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THE *APEX* CASE†

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An approach to recent developments in the application of the Sherman Act to organized labor, particularly its application in the recent case of *Apex Hosiery Company v. Leader*,[1] forces one to go back over those instances where the activities of workmen have on occasion been found to be in violation of our antitrust laws. For the *Apex* case has been variously interpreted by current commentators, who rightly regard it as a milestone in the development of the Sherman Act. But the directions carved upon that milestone have been said by some to point forward and by others to point backward,[2] so that one seems lost in a maze of contradiction.[3]

Directions of this character are, of course, meaningless without a point of reference and that point can only be the road begun just fifty years ago when on July 2, 1890, the Sherman Act received presidential approval. No significant statute ever succeeds in being adopted without some encrustation already having taken place upon the bare and meagre terms chosen to express a legislative desire. If the legislative proceedings fail to attach those meaningful glosses to the statute, the temper of the times may tend to make more plain what the manner of the application of the statute should be to those complex and unforeseen facts that it is certain to encounter as soon as it meets the real world of strife and altercation.

Obviously, the Sherman Act, if it were applicable to labor unions, would have embodied something of the national attitude that in 1890 characterized the reaction of the American people to the problem posed by the growth of organized labor. But unfortunately no such national attitude was in 1890 even at the beginning of a process of crystallization. In 1890 organized labor as a national movment was in its swaddling clothes. The public on occasion viewed it with a sympathetic eye as it became conscious of the labor movement as a significant social force in alleviating some of the situations that

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[1]310 U. S. 469, 60 Sup. Ct. 982 (1940).

[2]Compare, *e.g.*, the contradictory statements of Lee Pressman, General Counsel of the C. I. O., Frank Burch, Secretary of the Central Labor Union of Philadelphia, and Assistant Attorney General Arnold in N. Y. Times, May 28, 1940, p. 21.

[3]For an interesting analysis of the case, see *Labor under the Apex Decision* (1940) 8 INT. JURID. ASS'N BULL. 125.

cried out for remedy. On the other hand as dramatic tales of such excesses as characterized the Molly Maguires were brought to the public's attention by the Westbrook Peglers of that day, some doubts as to labor's place must have tempered that sympathy. More speculative members of that public must also have realized that the inevitable logic of the labor movement called for labor to be increasingly restive with regard to the "No Trespassing" signs with which the feudal industrial economy of 1890 encircled the domain of industrial management and industrial relationships.

Such judicial and sporadic legislative treatment of the problem as characterized the beginnings of the industrial era that preceded 1890 gives the same confused picture. Judges and legislators veered, as the public did, between sympathy and harshness. Liberal decisions such as that of Chief Justice Shaw of Massachusetts in *Commonwealth v. Hunt*[4] found their antonyms in the severe repressive utterances of which that of Chief Justice Beasley of New Jersey in *State v. Donaldson*[5] is an outstanding example. Legislation easing the severity of the older common law doctrines of conspiracy[6] was almost contemporaneous with repressive statutes such as the famous La Salle Black law of Illinois.[7]

The Sherman Act was enacted during this era. To argue that because no national policy governing labor activities had then developed, the purpose of that Act was not to embrace those activities, seems unwarranted. Though it was admittedly concerned primarily with the growing power of trusts and monopolies to interfere with accustomed competitive forces, nothing appears in its language to indicate a clear conviction that the fear of that interference could stem only from combinations of capital and not also from organizations of laboring men.[8] Instead, its words proscribing *every* combination and conspiracy in restraint of trade would seem calculated to embrace *all* combinations and not merely those of the haves as distinguished from the have-nots. Indeed, a good and an honest guess as to the intent of Congress in this connection—if there can ever be any such thing as a real Congressional intent—would seem to be that Congress by the use of these large and un-

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[4] 4 Metc. 111 (Mass. 1842). *Cf.* Master Stevedores Ass'n v. Walsh, 2 Daly 5 (N. Y. 1867).

[5] 32 N. J. L. 151 (1867). See also cases cited in LANDIS, CASES ON LABOR LAW (1934) 35, note 213.

[6] See, *e.g.*, Ill. Laws 1873, c. 76; N. J. Laws 1877, c. 142; N. Y. Laws 1870, c. 18.

[7] Ill. Laws 1863, p. 70; Conn. Laws 1864, c. 57; Kan. Laws 1879, c. 134; Mich. Acts 1877, c. 11; Minn. Pen. Code 1885, § 138.

[8] The legislative history of the Sherman Act has been exhaustively analyzed. The conclusion has been reached both that this history proves that labor unions were intended to be excluded from the Act and, contrariwise, that they were intended to be included within the Act. See BERMAN, LABOR AND THE SHERMAN ACT (1930); MASON, ORGANIZED LABOR AND THE LAW (1925); Emery, *Labor Organizations and the Sherman Law* (1912) 20 J. POL. ECON. 599.

defined words hoped that the courts, employing their customary powers of exposition, might during the years fill the vacuum that then existed and forge some adequate philosophy as to the relationship that the federal government should bear towards the many and various activities of organized labor.[9]

If one should ponder in the abstract this language of the Sherman Act as applied to combinations of labor and seek therefrom some test to distinguish the proscribed from the permitted activities, the natural inclination would be to turn to common law precedents to see whether they might be used to give that language relating to conspiracies and restraints of trade real meaning. Of course, whatever restraints and conspiracies with which the federal courts could deal, because of constitutional limitations, had to concern themselves with interstate as distinguished from intrastate commerce. The technique of distinguishing between interstate and intrastate commerce, though admittedly difficult in the close cases and sometimes metaphysical at best, was familiar and could presumably be adapted to this field. The area of possible federal concern being thus determined, the next question would be whether the particular activity was in restraint of such trade within the meaning of the statute and hence illegal, or whether, despite the fact that it might interfere with or affect normal industrial activity, it was nevertheless without the statutory proscription. On this issue there was a wealth of common law precedent, some of it bad, it is true, and yet malleable enough in its principles to permit judges to reach those conclusions that they thought right and wise under all the circumstances. For the common law in pricking out the allowable area of strikes and boycotts and correlated activities had used the old conceptions of conspiracy and restraint of trade—the very terms employed by the Sherman Act—to distinguish the unlawful from the lawful types. The doctrine that had been evolved made the illegality of such combinations depend either upon a judgment that the end sought was unlawful or upon a conclusion that, irrespective of the lawfulness of the objective sought, the means employed by the particular labor combination under scrutiny were unlawful. True, in this connection there was a general tendency on the part of judges to treat as unlawful ends that they deemed undesirable or means that they disliked, but at least that technique forced judgment to concern itself with the wisdom of objectives and the desirability of certain types of economic weapons.

It is surprising as one looks back upon this episode of Ameriean legal history—the judicial development of the Sherman Act—that some such technique was not employed in dealing with combinations of labor under the

[9]See Landis, Book Review (1931) 44 HARV. L. REV. 875.

Sherman Act, especially so, in that this very technique was employed in dealing with combinations of capital.[10] Decisions twenty and thirty years after the passage of the Sherman Act indicate some of the pitfalls that would have attended this approach, but nothing in the early decisions which hewed out a different line of departure indicates that these pitfalls were the reasons for not introducing into federal law, so far as interstate commerce was concerned, the common law conceptions of conspiracy and restraint of trade that distinguished lawful from unlawful labor activity.

These pitfalls might be adverted to now before proceeding to the manner in which Sherman Law doctrine developed. The first of them is that the immense area embraced by the conception of interstate commerce might have brought a large volume of labor cases into the federal courts. No significant strike fails to restrain interstate commerce in the sense of interfering with the normal entry into or transportation of goods in interstate commerce. Unless the federal courts were to assume substantially complete jurisdiction over labor controversies—a matter that we were unprepared for in 1890—some barrier against the flood of such cases had to be provided. Creating an appropriate barrier by distinguishing between lawful and unlawful restraints was complicated by the broad language of the statute, which proscribed all forms of restraint. True by heroic interpretation, such as became necessary years later in dealing with combinations of capital,[11] this all inclusive phraseology of the statute could have been whittled down to sizeable proportions by the invention of a rule of reason, but when the labor cases first hit the courts no such conception was on the courts' horizons. In the absence of such a rule even the simple, peaceful strike might be brought within the ban of a statute that supposedly spoke for the liberal, progressive consumer rather than the hard-shelled, hard-fisted industrialist.

A second difficulty in the way of absorbing into federal law the common law doctrines applied by state courts to labor combinations, was the inequality in treatment that would result from the three-fold damage clause of the Sherman Act. A restraint punished by the state courts, if punishable for the same reason by the federal courts because it restrained interstate commerce as distinguished from intrastate commerce, would subject the offenders to three times the penalty that they might otherwise incur. Such a treatment, though possibly the logical deduction that should be made from the Sherman

[10]See, *e.g.*, the reliance by Harlan, J., on state authorities, which in turn rely upon the older English authorities, in Northern Securities Co. v. United States, 193 U. S. 197, 339-341, 24 Sup. Ct. 436 (1904), and the direct reliance upon the early English authorities by White, C. J., in Standard Oil Co. of New Jersey v. United States, 221 U. S. 1, 51-59, 31 Sup. Ct. 502 (1911).

[11]United States v. American Tobacco Co., 221 U. S. 106, 31 Sup. Ct. 632 (1911); Standard Oil Co. of New Jersey v. United States, 221 U. S. 1, 31 Sup. Ct. 502 (1911).

Act, certainly would commend itself neither to labor as a whole nor to that normal American consumer whose genius had sought expression in the Sherman Act. Instead, the three-fold penalty suggested that some additional peculiar illegality attached to the restraints in interstate commerce that the Sherman Law condemned as contrasted with those restraints already illegal at common law.

How far these considerations actually motivated *sub silentio* the courts' conclusions in the early cases, it is impossible to say. It is clear, however, that the courts in theory and in expression struck out upon a different line than that indicated by common law doctrine.

The first occasion upon which the issue of the applicability of the Sherman Act to labor combinations was argued before the Supreme Court,[12] that Court found no occasion to announce its views upon the question. Though refusing to disagree with the lower court which found Eugene Debs' instigation of his men to interfere with the movement of railroad cargoes and trains a violation of the Sherman Act, the Supreme Court affirmed the conclusion below but placed the right of the lower court to enjoin that action on the broad and general ground that the United States could brook no such obstruction to the passage of interstate commerce or the carrying of the mails.[13] It is doubtful whether that hesitancy is significant. Unquestionably shocked by the violence of the Pullman strike, the Court chose to rest its power to deal with such a problem upon broad grounds of constitutional authority rather than the narrower base of statutory duty.[14]

A decade later, however, the issue of the Sherman Act was pointedly before the Court. Hatters in Danbury, Connecticut, sought to force collective bargaining in their factory and, failing to persuade the management of the desirability of their proposition, despite the fact that 70 out of 82 manufacturers in the country had acceded to similar terms, called a strike. And then they did more. They persuaded the national union of which they were a component part and the American Federation of Labor with which the national union was affiliated to back their effort by urging their members to refuse to patronize in any way any of the many distribution outlets in

[12]There is no need for our purposes here to review the early lower court decisions holding that the Sherman Act applied to labor combinations. They are collected in BERMAN, *op. cit. supra* note 8, appendix C.

[13]*In re* Debs, Petitioner, 158 U. S. 564, 15 Sup. Ct. 900 (1895).

[14]The validity of the premises underlying the *Debs* case is subject to considerable question in the light of the opinion in the *Apex* case. The implications of the latter opinion would seem to deny the authority of the federal courts to intervene to police the interstate transportation or movement of goods in the absence of legislation authorizing such action. The Court, however, points out that the public interest which was protected independently of statute in the *Debs* case now is protected by legislation specially directed to that end. Apex Hosiery Co. v. Leader, 310 U. S. 469, 486, note 5, 60 Sup. Ct. 982 (1940).

various portions of the country that after warning might continue to handle Danbury hats. Twice the Supreme Court concluded that this combination was in violation of the Sherman Act.[15]

Neither of these two opinions, however,—the first by Chief Justice Fuller on demurrer to the complaint, the second by Mr. Justice Holmes after trial —points out with any exactitude just how this particular combination fell afoul of the Sherman Act. Emphasis is placed upon the fact that the hats moved in interstate commerce in the sense that after being manufactured in Connecticut they were shipped and distributed throughout the United States. Emphasis is also accorded the fact that the effort of the defendants was to cripple and destroy the plaintiff's business unless he acceded to their demands.

But if one asks specifically where the illegality stemmed from, there is no clear answer in the opinion of these two Justices. Did it stem from the desire to cripple the business? If so, that desire was as active in instigating the strike as the boycott. Did it stem from the objective of the defendants, in the sense that by unionizing this factory they were taking another important and unlawful step toward unionizing the whole industry? Nothing in the opinion clearly indicates that such an objective must be deemed to run counter to the Sherman Act. Did it stem from the employment of economic pressure outside the state of Connecticut to effect a result inside the state —namely, the unionization of the factory? Such pressure, inasmuch as it operates at the point of destination of goods in interstate commerce as distinguished from pressure, like a strike, operating at the point of origin, looks superficially as if it is aimed more at destroying the interstate trade of the manufacturer than the strike. But such a distinction is highly superficial at best for interstate trade may in many situations be stifled as effectively by a strike at the point of origin as by boycotts at the points of destination. True, a distinction can be drawn upon the ground of employing a boycott in addition to a strike, for the use of the boycott, especially if it is of the so-called secondary type, may in some of its various forms be regarded as undesirable because it inevitably means a spreading of the area of industrial conflict and the participation of more people in that dispute. But none of these distinctions are pointed to by the Court, nor is there anything in its two opinions that indicates that the illegality of that particular combination stemmed from its employment of the boycott as distinguished from the strike. Instead the method of approach was to describe the picture as a whole, to illustrate how it affected the movement of these hats in interstate commerce, and then to condemn it as such.

[15]Loewe v. Lawlor, 208 U. S. 274, 28 Sup. Ct. 301 (1908); Lawlor v. Loewe, 235 U. S. 522, 35 Sup. Ct. 170 (1915).

Of great interest, however, is the fact that neither opinion cites any common law authority to buttress the conclusion of the Court—common law authority that might show that this type of restraint is unlawful and that therefore, since interstate commerce was involved, the restraint also fell within the ban of the Sherman Act. The absence of such authority is significant for that absence gives fair warning that the test for distinguishing between the labor combinations that are lawful under the Sherman Act and those that are unlawful will be based upon considerations that the Court will propose to draw out of that Act, rather than upon considerations derivable from general common law doctrine in the labor field.

The World War had come and gone when the Court was next called upon to elaborate the position it had taken in the *Danbury Hatters* cases. In 1921 the vicissitudes of industrial conflict so far as they affected the Duplex Printing Press Company came to the attention of the Supreme Court. The machinists' union had succeeded in unionizing three of the four manufacturers in this country of newspaper printing presses. The fourth, the Duplex Company, refused to be persuaded and insisted upon maintaining a wage scale below that prevailing elsewhere. It thus threatened the union's power to maintain its position in the other three factories. The union thereupon struck the factory in Michigan. To make that strike effective the union induced machinists in New York to refuse to assist in the installation of Duplex presses, truck-drivers to refuse to haul them, and encouraged other unionists to withdraw both labor and patronage from customers of the Duplex Company.

The differences between the *Duplex* and the *Danbury Hatters* cases are not great. One can, if one chooses, draw a distinction upon the basis that the Duplex boycott was more tightly articulated than the Hatters' boycott, in that the Hatters associated with themselves the members of all unions, whereas the machinists used only their membership and that of closely related trades. This distinction between tightly articulated boycotts and loose, general boycotts had been drawn in the state courts, particularly in New York,[16] where the cause of action in the case arose, but the majority of the Court paid little attention to it. A more significant distinction between the two cases lay in the fact that subsequent to the *Danbury Hatters* case the Clayton Act had been passed.

There were brave words in that statute saying that "the labor of a human being is not a commodity or article of commerce" and that nothing contained in the antitrust laws shall be construed to forbid members of labor organizations "from lawfully carrying out the legitimate objects thereof."[17] Some

[16]Bossert v. Dhuy, 221 N. Y. 342, 117 N. E. 582 (1917). *Cf.* Auburn Draying Co. v. Wardell, 227 N. Y. 1, 124 N. E. 97 (1919).
[17]Act of Oct. 14, 1914, Sec. 6, 38 STAT. 731.

men, such as Gompers, hoped for much from that statute.[18] Others, such as Taft, then a professor of law at Yale University, doubted.[19] The key to that situation lay in the use of the phrase "legitimate object." Was that an expanding concept, increasing the area of objectives that unions could lawfully pursue, or was it static in content as simply declaratory of existing doctrine?[20] Had a word such as "normal" or "labor" been used in the statute instead of the curiously question-begging term "legitimate" the answer would have been easier.

Mr. Justice Pitney, speaking for the Court,[21] took Professor Taft's view and thereby reduced those sections of the Clayton Act to sound and fury, signifying nothing.[22] But more than this he made plain the view that the meaning of the Sherman Act was to be found purely by the process of introspection and that common law doctrine as to the legality or illegality of particular types of labor activity was immaterial.[23] The process of introspection suggested by Mr. Justice Pitney consisted in thinking about the nature of restraints of interstate trade, and, if such a restraint were found, whether affected by peaceful means or otherwise, to condemn it without regard to the social or anti-social objective that it sought to attain. It was thus easy for him to disregard the New York distinction between tightly articulated boycotts and the loose, broad kind and apply the *Danbury Hatters* doctrine to the facts at bar. More than this, he specifically rejected the common law technique that would condemn restraints upon the basis of ends sought or upon the basis of means employed. Neither the justifiability of the objective, said Mr. Justice Pitney, nor the essential peaceableness of the means employed would make legal what the Sherman Act upon other grounds had made illegal.[24]

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[18]See (1914) 21 AMERICAN FEDERATIONIST 971.

[19]See (1914) 39 A. B. A. REP. 359, 380.

[20]For the contention that the legislative history of Section 6 of the Clayton Act discloses a Congressional intention to exempt labor unions from the Sherman Act and to abrogate the doctrine of the *Danbury Hatters* case, see Brief on Behalf of Congress of Industrial Organizations, *Amicus Curiae,* in Apex Hosiery Co. v. Leader, *supra* note 1.

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

[22]The task of applying a similar lethal technique to Section 20 of the Clayton Act was reserved for Mr. Taft himself, when, in American Steel Foundries v. Tri-City Central Trades Council, 257 U. S. 184, 42 Sup. Ct. 72 (1921), as Chief Justice, he concluded that the prohibitions of that section were to be interpreted as "introducing no new principle into the equity jurisprudence" but as "merely declaratory of what was the best practice always."

[23]"But, in determining the right to an injunction under that [the Clayton] Act and the Sherman Act, it is of minor consequence whether either kind of boycott is lawful or unlawful at common law or under the statutes of particular States. Those acts, passed in the exercise of the power of Congress to regulate commerce among the States, are of paramount authority, and their prohibitions must be given full effect irrespective of whether the things prohibited are lawful or unlawful at common law or under local statutes." Duplex Printing Press Co. v. Deering, 254 U. S. 443, 466, 41 Sup. Ct. 172 (1921).

[24]"It is settled by these decisions [Loewe v. Lawlor, 208 U. S. 274, 28 Sup. Ct. 301

Mr. Justice Brandeis took a different view,[25] but his opinion, so far as our problem is concerned, needs attention only because of his insistence that the Clayton Act had altered doctrine in that field. His position was that Section 20 of the Clayton Act had legalized the employment of certain means by employees, among them the refusal to patronize, irrespective of the objectives that they thereby sought to promote. He reached this conclusion because he thought that that Act sought to analogize the American to the British treatment of the problem.[26] In protest against the common law doctrine that permitted courts to declare illegal combinations of employees because they disapproved of the ends they fostered, irrespective of the legality or illegality of the means they employed, England had restricted judicial interference to cases where independently illegal means, other than the mere threat to strike or the refusal to patronize, were employed. England thus had forbade judicial interference simply upon the ground that the objective might be regarded by the courts as undesirable, limiting that interference to the punishment and restraint of those independently tortious acts that workmen might commit.[27] But Mr. Justice Brandeis' interpretation of the Clayton Act found only two other supporters on the Court, while the conclusion that the Act meant little or nothing appealed to the remaining six.

One can move from the *Duplex* to the *Bedford Cut Stone* case of 1927,[28]

(1908); Lawlor v. Loewe, 235 U. S. 522, 35 Sup. Ct. 170 (1915); Eastern States Retail Lumber Dealers' Ass'n v. United States, 234 U. S. 600, 34 Sup. Ct. 951 (1913)] that such a restraint produced by peaceable persuasion is as much within the prohibition as one accomplished by force or threats of force; and it is not to be justified by the fact that the participants in the combination or conspiracy may have some object beneficial to themselves or their associates which possibly they might have been at liberty to pursue in the absence of the statute." *Id.* at 467-8. The latter statement assumes that the Sherman Act goes further than the common law in penalizing those activities of labor unions because for some reason, not defined, they are found to be "in restraint of trade."

[25]Mr. Justice Holmes and Mr. Justice Clarke concurred with Mr. Justice Brandeis.

[26]"By 1914 the ideas of the advocates of legislation had fairly crystallized upon the manner in which the inequality and uncertainty of the law should be removed. It was to be done by expressly legalizing certain acts regardless of the effects produced by them upon other persons. As to them Congress was to extract the element of *injuria* from the damages thereby inflicted, instead of leaving judges to determine according to their own economic and social views whether the damage inflicted on an employer in an industrial struggle was *damnum absque injuria*, because an incident of trade competition, or a legal injury, because in their opinion, economically and socially objectionable. This idea was presented to the committees which reported the Clayton Act. The resulting law set out certain acts which had previously been held unlawful, whenever courts had disapproved of the ends for which they were performed; it then declared that, when these acts were committed in the course of an industrial dispute, they should not be held to violate any law of the United States. In other words the Clayton Act substituted the opinion of Congress as to the propriety of the purpose for that of differing judges; and thereby it declared that the relations between employers of labor and workingmen were competitive relations, that organized competition was not harmful and that it justified injuries necessarily inflicted in its course." Duplex Printing Press Co. v. Deering, 254 U. S. 443, 485-6, 41 Sup. Ct. 172 (1921).

[27]See LANDIS, CASES ON LABOR LAW (1934) 28.

[28]Bedford Cut Stone Co. v. Journeymen Stone Cutters' Ass'n, 274 U. S. 37, 47 Sup. Ct. 522 (1927).

find a very similar series of facts, a similar disposition of the controversy and little addition to doctrine. The only real mortar to be found in that particular piece of building is the suggestion made by two dissenting and one concurring Justice[29]—Brandeis, Holmes and Stone—that something akin to the rule of reason should be employed to distinguish justifiable labor combinations from those that the Sherman Act should be interpreted to condemn.[30] That suggestion, though grounded upon the *Standard Oil* case, is in essence an attempt to introduce into the labor field the older common law doctrine that drew distinctions between labor combinations upon the basis of the objectives that they sought to attain. Appealing as it is, both upon the ground of its intrinsic merit and upon the ground that it tended to make Sherman law doctrine applying to combinations of labor conform to that applicable to combinations of capital, the suggestion came too late. Development upon bases other than those which distinguished between reasonable and unreasonable restraints of trade had too long characterized judicial handling of these problems.[31]

Thus far the cases considered are those in which both a boycott and a strike were involved and in which the boycott, carried on in a state other than that where the strike occurred, had as its immediate aim the effectuation of a result at the point of manufacture of the goods. Was such a boycott an essential ingredient of a Sherman Act violation because of its operative effect at the point of destination of goods shipped in interstate commerce,[32]

[29]Mr. Justice Sanford, like Mr. Justice Stone, concurred upon the ground that the *Duplex* case was controlling, but Mr. Justice Sanford did not express a concurrence in the view that a rule of reason should be applicable to these labor cases.

[30]It should be noted, however, that in the *Duplex* case Mr. Justice Brandeis had urged that Section 20 of the Clayton Act was intended to prevent courts from indulging in those social judgments that necessarily inhere in the application of any rule of reason. See note 26, *supra*. Having been driven from that position, he took a new stand upon this ground.

[31]Mr. Justice Sutherland specifically rejected the contention that the claimed justifiability of the end was relevant to a determination of whether or not the restraint was in violation of the Sherman Act upon the ground that that question had been settled by the *Duplex* case. Mr. Justice Brandeis was admittedly in a difficult position in now insisting upon the criterion of reasonableness, for he had since the *Duplex* case concurred in Coronado Coal Co. v. United Mine Workers, 268 U. S. 295, 45 Sup. Ct. 551 (1925), where a strike was held to be in violation of the Sherman Act upon the basis of criteria which had no concern with the reasonableness or unreasonableness of the objective that the strikers were pursuing. To avoid the argument that his concurrence in the technique employed by the Court in this and other cases, such as United Mine Workers v. Coronado Coal Co., 259 U. S. 344, 42 Sup. Ct. 570 (1922); United Leather Workers v. Herkert, 265 U. S. 457, 44 Sup. Ct. 623 (1924), and Industrial Ass'n v. United States, 268 U. S. 64, 45 Sup. Ct. 403 (1925), had precluded him from now insisting upon a standard of reasonableness, he replied that in these cases "the questions put in issue were not the reasonableness of the restraint, but whether the restraint was of interstate commerce." Bedford Cut Stone Co. v. Journeymen Stone Cutters' Ass'n, *supra* note 28, at 64.

[32]The fact that the boycott must be carried on in one state to effectuate a result in another state seems an essential requisite of this line of cases. A boycott, even though it be upon goods that have moved in interstate commerce, destined to effect a result in the state

or could the Sherman Act be violated by restraints which though limited to the point of origin effectively prevented goods from ever entering into interstate commerce?

This question came to a head in three cases that the Court was called upon to decide between 1922 and 1925. A coal operator in the formerly unionized district of western Arkansas decided that his mines would go not only open shop but would give up the practice of collective bargaining that theretofore had prevailed in his district. His action in this respect was not unusual. A weakness was creeping into the union movement in certain sections of the coal industry. The competition of mines in strong non-union territory, particularly West Virginia, was making itself felt in the union fields and union operators handicapped by the union wage and hour scale were losing out in the terrific competition for markets that characterized the coal industry. To keep these union operators from going non-union some efforts had to be made to relieve this increasing pressure from non-union fields. The Coronado Coal Company in western Arkansas, however, decided that the pressure of non-union competition was too severe and determined to go non-union. That decision incited a veritable rebellion among its men. They not only struck but resorted to pillage, arson and murder to cripple the business of their employer. Indeed, the action of employees in the recent sit-down strikes seems peaceful when contrasted with the illegal and criminal tactics pursued by these miners of western Arkansas.

The company retorted by an action for three-fold damages under the Sherman Act. From a verdict and judgment for $745,600 the local union appealed to the Supreme Court. That Court upset this judgment and concluded that the conspiracy shown was not within the ambit of the Sherman Act.[33]

There was no doubt but that unlawful means had been used by the union and that the effect of those means was to reduce the supply of coal going into interstate commerce and that the union knew that this would be the effect of its action. There was also no doubt but that the union was conscious

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where the boycott is operative, seemingly falls within the category of the strike cases subsequently discussed. Because this is not a "direct" restraint of interstate commerce some additional objective is needed to bring it within the Sherman Act, an objective of a type that is sufficient to make what is normally indirect "direct." Industrial Ass'n v. United States, 268 U. S. 64, 45 Sup. Ct. 403 (1925); Levering & Garrigues Co. v. Morrin, 289 U. S. 103, 53 Sup. Ct. 549 (1933). It is this line of cases that the Department of Justice is now seeking to upset in its effort to reverse the lower court decision in United States v. Hutcheson, 32 F. Supp. 600 (E. D. Mo. 1940). Difficulty occurs in cases where the boycott though having an intrastate objective is operating upon goods which may still be regarded as being in interstate commerce. Compare Aeolian Co. v. Fischer, 40 F. (2d) 189 (C. C. A. 2d 1930), with Aeolian Co. v. Fischer, 35 F. (2d) 34 (S. D. N. Y. 1929).

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

of the serious competition that union mines were receiving from non-union coal in interstate markets and that it realized that reduction or elimination of that competitive pressure was essential for maintaining the gains it had already made. But the Court viewed the case as one where the primary objective of the union was to correct a local situation. Following prior *ex cathedra* announcements to the effect that coal mining and manufacture were not interstate commerce, even though the coal mined and the goods manufactured were later shipped in interstate commerce, it concluded that an obstruction to such manufacture or mining, though patently affecting interstate commerce and even though produced by illegal and highly criminal means, was not a "direct" restraint upon it and hence not a violation of the Sherman Act. The boycott, on the other hand, the Court observed, was one of those direct and therefore penal restraints.

Comment need hardly be made upon the essential difficulty of trying to judge when a restraint is a direct obstruction of interstate commerce and when it is only an indirect one. Restraints may be aimed at manufacture, at transportation, and at distribution after the major processes of transportation have taken place. If "directness" was to be the test and "directness" meant the nearness of the relationship between the restraint and the physical fact of goods moving in interstate commerce, were lines to be drawn between these three different processes, regardless of the general effect of the restraint in reducing the flow of goods in interstate commerce—an effort that could be produced by a restraint upon manufacture as well as by a restraint upon distribution or upon transportation?

Thus far the position of the Court was that a restraint upon distribution to effect a result at the point of origin was illegal despite the objectives of those who participated in the restraint. With regard to a restraint operating upon transportation, such as a strike of railroad employees or of interstate truck drivers, it had not as yet spoken, but, if "directness" were to be the test, certainly no more direct obstruction of interstate commerce could be imagined than such activity. If so, here again both objectives and means that might be employed would seem to be immaterial.[34] As to the restraints upon

[34]The lower federal courts had dealt with restraints upon transportation. But in those cases where they had concluded that the conduct was in violation of the Sherman Act, illegal means had always been employed. Thus the line between the legal and illegal restraint in this field may rest upon the nature of the means employed, though these courts have never clearly enunciated such a test. United States v. Anderson, 101 F. (2d) 325 (C. C. A. 7th 1939), *cert. denied*, 307 U. S. 625 (1939); Vandell v. United States, 6 F. (2d) 188 (C. C. A. 2d 1925); Williams v. United States, 295 Fed. 302 (C. C. A. 5th 1923); O'Brien v. United States, 290 Fed. 185 (C. C. A. 6th 1923); United States v. Railway Employees' Dep't A. F. of L., 290 Fed. 978 (N. D. Ill. 1923). But *cf.* United States v. Norris, 255 Fed. 423 (N. D. Ill. 1918). In the early cases a similar approach was made, that is, that a restraint which by illegal means prevents the transportation of goods in interstate commerce is a violation of the Act. United States v. Workingmen's

manufacture, knowledge and hence legal intent that the restraint would operate to prevent goods from entering into interstate commerce and thus reduce the supply of goods moving in interstate commerce, the Court in the first *Coronado* case regarded as insufficient proof of that directness that was essential for the Sherman Act. Nor would the addition of highly criminal and illegal means suffice to make direct what was otherwise merely indirect.

With regard to restraints upon manufacture, obviously some limit had to be imposed upon the federal jurisdiction, for otherwise almost every strike would fall within the purview of the Sherman Act. That consequence the Court acutely recognized, when in the second of these cases—the *Herkert* case[35]—it declined to treat as violative of the Sherman Act a strike accompanied by illegal picketing and intimidation in a trunk factory more than 90 per cent of whose product was shipped outside the state of manufacture for sale. But in disposing of this case the Court took occasion to try to pack some further meaning into its litmus test of "direct." To be a direct obstruction to interstate commerce and hence unlawful, the Court said, the intent of the conspirators or the necessary effect of their action must be somehow to enable them "to monopolize the supply [of the article], control its price or discriminate as between its would-be purchasers."[36] "Directness," if this be true, is thus a means for distinguishing between restraints upon manufacture not on the ground of tactics[37] or of effect in reducing the supply of goods moving in interstate commerce,[38] but upon the ground of objectives. Thus objectives which had been regarded as immaterial to the legality or illegality of a boycott became the prime test as to the legality or illegality of a strike.

When the *Coronado* case for the second time came to the Supreme Court, that Court found occasion to apply these general remarks to a concrete

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Amalgamated Council, 54 Fed. 994 (C. C. E. D. La. 1893), *aff'd*, 57 Fed. 85 (C. C. A. 5th 1893); Thomas v. Cincinnati, N. O. & T. P. Ry., 62 Fed. 803 (C. C. S. D. Ohio 1894). If means in these cases are the test of the illegality of the restraint, then "directness" in this field has another and different meaning. This question is further considered *infra* in the discussion of Chief Justice Hughes' dissent in the *Apex* case. See notes 42 and 43, *infra*.

[35]United Leather Workers v. Herkert, 265 U. S. 457, 44 Sup. Ct. 623 (1924).

[36]*Id.* at 471.

[37]In the first *Coronado* case, however, Chief Justice Taft laid emphasis upon the illegality of the means as well as the illegality of the objective. "If unlawful means had here been used by the National body to unionize mines whose product was important, actually or potentially, in affecting prices in interstate commerce, the evidence in question would clearly tend to show that that body was guilty of an actionable conspiracy under the Anti-Trust Act." United Mine Workers v. Coronado Coal Co., *supra* note 33, at 409.

[38]Effect, it will be noted, as such is not controlling, but effect in the reduction of supply may be such as to give a basis for deducing the possession of one of the illegal objectives.

situation.[39] On the second trial of that case considerable evidence was introduced to show that the union involved called the strike because of its belief that the union mines were threatened by the flow of this particular non-union coal into interstate markets. Freed from the union scale these operators could supply a substantial amount of coal to purchasers at a lower price and hence were taking away the market from union operators and thereby severely challenging the ability of the union to hold its existing gains. Thus, because the union had its eye primarily upon the interstate markets for coal in order to protect existing union territory from non-union competition, rather than being primarily concerned with the situation in the particular mines where the strike was called, what had been merely an indirect and innocent restraint of commerce became a direct and penal restraint.

This turn of doctrine means that so far as strikes are concerned their legality or illegality will depend upon the hierarchy of objectives which the courts may see behind them. The difficulty with such an approach is the assumption that objectives are both single and simple or if double or triple, are then primary and ancillary. The effort to unionize a mine, for example, may be not only to unionize that mine and thereby improve conditions at that mine but also to increase the area of unionized territory in order to lessen the competitive pressures always threatening such gains as may already have been made. The latter aim, for some reason not disclosed, the Court regarded as unlawful, but only unlawful if somehow judge or jury found that aim to be more dominant than the aim of merely seeking to unionize a mine.[40]

[39]Coronado Coal Co. v. United Mine Workers, 268 U. S. 295, 45 Sup. Ct. 551 (1925).

[40]It is difficult to understand the role that the legality or illegality of the means plays in the doctrine evolved in these three cases. Illegal means clearly cannot make a restraint that otherwise would not violate the Sherman Act an illegal restraint for the proscribed objective is wanting. But in addition to the proscribed objective must there also be the employment of illegal means? There is an indication that some manner of illegal means is also necessary. See note 37, *supra*. Otherwise the second *Coronado* case stands for the proposition that an effort to unionize an industry in which non-union competition threatens the maintenance of union standards is an objective that cannot be pursued under the Sherman Act. If so, any effort made by the United Mine Workers to organize the West Virginia fields would have violated the Sherman Act. But if the additional requirement of illegal means is read into the second *Coronado* case, the case then stands merely for the proposition that such an effort cannot under the Sherman Act be pursued by illegal means. How confused the Supreme Court left this issue is evidenced by Judge Parker's treatment of this problem in the *Red Jacket* case. International Organization, *etc.* v. Red Jacket C. C. & C. Co., 18 F. (2d) 839 (C. C. A. 4th 1927). The proscribed objective—unionization of competing non-union territory—was there clearly present. But Judge Parker relies upon little else than that that end was to be attained by a series of strikes in order to conclude that the restraint was in violation of the Sherman Act. He thus either implicitly rejected the requirement of illegal means or regarded the threats to strike, *etc.*, as supplying that requirement. Had he hewn more closely to the requirement of independently illegal means, some of the criticism he received would undoubtedly have been avoided. But that on this issue he may have misinterpreted the second *Coronado* case is not surprising.

Subsequent decisions under the Sherman Act add little to those doctrines. If we then try to sum up the situation prior to the *Apex* case, we can say that restraints on distribution violate the Sherman Act, independently of their objective or the peacefulness of the means they may employ, at least if they seek to affect a situation at some point in a state other than that where the restraint is active; that restraints upon manufacture do not offend the Sherman Act, despite tortious and criminal means employed, unless they have as their primary objective the effectuation of monopoly, price-control, price discrimination or the like, even though, as in the effort to unionize an industry such an objective may be sought not for itself but because it is essential to the attainment of some one of the normal labor objectives such as wages, hours, or collective bargaining. As to restraints upon the act of transportation, the Court had had no occasion to comment upon them, but if the test of directness is at all a type of test that would accord with the common use of language, all restraints of this character are direct and hence unlawful, at least if illegal means are employed.

In the years that passed between the development of this doctrine and the *Apex* case, the National Labor Relations Act had been upheld in a series of decisions.[41] I need not comment upon them save to observe that the law there evolved tended to destroy distinctions that the Court had earlier erected limiting the conception of interstate commerce to acts of transportation as distinguished from the processes of manufacture. Those distinctions, however, were essential to the doctrine developed under the Sherman Act. Consequently the undermining of the traditional metaphysics by the Labor Board cases called for a radical revision of Sherman Law doctrine. This, despite the protestations of the Court in its opinion to the contrary, is what happened in the *Apex* case.

The facts of the *Apex* case are simple—a violent sit-down strike in a hosiery factory in Philadelphia, most of whose product was shipped in interstate commerce, accompanied by assaults and destruction of physical property, together with a conscious refusal to lift the sit-down strike to permit completion of contracts calling for the shipment of thousands of pairs of hosiery to out-of-state purchasers. The Court that decided the *Herkert* and *Coronado* cases could hardly consistently with them have held this conduct to violate the Sherman Act, for the restraint being upon manufacture, none of that additional intent was present that under the doctrine of these cases

[41] Among the more significant of these are the following: National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U. S. 1, 57 Sup. Ct. 615 (1927); National Labor Relations Board v. Friedman-Harry Marks Clothing Co., 301 U. S. 58, 57 Sup. Ct. 645 (1937); Consolidated Edison Co. v. National Labor Relations Board, 305 U. S. 197, 59 Sup. Ct. 206 (1938); National Labor Relations Board v. Fainblatt, 306 U. S. 601, 59 Sup. Ct. 668 (1939).

was necessary for a violation of the Sherman Act.[42] Illegality or criminality of tactics, as in the *Coronado* case, was irrelevant for these factors would not supply the essential intent. But, if the effect of the Labor Board cases was to make manufacturing partake of interstate commerce to the same degree that transportation was interstate commerce, a new directness would now attach to the restraint. Additional intent, in the sense of the *Herkert* case, would be unnecessary and the restraint involved in the *Apex* case would consequently be a direct obstruction upon interstate commerce and hence banned by the Sherman Act.

The majority, however, retreated from the consequences that they felt were implicit in such an approach. For if that approach were to be law, not only would strikes that might cripple railroad operation, interstate transport by air or bus violate the Sherman Act, but strikes in ordinary manufacturing industries might have the same result. No line could then be drawn but one that would depend upon the illegality or legality of the means employed. Upon the federal courts would thus be thrust the duty of policing the major portion of American industrial strife with the crude bludgeons provided by the Sherman Act.[43] That prospect could scarcely please, especially judges

[42]The only way in which the restraint in the *Apex* case could have been regarded as illegal under the Sherman Act without regard to the shift in doctrine brought about by the Labor Board cases would have been to follow the technique employed in O'Brien v. United States, 290 Fed. 185 (C. C. A. 6th 1924), and United States v. Norris, 255 Fed. 423 (N. D. Ill. 1918). See note 34, *supra*. This would be to make everything hinge upon the tortious refusal of the strikers to permit the hosiery to be shipped to out-of-state purchasers, treat this as not being merely a prevention of manufacture but as a prevention of transportation, and hence conclude that a "direct" violation of the Sherman Act was involved. This approach, of course, makes illegality depend upon one incident that occurred during the strike rather than making that illegality stem from the character of the strike as a whole. It is this that makes the doctrines evolved in the *O'Brien* and *Norris* cases undesirable for criminality tends to attach to an entire strike because of certain sporadic action taken in conjunction with a strike that happens to disrupt transportation. It should be recognized that the strike in being aimed at preventing manufacture seeks also to destroy that transportation that is the normal resultant of manufacture. That the strikers in their avidity to bring the plant to a standstill may incidentally stop transportation directly should not make the strike a conspiracy if it would not become so by actually stopping manufacture. To accept the doctrine of the *O'Brien* and *Norris* cases would mean that the Sherman Act would be used to police industry in a manner that the Court sought to avoid in the *Herkert* case.

[43]It is not easy to discover just what the theory is that underlay the dissenting opinion in Apex Hosiery Co. v. Leader, *supra* note 1. Chief Justice Hughes seems to make the illegality hinge upon the prevention of the shipment of the finished goods to customers outside the state rather than the stoppage of production—an artificial distinction at best. See note 42, *supra*. It is this "deliberate" prevention that the Chief Justice states was the "direct and intentional prevention of interstate commerce in the furtherance of an illegal conspiracy." *Id.* at 514. By "deliberate" does the Chief Justice mean something more than intentional, that is, prevention by illegal means? If so, the language employed is unfortunately obscure. If "deliberate" is to be given its normal meaning every railroad strike, for example, would be a violation of the Sherman Act. There is much in his opinion to suggest that the Chief Justice held the latter view. He not only approves the holdings of the lower federal courts in United States v. Workingmen's Amalgamated Council, 54 Fed. 994 (C. C. E. D. La. 1893), *aff'd*, 57 Fed. 85 (C. C. A.

still cognizant of the unfavorable judgment of Congress, as contained in the Norris-LaGuardia Act, upon their former administration of the same broad field through their equitable injunctive powers. In the light of the public reaction to the government by injunction that characterized the twenties, it was natural to hesitate to assert that the slender and tenuous base of the Sherman Act required judges to assume a similar responsibility to govern vast areas of industrial strife by indictment and by the penalty of three-fold damages.

Mr. Justice Stone led this school of thought. To do so he was required in the *Apex* case to fashion new doctrine though naturally he purports merely to apply old law. Two propositions sum up his approach. These two must of necessity be paraphrased because the amenities of judicial conversation require judges on occasion to conceal rather than reveal the implications of their thought. The first[44] of Mr. Justice Stone's propositions is that any

5th 1893) and United States v. Debs, 64 Fed. 724 (C. C. N. D. Ill. 1894), cases of railroad strikes in which illegal means were employed, but does so merely upon the general ground that the defendants there "obstructed" and "prevented" transportation rather than that they accomplished these results by illegal means. Concluding his review of these cases, he says: "In the light of these decisions of the circuit courts and of the significant and unanimous expressions by this Court [in *Loewe v. Lawlor* and *Lawlor v. Loewe,* where, as it was pointed out earlier, the Court found the restraints illegal because their aim was to "cripple" the defendant's business], the argument seems to be untenable that the Sherman Act has been regarded as not extending to conspiracies to obstruct or prevent transportation in interstate or foreign commerce. On the contrary, I think that hitherto it has not been supposed that such conspiracies lay outside the Act." *Id.* at 521. He goes on: "Suppose, for example, there should be a conspiracy among the teamsters and truck drivers in New York City to prevent the hauling of goods and their transportation in interstate commerce, can it be doubted that the Sherman Act would apply?" *Id.* at 526. It is only at the every end of his opinion that the suggestion is made in terms, still far from clear, that the use of illegal means may be a necessary element of these "conspiracies" "directly" "to prevent interstate transportation." He there says: "It is said that such a view would bring practically every strike in modern industry within the application of the statute. I do not agree. The right to quit work, the right peaceably to persuade others to quit work, the right to proceed by lawful measures within the contemplation of the Clayton Act to attain the legitimate objects of labor organization, is to my mind quite a different matter from a conspiracy directly and intentionally to prevent the shipment of goods in interstate commerce either by their illegal seizure for that purpose, or by the direct and intentional obstruction of their transportation or by blocking the highways of interstate intercourse." *Id.* at 529. One is thus left still in doubt as to the legality of strikes aimed at transportation which employ no illegal means.

[44]Mr. Justice Stone in the prelude to his opinion rejects the contention that the Sherman Act was not intended to apply to labor unions, primarily upon the ground that the "long time failure of Congress to alter the Act after it had been judicially construed, and the enactment by Congress of legislation which implicitly recognizes the judicial construction as effective, is persuasive of legislative recognition that the judicial construction is the correct one." *Id.* at 488. He makes no mention of the stronger contention which was before the Court that the Clayton Act was an attempt to reverse the legislative interpretation made in *Lawlor v. Loewe.* Compare Mr. Justice Stone's treatment of the problem with that of Mr. Justice Frankfurter, then a Professor at the Harvard Law School, in the Foreword to BERMAN, LABOR AND THE SHERMAN ACT (1930) xiv: "Yet labor consistently denies that its activities are even subject to the Sherman Law. Though it has been judicially settled since 1908 that labor is amenable to the Sherman Law, the question is not closed for historians and it is wide open in the minds of labor. If moral assent to

restraint, whether of capital or labor, to be illegal under the Sherman Act, must have as its aim the desire to suppress the forces of competition which otherwise are assumedly active in the marketing of goods and services. This concept of interference with commercial competition is not too clear, but the Justice seeks to make it concrete by examples. Thus where the aim is one to restrain free competition in business and commercial transactions by restricting production, by fixing prices, by dividing marketing territories, by apportioning customers or the like, the restraint seeks to interfere with commercial competition.[45] But merely preventing substantial interstate shipments in order to enforce ordinary labor demands is not such an aim. There must in addition be this further objective of interfering with commercial competition—an objective of the general type comprehended by the common law conceptions of restraint of trade—as a necessary condition for the application of the Sherman Act. This proposition, it will be seen, reintroduces common law doctrine into this branch of labor law, an approach that was specifically eschewed by Mr. Justice Pitney in 1921. But the common law doctrine introduced by Mr. Justice Stone is the common law doctrine of restraint of trade as applied to combinations of capital rather than those doctrines of restraint of trade and conspiracy developed by the common law to deal with combinations of labor.

The second of Mr. Justice Stone's propositions breathes life into the Clayton Act that twenty years ago Mr. Justice Pitney and Chief Justice Taft had read out of existence. Any combination of employees, Mr. Justice Stone observes, tends to curtail the competitive forces that otherwise are operative in the sale of employees' services to their employers. That type of restraint is obviously designed to raise the price of labor, but nevertheless as such it finds specific sanction, if not at common law, in the language of the Clayton Act.

These two propositions easily disposed of the case at bar. Admitting the existence of a restraint on interstate commerce caused by the prevention of manufacture, there was absent any intent on the part of the strikers to do otherwise than raise the price of their own product, labor—a justifiable objective of combination.

But though these principles conclude the disposition of the particular case, how far can they be said to clear the decks for disposition of other controversies? Are the distinctions formerly made between restraints upon manu-

the authority of a law is of vital importance to the reign of law in a democracy, it can never be too late or too academic to examine the grounds on which rest even so well settled a doctrine as that the Sherman Law governs the activities of labor organizations. And the scope of its applicability, in any event, will continue to present issues of policy for the judgment of courts."

[45] *Id.* at 497.

facture, transportation and distribution to be maintained? Is the boycott to be handled differently from the strike? Is the effort by a boycott or by a strike to unionize an entire industry still to be regarded as unlawful? What means can be employed to prevent price competition based upon lower labor costs arising from the lack of union wage scales in portions of an industry, or to prevent the introduction of competitive materials of a grade cheaper only because of methods of manufacture that labor deems deleterious to its interests? What of the objective of resisting that technological unemployment that results as a consequence of the introduction of more mechanized methods of manufacture? And finally, what of the objective of one union seeking to destroy another union by pressure brought upon the employers of members of the latter union?

Unfortunately the Court is vague on these matters. One point seems clear and that is that no distinction will be drawn between restraints merely because one operates only upon manufacture and the other on actual transportation. The tests for the legality of a railroad strike, for example, will be the same under the Sherman Act as those that are applicable to a strike in a steel plant. But the other issues still remain shrouded save for a hint that the elimination of price competition based upon variations in labor costs falls within the class of objectives made justifiable by the Clayton Act.[46] If this be true, despite the apparent reconciliation affected by Mr. Justice Stone between his principles and the earlier cases,[47] nothing really remains

[46]The significant passage is the following: "Strikes or agreements not to work, entered into by laborers to compel employers to yield to their demands, may restrict to some extent the power of employers who are parties to the dispute to compete in the market with those not subject to such demands. But under the doctrine applied to non-labor cases, the mere fact of such restrictions on competition does not in itself bring the parties to the agreement within the condemnation of the Sherman Act. *Appalachian Coal v. United States, supra,* [288 U. S.] 360. Furthermore, successful union activity, as for example consummation of a wage agreement with employers, may have some influence on price competition by eliminating that part of such competition which is based on differences in labor standards. Since, in order to render a labor combination effective it must eliminate the competition from non-union made goods, see *American Steel Foundries v. Tri-City Central Trades Council,* 257 U. S. 184, 209, an elimination of price competition based on differences in labor standards is the objective of any national labor organization. But this effect on competition has not been considered to be the kind of curtailment of price competition prohibited by the Sherman Act. See *Levering & Garrigues Co. v. Morrin, supra; cf. American Steel Foundries* case, *supra,* 209; *National Association of Window Glass Mfrs. v. United States,* 263 U. S. 403." *Id.* at 503-4.

[47]The effort to reconcile these earlier cases hardly convinces. Of the *Duplex* and the *Bedford* cases, the Justice says that, though these cases followed the enactment of the Clayton Act and the recognition of the rule of reason in the *Standard Oil* cases, "the applicability of that rule to restraints upon commerce affected by a labor union in order to promote and consolidate the interests of its union was not considered." The learned Justice seems to assume that his own dissent and that of Mr. Justice Brandeis in the *Bedford* case were written merely for the delectation of the public and not for the "consideration" of the majority of his brethren. He also forgets Mr. Justice Pitney's specific insistence that the social justifiability of the end pursued by the union in the *Duplex* case was irrelevant to the question of whether its activity violated the Sherman Act.

of their announced doctrine. All of them, the *Danbury Hatters* case, the *Duplex* case, the *Bedford Cut Stone* case, the second *Coronado* case, had that objective in view. If an attempt to control commercial competition between union and non-union goods is now legal because that control is for the purpose of effecting the normal labor objectives of increased wages, improved hours, increased employment, or the preservation of an existing system of collective bargaining, a very profound change has taken place. To save anything of the former doctrine the Supreme Court will have to turn its attention to grounds that may exist for distinguishing the collective employment of the refusal to labor from the collective employment of the refusal to patronize, or find means to limit in some fashion the use of the strike and the boycott by persons only mediately and not immediately connected with a particular industrial discontent. Adequate rationalization of such distinctions is the real crux of labor law, for it forces thought to concern itself not with the metaphysics of the conception of interstate commerce but with the reality of what economic weapons our society will permit labor to use to gain its ends. Thus far the Supreme Court has contributed little to our thinking in this field. It has decided cases, it is true, involving these issues, but the grounds of these decisions have been concealed behind the factitious screens of direct and indirect or obscured by legalistic and technical conceptions of the nature of interstate commerce. It will now be forced to face the realities of economic conflict and thereby fashion more realistically the allowable area of collective labor activity.

It may well be that nothing resembling the former doctrine will ultimately be saved, and that the rule that will develop will be that labor combinations, irrespective of the means they employ, whether strike or boycott, will not be regarded as violating the Sherman Act provided that their objective is a normal labor objective. There is much in Mr. Justice Stone's opinion to suggest that such a principle underlies his thought. If so the ultimate effect of the *Apex* decision will actually be to read labor unions out of the Sherman Act so far as their activities are directed toward the promotion of those ends[48]—the improvement of labor conditions—upon which their justification alone can rest. That effect would realize the hopes entertained by those sponsors of the "new freedom" who in 1915 wrote into the Clayton Act brave but ineffective words of encouragement.[49]

[48]Cases like United States v. Brims, 272 U. S. 549, 47 Sup. Ct. 169 (1926) and Local 167 v. United States, 291 U. S. 293, 54 Sup. Ct. 396 (1934) are distinguishable upon this ground. *Cf.* United States v. Borden Co., 308 U. S. 188, 60 Sup. Ct. 182 (1939). It is of interest that even the C. I. O. in its brief as *amicus curiae* in the *Apex* case admitted the validity of these cases, arguing that the immunity that they urged labor unions had under a proper interpretation of the Sherman Act would not apply when labor unions were seeking to pursue other than labor objectives. See Brief, p. 59.

[49]See President Wilson's address of Sept. 2, 1916 accepting his renomination, 1 MESSAGES AND PAPERS OF WOODROW WILSON (1924) 302, 307.

One thing is certain. The announced policies that the Department of Justice indicated that it would pursue with regard to labor combinations will call for radical revision.[50] Those policies, as set forth by Assistant Attorney General Arnold in his famous letter to the Secretary of the Central Labor Union of Indianapolis,[51] will have to be materially modified in the light of the *Apex* case.[52] Of the five types of illegal labor restraints that Mr. Arnold there sets forth, only one—labor participation in price-fixing agreements—seems, since the *Apex* case, clearly within the ambit of the Sherman Act. The others that are described as consisting of "unreasonable" restraints to prevent the use of cheaper materials, improved equipment, or more efficient methods, to compel the hiring of useless and unnecessary labor, to destroy an established and legitimate system of collective bargaining,[53] to enforce systems of graft and corruption, may, perhaps, fall within the Sherman Act; but, if they do, they do so because of incidents that attend these efforts not made explicit in Mr. Arnold's statement of doctrine. Even the most vicious of these restraints—that to enforce systems of corruption and graft—may operate with the concern of graft alone in mind with no desire or appreciable effect of restricting commercial competition and hence not be illegal under the Sherman Act. But since the Anti-Racketeering Act of 1934, there is no need to complain of this result for another weapon to police this species of corruption is now possessed by the Federal Government.[54]

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[50]For a penetrating criticism of this statement antedating the *Apex* case, see *The Folk-Law of Thurman Arnold* (1939) 8 INT. JURID. ASS'N BULL. 53.

[51]This letter of Nov. 20, 1939 is conveniently found in (1939) 5 L. R. R. 316. See also ARNOLD, THE BOTTLENECKS OF BUSINESS (1940) 249.

[52]One aspect of these policies is now at issue in the case of United States v. Hutcheson, 32 F. Supp. 600 (E. D. Mo. 1940), on appeal to the Supreme Court of the United States. The announced policies, even before the *Apex* case, did not govern the Department's action. In United States v. Gold, 115 F. (2d) 236 (C. C. A. 2d 1940), the Department prosecuted officials of the Needle Trades Workers' Industrial Union for seeking by picketing, intimidation, *etc.*, to compel the unionization of non-union fur dressers and dyers located in New Jersey, to whom skins were shipped by New York City furriers for dressing and dyeing. The attack by picketing, intimidation, *etc.*, was made not only at the New Jersey plants but at the plants of those furriers in New York City who dealt with the New Jersey dressers and dyers. Though this grew out of an inter-union dispute between Needle Workers and the International Fur Workers, the case made under the Sherman Act related to the union's efforts to unionize the three non-union plants. Though the case has elements in common with the *Duplex* and *Bedford cases*, it is impossible to fit it within any of the five categories mentioned by Assistant Attorney General Arnold. The convictions below were reversed upon the strength of the *Apex* case.

Mr. Arnold in an appendix to his chapter on labor in his *Bottlenecks of Business* (1940)—a chapter which was obviously written before the *Apex* case—states that the result of the *Apex* case appears to be to support the prosecution policy of the Department just described. *Id.* at 319. The comment, however, is obviously too superficial and too casual to merit serious attention as the considered judgment of the head of the Department's Anti-Trust Division.

[53]For a thoughtful criticism of the Department of Justice's position in attempting to control the area and manner of jurisdictional strikes, see Jaffe, *Inter-Union Disputes in Search of a Forum* (1940) 49 YALE L. J. 424.

[54]See 48 STAT. 979 (1934), 18 U. S. C. A. §§ 420 a-e (Supp. 1940).

From a popular standpoint the *Apex* case can be considered as a very significant victory for organized labor. Of course, it does not legalize a violent or a sit-down strike. Indeed the very defendants in the *Apex* case are now defendants in a tort action in a state court—the appropriate tribunal for the adjudication of claims of assault and malicious destruction of property. But it does mean that the effort to precipitate the federal courts into policing the details of industrial strife failed and that the forties will not see a resuscitation of many of the unfortunate consequences that attended government by injunction in the twenties.

From a legal standpoint the *Apex* case means a much more realistic effort to deal with the appropriate responsibility that the Sherman Act thrusts upon organized labor, for by applying tests to combinations of labor akin to those applied to combinations of capital, it has instructed both to beware of using their powers to upset the competitive forces that otherwise should control prices of commodities other than labor in our interstate markets. It permits men, however, to insist that combination can be employed to sell as dearly as the market makes possible the services of human beings. What weapons that combination may use, it leaves for future determination. But the spirit of the older cases is missing. The metaphysical tactics which subsumed one type of restraint under the concept of "direct" and tossed off another as merely "indirect," the artificial distinctions drawn merely because of the locus of the operation of the restraint, are to be abandoned. In their place there is beginning to arise a technique that, in the light of our present day admission that collectivity of action is essential for the realization of labor's legitimate aims, will try to relate both labor's objectives and weapons to the positions that they should occupy in a system that legally, if not economically, insists that free competition in price, in quality, in service, is still most likely to assure that wide happiness that a free people desires.

ADDENDUM

Since the above analysis of the *Apex* case was written, the Supreme Court of the United States has disposed of the appeal in *United States v. Hutcheson.*[55] Its decision in that case is as significant as that in the *Apex* case and, because of the new approach there taken, demands re-examination of the above propositions.

The *Hutcheson* case involved a jurisdictional dispute between two American Federation of Labor unions. The carpenters, objecting to the employment of machinists on a construction job being done under contract with the Anheuser-Busch brewery plant in St. Louis, struck that job and also struck a similar construction project undertaken by the same contractor for a lessee of the brewery. The brewery and its lessee were also picketed and the carpenters further urged members of their union and their friends to refrain from drinking Anheuser-Busch beer. A demurrer to an indictment of the carpenters was upheld in the district court upon the ground that the purpose of the combination was not to restrain interstate commerce but to prevail in a local labor controversy.[56]

The affirmance of this decision by the Supreme Court was to be expected. The type of objective necessary for an indictable restraint, under the theory of the *Apex* case, was absent. Moreover the pattern of action did not necessarily fit within those patterns which the Court in its earlier decisions had condemned. The tactics employed by the union were limited to the locality where the dispute occurred,[57] except for the boycott of the beer and this, as a boycott aimed only at the purchase of a product, could justifiably be distingnished[58] from a general boycott of retailers[59] or a boycott on materials enforced by a threat to strike.[60]

This line of thought underlies the concurring opinion of Mr. Justice Stone in the *Hutcheson* case.[61] The majority opinion, however, by Mr. Justice Frankfurter strikes out a new line of approach. It points out that the acts complained of would all have come within the purview of Section 20 of the Clayton Act but for the fact that the dispute was not between an employer

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[55] 9 U. S. L. WEEK 4151 (U. S. 1941), decided February 3, 1941.

[56] United States v. Hutcheson, 32 F. Supp. 600 (E. D. Mo. 1940).

[57] *Cf.* Levering & Garrigues Co. v. Morrin, 289 U. S. 103, 53 Sup. Ct. 549 (1933).

[58] *Cf.* Goldfinger v. Feintuch, 276 N. Y. 281, 11 N. E. (2d) 910 (1937).

[59] Such as Loewe v. Lawlor, 208 U. S. 274, 28 Sup. Ct. 301 (1908).

[60] Such as Duplex Printing Press Co. v. Deering, 254 U. S. 443, 41 Sup. Ct. 172 (1921), and Bedford Cut Stone Co. v. Journeymen Stone Cutters' Ass'n, 274 U. S. 37, 47 Sup. Ct. 522 (1927).

[61] The dissenting opinion of Mr. Justice Roberts, concurred in by Chief Justice Hughes, is mainly aimed at the technique employed by the majority. It also refuses to draw distinctions between "secondary boycotts" of the character suggested by Mr. Justice Stone.

and his employees as that relationship had been interpreted by the Court in the *Duplex* case. And, but for this limitation of the *Duplex* case, those acts would also not have violated the Sherman Act, for Section 20 besides prohibiting the issuance of injunctions against them specifically provided that none of these acts should be "considered or held to be violations of any law of the United States."

Mr. Justice Frankfurter then proceeds to point out that the Norris-LaGuardia Act broadened the conception of "labor disputes" to include controversies between an employer and workmen irrespective of whether they might be "employees." He then finds a national policy implicit in that Act which he believes justifies him in reading that broadened conception of "labor disputes" back into the Clayton Act so as to extend its immunizing provisions to disputes of this character. The result is to legalize all the particular acts of the defendants alleged to be in violation of the Sherman Act.

The *Duplex* case is thus overruled both with reference to its substantive Sherman Law doctrine and to its interpretation of Section 20 of the Clayton Act, but the technique of Mr. Justice Frankfurter places the onus of this overruling upon the back of the Congress and not the Court. He thereby defends the Court from the criticism of late so frequently made that the Court has been indulging somewhat too extensively in overruling cases decided prior to the recent "reconstruction in the membership of the Court."[62] But justifieation for this interpretative technique must depend upon the correctness of the national policy Mr. Justice Frankfurter draws out of the Norris-LaGuardia Act, for no objection should be voiced against the extension of legislative policy to situations covered by the import though not the literal text of a statute.[63]

It has been generally supposed that the Norris-LaGuardia Act affected only the jurisdiction of the federal courts to grant injunctive relief in labor controversies except as permitted by its provisions, or to grant any relief with regard to the direct or indirect enforcement of anti-union contracts. It was drawn along these lines because it went to the general jurisdiction of the federal courts—a jurisdiction which enforces rights and duties arising under state law as well as federal law. And, while the alteration by Congress of substantive rights and duties under state law would be admittedly unconstitutional,[64] the practical impact of those rights and duties could be affected

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[62]Frankfurter, J., concurring in Graves v. New York *ex rel.* O'Keefe, 306 U. S. 466, 487, 59 Sup. Ct. 595 (1939).

[63]For an admirable example of the employment of this technique, see Frankfurter, J., in Keifer & Keifer v. Reconstruction Finance Corp., 306 U. S. 371, 59 Sup. Ct. 516 (1939). My own plea for its more extensive use is to be found in LANDIS, STATUTES AND SOURCES OF LAW (Harvard Legal Essays, 1934) 213.

[64]Erie R. R. v. Tompkins, 304 U. S. 64, 58 Sup. Ct. 817 (1938).

indirectly, so far as the federal courts were concerned, by the equally clear authority to alter the jurisdiction and procedural powers of the federal courts. Thus again and again its sponsors and its draftsmen, among whom was Mr. Justice Frankfurter,[65] then a professor at Harvard, pointed out that its concern was purely procedural and not substantive.[66]

Mr. Justice Frankfurter now urges that it is fallacious "to say that that which on the equity side of the court is allowable conduct may in a criminal proceeding become the road to prison. It would be strange indeed that although neither the Government nor Anheuser-Busch could have sought an injunction against the acts here challenged, the elaborate efforts to permit such conduct failed to prevent criminal liability punishable with imprisonment and heavy fines."[67] Traditionally, however, equity does not normally determine whether conduct is "allowable" or not; it determines whether under the

[65]The Norris-LaGuardia Act had its origins in the sub-committee to which the so-called Steiwer bill (S. 2497) had been referred. That bill was disapproved by the sub-committee but, being impressed that some legislation was necessary in this field, the sub-committee invited the following men to assist it in formulating an appropriate bill: Professor Felix Frankfurter (Harvard), Professor Herman Oliphant (Johns Hopkins), Professor Francis B. Sayre (Harvard), Mr. Edwin E. Witte (Chief of the Wisconsin Legislative Reference Bureau), Mr. Donald R. Richberg (attorney). See SEN. REP. No. 1060, 71st Cong., 2d Sess. (1930) Pt. 2, p. 5.

[66]The debates in Congress and the surrounding literature are explicit on this point. Of particular interest are the two following quotations from Professor Frankfurter's writings made while the bill was pending in the Congress:

"With due regard for the power of Congress to formulate policy and with insight into the realities of industrial life, these provisions [of the Norris-LaGuardia Act] ought to weather the tests of constitutionality. They do not offend any decision of the Supreme Court. To be sure, in *Truax* v. *Corrigan*, the Court by the narrowest division, found an attempted modification of equity jurisdiction by a state violative of the Fourteenth Amendment in that complainants' damage was in 'effect made remediless' and that they were 'denied the equal protection of the laws.' The first ground was rested upon a finding that the Arizona statute 'withheld from the plaintiffs all remedy for the wrongs they suffered.' No such interpretation is possible for the proposed bill, which explicitly applies only to the authority of United States courts 'to issue any restraining order or injunction.' All other remedies in federal courts and all remedies in state courts remain available." FRANKFURTER AND GREENE, THE LABOR INJUNCTION (1930) 220.

"But in matters where passion so readily gives rise to confusion of legal issues, it may not be superfluous to make specific answer to constitutional objections put by the Committee in the form of three rhetorical questions. . . .

"2. *Is the denial of all adequate judicial remedies in case of an illegal strike a denial of due process of law?* This question is not pertinent, for the bill only withdraws the remedy of injunction. Civil action for damages and criminal prosecution remain available instruments. Illegal strikes are not made legal." Frankfurter and Greene, *Congressional Power over the Labor Injunction* (1931) 31 COL. L. REV. 385, 408.

Two comments deserve to be made with reference to these statements. The first is that these remarks were addressed primarily with reference to the effect of the Norris-LaGuardia Act upon the substantive law of the states and not the substantive law of the federal government. The second is that even though it be thought that an inconsistency is present between these statements and those now made by Mr. Justice Frankfurter, inconsistency may on occasion be a virtue, save that the statements here possess historical significance as evidence from which Congressional "intent" is realistically deducible and have thus unusual relevance.

[67]United States v. Hutcheson, 9 U. S. L. WEEK 4151, 4153 (U. S. 1941).

circumstances its extraordinary powers shall be exercised to grant relief of the nature requested or whether the parties shall be left to such remedies as they possess upon the law side of the court. And the "law side" may in innumerable cases treat as criminal that for which injunctive relief is denied. This, moreover, was the great issue underlying the battle over government by injunction in labor disputes, namely that procedurally injunctive relief was unfairly administered to labor in this class of cases and that, therefore, the injunctive mode of relief should be curtailed and the complaining parties left to whatever remedies, legal or criminal, might otherwise be available.[68] Among these remaining remedies it would seem that, unless the Congress had given some indication to the contrary, there would be the criminal actions or suits for damages provided by the Sherman Act.[69] And one searches the records of the Congress in vain for even an inference of an intent also to do away with these remedies.

Little help for the Justice's technique comes from an attempt to read the Clayton and the Norris-LaGuardia Acts as integrated statutes. Indeed, history tells a contrary story, for it was because the Clayton Act, so far as those provisions are concerned, had become a dead letter that the Norris-LaGuardia Act was enacted. Rather than a supplement of a living growth, as the Court now claims the latter Act to be, the Norris-LaGuardia Act was rather a new plant to take the place of a withered and a broken reed.[70]

The technique of the majority opinion is thus difficult to defend, but what of its result? It establishes generally the principles advocated by Mr. Justice Brandeis in his dissenting opinion in the *Duplex* case, legalizing so far as the Sherman Act goes, certain specific conduct irrespective of the objectives of the actors. In 1921, when the *Duplex* case was decided, such an approach would obviously have been desirable for it would have removed from the courts the duty of exercising a broad range of judgment upon issues of social policy, for these judgments were determinative of the legality or illegality of specific activity. This duty, as the following years proved, was not discharged too wisely and one wonders whether any group of mortals purporting to act in terms of law could have discharged such a responsibility with satisfaction. For the issues in essence were political and thus demanded

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[68] See FRANKFURTER AND GREENE, THE LABOR INJUNCTION (1930) cc. 2 and 3.

[69] One of the great complaints by labor against the Clayton Act was that to the other sanctions for the enforcement of the Sherman Act provisions, it added the right of private parties to seek injunctive relief. See BERMAN, LABOR AND THE SHERMAN ACT (1930) 103.

[70] "The Clayton Act was the product of twenty years of voluminous agitation. It came as clay into the hands of the federal courts, and we have attempted a portrayal of what they made of it. The result justifies an application of a familiar bit of French cynicism: the more things are legislatively changed, the more they remain the same judicially." FRANKFURTER AND GREENE, THE LABOR INJUNCTION (1930) 176.

for their adequate resolution some mechanism which would reflect more quickly than law the impact of events and of changing public opinion.

But with the promulgation of the doctrine of the *Apex* case, the situation had changed. If its implications were broadly accepted, it distinguished between combinations whose objectives were labor objectives and those whose objectives were otherwise in restraint of trade—a distinction which upon substantive grounds raises issues that parallel to a great degree those now posed by making the question hinge upon whether a "labor dispute" is presented by the particular ease.[71] The *Hutcheson* case has thus not changed the basic problems raised by the *Apex* case but rather east them in one area in a different formal mould.[72]

That area is, moreover, a limited one, for when means exceeding those "legalized" under Section 20 of the Clayton Act are employed, as was true in the *Apex* case, the question of legality of the combination has to be determined by reference to the criteria announced in the *Apex* case. Thus the duty of further developing the implications of Mr. Justice Stone's doctrine remains in an area now somewhat circumscribed but still important.[73] That the development will take the line, already suggested, of reading labor unions

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[71]This is recognized by Mr. Justice Frankfurter in his opinion in the *Hutcheson* case where he still defends the result of United States v. Brims, 272 U. S. 549, 47 Sup. Ct. 169 (1926): "So long as a union acts in its self-interest and does not combine with non-labor groups, the licit and the illicit under § 20 are not to be distingnished by any judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means." 9 U. S. L. WEEK 4151, 4152 (U. S. 1941).

[72]Even in this area the approach in the *Hutcheson* case by its emphasis upon means raises problems of the application of doctrine not unlike those involved in O'Brien v. United States, 290 ed. 185 (C. C. A. 6th 1924), and United States v. Norris, 255 Fed. 423 (N. D. Ill. 1918)—a doctrine for which the Chief Justice pleaded in his dissent in the *Apex* case. The difficulties with this emphasis on means, on "policing" as Mr. Justice Stone might have put it, have alrcady been pointed out. See note 42, *supra.* They inhere in the fact that sporadic "illegal means" of a few individuals may make criminal otherwise lawful concerted activity—a danger slightly increased by the even more recent decision of Mr. Justice Frankfurter in Milk Wagon Drivers' Union v. Meadowmoor Dairies, 9 U. S. L. WEEK 4185, decided February 10, 1941.

[73]Assistant Attorney General Arnold has again indulged in an effort to formulate the policy of the Department of Justice toward prosecutions of labor union activity in the light of the restrictions placed upon its earlier policies by the *Apex* and *Hutcheson* cases. Unfortunately the only available report of the revised plan of the Department is too indefinite to permit comment, though it seems to possess weakness similar to that of Mr. Arnold's original plan. N. Y. Times, Feb. 14, 1941, p. 1. It may well be that the *Hutcheson* case will provoke legislation to reverse this liberalizing but surprising interpretation of Congressional legislation similar to that precipitated by the Court's decision in Kessler v. Strecker, 307 U. S. 22, 59 Sup. Ct. 694 (1939). See N. Y .Times, Feb. 14, 1941, p. 13. Saint Georges are even now on the horizon: "If labor is given enough rope and hangs itself without hanging the country, the possibility of eventual relief through federal legislation should not seem too Utopian. The refreshing spectacle will then be presented of the 'forward-looking' Court fighting the rear guard action." McLaughlin, *Bottlenecks (Union-made Included)* (1941) 8 U. OF CHI. L. REV. 215, 221.

out of the Sherman Act so far as their labor activities are concerned seems more predictable than ever. Certain is it, that the New Freedom of 1914, so rudely throttled by the Supreme Court in the twenties, has now been reborn by the New Deal of the forties.