

## LABOR v. THE SHERMAN ACT

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THIS article is not the outgrowth of scholarly research but of disputation, which the editors of this *Review*, with the opportunism characteristic of their guild, have diverted to serve their own editorial ends. In the course on "Law and Economic Organization" which Mr. Gregory and I have been teaching this year in the University of Chicago Law School, his primary concern has been labor law, mine anti-trust law. Though the *Apex* case<sup>1</sup> led to no jurisdictional dispute between us, it did produce divergent reactions. Mr. Gregory determined to set his views on paper;<sup>2</sup> the editors then incited me to comment upon them. This I declined to do, but I did agree to present my own thesis, with the understanding that they not expect more than an informal, sketchily-documented outline of my position. The reader, forewarned, should shape his own expectations accordingly.

Suppose an employer agrees with a union to run a closed shop. This employer—Smith, Inc.—does an interstate business; most of its materials and most of its products cross state lines. Though Smith, Inc., is the industry's Big Shot, its price leader, certainly no one will say that this agreement is "in restraint of trade or commerce among the several States." Nor do I suppose that there would be any talk of indictment even though everybody knew that Smith, Inc., had been the last open shop in the trade.

If we were to look into this business of organizing Smith, Inc., we should probably find that the company had signed the agreement at the muzzle of a gun, less metaphorically, in response to a threat to strike. Yet still I should be greatly surprised if the revelation of that familiar phenomenon were to lead to a call to the Anti-trust Division, or even the suggestion that the agreement, thus extorted, was invalid and unenforceable.

How explain this apathy to labor's attempt to monopolize through combination and coerced agreements?<sup>3</sup> Nothing seems more sinister to

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<sup>1</sup> *Apex Hosiery Co. v. Leader*, 310 U.S. 469 (1940).

<sup>2</sup> Gregory, *The Sherman Act v. Labor*, 8 *Univ. Chi. L. Rev.* 222 (1941).

<sup>3</sup> The simplest explanation would, of course, be the citation of Sections 6 and 20 of the Clayton Act, but to do so would not only frustrate this inquiry into the application of the

those who subscribe to the Economics of Despair.<sup>4</sup> Why do bench and bar accept it? I suppose the answer today is that the labor agreement is cast in a frame of reference—labor law—distinct from the frame of reference—anti-trust law—in which the problem of industrial restraint falls. This distinction had been sensed but left inarticulate until Mr. Justice Stone in the *Apex* case delimited the scope of the Sherman Act to the “prevention of restraints to free competition in business and commercial transactions.”<sup>5</sup> A labor agreement for a closed shop restrains the employer in his employing transactions, and control over these has been left a function of state law, except where in recent years the Federal Government by specific enactment has assumed it. Moreover, as I think Mr. Justice Stone persuasively shows, this distinction is embedded in the legislative history of the Sherman Act.

We should have had a different story, however, if Smith, Inc., had been tougher. Suppose President Smith, with such other remarks as might have been appropriate to the occasion, had told the union representative that he was an agitator, that the closed shop was un-American, and that he could go ahead and call a strike. Suppose the union had accepted the invitation and shut the plant tighter than a drum. There wouldn't be any more interstate commerce to and from Smith, Inc. Once in a while some bricks would go through the factory windows and a couple of guards would be beaten up by zealous pickets. Unionized competitors would

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Sherman Act but would also be psychologically unrealistic. Nobody thinks about those sections unless he is contemplating an injunction suit or until, when he gets down to the books, he encounters the broad language of the concluding clause in Section 20.

<sup>4</sup> This school rests the salvation of our economic system (and democracy to boot) upon the restoration of the automatism of the free market, with implementing monetary and tax measures. To its members, labor monopoly is peculiarly odious. Cf. Simons, *For a Free-Market Liberalism*, 8 Univ. Chi. L. Rev. 202, 205 (1941), and McLaughlin, *Bottlenecks (Union-Made Included)*, 8 Univ. Chi. L. Rev. 215, 218 (1941). Since the benefits of the treatment it would prescribe could be realized in the long run only and since grocers, landlords, mortgagees, and tax officials operate on the short run, the political prospects for the program thoroughly warrant the pessimism with which they are viewed by the school's adherents. Indeed, experience with the protective tariff alone is well-nigh conclusive. That the institutional trends which the school deplors might be so directed and supplemented by governmental action as to become compatible with both economic well-being and democracy is rejected as self-evidently impossible. Even to dally with the idea is to traffic with an economic devil (sometimes identified by the cabalistic letters NRA) or a political devil (known variously as nazism, fascism or communism). Mr. Arnold, it should be added, is not a member of this school; despite his advocacy of the free market, he is disqualified by reason of optimism.

<sup>5</sup> *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 493 (1940). The quotation continues: “. . . which tended to restrict production, raise prices or otherwise control the market to the detriment of purchasers or consumers of goods and services. . . .”

heave simultaneous sighs of relief and probably cut the trade discounts a few points.

Now while these unhappy events were transpiring, people would suddenly begin talking about the Sherman Act. This bothers me. I am puzzled why, if it is perfectly legal to threaten to tie up a plant and thereby extract a binding contract, it should be illegal to make good on that threat. Since I—together with everybody else—am convinced that the contract, so far as the Sherman Act is concerned, is an entirely legal restraint, I start to wondering whether the strike which is necessary to secure that contract may not be legal also.

As I consider the matter, I recall that the strike I have supposed was unruly. Can that be the reason the Sherman Act has been violated? I hardly think so. I find it quite impossible to suppose that whether the Magna Charta of our industrial liberties has been flouted should turn on the hurling of bricks or the brawling of pickets. What do we have police courts for? No, it must be something else.<sup>6</sup>

Then I note my stipulation that Smith, Inc., is the big company, the price leader, of the industry. I observe that competitors have profited by its embarrassment. Probably they have been worried because wage scales in their shops, even if no higher than in Smith's, are the product of a bargaining process, whereas Smith, Inc., need merely post a notice when a cut in labor costs seems indicated. If I pried further, I might find that the closed shop wage agreements were about to expire, that talk of higher wages was in the air, that the union employers were showing marked reluctance to cooperate so long as Smith, Inc., remained free to go its own way. Indeed, I might even find that the union officials were convinced that the only way they could keep what they had or get what they wanted was to organize that price cutter, Smith.

Now I begin to feel more comfortable. What the union was up to when they called this strike was to control the market, to keep cheap non-union goods out of it. So that's the reason they closed down Smith, Inc.! Why, we have "a tampering with price" here!<sup>7</sup> Surely we can't have one law for

<sup>6</sup> Here Section 20 of the Clayton Act bobs up to embarrass me. It stamps as legal certain union activities, provided they are conducted peaceably. However, it provides defences to prosecution under the Sherman Act; it does not determine whether an offense thereunder would have been committed in the first place, and that is our question here. Mr. Justice Stone in the Apex case makes it quite clear that the manner in which a strike is conducted does not determine violation of the Sherman Act.

<sup>7</sup> "Any combination which tampers with price structures is engaged in an unlawful activity." Douglas, J., in *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 221 (1940). But compare *Appalachian Coals, Inc.*, an organization formed, it seems, by singularly disinterested competitors in a time of ruinous price competition, which, Mr. Justice Stone assures us, "was not intended to and did not affect market price." *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 502 (1940).

the union and another for Socony-Vacuum. But that comfort is short-lived. I suddenly realize that we do have one law for the union and another for Socony-Vacuum. When Socony-Vacuum, its fellow "majors," and their respective "dancing partners" enter into a gentlemanly arrangement to stabilize (i.e., "tamper with") the price of oil, it's a matter for the grand jury. But, had our union sewed up Smith, Inc., under economic duress though without a strike, Mr. Arnold would have read the news in the papers next morning without turning a hair. What is more, nobody would have criticized him for his aplomb.

As I look back at the new facts I inserted in my picture, I realize that what they amount to is this: that the business of organizing Smith, Inc., was much more critical for the union than an ordinary organizing job, that this was due to the state of competition in the market, and that the union was conscious of these facts. Well, if such facts constitute the element which makes the strike illegal, then it seems that a union is free to act except when it matters most. If a union can legally absorb an industry bit by bit, with a little strike here and an agreement there, why should it run afoul of the law when a crisis comes along and, thanks to an unstable market, union agreements—and strikes to get them—become a matter of life or death to the union? Of course, if you don't want unions, a legal rule which works this way is a pretty good rule to have; it won't exterminate all unions (that too, would be un-American); it will simply keep them in their place. But if you think that unionization is proper, or if you merely recognize that our federal laws have permitted and even fostered it, a rule like that calls for a pretty hardy legal conscience to accept.

It is with regret, therefore, that I report my conclusion that this is just what Mr. Justice Stone has done in the *Apex* case. Of course he doesn't think that union agreements for closed shops in industries producing for interstate commerce violate the Sherman Act, even where such agreements blanket an industry. Nor does he think that strikes to exact such agreements are ordinarily illegal. When a strike gets violent, he leaves the employer to call the local police chief. But if the strike is so important that it will have a substantial effect on the market (and especially if the organizers know it) then it's a job for the Assistant Attorney General in charge of the Anti-trust Division.

Just how substantial must be this effect which makes strikes (but not the agreements they are designed to exact) in violation of the Sherman Act, Mr. Justice Stone does not state. Apparently that question will be reposed, in the first instance, in the discretion of the Assistant Attorney General and/or counsel for Smith, Inc., and its numerous counterparts. The question will next be relegated to the eighty-odd district courts, and,

if the unions sued still have funds, it can be deliberated in the ten circuit courts of appeals. Once in a while the Supreme Court will condescend, upon petition for certiorari, to answer this question which, in my opinion, it had no business to raise.

The Court had no business to raise this question, not only because in so doing it produced a rule that is uncertain of application and, when applied to sustain liability, is inconsistent with the broader position toward unionization to which the Court is committed by law, but because raising the question was unnecessary to the decision of the *Apex* case which, after all, was in favor of the defendant. Why the Court indulged in this trouble-making rationale is not an easy question to answer. One observer much closer to the problem than I has suggested that the Court desired to secure "a mobile position." If the Supreme Court alone had achieved this mobility, one might accept such judicial strategy with a degree of equanimity, but, as I have indicated above, the freedom it has accorded itself is shared with many others. Guerrilla warfare on the "substantial effect" line may result.

Another hypothesis is, I think, more probable. The Court was undertaking to execute a delicate maneuver: to shift the basis of its labor decisions under the Sherman Act from constitutional limitations on the commerce power to construction of the statute without conceding that, in so doing, it was changing the law. Unwilling, therefore, to yield a single position established by the earlier cases, the Court was compelled to develop a rationale which would accommodate the *Second Coronado* case.<sup>8</sup> It is to that effort that the "substantial effect" test is to be attributed, for in the *Second Coronado* case a restraint on "business and commercial transactions" could be shown only by finding that the strike there, unlike ordinary strikes, had a substantial effect on competition between union and non-union coal mines.

The Court's task would have been much simpler if it had not been so intent upon maintaining the appearance of consistency and had abandoned the *Coronado* case as a judicial aberration, extenuated perhaps by the outrageous conduct of the strikers which doubtless did much to induce the decision. A far less vulnerable solution could then have been attained which would have accorded with all the other labor decisions the Court has rendered.<sup>9</sup>

<sup>8</sup> *Coronado Coal Co. v. United Mine Workers*, 268 U.S. 295 (1925). It is of interest that Mr. Justice Stone was a member of the Court deciding this case, a fact that may tend to explain his solicitous treatment of it.

<sup>9</sup> Candor compels me to concede that another case, ignored in both majority and minority opinions, has to be explained before the number of exceptions may be limited to one. That

To attain this solution, the question the Court should have raised was: would the agreement<sup>10</sup> which the union was seeking to impose by its strike have restrained interstate commerce? To that question, the answer is clearly, no. Interstate commerce flows in and out of closed shops just as freely as out of open shops. Since, therefore, the agreement was not within the scope of the act, the union which was privileged to exact that agreement by the threat of a strike, should be entitled to act on its threat. The resulting interference to interstate commerce, large or small, should be recognized, as the Court in the past has recognized it, as incidental to the settlement of a local labor dispute and of no consequence under the Sherman Act.

This is the basis upon which the Court dismissed the suits in the *First Coronado*, *Leather Workers'*, and *Levering* cases.<sup>11</sup> The *Industrial Association* case,<sup>12</sup> though superficially different, falls in the same category. Unfortunately, the Court in those cases drew the line between the legal and the illegal by reference to constitutional limitations on the Congressional power over commerce, couched in terms of "indirect" and "remote" effects thereon which now seem a bit quaint. But the differences between restraints on employing transactions and on business and commercial transactions prove, in application, to be the same as the differences found be-

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case, *Anderson v. Shipowners Ass'n of the Pacific*, 272 U.S. 359 (1926), involved a labor restraint in that it presented a combination of competing shipowners who agreed not to hire union labor. The Court reversed a dismissal of the petitioning union seaman's bill. Although the restraint was imposed on the employers' employing transactions, nevertheless I think it may be properly regarded as constituting a restraint on the employers' "freedom in business and commercial transactions." This paradox is resolved by the fact that the restraint was imposed by an agreement of *competitors*. Whether a restraint so imposed operates on a cost factor or a price factor, it limits the competition among the parties to it in their "business and commercial transactions." Cf. *Hilton v. Eckersley*, 6 E. & B. 47 (1857) (an agreement of competing employers with a labor union is to be sustained on the basis of the union's privilege.)

<sup>10</sup> In using the term "agreement," I do not wish to exclude other manifestations of employer compliance with union demands which fall short of an express agreement.

<sup>11</sup> *United Mine Workers v. Coronado Coal Co.*, 259 U.S. 344 (1922); *United Leather Workers' Int'l Union v. Herkert & Meisel Trunk Co.*, 265 U.S. 457 (1924); *Levering & Garrigues Co. v. Morrin*, 289 U.S. 103 (1933). In the *First Coronado* case the Court, it should be conceded, opened the door to the decision in the second by its helpful suggestions to plaintiff's counsel.

<sup>12</sup> *Industrial Ass'n of San Francisco v. United States*, 268 U.S. 64 (1925). In this case a combination of dealers in local building materials refused to sell to unionized contractors. The latter were unable to buy out-of-state materials since those could not be used except in conjunction with locally supplied materials. Nevertheless, the Court held that the combination did not violate the Sherman Act. The refusal of the local suppliers to sell obviously restrained local "business and commercial transactions," but compliance with the combination's anti-unions demands would have left interstate transactions unaffected.

tween direct and indirect effects on interstate commerce.<sup>13</sup> Moreover, among the reasons why it is important to differentiate between the two types of restraint are considerations closely related to the reasons underlying the differentiation between direct and indirect effects on commerce. They go, as Mr. Justice Stone himself points out, to the "maintenance in our federal system of a proper distribution between state and national government of police authority and of remedies private and public for public wrongs."<sup>14</sup>

However blurred the line in the Court's opinions in these earlier cases, points were nonetheless fixed by its decisions therein, and to those points more are added by the *Loewe, Duplex*, and *Bedford* cases.<sup>15</sup> Rather than examine each of these three cases here, I shall conjure up a new labor difficulty for a new employer, Brown, Inc., which I think will typify the situation the cases present.

Brown, Inc., is a firm of moderate size supplying semi-finished goods to be fabricated further by other companies across the state line. Brown, Inc., is unionized; some of its customers are also unionized, and their employees and Brown, Inc.'s belong to the same union. The union decides to organize the shops of Brown, Inc.'s non-union customers. Since too few of their present employees are union members to provide the nucleus of a strike (and since importation of sitters-down to make good the deficit is no longer in vogue), the union adopts another pressure technique. It informs Brown, Inc., that the union will refuse to work on goods to be shipped to non-union customers. Now President Brown doesn't feel too happy about the whole business, but he realizes that he can keep pretty busy filling larger orders from his union customers and their gratification can be set off against the grief of their non-union rivals. So Brown, Inc., solemnly assures the union that no more goods will be dispatched to comfort its enemies.

You will remember that none of us was troubled (anti-trust-wise) when Smith, Inc., signed for a closed shop. Does the Brown agreement call for a comparable display of indifference? I don't think so. Note that the re-

<sup>13</sup> In the *Coronado*, *Leather Workers'*, *Levering*, and *Apex* cases, the strikes sought to impose a restraint on *local* employing transactions which, if effected, would not restrain *interstate* business and commercial transactions. The different effect of the "boycott" cases, which nevertheless sustain the generalization to which this note is appended, is discussed below at p. 255.

The inadequacy of the old rationale becomes most evident in the case of a strike to impose a labor restraint upon an interstate carrier. The local-interstate differentiation breaks down and resort must be had to a differentiation based on the character of the transactions restrained unless strikes of carriers' employees are to be singled out for special treatment under the act.

<sup>14</sup> *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 513 (1940).

<sup>15</sup> *Loewe v. Lawlor*, 208 U.S. 274 (1908); *Duplex Printing Press Co. v. Deering*, 254 U.S. 443 (1921); *Bedford Cut Stone Co. v. Journeyman Stone Cutters' Ass'n*, 274 U.S. 37 (1927).

straint to which Brown, Inc., has been subjected is a restraint on its freedom in interstate "business and commercial transactions." Note, too, that this restraint becomes operative by virtue of the agreement alone; execution of the threat of refusal to work by a strike would have involved more customers but, so far as transactions with non-union shops are concerned, the restraint would have been no more effective. Here, then, is a case which does not involve the anomaly of the legal threat to do an illegal act for both the successful threat and the successful action involve the same consequences.

Where, as in the *Loewe*, *Duplex*, and *Bedford* cases, the Supreme Court has been presented with refusals to buy or to work in order to exact a restraint which, if effective, would restrain freedom in "business and commercial transactions" across state lines, it has invoked the Sherman Act. When we connect the points marked by these cases with the points marked by the *First Coronado*, *Leather Workers'*, *Levering*, and *Apex* cases, we have a line which differentiates the legal from the illegal labor restraint on the basis of the agreement which the refusal to work or to buy was invoked to impose. Only when that agreement would have restrained interstate "business and commercial transactions" was liability imposed in these seven cases.

When, however, Mr. Justice Stone extrapolates the "substantial effect" line which he has drawn to reconcile the points marked by the *Second Coronado* and *Apex* cases, it extends to the cases where the agreement alone, without the refusal to work or buy, would have restrained interstate commerce. It superimposes on cases in the *Loewe*, *Duplex*, and *Bedford* category the requirement that the restraints of the type there involved should have a substantial effect on market competition reflected on the market price or supply. What is more, since his theory requires it, Mr. Justice Stone does find that effect in the *Loewe*, *Duplex*, and *Bedford* cases.<sup>16</sup> The effect may have been there though the Court in those cases did not take occasion to discuss or even to disclose it.<sup>17</sup> In any event, why

<sup>16</sup> "It will be observed that in each of these cases where the Act was held applicable to labor unions, the activities affecting interstate commerce were directed at control of the market and were so widespread as to substantially affect it." *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 506 (1940). Later in the same paragraph, Mr. Justice Stone observes that "in the boycott cases . . . the Court viewed the restraint itself . . . to be of a kind regarded as offensive at common law because of its effect in curtailing a free market and it was held to offend against the Sherman Act because it effected and was aimed at suppression of competition with union made goods in the interstate market." If only the latter sentence were to be consulted, substantial effect on the market might be regarded as immaterial, but the opinion as a whole discourages this interpretation.

<sup>17</sup> The *Loewe* Co. was evidently a small factor in the hat business. The *Duplex* Printing Co. was one of four concerns in its field, and Mr. Justice Brandeis' dissent (though not the

should a person be denied the protection of the Sherman Act simply because his business is small and the commerce restrained does not bulk large in the industry total? The market may be insensitive, but you can bet his profit and loss statement isn't.

Moreover, I should be worried if this emphasis on price and supply led to their use as crucial factors to determine all cases. Suppose—to resort to a hypothetical case which I trust will remain fanciful—a group of suppliers of a commodity in interstate commerce were to band together in a pact to sell no more goods to Negro customers. Suppose that the proscribed customers were few in number and their business small. Freezing them out of business would have no effect on the market price or on the volume of trade, and, therefore, if price and supply are determinative,<sup>18</sup> the act would not apply. Yet if that is not an apt case for the act's invocation, then Mr. Justice Stone and his acquiescing brethren have amended the statute with greater freedom, and less excuse, than Mr. Justice White was accused of doing when he read the "rule of reason" into the act.

The first fruits of this treatment of the *Loewe*, *Duplex*, and *Bedford* cases are at hand. In *United States v. Gold*<sup>19</sup> Judge Learned Hand, speaking for the Court of Appeals for the Second Circuit, held a refusal to work on furs sent from non-union New Jersey processors to New York furriers to be no violation of the act because he could detect no repercussions on price or supply. Judge Hand was patently unhappy about it and yielded reluctantly to the dictate of the higher forum.

Since I read the precedents as he seems to have read them, I sympathize with his attitude. On the other hand, I recognize that the suppression of refusals to work or buy deprives union labor of an important organizing weapon and therefore seems inconsistent with the more general policy of the Federal Government in aid of organization. If that more general pol-

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majority opinion) indicates that its competition was being felt by its unionized competitors. In the *Bedford* case, the Court indicates that the quarries against which the boycott was directed were large, but it does not state their share of the market nor the effect of the union activities upon it. (Query, whether this "market" should be defined by the particular type of stone produced by the quarries in the *Bedford* region or should the market embrace competing substitute materials? And, for that matter, is the "market" for *Duplex* presses to include all printing presses if the *Duplex* press is of distinctive design?)

<sup>18</sup> Although Mr. Justice Stone emphasizes price and supply, he does quote, 310 U.S. 469, 510 (1940), from the *Leather Workers' case* (265 U.S. 457, 471 (1924)) a passage making the illegality of a restraint depend on whether "the intent or necessary effect upon such commerce in the article is to enable those preventing the manufacture to monopolize its supply or control its price, or discriminate as between its would-be purchasers." And at page 501 he states that a restraint is not illegal unless it is "shown to have or is intended to have an effect on prices in the market or otherwise to deprive consumers or purchasers of the advantages which they derive from free competition." (Italics added.)

<sup>19</sup> 115 F. (2d) 236 (C.C.A. 2d 1940).

icy is to prevail, then the line I have found in the decisions must be shifted and new points substituted for those marked by the existing precedents. I think such a change would be compatible with the retention of my general analysis.

Let's go back to the labor troubles of Brown, Inc. I argued there that its agreement not to supply goods to non-union customers across the state line or its employees' refusal to work on such goods imposed a restraint on its interstate "business and commercial transactions" and therefore fell within the scope of the act. But it must be recognized that this restraint was incidental to a labor dispute in which Brown's customers were involved, that the restraint would be coterminous with that dispute, and would probably have only the same temporary disruptive effect as a strike in the customer's own shop. Given the importance to organization of this tactic, the community of interest between the employees of both Brown, Inc., and its customers, and the temporary nature of the dislocation, a court which has always accorded a certain latitude to industrial restraints might not be open to censure if it were to indulge labor in a privilege limited by the considerations noted above.<sup>20</sup> I do not, however, like to see that privilege further limited by the rule, which seemingly now prevails, that the privilege is to be accorded only when a stable market or the unimportance of those against whom it is exercised precludes a finding of "substantial effect" on market price or supply.

If the *Loewe*, *Duplex*, and *Bedford* cases are to be discarded, are there any labor restraints on which the act may nonetheless operate? There are, and I believe they are important. An obvious example is the situation presented in the *Brims* case<sup>21</sup> where a union combined with employers in an agreement not to work on goods shipped into the state from manufacturers of a product which competed with the local employers' product. Here there was an obvious restraint on interstate "business and commercial transactions" and a unanimous Court held it illegal. Unlike the restraint in the case of Brown, Inc., this restraint was not incidental to a labor dispute across the state line which would have ended with the ending of that dispute. It was an effort to impose a permanent embargo on goods produced outside the state. The collusion of employers and the

<sup>20</sup> This could be done either by an invocation of the "rule of reason" or by reversing the restrictive interpretation placed on Section 20 of the Clayton Act by the *Duplex* case. The Court in the *Apex* case points to, but does not pass on, both possibilities. 310 U.S. 469, 507 nn. 25, 26 (1940). Either alternative would permit discrimination among the three types of cases. It is easiest to defend the restraint imposed in the *Bedford* case, since it was in aid of members of the same union. In the *Duplex* case the aid of other unions was involved; in the *Loewe* case the entire federation was called upon to boycott the plaintiff's hats.

<sup>21</sup> *United States v. Brims*, 272 U.S. 549 (1926).

unions to advance their respective ends deprived the maneuver of any color of justification.

The Anti-trust Division of the Department of Justice is turning up a good many such unholy alliances in the course of its current "building drive," but there are perhaps still more cases where the employers are reluctant partners to the restraint. These are the cases where the unions restrain their employers from interstate purchases of goods which will diminish the need for union labor at the point of use. To cite an example from the books, there is the *Kitchen Cabinet* case<sup>22</sup> in which a union refused to install kitchen cabinets painted by spray gun at the out-of-state factory rather than by brush on the job. Such restraints are all too common in the building trades, and many of those who readily sympathize with the refusal to work on non-union supplies are slow to countenance this other tactic. Not only does it restrain interstate "business and commercial transactions" but it does so permanently—or until the union relaxes its grip or alters its objectives.<sup>23</sup> Whether or not the specific restraint in the local market affects the price on the national market, the supply of sprayed kitchen cabinets in the locality of the restraint is nil, and the higher costs of brush painting must be paid. Here is an important objective for Anti-trust Division activity and, in its current attack, the division is doing an excellent job.

However, the division has gone further. It is prosecuting restraints imposed by strikes where the agreements sought by the unions would not have restrained "business and commercial transactions." An outstanding example is afforded by the *Hutcheson* case<sup>24</sup> now awaiting decision in the Supreme Court. Anheuser-Busch, Inc., employed union machinists to install equipment in an addition to its brewery. The union carpenters coveted the work, and, when the contractor refused to discharge the machinists, the carpenters struck. Mr. Arnold, in common with most of us, doesn't like jurisdictional strikes, and so he moved in. He relies on the interference with interstate commerce resulting from the suspension of building operations and the consequent postponement of brewing operations to bring the restraint within federal power and on the fact that the

<sup>22</sup> *United States v. Painters' District Council No. 14*, 44 F. (2d) 58 (D.C. Ill. 1930), aff'd per curiam 284 U.S. 582 (1931).

<sup>23</sup> If, in such a case, it could be shown that the restraint the union was seeking to impose was a method of mitigating the incidence of technological change upon the union by providing an orderly process of introducing a new product or process, then the restraint might be deemed reasonable, and *Nat'l Ass'n of Window Glass Mfrs. v. United States*, 263 U.S. 403 (1923), could be invoked to sustain it.

<sup>24</sup> *United States v. Hutcheson*, 32 F. Supp. 600 (Mo. 1940), probable jurisdiction noted, 310 U.S. 609 (1940), and argued before the Supreme Court on December 10, 1940.

carpenters were not pursuing a reasonable labor objective to establish violation of the act.<sup>25</sup> Since he did not abandon the case upon the rendition of the *Apex* decision it is evident that he does not consider the requirement of "substantial effect" on the market to be applicable here. Apparently he views that as a criterion to be applied only to find a business or commercial restraint to accompany and invalidate an otherwise valid labor restraint.<sup>26</sup> Where there is no valid labor restraint to begin with,<sup>27</sup> then the substantiality test may be disregarded, a qualification which Mr. Justice Stone overlooked in his opinion but which he may now be persuaded to adopt.

What is there to complain of in this solution of the problem, aside from the complaints already registered with respect to so much of the *Apex* version of the *Second Coronado* case as remains unaffected by the interpolated qualification? What troubles me is that Mr. Arnold is using the Sherman Act to police labor restraints even though, if effected by agreement, they do not restrain interstate "business and commercial transactions." That a labor restraint is invalid because its objectives are unreasonable does not make it *ipso facto* a business or commercial restraint,<sup>28</sup> yet if Mr. Arnold determines that a restraint imposed upon an employer's freedom in employment is unreasonable, prosecution begins. What is unreasonable in this context is not to be derived from policies developed to protect freedom in business and commercial transactions but from policies shaped to demarcate the zone of permissible labor activity. Mr. Arnold may be a wise policeman but, in embarking on this program, he has involuntarily deputized every employer engaged in interstate commerce. If the Federal Government is to curb excesses in the labor activity which it has fostered, I suspect it can best do so by legislation specifically designed to that end, the enforcement of which may be entrusted exclusively to policemen who, like Mr. Arnold, are disinterested and sympathetic to the socially desirable objectives of the labor movement.

<sup>25</sup> The carpenters, of which defendant Hutcheson is president, published notices that Anheuser-Busch was unfair to organized labor, requesting patronage be withdrawn from its products. The district court found no secondary boycott, and held the means employed by the union lawful under the Clayton Act. The discussion in the text is not directed to this aspect of the case.

<sup>26</sup> E.g., a strike for higher wages, shorter hours, or a closed shop.

<sup>27</sup> It is difficult to consider a jurisdictional strike as not constituting a "labor dispute" within the terms of the Clayton Act, even where resort to such a strike may be highly arbitrary.

<sup>28</sup> A jurisdictional dispute may involve a violation of the Sherman Act under the test proposed in this article. Suppose an AFL union refuses to work on goods on which CIO, rather than AFL, unionists have previously worked in shops across the state line. If the employer agrees, he will have restrained his freedom in business and commercial transactions.