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THE WAGNER LABOR ACT CASES
By JACOB GEFFS and WILLIAM M. HEPBURN*

I. THE ACT AND ITS BACKGROUND.

The National Labor Relations Act, commonly called the Wagner Labor Disputes Act, was signed by President Roosevelt on July 5, 1935. To many people it seemed a novel and even radical experiment. Most of the Act was in fact not new, but the product of the long experience of the federal government in dealing with labor problems since 1877. Its substantive and procedural provisions were based upon earlier statutes, not all of which are new.

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"There is now pending in Congress a resolution to amend the Constitution. The first section of the proposed amendment is this: 'The Congress shall have power by laws uniform in their geographical operation to regulate commerce, business, industry, finance, banking, insurance, manufactures, transportation, agriculture, and the production of natural resources.' When that proposed amendment has been submitted and ratified the statute now under consideration, in the respects considered here, if then re-enacted, certainly will be constitutional. But not until then. Then also what yet remains of the sovereignty of the states will cease to be and the 'citizen' will have become a 'subject.'"
For the opinion of the Lawyers' Committee of the Liberty League, see infra, note 33.
3(1936) First Annual Report of the National Labor Relations Board, 1-8. As to when the labor problem first became national in scope, see Bonney, Federal Intervention in Labor Disputes, (1923) 7 MINNESOTA LAW REVIEW 467, 468-69.
which dealt with labor, however; nor had they all been upheld by the Supreme Court.6

The Act was passed to encourage collective bargaining between employers and workers in businesses subject to federal control. In general, under the Act, employers may not interfere with proper union activities of workers, and are required to recognize and deal with representatives of a majority of workers as their sole bargaining agency, whenever the workers can agree upon who shall represent them.7 The Act is based on the theory that strikes in many businesses and industries may be burdens upon interstate or foreign commerce, which is subject to regulation by the federal government; and that the federal government may therefore encourage collective bargaining in order to discourage strikes.8


829 U. S. C. A. sec. 157, 2 Mason's U. S. Code, tit. 29, sec. 157: [Sec. 7] "Right of employees as to organization, collective bargaining, etc. "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection."

29 U. S. C. A. sec. 159 (a), 2 Mason's U. S. Code, tit. 29, sec. 159(a): [sec. 9 (a)] "Representatives of employees for collective bargaining; . . . (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer."

29 U. S. C. A. sec. 151, 2 Mason's U. S. Code, tit. 29, sec. 151: [Sec. 1] "Findings and declaration of policy. "The denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce. . . . "Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees."

Compare the opinion of the Supreme Court in Schechter v. United States, (1935) 295 U. S. 495, 55 Sup. Ct. 837, 79 L. Ed. 1570, 97 A. L. R.
In addition to the provision of the Act asserting the right of employees to organize themselves into labor unions and bargain collectively through representatives of their own choosing, the Act defines unfair labor practices on the part of the employers and forbids them as interfering with the rights of employees. To guarantee these rights the National Labor Relations Board is created as the administrative agency of the federal government.

Procedure under the Act, from the point of view of the aggrieved individual, is simple. A charge is made to the National Labor Relations Board, which then determines its jurisdiction in the dispute; the board or its agent may thereupon issue a complaint and hold a hearing. Evidence is taken and a decision is reached on the merits of the case. If the decision is that the employee has been injured by unfair labor practices, the board has power to issue a "cease-and-desist order," requiring the person complained of to stop violating the rights of the employee.

947, where Mr. Chief Justice Hughes said: "The power of Congress extends not only to the regulation of transactions which are part of interstate commerce, but to the protection of that commerce from injury. It matters not that the injury may be due to the conduct of those engaged in intrastate operations," [if such conduct "affects" interstate commerce directly.]


1029 U. S. C. A. sec. 158, 2 Mason's U. S. Code, tit. 29, sec. 158; [Sec. 8] "Unfair labor practices by employer defined.

"It shall be an unfair labor practice for an employer—
(1) To interfere with, restrain, or coerce employees in the exercise of rights guaranteed in section 157 of this title [that is, to organize and bargain collectively].
(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it. . . .
(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. . . .
(4) To discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this chapter.
(5) To refuse to bargain collectively. . . ."


"The Board is given no blanket authority over all employers and employees in all industry, even in the restricted field of labor relations in which the Act operates. Jurisdiction is limited to the investigation of questions 'affecting commerce' concerning the representation of employees (Sec. 9 (c), and to the prevention of unfair labor practices 'affecting commerce' (sec. 10 (a)))." (1936) First Ann. Rep., National Labor Relations Board 11. The jurisdiction of the board is, of course, subject to review.

or it may be an affirmative order such as the facts of the case may justify. Should the person against whom the order is issued fail to conform to it, there is, up to this point, no sanction provided by the Act which can make him do so. The board may, however, then petition the proper circuit court of appeals to enforce its order. If the order of the board is affirmed by the court, the delinquent person must comply under penalty of contempt.

The jurisdiction of the board is limited to businesses in which labor disturbances will constitute a burden on interstate or foreign commerce. The Act does not confer on the federal government any general authority over all business.

The federal government has been involved in labor controversies, directly or indirectly, for more than half a century, by presidential intervention, through arbitration, as a policeman to keep the peace by military force, or through injunction in the

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14 29 U. S. C. A. sec. 160 (c), 2 Mason's U. S. Code, tit. 29, sec. 160 (c): "... 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 such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this chapter. . . ."

15 Except as provided for in section 12 of the Act (29 U. S. C. A. sec. 162, 2 Mason's U. S. Code, tit. 29, sec. 162): "Any person who shall willfully resist, prevent, impede, or interfere with any member of the board or any of its agents or agencies in the performance of duties pursuant to this chapter shall be punished by a fine of not more than $5,000 or by imprisonment for not more than one year, or both."

16 Subject to review of course, as in other decisions of the circuit courts of appeals, by the Supreme Court. 29 U. S. C. A. sec. 160 (c), 2 Mason's U. S. Code, tit. 29, sec. 160 (e).

17 (1936) First Annual Report of the National Labor Relations Board 11, note 12, supra. And see the definition of "commerce" as used throughout the Act, 29 U. S. C. A. sec. 152 (6), 2 Mason's U. S. Code, tit. 29, sec. 152 (6).

18 A somewhat different view evidently was entertained by Judge Otis when he wrote the opinion in Stout v. Pratt, (D.C. Mo. 1935) 12 F. Supp. 864, 866: "It so clearly applies, and was intended to apply, to all employers and employees in all industry, that it was thought necessary by Congress to expressly except from its provisions such employment as children by their parents and of that of domestic servants. Sec 2(3), 29 U. S. C. A. 152 (3), 2 Mason's U. S. Code, tit. 29, sec. 152 (3). If a father has three sons employed by him in a family enterprise, he still may bargain individually with each; he is not required to bargain with the representatives of the majority."

19 See Bonney, Federal Intervention in Labor Disputes, (1923) 7 MINNESOTA LAW REVIEW 467, 468-69: "... There was no national problem calling for federal intervention before 1877. . . . The approach of the national status of the problem is merely foreshadowed by the disturbances of this year. . . . The great southwestern strike of 1886 announced its arrival."
federal courts, principally against employees. On the ground of interference with interstate commerce or transportation of the mail, it has sought to end strikes. The legislative branch of the federal government has not been deaf to the interests of labor. Congress has time and again passed acts designed to give back to labor the bargaining power of which it was deprived long ago in England by the ancient Statutes of Laborers. But as often as Congress has attempted to restore to labor this lost bargaining power, the decisions have construed it away. An example of labor legislation later nullified by the courts is the Erdman Act of 1898, which was the basis of the decision in *Adair v. United States*. Not only have acts of Congress intended as an aid to labor been struck down by the courts, but at least one piece of legislation which was perhaps not intended to be used in the economic conflict as a weapon against labor, has been turned by the courts into such a weapon.

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22(1936) First Annual Report of the National Labor Relations Board 1-3; Witte, The Federal Anti-Injunction Act, (1932) 16 *Minnesota Law Review* 638. "In a striking series of cases decided between 1908 and 1923, the Supreme Court nullified a variety of efforts on the part of Congress to benefit the working classes. These decisions dealt, in a manner uniformly adverse to the interest of labor and favorable to the actual or apparent interests of business, with unionization, employers liability, workmen's compensation, child labor, and a minimum wage for women." Edgerton, The Incidence of Judicial Control over Congress, (1937) 22 Cornell L. Q. 299, 325-26.

23See Landis, Cases on Labor Law 1-3.


25"Finally, when the Democrats gained control of all branches of the government, the Clayton Act was enacted and labor heralded the labor sections of this measure as a combined magna charta and bill of rights. Within a few years, these sections were construed by the Supreme Court to have made no change in the law except to confer the right of trial by jury in a restricted class of contempt cases." Witte, The Federal Anti-Injunction Act, (1932) 16 *Minnesota Law Review* 638.

There is, however, a difference of opinion as to whether the Sherman Act of 1890 was intended to include labor combinations. See Landis, Cases on Labor Law 37.

"The Sherman Law was held in *United States v. United States Steel Corporation*, (1920) 251 U. S. 417, 40 Sup. Ct. Rep. 293, 64 L. Ed. 348, 8 A. L. R. 1121, to permit capitalists to combine in a single corporation fifty per cent of the steel industry of the United States, dominating the trade through its vast resources. The Sherman Law was held in United States
Among the immediate precursors of the National Labor Relations Act were the War Labor Board and the Railway Labor Act of 1926. The Wagner Act has borrowed a number of features from them. The War Labor Board, among other things, was designed to protect the union activities of workers. Under the Railway Labor Act of 1926, Congress used its power to regulate commerce among the states to control labor disputes in cases involving railways where the disputes might constitute an obstruction to interstate commerce. Thus it is apparent that the "board was created not as a completely new experiment in the field of labor relations but as the result of cumulative experience of many years during which various ways to deal with labor relations have been tried by the federal government."

II. SUPREME COURT DECISIONS ON THE WAGNER LABOR ACT.

A. THE CONSTITUTIONALITY OF THE ACT.

The five decisions of the Supreme Court upholding the v. United Shoe Machinery Company, (1918) 247 U. S. 32, 38 Sup. Ct. Rep. 473, 63 L. Ed. 986, to permit capitalists to combine in another corporation practically the whole shoe industry of the country, necessarily giving it a position of dominance over shoe manufacturing in America. It would, indeed, be strange if Congress had by the same act willed to deny to members of a small craft of workingmen the right to co-operate in simply refraining from work, when that course was the only means of self-protection against a combination of militant and powerful employers. I cannot believe that Congress did so." Brandeis, J., dissenting in Bedford Cut Stone Company v. Journeymen Stone Cutters' Association of North America (1927) 274 U. S. 37, 65, 71 L. Ed. 916, 928, 47 Sup. Ct. 522, 54 A. L. R. 791, 806.


See the principles and policies of the War Labor Board, as sanctioned by the president's proclamation, set out in Mr. Gregg's article, The National War Labor Board, (1919) 33 Harv. L. Rev. 39, 42.


National Labor Relations Act\textsuperscript{31} involved several constitutional questions. Most important of these were, first the constitutionality of the Act per se, and, second, the limits of its constitutional application.

The basic constitutionality of the Act was affirmed in the \textit{Washington, Virginia and Maryland Coach Company Case}\textsuperscript{32} by a unanimous opinion of the Court, holding that the Act was not an unconstitutional attempt to regulate intrastate as well as interstate commerce. In view of the fact that eminent lawyers had expressed positive doubts as to the possibility of such a holding,\textsuperscript{33} an examination of its basis in previous decisions of the Court on the question of Congressional power under the commerce clause of the constitution\textsuperscript{34} will help not only in understanding the implications of the \textit{Coach Company Case}, but the other four Wagner Act decisions also.

In 1908 the Supreme Court of the United States had before it the case of \textit{Adair v. United States},\textsuperscript{35} involving the constitutionality of the Erdman Act of 1898, section 10 of which provided that

"any employer subject to the provisions of this act and any officer, agent, or receiver of such employer, who shall require any employé, or any person seeking employment, as a condition of such employment, to enter into an agreement, either written or verbal, not to become or remain a member of any labor corporation, association, or organization; or shall threaten any employé with loss of employment, or shall unjustly discriminate against any employé because of his membership in such a labor corporation, association, or organization, . . . is hereby declared to be guilty of a misdemeanor, and, upon conviction thereof in any court of the United States of competent jurisdiction . . . shall be punished for each offense by a fine of not less than one hundred dollars and not more than one thousand dollars."

The indictment in the case charged that the defendant Adair, being an agent of a railroad company engaged in interstate commerce, violated section 10 of the Erdman Act, by threatening a carman employed by the defendant railroad company, with loss of his job, if he refused to enter into an oral or written agreement, not to become a member of the Brotherhood of Carman's.


\textsuperscript{33}We have no hesitancy in concluding that it [the National Labor Relations Act] is unconstitutional and that it constitutes a complete departure from our constitutional and traditional theories of government." The Lawyers' Committee of the Liberty League, Sept. 19, 1935.

\textsuperscript{34}United States constitution, art. I, sec. 8: "The Congress shall have power . . . to regulate commerce with foreign nations, and among the several states, and with the Indian Tribes."

merce and subject to the provisions of the act, had discharged one Coppage from its service because of his membership in a labor organization. Mr. Justice Harlan, giving the opinion of the Court, held, first that it was a violation of the fifth amendment for Congress to make it a crime to discharge a workman with whom there was no contract for a fixed term because he was a member of a labor organization. The Court said:

"... It was the defendant Adair's right—and that right inhered in his personal liberty and was a right of property—to serve his employer as best he could, so long as he did nothing that was reasonably forbidden by law as injurious to the public interests."

In the second place the Court decided that there was no

"such connection between interstate commerce and membership in a labor organization as to authorize Congress to make it a crime against the United States for an agent of an interstate carrier to discharge an employee because of such membership on his part. If such a power exists in Congress it is difficult to perceive why it might not, by absolute regulation, require interstate carriers, under penalties, to employ in the conduct of its interstate business only such members of labor organizations, or only those who are not members of such organizations—a power which could not be recognized as existing under the constitution of the United States."

In short, the Adair Case held that the right of an employer to fire employees not under contract is protected by the fifth amendment against Congressional interference, and that, moreover, labor organizations in industries admittedly in interstate commerce "have nothing to do with interstate commerce as such." Justices Holmes and McKenna dissented in separate opinions.

On both these points the Washington, Virginia and Maryland Coach Company Case seems to reach very different conclusions. In that case the Coach Company operated motor busses for hire between points in the District of Columbia and Virginia. A charge was filed with the National Labor Relations Board by the Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, alleging the discharge of drivers and garage workmen for union activity, in violation of section 8, subd. (1) and (3), and section 2, subd. (6) and (7) of the National Labor Relations Act, forbidding unfair labor practices.36

The board rendered its decision,\(^7\) setting forth its findings of fact, and issued an order against the Coach Company, which admitted the interstate character of its business. The Coach Company did not comply with the order of the board, which then petitioned the circuit court of appeals for the fourth circuit. The court entered a decree upholding the Act and enforcing the order of the board.\(^8\) Judge Soper, speaking for the court, held that if the findings of fact of the board were supported by evidence, they would not be inquired into, that the Act was not a denial of due process of law guaranteed by the fifth amendment, and that the power given to the board by the Act to prevent unfair labor practices in interstate commerce was properly exercised. This judgment of the circuit court of appeals was unanimously affirmed by the Supreme Court. In the argument before the circuit court of appeals the Coach Company relied on \textit{Adair v. United States}\(^9\) and its companion case, \textit{Coppage v. Kansas},\(^4\) involving a state statute and its validity under the fourteenth amendment. Said Judge Soper:

"in the first case, an act of Congress was declared unconstitutional which made it a misdemeanor for a common carrier to discriminate against its employees by discharge or otherwise because of membership in a labor union; and in the second case, a state law was declared invalid which made it unlawful for any individual to coerce or influence any person to enter into an agreement not to join a labor union as a condition of securing or continuing in employment.

"These citations are not irrelevant, especially \textit{Adair v. United States}, because there, as here, a carrier engaged in interstate commerce, in the commonly accepted meaning of the term, was involved, and vigorous argument was advanced by counsel for the United States and by the dissenting justices to sustain the act as a reasonable exercise of the power of Congress to regulate commerce between the states. But the difficulties which these decisions oppose to the validity of the National Labor Relations Act seem to us to have been removed by the more recent unanimous decision of the Court in \textit{Texas & N. O. Ry. Co. v. Ry. Clerks}, interpreting the Railway Labor Act of 1926. . . .

"The Supreme Court held that the act conferred the right of independent self-organization upon the employees, free from interference on the part of the employer enforceable by the courts.

\(^7\)(1936) 1 N. L. R. B. 769.
\(^8\)85 F. (2d) 990 (C.C.A. 4th Cir. 1936).
\(^4\)(1915) 236 U. S. 1, 35 Sup. Ct. 240, 59 L. Ed. 441, L. R. A. 1915C 960.
and that the prohibition upon the carrier was not a violation of the fifth amendment, since it did not interfere with the normal exercise of the right of the carrier to select its employees and discharge them. On this ground Adair v. United State and Coppage v. Kansas were distinguished. The court said (281 U.S. 548, 570): 'The petitioners invoke the principle declared in Adair v. United States and Coppage v. Kansas, but these decisions are inapplicable. The Railway Labor Act of 1926 does not interfere with the normal exercise of the right of the carrier to select its employees or to discharge them. The statute is not aimed at this right of the employers but at interference with the right of the employees to have representatives of their own choosing. As the carriers subject to the act have no constitutional right to interfere with the freedom of the employees in making their selection, they cannot complain of the statute on constitutional grounds.'

The status of Adair v. United States, after the decision of the Supreme Court in the Texas & N. O. Ry. Case was certainly not clear. Under the Adair Case the employer had a constitutional right to hire and fire for any reason or for no reason. The Railway Labor Act, as interpreted by the Supreme Court, meant that the employer could constitutionally be prohibited from interfering with the right of employees to have representatives of their own choosing. Under the decision in the Texas & N. O. Ry. Case, interpreting that Act, could the employer assert the right that was guaranteed him in the Adair Case, and discharge every workman who attempted to secure representatives of his own choosing by joining a labor union? True, it is possible to reconcile the cases on the superficial and unsatisfactory ground that "the employee's right to freedom from restraint during the period of employment does not conflict with the employer's right arbitrarily to terminate that period." If this is the true distinction, and Adair v. United States continued to be law after the decision in the Texas & N. O. Ry. Case, it is clear that the latter is not adequate as a precedent in the Wagner Act cases of April 12, 1937. In the words of the Court, the distinction lies in the fact that under the Railway Labor Act there is no interference with the "normal exercise" of the right of the carrier to select its employees or to discharge them. On what theory can it be said that the employer was not indulging in the "normal exercise" of that right in the Texas & N. O. Ry. Case, and so could be pre-

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42Note in (1935) 19 Minnesota Law Review 598.
vented from the acts in question, but that the employer was in the "normal exercise" of that right in the Adair Case? Perhaps it is merely another example of those not infrequent opinions in which the law is laid down with "seemingly studious obscurity," in which we cannot help but leave it. But one may wonder at the unwisdom, from the public's point of view, of leaving intact conflicting lines of authority upon which a court may rely at choice, to reach unpredictable results.

Relevant here also is another case—Virginian Railway Company v. System Federation No. 40. This was a suit by System Federation No. 40, Railway Employees Department, American Federation of Labor, representing employees of the Virginian Railway Company, against that Company. After an election conducted by the National Mediation Board, the board certified the System Federation No. 40 as the representative of six crafts for purposes of collective bargaining. The railroad refused to recognize the federation, which then sought by this suit to require the railroad to treat with it, and to enjoin the railroad from interfering with the employees in choosing representatives for the purposes of collective bargaining. The trial court granted the relief prayed for, with exceptions. This was affirmed by the circuit court of appeals, in an opinion by Judge Parker, who said:

"One purpose of the Railway Labor Act, as amended, was to insure free and untrammeled action on the part of the employees in the choice of their representatives for the purpose of collective bargaining; and it is a violation of the terms, as well as of the spirit of the act, for the employer to address arguments to the employees couched in such terms, or presented in such manner, as to lead the employee to fear that he may suffer from the action of the employer if he does not follow the wishes of the latter in making his choice of representatives. Collective bargaining would be a delusion and a snare if the employer were permitted to exert pressure of any sort upon the employee with respect to a matter of this kind."

One may question how a statute of the sort here dealt with can be upheld unless the Adair Case is overruled. On the point of due process under the fifth amendment, Judge Parker simply referred to the decision of the Supreme Court in the Texas & N. O. Ry. Case, adding:

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43 (1937) 57 Sup. Ct. 592.
45 (C.C.A. 4th Cir. 1936) 84 F. (2d) 641.
46 (C.C.A. 4th Cir. 1936) 84 F. (2d) 641, 643.
47 (C.C.A. 4th Cir. 1936) 84 F. (2d) 641, 652.
"The act does not require of the carrier the making of any agreement. It does not interfere with the normal exercise of the right of the carrier to select its employees or to discharge them. The requirement that the carrier recognize and treat with the chosen representatives of the employees is but an attempt to facilitate the amicable settlement of disputes which threaten the service of the necessary agencies of interstate transportation, as applied by the Supreme Court in the [Texas & N. O. Railway Company] Case. . . .

"We cannot see anything arbitrary or unreasonable in requiring that the carrier recognize the representatives of its employees and treat with them as such; and we do not understand on what theory the carrier can be said to be deprived of liberty or property by such requirement." 48

The discussion of the scope of the power of Congress under the commerce clause is much fuller. It upholds in broad terms 49 a plenary power in Congress to regulate interstate commerce which may be exercised to protect it "no matter what may be the source of the dangers which threaten it," even though "the dangers intended to be avoided arise, in whole or in part, out of matters connected with intrastate commerce." Nevertheless, the opinion in the Virginian Railway Company Case, like that in the Texas & N. O. Railway Case, leaves in doubt the continuing validity of Mr. Justice Harlan's assertion in the Adair Case that "labor organizations have nothing to do with interstate commerce as such," and the implication of his question, "What possible legal or logical connection is there between an employee's membership in a labor organization and the carrying on of interstate commerce?" 50 When the Virginian Railway Company Case reached the Supreme Court, both Adair v. United States and Coppage v. Kansas were again referred to, and again dismissed with the assurance that they had no present application, since the Railway Labor Act does not

"interfere with the normal exercise of the right of the carrier to select its employees or to discharge them." 51 "The provisions of the Railway Labor Act . . . neither compel the employer

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48 Under the Adair Case the employer has a "property right" to discharge for joining a union. If he can go this far, it would seem that any less drastic action, such as refusal to recognize representatives of employees, or refusal to deal with representatives of employees, would also receive constitutional protection.


to enter into any agreement, nor preclude it from entering into any contract with individual employees."

Although the Supreme Court was unanimous in upholding the Wagner Labor Act as applied in the Washington, Virginia and Maryland Coach Company Case, the ghost of Adair v. United States was not laid, for Mr. Justice McReynolds quoted from it in the dissenting opinion in the Steel, Clothing, and Trailer Cases in support of his argument that

"the employer and the employee have equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract, which no government can legally justify in a free land."

B. THE WAGNER DECISIONS AND INTERSTATE COMMERCE.

1. Have the decisions given new meaning to the term "Interstate Commerce"?

"The Congress shall have power . . . to regulate commerce with foreign nations, and among the several states, and with the Indian Tribes."

What does this provision mean? The first great case interpreting this section of the constitution was Gibbons v. Ogden. The facts were that New York had granted a monopoly to Robert R. Livingston and Robert Fulton to ply steamboats on her waters. This monopoly had come by mesne conveyances to the plaintiff, Ogden. The defendant Gibbons operated two steamboats between Elizabethtown, New Jersey and New York City, under a license from Congress. At the time the suit was begun New York had conferred upon the plaintiff the power to forfeit any vessel operating in New York waters without his consent. Connecticut had passed a statute making it unlawful for a vessel to enter her harbors if it had a license from the plaintiff. New Jersey had retaliated by passing a statute saying that if Ogden did forfeit any vessel he would be liable for its value and treble costs. Under this state of affairs the plaintiff obtained an injunction against the defendant's operation of his steamboats within the territorial waters of New York. The Supreme Court, Mr. Chief Justice Marshall writing the opinion, reversed the New York court, and held the statute granting the plaintiff a monopoly unconstitutional. The Chief Justice said:

51 (1937) 57 Sup. Ct. 592, 605.
52 (1937) 57 Sup. Ct. 592, 641.
53 United States constitution, art. I, sec. 8 (3).
54 (1824) 9 Wheat. (U.S.) 1, 6 L. Ed. 23.
54a (1824) 9 Wheat. (U.S.) 1, 187 et seq., 6 L. Ed. 23, 68 et seq.
“This instrument [the constitution] contains an enumeration of powers expressly granted by the people to their government. It has been said that these powers ought to be construed strictly. But why ought they to be so construed? Is there one sentence in the constitution which gives countenance to this rule? In the last of the enumerated powers, that which grants expressly, the means of carrying all others into execution, Congress is authorized ‘to make all laws which shall be necessary and proper’ for the purpose. But this limitation on the means which may be used, is not extended to the powers which are conferred; nor is there one sentence in the constitution which has been pointed out by the gentlemen at the bar, or which we have been able to discern, that prescribes this rule. We do not, therefore, think ourselves justified in adopting it. . . .

“The words are: ‘Congress shall have power to regulate commerce with foreign nations, and among the several states, and with the Indian tribes.’

“The subject to be regulated is commerce; and our constitution being, as was aptly said at the bar, one of enumeration, and not of definition, to ascertain the extent of the power it becomes necessary to settle the meaning of the word. The counsel for the appellee would limit it to traffic, to buying and selling, or to the interchange of commodities, and do not admit that it comprehends navigation. This would restrict a general term, applicable to many objects, to one of its significations. Commerce, undoubtedly, is traffic, but it is something more; it is intercourse. . . .

“To what commerce does this power extend? The constitution informs us, to commerce ‘with foreign nations, and among the several states, and with the Indian tribes.’

“It has, we believe, been universally admitted that these words comprehend every species of commercial intercourse between the United States and foreign nations. No sort of trade can be carried on between this country and any other, to which this power does not extend. It has been truly said, that commerce, as the word is used in the constitution, is a unit, every part of which is indicated by the term.

“If this be the admitted meaning of the word, in its application to foreign nations, it must carry the same meaning throughout the sentence, and remain a unit, unless there be some plain intelligible cause which alters it.

“The subject to which the power is next applied, is to commerce ‘among the several states.’ The word ‘among’ means intermingled with. A thing which is among others, is intermingled with them. Commerce among the states cannot stop at the external boundary line of each state, but may be introduced into the interior.

“It is not intended to say that these words comprehend that commerce which is completely internal, which is carried on be-
between man and man in a state, or between different parts of the same state, and which does not extend to or affect other states. Such a power would be inconvenient, and is certainly unnecessary. [Italics added.]

"Comprehensive as the word ‘among’ is, it may very properly be restricted to that commerce which concerns more states than one. The phrase is not one which would probably have been selected to indicate the completely interior traffic of a state, because it is not an apt phrase for that purpose; and the enumeration of the particular classes of commerce to which the power was to be extended, would not have been made had the intention been to extend the power to every description. The enumeration presupposes something not enumerated; and that something, if we regard the language or the subject of the sentence, must be exclusively internal commerce of a state. The genius and character of the whole government seems to be, that its action is to be applied to all external concerns of the nation, and to those internal concerns which affect the states generally; but not to those which are completely within a particular state, which do not affect other states, and with which it is not necessary to interfere, for the purposes of executing some of the general powers of the government. [Italics added.] The completely internal commerce of a state, then, may be considered as reserved for the state itself. . . .

"We are now arrived at the inquiry, What is this power? It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power like all others vested in Congress, is complete within itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution. These are explained in plain terms, and do not affect the questions which arise in this case, or which have been discussed at the bar. If, as has always been understood, the sovereignty of Congress, though limited to specific objects is plenary as to those objects, the power over commerce with foreign nations, and among the several states, is vested in Congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the constitution of the United States. The wisdom and discretion of Congress, their identity with the people, and the influence which their constituents possess at the elections are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied, to secure them from its abuse. They are the restraints on which the people must often rely solely, in all representative governments."

From this long excerpt from the chief justice's opinion it is clear that the Court at that time thought that the constitution was entitled to a fair interpretation and not a strict one; that the word "commerce" was not limited in its meaning to transportation, nor
to acts which directly interfered with or burdened transportation, or had to do with the instrumentalities of transportation. Those would constitute only one phase of "commerce." So much is clear from the view that navigation, trade and traffic were only some of the different sorts of commerce, but did not exhaust the meaning of that term. The only power left to the states was the control over internal commerce of a state, which would have to yield to the power of Congress if it affected other states. It seems clear that the chief justice would have no hesitation in subjecting a business or industry to the control of Congress if it affected the economic welfare of people beyond the limits of a state, whether or not its goods had taken a journey. Finally, Chief Justice Marshall did not doubt that the power granted to Congress acknowledges no limitations unless found within the constitution itself. The tenth amendment, which later loomed so large in decisions of the Court, had been part of the constitution for thirty-three years when Marshall rendered this opinion. If it was intended as a limitation on the power of Congress to regulate interstate commerce, it never occurred to the chief justice to mention it, although he discussed the whole subject at great length. At least it did not forestall Marshall's view that Congress had the same power over interstate commerce that it had over foreign commerce.55

The chief justice felt constrained to sound a note of warning at the end of his opinion. He said:

"Powerful and ingenious minds, taking, as postulates, that the powers expressly granted to the government of the Union are to be contracted, by construction, into the narrowest possible compass, and that the original powers of the states are retained, if any possible construction will retain them, may, by a course of well-digested, but refined and metaphysical reasoning, founded on these premises, explain away the constitution of our country, and leave it a magnificent structure indeed, to look at, but totally unfit for use. They may so entangle and perplex the understanding, as to obscure principles which were before thought quite plain, and induce doubts where, if the mind were to pursue its own course, none would be perceived. In such a case, it is peculiarly necessary to recur to safe and fundamental principles to sustain those principles, and, when sustained, to make them the tests of the arguments to be examined."

55Almost the same quotations from Gibbons v. Ogden as those used in the text are the basis for a much fuller discussion in Professor Edward S. Corwin's, The Commerce Power v. State Rights 5-52. Though the writer of this portion of the present article had prepared his original draft before reading Professor Corwin's book, he recognizes the priority of Professor Corwin's thoughtful consideration of the subject.
The chief justice probably spoke with greater prophetic vision than he realized. What he feared is just what seems to have happened later. In 1915 Professor Dudley O. McGovney defined interstate commerce thus:

"The test, then, as to an interstate transaction, is not whether it takes place between inhabitants of different states, but whether the transaction involves transportation of property, persons or intelligence from one state to another, or is a necessary incident to accomplishing the transit or transportation, or to making it fruitful."

Professor McGovney's definition was an epitome of the Supreme Court decisions as they stood at that time, with the possible exception of a few cases involving the Sherman Anti-Trust Law. At that time the word "transportation" had been substituted for the word "commerce," in the sense that Marshall understood the word. And there is no question that the McGovney definition was an accurate reflection of the decisions of that time, because they are replete with such expressions as "the interstate journey had ended" or "the interstate journey had not yet begun." The central theme was a journey of something from one state to another. The same author continues:

"So if A owns a stock of goods in Illinois, and while in Ohio makes a contract to sell the goods to B, who lives in Ohio, this is not a transaction of interstate commerce; but if A contracts to sell and ship the goods to B, it would be; at least so far as the performance of the contract is concerned.

"The Supreme Court has held that insurance contracts, fire, life or marine [citations omitted], made between an insurance company of one state and an insurer in another, are not transactions of interstate commerce. Why is not a contract between a New York insurance company and a man in Iowa, to insure the latter's life or house, a transaction of interstate commerce? The answer seems to be that the contract of insurance only makes the company in New York a debtor. The entire operation of the contract is in New York. The contract does not necessarily contemplate the transportation or transit of anything from New York to Iowa. The insured is free to collect his money in New York, and stay there with it. True, the insured may collect in Iowa, but that is due to the general principle that a debt may be sued upon wherever a court gets jurisdiction over the debtor.

"Clearly the manufacture of goods, even though the goods are intended to be shipped to other states, is not interstate commerce

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[citing a case]; it is not commerce at all. Manufacturing, mining, fishing, farming, in short production, must precede commerce, but they are not commerce.

This summary of decisions is intended to show that all the different species of interstate commerce, except transportation, had, by this time, been forgotten. But the climax of this development was not reached until 1918, in the case of *Hammer v. Dagenhart*. That case held that the tenth amendment prohibited Congress from barring commodities from interstate commerce unless there was something wrong with the commodity. The Court quoted from *Gibbons v. Ogden* and continued:

"... In other words, the power is one to control the means by which commerce is carried on, which is directly the contrary of the assumed right to forbid commerce from moving and thus destroy it as to particular commodities."

The Court in this case narrowed the power of Congress not only to transportation, but to the means of transportation. Congress could not prohibit commodities moving in that transportation unless they were inherently bad or sinful. That there be no question that the Court interpreted "commerce" as synonymous with "transportation," the following is quoted from the opinion:

"Over interstate transportation, or its incidents, the regulatory power of Congress is ample, but the production of articles intended for interstate commerce is a matter of local regulation. When the commerce begins is determined not by the character of the commodity, nor by the intention of the owner to transfer it to another state for sale, nor by his preparation of it for transportation, but by its actual delivery to a common carrier for transportation or the actual commencement of its transfer to another state."

Here the Court is using the words "commerce" and "transportation" interchangeably.

Four members of the Court in *Hammer v. Dagenhart* felt that the majority had fallen victims to the "powerful and ingenious minds" which the great chief justice had warned against. Furthermore, the majority overlook that part of Marshall's opinion which stated that the clause was a unit and that Congress has power over commerce among the states just as it has power over foreign commerce. And it would seem that the chief justice was correct, for the word "commerce" is used but once in the clause,

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providing that Congress has power to regulate "commerce with foreign nations and among the several states." No one would dispute the fact that Congress can prohibit absolutely the importation of foreign goods for any reason it pleases, or for no reason at all. *Hammer v. Dagenhart* means then that the single word "commerce" has two separate and distinct meanings in the same clause which Marshall described as a unit.\(^6^9\)

Little argument would have been needed to convince John Marshall that the majority was wrong. Can anyone say that the child-labor problem is one confined to one state and that low standards in one state do not affect standards elsewhere? A manufacturer in a low standard state has a distinct advantage over his competitor in a high standard state not only in the interstate market but in the home market of the high standard state as well. But under the majority decision in *Hammer v. Dagenhart*, neither the federal government nor the state, nor both of them, could protect the manufacturer in the high standard state. Before the constitution was adopted, a state could protect its own manufacturers by prohibiting the importation of goods. Prior to the decision in *Hammer v. Dagenhart* it was the general opinion that the constitution merely divided the power to regulate commerce, but the majority held, in effect, that part of it had been lost—that a "no-man's land" had been created.

This background is important in estimating the meaning of the Wagner Act decisions. On February 12, 1937, sixty days before the Supreme Court decided the Wagner Act Cases, the circuit court of appeals for the first circuit handed down its decision in *Myers v. Bethlehem Shipbuilding Corporation*.\(^6^9\) In this case the Shipbuilding Corporation and a company union, which was prohibited by the Wagner Act, had secured an injunction against the National Labor Relations Board, to prevent the board from proceeding with complaints of unfair labor practices. The circuit court of appeals, reviewing the litigation on this subject, said:

"The case is by no means of the first impression. Cases involving the powers and jurisdiction of the National Labor Relations Board have already arisen and been decided in the second,\(^5^0\)

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\(^{50}\)Corwin, The Commerce Power v. State Rights 50: "But that a word should have *two* quite different meanings in a single short sentence in which it occurs but *once*, is certainly a novelty to the science of hermeneutics and probably to that of linguistics as well."

\(^{6^9}\)(C.C.A. 1st Cir. 1937) 88 F. (2d) 154, 155.
fourth, fifth, sixth, eighth, and ninth circuits, some as in this case on proceedings to enjoin hearings, some on petitions to review orders made by the board, and some on petitions by the board for enforcement of its orders. Where the question was presented it has uniformly been held that the act does not apply to manufacturers. Such persons are not engaged in interstate commerce and their relations with their employees are within the jurisdiction of the state rather than of the national government [citing cases]."

The court continued:

"... On the present state of the law there would seem to be only slight probability that any order which might be made by the board in this case would be enforced. ...

The court was also of the opinion that the fact that respondent obtained much of its raw material from outside the state in which it was located and sent its finished products out of the state had not the effect of making the business a part of interstate commerce.

In National Labor Relations Board v. Jones & Laughlin Steel Corporation,\(^{61}\) decided by the circuit court of appeals for the fifth circuit on June 15, 1936, the court said:

"The National Labor Relations Board has petitioned us to enforce an order made by it, which required Jones & Laughlin Steel Corporation, organized under the laws of Pennsylvania, to reinstate certain discharged employees in its steel plant in Aliquippa, Pa., and to do other things in that connection.

"The petition must be denied because, under the facts found by the board and shown by the evidence, the board has no jurisdiction over a labor dispute between employer and employees touching the discharge of laborers in a steel plant, who were engaged only in manufacture. The constitution does not vest in the federal government the power to regulate the relation as such of employer and employee in production or manufacture."

The court then quoted from the case of Carter v. Carter Coal Company,\(^{62}\) decided by the Supreme Court on May 18, 1936, less than a year before the time the Court rendered the Wagner Act decisions. This quotation reads:

"One who produces or manufactures a commodity, subsequently sold and shipped by him in interstate commerce, whether such sale or shipment were originally intended or not, has engaged in two and separate activities. So far as he produces or manufactures a commodity, his business is purely local. So far as he sells and ships, or contracts to sell and ship, the commodity to customers in another state, he engages in interstate commerce.

\(^61\)(C.C.A. 5th Cir. 1936) 83 F. (2d) 998.
\(^62\)(1936) 298 U. S. 238; 56 Sup. Ct. 855; 80 L. Ed. 1160.
In respect to the former, he is subject only to regulation by the state; in respect to the latter, to regulation only by the federal government [citing a case]. Production is not commerce; but a step in preparation for commerce [citing a case].

"We have seen that the word 'commerce' is the equivalent of the phrase 'intercourse for the purposes of trade.' Plainly the incidents leading up to and culminating in the mining of coal do not constitute such intercourse. The employment of men, the fixing of their wages, hours of labor, and working conditions, the bargaining in respect of these things—whether carried on separately or collectively—each and all constitute intercourse for the purposes of production, not of trade. The latter is a thing apart from the relation of employer and employee, which in all producing operations is purely local in character. Extraction of coal from the mine is the aim and the completed result of local activities. Commerce in the coal mined is not brought into being by force of these activities, but by negotiations, agreements, and circumstances entirely apart from production. Mining brings the subject matter of commerce into existence. Commerce disposes of it."

The circuit court of appeals then applied this reasoning to the facts of the *Jones & Laughlin Case*. The underlying thought is clear. The Supreme Court had limited the power of the national government to interstate transportation. Nothing can be transported until after mining or manufacture. Production of an article is preparatory to transportation—hence it is local in its nature and beyond the power of the federal government to regulate.

So it was in the other circuit courts of appeals. In the case of *National Labor Relations Board v. Friedman-Harry Marks Clothing Company*, decided July 13, 1936, in the second circuit, the court said:

"The relations between the employer and its employees in this manufacturing industry were merely incidents of production. In its manufacturing, respondent was in no way engaged in interstate commerce, nor did its labor practices so directly affect interstate commerce as to come within the federal commerce power. *Carter v. Carter Coal Co.* 56 S. Ct. 855, 80 L. Ed. 1160, May 18, 1936; *Schechter Poultry Corporation v. United States*, 295 U. S. 495, 55 S. Ct. 837, 79 L. Ed. 1570, 97 A. L. R. 947. No authority warrants the conclusion that the powers of the federal government permit the regulation of the dealings between employers or employees when engaged in the purely local business of manufacture."

In *Schechter Poultry Corp. v. United States* (decided May 27, 1935), relied upon by the circuit court of appeals, it was held that

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685 F. (2d) 1 (C.C.A. 2nd Cir. 1936).
the sale of poultry in New York was not interstate commerce, although 96 per cent of it came from other states, and the sale of sick chickens in violation of the Code had so demoralized the market as to cut importations 20 per cent. Mr. Chief Justice Hughes, speaking for the Court, said:

"Were the transactions 'in' interstate commerce? Much is made of the fact that almost all the poultry coming to New York is sent there from other states. But the code provisions as here applied do not concern the transportation of the poultry from other states to New York, or the transactions of the commission men or others to whom it is consigned, or the sales made by such consignees to defendants.

"When the defendants had made their purchases, whether at the West Washington Market in New York City or at the railroad terminals serving the city, or elsewhere, the poultry was trucked to their slaughterhouses in Brooklyn for local disposition.

"The interstate transactions in relation to that poultry then ended. Defendants held the poultry at their slaughterhouse markets for slaughter and local sale to retail dealers and butchers, who in turn sold directly to consumers.

"Neither the slaughtering nor the sales by defendants were transactions in interstate commerce [citing cases].

"The undisputed facts thus afford no warrant for the argument that the poultry handled by the defendants at their slaughterhouse markets was in the 'current' or 'flow' of interstate commerce and was thus subject to congressional regulation.

"The mere fact that there may be a constant flow of commodities into a state does not mean that the flow continues after the property has arrived and has become commingled with the mass of property within the state and is there held solely for local disposition and use. So far as the poultry herein questioned is concerned, the flow in interstate commerce had ceased.

"The poultry had come to a permanent rest within the state. It was not held, used or sold by the defendants in relation to any further transaction in interstate commerce and was not destined for transportation to other states. Hence, decisions which deal with a stream of interstate commerce—where goods come to rest within a state temporarily and are later to go forward in interstate commerce—and with the regulation of transactions involved in that practical continuity of movement, are not applicable here [citing cases].

"Did the defendant's transactions directly 'affect' interstate commerce so as to be subject to federal regulation? . . . In determining how far the federal government may go in controlling intrastate transactions upon the ground that they 'affect' interstate commerce, there is a necessary and well-established distinction between direct and indirect effects. . . . Direct effects are illus-
trated by the railroad cases we have cited, as e.g., the effect of failure to use prescribed safety appliances on railroads which are the highways of both interstate and intrastate commerce. But where the effect of intrastate transportations upon interstate commerce is merely indirect, such transactions remain within the domain of state power.

"If the commerce clause were construed to reach all enterprises and transactions which could be said to have an indirect effect upon interstate commerce, the federal authority would embrace practically all the activities of the people and the authority of the state over its domestic concerns would exist only by sufferance of the federal government."

But so completely do these principles seem to have been overthrown in the Wagner Act decisions that one writer declares that they "create a new United States." In the *Jones & Laughlin Steel Corporation Case* the board found unfair labor practices in the corporation's Aliquippa, Pa. plant, and issued an order applying to production workers. The record showed that all the raw material coming to the plant was stored from three weeks to three months before it was used. It had not only "come to rest" but had been at rest a long time before it was used. Most of the finished products were not manufactured on contract, but were sold afterwards. Raw materials in storehouses, and finished products before being billed in interstate commerce, are subject to state taxation under *Coe v. Errol*, although the states cannot tax property or goods in interstate commerce. The *Friedman-Harry Marks Clothing Company Case* involved production employees. In the *Trailer Case* the board's order affected both production and maintenance employees. So sure were counsel that the activities of these employees were not interstate commerce and that, as to them, the Wagner Act could not be applied constitutionally, that they did not bother to make a defense except to object to the jurisdiction of the board. The majority do not purport to overrule any of these prior decisions, nor do they define interstate commerce.

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64 "A small clothing factory in Richmond, Virginia, imports materials from other states, transforms them into wearing apparel, and sells the result in all the forty-eight states. This again is 'interstate commerce,' subject to supervision under the historic phrase. It is not necessary to dissect the already celebrated opinion further—to point out fine, metaphysical distinctions that make one commercial transaction a Congressional object of attention and leave the other out, and to reconcile the latest definition with previous judicial attempts to explain a controverted sentence. What may fairly be said is that the five decisions rendered on April 12, 1937, create a new United States. The reign of Congress is now so sweeping that the Republic, in matters of industry, perhaps of agriculture, has become an integrated nation." Hendrick, Bulwark of the Republic xx-xxi.

The Jones & Laughlin Case is well epitomized by a newspaper comment which appeared the day after the decisions were handed down, reading:

"Supporters of the president's argument that his troubles have been due to the judiciary and not to the constitution emphasized that under the practical formula set forth by Chief Justice Hughes today what is and what is not within the federal power to regulate commerce becomes purely a matter on which the court will judge according to the practical experience and views of a majority of its members and not in accordance with any scheme which can be precisely defined in legal language."

How far the Court will go no one can say. The Court held the Act applicable to the Clothing Company, which is a small concern employing 800 men. There are 3,300 similar plants in the country. The Trailer Company employed 900 men. The chief justice emphasizes the practical aspects of the cases. He describes the far-flung activities of the Jones & Laughlin Company—control of steamers on the Great Lakes, railroads, ore mines, coal fields, warehouses in various parts of the country, sales offices in many large cities, and nineteen subsidiary corporations—and because of these facts he refuses to segregate the employees in the production plant at Aliquippa. On that subject he says:

"We do not find it necessary to determine whether these features of the defendant's business dispose of the asserted analogy to the 'stream of commerce' cases. The instances in which that metaphor has been used are but particular, and not exclusive, illustrations of the protective power which the government invokes in support of the present act. The Congressional authority to protect interstate commerce from burdens and obstructions is not limited to transactions which can be deemed to be an essential part of a 'flow' of interstate or foreign commerce. . . ."

How far the government's power extends away from the "flow" of interstate commerce is, says the chief justice, necessarily a question of degree.

In what direction is the Court presently headed? Do the decisions of last April 12 adopt the principles laid down by John Marshall one hundred and thirteen years ago, or have we now simply a glorified interpretation of the transportation doctrine? The following excerpt from the opinion in the Jones & Laughlin Steel Case is probably the best answer the decisions afford:

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"Giving full weight to respondent's contention with respect to a break in the complete continuity of the 'stream of commerce' by reason of respondent's manufacturing operations, the fact remains that the stoppage of those operations by industrial strife would have a most serious effect upon interstate commerce. In view of respondent's far-flung activities, it is idle to say that the effect would be indirect or remote. It is obvious that it would be immediate and might be catastrophic. We are asked to shut our eyes to the plainest facts of our national life and to deal with the question of direct and indirect effects in an intellectual, vacuum. Because there may be but indirect and remote effects upon interstate commerce in connection with a host of local enterprises throughout the country, it does not follow that other industrial activities do not have such a close and intimate relation to interstate commerce as to make the presence of industrial strife a matter of the most urgent national concern. 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?"

Four of the justices dissented in the manufacturing cases, Mr. Justice McReynolds writing the opinion. In his view the majority held overruled the Schechter Case and the Carter Coal Company Case. Further, he stated that the circuit judges were right in relying on these cases, and intimated that the opinion of the Court was perhaps not fair to the circuit judges who had based their opinions on the most recent decisions of the Court. And it can hardly be questioned that Justice McReynolds' argument is better than that of the majority, if reliance is to be placed on the precedents since 1904. The majority, however, are more in accord with Marshall's concept of interstate commerce.

The opinion of the Court does not purport to overrule any of the cases with which it is in apparent conflict. Therefore they are presumed to be good law. In fact the majority opinion is so general that one can find argument in it to sustain decisions either way when the next Wagner Act cases come before the Court. Under the decisions as they now stand, the Jones & Laughlin Steel Corporation would be subject to a state excise tax on manufacturing because it is a local business, but yet the same manufacturing is interstate in the sense that the federal government can compel the company to bargain collectively with employees. On the other hand, employees could burn the factory

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68See Corwin, The Commerce Power versus State Rights 24, 38, 44.
down, yet under the *Coronado Coal Company Case* the federal government could do nothing about it. Congress could forbid importation of foreign goods for any reason or for no reason at all, but cannot prohibit child-made goods from moving in interstate commerce. Congress may prohibit lottery tickets from moving in interstate commerce, not because they are inherently dangerous or bad, but because they are considered sinful. Agriculture and mining are still local industries, although interstate commerce might be said to be a dominant factor in their activities. It is impossible to find these distinctions in what the Court has called "the plain words of the constitution," but they arise out of the bewildering variety of precedents which still must be presumed to speak with authority, subject to the final choice of the Court. No one can predict the final effect of these controversial cases.

2. May the Decisions be rested Upon the Power of Congress to Regulate "Burdens" upon Interstate Commerce, although the Burdens exist in Intrastate Commerce?

It is not clear, in the *Jones & Laughlin Case*, whether the Court really bases its decision on the meaning of the term "interstate commerce" or not. The quotation on page 24 suggests that the Court looks upon the precise meaning of the term as not being involved in a decision of the case, since the Court says that Congress has authority to protect interstate commerce from burdens and obstructions which are not an essential part of its "flow." In other words, in spite of the fact that in the decisions under the Wagner Act the Supreme Court seems to have turned back to the views of Marshall, rejecting what it had said previously in many cases which, over a long period of years, narrowly limited the constitutional grant of power to Congress to regulate commerce among the states, nevertheless it is possible to view the Wagner Act Cases as coming within the doctrine that Congress may protect interstate commerce from threats of burdens or obstructions from without. A number of writers have insisted with some vehemence that these decisions have not widened the meaning of the term "interstate commerce," but that they recognize and apply an established rule, that Congress may legislate with respect to activities that burden

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69Unless the unlawful act is done with the intent to affect interstate commerce. See *Coronado Coal Company v. United Mine Workers of America*, (1925) 268 U. S. 295, 45 Sup. Ct. 551, 69 L. Ed. 963.

70(1937) 57 Sup. Ct. 615, 624.
it, though these activities may themselves be wholly outside of commerce between the states.

"Burdens and obstructions," said Mr. Chief Justice Hughes, in the *Jones & Laughlin Case* "may be due to injurious action springing from other sources [than interstate commerce]. The fundamental principle is that the power to regulate commerce is the power to enact 'all appropriate legislation' for its 'protection and advancement' (*The Daniel Ball*, 10 Wall. 557, 564, 19 L. Ed. 999)."

And in a brief discussion of the cases in a recent issue of the Georgetown Law Journal, a writer says that

"The scope of the term 'interstate commerce,' as it has previously been understood and interpreted remains the same. The decisions must be limited to the admittedly serious effect of labor disputes and disorders on the 'free flow of interstate commerce.' Nowhere in any of the majority decisions can it be found or even inferentially stated that there is now vested in Congress, as a result thereof, the power to regulate and control the internal affairs of a business of a purely intrastate character where there can be found no serious restriction or burden on the free flow of commerce between the states."

A like view was entertained by Mr. David Lawrence, who wrote on April 14, 1937, in a syndicated article entitled "An Independent Judiciary," in part as follows:

"The Supreme Court has, in effect, told a hesitant, wavering, doubtful Congress that the federal government does have power to protect interstate commerce against the impediments and obstructions which grow out of serious labor disputes.

"Thoroughly consistent with previous opinions, the Supreme Court has merely called attention with renewed emphasis to a decision rendered in May, 1925, known as the second *Coronado Case*, which governs almost identically conditions such as exist today.

"No new commerce clause has been written into the Constitution, but a definition of what really constitutes obstruction of interstate commerce has been restated with remarkable clarity and force.

"The American people generally have won a great victory. Labor, in particular, that is honest, decent, law-abiding labor, has won a triumph unexcelled in American history. . . .

"The Court has pointed out that production itself may still be local, just as it was in the coal mining case [the second *Coronado Case*], but that physical acts or obstruction could interfere with the movement of goods."

The draftsmen of the National Labor Relations Act were

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72 And see (1937) 37 Colum. L. Rev. 860, 861.
faced with the problem of preparing a statute which should apply as widely as possible the principles of collective bargaining in labor relations. They could have limited the scope of the Act to labor disputes occurring in interstate commerce, subject to the varying definitions of that term which the Supreme Court might from time to time adopt.\textsuperscript{79} It would seem fairly obvious, from a reading of the plain words of the constitution, giving Congress power to regulate commerce among the states, that labor disputes in interstate commerce would be subject to regulation as a part of that commerce, and under the Railway Labor Act and the \textit{Texas \& N. O. Railway Case} which upheld it, that must have seemed to the draftsmen of the Wagner Act established as law, subject to the \textit{Adair Case}. For it must not be forgotten that the \textit{Adair Case} was not overruled by the \textit{Texas \& N. O. Railway Case}, and that, in the \textit{Adair Case} the Court took the view that a labor organization whose membership was employed by an interstate carrier, had, nevertheless, no such substantial relation to or connection with interstate commerce as to authorize Congress to impose criminal penalties for discharging an employee because of his union membership. Said Mr. Justice Harlan:\textsuperscript{74}

"... What possible legal or logical connection is there between an employee’s membership in a labor organization and the carrying on of interstate commerce? ... It is the employé as a man, and not as a member of a labor organization who labors in the service of an interstate carrier."

Nevertheless, in prosecutions and suits under the Sherman Anti-Trust Act, forbidding combinations and conspiracies in restraint of interstate commerce, it has been held that the Sherman Act "prohibits any combination whatever to secure action which essentially obstructs the free flow of commerce between the states;" and that this prohibition includes combinations of labor;\textsuperscript{76} that obstructions of business not a part of interstate commerce by combinations of labor intended to restrain interstate commerce, or where that would be the necessary effect of the combination, are subject to the prohibition;\textsuperscript{76} in other words, that acts of labor or-

\textsuperscript{79}See supra, pages 13-26.

\textsuperscript{74}(1908) 208 U. S. 161, 28 Sup. Ct. 277, 52 L. Ed. 436, 13 Ann. Cas. 764.

\textsuperscript{75}Loewe v. Lawlor, (1908) 208 U. S. 274, 28 Sup. Ct. 301, 52 L. Ed. 488.

\textsuperscript{76}United Mine Workers of America v. Coronado Coal Company, (1922) 259 U. S. 344, 42 Sup. Ct. 570, 66 L. Ed. 975, 27 A. L. R. 762: "Coal mining is not interstate commerce, and the power of Congress does not extend to its regulation as such. ... And so in the case at bar, ... obstruction of coal mining, though it may prevent coal from going into
ganizations in businesses themselves either within or without inter-
state commerce, may constitute an obstruction of interstate
commerce such as to come within the regulatory power of Con-
gress, subject to the requirement that if the acts occur in intrastate
commerce, they must "affect" interstate commerce "directly."

It would seem to follow that some labor disputes in intrastate
commerce would in all probability be subject to federal legislation,
since their necessary effect, or their intended effect, could be to
impose a direct burden upon interstate commerce. Such labor
disputes and strikes could be regulated by Congress. The regula-
tion might legally be directed toward encouraging collective bar-
gaining in order to discourage strikes. This theory finds ex-
pression in the National Labor Relations Act, which says:77

"It is hereby declared to be the policy of the United States to
eliminate the causes of certain substantial obstructions to the free
flow of commerce and to mitigate and eliminate these obstruc-
tions when they have occurred by encouraging the practices and
procedure of collective bargaining and by protecting the exercise
by workers of full freedom of association, self-organization, and
designation of representatives of their own choosing, for the pur-
pose of negotiating the terms and conditions of their employment,
or other mutual aid or protection." [Italics added].

But it may as well be admitted that this theory, as a basis
for the regulation of labor disputes by Congress, is elusive and
indefinite.78 Alone, it is hardly likely to be a satisfactory test of
the proper scope of contemplated legislation. We say that if a
labor dispute in interstate or intrastate commerce is intended to,
or by "necessary effect" will "directly" "burden" interstate com-
merce, then the dispute may be "regulated" by Congress to pro-
tect interstate commerce. Admitting that words are never entirely
clear, yet there are degrees of exactness and clarity. The applic-
ability of the Act to new businesses can never be foretold with
any sort of certainty under the burden doctrine. It would be much
better, it would seem, to turn back again to the theories of John
Marshall as to the true meaning of interstate commerce. In
fact it may be that the burden theory is nothing but a survival of
his long-forgotten views. Nevertheless, this approach overcomes

interstate commerce, is not a restraint of that commerce, unless the obstruc-
tion is intended to restrain commerce in it, or necessarily has such a
direct, material and substantial effect, to restrain it that the intent reason-
151. See Willis, Constitutional Law 341-342.
difficulties due to the opinion expressed by the Court in the *Adair Case*, that labor organizations and membership in them are not subject to the regulatory power of Congress as a part of interstate commerce, even where members of the union are engaged solely by interstate carriers. It also extends the power of Congress to labor difficulties admittedly outside the scope of interstate commerce, whatever definition we give it, where the combination of workmen, by intent, or by necessary effect, will obstruct interstate commerce.\(^7\)

C. The Associated Press Case.

Of the five cases decided in April, 1937, upholding the National Labor Relations Act, *Associated Press v. National Labor Relations Board*\(^8\) involved some questions of importance peculiar to itself. Morris Watson, employed by the Associated Press in its New York office as an editorial employee in the News Department, was discharged in October, 1935. The American Newspaper Guild filed a charge with the board, alleging the discharge to be in violation of the National Labor Relations Act, in that it was due to Watson's activities in connection with the Newspaper Guild. Upon the recommendation of the Trial Examiner, the board entered an order against the Associated Press, based on findings that Watson had been discharged in violation of the Act. The order required the Associated Press to restore Watson to duty, and to make him whole for any losses he had sustained. His employers refused to comply and the board then petitioned the circuit court of appeals for the second circuit to enforce the order. This it did, by a decree after argument. In the argument, however, the board's findings of fact were not challenged, and the only point raised was the constitutionality of the Act.

The case was taken thence to the Supreme Court of the United States. The Supreme Court held, in an opinion by Mr. Justice Roberts, that the facts accepted as proved constituted unfair labor practices affecting interstate commerce, that the Act did not infringe freedom of speech as guaranteed by the first amendment, nor the right to trial by jury, under the seventh. On the first point the Court relied on the authority of *Texas & N. O. Ry. Co. v. Brotherhood of Ry. & S. S. Clerks*,\(^81\) and *Virginian Ry. Co. v. System Federation No. 40*.\(^82\) The third point, as to the right to a

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\(^7\) (1937) 37 Colum. L. Rev. 860, 861, note 10.
\(^8\) (1937) 57 Sup. Ct. 650.
\(^81\) (1930) 281 U. S. 548, 50 Sup. Ct. 427, 74 L. Ed. 1034.
\(^82\) (1937) 57 Sup. Ct. 592.
jury trial, was disposed of without discussion by reference to the
Texas & N. O. Ry. and the Jones & Laughlin Cases. But as
to whether or not the Act, as applied to the Associated Press,
abridged the guarantees of the first amendment the Court cited
no authority directly in point. Holding that the constitutional
guarantees of freedom of speech and of the press were not
infringed, Mr. Justice Roberts said:

"The conclusion which the [Associated Press] draws is that
whatever may be the case with respect to employees in its mechani-
cal departments, it must have absolute and unrestricted freedom
to employ and to discharge those who, like Watson, edit the
news, that there must not be the slightest opportunity for any
bias or prejudice personally entertained by an editorial employee
to color or to distort what he writes, and that the Associated Press
cannot be free to furnish unbiased and impartial news reports
unless it is equally free to determine for itself the partiality or
bias of editorial employees.

"So it is said that any regulation protective of union activities,
or the right collectively to bargain on the part of such employees,
is necessarily an invalid invasion of the freedom of the press.

"We think that the contention not only has no relevance to
the circumstances of the instant case but is an unsound generaliza-

"The Act ... does not require the [Associated Press] to
retain in its employ an incompetent editor or one who fails faith-
fully to edit the news to reflect the facts without bias or prejudice.
The Act permits a discharge for any reason other than union ac-
tivity or agitation for collective bargaining with employees."

Disagreement upon the freedom of the press features of the
Act, as applied to the Associated Press, was the basis for Mr.
Justice Sutherland's dissenting opinion, in which he said in part,
with the concurrence of Justices Van Devanter, McReynolds and
Butler:

"The findings of the board disclose that Watson continued
in various ways to promote the interests of the guild: and there
is no doubt that his sympathies were strongly enlisted in support
of the guild's policies, whether they clashed with the policies of
[his employer] or not. We do not question his right to assume
and maintain that attitude. But, if [the Associated Press] con-
cluded, as it well could have done, that its policy to preserve its
news service free from color, bias, or distortion was likely to be
subverted by Watson's retention, what power had Congress to
interfere in the face of the first amendment?"

It is suggested that in this passage the dissenting members of the

83 (1937) 57 Sup. Ct. 615.
84 (1937) 57 Sup. Ct. 615, 659.
Court fail to recognize a necessary distinction—that between discharging an employee because he is a member of a union, or engaged in union activities, which the Act forbids, and discharging an employee for any other reasons, good or bad, including even a mistaken belief that the employee is coloring the news. Discharges of the latter sort are not forbidden. This difference is recognized in the opinion of the majority, where the Court says:

"The business of the Associated Press is not immune from regulation because it is an agency of the press. The publisher of a newspaper has no special immunity from the application of general laws. He has no special privilege to invade the rights and liberties of others. He must answer for libel. He may be punished for contempt of court. He is subject to the anti-trust laws. . . . The regulation here in question has no relation whatever to the impartial distribution of the news. . . . [The Associated Press] is free at any time to discharge Watson or any editorial employee who fails to comply with the policies it may adopt."

CONCLUSION

In several important respects the Wagner Labor Disputes Act cases, decided by the Supreme Court in April, 1937, will probably long remain landmarks in constitutional law, and among the most important labor decisions of all time. In the first place, they indicate a return to a less artificial view of the term "interstate commerce." Not less important, they deal with facts of national existence in a realistic way, and in so doing, have apparently rejected in all respects the harsh emotionalism of *Adair v. United States*. That a unanimous Court upheld the Act in the *Coach Company Case* certainly occasioned surprise. It may, perhaps, without disrespect, be suggested that the Court reacted to the critical spirit of the times. But the division of opinion in the other cases is warning of storms to come, for the importance of the National Labor Relations Act to labor is not the mere fact of its constitutionality, but the elasticity of the constitutional limits of its application. If the language of the five original cases is too obscure to permit present agreement as to their true meaning and the precise theory upon which they have reconciled conflicting precedents of the past, it is not unlikely that future cases will furnish opportunity for distinctions so subtle and so refined

85"The fact that the 'Court Plan' had been introduced shortly before the decision in the [Jones & Laughlin] case suggests that too sanguine an attitude toward the liberalization of the Court's concept of interstate commerce may not be warranted." (1937) 37 Colum. L. Rev. 861.
that no decision of the Court will again go so far as the original five. And it is doubtful whether these cases have clarified a tradition which made it necessary for the Court, whether by conscious choice or not, in borderline cases, to deny validity to an act of Congress because the subject-matter to be regulated was not a part of interstate commerce, or, with equally good precedents to cite, to uphold legislation deemed to be desirable, because it protected interstate commerce from burdens or obstructions threatened from without.

Extra-legal attacks upon the Act and the board were not to end with the Supreme Court decisions. For example, an Associated Press dispatch from Nashville, Tennessee, August 3, 1937, reads, in part: "The Nashville Chamber of Commerce condemned the Wagner Labor Relations Act Tuesday as 'one-sided, biased and arbitrary' and recommended that it be amended 'so that the same tribunal shall not be both prosecutor and judge.' The action was taken by the board of governors in adopting a resolution which embodied also a recommendation that the act be amended 'to make labor organizations legally responsible for the actions of their members and agents, so that all contracts entered into between employers and employees would be equally binding and enforceable.' . . . This sort of attack, however, was not new. To previous ones Mr. Chief Justice Hughes had replied in the Jones & Laughlin Case, (1937) 57 Sup. Ct. 615, 628: "The Act has been criticized as one-sided in its application. . . . We have frequently said that the legislative authority, exerted within its proper field, need not embrace all the evils within its reach. The constitution does not forbid 'cautious advance, step by step,' . . ." And see note 33, supra.