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ESSAY

HOW THE WAGNER ACT CAME TO BE: A PROSPECTUS

*Theodore J. St. Antoine**

Ham. Do you see yonder cloud that's almost in shape of a camel?

Pol. By th' mass, and it's like a camel, indeed.

Ham. Methinks it is like a weasel.

Pol. It is backed like a weasel.

Ham. Or like a whale?

Pol. Very like a whale.¹

The Wagner Act of 1935, the original National Labor Relations Act (NLRA),² has been called “perhaps the most radical piece of legislation ever enacted by the United States Congress.”³ But Supreme Court interpretations supposedly frustrated the “utopian aspirations for a radical restructuring of the workplace.”⁴ Similarly, according to another commentator, unnecessary language in one of the Court’s earliest NLRA cases “drastically undercut the new act’s protection of the critical right to strike.”⁵

On the other hand, the goal of “industrial peace”⁶ often ascribed to the legislation has been criticized as suggesting a “blackmail-based explanation for the passage of the Wagner Act.”⁷

* James E. and Sarah A. Degan Professor Emeritus of Law, University of Michigan. A.B. 1951, Fordham; J.D. 1954, Michigan. — Ed.

1. WILLIAM SHAKESPEARE, *HAMLET* act 3, sc. 2, 11.358-64 (G.R. Hillard ed., Clarendon Press 1987).

2. Pub. L. No. 74-198, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-169 (1994)).

3. Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 *MINN. L. REV.* 265, 265 (1978).

4. *Id.* at 325. From a different perspective, Professor Paul Weiler contends that the Act is inherently defective because its allowance of lengthy representation campaigns gives recalcitrant employers the time to coerce employees into voting against the union. He would institute “instant” elections along the lines of a Canadian provincial model. See Paul Weiler, *Promises to Keep: Securing Workers’ Rights to Self-Organization Under the NLRA*, 96 *HARV. L. REV.* 1769, 1804-16 (1983).

5. JAMES B. ATLESON, *VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW* 19 (1983) (citing *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333, 345-46 (1938)); see also Matthew W. Finkin, *Labor Policy and the Evisceration of the Economic Strike*, 1990 *U. ILL. L. REV.* 547.

6. See, e.g., *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 794 (1990); *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 38 (1987); *Charles D. Bonanno Linen Serv., Inc. v. NLRB*, 454 U.S. 404, 409 (1982); *Brooks v. NLRB*, 348 U.S. 96, 103 (1954).

7. Douglas L. Leslie, *Multiemployer Bargaining Rules*, 75 *VA. L. REV.* 241, 271 (1989).

The objection is to the notion that the Act was designed “[t]o appease labor and as part of a program to stabilize the nation economically and politically” at a time of “disruptive strikes” and “political unrest.”⁸ Yet the avoidance of labor unrest *was* a major theme of the principal proponents of the Wagner Act, along with the nobler aims of “social justice” and economic prosperity.⁹

So, what was the true genesis of the Wagner Act? Was it meant to produce a whole new order in the workplace, with individual employees sharing basic decisionmaking with employers — perhaps even directly and not merely through the medium of their unions? Were the radical purposes of the statute stymied by a reactionary or timid new Supreme Court majority that only appeared to espouse a more progressive social philosophy? Contrarily, was the Act primarily intended as a sop to organized labor and the working class generally, to defuse the growing agitation and lethal strikes that had spread across the country during the Depression?¹⁰ Or was the major driving force a loftier concern about the economic and political empowerment of the ordinary American worker?

Do one’s political predilections — or beguilement by the intellectual fashions of the moment — inevitably preclude a reasonably objective set of answers to these questions? And finally, in our efforts to formulate sound labor policy for today’s very different world, are there any lessons we can glean from the story of how the Wagner Act came to be?

Beginning two decades ago, I became intrigued by the challenge leveled by several critical legal theorists¹¹ against conventional views of the Wagner Act. During the 1985-86 academic year I visited at George Washington University in Washington, D.C. There I had the good fortune to discover that several venerable figures who were “present at the creation” of the NLRA were still

8. *Id.*

9. 78 CONG. REC. 3443-44, 10,351-52, 10,559 (1934) (statements of Sens. Wagner and Walsh), *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935, at 15, 1117, 1122 (1985); *see also* JAMES A. GROSS, THE MAKING OF THE NATIONAL LABOR RELATIONS BOARD 180-81 (1974) (“The board decided that the foundation [of its argument for the constitutionality of the statute] would be the other congressional finding contained in section 1: that employer unfair labor practices lead to strikes and industrial unrest, which physically obstruct the flow of commerce.”). For a short but provocative treatment of the legislative background of the Wagner Act, *see* CHRISTOPHER L. TOMLINS, THE STATE AND THE UNIONS: LABOR RELATIONS, LAW, AND THE ORGANIZED LABOR MOVEMENT IN AMERICA, 1880-1960, at 103-47 (1985).

10. 4 SELIG PERLMAN & PHILIP TAFT, HISTORY OF LABOR IN THE UNITED STATES, 1896-1932: LABOR MOVEMENTS 609-14 (John R. Commons ed., 1935); PHILIP TAFT, ORGANIZED LABOR IN AMERICAN HISTORY 435-50 (1964).

11. *See, e.g.*, ATLESON, *supra* note 5; Klare, *supra* note 3.

around, and they agreed to talk with me about it. These included Simon H. Rifkind, the “clerk” or legislative assistant to Senator Robert F. Wagner who had a key hand in the drafting of section 7(a) of the National Industrial Recovery Act (NIRA);¹² labor economist Leon H. Keyserling, Rifkind’s successor as Wagner’s legislative assistant and the principal draftsman of the Wagner Act; Charles A. Horsky, who represented the government in several early Supreme Court cases interpreting the Act; and such prominent management and union lawyers as Gerard D. Reilly and Ruth Weyand. All of them, even the left-leaning Weyand, denied that the “higher echelon”¹³ promoters of the Wagner Act conceived of it as a “revolutionary” statute, designed to restructure the management of the American workplace in fundamental ways.

Judge Rifkind agreed to see me in his New York office at eleven o’clock on a summer morning in 1986. He was then eighty-five years old and was representing Pennzoil in the famous *Pennzoil v. Texaco* case.¹⁴ I arrived ahead of time and the Judge’s secretary ushered me into his office about five minutes before the hour. The Judge looked up and commented: “You’re a little early, Professor. I had planned to finish reading this brief before we talked. I hope you don’t mind.” My memory has become increasingly confident over the years that at exactly 10:59:59 A.M., he put a rubber band around the brief, tossed it into the out box, and leaned forward, saying: “All right, now, Professor, what do you want to know about the Wagner Act?”

Rifkind acknowledged that he “may have put on paper” the wording of section 7(a) of the NIRA,¹⁵ now famous because of its later incorporation in large part into sections 7 and 8(1) of the

12. National Industrial Recovery Act, ch. 90, § 7(a), 48 Stat. 195, 198-99 (1935). The NIRA was invalidated in *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529-50 (1935), as an unconstitutional delegation of legislative power (§ 3) and as beyond the scope of the Commerce Clause. In language closely foreshadowing §§ 7 and 8(1) of the Wagner Act, Pub. L. No. 74-198, 49 Stat. 449, 452 (1935) (codified as amended at 29 U.S.C. §§ 151, 157-158 (1994)), § 7(a) of the NIRA provided that codes of fair competition promulgated under the Act must contain conditions granting employees the right to “organize and bargain collectively through representatives of their own choosing” and to be “free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.” § 7(a), 48 Stat. at 198.

13. Weyand’s phrase. See *infra* text accompanying notes 32-34.

14. See Eric Pace, *Simon Rifkind, Celebrated Lawyer, Dies at 94*, N.Y. TIMES, Nov. 15, 1995, at D20. For an original and enlightening perspective on this litigation, see Robert H. Mnookin & Robert B. Wilson, *Rational Bargaining and Market Efficiency: Understanding Pennzoil v. Texaco*, 75 VA. L. REV. 295 (1989).

15. Interview with Simon H. Rifkind in New York, N.Y. (Aug. 11, 1986).

Wagner Act.¹⁶ He insisted, however, that many persons contributed during Task Force discussions to the concept that employees should enjoy the basic rights to organize unions and bargain collectively with their employers.

According to Rifkind, Senator Wagner got interested in union problems when he was asked to argue a "yellow dog" contract¹⁷ case involving Interborough Rapid Transit in New York City.¹⁸ As a legislator, Wagner's aim was to legitimate unionism, not to remake the American workplace. The Senator was a practical politician, and he knew that unions would be beholden to him if he succeeded. But Rifkind stressed that Wagner also believed in what he was doing. Wagner felt he had gone as far as he could go with both the NIRA and the NLRA, and to go further "would kill" the legislation.

Although Rifkind said Wagner was not scholarly himself, Wagner carried on correspondence with some 300 academics across the country. These included Professor, later Senator, Paul Douglas, who told Rifkind he had become interested in labor policy as a result of exchanges with Wagner. Rifkind also noted that European influences played a role in Wagner's thinking.¹⁹ Wagner considered the United States "behind the times on social issues."²⁰ Rifkind concluded by pointing out that a labor relations statute on the order of the NLRA was not even part of the initial New Deal legislative package.²¹

16. 49 Stat. at 452 (codified as amended at 29 U.S.C. §§ 157-158 (1994)).

17. Under a yellow-dog contract, an employee agrees as a condition of employment not to join a labor organization. See LLOYD G. REYNOLDS ET AL., *LABOR ECONOMICS AND LABOR RELATIONS* 390 (9th ed. 1986). Such agreements are now illegal under the NLRA.

18. *Interborough Rapid Transit Co. v. Lavin*, 159 N.E. 863 (N.Y. 1928) (limiting injunction that prohibited union members from inducing transit company's employees to leave their positions). Rifkind was co-counsel to Wagner in this case. Rifkind stated that Wagner unsuccessfully sought the help of then-Professor Felix Frankfurter, but did obtain the assistance of Professor Herman Oliphant of Columbia. See Interview with Simon H. Rifkind, *supra* note 15.

19. For an extensive and elaborate analysis of Wagner's labor theories, see Mark Barenberg, *The Political Economy of the Wagner Act: Power, Symbol, and Workplace Cooperation*, 106 HARV. L. REV. 1379 (1993). Professor Barenberg's thesis is that the philosophy behind the Wagner Act was actually cooperationist, not adversarial as traditionally characterized. See *id.* at 1385-88. For a contrary view, see Thomas C. Kohler, *Methods of Worker Participation: The Uncertain Significance of Section 8(a)(2)*, 27 B.C. L. REV. 499 (1986).

20. Interview with Simon H. Rifkind, *supra* note 15.

21. See IRVING BERNSTEIN, *TURBULENT YEARS: 1933-1941*, at 2-3 (1969); FRANCES PERKINS, *THE ROOSEVELT I KNEW* 239-40 (1946); see also BERNSTEIN, *supra*, at 186, 190-91, 215-16, 324 (describing efforts to include labor negotiations in New Deal legislation); PERKINS, *supra*, at 325-27 (describing Roosevelt's avoidance of labor negotiations as a political issue).

By the time I spoke with Leon Keyserling in the late spring of 1986, he had already spent several hours over two days discussing his role in drafting the Wagner Act with Professor Kenneth Casebeer²² of Miami. Keyserling had probably had enough of academic inquisitors, and we got down to essentials in a hurry. The Wagner Act, he said, was written in the Senator's office.²³ Keyserling did not explicitly claim authorship, but I think he assumed I knew about that from other sources.²⁴

On the point of most immediate interest, Keyserling was adamant. The twofold purpose of the Wagner Act was (1) to advance social justice and (2) to channel protest and defuse potential rebellion. In Keyserling's view it was essentially a "conservative" measure.²⁵ The Act did not have the "radical" purpose of reshaping industrial relationships between employers and employees.

Keyserling was more specific than Rifkind in identifying the intellectual sources of Senator Wagner's thought. Wagner was, declared Keyserling, directly affected by the concepts of industrial democracy that had been developed by Sidney and Beatrice Webb.²⁶ Might this whiff of Fabian Socialism suggest the possibility that, after all, the principal sponsor of the Wagner Act had a broader vision of the statute than its principal draftsman?²⁷

Charles A. Horsky was a Washington lawyer little known to the general public, but a legend within the legal profession. For many years he was the resident polymath at D.C.'s most prestigious law firm, Covington and Burling, as well as one of the most dedicated pro bono practitioners and a leader in a wide variety of civic

22. See Kenneth M. Casebeer, *Holder of the Pen: An Interview with Leon Keyserling on Drafting the Wagner Act*, 42 U. MIAMI L. REV. 285 (1987). For Keyserling's own account of the importance of New Deal legislation, including the Wagner Act, in improving income distribution, see Leon H. Keyserling, *The New Deal and Its Current Significance in re National Economic and Social Policy*, 59 WASH. L. REV. 795, 801 (1984).

23. Interview with Leon Keyserling in Washington, D.C. (May 23, 1986). Wagner's tight personal control over the drafting of the NLRA is detailed in GROSS, *supra* note 9, at 131-32. See also Casebeer, *supra* note 22, at 351. There was regular consultation with Charlton Ogburn, a lawyer for the American Federation of Labor, and with Milton Handler, Philip Levy, and other staff counsel from the National Labor Board and the old NLRB, but the Department of Labor was deliberately excluded. GROSS, *supra* note 9, at 19, 44, 131-32; Casebeer, *supra* note 22, at 303, 306.

24. Interview with Leon Keyserling, *supra* note 23.

25. *Id.*; see also Casebeer, *supra* note 22, at 362 (quoting Keyserling describing the Act as "in some ways a very conservative statute, because it says that there are a lot of things that the government ought not to decide").

26. See generally SIDNEY & BEATRICE WEBB, *INDUSTRIAL DEMOCRACY* 840-50 (1902); SIDNEY & BEATRICE WEBB, *THE HISTORY OF TRADE UNIONISM* 1-63 (1920).

27. Without going back to the Webbs, Professor Barenberg cites the appeal of "industrial democracy" to the "progressive mind" in America during and after the First World War. Barenberg, *supra* note 19, at 1422.

activities.²⁸ When the Wagner Act was passed, he was a member of the Solicitor General's Office and handled several of the first cases on the scope of the statute.²⁹

In an interview with me, Horsky emphasized that the lawyers at the Labor Board and in the Solicitor General's Office were very much concerned with preserving the constitutionality of the Wagner Act.³⁰ The arguments they prepared for the Supreme Court were "technical and pragmatic." At no point was there any discussion that the statute would revolutionize American employer-employee relations, beyond guaranteeing workers the right to organize and bargain collectively. According to Horsky, the early defenders of the Act in the courts viewed it as "designed in considerable part to still industrial unrest."³¹

Within a decade after the enactment of the Wagner Act, Ruth Weyand, then an NLRB staff lawyer but later a union advocate, wrote a bold and imaginative article in which she tried to promote the idea that "almost every conceivable provision respecting the future of the business" should be considered a proper subject for collective bargaining.³² But during an interview with me in 1986, she conceded she could find little support in the legislative materials for the notion that all lawful proposals constituted "mandatory subjects" of bargaining, about which both unions and employers would be required to negotiate at the other party's behest.³³

28. See Irvin Molotsky, *Charles A. Horsky, 87, Dies; Left Imprint on U.S. Capital*, N.Y. TIMES, Aug. 24, 1997, § 1, at 33.

29. See, e.g., *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240 (1939) (holding that Board could not order reinstatement of employees fired for engaging in illegal sit-down strike to protest employer's unfair labor practices); *NLRB v. Sands Mfg. Co.*, 306 U.S. 332 (1939) (finding that employer could discharge employees threatening to strike to force employer to comply with erroneous interpretation of collective bargaining agreement).

30. Interview with Charles A. Horsky in Washington, D.C. (Mar. 26, 1986).

31. *Id.*

32. See Ruth Weyand, *Majority Rule in Collective Bargaining*, 45 COLUM. L. REV. 556, 593 (1945).

33. Interview with Ruth Weyand in Washington, D.C. (Apr. 21, 1986). The Supreme Court later decided that the statute's listing of bargaining subjects as "wages, hours, and other terms and conditions of employment," 29 U.S.C. § 158(d) (1994), constituted words of limitation. Parties were obligated to negotiate about various aspects of the employment relationship but not managerial prerogatives or purely internal union affairs. See *First Natl. Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981); *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342 (1958). The soundness of this approach and the appropriate dividing line between mandatory and nonmandatory subjects remain burning issues under the Act. See, e.g., *Dubuque Packing Co.*, 303 N.L.R.B. 386 (1991), *enforced (sub nom United Food Commercial Workers Intl. Union v. NLRB)*, 1 F.3d 24 (D.C. Cir. 1993), *cert. granted*, 511 U.S. 1016, *and cert. dismissed*, 511 U.S. 1138 (1994); Michael C. Harper, *Leveling the Road from Borg-Warner to First National Maintenance: The Scope of Mandatory Bargaining*, 68 VA. L. REV. 1447 (1982); Theodore J. St. Antoine, *The Collective Bargaining Process*, in AMERICAN

The old AFL unions, according to Weyand, “bargained narrowly about bread-and-butter issues.” Their practices, she said, were not “precedent for an expansive view of the Wagner Act.” She agreed that Senator Wagner and the other principal proponents of the statute were influenced by the dual theme of quieting labor unrest and promoting “industrial democracy.” She too believed that the latter concept came to Wagner via Sidney and Beatrice Webb.³⁴

Weyand concluded, much like Horsky, that there was no suggestion at the “higher echelons” of government that the Wagner Act was a radical or revolutionary statute. The constant concern of its defenders in the early court challenges was to maintain its constitutionality. That called for cautious rather than ambitious claims about its scope.

Curiously (or perhaps not), management attorney Gerard D. Reilly, who was an early Solicitor and then a Member of the NLRB, came closest among my interviewees to identifying radical tendencies among the Wagner Act’s champions. Reilly dubbed as “Communist sympathizers” Edwin S. Smith, a member of both the old, nonstatutory Labor Board and the new Board created by the NLRA; Nathan Witt, Assistant General Counsel and later Secretary of the NLRB; and Lee Pressman, General Counsel of the Congress of Industrial Organizations and the United Steelworkers of America.³⁵

Apart from the three individuals he named, however, “and possibly the Board’s Economic Research Division,” Reilly did not believe that the major proponents of the Wagner Act had designs on remaking the American workplace. In Reilly’s opinion, Simon Rifkind and Leon Keyserling were the two persons who could speak most authoritatively on the influences on Senator Wagner during the drafting of the NIRA and the NLRA. He thus confirmed Keyserling’s assertion that Wagner kept legislative drafting very much within his own office.³⁶

LABOR POLICY: A CRITICAL APPRAISAL OF THE NATIONAL LABOR RELATIONS ACT 215, 221-25 (Charles J. Morris ed., 1987).

For a vigorous critique of the doctrine that once an “impasse” or deadlock is reached in collective negotiations, an employer may unilaterally implement its previous proposals to the union, see Ellen J. Dannin, *Legislative Intent and Impasse Resolution Under the National Labor Relations Act: Does Law Matter?*, 15 HOFSTRA LAB. & EMPL. L.J. 11 (1997); Clive Gilson et al., *Collective Bargaining Theory and the Doctrine of Implementation of Final Offers Collide*, 48 LAB. L.J. 587 (1997).

34. See *supra* text accompanying note 26.

35. Interview with Gerard D. Reilly in Washington, D.C. (Apr. 8, 1986).

36. See *supra* note 23 and accompanying text.

A dozen years have passed since my talks with these and a few other participants in the drafting and initial enforcement of the Wagner Act. In the meantime I found myself diverted to several other projects. Eventually, I realized the clock was ticking and I might never get around to completing my inquiry. A major reason for retiring a little early from classroom teaching was to have the time to see for myself just what forces and personalities molded the statute, and to tell that story as simply and straightforwardly as possible.

Labor history can be an exciting subject. Few fields produce more colorful characters and happenings. Lawmaking in tumultuous times can be equally exciting.³⁷ I am satisfied that a good job has already been done in spelling out a number of legal and socio-economic theories that may or may not be reflected in the final product we know as the Wagner Act.³⁸ I do not believe there is yet as rounded an account of the personalities and events that were responsible for the ultimate shape of the statute.

My hope is to show the human drama, and to bring to life the competing interests, behind the words in the statute book. In an era of deregulation and a resurgent U.S. economy, it is now even respectable to argue that the whole notion of statutorily protecting the right to organize was a monumental mistake.³⁹ While the severest critic of the New Deal's labor policy would have it that "it takes a theory to beat a theory,"⁴⁰ I have always thought that facts trump theories.⁴¹ Be that as it may, I see my initial task as just setting

37. See, e.g., PETER H. IRONS, *THE NEW DEAL LAWYERS* (1982); ARTHUR M. SCHLESINGER, JR., *THE AGE OF ROOSEVELT: THE POLITICS OF UPHEAVAL* (1960).

38. See, e.g., ATLESON, *supra* note 5, at 35-43; GROSS, *supra* note 9; Barenberg, *supra* note 19; Casebeer, *supra* note 22; Klare, *supra* note 3.

39. See, e.g., Richard A. Epstein, *A Common Law for Labor Relations: A Critique of the New Deal Labor Legislation*, 92 *YALE L.J.* 1357 (1983).

40. Richard A. Epstein, *Common Law, Labor Law, and Reality: A Rejoinder to Professors Getman and Kohler*, 92 *YALE L.J.* 1435, 1435 (1983) (arguing that critics of his view that common law regulation of labor relations would be superior to New Deal legislation lack any coherent theory in support of their position).

41. My knowledge of scientific method is rudimentary. It is largely derived from popularizers like Issac Asimov, see, e.g., ISAAC ASIMOV, *ASIMOV'S NEW GUIDE TO SCIENCE* 13 (rev. ed. 1984) ("[N]o matter how many times a theory meets its tests successfully, there can be no certainty that it will not be overturned by the next observation."). Perhaps Sherlock Holmes in *A Scandal in Bohemia* best summed up my attitude: "It is a capital mistake to theorize before one has data." SIR ARTHUR CONAN DOYLE, *A Scandal in Bohemia*, in *THE COMPLETE SHERLOCK HOLMES* 161, 163 (1930). I must concede, however, that sophisticated scientific thinkers take a considerably more complex view of the respective roles of theory and observation. See, e.g., KARL R. POPPER, *THE LOGIC OF SCIENTIFIC DISCOVERY* 107 (Karl R. Popper et al. trans., rev. ed. 1968) ("Theory dominates the experimental work from its initial planning up to the finishing touches in the laboratory."). *But see id.* at 109 ("[W]hat ultimately decides the fate of a theory is the result of a test, i.e. an agreement about basic statements."); see also THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* 97

forth the facts. That alone should provide a stirring story and help to preserve a part of our national history that regrettably is unfamiliar to much of today's general public. It would be a welcome bonus if a clear-eyed retelling of the tale confirmed or refuted some of the clashing theories about the origins and purposes, or even the economic and social soundness, of the Wagner Act.

Of course I start with some preconceptions. Experience tells me that few events as complicated as the passage of a pathbreaking new piece of legislation can be attributed to a single cause or explained by a single theory. The diverse proponents, both groups and individuals, are likely to have diverse motives for lending their support. Even the same individuals may have different factors affecting their thinking at different times — and may actually be unaware of those shifting grounds for their behavior. I also do not know how successful I can be in digging out and presenting “just the facts.” As the savvier philosophers of science suggest,⁴² even what facts I choose to pursue or emphasize may be influenced, consciously or otherwise, by the preconceptions I bring to the task or by the tentative judgments I reach along the way.

How shall I proceed? Naturally, I shall begin by reviewing the legislative history and the voluminous materials that many able scholars have produced to date.⁴³ In addition I plan to immerse myself in the newspapers and other periodicals of the time. I do not believe those sources have been adequately explored. They should give some indication, for example, of how strong and widespread were the fears of a major worker uprising in the early 1930s, which could lend credence to the theory of the Wagner Act as a pacification measure. Wide-ranging editorial support for labor legislation — or the lack of such support — could also put in better perspective the importance of Senator Wagner's advocacy. Was he the key figure, the moving force behind it all, or was he riding a tide of national sentiment? So far most of the attention has focused on the maneuvering of Washington officialdom. Did the rest of the country, or nongovernmental groups, play any significant role in generating the impetus for the statute?

(2d ed. enlarged 1970) (“[N]ew theories are called forth to resolve anomalies in the relation of an existing theory to nature”); *id.* at 122 (“[E]ach of these interpretations [e.g., by Galileo observing the pendulum and by Aristotle observing falling stones] presupposed a paradigm.” (emphasis added)).

42. See KUHN, *supra* note 41; POPPER, *supra* note 41.

43. See, e.g., authorities cited *supra* notes 3, 5, 9, 10, 19-22, 32, 37, and 39.

In recent years legal historians have focused primarily on the legislative contribution of Senator Wagner. But others in Congress played significant roles, especially in the committee deliberations and floor debates following the introduction of various versions of Wagner's "labor disputes" bills in 1934 and 1935. These included Chairman Walsh of the Senate Committee on Education and Labor and Chairman Connery of the House Committee on Labor. On the critical question of an employer's duty to bargain collectively with a union representing the company's employees, for example, Senator Wagner was of mixed mind. At one point he seemed to embrace the broad conception of the old NLRB that employers had to negotiate in good faith by matching proposals with counterproposals and "mak[ing] every reasonable effort to reach an agreement."⁴⁴ At the same time he would avow: "Most emphatically this provision does not imply governmental supervision of wage or hour agreements."⁴⁵

Senator Walsh and Representative Connery were less equivocal. In a famous pronouncement Walsh declared: "The bill does not go beyond the office door. It leaves the discussion between the employer and the employee . . . voluntary . . ."⁴⁶ Connery was even more explicit. In a colloquy with a colleague on the floor of the House, he stated: "The [employer] may say: 'I will not give you the 10 cents an hour increase you ask.' There is nothing [the union] can do then. . . . This bill just compels you to deal with the [employees] collectively. You must sit across the table and talk things over with them."⁴⁷ How all these contrasting strands of thought were ultimately woven together, on the duty to bargain and other items as well, will be a central theme of my chronicle.⁴⁸

Finally, having done as honest a job of relating the facts as I can manage, I shall undoubtedly be unable to resist the temptation to try my own hand at a bit of theorizing. Was the Wagner Act necessary or desirable? How well did it respond to the needs of that period? Did it empower unions at the expense of individual employees as well as employers? Were its most ambitious and salutary

44. 79 CONG. REC. 7571 (1935), reprinted in 2 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935, at 2336 [hereinafter 2 NLRB] (statement of Sen. Wagner (quoting Houde Engineering Corp., 1 Dec. N.L.R.B. 35 (1934))).

45. 79 CONG. REC. 7571 (1935), reprinted in 2 NLRB, *supra* note 44, at 2335 (statement of Sen. Wagner).

46. 79 CONG. REC. 7659 (1935), reprinted in 2 NLRB, *supra* note 44, at 2373 (statement of Sen. Walsh).

47. 79 CONG. REC. 9685 (1935), reprinted in 2 NLRB, *supra* note 44, at 3118 (statement of Rep. Connery).

48. See generally Russell A. Smith, *The Evolution of the "Duty to Bargain" Concept in American Law*, 39 MICH. L. REV. 1065, 1084-89 (1941).

aims blunted by constrictive judicial interpretation? For all its good intentions, did it fly in the face of inexorable economic laws? Later, perhaps, I may wrestle with such further questions as: Was the Taft-Hartley Act,⁴⁹ adopted a dozen years later, a preordained corrective to Wagner Act excesses or a betrayal of its noblest impulses? Or were both statutes the properly balanced regulatory instruments for their respective times?

I believe I have set myself a scholarly agenda⁵⁰ sufficient to get retirement off to a healthy start.

49. Labor Management Relations Act of 1947, ch. 120, 61 Stat. 136 (codified as amended at 29 U.S.C. §§ 141-197 (1994)).

50. That is not meant to preclude travel and leisure.