Labor Unions and Antitrust Legislation: Judicial Activism vs. Judicial Restraint from 1890-1941

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INTRODUCTION

In the March 1941 issue of the *American Federationist*, the American Federation of Labor's (AFL) primary publication, there was an article entitled "Mr. Arnold Gets Stopped."[1] The article was referring to Thurman Arnold, Assistant Attorney General in charge of the Antitrust Division in Franklin Delano Roosevelt's Department of Justice. Arnold was well known for his trust-busting campaign and acute insight concerning the legal mechanisms for controlling corporate monopolies. His later tenure in this position, however, was marked by attempts to use the 1890 Sherman statute to curtail the practices of labor combinations. In the February 1941 *U.S. v. Hutcheson* decision, the U.S. Supreme Court put a halt to his efforts to prosecute an AFL affiliated union for violating the Sherman statue. The article's text stated the following:

> With remarkable analytical insight, and in language noteworthy for its crystal clearness, Justice [Felix] Frankfurter traced the struggle between Congress and the judiciary over the relationship of the Sherman Act to labor. It described the Clayton and Norris-LaGuardia Acts as 'a series of enactments touching one of the most sensitive national problems.'
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> 'The underlying aim of the Norris-LaGuardia Act was to restore the broad purpose which Congress thought it had formulated in the Clayton Act but which was frustrated, so Congress believed, by 'unduly restrictive judicial construction.'[2]

This restrictive construction was established over time by conservative *Lochner* era courts that interpreted the Sherman Act broadly to include labor unions and interpreted the labor exemptions of the Clayton Act narrowly to prevent any legislative relief.[3] This, as it was called, was indicative of *Lochner* era activism. But with the decision in *Hutcheson*, the article stated that "It took a struggle of a quarter of a century to do it, but it has been done at last—and done well."[4] The significance of this legal victory was also echoed by national newspapers, including the *New York Times*. In one *New York Times* article, entitled "High Courts Holds Unions Exempt From Sherman Act in Own Disputes," the author stated that the *Hutcheson* decision marked a

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[1] Joseph A. Padway, "Mr. Arnold Gets Stopped," *American Federationist.* Vol. 48. No. 13 (1941): 12-13.
[2] Padway, 12-13; *U.S. v. Hutcheson*, 312 U.S. 219 (1941).
[3] Ibid.
[4] Ibid.

crossroads in labor's battle against the inappropriate application of the Sherman statute to its organizations and the use of injunctions, which had become a potent weapon for employers in labor disputes.[5]

The 1941 *Hutcheson* decision was a decisive victory for labor, but what is vital was how the court arrived at this decision. Was this outcome the result of judicial restraint, which repudiated *Lochner* era activism? Or, was it the result of a responsive legislature, which answered the calls of discontented labor organizations? Responding to labor's agitation, Congress passed the surprisingly ambiguous Clayton Act in 1914. The Norris-LaGuardia Act years later clarified its pro-labor use. In *Hutcheson,* labor was granted immunity from the operation of the Sherman statute and a new standard was developed. The doctrinal framework provided in Frankfurter's majority opinion in *Hutcheson* represented a sudden victory for pro-labor judicial restraint over long prevailing conservative, judicial activism. During this time, "judicial restraint" was best defined as deference towards the legislature and thus restraint in applying judicial construction or judge-made law. *Lochner* era "judicial activism," on the other hand, was best defined as what Frankfurter described as excessive, "unduly restrictive judicial construction."[6]

Frankfurter's position was founded in his sympathy toward labor and his belief in the clear legislative intent of the Clayton Act, which he exaggerated. Frankfurter was correct in concluding that the intent of the Norris-LaGuardia Act was to clarify the language of the Clayton Act and further extend the range of labor practices exempt from the antitrust statutes. The legislative history of the Norris-LaGuardia Act is clear in this matter.

A BRIEF HISTORIOGRAPHY

A vast majority of the historical analysis on this topic ends in 1930, two years prior to the passage of the Norris-LaGuardia Act and at the height of the Anti-Injunction Movement. In 1930, two major books were written on this topic: *Labor and the Sherman Act* by Edward Berman[7] and *The Labor Injunction* by Felix Frankfurter and Nathan Greene.[8] Berman's book provided an unparalleled analysis of the history the Sherman and Clayton statutes and how they applied to labor organizations. Reviewing the evolution of labor and antitrust cases in the courts, he showed how over time *Lochner* era courts were able to interpret the Sherman Act broadly to include labor unions. In addition, Berman demonstrated how the courts applied an unduly restrictive judicial construction when interpreting the labor exemption of the Clayton Act. Unfortunately, his study was published just prior to the passage of the Norris-LaGuardia Act of 1932 and before the 1941 *Hutcheson* decision, which ultimately made his comprehensive analysis inept.

In *The Labor Injunction*, Frankfurter and Greene condemned the over-reaching application of injunctions in labor disputes.[9] The central thesis of their book was that the use of

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[5] Louis Stark, "High Court Holds Unions Exempt From Sherman Act in Own Disputes," *New York Times*, 4 February 1941, 1.
[6] Padway, 13.
[7] Edward Berman, *Labor and the Sherman Act*, New York: Russell & Russell, 1930.
[8] Felix Frankfurter and Nathan Greene, *The Labor Injunction*, New York: The Macmillan Company, 1930.
[9] Ibid.

injunction was legally flawed and constituted an inappropriate use of judicial authority. They asserted that in equity theory the use of an injunction was an extraordinary legal measure that should be invoked only in emergencies characterized by "immediate danger of irreparable damage to physical property."[10] Labor disputes, however, usually permitted time for recourse in a court of law. Frankfurter and Greene further stated that by the 1920s, with the ordering of so many injunctions against labor, this practice "made a shambles of legal theory." The "extraordinary remedy of injunction," they argued, had the "ordinary legal remedy, almost the sole remedy."[11]

Charles Gregory's 1941 article "The New Sherman-Clayton-Norris LaGuardia Act"[12] refutes the legal reasoning of Justice Felix Frankfurter. Gregory argued Frankfurter was essentially legislating from the bench.[13] He also states that Frankfurter's over-exuberance to help out labor obscured his interpretation of the Norris-LaGuardia Act and caused him to define the intent of the legislature where no definitive intent was presented in the law. Gregory entitled his article "The New Sherman-Clayton-Norris LaGuardia Act" as a criticism of Frankfurter's judicial interpretation in *Hutcheson*. Gregory was the classic conservative case; numerous conservatives after *Hutcheson* attempted to paint Frankfurter as a radical jurist who cavalierly pieced together distinctly different pieces of legislation.

Dallas L. Jones' 1957 article "The Enigma of the Clayton Act"[14] sheds light on the legislative history of the Clayton Act and the rise of "Industrial Democracy"[15] in which labor made a deal with the Woodrow Wilson Administration and the Democratic Party for favorable labor legislation in return for political support. Jones highlighted the vast ambiguities of the legislative intent to exclude labor from the Sherman statute. But he does not blame Congress for the "qualifiers" and the equivocating language of the Clayton Act that enabled *Lochner* era courts to interpret the labor exemptions as narrowly as it had in the 1921 *Duplex* decision.[16] In *Duplex*, Jones stated that "The Supreme Court interpretation of these sections [Section 6 and Section 20 of the Clayton Act—the labor exemption provisions] was so narrow as to render them ineffective." [17] Jones blamed Woodrow Wilson for the failure of these sections because of his interference with the legislative processes in an attempt to garner favor with both business and labor supporters. The political interference of the executive led to two interpretations of the purpose of the Clayton Act and resulted in the bill's ambiguous language and inclusion of qualifiers such as "lawfully" and "peacefully."[18]

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[10]Edwin E. Witte, "The Labor Injunction." *The American Economic Review*, Vol. 20, No. 3 (1930):522-524; "Irreparable-injury rule" is "the principle that equitable relief [such as an injunction] is available only when no adequate legal remedy [such as monetary damages] exists." Bryan A. Garner, *Black's Law Dictionary*. St. Paul: West Publication Co, 2001: 372.

[11] Frankfurter., 13

[12] Charles O. Gregory, "The New Sherman-Clayton-Norris LaGuardia Act," *The University of Chicago Law Review*, Vol. 8, No. 3. (1941): 503-516.

[13] Ibid., 515.

[14] Dallas L. Jones, "The Enigma of the Clayton Act," *Industrial and Labor Relations Review*, (1957): 201-221.

[15] Ibid., 201; Joseph A. McCartin, *Labor's Great War: The Struggle for Industrial Democracy and the Origins of Modern American Labor, 1912-1921*, Chapel Hill: The University of North Carolina Press, 1997.

[16] Jones, 218.

[17] Ibid., 221.

[18] Ibid., 218.

Irving Bernstein's 1966 work, *The Lean Years: A History of the American Worker 1920-1933* provides a brief, yet compelling history of the "Anti-Injunction Movement" [19] and the motivation behind it. This movement clearly depicts labor's agitation against the ineffectiveness of the Clayton Act and the use of injunctions to halt collective bargaining. Labor sought substantial legislative relief from the courts' use of injunction against their organization, and Bernstein is effective at explaining why Congress responded with the passage of the Norris-LaGuardia Act in 1932. The Norris LaGuardia Act clarified the language of Section 20 of the Clayton Act and decreased the scope of labor activities that could be stopped by injunctions.

Supporting the argument made by Dallas L. Jones in 1957, Joseph McCartin's 1997 monograph, *Labor's Great War: The Struggle for Industrial Democracy and the Origins of Modern American Labor, 1912-1921,*[20] elucidates labor's alliance with the Wilson Administration and his vacillating support for favorable labor legislation. Wilson, as presented in the Jones' article, is portrayed as a man more concerned with his political career than with actually helping labor. McCartin adds that Wilson's uncertain support for labor stemmed from his discontent with industrial strife that adversely affect America's preparedness for World War I.[21]

So, unlike the Jones study, McCartin's depicts Wilson as not only concerned with his political position with business, but also with limiting industrial strife for America's entry into the war. Consequently, McCartin asserts that Wilson forced both business and labor leaders to compromise. While catering to both labor and business, Wilson interfered with the legislative response to labor's agitation with the application of the Sherman Act to labor. Wilson did not support full immunity of labor from the operation of the Sherman statute, and it was this belief, along with his interference, that ultimately resulted in two different Congressional interpretations of the aim of the Clayton Act. It also explains why the language of the Clayton Act was both ambiguous and weighted down with qualifiers.

The most recent scholarship on this topic is presented by George I. Lovell's 2003 book, *Legislative Deferrals; Statutory Ambiguity, Judicial Power, and American Democracy.*[22] Using the vehicle of labor legislation in the nineteenth and twentieth centuries, Lovell argues that "legislators, by enacting purposefully vague laws, consciously and cleverly transfer policy-making power to the courts."[23] Focusing primarily on his argument concerning the Clayton and Norris LaGuardia Acts, Lovell shifts the blame for the Clayton Act's ineffectiveness away from the judicial and executive branches and places it clearly on Congress. Lovell argues that legislators were often caught between "powerful constituencies with incompatible demands," and deliberately "empowered" *Lochner* era courts by enacting vague laws and thereby shifted policy-making responsibilities to the judiciary.[24] During the passage of the Clayton and Norris LaGuardia Acts, Lovell details how legislators cleverly positioned themselves for political

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[19] Irving Bernstein, *The Lean Years: A History of the American Worker 1920-1933*, Boston: Houghton Mifflin Company, 1966: 339

[20] See McCartin.

[21] Ibid., 39.

[22] George I. Lovell, Legislative *Deferrals; Statutory Ambiguity, Judicial Power, and American Democracy,* Cambridge: Cambridge University Press, 2003.

[23] Beau Breslin, "Review of Legislative Deferrals; Statutory Ambiguity, Judicial Power, and American Democracy," *Department of Government, Skidmore College.* Vol. 13 No. 11 (2003).

[24] Lovell, xix.

capital by working on two fronts. The first front was to enact laws to satisfy constituents and the second was to avoid the political consequences of such legislation by writing the statutes in ambiguous language. This is evident in the passage of the Clayton Act which resulted in vague language which the courts easily misconstrued.

My historiographical contribution centered on what was at stake for labor during the late 19th and early 20th century. Did labor have a right to exist as what John Kenneth Galbraith called a "countervailing power," that is, an equal power to bargain with rapacious industrial giants? And, the most pertinent question was, if labor would have failed its battle for industrial equality, then what was at stake for American society as a whole?

In writing my thesis, I used the vehicle of labor unions and antitrust legislation to critically examine the legal dimensions of this question. Between 1890 and 1941, a major battle raged in the courts—the battle between *Lochner* era, judicial activists, who sided with industrial giants against labor, and judicially restrained jurists, who fought to protect labor's legal authority to bargain collectively with employers.

Frankfurter was an ardent admirer of Justice Oliver Wendell Holmes Jr. and his philosophy on the proper place of the judiciary in relation to the legislature. Holmes stated: "The Legislature has the power to decide what the policy of the law shall be, and if it has intimated its will, however indirectly, that will should be recognized and obeyed."[25] This belief in the overall, yet sometimes implicit, will of the legislature and his sympathy towards labor led to Frankfurter's elimination of decades of judge-made law and the establishment of a new doctrinal standard in *Hutcheson.* Frankfurter was accused of exaggerating the uniformity of Congress's will to exclude labor from the antitrust laws. With the passage of the Norris-LaGuardia Act, however, Congress clearly responded to the judiciary's interpretation of the Clayton Act in *Duplex*. Frankfurter argued that the overall will of Congress was to exempt labor from the purview[26] of the Sherman statute, and his majority opinion in *Hutcheson* reflected this belief.

JUDICIAL ACTIVISM VS. JUDICIAL RESTRAINT

The *Lochner* era represented a period of consistent judicial hostility towards labor. Although the *Lochner* era judicial philosophy began to form in the 1890s, the symbolic case did not arrive until 1905 with the Supreme Court decision in *Lochner v. New York*. The case involved a New York statute that limited the number of hours a baker could work each week. In 1899, Joseph Lochner, owner of Lochner's Home Bakery, was fined for violating this law. He appealed the lower court's fine, and his case went before the Supreme Court in 1905. By a narrow margin of five to four, the Supreme Court rejected the argument that the law was needed to protect the health of bakers. Justice Rufus Peckham, writing for the majority, stated that the

[25] Keifer & Keifer v. Reconstruction Finance Corp., 306 U.S. 381 (1939)
[26] "*Law.* The body, scope, or limit of a statute." Garner, Bryan A, *Black's Law Dictionary*. St. Paul: West Publication Co, 2001: 574.

New York law was an "unreasonable, unnecessary and arbitrary interference with the right to free contract."[27]

Lochner argued that the "right to free contract" was one of the fundamental rights of "substantive due process." The Fourteenth Amendment of the Constitution states "... nor shall any State deprive any person of life, liberty, or property, without due process of law."[28] Starting with the *Dred Scott v. Sandford* (1857), the Supreme Court established that the "due process clause" was not just a procedural guarantee, but a "substantive" limitation on governmental regulations over individuals and their economic interests. By the end of the nineteenth century, it had become the judiciary's version of *laissez-faire* and was indicative of the Supreme Court's hostility to pro-labor legislation. Holmes, on the other hand, wrote the dissenting opinion in which he stated that the majority was engaging in judicial "activism." Further, Holmes asserted that the case was decided not on the law, but "upon the economic theory which a large part of the country does not entertain." [29] Conservative *Lochner* era jurists established a doctrine that protected the principles of *laissez-faire* by interpreting broadly the "due process" of Section 1.

Judicial restraint is a theory of judicial interpretation which promotes the limited exercise of the judiciary when deciding cases.[30] For example, in deciding constitutional questions, judicially-restrained jurists will first look at the U.S. Constitution. When this fails to produce results, the jurists "defer" to the Framers in order to discern their intent. It is this judicial restraint (deference) that Frankfurter and Holmes employed when deciding cases. Frankfurter noted: "Courts are not representative bodies. They are not designed to be a good reflex of a democratic society."[31]

Most of Frankfurter's views on judicial restraint were derived from his close relationship to Holmes who was a U.S. Supreme Court justice and learned legal philosopher. Holmes espoused a form of judicial self-restraint in which he deferred to the explicit or implicit intent of Congress when presented with difficult cases. The *Lochner* era, however, forced Holmes to dissent in numerous cases in which he represented the minority voice surrounded by overreaching jurists. In *Weaver v. Palmer Brother* (1926), Frankfurter praised Holmes in a letter for his vigorous dissent concerning the proper application of the Fourteenth Amendment's "due process clause."

In that case, Holmes echoed his 1905 *Lochner* opinion by arguing that the Court's overturning of a Pennsylvania law prohibiting the use of unsterilized "shoddy" as filling in beds was radical, judicial activism. Holmes, with Louis Brandeis and Harlan Stone concurring, dissented:

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[27] Paul Kens, *Lochner v. New York: Economic Regulation on Trial* Lawrence: University Press of Kansas, 1998: 18; Rudolph J.R. Peritz, *Competition Policy in America: History, Rhetoric, Law*, Oxford: Oxford University Press, 1996: 45-48.
[28] Ibid.
[29] Ibid., 171.
[31] Mark Silverstein, "Felix Frankfurter: Judicial Restraint and Individual Liberties," *The American Historical Review*, Vol. 97, No. 5. (1997): 1621-1622.
[31] Harold J. Spaeth, "The Judicial Restraint of Mr. Justice Frankfurter—Myth or Reality," *Midwest Journal of Political Science,* Vol. 8, No. 1 (1964): 24.

> If the Legislature of Pennsylvania was of opinion that disease is likely to be spread by the use of shoddy in comfortables [beds], I do not suppose that the Court would pronounce the opinion so manifestly absurd that it could not be acted upon…I think that we are pressing the Fourteenth Amendment 'too far.[32]

In both *Lochner v. New York* and *Weaver v. Palmer Brother*, Holmes deferred to the judgment of the legislatures and their determination to bar business practices that were hazardous to public health and safety.

When conservative judges interpreted the Sherman Act, they engaged in *Lochner* era activism by broadly defining the scope of the act to include labor, even though the will of Congress was to halt the rise of corporate monopolies. Judicially-restrained jurists, like Frankfurter, on the other hand, looked to the legislative histories to discern Congress's intent. This judicial deference later played a significant role on Frankfurter's conclusion in the 1941 *Hutcheson* decision.[33]

EARLY JUDICIAL UNCERTAINTY WITH THE SHERMAN ACT: THE LEGISLATIVE HISTORY OF THE SHERMAN ACT

Embodying labor's agitation in 1910, twenty years after consistent judicial misapplications of the Sherman statute, Samuel Gompers' declared angrily: "We know the Sherman law was intended by Congress to punish illegal trusts and not the labor unions, for we had various conferences with members of Congress while the Sherman Act was pending, and remember clearly that such a determination was stated again and again."[34] Gompers was right insofar as Congress's intent was to strike at the "evils of massed capital"[35] and to free competition from the anticompetitive hold of monopolies. But Congress ultimately passed legislation that the courts used to strike at the workingman.

The first debates on the Sherman Antitrust bill began on February 4, 1889. Early on, Senators included price-raising prohibitions in the original drafts of the bill. These price-raising prohibitions were measures intended to make the Sherman Act more effective against business combinations. This is significant because all of these early prohibitions also were more effective against labor and farmer organizations, and this fear permeated the minds of pro-labor Senators.[36]

When Senator John Sherman presented his bill to the Finance Committee, it was entitled, "A bill to declare unlawful trusts and combinations in restraint of trade (competition) and production."[37] Section 1 of that original bill stated explicitly that business combinations that restrained trade were illegal. On March 21, 1890, extensive debates began in the U.S. Senate.

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[32] Robert M. Mennel and Christine L. Compston, *Holmes and Frankfurter: Their Correspondence, 1912-1934*, Hanover: University Press of New England, 1996:199.
[33] Mark Silverstein, "Felix Frankfurter: Judicial Restraint and Individual Liberties," *The American Historical Review*, Vol. 97, No. 5. (1997): 1621-1622.
[34] Samuel Gompers, "The Sherman Law. Amend It or End It," *American Federationist*. Vol. 17. No. 3 (1910): 187, 202.
[35] Berman, 7.
[36] Ibid.
[37] Ibid.

Senator Sherman delivered a forceful speech on the merits of the anti-price raising measures and its effectiveness in preventing trusts. His entire speech never mentioned any intent that his bill should reach labor unions.[38]

Senator Frank Hiscock, on the other hand, firmly believed that the bill was unconstitutional and argued that it was applicable to labor organizations. He stated "Will it be said that [labor] combinations are not made with a view of advancing costs and regulating the sale of property? Will it be argued that they do not directly do it?"[39] Many pro-labor Senators, like Hiscock, believed that a price raising prohibition made the Sherman bill applicable to labor unions. Specifically, it was the Reagan amendment, presented by Senator John Reagan, which increased the penalties of the Sherman bill and added a measure prohibiting combinations that raised prices. Senator Henry Teller offered a caveat on the proposed Reagan amendment, stating that the Farmers' Alliance would be adversely affected by it.[40]

The Farmers' Alliance was a national organization of farmers that increased the price of farm products. Under the Reagan amendment, the Farmers' Alliance would be in violation of restraint of trade when in actuality this organization was, most likely, economically beneficial. The Farmers' Alliance was instituted in response to postbellum monetary deflation and falling commodity prices. Deflation led to widespread debt among farmers, and many lost their farms because they were not able to sell their goods at high enough prices. The Farmers' Alliance was a cooperation of individual farmers who formed an agricultural cartel to eliminate middlemen and sell their merchandise at higher prices to larger commodity brokers.[41]

Senator James George informed Senator Teller that not only the Reagan amendment, but the Sherman bill as well had this same effect. Besides the Farmers' Alliance, Teller concluded that the Knights of Labor would also be within the prosecutorial reach of the Sherman bill. The Knights of Labor, Senator George observed, increased the wages of its members and this increased the price of labor and eventually employers compensated by raising prices on products. Senator Reagan, as reflected by the Congressional debates, clearly had no intention of his amendment affecting the Farmers' Alliance or the Knights of Labor and offered a proviso to exempt these organizations. "Therefore, I suggest," Reagan stated, "…by a little modification it may be possible to relieve the bill of any doubt on this point."[42] In response to Reagan's labor exemption, Senator Sherman explained the nature of his bill. He said,

> It [the Sherman bill] does not interfere in the slightest degree with voluntary associations made to affect public opinion to advance the interests of a particular trade or occupation… [such organizations] are not business combinations…And so the combinations of workingmen to promote their interests, promote their welfare, and increase their pay…are not affected in the slightest in the words or intent of the bill as now reported.[43]

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[38] Ibid., 12.
[39] Ibid., 14.
[40] Ibid., 14; Peritz, 15.
[41] J.E. Bryan, *The Farmers' Alliance: Its Origin, Progress and Purposes*, Fayetteville: Arkansas, 1991: 157.
[42] Berman, 17.
[43] Ibid., 17; Peritz, 14.

This assurance, however, did not quell the concerns of pro-labor Senators. Senator William Stewart responded to Senator Sherman and stated that without the exemption the bill reached labor. Senator Teller agreed and argued that there was a great probability that labor and farmers' organizations faced prosecution under the Sherman bill.[44] "Strong corporations," he warned," were more likely to evade prosecution.

On the next day, March 25, 1890, the Senate debate continued along with the debate on the price raising prohibition and its effect on labor also continued. After persistent pressure from pro-labor Senators, Senator Sherman offered a labor exemption, but qualified it by stating "I do not think it necessary, but at the same time to avoid any confusion, I submit it to come in at the end of the first section."[45] By placing the labor exemption in the first section, it stressed the significance of labor immunity. Sherman's confidence that his bill immunized labor, on first glance, raises the suspicion that he intended the opposite, but when looking at the language of his original bill, it is quite clear that it targeted business monopolies. The language "restraint of competition," Senator Sherman believed, was sufficient for the courts to interpret the law to embrace businesses and not labor. The labor exemption read as follows: "It is [Provided] that this act shall not be construed to apply to any arrangements, agreements, or combinations between laborers."[46] This amendment was immediately adopted without the need for a roll call or recorded vote, illuminating the general feeling of Congress.

After the inclusion of a labor exemption, the Sherman bill was then inundated by "encumbering amendments."[47] Congress adopted amendments which placed taxes on dealing in futures, and liquor products and prohibitions on certain types of gambling. The bill became so packed with amendments that confused the language that Senator Arthur Gorman declared the bill "worse than a sham and a delusion."[48] He insisted that the amendments made the bill ineffective, echoing the concerns of a growing number of Senators.

Senator Sherman also expressed this belief and was concerned that the amendments hindered passage of his legislation, prompting Senator Joseph Hawley to suggest that the bill be sent to the Judiciary Committee, which had the power to eliminate, modify, and smooth out the language of Sherman's bill. On a vote of 29 to 24, the Senate voted against Senator Hawley's proposal. On March 27th, the Senate held a vote to consider the amendments one-by-one. When Senator Sherman's labor exemption was considered, Senator George Edmunds argued against it, stating "this [is a] matter of capital…and labor is an equation."[49] Senator Edmunds did not see labor at a disadvantage as did the pro-labor Senators and argued vigorously that labor combinations and business combinations were equals. But it was very clear to other Senators that labor and capital were not equals. Some years later, Frankfurter agreed with this reasoning and

[44] Berman, 19.
[45] Ibid, 21.
[46] Ibid., 21.
[47] Ibid., 22; Peritz, 18-21.
[48] Berman, 24.
[49] Berman, 24; Peritz 23.

insisted that "There is no greater inequality than the equal treatment of unequals."[50] Senators Sherman and Eugene Hoar argued in defense of the labor exemption.[51]

Again hoping to resolve the conflict over the encumbering amendments, including the labor exemption, the Senate voted 31 to 28 to send the bill to the Judiciary Committee. It should be noted that during that Senator Edmunds voted against this measure. This is significant because he was the chair of the Judiciary Committee, and as someone who appeared hostile to labor organizations, he did not want to send it to the Judiciary Committee where he could have manipulated the language so that the bill could be applied to labor. Evidenced in the debate was that the labor exemption debate was one of many in which he participated.

The bill was sent to the Judiciary Committee and under Edmunds' direction, the committee crafted a new bill which was similar to the one that eventually passed. The Judiciary Committee changed the title of the bill from, "A bill to declare unlawful trusts and combinations in restraint of competition and production"[52] to the more inclusive title, "A bill to protect trade and commerce against restraint and monopolies." This title was the final alteration made by Senator Edmunds who initially sought to include labor under the purview of the Sherman statute.

On April 8, 1890, the Senate took up consideration of the Judiciary Committee's substitute bill without a labor exemption attached by Senator Sherman and without the price-raising prohibition attached by Senator Reagan. Agitated by legislative delays, Senator Sherman agreed to vote for the substitute bill to move along his legislation for final passage. He declared "I shall vote for it, not as being precisely what I want, but as best under the circumstances that the Senate is prepared to give in this direction."[53] The Senate passed the substitute bill 52 to 1. Prior to passage, no debate on the labor exemption's absence from the substitute bill took place, nor did any debate occur on the absent price raising prohibition. It is possible that pro-labor Senators thought they won a victory with the elimination of Reagan's amendment, which they deemed more harmful than the Sherman bill itself.

Debate on the Judiciary Committee's substitute bill focused on the effectiveness of the Sherman statute against business combinations. When the bill was referred to the House for passage, no extensive debates occurred on its broad language and possibility of reaching labor. A conference committee worked out minor changes and the bill passed the House on June 28th. On July 2, 1890, the Sherman Antitrust bill was sign into law by President Benjamin Harrison.

Regarding Congressional intent, did the omission of a labor exemption from the final bill mean that its organizations were within its scope? It seems unlikely. During Congressional debates, every mention of labor dealt with the "price raising prohibition." Since the bill that passed the Judiciary Committee was not debated, pro-labor Senators probably thought the labor exemption unnecessary. It was the "all-inclusive" potency of the price raising prohibition that concerned pro-labor Senators. With its removal, the debates ended. None of the pro-labor Senators, including labor's most resolute ally, Senator Hoar, opposed the final passage of the

[50] Michael E. Parrish, *Felix Frankfurter and His Times: The Reform Years*, New York: The Free Press, 1982: 65.
[51] Berman, 26; Peritz 20.
[52] Berman, 11.
[53] Ibid., 29.

substitute bill in debate. They were lulled into a false sense of security with the removal of the price raising prohibition.

Moreover, even though Senator Edmunds, Chairman of the Judiciary Committee, saw labor as an equal to business, his views did not reflect the Senate as a whole. The Judiciary Committee was assigned the task of eliminating superfluous amendments and streamlining Sherman's bill. Therefore, the theory that Senator Edmund cleverly outmaneuvered his pro-labor opponents through the Judiciary Committee can not be substantiated, chiefly because he voted against sending the original to the Judiciary Committee in the first place. The best possible explanation is that confusion arose on the committee and removal of the price raising prohibitions translated in the minds of pro-labor Senators as a labor exemption.

Additional evidence of this confusion is supported by the terms "restraint of trade" and "restraint of competition."[54] Restraint of competition was directed solely at corporate combinations and anti-competitive behavior. Contrarily, restraint of trade was far more inclusive; labor and business combinations could both restraint "trade." Senators used these two terms so frequently that they became interchangeable and when restraint of trade was selected over restraint of competition it raised no concerns. The legislative history does not reflect that the Sherman statute was meant to apply to labor, but exactly the opposite from all the available evidence in the act's legislative history the Sherman statute was solely meant to apply to corporate combinations. *Lochner* era jurists, however, decided otherwise.

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[54] Berman, 52-53.
[55] Samuel Gompers, "The Sherman Law. Amend It or End It," *American Federationist*. Vol. 17. No. 3 (1910): 187, 202.
[56] Berman, 7.
[57] Ibid.

When Senator John Sherman presented his bill to the Finance Committee, it was entitled, "A bill to declare unlawful trusts and combinations in restraint of trade (competition) and production."[58] Section 1 of that original bill stated explicitly that business combinations that restrained trade were illegal. On March 21, 1890, extensive debates began in the U.S. Senate. Senator Sherman delivered a forceful speech on the merits of the anti-price raising measures and its effectiveness in preventing trusts. His entire speech never mentioned any intent that his bill should reach labor unions.[59]

Senator Frank Hiscock, on the other hand, firmly believed that the bill was unconstitutional and argued that it was applicable to labor organizations. He stated "Will it be said that [labor] combinations are not made with a view of advancing costs and regulating the sale of property? Will it be argued that they do not directly do it?"[60] Many pro-labor Senators, like Hiscock, believed that a price raising prohibition made the Sherman bill applicable to labor unions. Specifically, it was the Reagan amendment, presented by Senator John Reagan, which increased the penalties of the Sherman bill and added a measure prohibiting combinations that raised prices. Senator Henry Teller offered a caveat on the proposed Reagan amendment, stating that the Farmers' Alliance would be adversely affected by it.[61]

The Farmers' Alliance was a national organization of farmers that increased the price of farm products. Under the Reagan amendment, the Farmers' Alliance would be in violation of restraint of trade when in actuality this organization was, most likely, economically beneficial. The Farmers' Alliance was instituted in response to postbellum monetary deflation and falling commodity prices. Deflation led to widespread debt among farmers, and many lost their farms because they were not able to sell their goods at high enough prices. The Farmers' Alliance was a cooperation of individual farmers who formed an agricultural cartel to eliminate middlemen and sell their merchandise at higher prices to larger commodity brokers.[62]

Senator James George informed Senator Teller that not only the Reagan amendment, but the Sherman bill as well had this same effect. Besides the Farmers' Alliance, Teller concluded that the Knights of Labor would also be within the prosecutorial reach of the Sherman bill. The Knights of Labor, Senator George observed, increased the wages of its members and this increased the price of labor and eventually employers compensated by raising prices on products. Senator Reagan, as reflected by the Congressional debates, clearly had no intention of his amendment affecting the Farmers' Alliance or the Knights of Labor and offered a proviso to exempt these organizations. "Therefore, I suggest," Reagan stated, "…by a little modification it may be possible to relieve the bill of any doubt on this point."[63] In response to Reagan's labor exemption, Senator Sherman explained the nature of his bill. He said,

> It [the Sherman bill] does not interfere in the slightest degree with voluntary associations made to affect public opinion to advance the interests of a particular trade or

[58] Ibid.
[59] Ibid., 12.
[60] Ibid., 14.
[61] Ibid., 14; Peritz, 15.
[62] J.E. Bryan, *The Farmers' Alliance: Its Origin, Progress and Purposes*, Fayetteville: Arkansas, 1991: 157.
[63] Berman, 17.

> occupation… [such organizations] are not business combinations…And so the combinations of workingmen to promote their interests, promote their welfare, and increase their pay…are not affected in the slightest in the words or intent of the bill as now reported.[64]

This assurance, however, did not quell the concerns of pro-labor Senators. Senator William Stewart responded to Senator Sherman and stated that without the exemption the bill reached labor. Senator Teller agreed and argued that there was a great probability that labor and farmers' organizations faced prosecution under the Sherman bill.[65] "Strong corporations," he warned," were more likely to evade prosecution.

On the next day, March 25, 1890, the Senate debate continued along with the debate on the price raising prohibition and its effect on labor also continued. After persistent pressure from pro-labor Senators, Senator Sherman offered a labor exemption, but qualified it by stating "I do not think it necessary, but at the same time to avoid any confusion, I submit it to come in at the end of the first section."[66] By placing the labor exemption in the first section, it stressed the significance of labor immunity. Sherman's confidence that his bill immunized labor, on first glance, raises the suspicion that he intended the opposite, but when looking at the language of his original bill, it is quite clear that it targeted business monopolies. The language "restraint of competition," Senator Sherman believed, was sufficient for the courts to interpret the law to embrace businesses and not labor. The labor exemption read as follows: "It is [Provided] that this act shall not be construed to apply to any arrangements, agreements, or combinations between laborers."[67] This amendment was immediately adopted without the need for a roll call or recorded vote, illuminating the general feeling of Congress.

After the inclusion of a labor exemption, the Sherman bill was then inundated by "encumbering amendments."[68] Congress adopted amendments which placed taxes on dealing in futures, and liquor products and prohibitions on certain types of gambling. The bill became so packed with amendments that confused the language that Senator Arthur Gorman declared the bill "worse than a sham and a delusion."[69] He insisted that the amendments made the bill ineffective, echoing the concerns of a growing number of Senators.

Senator Sherman also expressed this belief and was concerned that the amendments hindered passage of his legislation, prompting Senator Joseph Hawley to suggest that the bill be sent to the Judiciary Committee, which had the power to eliminate, modify, and smooth out the language of Sherman's bill. On a vote of 29 to 24, the Senate voted against Senator Hawley's proposal. On March 27th, the Senate held a vote to consider the amendments one-by-one. When Senator Sherman's labor exemption was considered, Senator George Edmunds argued against it, stating "this [is a] matter of capital…and labor is an equation."[70] Senator Edmunds did not see labor at a disadvantage as did the pro-labor Senators and argued vigorously that labor

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[64] Ibid., 17; Peritz, 14.
[65] Berman, 19.
[66] Ibid, 21.
[67] Ibid., 21.
[68] Ibid., 22; Peritz, 18-21.
[69] Berman, 24.
[70] Berman, 24; Peritz 23.

combinations and business combinations were equals. But it was very clear to other Senators that labor and capital were not equals. Some years later, Frankfurter agreed with this reasoning and insisted that "There is no greater inequality than the equal treatment of unequals."[71] Senators Sherman and Eugene Hoar argued in defense of the labor exemption.[72]

Again hoping to resolve the conflict over the encumbering amendments, including the labor exemption, the Senate voted 31 to 28 to send the bill to the Judiciary Committee. It should be noted that during that Senator Edmunds voted against this measure. This is significant because he was the chair of the Judiciary Committee, and as someone who appeared hostile to labor organizations, he did not want to send it to the Judiciary Committee where he could have manipulated the language so that the bill could be applied to labor. Evidenced in the debate was that the labor exemption debate was one of many in which he participated.

The bill was sent to the Judiciary Committee and under Edmunds' direction, the committee crafted a new bill which was similar to the one that eventually passed. The Judiciary Committee changed the title of the bill from, "A bill to declare unlawful trusts and combinations in restraint of competition and production"[73] to the more inclusive title, "A bill to protect trade and commerce against restraint and monopolies." This title was the final alteration made by Senator Edmunds who initially sought to include labor under the purview of the Sherman statute.

On April 8, 1890, the Senate took up consideration of the Judiciary Committee's substitute bill without a labor exemption attached by Senator Sherman and without the price-raising prohibition attached by Senator Reagan. Agitated by legislative delays, Senator Sherman agreed to vote for the substitute bill to move along his legislation for final passage. He declared "I shall vote for it, not as being precisely what I want, but as best under the circumstances that the Senate is prepared to give in this direction."[74] The Senate passed the substitute bill 52 to 1. Prior to passage, no debate on the labor exemption's absence from the substitute bill took place, nor did any debate occur on the absent price raising prohibition. It is possible that pro-labor Senators thought they won a victory with the elimination of Reagan's amendment, which they deemed more harmful than the Sherman bill itself.

Debate on the Judiciary Committee's substitute bill focused on the effectiveness of the Sherman statute against business combinations. When the bill was referred to the House for passage, no extensive debates occurred on its broad language and possibility of reaching labor. A conference committee worked out minor changes and the bill passed the House on June 28th. On July 2, 1890, the Sherman Antitrust bill was sign into law by President Benjamin Harrison.

Regarding Congressional intent, did the omission of a labor exemption from the final bill mean that its organizations were within its scope? It seems unlikely. During Congressional debates, every mention of labor dealt with the "price raising prohibition." Since the bill that passed the Judiciary Committee was not debated, pro-labor Senators probably thought the labor exemption unnecessary. It was the "all-inclusive" potency of the price raising prohibition that

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[71] Michael E. Parrish, *Felix Frankfurter and His Times: The Reform Years*, New York: The Free Press, 1982: 65.
[72] Berman, 26; Peritz 20.
[73] Berman, 11.
[74] Ibid., 29.

concerned pro-labor Senators. With its removal, the debates ended. None of the pro-labor Senators, including labor's most resolute ally, Senator Hoar, opposed the final passage of the substitute bill in debate. They were lulled into a false sense of security with the removal of the price raising prohibition.

Moreover, even though Senator Edmunds, Chairman of the Judiciary Committee, saw labor as an equal to business, his views did not reflect the Senate as a whole. The Judiciary Committee was assigned the task of eliminating superfluous amendments and streamlining Sherman's bill. Therefore, the theory that Senator Edmund cleverly outmaneuvered his pro-labor opponents through the Judiciary Committee can not be substantiated, chiefly because he voted against sending the original to the Judiciary Committee in the first place. The best possible explanation is that confusion arose on the committee and removal of the price raising prohibitions translated in the minds of pro-labor Senators as a labor exemption.

Additional evidence of this confusion is supported by the terms "restraint of trade" and "restraint of competition."[75] Restraint of competition was directed solely at corporate combinations and anti-competitive behavior. Contrarily, restraint of trade was far more inclusive; labor and business combinations could both restraint "trade." Senators used these two terms so frequently that they became interchangeable and when restraint of trade was selected over restraint of competition it raised no concerns. The legislative history does not reflect that the Sherman statute was meant to apply to labor, but exactly the opposite from all the available evidence in the act's legislative history the Sherman statute was solely meant to apply to corporate combinations. *Lochner* era jurists, however, decided otherwise.

THE SHERMAN ACT

The 1890 Sherman Antitrust Act's initial legal application was solely confined to corporate monopolies. Consistently, however, beginning in 1893, judges gave legal sanction for its use against labor unions. The law itself, when read broadly, did allow for such prosecutorial measures, despite the Congressional intent that it only applied to business combinations.
Section 1 of the Sherman Act states:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal.

Section 2 states:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor.[76]

This legal language is broad insofar as it does not exclusively apply to "corporate" monopolies, but to any organization that "monopolized" to restrain commerce, and this reading of the

[75] Berman, 52-53.
[76] See Berman.

Sherman Act led to numerous cases against organized labor. Labor unions, on the other hand, protested vociferously stating that their organizations were not in the purview of the antitrust statute, and the original purpose of the legislation was to curtail the predatory practices of corporate monopolies.[77]

When found guilty of the Sherman Act, the courts could apply three penalties: (1) criminal prosecution, leading to incarceration, (2) injunctive relief sought by the government, and (3) punitive damages, granted by the courts. In the early Sherman cases, labor was subjected to all of these weapons. When the 1914 Clayton Act allowed for injunctive relief to be sought by "private parties," it became the primary weapon in an employer's arsenal to disrupt and preempt labor strikes.[78]

Conservative Attorney General Richard Olney dubbed the Sherman statute "an experimental piece of legislation,"[79] and rightly so. In 1892, the draymen's union in New Orleans which was affiliated with Workingmen's Amalgamated Council, a larger labor organization, went on strike. Soon after, numerous other unions went on strike in sympathetic strikes intended to aid the draymen. Consequently, these strikes had a crippling effect on the business of the city and its transportation of goods. The strikes were so pervasive, city official stated, that interstate and foreign commerce was "totally interrupted."[80] In response, federal attorneys brought suit for an injunction, charging that the strikers were violating the Sherman Act. The U.S. attorneys asserted that the striking unions represented "a gigantic and widespread combination of the members of a multitude of separate organizations for the purpose of restraining the commerce among the several states and with foreign countries."[81]

On March 25, 1893, the federal Circuit Court for the Eastern District of Louisiana rendered its decision in *U.S. v. Workingmen's Amalgamated Council*. Judge Edward Coke Billings' opinion, said:

> I think the Congressional debates show that the statute had its origin in the evils of massed capital; but, when the Congress came to formulating the prohibition, which is the yardstick for measuring the complainant's right to the injunction, it expressed it in these words: "Every contract or combination in the form of trust, or otherwise in restraint of trade or commerce among the several states or with foreign nations, is hereby declared to be illegal."[82]

The union argued that it was not in the purview of the Sherman statute, but Judge Billings thought otherwise. He further stated that the legislators "made the interdiction [prohibition] include combinations of labor as well as of capital."[83] Judge Billings granted an injunction

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[77] Ibid.
[78] Section 20 of the Clayton Act permitted the issuance of injunctions to prevent "injury to property, or to a property right," that is, private property, Berman, 100; Jones, 207; Bernstein, 395.
[79] David Ray Papke, *The Pullman Case: The Clash of Labor and Capital in Industrial America,* Lawrence: University of Kansas Press: 1999: 72.
[80] *US v Workingmen's Amalgamated Council*, 54 Fed. 994 (1893); Berman, 61.
[81] Berman, 61.
[82] *US v Workingmen's Amalgamated Council;* Berman, 61, 63.
[83] Ibid, 63.

against the labor unions and their activities were immediately stopped. With all the talk of equal distribution of the Sherman statute to labor and business combinations, Judge Billings, a month earlier, had refused to issue an injunction against a business combination. Under the rules of jurisprudence, the *U.S. v. Workingmen's Amalgamated* decision became precedent for subsequent Sherman Act labor cases.[84]

In *U.S. v. Patterson* (1893), the government sued Massachusetts cash register manufacturers for violating the Sherman Act. The government charged that the cash register manufacturers were a combination that monopolized trade and used "violence, annoyance, and intimidation" to force out competitors.[85] The question that was presented before the Massachusetts court was whether the provisions of the Sherman Act extended to all interference with interstate trade or did an actual measurable monopoly have to exist? Elihu Root, an attorney representing the government, declared that the term "restrain of trade" referred to interference with commerce and that the government's position was that the Sherman statute was applicable to all combinations that "restrained trade."[86]

The Circuit Court of Massachusetts took a different view, stating that the Sherman statute, when taken as a whole, applied solely to business monopolies. The court stated that "monopolies" and "attempts to monopolize"[87] must be taken in conjunction with "restraint of trade," thereby limiting the law's scope. If subsequent courts had accepted this interpretation, then labor unions would have been excluded from the antitrust law. Instead of following the precedent established in the *Patterson* case, it was *U.S. v. Workingmen's Amalgamated Council* (1893) that set the legal standard for review. The previous cases are significant because they show two intermediate courts that arrived at entirely different decisions when interpreting the scope of the Sherman statute, and this judicial uncertainty spread.

THE INJUNCTION AT PULLMAN

This judicial uncertainty, however, started to fade when the most potent use of an injunction occurred in 1894 with the Pullman Strike. When Pullman Palace Car Company owner George Pullman reduced wages without an equivalent decrease in rent and other expenses in his company town, his employees initiated efforts to force Pullman to agree to arbitration. Pullman's era was marked by significant railway expansion, a product of an industrializing economy. By 1860 alone, the nation had thirty-one thousand miles of track, which were heavily subsidized by the U.S. government. In negotiations with Thomas Heathcoate, head of the workers' grievances committee, Pullman stated that rent prices had nothing to do with wages. Pullman argued that rents were determined by supply and demand and adamantly refused to a decrease.[88]

Pullman's employees were unable to distinguish from Pullman the employer and Pullman the landlord. Pullman's employees lived in the Pullman company town in which he provided the housing and other services. Although workers could have moved into non-company housing,

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[84] Ibid.
[85] *US v. Patterson*, 150 US 65 (1893); Berman, 60-61.
[86] Ibid., 61.
[87] Ibid..
[88] Papke, 101; Berman, 64-65; Walter Licht, *Industrializing America: The Nineteenth Century*, Baltimore: The John Hopkins University Press, 1995: 171.

promotions and employment security were made contingent on whether a worker lived in company housing.[89] After Heathcoate's meeting with Pullman and his vice-president, several members of the workers grievance committee were dismissed from their jobs. Although Pullman stated that dismissals were not done in retaliation, Pullman employees were angry over the terminations. In March 1894, Pullman workers joined the American Railway Union headed by Eugene Debs. The union had gained tremendous popularity after its labor victory over the Great Northern Railroad in 1886. In May of 1894, as a result of failed negotiation and company retaliation, approximately three to four thousand Pullman workers went on strike.[90]

When the American Railway Union held its annual meeting in Chicago, from June 9th to June 26th, it attempted to force the Pullman Company to agree to arbitration.[91] Immediately after, plans went underway to carry out a secondary boycott. Debs was cautious and shied away from calling for a secondary boycott because of its national effects and negative impact on other businesses. He stated he did not "really like the term 'boycott.' [secondary boycott]…There is a deep-seated hostility in the country to the term boycott."[92] Instead of pursuing a boycott, the strikers, long with Debs, tried one last time to get Pullman to agree to arbitration.[93] These efforts failed and on June 22, 1894, six weeks after the start of the Pullman strike, the American Railway Union unanimously agreed to call for a secondary boycott. As Debs had feared, the public and press did not respond well to the secondary boycott. The *Daily Inter Ocean*, a major publication in Chicago, charged that "The railroad strike now on is one of the most foolish and inequitous [sic] ever ordered in this country…It is arbitrary, arrogant, and without a shadow of justification," but it was effective.[94]

Crucial in facilitating the secondary boycott were the switchmen who had joined the American Railway Union in large numbers. Loyal switchmen, Debs believed, would refuse to handle Pullman cars or place them on tracks. When loyal switchmen were fired for participating in the secondary boycott, their fellow workers walked out in solidarity, and this paralyzed more railroad companies. As Debs anticipated, the secondary boycott began slowly but soon progressed rapidly. By June 27th, fifteen railroads were stopped when five thousand workers went on strike. By June 28th, all the rail lines west of Chicago were frozen when forty thousand workers left their jobs. One day later, over one hundred thousand railway workers went on strike and almost twenty railroads were completely stopped.[95]

Debs, ultimately shocked by the effectiveness of the boycott, sent telegram after telegram urging local unions to avoid violence. Also, he declared that no trains should be stopped and reminded boycotters that the Pullman Company was the sole target and not all railroads. The press started to call it the "Debs Rebellion"[96] and hostility grew rapidly. To counter the boycott, the General Managers' Association, an organization of twenty-four railroads with and combined

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[89] Papke, 26.
[90] Ibid., 26, Berman, 64.
[91] Papke, 27; Berman, 64.
[92] Papke, 24.
[93] Ibid.
[94] Ibid., 25.
[95] Ibid., 26; John Berwick Taylor, "The Politics of the Labor Injunction," (Ph.D. diss., Princeton University, 1972), 44-45.
[96] Papke, 27.

assets of over $818 million, 41, 000 miles of track and 221,000 employees, sought judicial relief.[97] Along with seeking legal assistance, the General Managers' Association recruited about twenty thousand strikebreakers, derogatorily called scabs. Industry-wide unionism had to be stopped. In further efforts to disrupt the strike, the general managers' intentionally attached Pullman cars to mail trains, thus disrupting train schedules. The general managers' plan was to gain as much public and governmental support as possible to fight the American Railway Union.

Their efforts were also helped by the spread of wildcat strikes (unauthorized strikes) and increasing violence.[98] Debs had the multiple tasks of trying to control 150,000 members of the American Railway Union, preventing violence, and halting wildcat strikes. All of this led to a severe disruption in the U.S. Postal Service. After some debate in his Cabinet, President Grover Cleveland decided to commit troops over the protest of General Nelson A. Miles, who was ordered to carry it out. Cleveland forcefully stated, responding to Miles' protest, that "If it takes every dollar in the Treasury and every soldier in the United States Army to deliver a postal card in Chicago [the primary hub for the strike], that postal card shall be delivered."[99] Central to committing federal troops was the legal authority to do so. Attorney General Richard Olney was given the responsibility to determine legality. Olney was no friend of labor and agreed to his appointment in Cleveland's cabinet on the condition that he be allowed to continue private practice providing legal assistance to railroads. While in private practice, Olney's legal expertise was essential in coordinating railroad mergers, consolidation, and management issues. While serving as Attorney General, Olney continued to receive substantial retainers from railroads.[100]

Olney petitioned for an injunction in United States Circuit Court of Chicago, a court in the federal system until 1911. To thoroughly understand the significance of the injunction, four scholars explain it well: John Berwick Taylor, David Ray Papke, Felix Frankfurter, and Nathan Greene. American jurisprudence draws heavily on English law.[101] Since the start of the Republic, state and federal judges heard petitions and occasionally granted injunctions. *Black's Law Dictionary* defines an injunction as "a court order commanding or preventing an action." Injunctions are not final decisions and are usually interlocutory (temporary).[102] Injunctions are subject to the "irreparable-injury rule," which as defined in *Black's Law Dictionary*, is "the principle that equitable relief [such as an injunction] is available only when no adequate legal remedy exists."[103] This is what Frankfurter called an "extraordinary legal tool."[104] For example, *Black's Law* states "a judge may enjoin [stop] a person from dumping waste into a pond until ownership of the pond is determined."[105] This would be the typical use of an injunction which constitutes the need for an immediate legal remedy.

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[97] Ibid., 27.
[98] Licht, 173; Papke, 26-27; Berman, 26.
[99] Papke, 30.
[100] Ibid., 30.
[101] Taylor, 42; Papke, 39; Bernstein, 195.
[102] Bryan A. Garner, *Black's Law Dictionary*, St. Paul: West Publication Co, 2001: 349; Bernstein, 195; Frankfurter and Greene, 50, 80, 81.
[103] Garner, 372.
[104] Frankfurter, The Labor Injunction, 50, 80, 81; Bernstein, 195.
[105] Garner, 372.

Judges, while sitting in "equity jurisdiction," hear injunction requests. Article III of the United States Constitution gives federal courts the authority to hear cases in "law and equity." [106] Using this authority, the federal court in Chicago granted an injunction against Debs and his colleagues from engaging in strike and boycott activities. On June 2, 1894, federal judges Peter S. Grosscup and William A. Woods granted one of the most sweeping injunctions on record. Chiefly responsible for this successful petition was Attorney General Richard Olney, his assistant Edwin Walker, and the U.S. Attorney for Chicago, Thomas M. Milchrist. Judges Grosscup and Woods were *Lochner* era conservatives in the truest sense. Grosscup's brother was a lawyer for the Northern Pacific Railroad and Grosscup was on record as being hostile to labor

In a Declaration Day address, Grosscup declared that the American worker "has effectively sunk his will into the general will of his trade and has cast away for organization all the advantages and aspirations of independent individuality."[107] Grosscup made sure, however, to acknowledge that he was speaking as a private citizen and not a jurist. But as a private citizen or jurist, his hostility toward labor was made clear.

The Chicago federal court issued ordered the unionists to absolutely refrain from the following:

> in any way or manner interfering with, hindering, obstructing, or stopping any of the business of the railroads, or any trains carrying United States mails or engaged in interstate commerce; from interfering with or injuring the property of said railroads; from trespassing on such property for the purposes of said obstructions; from injuring, signals, switches, etc; from compelling or inducing or attempting to compel or induce, by threats, intimidation, persuasion, force or violence, any of the employees of any of the said railway companies to refuse or fail to perform any of their duties as employees in carrying mail or in interstate commerce.[108]

Put simply, this injunction ended the strike and the secondary boycott. It stopped union officials from convincing train workers to leave work and enjoined the physical abuse of "scabs" who worked for the railroads. The injunction was so expansive in scope, that even conservative members of the bar questioned its appropriateness. Charles Chaflin Allen, for example, a member of the then conservative American Bar Association, challenged the language of the injunction, specially the phrase "ten thousand strikers and all the [the entire] world besides."[109] The press also noted its expansiveness; the *Chicago Tribune* observed that on the day the injunction was issued it was "so broad and sweeping that interference with the railroads, even of the remotest kind, will be made practically impossible."[110]

With the injunction freshly in hand, General Nelson Miles, acting begrudgingly under the orders of President Cleveland, interrupted the strike in Chicago and around the country with two thousand U.S. troops along with hundreds of U.S. marshals. The troops were ordered primarily on the basis that the strikers interfered with the U.S. mail. But Debs did not blame the army for the break up of the Pullman strike. The Pullman strike, Debs declared, "was broken up by the

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[106] Papke, 39; Bernstein, 195.
[107] Papke, 41.
[108] Berman, 66; Papke, 41.
[109] Ibid.
[110] Papke, 42.

Federal courts of the United States, and not by the Army, and not by any other power, but simply and solely by the actions of the United States courts…"[111] Noting the injunction, Debs sought the legal counsel of William E. Erwin, a staunchly pro-labor lawyer. Erwin informed Debs that he should carry on attempting to restrain the violence.[112]

With the government's success in Pullman, federal attorneys in districts throughout the West and Central United States obtained similar injunctions. Federal attorneys in virtually all the cases, including Pullman, used the Sherman statute as applicable law. The U.S. attorneys, along with seeking injunctions in equity jurisdiction, charged strikers with restraint trade and interfering with interstate commerce in violation of the Sherman statute. This allowed the courts to apply more legal remedies against the violating parties. Judge Woods even went so far as to state that the terms of the Sherman statute not only applies to railroad strikes, in which strikers directly interfered with interstate commerce, but Congress had intended the statute to be applied broadly against other labor activities.[113]

Two weeks after the enjoinment of the Pullman strike, Debs and his union vice president, George W. Howard, were charged with violating the injunction. Federal Judge William H. Seaman heard the government's argument. U.S. attorney for Chicago, Milchrist and an attorney working on behalf of the General Managers' Association, charged that Debs and his vice president were inciting others to resist the court's injunction and continue the strike.[114] The government provided telegrams sent by Debs to local union leaders. In abundance the telegrams appeared harmless, but when selectively chosen, they portrayed Debs as a forceful figure calling for more strikes and resistance against federal troops. For example, a telegram from Debs sent to O. L. Vincent, a strike organizer in Clinton, Iowa, declared "Don't get scared by troops or otherwise. Stand pat."[115] Further, historian David Papke suggests that since the telegrams were non-violent and gave no direct instructions to disrupt the rail lines, than saying that Deb's telegrams violated the injunction was a stretch.[116]

After federal attorneys read the most incriminating telegrams, Judge Seaman ordered the temporary incarceration of Debs and the other defendants. Seaman also set a three thousand dollar bail until a hearing on July 23rd. While in prison, Debs sought additional legal counsel from Clarence Darrow and Stephen S. Gregory, both pro-labor Chicago lawyers. After hearings, Debs' case came before federal Chicago U.S. Circuit Court Judge Woods in September.[117] Following three months of arguments, Woods found Debs and the other union officials in contempt. In his lengthy opinion, Woods acknowledged labor's right to a "peaceful" strike. "The right of men to strike peaceably, and the right to advise a peaceable strike, which the law does not presume impossible, is not questioned,"[118] Woods asserted. But to enter into an unlawful conspiracy and to engage in a violent strike and to restrain trade, Woods stated was unjustifiable. In his opinion, "whatever the facts might have been proved…to be, [they] could furnish neither justification nor palliation for giving up a city to disorder and for paralyzing the industries and

[111] Taylor, 42.
[112] Papke, 42.
[113] Ibid., 50.
[114] Ibid., 44, 101.
[115] Ibid., 43.
[116] Ibid.
[117] Ibid., 49-50.
[118] Ibid., 49.

'commerce' of the country."[119] In this statement, Woods was directly addressing the authorized and unauthorized secondary boycotts that occurred during the Pullman strike.

Further in his opinion, Woods discussed the court's jurisdiction, specially pointing to the Sherman statute. Disregarding the original intent of Congress, Woods thought that in the time since its passage, the scope of the Sherman statute had broadened sufficiently to embrace labor. Since switchmen, who were affiliated with the American Railway Union, refused to move Pullman cars and therefore interfered with interstate commerce, the Chicago court, so Woods reasoned, had proper authority under the provisions of the Sherman Act to cite Debs and the other unionists with contempt of a court-ordered injunction. On December 14, 1894, Debs was sentenced to six months and the other unionists received three months. In *In re Debs*,[120] the case that was later appealed; the Supreme Court did not directly address the applicability of the Sherman statute to labor, but on the safe constitutional ground of the federal courts' "equity jurisdiction."[121]

Darrow and Gregory appealed the lower courts' ruling in the Debs case and challenged the court's authority to issue an injunction. *In re Debs* was argued before the Supreme Court on March 25, 1895. In their briefs, both Darrow and Gregory noted that the Debs' telegrams did not incite or in any way advocate violence.[122] Darrow stated that Judge Woods' reliance on the Sherman statute was improper and that Congress intended it to strike at the abuses of corporate combinations. Although strikes had increased in frequency and magnitude as trusts and corporations had grown, Darrow strongly believed that the law was meant to strike "against capital."[123] The injunction, Darrow and Gregory insisted, was so expansive as to not just enjoin the Pullman strikers, but the right to strike itself. Gregory wrote in his brief, "This injunction was aimed at a strike; these men [Debs, et al.] were imprisoned because they were leaders in a strike."[124]

The labor lawyers were opposed by Attorney General Richard Olney, a social Darwinist who demonstrated little sympathy for labor. Olney's co-counsel was Assistant Attorney General Edward B. Whitney, a junior member of the Justice Department. In presenting the government's argument before the Supreme Court, Olney wanted to emphasize equity jurisdiction and escape the legal quandary of the Sherman statute. He believed that Judge Woods' reliance on the Sherman Act was shaky and believed that the case had been "decided rightly enough but upon the wrong [legal] ground."[125] Although he did not inform Whitney not to rely on the Sherman statute, Olney did stress that it was best to focus on the general equity jurisdiction of federal courts. Olney saw the Sherman statute as a legal window that the defense could exploit to show the Chicago court improperly applied the law.[126]

Whitney's brief was based on procedural questions concerning Debs' writ of habeas corpus. Also, Walker, Olney's assistant, wrote a brief for the government that upheld the federal

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[119] Ibid.
[120] *In re*, according to *Black's Law*, is defined as "in the matter or case of; in regard to."
[121] Papke, 42; Bernstein, 195; Frankfurter and Greene, The Labor Injunction, 50, 80, 81.
[122] Papke, 60.
[123] Ibid., 65.
[124] Ibid.
[125] Ibid., 72.
[126] Papke, 72.

court's right to issue injunctions under equity jurisdiction. Walker wrote that the Interstate Commerce Act of 1887 provided sufficient legal authority for the court's injunction. Addressing other sensitive topics, Walker pointed out that the U.S. mail had been obstructed by the pervasive and negligent nature of the strike. He stated that the government was well within its authority to ensure the unobstructed transportation of the mail and the officers of the United States government were charged with this task.

To rebut Gregory's claim that the injunction targeted labor, Walker pointed out that the matter of Debs was a civil and not criminal case. "It [the injunction]," Walker insisted, "does not forbid a peaceful strike, nor does it forbid the exercise of all one's power to induce others, for lawful purposes, to institute a peaceful strike."[127] Walker went on, "The only persuasion specifically enjoined is persuasion of employees remaining in their employment not to do their duty."[128] In sum, Walker's position and therefore the government's position was that federal courts had the authority to prevent obstruction of the railroads and to stop interference with mail delivery. Federal courts, Olney and Walker believed, had the power under equity jurisdiction to "enjoin this menace,"[129] referring to the Pullman strike in general.

On March 25 and 26, 1895, the Supreme Court heard oral arguments from both Debs' attorneys and the government. In arguing against the government's jurisdictional claims, Gregory authoritatively stated that there was none and stressed the liberty of American citizens. He also mentioned that the government's use of the Sherman statute was inappropriate, noting that attempting to do so was equivalent to "judicial strabism."[130] When Olney responded to the defense, he stated that the single question before the Supreme Court was whether the lower federal court had jurisdiction to issue an injunction. In his argument, he focused little on the details of the strike or the Sherman statute, which he deemed "an experimental piece of legislation."[131]

Focusing primarily on "interstate commerce," Olney argued that trains and railroads have been recognized by federal legislation, the Interstate Commerce Act, as essential elements to commerce. This was being obstructed, and the government was allowed to act. With Olney's avoidance of the Sherman statute noted, Darrow criticized the government for abandoning its position on that statute. Darrow also criticized the government for the use of the Interstate Commerce Act, which according to Darrow, was railroad regulation and deemed it irrelevant to the state's jurisdictional argument.

On May 27, 1895, the Supreme Court issued its unanimous opinion in which it sided with the government. Although Debs' lawyers were passionate and moving in their pro-labor rhetoric, they did not rebut the government's argument of equity jurisdiction. Justice David Brewer wrote the majority opinion. He addressed the two most important questions of the case. The first was whether the federal government had the authority to prevent interruptions of interstate commerce

[127] Ibid., 69.
[128] Ibid..
[129] Ibid..
[130] Taylor, 45; Papke, 71.
[131] Ibid., 72.

and the transportation of mail.[132] The second concerned the authority of the federal courts to issue an injunction through its equity jurisdiction in support of efforts to protect interstate commerce and the mail delivery. The answer to both questions was yes according to the court.[133]

Brewer was convinced that the U.S. Constitution gave Congress authority to regulate interstate commerce and mails and to prevent any obstructions. He stressed that the Congress passed legislation suited to this task and that the federal court in Chicago was actually within its constitutional authority. "The strong arm of the national government may be put forth to brush away obstructions to the freedom of interstate commerce or the transportation of the mails,"[134] Brewer stated. Brewer's "strong arm" involved the right of the court to grant authority for the use of force in preventing these obstructions.

As for the second question, Brewer unequivocally wrote that the Chicago court was well within its authority to issue and injunction under equity jurisdiction. Brewer wrote:

> Grant that any public nuisance may be forcibly abated either at the instance of the authorities, or by any individual suffering private damage therefrom, the existence of this right of forcible abatement is not inconsistent with nor does it destroy the right if appeal in an orderly way to the courts for judicial determination, and an exercise of their power to writ of injunction and otherwise accomplish the same results.[135]

Put in simple terms, the federal government and the courts had the authority to grant injunctions under the Constitution.

Brewer did not consider the Sherman statute in his opinion. However, he did note that the court's failure to address the issue should not be taken as a dissent from the lower court's ruling concerning the scope of the Sherman statute. Instead, Brewer stated that the court chose to make an adjudication based on the broader ground of jurisdiction.[136] Despite Brewer's "clarification," it was evident that the Court eventually avoided addressing the complex and maybe even improper application of the Sherman statute and its use against labor. Numerous comments were made about the decision, but the most striking come from Debs himself. He declared that "both decisions are absolutely in the interest of corporations, syndicates, and trusts which dominate every department of the Federal Government, including the Supreme Court."[137] Debs continued by insisting that "Every Federal Judge is now made a Czar,"[138] and this was not too far from the truth with the eventual rise of what Frankfurter called "Injunction Judges."[139]

This case was significant because it not only involved the use of an injunction, but also because the injunction issue became a focus of much public attention. It illustrated how the court was hesitant to address the Sherman statute and in essence highlighted the questionable application of the law against labor unions. Although he approved of the outcome, Olney thought

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[132] Papke, 72-73.
[133] Ibid..
[134] *In re Debs*, 158 U.S. 564 (1895)
[135] Ibid; Berman, 69-70; Papke, 76-77.
[136] *In re Debs*, 158 U.S. 564 (1895); Papke, 76-77.
[137] Berman, 70.
[138] Papke, 77.
[139] Frankfurter and Greene, *The Labor Injunction*, 0, 80, 81; Bernstein, 195.

that the Pullman injunction was granted initially at this district court level upon the wrong legal ground. This ambiguous "legal ground" forced the Supreme Court to interpret the scope of the Sherman statute, and its proper application.

THE ERDMAN ACT AND YELLOW-DOG CONTRACTS

After the very contentious Pullman strike, Congress passed the Erdman Act in 1898 with the objective of improving arbitration in railroad labor disputes. Attorney General Richard Olney presented a draft of the Erdman Act for consideration in Congress in 1895. Olney devised the bill at the request of Representative Lawrence E. McGann, chair of the House Labor Committee and United States Strike Commissioners, Carroll D. Wright and John D. Kernan.[140] Representative Constantine Erdman was the author of the first House committee's report on the bill, but did not play a substantial role in its development. The most important provision of the bill was Section 10, which made it illegal for an employer to require employees to sign "yellow-dog" contracts. The statute defined a "yellow-dog" contract as: "an agreement, either written or verbal, not to become a member of any labor corporation, association or organization."[141] There also was an anti-blacklisting provision which made it an offense to "conspire to prevent an employee from obtaining employment after the employee quit or was fired."[142]

The Erdman Act was also relevant because in *Hitchman Coal and Coke v. Mitchell* (1917), nine years after it was declared unconstitutional in *Adair v. U.S.* (1908), the Supreme Court ruled that federal courts could issue injunctions to prevent labor organizations from unionizing workers who had signed yellow-dog contracts.[143] This again was indicative of a *Lochner* era judiciary determined to expand the scope of labor activities that could be enjoined by injunctions. In *Hitchman*, the yellow-dog contract was transformed from what Lovell calls a "mostly symbolic" tool used to intimidate employees into a potent weapon against unionization.

The legislative history of the Erdman Act provides significant insight on this issue. Under the recommendation of the United States Strike Commission, Attorney General Olney drafted the original bill for consideration by Congress. Aside from the primary purpose of the bill, which was to improve arbitration in labor railroad disputes, the United States Strike Commission pushed for provisions prohibiting yellow-dog contracts and blacklisting. Surprisingly, however, during floor debates on the provisions of the Erdman Act, Section 10 was only mentioned twice, an indication that Congress attached very little importance to the effectiveness of Section 10 and its ability to withstand hostile judicial review, later substantiated by *Adair*.[144]

The first mention of Section 10 occurred when Representative J.H. Lewis voiced his support for the bill as a whole because of the prohibitions on yellow-dog contracts and blacklisting. Lewis was less confident about the arbitration sections which he deemed a "trap," but supported the bill because of Section 10.

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[140] Lovell, 72; Frankfurter and Greene, The Labor Injunction, 147.
[141] Ibid., 74.
[142] Ibid., 74.
[143] Ibid., 79; Bernstein, 196-200.
[144] Lovell, 78.

> I have very little hope and less confidence that the arbitration feature of this bill will prove an advantage to anybody. But I have some hope of much reliance on the features of this bill which prevents corporations and employers from discharging or blacklisting their employees because they may be members of labor organizations. This provision may be effective. Therefore my support of this bill is rather in the line of the Merchant of Venice: 'I do a little wrong that I may do a great good.'[145]

When Lewis voiced his doubts about the arbitration sections of the bill he was not only echoing the concerns for other Congressmen, but of labor as well. After an extensive review of the legislation, Samuel Gompers came out against it. As president of the AFL, Gompers was concerned about Section 3, which gave the courts authority to issue injunctions to enforce arbitration agreements, and Section 7, which required workers to give thirty days notice before quitting after arbitration.[146]

The use of injunctions was also one sided. When Senator James C. George attempted to include an amendment that equalized the use of injunctions, it was swiftly defeated. The George amendment banned the right of the court to issue an injunction when employers, like the Pullman Company, refused to agree to arbitration prior to a strike. This was a reasonable amendment that reined in the judiciary's one-sided abuse of the injunction.[147] With Section 3 and 7 present in the bill, Gompers staunchly rejected the bill's passage. In a February 1897 article in the *American Federationist*, Gompers stated:

> The Erdman Arbitration bill, so called, is a piece of legislation destructive of the best interest of labor, ruinous to the liberties of our people, a step in the direction for the creation of an autocracy or an empire on the one side and a class of slaves or serfs on the other…We therefore urge…the defeat of this iniquitous bill by every means at the command of our people…[148]

When legislators offered AFL-affiliated unions immunity from the hostile sections of the bill, the AFL no longer spoke out against its passage. In particular, the seamen and the street railway workers were excluded from the operation of Section 3 and 7.

Congress also agreed to remove a section from Olney's original bill that gave the Attorney General the authority to request injunctions in railroad strikes. Olney, noting the experimental use of the Sherman statute in the Pullman strike, wanted a more reliable legislative tool.[149] Congress, however, thought this gave too much authority to the Attorney General and quickly removed the provision. After an internal fight, and with the removal of Olney's provision and immunity status for AFL-affiliated unions, the AFL decided not to publicly object to the final passage of the Erdman Act. The AFL did not give the bill its approval, but it did allow the bill to pass without another harsh editorial like Gompers' 1897 one in the *American Federationist*.

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[145] Ibid., 79.
[146] Lovell, 89.
[147] Ibid.
[148] Ibid.
[149] Ibid., 88.

The only other mention of Section 10 during debates came from Senator Richard Allen. Allen insisted because of the difficulty with proving the existence of the "blacklist" it made Section 10 somewhat ineffective. Besides these two, no members of Congress ever brought Section 10 up for discussion or debate again.[150]

This attitude was also reflected by powerful labor organizations such as the AFL. Gompers received a detailed critique of the Erdman Act from labor lawyers who reviewed the bill at his request in 1887. The two lawyers wrote that Section 10 was of no "considerable importance," and that similar state level statutes failed because the "offenses" were of a "covert nature."[151] The intent of Congress to outlaw yellow-dog contracts in Section 10 of the Erdman Act remains somewhat of a mystery. Two explanations arise from reviewing the legislative history. The first is that Congress thought that Section 10 did not merit sufficient debate because it was clear that they had the constitutional authority to prohibit such practices.[152] The courts made their opinion clear in terms of state level legislation regulating economic matters in the private sphere. Under that interpretation, the Fourteenth Amendment only placed bans on state level interference in the economy. The second explanation involves the peripheral nature of Section 10. The primary purpose of the bill was to improve arbitration in wake of the disastrous Pullman strike and not to outlaw yellow-dog contracts or blacklisting.

Given this little Congressional attention, the Erdman Act did ultimately not withstand judicial review and was declared unconstitutional in *Adair v. U.S.* That particular case will be discussed in detail in the next section along with the Danbury Hatters' case, in which the Supreme Court officially included labor in the purview of the Sherman statute. Those two cases demonstrated a clear judicial hostility toward labor and also show how *Lochner* era jurists opted to disregard the intent of Congress, but were assisted by ambiguous pieces of legislation.

THE COURTS GAIN CONFIDENCE: THE DANBURY HATTERS, GOMPERS AND ADAIR CASES

The Danbury Hatters' case (*Loewe v. Lawlor, 1908)* was the most significant decision rendered by the Supreme Court on the Sherman Act's applicability to labor. For the first time the Court took a definitive position on the Sherman Act's scope and purpose when used against labor. In the Danbury Hatters' case, the Brotherhood of United Hatters of America initiated a strike involving 250 employees from Loewe & Company after the company refused to agree to a closed shop.[153] During the strike, the union encouraged a secondary boycott[154] against the

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[150] Ibid., 86.

[151] Ibid., 86: The AFL's objections are outlined in the most detail in legal opinion given to Gompers by two attorneys. See Siddon and Ralston letter to Gompers, January 23, 1897, *American Federation of Labor Records: The Gompers Era*, reel 59, frame 290-299.

[152] Lovell, 95-96.

[153] A "closed shop" is a business or industrial company whose workers are required to be union members as a precondition to employment. An "open shop," on the other hand, is the refusal to hire workers because of their membership in a union or the lawful refusal to give union members preference in hiring.

[154] *Black's Law Dictionary* states that a secondary boycott is a boycott of an employer's products that a union does not have a direct dispute with. Secondary boycotts are generally used against management to add additional pressure to negotiate in a labor dispute by seeking the assistance of other unions. A primary boycott, on the other hand, occurs when a labor organization encourages it members and the general public not to purchase products of the

company's products. The Hatters' union even secured the help of the AFL. Two types of secondary boycotts were administered, a direct and indirect boycott. The "direct" secondary boycott was conducted by union leaders who traveled all over the country convincing other unions and dealers not to purchase Loewe's hats. The "indirect" secondary boycott involved general advertisements which included pamphlets and labor publications advising sympathetic unions and customers not to deal with Loewe & Company. This distinction is significant because Samuel Gompers was later held in contempt under the Sherman statute for orchestrating an indirect secondary boycott.

Outraged by losses totaling $88,000, Loewe & Company filed a lawsuit under the Sherman Act in the Circuit Court of Hartford, Connecticut. That court subsequently dismissed the company's complaint, arguing that although the Hatters' union facilitated a secondary boycott, the union never actually obstructed the "transportation" of the company's products. [155] Hence, the court reasoned, there was no restraint of interstate commerce and no violation of the Sherman statute.

The deciding judge in the case, Robert Platt, stated "there is no allegation… which suggests that the means of transporting plaintiff's product was obstructed," and therefore no restraint of trade.[156] Judge Platt stated that the real question "is whether a combination which undertakes to interfere simultaneously with both actions is one which directly affects the transportation of hats... to the place of sale."[157] Judge Platt answered by stating "It is not perceived that the Supreme Court has as yet so broadened the interpretation of the Sherman act…that it will fit such an order of facts as this complaint presents."[158] Put simply, Judge Platt stated the Supreme Court did not expand the scope of the Sherman statute to declare illegal secondary boycotts.

In response, the company appealed to the Supreme Court. On February 3, 1908, the court handed down its decision. Chief Justice Melville Fuller wrote the opinion, declaring that "the combination described in the declaration [Hatters' Union] was a combination in 'restraint of trade.'" The Court stated further that the Sherman Act prohibited secondary boycotts, which "essentially obstruct the free flow of commerce."[159] The labor union protested stating that its actions affected only intrastate commerce.[160]

James M. Beck and Daniel Davenport, who were attorneys for Loewe & Company, asserted in their brief, that Congress refused to exempt labor from the purview of the Sherman Act. When reviewing the legislative history of the Sherman Act, their position seems to hold only partial merit. They stated, when Senators Reagan and Sherman first introduced the Sherman Act, it contained no exemption for labor. On March 24, 1890, Senators John Teller and Robert Hiscock expressed concerns that the act would inevitably reach labor unions. The next day,

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company involved in the labor dispute. Primary boycotts are generally used as a tool by labor unions to force management to negotiate.

[155] Julia E. Johnson, *Trade Unions and the Anti-Trust Laws*, New York: The H.W. Wilson Company, 1940: 41; Berman, 78.

[156] Berman, 77-85.

[157] Ibid., 79.

[158] Ibid..

[159] Berman, 83; *Loewe v. Lawlor*, 208 US 274 (1908)

[160] Berman, 83; Bernstein, 202-203.

March 25, 1890, included a labor exemption provision which was subsequently adopted. On April, 2, 1890, the Sherman Act was amended by the Senate Judiciary Committee, which issued a substitute bill that removed the labor exemption.

Their brief then stated that a heated debate occurred between Senator John Sherman and other Senators. However, the 55th Congress ultimately agreed to pass the Sherman Act without the labor amendment. Beck and Davenport further stated that after the act became law, six other bills were introduced with the purpose of making the Sherman Act not applicable to labor organizations. While one of the six bills (H.R. 10539, Sec. 7) actually passed the House during the 56th Congress, none ever became law. Thus, Beck and Davenport concluded that the Sherman Act as passed did not discriminate. Their brief stated that the act applied to "'every' contract, combination or conspiracy in restraint of trade."[161]

The Supreme Court, using the legislative history supplied in Beck and Davenport brief, stated in its opinion that "the records of Congress show that several efforts were made to exempt, by legislation, organizations of farmers and laborers from the operation of the act and that all these efforts failed, so that the act remained as we have it before us," [162] without a labor exemption. The Supreme Court ultimately held in favor of Loewe & Company and issued an injunction against the Hatters' union.

But the brief presented by the company's attorneys made a number of misleading assertions about the Sherman Act's legislative history. First, the brief gives the impression that the labor exemption was omitted as a result of Congressional debate. However, the Sherman bill was originally sent to the Senate Judiciary Committee because it contained a number of constitutionally questionable add-on amendments and needed "a thorough overhauling."[163] Second, only one Senator actually objected to the adoption of a labor exemption. During the Congressional debates, prior to the bill being sent to the judiciary committee, Senator John Sherman stated about the labor exemption: "I do not think it necessary, but at the same time to 'avoid any confusion,' I submit it to come at the end of this first section."[164] Numerous other Senators took the opposing view and the Senate accepted the labor exemption on two occasions. Third, there was no direct debate about the Sherman Act's applicably to labor unions. Fourth, the brief asserted that after the Sherman Act's passage various other labor exemption bills were presented and all subsequently failed to pass.

The brief neglects to point out, however, that five of the six bills were proposals to strengthen the antitrust legislation by clearly prohibiting predatory pricing. Only one bill proposed amending the Sherman Act to include a labor exemption. This bill never made it out of committee, suggesting that Congress favored the broader language of the Sherman Act as passed. Edward Berman argues effectively, however, that the failure of this labor exemption bill might have been "lost in the legislative hopper" along with other amendments.[165]

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[161] Ibid, 85.
[162] Johnson, 41.
[163] Berman, 83.
[164] Julia E Johnson, *Trade Unions and the Anti-Trust Laws,* New York: The H.W. Wilson Company, 1940: 174
[165] Berman, 84

The *Loewe v. Lawlor* (1908) case established three important interpretive rules: (1) the Sherman Act applied to all combinations, including labor; (2) secondary boycotts were a violation of the Sherman statute; and (3) lawsuits for damages can be brought against individual unionists, primarily those who orchestrated the "conspiracy."[166] The hatters' company was awarded $252,000 in damages. In *Loewe v. Lawlor*, the judiciary established a legal precedent that would stand a long time. With this newly gained confidence, *Lochner* era jurists in case after case broadened the scope of the Sherman statute to include labor organizations. The judiciary further stretched its support for business in the next two cases— *Adair v. U.S.* (1908), in which the Supreme Court struck down the Erdman Act, and the Gompers contempt case, in which the Court reaffirmed the framework established in *Loewe v. Lawlor*. The hostility of the judiciary toward labor is evident and rigid judicial construction begins to take shape.

ADAIR V. UNITED STATES

In *Adair v. U.S.* (1908), the Supreme Court advanced further with its conservative economic philosophies and struck again at progressive labor legislation. In this case, William Adair, a master mechanic who supervised employees at the Louisville & Nashville Railroad, fired O.B. Coppage because he was a member of labor organization called the Order of Locomotive Fireman. Adair was charged and convicted of a misdemeanor.[167] Adair's actions were in direct violation of Section 10 of the Erdman Act which made it illegal for employers to "threaten any employee with loss a loss of employment" or to "unjustly discriminate against any employee because of his membership in…a labor corporation, association, or organization."[168]

Upon appeal, the Supreme Court overturned Section 10, citing that it violated the "liberty of contract" guarantee of the Fifth Amendment. In rendering its decision, the Court first ruled that Section 10 interfered with the "liberty of contract," and second, that Congress did not have sufficient constitutional authority (as outlined in Article 1 Section 8 of the U.S. Constitution) to regulate the liberty of contract as exercised by the railroad industry.[169] Although Adair was only guilty of violating the anti-discrimination clause of Section 10, the Court's decision invalidated the entire section.

To establish a new "liberty of contract" doctrine that applied to federal legislation, the Court used the Fifth Amendment due process clause. In earlier liberty of contract cases, the Court struck down state legislation by using the due process clause of the Fourteenth Amendment; however, this same doctrine did not apply to the Erdman Act, federal legislation. The Court, therefore, expanded the liberty of contract doctrine by using the Fifth Amendment. The Court imposed the liberty of contract doctrine of the Fourteenth Amendment due process clause onto the Fifth Amendment due process clause so it would apply to federal legislation. In effect, the Court struck down the Erdman Act because the Court believed Congress was going outside its constitutional authority to regulate interstate commerce. The majority stated that employment relations were local "man toward man"[170] and this was definitely out of reach of federal regulation.

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[166] Berman, 86.
[167] Lovell, 74-75; Bernstein, 199, 398, 406.
[168] Ibid., 74; Frankfurter and Greene, The Labor Injunction, 147.
[169] Lovell, 75.
[170] Peritz, 49.

This was inconsistent, however, because one month earlier in the Danbury Hatters' case the Court applied the Sherman statute (federal legislation) to enjoin the hatters' union strike.[171] On the one hand, the Court limited Congress's latitude to regulate under the commerce clause through the Erdman Act, and on the other, the Court gave Congress wide latitude to prosecute labor organizations under the Sherman statute. With this reasoning, it appears the Court only recognized Congress's ability to regulate commerce when it done in accordance with views espoused by conservatives. This definitely illustrates an employer biased Court. Subjectivity and conservative economic philosophies dominated *Lochner* era jurisprudence. Both *Adair* and the Danbury Hatters' case illustrated the Supreme Court's inconsistency when it involved Congressional authority to regulate labor relations. Although the Court frequently restricted Congress's power to regulate manufacturing industries, the Court usually allowed Congress wide latitude to regulate the railroads as part of interstate commerce.

In defense of its reading of the commerce clause (Article 1 Section 8 of the U.S. Constitution)[172] in *Adair*, the Court reasoned that Congress could regulate only activity that had a "substantial connection" to interstate commerce, adding more to the pattern of rigid judicial construction. To demonstrate that the activities banned in Section 10 were not substantially connected to interstate commerce, Justice John Harlan, writing for the majority, asked: "what possible legal or logical connection is there between an employee's membership in a labor organization and the carrying on of interstate commerce?"[173] Harlan answered by stating "Such relation to a labor organization cannot have, *in itself*, and in the eyes of the law, any bearing upon the commerce with which the employee is connected by his labor and services."[174] In short, Harlan insisted there was no logical connection and thus no activity regulated in Section 10 had a substantial connection to interstate commerce. Harlan's view won the day and the Court in a decision of 6-2 struck down Section 10 of the Erdman Act as unconstitutional.

Justices Joseph McKenna and Oliver Wendell Holmes Jr. wrote vigorous dissents in which they criticized the majority for reading too narrowly the commerce clause. In his opinion, McKenna, who was known to be a centrist, asserted that although the Fifth Amendment did guarantee liberty of contract but it did have limitations. Those limitations were recognized by the

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[171] Peritz, 49; Bernstein, 398.

[172] Article I, Section 8, Clause 3 of the United States Constitution, known as the Commerce Clause, empowers the United States Congress "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." During the New Deal, the clause was a matter of great conflict between the U.S. Supreme Court and the of Franklin D. Roosevelt administration (1935-1937). The Court struck down several of the FDR's "New Deal" reforms on the grounds that they encroached upon "intrastate" commerce. After winning the 1936 election by a landslide, FDR proposed a plan to appoint an additional justice for each unretired Justice over seventy. Given the justices ages, this permitted a Court population of up to fifteen. Roosevelt claimed that this was not to change the rulings of the Court, but to lessen the load on the older Justices, who he claimed were "slowing the Court down." There was widespread opposition to this "court packing" plan, but in the end the New Deal did not need it to succeed. In what became known as "the switch in time that saved nine," Justice Owen Josephus Roberts and Chief Justice Charles Evans Hughes switched sides in 1937 and upheld the National Labor Relations Act, which gave the National Labor Relations Board extensive power over unions across the country. Ellis Wayne Hawley, *New Deal and the Problem of Monopoly: A Study in Economic Ambivalence*, Princeton: Princeton University Press, 1966: 306

[173] Lovell, 75.

[174] Ibid.

Court when it applied to the railroad industry, which he deemed a "quasi public business."[175] McKenna insisted that the railroad industry was, to an extent, in the public domain and not strictly private. He reasoned, therefore, that Congress had the authority to regulate it. The railroad industry, McKenna noted, was also substantially connected to interstate commerce, noting that the Court had recognized this in previous decisions. To that end, he asked:

> I would not be misunderstood. I grant that there are rights which can have no material measure. There are rights which, when exercised in a private business, may not be disturbed or limited. With them we are not concerned. We are dealing with rights exercised in a quasi public business, and therefore subject to control in the interest of the public. [176]

McKenna was convinced that since the railroad industry was a quasi public business that it was subject to regulation by Congress and Section 10 was not unconstitutional. Unlike manufacturing businesses, where the courts gave Congress very little latitude to regulate, the judiciary did recognize time and again that the railroad industry was a unique entity, as in the Pullman strike in which the Supreme Court upheld the decision of a lower court's use of federal legislation to enjoin strikers.

In a more forceful dissent, Holmes announced clearly: "I also think that the statute is constitutional, and, but for the decision of my brethren, I should have felt pretty clear about it."[177] Holmes, who dissented in *Lochner v. New York* (1905), thought that the Court was stretching an economic philosophy which stripped Congress of its power to legislate and workers of their right to bargain collectively. Harlan wrote that Congress had the power to regulate only activity that had a "substantial connection" to interstate commerce.[178] Harlan did not agree that yellow-dog contracts were substantially connected. Holmes, on the other hand, thought contracts involving the railroad industry were substantially connected. He stated:

> I suppose that it hardly would be denied that some of the relations of railroads with unions of railroad employees are closely enough connected with commerce to justify legislation by Congress. If so, legislation to prevent the exclusion of such unions from employment is sufficiently near.[179]

Holmes went on to write that Section 10 was so narrow in scope that it was improper to suggest that it unduly interfered with a right to free contract. Because Section 10 only prohibited the discharging of an employee who joined or associated with labor organizations, Holmes insisted that this regulation was too narrow to violate the Fifth Amendment's "liberty" guarantee. A doctrine that Holmes thought the Court was stretching to the "extreme" as it had done in *Lochner v. New York* with the Fourteenth Amendment.

Holmes, like Justice McKenna, stated that since Section 10 did not overreach in its regulation of the railroad industry the statute was constitutional.

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[175] *Adair v United States*, 208 US 161 (1908).
[176] Ibid.
[177] Ibid.
[178] Lovell, 75.
[179] *Adair v United States*, 208 US 161 (1908).

> It does not require the carriers to employ anyone. It does not forbid them to refuse to employ anyone, for any reason they deem good, even where the notion of a choice of persons is a fiction and wholesale employment is necessary upon general principles that it might be proper to control. The section simply prohibits the more powerful party to exact certain undertakings, or to threaten dismissal or unjustly discriminate on certain grounds against those already employed.[180]

The railroad was the more powerful party and Holmes noted that since no other statutory prohibitions or regulations were made of the employer, Congress was within its authority. But Holmes also thought that the "liberty of contract" doctrine grafting into the Fifth Amendment was indicative of more judicial activism. To this end, Holmes stated "So I turn to the general question whether the employment can be regulated at all. I confess that I think that the right to make contracts at will that has been derived from the wor[d] 'liberty' in the Amendments has been stretched to its 'extreme'…"[181] by the Court.

The *Adair* decisions significantly expanded the protection of property rights and liberty of contract. These conservative economic doctrines became entrenched in *Lochner* era jurisprudence and laid the foundation for more rigid judge-made law. Later in *Coppage v. Kansas*[182] (1915), in which the Supreme Court overturned state legislation banning yellow-dog contracts, Frankfurter wrote Holmes praising him for his well anticipated dissent as he had done in *Adair*. Frankfurter wrote on January 27, 1915, "Dear Justice Holmes, I'm keenly awaiting your dissent in the Kansas case. In the meantime, for the fact of dissent and the smell of your opinion, at this distance even, my thanks…I *was* happy when I saw you drive another spike into the *Adair* case."[183] Although during the time of this correspondence Holmes had not yet written a dissent in the Kansas case, Frankfurter eagerly thanked him in advance.

GOMPERS HELD IN CONTEMPT

The second major appearance of a case involving labor and antitrust occurred on May 15 1911. *Gompers v. Bucks Stove and Range Company* originated out of a long dispute between the molders' union and the stove company. As a result of the extended labor dispute, the AFL, under the direction of Samuel Gompers, placed in 1907 the name of the company in the "We Don't Patronize List" of the *American Federationist.*[184] This resulted in national secondary boycott of the stove company by unions and consumers, which caused significant financial losses for the company. The legality of this indirect secondary boycott was still in question; that is, did mere

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[180] *Adair v United States*, 208 US 161 (1908).
[181] Ibid.
[182] *Coppage v. Kansas*, 236 U.S. 1, 27 (1915) The 6-3 majority opinion by Justice Mahlon Pitney held that a Kansas law outlawing yellow-dog contracts was an interference with the freedom of both employers and employees to set terms of their own labor. Like he did in *Adair*, Holmes vigorously dissented: "Whether in the long run it is wise for the workingmen to enact legislation of this sort is not my concern, but I am strongly of the opinion that there is nothing in the Constitution to prevent it…If that belief, whether right or wrong, may be held by a reasonable man it seems to me that it may be enforced by law in order to establish the equity of position between the parties in which liberty of contract begins."
[183] Mennel and Compston, 25-26.
[184] *Gompers v. Bucks Stove & Range Co*., 221 US 418 (1911); Frankfurter and Greene, 9; Berman 87; Bernstein, 194.

advertisements amount to a violation of the Sherman statute as it was interpreted in the Danbury Hatters' case?

In December 1907, the company sought and was granted an injunction by the Supreme Court of the District of Columbia against the AFL and its principal officers, including Gompers. The count injunction enjoined the "We Don't Patronize" list from calling attention to and endorsing a secondary boycott. However, in direct violation of the injunction, the AFL listed the stove company again in its January 1908 "We Don't Patronize" list. Subsequently thereafter, Gompers, John Mitchell, and Frank Morrison were cited in contempt of court and all received prison terms. The sentences ranged from one year to six months. Gompers' lawyers immediately appealed the decision to the Court of Appeals.[185]

In March 1909, the Court of Appeals limited the scope of the injunction to just prohibiting the printing of the stove company's name in the "We Don't Patronize" list. Regardless of this limitation, the court also upheld the contempt sentences against Gompers and the other principal officers of the AFL. Gompers' lawyers then merged the contempt and injunction cases and appealed to the Supreme Court. When the Bucks Stove and Range Company came under new management in 1910 and the labor dispute was settled, the company requested that the injunction proceedings be dropped. Gompers' contempt case, however, proceeded to the Supreme Court and on May 15, 1911 the Court rendered a decision.[186]

The Court dismissed the contempt cases against Gompers and his associates on legal technicalities, but did provide a decision on the issue of indirect secondary boycotts. In their argument before the Supreme Court, Gompers' lawyers asserted that no court had the right to enjoin a secondary boycott if "spoken words or printed matter were used as one of the instrumentalities by which it was made ineffective."[187] The Court, however, thought otherwise and made its position clear in its opinion. Justice Joseph Lamar, writing for the Majority, asserted that if their argument was valid no court could enjoin a secondary boycott "even if interstate commerce was restrained by means of a blacklist, boycott, or printed device to accomplish its purpose."[188] Lamar pointed to the Danbury Hatters case which found unlawful both the direct and indirect secondary boycotts. Lamar went on to say:

> The principle announced by the court was general. [The Sherman Act] covered any illegal means by which interstate commerce is restrained…we think also whether the restraint be occasioned by unlawful contracts, trusts, pooling, arrangements, blacklists, boycotts, coercion, threats, intimidation, and whether these be made effective, in whole or in part, by acts, words or printed matter. The court's protective and restraining power extend to every device whereby property is irreparably damaged or commerce is illegally restrained.[189]

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[185] Berman, 88.
[186] Ibid..
[187] Ibid
[188] *Gompers v. Bucks Stove & Range Co*., 221 US 418 (1911)
[189] Ibid.

Lamar also noted that if the courts were limited in enjoining all acts that restrained trade then the Sherman statute would be rendered impotent. The Pullman strike, Lamar noted, for the injunction to be effective, had to enjoin all avenues by which restraint of trade was accomplished, even peaceful ones.[190] Although most of Lamar's comments were dictum, Lamar and the Court were explicit that even peaceful means of boycotting were still enjoinable if they restrained trade. But the Court did not stop with *Gompers*, it established even more subjective judicial doctrine when applying the "rule of reason" to labor organizations.

LITERALISTS VERSUS RULE OF REASONISTS

For twenty years, the Court worked its way to a more fixed doctrine to establish a "rule of reason" in which business combinations were not *per se* illegal. But this also meant that the Sherman statute's application against labor unions was viewed more subjectively. Over a period of decades, the Standard Oil Company of New Jersey had purchased virtually all the oil refining companies in the U.S. The company's early success was first driven by superior refining technology. But then after acquiring more companies, Standard Oil used a number of anticompetitive tactics to solidify market dominance.[191] Standard Oil's management used their market share to secure favorable transportation rates from railroads, putting pressure on less organized and smaller refineries. This, in turn, compelled their competition to sell out or face insolvency. Among Standard Oil's anticompetitive tactics included predatory pricing (underpricing) and threats to suppliers and distributors who did business with its competitors. In response, the government sought to prosecute Standard Oil for violating the Sherman Act.

In *Standard Oil Co. of New Jersey v. United States* (1911), the Court held that Standard Oil was an illegal combination under the provisions of the Sherman statute and forced it to split into smaller competing companies. The most relevant part of the Court's decision, however, was the enshrinement of the "rule of reason" in *Lochner* era jurisprudence. Since the Sherman statute's enactment in 1890, the Court was influenced strongly by "Literalists" who prohibited literally *every* combination and contract that restrained trade. Literalists read the Sherman statute so broadly that it not only outlawed "price fixing cartels," but also labor and farmer organizations, partnership arrangements, and simple contracts for the sale of goods. The legislative history of the Sherman Act clearly demonstrates, however, that Congress did not intend for such a broad reading.[192]

In *Standard Oil*, the Court acknowledged that taken "literally" the term "restraint of trade" could outlaw any number of contracts no matter how innocuous they were to the public. After embarking on a lengthy exegesis of English authorities to define "restraint of trade," the Court determined that "restraint of trade" referred to a contract that resulted in a "monopoly" and "its consequences."[193] The three most adverse consequences recognized by the Court were high prices, reduced output, and reduced quality.[194] Thus, the Court concluded that any contract that resulted in one of these three consequences "unduly" retrained trade in violation of the antitrust

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[190] Ibid; Bernstein, 194.
[191] Phillip Areeda, *Antitrust Analysis: Problems, Text, Cases*, Boston: Little, Brown and Company, 1981: 148-149;Berman, 97-98; Peritz, 28; *Standard Oil Co. v. U.S.* 221 US 1 (1911)
[192] Peritz, 27.
[193] Areeda, 148-149; *Standard Oil Co. v. U.S.* 221 US 1 (1911)
[194] Ibid, 148-149.

statute. Offering a caveat, the "Rule of Reasonists" asserted that a broader reading prohibited innocuous contracts and thus infringed liberty of contract.[195]

Writing for the Majority, Chief Justice Edward Douglass White insisted that only contracts which unduly or unreasonably restrained interstate commerce were prohibited under the Sherman statue. He wrote:

> The statute [Sherman Act]…evidenced by the intent not to restrain the right to make and enforce contracts, whether resulting from combination or otherwise, which did not unduly restrain interstate commerce…but to protect that commerce from being restrained by methods, whether old or new, which would constitute and interference,--that is, undue restraint.[196]

White wrote that antitrust cases must be illuminated by the "light of reason"[197] and not by extreme Literalists interpretations which impeded liberty of contract. Thus the rule of reason emphasized that an illicit combination have a "direct, immediate, and (by implication) a material effect upon interstate commerce."[198] The Standard Oil case marked a shift in which the Rule of Reasonists, which included Holmes, became the majority and Literalists became the feeble minority.

Historian Rudolph J. R. Peritz contends that one of the most fundamental disagreements between the Literalists and Rule of Reasonists concerned the "political economy of competition," which was a clash between competing visions of society.[199] On the one hand, the Literalists, the early majority, believed that antitrust policy should promote unrestricted competition among roughly equal market participants. This was a more individualistic view supporting independent entrepreneurs or free workmen, without regard to the fairness or reasonableness of their business arrangements. The Rule of Reasonists, on the other hand, thought that antitrust policy should allow "large consolidations of capital"[200] as long as these arrangements did not unduly restrain trade and allowed for the fair return on property or what Peritz calls "some other traditional exercise of liberty of contract."[201] Given these two disagreements, it is difficult too discern which was less antagonistic to labor. Actually, the only issue on which both of these factions agreed was the on the treatment of labor under the antitrust statute.

While championing the sensibilities of reasonableness, the Rule of Reasonists still thought that labor unions were within the reach of the Sherman statute. Holmes' vigorous dissents in previous Sherman-labor cases, *prima facie*, appear inconsistent with his Rule of Reasonist's position. But Holmes saw both labor and business combination as judicial equivalents. In 1896 when Holmes was sitting on the Supreme Judicial Court of Massachusetts, he wrote in a dissenting opinion:

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[195] Ibid, 148; Berman, 96, 98.
[196] *Standard Oil Co. v. U.S.* 221 US 1 (1911); Berman 96.
[197] *Standard Oil Co. v. U.S.* 221 US 1 (1911)
[198] Berman, 98; Peritz, 35.
[199] Peritz, 63.
[200] Ibid, 64.
[201] Ibid, 94.

> If it be true that workingmen may combine with a view, among other things, to getting as much as they can for their labor, just as capital may combine with a view to getting the greatest possible return, it must be true that when they combine they have the same liberty that combined capital has to support their interests by argument, persuasion, and the bestowal or refusal of those advantages which they otherwise lawfully control.[202]

Holmes clearly did not support immunity for labor, but notably was not as convinced as his colleagues that liberty of contract should be interpreted broadly. For in *Adair* (1908), Holmes acknowledged that liberty of contract doctrine was being defined to the broadest "extreme"[203] by the Court. It was this split in opinion which ultimately caused Holmes to support a new rule of reason as formulated by Justice Louis Brandeis in *Chicago Board of Trade v. U.S.* (1918).[204] The Brandeisian rule of reason (post-classical rule of reason) accommodated labor organizations unlike its original counterpart "classical" rule of reason. Holmes joined the majority in *Standard Oil* (1911) against one of the last holdouts of the Literalist faction, Justice John Marshall Harlan.[205]

Harlan concurred with the majority that Standard Oil was an illegal trust, but strenuously contested the Court's adoption of the rule of reason. Citing *United States v. Trans-Missouri Freight* (1897), Harlan argued that the Court held all combinations in restraint of trade, whether or not the effect was direct or indirect. In *Trans-Missouri Freight*, various railroad companies had organized to regulate prices charged for transportation. The federal government charged these companies with violating the Sherman Act.[206] The railroad companies argued the contrary because their organization was designed to keep prices low, not raise them. Taking the extreme Literalist view, the Court held that the Sherman Act prohibited all combination irrespective of purpose. Antitrust experts, like William Howard Taft and Robert Bork, on the other hand, argued that the decision in *Trans-Missouri Freight* was dicta and not binding precedent. Critics of Harlan's dissent emphasize *United States v. Joint Traffic Association* (1898) in which the Court began its early formulation of the rule of reason when it announced that "ordinary contracts and combinations" did not violate the Sherman statute because they were "indirect."[207]

After *Standard Oil* (1911), the rule of reason dominated *Lochner* jurisprudence and the judiciary's hostility toward labor remained the same, especially given how the Court tended to view labor unions. Although antitrust doctrine was substantially modified, the language describing labor unions was still embedded in most judicial opinions of the time. In labor disputes, while capital was described as "entrepreneurial entity" or "the employer," labor unions were described as "union" or a "combination of workers."[208] Chief Justice Fuller in the Danbury Hatters' case (1908), for example, wrote that "The United Danbury Hatters of North America, comprising about 9,000 members and including a large number of subordinate

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[202] Ibid, 89.
[203] *Adair v United States*, 208 US 161 (1908).
[204] Peritz, 89; *Board of Trade of City of Chicago v. U.S.*, 246 US 231 (1918)
[205] Peritz, 89-90.
[206] *Standard Oil Co. v. U.S.* 221 US 1 (1911); Berman 96; Peritz 32.
[207] *Standard Oil Co. v. U.S.* 221 US 1 (1911)
[208] Peritz, 92.

unions…combined with some 1,400, 000 others…"[209] This very language was suggestive of guilt and unlawful activity on the part of labor.

Although a friend of labor, Brandeis added another layer to the mounting judicial construction and antitrust jurisprudence. His judicial construction, however, was more of a doctrinal deferral than judicial activism insofar as his interpretation brought the Court closer to the original intent of Congress. In *Chicago Board* (1918) and after, an argument developed between the Classical Rule of Reasonists and the pro-labor, Post-Classical Rule of Reasonists. Whereas the Post-Classical Rule of Reasonists distinguished between "good" trusts and "good" labor organizations, that is, whether their practices were monopolistic, the Classical Rule of Reasonists made no such distinctions and deemed illegal all contracts and combinations that resulted in monopoly and its adverse consequences as spelled out in *Standard Oil*.[210]

In order words, because a majority of the Classical Rule of Reasonists possessed an anti-labor bias, they were less even handed in the application of the rule of reason. They allowed more exceptions for business combination than for labor organizations. Conversely, the Post-Classical Rule of Reasonists were more balanced in their application of the rule of reason. The Post-Classical Rule of Reasonist made distinctions between good or bad corporate and labor combinations. Eventually, the Post-Classical Rule of Reasonists developed a pro-labor bias, but did not become anti-business. They were just more apt to offer more exceptions for labor organizations, which inched the Court closer to the will of Congress. This argument continued for over a decade until the *Bedford Cut Stone Company* decision in 1927 in which the Court no longer concerned itself with such distinctions. After 1927, the Court focused more on labor practices and factual circumstances.[211] The Bedford Cut Stone Company case will be examined in more detail after substantial attention is paid to Frankfurter, the Clayton Act, and the *Duplex* decision (1921).

The Literalists vs. the Rule of Reasonists, the Classical Rule of Reasonists vs. the Post-Classical Rule of Reasonists all show a Court becoming more entrenched in rigid judicial construction. All of this judicial construction made more difficult labor's fight for recognition and, most importantly, immunity from the Sherman statute. Brandeis, a pro-labor jurist, despite his best intentions, assisted in the formulation of more rigid judge-made law. Of further significance is the fact that these two competing doctrines substantially shaped Frankfurter's thinking. Frankfurter was influenced greatly by Brandeis and Holmes and therefore Post-Classical Rule of Reasonists helped to form Frankfurter and his philosophy concerning the Sherman statute's application against labor unions.

THE MAKING OF A PRO-LABOR JURIST 1906-1914

Felix Frankfurter burst onto the legal scene at this time after graduating from Harvard Law School with one of the best academic transcripts since Louis Brandeis, someone whom Frankfurter deeply admired. This section will examine Frankfurter's beginnings as a Progressive era attorney and how he grew to adopt a pro-labor deference to legislative judgment. In 1906, Frankfurter became an assistant United States attorney working for Henry Stimson in the

[209] Ibid, 92.
[210] Ibid, 89.
[211] Peritz, 89.

Southern District of New York. Frankfurter was influenced greatly by both Stimson and Theodore Roosevelt who shared the Progressive concerns about irresponsible corporations and labor militancy. Roosevelt, like many other Progressives, blamed "industrial titans" (corporate monopolies) for, among other things, low wages and poor working conditions, which sparked social unrest.[212] Frankfurter embraced this view and saw massive corporate power as one of the primary forces causing social strife. While working with Stimson, Frankfurter helped to prosecute numerous cases, which he considered intellectually unfulfilling (smugglers, counterfeiters, gun runners, and gambling touts just to name a few).[213]

Frankfurter learned from Stimson that social and economic relevancy was more important than inert legal theory. After *Muller v. Oregon* (1908), Frankfurter and Stimson started to use empirical social and economic evidence to support their cases more than legal theory. The real world applications of legal decisions became a driving force behind their practice of law. Frankfurter greatly admired this legal method pioneered by Brandeis, who in 1908, successfully defended Oregon's ten-hour law before the Supreme Court. Using sociological data in his brief, Brandeis was able to illustrate for the court the physical and social ills that resulted from working too many hours. The "Brandeis brief" was used by many Progressive attorneys as a legal tool in their reform cases, especially Frankfurter and Stimson.

When Stimson became Secretary of War in 1910, Frankfurter joined him as the War Department's law officer. His primary responsibility in this post was to oversee matters involving seapower and the nation's overseas possessions, taking his part in Roosevelt's "white man's burden." During his time in the War Department, Frankfurter and Stimson absorbed the reformist ideas presented in Herbert Croly's *The Promise of American Life* (1909). This book was a powerful contribution to progressive thinking and espoused patriotism and domestic reform. Of particular interest to Frankfurter, was Croly's description of the "unfulfillment" of America's promise, which ultimately led to class conflict and societal unrest. Croly, like many other progressive writers of the time, blamed this unrest on a "concentrated wealth."[214]

Frankfurter was well known for giving heavy weight to the legislative intent and he espoused the concept that the Court has limited competence in political and social spheres. "The Court," Frankfurter insisted, must have "above all, the humility not to set up its own judgment against the conscientious efforts of those whose primary duty it is to govern."[215] It was Frankfurter's belief that when the Court enters the political and social spheres, its most detrimental impact occurs when legislative acts are challenged. Frankfurter's deference to the legislative branch grew directly from his first-hand experience in preparing and arguing cases before the Court.

In 1912, before he became Brandeis's understudy, he observed that the Court in determining the constitutionality of minimum wage laws was making decisions based on social factors rather than the law and social statistics. But this was not entirely improper in

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[212] Michael E. Parrish, *Felix Frankfurter and His Times: The Reform Year*, New York: The Free Press, 1982: 62; Leonard Baker, *Brandeis and Frankfurter: A Dual Biography*, New York: Harper & Row, Publishers, 1984: 221.
[213] Parish, 29.
[214] Parrish, 29-32.
[215] Clyde W. Summer, "Frankfurter, Labor Law and the Judge's Function," *The Yale Law Journal*, Vol. 67, No. 2. (1957): 266-303.

Frankfurter's view. He recognized the importance of the Brandeis brief as a device which allowed the Court to give "due regard to the facts which induced the legislation,"[216] but still legislative intent remained supreme. Such a judicial approach, in Frankfurter's view, allowed the Courts to maintain judicial review of legislation while applying the proper facts. Frankfurter wrote in *The Zeitgeist and the Judiciary*:

> [The Brandeis brief would leave] still unimpaired the benefits of the reviewing power of the judiciary in our governmental system, for the reflex action of the *existence* of this power on the part of the courts to set aside legislation restrains unwise legislative action and induces the scientific attitude of basing legislation only upon adequately ascertained facts.[217]

Emphasized again in this excerpt was Frankfurter's belief in the effectiveness of the Brandeis brief in bringing real world facts into the legal arena. Instead of the jurist blindly deciding a case without regard to the social effects, the Brandeis brief allowed the jurist to see the "real world."[218]

In 1913, Frankfurter joined the Harvard Law School faculty and started to revamp the law curriculum. Part of those efforts, involved teaching his law students to use real world data in defense of their legal positions, and he strongly discouraged the use of abstraction. Frankfurter stated locating and solving social problems "require[d] adequate data, and correlated, prophetic thinking."[219] Also, while at Harvard, Frankfurter co-founded *The New Republic* (1914) a Progressive periodical with Croly, which called for various political and social reforms. It was Frankfurter's days as U.S. attorney, protégé to Stimson, and Harvard faculty member that later shaped his judicial views on labor. [220]

Frankfurter arose in the midst of what is considered to be the first Anti-Injunction Movement and aptly did his part. Frequently, while writing in *The New Republic*, Frankfurter condemned the use of injunctions, especially in labor disputes. When the Court, using the Fourteenth Amendment, struck down a state law limiting the use of injunctions in picketing, Frankfurter insisted: "It [the injunction] does not work…It neither mines coal, nor moves trains, nor makes clothing."[221] Failing to stimulate business, Frankfurter wrote, "the injunction has cut off labor from confidence in the rule of law and of the courts as it impartial organs."[222] Frankfurter went on to say that injunctions restrain clearly permissible conduct "like furnishing strike benefits, singing songs, and maintaining tent colonies,"[223] referring to some of the most absurd injunctions granted by courts.

After the establishment of the Federal Mediation Commission, one of Wilson's regulatory agencies, four copper districts in Arizona went on strike. In 1917, Frankfurter, while a

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[216] Summer, 277.
[217] Ibid., 276.
[218] Ibid.
[219] Jeffery D. Hockett, *New Deal Justice: The Constitutional Jurisprudence of Hugo Black, Felix Frankfurter, and Robert H. Jackson.* Lanham: Rowman & Littlefield Publishers, Inc., 1996:147.
[220] Parrish, 29-32.
[221] Baker, 205.
[222] Ibid.
[223] Ibid., 206.

federal labor mediator, became deeply involved in the Bisbee incident and witnessed first hand corporate cruelty. During a labor dispute in Bisbee, Arizona, mine workers went on strike to protest working conditions and wages. Under the guise of stemming a violent strike, Sheriff Harry Wheeler cut off outside communication to the town of Bisbee, Arizona and with several thousand armed vigilantes forced over 1,185 strikers into cattle cars. Despite a vigorous protest from Frankfurter, the cattle cars were dumped in the middle of the New Mexico desert and left the strikers without food or water. The miners were left there for two days until federal troops rescued them. This had a tremendous impact on how Frankfurter viewed employers; most, he believed, did not recognize a worker's legal right to strike. [224]

During the Anti-Injunction Movement of the 1920s, Frankfurter proved vital in forwarding anti-injunction legislation and became a more vocal critic of *Lochner* era jurisprudence. Prior to this, however, Frankfurter also observed the rise of a new political ideal that promised meaningful reforms. Indeed, "industrial democracy"[225] saw the passage of the Clayton Act and less governmental hostility toward labor. However, this was short lived. Labor historian Daniel Letwin notes that from 1917 the "luminous prospect" of an "Age of Industrial Democracy" became "all-too-revocable" by 1921.[226] "Suspect" legislative reforms, like the Clayton Act, ultimately proved ineffective at curbing the abuse of *Lochner* era jurists, and the Woodrow Wilson Administration attenuated the gains won by labor.

LABOR'S POLITICAL CAPITAL AND THE PUSH FOR THE CLAYTON ACT: THE RISE OF INDUSTRIAL DEMOCRACY

With the coming of "industrial democracy," the prospect of reform seemed near. Before 1912, the term "industrial democracy" was "little heard outside Fabian and Social Gospel circles,"[227] but it all too soon provided hope in labor's fight against a hostile *Lochner* era judiciary. As early as 1906, the AFL, under the direction of Gompers, started to change its unyielding nonpartisanship into valuable political currency. Labor was under constant siege from open-shop employers and "injunction judges," and Congress failed to offer any consequential legislative relief. As a result, the AFL embarked on its first major Anti-Injunction Campaign [228] in order to prevent conservative jurists from enjoining strikes, a right the AFL deemed essential.

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[224] Parrish, 81; Baker, 149-151.

[225] "Industrial Democracy" was a pre-WWI alliance of "Wilsonian Democrats, trade unionists, and left-wing progressives" with the aim of eliminating disruptive industrial conflict. During a time of unprecedented strikes, the Wilson-labor compromise established regulatory agencies that provided more rights and protections for workers in exchange for no labor militancy. McCartin argues, however, that three interpretations of "industrial democracy" arose. The first was proposed by a small group of conscientious employers, who supported company unions by which they could alleviate divisive labor issues. The second was promoted by the AFL, which was characterized by trade unionism and the Wilsonian compromise. The third was advanced by radicals who saw "industrial democracy" as being the adoption of socialism and class conflict. In effect, these various interpretations made "industrial democracy," and its practice, broadly defined, somewhat indistinct. Yet by 1916, the AFL forged an alliance with the Wilson Administration and the experimental democratization of industry became a lasting theme in labor history. Of primary importance to this analysis was how Wilson used "industrial democracy" to shape his approach to the antitrust-labor problem. Daniel Letwin, review of *Labor's Great War: The Struggle of Industrial Democracy and the Origins of Modern American Labor Relations, 1912-1921*, H-SHGAPE (1999, at: http://www.hnet.msu.edu/reviews/showrev.cgi?path=20213934921244); McCartin.

[226] Ibid.

[227] Ibid.

[228] Bernstein, 391; Taylor, 42.

The Republican leadership in Congress refused to address the grievances of labor, especially anti-labor Speaker of the House Joe Cannon, who rebuffed every labor appeal. Republicans no longer seemed appealing to labor, and the AFL drifted ever closer to the Democratic Party.[229]

In 1908, with the disastrous Danbury Hatters' decision, Gompers approached the leadership of both major political parties and proposed that they include in their platform a pledge to grant labor immunity from the Sherman statute and substantially limit the power of the courts to issue injunctions.[230] The Republican Party flatly refused Gompers's request; however, the Democratic Party was more receptive and accepted Gompers' suggestion. With the AFL's assistance, Democrats won control of Congress in the 1910 midterm elections. The naming of Congressman William B. Wilson, a former official for the United Mine Workers (UMW), to chair the House Committee on Labor helped to solidify an alliance between the Democratic Party and the AFL. Gompers later declared that Wilson's appointment help make Congress "a potent power responsive to social and economic conditions."[231] Later while in this position, William B. Wilson argued that, under Democratic control, Congress had passed such a sweeping amount of pro-labor legislation that it had "never been equaled by any party, at any time, or in any country in the world."[232] This, though, was greatly disputed.

During the 1912 Democratic National Convention, the AFL endorsed the radically pro-labor Speaker of the House Champ Clark for the Democratic nomination for President. However, Woodrow Wilson won the party's nomination. Many labor activists did not want Woodrow Wilson as the Democratic pick for president because of his lukewarm and sometimes even cold attitudes concerning labor. While in academia, Wilson had retained a persistent suspicion of labor organizations, which he deemed "economically disastrous."[233] Wilson rejected the collective consciousness of labor and categorized labor strikes as socially divisive. Another notable opponent to Wilson's nomination was pro-labor activist Judge Alton B. Parker, who advised the AFL to endorse Clark. Regardless of these efforts, Wilson represented the Democratic Party, and with the eventual support of Gompers, the interests of labor in the 1912 presidential election.[234]

Despite protest within the AFL, Gompers convinced a majority of its members to support Wilson. Crucial in gaining the AFL's continued support after Clark's defeat in the primary was Wilson's pledge to keep the party's promise to Gompers. Gompers was determined to forge a workable alliance with Wilson in the hopes of significant reforms. To further quell fears, Wilson emphasized the record from his second term as a reformist governor of New Jersey and his support of a workers' compensation bill. In addition to his record as governor, Wilson also agreed to recognize labor's right to organize. Following Brandeis's recommendations, Wilson stated several times during his campaign that his administration intended to secure the fundamental rights of labor. During a speech at Fall River, Massachusetts, Wilson declared that the law was "one-sided" because it allowed for yellow-dog contracts and disallowed a right to

[229] McCartin, 11.
[230] Ibid, 11; Jones, 202.
[231] McCartin, 14.
[232] Ibid., 14.
[233] Ibid.,15.
[234] Jones, 209.

strike.[235] On another occasion, Wilson insisted that he was opposed to the unrestricted use of injunctions.[236]

By November of 1912, all of Wilson's rhetorical maneuvering paid off, and Gompers enthusiastically declared that Wilson was labor's choice for President. With labor's support, the Democratic Party won sweepingly. Wilson secured 435 electoral votes and Democrats won seats in both the House and Senate.[237] In office, Wilson created the United States Commission on Industrial Relations (USCIR) and appointed Representative William B. Wilson to head the Department of Labor. Radical labor activists declared that Wilson's appointment came "virtually at the instigation"[238] of Gompers, offering a view of their future relationship together.

Labor Secretary Wilson, who arrived in the U.S. at age eight, worked in the coal mines of north-central Pennsylvania. As a longtime labor activist, who had served as a masterworkman for the Knights of Labor, he joined the UMW and quickly gained a leadership position. In 1906, Wilson was elected to the House of Representatives and led a critical investigation by the House Labor Committee into Frederick W. Taylor's scientific management practices.[239] Under Wilson's leadership, the Labor Department symbolized the very essence of the alliance forged between the Democrats and AFL. "Industrial democracy" was alive and well at the Department of Labor, and Wilson hoped this department would effectuate cooperation between labor and capital for the "common good."[240]

The close relationship between the AFL and the Department of Labor concerned many business leaders. As one observer noted, an "impression became current in many places that the Department was controlled by the labor unions, and practically all of its personnel were or had been connected with organized labor."[241] And Secretary Wilson only exacerbated these concerns when he addressed the delegates of the 1913 AFL convention as "fellow trade unionists." Becoming increasingly alarmed at this relationship, business leaders demanded that President Wilson "restrain" his "anarchist" cabinet member.[242] Historian Joseph A. McCartin noted that one employer asked pointedly: "Why is Mr. [William B.] Wilson allowed to take the stand he does with the American Federation of Labor?"[243] With competing constituencies, labor on one end and capital on the other, Wilson began his dilution of pro-labor legislation, most notably the Clayton Act.

President Wilson's political principles outlined in his "New Freedom" program were inconsistent with granting labor immunity from the Sherman statute. The "New Freedom" program was a promise "to restore laissez-faire—with some modification—and to revive competition."[244] Wilson asserted that there were would be no "special privileges" for anyone and

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[235] Ibid., 203.
[236] Ibid.
[237] McCartin, 15.
[238] Ibid.
[239] Ibid.
[240] Ibid.
[241] Ibid.
[242] Ibid.
[243] Ibid., 16.
[244] Jones, 203.

an elimination of all "class legislation."[245] There was no room in Wilson's "New Freedom" for radical pro-labor reforms. Given these principles, Wilson had to find a way to keep his pledge to aid labor while extending no special privileges, and strict governmental impartiality was the solution. The government remained impartial in labor disputes and did not aid employers in resisting labor unions. Wilson's labor constituency, however, refused to recognize this impartiality and demanded more positive protection.[246]

In 1912, "industrial democracy" was starting to inspire numerous reformers, but Gompers's fears persisted. In December 1912, the *Hitchman Coal and Coke Co. v. Mitchell* was argued before the Circuit Court of Appeals in which not just labor practices, but the United Mine Workers' union right to exist was challenged because of principles outlined in its constitution. In *Hitchman*, the appeals court overturned a lower courts' decision that dismantled the union as an "unlawful combination."[247] The lower court adjudicated against the UMW on the basis that its constitutionally-outlined objective to organize all mine workers' industry wide was unlawful under the Sherman Act. The appeals court overturned the decision, but Gompers' had serious reservations. He thought, regardless of the decision, that the labor unions' right to exist was in doubt so much so that it became an obsession of Gompers that labor unions' right to exist be spelled out in the law.

That same year, Gompers' concerns were evident when he appeared before a Senate committee considering the changes to the Sherman Act. He again expressed his belief that if an anti-labor administration rose to power that it could use the Sherman statute to "dissolve"[248] labor unions. This belief was the central theme behind most of his testimony before Congress. A couple of months later, when testifying before another committee, Gompers' declared: "Under the interpretation placed upon the Sherman antitrust law by the courts, it is within the province and with the power of any administration at any time to begin proceedings to dissolve any organization of labor in the United States…"[249]

Although Gompers did expect unions to be prosecuted for blatantly criminal acts, he was not concerned with the Wilson Administration. Underscoring the prevailing spirit of "industrial democracy," Gompers stated that he did not believe that the Wilson Administration would attempt to dissolve any labor organizations. Wilson, however, did not support total immunity for labor. Gompers insisted during his testimony that "We [labor unions] do not want to exist as a matter of sufferance subject to the will of or chances or the vindictiveness of any administration or of any administration officer."[250] Gompers was again emphasizing the dangers of an unfriendly administration and the judiciary's interpretation of the antitrust laws.

Gompers' told the committee members that all labor needed was the unfettered ability to negotiate in labor disputes; however, he stressed labor's existence more than immunity.

> We do not ask immunity for any criminal act which any of us commit; we ask no immunity from anything; but we have the right to existence, the lawful, normal existence

[245] Ibid..
[246] Ibid., 202-206.
[247] Ibid, 204; Bernstein, 196-200.
[248] McCartin, 204.
[249] Ibid.
[250] Ibid., 205.

> as voluntary association of workers, organized not for profit, but organized to protect our lives and normal activities.[251]

When Gompers insisted that labor wanted "no immunity from anything," he may have irreversibly hurt the campaign for a labor exemption from the antitrust laws. Perhaps not directly, but indirectly he shifted attention away from labor's fight for immunity, which was considered by some scholars to be the more important battle.

At one point, Representative John C. Ford asked, "What you desire is for us to give you a legal status under the law?" To which Gompers replied, "Yes, sir."[252] This is not to say that Gompers did not fully support immunity because he did support the pending Bacon-Bartlett bill, which excluded labor from the Sherman Act, defined property in labor disputes, and placed restrictions on the judiciary's power to grant injunctions. Historian Dallas L. Jones contends, however, that Gompers' support for the bill was "completely overshadowed by his emphasis upon the right to exist."[253]

"Industrial democracy" and labor's uncertain relationship with the Wilson Administration continued, especially with President Wilson's grudging support of the Sundry Civil Appropriations Bill. The AFL considered this bill important because it contained a rider prohibiting any of the funds appropriated in the bill for use in prosecution of labor under the Sherman Act.[254] Surprisingly, Wilson did not veto the bill; a similar bill had been vetoed by President William Howard Taft as "class legislation of the most vicious sort."[255] Upon affixing his signature and consistent with his "New Freedom" principles, Wilson strongly denounced "rider" legislation.[256] With this bill, it appeared that "industrial democracy" was working; however, it only intensified opposition to labor's exclusion from the Sherman Act, opposition that was clearly reflected in the legislative history of the Clayton Act.

The Sundry Civil Appropriations Bill did not restrict the use of regular Justice Department funds, and Wilson spent the next five months blocking other similar types of legislation.[257] Initially, when Wilson outlined his antitrust program before a joint session of Congress, it mentioned nothing of labor's objectives. Both labor and labor Congressmen[258] were infuriated by President Wilson's attempt to submit antitrust measures to Congress without keeping the party's promise to Gompers. Labor-sympathetic Congressmen also made it clear that unless labor's demands were considered they would block all of Wilson's antitrust measures. By mid-March 1914, when four antitrust measures had been introduced in Congress by the Wilson Administration without the provisions that labor requested, Gompers' angrily declared, "Without

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[251] Ibid., 205.
[252] Ibid., 205; Joseph Kovner, "The Legislative History of Section 6 of the Clayton Act," *Columbia Law Review,* Vol. 47, No.5. (1947)
[253] Jones, 216.
[254] Jones, 204.
[255] Ibid..
[256] Ibid., 204.
[257] Lovell, 109; Jones, 205.
[258] Jones, 206.

further delay the citizens of the United States must decide whether they wish to outlaw organized labor."[259]

President Wilson's New Freedom principles were impeding the hopes of "industrial democracy," especially where vital anti-injunction legislation was needed. Although "industrial democracy" considerably weakened Wilson's New Freedom programs, there was little indication that Wilson was prepared to budge on the antitrust issue let alone support total immunity. Wilson's position in the business community was another factor motivating his inaction on the antitrust-labor issue. With a labor department control led by a radical labor activist and marked criticism for his proposed economic plans, this was not the most politically advantageous time for him to act. This also explains why Wilson did not immediately act against the business community after his inauguration.

Many business leaders opposed Wilson's candidacy, and prior to his inauguration, had insisted that his proposed economic policies led the country to depression. In the fall of 1913, a business recession had gripped the country, and the prognostications about the effects of Wilson's economic program seemed all too real. This prompted Wilson to slow down his zeal for reform and focus instead on changing the attitudes of the business community. Reverberating throughout his agenda was his campaign to ease the tensions between business and his administration. This could not be done through his support for a labor exemption, which was bitterly and persistently opposed by the business community. Changes to the Sherman Act, the business community argued would create business uncertainty and thus exacerbate the recession.[260]

Wilson was opposed to a labor exemption for both philosophical and practical political reasons but nevertheless had to take into account possible political retaliation for his inaction on the antitrust issue. Unlike Wilson, however, Democratic Congressmen were faced with recession era re-election in 1914, and many of them thought the wisest course of action was to drop the controversial antitrust program. Instead, the Democratic controlled Congress focused on more general reform legislation. However, since the time Wilson's submitted his first antitrust program to Congress, political pressure from labor increased significantly. [261]

President Wilson was still in the process of deciding what modifications were in store for his antitrust program. Wilson started in January 1914 with his antitrust program based on "New Freedom" principles, which provided more exact definitions of restraints of trade and increased the penalties for violation of the Sherman statute, but by mid-April 1914, his program was based on "industrial democracy," which provided regulation of industry by administrative agency.[262] Both Wilson and Congress had to act on the issue. President Wilson wanted his modifications to the Sherman statute enacted, and the only way he could secure Congressional approval was by addressing labor's demands. In light of this situation and Wilson's cautious faith in "industrial democracy," the time was ripe for the introduction of the Clayton Act in Congress. In his usual flare for hyperbole, Gompers called the Clayton Act "the greatest measure of humanitarian

[259] Ibid.
[260] Ibid., 206; McCartin, 16.
[261] Jones, 207.
[262] McCartin, 15-16; Jones, 207.

legislation in the world's history."[263] However, the Clayton Act proved to be one the most ineffective pieces of labor legislation ever passed by Congress.

THE CLAYTON ACT AND ITS LEGISLATIVE HISTORY

On April 13, 1914, the *New York Times* reported that President Wilson insisted upon passage of anti-injunction and anti-contempt legislation in order to keep the Democratic Party's promise to labor.[264] Simultaneously, Representative Henry D. Clayton, chairman of the House Judiciary Committee, announced that the Clayton Anti-Injunction and Anti-contempt bills would be submitted to the House for consideration and subsequent passage. The more effective Bacon-Bartlett bill, however, remained in the committee. The original Clayton Anti-Injunction bill restricted the courts use of injunctions.

It prohibited the issuing of injunctions and restraining orders "…in any case between an employer and employee, 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…"[265] It also provided a section that listed labor activities that were not enjoinable by the courts. Some of these essential non-enjoinable rights included the right of a worker to quit, the right to collective bargaining, the right to have labor meetings, and the right to conduct primary boycotts (strikes).

Wilson was not entirely opposed to this compromise given that during his campaign he did mention that he was against the unrestricted use of injunctions in labor disputes. With restrictions on the use of injunctions moving forward in Congress, the President believed that this major victory would satisfy labor and end the opposition to his earlier antitrust programs.[266] In the *Democratic Text Book* (1912), Wilson's campaign declaration stated the following:

> Questions of judicial practice have arisen, especially in connection with industrial disputes. We [the Democratic Party] believe that the parties to all judicial proceedings should be treated with rigid impartiality, and that injunctions should not be issued in any case in which an injunction would not issue if no industrial dispute were involved.[267]

The Clayton bill was in line with this message and was far more conservative than the Bacon-Bartlett bill, inasmuch that the former did not give labor immunity from the Sherman statute. With the Clayton bill, Wilson was not subjected to as much criticism had he then went alone with the immunity bill.

The AFL was also reasonably satisfied with this bill, and the AFL Executive Council gave it approval.[268] On May 27, 1914, Gompers, speaking to members of the Executive Council, pushed for one amendment to the bill. He insisted that a concluding phrase should be added to

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[263] Lovell, 99.
[264] Jones, 207.
[265] Berman, 99-100; Jones, 207; Lovell, 134.
[266] Jones, 207; McCartin, 14-15.
[267] Jones, 208.
[268] Jones, 207.

the bill: "nor shall any of the acts enumerated in this paragraph be considered or held unlawful in any court of the United States,"[269] emphasizing that the listed injunction restrictions applied to all courts. The Executive Council agreed to submit the proposal for the amendment to Congress. After changes in both the House and Senate, the final phrase read, "nor shall any of the acts specified in this section be considered or held to be violations of any law of the United States."[270] This final rewording was accepted by both Congress and the AFL.

Labor, however, was not totally appeased. Of significance was the fact that there were two different measures in Congress. The first was Wilson's antitrust proposal, and the second was the Clayton Anti-Injunction and Anti-Contempt bills. These were two separate initiatives in Congress until Arthur Holder, a member of the AFL's legislative committee suggested that the anti-injunction and anti-contempt measures be written into the President's antitrust bill in order to expedite passage.[271] Congress compromised and agreed to combine the anti-injunction and anti-contempt measure with the antitrust legislation. The antitrust bill included a new section based on Gompers' testimony before Congress which eventually became Section 6 of the Clayton Act. As presented by Representative Clayton, the original language of Section 6 stated:

> That nothing contained in the anti-trust laws shall be construed to forbid the existence and operation of fraternal, labor, consumer, agricultural or horticultural organizations, orders or associations operating under the lodge system, instituted for the purpose of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such orders or associations from carrying out the legitimate objects of such associations.[272]

At the time this section was introduced, it enjoyed the support of both labor Congressmen and the AFL. When this section was sent to the Judiciary Committee for approval, labor advocates called for stronger language. In particular, labor supporters wanted the substitution of the words "shall apply to," for the phrase, "shall be construed to forbid the 'existence' and operation of."[273] Wilson approved of the original language as presented, but he was opposed to the substitute language because it specifically excluded labor from the antitrust laws. The original language in Wilson's view only stated that labor unions could not be dissolved using the Sherman statute.[274] A stalemate subsequently ensued and after several days, in an attempt to break the deadlock, a committee of labor Congressmen in the House—Representatives David J. Lewis, Edward Keating,[275] John J. Casey and Isaac R. Sherwood—met with Wilson and Attorney General James Clark McReynolds,[276] who later became a devoted supporter of *Lochner* era jurisprudence.

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[269] Ibid., 208.
[270] Ibid., 208.
[271] Gompers, *Seventy Years,* 2 vols, 295.
[272] Jones, 209.
[273] Ibid., 209.
[274] Ibid., 209.
[275] Edward Keating co-authored the Keating-Owen Child Labor Act of 1916, which a statute enacted by the Congress that "sought to address the perceived evils of child labor by prohibiting the sale in interstate commerce of goods manufactured by children." In 1916, it was signed into law by Wilson, but in *Hammer v. Dagenhart* (1918), the act was ruled unconstitutional: Stephen B. Wood, *Constitutional Politics in the Progressive Era: Child Labor and the Law*, Chicago: The University of Chicago Press, 1968.
[276] As an associate justice, McReynolds "was well known as a blatant anti-Semite and refused to sit near Louis Brandeis (the first Jew to sit on the Court) where he belonged on the basis of seniority for the Court's annual picture

On April 30, 1914, Wilson warmly received the pro-labor Congressional committee,[277] as Keating described the meeting later, they told Wilson that Gompers and other labor leaders, upon consultation with legal experts, had discovered that the section was not as strong as they initially thought. Wilson noted curiously that during a previous conversation with Gompers about the language both of them had agreed to accept it. After extended discussion, Wilson asked what caused Gompers to change his mind on the language. A member of the delegation then stated that Judge Alton B. Parker had pointed out to Gompers the weakness of the section. Keating then noted that upon hearing this, "the President face froze and from that point on he 'wouldn't yield an inch.'" According to Keating, the President immensely disliked Parker because he had opposed Wilson's nomination in the 1912 Democratic primary. [278]

Over a month had passed and the bill was still stalemated in the committee. During this impasse, Wilson had his leaders in the House resist every effort to include a labor exemption in the antitrust bill. On May 18, when the Judiciary again refused to consider labor's substitute language, Secretary Frank Morrison of the AFL declared that labor would carry the fight to both the House and the Senate. Simultaneously, labor Congressmen and other labor supporters continued to insist that they block the antitrust bill in its entirety unless the demands of labor were met. In response, Wilson's allies in Congress threatened to drop all of the labor sections from the bill if labor did not acquiesce in to keeping the original language. Gompers' earlier insistence that labor should be legally recognized arguably put the labor cause as a whole in jeopardy, especially labor's fight for immunity from the antitrust laws.[279]

Pointing to Gompers' testimony before Congress, Wilson's allies pointed out that labor was being unreasonable because Congress had acceded to labor's demands that trade unions be protected from dissolution. Representative John Floyd of the Judiciary Committee, an ally of Wilson's, pointedly asserted: "We are doing what Mr. Gompers asked. We are taking them out from the bad of the law that would make them liable to dissolution. This is a bill of rights for labor."[280] In addition to labor's original acceptance of language, Wilson's allies were now trying to paint Gompers as inconsistent and breaking faith with the political alliance. After Gompers testified before the House Judiciary Committee, the AFL presented a letter to Congress which unequivocally expressed labor's position on the passage of the Clayton Act.[281] Interesting

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to be taken in 1924; Chief Justice Taft decided that the Court take no picture that year. McReynolds refused to speak to Brandeis for three years following his appointment and when Brandeis retired in 1939, did not sign the customary dedicatory letter sent to Court members on their retirement." During Benjamin Cardozo's swearing in ceremony, "he pointedly read a newspaper muttering "another one," and did not attend Felix Frankfurter's , exclaiming 'My God, another Jew on the Court!' He was also a confirmed misogynist. His fierce opposition in the face of Franklin Roosevelt's New Deal legislation to fight the Great Depression led to him being labeled, one of the 'Four Horsemen,' along with George Sutherland, Willis Van Devanter and Pierce Butler, all of which were hold outs from the *Lochner* era." McReynolds despised Roosevelt and never denied an attributed quote from him that stated, 'I'll never resign [from the Court] as long as that crippled son-of-a-bitch is in the White House. William F. Shughart II, "Bending Before the Storm: The U.S. Supreme Court in Economic Crisis, 1935–1937," *Independent Review* (2004): 80, fn. 56.

[277] Jones, 209.

[278] Ibid., 209.

[279] Ibid., 210; McCartin, 15.

[280] Ibid..

[281] Kovner, 755-757

enough, another point also arose during the Congressional hearings, and that concerned the clarity of the legislative language. The discussion concerned whether the language of the bill was not clear enough, especially in regard to Section 7 [subsequently Section 6].[282] Thus, two distinctly different interpretations arose in Congress.

Leadership changes in Congress, however, led to another compromise with labor. Two powerful members of the House—Representatives Robert L. Henry, chairman of the rules Committee, and Claude Kitchen, soon to become majority leader—had agreed to support labor's demands. The compromise phrase added to the section the following language: "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."[283] This compromise, however, led to even more confusion.

Immediately after submission, this phrase was given conflicting interpretation by Wilson's ally, Edwin Y. Webb, the newly appointed chairman of the Judiciary Committee. He declared that the phrase did not alter the substance of the original section and that with this new phrase the original section had just been rewritten. Webb stated it was rewritten "in such a way as to be more along the lines demanded by labor."[284] Labor Congressman, Robert L. Henry, on the other hand, gave a much different meaning to the new provision when he addressed the House to discuss how it had been formulated. Henry stated the he and several other representatives, not all members of the labor committee, were dissatisfied with the original provision because in their opinion it abandoned the party's promise to labor. Commenting sometime later, Frankfurter and Greene stated that "the debates in Congress looked both ways."[285] The pertinent promise outlined in their platform read:

> That there should be no abridgment of the right of wage earners and producers to organize for the protection of wages, and improvement of labor conditions, to the end that such organizations and their members should not be regarded as illegal combinations in restraint of trade.[286]

In response to these concerns, a group of representatives met in Henry's office and decided to change the substance of the original section so that the party did not renege on its campaign promise. After this meeting, AFL leaders were consulted to discuss the changes. Henry and the other representatives stated that their provision explicitly granted labor immunity from the antitrust laws.

In his statement in front of the House, Henry said that "they [labor officials] called their counsel into conference with us, and we concurred that this amendment added to section 7 gave them what these organizations long desired,"[287] immunity from the antitrust laws. Henry then went on that Section 7 "would clearly exempt labor organizations and farmers' organizations

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[282] Kovner, 750.
[283] Jones, 213.
[284] Ibid., 212.
[285] Frankfurter and Greene, The Labor Injunction, 143.
[286] Jones, 210.
[287] Jones, 213; Kovner, 754.

from the provisions of the anti-trust laws."[288] This statement helps to explain why Gompers had such unyielding confidence in the final bill that passed Congress. In addition to relying on their own interpretation, leaders of the AFL sought legal counsel from labor lawyers and Federal Judge Alton B. Parker. With the assurance of legal counsel, Parker, and Henry, Gompers reported to the AFL Executive Council that an agreement had been reached between the President, the House Judiciary Committee, and the AFL. In Gompers' view, the agreement assured labor's exclusion from the Sherman statute.

Wilson, Webb, and the majority of the Judiciary Committee, on the other hand, did not accept this interpretation. Representative Webb and Floyd strongly asserted that the section did no more but make it impossible to dissolve labor unions under the antitrust laws, no immunity was given. Further, Webb insisted that unions were only removed "from the ban of the present law to the extent that in the future they cannot be dissolved as unlawful combinations. Their existence is made lawful and they are given a lawful status,"[289] nothing more. Supporting Webb's interpretation, Wilson in a public statement asserted that labor had not been given immunity from the Sherman Act, but were merely guaranteed the right to organize—a right to which there had been doubt, referring to Gompers' emphasis during his Congressional testimony.

Both Wilson and his allies in Congress were resolute in their position. The House debate that followed only reinforced the dispute over the different interpretations. Some representatives agreed with Wilson and Webb's interpretation and others agreed with Gompers and Henry's interpretation, whereas other representatives said that a precise interpretation was impossible because the section was too ambiguous. Supporting the argument made by George Lovell, one representative charged that Congress was "deliberately" avoiding plain English in order to pass policy making responsibility to the Supreme Court.[290] Thus, via a legislative deferral, Congress could not be held politically responsible for how the Court interpreted the section.

But the controversy over meaning was not confined to Section 6; there also was much debate over the interpretation of the injunction provision, Section 20. One Representative stated that the injunction prohibitions accomplished nothing because the language was limited to "employers and employees, and employer-employee relationships,"[291] which ceased when a strike occurred. It was also pointed out that there was no explicit definition of "property" in labor disputes, which could be defined as broadly as to mean "commerce" or as narrowly to mean "physical property."

Still other Representatives insisted that the section went too far because it legalized secondary boycotts. Webb, for instance, declared emphatically that he rejected the legalization of secondary boycotts. He stated:

> We did not intend, I will say frankly, to legalize the secondary boycott…It is not the purpose of this committee to authorize it, and I do not think any person in the House wants to do it. We do confine boycotting to the parties to the dispute, allowing parties to

[288] Jones, 213.
[289] Ibid., 213.
[290] See Lovell.
[291] Jones, 217-218.

> cease to patronize that party and *to ask others to cease to patronize the party to the dispute* [contradictory statement].[292]

Without realizing it, Webb made a contradictory statement and actually said that Congress did legalize secondary boycotts. Webb also stated that the section did legalize all the other acts mentioned in the section, which included, according to his statement, secondary boycotts.

After weeks of extended debate, both Gompers and Wilson held adamantly to their respective interpretations. When the House approved the measure, Gompers issued a press release that the bill secured "for America's workingmen freedom of self-protection."[293] He also wrote that labor had to resist every effort by the Senate to weaken the language. Additionally, Gompers refused to accept any other interpretation and was steadfast in his belief that labor was granted immunity from the Sherman Act. On one occasion, Gompers was asked whether he was certain that Section 6 granted labor immunity from the Sherman Act. He answered:

> …we have decided upon the amendment after a most careful consideration of the entire matter in conference with Judge Alton B. Parker, Attorney J. R. Ralston, of our Legislative Committee, Secretary Morrison…Not only that, but other eminent authorities have been consulted in the matter, and if Labor at last is deceived as to the provision of Section 7 [Section 6] there will be many others, some of high legal authority, who were equally deceived.[294]

Indeed, Gompers was told by numerous legal experts what the section meant, but so were Webb and Wilson. No clear interpretation existed, only various opinions on the meaning of Section 7.

As for Wilson, he maintained that his interpretation was the right one. When a business supporter questioned Wilson's "impartiality philosophy" regarding the controversial bill, Wilson replied, "The so-called labor exemption does not seem to me to do more than exclude the possibility of labor and similar organizations from being dissolved as in themselves combinations in restraint of trade."[295] Webb also emphasized this point when he asserted publicly that there was nothing "revolutionary or radical"[296] in the legislation. If Wilson endorsed a labor exemption, it would have been incongruent with how he viewed the purpose of "industrial democracy," which was to appease labor to a point to prevent militancy. Wilson was walking a fine political line between capital and labor. He was concerned with re-election in 1916 and understood that both labor and capital were needed to end industrial strife.

Upon consideration in the Senate, the bill's interpretation continued to be disputed. The Senate followed the same pattern as the House with Senators supporting Webb's interpretation and Senators supporting Henry's interpretation. Labor's right to exist was not in dispute, but whether the bill gave labor immunity and whether injunctions were successfully abated was fervently contested. Senator Charles A. Culberson, chairman of the Senate Judiciary Committee

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[292] Jones, 212.
[293] Ibid., 213.
[294] Ibid..
[295] Ibid., 213.
[296] Ibid.

and Senator Key Pittman adamantly supported Henry's interpretation. Culberson, in reporting the bill, declared that "following the original purpose of the framers of the Sherman antitrust law, the bill proposed expressly to exempt labor…from the operation of the antitrust laws."[297] Pittman concurred with Culberson and insisted that if labor unions "cannot be construed to be illegal combinations or conspiracies,"[298] then they were not within the purview of the antitrust laws.

During Senate debate, Senator Jack Cummins attempted several times to strengthen the bill; however, all of his attempts failed.[299] But still the debate continued with Senator James A. O'Gorman declaring that Section 20 (the injunction prohibition section) did not diminish the courts' power. O'Gorman stated that Section 20 was merely a codification of the law. Supporting Henry, Senator Horace Chilton of the Judiciary Committee insisted that "the demands of labor organizations…were intended to be met in this section,"[300] referring to Section 6. What was accepted, however, was the now famous phrase at the beginning of Section 6 which declared, "the labor of a human being is not a commodity or article of commerce."[301] Indeed, this was a colorful phrase, but it still shifted attention away from the more pertinent issues, injunctions and immunity.

As for Gompers, he was convinced that Henry's interpretation was correct and grandly declared that the words of Section 6 and 20 "were sledgehammer blows to the wrongs and injustices so long inflicted upon the workers…[It] is the Magna Carta upon which the working people will rear their structure of industrial freedom."[302] This statement was also unappreciative of the fact that the bill contained numerous qualifiers, which did exactly what Gompers had feared before the bill reached the Senate. The qualifiers appeared in the bill after modifications in the Senate. The most pertinent modifications in terminology were the inclusion of qualifiers in both Section 6 and 20. In Section 6, the word "lawful" was added, and in Section 20, the word "lawfully" was added. Section 6 now read as follows: "or to forbid or restrain individual members of such organizations from "lawfully" carrying out the legitimate objectives thereof…," and Section 20 read: "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…"[303]

The following offers a glimpse of the Clayton Antitrust Act as a whole and its most pertinent sections to labor:

Section 6 states: (Legalization of Labor Unions)

> That the labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor…organizations, instituted for the purpose of mutual help and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from <u>lawfully</u> carrying out thereof; nor shall such organizations, or the

[297] Ibid.
[298] Jones, 213.
[299] Kovner, 751.
[300] Jones, 213-214.
[301] Berman, 99; Jones, 214.
[302] Berman, 99; Jones, 214.
[303] Jones, 218.

> members of thereof be held or construed to be illegal combinations or conspiracies in restraint of trade under the law.[304]

Section 20: (Injunctive Prohibition Section)

> That no restraining order or injunction shall be granted by any court of the United States…in any case between an employer and employee [Proximate Relationship], 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 [the key escape clause], of the party making the application, for which injury there is no adequate remedy by law…[305]

Underlined in both Sections 6 and 20 were words and phrases in the bill that became the subject of great controversy in the courts. In *Duplex* (1921), the *Lochner* era jurisprudence remained the dominant practice of the Court and labor's plight as a judicial underdog continued.

It was also necessary to quote at length these two sections to prove a point. When one reads the Clayton Act, it appears as though labor was now totally exempt from the prosecutorial reach of the Sherman Act and "injunction judges." But one of the major underpinning of this bill was the use, by Congress, of extensive, confusing language. The Clayton Act labor exemption sections were not written in plain, non-ambiguous English. Partly to blame for this was the central focus of the bill itself. The main purpose of this act was to strengthen the Sherman Act's reach against corporate monopolies. This might explain some of the extensive, confusing language that anti-labor justices later exploited. With this immensely ambiguous language, Daniel Davenport, who for years was an exceptional attorney in cases against labor, and counsel for the Loewe company in the Danbury Hatters' case, insisted before the United States Commission on Industrial Relations that the Clayton Act gave labor no advantage that it did not already possess.[306]

After prolonged debate in both the House and Senate, Congress finally submitted the Clayton Antitrust Act to Wilson for his approval. On October 15, 1914, Wilson signed the bill into law. As for the correct interpretation of the Clayton Act, there was none. When the Supreme Court had to apply the Clayton statute in *Duplex* (1921), it had two different interpretations to choose from. No definitive Congressional intent was retrievable from an examination of the legislative history. Also, from reviewing the Congressional record, there was immense confusion over the issue of secondary boycotts.

Representative Webb stated blatantly that they were illegal; however, he contradicted himself and unknowingly stated the contrary. So much confusion arose from the labor immunity argument that the secondary boycott issue drifted into the periphery. The single most important reason why the bill was ineffective, besides the arguments about a legislative deferral, Gompers' emphasis on labor's right to exist, and the two interpretations in Congress, was the undue

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[304] Berman, 99.
[305] Berman, 100-101.
[306] Ibid, 102.

interference by Wilson, whose role was pivotal to the bill's ultimate failure. While he was balancing between labor and capital, between "New Freedom" and Industrial Democracy, and between Wilson the reformer and Wilson the anti-labor academic, labor suffered as well as Congress's ability to express its intent.

DUPLEX AND THE PROXIMATE RELATIONSHIP DOCTRINE

By 1921, the "Age of Industrial Democracy," which showed promise for significant labor gains ended and a long string of labor injunctions crippled labor's effectiveness. The *Duplex* case was symbolic of the death of this political alliance and continued judicial hostility to labor practices. On January 14, 1921, Frankfurter sent Holmes a letter conveying his disappointment with the Court's recent *Duplex* decision. Near the end of the letter he praised Holmes' dissent and questioned how such an insightful jurist "came out of this part of the world." [307] Frankfurter wrote:

Dear Holmes,

> The Clayton Act case [*Duplex*] must have seemed a familiar rehash of *Vegelahn v. Guntner* and *Plant v. Woods*[308] issues though here there was a new phrase. To be sure, Congress was dishonest in the Clayton Act, and both Congress and the Presbyterian Pope (alas! what feeble Pope he, that dwells in the White House, is)[309] handed "Labor" a gold-brick. And yet, and yet for the Court to say that all those words mean nothing. It needed no prophet to foretell the result and yet, it is a strong dose…So far as the social consequences go, the decision might well teach Messrs. Gompers et al. a few things!
>
> I sometimes wonder how you ever came out of this part of the world. The answer is you came out of it. I wrote this because I had to and now goodnight.
>
> F.F[310]

When Frankfurter mentioned that Congress was "dishonest," he was referring to the highly ambiguous language of the Clayton Act and its predictable failure to withstand hostile judicial interpretation. According to Frankfurter, the lesson Gompers learned from the *Duplex* decision was to be cautious in championing legislative acts that supposedly benefited labor. As mentioned before, Gompers enthusiastically endorsed the bill irrespective of the two Congressional interpretations and Wilson's detrimental interference.

On January 20, Holmes replied to Frankfurter's letter and praised Brandeis's concurring dissent. Holmes wrote:

Dear Frankfurter,

> How many times your kind words have given me courage in despondency! I thank you often in my heart. The Clayton Act case was the one though that most stirred me in this batch. I thought Brandeis's opinion admirable and, although I had some

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[307] Mennel and Compston, 101.
[308] Holmes's Massachusetts Supreme Court dissents, *Vegelahn v. Guntner* (1896) and *Plant v. Woods* (1900), supported labor's right to pursue it own ends by peaceful picketing even though the results might injury the interests of capital: Mennel and Compston, 100-101.
[309] Woodrow Wilson was a devoted Presbyterian who unduly interfered with the legislative process to enact the Clayton Act.
[310] Mennel and Compston, 100-101.

> misgivings as to what the New York Court would have said, to which if necessary there might have been further answers, I agreed with it joyfully or rather, sadly because of the small adherence it secured. I have been driven this week and therefore write but this line before going to my evening game of solitaire.
>
> Yours ever,
> O.W. Holmes[311]

Since the union involved in the *Duplex* case centralized its secondary boycott around New York City, the financial hub for the company, Duplex petitioned a lower court in that jurisdiction for injunctive relief. The District Court for the Southern District of New York heard Duplex's petition for an enjoinment of the boycott. The company charged that the union was an illegal combination that monopolized other unions in an unlawful secondary boycott. On April 23, 1917, Judge James Manton rendered a decision denying the company's petition. Manton held that since the conduct of the union was lawful, under the terms of the Clayton Act, the union could not be enjoined. The doubts that Holmes conveyed in his letter to Frankfurter concerned the peaceful nature of the strike, which was later challenged on appeal. Despite this, however, Holmes was convinced that the Duplex decision was an egregious case of judicial activism.

Duplex Printing Press v. Deering (1921) was the most substantial ruling after the passage of the Clayton Act and reaffirmed *Lochner* era jurisprudence. The Duplex Printing Press Company was a newspaper press manufacturer located in Michigan. There were three other such companies in the country. Between 1909-1912, the machinists' union convinced the other three newspaper press manufacturers to conform to an agreement allowing eight hour days and a reasonable minimum wage. The Duplex Printing Company, on the other hand, refused to agree to the machinists' union demands and operated on an open-shop basis. Additionally, the Duplex company required its employees to work ten hour days. Consequently, a portion of the Duplex employees went on strike. The three other manufacturers said that they terminated all business ties with Duplex Printing unless they signed the machinists' union agreement. Duplex Printing still refused to concede and the machinists' union instructed other machinists' unions at different company connected to Duplex Printing to boycott all business with the company. This was a secondary boycott.[312]

Duplex Printing appealed the decision and both the lower New York court and the Second Circuit Court of Appeals affirmed the lower court's judgment and rejected the company's petition for an injunction. On a decision of 2-1, the appeals court held that under the Clayton Act, the essentially peaceful activities of the union made the Sherman Act inapplicable. In addition it held that the Clayton Act legalized secondary boycotts because of the phrase "in 'any' case between employer and employees."[313] The appeals court reasoned that the inclusion of the word "any" applied to both primary and secondary boycotts.

Second Circuit Court of Appeals Judge James Rogers wrote a vigorous dissent. In his opinion, the secondary boycott was accompanied by violence and, therefore considering the qualifiers in the Clayton Act, declared that the union was an illegal combination under the

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[311] Ibid, 101.
[312] Berman, 103-106; Jones, 218; Lovell, 140-144; *Duplex v.Deering,* US 443, 470 (1921)
[313] Berman, 104-105; Jones, 219.

Sherman statute. He insisted that the activities were as clear a violation of the Sherman Act as the Danbury Hatters' secondary boycott. Further, he emphasized that the Clayton Act only prohibited injunctions in labor disputes involving "an employer and his own employees" and therefore secondary boycotts were still illegal. Referring to the unions' plans to make Duplex "unmarketable," Rogers declared:

> If this can be done under the laws of the United States, then it seems that no manufacturer of printing presses in this country can maintain "open" shop, no machinist engaged in the manufacture of such presses can earn his living at his trade, unless he consents to join a union, and be bound to all its rules and regulations, and channels of interstate commerce are practically closed against the products of an "open" shop [non-union products].[314]

From capital's perspective, an open shop agreement was equivalent to a "yellow-dog" contract for employers. While the courts acknowledged an employer's right to enforce yellow-dog contracts, it rejected an "open" shop strike as an undue restraint on trade. Rogers insisted that when employers and employees from other companies were not allowed to handle open shop, that is, non-union goods, then it constituted a violation of the law, especially when a business was engaged in interstate commerce.

When Duplex Printing appealed to the Supreme Court, its petition for an injunction was granted by a vote of 6 to 3. The court stated that the machinists' union boycott was a violation of the Sherman Act despite the passage of the Clayton Act. The union's attorneys, conversely, argued that the unionists had no direct hand in enforcing the boycott. The members and its labor allies only refused to handle and transport Duplex's presses. Justice Mahlon Pitney, writing for the Majority, stated that Section 20 of the Clayton Act did not legalize secondary boycotts because the act only legalizes boycotts involving "employers and employees."[315]

Pitney reasoned that since Section 20 prohibited injunctions in cases involving boycotts between "employers and employees," it only forbade the granting of an injunction in "parties standing in 'proximate' relation to a controversy,"[316] and thus the secondary boycott was not legalized. This established the Post-Clayton "Proximate Relationship" standard, which was a reaffirmation by the Court that the judicial construction in the Danbury Hatters' case (1908) involving secondary boycotts would stand. Congress was to blame for this confusion because of the ambiguous language of the statute and its lack of attention to the secondary boycott issue. Pitney wrote further that secondary boycotts were not peaceful because they constituted a "threat" to immediate employers not engaged in the labor dispute. He wrote:

> To instigate a sympathetic strike in aid of a secondary boycott cannot be deemed 'peaceful and lawful' persuasion [as spelled out in Clayton Act]. In essence it is a threat to inflict damage upon the immediate employer, between whom and his employees no dispute exists, in order to bring him against his will into a concerted plan to inflict damage upon another employer who is in dispute with his employees.[317]

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[314] Berman, 106.
[315] Bernstein, 191-193.
[316] Berman, 106
[317] Ibid, 107

Equating secondary boycotts with unlawful and injurious activities was a bit of a stretch; especially where the damage inflicted upon an immediate employer was financial. Whether the Duplex strikers were in violation of the qualified sections of the Clayton Act was greatly disputed in the Court.

Pitney then went on to insist that labor was not granted immunity from the Sherman statute because of the numerous qualifiers present in the language of the Clayton Act. Referring to the phraseology in Section 20, Pitney wrote: "The emphasis placed on the words 'lawful' and 'lawfully,' 'peaceful' and 'peacefully,' and the references to the dispute and the parties to it, strongly rebut a legislative intent to confer a general immunity for conduct [sic] violative of the Anti-trust Laws, or otherwise unlawful."[318] Pitney stated that there was nothing in the statute that did not hold labor accountable for illegal acts. He then proceeded to interpret Section 6 and make considerable critiques of the language in favor of Duplex Printing, stating that "there is nothing in the section to exempt such an organization or its members from accountability where it or they depart from its normal and legitimate objects and engage…in restraint of trade."[319] The Court enjoined the union and secondary boycott from interfering in any way with the operation of the Duplex company and its business transactions.

Justices Holmes, Brandeis, and John Hessin Clark vigorously dissented from with Pitney's interpretation. Speaking through Brandeis, they insisted that the Clayton Act was intended to improve the legal status of labor and agreed with the decision of the lower court. Using the concept of "common interest," they asserted that those engaged in a secondary boycott had a right to refuse "to expend their labor upon their standards of living and the institution they are convinced supports it." Brandeis emphasized that the phrase in the Clayton statute which prohibited injunctions "between employers and employees" legalized the secondary boycott. For according to the statute, a labor dispute could involve multiple employers and multiple employees, thus secondary boycotts were legal. Brandeis then wrote that the Duplex labor conflict was "not for judges to determine…this is the function of the legislature which, while limiting individual group rights of aggression and defense, may substitute processes of justice for the more primitive method of trial by combat."[320] In effect, the Court was overreaching and not providing sufficient deference for Congress to formulate an effective law to aid labor.

The Court's judgment in *Duplex* was undeniably the most significant since the Danbury Hatters' case (1908). It reaffirmed *Lochner* era jurisprudence and increased the means by which labor strikes could be enjoined. Further, it reiterated that secondary boycotts were illegal and that labor, regardless of the Clayton Act, was within the purview of the Sherman statute. In his opinion, Justice Pitney declared that the Clayton Act was "declaratory of the law as it had stood before."[321] Frankfurter and Greene later wrote that in interpreting the Clayton Act, "the Supreme Court had to find meaning where Congress had done its best to conceal meaning."[322]

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[318] Ibid, 107; *Duplex v.Deering,* US 443, 470 (1921)
[319] *Duplex v.Deering,* US 443, 470 (1921)
[320] Mennel and Compston, 101.
[321] Lovell, 99.
[322] Bernstein, 207.

BEDFORD STONE CASE

The *Bedford Cut Stone Company* (1927) decision was substantial because it renewed academic and legal interest in the labor-antitrust controversy. Around this time, monographs like Berman's *Labor and the Sherman Act* and Frankfurter and Greene's *The Labor Injunction* reinvigorated legal debate. This decision also appeared to mark the victory of Classical Rule of Reasonists over the pro-labor, Post-Classical Rule of Reasonists, two Court factions that battled for about nine years since *Chicago Board* (1918). Following *Duplex* (1921), an immense paralysis, brought on by endless court injunctions, crippled labor's power to recruit, to organize, and to strike. In 1920, aggregate union membership peaked to a little over five million, but by 1923, union membership declined drastically by two million.[323] This trend continued until the Bedford Stone case galvanized the next great labor movement, the second "Anti-Injunction Campaign." With this movement, criticism of *Lochner* era jurisprudence intensified and jurists, like Holmes and Brandeis, became judicial symbols of labor's great battle.[324]

Prior to 1921, Bedford Cut Stone Company engaged in quarrying and cutting limestone headquartered in Bloomington, Indiana. The company operated under a trade agreement with the Journeyman Stone Cutters' Association of North America. In April 1912, the Stone Cutters' union was unable to obtain a contract renewal from the Bedford Cut Stone Company and a strike ensued. Around July first, Bedford, with the help of similar businesses, reestablished operations despite intense opposition from the Stone Cutters' Union. In its constitution, the national union stipulated that "No member of this association shall cut, carve or fit any material that has been cut by men working in opposition to this association."[325] As all members, whether at Bedford Stone or other similar companies were compelled to comply with this provision. When the national union enforced this provision in 1924, a secondary boycott halted the operations of other stone cutting business around the country.[326]

In response, Bedford Cut Stone Company and about twenty other businesses petitioned the District Court of the District of Indiana for injunctive relief and charged that the national union conspired to restrain interstate commerce. Judge James Anderson heard the companies' case and rejected the petition. The companies then appealed the decision to the Seventh Circuit Court of Appeals. On October 28, 1925, the court reaffirmed the holding of the lower court, citing insufficient evidence to establish that the union conspired to restrain trade in violation of the Sherman statute. The appeal's court cited that repetitious insufficient evidence was presented to prove that quarrying and cutting of stone or any associated operations were interfered with, with no evidence of violence or threats. Although the acts of the national union "may have tended somewhat"[327] to restrain trade, the court held that the national union was within its right to carry out such actions.

Upon appeal, on April 11, 1927, the Supreme Court held that the lower courts erred and granted the companies request for injunctive relief. The Court reasoned that, since 75 percent of

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[323] Bernstein, 84.
[324] "Labor Plans War in Injunction Case," *New York Times*, 26 May 1927: 28.
[325] *Bedford Cut Stone Co. v. Journeyman Stone Cutters' Ass'n of North*, 274 US 37 (1927); Berman, 171; Baker, 208-209.
[326] Berman, 170-171; Baker, 208; Bernstein, 213-215.
[327] Berman, 171.

Bedford Cut Stone Company's "aggregate sales"[328] were made through interstate commerce, the secondary boycott violated the Sherman Act. Justice George Sutherland[329] wrote the majority opinion and emphasized that the evidence demonstrated "many instances of interference with the petitioners' stone by interstate customers and expression of apprehension on the part of such customers of labor troubles if it they purchased the stone."[330] Sutherland wrote that the secondary boycott threatened other employers with labor disputes if they required their employees to handle "unfair"[331] stone, and local unions were threatened with revocation of membership if they allowed their members to handle the "unfair" stone.

Sutherland went on to say that the local labor conflict with Bedford Cut Stone Company was not important and was just the means by which interstate commerce as a whole was restrained. Sutherland wrote: "In other words, strikes against the local use of the product were simply the means adopted to [sic] effect the unlawful restraint. And it is this result, not the means devised to secure it, which gave rise to the character of the conspiracy."[332] Applying the *Duplex* standard, Sutherland pointed out that both the *Duplex* and *Bedford Stone* cases were the same because "did not differ in essential character."

In *Duplex*, the Court defined the illegal secondary boycott as a "combination not merely by peaceful means to persuade complainant, or advise or by peaceful means persuade complainant's customers to refrain…but to exercise coercive pressure upon customers, actual or prospective, in order to cause them to withhold or withdraw patronage."[333] Sutherland was convinced that the Stone Cutters' union activities, regardless of local intent, were primarily aimed at narrowing Bedford Cut Stone Company's interstate commerce by taking away its customers, and argued that labor strikes were "necessarily illegal if thereby the interstate trade of another is restrained."[334] The Court granted the injunction, and public criticism of the Court increased as a result.

The rest of the Court, however, was not as convinced by Sutherland's reasoning. Justices Edward Terry Sanford and Harlan Fiske Stone wrote concurring opinions. They both agreed with the ultimate holding in the case but could not discern the criminal act to which the Sherman statute applied. Sanford wrote: "I concur in this result upon the controlling authority of Duplex v. Deering, 254 U.S. 443, 478…which, as applied to the ultimate question in this case, I am unable to distinguish."[335] Stone wrote: "As an original proposition, I should have doubted whether the Sherman Act prohibited a labor union from peacefully refusing to work upon material produced by nonunion labor or by a rival union, even though interstate commerce was affected."[336] Again, both Stone and Sanford were uncertain about the criminality of the acts but agreed that *Duplex*

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[328] Ibid., 172

[329] While he was a Senator from Utah, Sutherland stated that secondary boycotts were "an evil thing," Baker, 209. During the FDR Administration, Justice Sutherland, along with James Clark McReynolds, Pierce Butler and Willis Van Devanter, was part of the conservative "Four Horsemen" who struck down New Deal legislation as unconstitutional.

[330] *Bedford Cut Stone Co. v. Journeyman Stone Cutters' Ass'n of North*, 274 US 37 (1927); Berman, 172.

[331] Berman, 173.

[332] Ibid., 173.

[333] *Bedford Cut Stone Co. v. Journeyman Stone Cutters' Ass'n of North*, 274 US 37 (1927); Berman, 174.

[334] Ibid., 174.

[335] *Bedford Cut Stone Co. v. Journeyman Stone Cutters' Ass'n of North*, 274 US 37 (1927); Berman, 174.

[336] Ibid.

was the proper standard applied. Stone emphasized that a lot of Sutherland's rationale was inconsistent with business antitrust cases and therefore he was in doubt over Sutherland's reasoning this case. Stone did agree, however, that the *Duplex* precedent applied to the criminal acts committed by Stone Cutters' Union and thus concurred with the majority.

Both Justices Holmes and Brandeis dissented. Writing for the minority, Brandeis paid significant attention to the application of the Rule of Reason. He wrote:

> I have no occasion to consider whether the restraint which was applied wholly intrastate, became in its operation a direct restraint upon interstate commerce. For it has long been settled that only unreasonable restraints are prohibited by the Sherman Law…And the restraint imposed [here] was, in my opinion, a reasonable one. The [Sherman] Act does not establish the standard of reasonableness.[337]

Brandeis criticized Sutherland for abandoning the Rule of Reason when it was established for both labor and business combinations. In basing his decision solely on the restraint and not its aggregate effects on interstate commerce, Brandeis argued that Sutherland was ignoring the very purpose for which the Rule of Reason was established. But Brandeis was not talking about the Classical Rule of Reason; he was applying his Post-Classical Rule of Reason, which was labor friendly. Brandeis wrote that by using the "[Brandeisian] Rule of Reason," "the propriety of the unions' conduct can hardly be doubted by one who believes in the organization of labor conduct."[338] The dissent in this case illustrated how both Holmes and Brandeis dabbled with judicial construction as a means to frustrate the majority, but they still strongly believed in judicial deference. The Rule of Reason was the closest the majority got to deferring to the legislative intent by showing that Congress did not intent to outlaw all contracts.

The Brandeisian Rule of Reason was the closest doctrinal deferral ever presented by the judiciary during the *Lochner* era. Brandeis stated that the national union was within its rights to enforce its contractual agreement with its members. Upon membership, stone cutters' were aware of its constitutional restrictions not to work on "unfair" stone. He observed that the stone companies were not weak and had large financial resources. On the other hand, their employees, Brandeis noted, had scattered membership with an average of 33 members per company and therefore it if standing alone they had no bargaining power. It was only through connection with the national union that they gained equivalence in bargaining power, especially in local labor disputes. Emphasizing the reasonableness of the stone cutters' actions, Brandeis wrote that the national union did not prohibit the handling of stone because it was an article of commerce, which was clearly illegal. It only enforced a contract among constituent unions not to handle "unfair" stone.[339] The union was not violent and it did not explicitly call for a secondary boycott, but only enforced an agreement among its members who were obligated to comply for self-protection against very strong employers.

On April 11, 1927, the same day the Court handed down its decision, Brandeis wrote a letter to Frankfurter in which he expressed his belief that the Bedford Stone decision would awaken the dormant labor movement. Brandeis wrote: "If anything can awaken Trade Unionists

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[337] *Bedford Cut Stone Co. v. Journeyman Stone Cutters' Ass'n of North*, 274 US 37 (1927)
[338] Berman, 174; Peritz, 89, 93.
[339] *Bedford Cut Stone Co. v. Journeyman Stone Cutters' Ass'n of North*, 274 US 37 (1927)

from their lethargy, this should. And perhaps it needs a jolt of this kind to arouse them in this era of friendly cooperation."[340] Especially so in this case that involved a group of peaceful stonecutters who refused, in accordance with their constitution, to "handle" limestone cut by hostile stone cutter employers. Brandeisian historian David Levy called this decision "the high point in the trend toward utilizing the antitrust structure to curb labor activity."[341]

The Bedford Stone holding was a capstone of the long development in the application of the Sherman statute against labor. The decision in this case infuriated labor organizations and drew much publicity. Scathing criticism from the liberal press soon followed this case. One month later, the *New York Times* article entitled "Labor Plans War in Case" epitomized labor's agitation. In the article, AFL president William Green, while speaking before the National Civic Federation, declared that labor emphatically refused to accept the Court's decision in the Bedford Stone case.

While praising Brandeis and Holmes' vigorous dissents, Green insisted that the Court applied a "strange doctrine."[342] "In plains terms," Green asserted, "hundreds of men are being forced to work, by order of the Court, against their will and in spite of their protest…It means forced labor in a free country governed by a Constitution and where free Government derives its powers from the consent of the governed."[343] He went on that labor intended to seek substantive legislation "against the abuse of the writ of injunction."[344] Green echoed the sentiment of labor and soon Congress, who in the coming years developed just that legislation. The Bedford Cut Stone case added to the already significant judicial construction developed in the Duplex, and the Danbury Hatters' cases, representing *Lochner* era jurisprudence at its zenith.

THE ANTI-INJUNCTION MOVEMENT, FRANKFURTER, AND THE NORRIS-LA GUARDIA ACT:
LABOR'S WAR AND FRANKFURTER

"Indeed," Frankfurter and Greene articulated in 1928, "the use of injunctions in labor legislation furnishes the most striking instance, barring the history of the due process clause, of the luxurious development of the American legal doctrine."[345] Morris Ernst, an official for the American Civil Liberties Union (ACLU), told the Senate Judiciary Committee in 1928 that he uncovered that injunctions were used to enjoin prayer on the roadside, singing in groups, and required that picketers speak English.[346] These prohibitions demonstrated the absurd use and abuse of injunction by the judiciary. But the injunctions that infuriated labor the most were those issued to enforce "yellow-dog" contracts. Applying the *Hitchman* (1917) standard, courts granted employers the right to operate closed shops and to enjoin any attempts by their employees to unionize. Aside from the general use of injunctions under the Sherman statute, the granting of injunctions to enforce yellow-dog contracts fueled labor's agitation. The judiciary's

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[340] Melvin I. Urofsky and David W. Levy, *Half Brothers, Half Son: The Letters of Louis D. Brandeis to Felix Frankfurter*, Norman: University of Oklahoma Press, 1991: 283-284.
[341] Ibid., 284.
[342] "Labor Plans War in Injunction Case," *New York Times*, 26 May 1927: 28.
[343] Ibid., 28.
[344] Ibid
[345] Bernstein, 393; Felix Frankfurter and Nathan Greene, "The Use of Injunctions in American Legal Controversies," *Law Quarterly Review*, 44 (1928), 44.
[346] Baker, 205; Bernstein, 393.

abuse of injunctions was fought by labor organizations, by liberal scholars, and by labor friendly politicians. Keeping with William Green's statement after the Bedford Stone case, labor launched an all out war on injunctions.[347]

Along with national unions, local unions also participated in the battle. In 1928, the AFL made the injunction a major issue in the presidential election. Early that year, Governor Alfred E. Smith of New York, the leading Democratic hopeful, supported legislation by the New York Federation of Labor. The Byrne-Lefkowitz bill prohibited the use of injunctions during strikes until appropriate arbitration addressed the concerns of both sides. This local state measure, however, was soundly defeated by conservative members of the New York state legislature. Smith clinched the Democratic primary and included in his platform a proposal to seek substantial legislative relief from the labor injunction. The Republican platform mentioned nothing of legislation but did strongly denounce its abuse. The Republican nominee, Herbert Hoover, did not explicitly state that he intended to seek legislation, but on numerous occasions during the campaign referred disparagingly to labor injunctions. Since legislation was already underway in the Senate, Hoover's victory was of no major concern to labor organizations.

In the periphery during the presidential campaign was federal anti-injunction legislation proposed by Senator Henrik Shipstead. On December 12 1927, Senator Shipstead introduced the Shipstead bill. The first significant line in the bill read: "Equity courts shall have jurisdiction to protect property when there is remedy at law."[348] Put simply, federal courts, standing in equity jurisdiction, were prohibited from issuing injunctions when sufficient time was available to address the matter in court. The second line read: "for the purpose of determining such jurisdiction, nothing shall be held to be property unless it is tangible and non-transferable, and all laws and parts of the laws inconsistent herewith are hereby appealed."[349] In other words, property was not broadly defined to include commerce and only material property was considered property at law. This line also repealed inconsistent sections of the Clayton Act which contradicted this new bill.

The driving force behind this bill was Andrew Furuseth, president of the International Seaman's Union. He thought that since property was broadly defined to include commerce and trade it allowed the courts to abuse injunctions.[350] He reasoned that if property was defined to mean only material, tangible property than no labor-injunction controversy existed. The Clayton Act attempted just such outcome with the opening statement of Section 6 reading "labor is not a commodity or article of commerce."[351] It was reasoned in that line that if employers could not broadly define property to include labor then workers could strike without infringing upon an employer's property rights and thus strikes were secure from injunctions.

Upon referral of the Shipstead bill to the Senate Judiciary Committee, Senator George Norris formed a subcommittee to investigate the practical application of such a law. Norris selected pro-labor Senators Tom Walsh and John J. Blaine to join him on the subcommittee. On

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[347] "Labor Plans War in Injunction Case," *New York Times*, 26 May 1927: 28.
[348] Bernstein, 395; Lovell, 182.
[349] Ibid.
[350] Bernstein, 395; Lovell, 182.
[351] Berman, 99; Bernstein, 395; Lovell, 183.

February 8, 1928, when hearings commenced, conflicts between the unions immediately followed. Berstein notes that at a conference with over 127 AFL and railway unionists "sharp disagreement"[352] was clearly noticeable. The railway brotherhood chief counsel, Donald Richberg, warned the proposed Shipstead bill might cause more injunctions and protected "yellow-dog" contracts as transferable property. Even Furuseth's attorney, Winter S. Martin, commented that there was much opposition to the Shipstead bill.[353]

During the hearing, William Green made it clear that he was strongly opposed to the abuse of injunctions, but was not overly supportive of the Shipstead bill, and the conflict over the bill continued. Legal counsel for the United Mine Workers observed that bill was irrelevant to their problems. Joseph Padway, attorney for the Wisconsin Federation of Labor, insisted that the ambiguous language of the Shipstead bill rendered the bill ineffective. Morris Ernst, of the ACLU, supported the bill and said that any measure restricting injunctions could possibly help and urged the committee to support the bill. The American Patent Law Association was strongly opposed to the bill and warned that it undermined the law of patents, trades, and copyrights. And of course, conservative organizations like the National Association of Manufacturers, the American Bar Association, the League for Industrial Rights, and the Association of Railway Executives refused any statute that eliminated either yellow-dog contracts or injunctions, as they deemed them essential for protection against labor extremists.[354]

The subcommittee was overwhelmed by the opposition and agreed that the Shipstead bill needed a thorough overhauling. On February 18th, the Senators decided to drastically reshape the Shipstead bill despite the objections of Furuseth. Even Frankfurter, a strong advocate of anti-injunction legislation, was opposed to the Shipstead bill. Frankfurter and Greene wrote: "The Shipstead bill condemns many well-settled and beneficent exercises of equitable jurisdiction that do not touch even remotely the interests of labor."[355] Frankfurter thought that the measure was extreme insofar as it could restrict federal courts' use of injunctions in "extraordinary" circumstances which required immediate action. Even Senator Henrik Shipstead was not overly concerned with the bill that bore his name and only introduced it as a favor to his friend, Furuseth. With this type of opposition, the Furuseth anti-injunction measure was doomed to failure.

During the closing hearings, the subcommittee called in a group of injunction experts to help draft a new bill. Frankfurter was included in these experts along with Edwin E. Witte, a learned experts on the subject, Donald R. Richberg, counsel for the railway unions, and others. Collectively, these scholars provided the committee with the richest legal detail on how to pass an effective anti-injunction law. After their testimony, a new bill was drafted wholly different from the Shipstead bill. A publication of the time noted that "They [the injunction experts] locked themselves in and for forty-eight hours gave their undivided attention …to every court decision…They reviewed the decisions…with the most scrupulous case,"[356] as well as acute insight into the constitutional ramifications that might follow from an anti-injunction bill.

[352] Bernstein, 395.
[353] Ibid., 395-396.
[354] Ibid.
[355] Ibid.
[356] Bernstein, 397.

Knowledgeable of the fact that the bill had to face a hostile judiciary, the experts put the utmost care into drafting substantially effective language.

In addition, during debates, Senator Robert Wagner insisted that "The record should be complete so that when the Courts come to pass upon what we are doing here today they may be fully informed of the purpose which moved us and of the ends we desired."[357] Wagner, like Frankfurter and Greene, was arguing for a clear legislative history so that upon judicial review there would be no doubt about Congress's intent. Norris also insisted upon a clear legislative record. Citing *Duplex*, Norris maintained that the Court "when they were taking the life blood of the Clayton Act…quoted reports from the Committee on the Judiciary in the Senate, they quoted speeches and controversies taking place on the floor…"[358] In Duplex, the Court used Congressional records to establish that Webb's interpretation of the Clayton Act was the intent of Congress. Norris wanted to avoid giving the Court any ammunition for disturbing the intent of the Norris-LaGuardia Act.

As a result of these deliberations, the Norris measure was introduced on May 29, 1928. This measure served as the template for the final legislation. Section 1 denied jurisdiction to federal courts to grant injunctions in cases growing out labor disputes unless procedural requirements (which had expressed limitations and definitions contained in the statute) were met and the injunction conformed to public policy. Section 2 outlined the public policy for the United States as follows:

> 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 association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract…[this segment included a list of how workers might express their liberty of contract]…therefore, the following definitions of, and limitations upon, the jurisdiction and authority of the courts of the United States are hereby enacted.[359]

This was the opening section to the rest of the bill which explicitly outlined injunctive prohibitions. Sections 3, 4, 6, 7, and 13 are essential because they are directly relevant to this analysis. Sections 5, 8, 9, 10, and 11, however, are not directly relevant and therefore will not be discussed or quoted at length.

Section 3 made yellow-dog contracts unenforceable in federal courts, effectively eliminating the *Hitchman* doctrine.[360] This section stated that such a contract was contrary to the public policy of the United States as spelled out in Section 2 and therefore legal authority could not enforce such contracts. The draftsmen did not explicitly declare yellow-dog contracts unlawful because they were hesitant about overturning the *Adair* decision, which struck down the Erdman Act. This section asserted that enforcing yellow-dog contracts did not provide legal or equitable relief to the employer.

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[357] Lovell, 197.
[358] Ibid., 197.
[359] Bernstein, 397.
[360] Bernstein, 398; Lovell, 53.

Section 4 denied federal courts the authority to grant injunctions in a case growing out of a labor dispute which enjoined workers from doing "singly or in concert" the following acts:

(a) refusing to perform work or to remain in relation or employment;
(b) becoming or remaining a member of a labor or employer organization;
(c) paying or withholding strike benefits;
(d) by lawful means aiding a person involved in a labor dispute;
(e) giving publicity to a labor dispute by advertising, speaking, patrolling, or any other method not accompanied by force or violence;
(f) assembling peacefully to promote an interest in a labor dispute;
(g) advising any person of an intention to perform any of these specified acts;
(h) agreeing with other persons to do or not to do any of these acts;
(i) advising, urging, or causing to be performed without force or violence any of the acts heretofore specified.[361]

All of these activities were prohibited by the courts in previous injunction cases. For example, Section 4(e) was directly referring to the *Gompers v. Bucks Stove and Range Company* (1911) in which Gompers was enjoined for advertising the Bucks Stove and Range Company in the AFL's "We Don't Patronize List," which led to a secondary boycott of that company. Lovell provides an abbreviated list of these immunized activities as follows: "clause 4(a) striking; clause 4(e) and 4(g), picketing; clause 4(e), boycotting [secondary boycotts]; clause 4(c) and 4(d), paying benefits to strikers; clauses 4(e) and 4(f), assembling."[362]

Section 6 absolved officers and members of labor unions as well as the organizations themselves of liability for "unauthorized," unlawful acts such as violence and the destruction of property. This again was based on a previous decision that held and enjoined a labor strike for violent acts that were not authorized by either union officials or the organization itself. In effect, the qualifiers in the Clayton Act were limited in scope to only authorized unlawful acts, instead of the broad interpretation of the courts to enjoin strikes on the sole basis that violent acts followed.

Section 7 was a complete overhaul of the procedure for the issuance of injunctions by federal courts:

> No court of the United States shall have jurisdiction to issue an injunction in any case involving or growing out of a labor dispute…except after hearing the testimony of witnesses in open court [with the opportunity for cross-examination] in support of a complaint made under oath, and except after finding of fact by the court, to the effect—
> (a) That unlawful acts have been committed and will be continued unless restrained;
> (b) That substantial and irreparable injury to complainant's property will follow;
> (c) That as to each item of relief sought greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief;
> (d) That complainant had no adequate remedy at law; and
> (e) That the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection.

[361] Bernstein, 399; Lovell, 200.
[362] Lovell, 191.

> Such hearings shall be held after due personal notice thereof has been given, in such manner as the courts shall direct, to all known persons against whom relief is sought, and also to those public officers charged with the duty to protect complainant's property.[363]

In Section 7, the draftsmen eliminated the procedural abuse of the courts which had permeated throughout the federal judiciary in the form of the labor injunction. Section 7a prohibited injunctive relief in a labor dispute in which the employer himself failed to comply with the law "to make every reasonable effort"[364] to resolve the labor dispute. Bernstein asserts that this was part of the "clean hand" doctrine. Section 7b prohibited injunctive relief by the federal courts unless it had first made an effort to discern the facts of the case. Section 7(b) allowed for expeditious appeal to the circuit courts when injunctions were challenged. As for the remaining sections of the Norris bill, Section 8 allowed for trial by jury when unionists were charged with violating the non-violent provisions.[365]

The subcommittee accepted the Norris bill; however, due to the 1928 presidential campaign, the full Judiciary Committee took no action and Congress adjourned. During Congressional adjournment, the AFL took up consideration of the Norris bill. The AFL had its vast legal staff review the bill section by section and report back to the AFL's Executive Council with its recommendations. Matthew Woll, vice president of the AFL, was the chairman of this investigatory committee. On August 18, 1928, Woll reported that the AFL should endorse the proposed law with the inclusion of numerous amendments.[366]

The proposed amendments included Section 2 in which the committee wanted the language expanded somewhat. In Section 3, the committee did not just want yellow-dog contracts to be unenforceable in federal court. They wanted yellow-dog contracts to be outlawed altogether. As for Section 4, the committee wanted the following amendments to be added. It denied federal courts jurisdiction to issue injunctions for the following actions:

> (aa) Ceasing, failing or refusing to work upon handle or use any product or material made or produced, in whole or in part, by non-union or by a rival labor union, irrespective of whether such material has been shipped in interstate commerce;
> (aaa) Ceasing or refusing to patronize or employ any person participating and/or interested in a labor dispute, or any other person whatsoever, regardless of whether he stands in the relation of employer and employee or is participating and/or interested in a labor dispute.
> (j) Nor shall any of the act described in this section be considered or held to be unlawful acts.[367]

In addition, there were adjectives added to Section 4 which eliminated harmful qualifiers and made the language less subjective. The word "violence" qualified by the adjective "physical" violence and phrases like "by all lawful means" and "peaceably" were eliminated. Along with

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[363] Bernstein, 399-400; Lovell, 187.
[364] Bernstein, 400.
[365] Ibid.
[366] Ibid., 401.
[367] Ibid..

these modifications, a new section was added to retroactively nullify outstanding injunctions, and the language of Section 7 was expanded to eliminate blanket injunction.[368]

Soon after, Norris circulated the AFL amendments to the draftsmen for their review. The committee members did not agree with a majority of the AFL amendments. Protecting the statute against a *Duplex*-type interpretation, explains why legal experts like Frankfurter were dead set on non-ambiguous language or encumbering AFL amendments.[369] Frankfurter and Witte in a series of memoranda insisted that two of the new sections raised constitutional concerns since equity jurisdiction was granted by the U.S. constitution it could not be eliminated. Frankfurter went on to say that the removal of "lawful" in Section 4 served no purpose and that the adding of "physical" gave the impression that some forms of violence were acceptable. Additionally, Frankfurter warned the proposed paragraphs (aa) and (aaa) only served to intensify opposition in Congress and provoke judicial activism. Richberg, on the other hand, was willing to accept Section 4 (aa), (aaa), and (J). Richberg questioned the legality of the retroactive amendment and asserted that the expansion of language in Section 2 offered no substantive benefit.[370]

When Norris introduced the revised bill on May 19, 1930, although it differed somewhat from the 1928 version, it contained none of the AFL amendments. Most of the changes dealt with matters of organization. Section 12 was added which enabled defendants to challenge to conduct and character of a judge sitting in equity jurisdiction and to request a substitute. Section 13 was added and defined cases "growing out of labor disputes" as cases involving:

> persons who are engaged in the same industry, trade, craft, or occupation; or have a direct or indirect interests therein; or who are employees of the same employer; or who are members of the same or an affiliated or organization of employers or employees [Section 13(a)].[371]

Section 13 provides that a person or organization should be held to be a "person participating in a labor dispute" if

> relief is sought against him or it, and if he or it is engaged in the same industry, trade, craft, or occupation in which such disputes occurs, or has a direct or indirect interest therein or is a member therein…[Section 13(b)].[372]

Section 13 also defined the term "labor dispute" as

> any controversy concerning terms or conditions of employment, or concerning the association or representation of person in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, *regardless of whether or not the disputants stand in the proximate relation of employer and employee* [Section 13(c)].[373]

Responding to *Duplex*, Section 4 was crafted to work in conjunction with Section 13 which explicitly denies federal courts power to enjoin secondary boycotts. The Proximate Relationship

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[368] Ibid., 401; Lovell, 183-189.
[369] Bernstein, 401; *Duplex v.Deering*, US 443, 470 (1921); William E. Forbath, *Law and the Shaping of the American Labor Movement*, Cambridge: Harvard University Press, 1991: 161-162.
[370] Bernstein, 402; Lovell, 247.
[371] Lovell, 201.
[372] Ibid., 202.
[373] Ibid

doctrine was effectively eliminated with these two sections. By spring, 1930, modifications were completed on the anti-injunction legislation, and despite the omission of the AFL amendments, organized labor endorsed the measure. Since the legislative drafting of the bill was complete, all that was required now was major political action.

CONGRESS DEBATES JUDICIAL ACTIVISM

On February 3, 1930, Hoover elevated Charles Evan Hughes to succeed Taft as Chief Justice of the Supreme Court. Hughes was a distinguished Republican and intelligent lawyer. He was the former progressive governor of New York and a member of the Supreme Court until he resigned to run for President in 1906.[374] On February 10th, Norris declared "there were three legislative bodies: the house, with over 400 members, the Senate, with 96, and 'another…called the Supreme Court, of nine men; and they are more powerful than all the others put together."[375] Although he was in the minority, Norris decided to vote against Hoover's nominee to spark debate over the role of the Supreme Court. Whether Hughes was the right subject for his attack was irrelevant to Norris; what was relevant was the debate in general.

Norris argued that the justices were guided by their social predilections rather than the rule of law. "No man in public," Norris argued, "so exemplified the influence of powerful combinations in the political and financial world as does Mr. Hughes."[376] Senator Robert M. La Follette agreed with Norris and asserted that "We…are filling the jury box, which ultimately will decide the issue between organized greed and the rights of the masses."[377] "Under the Fourteenth Amendment," Senator William E. Borah declared, "the Supreme Court becomes really the economic dictator in the United States."[378] After examining every aspect of his fortune and his prior decisions in favor of business, the anti-judicial activism Senators proclaimed that Hughes' appointment placed a man who lived a one sided life on the Court. A man whose service to "powerful industry" placed him in a seat of power from which Norris declared he would ignore the plight of "the men who toil and the men who suffer."[379]

Hughes was confirmed by the Senate by 52 to 26 regardless of the best efforts of Norris and the other anti-judicial activism Senators. But a more important battle was on the horizon which pitted Senator Norris and his Senate supporters against an unquestionably pro-injunction judicial nominee. On March 21, 1930, Hoover nominated Judge John J. Parker for the Supreme Court. The "insurgent Senators," having found their attack on Hughes popular with the country, focused their next attack on Parker.[380] Unlike Hughes, Parker was an undistinguished circuit court judge and someone described as simply "technically proficient."

Parker was much despised by labor organizations for his rendering in the 1927 Red Jacket case. In the Red Jacket case, the UMW was enjoined from "trespassing upon the prosperities" or "inciting, inducing, or persuading employees of the plaintiffs to break their

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[374] Bernstein, 403-404.
[375] Ibid., 404-405; Howard Zinn, *LaGuardia in Congress*, Ithaca: Cornell University Press, 1959.
[376] Bernstein, 405.
[377] Ibid., 406.
[378] Ibid.
[379] Ibid.
[380] Parrish, 253.

[yellow-dog] contract of employment."[381] The plaintiffs were an amazing 316 coal mine companies with a combined 40,000 employees in southern West Virginia. This meant that the might have been able to obtain 40,000 new members and increased bargaining power with the coal mine industry; however, Parker's granting of the companies' injunction ended all these plans.

During confirmation hearings, Parker attempted to explain away his Red Jacket decision by arguing that he was bound by the *Hitchman* doctrine. Parker asserted: "I followed the law laid down by the Supreme Court…It is, of course, the duty of judges of the lower Federal courts to follow the decisions of the Supreme Court."[382] In addition to Parker's argument, his supporters denounced yellow-dog contracts and suggested that legislation should be enacted to outlaw such practices, but Parker should be confirmed because he followed the rules of the judiciary. Parker's reasoning, notwithstanding, both Norris and the AFL continued to mobilize against his appointment.[383] The Senate Judiciary Committee was flooded with letters from various labor organizations that opposed Parker's nomination. One letter declared that Parker, with his Red Jacket judgment, delivered "fifty thousand (50,000) free Americans into indentured servitude."[384]

On April 11, AFL president William Green approached Hoover with one last request that he nominate another person to fill the Court vacancy. Hoover adamantly refused and insisted that the labor movement was misled about Parker's character. In response, Green argued that someone would have to go all the way back to the Dred Scott decision to find a parallel with the *Hitchman* decision, which was unconscientiously supported by Parker's decision in the Red Jacket case. To Green, Parker's decision in that case demonstrated that he actually approved of yellow-dog contracts.

On May 7, 1930 the Senate rejected Parker's appointment by 41 to 39. The vote was close but marked a major victory for the labor movement and its supporters in Congress. Frankfurter later wrote that Norris's role in preventing Parker's appointment was "extremely wholesome and for the best interests of the Supreme Court."[385] Before Parker's failed nomination, the general public was unfamiliar with yellow-dog contracts. But after Parker, public outrage about yellow-dog contracts and the *Hitchman* doctrine grew significantly. This debate was significant because it brought attention to the inappropriateness of judicial activism. Green's war was well on its way and the failed Parker appointment was a major victory in that struggle.

CONGRESS DEBATES NORRIS'S BILL

Due to the political composition of Congress, Norris was unable to introduce his bill for a year and a half. In the elections of 1930, the Great Depression brought about major political changes.[386] For one, Democrats significantly reduced the Republican majority in the Senate from

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[381] Bernstein, 407
[382] Ibid., 407.
[383] Parrish, 253-254
[384] Bernstein, 407.
[385] Ibid., 409.
[386] Ibid., 410. In the election of 1930, Democrats won 52 seats in the U.S. House; Democrats won 5 seats in the U.S. Senate. In the election of 1932, liberal Democrats won sweepingly in the election of 1932; Franklin Roosevelt won 472 electors to Hoover's 52, winning approximately 60% of the popular vote; Democrats won 97 seats in the U.S. House for a majority of 313 to 117; Democrats won 12 seats in the U.S. Senate for a majority of 59 to 36.

eleven to one and won the House by five seats. This was in sharp contrast from the previous Republican majority that held a lead of over one hundred seats. During the elections, the AFL seized on the opportunity to promote the Norris bill and advertise the failed Parker nomination as a test of its growing power. The Great Depression started a political resurgence of liberals and members of both parties inched closer and closer to the left. These developments meant that the composition of the Senate Judiciary Committee had also changed, now consisting of more pro-labor Congressman. Later in 1930, the National Committee on Labor Injunctions was formed with the help of the ACLU. The committee was charged with the responsibility of supporting the Norris bill and drafting a state model bill based on the federal version. The committee then lobbied in state legislatures for passage of the anti-injunction measure.[387]

Even with major political changes, states moved more rapidly on anti-injunction legislation than the federal government. In April 30, 1930, New York enacted its own anti-injunction law based on the model of the Norris bill drafted by Nathan Greene and Frankfurter. Under the leadership of Governor Philip La Follette, Wisconsin passed the "little Norris La-Guardia Act."[388] In July 1931, Pennsylvania passed a measure to increase restrictions on the power to issue injunctions. In addition, Ohio, Arizona, Colorado, and Oregon sought legislation outlawing yellow-dog contracts. Indeed, these were the progressive years for most states. In late 1931, the AFL made one last ditch effort to forward anti-injunction legislation at the federal level and to gain acceptance for the Woll committee's amendments. The reconstituted Woll committee attempted to convince Norris to accept the AFL amendments. Again, Frankfurter and Witte wrote memoranda reiterating their original objections to the AFL amendments. Consequently, Norris informed the AFL that he did not intend to accept the amendments based on the recommendations of legal experts. And in December 1931, the AFL conceded and finally gave unqualified support to the Norris bill as originally drafted.[389]

In January 27, 1932, the Senate Judiciary Committee voted 11 to 5 to send the Norris bill to the Senate for full passage. Since 1927, Norris had waited to introduce his anti-injunction for passage and the opportunity arrived in February 23, 1932. The debate in the Senate was inconsequential because the opposition to the bill was small and mostly incompetent when it came to injunctions. The pro-labor Senators all gave magnanimous speeches supporting the Norris bill. The opposition, small and unprepared, submitted numerous recommendations from the American Bar Association that had protested the passage of the Shipstead bill. Opposition leader, Senator Felix Herbert, denounced yellow-dog contracts but then tried to halt the Norris legislation with "crippling amendments."[390] All the amendments were soundly defeated.

The only real obstacle was presented by labor Senator Walsh, who wanted Section 7(a) amended to allow courts to grant injunctions for "threatened" as well as actual violence. The AFL was opposed because it thought that such an amendment allowed judges to issue sweeping injunctions. Walsh was steadfast and eventually Norris and the other labor Senators conceded. Norris did, however, persuade Walsh to confine the courts' power to only persons and organizations making the threats. Walsh agreed and the revised Section 7(a) read as follows:

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[387] Ibid., 411.
[388] Ibid.
[389] Frankfurter and Greene, 207-228; Bernstein, 410.
[390] Bernstein, 412.

> The unlawful acts have been threatened and will be committed unless restrained or have been committed and will be continued unless restrained, but no injunction or temporary restraining order shall be issued on account of any threat or unlawful act excepting against the person or persons, associations, or organizations making the threat or committing the unlawful act or actually authorizing or ratifying the same after actual knowledge thereof.[391]

Eventually, the AFL considered this revision acceptable because it did limit to only persons and organizations making threats and did not allow federal courts to issue blanket injunctions as they had done in the Pullman Strike.

On March 1, 1932, the Senate overwhelmingly passed the Norris bill by a vote of 75 to 5. All the Senate Democrats and a majority of the Republicans voted for the measure including the opposition leader, Herbert. This was a clear sign of the changing political atmosphere in which conservatives were greatly detested for their inability to mitigate the effects of the Great Depression. The bill was then forwarded to the House for consideration and passage. A liberal Republican, Representative Fiorello H. La Guardia introduced the bill in the House and therefore won the right to include his name on the bill.[392]

On March 8, 1932, the House began debate on the anti-injunction bill. A majority of the representatives were unfamiliar with the injunction controversy and had little interest in debating the merits of the bill itself. Most of the House debates focused on whether the AFL was for or against Communism. Supporters of the bill announced that since the AFL was opposed to Communism, a bill protecting the AFL was only beneficial for the anti-Communism campaign. Only one Representative, James Beck, substantially spoke out against the measure. Beck was a Republican and former Solicitor General, who supported yellow-dog contracts. Continuing the same irrelevant Communism argument, Beck insisted that the Norris-La Guardia bill constituted "a long march toward Moscow."[393] His amendments were overwhelmingly defeated and the bill passed the House by a staggering 362 to 14.

Although most of the bill's supporters expected a presidential veto, Hoover grudgingly signed the Norris La Guardia Act into law on March 23, 1932. There were three reasons why he signed the bill. First, the House made it clear that any presidential veto could and would be swiftly overridden. He wanted to remove himself from a hot button political topic in anticipation of the tough presidential election. Second, Hoover did not think the bill eliminated the courts power to issue injunctions to enjoin racketeering, extortion, and violence. Third, Hoover and his conservative Attorney General, William D. Mitchell, thought that antitrust suits to enjoin conspiracies were still permissible.[394]

With the Norris-La Guardia Act, yellow-dog contracts were significantly curtailed and the courts' power to issue injunctions was substantially restricted. Legal scholar Lovell writes

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[391] Ibid., 413.
[392] Ibid., 413; Lovell, 170.
[393] Bernstein, 413.
[394] Ibid., 414.

that "Measured by its ostensible goal of curtailing injunctions and ending yellow-dog contracts, Norris-La Guardia Act was a success in precisely the areas where the Clayton Act and Erdman Act had failed."[395] But the Norris-La Guardia Act also marked a major victory over the use of antitrust legislation to enjoin labor strikes and enforce an employer's property rights, which was defined in the broadest possible sense by the Supreme Court. Labor lawyer Thomas Geoghegan went so far to say that the Norris-La Guardia Act allowed labor to "run naked in the streets."[396] This law was eventually tested in two landmark antitrust-labor cases.

FRANKFURTER: THE HAVARD LAW PROFESSOR AND NEW DEALER

Throughout the 1930s, Frankfurter worked in the Roosevelt Administration as a New Deal attorney. During this time, Frankfurter began to further refine elements of his judicial philosophy. He firmly believed in the Holmes philosophy that justices should practice judicial restraint. Holmes once declared "a law should be called good if it reflects the will of the dominant forces of the community even if will take us to hell."[397] As a New Dealer, Frankfurter was a respected member of Franklin Roosevelt's inner-circle of advisers. He advised Roosevelt on numerous legal matters, especially those involving labor relations. One journalist, John Franklin Carter, called Frankfurter the "legal master-mind of the New Deal."[398] In 1932, when Frankfurter was nominated for the Supreme Judicial Court of Massachusetts, Roosevelt called to offer his congratulations. Roosevelt said: "Felix…I haven't been able to tell you how happy I am…I wish it were the Supreme Court of the United States—that's where you belong."[399] Frankfurter, however, turned down the appointment and chose to remain at Harvard.

When Roosevelt asked Frankfurter to join his administration full-time, Frankfurter refused and again decided to continue teaching law at Harvard. But he remained an influential advisor for Roosevelt's New Deal, which he fully supported. Frankfurter was part of Roosevelt's Brain Trust and believed firmly in a rigorous anti-depression program. Frankfurter's anti-depression views drew heavily from the prescriptions of Brandeis and John Maynard Keynes.[400] It advocated a drastic attack upon massed wealth through progressive taxation and increased expenditures to help fund programs to employ idle workers. More specifically, Frankfurter outlined an anti-depression strategy in the 1933 issue of *Survey Graphic*. In addition, Frankfurter recommended the hiring of an army of legal talent to defend the New Deal programs from hostile judicial review. Frankfurter said the government should have "socially sound taxing system" to help pay for public works programs "even larger and more ambitious than the one [Senator Robert] Wagner sponsored."[401] "The nation's courts," historian Michael E. Parrish insists, were "the last bastion of institutionalized Republicanism following the party's crushing defeat in 1930 and 1932." [402]

When offered the position of Solicitor General, Frankfurter again turned Roosevelt down even though the President once mentioned that it was easier to put a Solicitor General on the Court than a Harvard professor. But the lawyers he trained gave him great pride. In one 1936

[395] Lovell, 161.
[396] Ibid., 162.
[397] Hockett, 144.
[398] Parrish, 221; Baker, 287.
[399] Baker, 277.
[400] Parrish, 221-223; Baker, 297.
[401] Parrish, 230.
[402] Parrish, 232.

Fortune magazine article, "The Young Men Go to Washington," Frankfurter hailed them as "the best men of the graduating classes of the leading law schools."[403] He emphasized that they were intellectually equipped to tackle entrenched conservatives in the judiciary.

Brandeis conveyed the same attitudes as Frankfurter. He advocated a public works program of "great magnitude"[404] funded first through deficit spending, but then through progressive taxation. As a whole, both Brandeis and Frankfurter disliked the National Recovery Administration (NRA), but endorsed strongly its beneficial labor provisions. In part, the program provided huge government partnership with industry and Brandeis regarded the act as impossible to enforce. Brandeis also concluded that the program had "a terrible record of putting men back to work,"[405] and Frankfurter shared these reservations. Even though Frankfurter had his greatest influence on Roosevelt between 1935 to 1936, Roosevelt still held back on increasing government expenditures for public works. Both Frankfurter and his friend Keynes pushed for significant fiscal stimulus. The 1937 recession was, perhaps, indicative of Roosevelt's failure to institute all the programs as recommended by Keynes who spoke through Frankfurter.

Despite these setbacks, the New Deal programs provided meaningful reform for both industry and labor, especially with the passage of the 1936 Wagner Act. The Wagner Act definitively recognized labor unions' right to exist and to exercise strikes for improved working conditions and benefits. How far workers could take collective bargaining and who could participate was still in question, especially with labor organizations still within the purview of the antitrust laws.

THE FALL OF LOCHNER ERA JURISPRUDENCE **FROM ROBERTS TO PARRISH (1937)**

One day in 1936, while walking along a Washington D.C. street, Justice Harlan Fiske Stone encountered a former student of his from Columbia Law School. "How are you getting on, John?" Stone asked. "Pretty good, Mr. Justice," replied John. "I was with the legal division of the NRA last year, then I transferred to the AAA, and now I am in the legal division of the Securities and Exchange Commission." Stone smiled. "I see," he said, "keeping just one jump ahead of us."[406] The Supreme Court struck down both the NRA and the AAA as unconstitutional because they interfered with property rights or so the Court reasoned. During the *Lochner* era, the Court used the Fourteenth Amendment and the commerce clause to assert its broad authority over the will of state legislatures and Congress to regulate economic iniquities.

This struggle reached its height during 1936 with the Court challenging the democratically elected branches of the federal government and states. Historian Michael E. Parrish asserts that it became "a full-blown crisis that pitted president, Congress, and forty-eight state legislatures…against a majority of the justices, whose narrow constitutional vision threatened the institution of judicial review itself."[407] The composition of the Court at this time still saw a conservative majority; however, that soon changed. Justices Charles Evans Hughes, Brandeis, Robert Stone, and Benjamin Cardozo composed the liberal minority and Justices

[403] Ibid., 229.
[404] Ibid., 250-251
[405] Ibid., 251
[406] Drew Pearson and Robert S. Allen, *The Nine Old Men*, New York: Vanguard Press, 1936: 44.
[407] Parrish, 252-253.

William Sutherland, Willis Van Devanter, James McReynolds, Pierce Bulter, and Owen J. Roberts were the conservative majority.[408]

Before Stone was appointed to the bench, he was deeply rooted in the Wall Street crowd, but he soon fell under the influence of Brandeis and Holmes who moderated his once conservative stance on issues. Stone was not completely proselytized by Brandeis and Holmes's judicial philosophy, but he was ripe enough to recognize that the Court should occasionally exercise restraint. When Roberts was appointed to the bench, Frankfurter was initially optimistic that with his intellectual aptitude he could be shaped like Stone into more moderate thinking, despite his past dealings with Wall Street. Roberts represented numerous corporations, but was well respected for his tenacious prosecution of those involved in the Teapot Dome scandal.[409] This, in Frankfurter eyes, made Roberts ripe for liberal proselytizing. Upon Roberts' appointment, Frankfurter commented that "I do not believe there are any skeletons in his mental closet." He reported in *The New Republic* that "Facts will find ready access to his mind."[410] Joe Cotton, on the other hand, offered extensive caveats insisting that "anyone who takes Owen Roberts for a liberal is going to be mistaken."[411]

Frankfurter remained convinced, however, that Roberts was another Stone. He wrote daily letters to Stone praising him for standing against the conservative jurists and grew to accept them. Frankfurter later humorously recalled: "If he [Stone] didn't get a letter of praise by Wednesday on a Monday opinion that he thought I ought to approve, he would grouch to L.D.B. [Brandeis]." After Roberts joined the Court, Frankfurter intended to give him the letters of praise and approbation for just decisions. But with the "Welfare State" on the rise, Roberts, much to Frankfurter's alarm, frequently voted with the "Four Horseman of the Apocalypse," Bulter, McReynolds, Sutherland, and Van Devanter. In rare decisions, Roberts voted with the liberals and received Frankfurter's unyielding praise. In one decision in which Roberts voted with the liberals, Frankfurter wrote: "He swept away all the rubbish that had accumulated around *Munn v. Illinois*."[412]

Increasingly agitated by judicial interference with his New Deal legislation, Roosevelt devised a Court packing scheme. The scheme's aim was to make Court more receptive to economic reform legislation by appointing more justices. Roosevelt's plan was denounced by a vast majority of Congress and faced an uphill battle. Roosevelt never pursued this plan because of the landmark case in 1937 known as "the switch in time that saved nine." *West Coast Hotel Co. v. Parrish* (1937) marked the beginning of the end for *Lochner* era jurisprudence. The Court no longer recognized "substantive due process" and judicial protection of *laissez-faire* was in its last throes.

In *Parrish*, the Court upheld the constitutionality of a Washington minimum wage law and thus allowed the government, despite *Lochner v. New York* (1905), to regulate the economy. The Court reasoned that the Constitution permitted the restriction of freedom of contract by state

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[408] *West Coast Hotel Co. v. Parrish*, 300 US 379 (1937); Baker, 332; Parrish, 253-257.
[409] Parrish, 254.
[410] Ibid., 190.
[411] Ibid., 254.
[412] Ibid., 257.

law where such limitations protected the community, health and safety or vulnerable groups. Citing *Muller v. Oregon* (1908), where the Court allowed for regulation of women's work hours, the Court held that the same rationale should be applied generally to every property right, including employer labor practices. The decision was made possible by Roberts, who agreed with the liberal jurists that the government was constitutionally permitted to regulate economic matters.

In a bitter dissent, Justice Sutherland wrote for the Four Horsemen that "Mr. Justice Van Devanter, Mr. Justice McReynolds, Mr. Justice Butler, and I think the judgment of the court below should be reversed."[413] He explained that the Court was given the jurisdiction to determine whether the Constitution authorizes laws that interfere and prohibit liberty of contract. Sutherland stated that the Court made the determination in case after case that Congress did not have this right. In addition, Sutherland's dissent contained a poorly veiled admonition of Roberts' switch and characterized it as betrayal. Sutherland wrote:

> Under our form of government, where the written Constitution, by its own terms, is the supreme law, some agency, of necessity, must have the power to say the final word as to the validity of a statute assailed as unconstitutional. The Constitution makes it clear that the power has been entrusted to this court when the question arises in a controversy within its jurisdiction; and so long as the power remains there, its exercise cannot be avoided without *betrayal of the trust*.[414]

Roberts' switch, regardless of Sutherland's scathing dissent, stood as a major defeat for judicial activism and became symbolic of the downfall of *Lochner* era jurisprudence. The reinterpretation of the substantive due process clause was only one victory in this trend.

The issue of antitrust and its applicability to labor soon faced its greatest battle ever with entrenched *Lochner* era jurists. *Apex* and *Hutcheson* were symbolic of this fight and labor's momentous victory in 1941. With the sudden death of Cardozo in 1939, a Supreme Court vacancy arrived and Roosevelt nominated Frankfurter. Frankfurter no longer had to stand on the sidelines while labor faced an assault from the right-wing judiciary. He now became an active player in restraining judicial activism and proved his worth in the fight against entrenched *Lochner* era conservatives and labor's prosecution under the Sherman statute.

APEX AND JUDICIAL SPECULATION

The *Apex Hosiery Co. v. Leader* (1940) decision was the first major step the Court took on the road to recognizing labor's immunity from the Sherman statute. It represented an intermediate step in the battle ground between rigid judicial construction and judicial restraint, between continued Court speculation and a judicial deferral to the legislative intent. Despite *West Coast Hotel v. Parrish* (1937), there were still *Lochner* era jurists entrenched in the Supreme Court and they refused to give up without a fight. In April 1937, the Pennsylvania company, Apex Hosiery Corporation was operating a nonunion shop. Apex employees, who were members of the AFL, demanded that the company operate on a closed shop basis. When the company's management adamantly refused, the Apex employees affiliated with the AFL ordered a general

[413] *West Coast Hotel Co. v. Parrish*, 300 US 379 (1937)
[414] Ibid.

strike on May 4, 1937. Subsequently thereafter, on May 6, 1937, the company's factory was shut down by members of the union. With the general strike under way, the AFL made a further demand for Apex to operate a closed shop.[415]

When the company refused the second time, strikers seized the plant and AFL leaders ordered "a sit down strike."[416] Immediately after, violence broke out and the striking employees forced control of the entire plant. The strikers locked all the gates and entrances to the plant and only strikers were given keys to the facilities. During occupation, the strikers supplied themselves with an abundance of provisions and the AFL paid the Apex employees involved in the labor dispute strike benefits. While occupying the factory, the strikers destroyed machinery and extensively sabotaged Apex's manufacturing equipment. As a result, all manufacturing in the plant ceased. On June 23, 1937, the company's owner immediately petitioned the Third Circuit Court of Appeals for injunctive relief. Before the employees seized Apex's factory, the owner tried to enjoin an initially non-violent strike. The lower level Pennsylvania trial court rejected the owner's request.[417]

But when the strike turned violent and the plant was seized, Apex petitioned for immediate injunctive relief. On June 23, 1937, the appeals court granted the company's request and ordered the strike enjoined. As a result, the workers were forcibly ejected from the plant and those that refused were arrested. When the company resumed operations on August 19, 1937, the financial damage to physical property, equipment, and lost production was enormous. The company then sought financial damages under the Sherman Act. The company charged that the labor union violated the Sherman statute and formed a conspiracy to restrain trade. The federal court sided in favor of the company and granted it punitive damages in the sum of $237,310.[418]

The Third Circuit Court of Appeals, however, reversed the decision on the ground that the strikers did not engage in acts that restrained interstate commerce, basing its decision primarily upon the fact that state laws already provided equitable remedy. Since local state laws provided remediation, the appeals court reasoned, federal courts have no jurisdiction. The appeals court also held that the company failed to prove that "interstate commerce was restrained or affected."[419] The court noted that since the total value of output was less than three percent of the total output industry wide the company did not sufficiently establish restraint of interstate. In addition, the appeals court held that the company failed to prove that the strikers' intent was to restrain interstate commerce—even though the company noted that for three months the strikers suspended the plant's operations and its flow of products into intestate commerce was completely stopped. The appeals court was still not convinced that interstate commerce was illegally obstructed.

The company immediately appealed the decision of the appeals court and on May 27, 1940 the Supreme Court affirmed the judgment of the intermediate court. In large part, the Court

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[415] *Apex Hosiery Co. v. Leader*, 310 US 469 (1940)
[416] Ibid.
[417] *Apex Hosiery Co. v. Leader*, 310 US 469 (1940)
[418] Ibid.
[419] Ibid.

based its decision on the ground that the Sherman statute was not intended to "police"[420] interstate commerce, and that based on the "Rule of Reason" doctrine the union did not violate the Sherman statute. Justice Stone, writing for the majority, emphasized that to establish liability under the Sherman Act it must first be proven that the combination intended to restrain interstate commerce and that the conspiracy resulted in a substantial material outcome such as high prices, reduced output, and reduced quality.[421]

Without this, Stone insisted, there was no violation of the Sherman statute. Referring to similar cases, Stone wrote "in the application of the Sherman Act, as we have recently had occasion to point out, it is the nature [monopolistic intent] of the restraint and its effect on interstate commerce [material, direct, aggregate effect] and not the amount of the commerce which are the tests of violation."[422] This was previously spelled out in *Standard Oil v. U.S.* (1911) and by Brandeis in his dissenting opinion in *Bedford Cut Stone Co. v. Journeyman Stone Cutters' Ass'n of North* (1927).

Applying *Duplex* (1921), Stone first asserted that unions were not granted a blanket immunity from the Sherman statute. Like Pitney in *Duplex*, he argued that the inclusion of qualifiers such as "peacefully" and "lawfully" meant that Congress did not intend to give labor an exemption. Stone wrote:

> A point strongly urged in behalf of [the union] in…argument before us is that Congress intended to exclude labor organizations and their activities wholly from the operation of the Sherman Act. To this the short answer must be made that for the thirty-two years which have elapsed since the decision of *Loewe v. Lawlor*…this Court, in its efforts to determine the true meaning and application of the Sherman Act has repeatedly held that the words of the act…do embrace to some extent and in some circumstances labor unions …and that during that period Congress, although often asked to do so, has passed no act purporting to exclude labor unions wholly from the operation of the Act.[423]

Explicitly, Stone insisted that labor was not given an exemption and that the *Duplex* interpretation, insofar as it stated that Congress did not give labor immunity, was correct. Stone then proceeded to discuss briefly secondary boycotts. Highlighting both the Danbury Hatters and *Duplex* decision, Stone concluded that the distinction between secondary and primary boycotts was no longer relevant to the Sherman statute. According to Stone, what was more pertinent was whether the restraints upon trade were reasonable insofar as it was defined by the Standard Oil decision.

To Stone, monopolistic intent and "its consequences" were more important and thus distinctions like primary and secondary boycotts, violent and non-violent strikes, and violent and non-violent secondary boycotts were all irrelevant. The Sherman statute was only applicable to combinations that gave rise to a "monopoly" and "its consequences."[424] Referring to the Danbury

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[420] Ibid,
[421] *Standard Oil Co. v. U.S.* 221 US 1 (1911)
[422] *Apex Hosiery Co. v. Leader*, 310 US 469 (1940)
[423] Ibid,
[424] *Standard Oil Co. v. U.S.* 221 US 1 (1911)

Hatters and *Duplex* cases, Stone wrote: "The only significance of the two cases for present purposes is that in each the Court considered it necessary, in order to support its decision, to find that the restraint operated to suppress competition in the market," and Stone insisted that this was not enough.

Further, Stone thought the idea of violence and non-violent boycotts and strikes also irrelevant to the operation of the Sherman statute. Verbosely, Stone cited example after example of state and federal legislation that was crafted to "police" interstate commerce, which he said was not the purpose of the Sherman Act. Stone wrote:

> It is in this sense that it is said that the restraints, actual or intended, prohibited by the Sherman Act are only those which are so substantial as to affect market prices [one of the three consequences]. Restraint on competition or on the course of trade [physical obstructions, i.e. violent interference] in the merchandising of articles moving in interstate commerce is *not* enough, *unless* the restraint is shown to have or is intended to have an effect upon prices…[425]

Citing the first and second Coronado cases where the Court held that even a violent strike, which in these cases shut down coal mines, was "normally too local in nature and extent to restrain interstate commerce."[426] These two cases both involved secondary boycotts being declared illegal. Unique about these two cases, however, was in both decisions the Court said that whether a strike is violent or non-violent has no bearing on the Sherman statute's application.

In the *First Coronado* (1922) case, the Court considered a case of a national labor union which sought recognition for a local coal miners' union. When their efforts were stalled, the miners went on strike. Thousands of tons of coal ceased to be transported between states. The court sided in favor of the coal miners, stating that although the effect of the strike was economically substantial, the coal miners were not in violation of the Sherman Act. The Court reasoned that as long as the union did not engage in secondary boycotts and convince other coal mine unions to join the strike then it was not illegal, regardless of violent or non-violent acts.[427] In the *Second Coronado* (1925) case, when it was later discovered that the national union planned just such a tactic, the Court declared it to be a "direct violation of the (Sherman) Act."[428] But again, the Court emphasized that violent and non-violent strikes were to a major extent irrelevant to the Sherman statute's application. Stone wrote in Apex:

> The Sherman Act is concerned with the character of the prohibited restraints and with their effect on interstate commerce [Rule of Reason]. It draws no distinction between the restraints effected by violence and those achieved by peaceful but oftentimes quite as effective means. Restraints not within the Act, when achieved by peaceful means, are not

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[425] *Apex Hosiery Co. v. Leader*, 310 US 469 (1940)
[426] Edward B. Miller, *Antitrust Laws and Employee Relations: An Analysis of Their Impact on Management and Union Polices, Philadelphia*: Trustees of the University of Pennsylvania, 1984: 57.
[427] *United Mine Workers of America v. Coronado Coal Co*., 259 US 344 (1922)
[428] *Apex Hosiery Co. v. Leader*, 310 US 469 (1940); *Coronado Coal Co. v. United Mine Workers of America*, 268 US 295 (1925)

> brought within its sweep merely because, without other differences, they are attended by violence.[429]

In *Apex*, the Court's decision legalized secondary boycotts and focused instead on purpose and consequence. Purpose and consequences, Stone asserted, were the determining factors in a case applying the Sherman statute. When looking at the rule of reason, however, as it was applied in Standard Oil, it mentions nothing of intent or monopolistic purpose, although "contract that results in a monopoly" could be interpreted as having "monopolistic intent."

In a pungent dissent, Justice Hughes illustrated in detail the violent destruction and forceful occupation of the Apex plant. Hughes wrote: "There was thus [no] direct and intentional prevention of interstate commerce in the furtherance of an illegal conspiracy. This, I take it, the opinion of the Court concedes…With that conclusion I cannot agree."[430] Hughes argued that the majority was adding new levels of uncertainty to the Sherman statute after decades of painstaking judicial construction. Hughes cited various cases where violent interference with commerce constituted a violation of the Sherman statute. Although the Court never applied the Sherman statute, Stone cited the Debs contempt case as an example of the Sherman statute's application to enjoin a violent labor strike. Further, Hughes argued: "Restraints may be of various sorts… But when they are found to be unreasonable and directly imposed upon interstate commerce, both employers and employees are subject to the sanctions of the Act."[431] Violence, according to Hughes, was one of these many sorts of restraints and therefore the Sherman Act applied.

Hughes went on to insist that the "Rule of Reason" had nothing to do with "motive" and was more so directed at combinations and their aggregate effect on interstate commerce as the determining factor for liability. Hughes wrote:

> Nor does the "rule of reason" aid respondents. The test of reasonableness under that rule is the effect of the agreement or combination, not the "motives which inspire it." Leaders of industry have been taught in striking fashion that when the Court finds that they have combined to impose a direct restraint upon interstate commerce, their benevolent purposes to promote the interest of the industry, or to rescue it from a distressful condition, will not save them even from criminal prosecution for violation of the Sherman Act.[432]

This, however, is not entirely accurate because in Standard Oil, after a long exegesis of English authorities, the Court determined that for a combination to unlawfully restrain trade it must demonstrate a "monopoly" and "its consequences." Again, monopoly and the way the term was interpreted led to judicial confusion.

Hughes also asserted that the qualifiers in the Clayton Act indicated that statutorily permissible labor practices were legal only if they were "peaceful" and "lawful." On one hand, Stone argued that the qualifiers in the Clayton Act meant only that labor was not granted blanket

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[429] Ibid.
[430] Ibid.
[431] Ibid.
[432] Ibid.

immunity. And on the other, Hughes argued that the qualifiers in labor meant that statutorily allowable labor practices were out of the reach of the Sherman Act only if they were carried out peacefully.

Both Stone and Hughes were centralists on the Court who split on the *Apex* case. They both insisted on maintaining rigid judicial construction and established precedent. One supported keeping the *Duplex* standard and the other supported the revival of the "Rule of Reason." Neither Stone nor Hughes attempted to apply the Norris-La Guardia Act to try to interpret further the will of Congress—perhaps intentionally, because another statute would have meant looking at its legislative history and the elimination of such cherished judge-made law. Although labor unions won this battle, they were still fighting the bigger war—the war against "unduly restrictive judicial construction."[433]

U.S. V. HUTCHESON: FOCUSING THE LEGISLATIVE LENS

"The underlying aim of the Norris-LaGuardia Act," Frankfurter declared, "was to restore the broad purpose which Congress thought it had formulated in the Clayton Act but which was frustrated, so Congress believed, by unduly restrictive judicial construction."[434] In 1940, *U.S. v. Hutcheson* appeared before the Supreme Court and ultimately marked a tremendous victory for the labor movement over conservative, judicial activism. In *Hutcheson*, two unions were engaged in a jurisdictional dispute, the United Brotherhood of Carpenters and Joiners of America and the International Association of Machinists. The dispute was over the erection and dismantling of machinery. Anheuser-Busch had an agreement with both organizations in which the Machinists received the disputed jobs and the Carpenters agreed to submit all their grievances to arbitration.[435]

But in 1939, the president of the Carpenters union and other union officials failed to settle a dispute with Anheuser-Busch. Anheuser-Busch operated a large plant in St. Louis and contracted with the Borsari Tank Corporation for the construction of a new facility. The Gay Container Corporation leased property to Anheuser Busch and entered into a similar contract with the Stocker Company for the erection of a new building. Among Anheuser-Busch employees were members of the United Brotherhood of Carpenters and Joiners of America and the International Association of Machinist.

These two labor organizations were affiliated with the AFL and were engaged in constant arguments over construction and dismantling of machinery, and most importantly, jobs. Anheuser Busch attempted to mitigate the dispute through arbitration; however, when the Carpenters' demands went unsatisfied, they went on strike. During the strike, the Carpenters facilitated both primary and secondary boycotts. The Carpenters' union sent out an official publication to other unions and the public requesting that they refrain from purchasing Anheuser-Busch beer. This was clearly a secondary boycott. Anheuser Busch sought legal action by claiming that strikers were in violation of the Sherman Act.[436]

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[433] Padway, 13; *U.S. v. Hutcheson*, 312 U.S. 219 (1941)
[434] Miller, 57-59;*U.S. v. Hutcheson*, 312 U.S. 219 (1941)
[435] Ibid.
[436] Miller, 57-59; *U.S. v. Hutcheson*, 312 U.S. 219 (1941)

Anheuser-Busch charged that the Carpenters' union violated the Sherman Act's restraint of trade provision by engaging in a secondary boycott and a criminal conspiracy to restrain interstate commerce. As a result, Thurman Arnold, chief of the Antitrust Division of the Justice Department, filed suit and the case appeared before the Supreme Court in 1941. Arnold charged that the United Brotherhood of Carpenters, an AFL affiliated union, violated the Sherman statute by initiating a strike in an intra-labor dispute and calling for a secondary boycott through the circulation of anti-Anheuser Busch pamphlets.[437] Thus, the question presented before the Court was "whether the use of conventional, peaceful activities by a union in controversy with a rival union over certain jobs is a violation of the Sherman Law."[438] The Court answered no and gave labor blanket immunity from the operation of the Sherman statute.

Frankfurter believed that the Clayton and the Norris-La Guardia Acts worked together as "harmonizing" statutes in which labor unions were excluded from the Sherman Act. Frankfurter wrote for the majority: "Therefore, whether trade union conduct constitutes a violation of the Sherman Law is to be determined only by reading the Sherman Law and 20 of the Clayton Act and the Norris-LaGuardia Act as a harmonizing text..."[439] Frankfurter insisted that the Norris-La Guardia Act was a clarification by Congress of the language in Section 20 of the Clayton Act. Section 20 of the Clayton Act provided for a list of practices that were exempt from injunction and antitrust prosecution because they were in the best interests of labor. Frankfurter, one of the drafters of the Norris-La Guardia Act, was convinced that the Norris La-Guardia Act provided a list of exemptible labor practices so comprehensive that it gave labor full immunity from the antitrust laws.

As for the secondary boycott, Frankfurter criticized the *Duplex* decision for its restrictive interpretation of Section 20 of the Clayton Act and thus its restrictive deference to the will of Congress. Frankfurter wrote: "Such a view it was urged, both by powerful judicial dissents and informed lay opinion, misconceived the area of economic conflict that had best be left to economic forces and the pressure of public opinion and not subjected to the judgment of courts."[440] Again, Frankfurter charged that the majority in *Duplex* engaged in judicial activism and blatantly disregarded the will of Congress in favor of judicial construction. Frankfurter asserted that the emphasis placed on the illegality of secondary boycotts only involved the Court in more subjectivity and insisted that such distinctions were constituted by judge-made law, not Congress. "The Act [Norris La Guardia Act]," Frankfurter wrote, "…established that the allowable area of union activity was not to be restricted… as in Duplex...to an immediate employer-employee relation."[441]

Citing Section 13 of the Norris La-Guardia Act, Frankfurter specifically pinpointed where Congress allowed labor unions to engage in secondary boycotts. Section 13 provided that any person in the same industry could participate in a labor dispute, "regardless of whether or not

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[437] Thurman Arnold, "Antitrust Law Enforcement, Past and Future." Law and Contemporary Problems Vol. 7, No. 1 (1940): 5-23; Alan Brinkley, "The Antimonopoly Ideal and the Liberal State: The Case of Thurman Arnold," *The Journal of American History* Vol. 80, No. 2 (1993), 557-579.
[438] *U.S. v. Hutcheson*, 312 U.S. 219 (1941)
[439] Ibid.
[440] Ibid.
[441] Ibid.

the disputants stand in the proximate relation of employer and employee."[442] This provision, when added by Congress, was directly referring to the Court's interpretation in *Duplex*. Using this reasoning, however, Frankfurter may have exaggerated Congress's will in the Clayton Act to offer labor an exemption.

The Clayton Act was an ambiguous and complex statute and evoked two competing interpretations in Congress. Ultimately, Frankfurter agreed that with the passage of the Norris La-Guardia Act "Congress cut through all the tangled verbalisms and enumerated concretely the types of activities which had become familiar incidents of union procedure."[443] The Clayton statute may not have explicitly given labor immunity, but much evidence exists to prove that implicitly Congress wanted a labor exemption. *Lochner* era conservative jurists ignored this implicit will. In *Hutcheson*, despite Roosevelt appointees like Frankfurter, the labor movement still faced entrenched opposition from activist judges. Frankfurter challenged these opponents and insisted that statutes like the Clayton Act must not be read "in a spirit of mutilating narrowness."[444]

In a series of letters, prior to the *Hutcheson* decision, Frankfurter attempted to convince Justice Stone that his use of the Norris-La Guardia Act was appropriate. Stone insisted that the Court not "overrule"[445] *Duplex* and keep in place decades of painstaking judicial construction. Beginning on January 21, 1941, Frankfurter urged Stone to consider the *Hutcheson* case without reliance on the *Duplex* standard. Frankfurter wrote:

Dear Stone:

> To take this indictment outside the ruling in the Duplex case would, for me at least, involve much more of a torturing of that decision than is the task of reading the Clayton Act in harmony with the Norris-La Guardia Act. Moreover, the latter procedure avoids giving the Duplex case further vitality even if only by accepting it as a basis for distinction. However, you have of course my blessings in winning the Court to your view.
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> Faithfully,
> F.F. [446]

In this letter, Frankfurter urged Stone to consider the Norris-La Guardia Act instead of trying to interpret the judge-made law established in *Duplex*. Stone, on the other hand, did not want the Court to rely on the Norris-La Guardia Act because there was insufficient evidence to establish substantial restraint of interstate trade and thus no violation of the Sherman statute. Stone thought that the application of the Norris-La Guardia Act in the *Hutcheson* case was inappropriate. Stone replied the same day:

Dear Frankfurter:

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[442] Lovell, 201.
[443] *U.S. v. Hutcheson*, 312 U.S. 219 (1941)
[444] Ibid.
[445] Frankfurter, Personal Papers; *Duplex v.Deering*, US 443, 470 (1921)

[446] Felix Frankfurter, *The Felix Frankfurter Papers, 1882-1965*. University Park, The Pennsylvania State University Microfilms, 1941.

> Mine was inspired by the assumption that I could write an opinion without reliance upon the Norris La-Guardia Act which our brethren [the remaining members of the Four Horsemen] could not plausibly challenge, and by my desire as a matter of judicial procedure to avoid, whenever possible, controversy in the Court about serious or important matters by selection…of an issue that will find unanimity or at least provoke only minor differences…
>
> Yours Faithfully,
> Harlan F. Stone[447]

In his reply, Stone urged Frankfurter not to pursue the "harmonizing text" options because it created "controversy in the Court." Stone reasoned that by applying, to some extent, the *Duplex* standard it made it harder for the more conservative jurists to challenge. Stone insisted that, in following "judicial procedure," the Court could avoid internal debates on *Hutcheson* and the judicial construction in *Duplex* remained secure.

On January 21, 1941, Frankfurter sent Stone another letter, again trying to persuade Stone to agree with his position. Frankfurter wrote Stone about the vagueness and uncertainty that arises from distinctions such as primary and secondary boycotts. Frankfurter asserted that the Court must move pass the uncertainties of judge-made law and acknowledge the Congressional intent as laid out in the Norris-La Guardia Act. Frankfurter wrote:

> Dear Stone:
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> …The vice of the whole business from my point of view is that the cases and the Chief and Roberts talk about "secondary boycotts" with all the undefined and conflicting meanings attached to those phrases when the legislation which we are to apply does not use those terms. I really think that it is far better to try to apply the exact language of the *Clayton Act as illuminated by the Norris-LaGuardia Act* rather than as obfuscated by the Duplex and Bedford cases, *than to enter the extremely difficult and dark territory of judicial construction with references to labor conduct under the generalities of the Sherman law.*
>
> Yours Faithfully,
> F.F.[448]

Again, Frankfurter emphasizes that judicial construction and *Lochner* era precedents were impeding Congress's ability to express its intent. Frankfurter argued that when Congress passed the Sherman statute, even though it was vague, it mentioned nothing of outlawing secondary boycotts. Secondary boycotts, according to Frankfurter, were one of many examples of arbitrary

[447] Frankfurter, Personal Papers.
[448] Frankfurter, Personal Papers.

judicial construction in landmark cases like *Duplex* and *Bedford*. Frankfurter noted that the clearest way to recognize Congress's will was by looking at the Clayton and Norris LaGuardia Acts together.[449]

Stone, on the other hand, thought he settled the labor-antitrust issue in his opinion in the *Apex* case (1941). In *Apex*, Stone resurrected the Rule of Reason without eliminating the *Duplex* standard. Stone also did not want his opinion overturned by Frankfurter's formulation in *Hutcheson.* On January 22, 1941, Stone replied:

> Dear Frankfurter:
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> …It has seemed to me that the Norris-La Guardia Act was possibly a springboard by which we might overturn Duplex, but here again Duplex has been so long on the books that I feel such a course embarrassing in view of what I said in the Apex case on the same subject, and in any case it seems to me not good judicial practice to overrule cases…
>
> Yours Faithfully,
> Harlan F. Stone[450]

Stone refused to overrule *Duplex* and he refused to eliminate his own cumbersome judicial construction in the *Apex* decision. These letters demonstrate clearly that Frankfurter was fighting the waning *Lochner* era judicial activists. After prolonged correspondence, Stone decided to write a concurring opinion in which he kept his judicial construction intact, even though he adhered to majority judgment.[451]

Frankfurter was at a unique advantage when he spoke about the intent of the Norris-LaGuardia Act and its overall purpose to clarify the Clayton Act. He helped draft the Norris-LaGuardia statute and thus had first hand knowledge of the intentions of Congress. Frankfurter highlighted this in his last letter to Stone. On January 23, 1941, Frankfurter wrote: "I speak from intimate personal knowledge regarding the drafting and the passage of the bill [Norris-La Guardia Act]."[452] He continued: "What we now have is what the proponents prepared and there is no opposition to what was the chief objective—the correction of the Duplex and Bedford constructions."[453] Indeed, this was a unique vantage point for a jurist.

In Justice Stone's concurring opinion, he strongly opposed Frankfurter's broad legal extrapolation. He was not overly dependent on the construction that he formulated in *Apex* mainly because in *Hutcheson* strike was an intra-labor dispute without monopolistic purpose and consequences. Further, Stone argued there was no reason to apply the Norris-LaGuardia Act because the Carpenters' union did not engage in a secondary boycott. First, Stone reasoned that the call for a boycott was not illegal because it was protected free speech in the First Amendment and second, since there was no strike against Anheuser-Busch distributors, the Carpenters' union only engaged in peaceful picketing. Stone wrote:

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[449] Ibid.
[450] Frankfurter, Personal Papers.
[451] *U.S. v. Hutcheson*, 312 U.S. 219 (1941)
[452] Frankfurter, Personal Papers.
[453] Ibid.

> The second and only other type of restraint upon interstate commerce charged is the so-called 'boycott' alleged to be by the publication of notices charging Anheuser-Busch with being unfair to labor and requesting members of the Union and the public not to purchase or use the Anheuser-Busch product. Were it necessary to a decision I should have thought that, since the strike against Anheuser-Busch was by its employees and there is no intimation that there is any strike against the distributors of the beer…[454]

In reiteration, since the secondary boycott was protected by the First Amendment and the secondary boycott was never instituted, no violation of the law could be cited. Although Stone stressed in *Apex* that such distinctions were irrelevant, he felt the need to emphasis it in *Hutcheson.*

Using his *Apex* construction, Stone argued that the strike was not substantial and did not have a monopolistic effect on interstate commerce and therefore not a violation of the Sherman statute. Stone was not convinced that labor was granted immunity and instead opted to rely on the judicial construction formulated in *Duplex* and *Apex.* Stone wrote:

> We are concerned with the alleged activities of defendants, actual or intended, only so far as they have an effect on commerce prohibited by the Sherman Act as it has been amended or restricted in its operation by the Clayton Act. It is plain that the first type of restraint is only that which is incidental…[455]

Since the effect was "incidental," the Carpenters' union was protected from prosecution under the Sherman statute. Thus, Stone agreed with the holding in *Hutcheson*, but disagreed with Frankfurter's rationale. Stone ended his opinion by suggesting that he and the Court was strictly bound by already well-established judicial construction.

Justice Owen Roberts, who was a *de facto* member of the Four Horseman, wrote a scathing dissent in which he stated "I venture to say that no court has ever undertaken so radically to legislate where Congress has refused so to do."[456] Roberts further stated that the labor union "undeniably" facilitated a secondary boycott with the goal of restraining interstate commerce and asserted that the Norris-La Guardia statute was not meant as a total exemption of labor. Roberts wrote: "Without detailing the allegations of the indictment, it is sufficient to say that they undeniably charge a secondary boycott, affecting interstate commerce,"[457] stressing its illegality under the *Duplex* standard. A vast majority of Roberts' argument was based on the notion that the Court should strictly adhere to the construction established in *Duplex*. For *Duplex*, according to Stone, expressed the will of Congress not to exclude labor from the antitrust laws, but also to curtail the abuse of injunctions. This was the entire argument of the dissent; that is, *Duplex* was the controlling authority for all future labor-antitrust cases.

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[454] Frankfurter, Personal Papers.
[455] Ibid.
[456] *U.S. v. Hutcheson*, 312 U.S. 219 (1941)
[457] Ibid.

In a five-two decision, labor was granted immunity from the Sherman statute after decades of judicial speculation. This judicial speculation was symbolized by overreaching *Lochner* era jurists who protected to an absurd extreme the property rights of employers and struck at labor for attempting to stand as equals. The Sherman Act was intended to strike against "massed capital,"[458] and not labor organizations. After a long battle, *Hutcheson* finally gave full consideration to the will of Congress and labor unions were wholly excluded from the antitrust laws as long as they did not combine with non-labor groups. While on a circuit court, Holmes argued that it was not an adequate discharge of the courts to ignore the implicit will of Congress. Throughout the *Lochner* era, the judiciary rejected this form of deference toward legislative intent. With *Hutcheson*, however, Frankfurter stood firm on the ground that judicial activism was a wholly inappropriate discharge of judicial authority.

[458] See Berman.

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