
Douglas J. Feeney-Gallagher*

I. HISTORY OF THE NATIONAL LABOR RELATIONS ACT AND THE NATIONAL LABOR RELATIONS BOARD’S RELATIONSHIP WITH THE FEDERAL CIRCUIT COURTS

The New Deal years witnessed an explosive growth in the size and powers of the federal government as President Roosevelt proposed a series of measures to lift the nation out of the grasp of the Great Depression.¹ Many of these measures involved the creation of new administrative agencies, each focused on a particular problem or facet of the national economy. To many it seemed that overnight an alphabet soup of “new instruments of public power” had emerged and brought under federal regulation whole areas of the national life once considered private and removed from the public sphere.² Never

* Ph.D. in American History, State University of New York at Binghamton. Many people have contributed to this Article. I would first like to thank the editors of the Seattle University Law Review for guiding a first-time author through the publication process. I must also thank Daniel Ernst, Christopher Tomlins, and Katherine Stone for the helpful comments and suggestions they offered when I first presented this paper at the annual meeting of the American Society of Legal Historians in October 1998. The members of my dissertation committee, Melvyn Dubofsky, Brendan McConville, and Sarah Elbert, also offered valuable insights and contributions to this Article.


Most historians divide the New Deal into two distinct periods: the First New Deal, which is usually seen as running from 1933 through 1934, and the Second New Deal, which begins in 1935. The programs passed during the First New Deal were primarily designed to provide immediate unemployment relief, through programs such as the Civilian Conservation Corp, and to bring industry together to help end the Depression. They were also aimed at lifting up the nation’s industrial and agricultural sectors through the NIRA and the AAA. The Second New Deal is generally viewed as the more radical of the two as its programs were far more permanent and far-reaching than those under the first New Deal. The National Labor Relations Act and the Social Security Act were products of the Second New Deal.

before, except during times of war, had the federal government held or exercised such broad and extensive powers.\textsuperscript{3} By the middle of 1935, federal administrative agencies were busily regulating nearly all facets of the economy. The National Recovery Administration drew up production codes for private corporations,\textsuperscript{4} the Civilian Conservation Corps provided direct public relief and employment, the Tennessee Valley Authority involved the federal government in regional economic and social planning, and the Securities and Exchange Commission brought under federal supervision the securities market. Nothing, it appeared to the New Deal’s critics, fell outside the scope of federal authority as the new administration attempted to resuscitate the moribund national economy.

The most significant federal agency born under the New Deal came to life in July 1935 when President Roosevelt signed the National Labor Relations Act (NLRA, or the Act), also called the Wagner Act.\textsuperscript{5} Never before in peacetime had the federal government decided to so heavily regulate the private relationship between an employer and his or her workers.\textsuperscript{6} On the surface, the Wagner Act simply

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\item \textsuperscript{3} World War I was the last time the federal government played such an active role in directing the national economy. For the most part, the wartime measures ended once the war ended. See DAVID KENNEDY, OVER HERE: THE FIRST WORLD WAR AND AMERICAN SOCIETY (1980).
\item \textsuperscript{4} The National Recovery Administration was part of the National Industrial Recovery Act, which was passed in 1933. It created a series of production codes for industry in an attempt to bring order back to the industrial sector. The Supreme Court ruled the Act unconstitutional in 1935. See A.L.R. Schechler Poultry v. U.S., 295 U.S. 495 (1935).
\item \textsuperscript{5} The Civilian Conservation Corps was established in March 1933 as the federal government’s primary unemployment relief program. It provided work for young men mainly on public projects such as road construction, conservation, and flood control. The Tennessee Valley Authority was perhaps one of the most ambitious of the New Deal’s programs. Established in 1933, the TVA undertook to revitalize the entire Tennessee River Valley through the development of dams and industry and by providing relatively cheap electricity to the region.
\item \textsuperscript{6} See National Labor Relations Act, 29 U.S.C. § 151 (1994) [hereinafter NLRA]. There are several published histories of the National Labor Relations Board. Irving Bernstein was one of the first historians to examine the origins of New Deal labor policy and to examine the birth of the National Labor Relations Act of 1935. James Gross, however, provides a much more detailed account of American labor policy in the New Deal years and focuses much attention on the battles over the NLRA after its passage in 1935. See IRVING BERNSTEIN, THE NEW DEAL COLLECTIVE BARGAINING POLICY (1950); JAMES GROSS, THE MAKING OF THE NATIONAL LABOR RELATIONS BOARD: A STUDY IN ECONOMICS, POLITICS, AND THE LAW, 1933–1937 (1974); and JAMES GROSS, THE RESHAPING OF THE NATIONAL LABOR RELATIONS BOARD: NATIONAL LABOR POLICY IN TRANSITION, 1937–1947 (1981).
\item \textsuperscript{6} During WWI, the federal government forcefully entered the field of labor relations. As wartime orders boosted the economy, the number of strikes began to rise, with over 4,400 in 1917 alone. To ensure that there were no interruptions in the production of wartime goods, Woodrow Wilson established the National War Labor Board (NWLB) in April 1918, and brought under government regulation and supervision the field of labor relations. For workers and organized labor, the entrance of government into the labor relations process, for a change, proved quite helpful. The NWLB forced employers to recognize and bargain with the chosen
restated the labor provisions contained in the earlier National Industrial Recovery Act, which also protected the rights of workers to organize but had lacked the power to enforce those provisions.7 The NLRA made illegal a whole host of employer actions designed to block the organizational and unionizing efforts of their workers.8 The legislation also created a powerful agency with administrative and adjudicative powers to enforce the Act’s protections.9 Congress delegated to the new National Labor Relations Board (NLRB, or the Board), sweeping powers over the employment relationship. The Board held the authority to charge employers with committing unfair labor practices, conduct administrative trials against the employer, and impose sanctions forbidding the employer from interfering with the right of his or her workers to organize. The existence of the Board challenged traditional managerial prerogatives in the workplace and threatened to fundamentally transform the power relations between workers and their employers.

representatives of their workers. For the first time, the government essentially declared that workers had a right to organize and bargain collectively with their employers. With the help of the federal government, the organized labor movement gained over two million members during the war years. Once the war was over, however, the federal government quickly dismantled the wartime labor relations apparatus it had assembled and left workers to their own devices in their postwar battles with employers. See MELVYN DUBOFSKY, THE STATE AND LABOR IN MODERN AMERICA (1994); JOSEPH MCCARTIN, LABOR’S GREAT WAR: THE STRUGGLE FOR INDUSTRIAL DEMOCRACY AND THE ORIGINS OF MODERN AMERICAN LABOR RELATIONS, 1912-1922 (1997).

7. See National Industrial Recovery Act § 7(a), 15 U.S.C. §§ 701, 702 (enacted 1933) [hereinafter NIRA]. Section 7(a) of the NIRA, which used similar language as first written into the Railway Labor Act of 1926 and the Norris-La Guardia Act of 1932, stated that every code of fair competition, agreement, and license approved, prescribed, or issued under this title shall contain the following conditions: (1) that employees shall have the right to organize and bargain collectively through representatives of their own choosing, and shall 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; (2) that no employee and no one seeking employment shall be required as a condition of employment to join any company union or to refrain from joining, organizing, or assisting a labor organization of his own choosing.

Id.

Unfortunately for labor, the Act did not contain any provisions for enforcement of these protections if employers violated them. Enforcement depended upon the will of General Hugh Johnson, the head of the National Recovery Administration, and President Roosevelt, neither of whom appeared eager to make the protections embodied in section 7(a) real. See DUBOFSKY, supra note 6, at 111-13.


9. NLRA, supra note 5, at § 3(A).
Looking back over the first ten years of the NLRA, Charles Fahy, the Board’s General Counsel from 1935 to 1941, reflected upon the Board’s close relationship with the lower federal courts. He reminded his readers that “like most quasi-judicial agencies . . . and perhaps to a greater extent than most, there are no powers which [the Board] can exert unaided.” Therefore, he continued, a Board ruling takes on the force of law only “until it becomes the order of a Circuit Court of Appeals.” Orders of the Board were not self-enforcing, and the Board could not compel or force employers to obey its directives. Thus, the Act itself gave the lower federal courts “a vital position in the statutory” structure of the new labor legislation as the constitutional body charged with enforcing decisions and orders of the Board. Fahy recognized that the judges sitting on the federal court benches, and not the Board, would “either make the Act work or destroy it” through their powers of judicial review over Board decisions. This was true despite the legislative intent of the NLRA, aggressive enforcement of the Act’s protections by the Board, and even public support for the new labor law.

Though the Wagner Act gave the NLRB the power to protect workers’ rights to organize, the Board nonetheless did not operate completely independent of the other branches of government. The Board was charged with enforcing the Act’s provisions, as Charles Fahy pointed out, but the federal circuit courts of appeals made the Board’s orders real. The Act allowed employers to appeal NLRB

11. Id. at 43.
12. Id.
13. The NLRB’s legal relationship with the circuit courts was modeled on that of the Federal Trade Commission and the Interstate Commerce Commission. The bill’s primary author, Senator Wagner, referred to the Act’s provisions of judicial review to counter the charge that the proposed “Board is to be invested with extraordinary powers.” Hearings on H.R. 6288 Before the Subcomm. on Labor of the House Comm., 74th Cong., 1st Sess. (1935) (testimony of Senator Robert F. Wagner).
14. FAHY, supra note 10, at 43.
15. Id. The judicial power to “either make the Act work or destroy it,” as well as the reasons for the Board’s utter dependence on the judiciary for enforcement of its orders lie in the very wording of the NLRA written and passed by Congress. Section 10(e) of the Wagner Act granted to the Board the “power to petition any Circuit Court of Appeals of the United States . . . wherein such person resides or transacts business” for the enforcement of its orders. If an employer disregarded a Board decision, the Board, then, had to seek judicial enforcement of that order by filing a petition of enforcement within either the circuit court where the unfair labor practice occurred or where the employer transacted business. Thus, the authors of the Act, though creating a quite powerful administrative agency, nonetheless did not allow the Board to enforce its own decisions but rather it had to rely upon judges sitting on the various circuit court benches.
rulings directly to the nation's federal circuit courts of appeals. The circuit courts also heard Board requests for enforcement of its decisions against recalcitrant employers. Through their powers of review, circuit court judges were the first group of federal judges to offer opinions on the Act's intent, rule upon its constitutionality, and delineate the proper jurisdictional boundaries of the NLRB as an agency with adjudicative and administrative powers. Thus, circuit court judges played an important role in the construction of a new body of national labor law around the legislative framework provided by the Wagner Act.

The question of how to enforce the Act, as this essay will show, varied among the various judges sitting on the federal court benches. Often the choice in the federal circuit courts was not between destroying the Act or deferring to the Board's aggressive enforcement of its provisions, but rather, the choice involved determining the proper limits of the Board's authority and drawing clear lines around that authority to safeguard traditional judicial powers and functions. Thus, the battle among circuit court judges who determined whether to enforce or vacate Board decisions revealed a deeper struggle concerning the role of administrative agencies in the American form of governance. For the Board, this struggle on the circuit court benches meant that the agency faced a divided judicial landscape. These divisions subsequently resulted in the uneven enforcement of the Act's new protections. Moreover, the battle on the benches forced the Board to continually meet the challenge of differing standards of conduct and evidence as well as limits on its administrative and judicial authority.

Few historians have examined the important role that circuit court judges played in the labor relations system set up with the National Labor Relations Act of 1935. Instead, most have focused on the Supreme Court's interpretation of the new labor legislation. By

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17. NLRA, supra note 5, at § 10(F).
18. Id. at § 10(E).
19. Those associated with Critical Legal Studies (CLS) have showered the most recent attention upon the Supreme Court's handling of Wagner Act cases. This group of scholars has been primarily concerned with the question of whether the Court essentially upheld or "de-racialized" the Wagner Act. For examples of the CLS approach see Karl E. Klare, Judicial De-Racialization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941, 62 MINN. L. REV. 265 n.3 (1978); JAMES ATLESON, VALUES AND ASSUMPTION IN AMERICAN LABOR LAW (1983).

Earlier historians tend to gloss over the circuit courts' role when looking at the development of American labor law after passage of the Wagner Act. Irving Bernstein focuses his attention upon the Supreme Court and what he sees as a "revolution" in its upholding of the Act's constitutionality. Richard Cortner and Peter Irons both discuss the NLRB's strategy of "circuit shopping" for judges likely to uphold their decisions in his study of the Wagner Act cases. None,
focusing on the Supreme Court, however, these historians overlook the intense battles that took place over the NLRA within the nation's eleven federal circuit courts of appeals. Circuit court judges handed down the first rulings concerning the Wagner Act, and it was from this group of judges that both employers and the NLRB sought relief or orders of enforcement. Though bound to accept rulings of the Supreme Court as precedent, circuit court judges, nonetheless, exerted an enormous amount of influence over how effectively the Board enforced the Act in different regions of the nation.

An examination of circuit court rulings concerning the NLRA from 1936 through January 1942 reveals the struggle waged by some circuit court judges to preserve the integrity of the judicial branch against intrusions from the NLRB and the rise of a reinvigorated conceptualist legal critique of the New Deal administrative state. These judges resisted the invasion of federal power into the employment relationship and interpreted as narrowly as possible the powers and scope of the NLRB. Additionally, most of these judges did not challenge the NLRB with purely nineteenth-century legal conceptualist or formalist reasoning. By the 1930s, they too had adopted many realist assumptions concerning law and spoke in a realist rhetoric. However, instead of championing the rise of administrative law and agencies, these judges reasserted legal principles firmly rooted in pre-Depression America. In essence a strain of legal formalism, though disguised, "persisted under the realist banner" within the federal circuit courts in their decisions concerning the new labor board.

The conflicting judicial attitudes expressed in the circuit courts did not solely concern the legitimacy of the new labor legislation. The battles over the Wagner Act also reflected deeper differences both over the role of the judiciary in the New Deal political order and the emergence of powerful administrative agencies seemingly operating outside of the Constitution. These legal and judicial differences exhibited in the circuit courts originated partly in the two competing schools of legal thought circulating in the early twentieth century.

however, explores these judicial differences in any detail. See Bernstein, supra note 5; Richard Cortner, The Wagner Act Cases (1964); Peter Irons, The New Deal Lawyers (1982).

20. See Bernstein, supra note 5.

21. The first Wagner Act cases did not reach the federal circuit courts until Spring 1936 and, in January 1942, the National War Labor Board assumed command of the nation's labor relations machinery for the duration of World War II.

22. See infra notes 24-36 and accompanying text (on legal conceptualism).

II. TWO COMPETING SCHOOLS OF THOUGHT: LEGAL CONCEPTUALISM AND LEGAL REALISM

The battles among the judges sitting on the circuit court benches over the new labor board illustrate differing conceptions concerning the role of the administrative agency in the American form of governance. The legal battles over the NLRB also reflect the two competing schools of legal thought circulating in the late nineteenth and early twentieth centuries. During the early twentieth century, the dominant classical legal thought, legal conceptualism, came under increasing pressure from a new school of legal thinking, often called legal realism. Legal conceptualism was firmly embedded in the notion that the individual was the foundation of society and the free market represented the natural ordering of the economy. Realism, on the other hand, challenged the individual's central place in the law and believed the free market was a human construct that benefited certain groups at the expense of others. The free market to realists was neither natural nor neutral in its operation.

A. Legal Conceptualism

Most judges coming of age in the late nineteenth century were products of the "classical legal thought" tradition, or legal conceptualism. Proponents of legal conceptualism believed that law "was the embodiment of timeless principles of truth and right" that did not vary either over time or with changing economic or social conditions, as did political decision making. To legal conceptualists, law was a science, as they "aspired to import into the process of legal reasoning the qualities of certainty and logical inexorability." In theory, judges studied their case books and legal categories and applied the law objectively to cases that came before their benches. This had the effect, as Morton Horwitz points out, of raising the credibility and prestige of judges by endowing their opinions with a sense of scientific objectivity, while at the same time creating "a self-contained system of legal reasoning that would be immune to the charge that it was simply political."

Classical legal thought was also influenced by the laissez faire legal tradition. Laissez faire was a product of the courts rather than

26. HORWITZ, supra note 24, at 16.
27. Id.
the academy. In laissez faire legal tradition, the individual stood at the center of legal formalist thought, especially as interpreted in judicial circles. This "atomistic individualism" of the courts viewed the individual as the fundamental unit of society and "individualism as a moral and economic ideal." In practice, this philosophy viewed "the freedom of the market [as] essentially the freedom of the individual to strike, or indeed not to strike, private bargains." Additionally, this laissez faire component of legal conceptualism viewed freedom of contract as one of the most fundamental of liberties whereby "each is free to offer; each is free to accept; each is free to refuse. . . . But . . . no one may force another to part with his goods; no one may force another to take a specified price; for no one can do so without assuming more liberty of action than the man whom he thus treats." Under this theory, the free market was sacrosanct, immune from government intrusion.

However, this viewpoint did not mean that all individuals were equal, or should be made equal, when it came to their respective bargaining positions within the market. The laissez faire legal tradition argued only that all individuals have a right to compete, enjoying whatever economic leverage they are able to muster. The tradition based its argument on the principle that the weak will fail and the strong thrive through the natural selection of the market.

In the labor relations field, legal formalists argued individual workers should bargain with their employers for the sale of their labor. If the workers did not accept the terms of the contract, they had a right to find alternate employment. Similarly, employers had a right to hire and fire whomever they pleased. Even with its laissez faire component, legal conceptualism did not concern itself with the inherent inequalities within the marketplace or between employers and workers. Therefore, as society became increasingly industrial and workers began to organize in increasing numbers, the foundations of legal conceptualism began to erode.

29. Id. at 25-26.
30. ERNST, supra note 25, at 2.
32. Id.
33. Id. at 27.
34. Id. at 27-28.
35. Id.
36. Id.
B. Legal Realism

Through the early twentieth century, legal realism, a new mode of legal thought, made headway against legal conceptualism, which dominated the late nineteenth century. According to legal realists, as society became increasingly industrial and organized along class lines, nineteenth-century classical legal thought based upon "atomistic individualism . . . had come to be out of touch with reality." Realists believed law constituted a living organism, constantly evolving with changing social and economic conditions. Some within the realist camp pushed the concept of a living law even further. Instead of contenting themselves with bringing law in line with the social reality of the 1930s, the more aggressive legal realists advocated the active use of the law as a tool for transforming, rather than merely reflecting, contemporary social conditions.

Additionally, realists attacked the formalist or legal conceptualist veneration of the free market as both natural and sacrosanct from public regulation. Realists, however, countered that the free market was neither free nor natural; rather, it was socially constructed, served particular interests over others, and relied on coercion rather than the voluntary striking of contracts as envisioned by the formalists.

Moreover, legal conceptualism's "scientific" language and methods cloaked deep-seated judicial biases, while its veneration of the natural function of the free market glossed over the current coercive nature of unfettered competition between unequal competitors. Therefore, the realists continued, because the free market was no longer comprised of individuals "freely" achieving their self-interests, it was also no longer neutral. Thus, the realists concluded that there was room for state interference. Once market outcomes were no longer regarded as natural, state regulation could not be accused of hindering the natural development of society or the economy.

Some realists took the living notion of law and the socially constructed nature of the free market a step further. This realist group

37. HORWITZ, supra note 24, at 3-7.
38. See ERNST, supra note 25, at 2; HORWITZ, supra note 24, at 187.
39. HOROWITZ, supra note 24, at 188.
40. ERNST, supra note 25, at 70.
41. HORWITZ, supra note 24, at 195.
42. Id. at 195-96.
44. ERNST, supra note 25, at 70.
45. HORWITZ, supra note 24, at 198.
46. Id.
47. See ERNST, supra note 25, at 70.
attempted to bring what they saw as a "lagging law" back into line with a rapidly changing society.\footnote{Id.} While the conceptualists applied general and (they would argue) timeless principles to the cases that arose before them, this realist group saw law as a much more dynamic force. Some, such as Pound,\footnote{Id.} thought law needed to focus on "the adjustment of principles and doctrine to the human condition they are to govern."\footnote{Id.} This meant simply bringing legal doctrine up to date with contemporary social reality. Jerome Frank also believed that modern problems required a "legal system capable of fluidity and pliancy."\footnote{Id.} In practice, this meant that judges and lawyers must "constantly overhaul and adapt" the law to "ever-changing social, industrial, and political conditions."\footnote{Id.} Others, such as Felix Frankfurter, argued that law should play a much more active role in society.\footnote{Id.} Law, he argued, was "a vital agency for human betterment," and those in the legal profession should become "the directors of social forces."\footnote{Id.}

Law, to this realist group, was not the mere passive application of case law or legal principles to legal controversies; rather, law was a much more active social force. Conceptualists might have been content with law sitting on the social and economic sidelines while individuals competed freely in the marketplace, but realists were ready to use law and the state to level the playing field.\footnote{Id.}

The New Deal provided realists with an opportunity to put facets of their legal ideology in action.\footnote{Id.} Although it should be noted that the New Deal was not a direct manifestation of legal realism, it nonetheless represented many of the realists' fundamental ideas and beliefs.\footnote{Id.} For example, the notion that the free market alone would

\footnotesize{48. Id.}  
\footnotesize{49. Id. Born in 1870, Roscoe Pound served as Dean of Harvard Law School from 1916–1936. Pound is associated with the sociological jurisprudence movement of the opening years of the twentieth century, the antecedent to realism.}  
\footnotesize{50. Id.}  
\footnotesize{51. JEROME FRANK, LAW AND THE MODERN MIND 7 (1930).}  
\footnotesize{52. See ERNST, supra note 25, at 70.}  
\footnotesize{53. Id.}  
\footnotesize{54. Id.}  
\footnotesize{55. Id.}  
\footnotesize{56. Like legal conceptualism, legal realism is a broad category and not a fixed set of ideas and beliefs. There was much variation among self-identified legal realists, as will be explored later in this Article in the sections dealing with the circuit courts. All legal realists agreed, however, that law needed to be brought back in touch with real life and legal conceptualism was not a value-free or objective application of the law.}  
\footnotesize{57. KERMIT HALL, THE MAGIC MIRROR: LAW IN AMERICAN SOCIETY 271 (1989).} Morton Horwitz also draws parallels between legal realism and the New Deal administrative State. Horwitz argues that the New Deal, as well as the Supreme Court's sudden support for the administrative state in 1937, "constituted the successful culmination of a generation of intellectual struggle against the legal foundations of the old order." MORTON HORWITZ, THE TRANS-
produce the best social good expired with the Great Depression's economic havoc. The Depression revealed that the state needed to play a more active role in directing contemporary society's complicated social and economic forces; it could no longer sit on the sidelines. Additionally, the Depression undermined the conceptualist notion that the individual constituted society's fundamental unit. The massive economic and social upheaval of the 1930s could be solved only on a national basis, not at the individual level, because the problem was a result of systemic problems and not individual failings.

Most of the New Deal programs were imbued with the realist notion that law and government should play active roles in society. President Roosevelt actively reshaped the federal government, primarily by creating administrative agencies, battling with the Depression, and taking the federal government into territory once considered private and free from public oversight. Federal legislation, such as that creating the National Recovery Administration, the Agricultural Adjustment Administration, the Tennessee Valley Authority, and the National Labor Relations Act, undertook to involve the federal government in economic and social planning. Though legal realists did not head these agencies, the New Deal administrative state nevertheless reflected some of the primary realist tenets which had evolved through the early twentieth century. This similarity between realist legal thinking and the New Deal administrative state raised the ire of many federal circuit court judges.58

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58. One of the most vigorous champions of the administrative process during the New Deal years was James M. Landis. He saw the growth of administration as arising “from the inadequacy of a simple tripartite form of government to deal with modern problems.” JAMES LANDIS, THE ADMINISTRATIVE PROCESS 1 (1938). Landis charged that the courts, in particular, were unable or at least unwilling to deal with the problems of contemporary society and, in good conceptuallist fashion, were prone to making decisions “springing from generalizations and principles drawn from the majestic authority of textbooks and cases.” The administrative agency, however, since it was designed to focus on one specific problem made law “from a practical judgment which [was] based upon all the available considerations and which [had] in mind the most desirable and pragmatic method of solving that particular problem.” Id. at 1, 24.

Though Landis was never included within the realist camp during the 1930s, Morton Horwitz argues that his defense of administration nevertheless drew from earlier “Progressive and Legal Realist attacks on the inefficiency of the judicial process and on the inability of judges trained in common law methods of thought to bring either consistency or deep social understanding to the task of regulation.” HORWITZ, supra note 24, at 214-15.
The rise of powerful administrative agencies during the New Deal, however, sparked a judicial counterattack in the lower federal courts against these dangerous tendencies in the deformation of the American system of governance. 59 Aware of the gap between late nineteenth-century legal thought and contemporary social conditions, judicial critics of the New Deal resisted what they saw as the blatant politicization of the law as well as the subordination of property and individual rights inherent within the New Deal administrative state. 60 Many circuit court judges opposed to the new labor board did not try to resurrect the legal conceptualism of the late nineteenth century. 61 Rather, they agreed with the realists that the examination of the law no longer constituted a "determinate, objective, and value-free operation." 62 Nevertheless, these circuit court judges insisted that legal and political reasoning still differed fundamentally from one another. 63

Furthermore, although this group of judges recognized the need for such administrative agencies as the NLRB, they questioned the Board's usurpation of the constitutional privileges granted solely to the judiciary and its limitations of what the judges saw as traditional individual and property rights. Therefore, the primary problem for judges' antagonistic attitude toward the Board was not whether the law should be brought into line with contemporary social conditions, but whether the rise of powerful administrative agencies, which seemingly operated outside of the Constitution and traditional law, was a proper extension of federal and executive branch power.

This paper examines the efforts of some circuit court judges to preserve the integrity of the judicial branch against the encroaching...
power of the New Deal administrative agencies, especially as represented by the NLRB. This paper offers a historical overview of the relationship between two circuits and the NLRB; one circuit welcomed the Board's aggressive enforcement of the Act, while the other expressed hostility towards the labor agency's powers and interpretation of the Wagner Act. An examination of the NLRB opinions in these two circuits illustrates the opposing judicial attitudes toward the new turn in labor law reflected in the Wagner Act. More significantly, the opinions also reflect deeply held differences concerning the role of the administrative agency in the American form of governance. The Eighth Circuit judges believed law must change and conform to society's needs. The Great Depression, then, called for drastic changes in both the American form of governance and in labor law. The Fifth Circuit judges, however, although agreeing that law must reflect the needs and conditions of contemporary society, nevertheless asserted that these changes must occur within constitutional bounds and the traditional form of American governance, both of which the NLRB trespassed upon.

The circuit courts heard three hundred eighty-eight NLRB cases from 1935 through January of 1942.64

NLRB Cases in the Circuit Courts of Appeals (1935–1942)

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64. There were four-hundred fifty-seven listed in the Federal Reporter, however, that total also includes consent decrees. It appears that not all of the circuits chose to publish the consent decrees entered into in their circuits. The Eighth Circuit published all of these decrees while others did not publish any. All of the consent decrees entered into by the board and employers are listed in the Board's annual reports.
Overall, the Board won forty-six percent of its orders brought before circuit court judges. However, the circuit courts vacated the Board’s orders in twenty-one percent of its decisions and modified them in another twenty-six percent of the courts’ decisions. These numbers, however, reflect the Board’s overall average in the circuit courts and hide the wide variations within the individual circuit courts.

The Eighth Circuit judges were the most favorable toward the NLRB. These judges heard forty-five cases concerning the Wagner Act between 1935 and January 1942. Moreover, nearly seventy-three percent of their opinions favored the Board, while only seven percent were against it. The Eighth Circuit modified an additional five Board orders, and four of their decisions fall outside these three categories. No other circuit upheld and enforced a greater percentage of the NLRB’s final orders. The First and Tenth Circuits ordered enforcement of only sixty- and fifty-seven percent of the Board’s findings, respectively, but these judges ruled on only twenty-nine cases during the time period considered. The Third Circuit, which heard nearly the same number of cases as the Eighth, sided with the Board only half of the time.

Nevertheless, although the Eighth Circuit proved welcoming to the NLRB and its enforcement of the Wagner Act, the Fifth Circuit judges were much more hostile to the New Deal administrative state. For example, the Fifth Circuit judges enforced only thirty-nine percent of the forty-four NLRB decisions presented for their review. This is among the highest percentage of reversals in all the circuit courts of appeals. Only eighteen out of forty-four cases, forty-one percent of NLRB orders survived judicial review and were fully enforced by the court. The court modified an additional eleven percent of the Board’s decisions before ordering them enforced. Thus, over fifty percent of the Board’s orders in this circuit, as opposed to fewer than twenty percent in the Eighth, were either wholly vacated or substantially modified before being enforced.

65. A modified decision is one in which the court decided that portions of the order could be enforced while others were to be denied. Modifications could be substantial or minimal. Orders of the Board enforced with minimal modifications I have placed in the enforced category, while those that were substantially modified to lose most of their original intent and force I have placed in the lost category.

66. Cases that fall under the “other” category include those in which a special master was appointed to take additional evidence in the case or in which the court referred the matter back to the Board for additional action before it would offer a ruling.
III. THE EIGHTH CIRCUIT'S INFLUENCE ON LABOR LAW

The Eighth Circuit judges were the most friendly toward the Board. They tended to give the Board greater leeway in enforcing the Act than did the other circuit courts.\(^67\) The Eighth Circuit judges tended to be wary of interfering with the Board's operations and used the powers granted to them lightly in deciding whether to overturn Board decisions.\(^68\) This restricted oversight of the Board covered nearly all facets of its administration.\(^69\) For example, the judges enforced the Board's rulings in the face of questionable evidence, allowed the Board to create multiplant bargaining units, and hesitated to extend strict judicial oversight over the Board, reasoning that the Board was the agency best left in charge of "effectuat[ing] the purposes of the Act."\(^70\)

The Eighth Circuit's opinions regarding the Wagner Act reflected some primary tenets of legal realism as it gained a stronger foothold during the 1930s. Legal realists accepted administrative agencies as legitimate entities of the American form of governance. Judges in the Eighth Circuit, like James Landis, believed administrative bodies were best suited to deal with the problems of modern society. Their decisions reflect the belief that law should play an active force in society. The Eighth Circuit judges did not view the NLRA as merely a negative piece of legislation that prohibited certain employer actions; rather, they viewed the NLRA as a positive piece of social legislation designed to fundamentally alter power relations between workers and employers. Finally, these judges acknowledged the inherent inequalities in bargaining power within the marketplace between employers and their workers. Therefore, they accepted the notion that America was a class-divided society and supported the Board's efforts to strengthen the bargaining positions of workers through the creation of multiplant bargaining units.

A. Pratt v. Stout: Is the Wagner Act Constitutional?

Initially, the new Board did not hold out much hope for the Eighth Circuit. In August 1936 the court refused to lift a temporary injunction placed on the Board by Judge Merrill E. Otis of the West-

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67. See chart, infra Part II.B.
68. See, e.g., NLRB v. Lund, 103 F.2d 815 (8th Cir. 1939); Cudahy Packing Co. v. NLRB, 102 F.2d 745 (8th Cir. 1939).
69. See Pittsburgh Plate Glass Co. v. NLRB, 113 F.2d 698 (8th Cir. 1940); Cupples Co. v. NLRB, 106 F.2d 100 (8th Cir. 1939).
70. Pittsburgh Plate Glass Co., 113 F.2d at 701.
ern District of Missouri. In a unanimous opinion written by Judge John Sanborn, the court ruled that the granting of the temporary injunction “will not be disturbed unless contrary to some rule of equity or the result of an improvident exercise of judicial discretion.” The court argued that the questions concerning the suit were “grave and difficult,” and the possible injury to the company could be “substantial and irreparable” if the temporary injunction was denied. Thus, because the injunction “will not result in too great injury” to the Board and the issues at stake were of such great importance, the court believed that the injunction should remain in effect until the controversy received a full hearing at the district court level.

However, the court refused to rule on the Wagner Act’s constitutionality. The controversy brought before it, the court noted, was the granting of the temporary injunction and not the constitutional status of the NLRA. Interestingly, the reason given for maintaining the injunction foreshadowed the court’s future relationship with the NLRB. “Since the granting or withholding of a temporary injunction rests in the sound judicial discretion of the trial court,” Judge Sanborn wrote, “its order may not be reversed . . . without clear proof of an abuse of discretion even though the appellate court” might have ruled differently concerning the injunction. The court ruled that there was

71. Pratt v. Stout, 85 F.2d 172 (8th Cir. 1938). In Stout v. Pratt, 12 F. Supp. 864 (W.D. Mo. 1935), District Court Judge Merril C. Otis granted a temporary injunction to the Stout family, operators of a small flour mill in Missouri, prohibiting the Board from proceeding with its unfair labor practices case against the company. The case began when the workers at the plant organized a union affiliated with the American Federation of Labor. Id. at 865. Their demands however, were met with resistance and the employer shut down the mill. Id. Upon reopening the mill, the employer rehired all former employees who applied for their jobs and refused to deal with the workers on a collective basis. Id. at 865-66. The Board then entered the picture, charging the company with violating the NLRA by refusing to bargain collectively with the workers’ chosen bargaining representatives. Id. at 866.

Otis issued the injunction and attacked the NLRA as clearly unconstitutional. Id. at 871. He criticized the Board’s defense that the Act was constitutional under the commerce clause because if the employer does not bargain, the workers may strike, and, thus, less flour will be introduced into interstate commerce. Id. at 867-68. Otis responded that “[i]t is difficult to imagine anything more remote from another and less directly connected with [interstate commerce] than is the first step in this suggested chain of events from and with the last.” Id. at 868. More importantly, Otis stressed, “manufacturing is not commerce nor any part of commerce.” Id. at 867. He also dismissed the Board’s assertion that the company had an adequate remedy at law to challenge any decision of the agency through appeal to the circuit courts. Id. at 870. Otis argued, however, that “the whole act is unconstitutional including that part of it which purports to give a remedy to those who may be injured by the enforcement of the act.” Id. at 871.

72. Pratt, 85 F.2d at 176.
73. Id. at 177.
74. Id. at 177.
75. Id. at 181.
76. Id.
77. Id. at 177.
no evidence that Judge Otis abused his powers by issuing the injunction; thus, they were unable to reverse his order. The judges on this bench followed a similar path when it came to reviewing orders of the NLRB. They were careful not to infringe upon the duties of administrative agencies or other judicial benches through an overly aggressive use of their powers of judicial review.

Though Judge Sanborn’s opinion “refrained from expressing an opinion as to the constitutionality of the Act,” the court did discuss the NLRA as part of their decision. The court considered the constitutional questions raised by the Wagner Act to be sufficiently important to uphold the district court’s injunction. The court, however, did not necessarily agree with Judge Otis’ conclusions. The Second Circuit Court of Appeals, Judge Sanborn noted, upheld the Act’s constitutionality in Associated Press but struck it down in their Friedman-Harry Marks opinion on the grounds that the NLRA did not encompass the labor relations of an employer engaged in manufacturing. The Eighth Circuit, though, was not sure “[w]hether the act, in view of its language, may be limited by construction so as to apply only to labor relations in or directly affecting interstate commerce. . . .” The Eighth Circuit, then, believed the Act might have had a broader applicability than offered by the Second Circuit.

In light of several other circuit court and Supreme Court rulings, the Eighth Circuit’s uncertainty of the Act’s applicability to manufacturing concerns proves interesting. By the summer of 1936, most judges believed the Act was clearly unconstitutional as applied to corporations engaged exclusively in manufacturing. The Second, Fifth,

78. Id. at 180.
79. Id. at 177-78.
80. Id. at 178-79.
81. See NLRB v. Associated Press, 85 F.2d 56 (2d Cir. 1936); NLRB v. Friedman-Harry Marks Clothing Co., 85 F.2d 1 (2d Cir. 1936).
82. Pratt, 85 F.2d at 178.
83. By August 5, the Fifth and Sixth Circuits had ruled the Act unconstitutional regarding employers engaged in manufacturing. See NLRB v. Jones & Laughlin Steel Corp., 83 F.2d 998 (5th Cir. 1936); Fruehauf Trailer Co. v. NLRB, 85 F.2d 391 (6th Cir. 1936). The Fifth Circuit in Jones & Laughlin wrote that “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.” Jones & Laughlin Steel Corp., 83 F.2d at 998. In Fruehauf Trailer Co., the Sixth Circuit ruled that since the Board’s order

is directed to the control and regulation of the relations between the trailer company and its employees in respect to their activities in the manufacture and production of trailers and does not directly affect any phase of any interstate commerce in which the trailer company may be engaged, and since, under the ruling of Carter v. Carter Coal Company, the Congress has no authority or power to regulate or control such relations
and Sixth Circuits had all ruled that the Act did not apply to employers engaged in manufacturing as opposed to commerce, and the Supreme Court also drew a very clear line demarcating commerce from production.\textsuperscript{84} The circuits that ruled on the Act believed themselves bound by the Supreme Court's ruling in Carter, which drew a clear line between commerce and production.\textsuperscript{85} The mining of coal, the Court argued, "brings the subject-matter of commerce into existence," while "commerce disposes of it."\textsuperscript{86} Thus, by the summer of 1936, the question of Congress' power in the field of labor relations appeared clearly confined to those concerns directly affecting or engaged in interstate commerce and not manufacturing. The judges in the Eighth Circuit, however, did not concede that the Board's powers were so limited.

The Court's upholding of the injunction, nevertheless, brought the work of the Board in the Eighth Circuit to "a complete and utter halt."\textsuperscript{87} The injunction shut down the Board's Kansas City, Missouri office by preventing the regional director from taking any complaints or launching any more investigations of employer violations of the Act. "Our paychecks were received," the regional director for the Kansas City office remembered, "but nothing else happened between the 15th of October, 1935, till April 12, 1937."\textsuperscript{88} Thus, unlike several of the other circuits, which had dismissed the district court injunctions against the Board, the Eighth Circuit did not issue its first rulings on the Act until well after its constitutionality had been settled.\textsuperscript{89}

B. Constitutionality Determined: Cudahy Packing Co. v. NLRB and the Eighth Circuit's Deference to the Board

After the Supreme Court upheld the Act's constitutionality in the spring of 1937, the Eighth Circuit proved to be one of the friendliest to the now legitimate Board.\textsuperscript{90} Moreover, their first written opin-

\begin{itemize}
\item \textsuperscript{84} See Carter v. Carter Coal Co., 298 U.S. 238 (1936); see also NLRB v. Friedman-Harry Marks, 85 F.2d 1 (2d Cir. 1936); NLRB v. Jones & Laughlin Steel, 83 F.2d 998 (5th Cir. 1936); NLRB v. Fruehauff Trailer, 85 F.2d 391 (6th Cir. 1936).
\item \textsuperscript{85} Id.
\item \textsuperscript{86} Id. at 304.
\item \textsuperscript{87} George Pratt, NLRB Oral History Project (Kheel Center for Labor-Management Archives, Cornell University).
\item \textsuperscript{88} Id.
\item \textsuperscript{89} Its first decision on the Act after the Pratt decision was not handed down until March 1939. See Cudahy Packing Co. v. NLRB, 102 F.2d 745 (8th Cir. 1939).
\item \textsuperscript{90} See chart, infra Part II.B.
\end{itemize}
ions concerning the new legislation initiated a pattern of judicial deference to the Board’s decisions and the Board’s aggressive enforcement of the Act. This deference was illustrated in Cudahy Packing Co., the Eighth Circuit’s first case after Stout. The central dispute in Cudahy Packing Co. originated in April 1937, when workers at a Minnesota meatpacking plant organized an independent labor union. The Board initially found that the new union had the support of a majority of the workers at the plant and had successfully signed a contract with the employer. The following month, however, an organizer for the Congress of Industrial Organizations (CIO), who had also hoped to organize the plant, approached the Board. The CIO organizer charged the employer with “dominating and interfering with the formation and administration” of the independent union. The Board took up the charge, conducted a hearing, and found the company guilty of committing an unfair labor practice. The Board ordered the company to “withdraw all recognition” from the independent union and “completely disestablish said organization” as the representative of its workers.

The Board’s ruling prompted the company and the independent union to file an appeal in the Eighth Circuit. The company argued that the only evidence supporting the Board’s determination that an unfair labor practice had occurred was the testimony of the CIO organizer. The court acknowledged the Board’s lack of evidence even when “stated in the aspect most favorable to the Board” but, nonetheless, upheld and enforced the original Board decision. The court ruled that “[w]hile the evidence, by no means, shows any flagrant interference, much less coercion of employees in the formation . . . of the independent union,” it could not say “there is not some . . . evidence of company influence. . . .” Thus, despite the preponderance of the evidence proving the independent union’s ability “to function as a free representative of the employees,” and that it truly represented the concerns of the plant’s workers, the court deferred to the Board and upheld its order.

91. Cudahy Packing Co. v. NLRB, 102 F.2d 745 (8th Cir. 1939).
92. Id. at 748-49.
93. Id. at 746.
94. Id.
95. Id.
96. Id.
97. Id. at 745.
98. Id. at 750.
99. Id. at 751.
100. Id.
101. Id. at 753. The first Cudahy case is one of many where the judges in the Eighth Cir-
In 1939 the Eighth Circuit also partially deferred to the Board's interpretation of the evidence in Cupples Co. v. NLRB. The court ruled that though the burden of evidence in an unfair labor practices charge is upon the Board, it was nonetheless "entitled to have the evidence and all reasonable inferences which may be drawn therefrom viewed in the light most favorable to its conclusions." Judge John Sanborn ruled that "[q]uestions involving the weight of evidence and the credibility of witnesses" were for the Board to determine.

The court cited this same reasoning sixteen months later in another decision involving the Cudahy Packing Company. The court in Cudahy II stated that "[w]hile the burden is upon the Board to sustain its findings, it is entitled to the benefit of all reasonable inferences supporting its findings." "It is not the province of this Court," the court continued, "to weigh the evidence and determine the accuracy of the Board's finding of fact." Though the court ultimately found that the Board in Cudahy II failed to prove its case in regards to one discharge, the court nonetheless granted the agency great leeway in the interpretation of its evidence. Thus, Eighth Circuit judges again acknowledged that although the court held ultimate authority to enforce or overturn Board orders, they believed this a limited power to be used only in the most extreme circumstances.

The court's decisions in Cudahy Packing Co. and Cupples Co. reflected the Eighth Circuit's overall deference to the Board and its enforcement of the Act. The court proved unwilling to hinder the Board even when faced with less than credible evidence that the employer had violated the Act or that the independent union was not a legitimate bargaining representative for the workers. While the judges in the Fifth Circuit repeatedly applied the heavy hand of judicial review over Board decisions, those in the Eighth Circuit hesitated

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102. Cupples Co. Mfr. v. NLRB, 106 F.2d 100 (8th Cir. 1939).
103. Id. at 104.
104. Id.
105. Cudahy Packing Co. v. NLRB, 116 F.2d 367 (8th Cir. 1940) [hereinafter Cudahy II].
106. Id. at 370.
107. Id.
108. Id.
before substituting their discretion for the Board's in enforcing the Act. These decisions also exemplify the Eighth Circuit's belief, which was much the same as Landis', in the superiority of administrative over judicial adjudication in the realm of labor relations. The judges in this circuit viewed their relationship with the Board as one of equals and were vigilant about "keeping to the right of the line" that marked off their jurisdiction from that of the NLRB's. 109 This placed the Eighth Circuit in direct opposition to the Fifth Circuit, whose judges continually asserted the Board's inferior position in relation to the constitutionally based federal judicial system.

C. Multiplant Bargaining Units and Collective Bargaining

The Eighth Circuit also encouraged the Board's efforts at creating multiplant bargaining units, which gave workers more leverage when bargaining with their employers. The judges in the Eighth Circuit clearly believed the Board held broad powers to determine appropriate bargaining units and that the courts were powerless to infringe upon that statutory prerogative. They also approved of the Board's broad view of the Act's collective bargaining provisions. The Fifth Circuit, which will be discussed later, limited the Board's intrusion into the employment relationship once workers successfully organized. The judges in the Eighth Circuit, however, permitted the Board greater latitude to intervene in the labor relationship after the organizational process and did not allow employers to limit the scope of collective bargaining.

In NLRB v. Lund, the court ruled that the Board could create a bargaining unit comprised of workers from two separate manufacturing plants owned by one individual. 110 Christian A. Lund and his family owned the Northland Ski Manufacturing Company of St. Louis, which Lund solely controlled, and Lund solely owned the C.A. Lund Company of Hastings, approximately twenty miles outside of St. Louis. 111 During an organizing campaign by the AFL, the Board found that Lund informed his workers that he would never deal with an outside union and threatened to shut down the Hastings plant and relocate the other plant if they joined the AFL. Lund also coerced the employees into joining a company-dominated inside union. 112 More importantly, however, the Board ruled that because a unity of interests

109. NLRB v. Lund, 103 F.2d 815, 821 (8th Cir. 1939).
110. Id.
111. Id. at 816.
112. Id. at 817-18.
existed between the workers at both of Lund's plants, together they constituted the appropriate unit for collective bargaining purposes.\textsuperscript{113}

Judges Stone, Woodrough, and Thomas agreed with the Board that Lund had blatantly violated the Act and, furthermore, that the multiplant bargaining unit was an appropriate determination.\textsuperscript{114} Lund claimed that the two plants constituted two separate employers as they were two legally distinct businesses.\textsuperscript{115} The court noted, however, that employees were transferred between the two plants, the plants jointly purchased and shared raw materials, and partially finished materials were shipped between the plants for completion.\textsuperscript{116} The only discernable difference between the plants, Judge Thomas wrote, was that the St. Paul plant produced higher-end goods sold directly to retailers while the Hastings plant sold somewhat lower-grade products to wholesalers.\textsuperscript{117}

The primary reason the court provided for upholding the multiplant bargaining unit, however, had little to do with the technical reasons concerning production at the plants. The Eighth Circuit judges believed the Wagner Act did more than merely protect the rights of workers to organize. The Act aimed to equalize the bargaining relationship. If the two plants were deemed separate and distinct bargaining units, Thomas argued that true "collective bargaining would be a farce."\textsuperscript{118} Lund, with a proven history of hostility toward unions, would be able to effectively "evade the purpose and intent of the law by transferring business from one plant to the other... according to the unit with which he could make the most favorable bargain."\textsuperscript{119} Thus, instead of furthering the purposes of the Act, placing the workers into two separate bargaining units would place the employer in the "position where he could force competition between... his employees to their detriment and his gain."\textsuperscript{120}

The Eighth Circuit offered an even more daring decision concerning multiplant bargaining units in the case of \textit{Pittsburgh Plate Glass Co. v. NLRB},\textsuperscript{121} decided in July 1940. This case began in April 1938 when the Federation of Flat Glass Workers, a CIO affiliated union, filed a petition for investigation and certification with the direc-

\textsuperscript{113} Id. at 816.
\textsuperscript{114} Id. at 818.
\textsuperscript{115} Id.
\textsuperscript{116} Id.
\textsuperscript{117} Id.
\textsuperscript{118} Id.
\textsuperscript{119} Id.
\textsuperscript{120} Id.
\textsuperscript{121} 113 F.2d 698 (8th Cir. 1940).
tor of the Board’s sixth region in Pittsburgh. The union claimed that the company’s production and maintenance employees in all six of its plants spread across five states constituted the appropriate unit for collective bargaining. A hearing was held in October 1938, and the company stipulated that “the Federation included in its membership a majority of the employees in the unit claimed by the Federation to be the appropriate unit for the purposes of collective bargaining.”

The company charged, however, that the union did not have a majority in the Crystal City, Missouri, plant where thirteen hundred out of the factory’s eighteen hundred workers belonged to the Crystal City Glass Workers Union, an independent labor organization. The Crystal City Glass Workers Union attempted to intervene in the proceedings, but the trial examiner denied the organization’s motion. The company then introduced evidence, a petition signed by 1334 workers at the plant, proving that this group of workers wished to be represented by the Crystal City Glass Workers Union rather than the CIO affiliated organization.

On January 26, 1939, the trial examiner and then the Board sided with the Federation of Flat Glass Workers and ruled that all five plants constituted the appropriate unit for collective bargaining purposes. The company, however, refused to recognize the Board’s decisions, causing the Federation to lodge an unfair labor practices charge with the Board charging that the company refused to bargain with the union as the exclusive representative of all of its production and maintenance employees. The company answered the charge by arguing that “the findings of the Board were erroneous, arbitrary, and invalid.” Another hearing was held on March 8, 1939, at which time the

122. Petition for Review of Order of the NLRB in the case of Pittsburgh Plate Glass Co. v. NLRB (filed September 22, 1939), National Archives and Records Administration, College Park, RG 25.

123. Id.

124. It appears that there was a stipulation agreed to by the company concerning the Federation’s petition sometime after the filing of the petition in April. The meaning of the stipulation, however, was under dispute, as Robert Kleeb wrote to Nathan Witt in August 8, 1938 expressing confusion over what exactly the company stipulated to in the agreement. It appears the company was ready to stipulate that the Federation of Flat Glass Workers represented a majority of its employees except at the Crystal City plant. Kleeb further believed that the company would stipulate that if the employer unit was found proper, the federation was the majority choice of its workers. The company, however, was arguing for the plant unit and would not agree to the multiplant bargaining unit thus throwing the issue into the court of appeals. Memo from Robert Kleeb to Nathan Witt, August 8, 1938, NLRB Oral History Project, #6058 (Kheel Center for Labor-Management Documentation & Archives, Cornell University).

125. Petition from Review of Order, supra note 119, at 5.

126. Id.

127. Id.

128. Id.
Crystal City Glass Workers Union offered to prove it now represented sixteen hundred out of eighteen hundred workers. The trial examiner, however, again ruled against the corporation. The Board agreed with the examiner that the company had violated the Act by refusing to recognize and bargain with the Federation and on September 19, 1939, issued a cease and desist order. Three days after this decision, the company appealed the ruling to the Eighth Circuit Court of Appeals.

The company did not find a sympathetic ear on the Eighth Circuit bench. The court acknowledged that the workers at the Crystal City plant had a unique relationship to the company's other workers, one that marked this case as different from the *Lund* decision.¹²⁹ They noted that the Crystal City plant was six hundred miles away from any of the other plants, the methods of manufacturing were different, the plant had its own superintendent who was in charge of hiring and firing, and the employees did not move between plants.¹³⁰ Sanborn's opinion ruled, however, that the issue of the appropriate bargaining unit was "[o]ne of the matters entrusted solely to the Board" by the Act.¹³¹ The Board was to use its own judgement in selecting a unit that "would best serve the public policy declared in the Act . . . as well as that of the various groups of employees of the Company. . . ."¹³² Moreover, because the NLRA entrusted the determination of certain matters to the Board alone, the circuit courts "were denied power to substitute their judgements with respect" to the composition of the appropriate bargaining unit for those of the Board.¹³³ Unless the Board acted arbitrarily, which in this case the court argued it did not, the court must accept the findings of the agency.¹³⁴

The judges did acknowledge the desire of the workers in Missouri to maintain their own organization and bargaining representatives. "It seems unfortunate that the employees at the Crystal City Plant should be forced to accept a representative, for collective bargaining, not of their own choosing," Sanborn wrote, "but that situ-

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¹²⁹. *Pittsburgh Plate Glass Co. v. NLRB*, 113 F.2d 698 (8th Cir. 1940). Unlike the *Lund* case, the workers in the Crystal City Plant were more than six hundred miles from any other plant of the company and workers, and thus were not shuttled between plants as they were in the case of *Lund*. Also, they were subject to the control of a different superintendent, and the manufacturing processes employed at the plant were distinct from the other manufacturing sites. The Board found "the business of the company at that plant is subject to a large measure of local control." *Pittsburgh Plate Glass Co.*, 113 F.2d at 700-01.

¹³⁰. *Id.* at 700-01.

¹³¹. *Id.* at 701.

¹³². *Id.*

¹³³. *Id.* at 701-02.

¹³⁴. *Id.* at 702.
tion is not an unusual one with minorities."¹³⁵ Though they are more than six hundred miles from the other plants, "it cannot be truthfully said . . . that one representative for all of the employees could not bargain for them as effectively or successfully as could one representative for a part of them and another representative for another part."¹³⁶ The wishes of the Crystal City workers were considered by the Board, but the agency believed the employer unit would best effectuate the policies of the Act. Moreover, "there is nothing in the history of the collective bargaining between the Company and its employees, which . . . would, as a matter of law, preclude the Board from determining that the production and maintenance employees at the six . . . plants were an appropriate bargaining unit."¹³⁷

The Eighth Circuit clearly believed that the Board held broad powers to determine appropriate bargaining units and that the courts were powerless to infringe upon that statutory prerogative. "Unless the finding of the Board," they wrote in the Lund decision, "is clearly arbitrary . . . the court is bound by its findings."¹³⁸ In Pittsburgh Plate Glass Co., the court further delineated the clear lines separating judicial from administrative authority. "The determination of certain matters . . . was, under the [NLRA], entrusted . . . to the [NLRB] alone, and the courts were denied power to substitute their judgements with respect to such matters for those of the Board."¹³⁹ Concerned about "keeping to the right of the line that separates the jurisdiction of the court from that of the Board," the Eighth Circuit judges allowed the Board great freedom in creating bargaining units.¹⁴⁰

In particular, Pittsburgh Plate Glass Co. clearly illustrates the Eighth Circuit's belief that law must change in response to social needs and social reality. The court rejected the "atomistic individualism" of classical and formalist legal thought and acknowledged that America was not a classless society. In Pittsburgh Plate Glass Co., the Eighth Circuit agreed with the Board that workers belonging to different labor organizations could not effectively counter the economic power wielded by their employers, even if this was their wish. Moreover, the desire of these workers to remain independent not only reduced their bargaining power, but their fellow workers in the company's other plants. The only way to ensure workers sufficient bargaining power was to include them all in one bargaining unit. The

¹³⁵ Id.
¹³⁶ Id. at 701-02.
¹³⁷ Id. at 702.
¹³⁸ NLRB v. Lund, 103 F. 2d 815, 821 (8th Cir. 1939).
¹³⁹ Pittsburgh Plate Glass Co. v. NLRB, 113 F.2d 698, 701 (8th Cir. 1940).
¹⁴⁰ Lund, 103 F.2d at 821.
desires of these workers to keep their union could not stand in the way of the needs of the larger group and the larger social policy aims of the Act.

D. Collective Bargaining

The same freedom granted by the Eighth Circuit to the Board to determine the appropriate bargaining unit was also given over the issue of collective bargaining.141 The Eighth Circuit's interpretation of the Wagner Act and of its purposes logically included a broad reading of the legislation's collective bargaining provisions. This interpretation arose from the emphasis that the court placed on the objectives embodied in section 1 of the Act. In NLRB v. Crowe Coal Co., the court emphasized that "[t]he first section of the Act recites... the inequality bargaining power between employees who do not possess full freedom of association and employers [affects the flow of commerce] and tends to aggravate recurrent business depressions..."142

In Wilson & Co. v. NLRB, the court upheld the Board's contention that the company had violated the Act by refusing to engage in good faith bargaining with the representatives of its workers.143 Since 1933, the workers at Wilson & Co. were affiliated with the AFL, but after May 1937 they switched their allegiance to United Packing House Workers, a union affiliated with the CIO.144 Though the company had negotiated wages, hours, and working conditions with the union, "at no time," the Board charged, "has petitioner accorded formal written recognition to the union... and has not entered into any written agreement with the union."145 Further, the company refused to offer the union a counterproposal after the union submitted its demands and there was further evidence that the employer also altered work schedules and pay scales before consulting the representatives of its workers.146

Relying upon the language of the Supreme Court's Jones & Laughlin decision,147 the court agreed with the company that the "act does not compel agreements between employers and employees."148

141. Wilson & Co. v. NLRB, 115 F.2d 759 (8th Cir. 1940). The Wagner Act included under its collective bargaining provisions, rates of pay, wages, hours of employment, and other conditions of employment.
142. NLRB v. Crowe Coal Co., 104 F.2d 633, 635-36 (8th Cir. 1939).
143. Wilson & Co., 115 F.2d at 761.
144. Id.
145. Id. at 762.
146. Id.
This language, however, did "not sustain petitioner's contention that bare collective bargaining, without any willingness on its part to reduce understandings reached to writing, constitutes the kind of bargaining which the law requires." The Act, Judge Sanborn wrote, "contemplates that agreements will be reached as the result of collective bargaining." Therefore, though the company cannot be forced to enter into an agreement it found unacceptable, it could not refuse to bargain or to offer counterproposals when requested by the union, or refuse to grant official recognition to the bargaining representatives chosen by its workers.

Moreover, the Eighth Circuit judges opposed the Fifth Circuit judges by holding that the Act required employers to bargain in good faith "with respect to all matters which affect his employees as a class, including wages, hours of employment, and working conditions." While the Fifth Circuit drew a tight circle around which issues legitimately fell under collective bargaining, the Eighth Circuit held an expansive view of proper collective bargaining issues, which included the "legislative" matters precluded in the Fifth Circuit. Thus, the company could not refuse, as it had, to bargain over the union's demands for a closed shop and a dues check-off. According to the Eighth Circuit, the appropriate matters and issues for collective bargaining included all aspects of the employment relationship.

In the Eighth Circuit, most issues involving the employment relationship constituted a valid subject for collective bargaining. Just as the Eighth Circuit judges accepted the Board's creation of multi-plant bargaining units, they further supported the agency's involvement within the collective bargaining process itself. This process was not considered fully private and immune from public regulation, as it would have been under classical legal thought. On the contrary, the Eighth Circuit decisions reflected the belief that the public policy provisions of the Wagner Act necessitated NLRB intervention in the employment relationship after the workers were successfully organized.

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149. Id.
150. Id.
151. Id.
152. Id.
153. See Globe Cotton Mills v. NLRB, 103 F.2d 91 (5th Cir. 1939).
154. The dues check-off allowed workers to agree to have their employer collect their union dues directly out of their pay and then turn it over to the union. This allowed the union access to a more dependable source of income than did asking every member each month for his dues. A closed shop is one in which all workers must join the union within a certain amount of time after being hired in order to keep their employment.
E. General Policy of Judicial Deference to the Board

The Eighth Circuit’s focus was not to limit the impact of the Act on the employment relationship or merely to protect the statutory right of workers to organize. Rather, the court actively encouraged the Board’s aggressive enforcement of its protections and fundamentally altered the power relationships between workers and employers. This was accomplished by granting the Board broad powers over the collective bargaining process and upholding its creation of multiplant bargaining units. The Eighth Circuit granted the Board near complete autonomy in its enforcement of the Act. The judges believed the Board was “entitled to the benefit of all reasonable inferences supporting its findings” and were hesitant to extend judicial oversight over the Board’s authority as the agency best left in charge of “effectuat[ing] the purposes of the Act.”

This policy of minimal oversight led the court to minimize the Board’s lapses in proper procedure. For example, in Cupples Co., the court acknowledged that the Board’s trial examiner “exceeded all reasonable bounds in examining . . . the witnesses of the petitioner.” The court agreed with the company that the Board examiner essentially attempted to make the Board’s case instead of acting as an impartial finder of facts. However, the court merely chastised the examiner, warning him “to keep in mind that the proper exercise of his functions requires open-mindedness, fairness, and impartiality.” The court in Cupples Co. ruled against the company and held that the trial examiner’s conduct was not “so unfair as to constitute a denial of due process.”

While the Eighth Circuit was conscious of the line separating judicial from administrative authority, it drew this line in quite a different place than the Fifth Circuit, which attempted to draw a clear line delineating its authority from and over the Board’s. The Eighth Circuit believed the Board held broad powers to enforce the Act and would overlook, as in Cupples Co., lapses in due process or less than

155. See Pittsburgh Plate Glass Co. v. NLRB, 113 F.2d 698 (8th Cir. 1940); NLRB v. Lund, 103 F.2d 875 (8th Cir. 1940).
156. See id.
157. Cupples Co. v. NLRB, 116 F.2d 367, 370 (8th Cir. 1940).
158. NLRB v. C. Nelson Mfg. Co., 120 F.2d 444, 447 (8th Cir. 1941); see also Cudahy Packing Co., 116 F.2d at 366.
159. Cupples Co. Mfr. v. NLRB, 106 F.2d 100, 113 (8th Cir. 1939).
160. Id.
161. Id.
162. Id.
163. See Magnolia Petroleum Co. v. NLRB, 112 F.2d 545 (5th Cir. 1940); NLRB v. Bell Oil & Gas, 91 F.2d 509 (5th Cir. 1937).
convincing evidence. Judge Seth Thomas emphasized in *Lund* that the "only purpose of the law is to achieve the purposes of the Act without regard to too close an observance of legal technicalities." Some on this bench believed that too close an observance to "legal technicalities" would hinder the Board's enforcement of the Wagner Act.

The NLRB found in the Eighth Circuit, then, a group of judges fully amenable to its interpretation of the Act. The judges presiding in this circuit affirmed the legitimacy of administrative agencies and administrative adjudication of social problems. They believed the NLRB was the body best able to "effectuate the purposes of the Act" and should not be burdened with close judicial scrutiny or supervision. The Board also found a circuit occupied by judges who shared their belief that the labor relationship was not one necessarily immune from public regulation. While the Fifth Circuit had to accept the legitimacy of the Act, it still limited the Board's impact within the employment relationship, a relationship that court viewed as essentially private in nature. The judges in the Eighth, on the other hand, held no such ideas in their review of Board decisions.

IV. THE FIFTH CIRCUIT'S INFLUENCE ON LABOR LAW

The judicial deference given to the Board in the Eighth Circuit did not extend to the Fifth. On the contrary, in the Fifth Circuit, the Board found itself continually at odds with a set of judges eager to thwart its efforts to enforce the Act. Unlike the judges in the Eighth Circuit, "we," Judge Hutcheson wrote, "refused to follow the unsound

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164. The court did have its limits, however, of what constituted proper conduct by the Board. In Montgomery Ward v. NLRB, 103 F.2d 147 (8th Cir. 1939), the court refused to enforce an order of the Board because of the conduct of its trial examiner assigned to hear the case. *Id.* The court argued that the trial examiner was so blatantly biased against the company that he had denied them "that fairness which is required by due process of law." *Id.* at 149. The examiner had badgered witnesses viewed as possibly friendly to the company, refused to allow the company's attorneys to question witnesses as they saw fit, and conducted most of the Board's case himself. *Id.* The court ruled that "[t]he extreme activity of the examiner in questioning of witnesses is quite evident—there is not much hazard in estimating that probably one-half of the pages of this record confined to testimony would show some questions by the examiner." *Id.* at 156. It is interesting to note, however, that though the court set aside the Board's order in its entirety, it remanded the case back to the Board for a new hearing with a different trial examiner. *Id.* at 156-57. None of the other circuits, least of all the Fifth, which we will examine in a moment, overturned an order of the Board then told it to try again.

165. NLRB v. Lund, 113 F.2d 875, 821 (8th Cir. 1940).

166. The Fifth Circuit also enjoyed the distinction of being one of only three circuits containing a majority of judges appointed by Roosevelt's three Republican predecessors for the entire period from 1935 through 1942. By the beginning of 1942, Roosevelt's judicial appointees either controlled all of the other circuit court benches or at least were evenly matched with those judges appointed by Hoover and Coolidge.
doctrine put forward in some quarters; that it was for the administrative to lead, the courts to follow."167 While the judges in the Eighth Circuit essentially followed the Board’s lead in enforcing the Act, lightly applying the tool of judicial review and rarely overturning Board decisions, those in the Fifth Circuit believed they had a constitutional obligation to assiduously review the actions and orders of the Board. Administrative agencies such as the Board were suspect in the Fifth Circuit. These agencies were viewed as bodies alien to the Constitution and the American form of governance because they held powers of all three branches of government and trespassed on the territory of the courts.168 Thus, in order to ensure that the government remained one of laws and not of men, the Fifth Circuit vigorously exercised its power of judicial review with the belief that "it is for the courts and not the administrators to determine the law."169

In the Fifth Circuit the Board encountered a group of judges particularly hostile to its aggressive enforcement of the Wagner Act. Though confronted with many of the same issues faced in the Eighth Circuit, the judges in the Fifth Circuit refused to follow the lead of the Board by readily enforcing its orders. The result of the Fifth Circuit’s refusal to follow the Board’s lead meant that the agency and workers faced a quite different set of circumstances than in the Eighth Circuit. The Board was faced with much higher standards of evidence, as the court eagerly examined the Board’s findings, and found its efforts to encourage organization spurned as too aggressive and beyond the scope of the Act.

Workers were also often at a disadvantage in the Fifth Circuit. The judges tended to support independent unions over unions affiliated with the AFL or CIO, and limited the items subject to the Act’s collective bargaining provisions. Overall, the Fifth Circuit’s more stringent application of judicial review limited the Board’s effectiveness in enforcing the Act in much of the southern United States during the period under consideration.

A. Judge Hutcheson and Judge Sibley: Conflicting Legal Philosophies with Similar Outcomes

Judges Hutcheson and Sibley both joined the Fifth Circuit bench on January 30, 1931, after being appointed to the court by President

168. See Zelden, supra note 167, at 914.
169. Hutcheson, supra note 2.
Herbert Hoover. Judge Sibley, a graduate of the University of Georgia, to the District Court for the Northern District of Georgia in 1919. Interestingly, President Wilson had also appointed Judge Hutcheson to the District Court for the Southern District of Texas in 1918. Judge Hutcheson became chief judge of the Fifth Circuit in 1947 and retired from the court in 1968.

Though appointed to the circuit court at the same time, Judge Sibley and Hutcheson exhibited different judicial philosophies when ruling on labor board cases. By the 1930s, Judge Hutcheson had jettisoned much of his earlier learning in classical legal thought; he was a realist. The New Deal, however, and especially the Labor Board, sparked a resurgent conceptualism in his judicial thinking as he attempted to defend the existing constitutional order from what he perceived as a grave threat. Judge Sibley, on the other hand, appeared to be relatively immune from the influences of legal realism and remained rooted in an older conception of law and its purpose in society. Though they held conflicting legal philosophies, they both arrived, with the labor board cases at least, at similar conclusions and decisions that severely limited the Board’s effectiveness in the southern United States.

1. Judge Hutcheson’s Dominance of the Fifth Circuit

Judge Hutcheson argued that courts, not administrative agencies such as the NLRB, should settle constitutional questions and interpret “the meaning of any particular act proceeding from the legislative body.” Hutcheson further argued that the Constitution granted the courts the power to determine questions of law, and while agencies with administrative and adjudicative powers served an important function, they had to respect the “law as determined and declared by the courts.” Judge Hutcheson considered the Board the “most recalcitrant” of the New Deal agencies, and believed the Board wished


172. Judge Sibley had among the least favorable voting records toward the NLRB. Judge Hutcheson’s record is among the most favorable for the Circuit, comparable to Judge Holmes who was an appointee of President Roosevelt. Hutcheson’s written opinions, however, in contrast to his voting record on the circuit, offer among the most explicit and unbending attacks upon the Board and its procedures written by any of the circuit court judges.

173. Hutcheson, supra note 2.

174. Id.
to "legislate, adjudicate, and execute... without limitation or accountability," thus violating the legislative intent of the Act and the constitutional limits placed on executive authority.\textsuperscript{175}

Judge Hutcheson was a product of the conceptualist school, and rejected, during his early days on the bench, "the suggestion that [law] still had life and growth."\textsuperscript{176} The notion that already-developed and fixed legal categories could be applied to all situations and cases sat at the heart of his legal education. Judge Hutcheson wrote, "I had been trained to expect inexactitude from juries, but from the judges quite the reverse... I had a slot machine mind. I searched out categories and concepts and, having found them, worshiped them."\textsuperscript{177} To Hutcheson, law was a fully developed science in which cases fell into preestablished legal categories, endowing judicial decisions an aura of objectivity and scientific certainty.\textsuperscript{178}

However, by 1929 Judge Hutcheson had discarded the notion that legal decisions arose from a scientific application of established legal principles to the facts of a case.\textsuperscript{179} Hutcheson stated,

\begin{quote}
[a]s I associated more with real lawyers, whose intuitive faculties were developed and made acute by the use of a trained and cultivated imagination, I came to see that as long as the matter to be considered is debated in artificial terms, there is danger of being led by a technical definition to apply a certain name and then to deduce consequences which have no relation to the grounds on with the name is applied.\textsuperscript{180}
\end{quote}

Judge Hutcheson realized that law arose from specific historical contexts and that current "regulations, the wisdom, necessity and validation of which as applied to, existing conditions, are so apparent that they are now uniformly sustained, a century ago... would probably have been rejected as arbitrary and oppressive."\textsuperscript{181} According to Hutcheson, law must change and reflect, to some degree, contemporary social conditions and reasoning.

When the Board was forum shopping for a court in which to file its enforcement petition against the Jones & Laughlin Steel Corporation, the agency's associate general counsel telegraphed Charles Fahy that filing the petition in the Fifth Circuit "would secure early argu-

\begin{footnotes}
\textsuperscript{175} Id.
\textsuperscript{177} Id.
\textsuperscript{178} Id.
\textsuperscript{179} Id. at 15-16.
\textsuperscript{180} Id. at 17.
\textsuperscript{181} Id. at 18.
\end{footnotes}
ment and favorable ruling which would greatly assist the general situation."^{182} Jones & Laughlin began when the Amalgamated Association of Iron, Steel & Tin Workers filed a complaint with the Board that the Jones & Laughlin Steel Corporation, the nation's fourth largest producer of steel, was interfering with its efforts to organize the workers at the Aliquippa plant in Pennsylvania.^{183} The Board took up the complaint, held a series of hearings, and found the company had violated of subdivisions (1) and (3) of section 8 of the Act when it discharged and refused to reinstate twelve workers involved with the union campaign.^184^ The corporation denied the charges, claiming the workers were discharged for inefficiency and that the employees had violated work rules, and claimed that the Act violated the Fifth and Seventh Amendments to the Constitution.^{185} The Board, however, decided against the company and filed a cease and desist order on April 9, 1936.^186^ The Board had reason to be optimistic about its chances in the Fifth Circuit, because the court's presiding judge was Judge Joseph C. Hutcheson.^{187} In 1928 Judge Hutcheson wrote an important opinion concerning the Railway Labor Act.^188^ In his decision, Hutcheson vigorously defended the Railway Labor Act and Congress' power to regulate the relationship between workers and employers in the railway industry.^{189} Not only did the court in Brotherhood hold that the legislation in question was "within the power of Congress to enact," the court also emphasized that the legislation "should be liberally construed and applied, so as to give effect to the paramount public con-

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182. Telegram from Robert Watts to Charles Fahy, March 1936, NLRB Oral History Project, #6058 (Kheel Center for Labor-Management Archives, Cornell University).
183. Jones & Laughlin Steel Corp., 1 N.L.R.B. 503 (1936). The plant at Aliquippa employed about 10,000 of the corporation's 22,000 workers.
184. Id. at 503-04. Subdivision (1) of section 8 of the NLRA states that it is an unfair labor practice to interfere with the rights of workers to organize. Subdivision (2) states that it is against the Act for employers to discriminate in regards to hire or tenure of employment because of a workers involvement in organizational or labor activities.
185. Id. at 504.
186. Id. at 517.
187. See IRONS, supra note 19, at 262.
188. Brotherhood of Ry. and S.S. Clerks, Freight Handlers, Express and Station Employees, S. Pac. Lines in Texas and Louisiana v. Texas & N.O.R. Co., 24 F.2d 426 (5th Cir. 1928).
189. Id. The Railway Labor Act of 1926 granted the right to organize and bargain collectively, free from employer interference, to railway workers. It also contained provisions for special mediation commissions to investigate violations of the Act as well as bargaining disputes, during which time strikes were illegal. The language guaranteeing the rights of workers to organize found in the Railway Labor Act served as the basis for the protections in Section 7(a) of the National Industrial Recovery Act and then in chapter 7 of the National Labor Relations Act. 29 U.S.C. §§ 157, 159, 172-73 (1994); See DUBOFSKY, supra note 6, at 100-01, 112.
venience subserved by it." Judge Hutcheson ordered the company to disestablish the company union, recognize and bargain with the railway brotherhood, and reinstate the discharged employees. The Supreme Court upheld Hutcheson’s opinion in 1930.

Brotherhood inspired hope on the Board that Judge Hutcheson would also “look with some favor, perhaps, upon the National Labor Relations Act.” Because of the Brotherhood opinion, some members of the Board even referred to Hutcheson as the “father” of the substantive provisions of the Wagner Act. The labor board viewed Hutcheson’s opinion in Brotherhood as positive because it legitimated the right of Congress to regulate the relationship between employers and their employees. The employer claimed that the Railway Labor Act violated its constitutional rights guaranteed under the Fifth and Fourteenth Amendments of the Constitution by infringing upon its liberty of contract. Hutcheson dismissed this defense countering that freedom of contract is not limitless, especially when an employer is engaged in interstate commerce. Congress, Hutcheson opined, has regularly legislated in the field of labor relations and “in cases without number the courts have issued their injunctions declaring and vindicating judicial power to protect the commerce of the country from the anarchy and disruption arising out of these fierce labor disputes.” The railroad, Hutcheson decided, if it insists the relationship with its employees is not a justiciable matter “must be prepared, not only to give learned dissertations on the freedom of contract, but to show . . . that it [the Railway Labor Act] has not behind it a sufficient force of general public opinion to create an established custom which may be articulated into law.”

190. Brotherhood, 24 F.2d at 431. The Railway Labor Act of 1926 replaced the Railway Labor Board established under the Transportation Act of 1920. The Act declared for the first time that it was the public policy of the U.S. to support trade unionism and collective bargaining in the railroad industry. The Act stated that workers had the right to organize and select bargaining representatives free from employer coercion or interference. This language was eventually incorporated into section 7(a) of the National Industrial Recovery Act and then into the National Labor Relations Act. 29 U.S.C. § 157 (1994); see Dubforsky, supra note 6, at 100-101, 104.

191. 24 F.2d at 434.


196. Id. at 431.

197. Id. at 429.

198. Id.
Hutcheson’s *Brotherhood* opinion also revealed that he was open to changing and growing law. “[A]ll justiciable matters,” Hutcheson wrote, “are made so by law derived from two sources… that ascertained and declared by the judges as founded in and springing from the customs of the people… that enacted by the legislatures.”199 Law changes, Judge Hutcheson continued, as customs adapt to “changed conditions” and legislatures “make innovations upon it.”200 Thus, “through judicial decisions, and… through legislative action, the law modifies and grows, and, growing, lives.”201 More importantly, because law is living and changing, his decision continued, “it is plain that… whatever a particular court or Legislature might think to be the custom could be declared to be the law, and laws might change with uncomfortable rapidity.”202 Thus, Judge Hutcheson essentially ruled that the employer’s assertion that the legislation was beyond the powers of Congress to enact was completely without support. Law, in Hutcheson’s mind, was always changing in response to new conditions and must do so in order to remain relevant and “alive”.203 Thus, the Board chose to file the petition for enforcement of *Jones & Laughlin* in the Fifth Circuit rather than watch another of their important test cases become bogged down in the Third Circuit.204

During arguments in *Jones & Laughlin* in May 1936, counsel for the Board found the judges in the Fifth Circuit genuinely interested in the issues at stake because it “spent a great deal of time questioning” the Board’s attorney.205 Thomas Emerson also complimented the judges on their attention to the case and remembered them as “reasonably sympathetic” to the Board’s arguments.206 However, Emerson also recalled that he “didn’t have any real hope of winning,” for the Supreme Court had just handed down the *Carter Coal* decision, invalidating the Guffey Coal Act, on May 18, 1935.207 Emerson stated that

199. *Id.* at 427.
200. *Id.*
201. *Id.* at 427-28.
202. *Id.* at 428.
203. *Id.*
204. See, e.g., NLRB v. Pennsylvania Greyhound Lines, 91 F.2d 178 (3d Cir. 1937); see also IRONS, supra note 19, at 254-56.
205. Interview with Emerson, supra note 193.
206. *Id.*
207. *Id.* In the *Carter Coal* case, the Supreme Court struck down the Bituminous Coal Conservation Act of 1935 (15 U.S.C. §§ 801-27) on the grounds that Congress had no authority to regulate employers engaged solely in production. 298 U.S. 238, 316 (1936). The Act had two purposes. The first was to regulate production in the coal industry, much like the NIRA had attempted to bring order back to other sections of the industrial economy. The second purpose was to regulate the labor relations between mine owners and workers. In language drawn from the NLRA, the Guffey Act protected the rights of mine workers to organize and bargain collec-
"[t]o persuade a lower court that our case was different from what the Supreme Court had said just weeks before was almost an impossible job." 208 In fact, relying on Carter Coal, the Fifth Circuit held the NLRA unconstitutional on June 15, 1936. 209

The Board, thus, was not surprised by the outcome of Jones & Laughlin. They were, however, soon confounded by the hostility expressed toward the labor legislation and the Board by the judges in the Fifth Circuit after the Supreme Court declared the Act constitution in April 1937. This emergent hostility to the Act was all the more surprising because many on the Board believed the Fifth Circuit constituted a relatively friendly circuit. Hutcheson's, and the courts', later opinions, though, reflected an amalgam of legal realist and conceptualist principles that did not bode well for the NLRB. Hutcheson "welcomed and encouraged good and lawful administration," 210 and acknowledged the "necessity of keeping law dynamic and in touch with life," 211 especially during times of profound economic or social upheaval. 212 Although Judge Hutcheson was a legal realist, his written opinions also reflected a belief that the NLRB had no legal or consti-

208. Interview with Emerson, supra note 193. The Guffey Bituminous Coal Act of 1936 regulated competition among soft coal operators and created a code of labor relations identical to that of the National Labor Relations Act. The NLRA was in essence based upon the labor provisions of the Guffey Act. The Supreme Court ruled in Carter Coal that mining was not commerce and thus was not open to regulation by Congress under the Constitution’s commerce clause. Carter Coal Co., 298 U.S. at 316. Manufacturing and commerce were two distinct and different enterprises the court ruled. Id. at 299. The former was subject to state regulation and the latter, if of an interstate nature, was subject to regulation by the Congress. Id. at 307. This decision proved devastating to the Board in its battles in the circuit courts, as the judges felt obligated to follow the Supreme Court’s reasoning and rule that the Act did not apply to employers engaged in production. For more on the Guffey Act and decision, see Dubofsky, supra note 6, at 132, 142.

209. NLRB v. Jones & Laughlin Steel Corp., 83 F.2d 998 (5th Cir. 1936). Even more worrisome to the Board was that the Texas & N.O.R. case was submitted as part of the government’s brief in defense of the Guffey Act.

211. Hutcheson, supra note 176, at 21.
212. Id.; Hutcheson, supra note 2.
tutional authority to intervene in the collective bargaining process or between employers and employees. In NLRB v. Whittier Mills, for example, the Fifth Circuit, through Judge Hutcheson, ruled that the employer had not refused to bargain with the union. On the contrary, wrote Judge Hutcheson, the employer had engaged in good faith collective bargaining that broke down because "each bargainer was endeavoring to get into the agreement the things he wanted. . . ." The Act, Hutcheson declared, only requires "good faith bargaining with the purpose of reaching an agreement," but "does not require that any particular form of agreement be reached."

For Judge Hutcheson, collective bargaining was essentially a private affair between the two parties at the center of the employment relationship. Consequently, neither the Board nor the courts could "prescribe what shall be written" in the final contract or "interfere in the negotiations as long as they are in good faith, going on." The Fifth Circuit allowed the Board to protect workers during the organizational process, but once organized, both Hutcheson and Sibley restricted any further interference by the Board in the employment relationship.

Judge Hutcheson's hesitation to allow the Board to interfere in the employment relationship was shared by his fellow jurist on the bench, Judge Sibley. Judge Sibley's opinions illuminate his belief that the employment relationship was essentially a private relationship not open to far-reaching public regulation. Unlike Hutcheson, however, Sibley's opinions were not grounded in legal realist reasoning. On the contrary, Judge Sibley appears quite rooted to the laissez faire, classical legal reasoning of the late nineteenth century in regards to labor matters. Yet, the differing legal philosophies held by Judges Hutcheson and Sibley led them to similar conclusions when ruling on NLRB cases. While Hutcheson proved relatively more friendly to the Board

213. See NLRB v. Whittier Mills Co., 123 F.2d 725 (5th Cir. 1941).
214. Id. at 727.
215. Id. at 728.
216. Id.
217. Id.
218. In a decision written by Judge Sibley, the Fifth Circuit took an even more restrictive view of the Board's powers to intervene in the collective bargaining process. In Globe Cotton Mills v. NLRB, 103 F.2d 91 (5th Cir. 1939), the court overturned the NLRB's finding that the employer refused to bargain in good faith, ruling that the company's refusal to bargain about "legislative policies" did not violate the Act's good-faith bargaining provisions. 103 F.2d at 94. Seniority rights, the dues check-off, and child labor, then, were removed from the collective bargaining table in the Fifth Circuit. Moreover, Sibley's ruling also permitted the company to not even offer the union a counter-proposal if it is "apparent that what the one party would thus offer is wholly unacceptable to the other." Id.
overall than did Sibley, both used their powers to shield the employment relationship from intrusive Board interventions.

2. Judge Sibley and Legal Conceptualism

Judge Sibley wrote the opinion in *Globe Cotton Mills*. Sibley, unlike Hutcheson, refused to adopt even the most minimal of realist principles. A small businessman himself, Judge Sibley owned and operated a small knitting mill until 1901, as well as a bank and a brick manufacturing company, in his home town of Union Point, Georgia. Sibley empathized with the small employer facing the specter of government regulation over the running of his business and private property. In a 1920 commencement address at the University of Georgia, Sibley warned that "the institution of private property is in peril" from "legislative and executive power." Sibley described to the audience how the federal government, with the willing aid of the judiciary, was in essence conspiratorially undermining the very foundations of the republic. The federal government was doing this not through revolutionary means, but through the established democratic and legislative process. These developments were contrary to the "object of government," Judge Sibley declared, which is the "protection of property rights" and the individual's "free exercise of this right . . . with the least interference by public law." Judge Sibley's lack of realist principles supported his strong belief in the separation of powers, for it was the role of the judiciary to safeguard traditional constitutional protections and rights. Among these protected rights were the protection of private property rights and the ability of the individual to use that property or enter into contracts with others free from undue government regulation.

219. Id.
220. NATIONAL CYCLOPEDIA OF AMERICAN BIOGRAPHY 212 (1972).
222. Id.
223. Sibley viewed the progressive income tax as "not only a way of raising money, but also an effective though indirect way of equalizing wealth, that may go far towards realizing one of the aims of the Communists." Id. He also watched with growing alarm the increasing government regulation of businesses "affected with the public interest." Id. He also cited the 13th and 19th amendments to the Constitution as proof for the "march of federal power" over traditional individual and private property rights." Id.
224. Sibley, supra note 221, at 1.
B. The Fifth Circuit in Action: Separation of Powers and Relationship Between Employer and Employee

Two issues were of paramount importance in the Fifth Circuit in cases involving the National Labor Relations Act: the constitutional separation of powers and the sanctity of the relationship between employer and employee. The Eighth Circuit believed the Board should be essentially left alone in its enforcement of the Act; the courts should interfere as little as possible. The judges in the Fifth Circuit, however, distrusted administrative agencies such as the Board, and through its Wagner Act decisions the court reasserted the central role of the judiciary in the field of labor relations. To Hutcheson, Sibley, and the other jurists on the bench, the courts were not mere rubber stamps for Board decisions. Rather, they occupied a constitutionally-based position to make sure the Board did not stray beyond its statutory powers or infringe upon constitutional restrictions.

The judges in the Fifth Circuit also differed from those in the Eighth Circuit with their reluctance to open the employment relationship to greater public regulation. As mentioned before, the Eighth Circuit allowed the Board to intervene in the collective bargaining process once workers successfully organized. It forbade employers from refusing to negotiate over nearly any item affecting the employment relationship. The judges in the Fifth Circuit, however, through their labor decisions, worked to limit the Board’s interference in the relationship between employer and employee. This relationship, they believed, was still essentially private in nature and not open to extensive regulation by the NLRB.

1. The Fifth Circuit Enforced the Concept of Separation of Powers

The legal realism of judges like Hutcheson, though open to an evolving and changing law, still rested upon a set of "first principles" not amenable to change. Among the most basic of these fundamental legal principles was the constitutional separation of powers among the three branches of government and the subordination of administrative agencies to the rule of law. In fact, when Hutcheson later wrote for the majority in NLRB v. Bell Oil, he emphasized that "the function of the courts in the operation of the act is by no means perfunctory. Upon them rests the final judicial responsibility, from them emanates the sole authority, for making the Board's orders coer-

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225. HUTCHESON, supra note 176, at 13.
226. See Hutcheson, supra note 2.
cively effective.”227 The court in Bell Oil & Gas further held that the courts are bound to accept Board decisions only “as to its fact findings, when they are supported by the evidence. . . .”228

Judges in the Fifth Circuit adopted an activist role for the judiciary and law within the new labor relations system. The primary differences between the Fifth and Eighth Circuits were that the “legal technicalities” and jurisdictional issues so easily overlooked by the judges in the Eighth Circuit served as a springboard in the Fifth Circuit for extensive judicial efforts to limit the impact of the new labor legislation on the existing social order. These “legal technicalities,” in the minds of judges like Hutcheson, were the last line of defense against the growing administrative state’s efforts to undermine the American form of governance.229

Thus, unlike the judges in the Eighth Circuit who granted the board free reign to best “effectuate the policies of the Act,”230 judges in the Fifth Circuit regularly exercised their powers of review to overturn Board rulings.231 While some believe, Hutcheson asserted, “that the Congress in enacting this legislation, was more concerned with . . . getting questions decided, than with getting them justly decided, the whole structure of the act as well as the whole course of informed judicial decision under it, makes it plain that this is not so.”232 Hutcheson argued that the courts were merely performing their constitutional duty when reviewing actions of the Board, and “nothing in . . . the long struggle of English speaking people against the arbitrary and despotic exercise by Governments of seated power” supported the notion that the judiciary should defer to administrative bodies such as the Board.233

2. Fifth Circuit Viewed the Relationship Between Employee and Employer as Private

Hutcheson and the Fifth Circuit also refused to accept the more radical notions concerning the public verses private nature of the employment relationship adopted by the judges in the Eighth Cir-

227. NLRB v. Bell Oil & Gas, 91 F.2d 509, 514 (5th Cir. 1937)
228. Id.
229. See NLRB v. Lund, 103 F.2d 815, 821 (8th Cir. 1939).
230. NLRB v. C. Nelson Mfg., 120 F.2d 444, 447 (8th Cir. 1941).
231. See, e.g., Bell Oil & Gas, 91 F.2d 509.
232. Magnolia Petroleum v. NLRB, 112 F.2d 545, 547 (5th Cir. 1940).
233. Id. at 548. Also, in 1938 Hutcheson wrote that “there is no place in our constitutional system for the exercise of arbitrary power; the arbitrary power and the rule of the constitution cannot both exist; they are antagonistic and incompatible forces, and one or the other must of necessity prevail whenever they are brought into conflict.” See HUTCHESON, supra note 175, at 41.
cuit.\textsuperscript{234} In contrast to the Eighth Circuit perspective, the Fifth Circuit believed that the employment relationship was a private, contractual relationship between two individuals—the employer and employee.\textsuperscript{235} Therefore, the power of the Board to regulate this relationship extended solely to the protection of workers' rights to organize. Once assured that the workers had organized and selected bargaining representatives free from employer interference, the judges in the Fifth Circuit argued, the Board's jurisdiction in the matter ended and the relationship again reentered the private sphere.\textsuperscript{236}

The issue of the extent of the Board's power to intervene in the employment relationship is illustrated by the case of \textit{Globe Cotton Mills}.\textsuperscript{237} The company in \textit{Globe Cotton Mills} asked the Fifth Circuit to overturn a Board ruling requiring it to bargain collectively with its employees.\textsuperscript{238} Attorneys for the company argued that the employer had bargained in good faith with the chosen representatives of its workers but found after months of fruitless discussions that "there did not seem to be any basis for an agreement... in the present business conditions."\textsuperscript{239} Only after the negotiations came to a standstill did the company end the negotiations with the union.\textsuperscript{240} The union then went to the Board, claiming that the employer had violated the National Labor Relations Act.\textsuperscript{241}

The court, however, overturned the Board's ruling that the company violated the Act by not engaging in good-faith bargaining.\textsuperscript{242} The court wrote that the company's refusal to bargain about "legislative policies," issues such as seniority rights, dues check off, and banning child labor at the plant, which were outside of the Act's

\begin{itemize}
  \item \textsuperscript{234} See, e.g., \textit{Globe Cotton Mills v. NLRB}, 103 F.2d 91 (5th Cir. 1939).
  \item \textsuperscript{235} The Eighth Circuit, on the other hand, opened up the employment relationship to a wider degree of regulation by the Board. See \textit{Wilson & Co. v. NLRB}, 115 F.2d 759 (8th Cir. 1940), \textit{Pittsburgh Plate Glass Co. v. NLRB}, 113 F.2d 698 (8th Cir. 1940).
  \item \textsuperscript{236} \textit{NLRB v. Whittier Mills Co.}, 123 F.2d 725 (5th Cir. 1941); \textit{Globe Cotton Mills v. NLRB}, 103 F.2d 91 (5th Cir. 1939).
  \item \textsuperscript{237} \textit{Globe Cotton Mills v. NLRB}, 103 F.2d 91 (5th Cir. 1939).
  \item \textsuperscript{238} Id. at 93.
  \item \textsuperscript{239} Id. at 94.
  \item \textsuperscript{240} Id. at 93-94. The main issues of contention between the union and the employer appear to be a 15% pay raise and a shortening of the work week from fifty to forty hours (which the company said it could not afford), seniority rights (which the company said it did not want to bind itself to), and the banning of child labor in the mill (which the company said was already illegal under Georgia law). Id. at 93. As the negotiations stalled, the union also asked for a dues check off—which was vehemently rejected by the company. Id. After the union requested the dues check off and increased its demand to 25% for a pay increase the company broke off negotiations and refused to offer a counterproposal—even though one was specifically requested by the union. Id.
  \item \textsuperscript{241} Id. at 94.
  \item \textsuperscript{242} Id. at 95.
\end{itemize}
definition of what constituted "the subject matter of collective bargain-
ing," did not violate the Wagner Act's good-faith bargaining pro-
visions. The court held that the company only had an obligation to
bargain over rates of pay, hours of employment, "or other conditions
of employment," and was not bound to offer a counterproposal where
it was "apparent that what the one party would thus offer is totally
unacceptable to the other." However, the Fifth Circuit agreed that
the company should have offered a counterproposal when asked, so as
to abide by the spirit of the Wagner Act.

3. Hostility Toward the Board: Multiple Bargaining Units,
   Deprivation of Property, and Social Reform

The Fifth Circuit also refused to support the Board's efforts, as
the court saw it, to organize workers for the CIO. While the judges in
the Eighth Circuit allowed the Board to craft multiplant bargaining
units that overrode the wishes of the workers involved, the judges in
the Fifth Circuit, more often than not, took the side of the independ-
ent union and ruled against the labor board. For example, in Magno-
lia Petroleum Co., the Fifth Circuit ruled against the Board's order
calling for the disestablishment of an unaffiliated union because it had
been organized with help from and dominated by the employer.
Judge Hutcheson blasted the Board for its lack of evidence of an unfair
labor practice and accused the agency of acting as a sponsor for the
CIO. "[T]his proceeding," he wrote, "takes its spring from long
continued and unsuccessful efforts of a nationally affiliated labor
union to organize . . . workers in a plant which has . . . a local unaffili-
ated labor organization." "Here, as in all the similar cases," he
continued, "the national union makes and the Board sponsors the
charge that the local unaffiliated union is not the result of self-organi-
ization. . . ."

Thus, while the Eighth Circuit focused on the Act's preamble,
which focused on the inequality of bargaining power between workers
and their employers, the Fifth Circuit placed more emphasis on the
Act's protection of workers' rights to self-organization. The Act,
Judge Hutcheson argued, "nowhere provides . . . that preference by

243. Id. at 94.
244. Id.
245. Id.
246. See Magnolia Petroleum Co. v. NLRB, 112 F.2d 545 (5th Cir. 1940).
247. Id. at 552.
248. Id. at 546.
249. Id.
250. Id. at 552.
employees for an unaffiliated . . . organization, raises a presumption that this preference was coerced or brought by the employer." 251 The NLRA, he continued, "goes on exactly the contrary presumption, that employees have the intelligence . . . requisite for self-organization, either by joining an existing labor organization or forming one of their own." 252

The concern expressed by the Fifth Circuit over the erosion of fundamental constitutional principles and division of society along permanent class lines provides another clue to the court's hostility toward the Board: the Fifth Circuit judges believed Board decisions deprived employers of property. "A fundamental tenet of liberal democracy" declared Hutcheson, "is the right of free men to . . . acquire, to own, and to hold property, and not to be deprived of it except by due process of law." 253 Judge Sibley also believed that the basic role of democratic government was to protect traditional property rights. 254 In addition, Sibley warned against judicial or legislative recognition "of the division of our citizenry into classes, irreconcilably opposed in interest or aim." 255 As Judge Sibley's opinions reflect, the NLRB, however, violated traditional property rights through its interference in private businesses, and attempted to divide the nation into two classes by pushing workers into nationally affiliated unions. 256

251. Id. at 549-50.
252. Id. at 550. The Eighth Circuit, however, offered a contrary opinion in its Pittsburgh Plate Glass Co. decision, 113 F.2d 698 (8th Cir. 1940), holding that it was up to the Board to determine the correct bargaining unit and representatives of the workers so as to best augment their bargaining power. Hutcheson also chastised the Board in NLRB v. Riverside Mfg. Co., 119 F.2d 302 (5th Cir. 1941). In this case the CIO was attempting to organize a small cotton mill in Georgia. Id. at 303. The court ruled that the evidence showed that the workers did not want to be represented by the CIO-affiliated union. Id. at 305-06. The court attacked the Board for what it saw as its organizational efforts for the union and viewed the worker as caught between their employers, who did not want any union, and the "efforts of the national union, assisted by the Board in its administrative capacity, to organize and represent him willynilly. . . ." Id. at 304. The court even excused the actions of a group of workers who physically drove pro-union supporters out of the factory, for "these employees took the action they did because they felt that the union with the assistance of the Board was trying to force upon them the representation they did not want." Id. at 306.
253. HUTCHESON, supra note 176, at 175.
254. Id.
255. Sibley, supra note 221.
256. The Fifth Circuit's focus on protecting the rights of workers to organize rather than on equalizing bargaining power meshes well with the legal philosophy of Sibley and Hutcheson. Neither judge denied that workers had a right to organize. Judge Hutcheson made this belief clear in his 1928 opinion in the Texas & N.O.R. case discussed earlier, and none of Judge Sibley's opinions argue that workers should not be allowed to organize freely from employer coercion. What they objected to was what they viewed as the Board's arrogant efforts to dismiss the wishes and desires of workers by pushing them into the C.I.O., believing that such affiliation would offer workers greater bargaining power. Hutcheson and Sibley believed the purpose of the Board and the Act was to protect workers who wished to organize or join any labor organization
V. CONCLUSION

Judicial criticisms of New Deal social reforms, specifically the NLRB, did not reflect a complete rejection of legal realist principles or reasoning. On the contrary, judges such as Hutcheson, "cherished as much as any 'the glorious uncertainty,' the iridescent beauty, of a changing law." The primary difference, however, with Hutcheson’s realism on the Fifth Circuit, as compared to that of the judges in the Eighth Circuit, was that Hutcheson advocated an evolving law not for social reform or in support of the New Deal administrative state, but rather to preserve fundamental constitutional principles from subversive social, economic, and political forces such as administrative agencies. The "growing tendency of even ruggedly individualistic Americans... to look to, to lean on government instead of upon themselves," declared Hutcheson, "is growing apace." The rise of the New Deal administrative state raised fears among many in the judiciary that the nation had begun taking the form of the dictatorial states dominating Europe during the mid-1930s and that it had eroded such traditional American values as self-reliance. Instead of serving as a "liberator," ideological forces in those nations had transformed law into a "master". The nation’s only hope of avoiding this fate, Judge Hutcheson argued, rested in the protection of the "first principles" enshrined in the Constitution, of which the most important were property and individual rights, as well as the separation of powers.

In some sense, then, the legal realists and conceptualist-realists on the circuit court benches did not differ substantially in their use of the law. The realists of the Eighth Circuit actively employed law to further the NLRB’s efforts at enforcing the Wagner Act. The judges sitting in the Fifth Circuit used the law just as aggressively to limit the Board’s impact on the employment relationship. The battling benches did differ, however, in their visions of the post-Depression social

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they wished. The Act’s purpose was not to make the Board an active agent of social change with the aim of building up the powers of workers by forcing them into nationally affiliated unions. Hutcheson makes these charges against the Board in NLRB v. Riverside Mfg. Co., 119 F.2d 302 (5th Cir. 1941).

257. HUTCHESON, supra note 176, at 22.

258. Id. at 8.

259. Id. at 7.

260. HUTCHESON, supra note 176, at 8.

261. Id. at 10. It should be noted that I am not arguing that the Eighth Circuit or New Dealers advocated the destruction of property or individual rights. The judges in the Eighth Circuit did, however, support extensive federal regulation of those rights when it came to the Wagner Act. This is especially true in cases where private property rights conflicted with the expressed public interest of the Act to protect workers’ rights to organize and prevent interruptions in interstate commerce.
order. The activist judges in the Eighth Circuit applied the law in the labor board cases to transform the existing power relations between workers and employers. The Eighth Circuit also fully accepted the New Deal administrative state and the notion that administrative agencies would occupy an important place in the post-New Deal form of American governance. This group of judges was willing to relinquish some of its judicial prerogatives to make room for these new instruments of public power. The judges in the Fifth Circuit, however, seeing a world divided by ideologically driven and highly administrative states where law had ceased to function as a form of liberation, were not yet ready to abandon their posts as guardians of traditional constitutional safeguards. These judges believed that property rights and the separation of powers were at the heart of the American system, and they were not willing to cede their constitutionally derived powers to administrative-adjudicative bodies that subverted these very ideals.

The battles on the Eighth and Fifth Circuit benches over the Wagner Act reflected two competing notions of the role law should play in labor relations. Through their decisions in labor board cases, the judges in the Eighth Circuit asserted that law needed to be brought back in touch with the social and economic conditions of the 1930s. Consequently, the judges in this court deferred to the Board's aggressive enforcement of the Act, even when in doubt as to the agency's case, and supported the administrative process in the field of labor relations. This group of judges fully subscribed to James Landis' belief that administrative agencies were far superior to the judiciary when dealing with problems arising within clearly defined boundaries, such as labor, agriculture, or the stock market. Courts, unlike administrative agencies, Landis asserted, "were jacks of all trades and masters of none,"

２６２ and the turn to the administrative process, especially in the field of labor relations "was resorted to... in the hope that it would buttress the legislative will to turn the existing current of judicial decision."２６３ The judges in the Eighth Circuit allowed the NLRB nearly free reign to fulfill its statutory mandate and rarely exercised their powers of review over the labor agency. Judicial deference in the Eighth Circuit resulted in greater effectiveness of the labor legislation within this jurisdiction.

Unlike the judges in the Eighth Circuit, the judges in the Fifth Circuit believed the judiciary still occupied an important role in the American form of governance and in the labor relations system con-

２６２．HORWITZ, supra note 24, at 215 (quoting Landis).
２６３．LANDIS, supra note 58, at 98.
structured by the Wagner Act. Their position was made all the more important in the face of a growing body of administrative agencies such as the NLRB. The NLRB interfered with traditional property rights and, more importantly, violated the constitutional doctrine of the separation of powers, which, as one critic of the New Deal asserted, was the only way of "preserving representative government, without which democracy cannot exist." Thus, though some of the judges in the Fifth Circuit were also advocates of a growing law, the rise of powerful administrative agencies led them to reassert that change must occur within the framework provided by the United States Constitution. The judges in this circuit, then, did not defer to the Board's aggressive enforcement of the Act. Rather, this group of circuit court judges readily employed the power of judicial review to overturn Board orders that they believed were either unsupported by the evidence or beyond the scope of the agency's constitutional and statutory authority.

264. C. Perry Patterson, Judicial Review as a Safeguard to Democracy, 29 GEO. L.J. 829, 847 n.7 (1941).