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J. Warren Madden

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# Origin and Early Years of the National Labor Relations Act\*

By J. WARREN MADDEN\*\*

IT is good for the participants in any institution to think about and discuss the history of their institution, even though this folklore is entirely familiar to them. The institution of the law of labor relations has a Founding Father, Senator Robert F. Wagner of New York. Starting as an immigrant boy from Germany, he found in the city and state of New York the opportunity to forge for himself a career which culminated in his service for several terms in the United States Senate. During the critical periods of the Great Depression, he brought into being more important and enduring legislation than any other member of Congress has done in our history. Of this legislation, the statute which, in common speech, bears his name is, of course, the one which is the foundation of the imposing structure of labor law in the United States.

Something of the story of the enactment of the Wagner Act<sup>1</sup> should be recounted here. In June, 1933, shortly after the new administration had taken office, the National Industrial Recovery Act<sup>2</sup> was passed. It provided that the various industries could establish codes providing minimum wages and maximum hours to prevent cut-throat competition. The act contained section 7(a), which provided that every code should contain a provision that employees should have the right to organize and bargain collectively through representatives of their own choosing. Even though section 7(a) created no enforcement machinery, the President, without any statutory authority, appointed a National Labor Board consisting of distinguished representatives of labor and of industry, with Senator Wagner as chairman.

In spite of the low level of some 3,000,000 to which union membership had fallen and the continued high level of unemployment, unions,

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\*\* Professor of Law, University of California, Hastings College of the Law. Senior Judge, United States Court of Claims. Sits frequently by assignment of Chief Justice of United States Supreme Court with United States Court of Appeals, Ninth Circuit.

<sup>1</sup> 49 Stat. 449 (1935), as amended, 29 U.S.C. §§ 151-68 (1964).

<sup>2</sup> 48 Stat. 195 (1933).

incited by section 7(a), demanded recognition and collective bargaining but were rebuffed by most employers, including all the big employers. The Senator, in his experience as Chairman of the Labor Board, learned that the refusal of employers to bargain, and their creation of "employee representation plans," better known as company unions, were prolific causes of strikes.

Within a year after the passage of the National Industrial Recovery Act, Senator Wagner drafted a statute, modeled after the Federal Trade Commission Act,<sup>3</sup> creating a quasi-judicial tribunal with defined legal authority and power to have its orders enforced by court decree. In February, 1934, the proposed statute was introduced in the Senate, and extensive hearings were held in the Senate Committee. Mr. Wagner urged that the National Industrial Recovery Act was having little success due to the lack of mass purchasing power which resulted from low wages and high unemployment and that section 7(a) was not being obeyed since it contained no enforcement power. Industry's spokesmen were unanimously opposed to the bill, and it became apparent that it could not be enacted at that session. As a compromise, in June, 1934, Congress enacted Resolution 44,<sup>4</sup> which authorized the President to establish a board or boards to investigate situations relating to section 7(a) of the Recovery Act. The only power, other than the power to investigate, given to the board by Resolution 44, was the power to conduct elections by secret ballot in order to determine the employees' choice as to representatives for collective bargaining.

The President promptly appointed a distinguished board of three men, none of whom represented industry or labor. The experience of this board may have been educational but it was also completely frustrating. It functioned until May, 1935, when the United States Supreme Court held the National Industrial Recovery Act unconstitutional.<sup>5</sup> In the meantime, Senator Wagner, recognizing that Resolution 44 was substantially worthless, introduced a bill similar to his 1934 bill. Again, extensive hearings were held and the same opposition developed. Leon Keyserling, the Senator's Administrative Assistant who worked intimately with the Senator on this project, writes:

[T]he legislation was opposed by organized industry with a force and fervor and expenditure of funds perhaps unparalleled. It was vehemently opposed by almost all of the press, ranging from the persistent

<sup>3</sup> 38 Stat. 717 (1914), as amended, 15 U.S.C. §§ 41-71 (1964).

<sup>4</sup> 48 Stat. 1183 (1934).

<sup>5</sup> *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

opposition of the *New York Times* to the less responsible tirades of less circumspect journals. It was roundly condemned by so eminent and sincere an editorialist as Mr. Walter Lippman, who said: "If the bill were passed, it could not be made to work. It is preposterous to put such a burden upon mortal men. The bill should, I believe, be scrapped."<sup>6</sup>

Frank R. Kent of the *Baltimore Sun* called the Senator a "labor addict" for championing the bill. Some left wing labor spokesmen opposed the bill because it would lead to government intervention in unionism.

In the presence of the President, influential senators asked Mr. Wagner to withdraw the bill. Only after the bill's passage by the Senate, and when it seemed certain that the House would pass it, did the President give it his endorsement. No member of the President's cabinet, or of his brain trust, gave Wagner any help in getting the bill passed. And Keyserling points out that even in their memoirs, in which they admitted participation in the great accomplishments of the New Deal Era, none claimed any credit for the Wagner Act.<sup>7</sup> To again quote Keyserling:

While it is true that [Wagner's] proposal could not have become law in the political climate of 1928, nor perhaps in the climate of 1938, it is equally true that there would never have been a Wagner Act or anything like it at any time if the Senator had not spent himself in this cause to a degree which almost defies description.<sup>8</sup>

The Senator's hope was that his law would make American working men free, by permitting them to join forces with their fellow workmen instead of standing alone and insignificant; that it would, in time, make them and their country affluent, by creating a great mass purchasing power for the products of American industry. He was right on both counts.

The United States Supreme Court, as mentioned above, invalidated the National Industrial Recovery Act in May of 1935.<sup>9</sup> Congress was anxious to do something but doubtful as to what it had power to do. It was aware that if it passed an unconstitutional law the Supreme Court would correct its error. Nevertheless, Senator Wagner's bill was passed by Congress on July 2, 1935, and signed by the President on July 5. The new act was to be administered by a three-man board appointed by the President. Ultimately the appointees were to serve

<sup>6</sup> Keyserling, *The Wagner Act: Its Origin and Current Significance*, 29 GEO. WASH. L. REV. 199, 201-02 (1961).

<sup>7</sup> 49 Stat. 449 (1935), as amended, 29 U.S.C. §§ 151-68 (1964).

<sup>8</sup> Keyserling, *supra* note 6, at 201.

<sup>9</sup> *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

five year terms, but the terms of the initial three appointees were to run for one, three, and five years so that expiration of the terms would be staggered. Although it was July, and Congress in those days was often hopeful of adjourning in July, the President did not hurry to appoint the members of the new board. There was much unemployment, even among persons who had had good salaries before the depression, and these board positions carried \$10,000 salaries, but apparently there was no insistent clamor by anyone to get appointed to the new board.

I was, at the time, a teacher of Real Property at the University of Pittsburgh Law School. I knew no more about the Wagner Act than what was written in Pittsburgh newspapers and in Time magazine. By the sheerest of accidents, I had served in 1933 on a Pennsylvania Governor's Commission, appointed to investigate a remarkable Pennsylvania institution known as the Coal and Iron Police; and in 1934 I acted as arbitrator in a rather dull contract renewal arbitration between the Pittsburgh Street Car company and its employees. About August 20, 1935, I received a telephone call from the Solicitor of the Department of Labor, speaking for the Secretary, asking me to come to Washington that afternoon and talk about a place on the new Labor Board. My wife and children were excited, as was I. My visit with the Secretary before dinner occupied about a half-hour. She told me that she had discussed my qualifications with two good men who knew me. I told her that I was a teacher of Real Property and knew practically nothing about Labor Law. She said that was good; that I would have no prejudices. We agreed to meet again at ten that night at her house. At that meeting she told me she was authorized to offer me the chairmanship of the Board and the five year term. She also told me that my colleagues would be economists who had practical experience in labor relations. I accepted the Secretary's offer.

Let us remind ourselves of the time, effort, thought and sacrifice which Senator Wagner had invested in this statute for which he had such high hopes and of Walter Lippman's statement that the statute could not be made to work; that it is preposterous to put such a burden upon mortal men.<sup>10</sup> With this in mind, what is the explanation for selecting the operating engineer of this delicate and complicated piece of machinery by a process about as casual as the picking of a name out of a hat by a blind man. I know of no explanation. But having in mind some professors, as well as some business executives and lawyers, who have gone to Washington, I think that, considering the method of

<sup>10</sup> See text at note 6 *supra*.

selection, it is not immodest for me to say that the result could have been worse.

The President sent the nominations to the Senate on the eve of adjournment, which had been delayed for a time by a one-man filibuster by Senator Huey Long. Since the names of my colleagues were favorably known, and mine was unknown, the Senate confirmed the nominations without debate.

The Board's first meeting was on August 27, 1935. There I became acquainted with the staff of people who had served the Resolution 44 Board and had, by statute, been assigned to serve the new Board if it desired to retain them. The Resolution 44 Board had set up Regional Offices in some 20 principal cities of the country. These holdover people knew the new statute thoroughly and had been busy making plans for its administration. Their knowledge was of great help to the Chairman. The General Counsel of the Resolution 44 Board, Professor (later Judge) Calvert Magruder was returning to his position on the Harvard Law Faculty, and as a replacement he found for us Mr. Charles Fahy, counsel of the Petroleum Board. Thus Mr. Fahy and I came to the Labor Board at the same time, both without the advantage of the "head start" which most of our staff had over us. Mr. Fahy has since gone much farther in a distinguished career, becoming the Solicitor General of the United States and a judge of the United States Court of Appeals for the District of Columbia. We could not have had a better General Counsel.

Just nine days after the Board's first meeting, the first of the slings and arrows, to which we were to become accustomed, arrived. The "National Lawyers Committee of the American Liberty League" called a press conference in Washington and distributed copies of its "Report on the Constitutionality of the National Labor Relations Act."<sup>11</sup> The committee members, whose names were printed in the report, were 58 in number, and the list was a real "who's who in American Law." A former Attorney General of the United States, two former Solicitors General, presidents of bar associations, lawyers for great business enterprises, and leaders of the bar in principal cities were among those who subscribed to the "Report."

This document is worthy of special mention because, I think, no such writing will ever occur again. It was in the form of a 132 page legal brief. Its introduction was a summary which concluded with this language:

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<sup>11</sup> NATIONAL LAWYERS COMMITTEE OF THE AMERICAN LIBERTY LEAGUE, CONSTITUTIONALITY OF THE NATIONAL LABOR RELATIONS ACT (September 5, 1935).

Considering the Act in the light of our history, the established form of government and the decisions of our highest Court, we have no hesitancy in concluding that it is unconstitutional and that it constitutes a complete departure from our constitutional and traditional theories of government.<sup>12</sup>

These fifty-eight lawyers had no client. The Board had not proceeded, nor even threatened to proceed, against anyone. So this definitive legal advice was just broadcast at large *pro bono publico*.

I have no doubt that the "Report" did great harm not only to the Board, in creating resistance to obedience to and enforcement of the law, but to clients of lesser lawyers who, relying on the dictum of the 58 distinguished lawyers, advised their clients that they could violate the law with impunity and thereby involved them in expensive litigation and charges for back pay. I think that had any one of these 58 lawyers had a paying client who sought advice on the question of whether the act was valid, the lawyer could not have given a definitive answer to his client's question. His research would have brought him to the conclusion that the act would probably be held unconstitutional, but there were precedents such as *Danbury Hatters*,<sup>13</sup> *Second Coronado*,<sup>14</sup> *Bedford Stone*<sup>15</sup> and other cases which might lead to the opposite result. In any event, the "Report" was an impertinence and was probably so regarded by the United States Supreme Court.

In spite of the condemnation of the new statute by important lawyers and editors, it was not for us to throw in the towel. But careful maneuvering was called for, lest we find ourselves in the United States Supreme Court with a weak case. That had happened to the Government in the *Schechter Poultry* case,<sup>16</sup> later known as the "sick chicken case," in which the Supreme Court had invalidated the National Industrial Recovery Act. The staff people of the board were able to settle unimpressive cases, or persuade unions not to press such cases, in order to protect our Supreme Court strategy. We were fortunate as well as careful, and in due time we reached the Supreme Court with five cases which fairly presented the constitutionality of our law as applied to a variety of situations.

Our cases were not argued in the Supreme Court until February,

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<sup>12</sup> *Id.* at x-xi.

<sup>13</sup> *Loewe v. Lawlor*, 208 U.S. 274 (1908) (*Danbury Hatters*).

<sup>14</sup> *Coronado Coal Co. v. United Mine Workers*, 265 U.S. 295 (1925) (*Second Coronado*).

<sup>15</sup> *Bedford Cut Stone Co. v. Journeyman Stone Cutters Ass'n*, 274 U.S. 37 (1927) (*Bedford Stone*).

<sup>16</sup> *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

1937, and in the meantime, that Court was making important decisions, some of which were not at all promising for our project. In January, 1936, the Court held the important Agricultural Adjustment Act unconstitutional.<sup>17</sup> That case did not involve labor, and the Government was relying on the taxing power rather than the commerce power. But the decision did show that the Court was still relentless in narrowly interpreting the Constitution. In May of 1936, the Court decided the case of *James Walter Carter v. the Carter Coal Company*,<sup>18</sup> which did involve statutory wage-fixing and price-fixing in the depressed coal industry. The opinion repeated earlier statements of the Court that manufacturing was not interstate commerce but preceded such commerce, and applied the same rule to mining.<sup>19</sup> We were greatly discouraged by the *Carter* decision.<sup>20</sup>

<sup>17</sup> United States v. Butler, 297 U.S. 1 (1936).

<sup>18</sup> 298 U.S. 238 (1936).

<sup>19</sup> *Id.* at 303-04.

<sup>20</sup> One staff member, who had a talent for rhyming, tried to cheer us up by composing a song about *Carter*, which he sang to the tune of "The Wreck of the Old '97"

T'was the 18th of May  
And the birds so merry  
Sang round the Court House door.  
Came James Walter Carter  
On a writ of certiorari  
A-cryin' that his hurt was sore.

Oh, Mr. Chief Justice and all your justices  
I've traveled a weary road  
To tell you my troubles,  
And the burden of this is  
They've hit me with a soft-coal code.

They's a tryin' to take away my right  
To cut my miners' wages.  
They's socked me with a draw-back tax.  
They's a whitlin' and a chawin'  
At my profits when I needs them  
To pay my surplus income tax.

Will the court stand up for freedom  
Or deny Mr. Carter?  
The question stood that way.  
There was joy in the heart of the tax-payin' martyr,  
When up spake Sutherland, J.

"I opine this statute has to do  
With miners black and smelly  
Who earn their bread from coal,  
But if no bread's forthcoming for a wholly local belly,  
The Government has no control.

Our activities proceeded on the assumption that the Wagner Act was our valid authority, but perhaps we were, as President Johnson said when describing the troubles which assail him from all directions, "in the position of a jack rabbit in a hailstorm, hunkered up and taking it." Some federal appellate courts had held, quite early, that our adversaries could not, by injunction, prevent us from holding hearings, but that they had to go through the statutorily provided procedure; and if they lost before the Board, they were required by statute to seek review in the United States Circuit Courts of Appeal.<sup>21</sup> The Board and its hearing officers were frequently charged with being lax about the admission of evidence. Our statute, like most of the statutes creating administrative, quasi-judicial agencies, provided that we were not bound by the rules of evidence. On one occasion, the Board itself was hearing a case which involved an important manufacturer of truck trailers. The vice-president of the company was questioned by the Board counsel about the employment of a Pinkerton spy to undermine the union, which had lost all 29 of its members. The company counsel objected, urging that the relation between a labor spy and his employer is a privileged relation which is not subject to disclosure at a hearing. I forewent the opportunity, perhaps a unique one, of making this addition to the list of privileged relations. The story, when it was told, was not a pleasant one: the spy put the names of union members on pieces of paper which he deposited in agreed places; the vice-president picked them up, memorized them and burned the papers, and a day or two later discharged the union men from lingering overlong in the toilet or smoking in a forbidden place or some other infraction of company rules; when the union men were all discharged the spy was ostentatiously marched to the door and discharged, taking with him the contents of the union treasury, he being the treasurer.

Evidence of such unfair labor practices, which were not only violations of the statute but were morally reprehensible, tended to divert the point of interest from the question of whether such practices occurred, to the naked constitutional question of whether it was the business of the federal government to interfere.

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"So James Walter Carter  
You may cut your miners' wages  
In the West Virginia hills.  
But if price wars run you,  
Remember that us sages  
Regards those as local ills."

<sup>21</sup> *E.g.*, *E. I. Dupont De Nemours & Co. v. Boland*, 85 F.2d 12 (2d Cir. 1936); *Bradley Lumber Co. of Arkansas v. NLRB*, 84 F.2d 97 (5th Cir. 1936).

The Supreme Court decisions in our cases came down on April 12, 1937<sup>22</sup> They were, of course, surprising. But it would be equally surprising to hear someone argue today that the federal government, given by the Constitution the power to foster and protect interstate commerce, must stand helpless in the face of an event which stops ore trains in Minnesota, ships on the Great Lakes, freight trains in Ohio, Pennsylvania and West Virginia and barges on the Ohio River, because the event occurred inside the gates of a steel mill in Aliquippa, Pennsylvania. I do not pursue this argument farther to include, for example, a barbecue stand in Alabama. But I can understand and sympathize with the Supreme Court's inability to draw a line anywhere short of *de minimis*.<sup>23</sup>

<sup>22</sup> NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937); NLRB v. Fruehauf Trailer Co., 301 U.S. 49 (1937); NLRB v. Friedman-Harry Marks Clothing Co., 301 U.S. 58 (1937); Associated Press v. NLRB, 301 U.S. 103 (1937); Washington, Va. & Md. Coach Co. v. NLRB, 301 U.S. 142 (1937).

<sup>23</sup> In 1937, Professor Calvert Magruder sent me a poem written by the class poet of his Labor Law class at Harvard. The poem is based upon an actual decision of the Board. So it is good law. You may judge whether it is good poetry.

Alice in Labor Land (1937 Anonymous)

When Alice had decided that she was a silly ass  
To waste her time exploring lands within the looking glass  
While man like Warren Madden, Johnnie Lewis, Willie Green  
At logical illogic far surpassed the King and Queen.

She tripped up to a factory which to her untutored gaze  
Appeared just like a factory of the horse and buggy days  
When stupid sort of people thought that laborers should work  
And speeches should be given by such lads as Edmund Burke.  
And other sorts of people had the charming naiveté  
That made them think employers were entitled to last say.

Said Alice to the foreman: "How about a job for me.  
For I would be a credit to your goddam company."  
"Well really," said the foreman, "I'm afraid you'll have to go,  
For I gather from your diction you espouse the C.I.O."

"Why, you economic royalist, you nasty so and so,"  
Replied our lovely Alice, "I'll report to Uncle Joe."

So Joseph Warren Madden, at sweet Alice's behest,  
Just took the little matter to his fond maternal breast.  
But his milk of human kindness, at the outset, seemed to curdle  
For he really hadn't reckoned on so difficult a hurdle.  
The factory in question did not have a job to fill  
Which to less resourceful bodies would have seemed a bitter pill.

It gives one a good feeling to be held legitimate by the United States Supreme Court; to know, after all, that one has not been presiding over a kangaroo court. Our work increased, since unions and workmen naturally expected more of the Board after the Supreme Court decisions. The great mass-production industries of the country, now having good legal advice, came to terms with the law. But even before the Supreme Court decisions, the AFL-CIO civil war in the labor movement had occurred. It posed hard problems of statutory interpretation and many of our decisions made all of the involved parties unhappy. But these decisions were the first steps in the formation of legal doctrines, most of which are still the law.

I return for a moment to the Founding Father, Senator Wagner. I have told you how casual he was about the selection of those who would operate the delicate machine which he had taken such extraordinary pains to create. That hands-off attitude was maintained throughout the five-year period of my chairmanship of the Board. There was constant newspaper and magazine criticism of the Board's decisions; there were hearings before Senate committees and a full-dress investigation of the Board by a House Special Committee; yet never *once* in the five years did the Senator make a suggestion as to how we might better do our work. I am sure that he would have regarded it as a tragedy if we had wrecked his machine, but I am not at all sure that he would have intervened to prevent even that.

While on the subject, I will say something about the Board's relations with the President. On a number of occasions when the Board seemed to be in even more of a crisis than usual, my colleagues urged me to go see the President, explain our predicament and ask for his help, but I never did that. Considering that the President and his advisers regarded the Board as a political liability, I thought that we were lucky that he left us strictly alone. I felt that he did not understand very well what we were doing; that if I went to him for help I would also get advice; that the advice might not be good but even if bad it would be embarrassing not to follow it.

On one single occasion did the President ask me to have the Board

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The Board would not be beaten, they just all let down their hair  
 And solemnly they chanted "unfair, unfair, unfair."  
 So let there be created here a preferential list.  
 From hiring aught *but* Alice you must cease, you must desist.  
 It really doesn't matter, as a worker Alice stinks,  
 Or that she's rich as Croesus, or a stone-head like the Sphinx.  
 You'll take her in your factory so that by this you may know  
 You cannot take in vain the mystic letters, C.I.O.

take certain action. In 1938, Senator Wagner was running for reelection. The President told me that he was hearing from New York that "Bob is in trouble." He had a formidable Republican opponent, and throughout the country, there were prospects of Republican resurgence. The New York Times had, for the first time in Wagner's political career, come out against him, principally because of connection with the Wagner Act. There was a strong implication in the President's conversation that the Wagner Act was a political albatross. The President's request was that the Board so revise its rules as to allow *employers* to petition for elections of collective bargaining representatives for their employees. I explained to the President why such a revision of the rules, at that early time in the development of unions, would not be good. The President seemed convinced, and I left. We did not revise our rules.

The election was held two weeks later, and there was Republican resurgence, in the country and in New York. Governor Lehman was re-elected over Mr. Dewey by only 50,000 votes. Senator Wagner, with a majority of 500,000, bore the albatross heroically. That was the only opportunity I ever had to play a role in party politics but I did not take the opportunity. If I had removed the albatross, perhaps the Senator would have gotten *all* the votes.

As I observe the Board's activities today, from a discreet distance, I can only say that the work of the Board is voluminous and complex, which may be partly due to the 1947 and 1959 amendments and partly due to fine points in the statute which the Board and the labor bar of the 1930's were too unsophisticated to discover. I am sure that the Board in recent years has not been engaged in crude empire building, but I am glad that I served with the Board during the 1930's and not more recently. In those days, there were very few gadgets on the instrument panel; we switched on the ignition, cranked up the machine and were off.

The great Learned Hand, in his little book, *The Spirit of Liberty*, said:

But I believe that the history of commissions is very largely this: When they start, they are filled with enthusiasts, and they are flexible and adaptive. Like all of us after they have proceeded a while they get their own set of precedents, and precedents 'save the intolerable labor of thought' and they fall into grooves. When they get into grooves, then God save you to get them out of the grooves.<sup>24</sup>

Before the Labor Board became respectable, Judge Hand made

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<sup>24</sup> L. Hand, *The Spirit of Liberty* (3d ed. 1960).

an offensive remark about the Board to one of our lawyers who was arguing before him. When I was told of the incident I sent the Judge an offensive telegram. A good while thereafter, we became good friends, and still later, I sat with Judge Hand on his court. He was still making offensive remarks to counsel, but I had become a judge and was fitting snugly into my groove; so I kept silent.

But the Labor Board, though it has become highly respectable, has never become stuffy or bogged down in a groove. It has done its work with intelligence and distinction, and I am proud to claim a place in its family tree.

### Sequel

The address upon which the foregoing pages were based was made to an audience of persons actively engaged in labor law litigation and administration. As I said at the beginning of my remarks, I had no useful information or advice to give to such a group of specialists. I therefore talked to them about the early history of the National Labor Relations Act and its administration. The less specialized readers of the *Journal* might, after reading the address, be left wondering what ever became of the enterprise which was, in the beginning years, the subject of much controversy, and of some eminent opinion that its basic law was unworkable.

Those unfriendly to the Act were hopeful that the Supreme Court would dispose of it by holding it unconstitutional. That hope was disappointed by the Court's decisions in April, 1937.<sup>25</sup> But it was, after all, only a statute, and was and is subject to repeal by Congress. There was agitation for its repeal. I recall a cartoon of the times which pictured a well-groomed lady saying to her friend: "My husband seems to have recently developed a great interest in vaudeville. I heard him cry out in his sleep last night, 'Kill the Wagner Act!'" But Congress did not repeal the Act. It did not even amend it until 1947, when it enacted the Taft-Hartley Act.<sup>26</sup> That important statute added to the original Act provisions creating unfair labor practices on the part of labor unions. By 1947 the Wagner Act had been in effective operation for ten years, long enough to establish general recognition of the rights of labor. It was not too early for Congress to impose some restrictions on the activities of labor unions, and it did so in the Taft-Hartley Act. If it had not been for the expanded view of the constitutional powers of Congress under the commerce power, which view was

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<sup>25</sup> Cases cited note 22 *supra*.

<sup>26</sup> 61 Stat. 136 (1947), 29 U.S.C. §§ 141-87 (1964).

first expressed by the Supreme Court in the *Jones & Laughlin* case in 1937,<sup>27</sup> there would have been no valid constitutional basis for the Taft-Hartley Act. Thus those who were unfriendly to labor and to the Labor Board, and who deplored the Supreme Court's 1937 decision, were able, in 1947 to build upon the foundation of that decision in imposing restrictions upon labor. One of the provisions of the Taft-Hartley Act, giving to each state the option of forbidding "union-shop" contracts if the state so chooses, has been the subject of political protest by union labor ever since 1947 "Right to work" laws, by which states make use of that option, are the subject of political agitation in some states, and Congress is constantly urged, unsuccessfully, to repeal that provision of the 1947 Act.

There has been important litigation in recent years about the extent to which the federal labor laws have "preempted" the field and disabled states from having labor laws of their own.<sup>28</sup> In California, in the past year, much attention has been given to absence of labor unions among field workers in agriculture. The Wagner Act expressly excluded agricultural workers from its coverage. That exclusion probably did not express any intention on the part of Congress that farm workers should not be allowed to have unions. It meant only that Congress was not willing to extend *national* protection to an effort by farm workers to organize and join unions. It would follow that the subject is not preempted by federal law, and that if a state desired to enact a law covering this subject it would be free to do so.<sup>29</sup>

The second of the important statutes amending the Wagner Act was not enacted until 1959, twelve years after the Taft-Hartley Act. This was the Landrum-Griffin Act.<sup>30</sup> Its provisions regulate in great detail the conduct of the internal affairs of labor unions including their elections of officers and their management of funds. Detailed reports to union members and to the Secretary of Labor are required. The prediction, made at the time the unions are urging the enactment of the Wagner Act, that if they induced the Government to involve itself in labor matters to protect labor from abuses by employers, they would, sooner or later, find themselves subjected to Government regulation, has been fulfilled. On March 2, 1967, the National Labor Relations Board in an impressive ceremony took notice of the fact

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<sup>27</sup> NLRB v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

<sup>28</sup> For a discussion of preemption in labor law see Updegraff, *Preemption, Predictability and Progress in Labor Law*, 17 *HASTINGS L.J.* 473 (1966).

<sup>29</sup> The subject of preemption has many and varied applications which will not even be mentioned in this article.

<sup>30</sup> 73 Stat. 519 (1959), 29 U.S.C. §§ 401-531 (1964).

that the Board, in performing its important function of ascertaining the choice of employees of "representatives of their own choosing" for collective bargaining had, a few days earlier, received the 25 millionth ballot in its long series of secret ballot elections held for that purpose. To me it was significant that one of the sponsors of the luncheon which was a part of the celebration was the National Association of Manufacturers.

The National Labor Relations Act, the administration of which this writer had a part in its early years, is still a lively, interesting and useful part of our law. It has, I think, more nearly fulfilled the hopes of its author than any other important statute in our history. Senator Wagner hoped that it would make the working people of the country confident and free, and that their prosperity would insure the prosperity of their country.