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A New Look at ADR in New Deal Labor Law Enforcement: The Emergence of a Dispute Processing Continuum Under the Wagner Act

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In this Article, Professor Sanchez continues her study of historical aspects of ADR. She examines an array of documentary material germane to the resolution of labor disputes during the New Deal era, and proposes a revised historical narrative about the use of ADR by the National Labor Relations Board to enforce the Wagner Act.

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> I am afraid you are like the Bishop of Oxford who said "Orthodoxy is my doxy and heterodoxy is somebody else's doxy."
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> Of course, I realize, and I am sure every thinking man does, that employees being human beings, they are like employers, and that human nature does not change because the individual is an employee or because he is an employer. We all have the frailties of our common nature. We are prone to control the people with whom we deal and exercise authority over. Interesting things appear in the cases that come to court where there is an impartial atmosphere as the judge sits down to examine the facts, we get some very interesting cases.**

I. INTRODUCTION

Conflict is inherent in human interactions, whether or not power imbalances, or perceived power imbalances, exist between people. Human nature is always part of the problem, and always part of the solution. Conflict and its resolution transgress the boundaries of every historical era because of the universal, enduring, and repetitive nature of human interactions. Thus, conflict and its modes of resolution are processes that survive the span of any single lifetime. It is universally, and eternally, evidenced by the struggle between people about real or perceived differences in viewpoint, economic and social interests, cultural values, moral and religious tenets, etc. The search for peaceful resolutions to conflict throughout Anglo-American legal history (as in other historical contexts) almost invariably aims at preserving

** 2 LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT 1935, at 1649–50 (1949) (James A. Emery, National Association of Manufacturers, in colloquy with Sen. Robert Wagner, Senate Committee on Education and Labor).

human life, limb, and the broader social and economic interests associated with the goal of preserving a stable civic polity.[1]

This Article is part of an ongoing study of evolving approaches to the peaceful processing of disputes throughout Anglo-American legal history.[2] The goals of that study are to foster greater understanding of, and scholarly discourse about, the uses and roles of alternative dispute resolution (ADR) in historical as well as contemporary legal systems. In some cases, the results of the study may suggest perspectives of first impression. In other cases, it may suggest revisions of historical perception and the prevailing historical narrative about the nature of dispute processing in a given era of English or American legal history. The focus of the present Article is on a single "micro-period" of American legal history relating to the resolution of labor disputes during the New Deal era. That period in American political and legal history, presided over by President Franklin D. Roosevelt, inspired the governmental crafting of experimental social reforms and the creation of numerous administrative entities whose chief aim was to fulfill the "New Deal" struck between the federal government and the American polity during the Great Depression. The chief aim of that New Deal, as articulated by President Roosevelt, was to right the imbalance of economic power between

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[1] One early exception to this preference for the preservation of life and limb in the resolution of disputes during Anglo-American legal history was the partial sanctioning of the bloodfeud in early Anglo-Saxon England, at the earliest stages of English legal history. It was during this period that legal process was first introduced to post-Roman English society as a peaceful alternative to this violent method of self-help which had been a normative procedure for resolving disputes under the Teutonic customary law imported to England by the Germanic tribes (the Angles, Saxons, and Jutes) that occupied the island after the Romans vacated it. *See* Valerie A. Sanchez, *Towards a History of ADR: The Dispute Processing Continuum in Anglo-Saxon England and Today*, 11 OHIO ST. J. ON DISP. RESOL. 1, 11–12 (1996) [hereinafter Sanchez, *Towards a History of ADR*] (discussing the Anglo-Saxon bloodfeud); *see also* William I. Miller, *Choosing the Avenger: Some Aspects of the Bloodfeud in Medieval Iceland and England*, 1 LAW & HISTORY REV. 159, 160–75 (1983).

[2] *See, e.g.*, Sanchez, *Towards a History of ADR*, *supra* note 1. The study will culminate in a multi-volume series exploring variant uses of dispute resolution processes on a broad time spectrum, ranging from the early Medieval period in English and Continental legal history, through the Colonial and post-Colonial periods of American legal history, to the current era of "renewed" globalization in the 21st century. I began this lengthy study as a Graduate Fellow at Harvard Law School under the tutelage of the late Professor Emeritus of Legal History Samuel E. Thorne, and Professor Frank E. A. Sander. To date, I have published two articles germane to this research. *See generally id.*; Valerie A. Sanchez, *Back to the Future of ADR: Negotiating Justice and Human Needs*, 18 OHIO ST. J. ON DISP. RESOL. 669 (2003) [hereinafter Sanchez, *Back to the Future of ADR*].

"the prosperous man at the top of the pyramid and the forgotten man, the little man, at the bottom."[3] One product of that New Deal was the formulation of an American labor policy deeply rooted in the use of ADR to resolve labor disputes, but also seemingly at odds with its use in the final stages of that policy's rhetoric on, and agenda for, law enforcement.

American labor policy came into being with the passage of the Wagner Act in 1935 (also referred to herein as the "National Labor Relations Act" or "NLRA"). The primary dispute resolution institution created by that Act was the National Labor Relations Board (also referred to herein as the "NLRB" or "Board").[4] Congress gave that Board the status of an independent agency, rather than placing it within the purview of the Department of Labor. The nature of the dispute resolution function of that Board was a source of confusion to contemporaries of the Wagner Act. It remains so today, as is evident from the array of erroneous or incomplete descriptions of the dispute resolution processes employed by the Board to enforce the Wagner Act. Underlying this confusion was a historical perspective fertile with ideas about the spectrum of dispute resolution processes used during this era to resolve labor disputes under numerous federal statutes. This expansive thinking about dispute processing, and the experience which informed it, was richly complex. It was evident in Congressional hearings about the dispute processing design of the NLRB. It also informed the actual workings of the NLRB and its use of an array of ADR processes after the passage of the Wagner Act.

After a period marked by the widespread, almost orthodox, use of ADR processes, such as mediation, conciliation, and voluntary arbitration, by federal labor boards to resolve labor disputes, Congress invested the NLRB with adjudicatory powers. Thereafter, ADR was widely viewed as heterodoxical to the effective enforcement of the Wagner Act. The historical record from this period suggests an emerging new orthodoxy that trumpeted the primacy of quasi-adjudication over ADR processes to resolve labor disputes under the Wagner Act. It heralded the Board's investiture with the power to adjudicate disputes in the enforcement of the Wagner Act, and disassociated the Board's adjudicatory function from the use of ADR by predecessor labor boards and from the continued use of ADR by other governmental entities to resolve labor disputes that were outside the jurisdiction of the Wagner Act.

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[3] Frances Perkins, *Labor Under the New Deal and the New Frontier*, *in* FRANCES PERKINS & J. PAUL ST. SURE, TWO VIEWS OF AMERICAN LABOR 1, 3 (1965).

[4] *See* The National Labor Relations Act of 1935, 29 U.S.C. § 153 (1998).

Today, there appears to be near universal acceptance of a single strand of historical narrative about the dispute resolution function of the NLRB under the Wagner Act. That narrative, repeated in scholarly works on labor law and on labor-management relations, suggests that ADR was anathema to the adjudicatory function of the NLRB under the Wagner Act.[5] Another strand of the same narrative suggests that the focus of the Wagner Act was the creation of rights for labor, rather than the resolution of labor disputes consistent with the aspirations of the Act.[6] One labor relations textbook also suggests that a common *misperception* about the Board was that it engaged in mediation and conciliation activities to resolve labor disputes under the Act.[7] A recent book chapter on labor relations practice during World War II provided "an historical perspective" of the NLRB's dispute resolution function that characterized it as a watershed, marking a bright line transition from the use of ADR to the use of adjudication to enforce federal labor law:

> This period saw the transformation of the pre-Wagner Act boards from strike settlement bodies of partisan representatives, utilizing mediation, non-legalistic informal discussions, and voluntary cooperation to achieve their objective to quasi-judicial bodies of neutrals deciding cases by setting forth principles of law, conducting formal hearings, issuing rules and regulations, and requiring legalistic uniformity in procedures. The *rejection of mediation*, partisan representation and voluntarism meant that U.S. labor policy would henceforth be developed by law and litigation through legislative enactment, the growth of NLRB case precedent, and the application of administrative law.[8]

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[5] *See, e.g.*, RUTH O'BRIEN, WORKERS' PARADOX: THE REPUBLICAN ORIGINS OF NEW DEAL LABOR POLICY 1886–1935, at 195 (1998) ("With the NLRB given authority to investigate and adjudicate labor disputes . . . the hearings were to be adversarial in format. . . . Unlike the board established by the Trade Disputes bill, the NLRB could not mediate or arbitrate a labor dispute; it had to represent the public interest.")

[6] *See* JAMES B. ATLESON, *The Law of Collective Bargaining and Wartime Labor Regulations*, *in* AMERICAN LABOR IN THE ERA OF WORLD WAR II 43 (1995) ("The Wagner Act . . . did not focus upon dispute resolution.").

[7] *See* TERRY L. LEAP, COLLECTIVE BARGAINING & LABOR RELATIONS 73 (2d ed. 1995) ("Misconceptions about the Wagner Act continued long after its passage. Despite beliefs to the contrary, the Act provided no mediation or conciliation functions. Rather, the NLRB served to regulate and punish employers who sometimes unwittingly violated the law.")

[8] James A. Gross, *The NLRB: An Historical Perspective*, *in* A GUIDE TO SOURCES OF INFORMATION ON THE NATIONAL LABOR RELATIONS BOARD 5–6 (Gordon T. Law, Jr. ed., 2002) (emphasis added). Professor Gross first articulated this view over thirty years ago. *See* JAMES A. GROSS, THE MAKING OF THE NATIONAL LABOR RELATIONS BOARD: A

Thus, the contemporary historical narrative suggests that the Wagner Act was informed by an orthodoxy that viewed adjudication as the sole dispute resolution process appropriate for use in the enforcement of labor law under the Wagner Act, and as the sole law enforcement process used by the NLRB. The corollary view of ADR as heterodoxical to the effective enforcement of the Wagner Act was evident in the rhetoric associated with the passage of the Act, though not in the federal government's ongoing use of (and enduring preference for) ADR to resolve labor disputes in general. Notwithstanding that rhetoric of heterodoxy in the law enforcement context, this Article suggests that the law enforcement framework of the administrative entity established by Congress as the NLRB utilized ADR processes to resolve a large number of its cases informally, through settlement agreements.[9] The NLRB's recourse to settlement agreements—or "adjustments"—was well-known to Congress, was not prohibited by the Wagner Act, and resulted in the emergence of a "dispute processing continuum"[10] within the

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STUDY IN ECONOMICS, POLITICS, AND THE LAW, VOL. I, 1933–1937, at 2 (1974) [hereinafter GROSS, THE MAKING OF THE NATIONAL LABOR RELATIONS BOARD] ("The rejection of mediation . . . meant that American labor policy would henceforth be developed by law and litigation through . . . the growth of a body of NLRB case precedent."); *accord* O'BRIEN, *supra* note 5, at 195.

[9] The law enforcement framework of the NLRB included Board "members" appointed by the President of the United States and a network of "agents" acting as Regional Directors of the Board, case examiners, and lawyers. The first series of Rules and Regulations promulgated by the NLRB designated "regional directors, examiners, and attorneys" employed by the Board as its "agents." *See* National Labor Relations Board, Rules and Regulations, Article IV, 1 Fed. Reg. 280–81 (Aug. 28, 1936). Notwithstanding the NLRB's broad composition, scholars and practitioners tend wrongly to conceptualize "the NLRB," and its alternative term of reference, "the Board," too narrowly, viewing it as a single entity, rather than as a vast law enforcement institution encompassing both Board "members" and Board "agents" whose powers and responsibilities are quite different. As Professor Archibald Cox and his team of prominent labor law scholars noted:

> Although it is customary to speak of 'the Board' as if the National Labor Relations Board and its large staff of employees thought and acted as a single person, this usage is highly misleading. In reality, the NLRB is composed of various categories of persons exercising quite different responsibilities.

ARCHIBALD COX ET AL., LABOR LAW, CASES AND MATERIALS 104 (13th ed. 2001).

[10] I created the phrase "dispute processing continuum" in an earlier article to describe the phenomenon of a spectrum of available dispute resolution processes used within the framework of a legal system to afford litigants the opportunity to resolve their legal disputes through ADR processes, such as negotiation and mediation, as well as through third-party-controlled processes, such as arbitration and adjudication. *See* Sanchez, *Towards a History of ADR*, *supra* note 1, at 1–3, 33 (discussing the "hat

"adjudicatory" law enforcement framework of the NLRB under the Wagner Act.

The present Article therefore suggests that the widespread understanding, after the passage of the Wagner Act, that the NLRB, by legislative design, discontinued the use of third-party facilitated processes such as mediation and conciliation to resolve labor disputes under the Act is, in fact, inaccurate. In taking a new look at ADR in New Deal labor law enforcement, this Article focuses on both *rule-centered* and *processual* evidence concerning the law enforcement functions of the NLRB.[11] That evidence is contained in the Wagner Act itself, the legislative history of the Act, the Annual Reports of the early NLRB, and an array of historical commentaries by courts, journalists, public servants, and scholars concerning the passage and content of the Wagner Act, as well as the workings of the early NLRB. This evidence

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changing" phenomenon of public judges in a dispute processing continuum present in the early English legal system, distinguishing between settlement outcomes reached "at love" and adjudicated outcomes reached "at law," and also discussing the related phenomena of bargaining in the "shadow of the law" and bargaining in the "clear light of legal certainty," where parties are given an opportunity to reach settlement agreements, respectively, *before* and *after* they have received a formal decision on the merits of a case). The classic text on the phenomenon of parties bargaining in the shadow of the law is Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979). There is much current debate about the desirability of modern judges "changing hats" to engage in settlement processes during the course of litigation. *See generally* Carrie Menkel-Meadow, *For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference*, 33 UCLA L. REV. 485 (1985); Judith Resnick, *Managerial Judges*, 96 HARV. L. REV. 374 (1982).

[11] A rule-centered approach to legal history involves the analysis of laws or other official decrees for normative evidence of social conduct (and misconduct) in any given era. By comparison, *processual* historical analysis involves investigation of documents recording *actual*, rather than aspirational, social conduct. *See* Sanchez, *Towards a History of ADR*, *supra* note 1, at 3. Any approach to legal history that takes only one of these approaches risks overlooking important evidence necessary to describing a more complete picture of the legal history of any era.

The distinction drawn between the processual and rule-centered approaches to legal history is well known in the discipline of legal anthropology. *See generally* SALLY FALK MOORE, LAW AS PROCESS: AN ANTHROPOLOGICAL APPROACH (1978); KARL N. LLEWELLYN & E. ADAMSON HOEBEL, THE CHEYENNE WAY: CONFLICT AND CASE LAW IN PRIMITIVE JURISPRUDENCE (1941). The essence of the distinction is that legal histories based solely on description of rules (i.e., mandates "from above") often do not accurately convey a picture of actual practice (i.e., the indicia of historical reality that come "from below" the rules, reflecting how they were enforced or even augmented through non-rule based activity). A holistic approach to legal history takes a combined rule-centered and processual approach to the documentary evidence. *See* Sanchez, *Towards a History of ADR*, *supra* note 1, at 3.

supports the conclusion that the historical narrative about the dispute resolution functions of the NLRB should be revised to reflect its use of ADR to enforce the Wagner Act. It further suggests that, because of the adjudicatory power the Wagner Act invested in the NLRB, Congress effectively sanctioned the emergence of a dispute processing continuum within the NLRB's enforcement practices that included the use of third-party-facilitated, as well as third-party-controlled, dispute resolution processes.

The dispute processing continuum that emerged within the NLRB has historical[12] and contemporary[13] analogues. In these analogues, when the entity of adjudication, such as a judge, can exercise both adjudicatory powers and serve settlement functions, alternately wearing the hats of a judicial decisionmaker empowered to decide a case and judicial facilitator of settlement agreements between the parties, such settlement outcomes are either mediated under the shadow of the law or in the clear light of legal certainty, and are examples of the phenomenon of justice negotiated, rather than justice adjudicated.[14] In a similar manner, the NLRB, as an entity of adjudication, could either facilitate the negotiation of justice by its staff and agents via settlement agreements reached under the shadow of the Board's adjudicatory machinery to enforce the Wagner Act (or with the benefit of the clear light of legal certainty provided by it), or it could exert its adjudicatory powers to reach formal decisions, thereby adjudicating justice.

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[12] *See generally* Sanchez, *Towards a History of ADR*, *supra* note 1.

[13] The "Multi-Door Courthouse" is one contemporary example of a dispute processing continuum within the framework of a courthouse—the institution associated today with the resolution of legal disputes. Another is the phenomenon that could be dubbed the "Multi-Door Court*room*," wherein a judge acts alternately as adjudicator and settlement facilitator. *See supra* note 10 (concerning the settlement functions of judges). Harvard Law Professor Frank E.A. Sander first articulated this idea of the "Multi-Door Courthouse" in 1976. *See* FRANK E.A. SANDER, THE MULTI-DOOR COURTHOUSE: SETTLING DISPUTES IN THE YEAR 2000 (1976); Larry Ray & Anne L. Clare, *The Multi-Door Courthouse Idea: Building the Courthouse of the Future . . . Today*, 1 OHIO ST. J. ON DISP. RESOL. 7, 9 (1985). A central feature of the "Multi-Door Courthouse" experiment is that it places practitioners of ADR within the purview of a court, giving parties to a lawsuit access to non-adjudicatory processes to resolve their legal disputes before taking that dispute before a judge. Thus, the courthouse provides parties access to adjudication and alternatives to it (i.e., ADR). Each of these processes, including adjudication, is located—metaphorically speaking—behind a different "door" within this "Multi-Door Courthouse."

[14] *See* Sanchez, *Back to the Future of ADR*, *supra* note 2, at 671–74; *see also supra* note 10 (discussing the phenomena of bargaining under the "shadow of the law" and in "the clear light of legal certainty").

II. THE ETHOS OF LABOR DISPUTE RESOLUTION IN THE NEW DEAL ERA: PROCESS PARADIGMS

By the beginning of the New Deal era, the federal government had a history of experimenting with non-adjudicatory methods of dispute resolution to resolve industrial relations conflict.[15] President Roosevelt's Secretary of Labor, Frances Perkins, expressed the view, in her testimony to Congress during the hearings on the Wagner Act, that continued experimentation with these processes in the labor law enforcement arena was central to government's fulfillment of the New Deal's broader mission:

> [T]his process of experimentation should, it seems to me, be allowed to continue. We have not yet reached the limits of the possibilities of cooperation or the possibilities for a great variety of devices to bring about the right relationship between employer and employee interests in a great democracy which is, after all, devoted constructively to the interests of all the people, not only the two great parties of the industrial situation [i.e. management and labor].[16]

The admixture of non-adjudicatory dispute resolution processes used by New Deal, and pre-New Deal, labor relations boards included negotiation, mediation, conciliation, and voluntary arbitration. In the nomenclature of the New Deal, these processes were defined as they are today, but without use of the umbrella acronym, ADR, used in this Article and, of course, in the contemporary U.S. legal system to distinguish these processes from adjudication, and describe them as "alternatives" to it.

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[15] *See, e.g.*, Arbitration Act of 1888, ch. 1063, 25 Stat. 501 (1888) (providing for voluntary mediation and compulsory fact-finding in railway labor disputes); Erdman Act of 1898, ch. 370, 30 Stat. 424 (1898) (providing for the mediation and voluntary arbitration of railway labor disputes); Newlands Act of 1913, ch. 6, 38 Stat. 103 (1913) (creating a Board of Mediation and Conciliation to resolve railway labor disputes); Federal Arbitration Act of 1925, 9 U.S.C. §§ 1–307 (1988) (originally called the United States Arbitration Law); Railway Labor Act of 1926, ch. 347, 44 Stat. L. 577 (1926) (codified at 45 U.S.C. §§ 151–69 (1988)) (creating the National Mediation Board to resolve disputes arising under railway collective bargaining agreements through mediation and arbitration); National Industrial Recovery Act, ch. 90, 48 Stat. 195 (1933) (creating the National Labor Board); Exec. Order No. 6763, June 29, 1934, *reprinted in* 3 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 332 (compiled by Samuel L. Rosenman, 1938) (abolishing the National Labor Board and creating the First National Labor Relations Board).

[16] 1 LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT 1935, at 50 (1949) (statement of Frances Perkins) [hereinafter 1 LEGISLATIVE HISTORY OF THE NLRA].

In one of her many statements to Congress during its hearings on the Wagner bill, Secretary Perkins described the salient qualities of the non-adjudicatory processes—*voluntary* arbitration, mediation, and conciliation—practiced by the Department of Labor:

> *Arbitration* is a function which, as is well known, can be exercised only when both parties to a controversy agree to permit a third party to act as an arbitrator and agree to abide by the *decision of that third party*. The Department of Labor can exercise the function of arbitration when both sides agree to it.
>
> The Department of Labor can also act as *mediator*, that is, it can of its own interposition and without invitation of either side, intervene in an industrial dispute with *suggestions as to the ways of bringing the conflicting parties into agreement, with suggestions perhaps as to the formula upon which they may agree.*
>
> It can also act in a third capacity of *conciliation*, by which is meant commonly a more or less negative activity in which *the conciliator attempts to be the go-between between the parties who are in conflict until they, acting through him, come to some formula which it appears can be mutually agreed upon.* Thereupon he retires from the scene leaving them to agree.[17]

These processes were paradigmatic of those practiced by the various labor boards preceding the passage of the Wagner Act. The Congressional testimony of Milton Handler, Professor of Law at Columbia University, who served as General Counsel of one such board, the National Labor Board (discussed in Part II.A.1 of this Article), describes the evolution of that board's recourse to a similar array of dispute resolution processes as it adapted to the exigencies of the moment in order to resolve industrial disputes and ultimately enforce § 7(a) of the National Industrial Recovery Act (also referred to herein as "NIRA"), sanctioning labor's rights to unionize and bargain collectively prior to the passage of the Wagner Act[18]:

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[17] *Id.* at 52 (emphasis added).

[18] *See* National Industrial Recovery Act, *supra* note 15, § 7(a); *see also infra* note 30. The chief aims of the National Industrial Recovery Act were

> to reduce unemployment, to increase purchasing power, and to insure just rewards to both capital and labor by eliminating unfair competition . . . . The [NIRA] suspended the anti-trust laws and authorized industries to organize representative associations and to frame codes of fair competition, which, upon approval by the President, should become binding upon the whole industry. An approved code constituted the standard for the industry or trade, and violations were deemed an unfair method of competition within the meaning of the Federal Trade Commission Act. The President was also given authority to impose codes on industries which refused or failed to frame acceptable codes for themselves, and also to move to punish violators

> [W]hile the [National Labor] Board was initially designed to mediate industrial disputes, it has served as a board of arbitration in cases where joint submissions were voluntarily made to the Board, and in the course of time it took on a new function, namely the enforcement of section 7(a) of the Recovery Act. . . . The Board also [had] a compact administrative staff which [was] . . . set up to supervise the work of the regional boards, to control the field work, prepare the hearings before the full Board, to conduct research and advise the Board on the legal phases of the problems that [were] presented to it, and to supervise the compliance with the Board's rulings.[19]

Professor Handler's description of how this pre-NLRB board processed labor disputes illustrates the emerging framework of a dispute processing continuum in the National Labor Board's practice. That emerging continuum began with the National Labor Board's use of a non-adjudicatory process (i.e., mediation) to achieve settlement outcomes or "adjustments" of the dispute, and culminated in its use of more formal intervention in the dispute, such as *voluntary* arbitration or *voluntary* adjudication:

> Upon refusal of the employer to deal with the officials of a union a strike is called. Now as soon as the board learns of the strike it sends a mediator to the field to adjust the dispute if that be possible. If he fails, the parties are then summoned to appear before the full Board, which is either a regional board or the National Labor Board, depending upon the importance of the case. Strikes have generally been settled along the following lines, after full hearing by the Board: An Agreement is made between the parties to the dispute and the Board and it provides typically for the following: First, the strike is called off and the workers are reinstated without discrimination; an election is held to determine who shall represent the workers and to settle this disputed question of the authority of the officials of the union to represent the workers. The employer agrees to bargain collectively with the representatives selected at this election held under the board's supervision and the parties agree to submit all their differences which cannot be settled by negotiation either to a board of arbitration or to the National Labor

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> of codes that had received his approval. By the end of the first month of the N.I.R.A. over 400 codes had been filed and eventually the total reached 677, including activities ranging from steel production to pants pressing, although unfortunately, many of the codes were too hastily drawn . . . . It should not be surprising under the circumstances that some industries drew up codes that gave them monopolistic powers.

ERNEST L. BOGART & DONALD L. KEMMERER, ECONOMIC HISTORY OF THE AMERICAN PEOPLE 653 (2d ed. 1947); *see also infra* text accompanying note 32.

[19] 1 LEGISLATIVE HISTORY OF THE NLRA, *supra* note 16, at 59 (statement of Milton Handler).

> Board or the regional labor board for final decision. . . . [This] procedure . . . has been entirely voluntary. In the great bulk of the cases before the board [sic] this method has been eminently successful. The mediators have settled on just and equitable terms innumerable strikes in the field, and the mere existence of this administrative machinery, the local and national boards, has been responsible for the averting of countless disputes.[20]

The perceived weaknesses of this emerging dispute processing continuum were its voluntariness and the National Labor Board's lack of enforcement power. It could neither compel compliance with its administrative procedures nor enforce its decisions. As Professor Handler explained to Congress during the Wagner Act hearings:

> [D]ifficulty has arisen where the parties have refused to appear before the Board, where the terms of settlement proposed by the Board have been rejected, where the employers have refused to furnish the Board with their payrolls and the cooperation which is essential if a fair and reliable election is to be held, and finally, where the hearings disclosed violation of the statute. In this last instance the lack of power on the part of the Board to enforce its decision and its inadequate facilities for the detection of violations, have made it difficult to enforce the law with desirable vigor and promptness.[21]

Congress' purpose in obtaining testimony on the operation of the National Labor Board in its hearings on the Wagner bill was to assist it in crafting the features of the soon-to-be National Labor Relations Board in a manner that would capitalize on the perceived strengths, and also circumvent the perceived weaknesses, of this predecessor board.

A central theme of these legislative hearings on the Wagner bill with regard to the design of the National Labor Relations Board concerned whether the new Board should practice the array of dispute resolution processes used by its predecessor board in conjunction with a stronger quasi-judicial power for enforcing the law, or whether its dispute resolution function should be limited to adjudication.[22] Secretary Perkins' opinion was that the new Board should exercise an adjudicatory function only, leaving the offices of the Department of Labor with exclusive exercise of the alternative,

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[20] *Id.* at 60.

[21] *Id.*

[22] *See, e.g.*, 1 LEGISLATIVE HISTORY OF THE NLRA, *supra* note 16, at 51 (statement of Frances Perkins), 60, 66 (statement of Milton Handler), 1464 (statement of Francis Biddle).

non-adjudicatory processes.[23] Her viewpoint was largely informed by a perspective of ADR relative to adjudication in law enforcement and law making that was akin to one articulated more recently, during the contemporary ADR movement, by critics of ADR (most notably that of Yale law professor, Owen Fiss[24]). Perkins associated the adjudicatory process, but not ADR processes, with what she described as the "practice of justice":

> A judicial board ought to be building up the body of our law and the body of our understanding, and our interpretation of law which we may come to count upon as a set of precedents. . . . This [proposed] board [under the Wagner bill], I think, should be confined to the practice of justice in this very unusual field, whereas the function of conciliation and mediation is an important function, but I do not think it should be performed by the same board.[25]

Secretary Perkins thus encouraged the continued use of ADR processes by the Department of Labor, but not by the proposed new board under the Wagner bill:

> The continuation of the function of conciliation in the Department of Labor closely allied with the [proposed] . . . Board is, I think, highly desirable. Moreover, I think the [proposed] . . . Board, recognizing as it will in certain cases that come before it, that as a practical matter the proper technique in the particular case is not a judicial decision but conciliation—that is, many cases are brought, as you know, almost in the spirit of litigation and will be brought before any board which is a judicial board in the spirit of litigation, and the judge sitting upon that case sees at once that what is really needed is not a judicial decision but some negotiation, some method of bringing parties together to agree upon a compromise which will meet the particular situation—the board should have the power to establish or to authorize the creation of boards of conciliation or boards of mediation or to refer the case for conciliation or for mediation to a properly constituted authority, but I feel that it should itself not engage and so impair its prestige in actual conciliation as it has been obliged to do [in its present, pre-Wagner Act form].[26]

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[23] *Id.* at 51 (statement of Frances Perkins).

[24] *See* Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1075 (1984).

[25] 1 LEGISLATIVE HISTORY OF THE NLRA, *supra* note 16, at 51 (statement of Frances Perkins).

[26] *Id.*

Thus, Secretary Perkins was strongly opposed to the creation of a labor board that exercised a "mixed" dispute resolution function. In her view, ADR should have a separate institutional situs of practice, outside the framework of an institution such as the proposed board which, similar to a court, would be empowered to adjudicate cases, enforce those decisions through statutory recourse to the Federal court system, and develop a body of legal precedent under the Wagner Act that would be analogous to the common law.[27] However, there were detractors from Perkins' view. Milton Handler, for example, urged Congress to create a mixed-function board, but to invest it with stronger adjudicatory powers than those vested in the National Labor Board on which he had served:

> Mediation is most successful when undertaken by a single individual. For this reason it is contemplated, under the bill, in continuation of our past practice, of having an experienced staff of mediators for field work. But where such mediation fails, and it does fail in many cases, unless there is to be a continuation of strife, it is imperative that there be some agency with adequate prestige to intervene in the interest of the public, and to bring about a peaceful settlement. It is for that reason that I urge that the bill re[t]ain the mediation functions of the present Board. . . . For the enforcement of the law, added powers are needed. Enforcement, to be effective, must be speedy. . . . Hence the need of an administrative agency with the power to issue orders enforceible [sic] in the courts.[28]

This, and other testimony, as well as data about the strengths and weaknesses of the dispute processing experiments of labor boards that immediately preceded the Wagner Act's NLRB, shaped Congress' final design of the NLRB's system for enforcing the Wagner Act and processing disputes arising under it. That historical record now serves as valuable evidence of both the *rule-based* and *processual* underpinnings of these boards, enabling us to see more fully *how* they *actually* processed labor disputes and worked to enforce labor law during this era.[29]

A. *Predecessors of the NLRB*

The National Labor Relations Board had numerous predecessors. Each of these predecessors was designed to serve a dispute resolution function associated with the implementation of federal labor law.

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[27] *See id.*

[28] *Id.* at 60, 66 (statement of Milton Handler).

[29] *See supra* note 11 (discussing the rule-centered and processual approaches to legal history).

1. *The National Labor Board (1933–34)*

The National Labor Board was the first federal labor board to undertake the function of implementing the first statutory incarnation of labor's rights to organize, engage in collective bargaining with employers, and refrain from joining company unions, accorded by § 7(a) of the New Deal's National Industrial Recovery Act.[30] President Roosevelt created the National Labor Board in 1933 by executive order to "handle labor disputes" arising from § 7(a) of the NIRA,[31] and to foster "voluntary" compliance with it. As Secretary Perkins explained to Congress, the NIRA was a grand-scale economic plan to pull the United States out of the Great Depression:

> The National [Industrial] Recovery Act was a piece of economic planning that . . . called for each industry to set up a code with standards for both business and labor that each firm would abide by. The N[I]RA proved to be a really remarkable instrument, first, from an educational standpoint and, second, by terminating bad practices and insuring compliance with the hours and wages provided for in the Act. . . . However, the most important part of the Act as far as labor was concerned was Section 7(a). This section gave to labor the right to organize and bargain collectively. . . . During the first year of the National [Industrial] Recovery Act . . . over a million

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[30] Section 7(a) was the first federal legislative provision giving labor (i.e., private sector, non-railway employees) the right to engage in collective bargaining with their employers. It provided 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.

1 NLRB ANN. REP. 4 (1936), *reprinted in* 1 NATIONAL LABOR RELATIONS BOARD ANNUAL REPORTS, 1936-1942 (1985) [hereinafter 1 NLRB REPORTS] (quoting National Industry Recovery Act, *supra* note 15, § 7(a)(1)). Section 7(a) also contained a second provision relating to company unions. It provided 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.* (quoting National Industrial Recovery Act, *supra* note 15, § 7(a)(2)); *cf.* Railway Labor Act of 1926, *supra* note 15, § 2 (establishing the "duty" of railway employers and employees "to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions" and providing that "representatives" of employers and employees shall be "designated by . . . means of collective action, without interference, influence, or coercion exercised by either party over the self-organization or designation of representatives by the other").

[31] *See* 1 NLRB ANN. REP., *supra* note 30, at 4.

> people joined the labor movement. It was a period of great energy and activity in a group of people who had almost ceased to function as a movement. With this came a new spark of life in people who ought to have been organizing long before and who ought to have been taking the lead in expressing their views and opinions, but who had never had any political power or force. The self-propelling, self-directing activity began that made the modern labor unions of America so effective for their own people, and so persuasive to other people. . . . The program went very well for the first five or six different industries but then began to run into trouble. . . . The principle cause of its failure was its attempt to spread its jurisdiction over too many and comparatively insignificant industries.[32]

Soon after the implementation of the NIRA began, President Roosevelt "proposed that all employers not yet under a code *subscribe* to the President's Reemployment Agreement."[33] This was an agreement that set forth "certain labor standards and incorporat[ed]" portions of § 7(a) of the NIRA.[34] Companies that complied with the terms of the NIRA were issued "Blue Eagles."[35] The Blue Eagle was not only a governmental logo to be openly displayed by corporations and valued by some as a patriotic "badge of honor."[36] It also gave its holder a valued economic privilege: eligibility to

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[32] Perkins, *supra* note 3, at 11–12; *see also supra* note 18.

[33] *See* 1 NLRB ANN. REP., *supra* note 30, at 4 (emphasis added).

[34] *See id.* At the time the National Labor Board was created, it was possible for each industry to establish a code that would "carry provisions for a labor relations board for the particular industry covered by the code." *Id.* However, "[m]ost of the codes thereafter contained no such provisions . . . and by necessity the National Labor Board took jurisdiction over all labor disputes arising under either the codes or the President's Reemployment Agreement." *Id.*; *see infra* note 64.

[35] The "Blue Eagle" was the icon of the National Recovery Administration:

> According to historian Arthur Schlesinger, 'One day, after talking with Henry Wallace about thunderbird, the general sketched a figure modeled on the old Indian ideograph. Suitably retouched by a professional, this grew into the Blue Eagle. Bearing the legend, "We Do Our Part," it became NRA's symbol of compliance . . . .

GROSS, THE MAKING OF THE NATIONAL LABOR RELATIONS BOARD, *supra* note 8, at 123–24, n.66 (quoting ARTHUR M. SCHLESINGER, JR., THE COMING OF THE NEW DEAL 114 (1959)).

The government sent NRA employer code agreements to every employer nationwide. When the employer signed the code and returned it to the post office, the post office gave him a Blue Eagle insignia for display in storefronts. *See* Russell Owen, *Over the Nation the Blue Eagle Wings*, N.Y. TIMES, July 30, 1933, at 102.

[36] Franklin Delano Roosevelt, *The Third 'Fireside Chat' — 'The Simple Purposes and the Solid Foundations of Our Recovery Program* (radio broadcast, July 24, 1933),

contract with the U.S. Government.[37] In the economic hard times of the Depression, this privilege was often vital to the survival of a company. The National Recovery Administration (also referred to herein as the "NRA") could remove the Blue Eagle from an employer for noncompliance with the requirements of the NIRA.[38] In the eyes of many employers, this was a daunting enforcement mechanism. It was also one that could be instigated by the National Recovery Administration Compliance Board to "enforce" a decision of the National Labor Board that went ignored by an employer.[39]

The National Labor Board had jurisdiction over labor disputes that arose under the NIRA *and* the President's Reemployment Agreement but was limited to reviewing alleged violations of § 7(a).[40] As a result of widespread defiance of § 7(a) by large employers who, presumably, could survive without the aide of the economic privileges associated with having "Blue Eagle" status, President Roosevelt issued a series of executive orders following his establishment of the National Labor Board that were designed to foster and coerce corporate compliance with that board's jurisdiction.[41] In December of 1933, Roosevelt "gave the [National Labor] Board the right to adjust *all* industrial disputes arising out of the operation of the President's Reemployment Agreement or the codes, and 'to compose *all* conflicts threatening the industrial peace of the country.'"[42] Two months later, Roosevelt issued two additional executive orders adding to the Board's powers. One gave the Board "the right to conduct [union] elections" for the purpose of designating the appropriate representatives of employees in the

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reprinted in 3 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT, *supra* note 15, at 301 (describing the Blue Eagle as a "badge of honor" to be displayed "prominently," and likening it to a "bright badge" worn on the shoulders of soldiers during wartime "to be sure that comrades do not fire on comrades . . . [and that] those who cooperate in the program . . . know each other at a glance.").

[37] *See* Exec. Order No. 6246, Aug. 10, 1933 (making federal government's contracts for supplies subject to contractor's compliance with the NIRA); Exec. Order 6646, March 14, 1934 (requiring all bidders for governmental contracts to certify compliance with the NIRA).

[38] *See* Exec. Order No. 6246, *supra* note 37 ("If the contractor fails to comply . . . the Government may by written notice to the contractor terminate the contractor's right to proceed with the contract . . . ."); *see also* 1 NLRB ANN. REP., *supra* note 30, at 5 (stating that the failure to comply with NIRA could result in loss of Blue Eagle status).

[39] *See id.*; *see also infra* notes 55–59 and accompanying text.

[40] *See* 1 NLRB ANN. REP., *supra* note 30, at 5.

[41] *See id.* at 5–6; *see also* GROSS, THE MAKING OF THE NATIONAL LABOR RELATIONS BOARD, *supra* note 8, at 41–59.

[42] *See* 1 NLRB ANN. REP., *supra* note 30, at 5 (emphasis added).

collective bargaining process.[43] The other provided that it "could report its findings of violations of section 7(a) and its recommendations to the Attorney General for possible prosecution or to the Compliance Division of the [National Recovery Administration] for appropriate action."[44] Both orders were designed to curb the "flagrant cases of defiance of the Board by large employers" who rightly perceived a lack of enforcement power in the National Labor Board's authority.[45]

Within a very short period of time following its creation, the administrative entity known as the National Labor Board had become a multi-tiered structure consisting of the board itself, numerous regional boards, and agent-employees:

> In order to take care of the large number of disputes arising under section 7(a), it established 20 regional boards, composed of representatives of labor and industry, with a representative of the public as impartial chairman, to *adjust* cases and hold hearings in the regions where the controversies arose, and thus expedite the cases and enable the parties to avoid the burden of coming to Washington.[46]

The dispute resolution practices of the National Labor Board bureaucracy ranged from the facilitation of "settlements" to the issuance of "decisions."[47] Its Chairman, Senator Robert Wagner, reported that during its nine months of existence, the Board and its regional offices handled "3,755 cases, of which 3,061, or 80 percent, were *settled* by the boards."[48] Thus, as Wagner explained to Congressional colleagues during the hearings on the Wagner Act,

> [a]pproximately two-thirds of these settlements were agreements, and agreements spell sound settlements. The boards mediated 1,323 strikes, involving 870,000 workers, not counting many more thousands directly affected. Three-fourths of these strikes were settled. In addition, 497 strikes were averted. Thus, the boards in strike situations alone returned to work or kept at work 1,270,000 workers directly involved, or about 1,500,000 including workers directly affected. Moreover, the boards reinstated 10,000

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[43] *See id.* (quoting Exec. Order, Dec. 16, 1933).

[44] *See id.* (citing Exec. Orders, Feb. 1 and 23, 1934).

[45] *Id.* at 4.

[46] *Id.* (emphasis added).

[47] *Id.* at 5.

[48] 1 LEGISLATIVE HISTORY OF THE NLRA, *supra* note 16, at 1211–12 (emphasis added).

> men found to have been discriminated against and unjustly discharged. Of the 3,755 cases, the primary cause of complaint in 2,655 cases was alleged violation of section 7(a), the collective–bargaining provision of the recovery law. [49]

In addition to its facilitation of settlement agreements, the board "held hearings and issued findings and recommendations in cases where no settlement had been achieved. Most of these decisions involved the interpretation of section 7(a), and its application to the facts of particular cases." [50] In cases where the board's decision was defied, or "not accepted," by the employer, the board sent its decision to the Compliance Division of the National Recovery Administration with the recommendation that the employer's Blue Eagle be removed.[51] Figure 1 provides the statistical data preserved in the historical record about the number of cases settled by the National Labor Board.

Figure 1

National Labor Board Cases and Settlement Statistics, 1933–34

	Total Cases	Cases Settled	Agree-ments	Deci-sions	Pending	§ 7(a) Cases	Total Strikes	Strikes Settled	Joint Arbitration
National Labor Board	258	186	80	66	30	202	148	123	11
Regional Labor Boards	3,497	2,875	1,877	689	423	2,453	1,175	882	149
TOTAL	3,755	3,061	1,957	755	453	2,655	1,323	1,005	160

Source: 1 LEGISLATIVE HISTORY OF THE NLRA 1212 (1949) (Tables I–III)

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[49] *Id. But cf.* 1 NLRB ANN. REP., *supra* note 30, at 5 (stating that the National Labor Board "settled 1,019 strikes, involving 644,209 employees, . . . averted strikes in 498 cases involving 481,617 employees . . . [and] settled about 1,800 disputes in cases where there were no strikes or threats of strikes").

[50] 1 NLRB ANN. REP., *supra* note 30, at 5.

[51] *See id.*

Thus, in difficult cases, the enforcement powers of the National Labor Board depended upon a network of agencies for its efficacy. During its short institutional life (from August 5, 1933, until June 9, 1934), it "valiantly attempted to *compose* labor disputes, to interpret the collective bargaining provision of the N.[I.]R.A. [§ 7(a)], and to ascertain and inhibit unfair labor practices."[52] The National Labor Board functioned as a "bi-partisan body . . . which strove to make effective the collective bargaining rights written into Section 7(a) of the . . . Act."[53] However, despite the ambitious and far-reaching goals of the NIRA, and the tough enforcement rhetoric issued from the Roosevelt administration, the two umbrella agencies established to effectuate the NIRA, the National Recovery Administration headed by General Hugh Johnson and the Public Works Administration directed by Interior Secretary Harold Ickes, lacked the level of coordination, breadth of enforcement powers, and resources needed to bring recalcitrant business entities into compliance with the law's aspirations.[54] The "enforcement" successes of the National Recovery Administration under Johnson were largely "voluntary," more the product of Johnson's determined personality and a vigorous public relations campaign than the result of force or threat of legal sanction under the NIRA.[55] With the abrasive behavioral display of a governmental "bully," Johnson took to the enforcement initiative in the various industries with "evangelistic fervor," drawing up regulatory codes for them and

> launching a national campaign aimed at getting the public to pressure employers to agree to the N.R.A. minimum–wage and maximum–hour standards. The idea was that buyers would boycott firms that did not cooperate, that did not display the official sticker bearing a blue eagle and the legend "We Do Our Part."[56]

Although the NIRA did not succeed in bringing about economic recovery, it did succeed in hurting small businesses that refused to comply with its

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[52] 1 LEGISLATIVE HISTORY OF THE NLRA, *supra* note 16, at 1119 (emphasis added). The term "compose" is used interchangeably with the terms "adjust" and "settle" in the legislative history of the NLRA. *See infra* note 128.

[53] J. Warren Madden, *The New Labor Relations Board*, 25 AM. LAB. LEG. REV. 179, 179–81 (1935).

[54] *See* DONALD R. MCCOY, COMING OF AGE: THE UNITED STATES DURING THE 1920S AND 1930S, at 210 (1973).

[55] *See* TED MORGAN, FDR: A BIOGRAPHY 388–90 (1985) (describing the personality of Hugh Johnson).

[56] MCCOY, *supra* note 54, at 210.

standards.[57] In addition, it created approximately two million jobs (rather than the six million target), improved business ethics, "considerably reduced sweatshops and child labor," and strengthened the organized labor movement by making "the concept of minimum wages and maximum working hours a continuing national objective . . . ."[58]

In an article published in the *New York Times* in June of 1934, Massachusetts Senator David I. Walsh, Chairman of the Senate Committee on Education and Labor that conducted the Congressional hearings on the original Wagner bill and its subsequent versions, discussed, for public consumption, the shortcomings of the National Labor Board as one of the forces that moved Congress to consider this new, broad-sweeping labor law reform legislation:

> A rising tide of labor unrest is plainly manifest. Strikes and threats of strikes are increasing in number and magnitude. . . .
>
> Labor, with a capital L, regards the right to strike as one that cannot be alienated and of which it cannot be deprived except in circumstances where public safety is jeopardized. . . .
>
> If we accept the foregoing premise, then it is obvious that we cannot by statute make arbitration of all labor disputes mandatory, for *compulsory arbitration*, if it is to be effective, must carry with it compulsory obedience, and that destroys the right to strike. . . .
>
> Congress, in setting up a new deal for industry in N[I]RA, likewise provided a new deal for labor. No section of the Recovery Act was more intensely disputed than Section 7a, both in the framing of the bill and in its subsequent operation. . . .
>
> The National Labor Board, created last year by Presidential Executive order and headed by Senator Robert F. Wagner of New York, has valiantly attempted to *compose* labor disputes, to interpret the collective bargaining provision of the N[I]RA [§ 7(a)] and to ascertain and inhibit unfair labor practices. The jurisdiction of this board and its authority have been challenged in various instances, and there has been very general recognition of the desirability, if not indeed the necessity, of some statutory enactment defining the board's powers and procedure if it is to be an effective and permanent instrumentality for the adjustment of labor disputes. . . .
>
> It was the apparent need for legislation along this line which was the genesis of the Wagner Labor Disputes Bill, introduced in Congress early in

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[57] *See id.* ("It is true that some small businesses that could not abide by NRA standards were hurt.").

[58] *Id.* at 210–11. Similarly, the Public Works Administration, under Harold Ickes, increased employment while improving the infrastructure of the nation through thousands of construction projects, ranging from the erection of 12,702 school buildings to the laying of 50,000 miles of roads and highways. *See id.* at 211–12.

> the present session. This bill, in the form introduced, provoked a vast deal of controversy and the subject was fully aired in extensive hearings before the Senate Committee on Education and Labor.
>
> The committee has now favorably reported to the Senate a substitute bill . . . [entitled] the National Industrial Adjustment Act [proposing] to create a national industrial adjustment board to supersede the present National Labor Board.[59]

When the Wagner Act was finalized and signed by President Roosevelt over one year later in July of 1935, its formal name, as well as that of the new labor board it created had been changed to the "National Labor Relations Act," and the "National Labor Relations Board," respectively. Between 1934 and 1935, the Wagner Bill evolved through a process of several legislative incarnations.[60] When Congress tabled the 1934 versions of the bill, largely for the reason that President Roosevelt was not happy with the contents,[61] both Houses of the 73rd Congress[62] subsequently passed Public Resolution

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[59] David I. Walsh, *To Combat the Strike Crisis, Walsh Urges the Wagner Bill–The Massachusetts Senator Says the Measure, While Defining Unfair Practices, Would Leave Employers and Employees Free*, N.Y. TIMES, June 3, 1934, at A1 (emphasis added).

[60] The first version of the bill introduced on March 1, 1934, and referred to by members of Congress as the "Wagner-Connery *labor disputes* bill," 1 LEGISLATIVE HISTORY OF THE NLRA, *supra* note 16, at 1144, did not "come to a vote in 1934." *Id.* at ix (statement of the method followed in preparing the legislative history of the NLRA); 78 CONG. REC. 3,443 (1934), *reprinted in* 1 LEGISLATIVE HISTORY OF THE NLRA, *supra* note 16, at 15; 78 CONG. REC. 8,884 (1934), *reprinted in* 1 LEGISLATIVE HISTORY OF THE NLRA, *supra* note 16, at 1144. The Senate's first version of the bill, entitled "A Bill to Equalize the bargaining power of employers and employees, to encourage the amicable settlement of disputes between employers and employees, to create a National Labor Board, and for other purposes," was introduced by Senator Robert F. Wagner. *See* S. 2926, 73d Cong. (1934), *reprinted in* 1 LEGISLATIVE HISTORY OF THE NLRA, *supra* note 16, at 32–37. The first House version of the bill, H.R. 8423, was introduced by Representative William P. Connery, Jr. *See* H.R. 8423, 73d Cong. (1934), *reprinted in* 1 LEGISLATIVE HISTORY OF THE NLRA, *supra* note 16, at 1128–40.

[61] *See* 1 LEGISLATIVE HISTORY OF THE NLRA, *supra* note 16, at 1144 (comments of Representative Peavey) ("Representative Connery . . . [stated] he was in constant communication with the White House on the measure for the purpose of bringing it up for consideration at the best time. The general sentiment prevailing [was] that the administration [was] opposed to the measure and that it [would] not be considered at [that] session.").

[62] Senate Joint Resolution 143 was passed and then followed by House Joint Resolution 375. *See* H.R.J. Res. 375, 73d Cong. (1934), *reprinted in* 1 LEGISLATIVE HISTORY OF THE NLRA, *supra* note 16, at 1224–25 (authorizing the President to create a board or boards authorized to investigate claims involving violation of § 7(a) of the NIRA for one year).

No. 44, authorizing President Roosevelt "to establish one or more boards to investigate the facts in labor controversies arising under section 7 (a) of the National Industrial Recovery Act or controversies which burden or obstruct . . . the free flow of interstate commerce."[63] The resolution instituted a procedure for judicial review by the U.S. Court of Appeals of decisions of any such boards in cases that involved the election of employee representatives for the purposes of collective bargaining. President Roosevelt thus acted by executive order to dissolve the National Labor Board and establish an interim "National Labor Relations Board" in its place. That interim board is often referred to as the "First NLRB," because it preceded, and is thus to be distinguished from, the National Labor Relations Board subsequently created by Congress in the Wagner Act.

2. *The "First" National Labor Relations Board (1934–35)*

On June 29, 1934, President Roosevelt signed the executive order dissolving the National Labor Board and establishing its successor, the National Labor Relations Board (herein referred to as the "First National Labor Relations Board" or "First NLRB"), to serve the function of a "permanent government board in the field of labor relations."[64] The vast bureaucracy of the National Labor Board was automatically transferred to the

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[63] 1 NLRB ANN. REP., *supra* note 30, at 6.

[64] *Id.* at 5. Exec. Order No. 6763 created the NLRB. On November 15, 1934, Roosevelt signed Exec. Order No. 6905, appointing Francis Biddle as Chairman of the First National Labor Relations Board following the resignation of its initial chairman, Lloyd K. Garrison. *See infra* note 65. Section 2 of that order made it clear that the NLRB, as created by Exec. Order No. 6763, "shall act only with the approval of the Secretary of Labor; but this section shall not be construed to give the Secretary of Labor any authority to review the findings or orders of the National Labor Relations Board in specific cases subject to its jurisdiction." Exec. Order No. 6905 (1934), *reprinted in* 1 LEGISLATIVE HISTORY OF THE NLRA, *supra* note 16, at 1456–57.

In addition to the First NLRB, several industries—such as bituminous coal, newspaper manufacturing, textiles, ship-building, and ship-repairing—witnessed the creation of labor boards created "by codes or pursuant to Public Resolution No. 44" to handle disputes involving section 7(a). 1 NLRB ANN. REP., *supra* note 30, at 8. In reporting on the success of these boards to President Roosevelt, the National Labor Relations Board concluded that it was not desirable to have separate boards in separate industries. Instead, one "impartial national board" was to be preferred with that single board determining "in the last instance and subject only to court review, all questions of interpretation and application of section 7 (a) . . . ." *Id.*

First National Labor Relations Board.[65] Roosevelt explained that this board "establish[ed] upon a firm statutory basis the additional machinery by which the United States Government will deal with labor relations . . . ."[66] It was empowered to "investigate controversies and hold elections in accordance with the terms of Public Resolution No. 44, to hold hearings and make findings of fact regarding violations of section 7(a), and to act as a board of voluntary arbitration."[67]

The First NLRB's procedures for resolving labor disputes involved the following:

> [C]omplaints of violations of section 7 (a) were filed with the regional board. *If the controversy could not be adjusted by mediation*, a hearing was held. No formal pleadings were used, nor were strict rules of evidence followed. The panel which heard the case rendered its findings of fact, and where a violation was found, its recommendations of the action the employer should take to bring about a condition in conformity with the law. If either party appealed, or if the employer refused to comply, the case was forwarded to the National Board, which, after oral argument or the submission of briefs, or in some cases, further hearing, issued its decisions. If no compliance resulted, the case might be sent to the Attorney General

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[65] Roosevelt appointed Lloyd K. Garrison (Dean of the University of Wisconsin Law School), Harry A. Millis (Professor at the University of Chicago), and Edwin S. Smith (former Commissioner of Labor and Industries for the Commonwealth of Massachusetts) to be the three members of the First National Labor Relations Board. 1 NLRB ANN. REP., *supra* note 30, at 6. Dean Garrison resigned in October 1934, and was replaced by Francis Biddle (a corporate lawyer from Philadelphia) in November of that same year. *Id.*; *see also* GROSS, THE MAKING OF THE NATIONAL LABOR RELATIONS BOARD, *supra* note 8, at 99. This First NLRB:

> continued in existence the various regional boards, but because of the burden of administrative work which had devolved upon the nonpaid impartial chairmen of these [regional] boards, it was decided to make the executive secretaries the administrative heads, under the title regional director, and to install the panel system whereby each case in the region would be heard by one representative of labor, one representative of industry, and one representative of the public, the panel to be chosen in each instance by the regional director. This change divided the work among the volunteer nonpaid members of the regional boards, and abolished delay which had resulted from attempts to get all the regional board members to sit on each case. However, the system was permitted to remain sufficiently flexible to meet the needs of the particular communities.

1 NLRB ANN. REP., *supra* note 30, at 6.

[66] *Id.*

[67] *Id.*

> for prosecution, and to the Compliance Division of the N.R.A. with a recommendation that the employer's Blue Eagle be removed.[68]

During its ten months of activity, the First NLRB "settled 703 strikes, involving 229,640 employees[,] . . . succeeded in averting threatened strikes in 605 cases, involving 536,398 employees, by securing agreements between the parties[, and] . . . settled about 1,400 disputes in cases where there were no strikes or threats of strikes."[69] The Board reached formal decisions in 202 cases.[70] In 158 of these cases, it directed compliance with the NIRA and secured it in 46 cases.[71] In reaching these "formal decisions," the First NLRB continued the practice of its predecessor, the National Labor Board, in "seeking to develop a set of decisions in harmony with the language and intent of section 7 (a), and thus make available, for the purpose of future legislation, the knowledge and experience it had gained from the cases before it."[72]

President Roosevelt created the First NLRB to take up the reins of the National Labor Board in the hopes that this new board would do a better job of protecting the rights of labor and resolving labor-management disputes involving those rights. The experience of the First NLRB

> proved that the mere airing of unfair labor practices can in the great majority of cases persuade employers that a proper relationship with their workers cannot exist along with espionage, discrimination and willful interference with the hope which labor cherishes to be its own master. More than 80 percent of cases arising in all parts of the country were settled by this Board's regional agencies. Yet it became apparent that the majority of employers resolved to resist the law were able do so because of a lack of final enforcement powers under the Congressional Resolution.[73]

While the "life" of the First NLRB was extended by executive orders from June 16, 1935, until its formal dissolution on August 27, 1935, the board ceased to exist for all practical purposes on May 27, 1935, when the Supreme

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[68] *Id.* at 6–7 (emphasis added).

[69] *Id.* at 7.

[70] *Id.*

[71] *Id.*

[72] *Id.*

[73] Madden, *supra* note 53, at 179–81.

Court struck down the NIRA as unconstitutional in the case of *A.L.A. Schechter Poultry Corp. v. United States*.[74]

B. *The "New" National Labor Relations Board Under the Wagner Act*

As if in immediate response to the Supreme Court's assault on New Deal labor policy, within little over a month following the *Schechter Poultry* decision, Congress passed the final version of the Wagner Act, which President Roosevelt signed into law on July 5, 1935. The Wagner Act created a "new" NLRB (herein referred to as the "NLRB" or "Board," the "new NLRB" or "new Board," or the "post-Wagner Act NLRB" or "post-Wagner Act Board"). This new NLRB had quasi-judicial enforcement powers that its predecessors had lacked:

> The machinery for the prevention of unfair labor practices "affecting commerce" follow[ed] closely the familiar provisions of the Federal Trade Commission Act, a procedural pattern which has been repeatedly approved as an appropriate and constitutional method for the administration of Federal law. Whenever it is charged that an unfair labor practice affecting commerce has been or is being engaged in, the Board or its designated agent is authorized to issue a formal complaint stating the charges and noticing the matter for hearing. The person complained of has the right to file an answer, and to appear and give testimony. The testimony is reduced to writing. Thereupon the Board states its findings of fact, and either dismisses the complaint if found unsubstantiated by the proof or issues an order requiring the person complained of to cease and desist from the unfair labor practices engaged in and possibly to take incidental affirmative action (sec. 10(b), 10 (c)) . . . . For the purpose of oral hearings and investigations which are necessary and proper in the exercise of the foregoing powers, the Board . . . [was] given authority to issue subpenas [sic], examine records, administer oaths, hear witnesses, and receive evidence.[75]

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[74] A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 551 (1935) (finding the NIRA's "code provision . . . to be invalid . . . "). Only days before *Schechter* came down, Roosevelt had announced his support for the Wagner bill. After the NIRA was struck down by the Court, the Wagner bill "assumed critical importance for FDR as the only currently visible symbol of his administration's alleged commitment to the attainment of certain beneficial social and economic goals." George Feldman, *Unions, Solidarity, and Class: The Limits of Liberal Labor Law*, 15 BERKELEY J. EMP. & LAB. L. 187, 199 (1994) (quoting STANLEY VITTOZ, NEW DEAL LABOR POLICY AND THE AMERICAN INDUSTRIAL ECONOMY 148 (1987)).

[75] 1 NLRB ANN. REP., *supra* note 30, at 11-12.

In addition to the Board's jurisdiction over unfair labor practices, it had jurisdiction over matters relating to workers' election of a union for representation in an employment relationship with management, particularly during the collective bargaining process. In this arena, it had the power to investigate and certify to the parties the name or names of the representatives that had been designated, provide for an appropriate hearing, and take a secret ballot of employees or utilize any other suitable method to ascertain such representatives.[76]

The first Chairman of the new NLRB, J. Warren Madden, explained that "[t]he Wagner Act . . . was . . . a reaffirmation of this principle of collective bargaining and a resolve to set up a permanent agency with full powers of enforcement."[77] Section 7 of the Wagner Act reenacted § 7(a) of the NIRA, giving employees the rights to self-organize and bargain collectively. And, as Chairman of the First NLRB, Francis Biddle, told Congress, the new NLRB was now equipped with an old enforcement power: "The basic features of the Wagner bill are that it establishes the right of collective bargaining, . . . defines unfair labor practices, and provides a simple and already well-recognized method for enforcing the law."[78]

In its basic framework, the enforcement power of the new Board actually paralleled that of the old Board. Unlike court decisions or orders, the "final decisions" or "orders" of neither board were "self-enforcing." The old NLRB reported cases needing enforcement to the NRA Compliance Board for enforcement. This was an administrative, not a judicial institution. However, the Wagner Act provided the new NLRB with recourse, by petition, to an "appropriate circuit court of appeals" in order to secure compliance.[79] These courts were authorized by the Act to "make . . . decree[s] enforcing, modifying, or setting aside the Board's order in whole or in part."[80] The Act also provided that "any person aggrieved by a final order of the Board . . . [could] obtain a similar review by filing in the appropriate circuit court of appeals a petition that the order be modified or set aside."[81]

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[76] *Id.* at 12.

[77] Madden, *supra* note 53, at 179–81.

[78] *A Bill to Promote Equality of Bargaining Power Between Employers and Employees, to Diminish the Causes of Labor Disputes, to Create a National Labor Relations Board, and for Other Purposes: Hearing on S. 1958 Before the Senate Committee on Education and Labor*, 74th Cong. 79 (1935) (statement of Francis Biddle), *reprinted in* 1 LEGISLATIVE HISTORY OF THE NLRA, *supra* note 16, at 1455.

[79] 1 NLRB ANN. REP., *supra* note 30, at 12.

[80] *Id.*

[81] *Id.*

The enforcement powers of the NLRB were enhanced in other significant ways as well. The new quasi-judicial machinery associated with proceedings of the new Board included "authority to issue subpoenas, examine records, administer oaths, hear witnesses, and receive evidence."[82] In addition, the new Board could apply to a federal district court to secure a court order "compelling" recalcitrant parties to obey a Board subpoena, and, in this manner, subject them to penalties "available" in circuit or district courts for failure to comply with either "cease and desist" orders of the Board or its demands to produce books, papers, or subpoenas compelling testimony.[83] The other punitive measures available to the new Board involved fining parties up to $5,000 or seeking their imprisonment for one year in order to protect "the Board and its agents . . . in the conduct of their work . . . [against] any person who . . . willfully resist[ed], prevent[ed], imped[ed], or interfere[d] with any member of the Board or any of its agents or agencies in the performance of duties pursuant to the act."[84] Thus, the quasi-judicial structure of the new NLRB institutionalized an enhanced version of the law enforcement practices of its predecessor boards. As Part III of this Article illustrates, this included the institutionalization of ADR procedures to achieve settlement agreements as a means of enforcing the Wagner Act and resolving legal disputes arising under it.

Professor James Gross, a labor relations historian, has suggested that the quasi-judicial dispute resolution activities of the National Labor Board and the First NLRB emerged in practice "without authorization from the White House" and signaled the gradual transformation of these boards "into quasi-judicial bodies of full-time, paid neutrals, deciding cases rather than suggesting compromises, obtaining competency in handling questions of law, adopting more legalistic, judicial methods, shifting from persuasion to formal hearings (including evidence, uniformity in procedures, and rules and regulations), and asserting the independence and impartiality of the boards."[85] As this Article suggests, however, the emergence of these quasi-judicial functions, "brought to fruition by the Wagner Act NLRB," actually signaled the evolution of a board machinery more broadly equipped to call upon the complementary functions of ADR *and* adjudicatory processes, rather than those more narrowly equipped with either quasi-adjudicatory or

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[82] *Id.*

[83] *See id.*

[84] *Id.* at 13.

[85] GROSS, THE MAKING OF THE NATIONAL LABOR RELATIONS BOARD, *supra* note 8, at 231–32.

ADR functions alone.[86] This *processual* evolution signaled the emergence of a dispute processing continuum in which both settlement outcomes and legal decisions were viewed as legitimate mechanisms for enforcing the Wagner Act and resolving disputes arising under it.

C. *The Rhetoric of Adjudication as Orthodoxy: ADR Rejected*

When Congress passed the Wagner Act, President Franklin Roosevelt issued the following statement distinguishing the dispute resolution function of the First Board from that of the new NLRB:

> The National Labor Relations Board will be an independent quasi-judicial body. It should be clearly understood that it will not act as mediator or conciliator in labor disputes. The function of mediation remains, under this act, the duty of the Secretary of Labor and of the Conciliation Service of the Department of Labor. *It is important that the judicial function and the mediation function should not be confused. Compromise, the essence of mediation, has no place in the interpretation and enforcement of the law. This act, defining rights, the enforcement of which is recognized by the Congress to be necessary as both an act of common justice and economic advance, must not be misinterpreted.* It may eventually eliminate one major cause of labor disputes . . . but is applicable only when violation of a legal right of independent self-organization would burden or obstruct interstate commerce. Accepted by management, labor, and the public with a sense of sober responsibility and of willing cooperation, however, it should serve as an important step toward the achievement of just and peaceful labor relations in industry.[87]

The next day, the *New York Times* reported on the passage of the Act using headlines that diffused the "anti-mediation" punch of the President's statement in its enigmatic headline: "Roosevelt Signs The Wagner Bill as 'Just to Labor: It is Important Step Toward Industrial Peace but Will Not Stop All Disputes,' He Says: MEDIATION NOT AFFECTED: President Explains New Board Will Act Only on Violations of the Right to Organize."[88] It is no wonder that, despite the "adjudication as orthodoxy"

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[86] *Id.* at 232.

[87] *Id.* at 9 n.1 (quoting President Franklin D. Roosevelt) (emphasis added).

[88] N.Y. TIMES, July 6, 1935, at 1 ("The bill provides Federal machinery for the adjudication of disputes over the right to organize when 'violation of a legal right of independent self-organization would burden or obstruct interstate commerce.' . . . Adjudication would be placed in the hands of a permanent National Labor Relations

rhetoric that ushered in the Wagner Act and the new NLRB, many contemporaries of the New Deal legislation, including the judges who were asked to assess the Wagner Act's constitutionality, remained confused about the dispute resolution processes used by the NLRB to enforce the Act. Some of these judges viewed the new NLRB as a "conciliation" board, while others thought it allowed for "compulsory arbitration."[89] From a processual standpoint, each of these views was partially correct given the multiple approaches the Board took on a case by case basis, ranging from the facilitation of settlement agreements reached through mediation and conciliation to the issuance of formal decisions on the merits of a case

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Board, to supercede the board carrying the same title which was organized under the National Recovery Act.").

[89] *See* 1 NLRB ANN. REP., *supra* note 30, at 49. ("Some judges had the impression that this act was one providing for compulsory arbitration. Others thought that is was merely a statute of conciliation."). Much of the early litigation involving the Wagner Act resulted from a concerted challenge to its constitutionality mounted by prominent members of the legal community within months of the Act's passage. On September 5, 1935, the National Lawyers Committee of the American Liberty League printed a widely publicized "assault on the constitutionality of the act . . . as a deliberate and concerted effort by a large group of well-known lawyers to undermine the public confidence in the statute, to discourage compliance with it, to assist attorneys generally in attacks on the statute, and perhaps to influence the courts." *Id.* at 46–47. The document, entitled "Report on the Constitutionality of the National Labor Relations Act," [hereinafter Report] was 132 pages in length and was authored by 58 nationally prominent lawyers, one of whom was a former U.S. Attorney General and two of whom were former U.S. Solicitors General. J. Warren Madden, *The Origin and Early History of the National Labor Relations Board*, 29 GEO. WASH. L. REV. 234, 242–43 (1960). The Report's conclusion, summarized in its opening statement, read as follows: "Considering the Act in the light of our history, the established form of government, and the decisions of our highest Court, we have no hesitancy in concluding that it is unconstitutional and that it constitutes a complete departure from our constitutional and traditional theories of government." *Id.* at 242.

During the first year of the NLRB's enforcement of the Wagner Act, opponents of the Act instigated numerous injunction proceedings to hinder, if not bring to a halt, the NLRB's enforcement activities. *See* Seymour S. Mintz, Note, *Suits to Enjoin the National Labor Relations Board*, 4 GEO. WASH. L. REV. 391 (1936). Professor Gross has calculated that between 1935 and 1936, 1,600 injunctions were issued. *See* GROSS, THE MAKING OF THE NATIONAL LABOR RELATIONS BOARD, *supra* note 8, at 205. These injunctions involved "'well over a third of the entire corps' of federal court judges restraining various acts of Congress." *Id.* (quoting ARTHUR M. SCHESLINGER, THE POLITICS OF UPHEAVAL 447–48 (1960)). Many of the federal district court opinions in these cases were unpublished. One published opinion characterizing the NLRB as a compulsory arbitration board is *Bendix Products Corp. v. Beman*, 14 F. Supp 58, 70 (N.D. Ill. 1936) ("compulsory unilateral arbitration . . . is the heart of the act").

reached through the new Board's quasi-adjudicatory function (akin to *compulsory*, as distinguished from *voluntary*, arbitration).[90] One contemporary social scientist who took note of the NLRB's use of conciliation and mediation during its first year of operations proposed that Congress amend the Wagner Act "to *regularize* the conciliatory and informal functions of the National Labor Relations Board."[91]

In seeking to foster a description of the new NLRB as a governmental agency equipped with stronger enforcement powers than its predecessor boards, President Roosevelt and members of Congress hoped to draw a fundamental distinction between the perceived weakness of the First NLRB as a "mediation board" and the promised strength of the "new" post-Wagner Act NLRB as a quasi-judicial board. Their goal was to convey to "the reactionary anti-New Deal economic elite"[92] a central message: Individual worker's rights to unionize and bargain collectively that had been vulnerable to evasion under the non-adjudicatory dispute resolution processes available to the labor boards enforcing the NIRA (i.e., mediation, conciliation, and voluntary arbitration) would now be compelled through the NLRB's new

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[90] *See* Madden, *supra* note 89, at 243–44; *see also infra* notes 124–25 and accompanying text.

[91] E. G. Latham, *Legislative Purpose and Administrative Policy Under the National Labor Relations Act*, 4 GEO. WASH. L. REV. 433, app. at 471 (1936) (emphasis added). Latham's proposal was rooted in the proposition that in drafting the Wagner Act, Congress had failed to heed "one of the lessons of previous boards . . . that each of these agencies found it necessary to exercise mediatory and conciliatory powers, and did so." *Id.* at 471. As Latham underscored, the new NLRB was no exception. "Proof that . . . [the NLRB] is settling many of its cases without recourse to the formal machinery set up by the Act is to be seen in the report by the Board of the number of cases it has succeeded in compromising." *Id.* at 469–70 (citing Press Release R-79, NLRB, Settlement of Labor Disputes effected by the National Labor Relations Board (Jan. 31, 1936)). In proposing this reform of the Wagner Act, Latham explicitly challenged "the customary objection to vesting . . . conciliatory or informal powers in a labor agency designed to exercise quasi-judicial powers . . . [because of perceived] natural incompatibility between conciliatory and quasi-judicial functions . . . ." *Id.* at 472. Latham argues that,

> if it were true . . . that conciliation always involved the making of compromises outside the law for the sake only of putting employees back to work, the development of a consistent body of labor law by the National Labor Relations Board would perhaps be seriously impeded by resort to compromise. But there is nothing abhorrent about the idea of compromise if the requirements of the law are not transgressed. Indeed, the law courts themselves afford a conspicuous example of where informal settlements are encouraged to avoid litigation.

Id.

[92] *See* Feldman, *supra* note 74, at 197 n.38 (citing IRVING BERNSTEIN, TURBULENT YEARS, A HISTORY OF THE AMERICAN WORKER 1933–1941, 289 (1969)).

quasi-judicial, adjudicatory enforcement process.[93] However, as this Article suggests, in keeping with the experimental and flexible spirit of the New Deal's search for "what works,"[94] the NLRB was actually left free, under the language of the Wagner Act (despite the rhetoric of ADR as heterodoxy voiced in Roosevelt's announcement of the new quasi-adjudicatory power of the NLRB), to continue to persuade parties, through informal settlement processes, to comply *voluntarily* with the Act by reaching facilitated settlement agreements through mediation and conciliation. As the historical record shows, the new power to *adjudicate* compliance with the Act was resorted to only when settlement processes failed. It was the NLRB's continued use of ADR processes in complementary concert with the Board's new, quasi-judicial adjudicatory powers that resulted in the emergence of a dispute processing continuum under the Wagner Act.

III. THE EMERGENCE OF A DISPUTE PROCESSING CONTINUUM IN THE NLRB

This Article suggests a revised view of ADR in labor law enforcement by the NLRB under the Wagner Act. The historical record documenting *how* the NLRB "disposed" of cases shows that justice was both negotiated *and* adjudicated along a dispute processing continuum.[95] That continuum began with the use of ADR processes such as negotiation, mediation, and conciliation to enforce the law via settlement agreements or "adjustments." If this informal phase of the process failed, agents of the Board would process the case for resolution by a formal decision of the Board, invoking its newly-acquired, quasi-adjudicatory function. Even during this "formal" phase of the continuum, the Board could resort to settlement outcomes as an alternative to reaching formal decisions on the merits of a case, underscoring its flexible access to ADR processes within its quasi-adjudicatory framework.[96] This Article suggests that the historical narrative about the law enforcement activities of the NLRB under the Wagner Act should be revised accordingly, moving beyond that narrative's view of ADR as heterodoxy.

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[93] Feldman explains that one view of "the Wagner Act . . . was [as] a successful response to a distortion of liberal society caused by the overwhelming growth of big business and its abuse of its power." *Id.* at 210.

[94] *Id.* at 209 (suggesting that the Wagner Act can be seen "as the vindication of the non-ideological, pragmatic, and flexible nature of the American system, much as the whole of the New Deal can be seen as a particularly American search for 'what works'").

[95] *See generally* Sanchez, *Back to the Future of ADR*, *supra* note 2.

[96] S*ee infra* Figures 4 & 5.

A. *Beyond ADR as Heterodoxy: Justice Negotiated*

It is significant that the members of the new NLRB (and the agents it inherited from its predecessor boards) had experience with the use of ADR to resolve labor law enforcement cases. NLRB Chairman J. Warren Madden, who had formerly been a Professor of Law at the University of Pittsburgh, had once served as a labor arbitrator.[97] His fellow Board member, John M. Carmody, had been formerly a member of the National Mediation Board, which was the body charged with administering the labor relations provisions of the Railway Labor Act.[98] The third member of the new NLRB, Edwin S. Smith, had been a member of the First NLRB and also a one-time Commissioner of Labor and Industries for the Commonwealth of Massachusetts.[99] Therefore, prior to the creation of the new NLRB, both Edwin Smith and John Carmody had been recently involved in the use of mediation to enforce the Federal Government's labor-relations policies through settlement agreements.[100] This experience with mediation shaped their view of how the Wagner Act, in practice, should be enforced by the NLRB, notwithstanding its rule-based policy directives reflecting the Congressional mandate that the new Board should be a "rigorous law enforcement operation rather than a mediation or conciliation operation."[101] One of John Carmody's contemporaries has suggested, as a matter of historical record, that Carmody "was committed by his experience to the mediation approach and . . . 'was not particularly sympathetic to what he regarded as a lot of legal rigmarole.'"[102] In the face of mounting practical challenges to the NLRB's law enforcement activities and its litigation strategy for testing the constitutionality of the Wagner Act, Edwin Smith

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[97] *See* Madden, *supra* note 89, at 241.

[98] Madden, *supra* note 53, at 180–81; *see supra* note 15.

[99] Madden, *supra* note 89, at 238.

[100] Madden, *supra* note 53, at 180–81.

[101] GROSS, THE MAKING OF THE NATIONAL LABOR RELATIONS BOARD, *supra* note 8, at 204 (quoting Minutes of a Conference of Regional Directors, June 19, 1936 (on file at the National Archives and Records Service, Washington, D.C., RG233, Box 157)). In September 1935, the NLRB informed its regional directors and office staff "not to attempt mediation or conciliation without direct authorization from the board." *Id.* at 158 (citing NLRB Files, Instructions to Staff Members, Sept. 17, 1935, at 21, and Memorandum from E. M. Herrick to office staff, Sept. 25, 1935).

[102] GROSS, THE MAKING OF THE NATIONAL LABOR RELATIONS BOARD, *supra* note 8, at 155 (quoting Oral History interview with Philip Levy, Mar. 15, 1969 (on file in the Labor Management Document Center, New York School of Industrial and Labor Relations, Cornell University, Ithaca, New York)).

advised the NLRB's Regional Directors in mid-1936 that "since the NLRB planned to 'take relatively few manufacturing cases . . . to a hearing and decision' mediation was 'the most important job before the regional director' and that they should be 'perfectly frank' in telling workers that 'the most we can do for them is likely to be through mediation.'"[103]

To aid its enforcement mission, the new NLRB developed an extensive bureaucracy.[104] In its Washington, D.C., office, it created five separate divisions: legal, administrative, trial examiner, economic, and publications. The legal division, headed by a general counsel, took charge of the "legal work involved in the administration of the National Labor Relations Act."[105] This included "supervision over the legal work of the regional attorneys in the field."[106]

The legal division of the NLRB consisted of two subdivisions: litigation and review. The litigation section was "headed by an associate general counsel [and was] responsible for the conduct of hearings before the Board."[107] It advised "the regional attorneys in their conduct of hearings before the agents of the Board in the field [and] represent[ed] the Board in judicial proceedings seeking to enjoin the Board from holding hearings and taking other action in cases before it."[108] It also prepared "briefs for presentation to the courts in all judicial proceedings brought by or against" the Board.[109] The NLRB's Review Section assisted with the analysis of

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[103] *Id.* at 204 (quoting Minutes of a Conference of Regional Directors, June 19, 1936, *supra* note 101).

[104] When it commenced operations, the NLRB had a staff of 50 people in its Washington office, 13 of which were lawyers. It employed 69 people in the various field offices, 20 of whom were regional directors, one being a lawyer and 16 case "examiners." These regional offices also had a support staff of 32. *See* GROSS, THE MAKING OF THE NATIONAL LABOR RELATIONS BOARD, *supra* note 8, at 167 n.79. By 1939, the Board's legal staff had increased substantially, consisting of 91 review attorneys. *Id.* at 170 n.88. Professor Gross has observed that "the essentially non legalistic mediatory approach of the NLB and of the [first] NLRB left the new board on September 1, 1935, with only" 14 lawyers and, as a result, rendered it "poorly equipped at the outset to implement its new quasi-judicial role." *Id.* at 167. However, as this Article suggests, the continued use of informal methods of dispute resolution to enforce the Wagner Act via settlement outcomes remained constant well beyond the NLRB's first years and the eventual augmentation of its legal staff.

[105] 1 NLRB ANN. REP., *supra* note 30, at 14.

[106] *Id.* at 15.

[107] *Id.* at 14.

[108] *Id.* at 14–15. The "Review Section" was headed by an assistant general counsel.

[109] *Id.* at 15.

"records of hearings in the regions and before the Board in Washington."[110] In addition, the Review Section gave the Board opinions and advice on "general questions of law and problems of interpretation of the act and [on] the Board's rules and regulations."[111] In response to inquiries from the regional offices, the Review Section provided the regional attorneys with "opinions on the interpretation of the act as applied to specific facts."[112] A Trial Examiners Division engaged in quasi-judicial functions such as holding hearings "on behalf of the Board."[113] Its members also presided over "hearings on formal complaints and petitions for certification of representatives, to make rulings on motions, to prepare intermediate reports containing findings of fact and recommendations for submission to the parties, and to prepare informal reports to the Board."[114]

Notwithstanding all of this quasi-judicial apparatus, however, and despite the rhetoric of adjudication as orthodoxy, the staff or agents of the NLRB often resorted to informal, non-adjudicatory methods of resolving cases filed with the NLRB in order to reach settlement agreements or "adjustments."[115] The NLRB's continued use of ADR processes employed by prior boards had been presaged by Secretary Perkins in her testimony before Congress during its hearings on the Wagner bill:

> [T]he National Labor Relations Board . . . is bound more and more to infringe upon the field of conciliation. Sooner or later, not only the Board itself, but it will be found some of its subordinates will be engaged in conciliation, because of the fact there are strikes which should never come before the Board because they do not involve the defining and interpreting of 7(a), but where perhaps there is a dispute due to a misunderstanding, and there should be a conciliatory effort to settle the case without making an issue or bringing it before the Board.
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> Whoever touches a case like that will be bound to realize that conciliation is what should be done, and if this Board itself begins to engage in conciliation, there will be confusion between conciliation processes and the judicial processes. It is a very embarrassing thing for a board to find itself in a position where in one case, just to get the parties back to work, it has agreed to a principle in conciliation, which as a judicial board interpreting the law it would not think of endorsing.

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110 *Id.*
111 *Id.*
112 *Id.*
113 *Id.*
114 *Id.*
115 *Id.*

> The Board itself, I assume, would never engage in conciliation, but more and more the subordinates are bound to do that, and there will be built up, I fear, a duplication of the conciliation service of the Department of Labor or a transference of the same to the Labor Board.[116]

Secretary Perkins' projection of how the NLRB would actually work, in practice, proved to be accurate. However, as previously mentioned, not only were her concerns about the NLRB's use of ADR not universally held, but neither were her concerns about the NLRB's duplication of dispute resolution functions practiced by the Department of Labor's conciliation service. Nevertheless, she proposed an amendment of the Wagner bill to Congress to prevent the duplication of Department of Labor functions by the NLRB.[117] In the same Congressional hearings, Francis Biddle, Chairman of the First NLRB, strongly opposed Secretary Perkins' proposed amendment, stating:

> I do not believe the very important questions of policy involved can be settled only by consideration of general administrative convenience, or should be determined by fears that the creation of an independent agency would in the future lead to possible duplication of governmental work. I wish to say also that all my observations are made from the long-range point of view.
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> . . . It seems to us that if—as is provided in the amendments offered by the Secretary—the employees and agents of the National Board and any regional boards set up by it are appointed subject to the approval of the Secretary of Labor and the Department of Labor, and the Board is subject to the budgetary control of the Department, the machinery cannot be considered either impartial or independent.
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> The National Labor Relations Board, as set up by Executive order of June 29, 1934, though it was directed to make its reports to the President through the Secretary of Labor, and directed not to duplicate the mediatory and statistical work of the Department, has nevertheless been, in its administration of section 7(a), and in its control of its own personnel and

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[116] 1 LEGISLATIVE HISTORY OF THE NLRA, *supra* note 16, at 1437 (statement of Frances Perkins).

[117] One clause in that version of the bill read:

> The Board may establish or utilize such regional, local, or other agencies, and utilize such voluntary and uncompensated services, and such agencies provided for by agreement, code, or law. But nothing in this Act shall be construed to authorize the Board to appoint persons to engage in mediation, conciliation, or statistical work, *when the services of such person may be obtained from other bureaus or divisions in the Department of Labor, as may from time to time be needed.*

1 LEGISLATIVE HISTORY OF THE NLRA, *supra* note 16, at 1444 (emphasis added).

> expenditures an agency independent of the Department. This independence has not resulted in the duplication of work which the Secretary fears as like to result from Senator Wagner's bill as now drafted. *The Board has taken pains not to encroach upon the work of the conciliation service of the Department.* It has proceeded under a harmonious working arrangement with the Department, specifying the respective functions of the Board and the Department. *To make it abundantly clear that there shall be no duplication of work the Board is entirely agreeable to the insertion in the bill of a provision forbidding the Board to appoint persons to engage in mediation, conciliation, or statistical work, when the services of such persons may be obtained from the Department of Labor. A similar provision in section 1(b) of the Executive order under which we now operate has proven entirely satisfactory.*[118]

Biddle's testimony before Congress went on to suggest that the "danger" in transferring functions of the Board to the Department of Labor could be illustrated by reference to one section of the Wagner bill as "reported out of committee" in the prior year.[119] That section would have made review of complaints by the Department of Labor a prerequisite to the processing of a case by the NLRB.[120] In Biddle's view, such a procedural and jurisdictional overlap between the NLRB and the Department of Labor would have allowed the Department to intrude on labor law enforcement matters and establish norms for settlement that were inconsistent with those governing the law enforcement function of Biddle's board. Biddle directed Congress' critical attention to the language in the earlier version of the bill that would have made the new board dependent upon the Department of Labor in the manner he described.[121] It stated:

> "[W]henever the Secretary of Labor shall notify the Board that there is reasonable cause to believe" that an unfair labor practice has been committe[d]. . . . [T]he Board would usually act "only when a case is drawn to its attention by the Secretary of Labor (who through the conciliation service of the Department of Labor will presumably first utilize every appropriate means for a voluntary adjustment of the matter)." The Board would thus not exercise any control over the complaints at the initial stage, though the very nature of the complaint calls for enforcement of the law rather than the compromising which is characteristic of the conciliator's function. In other words, a man has been fired on account of union activity

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[118] *Id.* 1461–64 (statement of Francis Biddle) (emphasis added).

[119] *Id.*

[120] *Id.*

[121] *Id.*

> and he wants to file his complaint in a court, and not to have the matter conciliated.
>
> *The Board would have no control, of course, over the actions of the conciliators, and the compromise they might undertake to negotiate, and the legal interpretations upon which they might presume to act.* The right to file a complaint of a violation of the law would rest upon the personal decision of the Secretary, rather than on the determination of the judicial body provided by the act for the enforcement of such right; and such decision by some future Secretary might well be tinged by considerations outside of the merits of the case . . . .[122]

In its final form, the language of the Wagner Act adopted Biddle's proposed language about the NLRB's use of mediation and conciliation. In as much, the Act *did* seek to avert overlap between the jurisdictions of the new Board and the mediation and conciliation services of the Department of Labor. It did not, however, bar the NLRB from using mediation or conciliation within its law enforcement framework to settle or "adjust" cases that were within its own exclusive jurisdiction, and that were, therefore, outside the jurisdiction of the Department of Labor and its conciliation and mediation services. The operative provision read as follows:

> The Board shall appoint, without regard for the provisions of the civil-service laws but subject to the Classification Act of 1923, as amended, an executive secretary, and such attorneys, examiners, and regional directors, and shall appoint such other employees with regard to existing laws applicable to the employment and compensation of officers and employees of the United States, as it may from time to time find necessary for the proper performance of its duties and as may be from time to time appropriated for by Congress. The Board may establish or utilize such regional, local, or other agencies, and utilize such voluntary and uncompensated services, as may from time to time be needed. . . . *Nothing in this Act shall be construed to authorize the Board to appoint individuals for the purpose of conciliation or mediation (or for statistical work), where such service may be obtained from the Department of Labor.*[123]

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[122] *Id.* at 1464 (emphasis added).

[123] S. 1958, 74th Cong. § 4(a) (1935), *reprinted in* 2 LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT 1935, 3272 (1949) (emphasis added) [hereinafter 2 LEGISLATIVE HISTORY OF THE NLRA]. Wagner's own version of this section of the bill as introduced to the Senate on February 15, 1935, before final amendment and passage, read as follows:

Another clause in the Act underscored the exclusive jurisdiction of the Board over unfair labor practices, stating that it could "not be affected by any other means of adjustment or prevention than has been or may be established by agreement, code, law, or otherwise."[124] Thus, the new NLRB had jurisdiction over all cases from the start, as a matter of first impression, without prior screening by the Department of Labor or any other governmental agency or department. This enabled the NLRB to conduct its own settlement processes in matters of its exclusive jurisdiction without, as Francis Biddle suggested, "encroach[ing] upon the conciliatory [or mediatory] service of the Department [of Labor]."[125] As a result, the NLRB's use of settlement processes was consistent with the Wagner Act's intent to protect the separate jurisdictions of the NLRB and the Department of Labor, while simultaneously facilitating the emergence of a dispute processing continuum within the NLRB's quasi-adjudicatory law enforcement framework under the Act.

This Article suggests, therefore, that, as a matter of *rule-based* interpretation, the statutory clause, "Nothing in this Act shall be construed to authorize the Board to appoint individuals for the purpose of conciliation or mediation (or for statistical work), where such service may be obtained from the Department of Labor," did *not* prohibit the NLRB from using ADR practices as part of its own process for *adjusting* cases that were within its exclusive jurisdiction, enabling it alone to facilitate the negotiation of settlement terms that it deemed to be in keeping with the legal parameters of the Wagner Act.[126]

> The Board shall appoint such employees, and, without regard for the provisions of the civil-service laws or the Classification Act of 1923, as amended, appoint and fix the compensation of an executive secretary, assistant executive secretaries, and such attorneys, special experts, examiners, and regional directors, as it may from time to time find necessary for the proper performance of its duties and as may be from time to time appropriated by Congress. The Board may establish or utilize such regional, local, or other agencies, and utilize such voluntary and uncompensated services as may from time to time be needed.

1 LEGISLATIVE HISTORY OF THE NLRA, *supra* note 16, at 1379.

[124] S. 1958, 74th Cong. § 10(a) (1935), *reprinted in* 2 LEGISLATIVE HISTORY OF THE NLRA, *supra* note 123, at 3275.

[125] 1 LEGISLATIVE HISTORY OF THE NLRA, *supra* note 16, at 1469 (statement of Francis Biddle).

[126] The historical record reveals that internal NLRB directives contemplated the continued use of mediation and conciliation by regional directors, with prior approval of the Washington office, as part of the new Board's law enforcement operation. *See supra* note 101 (quoting NLRB directives from September 1935, instructing regional directors and office staff "not to attempt mediation or conciliation without direct authorization

Consequently, the new NLRB was left at liberty by the language of the Wagner Act to devise and effectuate its own dispute processing continuum along which it could opt to facilitate the negotiation of settlement outcomes via mediation and conciliation *or* adjudicate formal decisions, on a case by case basis, without intervention by the Department of Labor, at preliminary or later stages in its processing of a case. The processual evidence documenting the Board's settlement activities supports these conclusions.[127] The case management records of the NLRB show that the Board achieved a settlement rate of approximately 45% during its first year, and over 60% in its second year, evidencing its liberal resort to informal dispute resolutions functions to "settle," "adjust," or "compose" cases.[128]

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from the board"). The Regional Directors of the NLRB at first resisted the rules and regulations promulgated by the Board to create a framework for the Board's new formalized, quasi-judicial powers, because they preferred the mediation-intensive focus of the law enforcement operations of the First NLRB and the National Labor Board that preceded it. *See* GROSS, THE MAKING OF THE NATIONAL LABOR RELATIONS BOARD, *supra* note 8, at 159. They also felt that rule-based restrictions on their previous activities and responsibilities "demonstrated little understanding of 'what actually goes on in the field offices dealing with problems.'" *Id.* at 160 (quoting Oral History Interview with George Pratt (Mar. 18, 1970) (manuscript at 80–81, on file with Labor Management Documentation Center, New York School of Industrial and Labor Relations, Cornell, Ithaca, New York)). As this Article suggests, the continued use of ADR practices by these regional directors and their staffs, as a matter of processual reality, led to the emergence of the dispute processing continuum under the Wagner Act. Although Congress did not take steps to "regularize" this use of ADR during this period, the use of ADR processes became institutionalized in practice (that is, processually) after the Supreme Court upheld the Wagner Act.

[127] See *supra* note 11, discussing the processual and rule-centered approaches to legal history. It was perhaps owing to the processual workings of the NLRB that it was perceived by many of its contemporaries as engaging in ADR processes, instead of solely quasi-adjudication. On the other hand, it was in part owing to its rule-based characterizations by President Roosevelt and others, as a quasi-judicial board and not a mediation board, that history has characterized the NLRB as an adjudicatory Board, rather than one which also called upon the informal processes of negotiation, mediation, and conciliation to enforce the law.

[128] *See* 1 NLRB ANN. REP., *supra* note 30, at 35, Table IV (45% of all cases were disposed of by settlement before issuance of a formal complaint and 35.2% after, resulting in a 44.9% settlement rate for the first year); 2 NLRB ANN. REP. 15 (1937), Table I, *reprinted in* 1 NLRB REPORTS, *supra* note 30 (60.9% of all cases were settled prior to the issuance of a complaint and for the entire second year of operations). The terms "settle," "adjust," and "compose" (or their grammatical variants) are used interchangeably in the annual records of the NLRB to refer to settlement outcomes, see 1 NLRB ANN. REP., *supra* note 30, at 5 (using the terms "adjust" and "compose," the latter term being quoted from Exec. Order, Dec. 16, 1933), 35 (using the term "settlement")

B. *Settlement Statistics of the Early NLRB: Bargaining Under the Shadow of the Law and in the Clear Light of Legal Certainty*

The historical documentation of the actual workings of the NLRB after the passage of the Wagner Act can be characterized as *processual*, rather than purely *rule-based*.[129] Figures 2 and 3 illustrate the disposition of cases by the NLRB in its first and second years of practice, along with summary details of the salient, law-enforcement-related terms of the settlement agreements reached. Figures 4 and 5 illustrate that settlements were reached at various stages along the NLRB's dispute processing continuum: before the issuance of a formal complaint, after the issuance of such a complaint, and before, during, or after a hearing had occurred following the issuance of a complaint. Thus, settlement agreements were reached, in varying degrees, either "under the shadow of the law" or in the "clear light of legal certainty."[130]

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and 11 NLRB ANN. REP. 84 (1946), *reprinted in* 2 NATIONAL LABOR RELATIONS BOARD ANNUAL REPORTS, 1943-1949 (1985) [hereinafter 2 NLRB REPORTS] (using the term "adjusted" to refer to cases settled).

[129] *See supra* note 11.

[130] *See supra* note 10 (discussing the distinction between settlement outcomes reached "under the shadow of the law" and "in the clear light of legal certainty").

Figure 2

Disposition of Cases by the NLRB 1935–36*

	Number of Cases	Number of Workers Involved
By Withdrawal of Charge or Petition	201	65,211
By Petition dismissed before hearing/refusal to issue complaint	113	21,781
By Transfer or consolidation	19	5,915
By Settlement (nature of settlement listed directly below)	331	40,358
▸ Recognition of workers' representatives	108	17,990
▸ Reinstatement	91	4,721
▸ Reinstatement and recognition	51	5,738
▸ Reinstatement and improved working conditions	17	1,973
▸ Consent election	24	5,610
▸ Arbitration	4	439
▸ Other (abolition of company unions; agreement to cease interference with employees' exercise of freedom of self organization, posting notices to this effect, etc.).	36	3,883
By Intermediate finding of no violation	6	306
By issuance of decisions:		
▸ Cease and desist orders	56	5,514
▸ Certifications	6	2,474
▸ Dismissal of complaints or petitions	5	2,057
▸ Refusal to certify	1	700
Injunctions issued restraining Board from further action	44	27,792
Cases pending	286	68,761
Total	**1,068**	**240,865**

Source: 1 NLRB ANN. REP. 30–31 (1936) (Tables I & II).
*Includes unfair labor practice and representation cases

Figure 3

Disposition of Cases by the NLRB 1936–37*

	Number of Cases	Number of Workers	Percentage of Total Cases	Percentage of Cases Closed
Cases pending June 30, 1936	330	96,553	7.5	----------
Cases received July 1, 1936 – June 30, 1937	4,068	1,398,282	92.5	----------
Total cases handled	4,398	1,494,835	100.0	----------
Before formal action:				
▪ **by settlement** (as follows)	1,429	325,898	32.5	60.9
▸ by recognition of worker's Representatives	739	156,388	----------	---------
▸ by reinstatement	335	22,046	----------	----------
▸ by reinstatement and recognition	46	4,115	----------	----------
▸ by reinstatement and improved working Conditions	31	5,590	----------	----------
▸ by consent election	194	127,213	----------	----------
▸ by arbitration	5	5,020	----------	----------
▸ by other (including abolition of company unions, agreements to cease interference with employees' exercise of freedom or right of self-organization, posting notices to this effect, placement of workers on preferential lists for employment, cash settlements of payment of back wages, increases in wages and improvement of working conditions)	25	5,526		
▪ **by withdrawal of charge or petition**	539	73,040	12.2	22.9
▪ **by dismissal of petition or refusal to issue complaint**	254	37,355	5.7	10.8
▪ **by transfer to other agencies**	13	3,486	0.3	0.5
After formal action:				
▪ **by consolidation**	38	----------	0.8	1.6
▪ **by intermediate report finding no violation**	2	21	less than .01	less than .01
▪ **by compliance with intermediate report**	6	604	less than .01	0.2
▪ **by dismissal of complaint or petition**	5	3,774	less than .01	0.2
▪ **by issuance of decisions or orders:**				
▸ certifications	43	18,249	0.9	1.8
▸ compliance	3	3,961	less than .01	0.1
▸ dismissal of complaint or petition	11	1,369	0.2	0.4
▸ refusal to certify	1	50	less than .01	less than .01
Total cases closed	**2,344**	**467,807**	**53.3**	----------
Cases pending	**2,054**	**1,027,028**	**46.7**	----------

Source: 2 NLRB ANN. REP. 15-17 (1937) (Tables I & II).
*Includes unfair labor practice and representation cases

In addition to the settlement agreements accounted for in the statistical data displayed in Figures 2 and 3, the NLRB's first and second annual reports, submitted by Chairman Madden to the President and Congress, detailed a segment of settlement activities by the Board that were not accounted for in the Board's settlement statistics contained in those annual reports. The reports described these actions taken to "adjust" cases under the general heading "informal activities":

> The regional directors, as a result of their position in the territories within which they operated, have been frequently consulted by employers and employees regarding labor relations problems, and have thus been able to prevent many labor disturbances or violations of the act which might otherwise have occurred. In addition, many labor disputes which never became formal cases have been adjusted by the regional directors. Sometimes this necessitated nothing more than a telephone call, or the arranging of a conference between the parties. At other times, it involved persuading the parties to arbitrate their disputes or to accept some other solution of their problems. In many of the cases disposed of in this manner, the jurisdiction of the Board was doubtful, and therefore no formal charges were filed, but the value to the community of a settlement of the dispute was clear. This work has been an important contribution to the industrial peace of various regions involved, and has effected considerable savings, in terms of industrial wealth. No statistical record has been kept of this phase of the Board's work, and it is not reflected in the [settlement statistics submitted as part of this report].[131]

As this description of one facet of the Board's informal settlement activities illustrates, the Board employed ADR processes, such as negotiation, conciliation, mediation, and even referrals to arbitration, to adjust cases, as well as screen out those deemed inappropriate for its formal consideration.

In addition to this account of the "informal activities" of the Board, both the first and second annual reports of the Board contain separate sections headed "Settlements." These settlement activities involved the Board's use of ADR processes to "adjust" or resolve cases by informal means that culminated in formalized settlement agreements.[132] These reports (spanning 1935–37), provide identical descriptions of the incidence of such settlements as follows:

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[131] 1 NLRB ANN. REP., *supra* note 30, at 32. The same explanation is given in the Second Annual Report as in the First Annual Report. *See* 2 NLRB ANN. REP., *supra* note 128, at 17.

[132] 1 NLRB ANN. REP., *supra* note 30, at 60.

> Almost 45 percent of all the cases disposed of were closed as a result of settlement of the disputes involved. Three hundred and thirty-one, being 31 percent of all the cases received, and involving 40,354 employees, were closed in this manner. In all of these cases, a member of the Board's staff participated directly in securing the settlement, and the terms of the settlement were in conformity with the provisions and policy of the act. In effect, substantial compliance with the act was secured by the settlements in these cases.[133]

Notwithstanding (or perhaps because of) the fact that the Board's role was touted as being that of a quasi-judicial enforcement agency, it took pains in these initial annual reports to underscore the necessity, for reasons of expediency, of its ongoing resort to informal settlement processes akin to those employed by prior labor boards:

> There is no way of avoiding a certain amount of delay in the formal procedure before the Board and the courts required under the act. The Board has attempted in every way possible to reduce the time element in the procedure before it to a minimum, but it has no control over the time which elapses as a result of the review of its orders by the courts. Therefore the ability of the regional offices to secure settlements before formal action became necessary has meant the rapid removal from the area of possible industrial conflict certain disputes which by their nature are likely to lead to economic strife. The benefits of such settlements have accrued to the employers and employees directly involved, as well as to the general public. There is no need to argue the value of such settlements as alternatives to strikes or other forms of industrial warfare, with consequent burdens upon commerce, nor to point out the elimination of economic waste, of privation and suffering, and of inconvenience and loss, to the public as well as to the parties directly and indirectly affected, which is achieved by the substitution of peaceful settlements for strikes.[134]

The Board's First Annual Report describes, in general terms, the issues involved and the timing of some of these settlement outcomes:

> In some of the settlements secured by the Board during the period ending June 30, 1936, intervention by the Board took place before the dispute involved had advanced to the stage of strikes or threatened strikes. However, the issues in these disputes, discrimination, union recognition and collective bargaining, were the same issues which have caused a large percentage of the strikes in the United States for many years, and we may

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[133] *Id.* at 31.

[134] *Id.*

> safely assume that a large proportion of these disputes would have resulted in strikes but for the intervention of the Board. In 72 of the cases in which settlements were secured, strikes were actually in progress, in 52 cases strikes had been threatened; in the remaining cases, the disputes had not yet reached the stage of strike or threatened strike.[135]

Figures 4 and 5 display the rates of settlement reached at each stage along the NLRB's dispute processing continuum in 1935–36 and 1937–38, respectively.

[135] *Id.*

Figure 4

Stages of Settlement along the NLRB's Dispute Processing Continuum 1935–36*

	Number of Cases	Number of Workers	Percentage of Total Cases	Percentage of Cases in Category
Cases disposed of before issuance of complaint:				
• by settlement	240	25,966	27.8	45.2
• by withdrawal of charge	168	37,772	19.4	31.6
• by refusal to issue complaint	108	15,681	12.5	20.3
• by transfer	13	1,779	1.5	2.5
• by consolidation	2	1	0.2	0.4
TOTAL: disposed of *before* issuance of complaint	**531**	**81,199**	**61.4**	**100.0**
Cases disposed of after issuances of complaint:				
• by settlement before hearing	18	1,365	2.1	17.1
• by settlement during hearing	6	98	0.7	5.7
• by settlement after hearing	13	2,119	1.5	12.4
• by dismissal after hearing by Board or trial examiners	9	2,199	1.0	8.6
• by withdrawal of charge after hearing	3	231	0.3	2.9
• by cease-and-desist orders issued by the Board	56	5,514	6.5	53.3
TOTAL disposed of after issuance of complaint:	**105**	**11,526**	**12.1**	**100.0**
Cases pending:				
• hearings to be held	135	36,725	15.6	58.9
• hearings prevented by injunction	30	17,487	3.5	13.1
• decisions of Board pending	48	11,934	5.5	21.0
• intermediate reports pending	16	1,475	1.9	7.9
TOTAL cases pending:	**229**	**67,621**	**26.5**	**100.0**
TOTAL COMPLAINT CASES	**865**	**160,346**	**100.0**	----------

Source: 1 NLRB ANN. REP. 35 (1936) (Table IV).
*Includes unfair labor practice cases only

Figure 5

Stages of Settlement along the NLRB's Dispute Processing Continuum 1936–37*

	Number of Cases	Number of Workers	Percentage of Total Cases	Percentage of Cases in Category
Cases disposed of before issuance of complaint:				
▪ by settlement	1,003	147,596	32.1	60.1
▪ by withdrawal of charge	422	55,734	13.5	25.3
▪ by refusal to issue complaint	234	26,309	7.4	14.0
▪ by transfer	9	2,626	0.2	less than .01
TOTAL: disposed of *before* issuance of compliance	**1,668**	**232,265**	**53.6**	**100.0**
Cases disposed of after issuances of complaint:				
▪ by consolidation	31	----------	less than .01	33.0
▪ by settlement before hearing	15	972	less than .01	16.0
▪ by settlement during hearing	11	907	less than .01	11.7
▪ by settlement after hearing	15	8,979	less than .01	16.0
▪ by dismissal after hearing by Board or trial examiners	8	850	less than .01	8.5
▪ by withdrawal of charge after hearing	3	1,327	less than .01	3.1
▪ by intermediate report finding no violation	2	21	less than .01	2.1
▪ by compliance with intermediate report	6	604	less than .01	6.4
▪ by compliance with decision of court order	3	3,961	less than .01	3.1
TOTAL disposed of *after* issuance of complaint:	**94**	**17,621**	**3.0**	**100.0**
Cases pending:				
▪ before hearing	**1,276**	**662,880**	**40.8**	**93.6**
▪ after hearing:				
▸ awaiting intermediate report	19			
▸ awaiting decision	31			
▸ awaiting compliance with cease and desist orders	36			
▸ awaiting intermediate report	19	8,796	less than .01	1.4
▸ awaiting decision	31	8,689	less than .01	2.3
▸ awaiting compliance with cease and desist orders	36	14,335	1.0	2.6
TOTAL cases pending:	**1,362**	**694,720**	**43.6**	**100.0**
TOTAL COMPLAINT CASES	**3,124**	**944,606**	**100.0**	----------

Source: 2 NLRB ANN. REP. 20 (1937) (Table IV).
* Includes unfair labor practice cases only

In 1937, towards the end of the NLRB's second year of operation, the Supreme Court upheld the constitutionality of the Wagner Act in *NLRB v. Jones & Laughlin Steel Corp.*[136] As the *New York Times* reported, because the NLRB had been "putting off consideration of many types of complaints in view of the imminence of court rulings," it was now expected that unions would press the NLRB "for action."[137] However, when the *New York Times* reporter asked NLRB Chairman Madden if he expected increased business by the Board as a result of the decision, Madden responded, "No, the reverse. . . . Our regional directors will be able to *adjust* matters very well."[138] Madden was clearly comfortable with the public acknowledgement that the NLRB would continue to use ADR processes to reach settlement outcomes as part of its law enforcement practices. Indeed, prior to *Jones & Laughlin Steel Corp.*, Madden wrote a short essay describing the institutional history of the Board and its use of settlement as an alternative to adjudicated outcomes in a significant percentage of the Board's law enforcement-related dispute resolution activity[139]:

> The National Labor Relations Act [Wagner Act] . . . passed by the 74th Congress and signed by the President on July 5, 1935, establishes a Board of three members who shall act as an independent agency of the Government to carry out the intention of Congress that American workers shall have the right to organize and select representatives for the purpose of collective bargaining with their employers.
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> . . .
>
> We began to function in late August of this year [1935]. . . . The Board to date (November 12, 1935) has taken two cases under its own jurisdiction. . . . In the regional offices a dozen additional cases have been set for preliminary hearing. . . . *In the face of an increasingly steady docket, it is a satisfaction to be able also to report that settlements in cases involving unfair labor practices have been made in several instances . . . the result being peaceful solutions of what had threatened to be disturbing situations.*[140]

Twenty-five years after the passage of the Wagner Act, Madden wrote a law review article describing the law enforcement functions of the Board under

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[136] NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

[137] Louis Stark, *Labor Will Drive for a New Power*, N.Y. TIMES, Apr. 13, 1937, at 1.

[138] *Id.*

[139] *See* PETER H. IRONS, THE NEW DEAL LAWYERS 254 (1982) (quoting Thomas Emerson, Columbia Oral History Collection, Columbia University Library, New York).

[140] Madden, *supra* note 53, at 179–81 (emphasis added).

his Chairmanship (spanning 1935–40). In that description he made reference to the Board's complementary use of ADR and adjudication:

> The Board and its staff went about administering the law as if it were the law. Charges of violations were numerous. They were investigated with care. A considerable proportion of them seemed to have merit, and were scheduled for formal hearings. Many of them seemed to have no merit and were dismissed. *The staff people in the field did a good deal of conciliating, persuading employers to redress alleged grievances which they did not admit, but which they were not unwilling to redress.* Some hearings were prevented by injunctions of state or federal courts, but that problem was solved by decisions that one had to submit to the administrative procedures before he could litigate the question of validity of the statute as applied to his case.[141]

Chairman Madden thus clearly saw it within the Board's rule-based power to enforce the legal requirements of the Wagner Act through non-adjudicatory processes that resulted in settlement agreements. This use of ADR to enforce labor law under the Wagner Act relieved the NLRB of the mechanical need to resort to formal hearings and issue orders in all cases. Thus, the use of ADR enabled the Board to resolve many of its bona fide cases flexibly, expeditiously, and consensually through these settlement agreements, rather than being compelled to delay resolution or prevention of industrial strife by having to process all of its cases through its adjudicatory machinery and, in some cases, court enforcement procedures.[142]

After the Supreme Court upheld the constitutionality of the Wagner Act, Chairman Madden's prognostications about the increased settlement activities of the regional boards proved accurate: the regional offices succeeded in adjusting, through informal dispute settlement means, a significant number of the cases brought before the Board. As Figure 6 illustrates, the rates of settlement by the NLRB remained constant, though the number of cases settled increased in proportion to the total number filed.

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[141] Madden, *supra* note 89, at 243–44 (emphasis added).

[142] *See supra* text accompanying note 134.

Figure 6

Settlement/Adjustment Statistics
National Labor Relations Board 1935–47

	Total cases settled or "adjusted"	Percentage of all cases disposed of during period
Under the Wagner Act*		
1935–1936	331	44.9
1936–1937	1,429	60.9
1937–1938	4,609	52.1
1938–1939	3,069	46.8
1939–1940	2,888	39.3
1940–1941	4,211	50.1
1941–1942	5,968	50.8
1942–1943	4,592	47.0
1943–1944	3,770	41.0
1944–1945	3,673	40.0
1945–1946	4,622	42.0
1946–1947	6,513	45.0
After the Taft-Hartley Act**		
1947–1948	20,233	69.0
1948–1949	21,845	67.0

Sources: 1 NLRB ANN. REP. 30 (1936); 2 NLRB ANN. REP. 15 (1937); 3 NLRB ANN. REP. 20 (1938); 4 NLRB ANN. REP. 19 (1939); 5 NLRB ANN. REP 20 (1940); 6 NLRB ANN. REP. 25 (1941) (Table 7); 7 NLRB ANN. REP 81 (1942) (Table 8); 8 NLRB ANN. REP. 91-92 (1943) (Tables 8 & 9); 9 NLRB ANN. REP. 82-83 (1944) (Tables 7 & 8); 10 NLRB ANN. REP. 84-85 (1945) (Tables 7 & 8); 11 NLRB ANN. REP. 79-80 (1946) (Tables 8 & 9); 12 NLRB ANN. REP. 71-72 (1947) (Tables 7 & 8); 13 NLRB ANN. REP. 104-106 (1948) (Tables 7-9); 14 NLRB ANN. REP. 164-66 (1949) (Tables 7-9).
* Includes unfair labor practice and representation cases
** Includes unfair labor practice, representation, and union-shop authorization cases

Each annual report from the Board's first five years of operation (1935–40) records a high rate of settlement and contains some variation of the following statement:

> The Board has attempted in every way possible to reduce to a minimum the time elapsing between the initiation and the closing of a case before it. To that end, it has encouraged the effectuation of settlements without recourse to formal Board procedure. The ability of the regional director to secure settlements without recourse to formal Board decisions and orders has

> meant the rapid removal from the area of possible industrial conflict of disputes which, by their nature, are likely to lead to economic strife.[143]

The Sixth Annual Report, for the fiscal year ending June 30, 1941, again referred to the Board's continued settlement practices, this time describing the closure of cases by "amicable adjustment in the form of settlement agreements."[144] That report also referred to the involvement in some cases of other governmental agencies whose sole focus was the mediation and conciliation of labor disputes.[145] This increased governmental effort to resolve labor disputes through ADR was occasioned by the mounting labor tensions in the defense industry leading up to the United States' entrance into World War II:

> The tension which has pervaded the field of labor relations during the last year has been apparent to the Board since the middle of the fiscal year. Over 50 percent of the cases on its docket involve defense industries. Practically all the representation cases handled either formally or informally represent issues which demand the most expeditious handling because of threatened stoppages in defense production. This is true also of a substantial number of the complaint cases where it has not been possible for any of the mediation or conciliation agencies of the Government *or of the Board's field staff to secure an amicable and satisfactory adjustment* despite the fact that such cases result in stoppages or prevent collective bargaining.[146]

In this report, the Board was at pains to explain that the jurisdictional overlap that was occurring between it and other agencies would not result in the usurpation of the Board's exclusive jurisdiction over matters involving the legal requirements of the National Labor Relations Act. It made it clear that where the "statutory rights of the workers [were] involved," such rights would not be resolved through mediation by any other agency of the government, but only through "decisions" or "satisfactory settlements" reached by the NLRB itself:

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[143] 4 NLRB ANN. REP. 20 (1939), *reprinted in* 1 NLRB REPORTS, *supra* note 30; *accord* 1 NLRB ANN. REP., *supra* note 30, at 31; 2 NLRB ANN. REP., *supra* note 128, at 16; 3 NLRB ANN. REP. 21 (1938), *reprinted in* 1 NLRB REPORTS, *supra* note 30.

[144] 6 NLRB ANN. REP. 26 (1941), *reprinted in* 1 NLRB REPORTS, *supra* note 30; *see also id.* at 14 ("About 50% of all cases closed in 1941 . . . were closed by agreement between the parties involved.").

[145] *Id.* at 3.

[146] *Id.* (emphasis added).

> In dealing with disputes in defense industries the Board has cooperated fully with other Governmental agencies. Problems involving the rights of employees to self-organization and to bargain collectively have cut across many disputes threatening or actually tying up defense production which have engaged the attention of the Conciliation Service of the Department of Labor, the Labor Division of the Office of Production Management, and the National Defense Mediation Board. Since these agencies operate to mediate disputes and do not adjudicate statutory rights, the existence of claims under the National Labor Relations Act has been recognized as calling for close collaboration with the Board in its handling of such disputes. Thus there are many cases where mediation of a dispute over working conditions must await the investigation by the National Labor Relations Board under section 9, or where the investigation to determine whether the union claiming to represent the workers really does so in the contemplation of the Act, must await adjudication of unfair labor practice charges. In cases where the statutory rights of the workers are involved, the mediation agencies cooperate with and *assist the Board to arrive at prompt decisions or satisfactory settlements*. Mediation of statutory rights has not been resorted to.[147]

Thus, during this intense period of agency overlap, the NLRB did not relinquish *its* use of ADR to other agencies or delegate to them the power to resolve, by settlement agreements, issues in cases that concerned questions of law under the Wagner Act, and that, therefore, remained within the exclusive jurisdiction of the Board.

Indeed, the statistical components of the Sixth Annual Report reflecting the increased rate of cases settled by the NLRB during that year, from 39.3% during its fifth year of operation to 50.1% during its sixth,[148] underscores the Board's heightened preference for using ADR along the dispute processing continuum that emerged, and had by now become institutionalized, within its law enforcement framework. As that report states:

> During the fiscal year a substantial reorganization has been undertaken and some changes in procedures inaugurated. . . . *The previously existing delegation of authority by the Board to staff members to dispose of cases by informal adjustment and to authorize formal proceedings has been broadened and deepened*, and, in line with the recommendations of the Attorney General's Committee Report, only cases involving perplexing and novel issues of law or procedure are now brought to the Board for guidance in the administrative phases. This has resulted in freeing a greater

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147 *Id.*

148 *See supra* Figure 6.

> proportion of the Board's time for deciding formal cases on the record, and for considering policy problems.[149]

During World War II (also referred to herein as "WWII"), the War Labor Board was established to resolve labor disputes. The NLRB's Eighth Annual Report refers to some aspects of the War Labor Board's jurisdiction, as well as the separate jurisdiction of the Department of Labor's Conciliation Service, and the continued centrality of the NLRB's role in the resolution of disputes concerning statutory rights under the Wagner Act:

> The tremendous impact of the war upon American industry has created a number of new problems in industrial relations, in the solution of which the Wagner Act has become of increasing importance. For the full and effective use of resources in the production necessary for the successful prosecution of the war, the principal Federal statute [i.e. the Wagner Act] defining the rights of employees and providing a forum, integrated with the courts, for the adjudication of controversies over these rights [i.e. the NLRB], has played an essential role. . . . [T]he tensions incident to these abnormal economic conditions have made it more essential than ever that agencies of Government should be utilized to eliminate the sources of friction and poor morale which could develop into serious interruptions of production. . . . [Disputes related to] . . . the elimination of unfair labor practices which impede the acceptance of sound collective bargaining practices . . . [and those involving] the prompt determination of disputes as to the choice of bargaining agents by employees . . . [raise] organizational questions [within the Board's jurisdiction]. . . . *After* these controversies have been resolved and collective bargaining established, it has been the province of the Conciliation Service to assist the parties in working out substantive agreements for wages and other working conditions. When an impasse develops in the negotiation of collective bargaining agreements, the War Labor Board has been vested with the duty of issuing decisions with respect to the substantive questions at issue, which are binding on the parties.[150]

Therefore, the NLRB retained jurisdiction over the substantive matters covered by the Wagner Act and continued to use informal and formal processes to resolve those matters independent of the increased, wartime involvement of other governmental agencies whose province was to help maintain harmony between the parties *after* the NLRB had resolved matters that fell within the purview of the Wagner Act. The Ninth Annual Report of

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[149] 4 NLRB ANN. REP., *supra* note 143, at 3–4.

[150] 8 NLRB ANN. REP. 1-2 (1943), *reprinted in* 2 NLRB REPORTS, *supra* note 128 (emphasis added).

the NLRB, for the fiscal year ending on June 30, 1944, discussed, with increased transparency, the importance of the Board's continued and, by now, increased use of "informal" methods of dispute resolution:

> The Board's overwhelming preoccupation with cases involving vital war operations continues to be demonstrated by the frequency with which the Board's services are invoked in certain industries. . . . Operating as it does in a field of dynamic relationships, the Board faces a constant challenge to maintain its procedures apace with the demands placed upon it. Consequently, the Board has devised and augmented certain administrative and informal procedures which are designed to facilitate the resolution of questions as to union majority status and the prevention and remedy of unfair labor practices. For example, the Board's administrative procedures, in effect, operate as a sifting process: securing . . . the adjustment of those cases with merit by the parties and in accord with the policies of the Act. Thus, of 34,879 charges of unfair labor practice filed with the Board since 1935, only 2,462, or 7 percent, have gone as far as formal Board decisions.
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> Furthermore, the Board encourages resort to its so-called "consent" arrangements. Under these procedures the parties themselves agree on the manner of disposition of cases, fully meeting the requirements of the law, and utilize the Board's personnel and machinery to do so. Thus, of the 31,222 petitions for investigation and certification of representatives handled by the Board since its inception, 16,592, or 53 percent, were based on the full agreement of all parties, thereby dispensing with any formal hearings and determinations by the Board.
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> The Board endorses and stresses the use of such informal procedures for the achievement of results consistent with national policy. They save parties and the Government the expense of formal hearings. They lead to the speedy resolution of questions of employee representation which impede or obstruct the course of collective bargaining. They hasten the removal and correction of practices which are contrary to law. Above all, the Board's experience has been that collective bargaining relations between employer and employees in a particular plant are more likely to develop if the charges of unfair labor practices are disposed of in an informal manner freely accepted by them, without recourse to formal procedures. The use of such informal procedures has been characterized as "the life-blood of the administrative process." . . . The Board has devised, and makes available to the parties, several types of procedures through which representation disputes can be resolved without recourse to formal procedures.[151]

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[151] 9 NLRB Ann. Rep. 7-9 (1944), *reprinted in* 2 NLRB REPORTS, *supra* note 128 (emphasis added). Some of the "new" procedures for effecting settlement outcomes are named and defined in this report. In representation cases, they are the "consent cross-

Clearly, in addition to the interventions by Board staff and officials that had become institutionalized through consistent practice since the Board's inception, involving the use of ADR processes such as negotiation, mediation, and conciliation, the Board had, over time, devised other "procedures" for processing cases informally that also became part of its regularized framework for reaching settlement outcomes. This evolution of new settlement devices indicates that the agents of the NLRB exercised creativity and flexibility in designing such mechanisms to assist with the settlement processes.

By the Board's tenth year of operations, the Supreme Court, in the case of *Wallace Corporation v. National Labor Relations Board*,[152] took judicial notice of the NLRB's high rate of settling cases: "50% of all cases before it have been adjusted under its supervision."[153] The Court also described, unabashedly and with clear approval, the NLRB's use, since its inception, of informal settlement practices as a means of enforcing the law through ADR without taking recourse in all cases to the more costly and time-consuming adjudicatory process.[154] In *Wallace*, the Court not only legitimated the NLRB's use of such settlement processes, but gave full force of law to its manner of implementing settlement agreements by upholding the Board's self-designed practice of using its quasi-adjudicatory powers, in conjunction with courts, to take corrective action when the agreements were breached or otherwise proved ineffective:

> To prevent disputes like the one here involved, *the Board has from the very beginning encouraged compromises and settlements.* [] The purpose of such attempted settlements has been to end labor disputes, *and so far as possible to extinguish all the elements giving rise to them.* The attempted settlement here wholly failed to prevent the wholesale discard of employees as a result of their union affiliations. The purpose of the settlement was thereby defeated. Upon this failure, when the Board's further action was properly invoked, it became its duty to take fresh steps to prevent frustration of the Act. *To meet such situations the Board has established as a working rule the principle that it ordinarily will respect the terms of a settlement*

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check," the "consent election," the "stipulated cross-check," and the "stipulation election." *Id.* at 9–11. In unfair labor practice cases, they include the use of "Board-prepared forms" for the settlement agreement and "printed notices for posting by the employer" in cases that settle before reaching the stage of a Board hearing, and settlement stipulations in cases that settle after the commencement of a hearing. *Id.* at 13–14.

[152] Wallace Corporation v. NLRB, 323 U.S. 248 (1944).

[153] *Id.* at 254 n.8.

[154] *See infra* text accompanying note 155.

> *agreement approved by it.* [] *It has consistently gone behind such agreements, however, where subsequent events have demonstrated that efforts at adjustment have failed to accomplish their purpose, or where there has been a subsequent unfair labor practice.* [] *We think this rule adopted by the Board is appropriate to accomplish the Act's purpose with fairness to all concerned.* Consequently, since the Board correctly found that there was a subsequent unfair labor practice, it was justified in considering evidence as to petitioner's conduct, both before and after the settlement and certification.[155]

Thus, notwithstanding the rhetoric of ADR as heterodoxy that ushered in the adjudicatory function of the new NLRB under the Wagner Act in 1935, by 1944 the Supreme Court's laudatory description of the NLRB's settlement activities underscored the primacy and prevalence of ADR practices in the NLRB's law enforcement activities since its inception.

It was, perhaps for this reason, that the Board's Tenth Annual Report, written after the end of World War II, and following the Supreme Court's decision in *Wallace*, provided more descriptive details about the nature of its settlement outcomes in unfair labor practice claims:

> The Board closed 2,308 unfair labor practice cases during the year [1944–45]. Eighty-seven and sixth-tenths percent of them were handled informally, without recourse to formal hearing and written decisions. The remedies in the cases closed by settlement or by compliance with Intermediate Report, Board order, or court decree, were varied. A total of 1,919 workers were reinstated to remedy discriminatory discharges, while 125 others were reinstated after strikes caused by unfair labor practices. Back pay amounting to $997,270 was paid to a total of 1,973 workers who had been the victims of discriminatory practices. Company-dominated unions were disestablished in 54 cases. Collective bargaining negotiations were ordered in 116 cases. The posting of notices was required in 576 cases.[156]

During the first year of NLRB operations after the conclusion of WWII, the cessation of international hostilities occasioned an upsurge in labor relations conflict in the United States, and challenged the efficacy of NLRB's dispute processing continuum in numerous ways. As the Board's Eleventh Annual Report explains:

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[155] *Id.* at 253–55 (emphasis added).

[156] 10 NLRB ANN. REP. 4 (1945), *reprinted in* 2 NLRB REPORTS, *supra* note 128.

> Not only was the volume of cases presented to the Board the greatest in its 11-year history, but their character was such that the entire organization necessarily functioned under great pressure.
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> The unprecedented number of cases filed with the Board was the expected aftermath of the sudden termination of hostilities. Due to its special position in the governmental structure concerned with labor relations, the Board's case load in effect mirrored what was happening during the first year after V-J day: It was hardly surprising that the close of the war should mean the release of tensions distilled during 4 years of exhortation, unstinting effort, self-discipline, and uncertainty. It was to be expected that both labor and management, once relieved of wartime restrictions, would turn to the adjustment of accumulated grievances, real and fancied. Concurrent with the recession of Government controls on the price-wage reconversion front, the Nation experienced a geographical reshuffling of industrial workers, the shutting down of war plants, the establishment of new firms, conversion to the production of peacetime products, a rise in the cost of living, and intensified organizing drives by labor organizations. All of these elements, incidental to a transitional economy, made it essential that labor and management have access to the Board's services, to the end that the transition should be as smooth and swift as possible. Herein lay the reasons for both the unprecedented number of cases presented to the Board, and the need for the Board to expedite their handling.[157]

Under the pressure of this unprecedented caseload, the NLRB's dispute processing continuum adapted to the exigencies of the circumstances by matching the upsurge in caseload with a corresponding rise in settlement rates:

> Congress passed the Wagner Act to provide a peaceful alternative to the costly strikes which had been fought over the denial of basic rights to union recognition and collective bargaining. The statute has served the public by decreasing such strife. The fundamental rights which Congress said should be the subject of Federal prosecution are no longer being bought at the price of economic struggle. . . . As in past years, the great majority of the 10,892 cases processed to conclusion were closed promptly in the informal stages of administration, without the necessity of hearings, reports, decisions, or subsequent litigation. Significantly, 91 percent of the unfair labor practice cases and 74 percent of the representation cases did not require formal

[157] 11 NLRB ANN. REP., *supra* note 128, at 1.

> action; in both groups this marked an encouraging increase over the preceding year.[158]

In its final year of administering the Wagner Act before the Act was amended by the Taft-Hartley Act (effective August, 1947), the Board's Twelfth Annual Report noted that the Eightieth Congress considered approximately 60 bills that concerned federal labor policy. These bills dealt with, among other things, "such matters as . . . proposals for labor courts and compulsory arbitration [and] proposals for mediation and conciliation . . . ."[159] In its final version, the Taft-Hartley Act's amendment of the NLRA removed part of one clause from the Wagner Act's language relating to mediation and conciliation recited earlier in this Article,[160] namely, the italicized language in the following phrase: "Nothing in this Act shall be construed to authorize the Board to appoint individuals for the purpose of conciliation or mediation (or for statistical work), *where such service may be obtained from the Department of Labor*."[161]

After the Taft-Hartley amendments, the NLRA's reference to mediation and conciliation read: "Nothing in this Act shall be construed to authorize the Board to appoint individuals for the purpose of conciliation or mediation, or for economic analysis."[162] Even this phrase, however, left the Board's staff free to continue its use of settlement processes to "adjust" cases before it, and to appoint new staff members to adjust them similarly. Indeed, after passage of the Taft-Hartley Act, not only did the caseload of the NLRB increase significantly, but the NLRB's rate of adjusting cases disposed of during the first two years following the Taft-Hartley Act also increased, considerably exceeding the settlement percentile range prior to the passage of the Taft-Hartley amendments.[163]

By the second year of the NLRB's implementation of the Taft-Hartley amendments, the new powers of the NLRB's general counsel were explicitly discussed in the Fourteenth Annual Report of the Board covering the fiscal

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[158] *Id.* at 2, 4.

[159] 12 NLRB ANN. REP. 5 (1947), *reprinted in* 2 NLRB REPORTS, *supra* note 128; *see also Hearings Before the Committee on Labor and Public Welfare*, 80th Cong. 1901–36 (1947) (statement of NLRB Chairman Paul M. Herzog before Congress on pending labor legislation) [hereinafter *Hearings*].

[160] *See supra* note 123 and accompanying text.

[161] 2 LEGISLATIVE HISTORY OF THE NLRA, *supra* note 123, at 3272 (S. 1958, 74th Cong. (1935)) (emphasis added).

[162] Labor Management Relations (Taft-Hartley) Act, Pub. L. No. 101, § 4(a) (1947) (codified at 29 U.S.C. §§ 141–87).

[163] *See supra* Figure 6.

year ending on June 30, 1949. These duties included the investigation of unfair labor claims by the General Counsel's staff, and the exercise of that office's authority under the amended NLRA "to effect settlements or adjustments."[164] A forthcoming Article will discuss the impact of the Taft-Hartley and Landrum Griffin amendments on the dispute resolution functions of the NLRB.[165] At present, it can be said that the NLRB's dispute processing continuum endures to the present day.[166]

IV. CONCLUSION

The Wagner Act's addition of quasi-adjudicatory powers to the law enforcement repertoire of the NLRB *effectively* created a full-fledged "dispute processing continuum" within the institutional framework of that permanent labor board. This development represented a historical watershed, marking a bright line in the enforcement of labor rights under federal legislation by marrying informal processes for resolving disputes, such as

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[164] 14 NLRB Ann. Rep. 9 (1949), *reprinted in* 2 NLRB REPORTS, *supra* note 128.

[165] The Landrum Griffin Act, known formally as the Labor-Management Reporting and Disclosure Act of 1959, is codified at 29 U.S.C. §§ 401–531.

[166] A classic text on labor law provides a detailed description of the informal stages of the present continuum—that is, after it was amended by the Taft-Hartley and Landrum Griffin Acts:

> When a charge is filed, the Regional Director normally required the person making the charge to submit the supporting evidence in the form of affidavits, lists of witnesses, etc. . . . [T]here will commonly be an informal conference at the local office of the Board, attended by both the respondent and the charging party, at which the alleged unfair practices are thoroughly discussed and possible settlements considered. It is important to emphasize the informality of these investigations, conferences and settlements. Except for such steps as are required by sound administration, including the reduction to writing of any settlement agreement, the entire procedure up to this point is conducted with all possible informality and an eye to amicable adjustments.
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> The overwhelming preponderance of unfair labor practice cases have traditionally been disposed of in one way or another in Regional Offices by these informal personal negotiations. In the fiscal year ending September 30, 1998 (the most recent year for which the Board has published figures), for example, of the 33,287 unfair labor practices charges that were "closed," 94 percent were closed by the NLRB Regional Offices prior to a formal hearing (within those cases, approximately 31 percent were disposed of by dismissing the charge, 31 percent by voluntary withdrawal of the charge, and 33 percent by settlement).

COX, *supra* note 9, at 105.

negotiation, mediation, and conciliation, with quasi-judicial, adjudicatory process. As a result, ADR and adjudication served complementary functions in the labor law enforcement activities of the NLRB under the Wagner Act.

The dispute processing continuum that emerged within the NLRB during the New Deal era is a historical phenomenon comparable to similar developments in other eras, past and present, where ADR and adjudication are used in complementary concert within the framework of a legal system.[167] While the NLRB's dispute processing continuum was the unique product of the experimental spirit of the New Deal era, the fact that it has historical and contemporary analogues suggests the possible universality of the concept of a dispute processing continuum, joining ADR with adjudication in the framework of a single governmental institution designed to serve both dispute resolution and law enforcement functions.

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[167] *See generally* Sanchez, *Towards a History of ADR*, *supra* note 1; Sanchez, *Back to the Future of ADR*, *supra* note 2.