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THE LABOR DECISIONS OF CHIEF JUSTICE TAFT

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If the average citizen were asked to relate the high points in the public life of William Howard Taft, he would perhaps recall that Taft is the only man throughout our history who has enjoyed the distinction of having filled the offices of President of the United States and Chief Justice of the Supreme Court. A better informed citizen might even remember that Taft was the first Civil Governor of the Philippines and Secretary of War under President Roosevelt. If, however, this question were put to an official of the American Federation of Labor, or any well informed trade-unionist, it is likely that more detailed information would be forthcoming. He would know, for instance, that Taft began his judicial career as a state judge; that he was on the bench of the Superior Court of Cincinnati from 1887 to 1890; that he served as judge in the Sixth Circuit in the United States Circuit Court from 1892 to 1900; that he became Chief Justice of the Supreme Court on June 30, 1921. There is a reason for the detailed knowledge of the well-informed trade-unionist regarding the judicial career of the Ex-Chief Justice. He knows from actual experience that Chief Justice Taft has had more to do with formulating, developing, and shaping the law of organized labor than any other person in the United States. Nor has the trade-unionist always

been happy at the findings of the Chief Justice. His decisions have sometimes been subjected to sharpest criticism. However one may feel concerning the justice of his decisions, no one can question the influential role Taft has played in shaping and crystallizing this important branch of the law.[1]

The key to a correct appreciation of the limitations which the law places upon the rights of organized labor in this country is to be found in the doctrine of conspiracy.[2] With beginnings far back in the history of English law, this doctrine was applied by the American courts in labor cases even when it was not yet fully developed in England. This was during the early Nineteenth Century. At that time there were acts of Parliament expressly limiting the right of laborers to act in combination. There was no well-defined common law on the subject, and certainly the Parliamentary statutes relating to labor did not extend to this country. Such common law as there was could find no better authority than occasional judicial dicta, and some of these were pronounced in cases of questionable authenticity. Despite these facts the juries in the earliest American cases usually convicted combinations for higher wages on the ill-founded judicial theory that all combinations *per se* were conspiracies at common law and illegal.[3] This, however, was never unchallenged law in the United States, but even those courts which declined to accept this extreme view of the law felt that there was something peculiarly unlawful about labor combinations. Certain judges held that "motive" or "intent" was the test of unlawfulness, while others claimed that the legality of combinations should be adjudged on the basis of the means which they employed. Not until near the middle of the Nine-

[1] The following articles discuss Taft's early labor cases: Judson, *The Labor Decisions of Judge Taft* (1907) 36 REVIEW OF REVIEWS 212; Alger, *Taft and Labor* (1908) 31 MCCLURE'S MAGAZINE 597; Hollister, *William H. Taft at the Bar and on the Bench* (1908) 20 GREEN BAG 337. See also Taft, *Judicial Decisions as an Issue in Politics* (1909) 33 MCCLURE'S MAGAZINE 201; Taft, *Recent Anti-Trust and Labor Injunction Legislation* (1914) 39 A. B. A. REP. 359; TAFT, THE ANTI-TRUST ACT AND THE SUPREME COURT (1914); TAFT, PRESENT DAY PROBLEMS (1908).

[2] A detailed study of the development of the principles of common law as applied to the activities of labor unions is given in MASON, ORGANIZED LABOR AND THE LAW (1925) pts. 1 and 2.

[3] These early cases may be found in 3 & 4 A DOCUMENTARY HISTORY OF AMERICAN INDUSTRIAL SOCIETY (Commons & Gilmore 1911).

teenth Century were the general principles of the common law reasonably well established, in the case of *Commonwealth v. Hunt.*[4] Here Chief Justice Shaw gave his celebrated definition of conspiracy. A conspiracy, he said, is "a combination of two or more persons, by some concerted action, to accomplish some criminal or unlawful purpose, or to accomplish some purpose, not in itself criminal or unlawful, by criminal or unlawful means."[5]

But what are the proper objects of a labor combination, and what means may it properly employ for legitimate purposes? In the year 1887, when Taft became judge of the Superior Court of Cincinnati, no very definite answer could be given to these questions. By that time it was well established that the trade union was a lawful organization and not in itself a conspiracy; that labor-unionists might lawfully strike for higher wages, shorter hours, better working conditions, or for any other purposes that might be considered beneficial to them. However, the increased power which combined action entailed led the courts to scrutinize the activities of combinations more carefully than those of individuals. This was due chiefly to the greater injury which such combinations could inflict on third parties, whether employers, employees, or the public. In the very year that Taft began his judicial career, Hampton L. Carson, after a detailed study of the law of organized labor, made this statement concerning the limits which the law had then placed on the rights of labor:

> "Workmen may combine lawfully for their own protection and common benefit; for the advancement of their own interests, for the development of skill in their trade, or to prevent overcrowding therein, or to encourage those belonging to their trade to enter their guild; for the purpose of raising wages, or to secure a benefit which they can claim by law. The moment, however, that they proceed by threats, intimidation, violence, obstruction, or molestation, in order to secure their ends; or where their object be to impoverish third persons, or to extort money from their employers, or to ruin their business, or to encourage strikes or breaches of contract

[4] 4 Metc. 111 (Mass. 1842).
[5] *Ibid.* 123.

> among others, or to restrict the freedom of others for the purpose of compelling employers to conform to their views, or to attempt to enforce rules upon those not members of their association, they render themselves liable to indictment. 'The rights of workmen are conceded, but the exercise of free-will and freedom of action within the limits of the law is also secured equally to masters.' " [6]

Couched as this statement of the law is in vague generalities, much was left to be done by way of clarification and definition. Even in cases where the courts attempted a definition of what labor could or could not do under the law, there was still considerable room for doubt. On the subject of picketing, for instance, few courts were in agreement as to how far organized labor could go in seeking to enlist the sympathy of fellow workers and others, without infringing their right to pursue their own calling. Peaceful persuasion was generally recognized as lawful, but there was widest divergence of opinion among the courts regarding the conditions under which picketing could be practiced and still be considered peaceful. Indeed it was not until 1921, when Chief Justice Taft handed down his opinion in the *American Steel Foundries* case [7] that any serious attempt was made to define the law on this subject. The law in regard to boycotting had been more definitely established, but even here there was room for clarification.

Whenever the acts of a labor combination inflicted damage or injury on private individuals, it became subject at common law to either civil or criminal action, or both. During the period from 1880 to 1890 an important innovation was introduced to prevent injury growing out of industrial disputes. Proceedings began to be instituted in equity whereby a person fearing irreparable damage to his property or business might obtain a restraining order preventing it or preserving the *status quo* until a

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[6] WRIGHT, THE LAW OF CRIMINAL CONSPIRACIES AND AGREEMENTS (Carson's Am. ed. 1887) 178. A very similar statement of the law is given by Judge Brown in Old Dominion Steamship Co. v. McKenna, 30 Fed. 48 (C. C. S. D. N. Y. 1887).

[7] American Steel Foundries v. Tri-City Central Trade Council, 257 U. S. 184, 42 Sup. Ct. 72 (1921).

settlement of conflicting claims.[8] These early cases clearly established the right of private individuals to resort to equity courts; but what about the rights of the public? Was the public entitled to the same kind of protection against the activities of a labor combination? As will be seen, Taft not only confirmed the use of the injunction as it had been employed in the early labor cases, but he extended its use in certain particulars.

Taft's first labor decision was rendered in 1890 from the bench of the Superior Court of Cincinnati. This was in the case of *Moores & Company v. Bricklayers' Union.*[9] A dispute arose between Parker Brothers, contracting bricklayers, and the Bricklayers' Union because Parker Brothers refused to reinstate an apprentice and grant certain other demands of the union. The union struck and declared a boycott against the company. Finding this action ineffective, they went further and notified all material men that any who sold to Parker Brothers would themselves be boycotted. Moores & Company ignored this order and continued to sell lime to Parker Brothers as usual. Thereupon the union advised all of the plaintiff's customers that none of its members would work with Moores & Company's material. Although there was no violence, actual or threatened, the result was to damage seriously the company's business. Since this was clearly a secondary boycott, Moores & Company sued the union for damages which they claimed had been done to their business by a wrongful and malicious conspiracy. The case was tried before Judge Taft, sitting as trial judge, who charged the jury that, on the basis of the facts, Moores & Company were entitled to recover damages. The jury awarded the plaintiff $2500. Upon motion for a new trial, Taft reserved decision for the consideration of a full bench of three judges. Here Judge Taft delivered the opinion of the court, confirming his decision as trial judge.

Although only about thirty years of age Judge Taft's opinion

[8] The earliest English case in which the injunction was used in labor disputes is Springfield Spinning Co. v. Riley, L. R. 6 Eq. 551 (1868). The early American cases are Sherry v. Perkins, 147 Mass. 212 (1888); Brace v. Evans, 5 Pa. C. C. 163 (1888); Casey v. Cincinnati Typographical Unions, 45 Fed. 135 (C. C. S. D. Ohio 1891); Coeur D'Alene, etc. Co. v. Miners' Union, 51 Fed. 260 (C. C. Idaho 1892).

[9] 23 Weekly L. Bull. 48 (Ohio 1890).

shows an extraordinary mastery of his subject. The opinion bristles with cases and authorities, both English and American.[10] Taft was not content to dispose of the case at bar summarily, as he might easily have done; [11] but, on account of the lack of agreement regarding the principles on which labor cases had been decided heretofore, he felt called upon to make a detailed statement of the reasoning underlying his decision.

At the very outset Taft set at rest any doubt that may have existed concerning the legality of the trade union as an organization, in these words:

> "We are dealing in this case with common rights. Every man, be he capitalist, merchant, employer, laborer or professional man, is entitled to invest his capital, to carry on his business, to bestow his labor, or to exercise his calling, if within the law, according to his pleasure. Generally speaking, if, in the exercise of such a right by one, another suffers a loss, he has no ground of action. Thus, if two merchants are in the same business in the same place, and the business of the one is injured by the competition, the loss is caused by the other's pursuing his lawful right to carry on business as seems best to him. In this legitimate clash of common rights, the loss which is suffered, is *damnum absque injuria.* So it may reduce the employer's profits that his workmen will not work at former prices, and that he is obliged to pay on a higher scale of wages. The loss which he sustains, if it can be called such, arises merely from the exercise of the workman's lawful right to work for such wages as he chooses, and to get as high a rate as he can. It is caused by the work-

[10] Among the authorities cited by Taft are: Old Dominion Steamship Co. v. McKenna, *supra* note 6; Commonwealth v. Hunt, *supra* note 4; Carew v. Rutherford, 106 Mass. 1 (1870); State v. Donaldson, 32 N. J. L. 151 (1867); People v. North River Sugar Refining Co., 54 Hun. 354, 7 N. Y. Supp. 406 (1889); Commonwealth v. Carlisle, Brightly's Rep. 36 (Pa. 1821); Gregory v. The Duke of Brunswick, 6 Man. & G. 953 (Eng. 1844); Bowen v. Hall, 6 Q. B. D. 333 (1881); Mogul Steamship Co. v. McGregor, 21 Q. B. D. 544 (1888); Lumley v. Gye, 2 E. & B. 216 (Eng. 1853); STEPHEN, HISTORY OF CRIMINAL LAW (1883); WRIGHT, *op. cit. supra* note 6.

[11] Moores & Co. v. Bricklayers' Union, *supra* note 9, at 53: "The conclusions we have reached as to the actionable character of the defendants' acts are supported by a great number of authorities in this country, and by the citation of those cases, we might have justified our decision without seeking to explain the principles upon which it depends. The reason why we have not done so is because in the discussion of illegal labor and trade conspiracies, there is not as uniform a statement of the principles upon which their illegality rests as could be wished."

man, but it gives no right of action. Again if a workman is called upon to work with the material of a certain dealer, and it is of such a character as either to make his labor greater than that sold by another, or is hurtful to the person using it, or for any other reason is not satisfactory to the workman, he may lawfully notify his employers of his objection and refuse to work it. The loss of the material man in his sales caused by such action of the workman is not a legal injury, and not the subject of action. And so it may be said that in these respects, what one workman may do, many may do, and many may combine to do without giving the sufferer any right of action against those who cause his loss." [12]

But the question still remains: What is the test for determining the limits beyond which labor combinations may not go in causing a loss to others in an effort to secure advantages for themselves? In other words, where there is no element of intimidation, molestation, or other illegality, what is the proper criterion of an actionable or indictable wrong? The answer, according to Taft, is that "in the exercise of common rights, like the pursuit of a business or a trade, which result in a mutual interference and loss, such loss is a legal injury, or not, according to the extent with which it has been caused, and the presence or absence of malice in the person causing it." [13] And malice Taft defined as "intent to injure another without cause or excuse".[14]

Applying this test to the combination before him, Judge Taft had no doubts concerning its illegality, for he said:

> "The conflict was brought about by the effort of defendants to use plaintiffs' right of trade to injure Parker Bros., and upon failure of this, to use plaintiffs' customers' right of trade to injure plaintiffs. Such effort cannot be in the bona fide exercise of trade, is without just cause, and is, therefore, malicious. The immediate motive of defendants here was to show to the building world what punishment and disaster necessarily followed a defiance of their demands.

[12] *Ibid.* 50.
[13] *Ibid.* 51.
[14] *Ibid.* 52.

> The remote motive of wishing to better their condition by the power so acquired, will not . . . make any legal justification for defendants' acts." [15]

The form of oppression involved in the case at bar Taft considering boycotting, "the essential feature of which is the exclusion of the employer from all communication with former customers and material men by threats of similar exclusion to the latter if dealings are continued." [16]

In the years 1887 and 1890 respectively, two federal statutes were passed of tremendous import to labor. The first was the Interstate Commerce Act of 1887. This statute gave to the Circuit Courts of the United States jurisdiction of a bill in equity to restrain violation of the act in case of irreparable injury to plaintiff's property, because of the subject matter, regardless of the citizenship of the parties.[17] The second was the Sherman Anti-Trust Act.[18] Although originally designed to remedy the vicious and ever-growing evils of capitalistic combinations known as trusts, this statute embodied language that was broad enough to cover the activities of labor combinations as well as industrial trusts.[19] What was more important from the point of view of laborers, the fourth section of the act expressly authorized the Attorney General to institute proceedings in equity to prevent and restrain violations of the act. Prior to these two enactments practically all decisions affecting the operations of organized labor had been handed down in state courts As a result of these statutes, the activities of labor combinations became subject to adjudication more and more frequently at the hands of the federal courts.

The next two labor decisions of Taft were rendered after he had been elevated to the federal circuit bench. The first of these cases arose out of a strike of locomotive engineers on the Toledo, Ann Arbor & North Michigan Railway.[20] A perfectly legitimate

[15] *Ibid.* 53.

[16] *Ibid.* 54.

[17] 24 STAT. 379 (1887), 49 U. S. C. A. § 1 (1928); 25 STAT. 855 (1889), 49 U. S. C. A. § 6 (1928).

[18] 26 STAT. 209 (1890), 15 U. S. C. A. §§ 1-7 (1928).

[19] MASON, *op. cit. supra* note 2, c. 8.

[20] Toledo, A. A. & N. M. Ry. v. Pennsylvania Co., 54 Fed. 730 (C. C. N. D. Ohio 1893).

strike at the outset, the Brotherhood of Locomotive Engineers having no other purpose than to compel the company to pay higher wages, the strike finally developed to the point of producing a national emergency. The union did not confine itself to a strike against the Toledo road, but attempted to compel other railroads to refuse to receive freight from the offending road, and thus bring the complainant to terms. This method of coercing the complainant was not a momentary creation. It was the following of an established rule of the organization. This was Rule 12, in pursuance of which P. M. Arthur, representative of the Brotherhood of Locomotive Engineers, sent to the chairman of the General Adjustment Committee of the Brotherhood on eleven railroad systems in Ohio and neighboring states this telegram:

> "There is a legal strike in force upon the Toledo, Ann Arbor and North Michigan Railroad. See that the men on your road comply with the laws of the brotherhood. Notify your general manager."

By the phrase "legal strike," Arthur meant one to which the Grand Chief of the Brotherhood of Locomotive Engineers had consented. In issuing this order Arthur was invoking Rule 12 of the organization, which provided in substance that after a strike had been declared against a railroad,

> " . . . it shall be recognized as a violation of obligation for a member of the Brotherhood of Locomotive Engineers who may be employed on a railroad running in connection with or adjacent to said road, to handle the property belonging to said roads or system in any way that may benefit said company in which the B. of L. E. is at issue until the grievance or issue of whatever nature or kind has been amicably settled."

In obedience to this rule, representatives of the Brotherhood on various roads notified the general managers of these roads that after a specified date the engineers would refuse to handle cars or freight from the Toledo road. The result was practically a paralysis of the business of interstate commerce in this section of the country. Whereupon the Toledo road applied to Judge Ricks in the United States Circuit Court for an injunction against

the connecting roads, alleging the existence of a combination whose purpose was to violate the Interstate Commerce Act. Later a petition was filed with Judge Taft requesting a mandatory injunction compelling Arthur to withdraw his order to the engineers of the Lake Shore road. Judge Taft granted the temporary order as prayed. In the Arthur case he made this order permanent and wrote an opinion giving his reasons.

Taft's opinion is a notable exposition of the power of a court of equity to issue a temporary injunction whenever necessary to prevent irreparable injury. Holding that the complainant was entitled to equitable relief against Arthur in his effort to enforce Rule 12, Judge Taft's argument may be summarized as follows: The complainant and defendant companies are common carriers subject to the provisions of the Interstate Commerce Act which expressly requires one common carrier to interchange freight with another wherever their lines connect. Therefore, for Arthur as a representative of the union to send word to the committee chairman directing the men to refuse to handle interstate freight of the complainant, in execution of Rule 12, was clearly a conspiracy in violation of Section 10 of the Interstate Commerce Act and Section 5440 of the Revised Statutes. Judge Taft was careful to point out that there was no intention to deny the right of laborers, individually or in combination, to quit work in an effort to improve laboring conditions. The strike was perfectly lawful. Feeling that their wages were inadequate, they had a lawful right to withhold their labor and cause such inconvenience or loss to their employers as would compel compliance with their demands. But the employees of the Lake Shore road had no grievance against the defendant companies. They were not dissatisfied with the terms of their employment. So, said Judge Taft,

> "What the employees threaten to do is to deprive the defendant companies of the benefit thus accruing from their labor, in order to induce, procure, and compel the companies . . . to consent to do a criminal and unlawful injury to the complainant. Neither law nor morals can give a man the right to labor or withhold his labor for such a purpose." [21]

[21] *Ibid.* 738.

The combination, he ruled, was clearly a conspiracy, since both the means taken by it and its object were direct violations of both the civil and criminal law as embodied in a positive statute.

There was no question of the illegality of the combination. Did the law afford the complainant an adequate remedy? If a single engineer of one of the defendant companies, acting alone, should cause the complainant loss by refusing to handle freight, the complainant could undoubtedly maintain a right of action for damages; there is little likelihood that the act of a single engineer in quitting work could cause any actionable injury. But when all the engineers on eight defendant roads combine to do unlawful acts for the purpose of injuring the complainant, damage is inevitable. Clearly Arthur and all the members of the brotherhood conspiring with him were liable to action in a civil court for damages. The question at issue was whether the equity courts afforded any relief. To this Taft gave an affirmative answer. The quasi-public nature of the duty to be performed by the common carriers and the irreparable character of the injury likely to result were ample grounds, he held, to entitle the complainant to a preliminary mandatory injunction compelling the defendant companies to discharge the duties imposed by the interstate commerce law to exchange interstate freight with the complainant.

Arthur was made a party to the injunction, restraining him from enforcing Rule 12, but Taft took pains to point out that there was no power in a court of equity, no matter how inadequate the remedy at law, to compel the enforcement of personal service as against either the employer or employee. Only in case the employees quit the service in execution of Rule 12, which amounted to a conspiracy, were the employees liable. Nor did the fact that the action of Arthur and his colleagues was criminal deny to a court of equity the right to intervene, because "when an irreparable and continuing unlawful injury is threatened to private property and business rights, equity will generally enjoin on behalf of the person whose rights are to be invaded, even though an indictment on behalf of the public will also lie." [22]

[22] *Ibid.* 744.

Several years later Taft himself wrote concerning this decision:

> "What I decided in the Arthur case was this: That the Toledo and Ann Arbor road had a right under the Interstate Commerce Law to have its cars hauled by the Lake Shore road, and that a conspiracy by the servants of the Lake Shore company to compel it to decline to perform that duty in order that they might injure the Toledo and Ann Arbor road, thus involving the Lake Shore Company in a controversy in which it had no interest and in which it was an unwilling participant, was a secondary boycott at common law. I also held that this was unlawful under the statutes of the United States, and injuries arising therefrom were of such a recurrent character and the loss was so difficult to estimate, that a suit at law offered no adequate remedy, and therefore a court of equity would prevent the injury by injunction." [23]

Taft's next labor decision was in the famous *Phelan* case, which grew out of the great Pullman strike of 1894.[24] As a result of the refusal of the Pullman company to restore wages which had been reduced the previous year, the employees of the company struck. The president of the American Railway Union, Eugene V. Debs, endorsed this strike and sought to make it a success. His first action was to demand that all railroads boycott and refuse to carry Pullman cars. Any road which refused to declare such a boycott was coerced into action by declaring a strike. The Cincinnati Southern, one of the roads involved, was at the time in the hands of a receiver appointed by the United States Circuit Court of Ohio. It applied to the court for protection against one Phelan, an official of the American Railway Union, who was engaged in inciting a strike among the employees of the road. The employees had no grievance against the road; the sole purpose of Phelan in instituting a strike was to compel the road not to carry Pullman cars. Although originally merely a strike against the Pullman Company, the dispute thus "degenerated into an attempt to tie up every railroad in the country by withdrawing all the railroad employees from railroad work. In other words, it

[23] Taft, *Judicial Decisions as an Issue in Politics, supra* note 1, at 205.

[24] Thomas v. Cincinnati, etc., Ry., 62 Fed. 803 (C. C. S. D. Ohio 1894).

became a boycott against the public in an attempt to make the public compel the Pullman Company to raise the wages it paid its employees." [25]

The court had granted a restraining order prohibiting any interference with the management of the receiver in the operation of the road. Phelan, having openly defied the court's order, was brought before the court and adjudged guilty of contempt in a carefully reasoned opinion by Judge Taft.

Emphasizing the same points which he had made in the earlier opinion, Taft's arguments foreshadowed the rulings of the United States Supreme Court in two notable labor cases. The employees, he held, had a right to quit their employment for the purpose of bettering their working conditions or for any other purpose which they considered beneficial to themselves, but they had no right to combine to injure their employer for the purpose of compelling him to withdraw from a mutually-profitable relationship with the Pullman company. As in the earlier cases Judge Taft argued that the purpose of the combination was not to advance their own interests, but was an attempt to injure the Pullman Company against whom there was no grievance. The purpose was malicious and therefore a conspiracy at common law.

He did not, however, rest the illegal character of the combination upon the common law doctrine of conspiracy alone. In their efforts to gain their own personal ends, Debs and Phelan had trampled upon the rights of the public. Pointing out the close relationship between the railroads and their continued operation and the public interest, Judge Taft argued that the combination had no right to starve the railroads and the public into compelling the Pullman Company to do something which they had no lawful right to compel it to do. Starvation of the nation, he argued, cannot be a lawful purpose of a combination, even though this purpose be effected by lawful means.[26] Here Taft laid the

[25] Taft, *Judicial Decisions as an Issue in Politics, supra* note 1, at 206.

[26] Taft put his argument in these words, at page 821: "The railroads have become as necessary to the life and health and comfort of the people of this country as are the arteries in the human body, and yet Debs and Phelan and their associates proposed, by inciting the employees of all the railways in the country to suddenly quit their service without any dissatisfaction with the

foundation for that rather extraordinary doctrine announced by Justice Brewer in the famous case of *In re Debs,*[27] the substance of which was that an injunction may be invoked, even though there is no property interest at stake, to secure the protection of any widespread public interest relating to matters entrusted by the Constitution to the control of the federal government.[28]

Taft found the combination before him illegal on another score. The combination, he held, was in defiance of the Sherman Anti-Trust Act. Up to this time there had been two views expressed by circuit court judges regarding the applicability of the Sherman Act to the activities of labor combinations. Judge Billings had held in *United States v. Workingmen's Amalgamated Council of New Orleans* [29] that the phraseology of the act was broad enough to cover the acts of labor unions. The opposite point of view was expressed by Judge Putman in *United States v. Patterson.*[30] Insisting that the activities of Debs and his followers were comprehended in the wording of the Sherman Act, Taft took a position which was fully sustained by the Supreme Court fourteen years later in the celebrated Danbury Hatters' case.[31]

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terms of their own employment, to paralyze utterly all the traffic by which the people live, and in this way compel Pullman, for whose acts neither the public nor the railway companies are in the slightest degree responsible, and over whose acts they can lawfully exercise no control, to pay more wages to his employees. . . . Certainly the starvation of a nation cannot be a lawful purpose of a combination, and it is utterly immaterial whether the purpose is effected by means usually lawful or otherwise."

[27] 158 U. S. 564, 15 Sup. Ct. 900 (1895).

[28] Declining to justify the government's right of access to a federal court in the Debs case solely on the ground that the government had a property right in the mails, Justice Brewer brought forward this broader ground for his decision: "Every government, entrusted, by the very terms of its being, with powers and duties to be exercised and discharged for the general welfare, has a right to apply to its own courts for any proper assistance in the exercise of the one and the discharge of the other." *Ibid.* 584, 15 Sup. Ct. at 906. ". . . while it is not the province of the government to interfere in any mere matter of private controversy between individuals . . . yet, whenever the wrongs complained of are such as affect the public at large, and are in respect to matters which by the Constitution are entrusted to the care of the nation, and concerning which the nation owes the duty to all the citizens of securing to them their common rights, then the mere fact that the government has no pecuniary interest in the controversy is not sufficient to exclude it from the courts." *Ibid.* 586, 15 Sup. Ct. 907.

[29] 54 Fed. 994 (C. C. E. D. La. 1893).

[30] 55 Fed. 605 (C. C. Mass. 1893).

[31] Loewe v. Lawlor, 208 U. S. 274, 28 Sup. Ct. 301 (1908). The view that the Sherman Act covered the operations of labor unions as well as in-

Despite these rulings which were to have such an important bearing upon the future activities of labor unions, Taft was careful to acknowledge the rights and benefits of labor organizations. Indeed, in this opinion there is embodied the following statement of the rights of trade unions, which is almost famous:

> " . . . the employees of the receiver had the right to organize into or to join a labor union which should take joint action as to their terms of employment. It is of benefit to them and to the public that laborers should unite in their common interest and for lawful purposes. They have labor to sell. If they stand together, they are often able, all of them, to command better prices for their labor than when dealing singly with rich employers, because the necessities of the single employee may compel him to accept any terms offered him. The accumulation of a fund for the support of those who feel that the wages offered are below market prices is one of the legitimate objects of such an organization. They have the right to appoint officers who shall advise them as to the course to be taken by them in their relations with their employer. They may unite with other unions. The officers they appoint, or any other person to whom they choose to listen, may advise them as to the proper course to be taken by them in regard to their employment, or, if they choose to repose such authority in any one, may order them, on pain of expulsion from their union, peaceably to leave the employ of their employer because any of the terms of their employment are unsatisfactory." [32]

This declaration of the legality of trade unions and the rights of representation has been often referred to and was most effectively invoked in labor's behalf by Frederick N. Judson, counsel for the unions, in the *Wabash Railroad* case.[33] Judge Adams, who spoke for the court in this case, commended Taft's version of the law, saying:

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dustrial trusts was generally accepted at this time. Not only was this the accepted view among the judges of the Sixth Circuit, but it was also followed by Judges Woods, Allen, and Grosscup, of the Seventh Circuit, and by Judge Woolson, of the Eighth Circuit. A study of legislative intent and a common law construction of the language of the Act point to the same conclusion. See MASON, *op. cit. supra* note 2, c. 7, 8.

[32] Thomas v. Cincinnati, etc., Ry., *supra* note 13, at 817.

[33] Wabash R. R. v. Hannahan, 121 Fed. 563 (C. C. E. D. Mo. 1903).

> "On this subject of organization of labor no one has spoken more clearly or acceptably than did Judge Taft in the case of *Thomas v. C. N. O. & T. P. Ry. Co.*" [34]

Writing a few years later, Frederick N. Judson, who was naturally in sympathy with labor's demands, denied that Taft had been unfriendly to labor in his early decisions, in these words:

> "Thus, while the law was declared by Judge Taft as to the limitations upon the lawful action of labor unions, the essential principles involved in the right of organization were also announced by him in the same opinion. . . . There is no foundation, therefore, for the suggestion that the decisions of Judge Taft were in any sense unfriendly to labor." [35]

Under the law as established in these cases, interstate commerce and the transmission of the mails can be properly interrupted only by the incidental injury that flows from the quitting of work, and not by boycotts and sympathetic strikes where the strikers have no grievance of their own to redress nor any purpose of bettering their own working conditions. The ruling that a boycott by railroad employees in interstate commerce and a strike to enforce it is impracticable and illegal in view of the paramount public interest involved, is now firmly entrenched in our jurisprudence. Certainly the opinion of Chief Justice White in the case of *Wilson v. New* leaves no doubt on this point.[36]

Taft's early cases are also notable for the statements they contain of the legal rights of labor unions. They declare unequivocally the right of laborers to organize and to strike, to act through official representatives, and to use peaceable persuasion to prevent other employees from taking the place of strikers. The allegation,

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[34] *Ibid.* 568.

[35] Judson, *op. cit. supra* note 1, at 216, 217.

[36] Upholding the Adamson Law of 1916 in the case of Wilson v. New, 243 U. S. 332, 352, 37 Sup. Ct. 298, 303 (1917), Chief Justice White declared: "Whatever would be the right of the employee engaged in a private business to demand such wages as he desires, to leave the employment if he does not get them and by concert of action to agree with others to leave upon the same condition, such rights are necessarily subject to limitation when employment is accepted in a business charged with a public interest." See also Judge Ricks' opinion in Toledo, A. A. & N. M. Ry. v. Pennsylvania Co., *supra* note 20 at 752, 753.

therefore, that these decisions enjoined the right to strike cannot properly be maintained. The injunction was not directly against the strike as such, but against the strike as a means of enforcing a secondary boycott.

It was with considerable misgivings that Taft allowed himself to be drawn from the congenial judicial atmosphere to the tempestuous political field. Indeed, it was only as a result of President McKinley's insistence that he was finally persuaded to become Civil Governor of the Philippines. President Roosevelt appointed him Secretary of War in 1904, and in 1908 it was Roosevelt's influence that gained for him the Republican nomination for President.[37]

As presidential nominee, he immediately became a target for labor sympathizers and others who saw in his labor decisions evidence of animosity toward organized labor. His vigorous use of the injunction in the *Toledo* and *Phelan* cases was especially condemned, as is evidenced by Gompers' characterization of him as the "injunction standard bearer" [38] and Bryan's references to him as "the father of injunctions". Such accusations, together with outright misrepresentation and exaggeration of facts by his Democratic opponent, Mr. Bryan, and his managers, called for a detailed statement of his stand on the labor question.[39] A speech delivered before the Cooper Institute in New York City, January

[37] See the interesting article by Duffus, *Our Chief Justice at Seventy*, New York Times, Magazine Section, Sept. 11, 1927. In 1909 Taft himself wrote concerning his labor decisions and their possible effect on his political career: "With this record of decisions in labor cases, in which I have had each time to decide against the labor organizations, or the cause with which they sympathized, I had always been of opinion that it would be utterly impossible for me to run for office before the people even if I desired to do so. My ambition was not political. I desired if possible to resume my work on the Bench, and the disqualification which these decisions seemed to me to make clear and certain did not really involve in my judgment any sacrifice on my part." Taft, *Judicial Decisions as an Issue in Politics, supra* note 1, at 207.

[38] (1907) 14 AMERICAN FEDERATIONIST 785.

[39] "I found that Mr. Bryan was constantly referring to me as the father of injunctions, and that Democratic managers were making as much of this part of the issues of the campaign as possible, and I concluded, therefore, that the only thing for me to do was to seek an opportunity to tell what I had decided (in labor cases) to audiences composed as largely of labor men as possible, and then leave it to their sense of justice whether their attacks upon me as an enemy of labor were justified." Taft, *Judicial Decisions as an Issue in Politics, supra* note 1, at 208.

10, 1908, was devoted to this purpose.[40] Here one finds a frank and courageous reiteration of the principles which he had enunciated in judicial decisions. Here is set out in detail the rights as well as the abuses of trade unions.

Taft commended collective bargaining as the only means of securing adequate wages and proper working conditions. He conceded the right of organized labor to bring pressure to bear on employers, even though it should entail great loss and inconvenience, as a means of bringing obstinate capitalists to terms. Moreover, he granted to unions the right to accumulate funds so as to enable laborers to hold out against an employer who refused to yield to their demands. The right to persuade others not to take their places and the right to act through their own representatives he held to be proper and legitimate.

The abuses of trade unions fell, according to Taft, under two heads. Violence or threatened violence, whether inflicted upon an employer or other workmen who seek to take the places of strikers, was of course strongly condemned. Another abuse which he considered equally objectionable was the secondary boycott—"a method by which the striking employees and their fellows attempt to coerce the whole community into a withdrawal of all association from their former employer by threatening the rest of the community with similar treatment if they do not withdraw their association from such employer." [41]

Turning to the subject of remedies for the abuses of trade-unionism, Taft devoted special attention to the injunction. His attitude was avowedly one of defense. He said:

> "This remedy by injunction has been severely denounced and criticized, on the ground that it places in the hands of a judge legislative, executive and judicial powers; that it enables him to make the law for one case against a particular individual and if he does not abide by it to try him and punish him." [42]

Taft denied that such was the case, and explained as follows:

[40] TAFT, PRESENT DAY PROBLEMS (1908) 241, a collection of addresses delivered on various occasions.

[41] *Ibid.* 262.

[42] *Ibid.* 265.

"An injunction suit does not differ in the slightest degree from a suit brought after the event, so far as the court is concerned in declaring the law, except that the court declares the law in respect of anticipated facts rather than in respect to those which have happened. He (the judge) has no authority to make law. In an injunction suit, as in any other suit, he merely interprets the law and applies it to the circumstances. His judgment in the one case involves exactly the same precedents and the same rules of law as in the other. In order to save the party plaintiff from having to bring suit to recover for an injury that he is going to suffer, he says, 'This is an unlawful injury; and as you threaten to do it I shall enjoin you from doing it.' Certainly, prevention is better than cure, and it is no wonder that a man who is about to have his business injured or his property destroyed prefers to prevent the injury rather than allow it to occur. Neither a suit in damages nor a criminal prosecution is likely to bring back his property or to restore his loss. Moreover, in cases of boycott, in many states, there is no provision for criminal prosecution." [43]

Although favoring equitable relief in labor disputes in preference to criminal prosecutions or suits for damages, Taft confessed that the writ of injunction had been abused. The chief abuse, he believed, flowed from issuing injunctions *ex parte;* that is, without giving notice or hearing to the defendant. He advocated, therefore, amending the law so as to provide that no restraining order should issue at all until notice and a hearing, thus making the law what it was when the Judiciary Act of 1789 was put into force. He also objected to the broad and vague phraseology in which the writ was frequently couched; that is, what was popularly known as blanket injunctions. Realizing that the defendants were workingmen and not lawyers, he favored a more definite statement of what labor could or could not do in the course of a labor dispute. Two other urgent demands were being made in the labor camp at this time. The first was that the same judge who issued the injunction should not sit in contempt proceedings. The second was the right to trial by jury in contempt cases. The first of these proposals Taft was inclined to favor, appreciating

[43] *Ibid.*

the popular doubt regarding the judge's impartial attitude in such cases. To the jury trial he was unqualifiedly opposed, first on the ground that it would involve delay, but more especially because the effect would be to weaken the authority and force of the court.

The frank and forceful manner in which Taft dealt with this most delicate subject was attended with unusual and no doubt unexpected success. Labor's hostility to him was in a measure appeased; at least his attitude toward labor was sufficiently well explained and justified to deny him the embarrassment of any noticeable opposition from that quarter in the presidential election.

Ever since 1895, when the Supreme Court, in the *Debs* case,[44] sanctioned the use of injunctions in labor disputes, as it had been inaugurated in the state and circuit courts at the close of the previous decade, the injunction has been recognized as a thorn in the side of organized labor. The Danbury Hatters' case,[45] decided in 1908, merely furnished a fresh impetus to an already insistent demand for relief against the evils of the injunction. Gompers no doubt exaggerated the effects of this decision when he declared that under the court's interpretation in the Danbury Hatters' case it was within the province and the power of any administration to begin proceedings under the Sherman Act to dissolve any labor organization in the United States. Be that as it may, such extravagant fears served to crystallize opinion in favor of remedial legislation; and the platforms of both parties in 1908 and 1912 expressly committed them to the enactment of such legislation.[46] In 1914 the Democratic Party attempted to carry this pledge into effect by the enactment of the now famous labor clauses of the Clayton Act.[47]

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[44] *Supra* note 27.

[45] *Supra* note 31.

[46] The Republican Platform of 1908 declared: "The Republican party will uphold at all times the authority and integrity of the courts, State and Federal, and will ever insist that their powers to enforce their process and to protect life, liberty, and property shall be preserved inviolate. We believe, however, that the rules of procedure of the Federal courts with respect to the issuance of the writ of injunction should be more accurately defined by statute, and that no injunction or restraining order should be issued without notice, except where irreparable injury would result from delay, in which case a speedy hearing thereafter should be granted." Quoted in Taft, *Judicial Decisions as an Issue in Politics, supra* note 1, at 202.

[47] 38 STAT. 730 (1914), 15 U. S. C. A. §§ 12-27 (1928).

That labor was satisfied with the legislation is attested by the unbounded praise which Gompers bestowed upon it. Sections 6 and 20,[48] supposedly the most important of the clauses, he characterized as the Magna Charta and Bill of Rights of labor, respectively.[49] There were those, however, who entertained no such optimism regarding the efficacy of the legislation. Among them was William H. Taft, then a private citizen and Kent professor of law at Yale.

In an address delivered before the American Bar Association, in 1915, Taft made a detailed study of the effect of the labor clauses of the Clayton Act.[50] He found nothing in this legislation that would warrant Gompers' enthusiastic praise of the statute. Rather he regarded the act as little more than a codification of the existing law, saying in part:

[48] Section 6 reads in part: "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, instituted for the purposes of mutual help . . . or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws."

Section 20: "No restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employees, or between employers 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, unless necessary to prevent irreparable injury to property, or to a property right, of a party making the application, for which injury there is no adequate remedy at law, and such property or property right must be described with particularity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney.

"No restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; . . . or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto."

One scarcely needs to do more than read the language of these clauses to realize that no extraordinary rights or immunities were granted by them to labor. A detailed analysis of the effect of these clauses is given in MASON, *op. cit. supra* note 2, c. 10, 11.

[49] See Gompers, *The Charter of Industrial Freedom—Labor Provisions of the Clayton Act* (1914) 21 AMERICAN FEDERATIONIST 957.

[50] Taft, *Recent Anti-Trust and Labor Injunction Legislation, supra* note 1.

> "All these provisions have been called the charter of liberty of labor. We have seen that the changes from existing law they make are not broadly radical and that most of them are declaratory merely of what would be law without the statute. This is a useful statute in definitely regulating procedure in injunctions and in express definition of what may be done in labor disputes. But what I fear is that when the statute is construed by the courts it will keep the promise of the labor leaders to the ear and break it to the hope of the ranks of labor. This will be an additional reason for blaming and attacking the courts. It is really a shifting of responsibility from Congress to the judicial branch of the government that has had to bear so many of such burdens conceived in political timidity of legislators. However this may be, I think we should be profoundly grateful that the impairment of the authority of our federal courts has been but small when compared with the very drastic and dangerous changes which were pressed and proclaimed as certain." [51]

Although speaking merely as a private citizen, Taft's opinion concerning the effect of the measure is of no small significance when one considers that he himself, as Chief Justice of the Supreme Court, was to have considerable power in construing the act. But even prior to Taft's elevation to the Supreme Bench, in 1921, the Supreme Court, in the *Duplex Printing* case,[52] had already largely shattered the fond hopes of organized labor. Justice Pitney, speaking for the court in this case, decided that Sections 6 and 20 neither granted labor general immunity from the anti-trust laws, nor legalized the secondary boycott, as labor sympathizers had maintained. Needless to add, the Court's interpretation of the act fell far short of what was expected of it by labor, and the Court, as Taft predicted, was again the object of attack. Such criticism was hardly justified, since an examination of the debates on the act shows that the Court construed the act to mean precisely what Congress intended. The responsibility for labor's disappointment, therefore, might better have been placed upon the legislature than upon the Court.

The purpose and effect of the labor clauses of the Clayton Act,

[51] *Ibid.* 380.

[52] Duplex Printing Co. v. Deering, 254 U. S. 443, 41 Sup. Ct. 172 (1921).

as expressed on the floor of Congress, as announced by ex-President Taft in 1915, and as declared by the Supreme Court in the *Duplex* case, was to stabilize and render uniform the law as it had been followed by the most advanced courts. It assumed, as the courts already did, that the normal objects of labor unions were legitimate. Instead of making any sweeping exemptions of labor from liability to the injunctive process, it was declaratory of what was always the best equity practice. This, however, is not to ignore the significance of the specific rules of procedure found in Sections 17, 18, 19, 21, and 22, which equity courts are henceforth required to follow.[53]

Section 20 merely placed "peaceful" and "lawful" means of persuading any person to work or abstain from work in the course of a labor dispute beyond the scope of equitable relief. The indefiniteness of this phraseology, however, left the law on the subject of picketing as uncertain as it was before the Act was passed. In the first case that came before the Court after his appointment as Chief Justice,[54] Taft sought to define the limits of lawful and peaceful persuasion, in these words:

> "In going to and from work men have a right to as free a passage without obstruction as the streets afford, consistent with the right of others to enjoy the same privilege. We are a social people and the accosting by one of another in an inoffensive way and an offer by one to communicate and discuss information with a view to influencing the other's action are not regarded as aggressions or a violation of that other's rights. If, however, the offer is declined, as it may rightfully be, then persistence, importunity, following and

[53] Section 17 provides that when a restraining order is issued without notice a hearing must be given within ten days thereafter; Section 18 requires that the applicant for an injunction shall furnish security in such sum as the court may demand; Section 19 is directed against the so-called blanket injunction, but in view of the now famous Dougherty injunction in the Railway Shopmen's strike in 1922, this section is of little or no value. Sections 21 and 22 provide that in all cases within the purview of the Act, excepting those which relate to contempts committed in the presence of the court and those in which the United States is a party, "trial may be by the court, or upon demand of the accused, by a jury." The provisions for jury trial in the specified kinds of contempt were upheld in Michaelson v. United States, 266 U. S. 42, 45 Sup. Ct. 18 (1924).

[54] American Steel Foundries v. Tri-City Central Trades Council, *supra* note 7.

dogging become unjustifiable annoyance and obstruction which is likely soon to savor of intimidation." [55]

Picketing, as carried on in the case before him, where the workers were approached by pickets in groups of three or four, Taft considered as unlawful, saying:

"All information tendered, all arguments advanced and all persuasion used under such circumstances were intimidation. They could not be otherwise. It is idle to talk of peaceful communication in such a place and under such conditions. The number of the pickets in the groups constituted intimidation. The name 'picket' indicated a militant purpose, inconsistent with peaceful persuasion. The crowds they drew made the passage of the employees to and from the place of work, one of running the gauntlet. Our conclusion is that picketing thus instituted is unlawful and cannot be peaceable and may be properly enjoined." [56]

The Chief Justice then proceeded to set forth his notion of peaceful and legitimate picketing, as follows:

"Each case must turn on its own circumstances. It is a case for the flexible remedial power of a court of equity which may try one mode of restraint, and if it fails or proves to be too drastic, may change it. We think that the strikers and their sympathizers engaged in the economic struggle should be limited to one representative for each point of ingress or egress in the plant or place of business and that all others be enjoined from congregating or loitering at the plant or in the neighboring streets by which access is had to the plant, that such representatives should have the right of observation, communication or persuasion but with special admonition that their communications, arguments and appeals shall not be abusive, libelous or threatening, and that they shall not approach individuals together but singly, and shall not in their single efforts at communication or persuasion obstruct an unwilling listener by importunate following or dogging his steps. This is not laid down as a rigid rule, but only as one which should apply to this case under the circumstances disclosed by the evidence." [57]

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[55] *Ibid.* 204, 42 Sup. Ct. at 76.
[56] *Ibid.* 205, 42 Sup. Ct. at 77.
[57] *Ibid.* 206, 42 Sup. Ct. at 77.

Prior to this decision the question of the legality of picketing had been a matter of considerable difference of opinion among the courts. It was apparently Chief Justice Taft's purpose to lay down in this opinion a general rule which the courts could henceforth follow. Herein, at any rate, one finds the nearest approach to a definition of lawful picketing that any court has yet made, and the effect of this decision is to make at least one branch of the labor law fairly predicable.

Even if the Clayton Act had made labor immune from the use of the injunction in industrial disputes, as was claimed by labor leaders, such an exemption would have been of questionable constitutionality. This conclusion, I think, may easily be inferred from Chief Justice Taft's decision in the case of *Truax v. Corrigan*.[58]

Paragraph 1464 of the Arizona Revised Statutes of 1913 contains phraseology almost identical with that of Section 20 of the Clayton Act. It declares that no restraining order shall be granted in any case between employer and employee unless necessary to prevent irreparable injury to property or a property right, for which injury there is no adequate remedy at law. Another paragraph prohibits the issuance of a restraining order against striking or against recommending, advising, or persuading others by peaceful means so to do.

The plaintiff, Truax, owned and operated a restaurant in the city of Bisbee, Arizona; the defendants were cooks and waiters, and were formerly employed by the plaintiff. The union of which the defendants were members ordered a strike when the plaintiff refused to yield to the terms demanded. To make the strike a success, the union sought to compel the plaintiff to comply with these demands by picketing, displaying banners, denouncing the plaintiff as unfair and circulating hand bills containing abusive and libelous charges against the plaintiff, his customers and employees. As a result of these acts many customers were driven away and the daily receipts from the plaintiff's business were reduced from $156 to $75.

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[58] 257 U. S. 312, 42 Sup. Ct. 124 (1921).

Against these acts the plaintiff sought an injunction, alleging that if the acts continued his business would be entirely destroyed; that he had no adequate remedy at law since such action would involve a multiplicity of suits, and that all the defendants were insolvent and therefore unable to respond in damages. To this the defendants filed a demurrer, claiming that the property rights involved were not, under paragraph 1464 of the Arizona Revised Statutes, of such a character that their irreparable injury might be enjoined. The Superior Court of Cochise County sustained the demurrer and this judgment was affirmed by the Supreme Court of Arizona. The effect of the ruling, in substance, was that under the Arizona statute, loss may be inflicted upon the plaintiff's property by picketing in any form, so long as violence is not used, and since no violence was shown or claimed, the acts of the defendants did not unlawfully invade the plaintiff's rights.

Chief Justice Taft reversed this judgment, basing his decision on the following grounds: The plaintiff's business is a property right, and free access for employees, owner, and customers to his place of business is incidental to such right. Intentional injury to either right is a tort. Concert of action is a conspiracy if its object is unlawful or if the means used are unlawful. The Chief Justice had no doubt of the intention to inflict loss, nor that the means used were illegal. The libelous attacks upon the plaintiff, his business, the employees, and the customers were palpable wrongs. The patrolling of the defendants immediately in front of the restaurant, within five feet of plaintiff's premises, continuously during business hours, with banners announcing plaintiff's unfairness, and many of the other acts did not constitute lawful persuasion. Rather it was compelling every customer or would-be customer to run the gauntlet of most uncomfortable publicity, aggressive and annoying importunity, libelous attacks, and fear of injurious consequences. This is what the Chief Justice called moral coercion, a conspiracy, and no less effective than violence. He had no doubt that any law which operates to make lawful such wrongs as here described deprives the owner of his property without due process of law and is invalid under the Fourteenth Amendment.

Answering the argument that, while the right to conduct a lawful business is property, the conditions surrounding that business, such as regulations of the state for maintaining peace, good order, and protection against disorder, are matters in which no person has a vested right, Chief Justice Taft observed:

> "The conclusion to which this inevitably leads in this case is that the State may withdraw all protection to a property right by civil or criminal action for its wrongful injury if the injury is not caused by violence. . . . It is true that no one has a vested right in any particular rule of common law, but it is also true that the legislative power of a State can only be exerted in subordination to the fundamental principles of right and justice which the guaranty of due process in the Fourteenth Amendment is intended to preserve, and that a purely arbitrary or capricious exercise of that power whereby a wrongful and highly injurious invasion of property rights, as here, is practically sanctioned and the owner stripped of all real remedy, is wholly at variance with those principles." [59]

Even if the statute did not withhold from the plaintiff all remedy for the wrongs suffered, but only the equitable relief of injunction, the act was still wanting in the elements of constitutionality. At this point the Chief Justice invoked that provision of the Fourteenth Amendment which forbids any state to deny to any person the equal protection of the laws. Under the Arizona statute the injury to one's property or property right was denied equitable relief only in labor disputes—disputes between employer and former employees. If competing restaurant keepers had inaugurated the same type of campaign against Truax as did the strikers, an injunction would necessarily have issued to protect him in the enjoyment of his business and his property. On this point the Chief Justice commented as follows:

> "Here is a direct invasion of the ordinary business and property rights of a person, unlawful when committed by any one, and remediable because of its otherwise irreparable char-

[59] *Ibid.* 329, 42 Sup. Ct. at 128.

> acter by equitable process, except when committed by ex-employees of the injured person. If this is not a denial of the equal protection of the laws, then it is hard to conceive what would be." [60]

In support of this contention, the Court made these interesting observations. The equal protection of the laws clause is associated in the Fourteenth Amendment with the due process clause, and it is customary to consider them together. It may be that they overlap, that a violation of one may involve at times a violation of the other, but the spheres of protection which they offer are not coterminous. The due process clause tends to secure equality of law in the sense that it makes a required minimum of protection for everyone's right to life, liberty, and property, which neither Congress nor the state legislatures may withhold. But the framers and adopters of the Fourteenth Amendment were not content to depend on a mere minimum of protection secured by the due process clause, or upon the spirit of equality which might not be insisted on by local public opinion. They therefore embodied that spirit in the specific guaranty of the equal protection clause. This guaranty was aimed at undue favor and individual or class privilege on the one hand, and at hostile discrimination or the oppression of inequality on the other. As the Court said, it

> " . . . does not prohibit legislation which is limited either in the objects to which it is directed, or by the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike, under like circumstances and conditions, both in privileges conferred and in the liabilities imposed." [61]

Chief Justice Taft concluded, therefore, that even if the granting of equitable remedies falls within the police power and is a matter which the legislature may vary as its judgment and discretion shall dictate, this does not meet the objection under the equality clause which forbids the granting of equitable relief to one man and the

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[60] *Ibid.* 335, 42 Sup. Ct. at 130.

[61] *Ibid.* 333, 42 Sup. Ct. at 130, quoting Hayes v. Missouri, 120 U. S. 68, 7 Sup. Ct. 350 (1887).

denying of it to another under like circumstances and in the same territorial jurisdiction.

Although he bases his decision almost entirely upon the equality clause, one can scarcely avoid the conclusion that the Chief Justice's argument really boils down to the proposition, that there is a minimum of protection to which an owner of property or a business is entitled, and of which he may not be deprived by denial of equitable relief, without an invasion of those fundamental rights guaranteed by the due process clause of the Fourteenth Amendment. He expressly denied that in holding paragraph 1464 of the Arizona statute invalid he was in effect declaring Section 20 of the Clayton Act unconstitutional. This is obviously true so far as his argument in connection with the equality clause is concerned, since this clause applies to state and not congressional action. I see no reason, however, why the argument advanced under the due process clause might not be invoked in denying the constitutionality of a federal anti-injunction statute under the Fifth Amendment.[62] It is quite clear that any federal enactment legalizing the secondary boycott, declaring that a man's right to do business is not property, and denying to the employer the right of equitable relief against damage inflicted upon his business by a secondary boycott, would not have been sustained by Chief Justice Taft. Moreover, would not the fact that a federal statute denies equal protection of the laws under certain circumstances be tantamount to a deprivation of due process? In the *Truax* case the Chief Justice said:

> "Classification like the one with which we are here dealing is said to be the development of philosophic thought of the world and is opening the door to legalized experiment.

[62] Support is given this point of view by a note entitled "Dissimilarities in Content between the Two Due Process Clauses of the Federal Constitution," (1929) 29 COL. L. REV. 624. There it is pointed out that the Supreme Court has construed the due process clause of the Fifth Amendment more narrowly than the due process clause of the Fourteenth Amendment. Thus it is concluded that the Court concedes to the nation a slightly wider range of action, at the expense of individual and property rights, than it allows the states. A different point of view is expressed in Frankfurter and Greene, *Labor Injunctions and Federal Legislation* (1929) 42 HARV. L. REV. 766, 786: "It is hardly to be assumed that the application given in Truax v. Corrigan to the equal protection clause of the Fourteenth Amendment will be imposed upon the due process clause of the Fifth Amendment."

> When fundamental rights are thus attempted to be taken away, however, we may well subject such experiment to attentive judgment. The Constitution was intended, its very purpose was, to prevent experimentation with the fundamental rights of the individual." [63]

In the light of this reasoning the sponsors of the Shipstead Bill now pending before Congress may profit by a study of Chief Justice Taft's opinion.

No opinion in recent years occasioned more widespread comment than that delivered by Chief Justice Taft in the well-known *Coronado* case.[64] The Court's decision in this case was apparently agreeable neither to the plaintiffs nor the defendants. Unanimously reversing the jury's verdict and the judgment of two lower courts, it denied to the Coronado Coal Company a verdict of several millions of dollars plus costs. At the same time, the ruling that a labor union, although unincorporated, is suable again aroused the indignation of laborers.[65]

Resenting the open-shop policy instituted by the Coronado Coal Mining Company, the United Mine Workers called a strike in District Number 21. Against the acts of violence and injury to its business that resulted, the company brought suit, alleging conspiracy in restraint of interstate commerce and asking for treble damages under Section 7 of the Sherman Act. Reversing the decision of the lower court, Chief Justice Taft found that the strike was essentially a local fight for the purpose of improving wages and the laboring conditions of the workers. Such purpose as there was to obstruct or restrain interstate commerce he regarded as secondary or ancillary to the primary object of maintaining proper standards of living within the locality. Taft's ruling rested on the theory that coal mining is not interstate commerce, and therefore the power of Congress does not extend to its

[63] Truax v. Corrigan, *supra* note 58, at 338, 42 Sup. Ct. at 131.

[64] United Mine Workers v. Coronado Coal Co., 259 U. S. 344, 42 Sup. Ct. 570 (1922).

[65] "The Supreme Court has not only rendered a decision which goes beyond previous decisions of that tribunal in its antagonism and opposition to labor but it has rendered such a decision when under the law of the land and under practices hitherto obtaining its decision should have been exactly the reverse." (1922) 29 AMERICAN FEDERATIONIST 509.

regulation, in cases where it is interfered with by a strike.[66] On this point Taft's opinion represented a great triumph for the union. A different decision would have clearly rendered the right to strike an empty phrase in concerns manufacturing goods which, in the knowledge of the strikers, were to be sent in interstate commerce. If the court had been willing to rest its decision here, the case would have caused little comment; but the Chief Justice was not content to pass upon the immediate question for decision. He proceeded to announce what the law would be under circumstances wherein a case might be made out against the union.

Members of a labor union who commit unlawful and injurious acts are liable to suit and recovery at the hands of the parties injured. But the practical difficulty of identifying and serving so large a group, together with the fact of insolvency, makes this a remedy of questionable value. The only real remedy against a combination of workers is to hold the union responsible and subject it to action in its union name. Standing in the way of this remedy, however, was the accepted common law principle that

[66] Chief Justice Taft's opinion on this point is expressed more fully in the case of United Leather Workers v. Herkert and Meisel Trunk Co., 265 U. S. 457, 44 Sup. Ct. 623 (1924). Here a strike, with picketing and intimidation, was instituted against an employer engaged in making, selling and shipping in interstate commerce trunks and leather goods. "The sole question here is whether a strike against manufacturers by their employees, intended by the strikers to prevent, through illegal picketing and intimidation, continued manufacture, and having such effect, was a conspiracy to restrain interstate commerce under the Anti-Trust Act because such products when made were, to the knowledge of the strikers, to be shipped in interstate commerce to fill orders given and accepted by would-be purchasers in other States, in absence of evidence that the strikers interfered or attempted to interfere with the free transport and delivery of the products when manufactured from the factories to their destination in other States, or with their sale in those States." *Ibid.* 464, 44 Sup. Ct. at 624.

"Mere reduction in the supply of an article to be shipped in interstate commerce by the illegal or tortious prevention of its manufacture, is ordinarily an indirect and remote obstruction to that commerce. It is only when the intent or necessary effect upon such commerce in the article is to enable those preventing the manufacture to monopolize the supply, control its price or discriminate as between its would-be purchasers, that the unlawful interference with its manufacture can be said directly to burden interstate commerce.

"The record is entirely without evidence or circumstances to show that the defendants in their conspiracy to deprive the complainants of their workers were thus directing their scheme against interstate commerce. It is true that they were, in this labor controversy, hoping that the loss of business in selling goods would furnish a motive to the complainants to yield to demands in respect to the terms of employment; but they did nothing which in any way directly interfered in the interstate transportation or sale of the complainants' product." *Ibid.* 471, 44 Sup. Ct. at 627.

an unincorporated association cannot be sued in its own name.[67] The Chief Justice frankly admitted this obstacle, saying:

> "Undoubtedly at common law an unincorporated association of persons was not recognized as having any other character than a partnership . . . and it could only sue or be sued in the names of its members, and their liability had to be enforced against each member." [68]

The question was whether, in view of this common law principle to the contrary, laborers having become voluntarily, and for the purpose of acquiring concentrated strength and the faculty of quick action and elasticity, a self-acting body with great funds to accomplish their purpose, may not be sued as this body, and whether the funds they have accumulated may not be used in satisfaction of claims for injuries unlawfully caused in carrying out their united purpose. To this query judicial precedents answered no; common law procedure also returned a negative answer. Disregarding both, the Court held unions suable as such. In partial justification for his decision, the Chief Justice reasoned as follows:

> "It would be unfortunate if an organization with as great power as this International Union has in raising large funds and in directing the conduct of four hundred thousand members in carrying on, in a wide territory, industrial controversies and strikes, out of which so much unlawful injury to private rights is possible, could assemble its assets to be used therein free from liability for injuries by torts committed in course of such strikes. To remand persons injured to a suit against each of the 400,000 members to recover damages and to levy on his share of the strike fund, would be to leave them remediless." [69]

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[67] WRIGHTINGTON, THE LAW OF UNINCORPORATED ASSOCIATIONS (2d ed. 1923) § 70 and the cases there cited. See also Baskins v. United Mine Workers, 150 Ark. 398, 401, 234 S. W. 464, 465 (1921); Citizens Co. v. Typographical Union, 187 N. C. 42, 121 S. E. 31 (1924); MARTIN, THE MODERN LAW OF LABOR UNIONS (1910) c. 17; Sturges, *Unincorporated Associations as Parties to Actions* (1924) 33 YALE L. J. 383.

[68] United Mine Workers v. Coronado Coal Co., *supra* note 38, at 385, 42 Sup. Ct. at 574.

[69] *Ibid.* 388, 389, 42 Sup. Ct. at 575, 576.

True, from a strictly legal point of view, labor unions, the Court conceded, were not to be regarded as legal entities, but for all practical purposes the labor union is an entity, and the Court refused to fly in the face of facts and consider the union not an entity in law. Indeed the union had been at least tacitly recognized as an entity in law. In the Court's own words,

> " . . . the growth and necessities of these great labor organizations have brought affirmative legal recognition of their existence and usefulness and provisions for their protection, which their members have found necessary." [70]

Congress, as well as several states, had recognized that trade unions were lawful and beneficial. Such legislation was cited by the Chief Justice for the purpose of showing a steady legislative trend in favor of treating labor unions as legal entities. Moreover, the Court pointed to Sections 7 and 8 of the Sherman Act as affording express authorization for suits against labor organizations such as the United Mine Workers.[71] Finally Chief Justice Taft found a measure of support for his opinion in a leading English case where the facts were almost identical with those presented in the case at bar.[72]

All of these considerations, in the mind of the Court, provided ample grounds for the conclusion that the United Mine Workers were properly made parties defendant in the case before it. Moreover, the Court ventured to assert that three-fold damages could

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[70] *Ibid.* 385, 42 Sup. Ct. at 574.

[71] Section 7 provides: "Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any Circuit Court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy and shall recover three-fold damages by him sustained, and the costs of suit, including a reasonable attorney's fee."

Section 8 provides: "That the word 'person' or 'persons' wherever used in this act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the territories, the laws of any State, or the laws of any foreign country."

Taft held that this language was broad enough to include labor unions.

[72] Taff Vale Ry. v. Amalgamated Society of Ry. Servants (1901) A. C. 426. It was the decision in this case that held a trade union suable in its registered name and made its funds liable for damages resulting from the acts of its members. Labor protested so strongly against the decision as to gain a reversal of the ruling by the passage of the Trade Disputes Act of 1906.

have been collected if evidence had been forthcoming disclosing an intent to restrain interstate commerce.

As a judicial performance, the *Coronado* decision represents one of the most extraordinary opinions delivered by the Supreme Court in recent years. Confronted with judicial precedents and a rule of common law to the contrary, the Chief Justice went out of his way to assert a rule that would make the law fit the facts. Neither logic nor sound policy, he thought, warranted a rule holding such highly organized bodies, with all the power of wealth and members combined, immune from group responsibility for their acts. Moreover, the Court feared that unfortunate consequences might follow a holding which recognized that labor unions possess various rights and privileges without recognizing any proper authority to enforce responsibility for the abuse of those rights.

The most comprehensive scheme that has yet been provided in this country for the settlement of industrial disputes is illustrated by the Kansas Industrial Court Act of 1920.[73] The Act was intended to be applied merely to businesses "affected with a public interest". Among the businesses embraced by the statute were the manufacture of food and its transportation, mining and the production of fuel, the manufacture of wearing apparel, and all public utilities and common carriers. The theory on which this legislation rests is that the businesses enumerated in the Act are so "affected with a public interest" that the state may compel their continuance and, if the owners and employees cannot agree, may fix the terms by compulsory action. A court of industrial relations was established, the function of which was to hear and settle controversies in any of the industries mentioned in the Act.

Opposed by both employers and employees, the Act soon became a subject for litigation. It first came before the Supreme Court in the case of *Wolff Packing Co. v. Court of Industrial Relations.*[74] The dispute arose when the Wolff Packing Company made a general reduction in wages. The Meat Cutters' Union objected and appealed to the Industrial Court. Finding that an emergency existed in the industry, the court ordered an increase

[73] KAN. REV. STAT. ANN. (1923) §§ 44-601 *et seq.*

[74] 262 U. S. 522, 43 Sup. Ct. 630 (1923) and 267 U. S. 552, 45 Sup. Ct. 441 (1925).

in wages and prescribed the hours of labor to be observed. The company ignored the court's order, and a writ of mandamus became necessary to compel compliance therewith. The company appealed from this order to the United States Supreme Court, contending that the Kansas statute was in conflict with the Fourteenth Amendment.

The state sought to justify compulsory arbitration and the interference with individual liberty which it involved, on the authority of *Munn v. Illinois* [75] and *Wilson v. New*.[76] Chief Justice Taft, however, who spoke for the Court, denied that the meat packing business was affected with a public interest in the sense of the businesses involved in these cases. Three classes of business, the Chief Justice pointed out, had heretofore been considered to be clothed with a public interest and subject to a certain degree of public regulation. First, there were the public utilities, carried on under the authority of a public grant of privileges, which imposed on such concerns the express or implied duty of rendering such service as is demanded by the public; second, there were certain exceptional occupations which have always been regarded as clothed with a public interest, such as innkeepers, grist mills, and so forth; and third, some businesses not public at their inception have become so as a result of changed conditions.

Certainly the meat packing business did not fall under either of the first two classifications. The question was whether it might be brought under the third head. Did the public interest attach to meat packing to such an extent as to justify such regulation as was provided in the Act? This raised the broader question of the tests of public interest. In this connection Chief Justice Taft made the following observations:

> " . . . the mere declaration by a legislature . . . is not conclusive of the question whether its attempted regulation on that ground (of public interest) is justified. . . . Clothed with a public interest . . . means more than that the public welfare is affected by continuity or by the price at which a commodity is sold or a service rendered." [77]

[75] 94 U. S. 113 (1876).

[76] 243 U. S. 332, 37 Sup. Ct. 298 (1917).

[77] Wolff Packing Co. v. Court of Industrial Relations, 262 U. S. 522, 536 43 Sup. Ct. 630, 633 (1923).

Rather public interest, the Chief Justice explained, might arise from "the indispensable nature of the service and the exorbitant charges and arbitrary control to which the public might be subjected without regulation." [78]

At this point the Chief Justice changed the tenor of his argument. Why be concerned, he asked, with the question whether the meat packing business was affected with a public interest? The attempted regulation—that of compelling continuity—could not be sustained, even conceding the presence of a public interest. Even in the case of *Munn v. Illinois,* where public regulation was upheld on the ground of the public interest in the business, it was recognized that the owner could discontinue the business if he desired. He was obliged to submit to the regulation only so long as he continued in the business. Here the very purpose of the regulation was to insure continuity.[79] Very special and extraordinary circumstances must exist to justify such a regulation. As the Chief Justice explained:

> "The power of a legislature to compel continuity in a business can only arise where the obligation of continued service by the owner and its employees is direct and is assumed when the business is entered upon. A common carrier which accepts a railroad franchise is not free to withdraw the use of that which it has granted to the public. . . . It may give up its franchise and enterprise, but short of this, it must continue. Not so the owner (of a business of another type) when by mere changed conditions his business becomes clothed with a public interest. He may stop at will whether the business be losing or profitable.
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> "The minutely detailed government supervision, including that of their relations to their employees, to which the railroads of the country have been gradually subjected by Congress through its power over interstate commerce, furnish

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[78] *Ibid.* 638, 43 Sup. Ct. at 634.

[79] It is rather doubtful whether any such distinction can properly be drawn between the two cases. The obvious purpose of the statute was to secure such continuity of the business as the legislature believes would result from the settlement of industrial disputes by compulsory arbitration. It is highly improbable that the legislature had any idea of compelling continuity against the will of the owner. Rather the purpose was to establish the conditions to which the owner must submit if he desired to continue in the business. From this point of view the cases are very similar.

> no precedent for regulation of the business of the plaintiff in error. . . . It is not too much to say that the ruling in *Wilson v. New* went to the border lines of constitutionality although it concerned an interstate common carrier in the presence of a nation-wide emergency, and the possibility of great disaster." [80]

Furthermore, said the Court:

> "It has never been supposed, since the adoption of the Constitution, that the business of the butcher, or the baker, the tailor, the wood chopper, the mining operator, or the miner was clothed with such a public interest that the price of his . . . wages could be fixed by State regulation." [81]

For these reasons the Court held that the "Industrial Court Act in so far as it permits the fixing of wages in plaintiff's packing house, is in conflict with the Fourteenth Amendment and deprives it of its property and liberty of contract without due process of law." [82]

It should not be inferred from this decision that Chief Justice Taft takes a narrow view of the due process clause. It will be remembered that in the case of *Adkins v. Children's Hospital,*[83] where the Supreme Court denied the constitutionality of the Minimum Wage Law for women in the District of Columbia (a statute which represented a most extraordinary encroachment upon liberty of contract), the Chief Justice dissented along with that arch-liberal, Mr. Justice Holmes.

The foregoing decisions bear evidence of the enormous influence of Chief Justice Taft in shaping the labor law in this country. Even prior to his elevation to the Supreme Bench, no other single judge was so widely cited and quoted as an authority on this branch of the law.[84] That he should be regarded as

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[80] *Supra* note 77, at 543, 544, 43 Sup. Ct. at 636.

[81] *Ibid.* 537, 43 Sup. Ct. at 633.

[82] *Ibid.* 544, 43 Sup. Ct. at 636.

[83] 261 U. S. 525, 43 Sup. Ct. 394 (1923).

[84] The following are a few of the cases in which Taft is quoted or his decisions cited: Gompers v. Bucks Stove and Range Co., 221 U. S. 418, 31 Sup. Ct. 492 (1911); Wabash R. R. v. Hannahan, *supra* note 33; Oxley Stave Co. v. Coopers' International Union, 72 Fed. 695 (C. C. Kan. 1896); Conti-

unsympathetic with the demands of labor is explained by the fact that in practically every case, whether as state judge, circuit judge, or Chief Justice, he has decided against the labor organization or the cause with which it sympathized. Even so, no one has more frequently acknowledged the benefits that flow from labor organizations than has Chief Justice Taft. But just as combined action makes for greater strength in pursuing the aims of labor, so it makes for greater power in inflicting injury on others. For this reason Taft accepted the common law doctrine of criminal conspiracy, and held that certain kinds of conduct, not criminal when pursued by one individual, may become criminal if done by a combination. A combination, he held, may make oppressive or dangerous that which would be otherwise, if it proceeded only from a single person. The very combination itself although not unlawful *per se,* may show that the object is to do harm to others and not to exercise one's own just rights. So, in recognizing the rights of organized labor, Taft was no less solicitous for the rights of non-union employees and employers, against whom there was no grievance, as well as those of the public. Accordingly, he endorsed the strike and primary boycott but strongly condemned the sympathetic strike and secondary boycott.

As for remedies, Taft not only invoked the injunction in labor cases, but, as a Republican candidate for President, he openly favored it as the best means of dealing with the abuses of trade-unionism. As early as 1894, he anticipated the decision in the Danbury Hatters' case, which finally established the applicability of the Sherman Act to the acts of labor combinations. In view of these facts, labor leaders may be somewhat puzzled by the statement which Taft made on November 20, 1919, concerning the frequency with which the injunction had come to be used in labor disputes:

> "Government of the relations between capital and labor by injunction is a solecism. It is an absurdity. Injunctions

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nental Ins. Co. v. Fire Underwriters, 67 Fed. 310 (C. C. N. D. Cal. 1895); Karges Furniture Co. v. Amalgamated Wood Workers, 165 Ind. 421, 75 N. E. 877 (1905); Pickett v. Walsh, 192 Mass. 572, 78 N. E. 753 (1906). For this information, I am indebted to a former student of mine, Mr. John S. Haven.

> in labor disputes are merely the emergency brakes for rare use and in case of sudden danger. Frequent application of them would shake to pieces the whole machine." [85]

In advocating the use of the injunction in labor disputes he did not close his eyes to the abuses that had attended their use. In fact the plank in the Republican platform of 1908 which advocated a modification of the federal court practice, under which injunctions were issued without notice, was adopted at Taft's request and suggestion. Several of these procedural changes were brought about by the enactment of the Clayton Act, but he had no hesitation in expressing the satisfaction he felt in the fact that this statute granted to labor no general immunity under the law and did not seriously impair the authority of the federal courts to issue injunctions in labor disputes.

Chief Justice Taft is opposed to compulsory arbitration in industrial disputes, on the ground that it violates the due process clause of the Fourteenth Amendment. Compulsory arbitration he considers especially objectionable from the point of view of the workers, since it would come very close to a violation of the Thirteenth Amendment, which forbids involuntary servitude.[86] A compulsory arbitration law to tide over a particular emergency, such as the Adamson Law of 1916,[87] he would no doubt sustain.[88]

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[85] Philadelphia Public Ledger, Nov. 20, 1919.

[86] TAFT, PRESENT DAY PROBLEMS (1908) 254.

[87] 39 STAT. 721 (1916), 45 U. S. C. A. § 65 (1928).

[88] In framing subsequent legislation for the settlement of industrial disputes in the railway industry Congress has cautiously avoided making any provision for compulsory arbitration. Anti-strike provisions were inserted in the original Esch-Cummins Bill. But these provisions were struck out by the House, and the Transportation Act of 1920, 41 STAT. 469 (1920) 45 U. S. C. A. § 131 *et seq.* (1928), became law without providing the Railroad Labor Board with power to enforce its decision. That the Labor Board had no such authority is established by Chief Justice Taft's decision in Pennsylvania R. R. System v. Pennsylvania R. R., 267 U. S. 203, 45 Sup. Ct. 307 (1925): "The board is to act as a board of arbitration. It is to give expression to its view of the moral obligation of each side, as members of society, to agree upon a basis for coöperation in the work of running the railroad in the public interest. . . . Under the act there is no constraint upon them to do what the board decides they should do except the moral constraint . . . of publication." Quoting Pennsylvania Railroad v. U. S. R. R. Board, 261 U. S. 72, 43 Sup. Ct. 278 (1923). The present Watson-Parker Act of 1926, 44 STAT. 577 (1926), 45 U. S. C. A. § 151 (1928), still falls short of compulsory arbitration. Indeed, legislation providing compulsory arbitration would be of doubtful constitu-

But Taft did more than define and clarify the labor law and exert his influence in bringing about desirable changes in the procedure of equity courts. It is hardly too much to say that his opinion in the *Coronado* case is about as good an illustration of judicial law-making as can be found. Appreciating the rapid growth of trade-unions and their great power for good as well as harm, but with no legal responsibility for their wrongs, the former Chief Justice, in opposition to judicial precedent and the prevailing common law law doctrine, held the union suable.

Although generally regarded as the greatest setback organized labor has ever suffered, this decision may yet be turned into a source of strength for labor. If the unions can be sued, they can also bring suits and secure injunctions against their employers for damages inflicted by breach of contract, lockouts and black lists.[89] Moreover, appeals to courts of equity in the past have been successful chiefly for two reasons. First, since the labor union was not suable in its trade name the only recourse against organized labor was that of instituting individual suits. A multiplicity of suits being impractical, the plaintiff for all practical purposes had no adequate legal redress. Secondly, even if an employer should undertake to serve all individuals forming the union, and judgments

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tionality. It would seem that Chief Justice Taft's decision in the Wolff Packing case, to say nothing of his utterances off the bench, offers as strong an implication against this power of Congress as Chief Justice White's decision in Wilson v. New, *supra*, note 47, offers in its support. See Mason, *The Right to Strike* (1928) 77 U. OF PA. L. REV. 52.

[89] See Mr. Justice Wagner's opinion in the case of Schlesinger v. Quinto, 117 Misc. 735, 192 N. Y. Supp. 564 (1922), where for the first time in our history an injunction was obtained by a trade union against an organization of capitalists. Justice Wagner's opinion reads in part as follows: "While this application is novel, it is novel only in the respect that for the first time an employees' organization is seeking to restrain their employers' organization from violating a contractual obligation. It is elementary, and yet sometimes requires emphasis, that the door of a court of equity is open to employer and employee alike. It is no respecter of persons—it is keen to protect the legal rights of all. Heretofore the employer alone has prayed the protection of a court of equity against threatened irreparable illegal acts of the employee. But mutuality of obligation compels a mutuality of remedy. The fact that the employees have entered equity's threshold by a hitherto untraveled path does not lessen their right to the law's decree." *Ibid.* 744, 192 N. Y. Supp. at 569. See also Brotherhood of Railway and Steamship Clerks v. Texas & New Orleans Ry., 24 F. (2d) 426 (1928), 25 F. (2d) 873 (1928); Texas & New Orleans Ry. v. Brotherhood of Railway and Steamship Clerks, 33 F. (2d) 13 (1929).

were obtained, the damage inflicted would still be irreparable inasmuch as the employees were usually insolvent. But now, with the bestowal of legal capacity upon trade unions, making them suable and the funds accumulated for the purpose of conducting strikes subject to execution in suits for tort, the chief grounds on which appeals to equity courts have heretofore succeeded may lose much of their force and effectiveness.