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COMMENTS

THE ANTITRUST LAWS AND LABOR

I. INTRODUCTION

In recent decades the question of concentration of economic power within labor unions has been the source of much controversy and debate.¹ The method of regulating the effects of this power constitutes the core of several labor statutes presently in force.² Despite these statutory provisions, however, many of the economic problems inherent in such a situation still remain unsolved.³ The reason for this predicament, it has been suggested,⁴ lies in the almost complete immunity from federal antitrust statutes which labor unions presently enjoy. At common law, certain labor activities were held to be restraints of trade and consequently illegal.⁵ Similarly, the first federal antitrust law, the Sherman Act, was also applicable to labor unions.⁶ Subsequent legislation⁷ and court interpretation,⁸ however, have dealt with unions more generously and have created the "labor antitrust exemption."

A. *Labor Market and Product Market*

When speaking of labor and antitrust, it is fundamental to distinguish between the labor market and the product market. The two markets are closely related in that the buyer in the former, management, is the seller in the latter. Further, since "the price of a commodity tends to equal its cost of produc-

1. See Iserman, *Labor Monopoly Problems*, 38 A.B.A.J. 743 (1952); Kelley, *Should Labor Unions Be Subject to Anti-Trust Laws? Yes.*, 36 Mich. S.B.J. 24 (1957); Segal, *Labor Unions and Monopoly*, 66 Com. L.J. 38 (1961). It should be noted that the 1961-1962 national intercollegiate debate topic is: Resolved: That Labor Organizations Should Be Under the Jurisdiction of Anti-Trust Legislation; see Walch, *Debate Handbook on Anti-trust Laws and Labor* (1961); cf. Krock, *In the Nation*, N.Y. Times, April 19, 1962, p. 30, col. 4.

2. Norris-LaGuardia Act §§ 1-15, 47 Stat. 70 (1932), as amended, 29 U.S.C. §§ 101-10, 113-15 (1958); Labor Management Relations Act, 61 Stat. 136 (1947), as amended, 29 U.S.C. §§ 141-44, 151-67, 171-82, 185-88, 191-97 (1958) (Supp. II, 1959-1960); Labor-Management Reporting and Disclosure Act, 73 Stat. 519 (1959), 29 U.S.C. §§ 401-531 (Supp. II, 1959-1960).

3. See notes 27-45 *infra* and accompanying text.

4. See Chamberlin, *The Economic Analysis of Labor Union Power* (1958); Pound, *Legal Immunities of Labor Unions* (1957).

5. See *Commonwealth v. Hunt*, 45 Mass. (4 Met.) 111 (1842). *The King v. Journeymen-Tailors*, 8 Mod. 10, 88 Eng. Rep. 9 (K.B. 1721). See also Dooley, *Antitrust Legislation and Labor Unions*, 11 Lab. L.J. 911, 915 (1960).

6. 26 Stat. 209 (1890), as amended, 15 U.S.C. §§ 1-2 (1958).

7. Clayton Antitrust Act §§ 6, 20, 38 Stat. 731 (1914), 15 U.S.C. § 17 (1958); 38 Stat. 738 (1914), 29 U.S.C. § 52 (1958); Norris-LaGuardia Act § 5, 47 Stat. 71 (1932), 29 U.S.C. § 105 (1958).

8. See *Hunt v. Crumboch*, 325 U.S. 821 (1945); *Allen Bradley Co. v. Local 3, Int'l Bhd. of Elec. Workers*, 325 U.S. 797 (1945); *United States v. Hutcheson*, 312 U.S. 219 (1941); *Apex Hosiery Co. v. Leader*, 310 U.S. 469 (1940).

tion,"⁹ and since wages represent a large portion of these costs, it would appear that the two markets are inexorably linked. Yet, an essential difference exists with respect to the subject matter of each;¹⁰ the labor market is concerned with the purchase and sale of employees' services, while the product market involves transactions in the company's product.

Monopoly power has been defined as the power to fix prices or to exclude competition.¹¹ On this basis, there can be no doubt that unions possess such capabilities. It is of the very nature and purpose of every labor organization that it be able to eliminate competition in the *labor market*.¹² It is only when labor possesses this monopoly power in the labor market that a range for collective bargaining appears at all. Since the employer is a powerful single unit on his side, while the employee is typically a very small part of the larger aggregate, there is clearly an overwhelming case for sanctioning collective action by labor in an effort to establish a single unit to negotiate with management.¹³ Thus, it is not suggested that the antitrust laws should be applied to the labor market as such.¹⁴ This is true even though unions may use monopoly power to influence the price paid for labor on an industry-wide basis and consequently *indirectly* affect competition in the product market.¹⁵ But, when labor unions engage in practices such as banning new products or processes, exerting pressures against individuals and firms not parties to a labor dispute (secondary boycotts), dividing up territories, restricting output so as to control market prices, excluding various commodities from the product market, and directly participating in price-fixing agreements, they engage in activities which *directly* restrain trade in the product market, and which if engaged in by management would, in many cases, be violative of the antitrust laws.

B. *Applicable Statutes*

Section 1 of the Sherman Act makes "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States . . . illegal. . . ."¹⁶ The Supreme Court has qualified this prohibition to the extent that the word "every" must be interpreted in each case with due consideration as to whether the conduct being reviewed constitutes an *undue* restraint of competitive conditions, or a monopolization, or an attempt to monopolize. This standard gives the courts discretion to decide whether conduct is significantly and unreasonably anticompetitive in character and effect—the "rule of reason."¹⁷ Certain activities, however, by

9. This is the "law of cost." See Chamberlin, *op. cit. supra* note 4, at 32, 34.

10. *Id.* at 31.

11. See, e.g., *United States v. American Tobacco Co.*, 221 U.S. 106 (1911); *Standard Oil Co. v. United States*, 221 U.S. 1 (1911).

12. Cox, *Labor and the Antitrust Laws—A Preliminary Analysis*, 104 U. Pa. L. Rev. 252, 254-55 (1955).

13. Chamberlin, *op. cit. supra* note 4, at 15.

14. Cox, *supra* note 12, at 254-55.

15. *Ibid.*

16. 26 Stat. 209 (1890), as amended, 15 U.S.C. § 1 (1958).

17. See *United States v. American Tobacco Co.*, 221 U.S. 106 (1911); *Standard Oil Co. v. United States*, 221 U.S. 1 (1911).

reason of their very nature or necessary effect are conclusively presumed to be unreasonable. Thus, any arrangement, which, either directly¹⁸ or by controlling production,¹⁹ fixes or stabilizes prices, or which unduly restricts "competitive opportunity or commercial freedom" is deemed a per se violation of section 1.²⁰

Section 2 states: "Every person who shall monopolize, or attempt to monopolize or combine or conspire . . . to monopolize any part of the trade or commerce among the several States . . . [is] guilty of a misdemeanor. . . ."²¹ Under this provision "economic monopoly becomes illegal monopolization not only (1) if it was achieved or preserved by conduct violating section 1 but also (2) if it was, even by restrictions not prohibited by section 1, *deliberately* obtained or maintained."²² Thus the element of purposiveness or deliberateness becomes essential to the existence of a section 2 violation.²³

II. UNION ACTIVITIES

A. General

In examining these activities we must at all times distinguish between those which have valid union objectives, and those which are aimed solely at direct control of the product market. The latter, more recent decisions have held, do not constitute a "labor dispute" and therefore are not within the antitrust exemption.²⁴ It is those activities which have as their ends valid union objectives—wages, terms and conditions of employment, etc.—to which the exemption is applicable.²⁵ The issue then, is whether these practices, when they cause anticompetitive effects prohibited by the antitrust laws, should be restricted, notwithstanding the objectives involved. Assuming that it is desir-

18. *United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927).

19. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940); *United States v. American Linseed Oil Co.*, 262 U.S. 371 (1923); *American Column & Lumber Co. v. United States*, 257 U.S. 377 (1921).

20. *Att'y Gen. Nat'l Comm. Antitrust Rep.* 12 (1955). See *International Salt Co. v. United States*, 332 U.S. 392 (1947) (tying arrangement held per se violation under Section 1 of Sherman Act and Section 3 of Clayton Act); *Fashion Originators' Guild of America v. FTC*, 312 U.S. 457 (1941) (group boycott is per se violative of Section 1 of Sherman Act); *United States v. Addyston Pipe & Steel Co.*, 85 Fed. 271 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899) (division of markets held per se violation of Section 1 of Sherman Act); cf. *Northern Pac. Ry. v. United States*, 356 U.S. 1 (1958) (tying arrangement held per se violation under Section 3 of Clayton Act).

21. 26 Stat. 209 (1890), 15 U.S.C. § 2 (1958).

22. *Att'y Gen. Nat'l Comm. Antitrust Rep.* 43 (1955). (Emphasis added.)

23. It should be noted that the "element of 'deliberateness' or 'purpose,' distinguishing economic monopoly from the offences of monopolization differs from the more demanding concept of 'specific intent' relevant where the offence alleged is an attempt to monopolize." *Ibid.* In cases of attempt to monopolize, proof of a specific or subjective intent to accomplish an unlawful result is required. *Swift & Co. v. United States*, 276 U.S. 311 (1928).

24. See, e.g., *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490 (1949) (application of state antitrust statute); *AFL v. American Sash & Door Co.*, 335 U.S. 538 (1949); *Lincoln Fed. Labor Union v. Northwestern Iron & Metal Co.*, 335 U.S. 525 (1949); *Whitaker v. North Carolina*, 335 U.S. 525 (1949).

25. *United States v. Hutcheson*, 312 U.S. 219 (1941).

able to restrict such activities, further problems arise as to how it can be done. Should the antitrust exemption be withdrawn—either totally or partially—thus making labor in some way subject to antitrust laws, or should certain activities be declared unlawful under the labor statutes? Assuming that the antitrust exemption is removed, would this require amendment of the Norris-LaGuardia Act?²⁶ Or, on the other hand, are there any alternatives to the “labor” and “antitrust” approaches? Before discussing these problems, it is important to note those union activities which have resulted in anticompetitive effects.

B. *Specific Activities*

A union's demands against the use of labor-saving devices which would displace its members, or in the alternative, demands that if new machines are used the same number of men must be employed, have been held legitimate activities which labor organizations may carry on in an effort to maintain employment and certain working conditions for their members.²⁷ Thus when the American Federation of Musicians imposed a ban on phonograph records and electrical transcriptions in 1942 and considerably reduced the market supply of these items for almost three years, the union's conduct was held not subject to the antitrust laws.²⁸ A similar result was reached by the Supreme Court when the International Hod Carriers and Common Laborers' Union struck to prevent the sale and delivery of truck cement-mixers which would have resulted in a reduction in production costs and considerably increased the supply of ready-mix concrete on the market.²⁹ On the other hand, where businessmen have combined to suppress patented inventions or technological improvements, their conduct has been held a *per se* antitrust violation.³⁰

Unions have legally imposed restrictions on production in order to maintain market prices and thus insure a constant or increasing wage scale—a valid union objective. Such was the case when the United Mine Workers curtailed all coal production to three days a week in order to stabilize production and prices.³¹ But any agreed-upon curtailment or shutdown by management which restricts production and fixes prices would constitute a section 1 violation, regardless of motive, simply because of the combination or conspiracy involved.³²

Unions, seeking to obtain more work for members, have lawfully used their economic power to compel business enterprises to use only products manu-

26. 47 Stat. 70 (1932), as amended, 29 U.S.C. §§ 101-10, 113-15 (1958).

27. See, e.g., *United States v. American Fed'n of Musicians*, 47 F. Supp. 304 (N.D. Ill. 1942), *aff'd*, 318 U.S. 741 (1943) (*per curiam*); *United States v. Carozzo*, 37 F. Supp. 191 (N.D. Ill.), *aff'd sub nom. United States v. International Hod Carriers Dist. Council*, 313 U.S. 539 (1941) (*per curiam*).

28. *United States v. American Fed'n of Musicians*, *supra* note 27.

29. *United States v. Carozzo*, *supra* note 27.

30. See *Hartford-Empire Co. v. United States*, 323 U.S. 386, 431 (1945); *Blount Mfg. Co. v. Yale & Towne Mfg. Co.*, 166 Fed. 555 (C.C.D. Mass. 1909).

31. *Penello v. UMW*, 88 F. Supp. 935 (D.D.C. 1950).

32. See *Virginia Excelsior Mills Inc. v. FTC*, 256 F.2d 538 (4th Cir. 1958). See also *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940).

factured in plants employing members of a certain union.³³ Often such demands take the form of contracts under which nonunion employers and employers and products designated by the union as "unfair" are boycotted. Thus in New York City the electrical workers union attempted to exclude from its geographical jurisdiction all nonunion and out-of-city electrical goods.³⁴ More recently, in the Western States, the carpenters' union refused to handle low cost Canadian shingles because of the competition with local mills.³⁵ These practices increase prices and exclude competing products from the consumer market. On the other hand, where businessmen, acting in concert, refuse to deal with others, such refusals to deal would be deemed per se violations of Section 1 of the Sherman Act.³⁶

Arrangements whereby industry-wide unions unite on a "one wage-and-working conditions" demand, applicable to an entire industry, with a nationwide strike as the alternative, have the net result of price fixing through noncompetition.³⁷ A conspiracy to fix prices through noncompetition would amount to a per se antitrust violation if engaged in by management.³⁸ But this involves a restraint of competition in the labor market and therefore concerns a practice which is essential to the existence of labor organizations. The possibility of applying antitrust policies is therefore dismissed for reasons of impracticability.

Labor unions may arbitrarily divide up and allocate industries, territories, and jurisdictions among themselves to the exclusion of competitors.³⁹ If businessmen entered into similar agreements, they would be guilty of conspiring to exclude competition, a section 1 violation.⁴⁰ Yet this device is a common practice among labor organizations. It is necessary as a means of preserving the natural union monopoly power in the labor market.

Secondary boycotts involve combinations not merely to refrain from dealing with a trader or manufacturer, or to advise or persuade his customers to so

33. See, e.g., *Allen Bradley Co. v. Local 3, Int'l Bhd. of Elec. Workers*, 325 U.S. 797 (1945); *Washington-Oregon Shingle Weavers' Dist. Council*, 101 N.L.R.B. 1159 (1952), enforcement granted, 211 F.2d 149 (9th Cir. 1954); cf. *Hunt v. Crumboch*, 325 U.S. 821 (1945); *United States v. Building & Constr. Trades Council*, 313 U.S. 539 (1941) (per curiam).

34. *Allen Bradley Co. v. Local 3, Int'l Bhd. of Elec. Workers*, supra note 33.

35. *Washington-Oregon Shingle Weavers Dist. Council*, 101 N.L.R.B. 1159 (1952), enforcement granted, 211 F.2d 149 (9th Cir. 1954).

36. See, e.g., *Millinery Creators' Guild, Inc. v. FTC*, 312 U.S. 469 (1941); *Fashion Originators' Guild of America, Inc. v. FTC*, 312 U.S. 457 (1941); *Eastern States Retail Lumber Dealers' Ass'n v. United States*, 234 U.S. 600 (1914).

37. See Krock, *Legal for Unions, Illegal for Management*, U.S. News & World Report Dec. 7, 1959, p. 124.

38. See, e.g., *United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927); *American Column & Lumber Co. v. United States*, 257 U.S. 377 (1921).

39. See Nat'l Ass'n of Mfrs., *Monopoly Power as exercised by labor unions 22* (post 1956 undated memorandum); White, *Should Unions Have Monopoly Powers?*, *Readers Digest* Aug. 1955, p. 33, where the author discusses several territorial division practices.

40. See, e.g., *Timken Roller Bearing Co. v. United States*, 341 U.S. 593 (1951); *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211 (1899), affirming 85 Fed. 271 (6th Cir. 1898).

refrain (primary boycott), but to exert coercive pressure upon such customers, actual or prospective, in order to cause them to withhold or withdraw patronage from such trader or manufacturer through fear of loss or damage to themselves, should they deal with him.⁴¹ In the past this device has been used quite effectively by unions in an effort to compel employers to meet contract demands respecting wages and conditions of employment.⁴² Although such practices have always been unlawful for management under section 1,⁴³ even today they involve no antitrust violation for labor.⁴⁴ Nevertheless, unions are not free to engage in such activities since they constitute an unfair labor practice under Section 8(b)(4) of the Taft-Hartley Act.⁴⁵

Thus, the activities of labor organizations which tend to reduce or eliminate competition may be divided into three classes: those which involve restraints of trade in the product market and are lawful; those which concern the labor market; and those which restrict competition in the product market but are unlawful under labor statutes. Practices in the last two categories are not in issue since they are either necessary to preserve the union's monopoly in the labor market or prohibited by the labor statutes. Those of the first, however, present many problems which, as yet, remain unsolved. The legality of these activities is dependent upon the scope of the antitrust exemption which Congress has granted to labor and the construction which the Supreme Court has given to the immunity concept as it is found in the statutes.

III. HISTORY OF THE EXEMPTION

A. *Legislative Immunity*

1. Sherman Act of 1890

Upon the passage of the Sherman Act,⁴⁶ controversies arose regarding coverage and exemptions. When read literally, section 1 prohibited every combination and conspiracy in restraint of trade whether engaged in by business enterprises or by others.⁴⁷ It was first argued that Congress had intended to exempt

41. See 5 Toulmin, *Anti-Trust Laws* § 5.32, at 252 (1950); cf. *Duplex Printing Press Co. v. Deering*, 254 U.S. 443 (1921).

42. See, e.g., *United States v. Hutcheson*, 312 U.S. 219 (1941).

43. "A combined refusal to deal with anyone as a means of preventing him from dealing with a third person, against whom the combined action is directed, is a boycott; and a boycott is prima facie unlawful; it must be justified." *Fashion Originators' Guild of America, Inc. v. FTC*, 114 F.2d 80, 84 (2d Cir. 1940), aff'd, 312 U.S. 457 (1941), citing *United States v. American Livestock Comm'n*, 279 U.S. 435 (1929).

44. See *United States v. Hutcheson*, 312 U.S. 219 (1941), where Mr. Justice Stone pointed out that § 20 of the Clayton Act makes lawful the action of any person "'ceasing to patronize . . . any party to such dispute' or 'recommending, advising, or persuading others by peaceful and lawful means so to do.'" *Id.* at 242 (concurring opinion). See generally Gregory, *Union Peacetime Restraints in Collective Bargaining*, 10 U. Chi. L. Rev. 177 (1943).

45. 61 Stat. 140 (1947), as amended, 29 U.S.C. § 158(b)(4) (1958) (Supp. II, 1959-1960).

46. 26 Stat. 209 (1890), as amended, 15 U.S.C. §§ 1-7 (1958).

47. Every contract, combination . . . in restraint of trade . . . is declared to be ille-

labor unions. Since the law as finally enacted, however, expressly omitted an exemption provision contained in a prior draft, this interpretation was soon rejected.⁴⁸ Within a few years, several decisions by federal circuit courts indicated approval of this inclusive construction,⁴⁹ but it was not until 1908 that the Supreme Court determined that labor unions were clearly within the scope of the act. In *Loewe v. Lawlor*,⁵⁰ more popularly known as the *Danbury Hatters* case, the United Hatters of America imposed a nationwide secondary boycott against the plaintiff-hat manufacturing company in an effort to compel consent to a closed shop. The Court held that such action constituted "a combination 'in restraint of trade or commerce among the several States,' in the sense in which those words are used in the [Sherman] act. . . ."⁵¹ Not until three years later, however, when the Court ruled that such illegal combinations could be dissolved,⁵² was the need for political action on the part of labor regarding the antitrust provisions realized. The result was the inclusion of an apparent labor exemption clause in the Clayton Act of 1914.⁵³

2. Clayton Act of 1914

This act,⁵⁴ *inter alia*, granted private parties the right to secure injunctions against continued violations of both the Sherman and Clayton Antitrust Acts. But section 6 stated that: "the labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor . . . organizations. . . ."⁵⁵ Thus, unions were afforded protection in the labor market by legalizing them as organizations which, unlike manufacturing associations, were not subject to dissolution when they violated the antitrust laws.⁵⁶ Supplementing this provision, section 20 barred the issuance of federal injunctions prohibiting activities such as strikes, boycotts or picketing, "in any case between an employer and employees . . . or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment. . . ."⁵⁷ In less than a decade, however,

gal. . . ." Sherman Antitrust Act § 1, 26 Stat. 209 (1890), as amended, 15 U.S.C. § 1 (1958).

48. See 21 Cong. Rec. 2729 (1890). See also *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944), where the Court intimated that the legislative history of the Sherman Act clearly shows that its applicability to combinations of labor as well as capital was not an oversight.

49. *United States v. Debs*, 64 Fed. 724 (N.D. Ill. 1894); *United States v. Workingmen's Amalgamated Council*, 54 Fed. 994 (C.C.E.D. La. 1893); *Blindell v. Hagan*, 54 Fed. 40 (C.C.E.D. La. 1893).

50. 208 U.S. 274 (1908).

51. *Id.* at 292.

52. *Standard Oil Co. v. United States*, 221 U.S. 1 (1911).

53. 38 Stat. 731 (1914), 15 U.S.C. § 17 (1958).

54. Clayton Antitrust Act § 16, 38 Stat. 737 (1914), 15 U.S.C. § 26 (1958).

55. 38 Stat. 731 (1914), 15 U.S.C. § 17 (1958).

56. See *Duplex Printing Press Co. v. Dearing*, 254 U.S. 443 (1921).

57. 38 Stat. 738 (1914), 29 U.S.C. § 52 (1958).

any hint of blanket antitrust immunity for unions was explicitly dispelled. In *Duplex Printing Press Co. v. Deering*,⁵⁸ the Supreme Court restrained the machinists' union from engaging in a secondary boycott stating:

[B]y no fair or permissible construction can it [the Clayton Act] be taken as authorizing any activity otherwise unlawful, or enabling a normally lawful organization to become a cloak for an illegal combination or conspiracy in restraint of trade, as defined by the anti-trust laws.⁵⁹

Thus, according to Mr. Justice Pitney, neither the legitimacy of the union's objectives, nor the nonviolent means employed to achieve these objectives could have any effect on a determination of the legality of the activities in question; the activities simply being within the interdict of the Sherman Act.⁶⁰ In respect to Section 20 of the Clayton Act, the Court, construing the act strictly, found it applicable only in disputes between those parties standing in the proximate relationship of employer and employee, and further ruled that a union does not stand in this relationship when the dispute affects only a few of its members.⁶¹ As a result, "Mr. Justice Pitney . . . thereby reduced . . . [Sections 6 and 20] of the Clayton Act to sound and fury, signifying nothing."⁶²

The result of the *Duplex* case was to engender uncertainty. Dean Landis, in an effort to explain some of the incongruities in the federal decisions during the 1920's, distinguishes between restraints upon distribution and those upon manufacture;⁶³ the former being violative of the Sherman Act regardless of the lawfulness of the objectives or the peaceableness of the means employed,⁶⁴ while the latter were lawful if incidental to the pursuit of legitimate union objectives.⁶⁵ Organized labor, in an effort to clarify its status under the anti-trust laws sought a statute which would grant unions relief from injunctions and at the same time confer complete antitrust immunity. As a result, in 1932, the Norris-LaGuardia Act⁶⁶ was enacted.

58. 254 U.S. 443 (1921).

59. *Id.* at 469.

60. "It is settled . . . that such a restraint produced by peaceable persuasion is as much within the prohibition as one accomplished by force or threats of force; and it is not to be justified by the fact that the participants in the combination or conspiracy may have some object beneficial to themselves or their associates which possibly they might have been at liberty to pursue in the absence of the statute." *Duplex Printing Press Co. v. Deering*, 254 U.S. at 467-68. See also Landis, *The Apex Case*, 26 *Cornell L.Q.* 191 (1941).

61. *Duplex Printing Press Co. v. Deering*, 254 U.S. at 472.

62. Landis, *supra* note 60, at 198.

63. *Id.* at 201-05.

64. *Id.* at 202-03.

65. *United Leather Workers v. Herkert & Meisel Trunk Co.*, 265 U.S. 457 (1924). In this respect, Dean Landis also considers the two Coronado cases: *Coronado Coal Co. v. UMW*, 268 U.S. 295 (1925); *UMW v. Coronado Coal Co.*, 259 U.S. 344 (1922); Landis, *supra* note 60, at 201-05.

66. 47 Stat. 70 (1932), as amended, 15 U.S.C. §§ 101-10, 113-15 (1958).

3. Norris-LaGuardia Act of 1932

The primary purpose of this act was to restrict the power of federal courts to issue injunctions in labor disputes.⁶⁷ It reflected a change in congressional policy and effectively resulted in federal support of labor unions. The anti-trust portion of the act in substance provided that federal courts no longer

have jurisdiction to issue a restraining order or temporary or permanent injunction upon the ground that any of the persons participating or interested in a labor dispute constitute or are engaged in an unlawful combination or conspiracy because of the doing in concert of . . . acts . . .⁶⁸

which are in restraint of trade. Thus the intervention of the courts in union controversies was terminated, the Supreme Court subsequently holding that the Norris-LaGuardia Act effectively immunized such disputes from the *equitable* jurisdiction of the antitrust laws and consequently the courts' most powerful tool—the injunction.⁶⁹

The ultimate effect of granting labor organizations an exemption under the antitrust laws has been characterized as "treating the Norris-LaGuardia Act as *pro tanto* repealing the Sherman Act"⁷⁰ with respect to unions. The extent to which this exemption applies is revealed by a series of Supreme Court decisions between 1940 and 1945.

B. *Judicial Immunity*

In 1940 the Supreme Court decided the first case in which it attempted to halt the use of the Sherman Act as a means of policing strikes affecting interstate commerce. In *Apex Hosiery Co. v. Leader*,⁷¹ the union, seeking to enforce demands for a closed shop, engaged in a sit down strike that compelled a shutdown of the factory. It was held that a restraint on the movement of goods in interstate commerce resulting from this shut down was not illegal and hence the petitioner was not entitled to treble damages under the Sherman Act. Even though a natural and probable consequence of the acts of the strikers was to prevent substantial interstate shipments by the employer, this was not the kind of restraint of trade or commerce at which the Sherman Act was aimed; there must be in addition, the unlawful objective of unreasonably restraining competition. It was this concept which was adopted by the Supreme Court, a year later, in *United States v. Hutcheson*,⁷² and extended to what is the current labor antitrust exemption.

In the *Hutcheson* case, an employer involved in a jurisdictional dispute between the carpenters' and machinists' unions assigned the controversial work to the machinists. The carpenters' union then called a strike, picketed, re-

67. Norris-LaGuardia Act § 1, 47 Stat. 70 (1932), 29 U.S.C. § 101 (1958).

68. Norris-LaGuardia Act § 5, 47 Stat. 71 (1932), 29 U.S.C. § 105 (1958).

69. See *United States v. Hutcheson*, 312 U.S. 219 (1941); *Apex Hosiery Co. v. Leader*, 310 U.S. 469 (1940).

70. Pound, *Legal Immunities of Labor Unions* 34 (1957).

71. 310 U.S. 469 (1940).

72. 312 U.S. 219 (1941).

quested its members and others throughout the nation to boycott the employer's product, and attempted to initiate sympathy strikes. Holding that labor activities exempt from injunction by the Norris-LaGuardia Act were also totally immune to the prohibitions of the Sherman Act, Mr. Justice Frankfurter stated:

So long as a union acts in its self-interest and does not combine with non-labor groups, the licit and the illicit under § 20 [of the Clayton Act] 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.⁷³

There is some dispute as to whether *Hutcheson* completely overruled the *Duplex* decision.⁷⁴ With respect to the *Duplex* interpretation of the Sherman Act as it applies to labor unions, there is little doubt but that such interpretation is overruled.⁷⁵ Mr. Justice Frankfurter, despite Mr. Justice Pitney's earlier holding to the contrary, found that what is on its face violative of the Sherman Act is lawful for a labor organization if done in the pursuit of valid union objectives. But precisely what such objectives might be was not stated. Rather the entire concept was defined in terms of "self-interest"—the essence of the present labor antitrust exemption. Contrariwise, it is not so clear that *Hutcheson* overruled Mr. Justice Pitney's narrow interpretation of a "dispute" within the meaning of Section 20 of the Clayton Act. *Duplex* was decided before the enactment of the Norris-LaGuardia Act,⁷⁶ while *Hutcheson* was not only decided after its enactment, but after numerous decisions had, in accordance with congressional intent, given a broad interpretation to the term "labor dispute" as used in that act.⁷⁷ Mr. Justice Frankfurter reasoned that Section 20 of the Clayton Act must be read in the light of the broad congressional policy toward labor as expressed in the enactment of the Norris-LaGuardia Act.⁷⁸ In effect then, the two acts were read as integrated statutes.⁷⁹ This interpretation has met frequent criticism⁸⁰ because the question arises: Would it not have been more accurate for Mr. Justice Frankfurter to have written that the *Duplex* interpretation of section 20 simply was incorrect?

The next major decision affecting union immunity was actually only an application of the rule laid down by *Hutcheson*.⁸¹ However, it did attempt to clarify the extent to which labor is exempt when it combines with nonlabor groups.

73. *Id.* at 232.

74. 254 U.S. 443 (1921). See also *Carey*, *The Apex and Hutcheson Cases*, 25 Minn. L. Rev. 915, 922 (1941); Landis, *supra* note 60, at 212A-12B.

75. Landis, *supra* note 60, at 212B.

76. 47 Stat. 70 (1932), as amended, 29 U.S.C. §§ 101-10, 113-15 (1958).

77. See *Milk Wagon Drivers' Union v. Lake Valley Farm Prods., Inc.*, 311 U.S. 91 (1940); *New Negro Alliance v. Sanitary Grocery Co.*, 303 U.S. 552 (1938); *United States v. American Fed'n of Musicians*, 47 F. Supp. 304 (N.D. Ill. 1942), *aff'd per curiam*, 318 U.S. 741 (1943).

78. *United States v. Hutcheson*, 312 U.S. at 231.

79. Landis, *supra* note 60, at 212D.

80. See, e.g., *Carey*, *supra* note 74; Landis, *supra* note 60, at 212B.

81. 312 U.S. 219 (1941).

*Allen Bradley Co. v. Local 3, Int'l Bhd. of Elec. Workers*⁸² involved a situation where the union arranged with contractors and manufacturers of electrical apparatus to boycott out-of-city and nonunion goods in order to elevate the status of its members by securing jobs and higher working standards. In upholding the injunction against the electrical workers' union the Court held that when the union combined with businessmen to restrain trade and eliminate competition it lost the exemption conferred upon it in the Clayton and Norris-LaGuardia Acts. Emphasizing the actual scope of the immunity at issue, the Court ruled that the injunction, as issued by the district court, was too broad and should be limited so as to prohibit only activities in which the union engaged in combination with nonlabor groups.⁸³

A question originally posed by Mr. Justice Roberts' dissent,⁸⁴ arises as to whether the opinion of the Court should be limited to the facts presented therein; *i.e.*, would the exemption be lost in a situation where there is "an agreement between one union and *one* employer requiring conduct whose object is some direct market restraint . . .,"⁸⁵ or would it be lost only as in the instant case, where the agreement is between a union and *several* employers who are a combination amongst themselves. The *Report of the Attorney General's National Committee to Study the Antitrust Laws* implies that in *either* case the exemption would be lost,⁸⁶ but Archibald Cox's views are to the contrary.⁸⁷ As yet the Court has not been squarely confronted with the problem.

C. Request for Legislation

The effect of these decisions was to make a basic delineation of the areas and occasions in which the antitrust immunity of labor exists. The theories behind Sections 6 and 20 of the Clayton Act⁸⁸ and Section 5 of the Norris-LaGuardia Act⁸⁹ were harmonized, and together produced the often quoted principle that so long as a union acts in its self-interest and does not combine with nonlabor groups, its activities in bona fide labor disputes shall not be subject to either the damage or the injunction provisions of the antitrust laws.⁹⁰ The antitrust problem inherent in this rule, "one which leaves labor unions free to engage in conduct which restrains trade,"⁹¹ was noted by the Court in *Allen Bradley* but was reserved as "a question for the determination

82. 325 U.S. 797 (1945).

83. *Id.* at 811-12.

84. *Id.* at 813-20.

85. Att'y Gen. Nat'l Comm. Antitrust Rep. 297 (1955). (Emphasis added.)

86. *Id.* at 297-98.

87. Professor Cox is of the opinion that the *Allen Bradley* decision would and should be limited to its precise facts. Cox, *Labor and the Antitrust Laws—A Preliminary Analysis*, 104 U. Pa. L. Rev. 252, 271.

88. 38 Stat. 731 (1914), 15 U.S.C. § 17 (1958), 38 Stat. 738 (1914), 29 U.S.C. § 52 (1958).

89. 47 Stat. 71 (1932), 29 U.S.C. § 105 (1958).

90. *United States v. Hutcheson*, 312 U.S. at 235-36.

91. *Allen Bradley Co. v. Local 3, Int'l Bhd. of Elec. Workers*, 325 U.S. at 810.

of Congress."⁹² It would appear that the answer to such a question lies either in the area of antitrust revisions or labor reforms. But to date, the Court's request for legislation has been interpreted almost entirely as an appeal for labor statutes, the "antitrust" approach, with the exception of a few abortive proposals, having been avoided.

IV. PROPOSALS AND CHANGES

A. *Antitrust Approach*

When the Hartley bill⁹³ was passed by the House in 1947, it included provisions which would have made antitrust laws applicable to certain union activities. The Taft-Hartley Law,⁹⁴ as finally adopted, however, contained no such antitrust sections. In 1950 Senator Robertson of Virginia unsuccessfully introduced a bill⁹⁵ which would have restored the application of antitrust policies, so far as labor unions were concerned, to their status before the enactment of the Norris-LaGuardia Act.⁹⁶ This proposal, although emphasizing the public character of the injury suffered from restraints on trade and commerce, in effect, equated unreasonable restraints with unlawful union objectives. Under such reasoning the antitrust exemption would be lost.

During the next few years sporadic attempts at similar legislation were made but invariably met with failure. Two such bills, those of Representatives Smith of Kansas⁹⁷ and Hiestand of California⁹⁸ would have extended antitrust coverage to presently immune union activities. The latter sought to accomplish this by repealing Sections 6 and 20 of the Clayton Act⁹⁹ and amending Sections 1 and 13 of the Norris-LaGuardia Act.¹⁰⁰ The former was substantially to the same effect. Finally, a third bill¹⁰¹ which would have pro-

92. *Ibid.*

93. H.R. 3020, 80th Cong., 1st Sess. § 301 (1947). See also 93 Cong. Rec. 3656, 3671 (1947).

94. Labor Management Relations Act, 61 Stat. 136 (1947), as amended, 29 U.S.C. §§ 141-44, 151-67, 171-87 (1958) (Supp. II, 1959-1960).

95. S. 2912, 81st Cong., 2d Sess. (1950). See also 96 Cong. Rec. 756 (1950) (introductory remarks). In substance, the bill provided as follows: "section 1 of the [Sherman Act] . . . is amended Provided further, That when a labor organization or the members thereof have unreasonably restrained trade or commerce among the several States, or with foreign nations, in articles, commodities, or services essential to the maintenance of the national economy, health, or safety, or any substantial segment thereof, such conduct shall not be made lawful, and the jurisdiction of any court of the United States to issue an injunction against any such conduct shall not be restricted or removed . . . [by the Clayton or Norris-LaGuardia Acts]."

96. 47 Stat. 70 (1932), 29 U.S.C. §§ 101-10, 113-15 (1958). It should be noted, however, the validity of this statement depends upon the Duplex interpretation of §§ 6 and 20 of the Clayton Act.

97. H.R. 6515, 85th Cong., 1st Sess. (1957).

98. H.R. 678, 85th Cong., 1st Sess. (1957).

99. 38 Stat. 731 (1914), 15 U.S.C. § 17 (1958); 38 Stat. 738 (1914), 29 U.S.C. § 52 (1958).

100. 47 Stat. 70, 73 (1932), 29 U.S.C. §§ 101, 113 (1958).

101. S. 3227, 85th Cong., 2d Sess. (1958).

hibited compulsory unionism was introduced by Senator Goldwater of Arizona, but it also was never enacted.

In September of 1961, Senator McClellan of Arkansas submitted a proposal¹⁰² to prohibit certain activities of labor organizations which restrain trade or commerce in industries engaged in transportation. The bill would amend Sections 1, 3, and 8 of the Sherman Act¹⁰³ and Sections 6 and 20 of the Clayton Act.¹⁰⁴ What effect this legislative effort will have is entirely speculative. But it does point out that "we need a rule of law to settle labor disputes . . . including protection for the public."¹⁰⁵

B. Labor Approach

In prohibiting certain union activities,¹⁰⁶ Congress has, in effect, declared that these activities are illegal, despite the lawfulness of the objectives they are designed to achieve. Thus, under the Taft-Hartley Act federal district courts have the power to issue injunctions upon the application of the National Labor Relations Board in cases involving jurisdictional disputes¹⁰⁷ and secondary boycotts,¹⁰⁸ notwithstanding the provisions of the Norris-LaGuardia Act.¹⁰⁹ Despite this means for curbing union activities aimed directly at suppressing commercial competition, the actual effect on such practices is limited due to the construction of the Taft-Hartley Act. Only those activities "specifically provided for" in the act¹¹⁰ are prohibited. The result is as stated in *Joliet Contractors Ass'n v. NLRB*,¹¹¹ that there are "numerous apparent incongruities."¹¹²

One of the more outstanding products of such incongruities was the "hot cargo" clause. While Taft-Hartley attempted to bar certain types of secondary boycotts,¹¹³ it left others virtually untouched. One such loophole was utilized by the International Brotherhood of Teamsters and became known as the "hot cargo" doctrine. Under this theory the union could refuse to handle cargoes to or from firms involved in labor disputes and such right could be made a matter of contract. This practice excluded competing products from the consumer market and, if done by businessmen, would be an unreasonable restraint

102. S. 2573, 87th Cong., 1st Sess. (1961).

103. 26 Stat. 209 (1890), as amended, 15 U.S.C. § 1, 3 (1958); 26 Stat. 210 (1890), 15 U.S.C. § 7 (1958).

104. S. 2573, 87th Cong., 1st Sess. (1961).

105. 107 Cong. Rec. 18943, 18946 (1961).

106. 61 Stat. 146 (1947), as amended, 29 U.S.C. § 160 (1958) (Supp. II, 1959-1960).

107. 61 Stat. 146 (1947), as amended, 29 U.S.C. § 160(j) (1958). In such cases, the Board may petition the district court for an injunction.

108. 61 Stat. 146 (1947), as amended, 29 U.S.C. § 160(l) (1958) (Supp. II, 1959-1960). This section makes it mandatory upon the Board to seek an injunction where a secondary boycott is alleged.

109. 47 Stat. 71 (1932), 29 U.S.C. § 105 (1958).

110. *NLRB v. International Rice Milling Co.*, 341 U.S. 665, 673 (1951).

111. 202 F.2d 606 (7th Cir.), cert. denied, 346 U.S. 824 (1953).

112. *Id.* at 612.

113. 61 Stat. 140 (1947), as amended, 29 U.S.C. § 158(b)(4) (1958) (Supp. II, 1959-1960). See also *International Bhd. of Elec. Workers v. NLRB*, 341 U.S. 694 (1951).

of trade under Section 1 of the Sherman Act.¹¹⁴ It was not until the Labor-Management Reporting and Disclosure Act of 1959, however, that such clauses in collective bargaining contracts were made illegal.¹¹⁵ Along with secondary boycotts this act prohibited extortionate picketing¹¹⁶ and certain types of organizational picketing.¹¹⁷ Its major purpose, however, was to provide for more democracy in labor union affairs.¹¹⁸ The effectiveness of this law is now being tested but due to its limited antitrust scope, *i.e.*, primarily with respect to the secondary boycott, it is doubtful that a solution to the labor antitrust dilemma has been found.

V. FUTURE REMEDIES

When the Attorney General's National Committee to Study the Antitrust Laws made its recommendations in 1955 it indicated that "to the extent that . . . commercial restraints [are] not effectively curbed . . . appropriate legislation to prohibit these union efforts . . ." ¹¹⁹ is needed. To satisfy this need two major approaches¹²⁰ to the regulation of union economic influence have developed:

(1) The application of antitrust policies to restrict the acts of organized labor;

(2) The development of legislation outside of the antitrust laws, *i.e.*, labor reforms, to cope with the specific problem of the undesirable effects of union power on the general public.

The latter theory has produced laws such as the Taft-Hartley¹²¹ and Landrum-Griffin Acts,¹²² while the former has yet to meet with congressional approval. True, present labor statutes would probably prevent situations like those which occurred in the *Apex*¹²³ and *Hutcheson*¹²⁴ cases, but many

114. 26 Stat. 209 (1890), as amended, 15 U.S.C. § 1 (1958).

115. 73 Stat. 542 (1959), 29 U.S.C. § 158(e) (Supp. II, 1959-1960). See also Ryan, Secondary Boycotts Under the New Labor-Management Reporting and Disclosure Act of 1959, 34 St. John's L. Rev. 42 (1959).

116. 73 Stat. 539 (1959), 29 U.S.C. § 522 (Supp. II, 1959-1960).

117. 73 Stat. 542 (1959), 29 U.S.C. § 158(b)(7) (Supp. II, 1959-1960). See also Wollett, Organizational Picketing and Related Activity, in Symposium on the Labor-Management Reporting and Disclosure Act of 1959 at 926 (1961).

118. See 73 Stat. 519 (1959), 29 U.S.C. § 401 (Supp. II, 1959-1960).

119. Att'y Gen. Nat'l Comm. Antitrust Rep. 304 (1955).

120. See American Enterprise Ass'n, Bill Analysis—Antitrust Law & Labor Unions, Rep. No. 12, 86th Cong., 1st Sess. 27-28 (1959 [hereinafter cited as AEA Bill Analysis]).

121. 61 Stat. 136 (1947), as amended, 29 U.S.C. §§ 141-44, 151-67, 171-82, 185-88, 191-97 (1958) (Supp. II, 1959-1960).

122. 73 Stat. 519 (1959), 29 U.S.C. §§ 401-531 (Supp. II, 1959-1960).

123. *Apex Hosiery Co. v. Leader*, 310 U.S. 469 (1940). The activities of the union in *Apex* are no longer protected labor practices under Section 7 of the National Labor Relations Act, 49 Stat. 452 (1935), as amended, 29 U.S.C. § 157 (1958). The Taft-Hartley Act, 61 Stat. 140 (1947), as amended, 29 U.S.C. § 158(a)(3) (1958) (Supp. II, 1959-1960), made the closed shop unlawful.

124. *United States v. Hutcheson*, 312 U.S. 219 (1941). Secondary boycotts were out-

vital issues remain unresolved, many union restraints of trade in the product market, unremedied.

How far should the "self-interest" concept be extended? Should a union acting alone be able to provide an employer with a sheltered market in an effort to get a share of the anticipated larger profit? How far may a union go in resisting the application of technological advances in an effort to secure more jobs for its members? Should the term "labor dispute," as it appears in the Norris-La Guardia Act be more narrowly construed? These are questions which still remain unanswered.

A. Antitrust Theories

Some authorities, such as Archibald Cox, have suggested that the key to such problems lies in an attempt to give legislative recognition to the conflict between the congressional policies of encouraging effective collective bargaining and promoting product market competition.¹²⁵ He would therefore make a clear delineation between the lawful and unlawful activities within the area of conflict.¹²⁶ While this proposal has the advantage of designating exactly what

lawed by the Taft-Hartley Act, 61 Stat. 140 (1947), as amended, 29 U.S.C. § 158(b)(4) (1958) (Supp. II, 1959-1960).

125. See AEA Bill Analysis at 30-33.

126. See Cox, *Labor and the Antitrust Laws—A Preliminary Analysis*, 104 U. Pa. L. Rev. 252, 284 n.117 (1955), where this proposal is presented:

"Section 1. The Congress finds—

(a) It is the policy of Congress, set forth in the Labor-Management Relations Act of 1947, to promote and encourage collective bargaining concerning wages, hours and other terms and conditions of employment and, to that end, to safeguard the right of employees to form, join and assist labor organizations, to bargain collectively through representatives of their own choosing and to engage in concerted activities for the purposes of organization, collective bargaining and other mutual aid and protection.

(b) It is also the policy of Congress set forth in the antitrust laws to prevent monopoly and promote product market competition among employers in the sale of goods and services.

(c) Labor organizations, acting alone and in combination with employers, have sometimes gone outside the sphere of organization and collective bargaining and have fixed prices, limited production, allocated territory or sales among employers, and imposed other like restraints on competition among employers in the product market, all being of a kind which would violate the antitrust laws if imposed by business groups.

(d) The policy of this Act is to prevent and punish such restraints without regulating the freedom of employees, labor organizations and their members to engage in strikes, boycotts or other concerted activities for the purposes of organization and collective bargaining or the negotiation and administration of agreements relating to the wages and other compensation of employees, their hours and working conditions, or their tenure and security of employment.

"Section 2. It shall be unlawful for a labor organization or its officers or members to enter into any contract or agreement affecting interstate commerce which—

(a) fixes prices, or

(b) limits the volume of production or sales (otherwise than by establishing hours of employment, overtime premiums, work loads, work standards, or measures for sharing available work), or

acts are permissible without regard to intent or purpose, it fails to distinguish cases where the same act might at one time be committed to accomplish a valid objective, *e.g.*, the betterment of wages and working conditions, and at another time, be aimed directly at obtaining an illegitimate one, *e.g.*, the creation of a sheltered market¹²⁷ for management. Thus it appears that while Archibald Cox would not approve of any blanket application of the antitrust laws to labor, he offers as an alternative, a proposal, which itself, mandates blanket application to certain union activities.

Another approach is that the undesirable aspects of labor power could be eliminated by making the legality of these activities depend upon their purpose and effects.¹²⁸ Advocates of this theory point out that the *Hutcheson* decision,¹²⁹ which in effect, equated legitimate union objectives to self-interest, rendered the legitimacy concept almost totally nugatory. Thus they urge that Congress change the *Hutcheson* delineation of union antitrust immunity so that if the immediate purposes are illegal under the Sherman Act, the exemption would be lost, despite the fact that the ultimate purposes (wages and conditions of employment) are valid objectives. In other words, "self-interest" should not be the sole criterion for determining "legitimate union objectives" and consequent antitrust immunity. The difficulty here is the method of proving purposes in cases where both labor and management would benefit from the same anticompetitive activity, *e.g.*, where the union acting alone creates a sheltered market.

(c) restricts the number or kind of employers or other persons who may engage in any particular kind of business activity or for whom members of a labor organization will work, or the area in which an employer or other person may sell goods or services, or the persons with whom an employer may do business, or

(d) otherwise, but in like manner, limits access to a market other than a labor market by employers and other persons engaged in business activity.

"Section 3. It shall be unlawful for a labor organization or its members or employees to engage in a strike, boycott or other concerted activities where an object thereof is to compel any employer to enter into a contract or agreement prohibited by Section 2, provided that nothing contained in this Act shall be deemed to prohibit a labor organization from excluding an employer from the market as an incident of a current dispute with such employer concerning the association or representation of employees or their terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee."

127. A sheltered market is a situation where unions have combined to restrain trade through the boycott or similar devices so as to allow only the products and services of an approved employer to be used within a given area. The purpose of such an activity is to increase the employer's profits and consequently the union's proportionate share through better wages, conditions etc. See also Cox, *supra* note 126, at 266-67.

128. See AEA Bill Analysis at 33-34. Advocates of this theory state that it emanates from § 6 of the Clayton Act, 38 Stat. 731 (1914), 15 U.S.C. § 17 (1958), as construed by the Supreme Court in the Duplex case, 254 U.S. 443 (1921), namely, that the antitrust laws should not be construed to forbid unions "from lawfully carrying out their legitimate objects . . ." *Id.* at 469. However, it should be noted that theirs is just one of the many interpretations given to the Duplex decision.

129. 312 U.S. 219 (1941).

B. *Labor Theories*

Within the ranks of those who would restrict union anticompetitive practices through labor legislation, several approaches have also been proposed. Some feel that there should be more democratic participation by local union members in the union's important functions.¹³⁰ Various methods to accomplish this have been offered, but in general, most would limit the influence of the national union in favor of local autonomy. The main objection to this plan is that it seeks to eliminate monopoly elements in the labor rather than product market and hence is impracticable. Also, if a limitation on union size is desirable, in what terms shall the measuring rod be expressed—by territory, by industry, or by company?

A second theory¹³¹ seeks to restrict specific acts of organized labor through statutory provisions similar to those found in the unfair labor practice section of the Taft-Hartley Act.¹³² Again, however, such prohibitions would not necessarily be limited to activities which restrain trade but would apply to all undesirable manifestations of union influence, whether in the labor or product market. Thus the criticism of impracticability is pertinent here also.

Finally, there are those who would curb union anticompetitive practices industry by industry.¹³³ In the past such efforts have resulted in legislation such as the 1946 Communications Act Amendment,¹³⁴ which barred featherbedding in the broadcasting industries. Although this approach is of its nature extremely limited in scope, it does possess merit in that certain industries might need regulation more than others. But the question arises, if what is sought is a remedy for anticompetitive practices in the product market, why not apply this same reasoning more directly and propose antitrust legislation? Perhaps this is what Senator McClellan had in mind when he introduced his bill, "Antitrust Laws Amendment of 1961," which seeks to prohibit certain restraints of trade by transportation labor unions.¹³⁵

VI. CONCLUSION

Whether the answer to the problem of union activities which restrain trade lies in the area of labor or antitrust legislation is, of course, "a question for

130. "One approach along these lines would be to formulate a special definition of a 'labor organization' for the purpose of determining what types of unions are entitled to the privileges and protections provided by the Taft-Hartley Act. Such a definition would start with the existing definition of 'labor organization' contained in the Taft-Hartley Act . . . and (1) spell out the meaning of an organization 'in which employees participate' and (2) distinguish the lawful purposes and/or functions of local unions from those of national unions National unions could be limited to functions outside of the direct employer-employee relationship. Signing a collective bargaining contract with other than a bona fide local union would be unlawful." AEA Bill Analysis at 40.

131. *Id.* at 41-42.

132. 61 Stat. 140 (1947), as amended, 29 U.S.C. § 158(b) (1953) (Supp. II, 1959-1960).

133. AEA Bill Analysis at 42-43.

134. 60 Stat. 89 (1946), 47 U.S.C. § 506 (1953).

135. S. 2573, 87th Cong., 1st Sess. (1961). See also 107 Cong. Rec. 18943 (1961).