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Images of Violence in Labor Jurisprudence: The Regulation of Picketing and Boycotts, 1894-1921

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I. INTRODUCTION

A. *Images of Workers in Modern Labor Cases—
“The danger of violence”*

THIS exploration of the labor jurisprudence of nearly one hundred years ago began with a very simple and very modern question: Why do some judges today assume that workers on a picket line are likely to provoke violence? The question seems important for several reasons which I will elaborate below. First, the notion that labor picketing is inherently violent and intimidating is expressed in recent Supreme Court cases which have significant legal or symbolic implications for labor unions. Second, there is evidence of a revival of interest in restoring the labor injunction to its former prominence in the arsenal of legal remedies available to employers faced with picket lines and other forms of collective action. Third, the presence in modern labor jurisprudence of unexamined assumptions about the violent nature of workers may inhibit the ability of courts to accept innovative and creative roles for unions in the structure and governance of the workplace.

1. *The “Unfounded Speculation” of the Supreme Court.* At least some contemporary Supreme Court justices have perceived labor picketing as inherently violent and threatening. For example, in the 1978 case of *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*,¹ Justice Powell wrote that “[t]he ‘danger of violence’ is inherent in many—though certainly not all—situations of sustained trespassory picketing. One cannot predict whether or when it may occur, or its degree.”² In the same case, Justice Blackmun wrote that to prohibit states from enjoining trespassory picketing would result in an “unacceptable possibility of precipitating violence.”³

The *Sears* case, however, involved peaceful picketing by union members on the walkways and parking area outside a department store. There was no evidence that the picketing was violent or intimidating to customers entering the store. As Justice Brennan wrote in dissent, the “suggestion” made by Blackmun and Powell that prohibiting state jurisdiction of

1. 436 U.S. 180 (1978). The *Sears* case changed a long-standing federal labor preemption doctrine—the so-called *Garmon* doctrine—that would have previously denied state courts jurisdiction over peaceful trespassory picketing. See *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959). The result of the *Sears* case is that state courts may, in certain circumstances, enjoin labor picketing that is arguably subject to the primary jurisdiction of the National Labor Relations Board.

2. 436 U.S. at 213 (Powell, J., concurring).

3. *Id.* at 208 (Blackmun, J., concurring).

peaceful trespassory picketing "results in a substantial risk of violence . . . can be dismissed as the most unfounded speculation."⁴ The fact that the *Sears* picketers were technically on private property, which was open to the public, rather than a public sidewalk, does not provide a satisfactory explanation for the presumption that their picketing was "potentially explosive."⁵

Distinctions between the legality of labor picketing and handbilling continue to persist in Supreme Court jurisprudence, apparently because of the belief that picket lines are associated with violence or the threat of violence. In the recent *DeBartolo* case,⁶ the Supreme Court held that the secondary boycott provisions of the National Labor Relations Act⁷ do not prohibit a union from engaging in peaceful handbilling for the purpose of urging consumers to boycott a neutral employer.⁸ The Court, however, was careful to note that "the union peacefully distributed the handbills without any accompanying picketing or patrolling."⁹ Justice White, who wrote the *DeBartolo* opinion, articulated this revealing distinction between picketing and handbilling:

The loss of customers because they read a handbill urging them not to patronize a business, and not because they are intimidated by a line of picketers, is the result of mere persuasion, and the neutral who reacts is doing no more than what its customers honestly want it to do.¹⁰

Explicit in this statement are assumptions that picketing is more than "mere persuasion"—it is "intimidation"—and that customers who boycott a store in response to a picket line may not be expressing their "honest" economic preferences. Implicit is much more: assumptions about the violent nature of workers, the inherent dangers of labor picketing, the malevolent intentions of unions, and the inability of communities to respond rationally to the message of a peaceful picket line. While it is

4. *Id.* at 227.

5. *Id.* at 213 (Powell, J., concurring) (text & *note).

6. *DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 108 S. Ct. 1392 (1988).

7. Labor Management Relations (Taft-Hartley) Act, ch. 120, § 8, 61 Stat. 141 (1947) (codified at 29 U.S.C. § 158(b)(4) (1982)).

8. In *DeBartolo*, a construction union peacefully distributed handbills on public property at the entrances to a shopping mall. The union had a dispute with a building contractor retained by a department store to build a store in the mall. The handbills asked customers to refrain from shopping at any stores in the mall "until the Mall's owner publicly promises that all construction at the Mall will be done using contractors who pay their employees fair wages and fringe benefits." 108 S. Ct. at 1394-95 (quoting union handbill).

9. *Id.* at 1395.

10. *Id.* at 1400.

true that labor picketing is sometimes accompanied by violence and threats of violence—by employees, employers, police, or bystanders—violence is certainly not inevitable or inherent in labor picketing. Yet such assumptions, revealed through images of worker violence, underlie the legal doctrine which today regulates the forms of economic activity of unions. In this Article, I will discuss the development of these assumptions in late nineteenth and early twentieth century labor cases.¹¹

2. *Reevaluation of the Anti-Injunction Statutes.* In the late 1970s, the Industrial Research Unit of the Wharton School obtained funding for a four-year study of union violence. The book, *Union Violence*,¹² which is the product of the study, has as its thesis the proposition that “the law generally reflects an attitude of indifference to the effects of labor violence.”¹³ The authors, Thieblot and Haggard, catalog and describe numerous contemporary incidents of strike violence and the legal responses to them and conclude that certain laws should be changed. In particular, the authors urge repeal of the Norris-LaGuardia Anti-Injunction Act of 1932¹⁴ and the analogous state “little Norris-LaGuardia Acts.”¹⁵ In much the same way that Felix Frankfurter and Nathan Greene intended their 1930 book, *The Labor Injunction*, to be a brief for the passage of the Norris-LaGuardia Act, Thieblot and Haggard apparently intend their work, *Union Violence*, to be a brief for its undoing.¹⁶

The starting point for the Thieblot and Haggard argument is an attack on the credibility of Frankfurter and Greene’s work,¹⁷ as well as the “conventional wisdom” that inspired it.¹⁸ This conventional wisdom is

11. The assumptions about the violent worker and his relationship to the community seem to have their genesis in the criminal conspiracy cases in the first half of the nineteenth century. These early labor cases articulated legal doctrines that greatly influenced later state and federal cases dealing with problems of labor combinations which restrained trade through strikes, pickets, and boycotts. Perhaps as important as the legal doctrine was the perception—that workers were transitory, irresponsible, and dangerous—which was expressed quite openly in the cases and provided a key element in the doctrinal analysis. See Holt, *Labour Conspiracy Cases in the United States, 1805-1842: Bias and Legitimation in Common Law Adjudication*, 22 OSGOOD HALL L.J. 591 (1984).

12. A. THIEBLOT, JR. & T. HAGGARD, *UNION VIOLENCE: THE RECORD AND THE RESPONSE BY COURTS, LEGISLATURES, AND THE NLRB* (1983).

13. *Id.* at 17.

14. Norris-LaGuardia Act, ch. 90, §§ 1-15, 47 Stat. 70-73 (1932) (codified at 29 U.S.C. §§ 101-15 (1982)).

15. A. THIEBLOT & T. HAGGARD, *supra* note 12, at 496-98. See generally Haggard, *Private Injunctive Relief Against Labor Union Violence*, 71 KY. L.J. 509 (1983); Stewart & Townsend, *Strike Violence: The Need for Federal Injunctions*, 114 U. PA. L. REV. 459 (1966).

16. See A. THIEBLOT & T. HAGGARD, *supra* note 12, at 199.

17. *Id.*

18. *Id.* at 198.

the belief that from the late 1800s to 1932, "federal judges were inclined to decide labor controversies according to their own predominantly conservative social and political views, and rendered decisions which were generally hostile to the union's use of economic power."¹⁹ It seems appropriate to reexamine some of the labor cases from this early period in order to assess the conventional wisdom.

Thus, in this Article, I intend to demonstrate that the labels *conservative* and *antilabor* are not very useful for understanding some of the significant labor injunction cases and the judges who wrote them. Indeed, the conventional wisdom does not go far enough, because it fails to account for the emergence of the foundations of modern liberal labor ideology within labor cases of the late nineteenth century. The judicial assumptions about labor violence that Thieblot and Haggard describe as idiosyncratic and time-bound, are in fact pervasive and continuous. For example, Thieblot and Haggard write that "[a]t one point in its history, [in 1921], the Supreme Court seemed to be of the view that the manner in which labor unions usually picketed was inherently intimidating and coercive."²⁰ The *Sears* and *DeBartolo* cases²¹ suggest that this view of labor picketing was not an anomaly of the 1921 Supreme Court. Furthermore, as this Article will show, the attitudes about worker violence expressed by the Supreme Court in 1921 were forged during the early judicial careers of two important members of that court: Chief Justice William Howard Taft and Associate Justice Oliver Wendell Holmes. In my conclusion, I suggest that the struggles of the judiciary to articulate the relationship between labor violence and economic coercion continue even today.²²

3. *The Future of Labor Unions.* If it is true that late nineteenth century attitudes about workers and worker violence persist in modern labor jurisprudence, the possibilities for reconceptualizing and changing the relationship between employers and employees are greatly limited.

19. Winter, *Labor Injunctions and Judge-Made Labor Law: The Contemporary Role of Norris-LaGuardia*, 70 YALE L.J. 70, 71 (1960), quoted in A. THIEBLOT & T. HAGGARD, *supra* note 12, at 198.

20. A. THIEBLOT & T. HAGGARD, *supra* note 12, at 226. The authors are here referring to the case, *American Steel Foundries v. Tri-City Central Trades Council*, 257 U.S. 184 (1921), discussed *infra* Part VI.B.

21. See discussion *supra* Part I.A.1.

22. See, e.g., Atleson, *The Legal Community and the Transformation of Disputes: The Settlement of Injunction Actions* (publication forthcoming in 22 LAW & SOC'Y REV. 41 (1989)) (discussing lawyers' and state court judges' assumptions about picket line violence in the context of labor injunction cases in the 1970s in Buffalo, New York).

Employees cannot become partners with employers in the managing of the enterprise if it is assumed that at critical moments they are likely to become deviant, irrational, and violent. In other words, the assumptions underlying the notion of shared authority and decision making in the workplace are in direct contradiction to the implicit assertion that workers need to be controlled when they engage in certain types of collective action, such as picketing. As the problems of the future role of unions in their relationship to corporations have moved to the forefront of legal scholarship,²³ it seems relevant to explore the way in which the contradictions between conflicting images of workers became embedded in labor jurisprudence.

B. *Images of Workers from the Past*

Some of the most significant labor picketing and boycott cases from the 1890s to the 1920s present a fairly consistent picture of the "typical" employee. He was almost always male, single, white, but probably foreign born with an unpronounceable last name, uneducated, unskilled, rootless, shiftless, irrational, unpredictable, aggressive and thus prone to violence, and sympathetic to socialist, revolutionary ideas.²⁴ He was poor, although his poverty was rarely discussed, and he was definitely lower class, although judges, many of whom were members of the upper class, were uncomfortable acknowledging class divisions.

It should be self-evident that the foregoing description does not appropriately portray the typical worker now, in the last quarter of the twentieth century, nor the typical labor picketer of today.²⁵ It is less obvious that this was a gross distortion of reality in the last quarter of the nineteenth century when the machinery of capitalism surged forward in boom and bust cycles, periods marked by excesses of both wealth and poverty, and massive dislocations in populations. This part of the history of the American labor movement was marked by episodes of violent worker protest of a kind which, when they occur today, seem anoma-

23. See, e.g., Klare, *The Labor-Management Cooperation Debate: A Workplace Democracy Perspective*, 23 HARV. C.R.-C.L. L. REV. 39 (1988); Stone, *Labor and the Corporate Structure: Changing Conceptions and Emerging Possibilities*, 55 U. CHI. L. REV. 73 (1988).

24. In 1894, William Howard Taft asserted that "[i]mpatience with the existing social order and contempt for the security of private property have found strongest expression among those who do manual labor for a living In the large cities where foreign labor is congested, we find bodies of avowed socialists." Taft, *The Right of Private Property*, 3 MICH. L.J. 215, 219, 231 (1894).

25. For example, in the union picket lines of the 1980s one sees school teachers, nurses, airline pilots, flight attendants, air traffic controllers, bank tellers—men and women from diverse ethnic and racial backgrounds who are educated, middle class, and highly trained.

lous.²⁶ Nevertheless, the fact that there were some workers who fit, more or less, into the general outlines portrayed by some judges was not an adequate rationalization for sweeping all workers within the universal stereotypes. Nor were the acts of violence which occurred in labor disputes during those turbulent years a sufficient justification for the aggressive use of the courts to suppress two of the most economically potent forms of collective action by workers—the picket line and the secondary boycott.

In this Article, I describe the images of worker violence found in several labor picketing and secondary boycott cases that represented key doctrinal developments at either the state or federal level. The preoccupation with violence which is seen in these labor cases from the 1890s to the early 1920s can only partly be explained by the reality of labor violence which at times existed outside the courtroom.²⁷ Much of the so-called labor violence throughout the early history of the American labor movement was a response to direct acts of violence against workers by employers and their agents, detectives, police, militia, and federal troops, as well as to the more diffuse structural violence of the workplace. The debate about whether worker violence at any particular time and place was rational or irrational, offensive or defensive, purposive or situational, coherent or random, justifiable or indefensible, depends on the facts and one's own social vision. I do not wish to enter the debate about either the causation of real worker violence or the justifications for it. I want instead to show how images of worker violence were created and used by several judges to shape legal doctrine independent of underlying factual events.²⁸ In the process of such image making, these judges often separated the idea of worker violence from the reality of worker violence, and thereby avoided confronting legal and moral questions of causation and justification. Thus the image of the violent male worker became part of a code language that expressed more abstract concepts and meanings. The code words—words that connoted the fear of worker violence—appear to have been used by some judges with the understanding that they would be read and heard by an audience whose shared political and economic views would enable them to decipher other levels of meaning.²⁹

26. *Contra* A. THIEBLot & T. HAGGARD, *supra* note 12.

27. *See, e.g.*, Taft & Ross, *American Labor Violence: Its Causes, Character, and Outcome*, in 1 *VIOLENCE IN AMERICA: HISTORICAL AND COMPARATIVE PERSPECTIVES* 221 (H. Graham & T. Gurr eds. 1969).

28. *See, e.g.*, C. SUMMERS, H. WELLINGTON & A. HYDE, *CASES AND MATERIALS ON LABOR LAW* 186-89 (2d ed. 1982).

29. By "code words" I do not mean to imply a contrived conspiratorial language with secret

In the labor cases discussed in this Article, a debate emerged among judges over whether violence was inevitable in all labor activity, just in certain situations, or just in the case before the court. If violence was found or presumed, could it be controlled and who should control it? The focus on violence masked the issues which were at the heart of the debate: What assumptions should a court make about the nature of employees, their forms of political expression, and the effectiveness of their economic power? During this period, judicial doctrine and legislative enactments dealing with labor picketing and secondary boycotts displayed tensions and contradictions which are symptomatic of American labor law even today.³⁰ The judges who have used images of worker violence in labor cases have, over time, both drawn from and contributed to shared cultural perceptions that danger lurks in the picket line.³¹ Furthermore, the power of images of violence to shape judicial decision making and to be manipulated by judicial decision makers is as real today as it was in

meanings. What I will attempt to demonstrate is that the invocation of images of violence was used to suggest notions of economic harm to property interests, civil and social disorder, socialism, communism, and anarchy. The power of such code language is that it translates complex and abstract ideas into terms that are accessible and readily communicated to others.

30. Labor picketing and boycott activity are today so circumscribed with rules and limitations, both explicit and implicit, both externally imposed and self-imposed, that they are no longer as effective a means of expression or economic persuasion as they once were. Part of the agenda of the New Deal labor legislation was to channel collective action into "orderly and peaceful" mechanisms for resolution of disputes involving interstate commerce. See National Labor Relations Act (NLRA), ch. 372, § 1, 49 Stat. 449 (1935) (codified at 29 U.S.C. § 151 (1982)); Norris-LaGuardia Act, ch. 90, § 2, 47 Stat. 70 (1932) (codified at 29 U.S.C. § 102 (1982)). Numerous judicial decisions have limited the scope of picketing and strike activity under the National Labor Relations Act of 1935 because of violence. See, e.g., *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240 (1939) (holding that the sit-down strike is unprotected activity). Congress outlawed the secondary boycott in the 1947 Taft-Hartley Amendments to the National Labor Relations Act (NLRA). Labor Management Relations (Taft-Hartley) Act, ch. 120, § 8, 61 Stat. 141 (1947) (codified at 29 U.S.C. § 158(b)(4) (1982)). In the 1959 Landrum-Griffin Amendments to the NLRA, Congress imposed limits on the ability of unions to engage in recognitional and organizational picketing. Landrum Griffin Labor Reform Act, Pub. L. 86-257, tit. VII, §§ 704(a)-(c), § 705(a), 73 Stat. 542-45 (1959) (codified as amended at 29 U.S.C. § 158(b)(7) (1982)).

31. I believe that this shared perception has contributed to the decline of unionism in the United States today and, in part, explains the paradox that the American labor movement has been both more militant and more conservative than its European counterparts. See P. EDWARDS, *STRIKES IN THE UNITED STATES, 1881-1974*, at 3 *passim* (1981). Although a comparative study of the role of American and European judicial attitudes toward violence in labor picketing would be appropriate to address fully my assertion here, it is beyond the scope of this Article. Edwards and others have attempted to describe and account for "American exceptionalism"—the distinct ways in which the development of the American labor movement has differed from the development of labor unions in Western European countries. *Id.* at 219-53. My purpose here is to add another small piece to the puzzle of "American exceptionalism" and to leave to others to determine whether this piece fits well within the body of comparative law.

the late nineteenth and early twentieth century. Although this Article will not explore the modern manifestations of the imagery of violence in labor law, much can be learned from the way in which the images of the violent worker in the early judicial opinions came to assume legitimacy in the legal regulation of the economic activity, and thus power, of unions.

The exploration of these themes begins in Part II where I discuss some of the reasons that employers, who sought legal intervention as a means of resolving labor disputes in the decades spanning the turn of the century, often preferred the jurisdiction of federal courts over state courts. In particular, in the 1890s the federal antitrust laws greatly expanded the possible bases of federal jurisdiction, and when coupled with the equitable remedy of the injunction, became the most significant employer weapon in labor disputes.

Part III focuses on an 1894 decision, *In re Phelan*,³² written by a young federal judge, William Howard Taft. The *Phelan* case was the result of a contempt trial of a labor leader who had violated a federal injunction in the Pullman strike. This case is significant for two reasons: It prefigures the analysis of the role of violence and economic coercion in federal labor cases over the next three to four decades, and it was written by a man whose presence and attitudes came to dominate federal politics and the federal judiciary from 1908 until the end of the 1920s.³³

In Part IV, I analyze the images of violence in two Massachusetts labor cases—*Vegelahn v. Guntner*³⁴ and *Plant v. Woods*³⁵—to demonstrate representative attitudes of state court judges. These cases articulate the common law analysis of labor activity which provided much of the conceptual framework for the federal labor cases brought under the federal antitrust laws. *Vegelahn* and *Plant* are particularly important because in both cases Oliver Wendell Holmes wrote influential dissenting opinions which formed the analytical framework for his later opinions and dissents in Supreme Court labor cases.

The Supreme Court's use of images of violence in the regulation of labor disputes under the federal antitrust laws and federal common law are examined in Part V, in the secondary boycott cases, *Loewe v. Lawlor*³⁶ and *Duplex v. Deering*,³⁷ and in Part VI in the labor picketing

32. *Thomas v. Cincinnati, N.O. & T.P. Ry. (In re Phelan)*, 62 F. 803 (C.C.S.D. Ohio 1894).

33. William Howard Taft was President of the United States from 1909 to 1913 and Chief Justice of the United States Supreme Court from 1921 to 1929. See *infra* note 73.

34. 167 Mass. 92, 44 N.E. 1077 (1896).

35. 176 Mass. 492, 57 N.E. 1011 (1900).

36. 208 U.S. 274 (1908).

37. *Duplex Printing Press Co. v. Deering*, 254 U.S. 443 (1921).

cases, *American Steel Foundries*³⁸ and *Truax v. Corrigan*.³⁹ In these cases, two other men emerge as pivotal judicial figures—the conservative, Justice Mahlon Pitney, and the liberal, Justice Louis Brandeis—who join Chief Justice Taft and Justice Holmes in articulating the boundaries of collective action of workers.

In my conclusion, in Part VII, I bring together the strands of judicial doctrine, language, and perceptions as they were interwoven in both state and federal cases—from common law restraint of trade, to protection of property in federal receivership, to protection of interstate commerce under the federal antitrust laws. The exposition of these labor cases, as well as the portrayal of the ideas of the judges who wrote them, illustrates the relationship of the imagery of the violent worker to the legal regulation of the economic coercion of the picket line and the secondary boycott.

II. THE FEDERAL COURTS AND FEDERAL INJUNCTIONS

A. *Judicial Attitudes about Labor Violence—*

“No such thing as peaceful picketing”

For nearly half a century following the passage of the Sherman Anti-Trust Act in 1890,⁴⁰ the federal courts and, ultimately, the Supreme Court had numerous occasions to comment on labor violence and the role of labor picketing and boycotting under the federal antitrust laws. The fear of labor violence, real or imagined, was an important theme running through the federal antitrust cases of the period. The consequence of much of the doctrinal development under the Sherman Act and the Clayton Act of 1914⁴¹ was that for many years the federal antitrust laws were used to police and punish labor activity that was either actually violent or perceived by judges to threaten violence. And, indeed, federal injunctions and treble damage awards frequently proved to be more effective against labor organizations than state civil and criminal sanctions.

The preoccupation with violence was evident in the paradigmatic images of workers which were injected into the discourse of the federal antitrust cases. Again and again, these images were used to explain and

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

39. 257 U.S. 312 (1921).

40. Sherman Act, ch. 647, § 1, 26 Stat. 209 (1890) (codified at 15 U.S.C. § 1 (1982)) [hereinafter Sherman Act].

41. Clayton Act, ch. 323, 38 Stat. 730-40 (codified at 15 U.S.C. §§ 12-27 (1982 & Supp. IV 1986)).

justify restraints on union activity. The judges' apparent concerns about protecting persons and property from physical harm and damage, traditionally a function of state laws and courts, sometimes shaped their economic analysis of the federal antitrust laws. Economic harm became blurred with physical harm; peaceful economic coercion became synonymous with coercion through violence. The talk of violence both masked and revealed the judges' real fears: fears of greater union strength and autonomy, of class warfare, of anarchy, of loss of control, of change.

Many on the federal bench shared a deep distrust of any form of collective action by workers, but picket lines and boycotts became the objects of special opprobrium.⁴² Typical of the views of many federal judges, were the attitudes expressed in District Judge McPherson's description of picketing in the 1905 case of *Atchison T. & S.F. Railway v. Gee*:

This picketing is done by details of pickets At all hours when men are going to and from work, morning, noon, and evening, the workmen must go through and by pickets, sometimes two, four, six, and more, at a place. At times the paths and walks are obstructed. At times the pickets are near by, making grimaces, and at times acting as if violence were intended, and at times uttering profanity and vulgarity. There is and can be no such thing as peaceful picketing, any more than there can be chaste vulgarity, or peaceful mobbing, or lawful lynching. When men want to converse or persuade, they do not organize a picket line.⁴³

For engaging in such picketing, four workmen were found guilty of contempt of an earlier injunction, issued by the same judge, restraining them from intimidating strikebreakers. Judge McPherson justified his punishment of the contemnors on the basis that "this court has a concern that peace and quiet prevail, and that a state of serfdom shall not exist, by a so-called system of 'picketing' of one crowd of men over another."⁴⁴

Despite his disapproval of the union's methods, even Judge McPherson had to acknowledge

[t]hat the employees have the legal right to [quit or strike at pleasure, and the company the legal right to discharge at pleasure, simple as the proposition is, is too often forgotten. And that the employees have the legal right to

42. See, e.g., *Hopkins v. Oxley Stave Co.*, 83 F. 912, 917, 921 (8th Cir. 1897); *Oxley Stave Co. v. Coopers' Int'l Union*, 72 F. 695, 699 (C.C.D. Kan. 1896); *Farmers' Loan & Trust v. Northern Pac. R.R.*, 60 F. 803, 821 (C.C.E.D. Wisc. 1894); *Casey v. Cincinnati Typographical Union*, 45 F. 135, 143, 146 (C.C.S.D. Ohio 1891). For a discussion of the persistent hostility of federal and state court judges toward picketing well into the mid-twentieth century, see Jones, *Picketing and Coercion: A Jurisprudence of Epithets*, 39 VA. L. REV. 1023 (1953).

43. 139 F. 582, 584 (C.C.S.D. Iowa 1905).

44. *Id.* at 585.

organize and maintain a union is equally simple, but just as often forgotten by many. No court, federal or state, nor, indeed, any informed man, longer denies the foregoing.⁴⁵

But the right to organize a union and to strike was meaningless if the strikers' jobs were taken by strikebreakers. Such "rights" were even more hollow when, as in the case before Judge McPherson, the employer discharged his union employees through a lockout and hired nonunion employees in their places, as a means of warding off a threatened strike. Yet the legality of the employer's behavior was not the technical question before Judge McPherson's court, and he pretended not to be deciding "[w]ho is in the right and who is in the wrong," while doing precisely that.⁴⁶

B. *The Abuses of the Labor Injunction—
"Government by injunction"*

The attractions of federal jurisdiction were considerable for employers engaged in blocking union activities. Not only did federal substantive law provide remedies and theories of liability unavailable in some state courts, but enforcement of federal injunctions permitted the use of United States marshals, and in appropriate cases, presidential authorization of the use of federal troops. Since the local police force or militia might be ineffective or sympathetic to union organizers—and less than diligent in enforcing the peace during outbreaks of violence—the United States marshals and federal troops could be expected to carry out the rule of law efficiently and professionally.⁴⁷

Federal judges were not insensitive to the delicate balance of local political power which might diminish the usefulness of local police and local courts to unpopular, union-busting employers. Often federal judges were more than willing to use the power and authority of the federal courts to aid employers in altering the local balance of power. For example, in the *Atchison* case, the local authorities apparently ignored the union's picketing because there had been no physical violence. Nevertheless, Judge McPherson observed that

there would not have been the slightest occasion for bringing this case, had

45. *Id.* at 582. Quotations in this Article have been modified to use the contemporary spelling of "employee."

46. *Id.*

47. See J. COOPER, *THE ARMY AND CIVIL DISORDER: FEDERAL MILITARY INTERVENTION IN LABOR DISPUTES, 1877-1900*, at 5-11, 25 (1980). In an address to the 1894 graduating class of Michigan Law School, Taft stated, "In several states the open sympathy of peace officers with law-breaking strikers has been most demoralizing to the cause of order." Taft, *supra* note 24, at 228-29.

there been any sincerity and honesty of purpose by the local authorities to maintain peace and order. Intimidation, force, violence, and brutality were all winked at, because of the belief on the part of certain peace officers that they would be kindly remembered on future election days . . .⁴⁸

While the local police "winked at" the picketing, the federal court condemned it for its inherent brutality and vulgarity. Rejecting the possibility of peaceful picketing, Judge McPherson relied on the injunction to serve a police function.

The injunction was a formidable weapon against unions. As Frankfurter and Greene documented in *The Labor Injunction*, employers could obtain temporary restraining orders in federal and state courts swiftly, ex parte, without notice or hearing, and often on the strength of bare allegations in a complaint, unsubstantiated by affidavits.⁴⁹ Notice and an opportunity to be heard would come at a later proceeding, at the time of issuance of a temporary or preliminary injunction, and a full hearing before a judge would be required for issuance of a permanent injunction.⁵⁰ By the time these later proceedings could be brought, however, the temporary restraining order frequently would have effectively defeated the union activity, obviating the need for legal intervention. Some restraining orders became permanent or "perpetual" injunctions, barring, in perpetuity, named defendants—union officials and employees—from engaging in proscribed activity against the plaintiff employer.

Federal judges often used contempt trials to enforce their equity jurisdiction over labor.⁵¹ Persons brought before the court for contempt proceedings, for violation of a temporary restraining order, or a preliminary or final injunction, had to face the same judge who issued the decree and risk punishment "at the discretion of the judge" ranging from "a substantial fine to months in jail."⁵² Justice Brandeis used the occasion of his dissent in *Truax v. Corrigan* to describe the consequences of "government by injunction":

Charges of violating an injunction were often heard on affidavits merely, without the opportunity of confronting or cross-examining witnesses. Men found guilty of contempt were committed in the judge's discretion, without either a statutory limit upon the length of the imprisonment, or the opportunity of effective review on appeal, or the right to release on bail pending

48. 139 F. at 583.

49. F. FRANKFURTER & N. GREENE, *THE LABOR INJUNCTION* 53-55 (1930).

50. *Id.* at 54.

51. *See id.* at 231 app. I (listing contempt proceedings and convictions in 118 federal cases during the early decades of the twentieth century).

52. *Id.* at 58.

possible revisory proceedings. The effect of the proceeding upon the individual was substantially the same as if he had been successfully prosecuted for a crime; but he was denied . . . those rights which by the Constitution are commonly secured to persons charged with a crime.⁵³

Through the use of injunctions and contempt proceedings, criminal remedies were imposed in instances where they could not be successfully obtained on the basis of violations of statutes or common law crimes. The equity courts became, in effect, a police arm of the state, and the threat of incarceration for contempt added persuasive authority to injunctions.

For the individual worker or union official, this threat could have deep, personal significance, as Eugene Debs and other labor leaders learned in 1894 when the United States government used the Sherman Act to defeat the Pullman boycott.⁵⁴ Debs was convicted under an "omnibus injunction"⁵⁵ which prohibited, among other activities, compelling or inducing "by threats, intimidation, persuasion, force, or violence" any employees of "said railroads" to "refuse or fail to perform any of their duties" or "to leave the service of such railroads."⁵⁶ Despite the fact that Eugene Debs and the other leaders of the American Railway Union directing the strike "had been repeatedly cautioning the strikers against any form of violence or intimidation," isolated episodes of violence broke out as the strike spread to railyards across the country.⁵⁷ Although the

53. 257 U.S. at 366-67; see *also id.* at 366 n.34 (listing articles cited by Brandeis concerning the evils of "government by injunction").

54. Debs was imprisoned for six months for contempt of an injunction brought under the Sherman Act. *United States v. Debs*, 64 F. 724 (C.C.N.D. Ill. 1894). The injunction was upheld in the Supreme Court on the different and broader grounds that the United States government had power to remove obstructions to the free passage of interstate commerce and the mails. *In re Debs*, 158 U.S. 564 (1895). Historian Robert V. Bruce noted that ex-President Rutherford B. Hayes in the mid-1880s reflected upon the growing power of the railroads and corporations,

[a]nd . . . came to the conclusion that "the governmental policy should be to prevent the accumulation of vast fortunes; and monopolies, so dangerous in control, should be held firmly in the grip of the people." By 1894, John Sherman's antitrust act was on the books. Its first great triumph was now at hand—sending Eugene Debs to prison.

R. BRUCE, 1877: YEAR OF VIOLENCE 320 (1959) (quoting 4 DIARY AND LETTERS OF RUTHERFORD BIRCHARD HAYES 383 (C. Williams ed. 1925)).

55. Arnold Paul noted that "[t]he Debs injunction, later to be known as the 'omnibus injunction,' occasioned surprise at the time for its breadth and scope and has been considered by many historians as unprecedented." A. PAUL, CONSERVATIVE CRISIS AND THE RULE OF LAW: ATTITUDES OF BAR AND BENCH, 1887-1895, at 139 (1960). For an account of the Debs litigation, see *id.* at 131-58.

56. The injunction is reprinted in F. FRANKFURTER & N. GREENE, *supra* note 49, at 253, 254-55 app. IV. See also A. PAUL, *supra* note 55, at 139-40.

57. A. PAUL, *supra* note 55, at 140; see N. SALVATORE, EUGENE V. DEBS: CITIZEN AND SOCIALIST 132-33 (1982); see also *United States v. Debs*, 64 F. 724, 757-62 (C.C.N.D. Ill. 1894), *aff'd sub nom.* *In re Debs*, 158 U.S. 564 (1895).

police had been able to maintain control in the Chicago railyards, and the state militia had not been called out, President Cleveland sent in federal troops on July 4, 1894, over the Illinois governor's objections.⁵⁸ The death and violence that ensued is a well-known chapter in labor history. During the succeeding weeks as the strike collapsed in disarray, Debs was arrested twice, eventually convicted, and sentenced to six-months imprisonment for contempt of court.⁵⁹

The United States Strike Commission, which President Cleveland appointed in late July of 1894, reported that the responsibility for most of the strike violence lay with the railroad companies, not the strikers.⁶⁰ But Circuit Judge Woods found Debs and others to be in contempt of court because, through their leadership of the strike, they had encouraged "threats, violence, and other unlawful means of interference with the operations of the roads."⁶¹ Judge Woods wrote:

Strikes by railroad employees . . . have been attended generally, if not in every instance, with some form of intimidation or force. . . . Under the conditions of last summer, when there were many idle men seeking employment, it was impossible that a strike which aimed at a general cessation of business upon the railroads of the country should succeed without violence; and it is not to be believed that the defendants entered upon the execution of their scheme without appreciating the fact, and without having determined how to deal with it.⁶²

The assumptions that railroad strikes were inherently violent, particularly in times of depression and high unemployment, and that the violence that ensued during strikes was the responsibility of the strike leaders, posed a serious dilemma for union organizers at the turn of the century. Successful strikes required a high degree of organization, expert management, and strong leadership. Some union leaders recognized that union-instigated violence was antithetical to the strike objectives and might lead to charges of criminal and tort liability.⁶³ Thus labor violence that occurred during strikes could be in defiance of explicit union directives, and could occur spontaneously, sporadically, and in response to

58. A. PAUL, *supra* note 55, at 140-41; see also G. CLEVELAND, *THE GOVERNMENT IN THE CHICAGO STRIKE OF 1894*, at 40-41 (1913), reprinted in *THE PULLMAN STRIKE* (L. Stein ed. 1969).

59. *United States v. Debs*, 64 F. 724.

60. A. PAUL, *supra* note 55, at 153.

61. *United States v. Debs*, 64 F. at 765.

62. *Id.* at 757. See A. PAUL, *supra* note 55, at 154; see also *id.* n.44 (listing additional cases arising out of the Pullman strike which also applied the Sherman Act to labor).

63. See *United States v. Debs*, 64 F. at 759-60; see also R. GINGER, *EUGENE V. DEBS: A BIOGRAPHY* 139, 153-62 (1949); 2 S. GOMPERS, *SEVENTY YEARS OF LIFE AND LABOR: AN AUTOBIOGRAPHY* 174-75 (1925).

what were perceived as acts of provocation by employers, their private guards and strikebreakers, the police, state militia, or federal troops. In fact, in some violent labor episodes such as the Pullman strike, many of the participants in the violence were not union members or employees.⁶⁴ The paradox for union leaders was that the more they assumed leadership over strikes and attempted to curb violent behavior, the more they became responsible for any violence that occurred. Responsibility inevitably meant culpability. The blame for all violence was placed on the most effective and powerful union leaders, not on the immediate events that precipitated the violent events, nor certainly on the general social and economic conditions that caused the workers to strike in the first place. Thus, ironically, strikers whose leaders were jailed on contempt charges may have been more prone to violent and irresponsible behavior, in part because of their lack of direction and organization, in part because of their frustration with the futility of peaceful methods.⁶⁵

Whether the particular strike or picketing activity was peaceful and orderly, or violent and disorderly, the bills of complaint requesting the equitable relief, and the restraining orders and injunctions issued in response, often contained formulaic recitations that violence had occurred or was threatened.⁶⁶ It was not necessary to prove that workers or union organizers were responsible for actual acts of violence, or even credible threats of violence.⁶⁷ The assumption that violence was "inevitable" in a strike, or "inherent" in a picket line, was a sufficient basis for issuing injunctions against workers and their union leaders. The assumption was not, however, universal. The parameters of the debate were revealed in a contempt case decided in 1894 by a federal court judge who later became president and then chief justice of the United States.

64. Samuel Gompers wrote of the Pullman boycott that "[e]ven papers that had never been friendly to labor conceded that no effort was spared to precipitate violence and then to give the impression it was due to strikers. Thus an opportunity was created for sending in troops." 1 S. GOMPERS, *supra* note 63, at 408. See generally S. BUDER, *PULLMAN: AN EXPERIMENT IN INDUSTRIAL ORDER AND COMMUNITY PLANNING, 1880-1930*, at 180-85 (1967).

65. See, e.g., J. COOPER, *supra* note 47, at 5-6.

66. F. FRANKFURTER & N. GREENE, *supra* note 49, at 61-65.

67. Bills of complaint were rarely accompanied by supporting affidavits and a majority of restraining orders "were granted without notice to the defendants or opportunity to be heard." *Id.* at 64.

III. FEDERAL JURISDICTION OVER RAILROADS IN RECEIVERSHIP: JUDGE TAFT AND THE *PHELAN* CASE

A. Introduction—"A kind of police court"

By the time of the Pullman strike in 1894, the federal courts had issued numerous injunctions in railway labor disputes in cases that did not require the innovative assertion of jurisdiction under the Sherman Act.⁶⁸ The recurring economic problems of the early 1890s had forced many railroads into receivership. As custodians of the assets of the railway corporations which were held in trust by court-appointed receivers, federal judges, sitting in equity, had jurisdiction over the operation of the railroads and the protection of railroad property. When labor unrest developed, the receivers often found it expedient to petition the courts for injunctions either to break up strikes or as a form of insurance against disabling strikes which were anticipated.⁶⁹ Given the obligation of the federal courts to protect the corporate assets under their jurisdiction from "irreparable mischief"⁷⁰—which could mean either physical harm to railroad property or economic harm to railroad interests—the "blanket injunctions"⁷¹ were generally granted in the sweeping form requested.

One such receivers' petition for equitable relief resulted in a decision, *Thomas v. Cincinnati, N.O. & T.P. Railway*—known as *In re Phelan*⁷²—by William Howard Taft.⁷³ Judge Taft's views are particularly noteworthy because he later wrote, as chief justice, the majority opinions in two significant Supreme Court cases in which key assumptions about

68. See F. FRANKFURTER & N. GREENE, *supra* note 49, at 23 & n.98.

69. See, e.g., A. PAUL, *supra* note 55, at 117-22 (discussing *Farmers' Loan & Trust v. Northern Pac. R.R.*, 60 F. 803 (C.C.E.D. Wisc. 1894)).

70. *Arthur v. Oakes*, 63 F. 310, 312 (7th Cir. 1894).

71. See A. PAUL, *supra* note 55, at 118 n.30.

72. 62 F. 803 (C.C.S.D. Ohio 1894).

73. In 1892, after serving as a judge of the Superior Court of Ohio and solicitor general of the United States, William Howard Taft was appointed judge of the United States Court of Appeals for the Sixth Circuit. As president from 1909 to 1913, Taft continued the aggressive trust-busting under the Sherman Act that President Roosevelt had initiated. See 1 H. PRINGLE, *THE LIFE AND TIMES OF WILLIAM HOWARD TAFT* 144 (1939). In 1921, President Warren G. Harding nominated Taft as chief justice. Taft served in that position until illness forced his departure in December 1929. He formally resigned on February 3, 1930, and died shortly thereafter. 2 *id.* at 1078-79.

In this Article, I use Taft as a representative judicial figure of the period. I do so in part because of his prominence as an author of judicial opinions and also because of his available writing, as both judge and politician, on legal matters, including the politics of law. It is, of course, risky and difficult to claim that his views were typical, but they were widely disseminated and heard. And they were influential to the extent he occupied important public positions. Historians often use representative figures to help capture historical periods and images, and I assume the risks of doing so here.

labor violence were articulated: *American Steel Foundries v. Tri-City Central Trades Council*⁷⁴ and *Truax v. Corrigan*.⁷⁵ The 1894 railroad receivership case foreshadows the later Supreme Court cases and reveals the struggle of one judge to define the legality of collective action by workers and the role of violence in the federal law then governing labor activity.

In the last week of June in 1894, while Judge Taft, a member of the Sixth Circuit, was sitting as a district judge for the Southern District of Ohio, he watched the American Railway Union, through its leadership of a rail strike and boycott of all trains carrying Pullman cars, "tie up" the railroads of Cincinnati and "paralyze all traffic of every kind" in and out of Cincinnati.⁷⁶ As part of the "Debs Rebellion," the railway strike and boycott in Cincinnati, as in other locations in the West and Midwest, prompted swift responses to the receivers' petitions by the federal judiciary. Because of the fortuitous circumstance that the Cincinnati, New Orleans & Texas Pacific Railway Company, "more commonly known as the Cincinnati Southern Railroad,"⁷⁷ happened to be in receivership under federal court jurisdiction, the receiver petitioned the court, on July 2, for assistance in stopping the strike. Within one day, Judge Taft had the strike leader, F.W. Phelan, arrested for conspiracy to interfere with the court receiver's operation of the railroad. On July 5th, Phelan began his trial for contempt of court.

For a week, Judge Taft heard testimony and took evidence in the contempt proceedings against Phelan, the American Railway Union official who had been sent to Cincinnati by Debs to organize and supervise the local trainmen in their strike and boycott efforts. Phelan was accused of having conspired with Debs to "tie up" the Cincinnati Southern Railroad, "and other roads in the western states" until demands of the Pullman Palace Car Company employees for reinstatement of strikers and higher wages were met.⁷⁸ He was also accused of inciting and directing the strike against the railroad, and of making "inflammatory speeches" to railroad employees, urging them "to quit the service of the receiver" and "prevent others from taking their places, by persuasion if possible, by clubbing if necessary."⁷⁹

74. 257 U.S. 184 (1921).

75. 257 U.S. 312 (1921).

76. *Thomas v. Cincinnati, N.O. & T.P. Ry. (In re Phelan)*, 62 F. 803, 812-13 (C.C.S.D. Ohio 1894).

77. *Id.* at 805.

78. *Id.*

79. *Id.*

Phelan, however, denied that he was "in any sense responsible for the strike of the receiver's employees . . . or for the paralysis of business which followed."⁸⁰ He claimed repeatedly and "with much emphasis" that he "at no time advised any man to strike."⁸¹ Although he admitted he was directed to be in Cincinnati during the time of the boycott, Phelan placed a different, more benevolent interpretation on his activities. Taft wrote concerning Phelan's testimony that

[h]e says that he came here with no direction except to visit the employees of the Pullman Company at a branch factory at Ludlow, to explain to them the merits of the controversy between their employer and their fellows at Chicago, and then, if they struck, to see that they appointed committees who should keep order among them, and look after the sick [B]ut he strenuously denies he was here for the purpose of laying on the boycott or inciting a general strike. He would have the court believe that what occurred was wholly spontaneous, and not through his agency, and that his business was, if there should be such coincidental spontaneity resulting in a strike; to prevent disorder, and to look after the sick.⁸²

Taft rejected Phelan's characterization of his activities, finding his testimony "evasive and wanting in sincerity."⁸³ He also disbelieved the versions of events given by the railroad employees who testified in Phelan's behalf. Taft commented that the employees "show nothing save that their loyalty to their chief is greater than their regard for the sanctity of their oaths."⁸⁴ He went on to note that "nearly all" of Phelan's witnesses "would have the court believe that Phelan was merely a peacemaker in this community, with no responsibility for the strike, and no purpose to incite it or continue it."⁸⁵

This was a world seen from two startlingly different perspectives. The events of the summer of 1894 were careening out of control, and the general strike and boycott in the Cincinnati railroads were a response to far more than the words of one man, or two. To the trainmen, Phelan was a sort of peacemaker, a person who could bring order and clarity out of the chaos and confusion which they experienced during those years of economic dislocation. In a way, too, it was not Phelan's strike; it was their strike. They could not have viewed themselves as mere pawns in a sinister conspiracy between Phelan and Debs. Rather, they almost cer-

80. *Id.* at 809.

81. *Id.*

82. *Id.* at 808.

83. *Id.* at 814.

84. *Id.* at 810.

85. *Id.*

tainly viewed themselves as people of will who had taken responsible actions to help improve the working conditions of members of their union—the Pullman Company employees.⁸⁶ Although Phelan had given the Cincinnati railway workers information, direction, and leadership, they had not responded out of fear and irrationality, but out of understanding and reason. They recognized the argument for the economic interdependence of working people and the importance of union solidarity. They were attempting to assert their notion of community through their participation in the strike and the boycott of the Pullman cars.⁸⁷

Taft was deeply disturbed by the Phelan contempt trial and his own judicial role as protector of the Cincinnati Southern Railway property. Privately he revealed his views of Phelan and the Pullman boycott in correspondence with his wife, Helen Herron Taft—Nellie—who was staying at the Taft summer residence in Canada. He wrote:

[W]hat has worried me more than anything else is this railway boycott. I have a force of fifty deputy marshals on one side of the river and of seventy-five on the other. Men are constantly being arrested and brought before me and I am conducting a kind of police court. I issued a warrant for Phelan, the head strike man here and Debs's assistant, and he was brought in yesterday afternoon. All the labor men are engaged in holding meetings every night. Last night . . . I was the object of fiery denunciations in many meetings. I hate the publicity that this business brings me into.⁸⁸

From Canada, Helen Taft expressed intense interest in the outcome of the *Phelan* case, which she had followed in the newspapers. She wrote her husband, "It was so exciting I could not read fast enough . . . I shall be so anxious to hear what you will do about Phelan."⁸⁹ Historian Judith Icke Anderson has written the following account of Taft's letters to his wife during the Phelan trial:

[H]e wrote to Nellie, . . . "The situation in Chicago is very alarming and distressing and until they have had much bloodletting, it will not be better." When word came that thirty men had been wounded by federal troops, he wrote coldly that "though it is bloody business, everybody hopes that it is

86. See N. SALVATORE, *supra* note 57, at 137 (discussing Debs's view of the Pullman boycott as a "practical exhibition of sympathy").

87. See, e.g., Zieren, *The Labor Boycott and Class Consciousness in Toledo, Ohio*, in LIFE AND LABOR: DIMENSIONS OF AMERICAN WORKING CLASS HISTORY 131, 134 (C. Stephenson & R. Asher eds. 1986).

88. Letter from William Howard Taft to Helen Herron Taft (July 1894), *quoted in* 1 H. PRINGLE, *supra* note 73, at 135.

89. Letter from Helen Herron Taft to William Howard Taft (July 1894), *quoted in* J. ANDERSON, WILLIAM HOWARD TAFT: AN INTIMATE HISTORY 64 (1981).

true There are a lot of sentimentalists who ought to know better, who allow themselves to sympathize with the wild cries of socialists." In another letter Taft told Nellie: "They have killed only six of the mob as yet. This is hardly enough to make an impression."⁹⁰

Taft's biographer, Henry Pringle, recounted that "[o]n the eve of Phelan's trial, Judge Taft was troubled by no doubts as to the man's guilt. 'I do not know,' he told his wife, 'just what the evidence . . . will show, but I am pretty sure he will have to be found guilty from his own published utterances.'" ⁹¹ While Taft was "a good deal in doubt" about what he "ought to do" with Phelan, he expressed to his wife his desires "not . . . to make a martyr of him nor . . . to be so easy with him as to encourage him or his fellow conspirators to think that they have nothing to fear from the court."⁹²

Taft's public judicial observations, however, were only slightly more restrained than his private comments to his wife. In his opinion deciding Phelan's fate, he presented the labor leader as an outsider and a troublemaker, a threat to the community. Perhaps recalling the bloody nationwide railway strike of 1877,⁹³ Taft wrote that "[t]he gigantic character of the conspiracy of the American Railway Union staggers the imagination."⁹⁴ According to Taft, the local trainmen were "incited" by Phelan to strike, and prevented from returning to work by his "secret terrorism."⁹⁵ Far from being responsible for their own actions, they were manipulated and terrified into responding to Phelan's commands. Their claim that they boycotted the Pullman cars out of sympathy for the situation of the Pullman strikers or out of shared economic interests was illogical to Taft because "there was no natural relation between Pullman and the railway employees."⁹⁶

Judge Taft's views of Phelan's role in the strike, the functioning of "secret terrorism" through threatened violence, and ultimately, the illegitimacy of the strike and boycott, were developed through his analysis of three questions. The first two were questions of fact, the last a question of law. First, was Phelan sent to Cincinnati by Eugene Debs and the

90. *Id.* at 63.

91. Letter from William Howard Taft to Helen Herron Taft (July 4, 1894), *quoted in* 1 H. PRINGLE, *supra* note 73, at 135.

92. Letter from William Howard Taft to Helen Herron Taft (July 4, 1894), *quoted in* 1 H. PRINGLE, *supra* note 73, at 135-36.

93. *See, e.g.,* R. BRUCE, *supra* note 54.

94. *Phelan*, 62 F. at 821.

95. *Id.* at 805, 815.

96. *Id.* at 820.

American Railway Union to enforce a boycott of Pullman cars by inciting a general strike of all Cincinnati railway employees, including the employees of the Cincinnati Southern which he knew was in the hands of the court receiver? Second, did Phelan advise "intimidation, threats, or violence in carrying out the boycott"⁹⁷ in any of the speeches which he gave to railway employees and local union officials? Third, "[t]he real question," was "whether the act of Phelan in instigating and inciting the employees of the receiver to leave his employ was without lawful excuse, and therefore malicious."⁹⁸

B. *The Outsider as Instigator of the Strike—*
"Knock it to them hard as possible"

In responding affirmatively to the first question regarding Phelan's responsibility for the general railway strike in Cincinnati, Judge Taft did not have to rest his finding of fact on just the lack of credibility of the union's witnesses and his own assumptions about Phelan's role in inciting and continuing the strike. From a series of telegrams exchanged between the two union officials, Taft also had evidence of the relationship between Debs and Phelan, and Phelan's own view of his functions in Cincinnati:

Debs to Phelan:

"June 27, 1894.

"Indications are that all western lines will be tied up solidly before sunset to-day."

Phelan to Debs:

"June 28, 1894.

"I cannot keep others out if Big Four is excepted. The rest are emphatic on all together or none. The tie-up is successful."

Debs to Phelan:

"June 29, 1894.

"About 25 lines now paralyzed. More following. Tremendous blockade."

Debs to Phelan:

"July 2, 1894.

"Knock it to them hard as possible. Keep Big Four out, and help get them out at other places."

Phelan to Debs:

"July 2, 1894.

"Going out all around. Firemen a unit. Will soon be an avalanche to us. Working outside points."

Debs to Phelan:

97. *Id.* at 813.

98. *Id.* at 816.

“July 2, 1894.

“Hold Big Four solid. Going out to-day at every point. Gaining ground rapidly.”

Debs to Phelan:

“July 2, 1894.

“Advices from all points show our position strengthened. Baltimore and Ohio, Pan Handle, Big Four, Lake Shore, Erie, Grand Trunk, and Mich. Central are now in fight. Take measures to paralyze all those that enter Cincinnati. Not a wheel turning on Grand Trunk between here and Canadian Line.”⁹⁹

This was indeed, as Taft wrote, a strike of “gigantic character.”¹⁰⁰ For Debs, Phelan, and the striking trainmen, the strike was empowering. It was at once an act demonstrating the strength, solidarity, and vitality of their fledgling union and an act affirming their determination to alleviate the miserable working conditions of some of the most vulnerable members of their class. For Taft, the strike was disabling, a threat to the order and hierarchy of society. It was nothing less than “the starvation of a nation”¹⁰¹ by cutting the supply lines of food and goods. The disjunction between the two perspectives grew out of different understandings of the immediate and ultimate goals of the union activity.

Given the existence of the strike, its massive scale, and Phelan’s clear leadership role in coordinating the Cincinnati boycott with the boycott in other locations, as well as Taft’s view of the malevolence of the strike, it is inconceivable that Taft would not have found Phelan responsible for inciting the strike. The business community of Cincinnati needed a scapegoat, and Judge Taft needed to assert the authority of the federal courts and the primacy of law and order. It would have been politically unwise and pragmatically difficult to institute civil or criminal proceedings against the large number of local trainmen who played a crucial role in the strike. Those who in fact participated in sporadic incidents of violence may have been impossible to identify, much less convict of criminal conduct. The railroad employers had, in any event, imposed their own sanction—discharge—against the strikers.

Judge Taft had to demonstrate the legitimacy and power of the court as caretaker of the railroad property in a way that would reaffirm the court’s role as arbiter of community values. Blaming Phelan, an outsider, would allow the community to heal more quickly from the wounds of the strike. The local community leaders—including the railroad em-

99. *Id.* at 812.

100. *Id.* at 821.

101. *Id.*

ployers—satisfied that the strikes were externally caused, could more readily forget the troubling incident and ignore any question of their own culpability in the events. Punishing Phelan also avoided the potential risk of making local citizens into martyrs.

As Judge Taft recognized, his jurisdiction was limited. He could only punish Phelan for contempt of court. The power to punish contempts existed

to secure present and future compliance with [the court's] orders . . . and not to impose punishment commensurate with crimes or misdemeanors committed in the course of the contempt, which are cognizable in a different tribunal or in this court by indictment and trial by jury. I have no right, and do not wish, to punish the contemner for the havoc which he and his associates have wrought to the business of this country, and the injuries they have done to labor and capital alike, or for the privations and sufferings to which they have subjected innocent people, even if they may not be amenable to the criminal laws therefore.¹⁰²

Through his protestations, Taft made clear what Phelan's six-month jail sentence meant. It was both a penalty to Phelan and a warning to labor leaders. Judge Taft attempted to distance himself from the sentence by claiming that "[t]he punishment for a contempt is the most disagreeable duty a court has to perform, but it is one from which the court cannot shrink."¹⁰³ But Taft was absolutely unambiguous in his assessment of what was at stake in the case: "If orders of the court are not obeyed, the next step is unto anarchy."¹⁰⁴ Phelan, unrestrained, was an anarchist in Taft's vision of the world.

Taft had told the 1894 graduating class of the Michigan Law School that "if the present movement against corporate capital is not met and fought, it will become a danger to our whole social fabric."¹⁰⁵ Those who wished to preserve law, order, and private property, he said, "must make their views and voices heard above the resounding din of anarchy, socialism, populism and the general demagoguery."¹⁰⁶ Taft observed that the role of lawyers and the courts was critical, because in the past "charter guaranties" had been established for

the benefit of the poor and the lowly against the oppressions of the rich and powerful. Today it is the rich who seek the protection of the courts for the

102. *Id.* at 823.

103. *Id.*

104. *Id.*

105. Taft, *supra* note 24, at 231. See also A. MASON, WILLIAM HOWARD TAFT: CHIEF JUSTICE 46 (1964).

106. Taft, *supra* note 24, at 231.

enforcement of those guaranties . . . Today, if a judge would yield to the easy course, he would lean against the wealthy and favor the many. While this seems to be a change, it is not really so. The sovereign today is the people, or the majority of the people. The poor are the majority. The appeal of the rich to the constitution and courts for protection is still an appeal by the weak against the unjust aggressions of the strong.¹⁰⁷

C. *Threats, Intimidation, and Violence*—“*Secret terrorism*”

The equation of some forms of worker collective action with anarchy, and the view of union leaders as anarchists, was most clearly expressed in Taft's discussions of the real or presumed role of violence in worker protests. The goal of the anarchist was to overthrow the rule of law; the method was violence. Although evidence of violence was not always necessary to establish the illegality of certain forms of collective action, such as the secondary boycott or mass picketing, the imagery of violence confirmed the unlawful, anarchistic motives of the union leaders. In a contempt trial, establishing the presence of actual violence or threats of violence was not subjected to the constitutional burdens of proof required for a criminal conviction.¹⁰⁸ The words and actions of union leaders could be tied to violence by the slenderest of threads.

In the *Phelan* case, Judge Taft apparently wanted to demonstrate that Phelan had advised the use of violence and intimidation, because this fact would confirm Taft's view of Phelan as an anarchist and would justify a harsh jail sentence. For three pages of his opinion, Taft linked Phelan to the violence of the strike by tenuous evidence. Phelan was charged with having said, at a June 28th union committee meeting “behind closed doors” where “no newspaper reporters were permitted to be present,” “that it was the duty of every A.R.U. man to quit work, to induce and coax other men to go out, and, if this was not successful, to take a club, and knock them out.”¹⁰⁹ According to the testimony of two witnesses, Phelan's statement “elicited much applause” and “shortly before or after, Phelan advised them to be law-abiding citizens.”¹¹⁰

The two critical witnesses who were present at the June 28th meeting were J.O. Sweeney, a timekeeper of the Big Four Railway, whom Taft considered to be “a wholly disinterested witness,”¹¹¹ and E.W. Dormer, a detective from the Field Detective Agency of St. Louis employed

107. *Id.*

108. *See supra* text accompanying notes 52-53.

109. *Phelan*, 62 F. at 813.

110. *Id.*

111. *Id.*

by the Cincinnati Southern Railroad. Dormer, working as a brakeman under the assumed name of Williams, had apparently taken an active part in the strike, including efforts "to involve some of his fellow strikers in a trespass on the company's property."¹¹² Nevertheless, Taft found that Dormer's "character has not been attacked otherwise than by showing his assumption of a false appearance and name."¹¹³

Since the credibility of Phelan and his union committee members was already in question, Phelan's "positive denials" of the version of events as characterized by Sweeney and Dormer carried little weight with the court.¹¹⁴ Phelan's testimony about his June 28th remarks was quoted by the court:

"I told nobody to take a club, and do anything with anybody . . . I said, 'You constitute yourselves a committee of one, each of you, and go to the people,—the community in which you live. Go to the boys . . . and explain to them this trouble. Talk to them about it. Beseech them to listen, because I want them to get the idea before they would condemn us about it; but do not take a club, and knock them in the head about it.' The peculiarity of the speech elicited applause, but I am afraid it was taken the other way."¹¹⁵

Whether, as a matter of fact, Phelan said "do take a club" or "do not take a club" in his speech was not as important as what Phelan intended by his words and how, in the context of his speech, the listeners—union committee members—understood his meaning. There was no evidence that the union trainmen present at the meeting, if they heard Phelan to say "take a club and knock them in the head," took the words in their literal sense as a call to violent action. There was ample evidence that Phelan may, indeed, have used such words as a rhetorical flourish to engender excitement, sympathy, and solidarity. Taken out of context, out of shared meanings and understandings, and placed under the stark lights of the courtroom, the rough, militant, and aggressive language of union organizers could be interpreted as exhortations to violence. Figurative speech could be understood as literal discourse; humor and sarcasm as threats; passion and fervor as cold-blooded deliberation and provocation.

Phelan admitted having said, "'He who is not with us in the struggle is against us, and will be so regarded.'"¹¹⁶ He did not deny speaking

112. *Id.* at 814.

113. *Id.*

114. *Id.*

115. *Id.* at 813.

116. *Id.*

"in scathing terms of the Pullmans," and saying that "[w]e want no weak-kneed individuals with us; we want warriors."¹¹⁷ Nor did Phelan deny Dormer's testimony that, at another closed union committee member meeting on June 29th, Phelan said, "We must stand solidly together in this hour of trial, and, if anybody returns to work, or takes the place of strikers, seize them by the back of the neck, and throw them out."¹¹⁸ Under examination, Phelan said he was not able to recollect this last remark, but he offered the explanation that "[i]f I did say it, I meant to throw them out of the organization."¹¹⁹

Phelan's excuse for what the court viewed as "personal intimidation" was that "in a speech remarks slip out that one does not intend."¹²⁰ The dilemma for Phelan was that if he denied that he said words which incited violence, he was not believed, and if he admitted that he said such words, which he understood to have a different meaning in context, his explanation was not believed. It is no wonder that Phelan was seen as an evasive witness, nor that union members called to testify in such trials might have had a difficult time establishing their credibility. Taft could not have understood the acts and intentions, the language and motivations, of the workers within the social and economic context of the working-class community. He thus linked the union leaders to violence and severed the violence from the context in which it developed. When the evidence of union responsibility for violence was slim or nonexistent, imagination sufficed.

Judge Taft used his imagination to fill gaps left in the testimony about Phelan's speeches. Taft wrote:

It is doubtless true that Phelan did tell his men to be law-abiding, that he did tell them to stay out of saloons, and off the company's property, in public, and that he did not wish his followers to subject themselves to the punishment of the law . . . [A]nd this has doubtless prevented many open assaults and trespasses. But I do not doubt that at the same time he encouraged in them a vicious and malicious disposition towards those of their fellows who did not join with them in this boycott, by expressions of the kind testified to by Sweeney and Dormer, and most evasively denied by Phelan, slyly slipped in where they could be given a double meaning if questioned.

The expressions were for the purpose of bringing into operation that secret terrorism which is so effective for discouraging new men from filling the strikers' places, and which is so hard to prove in a court of justice unless

117. *Id.*

118. *Id.* at 814.

119. *Id.*

120. *Id.*

it results in open assault. That Phelan openly discouraged conflict with the law is to his credit as a strike organizer, for he wished public sympathy; but that he wished the aid of that secret terrorism, which is quite as unlawful, seems to me to be established.¹²¹

It was thus through his encouragement of "secret terrorism," not his public speaking and organization, that Phelan became responsible for some threats, "an assault," and the "[i]nsulting and aggressive language" used during the strike.¹²² The effectiveness of the strike and boycott in shutting down railway operations was itself evidence of the existence of "secret terrorism," even without evidence of direct violent attacks. Thus, Taft believed that the employees participated in the strike out of fear of union reprisals. He wrote:

Threats are hard to prove. If effective, they not only keep away the employees from service, but the witness from the stand. The receiver has been obliged to keep a large force of the United States deputy marshals on both sides of the river and on his engines and trains in order to induce his employees, new and old, to remain in his service. I cannot presume that such protection was invoked by the employees because of groundless fears.¹²³

The notion that armed forces were "invoked" solely by employees for their protection against unruly and violent union trainmen was presented as a justification for either government intervention or the hiring of private guards and detectives. Protection of strikebreakers' access to work was characterized as protection of the individual's liberty of contract or right to accept work on any mutually acceptable terms, free of third-party coercion. However, this rhetoric also shielded the employer's property interests.¹²⁴ The guards and marshals were protecting employer access to the labor market of strikebreakers who were essential for continued productivity during a strike. The true coercion and "terrorism" were revealed in Judge Taft's statement that the United States marshals were needed to "induce" both "*new and old*" employees "to remain in service."¹²⁵ The responsibility for violence also lay with the powerful combination of the government and the railroad corporations determined to keep the trains running by the use of United States marshals, the hir-

121. *Id.* at 815.

122. *Id.*

123. *Id.*

124. Access of employees to their workplace was characterized as a property right of the employer. See *infra* text accompanying notes 366-76. See also *infra* text accompanying notes 399-401, 531-33 (discussing *Hitchman Coal & Coke Co. v. Mitchell*, 245 U.S. 229 (1917)). See generally Hurvitz, *American Labor Law and the Doctrine of Entrepreneurial Property Rights: Boycotts, Courts, and the Juridical Reorientation of 1886-1895*, 8 IND. REL. L.J. 307, 343 (1986).

125. *Phelan*, 62 F. at 815 (emphasis added).

ing of strikebreakers, the firing and blacklisting of union trainmen, and the use of undercover detectives to discredit legitimate union activity.¹²⁶

In Judge Taft's mind, however, the railroad receiver was merely reacting to Phelan's "secret terrorism." Difficult as such terrorism was to prove, the best evidence that it existed was the railway's use of armed marshals to keep the trainmen at work. Although the boycott itself was held to be an unlawful interference with property in the hands of the receiver, and was a contempt of court, Phelan's "secret terrorism" and his "suggestions leading to intimidations" were "aggravations of the contempt."¹²⁷ Phelan's link to the strike violence provided the needed justification for a sentence which would be understood as both punishment and deterrence. The focus on worker violence also served to undercut the legitimacy of the strikers' motives and of their concept of community. Taft did not perceive the acts and provocations of the government and railroad corporations as violence, but as legitimate social control.¹²⁸ Thus, the different understandings of violence were linked to conflicting views of community.

D. *The Strikers' Objectives—“The starvation of a nation”*

Judge Taft was undoubtedly uncomfortable in resting the contempt conviction solely on evidence of Phelan's statements about violence and his responsibility, as an outside instigator, for the strike. The alternative public persona of Phelan, as rational organizer and proponent of peaceful strike methods, had to be accounted for and discredited. Taft accomplished this by finding the motives for the strike and boycott unlawful on the theory that Phelan could have been held civilly liable for the railroad's losses, even if there had been no violence. Taft observed that if the railroad had not been in receivership, it could have attempted to recover damages for injuries resulting from Phelan's "malicious or unlawful interference" with its business by his act of inducing employees to leave its service.¹²⁹

126. Professor Salvatore has written that in Chicago "the presence of federal troops incited the violence they were purportedly called to suppress." N. SALVATORE, *supra* note 57, at 132.

127. 62 F. at 815.

128. Cf. M. BLUMENTHAL, R. KAHN, F. ANDREWS & K. HEAD, *JUSTIFYING VIOLENCE: ATTITUDES OF AMERICAN MEN* (1972) (a study of attitudes and beliefs about violence, based on research on American men in the 1960s).

129. *Phelan*, 62 F. at 816 (relying on *Walker v. Cronin*, 107 Mass. 555 (1871); *Sherry v. Perkins*, 147 Mass. 212, 17 N.E. 307 (1888)). It is interesting to note that Taft later found the authority of *Walker* unpersuasive when the plaintiffs in *American Steel Foundries v. Tri-City Trades Council* used the case, along with others, to support their argument that the "interference of a labor organization by persuasion and appeal to induce a strike against low wages" was "without lawful excuse and

According to Taft, Phelan “did the [railroad] trust a very substantial injury by stopping all traffic for a time, by making it necessary for the receiver to pay heavy expenses for unusual police protection, and by putting him to much trouble and expense in securing new employees.”¹³⁰ Given the likelihood that Phelan was judgment-proof, a jail sentence based on a finding of contempt of court was an even more fitting price to pay than any possible civil damage award. Indeed, in light of the difficulty of convicting Phelan of criminal charges related to the strike violence, Judge Taft’s sentence for contempt of court was perhaps the only way that Phelan could be made to pay for his acts.

Judge Taft acknowledged that workers were, in certain circumstances, justified in inflicting economic harm on their employers through withdrawal of their labor. The question of law in any specific instance of collective action was whether the imposition of economic harm that would otherwise be actionable was somehow privileged. Taft “conceded” that the receiver’s employees “had the right to organize into or to join a labor union which should take joint action as to their terms of employment.”¹³¹ Taft also recognized the inequality in bargaining power between the large employer and the single employee, which compelled legal justification of collective action undertaken “for lawful purposes.”¹³² Taft wrote:

It is of benefit to them and to the public that laborers should unite in their common interest and for lawful purposes. They have labor to sell. If they stand together, they are often able, all of them, to command better prices for their labor than when dealing singly with rich employers, because the necessities of the single employee may compel him to accept any terms offered him.¹³³

In this paragraph, Taft suggests a basic tension between competing images of workers. Workers who “unite in their common interest” and “stand together” are purposive, autonomous individuals capable of recognizing mutual interests and acting in a coherent, unified way to achieve common goals. Workers who “have labor to sell” are people whose humanity—their identity as autonomous individuals—is separate from their labor—a commodity which they sell on the market. As they enter the

malicious.” 257 U.S. 184, 210, 208-09 (1921). Taft discounted the relevancy of *Walker* because of the procedural posture of the case: “The element of malice was supplied by averment of the complaint, and was, of course, admitted by the demurrer.” *Id.* at 210. See *infra* text accompanying notes 371-73.

130. 62 F. at 816.

131. *Id.* at 817.

132. *Id.*

133. *Id.*

market to sell their labor, they act as independent, autonomous beings of full free will and liberty. Once their labor is contracted for, however, they become the commodity—dehumanized and devalued as anything other than a factor of production. Finally, workers whose “necessities” may force them “to accept any terms offered” are impoverished, disempowered, weak and dependent persons whose social and economic status is a bare step above slavery.

It is difficult to reconcile these competing images of workers with each other and with the image of workers as violent and irrational. Notions of workers as rational, dependent, or dehumanized, clashed with Taft’s vision of workers who inspire fear through “secret terrorism,” who “paralyze” a railroad maliciously, and whose actions, if not restrained, will lead to “anarchy.” Taft managed to tie the images together through his imposition of his own narrow definition of workers’ “common interest” and “lawful purposes”—legitimate only when defined as pure economic concern with their own personal terms of employment. Phelan’s leadership of a peaceful strike against the receiver over the amount of wages paid to the receiver’s workers would not have been contempt, “even if the strike much impeded the operation of the road.”¹³⁴ In other words, peaceful, purposive acts by workers to ameliorate their dependency and inequality as sellers of the commodity of labor were justified under certain conditions. As long as the workers’ goals were directly related to improvement of their own working conditions with their own employers, economic harm to those employers was justified. This notion of justifiable economic harm was based on a view of workers’ proper goals as being egocentric, not community-oriented.

The mistake of Phelan and the striking trainmen of the Cincinnati Southern Railroad was to take action for a community goal—to assist the Pullman workers in their strike against the Pullman Company. Taft believed that there was no logical or “natural” connection between the railway workers and the Pullman Company workers.¹³⁵ Taft wrote:

The employees of the railway companies had no grievance against their employers. Handling and hauling Pullman cars did not render their services any more burdensome. They had no complaint against the use of Pullman cars as cars. They came into no natural relation with Pullman in handling the cars. He paid them no wages. He did not regulate their hours, or in any way determine their services. Simply to injure him in his business, they were incited and encouraged to compel the railway companies to withdraw

134. *Id.*

135. *Id.* at 818.

custom from him by threats of quitting their service, and actually quitting their service. This inflicted an injury on the companies that was very great, and it was unlawful, because it was without lawful excuse.¹³⁶

Thus, the railroad employees' motive in striking their employers was to impose harm on the Pullman Company. As Taft noted, the distinction between "an ordinary lawful and peaceable strike" and a boycott "is not a fanciful one" because "[e]very laboring man recognizes the one or the other as quickly as the lawyer or the judge."¹³⁷ Whereas the strike against an employer to improve working conditions—the classic primary strike—was lawful, "[b]oycotts, though unaccompanied by violence or intimidation, have been pronounced unlawful in every state of the United States where the question has arisen, unless it be in Minnesota; and they are held to be unlawful in England."¹³⁸

Taft's views on the distinction between a strike of a primary employer and a strike against a secondary employer to enforce a boycott of the primary employer's business or products—the so-called secondary boycott—had been articulated earlier in his first labor case on the federal bench. In 1893, in the *Ann Arbor* case,¹³⁹ Taft had granted a permanent injunction compelling the Grand Chief of the Brotherhood of Locomotive Engineers, P.M. Arthur, to withdraw an order to the engineers that they follow Rule 12 of their organization. Rule 12 required that the members of the Brotherhood refuse to handle the trains of any connecting railroad company involved in a dispute with one of the Brotherhood's local unions. When a strike was called on the Toledo, Ann Arbor Railroad, Arthur ordered members of the Brotherhood, who worked for eleven railroad companies in Ohio and adjacent states, to comply with Rule 12.¹⁴⁰ Alpheus Mason wrote that "[t]he result was practically a paralysis of the business of interstate commerce in this section of the country."¹⁴¹

Taft found that Arthur's order to the engineers was part of a criminal conspiracy interfering with the obligations of the railway carriers, under section 10 of the Interstate Commerce Act of 1877,¹⁴² to accept

136. *Id.*

137. *Id.* at 818-19.

138. *Id.* at 819.

139. *Toledo, A.A. & N.M. Ry. v. Pennsylvania Co. (Ann Arbor)*, 54 F. 730 (C.C.N.D. Ohio 1893). See also Mason, *The Labor Decisions of Chief Justice Taft*, 78 U. PA. L. REV. 585, 592-96 (1930) (discussing *Ann Arbor* case); A. PAUL *supra* note 55, at 110-16.

140. See Mason, *supra* note 139, at 593.

141. *Id.*

142. Interstate Commerce Act, ch. 104, § 10, 24 Stat. 383 (1887) (amended by ch. 382, § 10, 25 Stat. 855, 857-58 (1888)) (repealed 1978).

and transfer the freight cars of connecting railway companies. Although Taft admitted that the strike of the Toledo, Ann Arbor engineers was lawful, he denounced the strike of the engineers on the connecting railways. Taft wrote:

What the employees threaten to do is to deprive the defendant companies of the benefit thus accruing from their labor, in order to induce, procure, and compel the companies . . . to consent to do a criminal and unlawful injury to the complainant. Neither law nor morals can give man the right to labor or withhold his labor for such a purpose.¹⁴³

In effect, Taft defined the legitimate boundaries of the union community as its functions within a geographically small locale for the purpose of direct and immediate economic advantage to its members. In rejecting broader conceptions of the union community, such as concerted activities undertaken for long-term economic and altruistic purposes and spanning states, regions, or even the nation, Taft revealed his inability to accept what unions were beginning to understand: their conception of community interests had to be as broad as the economic reach of the corporations.

Taft's injunction in the *Ann Arbor* case directed Arthur to rescind the order to the engineers to comply with Rule 12 of the Brotherhood. The injunction also commanded the engineers in the Brotherhood to carry out their duties as required by the Interstate Commerce Act—to exchange interstate freight with the Toledo, Ann Arbor line. Taft's order appeared to compel personal service, although he denied this by arguing that the engineers "may avoid obedience to the injunction by actually ceasing to be employees of the company."¹⁴⁴

Thus, Taft's view of the broad public character of the railway engineers' work,¹⁴⁵ and the narrow scope of their legitimate union concerns, justified enjoining their boycott. Nevertheless, despite his condemnation of the secondary boycott, Taft, in both the *Ann Arbor* and *Phelan* cases, acknowledged the legitimacy of a peaceful, primary strike. Although Taft apparently understood that such strikes could not be enjoined, his views were not universally accepted. Not long after the *Ann Arbor* case, the judge in another federal receivership case ordered railway employees to continue working or be subjected to contempt proceedings. In this case in late 1893, Circuit Judge Jenkins issued injunctions against the receivers' 12,000 employees "so quitting . . . as to cripple the property, or

143. *Ann Arbor*, 54 F. at 738.

144. *Id.* at 743. See also A. PAUL, *supra* note 55, at 114.

145. 54 F. at 742-43.

to prevent or hinder the operation of [the] railroad."¹⁴⁶ Jenkins observed:

It is idle to talk of a peaceable strike. None such ever occurred. The suggestion is an impeachment of intelligence It has well been said that the wit of man could not devise a legal strike, because compulsion is the leading idea of it. A strike is essentially a conspiracy to extort by violence¹⁴⁷

On appeal, in October 1894, the sweeping scope of Jenkins's injunctions was limited by the Seventh Circuit. Like Judge Taft, the court of appeals endorsed the view that "as a matter of law" a strike of employees, "having for its object their orderly withdrawal in large numbers or in a body from the service of their employers, on account simply of a reduction in their wages," is neither "illegal or criminal."¹⁴⁸ More importantly, the court recognized the limits of equity jurisdiction to compel personal service through injunctions. Justice Harlan¹⁴⁹ wrote in the opinion that "[i]t would be an invasion of one's natural liberty to compel him to work for or to remain in the personal service of another. One who is placed under such constraint is in a condition of involuntary servitude"¹⁵⁰

In the late nineteenth century, as these judges attempted to articulate theories that would define the boundaries between legal and illegal collective worker action, they also struggled to come to terms with the new, aggressive role of the federal courts in labor disputes. Consequently, the judges had to acknowledge and justify the use of the coercive power of the injunction as a means of controlling worker behavior. Implicit was the assumption that the free market had somehow gone awry. Where the coercion of employer economic power and governmental force failed to halt many strikes and boycotts, the injunction served well. But the courts did not take such responsibility lightly. Taft, like others on the federal bench, turned to the common law as the source of authority for extending equitable remedies into the terrain of the labor market.

The scope of lawful collective labor action recognized in receiver-

146. *Farmers' Loan & Trust v. Northern Pac. R.R.*, 60 F. 803, 807 (C.C.E.D. Wisc. 1894), discussed in A. PAUL, *supra* note 55, at 116-22.

147. *Farmers' Loan*, 60 F. at 821, quoted in *Arthur v. Oakes*, 63 F. 310, 326 (7th Cir. 1894).

148. *Arthur v. Oakes*, 63 F. at 327.

149. Justice John Marshall Harlan was appointed to the Supreme Court in 1877 and served as an associate justice for thirty-four years. His decision in *Arthur v. Oakes*, 63 F. 310, was written while he was sitting on the Court of Appeals for the Seventh Circuit.

150. 63 F. at 317-18. Historian Arnold Paul has written that Harlan's opinion "finally arrested the spreading scope of the labor injunction at the threshold of compulsory labor." A. PAUL, *supra* note 55, at 122 n.37.

ship cases was thus limited very early by reliance on notions of unlawful interference with business interests drawn from common law restraint of trade cases,¹⁵¹ as well as the ideas about the appropriate economic interests of workers that came from those cases. The federal district court judges, in their role as overseers of the railroads in receivership, were in a unique position to exercise control over many union leaders through the use of contempt powers. When, in the early 1890s, the lower federal courts began to see the first labor cases brought under the Sherman Act, the federal judges who had handled receivership cases were accustomed to their role as protector of community order from the potentially violent and disruptive influence of outside labor agitators. Even more significantly, these federal judges had developed a keen appreciation of the economic hardships imposed on the railroads through strikes, even in the absence of violence and destruction of railroad property.

The Sherman Act was embraced somewhat hesitantly at first.¹⁵² In the *Phelan* case, in two conclusory paragraphs which appear to be almost an afterthought, Judge Taft included the new statutory basis of equity and criminal jurisdiction of the federal courts under the Sherman Act as an additional reason for finding Phelan in contempt of court. Taft noted that Phelan and Debs's "conspiracy" was a "combination in . . . the teeth of the act of July 2, 1890."¹⁵³ Taft also indicated that he and his colleagues on the federal bench were following with great interest the new trend to use the Sherman Act against labor.¹⁵⁴ By the early twentieth century, the United States Supreme Court had confirmed the use of the federal antitrust laws as a weapon against organized labor.¹⁵⁵

IV. THE CONTRIBUTIONS OF THE COMMON LAW TO THE ANTITRUST LABOR CASES: THE HOLMES DISSENTS IN *VEGELAHN* AND *PLANT*

As the federal antitrust law evolved into a mechanism for restraining labor activity in the early twentieth century, it drew its rationale and rules from the common law restraint of trade cases. The

151. See *Phelan*, 62 F. at 819-21 (discussing English and American cases outlawing the boycott).

152. After Judge Billings's decision in *United States v. Workingmen's Amalgamated Council*, 54 F. 994 (C.C.E.D. La. 1893), discussed *infra* text accompanying notes 245-47, other judges in the Seventh and Eighth Circuits quickly followed suit. A notable exception to the trend was Judge Putnam's decision in the First Circuit. *United States v. Patterson*, 55 F. 605 (C.C.D. Mass. 1893).

153. 62 F. at 821-22.

154. *Id.*

155. See *infra* Part V.

condemnation of the secondary boycott and the suspicion of the picket line were clearly established features of the common law by the turn of the century. In 1894, Judge Taft in the *Phelan* case demonstrated both his expertise in the common law and his confidence in its suitability for solving the labor problems of the railroads under his court's receivership jurisdiction.

Twenty years later, in his book *The Anti-Trust Act and the Supreme Court*, Taft, then a professor at Yale Law School, reaffirmed his belief in the common law as a basis for interpretation of the federal antitrust laws. In response to the "ignorant but enthusiastic critics" of the Supreme Court who decried its "power to say what are the good trusts and what are the bad trusts, according to [its] economic and political views,"¹⁵⁶ Taft defended the reasonableness, consistency, and certainty of the common law as applied to the antitrust cases. Taft wrote:

What the court has said in effect is this:

"It is evident what the Congress had in its mind from the language it uses. We know from current history the evil it sought to remedy. It has used terms that had a well-understood meaning at common law—to wit, restraint of trade, monopoly, combination, and conspiracy. It is a settled rule of all American and English courts in construing statutes and constitutions that common-law terms are to receive common-law meaning unless there is good reason to the contrary . . ."

That is not assuming legislative power at all. It is only exercising the function that courts have exercised in applying a well-measured and definite yardstick to contracts incidental and ancillary for now more than three centuries.¹⁵⁷

The contribution of the Sherman Act, according to Taft, was to make restraints which were "only void and unenforceable at common law, positively and affirmatively illegal, actionable, and indictable."¹⁵⁸ Furthermore, Taft wrote, "[w]hether Congress intended it or not, it used language that necessarily forbade the combinations of laborers to restrain and obstruct interstate trade."¹⁵⁹ From Taft's perspective, the positive law of the Sherman Act as applied to labor did no more than make into federal law with federal jurisdiction and remedies what had long been recognized in the states and in England. With the common law came the assumptions about the inherent dangerousness of labor activity—the

156. W.H. TAFT, *THE ANTI-TRUST ACT AND THE SUPREME COURT* 114 (1914 & photo. reprint 1970).

157. *Id.* at 114-15.

158. *Id.* at 21.

159. *Id.* at 2.

risks of unrestrained labor organization and power. When arguments about the economic harms of concentrated labor power were not compelling enough to permit its restraint, the courts—both federal and state—invoked the specter of violence to buttress their reasoning about the unlawfulness of either the means or the ends of labor activity.

The common law means/ends analysis of labor activity, traceable to Chief Justice Shaw's opinion in *Commonwealth v. Hunt*,¹⁶⁰ predominated the federal antitrust labor cases just as it had predominated the state labor cases arising under common law restraint of trade.¹⁶¹ The means—methods—of union activity were legitimate only if they came within narrow boundaries of socially acceptable behavior and did not threaten the employer, his patrons, or his other workers with physical or economic harm. The ends—objectives—of union activity were legitimate only if they came within a limited range of local, self-interested economic gains and did not interfere with the employer's freedom of contract.

The important role that judicial assumptions about worker violence played in the common law development of the means/ends analysis of labor activity is illustrated in the Massachusetts cases of *Vegeahn v. Guntner*¹⁶² and *Plant v. Woods*.¹⁶³ Coming at the end of a decade or so that witnessed the Haymarket riots, the Homestead Strike, and the Pullman boycott, these two cases articulated a conservative vision of the worker's place in the new industrial order that was being created out of new forms of corporate wealth and a seemingly endless supply of immigrant labor. The judges who wrote the majority opinions in the two cases shared a preoccupation with worker violence that was not justified by the facts before the court, even if it could be explained by the tenor of the times. In dissenting opinions, however, Oliver Wendell Holmes disagreed in each case with the majority's determination of the appropriate means and ends of labor activity and the significance of violence in that analysis.

A. *Vegeahn v. Guntner*—"A patrol of two men"

"The principal question," wrote Judge Allen in *Vegeahn*, "is whether the defendants should be enjoined against maintaining the patrol."¹⁶⁴ The defendant union in the case was engaged in a strike for the purpose of raising its members' wages. To support their strike demands,

160. 4 Met. 111 (Mass. 1842).

161. See generally Holt, *supra* note 11.

162. 167 Mass. 92, 44 N.E. 1077 (1896).

163. 176 Mass. 492, 57 N.E. 1011 (1900).

164. 167 Mass. at 97, 44 N.E. at 1077.

the union members “conspired to prevent [the employer] from getting workmen, and thereby to prevent him from carrying on his business.”¹⁶⁵ The court conceded that the workers’ objectives—“to secure better wages for themselves”—were legitimate but did “not justify maintaining a patrol in front of the plaintiff’s premises, as a means of carrying out their conspiracy.”¹⁶⁶ The court even acknowledged that “[a] combination among persons merely to regulate their own conduct is within allowable competition, and is lawful, although others may be indirectly affected thereby.”¹⁶⁷

What the union members did that was unlawful was take their dispute with their employer to the street in front of his factory—to the workers who had not yet joined the strike and the workers who threatened to break it.

The means adopted were persuasion and social pressure, threats of personal injury or unlawful harm conveyed to persons employed or seeking employment, and a patrol of two men in front of the plaintiff’s factory, maintained from half past six in the morning till half past five in the afternoon, on one of the busiest streets of Boston. The number of men was greater at times, and at times showed some little disposition to stop the plaintiff’s door.¹⁶⁸

Because “it was found that the patrol would probably be continued, if not enjoined,” and because it was used “in combination with social pressure, threats of personal injury or unlawful harm, and persuasion to break existing contracts,” the court believed a sweeping injunction, barring all picketing, was justified.¹⁶⁹ The picketing, in any form, was “an unlawful interference with the rights both of employer and of employed.”¹⁷⁰ Even the goal of raising wages did not justify this direct means of interfering with the employer’s and the strikebreaker’s freedom of contract.

Holmes disagreed with the scope of the preliminary injunction which the majority of the court wanted to affirm in its original language. The modified final decree proposed by Holmes would have enjoined the union from interfering with the employer’s business

by obstructing or physically interfering with any persons in entering or leaving the plaintiff’s premises . . . or by intimidating, by threats, express or implied, of violence or physical harm to body or property, any person or

165. *Id.*

166. *Id.* at 98, 44 N.E. at 1077.

167. *Id.* at 98, 44 N.E. at 1077-78.

168. *Id.* at 97, 44 N.E. at 1077.

169. *Id.*

170. *Id.*

persons who now are or hereafter may be in the employment of the plaintiff, or desirous of entering the same, from entering or continuing in it¹⁷¹

This much of the proposed final decree was also consistent with the preliminary injunction that had been issued *pendente lite*. Holmes noted that "it must be assumed that the defendants obey the express prohibition of the decree," and "[i]f they do not, . . . [they] are liable to summary punishment."¹⁷²

But the preliminary injunction "goes further" than the proposed final decree, Holmes wrote, and it was the added prohibitions that Holmes found "most objectionable."¹⁷³ The preliminary injunction, Holmes observed, "forbids the defendants to interfere with the plaintiff's business 'by any scheme . . . organized for the purpose of. . . preventing any person or persons who now are or may hereafter be. . . desirous of entering the [plaintiff's employment] from entering it.'"¹⁷⁴ In effect, this would prohibit "social intercourse, and even organized persuasion or argument, although free from any threat of violence, either express or implied."¹⁷⁵

Holmes knew the facts of the case well because the hearing on the merits of the plaintiff's case for issuance of a final injunctive decree was held before him. He drafted his report for the court with care, so that the facts and their import could not be misconstrued.¹⁷⁶ Holmes observed, "There was no proof of any threat or danger of a patrol exceeding two men, and as of course an injunction is not granted except with reference to what there is reason to expect in its absence, the question on that point is whether a patrol of two men should be enjoined."¹⁷⁷

Holmes was careful "to insist a little" that he disagreed with the majority on "a difference of principle between the final decree and the preliminary injunction which it is proposed to restore."¹⁷⁸ But this "difference of principle" revealed starkly different views of how workers behave. Holmes wrote:

It appears to me that the judgment of the majority turns in part on the assumption that the patrol necessarily carries with it a threat of bodily

171. *Id.* at 96, 44 N.E. at 1077.

172. *Id.* at 104, 44 N.E. at 1080 (Holmes, J., dissenting).

173. *Id.*

174. *Id.*

175. *Id.*

176. Holmes wrote that "I assume that my brethren construe [the report] as I meant it to be construed, and that, if they were not prepared to do so, they would give an opportunity to the defendants to have it amended in accordance with what I state my meaning to be." *Id.*

177. *Id.*

178. *Id.* at 104-05, 44 N.E. at 1080.

harm. That assumption I think unwarranted. . . . Furthermore, it cannot be said, I think, that two men walking together up and down a sidewalk and speaking to those who enter a certain shop do necessarily and always thereby convey a threat of force.¹⁷⁹

Unlike his "brethren" on the court, Holmes was not prepared to assume that two workmen or union representatives on a picket line or "patrol" would inevitably either exhibit violent behavior or instill fear and dread of "bodily harm" in their audience. He felt that this presumed too much of both the workers and their audience, and it injected the court, through its use of equitable powers, into situations that were not only innocuous, but were part of the patterns of the daily "social intercourse" between workers, their employers, and their communities. Holmes went on to say:

I may add, that I think the more intelligent workingmen believe as fully as I do that they no more can be permitted to usurp the State's prerogative of force than can their opponents in their controversies. But if I am wrong, then the decree as it stands reaches the patrol, since it applies to all threats of force.¹⁸⁰

But the *Vegelahn* court was concerned about the economic coercion of the two-man picket, not just its perceived threat of force or potential for physical violence. Judge Allen wrote for the majority:

Intimidation is not limited to threats of violence or of physical injury to person or property. It has a broader signification, and there also may be a moral intimidation which is illegal. Patrolling or picketing, under the circumstances stated in [Judge Holmes's] report, has elements of intimidation like those which were found to exist in *Sherry v. Perkins*.¹⁸¹

Sherry v. Perkins had upheld an injunction against "[t]he act of displaying banners with devices, as a means of threats and intimidation, to prevent persons from entering into or continuing in the employment of the plaintiff."¹⁸² The banners used by the striking workers in *Sherry* were held to be "a standing menace to all who were or wished to be in the employment of the plaintiff."¹⁸³ The *Vegelahn* court believed that workers picketing, patrolling, or displaying banners were engaging in illegal "moral intimidation." From the "context" of *Sherry*, however, Holmes inferred that the "threats and intimidation" of the workers' banners were part of a scheme of "threats of personal violence, and intimidation

179. *Id.* at 105, 44 N.E. at 1080.

180. *Id.*

181. *Id.* at 98, 44 N.E. at 1077.

182. 147 Mass. 212, 214, 17 N.E. 307, 309 (1888).

183. *Id.*, 17 N.E. at 310.

by causing fear of it."¹⁸⁴

Holmes thus attempted to limit the legal connotation of words such as "threats," "intimidation," and "compulsion" to instances of "force or threats of force."¹⁸⁵ He believed that the "persuasion" of the two-man patrol in *Vegeahn* was legal as long as it was peaceful,¹⁸⁶ even though some may have described it as "moral intimidation."¹⁸⁷ As Judge Field had noted in a separate dissenting opinion in *Vegeahn*:

[I]f [the patrol] is merely a peaceful mode of finding out the persons who intend to go to the plaintiff's premises to apply for work, and of informing them of the actual facts of the case in order to induce them not to enter into the plaintiff's employment, . . . I doubt if it is illegal, and I see no ground for issuing an injunction against it.¹⁸⁸

Key to Holmes's analysis of the legality of the peaceful two-man patrol was his belief that the economic damage it caused was privileged. Holmes wrote that "the policy of allowing free competition justifies the intentional inflicting of temporal damage, including the damage of interference with a man's business, by some means, when the damage is done not for its own sake, but as an instrumentality in reaching the end of victory in the battle of trade."¹⁸⁹ Rejecting the "suggestion" that "the conflict between employers and employed is not competition," Holmes argued that "[c]ertainly the policy is not limited to struggles between persons of the same class competing for the same end." Rather, "[i]t applies to all conflicts of temporal interests."¹⁹⁰

Holmes concluded his argument with the following discourse on the economic realities of liberal capitalism and the role of law within that framework of free competition:

One of the eternal conflicts out of which life is made up is that between the effort of every man to get the most he can for his services, and that of society, disguised under the name of capital, to get his services for the least possible return. Combination on the one side is patent and powerful. Combination on the other is the necessary and desirable counterpart, if the battle is to be carried on in a fair and equal way

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

184. 167 Mass. at 107, 44 N.E. at 1081 (Holmes, J., dissenting).

185. *Id.* at 106-07, 44 N.E. at 1081.

186. *Id.*

187. *Id.* at 98, 44 N.E. at 1077.

188. *Id.* at 103, 44 N.E. at 1079.

189. *Id.* at 106, 44 N.E. at 1081 (Holmes, J., dissenting).

190. *Id.* at 107 (quoted language does not appear in 44 N.E.).

that when combined 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. I can remember when many people thought that, apart from violence or breach of contract, strikes were wicked, as organized refusals to work. I suppose that intelligent economists and legislators have given up that notion to-day. I feel pretty confident that they equally will abandon the idea that an organized refusal by workmen of social intercourse with a man who shall enter their antagonist's employ is wrong, if it is dissociated from any threat of violence, and is made for the sole object of prevailing if possible in a contest with their employer about the rate of wages.¹⁹¹

Holmes depended on the authority of earlier cases such as *Walker v. Cronin*¹⁹² and *Commonwealth v. Hunt*¹⁹³ to illustrate that he was firmly within the tradition of the common law. Nevertheless, he directly challenged his colleagues on the bench to confront the economic and social policies inherent in their analyses of common law rules. In 1894, the same year that Taft was marshaling the rules of the common law to condemn Phelan's participation in the Pullman boycott, Holmes had published his paper, "Privilege, Malice, and Intent."¹⁹⁴ There, in discussing the legality of boycotts and combinations under the common law, Holmes had written: "Behind all is the question whether the courts are not flying in the face of the organization of the world which is taking place so fast, and of its inevitable consequences."¹⁹⁵ Two years later, Holmes reiterated this theme in *Vegeahn*:

It is plain from the slightest consideration of practical affairs, or the most superficial reading of industrial history, that free competition means combination, and that the organization of the world, now going on so fast, means an ever increasing might and scope of combination. It seems to me futile to set our faces against this tendency.¹⁹⁶

B. *Plant v. Woods*—"The degree of fear and dread"

By the late 1890s, as both the state and federal courts were confronted with the task of deciding what forms of collective worker activity should be legal in the vast and rapid "organization of the world" taking place around them, they continued to rely on the familiar common law

191. *Id.* at 108-09, 44 N.E. at 1081-82.

192. 107 Mass. 555 (1871).

193. 4 Met. 111 (Mass. 1842).

194. Holmes, *Privilege, Malice, and Intent*, 8 HARV. L. REV. 1 (1894), reprinted in O. HOLMES, COLLECTED LEGAL PAPERS 117 (1920).

195. Holmes, *supra* note 194, at 8-9; O. HOLMES *supra* note 194, at 129.

196. 167 Mass. at 108, 44 N.E. at 1081 (Holmes, J., dissenting).

categories to shore up their vision of the future. The narrowness of their view of community was revealed in their limited definitions of worker interests. Doctrinally, this was expressed in legalization of certain peaceful union activities for local, immediate, and direct economic goals. Union activities undertaken for more far-reaching, diffuse, and indirect communitarian goals were illegal. Thus, even a judge like Taft could acknowledge the legality of a peaceful local strike for the purpose of raising the wages of the local union members. On the other hand, a sympathy strike or boycott in support of other workers' attempts to improve wages and working conditions, such as the Pullman boycott, even if it had been peaceful, was for an indirect purpose. What the Cincinnati Southern Railway workers hoped to attain through their collective action was illegal in part because it "had no effect whatever on the character or reward of their service."¹⁹⁷

Under the same analysis of direct versus indirect benefits, the Massachusetts Supreme Judicial Court in the 1900 case of *Plant v. Woods* held a strike for a closed shop to be "without justification, and therefore . . . malicious and unlawful."¹⁹⁸ The court in *Plant* recognized that certain union activity that restrained trade was privileged. But its definition of the permissible objectives of strikes or boycotts was "to get the hours of labor reduced or their wages increased, or to procure from their employers any other concession directly and immediately affecting their own interests."¹⁹⁹ As Holmes, now chief judge, noted in dissent:

[The union's] purpose was not directly concerned with wages. It was one degree more remote. The immediate object and motive was to strengthen the defendants' society as a preliminary and means to enable it to make a better fight on questions of wages or other matters of clashing interests. I differ from my brethren in thinking that the threats were as lawful for this preliminary purpose as for the final one to which strengthening the union was a means.²⁰⁰

Holmes understood that, from the perspective of the union member, the closed shop was a means to the perfectly legitimate end of improved working conditions. Nevertheless, to characterize the closed shop as a "means" to a lawful end, rather than as a remote, indirect, and therefore unlawful, "end" clearly would not have saved the closed shop. The Massachusetts Supreme Judicial Court would have found the closed shop un-

197. *In re Phelan*, 62 F. 803, 818 (C.C.S.D. Ohio 1894).

198. 176 Mass. 492, 502, 57 N.E. 1011, 1015.

199. *Id.* at 501, 57 N.E. at 1015.

200. *Id.* at 505, 57 N.E. at 1016 (Holmes, C.J., dissenting).

lawful whether it was characterized as a means to an end or an end in itself. The evil in the closed shop was in the violence that the court assumed to be inherent in any demand for a closed shop that was accompanied by a threat of a strike.²⁰¹

The court observed that the threat to strike for a closed shop

means more than that the strikers will cease to work. That is only the preliminary skirmish. It means that those who have ceased to work will, by strong, persistent, and organized persuasion and social pressure of every description, do all they can to prevent the employer from procuring workmen to take their places. It means much more. It means that, if these peaceful measures fail, the employer may reasonably expect that unlawful physical injury may be done to his property; that attempts in all the ways practised by organized labor will be made to injure him in his business, even to his ruin, if possible; and that, by the use of vile and opprobrious epithets and other annoying conduct, and actual and threatened personal violence, attempts will be made to intimidate those who enter or desire to enter his employ²⁰²

The Massachusetts court recognized the importance to the union of achieving a closed shop in light of the competing economic interests of the employer, rival unions and nonunion workers. The court assumed that violence would inevitably ensue if peaceful efforts were unsuccessful. In the hearing below, the master found that the union representatives were "courteous in manner" and "made no threats of personal violence." But he also found that "from all the circumstances under which [the] requests [for a closed shop] were made, . . . the defendants intended that [the] employers . . . should fear trouble in their business . . ." if they did not acquiesce to the requests.²⁰³

The Massachusetts high court accepted the master's inconsistent findings, noting that "[h]owever mild the language or suave the manner in which the threat to strike [for a closed shop] is made, . . . the employer knows that he is in danger of passing through such an ordeal as that above described [of violence and intimidation], and those who make the threat know that as well as he does."²⁰⁴ Despite objective evidence of peaceful behavior by union representatives, and the fact that the "ordeal"

201. "Plant represents a determination that the defendant union pursued an unlawful objective, although the court's stress on the possibly terrible consequences of the union's threat suggests the difficulty of distinguishing between unlawful means and ends." J. ATLESON, R. RABIN, G. SCHATZKI, H. SHERMAN, JR. & E. SILVERSTEIN, *COLLECTIVE BARGAINING IN PRIVATE EMPLOYMENT* 33 (2d ed. 1984).

202. 176 Mass. at 496-97, 57 N.E. at 1013.

203. *Id.* at 495, 57 N.E. at 1012.

204. *Id.* at 497, 57 N.E. at 1013.

the employer might face consisted of economic, not physical, harms, the court invoked images of "physical injury . . . to [the employer's] property" and "actual and threatened personal violence" to strikebreakers or customers.²⁰⁵

In an attempt to define unlawful union objectives, the court in *Plant* resorted to a discussion of unlawful means based on a physicalist notion of harm. The judges saw economic harm to some parties as an unavoidable consequence of fair competition which served larger societal goals of efficiency and utility. But physical harm to person or property, when employees or unions or their sympathizers could be held responsible for giving the "signal" for violence, could not be tolerated under any circumstances.²⁰⁶ Thus the achievement of the court in *Plant* was to equate some forms of peaceful behavior with violent behavior and to equate economic harm with physical harm. Because most peaceful labor activity, regardless of its objectives—whether direct or remote—was intended to cause or threaten economic harm to the employer, the common law judges were free to argue that almost any labor activity was suffused with the threat of violence.

Despite the insistence of many who, like William Howard Taft, saw the common law as logical, reasonable, coherent, and consistent, the law provided no basis, no authority, no rationale for distinguishing between labor activity which would necessarily lead to violence and that which would not. The court in *Plant* invoked the freedom of contract of the rival union members—"the right to dispose of one's labor with full freedom"²⁰⁷—as the right which deserved special legal protection. The court noted that "this is not a case between the employer and employed, or, to use a hackneyed expression, between capital and labor, but between laborers all of the same craft, and each having the same right as any one of the others to pursue his calling."²⁰⁸

The court's argument was disingenuous, for the economic cost of the closed shop would be borne by the employer as well as the rival union members who would either have to join the dominant union or find work elsewhere. The closed shop meant a union monopoly over hiring as well as greater union power to bargain for higher wages. The persistence and resources which employers devoted to defeat closed shops and to keep their workplaces either "open" or "closed to union members" through

205. *Id.* at 496-97, 57 N.E. at 1013.

206. *Id.* at 497, 57 N.E. at 1013.

207. *Id.* at 498, 57 N.E. at 1013.

208. *Id.* at 497, 57 N.E. at 1013.

lockouts, discharges, and "yellow dog" contracts belie the notion that the closed shop was not "a case . . . between capital and labor."²⁰⁹

But there may be a clue here about the source of the court's assumptions about the violence inherent in a demand for a closed shop. Judges might have believed that rival union disputes were likely to have a greater potential for violence because they set one labor organization against another for scarce resources. Indeed, the court in *Plant* characterized the dispute as "a contest for supremacy between two labor unions of the same craft, having substantially the same constitution and by-laws."²¹⁰ The fallacious conclusion was that supremacy was attained only through "molestation,"²¹¹ or through "fear and dread"²¹² of violent consequences, not through appeals to reason or demonstrations of commitment and solidarity through a unified withdrawal of labor. The "contest for supremacy" between two unions was a trial by combat between two irrational and violent foes. The stronger union was stronger because it could effectively "signal" violence, not because it was larger, better organized, more experienced, better funded, or could deliver more benefits or provide more services to its members. The weaker union was the innocent victim, which, if it responded at all on behalf of its members, necessarily responded with violence, not through its own strategies of organization, persuasion, and solidarity. The employer was a helpless bystander with no economic resources or power, who was forced either to suffer the "probable consequences" of the dominant union's "wanton or malicious acts" or bend to its will by inducing workers to join the dominant union or lose their jobs.²¹³

To assume that the prevailing union achieved its "supremacy" with "courteous" and "mild" words that were secret signals—"which might reasonably be expected to lead to [violent] results"²¹⁴—was to assume that unions and workers were not capable of peaceful, rational behavior when they engaged in collective action. In effect, the court saw in the union representative's words the "secret terrorism" that Judge Taft imputed even to Frank Phelan's most innocent utterances in the Pullman boycott.²¹⁵ However, the presumption of violent intentions and consequences in peaceful union activity struck at the heart of the liberal ideol-

209. *Id.*

210. *Id.* at 494, 57 N.E. at 1012.

211. *Id.* at 502, 57 N.E. at 1015.

212. *Id.* at 497, 57 N.E. at 1013.

213. *Id.* at 497, 498, 57 N.E. at 1013.

214. *Id.* at 502, 57 N.E. at 1015.

215. *See supra* text accompanying notes 121-23.

ogy of freedom of contract. The court failed to see the contradiction in protecting one set of workers because they exercised their "right to dispose of [their] labor with full freedom"²¹⁶ and condemning another set of workers because they were behaving in a responsible, rational manner to protect the interests of the members of their community.

The successful functioning of a contractual system of ordering relations depended on the premise that all individuals were autonomous, rational, self-interested actors. When the individual entered into contractual relations with another, there existed a degree of trust that each would in good faith carry out his or her promises. The trust came from evaluation of the objective behavior of the other individual in that relationship, in prior similar relationships, and in the world outside the relationship. Judicial attitudes about worker violence implied that workers could never be trusted because their objective behavior—their words and organized activity—could always be a masked "signal" for violence. Words and actions of actors other than workers, in places other than the work environment, were taken at face value, and in good faith, to mean what they appeared to mean. Words and actions of workers in the workplace were distrusted because the workplace context, and the inferior status of workers in that context and in society at large, called forth ambiguous and malevolent meanings. Furthermore, the class notion which presumed that workers were ignorant and dependent, alien and different, led to the conclusion that workers were incapable of perceiving their own self-interest. This assumption in turn justified paternalism.²¹⁷

Although judges in cases like *Plant* and *Phelan* frequently talked about the freedom of other workers to enter into the employment relationship on any terms they were willing to accept, without coercion by union members or organizers, that "freedom of contract" was a convenient fiction. Workers could not at the same time be (1) rational, autonomous, self-interested actors, (2) irrational, violent, self-destructive actors, (3) incompetent, dependent, self-less victims, and (4) inane, fungible, dehumanized commodities. Yet these four contradictory images were woven through the analysis of the common law restraint of trade and federal antitrust cases.

It was not the freedom of contract of other workers which the courts were protecting, but the freedom of employers to have unrestrained access to a cheap labor pool. Nevertheless, the libertarian and utilitarian

216. *Plant*, 176 Mass. at 498; 57 N.E. at 1013.

217. See generally Soifer, *The Paradox of Paternalism and Laissez-Faire Constitutionalism: United States Supreme Court, 1888-1921*, 5 LAW & HIST. REV. 249 (1987).

ideology underpinning freedom of contract doctrine assumed that workers operated in the labor market with the same rationality and capability for self-interested, economic decision making as employers.²¹⁸ The common law judges at the turn of the century did not assert *a priori* that employers, either as individuals or in associations in firms or organizations, would coerce others through implicit threats of violence. But some of these judges did imply that workers, particularly when they formed labor organizations, often achieved their goals through violence or threats of violence. And unlike laborers, employers who both owned and managed capital and the labor "contract," were rarely portrayed as victims,²¹⁹ and never as commodities.

The victimization and commodification of workers were generally addressed through the inequality-of-bargaining-power critique of freedom of contract.²²⁰ The fact that workers were victimized by the structure of the economy—scarce jobs and large pools of labor—and forced to "commodify" their labor, led to their inequality of bargaining power in the labor market. The libertarian and utilitarian response, typical of the late nineteenth century faith in the fairness of contractualism, was that inequality of bargaining power always existed between two parties to a contract, but did not amount to duress.²²¹ According to this argument, the inequalities in bargaining power of workers did not prevent them from acting in the market as autonomous, self-interested actors, nor did it prevent them from making choices that improved their economic well-being.

But the assumption that workers harbored violent thoughts and in-

218. The tenacity of this view is demonstrated in Richard Epstein's assertions about the continued viability for modern labor relations of late nineteenth century *laissez-faire* economics and the common law doctrines of freedom of contract. See Epstein, *A Common Law for Labor Relations: A Critique of the New Deal Legislation*, 92 *YALE L.J.* 1357 (1983).

219. *But see, e.g., supra* text accompanying notes 105-07 (Taft's speech to 1894 graduating class of Michigan Law School).

220. *See, e.g.,* *Holden v. Hardy*, 169 U.S. 366 (1898) (upholding Utah law imposing eight-hour day on miners).

221. Richard Epstein, for example, writes that

"[t]o insist . . . that there be economic equality before there can be contract is to destroy the usefulness of contract by imposing a set of exacting conditions that can never be satisfied or even approached. To confuse economic inequality with duress is to say that no bargains are ever free from duress, and to swallow up freedom of contract by an unprincipled expansion of the principled limitations upon the basic rule. It is quite enough that the contracts leave the parties better off than they were before. It is too much to ask of any system of rules that it correct whatever asserted social imbalances exist before the contract formation.

Epstein, *supra* note 218, at 1372.

tentions, regardless of their outwardly benign behavior, directly undermined the conceptual basis of freedom of contract. Judges who articulated beliefs that male workers were prone to violent acts and that their group behavior either led to violence or was a signal to violence, could not simultaneously argue that such workers were making rational, economic choices. Violence and expressions of violent intentions are duress. They are the imposition of the will of one person on the will of another through compulsion, intimidation, and coercion. Violence exists when bargain and free choice have not been resorted to or have failed; it is not explainable as part of the workings of a market based on freedom of contract.

When judges suggested that certain peaceful union collective action inevitably resulted in a veiled threat of violence or a signal to violence, they assumed away the capability for rational, good faith behavior which was the premise of contractualism. Physical harm, unlike economic harm, was concrete and unambiguous in its evil. Violence thus provided a way to resolve the instability in the market posed by combinations of workers. But in attributing violent and malicious intentions to workers and their unions, the courts revealed the fallacy of freedom of contract as a basis for governing the employment relationship. Workers who imposed their will through duress and coercion, by implicit threats of violence, were not workers who could be trusted to enter into or carry out contracts. The court in *Plant* revealed clearly its understanding about the ability of unions to coerce through peaceful behavior, "mild" language, and "suave" words:²²²

It is true they [the union agents] committed no acts of personal violence, or of physical injury to property, although they threatened to do something [to strike for a closed shop] which might reasonably be expected to lead to such results. In their threat, however, there was plainly that which was coercive in its effect upon the will. It is not necessary that the liberty of the body should be restrained. Restraint of the mind, provided it would be such as would be likely to force a man against his will to grant the thing demanded, and actually has that effect, is sufficient in cases like this.²²³

If violent threats were perceived in labor activity that was admittedly peaceful, they arose in the minds of the beholders. Thus the determination of liability or illegality of worker actions depended on the subjective views of employers and judges who were already predisposed to be suspicious of workers who came from different social class and eth-

222. 176 Mass. at 497, 57 N.E. at 1013.

223. *Id.* at 502, 57 N.E. at 1015.

nic backgrounds. It was difficult for unions to know before the fact what collective activity would be viewed as inherently violent. It could have been argued that closed shop disputes were more likely to result in violence because they involved contests between rival unions, or between pro-union and anti-union adherents. This, indeed, seems to be what the court in *Plant* attempted to do in a somewhat circuitous fashion. Likewise, secondary boycotts could have been outlawed on the basis that disputes involving third parties, employers outside the immediate employment relationship, had a high probability of arousing the anger of outsiders, thus leading to violence.

Such assumptions would have been based on conjecture, not empirically verified reality. There was no reason to expect, for instance, that a primary strike for wages in which the employees' jobs had been taken by scabs would result in any more or less violence than a strike for a closed shop or a secondary boycott. Yet the primary strike or boycott was tolerated and legal even though it could lead to violence, while the strike for a closed shop or secondary boycott was barred in part because it had a high probability of resulting in violence.

Thus, the fear of violence engendered by workers engaging in peaceful collective action was the foundation for liability under common law restraint of trade doctrine in circumstances that were normally beyond the reach of tort and criminal law. If strikers engaged in violence or threats of violence, their behavior and words were actionable under state tort law or indictable under state criminal laws. Peaceful behavior and language devoid of threats of physical violence, however, were not illegal or restrainable under the tort and criminal law which protected persons and property from physical harm. Nor could union agents or members be held liable for the violence of others, such as the employer's agents, other workers, or outsiders, unless they intentionally provoked or instigated the violence. The Massachusetts court in *Plant* acknowledged its frustration with the inability of the tort and criminal laws to deal with peaceful labor activity:

Even if the intent of the strikers, so far as respects their own conduct and influence, be to discountenance all actual or threatened injury to person or property or business, except that which is the direct necessary result of the interruption of the work, and even if their connection with the injurious and violent conduct of the turbulent among them or of their sympathizers be not such as to make them liable criminally or even answerable civilly in damages to those who suffer, still with full knowledge of what is to be expected they give the signal, and in so doing must be held to avail themselves of the degree of fear and dread which the knowledge of such consequences

will cause in the mind of those—whether their employer or fellow workmen—against whom the strike is directed²²⁴

The court here strained the conceptions of harm, danger, and coercion beyond their logical limits. In effect, the court asserted that all peaceful collective action by unions which has adverse economic consequences to anyone was harmful, dangerous, and coercive. If the union were strong and the union members' jobs could not easily be filled, the employer would feel "coerced" to accept union demands purely by the threat of the economic harm of a strike. To label this as coercion was to call all bargaining between parties of unequal bargaining power coercive, thereby collapsing the doctrinal foundations of freedom of contract.²²⁵ Such an analysis would bar even a peaceful primary strike for improved wages, something the conservative Massachusetts court was not prepared to do.²²⁶ Not wanting to acknowledge the coercion inherent in superior bargaining endowments that unions might possess, the late nineteenth century courts looked elsewhere for coercion and found it in the belief in the inevitability of worker violence.

The majority opinions in *Vegeahn* and *Plant* reiterated within the context of common law tort and restraint of trade the concerns with violence that Taft had voiced only a few years earlier in *Phelan*. Holmes's views on labor in his dissents in *Vegeahn* and *Plant* appeared to reject the distrust and fear of worker violence shared by his associates on the Massachusetts high court. Holmes instead focused on the necessity of workers acting collectively or singly to achieve economic goals within competitive markets. He affirmed the ideology of liberal individualism and its relationship to the growth of capitalism. *Vegeahn* and *Plant* thus revealed the disjunction between the liberal world view of Holmes and the conservative reaction to that view developed by Taft. Although this disjunction seemed to persist in unchanged form through the first decades of the twentieth century, Taft's later jurisprudence on the Supreme Court illustrated the accomodation of the two views.

224. *Id.* at 497, 57 N.E. at 1013.

225. See *Hitchman Coal & Coke Co. v. Mitchell*, 245 U.S. 229, 271 (1917) (Brandeis, J. dissenting) (discussion of the coercion of contract). See also *infra* text accompanying notes 531-33, 399-401. See generally Dawson, *Economic Duress—An Essay in Perspective*, 45 MICH. L. REV. 253 (1947); Hale, *Bargaining, Duress, and Economic Liberty*, 43 COLUM. L. REV. 603 (1943).

226. See *Plant*, 176 Mass. at 498-99, 57 N.E. at 1013-14.

V. REGULATION OF SECONDARY BOYCOTTS
UNDER FEDERAL ANTITRUST LAWS

A. *The Broad Sweep of the Antitrust Laws—
Attacking “the evil in its entirety”*

Many employers hoping to use the federal courts to defeat unions initially faced procedural barriers. Under article III of the United States Constitution, jurisdiction of the federal courts is primarily limited to two types of cases: cases that arise under federal law—federal question jurisdiction—and cases that are disputes between citizens of different states—diversity jurisdiction.²²⁷ While diversity jurisdiction was potentially available for employers bringing state law claims against unions and employees under theories of tort and common law restraint of trade, the threshold requirement of alleging and proving diversity of citizenship between plaintiffs and defendants limited access to the federal courts for many employers. Frankfurter and Greene observed that “[t]he eagerness of employers to be heard by a federal court is clearly revealed by the devices to which they resort in order to present an alignment of parties that meets the requisite diversity of citizenship.”²²⁸ The Sherman Act opened a new avenue of federal question jurisdiction for employers, as well as providing new federal remedies which could be effectively used to discourage unionization.²²⁹

Although the Sherman Act was passed by Congress as a means of dealing with the devastating economic consequences of monopolistic business practices, the statute was used effectively against unions long before it was used against the giant business trusts. In 1895, barely six months after Debs, Phelan, and other labor leaders were found in contempt of injunctions issued under the Sherman Act and receivership jurisdiction, “[a] death-blow to enforcement of the Sherman act [against business trusts] was delivered by the Supreme Court”²³⁰ In the *E. C. Knight* case,²³¹ the Court halted the government’s effort to break the monopoly on the price of sugar which the American Sugar Refining Com-

227. U.S. CONST., art. III, § 2, cl. 1.

228. F. FRANKFURTER & N. GREENE, *supra* note 49, at 13-14.

229. Frankfurter and Greene recognized that the introduction of federal jurisdiction based on the antitrust laws did not diminish the significance of diversity jurisdiction. Based on data in an unpublished study by W.C. Waring, Jr., *The Use of the Injunction in Labor Disputes by the Federal Courts* (available in Harvard Law School Library), Frankfurter and Greene estimated that between 1891 and 1927 approximately two-thirds of the labor cases in the federal courts were based on claims of diversity jurisdiction. *Id.* at 210 & n.20.

230. 1 H. PRINGLE, *supra* note 73, at 144.

231. *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895).

pany had achieved through its control of ninety-eight percent of the sugar refineries in the United States. The government's suit against the sugar company foundered on the Court's conclusion that the company's contracts and acts "related exclusively to the acquisition of the Philadelphia refineries and the business of sugar refining in Pennsylvania, and bore no direct relation to commerce between the States or with foreign nations."²³² Thus, despite the giant sugar trust's control of sugar refineries throughout the nation, and its monopoly on the sale and price of sugar, the Sherman Act was, for a time, an empty promise as a government weapon against business trusts. Indeed, William Howard Taft later wrote that

[t]he effect of the decision in the Knight case upon the popular mind, and indeed upon Congress as well, was to discourage hope that the statute could be used to accomplish its manifest purpose and curb the great industrial trusts which . . . were making every effort to restrict production, control prices, and monopolize the business.²³³

Following the *Knight* case, President Cleveland and Attorney General Olney "concluded that the evil must be controlled through State legislation, and not through a national statute."²³⁴ Taft complained that "the protection which has long been afforded to the ordinary criminal, and the leniency with which the law treats an accused, have enured greatly to the benefit of these wealthy and powerful violators of the law" who have an "immense fund at their disposal" and "are able to secure the most acute counsel."²³⁵ The McKinley administration came and went with "not a single indictment" against business under the Sherman Act, and "[e]nforcement virtually ceased until, in February 1902, President Roosevelt ordered a suit against the Northern Securities Company"²³⁶

232. *Id.* at 17.

233. W.H. TAFT, *supra* note 156, at 60.

234. *Id.*

235. W.H. TAFT, *FOUR ASPECTS OF CIVIC DUTY* 52 (1906). [hereinafter W.H. TAFT, *CIVIC DUTY*]. Probably one of Taft's greatest achievements as a judge of the court of appeals was his decision in *United States v. Addyston Pipe & Steel*, 85 F. 271 (1898), finding the pipe manufacturer in violation of the Sherman Act. The case was affirmed on appeal to the Supreme Court, on the basis of Taft's analysis. 175 U.S. 211 (1899). Taft later wrote about the case that "[t]he purposes and action of the combination, through the treachery of a stenographer, were laid before the court, so that minute dissection was possible It would be difficult to state a case of contract for sales among vendors more certainly restrictive and more selfish and monopolizing in character than this was." W.H. TAFT, *supra* note 156, at 71-72.

236. 1 H. PRINGLE, *supra* note 73, at 144. See *Northern Sec. Co. v. United States*, 193 U.S. 197 (1904). For an important evaluation of the antitrust laws of the period, see generally M. SKLAR, *THE*

Taft later reiterated his faith in the system of private property despite "the abuses that grow out of the possession of great wealth by unscrupulous men."²³⁷ In a 1906 Yale lecture titled, "The Duties of Citizenship Viewed from the Standpoint of a Judge on the Bench," Taft said:

I do not for a moment sympathize in the view that everything is corruption and that all the picture should be dark and black. I think that we have had during our last ten years a decade of prosperity never before known in the history of the country; and in the immense sums which have been made for the benefit of all of us in the prosperity that we all have enjoyed, there are some who have taken a larger and an ill-gotten share, and who are attempting to maintain and increase this share by methods that should be reprobated and punished. It is impossible that such abuses should not have occurred in prosperity so unprecedented. But the abuses furnish but little reason for condemnation of the system unless it can be first shown that the prosperity has not been general, and unless it can be further shown that the abuses of the concentration of much wealth in a few hands are a greater detriment than the general prosperity is an advantage.²³⁸

But the decade that began in 1895 saw the continued legal curtailment of laborers' efforts to use unions to obtain a larger share of the "general prosperity." In the year after the Pullman boycott, the Supreme Court upheld the use of the injunction against Eugene Debs.²³⁹ As the new century began, employers vigorously pursued legal and equitable remedies in state and federal courts to restrain the union activities of their employees.²⁴⁰ The Sherman Act was but one of these legal weapons against union organization, but it held great potential in its remedial scheme, providing for government injunctions and treble damages to private plaintiffs. A proposed section of the congressional bill intended to exclude labor unions from the Sherman Act did not survive the committee process, and the Act was silent on the issue.²⁴¹ Thus it was left to the

CORPORATE RECONSTRUCTION OF AMERICAN CAPITALISM, 1890-1916: THE MARKET, THE LAW, AND POLITICS (1988).

237. W.H. TAFT, *CIVIC DUTY*, *supra* note 235, at 51.

238. *Id.* at 53-54.

239. *In re Debs*, 158 U.S. 564 (1895).

240. See F. FRANKFURTER & N. GREENE, *supra* note 49, at 21-24.

241. See R. GORMAN, *BASIC TEXT ON LABOR LAW: UNIONIZATION AND COLLECTIVE BARGAINING* 621 (1976). Historian Arnold Paul notes that "[t]he Senate Judiciary Committee, some members of which favored including labor under the law, substituted broader language in its final report; that the Congress as a whole, however, was aware of the full implications of this change is unlikely." A. PAUL, *supra* note 55, at 110 n.16. *But see* Hovenkamp, *Labor Conspiracies in American Law, 1880-1930*, 66 TEX. L. REV. 919, 950-51 (1988) (arguing that the evidence on the legislative history "suggests that Congress fully considered whether to exempt labor but decided that no combinations, either capital or labor, should be exempted").

courts to decide whether unions were an appropriate object of antitrust litigation.

B. *Loewe v. Lawlor*—The “intimidation” of the Danbury Hatters

The remedial scheme under the Sherman Act proved to be a powerful offensive weapon against unions. Section 7 of the Act permitted private parties to sue for treble damages for injuries resulting from acts found to violate the antitrust laws.²⁴² Furthermore, the United States attorneys were required under section 4 of the Act to “prevent and restrain violations” of the Act through “proceedings in equity.”²⁴³ The effectiveness of federal injunctions, as well as the expanding scope of federal substantive law, had not gone unnoticed by employers who had observed the union defeats in the receivership cases and in the common law cases brought in federal courts under diversity jurisdiction.²⁴⁴

When, in 1893, a British ship-owning company attempted to use the new federal antitrust law to restrain the “unlawful and well-nigh violent combination” of persons organizing shipping crews, District Judge Edward C. Billings held that only the United States government could sue for injunctions under the Sherman Act.²⁴⁵ Within months of this decision, the United States Attorney in New Orleans appeared in Judge Billings’s court seeking to enjoin a union under the Sherman Act; as a result, Judge Billings “became the first judge to apply the Sherman Act to labor.”²⁴⁶ In that case, *United States v. Workingmen’s Amalgamated Council*, he articulated an expansive interpretation of the legislative history of the Sherman Act:

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, . . . [t]he subject had so broadened in the minds of the legislators that the source of the evil was not regarded as material, and the

242. Sherman Act, ch. 647, § 7, 26 Stat. 210 (1890), repealed by ch. 283 Pub. L. 137 § 3, 69 Stat. 282, 283 (1955). Section 7 of the original Sherman Act was replaced with Pub. L. 97-290, § 7, 96 Stat. 1246 (1982) (codified as amended at 15 U.S.C. § 6(a) (1982)). The provision for private suits for treble damages became section 15 of the Clayton Act, ch. 323, § 4, 38 Stat. 731 (1914) (codified at 15 U.S.C. § 15(a) (1982)).

243. 15 U.S.C. § 4 (1982).

244. See, e.g., F. FRANKFURTER & N. GREENE, *supra* note 49, at 13-14.

245. *Blindell v. Hagan*, 54 F. 40, 41 (C.C.E.D. La. 1893), *aff’d*, 56 F. 696 (5th Cir. 1893). In *Blindell*, Judge Billings permitted the suit to proceed nevertheless on the broader ground of the court’s general equity jurisdiction. For a discussion of the *Blindell* case, see A. PAUL, *supra* note 55, at 107-08.

246. A. PAUL, *supra* note 55, at 108-09.

evil in its entirety is dealt with.²⁴⁷

While other views of that legislative history are possible,²⁴⁸ the federal courts frequently interpreted the words of section 1 of the Sherman Act that declared illegal "[e]very . . . combination . . . or conspiracy, in restraint of trade or commerce"²⁴⁹ to include many otherwise lawful activities by unions.²⁵⁰ But it was not until 1908 that the Supreme Court in the Danbury Hatters case—*Loewe v. Lawlor*²⁵¹—finally placed its imprimatur on the use of the Sherman Act to sue combinations of workers.

In July of 1902, in an attempt to unionize the Loewe hat factory in Danbury, Connecticut, the United Hatters of North America called a strike at the factory and declared a nationwide boycott against the Danbury hats and the wholesale dealers in numerous other states who purchased the hats. With the American Federation of Labor, the United Hatters engaged in a large-scale publicity campaign, distributing circulars, employing union agents to visit wholesale dealers and their customers, and publishing reports of the boycott and strike in their newspapers, *The Journal of the United Hatters of North America* and *The American Federationist*.²⁵² The United Hatters union label, which the union owned and controlled "absolutely," provided the strikers with "a ready, conve-

247. *United States v. Workingmen's Amalgamated Council*, 54 F. 994, 996 (C.C.E.D. La. 1893), *aff'd*, 57 F. 85 (5th Cir. 1893), *quoted in* *Loewe v. Lawlor*, 208 U.S. 274, 301-02 (1908).

248. After years of federal antitrust litigation directed at unions, Justice Stone in the 1940 Supreme Court case of *Apex Hosiery Co. v. Leader* argued that the Sherman Act was directed at "another and quite a different evil." 310 U.S. 469, 491 (1940). Stone marshalled an exhaustive account of the legislative history of the Sherman Act to support his argument that

[i]t was enacted in the era of "trusts" and of "combinations" of businesses and of capital organized and directed to control of the market by suppression of competition in the marketing of goods and services, the monopolistic tendency of which had become a matter of public concern. The end sought was the prevention of restraints to free competition in business and commercial transactions which tended to restrict production, raise prices or otherwise control the market to the detriment of purchasers or consumers of goods and services, all of which had come to be regarded as a special form of public injury.

Id. at 492-93; *see also id.* at 491-95 nn.12-15 (legislative history). In addition, Justice Stone observed that "[w]ith few exceptions the articles, scientific and popular, reflected the popular idea that the [Sherman] Act was aimed at the prevention of monopolistic practices and restraints upon trade injurious to purchasers and consumers of goods and services by preservation of business competition." *Id.* at 490 n.11.

249. Sherman Act, ch. 647, § 1, 26 Stat. 209 (1890) (codified at 15 U.S.C. § 1 (1982)); *but see Apex Hosiery*, 310 U.S. at 488.

250. Professor Gorman notes that "[t]he courts in fact proceeded to hold unions liable for anti-trust violations in more instances than manufacturers or distributors . . ." R. GORMAN, *supra* note 241, at 621.

251. 208 U.S. 274 (1908).

252. *Id.* at 286 n.1 para. 10, 287 n.1 para. 13, 291 n.1 para. 20 (quoting complaint).

nient and effective instrument and means" of enforcing the boycott.²⁵³ Hat production was "cripple[d]" until "the latter part of" October 1902, and wholesalers were "intimidate[d]" from dealing with the Danbury hats because of the boycott, causing economic losses of \$80,000 to the Loewe Company.²⁵⁴ Loewe alleged that the United Hatters past organizing successes were attributable to the "intimidation of and threats made to" the hat manufacturers and their customers, which "forced" the manufacturers "to yield to their demand, and unionize their factories."²⁵⁵

Despite the use of language in the allegations of the complaint, repetitiously describing the "intimidation," "threats," and "coercion," of the United Hatters secondary boycott tactics, the only "harm" which the union threatened was economic. No actual violence or threat of violence was alleged, and the attorneys for the plaintiffs acknowledged in their argument before the Supreme Court that the defendants "did not . . . resort to the actual seizure of the plaintiffs' hats while in transit or otherwise physically obstruct their transportation." But the Sherman Act did not require physical harm to products in the interstate "stream" of commerce or physical obstruction of the interstate "flow" of goods. Under section 7 of the Sherman Act, "[a]ny person . . . injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful" under the Act could sue in federal court "without respect to the amount in controversy" and would "recover three fold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."²⁵⁶ The unlawful acts under the federal antitrust statute were the making of combinations or conspiracies "in restraint of trade or commerce among the several States, or with foreign nations" or the attempt to monopolize or the monopolization of any part of this interstate or international trade.²⁵⁷ The question thus before the Supreme Court was whether the United Hatters secondary boycott constituted an unlawful restraint of trade under the Sherman Act.²⁵⁸

253. *Id.* at 286 n.1 para. 11 (quoting complaint).

254. *Id.* at 291 n.1 para. 20, 292 n.1 para. 21, 296 n.1 para. 22 (quoting complaint), *id.* at 307, 309. In the first few years of the century, the United Hatters had used the boycott to unionize at least seventy out of eighty-two hat factories in America. *Id.* at 305, 289 n.1 para. 17 (quoting complaint).

255. *Id.* at 289 n.1 para. 16 & 17 (quoting complaint).

256. Sherman Act, ch. 647, § 7, 26 Stat. 210 (1890) (codified at 15 U.S.C. § 15 (1982)). See *supra* note 242.

257. Sherman Act, ch. 647, §§ 1-2, 26 Stat. 209 (1890) (codified at 15 U.S.C. §§ 1-2 (1982)).

258. The district court had sustained the defendants' demurrer and dismissed the complaint in *Loewe* on the ground that "the combination stated was not within the Sherman Act." 208 U.S. at 283. In reviewing the entire complaint on appeal, the Supreme Court held unanimously that the trial court had erred in sustaining the demurrer, and that on the basis of the Court's reading of the

The plaintiffs' attorneys in their argument had insisted that

[t]he complaint must be considered as an entirety. A combination so great in scope, and complex in its operations necessarily contains elements, which in and by themselves are either innocent or beyond Federal jurisdiction It is impossible for the plaintiffs to set forth all the defendants' secret operations with definiteness and particularity.²⁵⁹

Thus when Chief Justice Fuller delivered the opinion of the Court, he noted that "the Anti-Trust law has a broader application than the prohibition of restraints of trade unlawful at common law The object and intention of the combination determined its legality."²⁶⁰

Fuller recalled that in 1893, Judge Billings had enjoined "a gigantic and widespread combination of the members of a multitude of separate organizations" which had violated the Act by "the successful effort of the combination . . . to intimidate and overawe others who were at work in conducting or carrying on the commerce of the country."²⁶¹ But the portrayal of the awesome power of the United Hatters boycott was completed with Chief Justice Fuller's invocation of the memory of the Pullman strike and the prosecution of Eugene Debs.²⁶²

The 1894 Pullman strike injunctions and contempt cases and *Loewe*

complaint, "the combination described . . . is a combination 'in restraint of trade or commerce among the several States,' in the sense in which those words are used in the act . . ." *Id.* at 292. The *Loewe* Company was permitted to proceed with its action for treble damages.

259. *Id.* at 275 (Argument for Plaintiffs in Error).

260. *Id.* at 297. Fuller also quoted lengthy excerpts from an earlier Supreme Court opinion by Justice Holmes, who in *Aikens v. Wisconsin*, 195 U.S. 194, 206 (1904), had written, "The most innocent and constitutionally protected of acts or omissions may be made a step in a criminal plot, and if it is a step in a plot neither its innocence nor the Constitution is sufficient to prevent the punishment of the plot by law." See *Loewe*, 208 U.S. at 299.

261. *United States v. Workingmen's Amalgamated Council*, 54 F. 994, 995, 1000 (C.C.E.D. La. 1893), quoted in *Loewe*, 208 U.S. at 301, 302.

262. Fuller noted that the bill in *In re Debs* alleged that the American Railway Union "asserted that they could and would tie up, paralyze and break down any and every railroad which did not accede to their demands." *Loewe*, 208 U.S. at 303. The events of the Pullman strike—the solidarity of the railway workers in support of the boycott, the fear and violence that ensued, and the economic damage suffered by the railway corporations and the Pullman Palace Car Company—were certainly vividly recalled by the members of the *Loewe* court. Although the circuit court in the *Debs* case had enjoined the boycott and strike on the authority of the Sherman Act, the Supreme Court had decided the case "upon the broader ground that the Federal Government had full power over interstate commerce and over the transmission of the mails." *Id.* The *Debs* court had reserved decision on the applicability of the Sherman Act to labor combinations for another day, and that day had arrived for the Danbury Hatters. Justice Brewer in the *Debs* case had asked, "If a State with its recognized powers of sovereignty is impotent to obstruct interstate commerce, can it be that any mere voluntary association of individuals within the limits of that State has a power which the State itself does not possess?" *In re Debs*, 158 U.S. 564, 581 (1895), quoted in *Loewe*, 208 U.S. at 304. Chief Justice Fuller in *Loewe* responded, "The question answers itself . . ." 208 U.S. at 304.

were linked in their shared images of danger, the evocation of what Taft had called "secret terrorism," and what the plaintiffs' attorneys in *Loewe* had called the "secret operations" of workers joined together in unions. The complaint in *Loewe*, with its assertions that the union boycott was experienced as "intimidation" and "threats," was sufficient to state a cause of action under the Sherman Act because the actions alleged fit into a clear, but frightening, vision of a world which threatened the "inviolability of corporate property."²⁶³ A world in which "mere voluntary associations" of working class people could "threaten," "intimidate," "force," "coerce," and "overawe" factory owners "to unionize their shops . . . and to subject [them] to the direction and control of persons, other than the owners. . . in a manner extremely onerous and distasteful to [them]" was a world turned on its head.²⁶⁴ The Sherman Act would restrain not only the "evils" of massed capital, but the threat posed to the social order by the "evils" of massed labor.

From the workers' perspective, however, the Danbury Hatters boycott, far from being violent and intimidating, was marked by its solidarity, its careful planning and dissemination of information, and its control of the union label which symbolized the pride of the craftsmen in their work. Unlike the "plots" or "secret operations" that characterized the activities of corporations attempting to restrain trade to increase profits, the union boycott, by its very nature, was a public and open campaign to protect the wages and skills of workers. Furthermore, the literature of the Danbury Hatters boycott showed that the hatters, like the artisans of earlier generations, exhibited the characteristics of "good" Americans—a strong sense of community, pride in their work, loyalty to their country, and fierce independence. Translated into the workplace structures of the turn-of-the-century factory, these characteristics led them to fear and reject the "outsiders"—immigrants, unskilled workers, women and children, native Americans from different ethnic groups—who undercut their wages and their skills. Factory owners, however, exploited the fact that the workforce represented highly stratified social structures and identifiable communities, as well as diverse skills, abilities, and resources.²⁶⁵

The perspectives of work and workers and their relationship to

263. Taft, *supra* note 24, at 232.

264. 208 U.S. at 305 (quoting complaint).

265. See D. MONTGOMERY, *THE FALL OF THE HOUSE OF LABOR: THE WORKPLACE, THE STATE, AND AMERICAN LABOR ACTIVISM, 1865-1925*, at 116-23 (1987) (discussing changes in job structures and the effects of task specialization on workers' lives in the garment industry in the late nineteenth century).

unionization as seen from the bench and from the factory floor clashed irreconcilably. To judges like Taft, Fuller, and even Holmes, the union organizer was an “outsider” and a potential threat to the cohesion of the community. To skilled workers like the Danbury hatters, the union organizer was an “insider” who represented and solidified the interests of their community. From the former vantage point, collective action of workers meant disorder, social disruption, and even violent overthrow of the capitalistic system of property ownership. From the latter vantage point, collective action for most American union members meant order, social connection, and rationalization of the workplace.

In the Danbury Hatters case, the Supreme Court linked the images and language of violence and disorder to the reality of the economic power of the union’s highly organized—but peaceful—secondary boycott. These links justified increasing the scope of the Sherman Act beyond its purpose of proscribing economically harmful business or corporate behavior to proscribing certain types of economically harmful union behavior. Furthermore, in 1908, Chief Justice Fuller noted in *Loewe* that the Sherman Act “has a broader application than the prohibition of restraints of trade unlawful at common law.”²⁶⁶ Because “[t]he object and intention of the combination determined its illegality,”²⁶⁷ judges could interject their own ideas of appropriate and inappropriate economic goals for workers and unions.

C. Duplex v. Deering—“Polite” but “sinister” threats

Although private parties could sue labor unions for treble damages under the Sherman Act, the Supreme Court eventually held that the Sherman Act did not permit private parties to seek injunctive relief.²⁶⁸ Thus, for a time, the regulation of union activity by federal injunctions under the antitrust laws was left to the United States attorneys, and employers had to be content with either federal suits for damages or remedies available under state common law. This jurisdictional hiatus was remedied by passage of the Clayton Act in 1914.²⁶⁹

266. 208 U.S. at 297; see also *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 438 (1911) (discussing the scope of the Sherman Act).

267. 208 U.S. at 297.

268. *Paine Lumber Co. v. Neal*, 244 U.S. 459, 471 (1917) (holding that a private party cannot sue for an injunction under the Sherman Act).

269. Clayton Act, ch. 323, 38 Stat. 730-40 (1914) (codified at 15 U.S.C. §§ 12-27 (1982 & Supp. IV 1986)).

Hailed by Samuel Gompers as "Labor's Magna Carta,"²⁷⁰ sections 6 and 20 of the Clayton Act had given unions cause for hope that the federal antitrust laws would no longer be used against the activities of workers. For, as Justice Brandeis later wrote in his dissenting opinion in *Duplex v. Deering*, "[t]his statute was the fruit of unceasing agitation, which extended over more than twenty years and was designed to equalize before the law the position of workingmen and employer as industrial combatants."²⁷¹ Section 6 of the Act declared the law of the United States:

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, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.²⁷²

But for many years the Clayton Act proved to be labor's undoing. Significantly, as the Supreme Court affirmed in *Duplex*, section 16 of the Clayton Act explicitly gave "private parties a right to relief by injunction in any court of the United States against threatened loss or damage by a violation of the anti-trust laws."²⁷³ For over twenty years following the passage of the Clayton Act, employers vigorously asserted their right to proceed against union activities by injunctions based on alleged antitrust violations.

Brandeis noted in *Duplex* that "[a]side from the use of the injunction, the chief source of dissatisfaction with the existing [interpretation of the Sherman Act] lay in the doctrine of malicious combination"²⁷⁴ The nineteenth century federal judges applying the Sherman Act to union activities had justified criminal penalties, injunctions, or civil damage awards based on notions that union conduct which was "socially bad" was "animated by malice" because it was done intentionally.²⁷⁵

270. 2 S. GOMPERS, *supra* note 63, at 299; see also S. GOMPERS, SEVENTY YEARS OF LIFE AND LABOR: AN AUTOBIOGRAPHY 186 (N. Salvatore ed. 1984).

271. *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 484 (1921).

272. Clayton Act, ch. 323, § 6, 38 Stat. 731 (1914) (codified at 15 U.S.C. § 17 (1982)).

273. 254 U.S. at 464-65.

274. *Id.* at 484 (Brandeis, J., dissenting).

275. These notions derived from English and American common law criminal conspiracy and restraint of trade cases. J. BRYAN, THE DEVELOPMENT OF THE ENGLISH LAW OF CONSPIRACY (1909), quoted in *Duplex*, 254 U.S. at 485 n.1.

Brandeis explained that “[by] virtue of [the] doctrine [of malicious combination], damage resulting from conduct such as striking or withholding patronage or persuading others to do either, . . . became actionable when done for a purpose which a judge considered socially or economically harmful and therefore branded as malicious and unlawful.”²⁷⁶

But before becoming a Supreme Court justice, Brandeis himself was ambivalent about the legality of certain union objectives and methods. In testimony which Brandeis delivered to the Senate Committee on Interstate Commerce in 1912 he said:

Mr. Brandeis: . . . While I believe that the closed-shop idea is radically wrong and is illegal, in the sense that no court could enforce it (and to a certain extent the courts—our Massachusetts court—has interfered by injunctions with the closed shop) yet I should not think that the necessities of the situation were such as to require the same protection against the union which we now require against trusts

Senator Newlands: In other words, you do not think that the labor union constitutes the same menace to society that the capitalistic union does?

Mr. Brandeis: I do not.

Senator Newlands: But if it does you would be prepared to act on that?

Mr. Brandeis: Absolutely, I think. Society must protect itself.²⁷⁷

The Clayton Act attempted to alter the perspective that the courts had developed on the “menace” to society of the labor union as compared to the “capitalistic union”—the business trust. But far more significant than the Clayton Act’s declaration of the legality of unions under federal antitrust law, was its limitation on the power of federal courts to issue injunctions against certain types of labor activity in labor disputes. Section 20 of the Clayton Act declared it to be the law of the United States

[t]hat no restraining order or injunction shall be granted by any court of the United States . . . in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment, unless neces-

276. 254 U.S. at 485.

277. *Hearing on S. Res. 98 Before the Senate Comm. on Interstate Commerce*, 62d Cong., 1st Sess. 1173 (1912) (testimony of Louis D. Brandeis), reprinted in *A DOCUMENTARY HISTORY OF AMERICAN ECONOMIC POLICY SINCE 1789*, at 246 (W. Letwin ed. 1961) [hereinafter *DOCUMENTARY HISTORY*]. At the time of this hearing Louis Brandeis was a wealthy corporate attorney who had become a public advocate of legislative reforms supported by the labor movement, such as minimum wage laws and protective legislation for women. In 1916, Woodrow Wilson appointed him to the position of Associate Justice of the Supreme Court, where he served until his retirement in 1939.

sary to prevent irreparable injury to property, or to a property right, of the party making the application, for which injury there is no adequate remedy at law²⁷⁸

The remaining paragraph of section 20 of the Clayton Act listed acts which "any person or persons, whether singly or in concert" could engage in, without prohibition by a restraining order or injunction issued by a federal court, and which could not "be considered or held to be violations of any law of the United States."²⁷⁹ At issue in the *Duplex* case was the meaning of that part of section 20 of the Act which prevented the federal courts from prohibiting "any person or persons . . . 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."²⁸⁰ On its face, the words seemed to protect the secondary boycott, which had been found unlawful in *Loewe v. Lawlor*.

The labor dispute in *Duplex* was similar to the dispute in *Loewe*. Members of a union of skilled workers—the International Association of Machinists—engaged in a strike and boycott to put economic pressure on the Duplex Printing Press Company. The goal was to unionize the Duplex factory in Michigan, which manufactured newspaper printing presses, and to protect the wage scale and working hours the union had achieved elsewhere. In support of the strike, the union requested "its members and the members of affiliated unions not to work on the installation of presses which [Duplex] had delivered in New York."²⁸¹ It was the legality of this secondary boycott that was at issue in the *Duplex* case.

The Duplex Company brought its action in federal district court invoking jurisdiction on the grounds of diversity of citizenship and of the substantive federal question—were officials of the machinists union engaged in a conspiracy in restraint of trade under the Sherman Anti-Trust Act? Duplex sought to enjoin several officials of the International Association of Machinists from continuing the union boycott. After the suit was initiated, but before the final hearing in the United States District Court, Congress passed the Clayton Act of October 15, 1914. On appeal, the Clayton Act, in its first and most decisive test,²⁸² was applied to the facts

278. Clayton Act, ch. 323, § 20, 38 Stat. 738 (1914) (codified at 29 U.S.C. § 52 (1982)).

279. *Id.*

280. *Id.*

281. 254 U.S. at 480.

282. After the hearing, the district court dismissed the complaint, and the Second Circuit subsequently affirmed that decision, with one judge—Circuit Judge Rogers—dissenting. District Judge Learned Hand and Circuit Judge Hough wrote separate opinions affirming the lower court. *Duplex Printing Press Co. v. Deering*, 252 F. 722 (2d Cir. 1918). Upon reaching the United States Supreme

of the Duplex dispute.

The Court first held that section 16 of the Clayton Act extended to private parties the right to injunctive relief from threatened property losses caused by violations of the federal antitrust laws. Justice Pitney stated that "clear and undisputed evidence" proved that Duplex Printing Company's "business of manufacturing printing presses and disposing of them in commerce is a property right"; "a widespread combination [of Machinists Union members] exists"; and Duplex "has sustained substantial damage to its interstate trade, and is threatened with further and irreparable loss and damage in the future."²⁸³ Consequently, the plaintiffs were entitled to an injunction if the union's actions were proscribed by the Sherman Act as it had been amended by the Clayton Act.

The Court then gave a very restrictive reading of the parties protected from federal equitable remedies under section 20 of the Clayton Act.²⁸⁴ Whereas the majority of the circuit court of appeals interpreted the words "employers and employees" in section 20 to mean "the business class or clan to which the parties litigant respectively belong," the Supreme Court held the words to apply only to parties standing in the proximate relation described in the statute.²⁸⁵ Under the facts of *Duplex*, the defendant union officials who were orchestrating the boycott were

Court in 1921, however, *Duplex* justified what Felix Frankfurter and Nathan Greene described as "application of a familiar bit of French cynicism: The more things are legislatively changed, the more they remain the same judicially." F. FRANKFURTER & N. GREENE, *supra* note 49, at 176. The Supreme Court, with Justice Pitney writing for the majority, reversed the decision of the circuit court, holding that the activity of the Machinists Union was enjoined by a federal court. Brandeis dissented in an opinion joined by Justices Holmes and Clarke. Frankfurter and Greene later observed that

[h]ow much of the life of a statute dealing with contentious social issues is determined by the general outlook with which judges view such legislation, lies on the very surface of the *Duplex Case*. Thirteen federal judges were called upon to apply the Clayton Act to the particular facts of this case. Six found that the law called for a hands-off policy in the conflict between the Duplex Printing Company and the Machinists; seven found that the law called for interference against the Machinists. The decision of the majority of the Supreme Court is, of course, the authoritative ruling. But informed professional opinion would find it difficult to attribute greater intrinsic sanction for the views of the seven judges, White, McKenna, Day, Van Devanter, Pitney, McReynolds and Rogers than for the opposing interpretation of the six judges, Holmes, Brandeis, Clarke, Hough, Learned Hand and Manton.

Id. at 169.

283. 254 U.S. at 465.

284. Clayton Act, ch. 323, § 20, 38 Stat. 738 (1914) (codified at 29 U.S.C. § 52 (1982)); see *infra* note 366.

285. 254 U.S. at 471.

not employees of the plaintiff employer. In fact, no employees of Duplex were directly involved in the boycott activity.

Justice Pitney observed that section 20 of the Clayton Act "imposes an exceptional and extraordinary restriction upon the equity powers of the courts of the United States and upon the general operation of the anti-trust laws, a restriction in the nature of a special privilege or immunity to a particular class, with corresponding detriment to the general public."²⁸⁶ Therefore, "[f]ull and fair effect" would be given to the "guarded language" Congress used in the statute if the "exceptional privilege" were confined to "parties affected in a proximate and substantial, not merely a sentimental or sympathetic, sense by the cause of dispute."²⁸⁷ Union officials or other union members who were not, at the time of the suit, employees of the employer seeking equitable relief did not fall under the Clayton Act's savings provisions. Pitney observed that "Congress had in mind particular industrial controversies, not a general class war."²⁸⁸

Justice Brandeis countered that "a strict technical construction" of the words in section 20—"employers and employees" and "persons employed and persons seeking employment"—would make the statute inapplicable to most labor disputes, "since the very acts to which it applies sever the continuity of the legal relationship."²⁸⁹ Also, in his analysis of the legality of the secondary boycott under the common law, Brandeis pointed out that none of the defendant union officials or the machinists who refused to work on installing the Duplex presses was "an outsider, an interloper."²⁹⁰ Brandeis queried, "May not all with a common interest join in refusing to expend their labor upon articles whose very production constitutes an attack upon their standard of living and the institution which they are convinced supports it?"²⁹¹

The undercurrent of a fear of violence—of "class war"—runs through Pitney's opinion in *Duplex*. Pitney described the acts of the defendants in carrying out their secondary boycott as follows: "warning customers" not to purchase or install the presses and "threatening them with loss" if they do so; "threatening customers with sympathetic strikes in other trades"; "threatening" a trucking company "with trouble" if it

286. *Id.*

287. *Id.* at 472.

288. *Id.*

289. *Id.* at 488 (Brandeis, J., dissenting).

290. *Id.* at 481.

291. *Id.*

should haul the presses to the customers; “inciting” employees of the trucking company and the Duplex customers to strike their employers; “coercing union men by threatening them with loss of union cards and with being blacklisted as ‘scabs’ if they assisted in installing the presses”; and “resorting to a variety of other modes of preventing the sale of the [Duplex] presses in New York City . . . such as injuring and threatening to injure [Duplex’s] customers and prospective customers, and persons concerned in hauling, handling, or installing the presses.”²⁹² Pitney went on to emphasize that “[i]n some cases the threats were undisguised, in other cases polite in form but none the less sinister in purpose and effect.”²⁹³

According to the Court, the Clayton Act did not permit “a normally lawful organization to become a cloak for an illegal combination or conspiracy in restraint of trade.”²⁹⁴ Thus the fact that the machinists secondary boycott was outwardly peaceful did not change its “sinister” and “threatening” character. Peaceful economic pressure carried out through the secondary boycott—or what Taft had earlier described as “a cruel instrument” that “coerce[s] the whole community”²⁹⁵—implicitly contained the threat of violence. Pitney wrote in *Duplex* that the restraint of the secondary boycott “produced by peaceable persuasion is as much within the prohibition [of the antitrust laws] as one accomplished by force or threats of force.”²⁹⁶ The distinction between economic coercion and coercion by violence was too ambiguous. The peaceful and “polite” language of persuasion could too easily be a “cloak” for “sinister” threats of force. This ambiguity justified the prohibition of even peaceful persuasion.²⁹⁷

Brandeis, on the other hand, rejected the Court’s characterization of the machinists’ boycott as potentially violent. He observed that the union officials had not been charged with “inducing employees to break their

292. *Id.* at 463-64.

293. *Id.* at 464.

294. *Id.*

295. Address by William Howard Taft, Secretary of War, at Cooper Union, New York City (Jan. 10, 1908), reprinted in R. DUNN, WILLIAM HOWARD TAFT, AMERICAN 219, 248 (1908) [hereinafter Taft, Cooper Union Address].

296. 254 U.S. at 467-68.

297. At the conclusion of the majority opinion, Pitney declared that the defendants, the Machinists Union, and all its members should be enjoined “from causing or threatening to cause loss, damage, trouble, or inconvenience [to any person dealing or trading with Duplex] . . . , and also and especially from using any force, threats, command, direction, or even persuasion” with the purpose or effect of causing anyone to refuse to work for a Duplex customer or any firm involved in delivery or installation of Duplex printing presses. *Id.* at 478.

contracts."²⁹⁸ "Nor," Brandeis continued, "is it now urged that defendants threaten acts of violence."²⁹⁹ Congress had intended by the Clayton Act to declare that "the relations between employers of labor and workmen were competitive relations, that organized competition was not harmful and that it justified injuries necessarily inflicted in its course."³⁰⁰ Congress had chosen "to remove all restrictions which now prevent the freedom of action of both parties to industrial disputes, retaining only the ordinary civil and criminal restraints for the preservation of life, property and the public peace."³⁰¹ Brandeis believed that both the common law and the federal antitrust laws declared "the right of industrial combatants to push their struggle to the limits of the justification of self-interest."³⁰²

The congressional plan, however, was not to sanction violence. Rather, Brandeis argued, the legislative legalization of the secondary boycott was a means of avoiding violence. Brandeis concluded his dissenting opinion in *Duplex* with the following comment:

All rights are derived from the purposes of the society in which they exist; above all rights rises duty to the community. The conditions developed in industry may be such that those engaged in it cannot continue their struggle without danger to the community. But it is not for judges to determine whether such conditions exist, nor is it their function to set the limits of permissible contest and to declare the duties which the new situation demands. This is the function of the legislature which, while limiting individual and group rights of aggression and defense, may substitute processes of justice for the more primitive method of trial by combat.³⁰³

Earlier, in the year that the Clayton Act was passed, William Howard Taft had rejected the argument that the secondary boycott should be permitted because it would channel forces into "processes of justice" that would otherwise lead to "trial by combat." In his book, *The Anti-Trust Act and the Supreme Court*, Taft wrote:

The suggestion is made that the working-men ought to be allowed to use the secondary boycott, because if they do not, then they will resort to

298. *Id.* at 479 (Brandeis, J., dissenting). Brandeis was referring to the holding of *Hitchman Coal & Coke Co. v. Mitchell*, 245 U.S. 229 (1917), that a union official's peaceful attempts to persuade employees to break their "yellow dog" contracts by joining the union and unionizing their mine was enjoined.

299. *Duplex*, 254 U.S. at 479 (Brandeis, J., dissenting).

300. *Id.* at 486.

301. *Id.* at 486-87 n.2 (quoting REPORT OF THE COMMITTEE ON INDUSTRIAL RELATIONS 136 (1915)).

302. *Id.* at 488.

303. *Id.*

force. This seems to be a very poor argument. It assumes that militancy and the use of criminal means to further a cause should be recognized as an effective method of changing law.³⁰⁴

Thus, what unions correctly perceived as their most effective economic "weapon" came to be seen as either a veiled threat of violence or a rational response to avoid violence. The fact that the success of a secondary boycott depended on skilled leadership, effective communication, responsive organization, strong individual loyalty and solidarity, and community support was irrelevant. Rather, the organization of the secondary boycott became, for many jurists, the makings of "sinister" plots that could be prosecuted and enjoined under the federal antitrust laws.³⁰⁵

304. W.H. TAFT, *supra* note 156, at 25.

305. During the 1920s, the courts, including the Supreme Court, continued to use the Sherman Act, as amended by the Clayton Act, to prohibit secondary boycotts that involved interstate trade. In 1927, relying on the analysis of *Duplex*, the Supreme Court upheld an injunction against the Journeymen Stone Cutters Association, forbidding them to refuse to work on stone cut by men who were members of an "independent union" set up by the Bedford Cut Stone Company following a lockout of the journeymen. *Bedford Cut Stone Co. v. Journeymen Stone Cutters' Ass'n*, 274 U.S. 37 (1927). Brandeis again wrote a strong dissent, also joined by Holmes, in which he described the behavior of the members of the Journeymen's union:

They were innocent alike of trespass and of breach of contract. They did not picket. They refrained from violence, intimidation, fraud and threats. They refrained from obstructing otherwise either the plaintiffs or their customers in attempts to secure other help. They did not plan a boycott against any of the plaintiffs or against builders who used the plaintiffs' product. On the contrary, they expressed entire willingness to cut and finish anywhere any stone quarried by any of the plaintiffs, except such stone as had been partially "cut by men working in opposition to" the [Journeymen's] Association.

. . . .

Members of the Journeymen Stone Cutters' Association could not work anywhere on stone which had been cut at the quarries by "men working in opposition" to it, without aiding and abetting the enemy. Observance by each member of the provision of their constitution which forbids such action was essential to his own self-protection. It was demanded of each by loyalty to the organization and to his fellows. If, on the undisputed facts of this case, refusal to work can be enjoined, Congress created by the Sherman Law and the Clayton Act an instrument for imposing restraints upon labor which reminds of involuntary servitude.

Id. at 59, 64-65.

For a description of Chief Justice Taft's struggle to get a majority of the Court to follow *Duplex* in the *Bedford Cut Stone* case, see A. MASON, *supra* note 105, at 228-30. Mason notes that Taft wrote his son that "Brandeis has written one of his meanest opinions . . . Holmes sides with him, and while Sanford and Stone concur in our opinion, they do it grudgingly, Stone with a kind of kickback that will make nobody happy." *Id.* at 230 (quoting letter from William Howard Taft to Robert A. Taft (Apr. 10, 1927)).

VI. REGULATION OF PICKETING UNDER FEDERAL AND STATE ANTITRUST LAWS: THE TAFT OPINIONS

A. *Introduction—Injunctions “by the bushel”*

William Howard Taft took his seat as Chief Justice of the United States Supreme Court on October 6, 1921, less than a year after the *Duplex* decision was handed down.³⁰⁶ Before the year was out, he had written the opinions for the majority of the Court in two important cases involving labor picketing—*American Steel Foundries v. Tri-City Central Trades Council* and *Truax v. Corrigan*.³⁰⁷ The first case, *American Foundries*, concerned the effect of the Clayton Act on the scope of an injunction barring union picketing outside a steel factory. The second case, *Truax*, was a determination of the validity under the United States Constitution of a state's interpretation of its “little Clayton Act.” Both cases were significant for union endeavors to use the picket line as a method of organizing and striking, particularly in the wake of *Duplex*'s proscription of the secondary boycott.

The appointment of Taft to head the highest court did not bode well for the cause of organized labor. Taft's eight-year tenure on the Sixth Circuit during the last decade of the nineteenth century had given him a reputation as an antilabor judge. When in 1901 Theodore Roosevelt, then McKinley's vice president, had written a magazine article suggesting Taft's suitability for the office of president of the United States,³⁰⁸ Taft had written to his brother Charles:

The idea that a man who has issued injunctions against labour unions, almost by the bushel, who has sent at least ten or a dozen violent labour agitators to jail, and who is known as one of the worst judges for the maintenance of government by injunction, could ever be a successful candidate on a Presidential ticket, strikes me as intensely ludicrous; and had I the slightest ambition in that direction I hope that my good sense would bid me to suppress it.³⁰⁹

After serving as governor of the Phillipines and then as secretary of war in Roosevelt's cabinet, Taft, at Roosevelt's urging, “suppressed his good sense” and ran for the presidency in 1908. That year, in his address

306. *Duplex*, 254 U.S. 433, was decided on January 3, 1921.

307. *American Foundries*, 257 U.S. 184, was decided on December 5, 1921, and *Truax*, 257 U.S. 312, was decided on December 19, 1921.

308. The article in *Outlook* magazine was occasioned by Taft's appointment in 1901 as the first civil governor of the Phillipines. A. MASON, *supra* note 105, at 25.

309. Letter from William Howard Taft to Charles P. Taft (date unknown) in H. TAFT, *RECOLLECTIONS OF FULL YEARS* 223 (1914), *quoted in* A. MASON, *supra* note 105, at 26.

at the Cooper Institute in New York City to an "East side audience of workingmen and socialists"—some 3,000 strong—Taft attempted to dispel some of the labor bias against him.³¹⁰ The speech was designed to demonstrate the unity of interests of labor and capital—"that there is a wide economic and business field in which the interests of the wealthiest capitalist and of the humblest laborer are exactly the same."³¹¹ This "common interest" which Taft identified as the desire "to increase the fruits of production," did not, however, keep capital and labor from being "plainly opposed" to each other "in determining the share of each in the product."³¹² Labor unions are "necessary" because "capital will surely have the advantage unless labor takes united action."³¹³ Taft equally disparaged the "abuses" of capital and labor, particularly the business trust and the secondary boycott. But he reiterated his views on the legality of unions and peaceful strikes—a position he had expressed in unequivocal terms in his 1894 opinion convicting Phelan of contempt,³¹⁴ and had maintained steadfastly throughout his career as a politician and a jurist.

In attacking the "abuses of capital," Taft emphasized that wage earners are "seriously affected" by corporate anticompetitive practices which raise the "prices of the necessities of life," thereby reducing "the purchasing power of the wages which the wage-earners receive."³¹⁵ Likewise, Taft deplored the "rare instances corporate managers have entered into a course of violence to maintain their side of a labor controversy" and the employer tactic of "blacklisting . . . laboring men, solely because they may have been advocates of a strike."³¹⁶

Turning to the abuses of labor, Taft first criticized the use of "open violence and threats of violence to prevent the employment of other workingmen in the places which such members have left on a strike."³¹⁷ Although such violence and threats "are, of course, unlawful, and are strongly to be condemned," Taft continued, "[p]ersuasion not amounting in effect to duress is lawful."³¹⁸ After attacking labor's use of the second-

310. R. DUNN, WILLIAM HOWARD TAFT, AMERICAN 167 (1908).

311. Taft, Cooper Union Address, *supra* note 295, at 229.

312. *Id.*

313. *Id.* In this sense, Taft's views on labor were consistent with those of Holmes. See the dissenting opinions of Holmes in *Vegeahn v. Guntner*, 167 Mass. 92, 104, 44 N.E. 1077, 1079 (1896), and *Plant v. Woods*, 176 Mass. 492, 504, 57 N.E. 1011, 1015 (1900).

314. *In re Phelan*, 62 F. 803, 817 (C.C.S.D. Ohio 1894).

315. Taft, Cooper Union Address, *supra* note 295, at 244-45.

316. *Id.* at 245-46.

317. *Id.* at 246.

318. *Id.* at 247.

dary boycott, Taft concluded his speech with a lengthy discourse on the use of the injunction in labor disputes. Taft presented a brief history of the writ of injunction, a defense of its benefits and usefulness, and a reasoned critique of its abuse by employers and judges in cases when strikers "had no intention of doing anything unlawful or doing any violence."³¹⁹ Taft observed that because of what he believed were procedural defects in the granting of labor injunctions, "a number of injunctions have been issued that ought never to have been issued."³²⁰

For a judge who was denounced by labor leaders³²¹ for handing out labor injunctions—in Taft's own words, "by the bushel"—Taft's Cooper Union speech was a remarkable performance. For a politician, it nicely served the needs of the Republican Party, which was attempting to address some of the important labor issues which the Democratic Party had raised.³²² Not surprisingly, at the end of Taft's speech, a member of the audience submitted the written question, "Why has your attitude toward workingmen changed since you were on the bench in Ohio?" Taft replied, "It hasn't."³²³

In a way, Taft was right, for the elements of his views on the legal rights of workers, as well as the economic harm flowing from corporate monopolies of trade, existed in his early opinions written while serving as a judge first on the Ohio Superior Court and then on the United States Court of Appeals.³²⁴ One historian of Taft's judicial career wrote that "[i]t was [Taft's] fate to be holding high judicial posts at periods when there were numerous sharp clashes between labor and capital. This was especially so during his early years on the circuit bench and again in

319. *Id.* at 257.

320. *Id.* at 256.

321. David H. Burton noted that "[d]uring the 1908 Presidential campaign, Democratic speakers constantly reminded audiences of [Taft's] fondness for rule by injunction during his years as an Ohio judge." D. BURTON, *WILLIAM HOWARD TAFT: IN THE PUBLIC SERVICE* 134 (1986). Alpheus T. Mason noted that Gompers called Taft the "injunction standard bearer" and Bryan referred to him as "the father of injunctions." Mason, *supra* note 139, at 601.

322. Taft later wrote:

I found that Mr. Bryan was constantly referring to me as the father of injunctions, and that Democratic managers were making as much of this part of the issues of the campaign as possible, and I concluded, therefore, that the only thing for me to do was to seek an opportunity to tell what I had decided (in labor cases) to audiences composed as largely of labor men as possible, and then leave it to their sense of justice whether their attacks upon me as an enemy of labor were justified.

Taft, *Judicial Decisions as an Issue in Politics*, 33 *McCLURE'S MAG.* 201, 208 (1909), quoted in Mason, *supra* note 139, at 601 n.39.

323. R. DUNN, *supra* note 310, at 176 (quoting William Howard Taft).

324. See Mason, *supra* note 139, at 589-601 (discussing Taft's labor opinions during his early judicial career).

the first few years of his service as Chief Justice."³²⁵ In reconciling the rights of property owners with the rights of workers, Taft responded in 1921 much as he had as a circuit court judge in 1894; he protected property rights at the expense of the rights of workers to engage in picketing.³²⁶ Alpheus Mason wrote that Taft's

enduring aim was to safeguard private property—the bulwark of civilization. The Constitution, he believed, precludes social and economic experimentation. At the storm center for nearly half a century, he tried to dam the surging tide of progressivism. For him the final barrier against social disaster was the United States Supreme Court.³²⁷

Taft viewed the labor injunction, administered with appropriate procedural protections, as the central social mechanism for "safeguarding" private property.³²⁸ Even though the abuses of the labor injunction—and Taft's role as the "Father of Injunctions"³²⁹—had been a problematical issue in his presidential campaign in 1908, Taft strongly defended the labor injunction in his inaugural address:

Another labor question has arisen which has awakened the most excited discussion. That is in respect to the power of the federal courts to issue injunctions in industrial disputes. As to that, my convictions are fixed. Take away from the courts, if it could be taken away, the power to issue injunctions in labor disputes, and it would create a privileged class among the laborers and save the lawless among their number from a most needful remedy available to all men for the protection of their business against lawless invasion. The proposition that business is not a property or pecuniary right which can be protected by equitable injunction is utterly without foundation in precedent or reason.³³⁰

325. A. RAGAN, CHIEF JUSTICE TAFT 18 (1938).

326. See *id.* Ragan provided a more sympathetic view of Taft's labor decisions than the views put forward by labor and "those in sympathy with their cause" during Taft's lifetime. Ragan wrote that

[a]lthough as a rule supporting property rights when those rights were in conflict with the rights of labor, as a judge he was not a rank partisan for his social stratum. His deeply ingrained respect for law and order, however, was responsible for the numerous judicial checks which he administered to certain acts of labor groups.

Id.

327. A. MASON, *supra* note 105, at 15-16.

328. As president, Taft recommended that Congress reform the procedures used in federal courts in issuing writs of injunction in labor cases. See A. RAGAN, *supra* note 325, at 22-23.

329. This was Samuel Gompers's name for Taft during the 1908 election campaign. *Id.* at 18-19; see also *supra* note 321.

330. Inaugural Address of William Howard Taft (Mar. 4, 1909), reprinted in 15 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 7368, 7378 (J. Richardson ed. 1897-1917), quoted in A. RAGAN, *supra* note 325, at 22 n.54. Taft's statement prefigures his opinion in *Truax v. Corrigan*, 257 U.S. 312 (1921). See *infra* text accompanying notes 472-80.

Thus, coming to his first Supreme Court case involving the labor injunction, Taft brought a resolve to protect business against the "lawlessness" of some laborers. These views, first expressed in his judicial decisions in the late nineteenth century, became more fully developed during his years as president and later as a professor at Yale Law School.³³¹

Before he arrived on the Supreme Court bench, however, Taft's service on the National War Labor Board gave him a "firsthand relationship with such issues as the minimum wage, the right to organize and the eight-hour day."³³² Those fourteen months, beginning with his appointment by President Wilson in April of 1918, have been described "as an educational experience for him of the first importance."³³³ During his tenure on the Board, Taft traveled to the southern United States to conduct hearings on disputes over working conditions in munitions and textile mills.³³⁴ He apparently was shocked by what he observed. When Taft returned from the hearings, he asked the secretary of the War Labor Board, "Why didn't you tell me about the conditions down there? . . . Why, I had no idea! How can people live on such wages!"³³⁵ "By Taft's order, approved by the board, the wages in question were doubled and tripled."³³⁶

The mandate for resolution of labor disputes, under which Taft had accepted the joint chairmanship of the War Labor Board with Frank P. Walsh, aroused opposition from employers. But other than the establishment of "a living wage"—which Taft's biographer, Henry F. Pringle, described as "more or less revolutionary"³³⁷—most of the principles set forth in the presidential proclamation of April 8, 1918, were fully consistent with Taft's views on the rights of workers.³³⁸ Taft wrote, "My experience on the National War Labor Board . . . satisfies me that there ought to be a board upon which labor and capital shall both be represented to

331. In 1913, after losing his bid for reelection, Taft accepted an offer to become Kent Professor of Law at Yale. In 1914 Taft published his book, *The Anti-Trust Act and the Supreme Court* which set forth his understanding of the economic relationship between labor and capital and the role of the Sherman Act in regulating restraints of trade.

332. 2 H. PRINGLE, *supra* note 73, at 915. See generally V. CONNER, *THE NATIONAL WAR LABOR BOARD: STABILITY, SOCIAL JUSTICE, AND THE VOLUNTARY STATE IN WORLD WAR I* (1983).

333. 2 H. PRINGLE, *supra* note 73, at 915.

334. *Id.* at 916.

335. Conversation reported in letter from W. Jett Lauck to Henry F. Pringle, Oct. 5, 1937, quoted in 2 H. PRINGLE, *supra* note 73, at 916.

336. 2 H. PRINGLE, *supra* note 73, at 916.

337. *Id.* at 918.

338. The proclamation stated:

continue a refuge for both sides, *after they have tried economic powers*, as they call it, and reached no result."³³⁹

Taft's service on the War Labor Board proved to be an enlightening, but not a transformative, experience. It informed but did not fundamentally alter his approach to labor cases on the Supreme Court. He had earlier written, "Judges are men. Courts are composed of judges, and one would be foolish who would deny that courts and judges are affected by the times in which they live, as well by the defects of those times as by the higher ideals prevailing."³⁴⁰ Taft's social darwinism was tempered by his belief in the ability of judges, through careful interpretation of the antitrust laws, to control the "abuses" of capital and labor. Though the "times" of the twenties called for restraint of judicial excesses in issuing broad, sweeping injunctions against labor unions, the problems for Taft lay more in procedural defects than in substance. Although he had been exposed to the lives of working people while serving on the War Labor Board, when he approached his first labor cases on the Supreme Court, his fear of violence overshadowed his belief in the right of workers to picket. He could not forget Frank W. Phelan.

The right to unionize and bargain collectively is recognized and affirmed and may not be "denied, abridged or interfered with by the employers in any manner whatsoever."

....

Employers must not discharge workers for union membership nor "for legitimate trade-union activities."

The workers shall not coerce their fellows to join unions.

Where the union shop already exists it shall continue.

Shops with both union and nonunion workers are permitted, but this does not bar the organization of a closed shop.

Established health and safety regulations are not to be relaxed.

Women doing men's work receive the same wages as do men.

The basic eight-hour day continues where specified by law. In other cases the working day is to be determined by war needs and the health of the workers.

Maximum production in all war industries is to be maintained.

Wages and hours are to be fixed with due regard to conditions in the locality affected.

All workers, including common laborers, are entitled to a living wage. The minimum wage is to "insure the subsistence of the worker and his family in health and reasonable comfort."

Presidential proclamation, Apr. 8, 1918, *quoted in* 2 H. PRINGLE, *supra* note 73, at 918. The War Labor Board also refused to enforce "yellow dog" contracts in exchange for the workers' waivers of their right to strike.

339. 2 H. PRINGLE, *supra* note 73, at 920-21.

340. W.H. TAFT, *supra* note 156, at 33.

B. American Steel Foundries—“Running the gauntlet”

1. *Introduction.* The dispute in the *American Steel Foundries*³⁴¹ case occurred eight years before William Howard Taft heard the appeal from the Supreme Court bench. In November of 1913, American Steel Foundries, a New Jersey corporation, shut down the operations of one of its plants located in Granite City, Illinois. When operating at full capacity, the plant had employed 1,600 men, many of them skilled workers who were members of trade unions. On April 6, 1914, the plant “resumed operations with about 350 of its regular men, 150 of whom belonged to the skilled trades, electricians, cranemen, mill hands, machinists and blacksmiths.”³⁴²

The plant manager had testified at trial: “‘When we opened April 6th we employed whoever we saw fit, whoever applied for employment at the gate. We only had called for in round numbers 300 men, and laid off approximately 1300 men. Eighty or ninety per cent of the employees were old men. I assume these men were members of various organizations’”³⁴³ Half of the skilled workers who were recalled “were given wages at rates from two cents to ten cents an hour below those paid before the plant had shut down.”³⁴⁴

About April 15, the Tri-City Central Trades Council—a labor organization comprised of representatives from thirty-seven trade unions in the Illinois towns of Granite City, Madison, and Venice—received word that American Steel Foundries was paying wages below union scale.³⁴⁵ The recall of a fraction of the workers to the steel foundry, accompanied by the wage cuts of the skilled workers, threatened to undermine wages in the skilled trades in other industries in the community. A Trades Council committee appointed “to secure reinstatement of the previous wages” was told by the plant manager that “he ran an open shop, did not recognize organized labor and would not deal with the committee, but would entertain any complaint by an employee.”

In his 1908 Cooper Union Address, Taft had advised his audience:

[T]he labor union . . . is a permanent condition in the industrial world. It has come to stay Under existing conditions the blindest course that an employer of labor can pursue is to decline to recognize labor unions as the

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

342. *Id.* at 195-96.

343. *Id.* at 196 (quoting trial testimony).

344. *Id.*

345. *See id.* at 195-96.

controlling influence in the labor market and to insist upon dealing only with his particular employees

. . . What the wise managers of corporate enterprise employing large numbers of laborers will do, is to receive the leaders of labor unions with courtesy and respect and listen to their claims and arguments as they would to the managers of another corporate enterprise with whom they were to make an important contract affecting the business between them.³⁴⁶

If the manager of the American Foundries plant had heard Taft's advice, he would have had reason to ignore it. The large pool of laid-off foundry workers, eager for work at any price after five months of unemployment, would certainly spell defeat for a strike. Yet, in what must have been a desperate move in light of the economic realities of the situation, the Trades Council called a strike. Only two men—out of 350 at the plant—responded to the strike call and left their jobs at the foundry. One, defendant Churchill, "was a member of the Machinist's Union"; the other, defendant Cook, "was not a member of any union."³⁴⁷

a. Unionization in the steel industry. The strike at the Granite City steel foundry was evidence of the precarious status of the trade unions in the steel industry in the last years of the nineteenth century and well into the early years of the twentieth century.³⁴⁸ Rapid industrialization and reorganization of work tasks threatened the many highly skilled workers involved in the production of steel and the manufacture of steel products with loss of control over their crafts. Moreover, the influx of immigrant workers available to perform many of the newly deskilled tasks in and about the factories depressed wages for all workers, particularly during the recurring recessions and depressions of the period.³⁴⁹ In his testimony before the Senate Committee on Interstate Commerce in 1912, Louis Brandeis had remarked that

the whole tendency in the steel industry—indeed, in a large part of all in-

346. Taft, Cooper Union Address, *supra* note 295, at 232-33.

347. 257 U.S. at 196.

348. David Montgomery has written that

[i]n every industrial country of the world, except England, the steel industry was notorious for the weakness of its unions before World War I. But the work practices and moral codes of America's nineteenth-century craftsmen had given them the strength to wage a formidable and persistent battle to oppose the employers' power with their own collective regulation of the industry.

D. MONTGOMERY, *supra* note 265, at 43. See generally D. BRODY, *STEELWORKERS IN AMERICA: THE NONUNION ERA* (1960); Stone, *The Origins of Job Structures in the Steel Industry*, 6 REV. OF RADICAL POL. ECON. 115 (1974).

349. See generally D. MONTGOMERY, *supra* note 265, at 9-44.

dustries—is to the limitation in numbers of skilled workmen and to the rapid increase of the unskilled labor.

Now, the formation of a union under all circumstances is extremely difficult with unskilled labor. It becomes a matter almost of impossibility, when you are dealing as you do in the steel industry—and you must in so many of the large trades, with not only foreign labor but with the temporary foreign labor—the labor in which the inflow and outgo each year or every few years is such as to make labor practically as fluid as capital.

Now, under these conditions the formation and the control of the union within the control of a large part of the working people is a very difficult proposition. It is extremely difficult to hold the organization together.³⁵⁰

Because most unions operating within the steel industry were formed along craft lines which excluded unskilled and semi-skilled workers, their ability to succeed in a strike depended on their ability to band together in organizations such as the Trades Council.³⁵¹ To the extent that the jobs they performed in the plants required a high degree of skill and experience, the craftsmen could slow down production or shut down a factory, even without the support of the unskilled workers. But this was not possible unless most of the skilled workers in those trades in the community were members of the union and could be persuaded to support the strike.

As Brandeis suggested, the prospect of organizing unskilled workers in the steel industry was unpromising because of the transiency and varied foreign origins of many of the laborers who survived at the margins of the production processes.³⁵² Yet, maintaining union solidarity and loyalty within the trade unions, which were generally composed of workers of fairly homogeneous ethnic and racial backgrounds who had strong ties to the community, was an equally daunting task in times of high unemployment and fierce competition for scarce jobs. The struggle of the unions to maintain control of their membership sometimes erupted in violence. Describing the status of unions in the steel mills of the 1890s, David Montgomery has written:

[B]ecause the technology, the managerial controls, and the very size of the new steel mills made . . . self-discipline increasingly difficult to enforce, the

350. See *Hearing on S. Res. 98, supra* note 277, at 1173, reprinted in DOCUMENTARY HISTORY, *supra* note 277, at 245-46.

351. See, e.g., D. MONTGOMERY, *supra* note 265, at 22-44 (discussing the history of the Amalgamated Association and the Knights of Labor).

352. David Montgomery has estimated that by 1910, southern and eastern European immigrants made up nearly one-half of the workforce in the American steel industry, as compared to less than ten percent in 1890. *Id.* at 42 & n.101.

union members had to resort to ostracism, boycotts, and threats of violence against deviants, and when strikes came, they used mass picketing, sympathetic strikes, and even armed force. As this happened, the employers appealed increasingly to the community at large to support the freedom of property owners and of individual workers from "union tyranny," and to support "law and order."³⁵³

The inevitable tension between workers' desires for union solidarity and their desires for jobs often contributed to the violence in the mills. Despite the fact that strikebreaking undermined the long-term prospects of wage stability and improved working conditions, the immediate needs to feed and house families often prevailed over the uncertain and distant economic advantages unionization and collective bargaining might provide. The union representative's role in such a situation was ambiguous: part friend, part enemy, he epitomized the struggle within the worker's mind between group loyalty and self-preservation. All too often, this struggle was played out on the picket line.

b. Violence in Granite City. On the day in late April 1914 that the Trades Council declared its strike against the American Steel Foundries plant, members "displayed outside of the entrance to the plant a printed notice announcing that a strike was on at the plant and calling on union men and all labor to remain away from the works in order that an increase in wages might be secured."³⁵⁴ When only two workers—Churchill and Cook—responded, the Council established a picket outside the timekeeper's gate to the plant. The picket consisted of three or four groups of men, with from four to twelve men in a group, who would "stand about" in various locations on a public street or near railroad tracks which bordered the plant's twenty-five acre enclosure.³⁵⁵ In addition to the two striking employees and local union members who had not been recalled to work but sympathized with the strike effort, a number of union officials joined the pickets—Lamb, the national representative of the Machinists Union at St. Louis; Galloway, the president of the Trades Council; and Hartbeck, the business agent and secretary of the Blacksmith's Union.

Several of the foundry employees later testified that "just as the picketing began, they were warned by some of the defendants that they would be hurt if they did not quit."³⁵⁶ During three to four weeks of

353. *Id.* at 36.

354. *American Foundries*, 257 U.S. at 196.

355. *Id.* at 196-97.

356. *Id.* at 197.

picketing "without intermission," strikebreakers were assaulted by picketers in sporadic incidents—at least one of the confrontations provoked by "insulting and profane" name calling by a strikebreaker.³⁵⁷ On May 13, an "assault occurred, which developed into a mob" of 200 men.³⁵⁸ Two of the company witnesses "swore positively" that Galloway, president of the Trades Council, "was engaged in this disturbance and was throwing bricks."³⁵⁹ Company officials testified that wounded men were brought into the plant. On May 18, the company, asserting federal jurisdiction on the basis of diversity of citizenship, obtained a restraining order barring further picketing and "[a]ll disturbances ceased."³⁶⁰

The final injunction decree against the named defendants—the two striking employees and various union officials—was comprehensive. In addition to the usual litany of terms "perpetually" restraining the defendants from using "threats, or personal injury, intimidation, suggestion of danger or threats of violence of any kind" to interfere with employees or prospective employees entering the steel plant or to induce them to quit work, the court also prohibited the defendants' use of "*persuasion*" to accomplish these goals.³⁶¹ The defendants were additionally prohibited from "assembling, loitering or congregating about or in proximity of" the plant to accomplish the "forbidden acts" of interfering with access to the plant.³⁶² Finally, the defendants were restrained "*from picketing or maintaining at or near the premises of the complainant, or on the streets leading to the premises of said complainant, any picket or pickets.*"³⁶³

The defendants appealed to the Seventh Circuit which "modified the final decree by striking out the word 'persuasion' in the four places in which it occurred, and by inserting after the clause restraining picketing the following: 'in a threatening or intimidating manner.'"³⁶⁴ At this level

357. *Id.* at 196, 199.

358. *Id.* at 197, 200.

359. *Id.* at 197.

360. *Id.* at 193, 198.

361. *Id.* at 193-94. In the Argument for Respondents, defendants' counsel wrote, "To prevent a workingman from exercising the right of persuasion would deprive him of the right of free speech, guaranteed by the Constitution. To prohibit his right at or near the plant, on the streets leading to it, or elsewhere, is too general." *Id.* at 192. The Supreme Court and the court of appeals avoided dealing with the constitutional validity of the injunction by deciding this issue in defendants' favor on other grounds.

362. *Id.* at 194.

363. *Id.*

364. *Id.* at 195 (quoting *Tri-City Central Trades Council v. American Steel Foundries*, 238 F. 728 (1916)).

of appeal, the defendants, the union officials and the two striking workers, won a clear victory. But the plaintiff, American Steel Foundries, pursued the case to the Supreme Court where, after the case was reargued two times over a period of almost two years, the steel company won the right to an injunction against "picketing," but not against "persuasion." It was a mixture of victory and defeat for each side in the dispute.

2. *The Clayton Act and the Federal Common Law.* The Supreme Court in *American Foundries* had to determine four questions: (1) whether "property" or "a property right" included access to an employer's plant, (2) which defendants were persons specially protected by the limitations on federal equitable remedies in the Clayton Act, (3) whether federal courts could enjoin the act of "persuading" others to refuse to work for an employer, and (4) whether federal courts could enjoin "picketing." To resolve these questions, the Court was required to interpret both section 20 of the Clayton Act³⁶⁵ and the federal common law of restraint of trade. In doing so, the Court's understanding of the role of injunctions in protecting the employer's business interests from the effects of worker coercion was based on its assumptions about worker violence.

a. *Access to labor as a "property right."* The Court in *American Foundries* held that "irreparable injury to property or to a property right . . . includes injury to the business of an employer."³⁶⁶ The federal courts

365. Between the issuance of the final injunction decree in *American Foundries* and the appeal of the case to the court of appeals, the Clayton Act was passed. The circuit court held that the Clayton Act applied to the case, and the Supreme Court affirmed this part of the circuit court decision on the authority of the holding in *Duplex. American Foundries*, 257 U.S. at 201.

366. *Id.* at 202. The first paragraph of section 20 of the Clayton Act prohibited the issuance by a federal court of a restraining order or injunction "in any case," between an "employer and employees" or "between persons employed and persons seeking employment," "involving . . . a dispute concerning conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right [of the plaintiff] for which injury there is no adequate remedy at law." Clayton Act, ch. 323, § 20, 38 Stat. 738 (1914) (codified at 29 U.S.C. § 52 (1982)). Thus, in labor disputes involving persons within the statutory class of employers and their employees or prospective employees, federal courts could not issue injunctions on behalf of employers unless some "property right" was threatened with an injury that was not readily compensable by means of a civil suit for damages. This portion of the statute did no more than state the two key prerequisites for equity jurisdiction—(1) future harm to property and (2) lack of an adequate remedy in the common law courts. Nevertheless, the meaning of "property" and "property right" as used in the statute had to be defined by the Supreme Court. The Court in *Duplex* had held that "[t]he first paragraph [of section 20 of the Clayton Act] merely puts into statutory form familiar restrictions upon the granting of injunctions already established and of general application in the equity practice of the courts of the United States." 254 U.S. at 470.

could issue restraining orders and injunctions to avoid either economic harm, such as injuries to the employer's interstate business posed by the secondary boycott in *Duplex*,³⁶⁷ or physical harm, such as damage to the employer's property involved in interstate trade. A physicalist interpretation of "property" would have permitted federal injunctions only when the employer's land, buildings, equipment, tools, raw materials, or supplies were threatened with damage.³⁶⁸ Labor disputes in which strikers sat down on the job and took over the employer's physical plant, or in which strikers trespassed on the employer's land, were situations in which it was assumed significant damage might be done to the employer's physical property. Assaults on strikebreakers or other persons employed by the company were not injuries to the employer's "property" in a physical sense, because the employer did not "own" his employees.³⁶⁹

By the 1920s, however, narrow, physicalist conceptions of property rights had long since given way to broad, abstract notions which encompassed the benefits flowing from both existing and prospective contractual relations.³⁷⁰ For example, in the 1871 Massachusetts case of *Walker v. Cronin*, the plaintiff employer was held to have a property right in the present and prospective advantages derived from his relationships with his at-will employees, as well as in the "prospective advantage" anticipated from his "prospective" employees.³⁷¹ Essentially, *Walker* had held

367. *Duplex* had held that the company's "business of manufacturing printing presses and disposing of them in commerce is a property right, entitled to protection against unlawful injury or interference." 254 U.S. at 465.

368. See Vandevelde, *The New Property of the Nineteenth Century: The Development of the Modern Concept of Property*, 29 BUFFALO L. REV. 325 (1980).

369. Defendants' counsel, in the Argument for Respondents in *American Foundries*, contended that "[t]he plant was not injured, and no injunction should have issued, because no property right was involved. Labor is not a commodity (Clayton Act, § 6,) and an employer has no property right in his workmen." 257 U.S. at 192 (citation omitted).

370. See, e.g., Note, *Tortious Interference with Contractual Relations in the Nineteenth Century: The Transformation of Property, Contract, and Tort*, 93 HARV. L. REV. 1510 (1980) [hereinafter Note, *Tortious Interference*].

371. 107 Mass. 555. See discussion of *Walker* in Note, *Tortious Interference*, *supra* note 370, at 1528. In the *Phelan* case, Judge Taft gave the following synopsis of *Walker*:

In *Walker v. Cronin*, it was held that a count in a declaration which alleged that a plaintiff was a manufacturer of shoes, and for the prosecution of his business it was necessary for him to employ many shoemakers; that the defendants, well knowing this, did maliciously and without justifiable cause molest him in carrying on said business, with the unlawful purpose of preventing him from carrying it on, and willfully induced many shoemakers who were in his employment, and others who were about to enter it, to abandon it without his consent and against his will; and that thereby the plaintiff lost their services and profits and advantages and was put to great expense to procure other

that the acts of third parties, such as nonemployee union members, in persuading employees—present or prospective—to leave an employer were malicious and without lawful excuse.³⁷² Such an injury by “third-party interlopers” was a tortious interference with an employer’s property right which could be enjoined by a court of equity.³⁷³

In *American Foundries*, the employer’s physical property was neither damaged nor threatened with damage. The pickets never entered or even threatened to enter the employer’s twenty-five acre enclosure. All picket line behavior—whether violent threats and assaults or peaceful persuasion—occurred on public streets or rights of way adjoining the plant or within several hundred feet of the timekeeper’s gate of the plant.³⁷⁴ Thus, injury—actual or threatened—to the employer’s physical property was not an issue in the case. The assaults and threats against the strikebreakers, and, arguably, the peaceful persuasion of strikebreakers or potential employees, though not directly physically injurious to the employer’s property, came within the more abstract definition of interference with prospective advantage. The Supreme Court in *American Foundries* defined this prospective advantage as the “property right of access of the employer.”³⁷⁵ What was at stake in the case, then, was not avoidance of physical harm to persons or property through the violence of the pickets, but avoidance of any interference with the employer’s right of free access to the plant, in particular, the right to have strikebreakers freely enter and leave.³⁷⁶

b. The Clayton Act “employees.” Section 20 of the Clayton Act appeared to create a special class of persons who were immunized from broad federal restraining orders or injunctions in cases arising out of labor disputes.³⁷⁷ The Supreme Court in *Duplex v. Deering*, however, had

suitable workmen, and was otherwise injured in his business,—stated a good cause of action.

In re Phelan, 62 F. 803, 816 (C.C.S.D. Ohio 1894) (citation omitted).

372. 107 Mass. 555.

373. See Note, *Tortious Interference*, *supra* note 370, at 1528.

374. 257 U.S. at 196-97.

375. *Id.* at 204.

376. As in the late nineteenth century cases dealing with interference with prospective advantage in the employment context, the Supreme Court in *American Foundries* emphasized that it was protecting both “the rights of the employees to work for whom they will” and “the right of the employer incident to his property and business to free access of such employees.” *Id.* at 206. See, e.g., Note, *Tortious Interference*, *supra* note 370, at 1532-35; Hurvitz, *supra* note 124, at 342-44.

377. These were persons who were parties “in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of a dispute concerning terms or conditions of em-

held that union officials and union members involved in a labor dispute, who were not technically employees of the employer, were not within this statutory class, in part because they were not "affected in a proximate and substantial . . . sense by the cause of dispute."³⁷⁸ Their interests were "merely sentimental or sympathetic."³⁷⁹ But the *American Foundries* case required the Court to consider the application of section 20 to new categories of persons—striking workers, laid-off workers, and local union members in the trade who were potential employees.

Taft wrote in *American Foundries* that only two defendants, Churchill and Cook, who were actually "employees" of the "employer" at the time of the strike, were within the special class of persons "privileged" by section 20 of the Clayton Act.³⁸⁰ Indeed, Brandeis had commented in his dissenting opinion in *Duplex* that "[i]f the words [in section 20 of the Clayton Act] are to receive a strict technical construction, the statute will have no application to disputes between employers of labor and workmen, since the very acts to which it applies sever the continuity of the legal relationship."³⁸¹ As if in response to Brandeis's critique of the majority in *Duplex*, Taft made it clear that striking employees are "ex-employees" covered under the word "employees" in section 20.³⁸² It was a tortuous route to arrive at the common sense, if not "legal," conclusion that employees who were on strike were still in an employment relationship with their employers.³⁸³ Striking employees named as defendants in an injunction suit were certainly "affected in a proximate and substantial, not merely a sentimental or sympathetic, sense by the cause of dispute."³⁸⁴

All other named defendants in the *American Foundries* case were union officials or union members. Since they were neither "employees" or "ex-employees," they were not within the privileged class of section 20 of the Clayton Act. Also excluded were the "laid-off employees"—the

ployment . . ." Clayton Act, ch. 323, § 20, 38 Stat. 738 (1914) (codified at 29 U.S.C. § 52 (1982)). The Court in *Duplex* had held that "[i]t is very clear that the restriction upon the use of the injunction is in favor only of those concerned as parties to such a dispute as is described." 254 U.S. at 470.

378. 254 U.S. at 472.

379. *Id.*

380. *American Foundries*, 257 U.S. at 202. In *Duplex*, Justice Pitney had written that the Clayton Act conferred a "special privilege or immunity to a particular class." 254 U.S. at 471.

381. 254 U.S. at 488.

382. *American Foundries*, 257 U.S. at 202, 208.

383. In the Argument for Petitioner, plaintiffs' counsel asserted that "[e]ven the two men who quit the employ had no relation to the initiation of the strike and knew nothing of it until after the strike had been launched." *Id.* at 186-87.

384. *Duplex*, 254 U.S. at 472.

large pool of nearly 1,300 foundry workers who had not been employed by the foundry after it ceased operations in November of 1913, and who had not been recalled when the plant reopened in April of 1914. Although these laid-off employees were not named as defendants, some were witnesses to or participants in the threatening and violent incidents on the picket line, either as picketers or as sympathizers.³⁸⁵ The broad terms of an injunction would apply to them. Because of Taft's narrow conception of the word "employees" in the Clayton Act, many such workers, who were sympathetically involved in the labor dispute and economically dependent on its outcome, were potentially denied the "privileges" which the Act seemed to promise. Ironically, these distinctions did not matter much in the end. Taft interpreted the Clayton Act to be nothing other than the law that had always governed the use of federal injunctions in labor disputes.³⁸⁶

c. *Allowing "persuasion"—"all lawful propaganda."* As to the two "employees"—the strikers Churchill and Cook—the district court's decree in effect enjoined "persuasion by them at any time or any place. This certainly," Taft wrote, "conflicts with § 20 of the Clayton Act."³⁸⁷ But the Supreme Court had to determine whether "the injunction against persuasion" as it applied to the "Tri-City Trades Council and the other defendants" was proper under general principles of tort and equity.³⁸⁸

385. See *American Foundries*, 257 U.S. at 191 (Argument for Respondents).

386. See, e.g., *id.* at 203.

387. *Id.* at 208. In the final decree of the district court in the *American Foundries* case, the court prohibited the defendants' use of "persuasion to induce employees, or would-be employees to leave, or stay out of, complainant's employ." *Id.* (emphasis added). The court of appeals had modified the decree by striking out the word "persuasion" in the four places it appeared in the decree. *Id.* at 195. The final decree is reprinted in the *American Foundries* opinion. *Id.* at 193-94.

Section 20 of the Clayton Act bars the federal courts from issuing restraining orders or injunctions prohibiting "employees" from "recommending, advising, or *persuading* others by peaceful means" to terminate "any relation of employment" or to cease "to perform any work or labor." Ch. 323, § 20, 38 Stat. 738 (1914) (codified at 29 U.S.C. § 52 (1982)) (emphasis added). Section 20, in addition, "privileges" an employer's striking "ex-employees" (1) to "attend" "at any place" that they may "lawfully be . . . for the purpose of peacefully *persuading* any person to work or to abstain from working"; and (2) to recommend, advise, or *persuade* "by peaceful and lawful means" other persons to "cease to patronize" any party to the labor dispute. *Id.* (emphasis added). Because the final decree in *American Foundries* violated the literal words of section 20 of the Clayton Act as applied to the two "ex-employees," the Supreme Court held that "[t]he decree must be modified as to these two defendants by striking out the word 'persuasion.'" 257 U.S. at 208.

388. 257 U.S. at 208. To analyze the legality of the use of persuasion to entice employees or potential employees away from the employer, the Supreme Court turned to general principles of common law as articulated by the state courts and by federal courts in cases interpreting state common law under diversity jurisdiction. It is important to note that federal jurisdiction in the *American Foundries* case was obtained on the basis of diversity of citizenship, and the district court issued its

These defendants—the union officials, laid-off employees, or union members in the community who were potential employees—were not exempt from being enjoined by a federal court under section 20 of the Clayton Act. The question was whether it was unlawful for them to “entice” employees of the foundry away from their jobs by “persuasion” under the federal common law. American Foundries had argued that these defendants were “intruders into the controversy, and were engaged without excuse in an unlawful conspiracy to injure the American Foundries by enticing its employees, and, therefore, should be enjoined.”³⁸⁹

Under the common law, however, the Supreme Court did not view the “non-Clayton Act” defendants in the *American Foundries* case as “intruders” into the labor dispute. Taft concluded that it was “probable that members of the local unions were looking forward to employment when [the foundry] should resume full operation and even though they were not ex-employees within the Clayton Act, they were directly interested in the wages which were to be paid.”³⁹⁰ Thus, “interference of a labor organization by persuasion and appeal to induce a strike against low wages under such circumstances” was not “without lawful excuse and malicious.”³⁹¹

Here is evidence of the persistence of Taft’s early belief in the legitimacy of labor unions and the legality of the primary strike for improved working conditions.³⁹² Taft recognized the need for union solidarity and

injunction prohibiting “persuasion” and “picketing” under the “rule” of Illinois common law. *See id.* at 187 (Argument for Petitioner). The employer in *Duplex* had asserted federal jurisdiction both on the basis of diversity of citizenship and federal question—the Sherman Anti-Trust Act. 254 U.S. at 461. In both *Duplex* and *American Foundries*, however, interpretation of the Clayton Act became central issues since the Supreme Court held that the newly passed statute would apply to any prospective relief, such as in a pending suit for an injunction in a labor dispute involving interstate commerce. *Id.* at 464. But, whereas the employer in *Duplex* framed its antitrust arguments against the defendant union officials in terms of the proscriptions of the Sherman Act, the employer in *American Foundries* was making its case against the “non-Clayton-Act” defendants solely on common law restraint-of-trade principles as developed in both state and federal courts. In effect, then, for that portion of its opinion which determined the legality of enjoining the “non-Clayton-Act” defendants from “persuasion” of others to join the strike, the Court in *American Foundries* was articulating a “federal common law” of restraint of trade, not interpreting a federal antitrust statute.

389. 257 U.S. at 208.

390. *Id.*

391. *Id.* at 208-09.

392. In words reminiscent of views expressed in his opinion *In re Phelan*, 62 F. 803, 817 (C.C.S.D. Ohio 1894), Taft described the importance of unions and strikes to “laborers” and to the “economic struggle” between employers and employees. *American Foundries*, 257 U.S. at 209. Taft acknowledged both that “[l]abor unions are recognized by the Clayton Act as legal when instituted for mutual help and lawfully carrying out their legitimate objects” and that “[t]hey have long been thus recognized by the courts.” *Id.* Taft wrote:

loyalty within neighborhood communities, as well as the interdependence of workers in the skilled trades because of the competitive wage rates in different shops within each locale. Taft wrote:

It is helpful to have as many as may be in the same trade in the same community united, because in the competition between employers they are bound to be affected by the standard of wages of their trade in the neighborhood. Therefore, they may use all lawful propaganda to enlarge their membership and especially among those whose labor at lower wages will injure their whole guild. It is impossible to hold such persuasion and propaganda without more, to be without excuse and malicious.³⁹³

This was, however, a relatively narrow view of the appropriate scope of labor disputes. *American Foundries* was a dispute between an employer "in the community"³⁹⁴ and "local" unions who were represented by their "local" Tri-City Trades Council—a council consisting of the unions in three adjoining cities in one state. The union council's goal was to preserve the wage scale of its "local" union members, many of whom were laid-off foundry workers who had a high probability of being reemployed by the foundry in the future.³⁹⁵ The council, its constituent local unions, and their members were thus "directly interested in the wages which were to be paid."³⁹⁶

Taft believed that these factors distinguished the *American Foundries* case from other common law cases, such as *Plant v. Woods*, which had permitted injunctions against persuading workers to leave their employers.³⁹⁷ "[S]uggestions of coercion, attempted monopoly, deprivation of livelihood and remoteness of the legal purpose of the union to better its members' condition," Taft wrote, were "not present in a case like the

They [labor unions] were organized out of the necessities of the situation. A single employee was helpless in dealing with an employer. He was dependent ordinarily on his daily wage for the maintenance of himself and family. If the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and to resist arbitrary and unfair treatment. Union was essential to give laborers opportunity to deal on equality with their employer. They united to exert influence upon him and to leave him in a body in order by this inconvenience to induce him to make better terms with them. They were withholding their labor of economic value to make him pay what they thought it was worth. The right to combine for such a lawful purpose has in many years not been denied by any court.

Id. This passage is a paraphrase of a similar passage which Taft wrote in the *Phelan* case, 62 F. at 817. See *supra* text accompanying note 133.

393. *American Foundries*, 257 U.S. at 209.

394. *Id.* at 212.

395. *Id.* at 208.

396. *Id.*

397. *Id.* at 210-11 (citing *Plant v. Woods*, 176 Mass. 492, 57 N.E. 1011 (1900), among other cases).

present."³⁹⁸ Furthermore, Taft argued, *American Foundries* was distinguishable from the two Supreme Court cases which had permitted injunctions against unions for "persuading" workers to join a union or to quit working for an employer—*Hitchman Coal*³⁹⁹ and *Duplex*.⁴⁰⁰

Thus, Taft implicitly preserved the distinctions between "insiders"—local employees and their unions—and "outsiders"—representatives of large international unions from distant cities.⁴⁰¹ Taft also distinguished between purely local disputes—a strike at a local foundry over wages—and disputes that threatened the national economy or involved third-party "strangers"—such as the "formidable country-wide and dangerous character" of the "plan" to unionize the mine in *Hitchman Coal*, the "coercive" interference in a company's interstate trade by means of a secondary boycott in *Duplex*, or the "starvation of a nation" by means of the boycotts and strikes in the Pullman cases. The union activity in *American Foundries* had been open and direct—the Trades Council representatives had approached the employer forthrightly with their request for a raise in wages before calling the strike. In *Hitchman Coal* and in the *Phelan* case the unions had kept "secret" lists of the names of union members, had held "secret" meetings, or engaged in "secret terrorism."

Taft rejected union attempts to organize and engage in collective action on a nationwide scale—involving thousands of workers in many communities and across many trades and industries—to protect strikers and union members from being fired and blacklisted by employers, to extend the economic effects of their ability to withhold labor and patronage through strikes and boycotts, and to expand their objectives beyond the immediate economic demands of the employees of a particular firm. He found these activities illegal because they involved "outsiders," or because they involved thousands of workers in a "class war," or because they injured "strangers" to the dispute, or because they were "secret." And "persuasion" of others to join in such union endeavors could not be "lawful propaganda."

d. Prohibiting "picketing"—but allowing "missionaries." The method that labor "propagandists" in a strike for wages traditionally

398. *Id.* at 210-11.

399. *Hitchman Coal & Coke Co. v. Mitchell*, 245 U.S. 229 (1917).

400. 254 U.S. 443.

401. For discussion of the implications of those distinctions in *Hitchman Coal*, see Orren, *Organized Labor and the Invention of Modern Liberalism in the United States*, 2 *STUD. AM. POL. DEV.* 317, 320-22, 326 (1987).

used to “persuade” other workers to join the strike was the picket line. Picket lines could be effective for reasons completely unrelated to what the Supreme Court in the *American Foundries* case characterized as “the necessary element of intimidation in the presence of groups as pickets.”⁴⁰² Picket lines communicated the issues in a labor dispute to employees and other workers entering and leaving the employer’s place of business. The act of joining a picket line was a public demonstration of loyalty to the union or sympathy with the union’s goals. By the same token, crossing the picket line, whether by an employee strikebreaker or by another worker delivering goods or supplies, was a public admission of disloyalty to the union, or more, of contempt. Thus, the very existence of the pickets—the public identification of who was for the union and who was against it—was itself a form of moral persuasion. To the community at large, picket lines were a dramatic way of publicizing the labor dispute, as well as involving members of that community—family, friends, neighbors—in conducting the “patrol” itself. Finally, the number of people in the picket line and supporting it, its organization, its persistence day after day, was an indication to the employer and the strikebreakers of the strength and cohesiveness of the union. Picketers could accomplish all this without violence or threats of violence.

Indeed, the possibility that picketing could exist without violence was contemplated by the Seventh Circuit in the *American Foundries* case.⁴⁰³ The circuit court had added the words, “in a threatening or intimidating manner,” to the clause of the original decree which prohibited the defendants “from picketing or maintaining at or near the premises of the complainant, or on the streets leading to the premises of said complainant, any picket or pickets.”⁴⁰⁴ For the Supreme Court, however, there could be no such thing as “peaceful” picketing, for the word “picketing” itself was a “sinister name” which “indicated a militant purpose, inconsistent with peaceable persuasion.”⁴⁰⁵

The Court thus upheld the original decree because the qualification added by the court of appeals seemed “inadequate.” To permit picketing in any form would leave “compliance largely to the discretion of the pickets,” would ignore “the necessary element of intimidation in the presence of groups as pickets,” and would not “secure practically that which the court must secure and to which the [employer] and his work-

402. 257 U.S. at 207.

403. 238 F. 728 (1916).

404. 257 U.S. at 195, 194 (emphasis deleted).

405. *Id.* at 207, 205.

men are entitled."⁴⁰⁶ The Court concluded that "[t]he phrase really recognizes as legal that which bears the sinister name of 'picketing' which it is to be observed Congress carefully refrained from using in § 20 [of the Clayton Act]."⁴⁰⁷

The Supreme Court held, however, that section 20 of the Clayton Act introduced "no new principle into the equity jurisdiction" of the federal courts" and was "merely declaratory of what was the best practice always."⁴⁰⁸ And the "best practice" had been to permit federal courts to enjoin "picketing," whether peaceful or not. For the defendants in *American Foundries*, then, it did not matter that two of them—the striking "ex-employees" Churchill and Cook—were found explicitly to be "within the Clayton Act"⁴⁰⁹ so that they could "invoke in their behalf § 20."⁴¹⁰ The Clayton Act gave them no additional privileges that they did not already have under general principles of federal equity jurisdiction. Thus the striking "Clayton Act" employees were treated the same as union representatives, "recent" employees, and "expectant" employees.⁴¹¹ The artificial lines between persons "proximately" and "substantially" involved in the labor dispute and those only "sympathetically" or "sentimentally" involved were not relevant for determining the legality of picketing. All "picketing" per se was enjoinable.

According to Taft, when Congress enacted section 20 of the Clayton Act and when federal equity courts addressed labor picketing cases prior to the Clayton Act, the "object and problem" had been to balance and

406. *Id.* at 207.

407. *Id.* It was true that Congress had not used the word "picketing" in the list of "privileged" labor activities in section 20 of the Clayton Act. After quoting section 20 of the Clayton Act in full, the Supreme Court observed that section 20 prohibited the federal courts from issuing injunctions in labor disputes against three specifically described types of conduct that were "material" to the *American Foundries* case:

first, recommending, advising or persuading others by peaceful means to cease employment and labor; second, attending at any place where such person or persons may lawfully be for the purpose of peacefully obtaining or communicating information, or peacefully persuading any person to work or to abstain from working; third, peaceably assembling in a lawful manner and for lawful purposes.

Id. at 203 (paraphrasing Clayton Act, ch. 323, § 20, 38 Stat. 738 (1914) (codified at 29 U.S.C. § 52 (1982))). Peaceful picketing is, quite literally, "attending" or "peaceably assembling" "in concert" in a "lawful manner" and in a place that picketers "may lawfully be" for the "lawful purpose" of "peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working."

408. 257 U.S. at 203.

409. *Id.* at 207-08.

410. *Id.* at 202.

411. *Id.* at 208, 203.

reconcile the relative merits of two conflicting rights.⁴¹² “[O]n the one hand,” were “the rights of the employer in his business and in the access of his employees to his place of business and egress therefrom without intimidation or obstruction.”⁴¹³ “[O]n the other” hand was “the right of the employees, recent or expectant, to use peaceable and lawful means to induce present employees and would-be employees to join their ranks.”⁴¹⁴

Taft’s condemnation of picketing in *American Foundries* thus grew out of his desire to protect property, to avoid violence, and to “civilize” the forms in which the workers’ struggles with their employers were expressed.⁴¹⁵ In reconciling the conflicting rights of employers, employees, strikers, and unions, the “duty” of the Supreme Court was obvious:

If, in their attempts at persuasion or communication with those whom they would enlist with them, those of the labor side adopt methods which however lawful in their announced purpose inevitably lead to intimidation and obstruction, then it is the court’s duty which the terms of § 20 [of the Clayton Act] do not modify, so to limit what the propagandists do as to time, manner and place as shall prevent infractions of the law and violations of the right of the employees, and of the employer for whom they wish to work.⁴¹⁶

Taft asked, “How far may men go in persuasion and communication and still not violate the right of those whom they would influence?”⁴¹⁷ Protecting the employees’ rights “[i]n going to and from work” to “have a right to as free a passage without obstruction as the streets afford, con-

412. *Id.* at 203.

413. *Id.*

414. *Id.*

415. At the same time that Taft resolved to protect private property as Chief Justice he was also determined to obtain from the Court unanimous decisions. The fact that he persuaded Holmes and Brandeis to concur in his opinion in *American Foundries* was considered by some to be the high mark of his first year as chief justice of the Supreme Court. *See, e.g.,* A. MASON, *supra* note 105, at 212. In *American Foundries*, Justice Brandeis concurred “in substance” in the opinion and judgment of the Court, and Justice Clarke dissented without writing a separate opinion. The reason for Brandeis’s concurrence may be surmised from something Brandeis had stated in a public debate with Samuel Gompers years before he became an associate justice of the Supreme Court: “If unions are lawless, restrain and punish their lawlessness; if they are arbitrary, repress their arbitrariness; if their demands are unreasonable or unjust, resist them; but do not oppose unions as such.” Remarks of Louis Brandeis to Samuel Gompers, Debate before the Economic Club of Boston (Dec. 4, 1902), *quoted in* A. MASON, *BRANDEIS: A FREE MAN’S LIFE* 142 (1946). Mason wrote that “Brandeis conceded” in this debate that there was “a tendency among labor unions to be impatient with the requirements of civilized living.” *Id.* at 142. Taft and Holmes very likely would have agreed with that proposition.

416. 257 U.S. at 203-04.

417. *Id.* at 204.

sistent with the right of others to enjoy the same privilege" seemed to be of paramount concern to the Court.⁴¹⁸ Taft wrote:

We are a social people and the accosting by one of another in an inoffensive way and an offer by one to communicate and discuss information with a view to influencing the other's action are not regarded as aggression or a violation of that other's rights. If, however, the offer is declined, as it may rightfully be, then persistence, importunity, following and dogging become unjustifiable annoyance and obstruction which is likely soon to savor of intimidation.⁴¹⁹

This was a "gentleman's" code of polite behavior, perhaps appropriate for the drawing room, the halls of Congress, or the chambers of the Supreme Court, but a peculiar image to impose on the pickets and strikebreakers outside a steel foundry. Taft's imagined "scab" was a polite and sensitive workman, who had a right not to be offended and annoyed by groups of pickets whose livelihood he supposedly threatened when he crossed the picket line. Yet, ironically, this was a man who, by definition, was defying powerful group and community norms by either continuing to work during the strike or taking a striker's job. Taft's sympathetic portrayal of the strikebreaker, "likely" to feel intimidated by group "persistence, importunity, following and dogging," failed to account for the necessity of coercion in a strike. To maintain social control, the union needed to communicate its disapproval of the scab through groups of persistent, urgent, demanding picketers.

Taft's strikebreaker thus had a "right to be free" from the stigma and guilt of his violation of the group code of conduct. But this was not a right that Taft viewed as residing in the worker as a person, independent of the employer's interests in continued productivity. For example, a worker persistently "importuned" or "dogged" on the street by a street vendor, a religious zealot, or an angry creditor might have had a cause of action only when the "importunity" actually became tortious—assault, battery, or defamation. But Taft certainly was not concerned in general that "persuasion" which was "persistent," that might have offended "civilized" standards, may have been an aspect of the daily social intercourse of the streets, the taverns, the factories, the mills, and the homes of the wage-earning class. Rather, he invoked the "gentleman's" code in the limited context of the strike in the expectation that strikebreakers would be free from annoyance by pickets during a strike. Thus elitist norms of behavior were superimposed on the culture of the working class in a way

418. *Id.*

419. *Id.*

that protected the employer's business interests.⁴²⁰

Taft wrote that the "employer has a right to have [his employee] free" from the importunate and persistent persuasion of the picket line; moreover, "[t]he nearer this importunate intercepting of employees or would-be employees is to the place of business, the greater the obstruction and interference with the business and especially with the property right of access of the employer."⁴²¹ The employees and "would-be" employees were not protected from "importunate intercepting" by union representatives or striking employees in order to protect their personal sensibilities from being offended, but to make sure they could enter the workplace of the employer insulated from the physical demonstrations of the collective conscience of the union. The Court emphasized its concern for the "primary . . . rights of the employees to work for whom they will, and, undisturbed by annoying importunity or intimidation of numbers, to go freely to and from their place of labor," as well as "the right of the employer incident to his property and business to free access of such employees."⁴²² These rights had their source in the employer's paramount, but unstated, "right" to keep the business running and maintain productivity in the face of a strike.⁴²³

The evidence in *American Foundries* had shown that, during the three weeks of the strike, sporadic assaults and outbreaks of violence had occurred, and, on one occasion a "mob" had gathered with some 200 men.⁴²⁴ Taft viewed these occurrences as inevitable and unavoidable in the future. He wrote that "[a]ttempted discussion and argument" by picketers in "proximity" to the employer's property was "certain to attract attention and congregation of the curious, or, it may be, interested bystanders, and thus to increase the obstruction as well as the aspect of intimidation which the situation quickly assumes."⁴²⁵ Incident to the employer's rights in his property was the right to keep the "curious" or the

420. See, e.g., Atleson, *Obscenities in the Workplace: A Comment on Fair and Foul Expression and Status Relationships*, 34 BUFFALO L. REV. 693 (1985).

421. 257 U.S. at 204.

422. *Id.* at 206.

423. See J. ATLESON, *VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW* 2, 3, 6-7, 58, 59 (1983). Atleson demonstrates the potency of the "hidden set of values and assumptions" in judicial decisions under the National Labor Relations Act. He writes, "One of the most crucial assumptions that seems to underlie legal decision making is that continuity of production must be maintained, tempered only when statutory language *clearly* protects employee interference." *Id.* at 7. Although he is referring to post-1935 federal labor law decisions, the validity of Atleson's insight is borne out in the earlier cases I examine as well.

424. 257 U.S. at 197, 200.

425. *Id.* at 204.

“interested by-stander” from obstructing the routes of access to the business that were used by his employees or suppliers. Thus, the more the community became involved in the picket line, whether out of curiosity or sympathy, the greater the likelihood the picketing would be enjoined. A large number of workers and bystanders gathered around the entrance to the employer’s plant connoted the violence of a mob.

Past violence, regardless of who caused it, was thus viewed as evidence of the inevitability of future violence. Taft wrote, “When one or more assaults or disturbances ensued, they characterized the whole campaign, which became effective because of its intimidating character, in spite of the admonitions given by the leaders to their followers as to lawful methods to be pursued, however sincere.”⁴²⁶ And so violence of striking workers or union members, even when provoked by strikebreakers, was attributed to the union leaders who were held to be responsible for the foreseeable consequences of the picket line they had ordered.

In the *American Foundries* case, the union leaders claimed that they had not authorized any unlawful acts on the picket line. Galloway, the president of the Tri-City Trades Council, testified that the Trades Council “did not instruct anybody to assault anyone, but told them to picket the streets leading to the plant, and ask the men not to go into the plant or take work under the reduced wages.”⁴²⁷ Galloway “said he went down there to see that things were going right.”⁴²⁸ Lamb, the national representative of the Machinists Union at St. Louis “admitted saying . . . that the cut in wages was a severe one and that it looked as though they were going to raise hell in the town because conditions were good; that he didn’t like to see a fight going on, but it looked as though it would come.”⁴²⁹ Lamb visited the picket line several times a week during the strike and “did picket duty.”⁴³⁰ Although Lamb “heard of some fights which took place away from the plant,” he said he “was in no way connected with them.”⁴³¹ He said that he had not seen any “assaulting” occur, nor had the union pickets “authorized any assaults.”⁴³² According to Lamb, the pickets were “merely there to convey information and ask cooperation.”⁴³³

426. *Id.* at 205.

427. *Id.* at 198.

428. *Id.*

429. *Id.* at 197.

430. *Id.* at 198.

431. *Id.*

432. *Id.*

433. *Id.*

From the accounts of the assaults and skirmishes that occurred, it would have been difficult to pinpoint blame for the violence. It appeared that the violence was sporadic and incidental rather than part of a purposeful scheme of the union. The Supreme Court did not discuss any evidence in the record of police attempts to break up the "mob" that gathered or government attempts to prosecute picketers who admitted they had been involved in fights.

But, because violence had occurred, the union would bear the responsibility and the penalty. Taft wrote:

All information tendered, all arguments advanced and all persuasion used under such circumstances were intimidation. They could not be otherwise. It is idle to talk of peaceful communication in such a place and under such conditions. The numbers of the pickets in the groups constituted intimidation. The name "picket" indicated a militant purpose, inconsistent with peaceable persuasion. The crowds they drew made the passage of the employees to and from the place of work, one of running the gauntlet Our conclusion is that picketing thus instituted is unlawful and can not be peaceable and may be properly enjoined by the specific term because its meaning is clearly understood in the sphere of the controversy by those who are parties to it.⁴³⁴

Taft explained that a restraining order or injunction prohibiting picketing, without qualification, would prevent "earnest advocates of labor's cause" from "subject[ing] the individuals who wish to work to a severe test of their nerve and physical strength and courage." However, consistent with the intent of Congress in passing the Clayton Act and with the "principle of existing law which it declared," the courts were required to allow "ex-employees and others properly acting with them . . . to observe [employees] who are still working for the employer, to communicate with them and to persuade them to join the ranks of his opponents in a lawful economic struggle."⁴³⁵

The rights of the strikers and their supporters were to be protected by solitary "missionaries." Taft wrote for the Court:

We think that the strikers and their sympathizers engaged in the economic struggle should be limited to one representative for each point of ingress and egress in the plant or place of business and that all others be enjoined from congregating or loitering at the plant or in the neighboring streets by which access is had to the plant, that such representatives should have the right of observation, communication and persuasion but with special admonition that their communication, arguments and appeals shall not be abu-

434. *Id.* at 205.

435. *Id.* at 206.

sive, libelous or threatening, and that they shall not approach individuals together but singly, and shall not in their single efforts at communication or persuasion obstruct an unwilling listener by importunate following or dogging his steps The purpose should be to prevent the inevitable intimidation of the presence of groups of pickets, but to allow missionaries.⁴³⁶

C. *Truax v. Corrigan*—

"Peaceful picketing was a contradiction in terms"

1. *Introduction—The Court in Disarray.* Chief Justice Taft's opinion in his second labor case on the Supreme Court, *Truax v. Corrigan*,⁴³⁷ held that Arizona's interpretation of its state version of the Clayton Act was unconstitutional. Arizona had, in effect, legalized peaceful labor picketing under its "little Clayton Act." For Taft, however, the limitation on state court jurisdiction to issue injunctions against such picketing was a denial of due process and equal protection of the law. Arizona had denied employers an injunction remedy in state court that they could have obtained in federal court under *American Foundries*. The anomalous consequences of the Arizona law did not conform to Taft's understanding of the role of the courts in protecting employers' property rights against the inherent threat of violence in labor picketing.

Truax "was one of those five-to-four rulings which so greatly annoyed the Chief Justice" and "was to be criticized much more vigorously" than his opinion in *American Foundries*.⁴³⁸ Reargument of *Truax* was heard on the same day as the final argument in *American Foundries* in the fall of 1921, and the opinion was issued just two weeks after the *American Foundries* decision in late December of 1921.⁴³⁹ Taft "knew that Holmes and Brandeis would dissent," as they did in separate opinions, but the defections also included Justices Pitney and Clarke, who joined in a third dissenting opinion written by Pitney.⁴⁴⁰ Taft wrote a lengthy opinion, apparently compelled to "answer the arguments of his mistaken, but cogent, associates."⁴⁴¹ In the week after the *Truax* opinion was issued, Holmes wrote his friend Harold Laski that "the C.J. [Chief Justice] disappointed us after a happy success in uniting the Court" in

436. *Id.* at 206-07.

437. 257 U.S. 312 (1921).

438. 2 H. PRINGLE, *supra* note 73, at 1035.

439. 1 HOLMES-LASKI LETTERS 374 n.2 (M. Howe ed. 1953); 2 H. PRINGLE, *supra* note 73, at 1035.

440. 2 H. PRINGLE, *supra* note 73, at 1036.

441. *Id.*

the *American Foundries* case.⁴⁴² Holmes continued his correspondence on this subject several weeks later with the observation that “[t]he C.J. disappointed us after a good start, as it seemed, in what we think the right direction” in the *American Foundries* case, but as for *Truax*, he wrote, “I thought this performance rather spongy.”⁴⁴³

Taft’s “spongy” opinion in *Truax*, however, followed with an inexorable logic the premises underlying *American Foundries*. What both Holmes and Brandeis seemed reluctant to recognize was the profound antilabor implications of Taft’s holding in *American Foundries* that picketing per se was unlawful and could be enjoined as such, but that workers and their sympathizers would be permitted solitary “missionaries” at each gate of the steel foundry to observe or communicate with other workers. It was true that Taft had carefully limited the reach of *American Foundries* by noting that the Court’s holding which permitted “one representative for each point of ingress and egress in the plant or place of business” was “not laid down as a rigid rule, but only as one which should apply to this case,” and that “[e]ach case must turn on its own circumstances.”⁴⁴⁴ Nevertheless, his condemnation of the “inevitable intimidation” in “group picketing” and the “mob” which pickets “inevitably” attracted meant that workers who engaged in peaceful picketing—other than as single “missionaries”—could be readily enjoined by employers in the federal courts. Taft believed, as he stated in *Truax*, that “peaceful picketing was a contradiction in terms.”⁴⁴⁵

Holmes undoubtedly thought that *American Foundries* had been a “good start” in the “right direction” because, in the final form in which the opinion was written, Taft apparently incorporated many of the ideas contained in a memorandum Holmes had circulated among the justices that he described to Laski as “nothing much—a repetition of the dissent in *Vege-lahn v. Guntner* 25 years ago.”⁴⁴⁶ Holmes’s proposition in *Vege-lahn* that “it cannot be said . . . that two men walking together up and down a sidewalk and speaking to those who enter a certain shop do necessarily and always thereby convey a threat of force”⁴⁴⁷ was fully consis-

442. Letter from Oliver Wendell Holmes to Harold J. Laski (Dec. 22, 1921), *reprinted in* 1 HOLMES-LASKI LETTERS, *supra* note 439, at 389.

443. Letter from Oliver Wendell Holmes to Harold J. Laski (Jan. 15, 1922), *reprinted in* 1 HOLMES-LASKI LETTERS, *supra* note 439, at 398.

444. 257 U.S. at 206, 207, 206.

445. 257 U.S. at 340.

446. Letter from Oliver Wendell Holmes to Harold J. Laski (Oct. 9, 1921), *reprinted in* 1 HOLMES-LASKI LETTERS, *supra* note 439, at 374.

447. 167 Mass. 92, 105, 44 N.E. 1077, 1080 (1896) (Holmes, J., dissenting). Holmes had noted

tent with Taft's acceptance of the presence of solitary missionaries at each plant gate in *American Foundries*. Taft's restrictions on the behavior of the labor missionary in *American Foundries*, though limited to the facts of the case, "appeared to imply that the members of a picket line could dissuade workers or win recruits only by speaking in low and cultivated voices."⁴⁴⁸ This "civilized" conception of labor picketing—a patrol of one or two well-mannered, polite workers—apparently satisfied Holmes's criteria for carrying out the "battle" between capital and labor in a "fair and equal way."⁴⁴⁹ Holmes, nevertheless, was willing to put aside his own views on the appropriate conduct of labor's battle in deference to the "social experiments" approved by the state legislatures.⁴⁵⁰ Taft and the majority of the Court could not go so far in relinquishing the authority of the courts to protect property.

Brandeis, too, had seen in *American Foundries* what he wanted to see. In his dissent in *Truax*, Brandeis wrote that *American Foundries* had "held that peaceful picketing is not unlawful"⁴⁵¹—a broad proposition that Taft would certainly have disavowed. It was a true statement only if Brandeis believed that "peaceful picketing" and the stationing of solitary labor "missionaries" at plant gates were essentially equivalent forms of conduct. Brandeis's concurrence "in the substance" of the *American Foundries* case, without a written concurring opinion, almost certainly buried deeper disagreements he had with Taft's views on labor picketing—disagreements he glossed over, perhaps, to join with Holmes or to avoid friction with the newly seated Chief Justice. Brandeis's dissent in *Truax*, however, contained a lengthy discourse on the "history of the rules governing contests between employer and employed" under the laws of England and America, in which he made clear the conceptual distance between his own views and the views of the Chief Justice.⁴⁵²

Justice Clarke had dissented quietly in *American Foundries*, without a written opinion, so Taft could not have been greatly surprised when Clarke joined one of the dissenters in *Truax*. It was the author of the

in *Vegeahn* that "[t]here was no proof of any threat or danger of a patrol exceeding two men." *Id.* at 104, 44 N.E. at 1080 (Holmes, J., dissenting).

448. 2 H. PRINGLE, *supra* note 73, at 1035.

449. *Vegeahn*, 167 Mass. at 108, 44 N.E. at 1081 (Holmes, J., dissenting).

450. *Truax*, 257 U.S. at 344 (Holmes, J., dissenting).

451. *Id.* at 371 (Brandeis, J., dissenting).

452. *Id.* at 357 & *passim*. Holmes wrote to Laski concerning Brandeis's dissent in *Truax* that it was "a very elaborate study. He said what is true that it was not proper for a judicial opinion, ordinarily, but people are so ignorant that it was desirable that they should know and I dare say he was right." Letter from Oliver Wendell Holmes to Harold J. Laski (Dec. 22, 1921), *reprinted in* 1 HOLMES-LASKI LETTERS, *supra* note 439, at 389.

third dissent, Justice Pitney, a Taft appointee to the Supreme Court, whose apparent betrayal of his own and Taft's principled conceptions of law and order and the primacy of property rights must have been most disturbing to the new Chief Justice. Alexander Bickel observed that

[a]s a state judge in New Jersey, Pitney had made what the Senate opposition to his confirmation as Supreme Court Justice not unfairly considered an anti-labor record. And it was Pitney who, writing for the majority in the notorious case of *Coppage v. Kansas*, struck down as unconstitutional a statute outlawing "yellow-dog" contracts It was Pitney also who wrote for the majority in *Hitchman Coal & Coke Co. v. Mitchell*, enjoining as an unlawful interference with contractual relations efforts of the United Mine Workers to organize a mine that had extracted from its employees yellow-dog agreements. And it was Pitney finally who, in *Duplex Printing Co. v. Deering*, held that the Clayton Anti-Trust Act was not the Magna Carta labor had thought it was upon its enactment, but rather permitted issuance of an injunction against a union boycott. This was Pitney.⁴⁵³

Pitney's dissent in *Truax* was in reality a very narrow departure⁴⁵⁴ from the views he had expressed in *Coppage*,⁴⁵⁵ *Hitchman*,⁴⁵⁶ and *Duplex*.⁴⁵⁷ When *Truax* was first argued before the Supreme Court, Pitney "was with the majority and received the assignment of the opinion."⁴⁵⁸ After reading Brandeis's dissenting opinion, which had been circulated as a memorandum in November of 1920, and after hearing the reargument of the case in the fall of 1921, Pitney changed his vote and wrote his own dissent.⁴⁵⁹ The task of writing the majority opinion in *Truax* thus fell to Taft, who used the case to impose on the states his own version of the federal common law of labor relations.

2. *The "English Kitchen" Boycott and Picket*—"Violence could not have been more effective." The labor dispute in *Truax* began in April 1916, with a strike by the cooks and waiters at the "English Kitchen" restaurant in Bisbee, Arizona, over the terms and conditions of their employment. The strikers were members of the Restaurant Workers Union

453. A. BICKEL, *THE UNPUBLISHED OPINIONS OF MR. JUSTICE BRANDEIS* 66-67 (1957).

454. *See id.* at 67.

455. 236 U.S. 1 (1915).

456. 245 U.S. 229 (1917).

457. 254 U.S. 443 (1921).

458. A. BICKEL, *supra* note 453, at 67.

459. 257 U.S. at 344. *See* A. BICKEL, *supra* note 453, at 67. This dissent was consistent with his earlier acceptance of the state workmen's compensation legislation which the Supreme Court upheld in the *Arizona Employers' Liability Cases*, 250 U.S. 400 (1919) in a majority opinion which he wrote. *See* A. BICKEL, *supra* note 453, at 62-67.

which had called the strike; the union, in turn, belonged to a local trades assembly which endorsed the strike. The strikers and union officials conducted peaceful picketing and handbilling in front of the restaurant for the purpose of persuading potential patrons to boycott the restaurant. The consumer boycott took its toll. The restaurant's "daily receipts, which had been in excess of the sum of \$156 were reduced to \$75."⁴⁶⁰

When the restaurant proprietor, William Truax, and his partners sued in state court for an injunction against Michael Corrigan and other members of the union, the complaint was dismissed, upon demurrer of the defendants, on the basis of an Arizona statute⁴⁶¹ that was "substantially the same as" section 20 of the Clayton Act.⁴⁶² The Supreme Court of Arizona affirmed the judgment of the lower court.⁴⁶³ Truax and his partners appealed to the United States Supreme Court claiming that the Arizona statute, as construed by Arizona's highest court, deprived the plaintiffs of their property "without due process of law" and denied the plaintiffs "the equal protection of the laws" under the fourteenth amendment of the United States Constitution.⁴⁶⁴ Five justices of the Supreme Court agreed with Truax.

The Arizona Supreme Court had held that under the state's "little Clayton Act" peaceful picketing, which had previously been unlawful in Arizona because "it was presumed to induce breaches of the peace," was "no longer conclusively presumed to be unlawful."⁴⁶⁵ Taft understood the "effect of this ruling" to be that "under the statute, loss may be inflicted upon the plaintiffs' property and business by 'picketing' in any form if violence be not used . . ."⁴⁶⁶ Although the Arizona Supreme Court held that the plaintiffs made no allegations of violence,⁴⁶⁷ Taft's biographer noted that after Taft had reviewed the facts alleged in the complaint and the exhibits, Taft "concluded that violence, intimidation

460. 257 U.S. at 321.

461. ARIZ. REV. STAT. ANN. ¶ 1464 (1913).

462. 257 U.S. at 370 (Brandeis, J., dissenting).

463. The Supreme Court of Arizona had held that "the gravamen of the complaint" was that the union defendants were "merely inducing patrons to cease their patronage," that despite the resulting injury to the goodwill of the restaurant, "no man . . . has a vested property right in the esteem of the public," that the union "had a right to advertise the cause of the strike," that "picketing, if peaceably carried on for a lawful purpose, was no violation of the rights of the person whose place of business was picketed," and that the plaintiffs "did not claim that defendants had by violent means invaded their rights." *Id.* at 323-24.

464. *Id.* at 322.

465. *Id.* at 323.

466. *Id.* at 324.

467. See *supra* note 463.

and illegality had been rife."⁴⁶⁸

Taft's recital of the allegations and exhibits stressed what he found odious in the union's behavior.⁴⁶⁹ As Taft characterized the defendants actions, there could be "no doubt" that the union's picketing campaign employed "illegal" means.⁴⁷⁰ Taft wrote:

The libelous attacks upon the plaintiffs, their business, their employees, and their customers, and the abusive epithets applied to them were palpable wrongs The patrolling of defendants immediately in front of the restaurant on the main street and within five feet of plaintiffs' premises continuously during business hours, with the banners announcing plaintiffs' unfairness; the attendance by the picketers at the entrance to the restaurant and their insistent and loud appeals all day long, the constant circulation by them of the libels and epithets applied to employees, plaintiffs and customers, and the threats of injurious consequences to future customers, all linked

468. 2 H. PRINGLE, *supra* note 73, at 1036.

469. Taft described the plaintiffs' case as follows:

The defendants conspired to injure and destroy plaintiffs' business by inducing their theretofore willing patrons and would-be patrons not to patronize them and they influenced these to withdraw or withhold their patronage: (1) By having the agents of the union walk forward and back constantly during all the business hours in front of plaintiffs' restaurant and within five feet thereof, displaying a banner announcing in large letters that the restaurant was unfair to cooks and waiters and their union. (2) By having agents attend at or near the entrance of the restaurant during all business hours and continuously announce in a loud voice, audible for a great distance, that the restaurant was unfair to the labor union. (3) By characterizing the employees of the plaintiffs as scab Mexican labor, and using opprobrious epithets concerning them in handbills continuously distributed in front of the restaurant to would-be customers. (4) By applying in such handbills abusive epithets to Truax . . . and making libelous charges against him, to the effect that he was tyrannical with his help, and chased them down the street with a butcher knife, that he broke his contract and repudiated his pledged word; that he had made attempts to force cooks and waiters to return to work by attacks on men and women; . . . that he was a "bad actor." (5) By seeking to disparage plaintiffs' restaurant, charging that the prices were higher and the food worse than in any other restaurant, and that assaults and slugging were a regular part of the bill of fare, with police indifferent. (6) By attacking the character of those who did patronize, saying that their mental calibre and moral fibre fell far below the American average, and enquiring of the would-be patrons—Can you patronize such a place and look the world in the face? (7) By threats of similar injury to the would-be patrons—by such expressions as "All ye who enter here leave all hope behind." "Don't be a traitor to humanity"; by offering a reward for any of the ex-members of the union caught eating in the restaurant; by saying in the handbills: "We are also aware that handbills and banners in front of a business house on the main street give the town a bad name, but they are permanent institutions until William Truax agrees to the eight-hour day." (8) By warning any person wishing to purchase the business from the Truax firm that a donation would be necessary, amount to be fixed by the District Trades Assembly, before the picketing and boycotting would be given up.

257 U.S. at 325-27.

470. *Id.* at 327.

together in a campaign, were an unlawful annoyance and a hurtful nuisance in respect of the free access to the plaintiffs' place of business.⁴⁷¹

Again, Taft returned to the notion of free access to the employer's place of business that had been so significant in *American Foundries*, as well as in *Duplex v. Deering*. Taft noted that "[p]laintiffs' business is a property right and free access for employees, owner and customers to his place of business is incident to such right. Intentional injury caused to either right or both by a conspiracy is a tort."⁴⁷² Holmes countered in his dissent that "by calling a business 'property' you make it seem like land, and lead up to the conclusion that a statute cannot substantially cut down the advantages of ownership existing before the statute was passed."⁴⁷³

All the justices of the Supreme Court appeared to agree that the plaintiffs in *Truax* had alleged facts sufficient to warrant a cause of action at law. Their disagreement concerned whether the state could now constitutionally deny previously available injunctions in cases of peaceful labor picketing, where an injunction would be the only effective remedy given the inability of striking workers to respond in damages.⁴⁷⁴ Taft, a firm believer in the use of equitable remedies to protect "the advantages of ownership," could not accept as constitutional a result which would, in practical effect, leave the plaintiffs without a remedy.⁴⁷⁵ Thus he wrote for the majority of the Court that "[t]o give operation to a statute whereby serious losses inflicted by such unlawful means are in effect made remediless, is, we think, to disregard fundamental rights of liberty and property and to deprive the person suffering the loss of due process of law."⁴⁷⁶ And he concluded, "The Constitution was intended, its very purpose was, to prevent experimentation with the fundamental rights of the individual."⁴⁷⁷ Of course, the experiment which the Arizona State Legislature contemplated in its "little Clayton Act" was a limitation on the equity jurisdiction of the state courts in labor disputes, not immunization of labor activity from criminal prosecution or civil liability.

The Supreme Court also held that the statute denied equal protec-

471. *Id.*

472. *Id.*

473. *Id.* at 342 (Holmes, J., dissenting).

474. *See supra* note 463.

475. The plaintiffs in *Truax* had alleged that "all the defendants were insolvent, and would be unable to respond in damages for any injury resulting from their acts and the plaintiffs were therefore without any adequate remedy at law." 257 U.S. at 321.

476. *Id.* at 330.

477. *Id.* at 338.

tion of the law by limiting the discretion of the state courts in granting equitable relief in cases involving labor disputes between employers and employees. Taft wrote that the case involved "a direct invasion of the ordinary business and property rights of a person," which could, under any other circumstances, be remedied in a court of equity because of its unlawful nature and the lack of any adequate remedy at law.⁴⁷⁸ The effect of the statute was to deny equitable remedies to "injured" persons when "invasions" of their property rights were "committed by [their] ex-employees."⁴⁷⁹ According to the majority, "[i]f this is not a denial of the equal protection of the laws, then it is hard to conceive what would be."⁴⁸⁰

In dissent, Justices Pitney and Clarke agreed with Taft's characterization of the unlawfulness of the union's conduct. Pitney wrote, "Upon the facts, it hardly could be said that defendants kept within the bounds of a 'peaceful' picket or boycott. They appear to have gone beyond mere attempts to persuade plaintiffs' customers to withdraw their patronage, and to have resorted to abusive and threatening language towards the patrons themselves."⁴⁸¹ Nevertheless, Pitney viewed the question of the legislative withdrawal of equitable remedies for certain types of conduct in labor disputes as an appropriate exercise of the police power under state law. "The use of the process of injunction to prevent disturbance of a going business by such a campaign as defendants here have conducted," Pitney wrote, "is in the essential sense a measure of police regulation."⁴⁸²

In deference to the federal system of government, Pitney acknowledged that "[i]n truth, the States have a considerable degree of latitude in determining, each for itself, their respective conditions of law and order, and what kind of civilization they shall have as a result."⁴⁸³ Significantly, the Arizona statute had not modified "substantive rule[s] of law" and "[o]rdinary legal remedies" remained intact.⁴⁸⁴ The "undue favoritism" to the class of "ex-employees" which the majority found to be a denial of equal protection was no different than the special legislative classifications previously upheld in challenges to state employers' liability and

478. *Id.* at 335.

479. *Id.* at 336.

480. *Id.*

481. *Id.* at 346 (Pitney, J., dissenting).

482. *Id.* at 348.

483. *Id.* at 349.

484. *Id.*

workmen's compensation laws.⁴⁸⁵

Holmes, in his separate dissenting opinion, agreed with "the more elaborate expositions" of Pitney and Brandeis, but portrayed the issues in broader, less technical terms than Pitney had used.⁴⁸⁶ He recognized that the Arizona statute could deny the "extraordinary" remedy of the injunction in a particular class of disputes "without legalizing the conduct complained of" in the *Truax* case.⁴⁸⁷ Holmes wrote, "Legislation may begin where an evil begins. If, as many intelligent people believe, there is more danger that the injunction will be abused in labor cases than elsewhere I can feel no doubt of the power of the legislature to deny it in such cases."⁴⁸⁸ Here Holmes almost certainly was recalling his dissents in the labor injunction cases of *Vegeahn v. Guntner*⁴⁸⁹ and *Plant v. Woods*,⁴⁹⁰ in which he urged judicial restraint in the exercise of equity jurisdiction in labor disputes.⁴⁹¹ And he concluded his dissent with his now familiar words, at once embracing and distancing himself from the "social experiments" of the times:

There is nothing that I more deprecate than the use of the Fourteenth Amendment beyond the absolute compulsion of its words to prevent the making of social experiments that an important part of the community desires, in the insulated chambers afforded by the several States, even though the experiments may seem futile or even noxious to me and to those whose judgment I most respect.⁴⁹²

Brandeis concurred in Holmes's sweeping condemnation of the use of substantive due process to strike down state attempts at legislative reform. But he attempted to place the issues in the case squarely within their social and political context by a fourteen-page recitation of the his-

485. *Id.* at 350-53.

486. *Id.* at 344 (Holmes, J., dissenting).

487. *Id.* at 343.

488. *Id.*

489. 167 Mass. 92, 44 N.E. 1077 (1896).

490. 176 Mass. 492, 57 N.E. 1011 (1900).

491. Holmes had written a memorandum relying on *Vegeahn* for the Court's consideration in *American Foundries*, *supra* text accompanying note 446. Moreover, Holmes had, in October 1921, received recent confirmation from abroad of the wide acceptance of his views by "intelligent" people. Holmes wrote to Laski, "By good luck a decision of the English Court of Appeals—1921 3 KB 40 [Ware and De Freville, Ltd. v. Motor Trade Association] has just come out in which Scrutton refers to my opinion as one of the best statements and agrees with it. F.P. [Sir Frederick Pollock] had just sent me a note of his on it in the *L. Q. Review* [37 L. Q. REV. 395 (1921)]." Letter from Oliver Wendell Holmes to Harold J. Laski (Oct. 9, 1921), reprinted in 1 HOLMES-LASKI LETTERS, *supra* note 439, at 374 (bracketed material in editor's notes, *id.* at 374 nn.4-5).

492. *Truax*, 257 U.S. at 344 (Holmes, J., dissenting).

tory of the labor injunction and the legislative responses to it.⁴⁹³ He wrote, "Whether a law enacted in the exercise of the police power is justly subject to the charge of being unreasonable or arbitrary, can ordinarily be determined only by a consideration of the contemporary conditions, social, industrial and political, of the community to be affected thereby."⁴⁹⁴

It was these "contemporary conditions" that Taft refused to acknowledge. Taft's view of the facts of *Truax*, and the Arizona Supreme Court's application of the state statute to the facts, led him to conclude that Arizona had, in effect, legalized conduct that was as coercive as violence. Indeed, in Taft's characterization of the union's picketing and handbilling as a form of "moral coercion," his use of language reveals his belief that the union's conduct, not unlike the picketing in *American Foundries*, had violent and physically threatening overtones.⁴⁹⁵ Taft wrote that the union's picketing and handbilling in front of the English Kitchen

was not lawful persuasion or inducing. It was not a mere appeal to the sympathetic aid of would-be customers by a simple statement of the fact of the strike and a request to withhold patronage. It was compelling every customer or would-be customer to run the gauntlet of most uncomfortable publicity, aggressive and annoying importunity, libelous attacks and fear of injurious consequences, illegally inflicted, to his reputation and standing in the community. No wonder that a business of \$50,000 was reduced to only one-fourth of its former extent. Violence could not have been more effective. It was moral coercion by illegal annoyance and obstruction and it thus was plainly a conspiracy.⁴⁹⁶

The "gauntlet" is defined as "two rows of men facing each other and armed with clubs or other weapons with which they strike at an individual who is made to run between them."⁴⁹⁷ The recurrence of this powerful and highly evocative image of the individual being forced to "run the gauntlet" in the *Truax* case, after it had been used with such dramatic effect in describing the picketing in *American Foundries*,⁴⁹⁸ is very revealing. The "abusive" words, the stares, the loud voices, the "aggressive

493. *Id.* at 357-70 (Brandeis, J., dissenting).

494. *Id.* at 356.

495. Over fifteen years later, Brandeis adopted this view of *Truax* to distinguish it from a similar case in which he argued that "the only means authorized by the statute and in fact resorted to by the unions have been peaceful and accompanied by no unlawful act." *Senn v. Tile Layers Union*, 301 U.S. 468, 480 (1936).

496. 257 U.S. at 327-28.

497. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 941 (1971).

498. 257 U.S. at 205; see *supra* text accompanying note 434.

and annoying importunity" of the strikers, as well as the physical "obstruction" of their bodies arrayed only feet away from the restaurant entrance were as effective a deterrent in Taft's mind as a gauntlet—a barrier of men with clubs. "Social experiments" might compensate workers for their workplace injuries without violating the Constitution, but experimentation went too far when it condoned behavior that was not only tortious, but uncivilized as well.

VII. CONCLUSION

Violence played an important role in the history of the American labor movement, and many working people and their families were caught up in the crucible of their struggles as instigators, perpetrators, supporters, or victims of violence. The violence of the clashes between the wage-earning communities and their employers dominated the public consciousness of the times, from the 1892 Homestead Strike, when Pinkerton detectives were "forced to run a bloody gauntlet of men, women, and children," barely escaping with their lives, to the 1914 Ludlow Massacre, when Colorado National Guardsmen entered the tent camp of striking coal miners and their families, "burning tents, shooting people, and smashing accordians and violins"—killing thirteen women and children—and executing three striking miners "on the spot."⁴⁹⁹

During the first World War, the Espionage Act of 1917 legitimized arrests, jail terms, deportation, and systematic violence against workers. "[L]ocal patriots in the Arizona mining community of Bisbee, working in close association with state officials, 'captured' over 1,200 IWW copper miners, the majority of whom were American-born citizens, loaded them into cattle cars with minimal provisions, and deported them into the New Mexico desert."⁵⁰⁰ At the end of the war, strikes spread across the nation—from the Boston police to the steel workers. January 1920 brought the first of the "Palmer Raids," the mass arrests of 2,758 men and women—suspected radicals, revolutionaries, and "alien" labor agitators—by Justice Department agents under Attorney General Mitchell Palmer. Hundreds were subsequently deported.⁵⁰¹ Racist, antilabor, and anti-alien attitudes found expression in the prosecution of Sacco and Vanzetti, the lynchings of blacks by the Ku Klux Klan, and the cold-blooded shooting "by Anaconda Copper Company guards" of "[t]wenty striking miners, peacefully and legally picketing on the public highway

499. D. MONTGOMERY, *supra* note 265, at 37, 346.

500. N. SALVATORE, *supra* note 57, at 288.

501. See R. GINGER, *supra* note 63, at 416.

near Butte, Montana."⁵⁰²

It should not be surprising, then, that judges too were preoccupied with violence as they sat in courtrooms across the nation, deciding the fate of many workers and articulating the legal boundaries of collective action. When William Howard Taft conducted the contempt trial of Frank W. Phelan, "[t]he court room was always crowded with strikers, who, despite repeated warnings that the court room would be cleared if quiet were not maintained, gave noisy vent to their approval or disapproval of testimony as it was elicited."⁵⁰³ Taft resolutely saw the trial through to its conclusion "in the face of danger from numerous 'lunatics'"⁵⁰⁴ and "menacing notes sent him by strikers."⁵⁰⁵ But as the legal issues moved further from the tense and sometimes explosive drama of the trial courts to the presumably more rarified and dispassionate atmosphere of the appellate courts, and ultimately the Supreme Court, the understanding of labor violence became more deeply embedded in legal doctrine. Severed from its origins in the streets, in factories, in company towns, labor violence became an *idea* which took on different meanings in appellate judicial opinions.

The events of the Pullman boycott in the summer of 1894, and the contempt trials and jail sentences that were the legal response to it, were crucial events in the lives of two men: William Howard Taft and Eugene V. Debs. For Taft, the strike was a personal, transformative event. His task as judge was made clear—to prevent the destruction of property rights and order which the working class threatened through their unions. To accomplish this, he needed a theory that would accommodate both the recognition of unions as legal associations and the denial of their power to coerce employers through most forms of economic pressure. The theory came together in his portrayal of the "secret terrorism" instigated by the "outsiders"—Debs and his lieutenant, Phelan. Responsibility for all violence in the *Phelan* case lay with the "outsiders," and the broad communitarian goals of the Pullman boycott were recharacterized as the "starvation of a nation." Behind all economic pressure was the coercion of violence and the threat of violence.

In a sense, Taft was doing no more than expressing as judicial opinion what many radicals and reformers of the period understood to be the

502. *Id.*

503. H. DUFFY, WILLIAM HOWARD TAFT 40 (1930).

504. J. ANDERSON, *supra* note 89, at 63.

505. H. DUFFY, *supra* note 503, at 41.

necessity of force in the collective actions of labor unions. In 1891, Henry George had written:

Labor associations can do nothing to raise wages but by force; it may be force applied passively, or force applied actively, or force held in reserve, but it must be force; they *must* coerce or hold the power to coerce employers; they *must* coerce those among their members disposed to straggle; they *must* do their best to get into their hands the whole field of labor they seek to occupy and to force other workingmen either to join them or to starve. Those who tell you of trades unions bent on raising wages by moral suasion alone are like those who would tell you of tigers who live on oranges.⁵⁰⁶

Not surprisingly, in the face of sentiments like these, Taft feared more than just militant union action; he saw in the labor movement the potential for "class warfare" or "anarchy."

For Debs the Pullman strike was equally transformative, equally radicalizing. It set him on the path to socialism—through the Socialist Party—and industrial unionism—through the IWW, the Industrial Workers of the World. In each election between 1900 and 1912, Debs ran for president on the Socialist Party ticket; in two of these elections—1908 and 1912—he was running against William Howard Taft, and running effectively. Despite the fact that in the 1912 election "[t]he reform platforms of Roosevelt and Wilson probably hurt Debs badly . . ." because they had "adopted several planks from the Socialist platform," Debs garnered 900,672 votes, more than doubling his popular vote of the 1908 election.⁵⁰⁷ Woodrow Wilson's victory in the 1912 election, as well as the entry into that race by Taft's former mentor and friend, Theodore Roosevelt, embittered Taft, who left electoral politics for the remainder of his life. Thus, in an ironic twist of fate, just as Eugene Debs and the Socialist Party seemed to be gaining political ground, William Howard Taft, conservator of the faith of the Republican Party, became a law professor at Yale where he remained a vocal, but for a time disempowered, critic of the forces of change that had driven him from office.

Taft had only to await the election of the next Republican president, Warren G. Harding, for appointment to the post he had always coveted, Chief Justice of the United States. By 1921, Taft, on the Supreme Court, was again in a position of power, and in yet another twist of fate, Eugene

506. H. GEORGE, *THE CONDITION OF LABOR: AN OPEN LETTER TO POPE LEO XIII 86* (1891), quoted in M. OLSON, JR., *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* 71 (1965).

507. R. GINGER, *supra* note 63, at 331, 329. For voting statistics in presidential elections, see WEBSTER'S GUIDE TO AMERICAN HISTORY: A CHRONOLOGICAL, GEOGRAPHICAL, AND BIOGRAPHICAL SURVEY AND COMPENDIUM 767-70, 769 (C. Van Doren & R. McHenry eds. 1971).

Debs was in the federal penitentiary in Atlanta, a sick and aged man serving out the second year of two concurrent ten-year sentences for violation of the Espionage Act of 1917 and its 1918 amendments.⁵⁰⁸ Debs's conviction for an antiwar speech delivered in Canton, Ohio, on June 16, 1918, had been upheld by the Supreme Court in a brief unanimous opinion—*Debs v. United States*⁵⁰⁹—written by Justice Oliver Wendell Holmes. Holmes wrote his friend, Sir Frederick Pollock, "I am beginning to get stupid letters of protest against a decision that Debs, a noted agitator, was rightly convicted of obstructing the recruiting service so far as the law is concerned There was a lot of jaw about free speech, which I dealt with somewhat summarily in an earlier case" ⁵¹⁰

From his prison cell, Debs—the "noted agitator"—had run for president for the fifth and last time in 1920. Although the ratification of the nineteenth amendment to the Constitution⁵¹¹ enabled women to vote in the 1920 presidential election, the "vastly increased . . . electorate" failed to alter the fortunes of the Socialist Party.⁵¹² Though the election results "finally established" that "the Socialist Party had almost disappeared as an organized movement,"⁵¹³ Nick Salvatore, in his biography of Debs, argued that "[i]n a fundamental way neither Debs nor the American Socialist movement failed. That they were not victorious is evident, but in an important fashion both Debsian Socialists and later interpreters posited the wrong question. Failure assumes the possibility of success, but that was never a serious prospect for the Debsian movement."⁵¹⁴

508. Espionage Act of June 15, 1917, ch. 30, § 3, 40 Stat. 217, 219, as amended by Act of May 16, 1918, ch. 15, § 1, 40 Stat. 553 (1918 amendments repealed 1921); see also R. GINGER, *supra* note 63, at 398, 413.

509. 249 U.S. 211 (1919).

510. 2 HOLMES-POLLOCK LETTERS 7 (M. Howe ed. 1941), quoted in R. GINGER, *supra* note 63, at 402-03. The "earlier case" he was referring to was *Schenck v. United States*, 249 U.S. 47 (1919). To his close friend, Harold J. Laski, Holmes wrote condescendingly, "I wonder if Debs really has any ideas. What I have read of his discourse has seemed to me rather silly—and what he said about the judgment against him showed great ignorance, if as I am ready to believe he is not dishonest." Letter from Justice Holmes to Harold J. Laski (April 20, 1919), reprinted in 1 HOLMES-LASKI LETTERS, *supra* note 439, at 197. Laski replied to Justice Holmes: "*In re Debs*, I think most cool-minded people know that he is a well-meaning, obstinate mule—damnably sincere and a clear case for pardon. If the Court ever makes unofficial recommendations to the executive on this head, it has a great chance here to take the sting out of bad feeling. But no one I have met thinks the decision at all open to question—what was stupid was the act [the Espionage Act of 1917] with the substance of which you weren't concerned." Letter from Harold J. Laski to Justice Holmes (April 23, 1919), *id.* at 198.

511. Ray Ginger wrote that Debs "had been campaigning for this amendment for more than forty years." R. GINGER, *supra* note 63, at 424.

512. *Id.*

513. *Id.*

514. N. SALVATORE, *supra* note 57, at 271. (1982).

Why this is so is largely a tangential question. But one aspect of that question is important for present purposes: Debs's understanding of the role of violence in the labor movement. Debs had hoped to achieve socialism through nonviolent, political means, and for Debs, industrial unionism had this explicit political content. But by the 1912 election, the Socialist Party was breaking into factions, divided in part over the issue of the use of violence as a tactic in labor disputes. Ray Ginger described Debs's attack on the "left-wing tendencies" in the Socialist Party as follows:

[Debs] stated that he had no respect for capitalist laws and would not have "the least scruple about violating them," but such violations were foolhardy. Most American workingmen were law-abiding and completely rejected violent tactics. Violence actually played into the hands of the employers, who welcomed it because it assured them of public support. Moreover, individual action was the method of an anarchist, not a socialist, because it did not promote but destroyed the solidarity of labor. The conclusion was clear enough: "I am opposed to any tactics which involve stealth, secrecy, intrigue, and necessitate acts of individual violence for their execution."⁵¹⁵

The middle ground which Debs sought was rejected by others—socialists, communists, anarcho-syndicalists—who maintained that violence was essential to revolution. An example of renewed intellectual discussions about violence, the first edition of *Reflections on Violence* by Georges Sorel, appeared in 1908. It was an exploration of the moral and mythic dimensions of "[p]roletarian violence, carried on as a pure and simple manifestation of the sentiment of the class war."⁵¹⁶ In 1913, Sorel added an appendix to the third edition in which he wrote:

It is in strikes that the proletariat assert its existence. I cannot agree with the view which sees in strikes merely something analogous to the temporary rupture of commercial relations which is brought about when a grocer and the wholesale dealer from whom he buys his dried plums cannot agree about the price. The strike is a phenomenon of war. It is thus a serious misrepresentation to say that violence is an accident doomed to disappear from the strikes of the future.⁵¹⁷

On July 11, 1916, Harold J. Laski began his correspondence of nearly twenty years with Justice Holmes by sending him a "bread-and-butter note . . . following the first meeting of the two in the Justice's summer

515. R. GINGER, *supra* note 63, at 326.

516. G. SOREL, *REFLECTIONS ON VIOLENCE* 98 (T. Hulme & J. Roth trans. 1950).

517. Sorel, *Apology for Violence*, in *id.* at 274 app. 2.

home at Beverly Farms, thirty miles north of Boston."⁵¹⁸ Accompanying this note was a gift—Sorel's book, *Reflections on Violence*.⁵¹⁹

In the generation during which Taft and Holmes began and ended their judicial careers—and during which Debs traveled from the leadership of the Pullman boycott in Chicago to the deprivations of the federal penitentiary in Atlanta—the mainstream American labor movement abandoned Debs's political vision for "business unionism." For a brief moment in the summer of 1921, Samuel Gompers, the labor leader who had built up the American Federation of Labor in opposition to socialism and industrial unionism, confronted Debs in a meeting in the Atlanta penitentiary:

Thirty-five years earlier Gompers had been the more radical of the two young trade unionists. But he had grown steadily more conservative while Debs moved the other way. Their paths split sharply after the Pullman boycott. The socialist leader had found his place with the unskilled workmen, the unorganized farmers, the disinherited convicts, at the bottom of the social heap. Gompers had consciously chosen to speak for the skilled craft unionists. Now they met again: the squat and well-tailored confidant of industrialists and statesmen; the gaunt intimate of criminals, wearing his shabby prison stripes.⁵²⁰

When Chief Justice Taft sat with the Supreme Court in the fall of 1921 hearing the rearguments of the cases of the 1914 foundry workers' strike in Granite City, Illinois, and the 1916 restaurant workers' strike in Bisbee, Arizona, the political and social events of the intervening years were telescoped and viewed through a lens of fear. Taft's opinions in *American Foundries*⁵²¹ and *Truax*⁵²² reflected the fear of outsiders, of

518. Howe, Foreword to 1 HOLMES-LASKI LETTERS, *supra* note 439, at xiii.

519. Laski wrote, "I have sent you Sorel on *Violence*—perhaps it will pass some idle hour." Letter from Harold J. Laski to Justice Holmes (July 11, 1916), *reprinted in* 1 HOLMES-LASKI LETTERS, *supra* note 439, at 3. Holmes replied several days later, "Sorel came yesterday and I began it at once eagerly. I am not ready with opinions—except that I do not share his following of Bergson." Letter from Justice Holmes to Harold J. Laski (July 14, 1916), *reprinted in id.* This was followed by, "I finished Sorel and wrote a few remarks to Frankfurter. His first principles are left to be divined I should suppose . . . Sorel's myth formula is fine, but naturally I don't make much of his general conclusions." Letter from Justice Holmes to Harold J. Laski (July 19, 1916), *reprinted in id.* at 5.

520. R. GINGER, *supra* note 63, at 429. For Samuel Gompers's description of this meeting, see 1 S. GOMPERS, *supra* note 63, at 416. Ironically, in 1907 Gompers received a one-year prison sentence for speaking out in support of the metal polishers' union boycott of Bucks Stove and Range Company. The company obtained a sweeping injunction prohibiting the boycott and all speech concerning the strike. Although Gompers considered the *Bucks Stove & Range* litigation and appeals that ensued over "seven long years" to be "my most grilling experience with injunctions," Gompers, unlike Debs, never went to jail. 2 *id.* at 219, 205. See *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418 (1911); *Gompers v. United States*, 233 U.S. 604 (1914).

521. 257 U.S. 184 (1921).

anarchy, of violence which characterized Taft's 1894 decision in the *Phe-lan* case,⁵²³ and drew sustenance from the postwar hysteria of the Red Scare. In July of 1922, Taft wrote to Ambassador Harvey:

The situation in the United States now is . . . quite critical in respect to the coal strike and the railway strike

The war and general lawlessness everywhere stimulate bloody, murderous violence on the part of the strikers and their sympathizers, but that is not so much a dangerous symptom as it is a symptom of the times. Debs has now rushed in with a general declaration of war, while Gompers continues his vaporings, but I don't think they help the labor people. They rather tend to solidify conservative public opinion.⁵²⁴

And so, once again, the injunction was preserved as an offensive weapon against unionism.

The consequences of this decision were profound. Leon Fink has written that "[d]uring the decade of the twenties, injunctions rose to a new peak—in the pivotal 1922 railroad shop craft strike alone some three hundred restrictive injunctions were issued."⁵²⁵ The threat of injunctions and the ease with which employers could obtain them undoubtedly played a role in the "dramatic decline" of strike incidence in the 1920s.⁵²⁶

The confluence of events in the winter of 1921 was symbolic. Within days after *Truax* was handed down by the Supreme Court, President Harding commuted Debs's prison sentence. Response was predictable. Holmes wrote to Laski: "I too was glad at the release of Debs—although I hardly can believe him honest (not that that has anything to do with his

522. 257 U.S. 312 (1921).

523. 62 F. 803.

524. Letter from William Howard Taft to Ambassador William Harvey (July 21, 1922), quoted in 2 H. PRINGLE, *supra* note 73, at 1031.

525. Fink, *Labor, Liberty, and the Law: Trade Unionism and the Problem of the American Constitutional Order*, 74 J. AM. HIST. 904, 918 (1987). Leo Troy has written:

From its pinnacle in 1920, the American labor movement lost in excess of two million members by 1933, when it touched a low of just under three million. The drop began with a decline in employment in the industries that experienced most of the wartime growth—shipbuilding and metalworking. The sharp business recession of 1920-1921 caused a further and broader reduction in membership. In addition, the unsuccessful shopmen's strike on the railways in 1922, involving an estimated 400,000 workers, curtailed much of the wartime union growth in that industry. By the end of 1923—only three years after attaining a high of more than five million members—the American labor movement's losses ran to nearly 1.5 million.

L. TROY, *TRADE UNION MEMBERSHIP, 1897-1962*, at 4 (1965).

526. P. EDWARDS, *supra* note 31, at 14.

being kept in or let out)."⁵²⁷ Yet for Chief Justice Taft, "Debs was still a villain in 1922."⁵²⁸ As Debs left the Atlanta penitentiary on December 24, 1921, the legality of collective action by working people was more constrained than it had ever been before. The Supreme Court had ordained that federal legislation such as the Clayton Act, or the state statutes modeled after it, did not really alter the "federal common law" of picketing and boycotting.

Just as Taft in 1894 had feared violence in labor activity, the majority of Supreme Court justices in 1921 seemed not to understand that labor violence could have multiple meanings and multiple sources. It could be purposive or situational, planned or spontaneous. It could be the deliberate political tactic of a radical group. Or paradoxically, it could be a consequence of the collective actions of those identified with a more conservative ideology, for as Mancur Olson, Jr. has written:

The conservative or "business unionism" philosophy typical of American labor unions was no doubt less offensive to conservative ideologues than communism, socialism, or anarchism: yet it seems to have led to much more violence. The correct explanation surely centers around the need for coercion implicit in attempts to provide collective goods to large groups.⁵²⁹

The fact that labor violence under Gompers-style business unionism continued long after the influence on unions of various left-wing political groups had waned, was to a great measure the result of the necessity of coercion which Olson has identified.⁵³⁰ While many federal and state judges assumed violent coercion in labor disputes was directed to subversive, "secret" political ends, in fact the explanation for the violence was most often if not always quite different. Masked behind the imagery of the violent worker as a scheming, threatening outsider whose words and actions—however innocent in appearance—concealed ominous meanings, was the reality of the worker who, out of pure economic necessity, openly sought to coerce others to choose collective interests over those of the individual.

Similarly, in 1894 as well as 1921, many judges (not unlike many Americans in the same period) were unable to see and understand the necessitous worker, and therefore could not accept labor's use of economic coercion, though economic coercion had long been accepted as

527. Letter from Justice Holmes to Harold J. Laski (Jan. 15, 1922), *reprinted in* 1 HOLMES-LASKI LETTERS, *supra* note 439, at 397.

528. 2 H. PRINGLE, *supra* note 73, at 1030.

529. M. OLSON, JR., *supra* note 506, at 71.

530. *See id.* at 66-97.

part of an employer's basic right of liberty and property in the guise of freedom of contract. Part of the difficulty for Taft and other judges lay in determining where economic coercion ended and violent coercion began, as well as in speculating where violence might lead. Thus, within the social and historical context of the events of real labor violence and the conflicting strands of political and economic goals expressed by unions, the Supreme Court was poorly positioned to do more than sketch out the crudest boundaries for legal collective action. As the justices attempted to define, for the first time, the parameters of legally sanctioned coercion, they almost inevitably fell back on the rudimentary and unsophisticated understandings of both workers and their unions that had survived intact from nineteenth century case law. For Taft and Holmes, as well as others, this meant looking back to their own legal decisions written several decades earlier.

Certainly Brandeis had identified the legal issue and its underlying economic context in his dissent in *Hitchman Coal*.⁵³¹ Brandeis wrote:

[C]oercion, in a legal sense, is not exerted when a union merely endeavors to induce employees to join a union with the intention thereafter to order a strike unless the employer consents to unionize his shop. Such pressure is not coercion in a legal sense. The employer is free either to accept the agreement or the disadvantage If it is coercion to threaten to strike unless plaintiff consents to a closed union shop, it is coercion also to threaten not to give one employment unless the applicant will consent to a closed non-union shop. The employer may sign the union agreement for fear that *labor* may not be otherwise obtainable; the workman may sign the individual agreement for fear that *employment* may not be otherwise obtainable. But such fear does not imply coercion in a legal sense.⁵³²

In thus acknowledging explicitly the legality of the economic coercion of labor groups, Brandeis implicitly recognized both the necessity of coercion to ensure the survival of the union and the balancing function which such coercion served in a laissez-faire economy as a type of "corrective" to the freedom which employers possessed to coerce employment agreements. And on this point, his analysis harkened back to the economic notions which Holmes articulated in *Vegelahn* regarding the role of law in ensuring that the "battle" between the employer and the employee can be "carried on in a fair and equal way."⁵³³

To legalize the economic coercion of the picket line and the secon-

531. 245 U.S. 229, 263 (1917).

532. *Id.* at 271.

533. 167 Mass. 92, 108, 44 N.E. 1077, 1081 (1896) (Holmes, J., dissenting); see *supra* text accompanying note 191.

dary boycott, however, entailed more risks than protecting the primary strike alone. First, pickets and boycotts were public extensions of strike activity and were potentially far more coercive economically than strikes alone. Second, if it were assumed that workers, either by nature or by design, were prone to violence, the very public nature of picket lines and boycotts would tend to encourage acts of violence as a means of coercion. Thus, the shared imagery of workers as secretive, violent outsiders, profoundly influenced judicial decisions to constrain sharply the legal boundaries of these economically potent forms of collective labor activity.

At the same time that judges acted to limit pickets and boycotts, they struggled to legalize unions and place them, with corporations, into a universe of atomistic, rational actors.⁵³⁴ In a sense they succeeded; some union action was accepted as legal. But the intellectual price was high. The contradictions in the images of workers seem irreconcilable. Workers were one moment perceived as rational and responsible, the next as irrational and violent. From an economic perspective the worker was a depersonalized commodity; from a paternalistic perspective he or she was a weak, dependent member of the human family. Judges selectively called forth these images, but particularly the images of violence, associated somehow with the weak and dependent worker, to shape and explain their legal decisions. What they failed to recognize was the inter-relationship of the images which only superficially revealed the complex reality of workers' lives and personalities. For example, violence might be construed as a rational response of workers to the frustrations of both the

534. The fear of the violent worker manifested in labor jurisprudence might seem at first to be in direct historical contradiction to the increased statutory and juridical recognition of workers' rights. Why should rights have been granted in the face of perceived, and occasionally real, violence? Did violence or its imagery influence ideas or events so that abstract rights were granted to relieve the fear or threat of violence? How can a concern for violence over time be consistent with a so-called liberalization of rights rather than a further suppression of rights?

The resolution of the seeming paradox lies in the social context against which the fear of violence was developed. Taft, Holmes, and Brandeis all assumed that a social world governed by the convention of gentlemanly conduct should be the norm. Autonomous, calculating individuals behaved by the rules of the game. By imposing that norm on working class conduct, judicial actors sought to answer their own fears of violence. The rules of labor relations were defined to eliminate violent action, but at the same time to create a free range of economic activity that included legitimate, marketplace coercion. The categories of legal coercion were class-bound, designed to move the working class towards accepted and appropriate forms of behavior. The emerging contractual/collective bargaining model, therefore, was an attempt to force organized labor to abide by the rules for rational, economic bargaining. The liberalization of rights was consistent with, and not in contradiction, to the fear of violence. The enforcing of the contractual model was perceived as an ordering mechanism in the face of the fear of violence.

commodification of the labor market and the degrading paternalism of employers in the workplace—real conditions that often did violence to them. Many judges of Taft's generation, however, seemed to want to hold only one image in focus at a time, for to do otherwise would force them both to confront the contradictions in their justifications for creating and defending legal rules and their lack of insight in formulating their understanding of reality.

As Taft led the retreat into the security of legal rules that would, for over a decade, tightly circumscribe the ability of labor unions to engage in effective economic coercion, he unwittingly prepared the way for the acceptance of economic coercion by employees as a fundamental element in the legal structure of labor relations under the National Labor Relations Act.⁵³⁵ In time it made no sense to declare unions to be legal associations and simultaneously to deny them the ability to engage in the kinds of peaceful economic coercion that would assure their continued existence and enable them to overcome the "inequality of bargaining power" between employers and employees.⁵³⁶ The conceptual hurdles were, first, to acknowledge the legality of coercive collective labor activity—in particular the picket line and the secondary boycott—which had significant impact on an employer's trade, and, second, to acknowledge that such activity could be coercive without being violent. Although the Clayton Act was ostensibly based on these concepts, the Supreme Court, as late as 1921, was not prepared to abandon its understanding of the evils in union coercion which were formed by the images of violent workers from the early cases of common law restraint of trade and federal antitrust law. It was not until the passage of the Norris-LaGuardia Act in 1932,⁵³⁷ withdrawing federal equity jurisdiction over most peaceful labor activity, as well as the subsequent changes in the composition of the Supreme Court, that the rationale of modern liberal labor relations and its privatized, contractual assumptions fully confronted the myths and realities behind the images of violence in labor jurisprudence.⁵³⁸ The results of that confrontation changed a number of the legal rules and the

535. Labor Management Relations (Comery-Wagner Labor Relations) Act, ch. 372, § 1, 49 Stat. 449 (1935) (codified at 29 U.S.C. § 151 (1982)).

536. *Id.*

537. Norris-LaGuardia Act, ch. 90, §§ 1-15, 47 Stat. 70-73 (1932) (codified at 29 U.S.C. §§ 101-15 (1982)).

538. For an argument about the influence of contractarian reasoning on the drafting of the Wagner Act and development of modern labor relations, see Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-41*, 62 MINN. L. REV. 265 (1978).

ways in which they were argued, but not, ultimately, the enduring power and presence in labor law of the image of the violent worker.

