

LABOR ACTIVITIES IN RESTRAINT OF TRADE: THE HUTCHESON CASE*

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The "jurisdictional" dispute, which has plagued labor and the public alike almost from the beginning of organized labor, finally reached the Supreme Court in *United States v. Hutcheson*.¹ The offense was an alleged unreasonable restraint upon interstate commerce in violation of Section 1 of the Sherman Act.² Having held, as the Court did last year in the *Apex* case,³ that the "sit-down" strike is quite virtuous⁴—however much interference with trade and commerce—however much property damage and violence—and, irrespective of how legitimate or not the labor demand might be—it was perhaps to be expected that the "jurisdictional" strike, so-called, would also receive the Court's unqualified blessing. At all events, that is what happened; Mr. Justice Frankfurter writing for the majority. And so—though a bit tardy—was delivered another "sledge-hammer blow"⁵ for the "cause of labor"—whatever may be said of the decision from the standpoint of the public welfare.

Mr. Justice Frankfurter was careful to point out that the result was not all the Court's doing; most credit must be given to the Congress. In reality the Court's hands were tied, notwithstanding Mr. Justice Roberts, with whom the Chief Justice concurred, thought differently. The trouble, it seems, lay in Section 20 of the Clayton Act, which, adopted a quarter of a century ago to deprive the federal courts of their power to govern labor by injunction, had concluded with the "catch-all" phrase: "nor shall any of the *acts* specified in this paragraph be considered or

* "Candor compels me to say" that I had a part, as a member of the Anti-trust Division of the Department of Justice, in bringing the Hutcheson case. This article, of course, is written in my capacity as law school instructor. Any resemblance between counsel and instructor is purely "coincidental."

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¹ 311 U. S. —, 61 S. Ct. 463, 85 L. Ed. 422 (1941).

² The section reads as follows: "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."

³ *Apex Hosiery Company v. Leader*, 310 U. S. 469 (1940).

⁴ "Virtuous" may be too strong. Perhaps I should say "lawful," that is, the "sit down" strike is held to be quite lawful so far as the Sherman Act is concerned. Mr. Justice Stone recognized that it was "unlawful" in most other respects. It was characterized as a "high-handed proceeding without shadow of legal right" in *National Labor Relations Board v. Fansteel M. Corporation*, 306 U. S. 240, 252 (1939).

⁵ Borrowed from Mr. Gompers' characterization of the Clayton Act. "Those words, the labor of a human being is not a commodity or article of commerce, are *sledgehammer blows* to the wrongs and injustices so long inflicted upon the workers." Samuel Gompers, (1914) 21 *Am. Federationist* 971.

held to be violations of any law of the United States."⁶ The Congress having failed in this provision to distinguish the "licit and the illicit," the Court had no option but to decide as it did.⁷ Obviously, "we cannot write into" the statute our own judgment of the "rightness or wrongness" of the labor objective, least of all of the jurisdictional strike. That, as anyone can see, would be to usurp a function of the legislature.

Only one situation occurred to the Court by way of exception. Should labor "combine with non-labor groups," as in the case of *United States v. Brims*,⁸ where the purpose was to promote a local monopoly in the millwork business and so to maintain a wage scale, then the broad language of Section 20 would afford no protection. And this regardless of the fact that the union's activities were dictated by the purest "self interest."⁹ Mr. Justice Frankfurter did not pause to say how the Court was able to distinguish the "illicit" from the "licit" so readily in that case. Certainly nothing in the section gave him any hint that "picketing" or "refusal to work" for such an objective was to be condemned. Possibly the Court has been led into error here, and has inadvertently used its good judgment to determine a question of "rightness or wrongness." If so, the fault must be laid at the door of the businessman; labor should know better than to connive with him. For the result, as Mr. Justice

⁶ 38 Stat. 738 (1914), 29 U. S. C. §52 (1934). The section reads as follows:

"Sec. 20. No restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of 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.

"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 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; *nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States.*" (Italics added.)

⁷ 61 S. Ct. 463, 466. "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."

⁸ 272 U. S. 549 (1926).

⁹ ". . . I have come to the conclusion that both the common law of a State and a statute of the United States [Section 20 of the Clayton Act] declare the right of *industrial combatants* to push their struggle to the limits of the justification of self interest . . ." Mr. Justice Brandeis dissenting in *Duplex Co. v. Deering*, 254 U. S. 443, 488 (1921).

Frankfurter puts it, is very harsh indeed; it means nothing less than that conduct on the part of labor, which is *not subject to injunction*, may "in a criminal proceeding become the road to prison."¹⁰

With this one exception aside, it is evident that where labor is concerned the Court is bent upon wholly discarding the "processes of justice for the more primitive method of trial by combat."¹¹ In the *Apex* case the court greatly narrowed the application of the Sherman Act by insisting that only those labor activities which adversely affect "price" or "business" competition can now be brought within the statute.¹² Mr. Justice Stone, who wrote for the majority, restated his position in concurring in the *Hutcheson* case. But this time he stood alone, for his erstwhile colleagues had gone on to greener pastures. Perhaps they had come to see that, labor-wise, Mr. Justice Stone's view—that the Act forbids those labor activities which tend to eliminate competition between union and non-union made goods—was wholly indefensible. It would condemn labor restraints upon commerce in the very cases where the union demand was most legitimate. Such cases too must be swept out of court. Indeed, the Congress has required that result, so long as the labor activities in question do not overstep the bounds set in Section 20 of the Clayton Act. Or at least so Mr. Justice Frankfurter said.

A Cold Shoulder for Section 6 of the Clayton Act

One suspects that Mr. Gompers would have rubbed his eyes in disbelief could he have read the Frankfurter opinion. He would have gone back in his mind to that day a quarter of a century before—on June 2, 1914, to be exact—when labor representatives had sat in the gallery of the House of Representatives and watched Mr. Webb introduce the final clause of Section 20 as an amendment proposed by labor. It had been drafted and handed to the Congressman some days before with two or three other amendments.¹³ But Mr. Gompers, no doubt, would have remembered also that on June 1, 1914, when the express question before the House had been the extent to which the Sherman Act should apply to labor, the House had written the present Section 6 into the Act.¹⁴ That section, so far from exempting labor from the Act, had merely provided—rather carefully—that nothing in the "antitrust laws" shall

¹⁰ 61 S. Ct. 463, 467.

¹¹ 254 U. S. 443, 488 (1921).

¹² Steffen, *Labor Activities in Restraint of Trade: The Apex Case* (1941) 50 *Yale L. J.* 787.

¹³ Cong. R. 9652-9653 (1914).

¹⁴ See 51 Cong. R. 9538-9569 (1914) for the debate. The probable intent of Congress is fully discussed by Steffen, *Labor Activities in Restraint of Trade; The Apex Case* (1941) 50 *Yale L. J.* 787, 812.

forbid labor organizations "from lawfully carrying out the legitimate objects thereof."¹⁵

Instructed by Congress to go with Mr. Gompers one mile, it seems Mr. Justice Frankfurter and his three colleagues went the whole way.¹⁶ Of course labor must travel alone, for it will be remembered that "non-labor groups" are not invited. More light must be had on two points, however, before any very positive conclusions can be stated as to the exact extent to which the Court has gone beyond its instructions. In the first place, granting that a "jurisdictional" strike may "directly" and "substantially" burden commerce, is it not perhaps a "legitimate" activity of organized labor? If so, the court could have decided the *Hutcheson* case as it did, on that ground alone, resting the case on Section 6 of the Clayton Act. In the second place, assuming that resort must be had to Section 20, what precisely may Congress be taken to have meant by the final clause which it appended to that section at labor's behest? Surely it does not immunize the labor activities described in the section—wholly without regard to their purpose—for it will be noted the Court itself insists upon one exception.

Oddly enough Mr. Justice Frankfurter made no mention of Section 6 of the Clayton Act. In a learned paragraph, which reminds of Mr. Justice Sutherland, it is stated generally that the statute pleaded in an indictment is not very material. If the Grand Jury should name the wrong statute—or, perhaps, if it should name none at all—the court will obligingly supply the right one. And, notwithstanding the indictment is properly brought under one statute, the court may consider other statutes—which of course would have no place in the indictment—in order to "draw the sting of criminality from the allegations."¹⁷ Thus, it followed that although the indictment in the *Hutcheson* case was properly based on Section 1 of the Sherman Act the Court could, if it saw fit, look to Section 20 of the Clayton Act. Indeed, as will be discussed later, it looked even to the Norris-LaGuardia Act in its effort to "draw the sting of criminality." But why it should have completely overlooked Section 6 of the Clayton Act, which is expressly on the point, Mr. Justice Frankfurter did not say.

¹⁵ Section 6 of the Clayton Act, 38 Stat. 731 (1914) 15 U. S. C. §17 (1934) reads as follows: "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 the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws." (Italics added.)

¹⁶ Figuratively speaking, of course; Mr. Gompers died on December 13, 1924.

¹⁷ 61 S. Ct. 463, 464 (1941).

Jurisdictional Disputes α Blessing in Disguise

It is a fair guess that the majority was simply unwilling to put the "jurisdictional" dispute to the test laid down by the Congress in Section 6 of the Clayton Act. Mr. Justice Frankfurter mentions, it is true, that "these conflicts have intensified industrial tension," but he makes no appraisal of the extent of the interference with commerce which they cause; of the delays and losses to the public; of the increased costs in the market place brought about by the economic waste involved; or, even of the harm done to labor itself due to continual warfare.¹⁸ Yet these are all matters to be carefully weighed, it would seem, before a widespread disruption of trade growing out of such a dispute may be labelled "legitimate" within Section 6. Mr. Justice Frankfurter does make the sage observation, however, that "such strife between competing unions has been an obdurate conflict in the evolution of so-called craft unionism."¹⁹ And, it seems, if given enough rope, the labor groups so engaged may one day hang themselves, for such strife "has undoubtedly been one of the potent forces in the modern development of industrial unions."²⁰

Jurisdictional strife, then, must be given credit for the C. I. O.; that much can be said for it, the court suggests. The suggestion has its amusing aspects; it should be particularly so to William L. Hutcheson, general president of the United Brotherhood of Carpenters and Joiners of America—one of the four defendants in the case before the court. He surely has not forgotten the time in 1935, when he led the fight against industrial organization on the floor of the A. F. of L. Convention at Atlantic City. In spite of all the evils of jurisdictional warfare with which craft unionism had always been beset he was utterly opposed to industrial unionism. So much so that, when his position was characterized by John L. Lewis as "little potatoes," he replied that he had been "brought up on little potatoes," and— What was Mr. Lewis going to do about it?²¹ In the

¹⁸ "Such disputes have become so important that many unions consume more time in protecting their trade jurisdiction from encroachment by other unions than in protecting working conditions and standards from attack by employers. It has been estimated that 95 per cent of the strikes and 75 per cent of the days of idleness in the building trades are due to jurisdictional controversies among workers." Haber, *Industrial Relations in the Building Industry* (1930) p. 153. See also: Daugherty, *Labor Problems in American Industry* (1936) 510, 511; Galenson, *Rival Unionism in the United States* (1940).

¹⁹ According to Sidney and Beatrice Webb, *Industrial Democracy* (1921) 510, it is responsible for "nine-tenths of the ineffectiveness of the trade-union world."

²⁰ 61 S. Ct. 463, 466 (1941).

²¹ The A. F. of L. "Reports" for October 19, 1935, pages 726, 727 give an account of the verbal altercation. There are several versions of the fisticuffs which followed. According to Sullivan, *The Labor Union Racket* (1936), p. 235, this is what took place: "He (Lewis) indicated his irritation about the trend of things generally at the convention by knocking flat on the floor William L. Hutcheson, huge federation Vice President and member of the Executive Council, leader of 300,000 Carpenters. . . . In that blow, heard round the hall, Lewis had made an implacable foe of the, in a manner of speaking, craft-bloc head."

ensuing "trial by combat" was born the C. I. O.; the labor movement was to become more than a matter of craft monopoly. But still it is difficult to see how the Court can say that jurisdictional strife, especially as personified by Mr. Hutcheson, has been a particularly potent force in the modern development of industrial unions. To delay and to obstruct, yes, but not to promote.

So dubious a claim to credit will not suffice to make jurisdictional strife "legitimate" within Section 6 of the Clayton Act. In fact, as everyone knows, the creation of the C. I. O. has greatly increased the area of conflict and trade disruption.²² Not only are the long standing disputes between the A. F. of L. craft unions still being fought with vigor and enthusiasm,²³ but several large scale wars are on between certain craft unions and various C. I. O. organizations. Mr. Hutcheson's attitude toward the lumber workers in the Pacific Northwest is a case in point. For years, practically no effort was made by the A. F. of L. leadership to organize these men. Being neither carpenters, cabinet makers or millwrights, or members of any recognized craft, they evidently were not strictly eligible to membership in Mr. Hutcheson's union. There is a suspicion, moreover, that his union was actuated in this by good old monopolistic ideas; higher wages to lumber workers brought about by collective bargaining might eat into the carpenter's share of the home-builders' dollar. At all events, when the C. I. O. entered the field the carpenters showed their hand fully; they fought the C. I. O. unions at every turn—and by means that have long since been outlawed under the Sherman Act in the case of competing business groups.²⁴

The Millwrights' Desperate Struggle

The *Hutcheson* case itself, which grew out of a jurisdictional strike at the plant of Anheuser-Busch, Inc., in St. Louis, is but one episode in a 25 year old dispute between two A. F. of L. craft unions: the United Brotherhood of Carpenters and Joiners of America, numbering some

²² See in this connection Clark and Simon, *The Labor Movement in America* (1938) at 184.

²³ The long fight between the Teamsters and the Brewery Workers is a case in point; each claims jurisdiction to the hauling work for the breweries. For the most recent decision see *Green, et al. v. Obergfell, et al.*, decided by the United States Court of Appeals on March 17, 1941, and reversing 29 F. Supp. 589 (1939).

²⁴ "In the famous fight between the Carpenters Union (AFL) and the Woodworkers (CIO) in Oregon, the Board held an election which the CIO won. *Jones Lumber Co.*, 3 N.L.R.B. 855 (1937). The Carpenters treated the results of the election as irrelevant. They and their associate unions, by picket and boycott, held up a good part of the lumber business for some period of time. The public was angry and frantic, and the experience provided a plausible occasion for enacting one of the most reactionary of existing anti-picketing laws." Jaffee, *Inter-Union Disputes in Search of a Forum* (1940) 49 *Yale L. J.* 424 at 454. And see Robert R. Brooks, *Labor on New Fronts* (1938) 18; *The Carpenter* (1936) 3.

300,000 or more members, and the International Association of Machinists, with about 90,000 members. The Machinists, as their name implies, have always claimed jurisdiction to the making, installation, and repair of metal machinery. The Carpenters' claims, on the other hand, derive from the ancient jurisdiction of the millwrights. In the olden days, when wooden waterwheels provided the motive power for industry, the millwright was the man who built and kept the machine going. One would have thought that, with the virtual elimination of wood from the modern industrial plant, the millwright would have gone the way of the horse and buggy. And that is largely true, but though a "dying ember," so to speak, he has traded his chisel for a monkey wrench and demanded—with all of the power of the Carpenters' organization back of him—that he be given so much work on metal machinery as he can get away with.

Labor has appreciated fully that these fights are, or should be, suicidal.²⁵ That between the A. F. of L. and the C. I. O., as everyone knows, has been a wide-open affair. But, within the A. F. of L., it would seem that a different situation should prevail; certainly there have been many efforts to bring about a different condition. From the first, enlightened leaders have sought to require a careful statement of jurisdiction on the part of each craft, so that conflicts could be eliminated by agreement. In addition voluntary boards to hear jurisdictional disputes and make awards have at one time or another been instituted. These have so far failed to bring peace.²⁶ Of course both attempts have had to contend with an ever-changing industrial technology; no *permanent* solution could be hoped for.²⁷ But the real seat of the trouble has been that spirit of irresponsible "group aggression," limited only by "self interest," which Mr. Justice Frankfurter embraces; it has too often stood in the way of the most obvious temporary adjustment of differences. With the public paying the price, let the fight continue; might makes right.

The A. F. of L. finally put such pressure upon the Carpenters and the Machinists to settle their differences, that in 1932 Mr. Hutcheson for the Carpenters and Mr. Wharton for the Machinists were brought

²⁵ "I submit that it is untenable and intolerable for an organization to attempt to ride rough shod over and trample under foot rights and jurisdiction of a trade, jurisdiction of which is already covered by an existing organization." Gompers, testifying before U. S. Commission on Industrial Relations, Final Report (1915) 418. Ten years earlier he had spoken more philosophically; jurisdictional disputes "have developed a high order of intelligence in discussion among our unionists, keen perception in industrial jurisprudence." Proceedings of the A. F. of L. (1905) 23.

²⁶ See generally, Jaffe, *Inter-Union Disputes in Search of a Forum* (1940) 49 *Yale L. J.* 424, 429 *et seq.*

²⁷ See Shulman, *Labor and the Anti-Trust Laws* (1940), 34 *Ill. L. Rev.* 769, 786. It is Shulman's view that technological change presents an "enduring" social problem.

to a tentative jurisdictional agreement. For a moment it looked as though the quarrel was ended. The jurisdiction of the Machinists was to extend over "the building, assembling, erecting, dismantling and repairing of machinery in machine shops, buildings, factories, or elsewhere where machinery may be used," that of the Carpenters, over "line shafting, pulleys and hangars, spouting and chutes, all conveyors, lifts and hoists, except that type of conveyor that is an integral part of the machine . . ." But perhaps Mr. Wharton was the better horse trader; at all events in barely six months Mr. Hutcheson wrote to William Green, president of the American Federation of Labor, and annulled the agreement. His organization would prefer to fight the thing out. And, that it has been doing.

The dispute at the Anheuser-Busch brewery in the spring of 1939, therefore, was not a mere "local" or "incidental" matter. It was one more battle in a long warfare between two powerful national organizations. The "union demand," moreover, was by no means the highly favored one to gain recognition, but quite the contrary, for Anheuser-Busch, Inc., has had a long and creditable labor record; its first labor contract, with the Knights of Labor, antedated the organization of the A. F. of L. For years the large body of its employees have been members of the Brewery Workers, an A. F. of L. industrial union, and since repeal of prohibition, at least, it has also had contracts both with the Carpenters and with the Machinists. Nor can it be said that the dispute had anything whatever to do with wages, hours or working conditions, for these were identical in the case of each craft. Each, in fact, enjoyed the same perquisites, a schooner or so of beer thrice daily. The union "demand," therefore, simply had to do with jobs; the Millwrights wanted the Machinists' jobs, and proposed to take them by force if necessary.

There was nothing much Anheuser-Busch, Inc., could do about the thing; it was merely the innocent by-stander caught between two "industrial combatants." True, it could urge that the company's contract with the Machinists, which had been renewed from year to year since April 15, 1932, provided that they should do "the erecting, assembling, installing, and repairing of metal machinery or parts thereof;" that this was the jurisdiction Mr. Hutcheson had once conceded to the Machinists; and that to give this work to the Carpenters now meant breaking a contract with the Machinists. But, as Mr. Hutcheson intimated, the Machinists' contract could be torn up and thrown in their faces, so far as he was concerned. In fact, he had done much the same thing himself. And when it was suggested that the point should be arbitrated, there being an arbitration clause both in the Carpenters' and the Machinists'

contracts, it was made clear that there was nothing to arbitrate. There is a time to arbitrate, as Solomon once may have said, and a time not to arbitrate. Either the company would employ millwrights "exclusively for the work of erecting, assembling, installing, and setting machinery" in its brewery or a strike would be called by five o'clock P. M. on June 28, 1939. Such was the ultimatum.

The Carpenters' leaders chose their time for a show-down carefully. As they knew, Anheuser-Busch, Inc., had plans under way at the moment for the construction of a plant addition to cost \$500,000 or more. The contractor, Borsari Tank Corporation, a specialist in brewery construction operating in various states, had been engaged; certain out-of-state building materials had been contracted for. The carpenters' strike would—and did—stop this building at a loss of many thousands of dollars—to say nothing of the loss of work to the other building crafts in St. Louis. But it appeared, also, that the Gaylord Container Corporation, which leased its premises from Anheuser-Busch, Inc., was constructing a \$70,000 office building at the time. This too was stopped, the contractor, L. O. Stocker & Co., being denied carpenters to put in the form work for the foundations. The excavation, already dug, had to be filled back in at considerable cost. Neither building has since been constructed.

Of course the Carpenters had no dispute either with Borsari or Stocker; both had been union contractors for many years. Neither, moreover, would consider working non-union. Nor did the Carpenters have any quarrel with the Gaylord Container Corporation. Their purpose on the contrary was simply to force these concerns to put pressure on Anheuser-Busch, Inc., to the end that it in turn would break its contract with the Machinists. Rather harsh on these businesses, one might think, but, as Mr. Justice Frankfurter reminds us, men must be free to cease working for whomsoever they please. This is necessary to equalize the bargaining struggle; the converse would perhaps verge on peonage. That they may misuse their privilege and conspire to disrupt the hard-won bargaining positions of a brother union may not be considered, for, of all people, who are the justices of the Supreme Court to distinguish between the "licit and the illicit"?

But the Carpenters did not stop there. With a zeal worthy of a better cause they picketed the plant and sought to bring about a general walk-out. They reckoned, however, without the good sense of the Central Trades and Labor Council of St. Louis, for when the case was laid before it, the vote was overwhelmingly against support. The picketing, nonetheless, continued, presenting the strange spectacle of hundreds

of union men going through their own picket line daily. The next step, as is brought out in the concurring opinion of Mr. Justice Stone, was to instigate "a boycott of beer brewed by Anheuser-Busch, Inc., and of dealers in said beer throughout the United States . . ."²⁸ By circulars and notices in labor publications Anheuser-Busch, Inc., was widely denounced as "unfair" to organized labor. The "intent and effect" of the boycott was not only to burden the commerce of Anheuser-Busch, Inc., but to restrain and stop that of the independent dealers as well, even as in the Danbury Hatters case.

The Indictment Disposed of Piecemeal

Such were the facts as charged in the indictment. But when the case came before the District Court, upon demurrer, Judge Davis found it convenient to split the indictment into two parts. By this device, fortunately unique, he found that the "strike" and the "picketing" merely had to do with a "local" dispute and so constituted only an "indirect" effect upon commerce. Clearly that was no violation of the Sherman Act. Then, having so easily disposed of half of the case, Judge Davis took up the boycott. The allegations in the indictment concerning the interference with the sale of Anheuser-Busch beer undoubtedly did "set forth an attempt to interfere with the interstate commerce in that product." But the boycott was lawful, since it was peacefully carried out, and that being true, whether the *purpose* of the strike was lawful or not, made no difference. It seems the boycott could not be enjoined, assuming that the Norris-LaGuardia Act could be read into Section 20 of the Clayton Act. Therefore, the demurrer must be sustained: "That which does not amount to a civil wrong can hardly be characterized as criminal."²⁹

By writing one part of his opinion with his left hand, so to speak, and the other with his right, Judge Davis had wholly avoided the second *Coronado* case. There was no question but that defendants had actually restrained—and in fact stopped—a substantial incoming commerce in building materials, to say nothing of their intent, as alleged, to halt incoming shipments of barley and of other beer-making ingredients. But on this score the case could be likened to *Levering & Garrigues Company v. Morrin*³⁰ where the union defendants had stopped incoming shipments of structural steel without being thought to have "directly" interfered

²⁸ 61 S. Ct. 463, 469 (1941).

²⁹ 32 F. Supp. 600 (1940).

³⁰ 289 U. S. 103 (1933). In the *Hutcheson* case the company had erected a series of new tank buildings, thus producing something like a "flow" of tank buildings in interstate commerce.

with commerce. By forgetting that in the *Levering* case the union purpose was to attain recognition—while here it was to destroy another union's bargained-for position—that case could serve as authority. But the second *Coronado* case was something else, for there Chief Justice Taft had found the defendants guilty; there being “substantial evidence . . . tending to show that the *purpose* of the destruction of the mines was to stop the production of non-union coal and prevent its shipment to markets of other states . . .” it followed that the interference was no longer merely “local” and “incidental.”³¹ In the case before Judge Davis the nation-wide boycott of beer, whether primary, secondary, or tertiary, certainly showed an intention to interfere “directly” with interstate commerce. But, by not letting his left hand know what his right hand had written, he could ignore this allegation.

With these preliminaries aside, the case came directly to the Supreme Court. There, only Mr. Justice Stone followed closely in the footsteps of Judge Davis on the first branch of his argument. In fact, he went even further, and spoke of the different labor activities—“strike,” “picketing,” “boycott,” and so on—as if they were described in separate “counts” of the indictment. And while Judge Davis had at least noted the Government contention that such activities should be weighed against the labor *purpose* disclosed, Mr. Justice Stone merely considered them in the abstract. He was not to be misled by any allegations in the indictment characterizing defendants' activities as “jurisdictional” and “not within the ‘legitimate object of a labor union.’” It was thus easy for him to look at the “strike” as a wholly isolated and innocent adventure, quite without purpose. So with the “picketing,” which, however truthful it may have been, was at least “peaceful.” Even the “so-called ‘boycott’” was evidently altogether harmless, since the indictment had not detailed the business losses suffered by the many independent dealers affected. Accordingly, what was all the indicting about: “If the *counts* of the indictment which we are now considering make out an offense, then every *local* strike aimed at closing a shop whose products or supplies move in interstate commerce is, without more, a violation of the Sherman Act.”³²

It may be true that Section 6 of the Clayton Act became a dead letter, as is declared in labor circles, when the *Duplex* case was decided; but the section is still on the books for anyone to see. It still says that labor organizations may be “instituted for the purposes of mutual help” and that nothing in the antitrust laws shall “restrain individual members

³¹ *Coronado Coal Co. v. United Mine Workers*, 268 U. S. 295, 310 (1925).

³² 61 S. Ct. 463, 470 (1941).

of *such* organizations from *lawfully* carrying out the *legitimate* objects thereof."³³ Or, otherwise stated, the section does *not* authorize "a normally lawful organization to become a cloak for an illegal combination or conspiracy in restraint of trade . . ."³⁴ Finding substantial restraints, not only of the Anheuser-Busch commerce, but of that of Borsari, Stocker, Gaylord and the many independent dealers throughout the country, surely Mr. Justice Stone could at least have looked to the *purpose* of the restraints, however *lawful* the different activities might be when viewed separately and in the abstract.

Of course, had Mr. Justice Stone been able to reach a conclusion that a "jurisdictional" fight to *destroy* collective bargaining is less worthy, say, than a strike to *establish* collective bargaining, he would have had to face a very different problem. Against such a finding even a peaceful strike by the contesting union would scarcely seem justifiable. A union which has attained recognition and has bargained for satisfactory wages and working conditions should be free from such attacks. And interference with the trade of wholly independent businesses, as charged in the indictment, would seem to be even less justified. In such case, to take up independently each separate means employed by the defendants, as though they were unrelated phenomena, would hardly be an intelligent thing to do. For, as was pointed out long ago by Mr. Justice Holmes in the *Swift* case, the mere fact that several activities when viewed separately are quite lawful, does not mean that they may not make out a conspiracy in restraint of trade when seen together and in the light of their common purpose. Though his language has long been familiar to the Court it will be repeated:

The scheme *as a whole* seems to us to be within reach of the law. The constituent elements, . . . are enough to give the scheme a body, and, for all that we can say, to accomplish it. . . . It is suggested that the several acts charged are lawful and that intent can make no difference. But they are bound together as parts of a single plan. The plan may make the parts unlawful.³⁵

Mr. Justice Roberts, dissenting, did not have to pass on the question whether defendants were engaged in a "legitimate" union activity; the secondary boycott, the means, not being *lawful*, that alone would suffice in his opinion. In so holding he of course was supported by clear authority going back at least to *Loewe v. Lawlor*.³⁶ Whether the Court properly decided that case or not became a moot question when in 1914 the Congress, after long debate, passed the Clayton Act. Neither Section

³³ *Supra* note 15.

³⁴ *Mr. Justice Pitney in Duplex Printing Press Co. v. Deering*, 254 U. S. 443, 469 (1921).

³⁵ *Swift & Co. v. United States*, 196 U. S. 375, 396 (1905).

³⁶ 208 U. S. 274 (1907).

6 nor Section 20 of that Act, nor anything occurring in the course of the legislative debate, indicated that Congress intended to "legalize" the secondary boycott. In fact it did just the opposite. Nor was it made necessary to show, as Mr. Justice Stone suggested in the *Apex* case, that the purpose of the boycott was to eliminate competition between union and non-union made goods; such a distinction was not noticed, if it existed, in *Loewe v. Lawlor*, and if adopted, would only serve to condemn labor activity when most justified.³⁷ Drastic destruction of interstate trade alone may be a violation of the Sherman Act however laudable the particular labor purpose may be. This much for the public welfare.

Mr. Justice Frankfurter Points to "Public Policy"

Enough has been said to indicate that the Supreme Court as presently constituted is reluctant, at least, to consider whether *jurisdictional* strife is "legitimate." Last year, in the *Apex* case, it was equally wary of passing upon the "lawfulness" of a sit-down strike. For the moment then, we must take it that Section 6 of the Clayton Act has become a dead end street, whichever way one may seek to travel it. But possibly that is just as well, for if Mr. Justice Frankfurter can show us a way out by another route, Section 6 may well be abandoned, in legal contemplation. It will be recalled that Mr. Justice Frankfurter said that he saw a way to "draw the sting of criminality" from the indictment, without having to distinguish in any manner between the "licit and the illicit" contained in the various charges made by the Grand Jury. If such a happy route exists—and does not levy too great a tax on intellectual credibility—it is footless, to say the least, to spend further time on Section 6 of the Clayton Act.

Instead of starting with the Sherman Act, as the Grand Jury did, Mr. Justice Frankfurter scarcely considers that Act at all. His approach is to begin at the other end, with the *public policy* declared by Congress in the Norris-LaGuardia Act, and then to work backwards.³⁸ "Congress in the Norris-LaGuardia Act has expressed *the public policy of the United States* and defined its conception of a 'labor dispute' in terms that no longer leave room for doubt."³⁹ Here, indeed, was "furnished the light" by which the courts could be made to understand "the nature of *the industrial conflict*." Such being true, there is, obviously, "no profit in discussing those cases" decided in the benighted era before March 23,

³⁷ See criticism of Mr. Justice Stone's "new contribution" to the antitrust laws in Steffen, *Labor Activities in Restraint of Trade; The Apex Case* (1941) 50 *Yale L. J.* 787 *et seq.*

³⁸ 61 S. Ct. 463, 466 (1941).

³⁹ *Id.*, 467.

1932, the date when the Norris-LaGuardia Act became law.⁴⁰ Those decisions, too, have become dead-end streets; they evidently never were well-lighted.

Whether Mr. Justice Frankfurter himself wrote the statement of public policy contained in the Norris-LaGuardia Act does not appear.⁴¹ At all events—except for a rather muddy style—it is a very good one. In fact, it is a pity Mr. Justice Frankfurter did not bother to read it before deciding the *Hutcheson* case; it would have thrown considerable light on the actual nature of the *particular* conflict before the Court. The “public policy of the United States”—that is, for purposes of the Norris-LaGuardia Act—is there declared to be the following:⁴²

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.

If that statement of “public policy” means anything, considering its setting, it means that the “individual unorganized worker” is not to be met with a Federal injunction when seeking to organize and to bargain collectively. It says that and not much else. But the case before Mr. Justice Frankfurter did not involve an “individual unorganized worker.” It did not involve a demand for union recognition. It had nothing to do with wages, hours, or working conditions—matters usual to collective bargaining. On the contrary it was simply an attack by one union to disrupt and destroy a relationship which another had established by a peaceful process of collective bargaining. So far from being sanctioned by “the public policy of the United States,” to which Mr. Justice Frankfurter refers for light, defendants’ activities deliberately flouted that policy.

In 1935 the Congress made a further declaration of public policy in the Wagner Act, but Mr. Justice Frankfurter did not refer to it.⁴³

⁴⁰ *Id.*, 468.

⁴¹ It appears that Mr. Justice Frankfurter “collaborated with others like-minded in drafting” the legislation. Frankfurter & Green, *The Labor Injunction* (1930) 226, n. 61.

⁴² 29 U. S. C. A. §102 (1932).

⁴³ Except to point out that a broad definition of “labor dispute”—for purposes of that Act—had there too been adopted, as in the Norris-LaGuardia Act. See 61 S. Ct. 463 at 467 (1941).

That act announced a purpose "to eliminate the causes of certain substantial obstructions to the free flow of commerce . . . by encouraging the practice and procedure of collective bargaining."⁴⁴ Two thoughts are here apparent which Mr. Justice Frankfurter has ignored: first, that Congress is not oblivious to the obstructions to the free flow of commerce caused by labor strife; and second, that collective bargaining must, indeed, be encouraged to the end that employer-labor relations may be put on an orderly and peaceful basis. Surely the Congress has now made it clear beyond quibble that jurisdictional strife is contrary to "the public policy of the United States." It would seem that Mr. Justice Frankfurter, though, is still taking his cue from an earlier day, when it was said to be good form for "industrial combatants" to "push their struggle to the limits of the justification of self interest."

The New "Interlacing-Infusion" Process

But Mr. Justice Frankfurter had a further and more devious argument. In large part it is that suggested by Judge Davis in the second branch of his opinion. First we are to consider that the Sherman Act, Section 20 of the Clayton Act, and the Norris-LaGuardia Act are "interlacing statutes," providing "a harmonizing text of outlawry [sic] of labor conduct." Why Section 6 of the Clayton Act was not also "interlaced," the learned Justice did not say. Next, the reader is to note, indulgently, that these Acts are not "tightly drawn" and "technically phrased" tax provisions. Although perhaps some "meticulous words are lacking" to express what Congress had in mind, this can be disregarded; statutes of this sort "must not be read in a spirit of mutilating narrowness," but rather so as to give "hospitable scope" to the assumed Congressional purpose. Then, lest someone think this but an appeal to easy virtue, the mantle of Mr. Justice Holmes is borrowed to give the whole thing an air of respectability: ". . . it is not an adequate discharge of duty for courts to say: We see what you are driving at, but you have not said it, and therefore we shall go on as before."⁴⁵

Before the next step can be taken, it must be recalled that Mr. Justice Frankfurter apparently regards the "catch-all" provision at the end of Section 20 as relieving the "acts" described in that section "of

⁴⁴ N. L. R. A. §1, 49 Stat. 449 (1935), 29 U. S. C. §§151-166 (Supp. 1940).

⁴⁵ 32 F. Supp. 600, 603 (1940).

⁴⁶ 61 S. Ct. 463, 468 (1941). The quotation from Holmes was taken from the case of *Johnson v. United States* (1st Cir., 1908) 163 Fed. 30, 32, where the narrow contention was made that a sworn bankruptcy return should not be excluded from evidence as a pleading, since the statute, which made pleadings or evidence obtained in a judicial proceeding inadmissible in a criminal case to prove guilt, had not expressly referred to bankruptcy schedules. The quotation is a good one, but its aptness here is, to say the least, *dubious*. Compare, *Keifer & Keifer v. R. F. C.*, 306 U. S. 381, 391, where Mr. Justice Frankfurter used the same quotation with discrimination.

all illegal taint"—even of a possible violation of the Sherman Act. So his problem was to show how Section 20 had been broadened by the Norris-LaGuardia Act, that is, how new "acts" had been brought within its scope and thus given immunity. Well, the thing is done rather simply, it appears, by an "infusing" process: "The Norris-LaGuardia Act," we are told, "reasserted the original purpose of the Clayton Act by *infusing* into it the immunized trade union activities as redefined by the later Act."⁴⁷ And there you have it—the Clayton Act impregnated with the Norris-LaGuardia Act—judicial absolution extended to the Hutchesons, et al.—and all without any bother over confusing details. Thus proving again that the human hand is quicker than the eye.

Only the dissenting justices—and probably Mr. Justice Stone—were slow to follow. Mr. Justice Roberts' characterization of the new "interlacing—infusion" method of statutory construction well expresses his concern. I quote:

By a process of construction never, as I think, heretofore indulged by this court, it is now found that, because Congress forbade the issuing of injunctions to restrain certain conduct, it intended to repeal the provisions of the Sherman Act authorizing actions at law and criminal prosecutions for the commission of torts and crimes defined by the anti-trust laws. The doctrine now announced seems to be that an indication of a change of policy in an Act as respects one specific item in a general field of the law, covered by an earlier Act, justifies this court in spelling out an implied repeal of the whole of the earlier statute as applied to conduct of the sort here involved. I venture to say that no court has ever undertaken so radically to legislate where Congress has refused so to do.⁴⁸

A tax lawyer reading the Norris-LaGuardia Act for the first time would say that it was intended in large part to *displace* Section 20 of the Clayton Act—not to *infuse* new life into it. It covers all of the matters mentioned in Section 20 except two of considerable significance: the "ceasing to patronize," or boycott provision is entirely omitted, as is the final "catch-all" provision of the section. But other items all reappear; indeed, many of them have been reworded and carefully strengthened. There are, moreover, no words, meticulous or otherwise, referring to the Clayton Act—least of all to the final clause of Section 20.⁴⁹ In

⁴⁷ 61 S. Ct. 463, 468 (1941). In *Palmer v. Commonwealth of Massachusetts*, 308 U. S. 79, 83 (1939), Mr. Justice Frankfurter expressed himself in this fashion: "And so we have one of those problems in the reading of a statute [§77 of the Bankruptcy Act] wherein meaning is sought to be derived not from specific language but by fashioning a mosaic of significance out of the innuendoes of disjointed bits of a statute. At best this is *subtle* business, calling for great wariness lest what professes to be mere rendering becomes creation and attempted interpretation of legislation becomes legislation itself; etc., etc." (Italics added.)

⁴⁸ *Id.*, 472.

⁴⁹ The words "lawfully" and "peacefully," which were used generously in §20 of the Clayton Act, are omitted from the similar provision of the Norris-LaGuardia Act. It is suggested by Gregory, *The New Sherman-Clayton-Norris-LaGuardia Act*, 8 U. of Chi. L.

fact, the statute appears to have been meticulously drawn—for supposed constitutional reasons—to apply only to the jurisdiction of the federal courts in equity. As Mr. Justice Frankfurter has himself pointed out elsewhere, the Act “explicitly applies *only* to the authority of United States courts ‘to issue any restraining order or injunction.’ *All other remedies in federal courts and all remedies in state courts remain available.*”⁵⁰ Had it been intended to exempt labor activities from the civil and criminal provisions of the Sherman Act, or from any other federal law, it would not have taken a tax lawyer to suggest appropriate language for the purpose.

Nor does it take a tax lawyer to say that Congress had *no* intention, by adopting the Norris-LaGuardia Act, to widen the *criminal* and *civil* immunities extended to labor. Quite to the contrary. The bill was presented to Congress as a sweeping blow at the “labor injunction” and as nothing else. Both “foes and supporters” of the bill alike were “unanimous” that it would *not* affect any other remedy before the courts.⁵¹ In fact the suggestion was rather that all civil and criminal remedies not only *could* but *should* be used.⁵² The following quotation from the debates, Congressman Greenwood speaking, is both typical and informative:⁵³

I say that such injunctions have reached the point where they are indefensible, and the Congress ought to undertake to define this jurisdiction in order that the constitutional rights and privileges of men who labor and belong to unions may not be in any way infringed.

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. If men are guilty of crime they should have the full right and privilege of a trial by jury. They should have the

Rev. 503, 510 (1941) that it was these phrases which caused labor to demand the “catch-all” clause of §20. The union purpose was not to be free from all law, but simply to make sure that the courts would not issue injunctions as freely as ever, by purporting to find the particular labor activity “unlawful.” At all events, with such words omitted from the Norris-LaGuardia Act, no one seems to have thought another “catch-all” clause was necessary.

⁵⁰ Frankfurter & Greene, *The Labor Injunction* (1930) 220. And see, Frankfurter and Greene, *Congressional Power over the Labor Injunction* (1931) 31 Col. L. Rev. 385, 408 where the authors say: “Is the denial of all adequate judicial remedies in case of an illegal strike a denial of due process of law? The question is not pertinent, for the bill only withdraws the remedy of injunction. *Civil action for damages and criminal prosecution remain available instruments.* Illegal strikes are not made legal.” (Italics added.)

⁵¹ When both “foes and supporters” are unanimous it is now permissible to refer to Congressional debate, Stone, J., in *Apex Hosiery Co. v. Leader*, 310 U. S. 469, 493-4, n. 15 (1940).

⁵² Senator Blaine, in the debates on the measure quoted from a memorandum prepared by Dr. Edward E. Witte, an authority upon labor questions and one of the experts who assisted the committee in drafting the measure, as follows: “This section does not legalize strikes under any and all circumstances. It does not provide that the acts enumerated are always lawful but *only that these acts shall not be prohibited by injunction*; nor does it even prohibit injunctions against every sort of strike.” Cong. Rec., 72 Cong. 1st Sess., p. 4629 (1932).

⁵³ Cong. Rec., 72d Cong. 1st Sess., p. 5467 (1932).

full right of consideration of the crime by a grand jury, and the right to be proceeded against by indictment.

A man who is charged with crime should have the full protection and privileges thrown around him by the Constitution. No man, though he be a Federal judge, has anything attached to him in sanctity that he should be the prosecuting officer, jury and the judge all in one. (Italics added.)

The Duplex Case a "Dead Letter"

So far, at least, Mr. Justice Frankfurter's way is hedged about with difficulties. But one gets the impression that his detour through the Norris-LaGuardia Act was not altogether to reach a solution of the Hutcheson case; he wanted also to upset *Duplex Printing Press Co. v. Deering*.⁵⁴ That case, decided in 1921, was one of the great reasons for the Norris-LaGuardia Act. Indeed the Act, we are told, was "a disapproval" of the *Duplex* case, "as the authoritative interpretation of Section 20 of the Clayton Act, for Congress now placed its *own* meaning upon that section." The Congress, it seems, simply *expunged* that case from the books—and the *Bedford* case with it—when it adopted the Norris-LaGuardia Act. At least Mr. Justice Frankfurter would have it so, saving only perhaps, the dissenting opinions of Mr. Justice Brandeis.

Mr. Justice Pitney, in deciding the *Duplex* case, made three points of interest here. In the *first* place he indicated very plainly that Congress had provided in Section 6 the extent to which labor unions and their members should be generally exempted from the anti-trust laws. *Secondly*, he decided that Section 20, which forbids the Federal courts to issue injunctions respecting certain specified labor activities, did not reach so far as to include a case between the Duplex Company, operating non-union in Michigan, and certain members of the Machinists' national organization, who were boycotting the company's product in the New York market. The section applies to cases "between an employer and employees,"⁵⁵ and to Mr. Justice Pitney, the defendants, who had never been employees and who never intended to become employees, simply could not be brought within that category. Then, *thirdly*, it was decided that the Congress did not intend to legalize the "secondary boycott" by anything it had written in either Section 6 or Section 20.

If the Congress intended to "disapprove" of the *Duplex* case in *all* respects, it went to great pains to conceal its meaning. Nothing in the Norris-LaGuardia Act or in the legislative debate, indicates that the Court's construction of Section 6 of the Clayton Act was "disapproved." And, most emphatically, there is nothing to indicate that Congress intended to sanction the secondary boycott. As mentioned above, the

⁵⁴ 254 U. S. 443 (1921).

⁵⁵ The full section is set out supra, note 6.

Act was drawn to omit all reference to boycotting of whatever degree, and this notwithstanding the Congress was fully conversant with the views of Mr. Justice Pitney. It would have been painfully easy to insert a clause saying that boycotting, too, should not be subject to injunction. But it was not done. The conclusion is irresistible, therefore, that Congress not only did not "disapprove" of the court's opinion on this point, but that it actually approved of the views of Mr. Justice Pitney. Unless, that is, the real intent was written between the lines, awaiting the day when Mr. Justice Frankfurter could announce it for us from the bench.

But in one particular, at least, the Congress left no doubt that it "disapproved" of the *Duplex* case, or if you prefer, of the Clayton Act.⁵⁶ The intervening years had made it very clear that labor must organize on a national scale, if it would bargain effectively with industry, already operating on a vast country-wide basis. Moreover, the intervening years had further confirmed the country in its disapproval of the injunction as a means of dealing with labor disputes. The reasons are too well known to bear repeating here. Obviously the Clayton Act, limited as it was to cases between "employer and employees," was based on an erroneous assumption—that labor disputes are mere "local" matters. Only rarely are they so as witness the dispute in the *Hutcheson* case. Accordingly, if immunity from injunction is to be worth anything it must be extended realistically to *all* persons concerned with the dispute. The Congress fully recognized this in the Norris-LaGuardia Act, and carefully defined "labor dispute" for "the purposes of this Act," to include "any controversy concerning terms or conditions or employment . . . or any other controversy arising out of the respective interests of employer and employee, regardless of whether or not the disputants stand in the proximate relation of employer and employee."

The "Catch-All" Clause Supreme

So much distortion to sideswipe the *Duplex* case. But even granting Mr. Justice Frankfurter his reconstruction of the Clayton Act—after all he was one of the draftsmen of the Norris-LaGuardia Act—he still will not have *infused* into Section 20 the redefined trade union activities of the Norris-LaGuardia Act.^{56a} These, truly, can only be brought over by

⁵⁶ Mr. Justice Frankfurter quotes with a flourish the statement of the House Committee on the Judiciary that: "The purpose of the 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. L. 738, which Act, by reason of its construction and application by the Federal Courts, is ineffectual to accomplish the Congressional intent." So far as this has any bearing on the *Duplex* case it can only mean, intelligently, that the jurisdiction of the Act, as construed, was too limited. It does not even raise a faint "innuendo" that the *Duplex* case was *wholly* "disapproved."

^{56a} A sober attempt to follow Mr. Justice Frankfurter from one Act to the other, results in the following. Assume first that the opening sentence of the Norris-LaGuardia

a smuggling process. But no one would much complain how the thing was done, if the purpose were merely that of the Congress which passed the Norris-LaGuardia Act, to extend labor's immunity from the injunction; judicial appeasement could easily go so far. But it is evident that Mr. Justice Frankfurter has no intention of stopping with the injunction. On the contrary, having widened the scope of Section 20 of the Clayton Act and *infused* into it the redefined trade union activities of the later Act, he next points triumphantly to the "catch-all" provision at the end of Section 20 and demands that labor be given complete immunity from all civil and criminal penalties whatsoever. "In this light," or murk, "Section 20 removes all such allowable conduct from the taint of being a 'violation of any law of the United States,' including the Sherman Act."⁵⁷

Wherefore, Judge Davis properly sustained the demurrers in the *Hutcheson* case. He quite properly drew "the sting of criminality" from the indictment, so to speak, without in any way passing upon the "licit and the illicit" in defendants' conduct. Only Mr. Justice Stone, of the majority, refrained from attacking the *Duplex* case; perhaps he regarded the long journey through the Norris-LaGuardia Act and back to the Clayton Act as an incredible intellectual performance at best. In any case, it was quite a needless manoeuvre, since the *Hutcheson* dispute, as he saw it, could be regarded as one between "employer and employees," and so might be treated as a case directly within the limiting language of Section 20. Then, by soft-pedalling the secondary boycott, it was easy to find that the activities charged in the indictment were within the section and not subject to injunction. From this it followed, presumably, that they were not a violation of any law of the United States, including the Sherman Act.

The crux of the case, as is now very evident, has to do with the purpose and meaning of the final words of Section 20. Perhaps that is not quite accurate, for probably Mr. Justice Stone would have preferred

Act is to have general application. It says: "That no court . . . shall have jurisdiction to issue any . . . injunction in a case involving . . . a labor dispute, except" (a) certain procedure to be followed, and (b) the "public policy declared in this Act" be complied with. So far so good. Now assume that a case circumstanced like the *Duplex* case is before the court. Well, the facts would clearly constitute a "labor dispute" for purposes of the Norris-LaGuardia Act. But, unfortunately, that Act does not deal with a boycott. So, it is necessary to look to Section 20 of the Clayton Act. Possibly the Norris-LaGuardia definition of "labor dispute" can now be written into that Act, disregarding of course, that the Norris-LaGuardia definition was stated to be "for the purposes of this Act" alone. But we find that "labor dispute" is nowhere used in Section 20 of the Clayton Act. What the Justice must suggest, therefore, is that the whole opening paragraph of Section 20 should be torn down and rebuilt to conform to the definition of "labor dispute" appearing in the Norris-LaGuardia Act. This is really a fairly large job of law-writing, especially since Congress never so much as hinted that the job should be done.

⁵⁷ 61 S. Ct. 463, 468 (1941).

to put the case on an even broader ground: "In any case there is no allegation in the indictment that the restraint did or could operate to suppress competition in the market of any product and so dismissal of these counts is required by our decision in *Apex Hosiery Co. v. Leader*."⁵⁸ This position will be noticed in a moment, but the fact remains that even Mr. Justice Stone seems to have gone along with the majority in its bland assumption that the "catch-all" provision of Section 20 should be taken at face value, without any investigation of its credit.

Congressional Purpose and Section 20

The striking thing about the "catch-all" provision of Section 20—as Mr. Justice Frankfurter reads it—is that it is so all-pervasive. Everything that Congress has ever written concerning the antitrust laws and labor must be seen through this one inconspicuous clause. But if Congress had really thought the clause so all-important, it would surely have started Section 20 with a broad positive declaration that: "No act on the part of labor, as hereinafter described, shall constitute a violation of any law of the United States." Then, after describing the various activities in question, it might have added a short provision or so regulating the procedure to be followed in the few cases left where an injunction might yet issue. The Norris-LaGuardia Act, itself should have been framed as a simple amendment to Section 20, further broadening the area in which labor activities are immune from law. And as for Section 6 of the Clayton Act, it apparently should never have been written at all; if labor activities are to be immune from *all* laws, there clearly is no sense in granting only a limited exemption from the antitrust laws.

In its origin, as Mr. Justice Frankfurter well knows, Section 20 had nothing to do with the antitrust laws as such; it had nothing to do with the civil or criminal laws; it was designed purely as one of several sections to restrict the power of the judiciary to issue injunctions for the protection of "property," or business, from supposed "irreparable injury" by labor. As Mr. John W. Davis, the Congressman from West Virginia, pointed out in 1912, when the Wilson bill, then immediate predecessor of Section 20 of the Clayton Act, was being debated, a great many serious abuses had crept into the Federal equity practice. "Government by injunction," as he said, "is the expression of a long-standing complaint, which with many has ripened into a deep-seated conviction, that the *writ of injunction* has been carelessly, if not wrongfully used; that it has been turned to purposes beyond its proper scope; and that an evil

⁵⁸ *Id.* 470.

has sprung up which calls for legislative action."⁵⁹ The Wilson bill passed the House, but died in the Senate. In 1914 it was taken over bodily, becoming Sections 17 to 25 of the Clayton Act.⁶⁰

The gist of labor's complaint against "government by injunction" was not so much the unfairness of the procedure,—injunctions were being issued without notice, without hearing, without security, without parties. Violations, moreover, were followed swiftly by imprisonment for contempt. This was serious enough in all conscience, but in many cases, the courts were going to great lengths to find a property right in need of protection where none existed. True, in many cases, when finally a hearing was had, the temporary order was dissolved, but by then the damage to labor had been done. "Time is of the essence in a strike."⁶¹ Moreover, most labor disputes are for legitimate labor ends, to gain recognition, to raise wages or to improve working conditions, however exasperating they may be to the over-acquisitive business man. Accordingly, the plan of the Wilson Act, and of Section 20 of the Clayton Act, and of the Norris-LaGuardia Act, was to list a series of usual labor activities—strike, picketing, primary boycott and so on—which simply could not be *enjoined*, whatever the labor purpose might be. As the "workers" wanted, the chancellor was no longer to be set up at "the inception of a strike as an arbiter of their conduct, as well as a controller of their fates."⁶²

But, while the injunction was thus outlawed, there was no purpose whatever to *legalize*—the term is a slippery one—the various labor activities in question. That was not what Congress was "driving at." The bill was not a substantive provision based on the commerce clause, but one directed at the jurisdiction of the courts in equity—as is Section

⁵⁹ 48 Cong. R. 6435, May 14, 1912.

⁶⁰ The bill was reported to the House on May 6, 1914. 51 Cong. R. 8201. On page 21 of his report, House Report No. 627, Mr. Clayton stated that the new bill, §§15 to 23, was the same as that which passed the House in 1912. These sections were said to "deal entirely with questions of Federal procedure relating to injunctions and contempts without the presence of the court." He then set out in full House Report No. 612 which had accompanied the previous bill. See 48 Cong. R. 6458 (1912).

⁶¹ Frankfurter and Greene, *The Labor Injunction* (1930) 225. This book gives an excellent treatment of the reasons underlying the anti-injunction laws.

⁶² Quoted by Mr. Justice Brandeis, dissenting in the Duplex case, 254 U. S. 433 at 486, to support his point that §20 was drafted with a purpose of "expressly legalizing certain acts regardless of the effects produced by them upon other persons." The quotation, it will be noted, is directed solely at the abuse of the injunction in labor disputes. Moreover, a careful reading of Mr. Justice Brandeis' opinion indicates that he had no thought of such a far reaching exemption as Mr. Justice Frankfurter has written into the "catch-all" clause of §20. The case before him had to do with an *injunction*. It was with respect to the injunction that "the Clayton Act substituted the opinion of Congress as to the propriety of the purpose for that of differing judges." He, moreover, would be too good a lawyer to quote from the majority and minority reports of Congress to any other point; those reports had been written two years before the A. F. of L. had even drafted its "catch-all" clause. And the record is very clear that in 1912 there was no thought to exempt labor for its criminal conduct.

20—and as is also the Norris-LaGuardia Act. All that Congress intended to do was to change the *forum* in which the hearing upon legality should take place. As stated by Representative Wilson, and the same point was made over and over again: “This bill does not legalize the boycotting or picketing. It does not deal with the question of the legality of either of them. What it does do is to prevent the equity court from stepping in, in a case of peaceful picketing, or stepping in in the case of a boycott, and by the writ of injunction undertaking to adjudicate it.”⁶³ Nor did his measure exonerate labor activities from the Sherman Act—except insofar as the right to proceed by injunction was concerned. “The only way in which this measure modifies the Sherman anti-trust law is in limiting the use of the injunction process where no property right is involved.”⁶⁴

It is against this background, therefore, that the final clause of Section 20 must be construed. It was drafted, apparently, by the American Federation of Labor. When introduced by Mr. Webb, on June 2, 1914, he made the following brief statement: “Now, I will say to the gentlemen of the committee, having recognized and legalized the acts set forth in Section 18 [now 20], so far as the conscience side of the court is concerned, the committee feels that *no harm can come* from making those acts legal on the law side of the court, for anything that is permitted to be done in conscience ought not to be made a crime or forbidden by law.”⁶⁵ He could not, he said, make the point any clearer. Mr. Henry then took up the debate and said that the purpose of the amendment was to make certain that not only should labor be free from injunction, “but that no court should be able to lay its hands upon the members of the organizations touching the rights guaranteed in Section 18.” He wanted not only to “prohibit courts of equity from violating those rights, but also [to] restrain the courts of law *from undoing* any of those things we have guaranteed in this section.”⁶⁶

The subsequent debate, either in the Senate or the House, adds very little to these expressions of Congressional purpose. Perhaps Mr. Henry may have wanted to exempt labor from all law, whatever it might do. If so, one may merely say that his sympathy for labor outran his better judgment. But there is little indication that this would be the effect of Mr. Webbs' amendment. The clause, as finally adopted, does not neces-

⁶³ 48 Cong. R. 6450 (1912). Mr. Floyd of Arkansas made the same point forcefully later in the debate: “This bill has nothing to do with the law of conspiracy. Conspiracy under the law is a crime. The bill proposes to repeal no criminal statute. All the criminal statutes stand on the books as they were written, and will so stand when this bill is adopted.” 48 Con. R. 6469 (1912).

⁶⁴ 48 Cong. R. 6444 (1912).

⁶⁵ 51 Cong. R. 9653 (1914).

⁶⁶ *Id.*, p. 9653.

sarily go so far. It merely says: "nor shall any of the acts specified in this paragraph be *considered or held* to be violations of any law of the United States." Not boldly declared *legal*; simply not to be *considered or held* violations. But *considered or held* by whom? Obviously, in view of the setting of the provision, by any court seeking some way around the broad provisions of Section 20, some new way by which an injunction might still be granted. That door was closed firmly by Mr. Webb's "catch-all" clause. Resort should not be had to civil or criminal sanctions for the purpose of "undoing," as Mr. Henry said, what Congress intended to accomplish by Section 20. That, too, is clear enough, but it obviously falls far short of being a blanket immunity to labor conduct, regardless of purpose.

So far as the injunction was concerned Congress was willing to disregard the labor objective—whether legal or not. The purpose of the final clause of Section 20 was to give added assurance that labor might organize and use all reasonable economic pressure as part of its bargaining effort, without being harassed by an intemperate use of judicial process. While it was *necessary* to build on the assumption—so far as the injunction was concerned—that labor's purposes would always be lawful, it obviously was not so where the case could be taken to another forum, months later, for a fair and impartial hearing. At such time, Mr. Justice Frankfurter to the contrary notwithstanding, the court not only could, but should, distinguish between the "licit and the illicit" in the activity in question. There is nothing in the wording of the statute nor in the long legislative history that requires any other result.

An illustration will make the point very much clearer. Suppose that local union leaders call a strike, ostensibly to obtain a wage increase, but actually to "shake down" the employers. Or, having instituted a boycott for some legitimate purpose, refuse to lift it until "paid off." Perhaps, Mr. Justice Frankfurter would not think such things possible, but, unfortunately, they are among the facts of life. And, as witness the case of *People v. Hughes*,⁶⁷ the state courts have from time to time held such conduct to be extortion, punishable by imprisonment. Moreover, the Anti-Racketeering Act⁶⁸ passed by Congress in 1934 would now make it a Federal offense, providing the extortion was or threatened to become a burden in some degree upon interstate commerce. And, providing further, the court could see that such conduct is not a "legitimate" function of a labor organization.⁶⁹ Surely Mr. Justice Frankfurter would have no

⁶⁷ 137 N. Y. 29, 32 N. E. 1105 (1893).

⁶⁸ 48 Stat. 979, 18 U. S. C. Sections 420a-e (1934).

⁶⁹ The Anti-Racketeering Act has an exemption clause worded as is §6 of the Clayton Act: "provided, that no court of the United States shall construe or apply any of the

difficulty in putting the "catch-all" clause of Section 20 to one side in such case—notwithstanding he might quite properly refuse to sanction an injunction directed at the strike or the boycott. In all decency, even Mr. Henry must be taken to have had no purpose to protect *criminal* conduct on the part of labor. And one may scarcely suggest that Congress intended to do so.

But there is an even better illustration: suppose that labor combines with non-labor groups, as in *United States v. Brims*,⁷⁰ to put an embargo on out-of-state products, rig local prices and stabilize wages. Even Mr. Justice Frankfurter recognizes that this would constitute a violation of the Sherman Act, notwithstanding the various *means* by which it might be carried into effect—"strike," "picket," "boycott," and so on—would seemingly all be immune from injunction by reason of Section 20. Of course, it might be said the "catch-all" clause merely refers to *acts*—these may not be enjoined or held unlawful—it says nothing about the *conspiracy* of which they may be, in part at least, the means. But the real reason, as Mr. Justice Frankfurter tacitly recognizes, is that the concluding phrase of Section 20 is not to be given an all-encompassing construction. It is to be effective only so far as necessary to prevent the general purpose of Section 20 from being defeated. In that sense, as Mr. Webb said, "no harm can come." But the clause is not to be made a pro-labor tail to wag the anti-trust dog.

Back to the Apex Case

By recognizing the correctness of the *Brimms* case Mr. Justice Frankfurter opened a wide door through the final clause of Section 20. His opinion comes tumbling down about him like a house of cards. Truly, the court is not called upon by Section 20, as he tells us, to distinguish between the "licit and the illicit," but with equal verity it is called upon to do so by *other* statutes—including the Sherman Act, as modified by Section 6 of the Clayton Act. Both Section 6 and Section 20 are parts of the same statute; both became law on the same day; both must be so construed as to give "hospitable scope" to the evident Congressional purpose *each* was designed to serve. Though the court may be reluctant to consider Section 6, for reasons best known to itself, it obviously cannot—with candor—read the section out of court without a hearing. To

provisions of section 420a to 420e of this title in such manner as to impair, diminish, or in any manner affect the rights of bona fide labor organizations in lawfully carrying out the legitimate objects thereof . . ." (Italics added.) It may be assumed that *extortion* is not a legitimate union activity. But see, *United States v. Local 807*, decided April 4, 1941, C. C. A. 2d.

⁷⁰ 272 U. S. 549 (1926).

exclaim that it would be an outrage if conduct allowable on the equity side were to "become the road to prison" in a criminal proceeding, is a simple appeal to sentiment; it is not to be taken in an appellate court as a substitute for careful reading of Congressional purpose.⁷¹

The decision in the *Hutcheson* case, therefore, must come back to Mr. Justice Stone and *Apex Hosiery Co. v. Leader*⁷² if it is to be supported at all. So far from drawing "the sting of criminality" from the indictment, Mr. Justice Frankfurter has merely taken us on a "frolic and detour," it would seem. Granting, as he does, that the "catch-all" clause of Section 20 does *not* necessarily give immunity to an otherwise *illegal conspiracy* in restraint of trade, it is "idle" to give further consideration either to that section or to the Norris-LaGuardia Act. Labor's right to strike, to picket, to boycott, to what not, have in no way been jeopardized by a sudden and perhaps ill-conceived use of the injunction. On the contrary they have stood unabridged and in full sway throughout the whole course of the *Hutcheson* dispute. Those things that Section 20 gives to Caesar, therefore, have been fully rendered unto Caesar—or unto Mussolini, if you will. At all events, it is now high time that a careful examination be made of whether the Sherman Act, as modified by Section 6 of the Clayton Act, has not been violated. Possibly the Frankfurter majority never quite perceived the real nature of the contest before it.

Labor and the antitrust laws have been a subject for endless debate. Mr. Justice Stone, however, cleared up at least one point in the *Apex* case; it is now settled that the Sherman Act *does* apply to labor—"to some extent and in some circumstances."⁷³ At least it was "settled" last year and the question need not now be reconsidered, however *vanishing* the "circumstances" or "extent" may seem to be. Moreover, Mr. Justice Stone did a further service in pointing to the "well understood common law principles" of restraint of trade as the best guide in construing the Sherman Act. It is true he paid very little attention to "common law principles" in reaching his decision, but nonetheless it is a distinct gain

⁷¹ As everyone knows, "equity does not normally determine whether conduct is 'allowable' or not; it determines whether under the circumstances its extraordinary powers shall be exercised to grant relief of the nature requested or whether the parties shall be left to such remedies as they possess upon the law side of the court. And the 'law side' may in *innumerable cases* treat as criminal that for which injunctive relief is denied. This, moreover, was the great issue underlying the battle over government by injunction in labor disputes, namely that procedurally injunctive relief was fairly administered to labor in this class of cases and that, therefore, the injunctive mode of relief should be curtailed and the complaining parties left to whatever remedies, legal or criminal, might otherwise be available." Landis, *The Apex Case* (1941), 26 *Corn. L. Q.* 191, 212c-212d.

⁷² 310 U. S. 469 (1940).

⁷³ *Id.*, 487.

to have them so fully recognized as being significant.⁷⁴ Speaking of the scheme of the Act, he said:

. . . the legislators found ready at their hand the common law concept of illegal restraints of trade or commerce. In enacting the Sherman law they took over that concept by condemning such restraints wherever they occur in or affect commerce between the states.

Labor Becomes a Business Partner

One can not have read far in the old restraint of trade cases without discovering several things of present significance. Of course, the economy was once very much simpler than now, but it is in the simple economy that the underlying social and economic preconceptions written into the Sherman Act come most clearly into view. At all events, in the not so distant past the individual craftsman was manufacturer, laborer, and businessman all rolled into one—and the consumer too. An unreasonable restraint upon his trade was conceived to be against the public interest, and illegal, for two principal reasons. First, no citizen, be he manufacturer, laborer, or businessman, is to be driven to the wall by a “too fierce competition.” The bare right to pursue one’s calling—or trade—is first of all to be free from illegal restraints.⁷⁶ Secondly, the supply of goods to the public, in such variety and in such quantities and at such prices as a freely evolving economy will permit, must not be curtailed by any group for its own purposes. Broadly stated, therefore, the concept is simply that of a “free market.”⁷⁷

Today, of course, and for many years, there has been a sharp division in function; capital is Capital and labor is Labor. Moreover, as Judge and later Chief Justice, Taft said in the *Addyston Pipe* case, conditions have now so changed, that men have “ceased to be so entirely dependent for a livelihood on pursuing one trade” as formerly. It is no longer so important it would seem—though still not unimportant—that the right to pursue one’s calling be safeguarded. On the other hand, the evils of monopoly, of restraints upon competition in the sale of goods, “have certainly lost nothing in weight in the present day.”⁷⁸ In fact, the wheel has now so far turned that the present court is in danger of having wholly lost sight of the initial purpose of the restraint of trade laws—the protection of the worker in the pursuit of his trade or calling or

⁷⁴ This point is discussed fully by the writer in *Labor Activities in Restraint of Trade: The Apex Case* (1941) 50 *Yale L. J.* 787.

⁷⁵ 310 U. S. 469, 498 (1940).

⁷⁶ Those who have lost sight of this fact would read with profit: Hamilton & Till, *Antitrust in Action* (T.N.E.C. Monograph No. 16, 1940). Also see *United States v. American Medical Ass'n*, 100 F. (2d) 703 (App. D. C. 1940) cert. denied, 310 U. S. 644 (1940).

⁷⁷ See dissenting opinion of Chief Justice Hughes in the *Apex* case, 310 U. S. 469, 523 (1940).

⁷⁸ *United States v. Addyston Pipe & Steel Co.*, 85 Fed. 271, 279 (C. C. A. 6th, 1898).

business. It professes to be able to see only "goods" and "prices" and "consumers." "Competition," we are told, has become the *sine qua non* of a Sherman Act case.⁷⁹

But is this divorce between business and the worker so complete as we have been thinking? To say that business is engaged in making and selling goods, while labor merely works for wages, is not a very realistic way of looking at things. Having become engrossed, as we have, with organization and collective bargaining, we have tended to put capital and labor in opposing camps for all purposes. To those who take their views from the proponents of the "class struggle," of course, any other suggestion is wholly unpalatable. But though bargaining can proceed only at arms length, it would seem that once the bargain is struck, both parties, business and labor, are vitally interested in the sale of their joint product in the market place. That labor's share of the profits may be called wages, while that of business, dividends, is really not very important. Both are engaged in trade. Both are interested in the maintenance of a free market, and in having free access to that market.

Labor's Part in the Kitchen Cabinet Business

One of the clearest illustrations of this identity of interest to be found in the restraint of trade cases is *United States v. Painters District Council No. 14*.⁸⁰ The case had to do with the sale of kitchen cabinets and woodwork in the Chicago area. The question at issue was a very simple one: whether out-of-state manufacturers *and their employees* should be permitted to paint or lacquer their product at the factory—using a spray gun process—or whether defendants could require that they be permitted to do the work by hand in Chicago. The evidence all indicated that a better job could be done at the factory; whether there was a difference in "price"—of such consequence to Mr. Justice Stone—does not appear to have been thought important. However that might be, defendants were charged with having "pulled" one job after another—very much as the Carpenters did in the Hutcheson case—or with having threatened to do so, until they had brought about a virtual embargo on factory-painted products.

On these facts Judge Lindley had very little trouble in finding a "direct" and "unreasonable" interference with interstate commerce, in violation of the Sherman Act. The case was sufficiently obvious to the Supreme Court, after full hearing, that it affirmed without opinion. In

⁷⁹ 310 U. S. 469 (1940). This innovation has caused concern. See Cavers, *Labor v. The Sherman Act* (1941) U. Chi. L. Rev. 246, 254. Gregory, *The Sherman Act v. Labor* (1941) 8 U. Chi. L. Rev. 246; Landis, *The Apex Case* (1941) 26 Corn. L. Q. 191.

⁸⁰ 44 F. (2d) 58 (1930), *aff'd* 284 U. S. 582 (1931).

answer to the union's argument that perhaps its members were not subject to the antitrust laws, their purpose being merely to extend their jurisdiction, Judge Lindley said:⁸¹

It is not because defendants are members of labor unions that they are subject to restraint in this action; it is because defendants, irrespective of the purpose or character of their organizations, have unreasonably interfered with interstate commerce. The same action upon the part of building contractors or upon the part of owners of apartment houses would amount to the same unlawful action and be subject to the same restraint.

Of course this case was decided in 1931, during the dark era, as Mr. Justice Frankfurter would say, before the Norris-LaGuardia Act was passed. But had Judge Lindley been "enlightened" by "the public policy of the United States" as declared in that Act his decision should have been no different. The case had nothing to do, it will be noted, with the "individual unorganized worker." Defendants were very well organized indeed, and it does not appear that they were seeking to promote organization in other states. In this respect, the case was weaker even than *Duplex v. Deering*⁸² and the other secondary boycott cases, for there the union purpose, at least, was a legitimate one, to attain recognition at the factory. So far from being privileged in their actions, therefore, it was only too obvious that defendants had acted contrary to the policy of the restraint of trade laws in two respects. First, their actions restrained the right of painters (and their employers) in other states to pursue their own trade or calling as they might see fit—this by effectually denying to their product, painted cabinets, any access to the Chicago market. Secondly, the result to the public was equally contrary to ancient common-law principles. Not only did the consumer have to suffer the delays and expenses incident to labor controversy, but in the end he had to put up with an inferior product.

Labor, it would seem—once its turbulent struggle for recognition is over—must be accorded the status of the businessman. To date we have been content, even anxious, to see the "individual unorganized worker" ruthlessly crushed by unionism. That the unorganized worker—as in *Pickett v. Walsh*⁸³—has offered to do better work at lower costs, that

⁸¹ *Id.*, 62.

⁸² 254 U. S. 443 (1921).

⁸³ 192 Mass. 572, 78 N. E. 753 (1906). This case has two branches, only one of which is noticed by labor attorneys. It grew out of an effort of the Bricklayers to extend their jurisdiction over the "pointing" part of the work at the expense of plaintiffs, who had been refused an A. F. of L. charter. To gain their point defendants called a strike on three jobs, on only one of which plaintiffs were working. It was held that the Bricklayers could properly refuse to work on a job with the Pointers, but that when they sought to tie up other jobs, they had gone too far and should be enjoined.

The case is of importance here because it was before Congress, and apparently approved, when the Clayton Act was drafted. See House Report No. 612, 48 Cong. R. 6460

to deprive him of his job by organized coercion may have meant poverty to him, have been considerations almost ignored. In the long run, we assume, the general benefits to be gained from organization will outweigh the injustice to occasional individuals trampled down in the process. But with maturity attained, with organized labor an active partner with capital in their joint business, labor must put away childish things and act its new part. In other words, if one *organized* labor group is to compete with another *organized* labor group for the privilege of selling its goods in the market place, there are certain rudimentary principles of fair trade, it would seem, which must be followed.

Labor and the Poultry Racket

The Supreme Court has seen this clearly enough where labor has connived with "non-labor groups." The best illustration, other than the *Brimms* case, is *Local 167, International Brotherhood of Teamsters, etc., et al. v. United States*, decided in 1934 by a unanimous court.⁸⁴ The case had to do with a conspiracy to control the sale of poultry in the New York market. Labor's part, via the teamsters, consisted principally in refusing "to handle poultry for recalcitrant marketmen." Oddly, no one appears to have referred for enlightenment to "the public policy of the United States" as announced in the Norris-LaGuardia Act. Nor was it noticed that the teamsters had acted in a wholly polite and lawful way, in fact, as sanctioned by Section 20 of the Clayton Act. Labor, it will be recalled, may refuse or cease "to perform any work or labor" whatever, even for marketmen, and its acts in so doing, Mr. Justice Frankfurter says, may not be treated as a violation of any law, including the Sherman Act. These matters did not trouble the Court; the *purpose* of the labor activities in question was obviously "illicit," providing only the commerce affected could be said to be interstate in character. Finding that this was so, even though the various acts of restraint were mainly intra-state, the defendants were enjoined from continuing the conspiracy. Beyond question the case was rightly decided.⁸⁵

(1912). Only the first part of the opinion is quoted in the House Report, but "the whole opinion could be studied with profit." On the second branch of the case Judge Loring said: "It is a combination by the union to obtain a decision in their favor by forcing third persons who have no interest in the dispute to force the employer to decide the dispute in their (the defendant unions') favor. In our opinion organized labor's right of coercion and compulsion is limited to strikes against persons with whom the organization has a trade dispute." It may fairly be said, therefore, that "ceasing to perform any work," as intended by Congress in §20, would not have given immunity to the Carpenters' actions in the *Hutcheson* case as respects Borsari, Stocker and Gaylord.

⁸⁴ 291 U. S. 293 (1933). The opinion was by Mr. Justice Butler. With him were Chief Justice Hughes and Justices Van Devanter, McReynolds, Brandeis, Sutherland, Stone, Roberts and Cardozo.

⁸⁵ The significance of labor's combination with "non-labor" groups, if the case is still good law, is not that labor thereby becomes subject to the Sherman Act, but rather that

A. F. of L. v. C. I. O. in the Milk Business

But to return to organized labor's "competition" with itself. The case of *Lake Valley Farm Products, Inc. v. Milk Wagon Drivers Union, Local 753*, which had to do with two conflicting systems of distributing milk in the Chicago area, is instructive.⁸⁶ The defendants, teamsters affiliated with the A. F. of L., were employed by various Chicago dairies whose principal business consisted in the door-to-door sale of bottled milk. Plaintiffs were four: one was a Wisconsin cooperative association; two were Chicago dairies which bought milk from the association; and the fourth was the Chicago local of a C. I. O. union, the Amalgamated Dairy Workers, whose members were employed by the two dairies. Plaintiffs used the "vendor" system, milk being sold in quantity to "vendors," who in turn delivered it to independent retail stores for sale over the counter. The evidence left no doubt that by the "vendor" system milk could be sold at substantially lower prices than prevailed for milk delivered to the householder by defendants. Moreover, it was being sold at such rates, cutting seriously into the business of the dairies by whom defendants were employed.

Something had to be done. Accordingly, defendants embarked upon a vigorous campaign to stop the "vendor" system; it constituted the only real competition with their door-to-door method of distribution in Chicago. The first step was to induce "vendors," where possible, to join defendants' union—the very significant stipulation being attached always that, upon joining, the new members must quit the bulk delivery trade. When these and other efforts failed the retail stores were picketed; in some instances deliveries of other food products into these stores was stopped. If this did not bring results—by forcing the stores to discontinue the trade—various less subtle "competitive" tactics were brought into play. Circuit Judge Sparks described them this way:⁸⁷

The growth of the cut-rate milk business in Chicago has been accompanied by violence to the distributing stores. They have had their windows broken, they have been bombed, set afire, they have submitted to stench bombs and to other acts of violence. Cut-rate dairy plants have been bombed, have had machinery smashed, and their delivery trucks have been seized and destroyed, and they have been submitted to other [sic] acts of violence.

Upon the merits Judge Sparks decided that the facts presented an aggravated case of secondary boycott—and he held that an injunction should issue. The case was worse even than the *Duplex* case, in fact,

by so doing it even loses the immunity from *injunction* which it might otherwise have by §20 of the Clayton Act.

⁸⁶ 108 F. (2d) 436 (1939).

⁸⁷ *Id.*, 439.

because here defendants quite clearly had no single purpose to organize the plaintiff dairies, but on the contrary, intended to force them to discontinue a competing system of distribution of milk—a system, by the way, of great benefit to consumers in the poorer districts. But so far as defendants were concerned the consumer could be damned; they and their employers wanted no competition. And, on appeal, Mr. Justice Black saw the case from the defendants' viewpoint.⁸⁸ It would not do to say, as the lower court had done, that this was not a bona fide labor dispute, because the statutory definition is as broad as all outdoors; it makes no distinction as to good or bad faith or as to what the labor purpose may be.⁸⁹ It followed that an injunction could not issue, the procedural requirements of the Norris-LaGuardia Act not having been complied with.

Of course, this was not a ruling on the basic question, whether the defendants' activities were in violation of the Sherman Act, as the Circuit Court had held. But Mr. Justice Black's treatment of the point, stressed below, that defendants sought not so much to organize the plaintiffs as to force their abandonment of the "vendor" system, is enlightening. As he put it, to say as the lower court did that this "was an issue unrelated to labor's efforts to improve working conditions is to shut one's eyes to the everyday elements of industrial strife."⁹⁰ If by this Mr. Justice Black meant that the milk wagon drivers were seeking to protect their own work, or even that there is a great deal of industrial strife, he is no doubt quite right. But, if he meant to imply that the thing is not a violation of the Sherman Act, as modified by Section 6 of the Clayton Act, he cannot have read those statutes carefully. The "public policy of the United States" as announced in the Norris-LaGuardia Act, if indeed it was involved in this case at all, is by no means the sole "public policy" by which the Court is to be guided. Long ago Senator Sherman stated a broader one for the protection of the plaintiffs, *and of the consuming public*, in these words:⁹¹

It is the right of every man to work, labor, and produce in any lawful vocation and to transport his production on equal terms and conditions and under like circumstances. This is industrial liberty and lies at the foundation of the equality of all rights and privileges.

To say, moreover, as Mr. Justice Frankfurter suggests, that the case would be very different had defendants combined with their employers,

⁸⁸ Milk Wagon Drivers' Union, Local No. 753 v. Lake Valley Farm Products, Inc., 311 U. S. 91 (1941).

⁸⁹ And properly so, granting that the purpose was solely to draw an effective anti-injunction statute. See *New Negro Alliance v. Sanitary Grocery Company*, 303 U. S. 552 (1938).

⁹⁰ 61 S. Ct. 122, 126 (1941).

⁹¹ 21 Cong. Rec. 2457 (1890).

that is, with "non-labor groups," is indeed to shut one's eyes to everyday realities. There is no question that the door-to-door dairies were fully conversant with defendants' fight; at the very least they were silent partners in the campaign to drive plaintiffs out of business. And, given such a business orientation, the case is without question a violation of the Sherman Act. Perhaps the clearest illustration is *Eastern States Lumber Ass'n v. United States* where a group of retailers—much as here—sought to prevent wholesalers from selling lumber products in quantity directly to the consumer. The means used was to "blacklist" the recalcitrant wholesalers. There was no showing, as here, that the retailers were trying to eliminate price competition,—merely to eliminate the particular wholesalers and their employees. Mr. Justice Day, speaking for a unanimous Court, put the decision on a broad ground:⁹²

When the retailer goes beyond his personal right, and, conspiring and combining with others of like purpose, seeks to obstruct the free course of interstate trade and commerce and to unduly suppress competition by placing obnoxious wholesale dealers under the coercive influence of a condemnatory report circulated among others, actual or possible customers of the offenders, he exceeds his lawful rights, and such action brings him and those acting with him within the condemnation of the act of Congress . . . (Italics added.)

Machinists, Too, Have Rights

It is time to take stock. Seen in the above perspective, the Carpenters' quarrel with the Machinists, in the *Hutcheson* case, was simply one to get that part of the business of making beer which the Machinists had secured for themselves by contract. Very much as the Chicago painters, in the *Painters District Council* case had tried to take from the members of a brother union in another state, the business of painting cabinets. Or, in the *Milk Wagon Drivers* case, as the teamsters had tried to monopolize the delivery part of the milk business. Of course, no one has any wish to criticize purposes so laudable; it is part of the competitive game; but the game must be played according to rules. If the Carpenter's scramble for part of the business of making beer is to be judged by the rules applying to other participants in the business struggle, it unquestionably violated common law principles for the protection of trade. Business competitors of Anheuser-Busch, Inc., who might resort to equally high handed methods to take over its part of the business of making and selling beer, would be given short shrift indeed.

Consequently, though denied admittance at the door, Section 6 of the Clayton Act has come in at the window. But, how the Court could

⁹² 234 U. S. 600, 614 (1914).

have found defendants' conduct in the *Hutcheson* case either legitimate in purpose or lawful as to means is not clear. Certainly the Carpenters are in a poor position on their record to make such a contention. Not that a campaign for members, or for business if you will, is wrongful—for the exact opposite is true. The difficulty here was that the jobs had already been filled, a point whose importance the Carpenters have always insisted upon, when the shoe has been on the other foot. In *Central Metal Products Corp. v. O'Brien*, for example, the Carpenters had obtained certain work of installing metal doors, casings and so on, contrary to a jurisdictional award giving such jobs to the Sheet Metal Workers. When the Sheet Metal Workers sought by strike, picketing, boycott and so on to enforce their claims, the Carpenters stood by, quite smugly, to see their employer obtain an injunction.⁹³ Again, in *Armstrong Cork & Insulation Co. v. Walsh*, the Carpenters profited at the expense of another A. F. of L. union, the United States, Tile and Composition Roofers, Damp and Waterproof Workers' Association. This had to do with a jurisdictional dispute over which craft should install insulating cork board. The Carpenters having secured their position by contract, the Roofers were enjoined from interference.⁹⁴

No doubt it is "idle" to speak of such cases today; they were decided before March 23, 1932. In fact, they rest in part on the philosophy underlying the decision in *Hitchman Coal & Coke Co. v. Mitchell*, which as everyone knows is as dead as a door nail.⁹⁵ But there are increasing signs that the state courts, at least, are becoming impatient with labor activity which flies in the face of "the public policy of the United States" and has as its purpose the destruction of collective bargaining. And the necessary law is being found, sometimes with the help of the legislature,⁹⁶ to condemn it. A recent example is *Euclid Candy Co. of New York v. Summa*,⁹⁷ not strictly a jurisdictional dispute case, but instructive. Here an election was held, under National Labor Relations Board auspices, to see which of two unions should be recognized as bargaining

⁹³ 278 Fed. 827 (D. C. Ohio 1922); aff'd *O'Brien v. Fackenthal*, 5 F. (2d) 389 (C. C. A. 6th, 1925). To the same effect see *Dahlstrom Metallic Door Co. v. Local No. 5 of the International Ass'n. of Bridge, Structural and Ornamental Iron Workers* (D. C. Dist. of Columbia, 1929) 11 Law & Labor 88; *Metal Door and Trim Co. v. Booth* (S. D. Ind., 1928) 11 Law & Labor 26.

⁹⁴ 276 Mass. 263, 177 N. E. 2 (1931). See further, Jaffee, *Inter-Union Disputes* (1940), 49 Yale L. Journal 424, 450.

⁹⁵ 245 U. S. 229 (1917). The court's holding was expressly nullified by §103 of the Norris-LaGuardia Act, that is, insofar as it enforced the "yellow dog" contract. The ability of Congress to write a strong substantive declaration on this score, though, makes all the more significant its failure to enact so much as a "catch-all" clause concerning the other matters covered by the Act.

⁹⁶ See *Kraemer Hosiery v. American Etc. Workers*, 305 Pa. 206, 157 Atl. 588 (1931) and Pa. Laws 1939, Act 163.

⁹⁷ 19 N. Y. S. (2d) 382 (1940), aff'd 21 N. Y. S. (2d) 614 (1940).

agent. Defendants lost and a labor contract was made with the other union, whereupon the defendants took the case to the old arena for a "trial by combat." In granting an injunction—the case was thought no longer to involve a "labor dispute"—Judge Daly said:

The plaintiff has thus been placed in a dilemma. If it accedes to the demands of the minority union it breaches its contract with the certified union. If it attempts to abide by the terms of said contract, as it did in the instant case, it has a strike on its hands, and picketing and the other activities that go with it. It seems to the court that since the picketing by the minority union is, in effect, an attempt to force the breach of the agreement which was entered into under the circumstances above described, this court of equity should prevent the irreparable injury which flows therefrom.⁹⁸

But a very different case, indeed, is presented when the "out" union honestly seeks to raise the wages or to improve the working conditions of the "in" union.⁹⁹ In so doing it is not actuated by purely altruistic purposes, of course, but to "eliminate price competition based on differences in labor standards." This is to protect the employer—and so the union—from competition with goods produced under sub-standard labor conditions. But only by so doing may a union wage scale be maintained. And since this is the "objective of any national labor organization" it would seem to follow that it is "legitimate" for purposes of Section 6, although the "in" union may have buttressed its position by contract. And, although to break up such a relationship may result in a certain diminution of competition in the market place,—that based on differences in labor costs. As Mr. Justice Stone put it in the *Apex* case, this "has not been considered to be the kind of curtailment of price competition prohibited by the Sherman Act."¹⁰⁰

Mr. Justice Frankfurter, however, tells us in the *Hutcheson* case that such considerations can be given no weight. "The fact that what

⁹⁸ 19 N. Y. S. (2d) 382, 384 (1940). And see *Opera on Tour, Inc. v. Webber et al.*, 10 N. Y. S. (2d) 83 (1939), *aff'd* April 24, 1941, by the Court of Appeals. In this case defendants were enjoined from directing musicians, stage hands, and others to cease rendering services for plaintiff, where the purpose was to force the plaintiff to discontinue the use of electrically-transcribed recordings. In the opinion of Judge Finch this was "not a lawful labor objective."

⁹⁹ The case of *Stillwell Theatre, Inc. v. Kaplan*, 259 N. Y. 405, 182 N. E. 63 (1932) is perhaps the best example in the state courts. There the court refused to enjoin "picketing" by representatives of the Motion Picture Operators Union, notwithstanding the plaintiff theaters were operating under a contract with another union. But, Pound, Ch. J., was careful to point out that: "Unquestionably defendant in picketing these three theaters was actuated by a desire to improve labor conditions as to wages, hours, number of employees and conditions of work," and "although incidental disadvantage to the employer might result," that was not material. Picketing in such case is clearly "within the allowable area of economic conflict."

¹⁰⁰ 310 U. S. 469, 503-504 (1940). Of course Mr. Justice Stone, with complete inconsistency, then proceeded to say that the labor objective in the boycott cases "was held to offend against the Sherman Act because it effected and was aimed at suppression of competition with non-union made goods in the interstate market" (p. 507). See further, 8 Int. Jur. Assoc. Bul. 125, 136 (1940).

was done was done in a competition for jobs against the Machinists rather than against, let us say, a company union is a differentiation which Congress has not put into the federal legislation and which therefore we cannot write into it."¹⁰¹ If by "company union" Mr. Justice Frankfurter meant what the term usually connotes, a union having no real bargaining position and too often operating under sub-standard conditions, he is plainly wrong. Of course "insofar as the Clayton Act is concerned," that is Section 20 thereof, the learned Justice is quite right, for that section is aimed at the labor injunction. But if he means to include Section 6 of the Clayton Act—and there is every reason why he should, since that section deals specifically with antitrust violations by labor—he simply does not have a leg to stand on. Surely it would not be too difficult for the Court to "equate" its rulings with the "policy" of the National Labor Relations Act; a fight to disrupt a bargaining relationship which the Labor Board would approve should not be held *legitimate*. A strike to "organize the unorganized," or to take over a "company union," on the other hand, would be very different indeed.

There is a further consideration. Even if we were to assume that the union purpose in the *Hutcheson* case was *legitimate* for purposes of Section 6, a violent assumption, the whole question of *lawfulness* would still have to be considered. The union purpose in the *Duplex* case¹⁰² was legitimate enough, to organize the plant and so to eliminate competition between "union and non-union made goods," but the boycott was held to be *an unlawful means*. In the *Hutcheson* case Mr. Justice Frankfurter carefully avoided using the term "boycott" at all—even though it was charged in the indictment; defendants were merely "recommending" that their "friends" cease buying Anheuser-Busch beer. That the "independent dealers" may have suffered in the process, as the facts would show, was not considered. And as for the attempts to coerce Busch by bringing pressure on Borsari, Stocker and Gaylord, this was nothing at all; any person may refuse to work as he pleases. Refusal to work, it will be recalled, though, was the weapon by which the poultry conspiracy, in *Local 167 v. United States*,¹⁰³ was made effective.

If the Court were seriously concerned, in following Congressional purpose on these points, it would read with interest the debates in the House of Representatives in 1912, when Section 20 was first taking shape. What was there deemed an *unlawful* trade restraint, for purposes of

¹⁰¹ 61 S. Ct. 463, 466 (1941).

¹⁰² 254 U. S. 443 (1921).

¹⁰³ 291 U. S. 293 (1933).

Section 20, was set out in no uncertain terms. I again quote from Mr. John W. Davis:¹⁰⁴

What is a secondary boycott? It can be summed up in a sentence as *coercion in some form directed against a person who is not a party to the trade dispute, in order to force him to join in injuring one of the parties to the dispute.* It is a clear invasion of the rights of neutrals. . . . This bill does not countenance *coercion* toward anyone, and least of all toward third parties. (Italics added.)

While labor may not be required either to work for any employer or to buy his products it seems fairly clear that Congress did not intend to sanction *coercion* of the sort employed against neutrals in the *Hutcherson* case. Whether such coercion be called a boycott or not, is more or less beside the point; it would seem to be "unlawful" in a restraint of trade sense.

A Federal Labor Commission

Chief Justice Hughes wrote in the *Apex* case that the majority opinion opened "vistas of new uncertainties in the application of the Sherman Act."¹⁰⁵ His prediction has come true. What the majority will do next is not clear. As an intellectual matter, though, it must recognize that it was plainly in error in saying that an elimination of "price competition" has heretofore been essential to a Sherman Act case, whether involving labor or business. Labor, by Section 6 of the Clayton Act, has been given an immunity in that very situation at least; it must be permitted to eliminate price competition between union and non-union made goods in order to exist at all. On the other hand, when labor has no such purpose, but is merely bent on hi-jacking another union out of its jobs—or share of business—and in addition resorts to third party coercion of whatever sort to gain its ends, the exact opposite is true. Such an elimination of "competition," if it results in a substantial burden on interstate commerce, has traditionally been thought to constitute a violation of the antitrust laws.

The Frankfurter wing of the court, having so recently and so positively taken a position on the all-importance of the "catch-all" clause of Section 20, will probably not be willing to rechart its course at once, however much in error. On reconsideration, of course, before a full court, the logical difficulty of squaring the Frankfurter construction of

¹⁰⁴ 48 Cong. R. 6440 (May 14, 1912). See Frankfurter and Green, *The Labor Injunction* 160 (1930), where the learned authors, in speaking of the Congressional debate from which I quote, say that: "The ablest speech was by John W. Davis, then a member from West Virginia, who supported the bill as an 'effort to crystallize into law the best opinions of the best courts'."

¹⁰⁵ 310 U. S. 469, 514 (1940).

that section with the Court's holdings in the *Brimms*¹⁰⁶ and *Local 167*¹⁰⁷ cases can be made very apparent. It would seem some qualification will have to be made. Certainly some attention will have to be given to Section 6 of the Clayton Act.¹⁰⁸ But, with the Court in its present frame of mind, the prospect that a statesmanlike discussion of labor activities and the restraint of trade laws will be handed down is small indeed.¹⁰⁹ This is labor's day; the sins of big-business are now to be vindicated. The public interest, after all, is but an incidental matter. Mr. Justice Frankfurter's court is apparently not to be distinguished from that of Mr. Justice Sutherland; one, it is true, was pro-business and the other, it seems, is pro-labor, but *each* has shown an equally fine disregard of Congressional enactments running counter to its own particular bias.¹¹⁰

The dangers to labor in such a course should be obvious to the Court. If neither the "sit-down" strike nor the "jurisdictional" dispute are within the reach of present law; if the court, unfortunately, is not permitted to pass on the "rightness or wrongness" of the "boycott"; it would seem that Congress has no alternative but to write more explicit law for the Court's guidance. The danger is that if such legislation is put through in an anti-strike defense atmosphere it will go much too far. Of course, it would be amusing to see the present Court strike down such legislation as unconstitutional, resorting to the old cases under the Fifth and Fourteenth amendments for the purpose. In fact it has already forbidden the States to regulate "picketing," supposedly because of a possible infringement of the right of free speech.¹¹¹ That is, the good old doctrine of *laissez faire* enthroned once more, this time in behalf of big-labor. But it cannot be said that such a spectacle would contribute much to the long-range interests of labor, or business, or the public.

¹⁰⁶ 272 U. S. 549 (1926).

¹⁰⁷ 291 U. S. 293 (1933).

¹⁰⁸ In fact, it would not be too much to expect a construction of §6 indicating that anything a labor union wants to do is perforce *legitimate*, and any means it may adopt to gain its ends is perforce *lawful*. But to so hold would be "subtle business, *calling for great wariness* lest what professes to be mere rendering becomes creation and attempted interpretation of legislation becomes legislation itself."

¹⁰⁹ See the court's action recently in dismissing without opinion three other cases in this field. 9 United States Law Week 3269 (April 7, 1941).

¹¹⁰ The *Hutcheson* opinion invites a comparison with that of Mr. Justice Sutherland in *Carter v. Carter Coal Co.*, 298 U. S. 238 (1935). And see further Mr. Justice Sutherland's opinion in *Adkins v. Children's Hospital*, 261 U. S. 525 (1923). It would seem almost that Mr. Justice Frankfurter does not wear the Holmes mantle after all, but that of Mr. Justice Sutherland, other side to.

¹¹¹ See *Thornhill v. Alabama*, 310 U. S. 88 (1940), and the discussion by Gregory, *Peaceful Picketing and Freedom of Speech* (1940), 26 Am. Bar Assoc. J. 709. Compare, *Milk Wagon Drivers Union, Etc. v. Meadowmoor Dairies, Inc.*, 311 U. S. . . , 61 S. Ct. 552 (1941).

The key to the problem, it would seem, lies in a frank recognition that *organized* labor is in fact business.¹¹² Labor is making a strong bid for a share in industrial management; it is already the dominating force in some fields. The old struggle for union recognition must be put out of mind; that fight, however prominent in the news today, is in the "mopping up" stage. While matters having truly to do with collective bargaining—wages, hours and so on—must no doubt continue to be settled by "combat," there are many other labor demands and practices which are subject to regulation in the public interest. These, like their business counterparts, too often offend in that they put an unreasonable burden upon trade and commerce. If history is to repeat itself, therefore, the next move on the part of Government should be to set up a body roughly paralleling the Federal Trade Commission—let us say a Federal Labor Commission¹¹³—with broad authority to take the kinks out of labor practices which are unduly in restraint of trade. Not to supplant the Sherman Act as enforced by the Courts, but to provide a more flexible administrative device to supplement their work,—perhaps to enlighten them. No doubt Mr. Justice Frankfurter would not trust such a body to be fair to labor. But then, labor has not trusted the courts. The point is, though, that the public cannot trust *any* group to function wholly in "a legal no-mans-land."¹¹⁴

A single example must serve to illustrate the point.¹¹⁵ There is pending now in Southern Illinois another case against the Carpenters—this time charging them with having conspired to keep pre-fabricated housing out of the East St. Louis area.¹¹⁶ If one may believe the news-

¹¹² Mr. Justice Brandeis long ago insisted upon the point in his testimony before the Commission on Industrial Relations, 84 (1915). In his view the problems of "trade" are the joint problems of employer and employee:

No mere liberality in the division of the proceeds of industry can meet this situation. There must be a division not only of the profits, but a division of the responsibilities; and the men must have the opportunity of deciding, in part, what shall be their condition and how the business shall be run. They also, as a part of that responsibility, must learn that they must bear the results, the fatal results, of grave mistakes, just as the employer.

Whether Mr. Brandeis intended to include "responsibility" for a violation of the Sherman Act does not appear, but logically it would seem that he would have to.

¹¹³ The word "commission" is carefully chosen. The suggestion is not to set up some sort of arbitration board; such bodies function in the area of collective bargaining between labor and capital. The proposed commission would deal with those uneconomic practices of labor, which are "the causes of certain substantial obstructions to the free flow of commerce."

¹¹⁴ The suggestion that state laws afford adequate protection for the public builds on the assumption that labor disputes are merely "local" matters. See, Shulman, *Labor and the Anti-Trust Laws* (1940), 34 Ill. L. Rev. 769. Obviously the assumption has no basis in fact.

¹¹⁵ For a discussion of many of the other troublesome labor-business problems, see Arnold, *The Bottlenecks of Business* (1940) 249-253.

¹¹⁶ *United States v. Goedde & Co.*, indictment returned in the District Court for the Eastern District of Illinois, September 21, 1940. In this case defendants are also charged with eliminating "price competition" in combination with "non-labor" groups.

papers the same fight is being carried on in other parts of the country. Why? For two principal reasons: one, the local unions would prefer to erect houses by hand on the job in the way their grandfathers did;¹¹⁷ and two, the principal plants making pre-fabricated houses are C. I. O. That such houses may be cheaper, better, or, in any event, the kind that the home builder may want, is of no particular importance. That the manufacturer may have had no voice in whether his employees should organize C. I. O. or A. F. of L. is also beside the point. But is either statement true? On the contrary it would seem essential—quite as much for labor as for anyone else—that somebody be set up to certify that products made under proper conditions by organized labor—whether C. I. O., A. F. of L. or any other—may not be so discriminated against. After all, this is supposed to be a free country.

Such a commission would have a great deal of work cut out for it to do. But the issue in the *Hutcheson* case—which the parties have fought over for a quarter of a century—could be settled rather easily.¹¹⁸ And so also with many others.¹¹⁹ The assurance, moreover, that some check could be put on dictatorial and uneconomic labor leadership—as upon similar business leadership—would go a long way to clear the path for orderly labor relations. Perhaps something of the sort may come to pass. If so, Mr. Justice Frankfurter and his opinion in the *Hutcheson* case should be given great credit; his decision will have “been one of the potent forces,” unwittingly, in guaranteeing to all labor the advantages of a “free market.” That way lies true “industrial liberty.”

¹¹⁷ The apology of course is that the union wishes only to make work for its members. While this is laudable enough, in itself, it must be squared with the rights of the public.

¹¹⁸ In all probability by merely insisting that the two unions keep their quarrel out of the market place. There should be no objection if the Carpenters were to picket the Machinists' hall, or vice versa.

¹¹⁹ See, for example, the account of Stanley High, *Labor in the World of Tomorrow* (1939), 35 *Reader's Digest*, No. 211, p. 10.