or place of business. The verified return by the person so serving said complaint, order, or other process setting forth the manner of said service shall be proof of the same, and the return post office receipt or telegraph receipt for said complaint, order, or other process registered and mailed or telegraphed as aforesaid shall be proof of the service of the same.

Section 305: In labor disputes other than those embraced by section 304 the Board shall have power either by itself or through its agents or employees to hold public hearings to determine whether any person is using any unfair labor practice and to make public findings based thereon.

Section 306: (a) The Board shall have power to act as arbitrator in labor

disputes. Whenever all the parties to a labor dispute agree to submit the whole of it or any part thereof to the arbitration of the Board, and the Board accepts such submission, the agreement shall be valid, irrevocable and enforceable save upon such grounds as exist at law or in equity for the revocation of any contract.

(b) In any case accepted by it for arbitration the Board shall have power to issue an award.

(c) In a case involving a labor dispute that might burden commerce, or obstruct the free flow of commerce, or dissipate natural resources, or affect the general welfare, in which the Board has issued an award, any party to the arbitration or the Board itself may within one month thereafter apply to any district court of the United States for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified or corrected as prescribed hereafter. Notice of the application shall be served upon the adverse party by the marshal of any district within which the party may be found in like manner as any other process of the court, and thereupon the court shall have jurisdiction of such party as though he had appeared generally in the proceeding. The court may make an order vacating the award upon the application of any party to the arbitration if the Board exceeded its powers or so imperfectly executed them that a mutual, final and definite award upon the subject matter was not made. The court may make an order modifying or correcting the award upon the application of any party to the arbitration if the Board has awarded upon a matter not submitted to it unless it is a matter not affecting the merits of the decision upon the matter submitted or if the award is imperfect in matter of form not affecting the merits of the controversy. The order may modify and correct the award so as to effect the intention thereof and promote justice between the parties. Notice of a motion to vacate, modify or correct an award must be served upon the adverse party or his attorney within one week after the award is filed or delivered. Notice of the application shall be served by the marshal of any district within which the adverse party may be found. For the purpose of the motion, any judge who might make an order to stay the proceedings in an action brought in the same court may make an order, to be served with the notice of motion, stating the proceedings of the adverse party to enforce the award. The party moving for an order confirming, modifying, or correcting an award shall, at the time such order is filed with the clerk for the entry of judgment thereon, also file the following papers with the clerk: (1) an agreement to arbitrate; (2) the award of the National Labor Board; and (3) such notice, affidavit or other paper used upon an application to confirm, modify or correct the award, and a copy of each order of the court upon such an application. The order shall be docketed as if it were rendered in a suit in equity and shall have the same force and effect, in all respects, as, and be subject to all the provisions of law relating to, a degree in a suit in the court in which it is entered; and it may be enforced as if it had been rendered in a suit in the court in which it is entered.

Section 307. The Board shall have power in any dispute that may arise between an employer and his employees, or between two groups of employees employed by the same employer, as to who are the properly chosen representatives of such employees to investigate such dispute and to certify to both parties, in writing, the name or names of the individuals or organizations that have been

designated and authorized to represent the employees involved in the dispute. In such proceedings the Board shall be authorized to take a secret ballot of the employees, in such form as it may see fit, or to utilize any other appropriate method to ascertain the names of their duly chosen representatives. The Board shall determine whether eligibility to participate in elections shall be determined by employers unit, craft unit, plant unit, or other appropriate grouping.

Section 308. For the purpose of all hearings and investigations, which, in the opinion of the Board, are necessary and proper for the enforcement of section 304 and also for all proceedings under section 307 that involve labor disputes that might burden commerce, or obstruct the free flow of commerce, or dissipate natural resources, or affect the general welfare,—

(a) Any member of the Board or any agent or agents designated by it are empowered to administer oaths and affirmations, take depositions, subpoena witnesses, take evidence, and require the production of any books, papers, or other documents which the Board deems relevant or material to the inquiry. Such attendance of witnesses and the production of such documentary evidence may be required from any place in the United States or any territory at any designated place of hearing.

(b) In case of contumacy or refusal to obey a subpoena issued to any person, the district courts of the United States, the United States courts of any territory, and the Supreme Court of the District of Columbia shall severally have jurisdiction. Any of the said United States courts, within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides, upon application by the Board may issue to such person an order requiring such person to appear before the Board, or one of its examiners designated by it, there to produce documentary evidence if so ordered, or there to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof.

(c) No person shall be excused from attending and testifying or from producing books, papers, contracts, agreements, and other documents before the Board, or in obedience to the subpoena of the Board or any member thereof or any agent designated by it, or in any cause or proceeding instituted by the Board, on the ground that the testimony or evidence, documentary or otherwise, required of him, may tend to incriminate him or subject him to a penalty or forfeiture; but no individual shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, as having claimed his privilege against self-incrimination, to testify or produce evidence, documentary or otherwise, except that such individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying.

(d) Witnesses summoned before the Board or one of its examiners designated by it shall be paid the same fees and mileage that are paid witnesses in the courts of the United States, and witnesses whose depositions are taken and the persons taking the same shall severally be entitled to the same fees as are paid for like services in the courts of the United States.

Section 309. The Board shall have authority from time to time to make, amend, and rescind such rules and regulations as may be necessary to carry out

the provisions of this act. Such rules and regulations shall be effective upon publication in the manner which the Board shall prescribe.

Section 310. Any person who shall assault, resist, prevent, impede, or interfere with any member of the Board or any of its agents in the performance of his duties in enforcing section 304 or in enforcing section 307 in proceedings that involve labor disputes that might burden commerce, or obstruct the free flow of commerce, or dissipate natural resources, or effect the general welfare, shall be punished by imprisonment for a term of not more than one year, or by a fine of not more than $5000, or both.

Section 311. If any provision of this act, or the application of such provision to any person or circumstance, shall be held invalid, the remainder of this act, or the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby.

*Draft 3***

A Bill

To remove obstructions to interstate commerce, to equalize the bargaining power of employers and employees, to encourage the amicable settlement of disputes between employers and employees, to create a National Labor Board, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Section 8. The tendency of modern industry toward integration and centralized control has long since overturned the balance of bargaining power between the individual employer and the individual employee, and generally has rendered the individual, unorganized worker helpless to exercise actual liberty of contract, to secure a just reward for his services, and to preserve his standards of living. As a direct result, the national welfare has failed to keep pace with the national wealth. The failure of the total volume of wage payments to advance as fast as production and corporate surpluses has resulted in inadequate purchasing power, which has accentuated periodic depressions and disrupted the flow of interstate commerce. Inadequate recognition of the right of employees to bargain collectively through representatives of their own choosing has been one of the causes precipitating strikes, lockouts, and similar weapons of industrial strife, with consequent injury to interstate commerce. It is hereby declared to be the policy of Congress to remove obstructions to the free flow of interstate commerce by removing the obstacles which prevent the organization of labor for the purpose of cooperative action in maintaining their standards of living, by encouraging the equalization of the bargaining power of employers and employees, and by providing agencies for the peaceful settlement of industrial disputes.

Section 9. [The terms "Employer," "Employee," and "Representative" are substantially the same as Draft 2(a), except that "Employer"] shall not include employers subject to the Railroad Transportation Act of 1933."

** Drafts 3 to 7 contain no administrative provisions.

"Organization" shall mean any organization, association or society of any kind whatsoever composed in whole or in part of employees.

Section 10. Employees shall have the right to engage in concerted activities, either in labor unions or otherwise, for the purposes of organizing and bargaining collectively through representatives of their own choosing or for other purposes of mutual aid or protection.

Section 11. (a) No employer shall by interference, influence, restraint, favor, coercion, or in any other manner attempt to abrogate or modify the right of employees guaranteed in Section 10.

(b) It shall be deemed a violation of the above paragraph for any employer (1) to initiate, participate in, supervise, or influence, directly or indirectly, the formation, operations, constitution, by-laws, other governing rules, or elections of any organization; (2) to contribute financial or other material support or encouragement, direct or indirect, to any organization, either by permitting use of the company property or services, or by compensating anyone for services in behalf of an organization, or by any other means whatsoever; (3) to make the extension or withholding of any special privileges whatsoever to any employee or group of employees dependent upon whether such employee or group of employees belong or do not belong to an organization; (4) either by written or oral statements, or by discriminatory practices as to wage and hour differentials, advancement, demotion, hire, tenure of employment, or any other condition of employment, to encourage employees to join, or to attempt to dissuade them from joining or belonging to an organization; (5) to solicit or maintain membership lists of an organization, when such lists would tend to, or are for the purpose of, administering discipline or otherwise coercing or influencing employees with respect to membership or nonmembership in an organization: *Provided*, that nothing in this Act shall prevent an employer from requiring of a person seeking employment, as a condition of employment, that such person belong to an organization, when such organization is composed of at least 60 per cent of such employer's employees and imposes no inequitable restrictions upon membership.

(c) Any term of a contract or agreement of any kind entered into before the enactment of this Act which conflicts with the policies or provisions of this Act is hereby abrogated, and every employer who is a party to such contract or agreement shall immediately so notify his employees by appropriate action.

Section 12. (a) It shall be the duty of employers to recognize and to bargain collectively with the representatives designated by employees, and with the organizations to which these representatives belong, whether these representatives are or are not employees.

(b) Representatives agreed upon and selected by the majority of employees participating in the choice of representatives shall, for the purposes of dealing with employers, be the sole representatives of employees who were eligible to participate in the choice: *Provided*, that a quorum for the purpose of making a choice shall be not less than 60 percent of the employees eligible to participate in such choice; and *Provided* further, that no organization which imposes inequita-

ble restrictions upon membership shall be entitled to represent employees who are not members thereof.

(d) If any dispute shall arise between an employer and employees or between two groups of employees, as to who are the properly chosen representatives of employees, it shall be the duty of the National Labor Board, upon the request of any party to the dispute, to investigate such dispute and to determine and certify to all parties, in writing, within thirty days after the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute. Such certification shall be conclusive, for a period designated by the Board but not to exceed one year, upon the question of representation. In such an investigation, the National Labor Board shall be authorized to take a secret ballot of employees, or to utilize any other appropriate method of ascertaining the names of their duly chosen representatives in such a manner as shall insure the choice of representatives by employees without interference, influence, restraint or coercion exercised by the employer.

(e) In case any dispute arises as to whether eligibility to participate in elections shall be determined by employer unit, craft unit, plant unit or industrial unit, the National Labor Board, upon the request of any of the parties to the dispute, shall decide such disputed question.

Section 13. It shall be the duty of all employers and employees through their duly chosen representatives to exert every reasonable effort to make and maintain agreements concerning wages, hours, rules, and other conditions of employment.

Section 14. Section 7(a) of the National Industrial Recovery Act (approved June 16, 1933), insofar as inconsistent with the provisions of this Act, is hereby repealed.

Draft 4
Changes Only

Section 9. "Employee" shall mean any person in the service of an employer (subject to the continuing authority of such employer to supervise and direct the manner of rendition of his service) who regularly performs any work for such employer. Wherever the term "employee" is used in this Act, it shall not be construed to mean the employee of a particular employer, but shall embrace any employee subject to this Act, unless the Act explicitly states otherwise. Thus, "a dispute between employer and employees" is not confined to a dispute between an employer and his employees.

Section 12. (c) Where no representatives have been selected by the majority as provided in the above paragraph, the representatives chosen by any group of two or more employees shall represent such group for the purpose of dealing with employers.

Draft 5
Changes Only

Section 9. When used in this Act, the term "Employer," except where otherwise expressly stated, means a person, partnership, association, corporation, or the legal representative, trustee in bankruptcy, receiver, or trustee thereof, or the legal representative of a deceased person, who has five or more employees, except that the term "employer" shall not include the Federal Government, the government of the several States, municipal corporations, other governmental instrumentalities, or any labor organization, or anyone acting in his capacity as the officer or agent of such labor organization.

"Employee" means any person employed by an employer under any contract of hire, oral or written, express or implied, including all contracts entered into by helpers and assistants of employees, whether paid by employer or employee, if employed with the knowledge, actual or constructive, of the employer, or any prior employee whose stoppage of work has been in consequence, within a period of three months, of a trade dispute, except that the term employee does not include persons engaged in the operation of any means of interstate transportation except suburban electric railways and motor vehicles. Wherever the term "employee" is used, it shall not be construed to mean the employee of a particular employer, but shall embrace any employee, unless the Act explicitly states otherwise.

Section 9. [Change from Draft 3] "Organization" shall mean any organization, association, corporation or society of any kind in which employees, in whole or in part, participate to any degree whatsoever, which exists for the purpose, among others, of dealing in any way with the subjects of grievances, disputes, wages, hours, or other conditions of employment.

Section 10. Employees shall have the right to organize and join labor organizations, and to engage in concerted activities, . . . [rest of section unchanged from Draft 3]

[Section 11(b) of Draft 3 changes closed shop proviso to 75% of such employer's employees]

[Section 11(c) of Draft 4 deleted]

Section 12(a). Every employer shall recognize the representatives designated by employees, and shall make every reasonable effort to make and maintain agreements with such representatives concerning wages, hours, rules and other conditions of employment. When such representatives are acting as the agents of any organization, the employer shall recognize such organization.

(b) Whenever representatives are agreed upon and selected either (1) by the majority of the employees eligible to participate in the choice or (2) by the majority of employees participating in the choice when such majority constitute not less than 40 per cent of those eligible to participate, such representatives shall, for the purposes of dealing with employers, be the sole representatives of employees eligible to participate in the choice and of employees who subsequently fall within the classification upon which eligibility was based at the time of the choice: *Provided*, that no organization which imposes inequitable restric-

tions upon membership shall be entitled to represent employees who are not members thereof.

[Section 12(c) of Draft 4 deleted]

[Section 12(d) & (e) of Draft 3 becomes 12(c) & (d)]

[Section 13 of Draft 4 deleted]

Section 13(b) [reintroduced] Any term of a contract or agreement of any kind entered into before the enactment of this Act which conflicts with the policies or provisions of this Act is hereby abrogated, and every employer who is a party to such contract or agreement shall immediately so notify his employees by appropriate action.

Draft 6
Changes Only

Section 8. The tendency of modern industry toward integration and centralized control, hastened by the policy of the government to promote cooperative activity among trade groups, has long since overturned the balance of bargaining power between the individual employer and the individual employee, and generally has rendered the individual, unorganized worker helpless to exercise actual liberty of contract, to secure a just reward for his services, and to preserve his standards of living, with consequent detriment to the national welfare and the flow of commerce. Inadequate recognition of the right of employees to bargain collectively through representatives of their own choosing has been one of the causes precipitating strikes, lockouts, and similar weapons of industrial strife, with consequent injury to interstate commerce and the national welfare. It is hereby declared to be the policy of Congress to remove obstructions to the free flow of interstate commerce and to provide for the national welfare by removing the obstacles which prevent the organization of labor for the purpose of cooperative action in maintaining their standards of living, by encouraging the equalization of the bargaining power of employers and employees, and by providing agencies for the peaceful settlement of industrial disputes.

Section 9. When used in this Act, the term "Person" includes an individual, partnership, association, corporation, or the legal representative, trustee in bankruptcy, receiver, or trustee thereof, or the legal representative of a deceased person.

"Employer" means a person who has one or more employees, . . . [balance of "Employer" same as Draft 5]

"Employee" [same as Draft 5 except] or any such individual whose work has ceased as a consequence of or in connection with any current labor dispute or because of any unfair labor practice except that the term employee does not include individuals covered by the Railway Labor Act (approved May 20, 1926), as amended from time to time.

Section 11. It shall be an unfair labor practice for

(a) An employer or any person acting in his interest to attempt by interference, influence, restraint, favor, coercion, or in any other manner, to impair the right of his employees guaranteed in Section 10.

(b) An employer to refuse to recognize and/or deal with the representatives of (his) employees or to fail to exert every reasonable effort to make and maintain agreements with such representatives concerning wages, hours, rules and other conditions of employment.

[Section 11(b)(1) & (2) of Draft 3 becomes 11(c) & (d)]

Section 11. (e) An employer, by discriminatory practices as to wage and hour differentials, advancement, demotion, hire, tenure of employment, or any other condition of employment, to encourage membership or non-membership in an organization: *Provided*, that where a contract or agreement of any kind is in force between an employer and representatives who are not sole representatives as defined in Section 12, the conditions of employment covered by such contract or agreement shall not, because of anything contained in this paragraph, compel an employer to observe similar conditions of employment in his relation with all his employees.

[Section 11(b)(4) of Draft 3 becomes 11(f)]

[Section 12 [retains only part 12(b) of Draft 5 as the entire section]

Section 13. (a) In any case where the enforcement of the provisions of this Act would be valid in the absence of section 7(a) of the National Industrial Recovery Act, the provisions of this Act shall supersede the provisions of section 7(a) of the National Industrial Recovery Act.

(b) Any term of a contract or agreement of any kind entered into in anticipation of the enactment of this Act which conflicts with the policies or provisions of this Act is hereby abrogated, and every employer who is a party to such contract or agreement shall immediately so notify his employees by appropriate action. The making of any such contract or agreement within two months of the enactment of this Act shall be presumed conclusively to have been made in anticipation of this Act.

Draft 7
Changes Only

[Section 11(e) & (f) reordered, proviso of former (f) put in (e)]

Section 13(a). Whenever the provisions of Section 7(a) of the National Industrial Recovery Act are in conflict with the provisions of this Act, the provisions of this Act shall prevail: *Provided*, that in any situation where the provisions of this Act can not be validly enforced, the provisions of said Section 7(a), if applicable, shall remain in force.

Draft 8
Sent to Committee
February 27, 1934
Introduced March 1, 1934
Changes Only

To equalize the bargaining power of employers and employees, to en-

courage the amicable settlement of disputes between employers and employees, to create a National Labor Board, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Title One

Section 1. This act may be cited as the "Labor Disputes Act."

Section 2. [preamble same as section 8, Draft 6]

Section 3. [definitions same as section 9, Draft 6, except "employer" excludes persons subject to the Railway Labor Act; "employee" excludes a person put to work in place of a striking employee; and as follows]

"Representatives" includes any individual or organization.

"Organization" means any labor union, association, corporation or society of any kind in which employees participate to any degree whatsoever, which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages or hours of employment.

"Commerce" means trade or commerce, or any transportation or communication relating thereto among the several states, or between the District of Columbia or any territory of the United States and any state or other territory or between any foreign country and any state, territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign nation.

"Unfair labor practices" mean the unfair labor practices listed in section 5.

"National Labor Board" means the National Labor Board created and established by this Act.

Section 4. Employees shall have the right to organize and join labor organizations, and to engage in concerted activities, either in labor unions or otherwise, for the purposes of organizing and bargaining collectively through representatives of their own choosing or for other purposes of mutual aid or protection.

Section 5. It shall be an unfair labor practice for an employer, or anyone acting in his interest, directly or indirectly

(a) To attempt, by interference, influence, restraint, favor, coercion, lockout or in any other manner, to impair the right of employees guaranteed in Section 10.

(b) To refuse to recognize and/or deal with the representatives of his employees or to fail to exert every reasonable effort to make and maintain agreements with such representatives concerning wages, hours, and other conditions of employment.

(c) To initiate, participate in, supervise, or influence the formation, constitution, by-laws, other governing rules, operations, policies, or elections of any organization.

(d) To contribute financial or other material support to an organization by compensating anyone for services performed in behalf of an organization, or by any other means whatsoever.

(e) To use discriminatory practices as to wage or hour differentials, advancement, demotion, hire, tenure of employment, or any other condition of employment, which encourage membership or non-membership in any organization: *Provided*, that where a contract or agreement of any kind is or shall be in force between an employer and a group of employees whose representatives are not sole representatives as defined in Section 7, the provisions of such contract or agreement regarding conditions of employment shall not, because of anything contained in this subsection, compel an employer to observe similar conditions of employment in his relations with all his employees.

Provided, however, that nothing in this Act shall preclude the making of a contract, when such contract does not cover a period longer than one year, between an employer and an organization, which requires a person seeking employment, as a condition of employment, to join such organization, when no attempt is made to influence such organization by any unfair labor practice, and when such organization is composed of at least a majority of such employer's employees and imposes no inequitable restrictions upon its members or upon admissions to membership.

Section 6. (a) Any unfair labor practice that burdens or affects commerce, or obstructs the free flow of commerce, or has led or tends to lead to a labor dispute that might affect or burden commerce, or obstruct the free flow of commerce, shall be a misdemeanor and upon conviction thereof an offender shall be fined not more than $500 for each offense, and each day such violation continues shall be deemed a separate offense.

(b) The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain any unfair labor practice that burdens or affects commerce, or obstructs the free flow of commerce, or has led or tends to lead to a labor dispute that might affect or burden commerce, or obstruct the free flow of commerce, and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, upon the request of the National Labor Board, to institute proceedings in equity to prevent and restrain any such unfair labor practices; but nothing in this title shall be construed to impair the powers of the National Labor Board under title two of this Act.

Section 7. Whenever representatives are agreed upon and selected either (1) by the majority of the employees eligible to participate in the selection or (2) by the majority of employees participating in the selection when such majority constitute not less than 40 per cent of those eligible to participate, such representatives shall, for the purposes of collecting bargaining, be the sole representatives of employees eligible to participate in the selection and of employees who subsequently fall within the classification upon which eligibility was based at the time of the selection: *Provided*, that no organization which imposes inequitable restrictions upon membership shall be entitled to represent employees who are not members thereof.

Section 8. [Same as section 13, Draft 6.]

Title II

Section 201. A Board is created and established, to be known as the National Labor Board (hereinafter referred to as the "Board"), which shall be composed of five members, of whom one shall be appointed and designated as a representative of employers, one as a representative of employees, and three as representatives of the public. One of the three public representatives shall be appointed and designated as Chairman of the Board. All members shall be appointed and designated by the President, by and with the consent of the Senate. Two members of the Board shall constitute a quorum, but neither the representative of employers nor the representative of employees shall participate in any function of the Board unless the other is likewise participating. The first members appointed shall continue in office for terms of 1, 2, 3, 4, and 5 years respectively from July 1, 1934, the term of each to be designated by the President, but their successors shall be appointed for terms of five years, except that any person chosen to fill a vacancy shall be appointed only for the unexpired term of the member whom he shall succeed. [balance of section identical to section 301, Draft 2(b).]

Section 202. [balance of section identical to section 302, Draft 2(b).] The Board is directed to retain the officers and employees of the National Labor Board created by the President on August 5, 1933 to the fullest extent consistent with the efficient functioning of the Board.

Section 203. [identical to section 303, Draft 2(b).]

Section 204. (a) The Board shall have power, either itself or through its agents, to act as conciliator or mediator in any labor dispute, and to offer its services, whenever desirable, to the parties to any labor dispute, and to attempt to adjust such dispute by conciliation or mediation: *Provided*, that the Board may decline to take cognizance of labor disputes where there is another available means of settlement provided for by agreement, industrial code, or law which has not been utilized, and where such means of settlement would not involve any acquiescence in any unfair labor practice. The Board shall have power to make public the findings and results of conciliation or mediation in which it engages.

(b) The Board shall have the power, in any labor dispute, to hold public hearings and to make public findings based thereon.

Section 205. (a) The Board is empowered to prevent any person from using any unfair labor practice that burdens or affects commerce, or obstructs the free flow of commerce, or has led or tends to lead to a labor dispute that might burden or affect commerce, or obstruct the free flow of commerce;

(b) Whenever any member of the Board, or the executive secretary, or any person designated by the Board, from information acquired through any source whatsoever, shall have reason to believe that any person has been or is using any such unfair labor practice, . . . [balance of Title II is substantially the same as the balance of Draft 2(b), with some simplication of language and with the exception of: (1) removal of section 305, Draft 2(b); (2) addition of section 208(e).]

Section 207. (a) In any disputes that may arise between an employer and his employees, or between groups of employees, as to who are the representatives

of such employees the Board, if the dispute might burden or affect commerce, or obstruct the free flow of commerce, may investigate such dispute and certify to both parties, in writing, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute. In such an investigation, the Board shall be authorized to take a secret ballot of employees, or to utilize any other appropriate method to ascertain their representatives. The Board shall determine whether eligibility to participate in elections shall be determined on the basis of employer unit, craft unit, plant unit, or other appropriate grouping.

(b) In disputes that arise between an employer and employees, or between groups of employees, as to who are the representatives of such employees, the Board, if the dispute is not of the character described in subsection (a), may offer its services to ascertain who are the employees' representatives.

Section 208(e). The Board is empowered to secure information from any Department of the government when such information is relevant to the Board's inquiry.

Title III

Section 301. There is hereby created in the Department of Labor the United States Conciliation Service, under the direction of a Director of Conciliation. The Secretary of Labor shall appoint such Director and shall have authority to employ and fix the compensation of such commissioners of conciliation, clerks, and other employees as he may from time to time find necessary for the proper performance of the duties of the service, and as may be from time to time appropriated for by Congress. In employing such persons, the Secretary of Labor may act without regard to the provisions of the Civil Service laws and without regard to the Classification Act of 1923, as amended.

Section 302. It shall be the duty of the United States Conciliation Service to offer its services, whenever desirable, to the parties to any labor dispute, and to attempt to adjust such dispute by conciliation or mediation. Nothing in this Title shall limit the power given to the Secretary of Labor under the Act of March 4, 1913, chapter 141, § 8, 37 Stat. 738, U.S.C. Title 5, Section 619.

Section 303. Nothing in this Act shall be construed so as to interfere with or impede or diminish in any way the right to strike.

NLRA Draft 1
November, 1934
Modified from last Wagner version of Labor Disputes Act, May 5, 1934

A BILL

To equalize the bargaining power of employers and employees, to promote the amicable settlement of labor disputes, to create a National Labor Board, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

DECLARATION OF POLICY

SECTION 1. Under prevailing economic conditions, developed with the aid of governmental authority, owners of property are organized in the corporate and other forms of ownership and trade associations, and the individual unorganized worker, or the worker whose concerted activities are not free from the domination and control of his employer, is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment and preserve a decent standard of living, with consequent detriment to the general welfare and free flow of commerce. Inadequate recognition of the right of employees to bargain collectively and freely through representatives of their own choosing has forced them to attempt to preserve their standards of living by strikes and similar manifestations of economic strife, thus obstructing commerce and imperiling the general welfare. It is hereby declared to be the policy of the United States to remove unnecessary obstructions to the free flow of commerce, to encourage the establishment of uniform labor standards, and to provide for the general welfare, by establishing agencies for the peaceful settlement of labor disputes, and by protecting the exercise by the worker of full freedom of association, self-organization, and designation of representatives of his own choosing, for the purpose of negotiating the terms and conditions of his employment or other mutual aid or protection.

Definitions

SEC. 2. When used in this Act—

(1) The term "person" includes one or more individuals, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers.

(2) The term "employer" includes any person acting in the interest of an employer, directly or indirectly, but shall not include the United States, or any State, municipal corporation, or other governmental instrumentality, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization, or anyone acting in the capacity of officer or agent of such labor organization.

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his father, mother, or spouse.

(4) The term "representatives" includes any individual or labor organization.

(5) The term "labor organization" means any organization of any kind or any agency or employee representation committee or plan in which employees participate and which exists for the purpose, in whole or in part, of dealing with

employers concerning grievances, labor disputes, rates of pay, or hours of employment.

(6) The term "commerce" means trade or commerce, or any transportation or communication relating thereto, among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

(7) The term "unfair labor practice" means any unfair labor practice listed in section 8.

(8) The term "affecting commerce" means in commerce, or burdening or affecting commerce, or obstructing the free flow of commerce, or having led or tending to lead to a labor dispute that might burden or affect commerce or obstruct the free flow of commerce.

(9) The term "labor dispute" includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.

(10) The term "National Labor Relations Board," means the National Labor Relations Board created by section 3 of this Act.

(11) The term "old Board" means the National Labor Relations Board established by the President in July 1934.

NATIONAL LABOR BOARD

SEC. 3. (a) There is hereby created as an independent agency in the Executive branch of the government, a board, to be known as the "National Labor Relations Board" (hereinafter referred to as the "Board"), which shall be composed of three members, who shall be appointed by the President, by and with the advice and consent of the Senate. One of these members shall be appointed for a term of one year, one for a term of three years, and one for a term of five years, but their successors shall be appointed for terms of five years each, except that any individual chosen to fill a vacancy shall be appointed only for the unexpired term of the member whom he shall succeed. The President shall designate one member to serve as Chairman of the Board.

(b) A vacancy or vacancies in the Board shall not impair the right of the remaining member or members to exercise all the powers of the Board, and the majority of the existing Board shall, at all times, constitute a quorum. The Board shall have an official seal which shall be judicially noticed.

SEC. 4. (a) Each member of the Board shall receive a salary of $10,000 a year, shall be eligible for reappointment, and shall not engage in any other business, vocation or employment. The Board shall appoint such employees, and, without regard for the provisions of the civil-service laws or the Classification Act of 1923, as amended, appoint and fix the compensation of an Executive Secretary, Assistant Executive Secretaries, and such attorneys, special experts,

examiners, regional directors and mediators as may be from time to time appropriated for by Congress. The Board may establish or utilize such regional, local, or other boards, voluntary and uncompensated services, as it may from time to time find necessary.

(b) Upon the organization of the Board and the designation of its chairman, the old Board shall cease to exist; and all pending investigations and proceedings of the old Board shall be continued by the Board. All employees of the old Board shall be transferred to and become employees of the Board at their present grades and salaries. All records, papers, and property of the old Board, and all unexpended funds and appropriations for the use and maintenance of the old Board, shall become funds and appropriations available to be expended by the Board in the exercise of the powers, authority, and duties conferred on it by this Act.

(c) All of the expenses of the Board, including all necessary traveling and subsistence expenses outside the District of Columbia incurred by the members or employees of the Board under its orders, shall be allowed and paid on the presentation of itemized vouchers therefore approved by the Board or by any individual it designates for that purposes.

SEC. 5. The principal office of the Board shall be in the District of Columbia, but it may meet and exercise all its powers at any other place. The Board may, by one or more of its members or by such agents or agencies as it may designate, prosecute any inquiry necessary to its functions in any part of the United States. A member who participates in such an inquiry shall not be disqualified from subsequently participating in a decision of the Board in the same case.

SEC. 6. (a) The Board shall have authority from time to time to make, amend, and rescind such rules and regulations as may be necessary to carry out the provisions of this Act. Such rules and regulations shall be effective upon publication in the manner which the Board shall prescribe.

(b) [Note by Keyserling: Dictated.]

UNFAIR LABOR PRACTICES

SEC. (7). [Note by Keyserling: to be dictated]

SEC. (8). It shall be an unfair labor practice for an employer—

(1) To attempt, by interference, restraint, or coercion, to impair the exercise by employees of the rights guaranteed in section 7.

(2) To dominate or interfere with the administration of any labor organization or contribute financial or other support to it: *Provided*, that subject to rules and regulations prescribed by the Board, an employer shall not be prohibited from permitting employees, or their representatives, from conferring with him during working hours without loss of time or pay.

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment, or by contract or agreement, to encourage or discourage the exercise by employees of the rights guaranteed in section 7: *Provided*, that nothing in this Act, or in the National Industrial Recovery Act or in any code or agreement approved thereunder, or in any other statute of the

United States, shall preclude an employer from making an agreement with a labor organization to require as a condition of employment membership in such labor organization if the agreement is sought by the majority of the employees in a unit covered by it when made.

(4) To discharge, demote or otherwise discriminate against an employee because he has filed charges or given testimony under this Act.

(5) To refuse to bargain collectively with the representatives of his employees.

Representatives & Elections

Sec. 9(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in the unit appropriate for such purposes, shall be the exclusive representatives of the entire unit for the purposes of collective bargaining in respect to rates of pay, hours of employment, and other basic conditions of employment: *Provided*, however, that any minority group of employees in an appropriate unit shall have the right to bargain collectively through representatives of their own choosing when no representatives have been designated or selected by a majority in such unit: and *Provided* further, that nothing in this section shall prevent any individual or minority group of employees at any time from having representatives of their own choosing to present grievances to their employer, or from engaging in self-organization for their mutual protection or benefit.

(b) In any dispute affecting commerce as to who are the representatives of employees, the Board may investigate such dispute and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall hold an appropriate hearing, either in conjunction with a proceeding under section 9 or otherwise, and the Board shall be authorized to take a secret ballot of employees, or to utilize any other suitable method to ascertain such representatives. The Board shall decide whether, in order to effectuate the purposes of this Act, the appropriate unit for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or other appropriate unit.

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

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce.

(b) The Board may, in its discretion, decline to exercise jurisdiction over any such unfair labor practice in any case where there is another means of adjustment or prevention, provided for by agreement, industrial code or law, which has not been utilized. But in any case where the Board has so declined, the Board may at any time institute proceedings under this Act or exercise power of review in order to assure the effectuation of the policy of this Act and the development of a uniform body of administrative interpretation and practice thereunder.

(c) Whenever the Board shall have reason to believe that any person has engaged in or is engaging in any such unfair labor practice, it shall issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or before a designated agent or agency, at a place therein fixed, not less than three days after the serving of said complaint. Any such complaint may be amended by the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer and to appear by counsel or in person and give testimony at the place and time fixed in the complaint, and to invoke the compulsory process of the Board in summoning witnesses in its behalf. In the discretion of the agent or agency conducting the hearing or the Board, any other person may be allowed to appear in the said proceeding by counsel or in person to present testimony. In any such proceeding the rules of evidence prevailing in courts of law or equity shall not be controlling.

(d) The testimony taken by such agent or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board may itself take further testimony and/or hear argument. If upon all the testimony taken, the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take affirmative action or perform any other acts that will effectuate the purposes of this Act. Such order may further require such person to make a report from time to time showing the extent to which it has complied with the order.

(e) Until a transcript of the record in a case shall have been filed in a court, as hereinafter provided, the Board may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it.

(f) If such person fails or neglects to obey such order of the Board while the same is in effect, the Board may petition any District Court of the United States within any district wherein the labor practice in question occurred or wherein such person resides or carries on business, or the Supreme Court of the District of Columbia, for the enforcement of such order and for appropriate temporary relief, and shall certify and file in the court a transcript of the entire record in the proceeding, including the testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall

have jurisdiction of the proceeding and of the question determined therein, and shall grant such temporary relief or restraining order as it deems just and proper and shall make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree affirming, modifying, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board as to the facts, if supported by evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, the court may order such additional evidence to be taken before the Board and to be adduced upon the hearing. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which, if supported by evidence, shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate Circuit Court of Appeals or the Court of Appeals of the District of Columbia, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 28, secs. 346 and 347). The commencement of proceedings under this subsection shall not, unless specifically ordered by the court, operate as a stay of the Board's order.

(g) Any person aggrieved by an order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any District Court of the United States in the district wherein the unfair labor practice in question was engaged in or wherein such person resides or carries on business, or in the Supreme Court of the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, and including the testimony upon which the order complained of was entered and the findings and order of the Board. Upon such filing, the Board may file a petition for enforcement of such order, and the court shall have the same jurisdiction, and shall proceed in the same manner, as in the case of the application by the Board under subsection (f), and the findings of the Board as to the facts, if supported by evidence, shall in like manner be conclusive.

(h) When making and entering a decree affirming, modifying, or setting aside in whole or in part an order of the Board as provided in this section, the jurisdiction of courts sitting in equity shall not be limited by the Act entitled, "An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes," approved March 23, 1932 (U.S.C., title 29, secs. 101-115).

(i) Petitions filed under this Act shall be heard expeditiously, and if possible within ten days after they have been docketed.

(j) Complaints, orders, and other process and papers of the Board and its agents may be served either personally or by registered mail or by telegraph or by leaving a copy thereof at the principal office or place of business of the person required to be served. The verified return by the individual so serving the same setting forth the manner of such service shall be proof of the same, and the return post office receipt or telegraph receipt therefore when registered and mailed or telegraphed as aforesaid shall be proof of service of the same.

Section 11 [Note by Keyserling: dictated.]

ARBITRATION

Sec. 12(a) The Board shall have power to act and to appoint any person, agent or agency to act as arbitrator in labor disputes, when parties agree to submit the whole or any part of a labor dispute to the arbitration of the Board or its appointees. A provision in a written contract or a written agreement to submit to the arbitration of the Board or its appointees, when accepted by the Board after the dispute has arisen, shall be valid and irrevocable as to the parties of the agreement, save upon such grounds as exist at law or in equity for the revocation of any contract. If any party fails, neglects or refuses to perform under such contract or submission, the Board, its agents or appointees, may nevertheless, in the discretion of the Board, proceed to hear the case ex parte, and the Board, its agent or appointees, shall have the power to issue an award applicable to the submitting parties.

(b) The Board shall issue and promulgate rules for the conduct of arbitration and an agreement to submit to the arbitration of the Board, or its appointees or its agents, shall be deemed consent to the proceeding being conducted in accordance with such rules then obtaining unless otherwise specified in the arbitration contract or submission. An agreement to submit to the Board shall authorize the Board to appoint agents to hear the testimony, and in the discretion of the Board, to render a decision in the name of the Board on the findings thus presented, unless otherwise specified in the agreement. The Board may, however, in its discretion, render a decision on testimony taken before its agents.

(c) In any dispute in which an award has been made, the Board shall file the award in the Clerk's Office of the United States District Court that has been agreed upon by the parties, or, in default of such agreement, that of the Supreme Court of the District of Columbia. Notice of the filing shall be personally served or sent by registered mail to each submitting party. Unless a petition to impeach the award on the grounds hereinafter set forth shall be filed in the Clerk's Office of the Court in which the award has been filed, the Court shall enter judgment in accordance with the terms of the award: provided that no employee shall be compelled to render personal services without his consent.

(d) A petition for the impeachment of any award may be filed only in the court where the award has been filed and not more than ten (10) days after the communication of notice of the filing of the award to the submitting parties. Notice of filing of such petition shall be served personally or sent by registered

mail to each submitting party. The petition shall be sustained by the court only on one or more of the following grounds:

(1) That the proceedings were not substantially in conformity with the provisions of the arbitration agreement or rules adopted for the conduct of the arbitration.

(2) That an arbitrator or member of the Board participating in the award was guilty of fraud or corruption; or that a party to the award practiced fraud or corruption which affected the result, provided further that partisanship known, or which by the exercise of due care, should have been known, by a party prior to the arbitration proceeding, shall not constitute fraud to which he may avail himself within the meaning of this section.

(e) The court shall not set aside an award on the ground that it is invalid for uncertainty: In such case, the court shall suspend action pending the resubmission of said award to the Board for interpretation.

(f) Where there was an evident material miscalculation of figures, or an evident material mistake in the description of any person, thing, or property referred to in the award, or where the arbitrators have awarded on a matter not submitted to them, unless it is a matter affecting the merits of the decision on the matters submitted or where the award is imperfect in the matter of form in affecting the matter of the controversy, the court shall modify and correct the award so as to effect the intent thereof and promote justice between the parties, and thereupon shall enter judgment in accordance with Section .

(g) The court shall construe every award with a view to favoring its validity. If the court shall determine that a part of the award is invalid on some ground or grounds designated in this section as a ground of invalidity, but that a part of the award is valid, the court shall nevertheless enter judgment upon such part or parts of the award as are valid unless such part or parts are inseparable from the remainder of the award, in which case the entire award shall be vacated.

(h) If the petition for impeachment of the award is not sustained, the court shall enter judgment in accordance with the terms of the award subject to the provisos of Section . Where a petition for the impeachment of an award is granted, the award shall be vacated, and the court shall remand the arbitration to the Board, which may, in its discretion, accept the case for resubmission to arbitration in accordance with the terms of the original agreement or with such modifications as the Board deems fit, or it may refuse to take any further action regarding it.

INVESTIGATORY POWERS

SEC. 13. For the purpose of all hearings and investigations, which, in the opinion of the Board, are necessary and proper for the exercise of the powers vested in it by section 9, section 10, and section 12 (in any dispute affecting commerce)—

(1) The Board, or its duly authorized agent or agents, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any written or printed evidence of any person being investigated or proceeded against that relates to any question under investigation. Any member of the

Board shall have power to require by subpoena the attendance and testimony of witnesses and the production of any written or printed evidence that relates to any question under investigation. Any member of the Board, or any agent designated by the Board for such purposes, may administer oaths and affirmations, examine witnesses, and receive evidence. Such attendance of witnesses and the production of such written or printed evidence may be required from any place in the United States or any Territory or possession thereof, at any designated place of hearing.

(2) In case of contumacy or refusal to obey a subpoena issued to any person, any District Court of the United States, the United States courts of any Territory or possession, within the jurisdiction of which the inquiry is carried on or within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides or carries on business, and the Supreme Court of the District of Columbia, upon application by the Board shall have jurisdiction to issue to such person, wherever he resides or is found, an order requiring such person to appear before the Board, or an agent designated by it, there to produce written or printed evidence if so ordered, or there to give testimony touching the matter in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof.

(3) No person shall be excused from attending and testifying and from producing books, papers, agreements, documents, or written or printed evidence before the Board, or in obedience to the subpoena of the Board, on the ground that the testimony or written or printed evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture; but no individual shall be prosecuted subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce written or printed evidence, except that such individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying.

(4) Witnesses summoned before the Board or any of its agents shall be paid the same fees and mileage that are paid witnesses in the courts of the United States, and witnesses whose depositions are taken and the persons taking the same shall severally be entitled to the same fees as are paid for like services in the courts of the United States.

(5) The several departments and agencies of the Government, when directed by the President, shall furnish the Board, upon its request, all records, papers, and information in their possession relating to any matter before the Board.

SEC. 15. Any person who shall willfully assault, resist, prevent, or interfere with any member of the Board or any of its agents or agencies in the performance of duties pursuant to this Act shall be punished by a fine of not more than $5,000 or by imprisonment for not more than one year, or both.

LIMITATIONS

SEC. 16. Nothing in this Act shall be construed so as to interfere with or impede or diminish in any way the right to strike.

SEC. 17. Wherever the application, by means of code, agreement, board,

law, or otherwise, of the provisions of section 7(a) of the National Industrial Recovery Act (48 Stat. 198, U.S.C., title 15, sec. 706(a)), as amended from time to time, conflicts with the application of the provisions of this Act, this Act shall prevail: *Provided*, That in any situation where the provisions of this Act cannot be validly enforced, the provisions of such other Acts shall apply.

SEC. 18. If any provision of this Act, or the application of such provision to any person or circumstance, shall be held invalid, the remainder of this Act, or the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby.

SEC. 19. This Act may be cited as the "National Labor Relations Act."

NLRA Draft 2
February 15, 1935
New Preamble, Amendments in Committee
Annotated by L. Keyserling in Margin

SECTION 1. Equality of bargaining power between employers and employees is not attained when the organization of employers in the corporate and other forms of ownership association is not balanced by the free exercise by employees of the right to bargain collectively through representatives of their own choosing. Experience has proved that in the absence of such equality the resultant failure to maintain equilibrium between the rate of wages and the rate of industrial expansion impairs economic stability and aggravates recurrent depressions, with consequent detriment to the general welfare and to the free flow of commerce.

The lack of effective governmental machinery for promptly determining who are the representatives of employees, and denials of the right to bargain collectively through such representatives, establish unfair competitive advantages in commerce as between employers, and lead to strikes and other manifestations of economic strife as between employers and workers, thus creating material obstacles to the free flow of commerce. Such equality cannot be established and such unfair competitive advantages cannot be eliminated by state regulations and control because of the widespread distribution throughout the states of establishments, plants or operations whose products compete in commerce, or the wide-spread distribution throughout the states of such products, and the transfer of such plants, establishments, or operations from state to state, thus making necessary the exercise of the federal power in order to foster, protect, and promote the free flow of commerce to increase the amount thereof, and to remove obstacles and obstruction thereto.

It is hereby declared to be the policy of this Act to encourage the practice of negotiating terms and conditions of employment through collective bargaining, and to protect the exercise by the worker of full freedom of association, self-organization, and designation of representatives of his own choosing, for the purpose of collective bargaining or other mutual aid or protection.

Section 2(5). [Sec. Perkins] . . . to bargaining subjects: wages, rates of pay, hours of employment adds "or conditions of work."

Section 3(b). [AFL Counsel Ogburn adds] "The Board shall report annually to the President."

Section 4(a). [Sec. Perkins adds] "Attorneys appointed under this section may, at the direction of the Board, appear for and represent the Board in any case in court. Nothing in this Act shall be construed to authorize the Board to appoint individuals for the purpose of conciliations or mediation (or for statistical work), where such service may be obtained from the Department of Labor."

Section 6(b). [Sec. Perkins removed] "The Board shall have authority and is directed to study the activities of such boards and agencies as have been or may be hereafter established by agreement, code, or law to deal with labor disputes, and to receive from such boards reports of their activities."

Section 8(2). [NLRB Compliance Chief Davis rewords] "To interfere in any way with the formation or administration of any labor organization or contribute financial or other support to it: *Provided*, That an employer may permit employees without discrimination and subject to rules and regulations made and published by the Board pursuant to section 6(a), to confer with him during working hours without loss of time or pay, when engaged in the business of a labor organization.

Section 8(5). [NLRB Chairman Biddle added]

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9(a).

or, (5) To refuse to bargain collectively with employees through their representatives, chosen as provided in Section 9(a).

Section 9(c). [AFL Counsel Ogburn and Senator Borah reworded] "Whenever a question affecting commerce arises as to who are the representatives of employees in subsection (a), it shall be the duty of the Board to investigate such question and to certify to the parties in writing the name or names of such representatives. In any such investigation, the Board, its member, agent, or agency, shall provide for an appropriate hearing, either in conjunction with a proceeding under Section 10 or otherwise, and shall take a secret ballot of the employees involved. The Board, its member, agent, or agency shall establish the rules to govern any such election, and shall designate who may participate therein.

Section 10(a) [NLRB Compliance Chief Davis reworded] "The Board shall have power, as hereinafter provided, to issue orders and take appropriate steps to enforce or defend such orders, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall be vested exclusively in the Board, and shall not be affected by any other means of adjustment or prevention that is or may be established by agreement, code, law, or otherwise [except as provided in section 11.]

Section 10(b). [Senator Borah deleted]

Title II, Section 11. [Secretary Perkins deleted]

Title II, Section 12. [NLRB Compliance Chief Davis arbitration deleted]