1940

Labor and the Anti-Trust Laws

Harry Shulman

Yale Law School

Follow this and additional works at: https://digitalcommons.law.yale.edu/fss_papers

Part of the Antitrust and Trade Regulation Commons, and the Labor and Employment Law Commons

Recommended Citation

Shulman, Harry, "Labor and the Anti-Trust Laws" (1940). Faculty Scholarship Series. 4622.
https://digitalcommons.law.yale.edu/fss_papers/4622

This Article is brought to you for free and open access by the Yale Law School Faculty Scholarship at Yale Law School Legal Scholarship Repository. It has been accepted for inclusion in Faculty Scholarship Series by an authorized administrator of Yale Law School Legal Scholarship Repository. For more information, please contact julian.aiken@yale.edu.
LABOR AND THE ANTI-TRUST LAWS*

Harry Shulman†

This year marks the 50th anniversary of the birth of the Sherman Law. Before the statute was three years old, in the seventh proceeding under it instituted by the government, labor activities in the course of a strike of transportation workers in Louisiana were enjoined as violative of its prohibitions. From that day to the present the Sherman Law has been successfully invoked against labor activities in a great variety of cases. The Clayton Act of 1914, that "industrial magna charta" whose words were regarded by Samuel Gompers as "sledge hammer blows to the wrongs and injustices so long inflicted upon the workers" and which President Wilson characterized as giving "a veritable emancipation" to "the working men of America," was found in fact to be important for what "it does not authorize" and to be "merely declaratory of what was the best practice always." Its practical significance came to be the addition of a remedy of a private suit for injunction under the Sherman Law to the original remedies of criminal prosecution, government suit for injunction and private action for treble damages—a change of considerable importance since about half of the proceedings against labor under the anti-trust laws after 1914 have been private injunction suits under the Clayton Act. The result was, as observed by Professor Frankfurter in 1930, that whatever uncertainty there may be about the effectiveness of the Sherman law with respect to "industrial combinations" and "economic forces," "there can be

* This is, with some revisions, a talk delivered at Northwestern University School of Law, February 8, 1940, as part of a symposium on the anti-trust laws provided on the Rosenthal Lectures Foundation.
† A.B. 1923, Brown University; LL.B. 1926, S.J.D. 1927, Harvard University. Professor of Law, Yale University School of Law.

1 Act of July 2, 1890, 26 Stat. 209.
2 United States v. Workingmen's Amalgamated Council, 54 Fed. 994 (E. D. La. 1893), 57 Fed. 85 (C. C. A. 5th, 1893). The petition was filed on March 25, 1893, an injunction issued on the same day, and the decree was affirmed on June 13, 1893. U. S. Dept. of Justice, The Federal Anti-Trust Laws (1939) 84.

3 The cases through 1929 are collected in Appendices B and C of Berman, Labor and the Sherman Act (1930). The proceedings instituted by the Government are listed in the Federal Anti-Trust Laws, supra note 2. See also Comment (1940) 49 Yale L. J. 518.
5 Quoted in Frankfurter and Greene, The Labor Injunction (1930) 143.
6 Quoted in Frankfurter and Greene, op cit. supra note 5, at 143, n. 36.
no doubt of its potency as a restraint upon the activities of organized labor . . . when all discounts [for "the inadequacies of labor leadership" and "the consequences of economic forces"] are made, it is common ground among students of the Sherman Law, as well as among industrial and labor leaders, that it has been one of the strongest influences counteracting trade unionism in the United States.\(^{10}\)

Yet, during the entire life of the federal anti-trust laws, organized labor has not only complained of undue harshness in their application to labor but has insisted that it has been completely exempted from them and, indeed, that it was never intended to be subject to them. At the present term of the Supreme Court, in the Chicago Milk case,\(^{11}\) counsel for the A. F. of L. elaborately argued its claim of immunity. The Court held that the contention that "the Sherman Act does not apply to labor unions or labor union activities [was] not open on this appeal" because of the "restrictions of the Criminal Appeals Act" under which its jurisdiction was invoked.\(^{12}\) Judicial reconsideration of labor's claim was thus postponed, but the stage for reconsideration is being set and labor is in the meantime loudly proclaiming its absolute immunity. "Reconsideration" may not be the appropriate word; for, though the entire doctrine with reference to labor under the Sherman Law is judge made, the applicability of that law to labor activities has really never been thoroughly considered in opinions of the Supreme Court, or, indeed, of the lower federal courts.

In the Danbury Hatters case of 1908,\(^{13}\) the Supreme Court decided for the first time, and definitively, that the Law was applicable. Later cases accepted the holding without question and built on it as a foundation. The whole structure is an inverted pyramid resting on that case. But even there the issue was little considered. The opinion of the Court, written by Chief Justice Fuller, does little more than assert the conclusion. True, said the Court, adopting the language of the Louisiana federal court in the first government labor case\(^{14}\) under the Act, "the statute had its origin in the evils of massed capital." But as finally worded, it prohibited "every" contract, combination or conspiracy in restraint of trade. It "made no distinction between classes." The several efforts made in Congress "to exempt . . . organizations of farmers and laborers from the operation of the act . . . failed, so that the act remained as we have it before us."\(^{15}\) "Every" meant every, not some (this was, of course, three years before the Supreme Court decided in the Standard Oil case\(^{16}\) that every meant not every but some). The Danbury Hatters' combination sought to "compel" Loewe "involuntarily not to engage in the course of trade except on conditions that the combination"

10 Foreword to Berman, Labor and the Sherman Act (1939) xiv.
12 60 S. Ct. 192.
13 Loewe v. Lawlor, 228 U. S. 274 (1913).
14 Supra, note 2.
15 208 U. S. 301.
16 Standard Oil Co. of N. J. v. United States, 221 U. S. 1 (1911).
imposed.17 The trade attacked was interstate. Therefore the combination violated the statute. With only these few sentences of mechanical reasoning from words, the Court justified its resolution of an explosive issue of public policy affecting fundamental social forces and the relation of state and federal power to them.

The inadequacy of the Court's reference to Congressional intent has been fully exposed.18 But if we cannot agree with those who say that Congress intended not to include labor within the prohibitions of the Sherman law, we can hardly fail to agree that there is no evidence that members of Congress thought through the variety of labor activities upon which the statute might impinge and that Congress did not manifest any common understanding or desire in the matter.19 That left merely the words of the statute, which as the Court enigmatically said "made no distinction between classes."20 The Court apparently thought that there were but two solutions available: either labor unions enjoyed complete immunity from the Act, like unto the immunity of the sovereign, as some have claimed, or the Act restrained even bona fide labor activity for traditional labor ends. But orthodox standards for the meaning which courts may pour into empty vessels of legislation pointed to a third and more appropriate course.

First, no labor octopus comparable to the then popular portrayal of the "trusts" was threatening the social welfare. The one indubitable proposition about Congressional intent in the Hatters opinion is that the statute "had its origin in the evils of massed capital." The growth of "trusts" with which the states seemed to be unable or unwilling to deal, particularly "trusts" in ordinary, household commodities, led to a clamor for federal legislation. The Congressional debates concerned themselves with that problem. There was no public clamor for suppression of "evils" of organized labor; and Congress did not direct its attention to any such issue.21

Second, there was no lack of existing law to protect against the evils of organized labor. Statutes and common law, criminal and civil liability, already restrained concerted action by labor. Indeed, the dominant complaint was that the legal restrictions were too stringent and that some release was necessary.22

Third, there was no occasion for federal action. The States had shown no incompetence or unwillingness to deal with improper action by organized labor. No difficulties of foreign incorporation, extraterritorial power or inherent limitations pointed to a third and more appropriate course.

17 208 U. S. 294.
20 208 U. S. 301.
21 Except, indeed, for the purpose of excluding labor combinations from the enactment. See supra, note 18.
22 See Frankfurter and Greene, The Labor Injunction (1930) 4, 137. It was only fifty years earlier that Commonwealth v. Hunt, 4 Met. 111 (Mass., 1842) held a trade union not to be per se a criminal conspiracy. Similar determinations in other states came later. But all such decisions merely permitted unions to act for proper ends and with proper means. Impropriety on either score subjected the actors to criminal and civil liability.
terstate commerce stood in the way of effective local action, as was the case with respect to the "trusts." And no undue tolerance of labor action had been manifested by the state governments. Federal action might, indeed, have been necessary to protect concerted action by labor, as later history showed, but local law provided ample punishment for it.

Fourth, a labor union necessarily restrains competition between laborers in the sale of their services. Its chief function is to unite workingmen in their demands and substitute the strength of combination for the weakness of individuals. Yet it was altogether incredible that Congress could have been willing to prohibit the formation and existence of labor unions for the purpose of improving labor conditions; and no one has asserted that the Sherman Law does that. But if the Act permitted such restraint by labor combinations, what labor action did it prohibit? Nothing in the Act supplied even a hint of differentiation between some labor aims and others or between some labor activities and others. To be sure, the Act provided very little guidance even with respect to business combinations. But there was at least that little. Prevention of monopoly and preservation of competition were the known goals to be protected, however uncertain may have been their location or the nature of the prohibited attacks. With respect to labor combinations, however, not even the goals were fixed. Was the Court, then, to duplicate the law of the States and pour into the Sherman Act the whole of the common law relating to labor disputes? Was it, without any light from the statute, to create in its name a federal law to govern labor aims and labor actions?

Such considerations point to a limitation of the Sherman Law to that for which it affords some guidance, and which is concededly its historic object, namely, combinations of business. That would not require "distinctions between classes" and exemption of labor unions. On the contrary, to the extent that labor would participate in such combinations, it would be liable along with its partners. If, for example, labor unions were to boycott an employer in order to compel him to join an illegal conspiracy of other employers to fix prices, or restrict production or allocate business, they would be liable along with the employers. But, by the same token, they would not be liable for bona fide labor activity which does not look to restraint of trade by employers and does not subject the employers to liability under the Act.

The facts of the Hatters case provide a striking illustration. The controversy between the employer and the union was a labor dispute of traditional type. It concerned itself solely with terms and conditions of employment. Monopolization, tampering with prices or other restriction of competi-

---

23 The judicial language in some of the labor cases of that period rivals that of any anti-unionist in the severity of its condemnation. See Comment (1940) 49 Yale L. J. 518, 523.
tion in the manufacture or sale of hats was no part of the union's aims or of the expectable results of its action. The public interest in the preservation of competition in business was neither harmed nor threatened. The union's activity was directed solely toward coercing the employer to employ union men on terms widely adopted in his industry. State law provided numerous safeguards against unjustifiable harm to the employer. Under established local law both the union's aims and methods had to pass the tests of legality. The union's demand of the employer had to be one which it was entitled to make; and there were a number of limitations upon the types of permissible demands. But even for a permissible demand various forms of concerted action were forbidden, including probably some of the action actually taken by the union. Yet, into this already law-ridden field, the Court chose to inject the Sherman Law.

Six years after this decision Congress passed the Clayton Act. Sections 6 and 20 were direct responses to organized labor's cries for relief from the Sherman Law and from judicial control. Judging by the jubilation the Act produced in labor's ranks and among its friends in Congress, the promise to the hope of labor was immunity from the anti-trust laws at least along the lines I have indicated.

The language of Section 6 does not convey very precise meaning. But in the Duplex case the Supreme Court rendered it meaningless. It held that the "section assumes the normal objects of a labor organization to be legitimate and declares that nothing in the anti-trust laws shall be construed to forbid the existence and operation of such organizations or to forbid their members from lawfully carrying out their legitimate objects," but does not authorize illegitimate objects or unlawful means, and particularly it does not authorize an out and out conspiracy in restraint of trade. Now the endeavor of the defendants in the Duplex case was to unionize the plaintiff's plant. Unionization is of course an historic, normal object of labor unions and therefore a legitimate object under Section 6. There is no suggestion to the contrary in the Court's opinion. The issue therefore was whether contained in the anti-trust laws shall be construed to forbid the existence and operation of labor . . . organizations . . . 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 anti-trust laws." For the history of this Section, see Frankfurter and Greene, The Labor Injunction (1930) 140-46.

Duplex Printing Press Co. v. Deering, 254 U. S. 443 (1921). Mr. Justice Pitney delivered the opinion of the Court. Mr. Justice Brandeis wrote a dissenting opinion in which Mr. Justice Holmes and Mr. Justice Clarke concurred.

26 "That the labor of a human being is not a commodity or article of commerce. Nothing contained in the anti-trust laws shall be construed to forbid the existence and operation of labor . . . organizations . . . 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 anti-trust laws." For the history of this Section, see Frankfurter and Greene, The Labor Injunction (1930) 140-46.
this legitimate object was being "lawfully" carried out. The Court held the conduct unlawful, not because it violated state law (it probably didn't)\textsuperscript{34} or because it violated some federal law other than the anti-trust act, but precisely because the conduct restrained trade in violation of the Sherman Law. Legality or illegality "at common law or under the statutes of particular States" was "of minor consequence."\textsuperscript{35} Thus the Court made Section 6 say that nothing in the anti-trust laws shall be construed to forbid union members from carrying out union objects which do not violate the anti-trust laws in a manner which does not violate them. This did not, of course, completely emasculate the Section. These "sledge hammer blows" to labor's wrongs and injustices,\textsuperscript{36} "that the labor of a human being is not a commodity or article of commerce," were still left to be struck by any orator on suitable occasion. And left, too, was the declaration that a labor union is not \textit{per se} a combination or conspiracy in restraint of trade—a proposition which practically no one had denied.

Section 20 is more specific and detailed. Among other things it provides that: "... 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 ... no ... restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from ... persuading others by peaceful means so to do; or from ceasing to patronize or to employ any party to such dispute, or from ... persuading others by peaceful and lawful means so to do; ... nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States."

One chief aim of this Section was to curb the use of federal injunctions in industrial disputes, no matter what basis of federal jurisdiction was invoked; to control the system of "government by injunction" against which there had been loud protest from labor and from legal and lay circles generally. "Aside from the use of the injunction, the chief sources of dissatisfaction with the existing law," wrote Mr. Justice Brandeis, "lay in the doctrine of malicious combinations, and, in many parts of the country, in the judicial declarations of the illegality at common law of picketing and persuading others to leave work. . . . . . "By 1914 the ideas of the advocates of legislation had fairly crystallized upon the manner in which the inequality and uncertainty of the law should be removed. It was to be done by expressly legalizing certain acts regardless of the effects produced by them upon other persons. . . . The resulting law set out certain acts which had previously been held unlawful, whenever courts had disapproved of the ends for

\textsuperscript{34} See Bossert v. Dhuy, 221 N. Y. 342, 117 N. E. 582 (1917).

\textsuperscript{35} 254 U. S. 466.

\textsuperscript{36} Supra, note 5.
which they were performed; it then declared that, when these acts were committed in the course of an industrial dispute, they should not be held to violate any law of the United States. In other words the Clayton Act substituted the opinion of Congress as to the propriety of the purpose for that of differing judges; . . .

The majority of the Court in the Duplex case also took a serious view of the Act. Section 20, it said "imposes an exceptional and extraordinary restriction upon the equity powers of the courts of the United States and upon the general operation of the anti-trust laws, a restriction in the nature of a special privilege or immunity to a particular class, with corresponding detriment to the general public; . . ." Therefore a "loose construction of the section" was to be avoided and "the qualifying words that are found in it" were not to be slighted. The "exceptional privilege" was limited by the act to cases between "employers and employees . . . involving or growing out of a dispute concerning terms or conditions of employment." Giving "full and fair effect" to "every word" required the privilege to "be confined—as the natural meaning of the words confines it—to those who are proximately and substantially concerned as parties to an actual dispute respecting the terms or conditions of their own employment, past, present, or prospective . . . . and it would do violence to the guarded language employed were the exemption extended beyond the parties af-

97 254 U. S. 484-86.
98 254 U. S. 472.
99 These facts are stated in the dissenting, not the majority, opinion.
ized an unaffiliated company union. The concerted action of the stonecutters complained of in the case consisted only of their own peaceful refusal to work on stone produced in plaintiffs' quarries. No other crafts were called to their aid and no coercion, intimidation or other kind of boycott was involved. Yet the Court held the defendants' conduct violative of the Sherman Law and not within the purview of the Clayton Act. 41

In this construction of §20 of the Clayton Act, the Court committed its cardinal sin against labor policy. Other courts in their moulding of the common law were beginning to recognize the community of interest among workingmen of the same craft, or of the same industry or organization. 42

Apart from the Clayton Act, the Supreme Court itself in the Tri-City case 43 was of opinion that "the members of a local labor union and the union itself . . . have sufficient interest in the wages paid to the employees of any employer in the community to justify their use of lawful and peaceful persuasion to induce those employees to refuse to accept such reduced wages and to quit their employment." 44 The Court's failure to recognize such community of interest and solidarity of labor groups in its interpretation of the anti-trust laws offended the trend of the times and the developing history of labor policy. 45

Protest against what came to be called the "judicial emasculation of the Clayton Act" was immediate and strong. But it took until 1932, 11 years after the Duplex case and five years after the Bedford case, for remedial legislation to be finally enacted in the form of the Norris-LaGuardia Act. 46 This, as the Supreme Court said in 1938, was intended "further to extend the prohibitions of the Clayton Act respecting the exercise of jurisdiction by the federal courts and to obviate the results of the judicial construction of that Act." 47

---

41 The opinion of the Court was delivered by Mr. Justice Sutherland. Mr. Justice Sanford concurred in the result "upon the controlling authority" of the Duplex case, supra note 31, which he was "unable to distinguish." 274 U. S. 55. Mr. Justice Stone was of opinion that both "as an original proposition" and in the light of the Clayton Act and the Standard Oil (supra, note 18) and American Tobacco (221 U. S. 106) cases, the defendants' action was not a violation of the Sherman Law. But since this view was rejected in the Duplex case and again in the instant case, he concurred with the majority. 274 U. S. 55. Mr. Justice Brandeis wrote a dissenting opinion in which Mr. Justice Holmes concurred. 257 U. S. 55. This opinion pointed to many facts which might suffice to distinguish the Duplex case; and it urged that such restraint as was found in the case was reasonable under the circumstances. The opinion did not go over again the ground already lost in Duplex, that the case involved conduct in the course of a labor dispute which §20 of the Clayton Act legalized, regardless of reasonableness. The dissenting opinions in these two cases establish, then, two lines of defense: one, that the conduct is legal under §20 without inquiry into its purpose; the other, that if proper purpose is a requisite of legality, that requisite is found in the case.

42 See 4 Restatement of Torts (1939) §§802-805.

43 American Steel Foundries v. Tri-City Central Trades Council, 257 U. S. 184 (1921).

44 257 U. S. 212. (Italics added.) The court divided the defendants into two classes: those who were "employees" within §20 of the Clayton Act and those who were not. But the Court accorded the same privileges to both.

45 For discussion of the other labor cases under the Clayton Act, see Frankfurter and Greene, The Labor Injunction (1930) 155-76.

46 March 23, 1932, c. 90, 47 Stat. 70. See Frankfurter and Greene, The Labor Injunction (1930) 159-229; Frankfurter and Greene, Congressional Power Over The Labor Injunction (1931) 31 Col. L. Rev. 385.

47 New Negro Alliance v. Sanitary Grocery, Inc., 303 U. S. 552, (1938). The Norris-LaGuardia Act is, of course, not limited to cases under the anti-trust laws. It applies in all cases no matter what basis of federal jurisdiction is invoked.
No canon of statutory interpretation required the Court so to retard the current of labor history. Judges like Holmes, Brandeis, Clarke, Stone, Hough, Learned Hand, found in the Clayton Act a meaning different from that which prevailed. Adoption of the views of the dissenting judges would not have meant complete legalization of the dreaded "secondary boycott." In the first place, exemption from the anti-trust laws would have left that activity still subject to the control of state law. But perhaps even more important, was the error of speaking of "secondary boycott" without discrimination between the variety of situations which are sometimes denominated by that label. The dissenting opinions in the Duplex and Bedford cases indicated several safeguards against unduly oppressive boycotts short of blindness to a community of interest which long history confirmed.

No rational principle of labor policy—except possibly the policy that labor unions must "not be strong"—can harmonize the many decisions of the federal courts in labor cases under the anti-trust laws. The "rule of reason" has guided anti-trust decisions with respect to combinations of capital since 1911. Common law adjudications in cases arising out of industrial disputes concern themselves with the propriety of the objects and means involved in the particular situation. Concerted action which is illegal for one purpose may be legal if its purpose is something else. Differentiation is made between the means by which the purpose is sought to be accomplished, whether, for example, by moral persuasion, economic pressure, fraud or violence. Considerations of fairness in the given case as well as those of public policy with respect to the general type of activity play a part in adjudication. But, in the labor cases under the anti-trust acts, we are told, the question was merely whether the defendants' conduct, by intention or direct consequence restrained interstate trade or commerce. "A restraint of interstate commerce," said the Supreme Court, "cannot be justified by the fact that the ultimate object of the participants was to secure an ulterior benefit which they might have been at liberty to pursue by means not involving such restraint." Differences such as that between offensive and defensive union action, between a large union coercing a small employer and a small union defending against a strong association of employers, between action by employees united by a single craft or union and that by employees having lesser ties of community of interest, such differences were, as the Bedford

49 Ibid.
50 Ibid.
51 Bedford Cut Stone Co. v. Journeymen Stone Cutters' Ass'n, supra, notes 40 and 41.
53 Id., at 748.
54 See also Judge A. N. Hand in Aeolian Co. v. Fischer, 40 F. (2d) 199, 193-94 (C. C. A. 2d, 1930) and Judge Thacher in the same case be-
dissent deplored, not deemed important.

Again, a doctrinaire, physical conception of interstate commerce made no rational adjustment of state and national power in this field. Effect on interstate commerce was not decisive of federal jurisdiction. The question was whether the effect was the intended or the direct result of the conduct. Thus refusal by union men to work on a building with the non-union employees of an out of state manufacturer who were installing in the building an unassembled organ shipped from the other state was a violation of the Sherman Law. But the refusal of union men to work on a building with non-union employees of an out of state employer who were erecting the structural steel shipped from the other state was so clearly not a violation as not even to raise a substantial federal question. In the first case the interstate commerce involved, said the court, was the purchase of an organ—not of parts—and accordingly the transaction was not complete until the organ was installed. In the second case the interstate transaction was not the purchase of a steel frame building but of just structural steel; accordingly, that transaction was complete upon delivery of the steel, and its erection was no part of interstate commerce. Again, a strike against an employer for a "local purpose," such as higher wages, was beyond the jurisdiction of the Sherman Act, however unlawful the strikers' conduct or however substantial the amount of the product which the cessation of production kept from shipment in interstate commerce. But pickets who by intimidation of a truck driver prevented the interstate carriage of a single steel billet were convicted of a conspiracy in restraint of trade. Convicted also of this offense were railway employees in the Shopmen's Strike of 1922 who assaulted a station master (they were fined $25.00), others who sought to disable a locomotive by putting quicksilver in its boiler, others who dynamited a line of road, and members of the Progressive Miners Union who dynamited trains carrying coal mined by members of the United Mine Workers. In each case the conduct charged was concededly criminal and punishable by penalties more stringent than those provided by the anti-trust laws. Of course, some more or less logical verbal formulae may be devised to reconcile these cases. But the point is that neither the decisions nor the formulae make any apportionment of the labor problems between state and national power on any basis of need or convenience.

57 Aeolian Co. v. Fischer, 40 F. (2d) 189 (C. C. A. 2d, 1930).
63 Vandell v. United States, 6 F. (2d) 188 (C. C. A. 2d, 1923).
Only the limitations of the concept of the federal commerce power prevented the Sherman law from becoming a police measure for all industrial disputes. And when the Supreme Court redefined that concept in the N. L. R. A. cases, a Circuit Court of Appeals was at once ready to expand the scope of the Sherman Law in labor controversies. That was erroneous, to be sure. But it is further evidence of the unpredictable, anomalous and uncontrolled way in which the anti-trust laws may impinge upon labor under the judicial precedents. The situation thus calls for reexamination—particularly of the foundations upon which the entire structure rests, the Hatters case, the Duplex case and the Bedford case. Reexamination may be anticipated in view of the current readiness of the Supreme Court to prevent the continuation of its previous errors when the passage of time has served only further to expose the error and its continuance is not required for the proper protection of interests built in reasonable reliance on it.

The Department of Justice has begun the process of reconsideration in its own sphere. In its current vigorous effort to secure, as it states, a real and effective enforcement of the federal anti-trust laws, the Department announced a planned and thought out “labor policy.” In words reminiscent of the Clayton Act, the Department dealt its own “sledge hammer blows” to the earlier use of the Sherman Law. “The anti-trust laws,” it says, “should not be used as an instrument to police strikes or adjudicate labor controversies. The right of collective bargaining by labor unions is recognized by the anti-trust laws to be a reasonable exercise of collective power. Therefore, we wish to make it clear that it is only such boycotts, strikes, or coercion by labor unions as have no reasonable connection with wages, hours, health, safety, the speed-up system, or the establishment and maintenance of the right of collective bargaining which will be prosecuted. . . . In our anxiety to be fair to labor we are not subjecting to criminal prosecution practices which can be justified even under the dissenting opinions of the United States Supreme Court.”

To indicate the extent of its self-restraint, the Department cites examples. Thus it has “instructed the attorneys in the building investigation not to institute criminal prosecutions” for “refusals by unions to work upon goods made in non-union shops,” though “in the past courts have . . .

---


held that such secondary boycotts are violations of the anti-trust laws," because in "the Duplex and Bedford Cut Stone cases a minority of the Supreme Court presented the argument against this view."72 Again, it has "consistently disregarded all . . . requests . . . to proceed against unions because they maintain high rates of wages, because they strike to increase wages, and because they attempt to establish the closed shop."73 Apparently only a permissible "anxiety to be fair to labor" deters the use of the anti-trust laws against these historic practices of trade unionism.

But with respect to practices which, in the Department's opinion, "are unquestionable violations of the Sherman Act, supported by no responsible judicial authority whatever,"74 the Department states it has "no choice"75 but to take action. The "unquestionable violations" listed are "unreasonable restraints" to: (1) "prevent the use of cheaper material, improved equipment, or more efficient methods," (2) "compel the hiring of useless and unnecessary labor," (3) "enforce systems of graft and extortion," (4) "enforce illegally fixed prices," and (5) "destroy an established and legitimate system of collective bargaining."76

There is no novelty in the fact that the Government is proceeding against labor unions and their members under the anti-trust laws. Even during the present administration, before this "labor policy" was announced and before Assistant Attorney-General Arnold was appointed, the Government brought at least ten indictments and one equity suit against practices of the kind listed in the Department's statement.77 Nor is the Department engaged in a drive against labor unions. Their prosecution is merely incident to a wider attack on obstructions in commerce. The novelty lies in the fact of formulation and statement of a general labor policy, the vigor of the effort at enforcement and the publicity with which the effort is attended. These circumstances bring a renewed emphasis on the application of the anti-trust laws to labor activities.

The emphasis cannot be limited by the restrictions which the statement of policy announces. On the contrary, it extends to the full potential applicability of these laws to labor. The announced restrictions can bind the Department only so long as it wishes to be bound by them. The statement of policy virtually boasts of a self-restraint not required by judicial authority; and it implicitly discloses how fully the applicability of the Sherman Law to union activity is still, after fifty years, dependent on the individual views of the persons who for the time being happen to be charged with its enforcement. And enforcement is not limited even to the changing personnel of the Department of Justice. Private suits for injunction or damages are still permitted. These may be encouraged by the emphasis on the Sherman Law and be aided by the government proceedings without being

---

72 Id., at 3, 4.
73 Id., at 3.
74 Id., at 4.
75 Id., at 3.
76 Id., 4-5.
77 See Federal Anti-trust Laws (1938) 250, 252, 253, 254, 255, 261, 262, 266.
limited by the Department’s policy of self-restraint. The statement of policy urges that “unions stand to gain” by the government prosecutions because they will so educate the public as to relieve the unions from private suits at “the hands of those who may be hostile to organized labor itself.” But surely this is a mirage produced by intoxication with self-generated enthusiasm.

Sober reflection raises serious doubts as to both the legal basis and the wisdom of the announced policy, even though particular prosecutions thus far instituted may be entirely warranted. The Department says that the classes of restraints listed in its statement are “unquestionable violations of the Sherman Act, supported by no responsible judicial authority whatever” and not justifiable “even under the dissenting opinions” of the Supreme Court. The absoluteness of the certitude professed by this opinion is probably due to irrepressible doubts about its accuracy.

We can put to one side the issues of federal jurisdiction that will be met in all the cases. Their determination will depend on the specific records made. We can put to one side also the classes of restraints designed to enforce illegally fixed prices or systems of graft and extortion. The illegality in these cases does not arise from the nature of the labor activity and is assumed to exist independently of it. Our concern is with the other three classes of allegedly “unquestionable restraints” those dealing with “improved equipment,” “useless and unnecessary labor” and jurisdictional disputes. These are historic subjects of labor controversy.

The Department’s statement declares restraints in these cases illegal regardless of the means by which they are affected, that is, whether by “boycotts, strikes, or [other] coercion.” This legal opinion surely cannot be “unquestionable.” Section 20 of the Clayton Act lists a number of acts, those normally used by labor, which shall not be “considered or held to be violations of any law of the United States” (including, of course, the Sherman Law). The intent of this provision was, as stated by Mr. Justice Brandeis in the Duplex case, to legalize the specified conduct under the conditions stated whatever its effects and irrespective of judicial approval or disapproval of the ends to which it is directed. If the supposed restraints are effected by means of these acts, they do not violate the anti-trust laws, whatever might otherwise be the case, if the controversy (a) is between “employers and employees, or between employees” and (b) involves or grows out of “a dispute concerning terms or conditions of employment.”

78 Public Statement, supra, note 70, at 6-7.
79 Most of the proceedings thus far instituted involve alleged cooperation between unions and employers to effect restraints of competition among employers.
80 Public Statement, supra, note 70, at 3, 4.
82 It has been urged that even in these cases the Sherman law must be held inapplicable and the conduct prosecuted under other statutes. See the letter of Henry Epstein, Solicitor General of New York, in the New York Times, Nov. 26, 1939, p. 8E and his (unpublished) address at the Conference on Labor Problems and Relations of the National Lawyers’ Guild, Washington, D. C., January 12, 1940.
83 Public Statement, supra, note 70, at 1.
Now suppose that painters refuse to work for an employer who requires them to use spraying machines rather than brushes; or, to take an example cited by the Department, suppose they refuse to paint kitchen walls unless they are also given the work of painting the kitchen cabinets. When their concerted action is limited to their own refusal to work, it would seem to be within the immunity conferred by the Clayton Act, even as construed by the majority of the Court in the *Duplex* case, for "terminating [a] relation of employment, or . . . ceasing to perform any work or labor." Here is a dispute between an employer and his present or prospective employees; and it is a dispute concerning "terms or conditions of their own employment." They have no quarrel with any other employer and are not seeking to coerce any other employer. Suppose next that the painters by "peaceable persuasion" en-

84 "Unreasonable restraints designed to pre-
vent the use of cheaper material, improved 
equipment, or more efficient methods. An ex-
ample is the effort to prevent the installation of 
factory-glazed windows or factory-painted 
kitchen cabinets." Public Statement, supra, 
note 70, at 4. This statement conveys no idea as to the pur-
pose of the effort. Prevention of the installation of 
factory-painted kitchen cabinets is not neces-
sarily the result of caprice, or dislike of fac-
tories, or desire to increase the cost of construc-
tion. The effort generally is due rather to one of 
two things: (a) the factory employs non-
union or "enemy union" painters and/or (b) 
the house painters want the work of painting 
the cabinets, just as bricklayers wanted the 
work of painting in Pickett v. Walsh, 192 Mass. 
572, 78 N. E. 753. In both cases the union pre-
sumably would permit the installation of the 
cabinets if its members were permitted to re-
paint them or were paid the cost of painting 
them. The Department's way of putting the 
case suggests purposeless or malicious conduct 
when in fact the purpose is definite and real, 
however much people may differ as to the 
legality of the activity. The union's method 
may be short-sighted and may even defeat its aims, 
but the objective is the entirely justifiable one 
of increasing the employment of its members. 

85 The Department's statement seems to as-
sume that the *Duplex* and Bedford cases in-
volved merely the reasonableness of "refusals 
by unions to work upon goods made in non-
union shops." Public Statement, supra, note 70, 
at 3-4. To be sure, the dissenting opinion in the 
*Bedford* case concerned itself with the question of 
reasonableness. But that was the second line 
of defense. See supra, note 41. The first line of 
defense was built in the *Duplex* case on the 
Clayton Act. The issue upon which the Court 
there divided, as well as the issue upon which 
the majority differed from the courts below, was 
the existence of a labor dispute within the 
meaning of the Act. If, as the Department 
seems to suspect, the dissenting opinion in the 
*Duplex* case states the law that will prevail 
when the issue is reconsidered by the Court, 
then probably all three categories of restraints 
which the Department deems "unquestionable 
violations of the Sherman Act" present cases 
"between employers and employees or between 
employees involving disputes about "terms or 
conditions of employment" within the Clayton 
Act. The issue of reasonableness may then not 
be reached at all.

This objective must be taken into account in 
determining the legality of the conduct. See 
The Folk-Law of Thurman Arnold (1939) 8 

The *Duplex* case states the law that will prevail 
within the immunity conferred by the 
Clayton Act.
heinonline -- 34 ill. l. rev. 783 1939-1940

relation to the dispute even under the majority opinion in the Duplex case. And if the strikers' conduct is limited to refusal to work and peaceable persuasion of others, it is immune under the Clayton Act. If we take the next step and assume that the members of one union refuse to handle, or work on, goods produced by members of a rival or enemy union, the legality of the conduct would depend upon the issue of proximity or community of interest. The Supreme Court's decisions under the Norris-LaGuardia Act indicate immunity from, rather than violation of, the Sherman Law in these cases.

One legal flaw in the Department's position, then, is that it fails to note the fact that the Clayton Act legalizes certain labor activity regardless of its aims or its harmful effects on others. But even if the activity is legal only when directed towards ends deemed legally reasonable, there is "responsible judicial authority" to justify some of the conduct proscribed by the Department's policy.

One month prior to the issuance of the Department's statement of policy, a federal district court in Louisiana

---

88 Fur Workers Union No. 21238 v. Fur Workers Union, Local No. 72, 60 S. Ct. 292 (1939) and cases there cited.
84 In any event, we see no reason why it is

held that concerted labor action in the course of a jurisdictional dispute like that which is the basis of an indictment recently procured by the Department is not a violation of the anti-trust laws. At least since 1931 the New York Court of Appeals has permitted, as a matter of common law, some forms of concerted action against an employer in the course of a jurisdictional dispute by a union rival to that with which he had an established and legitimate system of collective bargaining.

Even after the Department's policy was announced, the New York Appellate Division permitted coercive action by unions of musicians, stage hands, and choral singers to compel an opera exhibitor to retain a live orchestra after he switched to canned music. To the argument that the union was seeking to impede technological progress the court answered in effect that the long run benefits of such progress do not appease present hunger. And the highest court of New Jersey has tolerated some concerted action to compel the continuance of older and less efficient methods which gave the workers involved greater present employment.
Agreement as to the long run uneconomic character of the named practices does not necessarily mean agreement on the desirability of prohibiting them by law.

The Department's economic position surely has sound support. Some of the labor strife to which it is addressed is extremely painful—to genuine friends of organized labor perhaps even more so than to its enemies. Patience with such situations is often a costly virtue and is always sorely pressed by power anxious to do something. But an unwise exercise of power may cause more harm than good. And in labor law, expansive, vague prohibition is particularly inappropriate.

A description of labor activity as designed to prevent the use of more efficient methods or to compel the hiring of useless and unnecessary labor tends to substitute epithet for reality. It is reminiscent of earlier descriptions of labor combinations as malicious or formed for the purpose of injuring another. Like the symbol secondary boycott, such phrases tend to impede thought and conceal judgment and error. The description emphasizes the verbal form of labor's demand rather than the thing labor wants. And it leaves tremendous scope for differences of opinion and personal choice.

The Department states that it will not find violation of the Sherman Law in demands for high wages or short hours even when it is charged that these will unduly increase costs and prices and retard production. Yet a demand for the hiring of so-called useless and unnecessary labor may be but an inartistic and clumsy way of expressing a desire for shorter hours or spreading of employment opportunities. And resistance to improved equipment or more efficient methods may be but a way of expressing, without the aid of a lawyer, the desire for continued employment and earnings. Both may be but means of safeguarding labor from receiving the entire immediate shock of technological change.

Workers' resistance to technological change is not a new phenomenon just uncovered in the building investigation.92 Nor is the resistance "founded on prejudice and error."93 "Invention is a great disturber."94 Its undoubted benefits are bought with the price of maladjustment and hardship upon those who are unprepared to weather the disturbance. At least part of the price is paid by labor "since many of the new machines and techniques result in 'occupational obsolescence'."95 And labor, like others in the same situation, has sought to reduce that price. "Among unorganized workers," states a recent authoritative survey, "action is often directed against the machine itself as the immediate cause of their degradation, with the result that machine wrecking occurs. Trade-unions reject the tactic of destroying machinery and seek to substitute organized measures of bargaining with employers to lessen the impact of the tragedy of

---

94 National Resources Committee, op. cit. supra, note 92 at viii.
95 Id., at ix.
displacement through the more gradual introduction of the machinery or process, and by demands for compensation to those displaced.\textsuperscript{96}

Labor is but one factor, and not the most important, in the total resistance to the utilization of invention and technological change.\textsuperscript{97} Investors combined in a corporation are also reluctant to adopt innovations which involve large costs of obsolescence. Charges have many times been made of predatory suppression of patents to protect existing plant and investment. Whether such charges are true or false, it is considered not predatory, but part of good business management, to introduce new technologies in such ways as to reduce the cost to investors.\textsuperscript{98} "Although an innovation may be more efficient than the processes already in use, it may be, temporarily at least, less economic."\textsuperscript{99} The National Resources Committee cites an industrial study in 1934 of "better-than-average" industrial power plants. Sixty-two percent of the equipment in these plants was more than ten years old and twenty-five percent over 20 years old. "The bulk of the equipment was regarded as obsolete to such an extent that, by replacing it by facilities of the most advanced design, fifty cents could be saved, on the average, out of each dollar spent in the older plants for industrial power."\textsuperscript{100} Labor has at least the same interest in continued employment that investors have in the security of their investments.

Resistance to technological change may be legally permissible even when not economically justifiable. But both legal and economic justification must take account of a variety of circumstances other than the fact that the resistance is to "cheaper material, improved equipment, or more efficient methods." When sound films were first introduced two motion picture operators were required for each exhibition. Technical improvements have made it completely unnecessary, it is said, to have more than one operator. Yet the operators' union requires some exhibitors to continue the employment of two men. Exhibitors say also that when they abandoned stage shows completely, they were still required to retain a stage hand with nothing for him to do. And on the legitimate stage there are said to be regularly accepted instances of so-called unnecessary labor. Impressions from the building industry, which furnished the occasion for the Department's statement, are not safe guides in the theatrical business.\textsuperscript{101} Again, in the railroad industry, collective agreements over a long period of years developed regularly accepted practices whereby employees may be paid for hours in which they did not work or for runs which they did not make. To dislodge these practices would require something akin to a revolution. Railroad consolidation has long been urged as a means of achieving spectacular economies in railroad transportation.

\textsuperscript{96} Id., at 64.
\textsuperscript{97} Id., at 59.
\textsuperscript{99} Stern, op. cit. supra, note 92, at 29.
\textsuperscript{100} National Resources Committee, op. cit. supra, note 92, at 12. See also note 90, supra.
\textsuperscript{101} Cf. the report of Assistant Attorney General Thurman Arnold: "A program which may be sound for, let us say, motion pictures, may be useless or positively harmful for steel." Ann. Rep. of Atty. Gen. (1938) 65.
By the Emergency Railroad Transportation Act of 1933, Congress sought to encourage it. But Congress expressly forbade reduction of employment by exercise of the authority conferred.

The impact of technological change on occupational skills and labor employment presents one of our major and enduring social problems. The Sherman Law provides no guides to the solution; the tools which it offers are awkward and unsuited to the task.

Nor will we find in the Sherman Law the Messiah to unite the errant A. F. of L. and C. I. O. and rid us of "jurisdictional disputes." That term, too, is of dangerously vague signification. Some jurisdictional disputes may be merely struggles between selfish leaders for the perquisites of labor leadership. Others may be competition between groups of employees for given work. Still others may represent struggles on the part of minority or rank and file members of unions to procure reforms and changes of policies within their organizations. And others yet may be attempts to increase labor's power in bargaining with employers. The *Bedford* case, for example, though taken by the Department to deal with a boycott of non-union goods, may properly be regarded as a jurisdictional dispute within the fifth category of the Department's statement. Bedford's employees were organized into a form of union with which Bedford had established a system of collective bargaining that was then entirely legitimate; and the defendants were seeking to destroy it.

Jurisdictional disputes are older than the Sherman Law and almost as old as trade unionism. It was not desuetude of the Sherman Law that has left them with us or that has kept the A. F. of L. and C. I. O. apart despite the efforts of our chief government officers and other responsible persons. Describing jurisdictional disputes as efforts "to destroy . . . established and legitimate system[s] of collective bargaining" tends to attach to them the opprobrium of undermining the policy of the National Labor Relations Act. The further statement, that "restraints of trade for such a purpose are unreasonable whether undertaken by a union or by an employer," seeks to create a disarming appearance of equal treatment. Yet it is surprising news, to say the least, that an employer who locks out a union or causes a strike by forming a company dominated union or by discrimination against union members is guilty of a violation of the anti-trust laws. Availability of the Sherman Law to protect the workers' interest in collective bargaining against impairment by employer or union is indeed novel. Perhaps the N. L. R. A. was really an employers' measure to relieve them from the harsh restrictions of the Sherman Law.

102 June 16, 1933, c. 91, 48 Stat. 211.
103 Id., §7(b): "The number of employees in the service of a carrier shall not be reduced by reason of any action taken pursuant to the authority conferred by this title . . . ; nor shall any employee in such service be deprived of employment such as he had . . . or be in a worse position with respect to his compensation for such employment, by reason of any action taken pursuant to the authority conferred by this title."
105 See Jaffe, Inter-Union Disputes in Search of a Forum (1940) 49 Yale L. J. 424.
106 Public Statement, note 70, supra, at 5.
In formulating public policy with reference to jurisdictional disputes, the N. L. R. A. is certainly a factor of importance. Many think that, with the right of collective bargaining protected by law, it is time to restrain the abuses in the internal government of unions and the internecine wars between unions. Few believe that the N. L. R. A., even if it survives current efforts at amendment, is the last word in labor relations. Additional machinery for adjustment of labor disputes between employers and employees or between employees is doubtless necessary and coming. But the machinery must be specially designed for the job. To use the anti-trust laws for this purpose seems quixotic. The statement that "the principle applicable to unions is the same as that applicable to other groups specially protected by law" is not merely abstract rhetoric; it is oversimplified and misleading. It was not true in the past and is not true now. Our anti-trust laws, except to the extent that they exempt labor activity, are not oriented in labor policy or correlated with other provisions for industrial disputes. They do not provide for negotiation, mediation, compromise, arbitration or adjustment,—the tools fashioned by experience for labor controversies. Their enforcement is not confined to the Department of Justice or any other single agency.

Their method of extensive litigation, with or without temporary injunctions and restraining orders, is wholly unsuited to the crisis situations involved in labor disputes and the limited financial resources of labor organizations. If applied to labor activity, they do not supplement or supplant state law but rather overlap that law without plan or reason.

The Department's statement of policy seeks to give to the anti-trust laws a new turn in the field of labor and to impose restrictions upon their availability. But the restrictions are at best uncertain and are in any event not within the control of the Department either for the present or for the future. The effort reemphasizes the relation of the Sherman Law to labor disputes and recalls the policy, steadily strengthened during the Law's fifty years, to withdraw the aims of labor action from the requirement of judicial approval or disapproval. The occasion is ripe for a return of the Sherman Law to its historic objects, combinations of capital and business competition. That would not leave labor activity uncontrolled, when not in cooperation with capital combinations. Until Congress enacts a national policy, that activity is subject to the many controls of state law. And recent state legislation and decisions of state courts indicate no undue tolerance of undesirable labor strife.

---

107 Id., at 6.
108 The peculiar effect of these remedies in labor cases is well known. See Frankfurter and Greene, The Labor Injunction (1930) 47 et seq.
109 See, e. g., Ore. L. 1939, c. 2, p. 7; Wis. L. 1939, c. 25, p. 33, c. 57, p. 77.