LABOR AND THE SHERMAN ACT

The recent drive by the Anti-Trust Division against building trade unions has revived the apparent anomaly of applying an act to prevent restraints of trade against organizations whose effectiveness lies in their ability to impose such restraints, at least temporarily. It is definitely established that union activity is subject to the Sherman Act; hence the main issue now is the extent to which labor can go in exercising its collective strength.

The economic tenor of the past fifty years was largely responsible for a steadily accumulating catalogue of punishable practices. But a period characterized by a fairly consistent lack of sympathy toward labor has been displaced by one of confused sentiments and shifting doctrine. New and

2. Although the Act was passed primarily to check combinations of capital, it was used against labor as early as 1893 in United States v. Workingmen's Amalgamated Council, 54 Fed. 994 (E. D. La. 1893), aff'd, Workingmen's Amalgamated Council v. United States, 57 Fed. 85 (C. C. A. 5th, 1893). The Supreme Court confirmed this interpretation in Loewe v. Lawlor, 208 U. S. 274 (1908). Labor's hopes of exemption from the prohibitions of the Act of 1890 were raised high by the passage of the Clayton Act, only to be rudely jolted by the Supreme Court's emasculation of the labor sections. § 6 was held not to exempt a union from accountability where it departs from its "normal and legitimate objects," while the attempt in § 20 to restrict the issuance of injunctions was rendered nugatory by narrow definitions of a "labor dispute." Duplex Printing Press Co. v. Deering, 254 U. S. 443 (1921); American Steel Foundries v. Tri-City Central Trades Council, 257 U. S. 184 (1921). See FRANKFURTER AND GREENE, THE LABOR INJUNCTION (1930) 142 et seq.; BERNER, LABOR AND THE SHERMAN ACT (1930) 99 et seq.; WITTE, THE GOVERNMENT IN LABOR DISPUTES (1932) 66 et seq.
3. The most complete and searching analysis of Congress' intent to include labor within the Sherman Act appears in BERNER, op. cit. supra note 2, 3 et seq. Professor Berman reaches the result that Congress did not intend the Act to cover labor organizations. Opposite conclusions are reached in MASON, ORGANIZED LABOR AND THE LAW (1925) 119 et seq., and in Emery, Labor Organizations and the Sherman Act (1912) 20 J. Pol. Econ. 599. Realistic observers have pointed out the futility of seeking a final answer to the "intent" of Congress, and indicate that Congress purposely left the interpretation of the ambiguous words of the statute to the courts. FRANKFURTER AND GREENE, op. cit. supra note 2, at 8, n. 36; Shulman, Book Review (1931) 40 YALE L. J. 831; Landis, Book Review (1931) 44 HARV. L. REV. 875.
4. Despite the unbroken succession of cases interpreting the Sherman Act and § 6 of the Clayton Act, labor leaders still insist that unions are not, and never were intended to be, subject to anti-trust prosecution. See letter of William Green to Attorney General Murphy in N. Y. Times, Nov. 23, 1939, p. 30, col. 4; Sherman Act and Labor Unions (1939) 5 LAB. REL. REP. 316. It seems very doubtful, however, that the Court will reverse its interpretation so as to exclude labor. Cf. Erie R. R. v. Tompkins, 304 U. S. 63 (1938). In the recent case of United States v. Borden Co., 7 U. S. L. WEEK 665 (U. S. 1939) the Supreme Court held that the question of whether the Anti-Trust Acts apply to unions "is not open on this appeal." The preferable approach for labor would be to meet the issues squarely and attempt to limit the application of the Act by restricting the scope of the interstate commerce clause and expanding the sphere of "legitimate" activity.

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contradictory factors have appeared in the form of a popular and governmental approval of collective bargaining and a growing dissatisfaction with inter-union conflict; in an anti-injunction statute and an attempt to apply to labor an extended concept of interstate commerce. In an effort to strike a balance between a benevolent approach toward labor and effective prosecution of "illegitimate" union devices, the Anti-Trust Division has obtained a number of labor indictments.\footnote{See notes 86-89 infra. Since § 6 of the Clayton Act exempts unions when lawfully carrying out their legitimate objectives, liability under the Anti-Trust Law is determined by setting the limits of lawful means and lawful objects.}

This Comment will attempt to evaluate the soundness of this policy by analyzing the legal and other issues which are involved in the application of the Sherman Act to labor.

A survey of anti-trust doctrine as applied to unions illustrates the manner in which a decision on the jurisdictional point of interstate commerce fades into and is combined with a determination on the merits of the union activity. The Supreme Court has gradually staked out the boundaries\footnote{Section 1 of the Sherman Act states: "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 . . ."} of an illegal restraint of trade\footnote{A conspiracy, the label usually attached to labor activities which violate the act, is traditionally defined as " . . . a combination of two or more persons by concerted action, to accomplish a criminal or unlawful purpose, or some purpose not in itself criminal or unlawful by criminal or unlawful means." See Duplex Printing Press Co. v. Deering, 254 U. S. 443, 465 (1921); Pettibone v. United States, 148 U. S. 197, 203 (1893); Jones' Case, 4 B. & Ad. 345, 349 (1832). See Terborgh, \textit{The Application of the Sherman Act to Trade Union Activities} (1929) 37 J. Pol. Econ. 203, at 205, for a discussion of the implications of this doctrine as used against labor unions.} to include a direct and substantial burden on interstate commerce — from which the requisite criminal intent will be inferred;\footnote{Loewe v. Lawlor, 208 U. S. 274 (1903); Duplex Printing Press Co. v. Deering, 254 U. S. 443 (1921).} and an indirect burden — where actual intent to restrain\footnote{Williams v. United States, 295 Fed. 302 (C. C. A. 5th, 1923); Vandell v. United States, 6 F. (2d) 188 (C. C. A. 6th, 1925).} is discernible.\footnote{Even though there is an ultimate objective to gain a legal end, no immunity obtains if the activities do in fact restrain commerce. See Bedford Cut Stone Co. v. Journeymen Stonemasons' Ass'n, 274 U. S. 37, 47 (1927).} Intent has been inferred in those cases where there were disturbances of the actual passage of goods or instrumentalities in interstate commerce. This category — covering such practices as strikes of transportation workers,\footnote{Coronado Coal Co. v. United Mine Workers of America, 268 U. S. 295 (192) 295.} interference with interstate carriers\footnote{Amalgamated Workingmen's Council v. United States, 57 Fed. 85 (C. C. A. 5th, 1893); United States v. Ry. Employees' Dep't, 250 Fed. 978 (N. D. Ill. 1923); Clements v. United States, 207 Fed. 206 (C. C. A. 9th, 1924).} and direct stoppage of interstate goods\footnote{O'Brien v. United States, 290 Fed. 185 (C. C. A. 6th, 1923); Buyer v. Guillan, 277 Fed. 65 (C. C. A. 2d, 1921); United States v. Norris, 255 Fed. 423 (N. D. Ill. 1918).} — fits easily within the doctrine of direct restraints and has been subjected to rigid
control by the courts. Intent has likewise been inferred from obstructions to the marketing, installation or use of goods which have already entered or normally would have entered interstate commerce. Such restraints, which include the various manifestations of the so-called "secondary boycott," represent the most wide-flung and controversial of labor practices. The Supreme Court has resorted in these cases to the rather nebulous rationale that the union activity was directed against the actual sale or flow or price of the product itself.

On the other hand, restraints of production have been considered primarily indirect burdens on interstate commerce. Consequently, their proscrip-

14. A case in which labor used the Sherman Act for its own benefit fits within this category. In Anderson v. Shipowners' Ass'n, 272 U. S. 359 (1926), seamen had an employers' restrictive agreement, relating to employment, declared an illegal conspiracy in restraint of trade. The court's remark, at 364, that both seamen and ships are "instrumentalities of, and intended to be used in, interstate and foreign commerce," may have some jurisdictional significance in the Anti-Trust drive in the building industry. See note 103 infra.

15. "Boycott" is a word "of vague signification, and no accurate and exclusive definition has . . . ever been given." Hough, J., in Gill Engraving Co. v. Doerr, 214 Fed. 111, 118 (S. D. N. Y. 1914). For purposes of clarity of thought, it is desirable to dispense with the use of the term "secondary boycott" in analysis. See Hellerstein, Secondary Boycotts in Labor Disputes (1938) 47 YALE L. J. 341-342; Frankfurter and Greene, The Labor Injunction (1930) 42 et seq.; Oakes, Organized Labor and Industrial Disputes (1927) 602 et seq.

16. The union activity was declared illegal in the following cases: Loewe v. Lawlor, 208 U. S. 274 (1908); Lawlor v. Loewe, 235 U. S. 522 (1915) (attempts to persuade customers of employee not to buy unfair goods); Duplex Printing Press Co. v. Deering, 254 U. S. 443 (1921) (attempts to discourage the purchase of non-union goods by threatening strikes); Bedford Cut Stone Co. v. Journeymen Stone Cutters' Ass'n, 274 U. S. 37 (1927) (strikes against the handling of non-union goods); United States v. Brims, 272 U. S. 549 (1926) (agreements between employers and the union to prevent the sale of out of state non-union goods). But in Levering & Garrigues Co. v. Morrin, 289 U. S. 103 (1933), the Court held that a strike for a union shop, although affecting the amount of steel shipped into the state, was not subject to the Sherman Act.


18. "The mere reduction in the supply of an article to be shipped in interstate commerce by the illegal or tortious prevention of its manufacture or production is ordinarily an indirect and remote obstruction to that commerce." Chief Justice Taft in Coronado Coal Co. v. United Mine Workers of America, 268 U. S. 295, 310 (1925).

19. In National Association of Window Glass Manufacturers v. United States, 263 U. S. 403 (1923), involving a combination of manufacturers and the union to fix prices and stagger output, the court looked to the economic structure of the industry, recognized that the agreement had a justifiable purpose, and held that there was "no combination in unlawful restraint of trade." In Rambusch Decorating Co. v. Brotherhood of Painters, Decorators and Paperhangers of America, 105 F. (2d) 134 (C. C. A. 2d, 1939), cert. denied, Oct. 9, 1939, Case 290, the court upheld a provision requiring non-resident contractors to pay the higher rate of wages and accord the shorter work-day of either the contractor's home or the place of the job.
tion has required ascertainment of an actual illegal intent\(^{20}\) — defined in terms of geography. Thus a strike against a manufacturer shipping into interstate commerce has been held not within the jurisdiction of the Act so long as restricted to the betterment of local working conditions\(^{21}\) but within the jurisdiction of the Act and illegal if instituted for the protection of union workers and producers in other states\(^{22}\).

An attempt to extract meaning from these formalistic distinctions makes it evident that the terms "direct" and "intent," rather than being instruments of analysis, are merely statements of results\(^{23}\). What seems to be a test is merely a rationalization of the judicial doctrine of condemning "secondary boycotts" outright, while recognizing strikes for better working conditions or for a closed shop as "legitimate"\(^{24}\) union activities\(^{25}\). Yet when a local

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\(^{20}\) It is an obvious truism that labor, when employing concerted action, rarely has as its direct object the restraint of trade per se, but rather hopes to ameliorate working conditions or strengthen the union. It likewise seems evident that the court is using the word "intent" in two different senses. In those cases where the Court infers intent from directness of restraint, intent is used not in the subjective sense of a planned result, but rather with reference to deliberate doing of an act with knowledge of its character. Conversely, in those cases where the Court feels constrained to look beyond incidental restraints to discover purposes, i.e., purposes to restrain interstate transactions, they are definitely concerned with planned results. The two Coronado cases, discussed in note 22 infra, seem adequate proof of this. Cf. Landis, Book Review (1931) 44 Harv. L. Rev. 875, 876, n. 8. To discover this intent, however, the Court need not conduct a psychological search for malice and motive, as Berman assumes in his criticism of the intent doctrine at 238-241. Much appears in direct evidence, to be accepted and weighed according to the attitude of the court.


22. Coronado Coal Co. v. United Mine Workers of America, 268 U.S. 295 (1925); cf. Bedford Cut Stone Co. v. Journeymen Stone Cutters' Ass'n, 274 U.S. 37 (1927). In the second Coronado case, the Court found direct evidence that the strikes had been called to aid union mines in Oklahoma, Kansas and other neighboring states. This evidence of intent was lacking in the first Coronado case, which was dismissed. It also appeared, and was given some weight as an aid in determining intent, that the production of the mine was 5,000 tons per day rather than the 5,000 tons per week figure used in the first Coronado case. It is highly doubtful, however, that this factor alone would have induced the Court to change its mind. See 268 U.S. 295, at 309, where the court mentions its denial of a rehearing on the sole basis of capacity.

23. Berman, Labor and the Sherman Act (1930) contains the most complete discussion and citation of labor cases under the act. See also Terborgh, The Application of the Sherman Act to Trade Union Activities (1929) 37 J. Pol. Econ. 203; Comment (1935) 35 Col. L. Rev. 1072; Witte, The Government in Labor Disputes (1932); Quigg, Trade Union Activities and the Sherman Act (Jan., 1930) 147 Annals 51. The classification of types of interferences is similar to that used by Terborgh and Berman.

24. "Union was essential to give laborers opportunity to deal on equality with their employer. They united to exert influence upon him and to leave him in a body in order by this inconvenience to induce him to make better terms with them. They were withholding their labor of economic value to make him pay for what they thought it was
strike takes on the aspect of concerted union activity over a number of states, it not only becomes subject to the jurisdiction of the Act but also becomes illegal— even though its effect on interstate commerce is exactly the same.20 It seems fair to assume that the Court's concern so far has been with excessive control by a widespread labor organization.27

The arbitrariness of these results has given rise to outbursts against judicial hocus-pocus28 and to the criticism that, although the "rule of reason" has been on the books since 1911,29 the Supreme Court has consistently refused to consider the reasonableness of a labor practice.30 It is true that once a direct restraint or actual proof of intent has been established, it has followed automatically, without discussion of reasonableness, that the activity

worth. The right to combine for such a purpose has in many years not been denied by any court. The strike became a lawful instrument in a lawful economic struggle or competition between employers and employees as to the share or division between them of the joint product of labor and capital." Chief Justice Taft in American Steel Foundries v. Tri-City Central Trades Council, 257 U. S. 184, 209 (1921). See also Hellerstein, Secondary Boycotts in Labor Disputes (1937) 47 Yale L. J. 341, 343.


27. This conclusion is borne out by the language of the Court in Duplex Printing Press Co. v. Deering, 254 U. S. 443, at 477 (1921), and Bedford Cut Stone Co. v. Journeymen Stone Cutters' Ass'n, 274 U. S. 37, at 54 (1927).

28. Terborgh, loc. cit. supra note 23, at 224. His point that the court's reliance on intent results in a lack of correlation between illegality and effect on commerce is well taken. In pushing his argument to an extreme, he maintains that a nationwide strike in a closed shop industry, which completely stopped the movement of the product, would not result in the union being "chargeable with an intent to restrain commerce." However, the more likely result in such a situation would be a conclusive presumption of intent based on directness of restraint.


30. Berman, op. cit. supra note 23, 228 et seq. Berman indicates the one exception, National Ass'n of Window Glass Mfrs. v. United States, 263 U. S. 403 (1923), which involved a manufacturers' association as well as a labor union. See note 19 supra. This statement refers only to majority opinions. Brandeis' dissents in the Duplex and Bedford cases stress the reasonable nature of the labor activity.
was illegal. But it is apparent that this is due to the confusion of “jurisdiction” with “merits,” for there is an inarticulate premise in each one of those cases that the practice was “illegitimate” and “unreasonable.”

Much of the explanation for this judicial ban of widespread union activity lies in the economic temper of the times. Within the broad scope of interpretation offered by the general words of the Statute, the Supreme Court could have chosen almost any path. Significantly, until fairly recently, a dominant majority of the public and the judiciary were prone to view with alarm, and even with active resentment, the collective bargaining practices of labor. The union was regarded as a rather alien and vicious institution, whereas employers’ property rights were conceived of as absolute. Consequently, although labor unions per se were granted both statutory and judicial recognition, most of their weapons for combating or inducing

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32. See Brandeis’ dissents in the Duplex and Bedford cases, note 31 supra. Fundamentally, this is the issue on which the Supreme Court divided.

33. “Much as the American middle classes, notably the farmers, were prone in depression to go on crusades against “monopoly,” they were also ever ready to flare up in resentment against labor insisting on maintaining wages and other standards and going on strike. Consequently, when the judiciary protected by its decisions the employer against legislation and unionism, it was not acting as a mere “tool” of a minority but reflected the strongly held view of the majority in the American community. Evidently, by these supports, the American employers’ will to freedom from unionism was kept from weakening.” Perlman and Taft, History of Labor in the United States, 1896-1932 (1932) 622.

34. See, for example, U. S. Strike Comm., Report on the Chicago Strike of June-July, 1894 (1894) XXVI, XLVII; 1 Comm. on Industrial Relations, Final Report, Sen. Doc. No. 415, 64th Cong., 1st Sess. (1916). These reports are discussed in Magruder, A Half Century of Legal Influence Upon the Development of Collective Bargaining (1937) 50 Harv. L. Rev. 1071. The language used by lower court judges, when dealing with employer-employee controversies, reflects the temper of the times. See My Maryland Lodge, No. 186, Internat’l Ass’n of Machinists v. Adt, 100 Md. 233, 59 Atl. 721 (1905); Branson v. Industrial Workers of the World, 30 Nev. 270, 93 Pac. 354 (1908). Similarly, the conservatively worded opinions of the Supreme Court indicate a lack of sympathy with union objectives. Adair v. United States, 208 U. S. 161 (1903); Coppage v. Kansas, 236 U. S. 1 (1915); Hitchman Coal & Coke Co. v. Mitchell, 245 U. S. 229 (1917); Truax v. Corrigan, 257 U. S. 312 (1921); cf. American Steel Foundries v. Tri-City Central Trades Council, 257 U. S. 184, 269 (1921). The intellectual and social background of the judges who decided the Sherman Act cases is also an important factor in evaluating the decisions. Professor Fetter, in Democracy and Monopoly, Stafford Little Lectures at Princeton University (1939), states: “The majority of the appointees to the Supreme Court from the ’80’s till, say, 1910, were distinguished corporation lawyers, who came to the Court with the long inbred habit of advocates and defenders of the new business corporations rather than of the public rights.”


employer action were blunted by the Act of 1890. It would seem that the Supreme Court, in deriving its rules, applied harsher doctrine against labor combinations than against capital combinations. Mr. Justice Brandeis put it clearly in his famous Bedford Stone dissent:

"The Sherman Act was held in United States v. United States Steel Corporation . . . to permit capitalists to combine in a single corporation 50% of the steel industry in the United States, dominating the trade through its vast resources. The Sherman Law was held in United States v. United Shoe Machinery Co. . . . to permit capitalists to combine in another corporation practically the whole shoe machinery industry of the country, necessarily giving it a position of dominance over shoe manufacturing in America. It would, indeed, be strange if Congress had by the same Act willed to deny to members of a small craft of workingmen the right to cooperate in simply refraining from work, when that course was the only means of self-protection against a combination of militant and powerful employers. I cannot believe that Congress did so."  

Present developments in the position of labor under the Sherman Act must operate upon this fairly settled judicial doctrine. A further extension of the Act to encompass violent strikes against production has recently been

Labor was caused alarm by the decision of District Judge Dayton in Hitchman Coal & Coke Co. v. Mitchell, 202 Fed. 512 (N. D. W. Va. 1912), declaring the United Mine Workers an unlawful combination under the Sherman Act. This decision, which stands alone, was reversed in Mitchell v. Hitchman Coal & Coke Co., 214 Fed. 685 (C. C. A. 4th, 1914).

37. If a conspiracy to restrain trade is found to exist, all means used to promote that conspiracy are illegal, even though innocent in themselves. This concept affords an instrument for preventing such activities as the check-off and the most peaceful forms of persuasion and picketing. Nevertheless, the courts have hesitated to include peaceful acts within their injunctions. See Berman, Labor and the Sherman Act (1930) 206-210; Terborgh, The Application of the Sherman Law to Trade Union Activities (1929) 37 J. Pol. Econ. 203, 206. For a summary of the various trade union activities declared illegal under the Sherman Law, see Berman, at 191-192.

38. The Court's preoccupation with subjective intent in labor cases has no counterpart in industrial cases, where it has looked mostly to effects on interstate commerce to discover intent to restrain. See United States v. Trans-Missouri Freight Ass'n, 166 U. S. 290, 342 (1897); Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 243 (1899); United States v. Patten, 226 U. S. 525, 543 (1913); cf. Chicago Bd. of Trade v. United States, 246 U. S. 231, 238 (1918). See also Jones, Historical Development of the Law of Business Competition (1926) 36 Yale L. J. 207, 225; Handler, Industrial Merger and the Anti-Trust Laws (1932) 32 Col. L. Rev. 179, 253; Bishop, Criminal Intent as Applied to Conspiracy Under the Sherman Act (1925) 11 Va. L. Rev. 417; Comment (1935) 35 Col. L. Rev. 1072, 1081.


urged, on the basis of the expanded concept of interstate commerce laid down in the NLRB cases. From the premise that these cases determine what activities in relation to interstate commerce come within federal control, it is glibly deduced that a strike within the cognizance of the National Labor Relations Act is a fortiori subject to the operation of the Sherman Act. The consequence claimed from this line of reasoning is that every strike in any factory that ships into interstate commerce, if accompanied by violence, is exposed to the criminal and treble damage penalties of the Sherman Act.

This doctrine was exploded in the latest version of the Apex controversy, where the Circuit Court of Appeals for the Third Circuit denied a treble damage action against a union for conducting a sit-down strike in a factory that shipped into interstate commerce. The court relied on the difference between the use of the word "affect" in the Wagner Act and of "restrain" in the Sherman Act to prove that, in cases arising under the latter, commerce "must not only be affected but also must be restrained and restrained


42. Leader v. Apex Hosiery Co., 5 LAB. REL. REP. 375 (C. C. A. 3d, 1939), rev'd, Apex Hosiery Co. v. Leader, C. C. H. Labor Law Serv. ¶ 18,353 (E. D. Pa. 1939). This case has passed through several stages, attracting much legal and popular attention. In 1937, a suit for an injunction under the Sherman Act against a sit-down strike was denied by Judge Kirkpatrick in the district court. 20 F. Supp. 138 (E. D. Pa. 1937). Upon appeal to the Third Circuit, Judges Davis, Buffington and Dickinson sitting, the judgment was reversed and an injunction granted on the ground that the NLRB cases had extended the interstate commerce concept. 50 F. (2d) 155 (C. C. A. 3d, 1937). It was appealed to the Supreme Court, which reversed the injunction decree and remanded the case because the controversy had become moot. Leader v. Apex Hosiery Co., 302 U. S. 656 (1937) (memorandum opinion). In 1939, a suit for triple damages was brought before Judge Kirkpatrick. His rulings on point of law were based on the Circuit Court's earlier opinion in the injunction suit, and the jury returned a verdict for $237,000. On appeal to the circuit court, Judges Biggs, Clark and Mavis sitting, the verdict was set aside on the grounds that there was no violation of the Sherman Act. In pointing out that the company's remedy for damage lay in the state courts, the court said: "In the injunction proceedings this court concluded that because the appellants committed unlawful acts they were therefore guilty of a conspiracy in restraint of trade. This conclusion we now think is erroneous." The case has been noted in 1939 39 COL. L. REV. 149.

43. The court held that both the strike against production and the refusal to allow the shipments of orders to leave the factory had only incidental effects on interstate commerce. The ruling on the latter goes farther than the first Coronado and Herkert cases. Judge Biggs based it on the principle of de minimis non curat lex in that the stopping of shipments had only a slight effect on interstate commerce, and distinguished former cases on the ground that the goods were not as yet in motion. See United Leather Workers Internat'l Union v. Herkert & Meisel Trunk Co., 265 U. S. 457, 463 (1924).
into an unreasonable degree.\textsuperscript{44} Although a distinction such as this seems little more than logomachy, it does tend to emphasize the formal difference between the two statutes in regard to the substantiality of the effect of the intrastate act on interstate commerce.\textsuperscript{45} It can be argued that this jurisdictional difference is inherent in the two laws, which are widely divergent in purpose, operation and scope. In setting up the Wagner Act\textsuperscript{40} to “diminish the causes of labor disputes,” Congress intended to exploit its interstate commerce power to the full constitutional limit.\textsuperscript{47} When deciding that certain intrastate activities so affect interstate commerce as to come within the control of the Federal Government, the Supreme Court has served merely to set the bounds of that power. Contrariwise, in the Sherman Act labor cases, the Court was interpreting a statute in which Congress did not exercise the full measure of its control over interstate commerce.\textsuperscript{48} Even if the artificial distinction between “affect” and “restrain” is abandoned, and a local strike is held to affect or restrain interstate commerce directly, it does not inevitably follow that the Sherman Act is applicable. “Interstate commerce” is not to be treated \textit{in vacuo} as an abstract conception when determining the jurisdictional scope of a statute. Rather it is to be interpreted in the light of each statute and its subject matter. The Supreme Court has recognized that the Wagner Act, in its effort to eliminate certain recurring practices that lead to industrial strife, extends to almost every strike that

\textsuperscript{44} The case was decided solely on jurisdictional grounds. “Unreasonable” here refers to quantitative effects on commerce, although usually it relates to the nature of the activity. Very often, the two usages are confused and combined, both in the mind of the judge and in the opinion.

\textsuperscript{45} The case of Lake Valley Farm Products, Inc. v. Milk Wagon Drivers' Union, 7 U. S. L. WEEK 622 (C. C. A. 7th, 1939), which came down on the same day as the \textit{Apex} case, has been thought by some commentators to be in conflict with the \textit{Apex} rationale. (1939) 7 U. S. L. WEEK 628; (1939) 5 LAB. REL. REP. Analysis (Dec. 4th). At the time of writing, a full copy of the decision is not available for purposes of comparison. Digest-summaries of the opinion, however, indicate that there are differences between the two cases—such as type of dispute and type of activity employed—that would enable them to be distinguished.

\textsuperscript{46} \textit{Apex} (1939) 39 COL. L. REV. 1247; \textit{McLauglin}, \textit{Cases on the Federal Anti-Trust Laws of the United States} (1930) 81, note.


\textsuperscript{48} The Sherman Act decisions recognized that Congress could control certain intrastate activities which, if permitted, would restrain interstate commerce. Coronado Coal Co. v. United Mine Workers of America, 268 U. S. 295 (1925). But, in denying the claims of the company in the \textit{Herkert} case, Chief Justice Taft agreed: “The natural, logical and inevitable result will be that every strike in any industry or even in any single factory will be within the Sherman Act and subject to federal jurisdiction provided any appreciable amount of its product enters into interstate commerce. We cannot think that Congress \textit{intended any such result} in the enactment of the Anti-Trust Act or that the decisions of this Court warrant such construction.” United Leather Workers Internat'l Union v. Herkert & Meisel Trunk Co., 265 U. S. 457, 471 (1924). \textit{See also} (1939) 39 COL. L. REV. 1247; \textit{McLauglin}, \textit{Cases on the Federal Anti-Trust Laws of the United States} (1930) 81, note.
affects interstate commerce, regardless of whether it affects 5% or 95% of the commerce of the particular industry which enters interstate channels. The Sherman Act, on the other hand, is concerned with the effect of the single strike before the court, not with the cumulative effect of all such strikes. Consequently, although the strike in the Apex factory may have been sufficient to invoke the jurisdiction of the Wagner Act, it did not sufficiently affect or restrain commerce, in the absence of a non-local intent, to come within the Sherman Act. Stated in somewhat different form: the intent requisite to a conspiracy to restrain commerce need not be conclusively presumed from a strike against production. Nor should the element of force and violence be sufficient to bring the strike within the scope of the Act. In considering the jurisdictional problem of the actual effect of the strike upon interstate commerce, the presence of force is an irrelevant factor. Likewise, as an issue of fact, a violent sit-down strike is no more evidence of "intent" to restrain trade than a peaceful walkout or peaceful picketing. As a matter of precedent, although the Supreme Court has uniformly banned acts of violence in its Sherman Act injunctions, the number of brickbats thrown has had little relevance in determining the fundamental issue of the existence of an illegal intent to restrain interstate commerce.

It is noteworthy that in the NLRB cases, Chief Justice Hughes did not attempt to overturn the Sherman Act decisions. Indeed, he relied heavily on them as illustrating "both the purpose and the limitation" of the com-

49. See note 25 supra.
50. In the first Apex case, the circuit court seemed to base its conclusive presumption of intent, in part at least, on a lawless sit-down strike. Apex Hosiery Co. v. Leader, 90 F. (2d) 155, 160 (C. C. A. 3d, 1937). The district judge in Wilson & Co. v. Birl, in interpreting the Apex case, limited this presumption solely to the lawless sit-down strike, holding that the reduction in the supply of goods shipped into interstate commerce caused by a peaceful strike does not give rise to such intent. If this interpretation is accurate, the first Apex rule represented a departure from precedent and seems clearly wrong. Even if the union members are held to have committed crimes and to have intended what they did, it does not follow that they intended to restrain interstate commerce. If, however, the rule of the first Apex case was (1) intent to restrain is conclusively presumed from the direct restraint caused by a strike at production, (2) a sit-down strike or other illegal means makes the restraint illegal, then it cannot be passed off so easily. It can be attacked, as it correctly was in the second opinion of the circuit court, on the jurisdictional ground that there is no direct restraint at all for purposes of the Sherman Act. The argument can also be made (but not as effectively) that, admitting a restraint of trade, it is not unreasonable despite the presence of illegal means which can be punished by the state courts.
51. In the Bedford case, the union members were innocent of acts of violence or intimidation. Bedford Cut Stone Co. v. Journeymen Stone Cutters Ass'n, 274 U. S. 37 (1927). In the Duplex case, the Court said: "It is settled by these decisions that such a strike produced by peaceful persuasion is as much within the prohibition as one accomplished by force or threats of force." Duplex Printing Press Co. v. Deering, 254 U. S. 443, 467 (1921). Nevertheless, the presence of force probably has some influence, perhaps unconscious, in the determination of the reasonableness of a strike.
The principles of these two lines of cases are complementary and can exist side by side in the federal system. A finding that Congress can control all aspects of interstate commerce is no basis for holding that a conspiracy exists under the Sherman Act—an interpretation that would substitute the Federal Government for the states as the final arbiter of purely local strikes which impinge upon interstate commerce. The Court is by no means forced into the ironical position of using its ratification of the Wagner Act as the means of further exposing unions to the Sherman Act.

In decided contrast with this attempt to extend the Sherman Act definition of interstate commerce is the legislative limitation on the courts’ equity powers in labor disputes. Since 1932, the Norris-LaGuardia Act, forbidding the issuance of enjoining orders against such normal labor activities as peaceful publicity and picketing, has stood as a more or less effective breakwater against the wave of injunctions that formerly followed labor difficulties. Well aware of the judicial interpretation of Section 20 of the Clayton Act, the drafters took especial care to supply full definitions of “labor disputes,” to omit the vexatious word “lawful,” and to specify that no injunction should issue because those participating in a labor dispute “are engaged in an unlawful combination or conspiracy because of the doing in concert of the things enumerated . . . .” Although injunctions may issue where neces-

54. This discussion has related solely to jurisdiction. Even if the activity were held within the scope of the act, however, the court could still find that it was a reasonable restraint. See note 97 infra.
57. Private suits for injunctions were made available by § 16 of the Clayton Act, 38 Stat. 737 (1914), 15 U. S. C. § 26 (1934). Cf. Paine Lumber Co. v. Neal, 244 U. S. 459 (1917). Berman’s figures indicate that such suits constituted more than half of all actions instituted under the Sherman Act after the passage of the Clayton Act, and more than three-fifths of all suits brought under the Anti-Trust Law. More than four-fifths of these suits were successful. Berman, Labor and the Sherman Act (1930) 219; see Shulman, Book Review (1931) 40 Yale L. J. 831, 832. In probably two-thirds of the labor cases in the federal courts, however, diversity of citizenship is the sole basis of jurisdiction. Frankfurter and Greene, The Labor Injunction (1930) 210. For treatment of the problem of the effectiveness of labor injunctions, see Frankfurter and Greene, at 82 et seq.; Witte, The Government in Labor Disputes (1932), 111 et seq.
58. “The legislative history of the Act demonstrates that it was the purpose of Congress further to extend the prohibitions of the Clayton Act respecting the exercise of jurisdiction by the federal courts and to obviate the results of the judicial construction of that act.” New Negro Alliance v. Sanitary Grocery, Inc., 303 U. S. 552, 562 (1938).
59. See note 2 supra.
sary to protect property against damage from force and violence, this jurisdictional loophole is well guarded by the requirements of a showing of damage and of attempts to settle, and by the various procedural safety devices.

The liberal scope given to the term "labor dispute" by the Supreme Court is indicative of the full effect that will be given the Norris-LaGuardia Act. Although not as yet fully tested in its Sherman Act aspects, it is probably broad enough to cover such situations as fit within the loose category of "secondary boycotts." In *Wilson and Company v. Birl*, the district court refused, on the basis of the Norris-LaGuardia Act, to grant an injunction against activities which included asking plaintiff's customers not to purchase his goods, followed by actual picketing in a few cases where the customer rejected the demand. In *Pauzy Jail Building Company v. International Association of Bridge, Structural and Ornamental Iron Workers*, another district court, in holding that the efforts of a minority union to obtain a collective bargaining agreement constituted a conspiracy under the Sherman Act, issued an injunction against fraudulent representations that they constituted a majority. But the court expressly refused, on grounds of the Anti-Injunction Act, to enjoin the union from agreeing with others to quit the employ of the purchasers of plaintiff's products. Both of these cases represent a refusal to enjoin a type of activity previously held punishable under the Sherman Act. But, as is apparent, they are no authority for holding such activities legal or reasonable under the Sherman Act. The Norris-LaGuardia Act deals only with the procedure of the federal courts, not with substantive law. Nevertheless, it indicates a realization and appre-

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69. Section 1, 47 Stat. 70 (1932), 29 U. S. C. § 101 (1934); § 4, 47 Stat. 70 (1932), 29 U. S. C. § 104 (1934). However, § 20 of the Clayton Act, which states: "... nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States," evidently was designed to affect substantive, as well as procedural law. 38 Stat. 738 (1914), 29 U. S. C. § 52 (1934). In holding that this section did not legalize the "secondary boycott," the majority in the *Duplex* case supplemented their reasoning with Congressional reports. Duplex Printing Press Co. v. Deer- ing, 254 U. S. 443, 474 et seq. (1921). Brandeis, Holmes, and Clarke dissented, declaring that Congress had legalized such acts as complained of in the case. Id. at 487-493. It would be possible—but very doubtful—for the Supreme Court, in passing upon a
ciation of labor’s objectives, and crystallizes a trend to keep labor out of
the courts when engaged in union activities.

Despite this protection, labor is still threatened by private action under
the Sherman Act in the form of a treble damage suit. By express rulings
of the Supreme Court, both the unincorporated union and its individual
members are liable to a damage action under the Anti-Trust Law. Partly
because the injunction was so quick and so thorough a remedy, there have
been but few treble damage suits in the past. Those that were successfully
prosecuted dragged on in the courts for years and finally resulted in actual
recovery of comparatively small damages. Notwithstanding these discour-
aging results, the number of treble damage suits is on the increase. Haunted
similar set of facts today, to adopt the Brandeis reasoning. Brandeis, himself, failed to
utilize it in his later Bedford Stone dissent. Such a decision would, in effect, lift the
judicial ban so far as usual labor practices are concerned. See note 4 supra.

70. See Sayre, Labor and the Courts (1930) 39 Yale L. J. 682.
49 Yale L. J. 284 for a discussion of the methods of anti-trust prosecution.
See Landis, Cases on Labor Law (1934 ed. and 1937 Supp.) 570, n. 2; Warren, Corporate
See Witte, The Government in Labor Disputes (1932) 144 et seq.
74. Section 6 of the Norris-LaGuardia Act, 47 STAT. 71 (1932), 29 U. S. C. § 106
(1934), states: “No officer or member of any association or organization, and no associ-
ation or organization participating or interested in a labor dispute, shall be held respon-
sible or liable in any court of the United States for the unlawful acts of individual offic-
ers, members, or agents, except upon clear proof of actual participation in, or of actual
authorization of, such acts, or of ratification of such acts after actual knowledge thereof.”
This section has been dealt with in Mayo v. Dean, 82 F. (2d) 554, 556 (C. C. A. 5th, 1936); Cinderella Theater Co., Inc. v. Sign Writers’ Local Union No. 591, 6 F. Supp.
75. Berman lists only five cases, of which the Danbury Hatters case (Loewe v. Law-
lor) and the second Coronado case were successful. Berman, Labor and the Sherman
Act (1930), 300-305. It has been held that damages cannot be recovered in the same
action in which an injunction is asked. Decorative Stone Co. v. Bldg. Trades Council,
Rules of Civil Procedure will probably affect this holding.
76. The Danbury Hatters case was in the courts for fourteen years and was finally
settled in 1917 for a little over $234,000, $216,000 of which was supplied by the AFL. The
second Coronado case was in the federal courts from 1914-1927, and was finally settled
for $27,500, but the company had to pay its own costs amounting to over $100,000. Witte,
op. cit. supra note 73, 134 et seq.; Landis, op. cit. supra note 72, at 531, n. 1. § 6 of the
Norris-LaGuardia Act has placed another barrier in the path of such suits by requiring
 stricter application of the doctrines of agency.
77. In the notorious Apex case, the company prosecuted its treble damage suit after a
sit-down strike had already been enjoined and the controversy settled. The judgment for
$237,000 (over $700,000 when trebled) in the District Court was recently reversed. See
note 42 supra. The suits by Republic Steel against the CIO for $7,500,000 and by three
New England Trucking Companies against the Teamsters’ Union for $990,000 are still
by the desolate picture of the Danbury Hatters, whose homes were attached in execution of a judgment for treble damages, labor might well abandon a boycott under threat of such a suit long before the courts pronounced the particular activity illegal. Moreover, once a substantial judgment for damages is obtained, it can serve both as a weapon for compelling concessions and as a means of draining a union’s strength. In view of the uncertainties inherent in obtaining a jury verdict and of the expenses of litigation, however, it seems unlikely that employers will push this remedy very far. Nevertheless, the treble damage suit remains a thinly concealed threat to the ranks of labor.

Although few would sanction so drastic a remedy as treble damages, a majority of the public today have strong ideas on the curbing of union excesses. A Gallup poll indicates that 79% of the interviewed voters favor increased government control of labor unions to protect the public from violence and disorder. Yet 74% of these voters favor the principles of unionism. Such figures highlight the curious combination of factors that make up the public attitude toward labor. The establishment of a Wagner Act, the promulgation of anti-injunction and anti-strikebreaking statutes, the declarations of public policy in favor of collective bargaining are all important indicia of a public sympathy with labor objectives. But the pendulum has recently begun to swing the other way, induced in large part by the AFL-CIO schism and by the jurisdictional disputes within the ranks of the AFL. This public reaction, which has set in against bickering and violence, may eventually translate itself into an anti-union policy.

Against this background of conflicting legal doctrine and mixed public opinion, the re-invigorated and expertly trained Anti-Trust Division has attempted to trace a consistent labor policy. The first move was to launch pending. In Republic Steel Corp. v. N. L. R. B., 5 Lab. Rel. Rep. 266 (C. C. A. 3d, 1939), the court upheld the Board’s reinstatement and back-pay orders, which concerned the controversy out of which the treble damage suit arose. The shift in the common law in favor of labor is reflected in Restatement, Torts (1939) §§ 775-816. See also Hellerstein, Secondary Boycotts in Labor Disputes (1938) 47 Yale L. J. 341. When an action is brought under the Sherman Act, however, Erie R. v. Tompkins, 304 U. S. 64 (1938) does not apply.

84. "It is my belief that under the present laws the most effective deterrent lies on the criminal side of the court, in so far as the prevention of illegal practices is concerned." Arnold, Fair and Effective Use of Present Anti-Trust Procedure (1938) 47
its cleanup of the building trades industry by obtaining indictments against labor unions in six different cities. Striking at jurisdictional disputes, the Washington and St. Louis indictments charge a conspiracy to coerce an employer to violate a contract with one group of employees and to replace them with another group. The other indictments, aimed against combinations of employers and labor unions, charge a conspiracy to "police" the industry, carry on collusive bidding and fix prices. Although the Government has brought approximately thirteen suits for injunctions and over thirty suits for indictments against labor, these present indictments represent the first incursion of the Anti-Trust Division into the field of jurisdictional disputes.

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85. Section 3, 26 STAT. 209 (1890), 15 U. S. C. § 3 (1934), provides for a maximum penalty of a $5,000 fine, a year in jail, or both. Several criminal suits have been brought against individuals for illegitimate labor activities. There have been less indictments against unions, but it seems clear that the unincorporated association is indictable in its own name. Brown v. United States, 276 U. S. 134, 142 (1928); United States v. International Fur Workers' Union of United States and Canada, 100 F. (2d) 541 (C. C. A. 2d, 1938).

86. Teamsters Union in Washington; Carpenters Union in St. Louis; Electrical Workers Union in Pittsburgh; Glaziers Union in Cleveland; Bricklayers Union in Detroit; Electrical Workers Union in San Francisco.

87. N. Y. Times, Oct. 13, 1939, p. 1, col. 2. Although it is reported that the unions have settled their dispute in Washington, the Government is continuing to prosecute its action. (1939) 5 LAB. REL. REP. 223.

88. N. Y. Times, Nov. 4, 1939, p. 13, col. 5.

89. N. Y. Times, Nov. 4, 1939, p. 13, col. 5; N. Y. Times, Dec. 6, 1939, p. 19, col. 2; N. Y. Times, Dec. 19, 1939, p. 27, col. 2; (1939) 5 LAB. REL. REP. 318.

90. These approximate figures have been derived from the cases cited in (1938) THE FEDERAL ANTI-TRUST LAWS (published by the Department of Justice), and the cases, reported and unreported, arising after January, 1938, but not including the pending indictments. Although the case has been counted as a unit, in some instances two or more cases arose from the same controversy.

91. In obtaining injunctions or consent decrees in a large majority of the equity cases and convictions in over half of the criminal suits, the Government has been successful in branding as an illegal conspiracy several types of labor activity. O'Brien v. United States, 290 Fed. 185 (C. C. A. 6th, 1923) (interference with the actual transportation of goods); Clements v. United States, 297 Fed. 206 (C. C. A. 9th, 1924) (interferences with railway traffic); Williams v. United States, 295 Fed. 302 (C. C. A. 5th, 1923) (sabotage of instrumentalities of commerce); United States v. Local 807, 1 Prentice-Hall Labor Serv. § 362 (S. D. N. Y. 1939) (racketeering activities); United States v. Journeymen Stone Cutters' Ass'n, THE FEDERAL ANTI-TRUST LAWS 220 (1929) (refusal to work on non-union product); United States v. Painters' District Council, 44 F. (2d) 58 (N. D. Ill. 1930), aff'd per curiam, 284 U. S. 582 (1931) (refusal to handle wholly fin-
Perspective for viewing the present indictments as a reflection of the Division's labor policy is acquired by a consideration of the Justice Department's general intention to free commerce of all restraints of trade—whether imposed by big business men, little business men, doctors' associations, or labor unions—in the interests of the consumer and of the preservation of free competition. Consequently, when a union engages in practices which exceed the ambit of "legitimate," it oversteps its privilege and becomes subject to prosecution for having unduly raised costs and restricted the flow of commerce. This policy has been sharply outlined in the recent letter of the Assistant Attorney General in charge of the Anti-Trust Division. While denying any intention to "police strikes or adjudicate labor controversies," he plans to prosecute certain activities which have no "reasonable connection with such legitimate objects as wages, hours, safety, health, undue speeding up or the right to collective bargaining," and cannot be classified as "legitimate" even within the scope of the dissenting opinions of the Duplex and Bedford cases. He has defined these illegitimate activities to include: (1) efforts to prevent the use of cheaper materials, improved equipment, or improved methods; (2) attempts to compel the hiring of useless and unnecessary labor; (3) extortion and graft; (4) combinations to enforce illegally fixed prices; (5) jurisdictional strikes to upset an established system of collective bargaining.

Mr. Arnold's letter reflects public sentiment to an amazing degree. By disregarding requests to proceeds against strikes for better conditions and against refusals to handle non-union goods, the Division has, in part at least, adopted a "rule of reason" toward labor objectives which saves the Sherman Act from being completely anachronistic. In all probability, this departure

95. The contravention of public as well as employer interest by labor activity finds immunity in the doctrine of damnum absque injuria, the damage being justified by the purpose. This doctrine was developed by Justice Holmes in his article, Privilege, Malice, and Intent (1894) 8 HARV. L. REV. 1, and in his decisions in Vegelahn v. Guntner, 167 Mass. 92 (1896); Plant v. Woods, 176 Mass. 492 (1900); Aikens v. Wisconsin, 195 U. S. 194 (1904). See discussion in Frankfurter and Greene, The Labor Injunction (1930) 24 et seq.
97. The point of departure for a legal appraisal of union activities in terms of economic and social factors has already been indicated by the dissents of Justice Brandeis.
from majority doctrine anticipates the direction of judicial opinion. Prosecu-
tion of racketeering activities of so-called union officials undoubtedly has
public and judicial sanction; but it would seem that a more desirable instru-
ment than the Sherman Act is a law specifically designed to meet the situation
—the Anti-Racketeering Act.98 No one would dispute the role of the
Division in proceeding against combinations of unions and employers whose
purpose is to foster collusive bidding and to freeze out competitors.99 On a
much different level, however, is the classification of jurisdictional disputes,100
refusals to handle factory finished products, and demands for more working-
men as "unreasonable restraints." Often economically indefensible, working
hardship on innocent employers and the subject of much censure today,
these controversies nevertheless involve grave questions of policy, with
much to be said on the side of labor.101 The unions are attempting to main-
tain and increase their strength, to maintain their standards, or to share
equitably in the profits of production.102 The reality to be faced in this
conflict is that their objectives can be gained only by "combining" to "restrain"

With the proximity of interest of the striking employees to the controversy as the basic
element, social and economic factors can be spelled out in the relative strengths of the
employees and the union, in the balance of benefits and harmful consequences to society.
If applied by the courts, such an approach would have the distinct advantage of piercing
the fog of "direct" restraints and bringing into the clear the social motivation for the
decision. But this is not to suggest that a judge, however, devoted to the cause of labor,
should impose his theory of the good economic life on the vital controversies before his
bar of justice. Reasonableness lies in the mores of the community, in legislative enact-
ment, and in public opinion.

99. Combinations of unions with employers are not bad per se. Cf. National Ass'n of
Window Glass Mfrs. v. United States, 263 U. S. 403 (1923), discussed in note 19 supra.
The courts will have to look to the purpose of the agreement, its effects on the industry,
and its possible justifications.
100. Jurisdictional disputes at present are the cause of great concern to both friend
and foe of labor. They have raised knotty legal problems. See Brooks, UNIONS OF
THEIR OWN CHOOSING (1939); (1939) 48 YALE L. J. 1053 (inter-union disputes);
(1939) 49 YALE L. J. 329 (intra-union disputes).
101. There have been but few jurisdictional dispute cases brought under the Sherman
Act. Rockwood Corp. of St. Louis v. Bricklayers' Local Union, No. 1, 33 F. (2d) 25
(C. C. A. 8th, 1929), cert. denied, 280 U. S. 575 (1929), involving a dispute between
bricklayers and carpenters, was turned off on the grounds that there was no conspiracy
because only a single person was responsible, and that, even if there was a conspiracy,
the effect on interstate commerce was indirect. The most recent case, Terrio v. S. N.
Nielsen Construction Co., 5 LAB. REL. REP. 271, (E. D. La. 1939), explicitly holds that
the AFL union, in striking to compel replacement of CIO drivers, was "lawfully carrying
out the legitimate objects." Cf. Blankenship v. Kurfman, 96 F. (2d) 450 (C. C. A. 7th,
1938); Pauly Jail Bldg. Co. v. International Ass'n of Bridge, Structural & Ornamental
Iron Workers, 29 F. Supp. 15 (E. D. Mo. 1939). The lower courts have condemned
refusals to handle wholly finished products. United States v. Painters District Council,
44 F. (2d) 58 (N. D. Ill. 1930), aff'd per curiam, 284 U. S. 582 (1931).
102. See The Folklaw of Thurman Arnold (1939) 8 INT. JURID. ASS'N BULL. 53,
62 et seq.
the employer's business. Their victories, if won over conference tables, are inspired by visions of the picket lines.

As a matter of policy, many activities which constitute a restraint of trade are not best, or even properly, dealt with by means of the Anti-Trust Law.\textsuperscript{103} From the extreme case in which a holdup man restrains trade by stopping and robbing a freight car, it is obvious that the nature of the activity is important in determining whether the Sherman Act, rather than some other law, contains the sanction which should be applied.\textsuperscript{104} The entire industrial history of America has been marked by conflict between employer and employee interests, as well as by opposing claims within the body of labor itself. When such crucial and delicate problems of human conduct are involved, when detailed statutes and expert administrative boards have been set up to cope with the issues,\textsuperscript{105} the wisdom of applying an act which entrusts policy to a Division concerned primarily with activities of capital, and which leaves determination of the boundaries of "legitimate objects" to courts with only the words "conspiracy in restraint of trade" to guide them, is highly dubious.\textsuperscript{106} This becomes even more apparent in the light of past uncertainties of judicial opinion.\textsuperscript{107}

Through its present policy, the Division — despite its claim — largely takes upon itself the function of "adjudicating" the issues of these controversies. By stepping in with an indictment, the Division tips the balance, and often by that very act determines questions which should be worked out by labor

\textsuperscript{103} The problems that the Anti-Trust Division will have to face in getting jurisdiction under the Sherman Act on grounds of a restraint of interstate commerce are not discussed here, principally because sufficient information is not available. Cases like Industrial Ass'n of San Francisco v. United States, 268 U. S. 64 (1925) and Levering & Garrigues Co. v. Morrin, 289 U. S. 103 (1933) will have to be met and distinguished. It has been indirectly indicated that the Anti-Trust Division does not favor the extended concept of interstate commerce sought in the \textit{Apex} case. See letter of William Green to Attorney General Murphy in N. Y. Times, Nov. 23, 1939, p. 30, col. 4.

\textsuperscript{104} Cases of violence and sabotage seem to call for local criminal sanctions rather than the Anti-Trust law. \textit{Apex Hosiery Co. v. Leader}, 5 LAb. Rel. Rep. 375 (C. C. A. 3d, 1939); (1939) 39 Col. L. Rev. 1247, 1250.


\textsuperscript{106} It has often been proposed that the Sherman Act be specifically amended so as to exclude labor from its operation. \textit{Apex Echo} (1939) 4 LAb. Rel. Rep. 379; cf. \\textit{Tait, The Anti-Trust Act and the Supreme Court} (1914) 98. Legislation, other than the Clayton Act, has in the past been introduced into Congress, designed to exempt unions. \\textit{Frankfurter and Greene, op. cit. supra} note 95, 139 \textit{et seq}.

\textsuperscript{107} "This fact that the Sherman Act puts upon courts the task of making law without any clear guidance from Congress or the constitution is sufficiently patent from the differences of opinion between the Supreme Court and its subordinates in the cases here reviewed. If we may judge from the record of the past three years, the lower courts seem to have a genius for not divining what their august superiors will decide and determine." Powell, \textit{Commerce, Congress, and the Supreme Court} (1926) 26 Col. L. Rev. 531, 545. See also discussion in \textit{Berman, Labor and the Sherman Law} (1939) 224 \textit{et seq}.; \\textit{Frankfurter and Greene, The Labor Injunction} (1930) 169.
itself or by an expert labor board. From the standpoint of technique, govern-
ment of labor relations by criminal indictment is as much a solecism as
"government by injunction." A realization of the deficiencies of the Sherman
Act as a labor statute should require the Division to restrict further its
interference to situations where the activities are non-union or flatly dis-
honest.

Despite its claims of benefit to responsible labor, the announced policy
has dangerous implications. Aggressive public action against labor will
probably bear fruit in an increased number of private suits against all types
of union activities. Successful or not, they are almost sure to hinder col-
lective bargaining. The Department's determination to operate within the
limits of even the dissenting opinions of the Supreme Court is no guarantee
that district courts will feel themselves so bound. Likewise, a division drive
against labor activities is a dangerous precedent in itself for future anti-trust
prosecutors, perhaps less aware than the present Division of the values of
collective bargaining.

If some action is necessary to curb union excesses, the most satisfactory
solution would be legislative enactments directed specifically toward the
labor situation. The National Labor Relations Board seems the logical body
to handle such enactments. Provisions granting broad discretionary power
to determine "unfair practices" in jurisdictional disputes, or to delimit the
practices in which unions may engage, would provide the flexibility necessary
for adequate treatment of these living issues.

108. Both Witte and Terborgh have termed the Sherman Act a "menace" to labor.
Witte, op. cit. supra note 73, at 74; Terborgh, loc. cit. supra note 37, at 204. Indeed it
would seem that the application of the Anti-Trust Law to collective bargaining has
resulted in the stunting of a movement that should have been allowed scope in order to
maintain a maturity free from violence. Nevertheless, the retarded growth of unionism
in the United States has doubtless been more the fault of economic forces and of union
leadership, than of court decisions. See Frankfurter, Foreword to Berman, Labor and
the Sherman Act (1930) XIV; Witte, op. cit. supra note 72, at 74; Wolman, Can

109. As a matter of administrative discretion, there are doubtless several other abuses
of the competitive process on which the Division could concentrate attention. Cf. letter
If the Sherman Act is to be applied at all to unions when acting for union purposes, a
court mindful of the vagueness of the act and of the proper limits of its lawmaking
function should apply an explicit "rule of reason." See note 97 supra.

111. Ibid.
112. The NLRB has so far refused to take jurisdiction of intra-Federation disputes.
See Comment, The Influence of the National Labor Relations Board upon Inter-Union
Disputes (1938) 38 Col. L. Rev. 1243.
113. The difficulties of getting legislative action are well recognized. This is scarcely
a warrant for the Division to step in and clean house. Although, in the interval, innocent
employers and the public will be caught between the warring factions, it can only be
answered that such has been the case for several years. It has been suggested that the
present campaign is simply a tactical effort to stop union bickering.