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COMMENT

LABOR ACTIVITIES AND ANTI-MONOPOLY LEGISLATION

The uproar of the ancient market place was the symbol of competition until contemporary times. Each purchase or barter was a thing of its own; each buyer was to be treated according to "what *this part of* the traffic will bear"; each seller was to be heckled until the price would be cut no lower. Although "survival of the fittest" was the keyword, by and large the majority survived.

Contrary to popular opinion, however, history has numerous examples of ancient and semi-modern attempts to control some of the unwanted effects of the competitive system.¹ Furthermore, while early civilizations may have agreed in practice, the doctrine of *laissez faire* did not get a firm foothold until the end of the 18th century.² The United States started its great century of expansion under the political and governmental philosophy of "hands off", and until 1890 unrestricted free competition had a fine opportunity to demonstrate its over-all results. Men discovered not only that too few were proving themselves fit in some industries, but that, horrible as it seemed to the advocate of free competition, the healthier boys were making agreements not to fight with one another. Mr. Business Without Restriction had to be prosecuted. He was not jailed, but was paroled in the care of the Sherman Act. This was our first important governmental control which aimed to foster free competition and, in a broad sense, the beginning of a series of Congressional paradoxes.³

The vital language of the Sherman Act is a summary itself, and so must be set out in full. This is all it says:

"Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal . . ."⁴

Does this very short Congressional sentence have any impact upon the activities of organized labor? The words "combination . . . in

¹ McAllister, *Price Control by Law in the U. S.* (1937) 4 LAW & CONTEMP. PROB. 273, 274.

² The WEALTH OF NATIONS by Adam Smith was published in 1776.

³ Academically, one can argue over the meaning of the word "competition." It may mean complete freedom of action by business approaching the *laissez faire* doctrine. Then, any statute that tries to help competition paradoxically is a control of competition. Or it may be just a distributive system whereby each individual tries to outdo his competitors but only under a set of rules. Thus the Sherman Act makes a rule against a group combining to squeeze out another competitor, or a combination to maintain prices. The Robinson-Patman Act keeps the teams "on-side" by making illegal much of the buyer's competition in the purchasing market.

⁴ 26 Stat. 209; 15 U. S. C. A. Sec. 1. The brevity of the statute has led many respectable authorities to contend that the Act is merely an expression of congressional policy—a condemnation of improper practices in a competitive system. This theory suggests an extremely liberal construction, and, as will be seen later, has been an important philosophy of Mr. Thurman Arnold. See discussion, *infra* page 212.

restraint of trade or commerce . . . illegal" certainly suggest that labor unions, which aim to control the supply of labor and thereby increase wages through collective bargaining, violate the Sherman Act by their very existence and purpose. By the twentieth century, however, all courts recognized the propriety of organizing labor to improve wages, hours, and working conditions. To insure an interpretation of the Sherman Act in accord with this prevalent attitude, Congress made the following declaration in 1914:

"The labor of a human being is not a commodity or article of commerce. Nothing contained in the anti-trust laws shall be construed to forbid the existence and operation of labor . . . organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit,⁵ or to forbid or restrain individual members of such organizations from *lawfully* carrying out the *legitimate* objects thereof; nor shall such organization . . . be held . . . to be illegal combinations in restraint of trade . . ."⁶

Since organization by peaceful means⁷ for mutual help was a legitimate object of labor unions, the danger that collective bargaining by strong unions would violate the Sherman Act was minimized.

The Clayton Act also contained an anti-injunction section which forbade the issuance of an injunction "in any case between an employer and employees . . . or between persons employing and persons seeking employment . . . growing out of a dispute concerning the terms or conditions of employment." The statute specified proper means to be used by labor, such as peaceful picketing, strikes, primary boycotts, and assemblies, and a catch-all clause removed such activities from the reach of the Sherman Act by declaring: "nor shall any of the acts specified in this paragraph be considered or held to be violations of any laws of the United States."⁸

These were the pertinent sections of the statutes on the books when the courts began to consider the applicability of anti-monopoly legislation to labor unions and their activities. Let us now examine the treatment of these Congressional mandates by the Supreme Court of the United States.

THE EARLY CASES DISAPPOINT LABOR

The Sherman Act imposes three sanctions on illegal restraints of trade or commerce—the injunction, criminal prosecution, and treble damages actions. The Supreme Court's first consideration of the applicability of the Act to labor activities involved an action for damages. In the *Danbury Hatters* case,⁹ the Court ruled that pressure upon purchasers of the employer's hats interfered with interstate sales, for the secondary boycott not only cut down the interstate *shipments* of the manufacturer, but also interfered with the employer's access to an outstate *market*. The Court simply inferred an intent to restrain inter-state commerce.

⁵ The writer has found no cases where a labor union has been held to be outside the protection of this section because of high dues—dues so high that the leaders might be charged with conducting the union for profit.

⁶ 38 Stat. 731; 15 U. S. C. A. Sec. 17.

⁷ Cf. *Hitchman Coal Co. v. Mitchell*, 245 U. S. 229 62 L. Ed. 260, 38 S. Ct. 65 (1917)—illegal to induce breach of a yellow dog contract.

⁸ 38 Stat. 738; 29 U. S. C. A. Sec. 52.

⁹ *Loewe v. Lawlor*, 208 U. S. 274 52 L. Ed. 488, 28 S. Ct. 301 (1908).

The *Danbury Hatters* case was before the Clayton Act of 1914, and labor hoped that this statute would lead the Court to reconsider, and to hold that the Sherman Act was inapplicable to all labor activities. Seven years after the passage of the Clayton Act this hope was dashed in *Duplex Printing Press Co. v. Deering*.¹⁰ New York workmen refused to aid in the installation of the products of a Michigan employer in an effort to force their own employer to withdraw patronage from this non-union company. The Court characterized their activities as a sympathetic strike in aid of a secondary boycott which was not "peaceful and lawful persuasion" under the Clayton Act, declared that the secondary boycott was not one of the means sanctified by Section 20 of the statute, and found that no labor dispute existed between the New York workmen and the out-of-state employer because the relation of employer-employee was absent. Finally, the Court held that Section 6 of the Clayton Act did nothing except state what had always been true—that unions could engage in lawful activity to carry out their legitimate objects.¹¹ The boycott was enjoined, and labor discovered that their protective Clayton Act leaked like a sieve hit by a shotgun.

Justice Brandeis wrote a now famous dissent in the *Duplex* case, arguing for a liberal interpretation of the Clayton Act. Since the secondary boycott was part of a dispute between labor and capital, it grew out of a "dispute concerning the terms or conditions of employment"¹² and was not enjoined, for the catch-all clause of Section 20 prevented injunctions under the Sherman Act as well as prohibiting restraining orders in general. The Court, however, was not ready to accept this interpretation in 1927, and in *Bedford Cut Stone v. Journey-men Stone Cutters*¹³ an injunction against the refusal of workmen to work on stone coming from a non-union, out-of-state quarry was declared proper. The *Duplex* interpretation of the Clayton Act was affirmed. Of course, Justice Brandeis dissented, and said that he would have the Court examine the degree to which the activity in question promoted the self-interest of labor and balance that against the weight of employer opposition and the necessities of the case.

The *Danbury Hatters*, *Duplex*, and *Bedford* cases all involved activity aimed at the marketing or use of interstate goods, and all three cases discovered a direct restraint on commerce.¹⁴ When confronted with a labor controversy which centered in the *production* of goods travelling in interstate commerce, the Court started to talk about *intent*. The *First Coronado*¹⁵ case concerned a strike, coupled with violence, in a non-union mine. The end sought was a closed shop. Large quantities of interstate shipments of coal were held up, but the Court held that this restraint on commerce was only "indirect." The primary concern of the workers was improvement of local conditions, and the effect on interstate commerce only incidental. Since no showing was made that

¹⁰ 254 U. S. 443 65 L. Ed. 349, 41 S. Ct. 172 (1921).

¹¹ Cf. Tunks, *A New Federal Charter for Trade Unionism* (1941) 41 COL. L. REV. 969, 974.

¹² Section 20 of the Clayton Act, set out *supra* page 207.

¹³ 274 U. S. 37, 71 L. Ed. 916, 47 S. Ct. 522 (1927).

¹⁴ See also *U. S. v. Painters' Council*, 44 F. (2d) 58 (C. C. A. 7th, 1930) *aff'd without opinion*, 284 U. S. 582, 76 L. Ed. 504, 52 S. Ct. 38 (1931).

¹⁵ *United Mine Workers v. Coronado Coal Co.*, 259 U. S. 344, 66 L. Ed. 975, 42 S. Ct. 570 (1922).

the union wanted to control the entire industry—a national closed shop—the “incidental” effects of purely local controversies would not violate the Sherman Act.¹⁶

Plaintiff's attorneys took the cue, and proceeded to get evidence against the union which showed that the end sought was to keep all non-union coal off the market.¹⁷ In the *Second Coronado*¹⁸ case, the Court looked at this evidence, found an intent to restrain interstate commerce as well as the actual restraint present in the *First* case, and granted the injunction.

One more case by way of background for the subsequent discussion of the recent attitudes of the Supreme Court toward labor and anti-monopoly legislation is *United States v. Brims*¹⁹ which case found capital and labor conspiring to tie up the building trades. A three-way contract was made between contractor, mills, and the union, whereby the contractors would hire only union men, the union men would work only on wood from union mills, and the mills would hire only union help. Non-union wood was effectively blocked from the local market. The Court quickly declared that a combination in restraint of trade and commerce existed.

Roughly, these early cases can be placed in three groups: the boycott cases; affecting commerce at the end of its journey;²⁰ the strike and picket cases, affecting commerce before it starts;²¹ and the joinder of capital and labor in restraint of trade.²² The second group seemed to require intent; the other two must have just assumed it since the *means* were improper. Thus the Sherman Act could be violated by improper purpose or improper means. Not until the late thirties was another approach brought forth—an approach that looked toward the *effect* of the labor activity upon the competitive structure, and ignored both the end and the means.²³

THE APEX CASE

Labor has always been irritated by the application of the Sherman Act to its activities,²⁴ and in *Apex Hosiery Co. v. Leader*²⁵ the attorneys for the union attacked a complain for treble damages strongly on the

¹⁶ See also *United Leather Workers v. Herkert and Meisel Trunk Co.*, 265 U. S. 457, 68 L. Ed. 1104, 44 S. Ct. 623 (1924). Cf. *Levering and Garrigues Co. v. Morrin*, 289 U. S. 103, 77 L. Ed. 1062, 53 S. Ct. 549 (1933). See *Tunks*, *supra* note 11, n. 40.

¹⁷ The union could survive only if all coal was dug at high wages because non-union coal was driving the market price so low that employers in union mines would go broke if they continued to pay union wages.

¹⁸ *Coronado Coal Co. v. U. S.*, 268 U. S. 295, 69 L. Ed. 963, 45 S. Ct. 551 (1925).

¹⁹ 272 U. S. 549, 71 L. Ed. 403, 47 S. Ct. 169 (1926).

²⁰ *Danbury Hatters, Duplex and Bedford* cases, *supra* notes 9, 10, 13.

²¹ *Coronado* cases, *supra* notes 15, 18.

²² *Brimms* case, *supra* note 19.

²³ *Apex Hosiery v. Leader*, 310 U. S. 469, 84 L. Ed. 1311, 60 S. Ct. 982 (1940), *infra* page 210 *et seq.*

²⁴ See 51 CONG. REC. 9538 *et seq.* (1914) for debate on Clayton Act. See also: Boudin, *The Sherman Act and Labor Disputes* (1939), 39 Col. L. Rev. 1283, (1940) 40 Col. L. Rev. 14; Teller, *Federal Intervention in Labor Disputes and Collective Bargaining—The Hutcheson Case* (1941) 40 MICH. L. REV. 24, 31.

²⁵ 310 U. S. 469, 84 L. Ed. 1311, 60 S. Ct. 982 (1940).

ground that the Sherman Act was inapplicable to labor controversies. The Hosiery Company was a large producer of silk stockings and shipped the majority of its finished pieces in interstate commerce. Only a few of its employees belonged to the Full-Fashioned Hosiery Workers' Union, and when the company refused to enter a closed shop agreement with that organization, a strike was ordered. Members of the union entered the plant and "sat down." Not only the few employee members took over the plant, but also many non-employee members joined them, and the multitude effectively damaged the plant equipment and prevented plant operation for two months. They refused the company permission to ship already finished goods on existing orders. The Supreme Court, speaking through Mr. Justice Stone, declared that the Sherman Act was applicable to labor in "some" circumstances, but proceeded to hold that the statute interdicts only those labor activities which injure the competitive system by controlling the market, restricting production, or raising prices to the detriment of the consumer.²⁶

The opinion is a study in technique. The Court says one thing, but proceeds to hold to the contrary; i. e., labor is covered by the Sherman Act, but since the Sherman Act condemns only those activities which injure competition substantially, as a practical matter, labor is almost exempt from its provisions. This approach is reminiscent of Chief Justice Marshall, who would say one thing to prevent present criticism, and then proceed to leave a foundation for subsequent holdings contrary to the ideas of his appeased critics.²⁷ Furthermore, although the opinion in the *Apex* case appears to affirm earlier holdings, the test laid down by the Court and Justice Stone would not lead to the same result today upon litigation of the identical facts involved in those cases affirmed.

Let us examine some of the postulates set forth by Justice Stone. The sit-down strike had previously been declared illegal by the Supreme Court,²⁸ but Mr. Stone met this troublesome fact simply by saying that the means used by labor are immaterial in a consideration of the applicability of the Sherman Act. Although the means may have been improper, treble damages will be allowed only when the *effect* of the activity is to injure competition substantially. The boycott cases, however, are affirmed. Those opinions,²⁹ as will be recalled, frowned upon the use of a secondary boycott. The Court said nothing about the *effect* of the labor activity, because it was looking at the *means*. The opinions assumed that any restraint upon commerce was improper if the pressures used on an employer were "naughty." Furthermore, the facts in those cases did not show a substantial impediment to free competition. Under the test of the *Apex* case, where *effect* is the only determinative factor, labor would win in a "re-hearing" of the sec-

²⁶ This is the language of the opinion: "The end sought [by the Sherman Act] was the prevention of restraint to free competition in business and commercial transactions which tended to restrict production, raise prices, or otherwise control the market to the detriment of purchasers or consumers of goods and services." 310 U. S. 469 at 493, 84 L. Ed. 1311, 60 S. Ct. 982 (1940). See Tunks, *supra* note 11 at 974.

²⁷ *Marbury v. Madison*, 1 Cranch 137 (1803).

²⁸ Comment (1940) 35 ILL. L. REV. 424, 426.

²⁹ Note 20, *supra*. (*Danbury Hatters, Duplex, Bedford*).

ondary boycott cases.^{29a}

Not only the means used, but also the *purposes* of the union pressure were discarded as tests. The *Coronado* cases³⁰ said that effect upon interstate commerce was immaterial, if the purpose was merely local; but that if the purpose was to restrain commerce nationally—to preclude non-union goods from entering the market—then the Act was violated. Compare the approach of Justice Stone. For him, *effect* is everything, and that effect must be much more than merely an impediment to interstate shipment. The Union can openly intend to prevent interstate shipments, but unless that intention is successful to the point of tying up markets and injuring consumers, no violation of the Sherman Act will result.³¹

The earlier opinions of the Court read the language "in restraint of trade *or* commerce" literally in the disjunctive, and a blocking of interstate shipments was in "restraint of . . . commerce." If the activity was a secondary boycott, it was assumed that the intent was present to restrain commerce by preventing sales—in fact, the Court just didn't talk about intent.³² When, however, the union pressure, such as a primary strike or picketing, struck at the production end of the interstate journey, the Court realized that "something new must be added"; otherwise, every strike would violate the Sherman Act. It can be argued that the intent doctrine was evolved to justify strikes for proper local purposes and to condemn activities aimed at national union power.³³

The contrast of Justice Stone's approach is striking. By looking at the intent of Congress in passing the Sherman Act, he concluded that "restraint of trade or commerce" should be read together. Monopoly was the evil sought to be eradicated by Congress. Common law principles of restraint of trade were in mind. There was no thought of prosecuting injuries to interstate commerce through a monopoly statute; "commerce" was either surplusage or synonymous with "trade." If the Hosiery Company, therefore, had argued the presence of a "national intent" in the *Apex* case, it is submitted that this "improper" purpose of the sit-downers would have been immaterial, and the result of the case the same. The intent ideas of the *Coronado* cases are gone.³⁴

The Court also had to deal with *N. L. R. B. v. Jones & Laughlin Steel Corp.*³⁵ which held that Congress has power under the commerce clause to legislate with reference to local strikes and other union activities which affect interstate commerce—production is a part of interstate

^{29a} Accord: *U. S. v. Gold*, 115 F. (2d) 236 (C. C. A. 2nd, 1940); *Int. Garm. Wks. v. Donnelly*, 4 L. C., § 60530 (1941).

³⁰ Notes 15, 18, *supra*.

³¹ Of course, common law remedies available in state courts are still open to the employer, but not treble damages in the federal courts. The Sherman Act is inapplicable, and no federal question is involved.

³² *Danbury Hatters, Duplex and Bedford* cases, *supra* notes 9, 10, 13.

³³ Gregory, *The Sherman Act v. Labor* (1941) 8 U. OF CHI. L. REV. 222, 228. See also: Gregory, *Labor's Coercive Activities under the Sherman Act—The Apex Case*, 7 U. OF CHI. L. REV. 347 (1940).

³⁴ Cf. Teller, *supra* note 24 at 27. "The Sherman Act, the court held, applies to such a case only as involves an *intent* to control prices in states other than that in which the activities sought to be censured are carried on." Mr. Teller appears to have misspoken, for the case talks about *effect*, not *intent*.

³⁵ 301 U. S. 1, 81 L. Ed. 893, 57 S. Ct. 615 (1937).

commerce. This case was met simply. Justice Stone admitted that Congress *could* pass a "Sherman Act" condemning injuries to the shipment of interstate goods, but that thus far, such an intention had not been manifested. Congress has only used part of its commerce power in the Sherman Act of 1890.

Mr. Thurman Arnold's program to prosecute labor under the Sherman Act when the union was promoting "improper" purposes was throttled by the *Apex* case.³⁶ High on his list of improper purposes sits the jurisdictional controversy between unions. The closed shop, however, is not on the list. After the *Apex* case, Mr. Arnold declared that if the end sought by the union was proper (such as the closed shop desired by labor in the *Apex* case), the Court would proceed to look at the effect upon competition, as they did; but that if the end was improper (such as getting the jobs of another union), the Court would say that the effect upon competition was immaterial.

At first glance, it is hard to see why the applicability of the Sherman Act should depend upon the reason trade is restrained. Mr. Arnold's position can be sustained only on the theory that the statute is a broad declaration of policy by Congress—a code to strike down improper activities detrimental to the best interests of the country at large.³⁷ The *Apex* case, however, contained no language supporting Mr. Arnold's interpretation, and subsequent decisions have proved him wrong.³⁸

What about closed shop contracts that substantially injure competition? Since the *Apex* case ignored the means used by labor and said that the effect upon competition was the controlling factor, can we differentiate between a contract for a closed shop which substantially injures competition and a strike or boycott striving to force an employer to sign that contract?³⁹ Having voluntarily signed a contract, an employer would not sue for treble damages, but the criminal prosecution would still be available to the government. Labor, however, would "scream to high heaven" if such an action were instigated. Justice Douglas has subsequently said that "any combination which tampers with price is engaged in unlawful activity."⁴⁰ Union leaders, nevertheless, want their contracts to be *sui generis*, and ask all the benefits of the approach in the *Apex* case without this possible detriment.

The *Apex* opinion left federal control of labor through the Sherman Act with little or no punch at all, and *United States v. Hutcheson*⁴¹ put a large glove on that already ineffective left hand. Let us now consider what Justice Frankfurter said in the latter case, and then re-examine the *Apex* doctrine under this new light.

³⁶ See ARNOLD, *THE BOTTLENECK OF BUSINESS* (1940). See also an interesting commentary on this publication: McLaughlin, *Bottlenecks (Union Made Included)* (1941) 8 U. OF CHI. L. REV. 215.

³⁷ See note 4, *supra*.

³⁸ Especially *United States v. Hutcheson*, 312 U. S. 219, 85 L. Ed. 788, 61 S. Ct. 463 (1941), *infra* page 213 *et seq.* (Sherman Act inapplicable to activity prompted by jurisdictional strife).

³⁹ *Cavers, Labor v. The Sherman Act* (1941) 8 U. OF CHI. L. REV. 246.

⁴⁰ 310 U. S. 150, 84 L. Ed. 1129, 60 S. Ct. 811 (1940). (*United States v. Socony-Vacuum Oil Co.*)

⁴¹ 312 U. S. 219, 85 L. Ed. 788, 61 S. Ct. 463 (1941).

UNITED STATES V. HUTCHESON

For years two branches of the American Federation of Labor have quarreled over which group has the right to perform the work of erecting and dismantling machinery. The Carpenters' Union traces its ancestry to the Millwrights, who did the repairing of the wooden paddles for mills run by water power. They contend that this history forces the conclusion that they should service machinery although it is now made of metal rather than wood. The Machinists parry this contention with their title. A compromise between the two factions was reached in 1932, but within three weeks, Mr. Hutcheson decided that the Carpenters had been short-changed, and repudiated the agreement.⁴² The jurisdictional warfare continued.

Anheuser-Busch Brewery found itself involved in one of the battles between the rival unions. The Brewery contracted with Borsari Tank Corporation for the erection of additional buildings, and a lessee of the Brewery, apparently by coincidence, entered a contract to have an additional office building erected on the leased premises about the same time. At this strategic moment, the Carpenters demanded the job of handling the machinery in the Brewery, and upon the company's refusal to fire the Machinists, they called a strike and requested union members and their friends to refrain from buying Anheuser-Busch beer. The strike stopped all new construction with considerable loss to the Brewery, the Tank Corporation, and the complete stranger to the controversy, the lessee.⁴³

Thurman Arnold prosecuted under the Sherman Act. Recalling for the moment the *Apex* decision, Justice Stone's reasoning would seem to acquit the defendants here. The *Hutcheson* case⁴⁴ involved peaceful striking, picketing, and boycotting, and no injury to competition resulted. Justice Stone perceived this easy, conventional solution, and in a concurring opinion, held that his "interstate market" test defeated the indictment. Furthermore the conflict was purely local and involved no intent to control interstate markets, so the *First Coronado* case doctrine would exonerate the defendants. Even the boycott cases would hardly censure their activity because the boycott here was not prosecuted seriously.

Justice Frankfurter and the majority, however, had other ideas. Three approaches to labor controversies versus anti-monopoly legislation have been discovered thus far: the "intent toward commerce" test of the *Coronado* decisions, the "means" test of the boycott cases, and the "effect" test of the *Apex* opinion. Only the purpose was questionable in the *Hutcheson* case—the jurisdictional strife. The Court, however, was unwilling to follow along with Mr. Arnold and to use the Sherman Act to condemn labor controversies unappealing to the Court (or probably more accurately, unappealing to Thurman Arnold). Justice Frank-

⁴²Steffen, *Labor Activities in Restraint of Trade: The Hutcheson Case* (1941) 36 ILL. L. REV. 1, 6. See also: Steffen, *Labor Activities in Restraint of Trade: The Apex Case* (1941) 50 YALE L. J. 787.

⁴³Incidentally, the union members of other branches of the A. F. of L. were so displeased with this jurisdictional squabble that the picket line was passed daily by many union members. See Steffen, *supra* note 42, 36 ILL. L. REV. 1 at 9 (1941).

⁴⁴*United States v. Hutcheson*, 312 U. S. 219, 85 L. Ed. 788, 61 S. Ct. 463 (1941).

furter chose to throw his hands up in the air and to declare that Congress, instead of having an intent in the Sherman Act to let the Courts work out a program for the good of the nation as a whole,⁴⁵ had an intent in the Norris-La Guardia Act to protect labor. The intent, it was held, must be read back into the Sherman Act to exempt labor from the operation of anti-monopoly legislation.

The technique used by the Justice is very interesting. First he interprets the Norris-La Guardia Act to amend the Clayton Act. As will be recalled, the *Duplex case*⁴⁶ held that a labor dispute must exist between an employer and his employees before the anti-injunction section of the Clayton Act comes into operation. Since the Norris-La Guardia Act says there shall be "no injunction in a labor dispute" which can be found whether the proximate relation of employer-employee exists or not, Justice Frankfurter interprets this latest statute to amend the Clayton Act and to overrule the *Duplex case*.⁴⁷ Then he applied the Clayton Act to the *Hutcheson* case and discovered that the catch-all clause says that nothing herein contained shall be "held to be violations of any law of the United States."⁴⁸ Conclusion: the Sherman Act is inapplicable.

Restated, the reasoning goes like this. The Norris-La Guardia Act talks only about injunctions, but it demonstrates a Congressional policy which calls for a re-examination of the Clayton Act, which talked about injunctions and also the anti-trust laws. The catch-all clause of the Clayton Act indicates that that which cannot be enjoined cannot violate the Sherman Act. So if the activity is unenjoinable under the Norris-La Guardia Act, it is unpunishable under the Sherman Act, for conduct on the part of labor which is not subject to injunction should not "in a criminal proceeding become the road to prison." By inference, the same reasoning would preclude an action for treble damages—the road should not contain potholes of civil liability, either.⁴⁹

The *Apex* case suggested that a "rule of reason" was applicable to labor activities under the Sherman Act. While the "rule" may be different from that expressed in the cases concerning business when applied to labor,⁵⁰ Justice Stone did expressly say that, under some circumstances and in some situations, labor could be plagued by the Anti-Monopoly Statute. The *Hutcheson* opinion, however, denies the Court the power to distinguish the reasonable from the unreasonable or the "licit from the illicit", although the language quoted earlier in this paper from the Clayton Act would intimate that Congress certainly had

⁴⁵ Mr. Arnold's theory. See page 212, *supra*.

⁴⁶ Note 10, *supra*.

⁴⁷ The Norris-La Guardia Act, however, says nothing about the Clayton Act.

⁴⁸ Set out, *supra* page 207.

⁴⁹ Observe how Justice Stone comforted capital by suggesting state remedies still available. Part of Mr. Frankfurter's opinion suggests that the states would be in contravention of federal policy in granting relief.

⁵⁰ Cf. with the *Apex* case such cases as *United States v. Socony-Vacuum Oil Co.*, 310 U. S. 150, 84 L. Ed. 1129, 60 S. Ct. 811 (1940), *rehearing denied*, 310 U. S. 658, 84 L. Ed. 421, 60 S. Ct. 1091 (1940); *United States v. United Shoe Machinery*, 247 U. S. 32, 62 L. Ed. 968, 38 S. Ct. 473 (1917); *United States v. American Tobacco Co.*, 221 U. S. 106, 55 L. Ed. 663, 31 S. Ct. 632 (1910); *Standard Oil Co. v. United States*, 221 U. S. 1, 55 L. Ed. 619, 31 S. Ct. 502 (1910).

“proper” labor activities in mind.⁵¹

Aside from quarreling with this expansion of the Clayton Act, let us return to a consideration of the applicability of the Norris-La Guardia Act to anti-trust prosecutions.⁵² The injunction has always been a thorn in the side of labor. Picketing, striking, and boycotting are effective because they place pressure upon the employer in his every day business. They are tortious because they are injurious, but if for a proper purpose, and if primary, the tort is justified.⁵³ Many courts, however, have issued temporary injunctions, determined the cause, found for the laborers and dissolved the injunction months or years later. These were a victory for capital, although the decisions went to labor, for the injunction stopped the vital pressure by the labor union at the height of the dispute. Legislators realized that it would be fairer in close cases to let the union continue its activity and to leave the employer merely his remedy by way of damages. Anti-injunction statutes were born.

The anti-injunction statutes aimed to help labor by ruling out of the contest an unfair weapon—the injunction. These statutes *do not* say that labor is beyond reproach, and damages remain for the wronged employer.

Just as damages and injunctions are different types of relief, so, too, the criminal prosecution is a different form of sanction available to the State under the Sherman Act. Justice Frankfurter, nevertheless, declared that the anti-injunction section in the Norris Act should be read to extinguish criminal prosecutions of labor under the Sherman Act, despite the fact that the Norris Act lacked the catch-all clause of Section 20 of the Clayton Act. Criticism of this technique has been showered upon the Justice, and the tomatoes were made juicier by the fact that Mr. Frankfurter himself declared in 1930 that the proposed Norris-La Guardia Act was solely an anti-injunction measure!⁵⁴ That Congress intended injunctions based upon the Sherman Act to be eliminated by the Norris Act cannot be successfully disputed, but considerable doubt exists whether they intended to say “labor can do no wrong.”

Justice Frankfurter could have avoided much criticism. Justice Brandeis wrote the dissent in the *Duplex* case,⁵⁵ and of late, the

⁵¹ Justice Frankfurter said the “licit and the illicit under Section 20 are not to be distinguished by any judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means.” He does not mention Section 6 of the Clayton Act which refers to the “legitimate objects” of labor unions. Furthermore, examine Section 20 itself. The justice’s conclusion is very debatable.

⁵² Justice Frankfurter started with the Norris Act and worked back to the Sherman Act. In his concurring opinion, Justice Stone starts with the Sherman Act and goes no further, for he finds it inapplicable under his test in the *Apex* case. For an interesting comparison of these two techniques, see Tunks, *supra* note 11 at 977.

⁵³ 1 TELLER, LABOR DISPUTES AND COLLECTIVE BARGAINING (1940) Sec. 136.

⁵⁴ FRANKFURTER and GREENE, THE LABOR INJUNCTION (1930) 222. “No such interpretation is possible for the proposed bill, which explicitly applies only to the authority of the United States courts ‘to issue any restraining order or injunction.’ All other remedies in federal courts and all remedies in state courts remain available.”

⁵⁵ See discussion, *supra* page 208.

Supreme Court has experienced little difficulty in making his dissents and those of Justice Holmes the law of the land. Why bother with the Norris Act? Why not just say that the Clayton Act removed labor activity from the Sherman Act? Perhaps other members of the Court were unwilling to be so bold. The criticism, however, has fallen upon the back of Justice Frankfurter.

One could continue to criticize for many pages⁵⁶ either the result in the *Hutcheson* case⁵⁷ or the technique used by the Court.⁵⁸ More worthwhile, however, is a consideration of the law as declared. Are there any shreds of the Sherman Act which still apply to labor activities?

The *Hutcheson* case may warrant the conclusion that the Sherman Act has been written off the books as far as labor is concerned^{58a} with one notable exception—where labor conspires with capital as was done in the *Brims* case.⁵⁹ A dictum suggests that union combinations with non-union groups to effect control of commodity markets will still be unlawful under the anti-trust laws.⁶⁰ The *Apex* doctrine is inapplicable to labor acting alone, for the *Hutcheson* case says that laborers playing by themselves cannot violate the Sherman Act. Labor can use all the low punches it wishes in squabbles, either with business or with other branches of itself. If capital joins the game, however, the rule book must come out, and the "rules of the game" followed.

In applying the Norris-La Guardia Act to other fact patterns the Court has said that the statute "does not concern itself with the background or motives of the dispute."⁶¹ It should follow that this interpretation carries over into cases involving the applicability of the Sherman Act. One authority, however, has suggested that the Sherman Act is still applicable if the activity has nothing to do with the "terms or conditions of employment" or concerns "restrictive union rules."⁶² The *Hutcheson* case gives little support to this view in light of the language quoted above.⁶³ If labor is prompted to demonstrate, the controversy will undoubtedly constitute a "labor dispute" and the Sherman Act will be inapplicable regardless of the subject matter of the dispute.⁶⁴

⁵⁶ For example, the Court's failure to mention Section 6 of the Clayton Act, set out *supra* page 207, and noted *supra* note 51.

⁵⁷ Steffen, *supra* note 42; Teller, *supra* note 24.

⁵⁸ Cavers, *supra* note 39; Steffen, *supra* note 42; Gregory, *supra* note 33, and especially his later Comment (1941) 8 U. OF CHI. L. REV. 503, and Caver's few words, Comment (1941) 8 U. OF CHI. L. REV. 516; Teller, *supra* note 24. Contrast a justification of the Court's position: Nathanson & Wirtz, *The Hutcheson Case: Another View* (1941) 36 ILL. L. REV. 41. (See also Steffen's rebuttal, p. 58).

^{58a} Teller, *supra* note 24, reaches this conclusion in his introduction!

⁵⁹ *Supra* page 209, note 19.

⁶⁰ "So long as a union acts in its self-interest and does not combine with non-labor groups. . ." 312 U. S. 219, 232, 85 L. Ed. 788, 793, 61 S. Ct. 463, 466 (1941), citing *U. S. v. Brims*, 272 U. S. 549, 71 L. Ed. 403, 47 S. Ct. 169 (1926). See Comment (1941) 8 U. OF CHI. L. REV. 503 (written by Charles O. Gregory).

⁶¹ *New Negro Alliance v. Sanitary Grocery Co.*, 303 U. S. 552, 561, 82 L. Ed. 1012, 1016, 58 S. Ct. 703, 707 (1938). See also Teller, *supra* note 24, at 41, n. 78.

⁶² Tunks, *supra* note 11 at 999.

⁶³ *Supra*, page 213.

⁶⁴ *Milk Wagon Drivers' Union v. Lake Valley Farm Products*, 311 U. S. 91, 85 L. Ed. 63, 61 S. Ct. 122 (1940).

The Norris Act sets up a statutory procedure which must be explicitly followed to obtain an injunction when "fraud or violence" is involved. What about the addition of these two elements to an anti-trust prosecution of labor? The granting of an injunction under the Sherman Act might be held to be a short cut of these statutory requirements. Damages and criminal prosecution, however, should still be available in this limited field if the test of the *Apex* case is satisfied.⁶⁵

Justice Frankfurter's opinion in the *Hutcheson* case has been sharply criticized as "judicial legislation."⁶⁶ In another sense, however, does not the decision *ask Congress to legislate?*⁶⁷ Mr. Frankfurter's technique might be paraphrased as follows: "The Norris-La Guardia Act indicates that the Sherman Act should not be applied to labor. We of the Court have no tools with which to control labor. You, Congress, must, therefore, give us something that specifically deals with labor if you want to control their activities that violate the spirit of a competitive society." Of course, judicial legislation can be done negatively by ignoring the true import of a statute.⁶⁸ The position of labor under the Sherman Act, however, has never been clear, and the opinion might well be interpreted as telling Congress that it should enact new legislation if federal control of union activities is desired. The employers have been given their medicine in the form of the Wagner Act and the "free speech" cases,⁶⁹ a "companion bill" giving labor "glass pockets" too may be in order.⁷⁰ Under the present state of anti-monopoly legislation versus labor activities, new legislation is needed, for the old has failed to prove satisfactory.

Let us now turn to a consideration of the one remaining problem. What is a labor union? When is a group entitled to the protection of the *Hutcheson* case from the Sherman Act?

FISHERMEN ARE BUSINESS MEN

Not long after the *Hutcheson* case the Court was called upon to determine the applicability of the Sherman Act to a controversy between a salmon packer and fishermen. If the activities of the fishermen's "union" in *Columbia River Packers v. Hinton*⁷¹ provoked a "labor dispute," then they were non-enjoinable under the Sherman Act, according to the *Hutcheson* doctrine. The Court, however, found no employer-employee relation, no dispute between labor and capital, and granted the injunction.

⁶⁵ The *Apex* case involved violence, but there was no injury to competition.

⁶⁶ Justice Robert's so characterized it in his dissent to the *Hutcheson* case.

⁶⁷ Cf. herein Nathanson & Wirtz, *supra* note 57, at 56.

⁶⁸ For example, the brush-off given to the express words of Washington's anti-injunction statute in *Safeway Stores v. Retail Clerks' Union*, 184 Wash. 322, 51 P. (2d) 372 (1935).

⁶⁹ *American Federation of Labor v. Swing*, 312 U. S. 321, 85 L. Ed. 855, 61 S. Ct. 568 (1941); *Thornhill v. Alabama*, 310 U. S. 88, 84 L. Ed. 1093, 60 S. Ct. 736 (1940); *Senn v. Tile Layers Protective Union*, 301 U. S. 468, 478 (1937).

⁷⁰ See William Hard, *Should Labor Have Glass Pockets* (1942) *READER'S DIGEST*, January, page 1. See also Walter Merritt, *The Open or Closed Shop for War Industries?* (1942) *BULLETIN OF AMERICA'S TOWN MEETING OF THE AIR*, Vol. 7, No. 22.

⁷¹ 315 U. S. 143, 62 Sup. Ct. 520, 86 L. Ed. Adv. Opinions 441 (1942).

Columbia River Packers purchased fish both from the members of the fishermen's "union" and from "scabs." The "union" demanded that the plaintiff company buy its fish only from "union" fishermen, and upon the packers' refusal to comply, the company was boycotted. The Court said that this was merely a "dispute among business men over the terms of a contract for the sale of fish,"⁷² that the fishermen's "union" was trying to monopolize the market, and that the fishermen were merely "independent contractors" selling fish rather than services.

The Court said that the purpose of the Norris-La Guardia Act is to protect labor from coercion, not to control the sale of commodities (fish). This thought throws doubt upon the propriety of the tests used by the Court to determine whether a labor dispute existed. Should the Court talk about agency (employees vs. independent contractors) or sales (sale of services vs. sale of goods), or should the justices look at the economic positions of the contestants? The latter might well be preferable, for labor problems are somewhat *sui generis*. In fact, does not the *Hutcheson* case almost admit the impropriety of applying general sanctions (such as the Sherman Act) to labor controversies? The fisherman is very close to the piece-work laborer. The packer's refusal to purchase only from the "union" is very similar to an employer's denial of the closed shop. Labor activity to foster the latter, however, is unenjoinable.⁷³

Of course, the Court has to draw some line between "labor disputes" and strife between two economic groups. A contrary decision in the *Columbia River Packers* case would have presented the problem of the extent to which agricultural organizations could go to raise prices offered by produce dealers. It is submitted, however, that if the *Hutcheson* case is correct, and that if the prevention of coercion of labor is the purpose of the Norris-La Guardia Act, then the Court should approach problems similar to the *Columbia River Packers* situation on the basis of their analogy to labor controversies, rather than by applying the traditional tests of agency and sales.

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⁷² 62 Sup. Ct. 521 (1942).

⁷³ *Apex Hosiery v. Leader*, 310 U. S. 469, 84 L. Ed. 1311, 60 S. Ct. 982 (1940).