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> All rights are derived from the purposes of the society in which they exist; above all rights rises duty to the community. The conditions developed in industry may be such that those engaged in it cannot continue their struggle without danger to the community. *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 488 (1921) (Brandeis, J., dissenting).

Since the passage of the Sherman Antitrust Act[1] in 1890, the applicability of the antitrust laws to organizations of workers has been the subject of much debate. In a time when the menace of inflation threatens the very fiber of our society, and competition from foreign producers is draining our national reservoir of economic strength, the considerations that underlie this debate must come again to the fore.

Presently, most activities of labor unions are exempted from the sanctions of the Sherman Act by §§ 6 and 20 of the Clayton Act[2] and the anti-injunction provisions of the Norris-LaGuardia Act.[3]

1. 15 U.S.C. §§ 1-7 (1970) (originally enacted as Act of July 2, 1890, ch. 647, §§ 1-8, 26 Stat. 209).

2. 15 U.S.C. § 17 (1970) (originally enacted as Act of Oct. 15, 1914, ch. 323, § 6, 38 Stat. 731); 29 U.S.C. § 52 (1970) (originally enacted as Act of Oct. 15, 1914, ch. 323, § 20, 38 Stat. 738).

3. 29 U.S.C. §§ 101-15 (1970) (originally enacted as Act of Mar. 23, 1932, ch. 90, §§ 1-15, 47 Stat. 70).

But are the basic premises upon which this exemption is founded as valid today as they were at the time the Clayton and Norris-LaGuardia Acts were passed by Congress? Do the antitrust laws provide a suitable vehicle for regulation of the activities of labor unions? Should the labor exemption be narrowed, or even eliminated? All these questions must be given serious consideration in the days to come.

This article proposes to consider the nature and scope of the labor exemption, from both a historical and contemporary perspective, and to analyze objectively the efficacy of changes which might be made. An attempt will also be made to evaluate proposals for change in light of present needs and the philosophy of the antitrust laws.

At the outset, however, it will perhaps serve a useful purpose to outline the competing positions which should be kept clearly in mind throughout the ensuing discussion. The basic position of the unions is that organization is necessary to give the worker the leverage necessary to deal on equal terms with his employer. In order for this organization or combination to be effective it must encompass all of those within the same trade and within the same community because each will be affected by the price of their trade in the community. Finally, the unions see the strike as a necessary instrument in the economic struggle between labor and capital to determine how their joint product will be divided.[4]

It is, of course, clear that many of the means employed by unions to achieve the above objectives necessarily restrain trade. Moreover, advocates of a strong labor movement argue that the efficiency with which the interests of the individual worker can be protected is a function of the degree to which the available means can be employed on a grand scale. Therefore, so the argument runs, combination and collaboration among unions is essential to the very well-being of the worker. Finally, it is maintained that a strong, unified labor movement provides a check on the tendency of big business to dominate political and economic affairs by giving the workers a

4. *See, e.g.*, American Steel Foundries v. Tri-City Cent. Trades Council, 257 U.S. 184, 209 (1921).

major voice in the society's decision-making processes.

Against these arguments, management proponents contend that labor unions have become too powerful, upsetting the delicate balance which is essential if the concept of collective bargaining is to retain any meaning. To support this contention, it is pointed out that unions can, and often do, drive employers out of business through excessive demands, strikes or secondary pressures such as boycotts. Management advocates further complain that, in many instances, existing labor laws have been ineffectual in deterring unlawful violence and secondary activities which tend to restrain trade.

The third position which must receive consideration is that of the public interest. While the public interest is broad enough to embrace the narrow interests of unions, employers and even individual employees, it also includes certain interests of a higher order, before which the narrower interests, insofar as they are incompatible, must yield. The paramount concern from this perspective is the deceleration of the rate of inflation. Other public concerns would include the minimization of disruptions in the availability of goods and services, and the maintenance of public order.

Although this outline of interests is hardly exhaustive, even an incomplete listing makes one thing very clear: the dynamic interplay of the various competing interests makes what has been referred to as "legislation by slogan and equity by analogy,"[5] a dangerous game indeed. In most respects, the study of labor-management relations cannot be regarded as the study of a dyadic relationship. Rather, alterations of the labor-management relationship must be fashioned with an eye toward their ramifications in an entire sociopolitical ecosystem which embraces the broad spectrum of interests briefly discussed above.

When Congress first passed the Clayton Act, the language therein which sought to exempt labor from the thrust of the antitrust laws was hailed by Samuel Gompers as labor's "Magna Carta."[6] The labor exemption has more recently been deprecated as a veritable

5. Meyers, *Unions, Anti-trust Laws, and Inflation*, 1 CALIF. MANAGEMENT REV. 36, 37 (1959).

6. Gompers, *The Charter of Industrial Freedom—Labor Provisions of the Clayton Anti-trust Law*, 21 AM. FEDERATIONIST 957 (1914).

carte blanche for union irresponsibility and lawlessness.[7] It is hoped that the discussion and conclusions following will reflect a reasoned approach, sufficiently deferential to the far-reaching implications necessarily attendant upon a problem of such complexity, which can serve to inject an element of objectivity into a controversy that has too frequently been obscured by reliance upon emotional epithet.

I. Historical Background

A. *Passage of the Sherman Act and Early Case Law*

When the Sherman Antitrust Act became law on July 2, 1890, its thrust was embodied in two somewhat delphic provisions:

> SEC. 1 Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.
> SEC. 2 Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.[8]

In addition to the criminal sanctions, the Act provided for injunctive relief,[9] available upon petition from the government, and dam-

7. Denbo, *Labor Exemption—An Anti View*, 20 Fed. B.J. 30 (1960).
8. Act of July 2, 1890, ch. 647, §§ 1, 2, 26 Stat. 209, *as amended* 15 U.S.C. §§ 1, 2 (1970).
9. Act of July 2, 1890, ch. 647, § 4, 26 Stat. 209, *as amended* 15 U.S.C. § 4 (1970) provided:
> The several circuit courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney-General, to institute proceedings in equity to prevent and restrain such

ages[10] to be awarded those aggrieved by the proscribed activity. There were no explicit indications in the language of the Act that was passed as to what, if any, exemptions to its application there might be.

To be sure, the question of whether the activities of labor unions would fall under the purview of the broad proscriptions which were to become §§ 1 and 2 received more than passing attention in the debates in Congress.[11] At one point, Senator Sherman, mindful of the concern that his bill might be construed to inhibit the activities of labor unions, offered a proviso which would have exempted agreements, combinations or arrangements between workers, entered into for the purpose of affecting hours and wages.[12]

The bill was later referred to the Senate Judiciary Committee, however, and when it was reported out, the proviso had been deleted.[13] It has been very cogently argued that the proviso was deleted because it was thought unnecessary.[14] Basically, the argument is that the proviso was offered in response to objections which had been aimed at language in the original bill stating that all combinations, the effect of which was to increase consumer prices, were to be prohibited. Since this language was dropped by the Senate Judiciary Committee, and since the concerns which had been voiced by

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violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises.

10. Section 7 of the Sherman Act provided:

> 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 therefore 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 the damage by him sustained, and the costs of suit, including a reasonable attorney's fee.

Act of July 2, 1890, ch. 647, § 7, 26 Stat. 210, *repealed by* Act of July 7, 1955, ch. 283, § 3, 69 Stat. 283. Section 4 of the Clayton Act, 15 U.S.C. § 15 (1970), *formerly* ch. 323, § 4, 38 Stat. 731 (1914), provides the present authority for treble damage suits.

11. For a very complete and informative discussion of the various opinions expressed on this issue in the course of the congressional debates see E. BERMAN, LABOR AND THE SHERMAN ACT 11-51 (1930) [hereinafter cited as BERMAN].

12. 51 CONG. REC. 13,908 (1914). Another proviso which would have exempted labor was offered by Senator Aldrich. BERMAN, *supra* note 11, at 22.

13. BERMAN, *supra* note 11, at 37.

14. *Id.* at 35-41.

those fearing that labor unions would be affected by the Sherman Bill had been in response to such language, it is maintained that the proviso was dropped under the assumption that the bill, as it was reported out of committee and later passed, had no potential of reaching labor unions. This assumption, if it in fact was indulged in by those responsible for the deletion of the proviso, never reached the record, and the intent behind the deletion proved to be a point about which reasonable men could differ.[15]

Less than three years after the passage of the Sherman Act, the question of whether Congress had intended labor unions to be subject to the Act was squarely presented to a federal court. In *United States v. Workingmen's Amalgamated Council*,[16] the Government sought an injunction to restrain a wide-spread strike in the city of New Orleans which had the effect of tying up traffic intended for interstate commerce. Judge Billings, writing for the court, granted the injunction, and had no trouble finding a violation of the antitrust law. He reasoned that, although the original impetus to enact the legislation had come from the evils of massed capital, by the time of its passage, the legislature had decided that the source of the evil was irrelevant and they, therefore, outlawed all combinations in restraint of trade.[17]

Following *Amalgamated Council*, there came a veritable avalanche of cases[18] arising out of the Pullman strike of 1894. Each of these cases either expressly or impliedly followed the *Amalgamated Council* rationale, with one of them, *United States v. Debs*,[19] reaching the Supreme Court.[20] The Supreme Court, however, specifically

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15. *See, e.g.*, 51 CONG. REC. 13,908 (1914) (remarks of Senator Pomerene).

16. 54 F. 994 (C.C.E.D. La. 1893).

17. Judge Billings' exact words were as follows:

> I think the congressional debates show that the [antitrust] statute had its origin in the evils of massed capital; but, when the congress came to formulating the prohibition . . . it expressed it in these words: "Every contract or combination in the form of trust, or otherwise in restraint of trade or commerce among the several states or with foreign nations, is hereby declared to be illegal." *The subject had so broadened in the minds of the legislators that the source of the evil was not regarded as material, and the evil in its entirety is dealt with.*

Id. at 996 (emphasis supplied).

18. *E.g.*, United States v. Debs, 64 F. 724 (C.C.N.D. Ill. 1894); United States v. Elliot, 63 F. 801 (C.C.E.D. Mo. 1894); United States v. Cassidy, 67 F. 698 (D.C.N.D. Cal. 1895).

19. 64 F. 724 (C.C.N.D. Ill. 1894).

20. *In re* Debs, 158 U.S. 564 (1895). The lower court had found Eugene V. Debs, leader of the American Railway Union, guilty of contempt for defying a very broad injunction issued

declined to rule on the question of the applicability of the antitrust law to labor, and chose instead to uphold the lower court decision on other grounds.[21]

It was not until 1908, in the so-called *Danbury Hatters*[22] case, that the Supreme Court ruled on the use of the Sherman Act against labor organizations. The case involved an action for treble damages brought by the Loewe Company, a hat manufacturer, against officers and members of the Brotherhood of United Hatters of North America.[23] The plaintiff alleged that it had suffered substantial damages as a result of a nation-wide consumer boycott organized by the defendant union with the cooperation of the American Federation of Labor in an attempt to coerce the plaintiff into agreeing to the institution of a closed shop at its place of business. Reversing the dismissal of the suit by the district court,[24] the Supreme Court unanimously held that labor organizations were subject to the Sherman Act, and that secondary boycotts were illegal under the Act if they affected interstate commerce. The Court dealt almost perfunctorily with the question of legislative intent:

> The act made no distinction between classes. It provided

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to restrain the Pullman strike. United States v. Debs, 64 F. 724 (C.C.N.D. Ill. 1894). The case was then appealed to the Supreme Court on a writ of habeas corpus.

21. *In re* Debs, 158 U.S. 564, 600 (1895).

22. Loewe v. Lawlor, 208 U.S. 274 (1908).

23. Note that, unlike the situation which was to become familiar, this case did not involve an action against a union, per se, but against its members.

24. All cases preceding the *Danbury Hatters* case in which the Sherman Act had been applied to unions had involved an interference with the *transportation* of goods in interstate commerce. *See, e.g.*, cases cited note 18 *supra*. It was upon the absence of such interference that the district court had focused in sustaining the demurrer to the complaint:

> The argument for the plaintiffs is that by entering into a scheme to curtail the production at home, and the distribution by customers abroad, the defendants have formed a combination to limit and restrain plaintiffs' trade between the two points, which is interstate trade, and that such restraint is the direct, positive, and inevitable result of the general scheme. The manufacture of the hats before they leave the factory in Danbury is not interstate commerce, nor are the hats themselves up to that time the subject of interstate commerce. The distribution of the hats from the hands of the customers in other states to the ultimate consumer is not interstate commerce, nor are the hats themselves during such distribution the subject of interstate commerce.
>
> The real question is whether a combination which undertakes to interfere simultaneously with both actions is one which directly affects the transportation of the hats from the place of manufacture to the place of sale. It is not perceived that the Supreme Court has as yet so broadened the interpretation of the Sherman Act . . . that it will fit such an order of facts as this complaint presents.

Loewe v. Lawlor, 148 F. 924, 925 (C.C.D. Conn. 1906).

> that "every" contract, combination or conspiracy in restraint of trade was illegal. The records of Congress show that several efforts were made to exempt, by legislation, organizations of farmers and laborers from the operation of the act and that all these efforts failed, so that the act remained as we have it before us.[25]

The Court then went on to quote the language from the *Amalgamated Council* case set out above.[26] It has been suggested that the Court in *Danbury Hatters* was guilty of relying too heavily upon misleading statements in the brief submitted by plaintiff's counsel regarding this point, and that had the Court embarked upon a thorough search of the legislative record, it might have reached a very different conclusion.[27] Whatever the merits of this contention, however, it is clear that by the time the *Danbury Hatters* case was decided, the judiciary was fully committed to the conclusion that the Sherman Act's proscriptions had been intended to embrace the activities of labor as well as business. In a later decision involving the Hatters, the Supreme Court further broadened the scope of the Sherman Act's impact by holding that individual union members could be held liable for acts committed by union officials, where the members paid dues and supported their officers in full knowledge that unlawful acts were being committed.[28]

In *Gompers v. Bucks Stove & Range, Co.*,[29] the Supreme Court held that even printed matter could be enjoined where it was employed as the means by which an unlawful combination was effected. The American Federation of Labor had printed the name of the company in the "We Don't Patronize" list of its magazine, the *American Federationist*. The union also sent out circulars urging participation in a nation-wide boycott. The boycott had been enjoined by a lower court,[30] and the appellants before the Supreme Court had been found in contempt for continuing to publish the blacklist and circulars.[31] The union argued that such publication could not be construed to be in violation of the injunction, because

25. 208 U.S. at 301.
26. *See* text accompanying note 17 *supra*.
27. BERMAN, *supra* note 11, at 81-86.
28. Lawlor v. Loewe, 235 U.S. 522 (1915).
29. 221 U.S. 418 (1911).
30. Bucks Stove & Range Co. v. Gompers, 33 App. D.C. 83 (1907).
31. Gompers v. Bucks Stove & Range Co., 33 App. D.C. 516 (1909).

to so find would place the Court in the position of abridging first amendment rights.[32] Justice Lamar, writing for the Court, rejected this argument,[33] went on to say that the principle set down in the *Danbury Hatters* case was a general one, and thus made it clear that the scope of labor's liability, in light of that decision, was broad indeed.[34]

B. *The Second Phase: Passage of the Clayton Act and Its Impact*

1. *The Move to Create an Exemption for Labor*

Even before the *Danbury Hatters* case[35] was decided, concern for labor's liability under the Sherman Act had begun to manifest itself in the form of legislative proposals for exemption.[36] Spurred on in part by the decision in the *Danbury Hatters* case, the Democrats took over the cause of providing labor an exemption and made it part of their party platform in 1908.[37] It became a major issue in the 1912 national election, and was a high priority when the new Congress and the Administration of Woodrow Wilson took office.[38] The culmination of the movement came on October 15, 1914, when the

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32. Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 436 (1911).

33. *Id.* at 437.

34. Justice Lamar's exact words were as follows:

> It [the principle in *Danbury Hatters*] covered any illegal means by which interstate commerce is restrained, whether by unlawful combinations of capital, or unlawful combinations of labor; and we think also whether the restraint be occasioned by unlawful contract, trusts, pooling arrangements, blacklists, boycotts, coercion, threats, intimidation, and whether these be made effective, in whole or in part, by acts, words, or printed matter.

Id. at 438. *But see* Thornhill v. Alabama, 310 U.S. 88 (1940), where an anti-picketing statute was declared invalid on first amendment grounds.

35. *See* text accompanying notes 22-28 *supra*.

36. In all, there appear to have been twelve bills introduced in Congress prior to the passage of the Clayton Act which would have exempted labor, to one degree or another, from application of the Sherman Act. These were H.R. 6640, in the 52d Congress; H.R. 10,539 in the 56th Congress; H.R. 11,667 in the 56th Congress; S. 649 and H.R. 14,947 in the 57th Congress; S. 1728, H.R. 89, H.R. 166, and H.R. 2636 in the 52d Congress; H.R. 7938 in the 55th Congress; H.R. 11,988 in the 57th Congress; and S. 1546 in the 55th Congress. Copies of these bills are printed in BILLS AND DEBATES RELATING TO TRUSTS, S. DOC. No. 147, 57th Cong., 2d Sess. 465 & 411, 469 & 449, 473 & 432, 477 & 417, 481, 581, 949, 953, 987 & 999 (1902-03).

37. Kovner, *The Legislative History of Section 6 of the Clayton Act*, 47 COLUM. L. REV. 749, 750 (1947).

38. *Id.* at 750-51.

Sixty-Third Congress enacted into law the Clayton Act.[39] For the most part, the new legislation was aimed at tightening the antitrust restrictions on business. Sections 6 and 20, however, were addressed to the application of the antitrust laws to labor.

Section 6 began by stating "[t]hat the labor of a human being is not a commodity or article of commerce"; it then went on to grant labor unions an exemption from the antitrust laws both as to their existence and operation.[40]

Section 20 prohibited any court or judge of the United States from issuing an order in any case "involving, or growing out of, a dispute concerning terms or conditions of employment . . ." unless the party asking for the restraining order would suffer irreparable harm to property or to a property right and had no adequate remedy at law.[41] Section 20 also broadly defined the type of conduct of parties to a labor dispute which could not be restrained and insulated such conduct from being held in violation of any law of the United States.[42]

In addition, § 16[43] gave private parties the right to injunctive relief

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39. Act of Oct. 15, 1914, ch. 323, 38 Stat. 730 (codified at 15 U.S.C. §§ 12-27, 44 (1970) and 29 U.S.C. §§ 52, 53 (1970)).

40. Section 6 stated:

> That the labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out 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.

Act of Oct. 15, 1914, ch. 323, § 6, 38 Stat. 731, *currently* 15 U.S.C. § 17 (1970).

41. Section 20 stated in part:

> That 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 the 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.

Act of Oct. 15, 1914, ch. 323, § 20, 38 Stat. 738, *currently* 29 U.S.C. § 52 (1970).

42. The second paragraph of § 20 read as follows:

> And no such 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, or persuading

from practices which served to restrain trade.[44] This provision, though less obviously applicable to labor organizations, would prove to be of no less significance in labor disputes than §§ 6 and 20.

Although §§ 6 and 20 were hailed at the time of their passage as a long-awaited triumph for labor, careful scrutiny of the language contained in those sections must have convinced many observers there was room for doubt that the changes were as substantial as popularly believed. In fact, within two years after the Clayton Act became effective, an attorney who had distinguished himself in antitrust actions against labor unions testified before the United States Commission on Industrial Relations that the Act had given the unions nothing they had not already possessed.[45]

Clearly, however, Congress had intended to grant labor unions some sort of exemption; the only question was how broad was this exemption and how far did Congress intend to go? Section 6, for

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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 to 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 paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value; or from peaceably assembling in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; or shall any of these acts specified in this paragraph be considered or held to be violations of any law of the United States.

Id.

43. Section 16 provided:

That any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections two, three, seven and eight of this Act, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: *Provided*, That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit for injunctive relief against any common carrier subject to the provisions of the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission.

Act of Oct. 15, 1914, ch. 323, § 16, 38 Stat. 737, *as amended* 15 U.S.C. § 26 (1970).

44. Previously, it had been held that only the federal government could secure an injunction under the Sherman Act. Paine Lumber Co. v. Neal, 244 U.S. 459, 471 (1917).

45. BERMAN, *supra* note 11, at 102.

example, declared that "Nothing in the antitrust laws shall be construed . . . to forbid or restrain [labor] organizations from lawfully carrying out the legitimate objectives thereof . . . ." But what is a "legitimate objective," and how may it be "lawfully" carried out? What is to be inferred from the fact that in § 20, such terms as "peaceful means," "lawfully" and "peacefully" were used with such relentless consistency? The end result was that §§ 6 and 20 probably raised more questions than Congress had sought to answer in enacting the new law.

Likewise, the legislative histories of §§ 6 and 20 offer little help in removing the shroud of ambiguity which veils the true intent of Congress. To be sure, a basic stimulus for § 6 (referred to in the House debates as § 7) was clearly a fear that the courts might be tempted to dissolve labor unions as unlawful combinations in restraint of trade[46] under §§ 1 and 4 of the Sherman Act.[47] This accounts for the explicit language in § 6 unequivocally establishing the legality of labor organizations per se.[48] Also, it is clear from the debates that the members of Congress felt compelled to go on record as declaring that there is some sort of essential difference between

46. In Hitchman Coal & Coke Co. v. Mitchell, 202 F. 512 (N.D. W. Va. 1912), a United States district court had held that the United Mine Workers was an unlawful organization, implying that it could be disbanded under the Sherman Act. This view was rejected on appeal to the circuit court. Mitchell v. Hitchman Coal & Coke Co., 214 F. 685 (4th Cir. 1914).

47. Section 4 states:

> The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of Sections 1 to 7 of this title; and it shall be the duty of the several United States attorneys, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises.

15 U.S.C. § 4 (1970) (originally enacted as Act of July 2, 1890, ch. 647 § 4, 26 Stat. 209). It will be recalled that § 1 makes unlawful "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce . . . ." 15 U.S.C. § 1 (1970).

48. Section 6 states:

> Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor . . . organizations, . . . 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.

15 U.S.C. § 17 (1970) (originally enacted as Act of Oct. 15, 1914, ch. 323, § 6, 38 Stat. 731).

labor and commodities[49]—hence the first sentence of § 6.[50] It seems likely, however, that this language was incorporated more as a gesture of ideological solidarity with the rhetoric of labor than anything else.[51]

It is also quite clear that the second paragraph of § 20[52] was intended to shelter certain specific union activities (*i.e.*, strikes and the peaceful encouragement of others to participate in them; the peaceful dispensation or receipt of information; boycotts directed at "any party to such dispute" and peaceful persuasion of others to participate in them; the payment or withholding of strike benefits; peaceful assembly; and "any act or thing which might lawfully be done in the absence of such dispute") from legal sanctions, including the issuance of injunctions.[53]

But what of the more general language of the first paragraph of § 20?[54] Was that language intended to provide unions with a blanket exemption from antitrust law injunctions? Were the activities specifically enumerated in the second paragraph of § 20 intended to be both lawful and immune to judicial intervention via injunction under any and all circumstances? Were §§ 6 and 20, taken together, intended to place all union activity beyond the reach of the antitrust laws, thereby leaving the remedy for "unlawful" activity on the part of labor to other provisions of law? Again, the legislative debates are less than models of clarity, but close scrutiny of the portions relating to these questions support some interesting conclusions, particularly regarding the question of whether Congress intended to confer on unions a blanket exemption from the antitrust laws.

These debates lend a good deal of credence to the argument that the intent of Congress was to (1) provide labor unions with protection from judicial dissolution, and (2) proclaim the legality of and protect from injunction the "legitimate" activities of the unions, most or all of which were listed in the second paragraph of § 20.[55]

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49. *See, e.g.*, 51 CONG. REC. 14,018 (1914) (remarks of Senator Cummins); *id.* at 9086-87 (remarks of Congressman Kelly).

50. *See* text accompanying note 40 *supra*.

51. *See* 51 CONG. REC. 13,667-68 (1914) (remarks of Senator Ashurst).

52. For text of § 20 see note 42 *supra*.

53. *See, e.g.*, 51 CONG. REC. 13,662 (1914) (remarks of Senator Ashurst). *See also* H.R. REP. NO. 627, 63d Cong., 2d Sess. 30-37 (1914).

54. For text of this portion of § 20 see note 41 *supra*.

55. The following excerpts from the Senate debates illustrates this point.

Mr. JONES. I desire to get the views of the Senator from Kansas as to how far he

thinks this provision of the proposed law goes. Does it go any further than recognizing the legality of these organizations as organizations, or does it permit these organizations, after they are organized, to then go on and do things in restraint of trade and exempt them from prosecution for such acts?

Mr. THOMPSON. I think it exempts them simply as lawful organizations; but, *of course, if they do anything unlawful or use any unlawful means, they are subject to prosecution under the antitrust law and under the general laws on the subject* without regard to the antitrust law.

Mr. JONES. That is what I wanted to get at; that is about my idea with reference to how far this provision goes.

Mr. THOMPSON. The provision only protects such organizations in the performance of lawful acts, as I understand.

Mr. JONES. It prevents the court from holding as a conspiracy [sic] in violation of the Sherman law simply because of their organization?

Mr. THOMPSON. That is the intention, as I understand.

Mr. JONES. As I understand, that is the Senator's idea as to the extent to which this provision goes?

Mr. THOMPSON. Yes, sir.

Mr. JONES. *I saw a statement purporting to come from the President that this provision, in effect, simply recognizes as lawful what many of the courts already hold is legal, and does not go any further; and, as I understand, the chairman of the Judiciary Committee of the other House gave out a statement to the press in which he held the same view; in other words, as the Senator understands, this provision does not really exempt any of these organizations from prosecution for the commission of acts which would, in fact, be in restraint of trade, and therefore prohibited by the Sherman antitrust law, but it does recognize their right to exist as organizations*; the mere fact that they are organizations does not warrant any prosecution against them?

Mr. THOMPSON. No, nor for performing lawful acts in connection with the purposes of the organization.

Mr. JONES. Of course, they could not be prosecuted for performing lawful acts.

51 CONG. REC. 13,847-48 (1914) (remarks of Senators Jones and Thompson) (emphasis supplied).

Even more revealing is a later exchange among Senators Culberson, Jones and West.

Mr. JONES. The point I am suggesting is this: Suppose that they do something unlawful. Suppose they do unlawful acts, then the court could restrain them from doing those acts.

Mr. CULBERSON. I think so, so far as this bill is concerned.

Mr. JONES. But would it not have to stop there, or could it go on and dissolve the organization?

Mr. CULBERSON. Not in my judgment. The court would not be authorized to dissolve the organization.

Mr. JONES. This is my point, and that is the suggestion that I am making. *That, in my judgment, is the only substantial change made by this provision in existing conditions. Under conditions now existing the court could dissolve the organization, while if this provision is passed and a labor organization should commit some unlawful act the court could stop those unlawful acts. There it must stop and let the organization continue its existence.* I think that is quite a substantial right and quite a substantial provision, but one that will not in any way interfere with interstate trade or commerce.

Mr. WEST. *Mr. President, in what way would the court stop such an organization—by fine or imprisonment?*

Mr. JONES. *I suppose so, or by injunction or something of that sort.*

Id. at 14,017. (emphasis supplied)

Furthermore, one need hardly rely on the familiar tool of negative inference to conclude that activities beyond the scope of the lawful and peaceful activities so protected were to be subject to the Sherman Act's sanctions insofar as they restrained trade. This position is buttressed by the authorities relied on in the report of the House Judiciary Committee which had reviewed the bill.[56] That the exemption was never intended to be total is also well supported by the fact that an amendment which would have had precisely that effect was soundly defeated in the House.[57]

Moreover, a review of the legislative history of § 20 would be incomplete without a glimpse at the comments on a subject that was to provide the context for the Supreme Court's first interpretation of that section—the secondary boycott. It is clear from the language of § 20 that boycotting of some sort was to be protected. But was the language intended to encompass all forms of union boycott activity? Judged by the comments of Congressman Webb it seems as if Congress did not intend to protect the enumerated activities in the second paragraph of § 20 under all circumstances.[58]

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56. H.R. REP. No. 627, 63d Cong., 2d Sess. 30-37 (1914).

57. The Clerk read as follows:

Strike out the first paragraph of section 7 as amended and insert in lieu thereof the following:

"The provisions of the antitrust laws shall not apply to agricultural, labor, consumers', fraternal, or horticultural organizations, orders, or associations."

The question being taken, the Chairman announced that the noes appeared to have it.

Mr. THOMAS. Let us have a division. The committee divided; and there were — ayes 70, noes 79.

Mr. THOMAS. Mr. Chairman, I ask for tellers.

Tellers were ordered, and the Chairman appointed Mr. Thomas and Mr. Webb.

The Committee again divided; and the tellers reported — ayes 69, noes 105.

Accordingly the amendment was rejected.

51 CONG. REC. 9569 (1914).

58. Congressman Webb, one of the major proponents of the Clayton Bill, stated:

Mr. WEBB. Mr. Chairman, I should vote for the amendment offered by the gentleman from Minnesota if I were not perfectly satisfied that it is taken care of in this section. The language the gentlman reads does not authorize the secondary boycott, and he could not torture it into any such meaning. While it does authorize persons to cease to patronize the party to the dispute and to recommend to others to cease to patronize that same party to the dispute, that is not a secondary boycott, and you can not possibly make it mean a secondary boycott. Therefore this section does not authorize the secondary boycott.

I say again—and I speak for, I believe, practically every member of the Judiciary Committee—that if this section did legalize the secondary boycott there would not be a man to vote for it. It is not the purpose of the committee to authorize it, and I do

At the very least, there should be little doubt that secondary boycotts were not intended to be shielded.

2. *Effect of the Clayton Act*

Whatever the intended effect of §§ 6 and 20 of the Clayton Act, it did nothing to reduce the number of antitrust actions in which a labor organization was named as the defendant.[59] In fact, the number of such cases actually increased, a phenomenon largely attributable to the fact that § 16[60] allowed private injunction suits.[61] It has even been suggested that the only real benefit that unions received from the Clayton Act was freedom from the fear that they might be dissolved as unlawful combinations in restraint of trade.[62]

The question of the scope of the labor exemption under §§ 6 and 20 of the Clayton Act first reached the Supreme Court in 1921, seven years after passage of the Act, in *Duplex Printing Co. v. Deering*.[63] The *Duplex* case involved an action for an injunction under § 16[64] of the Clayton Act, authorizing courts to grant injunctions in antitrust cases to private parties. The Duplex Printing Company, one of only four manufacturers of newspaper printing presses in the country at the time, had been subjected to secondary boycott activities by the machinists' union in order to induce the company to sign a union contract.[65] The petition for an injunction was denied at both

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not think any person in the House wants to do it. We confine the boycotting to the parties to the dispute, allowing parties to cease to patronize that party and to ask others to cease to patronize the party to the dispute.

51 CONG. REC. 9658 (1914) (emphasis supplied). *See also* 51 CONG. REC. 9652-53 (1914) (remarks of Congressmen Webb and Volstead). Note that the portion of H.R. 15,657, 63d Cong., 2d Sess. (1914), which dealt with the exemption of boycott activities was in the same form after it was reported out of the Judiciary Committee as it was when finally adopted. *See* H.R. REP. No. 627, 63d Cong., 2d Sess. 5-6 (1914).

59. It has been pointed out that of 83 cases brought against labor from 1890 to 1929, 64 (77%) were brought after the passage of the Clayton Act. BERMAN, *supra* note 11, at 219.

60. *See* note 43 *supra* for text of § 16.

61. Of the 64 antitrust actions brought against labor from 1914 to 1929, 34 (53%) were private injunction suits. Fully 94 percent of the private injunction suits were immediately successful, and 82 percent of those were ultimately successful. BERMAN, *supra* note 11, at 219.

62. *Id.* at 220.

63. 254 U.S. 443 (1921).

64. 15 U.S.C. § 26 (1970) (originally enacted as Act of § 15, 1914, ch. 323, § 16, 38 Stat. 737).

65. Among the tactics employed by the union were:

a variety of . . . modes of preventing the sale of presses of (Duplex's) manufacture in or about New York City, and delivery of them in interstate commerce, such as injuring and threatening to injure (Duplex's) customers and prospective customers, and per-

the district court[66] and circuit court[67] levels, with both decisions relying specificially on the exemption provisions of the Clayton Act. The Supreme Court, through Justice Pitney, reversed the lower courts, concluding that Duplex had a "clear right to an injunction under the Sherman Act as amended by the Clayton Act . . . ."[68] Interpreting § 20, Justice Pitney's opinion made three major points: (1) that the first paragraph of § 20 was a restatement of the law of equity;[69] (2) that the use of words such as "lawful," "lawfully," "peaceful" and "peacefully," in reference to the dispute between the parties, strongly rebutted an intent on the part of the legislature to grant a general immunity to conduct that violated the antitrust laws or any other laws;[70] and (3) that the second paragraph of the section was intended to protect from injunction and prosecution only acts committed by those concerned as parties, *i.e.*, the restriction upon the granting of injunctions and the relaxation of the laws of the United States were intended to be restricted "to parties standing in proximate relation to a controversy such as is particularly described."[71]

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sons concerned in hauling, handling, or installing the presses.

Duplex Printing Press Co. v. Deering, 254 U.S. 443, 463-64 (1921). The other three manufacturers of printing presses had signed agreements with the union, but two of the three had indicated that they would be compelled to terminate their union contracts unless Duplex signed a similar agreement because otherwise they would be unable to compete. The agreements these companies had signed provided for eight hour working days and a minimum wage scale. Duplex, on the other hand, operated on an open shop basis, and required its workers to put in a ten hour day.

66. Duplex Printing Co. v. Deering, 247 F. 192 (S.D.N.Y. 1917).

67. Duplex Printing Co. v. Deering, 252 F. 722 (2d Cir. 1918).

68. 254 U.S. at 478.

69. *Id.* at 470.

70. *Id.* at 473.

71. *Id.* at 470-71. It will perhaps facilitate an understanding of Justice Pitney's complicated but respectable logic on this point to set out that portion of his opinion in full.

> The second paragraph declares that "no *such* restraining order or injunction" shall prohibit certain conduct specified—manifestly still referring to a "case between an employer and employees, . . . involving, or growing out of, a dispute concerning terms or conditions of employment," as designated in the first paragraph. It is very clear that the restriction upon the use of the injunction is in favor only of those concerned as parties to such a dispute as is described. The words defining the permitted conduct include particular qualifications consistent with the general one respecting the nature of the case and dispute intended; and the concluding words, "nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States," are to be read in the light of the context, and mean only that those acts are not to be so held when committed by parties concerned in "a dispute concerning terms or conditions of employment." If the qualifying words are to have any effect,

With regard to secondary boycotts, Justice Pitney held that it was a subject dealt with specifically by the statute and that the language of the statute limited the pressure that could be applied to a party in a labor dispute to "peaceful and lawful" means of influencing neutrals. He then concluded that "peaceful and lawful" means of persuasion did not include the instigation of a sympathy strike in support of a secondary boycott.[72]

In effect, the *Duplex* decision restricted the exemptions of § 20 to cases where the union's activity was directed against the employer with whom a dispute over terms and conditions of employment had arisen. For authority on this point, Justice Pitney relied in large part on the legislative debates.[73] There can be little question but that Justice Pitney's interpretations of the language of § 20 were persuasive, perhaps even compelling. In sum, his construction of the Clayton Act could hardly be assailed as patently unreasonable. Nevertheless, the *Duplex* decision incurred the wrath of labor leaders and the guardians of their interests in Congress. It was this decision that sowed the seeds of discontent which would one day bear fruit in the form of substantial legislative restrictions on judicial equity powers.[74]

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they must operate to confine the restriction upon the granting of injunctions, and also the relaxation of the provisions of the anti-trust and other laws of the United States, to parties standing in proximate relation to a controversy such as is particularly described.

Id. Further insight into Justice Pitney's reasoning may be gained from the following excerpt which appears at a somewhat later point in his opinion:

> Section 20 must be given full effect according to its terms as an expression of the purpose of Congress; but it must be borne in mind that the section imposes an exceptional and extraordinary restriction upon the equity powers of the courts of the United States and upon the general operation of the anti-trust laws, a restriction in the nature of a special privilege or immunity to a particular class, with corresponding detriment to the general public; and it would violate rules of statutory construction having general application and far-reaching importance to enlarge that special privilege by resorting to a loose construction of the section, not to speak of ignoring or slighting the qualifying words that are found in it. Full and fair effect will be given to every word if the exceptional privilege be confined—as the natural meaning of the words confines it—to those who are proximately and substantially concerned as parties to an actual dispute respecting the terms or conditions of their own employment, past, present, or prospective. The extensive construction adopted by the majority of the court below virtually ignores the effect of the qualifying words. Congress had in mind particular industrial controversies, not a general class war.

Id. at 471-72.

72. *Id.* at 473-74.

73. *Id.* at 475, 476-77 n.1. *See* notes 56 & 58 and accompanying text *supra*.

74. *See* text accompanying notes 114-27 *infra*.

A second case worthy of mention at this point is *Coronado Coal Co. v. UMW*,[75] which came up before the Supreme Court on two occasions. The *Coronado* case involved an action for damages incurred when the defendant union, angry because one of Coronado's mine operators was using non-union men, attacked plaintiff's coal mining facility in Arkansas, killing some non-union employees and blowing up plaintiff's mines. The first *Coronado* decision[76] reaffirmed the suability of unions,[77] relying in part on §§ 7 and 8 of the Sherman Act.[78] The Court, noting that there was evidence to the effect that the national union had a policy of pressing for unionization of non-union mines "not only as a direct means of bettering the conditions and wages of their workers, but also as a means of lessening interstate competition for union operators . . . .",[79] concluded that the use of unlawful means to accomplish such an end would clearly violate the antitrust laws.[80] Finding insufficient evidence to prove the utilization of unlawful means on the part of the national union itself, the Court dismissed the part of the complaint alleging national UMW involvement in a conspiracy to restrain interstate trade.[81] The local union, whose men had been involved in the attacks on the Coronado mines, was found to have been motivated by strictly local considerations. As to the effects of the local's acts, the Court, contrasting this case to the *Danbury Hatters* case[82] and several others where interstate commerce had been the direct object of union activities, held that coal mining, in and of itself, is not interstate commerce, and, therefore, the union activity was not a restraint of commerce, unless it was intended to restrain the flow of coal in commerce or that intent could reasonably be inferred because of the direct and substantial effect on commerce.[83]

The case was remanded to the district court, where a verdict was directed for the defendant union, and the circuit court affirmed.[84]

75. 268 U.S. 295 (1925); 259 U.S. 344 (1922).
76. 259 U.S. 344 (1922).
77. *Id.* at 392.
78. Sherman Antitrust Act of 1890 § 7, ch. 647, § 7, 26 Stat. 209 (repealed by Act of July 7, 1955, ch. 283, § 3, 69 Stat. 283). Section 8 of the Act is codified at 15 U.S.C. § 7 (1970).
79. 259 U.S. at 408.
80. *Id.* at 408-09.
81. *Id.* at 409.
82. Loewe v. Lawlor, 208 U.S. 274 (1908).
83. 259 U.S. at 410-11.
84. Finley v. UMW, 300 F. 972 (8th Cir. 1924).

On appeal to the Supreme Court, the second *Coronado* case[85] involved almost exclusively factual questions, but the Court did provide further insight into its views as to the application of the antitrust laws. It stated that prevention of manufacture or production by illegal or tortious conduct is generally an indirect and remote restraint of commerce, even if there is a reduction in the supply of an article. But, if it could be shown that there was also an intent to affect commerce, by controlling the supply or by affecting the price of an article, the conduct would be directly violative of the antitrust laws.[86]

Based on this conclusion, the Supreme Court held that sufficient evidence had been adduced at the second trial to make out a prima facie case for an intent on the part of the local union to restrain interstate trade.[87] The case was remanded to the district court, and was later settled.[88]

The most significant contribution of the *Coronado* cases was the identification of a two-fold test for determining whether an interruption of production within a state (that could not, itself, be classified as interstate commerce) would violate the Sherman Act: (1) Was there intent to restrain interstate trade? (2) Was there an actual restraint on interstate commerce substantial enough to necessitate the inference of the requisite intent?[89] The question, addressed most directly in the second *Coronado* case—under what circumstances reduction in the supply of a product, manufactured intrastate to be shipped into interstate commerce, could be construed to be an antitrust violation—was elaborated upon somewhat by the Court in *Leather Workers Local 66 v. Herkert & Meisel Trunk Co.*[90] That Court stated that illegal interference with the manufacture of an article constituted a direct burden on interstate commerce only when there was an intent to affect commerce or the necessary effect of the activity was to allow a monopolization of the supply, a control

85. Coronado Coal Co. v. UMW, 268 U.S. 295 (1925).

86. *Id.* at 310.

87. *Id.*

88. The settlement was for $27,500. If the damages asked for had been granted and trebled, the unions would have been compelled to pay over $2 million. BERMAN, *supra* note 11, at 128-29.

89. For an application of this test see UMW v. Red Jacket Consol. Coal & Coke Co., 18 F.2d 839, 844-46 (4th Cir.), *cert. denied*, 275 U.S. 536 (1927).

90. 265 U.S. 457 (1924).

over price or discrimination between customers.[91]

In *United States v. Brims*,[92] decided about a year later, the Supreme Court rendered its first decision in which it subjected an ordinary trade agreement to the standards of the Sherman Act. This case foreshadowed the line of later cases going off on a finding of a "conspiracy with a non-labor group" which will be discussed below.[93] The *Brims* case involved an allegation of criminal conspiracy among manufacturers of millwork, building contractors and members of the carpenters' union in Chicago, who had entered into an agreement providing that manufacturers and contractors were to hire only union carpenters, and the carpenters, in turn, were to refuse to install millwork not produced under union conditions. The Supreme Court, per Justice McReynolds, found that among the incentives for the agreement had been the desire on the part of the manufacturers to eliminate competition from non-union mills which had been underselling them, that the parties to the agreement had intended to reduce such competition and had been successful in doing so, and that the local manufacturers had thereby increased their profits. Since part of the non-union millwork had come into the Chicago market through interstate commerce, the evidence was held sufficient by the Court to uphold the convictions of the parties to the agreement for violating § 1 of the Sherman Act.[94]

In 1927, the Supreme Court rendered its decision in *Bedford Cut Stone Co. v. Journeyman Stone Cutters Association*.[95] This case has been referred to as one of the most important cases of the post-Clayton/pre-Norris-LaGuardia era, owing in large part to the fact that it did much to rekindle union criticism of judicial interpretations of the Sherman and Clayton Acts.[96] The case involved a suit for an injunction under § 16 of the Clayton Act,[97] brought on behalf of several companies in the business of quarrying and fabricating limestone, largely for construction purposes, against the Journeyman Stone Cutters' Association of North America (hereinafter "the

91. *Id.* at 471.
92. 272 U.S. 549 (1926).
93. *See* text accompanying notes 150-59 and 169-228 *infra*.
94. 272 U.S. at 552-53.
95. 274 U.S. 37 (1927).
96. *See* BERMAN, *supra* note 11, at 170.
97. 29 U.S.C. § 26 (1970) (originally enacted as Act of Oct. 15, 1914, ch. 323, § 16, 38 Stat. 737).

Association"), a union representing mechanics in the stone-cutting trade. When the plaintiffs had terminated agreements with the Association, effectively locked out its members, and reinstituted operations under agreements with unaffiliated unions, the Association responded by issuing a nation-wide directive to all its members stating that they were to rigidly adhere to a rule forbidding them to work on stone "that has been started—planed, turned, cut or semi-finished—by men working in opposition to our organization . . . ."[98]

This, in effect, established a powerful nation-wide secondary boycott against the stone companies' product, since virtually all stoneworkers employed on buildings where such stone was used were members of the Association. Strikes against employers using the stone produced by Bedford and the other companies in the suit had been effectively initiated and sustained at the instigation of the Association's national organization, in some cases against the will of the local unions involved, and even where there had been no other dispute with the struck employer.[99] Justice Sutherland, writing for the Court, found this to be activity, the primary aim and necessary consequence of which had been to restrain the interstate sale and shipment of the stone produced by the companies seeking the injunction.[100] According to Justice Sutherland, since interstate commerce had been the direct object of attack in the union's activities, it did not alter the character of the conspiracy that the means employed would otherwise have been, in themselves, lawful.[101] Justice Sutherland further held that the fact that the union had been ultimately in pursuit of legitimate objectives was not determinative:

> A restraint of interstate commerce cannot be justified by the fact that the ultimate object of the participants was to secure an ulterior benefit which they might have been at liberty to pursue by means not involving such restraint.[102]

Relying heavily upon *Duplex Printing Press Co. v. Deering*,[103]

98. 274 U.S. at 42.
99. *Id.* at 43-45.
100. *Id.* at 46.
101. *Id.* at 46-47.
102. *Id.* at 47 (citations omitted).
103. 254 U.S. 443 (1921). Justice Sutherland also cited with approval United States v. Brims, 272 U.S. 549 (1926); Gompers v. Bucks Stove & Range Co., 221 U.S. 418 (1911); and Loewe v. Lawlor, 208 U.S. 274 (1908) (the *Danbury Hatters* case).

Justice Sutherland concluded that the plaintiffs in the *Bedford Stone* case were entitled to injunctive relief, notwithstanding the proscriptions of § 20 of the Clayton Act, where a secondary boycott had been employed.[104]

Justice Brandeis, joined by Justice Holmes, dissented[105] on the grounds that the union, insofar as it had restrained interstate commerce at all, had not imposed any *unreasonable* restraint. The factors enumerated by Justice Brandeis in determining the reasonableness of the union's restraints on interstate commerce should be briefly noted since they form the most desirable basis for evaluating the antitrust implication of labor union conduct, despite the fact that they have never received the imprimatur of a majority of the Supreme Court. The factors considered by Justice Brandeis were as follows:

(1) that the individual union members did not have contracts either with the plaintiffs or with their customers, and the strikes therefore did not involve any breach of contract;[106]
(2) that the plaintiffs were not "weak employers opposed by a mighty union";[107]
(3) that the means employed by the union members were not, of themselves, illegal (*i.e.*, they did not engage in trespass, picketing, violence, intimidation, fraud, threats, obstruction of attempts to secure other help on the part of the plaintiffs or their customers, etc.);[108]
(4) that the combination complained of involved only members of the same craft, sought to promote only the legitimate interests of the craft's members, and had acted only defensively.[109]

In addition to the Supreme Court cases, there were, in the fifteen or so years after the passage of the Clayton Act, a considerable number of circuit and district court decisions finding certain union activities to be unlawful restraints of trade. As a general rule, the union conduct that was susceptible to such a finding fell into the following broad categories:

104. Justice Sanford concurred, in a separate opinion, relying on the *Duplex* case. Justice Stone likewise concurred in a separate opinion, also finding *Duplex* to be controlling.
105. 274 U.S. at 56-65.
106. *Id.* at 58-59.
107. *Id.* at 59.
108. *Id.*
109. *Id.*

(1) interference with interstate transportation or the instrumentalities of interstate commerce;[110]
(2) interference with the production of goods which were intended for interstate commerce;[111] and
(3) interference with the sale, installation or use of goods which had passed through interstate commerce.[112]

All of these cases served as grist for the mill of labor officials, lobbyists and sympathizers. Perhaps even more significant, from the political point of view, is the fact that the courts, in addition to construing the labor exemption narrowly, were given to issuing extremely broad injunctions against unions where there was a finding of an unlawful restraint of trade.[113] These cases, along with a very dedicated and well organized labor lobby in Washington, eventually served to prod Congress into action.

C. *The Norris-LaGuardia Act and the Revolution In Judicial Attitudes*

1. *Congress Moves to Limit Judicial Equity Powers*

As a result of considerable agitation by and among labor unions, Congress passed the Norris-LaGuardia Act[114] in 1932 to limit federal

110. *See, e.g.*, Alco-Zander Co. v. Amalgamated Clothing Workers, 35 F.2d 203 (E.D. Pa. 1929) (trucker prevented by pickets from transporting steel billets across state line); Vandell v. United States, 6 F.2d 188 (2d Cir. 1925) (railroad tracks dynamited); Williams v. United States, 295 F. 302 (5th Cir. 1923) (convictions of strikers for putting quicksilver in locomotive boilers); United States v. Norris, 255 F. 423 (N.D. Ill. 1918) (strikers prevented from unloading of sand, which had been shipped from another state, from railroad cars.)

111. *See, e.g.*, UMW v. Red Jacket Consol. Coal & Coke Co., 18 F.2d 839 (4th Cir. 1927) (interference with mining operation); Dail Overload Co. v. Willys-Overland, Inc., 263 F. 171 (N.D. Ohio 1919) (strikers interfered with automobile production); Wagner Elec. Mfg. Co. v. Machinists Dist. Lodge 9, 252 F. 597 (E.D. Mo. 1918) (strikers interfered with munitions production). *But see* Leather Workers Local 66 v. Herkert & Meisel Trunk Co., 265 U.S. 457 (1924) (interference by strikers with further production of goods that were intended for interstate commerce held no violation where there was no attempted or actual interference with the transportation and delivery of products in interstate commerce).

112. *See, e.g.*, Decorative Stone Co. v. Building Trades Council, 18 F.2d 333 (S.D.N.Y. 1927) (refusal to work on buildings using stone cut by non-union labor); Boyle v. United States, 259 F. 803 (7th Cir. 1919) (trade agreement whereby manufacturer agreed not to hire non-union labor and union members agreed not to install non-union appliances). *But see* Aeolian Co. v. Fischer, 27 F.2d 560 (S.D.N.Y.), *aff'd*, 29 F.2d 679 (2nd Cir. 1928) (injunction to compel union workers to work in same building with non-union workers denied even though product being installed had passed through interstate commerce).

113. *See, e.g.*, the restraining orders quoted in BERMAN, *supra* note 11, at 141-42, 178.

114. 29 U.S.C. §§ 101-15 (1970) (originally enacted as Act of Mar. 23, 1932, ch. 90, §§ 1-15, 47 Stat. 70).

courts with respect to the issuance of injunctions in cases arising out of a labor dispute. To fully understand the significance of this action, it is best to begin by examining the public policy which Congress sought to clearly define in § 2 of the Norris-LaGuardia Act.[115] In language carefully chosen to, in the words of the Senate Judiciary Committee, "assist the courts in the proper interpretation of the proposed legislation,"[116] the Congress declared:

> Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; therefore, the following definitions of and limitations upon the jurisdiction and authority of the courts of the United States are enacted.[117]

One derives the impression that much of the impetus for this new legislation came from the clear absurdities arising out of judicial injunctive enforcement of the notorious "yellow dog" contracts[118] which had become relatively commonplace. Nevertheless, it is also

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115. 29 U.S.C. § 102 (1970).

116. S. REP. No. 163, 72d Cong., 1st Sess. 11 (1932). *See also* 75 CONG. REC. 4503 (1932) (remarks of Senator Norris).

117. 29 U.S.C. § 102 (1970).

118. *See, e.g.*, S. REP. No. 163, 72d Cong., 1st Sess. 14-16 (1932); 75 CONG. REC. 5479 (1932) (remarks of Congressman La Guardia); *id.* at 4626 (remarks of Senator Norris). A typical "yellow dog" contract as quoted in these congressional debates read as follows:

> The undersigned applicant for employment by the Great Northern Railway Co. as ____ ____ (or at present employed), in consideration of the granting or continuance of such employment, hereby states and represents to the Great Northern Railway Co. that he is not a member of or affiliated with the International Association of Machinists; the International Brotherhood of Boilermakers, Iron Ship Builders, and Helpers of America; the International Brotherhood of Blacksmiths and Helpers; the Amalga-

clear that there was general dissatisfaction with judicial practice in the area of labor injunctions.[119]

Both *Duplex Printing Press Co. v. Deering*[120] and *Bedford Cut Stone Co. v. Journeyman Stone Cutters' Association*[121] were cited as examples of judicial decisions militating in favor of the new legislation. Section 4 of the Act[122] was aimed directly at correcting what was seen as judicial misapprehension as to the true import of § 20

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mated Sheet Metal Workers International Alliance; the International Brotherhood of Electrical Workers; or the Brotherhood or Railway Carmen of America, and agrees that during the entire period of such employment he will not apply for membership in, or become a member of, or affiliate with, or lend any support, financial or otherwise, to any of said organizations. Upon the failure of the undersigned to comply with the foregoing agreement in every respect, it is agreed that this may be treated by the Great Northern Railway Co. as a resignation from its employment and that such employment shall immediately cease.

Id.

119. The fact that Congress was very unhappy with the interpretations that had been placed upon the labor exemption provisions of the Clayton Act was perhaps best exemplified by the following excerpt from the Senate Judiciary Committee Report:

> The purpose of the (Norris-La-Guardia) bill is to protect the rights of labor in the same manner the Congress intended when it enacted the Clayton Act, October 15, 1914 (38 Stat. 738), which act, by reason of its construction and application by the Federal courts, is ineffectual to accomplish the congressional intent.

S. REP. No. 163, 72d Cong., 1st Sess. 3 (1932). *See also* 75 CONG. REC. 4619 (1932) (remarks of Senator Blaine).

120. 254 U.S. 443 (1921). *See* text accompanying notes 63-74 *supra*.

121. 274 U.S. 37 (1927). *See* text accompanying notes 95-112 *supra*.

122. The section contains the following provisions:

> § 4. No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:
>
> (a) Ceasing or refusing to perform any work or to remain in any relation of employment;
>
> (b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in section 3 of this title;
>
> (c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value;
>
> (d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;
>
> (e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;
>
> (f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;

of the Clayton Act,[123] forbidding the issuance of an injunction in several enumerated situations, some of which corresponded to those listed in § 20 of the Clayton Act. Thus, § 5 of the Norris-LaGuardia Act stated:

> §5. No court of the United States shall have jurisdiction to issue a restraining order or temporary or permanent injunction upon the ground that any of the persons participating or interested in a labor dispute constitute or are engaged in an unlawful combination or conspiracy because of the doing in concert of the acts enumerated in Section 4 of this title.[124]

This section was specifically conceived to overrule part of the *Bedford Stone* holding.[125]

The final section of the Norris-LaGuardia Act which is relevant to the present discussion is § 13,[126] which sought to define the key terms—"labor dispute," "person participating in a labor dispute" and "case involving or growing out of a labor dispute." Of particular interest is § 13(c) which states:

> (c) The term "labor dispute" includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or condi-

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(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;

(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 3 [relating to "yellow dog" contracts] of this title.

29 U.S.C. § 104 (1970) (originally enacted as Act of Mar. 23, 1932, ch. 90, § 4, 47 Stat. 70).

123. The House Judiciary Committee had this to say about the rationale behind Section 4:

> These are the same character of acts which Congress and section 20 of the Clayton Act of October 15, 1913, sought to restrict from the operation of injunctions, but because of the interpretations placed by the courts on this section of the Clayton Act, the restrictions as contained herein have become more or less valueless to labor, and this section is intended by more specific language to overcome the qualifying effects of the decisions of the courts in this respect.

H.R. REP. No. 669, 72d Cong., 1st Sess. 7-8 (1932).

124. 29 U.S.C. § 105 (1970) (originally enacted as Act of Mar. 23, 1932, ch. 90, § 5, 47 Stat. 70).

125. H.R. REP. No. 669, 72d Cong., 1st Sess. 8 (1932).

126. 29 U.S.C. § 113 (1970) (originally enacted as Act of Mar. 23, 1932, ch. 90, § 13, 47 Stat. 73).

tions of employment, *regardless of whether or not the disputants stand in the proximate relation of employer and employee.*[127]

2. *Early Effects of Norris-LaGuardia*

When read in conjunction with § 4, § 13(c) essentially placed secondary boycotts and strikes beyond the reach of injunctive relief. This at least was the view taken in 1940 by the Supreme Court in *Milk Wagon Drivers' Local 753 v. Lake Valley Farm Products, Inc.*[128]

Earlier that year, in the case of *Apex Hosiery Co. v. Leader*,[129] some early signs of the revolution in judicial thinking, sparked in part at least by the passage of Norris-LaGuardia, had begun to emerge. The Court in *Apex* emphasized the fact that labor's exemption under the Clayton Act was less than total,[130] but it refused to hold that a violent local sit-down strike, in which union members had knowingly obstructed the flow of the company's goods into interstate commerce, was the kind of restraint of trade contemplated and proscribed by § 1 of the Sherman Act.[131] *Apex* was an action for treble damages, and the Court's decision did not rest directly on the Norris-LaGuardia Act. It is nevertheless apparent that the opinion relied in part on Norris-LaGuardia for its conclusion that an obstruction of commerce, such as the one involved in that case, was not considered by Congress to contravene the public policy embodied in the Sherman Act.[132] But beyond the narrow holding in the case, a general predisposition to find labor union activities to be beyond the Sherman Act's scope is intimated by the *Apex* decision.[133]

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127. 29 U.S.C. § 113(c) (1970) (emphasis supplied).

128. 311 U.S. 91 (1940).

129. 310 U.S. 469 (1940).

130. *Id.* at 487-88.

131. *Id.* at 493. Later in the same opinion the Court stated:

> It is in this sense that it is said that the restraints, actual or intended, prohibited by the Sherman Act are only those which are so substantial as to affect market prices. Restraints on competition or on the course of trade in the merchandising of articles moving in interstate commerce is not enough, unless the restraint is shown to have or is intended to have an effect upon prices in the market or otherwise to deprive purchasers or consumers of the advantages which they derive from free competition.

Id. at 500-01 (citations omitted).

132. *Id.* at 504 n.24.

133. Consider, for example, the following language from the *Apex* opinion:

> If, without such effects on the market, we were to hold that a local factory strike,

Just how dramatic an impact on judicial thinking the Norris-LaGuardia Act was likely to have did not become clear until a year later in the case of *United States v. Hutcheson.*[134] That case involved criminal indictments brought under § 1 of the Sherman Act in connection with a jurisdictional dispute between the United Brotherhood of Carpenters and Joiners of America and the International Association of Machinists, both affiliates of the American Federation of Labor. The two unions had long been at odds over which of them could claim jurisdiction over positions responsible for the erection and dismantling of certain machinery. Anheuser-Busch, the employer involved in the dispute, had agreements with

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stopping production and shipment of its product interstate, violates the Sherman law, practically every strike in modern industry would be brought within the jurisdiction of the federal courts, under the Sherman Act, to remedy local law violations. The Act was plainly not intended to reach such a result, its language does not require it, and the course of our decisions precludes it. The maintenance in our federal system of a proper distribution between state and national governments of police authority and of remedies private and public for public wrongs is of far-reaching importance. An intention to disturb the balance is not lightly to be imputed to Congress. The Sherman Act is concerned with the character of the prohibited restraints and with their effect on interstate commerce. It draws no distinction between the restraints effected by violence and those achieved by peaceful but oftentimes quite as effective means. Restraints not within the Act, when achieved by peaceful means, are not brought within its sweep merely because, without other differences, they are attended by violence.

Id. at 513.

The thrust of the *Apex* decision, in fact, revealed for the first time (notwithstanding the claim that the decision fully comported with past rulings by the Court) a willingness on the part of the Court to find no Sherman Act liability even where there had been some restraint of trade and the Clayton Act exemptions were inapplicable, as the following language clearly demonstrates:

> These cases show that activities of labor organizations not immunized by the Clayton Act are not necessarily violations of the Sherman Act. Underlying and implicit in all of them is recognition that the Sherman Act was not enacted to police interstate transportation, or to afford a remedy for wrongs, which are actionable under state law, and result from combinations and conspiracies which fall short, both in their purpose and effect, of any form of market control of a commodity, such as to "monopolize the supply, control its price, or discriminate between its would-be purchasers." These elements of restraint of trade, found to be present in the *Second Coronado* case and alone to distinguish it from the *First Coronado* case and the *Leather Workers* case, are wholly lacking here. We do not hold that conspiracies to obstruct or prevent transportation in interstate commerce can in no circumstances be violations of the Sherman Act. Apart from the Clayton Act it makes no distinction between labor and non-labor cases. We only hold now, as we have previously held both in labor and non-labor cases, that such restraints are not within the Sherman Act unless they are intended to have, or in fact have, the effects on the market on which the Court relied to establish violation in the *Second Coronado* case.

Id. at 512.

134. 312 U.S. 219 (1941).

both unions which provided that the disputed jobs would be assigned to the machinists, and that the carpenters would submit all grievances to arbitration. In 1939, the carpenters demanded the disputed jobs, and Anheuser-Busch refused, requesting that the question be submitted to arbitration. The carpenters refused the request to arbitrate, and called a strike which involved picketing (of Anheuser-Busch and some allied construction companies that were also involved) and a request, publicized through circulars, letters and the carpenters' official publication, that union members refrain from buying Anheuser-Busch beer.

It was perhaps not surprising that the Supreme Court sustained the district court's dismissal of the charges contained in the indictments, since the union activity was entirely peaceful, directed at the primary employer and clearly protected by § 20 of the Clayton Act.[135] In addition, the charges were brought against four officers of the United Brotherhood of Carpenters and Joiners of America.[136] It would seem elementary that such charges could not have been sustained even under the standard of *Duplex Printing Press Co. v. Deering*,[137] which held that, under § 20 of the Clayton Act, the laws of the United States (including, of course, the antitrust laws) were to be relaxed only as to "parties standing in proximate relation to a controversy".[138] Surely the officers of the carpenters enjoyed such a relationship to the dispute their union had with the machinists and Anheuser-Busch. Nevertheless, the Supreme Court refused to rule on that question, choosing instead to venture off into uncharted and, to say the least, unconventional judicial waters. Justice Frankfurter, writing for the majority, declared that there was no need to determine the legality of the conduct within the restrictions set forth in *Duplex*, because Congress' definition of "labor dispute" in the Norris-LaGuardia Act left no room for doubt.[139] He went on to say that it would be "strange indeed" if these acts were permitted to be subject to criminal liability in view of the elaborate congressional effort to permit such conduct by not allowing it to be enjoined.[140]

135. *Id.* at 233.
136. United States v. Hutcheson, 32 F. Supp. 600 (E.D. Mo. 1940).
137. 254 U.S. 443 (1921). *See* text accompanying notes 63-74 *supra*.
138. *Id.* at 470-71. *See also* note 71 *supra*.
139. United States v. Hutcheson, 312 U.S. 219, 233-34 (1941).
140. *Id.* at 235.

Justice Frankfurter's statement that it would be "strange indeed" if that which could not be reached in equity could nevertheless carry the possibility of criminal liability strikes an ironic note when considered in the light of both the language and legislative history of the Norris-LaGuardia Act. First, with only some unrelated exceptions,[141] the Act makes no attempt to alter substantive criteria for legality. Its language restricts it, instead, to limitations on judicial practice with regard to the issuance of injunctions.[142] But more basic than that is the underlying intent of Congress. The committee reports of both the House[143] and Senate[144] are devoid of any indication that Congress thought that, by placing some conduct beyond the reach of injunctions, those acts would necessarily become legal in all situations. Moreover, the debates in both houses reveal a concern with the *injunctive* process. The only times that criminal and ordinary civil liability were even mentioned disclose what appears to have been a consensus that the legislation under consideration would leave such liability unaffected.[145]

One must wonder why Justice Frankfurter and a majority of the Supreme Court felt compelled to cast aside the time-honored judicial tradition of refusing to break new legal ground when the facts of the *Hutcheson* case brought it within established precedent.[146]

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141. Section 3 [29 U.S.C. § 103 (1970)] makes "yellow dog" contracts unenforceable. Section 6 [29 U.S.C. § 106 (1970)] goes to the question of vicarious liability of individuals and organizations involved in a labor dispute.

142. *See* 29 U.S.C. § 101 (1970), which provides:

> No court of the United States, as defined in this chapter, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of this chapter; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this chapter.

143. H.R. REP. No. 669, 72d Cong., 1st Sess. (1932).

144. S. REP. No. 163, 72d Cong., 1st Sess. (1932).

145. Consider, for example, the remarks of Congressman Celler, a major proponent of the legislation in the House:

> All we do by the passage of this bill is to follow the English practice and relegate the disputants to the criminal side of the law and to actions for damages. Only in rare cases do we allow injunctions in this bill.

75 CONG. REC. 5490 (1932). Also worthy of note in this regard are the remarks of Congressman Greenwood:

> Most of these cases can be tried in the criminal side of the court and there is no desire and no provision in this bill in any way to hinder the administration of the criminal law.

Id. at 5467.

146. *See* 312 U.S. at 237 (Stone, J., concurring).

Why did Justice Frankfurter, in the name of "reading the Sherman Law and § 20 of the Clayton Act and the Norris-LaGuardia Act as a harmonizing text of outlawry of labor conduct,"[147] adopt a construction that flies in the face of the literal meaning of Norris-LaGuardia, and radically opposes clear evidence of the legislative intent.[148] The only conceivable answer seems to be that the rebuke that Congress handed the judiciary in the Norris-LaGuardia Act evoked a judicial overreaction, with ramifications far beyond the intended target of the rebuke.[149]

Although the Court had construed the labor exemption very broadly in the *Hutcheson* case, it was clear that there had to be limits on its scope. In fact, the Court in *Hutcheson* qualified its holding in an important respect, as follows:

> *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 distinguished by any judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means.[150]

In *Allen Bradley Co. v. Local 3, IBEW*,[151] the Court, in an opinion by Justice Black, in effect upheld its pre-Norris-LaGuardia decision in *United States v. Brims*,[152] by ruling that acts by labor unions, done in combination with non-labor groups, which serve to restrain trade, are beyond the limits of the labor exemption and subject to the sanctions of the Sherman Act. The case was concerned with union activities in the New York City area which had culminated in "industry-wide understandings, looking not merely to terms and

147. 312 U.S. at 231.

148. This question is especially enigmatic when contemplated in light of the fact that Justice Frankfurter had once expressed opposition to a proposed provision stating that activities which could not be enjoined under § 4 of Norris-LaGuardia should also not be "unlawful." Pointing to the difficulties such a provision would create, he said: "it is one thing . . . merely to withdraw the remedy of injunction for a given act; it is a wholly different thing to take away all remedies, including a civil action for damages . . . ." Kadish, *Labor and the Law*, in FELIX FRANKFURTER: THE JUDGE 171-72 n.92 (W. Mendelson ed. 1964).

149. *See, e.g.*, United States v. Carrozzo, 37 F. Supp. 191 (N.D. Ill. 1941), *aff'd sub nom.* United States v. International Hod Carriers, 313 U.S. 539 (1941) (per curiam).

150. 312 U.S. at 232 (emphasis supplied).

151. 325 U.S. 797 (1945).

152. 272 U.S. 549 (1926).

conditions of employment but also to price and market control".[153] Justice Black, obviously concerned about unions aiding and abetting businesses in market control or other monopolistic practices,[154] held that such activity could not qualify for the exemption, even though the means employed by a particular union might fall squarely within the "specified acts" of § 20 of the Clayton Act.[155] Justice Black remarked:

> Our holding means that the same labor union activities may or may not be in violation of the Sherman Act, dependent upon whether the union acts alone or in combination with business groups.[156]

Interestingly, *Allen Bradley* involved a suit for an injunction brought by a private party. In his discussion of the applicability of the labor exemption, Justice Black confined himself almost entirely to the terms of § 20 of the Clayton Act. He did not see fit to justify his apparent finding that the Norris-LaGuardia Act did not forbid the issuance of an injunction, despite the fact that he explicitly rejected the district court's sole reason—that the case did not involve a "labor dispute"[157]—for finding the Act inapplicable.[158]

The existence of this apparent gap in the Court's reasoning is probably attributable in part to the intricacy and difficulty of the task it had set for itself. Justice Black defined the task as trying to reconcile two conflicting congressional policies, one seeking a com-

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153. 325 U.S. at 799-800. The facts of the *Allen Bradley* case have been very aptly summarized as follows:

> Local 3 of the IBEW, having jurisdiction only over metropolitan New York City, organized the employees of most of the electrical equipment manufacturers and contractors in the area. Under the collective agreements, the contractors agreed to buy electrical equipment only from manufacturers in contractual relations with Local 3, *i.e.* those in New York City, while the manufacturer agreed to sell only to those area contractors who employed members of Local 3. The union, through the usual weapons of picketing and boycotts, prevented nonunion operations. Sheltered from competition, the manufacturers were able to raise their prices, while the contractors, with the union's blessing and participation, could rig bids. The result was higher wages and shorter hours for Local 3's members, greater profits for the manufacturers and contractors, exclusion for outsiders and monopolistic prices for the public.

Winter, *Collective Bargaining and Competition: The Application of Antitrust Standards to Union Activities*, 73 YALE L.J. 14, 45 (1963).

154. 325 U.S. at 808-11.

155. *Id.* at 807.

156. *Id.* at 810.

157. Allen Bradley Co. v. Local 3, IBEW, 51 F. Supp. 36, 37-38 (S.D.N.Y. 1943).

158. 325 U.S. at 807 n.12 (1945).

petitive business economy and the other seeking to allow workers to better their position through collective bargaining. He felt that the Court had to determine how much Congress intended one policy to "neutralize" the other.[159]

But another source of problems was the fact that Congress, in the Norris-LaGuardia Act, had legislated categorically (unless, of course, considerable weight is given to the statement of policy in § 2, a practice which has received little if any overt recognition in the judicial decisions). In the shadow of this, there was a natural temptation among the judiciary to interpret the law in the same spirit, as the Court did in *Hutcheson*. But to so interpret the law in every situation would inevitably have led to absurd results. Cornered between the irresistable force of the categorical reasoning in *Hutcheson* and the patently illogical results that it would have yielded on the facts in *Allen Bradley*, it is understandable that the Court would choose to invent an exception to the evidently absolute proscription in the language of §§ 4 and 5 of Norris-LaGuardia. Given this much, one begins to see the real source of difficulty. The problem, as very perceptively posited by Justice Black, was one of *reconciliation* of two sometimes incompatible policies. As a probable result of a judicial tendency toward some rigidity of thought, however, the Court's decisions in both *Hutcheson* and *Allen Bradley* look more like the *annihilation* of one policy for the other on a case-by-case basis. Nevertheless, both cases were destined to exert powerful influence upon the subsequent history of the labor exemption.

II. Recent Case Law: Elaboration on Post Norris-LaGuardia Trends

A. *Los Angeles Meat Drivers Local 626 v. United States*[160]

Expanding somewhat upon the doctrine of *Allen Bradley*, in 1962 the Court allowed partial dissolution of a labor union as an antitrust remedy in the *L.A. Meat Drivers* case. The defendants in the action, brought by the Government to secure injunctive relief against alleged violations of § 1 of the Sherman Act, had stipulated to all allegations of wrongdoing, to the ultimate conclusion that theirs was an unlawful combination in restraint of interstate trade and com-

159. *Id.* at 806.
160. 371 U.S. 94 (1962).

merce, and to the propriety of the issuance of a broad injunction against their activities.[161] As Justices Goldberg and Brennan said, "These concessions necessarily forfeit any antitrust exemption which might otherwise have been claimed to attach."[162]

Briefly stated, the facts as stipulated by the defendants were as follows: that so-called "grease peddlers" were independent entrepreneurs whose earnings consisted of the difference between the price for which they purchased restaurant grease and the price at which they sold it to processors; that most of the grease peddlers in Los Angeles joined the Meat Drivers Union at the instigation of the union's business agent for the purpose of increasing their profit margin; that this purpose was accomplished by the enforcement of pre-agreed price levels by union agents who used or threatened to use union economic power, including strikes and boycotts, against processors who resisted the price-fixing scheme; that the union business agent assigned accounts and territories to each grease peddler who was a member of the union; and that each individual grease peddler agreed to refrain from buying from or soliciting customers in the territory of another peddler, upon pain of suspension from the union. It was also established that the grease peddlers were treated as a separate group within the union, administered separately, and that there was apparently no real or potential wage or job competition between the grease peddlers and the other union members. On appeal, the only question was whether the district court order compelling the union to expel the grease peddlers from its membership should be allowed to stand.[163] The Supreme Court answered in the affirmative.

Relying upon *Allen Bradley*, the Court held that the case did not arise out of a labor dispute, but merely involved an unlawful combination between businessmen and a union to restrain trade. The Court, therefore, concluded that neither the Norris-LaGuardia Act nor the exemption provisions of the Clayton Act were applicable.[164] The Court indicated, however, that had the union been motivated by a "legitimate interest" in the solicitation of the grease peddlers' membership (*i.e.*, if there had been "job or wage competition or

161. *Id.* at 95-96.
162. *Id.* at 105 (Goldberg & Brennan, J.J., concurring).
163. *Id.* at 96-98.
164. *Id.* at 102.

economic interrelationship of any kind between the grease peddlers and other members of the . . . union"),[165] the antitrust sanctions would not have been available.[166] Justice Goldberg and Justice Brennan, in a separate concurring opinion, sought to emphasize what was only suggested by the majority opinion, stating:

> Today's opinion of the Court thus properly notes that a labor organization may "often have a legitimate interest in soliciting self-employed entrepreneurs as members" and recognizes that permissible union interest and action extends beyond job and wage competition to other "economic interrelationship[s]."[167]

Except for the unusual remedy, this case probably added very little to the law. Presumably, the incentive for the Meat Drivers Union to seek the membership of the grease peddlers was the desire to increase the number of dues-paying members—a purely pecuniary motivation. In *Allen Bradley*, a real motivation for the union activities involved was apparently work and salary level maintenance. It can hardly be gainsaid that these are *illegitimate* union objectives. It may be that the talk of "legitimate objectives" in both cases was an empty gesture, shrouding what has been referred to as "unprincipled" judicial decision making.[168] It is, however, obvious that union combinations with non-labor groups which restrain trade have tended to evoke a very strong, negative reaction on the part of the Supreme Court.

B. *UMW v. Pennington*[169]

The *Pennington* case, decided on the same day[170] as its sister case, *Local 189, Meat Cutters v. Jewel Tea Co.*,[171] suggested some very interesting expansions on the *Allen Bradley* rule. The United Mine Workers had brought suit against the owners of Phillips Brothers Coal Company, a small coal producer, for welfare fund payments allegedly due under its collective bargaining agreement with Phillips. The company then counterclaimed for treble damages, claim-

165. *Id.* at 103.
166. *Id.*
167. *Id.* at 104 (Goldberg & Brennan, J.J., concurring).
168. Winter, *Collective Bargaining and Competition: The Application of Antitrust Standards to Union Activities*, 73 YALE L.J. 14, 58 (1963).
169. 381 U.S. 657 (1965).
170. June 7, 1965.
171. 381 U.S. 676 (1965). *See* text accompanying notes 186-203 *infra*.

ing that the union had violated § 1 and 2 of the Sherman Act by combining with certain large coal producers to drive the smaller producers from the market. Specifically, Phillips charged that the Mine Workers had agreed with the large companies to, among other things, insist upon the same wages and benefit levels in collective bargaining with all mine operators in the industry, knowing that some of the smaller operators would be unable to comply with the demands and continue to survive economically. The Court, in an opinion by Justice White, concluded that such union activity did not qualify for exemption from the antitrust laws.[172]

Justice Douglas, writing in a separate opinion on behalf of himself and Justices Black and Clark, read the majority opinion as a mere reaffirmation of the rule in *Allen Bradley*.[173] A close reading of Justice White's language, however, suggests more than a simple restatement of a long established rule. For one thing, the National Labor Relations Act[174] was introduced as a new element in the equation which would seek to balance, as Justice Black put it in *Allen Bradley*, the need to "preserve a competitive business economy" against the need to "preserve the rights of labor to organize to better its conditions through the agency of collective bargaining".[175] In this regard, Justice White first characterized the Court's concern and then cautioned:

> Unquestionably the Board's demarcation of the bounds of the duty to bargain has great relevance to any consideration of the sweep of labor's antitrust immunity, for we are concerned here with harmonizing the Sherman Act with the national policy expressed in the National Labor Relations Act of promoting "the peaceful settlement of industrial disputes by subjecting labor-management controversies to the mediatory influence of negotiation" . . . . But there are limits to what a union or an employer may offer or extract in the name of wages, and because they must bargain does not mean that the agreement reached may disregard other laws.[176]

172. 381 U.S. at 661.

173. *Id.* at 672 (Douglas, Black & Clark, J.J., concurring).

174. 29 U.S.C. §§ 141-88 (1970).

175. 325 U.S. at 806. *See* text accompanying note 159 *supra*.

176. 381 U.S. at 665 (citation omitted). It should be noted that although Justice White is referring to the policy of the National Labor Relations Act, at the time of *Allen Bradley* unions were under no duty to bargain in good faith. This requirement was added in 1947 by the Taft-Hartley Act. Labor-Management Relations Act (Taft-Hartley Act), 29 U.S.C. §§ 141-88 (1970).

Subtle though the distinction may be between this language and "reading the Sherman Law and § 20 of the Clayton Act and the Norris-LaGuardia Act as a harmonizing text of outlawry of labor conduct",[177] it may nevertheless represent a nascent recognition of substantial changes in historical conditions which should influence the weight to be given the various factors regulating the scope of the labor exemption.[178]

Perhaps the most striking innovation in the *Pennington* majority opinion, however, is embodied in the following sentence:

> From the viewpoint of antitrust policy, moreover, all such agreements between a group of employers and a union that the union will seek specified labor standards outside the bargaining unit suffer from a more basic defect, *without regard to predatory intention or effect* in the particular case.[179]

Justice White argued that the "salient characteristic of such agreements" is the loss of freedom with respect to bargaining policy. He further argued that "[i]t is just such restraints upon the freedom of economic units to act according to their own choice and discretion that run counter to antitrust policy."[180] This position could lead to interesting results. If a union were to agree with employer *A* to seek certain standards in collective bargaining in another unit, this presumably would violate the antitrust laws regardless of whether the imposition of uniform standards carried any actual, or even intended disadvantage for employer *B*. In fact, in some instances, such an agreement might actually serve to *enhance* competition, since a union settlement with employer *B* for substantially lesser terms might permit employer *A* to be undersold and even driven out of business. On the other hand, a union plan to unilaterally impose uniform standards on an industry, *even with the express purpose of driving certain competitors from the market*, would presumably be sheltered under the labor exemption panoply.[181] If one focuses on the *process* employed by Justice White (*i.e.* balancing the national labor policy against the antitrust laws), it is arguable that such unilateral union conduct might be reachable

177. United States v. Hutcheson, 312 U.S. 219, 231 (1941).
178. For further discussion of this point see text accompanying notes 277-92 *infra*.
179. 381 U.S. at 668 (emphasis supplied).
180. *Id.*
181. *See id.* at 665 n.2.

under the Sherman Act to the extent it also contravened the labor laws and violated national labor policy.[182] Until a decision is handed down which refutes the apparent trend in earlier decisions[183] to find an absolute exemption for unilateral union behavior, however, the probability of the Court reaching such a conclusion is doubtful.

Two other refinements on the *Allen Bradley* doctrine which appear in the *Pennington* decision deserve mention: (a) that wage agreements between a union and multi-employer groups are exempt from the antitrust laws, as is any attempt by the union to obtain the same terms from other employers so long as the attempt is made pursuant to the union's own interests;[184] (2) that employer-union combinations to influence public officials in a manner that may be deleterious to other competitors "is not illegal, either standing alone or as part of a broader scheme itself violative of the Sherman Act".[185]

C. *Local 189, Meat Cutters v. Jewel Tea Co.*[186]

The *Jewel Tea* case came before the Supreme Court in the form of a challenge by the employer to the validity of a clause in its collective bargaining agreement with the union. The challenged clause prohibited the operation of meat departments in the employer's stores between the hours of 6:00 P.M. and 9:00 A.M., and had been acquiesced in by the employer only in the face of a strike threat. An identical clause had previously been accepted by an association of approximately 1,300 merchants and meat dealers (the association).

Alleging a conspiracy to inhibit competition by preventing the sale of meat during the specified hours, the Jewel Tea Company (the employer) brought suit under §§ 1 and 2 of the Sherman Act against the Meat Cutters Union, and the secretary-general of the association, seeking invalidation of the clause, treble damages and attorneys' fees. Although the case did not produce a majority opinion,[187]

182. *See* text accompanying notes 277-99 *infra.*

183. *See, e.g.*, United States v. Hutcheson, 312 U.S. 219 (1941); Apex Hosiery Co. v. Leader, 310 U.S. 469 (1940). *See also* text accompanying notes 129-50 *supra.*

184. 381 U.S. at 665.

185. *Id.* at 670.

186. 381 U.S. 676 (1965).

187. Justice White announced the decision of the Court, and wrote on behalf of himself, Justice Brennan and the Chief Justice. *Id.* at 679. Justice Goldberg wrote an opinion on behalf of himself, Justice Harlan and Justice Stewart, in which he concurred in the judgment of the

it can at least be valued for the extent to which it reveals the diversity of opinion and degree of confusion engendered by this area of the law.

The ultimate question in the case[188] (*i.e.*, whether the union activities were within the ambit of the labor exemption) was decided on the most fundamental level by the manner in which the sales hours restrictions were viewed. The two groups of three justices which comprised the majority led by Justices White and Goldberg, both saw the restriction as primarily relating to working hours, a substantial interest of the union. As Justice White put it: "And, although the effect on competition is apparent and real, perhaps more so than in the case of the wage agreement, the concern of union members is immediate and direct."[189] For Justice White, the basis for this conclusion was the fact that the trial judge had found the union's evidence tending to show that the working hours of its members would be affected, more believable than Jewel Tea's evidence that they would not, and Justice White could not be persuaded that this finding was "clearly erroneous."[190] Justice Goldberg's opinion, on the other hand, reflects a conviction that at least the working hours of butchers in small service shops would have been adversely affected by any relaxation of the hours restriction for Jewel Tea, since the small shops, in order to compete, would necessarily have had to extend the hours of their butchers.[191] Consequently, Justice Goldberg concluded that the hours restriction clause was clearly of direct interest to the union and therefore exempt from the antitrust laws.

The dissenters, led by Justice Douglas, viewed the hours restriction as a direct attempt at market control,[192] albeit the control sought was one of a temporal nature as opposed to the geographic area and price controls involved in *Allen Bradley*. In addition, the dissenters found that, contrary to the district court's ruling which was left undisturbed by the majority of the Supreme Court, there

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Court in *Jewel Tea* and dissented from the opinion but concurred in the result of *Pennington*. *Id.* at 732.

188. Another issue that was raised was whether the doctrine of primary jurisdiction required the courts to defer the central question to the National Labor Relations Board. Apparently, the Court was unanimous in concluding that it did not. For the only real discussion of the issue see Justice White's opinion, *id.* at 684-88.

189. *Id.* at 691.

190. *Id.* at 697.

191. *Id.* at 727-29.

192. *Id.* at 736.

was evidence of a conspiracy among the association of merchants and meat dealers in that the collective bargaining agreement itself showed "it was planned and designed not merely to control but entirely to prohibit 'the marketing of goods and services' from 6:00 p.m. until 9:00 a.m. the next day".[193] Arguing that an agreement to so restrict sales among employers alone would have violated the antitrust laws, the dissenters concluded that "the unions can no more aid a group of businessmen to force their competitors to follow uniform store marketing hours than to force them to sell at fixed prices."[194]

Justice Goldberg departed from Justice White's opinion in *Jewel Tea* primarily on what he saw as a difference of opinion as to the theoretical scope of the labor exemption. Justice Goldberg, who felt that all mandatory subjects of bargaining should be beyond the purview of the antitrust laws,[195] felt that Justice White would not grant antitrust immunity to all agreements dealing with mandatory subjects of collective bargaining.[196]

Justice White's conclusion that a matter must be such that "the concern of union members is immediate and direct"[197] in order for labor policies to outweigh antitrust policies, was unpalatable to Justice Goldberg, who, it will be remembered, thought that the fact that the hours of some union members (even though working for another employer) would be affected should be sufficient to make the issue bargained for a "legitimate object."[198] It has been suggested that the difference in the two positions is merely one of degree,[199] and there is some merit in that contention if one focuses solely on the end result. Certainly, if the most serious problem in the law under the labor exemption were that the question of whether all mandatory bargaining subjects are exempt (and what if any non-

193. *Id.* at 737.

194. *Id.*

195. *Id.* at 710.

196. Justice Goldberg apparently based his conclusion as to Justice White's position from the following excerpt:

> This is not to say that an agreement resulting from union-employer negotiations is automatically exempt from Sherman Act scrutiny simply because the negotiations involve a compulsory subject of bargaining, regardless of the subject or form and content of the agreement.

UMW v. Pennington, 381 U.S. 657, 664-65 (1965) (White, J.).

197. 381 U.S. 676, 691 (1965).

198. *Id.* at 727-28.

199. 1 M. HANDLER, TWENTY-FIVE YEARS OF ANTITRUST 618 (1973).

mandatory subjects are exempt) had not yet been answered satisfactorily,[200] there would be little to discuss. The fundamental and significant difference between the positions of Justices White and Goldberg in *Jewel Tea*, however, is not in the results, but in the approaches utilized to obtain the results. It is fairly clear that Justice White regarded the labor laws as only one factor (although a very important one) to be applied in determining the legitimacy of union activity, and he felt that this factor should be weighed against the antitrust policy.[201] Justice Goldberg, on the other hand, made it obvious that he preferred a much more extreme approach, which would regard all activities, directly or indirectly sanctioned under the labor laws, to be absolutely exempt from antitrust liability regardless of their impact on competition or the intent behind them.[202] Of the two, Justice White's position has the merit of at least some theoretical flexibility, and is consistent with the balancing approach used in earlier cases.[203]

D. *American Federation of Musicians v. Carroll*[204]

In *Carroll*, the Court was confronted with an alleged unlawful combination between the Musician's Union and band leaders in an action in which an injunction and treble damages were sought to remedy purported violations of §§ 1 and 2 of the Sherman Act. The allegations were bottomed on the fact that the union, with respect to "club date" engagements,[205] had unilaterally adopted bylaws and regulations requiring orchestra leaders to, among other things, charge minimum prices set out in a "Price List Booklet." The total of the minimum wage scales for all musicians engaged, a "leader's fee" which was to be twice the regular musician's scale when four or more musicians were to play at an engagement, and 8% of the total to cover incidentals such as social security, unemployment insurance, etc.,[206] comprised the total minimum charge that leaders

200. *See* Local 189, Meat Cutters v. Jewel Tea Co., 381 U.S. 676, 732 (1965) (Goldberg, J., dissenting).

201. *Id.* at 689, 691.

202. *Id.* at 707-09.

203. *See, e.g.*, Allen Bradley v. Local 3, IBEW, 325 U.S. 797, 806 (1945); United States v. Hutcheson, 312 U.S. 219, 231 (1941). *See also* UMW v. Pennington, 381 U.S. 657, 665 (1965).

204. 391 U.S. 99 (1968).

205. "These are one-time engagements of orchestras to provide music, usually for only a few hours, at such social events as weddings, fashion shows, commencements, and the like." *Id.* at 102 (footnote omitted).

206. *Id.* at 104.

were required to demand. In addition, for traveling engagements, a leader was required to charge 10% more than the minimum price of either the home local or the local in whose territory the group was to play, whichever was the greater.[207] Usually, the leader would book the engagements and hire the necessary musicians ("sidemen"), whom he would then conduct, often playing an instrument himself at the engagement. All wages and expenses were paid by the leader out of the sum he had charged the party who had engaged him to provide music. Occasionally, the leader would neither play nor conduct himself. In such cases, it was customary to hire a "subleader," who conducted the orchestra. The union bylaws specified that, in such instances, the subleader was to be paid one-half times the regular musician's scale out of the leader's fee. Most orchestra leaders were union members, and sometimes performed in different capacities—leader, subleader or regular musician—during the same day. It was argued that

> [the union's] involvement of the orchestra leaders in the promulgation and enforcement of the challenged regulations and bylaws created a combination or conspiracy with a "non-labor" group which violates the Sherman Act.[208]

The Court, in an opinion by Justice Brennan, agreed with the district court that the orchestra leaders did not comprise a non-labor group. The Court reasoned that so long as there existed "the 'presence of job or wage competition or some other economic interrelationship . . . [which affected] legitimate union interests . . . . the independent contractors were a 'labor group' and party to a labor dispute . . . .' "[209] The Court went on to state that all labor disputes were taken outside the scope of the Sherman Act by the Norris-LaGuardia Act.[210]

The Court further agreed with the district court's finding that the work of the orchestra leaders actually or potentially affected the jobs, wages and working conditions of union members.[211] Disagree-

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207. *Id.* at 105.

208. *Id.*

209. *Id.* at 105-06, *citing* Los Angeles Meat Drivers Union v. United States, 371 U.S. 94, 103 (1962); Allen Bradley Co. v. Local 3, IBEW, 325 U.S. 797, 805-06 (1945); United States v. Hutcheson, 312 U.S. 219, 229-36 (1941); Milk Wagon Drivers' Union v. Lake Valley Farm Prods., Inc., 311 U.S. 91 (1940).

210. 391 U.S. at 106.

211. This fact, in the opinion of the Court, served to legitimize several of the unions'

ing with the circuit court's ruling that the establishment of price minimums by the union constituted a per se violation of the Sherman Act,[212] the Court quoted from Justice White's opinion in *Jewel Tea* to the effect that " '[t]he crucial determinant is not the form of the agreement—*e.g.*, prices or wages—but its relative impact on the product market and the interests of union members.' "[213] But then the Court went on to say: "The critical inquiry is whether the price floors in actuality operate to protect the wages of the subleader and sidemen."[214] The Court thus seems to have endorsed the concept of balancing the effect on the product market against the effect on the interests of union members in one breath (the approach consistently followed by Justice White, and by the majority of the Court in *Pennington*[215]), and rejecting it in the next. The apparent import of the Court's statement as to what constitutes the "critical inquiry" is that, if the interests of union members are served by a given union action, any impact on the product market is immaterial. If this interpretation is correct, it would represent a significant retreat from Justice White's requirement that, where a union-employer agreement has an "apparent and real" effect on competition, the interests of the union members must be "immediate and direct" if the agreement is to qualify for exemption from the antitrust laws.[216]

The Court felt that when a leader charged below the minimum, only one of two possible results could occur: either the leader would

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practices. The Court's statement in this regard, including citations, was as follows:

> [I]n the light of the job and wage competition thus established, both courts correctly held that it was lawful for petitioners to pressure the orchestra leaders to become union members, *Los Angeles Meat Drivers, supra* and *Milk Wagon Drivers', supra*, to insist upon a closed shop, *United States v. American Federation of Musicians*, 318 U.S. 741, affirming 47 F. Supp. 304, to refuse to bargain collectively with the leaders, see *Hunt v. Crumboch*, 325 U.S. 821, to impose the minimum employment quotas complained of, *United States v. American Federation of Musicians, supra*, to require the orchestra leaders to use the Form B contract, see *Teamsters Union v. Oliver*, 362 U.S. 605 (*Oliver II*), and to favor local musicians by requiring that higher wages be paid to musicians from outside a local's jurisdiction, *Rambusch Decorating Co. v. Brotherhood of Painters*, 105 F. 2d 134.

Id. at 106-07.

212. *Id.* at 107.

213. *Id.*, *quoting from* Local 189, Meat Cutters v. Jewel Tea Co., 381 U.S. 676, 690 n.5 (1965).

214. 391 U.S. at 108.

215. UMW v. Pennington, 381 U.S. 657, 666-69 (1965). *See* Local 189, Meat Cutters v. Jewel Tea Co., 381 U.S. 676, 689, 691 (1965). *See also* text accompanying notes 169-203 *supra*.

216. *See* Local 189, Meat Cutters v. Jewel Tea Co., 381 U.S. 676, 691 (1965).

have to work for less than union scale himself, or he would have to pay the musicians he employed at less than union scale.[217] The Court then concluded, "the Price List is therefore 'a direct and frontal attack upon a problem thought to threaten the maintenance of the basic wage structure . . . .' "[218]

Justice White, joined by Justice Black, dissented, on the basis that the musicians union had combined with a non-labor group to effectively control the industry. They felt that the union had forced both membership and union rules not only on band leaders who cooperated willingly, but also upon others who had no desire to cooperate. The Clayton and Norris-LaGuardia Acts, they concluded, were "never intended to give unions this kind of stranglehold on any industry."[219]

Justice White agreed with the Court's result in most important respects, except with regard to that part of the minimum charge that was to be designated leader's fee. He felt that the union could have, within the ambit of the antitrust exemption, insisted on a leader's fee "not less than the union scale for a subleader plus the leader's costs in obtaining the engagement, hiring the musicians, and planning the program"[220] as long as the leader actually did lead the musicians at the engagement. But requiring the leader to charge more than union scale for a subleader where the leader did not lead, however, was to go beyond the protection offered by the exemption and enter the forbidden realm of price-fixing. The key, Justice White felt, was that where the leader did not lead, but confined himself to booking engagements and making other arrangements, he did no "labor group" work and, for such purposes, was not a member of a labor group within the meaning of the Clayton and Norris-LaGuardia Acts.[221] On the facts of the case, therefore, Justice White felt there existed a combination with a non-labor group that unlawfully restrained trade.[222] On the theoretical level, Justice White remained true to his interest-balancing test.[223]

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217. 391 U.S. at 111 n.12.
218. *Id.* at 110, *quoting from* Local 24, Teamsters v. Oliver, 358 U.S. 283, 294 (1959).
219. 391 U.S. at 121.
220. *Id.* at 116.
221. *Id.* at 117, 120.
222. *Id.* at 120.
223. Justice White applied his interest balancing test as follows:

Unions are, of course, not without interest in the prices at which employers sell. As the majority points out, by seeing that employers sell at prices covering all their costs,

E. *Ramsey v. UMW*[224]

The *Ramsey* case, which deserves brief mention here, is the latest case in this area to have been decided by the Supreme Court. The case was primarily concerned with the interpretation of § 6 of the Norris-LaGuardia Act,[225] and dealt with the standard of proof required to impute liability for the unlawful acts of individuals to officers or members of an association or organization involved in a labor dispute. While it is of some relevance, the Court's decision on this issue is beyond the scope of the present discussion. The Court in *Ramsey* was, however, also asked by petitioner coal mine operators to reconsider its holding in *Pennington*.[226] To this suggestion, the Court, per Justice White, responded by reaffirming, at least, the basic tenents of *Pennington* which remain good law today.[227] The law in this respect was perhaps best summarized in the following excerpt from a recent Ninth Circuit opinion:

> The type of activity by non-union entities sufficient to draw unions with whom they deal within the sphere of *Allen Bradley* was and remains uncertain. Union-imposed restraints which

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a union can insure employer solvency and make more certain employee collection of wages owed them. In addition, assuring that competing employers charge at least a minimum price prevents price competition from exerting downward pressure on wages. On the other hand, price competition, a significant aid to satisfactory resource allocation and a deterrent to inflation, would be substantially diminished if industry-wide unions were free to dictate uniform prices through agreements with employers. *I have always thought that this strong policy outweighed the legitimate union interest in the prices at which employers sell*, and until today I had thought that the Court agreed.

Id. at 119 (footnote omitted) (emphasis added).

224. 401 U.S. 302 (1971).

225. 29 U.S.C. § 106 (1970).

226. 401 U.S. at 312. *See also* text accompanying notes 169-85 *supra*.

227. The Court stated:

> The Court made it unmistakably clear in *Allen Bradley Co. v. Union*, that unilateral conduct by a union of the type protected by the Clayton and Norris-LaGuardia Acts does not violate the Sherman Act even though it may also restrain trade. . . . We adhere to this view. But neither do we retreat from the "one line which we can draw with assurance that we follow the congressional purpose. We know that Congress feared the concentrated power of business organizations to dominate markets and prices. . . . A business monopoly is no less such because a union participates, and such participation is a violation of the Act." Hence we also adhere to the decision in *Pennington*: "[T]he relevant labor and antitrust policies compel us to conclude that the alleged agreement between UMW and the large operators to secure uniform labor standards throughout the industry, if proved, was not exempt from the anti-trust laws."

401 U.S. at 313 (citations omitted).

> serve purposes closely related to wage, hours, and conditions of employment generally are considered free of *Allen Bradley* taint. On the other hand, union cooperation which enables one or more employers to obtain control of the supply and price of a certain product in a particular market, or to make possible the elimination of troublesome competition, is unmistakably tainted.[228]

If the precise parameters of the kinds of union-employer cooperation that may run afoul of antitrust provisions remain unclear, however, the question of what, if any, unilateral union activities can be subject to antitrust sanctions is completely shrouded in mystery.

III. Pending Cases: Examples of Continuing Problems

As might be expected, labor-antitrust cases continue to generate litigation. At this point, it may be appropriate to consider three illustrative cases, which have been recently decided or are currently pending. These cases serve to point out a few of the many remaining problem areas.

A. *Bodine Produce, Inc. v. United Farm Workers Organizing Committee*[229]

The *Bodine* case, decided in March of 1974 by the Ninth Circuit, had to do with the well-publicized concerted group boycott, which the Farm Workers have been using to force recognition of their union by certain grape growers. Plaintiffs in the case were a group of Arizona growers and shippers of table grapes, who sought damages and injunctive relief, alleging violations of §§ 1 and 2 of the Sherman Act. Defendant Farm Workers moved to dismiss in the district court on grounds that plaintiffs had failed to state a claim upon which relief could be granted. The district court denied the motion to dismiss, and it was on appeal from this ruling that the case came before the Court of Appeals for the Ninth Circuit.[230]

The circuit court's opinion began with an extensive review of the history of the labor exemption.[231] The more important conclusions

228. Bodine Produce, Inc. v. United Farm Workers Organizing Comm., 494 F.2d 541, 551 (9th Cir. 1974) (footnotes omitted).

229. 494 F.2d 541 (9th Cir. 1974).

230. *Id.* at 543.

231. *Id.* at 544-56.

reached by the court in its historical review include: (1) that *United States v. Hutcheson*[232] was the Supreme Court decision "on which prevailing views of the exemption rest";[233] (2) that agricultural employees were excluded from the benefits and burdens of the National Labor Relations Act, the Labor-Management Relations Act of 1947, and the Labor-Management Reporting and Disclosure Act of 1959;[234] (3) that *Hutcheson*, unlike later cases which included consideration of the National Labor Relations Act and its amendments, "referred only to the necessity of harmonizing the Clayton and Norris-LaGuardia Acts with the Sherman Act";[235] and (4) that consequently, agricultural unions are entitled to an exemption no more restrictive than that provided by *Hutcheson*, since later court decisions and legislative enactments have done nothing to indicate to the contrary.[236] Having drawn these conclusions, the court then proceeded to review the allegations in the complaint of the grape growers, measuring their validity as claims under §§ 1 and 2 of the Sherman Act against the very permissive standards to be applied in a motion to dismiss.[237]

The first allegation considered by the court was the charge that the United Farm Workers' Organizing Committee (UFWOC) and its officers had entered into a conspiracy with the Amalgamated Meat Cutters Union, in which the Meat Cutters had in fact enforced the boycott through a variety of tactics, including threats and coercion.[238] In short, this portion of the complaint alleged a secondary boycott, which but for the fact that agricultural workers are exempt from the Labor-Management Relations Act (as amended),[239] would

232. *See* text accompanying notes 134-50 *supra*.

233. 494 F.2d at 554.

234. *Id.* at 553-54.

235. *Id.* at 554.

236. *Id.* at 554-56.

237. The court quoted the following as an articulation of its standard vis-à-vis motions to dismiss:

> A complaint is not subject to dismissal unless it appears to a certainty that no relief can be granted under any set of facts that can be proved in support of its allegations. This rule, which has been stated literally hundreds of times, precludes final dismissal for insufficiency of the complaint except in the extraordinary case where the pleader makes allegations that show on the face of the complaint some insuperable bar to relief.

Id. at 556 (footnote omitted), *quoting from* C. WRIGHT, LAW OF FEDERAL COURTS 285-86 (2d ed. 1970).

238. The full text of this portion of the complaint was quoted by the court. 494 F.2d at 557 n.48.

239. 29 U.S.C. § 152(3) (1970).

almost certainly have been a violation of that Act.[240] The court did not feel, however, that this allegation stated a valid claim under the antitrust laws because it did not allege conduct constituting a combination with a non-labor group, nor did the allegation imply conduct that aided and abetted businessmen pursuing a course violative of the Sherman Act such as had been the case in *Allen Bradley*.[241] Noting that the goal of the boycott was the recognition of the UFWOC by the growers, the court further concluded that the agreement with the Meat Cutters had not run afoul of the *Pennington* and *Jewel Tea* doctrines.[242]

The second allegation considered by the court was that the defendants attempted to and did combine with non-labor groups in agreements "not to purchase, handle or sell table grapes."[243] The court felt that this allegation described conduct that amounted to a combination with a non-labor group, but that the activities were nevertheless within the bounds of conduct protected by the labor exemption.[244]

The third allegation was also found by the court to be deficient. It charged that the Farm Workers had violated the Sherman Act by using coercion, threats of financial ruin and intimidation in an effort to force plaintiffs' customers to cease purchasing, handling, transporting or selling plaintiffs' grapes.[245] Some of this, it was alleged, had been carried out by non-labor groups. To these charges, the court responded that restraints "imposed by labor but which are not within the Sherman Act 'are not brought within its sweep merely because, without other differences, they are attended by violence.' "[246] The court indicated that violent conduct is properly the

240. 29 U.S.C. § 158(b)(4)(ii)(B) (1970). Basically, this section makes it an unfair labor practice for a union to threaten, coerce or restrain any person with the object of forcing him to stop dealing in the products of any other producer or manufacturer.

241. 494 F.2d at 557.

242. *Id.* at 557-58.

243. *Id.* at 558 n.49.

244. With respect to the legality of such combinations, the court stated:

> The mere combination by a union with "non-labor groups" does not violate the Sherman Act. To hold otherwise would invalidate collective bargaining. Whether the combination violates the antitrust laws turns on the purpose served thereby. Here it is clear that the overwhelmingly predominant purpose of the union was to secure the objective of recognition by the plaintiffs. This is enough to insulate the combination from laws designed primarily to proscribe combinations between business groups.

Id. at 558.

245. The full text of this portion of the complaint was quoted by the court. *Id.* at 558 n.50.

246. *Id.* at 559, *citing* Apex Hosiery Co. v. Leader, 310 U.S. 469, 513 (1940).

subject of *state* law, and that to bring such conduct under the Sherman Act "would greatly expand the federal responsibility for local law enforcement and reduce the [labor] exemption's scope significantly".[247]

The fourth and final specific allegation ruled on by the court maintained that the Farm Workers, as an inducement for recognition, had offered to lift the boycott from plaintiffs' competitors while maintaining it as to plaintiffs' products. Allegedly, when plaintiffs' competitors accepted the offer and, in return, recognized the union, there arose an unlawful combination between the defendant union and a non-labor group (plaintiffs' competitors), as a result of which the competitors who were parties to the combination received a significant market advantage.[248] The court, however, found this conduct to be distinguishable from that which had been condemned in the *Allen Bradley* and *Pennington* cases. The court reasoned that the allegations, when viewed along with the entire complaint, could not be read to charge defendants with combining with plaintiffs' competitors to allow the competitors to control the supply and price of table grapes or to eliminate plaintiffs as competitors.[249] Furthermore, the court felt that the defendants had not impaired their power to bargain with the plaintiffs other than to maintain a boycott until recognized.[250]

Finally, the court turned to the general allegations contained in plaintiffs' complaint which merely stated in non-specific terms that defendants had participated in a conspiracy, among themselves and with others (including non-labor groups), to restrain trade by effecting a boycott of table grapes.[251] Such general allegations, the court reasoned, were not vulnerable to a motion to dismiss, and because of them the case was remanded to the district court for further proceedings. This, however, signified only a very minor victory for the plaintiffs. The court stated that, since the plaintiffs' specific allegations had failed to state any violation of the Sherman Act, it would be difficult for the plaintiffs to establish their case upon remand.[252]

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247. 494 F.2d at 559.

248. The text of this portion of the complaint was quoted by the court. *Id.* at 560 n.53.

249. *Id.* at 560.

250. *Id.*

251. The text of this portion of the complaint was quoted by the court. *Id.* at 561.

252. The court's reasoning was as follows:

> These general allegations are sufficiently broad to embrace perhaps all, and at least

B. *Connell Construction Co. v. Plumbers Local 100*[253]

The *Connell* case is certainly destined to be a significant one. The Supreme Court's decision in the *Connell* case will be especially interesting for two reasons. First, it squarely presents, for the first time since the passage of the Norris-LaGuardia Act, the question of what, if any, union antitrust liability may arise from activity in the nature of a secondary boycott or strike. Secondly, it will be the first labor-antitrust case to have been decided since Justices Powell and Rehnquist have been appointed to replace the late Justices Harlan and Black.

The facts of the case are very simple.[254] The defendant union had contacted Connell, a general contractor in the construction business, and asked Connell to agree to not do any business with any plumbing and mechanical firm unless such firm were party to a collective bargaining agreement with the defendant union. It threatened to picket the various construction sites where Connell was general contractor if the offer of agreement was refused. When Connell failed to consent to the proposed agreement, the union placed a picket at one of Connell's construction sites, causing 150 employees of Connell and its various subcontractors to walk off the job, thus halting work on the project. When its efforts to obtain an injunction against the picketing were frustrated, Connell entered into the proposed agreement under protest. Connell then brought suit under the antitrust laws, charging that the union had undertaken to restrict competition by forcing Connell to give all its work to unionized subcontractors, irrespective of whether such contractors submitted the lowest bid. This, Connell argued, was a violation of the antitrust laws, and after the district court ruled in favor of the defendant union, Connell appealed the case to the Court of Appeals for the Fifth Circuit.

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part, of the activities *not* specifically alleged by the plaintiffs. Moreover, such activities cannot unreservedly be placed within the labor exemption to the Sherman Act. . . . It does not appear "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief". The failure of the specific allegations to transgress the limits of the exemption may suggest that the plaintiffs will have difficulty in establishing their case following further proceedings in the trial court, but it by no means establishes that there exists on the face of the complaint "some insuperable bar to relief".

Id. at 561-62 (footnotes omitted).

253. 483 F.2d 1154 (5th Cir. 1973).

254. For the court's rendition of the facts see *id.* at 1156-57.

After reviewing the history of the labor exemption, the circuit court held, among other things: (1) that where the only non-labor group with which a union is alleged to have conspired is the very party seeking to invoke the antitrust laws, there is no conspiracy such as that condemned in *Allen Bradley* and *Pennington*;[255] (2) that the agreement secured from Connell by the union involved a legitimate union interest and did not violate the antitrust laws in that it sought only to eliminate competition based on labor standards and wages;[256] (3) that for antitrust purposes, the term "legitimate union interest" is not controlled by whether the goal sought or the method used violate provisions of the National Labor Relations Act;[257] (4) that in any event, the question of whether the labor laws have been contravened is a matter for the exclusive jurisdiction of the National Labor Relations Board;[258] and (5) that since the activity of the union in *Connell* was protected or prohibited by §§ 8(e) and 8(b)(4)(ii)(B) of the National Labor Relations Act,[259] federal law preempted and Connell could have no right of action under state antitrust laws.[260] Thus, the court felt, the district court's ruling adverse to Connell had to be affirmed.[261]

While much of the court's opinion would warrant considerable discussion, the reasoning behind the second and third conclusions is of particular interest. First, as to the conclusion that the union activities in *Connell* involved only a "legitimate union interest," the court pointed out that the "central reason" the union wanted the agreement from Connell was to aid in organizing non-union subcontractors.[262] This in turn, the court argued, would aid the union "in its battle to eliminate competition based on differences in wage and labor standards," a well-established legitimate union objective.[263] The court, in fact, went on to say that the interest of the union would be legitimate even where the subcontractors sought to be organized already paid union scale and met all other union stan-

255. *Id.* at 1165-66.
256. *Id.* at 1166-67.
257. *Id.* at 1170.
258. *Id.* at 1173-74. *But see* Local 189, Meat Cutters v. Jewel Tea Co., 381 U.S. 676, 684-88 (1965).
259. 29 U.S.C. §§ 158(b)(4)(ii)(B), 158(e) (1970).
260. 483 F.2d at 1175.
261. *Id.*
262. *Id.* at 1167.
263. *Id.* at 1170-71.

dards.[264] In other words, unions apparently have a legitimate interest in organization for the sake of organization. The court did note, however, that there are other interests to be considered, such as the right of employees to exercise free choice and the anti-inflationary role played by non-union contractors, in so far as they act as a brake on union demands. The court, however, concluded that congressional intent was that policies, such as employee freedom of choice, were to be protected by the labor laws and not the antitrust prohibitions.[265]

With respect to its conclusion that legality under the N.L.R.A. is immaterial to the question of whether a given union activity constitutes a "legitimate union interest" for antitrust purposes, the court noted that Congress has indeed concluded that "hot cargo clauses" and other forms of secondary activities are, with only very limited exceptions, "simply too powerful a weapon and too subject to abuse . . . to be allowed."[266] The court felt, however, that "[o]utlawing the means in no way outlawed the goal."[267] Thus, the court concluded, when a union violates the N.L.R.A., it subjects itself, not to the antitrust sanctions, but to punishments specified by Congress in the labor laws.[268] Precisely what troubled the court in the proposition that unions might violate the antitrust laws as a consequence of committing unfair labor practices was that Congress had never indicated that a violation of the labor laws should subject a union to the sanctions for violation of the antitrust laws. The court felt that, if it allowed the case to continue, the union would be subject to the antitrust sanctions.[269]

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264. *Id.* at 1171.
265. *Id.* at 1167-68 n.5.
266. *Id.* at 1172.
267. *Id.* at 1170.
268. *Id.*
269. The court said:

> In short, if we find this activity an unfair labor practice we will be deciding that Congress has directly addressed this question and decided how the balance of interest between labor and management is to be struck in the public interest. But no where has Congress ever said that a violation of the labor laws should give rise to treble antitrust damages, possible criminal punishments, and attorney's fees for the plaintiffs. Yet, allowing this suit to continue as an antitrust action merely because a violation of the labor laws was found would involve those punishments.

Id. at 1169-70.

C. *Altemose Construction Co. v. Building & Construction Trades Council*[270]

The *Altemose* case, currently pending in the Federal District Court for the Eastern District of Pennsylvania, deserves brief mention because it involves issues which must disturb every member of society who confronts them. The complaint, brought by Altemose and several other open shop construction contractors in the Greater Philadelphia area, alleges union activities which, if proven, must be numbered among the most egregious union abuses in the history of the American labor movement.[271] The plaintiffs charge an unlawful combination in restraint of trade in violation of §§ 1 and 2 of the Sherman Act, and seek injunctive relief and treble damages.[272] Specifically, plaintiffs allege that the defendant unions have used coercion and intimidation to obtain an agreement from open shop contractors which would prohibit them from doing business with non-union subcontractors. Likewise, the plaintiffs claim that the defendant unions have used coercion and intimidation to induce suppliers to stop deliveries to the non-union contractors, to induce banks to stop lending them money, and to induce construction purchasers to stop doing business with them.[273] Moreover, the plaintiffs claim that the methods employed in these attempts to coerce have included brutal assaults, sometimes en masse, on numerous individuals and the malicious, wanton destruction of private property in the thousands of dollars, including the complete demolition of some buildings with dynamite. Finally, the plaintiffs contend that the defendants have expressly disavowed any interest in organizing plaintiffs' employees, and that the real intent behind defendants' actions is that of creating a monopoly for union contractors in the Philadelphia area.

Of course, much remains to be seen and proven in the *Altemose* litigation. One cornerstone of the plaintiffs' case is the contention that the use of secondary pressures of the sort alleged is unlawful and therefore "beyond the scope of legitimate labor activity".[274] The

270. Civil No. 73-773 (E.D. Pa., filed Mar. 29, 1973).

271. Complaint, Altemose Constr. Co. v. Building & Constr. Trades Council, Civil No. 73-773 (E.D. Pa., filed Mar. 29, 1973).

272. *Id.* at 20.

273. Plaintiffs' Response to Defendants' Motion to Dismiss at 26, Altemose Constr. Co. v. Building & Constr. Trades Council, Civil No. 73-773 (E.D. Pa., filed Aug. 17, 1973).

274. *Id.* at 13.

outcome in this question will almost certainly be influenced by the upcoming Supreme Court decision in the *Connell* case.[275] But if one assumes that at least some of the allegations of illegal conduct can withstand the test of litigation, it may not be too long before a circuit court and eventually the Supreme Court will be given the opportunity to decide a case involving both secondary activity and extreme misconduct. It would be an opportunity to bring the full weight of the antitrust sanctions against those who might otherwise try to hide behind the labor exemption—an opportunity to end the use of the exemption as a license for lawlessness.

IV. The Case for Application of the Antitrust Laws to Certain Union Activities

It has been said that labor-antitrust is not one of the most inspiring chapters in our judicial history, and that the judicial decisions are less than exemplary.[276] Certainly the foregoing review of past and present decisions should have demonstrated that judicial thinking in this area is not to be noted either for its logic or its clarity. All this would seem to suggest that the courts have not interpreted and applied the basic principles correctly, or that the basic principles themselves suffer from some inherent defect. In either case, the time seems to have come for revision of the laws either judicially or legislatively. But before an intelligent determination can be made as to what the appropriate form (and means) of revision might be, the basic principles should first be revisited with an eye to changes in context which may have already affected their validity.

A. *Social and Legislative Changes Since the Passage of the Clayton and Norris-LaGuardia Acts*

To evaluate the continuing validity of the principle underpinnings of the labor exemption, one must first consider what specifically was intended at the time the exemption was conceived. As previously noted,[277] it is fairly clear that Congress did *not* intend, through the promulgation of §§ 6 and 20 of the Clayton Act, to provide labor with a blanket exemption from the antitrust laws. It is also clear that Congress was interested in protecting a weak and

275. *See* text accompanying notes 253-69 *supra*.
276. 2 M. Handler, Twenty-Five Years of Antitrust 1086 (1973).
277. *See* text accompanying notes 46-58 *supra*.

nascent labor movement from destruction at the hands of powerful industrialists who had a demonstrated ability to use the courts to their advantage. Section 20 was designed to provide unions with the essentials for survival—*i.e.*, the mechanisms for organizing—and to protect them from legal penalties for using them. But it is also apparent that the congressional purpose contemplated the imposition of antitrust sanctions where unions engaged in activities (including secondary boycotts and other unlawful conduct), not specifically protected by § 20, which restrained or were intended to restrain trade.[278] In sum, the emphasis was on nurturing a struggling movement, still fighting for acceptance by society, while stopping short of providing unions with a carte blanche to commit unlawful, antisocial acts, as they were then, and remain, occasionally want to do.

Much the same kinds of concern served to propel the Norris-LaGuardia Bill into law.[279] The injunction had been used to inhibit the development and growth of labor unions, and because the balance was still tipped more or less overwhelmingly in favor of employers at the time, Congress felt justified in removing one of the legal weapons at the disposal of the anti-labor forces. In all the years of litigation after the passage of the Norris-LaGuardia Act, however, it seems incomprehensible that the courts have been unwilling or unable to recognize the impressive foresight of that Act's promulgators. Nevertheless, that is precisely what has happened. It should be remembered that Congress prefaced the anti-injunction provisions with its statement of policy in § 2,[280] about which Senator Norris commented:

> If the act or any part of it should be involved in any litigation where an injunction was issued or asked for, the judge before whom such action was pending would be required to give full force and effect to the public policy thus declared by the act; and, having in mind the public policy thus declared, he would be able to so construe the various provisions of the act as to give full effect and validity to the public policy thus declared.[281]

The tone of the public policy was set by the reference in its first

278. *See* text accompanying notes 54-58 *supra*.

279. *See* text accompanying notes 114-27 *supra*.

280. 29 U.S.C. § 102 (1970) (originally enacted as Act of Mar. 23, 1932, ch. 90, § 2, 47 Stat. 70). For the text of the policy provisions of § 2 see text accompanying note 117 *supra*.

281. 75 CONG. REC. 4503 (1932).

282. *Id.* at 6452 (1932) (remarks of Senator Long).

phrase to "prevailing economic conditions," from which the drafters went on to speak of the "helpless" individual worker and the need for protection of his rights to organize and to be free from interference and restraint from his employers with respect to participation in concerted activities "for the purpose of collective bargaining or other mutual aid and protection." It is abundantly clear that Congress sought to alleviate the power imbalance that then existed in the labor-management relationship. But the phrase "under prevailing economic conditions" suggests, if it does not indeed compel, the conclusion that Congress was fully cognizant of the fact that the balance could shift, and that such a change in conditions should be considered in the application of the restrictions sought to be imposed on the equity jurisdiction of the federal courts. It seems that Congress was much more sensitive than the courts that have since sought to apply the Act in the antitrust context to the fact that equity is an elusive concept, that what is equitable in one situation may be manifestly unjust in another, and that the delicacy of the balance in the labor-management relationship precludes regulation by categorical and immutable principles.

What were the "prevailing economic conditions" at the time Congress passed Norris-LaGuardia? For one thing the country was in the throes of a major depression, with over 10 million unemployed, a fact that weighed heavily on legislators at the time.[282] For another, total union membership in the U. S. in 1932 was about 3,050,000,[283] an increase of only about 500,000[284] in the almost twenty years after passage of the Clayton Act. Finally, at the time Congress was considering the Norris-LaGuardia Act, §§ 6 and 20 of the Clayton Act were the only existing pieces of legislation that expressly recognized any right on the part of the workers to organize and bargain collectively.

How have conditions changed since the passage of Norris-LaGuardia? First, the nation was fortunately able to fully recover from its depression, and we have been able, in the last 40 or so years, to avoid a repetition of that sobering experience. Secondly, the numerical strength of labor unions increased exponentially in the

283. U.S. Bureau of Labor Statistics, Dep't of Labor, Handbook of Labor Statistics 345 (1973).

284. U.S. Bureau of the Census, Historical Statistics of the U.S. — Colonial Times to 1957, at 98 (1960).

immediate post-Norris-LaGuardia period, with membership increasing by nearly 6 million in the first six years.[285] By 1970, total membership in labor unions had reached approximately 20 million.[286] Along with numerical increases have come corresponding increases in financial resources and political influence. Today, organized labor is economically and politically one of the most powerful entities in the country.[287] In addition, the rights of workers to bargain collectively and engage in concerted activities, free from employer interference, received statutory recognition and elaborate protection in the Wagner Act of 1937.[288]

All of this would seem to suggest that organized labor has come of age, and that the breadth of its exemption from the antitrust laws should be reconsidered. The Supreme Court, in a different context, recognized only recently in the case of *Boys Market, Inc. v. Retail Clerks Union*,[289] that "[t]he Norris-LaGuardia Act was responsive to a situation totally different from that which exists today."[290] Noting that labor unions have grown in strength, and that "congressional emphasis has shifted from protection of the nascent labor movement, . . . ,"[291] the Court opined that "[t]he literal terms of § 4 of the Norris-LaGuardia Act"[292] (one of the cornerstones to the labor antitrust exemption) could be deviated from under some circumstances. The Court concluded that:

> Statutory interpretation requires more than concentration upon isolated words; rather, consideration must be given to the total corpus of pertinent law and the policies that inspired ostensibly inconsistent provisions.[293]

These revelations notwithstanding, however, *United States v. Hutcheson*,[294] with its sweeping assertions about the degree to which

285. B. MITCHELL, THE DEPRESSION DECADE: FROM NEW ERA THROUGH NEW DEAL, 1929-1941, at 272 (1972).

286. U.S. BUREAU OF LABOR STATISTICS, DEP'T OF LABOR, HANDBOOK OF LABOR STATISTICS 345 (1973).

287. *See* D. CADDY, THE HUNDRED MILLION DOLLAR PAYOFF (1974).

288. National Labor Relations Act of July 5, 1935, ch. 372, 49 Stat. 449 (currently codified, as amended, at 29 U.S.C. §§ 151-68 (1970)).

289. 398 U.S. 235 (1970).

290. *Id.* at 250.

291. *Id.* at 251.

292. *Id.*

293. *Id.* at 250.

294. *See* text accompanying notes 134-50 *supra*.

Norris-LaGuardia extended the scope of the labor exemption, remains to this day the case "that set the Court on the path upon which it presently walks."[295] Even if one assumes that *Hutcheson* did not go too far in 1940, it is a sad commentary on our judiciary that, in the labor-antitrust area, it has been unable to perceive the wisdom of the flexibility Congress chose to build into the Norris-LaGuardia Act in the policy statement of § 2. The courts have simply failed to respond to the implicit invitation to accommodate the conflicting policies of the antitrust and labor laws in a manner that more accurately reflects the present balance of power.

B. *Accomodating Conflicting Policies*

One commentator has aptly summed up the existing state of the law as follows:

> The crux of [the labor-antitrust] cases is that the Supreme Court, when forced to choose, has elected to subordinate the national policy protecting competition to the national policy protecting collective bargaining. The Sherman Act is made to yield to the Wagner Act.[296]

Few today would argue that the right of workers to organize and the institution of collective bargaining do not deserve protection. At the same time, however, few would suggest that we should abandon our protection of competition. Because these two policies, both of which are well established in our society, inevitably conflict, efforts must be made to accommodate them. Moreover, the accommodation process must look beyond the benefits and detriments falling on labor or management, and consider the combined impact on society as a whole from the application of the two policies.

It is hardly debatable that organized labor presently has the capacity not only to hold its own in the labor-management struggle, but also to exert enormous influence upon the product market.[297] While it may once have been valid to "accommodate" the antitrust and labor policies by having the former yield almost entirely to the

295. Bodine Produce, Inc. v. United Farm Workers Organizing Comm., 494 F.2d 541, 550 (9th Cir. 1974).

296. Timbers, *The Problems of Union Power and Antitrust Legislation*, 16 LAB. L.J. 545, 559 (1965).

297. *See* Winter, *Collective Bargaining and Competition: The Application of Antitrust Standards to Union Activities*, 73 YALE L.J. 14, 17-23 (1963).

latter, there is simply no longer the economic and social justification for such an approach. This is not to say, however, that we should return to the era when antitrust reigned at the expense of collective bargaining. Maintenance of the institution of collective bargaining has undoubtedly benefited our society. But, as has been noted elsewhere:

> If collective bargaining is to be encouraged, it is because it is a regulating process which produces results that are compatible with the public interest. To achieve this goal, those who shape the law should be concerned first with the maintenance of an appropriate power balance between the negotiating parties to encourage settlements which are at levels compatible with the rate productivity is improving . . . .[298]

Insofar as the labor exemption promotes a power imbalance, then, society's benefits from both collective bargaining and competition are correspondingly diminished. In this age of spiraling inflation, such a state of affairs cannot long be tolerated. But the simple fact is that the power balance is now tipped in labor's favor to the detriment of the entire society. Many people, both in and out of government, have recognized the need to correct the imbalance. Commissioner Mayo J. Thompson of the Federal Trade Commission, for example, declared in a recent speech:

> Many labor unions in the United States and in the other industrialized countries of the world clearly exercise a degree of monopoly power over the world's economies that is grossly inconsistent with the welfare of the great bulk of its citizens.
>
> My conclusion, then, is that the time has come to start cutting back on the monopoly power wielded by the trade unions in this country, perhaps by subjecting those unions to a modified version of our current antitrust laws. . . .[299]

Recognizing that a problem of imbalance exists, and that greater use of our antitrust laws may provide part of the solution, however, is only the beginning. The much more difficult process is that of fashioning the appropriate remedy. To contemplate a complete re-

298. Connolly, *Developing Trends Under the National Labor Relations Act*, in SOUTHWESTERN LEGAL FOUNDATION, PROCEEDINGS OF TWENTIETH ANNUAL INSTITUTE ON LABOR LAWS 160 (1974).

299. Address by Commissioner Thompson, National Fluid Power Association Meeting, May 6, 1974.

peal of §§ 6 and 20 of the Clayton Act and relevant portions of the Norris-LaGuardia Act would not only be politically unrealistic, but probably too extreme for proper resolution of the problems. Complete nullification of the labor exemption could no more be termed "accommodation" of the policies in question than could the present one-sided state of the law. The solution lies instead in drawing a line which would allow collective bargaining to flourish without permitting unions to utilize anti-competitive activities to create the kind of power imbalance that detracts from the effectiveness of collective bargaining as a regulatory process and one which can serve the public interest. What must be sought, in short, is a more acceptable definition of what constitutes, in the words of § 6 of the Clayton Act, "lawfully carrying out the legitimate objectives" of organized labor.

C. *Legitimate Union Activity and the Legality of Union Conduct That Restrains Trade*

It has been suggested by some, including Federal Trade Commissioner Thompson,[300] that monopolies within the labor market itself should be subjected to the scrutiny of the antitrust laws. The proponents of this approach argue that industry-wide bargaining by unions is a major factor influencing the rate of inflation, and should be eliminated. Such an approach, however, would be fraught with difficulty. In the first place, the fundamental principle embodied in § 6 of the Clayton Act—that labor is not a commodity and, hence, anti-competitive practices within the labor market are inherently different from similar practices within a product market—enjoys wide acceptance within our society. Consequently, the political and social obstacles which would have to be surmounted to bring labor monopolies under the antitrust laws would be extremely formidable, if not insuperable. Although it might be feasible to seek some regulation of industry-wide bargaining, inter-union collusion and the like under the labor laws, and the conceptual barrier which would obstruct efforts to reach such conduct with antitrust sanctions can scarcely be overestimated. Furthermore, there are some fairly respectable arguments against breaking up the large unions.[301] It is, for instance, contended that the sophistication of the large unions

300. *Id.*

301. *See, e.g.*, Sheed, *What Ever Happened to the Labor Movement?*, ATLANTIC, July, 1973, at 68.

promotes stability in industrial relations in that these unions, with their more elaborate data-gathering resources, can more realistically appraise the reasonableness of their demands. It is also argued that the large unions have a deeper appreciation for the long range destructive effects of needless industrial strife, and are therefore more inclined to follow a rational course. There are, of course, counters to these arguments, but it is beyond the scope of this article to attempt to evaluate the merits of this particular debate. Suffice it to say that the mere fact that such arguments have been and are being made should be enough to induce the objective observer to conclude that the chances of regulating the labor market with antitrust principles is less than overwhelming.

Most, if not all, of the arguments favoring protection of labor union activity, however, lose their force when unions engage in activity or seek a goal that, irrespective of the antitrust laws, is illegal. Even the staunchest advocate of labor's cause would have difficulty arguing that such conduct is "legitimate" union activity, since § 6 of the Clayton Act clearly states: "Nothing contained in the antitrust laws shall be construed . . . to forbid or restrain individual members of such organizations *from lawfully carrying out the legitimate objects thereof. . . .*"[302] By the same token, the Norris-LaGuardia Act, by its terms, seeks to protect only methods "not involving fraud or violence" and concerted activities conducted "peaceably."[303] Finally, if there is anything that clearly upsets the balance of power in the collective bargaining relationship, it is the ability of one of the parties to use illegal means or to seek illegal ends vis-à-vis the other party.

In the light of historical developments, it would appear that legal guidelines relating to the labor exemption must be reformulated to eliminate unnecessary and unfair advantages which derive from its application. The problems posed strongly suggest that a meaningful accommodation of antitrust and labor policies could most effectively be accomplished through the application of the following principles:

302. 15 U.S.C. § 17 (1970) (emphasis supplied). *See also* text accompanying notes 45-58 *supra*.

303. 29 U.S.C. § 104 (1970).

(a) Per se "legitimate" (and therefore exempt) union conduct should be defined as that conduct which is expressly protected by law, including the enumerated activities of § 20 of the Clayton Act[304] and § 7 of the Wagner Act.[305] In addition, the activities specifically enumerated in § 4 of the Norris-LaGuardia Act[306] should be defined to be beyond the reach of injunctive relief unless, in light of all the circumstances, the damage to competition that would result from the denial of such relief could be shown to be clearly greater than the damage to the collective bargaining process and the right of workers to engage in concerted action which would result from granting an injunction or restraining order. Irrespective of the availability of injunctive relief, however, the activities enumerated in § 4 of the Norris-LaGuardia Act should not necessarily be beyond the reach of actions for treble damages and criminal prosecution unless specifically sanctioned by some other provision of law.

(b) On the other hand, union conduct that violates some positive provision of law, other than the antitrust laws themselves, and that is intended to or had the necessary effect of restraining interstate trade, should be defined as per se violations of the antitrust laws. This would include such acts as violence, fraud and conduct proscribed by §§ 8(b) and 8(e) of the Wagner Act (as amended).[307]

(c) Additionally, all union conduct neither protected nor proscribed by any positive provision of law, which is intended to or has the necessary effect of restraining interstate trade, should be adjudged to be in violation of the antitrust laws

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304. *Id.* § 52. *See* text accompanying note 41 *supra*.

305. 29 U.S.C. § 157 (1970) (originally enacted as Act of July 5, 1935, ch. 372, § 7, 49 Stat. 452). Section 7 states:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158 (a)(3) . . . .

306. 29 U.S.C. § 104 (1970). *See* notes 122-23 and accompanying text *supra*.

307. Section 8(b) sets out what constitutes labor union unfair labor practices. 29 U.S.C. §§ 158(b)(1)-(7) (1970). Section 8(e) in general outlaws agreements between employers and labor organizations whereby the employer agrees to refrain from using the products of another person or agrees to cease doing business with any other person. 29 U.S.C. § 158(e) (1970).

unless it can be clearly shown that, under all the circumstances, the damage to collective bargaining and the right of workers to engage in concerted action that would be done by the imposition of legal penalties for such conduct would exceed the damage done to competition by allowing the conduct to go unpunished.

(d) Where instances of conduct allegedly protected under the Wagner Act (as amended) are involved, the interpretations of the Act by the National Labor Relations Board (except where overruled by the Supreme Court) should be controlling, unless clearly erroneous. All other provisions of law allegedly sanctioning specific union conduct should be open to interpretation by the federal courts, subject only to the restriction that such interpretation be guided by the principle of accommodating national labor and antitrust policies in such a way as to, under all the circumstances, provide the greatest benefit to society as a whole.

While this approach would certainly not be free from difficulty, it defines "legitimate" union activity in such a way as to allow for imbalances in the collective bargaining relationship and, above all, to prevent society from being the ultimate loser in labor-management struggles. The principles employed are, in fact, very similar to those implicit in Justice Brandeis' dissent in *Bedford Cut Stone Co. v. Journeymen Stone Cutters Association.*[308] In that case, it will be remembered, Justice Brandeis sought to determine the reasonableness of a union restraint on trade (a nation-wide secondary boycott) by asking: (1) Did the union breach any provision of its contract? (2) Did the union utilize means that were, of themselves, illegal? (3) Did the union possess a significant power advantage over the employer? and (4) Did the union's activity involve inter-craft collusion, promote interests that were not legitimate, or engage in predatory behavior? The similarities between Justice Brandeis' approach and that proposed above is that both employ a weighing of the separate interests in a manner that countenances the balance of power. If anything, Justice Brandeis' approach might go further in that it implies that inter-craft collusion and non-defensive action on the part of unions may make them culpable for

308. 274 U.S. 37, 56-65 (1926). *See also* text accompanying notes 105-12 *supra.*

any restraints on trade resulting therefrom. It is at least arguable that the approach suggested here, while sharing the spirit of Justice Brandeis' method, strikes an even more just balance between the competing interests.

The primary objection that is generally raised in opposition to the suggestion that union conduct which is illegal should be subject to the antitrust laws insofar as it restrains trade, is that there already exist remedies for such conduct. Violence and fraud, it is pointed out, are indictable offenses under state laws. This argument was followed by the Ninth Circuit in *Bodine Produce Inc. v. United Farm Workers Organizing Committee*,[309] where the court said:

> To permit wrongful conduct under state law to pierce labor's exemption under the Sherman Act would greatly expand the federal responsibility for local law enforcement and reduce the exemption's scope significantly.[310]

That the approach would significantly affect the breadth of the labor exemption is beyond doubt. To raise that fact as an objection, however, is to beg the question, since the appropriate breadth of the exemption is precisely that which must be determined. Moreover, to argue that federal responsibility for local law enforcement will be "greatly increased" is simply to miss the point. First, the interests sought to be protected by the state laws against fraud and violence and federal laws against restraints of commerce are entirely different. The mere fact that an individual may be prosecuted under a state law to protect a state interest hardly precludes prosecution under federal laws to protect a distinctly federal interest. Simple fraud and violence may be one thing, but fraud and violence that restrain interstate commerce are quite another. Therefore, to the extent that federal law enforcement responsibility would be increased at all, it would be to protect *federal* interests and enforce *federal* laws. Fraud and violence that did not restrain interstate trade, like simple car theft, would be no concern of the federal laws or enforcement mechanisms. On the other hand, perpetrators of fraud and violence (including labor unions) which were intended to or had the effect of restraining trade, would have harmed a federal interest and, like the car thief who drives his prize across a state line, would be subject to the federal laws. This is as it should be.

309. 494 F.2d 541 (9th Cir. 1974). *See also* text accompanying notes 229-52 *supra*.
310. *Id.* at 559.

Similar reasoning applies to conduct proscribed by the Wagner Act (as amended). Nowhere does it appear that the remedies provided for in the N.L.R.A. are to be the exclusive sanctions imposed on those who engage in conduct proscribed by the Act, where such conduct also invades another legally protected interest. Where acts forbidden by the Wagner Act have been committed that were intended to or had the effect of restraining trade, two seperate federal interests have been damaged, and remedies appropriate to each interest should be available.

The case of *Connell Construction Co.* v. *Plumbers Local 100*,[311] soon to be argued before the Supreme Court, provides an example. As the Fifth Circuit noted, the secondary activity in *Connell* may well have been a violation of Section 8(b)(4)(ii)(B) of the Taft-Hartley Act (as amended).[312] If so, the union was guilty of an unfair labor practice and might be subject to National Labor Relations Board sanctions. The NLRB, however, does not have responsibility for effectuating antitrust policies, and the remedy it would fashion might do little to deter or cure restraints of trade. The courts, therefore, should be able, using the approach proposed above, to fashion any further remedies which the antitrust policies might demand, without unduly denigrating the collective bargaining policies the NLRB is charged with promoting. Put another way, the commission of unfair labor practices could hardly be defended as being within the realm of legitimate union activity. Since it is the function of the NLRB to protect parties to the labor-management relationship in the exercise of their *legitimate* rights, the courts would not be invading the province of the Board if they found it necessary to punish conduct that was illegitimate under the labor laws and that unlawfully restrained trade.

The degrees of deterrence afforded under the various laws is yet another factor that must be considered. The assignment of penalties to be available under a given law involves a congressional judgment which considers the fact that, while less than 100% deterrence may be adequate to sufficiently protect some policies, less than the fullest possible deterrence may severely impair effectuation of another. The rather mild penalties available for unfair labor practices, for example, were designed specifically to remedy problems within the

311. 483 F.2d 1154 (5th Cir. 1973). *See also* text accompanying notes 253-69 *supra*.
312. 29 U.S.C. § 158(b)(4)(ii)(B) (1970). *See* note 240 *supra*.

narrow context of the labor-management relationship. On the other hand, the antitrust remedies—including injunctions, treble damages and criminal penalties—are more harsh, implying a congressional judgment that very effective deterrence is essential to the implementation of our antitrust policies. It may thus be sufficient that the penalties available under the labor laws for a simple secondary activity (injunctions,[313] cease and desist orders,[314] right of action for actual damages[315]) are not especially effective in preventing the practice.[316] Secondary activity that also restrains trade, however, demands more adequate measures, if the congressional judgment as to the required degree of deterrence for anti-competitive practices is to be implemented. In the *Connell* and *Altemose* cases discussed above,[317] therefore, if the unlawful secondary activities of the unions did in fact restrain trade, the aggrieved parties should be able to invoke the penalties under the labor laws, antitrust laws, or both, in order that the penalty be sufficient to cure all the *types* of injury that have been inflicted.

V. Conclusion

A review and analysis of the labor exemption to the antitrust laws suggests that the present state of the law is in need of some revision. The predeliction of the courts to find immunity for union conduct

313. Section 10(*l*) of the Taft-Hartley Act, 29 U.S.C. § 160(l) (1970), provides authority for officers or regional attorneys of the NLRB to petition in federal district courts for injunctions if, after preliminary investigation, there is reasonable cause to believe that a § 8(b)(4) unlawful secondary boycott has been committed. Also, "temporary relief" may be sought by the NLRB to halt the commission of other unfair labor practices under authority of 29 U.S.C. § 160(j) (1970).

314. 29 U.S.C. § 160 (1970) provides the authority for issuance of cease and desist orders by the NLRB.

315. *Id.* § 187 provides:

> (a) It shall be unlawful, for the purpose of this section only, in an industry or activity affecting commerce, for any labor organization to engage in any activity or conduct defined as an unfair labor practice in section 158(b)(4) of this title.
>
> (b) Whoever shall be injured in his business or property by reason or [*sic*] any violation of subsection (a) of this section may sue therefor in any district court of the United States subject to the limitations and provisions of section 185 of this title without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit.

316. *See* Goetz, *Secondary Boycotts and the LMRA: A Path Through the Swamps*, 19 Kan. L. Rev. 651, 706 (1971). Secondary boycotts apparently continue to flourish as evidenced by the fact that in 1972 there were no fewer than 2,596 complaints filed with the NLRB under § 8(b)(a) of the L.M.R.A. 1972 NLRB Ann. Rep., app. a, Table 2.

317. *See* text accompanying notes 253-75 *supra*.

that restrains trade, even where such conduct also subverts the national labor policy or violates other laws, must be reversed if society is to reap any benefits from the policy in favor of preserving competition. Moreover, the power and influence that labor unions have attained has created an imbalance in the relative power of the parties to the collective bargaining relationship. The nation's interest in stemming inflation demands that this imbalance be eliminated, and that the parties be returned to a status of equality. This, it is submitted, can best be accomplished by narrowing the labor exemption as proposed above. Basically, the proposal would leave unchanged the current law with respect to union antitrust liability arising out of combinations with non-labor groups. The primary change would be with respect to unilateral union conduct. If such conduct were found to be in violation of some positive provision of law (other than the antitrust laws), and if it were intended to or had the effect of restraining trade, union culpability under the antitrust laws would arise. Also, where union conduct restrained trade but was neither proscribed nor protected by any positive provision of law, the approach proposed herein would permit the finding of antitrust liability unless it could be clearly shown that collective bargaining would be affected more detrimentally by the imposition of penalties than would competition if such conduct were allowed to go unpunished.

It is submitted that, while the implementation of this proposal would do much to effect a more suitable accommodation of the national labor and antitrust policies, it would not require a radical departure from the fundamental legal principles which have long been associated with the two policies. In fact, when all things are considered, the proposed approach would accommodate the two policies in a manner that would do less violence to both of them than have the labor-antitrust judicial decisions of the past few decades. The question thus becomes how to go about changing judicial decision-making in this area.

It is conceivable that the courts might show some sympathy for the new approach if directly confronted with it. The fact of the matter is that judicial implementation of such an approach would require only a mild retreat from the excesses of *Apex Hosiery Co. v. Leader*[318] and *United States v. Hutcheson*.[319] Nevertheless, it is diffi-

318. *See* text accompanying notes 129-33 *supra*.
319. *See* text accompanying notes 134-50 *supra*.

cult to believe that the courts are likely to reverse their consistent 30-year trend toward expanding the labor exemption. In lieu of judicial willingness to adopt a more reasonable approach, legislative action should be encouraged. Although the Congress has been consistently cold to proposals that would have eliminated or severely impaired the labor exemption, even labor's strongest allies in the legislature should find it very difficult to oppose a bill which would seek to limit the use of the exemption as a license for union lawlessness.

Finally, it should be noted that even if the approach herein proposed were to be adopted, it would not entirely remedy the imbalance which currently exists in the collective bargaining relationship. Although it might eliminate certain union abuses which exacerbate that imbalance, the proposed approach, and the antitrust laws in general, should not be regarded as the panacea for the ills that afflict our labor relations. While the need to narrow the labor exemption is clear, effort should also be expended to refine the labor laws so they may more equitably regulate the complex interaction of labor, management and society.

Editor's Note

On June 2, 1975 the Supreme Court announced its decision in *Connell Construction Co. v. Plumbers Local 100.*[320] In a 5 to 4 decision the Court held: (1) since Local 100 had no interest in representing Connell's employees, the policy of promoting collective bargaining agreements underlying the national labor laws afforded no protection to the defendant union in its efforts to exclude non-union subcontractors from the subcontracting market in the Dallas area;[321] (2) the federal courts do have jurisdiction to decide labor law issues that are collateral issues in suits brought for violation of other federal acts, including the antitrust laws;[322] (3) the agreement forced

320. 43 U.S.L.W. 4660 (U.S. June 3, 1975). For an extended discussion of the facts of the case and the lower court opinion see text accompanying notes 253-69 *supra.*

321. 43 U.S.L.W. 4660 (U.S. June 3, 1975). *See* text accompanying notes 262-65 *supra.*

322. *Id. See* text accompanying note 258 *supra.*

upon Connell by the union was a "hot-cargo" agreement in violation of § 8(e) of the NLRA because it was an agreement with a contractor who did not have a collective bargaining agreement with the union;[323] and (4) Congress had *not* intended the remedy for violations of § 8(e) be limited solely to those enumerated in the NLRA, consequently excluding possible remedies under the antitrust laws.[324] The Court then remanded to decide the question of whether the agreement was a restraint of trade within the meaning of the Sherman Act.[325]

The major issue raised by *Connell* was not fully decided by the Court. As stated earlier,[326] the most significant question raised was whether a union could be held liable under the antitrust laws for secondary activity violative of the NLRA. Contrary to the lower court,[327] the Court found no immunity when dealing with a union violation of § 8(e). By dealing with the case on the basis of § 8(e), rather than on the broader question of secondary activity, the Court has left open the question of what union secondary activity might provide the basis for an antitrust suit.[328]

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323. 43 U.S.L.W. at 4661.

324. *Id.* at 4662-63.

325. *Id.* at 4664.

326. *See* text accompanying note 253 *supra*.

327. *See* text accompanying notes 266-69 *supra*.

328. *See* text accompanying notes 270-75 *supra* for a discussion of the *Altemose* case which may eventually decide this issue.